THE REVEREND JOSHUA P LEWIS AND FREDERICK JOHN STEWART, TRUSTEES OF THE ESTATE OF CHARLES MOORE (DECEASED), (PLAINTIFFS)..... } APPELLANTS;

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*May 30.
*Oct. 24.

AND

THOMAS ALLISON AND ANNIE F. ALLISON (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OP APPEAL FOR ONTARIO.

Trustees—Powers—Party wall—Tenants in common.

M., owner of two warehouses, Nos. 5 and 7 (the dividing wall being necessary for the support of both), executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation to the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was claimed by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M. to have it declared that the wall in question was a party wall.

Held, reversing the judgment of the Court of Appeal, that the trustees of the will and marriage settlement were bound by the trust declared in the instruments under which they derived their powers, and even if it could be shown that the confirmation deed had the effect of conveying a greater quantity of land than the deed from the trustees of the marriage settlement, such a voluntary conveyance in favour of one beneficiary, which would operate prejudicially to the interests of the other beneficiaries would be a breach of trust and conseqently void.

Held, that upon the execution of the deed by way of marriage settlement of No. 5, the wall common to the two warehouses, Nos. 5 and 7, became a party wall of which the owners of the warehouses were tenants in common.

APPEAL from the judgment of the Court of Appeal for Ontario, which reversed the judgment of the trial

* PRESENT :—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

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court, Falconbridge J., and dismissed the plaintiffs' action with costs.

A statement of the case appears in the judgment reported.

Shepley Q.C. for the appellants.

G. G. Mills for the respondents.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—In 1876 the late Mr. Charles Moore was the owner of three warehouses situate on the south side of Wellington (formerly Market) street, in the City of Toronto, respectively numbered as five, seven and nine. The warehouses numbers five and seven, which alone are in question in this litigation, were adjoining buildings having a party wall between them *i.e.*, a wall on which both the warehouses numbers five and seven, were dependent for support.

On the 18th of April, 1876, Mr. Moore executed a deed by way of a marriage settlement on his daughter Lilias Graham Moore (now Mrs. Warren), whereby he conveyed to Frederick John Stewart and John Edward Rose, warehouse number 5, by a description which gave a frontage of twenty-five feet (not adding the words more or less), along Wellington street westerly from the point of commencement, which point of commencement is fixed at a distance of seventy-eight feet (not adding the words more or less), from the north-east angle of Wellington and Yonge streets, thence south eighty-eight feet more or less, thence easterly twenty-five feet (not saying more or less), thence north eighty-eight feet more or less. It is to be remarked that whilst in the description the words "more or less" are used in connection with the easterly and westerly boundaries, there are no such words of extension added to the northerly and southerly boun-

daries. If the description had stopped here the trustees of the settlement would obviously have been entitled to but twenty-five feet on Wellington street, neither more nor less. The description by metes and bounds is however supplemented by the following words "said property being known as the warehouse No. 5 Wellington street west." Therefore any extension which the trustees could rightfully claim under the description, beyond a frontage of twenty-five feet, must depend altogether on these added words. Under the trusts of the settlement (which took effect a short time afterwards on the marriage of Mr. and Mrs. Warren), the trustees had amongst other things power to sell the settled property.

By his will dated in May, 1876, Mr. Moore devised all his real estate to his executors, Berry Moore, James Moore and the plaintiffs in the present action, who are now the surviving executors, upon certain trusts therein declared, one of which was a trust to sell. The testator died in August, 1876.

In March, 1883, the trustees under the settlement agreed to sell the settled property, warehouse No. 5, to the respondent Thomas Alison, for $9,500, and by an indenture dated the 22nd day of March, 1883, they conveyed the property to the respondent, Thomas Alison, in fee, by a description which was an exact transcript of that by which it had been conveyed to them in the deed of settlement. $6,000 of the purchase money was to remain on mortgage, but before executing the mortgage deed the respondent, Thomas Alison, raised a question as to the sufficiency of the description which he contended should be in accordance with a survey he had procured to be made by certain named surveyors who had as the result of their survey prepared what Mr. Alison claimed to be the correct description, and a draft deed was accordingly pre-

