REPORTS

OF

CASES IN CHANCERY,

ARGUED AND DETERMINED

IN

THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE

SIR JOHN ROMILLY, KNIGHT,

MASTER OF THE ROLLS.

BY

CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.

VOL. XXIII.

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A

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

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Nov. 5.
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EVANS *v.* EVANS.

A feme covert, having a limited testamentary power of appointment over personalty, made her will in 1848, whereby, without referring either to her power or to the property subject to it, she professed to dispose "of the property and income I am now or may become possessed of," and she then gave "her property" to her husband and her children. She died in 1854, at which time she had (independently of the property subject to the power) 93*l.* arrears of income and a contingent reversionary interest in some trust moneys. Held, that the will did not operate as an execution of the power.

THE question, on this special case, was, whether a special power of appointment, contained in an instrument bearing date the 20th of *July*, 1847, had been duly exercised by a will of the 1st of *August*, 1848.

The facts as stated in the special case were these:— In 1834, the father of *Emily Haigh* left, by will, a trust fund, now amounting to the sum of 2,500*l.*, to two trustees, in trust to pay the dividends to *Emily Haigh* for her life, for her separate use, and after her decease, for her children, as she should by deed or will appoint, and in default of appointment, upon trust for such of her children as should attain twenty-one, in equal shares. On

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On the 20th of *July*, 1847, a deed was executed between *Emily Haigh* of the one part, and three trustees of the other part, whereby it was declared, that they should stand possessed of four other sums of money and the securities by which they were secured, upon trust to pay the income thereof unto *Emily Haigh* during her life, for her separate use, and after her decease, upon trust, if she should so by will direct, to pay and apply the whole or any part of the said income unto any, her surviving, husband, during his life, and subject thereto, upon trust to transfer the trust premises to the child or children of *Emily Haigh*, in such proportions, manner and time as she should by deed or will appoint, and subject thereto, to such children as should attain the age of twenty-one years, in equal shares.

On the 21st of *October*, 1847, *Emily Haigh* married Mr. *Evans*, who confirmed this settlement. On the 1st of *August*, 1848, immediately before the birth of her first child, Mrs. *Evans* made a will in these words: —

"This is my last will and testament regarding the disposal of the *property and income* I am now or may become possessed of. I hereby appoint my uncle, Mr. *J. T. Haigh*, my mother and my husband to be the trustees or executors for the carrying out this my will. I will that, in the event of my leaving children, that my dear husband shall enjoy the interest of *my property* during his lifetime, and that at his death, it shall be equally divided amongst my surviving children on their arriving of age, or at the age of twenty-five years, to be determined by the trustees." The testatrix made several bequests over, contingent on her leaving no children.

Mrs. *Evans* died on the 13th of *December*, 1854, leaving her husband and three children surviving her.

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At the time of her death, she was entitled to the sum of 92*l.* 19*s.*, being the proportionate part of the income of the several trust funds settled upon her as above-mentioned. She had also a reversionary interest in some trust moneys contingent on the death of her mother, *Mary Haigh*, intestate. She survived her daughter and was still living.

The first question was, whether this will was a valid exercise of the power of appointment given by the settlement of 1847, and if so, to what extent. The second question was, whether this will was an exercise of the power of appointment contained in the will of her father, and if so, to what extent.

Mr. *Goldsmid*, for Mr. *Evans*. The will of Mrs. *Evans* was a valid execution of her power, though it does not specifically refer to it. A *feme covert* is incapable of making a testamentary disposition except under a power, and therefore it must be assumed that her will is made in pursuance of that which alone enables her, of her own authority, to make an effectual devise or bequest (*a*). The will, therefore, of a married woman must *primâ facie* be referred to her power.

Lovell v. *Knight* (*b*) does not govern the case, for there Mrs. *Lovell* had a sum of 112*l.* 18*s.* 9*d.* over which her will would operate independently of any appointment under the power (*c*), and the same was the case in *Lempriere* v. *Valpy* (*d*), where the testatrix had 500*l.* settled simply to her separate use, which would pass by a general gift made by her will. The case of *Churchill* v. *Dibben* (*e*) was overlooked and not cited in the cases of

(*a*) See *Parker* v. *Kett*, 12 *Modern*, 469.
(*b*) 3 *Simons*, 275.
(*c*) 3 *Simons*, 277, 278.
(*d*) 5 *Simons*, 120.
(*e*) 3 *Ld. Kenyon's Cases*, 85, and 9 *Simons*, 447, note.

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of *Lovell* v. *Knight* and *Lempriere* v. *Valpy*, and there it was held, that if a married woman, having a testamentary power of appointment, makes a will, it must be intended to be an exercise of the power, although it contains no reference to it. The same was held in regard to real estate in *Curteis* v. *Kenrick* (*a*). Lord *St. Leonards* does not appear satisfied with the decision in *Lovell* v. *Knight* (*b*).

Here the word "income" is satisfied by the arrears of income at the death, but the testatrix had nothing to satisfy the words "property I am now possessed of," except her own property, which, by the settlement, she had subjected to her power. These words cannot operate except under the power, and must, therefore, be held to be an execution of it. He also referred to *Standen* v. *Standen* (*c*).

Mr. *G. L. Russell*. *Lovell* v. *Knight* (*d*) is the acknowledged law of the Court. It was affirmed, upon appeal, by the Lord Chancellor (*e*), it has always since been followed, and is a binding authority. Here the words of the will of Mrs. *Evans* will be satisfied by the arrears of income, and by the reversionary property. They constituted property "she was then or might become possessed of." The powers here were not general, but special, and the Wills Act (*f*) does not apply. She had no power, under the will of 1834, to appoint to her husband; but by her will she gives him a life interest in the whole; she could not, therefore, have had the power in her contemplation.

He

(*a*) 3 *Mee. & W.* 461, and 9 *Sim.* 443.
(*b*) 1 *Sugden's Powers*, 6th ed. 417.
(*c*) 2 *Ves. jun.* 589, and 6 *Bro. P. C.* 193.
(*d*) 3 *Sim.* 275.
(*e*) 1 *Sug. Pow.* 6th ed. 419, and 5 *Sim.* 121.
(*f*) 1 *Vict.* c. 26, s. 27.

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might become possessed of. She no where refers to property not belonging to her, but over which she had a mere power of appointment. If there were nothing to satisfy the previous words, it might be urged, that the Court must decide that they operate as a good execution of the power, because, unless they be held to have reference to the power, there is nothing to which they can refer; but in this case, both the branches of the settlement in this will are satisfied when the facts are known.

The "property and income I am now possessed of" is satisfied by the 92*l.* 19*s.*, which had arisen from her separate estate, and which was then due to her, and of which she could dispose by will as she pleased. And the words "the property I may become possessed of" properly apply to the reversionary interest, which she had a power to dispose of, contingent on the event of her mother's death, without having disposed of it by her will.

In the case of *Jones* v. *Curry*(*a*), Sir *Thomas Plumer* makes some observations which are pointedly applicable to the present case, although there is this distinction between that case and the present, which is not material for the present purpose, viz.:—That there, the power of appointment by will was general, and here the power is special. In *Jones* v. *Curry*, the case was this: The donee had a general power of appointment over real and personal estate, in case she died without issue, which occurred. By her will, duly executed, she gave "all her estate and effects, of whatever denomination," to *A.* and *B.* She afterwards described it as "property," and she made a gift over, at the decease of *A.* and *B.* Sir *Thomas*

(*a*) 1 *Swanst.* 66.

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Thomas Plumer decided, that the will was no execution of the power, and he proceeded on this ground:—He says (*a*),—"But this will contains no words which will be without operation unless referred to the power. On the contrary, the testatrix uses terms of generality, "all my estate and effects of whatever denomination." That clause would embrace all her real and personal property, but would it go beyond that? Can it extend to what is not the property of the testatrix? The words are not a specific description of any estate, or of any species of interest; but adapted to comprehend everything which was, and to exclude everything which was not, a part of her property. In order to apply them to property not hers, we must reject the pronoun "my," and say, that by the phrase, my estate and effects, she meant to give what was not her own, that would be not to construe, but to contradict the words of the will. The distinction, notwithstanding some expressions of Lord *Rosslyn* in *Standen* v. *Standen* (*b*), being now established between property and power, these words, containing no direct reference to any particular fund, nothing in description to enable the Court to collect her intention to exercise her power, are not sufficient to designate, with due certainty, property not her own, but of which she was empowered to dispose. Though she had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that."

All these observations appear to be strictly pertinent to the present case.

But then it is said, that this is the case of a *feme covert*, and that when a married woman is the donee of the power, as she is under an incapacity to dispose of any

(*a*) Page 72. (*b*) 2 *Ves. jun.* 589, *and* 6 *Bro. P. C.* 193.

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any property except under her power, the disposition made by her must necessarily be referred to the execution of the power. In answer to this, the case of *Lovell* v. *Knight* (*a*), is cited, and it must be admitted, that *Lovell* v. *Knight* is an authority to the contrary. It is contended, that that case has been doubted on this point, and is no authority for such a proposition. I think it unnecessary to consider the question, whether that case is to be supported to the full extent of the doctrine which it is supposed to have laid down in it. The case itself was affirmed on appeal, and in its circumstances it is clearly analogous to the present; and when Counsel, for the validity of the appointment in this case, urged, that the only way in which *Lovell* v. *Knight* could be supported was, by the fact which appeared incidentally, that there were some small arrears of the income of the separate estate on which the will might operate without exercising the power, this observation applies most forcibly to the present case, makes it exactly analogous to *Lovell* v. *Knight*, brings it within the principle of *Jones* v. *Curry*, and points out the conclusion to which I must come. The expression is, "the property I am now or may become possessed of." I use the expression of Sir *Thomas Plumer*; these words embrace all her real and personal property; but if there be property to satisfy these words, can they go beyond that and extend to dispose of what was not the property of the testatrix, but over which she had only a power of appointment. It is difficult to found any principle of decision on the greater or smaller amount of her property, whether it was 90*l.* or 9,000*l.*, the words are adapted to include everything that was, and to exclude everything that was not a part of her own property.

(*a*) 3 *Sim.* 275.

perty. She had property to satisfy the words, and my opinion is, that the will did not operate as an execution of either of the powers contained in the will of the father, or in her own settlement of 1847.

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Mr. *Goldsmid* having referred to the question respecting the right to the 92*l.* 19*s.*,

The MASTER *of the* ROLLS added, the effect of my decision is, that a life interest is given in it to the husband. There are technical rules by which the Court is bound, and existing decisions which it must follow; but if I were at liberty to speculate, independently of these, I should be inclined to believe that the lady thought that she was effectually disposing of something substantial in favour of her husband.

NOTE.—See *Harvey* v. *Stracey*, 1 *Drew.* 73; *Innes* v. *Sayer*, 7 *Hare*, 382, and 3 *Mac. & Gor.* 611; and *Shelford* v. *Acland*, *post*, p. 10.

SHELFORD *v.* ACLAND.

Dec. 10, 19.

A will must be taken to be an execution of a power, where the words of it would, otherwise, have nothing to operate upon.

A *feme covert* had a general power of appointment over some personal estate of the value of about 2,600*l.* By her will, made in 1841, without referring to any power or property, she gave her husband 2,600*l.* There being no other property over which the will could operate, the Court held, that, independently of the 1 *Vict.* c. 26, s. 27, the will operated as an execution *pro tanto* of the power.

ON the marriage of the Rev. *Thomas Shelford* with *Caroline* his wife, a settlement was made, dated the 9th of *December*, 1840, whereby her property, consisting of one undivided fourth of a sum of 5,000*l.* (subject to her mother's life interest in it), and of one-fourth of three-eighths or three thirty-seconds of the residuary real and personal estate of *Mary Protheroe*, deceased, was assigned to trustees, upon trust for Mr. *Shelford* for life, with remainder to Mrs. *Shelford* for her life, and after the death of the survivor, upon trust for the issue of the marriage, and in the event of there being no issue of the marriage, and if the husband should survive his wife, then, after the decease of the husband so surviving, and such failure of issue as aforesaid, "upon such trusts, and subject to such powers and provisions, as Mrs. *Shelford*, by her last will and testament, or any codicil or codicils thereto, should, from time to time, notwithstanding her coverture, direct or appoint; and in default of such direction or appointment, and so far as any such, if incomplete, should not extend, in trust for the person or persons who, under the statutes made for the distribution of the estate of intestates, would have become entitled thereto, in case *Caroline Shelford* had died possessed thereof intestate and without having been married, and to be divided between or among the same persons respectively, if more than one, in the shares and proportions in which the same respectively would, under the said statutes, be divisible amongst the said persons respectively."

There

There was no issue of the marriage, and Mrs. *Shelford* died on the 20th of *June*, 1841, leaving her husband surviving. On the 5th of *May*, 1841, she made a will in these words :—

"I, *Caroline Shelford*, of *Broadclest*, do, by this my will, *give to the Rev. Thomas Shelford*, Rector of *Lambourne, Essex, two thousand six hundred pounds*, and I nominate and appoint my brother, the Rev. *William Barker*, executor of this my will."

At the date of her will and at her death, the property subject to the trusts of the settlement amounted, in value, to about the sum of 2,600*l.*, and Mrs. *Shelford* had no other property, in her own right, or which she had any power to dispose of by will, save only these trust funds.

The Plaintiff, *Leonard Shelford*, the administrator of the Rev. *Thomas Shelford*, by this bill, insisted, that the will of Mrs. *Shelford* was a valid execution of her power under her marriage settlement. The Defendant, Mr. *Barker*, one of her next of kin, contended the contrary.

Mr. *Lloyd* and Mr. *G. L. Russell*, for the Plaintiff. This will is a valid execution of the power, for there is nothing on which it can operate, except the settled property. *Curteis* v. *Kenrick* (*a*); *Churchill* v. *Dibben* (*b*); 1 *Sug.* Powers (*c*).

It is not necessary that there should be an express reference to the power, 1 *Sug.* Powers (*d*), if an intention to dispose of the property sufficiently appears.

Secondly,

(*a*) 3 *Mee. & W.* 467.
(*b*) 9 *Sim.* 447, note.
(*c*) Pages 417, 424, 6th ed.
(*d*) Page 388, 6th ed.

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Secondly, the late Wills Act, 1 *Vict.* c. 26, is applicable to the present will, and this is a general power; therefore, under the 27th section, the general bequest operates as an appointment.

Mr. *Selwyn* and Mr. *C. C. Barber*, for one of the next of kin (after stating that the property consisted of one-fourth of 5,000*l.* and three thirty-seconds of a residue, invested in railway shares, Consols and a policy, but that they asked no inquiry on the subject, proceeded). This will neither refers to the power nor to the property, and is not an execution of the power. *Lovell* v. *Knight* (*a*) was affirmed by the Lord Chancellor and cannot be reversed here, and that and the subsequent case of *Lempriere* v. *Valpy* (*b*) govern the present. The authorities as to real estate, as *Curteis* v. *Kenrick* (*c*) and *Churchill* v. *Dibben* (*d*) are inapplicable, for a *feme coverte* can never devise real estate except by means of a power, but she may bequeath personalty in the absence of any power. This does not profess to be an appointment of any particular property, but is a mere bequest of a pecuniary legacy of 2,600*l.*, without reference to any property out of which it was to be paid.

The Wills Act does not alter the old law. The 8th section provides, "that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of the act." But besides, this is not "a bequest of personal property described in a general manner" within the 27th section, but is a mere gift of a legacy. *Jarman* on Wills (*e*).

Mr. *Jenkinson*, for *Acland*.

Mr.

(*a*) 3 *Sim.* 275.
(*b*) 5 *Sim.* 108.
(*c*) 3 *Mee. & W.* 467.
(*d*) 9 *Simons*, 477, note.
(*e*) Page 586, 1st edit.

Mr. *Lloyd*, in reply. The 8th section only refers to the testamentary capacity of a married woman, and says, that it is not to be extended. The last objection is answered by the decision in *Hawthorn* v. *Shedden* (*a*).

The MASTER *of the* ROLLS. I will consider this case.

The MASTER *of the* ROLLS.

This case bears a close analogy to the last, and it has been for this reason that I have been desirous of giving judgment in them both together.

The question is, whether the will of Mrs. *Shelford* is a good execution of the power, and I am of opinion that it is.

The distinction which appears to me to exist between the present case and the last is this:—that here, unless as an execution of the power, this will has nothing that it can operate upon. The power was only to be exercised during coverture, and, except under a power or by the licence of her husband, she could not make a will. It is stated, that to be a good execution of the power, the will must either refer to the power or to the property, and that here, it does neither. But I think that this is stated too broadly; the case of *Churchill* v. *Dibben*, reported in the note to the case of *Curteis* v. *Kenrick* (*b*), is ample authority for the purpose of supporting such a bequest as this, as a due execution of the power; and the remarks of the Judges, during the argument of the case in *Curteis* v. *Kenrick* (*c*) are also conclusive, that

(*a*) 25 *L. J.* (*Ch.*) 833. (*b*) 9 *Sim.* 447.
(*c*) 3 *Mee. & Wels.* 461.

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that the will must be taken to be an execution of the power where the words of it would have nothing to operate upon except it were so considered. I do not feel pressed by the argument, that the words of the will import a mere pecuniary bequest, and that it contains no disposition of the residue. The testatrix knew of what her property consisted when it was settled, it was a share of money, and she makes a will giving a sum of money to a person. She obviously considered, that the bequest would be paid out of the property which she had the power of disposing of, and the distinction between property and power does not appear to me to exist in the present case, as I was reluctantly, on the state of the authorities, compelled to hold that it did in the last case.

The statute of 1 *Vict.* c. 26, had clearly no application to the last case, which was not the case, as this is, of a general power of appointment, to which alone the statute refers, and in this case, I do not think it necessary to have recourse to the statute of 1 *Vict.* c. 26, to support the validity of this bequest as an execution of the power; but if it were necessary to do so, without expressing any opinion on the question whether the words of the statute go to the full extent which the Vice-Chancellor *Stuart* seems to have ascribed to them in the case of *Hawthorn* v. *Shedden* (*a*), still the legislature has informed the donee of a power, that she may dispose of personalty, which is subject to her general power of appointment, by any legal bequest of personal property described in a general manner, and that the personalty subject to such powers would be included in such bequest, even though she had other and greater property of her own. This state of the law (the knowledge of

(*a*) 25 *L. J., Ch.* 833.

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of which must be imputed to the testatrix) might, in my opinion, if necessary, fairly be brought in aid of the construction of the testamentary instrument in this case, where the gift in her will cannot be satisfied without resorting to the power.

However, as I have already observed, I think this case is governed by the decision in *Curteis* v. *Kenrick* (*a*), and the observations there made:—that it is not affected by the case of *Lovell* v. *Knight* (*b*), and that the will of Mrs. *Shelford* is a good execution *pro tanto* of the power contained in the settlement made on her marriage.

(*a*) 9 *Sim.* 443. (*b*) 3 *Sim.* 275.

HUNTER *v.* AYRE.

Nov. 4.

Where, after plea of the Plaintiff's outlawry, the outlawry has been reversed, the Plaintiff may now obtain an order for liberty to proceed with the cause.

THE Defendant pleaded the Plaintiff's outlawry, and the outlawry having been afterwards reversed,

Mr. *Southgate* now moved *ex parte* that the Plaintiff might be at liberty to proceed with the cause. He referred to Lord *Clarendon's* order (*a*), in which it is stated, "And after the said outlawry reversed, the Defendant, upon a new *subpœna* served on him, and payment unto him of 20*s.* costs, shall answer the same bill as if such outlawry had not been."

He also cited *Hunter* v. *Nockolds* (*b*), where, after a plea of outlawry of the Plaintiff, the outlawry was reversed, it was held, that the Plaintiff was entitled to an order of the Court for the issue of a new *subpœna* against the

(*a*) *Beame's Orders*, 175, and 1 *Saunder's Orders*, 298.
(*b*) 6 *Hare*, 459.

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the Defendant, and that, upon service of such *subpœna* and payment of 20*s.* costs (as directed by Lord *Clarendon's* Order), the Defendant should answer the bill.

He observed, that, as the *subpœna* had since been abolished, an order of the Court, to the effect now asked, was the proper substitute.

The MASTER *of the* ROLLS so ordered accordingly.

NOTE.—See *Mitford*, 227, 4th ed.

Dec. 6.

HILL *v.* TRENERY.

A husband, on his marriage, assigned a policy on his life to trustees as a provision for his wife, but he afterwards became unable to pay the premiums. The Court authorized the trustees to sell the policy and accumulate the produce.

IN 1839, Mr. *Trenery*, on his marriage, assigned a policy on his own life for 1,000*l.* to the Plaintiffs, upon trust to receive the amount on his death, and hold the same in trust for Mrs. *Trenery* his wife. He covenanted with the trustees to pay the premiums.

Mr. *Trenery* had separated from his wife, and was resident at *Gibraltar*, and had become unable to pay the premiums.

The trustees filed this claim against Mr. and Mrs. *Trenery*, for indemnity and protection, and to have the policy sold, and out of the produce to have a sum of 24*l.* advanced by them for the last premium repaid.

Mr. *C. Barber*, for the Plaintiffs.

Mr. *Torriano*, for the Defendant, the husband, asked that the trustees might be directed not to sue him on the covenant.

The MASTER *of the* ROLLS (the wife not opposing) ordered

ordered the policy to be sold, and the trustees to be paid the 24*l.* out of the produce. He directed the surplus to be paid into Court and accumulated, and that the husband should not be sued on the covenant.

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v.
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Re HOOD.

Jan. 23.

An order to ascertain debts and liabilities under Sir *George Turner's* Act, cannot be obtained at the Secretary's Office at the Rolls upon petition of course.

MR. *BEAVAN* moved for an order to ascertain debts and liabilities under Sir *George Turner's* Act(*a*).

He stated, that although the statute (*a*) specifically provided that the order should be obtained "on motion or petition of course," yet, on application at the Secretary's Office for the order, it had been ascertained that such orders were now never made there upon petition of course (*b*).

The MASTER *of the* ROLLS said, he believed that such was the present practice, and that he would now make the order.

(*a*) 13 & 14 *Vict.* c. 35, s. 19. (*b*) *In re Harrold*, 15 *Jur.* 763.

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June 27.
Nov. 4.

FAREBROTHER *v.* WODEHOUSE.

Where two properties are mortgaged by *A.* to *B.* for distinct sums, and *C.* is surety for one only, the right of *B.*, to retain all the securities until repaid both debts, overrides the right of *C.* to have the benefit of the securities for that debt for which he is surety.

The Defendants lent *A. B.*, at the same time, two sums of 2,000*l.* and 3,000*l.* on distinct securities, and the Plaintiff was surety for the first sum. Held, that the Plaintiff, on paying the 2,000*l.*, was not entitled to have a transfer of the securities held for that sum, until the Defendants had also been paid the 3,000*l.*

IN 1841, the Rev. *Robert Croughton*, the vicar of *Melton Mowbray*, applied to the *Norwich* Union Life Insurance Company for a loan of 5,000*l.*, and it was finally agreed between them, that this should be accomplished by two separate and distinct loans, one for 2,000*l.*, and the other for 3,000*l.*

It was agreed that the 2,000*l.* should be advanced to Mr. *Croughton*, on the security of his bond and warrant of attorney, and the assignment of a policy in the National Loan Fund Assurance Office, effected on the life of Mr. *Croughton*, but standing in the names of the Plaintiff and Mr. *Broadhurst*, and also on the further security of a demise of the vicarage of *Melton Mowbray*, and provided the Plaintiff would become bound as security to the *Norwich* Union Company for the due payment of the 2,000*l.* and interest, and for the keeping on foot the policy of insurance.

It was also, at the same time, agreed, that the 3,000*l.* (the residue of the 5,000*l.*) should be advanced on other securities, wholly distinct and separate from the securities provided for the repayment of the 2,000*l.*

This arrangement was carried into effect, and the 5,000*l.* was advanced accordingly, 2,000*l.* on the security already referred to and the suretyship of the Plaintiff, and 3,000*l.* on other and distinct securities. In order to effect this arrangement, and complete the suretyship of the Plaintiff, he executed a bond on the 7th of *May*, 1841,

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1841, in a penal sum of 4,000*l.*, to which a condition was annexed, that the bond was to become void if Mr. *Croughton* paid the interest and premiums, and if the Plaintiff indemnified the Defendant against all loss in respect of the defaults or neglect of Mr. *Croughton*, or the insufficiency of the securities. Mr. *Croughton* failed to pay the interest. In *November*, 1842, a sequestration was issued by the *Norwich* Union Company against the living of *Melton Mowbray*, under which a considerable part of what was due to them, in respect of the 2,000*l.*, was paid. Some portion, however (about 900*l.*), remaining still unpaid, the *Norwich* Union Company, on 29th *November*, 1854, sued the Plaintiff at law on his bond. The Plaintiff was willing to pay the amount claimed, provided the securities held by the *Norwich* Union Company for the 2,000*l.* were handed over to him, but this they declined to do. The Plaintiff endeavoured, in the action, to plead the case made by him in this suit, but that failed, and thereupon, in *June*, 1855, he filed the present bill, praying for an injunction to restrain the further proceedings in the action, and offering to pay all that was due from him in the action, on having the securities, on which the 2,000*l.* was advanced, delivered up and assigned over to him. The right to the possession of these securities was the only question in this cause. The case came before the Vice-Chancellor *Wood* in *July*, 1855, on a motion for an injunction, when the following order was made:—

The Plaintiff, *C. Farebrother*, undertaking to give judgment in the action for 893*l.* 4*s.* 10*d.* and costs, to be dealt with as the Court should direct, it was ordered, that an account should be taken of what was due to the Defendants from the Plaintiff on his bond; and that the Plaintiff should pay the amount to the Defendants, within one month after the date of the Chief Clerk's

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certificate; and upon payment, it was ordered, that the Defendant should deposit with the Clerk of Records and Writs the policy of insurance of the 14th of *May*, 1839, the bond of the 7th of *May*, 1841, and the indenture dated the 7th of *May*, 1841. And it was ordered, that execution upon the judgment in the action should be stayed.

The Chief Clerk certified, on the 19th of *February*, 1856, that 837*l.* 16*s.* was due, and this the Plaintiff paid. The cause now came on for further consideration, when the question was, whether the deeds and documents deposited under the order of the Vice-Chancellor were to be delivered to the Plaintiff, or whether they were to retained by the Defendant, until the whole amount due from Mr. *Croughton* to the *Norwich* Union Life Assurance Company, in respect both of the 2,000*l.* and 3,000*l.*, had been paid.

Mr. *Roupell* and Mr. *Giffard*, for the Plaintiff, insisted on the Plaintiff's right to have the securities for the 2,000*l.* delivered over to him, relying on the principle of equity, that where a surety has paid to the creditor the debt of the principal, he is entitled to stand in the shoes of that creditor, and to have the benefit of all his securities against the principal debtor.

Mr. *R. Palmer* and Mr. *Baggalay*, for the Defendants, insisted that the Defendants were entitled to retain the securities. They relied on the rule, that where two separate estates are mortgaged to secure two separate debts, the mortgagor cannot redeem one without redeeming the other. That, although it was true that, as against the debtor, a surety who has paid off the debt stands in the place of the creditor, still that as against the creditor, he stood only in the place of the debtor; that,

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that, consequently, as the debtor here owed 5,000*l.*, the Plaintiff, when he had paid off 2,000*l.*, was not entitled to have these securities delivered up to him, without paying the additional 3,000*l.*; for the Defendants were entitled, as against Mr. *Croughton*, and consequently as against the Plaintiff his surety, to tack both sets of securities and hold them until the whole debt had been repaid.

The following authorities were cited and relied on: *Craythorne* v. *Swinburne* (*a*); *Newton* v. *Chorlton* (*b*); *Titley* v. *Davis* (*c*); *Barnes* v. *Racster* (*d*); *Higgins* v. *Frankis* (*e*); *Williams* v. *Owen* (*f*); *Bowker* v. *Bull* (*g*).

The MASTER *of the* ROLLS reserved judgment.

The MASTER *of the* ROLLS. *Nov.* 4.

This cause involves a question of very great importance, on which I felt considerable doubt, as it appeared to me, at first, to bring two principles of equity into direct conflict.

Practically, the question before the Court has resolved itself into a question of costs, because the *Norwich* Union Company, in consequence of the improvement, pending the suit, of the value of one of the securities on which the 3,000*l.* was advanced, have found that those other securities are sufficient to protect them in respect of the sum of 3,000*l.*, and are therefore willing to

(*a*) 14 *Ves.* 160.
(*b*) 10 *Hare*, 646, and 2 *Drew.* 333.
(*c*) 2 *Eq. Ca. Abr.* 604, *pl.* 35, 36, and 15 *Viner's Abr. pl.* 19, p. 447.
(*d*) 1 *Y. & C.* (*C. C.*) 401.
(*e*) 15 *L. J.* (*Ch.*) 329.
(*f*) 13 *Simons*, 597.
(*g*) 1 *Simons* (*N. S.*) 29.

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to deliver up to the Plaintiff the securities on which the 2,000*l.* was advanced. At first sight, therefore, it appeared that it would be unnecessary to decide this question, if it should appear, as it was contended, that this was a suit to redeem an incumbrance, and that, therefore, in any event, the costs of the suit must be paid by the Plaintiff.

But the answer to this was, that though this might be so up to the time of the payment of the money due, under the Vice-Chancellor *Wood's* order, yet, that upon payment of that sum, the Defendants ought to have delivered up the securities, unless they were entitled to retain possession of them, and that, therefore, from that period at least, it was merely a suit or proceedings by a mortgagor, to recover from a mortgagee, who had been paid in full, the title deeds and securities improperly retained.

As I concurred in that view of the nature of the suit, upon the assumption of the Plaintiff being right, it became necessary for me to determine the question raised in the suit, for the purpose of deciding how these subsequent costs should be borne. It is necessary, in order to arrive at the solution of this question, to consider whether the contract, express or implied, between these parties governs the case, and if not, what, in the absence of contract, is the rule which must prevail. Before I proceed to consider the contract in this case, I think it desirable to examine how the matter would stand, if it were not affected by any contract. In the absence of contract, it is clear, that, as against Mr. *Croughton*, the Defendants were entitled to tack their debts; Mr. *Croughton*, undoubtedly, could not have redeemed the securities, on the strength of which the 2,000*l.* was advanced by the *Norwich* Bank, without also

also paying what was due to them in respect of the 3,000*l.*; and it is settled by numerous authorities, that until the bank had been paid the whole that was due to them, they could not have been compelled by Mr. *Croughton*, or by any person claiming under him, to deliver up the securities relating to any portion of the debt secured, though it were by separate and distinct securities.

The question which then presents itself is this:—If a third person become surety to the mortgagee, for the payment by the mortgagor of one of these debts, will this, so far as he is concerned, affect this rule, and deprive the mortgagee of the right, which he would otherwise have possessed, of tacking his debts together, and making the property mortgaged available for both, in the absence of express contract for it. It is clear that the mortgagee may contract with the mortgagor, or with his surety, that this right of separate redemption shall exist in either or both of them. In the absence of contract, I think, that the fact, that a third person has become surety for one of the debts, does not deprive the mortgagee of his right to tack. If it did, it would, in most cases, enable the mortgagor to do, in the name of his surety, what he is not able to do in his own name. I am, therefore, of opinion, that the surety, by offering to pay or by voluntarily paying to the creditor the debt for which he has become surety, could not redeem the particular property which was made the subject of that mortgage, without also paying the other debt due from the mortgagor to the mortgagee, and thus redeeming the whole property. In other words, I am of opinion, that, in this respect, he can do no more than the mortgagor himself could do.

The next question is this:—Is the case altered by the

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the fact, that the surety does not initiate the proceedings, but that the mortgagee sues the surety for the amount for which he has become surety. It is to be observed, that the right of the mortgagee, who seeks to foreclose the mortgagor, is not the same as when the mortgagor seeks to redeem the mortgagee. If the mortgagee file a bill to foreclose either or both properties mortgaged, the mortgagor may redeem one, and allow the other to be foreclosed; still it appears to me, that the suit by the creditor against the surety is not analogous to a proceeding by the mortgagee to foreclose the mortgagor, and that, so far as regards the proceedings between the surety and creditor, their right, in this respect, must stand much on the same footing, whether it be that the surety is compelled by the creditor to pay the debt, or whether he voluntarily comes forward to do so. In this latter respect, it appears to me that the two proceedings are analogous, and that the rights, as between the parties, must be the same, whether the proceedings originate with the surety against the mortgagee, or with the mortgagee against the surety.

It is, no doubt, the right of the surety to have the benefit of every security which the creditor had against the principal debtor; but I think that this means when the creditor is paid in full, and that, unless he has contracted to do so, the creditor is not bound to give up to the surety securities which, by law, he is entitled to make available against the principal creditor. I consider it clear, for instance, that if a man advance 5,000*l.* to the mortgagor on the security of his estate, and that a third person became surety for the payment of 2,000*l.*, part of that debt, he cannot, on payment of the 2,000*l.*, require the mortgage deed and title deeds of the estate to be delivered up to him. If this be so, it shews, that the rule, that the surety is entitled to the benefit of all the

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the securities held by the creditor, is subject to this qualification:—That this right may be subject to prior rights in the creditor. If the rule be as I have stated it, in the case of a single debt and a surety for a part of it, is the case varied by the circumstance, that the debts are separate, and the securities distinct as between the mortgagor, the principal debtor and the creditor? In other words, does the mortgagee, by obtaining a third person to become surety for one debt, relinquish the right he would otherwise have to tack.

Upon the best consideration that I have been able to give to this case, I have come to the conclusion, that in an ordinary case, not governed by contract, and not affected by concealment or by misrepresentation, the creditor does not lose this right, by the fact that he has obtained a third person to become surety for one of the debts due by the principal creditor. Neither concealment nor misrepresentation form any element in this case. The whole transaction was well known to all the parties to it; the Plaintiff, in fact, negociated the whole transaction with the bank, and he knew that two sums, amounting together to 5,000*l.*, were to be advanced at the same time to Mr. *Croughton* on separate securities, and that he was to become surety for one of these sums.

The remaining question, then, is, how far is the case affected by the contract between the parties? There certainly is no express contract, that the Plaintiff shall be allowed to redeem the property included in the mortgage debt for which he became surety, distinct from the other. Is such a contract to be inferred from the dealings of the parties? It is contended, on the part of the Plaintiff, that the fact of his becoming surety for the 2,000*l.* only, and his refusing to become surety for

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for the other debt, implies that he contracted for all the rights and benefits of a surety belonging to that loan, exactly as if it were a single transaction, and that no other advance was to be made, and, consequently, that if he were compelled to pay the amount, he was to be entitled to a transfer of the securities. But after much consideration, I have not come to that conclusion. It is to be observed, that *mutatis mutandis*, the same argument lies in the mouth of mortgagee, who says, "that by advancing two sums on separate securities, I am to have the right of tacking inseparable from such a transaction."

In *Craythorne* v. *Swinburne* (*a*), Lord *Eldon* concurs in the observation, that the obligation of co-sureties is not founded on contract, but stands upon a principle of equity. But he says, "that after this principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the head of contract, implied from the universality of that principle." What, then, was the universally-acknowledged principle of equity which affected this case? One was, that until the bank were paid the 3,000*l.*, as well as the 2,000*l.*, in full, they could not be compelled to deliver up any of the securities on which the 2,000*l.* was advanced. This was not controlled by the terms of the contract, as it might have been, and it must therefore in my opinion, in the sense in which Lord *Eldon* uses the word in the passage I have cited, be considered as part of an implied contract, under which the parties were acting.

It is urged, no doubt, on the other side, that it is also an universally-acknowledged principle of equity, that the

(*a*) 14 *Vesey*, 169.

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the surety, who has been compelled to pay the debt of the principal debtor, is entitled to the benefit of all the securities which the creditor has against the principal debtor; but if I am right in the observations I have already made, this is stating the principle of equity too broadly. The surety is undoubtedly so entitled, provided the creditor has no lien upon them, or right to make them available against the principal creditor, to enforce the payment of a debt different from that which the surety has paid. But if the creditor has such a right, and one arising out of the transaction itself, of which the suretyship forms a part, then the right of the surety to the benefit of these securities is subordinate to the right of the creditor to make them available for the payment of his other claims, and can only be made available after the paramount right is satisfied.

At first sight, it appeared to me, that the effect of allowing the creditor to avail himself of this equity, would be, to enlarge the contract entered into by the surety for the benefit of the creditor, but I think that this is not so. The contract is silent on the subject; the contract might have superseded or regulated this equity, but it has not done so. The utmost, as it appears to me, that can be said in favour of the Plaintiff is, that the surety has an equity to make the securities available, and that the creditor has an equity to keep the securities till both debts are paid; the question is, which is to give way? In my opinion, the right of the surety is subordinate to that of the creditor, but if they were merely equal, this Court could not interfere to give the advantage to either, by taking away the securities from one and giving them to the other.

This is the view which I take on the principles of the case, but I wish especially to guard myself against being

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being supposed to lay down, that this is a rule which, in the absence of contract, is to prevail in all cases and under all circumstances. I can conceive cases of collusion or negligence, in which this Court might be of opinion, that the mortgagee had not the right to insist on this equity, but no such matter affects the case before me.

The reported cases on this subject are very few; two only have been cited, or have been found by me bearing directly on the question before me, one of them is the case of *Williams* v. *Owen* (*a*). That was a much stronger case than the present, and, if law, it governs this case. There, the mortgagor mortgaged the property to a person of the name of *Evans*, and three persons joined as sureties to pay the mortgage to *Evans*. Afterwards *Evans* advanced a further sum to the mortgagor, on the security of the same premises, in which transaction no persons joined as sureties, and the former sureties were not consulted. *Evans* enforced payment of the first mortgage against the sureties, and the Vice-Chancellor of *England* held, that he was entitled to tack the further charge, as against the sureties, and that in order to have precluded him from availing himself of this equity, they ought to have made *Evans* covenant that he would not advance any further sum to the mortgagor. In that case, the sureties were wholly ignorant of the second advance, which was not contemplated at the time of the original loan. In the present case, the two advances were made simultaneously, and through the negotiation of the Plaintiff.

In answer to *Williams* v. *Owen*, the case of *Bowker* v. *Bull* (*b*), decided by the present Lord Chancellor, is referred

(*a*) 13 *Sim.* 597. (*b*) 1 *Sim.* (*N. S.*) 29.

referred to as overruling that decision. *Williams* v. *Owen*, however, does not appear to have been cited on that occasion, and the circumstances of the case differ very materially, by reason of the special nature of the contract. In this later case of *Bowker* v. *Bull*, the mortgagor mortgaged his own estate, and his wife and daughters joined in the same deed, and mortgaged an estate belonging to them, to secure a sum advanced by the mortgagee to the father. By the deed, the mortgagee entered into a special covenant with the wife and daughters, that the estate of the father should be made primarily liable to answer that debt. Six years afterwards, the mortgagee advanced a further sum to the father, on the security of the estate, and Lord *Cranworth* held, that the mortgagee, filing his bill to foreclose both estates included in the first mortgage, was not entitled, as against the daughters, to tack his subsequent advance to the father, but that they were entitled to redeem the property mortgaged, on payment of what was due in respect of the first mortgage. On considering the whole case, I think that Lord *Cranworth* had regard to the nature of the special contract in that case, which he thought excluded the right to tack a subsequent debt, and amounted to a contract, that the debt of the daughters should stand second on the estate of the father. Certainly it was not intended by him to overrule the decision of the Vice-Chancellor of *England* in *Williams* v. *Owen*. I have, therefore, come to the conclusion, that *Williams* v. *Owen* is applicable to the present case, and that it must be decided in favour of the Defendant, both upon principle and upon authority.

The case, as I have stated, has become of comparative unimportance to the parties, as it affects only the costs of a portion of the suit, but for this purpose, I have

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have been compelled to examine it, exactly as I should have done if the original point had remained at issue between the parties. My decision will, in fact, only regulate the costs, as, by consent, a decree will be made, directing these Defendants to deliver up to the Plaintiff the securities on which the 2,000*l.* was advanced, and without any consent, direct the Plaintiff to pay to the Defendants their costs of the suit.

Although the question decided is one of costs, still it may be the subject of an appeal, as it involves a question of principle.

30th *January*, 1857. The Plaintiff appealed to the Lords Justices, but a compromise was effected.

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Jan. 17, 31.

The testator appointed, as trustee and executor, a person who, for many years, had been the paid receiver and manager of his estate. The tenant for life being an infant, the Court continued the executor as Receiver at a salary.

NEWPORT *v.* BURY.

COLONEL *CHARLETT*, who died in 1838, devised the estate in question to Mr. *Newport*. Mr. *Newport* died in 1855, having devised the estate to the Plaintiff, an infant, for life.

The Defendant *Thomas Henry Davis*, who, for many years before Colonel *Charlett's* death, acted as Receiver of the property in question at a salary, had, since that event, continued to manage it. He was appointed trustee and executor of the will of Mr. *Newport*.

The bill stated as follows:—"It is not in his (Mr. *Davis*') power, nor can it be fairly required of him, to give, gratuitously, the labour and time required for that purpose, and it is, therefore, requisite for the Plaintiff's interests, and for the benefit of the estate generally, that

that a salaried Receiver should be appointed. The Defendant *Thomas Henry Davis* is, probably, the fittest person that could be found for the office of Receiver, if this Court should think it fit to appoint him to that office; but if not, the Plaintiff desires that some other fit and proper person should be appointed by the Court."

It prayed, "That the Defendant *T. H. Davis*, or such other person as the Court might think proper, might be appointed Receiver of the estates of which the Plaintiff was equitable tenant for life as aforesaid, with the usual directions in that behalf, and with such salary or other remuneration as the Court might think just." It also prayed the performance of the trusts of the will, as far as regarded the estate of which the Plaintiff was tenant for life.

Mr. *Wickens*, for the Plaintiff.

Mr. *R. Palmer*, for the trustee.

Mr. *Renshaw*, for the remainderman.

The Earl of *Shrewsbury's* case was referred to, in which it was stated, that Mr. *Blunt*, the Receiver, was appointed a trustee, and was continued by the Court.

The MASTER *of the* ROLLS thought that, under the circumstances of the case, it would be proper to continue Mr. *Davis* as Receiver at a salary of 60*l.* a year, the rental being stated to be about 2,000*l.* a year.

NOTE.—See *Marshall* v. *Holloway*, 2 *Swanst.* 452, 453, and *Ex parte Fermor*, *Jacob*, 404.

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BURMESTER (Public Officer) *v.* THE BARON VON STENZ.

Nov. 20.

Bill dismissed with costs, as against a Banking Company, after the death of the public officer named as Plaintiff and before the substitution of another.

THIS suit was instituted by *Burmester*, the public officer of the *London* and *Westminster* Banking Company.

Burmester had died, and before another public officer had been substituted,

Mr. *Leonard*, on behalf of the Defendant, moved to dismiss the bill for want of prosecution. He stated, that by the 7 *Geo.* 4, c. 46, s. ix., the suit had not abated by the death of *Burmester*.

The MASTER *of the* ROLLS, being satisfied that the time had elapsed, and upon production of an affidavit of service of the notice of motion, ordered the bill to be dismissed, with costs to be paid by the *London* and *Westminster* Banking Company.

GREGG *v.* COATES.
HODGSON *v.* COATES.

July 12, 14.

A testator directed his trustees to allow *A. B.* to occupy a mill, &c. so long as he should think proper so to do, "he nevertheless keeping" the premises "in good and tenantable repair, and paying" a rent of 100*l*. *A. B.* accepted the gift, but the premises were afterwards totally destroyed by accidental fire. Held, that *A. B.* was bound to reinstate them, and was liable for the rent in the meanwhile, and that he could not escape from the liability to rebuild, by declining any longer to retain them.

IN this case, the testator devised his mill or factory, with its appurtenances, and the dwelling-houses thereto adjoining, and the three cottages to his three trustees, their heirs and assigns, upon trust to apply the rents and produce thereof, in common with the rents of the hereditaments thereinbefore and thereinafter mentioned, in the first place, in satisfaction and discharge of all the said testator's just debts (inclusive of the money borrowed by him for the use of the Defendant *John Thomas Coates*, and for which the testator was jointly liable), funeral and testamentary expenses, which his real and personal estate thereinafter given to his executors should be insufficient to discharge; and after payment of such debts, funeral and testamentary expenses, upon trust to apply the same rents and profits unto and for the personal support of the Defendant *John Thomas Coates* during his life, and after his decease, as thereinafter mentioned. And the testator also declared, that inasmuch as his aforesaid factory, &c. were then in the occupation of his nephew, the Defendant *John Thomas Coates*, and his undertenant, he, the testator, did thereby declare and direct, that his said trustees should allow him to continue to occupy the whole of such hereditaments and premises, *so long as he should think proper so to do, he nevertheless keeping the same hereditaments and premises in good and tenantable repair*, and paying to his trustees an annual rent or sum, not exceeding in amount the sum of 100*l*., as his trustees should in their discretion think reason-

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able, such sum to be payable half-yearly, and applied as thereinbefore directed concerning the rents of such real estates.

The testator appointed *John Thomas Coates* and others his trustees and executors.

The testator died in *October*, 1851, and his will was proved by *John Thomas Coates* alone. He remained in the occupation of the mill, &c., which, on the 1st of *April*, 1854, were totally destroyed by accidental fire. It was insured at the time for 1,400*l.*, and *John Thomas Coates*, having received 1,390*l.*, applied it in rebuilding portions of the mill, in a better and more substantial manner than the old one; but a considerable further sum was required to complete the rebuilding.

The Defendant *John Thomas Coates* claimed to be repaid, out of the testator's estate, the sum of 900*l.*, which he alleged would be required to reinstate the mill and premises fit for occupation. He also claimed to be exempted from the payment of a proportionate part of the annual sum of 100*l.* to the testator's estate, from the 1st day of *April*, 1854, when the mill and premises were destroyed by fire, to the time when the same should be rebuilt.

The Plaintiff and the other parties to the suit of *Hodgson* v. *Coates* claimed, on the other hand, that the Defendant *John Thomas Coates* should reinstate the mill and premises fit for occupation, at his own expense, beyond the sum of 1,390*l.* received from the insurance office, and also pay the rent during the period that the same had remained unoccupied.

Mr. *R. Palmer*, Mr. *Freeling* and Mr. *Pearson*, for parties

parties in the same interest. *Coates*, having accepted the benefit of the gift, has subjected himself to the liabilities imposed by the will of the testator. He is bound to keep the house and premises in good and tenantable repair. They are not now in that state, and nothing less than rebuilding them will put them in the situation stipulated by the testator. He is, therefore, bound to rebuild and reinstate the mill and premises. Such would be his liability, if he had been a tenant under a covenant or agreement to this effect, and he has, by his acceptance of the benefits given by the will, placed himself in the same situation.

In the case of *In re Skingley* (*a*), "*A. B.*, being devisee for life of premises, with a condition against committing any manner of waste, and for keeping the same in good and tenantable repair, became lunatic, and the premises were subsequently destroyed by accidental fire. A petition was then presented by the committee of the person, who was also remainderman, praying a declaration that the premises ought to be rebuilt at the expense of the lunatic's estate, and a reference as to the amount of such expense, and out of what fund it ought to be defrayed. Lord *Truro* made an order for the reference, holding that the words of the will created an obligation upon the tenant for life to rebuild the premises, and that the question of such liability was rightly brought before the Court on the petition."

Secondly. *Coates* is not entitled to be relieved from the rent for the time during which the premises may remain unoccupied in consequence of the fire. That was decided at law in *Baker* v. *Holtpzaffel* (*b*), and the rule is the same in equity; *Holtzapffel* v. *Baker* (*c*).

Thirdly.

(*a*) 3 *Mac. & G.* 221. (*b*) 4 *Taunt.* 45. (*c*) 18 *Ves.* 115.

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Thirdly. If he is not bound to reinstate the premises, he is not entitled to require the expenses of rebuilding to be borne by the testator's estate. A tenant has no equity even to compel a landlord to expend on the premises monies received from the insurance of them; *Leeds* v. *Cheetham* (*a*).

Mr. *Follett* and Mr. *Amphlett, contrà*, for Mr. *Coates*. The condition was only to continue until the testator's debts had been paid, and was introduced merely for the benefit of the creditors, and when they had been satisfied, Mr. *Coates* became simply tenant for life in possession. In that character he was not liable for permissive waste, nor was he under any equity to rebuild; *Powys* v. *Blagrave* (*b*). This is a case of accidental destruction, and not of waste, Mr. *Coates* has entered into no covenant or parol obligation either to repair or to rebuild, and the condition gives no right of action against him, but merely confers a right of entry for breach of the condition. It would be a most harsh proceeding to compel him to reinstate the mill and premises, which would be extending his liability far beyond an obligation to repair.

Secondly. It is said, that Mr. *Coates* is bound to pay the rent, though he has not the benefit of the occupation, for it is not shewn that he has been in possession since the fire. He is only to occupy "so long as he shall think proper," and, therefore, he has the option of abandoning the occupation, and of repudiating the further benefit of the gift, whenever he "thinks proper." No notice is necessary, for he is a mere tenant at will, besides which, being the sole trustee, it was impossible for him to give himself a notice to quit.

Thirdly.

(*a*) 1 *Simons*, 146. (*b*) *Kay*, 495, and 4 *De G., M. & G.* 448.

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Thirdly. Assuming his liability, then, at law, the measure of damages recoverable is the value of the factory at the time it was burnt down, and not the amount necessary to rebuild it: *Yates* v. *Dunster* (*a*); in which case the Defendant became the lessee of premises, which at the time of taking them were old and in bad repair, under a demise containing a covenant to repair; the premises were destroyed by fire; the costs of reinstating them would amount to 1,635*l.*, but when so reinstated they would be more valuable by 600*l.* than they were at the time of the fire. It was held, that the Defendant was liable to pay the sum of 1,035*l.* only, as damages for the non-repair, that being the amount of the Plaintiff's loss. Here Mr. *Coates* has expended a sum of about 1,400*l.* on the premises, which was their full value at the time they were burnt down. Nothing more can be required of him.

Fourthly. It is said, Mr. *Coates* is liable to pay the whole rent of 100*l.* a year until the premises are reinstated. There is nothing in the will to justify that demand. The rent is not to be a fixed sum of 100*l.* a year, but such sum, not exceeding that amount, "as his trustees shall, in their discretion, think reasonable." It would be most unreasonable to exact 100*l.* for premises which do not exist.

In re Skingley was not a case decided on strict rights, but on what was beneficial to be done in regard to the rights of a lunatic and his family.

The MASTER *of the* ROLLS.

I entertain no doubt with respect to the leading points; before I saw the case of *Re Skingley*, I had suggested the very same point on this will, namely, whether

(*a*) *Exch.* 26 *April*, 1855.

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whether a person taking the benefit of this bequest did not, thereby, take it upon condition to perform the duty imposed upon him, that is, whether a condition that he should keep it in good and tenantable repair and pay certain rent was not attached to the gift.

I am of opinion that this must be treated as an implied contract, entered into by the person who accepts the estate. If a bequest were made to a person of a house for twenty-one years, upon condition that he kept it and delivered it up at the end of the term in good and tenantable repair, if he chose to accept the bequest, it would be on the faith that he would perform the condition which the testator had attached to it.

It has been suggested, that the non-performance of the condition does nothing more than put an end to the term, and that if he did not perform the condition he could not retain the estate. I think that is not so, and that the case is similar to this:—A testator might leave an estate to a man for life, on condition that, at the end of his life, he should, by will or by bond, give a sum of 1,000*l.* to *A. B.* Could he keep the estate, and have the benefit of gift nearly all his life, and then give it up, and say he was not liable to pay the 1,000*l.*? Obviously not.

Again, it is suggested that this condition was merely operative while the debts were unpaid. That does not affect the question any more. Suppose he had said, I have a son abroad, it is doubtful when he will return, and I give my estate to you till my son returns, on condition that you pay a certain sum of money. If you accept the estate you must observe the condition, although, when the son comes from abroad, the estate will determine. So here, I am of opinion, that there is

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an expressed condition imposed upon this gentleman, that if he accept the benefit, he undertakes to perform the condition, and that he must perform it accordingly.

It appears to me also that he has not determined the occupation. He says, he ceased to occupy in *April*, 1854; in one sense he did, because he was burnt out and did not actually live in the place; but that does not determine an occupation; which does not determine until he thinks fit to determine it, by taking some active step for that purpose, and he has taken none. It is evident that the premises, when rebuilt, will be in a much better state than when he first had them, and it might be reasonable that the persons in remainder should contribute towards the expense in improving the property. I should think that would be a reasonable thing to do. That question, however, did not occur in *Re Skingley*, but I suggest it to the parties.

I think there must be an inquiry, what is a reasonable abatement in respect of the state of the premises since the fire, because Mr. *Coates* could not himself settle what a reasonable rent ought to be.

Mr. *R. Palmer* was heard, in reply, on the latter point, after which

The MASTER *of the* ROLLS said he would consider the last point.

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I must follow *Re Skingley*, I cannot distinguish it from the present case. The Defendant must reinstate the premises or pay a sufficient sum for that purpose, and he must also pay the rent since the mill was burnt down.

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By a settlement, a trust fund was settled after the death of husband and wife upon the children equally who should survive them. But if any child should die in the life of the husband and wife, and leaving "issue" then living, his share should go equally between the issue of such child, when and at such time as the respective shares of such child would have become due and payable. Held, that the "issue" of "children" took *per stirpes*, and that the successive generations of "issue" took their respective shares by substitution, and not concurrently, so that grandchildren and great grandchildren could not take together as a class.

A testator had a power of appointment amongst his issue, which did not warrant an exclusive appointment. By will, after reciting that the trust fund had been invested in land, and reciting (erroneously) that he had advanced 300*l.* towards the purchase, he made an exclusive appointment in favour of one of several objects of "300*l.* or such other sum as he was empowered to appoint." The Court, under the circumstances, held, that the intention was either to appoint the fund contributed (which was trifling, if any), or the whole trust fund, and that in the latter case, the appointment was void.

TWO questions of construction arose in this case, one on the settlement made on the marriage of *Charles Robinson* in 1788, and the other on the codicil to his will executed in 1852.

By the settlement, dated the 15th of *September*, 1788, some stock and money were vested in *Marrett*, in trust for Mr. and Mrs. *Robinson* successively for life, and after the decease of the survivor, upon trust to transfer and pay the funds "unto and amongst such child or children of the body of *Charles Robinson* on the body of *Mary* his intended wife, begotten or to be begotten, or unto and amongst the issue of such child or children, in case such child or children should be then dead leaving issue, in such shares and proportions, and at such time or times, and on such conditions, and in such manner and form, as *Charles Robinson* should, in and by his last will and testament in writing," appoint; and for want of such appointment, "and as to so much and such part or parts of the said sums of 450*l.* stock and 1,150*l.* stock, whereof no such" appointment should be made, then in trust that the trustee should apply and dispose of the same "unto and equally between all and every the child or children of the body of *Charles Robinson* on the body

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body of the said *Mary Jonas* who should be living at the time of the decease of the survivor of them the said *Charles Robinson* and *Mary Jonas* his intended wife, share and share alike."

Provided that, "in case any such child or children should happen to die in the lifetime of either of them the said *Charles Robinson* and *Mary Jonas*, without leaving issue of his, her or their body or bodies, or there being such issue, and such issue should all die in the lifetime of either of them the said *Charles Robinson* and *Mary Jonas*, that then the share or part of such child or children so dying without issue, as aforesaid, should go and be paid to and equally between the survivor and survivors of such child or children, share and share alike, when and at such times as their respective shares or parts should become due and payable."

Provided that, "if it should happen that any such child or children should die in the lifetime of the said *Charles Robinson* and *Mary Jonas*, leaving issue of his or her or their body or bodies then living, that the share or part of the said several sums of 450*l.* stock and 1,150*l.* stock, which such child or children would, if living, be respectively entitled to, should go and be paid unto and equally between the *issue* of such child or children so dying as aforesaid, when and at such times as the respective parts or shares of such child or children would, if living, have become due and payable."

"But in case there should be no such child or children of the body of the said *Charles Robinson* on the body of the said *Mary Jonas* begotten, or, there being such child or children, all of them should happen to die without issue, before any of their parts or portions should become

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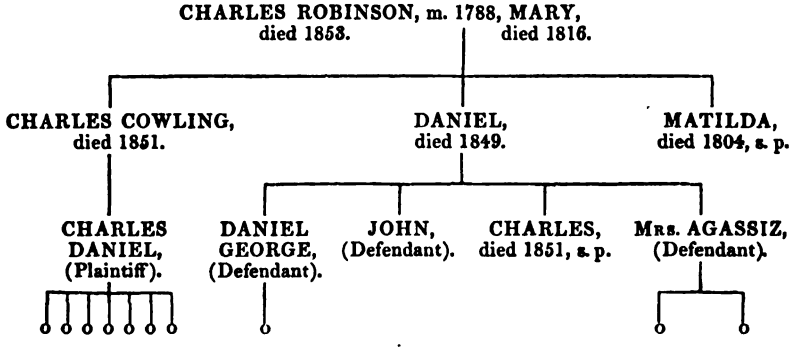
become due and payable, or there being such issue, and all such issue should happen to die, before any of the parts or portions should become due and payable," then there was a limitation to the settlors.

In 1789, *Marrett*, out of the trust funds, purchased a copyhold property called *Vernon Hill*.

In 1808, Messrs. *Sykes* (who had been appointed trustees in the stead of *Marrett*), with the consent of Mr. and Mrs. *Robinson*, applied the remainder of the trust funds, together with an inconsiderable sum (if any) advanced by Mr. *Robinson* out of his own monies, in the purchase of a copyhold estate called "The *Dundridge* Farm," to be held on the trusts of the settlement.

Mrs. *Robinson* died in 1816, her husband survived her, and he died in 1853. The state of the family will appear from the following diagram :—



There had been three children only of the marriage, one of whom, *Matilda*, died an infant, and without issue. The other two were sons, named *Charles Cowling* and *Daniel*, who both died in the lifetime of their father.

Charles

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Charles Cowling Robinson, the eldest son of the settlor, died in 1851; he had three children, two of whom died without issue, in 1822 and 1847, respectively, and the third was the Plaintiff *Charles Daniel Robinson*, who had seven children, four of whom were born before the death of their grandfather (*Charles Cowling*), and three were born afterwards, but before the death of the settlor.

Daniel, the second son of the settlor, died in 1849, leaving four children; three were Defendants to this suit, viz., *Daniel George*, *John* and Mrs. *Agassiz*, and the fourth, *Charles*, died in 1851 without issue. *Daniel George* had issue one child living, who was born after the death of his grandfather but in the lifetime of the settlor. *John* had no issue, and Mr. *Agassiz* had two children born after the death of *Daniel*, their grandfather, but in the lifetime of the settlor.

The settlor, *Charles Robinson*, by a codicil to his will, dated in 1852, after reciting that by his marriage settlement of 1788, certain funds were vested in a trustee upon certain trusts for the benefit of himself, his wife and their issue, and among other trusts, to sell and convert, and with the produce to purchase landed estate, expressed himself as follows:—"And whereas by an indenture, bearing date the 10th day of *March*, 1796, and made between me and *Mary* my said wife of the first part, the said *Hannah Marrett*, as the widow and executrix of the said *Charles Marrett* [the original trustee] of the second part, and *James Sykes* and *James Sykes* the younger of the third part, all the trust property, or the then residue thereof comprised in my said marriage settlement, was assigned to and vested in the said *James Sykes* and *James Sykes* the younger, upon the trusts of the marriage settlement, and whereas the

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the trustees of my said marriage settlement, in pursuance of the trusts thereof, agreed to purchase a copyhold estate, known as *Dundridge Farm*, in the county of *Southampton*, but the amount of the trust funds then in their hands being insufficient to pay the whole of the purchase money thereof, I contributed the sum of 300*l.* or thereabouts, part thereof, and the purchase of the said copyhold estate was thereupon completed, and the same estate was surrendered or otherwise conveyed to the trustees of my said marriage settlement, upon the trusts thereof; and whereas, under and by virtue of my said marriage settlement, and the deed or deeds executed upon the purchase of the said copyhold estate, or of some or one of them, I am empowered, by deed or deeds, or by my last will and testament, or any codicil thereto, to direct or appoint that the sum of 300*l.*, or thereabouts, should be raised by the trustees of my said marriage settlement, out of the said trust estate, and paid to such one or more of my issue by my said late wife *Mary*, as I should direct or appoint; and whereas no appointment of the said money, or of any part thereof, hath been yet made by me, but I am now desirous of making such appointment as hereinafter contained: Now, therefore, in order to effectuate my said desire, and pursuant to and by force and virtue and in exercise and execution of the power or authority to me given or reserved in and by my said marriage settlement, or other deed or deeds, and of every other power and authority whatsoever enabling me in this behalf, I do, by this codicil to my said last will and testament, duly executed and attested in the manner required by law, irrevocably direct and appoint, that immediately after my decease, the trustees or trustee for the time being of my said marriage settlement do and shall, out of the trust estate vested in them or him, *levy or raise the sum of* 300*l.*, *or such other sum as I am so empowered to*

to direct or appoint to be raised and paid as aforesaid, and do and shall pay the said sum of 300*l. or such other sum as aforesaid*, when and as soon as the same shall have been raised, unto my godson the Rev. *Charles Daniel Robinson*" (the Plaintiff).

The *Vernon Hill* property had been sold, in 1846, to the Defendant Mr. *Helps*, by the settlor and his sons and grandchildren, but the great grandchildren and the trustee had not joined in the sale, and the property had not been surrendered. The great grandchildren, therefore, insisted, that they were not bound by this sale; while Mr. *Helps* contended, that the great grandchildren took no interest under the settlement, and that he had a good title under the parties beneficially entitled to *the Vernon Hill property*.

Mr. *Roupell* and Mr. *Cole*, for the Plaintiff. The grandchildren and great grandchildren cannot take, under the gift to "issue," together and as one class. Secondly, the appointment by the will of "300*l.*, or such other sum as the testator was empowered to direct or appoint to be raised," was an appointment of 300*l.* out of the trust estate in the Plaintiff's favour.

Mr. *Lloyd* and Mr. *Giffard*, for Mrs. *Agassiz*. The appointment operates on the fund, if any, which the husband supplied toward the purchase, and not on the settlement fund.

Secondly. The great grandchildren cannot take in competition with their parents, it is not a gift to a class generally, but a gift, by substitution, to the next succeeding generation of issue, when the prior one has failed. They

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They cited *Ive* v. *King* (*a*); *Skey* v. *Barnes* (*b*); *Evans* v. *Scott* (*c*); *Emperor* v. *Rolfe* (*d*).

Mr. *W. R. Ellis*, for the child of *Daniel George*, cited *Watson* v. *Hayes* (*e*); *Leake* v. *Robinson* (*f*); *Hampson* v. *Brandwood* (*g*); *Butter* v. *Ommaney* (*h*).

Mr. *Torriano*, for the children of the Plaintiff, contended they each took one-eighth of a moiety under the word "issue," which comprised all issue living, and there was nothing to restrict it.

Mr. *Bagshawe*, jun., for the representatives of the settlor.

Mr. *Bonham Carter*, for the two children of Mrs. *Agassiz* and the child of *Daniel George*, cited *Eyre* v. *Marsden* (*i*).

Mr. *Taylor*, for other parties.

Mr. *R. Palmer* and Mr. *C. C. Barber*, for Mr. *Helps*, the purchaser of *Vernon Hill*. Admitting, for argument sake, that "issue" comprehends all generations of issue, still the question remains in what mode they are to take; if they take by representation, there is no difficulty, because each successive generation would come in only on the extinction of the preceding one; *Ross* v. *Ross* (*k*). That is so in the case of the parent, and so long as the principle of representation exists, the same rule applies to all subsequent generations of issue. All the issue are admitted, but they cannot take concurrently, as children with grandchildren or remoter generations, but merely by representation, *per stirpes*, when all the prior generation are extinct.

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(*a*) 16 *Beav.* 46.
(*b*) 3 *Mer.* 338.
(*c*) 1 *H. of L. Cas.* 43.
(*d*) 1 *Ves. sen.* 209.
(*e*) 5 *Myl. & Cr.* 125.
(*f*) 2 *Mer.* 363.
(*g*) 1 *Madd.* 388.
(*h*) 4 *Russ.* 70; 2 *Jarman on Wills* (2nd edit.), 489.
(*i*) 4 *Myl. & Cr.* 231.
(*k*) 20 *Beav.* 645.

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The word "issue," it is to be observed, is used in a settlement and not in a will, and must, to some extent, be restricted, for "issue" born after the death of the settlors must be excluded. The true construction is, to give the fund to a succession of classes, taking by representation.

Next, only those children take who existed at the death of their parents.

The power of appointment to the children or issue was destroyed by the conveyance by the settlor to Mr. *Helps*; *West* v. *Berney* (*a*), and *Badham* v. *Mee* (*b*).

Mr. *Martelli* and Mr. *Osborne*, for trustees.

Mr. *Roupell*, in reply.

The MASTER *of the* ROLLS.

I will consider this case.

The MASTER *of the* ROLLS. *July 29.*

The first question which arises in this case is, whether the codicil of 1852 operated as an execution of the power of appointment over the fund settled. The first thing to be regarded, in considering this codicil, is, what was the power of appointment intended to be exercised, and what were the funds appointed by that codicil. The part of it which is material for this purpose is this:—After reciting the deed, the testator says, "And whereas by an indenture, bearing date on or about the 10th day of *March*, 1796," &c. [*His Honor read the passage, stated ante*, p. 43.]

Now

(*a*) Referred to in 1 *Sugd. Pow.* (6th edit.) 98.
(*b*) 1 *Myl. & K.* 32.

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Now the contention on the part of the Plaintiff is, that this was intended to be an appointment of 300*l.* out of the trust estate in his favour, but I am unable to come to that conclusion. It appears to me to be either an appointment of the amount he contributed towards the purchase of the *Dundridge* estate, or an appointment of the whole of the trust fund, over which he had any power of appointment under his marriage settlement. The first recital points to the contribution, and the second and third point to the subject of the appointment, being whatever trust fund he had power to appoint, and that the whole of the money which he had power to appoint had been contributed towards the sale of the *Dundridge* estate, and the operative part appoints the whole of this trust fund over which he had any power of disposition whatever. I think that the proper construction of this codicil excludes the construction argued for by the Plaintiff, but that it is to be treated either as a disposition only of so much money as he had actually contributed, or of the whole fund settled by the deed of 1788. If it is to be treated as a disposition only of so much money as he had contributed towards the purchase of the *Dundridge* estate out of his own moneys, I am told that it is so small in amount, as not to be a matter worth contending for, and that the recital that the 300*l.* was so advanced is wholly erroneous.

But if the codicil be treated as an appointment of the whole of the fund settled by the deed of 1788, the remaining question is, whether it was intended to operate over the whole of it, or only over 300*l.*, part of that sum which he had a power to appoint. In my opinion, the true construction of the codicil is, that it was intended by the testator to operate over the whole amount that he had a power of appointing under the

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the settlement. The operative words are distinct, "to raise the sum of 300*l.*, or such other sum as I am so empowered to direct or appoint." That is, whatever the sum may be, he directs it to be raised. It is true he supposed it to be no more than a sum of 300*l.*; that is shewn, because he states, in the previous recital, that it was that sum "or thereabouts." He does not specify it distinctly, but he distinctly states, that his intention is to make the appointment thereinafter stated, and that appointment is, whatever he has a power to appoint under the settlement, whether it be the sum of 300*l.*, or whether it be any other or larger sum.

Having come to the conclusion that this is the proper construction of this codicil, then, in my opinion, it is not a good execution of the power of appointment. The power is to appoint "unto and amongst such child or children of the marriage," [this is not an appointment to them, that is quite clear,] "or unto and amongst the issue of such child or children," in case such child or children should be then dead leaving issue, in such shares and proportions "as he should think fit." Therefore it is not an exclusive power of appointment; and though, at the time when the codicil was executed, on the 22nd of *October*, 1852, all the children had died, still in any construction of the word "issue" there were, besides the Plaintiff, other issue who were entitled to take; there were thre echildren of his son *Daniel*, who were then and are now alive, and who are parties to this suit, and who are excluded from taking any interest under the appointment, although they were objects of the power.

I am, therefore, of opinion, upon the first point, that the codicil had no operation in giving to the Plaintiff 300*l.* or any other sum out of the settled property.

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The next question is, who are the persons who are entitled in default of appointment to the settled property. The effect of the settlement upon this subject is this:—In the first place, it is upon trust to divide the same equally among all the children who should be living at the decease of the survivor of the husband and wife [this did not take effect, because there were none such]. Then it is provided, that if any such child should happen to die in the lifetime of either the husband or the wife, without leaving issue of their body, or there being such issue, and such issue should all die in the lifetime of the husband or wife, then that the share or part of such child or children, so dying without issue, should be divided equally amongst the survivor and survivors of such child or children. [Nothing turns on this.]

In the events which have happened, this is the operative part of the settlement:—"If it should happen that any such child or children should die in the lifetime of the husband and wife leaving issue of his, her or their body or bodies then living, that the share or parts of the said several sums of 450*l.* stock and 1,150*l.* stock, which such child or children would, if living, be respectively entitled to, should go and be paid unto and equally between the issue of such child or children so dying as aforesaid, when and at such time as the respective parts or shares of such child or children would, if living, have become due and payable.

Now, the first thing is clear, that in the events which have happened, the fund is divisible into two halves, and that one-half (the one which *Charles Cowling Robinson* would have taken if he had survived his father) goes to the issue of *Charles C. Robinson*, and that the other half (which *Daniel Robinson* would have taken if he

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he had survived his father) goes to the issue of *Daniel Robinson*.

But then arises the question which was argued before me, which is, who constitute the class of "issue," and whether the seven children of the Plaintiff take with him equal shares in his moiety; or, 2nd, whether four only of the children of the Plaintiff, who were born before the death of *Charles Cowling Robinson*, take with him, on the ground that they take such parts as the children, if living, would have taken at that time; or, 3rd, whether the Plaintiff takes the whole moiety, to the exclusion of all his children. The same question arises with respect to the other half, whether the children of Mrs. *Agassiz* and the child of *Daniel George Robinson* participate with their parents and their uncle *John Robinson* in the division of the other moiety.

The cases on this subject are very numerous, many of them were cited to me at the time of the argument, and I was desirous to consult them again, before expressing any final opinion upon the construction of this settlement, and having done so, I think I should not usefully occupy the public time if I were to go through a detailed examination of these cases, upon the present occasion. I am of opinion that the rule which I adopted in the case of *Ross* v. *Ross* (*a*) is that which is applicable to the present case, and where I, acting upon the principle that though the word "issue" is *nomen generalissimum* and includes all the remotest descendants, nevertheless, held, that where issue are pointed out as persons to take with reference to the share of the parent, a gift which, so far as regards the parent, fails, they take on the principle which may be called a *quasi* representative principle,

(*a*) 20 *Beav.* 645.

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principle, that is, that the children of each parent whose share fails takes that parent's share, but not admitting the grandchildren to take in competition with the children, to participate in the share of that deceased parent.

The scope and object of the settlement, in the present case, and the previous clauses to which I have already referred for this purpose, all appear to me to point to this construction, viz. that though the word "issue" undoubtedly includes all the remotest descendants, yet that when each share is divisible, the division of that share must take place, in this manner:—amongst a class in the same generation, and that each share of a parent which fails is divisible amongst his children, if he has any, or if not amongst his grandchildren, excluding in the former case the grandchildren, if there should be any, and in the latter case, great grandchildren, if there should be any in existence at the time of the division.

This renders it unnecessary for me to go into the other points argued. My opinion is, that this fund is divisible into two moieties, that one of the moieties goes to the Plaintiff exclusively, for his own benefit, and that the other moiety is divisible into three parts, of which one part goes to Mrs. *Agassiz*, another part goes to *Daniel George Robinson*, and the remaining third goes to *John Robinson*.

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A power of sale, in a settlement, subsists only for the purposes of that settlement and during the time when the uses of the settlement are in existence, and when they are all (except a jointure secured by a term) spent, it cannot be exercised.

By a marriage settlement, an estate was settled on the husband for life, with a jointure to the wife secured by a term, with remainder to the issue, and, in default, to the husband in fee. The settlement contained a power of sale and exchange vested in trustees, to be exercised with the consent of the husband or the person entitled to the rents. The husband died without issue, having devised his estate in trust to sell. The wife was living. Held, that the power of sale, given to trustees of the settlement, had ceased on the union of the estate for life with the immediate reversion in fee, and that it could not be exercised with any consent.

THE question on this special case was, whether a power of sale and exchange created by the settlement made on the marriage of Mr. and Mrs. *Gordon* was still subsisting in the trustees.

By the settlement dated the 6th of *September*, 1832, Mr. *Gordon* conveyed some real estate to trustees, in trust for Mr. *Gordon* for life, with remainder to the use that Mrs. *Gordon*, if she survived her husband, should receive a jointure of 600*l.* per annum, with remainder to the use of other trustees for the term of 500 years, for securing the jointure out of the rents or by sale or mortgage, with remainder to trustees for a term of 2,000 years to raise portions for younger children; and subject to these estates and terms, the estate was limited in favour of the children of the marriage, and in default to Mr. *Gordon* in fee. The settlement contained a power to the widow, at any time after the marriage, by deed or will, to charge the sum of 2,000*l.* on the settled property, to be raised after her decease for the benefit of her personal estate; and for that purpose, she had power to create any term of years, upon such trusts as she should think fit for raising this sum of money; and there was a proviso for the cesser of the term, on the satisfaction of it, by raising the money required.

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The settlement contained the following power of sale and exchange, during the life of the husband with his consent, or within twenty-one years after his decease, with the consent of the persons entitled to the receipt of the rents.

It is agreed and declared, that after the solemnization of the said intended marriage, it shall be lawful for *T. L. Wolley* (said Plaintiff), and *J. Daniel*, and the survivor of them, &c., at any time or times during the life of the said *J. A. Gordon*, with his consent in writing, and after his decease and at any time or times within twenty-one years to be computed therefrom, with the consent in writing of the persons for the time being entitled to the receipt of the annual rents and profits of the hereditaments and premises, or of his guardian if a minor, to dispose of and convey, either by way of absolute sale or in exchange for other hereditaments, and for that purpose to revoke the uses, &c., of the settlement and to declare new ones. The trustees' receipts were to be good discharges.

There was no issue of the marriage. Mr. *Gordon*, the husband, died in *March*, 1854, having by his last will devised the lands in question, subject to the subsisting interests therein of his widow, to three trustees, *Grey*, *Cookson* and *Hillery*, in trust to sell and to invest the proceeds on certain trusts, not material to be mentioned.

The widow married Mr. *Bright* in 1855, and by one deed, the residuary estate of her husband was settled to her separate use without power of anticipation, and her jointure was settled in like manner by another deed, which contained a stipulation, that nothing therein contained should be construed so as in anywise to interfere with the exercise of the power of sale and exchange, or any

any other powers contained in the indenture of settlement, and that Mrs. *Bright* should, after the solemnization of the intended marriage, have the same powers of consenting and otherwise acting, in reference to any sales or exchanges to be made under the said powers, or to the exercise of any other powers contained in the same indenture as if she had been sole and unmarried. The indenture contained a declaration, that the receipts of the trustees or trustee for the time being should be good discharges.

The Plaintiff, the surviving trustee of Mr. *Gordon's* settlement, having agreed to sell the property to the Defendant, the question now was, whether the Plaintiff, as sole surviving trustee of the original settlement, with the consent of any, and if any of what persons, had now a right to exercise the power of sale contained in the indenture of the 6th *September*, 1832, and to sell the hereditaments thereby settled.

Mr. *R. Palmer* and Mr. *Giffard*, for the Plaintiff, argued, that there was an existing legal power, and no equitable impediment to its present exercise. Besides, the husband himself, by his will, had directed a sale of the estate. They cited *Mortlock* v. *Buller* (*a*); *Wheate* v. *Hall* (*b*); 2 *Chance* on Powers (*c*); 2 *Sugd.* on Powers (*d*).

Mr. *Lloyd, contrà* for the Defendant, argued that the power could no longer be exercised; for there was no possible reason for converting the estate, and the purposes for which it had originally been given had now ceased. That there was now no person, within the intention of the

(*a*) 10 *Ves.* 313.
(*b*) 17 *Ves.* 80.
(*c*) Page 624.
(*d*) Page 508, 6th edit.

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the settlement, to consent to the exercise of the power of sale. The trustees under the will of the settlor could not consent, for their power under the will was to sell merely the interest of the testator, and not the unincumbered fee simple, and that they had no authority to consent to a sale made by others. Besides, a difficulty occurred as to the person to whom the purchase-money could be paid without assisting in a breach of trust.

The MASTER *of the* ROLLS reserved judgment.

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The questions may be stated thus:—whether the power of sale and exchange in a settlement still subsists, after the union of the life estate with the reversion in fee, and, in my opinion, it does not. I think that this is established both upon principle and upon authority, as far as the authorities decide the question. It must, I think, in the first place, be manifest, that such a power subsists only for the purpose of the settlement, and during the time when the uses of the settlement are in existence; this is the obvious and common sense view of the subject. The deed is executed, settling the property in a particular manner, and in that settlement a power of sale and exchange is introduced, and it would be difficult, in the absence of any express declaration on the part of the parties themselves, to believe, that they intended the power should subsist, when it was no longer required for the limitations contained in the settlement itself.

The

The reported cases, as far as they go, confirm this view. In *Mortlock* v. *Buller* (*a*), it was held, that such a power given to trustees, to be exercised at any time at the request of the husband and wife, or the survivor, could not be exercised, after the death of the wife without issue, in the life of the husband. It is true, that this case differs materially from the present, in this respect:—that there was no jointure or charge subsisting, and that all the intermediate limitations of the settlement had failed.

Wheate v. *Hall* (*b*), was a case where the jointure of the wife was still subsisting, but the husband had died without issue in her lifetime, and thereupon, the estate for life and the reversion in fee had united in the father, and passed by his will. It was endeavoured, in that case, to make use of the power of the settlement to defeat the uses created by the will, but the Master of the Rolls held this could not be done. The Master of the Rolls certainly does not determine the power was wholly extinct; and there are two points of distinction between that case and the present, which were much relied on in the argument. First, that besides the jointure to the widow, there is here a power given to the widow to raise 2,000*l.* out of the property, in aid of her personal estate. There are therefore, it is argued, important trusts still to be performed, and it is contended, that this power, which was given for the purpose of the settlement, must be held to be still subsisting, as long as any of the trusts remain to be performed, and that the greater or smaller amount of those trusts cannot, with propriety, be taken into account or considered with reference to the existence of this power. In my opinion, however, little distinction can be drawn between

(*a*) 10 *Ves.* 315. (*b*) 17 *Ves.* 86.

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tween the effect produced, for this purpose, between the jointure and the charge for 2,000*l.*, or the combined effect of both. The answer to it is, that the power of sale or exchange is not wanted or created for the purpose of enforcing the payment of the jointure, or for raising the 2,000*l.* charged, each of which may be effected wholly independent of the power of sale and exchange; but the proper object of the power of sale and exchange, and that for which it was created, was, to enable the persons entitled to the estate settled under the limitations contained in the deed to make such sale and exchange as might be convenient, for the better enjoyment of the land settled, and none of these limitations are still subsisting, notwithstanding the jointure. Accordingly this was the view which Sir *William Grant*, in my opinion, took in *Wheate* v. *Hall* (*a*). Sir *William Grant* there held, that the power could not be exercised.

But then it was said, the reason why Sir *William Grant* would not allow it to be exercised, in that case, was, that it was intended to make, what may be called, a fraudulent use of the power, for the purpose of defeating the trusts and uses on which the reversion in fee was devised, and this circumstance constitutes another and a marked difference between the case of *Wheate* v. *Hall* and the present, and one on which reliance is principally placed by Sir *William Grant* in his judgment; namely, that in that case, the testator had devised the settled property in strict settlement, without giving any power of sale, and therefore it was said, the tenant for life under his will had no power of making or procuring a sale to defeat the testator's intention, through the means of the power given for the benefit of a series of *cestuis que trust*,

(*a*) 17 *Vesey*, 86.

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trust, none of whom were then in existence; and that Sir *William Grant's* decision amounts to no more than this, viz., that the power could not be exercised to defeat the uses created by the will; whereas here, it is alleged, it is sought to be used, for the purpose of giving effect to the testator's will, which directs this property to be sold, and that this will be accomplished, by means of the power given in the original settlement, for the benefit, if not of the persons interested in the lands settled, at least for the benefit of the *cestuis que trust* under the will still in existence, and that, in effect, it produces that which it was his object should be accomplished.

But, in my opinion, this argument does not hold good. Here the settlor being, in the event that has happened, entitled to dispose of the fee in the settled estates, devises it to trustees, and reposes in them the trust and discretion of selling the property. It is inconsistent with the exercise of this trust and discretion, that the sale should be effected by the trustees of a settlement, under the power therein contained, if it is done by different persons, and under a different responsibility from that which the testator contemplated. It would be, in my opinion, a very strained and illogical conclusion to come to, if I were to hold, that the subsistence of the power in the marriage settlement, or the right of the trustees to exercise it, depended on the circumstance whether the settlor had or had not devised the land to trustees, in trust to sell, and that, in the former case, it was subsisting and might be exercised, but that it could not in the latter. Suppose the settlor died intestate, and that the power in the settlement had been in the terms of the power in *Wheate* v. *Hall* (*a*), namely, one to be exercised with the consent of the survivor

(*a*) 17 *Vesey*, 86.

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survivor of the husband and wife, could it be reasonably contended, that the power could be exercised against the will of the heir-at-law and owner of the inheritance? And yet, if the subsistence of the power depended simply on the question, whether it was wanted for the purpose of the settlement, the person in whom the right to consent is vested, for the mere purpose of selling or calling forth the exercise of the power, could not affect the question, though it might the propriety of exercising it.

Here the power is to be exercised only with the consent of the husband during his life, and after his death, or twenty-one years, with the consent of the person or persons for the time being entitled to the rents. Now, this provision in the settlement, in my opinion, gives additional force to the argument against holding, that the right to exercise this power is still subsisting. If it be still subsisting, who are the persons whose consents to exercise it are necessary? The settlement says, they must be persons for the time being entitled to the receipt of the annual rents and profits of the hereditaments settled. This means the persons beneficially so entitled, and excludes mere trustees.

In that view of the case, then, who is now, or who are now, the person or persons entitled beneficially to the rents of this property under this settlement? In my opinion, no such person is in existence. It is clear it is not the widow of the settlor, or her second husband. It is true that she is entitled to a payment out of the estate, which is secured by a term, but that she is not the person to give such consent is clearly shewn by this; viz., assuming the power was existing, that if the husband had died leaving issue of the marriage, and that the power were now sought to be exercised, under this direction contained in the settlement,

ment, the consent of the widow and trustees would clearly not be the consent required for the exercise of the power, but it would be the consent of the only son, the first tenant in tail, if adult, or, if a minor of his guardian. The trustees of a settlement, made for this lady on her second marriage, are clearly not entitled to the rents of the property in any sense of the term; the trustees of the will of the husband are entitled, in one sense, to the rents of the property, but not beneficially, and their interest, such as it is, is under the will and not under the settlement. If the contest arose, which of the two trustees were entitled to sell this property, I should entertain no doubt, but that the trustees under the will had the right, but that their power and right to do so only arose after the trusts of the settlement, under the limitations of the property therein contained, had been exhausted.

I am clearly of opinion, that both powers to sell the same thing cannot be subsisting at the same time, and that the power to sell under the will did not arise till the power to sell under the settlement had ceased to exist.

Some argument for the existence of the power, in this case, would seem to arise from the circumstance, that the exercise of it is confined to the life of the husband and twenty-one years afterwards, and that it is not a general and unlimited power; but I do not think that this, when it is properly considered, has any important bearing on the subject. The limitation of the power, to the period of time of twenty-one years after the death of the husband, was probably introduced, in consequence of an apprehension that prevailed, that powers of sale and exchange, unlimited in point of time, were void, on the ground that they offended against the rule

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rule relating to perpetuity, inasmuch as it was, at one time, supposed, that this had been decided by Lord *Eldon* in *Ware* v. *Polhill* (*a*), although, I apprehend, that was not intended by Lord *Eldon* in pronouncing that judgment, nor is it, in my opinion, the effect of or fairly deducible from his decision when carefully read. Lord *St. Leonards*, in a late case of *Cole* v. *Sewell* (*b*), points out that such is not the meaning of Lord *Eldon's* decision, and also that it would be contrary to principle so to hold; because, so far as it was a power after an estate tail, it could not be too remote; and further, that if the life estate and reversion in fee under the settlement should unite, the power would cease to exist, and I refer to this decision for the purpose of this *dictum*, which relates particularly to this part of the subject. The passage I am about to read is in 4 *Dru. & War.* (*c*). Lord *St. Leonards* had previously been referring to some previous cases, and he had noticed *Nicolls* v. *Sheffield* (*d*), where, as he observes, Lord *Kenyon* would not hear an argument about the remoteness of the power of sale which was created after the estate tail. He would not listen to any argument to show that it could be too remote, and then Lord *St. Leonards* proceeds thus:—"The question has often been discussed, in recent times, how far the general powers of sale and exchange, which are usual in settlements, are good, and their validity has been doubted. I cannot say that I entertain any doubt upon the point. I think that they are perfectly good, although not, in terms, confined within the rule against perpetuities, and upon this principle, that such powers may be barred by the owner of the preceding estate tail; and if once an estate in fee has been acquired by any

(*a*) 11 *Vesey*, 257.
(*b*) 4 *Dru. & War.* 32.
(*c*) Page 32.
(*d*) 2 *Brown, C. C.* 215.

any one claiming under the limitations of the instrument by which the power was created, it naturally ceases." Lord *St. Leonards* holds it ceases at once. I admit he does not, in his work on the subject, treat it by any means as so clear a case, though he seems to think, that probably the better opinion would be, that it was so. In this case, however, he lays this down as the principle which is to govern these cases, and states why, upon that ground, these powers of sale and exchange of unlimited duration are not bad, and do not violate the rule against perpetuities. The effect of the reasoning of Lord *St. Leonards* on the cases is the same, that whether the powers are unlimited or limited to the life of the settlor and twenty-one years afterwards, the same principle would apply to the union of the two estates.

On the whole, my opinion is, that the power cannot be exercised after the union of the estate for life with a reversion or remainder in fee; that this union, in the present case, took place upon the death of the first husband, and that the trustees of the settlement thereupon ceased to have any right to exercise the power which was originally vested in them by the settlement of the 6th *September*, 1832, and, consequently, that this case must be answered in the negative.

NOTE.—Affirmed by Lord *Cranworth*, L. C., 27 *Jan.* 1857.

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July 14.

Decree made in favour of *cestuis que trust*, upon an original bill and without a bill of review, upon the discovery of fresh evidence, although a decree had previously been made, as to the same matter, against their trustees, but in a suit to which the *cestuis que trust* were not parties.

A. insured his life and assigned the policy to *B.* *A.* became bankrupt, and *B.* died, having bequeathed the policy in trust for *C.* In a suit between the assignee of *A.* and the trustee, and in consequence of the trustee not having proved that notice of the assignment had been given to the office, the fund was ordered to be paid to *A.'s* assignee, as being within the order and disposition of the bankrupt. Parties claiming under *C.* afterwards filed their original bill against the assignee, and having proved that notice had been given, recovered the fund.

IN the year 1800, *William Emmott* effected a policy on his life in the Equitable Assurance Company for 1,000*l.*

In 1821, *William Emmott* sold and assigned the policy to his father *Christopher Emmett*, who thenceforward paid the annual premiums.

In 1822, *William Emmott* became bankrupt. In 1825, his father *Christopher Emmott* died, having bequeathed the policy in trust for *Jane Emmott* (the wife of *William Emmott*) for life, with remainder to the children of *William Emmott*. *William Emmott* survived *Christopher Emmott*, and died in 1850. In the meanwhile, the policy had been kept up by the representatives of *Christopher Emmott*, under an authority in his will, and the children of *William Emmott* had, for valuable consideration, assigned their interest in the policy to *John Maund*.

Upon the death of *William Emmott*, the sum of 4,710*l.* became payable on the policy. This was claimed by the executor of *Christopher Emmott* on the one hand, and by the assignee in bankruptcy of *William Emmott* on the other, on the ground that notice of the assignment in 1821, from *William Emmott* to *Christopher*

pher Emmott, had never been given to the Assurance Office, and that, therefore, the policy was, at the time of the bankruptcy, within the order and disposition of the bankrupt.

Brady, the legal personal representative of *Christopher Emmott*, filed his bill (*Brady* v. *Morgan*) against *Patrick Johnson* (the assignee of Mr. *Emmott*) and the trustees of the Equitable, to recover the 4,710*l.*, or, at all events, the premiums paid for keeping up the policy. To this bill *Maund*, the purchaser of the children's interest, was not made a party.

The cause of *Brady* v. *Morgan* was heard in *February*, 1855, when the objection, that *Maund* was not a party being taken, was overruled, and the Plaintiff having failed to satisfy the Court that notice had been given to the Assurance Office of the assignment to *Christopher Emmott*, a decree was made for payment to *Brady* of the amount of premiums which had been paid in keeping up the policy, together with interest, and the residue of the fund was ordered to be paid to the bankrupt's assignee.

The Plaintiffs (*Maund's* representatives) having obtained evidence that notice of the assignment in 1821 had actually been given to the Equitable, filed the present suit in *September*, 1855, against *Brady* (the representative of *Christopher Emmott*), *Patrick Johnson* (the bankrupt's assignee) and *Jane Emmott* (the tenant for life of the policy money), stating the above circumstances, and insisting that, as the Plaintiffs had not been made parties to the suit of *Brady* v. *Morgan*, the decree made therein was not binding on them. The bill sought to recover the fund, which had not yet been distributed under the decree in *Brady* v. *Morgan*.

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It was stated, that, until 1825, the Equitable Assurance Company would not accept notices of assignments.

Mr. *Roupell* and Mr. *Beales*, for the Plaintiffs.

Mr. *Haig*, for Mrs. *Pierce*.

Mr. *Bagshaw* and Mr. *Hardy*, for *Brady*.

Mr. *Lloyd* and Mr. *W. D. Lewis*, for *Patrick Johnson*, the assignee of *William Emmott*.

The following cases were cited:—As to the necessity of making the *cestui que trust* parties to a suit, *Franco* v. *Franco* (*a*); *Adams* v. *Barry* (*b*); *Douglas* v. *Horsfall* (*c*); *Ex parte Heathcoate* (*d*); *In re Styan* (*e*); *In re Pole's* Trusts (*f*).

As to the effect of notice of the assignment, *Urquhart* v. *Urquhart* (*g*); *Josling* v. *Karr* (*h*); *Fortescue* v. *Barnett* (*i*); *In re Atkinson* (*k*); *Watts* v. *Porter* (*l*).

As to the necessity of filing a bill of review, and obtaining leave for that purpose, *Fordyce* v. *Bridges* (*m*); and see *Hodson* v. *Ball* (*n*); *Bainbrigge* v. *Baddeley* (*o*); *Toulmin* v. *Copland* (*p*); *Berrow* v. *Morris* (*q*).

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There are two questions in this case, one of form, and the other of merits, and both these questions must be

(*a*) 3 *Ves.* 75.
(*b*) 2 *Coll.* 285.
(*c*) 2 *Sim. & St.* 184.
(*d*) 2 *Mont., D. & De G.* 711.
(*e*) 1 *Phillips*, 105.
(*f*) 25 *L. J., N. S., Ch.* 862.
(*g*) 13 *Simons*, 613.
(*h*) 3 *Beav.* 494.
(*i*) 3 *Myl. & K.* 36.
(*k*) 2 *De G., M. & G.* 140.
(*l*) 3 *Ellis & B.* 743.
(*m*) 10 *Beav.* 90.
(*n*) 1 *Phillips*, 177.
(*o*) 2 *Phillips*, 705.
(*p*) *Ibid.* 711.
(*q*) 10 *Beav.* 437.

be determined in the favour of the Plaintiffs, in order to entitle them to the decree. On the state of the case before me, I think that both these points may be determined in their favour.

The question of form is of this character: — A suit of *Brady* v. *Morgan* was instituted by a gentleman, who was both the legal personal representative of *Christopher* and *William Emmott*; it sought to recover from the Equitable Assurance Company, who were mere stake holders and had no interest in the fund, a sum of 4,710*l.* payable on a policy on the life of *William Emmott*. The question raised in that suit was, whether Mr. *Brady* was entitled to the fund, not in his own right, but as a trustee for other persons, or whether it remained in the order and disposition of *William Emmott*, the bankrupt, by reason of no notice having been given to the Company. I was of opinion, upon the question being raised in that suit, that it was properly framed, and that it was not necessary that Mr. *Maund* should be made a party to the cause, although if the property belonged to *Christopher Emmott* at the time of his decease, and did not go to the assignees of the bankrupt, it had been assigned to Mr. *Maund*. I was of opinion, that Mr. *Brady*, as legal personal representative, represented all the *cestuis que trust*, and that the suit was properly constituted in that respect. I retain that opinion, and still consider that the suit was properly constituted.

The question now is, whether his *cestuis que trust*, having discovered fresh evidence, and filing a bill for the purpose of stopping the fund, which by that decree was ordered to be paid over to *Patrick Johnson*, for the purpose of being divided among the creditors of the bankrupt *William Emmott*, are entitled, before that

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division has actually taken place, to have that fund restored, for the purpose of being divided amongst or paid to the *cestuis que trust*, who are entitled to it in case it did not form part of the assets of the bankrupt.

It is suggested, in this state of the case, that the proper mode of proceeding would have been, to have allowed, or to have applied to Mr. *Brady* to file, a bill of review, and for that purpose, as a necessary preliminary step, to have applied to this Court, and obtained the leave necessary for filing a bill of review.

If Mr. *Brady* had adopted that course, and it had appeared that the evidence, which is now before the Court, was new evidence, which he had not been able to obtain (and which appears now, from his evidence, to be the fact), and that it was material to the matter in issue, then, no doubt, the Court would have given leave to file a bill of review, and the question would have been brought forward in that manner; but I am of opinion, that Mr. *Maund* is not precluded by the omission to adopt that course of proceeding, and that it is open to him now to file a bill. And assuming everything done in the cause of *Brady* v. *Morgan* to have been correctly done, which seems to have been the case, and not disturbing anything done in that case, I am of opinion, that the present Plaintiffs may now, by bringing forward proper evidence, arrest the fund in the hands of *Patrick Johnson*, for persons other than the creditors of *William Emmott*, who may be entitled to receive the money: not meaning thereby to express my opinion who those persons are, but assuming Mr. *Maund*, or rather the Plaintiffs in this cause, his representatives, to have made out a title to at least a portion of the fund. It would be a very unfortunate result, if this Court were compelled

compelled to come to an opposite conclusion, because it could scarcely do so, without giving Mr. *Brady* leave now to file a bill of review, which would only be to occasion considerable delay and expense, and the effect would ultimately be, to raise, upon the same evidence, exactly the same point as is now before the Court.

I am of opinion, that I am not driven to that result, and without meaning to express any opinion as to any other case, because all these cases must, in some degree, depend upon the peculiar facts that are brought before the Court, each of them varying in its character and circumstances, I am of opinion, in this particular case, that the Plaintiffs are entitled to get over the point of form, and that the Court is bound to say, that if they establish their case upon the merits, they are entitled to arrest the fund in the hands of Mr. *Patrick Johnson*.

That brings me to the question of merits, which rests on the testimony of Mr. *Tuff*, the clerk of Messrs. *Wimburn* and *Collett*, the solicitors of *Christopher Emmott*. It appears, I think, very material to notice the circumstance, because it is in favour of the Plaintiffs on the question of form, though it is against them upon the question of merits, that Mr. *Brady* did apply to Mr. *Tuff* previously to the institution of the suit or previously to taking the evidence in the cause of *Brady* v. *Morgan*, and that *Tuff* then informed him, that he could not recollect any thing as to the notice, sufficient for the purpose of giving evidence upon the subject. I thought, in *Brady* v. *Morgan*, that the burden of proof lay upon those persons who sought to establish that notice had been given to the office, I think so still, and, though they failed in that case, still I think that burden has been complied with on the present occasion.

I have

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I have very considerable doubt, whether I should have come to any conclusion upon the affidavit of Mr. *Tuff* by itself, but his cross-examination has convinced me.

In the examination of the evidence of witnesses, great difficulties of various sorts arise, and one of the difficulties and dangers with which the Court has constantly to deal, in examining the evidence of witnesses who are perfectly honest and give their evidence perfectly *bonâ fide*, arises from their turning inference into recollection. It frequently happens, that a person, by long dwelling on a subject, thinks that a thing may have happened, and he at last comes to believe that it actually did occur.

I have, in various cases, had occasion to remark this, especially in cases of pedigree, where persons are endeavouring to recall conversations about relationship which establish their title. In these cases, it is of great importance to distinguish whether either the recollection tends to the benefit of the witness, or whether he is perfectly indifferent, having no concern whatever in the matter. Undoubtedly, in the cases to which I have referred, I have frequently found, that, when it was for the interest of the witness, by dwelling long upon the subject, he has come to believe that to have happened which at first he did not remember, that he has turned inference into recollection, and has at last given positive testimony upon which the Court could place no reliance, although, at the same time, wilful perjury is not attributable to the witness. But then, on the other hand, this peculiar quality of memory, also, must be borne in mind (which we have frequent opportunities of observing) that a very slight and casual circumstance sometimes awakens recollection in the mind of a witness, who, before that, had forgotten every thing relating to the

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the matter. I have myself seen this on various occasions, and a very strong instance is present to my mind at this moment, where a perfectly disinterested and respectable witness was asked if he recollected a particular transaction; he had wholly forgotten it, but a diary having been produced and shewn to him, in which there was an entry made by himself, in his own hand-writing, relating to the subject, he remembered not only the matter itself but many of the surrounding circumstances, which were proved to be indisputably true by the evidence of the other witnesses, and which, without the production of the book, he would probably never have remembered.

I mention this for the purpose of saying, with respect to the witness *Tuff*, that I see no reason for doubting the credit of or casting any discredit upon his testimony, because he, at first, denied all knowledge of the subject. He has no interest in the matter, and is a perfectly honest and sincere witness, and I believe he spoke the truth when, in his affidavit, he says, he does not recollect the matter, but, in substance, says, he believes it must have happened from the ordinary course of business, but when entries in a book were brought to his recollection, and he was pressed, in the course of his cross-examination, the facts relating to the matter were, by degrees, recalled to his mind, and he then, I believe, also spoke the truth when he detailed the facts within his recollection with respect to this particular matter. If he had had a motive for giving his testimony, he might, undoubtedly, have told the whole, in his affidavit, in the first instance, and not have waited for any cross-examination, in which he could not have foretold what questions would be asked, or be aware of the circumstances which might be brought forward.

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In these circumstances, I am of opinion, that credit is to be attached to the evidence of Mr. *Tuff*, when he swears positively that he did give notice to the Equitable Assurance Office of the assignment of this policy.

That being so, it is not necessary for me to consider any ulterior question. I am of opinion, upon the merits, that the fact is proved, and that the fund must be paid, not to the creditors of *William Emmott*, but to those who are the *cestuis que trust* under the will of *Christopher Emmott*.

I am of opinion, that the costs of all parties must be paid out of the fund, and that all reasonable expenses which Mr. *Johnson* may have been put to, in respect of this money, must be allowed to him, he being a mere trustee in this respect.

Subject to that, I will make a decree, and allow Mr. *Johnson* to take such steps in the Court of Bankruptcy, as may be necessary for the purpose of having the fund transferred into this cause, and dividing it among the persons entitled.

I cannot, in this cause, determine the various other questions which have been raised.

FENN *v.* DEATH.

July 25.

Bequest to the children of *A.* equally. *A.* and all his children were dead at the date of the will, but there were grandchildren and great grandchildren of *A.* living. Held, that the grandchildren living at the death of the testatrix, to the excluding the great grandchildren, were entitled.

BY her will, dated in 1849, the testatrix bequeathed the residue of the produce of the sale of her real estate on the following trusts:—"in trust for the children of my late mother's half brother, *Thomas Death*, and which children shall, or to such one or more of them as shall be living at my decease, if more than one such child, to be equally divided between them as tenants in common."

The testatrix died in 1852.

Thomas Death had died in 1794, and at his death he had eight children, all of whom were dead at the date of the will; the three last died respectively in 1838, 1841 and 1846. There were nine grandchildren of *Thomas Death* at the date of the will, and twenty-seven grandchildren.

Under these circumstances, the question was to whom the fund now belonged, and inquiries having been made in Chambers as to the state of the family, the cause now came before the Court for its construction of the will.

Mr. *Pearson*, for the Plaintiff, the trustee.

Mr. *Waller*, for the grandchildren, argued that they were entitled to the fund exclusively. He cited and referred to *Crooke* v. *Brookeing* (*a*); *Gale* v. *Bennet* (*b*); *Reeves*

(*a*) 2 *Vernon*, 106. (*b*) *Ambler*, 681.

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Reeves v. *Brymer* (*a*); The Earl of *Oxford* v. *Churchill* (*b*); *Moor* v. *Raisbeck* (*c*); *Sanderson* v. *Bayley* (*d*).

Mr. *J. C. Wright*, for some of the great grandchildren, contended that they were entitled to participate in the fund equally with the grandchildren. He cited *Doe* d. *Smith* v. *Webber* (*e*); *Wyth* v. *Blackman* (*f*).

The MASTER *of the* ROLLS declared, that the grandchildren of *Thomas Death* who were living at the death of the testatrix were entitled equally to the residue of the money arising from the sale of the real estate.

(*a*) 4 *Ves.* 692.
(*b*) 3 *Ves. & B.* 59.
(*c*) 12 *Simons*, 123.
(*d*) 4 *Myl. & Cr.* 56.
(*e*) 1 *B. & Ald.* 713.
(*f*) 1 *Ves. sen.* 195; see *Amb.* 554.

NOTE.—See 1 *Roper on Legacies*, 68, 72 (4th edit.)

TYNDALE *v.* WILKINSON.

July 4, 5.

The testator had a son and two daughters (*A.* and *C.*) living, another daughter (*B.*) was dead having left five daughters. He bequeathed 15,000*l.*, as to 5,000*l.* for *A.* for life, with remainder to her children, as to 5,000*l.* to the five daughters of *B.*, and as to the remaining 5,000*l.* to *C.* for life, with remainder to her children. He then gave the residue "equally amongst his son, his daughter *A.*, the five daughters of *B.*, and his daughter *C.*, to be settled as he had directed the three sums of 5,000*l.* upon them and their issue." Held, that the five daughters of *B.* took *per capita*, so that each was entitled to one-eighth of the residue.

THE testator had a son and two daughters living; another daughter was dead leaving five daughters.

By his will, the testator, after referring to a provision made for his only son, gave his real and personal estate to trustees to sell and invest, and pay the income to his wife for life. Then, after reciting that Mr. *Wilkinson*, the husband of his daughter Mrs. *Wilkinson*, had died, leaving his wife and five daughters surviving, and that his

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his daughter Mrs. *Ripley* had died, leaving five daughters and five sons, the testator directed his trustees to stand possessed of the sum of 15,000*l.*, upon trust to pay the interest of 5,000*l.*, part thereof, to his daughter Mrs. *Wilkinson* for life, and after her decease to her children, as she should appoint, and in default, equally; and as to 5,000*l.*, part of the 15,000*l.*, upon trust for the five daughters of Mrs. *Ripley;* and as to the remaining 5,000*l.*, for his daughter Mrs. *Greenfield* for life, and after her death for her five children, as she should appoint, and if no appointment, equally, with benefit of survivorship.

After other gifts, the testator proceeded as follows:— "And subject thereto, *I give the said residue equally amongst my said son, my daughter Eliza C. Wilkinson, and the five daughters* of my lamented deceased daughter *Caroline A. Ripley, and my said daughter Octavia V. B. Greenfield,* to be settled in like manner as I have directed the aforesaid sums of 5,000*l.*, 5,000*l.* and 5,000*l.* upon them and their issue, upon the condition that they rest satisfied with such accounts of the same, as my son, as one of my executors, in conjunction with my nephew *George Annesley,* my grandson *Thomas Tyndale Ripley,* and my son in law *Benjamin Wyatt Greenfield,* may adjudicate, feeling well assured and confident they will do what is right."

The question was, whether under this gift, the residue was divisible into fourths, so that the five children of Mrs. *Ripley* took one-fourth between them, or whether it was divisible in eighths, so that each child of Mrs. *Ripley* took one-eighth.

Mr. *R. Palmer* and Mr. *H. Stevens,* argued that the residue was divisible *per stirpes,* and that the five daughters

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daughters of Mrs. *Ripley* took one-fourth between them. They cited *Arrow* v. *Mellish* (*a*); *Abrey* v. *Newman* (*b*); *Hunt* v. *Dorsett* (*c*); *Brett* v. *Horton* (*d*); *Nettleton* v. *Stephenson* (*e*).

Mr. *Lloyd* and Mr. *Faber*, in the same interest.

Mr. *Selwyn* and Mr. *Hitchcock*, for the Defendants, argued that the Misses *Ripley* took *per capita*, and were each entitled to one-eighth of the residue. They relied on *Blackler* v. *Webb* (*f*); *Dowding* v. *Smith* (*g*); *Lenden* v. *Blackmore* (*h*); *Amson* v. *Harris* (*i*).

Mr. *R. Palmer*, in reply.

The MASTER *of the* ROLLS.

I will read over the will and the authorities, and dispose of this case to-morrow.

July 5.

The MASTER *of the* ROLLS.

The question arises on the construction of the residuary gift, and having read the will, and the cases which were cited, I have come to the conclusion, that the words are too strong to enable me to give to them any other interpretation, than that the five granddaughters take distinctly and separately equal interests in the residue with their aunts.

On

(*a*) 1 *De G. & S.* 355.
(*b*) 16 *Beavan*, 431.
(*c*) 5 *De G., M. & S.* 575.
(*d*) 4 *Beavan*, 239.
(*e*) 18 *Law J.* (*N. S.*) *Ch.* 191.
(*f*) 2 *P. Wms.* 383.
(*g*) 3 *Beavan*, 541.
(*h*) 10 *Simons*, 626.
(*i*) 19 *Beavan*, 210.

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On reading the will, my disposition was to think, that the intention of the testator was different. But if that were really so, I am of opinion that the words do not express it. I thought I could control the words by reference to the general scope and object of the will; but, on consideration, I cannot do so. It may be a case in which the testator has not expressed his real intentions, but I think the meaning of the words used is clear.

Declare that the residue is divisible into eight parts, and that the five daughters of Mrs. *Ripley* each take one-eighth.

ASTLE *v.* WRIGHT.

July 13, 16.

The Defendant agreed to pay 1,000*l.* for a share in a partnership for fourteen years. The partners disagreed, and the partnership was dissolved by the Court, with the assent of both the partners. There being faults on both sides, the Court directed a due proportion of the premium to be returned.

AT the end of 1854, the Plaintiff, a surgeon, agreed to take the Defendant into partnership, and by an indenture, dated the 1st of *January*, 1855, in consideration of 500*l.* paid by the Defendant to the Plaintiff, and of a further sum of 500*l.* to be paid in annual instalments, the Plaintiff and Defendant agreed to become partners for fourteen years, and they entered into the usual stipulations, in regard to their diligent application to the business, keeping the books and accounts, &c.

Differences shortly afterwards arose between them, the Defendant alleging that the Plaintiff had systematically omitted to introduce him to his patients, and the Plaintiff complaining, that the Defendant was negligent in the discharge of his duties. In *May*, 1855, to put an end to the differences, they signed a written memorandum as to the future conduct and management of the business, and the Plaintiff agreed "to use his reasonable efforts to introduce his partner to the patients of the firm."

The

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The misunderstandings and recriminations, however, revived, and the Plaintiff filed his bill for a dissolution of the partnership. He asked, in winding up the partnership, to charge the Defendant with the second 500*l.* premium.

Both the Plaintiff and Defendant charged each other with a violation of their partnership duties, and both were desirous of having a dissolution; the Plaintiff claimed the whole premium, while the Defendant insisted on its return.

Mr. *R. Palmer* and Mr. *W. H. Clarke*, for the Plaintiff, cited *Baring* v. *Dix* (*a*); *Akhurst* v. *Jackson* (*b*); *Freeland* v. *Stansfield* (*c*).

Mr. *Lloyd* and Mr. *Batten*, for the Defendant.

July 16.

The MASTER *of the* ROLLS.

This is a case in which both parties express themselves to be equally desirous to have a dissolution of the partnership. On reading the affidavits in the cause, it appears to me that the fault lies, equally, on both parties, and that they have equally occasioned the impossibility of going on together.

It being agreed by both parties, that a dissolution is to take place, the question raised is this:—The Plaintiff contends that, notwithstanding the dissolution, he is entitled to have the whole premium of 1,000*l.* paid for a partnership, which was to last fourteen years,

(*a*) 1 *Cox*, 213. (*b*) 1 *Swans.* 85, and 1 *Wilson, C. C.* 47.
(*c*) 2 *Smale & G.* 479.

years, paid to him. On the other side, it is contended, that by reason of misrepresentation as to the amount of the income derived from the business, the whole ought to be returned. For the Plaintiff, reference is made to a class of cases, where the partnership has been dissolved by bankruptcy, death, or lunacy, in which cases, the Court has held, that no return of the premium was proper. There are certainly cases, where Lord *Eldon* thought that this Court could not entertain a bill for the return of the premium, and that the party must be left to an action at law. But this certainly is not the way in which, in modern times, cases of dissolution of partnership have been dealt with, and at the Bar I have obtained, and since leaving the bar I have made orders for dissolving partnerships, in which all the rights of parties have been determined in this Court, including the return of the premium, wholly or in part, and the parties have not been left to work out any portion of their rights at law, the whole of them having been determined here.

The rule, in which I have followed other Judges, is this:—that in the absence of any fraud or gross misconduct on either side, and where the continuation of the partnership has become impossible, by reason of incompatibility of temper, or other causes, springing from the parties themselves and not accompanied by circumstances which are controlled by the contract, I have treated the premium as having been paid for the whole of the term of the partnership, I have apportioned so much of it as belonged to the period the partnership had lasted, and have ordered a return of the rest. Here a premium of 1,000*l.* (500*l.* paid down and 500*l.* by instalments) was to be given for a partnership of fourteen years, and, therefore, one-fourteenth part of 1,000*l.* is, in my opinion, attributable to each year. The

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The interest of the part paid is not to be accounted for, because this was according to the contract, and was the property of the person who received it.

Upon reading through the evidence, I think it very probable that the income is less than the Defendant was made to believe. But on an examination of what took place, I am of opinion, that he had, before he entered into the engagement, sufficient opportunities, to enable him to judge and form a fair estimate of what the amount of the business was. It is true that the Plaintiff says, that the books of the partnership were produced to the Defendant, and it is now said, that there are none whatever to be produced, and that, in point of fact, no books were kept. Still the Defendant remained for a considerable time in the house, he had an opportunity of judging what the nature of the business was, and was thereby able to form a very fair opinion of it. I think, therefore, that I cannot hold that there was any misconduct in that respect, but that the Defendant knew what he was about when he entered into the partnership.

I am of opinion, therefore, that I must make a decree for dissolving the partnership and taking the usual accounts. Then I shall declare, that the premium of 1,000*l.* is to be apportioned over the whole duration of the partnership, and that so much of the 500*l.* as has been paid, and which is attributable to the time that has elapsed since the formation of the partnership, up to the date of the decree when the partnership was dissolved, is to be retained by the Plaintiff, and the residue thereof is to be returned to the Defendant, with interest at 4*l.* per cent. from the date of the decree.

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WORTHINGTON *v.* M'CRAER.

Nov. 12.
Dec. 6.

A trustee *bonâ fide* advanced a sum to apprentice an infant, in the life of the infant's father, who was in great pecuniary distress, and while the infant's interest in the trust fund was contingent, and before a power of advancement had come into operation. Held, that in taking the accounts as against the trustee, the amount ought to be allowed him.

THIS was a motion to vary the Chief Clerk's certificate, under the following circumstances:—

The testator, who died in 1837, left a legacy of 1,450*l.* to his son *George Sutton Davenport* for life, and after his death to his children, who being a son should attain twenty-one years, or being a daughter should attain that age or marry. The will contained a power to advance any money for the benefit of the children during their infancy, after the death of *George Sutton Davenport*. He gave the residue of his property to *John Davenport*, and made him and *Robert Worthington* his executors. The legacy was not vested in the grandsons till they attained twenty-one, and there was no power of advancement till after the death of their father. The legacy was treated as a charge on the estate, of which the son *John Davenport* was in possession, and which had been devised to him by his father. *George Sutton Davenport* had three children, the eldest of whom was *George Aldersey Davenport*. *George Sutton Davenport* fell into great distress, and became bankrupt, and, in 1842, his three children went to reside with and were supported by their uncle *John Davenport*.

In the year 1844, *John Davenport* put out the elder of his nephews, *George Aldersey Davenport*, as an apprentice to a surgeon, and paid with him a premium of 80*l.* *George Aldersey Davenport* thus had the benefit of this advance, and he acquired the requisite knowledge

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to enable him to pursue the profession of a surgeon, which he now followed. The money was advanced before the legacy had become vested, while his father was alive, and before the period had arrived at which the power of advancement could be exercised.

The father died in 1850; the interest of the son (who had attained twenty-one in 1849) thereupon became indefeasible, and he now sought payment of his share of the legacy of 1,450*l.*

The uncle had died in *February*, 1845, and his widow and executrix, in taking the accounts against her husband, as one of the trustees and executors, asked to be allowed, first, the monies expended by her husband in the support and maintenance of his nephew *George Aldersey Davenport*, and, secondly, the 80*l.* paid as a premium, on apprenticing him to a surgeon.

Mr. *R. Palmer* and Mr. *J. H. Palmer*, for the Plaintiff.

Mr. *J. J H. Humphreys*, for a Defendant.

Mr. *Selwyn* and Mr. *Bury*, for the executors of the uncle.

Hume v. *Rundell* (*a*); *Smith* v. *Gibson* (*b*); *Walker* v. *Wetherell* (*c*); *Carmichael* v. *Wilson* (*d*); *Ex parte Chambers* (*e*); *Ex parte England* (*f*); *Ex parte Swift* (*g*); *In re Welch* (*h*), were cited.

Mr.

(*a*) 2 *Sim. & St.* 174.
(*b*) *Peake*, 52; *Co. Lit.* 172.
(*c*) 6 *Ves.* 473.
(*d*) 3 *Molloy*, 79.
(*e*) 1 *Russ. & M.* 577.
(*f*) *Ibid.* 499.
(*g*) *Ibid.* 575.
(*h*) 23 *L. J.* (*Ch.*) 344.

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Mr. *R. Palmer*, in reply. The cases cited referred to property in possession; here it was reversionary.

The MASTER *of the* ROLLS, during the argument, observed, that it was settled law that an infant might bind himself for necessaries, and he referred to *Coke* on *Littleton* (*a*), where it is said, "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards."

As to the moneys laid out for the maintenance of the children, he said, he thought the evidence shewed, that there was no intention on the part of the uncle to charge it, and that they had been maintained and supported by him merely from feelings of kindness and charity. He reserved the other point.

The MASTER *of the* ROLLS. *Dec.* 6.

This case comes before me on a motion to vary the certificate. At the hearing, I disposed of the questions which related to whether the widow of the uncle of the infants was entitled to charge for the maintenance and education of the infants while supported in her house, and I stated my opinion, that she was not; but I reserved my judgment on the question, whether a sum of 80*l.* advanced by the uncle was to be allowed to his estate or not.

It is contended, on the part of the son, in the first place, that this was intended as a bounty on the part of his

(*a*) Page 172 a.

