

MUCHALL V. BANKS.

ChamPERTY—Maintenance—Mortgagor and mortgagee—Assignment of right to impeach a prior mortgage.

Where an assignment was executed by a *puisne* incumbrancer to another, for the purpose of filing a bill to impeach a prior mortgage on the ground of fraud, and which bill was accordingly filed; the court, without determining what might have been the result of a suit brought simply to redeem, or one instituted by the *puisne* incumbrancer himself, dismissed the bill with costs, notwithstanding the right to redeem formed one alternative of the prayer, it being evident from the whole proceeding that the alleged fraud was the ground upon which the plaintiff principally relied.

Statement.—This was a suit by *Richard Muchall* against *William Banks*, the Hon. *George S. Boulton*, *Samuel H. Gibbs*, *George Ley*, *Francis Dixon*, *Edward Trevor Boulton*, and *James Sackville*, praying a declaration by the court, that, under the circumstances stated in the judgment, plaintiff was the first mortgagee of the lands in question in the suit: for a receiver of the rents and profits, or for liberty to redeem the defendant, *George S. Boulton*, and for further relief.

Evidence was taken by the late Chancellor *Blake* at Cobourg, in the autumn of 1860, when the defendants *George S. Boulton* and *Sackville* were examined on behalf of the plaintiff, and the plaintiff was called and examined on the part of the defendants.

Mr. Boulton's evidence was as follows:—

"I knew *William Banks* in 1834; he was then in my debt; I was employed to prepare a mortgage from *William Banks* to *C. P. Banks* in 1834. *William Banks* told me that he was authorised to draw upon his brother *C. P. Banks*; he resided in England; he never was in this country, as far as I know. *William Banks* told me that he was authorised to draw upon his brother, and instructed me to draw a mortgage from him to *C. P. Banks*, to secure the amount to be advanced. The mortgage now shown to me, marked "D," is the mortgage which was prepared in my office, and is in the handwriting of *Mr. Wilcox*, then a clerk in my office. The bills [of exchange] now shown to me, marked