upon the Commissioners for the Reduction of the National Debt; and the Court to which such petition shall be presented, shall, and they are hereby authorised and empowered to make such order thereon, either for the transfer of the stock or annuities to which such petition shall relate or refer, and for payment of the dividends which shall have accrued or become due and payable thereon, or for payment of such lottery prizes or benefits, and principals of stock and annuities as aforesaid, or otherwise relating thereto, and to the costs of such application, as to such Court respectively shall appear to be just; and all costs and expenses which shall be incurred by or on behalf of His Majesty's Attorney-General or the said Commissioners for the Reduction of the National Debt, in resisting or appearing upon every such petition (if not ordered by the Court to whom the application shall be made, to be paid out of the stock or annuities and the dividends thereby claimed), shall be paid by the said Commissioners for the Reduction of the National Debt, out of the dividends or annuities to be received by them under or by virtue of this Act, and which shall not be claimed; and in case (*sic*), where any transfer or payment shall be made to any such Claimant or Claimants as aforesaid, either with or without the authority of either of the said Courts, the said governor and company shall cause notice to be given to the Commissioners for the Reduction of the National Debt at their office, of every such transfer or payment, within three days from the time of making the same."

MARCH *v.* RUSSELL. *July* 20, *August* 3, 1837.

[S. C. 6 L. J. Ch. (N. S.), 303; 1 Jur. (O. S.), 588.]

In the year 1810 a sum of stock was transferred into the names of A. and B., in trust for a father and mother, in certain proportions, for their respective lives, with remainder to their children. Shortly afterwards, the stock was transferred by A. and B. into the name of B. only, who appropriated it to his own use. In the year 1818, the father and mother filed a bill against A. and B., to have the stock replaced; and the children (two in number) were Co-plaintiffs, and, being infants, sued by their father, as their next friend; but that suit was soon afterwards compromised, upon B. giving security for the payment of interest for the time past and for the time to come. A. subsequently died, and his personal estate was distributed among his legatees; and two of those legatees then died, having received their legacies; and the residuary personal estate of one of them was paid over to her residuary legatee. These distributions were made in ignorance of any demand arising out of the breach of trust in which A. had concurred. The eldest of the two children attained twenty-one in 1821, and the other in 1823. In 1833 they filed a bill alone against B. and the personal representative of A. and his surviving legatees, and the personal representatives of his deceased legatees, and the residuary legatee of one of those deceased legatees, and against the father and mother of the Plaintiffs, praying to have the fund replaced. Held, that the Plaintiffs were entitled to call upon the surviving legatees of A., and the personal representatives and legatees of his deceased legatees to refund; and that, without any previous inquiry, as to whether the Plaintiffs had known of or acquiesced in the breach of trust, or the compromise of the suit of 1818.

By a deed, dated the 18th of November 1807, and made between Thomas March and Prudence his wife of the one part, and George Russell and George Hodgson of the other part, it was declared that Russell and Hodgson should stand possessed of a sum of £1000, Navy 5 per cent. Bank annuities, which had been transferred into their joint names by Thomas March, upon trust to permit Thomas March to receive one-third of the dividends for his life, and to pay the remaining two-thirds to Prudence March during the joint lives of her husband and herself, for her separate use; and, after the death **[32]** of Thomas March, and in the event of his wife surviving him, to pay the whole of the dividends to Prudence March, for her life; and, after the death of Prudence March, whether in the lifetime or after the decease of Thomas March, to stand possessed of the Bank annuities (subject to the trust for payment of the dividends of one-third to Thomas March during his life), in trust for George March and John

March, children of Thomas and Prudence March, and all and every other child and children of Thomas March by Prudence his wife, thereafter to be born, who should be living at the time of the decease of Prudence March, and the issue of such of them as should be then dead, leaving issue, in equal shares, such issue taking the shares to which their parents would have been entitled, to be vested interests when they should attain twenty-one, with benefit of survivorship. The deed contained a power, enabling Prudence March to appoint a new trustee, in the stead of any trustee who should die, or be desirous of being discharged, or refuse to act.

In the month of March 1810, Thomas Grant was appointed a trustee of the above-mentioned deed of settlement in the stead of George Hodgson, who retired from the trust; and the Navy 5 per cent. stock was thereupon transferred into the joint names of George Russell and Thomas Grant.

Soon after Grant's appointment as trustee, Russell and Grant transferred the stock into the name of Russell only, who subsequently sold it out, and applied the produce to his own use.