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his uncle, and that, if he had lived, no claim would have been made in respect thereof; but I am not satisfied that this is so. There is no evidence on the subject, and I think that the burthen of proving this lies on the son, and that, in the absence of any evidence, I cannot presume that the uncle intended to select this one of his nephews as an exclusive object of his bounty, to whom to give this sum of money. The same principle does not appear to me to apply to the question of maintenance, upon which I thought myself bound, from the course of conduct pursued by the uncle and aunt, to infer an intention to support these children, while their father remained in the state of destitution in which he then was.

It is next contended, on the part of the grandson of the original testator, that this sum ought not to be allowed, because it was an act amounting to a breach of trust and unauthorized by the power of advancement, which was not then in force, and not justified by the interest of the grandson, which was still contingent.

And it is also urged, that it cannot be assumed that the uncle intended to exercise the power, because he did not apply to the other trustee for his assistance and concurrence in the matter. I think that the last observation is disposed of by the fact, that the uncle had the fund in his possession; at least, he had it in this way:—He was in possession of the property, on which it was agreed that it was to be a charge, and he was the person who accounted for the interest to his brother, and who, after his death, would have to account for the principal to his brother's children, on their attaining twenty-one.

The question, then, appears to me to resolve itself into

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into one which may be thus stated:—Whether the trustee of a fund, in which an infant *cestui que trust* has a contingent interest, and over which, at a period which has not yet arrived, there is a power of advancement, which may be exercised by the trustee in favour of that infant, and the trustee advances a part of the trust fund *bonâ fide* for the benefit of that infant, for his advancement in life, whether, in this state of circumstances, the infant can afterwards, when his interest in the fund has become vested and absolute, insist, that the trustee shall repay the sum so advanced for his benefit, and require this Court to disallow the amount of it in taking the accounts against him. I am of opinion, that he cannot. I consider it to be established in this case, that, so far as the infant is concerned, it was very beneficial to him that the advance should have been made, and if the fund had been vested instead of being contingent, no question could have been raised respecting it.

In the actual circumstances of the case, if this Court had been applied to, it would have declined to make the advance, but only because, it might be, that, by so doing it would be parting with the property of another person; but if the fund had been vested, or if a stranger had been contented to incur the risk of the fund never becoming vested in the grandson, and had consented to advance the money, on the faith that if the legacy became vested afterwards, the amount should be repaid to him, this Court, I apprehend, would not have hesitated to sanction such an arrangement.

The trustee, the uncle, has thought fit to take that risk upon himself. If the infant had not attained twenty-one, the uncle would have to account to the person to whom the share of the infant would then have

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have belonged, and would have been allowed no deduction on this account; but as the infant has survived his father, and attained his age of twenty-one years, I am of opinion, that he cannot now say to the trustee, "you must be disallowed this sum, because it is a sum which you ought not to have advanced, having regard to the trusts you had to perform."

The question that presents itself to me is this:—Who was injured by the advance? The answer is, the person who would have been entitled to the legacy if the son had not attained twenty-one. The breach of trust was a breach of trust as against that person, but not as against the son; and, in my opinion, it does not now lie open to the son to say, that as another person might, in a particular event which has not occurred, have insisted upon the trustee replacing the fund which had been advanced for the benefit of the son, he is entitled to put himself in the shoes of the person who might have been injured, and compel the trustee to repay the money over again to him the *cestui que trust*.

The only question then is, whether the uncle intended to make a present of this sum to his nephew or not; if he did not, it must be treated exactly in the same manner as if he had sold out so much stock, of which he was a trustee, and had advanced it for the benefit of the nephew. In my judgment, the burthen of proving that it was intended as a bounty, by the uncle to the nephew, lies on the nephew, and that he has failed in such proof.

In my opinion, therefore, this amount must be allowed to the estate of the deceased uncle.

SAREL *v.* SAREL.

Nov. 5.

Bequest of a moiety of a residue to *A.* for life, and of the other moiety to *B.* for life, "and from and immediately after the decease of *A.* and *B.*" to stand possessed "of all my personal estate," in trust for eight grandchildren. *A.* died, and *B.* was living. Held, that the moiety enjoyed by *A.* became immediately divisible amongst the grandchildren.

THE testator gave the residue, which consisted of personalty, to trustees, in trust for his widow for life, and immediately after her decease, upon trust as to one moiety for his daughter Mrs. *Sarel* for life, and as to the other moiety for his daughter Mrs. *Martin* for life. He then expressed himself as follows:—

"And from and immediately after *the decease* of my daughter *Susanna Sarel* and my daughter *Grace B. Martin*, then that my said trustees shall stand possessed *of all my said personal estate*," &c., in trust for my grandchildren *Samuel Sarel* and seven others [naming them], "to be divided equally between them, share and share alike, on their attaining twenty-one years."

The testator died in 1842, his widow in 1847, and Mrs. *Martin* in 1850. His daughter Mrs. *Sarel* being still living, the questions raised by this special case were:—

First, whether, in the events which had happened, the moiety of the income directed to be paid to Mrs. *Martin* during her life was undisposed of during the life of Mrs. *Sarel*.

Secondly, if it was disposed of, then whether Mrs. *Sarel* was entitled thereto during her life, or whether it should be accumulated, or whether it was subject, immediately, to the trusts in favour of the eight grandchildren.

Mr.

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Mr. *Elderton*, for the Plaintiff Mrs. *Sarel*, argued that she took a life interest in Mrs. *Martin's* moiety by implication; *Bird* v. *Hunsdon* (*a*); *Davies* v. *Hopkins* (*b*).

Mr. *Hoare*, for trustees, who supported the case for the next of kin in their absence, contended for an intestacy. He observed that there was only one period referred to on which the gift to the grandchildren of all the personal estate was to take effect, namely, *immediately after* the decease of the two tenants for life, and that distinction was pointed at in *Swan* v. *Holmes* (*c*).

That there were no expressions of severance of the whole of the personal estate given to the grandchildren, and no gift on the respective deaths of the two daughters, but "immediately" after the death of both of them. That if this were not so, there must be either a gift to the widow by implication, which he argued was impossible on the authorities, or an intestacy. He referred to *Wyndham* v. *Wyndham* (*d*); *Townley* v. *Bolton* (*e*).

Mr. *Hallett*, for the grandchildren, was not called on.

The MASTER *of the* ROLLS.

I think that this case is governed by the view I took in the other cases. There are three cases on this subject, *Abrey* v. *Newman* (*f*), in which the bequest was to be equally divided between four for their lives, after which to be divided between their children. I there held that these were separate gifts to the parents, and on the death of any of them their shares became divisible amongst the children

(*a*) 2 *Swanst.* 342.
(*b*) 2 *Beavan*, 276.
(*c*) 19 *Beavan*, 476.
(*d*) 3 *Bro. C. C.* 57.
(*e*) 1 *Myl. & K.* 148.
(*f*) 16 *Beavan*, 431.

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children *per capita*. In *Swan* v. *Holmes* (*a*) I took the same view of the subject. In *Turner* v. *Whittaker* (*b*) the expression was "at the death of my sons *E.* and *A.*," to be equally divided amongst their children. The only difference between that and the present is, that here the expression is, "after the decease of *S. S.* and *G. B. M.*"

I think the meaning of the testator was to have a division of a moiety whenever it became set free by the death of the tenant for life who enjoyed it.

I shall answer the case by saying, that there is no intestacy, but that on the death of Mrs. *Martin* her share became divisible amongst the grandchildren.

(*a*) 19 *Beavan*, 471. (*b*) *Post*.

DRAKE *v.* MARTIN.

Nov. 6.

THE testator bequeathed to *Caroline*, *Ann* and *Charles Martin* as follows:—"All my *Bank Stock* and foreign securities, as invested by Mr. *William Legrand*, Broker."

Bequest of "all my Bank Stock and foreign securities as invested by Mr. *A.*, stock-broker." Held to pass Three-and-a-quarter per Cents., the testator not having, at the date of his will or at his death, any other stock to answer this description. Held also, to pass foreign securities, purchased after the date of the will by Mr. *B.*

At the date of his will he had no Bank Stock (strictly speaking), but he had 1,200*l.* Three-and-a-quarter per Cents. and eight Russian Bonds, which investments had been made for him by Mr. *W. Legrand*.

At his death, he retained the 1,200*l.* Three-and-a-quarter per Cents., but, in the meantime, he had sold the eight Russian Bonds, and had purchased eight others,

Bequest of "my property not in *England*, in the hands of my attorney abroad, Mr. *W.*, consisting of R. Bonds, &c." Held to pass all property abroad.

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others, through a Mr. *Sutton*, and these he possessed at his death.

Under these circumstances, the Three-and-a-quarter per Cent. Stock and the Russian Bonds were claimed both by the three legatees and by the residuary legatee.

The testator also bequeathed to his nephew and niece, *Titus* and *Albertine*, "my property not in *England* and in the hands of my attorney abroad, Mr. *Jacob Andrews Waitz*, consisting of Russian Bonds, &c." The testator had sold the Russian Bonds which were in the hands of Mr. *Waitz* at the date of his will, and the produce had been invested in Fire Shares.

Questions arose on this, between the two legatees and the residuary legatees, who respectively claimed the Fire Shares.

The will was dated the 20th of *November*, 1850, and the testator died on the 20th of *September*, 1854.

Mr. *W. D. Evans*, for the Plaintiff, the executor, stated the case.

Mr. *R. Palmer* and Mr. *Bird*, for the residuary legatees. The Three-and-a-quarter per Cent. Stock will not pass under the first bequest of "all my Bank Stock," for Bank Stock is distinct from Government Stock.

[*The* MASTER *of the* ROLLS intimated that in his opinion it would, if there was nothing else to satisfy the bequest.]

Secondly, as to the eight Russian Bonds, possessed by the testator at his death, they do not pass to the three legatees, for the gift is specific, of the "foreign securities" invested by Mr. *Legrand*. This bequest had been adeemed by their sale in the testator's lifetime, and those purchased by Mr. *Sutton* do not pass.

On

On the second bequest, they contended that the Russian Bonds having been sold, the gift of them also had been adeemed, and that the Fire Shares fell into the residue.

The MASTER *of the* ROLLS.

I am of opinion that the expression "as invested by Mr. *William Legrand*" is only a cumulative description of the subject of the gift, and does not make it specific. The gift is of "all my Bank Stock and foreign securities," which carries the whole; the testator proceeds to say, "as invested by Mr. *Legrand*." This is a description of his Stock and foreign securities, and is another mode of enabling the executors to ascertain them. He meant to give all his "Bank Stock and foreign securities" which he possessed at his death, and this was a mode of describing them. If he had said "the Bank Stock and foreign securities which I possess at this time," the case would be different. He means to give all, but adds some descriptive words which do not, however, limit the general effect of the pure gift, and consequently the three children are entitled to the Three-and-a-quarter per Cents. and the Russian Bonds.

As to the second gift, what he intended to dispose of was all his property not in *England*, but he adds, "it is in the hands of Mr. *Waitz* and consists of Russian Bonds, &c." He meant this as another mode of describing his property not in *England*, and did not intend to cut down the gift and limit it to property in the hands of Mr. *Waitz*. I think, therefore, that all his property not in *England* passed.

NOTE.—See Wills Act, 1 *Vict.* c. 26, ss. 23, 24; *Pulsford* v. *Hunter*, 3 *Brown's C. C.* 418; *Land* v. *Devaynes*, 4 *Brown's C. C.* 537; *Clarke* v. *Browne*, 2 *Sm. & Giff.* 524; *Le Grice* v. *Finch*, 3 *Mer.* 51; *Chapman* v. *Hart*, 1 *Ves.* 273; *Phillips* v. *Turner*, 17 *Beavan*, 194.

COORE *v.* TODD.

Nov. 8, 10.

By the same will were given a rent-charge for life to *A. B.*, a rent-charge to the tenant in tail during his minority, and a power to the tenant for life to jointure. The power was exercised and the jointure was secured by a term and powers of distress and entry. Held, upon a deficiency of income, that the three charges were payable *pari passu*.

A testator devised real estates in fee, in trust to pay to *A. B.* out of the rents, a rent-charge until he attained twenty-five, and 400*l.* a year to *C. D.* for life, and also during the minority of any tenant in tail in possession, 150*l.* a year for his maintenance. And "without prejudice to the trusts" aforesaid, and "to any jointure to be created under the power thereinafter contained," to pay the surplus rent to the mother of *A. B.* until *A. B.* should be entitled to possession of the estate (which was to be at twenty-five). And "subject to the trusts aforesaid," the trustees were to hold in trust for *A. B.* for life, with remainder to his eldest son in tail, with power to *A. B.* to limit a jointure for his wife, with powers of distress and entry, and to create a term to secure it. *A. B.* appointed the jointure and died, leaving an infant tenant in tail. The income being deficient, held, that *C. D.*'s rent-charge, the widow's jointure, and the tenant in tail's maintenance, must abate *pari passu*.

BY his will, dated in 1824, the testator devised certain real estate in the *West Indies* to four trustees and their heirs (subject and without prejudice to certain annual sums, thereinbefore charged thereon in favor of the testator's wife, and to the levying of 4,000*l.* thereby charged on the estate in favor of his granddaughters), upon trust out of the rents, to pay and apply the yearly sum of 150*l.* for the benefit of his grandson, *Henry Coore*, until he attained twenty-one, which was then to be increased to 300*l.* a year until he attained twenty-five. And upon trust, out of the rents, to pay and apply the yearly sum of 150*l.* for the benefit of his grandson, *Richard Coore* (the Plaintiff), until he attained twenty-one, which was to be then increased to 300*l.* a year until he attained twenty-five, and then to be further increased to 400*l.* a year for his life; and so long as any tenant in tail male in possession, under his will, should be under twenty-one, and whether the testator's daughter *Isabella* should be living or not, to apply, out of the rents, 150*l.* for his maintenance and education. And during such respective periods as *Henry Coore* and *Richard Coore* and their respective issue male should not,

not, under the limitations and provisoes thereinafter contained, be entitled to the actual possession of the estate, to pay the residue of the rents (without prejudice to the trusts and purposes aforesaid, and also without prejudice to any subsisting jointure which should have been created under the powers thereinafter contained) to the testator's daughter *Isabella*. And when *Henry Coore* and *Richard Coore*, or any of their issue male, should become entitled to the actual receipt of the rents of the estate, the trustees were, out of the rents or by mortgage, to raise 1,000*l.* a year, and pay it to his daughter *Isabella* for life. And after her decease, and during any period in which neither of his said grandsons or their respective issue should, under the limitations and proviso thereinafter contained, be entitled in possession to the hereditaments, his trustees should accumulate the rents not required for the purpose aforesaid, and, at the expiration of the period of accumulation, pay the same unto the person then entitled to the rents of the estate. And the testator declared, that as soon as any tenant for life in possession, under the limitations thereinafter contained, should attain the age of twenty-five years, or any tenant in tail male in possession, under the same limitations, should attain the age of twenty-one years, he should respectively be let into possession of the whole of the rents and profits of the said last-mentioned hereditaments, *subject and charged as aforesaid*, whether his said daughter *Isabella* should be living or not.

And the testator declared, that "subject to the trusts aforesaid," his trustees should stand seised of the estates, in trust for his grandson *Henry Coore* for life, with remainder for his first and other sons in tail male, with divers remainders over.

The

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The testator empowered *Henry Coore*, after he attained twenty-one, and whether *Isabella Coore* should be living or dead, to appoint to any wife 300*l.* a year for her life, issuing out of the estate, with the usual powers of distress and entry, and also to appoint the same premises for any term for better securing it, "to take effect immediately after the decease" of the tenant for life creating the same.

The testator died in 1824. *Henry Coore* and *Richard Coore* both attained twenty-five. In 1850, *Henry Coore* executed his power of jointure, by apportioning a rent-charge of 300*l.* a year to his wife *Eliza*, with powers of distress and entry, and he limited a term of 500 years to trustees to secure it.

Henry Coore died in 1854, leaving his widow surviving, who, four months afterwards, gave birth to a son, the Defendant *Henry John Blagrove*, who was first tenant in tail of the estate, and was entitled to an annuity of 150*l.* for his maintenance.

The rents of the estate had become insufficient to pay the several annuities in full, viz., the 400*l.* a year to *Richard Coore*, the 300*l.* a year to *Eliza* the widow, and 150*l.* to the infant tenant in tail.

Under these circumstances, each of the annuitants, upon the terms of the will, claimed priority over the others, and the present claim was filed by *Richard Coore* against the trustees, the jointress and the infant tenant in tail, to have the priorities and rights of the parties ascertained and declared.

Mr. *Lloyd* and Mr. *Nalder* for the Plaintiff *Richard Coore*. The annuity of 400*l.* a year has priority over the

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the widow's jointure. The testator having, in the first place, given this annuity, says, "that *subject to the trusts aforesaid*," his trustees are to hold in trust for *Henry Coore* for life, with remainder to his issue in tail, and the power to jointure comes afterwards. The jointure, which is incident to the estate for life, is therefore "subject to the trusts aforesaid," viz., to the trusts for raising the 400*l.* a year for *Richard*. The jointure is to be issuing out of the estate limited in tail male, which estate is subject to the 400*l.* a year, and the jointure, therefore, is equally subject to it.

Secondly, all estates created under a power are considered as limited by the deed creating the power, and, if the testator had himself given the jointure, he would naturally have placed it after the estate for life of the husband.

Thirdly. The 150*l.* is a mere allowance to the tenant in tail during minority, and is, therefore, issuing out of his estate tail, which is subject to the 400*l.* a year previously given to the Plaintiff.

Mr. *R. Palmer* and Mr. *Haynes* for the jointress. The jointure has priority, and if not, it ranks *pari passu*. It is quite inaccurate to say, that the jointure is an incident to the life estate; for it does not come out of that estate at all, and it does not take effect until after the life estate has ceased. It is created under a power overriding all other estates and interests, and is secured by legal powers and a legal estate, which the trustees might make available at law. If they did so, this Court would not interpose and prevent their having the benefit of their legal remedies.

They

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They cited *Twaites* v. *Foreman* (*a*).

Mr. *Mackeson* for the infant tenant in tail. The case is simply one, where, upon the gift of three annuities, the fund turns out insufficient to pay them in full, and it must be treated in the same way as where there are three legacies and the assets prove deficient. Unless a contrary intent appears upon the will, it must be presumed that a testator considered that he has property sufficient to answer all his legacies, and that he had an equal intention that all should be equally paid. This presumption of equality is not to be repelled by ambiguous expressions, but must prevail unless there be a clear intent to the contrary; *Beeston* v. *Booth* (*b*); and see *Brown* v. *Brown* (*c*); *Miller* v. *Huddlestone* (*d*). Here, when the testator intends a priority, he clearly expresses it.

Mr. *Lloyd* in reply.

The MASTER *of the* ROLLS reserved judgment.

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Mr. *Lloyd*, I have again read through the will, and the result to which I have come to is this:— Under the will of the testator, there are sums of 400*l.* per annum payable to a grandson of the testator, 300*l.* per annum jointure to the widow of a deceased grandson, and 150*l.* per annum for the maintenance of an infant tenant in tail. The proceeds of the estate are insufficient; and the question is, who is to give way? The grandson claims

(*a*) 1 *Coll.* 414.
(*b*) 4 *Madd.* 168.
(*c*) 1 *Keen*, 277.
(*d*) 3 *Mac. & Gor.* 513.

claims priority, because, as he says, the estate is given subject to the payment of his annuity; and the widow claims priority, because, as she asserts, there is a legal term created to pay her annuity, but which legal term, the Plaintiff says, is interposed subsequently to his annuity.

In the case of annuities, the burthen of proof is on the person who claims a priority. If, therefore, these were three annuities given out of an estate, then the burthen of proof would be on the person claiming the priority, to shew that, by the words of the will, any particular priority is given to one of them.

Now it is admitted, that this is a question of intention apparent on the face of the will, and if so, it must be established that it does appear on it. I have read the will with that view, but I do not find in it any intention whatever to put one of these payments before the other, and I am satisfied, that the view which I first took of this case is the right one, namely, that an event has occurred which the testator never anticipated, and, consequently, he has expressed no intention whatever, in a state of circumstances which he never supposed would arise.

It happens, no doubt, occasionally in the construction of wills, that this difficulty is imposed on the Court: that it is obliged to give the property to one of two persons; and, therefore, it is obliged to impute an intention to the testator, because, though an event has occurred which the testator never anticipated, yet, as the property must be given to one of the two persons, neither of whom the testator expected would take it, the Court is compelled, in that case, to spell out, from the rest of the will, what was the probable intention, or, in point of fact, what the testator would have done if the event

 which

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has occurred had been anticipated by him. But that is not so in the present case, because here it is not necessary for the Court to do anything, it has only to say that there being no intention expressed, it must be taken as if no intention whatever of priority was intended to be expressed on the subject, that is to say, they must take it *pari passu*. I admit, that if the priority be incidental to the estate which the parties take, a different rule of law might exist, but I do not think, that because the word "subject" was used in one case, and the words "subject to the trusts aforesaid" were used in another case, and a term created in a third case, this should induce me to come to a conclusion, that the testator has intended certain persons should take in priority to others, and that in a state of circumstances which he never contemplated.

I am, therefore, of opinion, that equality must be the rule in this case, and that they must take accordingly.

NOTE.—Affirmed by Lord *Cranworth*, L. C., 26th *March*, 1857.

WEARING *v.* WEARING.

Dec. 9.

A testator having freeholds and leaseholds, gave "all his real and personal estate" upon trust, "out of the rents and profits of his said real and personal estate," to pay his widow sufficient for her maintenance; and on her death, he devised "all his said real and personal estate" to his children. Held, that the trustee was not bound to convert the leasehold property.

THE testator bequeathed as follows:—

"I give, devise and bequeath all my real and personal estates, of what nature or kind soever and wheresoever, unto my executor and trustee, hereinafter named, his heirs, executors, administrators or assigns, according to the nature or tenure thereof respectively, upon trust to keep down the interest of any outstanding mortgage or mortgages out of the *rents and profits* of my said real and personal estate, and after the payment, out of the residue of such *rents and profits*, of all outgoings for rents, insurances, repairs and otherwise, to pay my dear wife *Martha*, out of such *rents and profits*, sufficient for the maintenance and support of herself and our dear children, and for the education of them, as my trustee may consider advisable.

"And in the event of my said wife ceasing to be widow or dying, whichever shall first happen, any *interest or income*, given or payable to her under this my will, is to cease, and I devise and bequeath all my said real and personal estate unto and equally between all my said children, their respective heirs, executors, administrators and assigns, as tenants in common.

"And I direct my said trustee, during the respective minorities of my said children, to apply such part of the *annual produce* of my said real and personal estate, to sell or dispose of them, as he may think fit, for the maintenance, education and advancement in the world

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of my said children, as my said trustee shall deem proper, and the residue or accumulation to be invested in freehold property or otherwise, as my said trustee and executor may deem beneficial for my said wife and children." He appointed his brother executor and trustee of his will.

The testator died in 1855, leaving his widow and six children surviving. He had freehold and leasehold property, and the question was, whether the leaseholds were to be enjoyed *in specie*, or were to be converted and invested in Consols.

Mr. *Villiers*, for the Plaintiffs, the infants.

Mr. *Greene*, for the trustee and executor.

Mr. *J. H. Palmer*, for the widow.

The following cases were referred to:—*Howe* v. Lord *Dartmouth* (*a*); *Goodenough* v. *Tremamondo* (*b*); *Morgan* v. *Morgan* (*c*); *Crowe* v. *Crisford* (*d*).

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Morgan v. *Morgan* was a different case. In that case there was a bequest of the personal estate, separate and distinct from the devise of the real estate, in which the word "rents" was used.

I think these leaseholds are not to be converted.

(*a*) 7 *Vesey*, 137.
(*b*) 2 *Beavan*, 512.
(*c*) 14 *Beavan*, 72.
(*d*) 17 *Beavan*, 507.

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Dec. 5, 6.

A. and his wife had a power of appointing a fund to her children, which, in default, was settled on the children who attained twenty-one, and in default thereof on the next of kin of the wife. There were powers of maintenance and advancement. There being but one child, of the age of three, of robust health, and the wife, being seriously ill, *A.* and his wife appointed the whole fund to the child, reserving a joint power of revocation. The child died three years after, an infant, and her father became entitled to her property. The appointment was held valid.

THE testator, by his will dated in 1839, gave one-fourth of his residuary estate in trust for his daughter Mrs. *Beere* for life, with remainder to Mr. *Beere* for life, "and after the decease of the survivor of them, upon trust for all and every, or such one or more of the children of his said daughter Mrs. *Beere*, in such shares, proportions, at such ages or times, and in such manner, and subject to such restrictions and limitations, as Mr. *Beere* and Mrs. *Beere*, by any deed or deeds, with or without power of revocation, should jointly direct or appoint; and in default of such joint direction or appointment, then as the survivor of them should by deed or will direct or appoint; and in default thereof, and so far as any such, if incomplete, should not extend, in trust for all and every of the children of Mrs. *Beere*, who, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, to be divided" between them equally. And if there should be no such child, who, being a son, should live to attain the said age of twenty-one years, or being a daughter, should attain that age or marry, then "in trust for the person or persons, who would have been entitled to the clear residue of the personal estate of Mrs. *Beere*, as her next of kin under and according to the statutes for distribution of intestates' estates, in case she had died a widow and intestate."

The will contained a power of maintenance, extending to the whole of the income, and a power of advancement limited to one-half of the presumptive portion.

By

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By a codicil dated in 1840, the testator revoked the life estate to Mr. *Beere*, but gave Mrs. *Beere* a power to give him a life interest in the premises.

The testator died in *October*, 1840.

Mr. and Mrs. *Beere* had married in 1838. They had one child only, namely *Susan Frances Beere*, born on the 21st of *June*, 1839, and who died on the 31st of *May*, 1845.

On the 16th of *March*, 1843, Mrs. *Beere* being "very ill," but the child being in perfect health, and of "a robust constitution," Mr. and Mrs. *Beere* executed a deed poll, whereby they appointed the trust funds unto *Susan Frances Beere*, her executors, administrators and assigns, to be a vested and transmissible interest in her immediately after the execution thereof, and to be paid or payable to her, upon her attaining the age of twenty-one years or being previously married, subject nevertheless to the interest, if any, therein of Mrs. *Beere*, and also to the life interest, if any, therein of Mr. *Beere*.

The deed contained a power to Mr. and Mrs. *Beere* jointly to revoke that appointment, or to make any new appointment.

Subsequently to the appointment, Mr. *Beere* appeared to have fallen into pecuniary difficulties.

Susan Frances Beere died of the scarletina in *May*, 1845, about six years of age; her father, Mr. *Beere*, died in 1853, and the Plaintiff (a child of Mr. *Beere* by a former marriage) obtained letters of administration to

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to him and to *Susan Frances Beere*. Mrs. *Beere* was still living.

The brothers and sisters, and only next of kin of Mrs. *Beere*, having disputed the validity of the appointment of 1843, the Plaintiff filed this bill against them and others, to have its validity established.

Mr. *R. Palmer* and Mr. *Shebbeare*, for the Plaintiff.

This is a valid appointment; if it were otherwise, parents could never execute a power in favour of their children, although the instrument creating the power expressly intended to give them a discretion and control over the property. The case of *Fearon* v. *Desbrisay* (*a*), elaborately argued on behalf of the Defendants, fully answers every objection which can be raised in this case. Here the mother, who was in a dangerous state of health, was naturally anxious to secure to her only child an absolute interest in the property, and she executed the power for the sake of the child and not of her husband. Lord *Hinchinbroke* v. *Seymour* (*b*) is explained by Lord *Eldon* in *M'Queen* v. *Farquhar* (*c*), where it appears that the child to whom the appointment was made was in a consumption. Here the appointee was in robust health, and there were reasons for the appointment, for it gave the child the benefit of having the whole instead of a moiety applied towards her advancement. The father survived ten years, and in no way availed himself of any supposed benefit arising from the appointment. It is not usual for a parent to anticipate his surviving his child; and if he did, it is immaterial, for the next of kin are secondary objects of the testator's bounty, and the result was accidental, arising, not from the

(*a*) 14 *Beavan*, 635. (*b*) 1 *Bro. C. C.* 395.
(*c*) 11 *Ves.* 479.

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the execution of the power, but from subsequent unforseen events, which cannot affect the validity of the previous appointment.

Mr. *Walford*, for Mrs. *Beere*, supported the appointment. He argued that if Mrs. *Beere*, who was in bad health, had died, the child would equally have taken under the ultimate limitation. That the object of the appointment was to benefit the child, to the exclusion of other persons, which the testator intended the parents should have the means of doing, and was perfectly justifiable.

Mr. *Selwyn* and Mr. *Martindale*, for the brothers and sisters of Mr. *Beere*.

The appointment was not made *bonâ fide*, it was executed for the purpose of benefiting the parents, and was not called for by any reason or necessity affecting the child. There could be no motive whatever for an appointment in favour of a child of three years of age, except to benefit the husband. A provision already existed for her maintenance and advancement, and the result would have been, to exclude all the other children of Mrs. *Beere*, if a joint execution of the power of revocation could not have been obtained. Nothing could be more unreasonable than to give the whole property to an infant, to the exclusion of all the other children of Mrs. *Beere*, and she might have survived her husband, and had a family by a second marriage equally standing in need of portions.

In *Fearon* v. *Desbrisay* (*a*), the father could not benefit by the said appointment, for it was made in favor of the children living at his death. In *Butcher* v. *Jackson*,

(*a*) 14 *Beavan*, 635.

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v. *Jackson* (*a*), the appointment was supported because it "was a reasonable one; for it was made to all the children equally; and equality is equity;" here it is exclusive, and consequently unreasonable and unequitable. Lord *Thurlow* says, "the meaning of a charge for children is, that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before the time;" Lord *Hinchinbroke* v. *Seymour* (*b*). Here it was in no way required.

They referred to *Wellesley* v. The Earl of *Mornington* (*c*); *Gee* v. *Gurney* (*d*).

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I will read the evidence, and dispose of the case to-morrow.

The MASTER *of the* ROLLS. *Dec.* 6.

I am of opinion, that this is a good execution of the power.

It is admitted that it is a good execution at law, and whatever is a good execution at law, in respect of matters of this description, will be good in equity, unless there be some corrupt bargain or some bad motive, which makes the execution fraudulent and void.

With respect to there being any corrupt bargain, there is none. Was there any bad motive? the power of appointment was exercised in favour of a child, who, the

(*a*) 14 *Sim.* 444.
(*b*) 1 *Bro. C. C.* 394.
(*c*) *Kay & Jones*, 143.
(*d*) 2 *Colly.* 486.

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the evidence satisfies me, was then in a very good state of health. She was three and three-quarters years old, but the evidence of all the witnesses establishes this, that she was a very healthy and robust child. She, however, died in 1845, within three weeks of being six years old, and two years after the appointment. I have no doubt that a part of the object with which the appointment was made, was to prevent, in any event which might happen, the persons in remainder from taking the fund; but the cases, the authorities and principles establish this:—that provided the power be well executed in other respects, the fact that it will disappoint other persons does not appear to be such an ill motive as to make the appointment a fraud on the power and void.

A power of revocation was reserved, by which, if other children of the marriage had been born, they might have been let in as objects. I am satisfied from the evidence of Mr. *Fox*, and the other circumstances, that it was believed, at that time, that Mrs. *Beere* could not live, and in that state of circumstances, I do not see anything in the execution of the power to make it void.

It is very different from *Fearon* v. *Desbrisay* (*a*), and though the husband did benefit by this, it is by no means clear, that in ordinary events he would not have taken an equal benefit.

I am of opinion, that this power must be held to have been well executed, and that the fund so appointed belongs to and forms part of the estate of Mr. *Beere*.

There was some evidence to show that the father was in

(*a*) 14 *Beavan*, 635.

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in distressed circumstances at the time, and if the father could have made the appointment available for raising the money, and had done so, it would materially have altered my view of the case. This was not done; on the contrary, the raising of money by him was not facilitated or assisted by the fact of the appointment.

Declare, that the deed-poll, &c. is a good and valid appointment of the trust funds, and that such trust fund forms (subject to the life estate of Mrs. *Beere*) part of the personal estate of Mr. *Beere*.

Nov. 6, 7, 8.

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Jan. 18.

LA MARQUISE DE RIBEYRE *v.* BARCLAY.

A trustee, one of a firm of stock-brokers, misapplied the trust securities. His partners were, under the circumstances, made responsible. *A*, who was in partnership with *B.*, *C.* and *D.*, as stock-brokers, was one of the trustees of the Plaintiff's marriage settlement. Some Portuguese bonds belonging to her, which were in *A.*'s custody, were included in the settlement. After the marriage, the firm bought some Brazillian bonds on account of the trust. The Court, from the course of dealing, considered the bonds to be in the custody of the firm, and *A.*, the trustee, having applied them to his own use, Held, that his co-partners were (as custodians) liable to replace them.

THE facts are more fully stated in the judgment of the Court, but it will be convenient to prefix the following short outline of the case.

Previous to 1839, and down to the 21st of *March*, 1855, *Edward Ellis*, *Ford Barclay*, *Welbore Ellis* and *Richard Ellis* carried on business together as stock-brokers, under the firm of "*Edward Ellis* & Co."

The senior partner, *Edward Ellis*, was intimately acquainted with the Plaintiff, and was consulted by her as to her money matters, and through him she employed the firm of *Edward Ellis* & Co. to invest her moneys.

In 1839, the Plaintiff married the Marquis *De Ribeyre*, and by a settlement made on the 8th of *April*, 1839,

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1839, between the Plaintiff of the first part, her intended husband of the second part, and *Edward Ellis* and Miss *Ross* (trustees) of the third part, some Portuguese bonds, then deposited with *Edward Ellis*, and other property, were assigned to the trustees, in trust to pay the income to the Plaintiff for her separate use, independent of her intended husband, and without power of anticipation, and the capital was to be in trust for her absolutely, if she survived her husband, and in case she predeceased him, then as she should by will appoint.

The settlement contained a proviso, that it should be lawful for the trustees "*to permit* all or any part of the trust *premises to remain* and continue, so long as such trustees or trustee should think fit, on the security or *in the custody* upon or in which the same were or was then invested or being, and either with or without the same producing annual or other income," unless the Plaintiff should express and deliver to the trustees a contrary desire and direction in writing; and also, with the consent of the Plaintiff, to call in, sell, &c. any part of the securities, and to lay out and invest the produce in their names, upon any securities, whether real or personal, or of any public body or company or state, foreign or domestic.

The settlement also contained a power to the Plaintiff to appoint new trustees, and a covenant on her part and on that of her husband, that all her future property, of the value of 50*l.*, should be assigned to the trustees upon the like trusts.

After the marriage, considerable securities were purchased out of the trust moneys through the firm of *Edward Ellis* & Co., and amongst them Brazilian bonds of the nominal value of 400*l.*, a sum of 37,500 francs Belgian

Belgian stock. Besides these, a sum of 4,800*l.* consols, and 2,500*l.* alleged to have been lent by the Plaintiff to the firm, were in question in this cause.

The securities were deposited, but whether with *Edward Ellis*, in his character of trustee, or with the firm, was a question in the cause.

Edward Ellis fell into pecuniary difficulties, he applied the trust securities to his own use, and afterwards went abroad and was made bankrupt.

The partnership was dissolved on the 21st of *March*, 1855, and the Plaintiff's moneys and securities having been lost, she filed this bill against the three solvent partners, to make them responsible for the losses which had occurred.

Mr. *R. Palmer* and Mr. *Amphlett*, for the Plaintiff, cited *Blair* v. *Bromley* (*a*); *Sadler* v. *Lee* (*b*); *Marsh* v. *Keating* (*c*); *Taylor* v. *Plumer* (*d*); *Bishop* v. The Countess of *Jersey* (*e*).

Mr. *Follett* and Mr. *Wickens*, for the principal Defendants, cited *Marsh* v. *Keating* (*f*); *In re Lawrence* (*g*); *Coomer* v. *Bromley* (*h*).

Mr. *W. R. Young*, for the Marquis *De Ribeyre*.

Mr. *R. Palmer*, in reply, cited *Pennell* v. *Deffell* (*i*).

The Master *of the* Rolls reserved judgment.

The

(*a*) 5 *Hare*, 542, and 2 *Phillips*, 354.
(*b*) 6 *Beavan*, 324.
(*c*) 2 *Cl. & Fin.* 250.
(*d*) 3 *Maule & Sel.* 562.
(*e*) 2 *Drewry*, 143.
(*f*) 2 *Cl. & Fin.* 288.
(*g*) 2 *Smale & G.* 367.
(*h*) 5 *De G. & S.* 532.
(*i*) 4 *De G., M. & G.* 381.

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The MASTER *of the* ROLLS.

This is a suit instituted to compel the three first-named Defendants on the record to pay to the Plaintiff the value of certain foreign securities, or to restore the same or similar securities, and also various sums of stock and moneys belonging to the Plaintiff, but parted with by *Edward Ellis*, the late partner of these Defendants.

The Plaintiff, formerly Miss *Elizabeth Lousia Ross*, in the year 1839, married her present husband, the Marquis *De Ribeyre*. Previously to that time, and subsequently down to the early part of the year 1855, she was intimately acquainted with Mr. *Edward Ellis*, who was, during the whole of that period, the senior partner of the house of "*Edward Ellis* & Co.," in which the three first-named Defendants were also partners, and who carried on business as stock-brokers in the city of *London*, under the style of "*Edward Ellis* & Co." Mr. *Ellis* seems to have been the friend of the Plaintiff from her childhood; she appears to have reposed unlimited confidence in his judgment, truth, honour and integrity. She consulted him and generally followed his advice in all matters relating to her pecuniary affairs. Previous to her marriage, she was possessed of considerable property, consisting of stock and foreign securities. These, and the claims of the Plaintiff in respect of them, form the subject of the present suit.

The claim made against the firm by the Plaintiff relate to five different and distinct species of property. The first is, as to the Portuguese bonds, of the nominal value of 6,000*l.* sterling; the second is as to the Brazilian bonds, of the nominal value of 4,000*l.*; the third relates

relates to 37,500 francs Belgian stock; the fourth is in respect of 4,800*l.* consols; and the fifth relates to a sum of 2,500*l.*, lent by her to the firm.

In respect of all these, the Plaintiff says, that the dealings which took place with respect to them were dealings with the firm, and that the firm and every member of it are jointly and severally liable to make good to her the loss sustained in respect thereof.

The Defendants, on the other hand, contend, that the dealings of the Plaintiff were with *Edward Ellis* alone, not as a member of the firm, but as a trustee for the Plaintiff, and that he only is accountable to her.

In considering this question, and for the purpose of duly appreciating the value of the facts proved or admitted, it will be convenient, in the first place, to consider what the business of the firm was, and what was their usual course of dealing with regard to their customers, and then to consider what bearing this has on the circumstances of the case. The firm carried on business as stockbrokers, on the Stock Exchange in the city of *London*, and their course of dealing is described in the 2nd and 3rd paragraphs of their answer to the original bill in these words:—" During the whole of the above-mentioned period the said firm of *E. Ellis* & Co. carried on an extensive business, and enjoyed, as we believe, a high repute on the Stock Exchange, and they were in the habit of receiving, and did, on a great variety of occasions, receive, large sums of money from the friends and connection of the said firm and of the individual partners thereof, for the purposes of investment, though how often in particular, or what sums in particular they so received, we are respectively unable to state, and could not ascertain without a laborious and protracted

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protracted search. The said firm of *Edward Ellis* & Co. sometimes retained the moneys so received by them in their own hands, under arrangements to that effect, with the persons advancing the same, and at the current or some agreed rate of interest. But we respectively deny that they ever employed the moneys so received, or any part thereof, in speculation, or purchases, or investments, on their own account, or otherwise for the purposes of their said business, save that they sometimes, out of the moneys so received, purchased foreign or other securities on account of clients of the said firm, which clients were charged by the said firm with interest on the sums advanced for the purpose of making such purchases, and also advanced portions of the moneys so received to parties at interest, taking security for the same; and also, occasionally, purchased exchequer bills and other securities with portions of such moneys, in order to obtain a better rate of interest for the same."

This, if it required confirmation, receives it from the course of dealing, which, it appears, the firm adopted with respect to other customers, as appears from some subsequent passages in their answer, to which I shall have occasion hereafter to refer. These are stated in the 50th paragraph of the answer to the original bill, and the 33rd and 34th paragraphs of the answer to the amended bill, in which a transaction with respect to another customer of the firm is mentioned, which illustrates and confirms this course of dealing by the firm.

In considering this case, it will be convenient to treat the claims of the Plaintiff separately, both because the facts vary with respect to each of them, and because, in consequence thereof, the principles applicable to them are not identical. In adopting this course, I also follow that

that pursued by the Counsel who have argued the case on both sides.

The Portuguese bonds stand thus:—Previously to the marriage of the Plaintiff, Mr. *Edward Ellis* held 4,000*l.* Portuguese bonds belonging to her, as he acknowledged by a letter bearing date the 23rd of *April*, 1838. On this lady's marriage, a settlement, bearing date the 8th of *April*, 1839, was executed, which recited, amongst other things, that "the principal sum of 4,000*l.* sterling was invested on Portuguese securities, the particulars of which securities, or of certain like securities in lieu of which the same had been then lately substituted, were set forth in the schedule to the settlement, and the certificates and other documents relating to which securities had been and were then deposited with *Edward Ellis*, as he did thereby acknowledge." The settlement then proceeded to settle the several properties therein mentioned, and all the property present or future of the Plaintiff, except cash at her bankers, on trust that the income should be paid to her for her sole and separate use, without power of anticipation, and if she survived her husband, to her absolutely; and if she predeceased her husband, then as she should by will appoint. Mr. *Ellis* and *Anna Maria Ross* (the sister of the Plaintiff, and now Mrs. *Galway*) were appointed trustees of the settlement, and the property therein described was assigned to them on the trusts thereof, and the settlement contained a proviso in these words—[See *ante*, p. 108.]

It is to be observed, therefore, that 4,000*l.* of the Portuguese bonds were held by *Edward Ellis*, before the marriage and before the execution of the settlement. Up to that time, therefore, he did not hold them as a trustee, in any proper sense of that term, but he held

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them as a member of the firm of *Edward Ellis & Co.*, for the Plaintiff, in like manner as other securities were held for other customers of the firm, as stated in the paragraph of the answer which I have already read.

Before pursuing the course of dealing with these securities, I pause here to consider, what would have been the rights of the Plaintiff and the liabilities of the Defendants, if, in this state of circumstances and before the marriage, *Edward Ellis* had disposed of these securities for his own personal benefit. So considering it, I entertain no doubt, that these bonds were held by him as a member of the firm, in his character of stock broker, and according to the course of dealing pursued by the firm, and specified in the passages of the answer I have referred to, and that the consequence of this would have been, that each member of the firm would have been liable to make good the amount of the loss to the Plaintiff. In my opinion, therefore, up to and at the time of the marriage of this lady, the firm generally, and all the partners of it, were liable to the Plaintiff, in respect of these 4,000*l.* Portuguese bonds, and would have had to make good to her any loss in respect thereof, that might have arisen from the unauthorized dealing therewith by any partner of the firm.

The next question is, did the marriage and the settlement then executed, whereby these securities were assigned to *Edward Ellis* and Miss *Ross*, as the trustees thereof, produce any change in this respect? I am of opinion that it did not. The custody is recited in the deed, that custody being, if I am right in my previous conclusion, the custody of the firm, that is, they were in his custody as one of the partners of the firm, on behalf of the firm. By the proviso which I have read, that custody was to remain the same, unless the Plaintiff should express

express and deliver to the trustees a contrary desire and direction in writing. No such direction was ever expressed or delivered, and the custody, therefore, remained the custody of the firm, as much as if a second person, wholly unconnected with the firm, had been appointed a trustee of the settlement, and *Edward Ellis* had taken on himself no duties as trustee in respect thereof. In order to constitute a change in the custody, some act ought to have been done, some desire expressed, some notice given. Nothing of the sort occurred, and the custody remaining the same, the liability of the custodians remained unchanged.

The course of dealing with the bonds, after the execution of the settlement, confirms the view which I have already expressed. The bonds were kept in a parcel called "Miss *Ross's* parcel." They remained in the same situation, and were deposited with the bankers of the firm (Messrs. *Barclay, Bevan, Tritton* & Co.), with the securities of the firm, and apparently, as far as can be inferred from the evidence, which is imperfect on this point, with parcels containing the securities of other customers, such as that of the customer mentioned in the subsequent paragraph of the answer, to which I have already referred. It is true that the Defendants deny the possession of Miss *Ross's* parcel, and they also deny that they knew that Miss *Ross* and the Plaintiff were one and the same person. But they also say, they knew nothing of the dealings between the Plaintiff and *Edward Ellis;* they do not attempt to shew where Miss *Ross's* parcel was or could have been deposited, unless with other parcels of customers of which the firm had the custody, and together with securities of the firm.

In addition to this, the letters of *Edward Ellis* are

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distinct and precise on this point. He states that they were kept with the documents which were deposited by the firm at their bankers, and were secured in the fire-proof safe of Messrs. *Barclay, Tritton* & Co. The denial of the Defendants, therefore, does not appear to me to carry much weight. It is rather a denial of the legal inference, than a denial of the fact, that the parcel was so deposited, inasmuch as they do not suggest or state in what other place it was or could have been deposited, nor do they shew any reason for doubting the accuracy of the statements made by *Edward Ellis*. In the latter end of 1842, these bonds were sent in to be converted, and in *December*, 1842, they, together with some unpaid dividends, were converted into bonds of the nominal value of 4,666*l*. 16*s*. 4*d*., being nine bonds of 500*l*. each, a bond for 100*l*., another for 50*l*., and a certificate, not bearing interest, for 16*l*. 16*s*. 4*d*. From time to time, the Marchioness desired additional purchases to be made of Portuguese bonds. In 1844, the account was made up to 5,000*l*. nominal value. In *February*, 1845, an additional bond for 500*l*. was bought by *Edward Ellis*, making up the amount to 5,500*l*. The bought note is made out in the name of *Edward Ellis* alone, but commission is charged on that transaction, which, it is not disputed, went to the credit of the firm generally, and the new bond was deposited with the others. The account of this is given by *Edward Ellis* to the Plaintiff, in a letter of the 3rd of *February*, 1845, in which he states:—"The above is placed with your other bonds, making altogether 5,500*l*., in my strong box at Messrs. *Barclay* & Co.'s, in their fire-proof safe." In *October*, 1845, the Plaintiff desired another 500*l*. bond to be bought, making up the total of 6,000*l*. bonds. The account of this is given by *Edward Ellis* in a letter to the Plaintiff, in which he speaks

speaks of the transaction as one on behalf of the firm. The bought note was in these words:—

"London, 17th *October*, 1845. Bought per order of *Edward Ellis*, Esq., for the Marchioness *De Ribeyre*,

"500*l.* Portuguese 4 per Cent. 60 at .	£300	0	0
"Commission	0	12	6
	£300	12	6

(Signed) "*Edward Ellis* & Co."

In the letter containing this account, *Edward Ellis* states thus:—"We have locked up the bonds in safe custody on your account" So that the purchase was made on behalf of the Plaintiff by the firm, and the senior partner of the firm writes to say, "We," that is the firm, "have locked up the bonds in safe custody on your account."

It appears to me to be the inevitable conclusion from these facts, that the firm, having bought the bonds for the Plaintiff, constituted themselves custodians of them on her behalf, and that they were liable to make them good to her, if lost while in their custody, by the default or misconduct of any one of the partners of the firm. In my opinion it is impossible, consistently with the security which is essential for the transaction of the business of mankind, to hold otherwise, where one partner, in the ordinary course of business, acts on behalf of the firm, and so expresses himself to the customers. To allow the other partners afterwards to repudiate the whole of the transaction, to avoid all liability in respect thereof, because it was not personally communicated to each of them, would be to make it difficult for customers to deal with a mercantile establishment, consisting of more than one partner, without a degree of trouble and precision

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cision of notice, which practically would render such dealings impossible. Whether the transaction was or was not entered in the books of the firm, I consider of no moment; the customer had no access to or control over these books. The transaction itself was in the regular course of business, and was so treated by the partner who conducted it. As a trustee, *Edward Ellis* could not have bought or deposited bonds; his acts were those of a stockbroker, he was instructed in that character, and in that character he acted.

In 1846, *Edward Ellis* deposited these Portuguese bonds with the *London* and *Westminster* Bank, as a security for money advanced to him, but the interest on the bonds was still duly credited and paid to the Plaintiff by Mr. *Ellis*. Afterwards, these bonds were redeemed from the *London* and *Westminster* Bank, and were sold and others purchased, and it is shewn to my satisfaction, by a careful examination of the sales and purchases, which were very clearly pointed out to me by Mr. *Amphlett*, and which a subsequent examination of the evidence confirms, that the sales and purchases correspond in time and amount. It may, therefore, be fairly inferred, that the transaction was little more than an exchange, and that the new Portuguese bonds stood in the place of the old, and were specifically liable to the same rights, on the part of the Plaintiff, and to the same obligations on the part of the Defendants. These new bonds were deposited by *Edward Ellis* to secure the debt of the customer mentioned in the paragraph of the answer which I have read. This debt arose from money entrusted by him to the firm, and which had been applied by *Edward Ellis* for the purpose of making good his personal obligations to the firm itself, but to no part of which transaction was the customer a party or cognizant of it. Subsequently to this transaction,

transaction, when he had no other bonds which would satisfy this statement, *Edward Ellis* wrote to the Plaintiff and credited and paid her interest on the Portuguese bonds.

The partnership of *Edward Ellis* and the three Defendants was dissolved on the 21st of *March*, 1855, by an agreement in writing of that date, in which a recital is introduced, "that *Edward Ellis* had become indebted to various persons, in very considerable sums of money, which he was unable to pay, and that it was apprehended, that the three Defendants were liable, as such partners, to make good some portion of the moneys so due from *Edward Ellis*;" and that it had been agreed, that *Edward Ellis* should assign to the three Defendants all the property of *Edward Ellis* mentioned in the first schedule thereto for that purpose, and that the three Defendants should have full power to sell and dispose of the same, for the purpose of enabling them to pay, as far as the same would extend, the several debts mentioned in the second schedule thereto; and the agreement then contained operative words to carry these recitals into effect. In the first schedule, 6,350*l.* Portuguese stock is stated as deposited to secure the debt of 10,000*l.* due from *Edward Ellis* to Sir *R. B.*, the customer I have already mentioned, but no question arises as between that Baronet and the Plaintiff. As I have already stated, he was a stranger to the whole matter. The firm owed him a sum of money, which they have since, I presume, paid or secured. This agreement and the recitals and schedules therein contained do not, in my opinion, affect the right of the Plaintiff to the bonds.

In my opinion, therefore, in the end of 1845, the firm had the custody of these Portuguese bonds on behalf of

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of the Plaintiff, and they were then liable to make them good to the Plaintiff, if they were lost. How have they discharged themselves of that liability? On behalf of the Defendants, it is contended, that at least in the month of *May*, 1848, they were in the custody of *Edward Ellis*, as a trustee under the marriage settlement, and not as a member of the firm, and his letter of the 17th *May*, 1848, is referred to for that purpose, which is in these words:—

"My dear Friend,

"Your favour, with the enclosed cheques, came duly to hand. I send you herewith a statement of the stock and different bonds *I hold, in trust for you*, jointly with your sister, and with kind regards to the Marquis, I am yours always sincerely." Then it mentions the Three-and-a-quarter per Cents., the 2,000*l.* Brazilian bonds, 6,000*l.* Portuguese bonds, and 5,000 francs four-and-a-half per cent. Belgian bonds.

The answer to this appears to me to be two-fold. In the first place, as I have stated, the firm was not justified in parting with these securities, unless under the direction of the Plaintiff; and without such direction of the Plaintiff, which was not given, they cannot discharge themselves of this liability. In the next place, if they parted with them to *Edward Ellis* and delivered them to him, it could only be in his character of one of the trustees under the marriage settlement. In doing so, in order to justify the delivery, they must have had notice of the trusts of the settlement on which those bonds were held. If they had such notice, they were bound not to allow such bonds, which stood in the place of those which were delivered to the trustee, (evidence of which was in their books,) to be taken to secure or discharge a debt due from the firm to a customer

tomer of the firm, as was proposed to be done by the terms of the agreement of the 21st *March*, 1855, and as if these bonds had been the private property of *Edward Ellis* himself. So far, therefore, as the Portuguese bonds are concerned, the Plaintiff is, in my opinion, entitled to the decree she asks.

The next claim of the Plaintiff, with respect to the 4,000*l.* Brazilian bonds, is, in my opinion, very clear. On the 7th *July*, 1845, 5,000*l.* Brazilian bonds were purchased for the Plaintiff. The money she paid for them passed to the credit of the firm of *Edward Ellis* & Co. at their bankers, and a bought note, in the name of the firm, was sent to her, advising her of such purchase having been made. On the 26th *July*, 1845, the firm bought 1,200*l.* more of Brazilian bonds for the Plaintiff, 1,000*l.* of the price was paid to the firm by Mr. *Jackson*, the solicitor of the Plaintiff, and the balance, a small sum of 69*l.*, was paid by the Plaintiff herself to Mr. *Ellis*. On the 26th *July*, 1845, a bought note was sent to the Plaintiff, in the name of the firm, stating the purchase, and adding a postscript in these words:—"The above bond we shall lock up with her other securities. *E. E.* & Co." In *May*, 1847, 300*l.* more of the Brazilian bonds were bought for the Plaintiff, and the money paid for them appears, in the clearing book of the firm, paid by the Plaintiff, making up the amount of 2,000*l.* bonds. In *May*, 1850, another bond for 200*l.*, and in *September*, 1850, another for 300*l.*, were bought by the firm on behalf of the Plaintiff. The money paid by the Plaintiff for these bonds passed regularly through the books of the firm and their account at the bankers. In *November*, 1850, 500*l.* additional Brazilian bonds were bought on behalf of the Plaintiff, of which she was informed by a broker's note in the name of the firm, signed *Edward Ellis* & Co. In *August*, 1852, 1,000*l.* more

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more Brazilian bonds, making up the total of 4,000*l.*, were bought for the Plaintiff; the price of them was paid by the Plaintiff, and the entry of the receipt of it appears in the clearing book of the firm, shewing that, in this instance, as we always find in case of the other sums paid for the purchase of the Brazilian bonds, that the firm received the money for the purchase of these securities. Besides this, a note, written and signed by a clerk of the firm and expressed to be on behalf of the firm, is sent to the Plaintiff, to inform her of the fact. Commission on all these purchases was duly charged by and received by the firm. Subsequently to this period, Mr. *Ellis* accounts to the Plaintiff for the dividends due on the Brazilian bonds, up to the time of his embarrassments becoming public. In *February*, 1849, and *September*, 1853, *Edward Ellis* borrowed money from the *London* and *Westminster* Bank, on the security of the deposit of the Portuguese bonds and of certain Brazilian bonds. Of those Brazilian bonds, the numbers of three are traced, as having been bought with the money of the Plaintiff; namely, Nos. 17, 112 and 755, the first two of which were Brazilian bonds for 500*l.*; these were bought for the Plaintiff in *July*, 1845; and the last was a Brazilian bond for 500*l.*, which was bought for her in *August*, 1852, and these three were part of those deposited with the *London* and *Westminster* Bank. The remainder of the Brazilian bonds were redeemed by the three first-named Defendants, from the *London* and *Westminster* Bank, after the known insolvency of *Edward Ellis* in *March*, 1855, at the time of or immediately before the dissolution of the partnership, and these three bonds were amongst and formed a part of the bonds so redeemed. Two of these identical bonds the Defendants appear to have delivered to a customer of the name of *Robertson*, and the third and last they retained. I mention this to shew, how circumstantially,

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circumstantially, in the case of 1,500*l.*, part of the Brazilian bonds bought by the firm for the Plaintiff with her money, the identical bonds appearing in the books of the Defendants have been traced into the very hands of the Defendants, who have received the benefit of the value thereof, in defraying liabilities of the firm. But, in my opinion, this tracing of the securities is a work of supererogation. The facts I have previously stated are abundantly sufficient to shew, that these bonds were bought by the firm, in the ordinary course of their business, with the money of the Plaintiff, paid to them for that purpose, and that afterwards these bonds were retained by them, according to the course adopted by them, in the case of other customers as well as in that of the Plaintiff; and I am of opinion, that all the members of the firm are jointly and severally liable to make good these bonds to the Plaintiff.

The fact, that the Plaintiff corresponded with only one member of the firm is, in my opinion, a matter not of the slightest moment. The business transacted was the ordinary and regular business of the partnership, entered in their books, and defrayed by money paid by the Plaintiff to the firm, and passing through their bankers' account, and for which, the ordinary profits, in the way of commission, was paid, received and divided amongst the partners of the concern.

The third case is that of the *Belgian* bonds for 37,500 francs. The first purchase of these was for 5,000 francs, on the 4th of *April*, 1845. It appears by the clearing book of the firm, that the money for the purchase of these bonds was paid by the Plaintiff, passed through the accounts of the firm at their bankers, in the ordinary way, and on the 12th of *July*, 1845, Mr. *Edward Ellis* forwarded to the Plaintiff a paper,

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paper, which, as far as it is material, is in these words: —"We hold, on account of the Marchioness *De Ribeyre*, 200 *Belgian* bonds in 5,000 francs. They are deposited with your other securities at our bankers, Messrs. *Barclay* & Co., in their fire-proof cellar in our strong box.—*Edward Ellis* & Co."

After this, it is, in my opinion, impossible for the other partners to say, that they are not bound. They have not attempted to shew, nor would it be possible to shew, that, in so stating and so acting, *Edward Ellis* was going beyond his authority as a partner, and out-stepping the scope of their partnership contract.

With respect to the remainder of the *Belgian* bonds, the case is this:—10,000 francs of them were bought in *February*, 1851, 15,000 francs in *October*, 1851, and 7,500 francs in *August*, 1853, making together *Belgian* bonds to the value of 32,500 francs. The numbers of all, or at least of 30,000 of them, are identified as forming part of the deposit made to the *London* and *Westminster* Bank, on the strength of which they advanced money to *Edward Ellis*, and which were afterwards redeemed by the three first-named Defendants, and were dealt with by them as forming part of the private property of *Edward Ellis* himself. In fact, it is the case of the Defendants, that the purchases were made by the firm on behalf of *Edward Ellis*, either on his own account, or as a trustee of the settlement for the Plaintiff; but the evidence of their own books contradicts them, and renders such a defence untenable. As I have already stated, the money having been shewn to have been the money of the Plaintiff, the purchase was either for her, on her separate account, or on the account of *Edward Ellis*, as a trustee of her settlement. If the former, they were bound to keep them for her; if the latter,

latter, they had notice of the trust, and could not allow the trustee to deal with them as his own private and personal property. As to all these securities, I am of opinion, that the Defendants are jointly and severally liable to replace them, and to account to the Plaintiff for the dividends that have accrued due since the last payment thereof to her.

The transaction relative to the transfer of the stock is very peculiar, and, I regret to say, it adds an additional stain on the character of *Edward Ellis*, as displayed in the transactions between himself and the Plaintiff, which I have already noticed. In *October*, 1844, Mr. *Ellis* sent to the Plaintiff an acknowledgment in these words:—"In case of death, I beg to acknowledge, that I have in my hands the sum of 3,000*l.* belonging to the Marchioness *De Ribeyre*, for which she holds a security cheque on our firm.—*Edw. Ellis.*"

The Plaintiff swears that this money was advanced to the firm at four-and-a-half per cent., at the request and through the instrumentality of *Edward Ellis*, and that the so called "security cheque" was a cheque drawn by Mr. *Edward Ellis*, either in his own name upon the firm, or in the name of the firm on the bankers of the firm. By the letter of the 19th of *October*, 1844, which accompanied this acknowledgment, he proposed to keep the money for two years more at four per cent. In *January*, 1846, he writes to the Plaintiff a letter, which, as far as it is material, is in these words:—"Tell me, as soon as you can, what your wishes are respecting your 3,000*l.* which stands for repayment next *April*; if you will have it paid into your bankers, or wish us to keep it out at interest for two years more. We can offer you four per cent., clear of income tax, which is as good as any thing you can employ it in. Let

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Let me have your answer, as we always make all our money arrangements early in the year; and I would oblige you and return the money of other parties I care not so much for."

It is to be observed here, that he confirms the statement made by the Marchioness, that the loan is to the firm and not to himself individually. Throughout he speaks of "us," "our" and "we;" and it is not alleged, that it was not within the scope of the partnership, that one partner should accept moneys from customers on behalf of the firm, and pay interest on account thereof. Subsequently to this, and before *October*, 1847, two additional sums of 500*l.* each were lent in the same manner. In *October*, 1847, the Plaintiff desired that this loan should be paid off and invested in stock, in the names of the trustees. Accordingly, she instructs Mr. *Edward Ellis* to do so. After some demur on his part, he writes, on the 26th *October*, 1847, to say that he had complied with her wishes, and he sends a note, stating that the stock had been purchased for the 14th *January* next. The bought note was enclosed and ran thus:—

"Bought for the Marchioness *De Ribeyre* £4,800, 3½ per Cent. at 83⅛ per Cent.	£4,008	0	0
"Commission	6	0	0
	£4,014	0	0

"Of *E. Hopkins*, for 14th *January*, 1848.

"For *E. Ellis* & Co.

"*Geo. Hewlett.*"

This is signed "*E. Ellis* & Co." *Edward Ellis* therefore is here accepting the Plaintiff's instructions to the firm, to lay out this sum retained by them, in the purchase

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purchase of stock, and, accordingly, on the 14th *January*, 1848, he writes again, and sends the stock receipt; but this receipt shews, what was unknown before to the Plaintiff, that the purchase of stock had been made in the name of *Edward Ellis* alone. The reasons which he alleges for so acting it is unnecessary to consider; they are difficult to understand, and are very far from satisfactory. No doubt it proceeded from the disinclination which he felt to part with the control over so considerable a sum of money, which would probably have accelerated the disclosure of his conduct and insolvency. The oath of the Plaintiff, as to her intentions in lending the money to the firm and not to *Edward Ellis* alone, receives confirmation from her conduct on this occasion. She appears to have been surprized and dissatisfied at the stock standing in the sole name of *Edward Ellis*, and at his having the exclusive control over it, and, accordingly, she writes immediately, insisting on the stock being transferred into the names of both the trustees of the settlement. She resists the suggestion of *Edward Ellis*, and writes several letters for this purpose; and finally, in *April*, 1848, as she had then come to *England*, and when the matter was urgent and could be no longer delayed, Mr. *Edward Ellis* encloses to her a stock receipt, in the ordinary form, by which it would appear, that the 4,800*l.* stock had been transferred into the names of Mr. *Edward Ellis* and *Anna Maria Ross*, as trustees. The fact was, that Mr. *Ellis* had already sold out the stock previously bought, and had converted the proceeds to his own use, and this was a mere nominal transaction, by which stock to that amount was transferred into the name of *Edward Ellis* alone from the firm of *Edward Ellis* & Co., and immediately afterwards re-transferred; and upon this stock receipt, Mr. *Ellis*, for the deliberate purpose of deceiving the Plaintiff, added, in his own handwriting, the name of

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of *Anna Maria Ross*, and thereby gave a false aspect to the document, and induced the Plaintiff to believe that her wishes had been complied with.

I am of opinion, that this sum was a loan to the firm, and that all the partners are bound to make good the amount to the Plaintiff. The Plaintiff claims the money and interest at five per cent., according to the terms of the loan, but my opinion is, that the Defendants are entitled, if they prefer it, to say, that her demand is satisfied by replacing the stock 4,800*l.*, and accounting for the dividends thereon, so far as the same have not been already accounted for to her.

The remaining question relates to a sum of 2,500*l.*, money lent to the firm by the Plaintiff through Mr. *E. Ellis*. This claim very properly was not disputed by the Counsel for the Defendants, there being, in fact, no reasonable probability of inducing the Court to get over the repeated acknowledgment of *Edward Ellis* to the Plaintiff, that the money was held by the firm.

The whole case is somewhat involved in correspondence and figures, but, in my opinion, on a careful examination of them, it presents no difficulty as to the conclusions which must be arrived at, and which are confirmed by various matters in evidence, appearing and to be derived from the books of the firm itself, and the various entries contained in them. All these entries contain direct evidence or direct notice of the facts relied on by the Plaintiff, and which books, it is but justice to the Defendants to state, have been most openly displayed to the Plaintiff for the purposes of this suit.

That these Defendants were personally and individually ignorant of the facts there appearing, and generally

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rally of the dealings of *Edward Ellis* with the Plaintiff I confidently believe, but a partner must be fixed with a knowledge of the transactions that appear in the partnership books, and by the entries therein, which either disclose or plainly lead to a disclosure of the full extent of the dealings of their partner. I repeat, that the whole of this case appears to me to shew, that the losses which have already been sustained by these Defendants, and those additional losses which will, under my Decree, if supported, fall upon them, were not occasioned by any default or want of caution on the part of the Plaintiff, but from the misfortune of the Defendants' being allied in partnership with an unprincipled man, who, while acting within the scope of his partnership authority, bound them, by his acts, to liabilities of which they were ignorant, and which they never intended to have incurred.

The costs must follow the event.

BROCAS *v.* LLOYD.

April 24, 26, *May* 8.

A witness is not bound to attend the Examiner, unless the reasonable expenses of his journey, &c. have been tendered to him, or where an insufficient tender has been made.

ON the 8th of *March*, Mr. *Bankes*, a solicitor resident at *Kington* in *Herefordshire*, which is distant 155 miles from *London*, was served with a *subpœna* to attend the Examiner in *London* on the 15th of *March* (a *Saturday*) to give evidence, and 2*l.* 10*s.* was tendered for his expenses.

He refused to accept that sum, and stated, that "he would not attend in *London*, in pursuance of the *subpœna*, without the previous payment, by the Plaintiff or his solicitor, of his reasonable travelling expenses to and from *London*, and of the reasonable expenses of his stay

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in *London*. But he stated that he would attend if the opposite solicitor paid him down, before he left *Kington*, 6*l*. on account of his expenses in travelling and for his stay in town, and, at the same time, gave him his undertaking to pay the further expenses which he might incur, in consequence of his stay in town during the examination.

On the 13th of *March*, a tender was made to him of 3*l*. 13*s*., and, at the same time, he was served with another copy of the notice of examination. He declined to accept the sum so tendered, but said he would attend in *London* to be examined, if the Plaintiff's solicitor would previously pay him his allowance as a witness and his travelling expenses, according to the scale paid in the table of costs signed by the Judges of the Superior Courts at *Westminster* on the 27th day of *January*, 1853 (*a*).

Mr. *Bankes* further stated, in his affidavit, "that *Kington* was distant 155 miles from *London*, and that his travelling expenses to and from *London* would not be less than the sum of 4*l*., and he should, in the event of his examination being concluded on the 15th instant, be absent from *Kington* four days, in going to, staying at and returning from *London*, unless he returned home on *Sunday*, the 16th instant."

No further tender having been made, Mr. *Bankes* did not attend in *London* at the time appointed, and, upon the Examiner's certificate, an order was made on Mr. *Bankes* to attend at his own expense and be examined, and a second order was made for an attachment.

Mr. *R. Palmer* and Mr. *Eddis* now moved to discharge the orders, on the ground that no tender of the sufficient

(*a*) See 2 *Archbold's Practice* (9th ed.) p. 1657.

sufficient and reasonable expenses of the witness had been made.

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Mr. *Lloyd* and Mr. *Horsay*, *contrà*, referred to *More* v. *Worcham* (*a*), and *Hunter* v. *Liddell* (*b*).

The MASTER *of the* ROLLS.

I will read the affidavits and consult the Taxing-master.

The MASTER *of the* ROLLS— *May 8.*

Referred to the Statute of the 5 *Eliz.* c. 9, and to *Chapman* v. *Pointon* (*c*); *Bowles* v. *Johnson* (*d*); *Fuller* v. *Prentice* (*e*); *Hallett* v. *Mears* (*f*), which established that Courts of Law would not grant an attachment against a witness for not obeying a *subpœna*, unless the whole of the necessary expense of going to the place of trial, of their return from it, and also during their necessary stay there had been tendered to them, and to *Collins* v. *Godefroy* (*g*), which shewed that an attorney, when *subpœnaed*, was not entitled to compensation for loss of time. He said, that the travelling expenses alone from *Kington* to *London* and back amount to 3*l.* 7*s.*, that the general rule at law, which was followed in equity, was to allow 1*l.* 1*s.* a day for the expenses of board and lodging of a gentleman. He held that the tender of 3*l.* 13*s.* was therefore insufficient, and discharged the order for the attachment with costs.

(*a*) *Carey* (2nd ed.), 141.
(*b*) 16 *Q. B.* 402.
(*c*) 2 *Strange*, 1150.
(*d*) 1 *W. Black.* 36.
(*e*) 1 *Hen. Black.* 49.
(*f*) 13 *East*, 15, note.
(*g*) 1 *Barn. & Adol.* 950.

NOTE.—See 1 *Chitty's Statutes* (2nd ed.) p. 1100, and the notes thereto.

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July 1.

SQUIRES *v.* ASHFORD.

A *feme covert* was entitled to a life interest in personal property producing 72*l.* a year. She filed a bill against the trustee, the assignee in insolvency of her husband and her husband, claiming the whole income. The Court directed it to be paid to her, though she was in receipt of a further income of 40*l.* a year, and was living with her husband.

WILLIAM ASHFORD made his will in 1833, under which, in substance, his widow, ***Harriet***, was entitled to the interest of a fund for her life.

The testator died in 1833, and in 1836 his widow married *George Squires*.

Under a compromise, made in a suit against the executors, the fund to which Mrs. *Squires* was entitled for life was ascertained, and consisted of a sum of 1,447*l.* retained in the hands of the executor, under a power in the will, and on which he paid Mrs. *Squires* interest at five per cent. (72*l.* 7*s.* a year).

In *December*, 1855, Mr. *Squires* took the benefit of the Insolvent Debtors Act, and the payment of the income to Mrs. *Squires* was thereupon stopped.

Mrs. *Squires*, by her next friend, filed her bill against the executor, Mr. *Sturgis* the provisional assignee and her husband, praying that the whole income of the 1,447*l.*, or a suitable part thereof, might be paid to her, or for her and the only child of her second marriage.

In her affidavit, the Plaintiff stated as follows:—"No settlement or agreement for a settlement was made or executed before, upon or since her marriage with the Defendant *George Frederick Squires*, and, in fact, *George Frederick Squires* was never possessed of or entitled

entitled to any property or effects, except a small quantity of household furniture, which was some years since sold under a distress for rent. In the year 1841, the Defendant *George Frederick Squires* was declared a bankrupt, and in the year 1844, he obtained his certificate of conformity. Deponent is in needy circumstances, and has no settled or certain means of subsistence, and the Defendant *George Frederick Squires* has not now, and for several years past has not had, any employment, and he has not maintained, and in fact is unable to maintain her and *Catherine Amelia Squires*, his daughter, or either of them; and, in fact, the Defendant *G. F. Squires*, and the said *C. Amelia Squires* (who is now an infant), have resided and now reside with, and have been and now are maintained solely and exclusively by Deponent. The Defendant *G. F. Squires*, is a person of intemperate and irregular habits, and Deponent has been ill-treated by him."

In opposition, it was sworn, that Mrs. *Squires*, under the will of her father, was entitled for her separate use, without power of anticipation, to some property, from which she received between 40*l.* and 50*l.* a year.

Mr. *Roupell* and Mr. *W. H. Terrell* for the Plaintiff.

Mr. *R. Palmer* and Mr. *Bevir* for the executor.

Mr. *Osborne* for *Sturgis*, the provisional assignee. The whole fund, which, by law, belongs to the husband, ought not to be given to the wife, who has already other separate estate producing 60*l.* a year. The effect of doing so will be to enable the husband to enjoy the property at the expense of his creditors, and for the future live a life of idleness, deluding other creditors. He

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He referred to *Sturgis* v. *Champneys* (*a*); *Napier* v. *Napier* (*b*).

The MASTER *of the* ROLLS.

I shall require an affidavit, categorically stating all the Plaintiff's sources of income, and what she has received for the last three years. The Plaintiff must pay all the costs, for she has not stated her case fairly, and, subject to that, I do not think that the income of this property is too much for her.

(*a*) 5 *Myl. & Cr.* 104. (*b*) 1 *Drewry & War.* 407.

ORDER.

Declare, that Mrs. *Squires* is entitled to the whole of the interest which may hereafter accrue due and payable during her life upon the 1,447*l.* for her separate use, without power of anticipation.

NOTE.—See *Koeber* v. *Sturgis*, 22 *Beav.* 588; *Stanton* v. *Hall*, 2 *Russ. & Myl.* 175; *Elliott* v. *Cordell*, 5 *Madd.* 149; *Wilkinson* v. *Charlesworth*, 10 *Beav.* 324; *Tidd* v. *Lister*, 10 *Hare*, 140.

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Re ANSTICE.

July 31.

Bequest of residue to *A.* and *B.* equally, and in case they should be married at the time it became payable, to be paid for her separate use, "and her receipt alone for the same to be a sufficient discharge." There was a gift over to *C.* and *D.*, in case *A.* and *B.* should die without leaving issue. Held, that this case was an exception to the general rule, and that the gift over was confined to *A.* and *B.* dying without leaving issue in the life of the testator.

THE testatrix gave the residue of her personal estate to trustees upon the following trusts:—"to pay, make over and divide the same, in equal shares, unto and between my said cousins, *Mary Ann Anstice*, and *Catherine Anstice*, for their respective use and benefit. And in case either of my said cousins shall happen to be married at the time of her said legacy becoming payable, *then the same shall be paid* or disposed of for her separate use, apart from her husband, which she may have, *and her receipt alone for the same shall be a sufficient discharge.* And in case either of my said cousins, *Mary Ann* or *Catherine Anstice*, shall happen to die without leaving any lawful issue, then the share of her so dying shall be paid over to her sister *Mary Ann*, or *Catherine Anstice;* and in case they both shall die without leaving any lawful issue, then the shares of them to be paid between my brother *Moses Anstice*, and my niece *Georgiana Harvey*."

Mary Ann Anstice married the Rev. *W. Scott*, and *Catherine Anstice* died in 1847 unmarried, and Mrs. *Scott* was her executrix.

This was a petition of Mr. and Mrs. *Scott* for payment out of Court of the whole fund.

Mr. *R. Palmer* and Mr. *Hotham* argued, that the dying without issue had reference to the period of the testator's own death, for there was no gift to the issue of *Mary Ann* and *Catherine*, and there was an express direction

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direction to pay over to them the whole legacy, and that their receipt should be a sufficient discharge.

They cited *Farthing* v. *Allen*(*a*); *Jarman* on Wills(*b*); *Edwards* v. *Edwards*(*c*); *Home* v. *Pillans*(*d*); and referred to the passage in *Edwards* v. *Edwards*(*e*):— "All these cases are, of course, liable to be varied by the force of particular expressions, which the testator may have made use of in importing a different intention, and there are many cases of this description."

Mr. *Follett, contrà*, for *Moses Anstice* and *Georgiana Harvey*, argued, that the gift over took effect upon the death of the legatee, and not of the testator.

He cited *Child* v. *Giblett*(*f*); *Smith* v. *Stewart*(*g*); and *Edwards* v. *Edwards*(*h*).

Mr. *Gill* for the trustees.

The MASTER *of the* ROLLS.

I think this is an exception to the general rule, and the reason arises from the words which the testator has used. He directs, that if the legatee should be married "at the time of her legacy becoming payable, then the same should be paid or disposed of for her separate use, apart from her husband which she might have, and her receipt alone for the same should be a sufficient discharge." Discharge for what? Why for the legacy then payable to her. This is inconsistent with giving a life interest only, and the two parts of the will would be

(*a*) 2 *Madd.* 310.
(*b*) Page 649, 2nd ed.
(*c*) 15 *Beav.* 363.
(*d*) 2 *Myl. & K.* 24.
(*e*) 15 *Beav.* 363.
(*f*) 3 *Myl. & K.* 71.
(*g*) 4 *De G. & Sm.* 253.
(*h*) 15 *Beav.* 357.

be inconsistent with each other, unless he meant the period of dying without issue to be the period of payment of legacy.

I think this is one of those cases to which I referred to in *Edwards* v. *Edwards*, in which the particular circumstances of the case take it out of the rule. I adhere to the opinion I then expressed, that when there is a gift to *A.*, and if he should die without leaving a child, to *B.*, "if at any time, whether before or after the death of the testator, *A.* should die without leaving a child, the gift over takes effect, and the legacy vests in *B.*;" but the rule does not affect a case, in which, it is declared, that, on a particular event, the receipt of the legatee shall be a good discharge for the legacy. There, the dying without issue is confined to the period at which the legacy became payable, that is, to a period previous to the death of the testator.

ORDER, half of the fund to be transferred to *Mary Ann Scott*, and the other to her as the executrix of *Catherine Anstice*.

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BASKETT *v.* LODGE.

July 8.

A. B. gave the moiety of a house and other property to trustees, to sell and pay a number of annuities and legacies, and the residue to six persons. *C. D.* afterwards devised the other moiety of the same house to *A. B.*'s trustees, upon the same trusts, for the benefit of the same persons, and to and for the same ends, intents and purposes as were directed by *A. B.*'s will of and concerning her moiety of the house. Held, that the legatees and annuitants under *A. B.*'s will had no further interest in *C. D.*'s moiety than to have their bequests paid in full.

ON her marriage in 1835, *Elizabeth Baskett* conveyed an undivided moiety of some freehold and leasehold property on trust for sale, and she also transferred some personal estate. The trustees were to hold them for her separate use for life, and in case she should die in the lifetime of her husband (which event happened), then upon trust to transfer the trust estates and premises to such person, &c. as *Elizabeth Baskett*, notwithstanding her coverture, by deed or will should appoint.

No part of the moiety of the freeholds and leaseholds had been sold. The other moiety belonged to *Sarah Leer*, the sister of *Elizabeth Baskett*.

Elizabeth Baskett, by her will dated in *January*, 1844, appointed, that the trustees should convey the freehold and leaseholds unsold, and the trust funds and all her other personal property, to the Plaintiffs, upon trust to sell and realize, and pay her debts and her personal and testamentary expenses, and then pay a considerable number of pecuniary legacies, and to purchase 4,960*l.* Consols, and out of the income pay *Mary Lodge* an annuity of 20*l.* for life, and another annuity of 5*l.* 4*s.*, and subject thereto, to pay the remaining income to her husband for life, and afterwards to her sister *Sarah Leer* for life. And as to all her personal estate comprised in the trust for sale, upon trust to invest and pay the income to *Sarah Leer* for life, and after her decease, to her husband

husband (Mr. *Baskett*) for life; and after the decease of both, as to both funds, which she designated "the consolidated trust funds and premises," upon trust, after paying a great number of legacies, for the persons who should be her next of kin at the decease of the survivor of her husband and sister.

Elizabeth Baskett made a codicil, dated in *August*, 1844, by which she revoked the trusts in her will declared concerning the residue of the trust funds and premises, and directed, that her trustees should stand possessed of such residue, in trust as to one-sixth part for the Defendant *Mehetabel F. Bristowe*, and as to the remaining five-sixths, in trust for other persons.

Elizabeth Baskett died in *August*, 1844.

In 1848, *Sarah Leer*, *Elizabeth Baskett's* sister, died, having made her will, dated in 1845, whereby she devised to the trustees of her sister's will the other moiety of the freehold and leaseholds, "*to hold to them upon the same trusts*, or such as should, after her decease, be subsisting and capable of taking effect, *for the benefit and to the use of the same persons*, and to and for the same ends, intents and purposes *as were directed*, expressed and declared in and *by her said sister's will, of and concerning the moiety* or half part, or other the right, title or interest *of her said sister in the same*."

The husband of *Elizabeth Baskett* died in 1855, and the hereditaments were sold, and a question arose as to the mode in which *Sarah Leer's* moiety of the produce of the property ought to be applied.

Mr. *Karslake*, for the Plaintiffs, the trustees.

Mr.

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Mr. *Little*, for *Mary Lodge*, an annuitant under the first will, argued, that the annuitants and legatees under the first will were entitled to participate in the property, which was given by the second will on the same trusts and to the same persons. He distinguished this case from *Hindle* v. *Taylor* (*a*).

Mr. *Shapter*, for *G. A. Patey*, the next of kin of Mrs. *Baskett*.

Mr. *Dewsnap*, for *Mehetabel F. Bristowe*.

The MASTER *of the* ROLLS was of opinion, that the intention of *Sarah Leer* was to add the produce of her moiety of the property to the sister's personal estate, and that the words "to hold," &c. &c. merely meant that it was to go in the same manner as the sister's moiety, and so as to form part of her estate.

That it was applicable in aid, in payment of such of the annuities and legacies given by the will of *Elizabeth Baskett* as remained unsatisfied, and subject thereto, belonged to the residuary legatees mentioned in Mrs. *Baskett's* codicil (*b*).

(*a*) 20 *Beav.* 109, and 5 *De G., M. & G.* 577.
(*b*) *Reg. Lib.* 1855, *A.* folio 1317.

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LIVESEY *v.* HARDING.

Nov. 5, 10.

A first incumbrancer on a reversionary legacy gave due notice to the trustees. A fund was afterwards brought into Court to provide for the legacy, and a second incumbrancer obtained the first stop order on it. Held, that he did not thereby obtain priority over the first incumbrancer.

UNDER the will of his father, *James Worthington Livesey* was entitled to a legacy of 1,000*l.* payable on the decease of his mother.

He mortgaged it in 1824, and the mortgagee gave due notice to the trustees. At this time, there was no fund in Court, but in this suit (*a*), instituted in 1823 for the administration of the estate, and in which *James Worthington Livesey* was a Defendant, the real estate was sold subsequent to 1833, and the produce brought into Court, and a fund was set apart to answer the legacies payable on the death of the widow.

On the 24th of *July*, 1844, *James Worthington Livesey* executed a second assignment of his legacy, and the second incumbrancer at once obtained a stop order on the fund on the 30th of *July*, 1844. The first incumbrancer obtained no stop order until 1845.

The testator's widow died in *May*, 1854, and the legacy became payable.

The Chief Clerk found the priority of the two incumbrancers to be according to their dates. The second incumbrancer moved by way of exception to his certificate.

Mr. *Hetherington*, for the second incumbrancer, argued, first, that *James Worthington Livesey* was a mere surety in the first transaction; and, secondly, that the second mortgagees had obtained priority over the first, by obtaining the first stop order on the fund in Court.

Mr.

(*a*) The case is reported in *Tamlyn*, 460, 1 *Russ. & Myl.* 636 and 21 *Beav.* 227.

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Mr. *R. Palmer, contrà.*

Greening v. *Beckford* (*a*); *Etty* v. *Bridges* (*b*); *Brearcliff* v. *Dorrington* (*c*) were cited.

The MASTER *of the* ROLLS reserved judgment.

Nov. 10. *The* MASTER *of the* ROLLS (after deciding that *James Worthington Livesey* was not a surety in the transaction) proceeded as follows:—

As to the second point, I think that it is clearly proved that due notice of the first mortgage was given to the trustees; but then Mr. *Hetherington* contended, that when a fund is paid into Court, the first person who obtained a stop order obtained a priority.

Without disputing this, as a general proposition, it does not apply to the case. Due notice was given to the trustees before the suit was instituted, and *Brearcliff* v. *Dorrington* (*c*) proves, that in such a case, the order in which the stop orders are obtained does not affect the prior incumbrancer, who had given due notice of his security. I am of the same opinion, and I think that puts an end to the matter with respect to the stop order.

The only other objection is, that nothing has been done in this matter for a great length of time; but I think there have been no laches, for the mortgage was of a reversionary interest, which did not fall into possession until two years ago.

Motion refused.

(*a*) 5 *Sim.* 195. (*b*) 2 *Y. & Coll. C. C.* 486.
(*c*) 4 *De Gex & Sm.* 122.

See *Matthews* v. *Gabb*, 15 *Sim.* 51, and *Day* v. *Day*, before the Lords Justices, 5th *June*, 1857.

OLDING *v.* POULTER.

June 12.

A decree having been made for the administration of an estate, another suit was afterwards instituted against the executrix to establish an adverse claim against a portion of the assets. The executrix being abroad, and neglecting to defend the second suit, it was about to be taken *pro confesso*. The Court gave leave to the Plaintiff in the administration suit to intervene and defend the second suit on behalf of the estate, upon payment of costs and giving an indemnity.

A CREDITOR'S suit of *Warburton* v. *Edge* was instituted in *March*, 1834, against the executrix, *Margaretta Cordelia Edge*, for the administration of the estate of the testator *Andrew Edge*. Part of his assets consisted of a mortgage executed to him by Mr. and Mrs. *Olding* of a reversionary interest in a sum of 3,500*l.*, for securing 990*l.* and interest. By the decree in *Warburton* v. *Edge*, made on the 7th of *July*, 1838, a Receiver had been appointed to get in the debts due to the testator *Andrew Edge*.

In *January*, 1855, Mrs. *Olding* instituted another suit of *Olding* v. *Poulter* against *Margaretta Cordelia Edge*, the executrix of *Andrew Edge*, and others, to establish her equity to a settlement upon the reversionary fund which had now fallen into possession.

Margaretta Cordelia Edge resided in *Paris*, and had, under an order, been served with the bill there. She not having appeared or taken any steps to defend the suit of *Olding* v. *Poulter*, the bill was about to be taken *pro confesso* against her. In order to protect the testator's estate, an order was made in *June*, 1855, in the suit of *Warburton* v. *Edge*, by the Vice-Chancellor *Wood*, giving the Receiver liberty to take such proceedings as he might be advised, either in his own name or in the name of the Plaintiff, or otherwise as might be directed, for the purpose of appearing or intervening in the suit of *Olding* v. *Poulter*, and claiming the 999*l.* due

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due to the estate of *Andrew Edge* in respect of his mortgage on the fund in that suit.

Mr. *Wm. W. Macheson*, for the Plaintiff in *Olding* v. *Poulter*, now moved to take the bill *pro confesso*.

Mr. *Bagshawe*, jun., moved, on behalf of the Plaintiff in *Warburton* v. *Edge*, that the Plaintiff and Receiver, or one of them, might be allowed to defend the suit of *Olding* v. *Poulter*, in the name of *Warburton*, the Receiver, or of *Margaretta Cordelia Edge*, or otherwise as the Court might direct.

The MASTER *of the* ROLLS refused to allow the Receiver to defend the suit of *Olding* v. *Poulter*, but he gave liberty to the Plaintiff in *Warburton* v. *Edge* to defend it, on payment of costs and giving an indemnity.

ABSTRACT OF ORDER.

The Clerk of Record and Writs to attend at the hearing with the record, in order that the bill may be taken *pro confesso* against *Margaretta Cordelia Edge*, if the Court should think fit so to order. And notwithstanding this order, upon *Warburton* paying the Plaintiff the costs incurred in proceeding to take the bill *pro confesso*, and the costs of this application, and indemnifying *Olding* in respect of any *extra* costs that might be incurred in this suit by reason of this order, and which the Court should think *Olding* ought to receive, give liberty to *Warburton* to intervene in this cause, so far as may be necessary to protect the estate of *Andrew Edge*, with liberty for her to enter into evidence in this cause, to the same extent as *Margaretta Cordelia Edge* might have done, and to do all other acts necessary to protect the estate of *Andrew Edge* in this suit. Let notice of all future proceedings in this cause be served on *Warburton*, she consenting to be bound by any order that may be made in this cause as to costs or otherwise, to the same extent as if she were a party to this suit.

NOTE.—A Receiver in an administration suit of *Child* v. *Ward* having obtained an order to defend *Ward* v. *Ward*, another suit against the same estate, in consequence of the poverty of the executrix, V. C *Stuart*, on the application of a creditor, rescinded that order, and gave leave to the creditor to defend the suit of *Ward* v. *Ward*, in place of the Receiver.—23rd *April*, 1857, V. C. *Stuart*. *Ex relatione.*

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Nov. 13, 14.
1857.
Jan. 13.

REIMERS *v.* DRUCE.

Extent to which a foreign judgment is impeachable, when the judgment creditor seeks to enforce it in this country.

A foreign judgment, sought to be enforced in this country, is impeachable for error apparent on the face of it, sufficient to shew that such judgment ought not to have been pronounced.

The reasons attached to a foreign judgment are part of the record, and is to be treated as an integral part of the judgment.

Bill by a foreign creditor to enforce a foreign judgment against the assets of the deceased debtor, dismissed on the ground of the great delay in instituting the proceedings.

THIS was a suit instituted to enforce, as against the executors of the debtor, a foreign judgment obtained in the Appellate Court of *Celle*, in the kingdom of *Hanover*, in the year 1842. This relief was resisted, first, on the ground that the judgment was erroneous; secondly, that the Plaintiffs had not come in sufficient time.

The facts of the case were these:—the Plaintiffs carried on business at *Emden*, in *Hanover*, under the style of "*Jansson*, Widow & Son." In 1818, they consigned a cargo of wheat to Mr. *Hennings*, carrying on business in *London* under the style of "*Hennings* & Co." The wheat was kept unsold and warehoused for seven years, and it was ultimately sold in 1825, when the charges exceeded the price obtained for the wheat. In 1832, *Hennings* instituted proceedings against *Jansson*, Widow & Son, in the Hanoverian district Court of *Emden*, to recover the balance due for the expenses upon the cargo of wheat beyond the price obtained for it. This was met by counter proceedings in the same Court, by the *Emden* house against the *London* house. On the 8th of *August*, 1832, a decree was made by the *Emden* Court in favour of *Hennings* & Co. This was taken, by way of appeal, to the Appellate Court of *Aurich*, and on the 27th day of *June*, 1829, the judgment of the inferior court, with reasons

A., residing in *Hanover*, consigned wheat to *B.*, residing in *London*, for sale. By the delay in selling, the charges exceeded the proceeds. *Semble*, that the English, and not the Hanoverian law, was applicable.

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reasons appended to it, was given in favour of the *Emden* house, and ordering the payment of 16,240 Dutch gilders (about 1,350*l.*) by *Hennings* & Co. to *Jansson*, Widow & Son. The cause was from thence taken, by appeal, to the ultimate Court of Appeal at *Celle*, which, on the 14th day of *May*, 1841, affirmed the judgment in favour of *Jansson*, Widow & Co.; and the amount not being paid by *Hennings* & Co. to *Jansson*, Widow & Co., a resolution in contumacy was, on the 7th day of *October*, 1842, pronounced against *Hennings*, directing the payment of the 16,240 Dutch gilders. This proceeding was final, and it was admitted by the Defendants, that no further proceeding in the Courts of *Hanover* could have affected or altered this judgment, and that, in *Hanover* at least, the firm of *Jansson*, Widow & Co. were entitled to levy execution on the goods of *Hennings* & Co. for the amount of the debt, together with interest at five per cent. till payment.

Hennings died in 1846, nearly four years afterwards, and the four Defendants were his executors. This bill was instituted on the 29th of *May*, 1855, by the Plaintiffs, who had been all along in *Germany*, against *Hennings'* executors in *England*, to enforce this judgment against his assets.

Mr. *R. Palmer* and Mr. *H. F. Bristowe* for the Plaintiffs. The final decree of a Court of competent jurisdiction will be enforced in this country unless there has been some fraud, for when the rights of parties have been in issue and decided by a competent Court, the judgment is binding on the parties everywhere, and the reasons for it will not be examined here; *Kennedy* v. The Earl *Cassillis* (*a*); *Boucher* v. *Lawson* (*b*); *Galbraith*

(*a*) 2 *Swanst.* 326, note. (*b*) *Ca. temp. Hardwicke*, 85, 89.

braith v. *Neville* (*a*); *Tarleton* v. *Tarleton* (*b*); *Ferguson* v. *Mahon* (*c*); *Martin* v. *Nicolls* (*d*); *Ricardo* v. *Garcias* (*e*); The Bank of *Australasia* v. *Nias* (*f*); The Bank of *Australasia* v. *Harding* (*g*); *Story's* Confl. (*h*).

Mr. *Follett* and Mr. *Druce* for the Defendants. A foreign judgment is examinable in this country when it is sought to be enforced. It is in the nature of a simple contract debt, and creates no estoppel, as in the case of an English judgment, *Wilson* v. Lady *Dunsany* (*i*); matters *in pais* may, therefore, be given in evidence regarding it.

They insisted that the judgment of this foreign Court shewed error on the face of it, that the reasons appended to it formed part of the judgment, and that by those it appeared, that the judges decided, first, on the ground that *Emden* was the *locus contractus*, and next, being so, that the law of *Emden* applied; whereas, the Defendants contended, that *London* and not *Emden* was the *locus contractus*, being the place to which the cargo was consigned.

Secondly, that even if *Emden* had been the *locus contractus*, still that the English law was not applicable to the case. *Houlditch* v. Marquis of *Donegall* (*k*); *Don* v. *Lippmann* (*l*); *Paul* v. *Roy* (*m*); *Ricardo* v. *Garcias* (*e*); The Duchess of *Kingston's* Case (*n*); *Bird* v. *Appleton* (*o*); *Story's* Confl. (*p*).

Thirdly,

(*a*) 1 *Douglas*, 6, n.
(*b*) 4 *Maule & S.* 20.
(*c*) 11 *Adol. & E.* 179.
(*d*) 3 *Simons*, 458.
(*e*) 12 *Cl. & Fin.* 368.
(*f*) 16 *Q. B. Rep.* 717.
(*g*) 9 *Com. Bench Rep.* 661.
(*h*) Sect. 607.
(*i*) 18 *Beav.* 293.
(*k*) 2 *Cl. & Fin.* 470.
(*l*) 5 *Cl. & Fin.* 1.
(*m*) 15 *Beav.* 433.
(*n*) 2 *Smith's Lead. Ca.* 593, 4th ed.
(*o*) 8 *Term Rep.* 562.
(*p*) Page 847, s. 584.

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Thirdly, that though the Statute of Limitations was not applicable (*a*), still that the great delay in taking proceedings in this country disentitled the Plaintiffs to any relief, especially since the assets of *Hennings* had been administered without notice of the demand of the Plaintiffs.

Mr. *R. Palmer* in reply. The reasons on the decree, though bad, are not in the nature of error, for the facts shewing the application of the law of a particular country do not appear.

The MASTER *of the* ROLLS reserved judgment.

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The first point raises the much litigated question of the effect in this country of a foreign judgment, whether it must be treated in this Court as conclusive between the parties, or whether the Court is bound to examine it, and if so, to what extent it will ascertain the correctness of the decision.

The Plaintiff declines to enter into any question respecting the correctness of the judgment, insisting that the judgment is not examinable by an English Court, but that it is and must be treated as conclusive here. This is a question of considerable importance, which has been the subject of grave discussion and consideration in our Courts, and one, as to which, I was desirous of considering the authorities before I pronounced my decision upon it.

The

(*a*) See 21 *Jac.* 1, c. 16, s. 7; 19 & 20 *Vict.* c. 97, s. 10; 3 *Chitty's Stat.* (2nd ed.) 61; and *Ib.* app. 482.

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The authorities are numerous, and, to a considerable extent, conflicting. The examination may, however, be very much curtailed, by examining those only which have reference first to judgments *in personam*, inasmuch as a new principle is introduced in the cases of judgments *in rem*, whether wholly so, or partly *in rem* and partly *in personam*; but this is the case of a judgment exclusively *in personam*, and therefore to be governed by the class of cases which relates to such judgments. There is also one observation which lies at the root of the question, and which is applicable to all classes of judgments, namely, that the judgment must be examined to some extent to see what it professes to decide, and also its authority to decide the question which it professes to decide. It is therefore clear, that for some purposes, a foreign judgment can be examinable to some extent, before it can be held to be conclusive. So that the question is, to what extent a foreign judgment is examinable, and to what extent is it conclusive in the Courts here.

In the numerous authorities that bear on this subject, a distinction is also taken, between the cases where the foreign judgment is brought before the cognizance of an English Court, upon an application by the successful party to enforce and obtain the fruits of it against the Defendant, and those cases where the Defendant here sets up the foreign judgment, as a bar to the proceedings instituted by the person who has failed against the same Defendant, with reference to the same subject-matter. Lord Chief Justice *Eyre* in *Phillips* and *Hunter* (*a*), considered that distinction to rest upon this principle:—that as, in the former case, the judgment is submitted voluntarily to the Court, the question arises, whether

(*a*) 2 *Hen. Bl.* 402.

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whether it is sufficient as a consideration to raise a promise, and that, thereupon, it must be examined as all other considerations for promises are examined, and that evidence of the foreign law is admissible to shew that the judgment was or was not warranted; but that it is otherwise in the case of a defence: that the party living abroad is not entitled to sue the successful Defendant again in another country, for the same subject-matter, but that the protection of a foreign judgment is complete everywhere, as well as in the place where it was pronounced. This distinction has certainly not been carried out to the extent laid down by Lord Chief Justice *Eyre*, still it is a distinction which has so much authority to support it, that it must be regarded at least, to some extent, in considering the value of a foreign judgment here; and it must not be lost sight of, in the present case, that this is the instance of a party seeking to enforce, in this country, a judgment obtained abroad.

According to my impression of the law, when the question was argued before me, I thought, that a foreign judgment sought to be enforced in this country was examinable for the following purposes, and for those only, namely, 1st. For the purpose of shewing that the Defendant abroad had no notice of the suit, and never knew of it until after judgment was given. 2ndly. That it was obtained by fraud. 3rdly. That the Court, which pronounced the judgment, had no jurisdiction. 4thly. That there was error on the face of the judgment, by which I mean error sufficient to shew that the Court had come to an erroneous conclusion, either of law or fact. Lastly. That it was contrary to the law which it professed to administer, but which, with reference to the merits of the case, the facts and other matters, was absolutely conclusive

conclusive between the parties, both as to the points raised and the facts which it professed to decide.

If this be a correct impression relative to the state of the law now prevailing on this subject, it would remain to be considered, whether the reasons appended to the decree formed part of the decree itself, and if so, whether they shew error in the Court, either as to the *locus contractus*, or as to the law which was applicable to this case; for, in all other respects, it is not, in the present case, attempted to impeach this judgment.

I do not think it necessary or desirable to go through the long series of reported cases on such subjects, all of which I have thought it necessary to examine myself. It will be sufficient if I refer to some of them, which will shew the view I take of this subject. I do not think the case of *Ricardo* v. *Garcias* (*a*) governs the present. The distinction, to which I have already referred, between pleading a foreign judgment, in bar to the same demand, in this country, by the same Plaintiffs against the same Defendant, and the instance of a Plaintiff successful abroad, seeking the assistance of the Courts here, to enforce a foreign judgment in this country, applies to that case. *Garcias* had sued the Defendants here, who were the Appellants, for the same matter in *Paris*. Judgment had been pronounced against the Plaintiff in that country. He came over here, and sought to enforce the same demand against the same Defendants. They pleaded, in bar, the foreign judgment, which was allowed by the House of Lords, in accordance, I must say, with previous authorities, and the opinion of all the most eminent jurists in this country.

The

(*a*) 12 *Cl. & Fin.* 368.

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The case of The Bank of *Australasia* v. *Nias* (*a*), which is principally relied upon by the Plaintiff, as very analogous to the present. There, the Plaintiffs had, in *New South Wales*, obtained judgment against the chairman of the Bank of *Australia*, of which the Plaintiff was a shareholder. The Plaintiffs sought to enforce that judgment in this country against the Defendant. The Plaintiffs set forth, in the first count of the declaration, an act of the colonial legislature, by which it was enacted, that a banking company in the colony should sue and be sued in the name of its chairman, and that an execution on any judgment against the company might be issued against the property of any member of the company, for the time being, exactly in the same manner as if judgment had been recovered against him personally. To this count the Defendant pleaded various pleas, upon which the judgment of the Court was given. The pleas which are omitted from the report I assume to have been merely formal. The third plea was, that the promise on which the Plaintiff relied was not made by the company. The twelfth was, that this promise was obtained by the fraud and covin of the Plaintiff. The Court of Queen's Bench held, that those matters were concluded by the judgment, and could not afterwards be inquired into here; that so far as the merits of the case were concerned, between the Plaintiff and the Banking Company of *New South Wales*, this was determined by the judgment, and that it could not be opened and impeached in this country. The sixth plea was, that the Defendants had not been served with process issuing out of the Court of *New South Wales*, at the instance of the Plaintiff. Upon this, the Court determined, that, although it was open to the Defendant to shew that he was never summoned to

(*a*) 16 *Q. B. Rep.* 717.

to answer, the fact, of whether he was or was not to be treated as having been summoned to answer, depended upon the validity of the act of the colonial legislature, on which the issue was directly taken by the eighth and tenth pleas.

Upon those other pleas, that is, the sixth, eighth and tenth, the Court of Queen's Bench held, that the act of the legislature of *New South Wales* was not repugnant to the law of *England* or to natural justice, and that the Defendant was bound by it: so that the Court examined the judgment, for the purpose of ascertaining whether it proceeded upon principles repugnant to natural justice or the law of *England*, and also for the purpose of ascertaining, whether the Defendant had been summoned. On all those points, the Court decided against the Defendant, holding that the act of the colonial legislature was not void, and that he must be held to have been summoned. The fifteenth plea, that the judgment was contrary to the law of the colony, is not specially mentioned in the judgment of the Court of Queen's Bench; but it seems to have been considered by the Court to have been covered by the observations made upon the eighth and tenth pleas, viz. that the Court here would not go into the merits of the case again, coupled with this observation, that from the decision of the Colonial Court, an appeal lay to the Queen in Council, where the decision, if it were erroneous, would have been corrected. In the course of the observations made by the Chief Justice, he uses these words:—"Doubtless, it is open to the Defendant to shew that the foreign Court had not jurisdiction on the subject-matter of the suit, or that he was never summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained."

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tained." The question, whether a foreign judgment, sought to be enforced in this country, could be examined, for the purpose of shewing some error on the face of it, as to shew that the Court below came to an erroneous conclusion, either of law or fact, does not appear to have arisen. In that case there was no plea to that effect, and it does not appear to have been adverted to by their Lordships.

What that case decides then is this:—That a foreign judgment, sought to be enforced in this country, cannot be examined, for the purpose of discussing the merits upon which it is pronounced; and apparently also (although this is less clear), that it cannot be examined, for the purpose of shewing that the judgment is contrary to the law that it professed to administer. Further, that a judgment can be examined for the purposes I have above mentioned; but it does not decide that these are the only purposes for which a judgment is examinable, or that manifest error on the face of the judgment itself would not render it of no avail here.

Upon the whole, having regard to the decisions of the Queen's Bench, in *Pollard* v. *Bell* (*a*) and *Bird* v. *Appleton* (*b*), particularly *Novelli* v. *Rossi* (*c*), and various others which might be stated, I am of opinion, that a foreign judgment sought to be enforced in this country is, in addition to the cases referred to by the Chief Justice, impeachable for error apparent on the face of it, sufficient to shew that such judgment ought not to have been pronounced. But this leaves open the nature and extent of the error apparent upon the face of the judgment which is sufficient to invalidate the

(*a*) 8 *Term Rep.* 434. (*b*) 8 *Term Rep.* 562.
(*c*) 2 *Barn. & Ad.* 757.

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the judgment. Upon that my opinion is, that it must be such error upon the face of the judgment itself, as, without any extrinsic evidence, shews that the Judges have come to an erroneous conclusion, either of law or fact.

The question which next arises, in the present case, is this:—of what does the judgment here consist, and does it shew such error on the face of it? It is clear, in my opinion, that unless the reasons appended to the *Aurich* Decree form part of the judgment itself, it cannot be impeached in this country. These reasons are an elaborate argument, drawn up and signed by the Judges of the *Aurich* Court, as forming grounds for their decree; they are attached to the operative part of the judgment, and are sent with it to the ultimate Court of Appeal, to which the Court of *Celle* itself referred. There is no evidence on this subject before me, but my opinion is, that these reasons formed a part of the record, and that they must be treated as an integral part of the judgment, in the same way as where an arbitrator makes an award and appends to it the reasons or grounds for having made that award; the accuracy of that award is examinable or impeachable, if the ground on which the arbitrator proceeds shall be found to be contrary to law.

I have, therefore, arrived at the conclusion, that, in this case, these reasons are examinable, for the purpose of ascertaining, whether, upon the face of them, it appears the Judges have come to an accurate or an erroneous conclusion upon the statement of the case. If the matter rested here, I should have been desirous to have had this case re-argued, upon the question whether such error is apparent, on the face of these reasons, as would

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would invalidate this judgment. The Counsel for the Plaintiff have, however, I think prudently avoided this part of the case, and have preferred to stand upon the ground, that the reasons formed no part of the judgment, and that the judgment itself is not impeachable in this country. I think that I am bound to take the law of the kingdom of *Hanover* to be such as the Judges have pronounced it to be, and that if that law was applicable, it entitled the Plaintiff to recover against Mr. *Hennings;* but the strong inclination of my opinion is, that, upon the facts as stated by the Judges of the *Aurich* Court, the English law, and not the law of the kingdom of *Hanover*, was that which governed this contract.

Upon that part of the case, I should have allowed the case to be re-argued before me, if it had been wished by the Counsel for the Plaintiff, but I have not thought fit to adopt this course, because, upon the question of the time which has elapsed, I have come to a conclusion unfavourable to the Plaintiff.

It is undoubtedly true that the Statute of Limitation has no sort of application in the case, but this Court, wholly independent of that Statute, has always considered it of great importance, that parties should not be negligent in enforcing their claims.

Now the question of the time stands thus:—the final judgment was obtained on the 7th day of *October*, 1842. Mr. *Hennings* survived four years. No step was taken against him to enforce this judgment. His assets were allowed to be divided, and no claim was made against his representatives until this bill was filed, in the year 1855, the exact date I have not got on the proceedings, but I assume it to be nearly thirteen years after

after the final judgment was obtained. It is true that the Plaintiffs were abroad, that they resided abroad; but is this to entitle them, in cases where they are fully cognizant of the facts of the case, to delay any time they may please before enforcing their demand? What is to be the limit to be imposed in such cases? Even in cases of fraud, this Court will not allow a stale demand to be enforced. No reason or explanation is given why this demand was not enforced at an earlier period, and although this Court, in the case of a foreigner resident abroad, would be disposed to look leniently at a case of delay, some explanation to account for the delay is necessary. In the case of an Englishman happening to be abroad when the cause of action arises, the legislature of the Courts of this country have thought, the one in the case provided for by the Statute (*a*), and the others in such other cases as are not provided for by the Statute, but in analogy thereto, he ought not to be bound by the lapse of time. The grounds of this are very obvious, the Englishman, while abroad, is either ignorant of his rights or unable to take the proper means to enforce them till he returns home. Being absent from home and detained abroad, he is unable properly to attend to the matters which requires his attention in this country, but even that has a limit placed upon it.

Here, the Plaintiffs are merchants residing at *Celle*, they might have instituted proceedings against Mr. *Hennings* during his lifetime, as well as twelve or thirteen years after the transaction was closed. The Defendants are wholly ignorant of the whole matter. Mr. *Hennings* might have made some valid defence, unknown to the Defendants, arising from his knowledge of

(*a*) But see the 19 & 20 *Vict.* c. 97, s. 10.

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of the transaction, or from subsequent dealings with the Plaintiffs themselves. If so, it has barred the possibility of its being adduced. The Defendants may have been seriously prejudiced by this delay, and it appears to me that the Plaintiff who seeks to enforce, in this country, a foreign judgment recovered by him, ought to be diligent in his proceedings for this purpose. Although I am far from saying he ought to be treated in the same manner as if he had been resident here, still I am of opinion, that where the delay is unreasonable, he ought not to obtain the assistance of this Court to enforce his demand. In this case, the Plaintiffs have waited upwards of twelve years, and have offered no excuse for this delay. I think this delay is unreasonable.

On the whole, therefore, although I have thought it fit to express my opinion on the whole case, at least so far as it was argued before me, I have thought that a due regard to justice and the necessity of compelling parties to enforce their demands with diligence, requires me to dismiss this bill; but I am of opinion that it is proper to dismiss it without costs.

NOTE.—The Plaintiffs appealed to the Lords Justices, when the matter was compromised by payment of 2,000*l.* and costs.—9th *March*, 1857.

THE UNIVERSITY OF LONDON *v.* YARROW.

Nov. 13.

Bequest for founding and upholding an institution, for investigating, studying and curing maladies of quadrupeds or birds useful to man, and for providing a superintendent or professor to give free lectures to the public. Held good, as a charitable legacy.

THE testator, *Thomas Brown*, by his will, bequeathed 20,000*l.*, which he possessed in consols, "and all the residue of his personal property not consisting of lands, houses or real estate," to the University of *London*, "for the founding, establishing and upholding an institution, for investigating, studying, and, without charge beyond immediate expenses, endeavouring to cure maladies, distempers and injuries any quadrupeds or birds useful to man may be found subject to; for and towards which purpose of founding, establishing and upholding such *Animal Sanatory Institution*, within a mile of either *Westminster*, *Southwark* or *Dublin*, as may at the time for making a decision as to locality," by the Chancellor, &c. of the University of *London* "be thought most consistent and expedient." He directed the residue to accumulate, not exceeding fifteen years from his death, and to be applied "solely to the object of founding, establishing and upholding *The Animal Sanatory Institution* as aforesaid," to become vested in the University of *London*.

He directed that, previous to the Animal Sanatory Institution "being opened for the reception of animals and cure of their ailments, a superintendent or professor of the Institution and its business should be appointed" by the University of *London*, and on a vacancy a successor. He then proceeded as follows:—"And I will and direct, that the professor or superintendent of the said Animal Sanatory Institution shall have a residence adjacent thereto, besides a salary, and that he shall, annually,

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annually, give, on the business of the said Institution, at least five lectures, in English and free to the public, at some place to be appointed by the governing majority of the Senate of the said University of *London*. And I further desire, that kindness to the animal committed to his charge shall be a general principle of the Institution to be founded as aforesaid. And I also will and desire, that the Chancellor, &c. of the University of *London* may, at any time, if they shall choose, appoint a committee of their own body of medical men, to control the number and cases of diseased or injured animals to be taken charge of, and to decide about the purchase of diseased or injured animals or their carcases, for the promotion of science, as well as for to determine about any contingency not hereinbefore provided for, relative to the said Animal Sanatory Institution."

If the University of *London* declined to accept the trust, or the Institution should any how not continue to be conducted *bonâ fide* for the said purpose, there was a gift over to the University of *Dublin* for other purposes.

The testator died in 1852.

The suit was instituted to establish the validity of the alleged charitable trust.

Mr. *R. Palmer* and Mr. *Amphlett*, for the University of *London*. This gift for the establishment of an Animal Sanatory Institution with a lecturer is a good charitable gift. It is one of general public utility, and a gift for the benefit and ornament of a town has been supported; The Mayor of *Faversham* v. *Ryder* (*a*). Secondly,

(*a*) 18 *Beav.* 318, and 5 *De G., M. & G.* 350.

Secondly, it does not require the land to be purchased in *England* for the establishment of the Institution, and it is not open to the objection, that it tends to bring land in *England* into mortmain, as in *Trye* v. The Corporation of *Gloucester* (*a*); *Philpott* v. *St. George's* Hospital (*b*); *Crafton* v. *Frith* (*c*); *Longstaff* v. *Rennison* (*d*).

Mr. *Lloyd* and Mr. *Baggalay*, for the executors.

Mr. *Cairns* and Mr. *Simpson*, for the University of *Dublin*, and Mr. *Cotton*, for the next of kin. First. This gift to found an Institution for Animals is not a good charitable legacy. To be so, it must come within the objects enumerated in the Statute of Charitable Uses (*e*), or be analogous to them; *Morice* v. The Bishop of *Durham* (*f*). Domestic animals cannot be objects of a gift at all. They cannot be legatees, and a gift to them would *per se* be void for uncertainty as to the objects. To make the gift valid, it must be for some recognized public object. A devise of a house to a senior fellow of college, "to keep it in repair, not to fell timber without the consent of the college, to live in his house hospitably, and sometimes give entertainment to the poor, to distribute cordials and drugs to them when needful, to give to them some books and pamphlets of good morals and piety, and give an annual entertainment to the fellows, has been held void; *Attorney-General* v. *Whorwood* (*g*), referred to in The *Attorney-General* v. The *Haberdashers'* Company (*h*). In *Kendall* v. *Granger*,

(*a*) 14 *Beav.* 173.
(*b*) 21 *Beav.* 134.
(*c*) 4 *De G. & Sm.* 237.
(*d*) 1 *Drew.* 28.
(*e*) 43 *Eliz.* c. 4.
(*f*) 9 *Ves.* 405, and *S. C.*, 10 *Ves.* 540.
(*g*) 1 *Ves. sen.* 534.
(*h*) 1 *Myl. & K.* 420.

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v. *Granger* (*a*), a gift "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," was held bad.

Secondly. The establishment of this permanent Institution will require the purchase of land, and this brings the case within the Statute of Mortmain.

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This is a perfectly good gift. It is a bequest for the purpose of investigating the diseases of animals which are useful to man, and healing them, and for giving lectures upon the subject. Can anybody say, that that is not a perfectly good and charitable purpose? Suppose he had founded an institution for the purpose of giving lectures upon comparative anatomy or physiology, would not that have been a perfectly good and charitable purpose? Combined with a purpose of a scientific character, the testator seems to shew some benevolent disposition towards the health of the animals themselves; but that circumstance does not make the gift void. His shewing a strong feeling that there should be a knowledge gained of their diseases, and that means should be taken to keep them in health, does not make an investigation into their diseases at all inconsistent with its being for a charitable purpose, which this Court would carry into effect. I hold that this is to be quite as good a bequest as if it had been for the establishment of a society for giving lectures on comparative anatomy or physiology, or the investigation of natural history.

(*a*) 5 *Beav.* 300.

NOTE.—See the cases on this subject in the note to *Loscombe* v. *Wintringham*, 13 *Beav.* 89.

history. This is a gift peculiarly connected with what is useful to mankind, and, therefore, I must make a declaration that this is a valid charitable bequest.

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Note.—Affirmed by the Court of Appeal, 29th *April*, 1857.

Dec. 15.

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Jan. 21.

HOLLOWAY *v.* RADCLIFFE.

Devise, after prior interests, "equally" amongst the testator's "legal personal representatives, in such and the like manner, as if the same had been to be paid under the Statute of Distribution."

Held, that the class were to be ascertained at the testator's death, and that the testator's widow and his only son took, not equally, but according to the statute, *i. e.* one-third to the widow, and two-thirds to the son.

A. B. was entitled to two-thirds of an estate directed to be converted into personalty.

Held, that it had not been re-converted into realty by acts of *A. B.* done independent of the person entitled to the other one-third.

THE testator, *John Radcliffe* the elder, by his will dated in 1832, devised and bequeathed his real and personal estate as follows:—"to my wife *Mary Radcliffe*, for and during the term of her natural life, she maintaining, educating and bringing up my son *John Radcliffe*; and from and after the decease of my said wife, I give, devise and bequeath the real and personal estate unto my son *John Radcliffe*, if he shall be then living, upon his attaining the age of twenty-one years, to hold to him, his heirs, executors, administrators and assigns for ever. But in case my son *John Radcliffe* shall happen to die in the lifetime of my dear wife [which happened], or surviving her, shall die before he attains the age of twenty-one years, then, upon the decease of my wife, or of my son, in case he survives her and dies before he attains the said age, I direct, authorize and empower my executors (*Holloway* and *Jones*) to sell; and as to the money to arise from such sale or sales, after payment of all expenses attending the same, I give and bequeath one moiety or equal half part thereof *unto and equally amongst my legal personal representatives*, in such and the like manner as if the same had been to be paid under the Statute of Distribution; and as to the other moiety or equal half part

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part thereof, I give and bequeath the same unto and equally amongst the *legal personal representatives* of my said wife, to be paid in manner aforesaid."

The testator appointed the Plaintiff, *Holloway*, and others executors. The testator republished his will in 1835, and died in 1840.

