

SUPREME COURT.

Monday, 19th June.

CIVIL SITTINGS.

Before his Honour Mr. Justice Chubb and a jury of four.

Hendle and Others v. Qualtrough and Another.

Mr. Stumm, with him Mr. Fewings (instructed by Messrs. Attbow and M'Gregor), for the plaintiffs; Mr. E. M. Lilley (instructed by Messrs. Roberts and Roberts) for the defendants.

This was an action in which William James Hendle, a butcher, residing at Nundah, and his wife, Lucy, and W. J. Heirdsfield were the plaintiffs, and Walter H. Qualtrough, a plumber, and Elizabeth Matilda Qualtrough, widow of William Qualtrough, deceased, were the defendants. The statement of claim set out that George Heirdsfield, in 1868, was the owner of a piece of land near the corner of Wickham and Brunswick streets, 14½ perches, being part of subdivision 4 of block 6 of eastern suburban allotment 71. On 18th December of that year he applied to have the land brought under the Real Property Act of 1861, and requested the Registrar of Titles to issue the certificate of title in the name of William Qualtrough, his brother-in-law. The latter had given no consideration for the land, but, in pursuance of Heirdsfield's application, the fee-simple of it was transferred to him. Wm. Qualtrough died on 31st August, 1870, without having disposed of the land, or of any estate in it. By his will, dated 4th July, 1864, and a codicil dated 14th May, 1869, he devised all his real estate to his wife, Elizabeth Matilda, and T. B. Stephens, upon certain trusts. Mr. T. B. Stephens died in April, 1890, and Elizabeth Matilda Qualtrough appointed the defendant, W. H. Qualtrough, as a trustee in his place, Qualtrough declaring himself a trustee of the lands in question for Geo. Heirdsfield. The latter died in November, 1890, intestate, leaving surviving him six children. The plaintiff, Lucy Hendle, was a daughter and Wm. J. Heirdsfield a son of Geo. Heirdsfield. Mrs. E. M. Qualtrough was their aunt, and Mrs. Heirdsfield was Mrs. Qualtrough's sister. About September, 1890, the defendants sold the land for £2144 5s. net, and informing Lucy Hendle that her share in the proceeds amounted to £350, paid her £25, and purchased for her a piece of land at Enoggera, which they alleged cost £325. They, however, refused to transfer the latter land to her, or to pay her the balance of the proceeds of the other land. Plaintiffs claimed that the defendants were trustees of the land originally held by Geo. Heirdsfield for him, and the property having been sold, Lucy Hendle and W. J. Heirdsfield, being two of his children, were entitled to a one-sixth share respectively of the proceeds, less the amount of £25 paid to the former, and £100 paid to W. J. Heirdsfield. The defendants in their statement of defence

paid to W. J. Heirdsfield. The defendants in their statement of defence denied that the land had been transferred to William Qualtrough, as stated by plaintiffs, and declared that it was purchased for a valuable consideration. The defendants admitted that they had sold the land, but denied that they had done so in breach of trust. The payments of £25 to Lucy Hendle and of £100 to W. J. Heirdsfield, they said, were charitable gifts, and the land said to have been bought at Enoggera was settled upon her for the same reason upon trusts which only gave her a life interest in it. The defendants further pleaded that the claim, if any, was barred by the Statute of Frauds and Limitations, and by laches, delay, and acquiescence on the part of the plaintiffs.

Mr. Lilley took the preliminary point that the action was defective for want of parties. Their case was that George Heirdsfield, who was now transferred, made an application to bring this land under the Real Property Act in the name of William Qualtrough, who was also now dead. They also said that the transfer was without consideration, and that William Qualtrough was a trustee for George Heirdsfield, and W. Qualtrough having died, the two defendants being the trustees under his will were trustees for him or his children. They also said that the defendants had declared themselves as trustees of George Heirdsfield's children. With respect to the first case, it was clear that if William Qualtrough had declared himself a trustee for George Heirdsfield, those plaintiffs could not sue without taking out administration of the estate of Geo. Heirdsfield. Though the latter died in 1890 intestate, and left six children, no administration had been taken out. He maintained that this action could only be brought by the administrator of the estate of Geo. Heirdsfield, and that the present plaintiffs had no locus standi. If the plaintiffs now got judgment against the defendants, it would mean that they would still be liable to an action by the administrator and by the other children of the deceased.

