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*Jan. 31.
*April 16.

FRANCIS KEARNEY AND MARIA KEARNEY, } .....APPELLANTS;

AND

ANN KEAN AND MARY McMINN.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Administratrix with Will annexed, purchase of fee simple estate by, when personal assets of testator sufficient to pay off incumbrance—Subsequent parol agreement to sell part of said Land null—Compensation Money for land, right to and how to be treated—Revised Statutes of Nova Scotia, (4th Series) c. 36, *sec.* 40.

About 1837 *Andrew McMinn* devised his lands to his wife, *Mary McMinn*, for life, with remainder to *Maria Kearney*. Letters of administration with the will annexed were granted to the widow. At the time of testator's death, the lands were mortgaged for £150. A suit to foreclose this mortgage was instituted after the testator's death, and it was alleged that under it a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. There was evidence that the administratrix received personal assets of the testator sufficient to have paid off the mortgage, had she chosen so to apply them. The sum of £725 was lent to the administratrix by *Ann Kean*, her daughter by a former marriage. The administratrix then sold the property to the public authorities for £1,750, out of which she paid her daughter £400. From 1858 the daughter, with the leave of the administratrix, occupied about $\frac{1}{4}$ of an acre of the land, until in 1873, under the authority of an expropriation Act, she was ejected from it, the Commissioner taking in all 3 acres $\frac{3}{10}$ths. of this property, the balance being in the occupation of *Maria Kearney* and her husband, *Francis Kearney* (the appellants). These 3 acres $\frac{3}{10}$ths. were appraised at $2,310, and that sum was paid into Court to abide a decision as to the legal or equitable rights af the parties respectively. *Ann Kean* claimed a title to the whole of the land taken, under an alleged parol agreement

* PRESENT.—Ritchie, C. J., and Strong, Fournier, Taschereau and Gwynne, J. J.

with her mother, that she should have the land in satisfaction of £325, the residue unpaid of the loan of the £725, and obtained a rule *nisi* for the payment to her of the sum of $2,310, the amount awarded as compensation for the land. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to the appellants in the whole property, reserving a rental of $80 a year and liberty to occupy two rooms in a dwelling house then occupied by her. On a motion to make this rule absolute, several affidavits were filed, including those of the appellants. On the 18th January, 1875, the matter was referred to a master, to take evidence and report thereon, subject to such report being modified by the Court or a Judge. The master reported that the appellants had the sole legal and equitable rights in the property. On motion to confirm that report, the Court made an order apportioning the $2,310 between *Ann Kean* and the appellants, the former being declared entitled to be paid $1,015.61, and the latter, on filing the written consent of Mrs. *McMinn*, the residue of the $2,310.

Held,—On appeal, 1st. That the administratrix, having personal assets of the testator sufficient to discharge the mortgage, was bound in the due course of her administration to discharge said incumbrance, and that the parol agreement made by her with her daughter was null and void.

2. That when land is taken under authority of legislative provisions similar to Revised Statutes of *Nova Scotia*, (4th Series) c. 36, sec. 40, *et seq.* the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* on a rule *nisi* to confirm a masters' report. Under the authority of c. 36 of the Revised Statutes of *Nova Scotia*, some 3 acres $\frac{3}{10}$ths. land were expropriated for the *Nova Scotia* hospital for the insane, and the compensation money for the same being claimed by Mrs. *Kean* and by Mr. and Mrs. *Kearney*, was deposited in the Supreme Court to abide a decision as to the legal or equitable rights of the parties respectively.

On the 18th January, 1875, the matter was referred to *H. C. D. Twining*, Esq., a master to take evidence and report thereon, subject to such report being modified

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by the Court or a Judge. The master reported that Mr. and Mrs. *Kearney* had the sole, legal and equitable interest in the property. On motion to confirm that report the Court made the following order:—

"The order *nisi* to confirm the masters' report in this cause having been referred to the Supreme Court for argument and decision by a Judge of this Court, and the said order having been argued accordingly by counsel for all parties, and judgment having been given thereon on the 26th day of March, 1877, but no rule having been applied for till the day of this date: It is now ordered that each party bear his or their own costs of argument and attendance before the master, and the master's fees be paid out of the funds in Court to the credit of the cause. That the sum of $1,015.61, with the bank interest thereon, be paid to Mrs. *Kean* over her own receipt, and the balance of the $2,310 in Court, with the bank interest on such balance, be paid, on their joint receipt, to Mr. and Mrs. *Kearney* as soon as they, Mr. and Mrs. *Kearney*, shall have filed in Court the written consent of Mrs. *McMinn* to such payment. Dated the 2nd day of March, A. D. 1878."

From this order Mr. and Mrs. *Kearney* appealed to the Supreme Court. The material facts of the case sufficiently appear in the head note and judgments. The case was inscribed for hearing *ex parte*.