John Radcliffe the son was the only next of kin of the testator at his death. He married in 1850, and died in 1852, in the life of his mother, who died in 1856. This gave rise to the first question, as to the construction of the gift to the "legal personal representatives."

Another question arose under the following additional circumstances. The property which passed by the first testator's will consisted of personal estate of the value of 1,000*l.*, and the following real estate:—1st, the *Egerton* Arms; 2nd, six cottages in *Egerton* Street; 3rd, a dwelling-house in *Brook* Street; and four other properties, which it is unnecessary to specify. By a settlement made in 1850, on the marriage of *John Radcliffe* the son, he conveyed the *Egerton* Arms, the six cottages, and the dwelling-house, specifically (subject to the life estate of the widow) to two trustees and their heirs, to the use of himself for life, with remainder to his wife for life, with remainder to his children as they should appoint, and in default to the children equally in tail.

John Radcliffe made his will in *April*, 1852, whereby, after reciting his marriage settlement, he devised the real estate comprised therein as therein mentioned. He died in the same year.

There was issue of the marriage one child only, who died

died two hours after its birth, without having been named.

The real estate had all been sold, and the fund in question consisted of 2,742*l.* 10*s.*, being a moiety of the aggregate amount of the sale of the real estate.

After the death of the widow of the first testator, which occurred in *January*, 1856, a special case was filed to determine the several questions and the rights of the parties to the fund.

Mr. *Follett* and Mr. *Amphlett*, for *Holloway*, the executor of the first testator, stated the case, and that the questions were, first, as to the meaning of the words "legal personal representatives," &c.; secondly, at what period that class was to be ascertained; and, thirdly, whether, by the effect of the subsequent dealing by the son, the purchase-money arising from the sale of the real estate passed as realty or personalty.

Mr. *Lindley*, for the representative of the widow of the first testator. The widow was entitled to one-half, or, at all events, one-third of the fund. By the words in question, the property passed to the persons entitled under the Statute of Distributions. In *Cotton* v. *Cotton* (*a*), under a bequest to the "legal representatives" of a person who was dead, it was held, that the next of kin, according to the Statute of Distribution, were entitled to the fund; and it appears from the decree (*b*), that the widow was not excluded, but was entitled to take as one of the persons pointed out by the Statute.

Secondly. The class is to be ascertained at the death of

(*a*) 2 *Beav.* 67. (*b*) 10 *Beav.* 365, n.

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of the original testator; *Cable* v. *Cable* (*a*); *Markham* v. *Ivatt* (*b*).

Thirdly. Generally, where there is a child, the widow takes one-third under the Statute, but here the gift is "*unto and equally amongst* my legal personal representatives." The Statute is referred to, by the testator, for the purpose of ascertaining the persons to take, and the will then determines their shares. They are to take "equally," and the widow is, therefore, entitled to one-half of the fund. To hold otherwise, would be to strike out the word "equally" from the will.

The MASTER *of the* ROLLS referred to *Long* v. *Watkinson* (*c*).

Mr. *R. Palmer* and Mr. *Osborne*, for devisees under the will of the son. First, the class is to be ascertained at the death of the testator. In this all the modern authorities concur. Secondly, the widow of the first testator is excluded. The whole scheme of the will is, in the event which has happened, to give one-half of the fund to the representatives of the son, and the other half to the representatives of the widow. It would be quite inconsistent to give three-fourths of the whole to the representatives of the widow. The word "equally" shews that a class of persons are to take the first moiety, who, under the Statute, would take equally as between them, and to introduce the widow into the class would necessarily be to create an inequality. The gift to the legal personal representatives, according to the Statute, must mean the next of kin, and a bequest by a husband to his next of kin does not include his widow; *Garrick* v. Lord

(*a*) 16 *Beav.* 507. (*b*) 20 *Beav.* 579.
(*c*) 17 *Beav.* 471.

v. Lord *Camden* (*a*), where there was a direction to divide the residue "amongst my next of kin, as if I had died intestate." The converse is equally true, when the gift is to the next of kin of the wife, there the husband is excluded; *Garrick* v. Lord *Camden* (*b*); *Bailey* v. *Wright* (*c*), where the ultimate limitation of the settlement was "for the next of kin or personal representatives" of the wife. *Robinson* v. *Smith* (*d*), where it was to the "personal representatives" of the wife. In *Kilner* v. *Leech* (*e*), the ultimate limitation in a marriage settlement of the husband's property was, for the husband, "next of kin or personal representatives," and a similar limitation as to the wife's property, and the claims of the husband's executors, and of his residuary legatee and widow, were rejected. They also cited on this point, *Saberton* v. *Skeels* (*f*); *Price* v. *Strange* (*g*), and *Daniel* v. *Dudley* (*h*).

Lastly, by the settlement of the son and by his will, it is clear that he elected to take the real estate in its character of realty and not as personalty. If the son had survived his mother, there would have been no conversion, and there is no reason why the opposite event should make any difference in the character of the property.

Mr. *Lloyd* and Mr. *Joliffe*, for the next of kin of the first testator living at the death of the tenant for life, cited *Bird* v. *Luckie* (*i*); *Pope* v. *Whitcombe* (*k*); *Say* v. *Creed* (*l*); *De Trafford* v. *Tempest* (*m*).

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(*a*) 14 *Ves.* 372.
(*b*) *Ibid.* 382.
(*c*) 18 *Ves.* 49.
(*d*) 6 *Sim.* 47.
(*e*) 10 *Beav.* 362.
(*f*) 1 *Russ. & Myl.* 587.
(*g*) 6 *Madd.* 159.
(*h*) 1 *Phillips*, 1.
(*i*) 8 *Hare*, 307.
(*k*) 3 *Mer.* 689.
(*l*) 5 *Hare*, 580.
(*m*) 21 *Beav.* 564.

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Mr. *Selwyn* and Mr. *Freeling*, on behalf of parties claiming under the will of the son, insisted that the property was of the quality of personal estate.

The MASTER *of the* ROLLS. I will consider this case.

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The questions which arise are, first, whether the persons who are to take under the designation "*my legal personal representatives*" are the persons who were next of kin of the testator at the time of his decease, or the persons who would have been his next of kin if he had died simultaneously with his wife. Secondly. If the next of kin take, then the question arises whether the widow is excluded by the expression used in the will, and if not, then whether she takes one-half or one-third of that moiety. Thirdly. Whether the share of the son in this moiety, if he take any, passes under his will as personal or as real estate. On the first point, these words must mean next of kin of the testator to be ascertained at his death, and not those who would have been his next of kin in case he had died simultaneously with his widow. The exclusion of any other meaning than next of kin according to the Statute is evident, from the reference to the statute for the purpose of ascertaining the persons who are to take beneficially, and none of those cases apply where a gift is made to the legal personal representatives of another, and it is held, that the legal personal representatives, in their strict legal acceptation (that is, executor or administrator), take, not beneficially, but in trust for others. In this case, the words "*legal personal representatives*" designate the persons

persons to take beneficially, and these persons are pointed out to be those to whom, under the Statute, the money would be paid. The words "*legal personal representatives*" are more flexible than the words "next of kin," and, as "legal personal representatives," in the strict signification of the term, do not take, these words are to be taken in conjunction with the rest of the will, in order to discover the persons intended, and consequently are not pointedly affected by the observations applicable to the words "next of kin" to be found in *Cable* v. *Cable* (*a*), and *Markham* v. *Ivatt* (*b*).

By referring to the Statute, to point out the persons who are to take, the testator has expressed that those are to take whom the Statute of Distribution designates, that is, certain persons who are living at the death of the person whose estate is to be distributed. *Primâ facie*, therefore, this is the meaning of the testator. There certainly might be words introduced which would specify some other time as the period at which the class was to be ascertained, but there are none here. The case would have been much varied if the words had run "in such and the like manner as if the same had been then, or at that time, to be paid under the Statute of Distribution," or even if the words "were then" had been substituted for the words "had been;" but it is simply "in such and the like manner as if the same had been to be paid under the Statute of Distribution," importing, as far as any time is thereby expressed, a past rather than a present ascertainment of the class. The words therefore designate the next of kin of the testator who survived him, according as the class is ascertained by the Statute of Distribution.

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(*a*) 16 *Beav.* 507. (*b*) 20 *Beav.* 579.

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On the second question, the next of kin of the testator, according to the Statute, who survived him were his son and his widow, and if the distribution be made according to the Statute, his son would take two-thirds and his widow one-third; but, on the part of the widow, it is contended, that she took half, and that the true reading is to refer to the Statute, to ascertain who are the persons to take under the description of "*legal personal representatives,*" and nothing more, and thereby give effect to the words "equally amongst." It will be seen that though the testator gave this moiety equally between the persons so ascertained, still the Statute of Distribution is referred to, not only for the purpose of pointing out who are the persons to take, but also for the purpose of pointing out the manner in which they are to take; that is, that the will directs that the persons pointed out by the Statute are to take this moiety "in the like manner" prescribed by the Statute. Upon this, if the matter rested here and there was nothing more in the will, this moiety would be divided into three parts, and one would go to the widow and the other two to the son.

But there still remains the argument, on the general scope and effect of the rest of the will, from which it is contended, that the effect is to exclude the widow from any participation in this moiety. This argument is founded on the fact of the testator having, by the early part of his will, provided for his widow and his son, and having then, on the death of the widow, if she survived him, divided the whole property into moieties, and having given one moiety to the relatives of the widow, and the other moiety to his own relatives. From this it is argued, that the moiety given to her relatives is the measure of his bounty as to what both she and they were to take; but in truth this argument would lead me

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to the exclusion of the son, as well as the widow, from any participation in the first moiety, and I have had to consider this argument in coming to the conclusion I have expressed, viz., that the next of kin of the testator, at the period of his death, are the persons described by the words of that bequest. Having come to that conclusion, which induces me to include the widow as one of the persons specified as legatees of that moiety, I cannot strike out her name, by reason that the other moiety is given to her legal personal representatives, to be ascertained in like manner by reference to the Statute.

The first moiety, therefore, passed in thirds; one-third to the widow of the testator, and two-thirds to the son, and the two-thirds passed by the son's will.

As the two-thirds which passed by his will to the son, it remains to consider, whether they passed as real or personal estate. The original testator directed the property to be converted into personalty. There is an absolute trust for sale before the division is to be made into moieties. By his will, therefore, in the event which has happened, the real estate was, on the death of the widow, converted into personalty. The question is, whether, as the will of the son devises it specifically, subject to the life estate of his mother, he ought to be treated as reconverting it into real estate, or as electing to hold and keep his share of it as real estate. The question, however, is settled by my decision, which limits the interest of the son, in the real estate, to two undivided third parts therein. The will of the son was framed in the anticipation that he should survive the widow, and he disposes of the whole, subject to her life estate therein. But the trust for conversion, on the death of the widow, was for the benefit of all the next of kin;

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kin; and unless they all concurred, in electing to take the property as land, the trust took effect. It would be repugnant to the principles on which the doctrine of conversion and reconversion rest, to hold that one of the legatees of an undivided share in the produce of real estate directed by the testator to be converted into personalty could, without the assent of the others, elect to take his share as unconverted, and in the shape of real estate.

The two-thirds of the son, therefore, passed as personal estate, and as such, in the hands of his executors, are subject to the trusts of his will.

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A young nobleman, on attaining twenty-one, for a small consideration, conveyed his reversion in real estates, and assigned policies which had been effected on his life in his name, for securing 20,000*l.*, with a proviso for redemption and reconveyance of the estates and policies on payment. After a delay of fourteen years the transaction was set aside, and in the meantime the policies had been sold under a power of sale. Held, that the mortgage must stand as a security for the moneys actually advanced, but not for the premiums which the mortgagee had paid for keeping up the policies.

In the same case, the bill specifically asked for the re-assignment of the policies, and the payment of the produce of those sold under the power of sale. The same relief was asked at the hearing, and was given by the decree. After the decree had been passed, the Plaintiffs, finding the account in respect of receipts and payments of the policies would be onerous to them, obtained a rehearing, and then asked that this part of the decree might be omitted. The Court held them entitled, and rectified the decree accordingly, and without costs.

WILLIAM LEONARD FELIX Lord *HUNTINGTOWER*, during his minority, had been engaged with a Colonel *Copland* and Mrs. *Edmonds* in a series of extensive bill transactions.

He attained twenty-one on the 2nd of *July*, 1841, at which time his acceptances to a considerable amount were in the hands of a Mr. *Dobson*, a diamond dealer in the City.

By

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By a mortgage, dated the 8th of *December*, 1841, and made between Lord *Huntingtower* of the first part, Colonel *Copland* and Mrs. *Edmonds* of the second part, and *Dobson* of the third part, after reciting (amongst other things) that Colonel *Copland* and Mrs. *Edmonds* were indebted to *Dobson* in 19,051*l.* 18*s.* 9*d.*, on an account stated, and had given *Dobson* divers bills for payment of such debt, on some of which Lord *Huntingtower* was liable, as acceptor, and reciting that Lord *Huntingtower* was justly indebted to Colonel *Copland* and Mrs. *Edmonds* in the like principal sum of 19,051*l.* 18*s.* 9*d.*, on an account stated, and that the three had applied to *Dobson* for a loan to Lord *Huntingtower* of 948*l.* 1*s.* 3*d.*, and had proposed and agreed to pay to *Dobson* the two sums, making together 20,000*l.*, the 19,051*l.* 18*s.* 9*d.* to be taken as a satisfaction of the debt to *Dobson*, and of the debt due from Lord *Huntingtower* to Colonel *Copland* and Mrs. *Edmonds;* and reciting a warrant of attorney given by the three for confessing a judgment for 40,000*l.*, IT WAS WITNESSED, that in consideration of 948*l.* 1*s.* 3*d.* paid to Lord *Huntingtower*, he conveyed to *Dobson* certain real estates, to which he was entitled (subject to the life estate of his father, the Earl *Dysart*), to hold for ninety years, if Lord *Huntingtower* should so long live. And Lord *Huntingtower*, Colonel *Copland* and Mrs. *Edmonds* assigned to *Dobson* eight policies of assurance on the life of Lord *Huntingtower*, one of which for 4,000*l.* had been granted and made payable to Colonel *Copland*, a second, for 5,000*l.* had been granted and made payable to Mrs. *Edmonds*, and the remaining six for 11,000*l.* in the aggregate, and dated in *November*, 1841, had been granted to and made payable to Lord *Huntingtower*. The deed contained a proviso for the redemption and re-conveyance and re-assignment of all the aforesaid premises, on payment by Lord *Huntingtower* to *Dobson* of 20,000*l.* on

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on the 30th of *May*, 1842. Lord *Huntingtower*, Colonel *Copland* and Mrs. *Edmonds* covenanted to pay the 20,000*l.* and the premiums, and, in default, a power was given to *Dobson* to keep them up, and also to sell the property mortgaged and the policies.

Lord *Huntingtower*, having embarked in the trade of horse dealer and coach proprietor, was made bankrupt on the 2nd of *September*, 1842, and the Plaintiffs were his assignees. Colonel *Copland* and Mrs. *Edmonds* were made bankrupts in the same year. *Dobson* died in *April*, 1850.

In 1853, the assignees of Lord *Huntingtower*, after twelve years' delay, instituted this suit, against the executor of *Dobson*, and the assignees of *Copland* and *Edmonds*, impeaching the mortgage of 1841 on the ground of fraud and inadequacy of consideration. The bill prayed, first, that the mortgage might be declared fraudulent and void, and delivered up to be cancelled. Secondly, that the several policies which had been assigned by Lord *Huntingtower* might be delivered up to the Plaintiffs; and by amendment it prayed for payment, to the Plaintiffs, of the purchase-money of such of them as had been sold. Thirdly, or otherwise that it might be declared, that the indenture of 1841 ought to stand as a security only for the sum of 948*l.* 1*s.* 3*d.*

It appeared that the first two policies for 9,000*l.* had dropped, and that the other six policies had been sold under a power in the mortgage deed, and had produced 700*l.*

The cause came on for hearing on the 27th and 28th of *June*, 1855.

Mr. *Roupell* and Mr. *G. S. Law* for the Plaintiff.

Mr.

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Mr. *R. Palmer* and Mr. *G. L. Russell* for the executor of *Dobson.*

Mr. *Follett* for other parties.

The MASTER *of the* ROLLS was of opinion that the transaction could not stand, and he ordered the security to be set aside, on payment of what had been received by Lord *Huntingtower*, with interest. But he gave no costs, in consequence of the laches of the Plaintiffs in not instituting the suit until after *Dobson's* death.

After the Court had delivered judgment, the following conversation took place :—

Mr. *Law.* It appears that there are certain policies of insurance. Will your Honor direct an account as to those ?

The MASTER *of the* ROLLS. Yes. Who paid the premiums ?

Mr. *Roupell.* Mr. *Dobson.* He must have credit for the amount of those premiums, and there will be a decree for payment of the balance.

The MASTER *of the* ROLLS. Yes.

In consequence of this, a direction to take the following accounts has been inserted in the decree :—An account of the premiums paid by *Dobson*, or by his executor since his death, in respect of the policies of insurance mentioned in the mortgage deed, with interest at five per cent.

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2. An account of the monies received by *Thomas Dobson* or his executor in respect of the said policies, with interest. And in case it shall appear that the payments of *Dobson* and his executor, and interest, exceeded their receipts and interest, then, upon payment by the Plaintiffs to *Dobson's* executor of the balance, and of 948*l.* 1*s.* 3*d.*, and interest, let *Millar* deliver up the indenture to the Plaintiff to be cancelled. But in case the receipts of *Dobson* and his executor in respect of the policies and the interest exceeded the amount paid, then the amount was to be deducted from the 948*l.*, and on payment by the Plaintiffs of the balance, the mortgage deed was to be delivered up to be cancelled, and satisfaction entered on the judgment.

The Plaintiffs discovering that, in respect of the premiums on the policies, a very considerable sum would be found due from them (about 2,000*l.* and interest), moved, on the 22nd of *December*, 1855, to omit from the decree all account respecting the policies. The motion was refused with costs, and the decree was passed and entered on the 9th of *May*, 1856, in its present form.

The Plaintiffs thereupon obtained an order to rehear the cause, which now came on.

Mr. *Follett* and Mr. *G. S. Law* for the Plaintiffs. The accounts directed respecting the premiums on the policies ought to be altogether omitted from the decree. We do not dispute that the premiums would have to be paid by the Plaintiffs if the policies were restored to them, but they do not now exist and cannot be reassigned. The Plaintiffs, at the first hearing, were entitled to an inquiry as to what had become of them, and when the circumstances had been ascertained, then, by analogy

analogy to the cases of breaches of trust, they might either have adopted or repudiated the policies.

The Court has set aside the transaction on the ground of a gross fraud having been practised on Lord *Huntingtower;* every part of it is therefore tainted and void, including that part which provided for effecting and keeping up policies to an enormous amount, while the whole debt was no more than 948*l.* It was a fraud to effect the 11,000*l.* policies, and being effected in the mortgagee's name, he had no sufficient insurable interest in the life to render them valid.

Where annuities are set aside under the Annuity Acts, the premiums paid by the grantees on the policies are never allowed; *Ex parte Shaw* (*a*); and though sometimes allowed on setting aside sales of reversions, *Gwynne* v. *Heaton* (*b*), still there is no case of such an allowance being sanctioned where the policies cannot be restored to the Plaintiff.

Mr. *R. Palmer* and Mr. *G. L. Russell* for the Defendant. This is an attempt to obtain, by rehearing, that which was refused with costs on the motion in *December,* 1855. Upon the pleadings, the Plaintiffs are not entitled to what they now ask. They might have made a case by the bill for getting rid both of all benefit of and liability on the policies; they have, however, done the reverse; the bill expressly claims them as belonging originally to the Bankrupt, and as being within his order and disposition at the time of his bankruptcy, and the prayer of the bill specifically asks for their delivery. The answer stated the sale, the Plaintiffs afterwards amended their bill, and, by amendment, asked for

(*a*) 5 *Vesey,* 620. (*b*) 1 *Bro. C. C.* 10, 11.

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for payment to them of the produce of the sale of the policies. They cannot, therefore, now make out a case directly opposed to that raised by their pleadings.

2. When sales are set aside, the deeds stand as a security for all that has been *bonâ fide* paid while they were allowed to remain unimpeached. The relief granted, in such cases, is on the principle of repayment of what is "fair and reasonable," and in *Hoffman* v. *Cooke* (*a*), it was considered, even in a transaction where there was no contract to that effect, that it was right to include, under those terms, premiums for insuring the grantor's life. The cases of setting aside annuities for a defect in the memorial, such as *Ex parte Shaw* (*b*), have no application to this case, for in those cases there was no contract to insure, as in the present, and where purchases have been set aside, the sums paid for insurance have always been allowed, *Gwynne* v. *Heaton* (*c*); *Heathcote* v. *Paignon* (*d*). This appears from the terms of the decree (*e*) of Sir *L. Kenyon*, M. R., and which was affirmed by Lord *Thurlow*. Here 11,000*l.* of the policies were in the name of Lord *Huntingtower*, and by the proviso for redemption, the mortgagee was bound to restore them. The present impossibility of reassigning them does not alter the case, for two were allowed to drop by the neglect of Lord *Huntingtower* to keep them on foot, pursuant to his covenant, and the remaining six were sold, under an express power of sale contained in the mortgage deed.

3. The Plaintiffs have, by their laches, disentitled themselves to what they now ask. They have allowed payments

(*a*) 5 *Vesey*, 622.
(*b*) *Ibid.* 620.
(*c*) 1 *Bro. C. C.* 10, 11.
(*d*) 2 *Bro. C. C.* 166.
(*e*) *Ibid.* 171.

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payments to be made on the faith of the deed, and without challenging its validity; they have taken the chance of the death of Lord *Huntingtower* in the meanwhile, by which, upon the transaction being afterwards annulled, they would have recovered 20,000*l.* after paying the premiums.

Lastly, it is not the proper office of a rehearing to enable Plaintiffs to withdraw from an option and election, exercised at the first hearing, of adopting a transaction and to enable them to repudiate it merely because it turns out disadvantageous (*a*).

Mr. *Follett* in reply. The whole transaction was a fraud from the beginning, and therefore no part of it can stand.

The MASTER *of the* ROLLS. I think I must look to the merits of the case, and I will take time to consider it.

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The MASTER *of the* ROLLS.

This is a petition of rehearing, presented for the purpose of obtaining from the Court a direction to omit from the decree what was pronounced by me on the hearing of this cause in *June*, 1855; the direction to take the accounts of the premiums paid upon certain policies of assurance effected by Mr. *Dobson*, deceased, on the life of Lord *Huntingtower*.

The suit was one instituted by the assignees in bankruptcy of Lord *Huntingtower*, to set aside a security entered

(*a*) See *Davenport* v. *Stafford*, 8 *Beav.* 503.

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entered into by him on the 8th of *December*, 1841. At the hearing of the cause, I considered it a very gross case, in which, for a sum of 941*l.*, less the costs of the transaction, a young man, within five months after he attained his age of twenty-one years, executed securities for a sum of 20,000*l.* with 5*l.* per cent. interest, and charged it upon the reversion of his estates expectant on the death of his father; besides which he covenanted to pay the premiums upon the policies of insurance to that amount. At the hearing of the cause, I ordered the security to be set aside, on payment of what had been received by Lord *Huntingtower*, with 5*l.* per cent. interest from the date of the transaction. I gave no costs, owing to the great delay of the assignees in not instituting the suit until after the decease of Mr. *Dobson*, but I had no hesitation as to the nature of the transaction, and if it had been recent, I should have made the costs follow the event.

After I had pronounced my opinion, it appears from the short-hand writer's notes, that the following conversation took place:—

[*His Honor here stated it and the terms of the decree, see antè*, p. 175.]

The Plaintiffs finding, as might have been expected, that this account might turn out very prejudicial to them, and subject them to a considerable payment, now seek to have it omitted. The Defendant, the representative of Mr. *Dobson*, objects, and insists that if it had not been asked for by the Plaintiffs, he would have been entitled to insist upon its being introduced into the decree.

After considering this point, I am of opinion, that this direction

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direction is erroneously introduced into the decree, and that the Plaintiffs are entitled to have it omitted. The keeping of the policies on foot and the payment of the premiums thereon was an affair in which, if my judgment was right, Mr. *Dobson* was alone interested, and in which Lord *Huntingtower*, or the Plaintiffs who represent him, had and have no concern. My judgment is, or rather was, that the whole transaction, by reason of the circumstances, was void, that the deed ought to be given up to Lord *Huntingtower* or his assignees to be cancelled, and the money advanced to him, with interest thereon, repaid to Mr. *Dobson*. If Lord *Huntingtower* had paid the premiums on the policies, he would have been entitled to the policies themselves, or to the moneys produced by the sale of them. But when Mr. *Dobson* paid the premiums, he paid them in the same manner as he might have done if he had, for his own pleasure, effected an insurance on the life of Lord *Huntingtower*, which (subject to any question between himself and the insurance office as to his insurable interest in the life of the insured) he might have done as he pleased, without the intervention of Lord *Huntingtower*. Mr. *Dobson* was not bound to keep up any policies or pay any premiums; and Lord *Huntingtower* and his assignees, in respect thereof, have no claim on him on the one hand, and on the other, have incurred no liability. The only obligation which could fall on Lord *Huntingtower* to keep up the policies and to pay the premiums must arise out of the contract, but I have stated that, in my opinion and according to my judgment, the contract is null and void; no obligation therefore could spring from it as between these parties.

So also, the only right that Lord *Huntingtower* or his assignees could have against Mr. *Dobson*, to make him account for the profits, if any, made by him of the policies

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policies effected on the life of Lord *Huntingtower*, must rest on the footing that the rights of the parties are to be regulated, in some manner, by the terms of the indenture; but I have held, that the indenture is void, that it ought to be cancelled, and that both parties are to be restored, as far as possible, to their former position.

If I am right, Lord *Huntingtower* was under no obligation to pay these premiums. If he had paid them, he could not have compelled Mr. *Dobson* to repay them to him. Mr. *Dobson* could not have enforced that covenant, by which Lord *Huntingtower* engaged to pay them, without being restrained by the injunction of this Court from so doing. I repeat, if Lord *Huntingtower* had paid the premiums, he would have been entitled to the policies, but not on the footing of contract, or of any covenant contained in the indenture, but upon this ground:—that as he had paid the price of the policies, that is, the premiums upon it, he was entitled to the benefit of it. So Mr. *Dobson* having paid the premiums, he is entitled to the policies and to the advantages to be derived therefrom.

I admit that some question might arise, if the premiums had been paid partly by the one and partly by the other, and if, assuming the policies to be of value, and a lien for the amount of the premiums paid by him were claimed by one on the policies in the hands of the other. But that question would not arise out of any rights or obligations flowing from the indenture or the contract on which it was founded, but on considerations wholly apart from and foreign to such indenture. Here the legal personal representative of Mr. *Dobson*, or Mr. *Dobson* himself, who paid Lord *Huntingtower* 941*l.*, is entitled to have that sum repaid with interest, on the condition

condition of surrendering up the deed and as the consequence of setting aside the transaction, but the payment of the premiums is Mr. *Dobson's* own act, of which he is entitled to all the benefit and is liable to no one in respect thereof.

The cases cited do not, in my opinion, controvert or affect this view of the subject; but, upon the whole, rather strengthen and confirm it. The cases principally relied upon before me were *Gwynne* v. *Heaton* (*a*), and *Heathcote* v. *Paignon* (*b*). They all lay down that when the transaction is set aside, it is upon the terms of repaying or of allowing the transaction to stand as a security for the amount of the money really advanced to the person who gave the security. But none of them decide that they must also pay to the person obtaining the security any money which he has laid out, with a view of securing to himself the great profits he hoped to realize, and which the person granting the security could only be required to pay upon the footing of the contract, which the Court has declared to be invalid.

I am of opinion that I must correct the decree in this respect, by omitting the direction complained of, but that it must be done without costs on either side. The necessity for coming here was occasioned, in the first instance, by the Plaintiff asking for this direction in the decree, and next by the Defendant insisting upon retaining it.

(*a*) 1 *Bro. C. C.* 1. (*b*) 2 *Bro. C. C.* 167.

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GUMMOE *v.* HOWES.

The words "heirs of the body" used in a will, held, by construction, to mean "children."

Devise to trustees, in trust to pay the yearly produce to *A.* and *B.* in equal shares, for life, with survivorship, in case of the death of either "without issue." But if either should die "leaving issue," then her part to be paid to her "children" equally. And after the death of both *A.* and *B.*, to convey "to the heirs of the body" of *A.* and *B.*, share and share alike, or to the survivors, and if but one, then to such "only child." There was a gift over if *A* and *B.* should die "without issue." Held, that *A.* and *B.* took life estates only, with remainder to their children, as purchasers.

THE testator devised and bequeathed his freehold, copyhold, leasehold and personal estate to two trustees, as to the residue thereof, after reserving a sufficient fund for the payment of the several legacies and annuities thereinbefore given, upon trust, which he expressed thus:—"Upon trust to pay the yearly produce thereof to *Sarah Board* and to my granddaughter *Sarah Nuttall*, in equal shares and proportions, share and share alike, for and during the term of their natural lives, payable half-yearly; but in case of the death of either of them *without issue*, the part or share of her so dying shall go and be paid to the survivor of them. But if either of them shall depart this life leaving *issue*, then the part or share of her so dying shall go and be paid to her *children*, in equal proportions, if more than one, and if but one, then to such only *child*. And after the death of both of them the said *Sarah Board* and *Sarah Nuttall*, it is my will and desire, and I do hereby order and direct my said trustees to convey, assign, transfer or pay all the rest and residue of my estate or estates, principal and interest, to the *heirs of the body* of the said *Sarah Board* and *Ann Nuttall*, lawfully begotten, share and share alike, or to the survivor or survivors of them, if more than one, and if but one, then to such only *child*, when and as often as he, she or they shall attain his, her or their respective age or ages of twenty-one years. And my will and meaning further is, that in case the said *Sarah Board* and *Sarah Nuttall* shall depart

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part this life *without issue*, that my said trustees shall convey, assign, transfer and pay the same and every part thereof unto my brother *John Finney* (if he shall be then living), if not, to be equally divided amongst his children and grandchildren, share and share alike, and to be conveyed, assigned, transferred or paid to them accordingly, as he, she or they shall attain his, her or their respective age or ages of twenty-one years."

The testator died in 1790.

Sarah Board married Mr. *Howes* in 1790, and died in 1828, leaving five daughters.

Sarah Nuttall married Mr. *Gummoe* in 1811, and she died in 1853, leaving four children, viz., the Plaintiff *John Gummoe* and three daughters.

In 1790, a suit of *Nuttall* v. *Clarke* had been instituted for the administration of the estate of the testator, in which the residuary personal estate had been ascertained; and in 1835, after the death of Mrs. *Howes*, it was declared, that, on her death, her children became entitled to a moiety of the fund in Court, which was ordered to be paid to them. A similar declaration and order had been made after the death of Mrs. *Gummoe*.

This was a supplemental suit, instituted for the purpose of having the rights and interests of all persons entitled under the will in the residuary freehold, copyhold and leasehold estates declared.

Mr. *Follett* and Mr. *Southgate*, for the Plaintiff, argued that the parents took estates tail, and that the prior decision, as to the personal estate, did not affect the

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the rights to the real estates:—They cited *Shelley's* Case (*a*); 2 *Jarman* on Wills (*b*); *Forth* v. *Chapman* (*c*); *Ex parte Wynch* (*d*); *Toller* v. *Attwood* (*e*); *Egerton* v. *Brownlow* (*f*); *Doe* d. *Bosnall* v. *Harvey* (*g*); *Jesson* v. *Wright* (*h*); *Doe* d. *Atkinson* v. *Featherstone* (*i*); *Haddelsey* v. *Adams* (*k*); *Jackson* v. *Noble* (*l*); *Meure* v. *Meure* (*m*); *Trevor* v. *Trevor* (*n*); *Fetherston's* v. *Fetherston* (*o*); *Lowe* v. *Davies* (*p*); *Lisle* v. *Grey* (*q*).

Mr. *R. Palmer* and Mr. *Money*, for the daughters of Mrs. *Gummoe*, argued that the words "heirs of the body" were used in the signification of "children," and that, therefore, the parents took for life, with remainder to their children, as purchasers:—They cited *Ridgeway* v. *Munkettrick* (*r*); *Edwards* v. *Edwards* (*s*); *Doe* d. *Player* v. *Nicholls* (*t*); *Milroy* v. *Milroy* (*u*); *Doe* d. *Gallini* v. *Gallini* (*x*); The Earl of *Oxford* v. *Churchill* (*y*); *Goodright* v. *Pullyn* (*z*); *North* v. *Martin* (*aa*); *Goodtitle* d. *Sweet* v. *Herring* (*bb*).

Mr. *Prendergast*, for the surviving children of Mrs. *Gummoe*, insisted, in addition, that the survivorship had reference to the death of the survivor of the parents, the tenants for life:—*Cripps* v. *Wolcott* (*cc*); *M'Donald* v. *Bryce* (*dd*); *Doe* d. *Comberbach* v. *Perryn* (*ee*); *Brett* v. *Horton*

(*a*) 1 *Rep.* 93.
(*b*) 2nd edit p. 299.
(*c*) 1 *P. Wms.* 663.
(*d*) 5 *De G., M. & G.* 188.
(*e*) 15 *Q. B. Rep.* 929.
(*f*) 4 *H. of L. Cas.* 1.
(*g*) 4 *Barn. & Cr.* 610.
(*h*) 2 *Bli.* 1.
(*i*) 1 *Barn. & Ad.* 944.
(*k*) 22 *Beav.* 266.
(*l*) 2 *Keen*, 590.
(*m*) 2 *Atk.* 290.
(*n*) 1 *H. of L. Cas.* 239.
(*o*) 3 *Cl. & Fin.* 67.
(*p*) 2 *Ld. Raym.* 1561.
(*q*) *Sir T. Raym.* 278.
(*r*) 1 *Dru. & W.* 84.
(*s*) 12 *Beav.* 97.
(*t*) 1 *Barn. & Cr.* 336.
(*u*) 14 *Sim.* 48.
(*x*) 5 *Barn. & Ad.* 621, and 3 *Ad. & E.* 340.
(*y*) 3 *Ves. & B.* 67.
(*z*) 2 *Ld. Raym.* 1437.
(*aa*) 6 *Sim.* 266.
(*bb*) 1 *East*, 264.
(*cc*) 4 *Madd.* 11.
(*dd*) 16 *Beav.* 581.
(*ee*) 3 *Term R.* 484.

v. *Horton* (*a*); *Woodhouse* v. *Herrick* (*b*); *Tribe* v. *Newland* (*c*).

Mr. *Wolstenholme*, for *John Smith*, the husband of *Harriett Howes*, who had survived her mother, but had died in 1849, in the life of Mrs. *Gummoe*:—*Goodright* d. *Docking* v. *Dunham* (*d*).

Mr. *Follett*, in reply.

The MASTER *of the* ROLLS.

This is a question of construction, arising upon the residuary clause in the will of *Thomas Finney*, who died in *March*, 1790, which is in these words:—"And as to the rest" and residue of my estate and effects, &c. &c. [See *ante*, p. 184.]

The first question is, what estate did *Sarah Nuttall* take. Did she take an estate tail or an estate for life in the real estate? This is a case of some difficulty, and it cannot be denied that it is not easy to reconcile all the decided cases, not even those subsequent to *Jesson* v. *Wright* (*e*). The rule may be stated without much difficulty, but the application of it to all cases presents considerable obscurity, when an attempt is made to reconcile all the decisions. The rule may be stated to be to this effect:—that in wills the words "heirs of the body" are words of limitation, and that they are never to be used as words of purchase, unless they are controlled by clear and express words, shewing that the testator used these words as synonymous with "children"

(*a*) 4 *Beav.* 239.
(*b*) 1 *K. & J.* 352.
(*c*) 5 *De G. & Sm.* 236.
(*d*) 1 *Douglas*, 264.
(*e*) 2 *Bli.* (*O. S.*) 1.

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dren" or some other class. Therefore, in all the cases where the words "heirs of the body" are used, the devisee takes an estate tail, unless the intent of the testator is so clearly expressed to the contrary, that no one can misunderstand it. Thus, for instance, where a testator devised an estate to one and *the heirs of his body*, and went on to explain those words, by saying, that is to say, to his first and other sons successively, and the heirs of the body of such first and other sons, which is the case of *Lowe* v. *Davies* (*a*), there the testator expressly states, that by the words "heirs of his body" he means "sons." There is no rule of law which forbids a testator from employing the words "heirs of his body" in the sense of "children," if he pleases so to do, provided he makes his meaning plain; but it is also equally clear, that in order to arrive at this result, the words of explanation used by the testator must be distinct and susceptible of no other meaning, and that if they be ambiguous, they will not control the effect of the words "heirs of the body." This was *Jesson* v. *Wright* (*b*), which established, that where the "heirs of the body" are really intended to take, the superadded words of modification inconsistent with an estate tail are to be rejected.

In *Jesson* v. *Wright* (*b*) the words were, "to one for life, and after his decease, *to the heirs of his body*, in such shares and proportions as he should, by deed or will, appoint, and in default to the heirs of his body, share and share alike, as tenants in common; and if but one child, the whole to such only child; and in default of such issue, over to other devisees." On this devise, both

(*a*) 2 *Raym.* 1561, and 2 *Strange*, 849; *Fitz.* 112.
(*b*) 2 *Bli.* (*O. S.*) 1.

both Lord *Eldon* and Lord *Redesdale* came to the conclusion, that the testator used the words "heirs of the body" in their ordinary legal acceptation, and that having done so, the superadded words, qualifying the estate, ought to be rejected.

The question, in this case, appears to me to be this:— The whole will must be examined to ascertain whether the testator has used the words "heirs of the body" in their ordinary legal acceptation; if he has, the devisee takes an estate tail, and all subsequent words controlling that estate will be rejected. But if he has used the words "heirs of the body" as synonymous with "children," then the Court will give effect to his intention. *Jesson* v. *Wright* (*a*), The *King* v. *Harvey* (*b*), and *Featherstone* v. *Hunt* (*c*) establish, that such an intention is not to be inferred from giving the devisee a power to appoint amongst the "heirs of the body;" nor from a declaration that if there be but one child, such child shall take; nor from the interposition of a limitation to trustees to preserve contingent remainders; nor from a direction that female as well as male heirs shall take; nor from a direction that they shall take as tenants in common; nor from a direction that the land shall be equally divided between them. But, on the other hand, the cases of *Lowe* v. *Davies* (*d*), *Lisle* v. *Gray* (*e*), and *North* v. *Martin* (*f*) establish, that where the testator uses words interpreting the words "heirs of the body" to mean "children," such interpretation shall have its effect given to it.

The only question here is, has the testator so interpreted the words "heirs of the body," and I think that he

(*a*) 2 *Bli.* (*O. S.*) 1.
(*b*) 2 *Barn. & Cr.* 257.
(*c*) 1 *Barn. & Ad.* 113.
(*d*) 2 *Ld. Raym.* 1561.
(*e*) *Sir T. Raym.* 278.
(*f*) 6 *Sim.* 266.

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he has. The words on which I found my opinion are these:—"I order my trustees," he says, "to convey the residue of my estate to the 'heirs of the body' of *Sarah Nuttall* lawfully begotten, share and share alike, or to the survivor or survivors of them, if more than one." If the devise had stopped there, I should not have doubted that *Sarah Nuttall* took an estate tail. There is nothing to give a different meaning to or impose another interpretation upon the words "heirs of the body" than their primary legal acceptation. But the will goes on thus:—"and if but one" (One what? Clearly, one heir of the body of *Sarah Nuttall*), "then to such only child;" interpreting, therefore, the words "one heir of the body" to mean "one only child." If the words "heir of the body," in the singular in this case means a child, then, I think, the same meaning is attached to them when used in the plural. *North* v. *Martin* (*a*) was very near this case. There, lands were conveyed to the use of the husband for life, with remainder to wife for life, and after the death of the survivor, to the use of the heirs of the body of the husband on the body of the wife to be begotten, and their heirs, and, if more children than one, equally to be divided between them, as tenants in common, and in default of such issue to go over to other persons. The Vice-Chancellor, Sir *Lancelot Shadwell*, held, that this was an interpretation of the words "heirs of the body," which made it synonymous with "children."

In *Jesson* v. *Wright* (*b*) the word "child" occurs, but not as synonymous with or as interpreting the word "heir." The words are, "to the heirs of the body lawfully issuing, share and share alike as tenants in common, and if but one child, the whole to such only child." If

(*a*) 6 *Sim.* 266. (*b*) 2 *Bli.* (*O. S.*) 1.

If the words had been, "but one heir, the whole to such only child," then it would have governed the present case; but upon the best judgment I can form upon the case before me, feeling the value of the decision in *Jesson* v. *Wright*, and considering myself bound by it, in every respect, as indeed I have always done, this devise appears to me, from the words used, to be a case where the testator has interpreted the words "heirs of the body" to mean "children," and I must follow that meaning.

The words "in case *Sarah Nuttall* shall depart this life without issue," do not appear to me to present any considerable difficulty, because, in my opinion, I must hold the word "issue" here to have the same signification as it has in the prior part of the clause, where it is clearly confined to "children," for the words are, "in case of the death of either without issue, the share of her so dying shall go to the survivor; but if either of them shall depart this life leaving issue, then the part of her so dying shall go to her children, in equal proportions, if more than one, and if but one, then to such only child." I think, therefore, that I must treat this as a case, where the gift over in case *Sarah Nuttall* shall die "without issue" occurs in a will, where there is a previous general devise to the children of *Sarah Nuttall* in fee, and that consequently, according to the rule applicable to such cases, the words "without issue" must be treated as referring to that class.

I have considered this question without reference to what has already been done in the case; but though I cannot find that these points have been previously argued in or determined by the Court, or that there has been any express judicial decision on the point, still the orders which have been pronounced, and the decision

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decision which has taken place as to the funds, would scarcely be consistent with holding that the words "heirs of the body" are to be treated as words of limitation, and not as synonymous with children. This is more peculiarly so as regards the leaseholds, for though it be true, that *Forth* v. *Chapman* (*a*) decides, that the words "in default of issue" may bear a different interpretation when applied to real to what they bear when applied to personal estate, the same distinction has not prevailed with respect to the words "heirs of the body," which would certainly give an absolute interest in personalty in all cases where they would give an estate tail in realty.

I do not say the case is free from difficulty, but upon the best consideration I have been able to give to it, I think that the testator has expressed his meaning to be, that the words "heirs of the body" are synonymous with children, and accordingly such is my decision. The parents took estates for life only.

Mr. *Wolstenholme* having asked for the Court's judgment as to the share of *Harriett Howes*,

The MASTER *of the* ROLLS added, that she, having survived her parent, was entitled, although she had afterwards died in the life of Mrs. *Gummoe*.

(*a*) 1 *P. Wms.* 663.

In re HEATH'S SETTLEMENT.

June 11, 12.

By a marriage settlement, a fund was settled, after the death of the survivor of the husband and wife, in trust for the "children then living," to be paid at twenty-one, and in case the parents should die "without leaving any lawful issue," then as the husband should appoint, and in default, "in case there should be no child or children as aforesaid," over. Children attained twenty-one, but they all died in the life of their parents, leaving issue, who survived the parents. Held, that the gift over took effect.

IN 1795, by the settlement made on the marriage of *Charles Heath* with *Sophia* his wife, a sum of 400*l.*, which belonged to the latter, was settled on *Charles Heath* for life, and afterwards on *Sophia Heath* for life, "and from and immediately after the death of the survivor of them, the said *Charles Heath* and *Sophia Newman*, in case there should be any child or children of their bodies begotten *then living*, then upon the further trust, that the trustees should pay and apply the said principal sum of 400*l.*, and all interest and produce thereof, equally amongst such children, if more than one, share and share alike, and if but one, such child to have the whole, and to be paid to him, her or them at his, her or their respective age or ages of twenty-one years; and in case *Charles Heath* and *Sophia* his wife should both happen to die *without leaving any lawful issue*, then the same to go to such persons" as *Charles Heath* should by will appoint; and for want of such appointment, "in case there should be no child or children as aforesaid, then the same should be assigned to and for the only use and benefit of such person or persons as would have been legally entitled to the same, in case the said *Charles Heath* and *Sophia* his wife had not intermarried."

There were three children of the marriage, viz., *Ann*, who died in 1798 an infant, and *William* and *Maria*, who both attained twenty-one. *Maria* died in 1833, leaving issue one child who was living; *William* died in 1854 without issue. *Charles Heath* died in 1835,

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without having exercised his power, and *Sophia Heath* died in 1855.

The Petitioner *John Peter Larrode*, the legal personal representative of *Sophia Heath*, presented this petition to have the rights of the parties to the fund, which had been paid into Court under the Trustee Relief Act, declared.

Mr. *Cole* for the Petitioner.

Mr. *R. Palmer* for the next of kin.

Mr. *Dart*, for the trustees of the original settlement, the executor of the will of *William Heath*, and the trustees of the marriage settlement of *Maria*. The two children attained vested interests at twenty-one. It is to be remembered, that this case arises on a marriage settlement, and not on a will; and to exclude the children, who attain twenty-one but predecease their parents, the intention must be clearly expressed, the presumption being in favor of a vesting in a child, for whose benefit the marriage settlement is naturally made. *Hourgrave* v. *Cartier* (*a*); *Perfect* v. Lord *Curzon* (*b*); *Torres* v. *Franco* (*c*); *Bailie* v. *Jackson* (*d*). The gift over is on a death "without leaving any lawful issue," and this event did not happen.

Mr. *Cole* in reply.

The MASTER *of the* ROLLS.

The only question is, whether the words "lawful issue" are to be restricted to "children," as in *Sibley* v. *Perry*

(*a*) 3 *Ves. & B.* 79.
(*b*) 5 *Mad.* 442.
(*c*) 1 *Russ. & Myl.* 649.
(*d*) 1 *Smale & G.* 175.

v. *Perry* (*a*). If so, I think the fund will go to the legal personal representative of the wife. I will dispose of the case to-morrow.

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In re HEATH'S SETTLEMENT.

June 12.

The MASTER *of the* ROLLS held, that the Petitioner, as legal personal representative of *Sophia Heath*, was entitled to the fund, and he directed payment of it to him accordingly (*b*).

(*a*) 7 *Ves.* 522. (*b*) *Reg. Lib.* 1855 *A. fol.* 1447.

KELL *v.* CHARMER.

July 26.

A testator bequeathed to his son "the sum of *i. x. x.*" Held, that extrinsic evidence was admissible to explain the meaning of these letters.

THE testator, *John George Fearn*, by his will, expressed himself as follows:—"I give and bequeath to my som *William* the sum of *i. x. x.* To my son *Robert Charles* the sum of *o. x. x.*" &c.

The letters *i. x. x.* and *o. x. x.* were written in pencil in the original will, but were included in the probate.

The testator, in his lifetime, had carried on the business of a jeweller, and, in the course of his business, used certain private marks or symbols to denote prices or sums of money, and, according to such system, the letters *i. x. x.* and *o. x. x.* represented the sums of 100*l.* and 200*l.* respectively.

The point was, whether extrinsic evidence was admissible to show the meaning of the letters *i. x. x.* and *o. x. x.*

Mr. *Lloyd* and Mr. *Baggallay* for the Plaintiff.

Mr. *Palmer* and Mr. *Shapter* for the Defendants.

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Goblet v. *Beechey*(*a*); *Clayton* v. *Nugent*(*b*); *East* v. *Twyford*(*c*); and see *Shore* v. *Wilson*(*d*).

The MASTER *of the* ROLLS held, that extrinsic evidence was admissible.

(*a*) 3 *Sim.* 24; 2 *Russ. & Myl.* 624; and stated in *Wigram* on Discovery, 2nd ed. App. p. 185.
(*b*) 13 *Mee. & W.* 200.
(*c*) 9 *Hare*, 713, and 4 *H. of L. Cas.* 517.
(*d*) 9 *Cl. & Fin.* 355, 555.

TURNER *v.* WHITTAKER.

July 2.

Bequest to *A.* and *B.* equally, but the principal to be divided equally amongst their children, "at the death of *A.* and *B.*" Held, on the death of *A.* in the life of *B.*, that a moiety of the fund became immediately distributable amongst the children of *A.*

THE testator bequeathed an annuity of 50*l.* a year to his widow, for her life. He also bequeathed an annuity of 50*l.* to his granddaughter, *Ann Vousden*, for life, and if, at her death, she should leave children living, then the principal of her annuity was to be divided equally amongst them. The testator desired his executors to place in the funds sufficient stock to secure the annuities. He afterwards proceeded as follows:—"At the death of my beloved wife *Elizabeth Turner*, I desire that the annuity held by her shall be equally divided between my sons *Edward* and *Alfred*, but not the principal, that *I bequeath to their children, to be divided equally among them at the death of my sons Edward and Alfred Turner*. So also, should my granddaughter *Ann Vousden* die childless, then that her annuity shall be equally divided between my sons *Edward* and *Alfred*, but the principal, that I bequeath to the children of my sons who may survive them, to be equally divided among them."

The testator died, and his widow, who survived, died in *October*, 1848. *Alfred Turner*, the son, died in *July*, 1855, leaving four children, the Plaintiffs, and *Edward Turner* was still living, and had six children.

The

The question was, whether a moiety of the fund was now divisible, or whether it became divisible on the death of *Edward*, and whether the children of *Edward* and *Alfred* took *per capita* or *per stirpes*.

Mr. *Palmer* and Mr. *G. L. Russell*, for the Plaintiffs, the children of *Alfred*, contended that the moiety of the fund set apart to provide the annuities became, immediately on his death, divisible amongst his children.

They cited *Arrow* v. *Mellish* (*a*); *Willes* v. *Douglas* (*b*); *Abrey* v. *Newman* (*c*).

Mr. *Lloyd* and Mr. *Freeman*, for *Edward Turner*, argued that he took, by implication, a life interest in *Alfred's* moiety, and that there was no gift to the children until after the death of the survivor of *Edward* and *Alfred*.

They cited *Townley* v. *Bolton* (*d*); *Malcolm* v. *Martin* (*e*); *Hawkins* v. *Hamerton* (*f*); *Ashley* v. *Ashley* (*g*); *Tuckerman* v. *Jefferies* (*h*); *Pearce* v. *Edmeades* (*i*); *Dermott* v. *Wallace* (*k*).

Mr. *Shapter*, for the children of *Edward*, cited *Alt* v. *Gregory* (*l*).

The MASTER *of the* ROLLS held, that according to the true construction of the will, the Plaintiffs, as the children of *Alfred Turner*, deceased, were now absolutely entitled, in possession, to the sum of 833*l.* 6*s.* 8*d.* £3 per Cent. Annuities Stock, a moiety of the sum of 1,666*l.* 13*s.* 4*d.* like annuities.

(*a*) 1 *De G. & S.* 355.
(*b*) 10 *Beav.* 47.
(*c*) 16 *Beav.* 431.
(*d*) 1 *Myl. & K.* 148.
(*e*) 3 *Bro. C. C.* 50.
(*f*) 16 *Sim.* 410.
(*g*) 6 *Sim.* 358.
(*h*) 4 *Bac. Abr.* 467.
(*i*) 3 *Younge & C.* (*Ex.*) 246.
(*k*) 5 *Beav.* 142.
(*l*) 20 *Jurist*, 577.

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Nov. 20, 21, 22, 24.

1857.

Jan. 19.

THE MANCHESTER, SHEFFIELD, &c. RAILWAY COMPANY *v.* THE WORKSOP BOARD OF HEALTH.

A local Board of Health held not justified in polluting the surface water which flowed by an open gutter into a canal, by diverting it into a sewer, and passing the sewage into it.

Where a canal company had a statutory power to supply it with water out of such "brooks, streams and watercourses as should be found within a certain distance." Held, that it would be difficult to hold, that the mere surface water of a road, not arising from any spring or natural certain supply, could fall within the Act, so far and to such an extent, as to exclude a local board of health, under the Public Health Act, from making a system of drainage essential to the district, which, offending against the rights of no one in any other particular, merely allowed to flow through gratings into the sewer the water collected on a public road from rain and from the overflowing of the surplus of the neighbouring houses, which water had theretofore flowed down an open gutter into a canal.

Difficulties in dealing with the assurances of a *quasi* corporate body liable to fluctuations as to its members.

THIS suit was instituted by the *Manchester, Sheffield* and *Lincolnshire* Railway Company, against the Local Board of Health for the District of *Worksop*, in the county of *Nottingham*, elected and constituted according to the Public Health Act, 1848, and the first Public Health Supplemental Act, 1852, and the two clerks of the board. The Plaintiffs were the owners of the *Chesterfield* and *Gainsborough* Canal, which runs through *Worksop*, and the object of this suit was to restrain the Defendants, "The District Board of Health," from diverting water from the canal, from fouling and polluting the water in the canal, by using it to cleanse drains and sewers, and also to restrain them from permitting the sewer, already constructed by them, to communicate with the covered drain or watercourse at the bottom of the *Doncaster* road, and the tunnel under the Plaintiffs' railway, or from using the same without the consent in writing of the Plaintiffs first obtained for that purpose.

The

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The circumstances which led to the institution of this suit, and the history of its progress, must both be referred to, in order to shew what were the issues between the parties, and to explain the course which the Court thought proper to adopt.

The short outline of the facts of this case, and which led to the institution of this suit, was as follows:—The road which leads from *Doncaster* to *Worksop* runs on a declivity from the Plaintiffs' railway, for a distance of between 500 and 600 yards, to the canal, and over it by a bridge into the town of *Worksop*. The place so traversed by the road is a populous district, with several houses upon it on both sides of it, and which is rapidly increasing in both respects. Under their local Act(*a*), the powers, duties and obligations of which were now vested in the Plaintiffs, they had a right to supply the canal with water from and out of "such brooks, streams and watercourses as were or should be found within the distance of 1,000 yards" from the canal, and had the exclusive right to the water in the canal, and they had also imposed on them the duty or obligation of repairing and keeping the canal in order, and preserving the supplies of water to the same, so as to be at all times navigable(*b*). Up to the beginning of the year 1854, the surface water, arising from rain or from the adjoining houses, flowed down this road, by an open gutter, and discharged itself into the canal near the bridge. Into these gutters flowed the refuse water from the adjoining houses, none of which was supplied with any proper drainage.

In 1854, the Local Board of Health for *Worksop* began

(*a*) The Acts referred to in the Bill were the 11 *Geo.* 3, c. lxxv.; 10 & 11 *Vict.* c. cxc.; and the 12 & 13 *Vict.* c. lxxxi.

(*b*) 12 & 13 *Vict.* c. lxxxi., s. 263.

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began to construct, and had since completed a large sewer, sufficient for the drainage of the whole district, not only as regards its present, but also its future wants, and whatever might be the number of additional houses which might hereafter be built in that neighbourhood. This sewer runs down the *Doncaster* road, in the same direction and below the line where the gutter formerly ran, and takes all the water which, heretofore, flowed down the gutter; in addition to which, the Defendants had made eyes in it, and side sewers to some adjoining houses, by which, whenever it might be considered expedient, they could open the communications between the sewer and the drains made and to be made to the adjoining houses, and which would, if and when the communication were made, drain off the water from the cesspools, and the refuse from the houses. This sewer discharged itself into an old covered drain near the bridge, and through it into the canal. In the course of its construction, the Defendants formed cesspools to retain any solid matter that might be in the sewer, and, as far as they were able to accomplish this object, with a view to cause only the water to flow over and down the drain. The Plaintiffs, naturally alarmed at this proceeding, applied, in *October*, 1854, to the Local Board of Health, and expressed their intention to take steps to prevent their proceeding, and required the matter to be brought before the Board. The answer sent by Mr. *Hickson*, the surveyor of the Board, was, that it was not intended that any water closets and cesspools should empty themselves into the canal. The Plaintiffs, by their solicitor, replied that, upon inquiry, that statement was found to be incorrect, inasmuch as the sewer was constructed with a view of draining all the houses in that district, at the instance of the inhabitants, who had memorialized the Board for that purpose. The solicitors of the Board of Health reiterated the assertion of Mr. *Hickson*.

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Hickson. This was still unsatisfactory to the Plaintiffs, who thought that they could not rely implicitly on those assertions, when, at the same time, they found all the preparations made, by which the houses might be drained into this sewer at any moment. An interview took place between the surveyor and the solicitor of the Board, on the one side, and the chairman and directors of the railway on the other, which interview was equally unsatisfactory; the Defendants, on the one side, asserting strenuously, that it was not their intention to drain the houses into the canal, and the Plaintiffs, on the other hand, asserting, that the assurances could not be trusted, while the facts patent and the works in progress contradicted that assertion, and plainly shews that they could have no other object or intention.

Thereupon the Plaintiffs filed this bill, asking for the injunction already stated, alleging that a great injury was done to the canal by the works already constructed, and that a still greater and prospective injury of an irreparable character was contemplated. The Defendants took issue on both these points. They still asserted that it was not and never was their intention to drain the houses into the canal, and that, in the present state and until some communication was opened between the sewer and the houses, the construction of the sewer with the cesspools was beneficial to the canal, and diminished the quantity of filth which heretofore was carried down the open gutter into it. The mode in which they attempted to reconcile the assertion of their intentions for the future with the acts which they admitted they had done, and with the admitted and manifest sufficiency of the drain throughout the whole of the district, however populous it might become, was this:—It is intended, they said, to have a complete system for the drainage of *Worksop;* that the act under which they proceeded made this

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this imperative upon them; and that this system not only was not yet settled, but even the general scheme or plan of it was not all matured. But they alleged, that in any system that might be adopted, and whatever the plan of it might be, this sewer and the drainage into it of the surrounding and neighbouring houses would, necessarily, form a part. They also admitted, that it would be a necessary part of such a drain, that it should not drain into the canal or into the river *Ryton*, but that an exit for the drain and for the water to be employed for the purpose of flushing the drain must be discovered and established elsewhere, and that when this was done, the sewer would then, it is true, drain all the houses in the district, but that it would no longer discharge itself into the canal, and that then, and not till then, would the openings be made where eyes were now placed in the sewer, and the communications be completed between the adjoining houses and the sewer so constructed in the *Doncaster* Road.

The Plaintiffs alleged, that this was an afterthought; that it appeared by what took place on the exceptions, and by the affidavits and the answers, that no such plan was formed, or was seriously in contemplation; and that already, in one or two instances, communications had been made between the adjoining houses and the sewer, and that, but for this suit and the undertaking given, amounting to an injunction and presently referred to, many more of such communications would have been opened, and great and irreparable damage done to the Plaintiffs' canal.

The bill having been filed on the 16th of *December*, 1854, an application, on notice, was, on the 15th of *January*, 1855, made for an injunction in the terms of the prayer. On the motion, Vice-Chancellor *Wood*, after hearing

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hearing the Plaintiffs' opening, was of opinion, that the case was properly one for an action at law; that actual damage to the canal was alleged to have taken place, and that the right of the Defendants to do the act complained of, if not insisted upon, was not abandoned by them, and that this might also then be tried. Accordingly, after some discussion between the Counsel, he made an order in these terms:—"The Defendants, by their Counsel, undertaking not to open or permit to be opened any side sewer or other sewer into the main sewer, in the Plaintiffs' bill mentioned, this Court doth order, that this application do stand over until the further order of the Court, with liberty to the Plaintiffs to bring such action as they may be advised, and any of the parties are to be at liberty to apply to this Court as they may be advised."

The Plaintiffs were dissatisfied with this order, and applied to the Lords Justices on the 12th *February*, 1855, for an injunction, in the terms of the original bill. After the opening had proceeded some little time, this motion was also stopped by the Lords Justices, and an order was made, directing the application to stand over until further order, with liberty for any of the parties to apply as they might be advised, either before or after the hearing. From the discussion which then took place, it appeared, that the order of the Vice-Chancellor was to be treated as in no way prejudicing the Plaintiffs, in case they should not bring an action, and also that their Lordships would dispose of the costs if nothing remained to be disposed of at any subsequent period.

This cause was now brought to a hearing, with a great amount of additional evidence, including the answers, affidavits and cross-examinations.

Mr.

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Mr. *R. Palmer* and Mr. *G. W. Collins*, for the Plaintiffs.

Oldaker v. *Hunt* (*a*); The *Attorney-General* v. The *Luton* Board of Health (*b*); *Wood* v. *Waud* (*c*); *Dickenson* v. The *Grand Junction* Canal Company (*d*); *Magor* v. *Chadwick* (*e*); *Arkwright* v. *Gell* (*f*); *Haines* v. *Taylor* (*g*), and *Wood* v. *Sutcliffe* (*h*).

Mr. *Selwyn* and Mr. *W. Forster*, for the Defendants.

Haines v. *Taylor* (*i*); *Attorney-General* v. The *Sheffield* Gas Consumers' Company (*k*); *Elmhirst* v. *Spencer* (*l*); The Mayor of *Liverpool* v. The *Chorley* Waterworks Company (*m*); *Wood* v. *Sutcliffe* (*n*); *Greatrex* v. *Hayward* (*o*).

Mr. *R. Palmer*, in reply.

The Master *of the* Rolls reserved judgment.

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The Master *of the* Rolls.

I have carefully read the evidence, and considered the comments of Counsel, and had the assistance of very carefully and elaborately-prepared maps and sections, and I must say, that the result of all this is, that this case appears to me to stand very much in the exact position

(*a*) 19 *Beav.* 485.
(*b*) 2 *Jur. N. S.* 180.
(*c*) 3 *Exch. Rep.* 748.
(*d*) 15 *Beav.* 260.
(*e*) 11 *Ad. & Ell.* 571.
(*f*) 5 *Mee. & W.* 203.
(*g*) 10 *Beav.* 75, and 2 *Phil.* 209.
(*h*) 2 *Sim. N. S.* 163.
(*i*) 10 *Beav.* 75.
(*k*) 3 *De G., M. & G.* 304.
(*l*) 2 *Mac. & Gor.* 45.
(*m*) 2 *De G., M. & G.* 852.
(*n*) 2 *Sim.* (*N. S.*) 163.
(*o*) 8 *Exch. Rep.* 291.

position in which it stood when before the Vice-Chancellor, and afterwards before the Lords Justices.

Upon the first point, viz., the diversion of water from the canal, none is now diverted, although, if the plan of the *Worksop* Board of Health, as above propounded, in which this sewer is to form a main ingredient, should ever be carried into effect, the surface water, which hitherto has flowed into the canal, either down the gutter or through the sewer, will probably be diverted from it. Until, therefore, the act diverting the sewer is actually done or is about to be performed, it is not necessary to express any conclusive opinion on this part of the subject; but it would, I think, be difficult to hold, that the mere surface water of a road, not arising from any spring or natural constant supply, could fall within the meaning of the clause in the local Act, which entitles the Plaintiffs to all the water within 1,000 yards of the canal, so far and to such extent as to exclude the Defendants, under the Public Health Act, from making a system of drainage essential to the district which, offending against the rights of no one in any other particular, merely allowed to flow through gratings into the sewer the water collected on a public road from rain and from the overflowing of the surplus of the neighbouring houses, which water had, heretofore, flowed down an open gutter into the canal. If I am wrong in this view, the drainage of this district would appear to me to be impossible.

Upon the next question, whether the water of the canal has or has not received any pollution from the works of the Defendants, I am unable, after carefully attending to the affidavits and after perusing them again, to come to any confident opinion upon this subject.

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The evidence is very contradictory. It is evidence of opinion, it is evidence which would, in every respect, be better judged of by hearing the witnesses give their evidence *vivâ voce* in Court, and on which a jury would be likely to come to a much more satisfactory conclusion than any other tribunal. That the water of the canal is far from being pure is, I think, clearly established. That several houses are drained into it, with which the Defendants have nothing to do, is also clear, but whether the acts of the Defendants have increased that impurity is, to my mind, on the evidence before me, a matter of the greatest doubt and of the utmost uncertainty. I think, therefore, that, on this part of the case, the course adopted by the Vice-Chancellor was the best, and would have been the most satisfactory if it had been adopted, and that, so far as this part of the case is concerned, it is a proper case for an action at law, which would try both the fact of pollution and also the right, if the Defendants should be advised to insist on this right, to pollute the water of the canal, which, however, they have not thought fit to do before me, and respecting which, as far as it may be necessary for me, I shall not hesitate to pronounce my opinion in the matter I am now about to mention.

The next, and most important point, is that part of the prayer in the relief now sought which asks that the Defendants may, by perpetual injunction, be restrained from permitting the water to flow into the covered drain and through it into the canal, and which is what may be called the mandatory injunction.

I am here also, in my opinion, in exactly the same position as their lordships and the Vice-Chancellor were, when the case came before them. So far as relates

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relates to the present flow of water, if it does no damage whatever to the water of the canal, I am of opinion that I cannot make such an order, which, without benefiting the Plaintiffs, may inflict very serious injury on the Defendants, or rather on the inhabitants of the town of *Worksop*, who will have to pay for the expenses of these proceedings, and of all acts done and to be done in consequence of it. If, on the other hand, the present flow of water does inflict a present injury on the Plaintiffs, that is, if it pollute the water of the canal, the Plaintiffs would, in my opinion, be entitled to an injunction to restrain the further continuance of this injury. But whether this be so or not would be decided by an action, if one were brought, and the injunction would depend upon the result of that action. So far as regards the prospective anticipated injury, to arise from the communication to be made between the sewer and the adjoining houses, in my opinion, the case also stands exactly as it did before the bill was filed and has done ever since, with the exception which I am about to mention. The Defendants assert, positively, that it is their intention carefully to guard against any such prospective injury. The Plaintiffs allege, "your acts shew that this is impossible." I think it is impossible for this Court to grant a mandatory injunction to compel the Defendants to undo all the works which, as they allege, are absolutely necessary to a plan they will have to form for the drainage of this district, under the duties imposed upon them by the Legislature, and by which they will, as they allege, carefully guard against the evil apprehended by the Plaintiffs. If it should hereafter appear, that the Defendants are not acting *bonâ fide*, that their assertions are devoid of truth, this Court must deal with them as it best can, but at present, I am of opinion, that this Court must give faith

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to the solemn and repeated assertions, that they do not intend to inflict this injury upon the Plaintiffs.

At the same time that I repose this confidence in their assurances, sanctioned by oath and reiterated by their Counsel at the Bar, from their instructions, I bear in mind all the difficulties which the Plaintiffs are under, from the fluctuating character of the Board, and the constant change of the persons who are and who will be, from time to time, really the Defendants under the same *quasi* corporate denomination of "The Board of Health." I think, however, that this Court may trust, that although a future Board will not be personally bound by the promises of a previous one, yet if any change of intention should from any cause occur, ample, distinct and preliminary notice will be given to the Plaintiffs of such change of intention, which may afford sufficient time to enable them to make any application to this Court. Having said that, I must give this faith to their assurances.

I am, at the same time, of opinion, that the Plaintiffs are entitled to have the undertaking, given at the time of the motion before the Vice-Chancellor, converted into the form of a perpetual injunction, so modified as to meet the circumstances of this case, as they now appear before me, on the evidence, after the advantage I have derived from the full hearing of this cause, the arguments of Counsel, and the perusal of the evidence. I am of opinion, that the modification I am about to state is proper and necessary.

I shall, then, in this suit, decree an injunction,—to restrain the Defendants from opening or permitting to be opened any side sewers or other sewer into the main sewer in the Plaintiffs' bill mentioned, so long as the said

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said main sewer shall flow into or discharge itself into the canal of the Plaintiffs, either by the old covered drain or otherwise.

And as there are certainly two cases in which, upon the evidence, it appears to me to be established, that the Defendants have made a communication with the main sewer from two houses, which communication did not previously exist, I shall grant a mandatory injunction to restrain the Defendants from permitting such communication to continue, and from permitting privies or cesspools from such houses to drain into or communicate with the said main sewer, so long as the said main drain or sewer shall flow into or discharge itself into the Plaintiffs' canal, either by the old covered drain or otherwise.

By this injunction, I do not mean that the side sewers are to be destroyed or put an end to, but simply, that the eyes, where they communicate with the main sewer, are to be built up or closed, and such other things done as may be necessary to prevent the drainage from such houses into the main sewer, and that this is to continue, so long as the main sewer flows into the canal, either directly or indirectly, but, at the same time, leaving the Defendants at full liberty to open these drains, and restore the communications between them and the main sewer, and also to make as many fresh communications and side sewers as they may think expedient, so soon as this plan of drainage is carried into effect, in such a manner, as in nowise to affect or injure the water of the canal. In so doing, I mean to express my opinion, that the acts, under which the Defendants exercise their powers, do not justify them in polluting the water of the canal, or entitle them to drain their sewer into it, without the sanction and consent of the Plaintiffs; if, indeed,

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indeed, they can do so with such consent (*a*), which I wish to be understood as not intending to affirm, and which may depend upon other considerations not brought before me at present.

It has certainly not been seriously contended before me, that the Defendants had any right to do so, without the consent of the Plaintiffs, but the injunction I decree is founded upon their possessing no such right, and that all the preparations are made which would enable them to do so at any moment.

The order I shall make, therefore, will be to grant these injunctions, in the terms I have last specified, but no others. I then propose, in addition, to give leave to the Plaintiffs, if they wish it, but not otherwise, to bring such action as they may be advised.

I am of opinion, that both parties must pay their own costs, including the costs of the motion before the Vice-Chancellor. The costs of the motion before the Lords Justices must be disposed of by their Lordships, upon application to be made to them for that purpose. If the Defendants had relieved the apprehensions of the Plaintiffs, by explaining that the side sewers and various preparations for draining all the adjoining houses were only part of a scheme not then formed, but of which it must necessarily form a part, which, when formed, would drain that district, in such a manner as to carry the sewage away from the canal, and if they had then offered to give every facility for seeing it so accomplished, and also given an undertaking not to make a communication between the said side sewers and the main sewer, until the system had been completed in the way proposed, and had not afterwards opened any communication, in any one instance, I should, in that case, have

(*a*) 12 & 13 *Vict.* c. lxxxi. s. 263.

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have thought, that the Defendants were entitled to the costs of the suit. But this is not so, and though I rely upon the positive and reiterated assertion of the Defendants, contained in the affidavits made by them and for and on their behalf, that they have not and never had such an intention, still there was much that might reasonably alarm the Plaintiffs, and induce them to institute these proceedings.

I cannot, however, give them the costs of these proceedings. In my opinion, they might and ought to have tested the sincerity of the assertions of the Defendants, as to their intentions, as, for instance, by requiring them to give a written undertaking, together with the means of verifying, from time to time, the way in which it was kept, which would have secured the Plaintiffs from injury, if it had been kept, and against any prejudice arising from delay, if it had been violated, and which, if it had been refused by the Defendants, would have given a very different aspect to this part of the case.

The decree will therefore be in these terms:—An injunction to restrain the Defendants from permitting to remain open, and also from opening or permitting to be opened, any side sewer or other sewer into the main sewer, in the Plaintiffs' bill mentioned, so long as the said main sewer shall run through the said covered drain, in the Plaintiffs' bill mentioned, or otherwise discharge itself into the canal of the Plaintiffs. All parties are to have liberty to apply to this Court as they may be advised, and if they wish it, the Plaintiffs are to have liberty to bring such action as they may be advised.

No costs of the suit.

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Commissioners were authorized, by Act of Parliament, to raise a sum of money for parish purposes, and to secure it by debenture or assignment of the rates. The commissioners gave a debenture for 1,000*l.* to *A. B.*, who was treasurer and also a commissioner. *A. B.* advanced nothing at the time, but he subsequently advanced the amount, and from that time only he received interest. By subsequent receipts of rates the balance was turned, and *A. B.* had funds in hand. Held, by Lord *St. Leonards* and the Master of the Rolls, that the transaction was not invalid, and that *A. B.* was entitled to charge full interest on his debenture until he had been formally paid off.

Commissioners were authorized, by an Act, to raise money on the security of the assignments of parish rates. Interest on the debentures was to be paid *pari passu*, and the debentures were to be paid off by ballot. Held, that the relation of trustee and *cestui que trust* was constituted by the Act, and that the holders of the debentures were entitled to sue in this Court for an account of the moneys received by the trustees and of their payments, and that they were not bound to proceed on their bonds at law.

In a suit against commissioners, to enforce debentures on parish rates, it was insisted that the ratepayers were necessary parties; 1st, because the validity of the Plaintiff's security was contested; and, 2ndly, because they ought to be present at the taking of the accounts. The objection was overruled, on the ground that the validity of the Plaintiff's security had been determined in a former suit, in which the Attorney-General was a party, and because the ratepayers would be sufficiently represented, in taking the accounts, by the commissioners who were Defendants.

Some only of many commissioners, appointed under an Act to raise money on the rates, for parish purposes, were made Defendants to a suit by a bond-holder to enforce payment. It was objected that all the commissioners ought to be parties. The objection was removed, by the Court ordering the decree to be served on the absent commissioners, with notice that they might attend the taking of the accounts.

Form of decree, in a suit against parish commissioners, to enforce payment of debentures on the parish rates under a special Act.

THE bill, in this case, was filed by the executors of *Joseph Fletcher*, deceased, to enforce payment of the interest due on a debenture or assignment of rates of the parish of *St. Paul, Shadwell*, for 1,000*l.* numbered 3.

In the year 1817, an Act was passed for the rebuilding of the parish church of *St. Paul, Shadwell* (*a*). This Act authorized a sum of 10,500*l.* to be raised, by way of loan, for this purpose, and it imposed parish rates, to pay the expenses, the interest on the loan, and also to form a surplus fund for the payment off of the money borrowed. Trustees were named for the purpose of

(*a*) 57 *Geo.* 3, c. lxxii.

of the Act; they consisted of the rector, the churchwardens, the overseers, the trustees of the poor, the steward of *Bowes'* (the Earl of *Strathmore's*) estate, and twenty-four other persons, including *Joseph Fletcher*.

The trustees were empowered to borrow such sum or sums of money, "not exceeding in the whole the sum of 10,500*l.*, as they should judge necessary, for the purposes of the Act" (*a*), and to assign the rates, as a security for the principal money to be advanced, with lawful interest. The assignments were to be in the form stated in the Act, by which the trustees assigned to the lender "such proportion of the rate," to be levied by virtue of the Act, as the sum advanced by the individual bore to the whole sum then charged upon the rates, to be had and holden until repayment.

These assignments or debentures were assignable, and were to be paid off according to a priority, to be ascertained by a species of lottery called a ballot, as specified in the 37th section of the Act.

A subsequent Act, passed in 1823 (*b*), to enable a further sum of money to be raised, which it is not necessary for the purposes of this case to refer to in detail.

In 1817, *Joseph Fletcher*, deceased, was appointed treasurer under the first Act, and continued to act as such until *February*, 1831.

In *February*, 1819, nine of the trustees executed to him an assignment of the rates for 1,000*l.*, and he carried that amount to the credit of the trustees in their account

(*a*) Sect. 33. (*b*) 4 *Geo.* 4, c. lxviii.

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account with him. The money was not then actually advanced; if it had been, it would have been paid over by the trustees to Mr. *Fletcher*, in his character of treasurer, but as the money was not actually advanced, Mr. *Fletcher* neither claimed nor received interest upon this assignment, until the whole amount of it had been advanced for the purposes of the trust, under orders duly made for that purpose by the trustees. The amount so placed to the credit of the trustees was actually expended, and there remained a balance in the hands of the treasurer; this event first took place in the year 1821. Mr. *Fletcher* charged interest on this debenture, and continued to do so, whatever might be the state of the account between him and the trustees; and although the balance in his hands, as treasurer, afterwards fluctuated, he had, as such treasurer, moneys in his hands belonging to the trust available for the purpose thereof.

In 1831, he ceased to be treasurer and trustee. The interest at 5*l.* per cent. on his debenture was duly paid until the beginning of the year 1846. Early in 1847, the Defendant *Gibbon*, the receiver of the *Bowes* estate, together with Lady *Glamis*, in the character of owner, by assignment, of one of the debentures, filed a bill in this Court against *Joseph Fletcher* (*Gibbon* v. *Fletcher*), contesting the validity of *Fletcher's* debenture. The grounds on which its validity was impugned were four.

First. That no power was contained in the Act of Parliament to raise the entire sum of 10,500*l.*, because, as the Act gave a power to parishioners to reduce their rates, by paying a sum down in lieu of all future payments, and as some of the parishioners availed themselves of this privilege, it was contended, that the amount so reduced ought to be deducted from the 10,500*l.*, which was not done.

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The second ground was, that at the time when this assignment was executed, *Joseph Fletcher* was the treasurer, and that he advanced no money upon it.

The third ground was, that although it was true that no interest had been paid upon it until the whole balance in his hands as treasurer, including this 1,000*l.*, had been drawn out and paid away, yet, that as shortly afterwards, fresh sums were paid to him as treasurer, which turned the balance in favor of the trustees, the fact of such repayment to the treasurer annulled the effect of drawing out of the whole balance, which alone gave activity to the assignment, and made it bear interest.

The fourth ground was, that he was a trustee, and that, therefore, an assignment given to himself was invalid.

To the bill so filed, neither the former trustees, who had acted from time to time and were then alive, nor the representatives of those who had died, were made parties, but the former treasurers were made Defendants. The trustees for the time being were also made Defendants, as well as the Attorney-General, to represent the general body of the ratepayers. The case came on to be heard in *June*, 1851, before the Vice-Chancellor *Knight Bruce*, when the points above mentioned, contesting the validity of this assignment, were raised and argued before him, and were disposed of by him in favor of the Defendant *Joseph Fletcher*.

The bill was dismissed with costs, as far as it sought any account of rates previous to filing the bill; an account was directed of the subsequent rates and of their application,

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application, and an account of what assignments, &c. the rates were subject to, under the Acts, and what was due, and to whom, with liberty to state special circumstances as to *Fletcher's* alleged assignment or debt, and further directions were reserved.

The Plaintiffs in *Gibbon* v. *Fletcher* appealed from that decision to Lord *St. Leonards*, who, on the 16th of *July*, 1852, dismissed the Plaintiff's bill with costs (*a*).

Mr. *Fletcher* died in *December*, 1852, and his executors having applied for payment of interest on his assignment No. 3, the trustees *Gibbon*, *Dobinson*, *Taylor* and others, in answer, stated, that having been informed that the Lord Chancellor had declined in *Gibbon* v. *Fletcher* to declare the assignment numbered 3 a valid security, they had determined, before paying any sum in respect thereof, to take the opinion of Counsel as to its validity.

They afterwards stated, that they had been advised that the assignment was not a valid instrument, because "*Fletcher*, who was a trustee as well as sole treasurer under the Act, and also churchwarden of the church, did not," at the date of such assignment, advance any part of the 1,000*l.*, and that such 1,000*l.*, if advanced, was in excess, and beyond the amount of 10,500*l.* authorized to be raised. The trustees further stated, that they were advised to resist, and intended to resist, payment of the amount and interest on No. 3.

The trustees, at their subsequent ballots for paying off the assignments, excluded No. 3, and several others which they contested, from the ballot.

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(*a*) See Judgment of Lord *St. Leonards*, MS.

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The present bill was filed in *September*, 1854, by the executors of *Fletcher* against *Gibbon*, *Dobinson* and *Taylor* (three of the trustees under the Act) and six other persons who were owners of debentures or assignments numbered 4, 5, 6, 13, 30, 32, whose claims, like the Plaintiffs, had been rejected, praying payment, by *Gibbon*, *Dobinson* and *Taylor*, of what was due on number 3; for an account of the rates in each year since 1845, and that the amount applicable in liquidation of the principal due on the assignments of the rates might be ascertained. That the three trustees might pay into Court the aggregate amount or the amount paid by them in discharge of the other assignments, and that the amount might be applied in liquidation of the unsatisfied assignments.

Mr. *R. Palmer* and Mr. *Osborne* for the Plaintiffs.

Delarue v. *Church* (*a*); *Attorney-General* v. *Wilson* (*b*); *Attorney-General* v. *Brown* (*c*).

Mr. *Follett* and Mr. *Giffard* for *Gibbon*.

Shipton v. *Rawlins* (*d*); *East Anglian* Railway Company v. *Eastern Counties* Railway Company (*e*); *Drewry* v. *Barnes* (*f*).

Mr. *Roupell* and Mr. *Walford* for *Dobinson* and *Taylor*.

The MASTER *of the* ROLLS said he would read the papers before calling for a reply.

The

(*a*) 15 *Jurist*, 455.
(*b*) *Cr. & Phil.* 1.
(*c*) 1 *Swanst.* 265.
(*d*) 4 *Hare*, 619.
(*e*) 11 *C. B.* 775.
(*f*) 3 *Russ.* 94.

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The MASTER *of the* ROLLS.

I have gone through the papers in the other cause of *Gibbon* v. *Fletcher* with care, and I must say that all the four points, impugning the validity of the assignment to Mr. *Fletcher*, are distinctly put in issue, and that the Lord Chancellor distinctly pronounced a decision on them all; he distinctly decides, both in terms and in substance, that the assignment, debenture or bond, whatever it is called, is a valid instrument, open to no legal objection or imperfection, and upon the strength of this being so, he dismissed the bill of the Plaintiffs with costs; because, having heard the whole case, the Plaintiffs had failed in shewing the least objection to this instrument. The decree of Lord *St. Leonards* was acquiesced in, the case was not taken, by appeal, to the House of Lords, and the decision is express and complete, that the assignment No. 3, held by *Joseph Fletcher*, is free from objection.

In this state of circumstances, it might have been expected, that after this double decision, the question of the validity of this bond would not again have been raised in this Court. It is impossible, however, to foresee the extent to which a spirit of litigation may lead persons, and this cause is a lively instance of the truth of this proposition. By a spirit of litigation I mean, not a desire to resort to law to have rights determined, but a desire to go to law or to continue in law for the sake of law, when there is really nothing left to determine. It seems that the Lord Chancellor was asked by the Plaintiffs' Counsel in *Gibbon* v. *Fletcher* to make a declaration, that Mr. *Fletcher's* security was unimpeachable. No doubt the object of this application was to avoid the payment of costs, on the ground that, as the Defendant *Fletcher* would thereby have obtained the benefit

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benefit of a decree, he would not have been entitled to ask for costs of the suit.

The Lord Chancellor dismissed the bill with costs; after which this conversation took place:—

"Mr. *Stuart*. I understand the Court to be decidedly of opinion that Mr. *Fletcher's* security is unimpeachable. Now, what we should desire is a declaration to that effect.

"*Lord Chancellor*. I do not mean to make any such declaration. You file a bill, and I dismiss your bill. It is my opinion that the security has not been impeached by you in this suit; if you like to try his security elsewhere, there is nothing to prevent you from doing it.

"Mr. *Stuart*. It is a mere legal question.

"*Lord Chancellor*. You have your remedy elsewhere. I am of opinion that it is not impeached in this suit, but I am not going to prevent your doing anything for the purpose; if you think you can impeach his security you can take your remedy."

The meaning of this is obvious; it is as if the Lord Chancellor had said, "I have no jurisdiction in this suit to declare that there are no other objections to this assignment; but on all those brought before me, I declare that you fail, and, therefore, you must pay the costs." Upon the strength of this answer of the Lord Chancellor, the Defendant, Mr. *Gibbon*, and the trustees, or the majority of them, say to Mr. *Joseph Fletcher*, "the Lord Chancellor has refused to declare that your bond is valid, and, therefore, we shall not acquiesce

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quiesce in his decision, and we shall refuse to pay you interest on your bond, or to pay off your bond itself."

In the course of the proceedings Mr. *Fletcher* died, and this bill is filed by his legal personal representatives, to obtain the payment of the interest on his bond, and for the right of having his bond paid off, in the usual way, by ballot, and for an account of the moneys properly applicable for these purposes.

On looking through the defence to this bill, and attending carefully to the argument of Counsel, I find nothing urged as an objection to the Plaintiffs' case, so far as regards merits or substance, which was not argued and disposed of, either expressly or virtually, by the Lord Chancellor, in the case of *Gibbon* v. *Fletcher*. No new grounds of invalidity are urged before me, and no new facts are presented. On the merits, therefore, nothing can, in my opinion, be more hopeless than the defence which has been set up. Even if I did not concur with the view of the Lord Chancellor in this case, which I do most thoroughly, I should feel myself bound to follow his view, and to work out his decision, as far as the rules of Equity will permit. On the substance of this case, therefore, and on the merits, everything is in favor of the Plaintiffs, and against the Defendant.

I have still, however, to dispose of the technical objections urged by the Defendants, to prevent my pronouncing any decree, and which did not exist in the case before the Lord Chancellor.

The first objection, which, however, is not wholly of a technical nature, is, that the case of the Plaintiffs is at law, and that they have no *locus standi* in this Court; that

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that they ought to sue on the bond, at law, and that its validity or invalidity would be there determined. I think it unnecessary to consider, whether the Plaintiffs might have adopted this course, or whether, if the Defendants had shewn, by way of defence, that they had no money in their hands, they might not have defeated, or, at least, delayed the Plaintiffs. I think it unnecessary to consider, whether the Court of Law could have given complete relief, as it could not have taken the account; because, in my opinion, the relation of trustee and *cestuis que trust* is created between the trustees appointed by the Act and the holders of debenture, and they are entitled to an account of the moneys received by the trustees, and of their application thereof.

The next series of objections all relate to the constitution of this suit, and the defects arising from the absence of persons, who ought, it is contended, to have been made parties to it. In the first place, it is contended, that the ratepayers ought to be represented in this suit, first, because the question is, whether this assignment is or is not a good charge on the rates; and, secondly, that their presence is necessary to check the taking of the accounts.

With respect to the first reason, I should have thought that it would have come with great force, had it not been that the validity of this very security was impeached, on the very same grounds on which it is now resisted, in a suit in which the ratepayers were represented by the Attorney-General, and in which it was decided, that this bond was valid by the dismissal of the bill impeaching it. Whatever might have been my opinion, had this been *res integra*, still after what has occurred, I shall not require them to be here, nor cause that

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that expense to be incurred, for the purpose of enabling them to hear me say, that I do not consider the validity of this bond any longer an open question, that I concur with Lord *St. Leonards*, and that if I did not, I am bound by his decision. As to their presence at the taking the accounts, I think that they will be sufficiently represented by the trustees, and that they ought not to be represented separately for this purpose. But if the parish wish to attend the taking of the accounts I am about to direct, separately, I will allow them to make any application to me they may think fit under the decree, to do so at their own expense.

The next objection is, that all the trustees ought to be parties. With respect to them, so far as regards the merits, which, as I have already stated, I consider to be determined by Lord *St. Leonards'* judgment, I think their presence is not necessary. With respect to their presence at the taking of the accounts, I think that it may be proper that they should attend, I shall therefore direct a copy of a decree to be served on those of the existing trustees who are not parties to this cause, with a notice that they are to be at liberty, if they think fit, to attend the taking of the accounts to be directed by this decree in the office of the chief clerk.

This disposes of the objections relating to parties, the consideration of which I reserved in conjunction with the papers in this cause. I was desirous of reading over the papers in both causes, before I called on Mr. *Palmer* for a reply, because, in my opinion, the matter mainly depended upon whether the questions before me were really raised and disposed of in the cause before the Lord Chancellor. The time I have had has enabled me

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me to do this to my own satisfaction, and has convinced me, that nothing of substance remains to be disposed of in this cause, and that the Plaintiffs are entitled to a decree.

With respect to the decree itself, I shall declare, that the Plaintiffs, as holders of the assignment No. 3, are entitled to be paid the interest and principal of the said assignment, in like manner as the other *bonâ fide* holders of valid assignments, and to have the benefit of the clause and provisions of the Act for that purpose. I shall direct an account to be taken of what is due for interest on the assignment of rate No. 3; and I will direct the Defendants to pay the same, out of any moneys which shall, on taking the accounts after directed, appear to be in their hands, or for which they are bound to account, so far as the same will extend, and the residue thereof, with the interest to accrue due from time to time hereafter, out of the first moneys coming to their hands properly applicable to the payment of interest on assignments. I must then direct an account to be taken of the rates made and levied and paid to the trustees, under and by virtue of the Acts of Parliament or either of them, since the year 1845, and of their application thereof, and in taking such account, ascertain what, if anything, was properly applicable to the payment of the interest or of the principal of the assignment of rates numbered 3.

I cannot go beyond this until these accounts are taken, and I must reserve further consideration till after that has been done. I trust, however, that those accounts never will be taken, and that, after this decided intimation of my opinion, the Defendants and the trustees will have better sense than to go into this account,

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count, the whole of the expense of which, if I am right, will fall upon them; but that if they acquiesce in my decision, they will settle the matter immediately, by admitting the Plaintiffs to their rights like all the other holders of securities under this Act, but that if they do not acquiesce, they will obtain the opinion of a higher tribunal, and resting satisfied with that, will not endeavour to evade the clear expression of the decision of the Court, and cause further litigation, to enforce the execution of a matter already determined.

In my opinion, the three first Defendants on the record have unnecessarily occasioned the expense of this suit, and they must pay the costs of it, up to and including the hearing. The subsequent costs I shall reserve until I see how the parties conduct themselves.

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STAINTON *v.* THE METROPOLITAN BOARD OF WORKS, AND THE LEWISHAM DISTRICT BOARD OF WORKS.

Dec. 15, 16, 17, 18. 1857. *Jan.* 22.

THIS case was argued by Mr. *R. Palmer*, Mr. *Lewin* and Mr. *Kenyon*, for the Plaintiffs.

The Metropolitan Board of Works constructed a sewer in the high road, and the *Lewisham* District Board made a branch sewer running into it. The combined effect of the two was, to drain an ornamental pond and rivulet in the adjoining lands of the Plaintiff. In a suit to obtain an injunction, Held, first, that neither of the Boards were, in respect to the divertion of the water, to be treated as clothed with the rights or obligations of adjoining landowners. Secondly, that they had not exceeded their statutory rights, so as to be liable to be restrained by injunction; but thirdly, that if either of these Boards were producing this injury to the Plaintiffs, by the unskilful or improper construction of the sewer, this Court would interfere to prevent it; and, fourthly, that such not being the case, the rights of the Plaintiffs were limited to a claim for compensation under the 11 & 12 *Vict.* c. 112, s. 50, and the 18 & 19 *Vict.* c. 120, s. 86.

They cited *Dawson* v. *Paver* (*a*); *Leader* v. *Moxon* (*b*); *Jones* v. *Bird* (*c*); The Grocers' Company v. *Donne* (*d*); *Sutton* v. *Clarke* (*e*); *Coats* v. The *Clarence* Railway Company (*f*); The Attorney-General v. *Forbes* (*g*); *Tyler* v. *Wilkinson* (*h*); *Dickenson* v. The Grand Junction Canal Company (*i*); *Gale* on Easements (*k*); *Acton* v. *Blundell* (*l*); *Bealey* v. *Shaw* (*m*); *Balston* v. *Bensted* (*n*); *Luttrel's* case (*o*); 1 *Rolle's* Ab. (*p*); *Saunders* v. *Newman* (*q*); 11 & 12 *Vict.* c. 63, ss. 32, 34, 38, 50, 59, 61, 66 and 69; 12 & 13 *Vict.* c. 93, s. 4; 18 & 19 *Vict.* c. 120, ss. 68, 69, 77, 86, 152; 21 *Jac.* 1, c. 16; The *Caledonian* Railway Company v. *Ogelvy* (*r*); *Hammond* v. *Hall* (*s*); *Beeston* v. *Weate* (*t*).

Mr.

(*a*) 5 *Hare*, 415.
(*b*) 2 *Wm. Blackst.* 924.
(*c*) 5 *Barn. & Ald.* 837.
(*d*) 3 *Bing. N. C.* 34.
(*e*) 6 *Taunt.* 29.
(*f*) 1 *Russ. & M.* 181.
(*g*) 2 *Myl. & Cr.* 123.
(*h*) 4 *Mason* (*Amer. Rep.*), 397.
(*i*) 7 *Exch.* 282, and 15 *Beav.* 260.
(*k*) Page 181.
(*l*) 12 *Mee. & W.* 324, 346.
(*m*) 6 *East*, 208.
(*n*) 1 *Campb.* 463.
(*o*) 4 *Rep.* 87.
(*p*) Page 107, pl. 16.
(*q*) 1 *Barn. & Ald.* 258.
(*r*) 2 *Macq. H. of L. Cas.* 229.
(*s*) 10 *Sim.* 551.
(*t*) 5 *Ellis & B.* 986.

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Mr. *Haynes*, for Defendants in the same interest.

The Attorney-General (Sir *R. Bethell*), Mr. *Lloyd* and Mr. *C. Hall*, for the Metropolitan Board of Works, cited *Broadbent* v. *Ramsbotham* (*a*); *Rawstron* v. *Taylor* (*b*); *Acton* v. *Blundell* (*c*); *Arkwright* v. *Gell* (*d*); *Chasemore* v. *Wyke* (*e*); *Shury* v. *Piggot* (*f*); 11 & 12 *Vict.* c. 112, ss. 38, 50; 18 & 19 *Vict.* c. 120, ss. 150, 151; *Coats* v. *Clarence* Railway Company (*g*); *Greatrex* v. *Hayward* (*h*); *Embrey* v. *Owen* (*i*); *Magor* v. *Chadwick* (*k*); *Wood* v. *Waud* (*l*); *Rawstron* v. *Taylor* (*m*); 11 & 12 *Vict.* c. 112; 12 & 13 *Vict.* c. 93; British Cast Plate Manufacturers v. *Meredith* (*n*); *Priestley* v. *Manchester* and *Leeds* Railway Company (*o*); *London* and *Birmingham* Railway Company v. Grand Junction Canal Company (*p*).

Mr. *Selwyn* and Mr. *Steere*, for the *Lewisham* District Board of Works.

18 & 19 *Vict.* c. 120, ss. 50, 86; *London* and North-Western Railway Company v. *Bradley* (*q*); *Frewin* v. *Lewis* (*r*); *Thicknesse* v. *Lancaster* Canal Company (*s*); *Rawstron* v. *Taylor* (*t*); *Oldaker* v. *Hunt* (*u*).

Mr. *R. Palmer*, in reply. The *Caledonian* Railway Company v. *Ogelvy* (*x*).

The

(*a*) 11 *Exch. Rep.* 602.
(*b*) *Ibid.* 369.
(*c*) 12 *Mee. & W.* 324.
(*d*) 5 *Mee. & W.* 203.
(*e*) *April*, 1856. *Exch.*
(*f*) 3 *Bulst.* 339.
(*g*) 1 *Russ. & Myl.* 181.
(*h*) 8 *Exch. Rep.* 291.
(*i*) 6 *Exch. Rep.* 353.
(*k*) 11 *Ad. & Ell.* 571.
(*l*) 3 *Exch.* 748.
(*m*) 25 *L. J.* (*Exch.*) 33.
(*n*) 4 *T. R.* 794.
(*o*) 2 *Railw. Cas.* 134.
(*p*) 1 *Railw. Cas.* 238.
(*q*) 6 *Railw. Cas.* 556.
(*r*) 4 *Myl. & Cr.* 254.
(*s*) 4 *Mee. & W.* 472.
(*t*) 11 *Exch.* 369.
(*u*) 19 *Beav.* 485.
(*x*) 2 *Macqueen, H. of L. Cas.* 229.

The MASTER *of the* ROLLS reserved judgment.

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This is a suit, originally instituted against the secretary of *The Metropolitan Board of Works*, and subsequently, by supplemental bill, against *The Metropolitan Board and the District Board for Lewisham*, seeking for an injunction to restrain both Boards from causing or continuing the diversion of a stream of water which theretofore flowed through the grounds of *Henry Stainton*, deceased.

The facts of the case are shortly these:—The testator had, for many years, and as early as *May*, 1817, been possessed of a house and grounds at *Lewisham*, in *Kent*, which, in that year, on the occasion of his marriage, he had settled. In the year 1835, he purchased, at a very great expense, a field consisting of three acres, which contained a very copious spring of water, from whence a stream, after producing a marshy piece of ground, flowed from it in a continued stream in a northerly direction. The testator, having purchased this piece of land, collected the water arising from the spring into one spot, and converted it into a circular pond or piece of water, and diverted the original flow of the rivulet from this pond into another channel, which he considered to be highly ornamental to his house and grounds, and by which, after several involutions, it ultimately found its way into the *Ravensbourne* river or brook, which flows at no great distance from it, and falls into the *Thames* at *Deptford*. The testator took a great pleasure and interest in this stream; he expended upon it so large a sum of money, as seems, from the affidavits, to have created the sur-

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prise and even ridicule amongst his neighbours. The affidavits relating to this part of the case, which have been filed on the part of the District Board, as far as they go, seem to me to assist the case of the Plaintiffs. It is, in my opinion, established, that, until the works I am about to refer to were begun, there always was a rivulet flowing from the field bought by the testator, called *Springfield*:—that the testator laid out large sums of money upon the formation of the original pond, where the water was received, and upon the diversion and formation of the course of the rivulet which he introduced into his garden and shrubbery, for the ornament of his grounds:—that he regarded it with peculiar pleasure, and that the Plaintiffs, probably, in some degree, from regard to his memory, have also, ever since regarded it with peculiar affection, and that no compensation given by any jury could repay to them the "*pretium affectionis*" with which they regard it.

In the early part of the year 1855, the Metropolitan Board of Works began to construct a sewer, in the high road leading from *Blackheath* to *Lewisham*, and in the month of *April*, when the sewer had got opposite to the testator's property, and had cut through a bed of clay, which seems to have retained the water in a basin of gravel and porous soil, the spring disappeared from the spot where it formerly welled out, and thereupon the Plaintiffs filed their present bill, and gave notice of motion for an injunction.

The motion came on before me on the 6th *June*, 1855, but the case was not fully heard. On the hearing of it, some affidavits were read, which seemed to indicate, that although the diverting the water from the spring, and thereby drying it up, was a necessary consequence of the works while in progress, that, nevertheless,

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less, this consequence and abstraction of the water would cease on the completion of the works. Upon hearing them I interposed, and having examined Mr. *Donaldson*, the engineer for the Defendants, and ascertained from him, that it was the intention of the *Board of Works* to construct this sewer in such a manner, that, if all their anticipations and the expectations of their engineer proved correct, it would not inflict any permanent injury on the Plaintiffs. It was stated to me, at that time, by Mr. *Lloyd*, that there was a question of law behind, and that even if the sewer should permanently divert the water from the Plaintiffs' spring, still that the Board of Works claimed the right of doing so; at the same time, as a great many affidavits were filed by the Defendants, disputing the facts stated by the Plaintiffs' affidavits, and as the question of fact was in contest, I thought it better that the motion should stand over for some little time, until the sewer had been completed, inasmuch as if the result turned out as was anticipated by the Defendants, no question of fact or of law would arise. The sewer is now completed, but the result arising from its construction is still as much in dispute as before, because a new element in the case has arisen, from the circumstance that a side sewer, draining the *Lewisham* district, has been made into this main sewer, within the limits of the band of clay which formerly retained the water. The result of their combined operation is now clearly shewn to be, that one or both of these sewers divert the water from the spring, which formerly welled forth in the *Springfield*, and which, by its constant supply, formed the rivulet which had been converted into the ornament of the ground of the testator. A supplemental bill was filed, bringing the District Board, as well as the Metropolitan Board, before the Court, the original motion was renewed and extended to obtain an injunction against the District Board,

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Board, as well as against the Metropolitan Board. On this motion being brought before me in *June* last, it was, at my suggestion, converted into a motion for a decree, in order that a final adjudication might be made in this stage of the cause on the contest between the parties. The case has occupied the greater part of four days; it has been gone into very fully, both on the facts and on the law of the case. Upon the question of fact, although there is considerable diversity of opinion amongst the witnesses, and some contrariety of evidence, I have come to the conclusion, that both the main sewer and the side sewer prejudicially affect the spring of the Plaintiffs, but to what extent and in what proportion I am unable to say. Upon the evidence, it appears to me, that the side sewer is the more injurious of the two, but the strong impression made on my mind by the evidence is, that either of them alone, if retained in its present position unaltered, would be sufficient to divert and drain away the water which formerly arose in the pond, and supplied the rivulet which flowed through the grounds of the testator. It is unnecessary for me to go through the particulars of the evidence, or to refer, in detail, to the affidavits which have led me to this conclusion. I have derived my opinion principally from the facts admitted by and contained in the affidavits of the Defendants.

This being established or assumed, the second point, the question of law, arises, viz., whether the consequence of this is, that the Plaintiffs are entitled to the injunction they ask, or whether the Defendants are both, or whether either of them is, entitled to do what they have done, and to continue the sewers and drainage in their present state; and, upon this part of the case, an ulterior question arises, viz., assuming that I shall be of opinion that the Defendants have this right, whether by their

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their conduct, in this suit or otherwise, they have deprived themselves of that right. Upon both these points I have come to a conclusion favourable to the Defendants and adverse to the contention of the Plaintiffs.

I think it unnecessary to consider the effect of the greater number of those decisions which have been very ably and fully commented upon in the argument before me, and which relate to the right of an adjoining proprietor to divert, by drainage or underground operation, water which would have flowed, or which is actually flowing, in the soil of a neighbouring proprietor. In my opinion, these decisions cannot properly be imported into the consideration of this case. I am of opinion that neither the *Metropolitan* nor the *District Board of Works* can be properly treated as being clothed with the rights or the obligations of the owners of land. In some respects, as regards the adjoining proprietors, their rights are greater, and, in some respects, the obligations imposed upon them are more onerous, than those which attach to the ownership in fee simple of neighbouring or contiguous land. The rights and obligations, such as they are, are conferred, imposed and defined by Statute; beyond the powers conferred upon them by Statute, they can do nothing; they may and are bound to do what the Statute permits or requires them to perform. I am of opinion, therefore, that I am not to regard the Defendants in the situation of adjoining landowners, but that I must look at the Statutes alone under which they act, for a solution of the question which I am now considering, interpreted and illustrated, as such question may be, by the decided cases which relate to acts done under these or other Statutes conferring similar powers.

I begin by expressing my full concurrence with that class

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class of cases, of which *Jones* v. *Bird* (*a*) and The Grocers' Company v. *Donne* (*b*) may be cited as illustrating the principle. In other words, I entertain no doubt, that, if either of these Boards were producing this injury to the Plaintiffs by the unskilful or improper construction of their sewers, this Court would interpose to prevent it. But I am of opinion that these cases do not apply here, for upon the whole of the evidence before me, on both sides, which I have carefully examined for this purpose, I am of opinion, that for the objects pointed out by the Statute, and which the Defendants seek to obtain, both these sewers, more particularly, perhaps, the main sewer, respecting which the evidence is more copious and distinct, but that both these sewers are constructed in a very skilful manner, and are well fitted to discharge the duties imposed upon them, provided the injury, thereby incidentally inflicted upon the Plaintiffs, is not to be regarded.

I have then to look at what the powers of the Defendants are under their Acts of Parliament; and after attentively perusing the Act of the 11 & 12 *Vict.* c. 112, I am of opinion, that this case is governed by the proviso contained in the 50th section of that Act. The first part of the clause, which is a long one, imposes on the Commissioners the duty of draining or covering, or causing to be drained or covered, offensive ponds, ditches, drains and the like, giving a notice to the owner to do so, and if he fail, to do it themselves, and to charge the expenses on the premises. Now this first part of the clause does not apply to the present case, but the proviso at the end of the clause is in these words:—"Provided also, that where any work, by the Commissioners done or required to be done in pursuance

(*a*) 5 *Burn. & Ald.* 837. (*b*) 3 *Bing. N. C.* 34.

nuance of the provisions of this Act, shall interfere with or prejudicially affect any ancient mill or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby, in manner herein provided concerning compensation to persons sustaining damage by reason of the exercise of any of the powers of this Act; or it shall be lawful for the Commissioners, if they shall think fit, to contract for the purchase of such mill or any such right connected therewith, or other right to the use of water; and the provisions of this Act, with respect to the purchases by the Commissioners hereinafter authorized, shall be applicable to every such purchase as aforesaid."

This proviso is clearly not limited to the previous part of the section. It is expressly extended "to any work of the Commissioners done or required to be done in furtherance of the provisions of this Act." It is as little connected with the previous part of the section as if it had formed a distinct and separate section, which would probably have made it more distinct. In my opinion, this is a case where the right of the Plaintiffs to the use of water is interfered with, by the works done by the Commissioners "in furtherance of the provisions of this Act," and that the right of the Plaintiffs is limited to a claim for compensation.

No doubt it may well happen, that in this as in many other cases, of which the experience of persons connected with public works, railways, canals and the like may furnish them many instances, the sum to be awarded by a jury may be no real compensation for the injury done. The jury, like some of the neighbours, who called this rivulet "*Stainton's folly*," may be unable to appreciate the pleasure enjoyed by another in a matter

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a matter, which to them might appear foolish or even disagreeable; but this is an evil inseparable from these matters. The legislature has thought fit to enact, that individual rights to property, in other cases held so sacred in this country, should in these cases be sacrificed to obtain a great public benefit, and has confided to juries the power and the duty of giving such compensation as they shall consider to be a fair and just compensation to the owner for the loss he sustains, not as a mere pecuniary loss, but taking also into account the loss of pleasure and enjoyment derived from it, even if it be, to a considerable extent, fanciful, and such as few others could sympathize with; but as the legislature has so done, it lies not within the power of a Court of Equity to say, that the object intended by the legislature shall be prevented, because a right is interfered with, for which adequate compensation cannot be afforded.

This observation, however, introduces an argument which was very ably pressed upon me, and which I have since considered carefully, in connection with the evidence. It is said, that these sewers might be so constructed as not to drain away any particle of the water that formerly supplied this rivulet; that if the main sewer were made water-tight, from the place where it enters the clay basin to the spot where it quits it, and if the side sewer were also made water-tight, and confined rigidly to draining the houses to which it attached, the injury to the Plaintiffs would be avoided, and thence, it is contended, that the only question is one of expense, and in support of this view the case of *Coats* v. *Clarence* Railway Company (*a*) is urged on me.

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(*a*) 1 *Russ. & M.* 181.

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The perusal I have made of the evidence, for the purpose of considering this view of the case (without taking into consideration any question of expense, or the possibility of doing it within the limits of the rate permitted by the Statute), has not brought me to the conclusion that it would be possible to construct these sewers in the manner suggested, having regard to the functions they have to perform. Part of the evidence states that the sewers would not be fitly constructed unless it admitted the filtration of water from the adjoining land, and the *District Board* expressly state, that they consider it essential for the due performance of their duty, having regard to the state of the adjoining soil, to make the water from it percolate into the drain, and be drawn off accordingly. If every drain to every house, now or hereafter to be made, were constructed in so water-tight a manner as to admit no water whatever from the adjoining land, but were merely to communicate with the house itself intended to be drained, it might be, that the flow of water would not at all times be sufficient to carry off the refuse and more solid matter intended to be removed. The same careful and expensive mode of constructing each separate drain would be required, in the case of every fresh house and of every new side sewer to be made to communicate with the main sewer, and the final result might be, as far as I can judge from the evidence, that the drainage of this district, when thus completed in this unusual manner, would be expensive, liable to great derangement, and probably ineffectual for the purposes intended to be provided for by the Act; while, on the present evidence, I am satisfied that the drains and sewers are perfectly well constructed for those purposes, setting apart only the interference which they occasion with the enjoyment of the Plaintiffs of this rivulet. If the object of the Plaintiffs could be attained, in the present case, by

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by the construction of the drains and sewers in the manner suggested by them, the same mode of constructing drains could be adopted in every case, and if such a course had been intended by the legislature to be imposed on the several lands, the proviso at the end of the 50th section would be useless and unmeaning. But in my opinion that proviso has a clear meaning, and it applies to the consequences which may be produced by the construction of the sewers and drains in the ordinary manner, and that the legislature did not mean to impose a peculiar mode of construction to meet any exceptional cases. The case of *Coats* v. The *Clarence* Railway Company (*a*) is not repugnant to this view of the case; there the evidence of the engineer selected to report on the matter shewed, not only that the bridge was injurious to the Plaintiffs' mill, but also that it was ill-constructed for the purposes of the railway. This makes a material difference, and brings it within the class of cases to which I first referred.

If I were satisfied, on the evidence, that the drains were improperly constructed, or even that, by a slight expense, as good a system of drainage might be obtained and kept up by the Defendants, consistently with preserving to the Plaintiffs the accustomed flow of their rivulet, I should not hesitate to enforce that mode of construction; but I repeat, that, upon the evidence, not only I have not come to that conclusion, but that an opposite conclusion, if not proved, is strongly impressed upon my mind, as the fair result of the evidence and of the facts proved in this case.

With respect to the ulterior question, whether it is now open to the Defendants, or to either of them, to raise

(*a*) 1 *Russ. & Myl.* 181.

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raise this question, and to protect themselves by the proviso at the end of the 50th section, I am also of opinion, that they are both entitled so to do. As to the Metropolitan Board, their case, on this matter, has never been abandoned by them. They did, indeed, state, on the original motion, that they did not intend permanently to interfere with the Plaintiffs' rivulet, and that they expected that they should complete their sewer without doing so, and they state the same now, with the additional assertion, in which I do not concur, that they have not affected it; but their case is, that they always intended to make the sewer, in the best way they could, for the purpose imposed on them by the statute; that in so doing, they did not expect to injure the Plaintiffs' rivulet; but that if they have done so, unintentionally, the Plaintiffs' case is one for compensation, if it be a case for anything. In my opinion, it is a case for compensation, but for nothing more.

So far as regards the *District Board*, they were no parties to the suit at the time of the hearing of the original motion. They had not then any separate existence; since then they have been constituted a Board, and have been made parties, by a supplemental bill, in the present year, and, therefore, they are not affected by anything which took place in Court on any previous occasion. They avow that they have drained this district, to a considerable extent, and they insist on the propriety of the course they have taken. In answer to this, it is urged, that they have exceeded their power and authority; that they have proceeded on a plan submitted by them to and approved of by the *Metropolitan Board;* that this plan did not propose to drain the district, and, consequently, that they having done so, they have thereby exceeded their powers and their duties. Upon the evidence, the extent to which their side

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side sewers were constructed with a view to drain the district is not clear, that they do so, to a considerable extent, is, in my opinion, quite clear; but it seems to me, on the evidence, that they have been skilfully and properly constructed, for the purpose of effecting the plan submitted to and approved of by the *Metropolitan Board*, although, in doing so, they may possibly, and as I believe they have, produced a further and additional result. The statute of 18 & 19 *Vict.* c. 120, under which they are proceeding, contains, in the 86th clause, a proviso identical in its terms with that which I have already commented on, as contained in the Act of the 11 & 12 *Vict.* c. 112. On this I have expressed my opinion in favor of the *Metropolitan Board*, and, in my judgment, the same conclusion follows in favor of the *District Board*, viz., that this is a case for compensation, but for nothing more.

I have felt considerable hesitation respecting the costs of this suit; but taking into account the various facts of this case, and that the principal part of the evidence relates to the question, whether these sewers do or do not affect the spring which supplied the Plaintiffs' rivulet, and also that a new series of affidavits and evidence have been gone into by both classes of Defendants, for the purpose of shewing that the injury complained of is caused by the side sewer, on the one hand, and by the main sewer, on the other, I am of opinion, that I shall best consult the ends of justice by dismissing the Plaintiffs' bill without costs.

I foresee that litigation is likely to arise hereafter, as to the Plaintiffs' rights to compensation, the amount of it, and whether it will have to be borne by the Metropolitan Board or by both, and if so, in what proportion. It would be a matter of great satisfaction to me, if the parties

parties could supersede this by some agreement, as to the amount, and the manner in which it should be raised and paid, which would put an end to all further litigation between all these parties. This, however, I can only suggest; the parties themselves must adopt the course they think best, but I have discharged the duties which fall upon me, by pronouncing the decree of dismissal I have already stated.

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WILLIAMS *v.* EVANS.

1856. *Dec.* 20.

Under an equitable mortgage by the simple deposit of a lease, unaccompanied by any memorandum, the tenants' fixtures will be included.

THE Petitioners were equitable mortgagees of the leases of a quarry, by a deposit of the leases made to them by the testator, unaccompanied by any memorandum.

The quarries were occupied and worked by the testator, who had placed on the premises a considerable quantity of plant, fixtures and machinery, suitable for working the quarries, part of which, of the value of 462*l.*, were affixed to the freehold and were of the nature of tenants' fixtures.

All the fixtures were sold in this suit, which was a creditors' suit, and the equitable mortgagees now presented a petition for payment to them of the produce of the tenants' fixtures, which they claimed to be entitled to under their equitable mortgage.

Mr. *Little* in support of the petition. The equitable mortgage, in this Court, passed the whole of the testator's interest in the premises, including the fixtures. Such

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Such would have been the result if a legal mortgage had been executed. He cited *Ex parte Barclay* (*a*); *Colegrave* v. *Dias Santos* (*b*).

Mr. *Prendergast, contrà.* The simple deposit of a lease passes no more than is comprised in it, and the title to these fixtures was neither governed or affected by the lease; they, therefore, did not pass to the mortgagees. The question in *Ex parte Barclay* (*a*) was one of reputed ownership, and there was a written memorandum of deposit; here there is none.

The MASTER *of the* ROLLS, without hearing a reply, said, I had to consider this question lately, and I think that the fixtures passed. Under the general words of a legal mortgage they certainly would have passed to the mortgagee as attached to the freehold, and I think the Petitioners, under their equitable mortgage, are entitled to the produce of them.

(*a*) 5 *De G., M. & G.* 403. (*b*) 2 *Barn. & Cr.* 76.

In re LINZEE'S SETTLEMENT.

Dec. 20.

By a marriage settlement, the income of a trust fund was to be paid during the joint lives of husband and wife, as they should appoint, "but not so as to deprive themselves of the benefit thereof by charge or otherwise in the way of anticipation." Upon a divorce *a mensâ, &c.*, they appointed the income between themselves in equal moieties. The Court held the appointment valid, and acted upon it.

UNDER their marriage settlement made in 1834, a sum of 3,400*l.* £3 per Cents. was held by trustees, on trust, during the joint lives of the Mr. and Mrs. *Linzee*, to pay the dividends thereof unto such person or persons, and for such intents and purposes, as *John Linzee* and *Margaret* his wife should, by writing under their joint hands, direct or appoint, *but not so as to deprive themselves of the benefit thereof by charge or otherwise in the way of anticipation.* And, in default of such appointment, into the proper hands of *Margaret Linzee* for her separate use, exclusive of her husband.

In 1841, Mrs. *Linzee* obtained a divorce *a mensâ et thoro*, and by deed poll, dated the 1st of *August*, 1841, Mr. and Mrs. *Linzee* appointed, that, during their joint lives, the trustees should pay and divide the dividends on the 3,400*l.* stock equally between them.

The trustees paid the money into Court under the Trustee Relief Act.

In *November*, 1855, an order was obtained by Mrs. *Linzee* for payment to her of a moiety of the dividends. A petition was now presented by Mr. *Linzee* for payment to him of the other moiety of the dividends on the 3,400*l.* during the joint lives of himself and wife.

Mr. *Follett*, in support of the petition.

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Mr. *Whitbread*, for Mrs. *Linzee*, argued, that by dividing the income of the fund with her husband during their joint lives, Mrs. *Linzee* would deprive herself of the benefit thereof, by anticipation, contrary to the obvious intent of her marriage settlement.

The MASTER *of the* ROLLS said, he thought that they would not deprive themselves of the benefit of the fund by dividing the income between them, and he made the order.

NOTE.—See *Harnett* v. *Macdougall*, 8 *Beav.* 187; *Moore* v. *Moore*, 1 *Colly.* 54.

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Jan. 15.

Bequest to *A.* and if she die leaving issue, to transfer it among such issue, and if she shall die leaving no issue, then over. Held, that the issue of all generations participated in the gift.

In re JONES' TRUSTS.

