

V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BENNET, Esq. of Lincoln's-inn, Barrister-at-Law.

Tuesday, July 29. GILPIN V. MAGEE. Practice— Claim. A residuary legatee who seeks an account against executors for the administration of an estate, and also at the hearing wishes for inquiries before the Master touching the effect of certain of the trusts in the testator's will as to whether they were or not created for "superstitious uses," should not proceed by claim. Where accounts are denied which can only be directed after evidence taken in the usual way, a bill must be filed.

This was a claim filed by the residuary legatees, devisees, and next of kin of Ann Tucker, late of Holy well-street, Westminster, who died in July last year. The claim was set down as a short claim, and was filed to administer the estate of the testatrix.

Bethell and Kinglake, for the plaintiffs said that what was now sought was to obtain the direction of the Court that certain inquiries should be made - which had become necessary under these circumstances. The testatrix, who was a Roman Catholic, upon the 6th July, 1849, made her will, which was alleged to have been drawn by Mr. John Athanasius Cooke, and by which, after appointing as her executors the very Rev. Monseigneur Anthony Magee, clerk, D.D. priest of the Roman Catholic Chapel in Romney-terrace, Westminster; John Athanasius Cooke, barrister-at-law; and her brother-in-law, Joseph Tucker, she gave certain pecuniary legacies and household furniture among her relatives. The testatrix then gave the following legacies:—To the most Rev. John Bernard Palmer, clerk of Mount St. Bernard, near Loughborough, Abbot of the Monastery and Abbey Church of Our Lady of La Trappe there, 100*l.* clear of legacy duty. Then followed gifts to several relatives; after which the testatrix gave—"To the person who, at the time of my death, shall be superioress of the convent of the Good Shepherd at Hammersmith, 19*l.* 19*s.* for the benefit of the convent; to the Roman Catholic Orphan Girls' Asylum at Hampstead, connected with the St. Patrick Roman Catholic charity school, 19*l.* 19*s.*; to the institution of the Charitable Sisters in the Virginia-street district for furnishing linen to poor pregnant women (to which I have been in the habit of subscribing), 10*l.*; to the Rev. John Moore, priest of Virginia-street chapel, 19*l.* 19*s.* to be applied as he may think fit towards the erection of the new Roman Catholic chapel in such district, but not for the purchase of land, to the Rev. Thomas Doyle, clerk, D.D. priest of St. George's Chapel, St. George's-fields, 10*l.*; to the Rev. Anthony Magee, for the poor-school, 10*l.*; to the Rev. Richard North, priest of the church of our Blessed Lady the Star of the Sea, at Greenwich, 19*l.* 19*s.*; to Bishop Davis, of Wales, 40*l.*; to the Right Rev. Bishop Waring, of Northampton, bishop and vicar apostolic for the eastern district of England, 10*l.*; to the Rev. Edward Kenny, clerk, of Bridport, 10*l.*; to the Rev. G. Holding, priest, of Whitehaven, 5*l.*; to the officiating priest of Maryport, Cumberland, 5*l.*; to the priest officiating at Vauxhall-street Chapel, Jersey, 5*l.*; to the Rev. Harding Ivers, clerk, priest of St. Alexis, at Kentish-town, 5*l.*; to the priest officiating at Hackney, 5*l.*" Then followed a gift of rings to her relatives; 19*l.* 19*s.* to her executors, Dr. Magee and William Tucker. The testatrix then gave her property to her executors, on trust, to pay her debts, funeral expenses, and legacies, and subject thereto on trust to be divided into four parts, two fourth parts for Dr. Magee, a third fourth share for her brother, William Leathers, and her sister, Sarah Gilpin, equally. As to one-half of the remaining fourth part upon trust for the Rev. Mr. Palmer and the Rev. William Joseph Daley, clerk, priest of the Immaculate Conception, at Penzance, equally, and as to the other one-half of such remaining fourth part in trust for her nephews and nieces, the children of her deceased brother, Joseph Leathers. The testatrix then went on to provide that in case of the death of any of the legatees described as bishop, prior, abbot, clerk, or priest, the legacy should not lapse, but be paid to his successor; and in case no successor was appointed, then the legacy was to go to the bishop, abbot, priest, or cleric who shall officiate for the said district. The testatrix also declared that in case any legacy should be void by the operation of any rule of law, the gift was not to go to her heirs, or next of kin, but was to be part of her residuary estate, which ultimate residue of her estate she bequeathed to the Rev. Anthony Magee, his heirs, executors, administrators, and assigns. Then followed the usual power for the appointment of new trustees. The witnesses to the will were Edward Power, barrister, of the Middle Temple, and J. Welsh, North-street, Westminster. The inquiries which the plaintiff now asked the Court to direct had become necessary in consequence of the conduct of the defendants, which gave rise to the suspicion that these legacies to different Roman Catholics were intended to be trusts for the performance of certain ceremonies and acts which the law declared to be "superstitious uses." On this supposition the gifts would fail, and the sums thus given become part of the residuary personal estate. What was therefore asked was, a reference to the Master to inquire whether any, and what part of the residuary estate of the testatrix given and bequeathed by her will were or was given or held upon any and what secret or other trusts. Affidavits had been filed in support of this claim stating that the will of the testatrix had been prepared by Mr. John Athanasius Cooke (which was not denied), and that it was believed that the bequests to the several Roman Catholics were not intended for their personal enjoyment, but subject to some secret trusts; that a correspondence had been had between the parties and solicitors to ascertain what those trusts were; and in a letter from Mr. J. A. Cooke, he stated that he had sent an " explanatory statement" to Mr. Froggatt, Dr. Magee's solicitor, in writing, which would answer those inquiries, but he was not at liberty to disclose the facts without Dr. Magee's consent. This, the explanatory statement, had, however, never been procured. Dr. Magee had also made an affidavit, swearing that to the best of his belief there was no secret trust.

Kenyan Parker and Bagshaw appeared for Mr. Palmer, one of the legatees.
Waller, for Dr. Magee.

The VICE-CHANCELLOR said he was clearly of opinion that he could not grant the relief which was asked. It was always a matter of great anxiety with him to save expense, but he thought that it was never intended that such an order as was now asked for should be made upon a claim. The plaintiffs asked for accounts which, in the case of a bill being filed, could only be had at the hearing and after evidence in the usual way had been gone into. Supposing the affidavits made out the case, as to which he (Lord Cranworth) desired it to be understood he expressed no opinion, that was not the case made by the claim. A plaintiff must proceed not only *secundum probata*, but *secundum allegata*, and therefore, under these circumstances, he thought that he could not make the order which was asked.