was made for an injunction to restrain the action at law, on the ground of plaintiff's right to apply the money due upon his mortgage to Bradbury.

Fitzgerald, in support of the application.

If the mortgage given by plaintiff had still been held by Bradbury, a clear right would exist for plaintiff to apply the amount due by him in reduction of the amount due upon the mortgage in the hands of Alexander; the position of the plaintiff is in fact that of surety for the debt due to him, and *Davis* v. *Hawke* (4 Grant, p. 408) is an authority in favour of plaintiff. The same rule must apply as to McDonell, who took the assignment subject to all the equitable rights of plaintiff as such surety. *Jones* v. *Mossop*, 3 Hare 568; *Moore* v. *Jervis*, 2 Col. 60; *DeMattos* v. *Gibson*, 5 Jur. N. S. 347.

The only point admitting of any question is the fact of notice to McDonell, but the notice conveyed by the abstract of title, and which is admitted by his answer, is sufficient for this purpose.

Strong contra. Although James R. Bradbury is bound to pay off the mortgage held by Alexander, still this affords no ground for plaintiff applying his debt in discharge of it. The pleadings and evidence shew that a bond was executed by Bradbury, for the purpose of indemnifying plaintiff against the mortgage of Alexander: this, it was contended, evinced an intention on the part of the plaintiff to rely upon that security, not upon any right of his to apply the amount secured by his own mortgage to discharge that held by Alexander. Besides, a person taking a bond of indemnity cannot refuse to pay his debt, because he has such bond before he has sustained any loss.

Here the most that can be claimed on behalf of plaintiff is a right of set-off, but this not having attached before the transfer of Tully's mortgage to McDonell, he must be treated as holding discharged of it.

Rigney v. *Vanzandt*, 5 Grant, p. 498; *Ex parte* v. *Hippins*, 2 Gl. & J. 98; *Barnet* v. *Sheffield*, 1 D. M. & G. 371; *Clark* v. *Cort*, Cr. & Ph. 154, were amongst other cases also cited by counsel.

Esten, V. C.—The material facts of this case, I understand, are these, the defendant, William Bradbury, purchased the lands in question, subject, with other lands, to a mortgage for £500 to one Alexander, which he covenanted to discharge. James Bradbury, another defendant, became entitled in equity to the lands in question, but received no conveyance of them from his father, William Bradbury. He contracts for the sale of them to the plaintiff for £645, of which £145 is paid, and £500 is secured by mortgage; and James Bradbury by bond agrees to discharge the mortgage to Alexander. The conveyance to the plaintiff is made by William Bradbury, as a trustee for James Bradbury, and he enters into covenants for the title limited to his own acts. James Bradbury transfers the mortgage for £500 to the other defendant, McDonell, who commences an action against the plaintiff on the covenant for payment of the mortgage money contained in it, and this suit is thereupon instituted by the plaintiff for an injunction to stay proceedings in that action, and to apply the mortgage held by McDonell to the exoneration of the lands in question from the mortgage of Alexander. The claim is based on several grounds; first, that the estate is a surety, and is entitled to apply its own debt to its exoneration as such surety; second, that both James and William Bradbury, the former by his bond, the latter by his covenant, have agreed to discharge the mortgage of Alexander, and that the plaintiff has a lien on his own purchase money or mortgage for securing all for which he bargained, namely, the estate free from incumbrances, and has therefore a right to apply his mortgage to the discharge of the incumbrance of the previous mortgage. Conceding the existence of these rights in the abstract, for the sake of argument, I think the circumstances of the case furnish an answer to them, inasmuch as they indicate an intention that the two mortgages shall be independent, and that one shall not be held as an indemnity or security against the other, and inasmuch as these rights cannot of course exist in opposition to the express intention. Had it been intended that the plaintiff should have a lien on his purcease money for the discharge of the incumbrance affecting the estate, he would have undertaken to discharge it, and purchased the equity of redemption merely, which would have been the prudent course. He would in this case probably have paid a little more for the estate. Aware of the incumbrance, and intending that it shall be discharged by the vendor, he nevertheless grants a mortgage and covenant, binding himself to pay the balance of the purchase money at stated times, and takes from the vendor a bond to discharge the incumbrance. This agreement indicates a clear intention to my mind that the balance of the purchase money should be paid irrespective of the prior incumbrance, and that no lien should exist upon it for the discharge of that incumbrance.

It is true, that if the mortgage remained in James Bradbury's hands, and the plaintiff had paid, or was required to pay the previous incumbrance, an off-set would be made of one against the other, in order to prevent any inconvenient circuity. But as I understand the law on this point, the right of set-off, when it is mere matter of arrangement, and does not arise from contract express or implied, accrues only when the necessity for making the arrangement occurs, and not before, and if one of the funds has been previously alienated, it does not arise at all.

In the present case, the circumstances, I think, exclude any implied contract that one mortgage should be a security against the other; and as a *bona fide* transfer was made by James Bradbury of the mortgage executed by the plaintiff before any right of set-off accrued, that is, before the necessity for it arose, I think it would be unjust to restrain McDonell from enforcing his legal rights; and therefore I think this application must be refused.

Andrews v. Maulson.

Practice—Breach of injunction—Order to commit.

Where a party commits a breach of an injunction after service of the order upon his solicitor, but before personal service of the injunction upon the party enjoined, the court will commit him for contempt.

In this case an injunction had been granted against the defendant restraining him from collecting rents or otherwise interfering with the estate of the plaintiff. A copy of the order directing the injunction to issue was served on the defendant's solicitor on the 16th September, 1861. but the defendant was not served personally with the injunction until the 30th September, 1861. Between the times of the service of the order and of the injunction, the defendant collected rents belonging to the plaintiff's estate. Evidence having been taken,

Hodgins, for the plaintiff, moved in court for an order *nisi* to commit the defendant for breach of the injunction. He cited Drewry on Injunctions.

Esten, V. C., after hearing the cases referred to in Drewry, considered that notice to the solicitor that an injunction had been ordered was sufficient, and that the defendant, having violated the order, was guilty of contempt, and he therefore granted the order *nisi*. No cause having been shown on the return of the order, an attachment was issued against the defendant for breach of the injunction.

COUNTY COURT CASES.

In the County Court of the County of Elgin, before his Honor Judge Hughes

Metcalfe v. Widdifield.

Taverns—Election law—Con. Stat. of Canada, ch. 6, sec. 81—Action for penalties thereunder—Demurrer.

The General Election Law, section 81, enacts that "every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days for polling, in the same manner as it should be on *Sunday during divine service*, and that no spirituous or fermented liquors shall be sold or given during the said period under a penalty of $100 for either offence."

In an action for penalties under this Act for both offences, claiming $100 for each in separate counts,

Held on demurrer that the prohibition is absolute, not restricted by any saving in other s atutes.

Also, that a plea to the whole declaration that the liquors were supplied to travellers was bad, and no answer to the second count.

Also, that a plea that there was not when the Act was passed any law of the land requiring taverns or hotels to be closed on Sunday during divine service was bad.

Declaration.—First count. For that the defendant is indebted to the plaintiff in the sum of $200; for that heretofore, to wit,