this would scarcely be adequate or complete, and would require a constant bringing of suits as fast as the rents were collected. Besides, for the present the answer will be treated as a waiver of all objections on the score of a want of equity in that behalf, as well as to the whole bill. In that view, this would be technically a bill for the specific performance of that deed or contract. Apart from that deed, the suit is a mere struggle over the legal or equitable title by claimants out of possession against one in possession under a deed especially good against the plaintiffs, if it be good at all, as against the averments of the bill. And this is the best attitude of the case as presented for the plaintiffs on their application for a receiver.

The bill is sworn to, and there is not an item of proof otherwise offered in support of the application for a receiver. Concede that it may be used as an affidavit in support of the application, and it is fully met by the sworn answer of the defendants, which flatly contradicts every essential statement of the bill. The oath to the answer is waived, and it is thereby, perhaps, even on an application for a receiver made by the plaintiff, shorn of the ordinary force of an answer in chancery as proof on all the issues of the case. Yet it is as good as the bill, as an affidavit, and then we have an exact equilibrium of proof as to the facts,—oath against oath, and nothing more on either side. But the one is the oath of a claimant of ownership in possession, in support of that possession; and the other, of a claimant out of possession, seeking to establish an adverse claim of ownership. The circumstances of this possession do not distinctly appear. The bill says—incidentally, somewhat—that plaintiff Iris C. Ryder, on account of her devotion to defendant Marie, "has permitted her and her husband to act as the agent" of the plaintiffs "in the collection of the rents, permitting the said Marie Bateman and Louis T. Bateman to enjoy a portion of said rents when so collected"; that this was their only means of livelihood; that they have taken advantage of this "generosity," and now set up an exclusive right to the property under the deed of gift, denying all right of plaintiffs, having "accounted to complainant for an insignificant amount of the rents they have collected." The answer treats this part of the bill somewhat obscurely, and sets up adverse possession in defendant Marie ever since the deed of gift, about 20 years, that the possession of the plaintiff was held as guardian or trustee for the defendant Marie, that she has never accounted to defendant, but has appropriated the money largely to her own use, and misappropriated much of it by "gambling in the bucket shops." The result of this, as evidence, is that the defendants substantially deny any agency, and claim the possession as one in their own right; and again it is only oath against oath, with the burden of proof on the plaintiff. Thus it is with all the important facts,—as to the proof of them, the burden of proof being always on the plaintiffs, it must be remembered. The bill says that the original deed of gift was never delivered. The answer says it was. The fact that it went to record appears, and is not denied, which is a corroborating circumstance, if not a conclusive one, in favor of delivery, standing

by itself, and unexplained by any facts to deprive this fact of its legal effect as a delivery. So, take the averment of the bill that the plaintiff Iris C. Ryder is not the mother of the defendant Marie. It is denied by the answer, and denounced by the defendants as "a horrible perjury." Naturally, the plaintiff best knows how this fact is. Just as naturally, there should be other people who either know the fact specifically, or of other facts to corroborate the plaintiff's statement that the defendant Marie is not her child by birth. Yet we are asked, without the least corroborating proof, to oust the defendant of her possession and enjoyment upon this bare statement of the plaintiff, against the fact that the very deed itself recites that she is the mother of the donee, and, according to the statements of even the bill itself, has conducted herself as such. Moreover, the fact is of a character, formidable as it seems and may be in relation to the will of George P. Cooper, and the right of defendant to claim under it as his grandchild, that is not controlling as against the defendant's title under the deed of gift; for the consideration of natural love and affection may attach in behalf of an adopted child as well as of one's own child, and, if the fact stated as a basis of that consideration be false, nevertheless the deed may be good, and the grantor be estopped by the deed itself to deny it.

Coming now to the plaintiffs' claim under the will of their father and grandfather, it appears by the bill that at the very least the plaintiff Iris C. Ryder had a life estate in this property, which passed under her deed to the defendant, and that of itself will support her possession as a rightful one, until the deed of gift is rescinded by a decree on this bill; and the real question, on the application for a receiver, is whether it appears probable that the deed of gift will be rescinded at the hearing upon the proof offered to sustain the application. The plaintiffs must show at least a prima facie case of right by the proof adduced. The want of it has already been pointed out; but, more, if the facts stated for rescission should be proved at the hearing, it is very doubtful if they would sustain a decree for rescission, except as to the fact of nondelivery, and, as to that, the bill contains no averment of a single circumstance to militate against its delivery for record, as before pointed out. Again, the answer sets up the fact that a court of competent jurisdiction, with these plaintiffs and defendants before it, has construed the grandfather's will to have devised to the plaintiff Iris C. Ryder, not a life estate, with remainder to her children, but an absolute estate in fee. A certified copy of this decree is not furnished here, and possibly the mere statement of the answer is not proof of the fact; but it presents an issue of fact, at least, which, as an issue, may be considered on this application as to the probability of plaintiffs' success at the hearing.

