THE

AMERICAN LAW REGISTER.

JANUARY 1878.

VOLUNTARY CONVEYANCES.

A LARGE number of cases, both in this country and in England, have come before the courts, in which it has been necessary to decide whether or not a donor could revoke his gift. Many more have arisen in which the conveyance had been beyond dispute perfected, and the question of intention had to be decided, in order to determine whether the transaction was intended as a gift, or the grantee's name used merely for the grantor's convenience, in which case there would be a resulting trust in favor of the latter. It is proposed in this article to state a few of the leading principles governing this branch of law, and illustrate them by some of the cases, reserving for a later article the question of how far, in modern times, an imperfect attempt to convey, by way of gift, will be upheld in equity as a declaration of trust.

FIRST PROPOSITION.—*A court of chancery will not aid a volunteer in obtaining the fruits of an imperfect conveyance or gift (except where the gift or conveyance, though imperfect, may be sustained as a declaration of trust), but will give effect to a perfect gift or conveyance by declaring the grantee's or donee's rights, and by enforcing them where they are wrongfully resisted.*

Langdon v. *Allen*, 1 Weekly Notes (Pa.) 395 (1875). One Abbott made a loan to his son and received from him two notes for the amount, made by the son, but payable to the order of two of the daughters of Abbott, sisters of the maker of the notes.

After Abbott's (the father's) death, the notes were found, one over-due, in an old envelope, which was post-marked and addressed, in an unknown handwriting, to the payee of the over-due note. The envelope containing the notes was found in a paper box, with other business papers of Abbott (the father), inside of a bureau-drawer or closet, which stood in the bed-room of the deceased, who died intestate, leaving several children, besides his two daughters, who were respectively the payees of the above notes.

The question arose on a petition to the Orphans' Court, by the administrators of Abbott (the father), upon which the above facts appeared. The widow of Abbott (the son) testified that she was present when the notes were made, and that the following conversation took place:—

Thomas F. Abbott (the son). "Who shall I make these notes out to?"

George Abbott (the father). "Well, I hadn't thought of any one else but myself to have them made to."

T. F. A. "Suppose I make one out to Sarah and one to Fannie (the respective payees of the notes), as there is an unjust claim talked of coming against your property."

G. A. "Well, I don't care; it would be just as well."

There was other evidence by the same witness, to the same effect, as to the contemporaneous intention of Abbott (the father). There was, also, contradictory evidence of subsequent conversations, in which Abbott expressed himself in regard to the notes in question.

It was not pretended that either of Abbott's daughters, the payees of the notes, had ever seen or heard of the existence of the notes prior to their father's death.

The rule was discharged, which had been granted upon the petition to stop proceedings upon the judgment, already obtained on the first note, in an action by the payee against the makers' administrators. The administrators of Abbott (the father), the petitioners, appealed from the decree discharging the rule.

The Supreme Court, without deciding whether an appeal lay, held that *primâ facie* there was evidence of a gift from the relationship of the parties and form of the notes, and said that the court could not say that that implication had been overturned by the evidence, and a resulting trust established. The court also said, that delivery of the instrument of title, the note, was unnecessary to perfect the donee's title. Per Curiam.—Judgment affirmed.

Sidmouth v. *Sidmouth*, 2 Beav. 447 (1840). Lord Stowell had purchased, at six different times, during 1825 and 1826, large sums in the funds in the name of his only son, Mr. Scott, who, on three occasions during those years, executed three powers of attorney, authorizing Lord Stowell and his bankers to receive the dividends, which was done, and the amount carried to the credit of Lord Stowell's account. Mr. Scott did not know of the purchases at the time they were made, and on two occasions he did not know of the fact till the time when he executed the powers of attorney. When Lord Stowell came to his bankers on these occasions, after mentioning that he had some money to lay out, he would say, "What shall I buy? I have some idea of buying the stocks in my son's name," and after hesitating and considering for a short time he would add, "Well, I think I will buy it in my son's name," or words to that effect. The witness, the banker's clerk, further testified that he was led to believe, as well from his conversations with Lord Stowell as from the manner in which the stock was dealt with and treated, that Lord Stowell always considered that the stock so purchased in his said son's name still remained his own property. Lord Stowell survived his son, and the question arose on a bill filed by Mr. Scott's executrix, his sister and Lord Stowell's daughter, against Lord Stowell's executors and next of kin.