Thomas and Prudence March had no children besides those already mentioned, of whom George was born in **[33]** or about the year 1800, and John in or about the year 1802.

In the year 1817, Messrs. Collins and Waller, the solicitors of Thomas and Prudence March, wrote to Grant, requiring that the stock should be replaced. To this demand Grant replied, in the following letter, addressed to Prudence March.

"Dear Madam,—I have received a letter from Messrs. Collins & Co., by your directions, demanding the immediate investment of the £1000 stock, which you so much wished me to let Mr. Russell have; and, to oblige you, I complied with your request. You may depend upon it I shall act with justice to you and your sons, and the money shall be invested. I hope you will not insist on its being done immediately, for I have not got the money by me, it being in estates and in business. Give me time; then I will do the business to you and your sons' satisfaction: the sooner I can buy in the stocks the better it will be for me, as they keep rising. It is very hard upon me to be obliged to pay this money; but, as I am answerable, it shall be done. I ask for time, and I hope you will give it me. It cannot be your wish to distress me, as it will put me to great inconvenience to buy in the stocks immediately: you cannot be affeared of your sons' not having the money, as all my estates are liable for the amount. It is not my wish to give you any trouble on the occasion. I understood you, when I was in town, that if the interest was regularly paid you would be satisfied. I am informed it is kept paid by Mr. Russell's agent. If it is not, let me know. When I returned from London I was attacked with inflammation on my lungs, which laid me up for some time; I have not recovered it yet; therefore I cannot come to town; but I hope the good weather will enable me to **[34]** be there before long. I am sorry to say Mrs. Matson is very ill. Your answer will oblige, dear madam, your humble servant, THOMAS GRANT.

"Mrs. March, No. 33 Moffatt Street, City Road, London."

In the year 1818, Thomas and Prudence March, and George and John March, their sons, then infants, by Thomas March, their father and next friend, filed a bill in Chancery, against Russell and Grant, for the purpose of compelling them to replace the stock; but that suit was compromised, soon after its institution, upon Russell giving additional security for the payment of interest for the time past, and for the punctual payment of interest for the future. Grant, however, had put in his answer to the bill, and had set forth in it a written document, purporting to be signed by Thomas and Prudence March, expressly authorising him to transfer the stock to his co-trustee Russell.

Grant died in the year 1820; having, by his will, given all his personal estate, not specifically bequeathed, to his sister Sarah Matson, widow, and to John Perkins and William Wise, upon trust to convert it into money; and, after payment of his debts, to pay one-third to Sarah Matson, and one other third to Mary Smith; and, as to the remaining third, to pay one-third part of it to Alicia Eliza Arrowsmith, wife of Thomas Arrowsmith; and, as to the remaining two-thirds of the last-mentioned third, to invest it upon Government or real securities, and pay the interest to Alicia

Eliza Arrowsmith for life, for her separate use; and after her death to divide the capital equally amongst all her children, the shares of daughters being vested at the age of twenty-one, or at marriage, **[35]** and the shares of sons at the age of twenty-one, with benefit of survivorship. Sarah Matson, John Perkins, and William Wise, were appointed executors of this will; and the will was proved, together with a codicil, by Sarah Matson and John Perkins, on the 18th of July 1820.

Sarah Matson died in the year 1830; having, by her will, given all the residue of her personal estate to Sarah Prudence Arrowsmith, spinster, and appointed John Perkins her sole executor, who afterwards proved her will.

Mary Smith also died, having appointed George Ray and John Grant Smith her executors, both of whom proved her will.

The present bill was filed, in the year 1833, by George March and John March, as the only children of Thomas and Prudence March, against Russell, Perkins, Thomas Arrowsmith, and Alicia Eliza his wife, Sarah Prudence Arrowsmith, who was one of the children of Alicia Eliza Arrowsmith, and also against her other children, against Thomas and Prudence March, against Ray, and against John Grant Smith, who was out of the jurisdiction of the Court; and it prayed that Russell, and Perkins, as executor of Grant, might be decreed to lay out the amount produced by the sale of the £1000 5 per cent. Navy Bank annuities, or the value of that stock, in the purchase of stock, in the name of the Accountant-General, upon the trusts of the settlement; and that the rights and interests of the Plaintiffs, and of the Defendants, Thomas and Prudence March, in the stock so to be purchased, might be ascertained and declared; and that Perkins might either admit assets of Grant, or that the usual accounts of Grant's personal estate might be **[36]** taken; and that, in case it should appear, in taking such accounts, that any part of Grant's personal estate had been received by Sarah Matson, Mary Smith, or the Arrowsmiths, as residuary legatees of Grant, then that the personal estate of Sarah Matson and Mary Smith might be charged with, and the Arrowsmiths might be ordered to refund a sufficient part of the personal estate so received, to answer the Plaintiffs' demands; and that Perkins, as executor of Sarah Matson, and Ray and J. G. Smith, as executors of Mary Smith, might admit assets of their respective testatrixes, or that the usual accounts of the personal estates of those testatrixes might be taken; and if it should appear that any part of the personal estate of Sarah Matson had been received by Sarah Prudence Arrowsmith, as her residuary legatee, then that she might refund the whole or a sufficient part of what she should so have received.