Mr. *Wallace* for appellants:

There was no specific agreement for the sale of any certain quantity of land between Mrs. *McMinn* and Mrs. *Kean*. The numerous versions, all materially differing, given by Mrs. *Kean* of a pretended parol agreement, destroys its certainty and specific character, and for that reason was not such an agreement as the law requires (1). The appellants contend, also, that they were

(1) Dart on Vendors and Purchasers, 1022, 1933; Fry on Specific Performance, 384, 423.

entitled to the property under the will of *Andrew McMinn*, and Mrs. *McMinn* would, under the relation of administratrix with the will annexed, there being sufficient personal effects left by *McMinn* to discharge all his debts including the mortgage, and under the other circumstances of the purchase, be a trustee for her daughter *Maria Kearney* (1). The occupation of house and small piece of land, with the consent of Mrs. *McMinn*, did not give her any other rights than those of a tenant at will or at sufferance, liable to be ejected at any moment. It is not because Mrs. *Kean* subsequently instituted proceedings in the Equity Court against Mrs. *McMinn* and the appellants for a specific performance of an alleged verbal agreement, that there was ever a resulting trust in her favor for these $3\frac{3}{10}$th. acres of land—such a position is utterly untenable (2).

Another reason why the appellants are entitled to the amount deposited as representing this property is that Mrs. *McMinn*, rather than be subjected to proceedings to have her declared a trustee for Mrs. *Kearney*, signed an agreement by which she conveyed the balance of the *McMinn* property to Mrs. *Kearney*, and afterwards made the lease of her life interest to the appellants. The property mentioned in that agreement and lease included the whole $3\frac{3}{10}$th. acres and the small house then occupied by Mrs. *Kean*, together with other property. Mrs. *McMinn* refused to perform this agreement, and a suit was instituted in the Equity Court to compel performance, to which no defence was put in, and a judgment was obtained in accordance with the bill. Under these circumstances appellants submit the master was fully justified in making the report he did, even if Mrs. *Kean* had proved a specific agreement for a specific

(1) Perry on Trusts, 17, 197, 205, 214, 217.

(2) Perry on Trusts, 83, 86, 116, 137 to 162.

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piece of property undisputed and undenied, which she did not do.

STRONG, J.:—

The facts of this case, so far as they are material to the present appeal, may be stated as follows: *Andrew McMinn*, being seized in fee of the lands in question, which formed part of a larger property at *Dartmouth* in *Nova Scotia*, made his will, whereby he devised these lands to his wife, *Mary McMinn*, for life, with remainder in fee to the child or children of his marriage with *Mary McMinn*. Of this marriage there was only one child, one of the present appellants, *Maria Kearney*. The respondent, *Ann Kean*, is a daughter of Mrs. *McMinn* by a former marriage. The testator appointed two persons as his executors, but they renounced, and letters of administration with the will annexed were granted to the widow. The testator, as nearly as I can ascertain, died about 1837. At the time of his death the property was mortgaged to a Miss *Tremain*, to secure £150. A suit to foreclose this mortgage was instituted after the testator's death, and it is alleged that a foreclosure was obtained, and that under it the property was sold and purchased by Mrs. *McMinn* for £905. There is great obscurity as to the true nature of this sale—the case, and the factum which the appellant has filed, alike leave us in the dark respecting it. The decree is not printed, and does not, indeed, appear to have been put in evidence in the Court below, although it was material to the case of the appellants in one aspect, and to that of the respondents in another. I gather, however, from the statements in the affidavits, that there was either a sale under a decree of the Court, at which Mrs. *McMinn* became a purchaser, or that the mortgage was paid off and an assignment taken; not that there was first a

final foreclosure, making the mortgaged land the absolute property of the mortgagee, and then a sale by the latter. The price which Mrs. *McMinn* says she paid was £905. The mortgage appears, from the certificate of the Registrar of Deeds, to have been, as stated, for the sum of £150, and to have been dated the 8th June, 1836.

It is, therefore, almost impossible to suppose that there could have been a redemption and transfer if the amount paid was, as alleged, £905, since the principal, interest and costs could not have amounted, at the time of the sale, to any thing like that sum; but a document has been put in by the respondent, Mrs. *Kean*, which, although not properly admissible in evidence originally, has been received without objection and treated as good evidence for her, and may, therefore, be used against her. This is a fragment of an account current, or bill of costs, furnished by Mr. *Uniacke*, Mrs. *McMinn's* former solicitor, to his client, which contains the two following entries under date 16th October, 1841 :—" Costs of defence *A. P. Tremain's* foreclosure £16 2s. 6d.; *cash* paid for assignment of *A. P. Tremain's* mortgage £379 17s. 8d." *A. P. Tremain* is a misprint for *H. P. Tremain*, who appears by the Registrar's certificate, already referred to, to have been the mortgagee. Against this we have, however, the oath of the respondent to the statement, not disputed by the appellants, that the property was sold under the decree for £905, and bought in by Mrs. *McMinn*. Had Mrs. *McMinn's* title deed even been produced, it might have thrown some light on this fact. But as it is, we must, I think, assume that the whole land subject to the mortgage was sold for a larger price than was required to pay off the mortgagee, and purchased by Mrs. *McMinn*. It is in proof that Mrs. *McMinn*, as the personal representative of the mortgagor, received personal assets

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of the testator amply sufficient to have paid off the mortgage had she chosen so to apply them.

