whether the objects of his bounty survived one of the tenants for life, provided they did not die in the lifetime of the other two, the testator's father and sister.

There are but two periods to which it is possible to refer the survivorship—the death of the testator, or the period of distribution. The very ground of the rule in *Cripps* v. *Wolcott*, namely, that there should be persons to take when the fund is divisible, has no application here. I cannot read "heirs and assigns" as next of kin; for if the children had dealt with their shares it is clear that these words must carry them to their assigns. Therefore, at the period of distribution you must pay to those children who are alive and to the assigns or representatives of any who are dead. The only period to which the survivorship, under such circumstances, can relate is the death of the testator; in other words, it is the survivorship at the time from which the will speaks.

MINUTE.—The fund to be divided among the children of Mr. and Mrs. Goble and Mr. and Mrs. Driver who survived the widow, and the legal present representatives of such of them as survived the testator and died in the lifetime of the widow.

[417] FRITH *v.* CARTLAND. *Feb.* 19, 20, 21, 1865.

[S. C. 34 L. J. Ch. 301; 12 L. T. 175; 11 Jur. (N. S.) 238; 13 W. R. 493.]

Trustee. Bankrupt. Following Trust Fund.

The rules as to following trust funds in the hands of a defaulting trustee apply against the assignees of the defaulting trustee as fully as against the trustee himself, and the circumstance that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other monies. Held, not to raise any equity in favour of the assignees or general creditors as against the owners of the trust fund.

This was a bill filed against the assignees of a bankrupt, John Plimley Edwards, under the following circumstances:—

On the 18th of May 1860 Edwards, who had had various business transactions with the Plaintiffs, was indebted to them, and induced them to give him their acceptances for £2500 in order that he might discount them and apply the proceeds in reduction of his debt.

Edwards discounted the bills together with other bills of his own, and received in payment a cheque for £3500, and a sum of £284 which was paid into the Birmingham branch of the Bank of England.

Edwards, instead of applying the proceeds of the Plaintiffs' bills according to his agreement, cashed the cheque and converted £500 of the money, together with a further sum of £500 derived from a cheque which he had obtained from a firm of Palmer & Clark, into four drafts on a bank at Hamburgh, and, having converted the rest of the proceeds into securities available abroad, he, on the 20th of May, absconded, and went to Hamburgh, and thence ultimately to Stockholm.

After some intermediate transformations the whole of the said £3500 and Palmer's £500, with the exception of a small sum which Edwards had spent, was converted into securities, which were found in Edwards's possession at Stockholm by a creditor named Sadler, who had pursued him. These securities ultimately realised £2637. In the meantime, on the 22d of May 1860, a petition in **[418]** bankruptcy was presented, on which an adjudication was obtained.

The Plaintiffs now claimed to have the funds recovered, and the sum in the bank at Birmingham applied towards their claim in priority to any claim of the assignees, but without prejudice to the repayment of the amount obtained from Palmer & Clark.

Mr. Rolt, Q.C., and Mr. De Gex, for the Plaintiffs. The principle simply is that we are entitled to follow the funds, and that when the bankrupt mixed them with other funds, and drew from the whole, the presumption is that he dealt with his own fund, and not with the trust fund. The trustee who mixes trust money with his own must himself distinguish them, and his assignees are in no better position: *Pennell* v. *Deffell* (4 De G. M. & G. 372); *Chedworth* v. *Edwards* (8 Ves. 46); *Lupton* v. *White* (15 Ves. 432); *Pinkett* v. *Wright* (2 Hare, 120); *Harford* v. *Lloyd* (20 Beav. 310).

Mr. James, Q.C., and Mr. Bardswell, for Defendant. This is a competition between the Plaintiffs and the general creditors, each claiming the same fund. Why should the right of the general creditors be postponed to that of the Plaintiffs, unless the Plaintiffs shew that the funds recovered were wholly derived from their money and not from ours? No presumption can be made against us, because it is not like the case of a man mixing trust **[419]** funds with his own. Here the bankrupt had no funds of his own. He commenced a fraudulent act of bankruptcy when he left Birmingham on the 18th. He gathered in all the funds he could by fraudulent means, and went abroad on the 20th. He had not a sixpence of his own, and there is no reason why what was recovered should be held to be the Plaintiffs' money rather than that of the general creditors.

The utmost that can be claimed is a *pro ratâ* division between the Plaintiffs and the assignees.

Mr. Rolt mentioned the case of *Taylor* v. *Plumer* (3 M. & Sel. 562).

Mr. James. That was a case of assignees seeking to recover back what the *cestui que trust* had already got into his hands. Here the whole money was by relation the property of the assignees from the date of the act of bankruptcy, and the ordinary presumption against a fraudulent trustee does not arise.

Mr. Rolt, in reply. The case in Maule & Selwyn lays it down that the remedy in such cases against the assignee is the same as against the bankrupt, and that is conclusive.

