intentionally fraudulent, those who make them cannot take advantage of want of caution and prudence on the part of those who are misled by them. Supposing that a prospectus were issued containing material misrepresentations, even though believed by the parties who issued it to be true, and a person accepts shares upon the faith of those representations, the parties who have made the misrepresentation cannot compel the party who has contracted to take the shares to perform his contract.

[His Honor then went into another minor case of misrepresentation, to which he applied the same reasoning and doctrine, and concluded by stating that, on the ground of the prospectus not setting forth clearly those facts which are essential to enable a contracting party to know completely what it was he was contracting to purchase, he was of opinion that the Plaintiffs were not entitled to specific performance; and he dismissed the bill, but without costs, on account of the *laches* and negligence of the Defendant.

[384] SMITH *v.* SMITH. *Feb.* 22, 1861.

[S. C. 4 L. T. 44; 7 Jur. (N. S.) 652; 9 W. R. 406.]

Indemnity. Executors. Leaseholds. 22 & 23 *Vict. c.* 35, *s.* 27.

Where leaseholds were devised to three trustees and executors, and, one of them having died, the two surviving trustees and executors (one of whom had never acted as executor) under an order of the Court assigned the leasehold in trust for themselves and a newly appointed trustee: Held, that by such assignment the leaseholds vested in them *quà* trustees and not *quà* executors, and that they were not entitled to an indemnity upon assigning them to the person entitled under the will.

Where an executor fairly represents everything to the Court, a decree directing him to deal with the property must operate as an indemnity to him.

The Act of the 22 & 23 Vict. c. 35 is retrospective in its operation.

This petition was presented by John Graham Smith, praying that the trustees under the will of the testator, William Smith, might assign to them (*inter alia*) certain leasehold property of which the testator died possessed, and that they might be ordered to pay over to him the residue of the testator's estate.

The testator, William Smith, by his will, dated the 24th day of February 1840, after making certain provisions for his wife and daughters, gave and devised all the rest, residue and remainder of his trust estate, monies, &c., to three trustees and executors, appointed in and by his will, upon trust for the Petitioner, John Graham Smith, and such other sons as should live to attain the age of twenty-five years; and if but one, then the whole to such one child.

The testator died in February 1840, leaving the Petitioner, John Graham Smith, his only son, who attained the age of twenty-five in January 1861.

Two only of the three trustees and executors proved the will, and, one of them having subsequently died in 1855, George Augustus Smith was, by an order made in July 1855, appointed a new trustee in his place. And by an indenture, dated the 29th of August 1855, the **[385]** leasehold estates of the said testator were assigned by the two surviving trustees and executors to a trustee upon trust to reassign the same to themselves and the newly appointed trustee, and such reassignment was shortly afterwards executed.

By an order made in 1857, on a petition presented by the present Petitioner, it was declared that upon the death of the testator the Petitioner became absolutely entitled (*inter alia*) to one-third of two-thirds of the testator's residuary personal estate, and the trustees were ordered to assign such proportion of the testator's leasehold property to the Petitioner.

No assignment of such portion of the testator's leasehold property was then executed; and the Petitioner, on his attaining the age of twenty-five, became entitled to have the entirety of the testator's leaseholds assigned to him by the trustees.

It appeared that the testator's leasehold property was acquired by him by an assignment from his brothers, on a partition by way of family arrangement, and the testator was not lessee thereof, nor had he any previous interest therein; and the testator and his brothers entered only into mutual covenants to indemnify each other in respect of the leaseholds acquired by each on such partition.

The trustees now insisted that they were entitled in respect of such leaseholds to an indemnity in respect of the covenants contained in the leases, although the Petitioner offered to covenant to indemnify them against such covenants.

[386] Mr. Baily and Mr. Horsey appeared in support of the petition, and submitted that the trustees were not entitled to any such indemnity. The testator was not an original lessee of any of the leaseholds in question, but acquired them under an assignment by way of partition. The Petitioner, however, would covenant to indemnify them. One of the trustees asked for an indemnity as being also an executor, but his right (if any) to such indemnity was waived by the assignment on the appointment of the new trustee. The leaseholds were held by the trustees *quà* trustees, and not *quà* executors; and the order which was made in 1857 reserved no right to such indemnity. The Act of 22 & 23 Vict. c. 35, s. 27 (Lord St. Leonards' Act), had rendered such an indemnity unnecessary. They referred to *Garrett* v. *Lancefield* (2 Jur. (N. S.) 177); *Dean* v. *Allen* (20 Beav. 1); *Buntina* v. *Marriott* (9 W. R. 264); *Dix* v. *Burford* (19 Beav. 409).

Mr. Glasse and Mr. Dewsnap, for the trustees.

Mr. J. J. Jervis and Mr. Surrage, for other parties.

THE VICE-CHANCELLOR [Sir R. T. Kindersley]. I may take this opportunity of saying that, after communication with the other Judges, I have come to the conclusion (though I had previously been of a different opinion) that the 27th section of Lord St. Leonards' Act (22 & 23 Vict. c. 35) is retrospective in its operation. In the present case I think the Petitioner is entitled to an assignment of the leaseholds, without setting apart any portion of the property by way of indemnity.

[387] Supposing there had been no dealing with the leaseholds by the executors, would they have been now entitled to any indemnity? In following the previous decisions, I have held that executors have such right; but I concur with the Master of the Rolls in thinking that, where an executor fairly represents everything to the Court, the decree directing him to deal with and distribute the property must operate as a complete indemnity to him; and that therefore an executor cannot need any other indemnity. It has, however, been suggested that there ought to be a fund set apart by way of indemnity, not for the benefit of the executor, but for the benefit of the lessor, in case of there being at any future time a breach of covenant? Now, if the lessor is entitled to any such equity as this, it would seem to follow that he might come to this Court to assert such equity, and to ask the Court to set apart a sum of money out of the testator's assets to provide for the event of a future breach of covenant, for which he might be entitled to recover damages. But it has been held that a lessor cannot be heard in this Court to maintain any such right. In truth, the whole doctrine on this subject is in a very unsatisfactory state; and does not seem to be founded on sound principles.

But it is unnecessary to decide the general question in the present case; for, supposing that there was originally a right to the executors, either for their own benefit, or for the benefit of the lessor, to ask for an indemnity, they have so dealt with the leaseholds that the right no longer exists. It has been held that if the executors assign the leaseholds to the legatee (whether specific or residuary), they lose their right to an indemnity. Here the surviving executors have assigned the leaseholds to trustees for the residuary legatee. And **[388]** it makes no difference that some of those trustees are also executors. The leaseholds are no longer vested in them in their character of executors. It is the same thing as if they had assigned the leaseholds to the residuary legatee. The Petitioner is entitled to have the leaseholds assigned to him, without setting apart any portion of the assets by way of indemnity.