The sum of £725 was, it is said, lent by the respondent, Mrs. *Kean*, to her mother, to make up the £905; and this, I think, is sufficiently proved to have been the fact.

The next circumstance to be mentioned is the sale by Mrs. *McMinn* to the public authorities, for the purposes of a hospital for the insane, of a considerable portion of the property, for the price of £1750, out of which Mrs. *McMinn* paid Mrs. *Kean* £400 in part payment of the loan of £725, and applied the balance to her own use. I may mention here, that the appellant, *Maria Kearney*, has not adopted this sale, but, on the contrary, she repudiates it, and declares her intention of calling its validity in question when her interest becomes an estate in possession on her mother's death.

Then, in 1858, Mrs. *Kean*, who had lived for a number of years with her mother, Mrs. *McMinn*, on this property, removed to a small house on the land, on which she laid out some money for repairs, and around which she enclosed about a quarter of an acre, and there she continued to live until the land was taken possession of, and she was ejected from it by the Commissioner of Public Works, under the authority of an expropriation act, for the purposes of the hospital for the insane. The land so expropriated consisted of 3 acres $\frac{3}{10}$ths, including that of which Mrs. *Kean* was, as stated, in occupation.

During the time Mrs. *Kean* was in possession, the fence she erected was pulled down by *Kearney*, and an action of ejectment was also brought by the *Kearneys* against her; this action, however, was never brought to trial. Mrs. *Kean* claims a title to the whole of the land taken, under an alleged parol agreement with her mother, Mrs. *McMinn*, that she should have the land

in satisfaction of £325, the residue unpaid of the loan of the £725 made by Mrs. *Kean* to her mother. It does not appear that Mrs. *Kean* was ever in possession of more than the quarter of an acre enclosed within her fence, *Kearney* being in possession of the remainder. The *Kearneys* having institued a suit in the Probate Court to compel Mrs. *McMinn* to account for the personal estate of her husband, in order to obtain a settlement of the suit, Mrs. *McMinn*, on the 24th February, 1871, entered into an agreement to convey to Mrs. *Kearney* for life, and to her children in fee simple, all the *Dartmouth* property, subject to a prior life estate which she reserved to herself. This agreement was signed and sealed by Mrs. *McMinn* only, and was not executed by Mrs. *Kearney*. On the 1st May, 1872, Mrs. *McMinn* executed an informal instrument under seal, purporting to be a lease of her life estate in the whole property to Mr. and Mrs. *Kearney*, in consideration of a rental reserved of $80 a year. In June, 1872, Mrs. *Kean* brought a suit for specific performance of the alleged parol agreement with her mother, already mentioned, against the *Kearneys* and Mrs. *McMinn*, but, an answer having been filed, no further proceedings were taken. The appellants also instituted an action for the specific performance of the agreement of the 24th February, 1871, in which the plaintiffs obtained judgment by default, ordering a reference to a master, who is said to have made a report, though the purport of the reference, and the finding of the report, are neither of them stated. The Act of the Provincial Legislature under which the expropriation took place is not specifically referred to in the case or factum, but I assume that it was under the 40th and following sections of cap. 36 of the Revised Statutes of *Nova Scotia* (4th series). The Commissioner of Public Works requiring, as before stated, a further portion of the land in question, amounting to

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3 and $\frac{3}{10}$th acres, for the purposes of the hospital for the insane, proceeded, under the Statute, to procure the nomination of arbitrators, who, on the 10th September, 1873, made their award, allowing $4,000. This included the compensation for the land taken, together with an allowance for fencing, and making a new road. This amount was subsequently paid into Court according to the Statute. Subsequently the sum of $1,690, being the amount paid in beyond the value of the land, which was not claimed by Mrs. *Kean*, was paid out to *Kearney*, leaving the balance $2,310 in Court.

Mrs. *Kean*, on the 16th December, 1874, obtained a rule *nisi* for the payment to her of the sum of $2,310, the amount awarded as compensation for the land. On a motion to make this rule absolute, several affidavits were filed, including those of Mrs. *Kean*, Mr. *Johnston*, her solicitor, Mr. and Mrs. *Kearney*, and Mr. *Wallace*, their solicitor, and two affidavits of Mrs. *McMinn*, directly contradicting each other, were also filed, one by each party. The Court made a rule referring the matter to *Henry D. Twining*, Esq., one of the Masters of the Court, with power to call the several parties and their witnesses before him, and to examine them under oath on the subject matter of the cause, and in addition to such affidavits, and to enquire into the respective legal and equitable rights of the several parties to the lands recently vested in the Commissioner of Public Works and Mines under the Revised Statutes, cap. 36, and to the proceeds thereof remaining in Court, and to report thereon at an early day, and that such report should be moved on before a Judge, who might confirm or modify the same, and pass a final order for the appropriation and distribution of such proceeds and the interest thereon. Under this reference the Master heard evidence, and made his report, dated the 20th January, 1876, finding that Mrs. *Kearney* had the legal

