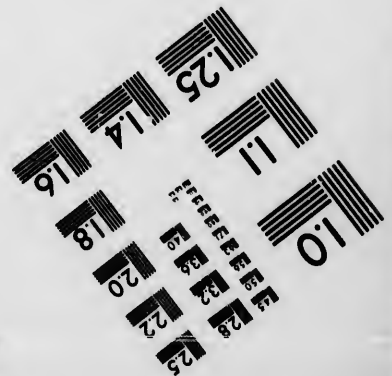
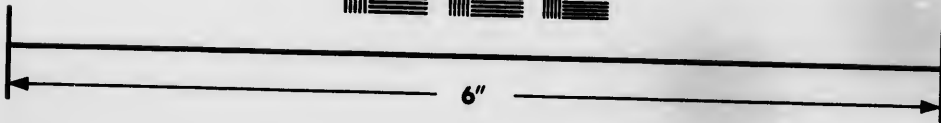
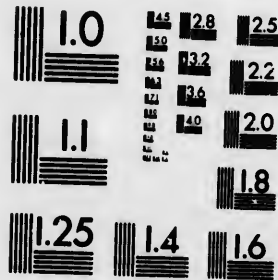


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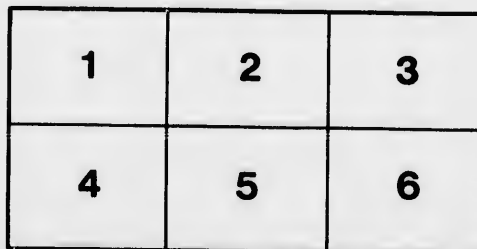
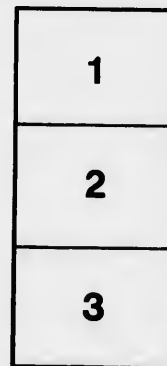
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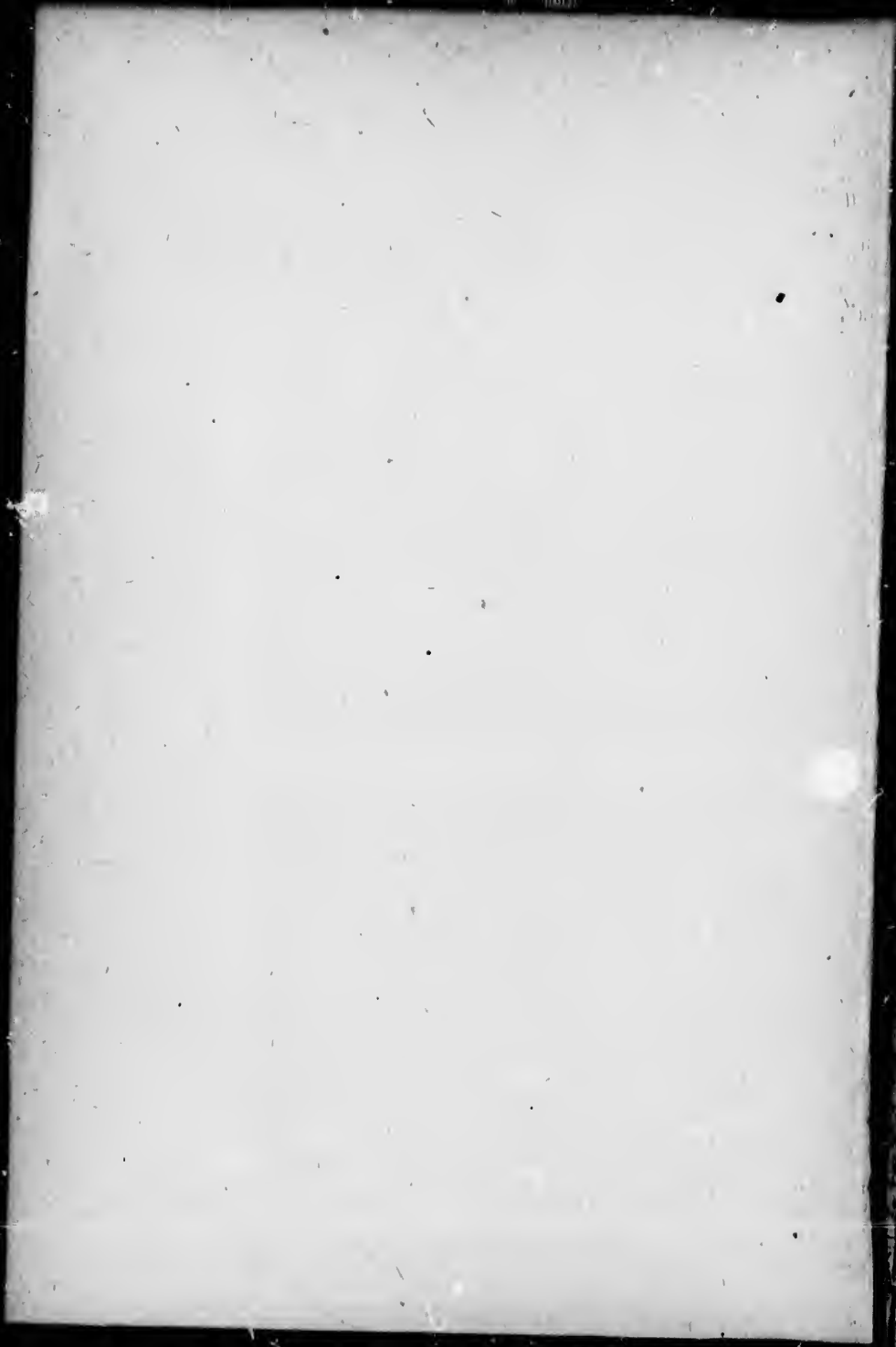
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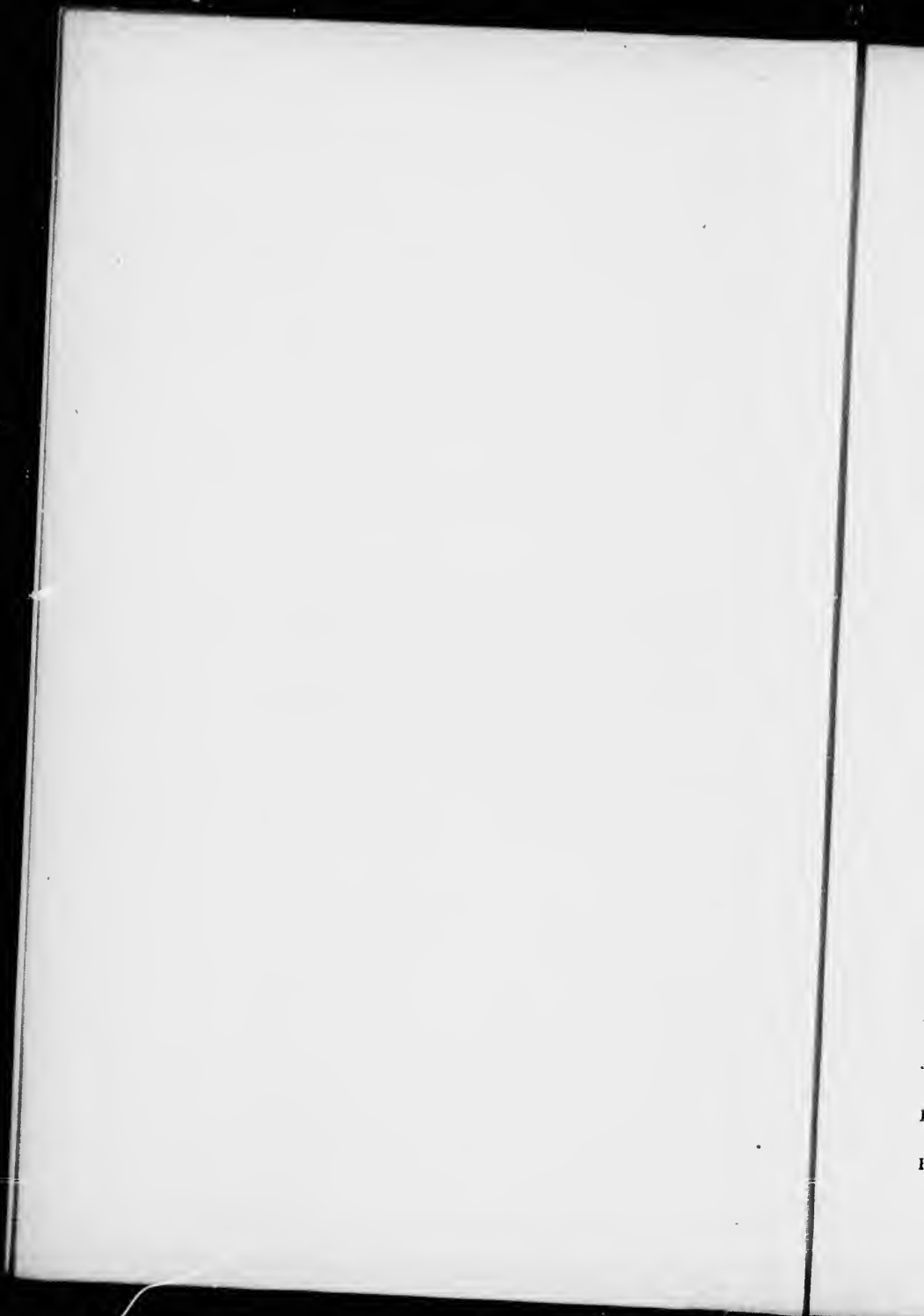
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A TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the plaintiff's name.

	PAGE.
A.	
Anderson v. McBean.	
<i>Principal and agent—Specific performance</i>	463
— v. Thorpe.	
<i>Practice—Long vacation</i>	542
Anonymous.	
<i>Practice—Permission to answer—Discretion of Judge—Appeal</i>	51
Ashbridge, Platt v.	
<i>Mortgage—Opening foreclosure</i>	105
Attorney-General, The, v. Harrison.	
<i>Navigable river—Injunction</i>	466
B.	
Bailey, The Municipality of Oxford v.	
<i>Municipal corporations—Mortmain acts</i>	276
Baker v. Ranney.	
<i>The Crown—Demurrer</i>	228
Bank of Upper Canada, The, Connor v.	
<i>Pleading—Multifariousness</i>	43
—, Jones v.	
<i>Practice—Parties—Master's office</i>	429
Bates v. Martin.	
<i>Injunction—Co-tenancy</i>	490
Bebee, Kerr v.	
<i>Practice—Equitable mortgage—Sale</i>	204

	B.	PAGE.
Becker v. Hammond.		
<i>Will, construction of—Dower, devise in lieu of—Election</i>		483
Berry v. The Columbian Insurance Company.		
<i>Set-off—Insurance</i>		418
Bingle, Crawford v.		
<i>Practice—Sale decree—Judgment creditors</i>		450
Black v. Harrington.		
<i>Wild lands—Mode of assessing</i>		175
Blain v. Terryberry.		
<i>Administration—Interest when chargeable against executor—Costs</i>		221
Boice, McDonald v.		
<i>Fraudulent judgment</i>		48
Boulton, McGregor v.		
<i>Improvvidence—Undue influence</i>		288
——, Fowler v.		
<i>Practice—Examination of parties</i>		437
Bowman, Buckler v.		
<i>Mortgages—Tacking</i>		457
Brooke v. Campbell.		
<i>Wild land assessment—Description in warrant—"Patented"—</i> <i>"Granted in fee"</i>		526
Brown v. Sage.		
<i>Injunction—Servant</i>		25
—— v. Deacon.		
<i>Deeds—Interest</i>		198
——, Grant v.		
<i>Specific performance—Parol contract partly performed</i>		52
Brummell v. Wharin.		
<i>Injunction—Obstruction of view</i>		283
Buckler v. Bowman.		
<i>Mortgages—Tacking</i>		457
Bull v. Frank.		
<i>Crown lands—Jurisdiction of court before patent</i>		80
Bullock, Cockenour v.		
<i>Practice—Reference as to title</i>		73
<i>Mortgages—Practice—Amending decree</i>		138
Burn, Sculthorpe v.		
<i>Practice—Appeal from Master</i>		427

TABLE OF CASES.

B.

	Burnham v. Dennistoun.	
	<i>Vendor and purchaser—Equitable execution</i>	135
485	Burton, Delesdernier, v.	
	<i>Right of infant to his wages—Stat. 13 Eliz. ch. 5—Costs—Fraudulent conveyance</i>	569
418	— v. The Gore District Mutual Fire Insurance Co.	
	<i>Insurance</i>	156
450		
175		

C.

221	Campbell, Brook v.	
	<i>Wild land assessment—Description in warrant—"Patented"—"Granted in fee"</i>	526
48	—, Elgie v.	
	<i>Fraud—Undue influence</i>	132
288	Cartwright v. Gray.	
	<i>Nuisance—Injunction</i>	399
437	Charles, Kintrea v.	
	<i>Partnership—Right of account between partners</i>	117
	<i>Right of action against partners</i>	123
457	Chewett, Torrence v.	
	<i>Will—Set-off—Husband and wife</i>	407
526	Christie v. Johnston.	
	<i>Sale for taxes—Assessment of several lots in bulk</i>	534
25	City Bank v. McConkey.	
	<i>Evidence—Defendant, where a competent witness for a co-defendant</i>	385
98	Clarke, Lymburner v.	
	<i>Costs of disclaiming defendant</i>	130
52	Coates v. Joslin.	
	<i>Insolvent, sale by—Preferring a creditor</i>	524
83	Cockenour v. Bullock.	
	<i>Practice—Reference as to title</i>	73
	<i>Mortgages—Practice—Amending decree</i>	138
57	Columbian Insurance Company, The, Berry v.	
	<i>Set-off—Insurance</i>	418
80	Connor v. The Bank of Upper Canada.	
	<i>Pleading—Multifariousness</i>	43
73	Conway, Harkness v.	
	<i>Partition suit—Costs</i>	449
38	Cook v. Gingrich.	
	<i>Practice—Further directions—Pro confesso</i>	416
27		

	PAGE.
C.	
Cornwall v. Henriod. <i>Foreclosure—Marriage settlement—Costs</i>	338
Crawford v. Bingle. <i>Practice—Sale decree—Judgment creditors</i>	450
Cunningham, Shaw v. <i>Judgment creditor—Lien</i>	101
Curtis v. Dales. <i>Practice—Affidavits</i>	244
D.	
Dales, Curtis v. <i>Practice—Affidavits</i>	244
Davidson v. Douglas. <i>Interpleader—Attaching order—Equitable assignment</i>	181
Dawson v. Dawson. <i>Voluntary deeds—Undue influence</i>	278
Deacon, Brown v. <i>Deeds—Interest</i>	198
DeBlaquiere, Walsh v. <i>Practice—Supplemental answer—Adjourning application from Chambers to Court</i>	107
Delesdernier v. Burton. <i>Right of infant to his wages—Stat. 13 Eliz. ch. 5—Costs—Fraudulent conveyance</i>	569
Demmery, McMaster v. <i>Foreclosure—Costs</i>	103
Dennis, Hamilton v. <i>Will—Words of devise—What a sufficient seal</i>	325
Dennistoun, Burnham v. <i>Vendor and purchaser—Equitable execution</i>	135
Donaldson v. Donaldson. <i>Undue influence—Will</i>	431
Douglas, Davidson v. <i>Interpleader—Attaching order—Equitable assignment</i>	181
Dumble v. The Peterborough and Lake Chemung Railway Co. <i>Railway injunction</i>	74
E.	
Eccles, Small v. <i>Trustee—Interest—Rests</i>	37
Elgie v. Campbell. <i>Fraud—Undue influence</i>	132
English v. English. <i>Administration—Parties—Next of kin—Heirs</i>	441

TABLE OF CASES.

ix

PAGE.

338
450
101
244
244
181
278
198
107
569
103
325
135
131
81
74
37
2
1

PAGE.

F.

Fallon v. Keenan.
Undue influence—Mortgage—Sale with right of repurchase 388

Farquhar v. The City of Toronto.
Equitable assignment—Appeal from County Court—Costs..... 186

Fitzpatrick v. Wilson.
Partition—Outstanding lease—Parties..... 440

Fleming v. Palmer.
Mortgage—Assignment of—Lien..... 226

Forman v. Hodgson.
Conveyance to defeat creditors..... 150

Fowler v. Boulton.
Practice—Examination of parties..... 437

Frank, Bull v.
Crown lands—Jurisdiction of Court before patent.,..... 80

Fraser v. Rodney.
Voluntary deeds—Trusts..... 154

Furlong, Latch v.
Mortgage—Power of sale..... 303

G.

Gingrich, Cook v.
Practice—Further directions—Pro confesso 416

Glass v. Munsen.
*Administration—Money paid to save infants' estate—Pleading—
 Multifariousness*..... 77

Gordon, McEdward v.
Arbitrator—Award—Reception of affidavit evidence—Practice.... 333

_____ v. Young.
Insolvent Act—Preference..... 318

Gore District Mutual Fire Insurance Co., Burton v.
Insurance..... 156

Gourlay v. Riddell.
Undue influence—Oppression..... 518

Grant v Brown.
Specific performance—Parol contract partly performed..... 52

Gray, Cartwright v.
Nuisance—Injunction..... 399

Grier v. St. Vincent.
*Injunction—Practice—Raising money under by-law of Township
 Council—Assessment Act* 330

B

	H.	PAGE.
Hamilton v. Dennis.		
<i>Will—Words of devise—What a sufficient seal</i>		325
———, Mulholland v.		
<i>Practice—Re-hearing</i>		413
——— v. Walker.		
<i>Specific performance—Infant</i>		172
Hammond, Becker v.		
<i>Will, construction of—Dower, devise in lieu of—Election</i>		485
Harkness v. Conway.		
<i>Partition suit—Costs</i>		449
Harrington, Black v.		
<i>Wild land taxes—Mode of assessing</i>		175
———, Irwin v.		
<i>Sale of land for taxes</i>		179
Harrison, The Attorney-General v.		
<i>Navigable river—Injunction</i>		466
Hawke v. Milliken.		
<i>Mortgage—Absolute deed</i>		236
Hayball v. Shepherd.		
<i>Practice—Discovery—Form of bill</i>		426
Henriod, Cornwall v.		
<i>Foreclosure—Marriage settlement—Costs</i>		338
Hodgson, Forman v.		
<i>Conveyance to defeat creditors</i>		150
Holland v. Moore.		
<i>Registry Acts—Unpatented lands</i>		296
Hubbs, Waring v.		
<i>Foreclosure—Disclaimer—Costs</i>		227
I.		
Irwin v. Harrington.		
<i>Sale of land for taxes</i>		179
J.		
Jackson v. Matthews.		
<i>Administration suit—Practice</i>		47
Jones, Kemp v.		
<i>Receiver—Bankruptcy</i>		260
——— v. The Bank of Upper Canada.		
<i>Practice—Parties—Master's office</i>		429

TABLE OF CASES.

xi

PAGE.

PAGE.

J.

Johnson, Paul v. <i>Agent—Mortgage—Improvements</i>	474
Johnston, Christie v. <i>Sale for taxes—Assessment of several lots in bulk</i>	534
Joslin, Coates v. <i>Insolvent, sale by—Preferring a creditor</i>	524

K.

Keating, King v. <i>Voluntary conveyances—Objection for want of parties—Trusts</i>	29
Keenan, Fallon v. <i>Undue influence—Mortgage—Sale with right of re-purchase</i>	388
Kemp v. Jones. <i>Receiver—Bankruptcy</i>	260
Kerr v. Bebee. <i>Practice—Equitable mortgage—Sale</i>	204
King v. Keating. <i>Voluntary conveyance—Objection for want of parties—Trusts</i>	29
Kintrea v. Charles. <i>Partnership—Right of Account between partners</i>	117
<i>Right of Action against partners</i>	123
Knaggs v. Ledyard. <i>Sale of lands for taxes—Sheriff</i>	320

L.

Lamphier, Murphy v. <i>Infants—Guardians—Maintenance</i>	241
Latch v. Furlong. <i>Mortgage—Power of Sale</i>	303
Ledyard, Knaggs, v. <i>Sale of lands for taxes—Sheriff</i>	320
———, Shaw v. <i>Pleading—Cloud on Title—Sheriff's deed</i>	382
Leslie, Moodie v. <i>Administration suit—Costs—Master's report</i>	537
Lewis, Rogers v. <i>Mortgage—Pleading</i>	257
London and Lancashire Insurance Co., The, Rowe v. <i>Fire Insurance—Authority of agents</i>	311
Loring v. Loring. <i>Will—Ademption</i>	103
<i>Will, construction of—Statute of Limitations</i>	374

	L.	PAGE.
Loucks v. Loucks.		
<i>Demurrer—Multifariousness</i>		343
Lymburner v. Clarke.		
<i>Costs of disclaiming defendants</i>		130
Lyon, Yarrington v.		
<i>Insolvency—Pleading—Administration</i>		308
M.		
Martin, Bates v.		
<i>Injunction—Co-tenancy</i>		490
— v. Martin.		
<i>Will—Disposing mind—Mental capacity of testator</i>		500
Mason v. Seney.		
<i>Practice—Evidence discovered after decree—Undue influence</i>		143
Mathieson, Weir v.		
<i>Practice—Re-payment of money on renewal of decree</i>		299
Matthews, Jackson v.		
<i>Administration suit—Practice</i>		47
—, Morley v.		
<i>Practice—Reference back to Master—Evidence—Correcting report</i>		453
Millar, McLeod v.		
<i>Practice</i> ..		194
Miller v. Ostrander.		
<i>Infants—Exchange of lands—Costs—Jus Tertii</i>		349
—, D. G., <i>In re</i> .		
<i>Practice—Re-hearing—Appeals from orders in Chambers</i>		73
Milliken, Hawke v.		
<i>Mortgage—Absolute deed</i>		236
Mitchel v. Richey.		
<i>Voluntary settlement</i>		88
Moodie v. Leslie.		
<i>Administration suit—Costs—Master's report</i>		537
Moore, Holland v.		
<i>Registry Act—Unpatented lands</i>		296
Morley v. Matthews.		
<i>Practice—Reference back to Master—Evidence—Correcting report</i>		453
Mowat v. The Corporation of the City of Toronto.		
<i>Esplanade Acts—Injunction</i>		267

M.

Mulholland v. Williamson.
Fraud on creditors—Marriage settlement 91

_____ v. Hamilton.
Practice—Re-hearing 413

Munsen, Glass v.
Administration—Money paid to save infants' estate—Pleading—
Multifariousness 77

Murphy v. Lamphier.
Infants—Guardians—Maintenance 241

Mc.

McBean, Anderson v.
Principal and agent—Specific performance 463

McConkey, the City Bank v.
Evidence—Defendant, where a competent witness for a co-defendant 385

McDonald v. Boice.
Fraudulent judgment 48

_____, McLaurin v.
Improvvidence 82

McDonald v. Wright.
Practice—Master's office—Appeal—Evidence 552

McDonell v. McKay.
Practice—Effect of amending bill on injunction 414

_____, Trust and Loan Company v.
Foreclosure—Infant—Sale 196

McEdward v. Gordon.
Arbitrators—Award—Reception of affidavit evidence—Practice .. 333

McGregor v. Boulton.
Improvvidence—Undue Influence 288

McIntyre v. Shaw.
Mortgagee 295

McKay, McDonnell v.
Practice—Effect of amending bill on injunction 414

McKnight v. McKnight.
Executor—Trustees 363

McLaurin v. McDonald.
Improvvidence 82

.. 343
 .. 130
 .. 308
 .. 490
 .. 500
 .. 143
 .. 299
 .. 47
 rt 453
 .. 194
 .. 349
 .. 73
 .. 236
 .. 88
 .. 537
 .. 296
 rt 453
 .. 267

	Mc.	PAGE.
McLeod v. Millar.		
<i>Practice</i>		194
McMaster v. Demmery.		
<i>Foreclosure—Costs</i>		193
McNab, Pattison v.		
<i>Practice—Witness—Costs—Putting off examination</i>		483
O.		
Ontario Bank, The, Paton v.		
<i>Simultaneous writs of fi. fa. against goods and lands</i>		366
Orford, the Municipality of, v. Bailey.		
<i>Municipal corporations—Mortmain acts</i>		276
Ostrander, Miller v.		
<i>Infant—Exchange of land—Costs—Jus. Tertii</i> ..		349
Owens, <i>In re</i> .		
<i>Insolvency Act—Appeal</i>		446, 560
P.		
Palmer, Fleming v.		
<i>Mortgage, assignment of—Lien</i> ..		226
Parke v. Riley.		
<i>Sale under fi. fa. against lands previously contracted to be sold</i> ..		69
Paton v. The Ontario Bank.		
<i>Simultaneous writs of fi. fa. against goods and lands</i>		366
Pattison v. McNab.		
<i>Practice—Costs—Witness—Putting off examination</i> ..		483
Paul v. Johnson.		
<i>Agent—Mortgage—Improvements</i> ..		474
Peck, Toms v.		
<i>Amendment—Equitable interest subject to execution—Costs</i>		345
Perry v. Walker.		
<i>Will, construction of</i>		370
Peterborough & Lake Chemung Railway Co., The, Dumble v.		
<i>Railway—Injunction</i>		74
Platt v. Ashbridge.		
<i>Mortgage—Opening foreclosure</i> ..		105
Porter, Seney v.		
<i>Vendor's lien—Exchange of lands</i>		546

TABLE OF CASES.

XV

R.

PAGE.		PAGE.
194	Rabian v. The School Trustees of Thurlow. <i>Injunction—Pleading</i>	115
193	Ranney, Baker v. <i>The Crozon—Remurrer</i>	228
483	Redford, Smith v. <i>Sale for taxes—Collector</i>	316
366	Richey, Mitchell v. <i>Voluntary settlement</i>	88
276	Riddell, Gourlay v. <i>Undue influence—Oppression</i>	518
349	Riley, Parke v. <i>Sale under fi. fa. against lands previously contracted to be sold</i>	69
446, 560	Rodney, Fraser v. <i>Voluntary deeds—Trusts</i>	154
226	Rogers v. Lewis. <i>Mortgage—Pleading</i>	257
69	Rowe v. The London & Lancashire Insurance Co. <i>Fire insurance—Authority of agents</i>	311

S.

366	Sage, Brown v. <i>Injunction—Servant</i>	25
483	Sculthorpe v. Burn. <i>Practice—Appcal from Master</i>	427
474	Seidler v. Sheppard. <i>Practice—Principal and surety</i>	456
345	Seney, Mason v. <i>Practice—Evidence discovered after decree—Undue influence</i>	143
370	— v. Porter. <i>Vendor's lien—Exchange of lands</i>	546
74	Shaw v. Cunningham. <i>Judgment creditor—Lien</i>	101
105	— v. Ladyard. <i>Pleading—Cloud on title—Sheriff's deed</i>	382
546	—, McIntyre v. <i>Mortgagee</i>	295
	Shepherd, Hayball v. <i>Practice—Discovery—Form of bill</i>	426

	S.	PAGE.
Sheppard, Seidler v.		
<i>Practice—Principal and surety</i>		456
Simpson, Stephens v.		
<i>Registration—Will—Mortgage—Parties</i>		493
Small v. Eccles.		
<i>Trustee—Interest—Rests</i>		37
Smith v. Redford.		
<i>Sale for taxes—Collector</i>		316
—, v. Stuart.		
<i>Trust, what sufficient to perfect a declaration or deed of</i>		246
— v. Wooton.		
<i>Injunction—Equitable set-off</i>		200
Stephens v. Simpson.		
<i>Registration—Will—Mortgage—Parties</i>		493
Stevenson, Wilson v.		
<i>Insolvent Act of 1864</i>		239
Stuart, Smith v.		
<i>Trust, what sufficient to perfect a declaration or deed of</i>		246
St. Vincent, Grier v.		
<i>Injunction—Practice—Raising money under by-law of Township Council—Assessment acts</i>		330
Sutton, Winters v.		
<i>Vendor and purchaser—Defence at law</i>		113
T.		
Terryberry, Blain v.		
<i>Administration—Interest, when chargeable against executor—Costs</i> . 221		
Thorpe, Anderson v.		
<i>Practice—Long vacation</i>		542
Thurlow, The School Trustees of, Rabian v.		
<i>Injunction</i>		115
Toms v. Peck.		
<i>Amendment—Equitable interest subject to execution—Costs</i>		345
Toronto, The City of, Farquhar v.		
<i>Equitable assignment—Appeal from County Court—Costs</i>		186
—, Mowat v.		
<i>Esplanade acts—Injunction</i>		267
Torrance v. Chewett.		
<i>Will—Set-off—Husband and wife</i>		407
Trust and Loan Company v. McDonell.		
<i>Foreclosure—Infant—Sale</i>		196

TABLE OF CASES.

U.

Upper Canada Building Society, The, Wilson v.
Building societies..... 206

Upper Canada, The Bank of, Jones v.
Practice—Parties—Master's office 429

W.

Walker, Hamilton v.
Specific performance—Infant..... 172

—, Perry v.
Will—Construction of..... 370

Walsh v. DeBlaquiere.
*Practice—Supplemental answer—Adjourning application from
Chambers to Court* 107

Waring v. Hubbs.
Foreclosure—Disclaimer—Costs 227

Weir v. Mathieson.
Practice—Repayment of money on reversal of decree 299

Wharin, Brummell v.
Injunction—Obstruction of view 283

Williamson, Mulholland v.
Fraud on creditors—Marriage settlement 91

Wilson, Fitzpatrick v.
Partition—Outstanding lease—Parties 440

— v. Stevenson.
Insolvent Act of 1864..... 239

— v. The Upper Canada Building Society.
Building societies..... 206

Winters v. Sutton.
Vendor and purchaser—Defence at law 113

Wootton, Smith v.
Injunction—Equitable set-off..... 200

Wright, McDonald v.
Practice—Master's office—Appeal—Evidence..... 552

Y.

Yarrington v. Lyon.
Insolvency—Pleading—Administration 308

Young, Gordon v.
Insolvent Act—Preference 318

456
493
37
316
246
200
493
239
246
ship
330
113
221
542
115
345
186
267
407
196

A TABLE

OF

CASES CITED IN THIS VOLUME.

A.	PAGE.	A.	PAGE.
Acton v. Woodgate	557	Attorney-General, The, v. The Mayor of Southmolton	468
Agriculturists' Insurance Co., The..	219	_____ v. The Sheffield Gas Consumers' Co	468
Ahearne v. Hogan.....	146	_____ v. Vivian.....	468
Aitkin, <i>Re</i>	334	Audsley v. Horne.....	258
Allan v. Fisher	180	Australia, The Bank of, v. Harris..	320
Alderson v. White.....	396	Austin v. The County of Simcoe ..	178
Alexander v. Vane.....	79	_____ v. Brady.....	258
Alliance Bank v. Brown	199	_____ v. Cradock.....	44
Alpha v. Payman	52	_____ v. DePlessis	233
Anderson v. Ellsworth.....	281	_____ v. Forbes	233
_____ v. Fitzgerald	424	_____ v. Halling	233
Andrews v. Sauderson	367	_____ v. Lambeth	233
Angell v. Bryan.....	296		
_____ v. Westcombe.....	543	B.	
Anonymous.....	52	Baillie v. Edwards	422
Antrobus v. Smith.....	253	Baker v. Monk	134
Arnsley v. Woodward	159	Bald v. Hutchinson	409
Ashburner v. Macguire	103	Balfe v. Lord	341
Atkinson v. Abraham	336	Bamford v. Turnley	399
Attorney-General, The, v. Alford ..	41	Bankart v. Houghton	399
_____ v. Birmingham ..	469	Bank of Montreal, The, v. Baker ..	50
_____ v. Chambers	468	_____ v. Thompson. 70	
_____ v. Cleaver	469	_____ v. Woodcock. 102	
_____ v. Crofts.....	468	Bank of Toronto, The, v. McDougall	320
_____ v. Doughty.....	287	Bank of Upper Canada, The, v. Shick- Inna	30
_____ v. Forbes	468	Banks v. Whittal	223
_____ v. Marsh.....	415	Barker, <i>Re</i>	552
_____ v. McNaughton..	38	Barling v. Bisshopp	101
_____ v. McNulty	80		
_____ v. Parmeter	468		
_____ v. The Mayor of Bristol.....	468		

B.	PAGE.	B.	PAGE.
Barnes v. Boomer.....	80	Bruere v. Pemberton	223
— v. Racster	462	Bruin v. Knott	243
Barrett v. Gôre	387	Buchanan v. Tiffany.....	102
Barrington v. Tristram	380	Buckland v. Rose	29
Barrs v. Jackson	369	Bugden v. Bignold	463
Barry v. Butlen	507	Burgess v. Wheate	233
Battersley v. Rochfort	308	Buron v. Denman	233
Batty v. Chester	154	Burridge v. Calton	217
Beardmore v. Treadwell	400	Burton v. The Gore District Mutual Insurance Company	163
Beasley v. D'Arcy	422	Byron v. Cooper	102
Bell v. Dunmore	109	— v. Thomas	102
Belton v. Hodges	78		
Bending v. Bending	488	C.	
Berdoe v. Dawson.....	282	Campbell v. McKay.....	44
Berwick, The Mayor of, v. Murray .	38	Campion v. Cotton	94
Bigelow v. Lord	247	Canterberry's Case (Lord)	233
Bignall v. Gale	336	Carbyon v. Lovering.....	468
Bills v. Smith	320	Card v. Carr	217
Bingaye v. Cotton	210	Carroll v. Perth	331
Bingham v. Dawson.....	148	Casberd v. The Attorney-General..	233
Blaauwpot v. Da Costa	159	Casey's Trusts	99
Black v. Harrington.....	534	Castelli v. Eoddington.....	107
Blackwell v. Child	103	Cavendish v. Greaves	201
Blagden, <i>Ex parte</i>	201	Cavey v. Ledbetter	400
Blewett v. Blewett	000	Challenge v. Sheppard	326
Blundell v. Cotterall	468	Chalmers v. Lawrie	445
Bostwick v. Phillips	395	Chapman v. Salt	409
Boulton v. Jeffrey	80	Charles v. Altin	524
Bourne v. Cross.....	223	Cherry v. Morton	52
Bowen v. Kirwan	146	Chishholm v. Barnard.....	409
Boyle v. Humphrey	326	Christie v. Saunders.....	491
Brace v. Ormond	556	Clark v. Malpas.....	87
Bradley v. Gill	399	Clarke v. Clark	284, 400
Bradshaw v. Outrim	197	— v. Hawke.....	145, 279, 393
Braunstein v. The Accidental Death Insurance Co.....	424	Clarkson v. Kitson	291
Brice v. Williams	296	Clement v. Donaldson	326
Bridge v. Bridge	246	Cleve v. Cleve.....	380
Bristowe v. Bristowe	380	Clubine v. McMullen	369
British Provident Life and Fire In- surance Company, <i>Re</i>	29	Cockerel v. Barber	409
Brittlestone v. Cook	570	Cockell v. Taylor	136
Bromley v. Holland	154	Coddington v. Davis.....	159
Brotherhood's case	219	Coldwell v. Hall	38
Brown v. Davison.....	29	Colebrooke v. The Attorney-General.	233
— v. Kennedy	281	Columbine v. Penhall	93
		Commercial Bank, The, v. Cooke..	93, 282

PAGE.

223

243

102

29

463

233

233

217

istrict Mutual

163

102

102

44

94

d) 233

468

217

331

-General.. 233

99

107

201

400

326

445

409

524

52

409

491

87

284, 400

445

145, 279

393

291

326

380

369

409

136

159

38

-General. 233

93

ooke..93, 282

C.

PAGE.

Coningham v. Plunkitt..... 246

Connell v. Curran..... 193

Connor v. The Bank of Upper Canada 341

Constable v. Tuffnell 512

Cook v. Black..... 169

Cooke v. Lamotte 281

Cooper v. Ulloxeter Burial Board.. 111

Corbett v. Radcliffe 94

Cornish v. Gest 441

Cotterell v. Purchase 396

Cotton v. Harvey 556

Cox v. Bernard 201

Crawford v. Meldrum 570

Crowder v. Tinkler 468

Cleve v. Mahany 405

Curling v. Townshend 52

Curriers' Company, The, v. Corbett 284, 402

Curson v. Belworthy..... 88

—— v. The African Co. 421

Curtis v. The Union Bank 284

Cowgill v. Rhodes..... 518

D.

Dalton v. Hayter 258, 341

Darley v. Baines 265

Darling v. Bishopp 94

Davenport v. Stafford 223

Davidson v. Douglass 191

Davies v. Davies 279

Davis v. Barrett..... 265

—— v. Davis 415

—— v. Otlý..... 44

—— v. Thomas 396

Davy v. Durrant 306

Dawson v. Dawson 431

Deare v. The Attorney-General 233

DeBallinhard v. Bullock..... 444

DeHogton v. Money..... 383

Delmage v. The Judge of the County Court of Leeds and Greuville.... 196

Dent v. The Auction Mart Co 402

Deornford, Exp 563

Deverill v. Pritchard 284

Dickenson v. Shaw 468

Dillon v. Coppin 246

D.

PAGE.

Dingwall v. Askew 103

Dixon v. Parker..... 387

Dobson v. Groves 336

Doe dem. Brennan v. O'Neil 72

Doe dem. Chidgey v. Harris 246

Doe dem. Dempsey v. Boulton 70

Doe dem. Dougall v. Fanning 70

Doe dem. Harley v. McManus 136

Doe dem. —— v. Russell..... 89

Doe dem. Spafford v. Browne 367

Doe dem. Smith v. Smith 250

Doe dem. Garnon v. Knight 247

Douglass v. Culverwell 396

Downman v. Matthews 421

Dunbar v. Tredennick 146

Durnell v. Corfield 516

E.

Edwards v. Dunliffe 106

—— v. Jones 254

Elgie v. Campbell 393

Ellis v. Earl Grey 233

—— v. Maxwell..... 455

Ellison v. Ellison 246, 557

Elliotson v. Feetham..... 399

Eloyd v. Smith 457

Ensworth v. Griffiths 396

Evans, Exp..... 563

—— v. Coventry 77

—— v. Evans..... 106

—— v. Knight 511

—— v. Root 415

—— v. Solly 233

—— v. Tweedy 381

Eyre v. The Countess of Shaftsbury 78

F.

Farmer v. Farmer..... 52

—— v. Smith..... 212

Farwell v. Wallbridge 233

Faulkner v. The Equitable Reversionary Society 306

Freed, Re..... 509

French v. Davis..... 448

Feathers v. The Queen 234

CASES CITED.

xxiii

PAGE.	
s. Co	164
Vells.	469
	35
	238
	394
	563
	320
	219
	240
	74
	219
	279
	377
	71
	199
	334
bus Co.	97
	388
	247
	227
	308
	422
	217
	377
	557
	306
	80
	88
	146
	519
	320
	563
	279
	390
	378
	422
	102
	154
	38
	491
	80
mutual	
	312
	99
	535

H.	
	PAGE.
Hilliard v. Campbell	106
Hodgkinson v. Whalley	369
Hoffman v. Duncan	265
Hole v. Barlow	399
Holman v. Loynes	146
Holmes v. Penny	570
Holroyd v. Marshall	233
Hope v. Harman	247
Hosking v. Terry	144
Howard v. Gosset	235
Hugenin v. Basely	279
Hungate v. Casgoine	144
Hunt, <i>Ex parte</i>	548
Hunter v. Aikins	519
Hutchins v. Hutchins	38
Hyman v. Roots	195, 459

I.	
Inglis v. Gilchrist	198
Inman v. Wearing	44, 258, 341
Innes v. Mitchell	44
Ireson v. Denn	461
Irving v. Harrington	316
— v. Richardson	167
Isenberg v. The East India Co.	284

J.	
Jackman v. The Duke of Newcastle	284, 405
Jackson v. Parish	52
— v. The Massachusetts Mutual Fire Insurance Co.	166
Jeffreys v. Smith	265
Jeffs v. Wood	421
Jekyll v. Wade	334
Jenkins v. Jones	305
— v. Vaughan	101
Jennings v. Ward	394
Jerdein v. Bright	44
Johnson v. Fessenmeyer	259
— v. Wild	284
Jones v. Foxall	38
— v. Jones	31
— v. Jukes	75

J.	
	PAGE.
Jones v. Locke	256
— v. Mossop	20
— v. Powell	556
Joseph v. Bostwick	94
Josselyn v. Josselyn	243
Judd v. Plum	195
Juson v. Gardner	31, 102, 367

K.	
Keat, <i>Re</i>	563
Keech v. Sandford	136
Keenes, Executors, <i>Re</i>	218
Kekewick v. Manning	252
Kent Benefit Society, <i>Re</i>	219
King, The, v. The Inhabitants of Oakley	78
King, <i>Ex parte</i>	308
Kirk v. Eddowes	409
Kirwin v. Daniel	444
Knebell v. White	259
Knight v. Bower	136
Knot v. Cattee	38
Knowles v. Richardson	287

L.	
Landman v. Crooks	38
Langdon v. Blake	89
Laughtenborough v. McLean	177
Lawrence v. Fitzgerald	195
— v. Humphreys	308
— v. Pomeroy	80
Lee v. Rutson	170
Leehmere v. Hawkins	422
Leeking v. Montague	467
Leman v. Whitley	100
Lewis v. Edmund	79
— v. Rees	89
Lincoln v. Wright	100
Livesay v. Livesay	454
London, The Mayor of, v. Bolt	468
Longmate v. Ledger	85
Longuet v. Scawen	395
Lord Advocate, The, v. Hamilton	468

L.	PAGE.	Mc.	PAGE.
Lovell v. Hicks.....	52	McDonald v. Boice.....	563
Lovett v. Lovett.....	513	McDonell v. McDonell.....	29
Luckie v. Bushby.....	424	McDougall v. Barrow.....	78
Lumsden v. Fraser.....	45	McKay v. Farish.....	94
		McKechnie v. McKechnie.....	247
		McLennan v. Heward.....	409
		McMahon v. Burchall.....	409
		McQuestien v. Campbell.....	295
M.		N.	
Macklem v. Cummings.....	78	Nanny v. Edwards.....	106
Madrago v. Willes.....	235	Neal v. Morris.....	396
Madden, <i>Ex parte</i>	570	Needham v. Smith.....	431
Maguire v. O'Reilly.....	88	Neesom v. Clarkson.....	136
Marlow v. Pitfield.....	80	Nicholl v. Woodhall.....	233
Marriott v. The Anchor Revisionary Co.....	305	Norris v. LeNeve.....	148
Mason v. Sainsbury.....	169	—— v. Morrison.....	380
—— v. Seney.....	270, 393, 431	Notman v. The Anchor Assurance Co.....	424
Mathie v. Edwards.....	305	Nunn v. Harvey.....	223
Mayhew v. Crickett.....	30		
Mayor of London, The, v. Bolt....	468	O.	
Maulson v. Topping.....	557	Obee v. Bishop.....	381
Maur v. Coventry.....	265	O'Connor v. Spaight.....	422
Maw v. Ulyatt.....	201	Ogden v. Battams.....	396
Mears v. Best.....	197	Oliver v. Court.....	306
Meek v. Kettlewell.....	246	Ontario Bank, The, v. Kirby....	367
Mellor v. Lees.....	395	—— v. Muirhead ..	367
Mew & Thorne, <i>Re</i>	563	Ord v. Noel.....	144, 306
Meyers v. Hutchinson.....	564	Osborne v. Usher.....	414
Millen v. The Attorney-General ..	233	Oswald v. Keefer.....	367
Mitchell v. Steward.....	399	Ottawa Union Building Society v. Scott.....	217
Mitchelson v. Piper.....	78		
Molteux v. The Governor and Com- pany of London Assurance.....	312	P.	
Morgan v. Higgins.....	146	Panton v. Labertouche.....	564
Morley v. Elway.....	396	Park v. Berczy.....	557
Mosly v. Baker.....	210	Parker v. Sowerby.....	488
Muchall v. Banks.....	136	Parr v. The Attorney-General.....	44
Muir v. Dunnett.....	247	Paterson v. Reardon.....	491
Mumford v. The Oxford, Worcester and Wolverhampton Railway Co.	400	Paterson v. Harrison.....	519
Munro v. Grey.....	176	Paulet v. The Attorney-General...	233
Murray v. Murray.....	279	Paynter v. Houston.....	554
—— v. Shadwell.....	387	Peak v. Highfield.....	154
Mc.			
McBirney, <i>Ex parte</i>	94		
McCormack v. Garnett.....	409		

.....	563
.....	29
.....	78
.....	94
ie.....	247
.....	409
.....	409
l.....	295
.....	106
.....	396
.....	431
.....	136
.....	233
.....	148
.....	380
Assurance
.....	424
.....	223
.....	381
.....	422
.....	396
.....	306
irby.....	367
uirhead ..	367
.....	144, 306
.....	414
.....	367
Society v.
.....	217
.....	564
.....	557
.....	488
eral.....	44
.....	491
.....	519
eneral.....	233
.....	554
.....	154

P.		R.	
	PAGE.		PAGE.
Pearson v. Pearson	489	Rankin v. Huskisson	233
Pemberton, <i>Ex parte</i>	240	Ranking v. Barnard	409
Penhall v. Elwin	35	Ratcliffe v. Anderson	136
Pennell v. Reynolds	570	Ravenscroft v. Jones	409
Penley v. The Beacon Insurance Co.	312	Rawson v. Samuel	201, 422
Penny v. Avison	38	Reece v. Pressey	508
Perlet v. Perlet	570	Reed v. Prest	31
Peters v. Soame	421	Regina v. Bradford Navigation Co.	469
— v. Stubbs	199	— v. Myers	468
Phillipson v. Kennedy	279	— v. Petty	468
Plowden v. Thorpe	102	— v. Tram	399
Pierson v. Barclay	457	Reid v. The Attorney-General	233
Piggott v. Stratton	287	Rex v. Chillesford	570
— v. Williams	422	— v. Neil	399
Pillow v. Roberts	326	— v. Russell	469
Pitt v. Pitt	227, 296	— v. Ward	469
Pole's Trusts, <i>In re</i>	189	— v. White	399
Pott v. Todhunter	146	Rhodes v. Bates	279
Powels v. Innes	167	Rich v. Basterfield	399, 402
Powis v. Blagrave	266	Richardson v. Ward	455
Prentice v. Mensal	455	Richmoud v. Evans	306
Price v. Berrington	88	Rider v. Kidder	98
— v. Price	246	Riviere v. Bower	284
Priddy v. Rose	233	Roberts v. Davey	159
Prosser v. Edmonds	136	— v. Kuffin	378
Prideaux v. Lonsdale	282	— v. Marchant	173
Purdon, <i>Re</i>	173	Robinson v. Pett	409
Pye, <i>Ex parte</i>	411	— v. Robinson	38
Q.			
Queen, The, v. Eyncourt	216	Robson v. Waddell	451
Queen, The, v. St. Paul's, Covent Garden	328	Roch v. Cullen	381
Quinn, <i>Ex parte</i>	563	Roche v. O'Brien	146
R.			
Radcliffe v. the Duke of Portland	284	Roche v. Hart	38
Radenhurst v. Coate	154, 400	Rodick v. Gandell	188
Randall v. Cochran	169	Rogers v. Acaster	410
— v. Willis	431	— v. Linton	444
		— v. Maule	233
		— v. Rajendro Dutt	234
		Rolph v. The Upper Canada Building Society	443
		Ross v. Chester	507
		— v. Harvey	154, 383
		Routh v. Tomlinson	556
		Row v. Dawson	188

R.	PAGE.	S.	PAGE.
Rowlings v. Lambert	44, 94	Solicitor and General Life Insurance	
Rufford <i>Ex parte</i>	536	Co. v. Lamb	170
		Soltan v. De Held	399
S.		South, <i>Ex parte</i>	189
		Sparrow v. Farmer	210
		Spirett v. Willows	29, 94
		Spokes v. Banburry	399
Samble v. Wilson	204	Spurgeon v. Collyer	394
Sampson v. Smith	399	Spurrier v. Fitzgerald	709
Sandon v. Hooper	480	Stafford v. Lord Canterbury	243
Say v. Boswick	291	Stainer, <i>Ex parte</i>	563
Scarf v. Soulby	33, 94	Stephenson, <i>Ex parte</i>	308
Scarbrick v. Lord Skelmersdale ..	144	Stark County Mutual Insurance Co.	
Scott v. Firth	406	v. Hurd	165
— v. Jones	381	Stephens, <i>Ex parte</i>	201
Scottish Marine Insurance Co., The,		Stewart v. Clark	326
v. Turner	169	— v. Horton	396
Seagrave v. Pape	210	— v. The Greenock Marine In-	
Sear v. Ashwell	247	surance Co	169
Searle v. Law	246	St. George's Building Society, <i>Re</i> ..	211
Secretary of State, &c., v. Karnachee		Stinson v. Hall	201
Boye Sahaba	233	Stokoe v. Cowan	94
Selby v. Pomfret	461	Stone v. Van Heythuysen	94
Seton v. Slade	396	Straffons, Executor's Case	219
Sevier v. Greenway	396	Straker v. Ewing	283
Sharp v. Leach	279	Styles v. Guy	38
Shore v. Weekly	380	Sutton v. Johnstone	233
Sbrursole v. Schneider	52	— v. Jones	267
Shuttleworth v. Roberts	131	Suffield v. Brown	284
Sichel v. Raphael	190	— v. Bond	543
Siffkin v. Davis	197	Sullivan v. Sullivan	265
Siggars v. Evans	94	Swinfen v. Swinfen	517
Silver v. Barnes	208	Sykes v. Hastings	265
Simpson v. Savage	399		
Singleton v. Cox	308	T.	
Smith v. Bowen	284	Tasker v. Small	460
— v. Chichester	194	Tassil v. Smith	460
— v. Fitzgerald	380	Taunton v. The Royal Insurance Co.	219
— v. Keating	557	Taylor v. Okey	422
— v. Owen	286	— v. Jones	37
— v. Parkes	210	Templeton v. Lovell	320
— v. Pilkington	214	Thayer v. Tombs	283
— v. Roe	38	Thelluson v. Woodford	409
— v. Smith	326	Thomas v. Hobler	44
— v. Stuart	308		
Smyth v. Simpson	397		
Sober v. Kemp	461		

CASES CITED.

xxvii

PAGE.