THE testator, who died in 1796, bequeathed 2,500*l.* Consols to trustees, in trust to pay the dividends to his niece *Sophia Sarah Jones* for life, and after her decease, "if she shall die leaving legitimate issue, that they do absolutely transfer the aforesaid 2,500*l.* £3 per Cent. Consolidated Bank Annuities, share and share alike, amongst such issue, towards their education and maintenance, in such manner as they the aforesaid trustees shall think most advisable; and it is, moreover, my will and desire, that from and after the death of my said niece *Sophia Sarah Jones*, if she the said *Sophia Sarah Jones* shall die leaving no legitimate issue," then there was a gift over.

The niece died in 1856, leaving three children, *Stephen*, *Sophia* and *Frances*, and at the time of her death *Stephen* had four children, and *Frances* four children.

Mr.

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Mr. *Roxburgh* argued, that the children of the niece were alone entitled to take the legacy to the exclusion of their eight children, and that "issue" must be construed "children." He cited *Bradshaw* v. *Melling* (*a*).

Mr. *Toller, contrà*, was not called on.

The MASTER *of the* ROLLS.

I am of opinion that the word "issue" is not cut down by the subsequent words. The general meaning of the word "issue" is all issue; it was construed "children" in *Bradshaw* v. *Melling* (*a*), because the testator expressed a distinct interpretation of his meaning of the word by using the expression "child" as its equivalent, and directing the issue to take "their parent's or parents' share."

There are no expressions here to cut down the general meaning of the word, and I am of opinion that I must hold that all the issue living at the death of the niece took, and that the fund is divisible *per capita*.

(*a*) 19 *Beav.* 417.

NOTE.—See *Ex parte Wynch*, 5 *De Gex, M. & G.* 188.

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Dec. 2.

In a suit for redemption a mortgagee is entitled to his costs, if it be found that anything was due to him at the filing of the bill, although the accounts be directed to be taken against him with annual rests.

Where on a bill for redemption nothing is found due to the mortgagee, he must pay the costs of the suit.

A mortgagor obtained a decree for redemption, but did not prosecute it, and died. The mortgagee then instituted a second suit against the representative of the mortgagor for foreclosure, and a similar decree was made. It was found, that a balance was due to the mortgagee at the institution of the first suit, but none at the second. The mortgagee obtained his costs of the first suit, but was ordered to pay those of the second.

IN this case, *Barlow* was the mortgagor, *Morris* the first mortgagee and *Gains* the second mortgagee. *Morris* entered into possession in 1837, but whether as mortgagee or under a general power of attorney from the mortgagor was a question in dispute, but it was ultimately decided, that he had entered in the character of mortgagee.

In *December*, 1842, *Barlow* instituted the suit of *Barlow* v. *Gains* against the two mortgagees for a redemption, and by the decree, made in that suit on the 18th of *March*, 1845, the Master was directed to inquire in what character *Morris* had entered into possession of the mortgaged premises, and if he should be found to have entered as mortgagee, then the usual accounts were directed against him, as a mortgagee in possession, and if the rent exceeded the annual interest, the Master was to make annual rests; further directions and costs were reserved.

Barlow went abroad and this decree was not prosecuted. He afterwards died, and in *November*, 1854, *Morris* instituted the suit of *Morris* v. *Islip* against *Islip* (the representative of *Barlow*) and against *Gains* for

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for a foreclosure. In *July*, 1855, a decree was made in *Morris* v. *Islip*(*a*) similar to that in *Barlow* v. *Gains*(*b*).

In taking the account with annual rests, it was found, that in 1842, when the first suit of *Barlow* v. *Gains* was instituted, 372*l.* was due to *Morris* in respect of his mortgage, and on taking the account with annual rests, it appeared that *Morris's* mortgage had been fully paid off on the 28th of *November*, 1851. It was also found, that subject to the question of costs, a balance of 369*l.* 4*s.* 1*d.* was due *from Morris* at the institution of the second suit. *Morris* had however paid to his solicitor for his bills of costs of the suit of *Barlow* v. *Gains* sums which amounted in the whole to 323*l.* 17*s.* 4*d.* He claimed to have this amount allowed him in taking the account, but the chief clerk disallowed them, the costs having been reserved by the decree of the 18th of *March*, 1845.

The cause now came on upon the chief clerk's certificate, when the principal question was, who was to pay the costs of the suits.

Mr. *Lloyd* and Mr. *J. H. Taylor* for *Morris* claimed the costs of both suits.

Mr. *R. Palmer* and Mr. *W. R. Ellis* for *Islip*, the representative of the mortgagor, *contrà*.

Mr. *Follett* and Mr. *Steere* for *Gains*, the second mortgagee.

The MASTER *of the* ROLLS.

In taking the account, under the decree, it appears, that

(*a*) 20 *Beav.* 654. (*b*) 8 *Beav.* 329.

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that at the filing of the first bill, a balance was due to the mortgagee; on that alone the mortgagee would be entitled to the costs of the first suit, and that is not varied from the mode in which the Court has directed the accounts to be taken, which is with the annual rests. The Court so directs, where the mortgagee takes possession when no arrears of interest is due to him. On the simple fact, that something was due to the mortgagee when the mortgagor came to redeem, the mortgagor must pay the costs of suit. But if the mortgagor had alleged and proved, that the mortgagee was fully paid off, at the filing of the bill, the mortgagee ought not to have put the mortgagor to file a bill at all, and the mortgagee would then have to pay the costs of the suit.

The Court appears to have thought proper, in 1845, to reserve the question of costs, in order that the facts might be ascertained, and which turn out in favor of the mortgagee, and the result is, that the mortgagee is entitled to the costs of the first suit, which ascertained that something was due on the mortgage, although the Court thought proper to direct the accounts to be taken with annual rests.

But it would be a totally new practice to hold, that though, on taking the accounts, nothing was due to the mortgagee at the filing of the bill, yet he is entitled to say to the mortgagor, I have paid, pending the suit, my solicitor's bill, and I must have it allowed in the account during the suit. The Court at the hearing reserved the costs, and in such cases it disposes of the costs at the end of the suit, and they would here be added to what is due from the mortgagor to the mortgagee:—that is what *Morris* is entitled to in this case.

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As to the second suit, he must pay the costs, because at the time he instituted it, he was over-paid. In 1854, when the second suit was instituted, he had a balance due from him of 369*l.* 4*s.* 1*d.* in respect of rents. The total amount paid to his solicitor was 323*l.* 17*s.* 4*d.*, and therefore, at that time, there was actually due from him, on his own statement, a sum of about 46*l.*, and if the former suit had been prosecuted in the ordinary manner, and he had been allowed his costs of 323*l.* 17*s.* 4*d.*, he would have been compelled to pay this balance. It is clear that he was then over-paid, and he must therefore pay the costs of the second suit. The matter arose from not prosecuting the decree in the first suit, as might have been done.

I must therefore allow *Morris* the costs of the first suit, but he must pay those of the second.

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Jan. 27, 28.
Feb. 16.

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A first principle applicable to charities is, that the intentions of the founder are to be carried into effect, as far as they are capable of being so, and so far as they are not contrary to law (using the word law in its proper and widest signification, as including the precepts of religion and morality). If therefore the founder has directed that only persons conforming to the Church of England shall be recipients of his bounty, his will must be followed.

THIS information was filed against the trustees of the *Hadleigh* Charities, and its principal object was

If a charity be founded to support some religious establishment, or if it seek to promote religious education (as in the case of Lady *Hewley's* Charity (*a*)), and if in addition to this, the intentions of the founder are not clearly expressed, or if the instrument of foundation be lost, or even never had any existence, the opinions and religious tenets of the founder have a most material bearing on this question:—who are the objects of the charity, and in what manner the trusts of it are to be performed? for the purpose of carrying into effect the general purpose, which is known to be the support of religion. In these cases, the presumption in the first instance is, that the founder intended to support an establishment belonging to some particular form of religion, and that he intended some particular doctrine of religion to be taught. The next presumption is, that this establishment and that this doctrine was that which he himself supported and professed, and the Court will look carefully at his course of life and conduct, and spell out expressions, not merely in the instrument of foundation but in his will and works, to ascertain what were the doctrines and opinions entertained and professed by him.

To some extent, though in a far less degree, the same principle applies when a charity has been founded for purposes of secular education. Here, in the absence of expressed intention, the Court will not assume that the founder intended any particular religious doctrine to be combined with the secular education; but on the contrary, will assume, that the object was for secular instruction generally, and that, admitting that religious education is to form part of the instructions given, it would still allow each person who needed the secular education to obtain the benefit of it, and would not, by enforcing particular rules relative to religious instructions, prevent all denominations of Christians from obtaining the benefit of the instructions so offered. But here again, if the founder has expressed an intention that religious instruction of a particular character shall form a part of the instruction given, the Court will follow that direction, although the effect may be to exclude a large portion of community, most in need of the charity, from deriving any benefit from it. But when the charity is purely eleemosynary, a different class of considerations arise.

Prior to the Reformation, almshouses were erected and endowed. The almspeople were required to attend the chapel and say *Pater-nosters*, *Aves*, &c. and pray for the souls of the dead; and if they did not obey the ordinances, were to be expelled. The Parson of the parish and Churchwardens were to distribute the rents. Held, that Dissenters who could conscientiously comply with the directions laid down by the founder, modified by the changes produced by the Reformation and the subsequent

(*a*) *Shore* v. *Wilson*, 9 *Cl. & Fin* 355.

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was to obtain a declaration that persons dissenting from the Church of *England*, being in other respects fit and proper objects, were entitled to participate in the charities, and also that dissenters from the Church of *England* were eligible to the offices of feoffees or trustees of the charity estates.

There were a number of distinct charitable gifts, which were administered by the Defendants; but it is only necessary to refer, in detail, to one, namely, that of the Rev. *William Pykenham*, formerly Archdeacon of *Suffolk* and rector of the parish of *Hadleigh*.

The will of Mr. *Pykenham* was dated the 6th of *April*, 1497, in the 12th *Hen. 7*, and thereby, after referring to a feoffment made by him to trustees of his lands, he proceeded to declare the charitable trusts on which the lands were to be held. He willed that the feoffees should suffer his five executors, during their life natural, and after their decease the Parson of the parish church of *Hadleigh*, and the wardens of the said parish church for the time being, for ever, to receive the rents, and well and competently repair, sustain and maintain, when and as often as need should be, as well all the lands and tenements in *Whatfield*, *Aldham*, *Newton*, *Elmoset*, *Hadleigh* and *Seymer*, as also all the twelve tenements, with the appurtenances, lately by him builded for twelve almshouses; and the residue of the said rents he willed that his executors, during their life natural, and after their decease the said Parson

Statutes, were not excluded from obtaining the benefit of the charity; and that if a Dissenter conformed to the rules, the trustees could not examine whether he did so sincerely.

The fact of the recipients of a charity being required to rehearse a particular prayer in church, or sit in a particular pew, or attend at the church porch or in the church itself to receive the bounty, does not justify the exclusion of Dissenters from participating in the charity.

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son and wardens of the aforesaid church for the time being, should well and truly lay out, bestow and distribute yearly for ever to and among the twenty-four poor persons, almsmen and women, now being and which for the time shall inhabit in the twelve tenements or almshouses abovesaid, towards the exhibition, finding and sustentation of the same twenty-four poor persons, men and women, that is, to wit, to every of the same poor persons, man and woman like much, in eschewing of variance and stryffes. He proceeded as follows:—"Also I will that every holyday in the year, from henceforth for evermore, the bell in the chappell be tolled every forenoon at eight of the clock, and in the afternoon, at four of the clock, by one of the said poor men," &c. &c. "And then I will that immediately, without any delay, every one of the said twenty-four poor men and women, which now be and which for the time hereafter shall be elect, chosen and admitted into any of the almshouses aforesaid, by all the time that he, she or they shall continue and dwell in one of the said twelve almshouses, shall daily resort into the chappell ordained to the said almshouses, and there, in the same chappell, shall continue and remain in prayer, every forenoon from the said hour of eight of the clock on to nine of the clock next ensuing, unless that a lawful and reasonable cause, as sickness, impotency, or such other duly proved let to the contrary, and that all every one of them devoutly say, every morning in the hour afore limited, in the same chappell, fifteen *Paternosters* and fifteen *Aves*, with the Creed, so that every one of them, in one whole year so continuing, may worship all the wounds that our Saviour *Christ Jesus* suffered for the redemption of sinful man. And over, that those that are learned say *matins*, *primæ* and hours of our Lady, and also the Psalm of *De profundis*, and once in the week, at their leisure, the 7th Psalm and the Litany,

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Litany, and *Placebo* and *Dirge* for the souls of one *William Pykenham*, their founder, and of *John* and *Catherine*, my father and mother, and for the soul of *Walter Lyard*, some time Bishop of *Norwich*, and for all other their benefactors, and for all Christians' souls; and likewise, every afternoon, in the hours afore limited, five *Pater-nosters*, five *Aves* and a *Credo*, and evening song and complyne of our Lady, with the Psalm of *De profundis*, as it is above rehearsed, and once in the week our Lady's Psalter. And that all such said almspeople as be not learned shall say, every forenoon, our Lady's Psalter, besides the fifteen *Pater-nosters*, fifteen *Aves* and *Credo*, as it is above rehearsed; and at every afternoon, in likewise, our Lady's Psalter, with five *Pater-nosters*, fifteen *Aves* and a *Credo*, for the souls above specified. And I will also, that if and when any of the aforesaid twenty-four poor persons be entered and set into of the said almshouses shall decease, or else that they be not of good behaviour in living, or will not obey unto the ordinances afore specified and hereafter contained, that then he, she or they, or any of those poor persons so offending, and will not amend themselves by twice warning to them, or any of them, duly given, by the aforesaid *George Pykenham*, *Edward Sulliard*, *Thomas Mason Clerke*, *William Baker* and *Thomas Rothman* (my executors), or their deputy during their life natural, and after their decease by the said parson and wardens of the said church for the time being, or else by their deputy in that behalf by them assigned, then I will that my executors above rehearsed or their deputy, during their life natural, and after their decease the same parson and wardens for the time being, shall utterly, for evermore, expel and put out of the said almshouses from the benefit and succour of the same such person or persons so offending, and never afterwards to be taken nor admitted in again into any of the same

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same houses as a dweller in the same; and that then in all goodly hope, and without any long tarrying or delay, other person or persons, one or more, as the case shall require, in the stead of him, her or they so deceasing or offending and expelled, shall be of new elected and set in the same almshouses by my executors above named, or by their deputy, during their natural life, and after their decease by the said parson and wardens for the time being, and by four of the most honest and discreet persons of the town of *Hadleigh*, feoffees in the aforesaid lands and tenements for the time being, and thus to continue from time to time for evermore, when and as often as any such case shall happen; provided always, that there be never more at once but two persons in any house of the said almshouses, that is to wit, man and wife together, if such case happens, or two men together or two women together, in eschewing if inconvenience may ensue if the contrary should happen. And I will that there be no person or persons from henceforth admitted into any of the said almshouses there to dwell, and have the relief thereof, but only such as now be, have been or shall be dwellers in the town of and in the parish of *Hadleigh* aforesaid, and there known of good and honest conversation and living, and, by fortune, fall to extreme poverty; and that any such person or persons once being admitted and entered into any of the said almshouses shall not be expelled, nor put out thereof afterwards, during their life, without a cause reasonable proved and thereof warned, and not amended as is above said."

There was nothing else in the will material to this subject, except this part:—"Howbeit, I will that those twenty-four poor persons in nowise be charged with prayers or observances above specified for me, but of the devotion only, until such time as the revenues and

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profits of my said lands and tenements, with other the premises unto the succour and relief of them, and then from thenceforth to be observed, and in the order and manner as is above specified, to the honour, laud and praising of Almighty God for evermore."

The information complained that the Defendants had systematically excluded Dissenters from a participation in the charity, and from becoming trustees or feoffees thereof.

Mr. *R. Palmer*, Mr. *Selwyn* and Mr. *Nalder*, in support of the information.

Mr. *Follett* and Mr. *Bird*, for the trustees.

Attorney-General v. The Corporation of *Beverley* (*a*); *Attorney-General* v. The Haberdashers' Company (*b*); *Shore* v. *Wilson* (*c*); *Attorney-General* v. *Sherborne* School (*d*) were cited. In re *Norwich* Charities (*e*); *Bedford* Charities (*f*).

Mr. *R. Palmer*, in reply.

The MASTER *of the* ROLLS reserved judgment.

The MASTER *of the* ROLLS. *Feb.* 16.

A question of very considerable importance and of extensive range is raised on this information, viz. whether charities of the description appearing in this information

(*a*) 15 *Beav.* 540, and 6 *De G., M. & G.* 256; but reversed by the House of Lords, 24th *July*, 1857.
(*b*) 19 *Beav.* 385.
(*c*) 9 *Cl. & Fin.* 355.
(*d*) 18 *Beav.* 256.
(*e*) 2 *Myl. & Cr.* 275.
(*f*) 5 *Sim.* 578.

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tion, ought to be dispensed amongst persons holding the religious tenets and doctrines of the Church of *England*, to the exclusion of all others, or whether the objects of the charity are persons of all persuasions, whether, in fact, any religious qualification in these charities is required, and, if so, the extent of it.

These charities are numerous; they have been united together under one management by the trustees, for a considerable time, which, as I understand, embraces all the charities which are in force for the benefit of the poor inhabitants of *Hadleigh*, in *Suffolk*. They are capable of a twofold cross division. By the former, they may be divided into charities of which the trusts are specified by the instruments of foundation or endowment, and those of which no original instruments of foundation appear, but of which the trusts are to be discovered, if at all, solely by the custom of administration which has prevailed respecting them. The other division is with reference to the object of the charities, which may be divided into those which are educational, and those which are not educational but eleemosynary. In order to make my views clear on this subject, I shall not mix up these charities into one general mass, as they have been consolidated under the administration of the modern trustees, but I shall state the principle, which, in my opinion, must govern this subject; and, having done so, I shall select one or more of these charities, and refer to them separately, in order that the principles on which I found my decision may be readily applied to those cases which I do not specially mention.

The first principle which is applicable to all these charities, without exception, is, that the intentions of the

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the founder are to be carried into effect, as far as they are capable of being so, and so far as they are not contrary to law, using the word law in its proper and widest signification, as including the precepts of religion and morality. If, therefore, the founder has directed, that only persons conforming to the Church of *England* shall be recipients of his bounty, his will must be followe .

In such cases no difficulty arises. The difficulty arises in cases where the intention of the testator is either not expressed, or expressed in a doubtful and uncertain manner, and then the question arises, in what case is it essential or desirable to ascertain that intention, and, when desirable, in what manner is this to be accomplished.

And here I think it proper to point out a distinction, which I consider to prevail in all these cases, arising from the nature and object of the charity itself. If the charity be founded to support some religious establishment, or if it seek to promote religious education (as in the case of Lady *Hewley's* Charity (*a*)), and if, in addition to this, the intentions of the founder are not clearly expressed, or if the instrument of foundation be lost, or even had never any existence, the opinions and religious tenets of the founder have a most material bearing on the question:—who are the objects of the charity and in what manner the trusts of it are to be performed? for the purpose of carrying into effect the general purpose, which is known to be the support of religion.

The reason of this is plain. It would be an absurd, or

(*a*) *Shore* v. *Wilson*, 9 *Cl. & Fin.* 355.

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or rather an impossible intention to attribute to a person, who founded a charity for support of a religious establishment generally, or for the purpose of affording religious instruction, the opinion that he regarded all religions with exactly the same favor, and that, provided some religion were taught, he was indifferent what it was, or even that he was indifferent as to the various shades and distinctions which obtain amongst the various classes of Christians: in other words, that he was indifferent whether the establishment to be maintained, or the doctrines to be taught were Papist or Protestant, Trinitarian, Arian or Socinian. In these cases, the presumption, in the first instance, is, that the founder intended to support an establishment belonging to some particular form of religion, and that he intended some particular doctrine of religion to be taught; the next presumption is, that this establishment and doctrine were those which he himself supported and professed, and the Court will look carefully at his course of life and conduct, and spell out expressions, not merely in the instrument of foundation, but in his will and works, to ascertain what were the doctrines and opinions entertained and professed by him. Accordingly, this was the course adopted in the case of Lady *Hewley's* Charity (*a*), which was one founded for the support of "Godly Preachers of *Christ's* Holy Gospel."

To some extent, though in a far less degree, the same principle applies when a charity has been founded for purposes of secular education. Here, in the absence of expressed intention, the Court will not assume that the founder intended any particular religious doctrine to be combined with the secular education, but, on the contrary, will assume, that the object was for secular instruction

(*a*) *Shore* v. *Wilson*, 9 *Cl. & Fin.* 355.

struction generally, and that, admitting that religious education is to form part of the instructions given, it would still allow each person who needed the secular education to obtain the benefit of it, and would not, by enforcing particular rules relative to religious instruction, prevent all denominations of Christians from obtaining the benefit of the instruction so offered. But here again, if the founder has expressed an intention that religious instruction of a particular character shall form a part of the instruction given, the Court will follow that direction, although the effect may be, to exclude a large portion of community, most in need of the charity, from deriving any benefit from it.

Both secular and religious instruction may be united together by the founder, and the observations I have already made, on the first branch, then become applicable, the more so, because it is to be observed, that no instruction is to be deemed adequate or complete which does not include religious instruction, and that even where secular education alone is the object of the charity, religious instruction is added in such a manner as not to deprive those, who sincerely dissent from the religious tenets inculcated, of the benefits to be derived from the secular institution; and in such cases, religious instruction, according to their own doctrines, is supposed to be afforded to the pupils by their parents or guardians at home. But when the charity in question is one of a purely eleemosynary character, a wholly different class of consideration arises. No doctrine of law, no precept of religion, establishes, that the act of relieving a fellow creature from the privations or calamities which have befallen him ought to be preceded by ascertaining that he holds opinions in accordance with the true doctrine of *Christ*, as promulgated in the Gospel, or with those which the donor believes to be

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such. The duty of relieving his fellow creature in distress is imposed on the Christian irrespective of religious doctrines and tenets, and notwithstanding that the object of charity may worship God in an erroneous manner, but in that which he believes to be most acceptable to his Creator.

In these charities, therefore, I consider that the presumption, that all classes were intended to participate in the bounty bestowed, is so strong, that it requires a clear and distinct expression of unequivocal import to exclude any class of Dissenters from the benefits of the original foundation; where such clear expressions are used, the Court must follow them, because the rule of this Court is, as I have already stated, to carry the will of the founder into effect, when it violates no rule of law or morality; but in such a case, it requires strict proof that such was the will of the founder, and all evidence as to the peculiar tenets and opinions of the founder are inadmissible as evidence of his intention. His intentions must be found to be expressed in the instrument itself, the burden of proof being thrown on those who seek to exclude. In these three classes of charities, therefore, these material distinctions are to be found.

In ecclesiastical charities, the religious opinions of the founder are of paramount importance; in educational charities, his religious opinions are only of value where some directions are given as to the religious instruction to be given; but in eleemosynary charities, the founder's religious opinions are wholly to be disregarded.

In ecclesiastical charities, the object being to promote religion, the opinions of the founder are of paramount importance. In the absence of any expressed intention, the established religion of the country would be assumed to be that intended, and the burden of proof lies on them who seek to extend it beyond that object.

In educational charities, the opinions of the founder are only of value, where some directions may have been given

given by him relative to the religious instruction to be given to the pupils to be taught, and only for the purpose of explaining and elucidating any obscurity or ambiguity which may be found in such direction.

In eleemosynary charities, the religious opinions and tenets of the founder are wholly to be disregarded, and are to be treated as forming no indication of his intention on which this Court can act. The presumption is, that he included all, and the burden of proof lies on those who seek to exclude.

It is obvious, that a considerable complication may arise, where a charity is founded for purposes partaking, more or less, of all these matters blended together. Such cases must be dealt with in the peculiar circumstances of each case, having regard to the principles I have stated. It is not, however, necessary to pursue that subject on the present occasion, as no such difficulty is presented here.

Having thus stated, generally, the principles on which I understand the Court of Chancery to act in such cases, I proceed to examine the charities in question. I begin with Dr. *Pykenham's* almhouses, both because it is one of the most important, and because it has been added to by other donations, for the purpose of augmenting and improving his gift. It has also this advantage, that the trusts and purposes of the charities are very clearly set forth in the instrument of foundation, viz. his will, which is dated the 6th of *April*, 1497, in the reign of *Henry* 7th. Before proceeding to read and comment upon it, I think it proper to state my opinion, that the directions contained in this will must, so far as they are now legal, govern the whole of the property which, by virtue of it, became vested in the trustees appointed by him, and, after their decease, in

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the rector and churchwardens of the parish. Whether Dr. *Pykenham* was the original owner of all these lands, or, as contended by the relators, of only a portion of them, I have not now the means of ascertaining; but I am clear, that for all purposes of this information, and of the future administration of the charity, all the property which he professed by his will to dispose of must be held to have passed under it and to be subject to the trusts contained in it.

The will is to this effect—[*see ante, p.* 249, *where it is stated.*] Dr. *Pykenham* was the rector of the parish. I do not understand whether he established a chapel in connection with the almshouse or not; there is no direction to maintain and repair it out of the rents, but a chapel was obviously attached to the almshouse, for he directs the almspeople to attend the chapel, he directs services to be performed, prayers to be said of a particular description, viz. for the souls of departed persons, and after the death of his appointed trustees, he directs the rector and churchwardens for the time being to perform the trusts of his will. This is, shortly, all that the will contains on this subject. I wholly disregard the circumstances that this will was anterior to the Reformation. I treat it exactly as I should do if the charity had been founded a hundred years later; and I entertain no doubt, that, so treating it, the chapel in which the testator expected that the service of the Church of *England* was to be performed. The prayers directed to be said by the almspeople, for the souls of the founder and other Christians, are practically put an end to by the Statute of *Chantries* in the reign of *Edw.* 6 (*a*), but this nowise affects the rest of the directions given by the testator, which, in substance, as I have stated, amount to this:—that prayers are to be said, attendance

(*a*) 1 *Edw.* 6, *c.* 14.

ance given by the almspeople in a chapel, where service, according to the doctrine and rites of the Church of *England*, was to be performed, and that the rector and churchwardens were to superintend the charity and elect the twenty-four almspeople, whenever a vacancy should occur.

After fully considering the will and all the directions contained in it, and having regard to the principles I have laid down on the subject, by which I have stated that I consider myself to be governed, I am unable to see anything in this will which should exclude any Dissenters from obtaining the benefit of the charity created by it, who can conscientiously comply with the directions laid down by the founder, modified, as they are, by the change produced by the Reformation and the Statutes which have since passed. Whether the Dissenter can do so or not is an affair between *God* and his own conscience, but, as I conceive the duties imposed upon the trustees, it is not an affair on which they are called upon to judge. They are bound to see that the rules prescribed by the founder, so far as by law they are in force, are complied with by the almspeople, but beyond this their duties cease. All that I find in this will is, a direction that certain rules shall be complied with. The person who cannot conscientiously comply with these rules must decline becoming one of the almspeople, or if elected must resign; but I repeat my opinion, that if he do so conform to these rules, the trustees can go no further, and that it is not open to them to examine whether he does so sincerely, or whether, having regard to his other religious observances, and his expressed opinions, he be or be not properly a member of the Church of *England*.

The observations I have made respecting the principles

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ples which govern charities of this description plainly shew, that I attribute no moment to the circumstance, that the persons appointed to superintend and administer this charity are the rector and churchwardens of the parish. It is a charity founded for the purpose of relieving fellow men from want, and the rector and churchwardens, from their position, were the persons most likely to know and judge best who were the persons standing most in need of such relief.

These observations of mine will also dispose of the cases of all the other charities, where the argument, that they were intended for the benefit of members of the Established Church, rests on the fact, that the persons appointed to distribute the bounty or to select the objects of it are the rector and churchwardens for the time being of the parish. In like manner, it follows from what I have said, that the fact that the recipients are required to rehearse a particular prayer in church, thanking the all-merciful *God* for his bounty dispensed through the means of a particular donor, and also the fact, that they are required to attend at the church and sit in a particular pew, or that they must attend at the church porch, or in the church itself, to receive the bounty awarded, do not, in my opinion, justify the exclusion, from participating in this charity, of persons who do not conform to the doctrines and rites of the Church of *England*.

The conditions above stated must be complied with, in those cases in which they are imposed by the donor; but the conditions are not to be imported into the other charities, where no such conditions seem to have been imposed. For instance, *Calton's* will is for bread to be distributed to such as shall "be and abide at the church." I think that regularity of attendance at the parish

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parish church is a condition precedent to entitle the poor to participate in this charity, but that this condition is not to be imported into those charities where the direction is simply, that the distribution shall take place in the church or at the church. Such directions I treat as the simple mention of the best known and most convenient place for making such distribution.

There is another charity mentioned, viz. *Glanfield's*, which is for distributing bread amongst "those" who keep their church duly and "orderly." This gift, as far I can make out, has disappeared; but, assuming it to be still in existence, it is like *Calton's*, a gift to those only who regularly attend the parish church, but this condition is not to be imported into those other gifts which are silent on this subject.

Having thus expressed the view I take of this case, I think it unnecessary to go, in detail, through all the charitable gifts which are referred to in the pleadings and evidence before me.

The views I have stated will apply to all those in which the trusts appear by any instrument of foundation; in those in which no instrument of foundation now appears, a question may arise from the inference to be drawn from immemorial usage, but it can arise in those only. Usage is not of importance where there is an instrument of foundation, because, as was justly urged in argument, the custom cannot control the expressed will of the founder, and it is only where there is no direct evidence of what that will was, that custom can be admitted as evidence, from whence the will of the founder may be inferred.

I do not mean to express any opinion as to the extent to which this Court would act upon immemorial usage

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usage, in the cases of simple eleemosynary charities, or to express any opinion whether, notwithstanding such usage, in cases of charities of the latter description, it would or would not be necessary for those, who insisted on the exclusive character of the charity, to prove the validity of that usage, or the unavoidable inference to be drawn from it. All that I think it necessary to say, in the present case, is, that after reading the evidence in this case very carefully, I have come to the conclusion, that such an immemorial usage is not proved in the case of the charities in question, and that, in my opinion, the burthen of proving, that such charities were of an exclusive character, lies on the persons who allege and who seek to establish or to justify that exclusive character.

My opinion, therefore, is, that there is nothing in the case before me, established in evidence, sufficient to justify the exclusive selection of objects of the charity, which has of late years prevailed in the parish of *Hadleigh*, and that it will be proper for this Court to make a declaration, that persons of all denominations and opinions are within the scope and objects of these charities, and that, provided the objects selected comply with the conditions imposed by the instruments of foundation in those cases, and in those only, where conditions are annexed to the gift, no further test can be properly required or condition imposed upon them; and further, that in the instances of those charities where the instrument of foundation is silent or is not now forthcoming, no person ought to be excluded from participating in the benefits of the charity or the bounty of the founder, by reason of such person entertaining or professing any doctrine or opinion dissenting from or not in unison with the doctrines and tenets of the Church of *England*, as by law established. I presume that such a declaration

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a declaration will be all that may be required in the present case, and that it will be unnecessary to direct any further steps to be taken. Liberty, however, to apply must be reserved.

I have, in the observations I have made, treated all the charities as eleemosynary; there are, however, two which are educational, and which, therefore, if the views I have expressed are correct, stand on a somewhat different basis as regards the question before me. It is not, however, necessary to go into this or speculate further on this subject, as these two charities contain nothing which can indicate, that the founders intended that the instruction should be afforded exclusively to the persons who conformed, in matters of religion, to the doctrines and practice of the Church of *England*, as by law established. The decree must, therefore, be pronounced containing the declaration I have specified, which I shall be glad to have worded in such a manner as may preclude all questions hereafter.

Liberty to apply must be reserved in order to enforce this declaration in practice, if not complied with, which I have no reason to suspect, and the costs of all parties must come out of the charity, those of the relators, because, in my opinion, they are right, and those of the trustees, because they have only continued a system which they found already established.

Re HADLAND'S SETTLEMENT.

June 30.

On a petition by tenant for life under the Trustee Relief Act, for payment of the income, her costs were ordered to be paid out of the income, and those of the trustee out of the corpus.

A SUM of 1,000*l.* Stock was held in trust for Mrs. *Hadland* for life, with remainder, as to 300*l.*, as she should by will appoint, and as to the remaining 700*l.*, in trust for her children. She had three children, and they assigned their reversionary interest in the 700*l.* to *Trail*. The trustees paid the fund into Court, under the Trustee Relief Act (10 & 11 *Vict.* c. 96), and Mrs. *Hadland* now presented a petition to obtain payment of the income to her. The question arose, out of what fund the costs of the petition ought to be paid.

Mr. *Waller* for the Petitioner.

Mr. *Pearson* for those in remainder.

Mr. *E. Smith* for the trustees.

The MASTER *of the* ROLLS directed the costs of the Petitioner to be paid out of the income, the costs of the two trustees of this application and consequent thereon, including any costs, charges and expenses properly incurred by them in relation to the trust fund, to be paid out of the 1,000*l.* Stock, and the costs of *Trail* out of the 700*l.* Stock part thereof (*a*).

(*a*) *Reg. Lib.* 1835, A. folio 1646.

In re HAMERSLEY'S SETTLEMENT.

Nov. 24.

Costs of an application by tenant for life to obtain payment of the income of funds paid into Court under the Trustee Relief Act, held to be payable out of the income and not out of the *corpus*.

A FUND had been paid into Court under the Trustee Relief Act (10 & 11 *Vict.* c. 96). *Samuel Hamersley*, the tenant for life, now presented a petition for payment to him of the income. A question arose as to whether the costs ought to be paid out of the income or out of the *corpus* of the fund.

Mr. *Martineau* for the Petitioner.

Mr. *W. H. Clarke* for the Respondent.

In re Field's Trust (*a*) was cited.

The MASTER *of the* ROLLS held, that the costs ought to be borne by the tenant for life.

(*a*) 16 *Beav.* 146

NOTE.—The following authorities as to costs under the Trustee Relief Act (10 & 11 *Vict.* c. 96), may be referred to:—*In re Cawthorne*, 12 *Beav.* 56; *In re Lorimer*, *Ib.* 521; *In re Field's* Trust, 16 *Beav.* 146; *Re Sharpe's* Trustees, 15 *Simons*, 470; *Dickson's* Trusts, 1 *Simons* (*N. S.*) 37, 47; *In re Feltham*, 1 *Kay & J.* 533, 534; *In re Heming's* Trusts, 3 *Kay & J.* 40; *Re Jones*, 3 *Drew.* 679; *In re Fletcher*, 12 *Jur.* 619; *Re Staples'* Settlement, 13 *Jur.* 273; *Re Bartholomew's* Will, 13 *Jur.* 380; *Ross's* Trusts, 15 *Jur.* 241; *Re Waring*, 16 *Jur.* 652; *In re Covington*, 1 *Jur.* (*N. S.*) 1157; *In re Woodburn's* Trust, 3 *Jur.* (*N. S.*) 799.

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EDWARDS *v.* TUCK.

Nov. 5.

A testator gave a moiety of his estate to the children of *A.*, and the other moiety to the children of *B.* The will contained a single clause of survivorship and accruer applicable to all the children and not, in terms, distributive, with a gift over if there should be no children of *A.* and *B.*, "or of either of them," or being such, all such children should die without having attained a vested interest. Held, that there were no cross remainders between the two classes of children, and that on the death of *A.* without having been married, the children of *B.* would not take the first moiety.

WILLIAM CHAPMAN, by his will, dated in 1826, gave the residue of his real and personal estate to trustees and their heirs, &c., and as to his freehold, copyhold and leasehold estates, upon trust to let, *or at their discretion, sell the same*, and as to his personal estate, upon trust to convert the same into money, and, after paying his debts and providing for some legacies, he directed them to accumulate the rents and profits of his real and personal estate, "for the benefit of the several persons, to and in trust for whom the said estates and premises were thereinafter devised and bequeathed," from time to time, "until the period of distribution thereinafter mentioned." And the testator directed his trustees to stand seised and possessed of his freehold, copyhold and leasehold estate, and the monies to arise from the sale of such parts thereof as should be sold under the aforesaid trusts, and of and in his personal estate and effects and the produce thereof, and of and in all accumulations of his real and personal estate and effects, and the rents, issues, dividends and profits thereof, and all other his estate and effects whatsoever, "*the whole of which I direct shall, for the purpose of distribution, be considered as personal estate*, in trust to

A testator empowered his trustees to sell his real estate, and directed it "for the purpose of distribution" to be considered personal estate. He then gave it and his personal estate to certain persons, with an ultimate limitation to "his own right heirs and next of kin, according to the respective natures and qualities thereof." The prior limitations having failed, held, that there was no absolute conversion, but that the heir at law took the produce of the realty.

The Court, acting on the improbability of a lady in her fifty-eighth year having future issue, distributed the fund.

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to divide the same into two equal half parts or shares, and to pay or transfer one of such half parts or shares unto and amongst all and every the child or children of my granddaughter *Frances Edwards*, and their respective executors, administrators and assigns, in equal shares and proportions, as tenants in common, and if but one, the whole to such one, his or her executors, administrators or assigns, and also to pay or transfer the remaining half part or share thereof, unto and amongst all and every the child or children of my nephew *Charles W. Chapman*, and their respective executors, administrators and assigns, in equal shares as tenants in common, and if but one, the whole to such one, his or her executors, administrators and assigns," the share of each of his said granddaughter and nephew who should be a son, to be conveyed &c., "to him at his age of twenty-one years, or to his heirs, executors or administrators, if he shall die under that age leaving issue," &c. And he declared, that the shares of the children of his nephew and of his granddaughter respectively should be considered as vested interests in sons who should live to attain twenty-one, or die before that age leaving issue, and being a daughter, who should live to attain that age or be married. The will proceeded thus:—"And I do hereby further declare, that if any such child or children shall depart this life without having attained a vested interest in his or her share of the said trust estate and premises, the share of each such child so dying shall accrue and belong *unto the survivors or survivor of the said children*, and the heirs, executors and administrators of such survivors, if more than one, in equal shares, and shall become vested and be conveyed, paid and transferred at such ages or times, and in such manner as is hereinbefore directed concerning his, her or their original share or shares respectively; and also that all and every the share or shares which, by virtue of this proviso,

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viso, shall accrue to any such surviving child, in case any such surviving child shall depart this life, without having attained a vested interest in his or her accruing share or shares, shall, from time to time, be subject to such and the like right of accruer or survivorship unto or for the benefit of the survivors or survivor of the said children, as hereinbefore is declared concerning the original share or shares of such child or children so dying as aforesaid.

"And I do hereby further direct and declare, that in case there shall not be any children or child of the said *C. W. Chapman* and of my said granddaughter *Frances Edwards, or of either of them*, or being such, if all such children shall depart this life without having attained any vested estate and interest in my said trust estate and premises, or any part thereof, then" my trustees "shall stand seised and possessed of and interested in my said real and personal estate and effects, or so much thereof as shall not have been applied for the purposes aforesaid, *in trust for my own right heirs and next of kin*, according to the respective natures and qualities thereof."

The testator died on the 19th of *November*, 1826.

Charles William Chapman, the nephew, died in 1836, and all his children having attained twenty-one within twenty-one years from the testator's death, a moiety of the property and of the accumulations had been conveyed, transferred and paid to them respectively.

Frances Edwards had never been married, and the other moiety of the residuary real and personal estate was accumulated down to *November*, 1847, when the twenty-one years from the testator's decease expired, and

and this suit was then instituted by *Frances Edwards* (as one of the next of kin of the testator), insisting that the direction for the future accumulation was invalid, and belonged, as to the personal estate, to the next of kin.

It was held by the *Master* of the *Rolls*, and afterwards by the full Court of Appeal (*a*), that the direction for accumulation beyond twenty-one years was void.

The Plaintiff, *Frances Edwards*, was in her fifty-eighth year and had never been married; she presented a petition for the distribution of the fund, founded on the moral impossibility of her ever having children to inherit that moiety.

Four-fifths of the fund had been found to have arisen from the real estate, and one-fifth from the personal estate.

Mr. *Sheffield* (in the absence of Mr. *Roupell*), in support of the Petitioner, argued, that the Court would act on the improbability of a female of fifty-seven ever having children, as in *Fraser* v. *Fraser* (*b*); *Lyddon* v. *Ellison* (*c*); *Brown* v. *Pringle* (*d*). Secondly. He relied on the judgment of Lord Justice *Turner* to shew that there were no cross remainders to be implied in favor of the *Chapmans*, as to the first moiety of the fund. Thirdly. That the direction to sell, and that the whole of the produce "should, for the purpose of distribution, be considered as personal estate," made the whole personalty, so as to pass to the next of kin under the ultimate gift.

Mr.

(*a*) 3 *De G., M. & G.* 68 to 71.
(*b*) *Jacob*, 586.
(*c*) 19 *Beav.* 565.
(*d*) 4 *Hare*, 124.

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Mr. *Follett* and Mr. *G. Simpson*, for the heir, argued against there being cross remainders, and contended that the conversion was not intended to affect the ultimate gift, which was positive, in favor of the right heirs and next of kin according to the respective natures and qualities of "the said real and personal estate and effects."

Mr. *Selwyn*, for the next of kin, also contended that the heir at law was not entitled to so much of the fund as represented real estate. He distinguished this case from *Ackroyd* v. *Smithson* (*a*).

Mr. *R. Palmer*, Mr. *Fookes*, Mr. *Lloyd* and Mr. *Surrage*, for the *Chapmans*, contended, that if Miss *Edwards* died without children her moiety would go to the children of Mr. *Chapman*; *Doe* d. *Clift* v. *Birkhead* (*b*); *Douglas* v. *Andrews* (*c*).

The MASTER *of the* ROLLS held, that there were no cross limitations and no absolute conversion, and that the heir of the testator took the produce of the real estate, and his next of kin the produce of the personal estate; and he ordered the fund to be distributed in the proportions stated.

(*a*) 1 *Bro. C. C.* 503.
(*b*) 4 *Exch. Rep.* 110.
(*c*) 14 *Beav.* 347, 355.

NOTE.—The Court has acted on the presumption of females being past child-bearing in the following cases:—*Leng* v. *Hodges*, *Jacob*, 585 (age 69); *Brown* v. *Pringle*, 4 *Hare*, 124 (age 66); *Davis* v. *Bush*, 8 *Jur.* 1114, note (age 59); *Edwards* v. *Tuck*, 23 *Beav.* 271 (age 57); *Lyddon* v. *Ellison*, 19 *Beav.* 565 (age 56); *Fraser* v. *Fraser*, *Jacob*, 586, note (*a*) (age 55).

ANON. *v.* ANON.

Jan. 8.

The privilege which enables a husband and wife to decline answering questions as to access or non-access in cases of disputed legitimacy, applies to a case where a child is born three months after the marriage.

THIS case, which was heard in private, is reported *ante* (*a*).

The following is a more accurate note of the opinion expressed by the Court:—

The MASTER *of the* ROLLS.

I think the principle of the English law, which makes a child previously conceived legitimate by the subsequent marriage, extends the privilege to the question of access or non-access, in such a case. I am not aware that the point has ever been determined, but I think that the principle is the same, and that as you are not at liberty to ask a husband or wife questions relating to access or non-access after a marriage has taken place, the same principle must apply to all the issue of a marriage, and to a child who becomes legitimate by the fact of a marriage subsequent to his conception, but previous to his birth.

Though I do not entirely adopt, to its full extent, the proposition, that a husband admits, by his marriage, that the child subsequently born is his, yet I think that the presumption is, that he does so admit it, if he take no step to repudiate it, but adopts towards it exactly the same course as if it were his own child, making no complaint of the premature birth of the child,

(*a*) 22 *Beav.* 481.

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child, or of his having married a woman not fit to be his wife. Of course, all these cases of presumption may be rebutted, and it may be shown that the marriage is not valid, in which case the presumption does not arise. But, assuming a valid marriage to have taken place, I think the child is legitimate, and that the burden of proving the contrary lies upon those persons who dispute the legitimacy.

Although I shall allow you to ask the wife, upon cross-examination, any question that will shew the invalidity of the marriage, or the fact that no child was born that was legitimate, I cannot allow you to ask her any question as to whether the husband had or had not access to her before the marriage.

I will allow you, if you cross-examine her, to ask her this question, "When did you first know this gentleman?" For, as at present advised, I should say, that you are entitled to know when she first knew him. Further than that I cannot allow you to go.

CIRCUITT *v.* PERRY.

Nov. 11.

A. B. bequeathed all his real and personal estate to *C. D.*; but he stated, that on his death, his father's property would, under his father's will, devolve on his nephews. This was not the fact, for it formed part of *A. B.*'s estate. Held, that the father's property did not pass under *A. B.*'s will.

JOHN Perry died in 1822; he had four children, *Richard*, *James*, Mrs. *Wright*, and Mrs. *Butler*. By his will, he made a disposition of his real and personal estate, one-fourth of which, on the death of *Richard* without issue, was to fall into the residue, which the testator devised and bequeathed "in trust for such person or persons as would have been entitled thereto as his heir at law and next of kin respectively, according to the nature and quality thereof, in case he had died intestate as to the same one-fourth part of the same premises." He gave the other three-fourths in similar terms to his three other children and their children, with a similar ultimate gift to his heir at law and next of kin.

In 1855, *Richard Perry* died, having in the same year made his will. At the date of his will and at his death he had no children, and his brother had no children, but he had six nephews and nieces (children of his two sisters). His wife was then dead; her sister was Mrs. *Circuitt*, who had several children.

In this state of circumstances, *Richard Perry*, by his will, gave and devised all his freehold messuages, tenements, lands and hereditaments whatsoever and wheresoever, and whether in possession, reversion, remainder or expectancy, and all his copyhold estates (if any) to trustees, to the use of the Plaintiff *Richard Circuitt* and his heirs, with divers limitations over. And, after giving some specific legacies, he proceeded

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as follows:—"As my nephews and nieces are provided for by the will of their late grandfather, and the property left to me and my brother *James Perry* under that will, on failure of our issue, devolves to them at our death, I trust it will not be considered by them with any unkindly feeling that the little I may have to leave is bequeathed to or for the benefit of the sister of my late dear wife and her children: I therefore give and bequeath to the said *Mary Circuitt* all my household furniture" and other chattels at my house. He afterwards gave his leasehold and "all the rest, residue and remainder of his personal estate and effects whatsoever" to trustees for Mrs. *Circuitt* for life, and afterwards to her children.

Richard Perry had real and personal estate of his own, and, having no children, he was entitled to one-fourth of the real, and one-sixteenth of the personal, estate of his father *John Perry*.

Two questions were raised by this special case.

First. Whether under *John Perry's* will, *Richard Perry* became, upon the death of *John Perry*, entitled to the real estate thereby given to *John Perry's* heir at law, and to one-fourth part of the personal estate thereby given to *John Perry's* next of kin, in expectancy upon failure of children, as in the residuary devise and bequest is mentioned, and if so,—

Second. Whether the parts of the residuary real and personal estate, to which *Richard Perry* so became entitled, passed under his will to the Plaintiffs, or whether the same devolved upon his nephews and nieces, or whether *Richard Perry* died intestate as to such real and personal estate.

Mr.

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Mr. *Lloyd* and Mr. *Cole* for the Plaintiffs :— *Cole* v. *Wade* (*a*); *Cambridge* v. *Rous* (*b*); *Smith* v. *Fitzgerald* (*c*); *Church* v. *Mundy* (*d*); *Bland* v. *Lamb* (*e*).

Mr. *R. Palmer* and Mr. *A. Smith* for *James Perry*, the testator's heir at law :—*Trevor* v. *Trevor* (*f*).

Mr. *Follett*, for nephews and nieces, argued that there was an intestacy.

The MASTER *of the* ROLLS.

When a testator states what his estate consists of, and that it is this which he intends to dispose of, the gift cannot extend beyond. Thus where he expressly states that he disposes of all his estate, but that something which he specifies does not form part of it, this excepted part will not pass by the gift.

I cannot speculate on what would have been the testator's intention if he had been aware of the effect of his father's will.

I have no doubt on the first question, and am of opinion that one-fourth of the real estate passed to *Richard* as the heir of his father, and that as he died without issue, he had the power of disposing of it by his will.

But I think that, in effect, he has not disposed of it by his will, and that it goes as in the case of an intestacy.

I will

(*a*) 16 *Ves.* 27.
(*b*) 8 *Ves.* 12.
(*c*) 3 *Ves. & B.* 2.
(*d*) 15 *Ves.* 396.
(*e*) 5 *Madd.* 412, and 2 *Jac. & W.* 399.
(*f*) 5 *Russ.* 24.

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I will answer the special case accordingly.

Declare that upon failure of children, *Richard Perry* became entitled to one-fourth part of *John Perry's* real estate as his heir at law, and to one-sixteenth part of his personal estate as one of his next of kin.

Declare that *Richard Perry* died intestate as to the real estate given by *John Perry* to his heir at law, and as to the personal estate given to his next of kin.

BISSET *v.* BURGESS.

Dec. 5.

The estate of an intestate was divided between the persons claiming to be creditors *pari passu*, and they executed a release to the administratrix from all claims. A creditor executed the deed in respect of a particular debt, which was stated. He some time after made a further claim against the estate of the administratrix, who had charged it with the payment of the intestate's debts. Held, that it was barred by the release.

The claim of an incumbent against the representatives of his predecessor, for dilapidations, will be paid out of equitable assets, *pari passu* with other creditors, though at law it would be postponed to simple contract creditors.

THE Rev. *John Knight*, the rector of *Petrockstow*, died in *November*, 1844, and was succeeded in the rectory by the Rev. *L. Woolcombe*. After payment of his specialty debts, his assets were insufficient to pay the debts on simple contract, and his widow, who was administratrix, divided the remaining assets between the simple contract creditors *pari passu*, and obtained the following release:—

By an indenture made between the several simple contract creditors of Mr. *Knight* of the first part, and Mrs. *Knight* (his administratrix) of the second part, after reciting that the personal estate, after payment of the testamentary expenses and specialty debts, amounted to 373*l.* 18*s.* 3*d.*, and that the simple contract debts, as far-

far as could be ascertained, amounted to 158*l.* 17*s.* 8*d.*, and that the administratrix has proposed to divide the said sum between the several persons parties thereto, rateably and in full discharge of their respective debts, at the rate of 4*s.* 8¾*d.* in the pound on such debts, and that the several persons parties thereto of the first part had agreed to accept the same in full discharge of their respective debts, and to give the release thereinafter contained, it was witnessed, that, in consideration of 4*s.* 8¾*d.* in the pound on their respective debts, amounting altogether to 373*l.* 18*s.* 3*d.*, to the several persons parties thereto of the first part paid by the administratrix, the several persons parties of the first part thereby released the administratrix, her heirs, executors and assigns, &c., and the real and personal estate of *John Knight*, deceased, and of the administratrix, from all actions, suits, claims and demands whatsoever by reason or on account of any debt or debts, &c. &c. whatsoever, owing from, &c., *John Knight*, deceased, or the said administratrix.

The Rev. *Louis Woolcombe* executed the deed as a creditor, in respect of a sum of 86*l.* set opposite his name in the schedule.

Mrs. *Knight*, the widow, by her will, charged all her real and personal estate with the payment of the debts of her late husband. She survived more than six years and died. By the decree in this suit (in *March*, 1856), it was declared, that all the debts of Mr. *Knight*, due at his death, were charged on the testatrix's estate, and the usual accounts were directed.

The Rev. *Louis Woolcombe* carried in a claim for 200*l.* for dilapidations to the rectory, committed during the incumbency of Mr. *Knight*, and he insisted that this was a debt due from Mr. *Knight*, and payable,

as

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as such, out of his wife's estate. The Chief Clerk disallowed the claim, and the question now came on for argument before the Court.

Mr. *Bagshawe* and Mr. *C. Wood*, for the Plaintiff, contended that a claim for dilapidations did not constitute a debt in the lifetime of Mr. *Knight*, and that no person existed, until afterwards, who had any claim against his estate in respect of it. They said, that the anomalous nature of the remedy was pointed at in *Bryan* v. *Clay* (*a*), where it was held, that the executor of a deceased incumbent is bound to satisfy simple contract debts before paying a claim for dilapidations; and therefore, in a suit, on the custom of *England*, for dilapidations, by the successor of a deceased incumbent against the executor, it was a good plea, that since the commencement of the suit, the Defendant had paid simple contract debts, leaving no assets to be administered.

Mr. *Follett* and Mr. *Rawlinson* for legatees. First, the assets are not equitable; secondly, the claim is covered by the release executed by Mr. *Woolcombe*. They referred to 2 *Burn's* Ecclesiastical Law (*b*), as to the nature of claims for such dilapidations, and relied on the fact that there was no remedy against the incumbent in his lifetime.

Mr. *Henry Stevens* for Mr. *Woolcombe*. Though damages could only be recovered after the death of the incumbent, still they constituted a debt payable out of the estate; *Morse* v. *Tucker* (*c*); *Bermingham* v. *Burke* (*d*). Secondly, the release only operated as to the

(*a*) 1 *Ellis & B.* 38.
(*b*) 9th edit. p. 148.
(*c*) 5 *Hare*, 79.
(*d*) 2 *Jones & L.* 699.

NOTE.—See *Lindo* v. *Lindo*, 1 *Beav.* 496.

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the debt mentioned in the deed. Its operation must be confined to the particular debt mentioned and to simple contract debts only.

The MASTER *of the* ROLLS.

I am of opinion that Mr. *Woolcombe* released all claims, and that it was intended by the deed to include all claims between him and Mrs. *Knight*. I think that her will is to be read with reference to this release, that she did not intend to restore any claim covered by it, and that therefore this claim of Mr. *Woolcombe* against Mr. *Knight*, in respect of dilapidations, is not one which ought to be paid out of Mrs. *Knight's* estate.

I should entertain little doubt, that where the assets are equitable and there are specialty and simple contract debts, and also claims of an incumbent for dilapidations, they would be treated in the same way, and that they would all be paid *pari passu*, for a claim for dilapidations is in the nature of a debt; and although it seems of a lower character than simple contract debts, still it must be satisfied out of the estate. That question does not, however, arise, for I think that the release does operate in regard to this claim.

It was then asked that the costs of suit might be paid as between solicitor and client, and *Waldron* v. *Frances* (*a*) was cited.

The MASTER *of the* ROLLS.—I will follow that case.

(*a*) 10 *Hare*, App. x.

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THOMPSON *v.* CLIVE.

Jan. 15.

Bequest to *A. B.* for life, and after her death, to pay and divide it amongst her children living at her decease, and the issue of such of them as should be then dead leaving issue, such issue to take their parents' share, with a gift over if all the children of *A. B.* should die in her lifetime without leaving issue. Two children died in the life of *A. B.*, leaving children. Held, that grandchildren of *A. B.* who predeceased their parents did not take; but that grandchildren of *A. B.*, who survived their parents, but died in the life of *A. B.*, took vested interests, which passed to their representatives.

THE testator bequeathed one-sixth of his residue in trust to invest and pay the income to his daughter *Jane May* for life, and after her death, to pay and divide the same, or the produce thereof, unto and among all and every the child and children of his daughter *Jane May*, which should be living at the time of her decease, and the issue of such of them as should be then dead leaving issue, such issue to take share only as their parents would have taken if living. And if all the children of his daughter *Jane May* should die in her lifetime without leaving lawful issue, then the testator directed that the whole of the last-mentioned one-sixth part of the general mass or fund aforesaid, and the stocks or funds whereon or wherein the same should be invested, should go and belong to his own next of kin.

Jane May, the tenant for life, survived the testator and died in 1856. Two of her children had died in her lifetime, namely, *Frances Chambers*, who died in 1847, and *Ann Lampert*, who died in 1849.

Frances Chambers left six children surviving her, one of whom, viz. *Frances Lewis*, died in 1854 and in the lifetime of the tenant for life.

Ann Lampert left five children surviving her, but she had had four other children, who died in her lifetime.

This was a petition for payment out of Court of the fund.

Mr.

Mr. *James*, for the five children of *Ann Lampert*, argued that they were alone entitled to *Ann Lampert's* share.

Mr. *Drury*, for the representatives of the four children of *Ann Lampert* who died in her lifetime, argued that they were entitled to participate in the fund, for the gift to the issue contained no such qualification as that they should survive their parents. That in the gift over if they should all die without leaving lawful issue, the word "leaving" should be read "having." He cited *Pye* v. *Linwood* (*a*).

Mr. *Rasch*, for the five surviving children of Mrs. *Chambers*, contended that the sixth, who had died in the lifetime of the tenant for life, was excluded. He referred to *Beck* v. *Burn* (*b*); *Parker* v. *Sowerby* (*c*).

Mr. *Serjeant*, for the representatives of *Frances Lewis*.

The MASTER *of the* ROLLS.

I think that *Frances Lewis*, the sixth child of *Frances Chambers*, is entitled. I express no opinion on *Beck* v. *Burn*; it does not govern the present case. The words are distinct and must be taken to be what the testator intended—[*His Honor read them.*]

I cannot concur in the construction argued by Mr. *Drury*, that issue who predecease their parent are entitled. The meaning is, that the issue of a child surviving her are to take and to take such share as the parent would have taken; that is, the issue which *Ann Lampert* left surviving her are to take the share which she would have taken if living. I do not find any such words in *Beck* v. *Burn*.

I am

(*a*) 6 *Jur.* 618. (*b*) 7 *Beav.* 492. (*c*) 1 *Drew.* 488.

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I am of opinion, that the plain and obvious meaning is, that the issue of the children of *Jane May* who survived their parents, but died before *Jane May*, take; that is, the representatives of such issue as died after their parent take, but not the representatives of those who predeceased their parent.

Re COMPTON SMITH.

April 16, 17.

Where counsel are not instructed to move on the seal day mentioned in the notice of motion, the Respondent is entitled to the costs of the motion as abandoned, and counsel for the motion, being afterwards instructed, cannot subsequently save the motion to the next seal.

A NOTICE of motion was given for the 16th of *April* (a seal day). The motion not having been made or saved before the conclusion of the seal,

Mr. *Southgate*, for the Respondent, asked for the costs of an abandoned motion.

The MASTER *of the* ROLLS granted them accordingly.

On the next day (17th *April*),

Mr. *Jessel* asked to save the notice of motion, but he admitted that he had not been instructed yesterday. He insisted, however, that he was not too late, and referred to the General Order of the 5th of *August*, 1818 (*a*).

The MASTER *of the* ROLLS, however, held, that where Counsel are not instructed to move during the pending seal, the motion must be considered as abandoned. He said that such had been the rule laid down by Lord *Langdale*, in a case in which he had been engaged.

(*a*) *Ord. Can.* 3.

DENTON *v.* DONNER.

July 16.

An absolute conveyance of a reversionary interest to a solicitor reduced, by decree, to a mortgage, the solicitor standing in a *quasi* though not absolute relationship of trustee and solicitor, and failing to prove that the transaction was clearly understood and that full value was given.

Distinction between a purchase by a trustee for sale and a purchase of a reversionary interest by a trustee from his *cestui que trust*. The former is absolutely void, and in the second case the burden of proof lies on the trustee, to show that every possible security and advantage were given to the *cestui que trust*, and that as much as possible was gained for him, in the transaction, and as could have been obtained under any other circumstances.

The case of *Harrison* v. *Guest* (6 *De G., M. & G.* 424) does not establish that the fact of an unprofessional person having employed no solicitor is a matter of no importance.

UNDER a settlement of 1836, prepared by the Defendant, a solicitor, and kept in his custody for safety, some property was vested in the Plaintiff, a butcher, and others, in trust for the Plaintiff's father for life, with remainder to the Plaintiff and other members of his family.

In 1843, the Plaintiff mortgaged his interest to the Defendant. In 1853, the principal sum of 140*l.*, and 52*l.*, arrears of interest, were due to the Defendant, and the Plaintiff, being pressed for payment, executed a deed, dated the 13th of *November*, 1853, whereby he conveyed the whole property *absolutely* to the Defendant. The Plaintiff had no professional assistance on the occasion. Part of the trust property had been sold in 1851, and the produce placed in the Defendant's hands, as he admitted "as trustee," for safe custody, the parties interested not wishing to trust it with the Plaintiff.

The tenant for life died in *September*, 1854, at the age of eighty-one, and the property was afterwards sold, and, according to the statement, the Plaintiff's share produced about 368*l.* The Plaintiff, in 1855, filed this bill to set aside the deed of the 13th of *November*, 1853, so far as it purported to be an absolute conveyance,

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conveyance, and praying that he might redeem, on payment of what was due on the mortgage.

Mr. *Lloyd* and Mr. *C. C. Barber*, for the Plaintiff, insisted, first, that the deed was executed under the belief that it was merely a mortgage for the principal and interest then due, and not an absolute conveyance of the equity of redemption. Secondly, that it was a purchase of a reversionary interest at an undervalue, and that the Defendant had failed in proving, as he was bound to do, that he had given full consideration. Thirdly, that the Defendant was the solicitor of the Plaintiff in the matter, and therefore that the transaction could not stand. And, fourthly, that the Defendant, by the conveyance of the trust property to him, became *de facto* a trustee, and incapable of purchasing the trust property from his *cestui que trust*.

Mr. *Lewin*, for the Defendant, argued, first, that the evidence shewed that an absolute sale was intended. Secondly, that the sale was of an equity of redemption, and not a reversionary interest. Thirdly, that the Defendant had never acted as the Plaintiff's solicitor but at arm's length, and that it was not necessary that the vendor should have the assistance of an independent solicitor; *Harrison* v. *Guest* (*a*). Lastly, that the Defendant was not a trustee, but a purchaser.

The MASTER *of the* ROLLS.

I think, upon the whole of this case, that this transaction cannot stand. The defendant says, that the Plaintiff agreed that he should take the whole of his shares in the trust property for the 192*l.* then due for principal

(*a*) 6 *De G., M. & G.* 424.

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principal and interest. The Plaintiff asserts, what was intended at that time was simply this:—that the interest should be turned into capital, and that by conveying the whole of the property to the Defendant he should be relieved from all personal liability. I am of opinion that the nature and form of the deed is quite consistent with the Plaintiff's view, and that he might well have understood it should be in this form. It is an absolute conveyance of the whole of the property; but if it had been a mere assignment of trust property to a new trustee, it would equally have been an assignment and conveyance of the whole of the property, yet it would not have prejudiced the right of the *cestuis que trust*, but would merely have been substituting a new person in whom was reposed the duty of seeing that the trusts were properly executed, and if the assignor, besides being trustee, was also one of the *cestuis que trust*, the mere conveyance of the property to a new trustee would not, in any degree, prejudice or affect his rights in the property. Therefore, as the appointment of a new trustee was one part of the arrangement, it would naturally be expected by the Plaintiff, even if he understood legal matters, that there would be an absolute conveyance of the whole property; but it would not necessarily follow, that it would prejudice his rights in the property. Therefore, the statement that the whole of the property was to be conveyed by an absolute conveyance, out and out, does not, in this particular transaction, strike me in the way in which Mr. *Lewin* has pressed it upon my attention. Now, if the Plaintiff understood this to be the nature of the transaction, it appears to me quite consistent with this: "the interest shall be turned into principal, and the whole shall carry interest. You, the Defendant, shall have the best security for its being paid; for I will convey you the whole trust property, so that you can then hold it and pay yourself; but, in consideration

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sideration of this, you must release me from all personal liability." That is really the nature and character of this transaction; and not only is it perfectly consistent with the general form of the deed, but it would require a very accurate explanation to point out to the Defendant that the deed went beyond that, and deprived him of any right to the surplus of the produce of his four-ninths of the property, after payment of 192*l.* and interest upon it.

I do not, therefore, upon the face of this evidence, see any proof that the Plaintiff understood the nature of the transaction, and that, in point of fact, he was selling his share of the property out and out; and in the relation that existed between the Plaintiff and Defendant, I think it was, in this suit, incumbent on the Defendant to prove that fact.

It has been said, that the strict relation of solicitor and client did not exist between them: if not, it was something as nearly approaching to it as can well be conceived. In the first place, the Defendant was one of the firm of solicitors who prepared the deed of 1836, of which the Plaintiff was the trustee. He was the depositary of the deed in this transaction, in which the Defendant proposed that the whole of the trust property should be assigned to him, so as to make him a trustee in the place of the Plaintiff; he did not employ, nor direct the Plaintiff to employ, any other solicitor for that purpose. Besides this, it is to be observed, that there being no power or authority in the deed to appoint the Defendant a trustee, it was a direct breach of trust to do so; and that if the trust property had afterwards been dissipated or misapplied, the Plaintiff (the original trustee) would have been liable to the other *cestuis que trust* to make good the total amount of the loss; and, as I have observed,

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observed, the Defendant was not only the solicitor who prepared the original deed, but he was the solicitor who proposed this transfer. It is to be observed (although it is said that it was merely an accidental error in the title of the bill of costs,) that he brought in a bill of costs against this Plaintiff with respect to this transaction, in which he treats the Plaintiff as his client. It is not suggested that the Plaintiff ever had any other solicitor, or employed any other solicitor; and the Defendant was the solicitor employed by the family with relation to the trust deed, and to the transactions with respect to the trust moneys. In addition to that, he stood in this peculiar relation; that one portion of the property had actually been sold two years before, and the produce of that sale had been paid into his hands, not undoubtedly as a trustee named in the deed, but placed in his hands, and accepted by him as a trustee, to hold it upon the trusts of the deed, and in order that it might not be placed in the hands of the Plaintiff, whom the other parties did not wish to trust. In that situation, he was undoubtedly a trustee of that fund, a trustee whom, by a borrowing of the expression applied to executors, you may designate as a trustee *de son tort*.

He was, for all purposes, a trustee of this property, although not properly constituted, and this Court will so treat him. One of the parties beneficially entitled was the Plaintiff, and the Defendant was therefore purchasing from his *cestui que trust* a portion of the trust fund remaining in his hand. In respect of that portion of the fund which was in his hands, the relation of trustee and *cestui que trust*, in my opinion, subsisted.

I think there is the distinction which Mr. *Lewin* pointed out, although not to the extent that he wishes to carry

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carry it, between a purchase by a mere trustee for sale, and by one holding certain property to be divided amongst *cestuis que trust*, after the death of the tenant for life. No doubt where a person is a trustee for sale, and he sells the estate to himself, the transaction is absolutely and *ipso facto* void; but if a trustee purchases from his *cestui que trust* his reversionary interest which he is liable to pay, I do not assert it is absolutely void, but certainly the burden of proof lies on the trustee to shew, that every possible security and advantage were given to the *cestui que trust*, and that as much as possible was gained for him in the transaction, and as could have been gained under any other circumstances. There is, in this respect, an absence of evidence which is strongly unfavourable to the Defendant. It does not appear that any estimate was made of the value of this reversionary property for the purposes of the sale. If it was intended to be sold, the Plaintiff ought to have been told what was the value, and the estimate that had been made of the value of the reversion of this property. It apparently produced something like 40*l.* a year, the tenant for life being at that time of the age of eighty, subject, it is proved, to serious disorders, although, at the same time, he was a hale, hearty man, capable of taking a great deal of exercise, still the value should have been ascertained and proved. It is to be observed, that the Plaintiff got no advantage from this transaction as a sale, beyond that which he would have obtained by giving proper security. In this state of things, I think the burden of proof necessarily falls upon the Defendant to shew the *bona fides* of the transaction throughout, and that every thing was done for the Plaintiff which could have been done if the property had been sold to a stranger, and that the utmost that could possibly have been produced was obtained. It is also to be borne in mind, that the necessity of selling

selling the property arose from the pressure which the Defendant exercised upon the Plaintiff, though not an improper pressure, because he was clearly entitled to be paid the money which he had advanced.

Upon the whole of this case, and in this state of circumstances, I am of opinion that this transaction cannot stand, that this deed can only stand as a security for the principal sum of 192*l.* and the interest which has accrued on it since that time, and that there ought to be a reconveyance to the Plaintiff.

In the course of the judgment *The* MASTER *of the* ROLLS also said:—

I will make one or two observations upon the fact of his not having any solicitor in the transaction. I do not understand the case of *Harrison* v. *Guest* (*a*) to mean this:—that the fact of an unprofessional person having no solicitor in the transaction, is a matter of no importance at all; because it is essential that it should be established, that a party to the transaction, or to the execution of a deed, understood the nature and character of the arrangement which he was entering into; and if it be shewn that a person did not really understand the nature of the deed he was executing, undoubtedly the transaction could not stand; while the employment of a solicitor would be *primâ facie* evidence that he explained to his client the nature of the transaction. All that I understand the Lord Chancellor to mean is this:—That where no peculiar relations of a fiduciary character exist between the vendor and the vendee, the fact of the seller not employing any solicitor, does not shift the burden, and not that it is not a material

(*a*) 6 *De G., M. & G.* 424.

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a material circumstance to be regarded in the transaction that he had not a solicitor on his part who would be likely to explain the matter fully to him.

NOTE.—Affirmed by the full Court of Appeal, *June* 6th, 1857.

BERESFORD *v.* BERESFORD.

March 19.

A husband, by his marriage settlement, covenanted to keep up policies on his life, for the benefit of himself, wife and children. He became wholly unable to pay the premiums. The Court authorized the trustees to surrender the policies.

IN 1830, a husband, on his marriage, assigned a sum of 1,900*l.* £4 per Cents., and policies on his life for 9,000*l.*, to trustees, on trust for himself and his wife for their respective lives, with remainder to their children. The husband covenanted to pay the premiums.

In 1855, he was convicted of uttering a forged bill of exchange, and sentenced to transportation for life. The only fund which remained for keeping up the policies was 57*l.*, while the annual premiums originally amounted to 238*l.* 15*s.*, but these were increased by his transportation. These he was wholly unable to pay.

This suit was instituted by the wife and only child, to authorize the trustees to surrender the policies, for which the Offices offered 3,435*l.* 12*s.* 3*d.*

Mr. *Karslake*, for the Plaintiffs.

Mr. *F. M. Nichols*, for the trustees.

The MASTER *of the* ROLLS authorized the surrender

NOTE.—See *Hill* v. *Trenery*, *ante*, 16.

DOUGLAS *v.* ARCHBUTT.

March 5, 6.

By inadvertence, an affidavit was not filed until after the evidence had closed, though prepared before. The Court, on motion, gave liberty to use, it, on payment of the costs of the motion.

THE Plaintiff moved to be at liberty to use an affidavit at the hearing of the cause, which, by the inadvertence of the clerk of the Plaintiff's solicitor, had not been filed until after the evidence had closed, on the 19th of *July*. The affidavit in question had been prepared on the 18th of *July*, but had not been filed until the 28th of *July*.

Mr. *R. Palmer* and Mr. *Bristowe*, in support of the motion, cited *Ferrand v.* The Corporation of *Bradford* (*a*).

Mr. *Selwyn* and Mr. *Lovell*, *contrà*.

The MASTER *of the* ROLLS: I will read the affidavit.

March 6.

The MASTER *of the* ROLLS.

I must give the leave asked; but, as the Plaintiff comes to repair a slip, he must pay the costs.

(*a*) 21 *Beav.* 422.

NOTE.—See 15 & 16 *Vict.* c. 86, s. 38, and 32nd General Order of 7th *August*, 1852, *Ord. Can.* 470.

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Nov. 14, 17.
1857.
Jan. 15.

By the rules of a company, no transfer of shares was to be made until all arrears of calls had been paid. The manager of the company transferred to a mortgagee his own shares, on which an arrear of calls was due, without paying them. The committee of management of the company having afterwards recognized the mortgagee as a shareholder, Held, that they could not claim from him the arrears due at the time of the transfer.

Where there was a right of forfeiture of shares, on giving ten clear days' notice, held that a notice to forfeit "on Monday the 9th" was insufficient, the 9th being on a Friday.

BY this suit, the Plaintiffs claimed to be entitled to 216 shares in the *North Frances Mines* Company, subject to the payment of two calls of ten shillings each per share, which shares had been transferred to the Plaintiffs by *Stainsby*, as a security for a debt. The following are the material facts of the case:—

In 1852, a partnership was formed for the purpose of working some mines at *Ellogan* in *Cornwall*, on the cost-book principle, and which was called "The *North Frances Mines* Company."

The company was divided into 2,500 shares, and rules and regulations were agreed upon for its management. The first rule provided that a committee of five members should manage the affairs of the adventure.

The other rules principally bearing on this case were as follows:—

XIII. The committee shall give *ten clear days' notice* to each shareholder of all special and general meetings, which notice, forwarded by post to the address as entered in the transfer books of this adventure or as last left with the committee, shall be deemed good and sufficient notice; the time to be computed from the day on which such notice was posted.

XV. That upon the transfer of shares being made, a certificate of such transfer, according to the form approved

proved by the committee, within fourteen days thereof, signed by the several parties thereto, shall be brought to the office of the company for the purpose of being entered, and each person to whom each share or shares shall be transferred shall, by such certificate, signify his acceptance of the said shares, and that he will be subject to and bound by the rules and regulations for the time being of the company; but no register of such transfer shall be made, unless all calls which have been previously made shall have been first duly paid upon all the shares standing in the name of the party purposing to transfer any part of the same.

XVII. All calls for money shall be paid to the committee, or to the bankers of this adventure, within fourteen days after notice of call shall have been forwarded to each shareholder.

XVIII. It shall be in the power of the shareholders, at a special general meeting, convened by a resolution passed at a general meeting, held next after the day upon which a call became due, or at any subsequent meeting, a copy of the said resolution having been first duly forwarded to every shareholder in arrear of calls, *to declare absolutely forfeited* all shares upon which such call shall remain unpaid, and every such declared defaulter shall, immediately and thenceforth, lose all right, title, interest, or share whatsoever in or to the said forfeited shares, or in or to any moneys, credits, ores, minerals, machinery, or other property of this adventure, that he might or would have been entitled to, either in law or equity, in virtue of such shares previous to such declared forfeiture.

In 1854, *Stainsby*, who was a member of the committee of management and treasurer and secretary of the company,

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company, had 596 shares standing in his name in the books of the company, on which (as the Defendants alleged) the calls of 1*l.* 4*s.* 9*d.* per share had not been paid. Being indebted to *Watson* in 1,700*l.*, *Stainsby*, on the 11th of *October*, 1854, executed a transfer of 250 shares to the Plaintiffs *Watson* and *Hodgson* (the latter being a mere trustee for *Watson*) not as an absolute sale, but as a security for *Watson's* debt, and to be re-transferred on payment thereof. In *January*, 1855, *Hodgson*, discovering that the transfer of the shares had not been made in the company's books, wrote to *Stainsby* to desire that this should be done forthwith. In answer *Stainsby* said he was only able to transfer 216 shares, and on the same day (1st *February*) *Stainsby*, who was still in office, caused his clerk to insert in the share registry list a transfer of the 216 shares to the Plaintiffs, who thereby appeared to be proprietors of them. *Stainsby*, on the same day, debited himself with the amount due from him on his shares, and he forwarded to the local manager a cheque, which he entered in his accounts as cash, but which was dishonoured.

On the following day (2nd *February*,) *Stainsby* was removed from his office of treasurer and secretary, and *Hunt* was appointed in his place. On the same day, a meeting of the company was held, when a call of 10*s.* per share was made and directed to be paid on or before the 19th of *February* then instant, and notice of this was given to the various shareholders, including the Plaintiff *Hodgson*, by a letter from the secretary. In the letter written to the Plaintiff *Hodgson*, the secretary informed him that 10*s.* per share had been called and was payable before the 19th of *February*, and proceeded thus:—"to the prompt payment of which, *on your* 216 *shares*, amounting to 108*l.*, I am desired to claim your

your particular attention." It was said, that by this letter, *Hodgson* was recognized as a shareholder to the extent of 216 shares.

Subsequently to this, the committee of management of the company seemed to have investigated the accounts of *Stainsby*, their late treasurer, and to have ascertained, that after charging him with his receipts, and allowing him all his payments, nothing was attributable to the previous calls of 1*l.* 4*s.* 9*d.* per share on his shares, and thereupon, on the 16th *February*, 1855, application was made, by the committee of management, to the Plaintiff *Hodgson* to pay up that amount on each of the 216 shares, amounting in the whole to 267*l.* 6*s.*, in addition to the last call of 10*s.* per share, of which notice had been previously given. The call of 10*s.* was not paid by the Plaintiff on the 19th of *February*, and on the 27th of *February* a notice, bearing date the 26th *February*, was posted by the company, addressed to the Plaintiff *Hodgson*, which was in these terms:—

"*North Frances Mines, London.*
"26th *February*, 1855,
"34, *Great Winchester-street.*

"Sir,—I beg to inform you that a special general meeting of the shareholders in this company will be held at this office on *Monday, the 9th March next*, at 12 o'clock, for the purpose of declaring absolutely forfeited all shares on which any calls shall remain unpaid, and of directing in what manner such forfeited shares (if any) shall be disposed of.

"Your obedient servant,
"CHARLES HUNT."

This letter was posted on the evening of the 27th of *February*, and was received by the Plaintiff on the 28th. The

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The 9th of *March* happened to fall on a *Friday*, and not on a *Monday*, and the committee of management, on the 3rd of *March*, 1855, attempted to correct the defect as to the day of the week, by stating that *Monday* was misprinted for *Friday*, but it was not proved that this communication was ever received by the Plaintiffs.

On *Friday*, the 9th of *March*, a meeting was held, at which the 216 shares were forfeited. Subsequently, in *March*, *Hodgson* tendered the amount of the call of 10*s*. per share on his 216 shares, which was refused, and he tendered a subsequent call, which was also refused.

In *March*, 1855, *Stainsby* became bankrupt, and the Plaintiffs filed this bill against the committee of management of the company, praying a declaration that they were entitled to the 216 shares, subject to the payment of the two calls of 10*s*. each, praying an injunction to restrain the sale of the shares by the committee of management, and also that they might make good to the Plaintiff *Hodgson*, the deficiency in value which might arise between the present price in the market of the shares, or when they should be sold, and the highest price which they had borne since the transfer of them by *Stainsby* to the Plaintiffs.

The Defendants, the committee of management, relied on the 15th and 18th clauses of the rules.

Mr. *R. Palmer* and Mr. *Baggaley*, for the Plaintiffs, argued, first, that no copy of the resolutions of the 26th of *February* had been forwarded to the Plaintiffs, as required by the 13th rule. Secondly, that ten days clear

clear notice had not been given, the notice having been posted on the 27th of *February*, and the forfeiture having been made on the 9th of *March*, which, they said, gave only nine clear days. Thirdly, that the notice was void for uncertainty, for it was impossible to say whether the forfeiture was to take place on the 9th or on the *Monday*. Lastly, that the company, having registered the shares in the Plaintiffs' names, and having afterwards recognized them as the owners, could not subsequently affect them by prior equities between the company and their officer, and charge the Plaintiffs with calls which were assumed to have been paid.

Mr. *Lloyd* and Mr. *Hetherington*, for the company, relied on the 15th rule of the company, which provided that no register of transfers should be made unless all calls which had been previously made should have been first duly paid, upon all the shares standing in the name of the party proposing to transfer any part of the same. They said, that at the time this transfer was made, it appeared by the account kept by *Stainsby* himself, that there was 91*l.* due from him to the company, and the fact of his being treasurer and secretary, which was known to the Plaintiff *Hodgson*, put him on inquiry as to the state of the accounts between *Stainsby* and the company. And further, that there being a balance due to the company, even on the books as kept by *Stainsby* himself, and the accounts being made out as far as possible in his own favour by himself as treasurer, and the register of the shares being also kept by himself, a defaulter, this transaction could not bind the company. That as the calls had not been paid, the company was now entitled to disregard such fictitious transfer, and to treat it as null.

Mr. *Surrage*, for the assignees.

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Murray v. *Pinkett* (*a*); *Pinkett* v. *Wright* (*b*); *Straffon's* Executors' Case (*c*); *Bargate* v. *Shortridge* (*d*), were cited.

The MASTER *of the* ROLLS reserved judgment.

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The day named in the notice of the 27th of *February*, was an impossible one, as "the 9th of *March* next" did not fall on a *Monday*. The consequence is, that the notice, in my opinion, was in itself worthless or unnecessary. Besides, it failed in not giving sufficient length of notice. By the 13th rule of the company, it is directed that "the committee shall give ten clear days' notice to each shareholder of all special and general meetings, which notice, forwarded by post to the address as entered in the transfer books of this adventure, or as last left with the committee, shall be deemed good and sufficient notice, the time to be computed from the day on which such notice was posted." The notice to the Plaintiff, even if correct, gave only nine clear days' notice.

In this state of circumstances, I am of opinion that this notice, so far as regarded the Plaintiff, was mere waste paper, and that no consideration whatever is to be attached to it, notwithstanding that the committee of management, on the 3rd of *March*, endeavoured to correct one defect, by stating that *Monday* was misprinted for *Friday*; but even this communication, if it had

(*a*) 12 *Cl. & Fin.* 764.
(*b*) 2 *Hare*, 120.
(*c*) 1 *De G., M. & G.* 576.
(*d*) 5 *H. of L. Cas.* 297; 16 *Beav.* 84.

had been worth anything, does not appear to have been received by the Plaintiff.

On *Friday*, the 9th of *March*, a meeting was held, at which resolutions were passed, proposing the forfeiture of certain shares, by reason of the non-payment of calls thereon, including in this number the 216 shares standing in the name of the Plaintiff. In my opinion, this proceeding was wholly inofficious, as regarded the Plaintiffs and their shares.

In *March*, the Plaintiff *Hodgson* tendered the amount of the call, 10*s*. per share on his 216 shares, which was refused. A subsequent call of 10*s*. per share was made, and the Plaintiff again tendered the amount of the two calls of 10*s*. each on his 216 shares, which was again refused. In *March*, 1855, *Stainsby* became a bankrupt.

In this state of circumstances, the Plaintiffs file their bill, praying a declaration that they are entitled to the 216 shares, &c.

I express no opinion as to what the consequences would have been, if the case now brought forward had been made in the first instance by the company, if the committee of management had never recognized the validity of the transfer, or treated the Plaintiffs as owners of these shares, and if, immediately on the removal of *Stainsby* from the offices he held, the committee had given notice to the Plaintiff of such their intentions.

This was not done, and that case does not arise, and I am of opinion, that the Defendants, the committee of management, have precluded themselves from raising this

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this question, because, after they had full notice of the state of the accounts between the company and *Stainsby*, they treated the Plaintiff *Hodgson* as the owner of these 216 shares, and applied to him to pay what was due from *Stainsby* as well as himself in respect of the calls made thereon. Nay, further, if this were not sufficient, when these calls were not paid, they proceeded against him as a shareholder in respect of these shares, to forfeit them on account of unpaid calls. Suppose that this had been a sale of shares, it is plain that when the company had openly and knowingly permitted the transfer of shares from one person to another, they could not have called on the new shareholder, under the penalty of forfeiture if he failed to comply, to pay up the calls which the company ought to have obtained from the original shareholder, without payment of which they need not have sanctioned the transfer, and on the faith of the payment of which the price at which the shares were sold must have been regulated.

The circumstance that this was a transfer to secure an existing debt, and not a sale, does not vary or alter the principle.

I am of opinion that, as against the company, the Plaintiffs must be held to be the owners of the 216 shares, subject to the payment of the two calls of 10*s.* per share only, on trust to secure the amount of principal and interest due to him on the debt of 1,700*l.*, from *Stainsby*. But as the Plaintiff is not the purchaser, but only the mortgagee of the shares (though in my opinion he has the first charge thereon), yet I am of opinion that, subject to the payment of what is due to him thereon, the company is entitled to claim a lien on these shares, or on the balance of the purchase-money to be realized by the sale of them, after paying the

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the Plaintiff (if any such balance shall remain), and that the extent of such lien is to be limited by the amount, which, on taking the account between them, may be found to be due to the company from *Stainsby*, in respect of calls unpaid by him. This would be so as between the company and *Stainsby* himself, and in my opinion, it makes no difference that he has become bankrupt, and that his assignees stand in his shoes.

This is the conclusion I have come to on the facts of this case, which, is obvious from the remarks I have made, induces me to consider it as analogous to the case of a mortgagee who files his bill to enforce his security against the second incumbrancer who disputes the priority, and against the owner of the equity of redemption, and accordingly I shall make a decree on this footing. The Plaintiff *Hodgson* must pay the two calls of 10*s*. per share, which he offers to do; and the Defendants, who represent the company, must account to him for the profits made by the mines during that time, the one to be set off against the other, and the balance paid. There must be an account of what is due to the Plaintiff in respect of his principal, interest and costs, including what he has paid for calls, and deducting what he has received for profits. The Defendants, the company, may then redeem him on payment of that amount, or, if, as I presume will be most for the advantage of all parties, the shares can be sold at once, then the proceeds must be applied in payment, in the first place, of what, on taking the account, may be found due to the Plaintiff *Hodgson*. If it fall short of his claim, he must be at liberty to prove for the difference against the estate of the bankrupt *Stainsby*. If it exceed that amount, the surplus must be paid to the Defendants, representing the company, for the unpaid calls

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calls of *Stainsby*, subject, nevertheless, to an account to be taken in respect thereof, unless this amount can be settled by arrangement between the Plaintiff, the company and the assignees of *Stainsby*.

Each party must add his costs of the suit to the debt, except the assignees, who will be entitled to have their costs out of their own bankrupt's estate, and subject also to this—that if the assignees of *Stainsby* shall be advised to dispute the claim of the company altogether, and allege that, on taking an account between them, it will appear that nothing is due from *Stainsby* in respect of calls on these shares, then, in that case, I must reserve the costs of these Defendants of that account until after that account shall have been taken. But from the course adopted before me in argument, I apprehend I shall not be called on to make any suspension of the final decree in this cause, but that the whole matter may be wound up by this decree, simply reserving liberty to apply.

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Jan. 26.

Though a person entering on the estate of an infant is treated, in equity, as his bailiff, the rule does not apply where the infant has never been in possession by himself, his guardian or agent, and where the estate has been held by a title adverse to the infant.

A general allegation, that the Defendant admits the Plaintiff's title, is too vague; the statement should be more circumstantial.

THIS came on for argument upon a general demurrer. The bill, in effect, stated as follows:—

John Crowther the younger, and *William Crowther*, were entitled to a moiety of a small copyhold, as tenants in common, subject to the payment of sums equivalent to half its value, which were charged thereon.

John Crowther the younger died in *September*, 1835, intestate, leaving the Plaintiff, then of the age of four months, his customary heir.

By indenture of the 15th of *December*, 1836, and made between *William Crowther* and others, and *John Crowther* the elder, after reciting (as the bill stated), "that *John Crowther* the elder had contracted and agreed with *John Crowther* the younger, and *William Crowther*, for the purchase of their moieties for 130*l.*," and reciting "that it had been agreed that the said piece of land should forthwith be conveyed and assured, as far as the same might be without the joinder of the said infant son (meaning thereby the Plaintiff), unto the said *John Crowther* the elder," the several parties then covenanted to surrender the property to *John Crowther* the elder and his heirs.

The bill stated that *John Crowther* the elder, "at or about" the date of the said indenture, entered into possession and retained it until 1843, when he died intestate. *Jonathan*, his heir, entered and retained

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possession until *June*, 1843, when he died, having devised all his real and personal estate to the Defendant *Martha Crowther*, who thereupon entered and continued in possession to the present time.

The Plaintiff attained twenty-one in 1856, when he instituted this suit against *Martha Crowther* alone.

The bill charged that the Plaintiff was "entitled both at law and in equity, to one-fourth of the property."

The bill contained the following allegations:—"The Defendant *Martha Crowther* admits that the Plaintiff is entitled at law to the said undivided fourth part of the same premises, but she claims to be entitled thereto in equity, by virtue of the said alleged agreement, entered into by the said *John Crowther* the elder with the said *John Crowther* the younger and *William Crowther*."

The Plaintiff also admits, "that the said *John Crowther* the elder, in his lifetime, and the said *Jonathan Crowther*, and *Martha Crowther*, after his decease, paid to the guardian of the Plaintiff interest on the sum of 32*l.* 10*s.*, being the other moiety of the said pretended purchase-money of the share of the Plaintiff in the said piece of land, and the Plaintiff is willing to allow such payment in the account hereinafter prayed."

The bill prayed a declaration, that the Plaintiff was entitled in equity "to one-fourth of the land, and for an account of the rents of one-fourth received by *John Crowther* the elder, *Jonathan Crowther*, and *Martha Crowther*, and for payment."

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To this bill *Martha Crowther*, the sole Defendant, filed a general demurrer for want of equity.

Mr. *Follett* and Mr. *G. L. Russell*, for the demurrer. This is a mere ejectment bill; the Plaintiff alleges no impediment to his recovering at law, and a bill seeking relief on a legal title is demurrable; *Pulteney* v. *Warren* (*a*); *Jones* v. *Jones* (*b*). The account is consequent on the legal title, which must be established at law, before any account or relief can be granted here; *Davenport* v. *Davenport* (*c*); *Vice* v. *Thomas* (*d*). Besides, if the Plaintiff has a legal title, he can recover the mesne profits at law. The difficulty under the statute of 4 *Ann.* c. 16, s. 27, is now removed by the 3 & 4 *Will.* 4, c. 27, s. 12, by which the possession of one tenant in common of the entirety is adverse to the other tenant in common, and therefore the liability of one tenant in common to account ought first to be established at law; *Henderson* v. *Eason* (*e*). This is not a case where the parties in possession can be treated as bailiffs of the infant. That principle can only arise where the infant's title is admitted. They also cited *Culley* v. *Taylerson* (*f*); *Wheeler* v. *Horne* (*g*); *Sturton* v. *Richardson* (*h*); and as to the right to devise copyholds before admittance, *Watkins* on Copyholds (*i*); *Wainewright* v. *Elwell* (*k*); *Phillips* v. *Phillips* (*l*).

Mr. *R. Palmer* and Mr. *A. Smith*, in support of the bill, argued, that a party taking possession of an infant's estate was in equity treated as his bailiff, and became accountable to him as a trustee; *Newburgh* v. *Bickerstaffe*;

(*a*) 6 *Ves.* 88.
(*b*) 3 *Mer.* 161.
(*c*) 7 *Hare*, 217.
(*d*) 4 *Y. & Col., Exch.* 538.
(*e*) 2 *Phill.* 308.
(*f*) 11 *Ad. & Ell.* 1008.
(*g*) *Willes*, 208.
(*h*) 13 *Mee. & W.* 17.
(*i*) *Coventry* edit., pp. 338—340.
(*k*) 1 *Madd.* 627.
(*l*) 1 *Myl. & K.* 649.

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staffe (*a*); *Yallop* v. *Holworthy* (*b*); *Morgan* v. *Morgan* (*c*); *Dormer* v. *Fortescue* (*d*); *Blomfield* v. *Eyre* (*e*); *Hicks* v. *Sallitt* (*f*). That according to the statements of the bill, the Plaintiff's title was admitted by the Defendant, and that the Plaintiff was entitled to relief, not only as tenant in common and, as such, entitled to a partition and account, but also to a declaratory decree of his rights, under the 15 & 16 *Vict.* c. 86, s. 50; *Rooke* v. *Lord Kensington* (*g*); *Jackson* v. *Turnley* (*h*).

The MASTER *of the* ROLLS.

I am of opinion that this demurrer must be allowed:—I will consider the case, in the first instance, as if the Plaintiff had been adult; and next, how it is varied by the circumstance that he was an infant.

If a Plaintiff file a bill against a person in possession for an account of the rents and profits, alleging a legal title, I am of opinion (assuming that if the legal title were established he would have a right to an account), that he must, in the first instance, establish his legal title. The cases of *Jones* v. *Jones* (*i*), and *Davenport* v. *Davenport* (*k*), establish this, and it is one of the first principles on which this Court acts. If it were otherwise, this Court would be deciding legal matters, and be trying actions of ejectment, which it has never done.

Then it is said that this is the case of an infant, and that the principle above stated does not apply to the case of an infant; but I think the authorities cited do not establish

(*a*) 1 *Vern.* 295.
(*b*) 1 *Eq. Ca. Ab.* p. 7, pl. 10.
(*c*) 1 *Atk.* 489.
(*d*) 3 *Atk.* 130.
(*e*) 8 *Beav.* 250.
(*f*) 3 *De G., M. & G.* 782.
(*g*) 2 *Kay & Johns.* 753.
(*h*) 1 *Drew.* 617.
(*i*) 3 *Mer.* 161.
(*k*) 7 *Hare*, 217.

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establish any such distinction. This Court will not allow an infant to be turned out of possession of an estate without legal process, and accordingly the cases cited are all instances of a person intruding on an infant in possession, either by himself or his guardian or bailiff; but if it is admitted that the infant never was in possession or in the enjoyment of the property, either by himself or his guardian, he stands in the same situation as any other person, and must first establish his legal title. That is the case here; it is not alleged that the infant was ever in possession, either by himself or his guardian, but the bill alleges an adverse title, under a contract entered into by the infant's father. It is not the case of an intrusion on an estate which an infant was ever in possession of, in any form whatever; it is a mere case of adverse possession, under a title springing from a contract entered into by his father.

Then it is said, that "you may have an admission of title," and there is an admission of right in this case, the bill stating, that "*Martha Crowther* admits that the Plaintiff is entitled at law." In my opinion that amounts to nothing. Such an admission is either an admission of the legal inference to be drawn from the facts stated, and then amounts to nothing, or it is an admission that, whatever be the right of the Defendant, she has waived it in favor of the infant, without stating how or by what means she has waived her right. It is only necessary to refer to the class of cases, of which *Frietas* v. *Dos Santos* (*a*) is an instance, where it was sought to raise an equity, by alleging generally the existence of mutual accounts, to show, that a bill, demurrable on the facts alleged, cannot be sustained by the introduction of a general allegation of this description.

(*a*) 1 *Young. & Jer.* 574.

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tion. I am of opinion that such a general allegation will not prevent a demurrer, unless the bill also contain distinct allegations of matters and facts sufficient to support it.

The demurrer must be allowed.

BREWER *v.* POCOCK.

Jan. 20.

Executors of the assignee of leaseholds held, after an assignment by them, entitled to have a fund set apart for their indemnity; but refused as to valuable leaseholds at small rents, of which the testator was original lessee.

THE question was as to the right of executors to be indemnified against the covenants in leases belonging to the testator.

In 1834 a warehouse and buildings in *Southwark* were demised to *Chadwick* for eighty years, at a rent of 140*l.* The lessee covenanted to pay the rent, to insure at the full value, and repair and surrender the premises at the end of the term, so sufficiently repaired, &c. A similar lease was granted to *Chadwick* of another house and premises in *Southwark* for seventy-nine years, at a rent of 60*l.* Both these leases had been assigned to the testator, who covenanted to perform the covenants and to indemnify *Chadwick*.

These leases had been assigned by the executors to purchasers, who covenanted to perform the covenants and to indemnify the executors and the estate of the testator. The first property was let at 200*l.* a-year; the second at 90*l.*

The testator was also original lessee of a messuage and piece of ground at *Lee*, in *Kent*, for a term of eighty-one years from 1850, at a rent of 14*l.*, which contained

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ained covenants to insure and surrender at the end of the term in good repair.

The latter leaseholds had been assigned by the executors, and the assignee covenanted to perform the covenants and to indemnify.

The testator was also original lessee of a piece of ground at *Bonchurch* for a term of ninety-nine years from 1840, at a rent of 10*l.*, which contained covenants to repair and insure the messuage covenanted to be built thereon. This, and the messuage erected, had been assigned on similar terms.

The two latter were beneficial leases, the former house had cost 1,569*l.*, and had been sold by the executors for 1,000*l.*, and the latter had cost 1,040*l.* for building.

The executors claimed an indemnity fund to be set apart, amounting to 4,656*l.*

Mr. *Lloyd* and Mr. *Prendergast*, for the Plaintiff, argued that this was not a case in which any indemnity was necessary; *Dean* v. *Allen* (*a*); and that the order of this Court for the distribution of the assets would be an available defence for the executors at law, who consequently incurred no personal responsibility.

The MASTER *of the* ROLLS.

I have always felt great reluctance in retaining a fund

(*a*) 20 *Beav.* 1.

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BREWER v. POCOCK.

fund for such a purpose as this. At the same time, there is the possibility that the houses may be left in such a state of repair as to fall down, by reason of the infancy or inability of the tenant, or from other causes. I think that there must be some indemnity, but only for the first two leaseholds. I should think that 1,000*l.* would be enough.

Mr. *Selwyn, contrà*, said that after this intimation, he would be content with 1,200*l.*, the parties in the meanwhile receiving the dividends.

This was acceded to.

HERMAN *v.* DUNBAR.

Jan. 17, *Feb.* 9.

Held, upon a petition to discharge a Receiver and pay over the money in Court and the balance, the Receiver, though served, ought not to appear, and his costs were not allowed.

A SUM arising from rents being in Court, a petition was presented to pay it to the mortgagee, to discharge the Receiver, and that he might pay his balance.

The Receiver having been served with the petition appeared at the hearing, and the question was, whether he was entitled to his costs.

Mr. *R. Palmer*, Mr. *Lloyd* and Mr. *J. H. Taylor* for different parties.

The MASTER *of the* ROLLS.—I will consider this point.

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HERMAN v. DUNBAR.

Feb. 9.

The MASTER *of the* ROLLS.

I have taken some pains to inquire whether there was any rule as to the appearance of the Receiver, and I have consulted one of the Vice-Chancellors on the subject. I think, with reluctance, that the Receiver must not be allowed his costs. The rule of the Court is, that though served with the petition, he ought not to have appeared, being a mere officer of the Court (*a*). Lord *St. Leonards* held that a party was not justified in appearing merely because he was served with a petition (*b*).

(*a*) See *Parker* v. *Dunn*, 8 *Beav.* 497.

(*b*) *Re Hertford Charity*, 19 *Beav.* 518, n.; and see 19 *Beav.* 160.

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Nov. 19, 20, 21.

1857.

Jan. 17.

WHITMORE *v.* EMPSON.

Traders mortgaged a leasehold factory to *A.*, and they afterwards mortgaged the machinery in it, separately, to *B.* Upon the bankruptcy of the traders, who had been allowed to retain possession of the machinery, Held, that the moveable machinery passed to the assignees, as being within the order and disposition of the bankrupt, but that the machinery fixed to the freehold did not, though mortgaged separately.

THIS was a special case, and the question was, whether goods and chattels, consisting of trade fixtures and machinery, passed to the assignees of the bankrupts, as in the order and disposition of the bankrupts, as reputed owners thereof at the time of the bankruptcy, or belonged to Mr. *Empson*, to whom they had been mortgaged by the bankrupts.

The bankrupts carried on business as die-sinkers and button manufacturers at *Birmingham*. They had two manufactories, one in *Tower* Street, and the other in *Great Hampton* Row, both of them held for the residue of two unexpired terms of ninety-nine years. The premises

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mises in *Tower* Street were mortgaged to Mr. *Fielding* on the 1st of *January*, 1852, to secure 800*l.*; and the premises in *Great Hampton* Row were, on the 6th of *April*, 1852, mortgaged to a Mr. *Smith* for 1,000*l.*

On the 15th *June*, 1852, the bankrupts executed a bill of sale to Mr. *Empson*, in consideration of 700*l.*, whereby they assigned to him all the machinery specified in the schedule to the bill of sale, with a proviso for making it void, on payment on the 15th *June*, 1862, or at such earlier day as Mr. *Empson* should appoint, with power of sale. It was provided, that until default, the assignors were to be at liberty to hold and use these chattels.

The property in the schedule was thus described:— "engine-house, horizontal steam engine and boiler complete, draw bench and tools complete. Shop, No. 6, new manufactory, twelve machines. Shop, No. 5, old manufactory, twelve stamps, four ditto, two medal presses, two cutting-out presses."

All the machinery and effects mentioned in the schedule, except the twelve machines therein stated to be in the new manufactory (meaning thereby the manufactory in *Tower* Street), were, at the date of the bill of sale, and thenceforth to the bankruptcy, in the manufactory in *Great Hampton* Row (called in the schedule the old manufactory), and were used by the bankrupts in their business, and were affixed to the walls or floors of the building to enable the same to be effectually worked, and constituted what are usually called "trade fixtures."

The twelve machines above excepted were what are called "damask, or engine cutting machines," and were not

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not affixed, but moveable at the will and pleasure of the bankrupts, and were, in fact, moved by them some time between the date of the bill of sale and the bankruptcy from the manufactory in *Tower* Street to the manufactory in *Great Hampton* Row, where they continued, and they were used by the bankrupts in their business down to the bankruptcy.

Mr. *Empson* advanced the bankrupts a further sum, and on the 17th of *September*, 1855, they executed to him a mortgage of their equity of redemption in the two manufactories as a further security for 700*l*.

It was admitted to be the common practice for manufacturers and others, to rent or hire steam engines and boilers, of the character and description mentioned in the schedule to the bill of sale of the 15th of *June*, 1852, and the machinery of the nature and description of the twelve stamps mentioned in the schedule were also, at times, rented or hired.

The bankrupts continued in possession of the manufactories, machinery and effects down to the 19th of *November*, 1855, when they were declared bankrupts, and the Plaintiffs were appointed assignees. The property included in the schedule had been sold, and the money had been deposited at the bankers, to abide the decision of this question.

Mr. *Follett* and Mr. *Amphlett*, for the assignees, argued that the fixed chattels, having been mortgaged separately, had lost their quality as portion of the realty, in the same way as growing crops would do, and that they were therefore chattels, within the order and disposition of the bankrupts with the consent of the true owner.

Mr.

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Mr. *R. Palmer* and Mr. *Bagley*, for Mr. *Empson*, argued, that the machinery formed part of the freehold, and that it being the custom to hire such machinery, the possession of it could not give the bankrupts any fictitious credit.

Mr. *Follett*, in reply.

The following cases were cited:—*Ex parte Barclay* (*a*); *Horn* v. *Baker* (*b*); *Clark* v. *Crownshaw* (*c*); *Parker* v. *Staniland* (*d*); *Doe* d. *Hanley* v. *Wood* (*e*); *Lingham* v. *Biggs* (*f*); *Trappes* v. *Harter* (*g*); *Bryson* v. *Wylie* (*h*); 13 *Eliz.* c. 5; 6 *Geo.* 4, c. 16, s. 72; 12 & 13 *Vict.* c. 106, s. 125; *Boydell* v. *M'Michael* (*i*); *Ex parte Dover* (*k*); *Hamilton* v. *Bell* (*l*); and see the note to 1 *Chitty's* Statutes, p. 237 (2nd ed.).

The MASTER *of the* ROLLS reserved his judgment.

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Jan. 17

The MASTER *of the* ROLLS.

With respect to such of the chattels as were affixed to the freehold, it is not disputed by the Plaintiffs, the assignees, that they would not pass to them under the clause in the statute (*m*), in ordinary circumstances, and they admit also, that these chattels would have passed under an assignment of the premises generally (*n*). But they contend, that this case is distinguished from the

(*a*) 5 *De G., M. & G.* 403.
(*b*) 9 *East*, 215; 2 *Smith's Lead. Cas.* 161.
(*c*) 3 *Barn. & Ald.* 804.
(*d*) 11 *East*, 362.
(*e*) 2 *Barn. & Ald.* 724.
(*f*) 1 *Bos. & Pul.* 82.
(*g*) 2 *Cr. & M.* 153.
(*h*) 1 *Bos. & Pul.* 83, n.
(*i*) 1 *Cr., M. & R.* 177.
(*k*) 2 *Mont., D. & D.* 259.
(*l*) 10 *Exch. Rep.* 545.
(*m*) 12 & 13 *Vict.* c. 106, s. 125.
(*n*) *Williams* v. *Evans*, *ante*, p. 239.

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the ordinary case, by the circumstance that the deeds and bill of sale have made a separation between the freeholds and the chattels attached to it, and which have, in law, as completely severed the chattels from the freehold as if they had been moveable and distinct, and as, according to one of the propositions in *Horn* v. *Baker* (*a*), a different consideration arises with respect to utensils, where a custom prevails of letting them out to the trade, so, on the contrary, the same rule does not apply to fixtures affixed to the freehold where, by the deeds and mode of dealing therewith by the parties themselves, these fixtures have been severed from them, and treated as something quite distinct from them.

They illustrate this argument by reference to growing crops, which, until severance, form part of the freehold, and pass with it as such, but which, if sold standing, become personalty in the hands of the purchaser, though still growing and standing in the freehold. They point out, that although, in the case suggested, the actual appearance and position of the property is not changed, yet that the character of the property is changed from realty into personalty, by the mere mode of dealing with it; and they argue, that so, in the like manner, though these goods and chattels remain attached to the freehold, and would, unless thus dealt with, pass with it, still that the dealings of the parties may, in like manner, produce a severance in law between these chattels and the freehold, and thereby alter the character of the property, and impart to chattels fixtures, while still attached to the freehold, the character and quality of chattels moveable; and having brought forward many illustrations to fortify the proposition, that this consequence

(*a*) 9 *East*, 215.

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quence may follow from the dealing of the parties, then they contend that this is the effect of the deed which has been executed, and the necessary consequence flowing from it. They say, that the express words of the deed, the manifest intention of the parties to it, and the necessary operation of these words effectuating this intention, all concur in converting these fixtures into chattels, which must, in law and for the purpose of carrying that deed into effect, be treated as moveable, and as detached from the freehold: that, thereby, they have lost the property of affinity and incorporation with the freehold, which they previously possessed from their position, and have become changed into chattels of another character and description: and that they now partake of the character of those which are moveable, and separated from the freehold, in fact as well as in law.

I was much struck with the ingenuity of the argument at the time it was urged on me, and I was desirous to consider it more fully than I was then able to do, and in connection with the cases cited, which I have since read and considered, but, in truth, none of them touch the peculiar argument I have to consider in this case, which rests wholly on the deed of *June*, 1852, and the separation of the chattels from the freehold, which I have before mentioned.

The two cases which have the closest reference to the subject are *Trappes* v. *Harter* (*a*), and *Ex parte Barclay* (*b*).

In *Trappes* v. *Harter*, the question turned on the construction of the mortgage deed. It appeared that the

(*a*) 2 *Cr. & Mee.* 153. (*b*) 5 *De G., M. & G.* 403.

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the fixtures, in that case, were, by the custom of the country, frequently let and sold apart from the freehold, but, in that case, they had always been treated as distinct from the freehold; and that subsequently to the mortgage, the partners, the mortgagors, had made statements of their affairs, in which these fixtures were treated as not being included in the mortgage, and the Plaintiff had inspected these statements, and had acquiesced in their accuracy, or, at least, had made no objection to them. The Court held, that upon the construction of the deed, these fixtures were not included in the mortgage, and the necessary consequence was, that they formed part of the property of the bankrupts, and passed to their assignees.

In *Ex parte Barclay* (*a*), the Lord Chancellor and Lords Justices pointed out this distinction in the case of *Trappes* v. *Harter*, and held, that the ordinary tenant's fixtures passed to the mortgagee, under a deposit of the lease, accompanied with a memorandum, constituting Messrs. *Barclay* equitable mortgagees of the leasehold premises, and of the fixtures and appurtenances thereto belonging, and that they were not in the order and disposition of the bankrupts, as reputed owners at the date of the bankruptcy.

These cases, however, do little to touch the peculiar argument on which the Plaintiff's contention is rested in this case; but having fully considered it in all its bearings, I am unable to go along with the Plaintiffs in their contention. I am of opinion, that the distinction is too thin and subtle to make any difference in this case, from what would occur in any other, where there was no such deed executed, or separation effected, and,

(*a*) 5 *De G., M. & G.* 403.

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and, independently of any such distinction, it is clear that the fixtures could not pass to the assignees.

I think it of great importance, that general rules and principles should not be frittered away by refinements which, however seductive to ingenious minds, will be found, in practice and in the dealings of mankind, for whose guidance these rules are framed and maintained, to render it difficult or impossible to ascertain the rights of parties, without resorting to a judicial tribunal.

The consideration which I have given to the case has brought me to the conclusion, that the chattels affixed to the freehold did not pass to the assignees, as being within the order and disposition of the bankrupts at the time of the bankruptcy. But as to the twelve machines not attached to the freehold, I have not been able to see anything in the case to distinguish it from *Horn* v. *Baker* (*a*); and with respect to those, I am of opinion they did pass to the assignees.

(*a*) 9 *East*, 215.

LORD RENDLESHAM *v.* ROBARTS.
THELLUSSON (THOMAS R.) *v.* ROBARTS.
THELLUSSON (CHARLES SABINE A.) *v.* ROBARTS.
THELLUSSON (THE HON. ARTHUR) *v.* ROBARTS.

June 4.

Under a devise, after the death of the survivor of several persons, to "*the eldest male lineal descendant of A.*" then living, this Court considered itself so fettered by the *dicta*, &c. in the House of Lords and of Lord *Eldon* and the Judges, in the case of *Oddie* v. *Woodford*, as to suggest a decree without argument, which excluded male descendants claiming through females, and gave preference to a grandson of *A.*, though younger in age, to a younger son of *A.*, who was in age the eldest male lineal descendant of *A.* The decree was made accordingly.

The Court also held the question of uncertainty and intestacy under the will of Mr. *Thellusson* to be already determined.

THE outline of the case was this:—The testator *Peter Isaac Thellusson* died in *July*, 1797, having three sons, *Peter*, *George* and *Charles*. By his will, he directed his large estate to be accumulated during the lives of nine persons who were living at his death, and on the death of the survivor, the accumulated estate was to be divided into three equal lots; one of which was to be conveyed in tail male to the "*eldest male lineal descendant then living*" of each of the three sons, with limitations over.

The testator's sons, *Peter* and *Charles*, had male issue, but his second son, *George*, had none; he had however two daughters, one of whom married and had a son, the Plaintiff in *Oddie* v. *Woodford* (*a*), which will presently be referred to.

On the 5th of *February*, 1856, the testator's grandson, *Charles Thellusson* the younger, died; he was the last survivor of the nine lives, during which the accumulation directed by the testator's will was to continue. This large estate, which for nearly sixty years had been under

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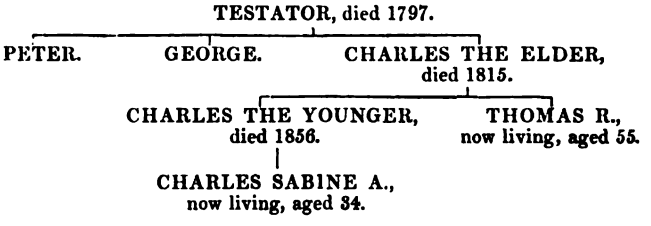
under the administration of the Court of Chancery, thereupon became distributable, and four suits were instituted by different parties for that purpose, and to obtain a construction of the will.

The principal question which now arose turned on the construction of the words "*eldest male lineal descendant*" in the limitations of the estate, and was in effect this:—whether, as regarded the descendants of each of the testator's sons (*Charles* for instance), a male descendant of *Charles*, who was elder in age but *puisné* in line, took the estate in preference to a male descendant of *Charles*, who was younger in age but *eigné* in line.

The pedigree of the testator's son, *Charles*, being the more simple, is taken in the following diagram, to illustrate the point in contest:—



The question was, whether *Thomas R.*, who fulfilled the conditions of being a "male lineal descendant" of the testator's son *Charles*, and was the "eldest" in point of age, was to be preferred to *Charles Sabine*, who was also a "male lineal descendant of the testator's son *Charles*," but younger in age though senior in line.

The question in *Oddie* v. *Woodford* (*a*), arose on a clause in the testator's will to the following effect:—

As

(*a*) 3 *Myl. & Craig.* 584.

As to his advowsons, when void, the testator directed his trustees to present a fit and proper person thereto, who should be "nominated by one of his said sons in rotation, the eldest having the first nomination, and the like nomination to be made by *the eldest male lineal descendant* of his three sons respectively, in the order and rotation aforesaid," if capable, "otherwise *the eldest male lineal descendant* of the next brother was to present to such living."

It was in that case decided by Lord *Eldon* and afterwards by the House of Lords on appeal, after consulting the Judges, that a male, claiming through a female, had no right to present to the livings. Incidentally in the case of *Oddie* v. *Woodford* several *dicta* fell from the Lord Chancellor and Judges, as to the meaning of the words "eldest male lineal descendant then living," as used in this will, and which were supposed to govern the present question.

Besides those in *Oddie* v. *Woodford*, questions under the will have been before the Court on other occasions. The following are the references:—*Thellusson* v. *Woodford* (*a*); *Woodford* v. *Thellusson* (*b*); *Rendlesham* v. *Woodford* (*c*); *Oddie* v. *Woodford* (*d*); and see *Seton* on Decrees (*e*); *Hargrave*, Jur. Arg. (*f*); and 39 & 40 *Geo.* 3, c. 98.

Mr. *R. Palmer* and Mr. *Renshaw*, for Lord *Rendlesham*, were commencing their opening of the first suit when,

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(*a*) 4 *Ves.* 227; 11 *Ves.* 112; 1 *Bos. & P.* (*New R.*) 357; 4 *Mad.* 420; 5 *Russ.* 100.
(*b*) 13 *Ves.* 209, 220.
(*c*) 1 *Dowl.* 249.
(*d*) 3 *Myl. & Cr.* 584.
(*e*) Pages 391, 392, 1st ed.
(*f*) Vol. 2, p. 1, and Appendix.

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The MASTER *of the* ROLLS interposed, and (in substance) made the following observations:—

It struck me, as I suggested yesterday, if the question here is, who is entitled under the words "the eldest male lineal descendant," that that question came before Lord *Eldon* expressly in the case of *Oddie* v. *Woodford* (*a*), which I have carefully read. And, in giving his judgment, he expressed his regret that his decision in that case would necessarily be the same when the estate came to be divided; but although it would necessarily be so, yet that he should leave the matter entirely open, so that nobody should be influenced by his decision, though, in point of fact, it raised exactly and identically the same question. That case of *Oddie* v. *Woodford* (*a*) was afterwards taken to the House of Lords and affirmed. If I am wrong in that impression, I must, no doubt, hear this cause; but I thought the proper course to pursue would be this:—to call upon those gentlemen who contend that this was not the effect of the decision in *Oddie* v. *Woodford* to satisfy me, that this case is not governed by that case, and if it be, then not only that I ought, but that I have jurisdiction to overrule *Oddie* v. *Woodford*.

Probably in this, as in every case of difficulty, the parties would be very glad to have the case re-argued, but I must have regard to the public time, and if the point in question is really and practically the same, and was decided, to all intents and purposes, by the expression of the opinion of the Lord Chancellor, of the Judges, and of the House of Lords, I put it to Counsel, whether it would not be an improper waste of the public time to attempt to induce me to come to an opposite conclusion.

The

(*a*) 3 *Myl. & Cr.* 584.

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The *Solicitor-General* (Sir *R. Bethell*). Your Honor has had your attention directed to the case, and certainly if your impression is, that the point in this case is, in effect, involved in what was done, or was deliberately said and laid down as the rule of judicial determination by Lord *Eldon* and the Judges, in the other case, all that we can do is to bow to it.

The MASTER *of the* ROLLS.

That would be so, and, therefore, what I proposed to do is, as a preliminary question, that my attention should be called to this:—whether, substantially, the question was not decided by the opinion expressed in *Oddie* v. *Woodford* by the Lord Chancellor and the House of Lords. If you should persuade me that it was not, I will then hear these causes willingly. I need not say that, so far as I am personally concerned, it would be as agreeable to me to listen to this case as to any other, for I feel a sincere pleasure in listening to the arguments of Counsel in a great and important case, and I derive personal advantage from it. It is to me an agreeable exercise of the mind, if I had no other public duty to consider, nothing would be more agreeable to me than to listen to the arguments of the gentlemen I see before me with respect to the construction of this will. But I must have regard to the number of other suitors whose cases are now waiting for decision, for my time is not my own, and it is my bounden duty to prevent an improper waste of the public time, an object in which Counsel have always assisted me.

The *Solicitor-General.* If, on reading the will, the Court's attention was directed to the very great difference between the presentation clause, and the clause limiting the estate, and it is still impressed with the conviction

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conviction that the decision of the present case is involved in the judgment in *Oddie* v. *Woodford*, in such a manner that it could not hold itself free to disregard and throw it aside, then I should be obliged to give way.

The MASTER *of the* ROLLS.

