

CORRESPONDENCE.

Mr. Dalton, Q.C.]

[Nov. 10.]

SEYMOUR V. DEMARSH.

Local venue—Foreclosure—Possession—Ejectment
—Rule 254 O. F. A.

An action by a mortgagee for foreclosure, payment and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254 O. F. A., and the venue need not therefore in such an action be laid in the county where the lands lie.

Hoyles, for defendant.

H. F. Scott, Q.C., for plaintiff.

CORRESPONDENCE.

THE REGISTRY ACT—WEIR v. NIAGARA
GRAPE CO.

To the Editor of the Law Journal:

SIR,—I have perused an article in the last number of the LAW JOURNAL, in reference to *Weir v. Niagara Grape Company*, 11 O. R. 700. I do not altogether agree with the views expressed there; and as I think it not undesirable that a temperate criticism of the judgments of our courts should be given to the profession in your periodical, I will take the liberty of expressing my views in reference to this particular action.

Section 74 of the Registry Act in effect postpones, as fraudulent and void, any instrument prior in date to any other subsequent instrument which is first recorded, and which is held in good faith and for value and without actual notice of the prior instrument. There is nothing in that section making it incumbent upon a court to direct that such an instrument shall be cancelled and the registration thereof vacated.

In reference to the powers of the court to deal with instruments which have been executed and delivered between parties, I conceive the doctrine to be this; that any instrument that has been delivered for a fraudulent or improper purpose—quite aside from the Registry Act—may by the court be declared to be void, and the registration, if necessary, to be vacated. This doctrine is equally applicable whether titles are recorded or not; but there are perhaps occasions, where the title is a recorded one, in which the court would

interfere, and yet would not interfere where the title is not a recorded one. It is also equally clear that the court will not remove as a cloud upon the title—even where titles are recorded—if the conveyance be void upon its face. No danger can result from its existence even if removed. His Lordship, Mr. Justice Armour, refers to the case of *Buchanan v. Campbell*, 14 Gr. 163, where the court refused to set aside such conveyance, from the simple fact that, upon a perusal of the deed (as the law then was), no interest passed by it as against the plaintiff; and the same general principle is well exemplified in the case of *Hurd v. Billington*, 6 Gr. 145, where it was quite obvious in looking at the power of attorney that the party who executed the deed on behalf of the grantor under the power of attorney had not the requisite authority. In these cases apparently neither the execution nor the registration of the instruments was otherwise than in good faith, and the court did not simply see fit to interfere.

But as to instruments recorded after the instrument held by the person seeking the aid of the court, which may or may not have been executed before the plaintiff's instrument; in my humble opinion it would not be proper in all cases that the court should direct the registration of such instruments to be vacated. The judgment of the court as to this point in *Truesdell v. Cook* is an *obiter dictum*, and may have been stated somewhat too broadly. In the case of *Dynes v. Bales*, alluded to by Mr. Justice Armour, the instrument was, I think, dated, delivered and recorded after the instrument held by the plaintiff, who prayed for the vacation of the registration of such instrument. I should submit, in my humble judgment, considering the importance that is attached to recorded instruments in this country, that when the instrument has been executed and recorded from idle or improper motives, or where no possible injury could possibly occur from such cancellation, and vacation of registration of such instrument as a matter of record—in all such instances—I should conceive, it would be proper for the court to direct such instruments to be cancelled, and such registration to be vacated. Mr. Justice Armour cites a case—apparently within the scope of section 74, where certainly it would be a grievous wrong for the court so to act—that is the instance of A making a mortgage to B, and subsequently another to C, who takes his mortgage without notice of the prior mortgage, records it before B records his prior mortgage, and advances the full consideration, when the property might be well worth both mortgages; and I do think that the judgment of the court in the action