Perkins, by his answer, stated that in the year 1823 Grant's affairs were finally wound up by Sarah Matson, by whom alone his personal estate had been possessed, and that the net residue of £2036, 11s. 4d. was appropriated by her, according to the directions of Grant's will; the two-thirds of a third, set apart for Alicia Eliza Arrowsmith and her children, being invested in the funds, in the joint names of Sarah Matson and Perkins; and that Grant's personal estate was thus applied and administered, without his (Perkins's) having any notice of the claim now made by the Plaintiffs in this suit. He admitted also that he had paid to Sarah Prudence Arrowsmith the clear surplus of Sarah Matson's estate, being £129, 15s. 11d., or thereabouts, but without any notice or knowledge of the Plaintiffs' claim, or of the circumstances under which it was now made; and that in January 1833 he changed the security of that part of Grant's estate which had been set apart for the **[37]** Arrowsmiths, from the funds to a mortgage. The statements of Thomas Arrowsmith and his wife, and such of her children as were of age, were to the same effect.

The Defendant Ray, by his answer, stated that he had possessed the personal estate of Mary Smith to a very small amount, and not sufficient to pay her funeral and testamentary expenses and debts, exclusive of the sum which the bill alleged that she had received as one of Grant's residuary legatees; as to which he was unable to state whether it had been received by Mary Smith or not.

By the decree made in this cause, by the present Master of the Rolls, it was declared that Russell and the assets of Grant were liable to make good the £1000 Navy Bank annuities, and to pay the Plaintiffs' costs of this suit; and an account of Grant's assets was directed; and it was declared that his residuary legatees, to the extent of the sums received by them, were liable to make good the Plaintiffs' demand; and an account was directed of what had been paid to each of the legatees; and an

account of Sarah Matson's assets was directed; and it was declared that Sarah Prudence Arrowsmith, as her residuary legatee, to the extent of the sum received by her, not exceeding the sum which should be found to have been received by Sarah Matson in respect of Grant's residuary estate, was liable to make good the Plaintiffs' demand; and an account was directed of what had been received by Sarah Prudence Arrowsmith in respect of the residuary estate of Sarah Matson: and it was declared that Thomas Arrowsmith was liable for the one-third of a third of the residuary personal estate of Thomas Grant, which had been received by his wife Alicia Eliza Arrowsmith; and the remaining two-thirds of such third, invested in the name of Perkins, were **[38]** declared to be also liable to the Plaintiffs' demand; and an inquiry was directed, whether Mary Smith had received anything, and what, in respect of Grant's residuary personal estate; and it was ordered that what should appear to have been received by her should be answered by Ray out of her assets. It was also ordered that, out of the funds so declared to be liable, the £1000 Bank Navy 5 per cent. annuities, now reduced to 3½ per cent. annuities, should be replaced. It was referred to the Master to tax the Plaintiffs' costs, and it was ordered that such costs should be paid by Russell, and by the other Defendants, out of the funds so declared to be liable; and that, when the stock should have been replaced, any of the parties should be at liberty to apply with respect to the dividends.

All the Defendants, with the exception of Russell and Thomas March and Prudence March, appealed from the whole of this decree, except so far as it affected Russell.

Mr. Barber, Mr. Koe, and Mr. Loftus Lowndes, in support of the appeal, said that Grant's assets had been duly administered, so long ago as the year 1823, in ignorance of this claim; and they contended, therefore, that his assets could not be followed. They cited *Harman* v. *Harman* (2 Shower, K. B. 492; 3 Mod. 115), *Brooking* v. *Jennings* (1 Mod. 174), *The Chelsea Water Works Company* v. *Cowper* (1 Esp. 275), and Ram on Assets (page 673, n., 2d ed.).