The amended bill presents a claim by the plaintiff Iris C. Ryder to be let into possession as a substituted trustee for Adams, the original trustee, who has died. For the present application it is sufficient to say that, on the case made by the bill alone, it is scarcely possible that a court of equity would install as trustee for a married woman one who denies the title of the beneficiary, repudiates

the trust, and sets up for herself and another an adverse and hostile title. Indeed, on the application of the married woman, such a trustee probably would be removed, if in possession, and another, more friendly to the trust and the beneficiary, substituted. Nor can the plaintiff, under those circumstances, assume the attitude of the next friend of the beneficiary, to protect her against the alleged extravagance of her husband, if that could be, under such a trust as the deed creates, a ground of equitable interference with the ordinary right of one having the whole beneficial estate, to do with its income as she might please.

The disputed deed from the defendant to the plaintiffs presents an altogether better claim for them to be let into possession for at least their share of the rents. It is very peculiar in its form, and may be of doubtful construction as to its legal effect. As a mere contract to allow the plaintiff Iris C. Ryder "to manage and control" the property, as it is suggested by the amended bill to be, it may not be irrevocable by the defendant, notwithstanding its agreement that it shall be "irrevocable"; for surely no court of equity would enforce such an agreement, when the "management and control" were in the hands of one who since its execution had set up adverse claims to the property, denying not only the title of the grantor, but its effect as reserving anything by it to herself. Courts of equity do not compel any one to keep, on the score of agency, their property rights, whatever they may be, in the control of hostile agents or trustees claiming for themselves against the trust or agency, and may even relieve against a contract to that effect, as unconscionable. But even if the deed goes further, and reconveys to Iris C. Ryder the estate she held before, still it plainly reserves to the defendant a share of the property; and, as before, a court of equity will not compel one co-tenant to submit absolutely the control to another co-tenant, who denies all share to the other, or all interest, as the plaintiff does here. And yet that control is the relief asked by the bill. It is precisely on this principle that the defendant cannot keep possession, absolutely, if that deed be valid; and for precisely that reason, if the alleged danger by insolvency, extravagance, and wastefulness were proved, a receiver should be appointed, and would be, if the execution of the deed had been admitted by the answer. But, as always before, the answer denies the existence of the deed, avers it is fabricated and forged; and again there is only oath against oath as to the fact, with the burden of proving it on the plaintiffs. The deed itself is not exhibited, but only a copy, and it appears by the answer that the plaintiff refuses to disclose it and to allow the defendants to see it; and by other proceedings in the case it appears that she puts the defendants to their bill of discovery to obtain a sight of the original document, as she has a right to do, according to our decision herein. But, notwithstanding that right, the fact that the document is withheld is to be taken as a suspicious circumstance against the plaintiff on this application. The ground for withholding it is stated to be that the defendant Louis T. Bateman is not a proper person to have possession of papers, but, if that be so, the danger could be guarded, according to the practice, by depositing the deed with the

clerk, into whose keeping it would remain during the process of inspection. Another suspicious circumstance, which, until explained, must have its effect on the hearing of this application, is that this deed, Exhibit D to the amended bill, alleged by respondents to be a forgery, was not mentioned in the original bill as a source of right or title in the plaintiffs, or referred to in any way, and is for the first time mentioned in the amended bill. That is a peculiar fact in the case. So, if the case is to be one of strategetical maneuvers on the chessboard of litigation by parties mutually distrustful of the common honesty of each other, the courts can aid neither litigant, except by keeping within the strict lines of legal remedy and procedure. There is no proof on this application of the existence of the deed whereby the plaintiffs claim a share of the rents and property, except their oath, and that is met by the oath of the defendants of its nonexistence. It is not on such proof that courts of equity appoint receivers, which are not to be had for the mere asking.