Life Insurance

..... 170
 399
 189
 210
 29, 94
 399
 394
 109
 erbury 243
 563
 308
 Insurance Co.
 165
 201
 326
 396
 k Marine In-
 169
 Society, *Re* .. 211
 201
 94
 sen 94
 Case 219
 283
 38
 233
 267
 284
 543
 265
 517
 265

T.

PAGE.
 Thomas v. Rawlings 145
 Thompson v. Gillespie 424
 — v. Hudson 131
 — v. Leach 249
 — v. Webster 29, 94
 Thomson v. Perceval 30
 Thorkell v. Patterson 72
 Thornecroft v. Crackett 462
 Thornborough v. Baker 396
 Thornhill v. Manning 106
 Thornton v. Court 201
 Thorpe, *Re* 71
 Tiffany v. Thompson 377
 Tilt v. Dickson 369
 Tipping v. St. Helens' Smelting Co. 399
 Tobin v. The Queen 233
 Toomes v. Counset 395
 Torrance v. Winterbottom 308
 Tourville v. Nash 203
 Townsend v. Westacott 33
 Townson v. Tickell 246
 Traders' Insurance Company, The, v.
 Roberts 166
 Trent v. Hanning 326
 Trimblestone v. D'Alton 514
 Tucker v. The Provincial Insurance
 Company 312
 Turner v. Turner 455
 Turnley v. Hooper 144
 Twyford v. Traill 454

U.

Unity Joint Stock Banking Associa-
 tion, The, v. King 422

V.

Vernon v. Bethel 394
 — v. Vernon 80
 Vint v. Padgett 459
 Vulliamy v. Noble 422

W.

Walker v. Frobisher 335
 — v. The Provincial Insurance
 Company 312

W.

PAGE.
 Walton v. Bernard 136
 Walter v. Selve 399
 Wanstead Board of Health, The, v.
 Hill 404
 Warburton v. Sandys 89
 — v. The London and Black-
 wall Railway Company 415
 Warden v. Jones 35, 570
 Ware v. Polhill 80
 Warren v. Coultts 557
 — v. Lynch 326
 — v. McKenzie 136
 Waters v. Shade 72
 Watt v. Grove 146
 Waterhouse v. Lee 279
 Watson v. Saul 377
 — v. The Duke of Wellington. 189
 Way's Trusts, *In re* 190
 Wellesley, Lord, v. The Earl of Morn-
 ington 25
 Wells v. Wood 141
 Whitaker v. Rush 201
 White, *Re* 563
 — v. Cohen 405
 — v. Dobinson 169
 — v. Haight 197
 — v. Hillacre 459
 — v. The Carmarthen, &c., Rail-
 way Company 76
 Whitmore v. Claridge 570
 Wild v. Gibson 88
 Wilkinson v. Adam 326
 Willett v. Winnell 394
 Williams v. Davies 422
 — v. Gaude 513
 — v. Owen 396
 — v. Powell 38
 — v. Thompson 52
 Williamson v. Codrington 89
 Willie v. Lugg' 460
 Wilson v. Baddard 508
 — v. Townsend 405
 Wing v. Harvey 159
 Wolfe v. Horncastle 169
 Wood v. Downes 146
 — v. Shakeshaft 327

W.	PAGE.	Y.	PAGE.
Wood v. Wood	514	Yates v. Jacke	284
Woodford v. Charnley	256	— v. Whyte	169
Woods v. Martin	203	Yem v. Edwards	136
Wormald v. Maitland	71	Young v. O'Reilly	52
Wright v. Wilken	44	— v. Reighley	147

PAGE.

.....	284
.....	169
.....	136
.....	52
.....	147

REPORTS OF CASES
ADJUDGED IN THE
COURT OF CHANCERY
OF
UPPER CANADA,
COMMENCING OCTOBER, 1865.

BROWN v. SAGE.

Injunction--Servant.

A servant, after leaving his master's service, continues bound by an injunction issued while he was a servant, against the master and his servants to restrain waste.

Where an injunction forbids the cutting down of trees, it is no answer to a motion to commit for breach of the injunction, that the trees cut down in contravention of the writ were of little value. A servant who has notice of an injunction, may be committed for breach of it, though he has not been served with the writ.

This was a motion before His Honor *V. C. Mowat*. *Statement.*
The case at the hearing is reported, ante vol. xi. page 239.

Mr. *Barrett*, for the plaintiff, in support of the application, cited Lord *Wellesley v. The Earl of Mornington (a)*.

Mr. *McLennan*, contra.

Mowat, V.C.—This was a motion to commit one *Frederick Pingstone* for breach of an injunction granted

1 VOL. XII.

(a) 11 Beav. 181.

1865. in this cause on the 21st of September, 1863, and continued by the decree of 14th February, 1865 (a). The injunction restrains the defendants *Dale* and *Fitzgerald*, and their servants, workmen and agents, from cutting down or removing any pine trees or timber standing, growing, or being on thirty acres of land described in the injunction, and from in any way interfering therewith.

Brown
v.
Sage.

Pingstone, a servant of the defendants, was not served with the injunction; but he admits that he was aware of its having been issued, and he does not pretend to have been under any misapprehension as to its terms. Servants, agents and workmen are bound to obey an injunction addressed to them as such, and of which they are aware, though they may not individually have been served with copies of it. Service on all is sometimes impossible; and where it is not impossible, to require it would often be oppressive as well as useless.

Judgment.

In *Pingstone's* affidavit in answer to the motion he does not deny that he has cut some pine trees or timber on the land in question; but asserts that he cut down only nineteen pine trees, that a small part was used for rails, and that the rest were rotten and not fit for timber or rails. These statements are controverted, but they would form no excuse even if true. The injunction forbade all cutting; and persons restrained by it had no right to limit their obedience by the opinion they might form as to the value of any trees the cutting of which was in terms enjoined.

It is further suggested that *Pingstone* cannot be proceeded against for a breach of the injunction, because he had ceased to be a servant of *Dale* and *Fitzgerald's* when he committed the acts complained of, though he was in their employment at and before the issuing of the injunction, and so continued for about a year after-

(a) Vide ante vol. xi, p. 239.

1865.

Brown
v.
Sage.

wards. No authority was cited in support of the argument which was addressed to me on this point. Having been a servant of the defendant's when the injunction issued, and having so continued for a considerable time afterwards, and having been bound as such by the injunction, I think he continued bound after having ceased to be their servant, unless he was in a position to claim an independent right to do the acts complained of. *Pingstone* makes no such pretence; he impliedly acknowledges that he considered himself bound by the injunction when he cut the trees, for he says: "I should not have cut the same had it not been that I considered that the injunction did not cover timber that was of no value for timber or that was unsaleable." He says further, that, before the right of the parties to this suit accrued, *William Sage*, the former owner of the property, put him in possession to take charge of the land, and to cut and clear what he wanted; that he partly cleared four acres and built a dwelling-house thereon, where he now lives; and that it was on these four acres that he did the acts complained of. This statement is not proved by any evidence except *Pingstone's* own affidavit; and, if true, does not shew that he thereby acquired any right to the property, nor does he pretend that he supposed or claimed that he had any. He does not even say that he has retained possession since the time to which he refers, or was in possession when *Dale* and *Fitzgerald* bought, or while he was in their service, though he is living on the place now. If he has been in possession, it has probably been as their servant and by their permission. I cannot, therefore, even upon his own account of the facts, assume the existence or claim of any independent interest in the property. I do not think he meant to assert either.

An injunction may not restrain a servant not named in it from exercising, after his service has ceased, any independent right he has to do the acts enjoined. But I think it does restrain him from afterwards committing

1865. the acts forbidden, as a mere wrong-doer, having no reasonable pretence of a right to do them. I do not think I would be justified in holding that, if a man, who with the aid of his servants and workmen was committing waste, is forbidden by injunction to continue the wrong, he may discharge his men and entitle them on their own behalf to proceed with the waste, notwithstanding their knowledge of the injunction. It is for the public interest that it should be well understood that injunctions, while they stand, must be obeyed.

Judgment.

It was further argued that the plaintiff should shew that his judgment is still in force and unsatisfied, and that execution is still in the sheriff's hands. I am clear that upon a motion of this kind no such evidence is necessary.

I think, therefore, that the motion to commit, if pressed, must be granted.

KING V. KEATING.

1865.

Voluntary conveyance—Objection for want of parties—Trusts.

A., having received a large sum for the sale of a secret imparted to him and his wife by a relative of the latter, bought with part of it a farm, of which he took the deed in his own name; and afterwards gave instructions for the preparation of a settlement of the property for the use of himself for life, with remainder to his wife and children; but the settlement was not prepared or executed for a year. Shortly before it was executed, he had entered into a hazardous business, which proved disastrous, all his means not sufficing to pay its losses. The farm was the only real estate he had in the province. *Held*, at the suit of a creditor whose debt accrued before the settlement, that the settlement was void as against creditors.

When a debtor makes a voluntary settlement under circumstances that render it void as against creditors, the grantee is not entitled, as being in effect a surety for the debt, in consequence of time being given to the debtor, or of any like transaction that would free a surety from his liability in ordinary cases of suretyship.

A. holding property in trust for B. for life, and then for B.'s wife and children, purchased B.'s life-estate at sheriff's sale. *Held*, that he was trustee thereof for B. only, and not for the other *cestuis que trust*.

After witnesses had been examined, and the cause heard at Sandwich, the cause was re-argued at Toronto. *Held*, that the defendant could not insist, as a matter of right, on an objection for want of parties not taken at the hearing at Sandwich.

The Court has jurisdiction to decree a trust deed void, in the absence of the *cestuis que trust*; the trustees sufficiently representing them under Order 6, sec. 2, rule 7 (1853); and it is in the exercise of the discretion of the Court under that rule, that in such cases the *cestuis que trust*, or some of them, are required to be made parties.

This cause was heard before His Honor *V. C. Mowat*.

Mr. Hector Cameron and Mr. G. D. Boulton for Argument.
 plaintiff cited, to shew that the settlement in question was void, *Spirett v. Willows (a)*, *Buckland v. Rose (b)*, *Brown v. Davison (c)*, *Thompson v. Webster (d)*, *McDonnell v. McDonnell (e)*.

(a) 11 Jur. N. S. 70.

(b) 7 Gr. 440.

(c) 9 Gr. 439.

(d) 4 L. T. N. S. 750.

(e) 9 U. C. Q. B. 259.

1865. Mr. Strong, Q.C., for the infant defendants, referred to *The Bank of Upper Canada v. Shickluna* (a), *Thomson v. Perceval* (b), *Mayhew v. Crickett* (c).

King
v.
Keating.

Mr. Douglas, for the other defendants.

MOWAT, V.C.—This is a bill by a judgment creditor of *John W. Keating* and *Stephen J. Davis*, who were partners in trade; and the object of the bill is to set aside a postnuptial settlement of real estate, executed by Keating on the 22nd December, 1851, for the benefit of himself for life, with remainder to his wife and their children. The defendants are the surviving trustees of the settlement and the *cestuis que trust*. The latter were added by direction of his Lordship the Chancellor, when the cause came before him for hearing (11th October, 1862). After they had been made parties, the cause came on again for examination of witnesses and hearing before the late Vice-Chancellor *Esten*, on the 3rd of May, 1864. That lamented judge having died without pronouncing judgment, the cause was re-argued before me on the same evidence upon the 19th of October, 1865.

Judgment.

At the hearing before me, Mr. *Strong*, for the infant children, took a preliminary objection that *Davis* should be a party to the suit. Now, unless the defendants, on whose behalf this objection is taken, are entitled to insist upon the objection as a matter of right, I think I ought not to give effect to it; for *Davis* appears from the evidence to have been destitute of means for many years past; and, therefore, no useful object would be accomplished by making him a party to the suit. The objection was not taken by the answers, nor when witnesses were examined and the cause heard before the late Vice-Chancellor, nor until the cause came before me. Under

(a) 10 Gr. 157.
(c) 2 Swans, 185.

(b) 5 B. & Ad. 925.

these circumstances I think that the objection cannot be insisted upon as a matter of right. *Jones v. Jones* (a).

1865.

King
v.
Keating.

It was also suggested by the learned counsel, in the course of his argument on the merits, that certain execution creditors, at whose suit the interest of *Keating* in the property was said to have been sold to one of the trustees in 1854, should be parties. This objection, like the other, was not before taken, and I think that no injustice to anybody will arise from my passing it by without further consideration.

The learned counsel for the infant defendants further objected, that the registration of the plaintiff's judgment does not affect these defendants, as they were not made parties until long after the time limited by the statute 24 Vic., ch. 41; and he referred to *Juson v. Gardiner* (b). To give effect to this objection would be inconsistent with his Lordship's order for making the *cestuis que trust* parties to the suit; and I do not see that the statute referred to, or the case we decided upon it, applies. I do not understand that the *cestuis que trust* are required in these cases to be made parties in order to bind their interests; for I think the trustees of the settlement sufficiently represent them for that purpose under Order 6, sec. 2, rule 7 (3rd June, 1853.) It is indeed said in some of the text books, that "trustees do not sufficiently represent their *cestuis que trust* on a bill to set aside a settlement." (c). But the only authority referred to for this statement is *Reed v. Prest* (d); while, on examining that case, I find that no such doctrine as the learned counsel contended for is laid down in it; and in fact some only of the *cestuis que trust* were ordered to be made parties. Having reference to the terms of the 7th rule, I find myself

(a) 3 Atk. 110. Vide 1 Daniel's Pr. 4th ed. 278.

(b) 11 Grant, 23.

(c) Morgan's Orders, p. 157.

(d) 1 K. & J. 183.

1865. ^{King}
v. ^{Teating.} unable to resist the conclusion that it was intended thereby to make it discretionary with the Court, in every case within the terms of the rule, either to require the *cestuis que* trust to be made parties, or to dispense with them as parties, or to require some to be made parties and to dispense with others. I do not think that it was intended by the Vice-Chancellor in *Reed v. Prest*, or by the Chancellor in the present case, to hold that the presence of the *cestuis que* trust was necessary in order to make the decree binding on them. I may observe, that a writ against lands was placed in the sheriff's hands on the 24th July, 1863, and is in his hands still. This gave the plaintiff a right to file his bill against the new defendants, whether the registration of his judgment was binding on them or not. But this writ is not mentioned in the bill.

Judgment. The result is, that I must consider the case on its merits.

The settlement purports to be voluntary. If that is its real character, it is under the circumstances clearly void as against creditors. The settlor was at the time engaged jointly with *Davis* in a hazardous and speculative, and (as a few months proved) a ruinous business. The partnership debt exceeded at the time £2,000. Its assets were in unorganized territory, situate somewhere on Georgian Bay, and were all beyond the reach of judicial process. The settlor's own property, real and personal, in Upper Canada, did not equal the liabilities of his firm. The settled property, valued at £1,000, was the only real estate which he had. His personal estate consisted of his furniture and farm stock, and money due to him from a Lower Canada corporation—the Montreal Mining Company. In August, 1852, he dissolved his partnership with *Davis*, selling out his interest to one *Murray*; and (with the exception of what went to pay the settlor's personal or family expenses) all the money he received from *Murray*, and all the

money he received from the Mining Company since the settlement, and all that could be realized from the partnership assets, appear to have gone to pay liabilities of the partnership; and yet many of its liabilities, including the debt due to the plaintiff, are still unpaid. Whatever the supposed or nominal value of the partnership assets may have been at the time of the settlement, it thus appears that all of them, and all the private means of the settlor, excluding the settled property, were in fact insufficient to pay the liabilities then outstanding or incurred immediately afterwards; and his partner appears to have had no private means. Vide *Townsend v. Westacott (a)*, *Scarf v. Soulby (b)*. It is beyond doubt that a voluntary settlement by a man so situated cannot be maintained. The principle stated in *French v. French (c)* is alone sufficient to dispose of it. The Lord Chancellor there observed: "A person may, although indebted at the time, withdraw some portion of his property, provided there remains enough for the satisfaction of his creditors; but it is an act which, *prima facie*, must be made out. It would be absurd to suppose that a person worth £10,000, and settling £1,000, such settlement could be impeached; but if, having £10,000, and owing that amount, he settles £5,000, it would clearly be a fraud; and that state of things is not altered by the debtor's having a reversionary interest, which, of course, is equally susceptible of value; nor is the transaction affected by the circumstance of his *having property abroad, or debts due to him*. If the effect is to withdraw any portion of the property, so that there does not remain sufficient to enable creditors to pay themselves, that is, in my opinion, clearly within the statute."

Mr. Keating says, in his disposition (which was read by the plaintiff), that he gave instructions for the

(a) 2 Beav. 343.

(b) 16 Sim. 481.

(c) 6 DeG. McN. & G. 95.

1865.

King
v.
Keating.

Judgment.

1865. settlement a year before, when he was under no embarrassment. This statement is not confirmed by any other evidence, and does not, I think, vary the case.

King
v
Keating.

So far as the plaintiff's own debt is concerned, and the other debts due at the time of the settlement, the mere fact of that instrument being voluntary, independently of the other facts in evidence, would render the settlement void as against these debts. *Spirett v. Willows (a)*.

But was it voluntary? The uncle of Mrs. *Keating*, an Indian chief, was aware of the locality of a valuable copper mine in Indian territory on Georgian Bay. He communicated the secret to Mr. and Mrs. *Keating*. The chief subsequently surrendered a large district of territory, including that in which the mine was; and the Government granted a patent of a portion to a mining company, of which Mr. *Keating* was the promoter. The terms of the surrender by the Indians are not stated, nor of the grant to the company: and none of the documents affecting or carrying out either transaction have been put in evidence. All that appears is in the evidence of Mr. *Keating* himself. The company gave Mr. *Keating* certain shares in the company for the secret; and the farm in question was bought with part of these shares, or of the proceeds of them. These are the facts by means of which the defendants endeavour to make out that the deed of settlement was not voluntary. I am asked to assume that the chief intended the secret for the separate use and advantage of Mrs. *Keating*: and that this intention impressed a trust on the secret, and on the profit made by means of its disclosure; or created a contract on the part of *Keating* to settle the proceeds to the separate use of his wife and family; or has that effect in reference to what was invested in the purchase of the farm. I do not see how I can say this. I do not

Judgment.

(a) 11 Jurist, N. S. 70.

see how I can attach any different consequence to the communication of the secret by an uncivilized Indian chief to his niece and her husband, from what would be proper if, under like circumstances, the disclosure had been made by a civilized white man. There would be no pretence for the contention in the latter case; and I think I must hold that there is no pretence for it, either, in the former case. No doubt, under the circumstances which are in evidence, there was a moral duty on Mr. *Keating* to secure a portion of the profit for his wife and family, just as there may be a like duty in the case of any husband who has received money from the relatives of his wife. But such a moral obligation is insufficient to sustain against creditors a settlement executed in fulfilment of it. I may quote the language of the Lord Chancellor in *Goldsmith v. Russell* (a) as applicable to this branch of the case: "The settlement was not one which [the settlor] was bound to make: it was said to have been made in pursuance of a previous parol agreement; this allegation is very loosely made: it seems always to have rested on an understanding only: it was not obligatory, which circumstance of itself would be sufficient to bring the case within the statute of *Elizabeth*," &c. See also *Penhall v. Elwin* (b), *Warden v. Jones* (c).

It was contended that the settlement being at all events valid as between *Keating* and the other defendants, they became to the extent of the property mere sureties in respect of the debts of *Keating* for which the property was liable; that the plaintiff's attorney procured the writ against *Keating's* goods to be returned *nulla bona*, though he had goods at the time; and that the other defendants are thereby released from their liability for the debt. To this argument there are several answers. There is no proof that either the plaintiff or his attorney knew at the time that there were any goods which might be seized under the writ,

1865.

King
v.
Keating.

Judgment.

(a) 5 DeG. McN. & G. 554.

(b) 1 Sm. & Giff. 258.

(c) 2 DeG. & J. 76.

1865. if indeed there were any such ; or that they even knew of the settlement ; but, had these difficulties been out of the way, I am not prepared to hold that a creditor is shackled in his dealings with a debtor who has made a voluntary settlement, by the rules which affect the relation of principal and surety ; and that the voluntary grantee is entitled to keep the property if the creditor has given a day's time to the debtor, or has varied in the slightest degree his contract with the debtor, after the execution of the settlement. The rules which the defendants desire to invoke are considered necessary in order to do justice to sureties ; but it does not follow that they would be just between voluntary grantees and the creditors of their grantor. I think that they would be most unjust and entirely indefensible if applied in such cases, and no authority or dictum was cited to me in favour of so applying them.

Another ground of defence urged before me was a purchase of the property by one of the trustees at a sheriff's sale under an execution against the lands of *Keating*, at the suit of certain creditors who are not parties to this suit. I am satisfied that this sale was intended and considered by all parties at the time, as a sale of *Keating's* life interest under the trust deed. Such is the view of it set up in all the answers ; and the consideration for it, while it was probably small as the price of even *Keating's* life estate, was merely nominal, if regarded as the price of the fee. Now the trustee held the estate for the life of *Keating* in trust for him ; and the purchase at the sale, if valid, enured for *Keating's* benefit. The plaintiffs, as creditors by registered judgment and execution, have clearly therefore a lien on the life estate for their debt. The bill does not claim a lien on this ground : and, on the other hand, the only sale set up in the answer of the defendants is a sale said to have taken place at the suit of the present plaintiff ; the fact being that no execution against lands at the suit of the plaintiff here appears to have been issued for several

King
v.
Keating.

years subsequently ; and the judgments and executions under which the sale did take place are not put in evidence. *McDonell v. McDonell (a)*. Whether, therefore, I consider the matter on both sides, as it would appear if all the necessary allegations and formal proofs were introduced, or as it stands on the pleadings and evidence now, this ground of defence must fail.

Adopting the language of Lord *Hardwicke* in *Taylor v. Jones (b)*, " It is upon these reasons I must decree for the plaintiff, the creditor, against the wife and children ; for though I have always a great compassion for wife and children, yet, on the other side, it is possible, if creditors should not have their debts, *their* wives and children may be reduced to want.

I think the settlement must be declared void against creditors.

The plaintiff is entitled to the costs of the suit.

SMALL V. ECCLES.

Trustee—Interest—Rests.

The estate of a trustee, who had retained money in his hands for six years after he should have paid it over, and had rendered an account claiming a balance in his favour, was held chargeable with interest at six per cent. with annual rests.

This was an appeal from the Accountant's report, and was heard before His Honor *V. C. Mowat*.

On the 9th of September, 1856, Messrs. *Small* and *Addison* assigned to the late *Henry Eccles* all their stock-in-trade and all debts due to them, to secure *Eccles* in respect of a debt of £175 they owed him, and of a bill of exchange for £500 sterling, which he had indorsed for their accommodation, and which

Statement.

(a) 9 U. C. Q. B. 259.

(b) 2 Atl. 603.

1865. had been protested for non-acceptance. On the 2nd of October, 1856, *Eccles* entered into possession, and during the next twelve months realised by the sale of the stock-in-trade and from the debts a large sum beyond what was necessary to pay his debt and the bill of exchange. *Eccles* died in November, 1863, and this suit was by *Small* and *Addison* against his administratrix. A decree was made therein referring it to the Accountant to take all necessary accounts. In pursuance of this decree the Accountant made his report, and thereby found, among other things, that there was a clear balance of £1448 4s. 4d. in the hands of *Eccles* on the 2nd of October, 1857; that he had paid no part of this balance; and that his estate was chargeable with compound interest thereon at six per cent. From this report the defendant appealed on nine grounds, all of which except one, which involved the question of the propriety of charging compound interest, were disposed of at the hearing. His honor the Vice-Chancellor referred the report back to the Accountant for reconsideration with respect to certain items amounting together to £253 1s. 1d.; and judgment as to the question of compound interest was given on a subsequent day.

Judgment.

Mr. *Gwynne*, Q.C., and Mr. *Ferguson* for the appellant, cited *Styles v. Guy* (a), *Jones v. Foxall* (b), *Williams v. Powell* (c), *Rocke v. Hart* (d).

Mr. *Fitzgerald* and Mr. *Davis*, contra, referred to *Landman v. Crooks* (e), *Coldwell v. Hall* (f), *Smith v. Roe* (g), *Penny v. Avison* (h), *The Mayor, &c., of Berwick v. Murray* (i), *The Attorney-General v. McNaughton* (j), *Hutchins v. Hutchins* (k), *Robinson v. Robinson* (l), *Knott v. Cottee* (m), *Hedges v. Hedges* (n).

(a) 16 Sim. 230.

(c) 15 Beav. 461.

(e) 4 Gr. 353.

(g) 11 Gr. 311.

(i) 3 Jur. N. S. 847.

(k) 16 Jur. 107.

(m) 16 Beav. 77.

(b) 15 Beav. 388.

(d) 11 Ves. 58.

(f) 9 Gr. 111.

(h) 3 Jur. N. S. 62.

(j) 4 DeG. McN. & G.

(l) 1 DeG. McN. & G. 247.

(n) 16 Jur. 634.

1865.

Small
v.
Eccles.

MOWAT, V. C.—This was an appeal from the Accountant's report. I disposed of all the grounds of appeal at the hearing of the motion, except as to the liability of the defendant to be charged compound interest at six per cent. on the balance in the hands of the intestate whose administratrix she is. The proper conclusion as to this point is clear enough, when the principles on which courts of equity act in such cases are considered.

A trustee is charged with all the interest or profit he has made with the use of trust money, whenever the amount so made can be ascertained. If a trustee wrongfully takes trust money from a proper state of investment, he is charged with all the interest, whether he received as much or not, which the investment if continued would have yielded. If he disregards any express provision for investment which the instrument contains, he must make good the loss to the fund. Judgment.

But in cases to which these rules do not apply, or in which they would not afford all the relief to which the *cestuis que* trust are justly entitled, the trustee is in England charged on money in his hands, sometimes interest at four per cent., sometimes simple interest at five per cent., and sometimes compound interest at five per cent. The reason that four per cent. was adopted as the lowest rate, is that it was the ordinary rate at which money was lent in England. Here, however, money has never been obtainable at four per cent. In 1811, the legal interest here was fixed at six per cent. (51 Geo. III, ch. 9). Special privileges were subsequently given by the legislature to certain companies, authorizing them to take more than six per cent.; and in 1853 an act was passed (16 Vic. ch. 80) modifying the usury laws as to all other associations and individuals. In 1858 (22 Vic. ch. 10) the banks were allowed to charge seven per cent.; the special privileges granted to particular companies with respect to interest were left to operate; and all restrictions in regard to contracts

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Hedges (n).

188.

S. 62.
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N. & G. 247.

1865. for interest on the part of other persons were abolished. But long before this it was generally impracticable to borrow at 6 per cent. ; and by various contrivances borrowers had constantly to submit to pay much higher rates. Since the abolition of the usury laws this court has generally invested its moneys at eight per cent. ; and sometimes at a still higher rate. The current rate since the abolition of the usury laws has seldom, if ever, been as low as seven per cent. in fact, whatever the nominal rate might be. In this condition of things the Court of Chancery in this country, which is required by statute to govern itself by the rules of decision which govern the Court of Chancery in England, found it necessary, according to a due construction of that enactment, to fix upon six per cent. as the lowest rate of interest chargeable in any case. This determination limited cases for interest to two classes up to the year 1858, viz., those in which simple interest at six per cent. should be charged, and those in which compound interest at that rate should be allowed ; *Landman v. Crooks* (a). On the abolition of the usury laws this restriction was at an end ; and the court has ever since been free to retain six per cent. as the lowest rate, and yet to recognize all the gradations observed by the English courts, on taking the accounts of trustees. *Smith v. Roe* (b).

Judgment.

Now, in England, five per cent. with rests is charged where a trustee, in breach of his duty, employs the trust money in trade, "that being," as Lord *Cranworth* observed in *Robinson v. Robinson* (c), "the ordinary rate of interest paid on capital in trade." *Penny v. Avison* (d), *Jones v. Foxall* (e), *Williams v. Powell* (f), and *Hutchins v. Hutchins* (g). Where the trustee has not employed the money in trade, but, in not paying over or investing the money, has been guilty of some mis-

(a) 4 Gr. 353

(c) 1 DeG. McN. & G. 257.

(e) 15 Beav. 392.

(b) 11 Grant, 311.

(d) 3 Jur. N. S. 62.

(f) *ib.* 468.

(g) 15 Jur. 107.

conduct beyond mere negligence, his case belongs to the second class I have mentioned, and he is charged with five per cent. without rests. Where no such special circumstances exist, he is charged at the lowest rate, or four per cent. *Knott v. Cottie (a)*.

1865.

Small
v.
Eccles.

Our lowest rate being six per cent. without rests, it is obvious that we ought to charge a trustee something more, when his conduct would in England have subjected him to a charge of five per cent. This we may do either by charging him with interest at some rate above six per cent., or with compound interest at six per cent. *Landman v. Crooks (b)*, *Smith v. Roe (c)*. The question in the present case, then, is, whether it is one for the lowest rate of interest, as the defendant in effect contends? Compound interest at six per cent. for the period for which the accountant has charged it, is about equal to simple interest at seven per cent. for the same period.

Judgment

I have said an increased rate is charged where the trustee has been guilty of some misconduct beyond mere negligence. But it is not any kind of misconduct beyond mere negligence which will have this effect: *Mayor of Berwick v. Murray (d)*, *Attorney-General v. Alford (e)*. One example of the misconduct necessary to be made out for such a purpose is stated by the Master of the Rolls in *Williams v. Powell (f)* to be, "If, in defiance of the duty which he has undertaken to perform, an executor, having ample means for the purpose, and there being no debts, does not choose to pay the legacies and divide the residue." Vide also *Attorney-General v. Alford*. Not paying over is treated as a greater wrong than a mere omission to invest.

Now, what the trustee is charged with in the present

(a) 16 Beav. 77.

(b) 4 Gr. 353.

(c) 11 Gr. 311.

(d) 7 DeG. McN. & G. 497.

(e) 4 DeG. McN & G. 852.

(f) 15 Beav. 461.

1865. case is, keeping without excuse the money in question from 1857, when he appears to have received it, until November, 1868, when he died; rendering no account of his receipts until 6th of February, 1860; and then delivering an account falsely claiming a balance in his favour. This account his administratrix by her answer insisted upon as correct. It was said that the discrepancy between the result as established, and the balance as stated in this account, has arisen from the inability of the defendant to explain and prove what the trustee might himself have been able to explain and prove satisfactorily, if this suit had been brought in his lifetime. This is quite possible; but I must adjudicate on the case upon the assumption that the truth is as now established. It is not pretended that the account delivered was acquiesced in; and, on the contrary, it was admitted that an arbitration had been in progress between the parties for some time before the trustee died. If his estate suffers loss, it is in consequence of his not having kept and preserved proper accounts and vouchers: and this is a breach of duty on the part of an accounting party, so much to be discouraged as the retention of trust money after it should be paid over. Whatever the real facts may be, I have no alternative but to assume judicially that this trustee received a large sum of money—upwards of £1,000—in 1856 or 1857, which he should immediately have paid over: that he did not choose to do so; but in disregard of his duty retained the money to the day of his death, six years afterwards; rendered no account for some years of his dealings as trustee; and then rendered an account, claiming, contrary to the fact, that he had no trust money in his hands, but was still a creditor of the plaintiffs' to a small amount. Under these circumstances, it is clear that such a case would not in England be regarded as one for the lowest rate of interest; and consequently it cannot be regarded as of that class here. The defendant must therefore be charged with more than our lowest rate—simple interest at six per cent.; and,

Small
v.
Eccles.

Judgment.

having reference to the considerations I have mentioned, I see nothing which the defendant can justly complain of in the Accountant's having selected, as the increased rate, six per cent. with rests.

1865.

Small
v.
Eccles.

The first, second, fifth, sixth, eighth and ninth grounds of appeal, I overrule with costs. I refer back to the Accountant for reconsideration the matters affected by the third, fourth, and sixth grounds of appeal. I disallow all the others with costs. The plaintiffs are also entitled to the costs of the motion, so far as relates to the sixth ground, as the Accountant's decision was right on the evidence before him; but I think the defendant should have an opportunity, since she desires it, of giving further evidence if she can in regard to the item. No costs to either party as to the third and fourth grounds of appeal.

CONNOR V. THE BANK OF UPPER CANADA.

Pleading—Multifariousness.

The purchaser of an estate which was subject to a mortgage created by way of security for a third party, of which the purchaser was ignorant, filed a bill to be relieved against it, stating two alternative cases for such relief; first, that the mortgage had been discharged by reason of time given by the holders thereof to the principal debtor; the second, that the mortgagor, who sold the premises and had covenanted that it was free from incumbrances, was bound, and might be ordered, to pay off the mortgage and procure its discharge, but did not offer himself to redeem the holders thereof. On demurrer by the mortgagee, held that the bill was multifarious.

The point involved in this case appears sufficiently Statement.
from the head note and judgment.

Mr. G. D. Boulton, for the demurrer.

Mr. Brough, Q.C., and Mr. Snelling, contra.

1865. *Tasker v. Small* (a), *Lumsden v. Fraser* (b), *Campbell v. MacKay* (c), *The Attorney-General v. Cradock* (d); Connor v. *Inman v. Wearing* (e), *Jerdein v. Bright* (f), *Parr v. The Attorney-General* (g), *Thomas v. Hobler* (h), *Wright v. Wilkin* (i), *Rawlings v. Lambert* (j), *Davis v. Otty* (k), *Innes v. Mitchell* (l), *Mitford on Pleading*, page 208, were referred to by counsel.

Judgment. VANKOUGHNET, C.—In this case the bill presents two alternative cases. The first is, that the mortgage in question has been discharged by reason of time given to the principal debtor, for whom the mortgagor executed the mortgage as surety. The second is, that, this case failing, the mortgagor, who had sold the premises to the plaintiff, after the mortgage had been created, and had covenanted that it was free from incumbrances, may be ordered to pay off the mortgage, and procure its discharge by the Bank of Upper Canada, the holder of it. The plaintiff does not offer to redeem the Bank. He simply asks in the second alternative that the mortgagor, who had sold to him, may be ordered to pay off the Bank, and his title be thus freed from their claim. It is contended that it is not necessary to make a formal offer to redeem, and that this is so much a matter of course, as to be implied from the mere fact of the mortgagor bringing the mortgage into court; that it is in fact necessary and direct relief, if the mortgage here be sustained. *Inman v. Wearing*, and the cases cited in it, are opposed to this view. But, however, this might be in an ordinary case in which a mortgagor comes to the court to pay off a balance, if any, remaining due on a mortgage (n), it seems to me clear that

(a) 3 M. & Cr. 53.

(b) 1 M. & Cr. 589.

(c) 1 M. & Cr. 616.

(d) 3 M & Cr. 93.

(e) 3 DeG. & Sm. 729.

(f) 4 L. T. N. S. 12.

(g) 8 Clk. & F. 409.

(h) 8 Jur. N. S. 125.

(i) 4 DeG. & J. 141.

(j) 1 J. & H. 458.

(k) 10 L. T. N. S. 284.

(l) 4 Drew. 57.

(n) But see *Patch v. Ward*, 7 L. T. N. S. 413; *Harding v. Turzey*, 10 Jur. N. S. 872.

1865.

Connor
v.
The Bank
of U. C.

on this pleading the mortgagor does not merely not offer to redeem, but does not mean to be considered as making such offer, and does not in fact intend to redeem. The first case made by him is an independent case, in which he asserts his right to get rid of the mortgage altogether, because of the dealings of the mortgagee. No intention or offer to redeem can be implied from this. It is a complete case of itself giving title to complete relief, if it be established in evidence. But, says the plaintiff or the owner of the equity of redemption, if this fails against the mortgagee, then I turn round and attack my vendor, the mortgagor, who is bound to save me harmless from the mortgage, and I ask relief against him, and that he may be ordered to pay off the mortgagee, but I do not offer, nor (as I read the pleadings) do I intend to pay him myself. Now what has the Bank to do with this latter question? The first case made by the bill failing, the Bank is entitled, for aught that appears, to their mortgage money: and what have they to do with the contest between the plaintiff and the mortgagor as to which of them shall ultimately lose the money? The bill, it seems to me, presents two cases directly inconsistent and opposite the one with the other, so far as the Bank is concerned. It is not, in the language of Sir *John Leach*, approved of by Lord *Cottenham* in *Parr v. The Attorney-General* (a), "an entire case against one defendant in which the other defendant is connected only with some portion of the whole case," and has no right, therefore, because of his partial interest merely in the entire case, to complain of his being made a party, for if he could, the whole matter in which he was involved, though to a very limited extent, could not be disposed of without splitting up the case, perhaps into several parts. This is rather a bill presenting two distinct cases, the right to succeed in the one of which depends or is rested only on the failure of the other. It is not the case of

Judgment.

(a) 8 Clk. & Fin. at page 234.

1865.

Connor
v.
The Bank
of U. C.

alternative relief arising out of one set of transactions to which both defendants were parties, or in which both are implicated, or by which both can be affected. The Bank had nothing to do with the sale by the mortgagor to the plaintiff, and cannot in any way be prejudiced by it. I think it does not fall within the class of cases, or the principles stated by Vice-Chancellor Wood in *Rawlings v. Lambert*, as reported at page 466 of *Jones and Hemmings*.

Judgment.

It is, as is constantly said by judges, very difficult to lay down any rule, by which to pronounce on the objection of multifariousness. Courts and judges are reluctant to yield to it. The desire is to settle as far as possible all matters between parties that are in any way connected, and to give complete relief. But this case, it seems to me, presumes too much on this desire, and the indulgence which flows from it. Look at the mere question of delay and expense, and inconvenience this procedure might occasion: a judge might have a great deal of evidence on the first case presented, and a great deal of argument, take time to consider it, and weeks afterwards decide it was not made out, and then go on with the second case on the same record. The plaintiff might desire to have reheard, in the meantime, the decision on the first case; the Bank would have to wait before they could get out of court till the second case in which they had no interest had been disposed of. Surely, this ought not to be. I must allow the demurrer with costs and leave to amend.

1865.

JACKSON V. MATTHEWS.

IN RE PATTISON.

Administration suit—Practice.

Although proceedings in the Master's office may, under the general order, be taken *ex parte* against a defendant, who has allowed a bill to be taken *pro confesso* against him, that mode of proceeding is irregular where an administration order has been obtained upon notice without bill filed.

This was an administration suit. The usual administration order had been obtained by the plaintiff after notice served on the heir-at-law and personal representative of the deceased. The heir-at-law did not appear on the motion, and all proceedings under the order were had in the Master's office, without notice being given to him. The Master having made his report, the cause was brought on for further directions, when

Mr. *Hodgins*, for the plaintiff, asked that a decree might be made directing a sale of the real estate, the Master having reported that there was not any personal assets.

Mr. *Graham*, for the executor, did not object to a decree as asked.

SPRAGGE, V. C.—An administration decree was obtained upon summons by a creditor, for the administration of the real and personal estate of *George S. Pattison*, deceased. The Master has reported that there is no personal estate, and I am asked, on further directions, to order the sale of the real estate. I find that all the proceedings in the Master's office have been *ex parte*. The administrator and the heir-at-law were served with the original summons, but have not since been notified of any proceedings. This appears to me to be irregular; there is nothing in the general orders to warrant it.