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and equitable right to the lands, and was, therefore, entitled to be paid out of Court the sum of $2,310, the compensation awarded for the lands. A motion was made before a Judge to confirm this report, who directed that the case should be argued before the full Court, which was afterwards done, when the Court made an order apportioning the $2,310 between Mrs. *Kean* and the *Kearneys*, the former being declared entitled to be paid $1,015.61, and the latter, on filing the written consent of Mrs. *McMinn*, the residue of the $2,310.

From that order Mr. and Mrs. *Kearney* have appealed to this Court.

The first question which presents itself for decision is that relating to Mrs. *Kean's* rights against the *Kearneys* and Mrs. *McMinn.*

Mrs. *Kean* has no conveyance conferring on her any legal title to any portion of land, nor does she pretend to have any written evidence of an equitable title. If, therefore, she has an interest, it must necessarily be by virtue of an equitable title depending on a parol agreement, partly performed, for the sale to her of the land she claimed. The insufficiency of the proof of the parol agreement set up by the respondent is the first objection which the appellants make to the order of the Court below, and there can, in my opinion, be no doubt but that the proof is quite insufficient. It consists wholly of the evidence of *Ann Kean* herself, for Mrs. *McMinn's* short and unsatisfactory affidavit is neutralised by her subsequent affidavit of December, 1874, directly contradicting her former one. Her evidence, therefore, is entitled to no consideration. Mrs. *Kean's* evidence is confirmed in one single remote point by Mr. *Uniacke's* account, but it is only as to the fact of the loan having been made by her to her mother, and not in respect of the agreement relating to the land. Then the evidence of Mrs. *Kean* itself is full of discrep-

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ancies and self contradictions, and, moreover, is too uncertain as to the terms of the agreement to warrant any Court in acting upon it, even if it had been the testimony of a disinterested third person.

Further, Mrs. *Kean* is contradicted, as to the quantity of land she was to have, by her own solicitor, Mr. *Johnston*. Thus, in paragraph 9 of her affidavit of 9th December, 1874, Mrs. *Kean* says:

> The said *Mary McMinn* offered, in lieu of the said balance, to give a small house that was on the property, together with upwards of three acres of land adjoining, which she, at the time, pointed out to me.

But Mr. *Johnston*, in his *vivâ voce* examination before the Master, says:

> About three years ago Mrs. *McMinn* wished me to draw a deed or settlement for the property. Out of this property she wished to leave Mrs. *Kean* an acre for her life. The deed was not executed. I cannot now remember that Mrs. *McMinn* ever mentioned to me any specific quantity of land that she had promised to give to Mrs. *Kean* on any other occasion.

It also appears, that though a vague indefinite intention of giving some land either by deed or will to Mrs. *Kean* was announced by Mrs. *McMinn*, yet there was not any positive agreement to do so, nor was any exact quantity of land ever specified. This conclusion is warranted by passages in Mrs. *Kean's* own *vivâ voce* testimony. Thus she says:

> My mother promised to give me the land from the first time I sold my house and wharf and gave her the money. I was to have any part of the place that I wanted, instead of the £325 she owed me. I was to have it either by deed or will. *She told me her word was her bond*, and what more did I want.

This implies a sort of honorary engagement on the part of the mother, rather than a definite concluded contract, and is, moreover, inconsistent with Mrs. *Kean's* own statement, that the agreement was made when she demanded from her mother payment of the balance.

Mr. *Johnston* also further states in his evidence:

At the time of the settlement, Mrs. *Kean* wished some arrangement made with her mother, Mrs. *McMinn*, about this money, and wished to get a part of the Dartmouth property to re-imburse her. Mrs. *McMinn*, who appeared very jealous about parting with any of the property, put her off by saying that the property was all there and was for them, or words to that effect.

This evidence, besides being inconsistent with Mrs. *Kean's* statement that her mother had agreed to give her a specific piece of land at the time of the loan, also shows that there was no contract, but a sort of family arrangement to be carried out at Mrs. *McMinn's* election, by will or conveyance *inter vivos*, and which was to be dependent on the mother's good will. Then the possession was only of a piece of land of about a quarter of an acre, and was therefore inconsistent with the terms of the alleged agreement, which Mrs. *Kean* swears was for 3 acres.

