SHORT NOTES OF ENGLISH CASES:

BEING A SELECTION OF ADJUDGED POINTS

Reported since May 1st, 1857.[1]

CANDLER *vs.* TILLETT. 22 Beav. 263.

Executor, Liability of—Misapplication of Assets by Co-executor.

"If one executor does any act which enables his co-executor to obtain *sole* possession of money belonging to the testator's estate, which, but for that act, he could not have obtained possession of, and this money is afterwards misapplied, the executor who thus enables his co-executor to obtain possession of the money, is liable to make good the loss."—*Per* Sir John Romilly, M.R.

JOHNSON *vs.* NEWTON. 11 Hare, 160.

Executors—Assets deposited with Bankers—Liability on Bankruptcy of Bankers.

The testator died in May, 1842, having at that time a balance, rather less than usual, at his bankers, of £3,243 12s. The executors paid further sums into the bank to the account of the estate, and also drew out such sums as they required; so that, on the bankruptcy of the bankers on the 10th of January, 1843, there was in their hands the balance of £2,056: 17: 11, belonging to the testator's estate, upon which the executors received dividends to the amount of £1,023: 8: 3, which they had duly accounted for as part of the testator's estate, by which the loss occasioned by the bankruptcy of the bankers was reduced to £1,033: 9: 8. It was found by the Master, "that there were not any purposes of their trust which rendered it necessary for the executors to retain the balance, or any part of it, with the bankers:" it was held, however, by Sir W. Page Wood, V.C., that the executors were not liable for the loss. "No case," said his Honor, "has been cited in the argument, nor do I know of any case, in which executors, who have merely left moneys belonging to the estate in the hands of the bankers of the testator, for a period of no more than nine months after his decease, have been held liable to make good the fund lost by the failure of the bankers. The executors are no doubt bound

[1] Law Magazine for August, 1857, p. 332.

to exercise their judgment on the safety of the place of deposit, whether it be that which the testator had in his lifetime chosen, or whether it be selected by themselves; and, where a loss unfortunately happens, the question must always be, how far the executors must be held to be answerable under the circumstances of the case. Now, what are the trusts and duties of the executors? They have first to pay the debts; secondly, the legacies; and, thirdly, to hand over the remainder to the residuary legatee. They are allowed by the rule of law one year before satisfying the claims of parties under the will. There is no doubt that a case may be suggested, in which a very large balance of the estate may be in the hands of the bankers, upon which there is no probability of any further demand arising, and in which the executors may well be asked why they do not distribute the estate. . . . . If the executors in this case, having no directions to invest the balance of the estate, had thought proper to do so, they would clearly have been liable to the residuary legatees for any loss on a resale if the funds had fallen, and the full sum which was invested should have happened not to be realized. The only course the executors could have taken, would have been to pay the balance over to the residuary legatees. There were, it appears, expenses of the executorship to be met, which afterwards amounted to about £550; and there were, at the time of the failure of the bankers, three or four months yet remaining of the time which the law allows to the executor to wind up the testator's estate. Executors cannot, in the nature of things, be supposed to be acquainted with all possible debts of the testator which may appear; and I do not think that in this case they were bound to have distributed the balance of the estate, or to have removed it from the bank before the time of the bankruptcy."

POLLOCK *vs.* LESTER. 11 Hare, 266.

Injunction—Nuisance—Brick-burning.

In this case an injunction was granted by Sir W. Page Wood, V.C., to restrain the defendant from burning any bricks on a piece of ground about sixty yards from the house of the plaintiff, other than those which were actually burning in clamp, and not to continue such burning beyond a week from the date of the injunction: the plaintiffs undertaking to proceed with their action at the then present assizes, and to abide by such order as the court might make for payment of any damages which should arise to the defendant in consequence of the order. "Every case of alleged nui-

sance," said his Honor, "raised a mixed question of law and fact. Every trade and occupation, called into existence to supply the wants of civilized life, whether in the construction of dwellings or otherwise, must be lawfully carried on somewhere; and therefore, irrespective of the circumstances by which it was surrounded, it could not be pronounced a nuisance. The plaintiff, to succeed in a court of law, must prove first *damnum* and then *injuria*. The observation of Lord Eldon in the case of the *Duke of Grafton* vs. *Hilliard*, (Amb. 160, n. 2, Blunt's Ed.,) would seem to imply that he thought it doubtful whether brick-burning, even carried on near dwellings, was legally a nuisance. That it is a nuisance under some circumstances was established by the decision of the Vice-Chancellor Knight Bruce in the case of *Walter* vs. *Selfe*, (15 Jur. 416;) and in this case there was positive evidence, on the affidavits, of the injurious effects which the operation complained of had produced on the state of health of two of the plaintiffs and members of their families; and the fact might also be adverted to, that the plaintiffs had been in the complete enjoyment of these houses, without any brick-burning in the neighborhood, until these operations had been commenced."