1865. When the proceeding is by bill, and the same is taken *pro confesso*, subsequent proceedings may be *ex parte*, but then the defendant is required by the general orders to be notified that they may be so. There is no such notice and no such order in relation to proceedings upon summons in administration suits. It is besides most reasonable that the representatives of the real and personal estate should have such notice; the latter probably usually have, being required, to bring in an account, but it would be most unfair to the heir or devisee, that the accounts which effect his estate so materially should be taken behind his back: so much so, that if it were left to the discretion of the Master, as in the case of proceeding by bill, to notify him or not, I should say it would be proper to notify him.

In this case he appears to be entitled to notice, and the proceedings having been taken *ex parte* are irregular. There must be a reference back to the Master.

MCDONALD V. BOICE.

Fraudulent judgment.

A judgment, recovered at law, by the fraudulent acquiescence of the defendant in the action, will be inquired into in this court at the instance of a subsequent judgment creditor; although the rule at law is that only the party to the action can move against the judgment there.

This was a bill filed impeaching the judgment recovered on cognovit by the defendant *Joseph S. Beatty* against one *William Beatty* and which had been assigned to the defendant *Boice*, on the ground that by the fraud of the parties the judgment had been recovered for an amount greatly in excess of what was due by *William* to *Joseph S. Beatty*; thereby depriving the plaintiff of the means of enforcing his judgment.

Upon application to His Honor *V. C. Spragge* an

injunction had been granted *ex parte* restraining *Boice* 1865.
 and *Joseph S. Beatty* from proceeding to enforce the McDonald
 execution issued on such judgment, and on motion made v.
 to dissolve this injunction before the late *V. C. Esten*, Boice.
 that learned judge refused the application, stating:—

“I think the injunction should be continued. I think sufficient doubt exists as to the facts to make it proper to continue the injunction. *William Beatty's* evidence is no doubt considerably weakened by the declarations he seems to have made to the defendant *Boice*, but they may have been made for a purpose, and his affidavit is clear and explicit, and is supported by the account signed by *Joseph S. Beatty*, supposing it to be admissible as evidence against *Boice*. Upon the law of the case, I think it was a fraud in *Joseph S. Beatty* to enter judgment for more than was due, and *William Beatty* himself might have applied against it at law, and the plaintiff, being unable to apply at law, is driven into this court. Statement.
 The authorities cited do not apply. They relate to cases where, the matters in dispute being equally cognizable at law and in equity, they have been first settled at law. Then the judgment may be pleaded in bar; but it cannot be pleaded in bar when it is sought to impugn it, because it has been obtained *per fraudem*. I do not think any case of acquiescence or representation on the part of the plaintiff is established, which should preclude him from obtaining any relief, to which he would be otherwise entitled. I therefore think that an injunction, which should admit the right of the defendants to the extent of £176 14s. 1d. and interest, and which should be limited to what remains due to the plaintiff on his judgment, should be continued to the hearing. The money, I think, ought to be paid into court, and the plaintiff should undertake to speed the cause. The best way is to make no order as to costs.”

Afterwards the cause came on to be heard before his Honor *V. C. Spragge*.

1865. Mr. A. Crooks, Q.C., for plaintiff.

McDonald
v.
Boice.

Mr. Gwynne, Q.C., for defendant.

SPRAGGE, V.C.—I have referred to the judgment pronounced by my brother *Esten* upon the application to dissolve the injunction which I had granted, and as I entirely agree with the grounds upon which he has placed his decision, I adopt his judgment without repeating the reasons for it.

I am satisfied that the plaintiff cannot be affected by any representation made by the judgment debtor; and there is no evidence of representation made by the plaintiff himself.

Judgment. With regard to the right of a subsequent incumbrancer to impeach the judgment of a prior judgment creditor, the point decided by the full court in *Montreal Bank v. Baker (a)*, as between the *Commercial Bank* and the defendants *Rigney* and *Brown*, applies in principle. In the case of *Harrison v. Paynter* an instance is given of an enquiry directed by this court as to the amount due upon a judgment at law. In this case what is brought in question is the amount truly due upon the judgment recovered by *Joseph S. Beatty* against *William Beatty*, there being no adjudication at law upon the amount due. At law *William Beatty* might have applied to reduce it, but a court of law would not hear such an application from a subsequent incumbrancer: so that unless that court can interpose, it depends upon the will of the judgment debtor whether those who have subsequently recovered judgment against him, shall have his effects swept away for a fictitious debt. The defendants are entitled to a reference to ascertain the amount due. There is a good deal of evidence to

(a) 8 Gr. 346.

shew that it is only £176 15s., but if the defendants think they can shew it to be more, the Master must inquire. I think the plaintiff entitled to his costs, unless the judgment recovered by *Joseph Beatty* is substantially sustained as to amount. 1865.

ANONYMOUS.

Practice—Permission to answer—Discretion of Judge—Appeal.

In a suit of foreclosure after the cause had been at issue for more than three years, but no hearing or examination of witnesses had taken place, the Judge in Chambers allowed the personal representative of a deceased party to the cause, who had purchased from the mortgagor, and against whom the bill had been taken *pro confesso*, to put in an answer setting up what in the opinion of the learned judge was a meritorious defence.

Quere, whether this was not a matter of discretion for the judge and was not the subject of appeal.

This was a foreclosure suit, and had been put at issue by filing replication in January, 1862, but no hearing or examination of witnesses had taken place. After the death of one of the defendants, against whom the bill had been taken *pro confesso*, the personal representative in September, 1865, applied to be at liberty to answer for the purpose of setting up facts said to have been discovered since the death of the testator, and which upon argument, his Honor *V. C. Mowat* gave permission to do, the defence intended to be set up by it being in his opinion a meritorious one. From this order the plaintiff appealed to the full court, but in the absence of the other judges it was arranged between the parties to argue the point before his Lordship the Chancellor. Statement.

Mr. *G. D. Boulton*, for the plaintiff.

Mr. *Brough*, Q.C., and Mr. *Snelling*, contra.

1865. *Curling v. Toussend* (a), *Anonymous* (b), *Young v. O'Reilly* (c), *Williams v. Thompson* (d), *Lovell v. Hicks* (e), *Jackson v. Parish* (f), *Fulton v. Gilmore* (g), *Farmer v. Farmer* (h), *Alpha v. Payman*, (i), *Cherry v. Morton* (j), *Smith's Chan. Practice*, vol. i. pp. 404, 472; *Daniel's Chan. Practice*, vol. i. page 271, were referred to.

VANKOUGHNET, C.—I think the court should not in this case interfere with the discretion exercised by the judge in permitting this defendant to file an answer.

The discretion granted an indulgence, and the doing so was not opposed to any rule of practice, nor calculated to cause any unreasonable delay to the plaintiff, and lets in a meritorious defence. See also *Shrursole v. Schneider* (k), as to appeal in matters within discretion of judge.

Appeal dismissed with costs.

GRANT V. BROWN.

Specific performance—Parol contract partly performed.

The evidence of a parol contract for the purchase of land considered, analyzed, and acted on.

This cause was heard before his Honor V. C. Spragge, at the sittings of the court at Chatham, in October, 1865. The facts giving rise to the suit are fully stated in the judgment.

Mr. Fitzgerald and Mr. Atkinson, for the plaintiff.

(a) 19 Ves. 628.

(c) 5 Ir. Eq. 519.

(e) 1 Y. & C. Ex. 230.

(g) 1 Phil. 522.

(i) 1 Dick. 33.

(b) 1 Moll. 462.

(d) 2 Br. C. C. 279.

(f) 1 Sim. 505.

(h) 6 Jur. 72.

(j) Chamb. Rep. 34.

(k) 9 L. T. N. S. 526.

Mr. Roaf, Q.C., and Mr. McCrea, for defendant. 1865.

Grant
v.
Brown.

SPRAGGE, V.C.—This bill is filed for the specific performance of an alleged agreement, for the conveyance by the defendant to the plaintiff of the west half of lot No. 8, in the fourth concession of the township of Chatham, the whole lot containing 200 acres of land.

There is no written agreement between the parties; but it is conceded that sufficient is shewn to let in parol evidence of the terms upon which the plaintiff was let into possession by the defendant, of the contract of purchase, if any, by the plaintiff from the defendant. The plaintiff and the defendant are brothers-in-law, the plaintiff's wife being the defendant's sister. The defendant is owner of the whole lot.

Up to 1842, the plaintiff had resided in Scotland with his family. He was a farm servant, but was not without means, having about one hundred sovereigns in gold, which had come to him through his wife. The defendant was by trade a carpenter. In the beginning of that year he visited Scotland, and was at the house of the plaintiff, and suggested to the plaintiff that he would better his condition and that of his family if he emigrated to Canada. What passed upon that occasion rests upon the evidence of *William Grant*, the plaintiff's eldest son, then fifteen years of age. He says that *Brown* spoke of having a lot of land in Canada; when his father said he would like to come out and farm it; *Brown* said you can't do that; but if you will come out, and work on the lot and clear it, I will give you half of the lot; and that his father at once agreed to this: and with his family left Scotland in the spring of the same year along with *Brown*, and came out to Canada. On their way out they stayed a few hours at Rochester, and there *Grant*, by the advice of *Brown*, purchased some axes, for the purpose of clearing land. They also stopped at Cleveland on their way, and there saw a

Judgment.

1865. *Mr. Duncan*, a mariner, who was there with his vessel, and *Brown* asked him to allow *Grant* to occupy a small house near the land in question, until he should build one for himself; and *Duncan* gave him permission. They arrived at Chatham, where *Brown* then resided, and resides still. *Grant* went upon the land with his family, and has cleared a large portion of it; he has lived upon it with his family ever since. The above is the contract which it is sought by this bill to enforce.

Grant
v.
Brown.

Judgment.

In further direct evidence of the alleged contract *William Grant* says, that after his father went out to the place, *Brown* went out and told *Grant* that he might take which half of the lot he liked: that *Grant* said, I will take this, pointing to a part which was on the west half of the lot; that *Brown* said there was a clearing of three or four acres on the other half, that he would give *Grant* the benefit of, and that he did not care which half *Grant* took. *Thomas*, the second son of *Grant*, and who was thirteen years old when he left Scotland, also deposes to the offer by *Brown* to allow *Grant* to take whichever half of the lot he chose to take.

Brown's account of the circumstances under which *Grant* came to Canada and went upon the land in question are, that when in Scotland he told the plaintiff, who was a farm servant, that he thought he could do better in America with his family then growing up, than in Scotland; but that he never gave him any other encouragement to come to this country. He then proceeds: "that the plaintiff then came to Canada with me; and when we arrived at the town of Chatham, where I live, I took him and his family to my house; and I then told him to look about the country for a time to see what he could do, and if he could find nothing better, he might go to the said lot and work on it, and upon which there was then about 612 acres cleared, and as soon as the place would afford it he might give me something for the use of it. After the

plaintiff had looked about him for some ten days, his family residing with me in the meantime, he decided to go on to the place under my proposal as aforesaid; and I at my own expense removed him and his family to a vacant house near the lot; in which he resided until he rolled up the logs of a small shanty on the lot, which I finished off and furnished with furniture, and into which he then removed."

1865.

Grant
v.
Brown.

The parties differ widely as to what passed, in Scotland, and what took place in this country. *Brown's* account gives the whole the air of generosity on his part; of a man of means assisting a needy relative, which is certainly not warranted by the evidence; and I may observe, in passing, that the procuring the use of *Duncan's* house by *Brown* for *Grant* until *Grant* should build one for himself, (and which is proved by *Duncan* himself) is much more consistent with *Grant's* account than with *Brown's*. And as to *Brown's* furnishing the house for *Grant*, both the sons swear that their father paid him: *Thomas* naming the amount as six sovereigns, the probable full value, I should say, of the articles enumerated by him.

Judgment.

In the dealings between the parties and in their dealing with the property, there were certain circumstances, some of which are relied upon by one party some by the other: and *Brown* relies upon certain disavowals by *Grant* of his having any right in the property, and upon certain conduct on the part of *Grant*, evidencing a conviction in his own mind (as *Brown* contends) that he had no right. I will make such observations as occur to me in relation to the principal of these matters,

The house and all the farm buildings were put up on the west half: that might be because that half was chosen by *Grant*, or it might be because the land on that half was better adapted for the purpose. I should mention that both parties understood the east and west

1865. halves to be the halves of an imaginary line drawn lengthways through the lot from front to rear. The buildings were put up at different times: the first dwelling was a small log shanty; this was followed after some years by a larger and better house, though built likewise of logs; which was built partly by *Grant* and partly by *Brown*, the carpenters' work by the latter, and who also provided the hinges. The flooring and other lumber was sawn at a neighbouring mill from timber got off *Thomas Grant's* lot, there being no pine on the land in question. Some years after this the house was clap-boarded and newly floored, and a kitchen was added: this was done not by *Brown*, but by a carpenter named *McTavish*, and *Grant* paid him \$100. The house is now spoken of as a good farm house, worth five or six hundred dollars. A granary, a frame building, was put up some sixteen or eighteen years ago. *Grant* provided the boards, and he and one of his sons got out the timber. It was framed by one *Miriam*, who was settled with by *Brown*, *Brown* saying, as *Thomas Grant* deposes, that he and *Miriam* exchanged work. *Brown* put up the building and closed it in. According to the evidence of *Thomas Grant*, his father, before the building was commenced, consulted with *Brown* as to what such a building would cost, and after it was finished asked *Brown* how much he was in his debt: to which *Brown* merely answered, without naming the amount, that he could pay him when he liked.

Judgment.

With regard to the second house, and the additions, repairs and improvements upon it, one can only say that it is improbable that *Grant* would have spent so much labour and money upon a building of which he might at any time, according to *Brown's* account, be dispossessed. But what passed in regard to the granary, if *Thomas Grant* is to be credited, is of more weight; for *Grant* could hardly be *Brown's* debtor for his work upon a building put up upon *Brown's* own property.

There are however some dealings and some circumstances in favor of *Brown's* view of the case. After *Grant* went upon the place *Brown* had some land cleared, and other land partially cleared, on the east half of the lot. This seems strange, if *Grant* was to clear the east half as a consideration for the purchase of the west half. This is not explained in evidence, nor is any explanation suggested in argument. Of course he was at liberty to do this in any view of the case; but his doing so would, if *Grant's* view be correct, be making him a present of the labor and expense of clearing so much land. The greater part of it however was cleared by *Grant*, about fifty acres, as I judge from the whole of the evidence, while about seventy acres were cleared by *Grant* on the west half: the whole clearing on the east half amounting to about the same. It is said that *Brown* cleared also on the west half, and there is some evidence of it; but it amounts to no more than a clearing on the east half running into the west half by accident. The mode of clearing by *Grant* is described to be entirely across the front, from time to time, beginning on the western side and clearing across to the eastern side, and so year by year gradually clearing from the front towards the rear of the whole lot.

1865.

Grant
v.
Brown.

Judgment.

Another circumstance relied upon by *Brown*, but which, like the last, *Grant* could not prevent, was a dispute between *Brown* and one *McKerchy* as to the boundary on the western side line of the lot. *Brown* claimed and obtained two feet eight inches more than was admitted by *McKerchy*. It is argued that *Brown* would have cared but little if at all about the western boundary, if the west half belonged to *Grant*: but, if the lot was to be divided, it was the same to him whether the western or the eastern boundary was encroached upon. His interest would in that case certainly be reduced to one foot four inches, a small piece on a farm; but there are few lawyers whose practice has

1865. not brought under their notice disputes about boundaries
 as small as this appears to be.

Grant
 v.
 Brown.

The planting of the orchard is also insisted upon as a circumstance in favor of *Brown*. A portion was planted some fifteen or more years ago ; and it is a question by whom the trees for that planting were purchased. *William Grant* says that he purchased them from a *Mr. Scarlett*. A *Mrs. Taylor*, a sister of *Brown's* wife, is brought to contradict this, and says that about fifteen years ago she saw *Brown* give *William Grant* money, some bills, to buy fruit trees to plant on the farm, and that she afterwards saw fruit trees in *Grant's* waggon the same day. *William Grant* being recalled gives no explanation of this, but denies it altogether : he says he never got money from *Brown* to buy apple trees, and never went for apple trees at his request. It thus becomes more than a question in regard to these trees. It is a question of veracity, and tends to throw doubt upon the whole of the evidence given by *William Grant*. Some years after the planting of the first orchard a number of trees were purchased by *Brown* : he said he had purchased them at auction ; he did not tell *Grant* where to plant them. *Grant* planted them on the west half of the lot. This seems in favor of *Brown*, inasmuch as if he owned only half the lot it is probable he would have had them planted on the half he owned. Another circumstance is, that after the issuing of the patent, which was in 1848, *Brown* informed *Grant* of its having issued, and *Grant* did not thereupon ask him for a deed, or make any allusion to his right to have one. I thought at the time that this was a circumstance of considerable weight ; and so it would be if *Grant* was then entitled to a deed from *Brown*, but the fact is that a good deal of his clearing was done after that ; and he might feel that it would be premature to ask for a deed or make any allusion to it before he had earned his right to it.

Judgment.

The fact of the clearing, and of the fencing, being made without regard to any division line between the east and west halves, is also insisted upon. I have already alluded to the mode of clearing, and I think the mode of fencing is not a circumstance of much weight. *Grant* fenced in the portions cleared from time to time, and it would result that the fencing would be irrespective of any division line. Besides, as it was rail fencing, it was easily removable. One would expect the fencing to be as it was, even if there had been the clearest agreement for such a partition as the plaintiff claims.

1865.

Grant
v.
Brown.

It appears that *Grant* made a considerable clearing on the east half after he had reason to believe that *Brown* would not give him a deed, in consequence of what passed between them some ten years ago. It is argued that when he found his claim for a deed repudiated, or, as his sons put it, evaded, he would not have gone on performing his part of the contract, if the clearing was in pursuance of such a contract as he sets up. There is force in this, especially when we take into account the fact (that for other reasons is insisted upon in his belief, viz. :) that he supposed himself to be entirely without remedy in any court. The only explanation that I see, and it is not entirely satisfactory, is, that after *Brown* had evaded giving the deed, *Thomas*, who had at first advised his father as he says to "push" for one, advised afterwards that he should wait and see whether *Brown* would not after all give a deed. If they decided upon that course as the most politic, they might think it advisable to continue clearing; so as not to come to an open rupture with *Brown*.

Judgment.

Before referring to the disavowals by *Grant* of his having any title to the property, I will notice what passed between the parties some ten years ago. It is detailed most fully by *Thomas Grant*, unless he and *William* speak of different occasions, which I do not

1865. think. A rumour had gone abroad injurious to the character of the *Grants*, to the effect that *Brown's* crown patent for the lot in question had been stolen, and that one of the *Grant's* had stolen it. This came to the ears of *Grant* the father, and he was naturally very indignant, and took occasion, when *Brown* came out to the place, to speak of it: he said to *Brown* that he would stand it no longer; that he would put a stop to it and have it settled; that he would have a deed of his own half lot. *Brown*, on his part, spoke soothingly to *Grant*, and told him he should give no heed to such slanders; and *Thomas* says he added, that he would make it all right soon, or have it settled soon. *Grant's* son *Thomas* suggested to him after this to go into Chatham and see *Brown*, which he did, and, as *Thomas* says, he brought back the same answer. *William* speaks of *Brown's* answer (upon his father going into see him, as I understand,) as being, "Go on, go on; I don't want anything;" and to go on and pay himself, which *William* understood to mean that *Brown* would not give his father a deed. *Thomas* also says, that they thought that *Brown* was evading the giving of a deed, and that they were all annoyed and vexed at his not giving it, and at first he advised that his father should insist upon it, "push for a settlement," is his term, and then afterwards that they should wait and see whether their uncle would not settle. It was after this that the admissions of *Grant* in regard to his title were made, with possibly one exception.

Judgment.

The witness *McCubbin* speaks of two conversations with *Grant*: at the first he asked him what understanding he had with *Brown* about the place; *Grant* said he had none, but there would be to be one soon; he varies this a little on cross-examination: he says this was seven or eight years ago. Supposing the witness both truthful and accurate, it would be straining *Grant's* answer to interpret it as meaning that he never had such an agreement with *Brown* as he now insists upon. The

other conversation he says was about two years ago, when he says he asked *Grant* why he did not put up a barn; and that *Grant's* answer was, that he was not going to put one up; that if *Mr. Brown* wanted one he might put it up: a strange question if the witness had understood from his answer on the previous occasion that he had no title, and a very natural answer on the part of *Grant* two years ago, when, as I gather from the evidence, *Brown* was denying his right to a deed. *McCubbin* speaks of only one occasion at which he said anything to *Grant* about his building a barn; but another witness, *Brown*, speaks of such a question being asked by *McCubbin* eight years ago, and of a similar answer being given by *Grant*. Which is right, if either, it is hard to say. Supposing *Brown* right, the answer was not an unnatural one in the mouth of a person who had spent a considerable sum of money in buildings upon the place, and whose title had since been not acknowledged, if not denied.

1865.

Grant
v.
Brown.

Judgment.

John Johnston speaks of a conversation eight or nine years ago. He says he observed to *Grant* that he had a nice farm, to which *Grant* answered, "Yes, if it was my own; howsoever I'll maybe get my life-time out of it." I have no reason to doubt *Johnston's* truthfulness; and he spoke confidently, and probably justly, of the accuracy of his recollection. He impressed me much more favorably than either *McCubbin* or *Brown*, particularly *McCubbin*. It struck me as strange that *Grant* should not in his answer to *Johnston* allude to the agreement which he now sets up, if it existed: some men would certainly have done so, and have complained bitterly of *Brown's* breach of faith. But men differ in that respect: *Grant* is described as an easy-going man, and was probably disposed to acquiesce in that which, as he felt, could not be helped, and might be careful moreover to give no answer of a character, which, if it reached the ears of *Brown*, might exasperate him, and

1865. cost *Grant* the "life-time" enjoyment of the place which he hoped for.

Grant
v.
Brown.

Judgment

The same observation may apply in some measure to the evidence of *McTavish*: he speaks of a conversation with *Grant* nine years ago, when *Grant* spoke of the difficulties emigrants had to contend with when they came out to Canada; and *McTavish* asked him if he had any arrangement with *Brown* about the land: *Grant* said none whatever; but that he believed that *Brown* would not put him off the place as long as he or his wife lived. *McTavish* says that this was said on more than one occasion. It might have been expected certainly that when *Grant* was asked if he had any arrangement with *Brown*, he would not have merely answered that he had none, but have spoken of one that he had had previously: but the reasons I have already suggested may have closed his mouth. He may have thought it useless, and that it might be mischievous to refer to that which would involve the charge of a breach of faith against one, upon whose sufferance he felt he was still living upon the place.

The evidence of *French* is of less weight still. *French* owned a lot adjoining the one in question on the eastern side of the latter. About five or six years ago he spoke to *Grant* about getting the boundary-line run between the two lots; when *Grant* said, I will have nothing to do with it; you must go to Mr. *Brown*: an answer he would have been likely to make, even if the agreement he now insists upon had been then unquestioned by *Brown*.

Rule says, that about two years ago *Grant* went to his place looking for a heifer; that they talked of the bad crops, and *Rule* said to *Grant*, "You need not mind; you have a good farm of your own," when *Grant* said, "It is not mine, it is Mr. *Brown*'s." I need not repeat the observations I have made upon the evidence of *Johnston* and *McTavish*.

The evidence of *James Houston* seems of some importance. He was tax collector in 1855 and 1856; and in one of those years, he thinks in 1855, when calling upon *Grant* to pay the taxes, *Grant* complained he says of the taxes being very high; and the witness then professed to give the words which passed between him and *Grant*, as follows: *Grant* said, "It is a very high rate for me to pay, who do not own the land." I said, 'If you do not own the land who does?' He said, 'one *Brown*.'" Upon cross-examination he says, "What *Grant* said was, the taxes are very high; the land does not belong to me, or it is not mine, or words to that effect: he said it belonged to *Brown*." *Grant* paid the taxes on the whole lot. It is suggested that *Grant* may have said that he did not own all the land; and complained of the hardship of having to pay taxes on the whole, when he owned but half. *Houston* appeared at first a very positive witness, and very strongly impressed with the absurdity of any objection being taken to the collector's roll, and indisposed to listen with attention to any objection that might be taken. I do not feel at all confident as to the accuracy of his recollection. It does not seem certain whether the conversation he speaks of occurred before or after the evasion, as it has been called, of *Brown* to give a deed. *William Grant* speaks of that circumstance as occurring ten or twelve years ago. If after, it is open to the observations I have made in regard to other statements of *Grant* made after that circumstance.

Robert Kennedy is another witness to alleged admissions by *Grant*. It occurred about three years ago, and was in answer to an inquiry by one *Knight* in regard to oak timber; but the evidence loses all its weight from the evidence of *Fisher* and *Thomas Grant*, from which it appears that there was no oak timber profitable for sale on the west half of the lot; and that the timber inquired after by *Knight* was on the east half.

1865.

Grant
v.
Brown.

Judgment.

1865.

Grant
v.
Brown.

In commenting upon the statements and admissions by *Grant*, I do not think that I have given a more favorable interpretation to them than they ought to receive. Statements in regard to a man's own title are of weight only in so far as they are inconsistent with his having title; and therefore the circumstances under which they are made, and the reasons which may have influenced the mind of the party making them, should be taken into account. It is to be observed, too, that all admissions brought forward in this case, with the exception of that spoken of by *Kennedy*, which turns out to be of no weight, were made in the course of casual conversation. The unsatisfactory nature of such evidence has been often commented upon.

It may also be said in reference to those statements, that in all of them *Grant* spoke only of the absence of present title, or used words which implied that he had no present title, and those witnesses are brought forward to whom he spoke of that only. It may be that to many others he spoke of having no title which was of any avail to him, by reason of an agreement formerly entered into by *Brown*, having been repudiated by him. *Brown* would of course call no persons to whom such statement was made; and *Grant* would not, as it would be objected to as evidence in his own favor. At the same time, I do not mean to say that these statements and admissions by *Grant* are of no weight, I am merely guarding against too much weight being attached to them.

I come now to what passed between *Grant* and *Brown*, and between *Grant* and *Mrs. Brown*, after *Grant* had been notified, in the autumn of 1864, to leave the premises in the spring of 1865. *Grant* pleaded for further time; he spoke of the hardship of having to leave in the spring, but said he would go in the fall; and he made no claim of title: this is the substance of the evidence. Much of what I have said will apply to

this. He felt helpless, and at the mercy of those who had notified him to leave the place; he had no idea that he had a title which he could enforce in any court; to assert title under such circumstances he might well feel to be useless, and might be worse, as irritating those to whose forbearance he was appealing. That his idea was that he was without remedy is proved, as far as such a thing can be proved, by the evidence of the solicitors whom he employed, after ejection was brought against him by *Brown*.

1865.

Grant
v.
Brown.

I have referred to several weighty circumstances against the claim of *Grant*; there are, on the other hand, some in his favor, and to some of these I have already referred, the principal being the expenses to a considerable amount incurred by *Grant* in building upon the west half of the lot, and the enquiry by *Grant* as to how much he was indebted to *Brown* for his work upon one of them, and *Brown's* answer. *Brown's* claim that he put up the buildings, is met by proof that he did little beyond the carpenter work; and by the evidence of *Grant's* son that he was to be paid for his work by produce from the farm, as *Grant* might be able to spare it from time to time; and that, in pursuance of their agreement to that effect, wheat was delivered to *Brown*, from ten to twenty bushels a year, perhaps not every year, but at any rate a number of times; and it is also proved that work was done for *Brown* by *Grant*. *Brown* says the delivery of produce was by way of rent, but there is no proof of this, and it seems to me not consistent with his position that *Grant* was to pay himself for his work and improvements upon the place by enjoying its profits. I think this delivery of produce of the farm to *Brown* a strong circumstance in favor of *Grant*.

Judgment.

The farming stock and implements appear to have been purchased by *Grant*; a fanning mill was purchased from *Brown* himself, *Grant* paying for it in gold; he

1865. also paid gold for a yoke of oxen. This does not prove
 Grant that *Grant* did not take the place upon the terms stated
 v. *Brown* by *Brown*, but it at least displaces the coloring that
Brown would give to the transaction as a dealing of
 generosity, if not of bounty, on his part.

Judgment. When, upon the occasion of the slander in regard to the lost patent, *Grant* told *Brown* that he would have a deed for his half, it might be expected that *Brown* would have denied his right explicitly; besides, the idea of one half being upon a different footing from the other, would, according to *Brown's* theory, have been a mere invention on the part of *Grant*. Something may be due to a desire on the part of *Grant* to soothe an angry man, indignant at a false charge against his family: but, if so, it is only a reason which may have induced his silence, or his evasion of a direct answer; as I have suggested, reasons may have induced *Grant* not to allude to his agreement with *Brown*.

When the *Grants* planted the orchard they measured across the lot so as to be sure that the whole of the trees should be on the west half; with this indeed *Brown* had nothing to do; but in that, it is only like the boundary question, between *Brown* and *McKerchy*, with which *Grant* had nothing to do. It proves too, that the claim to the west half is not a new idea on the part of *Grant*. It is proved indeed to be as old as his first going upon the land, by the evidence of *McKerchy*: he was called upon to prove more, viz., that, in connection between *Brown* and *Grant*, it was said that *Grant* was to clear as much on one half as would pay for the other half, but that he failed to prove to my satisfaction; but he did prove that *Grant's* statement to him was, that he was to clear thirty acres on the east half, and to have a deed of the west. I admitted evidence of this, to prove that *Grant's* claim was not a new claim, recently set up.

There is another circumstance to which, however, too much weight ought not to be attached. I mean the probabilities of the case. It is in evidence that the land was worth, when *Grant* went upon it, about three dollars an acre; and that the cost of clearing would be about fifteen dollars an acre. This I cannot doubt was known to *Brown* at the time, and would very soon become known to *Grant* and the elder members of his family, probably before they went upon the land, at all events within a short time after. Such a bargain as even *Grant* contends was made, would be a very advantageous one for *Brown*, much more so than for *Grant*, for supposing him to clear forty acres on the east half (and it is in evidence that he cleared much more,) he would thereby pay to *Brown* double the value of the west half: and such a bargain as *Brown* contends for, the *Grants* would soon discover to be a very bad one for themselves, so bad that they would probably either not enter into it at all, or leave the place very soon afterwards, as they were at liberty to do. Still such a bargain may have been made; and *Grant* may have trusted to his wife's brother to deal with him liberally. If so he had only been very unfortunate.

1865.

Grant
v.
Brown.

Judgment

The direct evidence in support of the contract is of itself sufficient, unless impeached, or unless the circumstances of the case are sufficient to outweigh it. The plaintiffs two sons, *William* and *Thomas*, are men of intelligence, and of apparent respectability. I thought each of them shewed a strong desire to place the facts to which they deposed in as strong a light as they would bear in favor of their father; but on the other hand they admitted ignorance of matters which, if answered in the affirmative, would have told strongly in his favor. What they say, the one as to the agreement in Scotland, and both as to what passed upon the land in reference to its division, is either true or it is an entire fabrication. If a fabrication, they would almost certainly have answered in the affirmative as to all facts confirmatory

1865.

Grant
v.
Brown.

of it, but they do not. *William*, for instance, says that he never heard his father ask *Brown* for a deed, and that he never himself asked him for one. *Thomas* says, that when *Brown* informed his father of the issue of the patent his father did not ask for a deed, and that when his father, on the occasion of "the slander," declared he would have a deed for his half, *Brown* did not in words promise to give one. Men who would manufacture a wholesale falsehood, would scarcely hesitate at minor points like these. Again, while both speak of what passed on the ground as to the division, *William* only speaks of what passed in Scotland, and says it passed in the presence of the family. If *Thomas* were deliberately inventing a story, he would scarcely fail to confirm *William's* account of what passed in Scotland. That they gave their evidence with bias in favor of their father I cannot but think; but their appearance, demeanour, the circumstance to which I have alluded, and the many small circumstances which occur in an examination, and which impress a court for or against the truthfulness of a witness, would lead me, apart from the circumstances against the plaintiff and in favor of the defendant upon which I have dwelt at some length, to give credit to the two sons of the plaintiff. Some of those circumstances are of considerable weight. The question with me is, whether they are of such weight as to outweigh direct evidence which otherwise I should believe. I think before I should discard the direct evidence, in fact pronounce it a deliberate fabrication, I ought to be convinced that the circumstances against it are inconsistent with it; not merely such as to render it improbable, but so inconsistent that the court must feel a moral conviction that the direct evidence is not true. I have weighed all the evidence and considered all the circumstances over and over again. Some of these circumstances, and with them the evidence of *Mr. Taylor*, have, in the course of my consideration of the case, shaken my faith in the direct evidence. But I have, upon the whole, come to the conclusion that

Judgment.

The weight of evidence, taking all circumstances into account, is in favor of the plaintiff's case, and that I ought to decree in his favor.

1865.

Grant
v.
Brown.

A doubt was suggested whether, supposing the agreement set up by the plaintiff proved, it was sufficiently certain; the number of acres in the east half not being specified. I think it is. It is not the custom of the country to clear every acre: leaving thirty acres uncleared does not seem unreasonable. I do not think the court would refuse to execute a written agreement to convey one-half of a lot in consideration of clearing the other half, if seventy acres out of one hundred acres were cleared, and the vendor, after taking the benefit of the clearing, brought ejectment against the purchaser.

The decree must be with costs.

PARKE V. RILEY.

Sale under fi. fa. against lands previously contracted to be sold.

Where a debtor had entered into a binding contract for the sale of his land, before execution against his land had issued. *Held*, that his interest as vendor was not saleable under the execution.

Parke, the plaintiff, being the holder of a judgment against *George* and *Henry Andrews*, issued a writ to the sheriff of the county of Frontenac, against the lands of the *Andrews*, who were then the legal owners of a lot of land in the village of Waterloo; but it appeared that the defendant *Riley* had previously purchased the lot from the *Andrews*, by a verbal agreement, and had gone into possession and made improvements; so that the contract might have been specifically enforced in equity. It further appeared, that the plaintiff was not aware of this contract till after he had issued his writ, but became aware of it before the sheriff sold the lot under the execution. The sale took place in October, 1864,

Statement.

1865. when the plaintiff became the purchaser, and the sheriff executed a deed to him in the usual form. Previous to the sale, but after the issuing of the writ, the *Andrews* had given a deed of the lot to *Riley*, who, at the request of the *Andrews*, gave a mortgage for the unpaid balance of the purchase money to *Smith*, another defendant, to whom the *Andrews* were indebted.

Parke
v.
Riley.

The plaintiff afterwards filed a bill, praying that the deed to the *Andrews* and the mortgage to *Smith* might be set aside as clouds on the title; and the cause came on before his Honor *V. C. Mowat*, at Kingston, in September, 1865.

Argument. Mr. *McGregor*, for the plaintiff, contended that the sheriff's deed to the plaintiff referred back to the time when the writ issued, and consequently cut out the deed to *Riley*, which had never been registered. He contended that the plaintiff, having notice before sale, could have no further effect than to bind him to carry out the agreement with *Riley*, which the plaintiff was willing to do, as the amount due on the mortgage to *Smith* was quite sufficient to pay the plaintiff's claim. He referred to the Consolidated Statutes of Upper Canada, ch. 89, sec. 44, page 891; *Bank of Montreal v. Thompson* (a), *Doe dem Dougall v. Fanning* (b), and *Doe dem Dempsey v. Boulton* (c).

Mr. *Blake, Q.C.*, for the defendants, contended that the plaintiff had constructive notice, as *Riley* was living on the lot when the execution issued, and had actual notice before the sale; that at most no more than the beneficial interest of the *Andrews* could be sold; and that such interest was not saleable under execution against lands; so that, in fact, nothing passed to the

(a) Ante vol. ix., p. 51.

(b) 8 U. C. P. 166.

(c) 9 U. C. Q. B. 532.

plaintiff by the sheriff's sale. He referred to *Gurnal v. Gardner* (a), *Wormald v. Maitland* (b), and *Re Thorpe*. (c).

1865.

Parke
v.
Riley

MOWAT, V.C.—The plaintiff in this case was a judgment creditor of the defendants *George and Henry Andrews*. On the 29th of October, 1862, he placed in the hands of the sheriff at Kingston a writ against the lands of his debtors. This writ was subsequently renewed, and on the 1st of October, 1864, the sheriff offered for sale, under the writ, the land in question. The plaintiff became himself the purchaser, and on the 3rd of October, 1864, the sheriff executed to him a deed of the property in the usual form. The property had formerly belonged to *Andrews & Co.*, the debtors. The deed to them was in possession of the defendants, and was not registered. *Andrews & Co.* had, in 1861, contracted for the sale of the property to the defendant *Riley*, who had paid part of the price and gone into possession before the writ was delivered to the sheriff. But the deed to him was not executed till subsequently, and was then antedated. *Riley*, at the same time, by direction of *Andrews & Co.*, executed a mortgage to the defendant, *John Smith*, for the balance of the purchase money, towards the satisfaction of debt of larger amount due by *Andrews & Co.* to *Smith*.

Judgment

The bill prayed that the deed to *Andrews & Co.* might be registered and delivered to the plaintiff, and that the deed to *Riley* and the mortgage to *Smith* might be declared void as against the plaintiff's deed as clouds on his title, and might be delivered up to be cancelled.

By the sale to *Riley* the debtors became mere trustees of the legal estate in the land for *Riley*; and their only beneficial interest in it was as being entitled to hold the property for the unpaid purchase money. This was

(a) 9 Jur. N. S. 1220.

(b) 12 L. T. N. S. 535.

(c) 3 Ir. Chan. Rep. 263.

1865. the nature of their interest when the writ against them was placed in the sheriff's hands; and such an interest was not saleable under the execution, just as the interest of a mortgage is not saleable (a). The deed to the plaintiff was therefore imperative.

Parke
v.
Riley.

Judgment.

The plaintiff contends that the sheriff's deed having been registered before any instrument connected with the sale to *Riley*, takes precedence of that sale. But it is clear that the plaintiff had notice of *Riley's* claim before the plaintiff made his purchase; and it is therefore unnecessary to consider the effect of such prior registration where there has been no notice; on which point *Doe dem Brennan v. O'Neil* (b), *Waters v. Shade* (c), and *Thirkell v. Patterson* (d), may be referred to. The answer, indeed, does not allege such notice, but on the other hand, the bill does not allege the particulars necessary for bringing the plaintiff's case within the operation of the registry law, and would need amendment for this purpose; and I could not give the plaintiff leave to amend his bill without allowing the defendants at the same time to supply the defect in their answer.

I think, therefore, that the plaintiff's bill must be dismissed with costs.

(a) Vide U. C. Q. B., *Doe Campbell v. Thomson*, Hilary Term, 6 Victoria.

(b) 4 U. C. Q. B. 86.

(c) 2 Gr. 457.

(d) 18 U. C. Q. B. 75.

1865.

IN RE D. G. MILLER.

Practice—Re-hearing—Appeals from Orders in Chambers.

Re-hearings, or applications to discharge orders made in Chambers, must be set down for a day which falls within the periods prescribed by the Orders of the 9th of May, 1862, and the 20th February, 1865, and it is not sufficient that the case should be set down and the notice thereof served within such periods.

When an order was made in Chambers in December, and the full Court had a sitting in the following January, and another in February, and not another until June:

Held, that it was irregular, without leave, to set down for hearing in June a motion to discharge such order.

A motion was made to the full Court to discharge an order made in Chambers under the circumstances set forth in the head note.

Mr. *S. Blake* objected that it was too late to move against the order, without leave being previously obtained.

Mr. *J. Boyd*, *contra*.

The Court allowed the objection, and ordered the case to be struck out of the paper with costs; observing, that the point raised had been decided in several cases already.

COCKENOUR V. BULLOCK.

Practice—Reference as to title.

Where a reference is made to the Master as to title, and objections are brought in thereto, the Master is not warranted in making a report, either for or against the title: his proper course is to mark each objection "allowed," or "disallowed," as the case may be.

This was an appeal from the report of the Master at Hamilton, in which he reported against the title to the property sold under the decree in the cause.

1865. *Mr. M. O'Reilly, Q.C.*, for appeal, cited 1 vol. *Daniel's Chancery Practice*, p. 813, 3rd ed.; *Green v. Cockenour v. Bullock. Monks (a)*.

Mr. Sadler, contra.

THE CHANCELLOR.—The Master has, in this case, made a report against the title without specifying the objections he finds to it. This seems a wrong course of proceeding. The General Order, 86, section 12, directs that the Master shall make no report upon the title, but is merely to mark "allowed," or "disallowed," the objections brought into his office. This was intended to avoid expense, and, at the same time, to afford to the court and the parties information as to the particular objections the Master has allowed or disallowed. The case must, therefore, go back to the Master, to be dealt with under the order named. At the same time, as the whole property was sold under the terms of sale in one lot, I do not see how a portion of it can be forced upon the purchaser.

Judgment

DUMBLE V. THE PETERBOROUGH AND LAKE CHEMUNG RAILWAY COMPANY.

Railway—Injunction.

A company being authorized to construct a certain railway or part of it, built and put in operation part in due time; and after the expiration of the ten years limited by the Consolidated Railway Act (22 Vic. ch. 66, s. 117) made calls, with a view of constructing the remainder:

Held illegal; and that consequently any shareholder was entitled to restrain proceedings, though he might be the only shareholder objecting thereto.

An injunction may be granted in a proper case, though the bill is defective in respect of parties and form,

This was a motion for an injunction before his Honor V.C. Mowat.

The plaintiff was a shareholder in the Peterborough and Lake Chemung Railway Company, and sued on behalf of himself and all the other shareholders except the defendants.

1865.

Dumble
v.
Peterboro'
and Lake
Chemung
Railway Co.

The defendants were the company and the directors.

The bill alleged that the time for building the defendants' road had expired; and that the directors were about to make an extension of their line after their power to do so had ceased; and that they had made calls on the shareholders to defray the cost.

The plaintiff now moved for an injunction to restrain the defendants from enforcing the calls, and from constructing the road.

Mr. Roaf, Q.C., for the motion.

Mr. Blake, Q.C., contra.

MOWAT, V.C.—By the statute, 18 Vic. c. 194, passed 30th May, 1855, the Peterborough and Lake Chemung Railway Company was incorporated, and was authorized (§ 3) to construct the whole or any part of a railway from any point on Lake Chemung to any point in the town of Peterborough or the village of Peterborough East. The act (§ 2) incorporates therewith the 117th section of "The Railway Act" (a) which enacts that "if the railway is not finished and put in operation in ten years from the passing of the special act, the corporate existence and powers of the company shall cease."

It appears, from the answer of the defendants, that the company constructed in due time part of the line authorized by their act, namely, from a point south of Lake Chemung, to a point about four miles distant in Peterborough East, and have had it in operation for some years; and reasons are given for the desire of the

(a) 14 & 15 Vic. ch. 51; Cons. Stat. Can. 22 Vic. ch. 66.

1865. defendants to build now the remainder of the railway which they were originally authorized to construct.

Dumble
v.
Peterboro'
and Lake
Chemung
Railway Co.

But I think it clear that they have no such power after the expiration of the ten years limited by the statute. The special act gave the company a discretion to build either the whole or part of the line specified; and the general act required the completion within ten years of whatever the special act authorized the company to construct. They elected to build part only, as this answered at the time the purpose of those interested; and I think they must now go to the legislature for the further privilege which changed circumstances make them desire. To hold otherwise would be to entirely disregard the distinct and emphatic enactment contained in the 117th section which I have quoted, and by which I am bound.

Judgment. As to the objections that the interests of the plaintiff are not the same as of the other shareholders, and that the object of the plaintiff in suing is not to benefit the shareholders but another company; a reference to *Forrest v. The Manchester, Sheffield and Lincolnshire Railway Company (a)*, and *White v. The Carmarthen, &c., Railway Company (b)*, is sufficient to show that these objections are no answer to the present application. This suit is really the suit of the plaintiff: the plaintiff is not alleged to be shareholder in the other Company; nor is the suit alleged to have been brought at the instance of the other company: the directors are proceeding to commit illegal acts, and any shareholder has a right to restrain them, though he may be opposed in doing so by all the other shareholders.

Several objections were taken to the frame of the bill, particularly as to parties. These objections, though distinctly relied on, were but slightly argued, and no

(a) 7 Jur. N. S. 887.

(b) 1 H. & M. 786.

cases were cited. In *Evans v. Coventry (a)*, it was held that on an application of this kind the court will not stay its hand on account of such objections, but will leave them to be removed by amendment before the hearing of the cause. I therefore express no opinion on the objections as to parties or form.