The Master of the Rolls, Lord LANGDALE, said that the law applicable to cases of this nature was subject to so little doubt that it had not been questioned in the argument of this case. "Where property is purchased by a parent in the name of his child, the purchase is *primâ facie* to be deemed an advancement; the resulting or implied trust which arises in favor of the person who pays the purchase-money, and takes a conveyance or transfer in the name of a stranger, does not arise in the case of a purchase by a parent in the name of a child; still * * * that evidence may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee."

His lordship then held that the deliberation exercised by Lord Stowell on the occasions of transfer afforded no evidence whatever that he intended his son to be a trustee of the stock. Lord Stowell probably intended, when the transfers were made, that the dividends should be received by himself. It could not, however, be supposed from that fact that Lord Stowell intended his son to be a mere trustee for him. He meant to continue to maintain his son,

who was living in the same house with him. If he had meant only a contingent provision, he would probably have made a transfer into the joint names of himself and his son. If he had intended to retain the absolute dominion in himself, notwithstanding the transfer, he would probably have extended the power so as to sell and transfer.

Ellison v. *Ellison*, 6 Ves. 656 a, 661 (1802). Nathaniel Ellison conveyed certain property, consisting of leases of collieries, &c., to trustees, in trust for himself for life, and after his death during the remainder of the terms of the leases owned by him, to be subject to the payment of a yearly sum to C., and subject thereto to the payment of a yearly sum to Jane Ellison, his wife, and various provisions for his children. After the testator's death his widow and C. filed a bill, praying that the trusts above declared might be established. One of the questions in the case was whether or not the court would carry out a voluntary settlement. ELDON, L. C., said: "I take the distinction to be, that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*, as upon a covenant to transfer stock, &c.; if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court. That distinction was clearly taken in *Colman* v. *Sarrel*, 1 Ves. 50, independent of the vicious consideration. * * * But if the actual transfer is made, that constitutes the relation between trustee and *cestui que trust*, though voluntary, and without good or meritorious consideration; and it is clear in that case, that if the stock had been actually transferred, unless the transaction was affected by the turpitude of the consideration, the court would have executed it against the trustee and the author of the trust."

"In this case, therefore, the person claiming under the settlement might maintain a suit, notwithstanding any objection made to it as being voluntary." * * *

"Upon the whole, therefore, this relief must be granted, though I agree, that, if it rested in covenant, the personal representative might have put them to their legal remedies."

Tierney v. *Wood*, 19 Beav. 330, 335 (1854). The settlor purchased a house which he had conveyed to the plaintiff in fee, who

held it in trust for the settlor. At the same time the settlor transferred a sum of stock into the plaintiff's name, and by his direction the plaintiff afterwards sold it out and delivered the proceeds of the sale to the settlor. Some time after the purchase of the house the settlor delivered to the plaintiff a writing signed by him, whereby he declared as follows: "I hereby desire that after my death, the stock now in the Bank of England, with the house and land now belonging to me, shall be held by you, as you at present hold it, for the benefit of my wife during her life, and after her death, for the sole benefit of my daughter." The plaintiff allowed the widow of the testator to receive the rents of the premises until her death, which happened some years subsequently to that of the testator. This suit was instituted by the plaintiff to obtain the opinion of the court as to the power of the above paper to effect a disposition by the settlor of his property.

ROMILLY, Master of the Rolls, said, "I examined what would have been the effect of this document, so far as it relates to the stock which had been transferred into the name of (the plaintiff) Tierney, the trustee. If this had not been sold out afterwards, by direction of the testator, and the direction to pay the dividends had been complied with by Tierney, the result would have been that the relation of trustee and *cestui que trust* between Tierney and the person mentioned in the instrument, would have been completed, so far as that stock was concerned, and the fact that the document had been a voluntary act on the part of the settlor would not have prevented this court from acting upon it: *Ex parte Pye and Dubost*, 18 Ves. 140; *Bridge* v. *Bridge*, 16 Beav. 315.

The Master of the Rolls then held that the document was good as a declaration of trust, as far as the land was concerned, to take effect upon the death of the settlor.