IN RE RICKIT'S TRUST. 11 Hare, 299.

Legacy—Misdescription of Legatee—Evidence.

A legacy was given by the testator to his "*niece, the daughter of his late sister* Sarah." It appeared that the testator's deceased sister's name was Sarah Ann, and that she had left only one child, a *son* named William Wand, and that he had no niece answering the description contained in the will. It was held by Sir W. Page Wood, V.C., that William Wand was entitled to the legacy. "The testator," said his Honor, "in the will, alludes to the fact of his sister Sarah being then dead, by referring to her as his 'late sister Sarah,' and then he intimates that the legacy is intended for an object who must be living at the date of his will, and must be a child of a sister who was then dead, and of a sister who bore the name of Sarah. All these conditions of this description concur in the person of William Wand; he is also the only child of Sarah, and I do not think that the fact of his being a male, instead of a female, is of sufficient weight to exclude him from the benefit of the gift. The case before Lord Langdale, *Ryall* vs. *Hannan*, (10 Beav. 536,) is a much stronger case than the present."

HANCHETT *vs.* BRISCOE. 22 Beav. 496.

Married Woman—Reversionary Interest of, in Personal Property, subject to her own Life Interest to her separate Use—Has no power to Alien.

A married woman being entitled to a fund transferred into the names of trustees upon trust for her absolutely, and that the dividends should be held and applied for her separate use for life; it was held by Sir John Romilly, M.R., that she could only dispose of her life interest, and, as her interest beyond that was reversionary, she could not dispose of it. A trustee, therefore, who had at her request advanced the whole fund to her husband, whereby it was lost, was held liable to replace it, indemnifying himself as far as he was able, out of her life interest. "Here," said his Honor, "is a fund given to trustees in trust for this lady's separate use. With respect to that she is a *feme sole*, she has the power of disposing of it. Subject to that, it was given to her absolutely. She had then the simple reversion in the estate. There is no question but that, if that reversion had been given to her for her separate use, she could have disposed of that reversion. *Sturgis* vs. *Corp*, (13 Ves. 190,) and several other cases, determine that she could then dispose of the life estate and the reversion, because she is made a *feme sole* in respect of both, and has as such the power of disposing of both; and although they do not coalesce, to use the expression of the Vice Chancellor of England in the case referred to (*Hall* vs. *Hugonin*, 14 Sim. 595,) she had the absolute power of disposal over the whole of the fund. . . . . The lady in this case has the power of disposition over the one estate *during coverture*, and she has no power of disposition over the other until she is *discovert*, when she acquires the power of disposing over the other. By what possibility can the fact of these two estates, or rather two interests, being united in the same person, give her an interest over the reversion which, taken by itself, she does not possess? No case was cited to me to remove this difficulty. Cases are cited which in my opinion go much further, as *Whittle* vs. *Henning*, (11 Beav., 222, 2 Ph. 731,) before Lord Cottenham, where the interests were of the same quality, but the one had been transferred to the other for the purpose of making them coalesce. Lord Cottenham said he would not allow her to dispose of the property. But here they are of different qualities; the estate for life is for the separate use, but the reversion is not for the separate use; it is to her absolutely, that is to say, it is only liable to be disposed of by some instrument when she is *discovert*."

NICHOLSON *vs.* TUTIN. 3 K. & J., 159.

Trustees can derive no Profit connected with Trust—Commission—Collecting Rents.

The decision in this case is an apt illustration of the strictness with which courts of equity prevent trustees from making a profit in any way connected with their trust. There, a mortgagee conveyed certain real estates, subject to incumbrances, the interest of which more than exhausted the rents, to trustees, upon trust for his creditors. The mortgagees afterwards employed Watson, one of the trustees, as their agent to collect the rents; it was held by Sir W. Page Wood, V.C., that he could not be allowed any commission out of the rents.

"I do not think," said his Honor, "that it is competent for a trustee to accept such a position, and to raise a claim of such an indefinite nature, unless there had been *previously a contract* that he should have compensation, or such a case of necessity as would justify such a claim, if made by a mortgagee in possession. But the persons to determine whether or not there were such a necessity, or to make such a contract in this case, would be the *trustees themselves*, of whom Watson was one. He would have to decide concerning the commission to be allowed to himself. The case, therefore, falls within the principle laid down by this court; namely, *that it will not allow a person to put himself in a position where his interest will be inconsistent with his duty.*"

SLEIGHT *vs.* LAWSON. 3 K. & J., 292.

Trustees—Executors—Rule as to obtaining Inquiry as to Wilful Default.