1865.
Dumble
v.
Peterboro'
and Lake
Chemung
Railway Co.

The injunction will restrain proceedings to enforce the calls, and will also restrain the extension of the road.

GLASS v. MUNSEN.

Administration—Money paid to save infants' estate—Pleading—Multifariousness.

Where a plaintiff, suing on behalf of himself and all other creditors, prayed for an administration of the estate, and specific performance of an agreement entered into with himself in case the defendants should elect to perform the same, the other creditors having no common interest in such agreement, the bill was held multifarious.

Where the plaintiff had, at the request of the mother and natural guardian of infant heirs, advanced money to pay debts of their ancestor to save the costs of suits therefor.—*Held*, that he was entitled to sustain a suit for administration as creditor.

This bill was by the plaintiff on behalf of himself and all other creditors of the late *Samuel Munsen*, against his infant co-heirs and the administrator of his estate.

The bill alleged that the deceased died intestate, in March, 1861, owing several debts and having no personal assets with which to pay them; but that he was seised and possessed of a lot of land which the bill specified: that in March, 1863, the plaintiff was requested by the intestate's widow, who was the mother of his children, and acting as their guardian, to advance funds on behalf of the children to pay the creditors their respective claims, in order to save the estate of the deceased from the costs of suits by the

Statement.

(a) 5 DeG. McN. & G. 911.

1865. creditors which would otherwise be brought, and the mother and her father agreed with the plaintiff that if he acceded to their request he should have a lien on the estate for his advances: that in pursuance of such request and agreement the plaintiff advanced the money and paid the debts referred to. The bill also set up a subsequent agreement with the same parties that the plaintiff should have possession of the lands for his own use until the youngest child came of age, in consideration of marrying the mother and maintaining the children. The mother died shortly after her marriage to the plaintiff. The defendant *John Milne* subsequently took out letters of administration to the estate of the intestate *Samuel Munsen*, and jointly with two others were appointed by the Surrogate Court guardians of the children. The prayer of the bill was that this latter agreement might be ordered to be carried out and performed, in case the defendants so elect and in case this court thinks proper; and for the usual administration decree.

Statement.

The defendant demurred, for multifariousness and want of equity.

Mr. *J. McLennan*, for the demurrer, referred to *Eyre v. Countess of Shaftsbury* (a), *White and Tudor's Leading Cases*, 154; *McDougall v. Barron* (b), *McPherson on Infants*, 484.

Mr. *Spencer*, contra, cited *McPherson on Infants*, 52, 65, 67; *Wentworth's Executors*, 14 Am. ed. 326; 1 *Blackstone's Commentaries*, 460, 463; *The King v. The Inhabitants of Oakley* (c), *Belton v. Hodges* (d), Statute 4 & 5 W. IV. ch. 8; *Jones v. Jukes* (e), *Mitchelson v. Piper* (f), *Macklem v. Cummings* (g), *Alexander*

(a) 3rd Am. ed.

(c) 10 East 491.

(e) 2 Ves. Jr. 518.

(b) 9 Gr. 450.

(d) 2 M. & S. 504.

(f) 8 Sim. 64.

(g) 7 Gr. 318.

v. Vane (a) *Lewis v. Edmund* (b), *Mitford on Pleading*, 1865.
5th ed. 21².

Glass
v.
Munsen.

MOWAT, V.C.—In this case I remain of the opinion I expressed at the close of the argument.

I think the demurrer for multifariousness must be allowed. So far as relates to the lease of the land the interest of the plaintiff is antagonistic to that of the other creditors on whose behalf he sues; and this is a fatal objection.—*Thomas v. Hobler*. (c). I do not think the difficulty is got rid of by the circumstance of the plaintiff's asking for the relief only in case the defendants (the infant heir and administrator) accede to it. Though they should accede to it, the relief would be not the less a relief in which the plaintiff and the other creditors have not a common interest.

The demurrer for want of equity I think must be over-ruled. No case in equity was cited in support of it. It is certainly most just that the plaintiff should be re-paid the money he advanced to pay debts for which the estate was liable, and which if not so paid would have been the occasion of costs to the estate. The friends of infants ought not to be discouraged from endeavouring to save their property by any proper means which may be to the infant's advantage. Courts of equity constantly act on this principle. Thus they even permit a stranger to file a bill on behalf of an infant; and if the bill is a proper one the "next friend" is reimbursed for his expenses out of the infant's estate, and sometimes although the suit is unsuccessful.—See the cases collected on this point in *McPherson on Infants*, 389, *et seq.* There are many other cases in which, for the benefit of infants, equity has acted on the like principle of re-imbursing persons who have advanced money for the benefit of an infant or his estate without

(a) 1 M. & W. 571.

(c) 8 Jur. N. S. 125.

(b) 6 Sim. 251.

1865. authority or under circumstances that would give no right of action at law.—Vide *Marlow v. Pitfeild* (a), *Glass v. Munsen*. *Harris v. Lee* (b), *Vernon v. Vernon* (c), *Ware v. Polhill* (d).

Judgment. There having been no means, according to the bill, to pay the intestate's debts, and the plaintiff having advanced money to pay them and save the estate, at the request of the natural guardians of the infant, I think that such payment must be taken to have been for the advantage of the estate, and that the plaintiff stands in equity in the place of the creditors whose debts he paid. Every analogy that occurs to me in the doctrines and practice of this court is in favor of this view.

No costs to either party.

The plaintiff to have leave to amend.

BULL V. FRANK.

Crown lands—Jurisdiction of agents before patent.

This court has jurisdiction in a proper case to give relief against a fraudulent assignment by a locatee of the Crown, before the issuing of letters patent, but a bill for the purpose must shew why it is necessary to come to this court.

Demurrer to bill.

Mr. *Boyd* for the demurrer, cited *Attorney-General v. McNulty* (e), *Boulton v. Jeffrey* (f), *Henderson v. Westover* (g), *Frichet v. Schreck* (h), *Barnes v. Boomer* (i), *Lawrence v. Pomeroy* (j).

Mr. *J. McLennan*, contra, referred to *Proctor v. Grant* (k).

(a) 1 P. W. 558.

(c) Cited in 1 Ves. Jr. 456.

(e) 8 Gr. 329.

(g) 1 U. C. App. 469.

(i) 10 Gr. 532.

(b) *Ib.* 483.

(d) 11 Ves. 257.

(f) 1 U. C. App. R. 111.

(h) 10 Gr. 254.

(j) 9 Gr. 474.

(k) 9 G. 26, 224.

1865.

Bull
v.
Frank.

MOWAT, V.C. — The question argued on this demurrer was, whether this Court has jurisdiction to try a question of fraud in obtaining an assignment of the interest of a locatee of the Crown, or whether it is to be presumed conclusively that the proper department of the Government had the means of ascertaining the truth, as well as the disposition to give effect to it. I see no reason to deny this jurisdiction of the Court. It does not interfere with the exercise, by the Commissioner of Crown Lands, of the full discretion which the law gives to him. The court has jurisdiction by statute "in all cases of fraud," and has better means of investigating such cases than have been given to the Commissioner. The Court has also jurisdiction (20 Vic., ch. 12, sec. 26, sub-sections 8 and 9) "to decree the issue of letters patent from the Crown to rightful claimants," and "to repeal and avoid letters patent issued erroneously, or by mistake, or improvidently, or through fraud." To ascertain and declare the fraud before it has accomplished its purpose is certainly something less than avoiding the letters patent after they are issued. I think, therefore, that in such a case some relief may be given on a bill properly framed. I do not say that all the relief prayed by this bill should be given.

Judgment.

No objection was taken to the frame of the bill, the object of the defendant being perhaps to insure thereby a judgment on the question on which I have just expressed my opinion, as, had my opinion been favorable to the defendant, it would have put an end to the suit, while successful objections to the frame of the bill may have no other effect than to cause delay. But it seems to me that the allegations of the bill are defective. I am not disposed to pronounce a judgment that would justify every man who is entitled to a patent in coming to this court, in the first instance, to establish his right, in the absence of any special ground for invoking this jurisdiction. If there is no real obstacle to his getting the patent from the commissioner, I think he should not

1865. come here. The plaintiff does not allege enough to enable me to see that there is any such obstacle; or that if he has a right, he cannot easily make it good without resorting to this court. He does not say, for example, that he needs the machinery of the court to adduce his proofs of fraud. He says his assignment was first in point of time. If it was also registered first, of which the bill says nothing, the plaintiff's case is one of common occurrence, and not necessarily involving any difficulty. Is there any undisclosed difficulty? The bill says the plaintiff apprehends that the commissioner will grant a patent to *Frank*; but he does not say why the commissioner is likely to do this, whether it is from any difficulty the plaintiff has in bringing forward his proofs, or for what other reason. Being of opinion that it should have appeared from the bill that there is some sufficient reason for coming to this court, and that the bill is defective in this respect, I think I must allow the demurrer—without costs. The plaintiff to have liberty to amend.

Bill
v.
Frank.

Judgment.

McLAURIN v. McDONALD.

Improvidence.

Where a woman of sixty, who had a first charge on property for her maintenance for life, was induced to change it for a life lease of part of the property, subject to conditions and burdens which rendered the transaction an improvident one on her part; and it appeared that she was illiterate and dull of intellect, and had no professional or other competent adviser in the matter, and did not in some important respects understand the nature or effect of the transaction—*Held*, that it was not binding on her.

This cause came on for the examination of witnesses and hearing at Cornwall before his Honor *V. C. Mowat*, in September, 1865.

Mr. *Bethune*, for the plaintiff.

Mr. *James McLennan*, for the defendant *McDonald*.

The bill was taken *pro confesso* against the other defendant *Angus McLaurin*. 1865.

McLaurin
v.
McDonald.

MOWAT, V.C.—On the 21st of March, 1855, the defendant *Angus McLaurin*, for valuable consideration, executed a mortgage on the property in question to the plaintiff *Margaret McLaurin*, and two other persons since deceased, with a condition that the same should be void, if the said *Angus* should, at his own proper costs and charges, furnish to the mortgagees for and during their natural lives respectively a decent and comfortable maintenance, meat, drink, lodging and apparel, and all necessary attendance in sickness and in health, such as they were accustomed to have, and suitable to their condition and to the changes that advancing age might effect upon them.

On the 20th of November, 1861, the plaintiff executed to *Angus* a release of her interest in the property; and the bill impeaches this release, treating it as made without consideration, and alleging that the plaintiff was induced to execute the release by diverse false representations of the one defendant, acquiesced in by the other, and which are set forth in the bill. Judgment.
The prayer is to set aside the release as fraudulent and void.

But the case, as it was proved, differs essentially from the case alleged by the bill. It is clear, for example, that the release was not without consideration: the consideration was a life lease to the plaintiff of part of the property at a nominal rent. I do not find, either, that any false representations were made to the plaintiff. The ground of fraud, which the bill proceeds upon, thus entirely fails.

The transaction, the proposal for which came from the defendants, was certainly a most improvident one as regards the plaintiff. The property is not worth more than \$50 a year to rent, while the cost of the plaintiff's

1865. support would exceed that sum. But the lease forbade
 McLaurin any assignment or sub-lease without the consent of
 v. Angus McLaurin, his heirs or assigns, thus putting it
 McDonald. in the power of the owners of the property to render it
 useless to the plaintiff, beneficial occupation by herself
 personally being out of the question. The lease contains
 other clauses which, though usual in leases, would or
 might be burdensome and unjust to the plaintiff.

Again, there were two subsequent mortgages on the
 property, one in favor of one *Campbell* to secure \$389
 (which was purchased by the defendant *McDonald*
 after the transaction in question), and the other in
 favor of the defendant *McDonald* to secure \$160; and
 it is at least questionable, if the legal effect of the
 transaction, supposing it valid, would not be to give
 priority to these mortgages over the plaintiff's claim.
 Judgment. This was evidently the understanding of Mr. *McDonald*
 at the time, and has been his understanding since; nor
 was a different view of the matter urged at the hear-
 ing. The transaction was, therefore, a surrender by the
 plaintiff of a first charge on the whole property for her
 support during her life, in consideration of a lease for
 life of part of the property, burdened with covenants
 and conditions that rendered it almost valueless to
 her, and subject to mortgages which approach so
 nearly the value of the place, that *Angus* has since
 allowed his interest to be foreclosed for non-payment
 of the mortgage money due upon them.

The plaintiff's position, under the new bargain, was
 thus much worse than the position she held previously.
 I may observe, too, that, though Mr. *McDonald* in-
 structed *Angus* to give the plaintiff possession when-
 ever she should demand it, the possession was never
 actually given or tendered to her by *Angus*, nor was
 any intimation made to her that it was ready for her.
 Whether she demanded possession and was refused, or

abstained from asking for it in ignorance that she might have it, it is not very material to know.

1865.
McLaurin
v.
McDonald.

Now the improvidence of a transaction is not of itself a sufficient ground for setting aside a transaction between persons who deal with one another on what equity regards as equal terms; but is very material where the parties do not deal on equal terms. In ordinary cases the onus of proof, in this court as well as at law, is on the party who impeaches a duly executed instrument; but where, through the relationship of the parties, or through ignorance, or weakness of understanding, on the part of the one, he or she is incapable of adequately protecting his or her own interests, the improvidence of the transaction may in this court be fatal to its validity. The rules applicable to the subject are thus stated and illustrated in *Longmate v. Ledger* (a): "By the settled doctrine of this court, in order to have a valid contract or conveyance of property, there must be a reasonable degree of equality between the contracting parties. In this case it is established by evidence that the property was sold for a price greatly below the value. This circumstance, of itself, might not be sufficient to invalidate the transaction; but when there is the additional fact, that the vendor was a man advanced in years, and known to be of a weak and eccentric disposition, and at the time of the sale was without the assistance of a disinterested legal adviser, there exists on the whole case such an inequality between the contracting parties, that it is to my mind impossible for the court to recognize the claim of the defendant to hold this property under the contract," &c. * * "There is enough to shew that the vendor from various causes was not competent to exercise a prudent care for his own interests, and did not in fact exercise such care."

Judgment.

(a) 2 Giff. 163.

1865. What was the condition of the plaintiff in the present case? She was an unmarried woman of 60; wholly illiterate, not being able to write or read; and dull and stupid, as compared with other persons of her own condition in life. Her only language is Gaelic, and she can neither speak nor understand English. Even what is spoken in Gaelic she does not comprehend easily; the witnesses tell us that it is both hard to make her "understand how any thing is," and hard even to understand what she says herself. It is plain, therefore, that no one could need protection in a bargain more than the plaintiff did. But in the transaction in question she had no professional adviser, and no other independent adviser except her cousin *Duncan McLaurin*, with whom she was living, and who was as illiterate as herself, but could speak and understand English imperfectly, and appeared to me to be otherwise a man of fair intelligence.

Judgment. I am satisfied, on the whole, that the plaintiff was willing to accept of a life estate in the place, in lieu of her right to maintenance from the defendant *Angus*. I think, too, she was willing that of the property covered by her mortgage, six acres for *Angus*, and, what is called in the lease, the hardwood ridge, should be reserved. I think that an arrangement fairly embodying these terms would have been regarded as satisfactory by those who took an interest in the plaintiff's welfare and comfort. But the postponement of her claim to claims of other mortgagees, theretofore subsequent to her own, and the obligation of not assigning or sub-letting the property,—I have no proof that either she or *Duncan* understood to be involved in the transaction; and to these terms, certainly, no competent professional or other independent adviser could have recommended her to accede. There are also other provisions in the lease which such an adviser would probably have strenuously resisted.

Though the plaintiff is a dull, stupid person, yet I think there was not that want of understanding which, as the Master of the Rolls observed in *Clark v. Malpas* (a) would "alone have been sufficient to induce the court to say that the transaction ought to be set aside, if there had been proper deliberation and time bestowed about it, and [she] had had good advice." But, having reference to the actual circumstances here, I must adopt the conclusion to which the learned judge came in that case, that "It is impossible, in my opinion, to say, that the defendant has performed the obligation which rests on him, for in my opinion the burden is upon him, of proving that the bargain for a sale, at what I consider a very inadequate consideration, was entered into by [the plaintiff] carefully, deliberately, and with a knowledge of all the circumstances connected with it."

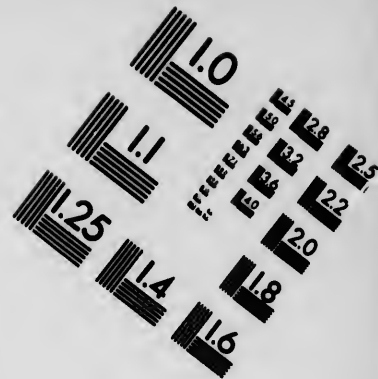
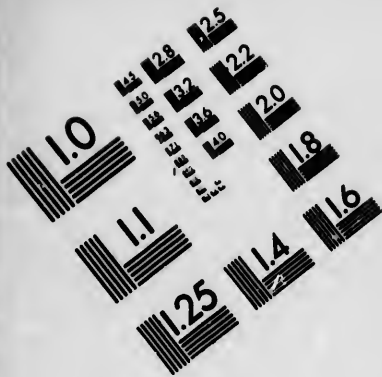
1865.
McLaurin
v.
McDonald.

This conclusion is all the more inevitable in the present case, because Mr. McDonald, in his conversation with the plaintiff on the occasion of the papers being prepared and executed, told her, in reference to the transaction, that "he would see her right." I think that he thus assumed towards her a confidential relation in the transaction; and that as the transaction was an improvident one, he can claim from it no advantage.

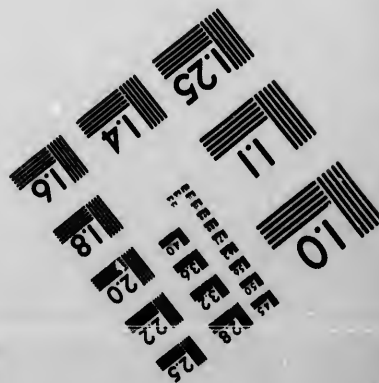
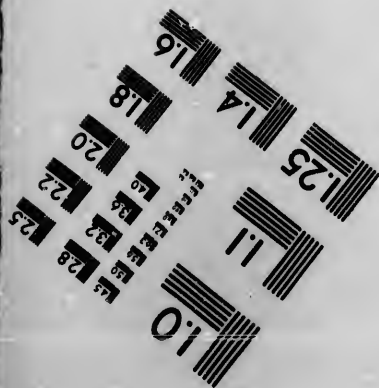
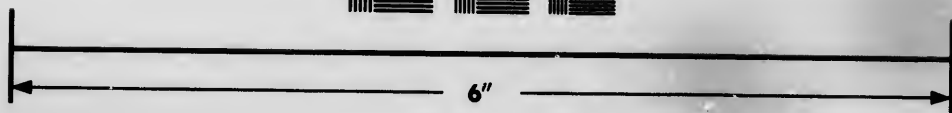
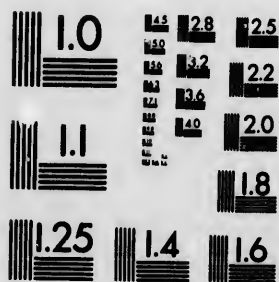
But the bill does not proceed on the improvidence of the transaction which took place. It does not complain that the rent of the property would not be sufficient for the plaintiff's support; or that the effect of the transaction was to give priority to the other two mortgages; or that the lease contained objectionable terms which were not understood or agreed to; or that possession of the property has been withheld from the plaintiff. It does not allege, either, that the plaintiff was induced to make a bargain by which she ought not to be bound; or that the instruments do not carry out the bargain actually

(a) 31 Beav. 86.





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1865. made. On the contrary, the case made by the bill is, that there was no bargain whatever; and that the release was obtained from the plaintiff without consideration, by fraudulent misrepresentations, and in ignorance of the meaning of what she signed. The evidence does not sustain these charges. The part which Mr. *McDonald* took in the matter arose, I am sure, from no purpose of advantage to himself, but to assist the other defendant, *Angus* and his wife having been old servants of Mr. *McDonald's*; and I am satisfied that he meant, while helping his old servants, to act fairly by the plaintiff; but their interests were antagonistic, and the result has been a transaction that was clearly invalid; though relief cannot be given against it under the present bill.—*Harrison v. Guest (a), Curson v. Belworthy (b), Wilde v. Gibson (c), Maguire v. O'Reilly (d), Glascott v. Lang (e), Price v. Berrington (f)*. All parties, however, having now ascertained their rights, I presume no new suit between them will be necessary.

Judgment

No costs.

MITCHELL V. ROHEY.

Voluntary settlement.

At and before making a voluntary settlement of real estate the settlor stipulated verbally with the trustee that the settlor's son should receive all moneys receivable under it, and should accumulate and dispose of the same by investment or otherwise, and that the trustee himself should have no trouble or concern in the matter. The son accordingly received the rents for several years, and, without the knowledge of the trustee, mis-appropriated them: Held that the trustee was not liable to make good the loss.

This was an appeal by the plaintiffs to the full court

(a) 6 DeG. McN. & G. 424; 8 H. L. 483, S. C.

(b) 3 H. L. 742.

(d) 3 J. & L. 224.

(c) 1 H. L. 605.

(e) 2 Phillips, 322.

(f) 3 McN. & G. 498.

from the decree pronounced by his Honor V. C. *Mowat* at the hearing of this cause, as reported ante vol. xi, p. 511.

1865.
Mitchell
v.
Richey.

Mr. *Ferguson*, for the plaintiff.

Mr. *Fitzgerald*, for the defendant *Wright*.

Mr. *Gwynne*, Q.C., for defendant *Richey*, senior.

Mr. *Roaf*, Q.C., and Mr. *Hector*, Q.C., for defendant *Baldwin*.

The following cases were cited:—*Langdon v. Blake* (a), *Doe v. Russell*, (b), *Lewis v. Rees* (c), *Williamson v. Codrington* (d), *Warburton v. Sandys* (e). Also *Peachy* on Marriage Settlements, 244; 2 *Chitty's Statutes*, 182.

The judgment of the court was delivered by

VANKOUGHNET, C.—Without expressing any opinion upon the rights, powers, duties and responsibilities of a trustee who is himself the voluntary settlor, so ably discussed in the judgment of my brother *Mowat*, I am of opinion, as we all are, that in this case neither *Baldwin* nor *Richey*, senior, is chargeable for the mis-appropriation of the funds by *Richey*, junior. The evidence of Mr. *Wilson*, quoted in the report of the case on the original hearing, establishes, we think, that *Richey*, senior, made the settlement on the express understanding, and that Mr. *Baldwin* accepted the trust on the faith and stipulation, that *Richey*, junior, was to be the recipient of all moneys receivable under it, and was to accumulate and dispose of them by investment or otherwise, and that Mr. *Baldwin* was to have no trouble

Judgment.

(a) 11 Jur. N. S. 762.

(b) 17 Q. B. 721.

(c) 3 K. & J. 132.

(d) 1 Ves. Senr. 511.

(e) 14 Sim. 622.

1865. or concern in the matter, nor to be called upon to look
 after the collection or disposition of the moneys. He, in
 fact, never did know how or when they were received or
 appropriated by *Richey, junior*. *Richey, senior*, was
 under no obligation to make the settlement in question.
 It was purely voluntary, and he could accompany it
 with any stipulation or condition he pleased. He did
 stipulate that *Richey, junior*, was to be at least the
 agent through whom the trusts were to be carried out.
 Had the beneficiaries been *sui juris* they could have
 agreed to the nomination of an agent at any time for
 such a purpose, and they would not afterwards be
 allowed to charge his default upon the trustee. Here,
 before the deed was executed, *Richey, senior*, and
Baldwin arranged that *Richey, junior*, should manage
 the trust. This he could do without the intervention
 of either his father or *Baldwin*. He could get in the
 moneys, pay them into the bank in his own name, and
 draw them out again and invest them, without *Baldwin's*
 or *Richey, senior's*, knowledge; and, on the understand-
 ing on which *Baldwin* accepted the trust, he was relieved
 from all inquiry as to why *Richey, junior*, was chosen
 instrument by whom the trust estate was to be managed.
 It would be hard to hold a trustee, who has himself
 done no wrong, and who was not aware of any wrong
 being done by the agent, responsible under such
 circumstances for the misconduct of the latter.

Judgment.

SPRAGGE, V.C.—I agree that upon the grounds
 stated in the judgment of his Lordship the Chancellor,
 the decree pronounced at the hearing should be
 affirmed.

At the same time, I do not desire to be understood
 as assenting to the proposition that the creator of a
 voluntary settlement, of which he is also a trustee, stands
 in any different position to the *cestuis que trust*, from
 that of any other trustee. It is true that he can destroy
 the trust estate by a sale; and, as has been decided,
 by a contract of sale; but it does not seem to me to

follow, that doing neither of these acts, and doing no act indicating any intention adverse to the continuance of the trust estate, he is not accountable as trustee, as any other trustee is accountable.

1865.

Mitchell

v.
Richey.

Decree affirmed, with costs to be paid out of the estate.

MIDLHOLLAND V. WILLIAMSON.

Fraud on creditors—Marriage settlement.

A deed purporting to be a bargain and sale in consideration of £1000, and bearing date the day before the marriage of the grantor to the grantee, was impeached by a creditor of the grantor. There was no evidence of any prior negotiation for a marriage settlement. The deed was not executed by the grantee, and there was no evidence that it was known to her, or to any one acting for her, until long after the marriage. The grantor who was in trade, continued to deal with the property as owner, and the deed was not registered for three years afterwards, when the grantor had become insolvent:

Held, that the deed could only be regarded as a voluntary deed; and as it did not appear that the grantor was in circumstances at the time to make a gift of so much property, the deed was set aside as a fraud on creditors. [SPRAGGE, V.C., dissenting.]

The bill was by the plaintiff on behalf of himself and all other creditors of *David Williamson* deceased, against *Jane Eliza Williamson*, his widow, *John Williamson*, and *John F. Moore*, defendants. Statement.

The plaintiff received judgment on the 30th of April, 1858, against *David Williamson* for £386 3s. 4d. on a covenant contained in a deed dated the 10th of December, 1856. This judgment was duly registered by the plaintiff, and he had kept alive his lien on his debtor's lands ever since by proper writs issued for the purpose. On the 9th of November, 1857, *David Williamson* assigned all his estate to the defendant *John Williamson*, in trust for his creditors; and *John*

1865. *Williamson* subsequently assigned the trust to defendant *Moore*. The object of the suit was to set aside a deed from *David* the deceased, to the defendant *Jane Eliza Williamson*, of certain real estate in Hamilton and Saltfleet, bearing date the 29th of November, 1854, purporting to be an ordinary deed of bargain and sale, in consideration of £1000. This deed was not registered till the 7th of April, 1857; and the bill charged that the said indenture of bargain and sale was not executed at the time it bears date; that the consideration money therein stated, or any part thereof, was never paid, and that said indenture was purely voluntary, and was made and executed for the purpose, and with the intent, of defeating and delaying the plaintiff and the other creditors of *David Williamson*, and was therefore fraudulent and void as against the plaintiff and the other creditors of *David Williamson*.

Statement.

That the said *Jane Eliza Williamson* pretended that the indenture was executed by *David Williamson* with the intention of settling £1000 upon her; but that notwithstanding such intention *David Williamson* never registered such indenture, and afterwards altered such his intention: that on the 27th of May, 1856, notwithstanding such indenture, *David Williamson* sold the Hamilton property to one *McInnis*, for £1100 or thereabouts, and invested the proceeds in certain other property, for the benefit of the defendant *Jane Eliza Williamson*, and this, plaintiff charged, was in lieu of any previous intended or pretended settlement by *David Williamson*: that *David Williamson*, during his lifetime, received for his own use and benefit the rents and profits of the lands freed from all trust for defendant *Jane Eliza Williamson*.

The defendant *Jane Eliza Williamson*, by her answer, set up that about September, 1851, the defendant *John Williamson*, father of *David Williamson*, brought her from Ireland to his house at Stony Creek, where she

continued to reside as a visitor with himself and family, until the time of her marriage with *David Williamson*: that about three months after her coming to reside with *John Williamson*, *David Williamson* proposed marriage to, and was accepted by her, but in consequence of the opposition to such marriage by the defendant *John Williamson*, the same was postponed till the 30th of November, 1854, when the same was duly solemnized; that before and in consideration of such marriage then about to be solemnized, *David Williamson* agreed to settle on her, or invest for her benefit £1000; that afterwards, and the day before the said marriage, and in lieu of the settlement upon her of such sum, and in consideration of such intended marriage, the said *David Williamson* executed and delivered to her the indenture in the bill mentioned, bearing date the 29th of November, 1854, and that at the time of the execution of such indenture, and for three years afterwards, the said *David Williamson* was perfectly solvent.

1865.
Mulholland
v.
Williamson.

Statement.

Subsequently *David Williamson* died, and Mrs. *Williamson* intermarried with *Robert Irving*, who was then added as defendant to the suit.

The cause came on for examination of witnesses and hearing before the late Vice-Chancellor Esten, at Hamilton, in October, 1863, when a decree was made dismissing the plaintiff's bill with costs. From this decree the plaintiff appealed to the full court.

Mr. *Strong*, Q.C., and Mr. *Hodgins*, for plaintiff.

Mr. *Gwynne*, Q.C., and Mr. *Proudfoot*, for defendant *Irving*.

Mr. *Hoskin* for defendant *John Williamson*.

Columbine v. Penhall (a), *Commercial Bank v. Cook (b)*,

(a) 1 Sm. & G. 258.

(b) Ante vol. ix. p. 524.

1865. *Spirett v. Willows* (a), *Corlett v. Radcliffe* (b), *Thompson v. Webster* (c), *Darling v. Bishopp* (d), *Stone v. Van Mulhoiland* v. *Williamson* *Heythuysen* (e), *Stokoe v. Cowan* (f), *Skarf v. Soulby* (g), were referred to and commented on by counsel for plaintiff.

For defendant *Irving*: *McKay v. Farish* (h), *Joseph v. Bostwick* (i), *Siggars v. Evans* (j), *Rawlings v. Lambert* (k), *Campion v. Cotton* (l), *Fraser v. Thompson* (m), *Ex parte McBirney* (n), were cited.

VANKOUGHNET, C., stated that he was of opinion the decree should be reversed, and the deed held voluntary; but having read the judgment prepared by his Honor V.C. *Mowat*, in which he fully concurred, his Lordship did not consider it necessary to say more than state the conclusion at which he had arrived. The plaintiff will receive his costs up to and at the hearing.

Judgment.

SPRAGGE, V.C.—I think it is satisfactorily established that the conveyance which is brought in question in this case was made before, and in contemplation of, marriage. This being the case, I take it to be clear that to impeach it successfully it must be shewn that it was either colorable, or made with intent on the part of the donee, the intended wife, as well as on the part of the donor, to defeat or hinder creditors.

There is not a pretence for such an intent on the part of the donee, so that if such intent were fully established against the donor, which I think it is not, the instrument could not be successfully impeached upon that ground.

(a) 10 L. T. N. S. 459; 11 Jur. N. S. 50. (b) 4 L. T. N. S. 1; 14 Moore, 121.
 (c) 4 L. T. N. S. 750. (d) 6 Jur. N. S. 812.
 (e) 1 Kay, 721. (f) 20 Beav. 637.
 (g) 1 McN. & G. 364. (h) Ante vol. 1, p. 333.
 (i) Ante vol. 7, p. 332. (j) 1 Jur. N. S. 851.
 (k) 1 J. & H. 458. (l) 17 Ves. 263.
 (m) 1 Giff. 49. S. C. 4 DeG. & J. 660. (n) 1 D. M. & G. 441.

Then, as to its being colorable, Mr. *Strong* has been astute in placing in the strongest light whatever circumstances of a suspicious aspect have attended the transaction, but they do not convince me that it was colorable. First, the form. True, it is a simple deed of gift, for the expressed consideration of £1000. The real consideration, I have no doubt, was the intended marriage, and that no money consideration was paid. But it is not denied that the true consideration may be shewn, for the purpose, as in this case, of rebutting fraud; and the sum of £1000, I infer, was inserted because the donor had agreed to settle that sum upon his intended wife. It is true, also, that there were no trustees, nor any separate use declared. But we cannot judge of this transaction by the same rules that we should apply to a settlement drawn in England upon the marriage of persons of a different class of life. It would be hard to pronounce this deed colorable, because when offered to a young female by her intended husband she did not object that it was not in due form, but accepted it as it was, as in fulfilment of his promise. It placed in her hands, and beyond his control, what she probably considered as equivalent to the promised £1000.

1865.
Mulholland
v.
Williamson

Judgment.

But it was not disclosed to the husband's father. The explanation of this is, that he was against the match; and the husband apprehended that his father would feel annoyed at the settlement; and that the knowledge of it might prejudice his prospects, from his father's bounty by will or otherwise. This apprehension may have been groundless, or the so-called concealment foolish, or even wrong; but it strikes me that it would be a very violent presumption that the transaction was colorable.

The non-registration until just before the assignment for the benefit of creditors is also pointed to; but no necessity existed for it before, unless the wife feared that her husband would, behind her back, convey to some third person. When she did register, it was to

(b), *Thompson*
Stone v. Van
Arf v. Souby
by counsel for

(h), *Joseph*
Rawlings v.
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14 Moore, 121.

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1865. protect herself, and upon advice of a friend as to which of two deeds she should register. The conveyance to *James Williamson* was for no improper purpose; and if registering that conveyance would have protected her, she would probably have registered it. Her doubt and hesitation about the matter rather indicate ignorance of business, than fraudulent intent.

The dealing of the husband with one of the parcels of land comprised in the deed of gift, the wife joining therein, is dwelt upon as strong evidence of fraud. But we must remember that it is a case of husband and wife. She joins with her husband in the conveyance to a purchaser of this parcel of land; perhaps willingly, perhaps after importunity, and unwillingly at the last. Further, it is said the land received in exchange was conveyed, not to the wife, but to the husband. More than one explanation of this may be suggested. It may be that it ought to have been, but was not conveyed to the wife; or it may be that from easiness of temper, or other cause, she was perfectly willing to forego that portion of the settled lands; or it may be that upon the lands turning out to be worth so much more than the sum of money talked of before marriage (and the value of the parcel intended to be left with the wife did itself exceed that sum), the husband may have put it to her that it was reasonable that she should forego a portion of it: and she may have assented to this. These indeed are only suggestions; but while several good and innocent reasons may be suggested for the act excepted to, it would not be right to infer that the deed of gift had all along been a mere imposition.

I find it indeed difficult to conceive how the deed could have been colorable, unless upon the assumption that this young person, upon the eve of her marriage, agreed with her intended husband to receive and hold a conveyance which should be a mere pretence. I do not see what reason he could suggest to her for such a

course, unless it were to use the deed as a fence to keep off creditors: and that would bring it within the other objection, and for that, as I have said, I think there is no pretence. It would be presuming fraud, and that against the evidence furnished by the nature of the original transaction; for a marriage, unless under circumstances which prove fraud, as in *Colombine v. Penhall* (a), and as I thought in *Commercial Bank v. Cooke* (b), is one of the last occasions upon which the parties would choose to conspire together to perpetrate a fraud upon others.

The most that can be said against this transaction is, that it is a case of suspicion. But suspicion is not sufficient to set aside a deed. Sir Richard Kindersly, in *Hale v. The Saloon Omnibus Company* (c), expressed himself upon this head thus:—After saying that at first sight the whole transaction brought in question in that case appeared to him one of great suspicion; that much of it had been removed, but not entirely removed; he added: “Still, as I have had occasion often to observe, suspicion, though a ground for rigid inquiry, is not a ground, if it remains only suspicion, for an adverse decree.” And that appears to me to be the case here: the suspicion is not wholly removed, though a good deal of it is; but what remains is only suspicion.

It is right, too, to bear in mind that if we set this transaction aside, we reverse the judgment of the late learned Vice-Chancellor, who had the advantage of hearing the *viva voce* examination of the witnesses, and consequently of appreciating all the merits of the case better than we can have. I concur in his judgment.

I may add, that I very much doubt whether the circumstances of *Williamson*, at or about the time of his

(a) 1 S. & G. 258.

(b) 9 Grant 524.

(c) 4 Dy. 499.

1865. marriage, were such as to enable any creditor that he
 Mulholland then had to set aside the conveyance; and there is no
 v. evidence that it was made in contemplation of future
 Williamson. embarrassments. The plaintiff is a subsequent credi-
 tor.—*Rider v. Külder* (a).

Mowat, V.C.—In this case nothing turns on the comparative credibility of the witnesses examined before the late Vice-Chancellor at the hearing of the cause.

The deed which the plaintiff impeaches is set up by the defendant as an ante-nuptial settlement, made in consideration of the marriage of the parties to it.

Judgment. The first observation which it occurs to me to make on this defence is, that it claims for the deed a character which the deed itself does not support, and the onus of establishing which, is, therefore, on the grantee. Accordingly, to give validity to the deed as a transaction in consideration of the marriage, the defendant must prove that she was a party to it; for otherwise it is a mere voluntary deed. But there is no such evidence. The deed is not signed by her; she does not appear to have been present when it was executed; no negotiation for such a deed or for any marriage settlement has been shewn; or any knowledge by her for some years after the marriage, that any such deed was in existence. All that we have on these points is the unproved statements of the defendant's answer. This objection appears to me to be fatal to the defence.

Further, if the deed was executed before the marriage, the circumstances are much more consistent with the contention, which the plaintiff sets up, that the deed was executed as a protection against creditors, in case the grantee should become unfortunate in business, than

(a) 10 Ves. 360, and other cases.

with any other explanation of it that has been suggested. It was wholly written by the deceased. It was kept secret from his father, who was also the guardian of the intended wife, and secret from the world. No trustee was named in it. It was not registered. There is no evidence of its having ever been out of the husband's possession, or of its contents being known to anybody, until the husband was on the eve of insolvency; and one of the properties comprised in it the husband in the interval sold as his own, the wife not objecting. The husband thus retained the apparent ownership, and had all the credit from the plaintiff and others, which such apparent ownership naturally carried with it.—*Higinbotham v. Holme (a), Columbine v. Penhall (b), Re Casey's Trusts (c)*. These are badges of fraud often referred to in such cases; and there are others. The property comprised in the deed was worth over £3000, and there is no evidence of the husband's having other property enough to pay his debts (*d*). The effect, however, of the transaction was to leave him apparent owner of the property until he should choose to produce and make public the deed, and then the deed would give him the control jointly with his wife; and the deed does not appear to have been in fact brought to light until a short time before the grantor found it necessary to make an assignment for the benefit of his creditors.

1865.
Mulholland
v.
Williamson.

Judgment.

I think there is no authority that would justify us holding such a transaction valid against creditors. If we should hold it to be valid we would be pointing out an easy way by which any man, having property at the time of his marriage, may hereafter, to the extent of such property, defraud his creditors at his leisure,

(a) 19 Ves. 88.

(b) 1 Sm. & Giff. 256.

(c) 4 Ir. Ch. 447; Vide also 27 Eliz., ch. 4, § 5, and the decisions thereon.

(d) French v. French, 6 DeG. McN. & G. 95.

1865. without embarrassing himself in the meantime. I think that the public policy which is recognized in this court as applicable to such transactions, clearly forbids such a course.

Again, the deed affords no internal evidence in confirmation of the defence, but entirely the reverse. For example, according to the purport of the deed, it would go into effect whether the marriage should take place or not; and in case the marriage should take place, the deed makes no provision for children. Moreover, the whole property, on the death of the wife without issue, would go to her heirs, to the exclusion of both the husband and husband's heirs; and there was no fortune brought to the husband by the wife that would weigh against this result.⁽¹⁾ Men do not make such settlements.

Judgment.

Assuming that the deed was executed before the marriage with an honest purpose of some kind—which it may have been, but which I think the evidence does not enable us judicially to affirm that it was,—a more probable explanation, had the defendant suggested it, would have been that the deed was intended rather as a temporary security for the £1000 which the defendant says (though she has not proved) that the deceased had intimated an intention of settling upon her (a); or even that he meant to retain out of it £1000, the consideration it names and for which no receipt is indorsed, and to settle the remainder only (b). Whether in either case he contemplated an absolute settlement on the defendant, or a settlement containing the usual provisions, would be mere matter of conjecture; but there would be no probability in favor of an absolute settlement having been intended.

(a) *Lincoln v. Wright*, 4 DeG. & J. 16.

(b) *Leman v. Whitley*, 4 Russ. 423.

The defendant says that the deed was made to her, ^{1865.} not to secure, but in lieu of, the £1000 which (she says) ^{Mulholland} the deceased was to settle upon her. She has given no ^{v.} evidence whatever of this; and the court cannot view ^{Williamson.} with favor a transaction by which property to the amount of three or four times the sum said by the defendant to have been agreed upon, was voluntarily given, to the prejudice of future creditors.

The husband was at this time in business; and one of the debts he owed was of £500 received by him as executor of one *Samuel Nash*, and which is still unpaid. The plaintiff's debt did not accrue till subsequently. But, as I think that the defendant has failed to shew either that the deed can be maintained as a valid ante-nuptial settlement in consideration of marriage, or that her husband was in circumstances to make a valid gift of so much property as against creditors, I think a bill by the plaintiff, though a ^{Judgment.} subsequent creditor, is maintainable. — *Jenkins v. Vaughan* (a), *Barling v. Bishopp* (b), *Spirett v. Willows* (c).

I am of opinion, therefore, that the plaintiff is entitled to a decree.

SHAW V. CUNNINGHAM.

Judgment creditor—Lien.

The lien of registered judgment creditors is not preserved by a bill filed before the 18th of May, 1861, but to which they were not made parties until after that day. *The Bank of Montreal v. Woodcock* (Ante vol. ix., page 142), overruled.

This was a suit of foreclosure. It was commenced before the 18th of May, 1861. After that day three

(a) 3 Drew, 423. (b) 29 Beav. 417. (c) 11 Jur. N.S. 50.

1865. judgment creditors were added in the Master's office as parties, and the Master reported that they had a lien on the property prior to the mortgage of the defendant *Blackett*. From this report *Blackett* appealed, contending that under the statute (24 Victoria, ch. 41) the lien of the three judgment creditors was gone. The Master's report was founded on *The Bank of Montreal v. Woodcock*. The judgment creditors insisted that the decision was correct; and if not so, yet, having been acted on ever since, should not now be disturbed. The question was argued before the full court.

Argument. *Buchanan v. Tiffany* and *Hawkins v. Jarvis* (a), *The Bank of Upper Canada v. Thomas* (b), *Jason v. Gardiner* (c), *Byron v. Cooper* (d), *Plowden v. Thorpe* (e), were referred to.

Mr. *Blake*, Q.C., for the appeal.

Mr. *Crickmore*, contra,

VANKOUGHNET, C.—We are of opinion that the decision in *The Bank of Montreal v. Woodcock* cannot be maintained, and that its having been acted on since is not a sufficient ground for refusing to give effect to what we consider the true construction of the statute.

(a) 1 Gr. 98, 257.

(b) 9 Gr. 329.

(c) 11 Gr. 23.

(d) 11 Clk. & F. 556.

(e) 7 Clk. & F. 137.

LORING V. LORING.

1865.

Will—Ademption.

A testator bequeathed to W. L. £1500, "due to me by R. C., and secured by mortgage." After the making of this will, and in the testator's life-time, R. C. sold to one H. the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this property and other property, and a covenant to pay the amount; retaining in his possession the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for payment of the debt. The testator died without in any way altering his will in regard to this legacy: *Held*, that the legacy was not adeemed.

This was an appeal by the defendant from a decree pronounced by his Lordship the Chancellor, declaring that a legacy of £1500, mentioned in the pleadings, was not adeemed, and that the plaintiff was entitled to receive the same.

Statement.

Mr. *Strong*, Q.C., for the plaintiff.

Mr. *Blake*, Q.C., contra.

The following cases were cited: *Blackwell v. Child* (a), *Dingwell v. Askew* (b), *Ashburner v. Macquire* (c).

VANKOUGHNET, C.—The testator bequeathed to *Wm. Loring* £1500, "due to me by *Ralph Clement*, and secured by mortgage." After the making of this will, and in the testator's lifetime, *Clement* sold to one *Hull* the property mortgaged; and the testator, to facilitate the sale and secure the debt due him, took from *Hull* a mortgage of this property and other property, and a covenant to pay the amount, retaining in his possession the mortgage from *Clement* under which he held the legal estate in the lands, and the bond originally obtained from *Clement* for payment of the

(a) *Ambl.* 260.(c) 2 *W. & T.* 227.(b) 1 *Cox*, 427.