Mr. Stumm contended that there was no necessity for the present action to be brought by an administrator. If Mr. Lilley's objection were valid, which he did not admit, he could remove all difficulty by asking for the statement of claim to be varied so as to ask for a declaration that defendants were trustees for Geo. Heirdsfield.

Mr. Lilley: What right have you to get that?

Mr. Stumm said he was entitled to that because he represented next of kin. In that capacity he submitted he was entitled to ask for a declaration of right. He urged, however, that the best way of getting over the difficulty would be by appointing the Curator of Intestate Estates either to represent the estate of G. Heirdsfield or to be a party to the action.

Mr. Chambers (Messrs. Chambers, Bruce, and M'Nab), appearing for the Curator, stated that the Curator was perfectly willing that he should be added as a defendant, and the action be proceeded with.

After further argument, his Honour made an order adding the Curator as a defendant, and appointing him to represent the estate

an order adding the Curator as a defendant, and appointing him to represent the estate of G. Heirdsfield for the purposes of the action.

Mr. Stumm then opened the case for the plaintiffs, after which evidence was given for the plaintiffs as follows:—

Lucy Hendle, one of the plaintiffs, and daughter of the late George Heirdsfield, stated that Mrs. Qualtrough was her aunt, and W. H. Qualtrough her cousin. Her earliest recollections were in connection with a brick cottage situated on the land in question. She was born there, and lived with her parents there until her marriage, some twenty years ago. Her father paid no rent for the property, and she understood it belonged to him. After his death her mother continued to live there, and she did not pay any rent. On one occasion Mrs. Qualtrough called at their house and asked her mother for the papers in connection with the property, but her mother declined to give them up. Three or four days after, Mrs. Qualtrough came to the house with the late Mr. D. P. Roberts, and some documents were signed. Witness did not know what the papers were. After that, witness's mother gave her a tin box, which she said contained papers with reference to the property. Witness put it in a chest of drawers, where it

remained until her mother's death, after which witness gave it to her brother George. Just before witness got married, Mrs. Qualtrough asked her if she had the papers, and offered to give her £50 for them. Witness told her then that she had given them to her brother. Mrs. Qualtrough then said she could not sell the property until she got the papers. Witness said her brother might not give them up, and she replied, "We can compel him to do so." Afterwards she told witness that she had asked George for the papers, but he had refused to give them up. Witness's father died at Dunwich on 29th November, 1890. Prior to that, he was always drinking on and off. He often said he wanted to sell the property. Mrs. Qualtrough said the property belonged to the children, and she wanted to get the papers from George so that she could sell it and divide the proceeds before she died. She said she could not buy the property herself. After the sale, she said there was about £350 coming to them, but she was not going to give witness or her sister Lizzie the money, but intended to buy property for them. On another occasion she said she had given George £400, which was £50 more than she said she intended giving to the others. Her brother George died on 30th December, 1890—a month after his father. Mrs. Qualtrough told witness that she had bought Lizzie a house in Simon-street, off Leichhardt-street, and about the same time she offered to buy witness one out at Lutwyche. Witness and her husband afterwards went to see the house with Mrs. Qualtrough. The latter told her that she could have it for £325, and she (Mrs. Qualtrough) would give her £25, the balance due to her. Witness said she did not like it, as it was too far out, and asked her to buy some property for her at Nundah. She replied that she would not do that, and

buy some property for her at Nundah. She replied that she would not do that, and witness would have to take this property or nothing. Prior to this witness had asked for the £350 which Mrs. Qualtrough had told her was coming to her, but she had declined to give it, saying that she intended to buy property with it. Witness, when she found that she could not get the money or the property where she wanted it, decided to take the Lutwyche property. Mrs. Qualtrough promised to give her the deeds, but never did so.

At this stage the court adjourned until 10 o'clock on the following morning.