Purnell v. *Hingston*, 3 Sm. & Giff. 337 (1856). John Hingston executed a voluntary deed, which purported to convey property to his brother, as trustee, upon various trusts. By the connivance of his brother he was allowed to retain possession of part of the property conveyed. *Held*, on a bill filed after the settlor's death, by the beneficiaries under the settlement, that the latter were entitled to relief against the trustee and the personal representative of the settlor, it appearing that more than sufficient property to satisfy the claim had come into the hands of the trustee.

The Vice-Chancellor held, p. 345, "that even if there were any

imperfection in the operation of the deed, as vesting property in the trustee, there was sufficient authority to show that the deed was a valid declaration of trust to bind the property in the hands of the settlor." And on p. 346, "even where the deed was invalid as a transfer of the legal title, it might, as in the present case, fasten a trust on the property which it purported to assign. It was not a mere engagement to create a trust, but a complete declaration," citing *Ex parte Pye*, 18 Ves. 140; *Fortescue* v. *Bartlett*, 3 Myl. & Keene 36; and *Blakley* v. *Brady*, 2 Drury & Walsh 311; which cases were said to have established the rule that there may be a valid declaration of trust by an instrument which purported ineffectually to convey a legal title.

Gilbert v. *Overton*, 2 Hemming & Miller 110, 116 (1864). In this case the settlor had assigned all the interest which he held in an agreement for a lease subject to rents and covenants, to trustees on trust after the settlor's decease as to one-fifth thereof to his son for life, with remainder to his other children. A short time after the execution of the settlement the legal estate in the above lease was demised to the settlor. The settlor's legal estate was never assigned by him to the trustees.

The question was whether or not the settlement was a valid one, it being argued against its validity that the settlement was voluntary, and that the settlor had never conveyed to the trustees the legal estate.

The Vice-Chancellor, Sir W. PAGE WOOD, held that the settlement was valid, saying that it contained a declaration of trust, and that was all that was wanting to make any settlement effectual. The settlor had conveyed his equitable interest, and directed the trustees to hold it upon the trust thereby declared. It was an exploded idea that in a voluntary instrument such a declaration of trust was insufficient. Such a declaration of trust was just as good as if the testator had declared that he himself would stand possessed upon these terms.

The whole doctrine of the court declining to assist voluntary settlements arose in the first instance out of two classes of cases; one where the settlor retained possession, and was considered to have reserved a *locus pœnitentiæ*, and the other where a settlor had made an incomplete conveyance, and the volunteers came into court to have it perfected. Where trusts had been actually executed, and administration only was asked, the court always gave its assistance, just as if the settlor had declared himself a trustee. The

trustees in this case could have had the settlement carried into execution, and could have obtained a lease in a suit for specific performance. The circumstance that the settlor afterwards got in the legal estate, did not displace the trusts which had been once effectually created. Where a settlor by a voluntary instrument conveyed all his interest, it might well be held that if that interest proved to be merely equitable the assignees became entitled to claim a conveyance of the legal estate from the person in whom it might be vested.

SECOND PROPOSITION.—*Where a voluntary conveyance or gift has been perfected, it cannot be revoked; and the grantee or donee will be aided in establishing his rights by a court of equity.*

Clavering v. *Clavering*, 2 Vernon 473 (1704). Sir James Clavering, in 1683, had made a voluntary settlement in trust for his grandson. In 1690, he made another settlement of the same estate to his eldest son for life, with remainder over, and by will gave his personal estate to the same grandson. It was proved that he had always kept the first settlement in his own custody, and had never published it, and that it was after his death found amongst waste papers; and that the second deed or settlement was often mentioned by him, and that he told the tenants that his son (the plaintiff), the grantee under the second deed, was to be their landlord after his death. *Held*, that the first settlement could not be revoked by the second. The Lord Keeper declared that he was sufficiently satisfied that the manor of Lamedon was intended as a provision for the plaintiff, and that it was but a reasonable provision, but that the case was too hard to be relieved in equity. Though the first settlement was always in the custody or power of Sir James Clavering, yet that did not give him a power to resume the estate; and although voluntary conveyances, if defective, should not in many cases be supplied in equity, yet where there had been a covenant to stand seised to the use of a relation, although it is a voluntary settlement, yet this court in the ancient times always executed such uses. In the *Lady Hudson's case*, where the father, having taken displeasure at his son, made an additional jointure on his wife, but kept in his power, and being afterwards reconciled to his son, cancelled the additional jointure and died, his wife after his decease found the cancelled deed, and recovered by virtue of it. And see *Barlow et ux.* v. *Heneage*, Pre. Ch. 211.