They urged that the present Plaintiffs, as well as the Defendants March and wife, must be deemed to have had full notice, not only of the breach of trust, but of what was done in the suit of 1818, and to have ac-**[39]**-quiesced in the abandonment of that suit, and the consequent undisturbed distribution of Grant's assets; for one of the Plaintiffs attained twenty-one in the year 1821, and the other two years afterwards. They were of age, therefore, when Grant's assets were administered, and an inquiry ought to be directed whether they were not cognizant of that administration. In an unreported case of *Smith* v. *Birch*, Sir John Leach, in the year 1831, under circumstances resembling the present, directed an inquiry such as was now asked for. The Plaintiffs did not state in their bill that they were not aware of the abandonment of the former suit, and the distribution of Grant's assets, and did not state when they first became aware of those circumstances; *Harden* v. *Parsons* (1 Eden, 145; 3 Mad. 63, n.), *Andrew* v. *Wrigley* (4 Bro. C. C. 125), and *Shannon* v. *Bradstreet* (1 Sch. & Lef. 52).

Mr. Wakefield and Mr. W. T. S. Daniel, *contrà*, cited *Bennett* v. *Colley* (5 Sim. 181; and 2 Mylne & Keen, 225).

Mr. Barber, in reply.

August 3. THE LORD CHANCELLOR [Cottenham], (after stating the facts of the case, and the substance of the decree):—

The appeal is not by Russell, but by the personal representative and legatees of Grant; and although the representative of Grant joined in the appeal, yet, in the result, the case, as far as Grant was concerned, was not pressed in argument. It seemed to be admitted that the decree could not be impugned, so far as Grant's assets were concerned; but, in opposition to the Plaintiffs' **[40]** right to call on the legatees of Grant to refund, two questions were made: first, that the assets of Grant, having been administered in ignorance of this demand, ought not to be followed; and, secondly, that the Court ought not to have made the decree which it has made, without a previous inquiry, whether the Plaintiffs knew of, or acquiesced in, the breach of trust, or in the arrangement stated to have been made in the year 1818.

Now, as to the first point, which raises the proposition that assets cannot be followed in the hands of legatees, to whom they have been handed over by the personal representative, in ignorance of the demands of creditors which existed at the time, it is to be observed that almost all, I may say all, the cases in which legatees

have been compelled to refund have been cases in which the assets have been distributed in ignorance of the claim. It can hardly be supposed that the personal representative would take upon himself the responsibility of handing over the assets to the legatees, if he was aware that any creditors of the deceased were still unpaid. Upon this branch of the argument several cases were cited which, in my opinion, have no application whatever to the present question. They were cases in which an executor or administrator has been held protected for payments which, though not regular, were payments made in ignorance of the superior claims of other parties. They were cases in which the executor or administrator had honestly and faithfully discharged his duty, to the best of his knowledge; and he was held to be protected. But the question here is, whether the creditor shall not be entitled to follow the assets, which are his fund (the debts not having been paid), in the hands of persons who have not purchased them, but to whom they have been delivered in mistake.

[41] That a creditor may follow assets in the hands of legatees to whom they have been delivered in ignorance of the creditor's demand has been an established principle of this Court from the earliest period, of the decisions in which we have any traces. In *Hodges* v. *Waddington* (2 Ventris, 360), the rule was laid down; and in *Noel* v. *Robinson* (1 Vern. 90; and see S. C. 2 Ventris, 358) it was said to be the constant practice to allow a creditor to compel a legatee to refund. From that period, to the decision of Lord Eldon in *Gillespie* v. *Alexander* (3 Russ. 130), there is no instance of any doubt being entertained as to the right of the creditor to follow assets in the hands of a legatee to whom they have been delivered upon the supposition of there being assets to pay that legatee: and what Lord Eldon says in *Gillespie* v. *Alexander* is applicable to more than one of the points in this case; for he says, that where a decree has directed an account of debts, a creditor is permitted to prove his debt, as long as there happens to be a residuary fund in Court, or in the hands of the executor; and that if he has not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree; for, if he has a mind to sue the legatees, and bring back the fund, he may do so. Now, that is a case in which the assets have been administered in ignorance of the claim, because they have been administered by the Court, after means have been taken for the purpose of bringing forward all those who have claims upon the fund; but that proceeding shall not protect a legatee from the liability to refund.

Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give **[42]** security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee.

The first proposition, therefore, cannot be maintained in point of law; but is contrary to the established rule of the Court, from the earliest period to which it can be traced.

The second point made by the Appellants is, that there ought to be an inquiry whether the Plaintiffs knew of or acquiesced in the breach of trust, or the arrangement said to have been made in the year 1818.