It was established and acted upon as a general rule by Lord Eldon, that a plaintiff proceeding against an executor or trustee, in order to obtain an inquiry as to wilful neglect or default, must aver and prove at least one act of wilful neglect or default. In *Sleight* vs. *Lawson*, upon the authority of *Coope* vs. *Carter*, (2 De G., Mac., and G., 297, 298,) it was contended that the rule was to be enlarged; so that, whenever there was an admission by executors or trustees of certain debts having been due to the testator at the time of his decease, unless they could prove at the hearing of the cause that the whole of those debts had been received in the lump, the plaintiff would be entitled to an inquiry. Sir W. Page Wood, V.C., was of opinion, "that the rule laid down by Lord Eldon ought to be adhered to; and he said he was satisfied that Lord Justice Knight Bruce never intended, in *Coope* vs. *Carter*, to depart from the rule. That this was the case was clear from the instance he gave in illustration of his remarks, for he said

this: 'For instance, if the allegation be that a sum of £1,000 has been lost by wilful default, the inquiry may well be, under what circumstances it was lost, and into the facts bearing on the loss. Then the evidence will be supplied; and, when it comes back to the court, an inquiry as to wilful default may be directed.' In other words," added his Honor, "you may raise your contest upon any item or items you choose to fix upon, as a specific instance of wilful neglect or default. And if you make out a case of suspicion in the mind of the court—if it remains doubtful whether wilful neglect and default have not been committed—then you may have the inquiry in question. But it is clear it was never intended to alter the law on this subject as laid down by Lord Eldon."

DIPPLE *vs.* CORLES. 11 Hare, 183.

Voluntary Trust—Mere Declaration of Intention to divide Property does not amount to Declaration of Trust.

The eldest son of a testator, on the day of the funeral, communicated to the family his determination to divide the estate (the whole of which he took by the will) equally between himself and his brothers and sisters; adding, that he proposed to sell every thing in order that it might not be said that he had taken more than any of the others. He afterwards sold some personal chattels, and became himself the purchaser of the house in which the testator lived, at a sum fixed or assented to by the rest of the family—the husband of a married sister having signed a document expressing such assent on her behalf.

It was held by Sir W. Page Wood, V.C., that with respect to the property remaining undivided, the eldest son had not declared a complete trust in favor of his brothers and sisters; but that his expression of an intention to divide it amounted to a mere *nudum pactum*, which would not be enforced in equity. "I agree," said his Honor, "that it is not necessary that the precise words 'trust' or 'confidence' should be used, in order to create a trust, and that any expressions will suffice from which it is clear that the party using them considers himself a trustee, and adopts that character. With regard to personal estate, it is not even necessary that the intention should be expressed in writing, but a trust may be created by parol. If, however, the case be one of doubt or difficulty upon the words which have been supposed to have been used, the court will give weight to the consideration, that the words, not being committed to writing in any definite and unquestionable form, may not be the deliberately expressed sentiments of the party. Lord Eldon, in *ex parte* Pye, adverts

especially to the fact, that the testator had in that case 'committed to writing' what he thought a sufficient declaration, that he held that part of the estate in trust for the annuitant. . . . No authority has been cited, nor do I think can be found, that upon expressions not importing a determination to hold property upon trust for others, but importing nothing more than a determination to divide it amongst such other persons, it can be held that such expressions constitute a trust, as distinguished from a mere promise to give." After considering whether there was a declaration of trust, or a mere promise to give, his Honor added, "The utmost that can be urged in behalf of the plaintiff is, that the declaration of the defendant in this case is *equivocal;* but that is not sufficient to establish the title which he claims. I think, however, that the evidence of what took place preponderates in favor of there being nothing more than a promise to give, and not any trust declared."

MORLAND *vs.* RICHARDSON. 22 Beav., 596.

Injunction—Disturbance of Graves purchased in Perpetuity.

Some persons had purchased graves from the trustees of a burial-ground in perpetuity, but no grant was ever executed to them, and the sole evidence of their title was a receipt for the purchase-money, stating the nature of the sale. The burial-ground was afterwards closed by an order of the Queen in Council; but it seems that, under the 6th sec. of 15 and 16 Vict. c. 55, the Secretary of State for the Home Department is empowered, in cases of private right, to permit burials in family vaults, notwithstanding the ground has been discontinued to be used for burial purposes generally. It was held by Sir John Romilly, M.R., that the plaintiffs were entitled to an injunction to restrain the trustees from injuring, defacing, and obliterating the graves of the plaintiffs in the burial-ground, or any of them, and from removing any of the gravestones. "This order," said his Honor, "will not however, in the slightest degree, prevent the defendants from making such use of the rest of the burial-ground as they may be advised to be fit and proper, with regard to the existing circumstances of the case. The rights of the plaintiffs do not extend to, or in my opinion affect, this part of the ground; they have nothing to do therewith. It is admitted that they have no legal right, and their equitable rights being confined to a right of burial in a particular spot, whenever the Secretary of State for the Home Department shall think fit to give such leave."