As to the second point, if the Plaintiff has no lien upon the estate created by the appointment, the alleged notice is immaterial; but it seems to have been supposed by the bill that a species of trust was created in the Plaintiff's favour as to the £1000. For this there is no pretence; the Plaintiff was no party to the transaction, and the whole £4500 is proved to have been paid by Shearly; £3500 to the prior mortgagees, and £1000 to the solicitor of Cook. It is quite immaterial whether it was the object of borrowing that sum that the Plaintiff's debt should be paid with it. There was nothing in the transaction to give her a lien upon the property, in preference to the mortgage of Shearly.

Assuming these points to be against the Plaintiff, still she is a judgment creditor, and as such, the bill seeks to redeem Shearly's mortgage, the equity of redemption being now, under the appointment, vested in fee in William Cook: but this view of the case is met by the production of the Defendant Shearly's mortgage deeds, by which it appears that his mortgage is not redeemable before July 1835, and the bill was filed in 1833. Every part, therefore, of the Plaintiff's case fails; and I entirely concur in the judgment of the Vice-Chancellor, in dismissing the bill, with costs; to which must now be added the costs of this appeal.

[122] KNATCHBULL v. FEARNHEAD. *August* 9, 10, 11, 1837.

[S. C. 1 Jur. (O. S.), 687. See *Turquand* v. *Kirby*, 1867, L. R. 4 Eq. 134; and as to limitation of liability, see Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8.]

The executors of a deceased trustee, having admitted the receipt of assets which would have been sufficient to answer a particular breach of trust committed by their testator, besides his other debts, held chargeable with the loss occasioned by such breach of trust, although they had paid all his debts of which they had any knowledge out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust, or of any claim in respect of it.

This suit was instituted in the year 1833, by persons interested in a sum of £5000, which, in the year 1801, had been vested in John Bradshaw and George Sayer, upon certain trusts for the benefit of the children of the late Sir Edward Knatchbull by Dame Mary Knatchbull, his wife. The object of the suit was to charge the personal representatives of the trustees, both of whom were dead, with the loss consequent on a breach of trust which they were alleged to have committed in paying over the trust fund to the late Sir Edward Knatchbull, who was entitled to a life interest in the fund, and by whom it had never been replaced.

The acts complained of as constituting the breach of trust took place in the years 1801 and 1804 respectively. The late Sir Edward Knatchbull died in the month of September 1819, leaving ten children by Dame Mary, his wife. Two of those children afterwards died under age: of the surviving eight, all of whom were parties to the suit, some as Plaintiffs and some as Defendants, several were still infants. Sayer, one of the trustees, died in the month of May 1814, leaving the Defendants Catherine Sayer, Nicholas R. Toke, and Edward Cage his executrix and executors, who duly proved his will. Bradshaw, the other trustee, died in the year 1823, and his will was proved by the Defendants Fearnhead and Tipler. (1)

[123] The answer of the Defendants, the personal representatives of Sayer, among other things, stated that their testator died in the year 1814; and that they had received assets of his estate sufficient to pay all his debts which had come to their knowledge, and also to answer the £5000 in question, in case the Court should be of opinion that their testator's estate was liable for the same. It further stated that the will of their testator, after giving divers specific and pecuniary legacies, bequeathed the residue of his personal estate to the Defendants, his executrix and executors, upon trust, to be divided among all his children, except his eldest son; and that they had paid all the legacies, and, many years ago, (2) paid and divided the residue of the personal estate among the residuary legatees; and that they had

not any fund out of which to answer any demand which might be established by the Plaintiffs against his estate. The same Defendants, by their answer, also stated that they were wholly ignorant of the existence of any such trust as in the bill alleged until the year 1830.

By the Master's report, made in pursuance of the decree pronounced at the hearing of the cause, it was, among other things, found that a sum of £1612, 16s. (being part of the trust fund), which in the year 1802 had been invested in the purchase of £2393, 15s. 4d. 3 per cent. consols, in the joint names of Sayer and Bradshaw, had been afterwards sold out, under a power of attorney from them, on the 11th of February 1804; and that the produce of the sale, amounting to the sum of £1328, 11s., had been, by their authority, paid over on **[124]** the same day to the account of Sir Edward Knatchbull, by whom it had been applied to his own use.

Certain exceptions taken to the Master's report by the Defendants, the representatives of Sayer, having been overruled, the cause came on to be heard at the Rolls for further directions, on the 5th of July 1836; when an order was made, declaring, among other things, that the respective estates of Sayer and Bradshaw were liable to make good the sum of £2393, 15s. 4d. 3 per cent. consols, together with the dividends which would have accrued thereon since the death of the late Sir Edward Knatchbull; and the Master was directed to ascertain what, at the market price on the 5th of July 1836 (being the day of the date of the order), would be sufficient to have purchased the same amount of such stock, and to take an account of the dividends which would have accrued thereupon from the day of Sir Edward Knatchbull's death; and it was declared that the Defendants, the personal representatives of Sayer, having admitted assets, were liable to make good such sum of stock, and the dividends in respect thereof; without prejudice, however, to any right which they might have, upon satisfying the claims of the Plaintiffs and of the Defendants in the same interest, to call upon the other Defendants, the executors of Bradshaw, for contribution.