Specific performance of a parol agreement for the conveyance or sale of land on the ground of part performance will never be decreed, unless a specific contract is clearly proved. In the present case such proof wholly fails. So far from a concluded agreement made at any fixed date, Mrs. *Kean's* evidence, in one of the passages cited, indicates that there was none, but that she was dependent on her mother's choosing to make a deed or will of the property. The conclusion must be, that this was one of those vague family arrangements in which possession of land is taken in reliance on a promise of bounty by a parent or relative, and not a contract entered into for valuable consideration (1) of which specific performance could be claimed. This result alone is fatal to the case of the respondent; but even if she had succeeded in proving a parol agreement partly performed for the whole $3\frac{3}{10}$ acres, it

(1) *Orr* v. *Orr*, 21 Grant 397.

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would not have sufficed to have entitled her to more than the value of Mrs. *McMinn's* life estate in that portion of the land. As I shall show hereafter, Mrs. *McMinn* was, subject to her own life estate, a trustee of the land for Mrs. *Kearney*, and Mrs. *Kean* would, of course, be bound by the same trust, unless she could show herself to be a purchaser for valuable consideration without notice; but to entitle herself to this protection, she must show a conveyance executed. This she never pretends to have acquired; she can, therefore, stand in no better position than her mother, but is bound by the same equities as regards Mrs. *Kearney*. The order of the Court below, so far as it directs the payment of any portion of the money to Mrs. *Kean*, must consequently, for the reasons given, be reversed. Mrs. *Kean's* claim being thus disposed of, the question next arises as to the rights of the appellants Mr. and Mrs. *Kearney* against Mrs. *McMinn*.

Mrs. *McMinn* was, without doubt, a trustee for her daughter, Mrs. *Kearney*, in respect of the fee simple. There are two characters in either of which she may have paid off the incumbrance or bought in the estate; she was tenant for life and also administratrix with the will annexed, who had received personal assets sufficient to discharge the mortgage, and, paying off the mortgage in either of these qualities she would become a trustee. If she had been tenant for life only, complicated equities as to contribution would arise which we are not called upon to consider or discuss, since the evidence is ample to show that Mrs. *McMinn* had received personal assets sufficient to satisfy the mortgage, and the payment must, therefore, be presumed to have been an act done in a due course of administration, the mortgage being primarily payable out of the testator's personal assets, and Mrs. *Kearney* having a clear equity to have the estate so exonerated. That the

transaction must substantially be regarded merely as the discharge of an encumbrance, whatever may have been its form, is clear when we consider that it must have either been a formal transfer of the mortgage, as is indicated by Mr. *Uniacke's* account already referred to, or, if in form a purchase of the estate under a decree of foreclosure for £905, still in substance a mere discharge of the incumbrance, since any surplus of the sale monies beyond the mortgage debt, interest and costs would belong to the estate of the testator. Apart, however, from this, an administratrix, allowing an equity of redemption to be foreclosed, while she had, or ought to have had, assets in her hands applicable to the payment of the mortgage, and afterwards becoming the purchaser of the estate herself from the mortgagee, upon the plainest principles of equity, would be regarded as a trustee for the persons entitled to the real estate, and the legal result of the transaction would be precisely the same as if she had paid off the mortgage and taken a transfer of it.

If, therefore, there had been no dealing with Mrs. *McMinn's* life estate, the proper disposition of the money would have been to have apportioned it between Mrs. *McMinn* and *Mrs. Kearney* according to the value of their respective estates. An instrument, purporting to be a lease, was, however, made on the 1st May, 1872, by Mrs. *McMinn*, by which she assumed to convey her life estate to Mr. and Mrs. *Kearney*, in consideration of a rental of $80 a year. This lease, not being in any way impeached, and being sufficient in equity, at least, to pass the estate, it follows that *Francis Kearney*, the husband, is entitled to receive the income of the money in Court during Mrs. *McMinn's* life, and that the *corpus* of the fund would, except in so far as it may be affected by the agreement of 24th February,

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1871, which I will presently further refer to, belong to Mrs. *Kearney*, as being, in the contemplation of equity, still real estate, though in the converted form of money. In one event, Mrs. *McMinn* might be entitled to some substantial indemnity out of the fund, although she has parted with all her interest in the land. Under the instrument of the 1st of May, she is entitled to a rent of $80 a year. Now, the $3\frac{3}{10}$th acres having been taken by title paramount, the *Kearneys* would be strictly entitled to an apportionment of the rent in respect of the eviction, and in that case Mrs. *McMinn* ought to receive an indemnity out of the fund for the deduction from the original rent. The *Kearneys* will, however, probably be prepared to waive any claim to an apportionment, which they must do by filing a written consent to that effect. If they are willing to do this, I think the Court need not send it back to the master to have so minute a calculation made, as would be involved in ascertaining what indemnity Mrs. *McMinn* would be entitled to, in respect of the deterioration of her security for her rent in consequence of the 3 th acres ceasing to be subject to it. If we give no costs against her, setting the costs against this indemity, we shall probably amply compensate her.