That is my present impression. I consider myself bound by what has passed.

It was then arranged, that a decree should be taken without argument as a preliminary step to an appeal to the House of Lords.

Mr. *Selwyn*, for the heiress-at-law, next proceeded to argue that the limitations were void for uncertainty, and that this point had been reserved on the former occasions.

The MASTER *of the* ROLLS.

This question arose sixty years ago, and if these limitations had been void, the heir-at-law ought to have been in the enjoyment of the estate during that period. I really consider this question decided.

Mr. *Selwyn* next argued, on the terms of the will, that a portion of the accumulated fund, arising from realty, was undisposed of, and belonged to the heiress-at-law, viz., the rents of the property purchased with the rents of those estates which had been purchased after the testator's death.

The

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The MASTER *of the* ROLLS held the contrary, and that the question had been determined by what had taken place in the administration suit of *Thellusson* v. *Woodford.*

Sir *F. Thessiger*, Sir *F. Kelly*, Mr. *Lloyd*, Mr. *Rolt*, Mr. *Follett*, Mr. *Cairns*, Mr. *Russell*, Mr. *Greene*, Mr. *Cotton*, Mr. *C. Hall*, Mr. *Pitman*, Mr. *Bromehead*, Mr. *C. C. Barber*, Mr. *Bennett*, Mr. *Wickens*, Mr. *Freeling*, Mr. *Kenyon*, Mr. *Faber*, appeared in the several causes for other parties.

ABSTRACT OF DECREE.

Declare, that the manors, &c. &c. devised by the will of the testator, and those purchased pursuant to the trusts of the will, and any cash, &c. applicable to be laid out in the purchase of lands, upon the decease of *Charles Thellusson*, the last survivor of the lives, "became and were then divisible into two lots of equal value."

That the Respondent Baron *Rendlesham* was the person who, at the time of the decease of *Charles Thellusson*, answered the description in the will contained, of "the eldest male lineal descendant then living" of the testator's son *Peter Isaac Thellusson*, and is entitled to have such one of the two lots as the Respondent Baron *Rendlesham* shall choose conveyed to him, as tenant in tail male thereof, with remainders over, pursuant to the trusts of the will, regard being had to the disentailing assurances.

"Declare, that the Respondent *Charles Sabine Augustus Thellusson* was the person who, at the time of the decease of the last-named *Charles Thellusson*, answered the description in the will contained, of "the eldest male lineal descendant then living" of the testator's son *Charles Thellusson*, and is entitled to have the other of the two lots conveyed to him and his heirs, or as he should direct, absolutely.

Consequential directions.

Costs of all parties out of the fund

NOTE.—An appeal is pending in the House of Lords.

1856.

Aug.
Nov. 7.

OMMANEY *v.* STILWELL.

A sailor, who left *England* in 1845, on the Arctic Expedition with Sir *John Franklin*, and who had not been heard of since *June*, 1845, was presumed, in 1856, under particular circumstances, to have survived the month of *January*, 1850.

EDWARD COUCH, the mate of her Majesty's ship *Erebus*, made his will on the 15th of *May*, 1845, whereby he devised and bequeathed all his estate to his father, Captain *James Couch*, and he appointed the Plaintiff executor.

The testator joined the expedition of Sir *John Franklin* to the *Arctic* Seas. He sailed in the *Erebus* on the 20th of *May*, 1845, and the expedition had never been heard of since the 30th of *June*, 1845, when he was living. It was now assumed that the whole of the expedition had perished.

Captain *James Couch* died in *January*, 1850, and the question was, whether it was to be presumed that he survived his son *Edward*. In 1854 the Plaintiff obtained probate of *Edward Couch's* will.

It was referred to chambers to ascertain when *Edward Couch* died, in order to determine the question of survivorship. The evidence relied on was, an affidavit of Dr. *Rae*, who had been engaged in searching for Sir *J. Franklin*. He stated as follows:—

"I arrived at *Repulse* Bay, in the *Arctic* Regions, in the month of *August*, 1853, and while engaged on such last-mentioned expedition, I, in the Spring and Summer of the year 1854, met with a party of the Esquimaux Tribe, who had in their possession and from whom I purchased and brought with me to this country, on my return

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return thereto in the month of *October*, 1854, various articles, which have since such my return been identified, by the name, initials or crests respectively engraved thereon, as belonging to or as having belonged to the said Sir *John Franklin* and some of the officers under him in the aforesaid expedition respectively. That among such articles so purchased by me and identified as aforesaid, there are the following, namely, a round silver plate engraved with the words and letters 'Sir *John Franklin*, K.C.H.'" [He then specified other articles, and proceeded :—]

"That I also, in the said Spring and Summer of the year 1854, obtained from such Esquimaux Tribe and other Esquimaux people, the following information, namely, that in the Spring, four Winters then past, which Spring would be during the months of *April* and *May*, in the year 1850, whilst a party of other Esquimaux people were killing seals near the north shore of a large island in the said regions, called *King William's* Land, about forty white men were seen by such party of other Esquimaux people travelling southward over the ice, dragging a boat and sledges with them along the west shore of such island, and that none of such party of white men could speak the Esquimaux language, so as to be understood by such party of other Esquimaux people, but by signs the latter were led to believe, that the ship or ships of such white men had been crushed by ice, and that such white men were going to where they expected to find deer to shoot, and that all such white men (with the exception of one who was apparently an officer or chief) were hauling on the drag ropes of such boat and sledges, and they were looking thin, and from their appearance, they were then supposed, by such party of other Esquimaux people, to be getting short of provisions, and they purchased of such party

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party of other Esquimaux people a seal or a small piece of a seal, and that at a later date the same season, but previous to the disruption of the ice, such party of other Esquimaux people discovered on the continent of *North America* the dead bodies of about thirty white men and some graves, and five dead bodies were also discovered by them on an island near such continent, about a long day's journey to the north-west of a large stream (which from its description I believe to be a river called '*Back's Great Fish River*'), in the said regions, and that some of such dead bodies were in a tent or tents, and others were under a boat, which boat had been turned over, apparently for the purpose of shelter, and some other of such dead bodies lay scattered about in different directions, and that one of the dead bodies discovered on the said island was supposed, by such party of other Esquimaux people, to be that of an officer or chief, as he had a telescope strapped over his shoulders, and a double-barrelled gun was underneath him, and that some at least of such white men must have survived until the arrival of wild fowl at the said places where such dead bodies were found, as the reports of the firing off of guns were heard by such party of other Esquimaux people, and the fresh bones and feathers of wild geese were noticed by them to be there.

"That I verily believe such dead bodies (if so seen or found as aforesaid, of which I have no reason whatever to doubt) were those or a portion of the party of the said white men, and that such party of white men were persons who joined in and left this country in the said expedition of the said Sir *John Franklin*. And from my experience in the said regions, I verily believe, that wild geese, in their migrations, would not, from the nature of the climate, reach at or near the mouth of the said river called '*Back's Great Fish River*' until

until about the latter end of the month of *May* or the first week in the month of *June*, and even if they could have reached there before those times, I say, from my knowledge and experience of their migratory habits in those regions, they would not reach there until about the times last mentioned, as the ice and snow do not begin to thaw there until about those times, and therefore there would not be any water or food for their sustenance, so that the fresh bones and feathers of such geese, mentioned, by the said Esquimauxs, as having been seen where such dead bodies were said to have been found, as aforesaid, lead me to conclude, that some of such white men survived until at least the latter end of the month of *May* or the beginning of the month of *June*, in the year 1850."

The Chief Clerk thought that the presumption was, that the son survived the father. The case was adjourned into Court for argument.

Mr. *Dickinson* for the Plaintiff.

Mr. *R. Palmer* and Mr. *Martelli*, for *Thomas Stilwell*, the executor of Captain *James Couch*, contended, that it must be presumed, under the circumstances of this case, that *Edward* died before his father.

Mr. *Lloyd* and Mr. *Bovill*, for *William Couch*, one of the next of kin of *Edward* at his death, contended, that it must be presumed that *Edward* survived his father, inasmuch as the death of *James* occurred less than seven years since *Edward* had been last known to be alive.

Sillick v. *Booth* (*a*), *Cuthbert* v. *Purrier* (*b*), *Dowley* v. *Winfield*,

(*a*) 1 *Younge & C.* (*C. C.*) 117. (*b*) 2 *Phillips*, 199.

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v. *Winfield* (*a*), were cited. And see *Underwood* v. *Wing* (*b*) and the cases therein referred to.

The MASTER *of the* ROLLS reserved judgment.

Nov. 7. *The* MASTER *of the* ROLLS.

This case involves a question of as great difficulty as any I have ever had to deal with; not only from the want of evidence, but from the tendency of the evidence which exists to create doubt.

The sole question is, whether the son or the father died first. The father died in *January*, 1850, and the son, who was an active, strong young man, went as mate with Sir *John Franklin* in 1845, and the question is whether he died before *January*, 1850. That is the sole question.

The ordinary presumption, that a person who has not been heard of for seven years (*c*) would apply, if there were nothing else on the subject. The evidence which exists is that of Dr. *Rae*. He discovered the remains of various persons who had perished from hunger belonging to the expedition of Sir *John Franklin*. It is clear that the persons who were seen in *April* survived the father; they were about forty in number, while the original number was 133, and no identity is proved.

In this state of things, I confess I cannot come to a satisfactory conclusion on the subject. My Chief Clerk is of opinion that the son survived the father, and has made or was about to make a certificate accordingly. He

(*a*) 14 *Sim.* 277.

(*b*) 19 *Beav.* 459, and 4 *De G., M. & G.* 653, and the cases there referred to.

(*c*) See 19 *Car.* 2, c. 6, s. 2.

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He relied on the youth and strength of the son. I cannot see that this conclusion is erroneous. I cannot but express my extreme inability to come to a satisfactory conclusion, but relying on the chances in favour of the youth and strength of the son, I see no reason to differ from the conclusion of the Chief Clerk.

Order accordingly.

In re CRAVEN.

1857.
31 *Jan.*

A testator bequeathed to *A.* 1,000*l.*, part of a policy of 1,200*l.*, and the remaining 200*l.*, together, with all advantages arising from the policy, to his widow. By a codicil he gave the 1,000*l.* to trustees for *A.* and her children, and in case of *A.*'s death without children, to his widow "or her heirs." The widow died, having bequeathed the 1,000*l.* to *B.*, and *A.* died afterwards without children. Held, that *B.* was not entitled, but that the next of kin of the widow (ascertained at her death, and not at the period of distribution) took the 1,000*l.* by substitution.

IN 1810, the testator, by his will, bequeathed 1,000*l.* to his adopted daughter *Lydia Craven*, being part of the sum of 1,200*l.* insured by him for his whole life in the *Equitable* Assurance Office. The testator proceeded in these words:—"but as the growing advantages of the above *Equitable* Office, arising from the assurance being for 1,200*l.*, gives a privilege of being considered as a proprietor, and deriving, in consequence, a proportionate share in the profits, producing, by inspection, nearly the sum of 300*l.* in the month of *October*, 1818, progressively increasing since, I do bequeath the sum of 200*l.*, the remaining part of the 1,200*l.* assured as aforesaid, together with all the advantages, emoluments and privileges arising to me from my assurance of the above-named sum in the *Equitable* Assurance Office, *Blackfriars*, to my affectionate wife *Roliana Frances Craven*, she paying all my just debts at the time of my decease."

By a codicil, dated in 1820, the testator expressed himself as follows:—"And whereas my adopted daughter, since this will was made, has married and changed her name

1857.

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name to *Smartly*, it is my further will, that the sum of 1,000*l.* bequeathed to her shall now be left to Mr. *Thomas Stilwell* and sons, in trust for her and her children's use and benefit, they taking care the principal is not broken in upon, and in case of her demise without children, the said sum of 1,000*l.* is to become the property of my beloved wife *Roliana Frances Craven, or her heirs.*"

The testator died soon after.

The testator's widow died in 1836. By her will, after giving some plate, she bequeathed as follows:—"All the remaining property I have or may have, including the 1,000*l.* which was left by my beloved husband to his adopted daughter *Lydia Smartly*, which, if she dies without issue, he left to me, I give and bequeath that legacy to my tenderly attached niece and godchild *Eleanor Bellairs.*"

At the time of her death the next of kin of the widow were *Eleanor Bellairs*, Mrs. *Holroyd*, Captain *Bellairs* and Mr. *Watford Bellairs.*

Lydia Smartly died in 1856, without ever having had any children, but Mr. *Watford Bellairs* predeceased her.

The 1,000*l.* having been paid into Court under the Trustee Relief Act, Mrs. *Holroyd* presented a petition, praying that the fund might be divided into thirds, and one-third paid to her, and the other two-thirds to the parties entitled thereto.

Mr. *Hobhouse*, for the Petitioner Mrs. *Holroyd.* The gift over to the widow or her heirs, is a gift by substitution to

to the next of kin of the widow. *Jacobs* v. *Jacobs* (*a*); *Doody* v. *Higgins* (*b*). The 1,000*l.* is divisible amongst the next of kin at the period of distribution, and the Petitioner is, therefore, entitled to one-third.

Mr. *Fooks*, for the representatives of Mr. *Watford Bellairs*, argued that it was divisible into fourths, amongst the next of kin, at the death of the widow.

Mr. *C. Hall*, in the same interest as the Petitioner, referred to *In re* the Estate of *William Walton* (*c*).

Mr. *R. Palmer*, for *Eleanor Bellairs*, claimed the whole of the fund as residuary legatee of the widow, contending that the gift to the widow, *or her heirs*, was an absolute gift to her. He argued that the codicil was referential to the will, which shewed that the testator intended his widow to take all the residue of the produce of the policy, after deducting the interests given to *Lydia* and her children, and that this case was different from those cited.

Mr. *Martelli*, for the trustees.

The MASTER *of the* ROLLS.

I am of opinion, that there is no distinction between this and the other cases. I doubt whether the intention of the testator is carried into effect, by making the gift substitutional, but the point is settled by a series of authorities.

The fund is divisible into fourths.

(*a*) 16 *Beav.* 557. (*b*) 9 *Hare*, App. xxxii.
(*c*) 2 *Jur. N. S.* 363.

Jan. 16.

By his will, a testator gave 20,000*l.* to his daughter for life, with remainder to her children, to be vested at twenty-one or death under that age, leaving issue. By a codicil, "instead of the 20,000*l.*," he gave 15,000*l.* to his daughter for life, with remainder to her children, "or the survivors." Held, that the gift by the codicil was not substitutional, so as to make the limitations of it similar to those in the will, and, therefore, that children who died after attaining twenty-one, in the life of the daughter, were excluded, as against the surviving children.

THE testator, by his will, gave 10,000*l.* Consols and 10,000*l* Reduced to trustees, for his daughter *Amelia* for life, for her separate use, without power of anticipation, and after her decease in trust for her children as tenants in common, to be vested in them when and as they respectively should attain "twenty-one years, or die under that age leaving lawful issue living at his or her death," with a clause of survivorship amongst them, in case any of them should die under twenty-one without leaving any issue living at his death, and to be vested at the same ages, days or times.

The testator made a codicil, which, so far as is material, was as follows:—"Instead of 20,000*l.* £3 per cent. Consolidated Bank Annuities, and Three Bank Reduced Annuities, which I have left to my executors in trust for my daughter *Amelia Haley*, I leave them in trust for my said daughter *Amelia Haley* only 15,000*l.* £3 per cent. Consolidated Bank Annuities, that is to say, 8,000*l.* £3 per cent. Consolidated Bank Annuities, and 7,000*l.* £3 per cent. Reduced Bank Annuities." He subsequently proceeded as follows:—"The 15,000*l.* £3 per cent. Consols and £3 per cent. Reduced Bank Annuities, which I have left to my executors in trust for my said daughter *Amelia Haley*, is for her lifetime, and without any control of her present or any future husband, after her decease to her children, to be equally divided amongst them, *or the survivors, share and share alike.*"

The daughter had five children, all of whom attained twenty-one

twenty-one. Two of them died in their mother's lifetime, and she died in *November*, 1856. This was a petition for payment out of Court of the fund.

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Mr. *Follett* and Mr. *Hastings*, representing the interests of one of the surviving children, argued that, by the terms of the codicil, the fund was divisible in thirds amongst the three surviving children.

Mr. *R. Palmer* and Mr. *A. Smith*, *contrà*, argued that the substituted legacy given by the codicil was subject to the same conditions and limitations as the original legacy given by the will; *Cookson* v. *Hancock*(*a*), which was affirmed; and that, therefore, all the children who attained twenty-one took a vested interest. That it was unreasonable to suppose, that if a child died a day before his mother, leaving a large family, the testator intended they should be excluded.

Mr. *Follett*, in reply, was stopped on this point.

The MASTER *of the* ROLLS.

I am of opinion, that the legacy given by the codicil is a new gift to those children who survived their mother. If it had been a mere substitutional legacy, it would go according to all the trusts of the will. I must either cut all these words out of the codicil, or give effect to them, and my opinion is, that the meaning of the will is to give the 15,000*l.* to the survivors. The fund is, therefore, divisible into thirds.

Declare, that, according to the true construction of the

(*a*) 1 *Keen*, 817, and 2 *Myl. & Cr.* 606.

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HALEY
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the will and second codicil, only those children of *Amelia Haley* took shares who survived their mother.

NOTE.—See *Day* v. *Croft*, 4 *Beav.* 562, note (*e*); *Fenton* v. *Farington*, 2 *Jurist*, *N. S.* 1120; and *The Earl of Shaftesbury* v. *The Duke of Marlborough*, 7 *Sim.* 237.

WILLIAMS *v.* THE PRINCE OF WALES LIFE, &c. COMPANY.

Jan. 26.

An undertaking to produce documents to the Plaintiff, means to him, his solicitor and agents.

A Plaintiff obtaining information from the production of documents in the Defendant's possession, is not at liberty to make it public, and an injunction will, if necessary, be granted to restrain him.

A Plaintiff, having published statements relative to the matters in question, was, as a condition for making an order for production of documents, required to undertake, "not to make public or communicate to any stranger the contents of such documents."

THIS suit was instituted by the Plaintiff, a shareholder, on behalf, &c., to make the directors responsible for large losses on policies on the lives of Mr. *Joddrell*, Mr. *Walter Palmer* and others, which, it was alleged, the directors had improperly granted.

Shortly after the filing of the bill, on the usual summons for an order for production, it was stated on affidavit by the secretary, that the documents amounted to 37,000, and that it required three months to schedule them.

Whereupon an order was made, dated the 19th of *December*, 1856, whereby the company were ordered, within two months, to make the usual affidavit as to documents, "the Defendants, by their solicitor, undertaking *to produce to the Plaintiff*, on and after the 14th of *January*, 1857, such of the said documents as the company, by their deed of settlement, are bound to produce to a shareholder."

The Plaintiff and the clerk of his solicitor attended to inspect, but the Defendants would allow no inspection of the Share Register Book, and would not allow the clerk to inspect any of the documents, insisting that the

the Plaintiff alone was entitled to an inspection under the undertaking. They also limited the inspection to one hour *per diem*.

A motion was made, that the Defendants might produce "to the Plaintiff, his solicitor or agent, the Share Register Book" and other documents, in accordance with their undertaking of the 19th of *December*.

The affidavits of the Defendants stated, that the Plaintiff, who had but a trifling interest in the company, was desirous of damaging it, and that he had, pending the suit, published prejudicial statements relative to the matters stated by his bill. The affidavits also stated, that, during the inspection, the solicitor's clerk had conducted himself in a noisy, boisterous, rude and offensive manner. This he abstained from answering, as having no bearing on the question.

Mr. *R. Palmer* and Mr. *C. T. Simpson* in support of the motion.

Mr. *Selwyn* and Mr. *Graham Hastings*, *contrà*.

The MASTER *of the* ROLLS.

I am of opinion, that both parties are under a mistake as to their rights.

I am of opinion, that every undertaking to produce means the ordinary production in a cause, and that an undertaking to produce to the Plaintiff, means to him, his solicitor and agents, unless that be guarded against and be so expressed. It is said, that the Defendants are only bound to produce in the manner pointed out by the deed; that is not the terms of the undertaking.

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WILLIAMS v. THE PRINCE OF WALES LIFE, &c. COMPANY.

Therefore the Defendants are bound to produce the documents at all reasonable times, and at a reasonable notice, but in such a manner as not to interfere with the business of the company.

On the other hand, it is not the right of a Plaintiff who has obtained access to the Defendants' papers, to make them public. The Court has granted injunctions to prevent it, and I myself have done so, to prevent a Plaintiff, a merchant, from making public information obtained under the order for production.

I shall only make the order in this case, upon the Plaintiff's undertaking not to make public or communicate to any stranger to the suit the contents of such documents, and not to make them public in any way.

As to the conduct of the solicitor's clerk, I think he was right in not answering these affidavits; there must have been some mis-apprehension on the matter. It is the bounden duty of every Plaintiff who inspects, to do it in a quiet, peaceable and decorous manner, in order that the business may be conducted in the only way in which it is possible for business to be transacted. If the contrary course were continued, I should hold the Plaintiff justified in withholding the inspection until it was conducted in a peaceable, decorous and gentlemanly manner.

TWEEDALE *v.* TWEEDALE.

Jan. 22.

A mortgage was given for a judgment debt. There was a prior equitable charge, of which the mortgagee had no direct notice, but no investigation of title or production of deeds was had, besides which, by arrangement, the mortgagor's solicitor prepared the deed for the mortgagee's solicitor. The Court concluded, that the arrangement was to give a mortgage subject to existing charges, and, also, that the mortgagee was affected by the notice possessed by the mortgagor's solicitor of the prior equitable title. *A.* made two equitable mortgages of two several estates, the one to *A.* and the other to *B.* He then executed a legal mortgage of both to *C.*, who had constructive notice of the prior equitable mortgages. *B.* obtained a transfer of *A.*'s mortgage. Held, that *C.* could only redeem *B.*, on payment of both debts.

IN 1841, *Abraham Tweedale* made an equitable mortgage to *Chadwick* of some property in *Yorkshire* Street, by means of a deposit of the deeds and by a memorandum, whereby he agreed to make a legal mortgage for 2,500*l.*

In 1848, *Abraham Tweedale* made a like equitable mortgage to the Plaintiff, *Samuel Tweedale*, of a leasehold property in *Alfred* Street, to secure all moneys due or thereafter to become due.

On the 21st of *February*, 1856, *Abraham Tweedale* executed a *legal* mortgage of both properties to *Rawstone* to secure 790*l.*, under circumstances which are hereafter stated and which gave rise to a question of notice, as to the *Alfred* Street property only, *Rawstone* claiming no priority over *Chadwick*.

On the 2nd of *April*, 1856, the Plaintiff (being liable to *Chadwick* for the amount of his mortgage, as representing the surety) paid off *Chadwick*, and obtained a transfer of his equitable mortgage.

The question being, whether *Rawstone* had, at the date of his legal mortgage, notice of the prior equitable mortgage

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mortgage of the *Alfred* Street property, it is necessary to refer to the circumstances relating to the execution of *Rawstone's* mortgage, which were these:—

In *January*, 1856, *Rawstone* obtained a judgment against *Abraham Tweedale* for 791*l.*, on which a *fi. fa.* was issued. Mr. *Sellers* (*Rawstone's* solicitor), in his evidence, stated as follows:—Early in *February*, 1856, *Abraham Tweedale*, through his solicitor, Mr. *Hartley* proposed to me, as solicitor of the Plaintiff in the action that, in order to save the expense and scandal of seizure, *Abraham Tweedale* should give security for the judgment debt, in the shape of a mortgage upon the freehold and leasehold property, which he represented to me as being a sufficient security for the amount. I as the solicitor of the Plaintiff, accepted this offer and in order to avoid expense and delay, consented that Mr. *Hartley*, who was well acquainted with the title to the premises, should prepare the draft of the mortgage to *Rawstone*, and have the same engrossed which Mr. *Hartley* accordingly did. But the mortgage deed was, of course, submitted to my approval as solicitor of *Rawstone*, and I being satisfied with the same on behalf of *Rawstone*, procured the same to be executed by *Abraham Tweedale*.

Mr. *Hartley*, in his evidence, confirmed this, and also stated as follows:—Early in *February*, 1856, while investigating the state of *Abraham Tweedale's* affairs, I was informed that the Plaintiff either was or had, at one time, been in possession of a lease of certain premises in *Alfred* Street, belonging to my client, *Abraham Tweedale*, and on the 13th of *February*, 1856, I wrote to him requesting that it might be handed over to me. I had not, of course, the least idea that the Plaintiff had or claimed any lien whatever on it, or else I should not have

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have made the application to him which I did make. The Plaintiff returned no answer to my letter, and I was, consequently, led to believe that the Plaintiff had not then the said lease, and it was not until the 13th of *March*, 1856, that I became aware that the said lease was in his possession, or that he claimed to have any lien or interest on it.

Rawstone swore positively, that, at the time of his mortgage, he had no knowledge or notion that the lease of the *Alfred* Street property was in the Plaintiff's possession, or that he had any claim thereon.

No investigation of title appeared to have been made.

Mr. *R. Palmer* and Mr. *Dickinson*, for the Plaintiff, argued, that *Rawstone*, who had the legal estate, had nevertheless constructive notice of the prior equitable mortgages, and that this, and his neglect to investigate the title, were both sufficient to postpone him to the Plaintiff; *Worthington* v. *Morgan* (*a*); *Colyear* v. *Finch* (*b*).

Mr. *Lloyd* and Mr. *Freeman*, for *Abraham Tweedale*, principally contended, that his mental capacity at the time was such, as to prevent his making a valid mortgage. [It is not necessary to advert to this point, which turned on the effect of the evidence.]

Mr. *Wickens*, for *Rawstone*, contended, that he had no notice, either actual or constructive, of the mortgage of 1848, and that, having the legal estate, he was entitled to the first charge on the *Alfred* Street property. Secondly, that the two estates having been mortgaged separately to two different persons, he had a right of redeeming

(*a*) 16 *Sim.* 547. (*b*) 19 *Beav.* 500.

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redeeming each separately, and was not bound to redeem both charges together; and that the transfer in 1856, by *Chadwick* to the Plaintiff, with notice, could not alter the then existing right.

The MASTER *of the* ROLLS, after disposing of the other point, proceeded thus:—

The next question is as to notice, and whether Mr. *Rawstone* is to be considered as a purchaser without notice of the *Alfred* Street property. On that part of the case, I must say, that the evidence is by no means in a satisfactory state. This appears to be the fair result of the affidavits:—Mr. *Rawstone* obtained a judgment against *Abraham Tweedale* for 791*l*. Thereupon *Abraham Tweedale's* solicitor suggests, that *Rawstone* should take a mortgage on the property. No inquiry was made or suggested, it was merely represented that the property was a sufficient security. No inquiry was made as to the title, or as to any thing relating to it, or whether there were any incumbrances upon it, no inquiry was made as to the title deeds, and none were produced, but it is agreed, simply, that a mortgage is to be given on the property. The result of that appears to me to be, a sort of mutual belief, on both sides, that there were charges upon it, and that it was desirable that *Abraham Tweedale* should give what security he could upon the property, and subject to whatever charge there might be upon it. In order to have the thing completed as rapidly as possible, Mr. *Rawstone's* solicitor asks Mr. *Abraham Tweedale's* solicitor to prepare the mortgage on behalf of both parties, and accordingly, it being the duty and right of the mortgagee's solicitor to prepare the deed, it is committed to Mr. *Hartley*, the mortgagor's solicitor, who prepares the deed on behalf of both parties. I treat him, for that purpose, exactly in the same way as if he were the agent of Mr. *Sellers*,

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Sellers, Mr. *Rawstone's* solicitor, and had prepared it for him, and the fact of his being solicitor for *Abraham Tweedale* does not at all alter the character which, in my opinion, he fills in this particular transaction; for this purpose, he was the agent of Mr. *Sellers*, the solicitor of the mortgagee, who must be bound by the knowledge which he possessed in the transaction.

Being the solicitor of the mortgagor, he undoubtedly had knowledge of the deposit of the lease of the *Alfred* Street property, because, on the 13th of *February*, 1856, Mr. *Hartley* writes to the Plaintiff to ask him to produce the deed; therefore he believed that the Plaintiff had the deed, and must have believed that he had some rights in respect of it. The Plaintiff gives no answer; but why should that dispel this belief, that he had the deed in his possession? On the contrary, there was every reason to conclude, from his refusing or declining to answer, that he intended to keep the deed which Mr. *Hartley* had before reason to believe was in his possession, by reason of his having some claim or right upon it. This shews that Mr. *Rawstone*, or his solicitor, knew that there were some charges on this property.

All the transaction seems to me to shew, as I before stated, that they were to take the property as a security for what it might be worth; the property was whatever interest Mr. *Abraham Tweedale* had in it; in other words, it was taken subject to the charges upon it.

The next question is, assuming this to be so, whether the Plaintiff has any right to tack the two mortgages together. In the first place, I will consider it independently of the question of his having notice of the mortgage made to Mr. *Rawstone*. Independently of that, he does this:—He was liable to pay *Chadwick* the

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the amount of the debt, for he was surety for it. Accordingly, he pays the debt, and he gets the security assigned over to him. He had, by his memorandum of 1848, a security, not merely for the money that was then due, but for all the money that might thereafter become due, and one of his liabilities, on behalf of *Abraham*, was this sum of 2,500*l.*, which was due to *Chadwick*. Thereupon he pays that off. Now, what would be the right of *Abraham Tweedale* himself? Would he be entitled, after that, to say, he would redeem either of these properties in the hands of the Plaintiff without redeeming the other? It is clear to me he would not. The equity of redemption being vested in *Abraham* alone, he would not be entitled to say to the Plaintiff, "you shall give me back one of the properties upon payment of the particular charge which is on it, without reference to the remainder." If that be so, how can *Rawstone* stand in a better situation? *Rawstone*, in point of fact, as I hold, took merely an equitable interest, with knowledge of what had taken place as to the prior charge. With notice he can only stand in the position of *Abraham*, and be entitled to his rights only; and if *Abraham* could not have redeemed one property without the other, then I am of opinion, that *Rawstone* stands in no better or more favourable situation, and that he is not entitled to redeem one without redeeming the other.

Then it is said, that at the time when the Plaintiff redeemed *Chadwick*, he had notice of this charge to *Rawstone*, and, I think, the fact is, that he was perfectly well aware of it; but that does not affect the case. He had a right to perfect his securities, and was entitled to do all acts necessary for that purpose. He was entitled to redeem the securities as against *Abraham Tweedale*, and he was entitled to do the same as against *Rawstone*.

Re GEDYE.

Jan. 30.

A solicitor agreed to undertake the defence of another solicitor upon agency charges. On special petition, a taxation of his bill was ordered, "having regard to the agreement."

A solicitor agreed to conduct the defence of another solicitor upon agency terms, in case of the defence being unsuccessful. On entering into the agreement, the latter suppressed from the former the existence of a material correspondence, which was the principal ground of a decree being made against him. But the solicitor, after the discovery, still continued the defence without objection. Held, that he was not released from the contract.

IN 1854, the suit of *Kay* v. *Smith* (*a*) was instituted against the Defendant, a solicitor, to set aside some securities given by a party immediately on his coming of age. The Defendant, in *April*, 1855, applied to Mr. *Gedye*, another solicitor, to undertake his defence, and the terms on which he agreed to do so were evidenced by a letter, written by Mr. *Gedye* to Mr. *Smith*, and dated the 2nd of *April*, 1855, which was as follows:—

"In reference to your wish for me to state the terms upon which I should be disposed to conduct the business now pending in Chancery between Mr. *Kay* and you, I beg to inform you, that such terms are as follows:—1st. That I should be paid as your solicitor properly employed in case of success. 2nd. *That if your case fail, I will then accept usual agency charges.* 3rd. That you shall advance all moneys sufficient for the purpose of out of pocket payments as the business proceeds.

"*Nicholas Gedye.*

"To *George Smith*, Esq."

The cause was heard on the 29th day of *February*, 1856, when the Defendant completely failed, and his failure was principally in consequence of two letters given in evidence against him; one from Mr. *Smith* to Mr. *Adams*, dated the 5th of *April*, 1854 (*b*).

Mr. *Gedye*, in *October*, 1856, delivered his bill of costs,

(*a*) See 21 *Beav.* 522. (*b*) *Ibid.* 525, 531.

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costs, made out as between solicitor and client, and amounting to 910*l.* Mr. *Smith* now presented a petition, praying a reference to the Taxing Master, to ascertain and certify what, having regard to the said agreement to charge only agency charges, was the amount properly payable by him to *Gedye* for the costs of the suit, and for the usual consequential directions.

The defence relied on by Mr. *Gedye* was this:—That Mr. *Smith* had improperly suppressed from him all knowledge of the two material letters when he undertook his defence, and which had caused his case to fail. Mr. *Smith* had, at the time, put in his answer and had been cross-examined thereon, but he made no reference therein to the letters, a copy of one of which was in his letter-book. The existence, however, of the letters first appeared in the suit from the answer of his co-Defendant Mr. *Adams*, and it was admitted that they had been communicated to Mr. *Gedye* in *June*, 1855, after which he continued the defence, apparently without any objection.

Mr. *R. Palmer* and Mr. *Jessell*, in support of the petition.

Mr. *J. H. Palmer* and Mr. *Welford*, *contrà*, argued, that Mr. *Smith*, by wilfully suppressing the existence of two vital letters, had released the Respondent from the obligation of conducting his defence on the terms of agency charges; for the contract as to charging agency charges, "if your case fail," was entered into on the foundation of the truth of the case stated by Mr. *Smith*, and would not have been entered into, if the facts had been known, shewing that a defeat was unavoidable.

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They referred to *Re Ransom* (*a*).

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I think this a clear case. Mr. *Gedye*, a solicitor of this Court, says to his client, Mr. *Smith*, "I will conduct the business on these terms:—if your case fail, I will then accept usual agency charges." Upon that *Gedye* conducts the case. He has completed the business, which has failed, and he now says, that, by reason of some information which *Smith* has not communicated to him, he is entitled to get out of the contract, and that the business was not conducted on the footing of it.

It appears that the letters in question were known in *June*, 1855, and the answer to Mr. *Gedye's* case is this:—You became aware of the contents of these letters in *June*, 1855, and after doing so, you continued to conduct the defence without observation; the inference is irresistible, that you continued to do so on the same terms as before, for if you had considered that these letters made any variation in the arrangement, it was your duty to tell *Smith* so, and that you were proceeding on different terms. Nothing of the sort was done.

There must, therefore, be an order to tax the bill, "having regard to the agreement contained in the letter of the 2nd of *April*, 1855."

(*a*) 18 *Beav.* 220.

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THE ATTORNEY-GENERAL *v.* THE GOVERNORS OF THE FREE GRAMMAR SCHOOL OF QUEEN ELIZABETH IN DEDHAM.

THE ATTORNEY-GENERAL *v.* ELLIS.

THE ATTORNEY-GENERAL *v.* GRIGNON.

In the Matters of the 52 *Geo.* 3, c. 101, The Charitable Trusts Act, 1853, and of the several specified Charities.

Jan. 30.

In charity cases, where there is a visitor, this Court will not interfere with the visitatorial power, as to internal regulations and management, unless there be a breach of trust.

Where the Crown is the founder, the King is the visitor, and the Court does not interfere as to the internal regulations and management, but where the charity is founded by a private individual, and no visitor is appointed, and the Crown, by Royal Charter, has incorporated the governors, and authorized them to make rules, this Court will interfere, if the existing rules do not carry into effect the views and wishes of the founder, and, to further the founder's intention, it directs a scheme, rendered necessary by the altered state of circumstances and the progress of civilization.

A grammar school, previously founded, was endowed in 1571, and the governors were, in 1577, incorporated by Royal Charter, giving them powers to make rules and elect governors. Afterwards, various other charitable gifts were made to the governors connected with the school. Held, that, though improper conduct was not even alleged against the governors, this was a proper case for a scheme, for the purpose of putting the whole under one uniform system of management.

PREVIOUS to 1571, a school-house was given to *Dedham* school by Dame *Clarke*. The school was afterwards endowed by *William Littlebury*, who, by his will, devised a messuage, called *Ragmarsh*, to trustees, upon uses declared as follows:—"Whereas the township of *Dedham* hath a fair school-house builded, with a house joined to the same, meet for a schoolmaster to dwell in, given by one Dame *Joan Clarke* to that use, and no living pertaining to the same, I will, give and bequeath the yearly rents and profits of the aforesaid messuage, called *Ragmarsh*," &c., situate &c., of the yearly value of 20*l.*, to be bestowed yearly on one schoolmaster, such a one as hath taken

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taken degree in the University, as shall be thought meet to teach the grammar school and writing school, and that freely for ever, after this order following:— Item, I will that the said master, for his yearly stipend of 20*l.*, shall teach the grammar school and to write twenty of the poorest men's children of *Dedham*, &c., until fit "to go to further schools, as the Universities of *Oxford* and *Cambridge*." He then gave further directions and powers to his executors and assigns, and to the Vicar of *Dedham* and four of the chief and most honest of the town of *Dedham*.

By letters-patent, dated the 14th day of *May*, 1577, her Majesty Queen *Elizabeth* granted and ordained, that the twenty-four persons therein named should be governors of the free grammar school, and that they and their successors should be and become one body corporate, under the name of "*The Governors of the Free Grammar School of Queen Elizabeth in Dedham.*" The governors were thereby empowered to make and carry out such orders and rules, for the government and management of the school, as they or the major part of them should, from time to time, think meet. And it was thereby ordained, that, as often as any one or more of the governors should die, it should be lawful for the survivors, &c., to appoint a successor. Power was given of taking and holding the lands aforesaid, and other lands of the clear yearly value of 40*l.*; and that the governors or the major part of them should have power to make orders and rules for the better government of the school, and to alter and correct them, from time to time, as they, or the major part of them, should think fit.

On the 25th *July*, 1579, soon after the date of the letters-patent, statutes, thirteen in number, were agreed on

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on by the governors, to which some alterations and additions had subsequently been made.

The school was conducted by the head master, who received the net income, and was permitted to take boarders, and he was assisted by three under masters. The boys on the foundation were instructed in French and drawing at an additional charge.

There were a number of other charitable gifts connected with the school and for the benefit of *Dedham*, which were specified in the petition, viz.:—*Cardinal's*, in 1595, whereby he devised lands to the governors for the maintenance of poor scholars sent from the school to *Cambridge*, and in default for the "maintenance and government of the school," as the governors, in their discretion, should think fit. Lands at *Chattesham* and a tenement called "*Caggs Croft*," and a piece of land called "*Purvey Heath*," were vested in the governors upon trusts, which were unknown.

The English school was founded by *Edward Shearman* in 1599, who devised a schoolmaster's house to the governors. An addition to both schools was made by the will of *John Marsh* in 1642, who devised to the governors a rent-charge of 6*l.* per annum.

There were also almshouses under the will of *Dunter* in 1517, *Littlebury* in 1571, and moneys left by *Littlebury*, *May* and by several other persons, to be let out in loans.

By the decree, on further directions, in 1854, an old conveyance of *Cardinal's* lands was set aside, and a scheme directed in respect of them.

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In *May*, 1855, the Attorney-General presented his tition in the above causes and matters, stating the ove (amongst other) matters, and "that it would be eatly for the benefit of the objects of the before-men- ned charities, that, concurrently with the settlement the scheme directed by the order of 1854, a scheme ould be settled for the administration and manage- nt of all the before-mentioned charities. The petition ayed, that inquiries might be directed of what the perty belonging to the several charities consisted, d that a scheme might be settled by this Honourable urt for the management and regulation of the free ammar school and English school, respectively, and the exhibitions, and for the extension of the benefits ereof respectively, and that provision might be made r the future appointment of the governors of the ammar school, under the power contained in the let- rs-patent, and under the sanction of the Court, and so that a scheme might be settled for the regulation d management of the several other charities, and for e application of the income.

The governors appeared, and, making no opposition, e order was made on the 23rd of *May*, 1855. A heme was prepared in Chambers, which, the governors lleged, contained very numerous and minute regula- ons as to all the details connected with the free gram- ar school and the management thereof, in every parti- ular, as fully, in all respects, as if no charter whatever mpowering the governors to make orders and rules for he government thereof, and to alter and correct the ame, from time to time, as they should think fit, had xisted; and that such scheme not only superseded the oyal charter incorporating the governors, but also con- ained provisions for associating with them certain *ex officio* trustees not authorized by such charter, and pro-

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visions for the election of future governors wholly at variance with the terms of such charter.

The governors objected to the scheme in Chambers, but found themselves bound by the order of the 23rd of *May*, 1855. They now presented this petition, stating the before-mentioned matters, and that their abstaining from opposing the order made on the Attorney-General's petition had proceeded on an entire misunderstanding of the effect thereof, and of the consequences of directing a scheme as to the grammar school. The governors moreover stated, that no complaint had ever been made of any misconduct by them, in the exercise of the powers given to them by their charter, and they insisted, that neither they nor their successors ought to be deprived of any of the powers conferred by such charter, by reason of their having, through a misunderstanding, omitted to object to the order of the 23rd day of *May*, 1855, at the time the same was made; that they had not, in fact, any power to deprive their successors of the rights conferred by such charter, by any consent on their parts, and that this Court had no jurisdiction to deprive the Petitioners and their successors of the powers thereby conferred on them, by establishing a scheme for the regulation of the grammar school, independently of the powers conferred on the governors by the letters-patent of Queen *Elizabeth*. They prayed that the petition of the Attorney-General might be reheard, and that the order made thereon on the 23rd day of *May*, 1855, might be varied, so far as the same directed a scheme to be settled for the management and regulation of the free grammar school, and also, so far as the same directed, that provision be made for the future appointment of the governors of the grammar school.

Mr.

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Mr. *Rendall*, in support of the petition, argued, that, in the absence of an improper exercise of the powers of the governors, the Court had no jurisdiction to interfere with their rights conferred on a corporate body by royal charter.

He cited *Attorney-General* v. *Smart* (*a*); *Attorney-General* v. *Middleton* (*b*); *Attorney-General* v. The Governors of the *Foundling* Hospital (*c*); *Attorney-General* v. The Corporation of *Bedford* (*d*); *Attorney-General* v. The Dean and Canons of *Christchurch* (*e*); *Attorney-General* v. Lord *Clarendon* (*f*); *Attorney-General* v. The Governors of *Sherborne* Grammar School (*g*).

The *Attorney-General* and Mr. *T. H. Terrell* were not called on.

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The view I take of these cases is this:—What this Court looks at, in all charities, is the original intention of the founder, and, apart from any question of illegality and various other questions, this Court carries into effect the wishes and intentions of the founder of the charity; and where it sees that those intentions have not been carried into effect, it rectifies the existing administration of the charity for that purpose. If it cannot carry them into effect specifically, it carries them into effect as nearly as may be, and with as close a resemblance to them as it can.

With respect to the internal regulation and management

(*a*) 1 *Ves. sen.* 72.
(*b*) 2 *Ves. sen.* 327.
(*c*) 2 *Ves. jun.* 42.
(*d*) 2 *Ves. sen.* 505.
(*e*) *Jacob*, 479.
(*f*) 17 *Ves.* 491.
(*g*) 18 *Beav.* 256.

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ment of a charity, apart from any question of breach of trust, if the original founder of the charity has appointed a visitor for the purpose of seeing that certain parts of the internal regulation are carried into effect, this Court does not interfere with the visitatorial power, unless it finds a breach of trust; that is, something totally at variance with the views of the founder. Wherever the Crown founds a charity, this Court treats the Crown as the permanent authority and visitor of the charity, unless where the Crown has thought fit to appoint a special visitor; and in these cases, it is necessary to apply to the Lord Chancellor, by petition, in his visitatorial character, to exercise jurisdiction on behalf of the Crown as visitor. This jurisdiction is quite distinct from the ordinary jurisdiction exercised by the Court. But where the Crown itself grants a charter of incorporation, or a charter appointing governors, and, at the same time that it incorporates them, gives them the power to make rules, and all this with respect to a charity founded by somebody else; in that case the Court infers, that the Crown does what the Court of Chancery would do by decree in any such case, viz. that it grants that charter with the view and intention of carrying into effect the views and wishes of the original founder; and accordingly when, as in this case, the Court finds thereafter that those rules and those regulations do not carry into effect the views and wishes of the original founder, this Court interposes to make such a scheme for the purpose of furthering the intentions of the founder, as may have been rendered necessary by the altered state of circumstances and the increased civilization of the country. That, I apprehend, is the foundation of the jurisdiction which this Court exercises in those cases, and, accordingly, I have, in a great number of instances, interfered, where there has been a charter of incorporation and a direction

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tion to the governors or persons to make rules, and I have directed a scheme where the altered circumstances of the charity have made it necessary, for the purpose of carrying into effect the wishes and views of the original founder.

That disposes, in my opinion, of the question of jurisdiction. Whether this was a proper exercise of the jurisdiction of the Court, I have not had so fully brought to my attention. Mr. *Rendall* says, I proceeded on no evidence at all, and that, in point of fact, the question was not argued; but, as I understand from the Attorney-General, the case was of this nature: viz., that these governors of the school had acquired in their own persons various other charities proceeding from other sources, all of them connected with this school, but with respect to which there was no charter and no regulations by which the Court could know how to proceed; the Court, in that state of circumstances, thought it desirable that all these should be consolidated together, and be put under one uniform system of management. This appears to me to be a reasonable and proper thing.

That being so, upon the consideration of the scheme, it is quite open to say, that the system which the governors have hitherto pursued, and the powers which they have exercised, have been so beneficial to the school, as to make it desirable that they should be continued for the future; but that is a matter for consideration in Chambers in settling the form and terms of the scheme. On that point, I express no opinion, because that is open to me to consider in Chambers; but on the question of the jurisdiction of the Court, I entertain no doubt of the jurisdiction and the power of this Court.

Dismiss the Petition.

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Purchase by a trustee and executor from his *cestui que trust* of a portion of an unascertained residue set aside.

An executor purchased a share of the residue, and, in an administration suit, he was ordered to pay the assets into Court, *minus* the amount of the purchased share. Afterwards, in another suit, the purchase was set aside. Held, that the executor was not entitled, on setting aside the transaction, to a decree for repayment of the consideration money, but that it must be paid into Court in the administration suit.

THE testator, by his will, gave his real and personal estate to *Varley* and *Winstanley*, in trust to sell, and hold one moiety of the produce for *Varley* beneficially, and the other moiety for the testator's nephews and nieces. *Varley* was himself a solicitor, and had been employed by the testator.

The testator died in 1854, and his executors proved his will.

In 1855, four of the nephews and nieces, each of whom was entitled to one-sixteenth of the estate, sold and conveyed their shares to *Varley*, the trustee and executor, in consideration of 830*l.* paid to each.

No particulars and no valuation of the property appeared to have been made, and the value had not even now been ascertained, but the accounts were being taken in another suit of *Warbrick* v. *Varley*. The vendors had no professional assistance.

In *Warbrick* v. *Varley*, on an application that the Defendant should pay 12,000*l.* into Court, he claimed half as legatee and one-fourth as purchaser, and thereupon the sum of 3,000*l.* only was ordered into Court.

This suit was instituted by the four residuary legatees to set aside the transaction.

Mr. *Follett* and Mr. *Amphlett*, for the Plaintiffs, argued,

argued, that this transaction was one which could not stand in a Court of Equity.

Mr. *R. Palmer* and Mr. *J. H. Palmer*, for the executors, resisted the decree, and insisted, that if the transaction should be set aside, it could only be upon repayment, by the Plaintiffs to the Defendant, of the 3,320*l.* which he had paid as the consideration.

Mr. *Wigleswortb* for another Defendant.

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In this case, a trustee of the testator's will purchased of his *cestuis que trust* some shares of the residue. This Court will not allow such a transaction to stand, except under circumstances of great specialty, and when it is clear that every species of protection has been given to the *cestuis que trust;* this was not the case in the present instance. Whether the purchase was at an undervalue or not I do not know, and that can only be ascertained when the accounts have been taken in the other suit. But I am of opinion that this is wholly immaterial, the transaction being one which this Court cannot allow to stand, for it is clear that the Plaintiffs knew nothing about the value.

The only question is, on what terms the transaction is to be set aside? The usual rule is, to reinstate the parties in the same situation in which they were at the purchase, *i.e.* the vendor to repay the purchase-money which he has received, and the purchaser to reconvey the property he has sold. It is obvious, however, that this rule is not applicable to every species of case. In this, I am of opinion that the 830*l.* ought not now to be repaid to the Defendant. The state of the case is this:—

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this:—it appears that, in the administration suit, a balance is due from *Varley* on the accounts exceeding 12,000*l.* On an application being made to pay the amount into Court, the Defendant said, "I am entitled to one half as residuary legatee and to one-fourth as purchaser." The Court thereupon ordered 3,000*l.* only to be paid into Court. If it had not been for this purchase, he would have been ordered to pay at least 6,000*l.* into Court.

I am of opinion, that the utmost the Defendant can ask is, that this purchase-money shall be paid into Court in the administration suit, and when that has been done, the total amount in Court will not exceed 6,320*l.* in respect of the residue in the hands of the executors, which exceeds 12,000*l.* I shall direct the money to be paid into Court and give liberty to any party to apply.

This is a transaction which this gentleman ought never to have allowed to come into Court, and he must pay the whole of the costs.

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Jan. 23, 24.
Feb. 11.

Surety, by subsequent dealing with the creditor, held to have become a principal.

Judgment having been obtained against *A. B.*, a surety, he entered into a new arrangement with the creditor (irrespective of the principal debtor), by which execution was not to issue while he kept up certain policies for securing the debt. Held, that *A. B.* became principal, and not surety, by the new arrangement, and that no subsequent dealing between the creditor and principal debtor would annul it. Therefore, the creditor having afterwards taken the principal debtor in execution, and discharged him without payment, Held, that *A. B.* was not thereby released.

THE judgment of the Court contains a complete statement of this case.

Mr. *Follett* and Mr. *Rowcliff* appeared for the Plaintiff and

Mr. *R. Palmer* and Mr. *Faber*, and Mr. *Selwyn* and Mr. *Greene* for the Defendants.

Owen v. *Homan* (*a*); *Denton* v. *Godfrey* (*b*); *Clarke* v. *Clement* (*c*); *Crawley* v. *Lidgeat* (*d*); *Fowell* v. *Forest* (*e*); *Brooks* v. *Stuart* (*f*); *English* v. *Darley* (*g*); *Crawthorne* v. *Swinburne* (*h*); *Mayhew* v. *Crickett* (*i*), *Samuell* v. *Howarth* (*k*) were cited.

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This is a suit to relieve the Plaintiff from the liability he entered into with the Defendant *Charles Lowndes*, on the ground that the Plaintiff was surety only in the transaction in which Mr. *Lowndes* advanced his money, and that Mr. *Lowndes*, having since discharged the principal debtor from the payment of the debt contracted, has thereby released the Plaintiff, the surety, from his liability.

The

(*a*) 13 *Beav.* 196, and 3 *Mac. & Gor.* 378.
(*b*) 11 *Jurist*, 800.
(*c*) 6 *Term Rep.* 525.
(*d*) *Cro. Jac.* 338.
(*e*) 2 *Saund. R.* 6th ed. 47 Gg.
(*f*) 9 *Ad. & El.* 854.
(*g*) 2 *B. & P.* 61.
(*h*) 14 *Ves.* 160.
(*i*) 2 *Swanst.* 185.
(*k*) 3 *Mer.* 272.

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The statement of the facts of this case, as far as they are necessary for the purpose of explaining the grounds of my decision, need be but very summary, because the decision must, in my opinion, turn on the effect of the transaction in *April*, 1852, which I shall refer to in greater detail.

The Plaintiff had the misfortune to discover a new and possibly a valuable mode of producing metallic inks and salts, and he became the patentee of his invention. In *March*, 1847, he assigned the patent to *E. Duncombe Lines*, in consideration of receiving a share of the profits, but so as not to constitute any partnership between them. Mr. *Lines* formed a partnership to work the patent with another gentleman of the same name, and also with a brother of the Plaintiff. They had no capital to enable them to carry on the concern, and they applied to Mr. *Charles Lowndes* to advance them 6,000*l.*, for the purpose of establishing the concern. This he consented to do on certain terms, which were embodied in a deed of the 10th of *May*, 1848, to which the Plaintiff, the three partners and Mr. *Lowndes* were all parties.

By this deed, the 6,000*l.* was to be advanced to the partnership, with a stipulation that, if there was a loss sustained in carrying on the concern, it was to be made good by the Plaintiff and the three partners, in certain proportions, of which the Plaintiff's share was seven-twenty-eighths, or one-fourth of the total loss. I think that the effect of this deed was, to make the Plaintiff liable as surety, but not as principal, to Mr. *C. Lowndes*, for the whole 6,000*l.* advanced, if it were not paid by the three partners, and further, that, in the event of a loss, it made the Plaintiff liable, as principal, for one-fourth of the loss, but no further.

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The concern was expensive and unprosperous, and in the beginning of 1851, Mr. *C. Lowndes* was a creditor of the concern for principal and interest, in respect of the money advanced, to the amount of 13,440*l.* In the latter end of *March*, 1851, six deeds were executed, four on the 22nd and two others on the 24th and 25th days of that month.

By the first of the four deeds the Plaintiff relinquished all his claims under the original assignment to *E. D. Lines* in *March*, 1847.

By the second deed, the Plaintiff covenanted to pay the 6,000*l.* to the Defendant *Charles Lowndes*, and also the premiums which would become due on certain policies of assurance for 4,000*l.*, which had been effected at the expense of the firm, for the insurance of his life.

By the third deed, the policies were assigned by the firm to *Charles Lowndes*, as a securety for the repayment of the 6,000*l.*

By the fourth deed, the deed of the 10th of *May*, 1848, was put an end to, and the covenants declared to be at an end, and regulations were made for the future conduct of the business.

By the deed of the 24th of that month, these securities were assigned to Defendant *William Lowndes*, the brother of *Charles Lowndes*, and on the 25th they were assigned to Mr. *Tindale* to secure 2,000*l.* advanced by him. Therefore at the time when the arrangement was entered into, which was carried into effect by these deeds, the Plaintiff was liable as surety for 6,000*l.*, and as principal for one-fourth of the losses of the firm, exceeding apparently the sum of 3,000*l.*

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In *February*, 1852, Mr. *C. Lowndes* brought an action against the Plaintiff to recover the 6,000*l.* and interest at 10*l.* per cent. per annum, under the covenant contained in the second deed of 22nd *March*, 1851.

There was obviously no defence to such an action, but an arrangement was entered into between the Plaintiff and the Defendant *C. Lowndes*, which was to this effect:—On the 31st *March*, 1852, judgment was entered up in the action for the full amount claimed, viz., 6,613*l.* 3*s.*, besides the costs, but this amount was to be reduced to 4,000*l.*, the amount of the policies aforesaid, and the Plaintiff was to give up the proceeds of his living for the purpose of paying the premiums on the policies as they accrued due; if 4,000*l.* should be paid by the firm of *Lines* & Co., immediately thereupon the liability of the Plaintiff was to cease, and the policies were to be reassigned to him. This arrangement was carried into effect by two deeds of the 26th and 27th of *April*, 1852. By the former of these deeds the Plaintiff appointed *Horace Cuerton* his receiver, to get in the proceeds of his living, the vicarage of *Stone*, and to hold the same on trust, in the first place, to pay the premiums on the policies, in the next place to retain his own poundage at 5*l.* per cent. on the amount received, and lastly, to pay the balance to the Plaintiff. The other deed bore date the 27th of *April*, 1852; it was in the form of articles of agreement; it was executed by *Charles Lowndes* of the first part, *William Lowndes* of the second part, *Henry Tindale* of the third part and the Plaintiff of the fourth part. It recited that *Charles Lowndes* had recovered judgment in the action of covenant for 6,613*l.* 3*s.*, and the costs of the suit, and that the judgment had been duly entered up and registered; it further recited, that on the request of the Plaintiff the three other parties to the deed had agreed not to sue out execution

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execution on the judgment, on the terms which I have already mentioned, and that they had also further consented, on the request of the Plaintiff (provided the policies were kept in full force by the Plaintiff until his death) to limit his liability under the judgment to the sum which, on his death, should be received in respect of these policies, and thereupon, these three persons, jointly and severally, covenanted with the Plaintiff, that, as long as the premiums on the policies were punctually paid, no execution should issue or sequestration be sued out; and further, that, if on the death of the Plaintiff the policies were in full force, satisfaction should be entered upon the judgment, and the liability of the Plaintiff, under the judgment and under the indenture of 22nd *March*, 1851, should cease; and they further covenanted, that if they or any one of them received 4,000*l.* out of the profits of the business, that then satisfaction should be entered up on the judgment, and the policies should be reassigned to the Plaintiff.

The question is, how far this arrangement is affected by the subsequent conduct of *Charles Lowndes*, which was this:—In 1852 *Charles Lowndes* obtained judgment for 13,440*l.*, and interest and costs, against the two *Lines*, and they were taken in execution under that judgment. They presented a petition in insolvency in *April*, 1853, and were, by *Charles Lowndes*, discharged out of custody, on an agreement, that they should not carry on any manufacture of ink, but they might be permitted to continue their business of wood cutting and extracting (which they had previously conducted, and which forms no part of the subject-matter of this suit). Does this dicharge of the two *Lines* relieve the Plaintiff from the effect of the agreement entered into by him on the 27th *April*, 1852. I am of opinion that it does not.

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The doctrine, that the release of the principal debtor will release the surety, is not, as indeed it could not be, disputed; the only question is, whether it is applicable to the facts above stated. In my opinion it is not. I think that the transaction in *April*, 1852, put an end to any character of surety which remained in the Plaintiff, if there was any, and made him liable as a principal debtor. In the original transaction, according to the view I take of it, the Plaintiff was a surety for the payment of 6,000*l.*, to be advanced to the firm of *Lines* & Co., and besides this, he was liable, as principal, for one-fourth part of the loss that might be sustained by the firm. That arrangement was put an end to, and in *March*, 1851, the Plaintiff assigned policies of assurance to *C. Lowndes*, covenanted to pay the premiums, and also covenanted to pay 6,000*l.* to him, with interest. The arrangement come to in *April*, 1852, alters the whole character of the relation between the Plaintiff and *C. Lowndes*. This was the position of the parties:—The Defendant, *C. Lowndes*, had recovered against the Plaintiff a judgment for 6,613*l.* 3*s.*, besides the costs. He might have levied this amount against the Plaintiff, taking all his goods, and sequestrating his living, till he had been paid the full amount secured by the judgment, and leaving the Plaintiff to obtain payment from *Lines* & Co., as he best might. There was no doubt about the validity of the judgment, or the power of *C. Lowndes* to enforce the uttermost penny secured by it, as far as the property of the Plaintiff would enable him to pay it. Thus situated, the Plaintiff enters into an agreement, by which he obtains full and complete release from all the consequences of this judgment, upon his securing the due payment of the premiums, as they shall accrue due on the policies of assurance, which had been assigned to Mr. *Lowndes*. I am of opinion, that this is an agreement entered into between the Plaintiff and the Defendants,

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Defendants, in *April*, 1852, as principals for valuable consideration, that it was a valid and binding contract, the specific performance of which either party might enforce, irrespective of the subsequent dealings of either party with the two *Lines*. If the character of surety existed at that time in the Plaintiff, this contract abrogates altogether that relation, and puts the parties on a new and distinct footing, in which all parties stand towards each other in the relation of principals. It left all the parties to it open to deal with the *Lines* as they might think fit, and my opinion is, that no subsequent dealing with the principal debtor will annul this contract, although such dealings might give the Plaintiff rights under the contract, and upon the footing of the terms contained in it. For instance, it might be suggested, that *C. Lowndes* might have taken steps to prevent any profits from being realized by the concern, or from receiving any thing against the *Lines;* and if so, the Plaintiff might have been entitled to charge *Charles Lowndes* with having received what, but for his wilful default, he might have received; as, for instance, if the profits of the business had exceeded 4,000*l.*, and *C. Lowndes* had allowed the *Lines* to retain that amount; but the right to such an account would be, not by reason of the contract having ceased to exist, but by virtue of it, and under the terms of it.

But even supposing that the liability of the Plaintiff in *April*, 1852, was merely that of surety, I am not prepared to say that the subsequent release of the principal debtor would have given the Plaintiff any rights against the creditor, Mr. *C. Lowndes*. I treat this transaction of *April*, 1852, as equivalent to payment of 4,000*l.* at a subsequent period, in consideration of which payment the surety is discharged from the whole debt, which might have been recovered against him, and no case has

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has been cited to me to shew that when the creditor has obtained from the surety a portion of the debt due, and he afterwards takes the principal debtor in execution for the debt, he is not justified in discharging the principal debtor on payment of the balance remaining due to him. The reason for permitting him so to do seems obvious, for the right of action against the principal debtor had accrued to the surety as soon as he paid to the creditor the amount required from him, and he is alone to blame if he do not enforce his demand. The reason on which the equity is founded does not apply.

Lord *Eldon* states it thus in *Samuell* v. *Howarth* (*a*) "The rule is this—that, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal—not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract."

Apply that doctrine either to the case suggested or to the present case. The surety had been compelled to pay all that he could, his right of action then arose against the principal debtor. How does the subsequent dealing of the creditor with the principal debtor put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or

(*a*) 3 *Mer.* 278.

or not, or how is he prevented from having the same remedy against the principal debtor, as he had before the release of that debtor? If this be so, it puts an end to this case, in every point of view, for it is not suggested to me that the Defendant *Charles Lowndes* could have obtained anything in the shape of payment from the two *Lines's*, or that the business of the firm was in a state to produce anything but further loss to those who might conduct it.

In every point of view, therefore, I am of opinion that the agreement of *April*, 1852, is a valid and subsisting contract, that the only rights of the Plaintiff are under that contract, and that he has not alleged or proved any case entitling him to relief on the footing of that contract.

It must also be borne in mind, that it is not pretended that the Plaintiff has sustained the slightest injury by the conduct of *C. Lowndes*, and that the Plaintiff seeks to take advantage of a doctrine of equity, emanating from a desire to preserve the surety free from any possible injury that might arise from the dealing of the creditor with the principal debtor, for the purpose of getting rid of an arrangement at the time most beneficial to himself, and without which his situation would, in every respect, have been as bad as possible. I am of opinion that, whatever were the prior rights and situation of the parties, this agreement of *April*, 1852, is not affected by the subsequent dealing of the Defendant *C. Lowndes* with the two *Lines's*, and that, consequently, the contention of the Plaintiff fails, and that this bill must be dismissed.

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Dec. 22.
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Jan. 15, 16.
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Observations as to partnerships conducted on the cost-book principle.

The Court does not, without evidence, take judicial cognizance of the meaning of the term "cost-book principle."

In a company conducted on the "cost-book principle," shareholders in arrear were, by a general meeting, allowed to surrender their shares without discharging such arrears. The Court, from the practice of the company in other cases, inferred that this was authorized, and held, that the shares having been legally surrendered, the surrenderors were not contributories.

THIS company, conducted on the cost-book system, having been ordered to be wound up, the question on this adjourned summons was, whether three of the projectors, *Liddell*, *Rich* and *Bray*, ought to be put on the list of contributories, and it arose under the following circumstances:—

On the 10th of *June*, 1852, the company was formed, upon the cost-book system, for working these mines, and it was divided into 20,000 shares.

Liddell, *Bray*, *Rich* and *Tregellas* were the owners of the grants or setts of the mines, and they received, for their interest therein, 3,000 of these shares, taken as paid up to the extent of 12*s.* per share. The proper entries were thereupon made in the *cost book*, as to which entries, the affidavit stated, "that, according to the custom of cost-book mines, as carried on in the county of *Cornwall*, all parties, from time to time, becoming adventurers or shareholders in any mine worked under the cost-book system are bound by entries duly made in the cost book thereof."

The mines were accordingly worked, and calls from time to time made for that purpose.

In *January*, 1855, the calls had amounted to 19*s.* per share, so that there was payable by the four projectors, on each share held by them, 7*s.* per share, being the amount

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amount of calls beyond the 12*s.* per share, from which, by the arrangement, they were to be free. At this time the projectors and other shareholders were in arrear for the calls then made.

A general meeting of the shareholders was held on the 9th of *January*, 1855, at which a further call of 2*s.* per share was made, and the following resolution was come to unanimously, which was entered in the cost book, and was confirmed by a subsequent general meeting:—"That the committee of management be and are hereby empowered to make an arrangement with shareholders in arrear, viz., on the shareholder in arrear surrendering to the committee the whole of his shares, he may be entitled to redeem, within the present month, so many of the surrendered shares, which, at 19*s.* per share, will equal the amount paid by him, provided the present call of 2*s.* per share be paid on the shares when redeemed."

On the 12th of *January*, Mr. *Braithwaite*, on behalf of the committee of management, wrote to *Liddell* as follows:—"With respect to your calls and those of Captain *Rich* and Mr. *Bray*, the committee have the power to make the following arrangement, namely:—You, Mr. *Liddell*, will surrender all your shares (471), when, within the present month, you will be entitled to redeem so many shares, at 19*s.* per share, as will be equal in amount to 12*s.* per share on 471, and which will be 297 shares, provided that on taking up the 297 shares you pay 2*s.* per share, the call just made. The same operation as to Captain *Rich* will give him 307 shares, 2*s.* to be paid. The same as to *Bray*, 307 shares, 2*s.* to pay. Your answers to this arrangement, yes or no, must be sent in a week."

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On the 17th of *January*, Mr. *Liddell* replied as follows:—"I have seen Mr. *Bray* and Mr. *Rich*, in regard to the proposition made by the committee in respect to the shares held by us, to which we all accede, and the necessary documents shall be forwarded to-morrow to the committee."

Liddell, *Bray* and *Rich* accordingly signed documents on the 19th of *January*, 1855, whereby they did "surrender and yield up unto the committee of the *Bodmin* United Mines" all the shares then held by them respectively (being in number 471, 487 and 487), and all their estate, right, title and interest of and in the same shares." The surrenders so signed were sent to the committee, and they were posted in the transfer book, by the official manager, after the winding-up order.

On the 18th of *January*, 1855, *Liddell* wrote to the secretary of the company as follows:—"I beg to hand to you, as secretary of the company, a resignation of 471 shares in the *Bodmin* United Mining Company, being the whole of my interest in the undertaking. At the same time, in accordance with the resolution of the general meeting on the 9th instant, as communicated to me by Mr. *Burge* and Mr. *Braithwaite*, I claim the right of having assigned to me, by the committee, at any time within one month from the date thereof, 297 shares in the adventure, on my paying, on or before the time of my making such claim, the sum of 2*s*. per share on the number so demanded to be assigned to me. I also enclose Mr. *Bray's* resignation of shares, who also claims the right of having 307 shares assigned to him by the committee on the above conditions."

No answer appeared to have been sent to this letter.

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Neither *Liddell*, *Bray* or *Rich* ever paid the 2*s.* per share or availed themselves of the option to redeem any of the surrendered shares.

The working of the mines was stopped in *June*, and in *August* an order was made to wind-up the concern.

The facts thus stated gave rise to the first question, whether the general meeting or the committee had power to accept the surrender of these shares, as against the other shareholders.

The subsequent facts were as follows:—Further calls were made, and on the 3rd of *May*, 1855, the new secretary of the company wrote to *Liddell*, *Bray* and *Rich*, stating that the committee of management did not regard the transaction of *January*, 1855, as a relinquishment of all their shares, but only as a reduction of the number, and he required payment of the subseqent calls.

Liddell and *Bray*, in answer, insisted that they had surrendered the whole of their shares, and had not exercised the option of redemption; but they seemed inclined to take a new interest in the company, which, however, was never given them.

Rich, in answer, on the 10th of *May*, spoke of "my shares," and of his willingness to do what the secretary might think proper to be done.

Rich, in a subsequent letter of the 22nd of *May*, written by him to the secretary, stated as follows:—"With reference to the arrears of calls due *on my shares*, I beg to observe, that, inasmuch as it is not convenient for me to pay the calls on the whole number of shares standing

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standing in my name, I shall feel obliged if the committee will allow me to reduce the number to 100. I have not sold a share in the mine from its commencement."

These facts gave rise to the second question, whether these persons had subsequently become shareholders.

Liddell, *Bray* and *Rich* insisted that one of the terms on which this company was conducted was, that any shareholder might relinquish his shares, upon such terms and conditions as might be agreed upon between him and the general meeting of the company, or a committee appointed for that purpose at any such meeting. They relied on the entries in the company's books as establishing this conclusion. From them it appeared, that at a general meeting held in *July*, 1854, *Bray* and *Rich* each surrendered 113 shares without payment of the amount due, and *Liddell* did the like in respect of 729 shares. It also thereby appeared, that in the month of *November*, 1854, *Tregellas* made a proposal to the committee of management for the surrender of all the shares held by him; that this was acceded to and his terms accepted, and thereupon he ceased to be a shareholder. These transactions had never been questioned by any of the shareholders, or the official manager.

Mr. *Follett* and Mr. *Roxburgh*, for the official manager. These parties ought to be placed on the list of contributories. Neither a general meeting nor the managing committee had any authority to allow members in arrear to resign their shares, without payment of what was due from them. No such arrangement could bind the absent shareholders or the company collectively, or even a minority present, it being *ultra vires*. If it

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it were otherwise, by the secession of a body of the shareholders, the whole liabilities of the company might be thrown on a few who remained, and who had never consented to the retirement of their co-partners. Here the case is stronger, for the concern must have been insolvent at the time, and it stopped soon afterwards. One-fifth of the contributories have been absolved, and their liability thrown on the others without any assent or acquiescence by them. It has been decided, that in ordinary companies no such powers exist in the managing body; *Morgan's* Case (*a*); *In re Cameron's Coalbrook*, &c. Railway Company (*b*); *Munt's* Case (*c*); *Daniell's* Case (*d*); *Hart* v. *Clarke* (*e*). Does it make any difference that this is the case of a company on the cost-book system? Certainly not. Such a company is in the nature of a partnership at will, on a sort of ready money principle, having no outstanding debts beyond those for the current month. The captain or purser, at the end of each month, ascertains the existing liabilities, which must be provided for, and, as in all partnerships at will, any shareholder may then retire upon paying his share of the existing liabilities. There is no custom by which a shareholder can relinquish his shares, and thereby escape his debt and shift his liability on his co-partners. Under the cost-book system, no greater powers are to be implied than in ordinary partnerships; here none are expressed, as in *Fenn's* Case (*f*), where there was a written contract on the subject of retirement. Besides, due notice was not given of what was intended to be done, so that the other shareholders might have an opportunity of dissenting.

Secondly.

(*a*) 1 *Mac. & Gor.* 225, and 1 *Hall & Tw.* 320.
(*b*) 18 *Beav.* 339, and 5 *De G., M. & G.* 284.
(*c*) 22 *Beav.* 55.
(*d*) 22 *Beav.* 43.
(*e*) 19 *Beav.* 349, and 6 *De G., M. & G.* 232.
(*f*) 4 *De G., M. & G.* 285.

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Secondly. Assuming, however, that this could have been done so as to bind all the shareholders, still the arrangement was never completed. The transfers were never entered in the book, and until that was done, none of the other shareholders were bound. The relinquishment was to the committee and not to the company, and no answer was sent accepting the transfer; the subsequent correspondence and conduct of the parties show that they had not absolutely surrendered all their shares, but retained an equity of redemption.

Mr. *R. Palmer* and Mr. *Osborne, contrà*. We do not dispute the decision in *Morgan's* Case, which was a case of an ordinary company, where the powers of the directors were limited. This is the case of a partnership under the cost-book system, where, by the custom, such a power is implied; *Collier* on Mines (*a*); Procedure in *Stannaries'* Court (*b*); *Fenn's* Case (*c*); and every party knew of it when he took shares, and that it was one of the terms of the partnership he was entering into.

Again, the practice in this mine shews that such a right exists; for the books contain repeated entries of similar transactions, which have never been called in question.

They also referred to *Taylor* v. *Hughes* (*d*).

Mr. *Follett*, in reply. The common rules of partnership must apply, unless the case is governed by some special contract. The only evidence of custom is the text books, which are inadmissible in evidence; and the Court

(*a*) Chap. 3, § 3.
(*b*) P. xxiv.
(*c*) 4 *De G., M. & G.* 285.
(*d*) 2 *Jones & L.* 24.

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Court cannot recognize the cost-book principle in the absence of evidence; *Fenn's* Case (*a*). The retirement was upon a special contract, which, therefore, excludes any custom, and the question is, as to the right of a section of the shareholders to enter into such a special contract binding either the company or the dissentients. If the company's books are binding, then these parties are entered as shareholders, and are bound thereby.

The Master *of the* Rolls. I will read the papers.

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The question on this adjourned summons is, whether three persons of the names of *Liddell*, *Bray* and *Rich*, ought to be put on the list of contributories of this concern.

It is not disputed that they were original shareholders; but they allege, that by a transaction which took place on the 9th of *January*, 1855, they ceased to be shareholders, and that they have never since become shareholders of the company. There are three questions to be considered, in order to determine whether they are or are not to be placed on the list of contributories.

The first question is, did there exist, in this mining concern, any contract or custom, by which, as between themselves, the shareholders could relinquish their shares.

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(*a*) 4 *De G., M. & G.* 295, and see *Hawkin's Case*, 2 *Kay. & J.* 263.

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The second question is, if the first proposition be determined in the affirmative, was the effect of the transaction which occurred on the 9th of *January*, 1855, such as to amount to a valid relinquishment of their shares by these three, or by any, and which of them?

And if this question be also determined in the affirmative, then did they, or any two or one of them, become a shareholder by any subsequent acts, and if so, for what number of shares.

On the first proposition it is material to ascertain the terms on which this mine was conducted. In the first place, it was carried on on the cost-book principle. What is this principle? Partnerships of this description have been brought before the attention of the Court very frequently of late years, but what is included in this expression has never been, as far as I am aware, defined. It is extremely vague, and I concur with Lord Justice *Knight Bruce* in saying, that this is no recognized principle of partnership, which, in the absence of evidence, the Court is bound to understand; it certainly does not depend on immemorial custom, the institution and practice being comparatively modern. There may have grown up, since these partnerships have been in practice, a custom understood amongst the shareholders in them, which would bind the parties to it; but if any such exists, none such is proved before me. Mr. *Smirke's* book and Mr. *Collyer's* book, which have been cited, even if they could be admitted as evidence in this case, do not go beyond what is admitted, by the Counsel for the company's official manager, to be the custom or practice of these mines, viz., that, as between the existing shareholders, and apart from their liability to the then existing creditors of the concern, any

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any shareholder may retire on paying up all the calls then due from him at that time. I am of opinion, therefore, that, in absence of evidence, there is nothing to indicate, with precision, what, with reference to the point before me, is included in the terms "cost-book principle," and that the parties who join in carrying on and working a mine may, by contract, either expressed in writing or agreed upon by parol, add to, alter or qualify, as they please, whatsoever may be necessarily included in the term "cost-book principle," and may interpret these words to have any particular meaning they may please to agree upon.

In this case, as is usual in mines so conducted, there was no written contract. If, therefore, it formed a part of the conditions on which this mine was worked, that any of the partners might retire on any terms or in any specified manner, this is to be discovered from the dealings of the partners and the practice adopted by them in carrying on the mine from the beginning of their partnership. In this view of the case, and on looking at the books of the partnership for the purpose of discovering the mode of dealing with each other between these partners, I have come to the conclusion, that one of the terms or stipulations on which this mining partnership was conducted was, that, besides the right, which is conceded, of retirement on payment of all the calls due, any one or more of the shareholders might, as between themselves, relinquish his shares, upon such terms and conditions as might be agreed upon between the retiring shareholder and the company, to be approved of at any general meeting of the company, or by a committee to be appointed for that purpose at any such meeting. The entries in the books, which I have examined, and the affidavits in this case, in my opinion, establish this conclusion. Accordingly, many instances occur

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occur in the books to shew that this course was adopted.

The original shares held by *Bray*, *Rich* and a gentleman named *Tregellas*, were 600 shares each, and the shares held by *Liddell* were 1,200. By a general meeting held in *July*, 1854, the shares held by *Bray* and *Rich* were reduced to 487 each, and the shares of *Liddell* were reduced to 471. In the month of *November*, 1854, *Tregellas* made a proposal to the committee of management for the surrender of the shares held by him. This was acceded to; his terms were accepted, and thereupon he ceased to be a shareholder. In none of these cases was the amount then due in respect of calls on the shares paid up before the shareholder was allowed to relinquish his shares; and it is obvious, that the principle is exactly the same whether he relinquishes all his shares or only a portion of them. These transactions seem never to have been doubted or questioned in the company, or by the persons who constituted the partners or shareholders in it. Could they be questioned now? I think not. If the mines had turned out highly prosperous, could *Tregellas*, could *Liddell*, *Bray* or *Rich* successfully contend, that the other shareholders had no authority to accept the relinquishment of these shares, and insist, that they were entitled to an account of profits, on the same footing as if no such transactions as those in *July* and *November*, 1854, had occurred? I am of opinion, that they could not; that these transactions must be considered valid, and that they can only be considered valid, on the ground that one of the terms of the partnership contract was, that any shareholder might, wholly or partially, relinquish his shares, upon terms to be agreed upon between them and the rest of the shareholders. I am of opinion, that the partnership was so constituted in this case, and that a general

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general meeting of the company had authority, in this respect, to bind the absent shareholders; in other words, that it was within the scope and province of a general meeting of the shareholders to settle and determine upon such matters, and that no special notice was required to be given of the intention to transact business of this particular character at such general meeting.

The next point to be considered is, the transaction of the 9th of *January*, 1855, and whether what then and subsequently took place amounts to a valid relinquishment by these three persons of all their shares in the concern.

[*His Honor here read and commented on the resolution of the 9th of January, the letters of the 12th of January and 17th of January, the surrender and the letter of the 18th of January.*]

The letter of the 18th of *January*, besides the relinquishment there made, claims, it is true, a right to have assigned, within a specified time and on certain conditions, 297 shares in the adventure; but this does not affect the relinquishment, which was not made conditional upon their claim being admitted. To this letter no answer was sent, Mr. *Square* having been appointed secretary, in the meantime, in the place of Mr. *Truscott;* but I am of opinion, that this transaction, although no answer was sent to the letter, amounted to a valid and effectual relinquishment of the shares. The general meeting had empowered the committee of management to make this arrangement, not with these three shareholders exclusively, but with all the shareholders in arrear. Being so empowered, the committee of management, by Mr. *Braithwaite*, one of the members of it, apply to them to know if they will accede to this proposal.

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proposal. They do accede to it; they say so in writing, and then they sign a formal relinquishment to carry this object into effect, and they transmit it to the secretary of the company. In addition to this, they claim the right of hereafter becoming shareholders on certain terms, if they should think fit. This claim is not answered, and they never insisted upon it, and it does not, in my opinion, affect the relinquishment. Apart from any question on the construction of the resolution, on which I shall observe presently, the transaction is, in my opinion, complete.

It is argued, on behalf of the official managers of the company, that this differs from the case of *Tregellas*, because he made certain proposals to the company, which were accepted by them; but that the proposals of *Liddell*, *Bray* and *Rich* were not accepted by the company, and that, until acceptance, they remained shareholders. But the truth is, that the transaction is just as complete in this case as in the case of *Tregellas*; one is the converse of the other. In the case of *Tregellas*, the proposal to relinquish emanated from himself, and was accepted by the company. In the case before me, the proposal to relinquish emanated from the committee of management, under the authority of the company, and was accepted by the shareholders. Both are equally complete and final.

With respect to the construction of the resolution itself, I think that it plainly imports a power to relinquish or surrender their shares. The words are, "That the committee," &c. (see *ante*, p. 371). It is contended, that if the general meeting could do this, they could have passed a resolution surrendering all their own shares, and thus throw the liability exclusively on the absent shareholders. The answer to this appears to me to

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to be, that the validity of the transaction depends upon whether it was done *bonâ fide*. Fraud, or an intention to benefit either the persons present at the meeting, or any particular person or class of persons, at the expense of the general body of shareholders, would no doubt invalidate any transaction or resolution of the general meeting; but if done *bonâ fide*, and within the scope of the partnership contract, it would be good. I have already observed, that, in my opinion, this was within the scope of the partnership contract.

It remains to be considered, whether it was done *bonâ fide*. I am at a loss to discover any badge of fraud in the whole transaction. I believe that the meeting was acting in the manner considered by the persons attending it as most beneficial to the company; I see no desire to benefit themselves at the expense of others; I see no motive or desire to benefit these three shareholders, or any class of shareholders to which they belonged, at the expense of the rest. The mine was probably in an insolvent condition at the time, but it is plain that this was not known or believed to have been the case by the other shareholders. On the contrary, from the report of Mr. *Braithwaite*, it seemed probable, that, by arrangements with creditors, the mine might be made productive and profitable to the remaining shareholders, but that it was, as it always is in cases of mines, a matter of doubt and hazard, depending on the produce of the mine itself.

I have, therefore, come to the conclusion, that the transaction was within the scope of the authority of a general meeting to sanction, and that the transaction itself amounted to a relinquishment of these shares.

The only remaining question is, did the subsequent acts

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acts make the persons, or any of them, shareholders again, and, if so, for what number of shares? and on this part of the case, I am of opinion that the subsequent transactions had no such effect.

Mr. *Square*, the new secretary of the company, puts a different construction on the transaction to that which I think it bears. On the 3rd *May*, 1855, he writes to these three persons, stating that he does not, and that the company, or rather the committee of management, do not treat this transaction in *January* as constituting a relinquishment of their shares, but that it amounted merely to an arrangement, by which the number of their shares was to be reduced to correspond with the amount paid; that is, from 487 to 279. He requires payment of the calls on the 297 shares, and he contests the construction put by them on the arrangement of *January*. How does that affect these three persons? The error of Mr. *Square* respecting the true character of the transaction, cannot prejudice either side, or vary the real effect of it. I think that the transaction in *January* amounted to a relinquishment of all their shares; if I am right in this conclusion, it follows, that the circumstance that the secretary of the company took a different view of the case, cannot alter the result, it would neither entitle these three persons to claim to be shareholders of the mine, had it been prosperous, nor can it entitle the rest of the company to insist on their remaining or becoming shareholders against their inclination.

The case of *Rich* varies a little from that of the others, for on the 2nd of *May*, 1855, he wrote, admitting that he had a certain number of shares, and wishing them to be reduced to 100. It is clear, that *Rich* thereby admits that he is a shareholder, but I think that this was a mistaken view of his position. It is not

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an admission given on his part, that, notwithstanding the transaction of *January*, he was willing thenceforth to become or to be treated as a shareholder of the Company, but it seems to be the statement of a belief that he is a shareholder, and, if so, it merely mis-states and cannot alter the original transaction. As a separate and distinct transaction, it does not make him a shareholder; it clearly could not if it were for his own benefit, as if the company had become prosperous; can it for his prejudice, the company having become a losing concern? Although there is some difficulty in the case of Mr. *Rich*, arising from this circumstance, I think that I cannot deal with his case differently from that of the others, and that the fair result of the whole transaction, taken together, is, that no one of these three gentleman is a shareholder, and that no one of them ought to be placed on the list of contributories.

The costs of all parties will be paid out of the assets.

This being an adjourned case from Chambers,

Mr. *Jessell* pressed to be heard on behalf of some of the other contributories.

Mr. *R. Palmer* objected.

The Master *of the* Rolls. I never hear contributories in such cases. There would be no end of it if it were once admitted.

Contributories held not entitled to be heard on a question as to placing others on the list.

Note.—See *Re The Norwich Yarn Company*, 13 *Beavan*, 428, note (*a*).

1857.

STAFFORD *v.* FIDDON.

Feb. 9.

An executor who had unnecessarily retained in his hands uninvested a balance of 655*l.*, for a year and a half, charged interest thereon.

AT the end of two years after the testator's death the executor had in his hands a sum of 655*l.*, which had been retained by him uninvested without any necessity for a year and a half.

The MASTER *of the* ROLLS decided that the executor ought to be charged with interest on this balance.

Mr. *Druce* for the executor.

Mr. *R. Palmer, contrà.*

NEWBEGIN *v.* BELL.

Feb. 18.

Bequest of specific chattels in trust to sell, "in the first place" to pay the debts, and then to divide the residue amongst five persons. There was no residuary gift. Held, that the debts were primarily payable out of the general residue.

THE testator by his will, dated the 5th of *November* 1847, bequeathed a leasehold, and a ship called *Ophelia* and *Mary*, to his three trustees and executors in trust to sell, and he proceeded as follows:—"And I hereby declare that my said trustees shall stand and be possessed of the moneys which shall arise from such sale and sales as aforesaid, upon trust, *in the first place*, to pay off and discharge all my just debts and funeral and testamentary expenses, then the residue of such moneys shall be divided amongst my daughter-in-law *Jane*," and

There being no residuary gift, the next of kin filed a bill for administration. The debts exhausted the residue, but there remained assets specifically bequeathed. Held, that the Plaintiff must bear his own costs, but that the executor was entitled to his costs out of the specific legacies.

and four other persons whom he named. The will contained no residuary gift.

The testator died on the 13th of *November*, 1847.

On the 13th of *May*, 1847, the testator had chartered the vessel, and under the terms of the charter-party, the freight became payable on the delivery of the cargo at *Hull*, which happened two or three days before the death of the testator. It produced 537*l*.

This bill was filed by the next of kin against the executors alone, claiming the freight and asking for the administration of the estate. They succeeded at the hearing (26th of *June*, 1856) in establishing that the freight did not pass with the ship.

The accounts were taken, and the debts were all paid. There were two questions; first, whether the debts were to be paid out of the produce of the ship, or out of the residue; secondly, as to the costs of suit. As to the latter point, the executors had stated, by their answer, that they could not safely administer the estate.

On the first point *Choat* v. *Yeats* (*a*); *Browne* v. *Groombridge* (*b*); *Hewett* v. *Snare* (*c*) were cited.

Mr. *Follett* for the Plaintiff.

Mr. *Stevens* for other parties.

Mr. *Torriano* for the executor.

Mr. *C. Hall* for the specific legatees, as to the costs.

There

(*a*) 1 *Jac. & W.* 102.
(*b*) 4 *Madd.* 495.
(*c*) 1 *De G. & Sm.* 333

1857.

NEWBEGIN v. BELL.

There is no residue, and therefore the Plaintiffs must bear their own costs. The ordinary decree does not affect assets bequeathed as specific legacies, but is confined to personal estate not specifically bequeathed.

Mr. *Follett*. The executors state that an administration in Court was necessary, therefore all the assets are liable for the costs of administration.

The MASTER *of the* ROLLS.

There being no residuary gift, the debts are payable out of the residue. The Plaintiff can only have his costs out of the residue, and as there is none, he will have to bear them. The executors are entitled to their costs out of the other funds, as the suit was necessary for their protection.

GRAHAM *v.* LEE.

Feb. 10.

Under a clause of forfeiture, in case of a party attempting or agreeing to assign or anticipate a fund,—Held, that a voluntary declaration of insolvency under which a fiat immediately issued, did not create a forfeiture. Secondly, that negotiations as to charging the fund, which resulting in nothing, did not create a forfeiture, and that to constitute an "attempt" to anticipate, there must be some act, which, but for the clause of forfeiture, would have the effect of anticipating the fund.

THE testator gave to *Henry Smith* a legacy of 500*l*. stock on his attaining the age of twenty-five, but subject to the following restrictions, conditions and forfeiture:—"And in case he shall assign, mortgage, or in any manner anticipate the same, *or attempt or agree to assign, mortgage or otherwise anticipate the same*, then I revoke the said bequest, and I direct the said sum to be and form part of my residuary estate, and be payable to the party hereinafter named as my residuary legatee."

The

1857.

GRAHAM v. LEE.

The testator died in 1849.

Henry Smith attained twenty-five in *February*, 1856, but in the meantime he had entered into partnership and got into pecuniary difficulties, and it was now insisted that he had forfeited the legacy. The circumstances relied on were these:

In *October*, 1853, *Henry Smith* expressed a desire to borrow a sum of money on the legacy, but his solicitor explained to him his incapacity to do so. Two days afterwards, he stated to his solicitor his necessities and urged him to procure, if possible, an advance from the trustees, when the solicitor read the will and explained to him that he was prevented anticipating the legacy; thereupon nothing was done. Besides this, some creditors of the firm were very pressing for payment or security, and *Smith's* partner stated to them that *Smith* was entitled to the legacy of 500*l.* The solicitor of the creditors called on *Smith* and got some information, and he referred him to his (*Smith's*) solicitor; but, before seeing him, the creditors' solicitor procured a copy of the will, and found that *Smith* could not make any charge without forfeiting the legacy. Nothing further was done.

It was sworn that *Smith* had stated that he had proposed to give these creditors a charge on the legacy, but he positively denied having made any such proposition.

Being still pressed by their creditors, *Henry Smith* and his partner, on the 9th of *December*, 1853, made the usual declaration under the Bankrupt Act, "that they were not able to meet their engagements with their creditors," and on the same day, upon the petition of their

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their largest creditors, they were declared bankrupts. The Plaintiff, their assignee, now claimed the legacy.

Mr. *R. Palmer* and Mr. *Surrage*, for the Plaintiff, argued that there had been no forfeiture and no attempt to assign or mortgage, and that bankruptcy was not an assignment, mortgage or anticipation by the bankrupt. They cited *Jones* v. *Wyse* (*a*); *Doe* d. *Mitchinson* v. *Carter* (*b*); *Whitfied* v. *Prickett* (*c*).

Mr. *Lloyd* and Mr. *J. H. Palmer*, for the residuary legatees, insisted that there had been a forfeiture, by the attempt to assign, and secondly, by the declaration of insolvency, which was voluntary, and done for the very purpose of vesting the legacy in the assignees. This, they said, was different from a bankruptcy *in invitum*. They cited *Brandon* v. *Aston* (*d*); *Churchill* v. *Marks* (*e*); *Yarnold* v. *Moorhouse* (*f*); *Lear* v. *Leggett* (*g*); *Rochford* v. *Hackman* (*h*); *Martin* v. *Margham* (*i*); 6 *Geo.* 4, c. 16, s. 6; 12 & 13 *Vict.* c. 106, s. 70.

Mr. *Babington* for the trustees.

The MASTER *of the* ROLLS during the argument and afterwards observed as follows:—

A condition of forfeiture must be strictly construed, and here nothing is said as to bankruptcy being a ground of forfeiture. It is then said, that this declaration of insolvency, which was the foundation of the bankruptcy,

(*a*) 2 *Keen*, 285.
(*b*) 8 *T. R.* 57.
(*c*) 2 *Keen*, 608.
(*d*) 2 *Younge & C.* (*C. C.*) 24, 30.
(*e*) 1 *Coll.* 441.
(*f*) 1 *Russ. & M.* 364.
(*g*) 1 *Russ. & M.* 690.
(*h*) 9 *Hare*, 475.
(*i*) 14 *Sim.* 230.

bankruptcy, was voluntary, but the same may be said of every act of bankruptcy.

Next, as to the alleged attempt to anticipate. I think that an offer to give a security on the legacy was neither an assignment of it nor an attempt to assign it. To constitute such an attempt there must be some act which, but for the clause of forfeiture, would have the effect of "assigning, mortgaging or otherwise anticipating" the legacy.

The Plaintiffs are entitled to the legacy.

DAY *v.* DAY.
DAY *v.* RAWLINS.
DAY *v.* BUCKLAND.

Feb. 23, 26.

The Plaintiffs' solicitor made an equitable assignment of the costs, to which he would become entitled in the suit, to a stranger to the cause. An order was afterwards made for taxation of the Plaintiffs' costs, and for their payment to the solicitor out of a fund in Court. The solicitor became bankrupt before the creditor had obtained any stop order or given notice of the assignment. Held, that costs were within the order and disposition of the bankrupt, and passed to his assignees.

MR. *TUCKER*, a solicitor, was employed for the Plaintiffs in the above suits. He had borrowed from the Petitioners, *The United Kingdom Mutual Annuity Society*, 250*l.*, on his promissory note. The note was not paid when due, and thereupon Mr. *Tucker* offered to assign to the Petitioners his interest in the costs due to him, as the Plaintiffs' solicitor, in the above-mentioned suits. This offer the Petitioners accepted, and they consented to renew the promissory note for one month. Accordingly, on the 8th day of *June*, 1854, Mr. *Tucker* signed and gave the Petitioners an agreement, dated the 8th of *June*, 1854, which was as follows:—"In consideration of your having this day renewed

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renewed my promissory note for one month, I hereby undertake, and agree to assign, by way of charge, the costs due to me in a Chancery suit, amounting to upwards of 400*l.*, and in which suit the Master has made his report, and the cause is set down to be heard before Master of the Rolls on further directions, and there is a fund at the Accountant-General's, to the credit of the cause, *Day* v. *Day*." He also gave a second promissory note.

On the 4th of *August*, 1854, the cause came on for further directions, when it was ordered, that the Accountant-General should transfer 159*l.* stock, part of 326*l.* stock in Court, to the Defendant *Buckland*, and that the residue should be sold, and that the Defendant *Paxton* should pay 553*l.* into Court on or before the 10th of *November*. The Taxing Master was directed to tax the costs of all parties, and out of the fund realized by the sale of the residue of the stock, and the money directed to be paid into Court, the costs of *Day* and *Buckland* were, in the first place, to be paid, and out of the remainder of the cash, the Plaintiffs' costs (408*l.*) were to be paid to Mr. *Tucker*, their solicitor.

The 553*l.* was paid into Court, and the claims having priority over the Plaintiffs' costs being paid, there then remained in Court a sum of 309*l.* applicable to the payment of Mr. *Tucker's* costs, taxed at 408*l.*

On the 7th of *October*, 1854, Mr. *Tucker* became bankrupt. The Petitioners now presented a petition, praying, that notwithstanding the order on further directions, the balance in Court might be paid to them.

It did not appear that any stop order had been obtained

tained on the fund by the Petitioners, or that any notice had been given by them.

Mr. *Nalder*, in support of the petition. The Petitioners are entitled to the fund. It will be objected that no stop order or notice was given, but the doctrine of priority by stop order and notice has no application as between the vendors and purchasers of *choses in action*, and the assignees in bankruptcy stand in the same position as *Tucker* himself. The very point has been recently decided in *Re Pole's* Trusts (*a*).

Neither a stop order nor a notice is necessary to perfect the title as between the assignor and assignee. In *Re Atkinson* (*b*) it is said, that the assignee in insolvency takes only the interest of the insolvent, and is subject to the same equities as the insolvent.

Mr. *Hardy*, *contrà*, for the assignees. The only question is, whether the fund was within the order and disposition of the bankrupt, and it is clear from the authorities that it was. The law is stated 2 *Spence*, p. 856, "It was decided," &c. &c.; *Ryall* v. *Rolle* (*c*); *Greening* v. *Beckford* (*d*); 6 *Geo.* 4, c. 16, s. 72; 13 & 14 *Vict.* c. 106, s. 125. No stop order having been obtained and no notice given, the *chose in action* was therefore within the reputed ownership of the bankrupt, and passed to his assignees.

Mr. *Nalder*, in reply. No stop order could have been obtained, because there were other costs to be paid which had priority, and there might have been no surplus. The assignees have themselves given no notice, nor

(*a*) 25 *L. J.* (*Ch.*) 862.
(*b*) 2 *De G., M. & G.* 143.
(*c*) 1 *Atk.* 165.
(*d*) 5 *Sim.* 195; and see 1 *Chit. Stat.* 2nd edit. p. 237 to 244, notes; *Bartlett* v. *Bartlett*, 1 *De Gex & Jones*, 127; and *Re Rawbone's Bequest*, 3 *Kay & Johnson*, 300.

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nor have they obtained any stop order; they cannot therefore, on that ground, assert any superior equity against a prior incumbrance. They are mere assignees themselves, through the vesting order, and they have, by their negligence, equally forfeited their right.

The MASTER *of the* ROLLS.

I must look into the cases. I have held, that in cases of bankruptcy, assignees for value, who have not given notice, but have allowed *choses in action* to remain in the order and disposition of the bankrupt are postponed, and, consequently, that such *choses in action* become divisible amongst the general body of creditors.

I was staggered at the case cited, and I will look into it. I am satisfied the Vice-Chancellor did not mean to alter the established law.

Feb. 26.

The MASTER *of the* ROLLS.

The question on this petition is, whether a sum of costs due to Mr. *Tucker*, a solicitor, passed to his assignees, as being in the order and disposition of the bankrupt at the time of his bankruptcy, or passed *to the United Kingdom Mutual Annuity and Insurance Society*, under a particular assignment.

The state of the case is this:—Mr. *Tucker* was the Plaintiffs' solicitor. He has a lien on the fund in Court for his costs, which were afterwards taxed at 408*l.* The Petitioners advanced the sum of 250*l.* to Mr. *Tucker*, upon the security of his claim upon the fund in Court, and in *June*, 1854, he made an assignment of it to them, but the

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hey did not obtain any stop order. Now, undoubtedly, he usual principle is, that where there is an assignment of a *chose in action* to a particular assignee, and he takes no step by giving notice to the person who is bound to pay the money to the debtor, or, if it is a sum due from an insurance company, to the insurance company, or if it is a fund in Court, by obtaining a stop order, it passes to the assignees of the bankrupt, as being in his order and disposition at the time of the bankruptcy, and certainly I have never heard that proposition doubted. It might have been originally a question whether a *chose in action* came under the order and disposition clause; that, no doubt, was a question of some nicety, but it is now finally determined. The reason why I delayed my judgment in this case was, to consider more particularly the case of *Re Pole's* Trusts (*a*), which was cited to me as an authority in favour of the Petitioners. But upon the fullest consideration that I can give to that case, I do not think the Vice-Chancellor there meant to determine anything contrary to the ordinary rules which relate to order and disposition, and that in fact, all that he meant to determine was, the question of whether there was a valid assignment in that case or not. At least that is the view I take of the case; there may possibly be something omitted from the report, but that is the view I take of that decision.

Now the facts of this case are very peculiar, because the Petitioners certainly allowed Mr. *Tucker* (the bankrupt) to have complete control over this fund subsequently to the period of the assignment; for the assignment having taken place on the 8th of *June*, they allowed him on the 4th of *August*, 1854, to obtain an order for the payment

(*a*) 25 *L. J.* (*Ch.*) 862.

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payment of the amount of his costs, out of the fund in Court, to him personally. The bankruptcy occurred afterwards in *October;* therefore, two months after the assignment was made to them, they allowed an order to be obtained for the payment of the fund to him personally. What they ought to have done was this:—To have had the order made directing payment of the fund to them, as the assignees of Mr. *Tucker*, or to pay to them the amount that was due to them upon the assignment. And if that had been done, the case would have been considerably varied, and I should then have been of opinion, that it was not in the order and disposition of the bankrupt. But allowing an order to pay it to him personally makes the case exactly as if it had been paid to him previously to the bankruptcy, in which case, I am of opinion that no question could have arisen, but that it was in the order and disposition of the bankrupt at the time of the bankruptcy.

The facts of this case, and the authorities to which I have referred, since the hearing of this petition (which it is not necessary to go through in detail, for they are very numerous), satisfy me, that this is an ordinary case of a *chose in action*, remaining in the order and disposition of the bankrupt, by reason of the particular assignee not having taken the necessary steps for the purpose of giving notice to the debtor, or to the depositary where the fund was preserved for the benefit of the person entitled to it; and it appears to me to be a case, in which I must make an order for payment of the fund to the assignees in bankruptcy.

Of course the company must have liberty to prove under the bankruptcy, and it had better be part of the same order, that the proof should be admitted.

I think

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I think the costs of all parties ought to come out of the fund, for I think that this question could not have been determined without coming to the Court.

NOTE.—The Petitioners appealed to the Lords Justices, who allowed new evidence to be produced, and they reversed the decision, but upon grounds not brought forward at the Rolls.

WIGHTMAN *v.* WHEELTON.

Feb. 16.

On a motion for a decree, the answer is an affidavit, and the Defendant may be cross-examined on it.

No weight is to be attached to an affidavit where the opposite party has had no opportunity to cross-examine the witness.

On a motion for an injunction, the Plaintiff, who has compulsorily obtained an answer, cannot cross-examine the Defendant on it, unless it is to be used on the Defendant's behalf. *Semble.*

THE bill sought an injunction to stay proceedings at law upon a policy, on the ground of fraud. The Plaintiffs filed interrogatories for the examination of the Defendants, but before they had obtained an answer, they moved for an injunction. The motion, by arrangement, stood over to enable the Defendants to file their answer, which they did on the 10th of *December*. The Plaintiffs thereupon served the Defendants with a *subpœna* to attend and be cross-examined on their answer. The Defendants attended, but insisted that, under these circumstances, there was no power to cross-examine them, and they refused to be examined. A motion was now made, on the Examiner's certificate, that they might attend and be cross-examined.

Mr. *R. Palmer* and Mr. *G. L. Russell* in support of the motion. It is intended to use the answer on the motion, and by the 59th section of the 15 & 16 *Vict.* c. 86, the answer is, upon a motion for an injunction, to "be regarded merely as an affidavit of the Defendants." It will be said that *Kay* v. *Smith* (*a*) was subsequently overruled

(*a*) 20 *Beav.* 566.

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overruled by the Lords Justices in *Manby* v. *Bewicke* (*a*), but that was a peculiar case relating to the affidavit as to the possession of documents.

The MASTER *of the* ROLLS asked if the Defendants would undertake not to use the answer in evidence.

Mr. *Selwyn* and Mr. *Walford*, for the Defendant, declined, unless the Plaintiff's evidence remained as it stood. They proceeded to argue, that the Plaintiff was not entitled to cross-examine a Defendant on his answer, and that the case was governed by *Manby* v. *Bewicke*. Here the answer was not put in voluntarily, but had been insisted on compulsorily by the Plaintiffs as part of the discovery sought, and as affording evidence in support of their case, and that it was only in the case of an adverse party that cross-examination was allowed. Besides, if the Plaintiffs were not contented with the answer, they must obtain further discovery by the usual modes, and not by a *viva voce* examination. That the 59th rule had no application, for it was introduced to alter the old technical rule of practice by which a Plaintiff, on a motion for an injunction, was not allowed to contradict the answer. That this was a question of strict right under the 40th section of the 15 & 16 Vict. c. 86, and not one of discretion.

The MASTER *of the* ROLLS.

It is my practice to place little or no reliance on an affidavit where there has been no opportunity to cross-examine, as in a recent case (*b*) where a witness went out of the jurisdiction before cross-examination.

Mr. *R. Palmer* was stopped in his reply.

The

(*a*) 26 *L. J.* (*Ch.*) 20.
(*b*) *Spicer* v. *Spicer* (*M. R.*, *Dec.* 1855) was possibly the case here alluded to.

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WIGHTMAN v. WHEELTON.

The MASTER *of the* ROLLS.

I am clear that this case is within the spirit of the Act, ecause the matter was under the consideration of the ommissioners, whose intention was, to put an answer ı a suit for an injunction, as nearly as possible, on ıe same footing as an affidavit. There are, however, ome distinctions, which it is not necessary now to refer ', but I have pointed them out on several former occaons (*a*). It is within the letter of the Act, and it was onsidered by the commissioners, and by the persons ho framed these rules, that one of the great advantages f them would be, to prevent inconsiderate and neglient swearing, by subjecting the persons to a cross-xamination, and putting answers on the footing of affiavits was one of the objects of the commissioners.

I am of opinion that the 15th clause of the Act, in which it is said that upon a motion for a decree, "the nswer shall, for the purposes of the motion, be treated as an affidavit," makes the answer an affidavit on which a party may be cross-examined, in the same manner as any other affidavit, and that the answer, for the purposes of the motion, will be considered as an affidavit of the Defendant.

There is, however, a very material distinction between a motion for a decree and the hearing of the cause. Upon a motion for a decree, the answer is to be treated as an affidavit, but if a cause is brought to a hearing in the ordinary way, the answer is not an affidavit in favour of the Defendant, although such parts as the Plaintiff may think fit to use are evidence in his favour.

(*a*) *Senior* v. *Pritchard*, 16 *Beav.* 473; *Lovell* v. *Galloway*, 19 *Beav.* 643.

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favour. The Defendant, however, may make his answer evidence by filing an affidavit, affirming generally that all the statements contained in his answer are true, and then the Plaintiff is entitled to cross-examine the Defendant on his answer.

It would, however, be placing a Defendant in an unjust position, if he were cross-examined on his answer upon a motion, and if the Plaintiff should be successful in his cross-examination, he might use it, but if not, then that he should be at liberty to use such parts only of the answer as he pleased on the hearing. It would place the Defendant in an unfair situation. I am disposed to allow the motion for an injunction to stand over to the next seal, with liberty to file such affidavits as the Plaintiff shall think fit; but I should not allow the Defendant to use his answer, on that occasion, in his own favour, unless he has been cross-examined.

I have not only on one, but on many occasions, refused attention to affidavits, where there has been no opportunity to cross-examine the persons who made them.

The motion for cross-examination stood over generally, with liberty to apply.

1856.

HEALES *v.* M'MURRAY.

Feb. 16.

Liability of a mortgagee, who gives notice to the tenants to pay him their rents, but does not take possession, whereby a loss is occasioned.

THIS suit was instituted by a mortgagee for redemption. The bill alleged as follows:—"The Defendant has served upon the tenants, or some of the tenants on the said hereditaments comprised in his security, a notice ordering them not to pay their rents to the Plaintiff, and the tenants have, in consequence, not paid their rent to the Plaintiff, and the Plaintiff has lost considerable sums thereby."

The Defendant was not interrogated as to this statement, and his answer did not deny its truth, but the evidence was not strictly formal.

Mr. *Follett* and Mr. *T. C. Wright*, for the Plaintiff, asked that the decree for the account might include what, but for his wilful default, the Plaintiff might have received.

Mr. *R. Palmer* and Mr. *Terrell* resisted this.

The MASTER *of the* ROLLS.

If a mortgagee gives notice to the tenants not to pay their rents to the mortgagor, he becomes entitled to take possession, and though he does not do so, I apprehend he must be answerable to the mortgagor for any loss which may occur. It is his duty either to take possession himself, or to leave the mortgagor in possession.

I must direct an inquiry whether any notice was given, and if any loss has been occasioned by it, and if so, under what circumstances.

1856.

CHESTER *v.* URWICK. (No. 1.)

Feb. 18, 19.

Bequest of legacies to be transferred by the executors "either in Three per cent. Consols or Three per cent. Reduced Stock standing in the testator's name," within twelve months after his decease. The transfer was made after the twelve months. Held, that, notwithstanding the discretion, the legacies were specific, and that the legatees were entitled to all the dividends accruing thereon subsequent to the testator's death.

IN this case, the testator expressed himself as follows:—"I give and bequeath the following legacies in stock, out of the money in the £3 per cent. Consols, and in 3*l.* per cent. Reduced Annuities, belonging to me, and standing in my name in the books of the Governor and Company of the Bank of *England*," *viz.*, &c. He then gave several legacies and proceeded, "And I direct my executors or executor to transfer stock to the above-named legatees, to the amount of their respective legacies, in either the £3 per cent. Consols, or the £3 per cent. Reduced Annuities, belonging to me, within twelve calendar months after my decease; such transfer to be at the expense of the party into whose name the stock is transferred."

Some of these legacies were not transferred within twelve months after the testator's death, and the question was, whether the legatees were entitled to the whole of the dividends which accrued on their stock legacies subsequently to the testator's death.

The contrary was contended, on the ground of the option given to the executors to transfer either Consols or Reduced, and it was argued, that until the transfer, it could not be ascertained what it was that the legatee was specifically entitled to. Secondly, on the ground that the direction was merely to transfer *within* the twelve months, and would entitle the legatee to one-half year's dividend only, in the circumstances of this case.

Mr. *R. Palmer*, Mr. *Smyth*, Mr. *Bagshawe*, Mr. *Ellis*, Mr.

1856.

CHESTER v. URWICK.

Mr. *Follett*, Mr. *Bird*, Mr. *Selwyn*, Mr. *E. F. Williams*, Mr. *Fischer*, Mr. *Horsey*, Mr. *Simpson*, Mr. *Prendergast* and Mr. *C. Hall*, for different parties.

The MASTER *of the* ROLLS.

I am of opinion that these legacies were specific at the death of the testator. They are legacies of stock out of the money in Consols and Reduced, and the only argument founded on it is this:—being given out of £3 per Cents. and Reduced, the testator gives a discretion to the executors to say which stock, these being sufficient.

Suppose a testator, having £3 per cent. Consols and £3 per cent. Reduced, says, I give 2,000*l.* stock, to be paid out of my £3 per cents. in the Bank of *England*, why should not that be a specific legacy of so much stock? Three per cents. would include both Consols and Reduced, and the testator has provided two funds, both of which are £3 per cents., for the payment of the legacy, and it is indifferent to the legatees in which way they have their legacies, although there might perhaps be a trifling difference on account of the dividends on the one being more nearly payable at the death of the testator than of the other. The executor would probably set that right. This is a direction to transfer the stock legacies to the above-named legatees, either in Consols or Reduced, thus making both liable for that purpose. That is, as soon as the executor is satisfied that the estate is sufficient, he runs no risk by assenting to the legacy. I am of opinion these are specific legacies, and that the legatees are entitled to the dividends from the death of the testator.

CHESTER *v.* URWICK. (No 2.)

Feb. 19.

It is dangerous to extend the doctrine of *Eden* v. *Smyth* (5 *Ves.* 341).

The testator bequeathed 1,000*l.* to *A. B.*, who was indebted to him on bond. He gave instructions for a codicil, and, in his own hand, wrote his wish that *A. B.*'s legacy should be made up 8,000*l.*, specifying the bond as part of that sum. The codicil was never executed, and the document was not proved as testamentary. Held, that the bond debt was not released, and that *A. B.* took the legacy subject to the payment of the debt.

IN 1844, Mr. *Richard Flour Bailey* became bound to his father in bond to secure 2,600*l.*, payable by half-yearly payments of 65*l.* This bond was, in 1848, purchased by and assigned to the testator, Mr. *Bennett*.

The testator, by his will, dated the 26th day of *April*, 1855, bequeathed to Mrs. *Bailey* 1,500*l.* Three per cent. Stock, and to her son, *Richard Flour Bailey*, 1,000*l.* Stock; and if Mrs. *Bailey* should die before the testator, he gave the 1,500*l.* to his son *Richard Flour Bailey*.

In pursuance of instructions from the testator, a codicil to his will was prepared by his solicitor, by which several legacies were purported to be given, but as the testator had not furnished a list of all the legacies he intended to bequeath, the codicil was, in that respect, left in blank.

On the 2nd day of *May*, 1855, the document thus prepared was forwarded to the testator, enclosed in a letter from his solicitor, in which he gave directions as to filling in the names of the legatees. Shortly after the receipt thereof, the testator drew out, in his own handwriting, a list of the legacies on a sheet of note paper, which was dated the 8th of *May*, 1855. Amongst other proposed bequests, was the following:—

Mr. *R. Bailey*. I wish his legacy to be made up 8,000*l.*, thus:—

His bond to me	£840
His legacy	1000
His mother	1500
Addition	4660
	£8,000

The

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The sum of 840*l.* was the value which had been put upon the bond by direction of the testator.

The testator died suddenly on the 25th of *May*, 1855, and amongst his papers were found the bond, the proposed codicil, in the state in which it had been sent to him, and the paper dated the 8th day of *May*, 1855, in his own handwriting; but which was not proved with the will of the testator. The last payment on the bond was made in *January*, 1855.

Richard Flour Bailey refused to make any further payment on the bond, on the ground that the testator intended to release it, and a question therefore arose, whether it was to be treated by the executors as part of the outstanding estate of the testator.

Mr. *C. Hall* for the legatee *Richard F. Bailey*. The legatee takes his legacy free from the debt. There is an intention declared in the handwriting of the testator of holding the obligor released, which, though not testamentary, is still admissible in evidence. The legacy given by the will is clear and distinct, and, if it is to be reduced by evidence *dehors* the will, the same species of evidence may also be used to sustain it. If parol evidence be used to raise a presumption, parol evidence may be used to rebut and repel it. In *Eden* v. *Smyth* (*a*) a legatee was held entitled to his legacy discharged of debts due from him to the testator, upon evidence from the testator's accounts, letters and memorandums in his handwriting.

Mr. *Bagshawe* and Mr. *Eddis*, for the Plaintiff, were not heard.

The

(*a*) 5 *Ves.* 341; and see *Cross* v. *Sprigg*, 6 *Hare*, 552; *Flower* v. *Martin*, 2 *Myl. & Cr.* 459; *Peace* v. *Hains*, 11 *Hare*, 151.

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I am of opinion that this is not a discharge of the debt due from the legatee to the testator. I do not dispute the authority of *Eden* v. *Smyth*, but I think it very dangerous to carry the principle a step further; the result would be, that in most cases, you would completely alter the effect and operation of a will by parol evidence. What I have here is the writing of the 8th of *May*, 1855, in which amongst a number of gifts is this: after several proposed gifts, in addition to what he had left by his will, he says:—"Mr. *R. Bailey*. I wish his legacy to be made up 8,000*l*., thus:"—and he then specifies the bond as a part of that sum.

What I am asked to do is this:—I am to take this instrument as operative as regards the bond, but invalid as far as concerns the other sums mentioned in it, that is, partially good as regards Mr. *Richard F. Bailey*, but invalid altogether as respects the other legatees. It is quite clear what this instrument means; it consists of a series of notes for the purpose of making an intended codicil, but which he did not execute. I hold this document to be no expression of his intention, but a memorandum for making a codicil, and therefore the debt is payable, as well as the legacy. The legatee, however, will get the full benefit of the 1,000*l*. in the release of his debt.

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CHESTER *v.* URWICK. (No. 3.)

Feb. 19.

A sister, in a writing addressed to her brother, after stating, "as you have kindly promised, if I do not make a will, my wishes shall be fulfilled," expressed her wish that *A. B.* and others should have the sums therein specified. She died intestate, and the brother inherited her property. There was some evidence of the brother's having seen the writing in her life, and of his having afterwards expressed an intention to carry his sisters' wishes into effect, but he died without having done so. The Court held, that there was not sufficient evidence of a contract on the part of the brother, to enable it to enforce the performance of the sister's wishes.

THE testator *William Bennett*, had two sisters, viz., *Jane Adams*, widow, who died in 1838, and Miss *Elizabeth Bennett*, who died in 1852. The testator himself survived them, and died in 1855.

His executors discovered amongst his papers six documents, which they submitted to the Court, in order to ascertain whether they had the force or effect of testamentary dispositions, or if they had not, whether they created any trust in favour of the parties named therein. The documents were as follows. The first was in these terms:—

"My dear brother,

"Life being very uncertain, and as you have kindly promised, if I do not make a will, my wishes shall be fulfilled, I have put them down, first, I request my beloved sister *Eliza* to have, for her life, all I possess."

"She could not finish."

This document was addressed to the testator, and, except the words at the end, "she could not finish," was in the handwriting of *Jane Adams*, and the words "she could not finish," were in the handwriting of *Elizabeth Bennett*.

The

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The second was as follows:—

"To *Thomas Smallwood*, Mr. *Adams's* godson, one hundred pounds." It contains a number of other similar gifts and was signed thus—

"*Elizabeth Bennett*,
"*February*, 1836.
"*Jane Adams*."

This document was in the handwriting of *Elizabeth Bennett*, and was addressed to her brother.

The third was as follows:—

"My dear brother,

"As you have kindly promised my beloved sister and myself, that if we make no will, our wishes shall be fulfilled, I shall therefore hastily write them down, first naming, what money we possess belongs equally to my dear sister and self, though all the stock is in my name. We wish you to have all for your life. After then, it is our desire Mrs. *N. Lutenes Dolem* may have 800*l.* of the same," &c. &c. "To Miss *Margaret Griffiths* 2,000*l.*, for the use of herself and three sisters, *Jane*, *Susan*, and *Mary*," &c. &c.

