by the answer; but if the parties be willing to accept this as the decision of the case, we think the plaintiffs should have their costs, except of the hearing, and they should convey to the defendant the parcel of ground conveyed by mistake by the elder Macbell to the original trustees.

After the foregoing judgment, the defendant Farrell, through his solicitors, intimated to the plaintiffs' solicitors that he was willing to accept the judgment of the court, and to execute conveyances to rectify the mistake, but insisted that the plaintiffs should prepare both deeds. The plaintiffs declined, as the defendant Farrell had been in the wrong by compelling them to come to court, but offered to prepare one of the deeds. The offer was refused, and the Township Municipality refusing to join as co-plaintiffs, as directed by the court, they were added as defendants; and on the bill being taken *pro confesso* against them, the cause was again set down for a hearing.

Hodgins, for the plaintiffs, contended that Farrell was the proper party to prepare the deeds. He had full notice of the plaintiffs' claim, and by his own wrong obtained a deed of land which neither he nor his grantor had any estate in. The plaintiffs had so far shown a willingness to settle that they prepared a draft deed, and submitted it to the defendant, but he refused to do his part. If it was to be held that both parties should have prepared deeds, then, according to *Jones v. Barclay* (2 Doug. 684), where there are mutual conditions to be performed at the same time, and one shows that he is ready to do his part, but the other stops him by an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act. That was a case similar to the present. Besides, the rule which governs in the preparation of deeds in specific performance may apply here. He referred to 9 Bythewood's Conveyancing, 518 (note); *Glazeburn v. Woodrow*, 8 T. R. 366; *Laird v. Pim*, 7 M. & W. 482.

Morphy, for defendant Callaghan.—His client had submitted to act as the court should direct, and must be held entitled to his costs. It was clearly the duty of the defendant Farrell, who had been condemned in costs by this court, to tender such a conveyance as would show that he had submitted to the judgment which had been pronounced.

Roaf, for defendant Farrell, contended that the plaintiffs had never tendered a proper deed to the defendant; that being trustees for him of the piece they held by mistake, it was their duty to have prepared all proper deeds to rectify that mistake, according to the rule laid down in *Rowsell v. Hayden* (2 Grant, 557), which was, that where a trustee is required by his *cestui que trust* to convey to the latter the trust lands, where such a conveyance is proper, it is the duty of the *cestui que trust* to solve all reasonable doubts suggested by the trustee as to the course he is desired to pursue; and the *cestui que trust* must also pay all costs, charges and expenses properly incurred in relation to the trust.

Hodgins, in reply.—The rule in *Rowsell v. Hayden* does not strictly apply; if anything, it applies to both parties, as it might be considered there was here a double trusteeship.

ESTEN, V. C.—It must be supposed that the court thought Farrell in fault, by condemning him in costs, and that he ought to have rectified it. I see nothing to exonerate him from preparing the deeds. He should have prepared a description of the property he intended to convey to rectify the mistake, and let his solicitor draft a proper conveyance of what he wished the plaintiffs to convey to him; and if the parties disagreed, it should be referred to the Master to settle. The plaintiffs are entitled to a decree, as asked for. The defendant Callaghan, and the Municipality of the township, and all proper parties, should join in the conveyance. Callaghan is entitled to his costs, to be paid by the plaintiffs, who may have them over against Farrell.

FISKEN v. WRIDE.

Special Performance.

This was a bill by the vendor for the specific performance of an agreement for the purchase of land. In the agreement it was stated that the plaintiff would give the defendant a bond against a mortgage on the property to the Trust and Loan Company. The defendant resisted on the following grounds: first, that the plaintiff had no possession, and did not give the defendant possession when demanded; secondly, that the defendant had no professional adviser, while the plaintiff had, and that he was greatly imposed upon; and, thirdly, that the plaintiff and his co-partners had failed since the contract.

McDonald for plaintiff. *Turner* for defendant.

SPRAGGE, V. C., delivered the judgment of the court.

I do not think the defendant makes out his case. It is not shown that the plaintiff had not possession, but rather the contrary. As to the second, the plaintiff's evidence proves that he was a shrewd man, and one that well understood his bargain, and he shows nothing against this. I do not think that he was entrapped. As to the charge, that since the contract Fisken had failed in business, and that his bond is of no good, that is true, the contract having been made on the 27th May, 1857, and the failure having occurred in October of the same year. This is not that there was fraud or an unconscionable bargain, but that something has occurred since, which renders it inequitable to enforce the contract. Mr. Turner cited nothing in support of this argument, but there are several railway cases against it. I do not think that this is such a case as could be barred by such an event. The firm is still in business, and it is not shown that their payments to the Trust and Loan Company have failed; and in regard to such, this Trust and Loan Company have agreed to take the defendant's payments for the plaintiff's. Besides, the title was investigated before the failure by the solicitors of both parties.

As to the penalty, I do not think that it was the intention of the parties to pay it, and then rescind the contract. If so, it was the duty of the defendant to take occasion to claim it in his answer. If the Trust and Loan Company do not carry out the contract as to accepting the defendant in the payments yet to be paid on their mortgage, I do not think the plaintiff should have the aid of this court to enforce his contract. Each party will therefore have liberty to apply; and the decree will be for reference as to title, and for specific performance against the defendant.

CHAMBERS.

MITCHELL v. HAYES.

Foreclosure—Attendance to receive mortgage money.

This was an application for a final order of foreclosure; but the affidavit of the attorney appointed by the mortgagee showed an attendance of only a quarter of an hour at the appointed place, the solicitor's office. There was also an affidavit from the solicitor that no one attended during the two hours appointed by the Master's Report, to pay the mortgage money.

ESTEN, V. C., at first doubted whether he could make the order asked for, as the attendance was for such a small portion of the time; but after consideration, granted the order.

WHITEHEAD v. BUFFALO AND LAKE HURON R. R. CO.

Examination de bene esse.

This was an application by the plaintiff, on notice, supported by his own affidavit, to examine a witness *de bene esse*, who was about to go abroad. The cause had been heard, but no judgment pronounced. The plaintiff, presuming the decree would be in his favor, proposed to examine the witness with a view of using his evidence in the Master's Office in taking the accounts. The affidavit showed that the witness was going abroad; that the plaintiff could not prevent them; and that he was the only person within the jurisdiction who could give testimony in regard to the matters on which it was proposed to examine him; and also stated the grounds of the plaintiff's so considering him. The motion was unopposed.

ESTEN, V. C., made the order, on the ground that although such orders are only granted where it is shown that the evidence is to be used for some definite purpose, yet the court will make such an order where it considers that practice requires it.

COUNTY COURTS.

In the County Court of the County of Ontario, before His Honor Judge BURNHAM.

PERRY v. IRONS.

The defendant in this case, was arrested under a *capias* after action brought, issued on an order made by Burnham, J., under the 2nd section of 22nd Victoria, cap. 96.