cipality from acting on such by-law, and from making, issuing, or negotiating any of the debentures ordered by it to be issued.

A motion was made upon notice, before his Lordship, the Chancellor, for an injunction, in the terms of the prayer of the bill, which application was refused, liberty being given, however, to the plaintiffs to put the cause in the list of causes for re-hearing and which, accordingly came on before the full court.

Strong, Q. C., and *Blake* for the plaintiffs.

McLennan, contra.

The judgment of the court was delivered by

VANKOUGHNET, C.—When this case was before me on the motion for an injunction to restrain the defendants from acting on their by-law, passed the 16th September, 1863, and numbered 91, I expressed an opinion that the by-law was bad, on the ground that it was not based on the assessment as made and revised last before the by-law was passed, but I refused the injunction at the instance of the plaintiffs, because I thought they had not come for it as promptly as they should have done, and had waited till after a term in the common law courts had elapsed, during which the validity of the by-law might have been tested before one or other of those tribunals, specially charged with the cognizance of such matters, and all necessity for the aid or intervention of this court thus have been avoided. On this rehearing my brothers, with myself, are of opinion that the by-law is invalid, on the ground mentioned, and we have not considered it necessary, therefore to examine any other of the objections to it. They, however, think that the plaintiffs may have been misled by the action of the court in *Smith* v. *Renfrew*, before my brother *Esten* and by the absence. hitherto, of any rule requiring parties to proceed at the earliest opportunity to obtain the action of a court of law, and that to refuse intervention, therefore, in the present case, might be acting somewhat hastily. I yield to this view, but with some reluctance. The bill in this case was filed on the 20th October. Nothing new has transpired since; nothing has been added to the plaintiff's case. A term of the common law court intervened before this motion was made, and a prompt application then and there would have rendered the action of this court unnecesary. Our jurisdiction in such matters, it seems to me, is essentially preventive, and, therefore, ancillary. It should only be invoked and employed where absolutely necessary; and this cannot be where the parties seeking it might have gone to the proper tribunal, and had removed or abolished the enactment which they ask this court to restrain the use of till its validity can be ultimately settled. The remedy by application to the courts of law is speedy and inexpensive, compared with proceedings in this court. That remedy might have been pursued last term in this matter, and this court relieved of the trouble, and the parties of the expense, of an application here. When there has been no opportunity to apply to a court of law, the exercise of the jurisdiction of this court, by way of prevention, may be most salutary, and even where there has been opportunity, and no default in the parties applying, the court may, under special circumstances deem it right to interfere; but certaintly not at the instance of any rate-payer who might have gone to law, and had the matter settled there, instead of coming into this court, and placing it in the embarrassing position of restraining action on a doubtful by-law, which may be afterwards upheld by the court which is moved to quash it.

McANANY v. TURNBULL.

Statute of Frauds—Equities before 1816—Sale of right to dower under Execution—Costs.

The several parts of a contract not taken out of the Statute of Frauds by part performance, must be proved by writing.

There being no court of equity in 1816, makes no difference in the rights of a purchaser at that time, as all that can be said is, that the laws of the Province had not then provided the machinery for dealing with equitable rights

A mere right to dower is not such an estate or interest in land, as can be seized and sold by the sheriff under an execution.

The sole defence having failed and the grounds on which, on rehearing judgment, defendants favour rested, were not here pointed to by defendant, the bill though dismissed was dismissed without costs.

The plaintiff filed his bill, as having acquired the title to dower of Agnes Smith, widow of Robert Smith, in a parcel of land in the Town of Belleville, against the defendant, as claiming under one to whom Robert Smith conveyed the land after his marriage with Agnes.

The defendants case at the hearing, was, that before his marriage, Robert Smith had contracted to sell the land in question to Kimmerly and Hubbard, under whom he claims.

The material dates were contract of sale before or on 12th September, 1816, Robert Smith not having then received a patent from the Crown; issue of the patent to Robert Smith on 30th November, 1816; marriage 4th April, 1817; conveyance to Robert Smith to Kimmerly and Hubbard, the 17th of the same month.

It was admitted that the puchase money was paid to Robert Smith, before the marriage.

The contract or memorandum set up, read as follows:—"Memorandum of agreement, entered into at Thurlow, the twelfth day of September, 1816, between Andrew Kimmerly and John Hubbard of the one part, and Robert Smith of the other part, as follows—the said Kimmerly and Hubbard having purchased of Robert Smith, lot number twenty-four, situate in the village of Belleville, together with the buildings thereon standing, it is mutually agreed upon by the said parties, that the said Robert Smith is to remain in possession of such part of said premises, as are occupied as a dwelling house (until he prepares another place of residence) free of rent. It is also understood and agreed upon, that whatever expenses may attend the finishing off of the kitchen in the rear of the house, agreeable to the mode intended by the said Smith, are to be paid to the said Smith by the said Kimmerly and Hubbard, and at the nett price of the materials and work required."

Strong, for plaintiff; *English*, for defendant.

SPRAGGE, V. C.—This paper, it is to be observed, is silent as to any consideration paid or to be paid. It is said for the defendant that it assumes that the consideration, the purchase money, had already been paid. If it had been a contract to convey, there would be room for such construction. But it is not. It is only an agreement, collateral to contract of sale, which it recites, in relation to possession, and the finishing of a kitchen The contract of sale itself, whether verbal or in writing, may, consistently with this instrument, have been silent as to consideration, or may have provided for its payment at a future time.

The legal estate being in Robert Smith at the time of the marriage, the defendant must shew that the equitable estate was in those under whom he claims; and to do this, must establish, I apprehend, that there was a binding contract of sale, enforceable in equity. The paper which I have referred to, would be, I think, a sufficient memorandum or note within the Statute of Frauds, though not itself a contract of sale: if the consideration had been expressed; but without that, it is imperfect. Part performance by possession is urged; but it does not appear whether the possession was before or after the marriage. But suppose possession proved, there is still wanting evidence of a perfect contract by parol or otherwise, because the price of the thing sold is not proved. It may be that the price was to be ascertained in some way which the court cannot execute.

It must then rest upon this, that as a fact, the purchase money whatever the amount was, was paid before the marriage. It has been decided that payment of purchase money, is not part performance to take the case out of the statute. But the purchaser's position would be this, he had a sufficient writing within the statute, except as to one point, the consideration, and that it might be agreed had become immaterial, because, whatever it was, it had been paid. But I am not satisfied with this reasoning; because, the contract not being taken out of the statute by part performance, the several parts of the contract must be proved by writing, one as much as the another; in proving payment of the purchase money, the *amount* of that purchase money is of course essential, and that would be proving one term of the contract by parol.

I do not agree in the plaintiffs contention that there being no Court of Equity in Upper Canada at the date of these transactions, can make any difference in the rights of the purchaser. All that can be said is, that the laws of the Province had not at that time, provided the machinery for dealing with equitable rights.

But I think I ought not to conclude the defendant by the evidence now before me I have very little doubt that there was a contract of sale before the marriage, and think it very probable that