Feb. 21. VICE-CHANCELLOR Sir W. PAGE WOOD. The contest in this case is as to the title to the proceeds of certain bills which the Plaintiffs entrusted to a **[420]** Mr. Edwards, who has since become bankrupt, and which Edwards converted into cash and mixed with monies of his own. The greater part of these funds were traced through successive changes into letters of credit and foreign bills and notes, and ultimately into the hands of the bankrupt when he was arrested at Stockholm.

Another transaction of the same kind occurred, in which Edwards had obtained a bill for £500 from a firm of Palmer & Clark, and converted it together with part of the proceeds of the Plaintiffs' bills into a letter of credit for £1000. No question is raised in this suit as to Palmer & Clark's title to be paid their £500 out of the monies now available.

On the 22d May Edwards was adjudicated bankrupt, the transactions which I have described having taken place on the 18th and 19th of that month, and the question which now arises is as to the respective rights of the assignees and the original owners of the funds so applied by the bankrupt. *Pennell* v. *Deffell* is a very instructive case upon all questions of this kind. It does not indeed lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines in their bearing upon circumstances of some difficulty. The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that, if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.

[421] Upon these two principles the case of *Pennell* v. *Deffell* was decided, and it illustrates very strongly the manner in which the Court will follow trust property. The sole question in every case is whether the property can or cannot be identified.

In the present case the evidence amounts to this. The bankrupt took £2500 of bills belonging to the Plaintiffs, and discounted them together with bills of his own.

He received a cheque for £3500, besides a further sum which was paid to his credit at the Bank of England. These dealings, and the conversion of the proceeds into credits on foreign banks, raise the same kind of case as was suggested by the Lord Justice Knight Bruce in his judgment in *Pennell* v. *Deffell.* If a man has £1000 of his own in a box on one side, and £1000 of trust property in the same box on the other side, and then takes out £500 and applies it for his own purposes, the Court will not allow him to say that that money was taken from the trust fund. The trust must have its £1000 so long as a sufficient sum remains in the box. So here, Edwards could not be allowed to say that the £284 deposited in the Bank of England was his own, and that the trust portion of the fund was that which he took abroad with him, and from which he drew as he required for his own purposes. There is, therefore, no difficulty in treating that sum at the bank as belonging to the trust, together with what remains of the sum which he took abroad. It appears that Edwards, after passing the property through various transformations, had at last a sum nearly sufficient, together with the money at the bank, to cover the amount of the Plaintiffs' trust fund as well as Palmer's £500. During the interval he had spent something out of the mixed fund, which expenditure must be attributed to that portion which I may call his own, using the expression subject to the title of **[422]** Palmer to the £500, about which no question is raised. Unless therefore the bankruptcy makes a difference, there can be no ground for denying the Plaintiffs' title to the fund recovered, or for dividing it *pro ratâ.* The Court attributes the ownership of the trust property to the *cestui que trust* so long as it can be traced. Here there is no difficulty in identifying it. Throughout the whole series of transformations the bankrupt always held a fund available to meet the claim of the trust. In *Pennell* v. *Deffell* part of the trust fund had been paid into a bank, but it was not ear-marked, and was wiped out by subsequent drawings, and the whole ultimate balance could not be fixed with the trust, any more than a second £1000 of stock which a trustee might happen to acquire after selling £1000 of trust stock and spending the proceeds. So long, however, as the fund can be traced the trustee cannot assert his own title to it.

The argument on behalf of the assignees was very ingenious. It is quite unsupported by the answer, and is indeed a departure from the case there made; but, independently of that difficulty, I think it could not prevail. The answer simply states the petition and adjudication, the bankrupt's departure for Hambro', and then, in paragraph 19, states that he paid away part of the proceeds of the bills to his father-in-law. It is not stated when this payment was made, but it is relied on as a fraud against the assignees. Then the issue is raised by the 20th paragraph, and very properly raised, with a due regard to the principles of law. The allegation is, in effect, that the funds recovered belong to the general creditors, unless the Plaintiffs can prove the alleged trust, and identify the trust monies.

It appears to me that these matters are proved, subject only to the questions whether the doctrines applicable **[423]** to the ordinary case of a trustee dealing with a trust fund can be applied to a case where a bankrupt has absconded, and a petition has been presented two days after his departure; or whether I can say that this money was not the bankrupt's in the sense in which it would be considered his but for the bankruptcy.

Now, if I assume the payment of the father-in-law to have been made under pressure it would be perfectly good. As to the charges on the road, they cannot be recovered. The monies were in all respects at the bankrupt's disposal, and the fallacy of the argument for the assignees lies in treating this fund as the money of the general creditors, merely because assignees have in certain cases a right to treat property as theirs as against wrongdoers who may have possession of it. The funds must, I think, be applied in recouping the trust, with the exception of a sum of £482, which it is not disputed represents the cheque obtained from Palmer & Clark, and must be retained to meet their claim. The expenses of recovering the fund to be borne rateably by this and the other portion of the fund.