There remains still to be considered what rights (if any) Mrs. *Kearney's* children have under the informal instrument of the 24th February, 1871, made on the compromise of the suit in the Probate Court. Mrs. *Kearney* had, as already shown, a clear right to the remainder in fee, paramount altogether to any title derived under that agreement. She did not sign the agreement and has done nothing under it sufficient to bind her to make a settlement of her estate upon her children pursuant to its terms, unless her joinder with her husband as a co-plaintiff in the suit, brought for the specific performance of this article, should be suffi-

cient for that purpose. As the institution of a suit in the joint names of husband and wife is considered as the act of the husband alone, the suit and the judgment were insufficient to affect her rights as between herself and her children, and she is, therefore, free to insist that, as a married woman, her estate in this land can be bound by nothing short of a deed executed and acknowledged pursuant to the provisions of the Revised Statutes, (4th series) cap. 27, and no such deed is in existence. I am, therefore, of opinion that the finding of the Master was right, and the judgment of the Court below ought to be reversed.

I have before said that the fund is still to be considered land. The rule is clear, that when land is taken under the authority of legislative provisions similar to Revised Statutes, cap. 36, secs. 40, *et seq.*, the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land.

This has in many cases been determined to be so with regard to lands taken under the English Land Clauses Consolidation Act. If the person entitled is *sui juris*, of course he can elect to take the fund as money, but a married woman can only deal with it as land. The consequence is that this money ought to remain in Court and be invested so as to produce an income which will be payable to *Francis Kearney* during the life of Mrs. *McMinn*, and at the termination of Mrs. *McMinn's* life estate, Mrs. *Kearney*, or her heirs, will be entitled to the *corpus*, unless Mrs. *Kearney*, her husband consenting, thinks fit, on being examined before a Judge apart from her husband, to authorize the payment out of Court of the money.

It will be sufficient for us to reverse the order complained of and remit the cause to the Court below with the foregoing declarations. The appellants should have their costs against Mrs. *Kean*.

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I am unable to see any evidence in this case which would have justified the master, to whom the matter was referred, in reporting that the respondent *Kean* had any estate, legal or equitable, in the lands in question, which would entitle her to receive any portion of the purchase monies paid into Court, representing the fee simple estate therein; nor can I see that the evidence calls for any qualification in the terms of the report which he has made, whereby he finds that the appellant *Maria Kearney* had the legal and equitable right to these lands, and that she is entitled to receive the $2,310, proceeds thereof remaining in Court, together with any interest that may have accrued, unless it be that the evidence warranted his ordering: "Subject to the value of the life interest of Mrs. *McMinn* in the use of the two rooms reserved by her for her life under the lease of the 1st May, 1872."

The claim of the respondent *Kean* is based upon an assumption of a fact of which there is not a tittle of legal evidence, namely, that Mrs. *McMinn* became seized in fee simple, in virtue of a purchase made by her, and of a deed executed in her favor by the mortgagee of a mortgage executed by the late *Andrew McMinn* in his life time, securing £150, and which mortgage was, as is suggested, foreclosed by the mortgagee after the decease of the mortgagor, whereby the fee simple estate became vested absolutely in such mortgagee discharged of the mortgage. Now, in the evidence before us, there is neither the alleged mortgage, nor the decree of foreclosure, nor any deed, after the foreclosure, executed in favor of Mrs. *McMinn*, produced or shewn to have existed.

By the will of *Andrew McMinn*, a copy of which was produced, we find that he devised all his personal pro-

perty remaining after the payment of his just debts, and subject to such payment, to his widow, Mrs. *McMinn*, to whom he devised the lands in question and 550 acres of other land for her natural life, with remainder to the appellant *Maria Kearney* in fee. The appellant in her affidavit states that, as she is informed and believes, there was, at the time of her father the testator's death, a small mortgage to the amount of £150 upon the premises, but that there was personal estate left by him more than sufficient to pay that amount, and that there were no other debts due by him, and that letters of administration with the will annexed were granted to appellant's mother, the testator's widow, and that, instead of her paying the mortgage out of the personal effects, the said mortgage was foreclosed, and the whole property sold under a decree of the Court of Chancery, and bought in by appellant's mother, while appellant was an infant of about four years of age. This is the sole apparent foundation for the suggestion that Mrs. *McMinn* ever acquired a fee simple estate in the land in question. The appellant, who was an infant when these proceedings are alleged to have taken place, may have been informed that there was a decree of the Court of Chancery authorizing the alleged sale, but we cannot admit this statement in the appellant's affidavit (brought forward for the purpose of showing how defective would be any title set up by Mrs. *McMinn* obtained under such circumstances,) as evidence of the title. We should be slow to believe that a Court of Equity sanctioned such a destruction of an infant's estate. To support a title, resting upon a decree of the Court of Chancery for its validity, we must see the decree, if there be one, and, if none be produced, we must presume that there is none, for, assuming that there was a sum of £150 due upon a mortgage of the land in question at the

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time of the testator's death, we know that the amount so due should have been paid out of the testator's personal estate, of which his widow was legatee, subject to the payment of the debts, and also, as is sworn and not denied, administratrix with the will annexed, as well as devisee for life of the mortgaged premises, with remainder in her infant child in fee.