The alleged insolvency of the defendants is denied, and there is no proof of it, nor of any fact or circumstance from which it may be inferred,—again, mere oath against oath of interested parties. But no allegations of insolvency can strengthen the application, under the circumstances above set forth. If the property belongs to the defendants, they are shown by its ownership not to be insolvent, in the sense of having no property at all; and it is not to be held that every man is to keep enough property, outside of that which is claimed adversely, to protect him from being ousted by a receiver from that which he has. The bearing of the fact of insolvency is often misunderstood on an application for a receiver, and often, erroneously, it is supposed to be controlling. An insolvent party has the same right as another to enjoy his own until a better title is displayed. If a plaintiff sets up a case where the defendant is under some sort of obligation to pay over the rents to some one else, and he be insolvent, that fact might be controlling, perhaps; but not if he claims as owner, and is in possession and enjoyment as owner, absolutely. Then, if his right of ownership be challenged, the plaintiff must show something more than the challenge, to be entitled to a receiver pending the litigation. He must show a probably better right of ownership; otherwise insolvency is quite immaterial. If the corpus be in danger, there might be a better claim against an insolvent in possession of disputed property. Here the answer denies all charges of mismanagement; avers that taxes and mortgage interest are promptly paid, and repairs kept up as required.

One cannot read this bill and answer without the suggestion that it may have been improvident that the mother or foster mother, as the fact may be, should have given this large and valuable property to her child or foster child, subjecting herself to possible deprivation through that ingratitude of a thankless child which is "sharper than a serpent's tooth"; but, bitterly as she may now regret the deed, the courts cannot revoke the gift, beyond the rules of law. The deeds of grantors and donors must operate according to their terms, and cannot be rescinded because of the neglect of filial duties

by children; courts dealing only with their legal duties or obligations.

In the case of Sage v. Railroad Co., 125 U. S. 361, 376, 8 Sup. Ct. 891, Mr. Justice Harlan observes that:

"Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution, * * * and always with reference to the special circumstances of each case as it arises."

The case of Owen v. Homan, 3 Macn. & G. 378, 4 H. L. Cas. 997, is perhaps the leading case on this subject, and is appropriate here. It is there said that:

"The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case,—one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree."

In another case (Bainbridge v. Baddeley, 3 Macn. & G. 413) it is said there are two grounds only for appointing a receiver:

"(1) That there is a reasonable probability of success on the part of the plaintiff; and (2) that the property, the subject of the suit, is in danger."

In Vose v. Reed, 1 Woods, 647, Fed. Cas. No. 17,011, Mr. Justice Bradley lays down substantially the same rules for the guidance of the courts as found in the other cases.

Chancellor Kent, in Verplank v. Caines, 1 Johns. Ch. 58, remarked that:

"The court ought not to interfere pending litigation, when the plaintiff's right is not perfectly clear, and the property itself, or the income arising from it, is not shown to be in danger."

That is the universal rule in cases like this,—reasonable probability of plaintiff's right, and danger to the property, established before the hearing by sufficient proof to satisfy the court of both these conditions.

And in Houlditch v. Lord Donegall, 1 Ball & B. 402, it has been observed:

"That such interference is, to a certain extent, giving relief,—in fact, depriving the defendants of a present use and enjoyment of the estate, and so far a decision pro tempore against them; and therefore, without some strong necessity, the court ought not to do any act to disturb the existing possession, until, from a view of the whole case by a regular adjudication, it can pass upon the right." Willis v. Corlies, 2 Edw. Ch. 281, 286.

In Baird v. Turnpike Co., 1 Lea, 397, the court, in determining whether a decree appointing a receiver may be superseded, remarks that such an appointment is extraordinary process; that ordinarily it cannot be superseded by the appellate court, unless "it would affect possession which is itself a right," where the contest is over the legal title to land; and the intimation is that in such a case there is the want of power to appoint a receiver. Possibly that may be going too far, but it shows with what solicitude courts protect the possession of one having a prima facie right to it, against a plaintiff who does not show a better prima facie right at the time of the application.

In Richmond v. Yates, 3 Baxt. 204, there was a supersedeas of an interlocutory decree appointing a receiver of the rents on the application of a defendant, as against a plaintiff who was in possession, in a controversy as to the real owner of the land. The court says:

"It is a contest as to the title of the land, the complainant being in possession; and, until it is determined at the hearing that her title is invalid, she cannot be disturbed in her possession." 2 Daniel, Ch. Prac. (6th Ed.) 1715, 1718, 1720, 1725.

This author notes that:

"A receiver may be appointed against a party having possession under a legal title. Thus, where fraud can be clearly proved, and immediate danger is likely to result, if the intermediate possession should not be taken under the care of the court, a receiver may be appointed."

For which he quotes in the notes Lord Eldon's observation to that effect in Lloyd v. Passingham, 16 Ves. 70; saying, also, that "the court interposes against the legal title with reluctance."