1865. amount. The testator died without in any way altering his will in regard to this legacy. The question presented for our decision is: whether or not this legacy was adeemed in the testator's lifetime? There is no authority precisely in point, at least none such has been furnished to us; and from the well known industry and ability of the counsel by whom the case was argued, I assume none can be found. On the best consideration I can give the matter, I am of opinion that there has been no ademption. The debt of £1500, which *Clement* was to have paid, is still a debt unpaid, though no longer payable by him; for I apprehend, that though liable still at law, this court would interfere to protect him from it, under the arrangement made by the testator and *Hull*. Yet it is the same sum of money still owing to the testator, secured in part on the same property still held by the testator under the same mortgage. The amount was not received by the testator in his lifetime, the same debtor remaining liable at law for it; and though this court would hold him discharged, it would do so only because of the dealings between the testator and *Hull*, and not because he had paid it.

Judgment

If a legacy were of a promissory note, and that note became afterwards merged in a higher security, and so discharged, I apprehend the amount represented by the note would be treated as the legacy, and that this had not been adeemed by the change of security.

SPRAGGE and MOWAT, V.CC., concurred in affirming the decree.

Appeal dismissed with costs.

PLATT V. ASHRIDGE.

1865.

Mortgage—Opening foreclosure.

A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate, had had no solicitor in the cause, and misunderstood the object of the bill, which was the only paper served on him; the mortgage bearing twelve per cent. interest, the property appearing to be three times the value of the incumbrance, and the whole or greater part of the property being still in the possession of the mortgagor.

This was an appeal to the full court from an order made in Chambers by his Honor *V.C. Mowat*, opening a foreclosure after final order. The final order was dated the 19th of April, 1864. The motion in Chambers was argued on the 26th of October, 1865. The defendant, the mortgagor, had remained in possession of the property, or the greater part of it, and the mortgagee had made no disposition of it except a verbal lease, the evidence of which was not satisfactory. Affidavits were filed on both sides, and some of their statements were contradictory, but the result of them all—according to the view of the court—was as stated in the judgment of the Vice-Chancellor in granting this order. The judgment was as follows:—

Statement.

MOWAT, V.C.—The circumstances of this case are very special; but having reference to the facts—that a foreclosure is one-sided, and does not prevent a mortgagee from afterwards suing the mortgagor for the mortgage money if he himself still retains the mortgaged property; that the defendant in the present case is an ignorant and illiterate man, unable to write or read; that he had no solicitor in the suit; that he was served therein with but one paper, the bill; that it was not read to him, nor did he learn its contents; that he ignorantly supposed the course was that the plaintiff should sell the property, and give him the balance of the purchase money after deducting the debt; that the property is worth three times the

1865. mortgage money; that the defendant did not know
 the nature or effect of the final order till March or
 April, 1865; that it was only recently that he was
 aware he could get any relief against it; that the
 mortgage bears interest at twelve per cent.; that no
 injustice will be done to the mortgagee by opening
 the foreclosure and granting a short day to the mort-
 gator to pay the debt, interest, and costs—I think I
 ought not to refuse the application.

Platt
 v.
 Ashbridge.

Statement.

The order as drawn up directed the foreclosure to be opened and the final order set aside; and extended the time for payment, until the first day of September, 1865, of the debt, interest and costs, subsequent interest and subsequent costs; and the order further provided, that it was to be without prejudice to the rights of any tenant of the plaintiff in possession of any part of the premises.

From this order the plaintiff appealed to the full court.

Mr. Crombie, for the appeal.

Mr. Fitzgerald, contra.

The following cases were cited: *Edwards v. Cunliffe* (a), *Nanny v. Edwards* (b), *Ford v. Wastell* (c), *Thornhill v. Manning* (d), *Hilliard v. Campbell* (e), *Evans v. Evans* (f).

The judgment of the court was delivered by

VANKOUGHNET, C.—As is said in *Thornhill v. Manning*, the relations of mortgagor and mortgagee in this court are anomalous. This court looks at the estate from first to last as only a pledge for the debt.

(a) 1 Madd. 287.

(c) 6 Hare, 233.

(e) 7 Grant, 96.

(b) 4 Russ. 124.

(d) 1 Sim. N. S. 453.

(f) 9 U. C. Law J. 71.

The mere fact of an order absolute for foreclosure being obtained, does not necessarily prevent the court from rescuing the estate from the mortgagee. Indeed the order absolute amounts to little more than an authority by the court to the mortgagee to deal with the property as his own. When he in any way as such owner alters his relation to it, he adopts it as his own and foregoes his debt, and neither he nor the mortgagor afterwards can treat it as a mere pledge for the debt, and insist that the latter is subsisting. Until this is done, the mortgagee is in no way bound to take the property for his debt notwithstanding the order for foreclosure. He may treat this as a nullity, and sue at law for his mortgage money. Can he therefore insist that it is final as against the mortgagor, when there has been no change otherwise in their relations; no change in the property or the use of it? It is a matter of discretion to grant indulgence to a mortgagor, and though my brother *Mowat* has taken a very lenient view of his case here; yet, for the reasons stated by him, I am not disposed to disturb it.

1865.
Platt
v.
Ashbridge.

Judgment.

Order affirmed with costs.

WALSH V. DEBLAQUIERE.

Practice—Supplemental answer—Adjourning application from Chambers to Court.

A joint answer having been put in by a corporation under the corporate seal, and by their officer under oath, the defendants afterwards applied for leave to file a supplemental answer, alleging a material mistake in the original answer; and the court granted leave to the corporation to file the supplemental answer on terms, but refused such leave to the officer, his explanation of the alleged mistake being unsatisfactory.

A judge in Chambers has a discretion to refuse to adjourn any matter to be heard in court.

This was a motion to the full court to discharge an

1865. order made by his Honor V. C. Mowat in Chambers, granting leave to the defendants, the *Gore Bank*, on certain terms, to file a supplemental answer to correct an alleged mistake in their original answer. The original answer was a joint answer by the Bank and its Cashier, and the application was for leave to file a supplemental answer by both, but leave was granted to the Bank only.

Walsh
v.
DeBlaquiere

When the application was made in Chambers,

Mr. Blake, Q.C., for the plaintiff, demanded that the case should be adjourned to the full court under the third section of Order 34, of June, 1853, claiming that he was entitled to the adjournment as of right. The Vice-Chancellor, however, being of opinion that, as the court would not sit for the hearing of such matters under the Order of 1862 until after the hearing of the cause, it would not be proper to adjourn the motion, refused the adjournment. The application was then argued on the merits, and the Vice-Chancellor pronounced the following judgment.

Statement.

MOWAT, V.C.—The defendant *Cassels* is trustee of the property in question, and the officer of the *Gore Bank*. The Bank and he put in a joint answer, stating that *Cassels* holds the property as a security for \$7,200. The defendants wish now to put in a supplemental answer, claiming to hold the property for a much larger sum,—the learned counsel for the plaintiff said, amounting to nearly \$50,000.

Ought this to be permitted?

On the one hand, the court must feel a desire that the case may be decided on its real merits, whatever these are; and, on the other hand, is to be considered the reluctance of the court to allow answers to be altered.

In *Bell v. Dunmore* (a), where an application of this kind was made, the Master of the Rolls observed in reference to it, "that the course of the court is to allow neither party to obtain a victory at the expense of truth." On another application of the same kind in *Fulton v. Gilmour* (b), the same learned judge remarked: "The court itself has, as it appears to me, the strongest interest and a plain duty, to use its best endeavors to escape from the chance of deciding on facts which are false, and making a decree not warranted by the truth of the case."

1865.

Walsh
v.
DeBlaquiere

Reference has sometimes been made, in refusing such applications, to the impossibility of placing the plaintiff in the position he would have been in had a correct answer been filed in the first instance, and to the delay which the new answer would create. Here it is said that the plaintiff has been induced, by the terms of the first answer, to withdraw \$2,400 from Messrs. *Chaffey & Co.*, which otherwise he would not have touched. But I think any prejudice from that cause can be avoided by exacting from the defendants, as a condition of granting their application, a consent that the circumstance referred to shall not prejudice the case of the plaintiff in any way. As for the delay, it is not such as the authorities would warrant me in holding to be fatal to the defendants' motion, especially as I may require them to consent to go to a hearing this autumn at any place the plaintiff may select for the purpose, the defendants paying the additional expense of witnesses' fees occasioned by the hearing being transferred to such place from Toronto.

Judgment.

The principal reason why the court makes greater difficulty in allowing a defendant to correct a mistake in his answer, than in allowing a plaintiff to correct a mistake in his bill, is no doubt because the answer is

(a) 7 Beav. 283.

(b) 8 Beav. 157.

1865. *Walsh v. DeBlaquiere* sworn to and the bill is not sworn to. But this reason does not apply to the answer of the principal defendants in the present case; for, being a corporation, their answer was not on oath or honor, and the hardship of binding the shareholders by an erroneous answer which their officer has put in, is quite as great as the hardship would be of binding the plaintiff by the erroneous statements of his bill, or of binding defendants at law by erroneous pleadings instead of amending them, as the practice in such case allows.

It was argued that the proposed answer is not true, and that the truth is according to the statement of the original answer. Under the present system of trying causes in Chancery, this question can be far better determined by a judge before whom the witnesses will give their evidence in open court than by me here; and I do not perceive that anything would be gained to justice by my forming an opinion on the subject here, and being guided by such opinion in granting or refusing the defendants' application. If granted, the defence which the corporation desire to set up will be proceeded with, damaged by its inconsistency with the defendants' first statement; but, if they are able to substantiate its truth, I cannot satisfy myself that I would be doing right in excluding it, as it is hardly disputed that the answer filed was wrong to some extent. I can scarcely doubt, I think, that the assignment from Mr. Jones must have been intended as a security, to the extent of *DeBlaquiere's* interest at all events, for the sum paid to *Jones* by the Bank, or due to the Bank by *DeBlaquiere*. Mr. *DeBlaquiere* indeed appeared by his solicitor in support of the motion. The only reasonable doubt, therefore, seems to be as to whether there was or was not an agreement that *Walsh* should be entitled to a conveyance of his interest in the property on paying the \$7,200.

Judgment.

"On the whole," to use the language of Lord

Langdale in *Bell v. Dunmore* (a), "it appears to me that the danger of doing injustice will be greater by refusing than by granting the application."

1865.

Walsh
v.
DeBlaquiere

Besides the conditions already mentioned, the defendants must pay the costs of the day and of this application.

On the appeal,

Mr. *Blake*, Q.C., for the appeal, cited *Wells v. Wood* (b), *Spurrier v. Fitzgerald* (c).

Mr. *Crooks* Q.C., for the *Gore Bank*, referred to *Dwarris* on Statutes, 691, 740; *Seton* on Decrees, 4th ed., 45, 84; *Fulton v. Gilmore* (d), *Cooper v. Uttoxeter Burial Board* (e).

Mr. *Hector Cameron*, for the defendants *De Blaquiere* and *Jones*, did not object to the order appealed against.

VANKOUGHNET, C.—Mr. *Blake* contends that subsection three, of Order thirty-four, gives a party a right to insist that any matter before a judge in Chambers shall be adjourned into open Court. Such a practice has never, I think, been the received construction of the order; and it would be a most inconvenient construction to give it. I am not aware that any judicial decision has ever been had, or, before this case, been invoked, upon the view presented by Mr. *Blake*. The Order is in these words: "The Court may adjourn for consideration in Chambers any matter which, in the opinion of the Court, may be disposed of more conveniently in Chambers; and any judge sitting in Chambers may direct any matter to be heard in open Court which he may think ought to be so heard; and such

Judgment.

(a) 7 Beav. 283.

(b) 10 Ves. 402.

(c) 6 Ves. 548.

(d) 1 Phillips, 122.

(e) 1 H. & M. 680.

1865. matter is to be adjourned at the request of either party, subject to such order as to costs or otherwise as the Court may think it right to impose." The last part of the section cannot refer to any of the matters covered by the first part, for of course a judge in Chambers would not send back to the court, at the instance merely of a party, that matter which the court had sent to Chambers; and yet this last part of the section must refer to some other part, which can then only be the second part, as the word "such," is a term of reference. What then is it that the judge is to adjourn into court? Grammatically, the matter referred to in the second part as that which the judge thinks ought to be heard in open court; and only such matter, therefore, is to be adjourned at the request of either party. The judge himself may adjourn the matter if he thinks fit. If in his opinion it is a fit case for court, he may still not choose to put the parties to the expense of sending it there, but may, on the whole, prefer to take the responsibility of disposing of it himself. Or, if either party requires such a case to go to full court, and the judge sees fit to send it, he will impose such terms as he thinks reasonable. The language of the section will bear this construction. It is the convenient one, and that which, I think, has been generally acted on in practice for the last twelve years. The subsequent orders of the court providing for appeals from orders in Chambers favor this construction.

Judgment.

As to the merits, I am not disposed to disturb my brother *Mowat's* order permitting the supplemental answer of the Bank. Had Mr. *Cassells* been the responsible defendant, and made a similar application, I would have refused it, for his explanation of how he came to make the statements in the first answer, and how he afterwards discovered they were wrong, is unsatisfactory. He is, however, merely an officer of the corporation, which had no information when its answer was prepared other than that furnished by him.

This information he now says was given in mistake, and the Bank seeks to be relieved from that mistake. It would not be just, I think, to hold them bound by it. Mr. *Cassells* is at most a witness. He is a party merely because he holds the legal estate for the Bank, or for discovery. If a witness gives a wrong account of a transaction, discovers his error, returns to court and asks to correct his evidence, the request is in the interests of truth complied with, and the corrected evidence will be taken subject to such criticism as inconsistent statements may properly provoke.

1865.

Walsh

v.

DeBlaquiere

I think the order of the learned Vice-Chancellor right, on the grounds stated in his judgment

Appeal dismissed with costs.

WINTERS v. SUTTON.

Vendor and purchaser—Defence at law.

Upon a contract for sale of land the purchaser was let into possession; the vendor, instead of complying with his vendor's demand for an abstract of title, instituted proceedings in ejectment, so as to compel payment of the purchase money; and the purchaser defended that action, and did not proceed in this court until the vendor had recovered judgment. On investigating the title it was found to be bad: the court, although it gave the purchaser relief so far as restraining the proceedings in ejectment, refused him his costs of his defence at law, but gave him his costs in this court.

This was a bill by a purchaser, praying to have specific performance of a contract for sale of land, of which he had been let into possession, if a good title could be shewn; and if a good title could not be made that the contract should be rescinded, and an action of ejectment, brought by the vendor, restrained.

Statement.

It appeared that after the contract the purchaser

1865. *Winters v. Sutton.* went into possession, and subsequently demanded an abstract of title, which the vendor refused, insisting that his title was perfectly good, and that the purchaser was aware of the nature of it at the time he purchased and went into possession, and thereupon instituted proceedings at law with a view, as was alleged, of compelling plaintiff to carry out the contract without a proper investigation of the title. Under these circumstances the present suit was brought, and an injunction obtained restraining proceedings in the action; and at the hearing a reference as to title was directed, further directions and costs being reserved.

The Master reported against the title, and on the cause coming on for further directions,

Argument. Mr. *Spencer*, for the plaintiff, asked that the decree to be made should be for a rescission of the contract, and payment to the plaintiff of the costs of this suit, and at law, the defendant's inequitable conduct having been the cause of the suit being instituted, which might have been avoided had he, as he should have done, furnished an abstract of title, and submitted to an investigation of the title, instead of taking proceedings to compel the plaintiff to accept that which proved to be a bad title.

Mr. *S. Blake*, contra, insisted that plaintiff was not entitled to his costs in either court. His defence at law was clearly for delay, and should not have been entered upon, and had only tended to create unnecessary expense. And in this court the rule is, that where the bill of a purchaser is dismissed because the vendor cannot make a title, neither party gets costs.

VANKOUGHNET, C.—I think the plaintiff cannot have the costs of his defence at law. He might earlier, indeed at once, after the execution of the contract have required an abstract, and had an investigation of the

title. He did not do so, but waited till the last moment; made a useless defence at law, and caused thereby additional expense. But as the defendant improperly sought to enforce his contract at law, I think he should not have any costs at law. He was asked for an abstract of title, and refused it, insisting that his title was good, and that the plaintiff understood it. I think, therefore, the decree should be that the contract be rescinded; that the injunction restraining defendant from proceeding on the contract at law should be made perpetual; that the money in court should be paid out to the plaintiff; and that he should have his costs of suit, but that he should deliver up possession of the premises.

1865.

Winters
v.
Sutton.

RABIAN V. SCHOOL TRUSTEES OF THE TOWNSHIP OF
THURLOW.

Injunction—Pleading.

A bill was filed by a rate-payer seeking to restrain the trustees of a school from allowing the school house to be used for religious services, but the bill did not allege that it was filed on behalf of the plaintiff and all other rate-payers: two of the three school trustees consented to the injunction being granted as asked. The court refused the application on the grounds, first, that the suit was improperly constituted; and if it had been, it appearing that a majority of the trustees were in favor of the views of the plaintiff, they had, themselves, the power to do that which they consented to the court doing. And if the bill had been by the plaintiff, on behalf of himself and all other rate-payers, whether then the suit would have been properly constituted. *Quare.*

The bill in this case was filed to restrain the School Trustees of School Section No. 9, in the township of Thurlow, from suffering or permitting the school house to be used for other than school purposes. It appeared that the trustees had been in the habit of allowing different religious bodies to perform divine service therein, when, as it was alleged, the fuel furnished for school purposes was consumed by the parties so using

Statement.

1865. the school house for their religious services. It is also alleged that the building and fittings were injured by such user.

Rabian
v.
School
Trustees of
Thurlow.

Mr. Bull, for the plaintiff, moved upon notice for an injunction in the terms of the prayer of the bill.

The defendants did not appear, and it was shewn that two of the three trustees consented to the application being granted, but

SPRAGGE, V.C.—I refuse the injunction. The bill is by one rate-payer, and is not on behalf of himself and all other ratepayers: without saying that the suit would be in that case properly constituted, I hold it not properly constituted as it is. Besides, there appears to be no necessity for an injunction, inasmuch as two of the three school trustees consent to the injunction prayed for. What they consent to the court doing they have the power, as the majority, to do themselves.

Judgment

It is suggested that the trustees are a varying body, and the next trustees or a majority of them may be of a different mind. But the bill proceeds of course upon the act complained of being illegal; and I cannot assume that any future trustees will sanction what is illegal. If not illegal, the injunction ought not to be granted. I pronounce no opinion upon whether it is illegal or not, but whether it is so or not the injunction ought not to be granted.

KINTREA V. CHARLES.

1865.

Partnership—Right of account between partners.

One member of a co-partnership was entrusted with the sole management of the books and finances of the company. The books, kept by the book-keeper of the company, showed him in advance to the firm, while in reality they should have shown a balance against him for a considerable amount. This partner sold out his interest to one of his co-partners: *Held*, that such purchase did not vary the right of the partner to call upon the other to account for moneys not appearing in the books of the co-partnership.

This was a bill by *James Kintrea* against *Jordan Charles* and *William Spencer*, praying an account of the dealings of a certain co-partnership business which had for some time been carried on between the plaintiff and defendants, upon the grounds stated in the head note and judgment.

The cause came on for the examination of witnesses and hearing, before his Honor *V. C. Spragge*, at the sittings of the court held at Woodstock, in the autumn of 1865. Statement.

Mr. *J. McLennan*, for the plaintiff.

Mr. *Freeman*, Q.C., for the defendants.

SPRAGGE, V.C.—The plaintiff and the two defendants were partners in the business of coal oil refining and selling. On the 24th of March, 1863, at a meeting of the three partners, in the office of the company, and on the business of the company, they agreed to dissolve partnership. It was agreed that the two defendants should sell out their interests to the plaintiff, for which he was to pay to each of them the sum of \$3000; and it appearing, upon a statement of the affairs of the company, that the defendant *Charles* was then in advance to the company to the amount of \$811; it was agreed that that sum should be paid to him by

1865. the plaintiff; and the same was paid, together with the respective sums of \$3000 to each of the retiring partners.

Kintrea
v.
Charles.

It now appears that so far from *Charles* being in advance to the partnership, the account, as between him and the partnership was very much the other way, and it arose in this way. *Charles* was the partner who managed the financial part of the business. All monies were paid into his hands, and all monies so paid in ought to have appeared in the cash book. It was upon the footing of what appeared in the cash book to have been received, and paid out by him, that he accounted with the partnership. A number of serious errors are pointed out; the largest in amount is a sum of \$1200; a column of moneys received by him having been erroneously added up at an aggregate, less by that sum than the true amount. Another error is, that he is credited twice with the sum of \$57 paid to one *Chapman*; another, that he is charged in the cash book with a sum of \$41 73, the true amount received having been, as appears by the day book, and as the fact was, the sum of \$401 73; and there are several others. They amount in all to a very considerable sum; and it is not denied that *Charles* did in fact receive more by the aggregaté amount of these several sums than he appears by the cash book to have received. The book-keeper was examined, and stated that all the errors arose from his mistakes; that *Charles* had nothing to do with the erroneous addition, or the erroneous entries. It is quite clear, nevertheless, that *Charles* was accountable to the partnership for all these sums; and, simply because he had received them; the omission to charge him, granting that the omission was by the servant of the three partners, could make no difference in his liability; and, of course, both or either of his partners could bring him to account. The question is, whether the agreement to dissolve—that he

Judgment.

and *Charles* should retire and sell their interests to the plaintiff—has barred the plaintiff of that right.

1865.

Kintrea
v.
Charles.

The plaintiff was willing to purchase upon the terms he did, assuming the affairs of the partnership to be what, upon the account exhibited, they appeared to be. In truth they were much better than they so appeared to be. It may be that *Charles* and *Spencer* would not have sold upon the terms they did, if acquainted with their true condition; and it may be that the plaintiff would have offered a larger sum to each, if the true condition of their affairs had been stated. All parties proceeded upon the assumption that the state of the accounts presented was correct. The plaintiff says that *Charles* represented them to be so; granting that he did, the plaintiff did not purchase upon the faith of their being as represented; and *not as in fact they were*; inasmuch as the inducement to purchase would have been greater, if their true condition had been disclosed. His complaint then must be not as a purchaser, but as a partner; not that he was induced by misrepresentation to purchase; but that having purchased under the circumstances that he did, and thereby acquired the rights of the partnership, he has a right to make *Charles* accountable for partnership funds, that he received and did not account for.

Judgment.

And here, I may observe, that I do not think it lies in *Charles'* mouth to say that he sold upon the terms that he did upon the assumption, (which he believed,) that the accounts stood, as by the statement they appeared to stand; because, in a matter which should have been within his own personal knowledge, it was his own fault, his own wrong, as between himself and his partners, that the account between himself and the partnership was untruly stated. It all arose out of moneys of the partnership that passed through his own hands. It was his duty to see that all such moneys were accounted for; and not to appropriate to his own

1865. use whatever did not appear in the cash book. It is suggested that he mixed the partnership moneys with his own; and in charging himself with what appeared against him in the cash book, he thereby accounted for all that he knew that he had received. This suggestion can be received only by way of excuse. It is in effect saying, these erroneous entries were not corrected, and the erroneous statement of account was presented and acted upon, not through any *wilful fraud* on my part, but in consequence of my loose mode of conducting business. It is manifest that such explanation can go no further than to exculpate a party from intentional wrong. It cannot prejudice the rights of parties affected by the breach of duty. It must follow, that the legal consequences are precisely the same as if *Charles* had made a wilful misrepresentation in regard to the state of the account between himself and the partnership; and in speculating upon the probability that the defendants would not have retired upon the terms they did, but upon the assumption that the accounts stood as they were represented to be: it is, on the other hand, not to be assumed, that if they had been truly represented the plaintiff would have been willing to pay *Charles* \$3000 and \$800, and to leave in his hands, unaccounted for, the various sums of money with which it is now clear that he was properly chargeable.

Judgment.

Looking at the instrument of dissolution and assignment, I do not think that the plaintiff can found anything upon that. It recites the agreement of the parties that the copartnership should be determined, *Charles* and *Spencer* assigning to the plaintiff all their interest in the same; and what is assigned is "all those the two undivided parts and shares of them, the said *Jordan Charles* and *William Spencer*, of, and in all and singular, the real estate, stock in trade, goods, chattels, credits and effects of the said co-partnership, and all the estate, right, title," &c., therein. Among the credits of a partnership is comprised in equity the debt

of a partner to the partnership, but I think such debt did not pass by this instrument. I am satisfied it was not intended; and the payment of a sum to the retiring parties negatives such intention under the circumstances of the case. I think the plaintiff's equity must rest upon his rights, as a partner, remaining unaffected by the agreement to dissolve and assign: that would entitle him to one-third of the debt due by *Charles* to the partnership: to one-third of it *Charles* would be entitled himself; that could not have been intended to pass by the instrument; and, it being assumed that *Charles* was not indebted, any intention to pass *Spencer's* interest in *Charles's* indebtedness is negatived. Therefore, if no money had been paid by the plaintiff to *Charles* upon the footing of his being a creditor instead of a debtor, the proper decree would be for the payment to the plaintiff by *Charles* of one-third of the amount he received, beyond what he accounted for.

1865.

Kintrea
v.
Charles.

Judgment.

The \$811 having been paid under misrepresentation must of course be paid back. I may observe, in passing, that the parties appear to have acted under a misapprehension in paying the whole of that sum to *Charles*; for assuming him to be a creditor to that amount, he was creditor of a partnership consisting of three, of whom he was one; and so as to one-third he was a debtor to himself, and two-thirds only of the amount should have been paid to him. But that is of no moment now; the whole was paid, and so the whole must be repaid; and as to the difference between that sum and the whole amount of receipts unaccounted for by *Charles*, he must pay one-third thereof to the plaintiff.

It is charged further against *Charles* that he chequed out from the bank a sum of \$1,200 on the 4th of March, 1863: he accounts for it by shewing payments of \$1,160 and \$40. I cannot, with the materials before me, say whether or not the proceeds of the cheque were so

1865. applied. *Charles* appears also to have chequed out a sum of \$395 after the dissolution, and to have had the amount paid to his own credit: this requires explanation. There can be an inquiry as to both sums if the plaintiff desires it. I do not understand any account to be asked for of the previous receipt and application of moneys other than those specifically mentioned in the bill.

Kintrea
v.
Charles.

I do not think the defendants liable by reason of any representation made in reference to the amount due to *Goyfer*. What passed was no more than an expression of the views of the different partners in regard to a liability of the partnership. The defendants appear to have been mistaken, but that does not render them liable to the plaintiff.

Judgment.

The defendant *Spencer* appears to be liable to account in a very small matter: he seems to have settled an account of something over \$20, which the partnership had against one *Carr*, by setting against it an account which *Carr* had against him individually, and then omitted to charge himself with the amount. All that the plaintiff could be entitled to in respect of this would be one-third of the amount, about \$7. He is of course not made a defendant in respect of this trifling item, but he and *Charles* are charged together with all the derelictions of duty, which fail as to him, though they are sustained against *Charles*. I think *Spencer* should have his costs, less the sum of \$7 to which I have referred. The decree will be for costs against *Charles*.

1865.

KINTREA V. CHARLES.

Partnership—Right of action against partners.

Where one of several co-partners acts so improperly in the affair of the co-partnership as to render it liable to an action for damages, the other members will be entitled to maintain a suit for the amount thereof against him; and this right will not be prejudiced by the fact, that on the dissolution of the partnership the continuing partner gave to the one so acting a bond of indemnity, and to save him harmless from actions, if it appears that the fact of such improper acting of his partner was withheld from him.

This was a suit between the same parties, the bill in which alleged that it was agreed between the parties that *Spencer* should have the entire superintendence and management of the manufacturing and refining of oil, the business of which they were carrying on in co-partnership together; for which superintendence he was to receive from the partnership the sum of \$1000 a-year, over and above his proportion of the profits. It also alleged that *Spencer* had so improperly manufactured the oil that the co-partnership had been sued by the Canada Oil Company, to whom a quantity thereof had been sold, and damages were recovered against the co-partnership; prior to which, however, and in ignorance of any liability of the co-partnership in this respect, plaintiff had agreed with the defendants to purchase out their respective interests in the firm, at the price or sum of \$3000 each, which was accordingly carried out, and a bond executed by plaintiff to save harmless and indemnify the defendants from all claims for loss or damage by reason of any acts of the partnership firm.

Statement.

An action, it appeared, was afterwards brought by the Canada Oil Company against the firm, and a verdict recovered against them, on which judgment was entered and execution issued; part of the amount the plaintiff had paid, the residue had been paid by the defendants, who had obtained control of the execution,

1865. *Kintrea*
v. *Charles*. and were about making use thereof to compel the plaintiff to pay the amount still due thereon. Under the circumstances, the plaintiff submitted the defendants were not entitled to be indemnified by him, and prayed an injunction to restrain such use of the writ of execution—for repayment by defendants of what the plaintiff had paid, and for other relief. In the view the court took of the evidence, these statements of the bill were substantially corroborated.

The cause came on for the examination of witnesses and hearing, at the sittings of the court at Woodstock, before his Honor *V.C. Spragge*, in October, 1865.

Mr. J. McLennan for the plaintiff.

Mr. Freeman, Q.C., for the defendants.

Judgment. *SPRAGGE, V.C.*—The evidence shews, in my judgment, that the defendant *Spencer*, either wilfully or through culpable negligence, manufactured the oil sold by the plaintiff and the defendants, when they were in partnership, to the Canada Oil Company, of so bad a quality as to be unfit for use. The evidence of *George Allan* and of *Alexander McKay* shews this, and shews that it was done with a deliberate disregard of the consequences, which cannot be too strongly condemned.

George Allan, a witness called by plaintiff, states in his evidence:—"I was employed in the Woodstock Oil Refinery from the commencement of their business until the dissolution: my business was the running of the stills and assisting *Spencer* in the refining; that is after he joined the concern. I was at the place when the oil complained of was manufactured. I knew at the time that part of it was of bad quality. *Spencer* manufactured it. I stilled it according to his orders. He desired me to turn it into illuminating oil at seventy-eight degrees gravity; the ordinary way was to turn it in at from fifty-eight to sixty degrees gravity. I told *Spencer* it would not be good oil, that it would be too

light in gravity; he said he would run in lubricating oil to make the body stand at from forty to forty-two degrees gravity. The oil was bad, not fit for illuminating purposes, as it would explode at from seventy to eighty degrees. It ought to stand a temperature of 100 without exploding. When I remonstrated with *Spencer* he said the oil was going to the old country, and they knew no better there. I was present when the oil was barrelled. A person from the Canada Oil Company was also present. *Spencer* expressed annoyance at seeing him there; he said that the company shewed that they were afraid of being cheated by sending the man, but that he would cheat them to his face; that if left to his own honor he would have made a better oil. There was nothing to prevent good oil being made at that time. We had good material on hand. I do not remember any other bad oil being made.

1865.

Kintrea
v.
Charles.

Cross-examined.—Some of the chemicals had been frozen which were used in the oil in question. *Spencer* said they were as good as if not frozen. I thought otherwise, and told him so.

Re-examined.—The chemicals I spoke of were acids. Sulphuric acid. It is used for deodorising, not for any other purpose. That would not affect the explosive quality of the oil. Good oil was made with the same sulphuric acid.

Evidence.

Alexander McRory, another witness called by the plaintiff, stated:—"I was employed at the refinery when the oil in question was manufactured. I was present when it was being barrelled. An agent of the Canada Oil Company was present. He said the first barrelled was good, but that the other was queer looking stuff. Afterwards *Spencer* said to me that he would cheat the man before his face."

Spencer has called no evidence against that of the above witnesses; and I must take it as proved that he knowingly made the oil of a bad and dangerous quality.

An action was afterwards brought against the company in respect of this oil, and heavy damages recovered. A portion of these damages has been paid

1865. by the plaintiff, and the residue by the two defendants, in what proportion paid by them, or whether out of joint funds, does not appear. They are now using the execution in order to enforce payment from the plaintiff, under the bonds of indemnity, to which I will presently refer, and this Bill is filed to restrain them from so doing, and to compel them to reimburse to the plaintiff the amount he has been compelled to pay.

I may say here, that I think the evidence does not shew that *Charles* had anything to do, directly or indirectly, with the oil being made of a bad quality; or that he took any part in the sale of it; or was cognizant any more than the plaintiff was, of the sale of it; and that was after the sale. The manufacturing or refining part of the business was managed by *Spencer*; and, as between the partners themselves, he alone was responsible for it. The excuse made by *Charles* to *Edgar* and *Melville* is not sufficient to fix him as *particeps fraudis* with *Spencer*.

Judgment.

Apart from what took place upon the dissolution of partnership, I think upon the authorities that, as between the partners, *Spencer* was liable to make good the loss which resulted from his improper conduct in the manufacture of the oil. For this I refer to the language of Vice-Chancellor *Knight Bruce*, in *Bury v. Allen* (a), also, to the cases of *Robertson v. Southgate* (b), and *Campbell v. Campbell* (c); and it is clear, from the latter case, that it is not necessary that the partner, through whose wrong the loss has occurred, committed the wrong, in order to defraud his partners. In that case the wrong was intended to be for the profit of the partnership, as was probably the case here. The managing partner had made a purchase of illicit whiskey; a portion of the penalty was levied from an innocent partner, and he was held entitled to recover

(a) 1 Coll. 589.

(b) 6 Hare, 536-540.

(c) 7 Clk. & F. 166.

it back from the managing partner. So, as between the partners themselves, the loss was held to fall upon the wrong doer alone.

1865.

Kintrea.

Charles.

But, it is contended, that upon the dissolution of partnership the plaintiff agreed to indemnify *Spencer* as well as *Charles*, both the retiring partners, against all damages that might be recovered against the firm, and that it was known to the plaintiff that the claim for damages, which resulted in the recovery of the judgment out of which this suit arises, was then pending.

The agreement of dissolution does provide that the plaintiff should pay all debts due by the firm, and indemnify *Charles* and *Spencer* respectively from all claims for loss or damages by reason of any acts done or committed by the firm; and, in pursuance of this, a bond was executed by the plaintiff to each of the retiring partners conditioned for the payment of such debts, and to indemnify him of, from, and against all actions, damages, and costs which might already have been brought or claimed, or might thereafter be brought against or claimed, from him, for or by reason of any act, matter, or thing caused by the co-partnership or firm, or arising thereout.

Judgment.

It will be convenient, as I consider *Charles* not under any liability to the plaintiff in respect of the oil, to consider the case as one between the plaintiff and *Spencer* alone, and as if they had been the only partners. The loss in question is within the words of the indemnity; these words implying a claim by third persons arising out of acts of the partnership, and this, as between the partnership and third persons, was an act of the partnership; and therefore, if this claim had arisen out of a mere error in judgment on the part of *Spencer*, or from any other cause which would not, as between the partners themselves, make one of them liable to the other, I should think the plaintiff would probably be bound to indemnify *Spencer*.

1865.

Kintrea
v.
Charles.

Assuming that the plaintiff knew of the claim against the company, and knew also that the oil was of bad quality, which I incline to think is made out by the evidence, and that, with that knowledge, he chose to run the risk of damages being recovered, which is putting the case as strongly for *Spencer* as it can be put, there remains the question whether *Spencer* did not withhold from the plaintiff knowledge that he had knowingly manufactured and sold oil entirely unfit for use, and that with the materials in his possession out of which good oil might have been made; that is, knowledge of facts which, as between him and the partner with whom he was dealing, made him responsible for the consequences of that unlawful act, as between himself and his partners.

Judgment.

It would probably be a proper inference, from the fact of the plaintiff advisedly agreeing to indemnify his retiring partner from claims for damages in regard to this bad oil, as *Spencer* says he did, that he was ignorant of the facts which made the retiring partner liable to him to answer that very claim. But I think it certain that he did not disclose the real facts; for what he discloses by his answer is at variance with them. He says that he made the bargain for the sale of the oil to the Canada Oil Company; and then follows his excuse for the badness of the oil: "that the time stipulated for the delivery of the refined oil was short, and it had to be refined from the crude oil thus obtained," (*i. e.*, from the Canada Oil Company); "and owing to some of the chemicals, which I had to use, having been injured by the cold weather which set in, I found that I could not make a good article, and deliver it within the time stipulated." In another passage he says, "that, except as to the injured chemicals, everything was in order for making good oil at that time at our factory." In another passage: "I did the best I could with the materials I had; but the oil was not a good article; but I did believe it was fit for use, though inferior to

the oil we had previously made, which was the very best made, as I believe." 1865.

Kintrea
v.
Charles.

He says also, that in conversation between himself and his partners, he always said that the oil was not good.

It is, I think, a proper inference from what he states upon his answer, that he either gave no excuse or reason for the oil being bad, or, what is more probable, that he gave the same excuse that he gives in his answer. If the latter, he made a positive misrepresentation; if the former, there was a *suppressio veri*. Facts most material for the plaintiff to know, and bearing directly upon the point of his indemnifying *Spencer*, were either suppressed or misrepresented, and it was under these circumstances that the agreement to indemnify was obtained. *Spencer* must rely upon that agreement in bar of the plaintiff's equity, to throw the loss upon him; but if that agreement to indemnify was obtained by what is at least *legal fraud*, he cannot, I apprehend, set it up.

Judgment.

It does not lie in his mouth to say, that without that agreement to indemnify, he would not have agreed to the other terms for the dissolution of partnership. The partnership is *dissolved*, and the plaintiff may well say that he would not have agreed to take upon himself to indemnify *Spencer*, if he had known the facts which made *Spencer* liable to indemnify him. I judge, too, from his answer, that he represented to his partners merely that the oil was of an inferior quality as compared with the oil of first-rate quality, which he was in the habit of making, and that he did not disclose its true character—that of a bad and dangerous fluid, utterly unfit for use.

At the hearing, I took a less favourable view of the plaintiff's case. I thought he must be taken to know that his partner, *Spencer*, was skilled in the refining of

1865. coal oil; and that if he made it of bad quality, he did it knowingly and wilfully; and that with such knowledge he undertook to indemnify him, and I said that such was my impression, but that I would consider the case further. Upon reflecting upon the case, and particularly upon seeing the excuses offered by *Spencer* in his answer, I am led to think, that for the reasons I have now given, the plaintiff is entitled to relief.

In my opinion, *Spencer* stands upon the same footing as if the plaintiff had not indemnified him; consequently that he is bound to indemnify the plaintiff; and the decree, therefore, will be, that he be restrained from using the execution against the plaintiff; and that he pay to the plaintiff what he has paid under the execution; and further, that he indemnify the plaintiff for any moneys that may be levied against him by *Charles*. There may be an enquiry as to what part of the execution has been satisfied by *Charles*, and what part by *Spencer*. The plaintiff is to have his costs of suit against *Spencer*: the bill, as against *Charles*, to be dismissed with costs.

Judgment.

LYMBURNER V. CLARKE.

Costs of disclaiming defendant.

A., an execution creditor of *B.*, was made a defendant to a suit as claiming an interest in certain chattels which the plaintiff claimed as prior mortgage. *A.* filed an answer and disclaimer, but it appeared that his solicitor had given instructions to the sheriff to seize the interest of the debtor therein, if any. *Held*, that before answering the bill he should have notified the plaintiff that he made no claim to the chattels, and that, not having done so, he was not entitled to the costs of the suit.

This was a motion for decree. The plaintiff was a mortgagee, and claimed certain machinery as annexed to, and forming part of, the mortgaged property. The defendant *Nixon* was an execution creditor of the mortgagor and one *Melinda Clarke*, to whom the same

mortgagor had given a mortgage on the machinery of subsequent date to the plaintiff's mortgage. The only question discussed upon the motion was as to whether, taking *Nixon's* answer to be true, he was entitled to his costs.

1865.

Lymburner
v.
Clarke

The plaintiff had already effected an arrangement with the other defendants, as to the form of the decree in their case. *Nixon* was made a defendant as claiming an interest in the chattels in question under his execution.

Mr. *R. Sullivan*, for the plaintiff,

Mr. *Hodgins*, for defendant *Nixon*.

Mr. *Scott*, for defendant *Gordon*.

MOWAT, V. C.—I understand the rule to be that a disclaiming defendant, in order to entitle himself to costs on the ground of such disclaimer, must shew that he never had, and never claimed, the interest by reason of which he is made a defendant; or that he disclaimed, or offered to disclaim, before the institution of the suit.—*Ford v. Lord Chesterfield* (a), *Shuttleworth v. Roberts*, (b), *Morgan on Costs*, 81. The object of requiring this course to be taken is to save all unnecessary costs. Here *Nixon* shews, by his answer, that he never had any interest in the chattels in question, but he does not shew that he never claimed an interest therein. On the contrary, he admits that his solicitor instructed the sheriff to seize under his execution whatever interest in them (if any) *Melinda Clarke* had. He does not say that he subsequently countermanded these instructions, or withdrew his writ (c), and I think that the instructions implied such a claim as made it incumbent on *Nixon*, before answering the bill, to give

Judgment.

(a) 16 Beav. 516.

(b) 11 Grant, 237.

(c) Vide *Thompson v. Hudson*, 34 Beav. 107.

1865. *Lymburner v. Clarke.* notice to the plaintiff of the position he desired then to assume. Having put in an answer and disclaimer, without first making such a communication, I think he is not entitled to his costs. The bill will therefore be dismissed as against *Nixon* without costs.

ELGIE A. CAMPBELL.

Fraud—Undue influence.

T., who owned a farm which he had mortgaged to its full value, executed a conveyance thereof to the defendant, and procured her to execute a mortgage thereon in his favor for £1125. The defendant was a woman of fifty or sixty years old at this time, and had been living for some weeks at *T.*'s house, who had her entire confidence. She had no other adviser in the matter, and there was no reliable evidence of the deeds having been read over or explained to her; and no evidence of any previous negotiation for a purchase by her:

Held, that the transaction was invalid.

This was an appeal by the plaintiff to the full court against a decree pronounced by his Honor *V.C. Mowat*, dismissing the plaintiff's bill with costs.

The property in question was subject to two mortgages at the time of the transaction in question. One in favor of the defendant on one-half of the property, and another in favor of another party on the other half. Proceedings for the foreclosure of the latter mortgage were in progress on the 10th of November, 1862, when *Henry P. Thompson*, who had the equity of redemption, executed a conveyance thereof to the defendant, and procured her signature to a mortgage for £1125, in his favor. There was some evidence of negotiations between them for a lease of the property, but none for a sale. The value of the property did not exceed the amount of the two prior mortgages. On the 18th of November, 1862, *Henry P. Thompson* assigned the mortgage so signed by the defendant, to his brother *Charles E.*

Thompson, one of the subscribing witnesses, and on the 5th of December, 1862, *Charles E. Thompson* assigned it for valuable consideration to the plaintiff, a relative of the *Thompsons*. The other facts are stated by his Lordship the Chancellor in his judgment.

1865.
Elgie
v.
Campbell.

Mr. *McMichael* and Mr. *Fitzgerald*, for plaintiff.

Mr. *Blake*, Q.C., and Mr. *George Murray*, for the defendants.

VANKOUGHNET, C.—A consideration of this case has satisfied me that the mortgage in question cannot stand. My brother *Mowat*, who took the evidence, thought the matter so clear at the hearing before him that he did not call upon the defendant's counsel for argument.

We find here that the defendant *Campbell* was a woman of between fifty and sixty years of age; that she was a simple confiding person; that she believed anything that the mortgagee, *Henry P. Thompson*, told her; that she was greatly under his influence, and would do anything he wished; so much so that a neighbour named *Hunter*, an intelligent man, and a disinterested witness, who (as the plaintiff alleges) always managed her business and advised her, could not with any amount of reasoning or persuasion induce her to refuse a bargain which *Thompson* had proposed to her, though, in his (*Hunter's*) opinion, it was not an advantageous one for her; that *Thompson*, shortly before the transaction now impeached, that is ten days before, stated to more than one person that he had arranged to lease the property in question to Mrs. *Campbell* for one year; that her adopted child, one of the witnesses to the deed, *Robert Campbell*, understood the same thing from *Thompson* just before, or about the time of, the execution of the mortgage; that *Thompson* was a very shrewd man of business, and keen at a bargain; that at the time he was greatly

Judgment.

1865. ^{Elgie} _{v.} ^{Campbell.} embarrassed, and contemplated leaving the neighbourhood; that the defendant Mrs. Campbell was, and for some months had been, living in his house with him; that the property, previously to and at the time of the mortgage, was encumbered for at least its full value; that Mrs. Campbell, notwithstanding, received a deed of it from Thompson, and executed to him a mortgage to pay him £1125 over and above the incumbrances—that is, in reality, to pay him that sum for nothing; that she did not understand the nature and effects of deeds; that Robert Campbell, the witness, was equally ignorant, never having, so far as we know, seen a deed before; that these deeds do not appear to have been explained to her; that so soon as she heard the character and effect of them she remonstrated and declared she was cheated; that Thompson immediately after its execution assigned the mortgage to his brother Charles E. Thompson, and he assigned in turn to the plaintiff his brother-in-law; and that the evidence of Charles E. Thompson, taken under commission, is not worthy of credit.