Boughton v. *Boughton*, 1 Atkyns 625 (1736). The question was whether a voluntary deed could be revoked by a subsequent will. Chancellor HARDWICKE said that the will was no more than voluntary, and as there was no case where a voluntary settlement had been set aside by a subsequent will, it no longer remained a question.

Knye v. *Moore*, 1 Sim. & Stu. 61–64 (1822). In this case a married man had executed a deed, providing, in case of his death, for a woman, with whom he had lived in adultery, and his children by her, and deposited it in the hands of his attorney, but afterwards procured possession of it. Sir JOHN LEACH, V.-C., *held*, on demurrer, that the woman and children could maintain a bill to compel him to deliver up this deed.

Simonton's Estate, 4 Watts 180 (1835). An agreement to deliver a deed as an escrow to the person in whose favor it is made, will not make the delivery conditional; but if delivered under it, it is an absolute delivery, a consummation of the execution of the deed.

Rycroft v. *Christy*, 3 Beav. 238, 241 (1840). A *cestui que trust* who was entitled for life to the income of a certain fund, instructed her trustee, by an instrument entered into between them, to pay a certain portion of the interest, to which she was entitled, for the maintenance of a certain child, in no way related to the *cestui que trust*, until she should attain sixteen years, and covenanted to indemnify the trustee in respect of such sums, and agreed to allow him the same out of the dividends payable to her. The trustee accepted these trusts and acted upon it for several years. The *cestui que trust* subsequently filed this bill against the trustee for the administration of the estate, and the question was whether or not the new trust declared by the *cestui que trust*, could be set aside at her desire. But the Master of the Rolls, Lord LANGDALE, *held* that this could not be done. She had executed an instrument which contained an express direction to the trustee to pay a certain portion of the property to the child. So far as the *cestui que trust* had the power, she had transferred the trust to the object she desired to be benefited, and from the moment that direction was signed, and accepted by the trustee, it became his duty to pay the money directed to the child. The trust was not revocable.

Cressman's Appeal, 6 Wright (Pa.) 147 (1862). A mother entitled by the intestate laws to the whole of her deceased son's

personal estate, signed articles of agreement with her other children by which the balance of the estate was to be invested, the interest to be used for the benefit of an invalid son, and the principal, at his death, to go to the brothers and sisters of the intestate. The money was invested and the interest paid as agreed on for several years, when the mother claimed the balance of the estate, repudiated her agreement as invalid, on the grounds that some of her children were minors when they executed it with her, and that it was voluntary. *Held*, that the articles amounted to an executed trust in favor of the children, and that, though voluntary, it could not be rescinded.

THIRD PROPOSITION.—*The mere fact that the instrument by which the conveyance or gift operates, or that the instrument which is the evidence of the completion of the transfer, and of the legal title of the transferree, is retained by, or has gotten back into the hands of, the grantor or donor, does not render revocable the grant or gift, otherwise irrevocable. Nor if the property given is a fund, does the fact that the donor retains possession and exercises control divest an executed gift.*

Worrall v. *Jacob*, 3 Merivale 256 (1817). The grantee of a power, Mary Wilkinson, duly executed a deed in accordance with the power appointing the estate to Worrall for life, and after his death to the use of his children as tenants in common. Three days afterwards the deed was re-sealed and re-delivered by her in presence of the same persons who were witnesses to the first sealing and delivery, which was mentioned in the deed, whereby the estate was appointed to the use of Worrall for life, and after his death to the use of Ann Worrall, his wife, for her life, and after their several deceases, to the children as before. The question was whether Mrs. Worrall could claim under the second deed. Sir WILLIAM GRANT, Master of the Rolls, said that, as to her claim, the objection to it was that, as Mrs. Wilkinson had reserved no power of revocation, she could not insert a limitation which had, *pro tanto*, the effect of revoking the appointment she had already made. The answer attempted to be given to this objection was that as this was on the part of Mrs. Wilkinson a mere voluntary deed which had not been out of her own custody, she might cancel or revoke, and *à fortiori*, alter it at her pleasure. But there was no authority for a proposition so broadly stated. The case of *Clavering* v. *Clavering*, 2 Vern. 473,

was a direct authority the other way. Sir JOSEPH JEKYLL had conceived it to be so clear that a voluntary deed, once perfected, could not be revoked at pleasure, that he established the copy of the first deed, though the original had been destroyed by the maker.