"*Jane Adams*,
"*October*, 1836.
"*Elizabeth Bennett*."

This was also addressed to the testator.

There were three other papers of a similar character. The first signed by *Elizabeth Bennett* and *Jane Adams* in 1837 and 1838; the second by *Elizabeth Bennett* alone in *November*, 1842; and a third was in the handwriting of *Elizabeth Bennett*.

The sisters retained these documents in their possession,

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sion, but there was the evidence of one of the parties intended to be benefited, that the brother had seen them in his sisters' lifetime, and that they had been read over and handed to him, and she said she believed that thenceforth they remained in his possession until the time of his death. At his death his executors found them amongst his papers.

Both of the sisters died intestate.

The testator on the 9th of *March*, 1852, obtained letters of administration to the effects of *Elizabeth Bennett*, and took possession of a freehold house at *Newport*, in which she and her sister had resided, and of personal estate to the amount of about 8,000*l.*

The testator neither paid the 2,000*l.* to *Margaret Griffiths* or her three sisters, nor did he give them anything by his will. He acted similarly with regard to other persons mentioned in the six papers.

The testator, during his life, frequently admitted the existence of the six documents. He had also, on more than one occasion, produced them to his solicitor, Mr. *Chester*, and expressed to him his intention to carry out what his late sisters intended by those papers, with reference to seven of the persons mentioned therein, and to make additions thereto, and allow interest thereon, on the ground, as he said, that they ought to have been paid to them on the death of his sisters; in consequence of this a calculation was made of such interest. Mr. *Chester*, in *April*, 1855, prepared the draft of a codicil to the testator's will, which was sent to the testator, but the blanks were never filled in, and the intended codicil was never executed. About the 8th of *May*, the testator wrote to Mr. *Chester* as follows:—"I am not so well since you left. I find in the codicil you sent some errors.

Mrs.

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Mrs. *Hughes* (meaning *Margaret Griffiths*, who had married) you say, wife of *R. Hughes*, 2,000*l.* You forget the wishes of my sister; it was 2,000*l.* for herself and three sisters, *Mary*, *Susan*, and *Jane*, before she was married, all in stocks." [He then referred to other gifts in the papers, and to his intentions in respect thereto.] "I shall add other names, that's all today.

"Yours truly,

"*W. Bennett.*"

"I will send you the codicil to add the names shortly."

The testator died suddenly on the 25th of the same month of *May*, 1855.

The question was, whether the testator's estate was liable to make good the gifts mentioned in the six papers; it now came on for argument.

Mr. *Horsey*, for the claimants.

These documents either constitute a declaration of trust, or an agreement in the nature of mutual wills. The two sisters abstained from making wills, on the faith of the agreement; and even if there was no distinct agreement on the part of the testator, yet he was cognizant of the contents of the documents, and having stood by and obtained the benefit of the intestacy of his sisters, he is bound to perform their intentions. His estate must now give effect to the whole of the sisters' intentions expressed in the six documents.

In *Dufour* v. *Pereira* (*a*) it was held, that "A mutual will by husband and wife, if revoked, must be revoked jointly, or if revoked separately, notice must be given to the other party of such revocation."

Drakeford

(*a*) 1 *Dickens*, 419.

Drakeford v. *Wilks* (*a*) decides, that "If a legatee promises a testator, that in consideration of a disposition in her favour, she will do an act in favour of a third person, she who undertook to do the act must perform it."

The MASTER *of the* ROLLS, (without hearing the other side,) said—

There may have been a promise on the part of the testator to his deceased sisters, that in consideration of their dying intestate, he would carry into effect their intention. If this promise were proved, the Court would enforce it against the testator's estate, after he had had the benefit of the intestacy (*b*). But in this case the evidence of such a promise entirely fails. I may have suspicions, and think it very probable, that the testator intended to carry the intentions of his sisters into effect, and the codicil prepared by Mr. *Chester* shews, that, if he had not died sooner than he expected, he would probably have carried those intentions into effect. This may operate on the minds of those taking under the will, and induce them to consider themselves bound in honor or conscience to perform those intentions, if they believe that such a promise was made, though it cannot be proved; but neither a Court of Equity nor of Law can enforce a promise without some proof of it. Here there is no evidence that the testator entered into any arrangement with his sisters. The parol evidence rather repudiates it.

If the letter of the 8th *May* had been a testamentary document and proved, then I could have acted on it, but I cannot treat it as evidence of a contract, although it is evidence, that if he had lived, he would have done what his sisters desired.

(*a*) 3 *Atk.* 539.
(*b*) See *Sticklund* v. *Aldridge*, 9 *Ves.* 519; *Podmore* v. *Gunning*, 5 *Sim.* 485; 7 *Sim.* 644.

NOTE.—See *Lord Walpole* v. *Lord Orford*, 3 *Ves.* 402, and 2 *Hargrave's Jur. Arg.* 272.

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Re CATLIN. (No. 2.)

Feb. 24.

A petition was presented for the taxation of a paid bill of costs, alleging specific items of over-charge. The solicitor thereupon offered to repay the amount of such items and the costs. The Petitioner did not accede to this, but brought the petition to a hearing. The Court ordered the taxation of the bill, treating these items as omitted.

THIS was a petition, by the client, for the taxation of a solicitor's bill of costs which had been paid. The petition specified particular matters of over-charge, amounting to 5*l.* 10*s.* 10*d.*, whereupon the solicitor offered to repay the amount and the costs of the petition up to that time.

This was not accepted by the Petitioner, who proceeded with his petition, and brought it on for hearing.

Mr. *Morris*, in support of the petition, argued, that, although in cases of taxation after payment, the rules of the Court require the Petitioner to specify some items of over-charge, still he was not under an obligation to specify the whole of the overcharges, and that the taxation ought to be directed, not of the items specified, but of the bill generally.

The MASTER *of the* ROLLS, before hearing the Respondent, said:—

I propose to make this order, if the Respondent does not object to it, if he does, I will hear him:—The Respondent repaying the 5*l.* 10*s.* 10*d.*, the amount of the specified items complained of by the petition, refer the bill for taxation, and, on the taxation, let the Taxing Master treat these items as omitted from the bill, and let the costs of the petition be costs on the taxation.

Mr. *Catlin* assented, and was not heard.

The

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Re CATLIN.

The MASTER *of the* ROLLS then added:—

Before the petition was brought on, the Respondent offered to pay the amount of the over-charges complained of, and the costs of the petition up to that time. The Petitioner neglected, though he did not absolutely refuse to accede to this, and afterwards prosecuted the petition. If there had been no offer to pay the costs up to that time, I should not have considered it sufficient. As the Petitioner prosecutes the petition on the allegation that there are other improper items, I will try that issue, by ordering the taxation in the terms I have stated.

HUTCHINSON *v.* KAY.

Feb. 20, 21, 23, 24.

Looms in a mill were not fixed, but were merely steadied, by having their four iron legs let into four loomfoots dropped into the floor: Held, that they did not pass by a mortgage of the mill and the machinery belonging to the mill, nor by a contract for sale in similar terms.

IN 1847, Messrs. *Fletcher* mortgaged to Mr. *Kay* a mill or factory at *Umsworth*, with the rights, members and appurtenances thereunto belonging, "together with the steam engines, boilers, shafting, piping, mill-gearing, gasometers, gas pipes, drums, wheels, *and all and singular other* the machinery, fixtures and effects, fixed up, in, or attached or belonging to the said mill or factory, buildings and premises." The mortgage contained a power of sale on default of payment of the mortgage money.

The factory was a nankeen manufactory, and at the date of the mortgage, there were on the premises 220 looms for weaving cotton yarn into cloth, of the value of 958*l.* They were on the basement, standing on iron feet, and were steadied for working in the usual way, thus:—four holes were made in the flag pavement, into each of which was placed an iron cylinder, surmounted by an iron cup or hollow parallelogram, which cylinder and

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and cup is usually called a "loom-foot;" and each of the four legs of the loom was placed, without any fastening, into one of such cups. The answer stated, "that such cups are not, however, in any way fastened to the flooring of the said mill, but are merely dropped into the holes made in such flooring, and such cups can be taken out and removed at pleasure, without any fastening of any kind whatever having to be undone, there not being, in fact, any such fastening."

In *March*, 1855, Mr. *Kay* sold the mortgaged premises to the Plaintiffs for 2,285*l.*, and in the particulars of sale the property was described as follows:—"All that mill or manufactory, situate, &c., used for manufacturing ginghams, drills and fancy goods, together with the weaving shed, steam engine, boiler, shafting, pipes, mill gearing, gasometers, gas pipes, and other the machinery and fixtures fixed up in and attached and belonging to the said mill."

The question was, whether the looms passed by the mortgage deed and were comprised in the sale.

Mr. *R. Palmer* and Mr. *Bird*, for the Plaintiff, the purchaser, contended that the looms in question passed by the mortgage, and that they were also included in the contract for purchase. They argued, that they formed parcel of the mill, in the same way as the engine let in or screwed to a ship formed part of a steam ship, or as the upper moveable stone of a grinding mill constituted part of the mill, for without the necessary machinery it would no longer be a mill. That they really came within the definition of fixtures, and at all events were "machinery" and "effects" "in" the said mill, and "belonging to the said mill."

They

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They cited *Place* v. *Fagg* (*a*); *Ex parte Barclay* (*b*); *Mather* v. *Frazer* (*c*); *Amos* & *Ferrard* on Fixtures (*d*).

Mr. *Follett* for *Kay*, the mortgagee and vendor, argued that if the looms were comprised in the contract, they were also comprised in the mortgage, and the reverse, and that therefore, the purchase-money being fixed, the point did not affect the vendor as it did the mortgagor. He observed, however, that this was an attempt by the Plaintiffs to obtain for 2,000*l.* odd, property worth 3,000*l.*, which was its value, if the looms were included.

Mr. *Lloyd* and Mr. *C. Hall*, for the party entitled to the equity of redemption, argued, that the looms, being mere moveable chattels, did not pass by the mortgage, and that the general words used in the mortgage must be limited to machinery *ejusdem generis*, namely, that attached to the mill; that it could not have been intended to include any chattel accidentally in the factory at the date of the mortgage. Secondly, that if the mortgage did comprise the looms, the mortgagee had not intended to sell them, that if he did, the sale had been so improperly and improvidently conducted as to amount to a breach of trust, and that this Court would not enforce such a contract. They cited *Beck* v. *Rebow* (*e*); *Hotham* v. *Sutton* (*f*); *Pope* v. *Whitcombe* (*g*); *Ivison* v. *Grassiott* (*h*); *In re Wright's* Trusts (*i*); *Waterfall* v. *Pennistone* (*k*).

Mr. *R. Palmer*, in reply, abandoned the point that they passed as fixtures.

The

(*a*) 4 *Man. & R.* 277.
(*b*) 5 *De G., M. & G.* 403.
(*c*) 2 *Kay & J.* 536.
(*d*) Page 1.
(*e*) 1 *P. Williams*, 94.
(*f*) 15 *Ves.* 326.
(*g*) 3 *Russ.* 124.
(*h*) 17 *Beav.* 321, and 3 *De G., M. & G.* 958.
(*i*) 15 *Beav.* 367.
(*k*) 6 *Ellis & Bl.* 876.

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HUTCHINSON v. KAY.

The MASTER *of the* ROLLS. I will dispose of this case to-morrow. It will be very difficult to make these looms, which are, as it were, the furniture of the mill, pass.

Feb. 24. *The* MASTER *of the* ROLLS.

Practically the same question arises both under the deed and under the contract for sale. The property mortgaged is this:—"All the mill or factory, &c." That is the principal thing mortgaged in the first place. "Together with all the rights, members and appurtenances thereunto belonging, together with the steam engines, boiler, shafting, piping, mill gearing, gasometers, gas pipes, drums, wheels, and all and singular other the machinery, fixtures and effects fixed up in and attached and belonging to the said mill or factory, buildings and premises."

My opinion is, that those words mean that the mill and everything that properly belongs to the mill is the thing that is mortgaged. I do not think that the furniture of the mill does properly belong to the mill; it is liable to be changed from time to time. The mill is a building erected for the purpose of applying steam power for various purposes, and, as I stated yesterday, it may be applied for weaving, for spinning, for turning or for various other purposes. The way in which a mill is furnished depends upon the species of manufacture to which it is intended to apply the steam power; on that depends what machinery and instruments must be put into it. I do not doubt that looms are machinery in one sense, but the question is, are they properly speaking machinery belonging to the mill. In one sense,

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sense, no doubt, they belong to the mill, because they are put into the mill, but I read those words as "belonging essentially to the mill," and forming, necessarily, a part of it, whatever may be the purpose to which the mill may be applied. To whatever purpose the mill may be applied, the steam power, the gas-lighting and the like do form a part of it; the others do not; the others are merely accidental, and no more form a part of the mill than a carpet forms part of a house. If a house and all the things belonging to the house were assigned, that would not necessarily include the furniture unless it was so specified.

My opinion also is, that in putting up the mill for sale by auction, according to the ordinary acceptation of the term, it would not be understood that the looms were included, and I think that a person, who intended and expected the looms to pass, would have inquired at the time whether they formed a portion of the property intended to be sold.

I am clear they are not fixtures in any proper sense of the term. The word "fixtures" does not assist the argument of the Plaintiff in the least; but as they are clearly machinery, the only question is, whether they are machinery "belonging" to the mill. In the sense in which the words are understood, when you give a mill and all the machinery "belonging" to it, can the looms which are fitted up in the mill, for the purpose of enabling the power to be used in the manufacture of articles, be said to be the "machinery" belonging to the mill? My opinion is, that they cannot, and that according to the true construction of the contract, these looms do not pass.

I think the Plaintiff ought to pay the costs up to the

 hearing,

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hearing, because, in my opinion, the litigation has been occasioned solely by the contest as to the construction of the instrument, in which he fails, and therefore, although I shall give him a decree to the extent I have mentioned, yet he must pay the costs.

SELBY *v.* COOLING.

Feb. 23.

Authority given to insert a power of sale in a mortgage of an infant's real estate to pay debts and costs.

AN order had been made for raising a sum of money by mortgage of an infant's real estate for payment of debts and costs.

Mr. *C. C. Barber* applied that the decree might contain a direction that the mortgage might contain a power of sale, if the mortgagee required it. The Registrar had objected to insert these words, and the result, he said, would be, that the Conveyancing Counsel would not, without such a direction, insert such a clause, and a second application would therefore become necessary. He referred to the case of *Drake* v. *Avery* (*a*), in which such a form of order had been made.

The MASTER *of the* ROLLS.

I generally insert a power of sale, because I find that better terms can be obtained in raising the money; but I cannot make the order imperative; you may take it with the qualification "if the mortgagee should require it."

(*a*) 12th *April*, 1856.

NOTE.—See *Russell* v. *Plaice*, 18 *Beavan*, 21, and *Clarke* v. *Panopticon*, 3 *Jurist* (*N. S.*) 178.

1857.

SHARP *v.* MILLIGAN. (No. 2.)

Feb. 23.

Under a contract for a lease of a mill, to contain "all usual and necessary covenants and provisoes," and particularly a covenant on the part of the lessee to keep the mill in good tenantable repair. Held, that the lessee was not entitled to have introduced into the covenant the words "damages by fire or tempest only excepted."

In 1843, tenants in possession agreed to take a lease of a mill, with the gas-house and apparatus, as the same were then occupied by them, for twenty-one years from 1841. In settling the lease in Chambers, they insisted on having a schedule of landlord's fixtures, on the ground of their having placed tenant's fixtures on the premises, and they sought to exclude the gas-works set up by them. It did not appear when they were placed and set up. The Court refused to insert the schedule or the exception.

BY an agreement, dated the 6th of *October*, 1843, *Sharp* agreed to grant Messrs. *Milligan* and *Jowett* a lease for twenty-one years, from *May*, 1841, of the *Aire Bank* Mill, "with the steam engine, and engine and gas-houses, outbuildings and appurtenances to the same belonging, and as the same are now respectively occupied by them, and the main shafts and going gear for working the machinery therein." And it was stipulated "that such lease shall contain all usual and necessary covenants, provisoes, and particularly the following on the part of the lessees, namely, to pay the rent, to pay all other rates and taxes, to keep the mill and buildings in good and tenantable repair and condition, as the shafts and going gear, and the steam engine clean and neat and in good working condition, and so leave the same (reasonable wear thereof excepted)."

At the hearing (*a*) a specific performance was decreed, and it was referred to chambers to settle the lease. The chief clerk approved of a demise, which purported to be of the mill and the steam engine, and engine and gas-house and gas-works [ ], outbuildings and appurtenances to the same belonging, as the same are now or were lately occupied by Messrs. *Milligan* and *Jowett*.

The

(*a*) 22 *Beav.* 606.

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The lessees objected to this form of lease, because they said that there were a number of tenants' fixtures on the premises, which would thereby pass to the landlord. They required that the landlord's fixtures should be distinguished, by being specified in a schedule to the lease, and that, in the parcels, there should be inserted between the brackets (*see last page*) the words "in the schedule hereto."

In an affidavit of one of the Defendants it was stated as follows:—"There are now upon the mill and premises the trade fixtures specified in the first schedule hereto, which are not the property of the landlord, but which were bought and set up by me and my co-partners in business, during our tenancy of the said mill and premises, at our own expense. The said fixtures are of the value of, at least, 250*l.*, and which the lessees are entitled to remove on the determination of the lease, unless precluded from doing so by the terms of the lease hereinafter referred to." The schedule was as follows:—

Description of Fixtures.	Estimated Value. £	s.	d.
Castings for the roof, 12 cwt. . . .	4	10	0
Sky-lights in attic	3	0	0
Sack tackle and chain, &c.	15	0	0
Stone water cistern (entrance) . . .	4	0	0
Railing from boiler-house to gas-works	0	10	6
Wrought iron pipes about gas works .	1	7	9
New retorts and buildings for coal-house	35	0	0
For pumps, &c., 34 feet of inch lead pipe	2	10	0
Gas works complete	170	0	0
Water closets and fittings	50	0	0
	£286	4	3

In

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The MASTER *of the* ROLLS then added:—

Before the petition was brought on, the Respondent offered to pay the amount of the over-charges complained of, and the costs of the petition up to that time. The Petitioner neglected, though he did not absolutely refuse to accede to this, and afterwards prosecuted the petition. If there had been no offer to pay the costs up to that time, I should not have considered it sufficient. As the Petitioner prosecutes the petition on the allegation that there are other improper items, I will try that issue, by ordering the taxation in the terms I have stated.

HUTCHINSON *v.* KAY.

Feb. 20, 21, 23, 24.

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IN 1847, Messrs. *Fletcher* mortgaged to Mr. *Kay* a mill or factory at *Umsworth*, with the rights, members and appurtenances thereunto belonging, "together with the steam engines, boilers, shafting, piping, mill-gearing, gasometers, gas pipes, drums, wheels, *and all and singular other* the machinery, fixtures and effects, fixed up, in, or attached or belonging to the said mill or factory, buildings and premises." The mortgage contained a power of sale on default of payment of the mortgage money.

The factory was a nankeen manufactory, and at the date of the mortgage, there were on the premises 220 looms for weaving cotton yarn into cloth, of the value of 958*l.* They were on the basement, standing on iron feet, and were steadied for working in the usual way, thus:—four holes were made in the flag pavement, into each of which was placed an iron cylinder, surmounted by an iron cup or hollow parallelogram, which cylinder and

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are now occupied by the firm, for twenty-one years. The question is, what is proper to be included? I have no doubt that the machinery which creates the power and the gas-works are properly part of the mill. The tenant ought to have introduced the exceptions into the contract if he intended that some part was to be treated as not being the landlord's property. The construction of the contract is simply that it is to be a lease of the mill and everthing which belongs to it.

With respect to the other point, there is still less question. It is not disputed that the lease must contain a covenant to repair, and that it is an ordinary covenant. It is, however, contended, that it ought to exclude damages by fire or tempest. I am of opinion there is nothing in the agreement to justify the exception; it is an ordinary covenant to repair.

I think the lease ought to contain the gas-works and everything which is necessary to make a mill a mill, and to enable it to be worked as such.

WOLTERBEEK *v.* BARROW.

Feb. 14, 25.

A marriage settlement, dated in 1823, reformed in 1857, and after the death of the husband, upon proof of the written instructions, so as to give the property to the wife absolutely in the event of her surviving her husband and there being no issue (which events had happened).

THE object of this suit was to reform the settlement made on the first marriage of the Plaintiff, Mrs. *Wolterbeek*, as regarded the ultimate limitation in default of issue.

In 1823, the Plaintiff, then Miss *Barrow*, married Mr. *Grant*, on which occasion a settlement of her fortune was executed as follows:—

By an indenture dated the 10th day of *September*, 1823, being a settlement made on the marriage of the Plaintiff with Mr. *Grant*, certain trust funds, the Plaintiff's fortune, were vested in *Richard Bromley* (since deceased), and the Defendant *Francis Barrow* the elder, upon trust, for the separate use of the Plaintiff, during the joint lives of her intended husband and herself, and for the survivor of them during his or her life; and after the decease of the survivor, for the children of the marriage. And in case there should be no child of the marriage (which happened), for such persons, and for such intents, as the Plaintiff should *by will*, whether covert or sole, direct or appoint; and in default, for the persons who should, at her decease, be her next of kin, in case she had died intestate and unmarried.

The marriage took place shortly after the date and execution of the settlement. There never was any issue of such marriage, and Mr. *Grant* died on the 7th of *October*, 1840.

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By an indenture dated 1835, the Plaintiff charged the interest and dividends of the trust funds subject to the settlement with the payment of a sum of 4,000*l.*, which had been lent to her husband, with interest.

On the death of Mr. *Grant*, the Plaintiff was advised, that, in the event which had happened, she was not liable to the payment of the 4,000*l.*, if any part remained unpaid, and she applied to the Defendant *Francis Barrow* the elder, the then surviving trustee of the settlement, to transfer the funds then subject to the trusts of the settlement, which he accordingly did.

On that occasion, by an indenture dated the 16th of *May*, 1842, and made between the Plaintiff of the one part, and the Defendant *Francis Barrow* the elder of the other, after reciting that inasmuch as it might be contended, that in the event of the intestacy of the Plaintiff, her next of kin living at her decease might become entitled to the funds subject to the trusts of the indenture of *September*, 1823, and the Defendant *Francis Barrow* the elder might be subject to claims under the appointment or charge, or supposed appointment or charge, made by the indenture of *January*, 1835; and had that day transferred the trust funds into the name of the Plaintiff, the Plaintiff, after releasing the Defendant *Francis Barrow* the elder, covenanted that she, her heirs, &c., would indemnify him and his estate from all claims which he might incur, or be subject to, under or in consequence of the indenture of 1835, or of the trust, or supposed trust in favor of the next of kin of the Plaintiff, expressed by the indenture of *September*, 1823, in default of such testamentary direction and appointment as therein mentioned, or otherwise howsoever, on account of the Defendant *Francis Barrow* the elder having transferred the said trust funds,

funds, or of the trusts of the said settlement; and further, that the Plaintiff would forthwith duly make her will, in manner required by law and by the settlement, and thereby effectually direct and appoint, that all the estate, subject, or which might or could become subject to the trusts of the same indenture, should stand and and be charged, and chargeable with, the indemnification of *Francis Barrow* the elder, in manner aforesaid, so that the same might continue and be a valid testamentary appointment and charge, until and at the decease of the Plaintiff.

The Plaintiff stated, that she and *Francis Barrow* the elder were, at or about the date of the last-mentioned indenture of *May*, 1842, advised, by Counsel of great eminence, that the Plaintiff was, under the trusts of the settlement, absolutely entitled to all the trust premises comprised therein and affected thereby, and it was, in consequence of such advice, that the transfer and sale were made. That the indemnity had been given out of abundant caution, and not because any real doubt was entertained of her right, and that if any such doubt had been entertained, *Francis Barrow* the elder would not have been advised, and would not in fact have made such transfers and sale. That, by reason of such advice and transfer, the Plaintiff believed that she was absolute owner of all the property comprised in the settlement, and that therefore she did not make any particular inquiry as to the other contents of the settlement, or whether the same were or were not in accordance with the contract of marriage and intention of the parties to the settlement, at the time the same was executed.

In *October*, 1843, the Plaintiff married Mr. *Wolterbeek*; and by their marriage settlement, dated the 26th day of *October*,

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October, 1843, and made between Mr. *Wolterbeek* of the first part, the Plaintiff of the second part, the Defendant *Francis Barrow* the elder of the third part, and the Defendants *Francis Barrow* the elder and *Francis Barrow* the younger of the fourth part, reciting the transfer to the trustees of the then remaining trust funds, it was declared, that *Francis Barrow* and *Francis Barrow* the younger should stand possessed thereof, in trust, in the first place, for the indemnification of *Francis Barrow* the elder, according to the intent of the deed of *May*, 1842, and subject thereto, in trust, for Mr. and Mrs. *Wolterbeek* for their lives, and afterwards for their issue, and in default, upon trust for the Plaintiff.

Mr. *Wolterbeck* died on the 7th day of *June* 1853; and there was no issue of the marriage.

Shortly after the decease of Mr. *Wolterbeek*, the Plaintiff applied to the Defendants *Francis Barrow* the elder and *Francis Barrow* the younger, to transfer into her name the funds transferred to them upon the trusts of the settlement of *October*, 1843, and was informed by them, that they could not, having regard to the trusts of the settlement of *September*, 1823, safely make such transfer.

The bill then stated, that, in consequence of such information, the Plaintiff was induced to inquire into the trusts and powers of that settlement, and then, for the first time, discovered, as the facts were, that the trusts by such settlement declared of the property comprised therein, in the event of failure of children of the then intended marriage, were trusts not in accordance with the contract of marriage, or with the intention of the parties at the time such settlement was executed.

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As evidence, that the terms of the settlement intended to be made were arranged between the Plaintiff and her brother, the Defendant *Francis Barrow* the elder, and that such terms as arranged were, that in the event of the death of *John Schank Grant* in the lifetime of the Plaintiff, and of failure of children of the then intended marriage, the Plaintiff should have the entire and absolute control over the whole of her property, and that *John Schank Grant* acquiesced, so far as he could, in the terms of the arrangement then made. It was stated, that the instructions for the settlement were given by the Defendant *Francis Barrow* the elder (a clergyman) to his solicitor, who was the solicitor for the *Barrow* family, in a letter dated the 25th of *June*, 1823, which, so far as material, was as follows :—

" As Mr. *Grant's* father cannot advance any money now, and as Lord *Exmouth* says he never will be able to give his son a shilling, my sister's property ought, in common justice, to be as much at her own disposal as the law will allow. My ideas are as follows :—That her property should be conveyed to trustees for her benefit during her life; should the husband survive, that he should be allowed the interest of the funded property and the proceeds of the estate for his life, and, if any children, the survivors should share equally; that the wife should be allowed the power of making a will, so that if there should be no children, or, being children, they should not live to obtain a vested interest in the property, she may give it away as she likes; and, if she should die intestate, and without children, then, after the husband's death, it *should go to her heirs-at-law*," &c. &c. " I do not know whether I have made myself intelligible, if not, perhaps it would be better that I should run up for a few hours to *Rochester*," &c. &c. " I think, under all circumstances, this is the proper mode of

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of settling the property, (always supposing that I have made myself intelligible,) for as the husband will enjoy it for his life, should he survive, it is as much as ought to be required. The draft might be prepared immediately, with blanks, to be filled up hereafter, and the business might thus be considerably expedited. When prepared, it might be submitted to Mr. *Peale*, when any alterations which he might suggest could be made."

In consequence of such letter, the solicitor, on the 3rd day of *July* following, laid instructions before Counsel for the preparation of a draft settlement, which, so far as material, was as follows:—" It is proposed that the property shall be settled to the use of Miss *E. Barrow* for her life; remainder to the use of Mr. *Grant* for life; remainder to the children, if any, equally. *The wife to have the power of disposing of the property*, if there are no children, or none who shall live to attain a vested interest. If she should die intestate, and without children, the property, at his death, to go to her family, as if she had never been married. As Mr. and Mrs. *Grant* will reside in the East Indies, a power of sale must be given to the trustees, and all other usual and proper powers must be inserted in the settlement."

A draft settlement was accordingly prepared by counsel, in pursuance of such instructions, on the 26th of *July*, 1823, which draft, as settled, contained a clause as follows:—" But in case there shall be no child of the said *John Schank Grant* on the body of the said *Elizabeth Barrow* (party hereto), lawfully to be begotten, or in case there shall be such child or children, and no such child shall live to attain a vested interest in the trust premises, under or by virtue of these presents, then upon trust that they, the said *Richard Bromley* and *Francis Barrow* the younger, and the survivor

survivor of them, his executors or administrators, shall and do stand possessed of and interested in all and singular the trust premises, or so much thereof as shall not have been applied for the advancement of the said children, being a son or sons as hereinbefore is mentioned, in trust for such person or persons, and for such intents and purposes and in such manner and form as the said *Elizabeth Barrow*, party hereto, [*by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of and attested by one or more credible witness or witnesses*, or] by her last will and testament, in writing," &c., shall, "whether covert or sole, direct or appoint; and in default of and until such direction or appointment, in trust for such person or persons, as under or by virtue of the statute for the distribution of intestates' effects, should or would, at the time of the decease of the said *Elizabeth Barrow*, have been entitled to her personal estate as her *next of kin*, in case she had died intestate and unmarried."

The draft, as so drawn and settled by counsel, was altered by the solicitor charged with the preparation of the settlement, by striking out the above words which are within brackets and in italics.

The bill alleged, that these words were so struck out by the solicitor, under the impression that the effect of them, if left in the deed, would be to place the Plaintiff greatly under the marital influence and control of her husband; but that it was not intended, by striking out such words, in any manner to interfere with the absolute power of the Plaintiff to dispose of the settled property in her lifetime, in the event, which happened, of the death of Mr. *Grant* in her lifetime, and failure of children of their marriage.

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The draft, as settled by counsel, was copied, with the exception of the words struck out, by the solicitor, and the bill alleged, that the copy was perused and approved by Mr. *Grant* and the Plaintiff, and by *Francis Barrow* the elder on behalf of the Plaintiff, and by Mr. *Peale*, a friend of the Plaintiff, who had formerly been a solicitor, but who had retired from practice; but that their attention was not called to the omission of the words struck through, and that Mr. *Peale* was not made acquainted with the above-stated letter, or the effect of it; that the settlement was engrossed and executed in the terms above mentioned, but was not, in the particulars aforesaid, in accordance with the contract of marriage, or with the instructions for the settlement given to the solicitor, or with the intention of the parties at the time of its execution.

The bill prayed, that it might be declared, that the Plaintiff was entitled to have the settlement of *September*, 1823, amended and reformed, by inserting therein a general power of disposition by the Plaintiff, after the death of *John Schank Grant* and failure of children of the then intended marriage, of the property comprised in or subject to the trusts of the settlement, or otherwise, as to the Court should seem meet.

The Defendants *Francis Barrow* the elder, and *Mary* the wife of the Defendant *Robert Sloper Piper*, were the only presumptive next of kin of the Plaintiff at the time of the filing of the bill.

The Defendant, *Francis Barrow* the elder, stated, by his answer, that his letter of the 25th of *June* was not supposed or intended by him to contain complete instructions for the settlement, but only general instructions as to such points as therein particularly referred to,

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to, and that he left it to the solicitor to give legal effect to the intentions of the parties, as expressed in the letter, and to provide, in ordinary form, for any contingencies which might arise, whether referred to in the letter or not. That in making the transfer of the trust funds, in 1843, he acted upon the supposition and belief that such contingencies had been provided for by the settlement, and that, in the events which had happened, the Plaintiff was absolutely entitled to the property comprised in the settlement; and that he did not, to the best of his recollection, consult counsel; and that the indemnity was given from abundant caution, and not because any real doubt was entertained.

The circumstances above stated with respect to the instructions for, and the preparation of, the settlement, and the striking out of part of the clause, and the subsequent perusal of the settlement by the parties and Mr. *Peale*, appeared by the affidavit of the solicitor.

Mr. *Follett* and Mr. *Martindale*, for the Plaintiff, cited *Harbidge* v. *Wogan* (*a*).

Mr. *Morris*, for the Defendants, the *Barrows*.

Mr. *Sandys*, for the Defendant *Piper*.

The MASTER *of the* ROLLS. *24th Feb.*

I have had time to consider this case, and I think I must reform the settlement. It is very true, that the Court pays great attention to the lapse of time in cases of this description on account of the loss of evidence and the doubt thence arising; but here there is none, for the instructions, which were given in writing, are preserved, and the intention is established, which was, to

(*a*) 5 *Hare*, 258.

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to give the lady an absolute power over her own fund in the event of there being no children. That is consistent with the written instructions to the solicitor, and those to the conveyancing counsel, and with the whole transaction, and there is really no other view of the case.

I concur in the observation of Mr. *Morris*, and think that if I had been called on to settle the deed I should have done this:—I should have struck out the general power to appoint by deed, and have inserted an absolute gift to the wife if she survived her husband and there were no children, thus giving the property simply to wife, her executors and administrators. In that event it would, if she survived, have enabled her to dispose of it by deed or will, and if she did not, it would go to her next of kin; that simple mode of disposition would supply the limitation to the next of kin, which would be carried into effect by the mere operation of law.

I am disposed to think, that it would now be better to introduce a limitation in that form, and so leave the ultimate limitation as it is; that is, leaving the passages struck out as they are, and introducing a limitation to the Plaintiff. There was a clear intention to give the property absolutely to the wife in case she survived her husband and there was no issue, and, by introducing these words, they will enable her to dispose of the property *inter vivos*, or by will. I am clearly of opinion that there has been a mistake, and I will make a decree accordingly.

NOTE.—See The Duke of *Bedford* v. The Marquis of *Abercorn*, 1 *Myl. & Cr.* 312; The Marquess of *Breadalbane* v. The Marquis of *Chandos*, 2 *Myl. & Cr.* 711; The Marquess of *Exeter* v. The Marchioness of *Exeter*, 3 *Myl. & Cr.* 321; *Pearce* v. *Verbeke*, 2 *Beav.* 333; *Mortimer* v. *Shortall*, 2 *Dru. & War.* 363; *Alexander* v. *Crosbie*, 1 *Lloyd & G.* 150.

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Feb. 23.

The Court of Chancery (adopting the practice of the Court of Exchequer) gave costs in the case of lands compulsorily taken under an Act of Parliament, beyond those expressly authorized by the Act, and contrary to the usual practice of this Court in such cases.

THE testator, who died in 1837, devised a house in *Abingdon* Street to his wife for life, with remainder to his children (then infants).

In 1838, the Commissioners of Woods and Forests, under the powers of the 1 *Vict.* c. 7, s. 3, took the house for public purposes, and they paid the purchase-money into the Court of Exchequer. The Act (*a*) only expressly authorized the Court to order the Commissioners to pay the costs of reinvestment, in such cases.

By an order of the Court of Exchequer in *May*, 1839, made on the petition of the widow, the purchase-money was directed to be invested in Consols, and the income paid to her *durante viduitate*, with liberty to apply, and the Commissioners were ordered to pay the petitioner's costs, charges and expenses of the application and of the investment.

By the 5 *Vict.* c. 5, the equity jurisdiction of the Court of Exchequer was abolished, and all suits, &c. pending therein were transferred to the Court of Chancery, to be dealt with according to the practice of the Court of Chancery (*b*). But it provided as follows: — "Provided always, that in case it shall appear to the Court of Chancery to be just and expedient, that any suit or suits, matter or matters, so transferred to the said Court of Chancery, should be wholly or partially carried on, according

(*a*) Sect. 25. (*b*) 5 *Vict.* c. 5, s. 2.

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according to or regulated by the present practice of the Court of Exchequer, or that a question or questions arising in the same suit or suits, matter or matters, should be decided with reference to the present practice of the said Court of Exchequer, it shall be lawful for the said Court of Chancery to make such order or orders, in relation thereto, as to the said Court of Chancery shall seem meet."

The widow and the children (who had all attained twenty-five) presented a petition for the transfer of the fund to them.

Mr. *C. C. Barber*, in support of the petition, asked that the costs of the present application might be paid by the Commissioners. He said that although, by the practice of the Court of Chancery, such costs were not given, *Ex parte Molyneux* (*a*), yet that the practice was different in the Exchequer; *Ex parte Trafford* (*b*); *Ex parte Northwick* (*c*); *Ex parte* The Bishop of *Durham* (*d*). That this being a case transferred from the Exchequer, the Court had jurisdiction under the 5 *Vict.* c. 5, s. 2, to adopt the practice of that Court.

He added, that even in *Ex parte Molyneux* an appeal had been advised, and that thereupon the railway company had, in that case, paid the costs in question.

Mr. *Hanson, contrà*, for the Commissioners. The petitioners are only entitled to those costs which are given them by the Act, and this Court has no jurisdiction to go beyond them; *In the matter of Strachan's Estate* (*e*). The same question has arisen before Vice-Chancellor *Kindersley*,

(*a*) 2 *Collyer*, 273.
(*b*) 2 *Y. & C.* (*Ex.*) 522.
(*c*) 1 *Y. & C.* (*Ex.*) 166.
(*d*) 3 *Y. & C.* 690.
(*e*) 9 *Hare*, 185.

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Kindersley, who has refused costs of this nature, which were not included in the Act. The petitioners are entitled to the costs of a reinvestment, but not to the costs of obtaining payment of the money.

The MASTER *of the* ROLLS.

I think I must follow the practice of the Court of Exchequer, which, on the former occasion, ordered the costs to be paid in this matter. The petitioners are now obliged to come to the Court of Chancery for payment, and the Act says, that this Court, where it thinks proper, may follow the practice of the Court of Exchequer. I am quite sure that it is equitable and proper, that the public, who compulsorily take the property of others, should pay the costs. I do, therefore, think it expedient to follow the practice of the Exchequer in this case, and I have the best means of knowing what that practice was, for I have the order made by that Court in this very matter.

The Commissioners must pay the petitioners their costs of this application.

NOTE.—As to the jurisdiction to order payment of costs, upon applications which are not in a suit, see *In re Woodburn's Trusts*, 26 *L. J.* (*Ch.*) 522.

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STARR *v.* NEWBERRY.

March 7.

A testator gave his residue to his wife, and on her death or marriage, to his children. But in case she should die or marry again without leaving any child, or should any such child die before twenty-one, he directed the trustees to pay it to "such person or persons as might be legally entitled to the same under the Statute of Distributions." There was one child only, who was born after the testator's death, and who died three years old. The widow married again. Held, that the class to whom the residue was given over was to be ascertained at the testator's death, and not at the death of the child, and that the widow was not excluded.

THIS was a special case for the opinion of the Court.

The testator gave the residue of his personal estate to his executors, in trust, to pay the interest to his wife "during the term of her natural life, or until she should marry again;" and from and after her decease or marrying again, whichever event should first happen, then he directed his trustees to apply such interest money, as aforesaid, for the absolute benefit of his children (if any), until he or she should attain the age of twenty-one years, and on such child attaining the age of twenty-one years, to "pay the same to such child absolutely; but in case his said wife should die or marry again without leaving any such child, or should any such child die before he or she attained the age of twenty-one years, then he directed his trustees to pay such trust moneys *to such person and persons as might be legally entitled to the same under the Statute of Distributions.*" But he nevertheless empowered his trustees, with the consent of his said wife, to advance all or any portion of such trust moneys for the advancement or other benefit of such child.

The testator died on the 11th of *June*, 1845; he had no children born during his lifetime, but his wife was *enceinte* at the time of his death. The testator's only child, *Alice Griffiths*, was born in the month of *September*,

tember, 1845, and she died at the age of three years, in 1848.

In *March*, 1854, the testator's widow married, and was now the wife of the Plaintiff, *John Starr*.

The first question turned on the words, "to such person and persons as may be legally entitled under the Statute of Distributions," and whether those words had reference to a class of persons coming within that description at the testator's death, or at the time of the death of his only child, *Alice Griffiths*, or at the time of the second marriage of the testator's widow. The next question was, whether the widow had not forfeited all her rights by her second marriage.

Mr. *R. Palmer* and Mr. *W. W. Cooper*, for the Plaintiff, argued, that, under the gift over to the persons entitled under the statute, the class was to be ascertained at the death of the testator, and not at the death of the child under twenty-one. They cited *Cable* v. *Cable* (*a*); *Gorbell* v. *Davison* (*b*).

Mr. *Selwyn* and Mr. *George Miller*, *contrà*, admitted the general rule, but insisted, that a contrary intention might appear from the limitations and directions in the will, that the class was to be ascertained at the later period, as in *Jones* v. *Colbeck* (*c*), and in *Clapton* v. *Bulmer* (*d*), in which Lord *Cottenham* was inclined to such a construction; *Godkin* v. *Murphy* (*e*). Secondly, that here there was a clear intention, that on the widow's second marriage, she should forfeit all interest, and

(*a*) 16 *Beav.* 507.
(*b*) 18 *Beav.* 556.
(*c*) 8 *Ves.* 38.
(*d*) 5 *Myl. & Cr.* 108.
(*e*) 2 *Younge & C.* (*C. C.*) 351.

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and that the property should go over to the persons entitled under the statute, exclusive of his widow, and not that the whole *corpus* should belong to her as surviving joint tenant.

Mr. *Tudor*, for trustees.

Mr. *Cole*, for infants.

The MASTER *of the* ROLLS.

I think this case very clear; it is a case in which the testator has expressly said, "I intend, in a particular event, to die intestate with respect to this fund." It is open to the observations made by Mr. *Selwyn*, but all these cases do lead to peculiarities and inconsistencies, which, if pointed out to the testator, would have been avoided. He gives "such trust moneys to such person or persons as might be legally entitled to the same under the Statute of Distribution." How can I say, that, under the statute, the widow is not entitled?

I have always held, that the persons who are next of kin of the testator are the next of kin when he died, and not when the fund becomes distributable.

This is a clear and distinct expression, that, in the event stated, he intended the property to go as if he had died intestate.

Re LOUGHBOROUGH.

Jan. 31.

Bills of costs assumed to be taxable in equity, where the solicitor had retained them in his possession, and declined to produce them.

Order made for taxation of bills of costs after payment, where the solicitor had produced them on the execution of a mortgage, out of the produce of which they had been paid, but had taken them back immediately, and afterwards refused to produce them.

It is not necessary to specify items of overcharge, upon a petition for taxation after payment, in a case in which the solicitor, by retaining the bill of costs and refusing to produce it, prevents the client pointing out the overcharges.

IN 1826, Sir *Francis Desanges* had mortgaged his property.

In the latter part of 1855, Messrs. *Loughborough* and *Barfield*, who had previously acted in this and other matters for Sir *Francis Desanges*, as well as for his mortgagees, arranged that the latter should advance a further sum of 200*l.* on mortgage. In *January*, 1856, they made out the accounts between the mortgagor and mortgagees, including their own bill of costs up to that time. On the 14th of *January*, 1856, Sir *Francis* attended at Messrs. *Loughborough's* office and executed the further charge, and at the same time the account and bill of costs were handed over to him for his perusal. He signed the account, but left it, together with the bill of costs, with Messrs. *Loughborough*, to be placed with the mortgagee's vouchers. The amount due on the bill of costs was, by these means, discharged.

A second transaction of a similar nature took place in *July*, 1856. Sir *Francis*, being then in confinement for debt, a second bill of costs was, in like manner, produced and paid; it was then taken away, as before, to be placed amongst the mortgagee's papers. Sir *Francis*, being desirous of taxing the bills, applied to Messrs. *Loughborough* for them, but they did not comply with his request. The Respondent's clerk afterwards attended Sir *Francis* in prison on the 8th of *November*, 1856, with the accounts, bills of costs

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costs and mortgages, and explained the same to him, but he did not leave them.

In *December*, 1856, Sir *Francis* presented a petition, praying for the delivery and taxation of the bills. Neither the petition, nor the affidavit in support of it, alleged any fraud or items of over-charge. The Petitioner, however, stated his belief, that no part of the business "was transacted in any Court of Law or Equity."

The Respondents, in their affidavit, stated that the bills included the costs of an interpleader summons, the costs of proceedings to ascertain the validity of a judgment and execution against Sir *Francis*, and the costs of a *habeas corpus* to remove Sir *Francis* from *Whitecross* Street prison to the *Queen's Bench* prison, and the fees and disbursements incident thereto, which the Respondents submitted were costs incurred in a Court of Common Law.

Mr. *R. Palmer* and Mr. *A. Smith*, in support of the petition.

Mr. *Selwyn* and Mr. *Hardy*, *contrà*. No part of the business was transacted in Chancery, or in any other Court of Equity, or in Bankruptcy or Lunacy, but part was transacted in a Court of Law. This Court, therefore, has no jurisdiction to order a taxation; *In Re Gaitskell* (*a*); *In re Andrews* (*b*), and 6 & 7 *Vict.* c. 73, s. 37.

Secondly. The discharge of the bills of costs out of the produce of the money raised by the mortgages was a payment

(*a*) 1 *Phil.* 576. (*b*) 17 *Beav.* 510.

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Re LOUGHBOROUGH.

a payment within the Act; *Ex parte Hemming* (*a*); and precludes taxation without special circumstances; *In re Boyle* (*b*). Here no fraud, nor a single item of over-charge, is either alleged or proved.

The MASTER *of the* ROLLS, in substance, said,

I am of opinion that I must order the taxation of these bills.

Two questions of considerable importance are raised in this case; the first as to the jurisdiction, and the second on the merits.

The bills are not in the possession of the Petitioner or his present solicitor, and an application has been made for them, which has been refused, and I am asked to say, though the bills are not produced or given in evidence by the Respondents, and upon their affidavit, stating that they contain common law items, but not going on to state that they contain no chancery items, that the jurisdiction of the Court to order a taxation is excluded. The Court does not receive secondary evidence of the contents of written documents which are accessible, and no opportunity has been given of ascertaining whether the bills do or do not contain items of over-charge, or items rendering them taxable here. It is therefore impossible for the Court to take it as an established fact, that the bills are not taxable here, when the Respondents possessing the bills have given no means of ascertaining the fact. I proceed on this:—that the evidence has been withheld by the Respondents.

Besides this, the accounts current, which are exhibited,

(*a*) Common Pleas, 25th *Nov.* 1856. (*b*) 5 *De G., M. & G.* 540.

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Re LOUGHBOROUGH.

bited, refer to a series of bills of costs in respect of matters which are neither proceedings at law or equity, as for leases, surrenders, mortgages, sales, commission on rents, and the like, so that not one of these bills does on the title or face of it contain any item at law or equity, and therefore every one of them is taxable here, though the affidavits of the Respondents state two items on which there may be a question, under *Re Gaitskell* (*a*).

I am, therefore, of opinion that the question of jurisdiction does not arise on this petition, and that the evidence, so far as it goes, shews that the bills are taxable here.

As to the merits, the question is, whether there has been such a delivery and settlement of the bills of costs as entitles the solicitors to say, that the client is not entitled to a taxation. The bills are such as would require great time and consideration, and an inexperienced person would not be competent to form an opinion whether they are correct or not. To say that there has been a sufficient delivery of the bills, which were not left with the client, but taken back and kept with the mortgagee's papers as his vouchers, is impossible; and I do not consider that such a delivery entitles solicitors to say, that the client has had a full opportunity of examining and ascertaining their accuracy.

As to the transaction in *July*, 1856, the Petitioner was in prison, the accounts and bills were brought to him by a clerk who read them over, and the whole matter being settled, he took away the bills of costs. How could the Petitioner possibly understand them?

In cases of alleged over-charge, I have usually applied to

(*a*) 1 *Phillips*, 576.

1857.

Re LOUGHBOROUGH.

to the Taxing Master, or to the Chief Clerks for assistance, but no proper facility has been given to enable me to do so here.

It is said that there is no instance of over-charge, but the answer is this:—that the Petitioner has not got the bills, or had an opportunity of shewing them (*a*).

In that state of circumstances, I must order the taxation of the bills.

(*a*) See *In re Stephens*, 2 *Phil.* 576.

HERVEY *v.* SMITH. (No. 2.)

1856.

Dec. 17.

Objections were taken before the Taxing Master to his certificate, and affidavits were filed on that occasion. He disallowed them, and the Defendant gave notice of motion to review the certificate, but no further affidavits were filed. The Defendant, having abandoned his motion, was held liable to pay taxed costs, and not forty shillings.

THE Defendant, being dissatisfied with certain allowances made by the Taxing Master, took in objections, under the 12th, 13th and 14th General Orders of *June*, 1854. On this occasion, affidavits had been filed both on behalf of the Plaintiffs and the Defendant.

The Taxing Master disallowed the objections, whereupon the Defendant, in *August*, 1856, gave a notice of motion, that the certificate of the Taxing Master, overruling the objections, might be referred back to the Master, to reconsider and review the taxation as to the same. No further affidavits were filed in support or opposition to the motion.

On the first motion day (4th of *November*), the Defendant's Counsel saved his motion to the next seal. On

1856.

HERVEY v. SMITH.

On the next seal (13th of *November*), the motion not having been made, an order was made that the Defendant should pay the costs of an abandoned motion. The order, as drawn up, after reciting that affidavits had been filed, directed the Defendant to pay to the Plaintiffs "their costs occasioned by the said notice of motion."

The Defendant now moved to discharge the order, and that the Plaintiffs might be ordered to pay the costs of the present motion, "less the sum of forty shillings for the costs of the said abandoned notice of motion."

The question was, whether the Plaintiffs were entitled to the taxed costs of the abandoned motion, or to forty shillings only.

Mr. *Selwyn* and Mr. *Southgate* in support of the motion. The order of the 13th of *November* is irregular. Under the General Order of the 5th of *August*, 1818 (*a*), "when no affidavit is filed," the Respondent is entitled to forty shillings costs only. Here no affidavit was filed within the meaning of the order, which refers to affidavits filed after the notice, and for the express purpose of the motion, and not to any filed previously.

In *Green* v. *Meares* (*b*) it was held, that the costs of an abandoned motion, in support of which the party had given notice of his intention to read an affidavit previously filed in the cause, were only forty shillings. Here the order is drawn up on this false suggestion:—"and affidavits having been filed."

Mr. *R. Palmer* and Mr. *Nalder*, *contrà*, were not heard,

(*a*) *Ordines Can.* 3. (*b*) 14 *Sim.* 526.

1856.

HERVEY v. SMITH.

heard, but they referred to *Tucker* v. *Hernaman* (*a*), where it was held by the Vice-Chancellor *Stuart* that the order of the 5th *August*, 1818, does not apply to a notice of motion to vary the Chief Clerk's certificate, and that a party giving such a notice will not be allowed to abandon his motion on payment of forty shillings costs.

The MASTER *of the* ROLLS.

I am satisfied that where an affidavit may be used on the motion, the party, on abandoning his motion, pays taxed costs. I concur with the Vice-Chancellor *Stuart* on the subject, and I must refuse this motion, with costs.

(*a*) 24 *L. J.* (*Ch.*) 456.

NOTE.—See *Davis* v. *The South-Eastern Railway Company*, *post*, p. 548, and the note, p. 550.

1857.

LILL *v.* LILL.

March 4.

After gifts to *A.*, *B.* and *C.*, there was a gift, "after their decease," of that property together with the residue. Held, that "after their decease" meant "subject to the interests of *A.*, *B.* and *C.*," and that these words did not postpone the immediate enjoyment of the general residue.

Gift of "30*l.* each yearly, so long as *A.* and *B.* shall live." Held, to be several annuities to each, during their several lives.

After certain bequests for life, the general residue was bequeathed to the surviving children of *A.*, who was living. Held, that the survivorship had reference to the death of the testator.

THE testator devised and bequeathed as follows:—"I give, devise and bequeath unto my son *Thomas Lill*, all that house and premises, with the garden and orchard belonging to the same, situated *at Handley*, together with the sum of 20*l.* yearly, for the term of his natural life. Also, I give unto my son *Abraham Lill*, all that my house I now live in, with the outbuildings thereto belonging (subject, nevertheless, to an abiding place in the same for my daughter *Eliza Lill*, so long as she shall live unmarried), *together with the sum of* 30*l. each, yearly, so long as the said Abraham and Eliza Lill shall live.* Also, I give unto my son *John Lill* the sum of 20*l.* yearly, so long as he shall live; all which sums of money are to be paid half-yearly by my executors to this my will, hereinafter named. *And after their decease*, I then devise and bequeath all the several sums of money hereinbefore mentioned, with the houses and outbuildings and lands before named, together with all the rest, residue and remainder of my moneys, securities for money, household goods and furniture, real and personal estate and effects, of every kind and description, unto *the surviving children of my son Thomas Lill*, share and share alike, on their attaining each the age of twenty-one years."

The testator died in 1855, and the Defendant *Thomas Lill* had eight children.

The first question was, whether the residuary gift being given "after their decease," there was an intestacy, until after the deaths of the several annuitants.

Secondly,

1857.

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Secondly, whether the gift of "30*l.* each, yearly, so long as the said *Abraham* and *Eliza Lill* should live," was a gift during their joint lives, and therefore ceased on the death of either, or was a several gift to each for their several lives.

Thirdly, as to the meaning of "surviving children of my son *Thomas Lill*."

Mr. *Follett* and Mr. *Wickens*, for the Plaintiffs, the children of *Thomas Lill*.

Mr. *Little* cited *Woodstock* v. *Shillito* (*a*).

Mr. *C. T. Simpson* cited *Re Drakeley* (*b*); *Moffat* v. *Burnie* (*c*).

Mr. *R. Palmer*, for *Thomas Lill*, cited *Edwards* v. *Edwards* (*d*).

The MASTER *of the* ROLLS.

As to the construction contended for, that the testator died intestate of the residue of his property, until the decease of the survivor of the persons before mentioned, I read the words in this will, "after their decease," as applicable, in fact, to the particular property which he had before given to them specifically, that is, subject to their interests, he gave the residue to the children of *Thomas*, and the word "together" does not mean that "after their decease" is to govern the whole gift of the residuary estate. The expression is elliptical and imperfect, but it means, that "after their decease," I give the

(*a*) 6 *Sim.* 416.
(*b*) 19 *Beav.* 395.
(*c*) 18 *Beav.* 211.
(*d*) 15 *Beav.* 357.

1857.

LILL v. LILL.

the property in which I have given them a life interest, and I give all the residue to the children of *Thomas*, that is, "subject to the interest aforesaid, I give them the whole of the property." It would be a very strained and inconvenient construction to arrive at the other conclusion, for then there would be an intestacy as to the real and personal estate, and no disposition of the goods and chattels until after the death of the several persons previously named. In that case they would be of very little value, and could not be disposed of in the mean time.

I am of opinion that the proper construction of these words, "and after their decease," whether they are applicable to the first part of the clause, which is the proper signification, or to the whole, is, "subject to the interests before given."

The expression "surviving children" means those surviving the testator on attaining twenty-one. My impression is, that they do not attain vested interests until twenty-one, but I will reserve the point.

I am of opinion that the two annuities are several, and that *Abraham* and *Eliza* have each an annuity of 30*l.* for their respective lives. The word "each" is decisive of the question.

Mr. *R. Palmer* afterwards referred to *Key* v. *Key* (*a*), as being in conformity with the decision on the first point.

(*a*) 4 *De G., M. & G.* 73.

MEYRICK *v.* LAWES.

July 7.

The Master of the Rolls has no jurisdiction under the 6 *Ann.* c. 18.

MR. *FOLLETT* moved, under 6 *Ann.* c. 18, for the production of the tenant for life.

The MASTER *of the* ROLLS said, that the *Master of the Rolls* had no jurisdiction under that statute, which only authorized a party to "move the Lord Chancellor, Keeper or Commissioners for the custody of the Great Seal of *Great Britain* for the time being."

FLOWER *v.* GEDYE.

July 7.

A decree was taken by default in consequence of the negligence of the clerk of the Defendant's solicitor. The Court refused to restore the cause. The last cause in the paper is no longer privileged.

THIS cause, which was the last in the paper, being called on, no one appeared for the Defendant, and a decree was thereupon taken upon affidavit of service. No one had appeared for the Defendant, in consequence of the neglect of the clerk of the Defendant's solicitor.

Mr. *J. H. Palmer* moved to restore the cause to the paper, offering to pay the costs. He cited *Hale* v. *Lewis* (*a*) and insisted that the cause, being the last in the paper, was privileged.

Mr. *R. Palmer* and Mr. *Smythe*, for the Plaintiff, declined consenting to the order.

The

(*a*) 2 *Keen*, 318.

1857.

FLOWER v. GEDYE.

The MASTER *of the* ROLLS said, he could only make the order on the consent of the Plaintiff, and that being declined, he must refuse the motion with costs. As to the last cause being privileged, he said, that such was not now the practice of the Court. It had been abolished by Lord *Cottenham*, who observed that the only effect of such a practice would be, to put an additional cause in the paper.

1857.
Feb. 10, 11.

A father directed a fund, given to his daughter, to be settled "upon her and her issue," so that "the same might not be liable or subject to the debts, control or engagements of any husband" whom she might happen to marry during her lifetime. Held, that the settlement ought to give the daughter a power of appointment by will, in default of issue.

Form of settlement in such a case.

STANLEY *v.* JACKMAN.

BY deed, dated in 1811, *William Stanley* conveyed some freehold property to trustees, upon trust to sell after his decease and invest the produce, and to pay the dividend to his wife for life, and after her decease, upon trust for all his daughters by his late and present wife, "share and share alike, the shares of such daughters to be vested interests in them at the age of twenty-one years or marriage, which should first happen, *and to be settled on them as thereinafter mentioned.* And in case any such daughters should die under the age of twenty-one years and unmarried, then the share of her or them so dying of and in the said Bank Annuities should go and accrue to the survivor or survivors of them." And upon further trust, subject to the life interest of his widow, "*to settle and assure the share of each such daughters* of and in the same Bank Annuities upon her and her issue, so and in such manner and form as that the same might not be liable or subject to the debts, control or engagements of any husband or husbands whom any such daughter or daughters should

should happen to marry during the lifetime of any such daughter or daughters."

The settlor died in 1825, leaving his widow and several daughters surviving.

In 1851, one of his daughters, *Elizabeth*, who had attained twenty-one, married *Frederick Durrant*; and she died in 1855, without having had any issue, leaving her husband surviving her. By her will, made in 1854, she appointed all her share of the property to her sister *Jane* absolutely.

No settlement had been made pursuant to the directions of the deed, and the question was, what the proper limitations of such settlement ought to have been, and whether they ought to have excluded the marital right of Mr. *Durrant*, under the circumstances which had occurred.

Mr. *R. Palmer* and Mr. *W. J. Bovill* for the Plaintiff.

Mr. *Lloyd* and Mr. *A. Smith* for other parties.

Mr. *Selwyn* and Mr. *Surrage* for *Frederick Durrant*, the surviving husband of the testator's daughter *Elizabeth*. It is to be observed, that this is the case of a deed and not of a will, and it must therefore be construed with greater strictness.

First. The gift to the daughters is absolute in the first instance. If this absolute interest be clear, it is incumbent on those who contend that it is cut down to shew it in terms equally plain and distinct; *Doe* d.

1857.

STANLEY v. JACKMAN.

Hearle v. *Hicks* (*a*). The rule is, that where there is an absolute gift, in the first instance, with a restriction as to the mode of enjoyment, to secure certain objects, then, upon, failure of those objects, the absolute gift prevails; *Lassence* v. *Tierney* (*b*). Thus where there is an absolute gift in the first instance, with a subsequent direction to settle for the benefit of the children, or a subsequent gift directly to the children or others, which afterwards fails, it has always been held, that the first absolute gift prevails; *Whittell* v. *Dudin* (*c*); *Hulme* v. *Hulme* (*d*); *Arnold* v. *Arnold* (*e*); *Campbell* v. *Brownrigg* (*f*). In *Lyddon* v. *Ellison* (*g*), where there was an absolute gift to daughters, in the first instance, with a subsequent direction to settle, the Court said (*h*), "The scope and effect of the will is, to give the daughter an absolute interest in her share, with a direction to settle it in such manner as to take a portion out of it in favour of her children. Except so far as it is taken out of the daughter, the gift remains in her. That is the case of *Hulme* v. *Hulme* (*d*), and is consistent with the rules which obtain in the construction of such bequests. If therefore she never marries, the absolute interest remains in her;" and one of the daughters being fifty-six and unmarried, the Court then directed payment to her of her share.

Secondly. The gift over to the survivors is only upo death under twenty-one or unmarried, and this therefo has failed.

Thirdly. The question therefore is, as to the effec the direction to *settle* the daughters' shares, "so as

(*a*) 8 *Bing.* 480.
(*b*) 1 *Mac. & Gor.* 551.
(*c*) 2 *Jac. & W.* 279.
(*d*) 9 *Sim.* 644.
(*e*) 16 *Sim.* 404.
(*f*) 1 *Phil.* 301.
(*g*) 19 *Beav.* 565.
(*h*) *Ibid.* 574.

the same may not be liable or subject to the debts, control or engagements of any husband or husbands whom any of such daughters may marry during the lifetime of any such daughter or daughters." The property should be settled on the wife for life for her separate use, without power of anticipation, with limitations to her issue, but nothing more should be added, for the intention of the testator was only to secure the non-interference of the husband during the daughter's life, for her benefit, and not to limit his marital right as regards volunteers claiming after her death. There is no principle or authority for introducing a limitation to her next of kin, or a power enabling her to appoint the property so as to defeat the marital right. Here there has been no issue, and striking the limitation to them out of the settlement, there remains an absolute interest in the daughter, with the qualification as to separate use, &c., during her life, and affecting only her life estate.

In *Stoner* v. *Curwen* (*a*), "a testator gave one-third of his residue to his niece, which he desired might be *settled* by his executors on her for her separate use for her life, but to devolve to her issue at her death, and failing issue, then to revert to his nephew. The Court directed the third to be settled in trust for the niece for her separate use for life, and after her death, in trust for her issue then living, and if there should be no such issue, then in trust for the nephew."

In *Young* v. *Macintosh* (*b*), a testator left to his daughter *Jane* the sum of 2,000*l.* to be *settled* on her when she married, or to be paid to her on her attaining twenty-one; should she die not leaving issue, the

(*a*) 5 *Sim.* 264. (*b*) 13 *Sim.* 445.

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STANLEY v. JACKMAN.

the 2,000*l.* to fall into the residue of his estate. *Jane* married in her father's lifetime. The Court directed the legacy to be settled in trust for her separate use for life, remainder for her children living at her death, according to her appointment, in default of appointment for her sons at twenty-one, and her daughters at that age or on marriage, remainder for her next of kin, and, if she had no child living at her death, the legacy to become part of the testator's residue.

In *Head* v. *Randall* (*a*), the residue was given to two granddaughters, followed by a declaration that it should not be subject to the control of their husbands, but should be held in trust until a proper settlement should be made on them and their issue. Sir *John Leach* declared, that *Elizabeth Randall* was entitled for her life for her separate use to the interest of the sum, and he directed it to be carried over to her separate account, and ordered the interest to be paid to her during her life, for her separate use; and he declared, that, upon her death, her issue would become entitled thereto.

In *Carter* v. *Taggart* (*b*), it was held by the Lords Justices, that in settling a wife's property, under an order of the Court giving effect to her equity to a settlement, there is no established rule entitling her to have the property limited in the events of failure of issue of the marriage and of her dying in her husband's lifetime, upon such trust as she shall appoint, and subject thereto, upon trusts, excluding the husband from any interest in the settled portion of the property; and that, in the absence of special circumstances, the limitation,

(*a*) 2 *Yon. & C.* (*C. C.*) 231. (*b*) 1 *De G., M. & G.* 286.

tation, in the events above mentioned, should be to the husband.

Mr. *Follett*, for one of the sons.

Mr. *Dickinson*, for the widow.

Mr. *Bagshawe* and Mr. *Walford*, for two daughters.

Mr. *Karslake*, for other parties.

The MASTER *of the* ROLLS.

The view I take of this case is this:—I concur in much of what has been said, but I do not think the directions of the deed ought to be carried into effect in the manner suggested. I discard from my consideration those cases in which the trust was not executory and where a testator has either specified the trust, or having given an absolute interest in the first instance, afterwards cuts it down to the extent expressed by him. I discard also the cases relating to a wife's equity to a settlement; they have, in my opinion, no application to the present case.

Here I have to carry into effect the views and intentions of the settlor expressed in the deed, and I think the deed expresses that his daughters are to take an absolute interest in the property, except so far as it is afterwards cut down. How can you give an absolute interest to a married woman over a fund except by excluding the marital right and by giving her a power to dispose of it as she thinks fit? That is the only way to give an absolute interest. I think the object was to give the daughters the fullest possible control over the fund, subject to the interests of their issue.

I concur

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I concur in the observation, that the word "marry" is not the antecedent to which the word "lifetime" applies, because the daughters could only marry in their lifetime. But what is there to show that the husband was to have the fund if there was no issue?

I shall, if there be no issue, give the daughters a power of appointment over the fund. I do not thereby intend to exclude the husbands, for, if there be no execution of the power and no issue, the property will belong to the husband if he survive, and if not, then to the next of kin.

The proper mode of carrying into effect the direction of the deed is this:—To settle the property on the daughter for life, for her separate use, without power of anticipation; after her death to her issue as she shall appoint by deed or will; and, in default of appointment, to the issue living at the death of the daughter equally, *per stirpes;* so that any issue then living, more remote than children, shall take (in case of the previous decease of their respective parents or parent) only the shares or share to which their respective parents or parent would, if living, have been entitled; and, in default of issue living at their death, then as the daughters shall by will appoint, and, in default, to her executors, administrators and assigns.

The husband therefore will take the whole if there be no issue and no appointment.

ANDERSON *v.* ABBOTT.

Feb. 20, 28.

By a post-nuptial settlement, a husband and wife covenanted with trustees to settle all the property which the wife might become entitled to during the coverture on themselves for life, with remainder to their children. During the coverture, part of such property was allowed by the husband to be paid over to the trustees; the other part was not reduced into possession at the husband's death. Held, that, originally, the settlement was binding on neither party; secondly, that the part paid over had been effectually made subject to the trusts by the husband; and thirdly, that the wife refusing, after the death of her husband, to perform her covenant, was not entitled to a life interest in the portion settled, which was applicable to recoup the children.

IN 1850, the Plaintiff Mrs. *Anderson* married Captain *Anderson*, in the *East Indies*, but no settlement was executed on their marriage. In 1851, however, a settlement was made between Captain *Anderson* of the first part, the Plaintiff Mrs. *Anderson* of the second part, and trustees of the third part, whereby, after reciting (contrary to the fact), that it had been agreed, prior to the marriage, that the present and future property of the Plaintiff should be settled as therein mentioned, it was witnessed and agreed, that the trustees should stand possessed of certain personal estate which the Plaintiff was entitled to at her marriage, upon trust for her and her husband successively, for their lives, with remainder to their children. And Captain and Mrs. *Anderson* thereby respectively covenanted with the trustees for the settlement of "all such real and personal estate as, at any time or times during the said coverture, should descend or devolve to or vest in the Plaintiff in her right" upon the same trusts.

Upon the death of General *Carpenter* (the grandfather of Mrs. *Anderson*), in *January*, 1855, she became entitled to a share in his residuary personal estate.

Captain *Anderson* died in *September*, 1855, leaving three children. In his lifetime a portion of his wife's share

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share of General *Carpenter's* estate (stated to be 2,004*l.* 3*s.* 6*d.*) had been paid over to the trustees of the post-nuptial settlement, but a considerable residue still remained unpaid.

Mrs. *Anderson* instituted this suit in *July*, 1856, insisting, that as to her property not reduced into possession, the settlement was inoperative; that there had been no ante-nuptial agreement for a settlement, as recited in the deed of 1851, and, if any, that it was by parol only and inoperative. She, by this bill, claimed the property in question absolutely.

Mr. *Follett* and Mr. *Prendergast*, for the Plaintiff. There was no agreement for a settlement prior to the marriage. If any, it was by parol and not in writing, and therefore void under the Statute of Frauds. The post-nuptial settlement was not binding on the Plaintiff, for, being a *feme covert*, she was incapable of entering into a binding contract.

Mr. *Teed* and Mr. *Gowan*, for the children, insisted on the validity of the settlement, and argued, that the English Statute of Frauds was inapplicable to a contract entered into in *India*.

Mr. *R. Palmer* and Mr. *Bird*, for the trustees.

Mr. *Lloyd* and Mr. *Goldsmid*, for the administratrix of General *Carpenter*.

Ellison v. *Elwin* (*a*), and *Field* v. *Moore* (*b*), were cited.

The

(*a*) 13 *Sim.* 309. (*b*) 19 *Beav.* 176.

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The MASTER *of the* ROLLS.

I think there is very little doubt that the lady is not bound by the settlement. The evidence disproves any contract binding on her prior to the marriage; but afterwards, when under the disability of coverture and not in a situation to contract, she enters into a covenant to settle all the property she might afterwards acquire. After the death of her husband, she says, "I am not bound to settle this property according to the covenant, though it vested in me during the coverture." I am of opinion she is not, and that the covenant does not bind her.

With respect to her property and her *choses in action*, which her husband received during the coverture, they, in my opinion, must be held to be bound by the settlement. He had entered into a covenant to settle them, and, having received them, he allowed them to be given to the trustees, to be held on the trusts of the settlement. That was a performance of his covenant and constitute a valid, complete and effectual disposition, as far as the children were concerned, so as to entitle them to the benefit of the trust.

As to the question, whether the wife is entitled to enjoy a life interest under the settlement, I leave that to be spoken to on a future day; but, with respect to the rest of the case, I entertain no hesitation on the subject.

The

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The question of election was now argued.

Mr. *Follett* and Mr. *Prendergast*, for the Plaintiff. It has been decided by the Court that there was no contract prior to the marriage, and therefore the recital to that effect is to be wholly omitted in the consideration of the present question. If, then, the settlement is, to any extent, binding, Mrs. *Anderson* is as much entitled to the benefit of it, and to a life interest in the property affected by it, as the other volunteers taking under it; for it was equally the intention of Captain *Anderson* to benefit his wife as his children. The execution of the settlement by the Plaintiff was merely nugatory; she could not contract, and therefore cannot be bound to give effect to it, even in its limited operation. The original settlement was inoperative, and the Plaintiff is only bound to give effect to the subsequent trust created by her husband, which affected merely that portion of her property which was received in his lifetime. This is not a case of election.

The MASTER *of the* ROLLS. This was a voluntary deed, and, as in the case of a will, all parties taking under it are bound to give effect to it.

They cited *Campbell* v. *Ingilby* (*a*); *Birmingham* v. *Kirwan* (*b*); *Dillon* v. *Parker* (*c*); *Hearle* v. *Greenbank* (*d*).

Mr. *Teed* and Mr. *Gowan*, for the children, were not heard.

The

(*a*) 21 *Beav.* 567.
(*b*) 2 *Sch. & Lef.* 444.
(*c*) 1 *Swan.* 359.
(*d*) 3 *Atk.* 695.

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The MASTER *of the* ROLLS.

I am of opinion that a case of election arises for the benefit of the children.

I have had occasion to consider this point since it was last before me, and my opinion, on the true meaning and effect of this settlement, is this:—that the husband, who I assume had a knowledge of the law, and was aware that the covenant of his wife would not bind her, agreed with her, (being aware she was not legally bound,) that it would be very beneficial for their children, if all her property which came into possession during coverture should be so settled, that the capital should be secured to the children after the death of their parents; that was the foundation of the settlement. If nothing had fallen in during the coverture of the wife, I should have been of opinion that the settlement was not binding, and that it was of no effect whatever. Even if the wife had died first, it would have been impossible, as it was without consideration, to have enforced the performance of it against the husband: nor would it have been possible to have enforced the performance of it against the wife, because she was under an inability to contract at the time she entered into and executed the settlement. But during the coverture certain property does fall in: what does the husband do with it? He treats himself as bound by covenant though he was not, and though, in my opinion, it was not binding upon the Plaintiff. Instead of repudiating the settlement he orders or sanctions the property to be transferred to the trustees on the trusts of the settlement. When that had been done it was irrevocable; the property had passed from his hands;

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hands; the thing was complete, and no longer rested *in fieri:* there was an absolute conveyance of the property to trustees, on certain trusts declared in the settlement, which were for himself for life, with remainder to his wife for life, and after her death for the benefit of the issue of the marriage.

I think the fair conclusion is, that he so acted on the faith and in the belief that the wife also would carry into effect her part of the settlement; and that as he had carried into effect that portion which was not binding on him, so she would carry into effect that portion which was not binding on her. She has not thought fit to do so: she is at perfect liberty to refuse to do so, the settlement not being binding on her in any respect whatever: but then the question is whether, (if I am right in believing that to be the true construction of the settlement,) she can come in and claim the life interest in that fund, which the husband, not being bound to transfer to the trustees, has thought fit to transfer to them on the faith and in the belief that she would perform her part of it, but which she now refuses to perform? I am of opinion that she cannot. The object was, that the capital of this fund should, after the death of the survivor of the husband and wife, be secured to the children. The husband has done that as far as he could; the wife has thought fit to say, that she will not perform her part of it, and which she is not bound to do: but, in my opinion, the children have a right to say, "we are entitled to that portion of the fund, which you, the Plaintiff, would have taken if the settlement had been completed, and it must go to recoup that capital, which, if the whole had been carried into effect on both sides, we should have been entitled to receive. Consequently, this is not the case which was referred to in *Campbell* v. *Ingilby;*

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v. Ingilby; it is a case in which, acting on the intentions of the parties, as far as I can gather them from the settlement that has been executed, I perceive an intention, on the part of the father, to settle this fund in such a manner that the whole of the wife's property should, after the death of the survivor, be secured for the benefit of the children. He has done that as far as he can, but she has opposed that to the extent of her power, and she must make good the part that fails out of that interest which, under the settlement, she would have been entitled to receive.

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February 27.
March 4.

Generally, the costs of a mortgagee are added to his security, and in whatever rank or order the security stands, his costs are united to it and form part of it; but if he institute a suit for the administration of a deceased mortgagor, his costs are those of a Plaintiff in an ordinary administration suit.

When a *puisné* incumbrancer sues for and recovers a fund for the benefit of all, his costs are paid, in the first instance, out of the fund recovered.

An estate was greatly incumbered. The first charge was an annuity, and, in default of payment, the annuitant had a power to sell and invest the produce in the purchase of a similar annuity. The grantor reserved a power of repurchase. The annuitant having sold the estate, the fifth incumbrancer filed a bill to repurchase the annuity and distribute the produce. Held, that the Plaintiff's costs were the first charge on the fund, and that the costs of the other incumbrancers must be added to their securities.

THE real estate of *Thomas Twisden Hodges* was subject to a considerable number of incumbrances.

The first, dated in 1848, was a grant of a life annuity of 550*l.* to *Henry Porter Smith*, secured on the estate. The deed contained a power, upon default in payment of the annuity, to sell the estate and to invest the produce in the purchase of a similar life annuity, and to hold the surplus in trust for the grantor. The deed also

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also contained a power for the grantor to repurchase the annuity on payment of 4,146*l.*

The second incumbrance was a mortgage to *Maesfield*, the third was a mortgage to *Gambier*, the fourth was a registered judgment obtained by *Webb*, and the fifth was a similar judgment obtained by the Plaintiff *Wright*. There were a great number of subsequent incumbrancers, who were Defendants, but it is unnecessary to specify their names or the order of their charges.

In 1853, the annuity being in arrear, *Smith* exercised his power of sale and sold the whole estate, and after payment of the arrears, &c., a very large balance remained in his hands.

The Plaintiff, the fifth incumbrancer, instituted this suit against *Smith*, and all the other incumbrancers, seeking to repurchase *Smith's* annuity out of the funds in his hands, and to have the surplus distributed amongst the other incumbrancers, according to their priorities.

Smith did not resist the repurchase, and under an order made in the suit, *Smith's* annuity was repurchased out of the funds in his hands, and he paid the residue into Court in this suit.

Under another order, *Maesfield's* claim was compromised for less than was apparently due, and he was paid off out of part of the fund in Court, and thereupon, the Plaintiff became third incumbrancer on the residue of the fund. Under the decree, the priorities of the several incumbrancers, and the amounts due to them were ascertained, and the cause now came on for further consideration. The fund was greatly insufficient to pay all the charges.

Mr.

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Mr. *R. Palmer* and Mr. *Speed*, for the Plaintiff. The Plaintiff's costs should be first paid, but the costs of the Defendants should be added to their securities and paid, in succession, according to their priorities. The fund has been realized by the diligence of the Plaintiff, and for the benefit of all parties, the Plaintiff's costs have therefore priority over all other claims. Thus, if a simple contract creditor institutes a suit for administration, and there is a deficiency, the Plaintiff is entitled to his costs as against the specialty creditors. In *Wedgwood* v. *Adams* (*a*), Lord *Langdale* thus states the rule:—"If, through the exertions of a Plaintiff, the Court is enabled to distribute a fund, or if it makes a declaration of rights necessary for its administration, there, although the Plaintiff may fail in his claim, the Court will not permit the other parties to carry off the fruit of his exertions without defraying his costs out of the fund."

In *White* v. The Bishop of *Peterborough* (*b*), Sir *Thomas Plumer* thus states the principle:—"What is the practice when a second incumbrancer files his bill to have the priorities ascertained, and the first incumbrancer does not insist upon having it dismissed as against him, but submits to it, goes before the Master and states his title, taking the benefit of the suit for the purpose of obtaining payment of what is due to him? Must he not, then, contribute to the costs? He is certainly entitled to the benefit of his incumbrance, but the Court must consider the suit as being for the benefit of all parties, and the costs must therefore be paid out of the fund."

In

(*a*) 8 *Beav.* 105.

(*b*) *Jacob*, 402.

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In *Ford* v. The Earl of *Chesterfield* (*a*), the Plaintiff, who was a *puisné* incumbrancer, had his costs first, and it was held, that the costs of the other incumbrancers were not to be paid in the first instance, but were to be added to their securities.

Mr. *Lloyd* and Mr. *G. L. Russell*, for the second incumbrancer, *contrà*. The Plaintiff has no priority for his costs; either the costs of all parties must be paid in the first instance, as in *Brace* v. The Duchess of *Marlborough* (*b*), and *Kenebel* v. *Scrafton* (*c*), or the Plaintiff and all the other parties must add their costs to their securities, and be paid according to their priorities, for the institution of a suit cannot alter the rights of the parties *inter se*; *Wild* v. *Lockhart* (*d*); *Upperton* v. *Harrison* (*e*); *Hepworth* v. *Heslop* (*f*); *Barnes* v. *Racster* (*g*).

The MASTER *of the* ROLLS. I am clearly of opinion, that the sale of a mortgaged estate makes no difference in the rights of the incumbrancers upon it.

Mr. *Follett*, for *Smith*, and *Kirby* his trustee.

Mr. *Bagshawe*, for *Gambier*.

Mr. *Forster*, for other incumbrancers, asked that the costs of all parties might be paid in the first instance.

The MASTER *of the* ROLLS. I cannot order that, I will read the bill and consider the authorities.

The

(*a*) 21 *Beav.* 426.
(*b*) *Mosely*, 50.
(*c*) 13 *Ves.* 370.
(*d*) 10 *Beav.* 320.
(*e*) 7 *Sim.* 444.
(*f*) 3 *Hare*, 485.
(*g*) 1 *You. & C.* (*C. C.*) 401.

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March 4.

The MASTER *of the* ROLLS.

The only question in this case, is the mode in which the costs are to be disposed of. The principle is not doubtful, though the application of it is difficult. Generally, the costs of a mortgagee are added to his security, and, in whatever rank or order that security stands, his costs form a part of it and are united to it; and if he stand aloof from any proceeding, and is brought into Court compulsorily, he stands in this position, and this is the principle which affects him. But if he initiate proceedings himself, a fresh element arises. If a mortgagee institute a suit for the administration of the estate of his deceased mortgagor, it is to be considered that, in so acting, he is suing as a creditor for the benefit of creditors generally, and not as a mere mortgagee enforcing his securities, and his costs are the costs of a Plaintiff in an ordinary administration suit. It was on this principle that I decided the case of *Armstrong* v. *Storer* (*a*).

If, however, a mortgagee institutes a suit to redeem prior and to foreclose subsequent incumbrancers, his costs are added to his debt, and have no priority over the prior charges. It may be, and it does sometimes happen, that a subsequent mortgagee institutes proceedings to realize and distribute a fund, which, but for such exertions, would have been unavailable for the purpose of paying the incumbrances, and which proceedings would have to be taken at all events. If this be done by a *puisné* incumbrancer, and the other incumbrancers, both prior and subsequent, take the benefit of it, and make use of the Plaintiff's proceeding for their

(*a*) 14 *Beav.* 535.

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their advantage, then the Plaintiff's costs ought to be paid first. To hold otherwise would be to say, that in the case of a deficient security, unless the first incumbrancer will take such proceedings, they shall not be taken at all. This is the principle on which I disposed of *Ford* v. The Earl of *Chesterfield* (*a*).

The question is, whether the case now before me is one of this latter description. It was for this purpose that I took the papers home, in order, by the perusal, to satisfy myself whether this was the case; and the perusal of the papers has satisfied me, that this case falls within that description.

I am of opinion, therefore, that the Plaintiff's costs must be paid, in the first instance, out of the fund; and that the costs of all other parties must be added to their securities and paid in regular succession.

(*a*) 21 *Beav.* 426.

WILKINSON *v.* DUNCAN.

February 13.
March 7.

Trustees, having a discretion, allowed a reversionary interest to remain unsold for nineteen years, when it fell into possession. Held, that the tenant for life, who had, in the meanwhile, received nothing in respect of income on it, was entitled to be recouped out of the fund.

Mode of calculating the amount to be received by the tenant for life, and of regulating the relative rights of the tenant for life and remainder-man, in such a case.

THE testator was entitled to one-sixth of about 23,000*l.* in the funds, in reversion expectant on the deaths of Mrs. *Wilkinson* and Mr. *Grueber*.

By his will, made in 1833, the testator bequeathed "all the rest, residue and remainder of his personal estate and effects, whether in possession, reversion, remainder or expectancy, to his three executors, upon trust to collect, get in and convert into money all such parts of his said residuary estate and effects as should not consist of money, at such time or times, and in such manner, as his trustees or trustee for the time being should, in their or his discretion, think expedient, and should lay out and invest the moneys to arise from such sale, collection and conversion" in the funds, &c. and out of the dividends, &c., maintain, &c. *George Wilkinson* during his minority, and invest the residue, and after he attained twenty-one, to pay "the interest, dividends and income of the said residuary estate, stocks, fund and securities, and all accumulations thereof, unto him, *George Wilkinson*, for life, with remainder to his children.

The testator died in 1836, *George Wilkinson* attained twenty-one in 1841, *Mary Wilkinson* died in 1842, and Mr. *Grueber* died in 1855. The one-sixth of the reversioner's fund thereupon fell into possession and became payable. The executors, apprehending some difficulty in deducing a marketable title to the reversionary interest,

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rest, had not sold it, and the tenant for life, from the death of the testator, had received no benefit from the reversion. He filed this bill in 1856, insisting that having been deprived of the income which would have arisen from the investment of the proceeds, if it had been sold, he was entitled to some allowance or compensation out of the fund now rendered available.

Mr. *Lloyd* and Mr. *C. Hall*, for the Plaintiff.

The discretionary authority given to the trustees was limited to the time and manner of sale, and did not authorize them to say, that there should be no sale at all. But no exercise by a trustee of a discretion can disappoint the rights of any of the parties having limited interests. The case is the converse of those where the property is perishable and the tenant has been allowed to enjoy it *in specie*. In the latter case, the tenant for life receives too much, and must refund: in this, he has received too little, and is entitled to receive a compensation out of the fund which has been increased at his expense. The proper mode of ascertaining the amount would not be by ascertaining the value at the testator's death and giving the income of the investment, for it is notorious, that reversions never fetch their real value. You must take the result and ascertain the relative shares.

They cited *Marker* v. *Kekewich* (*a*); Lord *Londesborough* v. *Somerville* (*b*); *Sitwell* v. *Bernard* (*c*); *Gibson* v. *Bott* (*d*); *Walker* v. *Shore* (*e*); *Tucker* v. *Boswell* (*f*); *Kilvington* v. *Gray* (*g*); *Starely* v. *Hutchinson* (*h*); *Dimes* v. *Scott* (*i*).

Mr.

(*a*) 8 *Hare*, 291.
(*b*) 19 *Beav.* 295.
(*c*) 6 *Ves.* 520, 535.
(*d*) 7 *Ves.* 89.
(*e*) 19 *Ves.* 387.
(*f*) 5 *Beav.* 607.
(*g*) 2 *Sim. & Stu.* 396.
(*h*) Vice-Chancellor *K. Bruce*, unreported.
(*i*) 4 *Russ.* 195.

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Mr. *Selwyn* and Mr. *Colquhoun* for the executors.

Mr. *Surrage* for the children.

The testator has expressly given to his trustees a great discretion, which they have properly exercised. All persons take subject to that discretion, and, under the terms of the will, the tenant for life takes nothing but the income of the residue when invested. No case has been cited in which the tenant for life has obtained the relief now asked, and in those referred to the interests were not reversionary.

The MASTER *of the* ROLLS. I will read the papers.

March 7.

The MASTER *of the* ROLLS.

This is a case, in which the testator, being entitled to the reversion of a considerable sum of money, gave all his estate to trustees, in trust for his son for life, with remainder to his son's children, and intrusted a large discretion to the trustees, to convert his estate, at such times as they might think best. The testator died in *May*, 1836. The trustees, in their discretion, declined to sell the reversion in this sum of stock, which ultimately fell into possession in *January*, 1855. The tenant for life now asks to be recouped, out of the capital of this sum, what he would have had, if the trustees had exercised their discretion, by selling the reversion of this fund at the end of one year after the death of the testator, in which case, the tenant for life would have had the dividends up to the present time on the sum so produced.

After some hesitation during the argument and since, as

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as to the mode in which this equity ought to be enforced, I am of opinion, that the discretion of the trustees, which I assume, in this case, and have every reason to believe, was properly and duly exercised, ought not to be allowed to prejudice the tenant for life. The trustees delayed to sell the reversion until it had fallen into possession, because they were of opinion, that by so doing, they would, in the end, produce a larger amount to the estate of the testator. They acted properly in so doing, but they ought not thereby to injure one of the legatees of that trust fund for the benefit of others, and it is to be presumed that they in no way intended to do so. The tenant for life has received nothing for interest down to the present time; but if the reversion had been sold he would then have received the interest on the amount of the purchase-money; and if the period when the reversion fell in could have been foreseen, and the reversion could have been sold at a fair price, it ought, with the accumulated interest upon it, to have realized the full amount of the fund as it stands at present. I am of opinion that the tenant for life is entitled to have paid to him, in respect of interest, out of the capital of the fund now realized, the amount which he would have so received.

The next question is, to what extent and upon principle this is to be ascertained. If the actual risk has been ascertained in awaiting the result, I think that the fair mode of dealing with the case is not to divide the fund, by ascertaining the sum at which the reversion would have sold at the death of the testator, according to the probabilities of the case, or at the lapse of one year after the testator's death, but by ascertaining the value of the reversion, on the assumption that it was to fall in on the day when it actually did fall in, namely, on the 31st of *January*, 1855. That is, not to ascertain

the

the value of one-sixth of 23,000*l.* (assuming that to be the amount) expectant upon the expiration of the survivor of two lives, at the period of one year after the death of the testator, (stating the ages of the lives,) but to ascertain the value on the 7th of *May*, 1837, (which would be one year after the death of the testator,) of one-sixth of 23,000*l.*, to be paid on the 31st of *January*, 1855.

Accordingly, the course which I propose to take on the present occasion is this:—when the value of the reversion shall have been thus ascertained, I will then direct the costs of all parties be taxed, as between solicitor and client, and apportioned, rateably, between the two funds so ascertained. It appears to me that this application was absolutely necessary, by reason of the course that has been adopted. I think it was the proper course for the trustees to have adopted, and I assume that it was the most beneficial one, and the costs ought, therefore, to be borne by the fund generally. I think both parties ought to bear their share of the costs of all parties, and which should be taxed and apportioned between them according to their due proportions.

The reversion will then be secured for the benefit of the parties entitled, the dividends on it will be paid to the son during his life, and after his death, the capital will be divided amongst his children according to their rights under their grandfather's will, but the portion of the fund which belongs to the tenant for life will be paid to him at once.

SUBSTANCE OF THE DECREE.

1. Ascertain the value of one-sixth of the existing fund on the 7th of *May*, 1837, to fall in on the 31st of *January*, 1855.

3. Declare Plaintiff entitled to the difference between one-sixth of the present fund and the value of the reversion to be ascertained as aforesaid, and to the future dividends on the residue. *Reg. Lib.* 1856 *B.* fol. 1011.

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March 12.

The testator directed a reversionary sum to fall into his residue. He gave an annuity to *A.* for life, and his residue to a class of children who should attain twenty-one. The only residue was the reversionary sum and the fund set apart to answer the annuity. On the death of *A.*, held, that children born in the life of *A.*, but after one of the class had attained twenty-one, were excluded, and did not participate in the fund then distributable.

Where a residue, consisting partly of reversionary property, is given directly to a class, the class is to be ascertained at once, and not from time to time as the reversions fall into possession and become distributable.

THE testator having a power of disposition over 10,000*l.*, subject to his wife's life interest therein, bequeathed 6,000*l.*, part of it, as his wife should appoint, and he directed the residue to fall into his personal estate. He gave *Mary Payne* an annuity of 60*l.* for life, and "all the rest and residue of his personal estate and effects," (in default of his having children, which happened,) in trust "for all and every the children and child" of *John Hagger*, *Mary Hall*, *Joseph Payne*, and *Morris Payne*, "who being a son or sons should respectively attain the age of twenty-one years, or being a daughter or daughters should respectively attain that age, or marry under that age" with the consent of their parents or guardians, *per capita*. The will contained the usual powers of maintenance and advancement.

The testator died in 1830; his wife was still living. There was no available residue until the death of the annuitant *Mary Payne*, who died in 1856, when the fund set apart to answer her annuity became distributable.

There were nineteen children of *John Hagger*, *Mary Hall*, *Joseph Payne*, and *Morris Payne*, several of whom had attained twenty-one prior to the testator's death; five of them were born after the death of the testator,

testator, and this gave rise to the question, whether these five children were entitled to participate in the fund now distributable.

Mr. *Selwyn* and Mr. *Hobhouse* for the Plaintiffs, who were born in the testator's lifetime. A child having attained twenty-one in the testator's lifetime, the death of the testator became the period of distribution, and no child born after that time could participate in the gift. This construction was admitted so long back as the case of *Hoste* v. *Pratt* (*a*), and followed in *Berkeley* v. *Swinburne* (*b*), *Bateman* v. *Foster* (*c*). Even if the words had been "hereafter to be born," it would not alter the construction.

This construction is not varied by the particular position of the fund in question. The gift is strictly of a *residue* amongst a class, without any prior gift for life, and the mere accident, that a portion of the residue was not receivable until after the death of the annuitant, does not affect the question, otherwise the class would vary according as each portion of the residue which might be reversionary fell in. In *Hill* v. *Chapman* (*d*), there was a gift to grandchildren, to be transferred at twenty-three, and a direction to set apart 1,000*l.* to answer an annuity, it was held, that a child born after the testator's death, but before the death of the annuitant, was not entitled to share in the 1,000*l.* They also cited 2 *Jarman* on Wills (*e*).

Mr. *R. Palmer* and Mr. *Fry*, *contrà*. The rule, excluding a portion of a class of children where the gift is to all, is purely artificial, and it has often been disapproved

(*a*) 3 *Ves.* 730.
(*b*) 16 *Sim.* 275.
(*c*) 1 *Coll.* 118.
(*d*) 1 *Ves. jun.* 405.
(*e*) Page 129 (2nd edit.)

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proved of. It will yield to any intention to the contrary. Mr. *Jarman* (*a*) observes, "The rule in question, as it respects the exclusion of children born after the vesting in possession of any of the shares, has been viewed with much disapprobation; and Lord *Thurlow*, in *Andrew* v. *Partington* said, he had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children."

In *Gooch* v. *Gooch* (*b*), and *Mainwaring* v. *Beevor* (*c*), after-born children were held to be included; and in *Brandon* v. *Aston* (*d*), the Vice-Chancellor would not hold them to be excluded. In *Walker* v. *Shore* (*e*), the testator, being entitled to some Bank Stock after the death of *M. B.*, bequeathed the produce to the children of two persons equally, and it was held, that a child born after the death of the testator, and before the death of *M. B.*, was entitled to a share.

The intention in this case was clearly to benefit "all and every the children;" and those words negative the supposition that the testator did not intend to include *all* the children; *Harvey* v. *Stracey* (*f*). The rule is correctly stated in *Crone* v. *Odell* (*g*), "Where the enjoyment of the thing devised is, by the testator's expressed intent, not to be immediate by those, among whom it is finally to be divided; but is postponed to a particular period, or until a particular event shall happen, then those, who answer the general description at that

(*a*) 2 *Jarm. on Wills* (2nd edit.) p. 131.
(*b*) 14 *Beav.* 565 and 3 *De G., M. & G.* 366.
(*c*) 8 *Hare*, 44.
(*d*) 2 *You. & C.* (*C. C.*) 24.
(*e*) 15 *Ves.* 122.
(*f*) 1 *Drew.* 127.
(*g*) 1 *Ball & B.* 459.

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that period, or when the event happens, on which the distribution is to be made, are entitled to take." In a subsequent passage (*a*), it is said, "What the cases mean by the time of distribution, which closes the number of those who are to share, is this: at the period of such distribution, the thing is divided, and to be enjoyed by those who then answer the general description of those who are then to take; there is an end then of the thing; there is nothing left to be shared by any who shall afterwards come into existence, and who would fall within the description of those who were to take, if the distribution had not taken place. The nature of things excludes them; the number to take was full at the time of the distribution; the thing to be divided is gone."

Here the testator knew the state of his property, and that nothing could be distributed until the death either of his wife or that of the annuitant; the death therefore of the annuitant was the period of division of this fund, and all children *in esse* at the time participated in the gift.

The MASTER *of the* ROLLS.

It is of great importance to preserve settled and established rules; an endeavour to cut them down on presumptions of intention, or notions of convenience, leads to great evil, as it would render it impossible for the advisers of testators to state, what would be the effect of the words of a will which he proposed to use.

The primary rule is, that you must follow the intention of testators, but that intention must be expressed clearly and according to certain rules. It is an object of the greatest importance, that fixed rules should not be broken in upon, and I am of opinion that I should be doing

(*a*) Page 473.

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doing so, and to use the words of Lord *Eldon* (*a*), "I should be shaking settled rules to their very foundation," if I were to accede to the view taken by the Defendants.

One of the first rules of construction I take to be this:—That where a legacy, or a residue, is given to a class of persons, and no period of distribution is mentioned, the rights of the parties are ascertained at the death of the testator, although payment is postponed for a year for the convenience of the estate. Another canon of construction is, that the period of division is the time for ascertaining the legatees, and I have followed that rule in a number of cases. The third principle is this:—That where a legacy is given to a class at twenty-one, then, as soon as one of the class attains twenty-one, the fund becomes distributable, and by reason of the fund being then divisible, persons of that class afterwards coming into *esse* are necessarily excluded.

The testator may express a different intention, but if he does not, the Court must follow this rule. I do not concur in the opinion that this is a very inconvenient rule, for it is of great importance to ascertain the shares of the legatees at the earliest possible period, in order that their enjoyment should not be postponed. I cannot, however, concur to its full extent in the observation from the case in *Ball* and *Beatty's* Reports, that the period of division, or that at which the actual corporeal distribution of the fund is made between the parties, is the period for ascertaining the class, because the distribution may take place at different times. It is the case where the whole class is entitled to have their shares paid to them; but it is not the case in the instance I have referred to, where a legacy is given to a class of children at twenty-one.

(*a*) 9 *Ves.* 203.

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one. As soon as one attains twenty-one he is entitled to his share, but there is not a corporeal division, except as to that one part or share, yet it is the period at which the number of the other legatees is to be ascertained. Neither is it the case where the property to be distributed has not been got in. It is important to consider the material subject-matter to be divided. Here, it is a residue, and when that residue is to be divided, the number of legatees is to be ascertained. A residue may include reversions or expectancies which may come in hereafter, but this Court does not make separate and distinct classes, as each part of the residue falls in, but when once the residue, in general, becomes distributable, the rights are to be then ascertained and the class determined.

I am of opinion, if part of the residue consists of a reversion, and the money does not fall into the residue until the happening of a given contingency, that the postponement would not affect the rights of persons who are to be ascertained when the residue generally is distributable. Where the actual distribution of the money is postponed, either because some of the members of the class are incompetent to give a discharge for the money, or by reason that the money itself is still outstanding, this does not affect the ascertainment of the members comprising the class of the legatees who are to take.

Where there is a prior estate for life, then, as I stated in *Edwards* v. *Edwards* (*a*), the period of division is not until after the death of the tenant for life, at which time the class is to be ascertained. If there be no life estate, the class is ascertained at the testator's death, though the distribution is postponed for twelve months.

The cases cited appear to have turned on the particular

(*a*) 15 *Beav.* 357.

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cular terms of the wills, and I see nothing in this case to distinguish it from the common case of the gift of a residue to a class at twenty-one, and I should be frittering rules away if I were to hold otherwise, and apply a different rule to different portions of the residue. I am of opinion that the class was to be ascertained on the eldest attaining twenty-one, and that this fund is divisible into fourteenths.

February 18.
March 26.

A judgment creditor of a banking company may prove his debt, in this Court, against the assets of a deceased shareholder, without first obtaining the leave of a Court of Law to issue execution against the testator's assets under the 7 & 8 *Vict.* c. 113, s. 13.

Re WALTON'S ESTATE.

THE testator, *Charles Walton*, died in 1856, being the holder of twenty shares in the *Royal British* Bank. A creditor, named *Powys*, obtained a judgment against the official manager, and a *fi. fa.* was issued against the company's assets, to which a return was made of *nulla bona*. The creditor then proceeded at law, under the 7 & 8 *Vict.* c. 113, s. 13, and called on *Walton's* executors to shew cause why execution should not issue against the testator's assets.

A decree having been made for administering the testator's estate,

Mr. *R. Palmer*, on behalf of the executors, now moved to restrain the proceedings at law.

Mr. *Welford, contrà*, argued, that until the leave of the Common Law Court to issue execution had been obtained, the creditor could not prove his debt in this Court, the right being wholly under the statute; *Steward* v. *Greaves* (*a*), and *Barker* v. *Buttress* (*b*).

The MASTER *of the* ROLLS held that such a proceeding

(*a*) 10 *Mee. & W.* 711. (*b*) 7 *Beav.* 134.

ing at law was unnecessary, to enable a creditor to prove here, and he granted the injunction.

NOTE.—The creditor took in his claim, which raised a question of great difficulty, as to the liability of the testator's estate upon a judgment obtained against the company subsequent to his death. It was now referred for the decision of a Court of Law. (26th *March*, 1857.)

Re HUBBARD. (No. 2.)

Feb. 23.

A petition of a solicitor to review the Taxing Master's decision, as to specified items of charges for conferences, some of which had been reduced and others wholly disallowed, was dismissed with costs, the Court declining to enter into the merits of such matters.

THE bill of costs of the solicitor of a sole retiring trustee was referred for taxation, in the usual terms. The bill, amounting to 45*l.* 5*s.* 2*d.*, was taxed at 37*l.* 10*s.* 10*d.*, so that about 3*s.* 6*d.* more than a sixth was taken off, and the solicitor was, consequently, liable to the costs of the taxation.

The solicitor presented a petition to review the Master's certificate, specifying certain items which had been reduced or disallowed. They were of the following nature:—

1. A charge of 13*s.* 4*d.* for perusing certain documents, and making notes, had been reduced by 6*s.* 8*d.*
2. Two charges of 6*s.* 8*d.* each, for attendances on the client on the 2nd and 15th of *September*, had been reduced by 6*s.* 8*d.*
3. A charge of 6*s.* 8*d.* for attendance on the client had been struck out.

As to these three items, the Master, upon a review of the taxation, had made the following note:—"These disallowances were made by me after a long discussion,

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and upon the best judgment I could give as to the *quantum meruit* of the several charges, either taken separately, or in connection with the charges in the bill, and I see no reason to alter my opinion."

Nos. 4 and 5 were similar charges of 6*s.* 8*d.* each for attendances, which, as the Master said, "in exercise of his discretion," he had disallowed.

Nos. 6 and 7 were as follows:—

Attending broker, giving him instructions [*i. e.*, as to the transfer of the trust fund to the new trustee] . . . 3*s.* 4*d.*

Attending Mr. —— [the retiring trustee] to the Bank, to complete sale [viz., of stock, to pay the solicitor's bill] . . 6*s.* 8*d.*

Attending broker, instructing him to transfer [viz., to new trustee] . . . 3*s.* 4*d.*

Attending trustee making same . 6*s.* 8*d.*

All these items the Master originally disallowed, but on a review, he allowed 13*s.* 4*d.* for the whole, and made the following note:—

"I had disallowed these items, because they were for business which had not been transacted at the time even of the delivery or taxation of the bill, and because they were objected to on that ground. But on the review, the objection having been withdrawn, I have allowed 13*s.* 4*d.*, being, as I consider, a sufficient charge for attending the trustee to make the transfer. All previous arrangements with the broker, and notices of the appointments to make the transfer, will be the duty of the solicitor for the new trustee."

Mr. *R. Palmer* and Mr. *Joliffe*, in support of petition.

Mr.

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Mr. *Selwyn* and Mr. *Southgate, contrà*, were not heard.

The MASTER *of the* ROLLS.

I am of opinion that this petition fails altogether. The Court has not the same means of dealing with questions of practice and custom as the Taxing Master. As to the first three items, it is obvious, after reading the Master's note, that it would be impossible for this Court to go into the question respecting them. I shall not have the same facility or knowledge or experience in judging as he has had, and it is just one of those cases in which there ought to be no appeal from the judgment of the Master. He had the parties before him, and heard orally all objections, and, as he says, formed the best judgment he could as to the *quantum meruit* of the several charges.

The next two items for attendance the Master says he disallowed "in the exercise of his discretion." It is impossible, unless the Court holds that it will itself, in every case, judge of the propriety of the extent of the charge, by hearing evidence as to the length of the conference, the subject of it, and the time it ought to have lasted, and the propriety of more than one and so on, that it can disagree with the Master's finding as to fees for conferences, amounting to 13*s.* 4*d.* There might be an almost interminable appeal in respect of every item in a bill of costs, if these questions are to be gone into.

The last matters complained of is the disallowance of certain charges relating to the transfer. These were originally disallowed on the ground that the business had not then been done. That might be a very

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questionable ground to decide upon; but the Master afterwards, on review, allowed what he thought right; and on this, also, I must follow his view of the case. He had much better means of knowing whether two meetings were necessary or not than I can have.

The result is, that I must hold that the Taxing Master has come to a right conclusion on all these items, and this petition must be dismissed with costs.

NOTE.—As to reviewing the Master's taxation as to items not involving a principle, see *Fenton* v. *Crickett*, 3 *Madd.* 496; *Alsop* v. *Lord Oxford*, 1 *Myl. & K* 564; *In re Congreve*, 4 *Beav.* 88; *Attorney-General* v. *Drapers' Company*, 4 *Beav.* 305; *In re Pender*, 10 *Beav.* 390; *Re Catlin*, 18 *Beav.* 508; *Davis* v. *Earl of Dysart*, 21 *Beav.* 124.

1856. *March* 11. 1857. *March* 7. *June* 6.

HARGRAVE *v.* HARGRAVE.

Under the 1 & 2 *Vict.* c. 110, a judgment has no retrospective operation as against purchasers, &c., upon a minute being left with the Master of the Common Pleas.

Under the 1 & 2 *Vict.* c. 110, an order for payment of costs operates only as against purchasers, &c., from the registration of the certificate of taxation.

IN a former suit of *Hargrave* v. *Hargrave* (*a*), the Plaintiff ultimately (22nd of *March*, 1851,) established his right to a moiety of the estate in question.

By orders in the suit, and by the decree, the Plaintiff *John Robert Hargrave* recovered from the Defendant *William Josceline Hargrave* certain costs, which were ordered to be taxed and paid by the Defendant.

The Plaintiff sought, by this bill, to obtain payment of the costs out of *William Josceline Hargrave's* real estate, as a charge thereon under the 1 & 2 *Vict.* c. 110, s. 13. There were other mortgagees and incumbrancers on the property, who were made Defendants, and upon the minutes, a question arose as to the priority of the Plaintiff's charges under the orders of this Court.

Mr.

(*a*) 8 *Beav.* 289; 9 *Beav.* 153, 549, 552; 12 *Beav.* 408; 13 *Beav.* 102.

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Mr. *R. Palmer* and Mr. *Karslake*, for the Plaintiff. The 13th section of the 1 & 2 *Vict.* c. 110, makes judgments absolute charges on the judgment debtor's real estates; and by the 18th section, the orders of this Court are equivalent to judgments. The absolute charge is limited by the 19th section in this way:—It is not to operate as against purchasers, &c., "unless and until" registered. This merely suspends its operation "until" that act is done, but when registered, it has relation to the date. It is a condition precedent, but when fulfilled, its effect results back, in the same way as the grant of letters of administration have relation back to and legalize the previous acts of the administrator; and as by the enrolment of a bargain and sale it is made to operate from its date.

Mr. *Lloyd* and Mr. *Hetherington*, for a mortgagee, contended, that a judgment only operated as against a purchaser or mortgage from the date of its registration, the object of the 19th section of the act being, to enable them to ascertain, by a search, what judgments affected the mortgagor's estate.

Mr. *Bagshaw* and Mr. *Prendergast*, for the other parties.

The MASTER *of the* ROLLS.

I think that this clause means, that a judgment is to have no operation until the memorandum has been left with the Senior Master of the Common Pleas, and that it was not intended to have an *ex post facto* operation. The effect of the 19th section is to cut down the prior clause, and to enable purchasers, by searching at the office, to see whether there are any judgments entered

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entered up against vendors. It would destroy this object if the clause had a retrospective action.

I think that the correct construction of this clause is, that the judgment was only to operate as a charge as against "purchasers, mortgagees, and creditors," from the time when the proper minute is left with the Senior Master of the Common Pleas.

My decision in The *Derbyshire* Railway Company v. *Bainbrigge* (*a*), does not apply.

June 6.

On a subsequent occasion,

The MASTER *of the* ROLLS held, that as against purchasers, mortgagees, and creditors, the Plaintiff was entitled only to rank as an incumbrancer upon the Defendant's estate, for the several sums ordered to be paid for costs, from the respective dates of the first registration, in the office of the Senior Master, of the certificates of taxation, and it was so declared by the decree.

(*a*) 15 *Beav.* 146.

WARDEN *v.* JONES.

March 26, 27.

Prior to his marriage, a husband entered into a parol contract to settle his intended wife's property. The property was not settled until after the marriage. Held, that the antenuptial parol contract was inoperative under the Statute of Frauds, that the marriage was not a part performance, that the postnuptial settlement was voluntary, and the husband being greatly indebted at the time, that the settlement was void as against the husband's creditors.

Distinction between an antenuptial parol contract between husband and wife in consideration of marriage, and an antenuptial parol contract between a third party and the husband for other valuable consideration. The Court will enforce the latter after the marriage, but not the former.

THIS was a suit to set aside a postnuptial settlement, as fraudulent against the husband's creditors.

The Defendant Mr. *Barnett*, a commercial traveller, of no means, and considerably indebted at the time to the Plaintiff and others, married Miss *Jones*, on the 16th of *June*, 1855. At the time of the marriage, Miss *Jones* was registered proprietor of a sum of 1,000*l.* stock in the *Lancashire* and *Yorkshire Railway Company*; it was, however, subject to a mortgage for 260*l.*, and the stock certificate was in the hands of the mortgagee.

Shortly after the marriage, a settlement was executed, on the 6th of *July*, 1855, between *Barnett* and his wife of the one part, and trustees of the other part, whereby *Barnett* covenanted with the trustees to sell the stock and invest 500*l.* in the trustees' names, to be held for Mrs. *Barnett* for her separate use for life, with remainder to Mr. *Barnett* for life, with remainder to the issue, and in default for Mrs. *Barnett*. The stock was sold, under a transfer or assignment executed by Mr. and Mrs. *Barnett*, on the 7th of *July*, 1855, and the produce paid on their joint receipt. Out of this, a sum of 500*l.* was invested upon the trusts of the settlement, and Mr. *Barnett* applied the residue to his own use.

The

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The Plaintiff, by this suit, insisted that the post-nuptial settlement was void as against creditors, and that Mr. *Barnett* had reduced the fund into possession. The bill prayed that the settlement might be set aside as fraudulent against the creditors, and that the 500*l.* might be applied in payment of Mr. *Barnett's* debts.

Mrs. *Barnett*, and the trustees of the settlement, by their answer, resisted this, on the ground, first, that there had been a parol antenuptial agreement to settle the property; secondly, that the husband had not and could not reduce this property into possession without the certificates, and therefore that the wife was entitled to an equity to a settlement; and, thirdly, they insisted, that this was a collusive proceeding between the Plaintiff and Mr. *Barnett*, in order to defeat the settlement for the benefit of Mr. *Barnett*.

Mrs. *Barnett*, in her affidavit, stated, that before the marriage, Mr. *Barnett* agreed with her, and also with her father, that all her property should be settled upon her, and that her father gave his consent to her marriage upon that condition, for she heard her father tell Mr. *Barnett*, that he would not consent to her marriage unless her property was settled upon her. That Mr. *Barnett* promised her father that it should be settled upon her; but he induced her to marry him without the knowledge of her father or family, upon the distinct promise and understanding, however, that her property should be brought into settlement. That a few days before the marriage took place, she and Mr. *Barnett* went to a solicitor to have a settlement prepared of the stock, but he could not get it ready in time for the wedding; and when she came away, Mr. *Barnett* stated to her, that her marriage with him would make no difference, and that the settlement would be equally good

if

if made after the marriage, and accordingly no settlement was made until afterwards.

It appeared, also, from her statement, that her husband had failed to support her, and had treated her with great brutality, and that he had obliged her to live separate and to support herself.

Mrs. *Barnett's* father, in his affidavit, stated as follows:—In a conversation with Mr. *Barnett* before the marriage, in relation to the stock, I said that it must be settled upon my daughter, with the exception of about 100*l.*, which, if he wanted, he might have. To which Mr. *Barnett* replied, that he would settle the whole of it upon her; and upon this express condition (namely, that he would settle my daughter's money upon her), I gave my consent to the marriage of *Barnett* with my daughter.

This antenuptial promise was further corroborated by Mrs. *Barnett's* sisters.

As to the formality necessary in the case of a transfer of the railway stock, the treasurer of the railway company stated, that before a transfer of stock could be "registered in the books of the company, it was absolutely essential that the certificate relating thereto should be delivered up by the transferor thereof, and be deposited in the office of the company, when a new certificate is issued to and delivered to the transferee thereof." He stated, also, that this had been done in the present instance.

Mr. *R. Palmer* and Mr. *J. Sidney Smith*, for the Plaintiff. There was no agreement in writing prior to the marriage, and by the Statute of Frauds, 29 *Car.* 2, c. 3,

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c. 3, s. 4, it is enacted, that no action shall be brought to charge any person, upon any agreement made upon consideration of marriage, unless the agreement shall be in writing and signed by the party to be charged therewith. The parol agreement was, therefore, void, and the subsequent settlement founded on it was merely voluntary, and void as against the husband's creditors, under the statute of 13 *Eliz.* c. 5; *Randall* v. *Morgan* (*a*); for it was made by him when in a state of insolvency. Secondly, the wife has no equity to a settlement out of the fund, because the legal interest in it vested in the husband on his marriage, *jure mariti*; *Fitzer* v. *Fitzer* (*b*); and it has been reduced into possession. It is not an equitable interest, as in *Sturges* v. *Champneys* (*c*), and the principle does not apply to a legal estate or interest, or to property which vests in a husband upon his marriage; *Hill* v. *Edmonds* (*d*).

Mr. *Lloyd* and Mr. *Langworthy*, for Mrs. *Barnett*. There was a positive promise before the marriage to settle this property, and this case is taken out of the statute by the subsequent settlement, made in pursuance of the previous parol agreement, and the husband was not bound to set up the Statute of Frauds. What Lord *Thurlow* said in *Dundas* v. *Dutens* (*e*), is strictly applicable to this case. He observes, "If the husband made an agreement that he would settle, and then, in fraud of that agreement, got married, would not he be bound by it? I thought there was a case in point for that. What the settlement might be, if made upon himself after marriage, is another question. But in Eq. Cas. Ab., where there was an agreement before marriage,

(*a*) 12 *Ves.* 67.
(*b*) 2 *Atk.* 511.
(*c*) 5 *Myl. & Cr.* 97.
(*d*) 5 *De Gex & Sm.* 603.
(*e*) 1 *Ves. jun.* 199.

marriage, and the father drew the man in, and was privy to his having married without any execution, and then refused to execute, relief was given. If in this case there was an agreement before marriage, and afterwards he drew her in to be married, and then refused to perform it, it appears to me to be that kind of fraud, against which this Court will relieve. If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner; but is there any case, where in the settlement the parties recite an agreement before marriage, in which it has been considered as within the statute?"

Secondly, the statute does not apply to a case of fraud. On these two points they cited *Hammersley* v. *De Biel* (*a*); *Luders* v. *Anstey* (*b*); *Lassence* v. *Tierney* (*c*); *Surcome* v. *Pinniger* (*d*); *Jorden* v. *Money* (*e*); *Dundas* v. *Dutens* (*f*); *Montacute* v. *Maxwell* (*g*); *Ryland* v. *Smith* (*h*).

Thirdly, the property was not of such a nature as to be capable of being taken in execution under the 1 & 2 *Vict.* c. 110, s. 14, for it was not standing in the husband's name, in his own right, or in the name of any other person in trust for him (*i*). His wife was not a trustee for her husband, for if she had survived him, the stock, if remaining in her name, would have belonged to her by survivorship.

Fourthly,

(*a*) 12 *Cl. & Fin.* 45, and 3 *Beav.* 469.
(*b*) 4 *Ves.* 501.
(*c*) 1 *Mac. & G.* 551, and 2 *Hall & Twells*, 115.
(*d*) 3 *De G., M. & G.* 571.
(*e*) 5 *H. L. Cas.* 185, and 15 *Beav.* 372.
(*f*) 1 *Ves. jun.* 196, and 2 *Cox*, 235.
(*g*) 1 *P. W.* 618, and 1 *Strange*, 236.
(*h*) 1 *Myl. & Cr.* 53.
(*i*) But see 3 & 4 *Vict.* c. 82, s. 1.

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Fourthly, the wife is entitled to a settlement out of the fund, which cannot be got at except through the assistance of a Court of Equity.

Mr. *Heming* for Mr. *Barnett*.

March 27. *The* MASTER *of the* ROLLS.

This is a very unfortunate case, but I can only come to one conclusion upon it. I think the Plaintiff is entitled to a decree.

The state of the case is this:—The statute expressly states, that a parol agreement, made upon consideration of marriage, shall not, in fact, constitute a valid agreement, and that no action shall be brought to charge any person on it. If it had not been for the positive words of the statute, it is probable, having reference to the doctrine of this Court upon matters of part performance, that it would have held that the marriage was a part performance of the contract.

The words of the statute are "that no action shall be brought whereby to charge any person upon any agreement made upon consideration after marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith." But for that statute, I apprehend, having regard to the doctrine of a Court of Equity with respect to part performance, a parol agreement followed by marriage would have been treated as a part performance. Certainly it is quite as much a part performance as a parol agreement for the sale of lands, where the whole of the purchase-money is paid, but here it is more, the whole of the consideration is paid and the purchaser

purchaser has been put into possession. The words of the statute are, however, precise upon the point.