Judgment.

On this state of facts, as found by us, we think the mortgage was obtained by fraud, and we so declare, and it must be delivered up to be cancelled or be released.

The case, in our opinion, is far more strong for relief against the mortgagee than even the case of *Baker v. Monk (a)*. There the party complaining of the fraud admitted that she knew what she was selling, and her intention to sell, but complained merely of the deception practised upon her as to the value of the property, she being an ignorant and infirm old woman, and her vendee a man of business and superior intelligence. The court there set aside the transaction, as the parties did not deal on equal terms. Here the defendant complains, not only that she had got nothing

(a) 10 Jur. N. S. 624; and on appeal at 629.

for the amount which by her mortgage she agreed to pay, but that she never intended to buy, and never understood she was buying the land, and that in every way she has been, as we think she was, imposed upon.

1865.

Elkie
Campbell.

Of course the plaintiff, as assignee of the mortgagee, has no greater rights in it than the original mortgagee had.

We think, however, that the bill should be dismissed without costs; the defendant, Mrs. Campbell, having, from negligence, or blind trust in Thompson, put it in his power to deceive the plaintiff, who must be held as an innocent, though perhaps a negligent purchaser.

BURNHAM v. DENNISTOUN.

Vendor and purchaser—Equitable execution.

W. had an interest in land as vendee, but had made default in paying the purchase money and otherwise. The plaintiff B. and one H. had executions in the sheriff's hands on judgments recovered at law against W., H.'s execution having priority. The Plaintiffs B. and D. (the latter having the control of H.'s execution) severally inquired of the vendor, whether, if he purchased at sheriff's sale, the vendor would give him the benefit of the contract; and each had received a favorable answer. The defendant D. became the purchaser at sheriff's sale at a fair price. Meanwhile the vendor had brought an action of ejectment to put an end to the original contract; and, after the sheriff's sale, executed a writ of *habere facias possessionem*, but subsequently received payment from D. of the arrears, without objection by B. Two years afterwards B., who had kept alive his execution against W.'s land, filed a bill against D., claiming that he, B., was entitled to a lien on the interest acquired by D. in the land under this agreement with the vendor:

Bill dismissed with costs; affirming the decree reported ante vol. xi., p. 490.

This was an appeal by the plaintiff to the full court against the decree of his Honor V. C. Mowat, reported ante vol. xi., page 490.

1865. *Mr. A. Crooks, Q.C., for the plaintiffs, referred to*
Burnham v. Edwards (a), Neeson v. Clarkson (b), Warren
v. McKenzie (c), Walton v. Bernard (d), Ratcliffe v.
Dennistoun v. Prosser v. Edmonds (f), Cockell v.
Anderson (e), Knight v. Bowyer (h), Lewin on Trusts,
221, Keech v. Sanford (i).

Mr. Roaf, Q.C., contra, referred to Muchall v.
Banks (j), Doe Harley v. McManus (k).

Judgment. VANKOUGHNET, C.—I think the judgment right. The most the University said to the contesting parties was this: "If either of you purchase at the sheriff's sale we will take our money from you. In the meantime, however, we are proceeding by ejectment to terminate the contract." The ejectment did proceed and the writ of *habere facias possessionem* was executed, and the contract destroyed, unless what the University said to each of the parties proposing to purchase at the sheriff's sale kept it alive. It is quite clear the University did not intend this. Suppose no sale had been effected by the sheriff, could *West's* heirs, in consequence of anything that had so passed between the Corporation and the plaintiff and *Dennistoun*, have claimed that the contract had been kept alive, notwithstanding that the Corporation proceeded with their ejectment and executed the writ of *habere facias possessionem*? Well, if they could not, what interest, then, on the execution of that writ, had *West*, or rather his representatives, left in the property, on which the plaintiffs' writs of execution could fasten? If they had not any such interest, then how could the action of the University, in dealing with the sheriff's vendee afterwards, give them any right?

(a) 3 K. & J. 564.

(b) 2 Hare, 163, 176.

(c) 1 Grant, 436.

(d) 2 Grant, 356.

(e) 2 B. & G. 822.

(f) 1 Y. & C. Exchq. 481, 499.

(g) 15 Beav. 103, 116.

(h) 2 De G. & G. 445.

(i) 1 W. & T. 32.

(j) 10 Grant, 25.

(k) 1 U. C. Q. B. 141.

The Corporation did not know that there would be a sale—that a sheriff's vendee would ever turn up—but having taken care to terminate the contract so that they were and might be in a position to deal with any one, they did prefer to deal with and recognize the sheriff's vendee who had a shadow of right, perhaps a moral right, to consideration, inasmuch as his money had gone through the sheriff's hands towards payment of a debt of *West's*, and because also they had said they would take their money from the sheriff's vendee; though, as I understand the evidence, having only promised to do so if their money was paid to them before the ejectment was terminated. Now the plaintiff knew this; he permits the sheriff's sale to go on—he could not, I suppose, prevent it; he permits *Dennistoun* to purchase; he waits till the contract is legally terminated by the University; till *Dennistoun* (who might never have done so however) has bought from the University, and then he turns round and says to *Dennistoun*: "By the arrangement between you and the University the contract of *West*, which the University had a right to put an end to, and did put an end to, has been revived; and I, having kept alive my writs of execution at law, while that under which you purchased has expired, will ask a court of equity to fasten them upon this property in your hands as the assignee of *West*." Is this fair conduct? Would it be equitable to help it; to give effect to it? It seems to me not. *Burnham* knew that the most the University would do was to recognize the sheriff's vendee, though they were not bound to do so; and he seeks now to turn this to his own advantage against the sheriff's vendee, whom he had neglected or failed to become. I think the decree should be affirmed with costs.

1865.
Burnham
v.
Dennistoun

Judgment.

SPRAGGE and MOWAT, V.CC., concurred.

Appeal dismissed, with costs.

1865.

COCKENOUR V. BULLOCK.

Mortgages—Practice—Amending decree.

It is no defence to a bill of foreclosure that the mortgage was given to secure the purchase money of the mortgaged property, and that to part of it the vendor (now the mortgagee) had no title.

Where, on a bill praying foreclosure only, a decree for sale was drawn up with a direction that the mortgagor should pay any deficiency, the court, at the instance of the mortgagor, four years afterwards amended the decree by striking out this direction, but ordered the mortgagor to pay the costs of the proceedings which had taken place under the decree.

This was an appeal to the full court from an order made by Vice-Chancellor *Spragge*, in Chambers, on the 19th of September, 1865, amending the decree by striking out a direction therein for payment by the defendant, the mortgagor, of the deficiency, in case the property on a sale should not produce enough to pay the mortgage debt and costs.

Statement.

Certain property had been sold and conveyed by the plaintiff to the defendant, and the mortgage in question was given by the latter for payment of the unsatisfied part of the purchase money. The decree was made on the 15th of May, 1861, and the following judgment by his Honor Vice-Chancellor *Spragge*, who pronounced the decree, sufficiently shews the facts of the case.

SPRAGGE, V.C.—The plaintiff is entitled to a decree. He is a mortgagee of a certain two acres of land which he conveyed to the defendant. The defendant, the purchaser, paying him £50, and giving a mortgage on the same land for the balance of the purchase money. The plaintiff alleges in his bill that a portion of the two acres conveyed was intended to be excepted from the sale, being one rod and twelve perches at the north-west corner, which had previously been conveyed by the plaintiff's grandfather to one *Frazer*, who had built upon it, and lived upon it for a number of years,

a fact well known to the defendant. I think it proved that the defendant knew of *Frazer's* possession and improvements, but I do not think it is established with sufficient certainty that there was any mistake in the conveyance. The defendant in his answer alleges that the plaintiff contracted to sell him the land conveyed, free from incumbrances; that he represented that he had a good title, and that the defendant, relying upon that representation, and especially on the covenants contained in the conveyance, executed the mortgage. He denies that the plaintiff has such good title, and prays that it may be inquired into; and that the plaintiff may be compelled to perfect the same prior to his paying the mortgage money, and that in default of his doing so he may be ordered to repay the amount paid and interest, and that the sale may be cancelled. The only question is as to the piece in the corner, as to which the plaintiff says it was not included in the sale, and the defendant says it was included, but that the plaintiff has no title to it.

1865.
Cockenour
v.
Bullock.

Judgment.

Supposing the defendant's position right as to the facts, is it a good defence for his not paying his mortgage money? What he alleges is a partial failure of the consideration. If the mortgage were given for money advanced, that would be no reason for not paying what really was advanced; or, suppose the consideration were the sale and the conveyance of 100 acres of land, could the mortgagor allege, in answer to a bill to foreclose, defective title in ten acres? The defendant says the corner piece of land is necessary to him, and that the title being defective, it is not a subject for compensation, but for rescission of the contract, for which he prays in his answer; if the matter were in *fiery*, and this a bill by vendor for specific performance, his position would probably be tenable, but this is not such a bill. A conveyance, with covenants relied upon, as the defendant says, has been executed by the vendor, and the purchaser has given

1865. his mortgage for payment of the purchase money.
 Cockenour v. Bullock. The matter set up by this answer is not a matter of defence to the bill. I may observe that no fraud is alleged in the answer. It is alleged that plaintiff represented he had a good title, and that in truth he had not a good title; but it is not alleged that he knew that his title was not good, and if that had been alleged it would have been a proper subject for a cross-bill. The defendant has, at all events, his remedy upon his covenants for title.

The plaintiff is entitled to take the usual decree.

The decree drawn up on this judgment was a decree for sale, and for payment of the deficiency by the mortgagor.

Statement. The bill had prayed a foreclosure, not a sale. Minutes, however, containing this direction as to the deficiency, were submitted to one of the defendant's solicitors before the decree was completed; and, as they had a lien on the mortgaged premises, a copy of the decree was, by direction of the Master, served upon them on the 24th of June, 1861, but the direction therein for paying the deficiency was either overlooked, or the objection to such a direction was not known or perceived. The Master at Hamilton, in March, 1862, put up for sale part of the property only, excluding the portion to which the title was defective. This sale was set aside and a new sale ordered by his Honor, who, on making the order, made the following observations:—

SPRAGGE, V.C.—The Master certifies that he settled the advertisement under a misapprehension, supposing that the parcel of land excepted from the advertisement was excepted from the mortgage. Mr. Dunne's affidavit does not deny that he represented to the Master that such

was the case; still it seems strange that such a representation should have been made, or, if made, acquiesced in by Mr. *Sadleir*, for the one must have known, and the other had every reason to believe, that the parcel of land was included in the mortgage, as it undoubtedly was in the deed. Upon such a decree as the plaintiff had taken, the defendant is entitled, I think, to have the whole mortgaged premises sold or offered for sale (in two lots would be the most convenient course). In my judgment I assumed, that a foreclosure was asked for, and I have no note of an order for payment of deficiency being asked for, nor does the registrar's book contain such a note; the bill is filed in Hamilton, and I do not know whether it is asked for by the prayer. The decree, therefore, is probably erroneous in that respect; but, even if correct, it places the plaintiff in an anomalous position. The proper decree under the circumstances would have been a foreclosure, or if a sale, without an order to pay deficiency. If such order had been asked for, it would have been proper to consider whether, inasmuch as the defendant would have no remedy at law upon his covenants for title, the legal title being in the plaintiff, there should not have been an inquiry in this court. The present order will be to refer it back to the Master to review the settling of the advertisement; the Master might probably have done this himself.

1865.

Cockenour
v.
Bullock.

Judgment.

In June, 1862, the defendant's solicitors obtained a copy of this judgment, and had their attention called to the objection there was to that part of the decree which provided for payment of the deficiency. However, they took no step to have the direction cancelled, and induced the Master to sell the whole property in one lot, instead of in two lots as recommended in the judgment. The second sale took place in August, 1862, and one *Bullock* became the purchaser. He objected to complete the sale in

1865. consequence of the defect of title. On the 18th of May, 1865, an order was made substituting one *Fraser* for *Bullock* as purchaser. The defendant then moved to strike out the objectionable clause, which was granted on the 19th September, 1865, without costs. From this order the plaintiff appealed.

Cocke, J.
v.
Bullock.

Other proceedings were had under the decree, which it is not considered necessary to set forth.

Mr. *Miles O'Reilly*, Q. C., for the appeal referred to *Seton* on Decrees, 1143; *Morgan's Orders*, 346; *Sugden's V. & P.* 646.

Mr. *Dunne*, on same side.

Judgment.

Mr. *S. Blake*, contra.

The judgment of the court was delivered by

VANKOUGHNET, C.—However mistaken the defendant's solicitor may have been as to the right of the plaintiff to obtain upon his bill as framed an order for the payment by the defendant of any deficiency of mortgage money on sale, yet it is clear that the defendant's solicitor knew there was such a decree; that he did not take the trouble to inquire into its propriety, and that in June, 1862, he ascertained from a judgment of my brother *Spragge* that the plaintiff was not entitled to it. Notwithstanding this he chooses to submit to it, and run the risk of it, thinking that in consequence of the defect of title the plaintiff would not be able to effect a sale; but would ultimately, as he probably yet may, be compelled to put up with a foreclosure. Acting on this view, the defendant allows several abortive proceedings for sale to take place, and procures them to be abortive by insisting on the Deputy Master's taking a course which we think he ought not to have taken in the sale of the property, and for the purpose,

as the defendant admits, of rendering the sale impossible; and he has so far succeeded. An order having been obtained permitting the substitution of another person in the place of a purchaser on whom, as the defendant knew, the court would not, and could not, force the title, the defendant gets frightened, and for the first time applies to the court to have the decree amended by striking out the order for payment by him of any deficiency on sale. I think the defendant has by laches and acquiescence, and conduct, debarred himself from complaining of the decree as irregular or improper. At the same time, I think it would be inequitable to enforce against him the personal order for the payment of the deficiency in the altered position of matters, and therefore the order already made for altering or amending the decree may as well stand; but we think that, in consequence of the defendant's conduct, it should only go into effect on his paying all costs subsequent to the order of June, 1862, including the costs of the order now in review, and the costs of judgment. this motion or petition; but not the costs of any other orders already disposed of; and that in this respect the order should be varied.

1865.
Cockenour
v.
Bullock.

The Deputy-Master seems very blameable for not having followed the suggestion, indeed opinion, of my brother *Spragge*, made in 1862, as to the mode of selling the property, which it is clear should have been put up for sale in two lots.

MASON V. SENEY.

Practice—Evidence discovered after decree—Undue influence.

The particulars stated that are necessary to be shewn in support of a petition to be allowed after the hearing of a cause to put in newly discovered evidence.

A sale at an undervalue to a person under whose influence the grantor is, is as objectionable as a gift would be under like circumstances.

This was a petition by the defendant *Thomas Porter*

1865. under No. 9, sec. 18, of the General Orders of the 3rd of June, 1853; and the object of it was to obtain another hearing of the cause, in order that the petitioner might have an opportunity of putting in evidence the deed or alleged deed of 29th January, 1859, said to have been discovered since the cause was heard, and the testimony of persons said to have been present at the execution thereof; a fact of which, also, the petitioner stated he was ignorant until after the hearing. These witnesses were one *Leslie*, who, before the date of this deed, made a purchase from the defendant *Seney* of part of the property embraced in it, and *Mrs. Seney*, wife of the defendant *Samuel*, and sister of the petitioner. The judgment on hearing is reported ante vol. xi., page 447.

Mr. *Spencer*, for the motion.

Mr. *Hector Cameron*, contra.

The following cases were cited.—*Ord v. Noël* (a), *Hungate v. Casgoine* (b), *Scarbrick v. Lord Skelmersdale* (c), *Turnley v. Hooper* (d).

Judgment. *MOWAT*, V.C.—To entitle the petitioner to succeed on this application, he has to shew the same things as would have been necessary to entitle him to file a bill of review under the old practice. The statement of these particulars by Lord Kingsdowne, in delivering the judgment of the Privy Council in *Hosking v. Terry* (e), is in accordance with many previous authorities. "The rule," said his Lordship, "which we collect from the cases cited in the argument is this, that the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must shew that the matter so discovered has come to the

(a) 4 Madd. 438.

(c) 4 Y. & C. 78.

(b) 10 Jur. 625.

(d) 2 Jur. 1081.

(e) 8 Jur. N.S. 977.

knowledge of himself, and of his agents, for the first time since the period at which he could have made use of it, and that it could not with reasonable diligence have been discovered sooner; and, secondly, that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment." (a)

1865.

Mason
v.
Seney.

To consider the last of these requisites first: Has the petitioner shewn that the evidence he desires to offer "might probably have altered the judgment?"

Now, the document produced is confessedly open to every objection to which the other deeds were open, except one, and that is, that it is said to have been executed for value. But it is admitted that the alleged consideration was not equal to the value of the property; indeed it was not half the value; and not one-sixth part of the alleged consideration has been paid; nor is any security worth the name pretended to have been given for the unsatisfied portion of it. And I take it to be clear, that, where the grantor is under the influence of the grantee, an inadequate consideration, even though paid and satisfied, is as fatal an objection to the validity of the transaction, as the want of any consideration would be. Several of the cases which I had occasion to refer to in *Clarke v. Hawke* (b) shew this. Mr. *Spencer* suggested that, considering the existence of the prior deeds and the litigation necessary to get rid of them, a sum considerably less than the value would be a sufficient consideration to sustain the alleged deed. But the existence of prior deeds wrongfully obtained, and the unfavorable position in which they place the grantor, are regarded in equity as grounds for setting aside, rather than for sustaining,

(a) Vide also *Thomas v. Rawlings*, 10 Jur. N.S. 1192.

(b) 11 Grant, 527.

1865 a subsequent transaction between the same parties.—
 See *Wood v. Downes (a)*, *Watt v. Grove (b)*, *Roche v. Mason v. Seney. O'E'ien (c)*, *Dunbar v. Tredennick (d)*.

It would also be very difficult to make out this alleged deed to have been executed for any valuable consideration. No such character was claimed for it in the answers of the defendants, though the bill had charged that there was no consideration for it; and the consideration named in the deed itself is natural love and affection, and £5. A false statement of the consideration, though not necessarily a fatal objection to the validity of a deed—*Pott v. Todhunter (e)*, *Gale v. Williamson (f)*—is a grave difficulty in the way of maintaining a deed in favor of a person occupying a fiduciary relation to the grantor.—*Bowen v. Kirwan (g)*, *Gibson v. Russell (h)*, *Ahearne v. Hogan (i)*, *Watt v. Grove (j)*, *Harrison v. Guest (k)*, *Holman v. Loynes (l)* *Morgan v. Higgins (m)*.

Judgment.

Then, again, the alleged consideration is not pretended to have been paid at the time, nor was any agreement signed by the grantee, rendering himself responsible for it. In case he chose to dispute it, the plaintiffs were quite unable to prove that any such consideration was to be given if it had been their desire to establish it.

Moreover, the execution of the instrument is still open to the gravest doubt. At the hearing no attempt was made to prove it. The grantee, *Samuel Seney*, admits in his evidence that, in the first instance at all events, the plaintiff, his mother, refused to execute it;

(a) 18 Vesey, 120.

(c) 1 B. & B. 343:

(e) 2 Colly 76,

(g) L. & G. Sug. 66.

(i) Dru. 326.

(k) 8 H. L. 491.

(b) 2 Sch. & Sef. 492.

(d) 2 *Ib.* 317.

(f) 8 M. & W. 405.

(h) 2 Y. & C.CC. 104.

(j) 2 S. & L. 502.

(l) 4 DeG. McN. & G. 272.

(m) 1 Giff. 278.

1865.

Mason
v.
Seney.

and he does not assert he ever had the deed in his possession; or even saw it. It was not registered for sixteen months after it is said to have been executed. The only subscribing witness has absconded, charged with fraud and forgeries. The magistrates whose certificate is indorsed are both dead; and the evidence which the petitioner represents himself to have discovered since the hearing is of the most unsatisfactory and suspicious character. It is at least doubtful, too, whether the evidence of one of the two witnesses on whom the petitioner relies, namely, his sister, who is the wife of the co-defendant, would be admissible.— See *Taylor* on Evidence, vol. 2, § 1228. To send the case to another hearing for the purpose of letting in such testimony would, under all the circumstances, be an unwise exercise of the discretion which belongs to the court on these applications.

I think it is quite certain that the evidence said to have been newly discovered could not have altered the judgment, but it is important that it should be well understood, that parties must use diligence in bringing forward at the hearing of a cause all evidence that is really material, or it will be excluded. In *Young v. Keighly* (a) Lord Eldon, on a petition for leave to file a bill of review, refused to admit evidence which he said was "very material," observing that, "it is most incumbent on the court to take care that the same subject shall not be put into a course of repeated litigation; and that, with a view to the termination of suit, the necessity of using reasonably active diligence, in the first instance, should be imposed on parties. The court must not therefore be induced by the fact, that the plaintiff had originally a demand which he could clearly have sustained, to break down rules established to prevent general mischief at the expense even of particular injury." In the present case there is not the slightest proof of any diligence

Judgment.

(a) 16 Ves. 348.

1865.

Mason
v.
Seney.

whatever being employed before the original hearing in searching for the deed in question, or obtaining evidence as to its execution. As Lord *Eldon* said, on dismissing a similar petition in *Bingham v. Dawson* (a), "It is not a case of a search made, and a miscarriage in that search, but it does not appear that there was any search at all." The answers were filed in February, 1868. The cause came on for hearing before my brother *Spragge* the same year, but stood over on an objection for want of parties; and, this defect having been removed, the cause was heard before me on the 23rd of May, 1865. The defendants had thus more than two years to prepare for the hearing. The petitioner says, that from January, 1865, to the latter part of April or the beginning of May, he was confined in a gaol in the United States, on a false charge of a criminal offence; but this accounts for but a small part of the time, and as the petitioner had no personal knowledge of this deed, his co-defendant and their solicitor could search for it more effectually than he could; and any want of diligence on the part of his solicitor is as complete a bar as similar negligence on his own part (b).

Judgment.

Had the alleged deed been thought before the hearing to be as material as the petitioner asserts, and had ordinary diligence been used in searching for it, I have not the slightest reason for doubting that the search would have been successful. The deed, when found, was in the possession of Mr. *Kirchhoffer*, a solicitor in large practice at Port Hope. The petitioner says that Mr. *Kirchhoffer* "obtained it through another solicitor who had at one time acted in another suit or matter for the said defendant, *Samuel Seney*, from whom the said deed got into the hands of the said other solicitor previous to [the petitioner's] purchase of the said land." The name of this other solicitor is not given; and the

(a) Jac. 245.

(b) *Norris v. LeNeve*, 3 Atk. 35.

petitioner has not procured the affidavit or deposition of Mr. *Kirchhoffer*. *Leslie* says, in his cross-examination, "I told petitioner a few days after the trial, that if he could find the deed that was executed in 1859, I and *Turner* [the subscribing witness] could prove that it was all right. Petitioner then went and told *Kirchhoffer* if he found the deed for him he would give him \$50. They set to work, and found it I think the same evening. * * I do not think *Kirchhoffer* charged him anything for finding the deed. It was a short time after the trial—it might be a week or more—that the deed was found." The first person applied to thus had the deed, and it was found on the first day any search for it appears to have been made. To use again the language of Lord *Eldon* in *Bingham v. Dawson*, "If it is laid down that a party may go on to a decree without looking for a defence, and may then make applications of this kind, there will never be an end to them." Judgment.

1865.

Mason
v.
Seney.

It was necessary, also, for the petitioner to establish that he came here as soon as he discovered the document.—*Thomas v. Rawlings* (a). If he had come promptly, the further hearing, if allowed, might have taken place at the autumn sittings of last year, for the deed is said to have been discovered in May, and the evidence which *Leslie* was prepared to give about it had before then been made known to the petitioner. I presume that the evidence which the petitioner's sister, Mrs. *Samuel Seney*, would give, was also known to him, as the affidavits do not affirm the contrary. I think this delay is of itself an answer to the application. The petitioner says he was in search of further evidence, but this is obviously no excuse.

The petition must be dismissed with costs.

(a) No. 3, 34 Beav. 54.

1865.

FORMAN v. HODGSON.

Conveyance to defeat creditors.

The owner of real estate worth \$4800, subject to a mortgage on which the sum due was \$1950, sold the equity of redemption for \$500, for the purpose of avoiding executions at the suit of his creditors, he being insolvent, and his vendee aware of that fact, and that his object was to place his property out of reach of his creditors. The purchaser resold the property for an advance of \$1000, after the institution of proceedings to set aside the transaction, of which the party purchasing was aware. *Held*, that the transaction was within the statute 13 Elizabeth, and should be set aside, as having been made to hinder and delay creditors.

The cause came on for the examination of witnesses and hearing, before his Honor V. C. *Spragge*, at the sittings of the court held at Whitby.

Mr. *Blake*, Q.C., for the plaintiff.

Mr. *Fitzgerald*, for the defendant *Watson Hodgson*.

Mr. *Cochrane*, for the defendant *Paxton*.

The bill had been taken *pro confesso* against the defendant *Christopher Hodgson*.

Judgment. SPRAGGE, V.C.—The conveyance impeached as void, under statute 13 Elizabeth, is from *Christopher Hodgson* to *Watson Hodgson* and is of lot 22, in the 7th concession of Seugog, 70 acres, and a portion of lot 23, in the same concession, containing 50 acres. Some technical difficulties are in the first place to be disposed of.

The bill, as it now stands, is against *Christopher* and *Watson Hodgson*, and *Thomas Paxton*; the last named defendant having been added by amendment on the 16th of June, 1864, upon the statement in the answer of *Watson Hodgson*, that he had sold and conveyed to *Paxton*. *Paxton* again in his answer states that he sold and conveyed the same premises to one *Madden*,

in November, 1863, and a conveyance from *Paxton* to *Madden*, dated the 14th of that month, is put in. 1865.

Forman
v.
Hodgson.

A bill was filed by the plaintiff against *Christopher* and *Watson Hodgson*, and some other defendants; for, among other things, impeaching the conveyance to which I have referred, on the 17th of November, 1860. Demurrers were put in by some defendants and over-ruled; and after a great lapse of time, a bill indorsed as an amended bill, impeaching the above conveyance only, was filed against *Christopher* and *Watson Hodgson*; that bill was filed on the 14th of March, 1864. It is objected that this is a new suit; that it cannot be an amended bill under the circumstances; and I doubt very much whether it was intended at first as an amended bill. But *Watson Hodgson* put in his answer to it in terms as to an amended bill; and *Paxton* did the same; as to the latter, however, it was certainly an amended bill, he being made a party by amendment.

Judgment.

This objection is made for the first time at the hearing; I think too late. If the parties desired to object to it, and to avoid the consequences of its being a continuation of the suit commenced in 1860, they should have moved to take it off the files, or at least have made the objection by answer. *Watson Hodgson* is the principal defendant, *Paxton* being indemnified by him; and he has by the terms of his answer admitted it to be an amended bill, and *Paxton*, I think, comes too late with his objection. It was taken *pro confesso* against *Christopher Hodgson*.

If this suit was commenced in 1860, as I must take it to be, *Madden*, the purchaser from *Paxton*, is not a necessary party, that is, if *lis pendens* was registered before he purchased. I do not know how that was. A certificate of *lis pendens* was registered after *Madden's* purchase, viz., the 1st of December, 1863, but *Paxton* speaks as if one had been registered before; for he says,

1865. that when he purchased his solicitor, Mr. *Billings*, told him that "a *lis pendens* was registered, that some proceedings were in the office." The certificate is not among the papers. *Madden* would not be a necessary party if affected with notice by *lis pendens*, although the legal estate passed to him, inasmuch as no conveyance is, or can be asked from him.

Forman
v.
Hodgson.

The question, whether the suit now pending is the one which was commenced in 1860, is material in this. The plaintiff's file their bill upon their judgments registered at that date. It does not appear that they placed writs against lands in the hands of the sheriff, and they must rely upon the 11th sec. of ch. 41, 24 Vic., saving from the effect of the act suits pending on the 18th of May, 1861, in which any judgment creditor is a party. This clause, I think, preserves the rights of these plaintiffs in respect of the charge created by the registration of their judgments.

Judgment. In May, 1864, there was a sale of the land in question upon executions, issued upon judgments recovered during the pendency of this suit, against *Christopher Hodgson*; when the land was bought in for the benefit of the plaintiffs in this suit by one *Edward Major*; and *Major*, by deed poll bearing the same date as the hearing of this cause, conveyed lot 22 to the plaintiffs: why that lot only, is not explained; but *Major* consents to be a party of this suit, and to be bound by the decree.

I think the plaintiffs have a *locus standi* in this court, by reason of their registered judgment, and that it stands unaffected by anything that has occurred since.

Upon the merits there is really very little to be said. The evidence of *Christopher Hodgson* shews clearly that his purpose in selling as he did was to defeat creditors. His object was to obtain for the land as much as he could in cash, beyond the mortgage to the Canada Agency Association for \$1800, and his intention was to

use the money so obtained in the support of his family, to the exclusion of creditors, whose executions were impending; and this intention he declared to *Watson Hodgson* while the two were negotiating about the sale. The evidence leaves no room for doubt upon this point, and it is clear, from the evidence of *Hislop* as well as of the *Hodgsons*, that *Christopher* was insolvent, and from the evidence of the latter that *Watson Hodgson* knew him to be so.

1865.

Forman
v.
Hodgins.

The price too was very inadequate. From the evidence, I take the value to have been not less than \$4,800, upon a sale partly for cash and partly upon time. The mortgage had about four years to run; and assuming the interest to be the outside amount suggested by *Hodgson*, say \$150, it was worth \$2,800 beyond the mortgage; yet it was sold for \$500. It would have been difficult, probably, to have realised the value in cash; and it is probable that \$500 was all that *Hodgson* could get for it under the circumstances? but then, few would purchase, or could be expected to give value under the circumstances, for, as *Hodgson* says, he had at that time been sold out by the sheriff, and that *Watson* knew it as everybody did. The sale to *Paxton* was at an advance of about \$1000, although *Paxton* knew at the time of the pendency of this suit, must have apprehended trouble, for he required to be indemnified. I refer to the inadequacy of price as an element in the question of fraudulent intent.

Judgment.

Paxton, it is hardly necessary to say, cannot stand in any better position than *Watson Hodgson*, from whom he purchased. There must be costs against all the defendants.

I have given my opinion in this case, as it may be useful to the parties, although, of course, it cannot affect *Madden*, if in fact there was no registration of *lis pendens* at the date of his purchase.

1865.

FRASER v. RODNEY.

Voluntary deeds—Trusts.

A deed having been executed by a husband and wife under such circumstances as to make the conveyance voluntary, the court held that the onus was (on the grantee, of proving that the grantors understood the nature and effect of the deed; and as it did not appear to have been explained before being executed, the deed was held invalid.

A deed purporting to convey land to *M.* was executed by the plaintiff under circumstances that disentitled the grantee to hold it as a valid deed entitling him to the beneficial interest in the property. The grantee, *M.*, having afterwards sold and conveyed the land to *R.*, receiving part of the purchase money, and a mortgage for the balance:

Held, affirming the decree reported ante vol. xi., page 426, that on confirming the title of the purchaser (*R.*), the plaintiff was entitled to the balance of the mortgage money from *R.*, and to a decree against *M.* for what *M.* had received.

Statement. This was an appeal by the plaintiff to the full court against the decree of Vice-Chancellor *Mowat*, reported ante vol. xi., page 426. The plaintiff had elected to take a decree dismissing the bill with costs, in order to bring the matter before the full court.

Mr. Fitzgerald, for the plaintiff, referred to *Peake v. Highfield* (a), *Hayward v. Dimsdale* (b), *Bromley v. Holland* (c), *Ross v. Harvey* (d), *Story's Equity Jurisprudence*, secs. 694 to 705; *Drury* on Injunctions, 9, 10.

Mr. Blake, Q.C., for the defendant *Rodney*, referred to *Story's Equity Jurisprudence*, sec. 693.

Mr. McGregor, for *McMillan*, referred to *Batty v. Chester* (e), *Radenhurst v. Coate* (f).

(a) 1 Russ. 565.

(c) 7 Ves. 21.

(e) 5 Beav. 103.

(b) 17 Ves. 111.

(d) 3 Grant, 649.

(f) 6 Grant, 139.

VANKOUGHNET, C.—Although the decisions of courts of equity are governed by rules more rigid than formerly prevailed; yet, in cases like this, the court has never abandoned the right to refuse relief where its interference was not imperatively called for, or where that interference would merely aid a harsh legal case. In the suit before us, the position of the defendant *Rodney* is a peculiarly hard one. Twice duped or deceived, or at the least misled by ignorance, he has attempted to acquire, for its fair value, land to which it is said he has not obtained any title, because the forms of the statute law enabling married women to sell lands have not been complied with.

1865.

Fraser
v.
Rodney.

The facts of this case are set forth in the judgment of my brother *Mowat*, before whom the cause was heard, and I need not therefore repeat them here. Reading and bearing in mind those facts, it seems to me almost a piece of presumption in the plaintiff to ask us for aid. Although, by her negligence, or blind confidence in the defendant *McMillan*, she has enabled him to commit a fraud on the defendant *Rodney*, who has acted an honest part throughout; yet she—declaring that the deed which *McMillan*, by means of this trusted confidence, procured from her, has no validity at law, and passes no estate—invites us to help her by decreeing that it shall be wiped out of notice, expunged, and removed as a cloud upon her title. I do not think that, under the circumstances, we are called upon to comply with or accept such an invitation. If the deed is invalid, it cannot affect the plaintiff's legal estate. She can avail herself, without the aid of this court, of the technicalities of the law; but I think we should leave her there. We are not bound to act in case of a party who, through ignorance or blind confidence, permitted such a deed as the present to be obtained. Although it is almost as much a matter of course to enforce in equity contracts relating to land, as it is at law to enforce payment of debts;

Judgment

1865.

Fraser
v.
Rodney.

yet even now, though not to the extent that formerly prevailed, this court in many cases abstains from decreeing specific performance where injustice would be thereby occasioned. Here the plaintiff does not ask for the performance of any agreement or right; she simply asks the interposition of this court to save her from the embarrassment which an invalid deed may cause her in dealing with property, the value of which she enabled her agent fraudulently to obtain from an innocent purchaser.

We think she is not entitled to our interference on her behalf, and we dismiss her bill with costs; except as to *McMillan*, who ought not to have costs, and in this respect the decree made on the hearing will be varied.

BURTON v. THE GORE DISTRICT MUTUAL FIRE
INSURANCE COMPANY.

Insurance.

Where a fire policy provided that the same should be void if a new policy was effected without the consent of the Insurance Company, and an assignment was subsequently made of the policy to a mortgagee of the property with concurrence of the Company, after which the mortgagor effected another insurance without the consent required by the policy: *Held*, on the premises being burnt down, that the policy was not void in equity as respected the mortgagee. [SPRAGGE, V.C., dissenting.] *Held*, also, that on paying the amount of the debt the company was entitled to an assignment of the mortgage.

This was a re-hearing of a cause which was originally heard before his Lordship the Chancellor, in Hamilton, in November, 1864. The bill was by the plaintiffs as assignees of a policy of insurance for £1000 on certain buildings in the city of Hamilton. The insurance had been effected by *Edward Montgomery* in his own name, on the 16th of April, 1855. The policy contained in the body of it these provisions :

Statement.

"In case the assured, or the assignees of the assured, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same indorsed on this instrument, or otherwise approved of and acknowledged by them in writing, this policy shall cease and be of no further effect; and, provided further, that the insured shall be bound by the conditions hereunto annexed."

1865.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

"The interest of the assured in this policy is not assignable without the consent of the said company in writing: and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect."

Amongst the conditions indorsed were the following:

"The interest of the assured in this policy is assignable, provided the consent of the directors be first obtained to the transfer. Notice of such assignment shall be given before any loss may have happened."

Statement.

"In case of a subsequent insurance on property insured by this company, notice thereof must with all due diligence be given to them, to the end that such subsequent insurance may be indorsed on the policy subscribed by the company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect. And in all cases of insurance this company shall be liable for such ratable proportion of the loss or damage happening to the subject insured as the amount insured by this company shall bear to the whole insured thereon, without reference to the dates of the different policies."

After effecting this insurance *Montgomery* executed two mortgages on the property, the first to one *Fredrick J. Rastrick* for £800, and the second to the plaintiffs for £295. The latter mortgage was given on the 9th of May, 1855. On the same day the consent of the company to the transfer of the policy to the plaintiffs was indorsed on the policy, and *Montgomery*, thereupon,

1865. by another indorsement of the same date, assigned the policy to the plaintiffs.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

The buildings were afterwards destroyed by fire, and the company refused to pay any part of the money, on the ground that the mortgage to *Rastrick* avoided the policy, and that *Montgomery*, after the assignment of the policy to the plaintiffs, had effected another insurance in another company, without obtaining the consent of the defendants. The first ground was abandoned at the original hearing, but the second ground was strongly insisted upon.

His Lordship decreed in favour of the plaintiffs, when he made the following observations.

VANKOUGHNET, C.—This case at law is reported in 14 U. C. Q. B. page 342, and the material facts in it sufficiently appear from the pleadings and judgment there set out. It comes before me now by the plaintiffs claiming to be allowed the amount for which the policy of insurance was assigned to them as mortgagees. The defendants have abandoned as a ground of defence the mortgage to *Rastrick*, set up in the pleadings at law and in the answer here, as a defence to the claim; but they still insist that the mortgagor, *Montgomery*, having, after his assignment of the policy, effected a further insurance on the premises, thereby destroyed the policy, which he had passed away. The Court of Queen's Bench, by a majority of its judges, held that an assignment by way of mortgage was an alienation, within the meaning of the statute, and entitled the plaintiffs at law to sue in their own name; and yet, with what seems to me an inconsistency, they also held that the mortgagor, who had thus alienated the policy, could by his own sole act afterwards destroy it. Whatever difficulty a court of law might have felt in dealing with the divisible interests of mortgagor and mortgagee, no such difficulty exists here. I think the mortgagor, by the subsequent

insurance, only destroyed his own interest in the policy, leaving that of the mortgagee unaffected; and that if the latter could at law, as alienee, recover the whole amount of the policy, this court would restrain him from taking more than his own interest in it, and thus prevent the frauds and difficulties which the court at law seemed to apprehend would arise from treating the mortgagee as the owner there of the policy, as well as its alienee.

1865.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

Decree for plaintiffs, with costs.

The cause afterwards came on to be re-heard in full court,

Mr *Blake*, Q.C., appeared for the plaintiffs.

Mr. *Roaf*, Q.C., for the company.

Wing v. Harvey (a), *Arnsby v. Woodward (b)*, *Roberts v. Davey (c)*, *Coddington v. Davis (d)*, were referred to. Argument.

VANKOUGHNET, C., remained of the same opinion as expressed by him on the original hearing.

SPRAGGE, V.C.—I agree that the clause in the statute upon which the Insurance Company relies, does not apply to insurances effected by persons having different interests in the property insured. The difficulty that I feel is as to what is the proper effect to be given to the assignment, sanctioned by the company, from *Montgomery*, the party originally insured, to *Burton* and *Sadlier*.

Montgomery on the 16th of April, 1855, insured with

(a) 23 L.J. ch. p. 511.

(b) 6 B. & C. 519.

(c) 4 B. & Ad. 664.

(d) 1 Comstock's Rep. 196.

1865.
 Burton
 v.
 Gore
 District
 Mutual Fire
 Ins. Co.

the company for £1000, giving the usual premium note, and becoming thereby a member of the company. On the 9th of May, in the same year, as appears by the pleadings, *Montgomery*, being indebted to *Burton* and *Sadlier* in the sum of £235, mortgaged the insured premises to those gentlemen; and by instruments of the same date, indorsed on the policy of insurance, the company consented that *Montgomery* might transfer his interest in the policy to *Burton* and *Sadlier*; and *Montgomery* did transfer to them the policy of insurance, and all sums of money due or to become due by virtue thereof.

Judgment.

Now the real nature of the transaction known as I infer from the pleadings to all parties, was that in the event of a fire, the right to receive insurance moneys, to the extent of the mortgage debt, was transferred from *Montgomery* to *Burton* and *Sadlier*; the whole indeed was properly payable into their hands; but as to the excess only for the purpose of paying it over to *Montgomery*: in other words, *Montgomery* having a contingent interest in £1,000, pledged that interest to the extent of £235 to secure a debt to that amount.

Then, one of the conditions of the policy being that (as we may read it for the purposes of this suit,) if *Montgomery* effected an insurance in another office the policy with this company should be void, his effecting such other insurance as he did, would have avoided the policy in toto, if the assignment to *Burton* and *Sadlier* could have been properly made and had been made without the assent of the company. The subsequent insurance by *Montgomery* would be entirely his fault; *Burton* and *Sadlier* entirely innocent in the matter; yet the interest of the latter in the policy would be as entirely defeated as the interest of *Montgomery* himself; and that upon the well known maxim, that the assignee of property takes it subject to all

the liabilities, as well as clothed with all the rights which attached to it in the hand of the assignor.

1865.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

What then is the effect of the consent of the company to the transfer? Such consent is required by insurance companies for their own protection: and this reason is given for it, that the character of the insured for honesty and carefulness is an important consideration with insurers, and it is reasonable, therefore, that they should have a voice in the transfer of the policy. Such consent indeed is required only in the case of alienation; and I agree with the judgment at law of the late Chief Justice, that the transfer in this case was not an alienation within the meaning of the act. Where there is an alienation within the meaning of the act, assented to by the company, the company does, I apprehend, accept the alienee, in place of the party originally insured; and it would follow that a subsequent insurance in another office, by the latter, would not affect the alienee. In that view of the case this question arises. The company give their consent to a partial transfer of interest, to which, not being an alienation within the act, their consent was not necessary. When their consent is necessary, and is given, the alienee becomes the insured in place of the party originally insured; it amounts to a new contract of insurance with the alienee. Does a consent to such a transfer as was made in this case involve the same consequences? The reason for requiring consent does not exist in such a case; and, looking at the true nature of the transaction, I cannot think that *Burton and Sadlier* could be looked upon as substituted for *Montgomery*, but that *Montgomery* continued the insured. The consent of the company was asked, I should say, *ex abundante cautela*; and was given as a matter of course, as in a case in which there was nothing requiring any exercise of judgment, and in which there was no idea of making any contract of insurance with *Burton and Sadlier*.

Judgment.

1865.
 Burton
 v.
 Gore
 District
 Mutual Fire
 Ins. Co.

It may be that the legal effect of such a consent, though unnecessarily asked for and given, was to make a new contract with *Burton* and *Sadlier*, at least to the extent of the interest assigned to them. It may be put thus, that a consent to an alienation under the statute amounts to a contract of insurance directly with the alienee; that here, the company having given such a consent, it must be taken to have been asked for, as proper under the statute, and intending the same consequences, and consented to in the same view.

Judgment.

I confess, however, the inclination of my opinion is otherwise. I think the consent of the company was not necessary to the validity of the pledge: that a notice to the company would have sufficed: that consent was asked as a matter of extreme caution, in order to be on the safe side where there was room for doubt; and was given in the same spirit, without any idea on either side that *Burton* and *Sadlier* were anything more than pledgees *pro tanto* of *Montgomery's* interest in the insurance money, and that it was advisable, if not necessary, that the consent of the company should be given to the document creating the pledge. I incline to think that *Burton* and *Sadlier* are mere assignees of a contingent interest, subject to the same liabilities and contingencies which attached to it in the hands of their assignor.

MOWAT, V.C.—Fire policies are not assignable at law unless made so by special statute, but the effect of a company's consent to an assignment is to create an equitable, if not a legal, contract of insurance in favor of the assignee. The assignee thenceforward becomes in equity, if not at law, the assured. If the assignee is not a purchaser of the property insured, but is a creditor merely of the owner, and takes the assignment as a mortgagee, he becomes the assured to the extent of his debt only.

This being in the present case the mutual relation of the plaintiffs and the company, the question is, whether the subsequent insurance by *Montgomery* avoided the contract?

1865.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

To hold in equity that it did, would, in my opinion, be opposed to the spirit of the whole law of insurance.

Apart from what fell from the learned judges in the suit at law between these parties (*a*), we have been referred to no decision or dictum in England or this country in favor of the defendants' contention. It is also against the well established doctrine of the American courts, where questions of insurance have been much considered and ably adjudicated upon (*b*). And I have failed to find any trace of the defendants' view in the decisions of the courts, or the opinions of the jurists, in other foreign countries.