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pared to which the surviving executors were parties, and by which it was proposed they should convey (by way of confirmation) to Mr. Alison, by a description of the land taken from the survey mentioned. This draft deed, however, coming to the hands of Mr. Justice Rose, who as one of the vendors, was of course concerned in seeing that the sale was properly carried out, he (as might have been expected) not being willing that the executors should commit a breach of trust to which he would have appeared to have been a consenting party, altered the description of the parcels so that this deed of confirmation when executed contained the following description :

> And all and singular, the interest, estate and demand of the said Charles Moore, or any other interest which they can convey in and to all and singular the lands and premises upon which the said store No. 5 is situate, whether the same be twenty-five feet in width, or more or less,

this being a description which rendered the deed one which the executors might safely execute, and moreover one accurately carrying out the evident intention of the settler, which was that the whole of the warehouse No. 5 should pass without any limitation arising from the description by metes and bounds, or from want of the words "more or less." I should have said that this last deed which was executed on the 31st of March, 1883, contained a recital of the description furnished by Mr. Alison's surveyors, which as a good deal of importance has been attached to it, I will give in full; it is as follows :

> And whereas it appears from a survey of the said property made the 8th day of March, A.D. 1883, by Unwin Browne & Sankey, provincial land surveyors, of the said City of Toronto, for said Alison, and the said Alison claims the fact to be, that the correct description of the land upon which the same warehouse stands is as follows, namely :
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> All and singular that certain parcel or tract of land and premises containing by admeasurement 2,386 square feet, more or less, being

composed of a part of town lot no. 2, on the south side of Market (now Wellington) street, in the City of Toronto, aforesaid; commencing at a point on the southern limit of Market (now Wellington) street west, distant 77 feet 8 inches, measured westerly along said limit of said street from the western limit of Yonge street, said point being the intersection of the eastern face of brick wall of warehouse no. 5 Wellington street west with the said limit of Wellington west, thence south 74 degrees west along said last mentioned limit 26 feet 7 inches to the western face of a brick wall of said warehouse, thence south 16 degrees east along last mentioned face of brick wall 89 feet 8½ inches to the northern boundary of lot deeded to Hugh Carfrae, or 120 feet less than the southern boundary of said lot, thence north 74 degrees east along last mentioned boundary 26 feet 7 inches to the eastern face of first mentioned brick wall, thence north 16 degrees west along said face of last mentioned brick wall, 89 feet 8½ inches, more or less, to the point of commencement.

The purchase was then completed by the payment of the cash portion of the purchase money a mortgage being given for the unpaid residue. This mortgage contained a description not following the deed of settlement but embracing the description prepared by the surveyors and carrying the western boundary of the mortgaged property to the west face of the west wall of warehouse number 5.

Subsequently, and in 1894, this mortgage was paid off and a transfer of it taken to the respondent Mrs. Alison, the wife of the purchaser Thomas Alison.

The respondents claiming title to the whole of the west wall of no. 5 that is to the whole of the wall between no. 5 and no. 7 upon which both warehouses depended for support, the appellants who were the surviving executors and trustees under the will of Charles Moore brought the present action claiming a declaration that the wall between warehouses nos. 5 and 7 was a party wall, alleging that the appellants and respondents are the owners of the land on which the wall is erected as tenants in common and that the defendants should be restrained from interfering with

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the use and enjoyment by the appellants of the said wall as a party wall.

The respondents set up several defences the principal of which were founded on the deed of the 31st of March, 1883, and on the mortgage given by Alison which had been paid off by and transferred to his wife.

The action was tried before Mr. Justice Falconbridge who pronounced a decree declaring the appellants and respondents to be tenants in common of the wall and of the land upon which it is erected and enjoining the respondents from interfering with the use and enjoyment of the wall by the appellants as a party wall.

From this judgment the respondents appealed to the Court of Appeal when that court (the Chief Justice dissenting) allowed the appeal and dismissed the action with costs.

I will in the first place dispose of the pretentions of Mrs. Alison as mortgagee to some superior right, as a purchaser for valuable consideration without notice, by saying that this respondent is not in a position to say she had no notice of the equities and titles which may bind her husband since these appear on the registered title. Further Mrs. Alison is not a purchaser without notice inasmuch as the rights which the appellants claim to have declared are all based on the title deeds under which she claims. Mrs. Alison must therefore be deemed to have constructive notice, (apart altogether from registration,) of everything which appears on the face of the title deeds under which she claims.