A petition of appeal, presented by the personal representatives of Sayer against the original decree, and also against the order made on the exceptions and on further directions, having come on to be heard,—

The Lord Chancellor [Cottenham], after argument, dismissed so much of the appeal as related to the original decree, and to the order overruling the Appellants' exceptions. That part of the petition which appealed against the **[125]** order on further directions was then brought on for discussion, when several points were raised and debated, which it is not material to report, as they referred exclusively to other sums, being portions of the trust fund which had never been invested in stock, and for the loss of which also the Appellants had been declared answerable. With respect to those sums, the Lord Chancellor varied the order, by directing a number of preliminary inquiries.

Sir William Horne, Mr. Monro, and Mr. Purvis, for the Appellants, then submitted that, with respect to the sum of stock which the Master's report found to have been sold out by the trustees, and paid over by their authority to the late Sir Edward Knatchbull, it would be extremely hard and unjust that the representatives of Sayer should be made personally responsible for the act of their testator, when it appeared from their answer, and was not disputed, that they had been in total ignorance of the breach of trust complained of, and, indeed, of the existence of the trust itself until after the lapse of sixteen years from the death of their testator, and of eleven years from the death of Sir Edward Knatchbull; and when, moreover, as they had sworn by that answer, they had many years ago, in the regular discharge of their duty as executors, paid off all their testator's debts of which they had any knowledge, and distributed the surplus of his personal estate among his residuary legatees, and had not now a single shilling of his assets in their hands to answer the claim set up against them. If, under such circumstances, they were held personally liable, an executor could never safely administer his testator's estate, except under the indemnity afforded by a decree of the Court; and yet, if he insisted upon having recourse to that indemnity in a case where he had no notice of any **[126]** doubtful or contingent claim to justify such a proceeding, he would do so at the risk of being saddled with the costs. For these reasons, it was impossible to hold that the Appellants had been guilty of any *devastavit* with which they ought to be charged in a Court of Equity:

Hawkins v. *Day* (Ambl. 160; and see App. 803, Blunt's ed.), *The Governor and Company of Chelsea Water Works* v. *Cowper* (1 Esp. 275), *Davis* v. *Blackwell* (9 Bing. 5).

THE LORD CHANCELLOR [Cottenham] said that where an executor passes his accounts in this Court he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in Court he does it at his own risk. (3)

THE SOLICITOR-GENERAL [Rolfe] and Mr. Lovat, *contrà*, were not called upon to argue the point.

(1) From the pleadings it appeared that Bradshaw died in the lifetime of Sayer; but this was admitted at the bar to be a mistake, and it was stated that Bradshaw died in the year above mentioned.

(2) This was the expression used in the answer; but it was admitted, on all hands, that the period referred to was anterior to the time at which the Defendants had notice of the breach of trust, or even of the existence of the trust itself.

(3) See *Norman* v. *Baldry*, 6 Sim. 621; *Richards* v. *Browne*, 3 Bingh. N. C. 493; *March* v. *Russell*, 3 My. & Cr. 31; and Ram on Assets, ch. 41, s. 16.

[127] ELLICOMBE *v.* GOMPERTZ. *August* 3, 4, *Nov.* 4, 1837.

[See *Leeming* v. *Sherratt*, 1842, 2 Hare, 17; *Hillersdon* v. *Lowe*, 1843, 2 Hare, 372; *Eno* v. *Eno*, 1847, 6 Hare, 179.]

Bequest of a residue upon trust for the testator's grandson B, the son of Isaac, at twenty-five for life; and after the death of B., in case he shall have a son who shall attain twenty-one, then for such son of B. who shall first attain twenty-one, absolutely; and in default of such son of B., and after B.'s death, then upon trust for the testator's grandson, J., the son of Isaac, at twenty-five for life; and after the death of J., in case he shall have a son who shall attain twenty-one, then to such son of J. who shall first attain twenty-one, absolutely; with the like limitations successively in favour of any other grandsons, sons of Isaac, born in the testator's lifetime, and their respective sons first attaining twenty-one; and in default of a son of any such grandson attaining twenty-one, then upon trust for any son of Isaac born after the testator's decease, who shall first attain twenty-one, absolutely; and in case no son of any son of the testator's son Isaac, then born, or thereafter to be born in the testator's lifetime, nor any son of his son Isaac, born after his decease, shall live to attain twenty-one, then from and immediately after the decease of all the sons and grandsons of his son Isaac, upon trust for the testator's nephew G., for life; and upon the decease of his nephew G., in case he shall have a son who shall live to the age of twenty-one, then upon trust for such son who shall first attain twenty-one, absolutely. Held, upon the whole context of the will, that the words "after the decease of all the sons and grandsons" must be read as if they had been "after the decease of all the *aforesaid*," or "all *such* sons and grandsons;" and that the limitation over in favour of the first son of G. attaining twenty-one, was therefore not too remote.

Henry Isaac, by his will, dated the 6th of August 1771, which was duly executed and attested to pass freehold estates by devise, gave and devised all his freehold and copyhold hereditaments, except his house in Magpie Alley, London, and his estates in the parish of Walthamstow, to Joseph Martin, Ebenezer Blackwell, and Joseph Gompertz, and their heirs, to the use of his son Isaac Isaac for life, with remainder to the use of trustees to preserve contingent remainders; remainder to the use of the first son of the body of Isaac Isaac and his heirs male; with similar remainders to the use of the second and other sons of the said Isaac Isaac, and the heirs male of their respective bodies; remainder to the use of his (the testator's) nephew, the said Joseph Gompertz, his heirs and assigns for ever. The testator also devised his house in Magpie Alley, together with the furniture therein, to the same trustees, upon trust to permit his said son Isaac Isaac [128] during his life, and after his decease, his (the testator's) son Hyam Isaac, during his life, to possess and enjoy the same; and after