This doctrine is approved by the supreme court in Wiswall v. Sampson, 14 How. 52, 64, where it is thus stated:

"If the person holding the legal interest is not in possession, the equitable claimant against the property is entitled to the interference of the court, not only for the purpose of preserving it from waste, but for the purpose of obtaining the rents and profits accruing, as a fund in court to abide the result of the litigation. And the court will also appoint a receiver, even against a party having possession under a legal title, if it be satisfied such party has wrongfully obtained that interest in the property. Thus, where fraud can be proved, and immediate danger is likely to result, if possession pending the litigation should not be taken by the court in the meantime."

The text writers are equally explicit on this subject, and cite innumerable cases following the lead of those already cited here. High, Rec. §§ 19, 20, 591–603, et seq.; Beach, Rec. §§ 5, 7, 67–70, 72, 480–484, 486, 488, 489; 3 Pom. Eq. Jur. §§ 1330–1335; Beach, Mod. Eq. Jur. §§ 931, 933, 936, 941; Beach, Mod. Eq. Prac. § 720.

The case of Hugonin v. Basely, 13 Ves. 105, wherein a receiver was appointed, has some features quite similar to this case, but the distinctions between the two are apparent. A widow, with an estate in Jamaica, lamenting her destitute condition, without consideration executed a conveyance to her clergyman, as a friend she could trust to manage her affairs; reserving for herself only an annuity of an amount about equal to the rental value. Lord Chancellor Erskine was embarrassed by the fact that the legal estate and possession were with the defendant, but there being "a very strong probability that the plaintiff had the title to call back this estate, and because of the suggestion of counsel that one standing in the capacity of a trustee could not take a bounty from the cestui que trust without great suspicion of undue influence," appointed a receiver pending the litigation. That was a case of a donor seeking to recover the estate from a donee who was at the same time trustee for the reserved interest, upon the ground of undue influence. This is the case of a donor without any reserved interest seeking to recover from the donee, for whom at the same time she is a trustee, upon the ground that the donee is not in fact the donor's daughter, as the

deed recites, and of a subsequent reconveyance by the donee which is denounced a forgery.

Mr. High in his work on Receivers, as do the other authors cited, states that the insolvency of a defendant in possession does not of itself warrant the court in appointing a receiver, but, in addition, it must appear that the plaintiff has a probable right to recover in the end. High, Rec. § 18, citing Gregory v. Gregory, 33 N. Y. Super. Ct. 39; Lawrence Iron-Works Co. v. Rockbridge Co., 47 Fed. 755.

Recurring now to the quotation from Mr. Justice Nelson's exposition of the principles governing the application for a receiver in a case like this, in Wiswall v. Sampson, supra, it is apparent that the defendant has not the legal title, strictly and technically considered, perhaps, but she has the "legal interest," to use his words,—chosen, no doubt, to accurately express the fact, running through the authorities, that the protection of the defendant in possession does not depend on the bare technical legal title, but on the right to enjoy the income or profits of the estate as the owner thereof; and, united with her trustee, the defendant has that, if her deed is good, both as to the legal and equitable interest. She may be separated from the bare legal title, but otherwise she has the entire interest, under the terms of her deed. It is not necessary to inquire whether the trustee under that deed had anything more than "a dry trust," or whether the effect was to give her a legal title. Certainly he has no active duties imposed by the terms of the trust. She has, in my opinion, the same standing in a court of equity, on an application like this, and under the peculiar circumstances of this case, as if she stood here with the legal title, or as if she and her trustee were both standing here, in possession. It is not to be overlooked that one of the plaintiffs is the substituted trustee of the deed of settlement and gift, but, as already pointed out, she is a hostile trustee, denying her own title as trustee, and the defendants' interest under the trust, by denying the validity of the deed, and seeking to set it aside. She cannot claim under it and against it, and if she were in possession, making such claims of adverse ownership as she makes here, a court of equity would remove her as trustee, or appoint a receiver against her, on the application of the defendant or her next friend. Therefore she can claim nothing as to a receiver on that score, but her application must stand on the merits of the hostile claims of adverse title she sets up by this bill. The application for a receiver must be denied. Ordered accordingly.

RYDER et al. v. BATEMAN et ux.

(Circuit Court, W. D. Tennessee. October 3, 1898.)

1. EQUITY PRACTICE—REQUIRING PRODUCTION OF DOCUMENTS—RULES IN FEDERAL COURTS OF EQUITY.

   Rev. St. § 724, is designed merely to give courts of law of the United States the power to require the production of documents to obviate the necessity of parties going into equity with a bill of discovery for that purpose in aid of an action at law, and in no way affects the practice of federal courts of equity, which is governed by the general equity rules prescribed by the supreme court, and where they do not apply by the