I wish to guard against two classes of cases, which appear to me to have been confounded with this. This case cannot be put higher than this: that there was a promise made by the husband to the father or agent of the wife, that he would settle all her property upon her. Now, in the first place, the case of *Money* v. *Jordan*, and the other similar cases which were referred to, do not apply to such a case. In those cases the Court held, upon a principle not peculiar to this Court, but which this Court enforces very thoroughly, that if a man make a statement to another person, for the purpose of inducing that person to do an act, and the act is done on the faith of such representation, he shall be held to his word and be compelled to make good that statement. In *Neville* v. *Wilkinson* (*a*), a gentleman who was indebted to his solicitor, and being about to marry, begged of the solicitor to understate to the lady's father the amount due to him, because it might prevent his marriage. Upon this, the solicitor misrepresented the amount of his debt and stated that the intended husband owed him nothing more than what he stated. The Court, after the marriage, restrained the creditor from enforcing payment against the husband, of the demand he had concealed, because he had induced the parties, upon the faith of the representation, to enter into the marriage. No Judge has felt more disposed to enforce or uphold than I have the principle of those cases, which is not affected by the Statute of Frauds, but which rests on a different equity, which lies at the root of and is the essence of equity, viz., the enforcing of truth in all dealings. But

(*a*) 1 *Bro. C. C.* 543.

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But these cases do not apply to this, which is a mere arrangement between the intended husband and intended wife prior to the marriage, and which, but for the statute, and as between them, this Court would probably have enforced. I need not, therefore, advert to those cases, like *De Biel* v. *Thomson* (*a*), where the father or a friend of the lady, upon her marriage, enters into a contract with the husband, that if the husband will do some act, the father or friend of the lady will do some act for the benefit of the husband. Assuming that in *De Biel* v. *Thomson* (*b*) there was no signature on the part of Mr. *Thomson*, the lady's father, still there was a parol agreement by which he agreed, if his daughter married Baron *De Biel*, to leave her an additional 10,000*l.*, and this he agreed to do in consideration of the Baron and his brother settling 500*l.* a year on Miss *Thomson*. The marriage took place, and the 500*l.* was settled upon her, and that was held to be part performance of the parol agreement between these two persons, which, accordingly, the Court afterwards enforced. So also in the other cases referred to, where third parties have entered into a contract for the benefit of the lady. That was the case of *Surcome* v. *Pinniger* (*c*), where a father, shortly before the marriage of his daughter, told the intended husband that he meant to give certain leasehold property to them upon their marriage. Upon the faith of that the husband enters into the marriage. After the marriage the father gave up possession of the property to the husband, and he directed the tenants to pay the rents to the husband, and he gave him the title deeds, and the husband expended a considerable sum of money in the repairs of the property, and then the father died. The

(*a*) 3 *Beav.* 496.
(*b*) 3 *Beav.* 469, and 12 *Cl. & Fin.* 45.
(*c*) 3 *De G., M. & G.* 571.

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The question was, whether the leaseholds belonged to the father's estate, and it was held, that there was a parol agreement between the father and the intended husband, which had been afterwards ratified between them. The father, however, did not, in that case, enter into the contract upon the consideration of the marriage; he had nothing to do with the marriage personally, which is the meaning of the statute upon that subject, but there was a parol agreement entered into between him and the husband, which was carried into effect afterwards. I may, therefore, for the present purpose, omit all consideration of that class of cases.

Then comes the other class of cases as *Dundas* v. *Dutens*, which, if it is to be followed, is a strong authority in favour of the Defendants in this case. In *Dundas* v. *Dutens* (*a*) there seems to have been a parol agreement between the husband and wife, which was afterwards carried into effect, and the Court would not allow the creditors to disturb it. There may have been other circumstances in that case, but I am at a loss to understand how that decision is to stand with the case of *Randall* v. *Morgan* (*b*), which is express on this point, or with *Lassence* v. *Tierney* (*c*), in which Lord *Cottenham* expressly guards against the very matter in question: the observations he makes use of referring to *De Biel* v. *Thomson* are these:—"I was very glad to find, that in giving judgment in that case, I guarded myself, as I supposed, against such a use being made of the case, for I then said, that a parol agreement followed only by marriage is not to be carried into effect, marriage being no part performance of the contract."

Mr.

(*a*) 1 *Ves. jun.* 199.
(*b*) 12 *Ves.* 67.
(*c*) 1 *Mac. & G.* 551, and 2 *Hall & T.* 115.

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Mr. *Lloyd*, ingeniously enough, but I think somewhat fallaciously, attempted to make out, that the settlement here was a part performance, but it is clear, that the settlement itself was a complete performance, if it was anything; and the cases of part performance do not apply, as I have already observed, to cases between mere husband and wife; but where a third party, on behalf of the wife, enters into a contract with the intended husband, to do something, which is performed by the husband, the Court enforces the contract against the person who entered into the parol contract for the benefit of the lady.

Another case, which lays down the same principle, is the Earl of *Glengal* v. *Barnard* (*a*): it merely confirms the other cases upon this subject.

I therefore hold, that where a man enters into a parol agreement with his intended wife, and nothing follows but the marriage, the marriage cannot be treated as part performance of the parol contract; and that the carrying into effect the parol contract after the marriage by a deed amounts to no more than a voluntary settlement.

In the next place, it is said, that the husband committed a fraud, by telling this lady, that a settlement after marriage was just as good as a settlement before marriage. I think I cannot act upon the supposed ignorance of the law. She had employed a solicitor, and must be held to have known the contrary, or, if not, to have trusted entirely to the husband's honor, as in the case of the Countess in *Montague* v. *Maxwell* (*b*).

It

(*a*) 1 *Keen*, 769.

(*b*) 1 *Strange*, 235, and 1 *P. Wms.* 618.

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It was next observed, that it was not imperative on the husband to plead the Statute of Frauds, and that if a suit had been instituted, and the objection had not been raised, a decree would have been made. No doubt it would not have been obligatory on the husband to have pleaded the statute, but it is unnecessary for me to consider what would be the effect of that upon his creditors, for no such case arises before me. This is certain, that the husband himself is bound by this arrangement, and that he cannot raise any question, as to the validity of the settlement, but whether the creditors, who had claims against him previous to the settlement, can, is a totally different question.

The next argument was this:—that it is not fraudulent within the statute of 13 *Eliz.* c. 5. But the words of that statute are really decisive upon the subject, for it enacts, that every instrument, by which creditors are delayed, hindered or defrauded, shall be utterly void and frustrate to all intents and purposes; and the Courts have held, that where a deed is executed without consideration, that the case comes within and is a fraud within the words of the statute. I have before stated that the word "fraudulent" is frequently used in a sense which it does not properly bear, but at all events, the cases hold this:—that all deeds executed for voluntary consideration are void against creditors, and as I have already stated, there was, in my opinion, no consideration for this settlement.

It is then suggested, that this fund was never reduced into possession, and that the husband could not have obtained possession of it. That does not appear to me to be the result of the evidence; on the contrary, I should infer from the evidence, that if the mortgagee had positively refused, upon payment of 260*l.*, to produce

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duce the certificate, then, upon proof of that fact, and he not claiming anything more than his mortgage money, the railway company would have allowed a transfer to have been made. I cannot say that this appears distinctly upon the evidence, but I should wish to know how the company proceeds in the cases of lost certificates: they do not, I presume, always require a bill to be filed in Chancery. I presume, that in all cases where the certificate is not produced, they require reasonable evidence, to satisfy them, that the person proposing to transfer is the real owner of the stock. If that had been established, it would not have been necessary to come to this Court for that purpose. In addition to that fact, I have evidence that the money was actually paid to the husband, for it was paid to him, upon the joint receipt of the husband and wife, which is nothing more than a payment to the husband, and amounts to no payment at all to the wife. It was then divided, and a certain portion was invested in stock.

I regret very much, in this state of circumstances, that I cannot hold that this is a valid and subsisting instrument, but upon the case before me and upon the authorities which have been cited to me, I am of opinion, that the Plaintiff is entitled to a declaration that the deed is void as against prior creditors.

NOTE.—This case has been heard, upon appeal, by the *Lord Chancellor*, and now stands for judgment. *November*, 1857.

ATTORNEY-GENERAL *v.* LOVE.

Feb. 14.

An estate was devoted to the reparation of the parish church of *S. N.* Part of this parish was, under the 6 & 7 *Vict.* c. 67, formed into a new district, *St. M.* Held, that the church of *St. M.* was not entitled to an apportioned part of the income of the charity.

FROM time immemorial, about six acres, called the "*Palatine* Estate," had been held by trustees for the parish of *St. Mary, Stoke Newington*; and, so far as appeared, the rents were applicable "*for and towards the reparations, ornaments and other necessary occasions of the parish church of Stoke Newington:*" and they were directed, by a decree of charitable uses made in 1638, to be so applied. The average gross income was now about 338*l.*, and the net income about 237*l.*

In *October*, 1848, her Majesty in Council, on the recommendation of the Ecclesiastical Commissioners for *England*, issued an order for incorporating about one-fifth part of the parish of *St. Mary's, Stoke Newington*, with some outlying portions of the parish of *Hornsey*, into a district to be called the District of *St. Matthias, Stoke Newington*, under the provisions of the Act 6 & 7 *Vict.* c. 37.

A large church was erected for the district, at an expense of 8,000*l.*, raised principally by subscription, which was approved of by the commissioners, and was duly consecrated in *June*, 1853; thereupon, by virtue of the provisions of the 6 & 7 *Vict.* c. 37, such district became a new parish for ecclesiastical purposes, and such new church thereupon became the church of such new parish accordingly.

The whole of the income of the charity property had been heretofore devoted to the use of the church of *St.*

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Mary's, Stoke Newington, and had been applied in the repairs, in payment of the salaries of the clerk, organist, sexton and pew-openers, and in insurance and cleaning the organ and clock. The whole of these expenses amounted to about 267*l.* per annum. It appeared also, that a new parish church was being built at *St. Mary's, Stoke Newington*, on a different site, and to which it was contemplated applying the income of the charity property.

The expenses of reparations, ornamenting the church of *St. Matthias*, and of the lighting, warming, salaries of organist, sexton and clerk, cleaning, and other incidental expenses, amounted to about 300*l.* per annum; and as no funds existed for the payment of these expenses, and no power to make a rate, and the sittings in the church were all free, the amount had to be raised by voluntary contributions and collections.

By a decree in this cause, made in 1855, it was ordered, that a scheme should be settled, for the future regulation of the charity, and the application of the income; and it was ordered, that in settling the scheme regard should be had to the right (if any) of the new parish of *St. Matthias, Stoke Newington*, to participate in the benefit of the charity.

The scheme, as prepared, proposed to pay to the churchwardens of the parish of *St. Mary*, a sum equal to the estimated amount of the "reparations, ornaments and other necessary occasions" of the church, to be applied thereto, and to pay the residue to the churchwardens of *St. Matthias*, to be similarly applied.

To this scheme the parish of *St. Mary* objected, on the ground that the charity was for their exclusive benefit;

nefit; and further, that if it should be held that it was not, then, that the annual expenses would more than exhaust the present income.

The district of *St. Matthias* objected to any preference being given to the mother church, as they considered that the Court had full power to make an apportionment equally between them, according to the particular circumstances of each parish.

The Act of Parliament, under which the new church was built and the district formed, did not expressly give the Court power to make an apportionment of any charitable funds, though such a provision is contained in the other Church Building Acts.

The main question for the decision of the Court, before the scheme could be settled, was, whether the parish of *St. Matthias* had any right to participate in the benefits of the charity. To decide this, the case was adjourned into Court for argument.

Mr. *Terrell*, on behalf of the Attorney-General, said, that residents of the parish of *St. Matthias* being liable to the payment of church rates were equally entitled to the benefit of the charity. He proposed that the church of *St. Matthias* should participate in the charity, but left the question to be discussed between the two parishes.

Mr. *Lloyd*, for the trustees.

Mr. *Selwyn* and Mr. *C. Hall*, for the parish of *St. Mary*.

There has been no division of a parish into two separate

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separate parishes under any of the acts referred to in the 8 & 9 *Vict.* c. 70, s. 1, but merely a formation of outlying portions of two parishes into a district, "for *spiritual* purposes" only, under the 6 & 7 *Vict.* c. 37.

The 8 & 9 *Vict.* c. 70, s. 22, authorizes an apportionment of parish charities where there has been a division into two separate parishes under the acts therein recited, but the 6 & 7 *Vict.* c. 37 is not therein recited. There is therefore no statutory power to apportion this charity, and the 18th sect. of 6 & 7 *Vict.* c. 37, expressly enacts, that "nothing therein contained shall be construed to affect or alter any rights, privileges," &c. of any parish, &c., "except as is therein expressly provided." There exists no jurisdiction authorizing the Court to apportion the charity. It was founded expressly for the repairs, &c. "of the parish church of *Stoke Newington*," no other church but *St. Mary's* fills that character, and the income of the charity estate is, therefore, applicable to no other than the parish church. There is and can only be one parish church; it is indivisible like a particular school, hospital, or almshouse. This is not like a charitable gift of bread for the poor of a parish, in which case all would be entitled to participate, but one for the support of a particular fabric.

The *cy près* doctrine is inapplicable, for the original purpose has not failed, and there is not, nor is there likely to be, any surplus, for the whole income can properly be applied towards the objects specified in the original foundation.

Ex parte The Incumbent, &c. of *Brompton* (*a*); *Attorney-*

(*a*) 5 *De Gex & Sm.* 626.

ney-General v. *Whiteley* (*a*); The *Attorney-General* v. The Earl of *Craven* (*b*), were referred to.

Mr. *C. Brown, contrà.*

Under the terms of this charitable gift, so far as appears from the documents now in existence, the parish of *St. Matthias* is entitled to an apportionment of the fund *pro rata* with the parish of *St. Mary*. The intention was to assist in furnishing church accommodation to the then existing parish of *St. Mary*, and to every portion of it, and by the severance of a part of it, that part is not thereby deprived of its existing right to participate in the charity. The 6 & 7 *Vict.* c. 37, s. 15, declares, that when a district church has been built and consecrated, the district "shall be deemed to be a new parish for ecclesiastical purposes." This then is a new parish, and the church is the parish church of the portion severed, the same as *St. Mary's* is of the remainder, and the former is as much an object of the founder's bounty as the latter. The fact, that a portion of *Hornsey* parish has been taken to form the new parliamentary district, is no objection to the claims of that portion of it which was originally part of *St. Mary's*. The rights of *St. Matthias* cannot be defeated altogether, because some other object may, without injustice to the parish of *St. Mary*, participate in the benefits apportioned to *St. Matthias*. It appears that a new church of *St. Mary* is now being built on a different site, and to which it is proposed to transfer the endowment; if so, the principle is admitted, that the charity is not attached to a church on a particular site. In *Attorney-General* v. *Grant* (*c*), the parishioners of the *Liberty* of the *Rolls*, which

(*a*) 11 *Ves.* 241.
(*b*) Unreported on this point.
(*c*) 1 . *Wms.* 669.

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which is within the parish of *St. Dunstan*, but had distinct overseers and officers for the parish, claimed a proportion of the charities given to *St. Dunstan's* parish. Lord *Parker* said, "before the statute of the 43 *Eliz.* there were no such officers as overseers of the poor, since which, as that part of the parish of *St. Dunstan* which lies in *London* has had distinct overseers, made distinct rates and maintain their poor separately, this ranks them as a distinct parish," . . . . . "as to all such gifts, grants or devises *before* the statute of 43 *Eliz.*, as, at that time, the parish and liberty were not separated by distinct officers and overseers of the poor, the *Liberty* of the *Rolls*, being then part of the parish, shall have a proportion thereof." The legislature by the 18 & 19 *Vict.* c. 124, s. 10, seems, by the use of the expression "parish or ecclesiastical district," to assume this right, but the section does not apply to charities whose income is above 30*l.* a-year.

The purposes to which this income has heretofore been applied are not within the terms of the foundation, such as the salaries of the clerk, organist, &c. &c.

The MASTER *of the* ROLLS, stopping the reply, said, I think no question can arise upon the fact that the adjoining fabric is substituted for the present fabric as the parish church. The parish church is one indivisible thing, and if the present parish church should be pulled down and a new one built on the spot, or if it were to stand or be built partially on the spot where it stands or by the side of it, so long as it remains the parish church, it would still be the fabric intended by the donor of the charity, assuming that he gave the lands for the support of the parish church. The fact of its being altered, by occasional repairs and alterations or by rebuilding, would not, in any respect, prevent it from filling

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filling the character of being the parish church or disentitle it to receive the benefit of a charity given for the support of the fabric of the parish church.

I think the right of apportionment depends upon two questions, first, whether the inhabitants of that portion of the parish of *St. Matthias*, which formed a portion of the parish of *St. Mary, Stoke Newington*, are objects of the charity; and secondly, if they be not, whether, by the statute, any apportionment has been directed between this parish and that portion of the parish of *St. Matthias* which has been carved out of the parish of *St. Mary, Stoke Newington*.

The first question depends upon this:—whether the inhabitants of the parish of *St. Mary, Stoke Newington*, are direct and immediate objects of this charity, or whether they are only to be mediately benefited, by means and through the instrumentality of the support of a particular fabric in the parish.

I am of opinion that this charity, for the support of the fabric of the parish church, is perfectly good and valid, and although all the inhabitants of the parish may have a right to the benefit of the charity, by attending the church so supported and having seats in it, yet the charity itself is given for the "reparation, ornament and other necessary occasions of the parish church." That is the object of this charity, and the cases cited, where the object was to benefit the inhabitants of the parish directly and immediately, do not apply to this case; such, for instance, as gifts for the support of the poor, either by food, clothing or money payments, in which case, the poor of the parish

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parish within the whole district are the objects originally intended.

I treat it as analogous to the case of a donor having founded a charity for building, repairing, sustaining and maintaining the fabric of a particular school within a particular parish; there, the fact of another district being carved out of the parish by Act of Parliament, and a new school being erected for that new district, would not, in my opinion, entitle any person to claim, on behalf of the fabric of the new school, that charity which was devoted to the sustentation of the fabric of the old school. Consequently the object of the charity here was the support of the parish church of *St. Mary, Stoke Newington.*

The Acts of Parliament cannot apply to this case, because the 8 & 9 *Vict.* c. 70, is expressly limited to the Acts recited in it, and it omits the Act in question, *viz.*, the 6 & 7 *Vict.* c. 37, from its consideration. This Act, therefore, does not give the Court of Chancery any power or liberty to make an apportionment in this case. Neither does the subsequent Act of the 18 & 19 *Vict.* c. 124, s. 10 apply, because that clause is expressly confined to cases of charity, smaller in amount than that which the Court has to deal with on the present occasion. Therefore I am of opinion that they do not apply.

With respect to the *cy près* doctrine, it is true, that if a charity fails or there is more than sufficient for the objects of the charity, this Court will apply the surplus for purposes as nearly analogous as it can to those of the original foundation. I express no opinion as to what those would be, but the Court must first see that there is a surplus.

I do

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I do not know whether anything is brought before me except the question of right. If the question were before me, subject to what I might hear in reply, I should think it extremely doubtful whether the salaries to particular persons could be brought within the terms of the original foundation, which are these, "towards the reparations, ornaments, and other necessary occasions of the parish church of *Stoke Newington*."

It was arranged that four new trustees should be appointed, and that the question as to surplus, if any, should be adjourned into Chambers.

The MASTER *of the* ROLLS afterwards added,—What I mean is, that the *cy près* doctrine would apply if there should be a fund accumulating, by reason of the excess of the income beyond the objects to which it was originally devoted; but in all charities for repairs, it is to be observed, that they are of a very uncertain character; one year they may be very large and another very small, and I should not consider the doctrine of *cy près* applicable in every case of a surplus.

THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS, AND THE BATTERSEA PARK COMMISSIONERS *v.* HARBY.

March 9, 11.

A sum was due from the Plaintiffs to a contractor, which he had mortgaged successively to *A. B.* and *C. D.* and others. By arrangement between the mortgagees, the fund was assigned to *C. D.*, upon trust to distribute it amongst them. At the date of the assignment, *C. D.* had a charge on *A. B.*'s mortgage, but which was not noticed in the assignment. *A. B.* afterwards assigned his mortgage to *E. F.*, who had no notice of *C. D.*'s charge on it. Held, that *C. D.* was to be postponed to *E. F.* in consequence of *E. F.*'s neglect to have his claim noticed in the trust deed.

THIS was an interpleader suit.

The Plaintiffs employed *Thomas Earle*, a contractor, to execute various works connected with the *Chelsea* suspension bridge and *Battersea* park, in respect of which a sum of 7,255*l.* ultimately became due to him. *Earle* had created several incumbrances on the fund, and they stood in the following order of priorities:—

1. *Meyrick*	£1,300
2. *Carr*	2,508
3. *Richardson*	1,500
4. *Harby*	2,250

Notices of these incumbrances had been given to the Commissioners.

For the purpose of conveniently distributing this fund, an agreement was entered into between these four parties, dated the 28th of *July*, 1855, by which it was agreed that the whole fund should be paid to *Carr*, and that he should hold it in trust, in the first place, to pay 1,300*l.* to *Meyrick*, and then retain his own charge of 2,508*l.* and interest, and then to pay *Richardson* and *Harby*.

So far there was no dispute, but a question arose as to

to the priorities of two incumbrances created by *Meyrick* upon his 1,300*l.*, under the following circumstances:—

In *March*, 1855, *Carr* had advanced 400*l.* to *Meyrick* on the security of the 1,300*l.*; no notice of this charge was given to the Plaintiffs, and no notice was taken of it in the deed of the 28th of *July*, 1855.

On the 7th of *February*, 1856, *Meyrick*, for valuable consideration, assigned the 1,300*l.* to *Merrett*, to secure 1,596*l.* *Merrett*, who had no notice of *Carr's* prior charge on the 1,300*l.*, immediately gave notice to the Plaintiffs and to *Carr* of the assignment to him.

The question was, whether *Carr* was entitled to be paid the 400*l.* out of the 1,300*l.* in priority of *Merrett*.

Mr. *Hanson*, for the Plaintiffs who had no interest.

Mr. *R. Palmer*, and Mr. *Hobhouse*, for *Carr*, *Richardson* and *Harby*.

Mr. *C. Browne*, for *Merrett*.

Mr. *Goldsmid*, Mr. *H. Cox* and Mr. *Roxburgh*, for other parties.

Cockell v. *Taylor* (*a*); *Mackreth* v. *Symmons* (*b*); *Priddy* v. *Rose* (*c*), were cited.

The MASTER *of the* ROLLS.

That which is pressing me against the claim of Mr. *Carr* is this:—Whether the Commissioners or Mr. *Carr* were

(*a*) 15 *Beav.* 103.
(*b*) 15 *Ves.* 329.
(*c*) 3 *Mer.* 86.

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were to be treated as the trustees of the fund; and if *Carr* had been a stranger, whether notice ought not to have been given? It has been justly observed, that a trustee cannot give notice to himself; but does not that very impossibility of giving notice to himself impose upon him the necessity of specifying in the deed itself, in which he declares himself a trustee, the claims which he has individually on the fund which he holds in trust.

Mr. *Hobhouse*, in reply.

The MASTER *of the* ROLLS. I will reserve the question.

March 11. *The* MASTER *of the* ROLLS.

The question is, whether this sum of 1,300*l.* is liable, in the first place, to pay Mr. *Carr* the 400*l.*, or whether that charge ought to be postponed to the claim of Mr. *Merrett*. I think it is necessary to consider, who may be called the legal hand or trustee of the fund. In the first instance, undoubtedly, the Commissioners of the Public Works were so; and it would follow, of course, that notice should be given to them of the incumbrances which would then rank according to the priority of the notices given to the Plaintiffs. But as soon as, by agreement, the money was to be paid to a new person, to be distributed by him between the incumbrancers, then it appears to me that a new principle arose, and that if any of those incumbrancers had sub-incumbered their charges, then Mr. *Carr* was the person to whom notice ought to have been given of such sub-incumbrances, and that they would rank according

according to the priorities of their notices. But then this difficulty arises with respect to Mr. *Carr*:—Mr. *Carr*, in the view which I take of the matter, being in a situation of *quasi* trustee, or the person to whom notices ought to have been given, Mr. *Merrett* did properly give notice to him of his charge; but it was argued, and very forcibly and properly, that Mr. *Carr* could not give a notice to himself, as a trustee, and I hold that that would be so.

But I think, that Mr. *Carr's* claim must be postponed, for this reason: he had made the advance prior to the time when he was appointed to receive the fund, and, having this claim of 400*l.*, he, upon that occasion, not only allows the agreement to be drawn, stating that the first charge upon the fund is the 1,300*l.* to Mr. *Meyrick*, but he actually executed it. This instrument is similar to and in the character of a declaration of trust by the trustee, that the first charge on the fund was the 1,300*l.* due to Mr. *Meyrick*. Now, after that, I think that he cannot with propriety say, that the first charge on the fund was, in point of fact, the 400*l.* due to himself, and that the charge to Mr. *Meyrick* is subject to the 400*l.*; or, in other words, he cannot assert that he had a charge on the 1,300*l.* existing previously: although he could give no notice of it to himself, being a trustee, it was, on that account, incumbent on him to specify in the deed that there was such an incumbrance. By reason of that omission, he enabled Mr. *Merrett* to treat the deed as a declaration of trust by Mr. *Carr*, that the first incumbrance belonged to Mr. *Meyrick*, clear, at all events, of any charge in favour of the trustee in respect of it. I think that upon that principle Mr. *Carr's* claim must be postponed with respect to the 400*l.*, and that Mr. *Merrett* is entitled to the first charge on the 1,300*l.*

CRANLEY *v.* DIXON.

March 9, 10.

A testator bequeathed life annuities payable from his death, and he directed a fund to be set apart to secure them. He also gave one-half of the residue of his personal estate to his widow absolutely, and the other half to other parties for life, with remainders over. By a codicil, he postponed the payment of the annuities until the death of the wife. Held, first, that she did not, by implication, take the intermediate dividends of the fund set apart to answer the annuities; and, secondly, that such dividends as between the tenants for life and those in remainder, constituted income and not *corpus*.

BY his will dated in 1847, the testator, after sundry devises and bequests, gave a number of life annuities, amounting in the whole to 570*l.*, to his servants, payable quarterly from his death; and he directed his executors, out of his personal estate, to place in the £3 per Cents. sufficient to answer all the annuities, and upon the decease of each of the annuitants, so much of the principal of the funds as should not be required for the continuing annuities should sink into the residue of his personal estate. And he bequeathed the residue of his personal estate, as to two equal fourth parts thereof, to his wife, for her absolute use; and he bequeathed to trustees upon trust, one other fourth part thereof for his sister *Sarah* for life, with remainder to her children; and he bequeathed the remaining one-fourth of his residuary estate to trustees upon trusts for his sister *Alice* for life, with remainder to her children. The testator appointed his wife and two others executors.

In 1849, the testator made a codicil, whereby, after reciting the bequest of annuities to his domestic servants, he directed that the payment of the annuities should be postponed until the decease of the survivor of himself and his wife; and he thereby revoked so much of his said will as was necessary to be revoked for the purpose of carrying those his intentions into execution.

The testator died in 1855, his wife survived him, and was still living.

A question

A question arose as to the rights of the parties to the income of the fund set apart to answer the annuities, and which accrued between the death of the testator and that of his widow.

Mr. *Lloyd* and Mr. *G. L. Russell*, for the Plaintiffs, some of the annuitants.

Mr. *Shebbeare*, for the remaining annuitants.

Mr. *Cecil Russell*, for the widow. The direction in the codicil, by which the payment of the annuities was postponed until the death of the testator's wife, constituted a gift, by implication, to her for life, of the income of the fund set apart, by his directions, to answer the annuities. There could have been no other intention, on the part of the testator, for postponing the payment during the life of his widow, than to give her an additional benefit of the income in the meantime. This construction is supported by authority.

In *Blackwell* v. *Bull* (*a*), the testator devised in trust all his property for the following purpose, that is to say, that *at his wife's decease*, the whole of his property, of whatever nature or description, as well freehold as personal, should be equally divided amongst his children, *J.*, *R.*, *W.*, *M.* and *C.* One of these children was the heir at law, and Lord *Langdale* held that the widow took a life interest in both the real and personal estates.

In *Cockshott* v. *Cockshott* (*b*), a testator, after giving 1,200*l.* to his four daughters, after the death of his wife, or so long as she continued his widow, further willed,

(*a*) 1 *Keen*, 176. (*b*) 2 *Collyer*, 432.

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willed, that his estates at *A.* and *B.* should be given to his four sons, as tenants in common, but not to be put in possession of the said estates, so long as his wife *M.* kept his widow. He then gave various personal property to his four sons, at the death or second marriage of his wife, and gave the tenant right of his farm at *C.* to two sons, at the death of his wife, or when she ceased to be his widow; and in case his wife gave up the farm at *C.*, he willed that his said sons, from and out of *A.* and *B.* estates, should pay her 25*l.* a year, so long as she continued his widow. The Vice-Chancellor thought, notwithstanding the last clause, that the expressions in the will indicated an intention that the widow was to take during her widowhood.

Mr. *Bedwell*, for the testator's sister *Sarah*, who was tenant for life, argued, that the income was not disposed of, that it would not fall into the *corpus*, but that it constituted income.

Mr. *Holroyd*, for the testator's sister *Alice*. In this case there is a residuary bequest, which carries everything, unless there be an express intention to the contrary. In the cases cited, there would have been an intestacy, unless it had been held that a life estate was given by implication. The testator's intention was, merely to postpone the annuities for the benefit of the residuary legatees generally, and not for that of the widow alone, for whom a distinct provision was made by the will.

Secondly, the income of the fund set apart does not form *corpus*, but belongs to the tenant for life. In *Crawley* v. *Crawley* (*a*), a testatrix gave legacies to certain parties if they attained twenty-one, and her residuary

(*a*) 7 *Sims.* 427.

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residuary estate to parties for life, with remainders over. The Vice-Chancellor held, that the income of the sums set apart to answer the contingent legacies, until the happening of the contingency, was part of the income of the tenant for life of the residue. The same doctrine was adopted in *Morgan* v. *Morgan* (*a*).

Mr. *Giffard*, for the children of the tenant for life. There is a positive distinct gift of all the residue; this destroys the operation of the doctrine of implication.

Secondly, the intermediate dividends are in the nature of terminable annuities, which cease with the death of the widow. The doctrine of *Howe* v. Lord *Dartmouth* (*b*) is therefore applicable, as between the tenants for life and those in remainder, and they therefore constitute capital.

Mr. *Cotton*, for trustees.

Mr. *Karslake*, for the committee of a lunatic.

The MASTER *of the* ROLLS reserved judgment.

The MASTER *of the* ROLLS. *March* 10.

In this case the question turns upon the construction of a will. Generally speaking it is undoubtedly true, that an estate or a bequest given to a person, after the death of another particular person, gives that particular person, after whose death the gift is to take effect, an estate by implication in all those cases, where, by law, and

(*a*) 4 *De Gex & Sm.* 164. (*b*) 7 *Ves.* 137.

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and but for the postponement of the gift, the person in whose favour the gift is made would have taken some interest in the gift itself. Such as, for instance, if a man devises an estate to his heir at law, after the death of *A.*: that is a case in which the implication is supposed to arise, because, undoubtedly, if the heir were not disinherited during that time, he could not be postponed until after the death of another person; it is therefore assumed, that that person was meant to take an interest in the estate. The same principle applies to gifts of personalty; but I am not aware that this principle has ever been extended beyond cases of that description. Undoubtedly the case of *Blackwell* v. *Bull* (*a*), and the case of *Roe* dem. *Bendale* v. *Summerset* (*b*), seem to go beyond that, and to lead to a different conclusion; but they involve a great many niceties, which I do not think it necessary to go into on the present occasion, because, on the construction of the will and codicil in this case, I am convinced, that the arguments in favour of this being part of the residue are well founded, and that it is, in fact, merely part of the residue itself.

What the testator does is this:—By his will, he gives certain annuities, to take effect immediately upon his death. By his codicil, he directs that these annuities should be postponed until the death of the survivor of himself and his wife, and he revokes as much of his will as is necessary for the purpose of carrying that intention into effect. If it be observed what the effect under his will, taken alone, would be, I think it is clear what the effect of the codicil is. Under his will, assuming these annuities to amount to about 600*l.* a year, there would have been so much stock set apart as would

(*a*) 1 *Keen*, 176. (*b*) 5 *Burr.* 2608.

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would have produced 600*l.* a year, and the income would have been paid to the annuitants. By the codicil, he directs those payments to be postponed until after the death of his wife. This capital, in the meantime, is producing interest, which is to be applied like the rest of his estate; that is to say, the capital, which would have produced the 600*l.* a year, is to be treated as so much of the residue, and the income of that is to be distributed amongst the residuary legatees, according to their shares and proportions. The result of this would be, that his wife would get two-fourths of this income during her lifetime, (that satisfies the object and the intention of the testator, as in the other cases, where it is assumed that the testator intended, that the wife should take a benefit by postponing the payment of the annuity during her life,) and the remaining residuary legatees will each get one-fourth. In my opinion, that disposes of the whole question; and it is not necessary to go into a question, which, I think, does not arise, as to the principle of *Howe* v. Lord *Dartmouth*, supposing the income to be a terminable payment, which ought to be capitalized, and the income only paid to the tenants for life. That is not the view I take of this case at all. I assume that 20,000*l.* is necessary for the purpose of providing for these annuities, and that it had been set apart for that purpose; as the annuities will not be payable until after the death of the wife, the interest of the 20,000*l.* will, in the meantime, be divided, as income of the residue is, into fourths; two-fourths will be paid to the widow, one-fourth to the sister for life, and the other one-fourth to the other sister for life.

If all the annuitants survive the widow, they will all get their annuities at her death. If any of them should die before that period, then the amount of capital sufficient to answer that annuity will be thereby released and

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and become divisible as residue, and so it will go on until the death of the last annuitant.

That is the construction which, in my opinion, the will properly bears.

NOTE.—See *Aspinall* v. *Petvin*, 1 *Sim. & S.* 544; *Henderson* v. *Constable*, 5 *Beav.* 297; *Hudleston* v. *Gouldsbury*, 10 *Beav.* 547; *Attwater* v. *Attwater*, 18 *Beav.* 330; *Swan* v. *Holmes*, 19 *Beav.* 471.

CROSBIE *v.* GUION.

March 11, 26.

In 1851, *A.*, *B.* and *C.* agreed to be partners for five years. Six months afterwards, *A.* being in difficulties, it was agreed between *A.*, his creditors, and *B.* and *C.*, that *A.* should retire, and *B.* carry on the business for his own behoof and that of *A.'s* creditors for the period of five years, as agreed on by the articles. 2nd. That *A.* should assign to trustees his separate estate for the benefit of his creditors, and *B.* agreed to appropriate to the said trustees the share of profits in his business that would have accrued to *A.* in the event of the partnership having been continued, less 400*l.* a year to be appropriated to *A.'s* maintenance. *A.* died two months after. Held, that the right of his creditors to a share in the profits thereupon ceased.

BY articles of partnership, dated the 14th of *April*, 1851, and made between *Williams* and *Guion*, of the first part, and *Crook* of the second part, they agreed to carry on partnership for five years.

Crook, at the time, was largely indebted, and, being pressed by his creditors, (*Taylor* and the *Liverpool* Borough Bank,) an agreement was entered into between *Crook*, *Guion*, the Bank and *Taylor*, on the 30th *October*, 1851, whereby "it was agreed, first, that the firm of *Crook* and *Guion* be dissolved on 1st *November* next; that Mr. *Crook* retire and Mr. *Guion* carry on the business, for his own behoof and that of Mr. *Crook's* creditors, for the period of the five years, as agreed on under the articles of copartnery of *Crook* and *Guion;* secondly, that Mr. *Crook* agrees to assign over to trustees, for behoof of his creditors generally, all his present estate, valued about 2,400*l.*; and

and moreover Mr. *Guion* agrees to appropriate to said trustees, the share of profits in his business, that would have accrued to Mr. *Crook* in the event of the copartnery having been continued, less the sum of 400*l.* per annum, to be appropriated to Mr. *Crook* for maintenance, and this until the creditors shall be paid 10*s.* per pound on the amount of the balance of their claims on Mr. *Crook*, after the payment of the proceeds of the assets when realized."

Crook died on the 1st of *December*, 1851; the business was, after the dissolution, carried on by *Guion*.

The bill was filed by the Plaintiffs, on behalf of themselves and all other creditors of *Crook* entitled to the benefit of the agreement of the 30th of *October*, 1851, insisting that, under the agreement, they were entitled to half of the profits of the trade down to the year 1856, when, under the deed of partnership, the partnership would have expired by effluxion of time.

Mr. *R. Palmer* and Mr. *Eddis*, for the Plaintiffs. The creditors are, under the agreement of the 30th of *October*, 1851, entitled to half of the profits of the business carried on by *Guion*, during the residue of the term of five years agreed upon by the partnership deed. The agreement with the creditors cannot be altered by any subsequent act, and the death of *Crook*, who had nothing more to do with the business, cannot alter the existing rights of the creditors. Secondly, the 400*l.* a year is still payable, and the right to it vests in his legal personal representative. It is similar to the case of a gift to a person for maintenance, which does not terminate by his death; *Webb* v. *Kelly* (*a*); *Soames* v. *Martin* (*b*).

Mr.

(*a*) 9 *Sim.* 469. (*b*) 10 *Sim.* 287.

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Mr. *Selwyn* and Mr. *Wood*, *contrà*.

The MASTER *of the* ROLLS.

The contract is this:—"That Mr. *Crook* retire, and Mr. *Guion* carry on the business, for his own behoof and that of Mr. *Crook's* creditors, for the period of the five years, as agreed on under the articles of copartnery of *Crook* and *Guion*."

This may refer either to the terms of that partnership, or that it was to be carried on in the same way as if the partnership had not been dissolved. But the next clause appears to me to be distinct, or, at least, very unfavourable to the Plaintiffs. *Crook* is to assign to trustees for his creditors, all his present estate; and *Guion* agrees to appropriate to the trustees the share of the profits which would have accrued to *Crook*, in the event of the partnership having been continued. The profits "*which would have accrued*" to *Crook* are only those which would have accrued during the time when he was alive, and therefore I think that it is limited to the duration of the partnership under the articles. The proviso, that it is to be less the 400*l.* per annum, to be appropriated to *Crook's* maintenance, also shews that such was the intention of the parties. I think that the provision for the creditors terminated by an event, which would have operated as a dissolution if the partnership had continued, and that this was limited to the life of Mr. *Crook*.

DECREE.

Declare the separate creditors of *Crook* were entitled to have applied, in discharging their debts, a moiety of the profits which accrued from the 1st of *November*, 1851, and the 1st of *December*, 1851.

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BENNETT *v.* WYNDHAM.

March 11, 13.

A prohibition against raising a charge by sale held also to prevent its being done by mortgage.

Devise of real estates to trustees in fee, upon trust, "out of the rents, issues and profits" thereof, to pay two annuities, "and by the same ways and means, or by such other ways and means (except a sale or sales) as they may think proper, to levy and raise" sufficient to pay off the charges on the estate. And subject to the trusts aforesaid, to *A.* for life, with remainders over. Held, that the trustees could not raise the charges either by sale, by mortgage, or by leases on fines, but that they must be raised out of the rents and the profits of timber and mines, the trustees exercising a discretion, so as not to exhaust the whole income, and leave nothing for the tenant for life.

Held, that it was not proper to keep up the mansion on a settled estate, as a residence, during the minority of the tenant for life.

THE testator had a power of appointment over his settled estates, subject to the interest of his grandson, *John Edward Bennett*, an infant, who was tenant in tail thereof. The testator had other real estates of his own.

By his will he appointed the settled estates to the same uses as were thereinafter declared concerning his residuary real estate (except as to the charge of two annuities in favour of his daughters).

He devised his residuary real estate to trustees in fee, upon trust expressed as follows: "Upon trust, *by and out of the rents, issues and profits* thereof, to pay" two annuities of 300*l.* and 186*l.* to his daughters (from the payment of which I exonerate my personal estate) and by the same ways and means, *or by such other ways and means* (except a sale or sales), as they may think proper, to levy and raise such sum or sums of money, as shall be sufficient, with my said residuary personal estate, to pay off and discharge the several principal sums of money which now are, or shall then be a charge upon, or affect my residuary real estates and my said settled estates, and the interest thereof respectively, and to apply the moneys so to be levied and

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and raised, in the first place, in paying off the several principal sums and interest charged on my residuary real estates solely, and in the next place, in or towards payment and satisfaction of the several principal sums charged on my residuary real estates and my settled estates jointly, and in the last place, in or towards payment and satisfaction of the principal sum or sums, if any, charged on my settled estates solely. And I do hereby declare my will and desire to be, that notwithstanding the trusts aforesaid or any of them, the rents and profits of my settled estates shall continue liable to and be applied in keeping down the interest of the principal sums, if any, solely charged thereon, and such a proportion of the interest of the principal sums charged jointly on my settled estates and my residuary real estates, as the clear yearly rents and profits of my settled estates shall, from time to time, bear to the clear yearly rents and profits of my residuary real estate, so jointly charged with my settled estates, being according to my estimate three-fourths for the settled estates and one-fourth for the other estates."

Subject thereto, he directed his trustees to stand seised of his residuary real estates, upon trust for *John Edward Bennett* in tail, and in default, to the Plaintiff *Vere Fane Bennett*, an infant, for life, with remainder to his first and other sons in tail. Then followed limitations successively to the Plaintiff's four brothers for life, with remainders to their first and other sons in tail.

The will contained a power of leasing for twenty-one years, with the consent of the tenant for life, without fine.

The testator died in 1852, and *John Edward Bennett* died in 1856, an infant, and unmarried.

At

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At the date of the testator's death, there were no incumbrances affecting his settled estate solely, or his residuary estate solely, but there was one mortgage, comprising both classes of estates equally, and the amount due on this mortgage was, by application of the testator's personal estate to its payment, reduced, after his death, to the sum of 38,000*l.*

The gross rental of the estates was about 6,000*l* per annum, and after paying all the annuities and the interest on the mortgage debt, the net rental was about 2,500*l.* per annum.

The points raised in this suit were stated in the bill as follows:—the Plaintiff contends, that, subject to the annuities and to the interest of the mortgage debt, he is entitled, in possession, to the income of the estates so devised and appointed. But the Defendants *Henry Arthur Fane*, &c. contend, that the whole income of the estates ought to be applied in reducing the principal of the mortgage debt, until it is entirely cleared off.

The Plaintiff contends, that a proper sum ought to be allowed for his maintenance, and that proper directions ought to be given for keeping up *Pythouse* (the mansion-house on the estate) as a residence suitable to the magnitude of the said devised estates.

The said mansion called *Pythouse* has been furnished by Mr. *Higgins*, who had married the widow of *John Bennett*, the testator's son and the mother of the said *John Edward Bennett*, and the whole of the furniture now at *Pythouse*, with very trifling exceptions, belongs to Mr. *Higgins;* and it is desirable that a sufficient sum of money should be provided for purchasing it from him, as the best and most economical method of furnishing *Pythouse*. The estimated cost of such furniture is about

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about 2,200*l.*, at which price Mr. *Higgins* is willing to sell it.

Mr. *R. Palmer* and Mr. *Hobhouse*, for the Plaintiff. From the careful and strict manner in which the testator has settled this property, it is obvious that his desire was to preserve the estate in his family, and to provide the means of preventing its being lost, by the inability of the trustees to pay off the charges, if demanded. It is also clear, that he intended the several devisees to enjoy it in succession. It is impossible to conceive, that after giving immediate annuities and life estates, he intended them to be postponed for years, by an accumulation of the whole of the rents until the large charges on the estates had been paid off. The power to lease, with the consent of the tenant for life, shews, that he never contemplated that the life estate would be in abeyance.

The words used are taken from one of the common forms used by conveyancers (*a*), and must receive a reasonable construction. The testator prohibits a sale, but directs the charges to be raised "*by such other ways and means*" as the trustees may think proper. The intention may be effected by a mortgage, or by fines, and no limit as to time is imposed on the trustees for that purpose.

The mansion-house should be kept up, and the furniture purchased out of the rents.

Mr. *Selwyn* and Mr. *H. R. Farrer*, *contrà*. The primary object of the testator was his estate, which he regarded more than the persons who were to enjoy it, and he was desirous that it should become unincumbered. He directs the amount of charges to be raised out of the rents

(*a*) 4 *Martin's Conveyancing*, by *Davidson*, p. 511; 5 *Id.* 169.

rents and profits, and he prohibits a sale, and a mortgage, being a sale *pro tanto*, that mode cannot be resorted to, neither can a lease upon fine, for that is prohibited by the leasing powers. But he authorizes it to be done "*by such other ways and means* as they might think proper," and if no other ways and means can be suggested, the direction as to the rents and profits must be pursued. The discretion given to the trustees is as to "the ways and means," and not as to the period. The purposes of the trust are to be satisfied out of the annual rents and profits, as in *Wilson* v. *Halliley* (*a*).

Mr. *A. Leigh*, for the trustees.

Mr. *R. Palmer*, in reply. The parties in succession ought to bear the charges in proportion to the enjoyment of the estate, as in *Marker* v. *Kekewich* (*b*). The unlimited charge on the rents is but a charge on the *corpus*, and if the money could be raised merely on a charge of the rents, as by annuity, it would be a due performance of the instrument. Secondly, the direction does not apply to the rents of the settled estates.

The MASTER *of the* ROLLS reserved judgment.

The MASTER *of the* ROLLS. *March* 13.

The perusal of this will satisfies me, that the absolute impounding of all the rents, for the purpose of defraying the charges upon the settled and unsettled estates, is not the true construction of or the meaning of

(*a*) 1 *Russ. & Myl.* 590. (*b*) 8 *Hare*, 291.

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of the testator in this will. The words are:—"And as to all other the estates lastly devised, upon trust, by and out of the rents, issues and profits thereof, to pay the said annuities of 300*l.* and 186*l.* to my said daughters *Anna Maria Jeffreys* and *Fanny Bennett* (from the payment of which I exonerate my personal estate), and by the same ways and means, or by such other ways and means (except a sale or sales) as they may think proper, to levy and raise such sum and sums of money as shall be sufficient, with my said residuary personal estate, to pay off and discharge the several principal sums of money."

Now I do not think that much turns upon the circumstance, that he makes a provision for discharging, in the first instance, the charges which solely affected the unsettled estate; then for those which affected jointly the settled and unsettled estates, and lastly, those which affected the settled estates; the fact being (which he must be taken to have been cognizant of, although perhaps he might have intended to make some alteration in that respect, or to have paid them off) that there was only a charge affecting jointly the settled and unsettled estates. I think in the passage which I have read, the word "sale" expressly excludes the possibility of raising it by sale of any portion of the estate, and I think the word "sale" virtually includes within it the word "mortgage," which is practically a sale, and which cannot be resorted to without giving to the mortgagee a power of getting possession of the estate, if the charge is not paid off when required; for whether there is a power of sale contained in the mortgage or not, the mortgagee would have the power of foreclosure which is incidental to a mortgage, and the effect is practically the same.

I also

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I also think, upon a full consideration of the whole will, together with this clause, that what appeared to me, at one time, as possibly within the meaning of the testator is excluded, namely, the power of raising the amount by granting a lease for lives, or a long lease with a fine. Mr. *Farrar* and Mr. *Selwyn* pointed out to me the terms of the leasing power, which is confined to twenty-one years, and to cases of leases without fine, premium or any fore-gift. No doubt it would be a question which of the two directions is to override the other, but taking the whole will together, I think that raising money by a lease of this description is also excluded. This is favourable to the persons in remainder, as far as I have gone at present; but I think that "by the same ways and means," means "rents, issues and profits," and "by such other ways and means, except by a sale or sales," means, by timber or mines, if any such mines could be discovered, but not by making a positive charge on the estate, whether in the shape of a mortgage, or by alienation or sale, or by partial alienation by means of a lease with a fine.

So regarding it, and considering that these charges are to be paid by the means specified, I then look to see within what time it is to be done, and also what is the general object and scope of the will with respect to the objects of his bounty. My opinion is, that he regarded all the tenants for life in the same light; he specifies no time within which this is to be done, and I think that the only mode of giving a rational interpretation to the will is, that this is to be done by means of the discretion vested in the trustees. Although I admit the true construction to be as Mr. *Selwyn* contends, that the words, "as they may think proper," refer to ways

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ways and means, and not to the general clause, yet I am of opinion that the will does not directly impose upon the trustees the duty or the necessity of applying all the rents and profits for that purpose.

In the cases cited to me, particularly the case of *Wilson* v. *Hallalay* (*a*), that intention was very clear and distinct; but in this case, I think that there was this species of discretion given:—that it was not intended to annihilate the interests of the tenants for life, but that the trustees were to regard their interests, and at the same time to consider, as the primary trust and the primary charge, the putting an end to the incumbrances on the property: that they were to do this out of the rents, but, subject to that, still to reserve something for the tenants for life. I cannot say that any precedents assist us in a case of this description. I have come to this opinion from a perusal of the whole will; and my opinion of the construction of it is, that the primary intention, and the primary object of the testator, was to pay these charges out of the rents, but at the same time not to exhaust the rents for that purpose, and to preserve something for the enjoyment of the tenants during the period.

I think the best mode of carrying this into effect can only properly be considered in Chambers. I indicate generally the mode of doing it, but I should wish to have the details of the estate, and the circumstances respecting the charges, before me, before I can properly determine the details of the execution. I apprehend, in the state of this case, that the trustees have imposed this duty on the Court, as they have declined to take on themselves

(*a*) 1 *Russ. & Myl.* 590.

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selves to decide, what would be fit and proper to be done, at the risk of being afterwards called to an account. I think, therefore, that the best course will be to refer it to Chambers, to consider and inquire what portion of the rents ought to be applied or impounded, for the purpose of paying off the charges, and subject to this, out of the residue which will remain and after setting apart a certain portion for that purpose, to determine what will be proper to be allowed to the tenants for life out of the estate.

I think it will not be proper to keep up the house as a residence, unless that is the most profitable thing for the estate, because, as was justly observed by Mr. *Selwyn*, in this case, as in many others, the object of the testator is as much the estate as the persons who are to enjoy the estate. It is clear in the present case, that he had the preservation of the estate in his mind, and that this (if the word may be used without an abuse of terms) is an object of his care, as much as the persons who are to enjoy it. I think this is the scope of this will: so regarding it, I think that the house ought not to be kept unlet, unless it is really for the benefit both of the estate and the tenant for life that it should be so, and that it should not be enjoyed and preserved as a residence; the more so, as the tenant for life is an infant, and is at this time out of the country with his regiment in a distant part of the globe, where it is impossible he can derive any benefit from the house as a residence.

I do not mean to fetter myself in Chambers by any declaration on this subject, I merely express the view I take of this case, in order that when proposals are laid before me in Chambers, the general view I take of this will may be borne in mind.

Feb. 11, 12, *March* 27, *April* 16.

GREEN *v.* NIXON.

Directors allowed a judgment to go by default against a public company, which the Plaintiff proceeded to enforce against the shareholders. Held, that the shareholders could not, in the absence of collusion and concert, question, as against the creditor, in this Court, the validity of the original debt, or discuss whether the action could have been successfully resisted by the company.

A person, employed by directors of a company, is not bound to inquire whether they are acting within the limits of their power.

Where a creditor obtained a judgment against a company, and then proceeded to enforce it against several shareholders, the Court considered that he was bound to give credit, to one shareholder whom he sued, for moneys previously received from the others, but the Court would not disturb the appropriation of part of the moneys the creditor had received, in payment of his costs of his ineffectual proceedings against other shareholders.

THE suit was instituted by *Green*, one of the shareholders of the *Kilkenny and Great Southern and Western Railway Company*, and it sought to restrain the Defendant *Nixon*, who had recovered a judgment against the company, from proceeding at law against the Plaintiff, by *scire facias*, in respect of that judgment.

The short facts of the case were these:—The company was established by Act of Parliament in *August*, 1846, and the Companies Clauses, Land Clauses and Railway Clauses Acts were incorporated in that Act. The compulsory powers to take land having expired in 1851, and no land having then been bought, the power to make the railway was at an end, unless new powers could be obtained for that purpose. In 1853, application was made to Parliament for an extension of time and for an alteration of the railway. The Defendant *Nixon* was employed by the directors for the purpose of acting as engineer and of promoting this application. An agreement was entered into between them, as to the remuneration he was to receive in case either of failure or success. The application failed "solely on the consideration of the financial position of the company." A second application was made, for a bill in 1854, but the bill was withdrawn in *March* in that year. The Defendant

fendant *Nixon* made several applications to the directors for the payment of his demand, and, not being paid, he commenced an action against the company on the 14th of *April*, 1855. The directors offered no defence to the action and allowed judgment to be entered up by default on the 26th of *April*, 1855, for 505*l.* debt and 3*l.* 8*s.* costs. A writ of *fi. fa.* was issued against the effects of the company, to which a return of *nulla bona* was made. On the 23rd of *May* following, the Defendant *Nixon* served the Plaintiff with a rule *nisi*, to shew cause why a writ of *scire facias* should not issue for obtaining execution on the judgment against the Plaintiff, as a shareholder in the company. On the 26th of *May*, the Plaintiff obtained a rule *nisi*, calling on *Nixon* to shew cause why the judgment should not be set aside. On the 9th of *June*, 1855, the matter came on to be heard before the Court of Exchequer, when the rule of the Plaintiff *Green* was discharged, and the rule of *Nixon* was made absolute. By the affidavit filed on that occasion by Mr. *Green*, he contended, that the directors had no power to bind the shareholders in this matter, and that consequently, the Defendant *Nixon* could not recover against the company. He also, by his affidavit, contended, that the judgment obtained by the Defendant was fraudulently and collusively obtained. Finally, on the 9th of *June*, 1855, the Court discharged the rule of the Plaintiff *Green* and made the rule of the Defendant *Nixon* absolute.

Thereupon, a declaration in *scire facias* was served on *Green*, to which declaration he pleaded three pleas, first, that he was not a shareholder of the company at the time of issuing the writ of *scire facias;* and, thirdly, that he was not a shareholder when the rule was made absolute. His second plea was, that *Nixon* ought not to have execution against him, because the action in

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which the judgment was so recovered was brought for a demand for which neither he nor the company was by law liable, as he, *Nixon*, and the directors knew at the commencement of the action. And he said, "that the directors did fraudulently and deceitfully, and by connivance with *Nixon*, suffer and allow the said judgment to be recovered, and that *Nixon* did then recover the same against the company, in order and with intent and purpose that he might thereupon proceed against the Plaintiff, as a pretended shareholder of the company, and might obtain payment of the amount of such judgment from the Plaintiff. The Plaintiff at law demurred to the first and third of those pleas, and the demurrer was allowed. On the 18th of *January*, 1855, notice of trial of *scire facias* was given, and an order obtained to try it by a special jury.

The Plaintiff *Green* filed this bill on the 25th of *January*, 1856, against *Nixon*, the company and two of the directors. The bill insisted, that the amount recovered by *Nixon* was greater than what was due to him upon the special agreement entered into by him with the directors; that the judgment had been obtained collusively, and that the directors, in breach of duty, had never properly investigated *Nixon's* claims, and had allowed judgment to go by default, by arrangement with *Nixon*, that it should be used as the means of enforcing the payment of calls, the validity of which was in contest in a suit of *Horn* v. The *Kilkenny*, &c. Railway Company (*a*). The Plaintiff submitted, that the judgment by default was obtained by fraud and collusion, and was not binding in equity on the company, and much less upon the Plaintiff and the other shareholders not parties or privies thereto. He also alleged, that *Nixon*,

(*a*) 1 *Kay & J.* 399.

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Nixon, by threats and by proceedings against other shareholders, had received large sums for debt and costs, and little, if any thing, was now due to him on his judgment.

The bill prayed an injunction to restrain proceedings at law on the judgment; a declaration that the Defendant *Nixon* was not entitled to recover any thing from the Plaintiff in respect of the judgment, or that the amount due to *Nixon* might be ascertained; and that the Plaintiff might be indemnified by the company, &c.

It appeared that *Nixon* had proceeded against other shareholders, and had recovered some moneys from them, by compromise, for debt and for costs. He claimed a right to apply these sums in discharge of costs incurred by him in ineffectual proceedings against other shareholders.

Mr. *R. Palmer* and Mr. *Amphlett*, for the Plaintiff, argued, first, that the directors had no authority to apply the funds of the company in payment of the expenses of soliciting an Act of Parliament for an extension of the powers, which was not within the scope of their original Act; *Stevens* v. The *South Devon* Railway Company (*a*); *Ware* v. The *Grand Junction* Waterworks Company (*b*); *Munt* v. The *Shrewsbury*, &c., Railway Company (*c*); The *Great Western* Railway Company v. *Rushout* (*d*); The *Attorney-General* v. *Norwich* (*e*); The *Attorney-General* v. The Guardians of *Southampton* (*f*); The *Attorney-General* v. *Andrews* (*g*); The *Attorney-General* v. The Mayor of *Wigan*

(*a*) 13 *Beav.* 48.
(*b*) 2 *Ryl. & M.* 470.
(*c*) 13 *Beav.* 1.
(*d*) 5 *De G. & Sm.* 290.
(*e*) 16 *Sim.* 225.
(*f*) 17 *Sim.* 6.
(*g*) 2 *Mac. & Gor.* 225.

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Wigan (*a*); *Nixon* v. *Browlow* (*b*); and that *Nixon* had notice of the breach of trust thus committed by them.

Secondly, that though a Court of Law would take cognizance of a direct legal fraud, as in *Philipson* v. Lord *Egremont* (*c*); yet the fraud here complained of was of an equitable nature, which was only cognizable in this Court, and that the judgment at law did not preclude the Plaintiff from insisting on these matters; *Bargate* v. *Shortridge* (*d*); *Taylor* v. *Hughes* (*e*); especially as these points had not been raised in the action against the company, and as the judgment in that action was clearly collusive.

Thirdly, that *Nixon* was bound to account for the moneys received by him from other shareholders, and ought not to be allowed to apply moneys received for the debt to be applied in payment of his costs. Lastly, that this account and relief could not be had at law.

Mr. *Lloyd* and Mr. *Piggott*, for *Nixon*, argued, that there was not fraud or collusion of any kind; that the rights of *Nixon*, as a creditor of the company, had been finally settled at law, and that the same matter could not be re-opened in equity.

Mr. *Follett* and Mr. *Surrage*, for the company.

Mr. *Amphlett*, in reply.

March 27. *The* MASTER *of the* ROLLS.

This cause came on before me on a motion for a decree, and, as I thought it involved an important question

(*a*) *Kay*, 268.
(*b*) Unreported.
(*c*) 6 *Q. B. Rep.* 587.
(*d*) 5 *H. L. Cas.* 297, and 16 *Beav.* 84.
(*e*) 2 *Jones & Lat.* 24.

question, I was desirous to take time to consider the point before I disposed of it. The question is, whether, as between these parties, and under the circumstances herein appearing, a judgment against the Company can be treated here in any different manner than at law. The case of *Philipson* v. Lord *Egremont* (*a*), establishes, that such a judgment as this may be disputed at law in an action of *scire facias*, on the ground of fraud, and that fraud, if established, will vitiate it. Fraud is the same in all Courts, but such expressions as "constructive fraud" are, in my opinion, inaccurate; Judges may, no doubt, differ as to what precisely constitutes fraud, and it is not my intention to attempt any complete definition of the word "fraud;" but I consider that it implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to. It is true, that Courts of Equity will sometimes set aside proceedings, on the ground of fraud, where Courts of Law will not, and it is difficult to define the distinction between that which a Court of Equity treats as a fraud, and that which is so considered by a Court of Law.

In *Philipson* v. Lord *Egremont* (*a*), it is laid down, that fraud will vitiate the judgment. In that case, the Defendant to a declaration in *scire facias* pleaded, that the original action was brought against the registered officer for a demand on which neither the Defendant in *scire facias* nor the Packet Company was, by law, liable, as the Plaintiff, at the commencement of the action and then knew, and that the registered officer fraudulently, and by connivance with the Plaintiff, suffered the judgment to go by default in order that the Plaintiff might sue for and recover the amount against the Defendant in the *scire facias* (which is what is said to have occurred here).

It

(*a*) 6 *Q. B. Rep.* 587.

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It was held, in that case, that the plea was good, as containing a sufficient allegation of fraud and collusion between the Plaintiff and the nominal Defendant in the original action, and that the Defendant in *scire facias* was entitled to avail himself of such defence by plea. It is not necessary to go into the facts of that case, for the marginal note clearly expresses the principle upon which a Court of Law would proceed.

The cases of *Bargate* v. *Shortridge* (*a*), and *Taylor* v. *Hughes* (*b*), were cited as authorities to support the case of the Plaintiff; but, in my opinion, the proposition of what was decided in those cases is stated too broadly. The former of them was an appeal from my decision in *Shortridge* v. *Bosanquet* (*c*); but it decided no more than this:—that if a company make use of a judgment recovered against the company as an instrument for making a shareholder pay money to or for the use of that company, the Court will inquire into the circumstances, and ascertain whether the shareholder, as such, is really liable to pay the money in question, and, whether the person who is sought to be treated as a shareholder is really a shareholder. *Shortridge* v. *Bosanquet* (*c*), was peculiar in this respect:—that, after the shareholder had sold his shares and the directors had made a return to the Stamp Office that he had ceased to be a shareholder in the company, they made a new return and placed him in the new list as a shareholder of the company. An indemnity had also been given to the *London* and *Westminster* Bank, the nominal Plaintiffs, and it was admitted that the action was really that of the company.

Taylor v. *Hughes* (*b*) was a case where the action, though brought by a creditor, was manifestly, and indeed

(*a*) 5 *H. L. Cas.* 297.
(*b*) 2 *Jones & Lat.* 24.
(*c*) 16 *Beav.* 81.

deed was admitted to be, the action of the company. The Plaintiff had many years before disposed of his shares, but had been replaced on the list of shareholders by the directors; and, though it was nominally the action of the creditor, it was in reality the action of the company.

The question to be considered upon the facts of the present case is this:—Whether this was a concerted and collusive judgment, and this question is very fairly raised by the 33rd paragraph of the bill. It says, "In fact, the allowing the judgment to go by default was under some understanding and agreement, between *Nixon* and the directors and the solicitors and secretary of the company, or some of them, that the judgment should only be made use of to enforce payment of overdue calls from the shareholders. Accordingly, an express promise was made on the part of the company to *Nixon*, that any calls paid by shareholders, in consequence of proceedings on the judgment, should be handed over by the company to *Nixon*." And it states that it was moreover arranged, or understood, that *Nixon* should not proceed on the judgment against the solicitors and secretary, or directors, all of whom held shares in the company. It then states that these matters are evidenced by a letter of *Nixon* to the solicitors of the company, dated the 22nd of *May*, 1855. It appears to me that this letter not only does not bear out this allegation, but that it negatives the charge. The grounds upon which the charge rests are, first, that on the 25th of *April*, 1855, the directors determined not to defend the action. Secondly, on the same day, they disqualified themselves to act as directors, and elected two others, Messrs. *Anderson* and *Hulse*, who knew nothing about the matter; and that since then, there has not been a sufficient number of directors to form a meeting of the company; and also, that there was both concert and collusion,

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collusion, between the directors and *Nixon*, to make use of the judgment for the purpose of enforcing the payment of calls from the other shareholders.

With respect to the first charge, I am of opinion that the directors' declining to defend the action of *Nixon* is no evidence of *concert* or collusion. The directors, as it appears to me, had no legal defence to the action. If they had not, it was not their duty to defend it and thereby increase the costs: no legal defence has been suggested to me which could have been urged, except the point as to the illegal application of the funds of the company, which I shall have presently to consider, and which it does not appear to me that the Defendants could have successfully averred; besides which, the solicitors of the company expressly told the directors, that they had no defence to the action. Any further evidence brought to prove concert or collusion, in my opinion, wholly fails; the correspondence does not prove it; it is expressly denied, and it is disproved by the solicitors of the company and the secretary in their affidavit. I am of opinion, therefore, that neither *Bargate* v. *Shortridge* nor *Taylor* v. *Hughes* apply to this case. Not only is there no collusion, but, on the contrary, on the evidence, it appears to me, that the action by *Nixon* against the Plaintiff was brought not for the purpose of assisting the company at all, but for the purpose of obtaining payment of his own debt, without any reference to the state of the company.

In this state of things, it appears to me, that as collusion or concert between the Plaintiff at law and the company is disproved, it is not possible for this Court to go into the question of the validity of the original debt, or to discuss whether it was one which could or could not have been successfully resisted in the Court of Law by

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by the company. If such a question could be gone into now, I do not see how or when the discussion would end, or at what time the question could be set at rest. Suppose an action were brought for goods sold and delivered to the company, and a judgment obtained, and the sheriff on an execution returned *nulla bona*, could one of the shareholders, in an action upon *scire facias*, dispute the validity of the debt or the delivery of the goods, or the price. If he could, it is clear that great difficulties might arise, when, from the subsequent failure of evidence, or the different views which juries might take of the same case, contradictory decisions might be come to; the creditor might thus succeed against some shareholders, and fail as to others.

Then it is said, that the application to Parliament was an illegal use of the funds of the company, and that the company was not established for the purpose sought by the proposed bill; and that as it was, obviously, not within the scope of their trust, or the original Act, to apply the funds for that purpose, so the refusal of the legislature to entertain the proposal is a conclusive proof that this was a misapplication of the funds of the company. It is alleged, that *Nixon* was aware of this fact, and that if he had knowledge that the directors were applying the funds of the company for an unauthorized purpose, his claim could not be enforced.

I do not concur in this argument. I assume, for the purpose of this question, that the directors had no authority to apply the funds of the company for the purpose for which *Nixon* was employed. I do not think that persons employed by the directors of the company can be required to investigate the objects for which they are employed, and to ascertain whether the objects are or are not in accordance with the trusts reposed

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posed in the directors by the deed or the Act of Parliament, of both of which he had notice. If the law were that they were bound to make such investigation, it would cripple the necessary powers of the directors of any company to employ tradesmen; nor would any tradesman enter into any contract with directors at the risk of its being void, as regarded the shareholders, if the goods furnished were not within the Act of Parliament, of which, without having seen it, the tradesman must be held to have had notice. If that were so, a person employed by directors would become involved in all the intricacies respecting notice, and, a casual conversation, to which he applied no sort of weight, might involve him in the consequences of notice of the purposes and objects for which the money and goods were intended to be applied.

The principle upon which this Court grants injunctions to restrain directors from pursuing objects at variance with the original scope of the company, would rather seem to imply, that it would bind the assets and the shareholder of the company; and that it is this which gives the shareholder so strong an interest to prevent the directors from misapplying the funds of the company. Neither am I satisfied that, in this case, *Nixon* could be held to have had notice. In the case of the *Great Western* Railway Company v. *Rushout* (*a*), Sir *James Parker* lays down the proposition, that an application by directors to Parliament does not necessarily give notice that there was an intention to apply the funds of the company improperly. At all events, in my opinion, the objection, if at all, could never be urged at law, as an objection to the validity of the judgment, and if it would not prevail there, it would not prevail here, in a case where the judgment had not been obtained by collusion, fraud or deceit.

In

(*a*) 5 *De G. & Sm.* 290.

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In fact, the rights of the shareholders in cases where fraud, collusion and concert are all excluded are these:—he may, if he be sufficiently diligent, stop beforehand the misapplication of the funds or credits of the company, by an application to this Court. If he do not adopt this course, or from want of knowledge be unable to adopt it, he is entitled to call the directors to account for all the moneys received and paid by them, for or on behalf or for the purposes of the company, the application of which was intrusted to them, and those sums which have been misapplied will be disallowed to them on taking such account. In such an account, the directors would be charged with all sums received, and would be compelled to make good to any shareholder any sums which he had been compelled to pay and which were not properly due from him, and this is, in fact, provided for by the 36th and 37th sections of the Companys' Clauses Consolidation Act.

It is unnecessary to refer, in detail, to the case of *Horn* v. The *Kilkenny*, &c. Railway Company (*a*), because that case was finally settled by arrangement between the parties. But there it was a clear case of concerted action and judgment, the suit being brought by the solicitor of the company against the company, for the very purpose of being made use of against the shareholders.

I am, upon all these grounds, of opinion, that this is not a case where the Court can be properly called upon to interfere, to prevent the Plaintiff at law from enforcing his judgment, and that the principal object and purpose of this bill fails.

There remains only this point:—The Plaintiff says he

(*a*) 1 *Kay & J.* 399.

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he is entitled to an account, because the Defendant has received, from various other shareholders, sums in part payment, and, I think, that this is information to which the Plaintiff is entitled, whether he receive it at Law or in Equity. The Plaintiff cannot, in my opinion, recover more than is actually due to him, but if such an account were taken in this cause, I should not disturb the appropriation made of parts of the moneys towards the payment of costs, incurred by the Defendant *Nixon* in enforcing his claim against other persons, or the part that was employed for the payment of the debt; nor should I hold that the Plaintiff was entitled to insist, that the whole amount recovered was to be applied towards the liquidation of the debt. I do not know whether this is distinctly in evidence, but it was stated to me at the hearing, (and, if there is any dispute with respect to the facts of the case, I will allow it to be mentioned again,) that these actions were compromised on certain terms, by which the Defendants in such actions, with full knowledge of such circumstances, agreed to pay a sum to *Nixon* in respect of costs incurred by him, and another sum in respect of the debt, and I should not disturb such arrangements, or allow the Plaintiff here to convert them into different arrangements, in order that he might have the benefit of them. In saying this, I assume that such costs had been *bonâ fide* incurred by *Nixon*, in endeavouring to obtain payment from those persons, and in which he had failed from their inability to pay.

That being my opinion on this part of the case, probably the best course for both parties to adopt would be, that the Defendant should verify, by affidavit, the sums received by him in respect of the debt and what remains due thereon, and that an order should be made on the Plaintiff to pay that amount to the Defendant at

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at a certain time, for I presume that neither party wishes that these proceedings at law should continue. Still the Plaintiff is entitled to make out any defence to the *scire facias*, if he thinks he can, and to insist that it should be heard. But taking the view I do of the circumstances of the case, the Plaintiff must pay the costs of the suit up to the time of the hearing.

If the Plaintiff should elect to proceed in the action at law, I shall simply dissolve the injunction and dismiss the bill with costs.

April 16.

The injunction was dissolved and the bill was dismissed with costs.

ELLIS *v.* EDEN.

March 27.
April 16.

The words "stock in the foreign funds" held, upon the terms of a will, to comprise all foreign securities, for which the faith of the government of the foreign country was pledged.

THE testator Sir *Henry Ellis*, K.C.B., by his will, devised and bequeathed all his real and personal estate to trustees, upon trust, as soon as conveniently might be after his decease, in the discretion and of the absolute authority of the trustees, to "sell and dispose of, collect, get in and convert into money, so much and such parts of the same residuary, real and personal estate, as should not consist of money, or *of stock in the foreign funds*, or of Government or real securities in *England* or *Wales*." And he declared, that the trustees should "stand possessed of the money to arise from his residuary real and personal estate, or the money of which the same should consist at the time of his decease, and of the said *stock in the foreign funds*, and of his said

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said Government and real securities," upon trust to invest " in the parliamentary stocks or public funds of *Great Britain*, or at interest upon Government or real securities in *England*," and stand possessed thereof, in trust for his wife Lady *Ellis* during widowhood, with remainder to his sons and their children.

His will contained the following direction :—" I direct that my *stocks in the foreign funds* shall not be sold out during the widowhood of my wife, unless with the consent of my wife during such widowhood," " my object being, that my wife may enjoy the larger income derivable from such foreign funds."

The testator died in 1855.

According to the affidavit of a Mr. *Greathead*, the following foreign securities were held by the testator at the time of his death :—

18,000 dollars, 6 per centum stock, of the *Commonwealth of Virginia*, one of the *United States* of *North America*, inscribed in the testator's name.

Bonds or debentures of the same state of *Virginia* for 20,000 dollars, bearing interest at 6 per cent. per annum, and redeemable in 1886, and which bonds or debentures are payable to bearer and transferable by delivery.

Bonds or debentures of the *State of Maryland*; another, of the same, *United States*, for 500*l.* sterling, bearing interest at 5 per cent. per annum, and redeemable in 1889, which bonds or debentures are also payable to bearer and transferable by delivery.

Certificates for 1,500*l.* sterling, 5 per cent. stock, of

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of the *Commonwealth* of *Massachusetts*;" another of the same, *United States*, redeemable in 1868, the moneys secured on each such certificate being payable to the holder thereof.

Certificates for 2,000*l.* sterling, *Boston Water Scrip*, being a stock created for the purpose of paying for the introduction of water into the city of *Boston*, in the same state of *Massachusetts*, redeemable in 1782, bearing interest at 4½ per cent. per annum; the money secured on each such certificate being payable to the bearer thereof.

Bonds or debentures of the *Pennsylvania Railroad Company*, for 10,000 dollars, being a company existing in the state of *Pennsylvania*, another of the same *United States*, which bonds or debentures form part of the security issued by the said company for a 6 per cent. loan, and are convertible into capital stock of the said company; secured by a mortgage on all their estate between the *termini* of their road. The said bonds or debentures are payable to bearer, and redeemable in 1880.

Certificates for 4,000 dollars stock of the United States of *America*, redeemable in 1868, and bearing interest at 6 per cent. per annum, and which stock is transferable by indorsement and delivery of the certificates.

Inscriptions for 500*l.* sterling of the *Russian* 4½ per Cent. Loan, which inscriptions are payable to bearer.

Certificates for 2,210 francs, 3 per Cent. French Rentes, payable also to bearer.

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The testator was also entitled to the following foreign securities at the time of his death, which were deposited with Messrs. *Rothschild*, of *Paris*, the testator's bankers there :—

Bonds or debentures for 3,250*l.* sterling, part of securities issued by the empire of *Austria* for a loan raised by them in the year 1852, bearing interest at 5 per cent. per annum, such bonds or debentures being payable to bearer.

Certificates for 650 francs annual rente of the states of *Sardinia*, also payable to bearer.

The widow having declined to consent to a conversion of the foreign securities, the question arose as to what was comprised in this exception of "stocks in the foreign funds."

Mr. *Selwyn* and Mr. *Joliffe*, for the Plaintiff the widow, contended that all the testator's property in foreign securities was included in these words. They cited the following authorities :— *Mangin* v. *Mangin* (*a*), in which the words, "all the funded property in my name," were held to pass Irish Bank Stock ; *Ex parte Mattheson* (*b*), in which the Court held railway stock to be within the terms "government or other stock," as used in the Bankrupt Consolidation Act, 1849 (*c*); *Ex parte Copeland* (*d*), in which paid-up shares in a railway, in which it had been resolved that paid-up shares should be converted into stock, were held also to be within the same section of the Bankrupt Consolidation Act; *Burnie* v. *Getting* (*e*), where the Court decided,

(*a*) 16 *Beav.* 300.
(*b*) 1 *De G., M. & G.* 448.
(*c*) 12 & 13 *Vict.* c. 106, s. 201.
(*d*) 2 *De G., M. & G.* 914.
(*e*) 2 *Coll.* 324.

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cided, that Greek bonds, though guaranteed by *England*, were not comprehended in the words "moneys in the funds;" *Ridge* v. *Newton* (*a*), in which a bequest of "the whole of my Irish funded property standing in my name in the Bank of *Ireland*, was held not to pass government debentures, yet it was held that they constituted part of the funded property of *Ireland*.

Mr. *Jessel*, *contrà*. The words, "stock in the foreign funds," means property invested in the funded public debt of some foreign state, forming part of the permanent debt of the country, and transferable in the public books. Assume that these securities are all called "stocks," still, to bring them within the exception contained in the will, they must also be in some "foreign funds;" for effect must be given to both words. In *Johnson* v. *Digby* (*b*), it was held, that a bequest of "property in the English funds" would not pass India Stock or Exchequer Bills; so here, the bonds and debentures of foreign states are not "foreign funds." All the foreign securities which do not consist of a funded public debt must, therefore, be converted.

Mr. *Selwyn*, in reply.

The MASTER *of the* ROLLS. *April* 16.

The question is the meaning of the words, "*money or stock in the foreign funds*." A large portion of the testator's property consisting of foreign securities, the question is, which of them ought to be got in and converted, and which are to remain outstanding in the foreign securities.

On one side, it is contended, that this includes all his property

(*a*) 2 *D.* & *W.* 239. (*b*) 8 *Law J.* (*O. S.*) *Ch.* 38.

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property invested in foreign securities; and on the other, it is contended, that the words are restricted to funded property, as distinguished from property that is not funded; that, for instance, if it relates to *England*, Exchequer bills would be government securities, but would not be funds, although the security would be as perfect before as after such Exchequer Bills have been funded, and have thereby been actually converted into stock. It is also contended, that a distinction is drawn between foreign and English securities, inasmuch as the expression relative to the foreign securities is "money or stock in the foreign funds," whereas, as regards English, it is "government securities." My opinion, upon considering the whole context and effect of the will, and observing what property the testator had in the foreign securities, is, that he meant, by these expressions, any foreign security for which the faith of the government of that country was pledged, which was secured, in fact, by the government, and for which the government of that country had made itself liable.

In so saying, I do not mean to lay down any rule to govern the use of the same words in other wills, where the circumstances may not be the same; but, in reading through the will, this appears to me to be the scope and object of it: and, in going through his property, I observe, that, at the time of his death, he had nothing to answer these restricted sums which the will is sought to be confined to, with the exception of the *Virginia* stock, though, even as to that, a portion of the same argument would apply to exclude it, as the interest is payable to the holder of certain *coupons*. The nature of these several securities is set forth in the affidavit of Mr. *Greathead*.

In fact, treating it strictly, there is nothing to answer

swer the words of the testator at his decease, and why is one to be distinguished?

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The whole must be left unconverted, except the railway debentures and City of *Boston* Stock.

DECREE.

His Honor doth declare, that the words "stocks in the foreign funds," contained in the will of the testator, were intended to comprise foreign securities, to which the faith of the country or state in which they are funded is pledged; and his Honor doth declare, that all the foreign securities mentioned in the affidavit of *Joseph Greathead*, except the 4½*l.* per centum loan of the city of *Boston*, and the 6*l.* per centum loan of the *Pensylvania* Railway Company, mentioned in the said affidavit, are comprised in the foregoing declaration, and are not to be sold or converted during the widowhood of the Plaintiff, without her consent in writing.

DAVIS *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Jan. 19.

A notice of motion was given by the Defendant to dissolve an *ex parte* injunction obtained on affidavit. The motion was abandoned. Held, that the Plaintiff was entitled to full costs, though the Defendant had filed no affidavit in support of his motion.

AN injunction had been obtained on affidavits and *ex parte*.

The Defendants gave notice of motion to dissolve it, but they filed no affidavit. They abandoned the motion, and the question was, whether, under the General Order of the 5th of *August*, 1818 (*a*), the Plaintiff was entitled only to 40*s.* costs, or to taxed costs.

Mr. *Jessel* argued, that, as affidavits had been filed by the Plaintiff, which might be used on the motion to dissolve, the Plaintiff was entitled to full costs.

Mr. *Robertson*, *contrà* argued, that as the affidavits referred

(*a*) *Ord. Can.* 3.

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referred to were those filed in support of the motion for the injunction, and before the notice of motion to dissolve was given, they could not be treated as affidavits filed upon the motion, within the meaning of the order.

The MASTER *of the* ROLLS, after consulting the senior Registrar, said, that he thought the Plaintiff was entitled to full costs.

NOTE.—Previous to this General Order of 5th *Aug.*, 1818, a party might give a notice of motion, and afterwards abandon it, without paying to the opposite party his costs of appearing to oppose it. This proceeding he might repeat three times; *Wyatt's Prac. Reg.* 287; *Shelly* v. *Shelly*, 8 *Ves.* 315; *Hurd* v. *Partington*, *M. Clel. & Y.* 40; but on the fourth notice of motion, such motion could not be made till the cost of the previous abandoned motions had been paid; *Anderson* v. *Palmer*, 14 *Ves.* 151. See *Whitcombe* v. *Minchin*, 1 *Wil. C. C.* 1, which was held to be a case of exception to the rule. Previous, also, to this General Order, the costs of an abandoned motion were not costs in the cause; *Lewis* v. *Armstrong*, 3 *Myl. & K.* 69. To obtain the costs under this General Order, the notice of motion must be mentioned to the Court, and it must be produced to the Registrar before he draws up the order; *Withey* v. *Haigh*, 3 *Mad.* 437; and where the costs of a first abandoned motion have been given, a second motion, for the same purpose, cannot be made, until the costs of the first have been paid; *Bellchamber* v. *Giani*, 3 *Mad.* 550; *Killing* v. *Killing*, 6 *Mad.* 68; *Oldfield* v. *Cobbett*, 12 *Beavan*, 91; but it seems, that if the costs have not been taxed, non-payment is no objection. See *Anon.* 6 *Mad.* 68, note (*b*).

A party in contempt cannot apply for his costs of an abandoned motion; *Ellis* v. *Walmsley*, 4 *L. J.* (*Ch.*) 161, and *C. P. Cooper* (*temp. Cott.*) 207; and where a bill is dismissed for want of prosecution, the Plaintiff cannot, afterwards, obtain the costs of an abandoned motion; *Farquharson* v. *Pitcher*, 4 *Russ.* 510. A Plaintiff gave notice of motion and died before it was heard, and his executor revived the suit; it was held, that the case was not within this General Order; *Warner* v. *Armstrong*, 4 *Sim.* 140; *Lewis* v. *Armstrong*, 3 *M. & K.* 69.

In the *Attorney-General* v. *The Mayor of Norwich*, 2 *M. & Cr.* p. 406, a demurrer had been allowed by the *Master of the Rolls*; the Plaintiff appealed, and afterwards gave notice of motion to restrain the Defendants from making payments out of the fund pending the appeal; the *Lord Chancellor* having affirmed the decision before the motion had been heard, he gave the costs of the motion which was then abandoned.

A motion which has been opened cannot be afterwards treated, by the party moving, as an abandoned motion; *Dugdale* v. *Johnson*, 5 *Hare*, 92. In *Greene* v. *Meares*, 14 *Simons*, 526, it was held, that the costs of an abandoned motion, in support of which the party had given notice of his intention to read an affidavit previously filed in the cause, were only 40*s*. But this General Order does not apply to a notice

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notice of motion to vary the Chief Clerk's certificate, and a party giving such a notice will not be allowed to abandon his motion on payment of 40*s.* costs; *Tucker* v. *Hernaman*, 24 *L. J.* (*N. S.*) *Ch.* 456. In *Hervey* v. *Smith*, *ante*, p. 443, objections had been taken before the Taxing Master to his certificate, and affidavits had been filed on that occasion; he disallowed them, and the Defendant gave notice of motion to review the certificate, but no further affidavits were filed. The Defendant having abandoned his motion, he was held liable to pay taxed costs, and not 40*s.*

Counsel may save a motion to the next day of motions, but he must be instructed before the close of the seal for which notice of motion is given; *In re Compton Smith*, *ante*, 284. It seems that the application for costs of an abandoned motion may be on a future day; *Ex parte Stone*, 2 *Mont. & A.* 503. See also *Rashleigh* v. *Mount*, 16 *Sim.* 390.

HADWEN *v.* HADWEN.

March 7.

A testator empowered his trustees to purchase freeholds "to the amount of 1,500*l.* of his personal estate, for the use of *A.* during life, and then divided among his issue, if any." Held, that this was executory, and that *A.* took for life, with remainder to his children as tenants in common in tail, with cross remainders between them in tail, with an ultimate reversion in fee to *A.*

THE testator made his will dated the 12th of *May*, 1806, "and thereby, after appointing his son, *Thos. Hadwen*, sole executor thereof, he gave and devised to him all his real and personal estate, whatsoever or wheresoever the same shall be found, to have and to hold to him and his heirs for ever, on conditions nevertheless," that he paid the testator's debts and legacies. The will then proceeded as follows:—"And it is further my will, that if my executor, *Thos. Hadwen*, *shall die leaving no lawful issue*, then and in such case, I further give and devise all my real estate whatsoever to my cousin *Anthony Eidsforth* and his heirs for ever, subject nevertheless to such annuities and legacies as are above." He appointed *John Hubbersty* and *Robert Rowlandson* his trustees, and proceeded thus:—"I also empower my trustees to purchase freehold land to the amount of 1,500*l.* of my personal estate, for the use of my executor *during life, and then divided among his issue if any.*"

The testator died in 1807, and in the same year, 1,500*l.* were

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were laid out by the trustees in land, and the question was, to what uses it ought to have been conveyed.

Thos. Hadwen died in 1854, having had ten children; one of his sons died in 1840 intestate, leaving four children.

Mr. *R. Palmer* and Mr. *Eddis*, for the Plaintiff.

Mr. *C. M. Roupell.* There is no gift to the issue except in the direction to divide, and there is no gift over. The gift in effect is therefore only to those who were living at the death of the tenant for life or the period of division. It has been decided in *Leigh* v. *Norbury* (*a*) that "lawful issue" includes children and grand-children, for the word "issue," unconfined by any indication of intention, includes all descendants; the distribution is *per capita*.

Mr. *Dickinson.* The son took an estate tail; there is in the first instance an universal gift of every thing to him absolutely, which, by the gift over, if "he shall die leaving no issue," is cut down to an estate tail; *Doe* d. *Ellis* v. *Ellis* (*b*). In a will the word "issue" is either a word of purchase or of limitation, as will best answer the intention of the devisor; *Doe* d. *Cooper* v. *Collis* (*c*); but it is a word of limitation, if the context does not afford sufficient reason to construe it otherwise; *Kavanagh* v. *Morland* (*d*); *Tate* v. *Clarke* (*e*). Here there is a contrary intention, for the testator must have intended that the part taken out of his residuary personal estate and invested in realty should devolve in the same way as his own real estate. The son, therefore, took an estate tail which he has barred.

Mr.

(*a*) 13 *Ves.* 340.
(*b*) 9 *East*, 382.
(*c*) 4 *Term R.* 294.
(*d*) 1 *Kay*, 16.
(*e*) 1 *Beav.* 100.

Mr. *Fry*, for other parties.

The MASTER *of the* ROLLS.

I entertain no doubt that I cannot treat this as an estate tail.

The only ground suggested is, that, in another part of the will, he has given the son an estate in fee simple, which he has afterwards cut down to an estate tail. The words here are distinct that it is not to be an estate tail. Freehold land of the value of 1,500*l.* was to be purchased, "for the use of his executor during life, and then divided amongst his issue, if any." This means, that the issue are to take estates of inheritance, but that the executor is to have an estate for life only. It is a direction to settle on the testator's son for life, and afterwards to be divided between his children in tail, with cross remainders between them in tail, with ultimate remainder in fee to the son.

Mr. *C. M. Roupell* asked whether the children of children took by substitution.

The MASTER *of the* ROLLS. No, they take under the entail.

DECREE.

Declare, that, according to the true construction of the will, the lands and premises, &c, ought to have been settled to the use of *Thomas Hadwen* for his life, with remainder to his children as tenants in common in tail, with cross remainders between them in tail, and with ultimate reversion to *Thomas Hadwen* in fee. *Reg. Lib.* 1856 *A.*, folio 679.

NOTE.—See *Woolmore* v. *Burrows*, 1 *Sim.* 527; 2 *Jarman on Wills* (2nd edit.), 286.

SMITH *v.* SMITH.
TRINDER *v.* SMITH.

March 16.

A daughter was entitled to one-fifth of some property, and her father to the remainder. She resided with, and was maintained by him, and he received the whole of the rents. After his death, she, for the first time, claimed against his estate an account of one-fifth of the rents for twenty years. The Court concluded, that the common establishment had been maintained out of the mixed fund, and rejected the claim.

BY the decree, the usual accounts were directed of the estate of the testator *Henry Smith*, as against his daughter and executrix *Ann Smith*. She brought in a claim against her father's estate under these circumstances:—she was entitled to one-fifth of some property, her father being entitled to the other four-fifths. He for a number of years received the whole rents. On the other hand Miss *Smith*, during the whole period, had resided with her parents in one common establishment, and had been maintained by her father who had supplied her with money, but no accounts seemed to have been kept between the parties, and no claim had been made during the testator's life. After the death of her mother in 1848, the same course continued until the death of her father in 1851. Before the Chief Clerk Miss *Smith* carried in a claim in respect of her one-fifth share of the rents received by her father for a period of twenty years. This was disallowed by the Chief Clerk, and the question was adjourned into Court.

Mr. *R. Palmer* and Mr. *Fooks*, for Miss *Smith*, supported her claim.

The MASTER *of the* ROLLS. The father was no more than the mere agent of the daughter. In that case, her claim would be limited to six years, with a set off, for the expenses of her maintenance. In a case recently before me, I decided that where parties were living together for some time, in a common establishment, without

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without making any claim against each other, it was to be presumed that the accounts were settled between them.

Mr. *Hatchard*, for a Defendant in the second suit.

Mr. *Lloyd* and Mr. *Faber*, for the Plaintiff, were stopped.

The MASTER *of the* ROLLS.

I cannot allow this claim. I hold that when a father and daughter are living together in this manner, the common establishment is maintained out of the mixed fund, and that there can be no account. It would be impossible for the Court to take such an account.

TANNER *v.* HEARD.

March 17, 18.

A., the first mortgagee of a ship, with the sanction and authority of *B.*, the second mortgagee, sold it and received the proceeds, which exceeded the amount due to him. Held, that *A.* was accountable to *B.* in the character of trustee, and *A.* having insisted that there was a deficiency, and having neglected to account, and a balance having been found against *A.*, in a suit by *B.*, held that *A.* ought to pay the costs of the suit. *B.*, however, had made charges, in which he failed, and the Court therefore gave neither party costs.

IN 1851, *Richard Richard*, the owner of a ship, mortgaged it to *Richard Heard*, and in 1853, he mortgaged it to the Plaintiff *Tanner*.

The mortgagor attempted to sell the ship and obtain the produce, but *Heard* caused it to be arrested at *Amsterdam*, and it was sold in *May*, 1854, under powers of attorney; given by *Heard* and *Tanner*, and the produce, after payment of the expenses, was received by *Heard*. On

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On the 15th of *June*, 1854, the Plaintiff applied for an account of the proceeds of the sale, which was promised by the Defendant, as soon as he had got his papers, but, he added, that there had been a deficiency of 74*l.*

The Plaintiff made other applications for the account, and on the 17th of *July*, he threatened legal proceedings. None having been furnished, the Plaintiff filed the present bill on the 25th of *November*, 1854, for an account of the produce of the ship, and for payment to him of the surplus.

The Plaintiff by his bill insisted, that the Defendant was also liable to account for stores belonging to the ship and included in his security, of the value of 120*l.*, which, he alleged, the Defendant had improperly allowed the mortgagor to take possession of and appropriate to his own use. In this contention, however, the Plaintiff failed.

By the decree, accounts and inquiries were directed, and before the Chief Clerk the Defendant claimed a balance of 100*l.* 11*s.* 1*d.* to be due to him on his mortgage; but the Chief Clerk found that the Defendant had been fully paid, and that a balance of 105*l.* was due from him.

The Defendant now moved to vary the Chief Clerk's certificate.

Mr. *R. Palmer* and Mr. *Karslake*, for the Plaintiff.

Mr. *Selwyn* and Mr. *Osborne*, for the Defendant.

Attorney-General

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Attorney-General v. The *Brewers'* Company (*a*); *Griffiths* v. *Lewis* (*b*); *Loftus* v. *Swift* (*c*), were cited.

The MASTER *of the* ROLLS.

The question in this case is, as to costs, which are claimed by both sides. The Defendant says, he is first mortgagee, that this is a bill to redeem, and that, on established principles, the first mortgagee is entitled to principal, interest and costs in the first place.

The Plaintiff says, that the mortgage is paid off, that the Defendant is a trustee for him of the surplus, that the ship was sold on behalf of both parties, that a balance has been found against the Defendant in taking the accounts, and that, consequently, the costs ought to abide the result. I am of opinion that this is not a case in which the principles which obtain in a suit between mortgagees are applicable; I think it distinguishable. It is a case of this description:—the Defendant was first mortgagee of a ship, the Plaintiff was the second. The Defendant, with the sanction and authority of the Plaintiff, sold it at *Amsterdam*, and received the proceeds of the sale. Being entitled, in the first place, to the amount due on his mortgage and the expenses of the sale of the ship, and there being a surplus, he was bound to account to the Plaintiff in the character of trustee. The question then is, in what manner I must dispose of the costs. Considering this to be the character of the suit, I am bound to look into what are the facts and what is the result of the contention on both sides.

The Plaintiff puts forth prominently by the bill, and insists

(*a*) 1 *P. Wms.* 376.
(*b*) 2 *Bro. P. C.* 407.
(*c*) 2 *Sch. & Lef.* 642.

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insists, that there were stores belonging to the ship, which *Richard Richards*, the mortgagor, had been improperly allowed by the Defendant to retain, and this matter being brought forward by the Plaintiff, as one of those grounds on which the Defendant ought to account for these matters, the result of the inquiry turns out to be in favour of the Plaintiff. The only argument of the Plaintiff now is, that there was reasonable ground for bringing forward that case. It may be so, on that I express no opinion, but the Defendant, having succeeded in it, would be entitled to the costs of that contention; it was a serious charge, and in respect of it he stands exonerated.

On the other side, the Defendant is called on to account for the produce of the ship; he does not refuse, but says he is ready when he gets the papers from *Amsterdam*, and four months after the last application the bill is filed. Before the bill was filed the Defendant says, "You take this account at your own risk; there is a balance of 74*l.* due to me." The accounts are brought in and a claim is made by the Defendant of a balance of 100*l.* On taking the accounts, the Chief Clerk, who has dealt very liberally, found 100*l.* due from him. The result as to this is, that the Defendant claimed what he was not entitled to, and he would have to pay the costs of taking the account, that is the ordinary result.

On the whole, I shall give no costs of the suit to either side. The Defendant must pay the balance found due from him, which is 105*l.*, and the Defendant must pay the costs of the motion to vary the Chief Clerk's certificate, in which he has failed.

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MEREDITH *v.* VICK.

May 17, 23.

A. B. being under a will entitled to freeholds in possession and copyholds in remainder, which were both impressed with the character of personalty, did acts expressive of an intention to reconvert, as regarded the freeholds only. Held, that the copyholds still retained the character of personalty.

THE testator *John Sueter* made his will in 1817, whereby he devised all that his copyhold called the *Mill Field*, at *Ensworth*, unto his niece *Sally Mower* for life, and after her decease, to her children for life (*a*). And the testator devised all and every other his real estates not thereinbefore otherwise disposed of, and the residue of his personal estate, to two trustees and their heirs, &c., upon trust, as soon as conveniently might be after his decease, to sell and convert into money, and thereout to invest the sum of 1,000*l.* on government securities, upon certain trusts, and to pay and apply the residue and remainder of the moneys arising from the sale and conversion of his real and personal estate unto his brother *Thomas Sueter*, his executors and administrators.

The testator died in 1820.

The 1,000*l.* was raised in 1825, partly by the sale of part of the residuary real estate, and partly out of his personal estate, and it was invested. There then remained the following real estate unsold:—First, a freehold in *Warblington*, in the occupation of *Barnett* and *Blackburn*; secondly, a freehold piece of marsh in the occupation of *Preston*; thirdly, two freehold messuages in *Bathing House Road*; and, fourthly, the reversion of the copyhold called *Mill Field*, subject to the life estates of *Sally Mower* and of her children. *Thomas Sueter* received

(*a*) So decided in *Vick* v. *Sueter*, 3 *Ell. & Bl.* 219.

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received and enjoyed the rents and profits of the freeholds so remaining unsold, and he went to reside with *Sally Mower*, his daughter, in one of the seven dwelling-houses forming part of the copyhold call *Mill Field*.

Thomas Sueter, by his will made in 1826, specifically devised, by name and description, the three freeholds remaining unsold, viz., that at *Warblington*, the Marsh Land, and that in *Bathing House Road*.

Thomas Sueter died in 1827.

Sally Mower died in 1851, having had one child only, born in 1829, and who died in 1835, in his seventh year, and it was decided in *Vick* v. *Sueter* (*a*), that such child only took for life, and that the remainder in the copyhold passed under the residuary devise.

Sally Mower had been admitted to the *Mill Field*, and upon her death it remained unconverted. It was sold under the decree, and the question now was, whether the produce passed to the real or to the personal representatives of *Thomas Sueter?*

Mr. *Lloyd* and Mr. *Nalder*, for the petitioners, contended, that the copyhold in question had been converted, out and out, into personalty, by the will of the original testator, and that his son *Thomas*, whatever he might have done as to the other real property, had done no act whatever, as regarded the *Mill Field* copyhold, which could be construed into a reconversion of it into realty, and that he had not been proved to have said or done

(*a*) 3 *Ell. & Bl.* 219.

done anything leading to that conclusion; *Dixon* v. *Gayfere* (No. 2) (*a*).

Mr. *Selwyn* and Mr. *Simpson*, *contrà*. The whole real estate, though impressed with the character of personalty by the terms of the will of the first testator, was afterwards reconverted into real estate by the acts of his son, who, after the 1,000*l.* had been raised, had full power to exercise his option, notwithstanding his estate in the *Mill Field* was reversionary; *Triquet* v. *Thornton* (*b*). If the "property is at home," which merely means where a party has the power of electing in what character he will take the property, "the slightest act would do;" *Wheldale* v. *Partridge* (*c*); *Dixon* v. *Gayfere* (*d*). "It is quite sufficient if the Court sees that the party meant it to be taken in the state in which it actually is," and a declaration to that effect is unnecessary; *Harcourt* v. *Seymour* (*e*).

Here, the intention expressed by the testator is distinct. The 1,000*l.* was actually raised by a sale of part, shewing an intention to hold the remainder as it was, for otherwise, why was not the whole converted at the same time? The residue of the property (except the *Mill Field*) was enjoyed by *Thomas Sueter* down to his death, and he specifically devised it, by name and description, in his will. As to that part there is no question, but the intention as to part must apply to the whole estate taken by him under the same instrument, and his acts, as regarded one portion of the estate, are evidence of his intention as to the rest. In *Crabtree* v. *Bramble* (*f*) there were two real estates, one at *Thorney*, and

(*a*) 17 *Beav.* 433.
(*b*) 13 *Ves.* 345.
(*c*) 8 *Ves.* 236.
(*d*) 17 *Beav.* 433.
(*e*) 2 *Sim.* (*N. S.*) 46.
(*f*) 3 *Atk.* 680.

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and the other called *Raymond*, and it was considered that the fact, of leases having been granted of *Raymond*, was evidence of an intention of holding not only that estate as realty, but also *Thorney*. In the absence of any contrary evidence, why should the reconversion be partial? In the absence of expressed intention to the contrary, the reconversion of part must be held as a reconversion of the whole, where there is no object for making a distinction; at least the *onus* of proof is then shifted. It was clearly his interest to take it as realty, for he thereby saved the probate, legacy, and succession duties, which was a strong inducement. He resided on the *Mill Field* property with his daughter for two years previous to his death, and it is impossible to suppose, that he intended, if his daughter died, that his residence should be sold over his head.

Pulteney v. *Darlington* (*a*), *Griesbach* v. *Fremantle* (*b*), and *Davies* v. *Ashford* (*c*), were also cited.

The MASTER *of the* ROLLS. I think the only point in the case is this:—whether the acts done with respect to the freeholds in possession are necessarily applicable to the copyholds in reversion? I am of opinion that the burden of proof is on the persons asserting the reconversion, and that it is not sufficient to shew that it was his interest to reconvert; there must be some act to shew the intention to do so. I am of opinion that there would be no question as to the copyholds if alone, and the point is, whether the acts done by him in regard to the freeholds in possession are attributable also to the copyholds in reversion.

Mr. *R. Palmer* and Mr. *H. Stevens*, for trustees.

Mr.

(*a*) 1 *Bro. C. C.* 238, and 7 *Bro. P. C.* 530.

(*b*) 17 *Beav.* 314.

(*c*) 15 *Sim.* 42.

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Mr. *Lloyd*, in reply. The question, which is one of intention, is this:—are the trusts for conversion put an end to? The raising the 1,000*l.* cannot be said to be such an act, for it was a performance of one of the trusts. 2. It is said, that there being an entire devise of the whole property and a general trust to convert, therefore the whole must be reconverted. But that is not so, *Thos. Sueter* had power to reconvert the whole or any part he pleased, he has expressed his intention as to part only, and the acts being partial, the inference from and operation of them were partial also. 3. The part reconverted was the freeholds in possession alone, and therefore, in the language used in *Wheldale* v. *Partridge* (*a*), "the property was at home, in the possession of the person." But here the *Mill Field* was reversionary, subject to the life estates of *Sally Mower* and her children; it was never "at home" or in the possession of *Thomas Sueter*, and no intention was ever expressed regarding it. In *Crabtree* v. *Bramble* (*b*), there was possession of the whole, though the lease was of part, and in *Davies* v. *Ashford* (*c*), and *Griesbach* v. *Freemantle* (*d*), there was possession of the whole property.

The MASTER *of the* ROLLS. I will consider this case.

The MASTER *of the* ROLLS. *May* 23.

The question on this petition and on further directions is, whether certain real estates, converted by the will of the original testator into personalty, have been reconverted

(*a*) 8 *Ves.* 235.
(*b*) 3 *Atk.* 680.
(*c*) 15 *Sim.* 42.
(*d*) 17 *Beav.* 314.

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reconverted by *Thos. Sueter* his son, and consequently whether, on his death, they pass to his real or his personal representatives.

On the 10th of *January*, 1817, *John Sueter* made his will, by which he devised certain copyholds at *Emsworth*, called the *Mill Field*, to his niece *Sally Mower* for her life, and after her death he gave them to her children; and he gave his other copyholds to his niece *Ann*. All and every other his real estates not thereinbefore otherwise disposed of, and the residue of his personal estate, he gave to *Thos. Sueter* and *John Vick*, their heirs, executors, administrators and assigns, upon trust, as soon as might be, to sell and to convert into money, and thereout to invest 1,000*l.* upon certain trusts therein mentioned; and subject thereto, he gave the whole of the money, the produce of such real and personal estate, to his brother *Thos. Sueter*.

The first question raised at the bar was, whether the reversion in the copyholds devised to *Sally Mower*, in the event of her leaving no children, which event took place, passed under the residuary devise. I expressed my opinion to that effect at the hearing of this petition, and the only question which remains is, whether, there having been a clear conversion of all the residuary real estate into personalty, *Thos. Sueter* has by his acts reconverted the same into realty.

The original testator died in 1822, *Thos. Sueter* died in 1827, and *Sally Mower*, who was admitted to the copyholds as tenant for life thereof, did not die till 1851. The reversion therefore of these copyholds never fell into possession during the lifetime of *Thos. Sueter*.

The acts of *Thos. Sueter* which are relied on as giving his

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his real representative, rather than his personal representatives, a right to these copyholds are the following:—The 1,000*l.*, directed to be set apart out of produce of the residuary estate of *John Sueter*, was raised out of his personal estate and by sale of a part of his freehold estates. The remainder of his freehold estates continued unsold and was enjoyed by *Thos. Sueter*, who received the rents thereof. In addition to this, *Thos. Sueter* made his will on the 29th of *June*, 1826, by which he specifically devised these freeholds to certain persons named in his will; he made no mention whatever of the copyholds, but, subject to the payment of his debts, he bequeathed all his personal estate and effects upon certain trusts, to administer which this bill was filed.

Reconversion is a question of intention, and the contention here, on the part of the Petitioner, is, that the whole of the property of *John Sueter* must be taken as converted, and that as *Thos.* expressed a clear intention to keep the unsold freeholds as land, that intention is also to be attributed to every thing which was unsold, and therefore to the reversion in the *Mill Field*. Reference is made to some cases which decide, that where an estate, consisting of several farms, is left on trusts to sell and pay the produce to *A. B.*, if the estate remain unsold, and, with respect to some portions of that estate, *A. B.* express, by his acts, an intention to keep them as land, these acts affect the whole estate, and that the whole is to be treated as reconverted.

This is not disputed on the other side, but it is contended, that the case suggested is applicable only to cases where, to use the expression of Lord *Eldon* in *Wheldale* v. *Partridge* (*a*), the estate or the money is at

(*a*) 8 *Ves.* 227.

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at home. To express this proposition in other words, it is, that the use or equity once impressed on the property, whether land converted into money or money converted into land, goes through all the limitations until it becomes vested in a person in possession, who can deal with it as he pleases. I think this a just observation, and that it is applicable to the present case. If the direction of the testator *John Sueter* had been, to sell the *Mill Field* and to invest the proceeds in trust for *Sally Mower* for life, and after her decease to go to her children, and in default of children to *Thomas Sueter*, the observation would strictly apply. The election of *Thomas Sueter* to treat the property, if unsold, as land, would not have arisen until his interest in it took effect in possession in him. Here the trust for conversion is not impressed on the property in the first instance, that is, as property in possession, but the reversion, subject to the prior interests, passes with the rest of the property to the trustees, with a general trust, which is not exercised so far as this reversion is concerned. To what acts of *Thomas Sueter* can I properly refer, to shew his intention that this reversion should be treated as land? Not to any act relating to the possession of the property, such as the receipt of rents or the like, for he did no such act, and was not in a situation to do any; nor can I refer to any expressed intention, because he expressed none, either in words or in writing. The argument, then, of the Petitioner is reduced to this single point:— that the copyholds must be treated as part of the estate, over another portion of which he has expressed intention; but in truth, properly speaking, and for the purpose of this argument, the copyholds cannot be treated as part of that estate, they stand in a totally different relation towards him; he had not any power in possession over them, as he had over the other part of the property, and the only circumstance on which reliance

can

can be placed is, that they passed to him by the same will as the freeholds.

The cases adduced by the Petitioner are cases where the acts relied on had, by necessary implication, reference to the whole land, which is not so here, neither do the cases cited shew that acts which are unequivocal, with respect to one estate, are necessarily attributable to another estate, although devised under the same will. If a devise be made to trustees, in trust to convert *Whiteacre* and *Blackacre*, and pay the produce of the same to *A. B.*, does the declaration of *A. B.*, that he wishes to hold *Whiteacre* as unconverted, necessarily apply to *Blackacre?* It is a question of intention, and must be dealt with as such; and, as such, I am of opinion, that I cannot attribute expressions by a man, which are unequivocal as to freeholds in his possession, as applicable to copyholds not in his possession, and the possession of which might never come to him. It is, no doubt, urged, that the reversion of the copyholds was in his possession; but it seems to me impossible to attribute an intention to a reversion to be derived from acts which have no application except to possession.

I think, therefore, that the reversion of the *Mill Field* passed under *Thomas Sueter's* will as being included in the residue of his personal estate, and that this petition fails and must be dismissed, but without costs, as but for the determination of this question the estate could not have been administered.

DANIELL'S CASE. (No. 2.)

Re THE UNIVERSAL PROVIDENT LIFE ASSOCIATION.

April 18.

Directors who had voted to themselves a number of paid up shares, held liable to all the calls.

The directors of a company voted themselves 2,400 "paid up shares" for their services. The company having been ordered to be wound up, the Official Manager insisted in having them placed on the list of contributories in respect of these shares and he succeeded. Held, that though the shares were voted to them as "paid up shares," the directors were still liable to pay the calls like the other shareholders.

THIS insurance company was established in 1853, and the terms were regulated by a deed of settlement, dated the 23rd of *February*, 1853, by which the several shareholders entered, as between themselves, into covenants usual in such cases.

Dr. *Daniell* was an original director of the association, and he also acted as medical adviser to the company. He originally took 200 shares to qualify himself as a director, and he signed the deed in respect of them.

Subsequently, at a meeting of the directors, held on the 26th of *October*, 1854, this resolution was passed,—

"That 2,400 *paid up shares* be divided equally amongst the promoters of the society, in consideration of the services rendered by them in its formation and management."

Dr. *Daniell*, being one of the promoters, accordingly accepted the 200, but paid nothing on them, though 5*l.* per share had been called. The company soon fell into difficulties, and an order was made to wind it up. The Official Manager applied to have Dr. *Daniell* placed on the list of contributories for 400 shares. He disputed his liability, insisting that he had been released by a subsequent resolution of the board of directors; the Court,

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DANIELL'S Case.

Court, however, held him to be a contributory for the 400 shares (*a*).

Afterwards an additional call of 30*s.* per share, besides arrears, was directed, in order to pay the liabilities of the company. Dr. *Daniell's* call amounted to 650*l.*, and he thereupon insisted, that, in respect of the 200 shares presented to him as a gratuity, they were "*paid up shares*," and that he ought not to be called on to pay the present call until all the other contributories had paid up 5*l.* per share on their shares. The Chief Clerk having entertained a different opinion, Dr. *Daniell* applied, by motion, to the Court, to get released from the call until the other shareholders had paid up 5*l.* per share.

Mr. *Batten*, in support of the application. I admit that Dr. *Daniell* is a contributory in respect of the 400 shares, for that has already been decided; but he is to be fixed only upon the terms of his contract. What he agreed to take was "paid up shares," and, if he is to be bound by the contract, he is entitled to the benefit of that qualification, and is not liable to the first call of 5*l.* per share. Some of the shareholders have paid nothing on their shares, and until they have all paid up the first call of 5*l.*, (which was the amount payable at the time Dr. *Daniell* took the 200 "paid up shares,") and have thus brought themselves to an equality with him, he is not liable to the second call of 30*s.* He is only to be fixed by virtue of his contract to take these shares, and which the association have held him to; he is not, therefore, bound to take any other shares than those which he has agreed to take, namely, "paid up shares." The contract is clear on that

(*a*) 22 *Beav.* 43.

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that point,—it cannot be varied, and it governs the rights of the parties.

Mr. *Selwyn* and Mr. *Beavan*, for the Official Manager, were not called on.

The MASTER *of the* ROLLS, during the argument and at the conclusion, made the following observations:—I cannot infer an agreement that Mr. *Daniell* should take the 200 shares as paid up. The agreement was merely that they should be treated as paid up shares, and against the other shareholders this was not binding, it could not be enforced against them. He paid nothing, but received them as a bounty for his exertions in promoting the undertaking, and this was the only consideration for which they were given to him. He took the shares, and must take them with all the qualifications and liabilities which attach to them.

Mr. *Batten*. I submit that one of those qualifications was, that they were paid up shares.

The MASTER *of the* ROLLS. I think not. He became a shareholder, and must contribute in respect of these shares towards the payment of the debts of the company in the ordinary way. He took them as a benefit; if the concern had been successful, he would have received dividends on all these shares without having paid a penny for them; and, on the other hand, he became liable, in case of a loss, to contribute towards it. He simply became a shareholder in respect of these shares.

The application must be refused with costs.

NOTE.—Dr. *Daniell* appealed to the *Lords Justices*, when *Lord Justice Turner*, concurring in the opinion of the *Master of the Rolls*, and the *Lord Justice Knight Bruce* doubting, the decision of the *Master of the Rolls* was affirmed 10th *June*, 1857.

GUNTER *v.* GUNTER.

April 20.

The owner in fee bought up an existing building lease of the property, and had it assigned to a trustee, in trust for him, "his executors, administrators and assigns." Held, that the presumption was, that the lease had not, in Equity, merged in the inheritance, but that it passed as part of his personal estate. Held, also, that the burden of proof was on those who asserted the contrary.

THIS case came before the Court on general demurrer upon the following facts :—

By indenture of the 10th of *October*, 1810, *James Gunter* (the owner in fee) demised a public house called "*The Hope and Anchor*," to *Symons*, for a term of seventy-seven years, at a rent of 10*l.*

In 1812, this leasehold was mortgaged by *Symons* to *James Gunter*, by an indenture dated the 24th of *February*, 1812, whereby *Symons* (by the direction of *James Gunter*) assigned the premises for the residue of the term to *Richard Sarel*, in trust nevertheless for *James Gunter*, subject to a proviso for redemption on payment of 1,000*l.* and interest.

In 1813, *James Gunter* agreed to purchase the equity of redemption; and by an indenture dated the 16th of *July*, 1813, *Symons*, in consideration of 500*l.* paid by *James Gunter*, did, by his direction, "assign and release" the premises to *Richard Sarel*, for the residue of the term of seventy-seven years, "*in trust nevertheless for James Gunter, his executors, administrators and assigns*," and to be assigned and disposed of as *he or they* should direct, freed from the payment of the sum of 1,000*l.* and interest, but subject to the payment of the rent, and the observance and performance of the covenants reserved and contained in and by the indenture of lease.

James

1857.

GUNTER v. GUNTER.

James Gunter, by his will, dated in 1816, bequeathed the surplus of his personal estate to *Robert Gunter*, his son, absolutely, and he devised his freehold hereditaments to *Richard Sarel* and another, to the use of *Robert Gunter* for life, with remainder to his first son in tail male.

James Gunter died in 1819, and after his death, *Robert Gunter* entered into possession, and upon the expiration, in 1831, of a sub-lease, which had been granted by *Symons*, *Richard Sarel*, by the direction of *Robert Gunter*, demised the premises to a tenant for twenty-one years, reserving the rent to *Richard Sarel*, his executors, administrators, and assigns; and surrenders being made, two subsequent renewals were, by the direction of *Robert Gunter*, granted by the persons in whom the term of seventy-seven years was, at the time, vested.

Robert Gunter, by his will, gave his real and personal estate between his sons, the Plaintiff and the Defendant. *Robert Gunter* died in 1852, and on his death the Defendant, his eldest son, and the tenant in tail under the will of his grandfather, *James Gunter*, entered into possession of the *Hope and Anchor*, on the supposition that the term of seventy-seven years had merged in the inheritance, but the Plaintiff afterwards insisted, that the term was still subsisting at law and in equity, in which case it passed absolutely to *Robert Gunter*, under *James Gunter's* will, and was by him bequeathed to the Plaintiff and Defendant. The bill prayed a declaration that the term was still subsisting at law and equity, and had passed by *Robert Gunter's* will.

To this bill the Defendant filed a demurrer, which now came on for argument.

Mr.

Mr. *Selwyn* and Mr. *Westlake*, in support of the demurrer, cited *Pitt* v. *Pitt* (*a*); *Hood* v. *Phillips* (*b*); *Tiffin* v. *Tiffin* (*c*); *Best* v. *Stampford* (*d*); *Swabey* v. *Swabey* (*e*); *Whitchurch* v. *Whitchurch* (*f*); *Dowse* v. *Percival* (*g*); and see The Earl of *Buckinghamshire* v. *Hobart* (*h*).

Mr. *R. Palmer* and Mr. *Jolliffe* were not called on.

The MASTER *of the* ROLLS.

I am of opinion that this demurrer cannot be sustained.

It is true that where a charge is simply paid off by the owner of the inheritance, it is to be assumed that it is merged, and the burden of proof is on the person who contends that it is still subsisting; but though this observation applies to a case where there is a simple payment off of the charge by the owner of the inheritance, this is a matter of inference only, and may be rebutted by evidence, as well as by the mode in which it is done. Thus, if the form be such as to keep the charge on foot, the burden is shifted, in consequence of the presumption of an intention to keep it on foot, arising from such being the form of the transaction. The burden of proof is then on those who seek to establish, that, notwithstanding the form, it was intended by the person paying off the charge to merge it in the inheritance.

Nothing can be stronger than the form in this case. The owner in fee simple grants a building lease reserving a small rent; a house is built by the tenant, to whom he lends

(*a*) 22 *Beav.* 294.
(*b*) 3 *Beav.* 513.
(*c*) 1 *Vern.* 1.
(*d*) 2 *Vern.* 520.
(*e*) 15 *Sim.* 106.
(*f*) 2 *P. Wms.* 236.
(*g*) 1 *Vern.* 104.
(*h*) 3 *Swan.* 186.