Judgment.

The argument addressed to us in favor of the defendants' contention was, no doubt, chiefly founded, not on general principles of law, but on the 22nd section of the Provincial Act, 6 Wm. IV. ch. 18, which provided for the establishment of Mutual Insurance Companies in Upper Canada. That section is as follows:

"If insurance on any house or building shall be and subsist in said company, and in any other office, or from or by any other person or persons, at the same time, the insurance made in and by said company shall be deemed and become void, unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary."

It was broadly argued that this section is not confined to additional insurances by the same person, and that a

(*a*) *Burton v. The Gore District Mutual Insurance Co.*, 14 U.C.Q. B. 342.

(*b*) Vide the cases in *Phillips on Insurance*, secs. 81, 868, &c.

1865. policy is rendered void by another insurance, even by another person. But I am satisfied that this is not the meaning of the act, or the position of those who insure in companies incorporated under it. It was "double assurances" which the legislature meant to forbid; and what is a double insurance? The expression has a recognized and definite signification in the law. "Double insurance takes place," according to the definition in *Arnould on Insurance*, (vol. i., p. 345, § 11, ed. of 1857;) "when the insured makes two or more insurances on the same subject, securing the same risk and the same interest" (a). In one of the text books—*Phillips on Insurance*, § 373—the very case of insurances by a mortgagee and mortgagor is put to illustrate what is not a double assurance. In *Godin v. The London Assurance Company* (b) Lord Mansfield explained the matter at length. He observed:

Judgment. "Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies, a double satisfaction, the law certainly says, that he ought not to recover doubly the same loss, but be content with one single satisfaction for it. And if the same man really, and for his own proper account, insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing," &c. His Lordship further observed: "Here Mr. *Armyard* [a creditor] had an interest of his own, distinct from the interest of *Meybohm* [the debtor and owner], he had a lien upon these very goods, as a factor to whom a balance was due. Though there be two insurances, yet it is not a double insurance; to call it so is only confounding terms.... This is by no means within the idea of a double insurance. Two persons may insure two

(a) Vide also Parke on Insurance, vol. ii. p. 600; Angell on Insurance, s. 26; Phillips on Insurance, ss. 359, 1263.

(b) 1 Burr. 492.

different interests, each to the whole value; as the master for wages, the owner for freight, &c. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods or the same ship."

1865.
Burton
v.
Gore
District
Mutual Fire
Ins. Co.

The practical effect of any other construction of the statute would be to confine the operation of our mutual insurance companies to persons having the fee simple of the property insured free from any incumbrance, and being in the actual personal occupation of it; for it is obvious that no others could insure in such companies with safety, if even these could. But it is quite clear that the statute did not contemplate any such novel restriction on the business of these companies. The 17th section expressly refers to insured persons whose estate in the property insured is less than an estate in fee simple, and whose estate is subject to incumbrances.—(Vide also the 5th, 6th and 18th sections.) It is plain, also, from the first condition indorsed on the policy now in question, that this company contemplated insuring for such persons. Judgment.

The condition indorsed on the policy as to subsequent insurances does not contain the expression "double insurance," but must be read as meaning the same thing as the condition in the body of the policy, which is expressly confined to other insurances by the assured himself or his assigns.

I may observe that the 22nd section of the statute, the language of which I have quoted, appears to have been taken from acts incorporating like companies in the neighbouring States (a); and I cannot discover that it has ever received there the narrow construc-

(a) Vide Angell on Fire and Life insurance, s. 92; Stark County Mutual Insurance Company v. Hurd, 19 Ohio, 176.

1865. tion we are asked to place upon it here. Clauses, too, similarly expressed, are to be found in policies there, which have been the subject of judicial construction; and it seems to have been uniformly held that, notwithstanding the generality of their terms, such clauses, like provisions to the same effect in statutes, refer only to insurances created by the assured himself, or on his behalf.—Vide *Jackson v. Mass. Mutual Fire Insurance Co. (a)*, *Traders Insurance Co. v. Robert (b)*.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

The Court of Queen's Bench did not adopt the view of the 22nd clause which the company contends for. On the contrary, the three judges concurred in thinking that a subsequent insurance on the same property by a prior mortgagee would not invalidate the policy. *Burns, J.* expressly intimated, also, that a mortgagee who had taken out a policy in his own name, instead of accepting an assignment of the mortgagor's policy, would be protected against a subsequent insurance on the same property by the mortgagor; and this indisputably correct intimation seems to have been the declared opinion of the whole court.

Judgment.

But it is said, that no new policy having been taken out, and the mortgagee having been induced to rest content with an assignment of the old policy, the condition in the latter as to a subsequent incumbrance is not divisible; and that the subsequent assurance by *Montgomery* cannot, therefore, be held to render void the policy to the extent of the surplus, and not to render it void also to the extent of the debt due the mortgagee.

Why is not the condition divisible for the purpose suggested? What recognized rule or maxim in the law of insurance would be violated by holding it to be divisible? If not divisible, would not the logical consequence

(a) 23 Pickering, 418.

(b) 9 Wendell, 404.

be the reverse of what the company contends for? Would not the logical consequence be that a subsequent insurance by *Montgomery* did not avoid the contract even to the extent of his own interest? He had made an absolute assignment of the policy to the plaintiffs. He was authorized by the policy to make such an assignment with the company's consent, and the company gave their consent to such assignment. The assignees, and not the assignor, became thenceforward the persons who alone stipulated with the company, and with whom alone the company stipulated. If, therefore, there is any technical difficulty in the way of holding the stipulation in question to be divisible, would not the effect be that no act of *Montgomery* could affect the policy to any extent?

1865.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

But is there really any such technical difficulty? If there is at law, how can there be in equity, where the substance, and not the form of transactions, has to be regarded? On what principle could a court of equity hold that there was so enormous a difference between a policy in the name of the mortgagee, and a policy in the name of the mortgagor assigned to the mortgagee with the company's consent? For many purposes the stipulations of a policy are unquestionably divisible, both at law and in equity. Thus, it is clear law that a mortgagee or other creditor, who insures in his own name, can only recover to the amount of his debt, unless it appears that he insured on behalf of the mortgagor or owner, as well as on his own behalf; and in that case, but in that case only, he can recover the whole loss, and he is a trustee of the balance for the mortgagor.—*Irving v. Richardson* (a). A still stronger illustration of the divisibility of the stipulations of a policy is to be found in *Castelli v. Boddington* (b). Vide also *Powles v. Innes* (c). And these are but examples.

Judgment.

(a) 2 B. & Ad. 193.

(b) 1 E.H. & Bl. 65; S. C. ib. 79.

(c) 11 M. & W. 10.

1865. I think it clear that the plaintiffs' position in equity was precisely the same as if they had taken out a new policy in their own names. Under the assignment, with the company's consent, the plaintiffs were beneficially interested in the policy, as an indemnity against loss, to the extent of their debt; and, subject to this, they were trustees for *Montgomery*. Payment to him would clearly be ineffectual against their rights: a set off on account of subsequent transactions with him would not be admitted: a release by him would be unavailing. In a word, I think no act of the assignor, after assigning, could affect the plaintiffs' right to indemnity. Subject to the plaintiffs' rights, *Montgomery* could, without the plaintiffs' concurrence, release or otherwise destroy his own equitable interest under the policy; but the plaintiffs' rights he had no power to deal with; or by any act of his, without their concurrence, to destroy.

Judgment. It appeared on the argument to be assumed, that, if the company paid the plaintiffs, *Montgomery* would be released from his debt; and it was said, in effect, that by compelling the company to pay the plaintiffs, *Montgomery* would be put in possession of a corresponding benefit from the policy, notwithstanding his having effected the subsequent insurance without the company's consent. It is clearly no objection to a suit by creditors that, if permitted to recover what they demand, the insurers would be paying more than the debtor himself could have recovered from them.—*Godin v. The London Insurance Company (a)*. But, if the subsequent insurance by *Montgomery* destroyed to any extent his beneficial interest under the policy, I think it should be held in equity to have destroyed it wholly, but without prejudice to the rights of the plaintiffs; and that, on paying to the plaintiffs a sufficient sum to cover the debt due to them, the company is entitled to an assignment of the mortgage security for the benefit of the

(a) 1 Burr. 492.

Company.—*Blaauwpot v. DaCosta* (a), *Randal v. Cockran* (b), *White v. Dobinson* (c), *Mason v. Sainsbury* (d), *Yates v. Whyte* (e), *Stewart v. The Greenock Marine Insurance Co.* (f), *Scottish Marine Insurance Co. of Glasgow v. Turner* (g), *Wolff v. Horncastle* (h), *Beaumont on Insurance*, p. 37; *Phillips on Insurance*, ss. 1511, 1707, *et seq.* 1796 *et seq.*

1865.
Burton
v.
Gore
District
Mutual Fire
Ins. Co.

Then have the plaintiffs a remedy here, or should they be left to an action at law?

Two of the judges of the Court of Queen's Bench who decided the demurrer in the action at law between these parties, were of opinion that the transaction of the 9th of May, 1855, constituted, not merely an equitable contract, but a legal contract, between the plaintiffs and the company, and, under the 19th section of the act, entitled the plaintiffs, *prima facie*, to sustain an action at law in their own names; but the Chief Justice differed from them; and to defeat a plaintiff here on the ground that his remedy is at law, his legal remedy ought to be clear. Otherwise relief might be refused here, and yet the courts of law decide they had no jurisdiction; and a plaintiff, with perhaps a clear ground of suit, might thus lose his remedy in either court. My own opinion is, that the construction which the learned Chief Justice placed on the 19th clause is the correct one (i). There appear to be other technical difficulties in the way of a recovery at law.

Judgment.

I am also of opinion, that this is not a case in which it is proper to say that the plaintiffs must be content to sue at law in *Montgomery's* name.—*Cook v. Black* (j).

- (a) 1 Eden. 130. (b) 1 Ves. Senr. 98.
(c) 12 Sim. 273. (d) 3 Doug. 61.
(e) 4 Bing. N. C. 272. (f) 1 McQ. H. L. 328.
(g) 1 McQ. H. L. 334. (h) 1 B. & P. 316 N. R.
(i) 14 Q. B. U. C. 353; *Phillips on Insurance*, s. 880.
(j) 1 Hare. 390.

1865. On the whole case, therefore, I think that the decree of his Lordship the Chancellor should be affirmed, with costs.

Burton
v.
Gore
District
Mutual Fire
Ins. Co.

A direction may be added to the decree, if the company wishes, that, on payment of the money, the plaintiffs shall assign to the company their mortgage security.

The right of the company to an assignment of the mortgage on paying the plaintiffs' debts, not having been argued at the bar, it was spoken to by counsel after the above judgments were delivered.

Mr. Blake, Q.C., for the plaintiffs.

Judgment. Mr. Koaf, Q.C., for the company.

Mr. Burton, Q.C., for defendant *Montgomery*.

The Solicitors' and General Life Insurance Company v. Lamb (a), and Lee v. Ruston, (b), were referred to.

VANKOUGHNET, C.—We are of opinion that the Insurance Company is entitled to an assignment and to the benefit of the mortgage held by the plaintiffs, on paying them the insurance money. The mortgagor has acted in breach of the conditions on which his insurance was effected, by effecting another insurance on the premises after his assignment of the policy of the company to the plaintiffs. We hold that the plaintiffs ought not to suffer from this act; but neither should the defendants, the company, as against *Montgomery*, the insurer, if they can make good against him the

(a) 1 Hem. & M. 716, 10 Jur. N. S. 579; and on appeal at page 739.

(b) 24 L. T. 101.

money payable by them to the plaintiffs. He could not have recovered against them on the policy; and it is but right that he should be compelled to make good what they are obliged to pay to his innocent assignee. This is not the case of a life policy.

1865.

Burtou
v.
Gore
District
Mutual Fire
Ins. Co

SPRAGGE, V.C.—I think the Insurance Company entitled to an assignment of the mortgage given by *Montgomery* to the plaintiffs upon paying to the plaintiffs their mortgage debt.

The case in *Hemming and Miller* is distinguishable. It was a contract of life assurance, and turned upon the words of the policy. Sir *W. Page Wood* said: "If this were to be looked upon as a case of suretyship, the results would be very different, because then the company, as sureties, would, upon payment of the debt, be entitled to a transfer of the securities. But I do not take that view of the rights of the parties." In fire and marine insurances the policy is a contract of indemnity; and it is upon that ground, in accordance with the general law of suretyship, that the insurers are entitled, upon payment, to a transfer of the securities; that is to say, in the event of a total loss. The short ground however, upon which I think the Insurance Company entitled in this case to an assignment of the plaintiffs' mortgage is, that as between the company and the mortgagor *Montgomery*, *Montgomery* is the party to pay the mortgage, and the company, upon paying, is entitled to a remedy over against him; and this carries with it the right to have the security held by the party paid assigned to the party paying.

Judgment.

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1865.

HAMILTON V. WALKER.

Specific performance—Infant.

Where in a suit by the personal representatives of a vendor, for the specific performance of the contract of sale, an infant heir was joined as a co-plaintiff, the court refused to make a decree, although the bill had been taken *pro confesso* against the defendant, the purchaser, and ordered the case to stand over, with a view to the plaintiffs' amending their bill, by making the infant a party defendant, in order that the contract might be established against him.

This was a suit for specific performance, the defendant in which had allowed the bill to be taken *pro confesso* against him. The bill was filed by the personal representatives of the vendor: the real representatives, one of whom was an infant, were joined as co-plaintiffs. On the cause coming on to be heard,

Mr. *M. VanKoughnet*, for the plaintiffs, asked that Judgment. the usual decree for specific performance might be made; but,

SPRAGGE, V.C.—This bill is in substance a bill by the personal representatives and the heirs at law of a vendor of real estate against the purchaser. The bill is taken *pro confesso*.

One of the heirs at law is an infant. He is made a co-plaintiff, and no evidence is given of the contract of purchase. The Infant is made a party, I apprehend, in order to his being directed to join in a conveyance to the purchaser upon payment of the purchase money. The bill is in fact by the personal representatives of the vendor, being for the benefit of the personal estate. The adult heirs at law may properly join as co-plaintiffs, as it is competent to them to admit, as they thereby do admit, the contract of purchase. But the infant heir at law stands upon a different footing. He cannot admit the contract; the admission might be greatly to his disadvantage, as in the case of the personal estate

being bequeathed to other interests. Suppose in such a case a bill by the personal representative, joining as co-plaintiff the sole infant heir of the vendor, the interest of the plaintiffs would be conflicting; and if a decree were made without evidence, upon the bill being taken *pro confesso*, as in this case, against the purchaser, the heir might be made to convey away his estate without any proof that his ancestor had contracted to sell it.

1865.

Hamilton
v.
Walker.

In a suit by the personal representative of an alleged vendor the heir at law is a necessary party, not only to convey the legal estate, upon payment by the purchaser, but because he has a right to have the contract proved. In *Roberts v. Marchant* (a) Lord *Lyndhurst* met the objection that the heir was not a necessary party thus: "It was argued that by the contract the estate was converted into personalty, and that the heir at law had no interest in the matter. But that is to assume the very point in controversy, for the heir at law may dispute the contract and controvert its validity."

Judgment.

Where proceedings are taken under the trustee acts to obtain a conveyance from the infant heir of a vendor, great care is taken that it shall be well established in evidence that his ancestor had contracted to sell; and that he is bound to convey. The statute provides that in such case the petition must be by some person beneficially entitled to the land; thereby excluding an application in the name of the infant. It is then referred to the Master to find whether the infant is a trustee within the act; and so particular is the court in protecting the infant, that it will not be satisfied with a report finding the infant to be a trustee. In *re Purdon*, Lord *St. Leonards* (b), then Chancellor of Ireland, sent back a report because it did not shew how the infant was made out to be a trustee: he said, "It is not sufficient for him (the Master) to tell the court

(a) 1 Ph. 373.

(b) 1 D. & W. 500.

1865. that the party is a trustee within the act. He must
 Hamilton state upon the report the documents which make out
 v. Walker. the fact ; and I shall then be able to say, whether he
 has come to a right conclusion."

It is in the discretion of the court to direct a conveyance by the infant in the suit for specific performance, or to put the purchaser to a petition, if directed in the suit, and in the case of an unwilling purchaser especially it would appear to be proper in the suit. It ought not to be upon less evidence of the infant being a trustee to convey, than is required where proceedings are taken under the act. I might direct an inquiry as to the infant being a trustee, leaving the suit constituted as it is ; but I think it would be an anomalous proceeding. It would be requiring the plaintiff's case to be proved against one of the plaintiffs ; and that plaintiff would necessarily be required to be represented by a different solicitor from his co-plaintiffs by reason of the diversity of interest between him and the substantial plaintiff, the personal representative ; or, rather, being an infant, by his next friend. I am clear that I cannot make a decree directing a conveyance by the infant without evidence ; and my opinion is, that the suit can only be properly constituted for that purpose by making the infant a defendant. The fact of the adult children of the alleged vendor joining with the personal representatives in alleging the contract, leads me to believe that such a contract was made, and that the infant is consequently a trustee to convey ; but I cannot for that reason dispense with proof, before directing the infant to part with his estate. The cause may stand over, with liberty to strike out the infant's name as plaintiff, and to make him a defendant.

Judgment.

1865.

BLACK v. HARRINGTON.

Wild land taxes—Mode of assessing.

It is the duty of the assessors to assess village lots, the property of non-residents, separately, placing opposite to each the value and amount of assessment. Where, therefore, the assessor had included three village lots in one assessment, two of which only belonged to one person, the sale was set aside; but without costs, as the purchasers—the defendants in the suit—had not anything to do with the irregular proceedings which formed the ground for setting aside the sale.

This cause was heard before Vice-Chancellor *Spragge*, at the sittings of the court held at Chatham, in the autumn of 1865.

The facts are clearly stated in the judgment.

Mr. *Douglas*, for the plaintiff.

Mr. *Roaf*, Q.C., for the defendants *Harrington* and *McDougall*, the purchasers of the property sold.

Mr. *Fitzgerald* and Mr. *Atkinson*, for the defendants, *The Municipality of Kent*.

SPRAGGE, V.C.—Before the 30th of October, 1855. Judgment.
D. McKellar was the owner of certain land, designated as lots 34, 35, and 36, in the village of Wallaceburgh, being in the Township of Sombra, then in the county of Lambton. By conveyance of the above date *McKellar* conveyed two of the above lots, 34 and 36, to the plaintiff. The three lots were sold by the sheriff of Kent in 1862, for taxes, assessed, as I gather from the sheriff's deed, and from the return made by the treasurer of Lambton to the treasurer of Kent, upon the three lots together.

It is admitted that the lots were assessed and returned as non-resident lands, *D. McKellar's* name

1865. appearing as supposed owner. The taxes on the three
 Black lots had been paid up to 1856 by a Mr. *Lillie* as agent
 v. for *McKellar*, and since 1856, the taxes on the two
 Harrington. lots purchased by the plaintiff have been paid by the
 same person as agent for the plaintiff, that is when
 not paid by the tenants of the premises. Mr. *Lillie*
 says he supposed the taxes for 1856 had been paid.
 The only evidence of non-payment for that year is a
 return from the treasurer of the county of Lambton
 to the treasurer of the county of Kent, Sombra having
 been separated from the former county and annexed
 to the latter.

It was decided in *Munro v. Grey (a)*, that an extract
 from the treasurer's books, proved by a witness who
 had compared it with the original, such extract pur-
 porting to shew arrears of taxes on lands, was not
 sufficient legal evidence of the taxes being in arrear;
 upon the ground, I apprehend, that the entry in the
 book was not evidence of the fact.

The provision of the statute in regard to the assess-
 ment of lands of non-residents is very explicit. Where
 land is known to be sub-divided into lots, it is provided
 that opposite the number of each lot shall be set down
 the quantity of land therein liable to taxation; and
 opposite to the quantity the value of such quantity.
 Here it was known that the land was sub-divided into
 lots, for the lots are given by their number; and if
 properly assessed the quantity and value of each lot
 would be set opposite to each lot, and each lot would
 bear its own burthen of taxation; whereas in this case the
 three lots had to bear the taxation, each of the other as
 well as its own. I understand that this particularity is
 required in the case of non-resident lands, because of the
 great uncertainty as to the ownership of such lands,
 and this case is a good illustration of its propriety; for
 the three lots assessed together in 1856, as a fact,

(a) 12 U. C. Q. B. 647.

belonged to different persons at the time. 34 and 36 1865.
 were sold for taxes due not only upon those lots, but for ^{Black}
 taxes due upon another lot owned at the time by a ^{Harrington.}
 different owner. It is true that lot 35, owned by the
 other owner, was in the like position, but that does not
 better the case of lots 34 and 36.

I have not the assessment roll, and so have not before
 me the best evidence of the manner of assessment; but
 supposing the three lots correctly assessed according to
 the statute, it only shifts the irregularity to a later
 stage in the proceedings; a return of the three lots for
 an amount due for taxes (the three having been assessed
 separately), and an advertisement and sale in pursuance
 of such return, would be as faulty as if the original
 assessment had been as I have inferred it to be. This is
 at least as strong a case as *Laughtenborough v. McLean*
 (a), in the Common Pleas. I think that each of the ^{judgment.}
 objections I have stated is fatal to the sale.

In looking at the proceedings brought into question
 by this suit, I could not help being struck with the
 careless, and I do them no injustice when I add, callous,
 manner in which the municipal officers of Sombra
 discharged their duties: the assessor in disregarding
 the statute in the way I have pointed out; the collector
 in returning the taxes unpaid when he might easily
 have collected them: for it is in evidence that of two
 houses on lot 34, at least one of them was occupied for
 the greater part of the summer of 1856, and Mr. *Lillie*,
 the agent, kept a shop opposite to them, and says he
 would have paid the taxes if applied to. A very little
 trouble in the way of inquiry would have brought the
 money, and saved two houses, sworn each to be worth
 \$400, and three lots from being sold six years after-
 wards for \$36. The whole tenor of the Assessment
 Act shows the anxiety of its framers that taxes should

(a) 14 C. P. U. C. 175.

1865. be collected if possible ; it evidently contemplates diligent efforts in their collection, not negligence and apathy, such as have been displayed here.

Black
v.
Harrington.

Judgment.

One might also have reasonably looked for a less apathetic discharge of duty on the part of the treasurer ; he received the taxes both before and after 1856 from Mr. *Lillie* ; and his book showed the taxes in arrear for that year ; yet he received them for subsequent years without calling *Lillie's* attention to the omission, and returned the default in order to a sale, without any intimation of the fact. This is certainly not acting in the spirit of the act. What passed at the sale I do not know, but as I have said in other cases, it is the duty of the sheriff to make himself acquainted with the particulars of the land he is selling. If he had himself known, and had informed the audience that upon one of the three lots he was offering for sale, there were two houses, it is difficult to believe that it could have been necessary to sell the three lots to satisfy the taxes in arrear.

With regard to the County of Kent being made a party defendant, the municipality was made a party, it is stated, upon the authority of *Ford v. Proudfoot* (a). A case was decided in the Court of Queen's Bench about the same time, *Austin v. County of Simcoe* (b), which, though not precisely upon the same point, tends to throw doubt upon the liability of the municipality. I have referred to the papers in *Ford v. Proudfoot*, but do not find from them, nor from my note of the argument, whether the suggestion was that the township or the county should be made defendants for the purpose of remedy over. I confess I do not see how there can be any remedy over against the county. Where land is sold for taxes as in arrear, which in truth are not in arrear, the untrue representation is made by the township or

(a) 9 Grant 478.

(b) 22 U. C. Q. B. 73.

other municipality within the county, to an officer of the county, its treasurer; and that officer and the sheriff of the county then carry out the sale; but it is, I apprehend, carried out by them because it is desirable that there should be but one sale for all the arrears of taxes on lands within the limits of the county. The treasurer and sheriff in so acting are the instruments for enforcing payment for the several municipalities, and for their benefit, not for the benefit of the county. The county itself has nothing to do with the sale. Its only connection with it, if connection it can be called, is that two county officers, upon whom the legislature has cast certain ministerial duties for the benefit of townships, towns and the like, have been the instruments for the sale of land for taxes, by which sale the owner of certain land has been aggrieved. It would be an anomaly to make the county liable under such circumstances, and I must therefore dismiss the bill as against the corporation of Kent, and I must dismiss it with costs. The corporation alleges truly that it had no control over the treasurer and sheriff in the matter of the sale, and submits that it is not liable and ought not to be made a party.

1865.
Black
v.
Harrington.

Judgment.

The sale must be set aside as against *Harrington* and *McDougall*, but without costs, as they had nothing to do with the erroneous proceedings by reason of which the sale is set aside.

IRWIN v. HARRINGTON.

Sale of land for taxes.

Where a sale of land for wild land taxes was effected; and the taxes assessed included one year's assessment which had been paid; the sale was set aside, notwithstanding the fact that the number of years for which the assessment was in arrear was greater than was required to render them liable to sale.

This cause was heard before Vice-Chancellor *Spragge*, at *Whitby*.

1865. Mr. Strong, Q.C., for the plaintiff.

Irwin
v.
Harrington.

Mr. Fitzgerald, for the defendant.

SPRAGGE, V. C.—It has been held at common law, that upon a sale of land for taxes under our assessment law the sale is entirely void where the amount directed to be levied is larger than the amount properly due.—*Allan v. Fisher (a)*, and cases on the same point therein referred to.

In this case the taxes had been in arrear for several years, I think eight in all; the sale was for nine years' taxes. The taxes for 1852 had been duly paid, but the treasurer's warrant included the taxes for that year, and the land was sold to satisfy the taxes for that and subsequent years; the case is therefore within the terms of the rule. But counsel for the defendant urge Judgment that the excess is so small as to fall within the rule *de minimis non curat lex*. The amount of taxes paid for 1852 was 10s. 7½d., but ten per cent. having been added year by year would, according to my computation, make the amount at the time of the sale close upon \$5. The aggregate amount for which the warrant issued was \$56.85, it should have been about \$52. The difference certainly is not a large sum, but in sales for taxes the amounts are frequently small. In some cases which have been before this court, the amount has been only about double the sum which is the amount of excess in this case. The amount of excess might certainly be so insignificant as to fall within the maxim invoked; but when it is a substantial sum, and is, as in this case, the taxes for a year, I feel obliged to hold that it falls within the rule established by the cases to which I have referred, and should necessarily come to the same conclusion, even if the sum were smaller than it appears to be.

(a) 13 U. C. C. P. 63.

It is unnecessary to decide the other points raised. 1865.
 The plaintiff is entitled to his costs. He offered to repay the defendant the taxes due; which offer was refused.

DAVIDSON V. DOUGLAS.

Interpleader—Attaching order—Equitable assignment.

On G. recovered a verdict against the plaintiff, in March, 1863, in the county court of P., which G. assigned during the same month to D. & R., of which assignment notice was given to the plaintiff in the November following. In April, the month after the recovery of the verdict, the debt was attached by certain creditors of G., and they, as well as D. & R., pressed the plaintiff for payment, but took no step as between themselves to test the question as to which had a right to payment. An execution in the suit having been placed in the hands of the sheriff, the plaintiff paid the amount to the sheriff, which was immediately paid over to D., the attorney in the action. In the meantime a writ had been ordered to issue at the suit of the attaching creditors, by the judge of the county court of N., which action D. refused to defend; and judgment was entered by default the same day that the debt and costs had been paid to the sheriff.—*Held*, under the circumstances, that the plaintiff was not bound to take upon himself the responsibility of deciding between the rival claimants, and that he was entitled to file a bill in this court, calling on them to interplead, without paying the money into court.

This was a cause heard before Vice-Chancellor Spragge, at Lindsay. The facts appear in the head Statement. note and judgment.

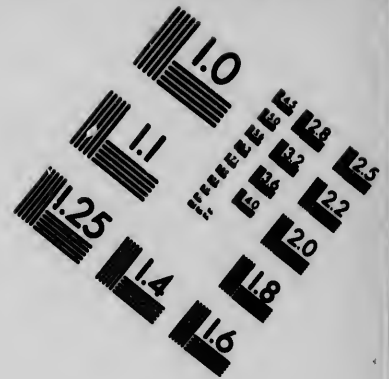
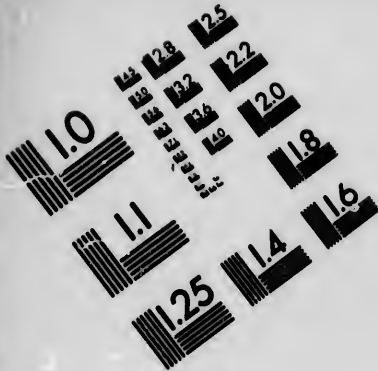
Mr. Hector Cameron, for plaintiff.

Mr. J. Boyd, for the defendants *Dunsford, Rae and Gibb.*

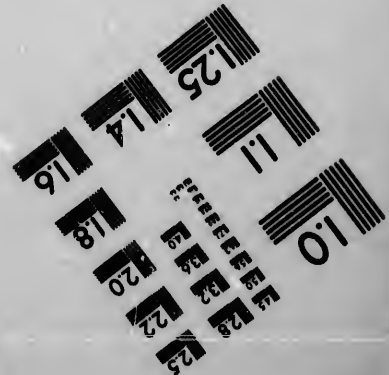
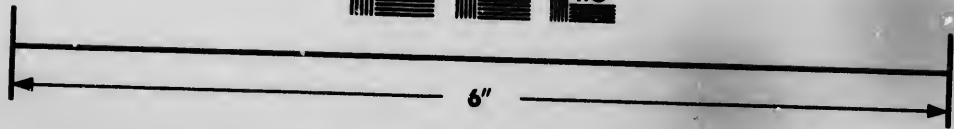
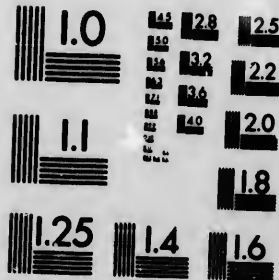
Mr. J. F. Dennistoun, for the defendant *Douglas.*

SPRAGGE, V.C.—This is an interpleader suit. The plaintiff was defendant in a suit brought by defendant *Gibb*, in which a verdict for £55 was recovered in the





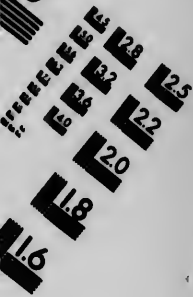
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1865. county court of Peterborough and Victoria, in March, 1863. *Davidson* appealed against an order made after the verdict. The appeal was decided against him, and judgment was entered in December in the same year.

Davidson
v.
Douglas.

Judgment.

In March, shortly after the recovery of the verdict, *Gibb* assigned a portion of the debt to the defendant *Dunford*, and the residue to the same defendant in trust for the defendant *Rae*; and gave notice of the assignment to *Davidson* in November of the same year. In April, the month after the recovery of the verdict, the debt was attached by the defendants *Douglas*: that is, between the assignment to *Dunford* and *Rae*, and the notification to *Davidson*; defendants *Douglas* had recovered judgment against *Gibb* in the county court of Northumberland and Durham. The defendants *Douglas* on the one side, and *Dunford* and *Rae* on the other, are rival claimants upon the debt recovered by *Gibb* against *Davidson*: *Dunford* was attorney for *Gibb* in the suit in which the debt was recovered. The claimants on each side complain that *Davidson* did not pay the debt to them; and complain of the course which he took in proceedings, to which I will refer presently. There has been no unwillingness or backwardness on the part of *Davidson* to pay the debt: his difficulty has been to know to which to pay it; a difficulty which the respective claimants have not assisted to solve. They have, on the contrary, as far as in them lay, thrown upon *Davidson* the responsibility of deciding which of them was entitled to the money.

The position of *Davidson* was a difficult one. *Dunford*, on behalf of himself and *Rae*, was pressing the judgment recovered against *Davidson* by *Gibb* in the county court of Peterborough, and placed a writ of *fi. fa.* in the hands of the sheriff: while, on the other hand, the *Douglases* were pressing their garnishee proceedings in the County Court at Cobourg. In this dilemma he made applications in each court to stay proceedings,

or for other relief. An application at Peterborough, made on the 12th of March, 1864, was enlarged, and was finally refused on the 1st of June: and on the following day the notice was served on the sheriff, and he was instructed to proceed immediately, and levy upon the *fi. fa.* in *Gibb v. Davidson*, which had been placed in his hands in the previous March. A bailiff was sent out promptly, and on the 3rd of the same month *Davidson* called on the sheriff, and paid him the debt and costs, which were paid over to *Dunford* the same day.

1865.
Davidson
v.
Douglas.

In the meantime the County Court judge at Cobourg had directed a writ under the statute to issue against *Davidson*, at the suit of the *Douglasses*. *Davidson's* solicitor endeavoured in vain to induce *Dunford*, as assignee of *Gibb*, to defend the suit; and judgment was entered by default on the same day that *Davidson* paid the debt and costs to the sheriff in *Gibbs'* suit against him. The contest between the rival claimants was a real one; and one that it would be most unreasonable to expect that *Davidson* should take upon himself the responsibility of deciding. The assignments to *Dunford* for himself and *Rae* were of prior date to the attaching order; but the attaching creditors objected to them that *Gibb* was insolvent at the time he made them: and there is some evidence given tending to shew, though not absolutely establishing, insolvency: and further, that the priority in point of date was lost by the omission to notify *Davidson*. On the other hand, the priority of the assignment is insisted upon; and as to costs due to *Dunford*, it is said that he had a paramount claim to that extent, independently of any assignment from *Gibb*. I only refer to these points to shew that there were questions between the parties, which *Davidson* could not be expected to decide.

I do not see that the conduct of *Davidson* has been improper. I do not agree that he has lent himself to

1865. either party ; his sole anxiety appears to have been, not to be himself involved in the question of title between them.

Davidson
v.
Douglas.

Judgment.

It is suggested that he ought to have paid the money into court : that would have been into the court at Cobourg, where the *Douglases* had obtained judgment against *Gibb*. But could he do so safely ? The judge of that court could not protect him from the execution, in the suit in which *Gibb* had recovered judgment against him at Peterborough ; and in fact the judge of each court refused to stay proceedings against him. Besides, he had been notified of the assignment ; and, for aught that appears in the statute, or is shewn to me as practice at common law, it would have been the right of the attaching judgment creditor to take out of court the amount of his judgment. Suppose this done, *Dunaford* and *Rae* would naturally complain that after notice of their assignment he had placed the money where it fell into the hands of the attaching creditors ; and *Davidson* would have incurred the risk of having to pay the money over again. It is not necessary to say that such would have been the consequence : but those who urge that he ought to have paid the money into court should shew that he would have been quite safe in doing so.

The fact is, our Common Law Procedure Act does not provide for the case of rival claimants to the debt due by the garnishee. The same defect existed in the Imperial statute, from which ours was taken ; but has been since remedied by 23 & 24 Vic. ch. 126, secs. 29 & 30.

I do not see how, in justice to *Davidson*, this court can refuse him relief. It is not shewn that he has any adequate remedy at law. In both the county courts he struggled to obtain relief, but ineffectually. It is against the policy of the law ; and it is in the highest degree unreasonable that he should have been left at his own peril, to decide which of the rival claimants to pay.

His proposition to the assignees was reasonable: the claimants ought themselves, and at their own expense, to have contested their rival claims, instead of throwing the burthen upon one who was a mere stakeholder between them.

1865.

Davidson
v.
Douglas.

It is proper that I should, at the hearing, decide the case, as far as I can, as well between the respective claimants upon the fund, as between them and the plaintiff. I think the plaintiff entitled to relief; and if the case were sufficiently clear, as to which of the defendants is entitled, I should decide that also. If the omission to give notice, for instance, were decisive of the question between them, I should decide it now; but there would still remain the question of the *lien pro tanto* of the attorney for his costs: and if the question of notice were decided against the attaching creditors, the question of insolvency, a question of fact, would still remain for inquiry. The question of notice was argued only by one side, that of the attaching creditors. I said my impression was against the objection: and it is so still; because no one was, or could be, prejudiced by the omission; and I did not see that there was any default. The peril, if any, was to themselves. They did give notice before judgment was recovered against *Davidson*. If in the meantime he had chosen to withdraw his opposition to the verdict, and had paid the debt to some other assignee, or perhaps to the attaching creditor, it may be that they would have found the assignment useless. It may be, on the other hand, that some prejudice has or might have accrued to the attaching creditors, inasmuch as if *Davidson* had been notified of the assignment, he might have informed the attaching creditors of it, and they might have abandoned their attachment and adopted some other proceeding for the recovery of their debt. The question of attorney's *lien* was also argued only by the counsel who put it forward.

Judgment.

If the question as to the invalidity of the assignment

1865. by reason of the alleged insolvency of *Gibb* is pressed, it will be well that the other questions to which I have adverted should be argued, on further directions after the inquiry as to that fact. If that inquiry is not pressed, I would decide the other questions now, and should like to hear one counsel upon each side. The costs must stand for the present. I suppose they must be borne by the unsuccessful claimant. The plaintiff has already paid the debt: I do not think it is necessary that he should pay the amount into court.

FARQUHAR V. THE CITY OF TORONTO.

Equitable Assignment—Appeal from County Court—Costs.

Where a person having a demand against another, gave to a creditor of his own an order on his debtor for a portion of his demand, notice of which was duly given to the debtor, but this order the debtor did not accept—*Held*, notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which it covered.

Where a party filed a bill on the equity side of the County Court, which on the hearing was dismissed with costs, and the plaintiff appealed to this court, when the ruling of the judge was reversed, the court gave to the plaintiff the costs of the appeal, as well as of the court below.

Statement. This was an appeal from the judgment of the judge of the County Court of the United Counties of York and Peel, dismissing a bill filed on the equity side of that court to compel the payment by the City Corporation to the plaintiff of a sum of \$178.05, being a portion of the amount payable by the city to the defendant *Storey* for work done by him for the corporation, and for which he had given to the plaintiff an order on the city chamberlain, but which that officer declined to accept, and had paid the amount coming to *Storey* from the corporation over to an execution creditor of *Storey*, who had attached the debt.

Mr. Roaf, Q.C., for plaintiff.

Mr. McBride, for the City of Toronto.

1865.

Farquhar
v.
The City of
Toronto.

SPRAGGE, V.C.—On the 5th of August, 1864, the corporation of the City of Toronto was indebted to the defendant *Storey* in a sum exceeding \$200, and on that day *Storey* gave to the plaintiff an order on the chamberlain of the city in these words:

“TORONTO, August 5, 1864.

“\$178.05.

“To Mr. McCord, Chamberlain of the Corporation of the City of Toronto :

“Pay Mr. James Farquhar the sum of one hundred and seventy-eight dollars $\frac{05}{100}$, due from me to him, on account of work done at registrar's office, on Court Street.

“RICHARD STOREY.”

Storey was indebted to *Farquhar* in the above amount.

The order was, on its date, carried to the chamberlain's office by an agent of the plaintiff, and presented to a clerk in the office, and payment of it demanded, which was refused. The order was left in the office, but was not returned by the clerk, as he swears. The clerk called attention to a resolution of the council of the city, which resolution is as follows: “Resolved, that it be an instruction to the chamberlain, hereafter, not to accept or to receive any order in favor of any contractor, or other party, in advance or in anticipation of payment, and that such instruction shall not be departed from except upon a special resolution of council.”

Judgment.

On the 17th of the same month of August the plaintiff himself, at the office of the chamberlain, demanded of that officer payment of the amount of the order. The chamberlain did not pay it.

It appears by the affidavit of the chamberlain that the

1865. *Farquhar v. The City of Toronto* amount due to *Storey* was not ascertained—that is, as I understand, agreed upon between the city and *Storey*, until the 15th day of October following, when it was ascertained to be \$227.33; and that sum was, as the affidavit states, then agreed upon and offered by the corporation to be paid to *Storey*; which offer was accepted by *Storey* in full satisfaction. The money was not however actually paid to *Storey*, but to one *Simpson*, an execution creditor of *Storey*, under circumstances which I will refer to presently.

My opinion is, that the order upon the chamberlain, given by *Storey* to *Farquhar*, was an equitable assignment *pro tanto* of the debt due by the city to *Storey*, and that the assent of the city was not necessary. The order given in *Row v. Dawson (a)* was very similar: Judgment. “Out of the money due to me from *Horace Walpole* out of the exchequer, and which will be due at Michaelmas, pay to *Tonson* £400, and to *Cowdery* £200, value received.” The order was given by one *Gibson*, to whom *Tonson* and *Cowdery* had made advances; and was presented to and lodged with a Mr. *Swinburne*, the Deputy Controller of the Exchequer. *Gibson* became bankrupt after the order was given, and before it was acted upon: and Lord *Hardwicke* held it to be a good equitable assignment, of which (and this answers the objection that notice should have been given to the mayor, as the head of the corporation,) the only practicable notice was given by service of the order upon the officers of the department; “thus reducing the case,” as put by Lord *Truro* in quoting it in *Rodick v. Gandell (b)*, “to the ordinary position of an order upon a debtor or person having funds belonging to the giver of the order, requiring the debtor to pay the debt or fund to the creditor of such giver of the order.”

Rodick v. Gandell is cited on behalf of the city. Lord

(a) 1 Ves. Senr. 331.

(b) 1 D. M. & G. 775.

Truro held the instrument given in that case not to amount to an assignment, as he thought it was not intended so to operate; and he shewed that reasons of prudence existed on the part of the giver of the instrument why no arrangement should be made that should have that operation. And at the same time, after reviewing the cases on the subject, he deduces from them this principle, "That an agreement between a debtor and a creditor, that the debt owing shall be paid out of a specific fund, coming to the debtor; or an order given by a debtor to his creditor, upon a person owing money, or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debt or fund to which the order refers."

1865.

Farquhar
v.
The City of
Toronto.

Watson v. The Duke of Wellington (a) is, like *Rodick v. Gandell*, plainly an exceptional case. The Marquis of *Hastings*, who was entitled to a share in the Deccan prize money, gave to a creditor a note addressed to Col. *Doyle*, running thus: "My dear friend. As I shall leave to you the distribution of the prize money, as soon as it shall be issued for me, I have to mention that the executors of Mr. *Sims* are claimants on that fund for a bond debt, with interest." Sir *John Leach* thought the words used did not import a direction to Col. *Doyle* to pay the debt; and therefore held that the paper did not amount to an equitable assignment.

Judgment.

It is clear from the cases that the assent of the holder of a fund, or debtor upon whom an order to pay is given, is not necessary to an equitable assignment, whatever may be the case at law.—*Ex parte South* (b). Even notice is held to be necessary only for the purpose of preserving priority. Upon this point I will refer only to *In re Pole's Trusts* (c), before

(a) 1 R. & M. 602.

(b) 3 Swan. 392.

(c) 2 Jur. N. S. 685.

1865. *Sir John Stuart, In re Way's Trusts (a)*, before the Lords Justices, and *Sichel v. Raphael (b)*, before Lord Westbury.

Farquhar
v.
The City of
Toronto.

I think it clearly established by the authorities to which I have referred, that the order given by *Storey* was a valid equitable assignment; and that the notice given to the chamberlain was sufficient, being, as was said in *Rodick v. Gandell*, the only practicable notice that could be given. Without that case, indeed, I should have said that as a corporate body can only be notified through its officers, the chamberlain was the proper officer through whom a notice of this nature should be given; and besides, it is clear, independently of the actual notice proved, that the city authorities had notice; for they resisted payment to *Simpson*, the attaching creditor, on the ground of this very assignment to *Farquhar*. Their answer states that an order having been made by his honor the county court judge, ordering payment to *Simpson*, the attaching creditor, they, the corporation, moved to rescind the order, on the ground of the equitable assignment to *Farquhar*.

Judgment.

I should not have felt it necessary to go into the question at the length that I have done, were I not overruling a decision of the judge of the County Court, whose judgment it is stated by the answer proceeded on the ground that there had been no equitable assignment of the debt from *Storey* to *Farquhar*; as no acceptance of the order of *Storey* in favor of *Farquhar*, or any recognition whatever of the same, had been made by the corporation, or by any one on its behalf, to *Farquhar*. In regard to the resolution of the city council, it does not in terms forbid payment by the chamberlain to any person presenting an order from a party to whom the corporation might be indebted: and if it did, it is hardly necessary to observe, that the council cannot

(a) 5 New R. 67.

(b) 5 New R. 149.

by its resolution exempt the city from the rules of law applying to other parties. 1865.

Farquhar
v.
The City of
Toronto.