One observation may be made which applies to both sets of trustees—those of the settlement as well as those under the will—namely that they were bound by the trusts declared in the instruments under which

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they respectively derived their powers, the marriage settlement and the will, in each of which there was contained a power of sale, no power of gratuitous disposition being, however, conferred either in the one or the other instrument. Consequently any voluntary conveyance of land by the executors in augmentation of what the testator had conveyed to his daughter's trustees for the purpose of the settlement would be a breach of trust and void, and the court is bound to regard it as such in any declaration of title which it may make.

The description contained in the deed of settlement was manifestly intended to include the whole of warehouse no. 5, and no technical argument derived from cases showing that a description by metes and bounds ought to control it and limit the property conveyed to the twenty-five feet frontage ought to be allowed to prevail; all the surrounding circumstances show that what the settlor intended to give to his daughter was just that which was described in the trust deed, neither more nor less, and this composed the whole of warehouse no. 5. The description of the parcels granted contained in the deed of the 31st of March, 1883 (I do not mean the description in the recital but that in the granting part), carries this into effect in plainer and more precise language, but it does not add in the least to the property which passed under the deed of 1876 by its own force.

The recourse to surveyors and to descriptions prepared by them was therefore wholly inadmissible. All that was intended by the settlor to pass to his daughter's trustees was ascertainable from the settlement deed itself—it was warehouse no. 5—then if it was so ascertainable there was no necessity for any survey or additional description by surveyors; if on the other hand the description prepared by the

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latter contained more than the trust deed, any voluntary conveyance by the executors according to its terms would have been a breach of trust and void. It was quite legitimate for the executors to render the description clearer, as they have done by executing the deed of 31st March, but if they had exceeded this and attempted to convey gratuitously and without consideration any part of the land which had passed to them under the will, their conveyance would have been in violation of their trust and absolutely void. That the executors did not so exceed their powers I think clear.

The recital of the survey and the description consequent thereon had not the effect of making the land so described the subject of the grant. As a rule all recitals in an indenture must be taken to be true and to be treated as a statement binding all parties who execute the deed. But the recital here is not that, in fact, the true description was that prepared by Unwin & Co., but merely the fact that Unwin & Co. had made a survey for Alison, and that Alison claimed the fact to be that their description was a correct one.

This is very far from being a statement in recital of the absolute fact that the description was a correct one. The whole contention is too clear for argument, and the answer given to it by Mr. Justice Falconbridge is right and conclusive. The question therefore is just the same as if it had arisen immediately after the execution of the deed of settlement between Mr. Moore himself and his daughter's trustees, and is confined strictly to the construction of the description in that deed.

We are then brought to this: What is included in the description "Warehouse No. 5, Wellington street west"? The measurements and boundaries stated in the paper prepared by the respondents' surveyors was

manifestly not the proper legal description of this building if the whole of the western wall was not according to proper legal construction included in the denomination of warehouse no. 5. Whether the whole of this western wall ought to be so included is a legal question, and the very question in dispute in this action, and this the surveyors improperly assumed in the respondents' favour.

Then what were the rights of the respective parties, Mr. Moore and his daughter's trustees, immediately after the marriage? The trustees became the owners of warehouse no. 5 by that bare description, and Mr. Moore remained the owner of warehouse no. 7, and the wall which was common to the two houses could, up to the time of the separation of the two properties, be no more said to belong to and be part of no. 5 than it could be said to belong to and be part of no. 7 This it must be remembered is no question of easements; what we have to adjudicate upon is the right to the land on which this party wall is built. The appellants if they had chosen might have claimed that the wall on the separation of the properties vested in the respective owners in severalty each for one half of the wall divided laterally, or they might have claimed easements, but the only right insisted on by the appellants is that they should be declared tenants in common of the wall and the land on which it stands.

In the case of *Watson* v. *Gray* (1) Fry J. makes the following observations:

> The words party wall may be used in four different senses. First, as meaning a wall of which the two adjoining owners are tenants in common, as in *Wiltshire* v. *Sidford* (2), and in *Cubitt* v. *Porter* (3), and that is possibly the primary meaning of the phrase. Secondly, as meaning a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts* v. *Hawkins* (4).

(1) 14 Ch. D. 192.
(2) 1 Man. & R. 404.
(3) 8 B. & C. 257.
(4) 5 Taunt. 20.