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lends 1,000*l.* on the security of that lease, which is assigned to a trustee for that purpose. Shortly afterwards, the lessee being in want of more money, sells the whole interest in the lease to the landlord, who pays 500*l.* more for the equity of redemption. The owner of the fee does not require the term to be assigned to himself, which would put an end to it, he not only requires an assignment and release of the term to be made to a trustee, but he directs that he shall hold it, for the residue of the term, in trust for him, *his executors, administrators and assigns,* not mentioning his *heirs.* It is very difficult to get over these words, which expressly shew an intention to keep the term on foot.

Having done this, he leaves all his personal estate to his son and his freeholds to two trustees (one of whom is the trustee of the term, but on which, as it appears to me, nothing turns) to the use of his son for life. He gives no leasing power, so that if the existing under lease of twenty-one years fell in, which was to be expected and happened, the son would have no power to grant another lease for twenty-one years, or for any longer term than one to expire on his own death.

How was this acted on by the son, who may be supposed to have known the intentions of his father as to keeping the term on foot? he grants leases for an absolute term of twenty-one years on three occasions. He therefore considered that he had power to demise this property for a period which would not determine on his death. The consequence was, that this was the construction which he put on it. Having so treated it he makes his will, and it is obvious that he intended to leave this as personal property to his younger son, for he has treated it as personal estate, or the demises which he made would not have been effectual.

I am

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I am of opinion, therefore, that there is no evidence to rebut the very strong presumption, arising from the form in which the transfer was made, viz., in trust for him, his executors, administrators and assigns.

Overrule demurrer.

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April 17, 18, 20.
May 25.

A company having given notice to take land under their compulsory powers, and the price being fixed, the contract is complete, and this Court will entertain a suit by the company for specific performance, but they will not, though successful, obtain their costs, if they could have derived the same advantage by proceeding under their Act.

When the completion of a purchase is delayed through the default of the vendor in possession, and the property has diminished in value or has been deteriorated by permissive waste, the purchaser is entitled to compensation.

Vendor held accountable for the rents, but not entitled to any interest on the purchase-money, the purchase not having been completed through the default of the vendor, and the purchase-money having, after notice to the vendor, been lying idle.

It seems doubtful, whether, where a public company have, under their compulsory powers, given notice to the landowner to take his land, and nothing more is done, a suit for specific performance can be maintained.

THIS was a bill for specific performance, and the principal question which arose was, whether a joint-stock company, incorporated by Act of Parliament, with powers to take land compulsorily, could file a bill for specific performance of a contract entered into with a landowner, under the peculiar circumstances here detailed, or whether they must proceed under the compulsory clauses of their Act. The facts which raised this question were as follows:—

The Plaintiffs were incorporated by Act of Parliament in 1812. Subsequently, by a further Act of Parliament, they were empowered to take land to construct a reservoir on the river *Brent*. This reservoir, although, in the year 1840, extending over 135 acres of land, was still insufficient for their purposes, and a further Act of Parliament was applied for and obtained in 1851, to enable the company to enlarge their reservoir, in which Act the Lands Clauses Consolidation Act

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Act of 1845 (8 & 9 *Vict.* c. 18), was incorporated. The Defendant was the owner of certain freehold and leasehold lands in the immediate vicinity of the reservoir, part of which leaseholds were required for the purposes of the undertaking, and, at his instance, the legislature introduced into the last Act so obtained by the company the following clause (*a*):—

"And whereas *Samuel Ware*, Esq., claims to be lessee, under a renewable lease, of certain land in the said parish of *Hendon*, comprised in the hereinbefore mentioned plan of the enlargement of the reservoir, and described in the hereinbefore mentioned book of reference to the plan, part of which land will be required for the purposes of the enlargement; and the said *Samuel Ware* also claims to be owner of the fee simple of a piece of land containing four acres, or thereabouts, with the two houses and buildings erected thereon, situate on the north side of *Colin Deep* Lane, in the parish of *Hendon*, near to the reservoir, which is not included within the limits of deviation marked upon the plan or in the book of reference; and *Samuel Ware* alleges, that the last-mentioned land and the houses thereon will be injured and deteriorated in value by the construction of the works hereby authorized: be it therefore enacted, that if *Samuel Ware*, his heirs or assigns, shall, within three calendar months after the passing of this Act, by notice in writing under his hand or hands, to be left at the office of the said company of proprietors of the *Regent's* Canal, require such company to purchase the freehold of the said piece of land, with the houses and buildings thereon, situate on the north side of *Colin Deep* Lane, then and in such case it shall not be lawful for the company to exercise the compulsory

(*a*) 14 *Vict.* (local and personal) c. xxxii. s. 7.

compulsory powers of purchase, conferred by this Act, in respect of the said land whereof *Samuel Ware* claims to be lessee as aforesaid, without also, at the same time, purchasing the freehold of the said piece of land, with the houses and buildings thereon, situate on the north side of *Colin Deep* Lane, and then and in that case, the company are hereby authorized and required, with all convenient speed after such notice, to purchase the freehold of the said piece of land, with the houses and buildings thereon, situate on the north side of *Colin Deep* Lane; and all the powers and provisions of this Act, and of the Lands Clauses Consolidation Act, 1845, incorporated herewith, shall extend and be applicable for the purchase of the said piece of land, with the houses and buildings thereon, situate on the north side of *Colin Deep* Lane, in such and the same manner, to all intents and purposes, as if the whole of such piece of land, with the houses and buildings thereon, situate on the north side of *Colin Deep* Lane aforesaid, had been included within the limits of deviation marked upon the said plan, and had been described in the book of reference."

The Act passed on the 5th of *June*, 1851, and on the 27th of the same month, the Defendant sent to the Plaintiffs' office a notice in writing, requiring the company to purchase the freehold of this piece of land, with the houses and buildings erected on it, situate on the north side of *Colin Deep* Lane. On the 15th of *July*, 1852, the Plaintiffs served on the Defendant the usual notice of the lands they required to take under the Act, and requiring a statement of the particulars thereof, and stating their readiness to treat and agree for the purchase thereof. The statement required was sent by the Defendant, and in it was included the description

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scription of the freehold land, which the Defendant was entitled to require the company to buy.

On the 21st of *December*, 1852, the Plaintiffs caused two further notices, in a similar form, to be served on the Defendant; the first requiring to take from him a further piece of the leasehold lands, and in the second, stating that the company intended to exercise their compulsory power of purchase as to the leasehold land; that they intended, in pursuance with the provisions of the Act, to purchase the freehold piece of land, and that they were willing to treat with the Defendant as to the price thereof, and the compensation to be made to him for damage to be occasioned by their works.

In *January*, 1853, the Plaintiffs served another notice, that, at the expiration of ten days, they intended to summon a jury to assess the price to be paid for the land and for compensation. Before this had been done, the Defendant expressed his desire to have this settled by arbitration, and accordingly, on the 18th of *March*, 1853, an agreement in writing was duly signed by Mr. *Lyon*, as the agent of the company, on the one part, and the Defendant on the other, whereby it was agreed, that the amount should be settled by the award of Mr. *W. Tite*. On the 4th of *October*, 1853, Mr. *Tite* awarded the sum of 145*l.* for the land comprised in the first notice, the sum of 35*l.* for the land comprised in the second notice, and 2,730*l.* for the freehold land. Previously to this time, the title of the Defendant had been accepted by the company. On the 25th of *October*, 1853, drafts of the assignment of the leaseholds and conveyance of the freeholds were sent for approval, and altered by the Defendant's solicitor into a form, which, after some demur, had been acceded to by

by the Plaintiffs, and which they are willing should be executed in that shape.

The Defendant was dissatisfied with the award, and, in 1854, an application was made by him to the Court of Exchequer to set it aside on four grounds. After hearing the argument, and taking time to consider, the Court of Exchequer confirmed the validity of the award (*a*). Having been disposed of by that Court, the *Master of the Rolls* held that they could not now be raised here.

The Defendant having neglected to execute the engrossments of the drafts which had been approved, the Plaintiffs, on the 22nd of *June*, 1855, gave notice to the Defendant, that their purchase-money was lying idle, and they filed this bill against the Defendant for a specific performance.

The cause now came on for hearing.

Mr. *R. Palmer*, Mr. *Follett* and Mr. *Wickens*, for the Plaintiffs. The moment the company had given notice of their intention to take land, the relation of vendor and purchaser was constituted between the parties; *Stone* v. The *Commercial* Railway Company (*b*). The company became thereby bound, even if the compulsory powers had expired before the completion of the purchase; so, reciprocally, the landowner is equally bound; The *Queen* v. The *Birmingham* and *Oxford* Railway Company (*c*). There being an existing contract, the landowner, on his part, might maintain a suit for specific performance; *Walker* v. The *Eastern Counties* Railway Company (*d*); *Hawkes* v. The *Eastern Counties* Railway Company (*e*); The

(*a*) *Ware* v. *The Regent's Canal Company*, 9 *Exch. Rep.* 395.
(*b*) 4 *Myl. & Cr.* 122.
(*c*) 15 *Q. B. Rep.* 634.
(*d*) 6 *Hare*, 594.
(*e*) 3 *De G. & Sm.* 743; 1 *De G., M. & G.* 737, and 5 *H. L. Cas.* 331.

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The *Midland Counties* Railway Company v. *Westcomb* (*a*); and this is the converse case. The old jurisdiction is not taken away by a new remedy being given; *Attorney-General* v. *Aspinal* (*b*); and there is this peculiarity in the present case:—that lands are comprised in the purchase which are not within the limits of deviation, but which the Defendant can force the Plaintiffs to purchase under the special clause in his favour.

The Defendant is liable for the deterioration of the property; *Foster* v. *Deacon* (*c*); and the purchase-money having been idle, the Defendant must account for the rents, but is entitled to no interest.

Mr. *Lloyd* and Mr. *T. Stevens*, for Mr. *Ware*. The bill asks for the specific performance of some contract between the parties; none exists. A contract implies a voluntary engagement between two contracting parties; here there is none. A notice has been given the Defendant, requiring him to determine whether he will enter into an agreement to sell; he has not acceded to the proposal, and the Plaintiffs are taking his lands without his consent, and compulsorily. Though the Defendant must submit to the necessity of the case, yet he is not a contracting but a dissenting party, and the relation of vendor and purchaser is not constituted. In the cases cited, the landowners were Plaintiffs, and therefore assenting parties; here the assent is wanting. The Act does not consider the notice as constituting a contract, but as a preliminary step, and as bringing the parties together, and who must afterwards settle the matter between them, either by agreement, arbitration, or a verdict of a jury; *Adams* v. The *London* and *Blackwall* Railway Company (*d*).

Although

(*a*) 11 *Sim.* 57.
(*b*) 2 *Myl. & Cr.* 613.
(*c*) 3 *Madd.* 394.
(*d*) 2 *Mac. & Gor.* 132.

Although an old jurisdiction is not taken away by a new remedy being given, yet, if a new right be given and a special remedy provided for enforcing it, such remedy must be pursued; *Adams* v. The *London* and *Blackwall* Railway Company (*a*).

The Plaintiff must pursue the specific remedy pointed out by the Statute, Lands Clauses Act, 8 & 9 Vict. c. 18, and upon the default of the landowner to convey, they must deposit the purchase-money and convey the property to themselves, under the 75th and 76th clauses. In ordinary cases of a contract unperformed, the remedy is by an action for damages at law, and this Court only interferes because that remedy is inadequate; but here, the Plaintiffs have another and an adequate remedy under their Act, and therefore are not entitled to have recourse to this Court.

Mr. *R. Palmer*, in reply.

Inge v. The *Birmingham*, &c. Railway Company (*b*); *Gray* v. The *Liverpool* and *Bury* Railway Company (*c*), were also cited. Besides these, *De Visme* v. *De Visme* (*d*), was cited as to interest on the purchase-money; and *Sherwin* v. *Shakspear* (*e*), as to the mode of accounting for the rents.

The Master *of the* Rolls reserved judgment.

The

(*a*) 2 *Mac. & Gor.* 131.
(*b*) 3 *De G., M. & G.* 658.
(*c*) 9 *Beav.* 391.
(*d*) 1 *Mac. & Gor.* 336, and 1 *Hall & Twell*, 408.
(*e*) 17 *Beav.* 267, and 5 *De G., M. & G.* 517.

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May 25.

The Master *of the* Rolls.

The principal question which arises in this suit is, whether a joint-stock company, incorporated by Act of Parliament, with powers compulsorily to take land, can file a bill for specific performance of a contract entered into with a landowner, under the peculiar circumstances here detailed, or whether they must not proceed under the compulsory clauses of their Act.

Before me, the defence to the suit raises, incidentally, some points which were disposed of by the Court of Exchequer, and which I think it unnecessary to notice, as I consider them no longer open. But the principal objection to the relief sought by the Plaintiffs is, that they might proceed under the Lands Clauses Consolidation Act to take the land:—that no necessity existed of instituting this suit, and that, as a suit for specific performance, it cannot be maintained.

It is laid down by Lord *Cottenham*, in *Stone* v. *Blackwall* Railway Company (*a*), that the moment the company have given the notice, the relative situation of vendors and purchasers is constituted between the parties, and this is confirmed by many other cases, particularly by *Walker* v. The *Eastern Counties* Railway Company (*b*). This, as a general proposition, is not disputed by the Counsel for the Defendant, but it is urged by them, that this relative situation simply extends to fixing, between them, what the land is which is to be taken, and that it does not enable the person whose land is taken to file a bill against the company for specific performances of the purchase of the land, of the

(*a*) 4 *Myl. & Cr.* 122. (*b*) 6 *Hare*, 594.

the taking of which notice has been given; and they urge, that the case of *Walker* v. The *Eastern Counties* Railway Company was, if not overruled, at least shaken by Lord *Cottenham* in the case of *Adams* v. The *London* and *Blackwall* Railway Company (*a*); and that even if they are wrong in this contention, still that the doctrine established extends only to confer this right on the landowner, and that no reciprocal right exists on the part of the company; that a company cannot give a notice to the landowner, and then file a bill against him for specific performance; that the proceedings against him are *in invitum*, and that admitting that when the company have thought fit to constitute that relation, the landowner may, by means of this Court, enforce the right so conferred on him; still, that the giving such a notice does not enable the company to resort to the assistance of Equity against him, as they might do in the case of a person contracting with them, voluntarily and under no compulsion, for the sale of a piece of land. They argue, that the decision of Lord *Cottenham* is precise on this point, for that he expressly states, that it by no means follows, that the Court will take upon itself the specific performance of such sales; and further, that in a subsequent part of his judgment, he proceeds thus (*b*):—" It cannot be that the notice *per se* gives to this Court jurisdiction, for if this were so the jurisdiction would arise as soon as the notice was given. On that step being taken, however, three modes of proceeding are pointed out by the Act:—an agreement, an arbitration and a jury; the last only in the event of the two first not taking effect. At the time, therefore, of the notice being given, it must be uncertain which course will be adopted, and the Court, therefore, has no guide as to what course it ought to enforce. It is only after the time for an agreement or arbitration has expired that

(*a*) 2 *Mac. & Gor.* 118. (*b*) *Ibid.* 132.

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that the jurisdiction to enforce proceedings before a jury can arise; but that time cannot ever arrive, where a valid agreement has been entered into." Thus giving the reason for the opinion he had formed, that in such a case, a suit for specific performance would not lie.

Upon attentively considering that case, I concur with the Defendant's counsel in the opinion, that Lord *Cottenham* expressed more than doubts as to the decision of *Walker* v. The *Eastern Counties* Railway Company, and as to the power of this Court to entertain any suit for specific performance, in the case of a mere notice, and nothing more being done. But I do not think it necessary to investigate the correctness of that decision, because the facts in this case, in my opinion, take it out of that decision, preclude the point on which Lord *Cottenham* expresses doubts from arising, and thus bring it within the ordinary jurisdiction of this Court. This, in my opinion, is shewn by various passages in Lord *Cottenham's* judgment in the case referred to. In one place, his Lordship uses the words, that "if the proceedings led to an agreement the Court might do so," (that is, take upon itself the specific performance of such sales,) "for then, although originating in the compulsory power, the purchase would be effected under a private agreement, and so other cases may arise."

All these cases establish, that the notice fixes the extent of the land to be taken, and the relation of vendor and purchaser as regards that land. The only thing that remains to be done after this, is the fixing the price to be paid; when this is done, the whole relation of the parties as vendor and purchaser is as fully constituted as in the case of a formal and regular agreement, and this it is to which Lord *Cottenham* refers in the passage of his judgment which I first read, and

and this also is what, I apprehend, Vice-Chancellor *Wigram* refers to in the following passage of *Walker* v. *Eastern Counties* Railway Company, cited to me by Mr. *Follett*:—" If, after notice by the company to take the land and tender of the price, the owner should attempt to deal with the property in a manner injurious to the company, or simply refuse to execute a conveyance, I cannot think that the jurisdiction of this Court would be doubtful." The Vice-Chancellor there anticipates that everything is fixed and concluded, except the conveyance, and Lord *Cottenham* seems also to consider, that when the other two modes of proceeding are excluded, and that proceedings before a jury are the only matter which remains to be done, the jurisdiction might exist.

In this case, not only is the extent of land to be taken fixed, and the relation of vendor and purchaser with respect to it constituted, but the price has also been fixed and settled by an award, the validity of which has been established by the Court of Exchequer. It is therefore no longer uncertain (to refer once more to the difficulty expressed by Lord *Cottenham*), which of the three modes of ascertaining the price is to be adopted, and the only matter that remains is, the execution of the conveyance, which is refused by the vendor, exactly in the manner pointed out by the Vice-Chancellor, when he says, " that the jurisdiction of the Court (in such a case) would not be doubtful."

But beyond all these considerations, that which weighs much with me here, is the circumstance, that the Defendant, as to the freehold land, is in the position usually occupied by the company, to this extent, at least, that he is the party insisting on the land being bought by the company which they do not wish to buy, and

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and which, but for his insisting on it, they would not have taken.

It is said by Mr. *Lloyd*, that there can be no agreement, where there is no will or intention to enter into a contract. Admitting this to be correct, still, as regards the freehold land, which alone is in question in this suit, this is not the situation of the Defendant. For he himself, under the 7th section of the Act, gave notice to the Plaintiffs to take the land. True it is, that this section is conditional on their taking the leasehold; but assuming the leasehold to be taken, which is the event which has occurred, then his intention and desire is, that they should buy the freehold too. It is equivalent to this:—*A.* agrees with *B.*, in a particular event, to sell a plot of land to *B.*, and *B.*, in that event, agrees to buy. That event takes place, and then *A.* and *B.* agree that the price shall be fixed by the arbitration of a third person, who accordingly fixes the price. What more is required to constitute a valid and complete agreement between *A.* and *B.* The circumstance, that the agreement is contingent till the event happens, does not, after the event has occurred, affect the validity of the contract. The declaration of war or the conclusion of peace with a foreign country might well be an event on which might depend the eligibility of the sale or purchase of a piece of land, affording facilities for carrying on a trade with that country. The agreement is contingent, and not enforceable till the event on which it was to depend has arisen; but when that event has occurred, the contract, for all purposes, rests on the same footing as if it had been made positively and without reference to any contingency.

It is justly observed, by Lord *Cottenham*, that an old jurisdiction

jurisdiction is not taken away by a new remedy being given: he goes on to say, that if a new right be given and a special remedy provided for enforcing it, such remedy must be pursued: but here, it is to be observed, that the new right, in respect of the freehold, is not given to the company, but to the Defendant. The right is given to the Defendant by the 7th section, of selling this land to the company, and on the company is imposed the obligation of buying it. In such a case, I cannot doubt but that the Defendant might have enforced that right by the power of this Court, and the contract being complete, in all respects except the execution of the conveyance by the Defendant, the terms of which are not now in dispute, I am of opinion that this Court is bound, at the instance of the Plaintiffs, to compel the Defendant to give them the conveyance, upon payment of the price awarded.

There are two other minor matters to be disposed of, one relating to the interest of the purchase-money and the rents of the land. The price was fixed by the award of Mr. *Tite*, on the 4th of *October*, 1853; at this time the contract was, in my opinion, complete, and from that period, under ordinary circumstances, the purchaser would have to pay interest for the purchase-money, and the vendor would have to account for the rents of the property. The interest, therefore, will begin to run from that period, but on the 22nd of *June*, 1855, the purchasers gave notice that their purchase-money was lying idle; this, therefore, stops the payment of interest, it being owing to the default of the Defendant that the purchase was not then completed. The Plaintiffs, therefore, will have to pay interest at 4*l.* per cent. per annum on the purchase-money from the 4th of *October*, 1853, to the 22nd of *June*, 1855, and the Defendant will have to account for the rents and profits of

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If this were a mere idle dispute, and if the company would have derived the same advantage by proceeding under their Act, as by the decree of this Court, although they would have been entitled to a decree, I should not have given them the costs: but it is obvious, that as to a property not required for the purpose of the company, and therefore probably to be disposed of by them, the proceeding under the compulsory clauses would impose inconveniences, and possibly obstacles, in the way of the future disposal of the property, from which, under the conveyance of the owner, they would be free.

I think, therefore, that the Defendant having been in the wrong, must pay the costs of the suit up to and including the hearing.

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of the land from the 4th of *October*, 1853, to the time when the Plaintiffs are put in possession of the land. As to the mode in which he is to account, that is settled by *Sherwin* v. *Shakespear* (*a*), to be in the ordinary manner of a trustee, and not as a mortgagee in possession.

A further question is raised as to the dilapidations, and it is alleged, that from negligence on the part of the Defendant, the property has diminished in value or has been deteriorated by permissive waste, since the award of Mr. *Tite*; if this be so, I am of opinion that the Plaintiffs are entitled to compensation in respect of such waste, but I have no evidence before me on this subject. There is an allegation to that effect by the Plaintiffs, which is denied by the Defendant, and, in the absence of any evidence on the subject, I am of opinion that I cannot make any order on this part of the case, and that some evidence (which there is not) would be required, even to found an inquiry on this point.

All, therefore, that I can do is, to decree the specific performance of this contract, and order the Plaintiffs to pay to the Defendant the purchase-money, with interest at 4*l.* per cent., from the 4th of *October*, 1853, to the 22nd of *June*, 1855, less the amount of the rents and profits of the land received by the Defendant since the 4th of *October*, 1853, of which, unless the parties can agree, an account must be taken. Order the Defendant to execute the conveyance, as approved by his solicitor; and, on payment of the purchase-money, order the Defendant to deliver the conveyances to the Plaintiffs and to give possession of the premises.

If

(*a*) 17 *Beav.* 267; reversed 5 *De G., M. & G.* 517.

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If this were a mere idle dispute, and if the company would have derived the same advantage by proceeding under their Act, as by the decree of this Court, although they would have been entitled to a decree, I should not have given them the costs: but it is obvious, that as to a property not required for the purpose of the company, and therefore probably to be disposed of by them, the proceeding under the compulsory clauses would impose inconveniences, and possibly obstacles, in the way of the future disposal of the property, from which, under the conveyance of the owner, they would be free.

I think, therefore, that the Defendant having been in the wrong, must pay the costs of the suit up to and including the hearing.

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In re PRIMROSE.

In the Matter of the Trustee Acts, 1850 and 1852.

In the Matter of the Bankrupt Consolidation Act, 1849.

April 16, 18, 20.

Parties are not justified, by remaining passive, to prevent the rightful owners obtaining possession of their property, but if called on to do an act, involving no risk or responsibility, which is necessary to enable the true owner to obtain his property, they are bound to do it. If therefore their refusal renders an application to the Court necessary, they will be made to pay the costs.

Trust funds stood in the Bank books in the name of a bankrupt and another as trustees. The assignees made no claim to it, but refused to sign a paper stating so, and which was necessary, by the rules of the Bank, to obtain a transfer into the names of a new trustee. The Court held such conduct unjustifiable, and that the assignees ought to pay the costs occasioned.

The Court has no jurisdiction to award costs adversely against third parties cited to appear as Respondents upon a petition to appoint new trustees under the Trustee Act, 1850.

UNDER the settlement made on the marriage of the Petitioner, Mrs. *Primrose*, certain stock in the funds and other personal property were vested in two trustees, upon certain trust for her benefit. In 1855, one of the trustees retired, and *Leopold Redpath* was thereupon duly appointed a trustee in his place. The funds were then transferred into the names of the two trustees *Orme* and *Redpath*, and the other property was likewise vested in them.

In 1856, *Redpath* was adjudicated a bankrupt; and in *January*, 1857, he was convicted of forgery and sentenced to be transported for life.

Mrs. *Primrose* was desirous of appointing Mr. *Walker* a new trustee, in the place of *Redpath*, and of having the trust funds transferred into the names of *Orme* and *Walker*, but the Bank of *England* would not act on a power of attorney to transfer the funds executed to *Redpath*, unless his assignees in bankruptcy signed a disclaimer in this form:—

In the matter of Leopold Redpath, a bankrupt.

We the undersigned, assignees of the said bankrupt, declare

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In re PRIMROSE.

declare that the sums of 4,725*l.* Consols, and 10,100*l.* New £3 per Cents. standing in the names of Mr. *Orme* and *L. Redpath*, are trust property, and that the same constitutes no part of the said bankrupt's estate.

To the Governor and Company
of the Bank of *England*.

Assignees.

Frequent applications were made to the assignees to sign this declaration, and offers were made to furnish them with every information, and to pay their costs. The assignees, though they did not decline, yet they postponed and neglected signing the document, and Mrs. *Primrose*, after giving them notice, presented this Petition, praying that *Walker* might be appointed a new trustee, for an order vesting the funds in the two trustees, or that the assignees might join in the transfer, or do all necessary acts to give effect to *Redpath's* power of attorney to transfer, *and that the assignees in bankruptcy might pay the costs.*

Mr. *Selwyn* and Mr. *Bovill*, in support of the Petition.

Mr. *R. Palmer* and Mr. *Hardy*, for the assignees.

13 & 14 *Vict.* c. 106, s. 130; *In re Heath* (*a*); *In re Heming's* Trusts (*b*); *Ex parte Cartwright* (*c*); *In re Marrow* (*d*).

The MASTER *of the* ROLLS. *April* 16.

I wish to hear a reply upon one point, for I think that

(*a*) 9 *Hare*, 616.
(*b*) 3 *Kay & J.* 40.
(*c*) 3 *De G. & Sm.* 648.
(*d*) *Craig & Ph.* 142.

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that this is a matter of considerable importance with regard to the mode in which assignees should act in future, in cases of this description.

If a property cannot be obtained by the rightful owner, except by another person saying, whether he claims it or not, it is not sufficient for him to hold his tongue and say nothing. In my opinion, he is bound to say whether he will claim it or not; and if he chooses to say, "I will make no claim," he is bound to express that in clear terms; and if he makes no claim, to disclaim; that is the principle on which I have frequently acted both with respect to assignees and other persons in suits for foreclosure, where the bankrupt was the mortgagor, and the assignees being applied to before the suit was instituted to know if they claimed anything, said, "we neither claim nor disclaim," and it then became necessary to make them parties to the suit. In all those cases the Court has refused to give them their costs (*a*), even though they had afterwards filed a disclaimer in the suit. In my opinion, assuming that the Petition to this Court was rendered absolutely necessary, by reason of the assignees not disclaiming all interest in this fund, (but upon which I mean to express no opinion,) then I think it was their duty to investigate the matter, and if it were an ordinary, simple and clear case, free from all difficulty, to disclaim, and not to render a Petition necessary, and having rendered a Petition necessary, that they ought to pay the costs. But if the Petition would have been necessary, in any event, for the purpose of appointing new trustees, or if the Petitioner has thought it a more desirable course and one by which she would get a better and more effectual order made, to present the Petition, then, in my

(*a*) See *Ford* v. *White*, 16 *Beav.* 120, and the note, p. 126.

my opinion, this is not a case in which the bankrupt's assignees ought to be made to pay the costs. 1857. *In re* PRIMROSE.

I should wish to look into the papers and to consider them.

The MASTER *of the* ROLLS. *April* 18.

After perusing the papers and evidence, I am of opinion that this petition has been occasioned solely by the Respondents, who, making no claim to the fund in question, do not choose to say so in writing, and in such a form as will enable the Petitioners to prove to the Bank that the Respondents make no claim, and that the Petitioners are entitled to it. The Bank of *England*, it appears, requires, in cases where stock is standing in the names of two persons as trustees, and one of them becomes a bankrupt, before they allow a transfer of that fund, that the assignees should sign a paper, disclaiming, according to a form prepared by the Bank, all interest in it. It is the refusal to sign this paper which has made this petition necessary, and the perusal of the evidence satisfies me, that the fact of not signing this paper has alone made this petition necessary, that without it no petition would have been presented, and that what was required, would have been done in another form and in a less expensive form than that by this petition.

Although it relate merely to costs, it is a question of great importance, with reference to other proceedings, because it does not apply exclusively to assignees

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or to any particular class of individuals, but affects all members of the community, with reference to their duties towards each other and to the course of conduct they ought to pursue on occasions like the present.

It appears to me that the proposition must be thus stated:—If the course of events has so placed the fund or property, that the beneficial owner cannot get it without some act done on the part of a mere stranger to the fund, which act, on the part of that stranger, involves no responsibility and no risk whatsoever, this Court will not permit that person to be merely obstructive, and will not allow him to say, "I make no claim to it myself, but I will interpose every passive obstacle which I can throw in the way, to prevent your getting the fund. I shall do nothing active, but I shall do nothing to assist you to get the fund." In such a case, my opinion is, that if the passive resistance of this person drives the rightful and beneficial owner into Chancery, and this Court perceives that the application to Chancery has become necessary, solely by reason of the Defendant refusing to do an act which would have involved no risk and no responsibility whatever, then I take the rule to be this:—that the person indulging in this, which I may call unamiable disposition of obstruction, must pay the costs of the application to this Court, which he has rendered necessary. It is no answer, in my opinion, for him to say, "I did not put myself in this position, it is not owing to any act of mine that this has occurred." The observation is undoubtedly a correct one, but it applies just as much to the rightful and beneficial owner as it does to himself. The relative position in which they are placed arises from no act of either of them, but from circumstances over which neither of them had any control; for I do not treat the act of a person appointing another

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as his trustee, to be the act which has created the difficulty, any more than the fact of the Respondents having accepted the office of assignee has created it. In point of fact, as I before stated, the position in which they are placed arises out of circumstances for which neither of them is in any respect responsible.

Neither do I mean to say that a person in such situation is called upon to investigate difficult claims, or to decide upon doubtful rights. I have guarded against this, by saying, that the act "involves no responsibility or risk whatsoever," but when none is incurred, and all expenses are paid, it is, in my opinion, his duty to afford to a rightful and beneficial owner facilities to obtain the property, and not to compel him to waste his money in getting it done through the assistance of this Court.

The observations which I now make, although of general application, applying not to assignees or trustees in particular, but to everybody, are peculiarly applicable to the present case. The Respondents were nominated to act, and consented to act as trustees of the estate of the bankrupt. What were the duties which, in that position, they had undertaken to perform? They were these:—to ascertain the property to which the bankrupt was entitled; that was their first duty. It is not necessary for me to proceed further. They find a sum of stock standing jointly in the name of the bankrupt and of another person; *primâ facie*, by law at least, the bankrupt would have a beneficial interest in that stock. Then part of the duty which they undertook to perform was to ascertain whether the bankrupt had any beneficial interest in that stock. That was their first duty, and if, in their attempt to perform

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it, the Petitioners or any other persons had thrown any obstacle in their way, by refusing to afford them the necessary information on the subject, or had so acted as to make it necessary to come to this Court, then I should have made them pay the costs arising from the consequences of their acts. But what has happened here? This duty, which it was incumbent upon the Respondents to perform, they have, in my opinion, performed; they have ascertained that this stock did not, in any respect, belong to the bankrupt, and that he had no interest in it, and they have verbally stated, that they make no claim to it. It is obvious they must do one of two things; either they must claim an interest in it, or not claim an interest in it. There is no other alternative. They do not claim an interest in it, and they so state, but when they are asked to put the fact of their not claiming in such a form as the Bank requires (which is a mere matter of form, involving no species of risk or responsibility whatever, but merely enabling the Bank to give it to the person who is entitled) they refuse to do it. Now it is observed, that the assignees were not called upon to decide any question whatever as to the rights of the parties. They were not called upon to incur any risk or responsibility; they were not required to determine who was entitled to the stock, but simply to put in writing, in this particular form, that which they have verbally or impliedly already done, viz. that they made no claim.

This they have refused to do, and I must say for this most singular of all reasons, which is stated in the affidavit of one of the assignees in these terms:—"Shortly after the conviction, the bankrupt was brought up before the Commissioner of the Court of Bankruptcy, for the purpose of being examined touching his estate and effects, and the bankrupt then positively refused to answer

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answer a single question, or to give the slightest information respecting his estate. In consequence of such refusal, I have ever since thought it perfectly useless to ask for any information from the bankrupt, and I have consequently not done so, and no information whatever has been given by him respecting his estate and affairs, although I verily believe that the bankrupt was, at the time of his bankruptcy, possessed of, entitled to or interested in property to a large amount, the particulars of which have not been, in any way, disclosed by the bankrupt to his assignees; and no balance-sheet has been filed by the said bankrupt. Mrs. *Primrose*, who has presented a petition for the appointment of a new trustee of her marriage settlement, was an intimate friend of the bankrupt. Under the circumstances aforesaid, and having regard to the fact, that I am a trustee for so large a body of creditors, I did not consider that I was justified in voluntarily signing the disclaimer mentioned in the petition of Mrs. *Primrose*, but I am, and always have been, perfectly ready and willing to act under the sanction and direction of this Honorable Court, or any other Court of competent jurisdiction. In not signing the disclaimer, I have not been desirous of causing any delay, expense or trouble, and I have not been actuated by any improper motive; but I have forborne to sign the same, solely from a sense of the duty I owe to the body of persons whom I represent, and a sense of the responsibility I might incur by voluntarily disclaiming as required by the Petitioner."

I have already stated, that the assignees make no claim to this stock, that they do not pretend that they are entitled to or have any right whatever to it, and therefore the only question is, whether, making no claim whatever, they shall disclaim. In fact, their reasoning is this: because the bankrupt *Redpath* behaves improperly,

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perly, the assignees shall punish Mrs. *Primrose;* that because the bankrupt will afford no information whatever, and will give us, the assignees, no facilities for ascertaining the property of the creditors, we will, in consequence of this, afford Mrs. *Primrose* no facility for getting her property, that is, that because the bankrupt interposes every species of passive obstacle, in every way that he can, to the course of the assignees, the assignees will do the same to Mrs. *Primrose* and her trustees.

Now what privity is there between the bankrupt and Mrs. *Primrose*, except that which is prominently put forward in the affidavit I have read, that Mrs. *Primrose* "was an intimate friend of the bankrupt," I am totally at a loss to conceive; nor can I conceive upon what ground it is, that because a bankrupt has misconducted himself, therefore the assignees should not allow the rightful owner of such property, and her trustees, to have it transferred to them, by refusing merely to put in writing that which they have verbally stated:—that they do not claim it. The real fact is, that the affidavit shews the *animus*, it is simply an affair of temper, and as it is an affair of temper which has been indulged in by the assignees, they ought to pay the costs of it.

Mr. *R. Palmer* then pressed upon the Court, that, under the Trustee Act, there was no jurisdiction to award costs against Respondents who were mere strangers to the trust. He referred to the 51st section of the 13 & 14 *Vict.* c. 60, which enacts, "that the Lord Chancellor, intrusted as aforesaid, and the Court of

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of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper."

The MASTER *of the* ROLLS said he would consider the point.

The MASTER *of the* ROLLS. *April* 20.

I have looked into this matter since giving my judgment upon the merits. The point of jurisdiction certainly never occurred to me, for I had assumed that it was not raised. Mr. *Palmer*, finding that I had not noticed the point in my judgment, very properly called my attention to it. Having looked into the matter, I am of opinion that I have no jurisdiction as to the costs. The question depends upon the statute, which gives a certain jurisdiction to this Court, by way of petition, and acting under it, the Court is not exercising its ordinary jurisdiction, in which it has a jurisdiction to dispose of costs. In looking through the statute, I find no clause in it which gives any power upon the subject; nor does it, from the nature of the relief afforded by petition, involve incidentally that power: it differs in fact materially from the Trustee Relief Act of 10 & 11 *Vict.* in this respect. I should not have made the observations I did, respecting the merits, if I had thought the question did not arise, but I should have

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have disposed of it at once upon the question of jurisdiction. However, I still abide by the observations I made as to the general merits, but upon the question of jurisdiction, I am of opinion, upon the terms of the statute, that I have no power to order Respondents to pay any costs of the improper resistance or of the improper proceedings which may have made an application to the Court necessary. The result must be, that I must make an order for the appointment of new trustees, as prayed, but I shall make no order as to costs.

NOTE.—In a subsequent case of *In re Woodburn's Will*, 22nd *May*, 1857, 1 *De G. & Jones*, 333, the *Lord Chancellor* and *Lord Justices* decided, that the Court has jurisdiction, under another Act (the Trustee Relief Act, 10 & 11 *Vict.* c. 96), to award costs against a trustee, who had availed himself of the provisions of that Act by paying the trust fund into Court, and thus submitted himself to the jurisdiction.

FIELD *v.* COOK.

Feb. 25.

A creditors' deed was executed in 1849. The Plaintiff, a creditor who had executed the deed, insisted on an alleged settled account, and refused to verify his claim, as required by the deed. A dividend was paid the other creditors in 1854, and in 1856 the Plaintiff instituted a suit for the performance of the trusts of the creditors' deed. There being no valid settled account, the Court held that the Plaintiff was entitled to the benefit of the deed, but only on the terms of not disturbing any dividend already made.

ON the 24th of *February*, 1849, *John Gootheridge* assigned his property to the Defendant *Cook* for the benefit of his creditors. The deed, however, provided "that no one of the creditors should be entitled to receive any part of his share of the estate and effects thereby assigned, until such time as every such creditor should first have made a solemn declaration or affirmation (if required), before some magistrate, that a debt was then justly due and owing and that no security or satisfaction whatsoever had been received for the same, other than and except such security or satisfaction (if any)

as

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as should be expressed in such solemn declaration or affirmation, and, at the same time, to make his or their election, and either wholly reject or accept such security in full satisfaction of his or her debt, and in full discharge thereof." And it was thereby further agreed and declared, by and betwen the parties thereto, "that if any of the creditors of *Gootheridge* should refuse to come in and execute the said deed, or otherwise accede thereto, within three months after the day of the date thereof, then and in such case, all the dividends on such debts respectively should be paid to *Gootheridge*."

About the same time *Gootheridge*, who was indebted to the Plaintiff, as his solicitor, settled and signed an account and agreement, which was as follows:—

Mr. *John Gootheridge*, in account with *G. V. Field*.

1849, *Feb.* 20th.—To amount of Mr. *G. Ventris Field's* account delivered, for business matters and journies, &c., moneys lent and advanced up to this day, £120 : 10*s.* . .	120	10 0
	£120	10 0

"I have gone through my account with Mr. *Field*, and am perfectly satisfied therewith, and it has been agreed upon between us at the sum of 120*l.* 10*s.* up to this day; and it has also been agreed, that I am to pay him 5*l.* per cent. interest, from the date hereof, on the said amount, until paid, and also to give him a mortgage on my property, if he desires it, to further secure the said amount, with the usual covenants therein, the expense of which I undertake to pay. Dated this 20th day of *February*, 1849.

"*John Gootheridge*."

There

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There was some doubt as to when this document was signed, and the Court decided that it could not stand as a settled account as against the other creditors.

The Plaintiff signed the deed, and made repeated applications to the Defendant in 1852 and the following years for an account and payment. The Defendant, in reply to the frequent applications of the Plaintiff, required him to furnish the particulars of his claim, and a satisfactory declaration as to his debt. This the Plaintiff never complied with, relying and insisting on his alleged settled account. In the meantime dividends had, in 1854, been paid to the other creditors, who had substantiated their debts to the satisfaction of the trustee.

Ultimately, in *May*, 1856, the Plaintiff filed this bill for the performance of the trusts of the creditors' deed, and for payment to himself and the other creditors of their debts.

Mr. *R. Palmer* and Mr. *H. Cory*, for the Plaintiff.

Mr. *Selwyn* and Mr. *Druce*, for the Defendant, argued, 1st. That the Plaintiff had not acceded to the deed, but had acted in opposition to it; 2nd. That he had not given the Defendant satisfactory evidence of his debt; 3rd. That the alleged settled account was not signed on the day it was dated, and was not binding; 4th. That the Plaintiff could not question the payments already made under the deed and before he had placed himself in a position to entitle himself to the benefit of its provisions.

Mr. *R. Palmer* in reply.

Field v. *Titmuss* (*a*); *Watson* v. *Knight* (*b*); *Bush* v. *Shipman*

(*a*) 1 *Sim.* (*N. S.*) 218. (*b*) 19 *Beav.* 369.

Shipman (*a*); *Johnson* v. *Kershaw* (*b*), and *Gould* v. *Robertson* (*c*) were cited.

The MASTER *of the* ROLLS (having decided that the Plaintiff was entitled to the benefit of the creditors' deed, and that the alleged settled account was not binding on the creditors) proceeded :—

The next question is, whether the Plaintiff is entitled to disturb any settlement that has taken place. He always insisted that this was a settled account, and all the material letters, written in the years 1852, 1853, 1854, prove that the contest was, whether this was a settled account or not. In 1852, a dividend was declared, but the correspondence still went on, the trustee resisted this being taken as a settled account; the dividend was not paid until 1854, and a subsequent payment was made at the end of that year. How long was the trustee to delay paying the dividend? He contested this being a settled account, while *Field*, insisting that it was, took no steps whatever to settle the question, although the payment of the dividends was stopped for two years. In my opinion, the trustee was justified in making the payment to the other creditors, and I think that it would not be just to make the trustee personally bear the amount of the dividends, which would be the effect of allowing the Plaintiff to disturb what has taken place.

I am therefore of opinion, that the Plaintiff is entitled to the benefit of the deed, and being of opinion that the agreement dated the 20th of *February*, 1849, and signed by *Gootheridge*, is not to be deemed a settled account, I must direct the accounts against the Defendant, but not disturbing any dividend already made.

(*a*) 14 *Sim.* 239.
(*b*) 1 *De G. & S.* 260.
(*c*) 4 *De G. & S.* 509.

HODGSON *v.* HODGSON.

May 8.

An attachment was issued by mistake into a county in which the Defendant, (who was abroad,) had not resided, and a return of "*non est inventus*" made. The Court ordered a sequestration.

BY the decree made in *July*, 1856, the Defendant *William Hodgson* was ordered to pay 120*l.* into Court, and to pay the costs of the suit.

Previous to the decree, the Defendant had gone to *Australia*. The Plaintiff, by mistake, issued an attachment into the county of *Westmorland*, instead of into the county of *Lancaster*, in which the Defendant had resided before going abroad, and a return had been made of *non est inventus*.

Mr. *Karslake* moved that a sequestration might issue, without a return to an attachment in the county of *Lancaster*. He cited *Buttler* v. *Mathews* (*a*).

The MASTER *of the* ROLLS.

It would be an idle form to issue another attachment. Take the order.

(*a*) 19 *Beav.* 549.

The LONDON AND BRIGHTON RAILWAY COMPANY *v.* The SHROPSHIRE UNION RAILWAY, &c. COMPANY.

Nov 24.

The trustees of two charities, being identical, purchased one estate on behalf of the two charities, out of two sums of money paid into Court by two distinct railway companies for parts of the charity lands taken separately by them. The proceedings to complete and apportion the estate were consolidated. Held, that the costs of the joint proceedings were payable by the railway companies equally, and not in proportion to the values.

THE Haberdashers' Company were the governors of *Jones's* charity at *Monmouth*, and also of *Adams's* charity at *Newport*.

The *Brighton* Railway Company took lands belonging to *Jones's* charity, and the purchase-money was paid into Court and invested, and (two purchases having been made) there remained in Court the sum of 7,800*l.* Consols.

The *Shropshire* Union took lands belonging to *Adams's* charity, and the purchase-money was paid into Court and invested in 1,938*l.* Consols.

The Haberdashers' Company being desirous of investing the money belonging to both charities in the lands of a Mr. *Palin*, which were about to be sold, presented two petitions for that purpose. When the petitions came before the Court on the 30th of *July*, 1855, the proceedings were consolidated, and one order made on both petitions, giving the Petitioners leave to bid 7,500*l.* for the lands. They accordingly agreed to purchase them for the sum of 7,460*l.*

By an order of the 1st of *April*, 1856, the contract was ordered to be carried into effect, and an inquiry was directed as to the title, and proper conveyances were to

1856.

The London and Brighton Railway Company v. The Shropshire Union Railway, &c. Company.

to be made to the Haberdashers' Company, as governors of the two charities; and it was ordered, that the lands and the purchase-money should be apportioned between the two charities. The Chief Clerk approved of the title, and he apportioned 107 acres to *Jones's* charity, and 31 acres to *Adams's* charity, and he apportioned 5,788*l.* of the purchase-money to *Jones's* charity, and 1,672*l.* to *Adams's* charity.

The case now came before the Court as to the costs of the proceeding.

Mr. *Shapter*, for the Haberdashers' Company, asked for all the costs, according to the Lands Clauses Act, 1845 (*a*). That the costs of the separate conveyances should be paid by each company, and that those of the joint proceedings should be apportioned between them.

Mr. *Bovill*, for the *Brighton* Company, argued, that the costs of the joint proceedings ought to be divided equally between the two companies.

Mr. *Joliffe*, for the *Shropshire* Union, insisted, that they ought to be paid in the proportion of the purchase-moneys attributable to the two charities, (*i. e.*) in the proportion of 5,788*l.* to 1,672*l.*

It was also argued that the Haberdashers' Company ought not, originally, to have presented two petitions.

The Master *of the* Rolls.

I think the costs of the joint proceedings ought to be divided

(*a*) 8 & 9 *Vict.* c. 18, s. 80.

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The LONDON and BRIGHTON RAILWAY COMPANY v. The SHROPSHIRE UNION RAILWAY, &c. COMPANY.

divided equally between the two companies. It is the only mode of dividing them.

I do not think that two petitions were improper.

NOTE.—See *In re The Manchester, &c. Railway Comp.*, 21 *Beav.* 162.

LARABIE *v.* BROWN.

1857.

April 23.

Leave to file an interpleader bill, without the usual affidavit of no collusion (the Plaintiff being abroad) refused by the *Master of the Rolls*, but allowed by the Court of Appeal, subject to all questions.

THIS was an interpleader suit. The Plaintiffs were resident at *Nantes*, and therefore unable to make the usual affidavit of no collusion, which, by the practice, ought to be annexed to the bill.

Mr. *A. H. Louis* applied to the Court for leave to file the bill without the affidavit, stating that the case was urgent, a special injunction being necessary.

See *Mitford* on Pleading (*a*); *Metcalf* v. *Hervey* (*b*); *Stevenson* v. *Anderson* (*c*); *Wood* v. *Lyne* (*d*); *Bignold* v. *Audland* (*e*).

The MASTER *of the* ROLLS said that it was contrary to the established practice, and that he could not make a precedent.

(*a*) Page 143 (4th ed.)
(*b*) 1 *Ves. sen.* 248.
(*c*) 2 *Ves. & B.* 410.
(*d*) 4 *De G. & Sm.* 16.
(*e*) 11 *Sim.* 23.

NOTE.—The *Lord Chancellor* and *Lords Justices* permitted the bill to be filed, subject to all objections thereto by demurrer. 1 *De Gex & Jones*, 204.

1857.

O'CONNOR *v.* SIERRA NEVADA COMPANY.

April 23.

A Plaintiff, who had gone to *California*, was ordered to give security for costs. Two months afterwards, the Defendant moved, that the Plaintiff might give security within a limited time, or that the bill might be dismissed. Held, that the motion was premature.

THE bill was filed in *November*, 1856. In *January*, 1857, the Plaintiff went to *California*, and on the 25th of *February*, 1857, he was ordered to give security for costs.

Mr. *Rodwell* now moved that the security might be given within a limited time, or that the bill might be dismissed. He cited *Giddings* v. *Giddings* (*a*).

Mr. *Hobhouse*, *contrà*, said, that two months only had elapsed, and that it was not sufficient to enable the parties here to communicate with the Plaintiff.

The MASTER *of the* ROLLS held that the application was premature.

(*a*) 10 *Beav.* 29.

NOTE.—See same case, *post*, 18th *November*, 1857.

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BETWEEN

ROBERT KNIGHT (since deceased) and his Executors (by amendment), and RICHARD TOMKINSON . . . . . Plaintiffs,

AND

GEORGE BOWYER, JOHN THOMAS GROVES and EMMA his Wife, CHARLES PUGH, The Rev. GEORGE FRAZER MATHEWS and ANN MARTHA his Wife, late ANN MARTHA BRIDGER, EDWARD KYNASTON BRIDGER, WILSON LOMER, CHARLES BRIDGER, CHARLES KING, ALEXANDER DONOVAN, SAMUEL STURGIS, WILLIAM WHITFIELD, HARRIETT HUNTINGFORD (since dismissed), JOHN SAMUEL BOWLES, GEORGE WARNER, The Rev. JOHN TUNNARD, Clerk, JOHN TAYLOR, JOHN MATTHEWS, and Sir GEORGE BOWYER, Baronet . . Defendants.

May 1, 2, 4, 5, 6.
June 8.
July 1.

An annuity was granted free of all taxes "except the property tax," and the deed contained a proviso, that in case the income tax should be reduced, the reduction should enure to the benefit of the grantor. This proviso was omitted in the memorial. Held, that the memorial was sufficient.

If a solicitor purchase from his client, and institute a suit against third parties to enforce his right, the objection to the transaction, on the ground of its being a purchase by a solicitor from his client, cannot be maintained by such third parties.

Annuitants upon an estate, relating to which and to the incumbrances on which

THE present suit arose out of the complicated matters which have several times been before the Court, in the suits of *Hele* v. Lord *Bexley* (*a*).

The length of the case renders it convenient to adopt the careful statement of the facts contained in the judgment

(*a*) Reported 11 *Beav.* 537; 15 *Beav.* 340; 17 *Beav.* 14, & 20 *Beav.* 127.

1857.

KNIGHT and Others v. BOWYER and Others.

judgment of the Court, and which, with some few additions from the pleadings, was as follows:—

Sir *George Bowyer*, the Defendant, was, in and prior to the year 1814, equitable tenant for life, without impeachment for waste, of the *Radley* Estate, subject to four incumbrances affecting it. These incumbrances were, first, a mortgage for 9,560*l*, which was vested in Lady *Henrietta Bowyer*, (since deceased,) for her life, with the absolute interest in reversion in Sir *George Bowyer*. Secondly, 7,125*l*., due to the four brothers and sisters of Sir *George Bowyer* (being the residue of

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suits were pending in this Court, sold their interests, the purchaser and the annuitants instituted this suit to enforce their claim. Held, that this transaction was free from champerty.

When the owner of an estate contracts for valuable consideration with his mortgagees to put a man in possession, and directs him to apply the rents in payment of the interest on the first mortgage, and then the interest on the second, the mortgagor cannot afterwards urge, that the Statute of Limitations excludes the second mortgagee, because the rents were no more than sufficient to pay the first, and the second mortgagee had, for more than twenty years, received nothing.

In *June*, 1814, Sir *G. B.* granted six annuities, and executed a receivership and trust deed to secure them. By the former, the receivers were to receive the rents of estate, "in trust" to pay the six annuities, and also other annuities thereafter to be granted; and by the trust deed, the estate was conveyed to a trustee to secure the same annuities. In *August* following, Sir *G. B.* granted three other annuities, and he executed a deed of direction, requiring the receivers and the trustee to pay all the nine annuities. Notice was given to the receivers and trustee. The receivers remained in possession, but the rents were insufficient, and for forty years the three annuitants received nothing. They then filed a bill to enforce their claims. Held, that they were not barred by the Statute of Limitations.

Sir *G. B.*, being tenant for life in possession, and also absolutely entitled in remainder, after the death of his mother, to a sum of 9,560*l*., which was the first charge on the estate, granted an annuity secured on his life estate, and by the grant he covenanted against all charges. After the death of his mother, held, as against Sir *G. B.*, that the annuity had priority over the interest of the 9,560*l*., but that it was not a charge on the *corpus* of that fund, for interest paid on it after the death of his mother, to the detriment of the annuitant; held, also, that the same equity affected both a purchaser from Sir *George* with notice of the annuity and also volunteers under such purchaser.

The rule, that a purchaser has constructive notice of the rights of the tenant, is not limited to the terre-tenant, who is in the actual occupation, but it extends also to the person who is known to receive the rents from the occupier of the land.

The purchaser of a charge upon an estate had notice that the rents were received by *A. B.*, and not by the owner of the estate. Held, that the notice that the tenants paid their rents to a person other than the owner, was notice of the instrument by which they were compelled so to pay them, and of the rights of all parties thereunder.

a charge of 10,000*l.*). Thirdly, an annuity of 30*l.* to an annuitant (since deceased). And fourthly and lastly, an annuity of 250*l.* to Lady *Anne Bowyer*, who was also since dead. While Sir *George* was so entitled, a person named *Donovan*, obtained judgment against him in respect of securities for three annuities, the consideration for which was 7,758*l.*; these were entered up in *March*, 1814.

On the 25th of *June*, 1814, Sir *George Bowyer* in consideration of 15,994*l.*, granted six annuities to six persons, who were called "the six annuitants."

To secure them, he, on the 28th of *June*, 1814, executed a deed, to which the six annuitants were parties, by which he appointed *Ballachy* and *Ralfe* receivers of the *Radley* Estate for the purpose of paying these annuities. This deed, which, in the argument, was referred to as "*the receivership deed*," was made between Sir *George Bowyer* of the first part, the six annuitants of the second, third, fourth, fifth, sixth and seventh parts, and *Ballachy* and *Ralfe* of the eighth part. It recited the annuities; it then recited an agreement, that it should be lawful for Sir *George Bowyer*, by mortgage or grant of annuities, to raise any further sum, not exceeding in the whole, (including the considerations for the six annuities already granted, and including also any judgments which, at the time of such further sums being raised, might be available against the said hereditaments,) the sum of 20,000*l.*, and that such further grantees of annuities or mortgages should stand and be entitled, *pari passu*, with the six. The indenture then recited the six annuities, and was witnessed, that in consideration of the sum paid, Sir *George Bowyer*, with the consent of the six annuitants, appointed *Ballachy* and *Ralfe*, and the survivor of them, his receivers, agents

The receivership deed.

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and attorneys, in the name of him Sir *George Bowyer* to ask, demand, collect and receive all the rents of the estate charged with the payment of the annuities, and take all lawful steps, by action, distress or otherwise, to obtain payment thereof; and he directed the tenants to pay to *Ballachy* and *Ralfe*, and declared that their receipts should be good discharges to the tenants. The indenture then went on to declare, that all the rents and profits so to be received by *Ballachy* and *Ralfe* should be applied upon and for the trusts, intents and purposes after mentioned, that is to say, upon trust first to pay taxes and rates, in the next place to pay the interest on the 10,000*l.* (this was the charge of which, as already mentioned, 7,125*l.* alone remained charged on this estate), the two annuities of 250*l.* and 30*l.* (both of which were now extinct) (*a*), and in the next place, to pay to the six annuitants, and such other grantees of annuities and mortgagees as might advance any further sum or sums of money on the security of the said hereditaments, pursuant to the terms of the proviso already mentioned, all their annuities *pari passu*; and, lastly, that they should pay to Sir *George Bowyer*, or his assigns, or to such person or persons as he or they should order or direct, the clear residue of the rents and profits, and that out of such residue should be deducted a commission of 5*l.* per cent. on the gross amount received, and also the costs and expenses to which the receivers might be put. The indenture contained a covenant by Sir *George Bowyer*, that he would not revoke the powers and authorities therein contained without the consent of the six annuitants, and further, that if *Ballachy* and *Ralfe*, or either of them, should die or refuse or become incapable of acting, Sir *George Bowyer* would appoint such other person or persons in their place, as the six annuitants, or

(*a*) Omitting, therefore, the interest on the 9,560*l.* See *post*, p. 643.

or the major part of them, should appoint, and in case of refusal or neglect by Sir *George Bowyer* to make any appointment, then that the six annuitants might themselves appoint the persons to receive.

Upon the same day (the 28th of *June*, 1814), Sir *George Bowyer* executed another deed, called "*the trust deed*," by which he appointed *Edward Bridger*, in a particular event, a trustee of the *Radley* Estate. This deed was made between Sir *George Bowyer* of the first part, the six annuitants of the six following parts, and *Edward Bridger* of the eighth part. It recited "the receivership deed," and an agreement made when the annuities were granted, that the hereditaments charged with the annuities should be conveyed to the use of *Edward Bridger*, his heirs and assigns, upon the trusts for better securing the payment of the six annuities, and also any other annuities, or the interest of any mortgages which might thereafter be charged upon the hereditaments under the proviso already mentioned. The indenture witnessed, that, in consideration of the sums paid for the purchase of the six annuities, Sir *George Bowyer* conveyed the *Radley* Estate, and all his estate, right, title and interest therein, to hold to *Edward Bridger*, his heirs and assigns, during the life of Sir *George Bowyer*, subject to the charges of 10,000*l.* and the two annuities of 250*l.* and 30*l.*, upon trust to permit Sir *George Bowyer* to receive the rents until default should be made in payment of some one of the six annuities or other annuities to be granted as aforesaid, for the space of sixty days, and thereupon, in trust to sell the said hereditaments, and stand possessed of the proceeds, and apply the same, first, in payment of expenses, then to pay the six annuitants and subsequent annuities, and subject thereto for Sir *George Bowyer*, his executors, administrators and assigns.

The trust deed.

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Under these deeds, *Ballachy* was put into possession of the rents as receiver.

Sir *George Bowyer* afterwards borrowed of *Knight*, *Bernard* and *King*, (who are hereinafter referred to as "the three annuitants,") the further sum of 3,997*l.* by way of annuity, on the security of his life interest in the *Radley* Estate, and in consideration thereof, Sir *George Bowyer*, by three several indentures, dated respectively the 30th day of *August*, 1814, granted to *Knight*, *Bernard* and *King* three several annuities of 285*l.*, 142*l.* 10*s.*, and 142*l.* 10*s.*, for his Sir *George Bowyer's* life, issuing out of and charged upon his life interest in the *Radley* Estate. In each of these annuity deeds it was recited, that Sir *George Bowyer* was, under the settlement, seised of the *Radley* Estate for an estate of freehold, during his life, without impeachment of waste, subject to the sum of 10,000*l.*, and interest charged thereon, for the portions of the younger children of the late Baronet, and to the annuity of 250*l.* to Lady *Bowyer*. And in each of the three annuity deeds, Sir *George Bowyer*, for himself, his heirs, executors and administrators, covenanted to pay the three annuities thereby granted, and that he had good right to grant the three annuities respectively, and the powers and remedies for compelling payment thereof, and to charge the same upon the *Radley* Estate, and that the said estate should continue charged with the said three annuities, and liable to distress and entry for the recovery of the same, and that free and clear, and freely and clearly, and absolutely exonerated and discharged by Sir *George Bowyer*, his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from and against the charges and incumbrances thereinbefore mentioned and recited, and all other charges and incumbrances whatsoever.

The

The "three annuitants" (as the Court held) had constructive notice of *Donovan's* judgment at the time they advanced their money, and therefore that more than 20,000*l.* had been raised by Sir *George Bowyer*, at the time he granted the three annuities.

A memorial of each of the "three annuities" was inrolled under the Act 53 *Geo.* 3, c. 141, the validity of the memorials were, however, questioned, and the facts relating to them were as follows:—

The annuity of 285*l.* to *Knight* was, by the grant, payable without any deduction in respect of any taxes charged upon the hereditaments or upon *Knight*, "save and except the property tax," and the deed contained the following proviso:—"In case the present or any future tax in the nature of, or similar in principle, to the present tax upon property or income shall be either partially reduced in amount or totally repealed, then and in that case, and so often as such partial reduction or total repeal shall, from time to time, take place, the annuity hereby granted shall, during the continuance of such abatement or extinguishment of such tax, (but not during any other period,) be reduced in precisely the same ratio and degree, it being the true intent and meaning of these presents, that he the said Sir *George Bowyer* shall be benefited by any abatement or repeal of such property or income tax, in respect of the said annuity of 142*l.* 10*s.*, and not the said *John Knight*."

In the memorial this proviso was omitted; and in the ninth column of the form prescribed by the Act of Parliament, "the amount of annuity or rent-charge" was stated simply to be "285*l.* a year," and no mention whatever was made in the memorial of the property or income tax.

The

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The property tax ceased in 1816, and the annuity of 285*l.* became thereby reduced to 256*l.* 10*s.*, and it was therefore insisted that the annuities were void under the 53 *Geo.* 3, c. 141. The other two annuities to *Barnard* and *King* were open to the same objection.

The deed of direction.

On the same day (30th of *August*, 1814), Sir *George Bowyer* executed a deed (called "*the deed of direction*") to the two receivers, *Ballachy* and *Ralfe*, and to *Bridger*, directing them to pay certain rents of the *Radley* Estate to the "three annuitants." This deed was made between Sir *George Bowyer* of the first part, and the three annuitants of the second, third and fourth parts. It recited the grants of the six annuities, "*the trust deed*" of even date, and "*the receivership deed*," and next the grant of the three annuities, and then it was witnessed, that, for the several considerations in the three grants expressed, and in pursuance of the recited agreement of Sir *George Bowyer*, in that behalf therein mentioned, Sir *George Bowyer* thereby authorized, empowered, required and directed *Ballachy*, *Ralfe* and *Bridger*, respectively, to exercise the power and authorities in them respectively reposed, by virtue of the trust indentures and the said receivership deed respectively, for the purpose of raising and paying not only the annuities to the "six annuitants," but also the three annuities to *Knight*, *Bernard* and *King*, respectively. And to make such payments unto the six annuitants and *Knight*, *Bernard* and *King*, respectively, of their several annuities, *pari passu*, and without any preference or priority whatsoever. And further, Sir *George Bowyer* thereby directed *Ballachy*, *Ralfe* and *Bridger*, to withhold from him the payment of every part of the trust moneys which might come to their hands, by virtue of the

(*a*) Examined with original.

the several trusts aforesaid, until *Knight*, *Bernard* and *King*, as well as the six annuitants, should be respectively fully paid all arrears of their annuities. And lastly, Sir *George Bowyer* thereby covenanted with *Knight*, *Bernard* and *King*, that *Ballachy*, *Ralfe* and *Bridger* would act, in all respects touching the premises, pursuant to the directions and authority by him Sir *George Bowyer* to them given.

Notice of this deed was given to *Bridger*, *Ballachy* and *Ralfe*, immediately after the execution of it. The way in which this notice was dealt with by Messrs. *Ballachy* and *Bridger* appeared by a letter addressed by them to the solicitor of the three annuitants, dated the 29th of *October*, 1816:—

"There are some arrears due to the first class of annuitants, after payment of which, there seems no objection to apply the surplus of the timber money in hand towards payment of the arrears of the second class, upon an indemnity."

Donovan afterwards gave notice of his claim. On this being received, Messrs. *Ballachy* and *Bridger* wrote to the solicitor of the three annuitants on the 27th of *November*, 1816, as follows:—

"Having received a regular notice from Mr. *Donovan*, we cannot consent to distribute any more money till we have learnt the extent of his claim, which we will make a point of inquiring into."

Their next letter, of the 18th of *December*, 1816, was:—"We have both been out of town, or you would have received an earlier answer to your favour of the 8th inst. We have no wish whatever to give Mr. *Donovan* a preference to the three last annuitants; but we do not feel justified in distributing the timber money in hand, even with

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with an indemnity, until Mr. *Donovan's* claim is, in some manner, disposed of. We are as anxious as yourself to avoid getting into Chancery, but when Mr. *Donovan* is threatening a suit in Equity, on one side, and the three last annuitants holding out the same threat on the other, you will admit we cannot, with safety, part with the money, until we know who are strictly entitled to it. If that can by any means be ascertained, or if any arrangement with Mr. *Donovan* can be effected, so that the money can be applied without risk, we shall be extremely glad, as we are willing to concur in any plan that can with safety be adopted. We fear Mr. *Donovan's* claim has been the means of preventing Sir *George's* family agreeing to our proposals."

On the 5th of *February*, 1817, another letter was written for *Ballachy* and *Bridger*, as follows:—"I have to beg pardon for not having answered your letter before; but I put it in my pocket with the intention of calling on you in my way to *Southampton*, but could not. The last rents received on Sir *George Bowyer's* account will be distributable immediately after the 11th of next month, some of the tenants having given bills for their rent, which will not become due till then."

The rents of the estate were actually received either by *Ballachy* or by *Bridger*, down to the death of *Bridger*, in 1846. They were, however, insufficient, after paying the interest on the prior charges, to pay *Donovan* and the "six annuitants," and, thereupon, on the 31st of *March*, 1817, an arrangement was come to between *Donovan* and the six annuitants, as to the manner in which the rents should be apportioned between them. In *June*, 1819, the "six annuitants" gave *Ballachy* and *Bridger* a bond of indemnity against the consequences

consequences of their so paying the rents. The agreement was acted on, and was communicated to the "three annuitants."

After the death of *Bridger*, in *November*, 1846, the rents were received by his son, *Edward Kynaston Bridger*, for one year; after which, Mr. *George Bowyer*, the first tenant in tail, entered into possession and received the rents of the estate, under an assignment of the mortgage of 9,560*l.*

The facts relating to Mr. *George Bowyer's* title to this charge were as follows:—Lady *Henrietta Bowyer* was entitled to this charge for her life, and the absolute reversion in it was vested in her son, Sir *George Bowyer*. On the 15th of *May*, 1837, Sir *George Bowyer*, for valuable consideration, assigned his interest in this charge to his mother, Lady *Henrietta Bowyer*, absolutely. By deed, two days afterwards, Lady *Henrietta Bowyer* assigned the whole charge to two trustees, in trust to pay the interest to herself for her life, with remainder, during the joint lives of Sir *George Bowyer* and Lady *Ann Bowyer*, for the separate use of Lady *Ann Bowyer;* and after the decease of the survivor of herself and Lady *Ann*, to the Defendant Mr. *George Bowyer* absolutely. Lady *Ann Bowyer* died in 1844, whereupon the annuity to her of 250*l.*, charged on the property, ceased, and Lady *Henrietta Bowyer* died on the 15th of *November*, 1845, when the interest in the reversion of the mortgage of 9,560*l.* became absolute.

The "three annuitants" received from Sir *George Bowyer* the first two quarterly payments of the annuities, but had received nothing since.

Many complicated and expensive proceedings had been

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been had in this Court, but which had proved ineffectual. The first suit of *Hele* v. Lord *Bexley* (*a*), was instituted in *April*, 1829, by a subsequent incumbrancer on the *Radley* Estate, and a leasehold estate, called "The *Sunningwell Estate*." Under it long accounts were taken, and the priorities of the incumbrancers ascertained, and their rights declared, but all in vain; for in 1853, the Lords Justices declared, on appeal, that Sir *George Bowyer*, in consequence of his absence, was not bound by any of the proceedings.

A compromise was effected between Mr. *George Bowyer* and "the six annuitants," and their annuities became vested in him.

The present Plaintiffs were *Knight*, one of "the three annuitants," and *Tomkinson*, who had purchased, for a small sum, the other two annuities granted to *Barnard* and *King*, and which had been assigned to him by an indenture of the 20th *July*, 1852, partially in trust for some solicitors, who, it was said, though the fact was not proved, had purchased from their clients.

The present Plaintiffs were Defendants to *Hele* v. Lord *Bexley* (*a*); but now alleging their inability to obtain their rights in that cause, they instituted the present suit on the 11th of *January*, 1855, questioning the payments to *Donovan* and the six annuitants to their prejudice, and seeking to make *Bridger* and his representatives liable; praying a declaration, that upon the death of Lady *Henrietta Bowyer*, the mortgage of 9,560*l.* belonged to Sir *George Bowyer*, and that Mr. *George Bowyer* was a trustee thereof, and for a decree of

(*a*) 11 *Beav.* 537; 15 *Beav.* 340; 17 *Beav.* 14, and 20 *Beav.* 127.

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of redemption and foreclosure against him. It prayed to have the accounts taken of the rents of the estate received by *Bridger* and Mr. *George Bowyer*:—for their application in payment of the Plaintiffs, and for the ascertainment of the rights and interests of the several parties on the estate.

Immediately before the hearing, the Plaintiffs abandoned their claim to rank, *pari passu*, with "the six annuitants:" and it being objected that the solicitors interested in the three annuities were not parties, the Plaintiffs' Counsel were instructed to appear for them, and to consent to be bound by these proceedings.

Mr. *Selwyn* and Mr. *W. H. Currie*, for the Plaintiffs.

The *Attorney-General*, Sir *R. Bethell*, Mr. *Teed* and Mr. *Goldsmid*, for Sir *George Bowyer*.

Mr. *Rait* and Mr. *Wickens*, for Mr. *George Bowyer*.

Mr. *Lloyd* and Mr. *Druce*, for *Lamer*.

Mr. *R. Palmer* and Mr. *Gifford*, for *E. K. Bridger*.

Mr. *Bagshawe* and Mr. *Jessel*, for *C. Bridger*.

Mr. *Follett* and Mr. *Freeling*, for *Donavan*.

Mr. *Lee* and Mr. *Osborn*, for *Sturgis*, the assignee of *Carter*.

Mr. *Shapter*, for *Groves* and wife.

Mr. *Speed*, for *Whitfield*.

Mr. *Boyle*, for *King*.

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Mr. *Hetherington*, for *Bowles* and others.

Mr. *Selwyn*, in reply.

The points raised were as follows:—

1st. That the annuities granted to the three annuitants were void for want of a proper memorial. On this point the following authorities were cited: 53 *Geo.* 3, c. 141; *Howe* v. *Synge* (*a*); *Readshaw* v. *Balders* (*b*); *Bleamire* v. *Barfoot* (*c*); *Earle* v. *Browne* (*d*); *Friar* v. *Wilkinson* (*e*); *Nash* v. *Godmond* (*f*); *Ex parte M^c^Kenzie* (*g*); *Wood* v. *Perrott* (*h*); *Cane* v. *Lovelace* (*i*); *Crowther* v. *Wentworth* (*k*).

2nd. That the Plaintiffs, claiming under an invalid purchase by solicitors from their clients, could not maintain the suit; *Wood* v. *Downes* (*l*).

3rd. That the Plaintiff *Tomkinson*, and his *cestui que trust*, had been guilty of champerty, by purchasing the matter in litigation, and that therefore they have no relief for claims arising out of such a transaction; 28 *Edw.* 1, c. 11; *Stanley* v. *Jones* (*m*); *Prosser* v. *Edmonds* (*n*); *Williams* v. *Protheroe* (*o*); *Cholmondely* v. *Clinton* (*p*); *Cockell* v. *Taylor* (*q*); *Harrington* v. *Long* (*r*); *Hartley* v. *Russell* (*s*); *Hunter* v. *Daniel* (*t*).

4thly. That the Statute of Limitations was a bar to

(*a*) 15 *East*, 440.
(*b*) 4 *Taunt.* 57.
(*c*) 6 *Ibid.* 504.
(*d*) 10 *Ad. & E.* 412.
(*e*) Unreported (1821).
(*f*) 1 *B. & Ad.* 634.
(*g*) 4 *Taunt.* 323.
(*h*) 5 *J. B. Moore*, 63.
(*i*) 2 *B. & Ad.* 767.
(*k*) 6 *B. & C.* 366.
(*l*) 18 *Ves.* 120.
(*m*) 7 *Bing.* (*O. S.*) 369.
(*n*) 1 *You. & C.* 481.
(*o*) 5 *Bing.* (*O. S.*) 309.
(*p*) 4 *Bligh*, 1, 96.
(*q*) 15 *Beav.* 103.
(*r*) 2 *Myl. & K.* 590.
(*s*) 2 *Sim. & St.* 244.
(*t*) 4 *Hare*, 420.

to the Plaintiffs' claim; 3 & 4 *Will.* 4, c. 27, ss. 3, 25; *James* v. *Salter* (*a*); *Francis* v. *Grover* (*b*); *Phillipo* v. *Munnings* (*c*); *Law* v. *Bagwell* (*d*); *Burroughs* v. *M*ᶜ*Creight* (*e*); and that after forty years the Plaintiffs' claims must be presumed to be satisfied; *Pickering* v. Lord *Stamford* (*f*); or, at all events, that the statute limited the Plaintiffs' demand to six years' arrears of their annuities; *Chappell* v. *Rees* (*g*); *Cox* v. *Dolman* (*h*); *Hughes* v. *Williams* (*i*); *Snow* v. *Booth* (*k*). As to this, it was said, on the one hand, and on behalf of the Plaintiffs, that a valid trust had been created in favour of the "three annuitants;" that the estate had all along been in possession of the trustees, who had never and could not repudiate the trust; *Young* v. Lord *Waterpark* (*l*); *Stone* v. *Godfrey* (*m*); and that the possession and application of the rents, so far as possible, had been in accordance with the trusts, and not adverse; *Burrell* v. Lord *Egremont* (*n*); *Raffety* v. *King* (*o*); *Wynne* v. *Styan* (*p*). On the other hand, the Defendants contended, that the estate had been in the possession of *Bridger*, as the mere agent of the owner; *Garrard* v. Lord *Lauderdale* (*q*); or as trustees in an independent matter, and for other parties; *Knight* v. *Marjoribanks* (*r*); and that such a possession would not give to the three annuitants any such rights as would except them from the operation of the Statute of Limitations; *Marshall* v. *Studden* (*s*); *Dove* v. *Everard* (*t*).

5thly.

(*a*) 2 *Bing.* (*N. C.*) 505; 3 *Bing.* (*N. C.*) 544.
(*b*) 5 *Hare*, 39.
(*c*) 2 *Myl. & Cr.* 309.
(*d*) 4 *Dru. & W.* 398.
(*e*) 1 *J. & L.* 290.
(*f*) 2 *Ves. jun.* 272, 280; *S. C.*, 4 *Bro. C. C.* 214.
(*g*) 1 *De G., M. & G.* 393.
(*h*) 2 *De G., M. & G.* 592.
(*i*) 3 *Mac. & Gor.* 683.
(*k*) 2 *Kay & J.* 132.
(*l*) 13 *Sim.* 199.
(*m*) 5 *De G., M. & G.* 76.
(*n*) 7 *Beav.* 205, 235.
(*o*) 1 *Keen*, 601, 618.
(*p*) 2 *Phill.* 303.
(*q*) 3 *Sim.* 1, and 2 *Russ. & M.* 451.
(*r*) 11 *Beav.* 322; *S. C.*, 2 *Mac. & Gor.* 10; 2 *Hall & Tw.* 308.
(*s*) 7 *Hare*, 428.
(*t*) 1 *Russ. & M.* 231; *S. C.*, *Tamlyn*, 376.

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5thly. It was contended by the Plaintiffs, that upon the death of Lady *Bowyer*, when Sir *George Bowyer* became absolutely entitled to the charge of 9,560*l*, it was not competent for him to set it up as against his incumbrancers; *Otter* v. Lord *Vaux* (*a*); and that by force of Sir *George Bowyer's* covenants for title and indemnity, contained in the deeds granting the three annuities, those annuitants were entitled to the benefit of the *corpus* of the charge; or at all events, that no interest could be charged against them in respect of it during the continuance of these three annuities. That Lady *Henrietta Bowyer* was, in respect to the capital sum of 9,560*l*., equally bound by this equity, she having notice, both actual and constructive, of the rights of the annuitants, and being bound by all the rights and equities of the trustee in possession, and of those whom he represented; *Jones* v. *Smith* (*b*); *Bailey* v. *Richardson* (*c*); *Daniels* v. *Davison* (*d*); *Barnhart* v. *Greenshields* (*e*); and that Mr. *George Bowyer*, who was a mere volunteer under her, was in no better position.

As to costs, *Gabriel* v. *Sturgis* (*f*), *Hurst* v. *Hurst* (*g*), *Ford* v. The Earl of *Chesterfield* (*h*) were cited.

The MASTER *of the* ROLLS reserved judgment.

June 8. *The* MASTER *of the* ROLLS.

This case raises several questions of great importance, which depend partly on an accurate examination of the documents in evidence; these I shall state more fully as

(*a*) 2 *Kay & J.* 650, and 6 *De G., M. & G.* 638.
(*b*) 1 *Hare*, 43; 1 *Ph.* 244.
(*c*) 9 *Hare*, 734.
(*d*) 16 *Ves.* 249.
(*e*) 9 *Moore, P. C. C.* 18.
(*f*) 5 *Hare*, 97.
(*g*) 16 *Beav.* 372.
(*h*) 16 *Beav.* 516.

as I discuss the various points raised and argued before me at the bar.

If the matter were recent, it would be reasonably clear, that subject to the objections which may be urged against them as to the frame of the suit, the Plaintiffs would be entitled to the general account they ask. Whether, in taking that account, they would be entitled to have the payments for interest on the 9,560*l.*, or any of these payments, disallowed, would depend upon the case they could make out on the deeds to establish any such right. Besides resisting this claim generally, the various Defendants on the record raise many objections to the relief sought by the Plaintiffs, any one of which, if it succeeds, would be fatal to their claim. I shall examine these in their order, and refer to the facts as applicable to each, as being, in my opinion, more consistent and more likely to make my judgment less ambiguous, than if I had first stated all the facts generally which bear on each of these questions. The objections raised are,—

1st. That the annuities granted to the three annuitants are void for want of inrolment of proper memorials of the annuities.

2nd. That the Plaintiffs, or at least *Tomkinson* and his *cestuis que trust*, are guilty of *champerty*, by reason of their having purchased a matter in litigation.

3rd. That the Statute of Limitations of 3 & 4 *Will.* 4, c. 27, is a bar to the Plaintiffs' claim.

If all these objections are overcome by the Plaintiffs, there remains the question which the Plaintiffs have to establish, viz., whether in taking the account they

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seek, they are entitled to have any special directions on the subject of the interest of 9,570*l.*, and whether the Defendant *George Bowyer* is not entitled to claim interest on that charge in priority to any of these annuities.

On the first point, as to the inrolment of the memorial of the annuity, I think, on reference to the statute of 53 *Geo.* 3, c. 141, that this is an accurate memorial of the deed; the amount of the annuity is correctly stated. In *Bleamire* v. *Barfoot* (*a*), to which I was referred, the Court held, that an incomplete statement of a promise contained in the deed, respecting the insurance of the house charged with the annuity, and assigned to a trustee for that purpose, did not invalidate the deed. Here, the deed correctly states the amount of the annuity payable to the grantee, which was so much after deducting the property tax; the annuity was never to be more; it might be less, if the property tax were increased, but if not taken off, the annuity was always to remain the same. In *Cane* v. *Lovelace* (*b*), it was held unnecessary to notice, in the memorial, a covenant which was to this effect, *viz.*, that if the grantor went abroad, whereby the expense of insuring his life would be increased, then that the *extra* premiums might be deducted out of the dividends of the stock assigned to secure the annuity, and that if these dividends were not sufficient for that purpose, then that the grantor would pay such further sum as might be necessary for that purpose. I think that a stronger case than the present, and no case has been cited to me where such an omission has been considered fatal, unless the case of *Friar* v. *Wilkinson* (*c*) be one of that description.

Friar

(*a*) 6 *Taunt.* 504.
(*b*) 2 *Barn & Ad.* 767.
(*c*) Unreported, *V. C. E.*, 3*rd May*, 1821, *Reg. Lib.* 1820 *A.*, *fol.* 1376.

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Friar v. *Wilkinson* is not reported either in print or in MS., the case is cited from the proceedings in the cause filed in the Chancery offices, but it is extremely difficult to rest safely on a case not reported by any competent person, and in which the grounds of the decision are to be picked out of the facts appearing on the recorded proceedings, while, if the case had been reported, it might appear that, in truth, some other matter than the reason supposed was the principal cause of the dismissal of the bill. If the case had been seriously argued, it would probably have been reported, and being a question of law, it would probably have been sent for the decision of a Court of Common Law, as was done in the case of *Bleamire* v. *Barfoot* by Sir *William Grant*. On the statute, I think, the memorial is not defective; no case, by which I can satisfy myself that the point was solemnly decided otherwise, has been cited to me; and the current of the reported authorities runs the other way.

No question, in my opinion, can arise as to the other deed, called the deed of direction. In the first place, it is memorialized, the necessity of which might, on the authorities, have been questioned, and the only objection made to the memorial is, that the consideration for granting the annuity is not mentioned in it, but as it is not the deed granting the annuity, but only, if anything, a collateral security, the consideration is not required to be stated in the memorial of it, such consideration having been stated properly in the memorial of the deed granting the annuity.

I think, therefore, that the first objection, that the annuities were void *ab initio*, for want of a proper memorial, cannot be sustained.

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The second objection, that the Plaintiffs cannot sustain the suit by reason of champerty, in my opinion, also fails. In considering this objection, I lay aside the argument urged before me, that this, being a purchase by a solicitor from his client, cannot be sustained. That objection is one which the client is the person to maintain, and it cannot, in my opinion, be raised by a third person in this suit. This being so, the objection resolves itself into this:—that two persons, being annuitants on an estate, relating to which and the incumbrances on which, suits are pending in this Court, have sold their interests to certain other persons, who have, with the third annuitant, instituted this suit to enforce their claims. This appears to me to be quite clear from the objection of champerty. *Harrington* v. *Long* (*a*) lays down, that a person may sell or buy an interest which is the subject of a suit in Equity. Practically, it is done daily, and were it otherwise, a serious difficulty would be imposed in the way of persons who might be parties to a suit in Chancery, by fettering their power of dealing with their property. None of the cases cited establish the point contended for. *Wood* v. *Downes* (*b*) was a case of the invalidity of a purchase by a solicitor from his client, in a suit instituted to set it aside, a question which, as I have stated, does not arise here; and no argument can properly be sustained on the statute of 32 *Hen.* 8, c. 9, on bracery and the buying of titles, which statute relates to titles to lands. This is the ordinary case of an incumbrancer, who sells his incumbrance, the right to do which and to purchase which is not, either by statute or common law, affected by the circumstance that the incumbrance is the subject of a suit in Equity. I think it unnecessary to dwell longer on this point, because, in fact, if it could be sustained,

(*a*) 2 *M. & K.* 590. (*b*) 15 *Ves.* 120.

sustained, which in my opinion it cannot, it would not preclude the necessity of my dealing with the rest of the case, as the original annuitant *Knight*, or his representatives, are co-Plaintiffs, who have not sold his annuity, and misjoinder of Plaintiffs has ceased under the late statute (*a*) to be an objection fatal to the further prosecution of a suit in Equity.

The next objection, viz., that relating to the Statute of Limitations, is of a much more serious character; and which has been urged with great force, and requires very careful consideration. The three annuities were granted in *August*, 1814, two quarters of the annuities only have been paid, so that no payment has been made, in respect of them, since *March*, 1815, and the bill was filed in *January*, 1855, nearly forty years afterwards. *Primâ facie*, this is a bar to the Plaintiffs' demand under the statute of 3 & 4 *Will.* 4, c. 27, unless the facts of the case bring it within the savings clause of that statute.

This question depends upon the effect of three deeds, called the "*receivership deed*," the "*trust deed*," and the "*deed of direction*." The two first deeds were of even date with the six annuities—[*His Honor stated the effect of the receivership and trust deeds* (*b*), *and then stated the effect of the deed of direction*:]—Notice of this deed was given to *Bridger*, *Ballachy* and *Ralfe* immediately after the execution of it. The way the notice was dealt with by *Ballachy* and *Bridger* appears from a letter of the 29th of *October*, 1816, addressed to the solicitor of the three annuitants—[*His Honor read it.*]

(*a*) 15 & 16 *Vict.* c. 86, s. 49. (*b*) See *ante*, pp. 611 and 613.

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it (*a*).]—Afterwards, *Donovan* gave notice of his claim; upon this being received, the following letters were written by *Ballachy* and *Bridger* to the solicitors of the three annuitants—[*His Honor read the letters of the 27th of November*, 1816, *and 18th of December*, 1816 (*b*).]—The rents of the estate were not sufficient, after paying the interest of the prior charges, to pay *Donovan* and the six annuitants, who thereupon came to an arrangement as to the manner in which the rents should be apportioned between them, and in *June*, 1819, they gave *Ballachy* and *Bridger*, a bond of indemnity for their so paying the rents. This agreement was acted upon, and was communicated to the three annuitants, who had, through their solicitor, constructive notice of *Donovan's* judgment, at the time when they advanced the money for the purchase of their annuities. They must, therefore, be taken to have been cognizant of the effect of that judgment, which was, that the 20,000*l.*, the limit of the charges to be paid *pari passu* with the six annuitants, was already exhausted, before they purchased their annuities. They were, therefore, unable to contest the right of the six annuitants to be paid in priority to them. The rents of the estate were, as I have before observed, received by *Bridger* until his death in *November*, 1846, and after his death, for one year, by his son, since which time, they have been received by the Defendant Mr. *George Bowyer*. Since Mr. *George Bowyer* has been in possession, there can be no doubt but that his possession has been adverse, but this is not sufficiently long to create a bar under the statute, and the question is, whether the possession was adverse during the time that the rents were received by *Edward Bridger*.

For

(*a*) See *ante*, p. 617. (*b*) *Ante*, p. 617.

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For this purpose, the argument of the Defendants may be shortly stated to be this:—They contend, that the only saving under the statute is by virtue of the 25th section, which is confined to cases of express trust; that *Bridger* never was in possession as a trustee; that the trust deed was never acted upon, and that his possession and receipt of the rents was merely as the agent of *Ballachy;* that *Ballachy*, who is still alive, was the mere agent or steward of Sir *George Bowyer;* that, therefore, Sir *George Bowyer* has always been in possession, until the Defendant *George Bowyer*, his son, took the possession from him, and that the grantor of the three annuities, having always been in possession and not having paid a penny to the three annuitants for forty years, their annuities are barred.

It is also contended by the Defendants, that by reason of *Donovan's* charge, which exhausted the 20,000*l.*, the three annuitants were not within the scope and object of either the deed of receivership or the deed of trust; that the right of the three was always repudiated, or at least never acknowledged, by *Ballachy* or by *Bridger;* and that it matters little who has been in possession of the property and in receipt of the rents, if the person so in possession has, for forty years, repudiated the Plaintiffs' title, and if they have taken no step to enforce it. The Defendants contend, that the possession was under the deed of receivership, and not under the trust deed; and they also further urge, that it is a matter which has been decided by the Lords Justices, who have expressed their opinion, that the deed of trust was never in fact acted upon.

A considerable mass of evidence has been gone into, for the purpose of shewing that *Bridger* was in possession as a trustee, which is met by counter evidence, to

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to shew that he acted on behalf of *Ballachy*. None of this evidence, it is said, was before the Lords Justices, nor was the fact in evidence before them, which is much relied on by the Plaintiffs, that *Edward K. Bridger*, the son of *Edward Bridger*, was in receipt of the rents of the property for one year after his father's death, as his heir, which he could only be, on the assumption that *Edward Bridger* was in possession as trustee; and this is urged the more, because such receipt of rents not only did not appear in evidence before the Lords Justices, but because the absence of any such receipt of rents was relied on by their Lordships as a circumstance influencing their view of the case.

I have not thought it necessary to comment, in detail, upon this evidence, or to attempt to reconcile the contradictions which appear in it, if they be reconcileable, because I am of opinion that, assuming the possession of the estate and the receipt of the rents to have been that of *Ballachy*, either by himself directly or by *Bridger*, as his agent under the receivership deed, this is sufficient, coupled with their acts regarding the three annuitants, to prevent the statute from running till the death of *Edward Bridger*, so as to bar the claim of the three annuitants against Sir *George Bowyer*, or of any person claiming through him.

I think that the receivership deed, coupled with the deed of direction, created an express trust in favour of the three annuitants. Sir *George Bowyer* had not the legal estate in the *Radley* property, that was vested in the trustees of the will of Sir *William Stonehouse*; he had, therefore, only an equitable interest for life. Being so possessed and entitled, he put *Ballachy* in possession of the estate, that is, in receipt of the rents and profits of it, he constituted him his attorney to receive and enforce

enforce payment of the rents and profits; he does this for valuable consideration, with the six annuitants, and he covenants that *Ballachy* shall not be removed except at their appointment. (I use the name *Ballachy* alone, because *Ralfe*, though associated with *Ballachy*, never acted.) He does all this by deed, to which both the six annuitants and *Ballachy* are parties, and he directs *Ballachy* to hold and apply the rents and profits upon *trust* to pay the rates and taxes, &c., and then the two annuities and interest of the mortgages respectively, *pari passu*, and, in the next place, to pay the six annuitants, and to such other grantees, annuitants and mortgagees, as may advance any further sum or sums of money on the security of the moneys, and pursuant to the terms and conditions of the proviso in the above-mentioned grants contained, all such the said several annuities and interest on such mortgages respectively, *pari passu*, and without any preference or priority whatsoever, according to the true intent and meaning of the several grants hereinbefore recited; and, lastly, to pay the clear residue to Sir *George Bowyer*.

I think that *Ballachy*, having after this accepted the office, was possessed of the rents, upon the express trusts specified in that deed, as long as it was in operation; that he would have been treated as a trustee in this Court; that he would have been compelled to account as a trustee, and was entitled to the benefits and advantages of a trustee within the terms of the deed. The ultimate trust for the payment of the rents was to Sir *George Bowyer* himself and his assigns. He therefore and his assigns were some of the *cestuis que trust*. He assigns all his interest in these rents and profits to the three annuitants to secure their annuities; and, by the deed of direction, he directs *Ballachy* to apply the rents received by him in payment of these three annuities.

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ties. I think it immaterial that the direction given to *Ballachy* and *Bridger* was to pay these annuities *pari passu* with the six, it is, in my opinion, impossible for Sir *George Bowyer* to contend, that if not paid *pari passu*, they were not to be paid at all. He did all he could to give them that right of equality, and if he had given the three express notice of *Donovan's* judgment, instead of their having had constructive notice of it, the effect probably would have been, that he would not have got anything from them, instead of obtaining nearly 4,000*l.*, in respect of which only 285*l.* has been paid, and that, forty years ago. I also think it impossible, with any show of justice, to contend, that because the three claimed to be paid *pari passu*, and did not claim otherwise, they are therefore not to be paid at all, and are to be treated as having had all claim by them absolutely repudiated and rejected. What interest Sir *George Bowyer* had he gave to the three; and they are *cestuis que trust*, entitled to have an account of the estate as much as Sir *George* himself has. I entertain no doubt, that if the rents of the estate had left a surplus, after paying *Donovan* and the six annuitants, *Ballachy* would then have been answerable, in this Court, in a suit instituted by the three annuitants, and would have been made to account for the surplus to them, and that Sir *George Bowyer* and *Ballachy* could not successfully have resisted any such claim. As to the argument that *Ballachy* and *Bridger*, even if they were trustees for the three annuitants, have always repudiated their claim, the facts, in my opinion, disprove it; for the letters I have read shew, that they, on the contrary, admitted their claim to be paid, if there was a surplus after satisfying the six annuitants. If the equitable owner of an estate contract for value with *A.* and *B.*, who are mortgagees on his estate, to put a man in possession of his estate, and directs that man to receive and to hold the

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rents in trust to pay, first, the interest on *A.'s* mortgage, and then, out of the residue, to *B.* the interest of his mortgage, and the rents are not sufficient to do more than pay *A.* the interest due to him, I am of opinion, that it is not within the power of the mortgagor afterwards to urge, that the statute has excluded *B.*, because the rents were insufficient to do more than pay the interest on the first mortgage. I think it immaterial whether this were done by one deed or by two, the mortgagor is a *cestui que trust*, all persons claiming the estate by, through, or under him, are equally so. It is not, in my opinion, necessary to constitute a trust that the person in receipt of the rents of the estate should have the legal estate, if so, no equitable owner could create a trust. I admit that if, expressly or inferentially, the person in possession had wholly repudiated the claim of the three annuitants, as if he had given them notice that he would never recognize them as having any claim on him, under any circumstances; or if there had been a surplus of rents after paying the six annuitants, and *Ballachy* had constantly refused to pay the three annuitants, the case would have been much altered, and the statute would have barred them: but the letters I have referred to, in my opinion, are an acknowledgment instead of a repudiation of their claim. When there was no surplus, against whom were they to proceed, and how could they obtain payment in that case? It is obvious, that in such a case, the principle laid down by Lord *Langdale* in *Burrell* v. Lord *Egremont* (*a*) applies, here, in consequence of there being no surplus, there was, in fact, no person who could be made to pay the charge, and no person who, by the delay, could be induced to believe that the charge was abandoned. Were it otherwise, the possession

(*a*) 7 *Beav.* 235.

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sion of *Ballachy* would have been, if the three annuities had never been granted, adverse to Sir *George Bowyer*, and he would have been excluded by the statute; a conclusion which appears to me to be impossible to be maintained for a moment.

The same principle, which is stated by Lord *Langdale* in *Burrell* v. Lord *Egremont*, seems to be recognized in *Pulteney* v. *Warren* (*a*), where an account of *mesne* profits was directed against the Defendants, because the act of the Court had prevented any action from being brought, as it appeared, in the result, wrongfully.

I think it unnecessary to comment on all the cases cited to me on both sides on this question, they, none of them, controvert the principle I have stated, which I think must govern this case, and which may be shortly stated thus:—I think that *Ballachy* was constituted a trustee to receive and apply the rents of this estate; that this trust related not merely to the charge for which 20,000*l.* was the consideration, but that it was a trust of all the rents of the estate:—that Sir *George Bowyer* declared, that the three annuitants were entitled to the benefit of that trust, and that he thereby created them *cestuis que trust* of the rents and profits received by *Ballachy*, subject to the rights of the six annuitants, which he could not affect. I am of opinion, that this trust was accepted by *Ballachy*, and that the insufficiency of the rents has alone prevented the three annuitants from deriving any benefit from the rents so received, and from enforcing their claims to the present time. I am also of opinion, that Sir *George Bowyer* is estopped, by the terms of the deed itself, from denying that trust, and the claims of the three annuitants under it,

(*a*) 6 *Ves.* 72.

it, and the deed of direction; and that this estoppel not merely binds him, but that it also necessarily binds all persons claiming through him.

I think it scarcely necessary to notice the argument that was urged, that no person is within the express trust, except the person whose name is in the instrument creating the trust; the assigns of the *cestui que trust* are mentioned in the instrument, and if the argument goes beyond that, to which this is an answer, then it destroys itself, because, in that case, no *cestui que trust* could ever assign his interest, which is manifestly erroneous. I think, also, as I have already stated, that this question never came before the Lords Justices, and that it is wholly untouched by any observations which fell from their Lordships in the judgment, of which the short-hand writer's notes are before me,

The next question is, whether the interest on the 9,560*l.* charge can be allowed in account against these three annuities, and if so, to what extent? It is, of course, clear, that the three annuitants took subject to that charge, as far as regards any interest in it prior to that of Sir *George Bowyer*, therefore all payments to Lady *Henrietta Bowyer* are perfectly good. After her death a different question arises. If the reversion in this charge had not been sold by Sir *George Bowyer*, it would, on her death, have vested in him absolutely. If that event had occurred, as he represented the estate to be free from any such incumbrance, and covenanted against any, he could not be allowed to claim anything in respect of it, as against the three annuitants. They had, however, notice of the deeds creating this incumbrance, and all, therefore, that they had to rely upon was the covenant of Sir *George*, that no incumbrance, other than the three specified, should affect their annuities;

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nuities; that is, in fact, that if in existence, it should be paid out of other sources up to the death of Lady *Henrietta Bowyer*. The failure to provide for the payment, out of some other fund or some other estate, did not create more than a mere personal liability of Sir *George Bowyer* for the non-performance of his covenant. It cannot, therefore, during that time, affect the payments of the receivers, or the accounts they may have to render of the rents and profits of the estate and of their application thereof, for they were compellable to make such payments. The three annuitants must be taken to have been cognizant of those accounts, in fact, the principle of my decision is, that they were, and were admitted to be, entitled to see them, and know what rents were received, and how they were applied; but admitting this to be so, the contention of the Plaintiffs is, that the three annuitants are entitled, as against Sir *George Bowyer*, to go against the *corpus* of this charge of 9,560*l*., and put themselves in his position, in respect of interest paid upon it; that he covenanted that the interest of this charge should not come out of the rents of the estate, and, as he has allowed this to be done, by which the rents applicable to the Plaintiffs have been diminished, they are entitled to stand in his place on the estate, not merely as regards the receipt of rents, but also as regards the particular charge upon it, the interest of which he covenanted to keep down, but has not, in fact, done.

Upon the best consideration I can give to this argument, I think that the Plaintiffs are not entitled to stand in Sir *George Bowyer's* place, as regards the capital of this money, and that to do so would, in fact, be giving them the benefit of the *corpus* of the charge, to an extent which was never contracted for, and for which their only remedy was by action on the covenant.

nant. I think, therefore, that they are not entitled to this claim against Sir *George Bowyer*, and consequently, that they are not entitled to it as against any person who is a purchaser from him.

But then the question arises, how are the payments for interest on this charge to be dealt with, as against the Defendant *George Bowyer*. If I am right in the view I have already expressed, the Defendant *George Bowyer* will have to account for the rents of the *Radley* Estate since he has been in possession of it. In taking those accounts, is he to have disallowed to him the payments made or deducted in respect of the interest on the charge of 9,560*l*.? This depends upon whether Lady *Henrietta Bowyer*, when she bought this reversion from Sir *George Bowyer*, knew that he had covenanted that the rents of the *Radley* Estate should be applied in payment of this interest in priority to the three annuities—[*His Honor here stated the facts relating to this part of the case* (*a*)].

I have already stated, that Sir *George Bowyer* would not, if he had not assigned this mortgage, now be at liberty, since that time, to deduct any part of the rents of the *Radley* Estate in payment of the interest. The Defendant *George Bowyer* is a volunteer under Lady *Henrietta*, and stands exactly in her position with regard to it. If, therefore, Lady *Henrietta*, when she bought this charge in *May*, 1837, knew that Sir *George Bowyer* was so bound, with respect to the application of the rents of the estate towards the payment of the interest, Mr. *George Bowyer* is also bound, in like manner, and would not be entitled to deduct the payments of interest in respect of this mortgage, since the decease of Lady *Henrietta*

(*a*) See *ante*, p. 619.

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Henrietta Bowyer. If she knew of the claim of the three annuitants, then I am of opinion that she had such notice, and that these payments cannot be allowed, and I think, upon the facts proved in evidence, that she must be held to have had such notice. Her agent and solicitor duly attended the audits of the rents; he knew that *Ballachy* and *Bridger* received them, and he received from *Bridger* the interest on the 9,560*l.* for Lady *Henrietta*, as well as the 250*l.* for Lady *Ann*.

I am of opinion, therefore, that Lady *Henrietta* had notice that *Ballachy* and *Bridger* were in receipt of the rents of the property, and that Sir *George Bowyer* was not in such possession. That being so, I think that she was bound by notice of who the persons were who were in the possession of the hereditaments, and this is what is laid down in *Bailey* v. *Richardson* (*a*), and that in any dealing with respect to that estate, she was bound to make inquiry of the person in possession.

The case of *Barnhardt* v. *Greenshields* (*b*) was cited, for the purpose of establishing the proposition, that the rule only applied to the person in actual possession of the land, as the *terre tenant*, but if this were so, it would clearly be contrary to reason and common sense, the fact being almost invariable, that the actual *terre tenant* is not the owner, but that the person to whom he pays his rent is the owner, and accordingly, when the case is examined, it does not establish the proposition sought to be maintained by it; on the contrary, the rule of law, as laid down in that case, appears to me to be strictly pertinent to the present occasion. It is in these words—"With respect to the effect of possession merely,

(*a*) 9 *Hare*, 734.

(*b*) 9 *Moore, Privy Council Cas.* 32.

merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with tenancy, as in *Taylor* v. *Stibbert* (*a*), but also to interests under collateral agreements, as in *Daniels* v. *Davison* (*b*), *Allen* v. *Anthony* (*c*), the principle being the same in both classes of cases, namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be."

The judgment then proceeds as follows:—"The rule is stated in the same way by Sir *James Wigram*, in his elaborate judgment in the case of *Jones* v. *Smith* (*d*), If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land; and, referring to the authorities which I have mentioned, he adds, for possession is *primâ facie* evidence of a seisin in fee."

I apprehend that these passages do not mean that it applies merely to the person, who, by himself and his labourers, tills the land, but that by "the person in occupation," is also meant the person who receives the rents.

Here, therefore, they had distinct notice, that *Ballachy* or *Bridger* were receiving the rents, and that the tenants in actual possession paid the rents to them. I think

(*a*) 2 *Ves. jun.* 437.
(*b*) 16 *Ves.* 249.
(*c*) 1 *Mer.* 282.
(*d*) 1 *Hare*, 60.

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think that this was notice of the character under which the tenants paid and *Ballachy* and *Bridger* received the rents, and that, therefore, it was notice that they received the rents under deeds constituting a trust in favour of six annuitants, and also of other annuities to be created to a limited extent, and which deeds recited the deeds granting the annuities, under which Sir *George Bowyer* was debarred from setting up this mortgage interest against the payment of the annuities. Even if the rule be regarded as applicable exclusively to the tenants in the actual occupation of the land, here Lady *Henrietta Bowyer* had notice. On the evidence, I think that she had notice, both actual and constructive, that her son was not in the actual receipt of the rents of his own estate, the *Radley* Estate, and that his tenants paid persons other than himself. By what authority did they do so, and why were they compellable to do so? Because her son had executed a deed, which put the agents of the six annuitants in possession of the rents, and precluded Sir *George*, her son, from removing these agents; and because, in my opinion, according to the proper construction of the receivership deed, *Ballachy*, who was the agent of the six in the first instance, had, by Sir *George*, been put into possession of the rents and profits of the estate, in trust, to pay the six annuities, and other annuities within a limited extent to be thereafter granted. The tenants must have had notice of the authority or direction given by Sir *George* to them, to pay their rents to *Ballachy*, and also of Sir *George's* declaration that *Ballachy's* receipts should be good discharges to them. The tenants, therefore, in my opinion, were bound to know, and did know, that they were compellable, under the equities created by that receivership deed, to pay the rents to *Ballachy* and *Ralfe*, upon the trusts specified in that deed, the first of which was, to pay the three charges, omitting the

the interest on the 9,560*l.*, and the next, of which was the six annuitants, and the last, of which was such other annuitants as Sir *George Bowyer*, within the limits there specified, might thereafter grant.

If Lady *Henrietta* was affected with the knowledge of the equities by which the tenants in possession of the land were affected, she was, in my opinion, affected with the knowledge of the deed of receivership, and, consequently, that Sir *George Bowyer* was not entitled, so far as he or any person claiming through him was concerned, to make any payments in respect of the interest on the 9,560*l.* out of the rents of the *Radley* Estate, or to be allowed such payments, in account, as against the six annuitants, or such other annuitants as Sir *George* should appoint, within the limits of the proviso, which Sir *George* professed his power to do, and did, as far as he was concerned, actually create.

If it be argued that, by reason of *Donovan's* judgment, the rights of the subsequent annuitants to rank with the six was defeated, my answer is, that the persons knowing these matters knew also, that Sir *George* could never set up such a plea, although the six annuitants might; and that therefore Sir *George*, and those claiming under him, were as much bound towards subsequent incumbrances as if *Donovan's* judgment had not existed, and that the proviso, reserving rights for subsequent incumbrances, put persons who had knowledge of that deed upon inquiring, whether there were any such subsequent incumbrances.

I am of opinion, therefore, that notice that *Ballachy* was in possession of the rents was notice in what character he received them, and that he received them as

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trustee for the Plaintiffs, amongst others. I am further of opinion, that notice that the tenants paid their rents to a person other than the owner, was notice of the instrument by which they are compellable so to pay them, and that this deed requires a person having notice of it to inquire whether subsequent incumbrances existed. Lady *Henrietta Bowyer* had, in my opinion, actual as well as constructive notice of the authority under which the tenants paid their rents to the receiver, and I say this, because, besides the knowledge she derived from her solicitor, who attended the audits, the general evidence convinces me, that the mother of Sir *George Bowyer* was, as might reasonably be supposed that she would be, aware that Sir *George Bowyer* was not in receipt of the rents of the *Radley* Estate, but that, in fact, they were received by his creditors, and that they were in possession of his estate. I think that she cannot claim to stand, as against them, in any higher position than Sir *George Bowyer* himself could stand, and that, consequently, the payments of interest, in respect of this mortgage, since the decease of Lady *Henrietta Bowyer*, must be disallowed.

I think that the Plaintiffs are entitled to an account of the rents received by *Ballachy* and by *Bridger*, and of their application thereof, not disturbing the arrangement entered into between them and the six annuitants, and also as against *Edward Kynaston Bridger*. As, however, I should treat the Plaintiffs as cognizant of the mode in which these accounts were taken, I presume that they will not think it necessary to have the accounts actually gone into, unless they can point out some gross errors in them. They are also, in my opinion, entitled to a like account against the Defendant *George Bowyer*, since he has been in possession, and in taking such account, no sums are to be

be allowed to him in respect of payments made by or to him on account of the interest on the 9,560*l.* since the decease of Lady *Henrietta Bowyer*.

I think that the Plaintiffs must pay the costs of Mr. *Speed's* client, the subsequent incumbrancer who has no interest in this suit, and I should have said so as regards Mr. *Boyle's* clients, had it not been that they have thought fit to go into evidence, against the Plaintiffs in this cause, on the merits, which, in my opinion, deprives them of any right to ask for costs as disclaiming Defendants.

So far as the bill seeks to rank *pari passu* with the six annuitants, it must be dismissed with costs.

The six annuitants had no interest in the matter, and have resisted the Plaintiffs' case to claim as an incumbrancer, they therefore are not entitled to ask for costs.

George Bowyer, who has opposed the Plaintiffs' claim, must, in my opinion, pay the cost of that opposition. If it had been an ordinary case of foreclosure and redemption, I should have simply added the costs to the security, but the expenses of this suit has been occasioned by insisting, that the Plaintiffs were not incumbrancers at all on the estate, and I think that he ought to pay the costs of so doing. Therefore *George Bowyer* will have to pay the costs of the Plaintiffs, up to and including the hearing; but the subsequent cost will follow the usual rule.

NOTE.—It was afterwards found, that *Ballachy* not being a party to this suit, the accounts against the representatives of *Bridger* could not be taken in his absence.

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A defendant answering must answer fully, and he cannot, by denying the plaintiff's title, refuse a discovery of the accounts which are consequential on a decree being made against him.

A railway company, under the advice of the chairman and directors, bought up another line in which the chairman was principally interested, and the chairman was furnished with a number of paid-up shares to effect the object. In answer to a bill by the company impeaching the transaction, on the ground of suppression and misrepresentation, and of ignorance, on the part of the company, of the chairman's interest, he insisted on the validity of the transaction on various grounds, and declined to set forth how he had dealt with the shares. Held, that the answer was insufficient.

THIS case came before the Court upon exception to the Defendant's answer for insufficiency. The outline of the case alleged by the Plaintiffs was as follows:—

The Defendant, Sir *William Magnay*, was the director, chairman and president of the "*Great Luxembourg Railway Company.*" He was also (though the fact was alleged to have been unknown to the company) one of the "concessionnaires" (or parties empowered by the Belgian Government to construct the railway on certain terms) of another Belgian railway, called the "*Grand Junction.*"

In 1853, the Defendant and his co-directors made reports to the *Great Luxembourg* Railway Company, shewing the advantages which would result to them from the acquisition of the "*concession*" of the *Grand Junction* Line, and stating that they had entered into negotiations with the *concessionnaires* of the *Grand Junction* Line, which warranted the expectation that they would obtain from them, on equitable and moderate conditions, the transfer of the "*concession*" which they had obtained from the Belgian Government.

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On the 17th of *December*, 1853, the *Great Luxembourg* Railway Company, relying, as they alleged, on these representations, and in ignorance of the Defendant's connexion with the *Grand Junction*, authorized the Board of Directors "to assume the concession of the Belgian *Grand Junction* Line."

But, previously, on the 18th of *November*, 1853, the directors had furnished the Defendant *Magnay* (who was proceeding to *Brussels* to complete the arrangements as to the acquisition) with 5,000 of the guaranteed shares in the *Great Luxembourg* Railway Company, paid up to the extent of 5*l.* (equal to 25,000*l.*), for the purpose of acquiring the *Grand Junction* Line for the *Great Luxembourg* Company. The Defendant went to *Brussels* and completed the arrangement, but rendered no account of the application of the 5,000 paid-up shares, the Plaintiffs alleged that he had parted with them and had applied the produce to his own use.

The bill stated, that the *Grand Junction* Line was not of any value to the Plaintiffs; that the Plaintiffs had been deceived by the Defendant, he having suppressed many material circumstances and misrepresented others; that in his position of director, &c. of the company, he could not contract with it for any benefit for himself, inasmuch as a confidential relation subsisted between them; that he was a trustee for the Plaintiffs of the 5,000 shares, and was responsible for the proceeds. The bill alleged, that it would appear that the Plaintiffs were entitled to the relief sought by the bill, if the Defendant would make the discovery required of him. It prayed an account of the dealings and transactions of the Defendant with the shares and the proceeds thereof, and that he might be declared a trustee of

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of the shares for the company and proceeds, and that he might "indemnify the Plaintiffs in respect of the matters aforesaid," and for payment of the amount found due.

The Defendant was interrogated in the usual manner, as to the statements contained in the bill, and was required to set forth the particulars of his dealings with the shares and proceeds, which are referred to in his answer (*a*), and which it is therefore unnecessary to repeat.

The Defendant, by his answer, alleged, that his connexion with the *Grand Junction* Line was notorious and known to the Plaintiffs. He "insisted that the 5,000 shares were not placed in his hands as a trustee, or on behalf of the company, but the same were absolutely given to him as the price and consideration for his obtaining a transfer of the *Grand Junction* concession to the *Luxembourg* Company, free from all expenses in connexion therewith, and that having effected that transfer, he had a perfect right to deal therewith as he thought proper, and was in no way whatsoever accountable to the company or any one else in respect of the shares or any of them." He afterwards stated, that he did allege "that he was entitled to the 5,000 shares, as the price or consideration for the transfer to the *Luxembourg* Railway Company of the *Grand Junction* Line, and in satisfaction of the engineering and other expenses incurred previous to the transfer of the 'concession' to the Plaintiffs. Having performed the services and effected the purposes, as the price or consideration for which the shares were given to him, he insisted

(*a*) *Post*, p. 649.

insisted that he was in no way liable to account in respect thereof."

The Defendant objected to set forth the accounts and particulars required of him, as follows:—

"I submit, that I am not bound to set forth a full, true and particular account of all and every the sum or sums of money, which I, or any person or persons, by my order, or for my use, has or have received, in respect of the said 5,000 shares, and from whom and for what, and at what particular times each and every part of the said sums which had been so received have been, from time to time, converted: and how each and every part thereof has been applied; and when, and by whom, and why and in whose hands the said sums, and each and every part thereof, now are; and what costs and expenses I have properly incurred in respect of the said shares, and the proceeds thereof, since the 17th *December*, 1853, and the particulars of the same.

"I submit to the Court, that I am not bound to set forth, whether I have parted with the whole, or some, or how many of the said 5,000 guaranteed shares, or whether or not I have received the proceeds thereof, or to what amount, or whether or not I have made large, or some, or what profits, by dealing with the said shares, or the proceeds thereof, or whether or not I have applied such proceeds or profits, or any part thereof, to my own use. I have wholly refused, and still refuse to account for the said proceeds or profits, or any part thereof.

"I submit, that I am not bound to set forth, whether or not the said 5,000 shares were parted with by me at divers, or what different times. I deny that there is, in respect

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respect of the same, or of the proceeds thereof, or of the payments made and alleged by me to have been made thereout, or my dealings with such proceeds, a long and complicated or any accounts at all, between the Plaintiffs and myself, or that a large or any balance at all, is due to the Plaintiffs on such account."

Mr. *Follett* and Mr. *Giffard*, for the Plaintiffs, in support of the exceptions. The Defendant, having undertaken to answer, is bound to answer fully; *Lancaster* v. *Evors* (*a*); he cannot, by contesting the Plaintiffs' right, escape from the obligation of putting in a perfect answer; *Swinborne* v. *Nelson* (*b*); nor can he refuse the accounts, by assuming that the Plaintiffs will not obtain a decree; *Clegg* v. *Edmonson* (*c*). The Plaintiffs, at the hearing, might adopt the account rendered by the Defendant in his answer, and thus avoid the delay and expense of a reference for that purpose. The Defendant ought to have pleaded to the discovery if he intended to resist giving it.

Mr. *R. Palmer* and Mr. *Hardy*, *contrà*. The discovery asked is consequential or resulting from the character or title of the Plaintiffs, and which is denied by the answer. The Plaintiffs are not, therefore, entitled to the discovery; *Stanton* v. *Chadwick* (*d*). The Plaintiffs are entitled only to such a discovery as will enable them to obtain a decree at the hearing, and the discovery, which is the subject of the exceptions, is quite irrelevant to the case made; for how can the subsequent dealing with the 5,000 shares affect the validity of the original transaction? No answer to these interrogatories can, in the slightest, assist the Plaintiffs in

(*a*) 1 *Phillip*, 349.
(*b*) 16 *Beav.* 416.
(*c*) 22 *Beav.* 125.
(*d*) 3 *Mac. & Gor.* 575.

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in obtaining a decree. The accounts would be oppressive, as regards the Defendant, and expensive and inconvenient to both parties. The Plaintiffs' right to the accounts depends on their right to a decree; and if they should fail, the accounts will be useless. The expression, "answer fully," does not mean, that a Defendant must answer every question which a Plaintiff may choose to ask; but that he must answer those which are material to the Plaintiff's case and would assist him in obtaining a decree; it does not apply to matters consequential on the Plaintiff's succeeding on the merits. It is said that the Defendant ought to have pleaded, but that was impossible, for his defences could not be reduced to one single point. He relies on several defences: first, that he is a purchaser for valuable consideration; secondly, that the transaction has been ratified at a general meeting; thirdly, that the Plaintiffs cannot now restore the Defendant to the same situation in which he was at the time when the arrangement was entered into; fourthly, that the suit is in respect of a Belgian transaction, over which this Court has no jurisdiction; and lastly, that by the Belgian law, which governs the case, this transaction is perfectly valid. If the Defendant should succeed in either of these, the bill must be dismissed. He has, therefore, five valid defences, any one of which would be an answer to the Plaintiffs' case; and he ought not to be in a worse situation, with five answers to the Plaintiffs' case, than he would be if he had but one single defence, which could be raised by a simple plea.

Exceptions being now heard by the Court itself, instead of by the Master, the strict practice is relaxed, and the Court has now the power to protect a Defendant from being compelled to give useless and oppressive discovery.

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I think these exceptions must be allowed. There are many authorities on the subject which cannot be reconciled; but in the case of *Swinborne* v. *Nelson* (*a*); and *Clegg* v. *Edmonson* (*b*); I fully expressed my opinion on this point. I cannot distinguish this case; to do so would be to draw thin and subtle distinctions.

One of the great inconveniences which would arise, from relaxing the rule, that the person who answers must answer fully, would be this:—that you must hear the merits of the cause, with very imperfect means, for the purpose of determining whether the Defendant is bound to answer. I do not consider the case of an executor or administrator as any exception to the rule I have laid down, though it has been suggested, that if they dispute the debt or legacy by their answer, they may refuse to set out the accounts.

I do not concur in the observation, that since the change of the practice, by which exceptions are now heard by the Court itself, or by the alteration in the rules of evidence, the right of a Plaintiff to discovery is at all affected. The rule of the Court is this:—that when a Defendant answers, he must answer fully; and I think this observation of Mr. *Follett* is just:—that the Plaintiff may, at the hearing of the cause, adopt the account stated in the answer.

Exceptions allowed.

(*a*) 16 *Beav.* 416. (*b*) 22 *Beav.* 125.

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