In *Brown* v. *Cavendish*, 1 Jones & Latouche 606, 637 (1844), SUGDEN, Lord Chancellor, said that where under a voluntary settlement the fund had been actually vested in trustees, though there had been no consideration for the creation of the trust, and though the fund had got back by accident into the possession of the person who created the trust, yet the trust might be enforced for the benefit of volunteers, for the relation of trustee and *cestui que trust* had been created. In *Bill* v. *Cureton*, 2 M. & K. 603, the distinction was taken and enforced in favor of the voluntary settlement.

Kiddill v. *Farnell*, 5 Weekly Reporter 424 (1857). STUART, V.-C.: The transfer of a sum of stock under a power of attorney, given by the donor a day or two before her death to her sister, who had lived with her from childhood, and to whom she was much attached, was held good, although the stock was not transferred into the name of the donee until after the donor's death.

Evans v. *Jannings*, 6 Weekly Reporter 616 (1858). A member of a mercantile firm, with which firm his sisters-in-law had a deposit account, transferred 2700*l.* to that account, and procured from his firm a promissory note to that amount, which sum he verbally declared was to be the private property of his wife. He enclosed a note in an envelope, upon which he endorsed a memorandum to the following effect: "This note of hand stands to the credit of Martha and Christiana Forth, in the banks of Seager, Evans & Co., and is to be the property of Mrs. Evans." Afterwards, without having parted with the possession of the note, he transferred the 2700*l.*, in the books of the firm, into an account of his own, at the same time writing across the memorandum, above referred to, another memorandum, as follows: "The within amount of 2700*l.* is transferred to William Evans's trustee account, but it is to be considered the private property of Mrs. Evans." He dealt with the 2700*l.* as his own property, paying his wife no interest thereon, and ultimately reducing the capital sum to an amount less than 2700*l.* By his will he bequeathed to his wife an annuity of 1000*l.* during her widowhood, but did not refer to or mention the above sum of 2700*l.*, and gave his residuary estate to his niece.

Held, that a valid trust had been created for the separate use of the wife, and upon a bill filed by her after his death she was declared entitled to the 2700*l.*, out of his estate, with interest from the day of his decease. STUART, V.-C., said that there was a most essential difference between the case of a man who declares that he will hold property in trust for another, and that of one who only affects to give, but did nothing to complete his gift. He was surprised to find it laid down that if there was a declaration of trust, with notice to the trustee, the question whether the latter acted upon such notice or not made a difference as to the validity of the declaration of trust. It was always his understanding that wherever property was once impressed with a trust, the right of the *cestui que trust* was wholly independent of the conduct of his trustee; that the recognition of the trust by the latter, on the one hand, or his refusal to execute it, on the other, could not affect the interest of the person beneficially entitled. If the trusts were once impressed, it could not affect the right of the *cestui que trust* that the trustee had applied the trust property to his own use or otherwise committed a breach of trust. A. SYDNEY BIDDLE.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Supreme Court of New Jersey.

JOHN HIRES *v.* WILLIAM HURFF.

The property in a chattel passes according to the intention of the parties. That is a question of fact for the jury, unless it is plain by admitted facts, that the law will justify a finding but one way.

Where there is a contract for the sale of a smaller quantity of goods from a greater mass of like quality (corn), which remains in the possession of the seller, without selection or appropriation, the contract is executory, and the property does not pass, unless there be a clearly expressed intention to make the sale complete without further action by the parties.

ON error to Gloucester Circuit Court. This was an action of trover, brought by the sheriff of Salem county, John Hires, to recover the value of two hundred bushels of corn, under the following circumstances: In November 1873, George W. Heritage was the owner of about five hundred bushels of corn, in bulk, and sold two hundred bushels of the same to William Hurff, who paid cash. By the verbal terms of the sale, the two hundred bushels of corn were to be retained by Heritage until they were in a condition to keep