Now, there is evidence that there was considerable personal estate left by the testator, and if the legatee of personal estate subject to the payment of debts, who was also administratrix with the will annexed of the personal estate, and who was devisee for life of the mortgaged premises, the remainder in fee in which was devised to her own infant child, received and enjoyed the personalty without paying the mortgage debt, she could never be permitted to acquire by any deed the fee simple estate in the mortgaged premises to the prejudice of the devisee in remainder. I confess I think we should be slow to believe that a Court of Equity sanctioned any such proceeding. It is but reasonable that we should call for very precise evidence, and that we should scrutinize with a jealous eye all the proceedings by which such a result is claimed to have been attained.

In the absence, however, of any evidence of any such decree, and of all legal evidence shewing the estate devised to the appellant by her father to be defeated, we must hold the estate so devised to her to be still existing. Then, we find it established that on the 24th February, 1871, the respondent, Mrs. *McMinn*, in settlement of a suit instituted by the appellant against her as administratrix with the will annexed of the personal estate of the testator, calling her to account for her dealings with that estate, and to avoid, as is sworn and not denied, an examination respecting her conduct as such administratrix, executed a deed under her hand and seal in relation to this very land, in which it is

assumed that she had acquired the fee simple estate, in the words following :—

In consideration of the proceedings in the Probate Court against me, and of the devise of *Andrew McMinn*, to *Maria Kearney*, in his will, I agree to convey,on or before the 1st day of April next, all the real estate now owned by me, or in my possession at *Dartmouth* or near the asylum,to the said *Maria Kearney* for her life, then to go to her children in fee simple, subject to a life interest in myself in said real estate, which life interest in me I especially reserve to myself. A good deed of all my present estate therein subject to the said condition to be given, so as to carry out the above object and intention.

This instrument, so executed, seems to evince a desire to atone for an admitted wrong, which it is probable the suit instituted against the administratrix would have redressed, and the different disposition purported by the deed to be made of the estate which the testator had devised to the appellant cannot affect the appellant's right to rest in preference upon her title under the will, if, at least, the deed agreed to be executed, whereby the appellant would have only an estate for life with remainder to her children in fee, has not been executed. The object of the deed of February, 1871, seems to have been to remove all pretended claim of Mrs. *McMinn* to a fee simple estate in the land. Then, we find further that on the 1st May, 1872, Mrs.*McMinn*, in consideration of $80 per year, payable quarterly, doth demise and lease to the appellant and her husband all that farm known as the *McMinn* property, adjoining to the north the asylum property at or near *Dartmouth*, in the County of *Halifax*, for and during the life of the said *Mary McMinn*, to have and to hold the said farm to the said lessees for and during the life of the said *Mary McMinn*; and by that lease the appellant and her husband covenanted to pay to the said *Mary McMinn* yearly, during her life, $80 per year by quarterly payments; and also agreed to permit the said *Mary McMinn* to occupy two rooms in the dwelling house now occupied by her on the said farm.

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If this were a bill filed by the respondent Mrs. *Kean*, claiming specific performance of the verbal agreement now alleged by her to have been made by Mrs. *McMinn*, it is clear that no decree could be made in her favor upon the evidence here given, as against the appellant's estate in remainder, nor, if this was a bill merely claiming a right to charge Mrs. *McMinn's* life estate, would the evidence given warrant any decree to the prejudice of the lease of that life estate to the appellant by the deed of May, 1872, which, the appellant swears, was executed before ever the respondent Mrs. *Kean* asserted against Mrs. *McMinn* the claim which she does now assert. The contradictory statements at different times made by Mrs. *Kean*, who is Mrs. *McMinn's* daughter, as to the transaction which she alleges took place between them, and the affidavit of Mrs. *McMinn* made in February, 1873, denying altogether the loan which is now set up, and the apparent absence of any necessity for a loan for the purpose for which it is alleged to have been made, and the absence of all evidence in writing of the transaction as now set up, all concur in investing the alleged transaction with well founded doubt as to its reality, and as to the *bona fides* of the parties to it, whatever may have been its nature.

If the mortgagee of the small mortgage for £150 had actually obtained an absolute title in fee simple to the mortgaged premises by foreclosure, he might, no doubt, afterwards have sold the fee so obtained for £905 to whomsoever he pleased, but to obtain that title by foreclosure, there must have been a decree in Equity, and before that decree could have been obtained, the administratrix, who was also devisee of the mortgaged premises for life, would have been compelled to apply the personal estate of the mortgagor in payment of the mortgage as far as it would go. There seems to have been abundance of personal estate to

satisfy the mortgage, but assuming the administratrix, who was also legatee of the personal estate, to have squandered that estate, Equity would have compelled her to replace the amount, and in that case her *necessity* for borrowing would have been limited to the amount of the mortgage. But there is no reason to believe that the mortgagee ever did obtain title by foreclosure; indeed the account which was produced from the papers of Mr *Uniacke*, if admissible in evidence, would seem to show that Mrs. *McMinn* obtained an assignment of the mortgage to herself, if, as seems likely, the item there charged under date of October 16, 1841, relates to this mortgage: "Cash paid for assignment of *A. P. Tremaine's* mortgage £379 17s. 8d."

