COMMON LAW EQUITY.

The case of *Weir* v. *The Niagara Grape Co.*, 11 O. R. 700, appears to us to furnish a specimen of what may be called "common law equity," or the kind of law which a common law lawyer is apt to mistake for "equity."

The case before the court was a very simple one. The plaintiff, on 31st March, 1884, being mortgagee of the lands in question, under several mortgages, took from the mortgagor, John Kievell, a release of his equity of redemption in consideration of the amount due on the mortgages. The mortgages and the release of the equity of redemption were all taken without notice of an agreement which Kievell, the mortgagor, had made with the Niagara Grape Co. for the purchase of certain vines planted on the mortgaged property, and by the terms of which agreement the vines were to remain the joint property of Kievell and the Company until paid for; and in the event of Kievell alienating the land before the price should be paid, it was to form a lien on the land. This agreement was made in 1882, but was not registered until after the plaintiff's conveyance of 31st March, 1884; and the object of the suit was to obtain a declaration that the agreement of 1882 was fraudulent and void as against the plaintiff, and to have the agreement of 1882 removed from the register as a cloud upon the plaintiff's title.

Under the circumstances the court conceded, as it would be impossible to do otherwise, that the agreement of 1882 is, under the provisions of sec. 74 of the Registry Act, fraudulent and void as against the plaintiff; and, having arrived at that conclusion, one would have thought that that which is admitted to be fraudulent and void as against the plaintiff, and which was utterly inconsistent with the absolute title claimed by him, would have been ordered to be removed from the register.

The court, however, was unable to arrive at that conclusion; but, *mirabile dictu!* made a declaration that the deed of the plaintiff was entitled to priority over the agreement of 1882, upon the plaintiff paying to the Niagara Grape Co. what was due to them under that agreement; and whether the plaintiff chose to accept relief on these terms or not, gave the Niagara Grape Co. that relief as against the plaintiff in any event.

The rationale of the Registry Act appears to be this: All instruments affecting the title are required to be registered, in order that third persons dealing with the land may have notice of their existence. If a person takes a conveyance from the registered owner and neglects to register it, he enables the grantor to pass himself off as still the owner, and he becomes, by his neglect, a passive party to the fraud, if the latter assumes to make a subsequent conveyance of the property. The Registry Act, therefore, declares that as between an unregistered purchaser and a subsequent purchaser who first registers his conveyance, the latter shall prevail, and that as against him the prior unregistered instrument shall be adjudged fraudulent and void. Now it certainly is the queerest way of administering this very beneficial Act to say "true it is that this prior instrument is fraudulent and void as against you; yet it shall remain on the register and be a cloud on your title, unless you give to the person entitled thereunder all the benefit and advantage he would have had if he had duly registered his conveyance." And yet that in substance is what the court did in this case.

The court was led into, what appears to us, this erroneous conclusion by the fallacious reasoning of Armour, J., who delivered the judgment of the court. He says at p. 716: "If the plaintiff is entitled