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Thirdly, as meaning a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; and fourthly, as meaning a wall divided longitudinally into two moieties each moiety being subject to a cross easement in favour of the owner of the other moiety.

Can it be said that the learned trial judge was wrong in ascribing to this wall the character of a party wall according to the first of these definitions given by Fry J.? I think not. The wall had been used by Mr. Moore for the purposes of both no. 5 and no. 7; it was as much part of the one building as of the other. In saying this I am not losing sight of the fact that no. 5 had been built some time before no. 7, and that this wall had originally wholly belonged to no. 5. What we have to consider, however, is the state of the two tenements 5 and 7 at the date of the settlement, when beyond doubt this wall was common to both buildings. Then as it would be a most unreasonable presumption to make to hold that it was intended to convey any part of no. 7, we must necessarily conclude that it was intended that after the severance of the title the wall should be still used for the common purposes of both the warehouses which *primâ facie* would make the owners tenants in common.

This seems to have been the opinion of Mr. Justice Bayley who in *Wiltshire* v. *Sidford* (1) thus expresses himself:

> Where the builder of two houses grants off one it is more reasonable to presume he grants the whole wall in undivided moieties than that he should leave either party the power of cutting the wall in half.

The presumption of a tenancy in common of a party wall is certainly the proper conclusion where the origin of the party wall cannot be ascertained, but this is not that case for we have full information as to the construction of the wall.

(1) 1 Man & R. 404.

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If the wall belongs to the owners of no. 5 and no. 7 as tenants in common, either party may be entitled to a partition of the wall (1); and that partition may be made either free from or subject to mutual easements for support.

Had the appellants claimed that this was a party wall in which the adjoining owners had several rights with reciprocal easements according to the fourth head of Mr. Justice Fry's classification there would have been a question as to the right to easements which does not here arise. For this reason all the argument in the respondents' factum about the applicability of the principle of *Wheeldon* v. *Burrowes* (2) is irrelevant. Further, even if *Wheeldon* v. *Burrowes* (2) did apply it would not be conclusive against the presumed retention of an easement by the settlor, Mr. Moore, in respect of no. 7. In giving the judgment of the Court of Appeal in *Wheeldon* v. *Burrows* (2), Thesiger J. expressly excepts easements of necessity such as were considered to have been reserved in *Richards* v. *Rose* (3), which he recognises as good law. The Lord Justice there says:

> Two houses had existed for some time each supporting the other. Is there anything unreasonable—is there not on the contrary something very reasonable—to suppose in that case that the man who takes a grant of the house first and takes with the right of support from that adjoining house should also give to that adjoining house a reciprocal right of support from his own?

In *Suffield* v. *Brown* (4), Lord Westbury's judgment, which is the fountain head of all this doctrine against the presumed reservation of easements, contains the following passage:

> It is true that there may be two tenements, as for example, two adjoining houses so constructed as to be mutually subservient and

(1) See *Mayfair Property Co.* v. *Johnston* [1894] 1 Ch. 508.
(2) 12 Ch. D. 31.
(3) 9 Ex. 218.
(4) 4 DeG. J. & S. 185.

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to depend on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour; in which case the alienation of one house by the owner of both would not estop him from claiming in respect of the house he retains, that support from the house sold which is at the same time afforded in return by the former to the latter tenement, which was the case of *Richards* v. *Rose* (1).

Therefore even if this has been the case in which the appellants were claiming an easement for support for no. 7, instead of as it is a claim to the land itself, nothing in *Wheeldon* v. *Burrowes* (2), would have operated against the presumed reservation of such an easement.

Were it open to us to do so I should have been prepared to have made a slight alteration in the original judgment by inserting a declaration as to easements in case of a partition of the wall. This however has not been asked for by the appellants, and probably they can safely rely on the protection of their rights in this respect in any judgment for partition which may hereafter be obtained.

The result is that the appeal must be allowed with costs to the appellants in this court and in the Court of Appeal, and the judgment pronounced by Mr. Justice Falconbridge must be restored.

Appeal allowed with costs.

Solicitors for appellants: *Maclaren, Macdonald, Shepley & Middleton.*

Solicitors for respondents. *Mills, Mills & Hales.*

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(1) 9 Ex. 218.

(2) 12 Ch. D. 31.