Now, if this be the mortgage in question, then it is plain that the suggestion of her having borrowed £905 to purchase the fee from the mortgagee after foreclosure, or even by a sale under a decree of the Court, is altogether a myth; but whether it be the mortgage in question or not, there is no evidence that Mrs. *McMinn* ever by payment of £905, or of any other sum, or in any way, obtained, either through the intervention of a Court of Equity, or otherwise, any title to the mortgaged premises other than that derived from the mortgagor's will; and that a Court of Equity could have been a party to a transaction purporting to sell to her this property in fee simple for £905, or for any other sum, is what I must decline to believe in the absence of proof.

That something may have been done by Mrs. *McMinn* out of Court in a suit for the foreclosure of the mortgage, by which she may have tried to defeat the remainder, which was vested in her infant child, I can believe, for the deed of 1871 was apparently executed to atone for some such attempt, but that the attempt was ineffectual, I entertain no doubt, and that a Court

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of Equity took any part in such a proceeding, I must decline to believe. The evidence is wholly defective to establish such a position, and whatever may have been the dealings between Mrs. *McMinn* and her daughter, Mrs. *Kean*, who derived benefit under the same will as that which constitutes the appellant's title, and who, therefore, must have known in what her title consisted, the evidence is, to my mind, wholly insufficient to affect the life lease to the appellant of May, 1872, which, upon the evidence before us, cannot be said to have been obtained otherwise than *bonâ fide*, without any notice of any prior or preferable claim, lien or charge of the respondent Mrs. *Kean* upon that estate.

As against the appellant's claim, therefore, to the monies paid into Court, nothing is shown, unless it be, as I have said, the value, whatever that may be, of Mrs. *McMinn's* life interest in the benefit reserved to her by the lease of May, 1872, and all this litigation having taken place at the instance of, and in the interest of, Mrs. *Kean*, whose claim fails, she should pay all the costs, as well in the Court below as of this appeal, and it should be referred back to the Court below, with a direction that it be referred to the master to set a value upon such life interest of Mrs. *McMinn*, with directions to pay that amount, when ascertained, to Mrs. *McMinn*, and the balance to the appellant, *Maria Kearney*. I think Mrs. *Kean* may well be remitted to assert, as she may be advised, in the ordinary way any claim she may have, or may think she has, against Mrs. *McMinn*.

THE CHIEF JUSTICE and FOURNIER and TASCHEREAU, J. J., concurred.

The minutes of the order as finally approved were as follows:

ALLOW the appeal of *Francis Kearney* and *Maria*, his wife.

ORDER that the rule of the Court below of the 2nd March, 1878, be reversed and discharged.

DECLARE that the respondent *Ann Kean* is not entitled to any part of the sum of $2310 remaining in the Supreme Court of *Nova Scotia* in this matter.

DECLARE that the said appellants *Francis Kearney* and *Maria* his wife, in the right of the said *Maria*, are entitled to the whole of the said sum of $2310, less the capitalised value of the life interest of *Mary McMinn*, in the occupation of the two rooms in the dwelling house reserved by the lease executed by her to the said *Francis Kearney* and *Maria*, his wife, bearing date the 1st day of May, 1872, in the proceedings in this matter mentioned.

ORDER that it be referred to the master of the Supreme Court of *Nova Scotia*, in case the parties differ, to set a capitalised value upon such life interest of the said *Mary McMinn* in the said two rooms.

ORDER that such value, when so agreed upon, or ascertained, be paid out of the said sum of $2310 to the said *Mary McMinn*.

DECLARE that the residue of the said sum of $2310 is to be considered as land, and is to be dealt with and enjoyed by the said *Maria Kearney* and her said husband, as they would respectively have been entitled by the laws of *Nova Scotia*, to deal with and enjoy the land which it represents, regarding such land as the fee simple estate of the said *Maria Kearney*; subject, nevertheless, to the right of the said *Francis Kearney* and *Maria*, his wife, to elect to have the said money paid out to them, provided that the said *Maria Kearney*, on

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being examined before a judge of the Supreme Court of *Nova Scotia*, apart from her said husband, shall declare that she consents to the payment of the said money out of Court, freely and without the compulsion of her said husband.

ORDER that all interest accrued upon the said sum of $2310 be paid to the said *Francis Kearney*, as his own proper monies.

ORDER that the said *Ann Kean* do pay to the said appellants all their costs of the proceedings in the Court below and of this appeal.

Solicitor for appellants: *T. J. Wallace.*