Now, in order to make it proper to direct that inquiry, it would be necessary to shew that such knowledge and acquiescence would afford a defence, and also that sufficient matters are put in issue by the pleadings to entitle the party to ask for that inquiry. It cannot be meant that the Plaintiffs acquiesced in the breach of trust at the time at which it was committed; because it was committed in or soon after the year 1810, when one of the Plaintiffs was only ten years of age, and the other was only eight. What is meant, therefore, must be knowledge and acquiescence after the two Plaintiffs attained twenty-one, which, as to one of them, was in the year 1821, and as to the other, in the year 1823.

The knowledge or acquiescence would not be knowledge of or acquiescence in the breach of trust, but it would be knowledge in 1821 of a title to the property (supposing they became informed of their title then), and abstaining to sue, from that time until the year 1833; **[43]** but it was admitted that, as against Russell and the estate of Grant, the Plaintiffs were not barred by the time that had elapsed. It was admitted (and indeed it could not have been disputed) that the time was not such as

to prevent the Plaintiffs from instituting this suit against one of the trustees and the representatives of the other. There appears, therefore, to be nothing to prevent them from suing Grant's legatees, unless there have been acquiescence, and knowledge, and concurrence, on the part of the Plaintiffs.

Not only has no knowledge, on the part of the Plaintiffs, of the breach of trust been proved, but there is no allegation in the bill from which their knowledge would appear, nor is any such defence put in issue.

It was said that in the year 1818 another bill was filed, and that the Plaintiffs may have known of the compromise of that suit.

The only evidence of that is, that one of the witnesses deposes to the fact of a bill having been filed, in which the children were joined as Co-plaintiffs, but of the proceedings having been stopped, by Russell having offered to give security for the payment of the arrears of interest, and for due payment of the interest for the future. This would be an agreement wholly for the benefit of the tenants for life, and affording no security, indemnity, or remedy to the children, who are the present Plaintiffs. It is not to be supposed that, if they did know of this agreement, many years afterwards, when they came of age, they would acquiesce in an arrangement which gave them no sort of benefit, but, on the other hand, would deprive them of their remedy for the recovery of the property; nor are there any allegations, **[44]** in the pleadings, of their having known of it, or of their having adopted it so as to make it an act of their own.

Then I was referred to the decree made in *Smith* v. *Birch*, which directed an inquiry, whether the Plaintiffs had assented to or acquiesced in the funds remaining in wrong hands, by means of which they were lost: but, without knowing all the circumstances of that case, it is impossible to know whether the facts justified that decree. If any breach of trust had there been committed, by the funds being allowed to be in improper hands, and if the parties to whom the funds belonged chose to acquiesce in that state of circumstances, they could not very well complain of an act to which they were themselves parties. That decree, therefore, affords no ingredient for coming to a conclusion in the present case.

When the Plaintiffs first became informed, either of the breach of trust or of the abandonment of the suit of 1818, does not appear; and whatever may have taken place before the year 1821 is immaterial, inasmuch as, up to that period, they were both under age. There is no allegation with respect to the time at which they became aware of any of the circumstances, except that they came of age in the years already mentioned, and that the bill was not filed until the year 1833. It is not contended that the lapse of time will bar their right to the remedy to which, according to the practice of this Court, they are entitled. I see nothing to interfere with that right so vested in them, and the appeal must, therefore, be dismissed, with costs. (1)

Decree affirmed.

(1) See *Anon.* 1 Vern. 162; *Anon.* Freem. 134; *Anon.* Freemen, 137; *Chamberlaine* v. *Chamberlaine*, *ib.* 141; *Hawkins* v. *Day*, Ambl. 160; *Anon.* 1 Atk. 491; *Hardwick* v. *Mynd*, 1 Anst. 109, see p. 112.

[45] MOORE *v.* FROWD. *Dec.* 18, 19, 21, 1835; *Jan.* 13, 1836; *August* 15, 1837.

[S. C. 6 L. J. Ch. (N. S.), 372; 1 Jur. (O. S.), 653.]

A trustee, who is a solicitor, is entitled to be repaid such costs, charges, and expenses only as he has properly paid out of pocket; and it makes no difference in this respect that the instrument creating the trust may have directed that the trust monies should be applied (*inter alia*) in payment of all expenses, disbursements, and charges, to be incurred, sustained or borne by the trustee, in professional business, journeys or otherwise; and that the trustee might retain all reasonable costs, charges, and expenses which he might sustain or be put unto; such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client.