It is contended that *Farquhar* has disentitled himself to these moneys, by reason of having attached the balance left in the hands of the corporation, after satisfying *Simpson's* claim, as he must have made an affidavit that the debt was still due by *Storey*. I do not think this disentitles him: the debt from *Storey* did remain due, unless he took this order as payment; and there is nothing to shew that he did so take it. In the case of *Ex parte South (a)* a similar question arose. A party having given certain creditors an order for payment, upon the executor of a person indebted to him, which was retained by the executor until he should ascertain whether he would have assets to meet it, the creditor sometime after receiving the order, arrested his debtor: and it was held, first, by Sir *John Leach*, and then by Lord *Eldon*, that the arrest was not a waiver of his right to receive the proceeds of the order: Lord *Eldon* putting it upon this ground, that the debt "could not be considered as in any way discharged, nor the other remedies of the creditors affected; except that if they resorted to those remedies, the executor would be liable to pay to them so much only as remained unsatisfied."

Judgment.

The last point made arises out of the provision of the Common Law Procedure Act, that "Payment made or execution levied upon the garnishee, under any such proceeding as aforesaid, shall be a valid discharge to him, as against the judgment debtor, to the amount paid or levied, although the proceeding should be afterwards set aside, or the judgment reversed." The money in this case has been paid to *Simpson*, upon an execution, at his suit against the corporation, being placed in the hands of the sheriff. The corporation did not pay without setting up the right of *Farquhar*, nor

(a) 3 Swan. 392.

1865. until the pressure of an execution was brought to bear upon them; but they did pay after *Farquhar* had instituted his suit against them in the County Court, and after they had put in their answer in that suit; for they state in their answer that *Simpson's* execution was at that time in the hands of the sheriff. That execution was issued upon an order made in a proceeding to which *Farquhar* was not a party.

The clause to which I have referred makes payment by the garnishee a valid discharge only *as against the judgment debtor*; that is, in this case, as against *Storey*. It could not have been intended to be a discharge as against rival claimants to the fund; for it ignores the existence of any contestants other than the garnishee and the judgment creditor; making no provision for an adjudication upon the claims of rival claimants: an omission in the statute which existed in the Imperial act, from which ours was taken, but which has since been remedied in England by Stat. 23 & 24 Vic. c. 126, ss. 29, 30, but has not as yet been remedied in Canada.

Judgment.

Still, although the corporation could not have put the rival claimants, *Simpson* and *Farquhar*, to interplead in the garnishee proceedings, it was not without remedy. The corporation might have filed a bill of interpleader on the equity side of the County Court. Such a bill was filed in this court in *Davidson v. Douglas (a)*; and the garnishee obtained relief. If the corporation, instead of taking this course, thought proper, or felt safe, in relying upon the ruling of the County Court judge being sustained, in the event of its being impeached by *Farquhar*, it did so at its peril. The statute does not make the order of the judge final as against any, not parties to the proceedings; and it would have been a most anomalous provision if it had done so.

The plaintiff's claim in the County Court was dismissed

(a) Ante p. 181.

at the hearing. The order made will be reversed, and the corporation be ordered to pay to the plaintiff the amount of *Storey's* order, with interest from 17th of October, 1864, with costs in the County Court suit, and the costs of the appeal: these latter costs are part of the costs incurred in the litigation of the question between the parties; and necessarily incurred by the plaintiff, in order to his attaining the remedy to which he is, in my judgment, entitled. The County Court Act leaves it open to the court appealed to, to make such order as to costs *inter alia* "as may be just and proper."

1866.

Farquhar
v.
The City of
Toronto.

McMASTER v. DEMMERY.

Foreclosure—Costs.

Where a mortgagor subsequently executed a lease of part of the mortgaged property, and one of the two owners of the lease mortgaged his interest therein, such mortgagee was made a party in the Master's office to a suit by the original mortgagees for the foreclosure of their mortgage:

Held, on further directions, that, in case the mortgagor redeemed the plaintiffs' mortgage, he was not entitled to claim against his co-defendants, or any of them, the costs occasioned by the mortgage of the leasehold.

On the 25th of June, 1857, the defendant *Demmery* mortgaged the property in question to the plaintiffs, and on the 8th of August following executed a lease of part of the property to one *Leak*, with the right of purchasing on certain terms therein mentioned. *Leak's* interest became subsequently vested in the defendants *Parsons* and *Westmacott*. The bill was for the foreclosure of the plaintiffs' mortgage; and the court made the usual decree to inquire respecting incumbrances, reserving further directions and costs until after report. The Master reported the only incumbrances to be the defendants' mortgage, and a mortgage which the defendant *Parsons* had given on his interest to one *William Thorne*, who was made a party in the Master's office.

Statement.

1866.

McMaster
v.
Demmery.Mr. *Hodgins*, for plaintiff.Mr. *Roaf*, for defendant *Demmery*.

MOWAT, V.C.—This cause coming on before me upon further directions, the only question discussed was as to the costs occasioned by the mortgage to *Thorne*. Mr. *Roaf*, for *Demmery*, said that he intended to redeem the plaintiffs' mortgage; and he argued that, in that case, so much of the costs as was occasioned by the mortgage to *Thorne* should be re-paid to *Demmery* by his co-defendants, or one of them. No case was cited in support of this claim. Had the transaction between *Demmery* and *Leak* been a mortgage, *Demmery* would clearly have had to pay the costs of the sub-mortgagee (a); and one of the reasons given is, that after the mortgage is forfeited the estate is the absolute property of the mortgagee, and he may deal with it as his own. Where the estate is in the first instance absolute, a similar rule seems proper. *Non constat* that any suit would have been necessary between *Parsons* and *Thorne*, or that any costs would have been incurred by either if *Demmery* by his default had not occasioned the present suit. I think that *Demmery* must pay all the costs.

Judgment.

MCLEOD V. MILLAR.

Practice.

Where the Master is directed by a decree to tax the costs of the suit, he has no jurisdiction to decline taxing them, even if he finds that the amount due does not exceed \$200, and that the suit might have been brought in the County Court.

A County Court has no equitable jurisdiction where all the defendants do not reside in the county.

This was a foreclosure suit, and a decree was made in the usual form. The Master found less than \$200 to be due to the plaintiff, and therefore declined to tax any costs. (Consol. Stat. U. C. 22 Vic. cap. 15.)

(a) *Smith v. Chichester*, 2 Drury & War. 393.

The plaintiff appealed, and the appeal was allowed, on the ground that the decree had directed the costs to be taxed, and that the Master was not at liberty to disregard the direction of the court. The defendants then presented a petition under the late orders, for an amendment of the decree, directing the Master to find what was due, reserving further directions and costs, or directing him to tax the costs in the event only of the amount due exceeding \$200. Affidavits were filed, stating this to have been the form of the decree agreed to by the parties at the hearing, and that the registrar declined to depart from the usual form, deeming the same unnecessary on the authority of *Connell v. Curri* (a).

1866.

McLeod
v.
Millar.

The plaintiff contended that the alteration asked for should not be made, because, amongst other things, all the defendants did not live in one county; that the County Court for that reason had no jurisdiction in the case; that the plaintiff was therefore entitled to his costs; and the alteration, if allowed, would be of no service.

Statement.

Mr. *Graham*, for petitioner, cited *Hyman v. Roots* (b), *Judd v. Plum* (c).

Mr. *McGregor*, contra, cited *Lawrence v. Fitzgerald* (d).

MOWAT, V.C.—Having examined the act, I think the contention of the plaintiffs is well founded. The 34th section provides that “any person seeking equitable relief may (personally or by attorney) enter a claim against any person from whom such relief is sought, with the clerk of the County Court of the county *within which such last mentioned person resides*,” &c. I think the 64th clause, to which Mr. *Graham* referred, does not extend the jurisdiction, but applies

(a) Chamb. Rep. 11.

(b) 11 Grant, 202.

(c) 29 Beav. 21.

(d) 9 Grant, 371.

1866. McLeod only to the mode of exercising it. But the 34th clause
 vs. Millar. speaks of a single defendant. How does it apply
 where there are more defendants than one? In that
 case must all be residents of the county, as the plain-
 tiff contends; or is it sufficient that any one defendant
 should be a resident of the county, as the defendants
 contend? I think the former is the correct construc-
 tion. The U. C. Interpretation Act, (Consol. ch. 2,
 sec. 10.) declares that words importing the singular
 number shall include more persons, &c., than one.
 The clause in the County Court Act must therefore
 be read as if it had used the plural instead of the
 singular number; in which case the jurisdiction
 would clearly be confined to cases where all the
 defendants reside in the county where the suit is
 brought (a).

Judgment. In the case of *Connell v. Curran* (b), which was sup-
 posed to decide that the Master was at liberty to refuse
 to tax costs where the demand is under \$200, though the
 court had directed the taxation without any reference
 to that contingency, the point was not taken or referred
 to, and was not intended to be decided.

Petition dismissed

TRUST AND LOAN COMPANY v. McDONELL.

Where a bill by a mortgagee against the infant heir of the mortgagor
 prays a foreclosure, and the court, for the protection of the infant,
 directs an enquiry whether a foreclosure or a sale is more for the
 benefit of the infant, it is not necessary to direct the Master to
 make the executor of the mortgagor a party in his office, in case of
 the Master's opinion being in favor of a sale.

This was a bill for the foreclosure of a mortgage,
 against the heirs of the mortgagor, one of whom was an

(a) Vide *Dulmage v. The Judge of the County Court of Leeds*
 and *Grenville*, 12 U. C. Q. B. 32.

(b) *Chamb. Rep.* 11.

infant. The court directed the usual inquiry as to whether a sale or foreclosure would be more for the benefit of the infant, and ordered the executors of the mortgagor to be made parties in the Master's office. The plaintiffs applied by petition that the decree might be varied by striking out the direction as to the executors, alleging that the plaintiffs had discovered since the decree that the statement in the bill that the executors proved the will was incorrect, and that in fact they had not proved, and did not intend to do so, there being but little personal estate.

1866.

Trust and
Loan Co.
v.
McDonell.

Mr. Moss, for the plaintiff.

An admission of service by the guardian of the infant, and his consent to the required variation, were put in.

MOWAT, V.C.—In this case, I understand, the bill prayed a foreclosure. The court, however, for the protection of the infant, directed an inquiry whether a foreclosure or sale would be more for the advantage of the infant heir of the mortgagor. In such a case the personal representative of the mortgagor does not appear to be a necessary party (a), the sale not being at the instance of the mortgagee (b), and the personal representative of the mortgagor not being a necessary party to a bill for foreclosure (c). Judgment.

The decree, therefore, may be amended as prayed, without costs.

(a) Vide *Siffken v. Davis*, Kay. App. 21; *Mears v. Best*, 10 H. 51 App.

(b) *White v. Haight*, 11 Gr. 423.

(c) *Bradshaw v. Outram*, 12 Ves. 234.

1866.

BROWN v. DEACON.

Deeds—Interest.

An instrument under seal may be varied in equity by an agreement, for valuable consideration, not under seal.

A written promise by a mortgagor, after default, to allow more than the six per cent. interest reserved by the mortgage, was held to be binding, on the authority of *Alliance Bank v. Brown*, 10 Jur. N. S. 1121; though there did not appear by the writing to have been any consideration of forbearance or otherwise for such promise.

This was an appeal from the report of the Master at London.

The suit was on a mortgage for \$800, made the 2nd of March, 1848, and due one-half in one year, and one-half in two years, with interest at six per cent.

Judgment. On the 3rd of January, 1861, the mortgagor signed a memorandum, promising to pay interest at 10 per cent. from the 2nd of March, 1860, when the whole mortgage money became due. The Master had computed interest at 6 per cent. only, on the ground that the mortgage, being under seal, could only be varied or altered by an instrument of equal solemnity. From this finding the plaintiff appealed.

Mr. *George Murray*, for the appeal.

Mr. *McBride*, contra.

MOWAT, V.C.—I think the appeal must be allowed. The common law rule, on which the Master proceeded, is not the rule of this court. Effect is constantly given here to agreements not under seal, in derogation of sealed instruments. The case of *Inglis v. Gilchrist* (a), cited by Mr. *Murray*, is an example. The distinction between law and equity on the point was referred to by *Tindal*,

(a) 10 Grant, 301.

C. J., in *Gwynne v. Davy* (a); and, since equitable defences have been allowed, has been acted upon at law, as in *Lord Petre v. Stubbs* (b). But in equity the rule is of frequent application for correcting mistakes in deeds, proving trusts, and establishing absolute deeds as mortgages; as well as in establishing subsequent agreements inconsistent with the provisions of existing instruments under seal.

1866.
Brown
v.
Deacon.

Mr. *McBride*, for the defendant, contended that if a seal was not necessary, yet a consideration for the promise to pay ten per cent. was necessary. But the cases of *Alliance Bank v. Brown* (c) seems to shew that, without any express statement of a consideration in the writing, and without any other proof of one than may be inferred from the defendant's contract, such contract is binding to the extent insisted upon by the plaintiff. I say this, assuming that, as a matter of fact, there was forbearance by the plaintiff after the date of the agreement.

Judgment

Appeal allowed, without costs.

(a) 1 M. & Gr. 868.

(b) 25 Law T. R. 81.

(c) 10 Jur. N. S. 1121.

1866.

SMITH V. WOOTTEN.

Injunction—Equitable set-off.

This court has no jurisdiction to restrain execution or other proceedings at law on a legal demand upon a written instrument, on the ground that the defendant at law has a counter claim for unliquidated damages for the violation by the plaintiff at law of covenants contained in the same instrument.

This was a motion for an injunction to stay execution in an action at law brought by the defendant here, *Wootten*, against the plaintiffs, *Smith and Berry*.

Wootten carried on the business of a blacksmith in the city of Toronto, and on the 16th of December, 1864 agreed for the sale to *Smith and Berry* of his stock in trade, and the good will of the business, from the 1st of January, 1865, for \$700, payable as follows: \$100 on the 1st of January, 1865, \$300 on the 1st of April following, and \$100 on the 1st of January, 1866, 1867, and 1868; and the defendant covenanted that he would not, directly or indirectly, carry on the business of a blacksmith in Toronto for 12 months from the 1st of January, 1865, but would, by all ways and means he could, direct the trade or business incident to the occupation or calling of a blacksmith in favor and for the benefit of the plaintiffs. The plaintiffs duly paid the 1st and 2nd instalments as agreed upon; but before the 3rd instalment came due, they filed their bill complaining of breaches of the defendant's covenants, and praying for an injunction to restrain him from any further violation of his agreement. The injunction was granted. After the 3rd instalment became due, *Wootten* brought an action at law to recover the amount of it, and the present motion was to restrain that action.

Mr. *Fitzgerald*, for the motion, referred to Dart. on Vendors and Purchasers, 538; note to 11 Ir. Ch. Rep.

152, and 3 P. W. 306; *Thornton v. Court* (a); *Rawle* 1866.
 on Covenants, 178, 179, 180, and 180; *Cox v. Bernard*
 (b), *Kehewich v. Manning* (c). Smith
v.
Wootten.

Mr. *Blevins*, contra, relied on *Stimson v. Hall* (d),
Rawson v. Samuel (e), *Maw v. Ulyatt* (f).

MOWAT, V.C.—The conclusion to which I have come
 in this case is, that the motion for an injunction must
 be refused. It may be just that the defendant should
 not enforce the payment of the instalment which has
 fallen due of the purchase money payable to him by
 the plaintiffs, while the plaintiffs have a counter claim
 against him for the violation of his part of the agree-
 ment. But there is, confessedly, no right at law to
 set off a claim for unliquidated damages like this
 against a legal demand; and while there are many
 cases in which a set-off is allowed in equity though
 not at law (g), I fear this is not one of those cases. Judgment.

It was argued on behalf of the plaintiff, that where
 the claim to such damages arises under the same in-
 strument as the claim for which the action at law is
 brought, the former may be set off in equity. But I
 find no authority for this proposition, and I find
 authority against it. Indeed, Lord *Cottenham* decided
 the very point, in *Rawson v. Samuel* (h). The follow-
 ing is his language: "It was said that the subjects of
 the suit in this court, and of the action at law, arise
 out of the same contract; but the one is for an account
 of transactions under the contract, and the other for

(a) 3 DeG. M. & G. 293. (b) 8 Hare, 340.
 (c) 1 DeG. M. & G. 176. (d) 1 H. & N. 831.
 (e) Cr. & Ph. 161. (f) 7 Jur. N. S. 1300.
 (g) Vide *Ex parte Stephens*, 11 Ves. 27; *Ex parte Blagden*, 19
 Ves. 467; *Whitaker v. Rush*, 1 Ambl. 407; *Jones v. Mossop*, 3 Hare,
 568; *Cavendish v. Greaves*, 24 Beav. 163; *Smith v. Parkes*, 16 Beav.
 115; and the cases collected in 2 Story Eq. Jur. s. 1435, et seq.
 (h) Cr. & Ph. 178.

1866. ^{Smith} v. ^{Wootten.} damages for the breaches of it. The object and subject matters are, therefore, totally distinct; and the fact that the agreement was the origin of both, does not form any bond of union for the purpose of supporting an injunction (a).” His Lordship held, also, that the insolvency of the plaintiff at law, or his absence from the jurisdiction, made no difference (b).

Glennie v. Imri (c) is also in point. There an action at law had been brought on a bill of exchange which the plaintiff in equity had given for goods; and he filed a bill for an account, and to restrain the action, alleging that he had been fraudulently deceived in his contract, the goods delivered being inferior, both in quality and quantity, to what he had ordered. The defendant demurred to the bill; and the Lord Chief Baron, in giving judgment, said: “I am of opinion that this demurrer must be allowed. The account which a court of equity adjusts must be one of debtor and creditor, and not an account of debts one way and of damages the other way. The plaintiff has given a bill of exchange for paper which turns out to be not of the quality for which he stipulated. * * What is the case which he offers to the court for an account? It is this, that he ought to be allowed to debit the defendant with an account of the paper in hand, and strike a balance on that footing. Let us see whether he could do that at law; for if he could not at law, he cannot in equity.” The judgment concludes with the observation: “The ground which I take in allowing this demurrer is, that the subject matter in which this account is sought to be taken is not matter of set-off, but matter of damages.” In *Stimson v. Hall* (d) an equitable plea of set-off was held bad under like circumstances.

That these cases state what is well understood in

(a) Vide also *Fisher v. Baldwin*, 11 Hare, 352. (b) *Ib.* p. 175.

(c) 3 Y. & C. Ex. 436.

(d) 1 H. & N. 831.

England to be the rule cannot, I think, be doubted, 1866.
 when we perceive from the reports how frequently the
 attempt has been unsuccessfully made at law to set off
 unliquidated damages.

Smith
 v.
 Wooten.

Mr. *Fitzgerald*, for the plaintiff, referred to the late statute (28 Victoria, chapter 17, section 3), and to the authorities, as shewing that this court has jurisdiction in certain cases to assess damages. But the question on this motion is, not the right to assess damages, but the right to set off a claim for unliquidated damages against a definite legal demand for which a party is suing at law.

The learned counsel also referred to the doctrine of courts of equity as to staying actions for unpaid purchase money, where a defect of title, covered by the vendor's covenants and creating a partial failure of consideration, has been discovered after the execution of the conveyance. I am not aware of any case in the English courts or here, in which such an action was stayed pending an inquiry as to unliquidated damages, though to allow a set off in such cases seems to be the practice of the American state courts (a). The cases in England of equitable set off against unpaid purchase money appear to have been cases where the set off was for ascertained sums due on incumbrances (b). But if, in regard to real estate, the English courts would not confine relief to such cases, the authorities I have referred to (c) seem clearly to shew that where the subject of the transaction is not real estate, the unliquidated character of the damages which it is proposed to set off is a fatal objection in equity, as well as at law.

Judgment.

Motion refused, with costs.

(a) Rawle on Covenants, 672 et seq. 3rd ed.

(b) Vide *Tourville v. Nash*, 3 P. W. 307; *Woods v. Martin*, 11 Ir. Ch. 148, *Sugden on Vendors*, ch. 13, sec. 2, pl. 16, 17, p. 552, 14th ed.

(c) *Rawson v. Samuel*, Cr. & Ph. 161; *Glennie v. Imri*, 3 C. 436; *Stimson v. Hall*, 1 H. & N. 831.

1866.

KERR V. BEBEE.

Practice—Equitable mortgage—Sale.

A subsequent incumbrancer is entitled to a sale upon the usual terms, where the plaintiff is an equitable mortgagee by deposit of title deeds, as well as where the mortgage is by deed.

Statement. This was a suit by an equitable mortgagee by deposit of title deeds, against the mortgagor and a prior mortgagee by deed. At the hearing a decree was made for foreclosure, and a reference directed to inquire as to other incumbrances, in proceeding on which an incumbrancer subsequent to the plaintiff was added in the Master's office; who, when the decree on further directions was about to be drawn up, required that it should be a decree for sale under the terms of the General Order No. 9, of the 20th of December, 1865, and the Registrar settled the minutes accordingly. The plaintiff, being dissatisfied, moved before Vice-Chancellor *Spragge* to vary the minutes, insisting that his right was to have a foreclosure, and not a sale.

Mr. *Snelling*, for the plaintiff, cited *Samble v. Wilson* (a) as a clear authority for this position.

Mr. *F. W. Kingstone*, contra. If the plaintiff were a legal mortgagee created by deed, the subsequent incumbrancer would clearly have this right; the fact that the plaintiff is only an equitable mortgagee cannot lessen the rights of other incumbrancers.

SPRAGGE, V.C.—The plaintiff is an equitable mortgagee subsequent to a legal mortgage and a decree was made—the above incumbrancer and the mortgagor being then the only parties—for a foreclosure. An incumbrancer subsequent to both is made a party in the Master's office, and now asks for a sale instead of a foreclosure upon the usual terms; and the question is whether he can ask this against an equitable mortgagee

(a) 5 N. R. 395.

as he can against a legal mortgagee, or a mortgagee by mortgage deed of the equity of redemption. 1866.

Kerr
v.
Bebee.

There is a conflict of authority as to whether foreclosure or sale is the proper remedy of an equitable mortgagee. It is another question whether the equitable mortgagor, or a subsequent incumbrancer, has not the same rights under our general order as if the mortgage had been created by deed. I find two cases reported in which the equitable mortgagor applied for a sale; one, *Moore v. Perry*, reported in 1 Jur. N. S., page 126, before Sir *John Romilly*. It does not seem that any terms were offered, or that the application was made under 15 & 16 Vic.; the report of the case merely states that a sale was asked for on the ground that a sale and not a foreclosure was the remedy which the court afforded to equitable mortgagees, and the application was refused on the ground that the equitable mortgagee was entitled to a foreclosure. The other case was before Sir *Richard Kindersley*, and the application was put upon the same footing. The learned Vice-Chancellor was willing to grant a sale upon the usual deposit, which the defendant's counsel declined to make. In neither of these two cases was it decided, or indeed contended, that if the defendant asked for a sale under 15 & 16 Vic., he was upon a different footing than if the plaintiff were a mortgagee by deed. It was the defendant who contended that an equitable mortgagee plaintiff was upon a different footing, and was confined to one remedy only, while a mortgagee by deed had two.

Judgment.

In this case the equitable mortgagee contends that he is on a better footing than a mortgagee by deed, as against the depositor and subsequent incumbrancer. I see nothing in the authorities, nor in reason, to support this. The 48th section of the Imperial statute, and our General Order, are comprehensive enough in terms to embrace such a case, and I think do embrace it, and therefore that the subsequent incumbrancer is entitled to a sale upon the usual terms.

1866.

*Wilson v. Upper Canada Building Society.**Building Societies.*

Where a building society should, if properly managed, have terminated in ten years, but did not terminate then; *Held*, that borrowing members, as well as non-borrowing members, were bound to continue paying their monthly subscriptions, if necessary, until they reached the amount of their shares.

Where a mortgage given by a borrowing member recited that he had become the purchaser of seven shares of £100 each, and the mortgage was conditioned for the payment of the monthly subscriptions upon such shares, and of interest upon the said sum of £700, by equal monthly payments of £3 10s. each, and contained a provision for the sale of the property in case of default, and for the Society's retaining out of the proceeds the remainder of the principal sum of £700 then remaining unpaid, and all interest, fines, and other sums due or payable to the society, giving credit for subscriptions theretofore paid, and interest thereon at six per cent. from the time of such respective payments, and for payment of the surplus to the mortgagor: *Held*, that the mortgagor was not liable to pay £3 10s. a month, or 10s. per share, for interest for the whole period, but only at that rate on so much of the £700 as from time to time was due, after giving credit for the monthly subscriptions paid.

A rule of the society declared, that, in case of default in paying the monthly subscriptions, the defaulter should pay a fine of three-pence per share for the first month, sixpence for the second month, one shilling for the third month, doubling the fine for each succeeding month till the expiration of the first six months; and that, after that time, if the same remained unpaid, it should become forfeited: *Held*, that no fine was chargeable after the expiration of the first six months.

Such a rule for the paying of fines cannot be waived by the directors.

Where the members ceased paying their monthly subscriptions in ten years after the establishment of the society, under the supposition, on the part of all, that the society should then terminate, and did not resume paying the same, but it was subsequently found that, from mismanagement and losses, further payments were necessary: *Held*, that the rule as to fines was not to be enforced as regards monthly subscriptions falling due after all had ceased to pay.

This was an appeal by the defendants against the Master's report, and was argued before Vice-Chancellor *Mowat*, on the 24th of January, 1866.

The bill was by a borrowing member of the *Upper Canada Building Society*, established under the Statute 9 Victoria, chapter 90, against the society and its president and treasurer, alleging that the mortgage to secure his shares had been over-paid, and praying for an account and reconveyance. A decree was made by consent on the 15th of February, 1864, referring it to the Master to inquire and state what, if anything, was due by the plaintiff to the defendants upon the plaintiff's mortgage; and the court reserved the consideration of further directions and costs until after the Master should make his report. On the 18th of March, 1865, the Master made his report, and thereby set forth as follows:—

1866.

Wilson
v.
U. C. Build-
ing Society.

That the said Building Society began on the 1st of June, 1848, and that, had its business been properly conducted by the Society, the probability is, that the same would in regular course have been closed in about eight and a half or nine years from the commencement, but, in consequence of the Society having negligently or improperly allowed the monthly subscriptions, interest, and other dues, to remain unpaid by its members to the Society, or the misapplication of its funds or other mismanagement, the Society, although it ceased to loan moneys to its members in August, 1852, was not so closed, and has not in fact as yet been closed by regular operations.

Statement

That as it appeared to him manifestly unjust and unreasonable that the Society, by neglecting to enforce the payment of the dues from its members generally, or other mismanagement, should be allowed to postpone the closing of the Society beyond a fair and reasonable period, and to enforce the payment of monthly subscriptions and interest, and other sums, from borrowing members, beyond such period, and as the bonuses allowed by borrowing members were calculated and allowed to the Society upon an implied understanding that the said Society would be closed within a reasonable time after its commencement, he found that the Society should have been closed within such reasonable time; but, inasmuch as the prospectus on which the said Society was formed appeared to

1866. contemplate that it might not close, and its business be wound up before the expiration of about ten years from its commencement, he found that the reasonable period for closing the Society should not have exceeded such ten years; and that he had therefore taken the account referred to him to be taken in this cause, as if the Society had closed at the end of ten years from its commencement; that the Society was composed of non-borrowing and borrowing members; that the interest of the borrowing members depended on the profits arising from the business of the Society, inasmuch as the greater the profits the sooner the Society would close, and thereon the mortgages given by them to the Society be deemed satisfied, save as to any monthly subscriptions, management, fees, fines, or interest which had theretofore become payable, and had not at the time of such closing been paid by them to the Society; that a great, if not the greatest, source of the profits to the Society arose from the bonuses allowed to the Society by the borrowing members, in respect to the sums expressed in their mortgages to the Society, such bonuses being allowed by the statute under which the Society was formed to be taken instead of what would otherwise have been deemed usurious interest; that the Society were otherwise entitled to charge simple interest only, as interest against the borrowing members (a); and, under all the circumstances, he found that the Society, as a Society, was and is trustee to the borrowing members for the due and proper management of the affairs of the Society; and that the borrowing members ought not to be subjected or compelled to pay any greater sums of money than they would have been compelled or bound to pay, had the business of the Society been properly managed, and the Society been closed within a reasonable time, not exceeding ten years from its commencement.

Statement.

That, therefore, in taking the account referred to him, had not allowed to the Building Society any monthly subscription, or management fee, or fines, or forfeitures, or any interest upon the plaintiff's mortgage to the Building Society beyond the period at which the Society ought to have been closed.

That the plaintiff's mortgage was dated the 26th of December, 1848, and made to secure the payment of

(a) But vide *Silver v. Barnes*, 6 Bing. N. C. 180.

the principal sum of £700; that the bonus allowed thereon was £390, which left the net sum of £310 only as payable in money from the Society to the plaintiff thereon; that of the said sum of £310, the sum of £284 4s. 8d. only was paid to the said plaintiff, or by his order, to his use, at or shortly after the execution of the mortgage; and the residue of the said sum of £310, being the sum of £25 15s. 4d., the Master allowed to the credit of the plaintiff in taking the account under the decree.

1866.

Wilson
v.
U. C. Building Society.

That at the end of ten years from the commencement of the society, that is to say, on the 31st of May, 1858, there was nothing due from the plaintiff to the Society; on the contrary, that, beyond the sums properly payable to the Society, the plaintiff had paid to the Society the sum of £77 4s. 8d., all of which was principal money.

Against this report the defendants moved, by way of appeal, on the following grounds:—

1. For that the Master had not allowed to the Society the monthly payments of interest amounting to the sum of £3 10s., in full from the date of the mortgage until the winding up of the Society, or until the objects of the Society should have been attained.

Statement.

2. That the Master had fixed the period of ten years from the commencement of the Society as the time when the same should have been wound up; and that the Society cannot be considered as terminated or wound up so long as there were assets outstanding to be collected, and liabilities to be discharged.

3. That the Master had allowed the plaintiff, and disallowed to the Society the sum of £25 15s. 4d., as that sum was a proper charge made by the Society, and must be taken to have been assented to by the plaintiff at the time, and was in fact assented to by him, and that a portion thereof was properly charged to the plaintiff by the rules of the Society.

1866. Wilson v. U. C. Building Society. 4. That the Master had not disallowed to the Society fines which, according to the rules thereof, should have been allowed to it, and some of which were charged to the plaintiff in the books of the Society, and were taken into account in the statements rendered to him from time to time.

5. That the Master's report took the account made up by him, on an incorrect and erroneous principle, and the same was not in accordance with the evidence and depositions.

Mr. *McBride* and Mr. *Dougall*, for the appeal.

Mr. *Gwynne*, Q.C., contra.

The following cases were cited:—*Mosly v. Baker* (a), *Silver v. Barnes* (b), *Bingaye v. Cotton* (c), *Seagrave v. Pope* (d), *Fleming v. Self* (e), *Sparrow v. Farmer* (f).

MOWAT, V.C.—This was an appeal from the master's report.

Judgment. The plaintiff is, what is called, a borrowing member, of the Upper Canada Building Society. This Society was established in 1848, and ceased all operations some years ago, having made no loan since 1852, and received no money since 1858. It was in the latter year, at longest, that, when the Society was established, it was expected to terminate. Many of the members withdrew before 1858, and were allowed a large bonus in respect of the profits or supposed profits; and in or before that year others are said to have been settled with on the supposition that the profits of the Society were then sufficient to pay the shares in full. This supposition has since

(a) 6 Hare, 87.
(c) 5 DeG. & Sm. 15.
(e) 1 Jur. N. S. 25.

(b) 6 Bing. N. C. 180.
(d) 1 D. M. & G. 783.
(f) 5 Jur. N. S. 530.

been ascertained to have been erroneous. Losses, too, have been incurred since, through the depreciation of property, and otherwise; so that there are not now assets enough, exclusive of subscriptions falling due since 1858, to settle with the remaining members on the same footing as those were settled with who have withdrawn.

1866.

Wilson
v.
U. C. Building
Society.

The plaintiff claimed by his bill that his mortgage had been overpaid; and he obtained, by consent, a reference to the Master to ascertain what, if anything, was due upon his mortgage. The Master has found that the Society, if properly managed, should have terminated in ten years at longest; and, taking the account upon that basis, has found the mortgage overpaid by the sum of £77 4s. 8d.

Judgment

The defendants' first objection to the report is, that the Master should have held the plaintiff bound to continue his monthly payments until the objects of the Society are fully accomplished, and not to be discharged from liability even by payment of the full amount of the shares, viz., £100 each, besides interest. I am clear that this objection presses the plaintiff's liability too far. I think it beyond a doubt, that, according to the true construction of the statute, and of the rules of the Society, and of the provisions of the mortgage, the maximum liability of the plaintiff is the amount of his shares, viz., £700, with interest.

But I think the plaintiff's liability cannot be limited to the subscriptions becoming due within a period of ten years; or, in other words, to the payment of £60 of the principal of each share. These societies are partnerships (a); and the losses, as well as the profits, all the partners or members must share. The

(a) *Re the St. George's Building Society*, 4 Drewry 154; *Silver v. Barnes*, 6 Bing. N. C. 180; *Mosley v. Baker*, 6 Hare, 104; *Sparrow v. Farmer*, 26 Beav. 520.

1866. borrowing or advanced members have no equity as against the non-borrowing or unadvanced members. Both classes have the same control over the operations of the society. Both have the right of voting for directors; and both have, in proportion to their shares, the same number of votes at all general meetings of the Society. The borrowing members did not cease to be members when they obtained payment, or what they accepted as payment, of their shares, in advance. The Society was to exist until the shares should be paid up in full by the monthly subscriptions, or until any earlier period at which the profits with the antecedent subscriptions should suffice to pay all the shareholders the amount of their shares. Some, like the plaintiff, preferred receiving their shares in advance, a privilege for which they allowed to the Society a bonus; and some, instead of allowing a bonus or discount for an anticipated payment, preferred waiting for their shares until the Society should terminate, when they hoped to receive the amount in full (a). Under these circumstances, it is plain that there can be no reason why losses should fall on the latter class of members, and not also on the former, whether such losses have arisen from bad debts or bad management,—from the depreciation of property, or from erroneous settlements with the members who have withdrawn.

Judgment.

It is said that the Society were trustees for the borrowing members; but, in truth, the members of both classes together constitute the Society (b); and the plaintiff is himself quite as much part of the Society as any other member of it can be said to be. Perhaps, if there were to be any distinction in the extent of the liability of the two classes respectively, the non-borrowing members might, with a show of justice, say that they should be more favourably treated than the others; for

(a) *Farmer v. Smith*, 4 H. & N. 196; *Fleming v. Self*, 3 DeG. M. & G. 102; *Mosley v. Baker*, 6 Hare 98; 1 H. & T. 301, S. C.

(b) See the statute, sec. 1.

they have paid their subscriptions and received nothing, while the borrowers have had the use of a considerable proportion of the amount they have to pay.

1866.

Wilson
v.
U. C. Build-
ing Society.

I think, therefore, that the plaintiff is bound, in common with all other members, to pay the full sum of £100 per share, making 200 monthly subscriptions of 10s. each, unless the objects of the Society are fully accomplished by the contribution of a less sum. The circumstance that the directors thought that not more than half this number of monthly instalments would be required, or that they settled on that footing with the members who have withdrawn, is entirely immaterial to the present controversy. The only question now is, What is the fact? How many instalments of the £100 per share are really necessary now, to make up that sum per share to the remaining members?

The defendants' counsel further contended that the interest should be paid on the whole £700, and not merely (as the Master has charged it) on such portions of the £700 from time to time, as the monthly subscriptions which were paid, did not liquidate.

Judgment.

In the rules of most of the Societies, in regard to which there are reported cases, this interest is called "redemption money," and "redemption money or interest," and is a small sum, generally about one-third of the amount of the monthly subscription; and the amount of it is expressly fixed. The rules of this Society do not fix the rate. The proviso in the mortgage is, that the mortgagor shall "pay the interest upon the said sum of £700, so advanced as aforesaid, by equal monthly payments of £3 10s. on or before the first day of each month." Now, a proviso in any instrument for interest being paid on the sum advanced and secured, is always construed as meaning on so much thereof as from time to time remains due; and the language of this proviso will, I think, bear that

1866. construction ; while the provision, in a subsequent part of the mortgage, about the sale of the property in case of the mortgagor's default, makes this intention manifest ; as it declares that what the Society is to retain out of the proceeds of a sale, is " the remainder of the said principal sum of £700 then remaining unpaid, and all interest, fines, and other sums due or payable to the said Society, giving credit for such of the subscriptions upon the said shares so advanced as shall have been paid to the said Society by the said party of the first part [the plaintiff], and interest thereon at the rate of six per cent. per annum from the times of such respective payments." The residue was to be paid over to the plaintiff. (a)

Judgment. The plaintiff's counsel contended that the interest should be confined to the amount unpaid, not of the principal sum of £700, but of the difference between that sum and the bonus ; in other words, should be confined to interest on the sum actually received by the plaintiff for his shares. The argument in favour of this view was supported partly on the statute, and partly on the twenty-eighth rule of the Society.

I do not think the statute can be construed as the learned counsel contended for.

The twenty-eighth rule of the Society contains a reference to the subject, though it does not fix the rate of interest. It required mortgages to be taken "securing the moneys advanced with interest, and also the due payment of the ordinary monthly subscriptions." But, if this rule is to be construed as contemplating interest on the sum received by the borrower only, it also appears to provide that the mortgagor should pay the monthly subscriptions in addition

(a) *Mosley v. Baker*, 6 Hare, 106 ; 1 H. & T. 305 S. C. ; *Smith v. Pilkington*, 1 DeG. F. & J. 120.

to the re-payment of the sum so received and interest, which was clearly not the intention. The rule is very loosely expressed; and my conclusion in regard to the argument founded upon it may be expressed in the language of Sir *James Wigram*, V.C., in *Mosley v. Baker* (a):—"If the matter in dispute is to be settled by what appears upon the mortgage deed, that is, if there be nothing in the articles of the association which, by reference in the mortgage deed, affects its construction, it is clear, in my apprehension, that the claim of the association is well founded. I have read the articles, and although the language in which the clauses bearing upon the matters in question are expressed, do not, in all respects, appear to contemplate a mortgage in the form of that which the plaintiff seeks to redeem, there is nothing in the sixty-second clause or any other, which, as I understand them, is inconsistent with such a contract as I suppose the plaintiff to have made by the mortgage deed. And if (as I think is the case) the construction of the mortgage deed is free from ambiguity, it cannot be invalidated, nor can its effect be controlled, by any ambiguous expressions in the articles of the association."

1866.
Wilson
v.
U. C. Build-
ing Society.

Judgment.

If the terms of the mortgage had been inconsistent with the rules of the Society, the mortgage would probably have to govern, on the pleadings here; for neither party had sent up any case for its alteration.

The hardship of the plaintiff's position was much insisted on by his counsel; and, no doubt, his case is one of hardship; but so is that of every member who did not withdraw from the Society in time; and the plaintiff could only be relieved now by his share of the burden being transferred to others who, for all that appears before me, are as free from blame as himself.

(a) *Mosley & Baker*, 6 Hare, 102; 1 H. & T. 306 S. C.

1866. Another of the defendants' objections to the report is, that the Master has not allowed to the Society all the fines for which the plaintiff is liable.

Wilson
v.
U. C. Building
Society.

The Master has allowed all the fines that were charged in the accounts rendered to the plaintiff by the secretary and treasurer, and all charged in the secretary's books; but I think this is not sufficient. The 22nd rule of the Society is peremptory: "Every member shall, so long as he shall continue to be a member, and until the objects of the society be attained, pay 10s. per share per month, on or before the day appointed for that purpose; and in default thereof, shall pay a fine of 3d. per share for the 1st month, 6d. for the 2nd month, 1s. for the 3rd month, doubling the fine for each succeeding month till the expiration of the first six months, and, after that time, if the same remains unpaid, the share or shares of such member or his representative shall be forfeited." (a)

Judgment. It was very important to those who paid regularly, that these fines should be exacted from defaulters; and I see nothing in the statutes or rules which gives the treasurer or the directors power to abstain from exacting them. On the contrary, the statute enacts (sec. 6) that "all rules from time to time made and in force for the management of such Society, and entered and recorded as aforesaid, shall be binding on the several members and officers of the said Society," &c.; and sec. 7 provides "that no rule entered as aforesaid shall be altered, rescinded or repealed, unless at a general meeting of the members of such Society convened by public notice," &c.

My conclusion on this point accords with the decision of the Master of the Rolls in *Handley v. Farmer* (b). There the fines fixed by the rules had not been charged by the Society against the defaulting member, and the

(a) *The Queen v. Eyncourt*, 4 Best & Sm. 825. (b) 29 Beav. 352.

Master of the Rolls held the latter liable for them, notwithstanding. He said: "As to the cards and omissions to charge the plaintiff with the fine, it amounts to nothing; for if the directors omitted to perform their duty, it cannot prejudice the other shareholders; because if he pays too little the others will have to pay the deficiency." Vide also *Card v. Carr* (a).

1866.

Wilson
v.
U. C. Build-
ing Society

I think fines on each default are only payable for the first six months; and that the practice of charging in the seventh month the fine payable the first month, and so on, doubling again to the sixth, is not correct. But for the rule, no fine could be charged; and the amount chargeable under the rule depends entirely on its terms. It provides for fines for the first six months, and says nothing as to fines afterwards. The amount of these fines is enormous, amounting to 15s. 9d. for non-payment of 10s. for six months. In the English rules, the fine is generally very much smaller; and the rules expressly provide for its continuance in subsequent months (b). I think where the rule contains no such provision, no charge can be made (c).

Judgment.

But I think fines ought not to be charged in respect of the later instalments.

I have said that this Society, at its establishment, was expected to terminate in about ten years, or in the year 1858. In or before 1853, a premium of £10 a share was offered to withdrawing members. In the report for the year ending 31st March, 1854, the directors stated that the bonus to be paid to withdrawing members had "been calculated at £15 per share, being the actual profits accruing by the operations of the society

(a) 1 C. B. N. S. 197.

(b) *Handley v. Farmer*, 29 Beav. 362; *Fleming v. Self*, 3 DeG. McN. & G. 998; *Seagrove v. Pope*, ib. 785; *Burridge v. Catton*, 5 DeG. & S. 19; *Smith v. Pilkington*, 1 DeG. F. & J. 120.

(c) *Ottawa Union Building Society v. Scott*, 29 U. C. Q. B. 341.

1866. at this period;" and the directors stated, as they had
 done in previous reports, that no losses had been sus-
 Wilson v. U. C. Building Society. tained. The nominal profit at this time was £17 4s. 8d.
 per share. Many shareholders accepted the offered pre-
 miniums, and withdrew. From the statements contained
 in this report the society should have closed in eight
 years, or eight and a half years, and this was probably
 the general expectation; for members generally ceased
 to pay their monthly subscriptions in 1857. The treas-
 urer says he received but a trifling sum after 1857;
 and he seems to have received nothing after June, 1858.
 I think that, under these circumstances, the discon-
 tinuance of all the members in 1858 to make any
 further payments may be taken as an abrogation of
 the rule, so far as regards fines for future defaults, by
 common consent of all the shareholders. The omission
 to pay from that period was hardly the kind of default
 which the rule contemplated as punishable by fines.
 It was rather a default from a common mistake and
 misfortune of all parties, against the consequences of
 which this court would be disposed to relieve, and
 may relieve by holding the rule to be rescinded on the
 principle cautiously expressed by Lord Justice *Knight*
Bruce in *Keene's* executors case (a): "Unquestionably,
 in ordinary partnerships, any clause of the deed, how-
 ever strict or precise, may in practice be departed
 from or waived. In a partnership, for instance, of
 two, three, or four, where they alone are interested in
 the stipulations into which they have entered, as they
 were the persons who created the obligation, and are
 the only persons whom the obligation concerns,
 they are at liberty to depart from it; and it has
 often happened that, on dissolutions and the wind-
 ing up of partnerships, the arrangements made
 have proceeded on a basis very different from that
 which the deed provided, the evidence being plain
 of a departure agreed to between those concerned
 in the matter, who were competent to agree to

Judgment.

(a) 3 DeG. McN. & G. 278.

that departure. The same course, attended with the same results, is not absolutely impossible in the case of one of those extended partnerships called joint-stock companies, in which, it being impossible for every partner usefully, or with propriety, to interfere directly or personally in the management of the business, its affairs are delegated to a chosen body, whether called a committee, or directors, or by any other name, acting as agents for the whole. But there is obviously much more difficulty in acting on the rule which I have just mentioned, in such a case; because, *prima facie*, the duty of an agent is to obey and follow his instructions. Directors and committees are not appointed to depart from the deed of constitution. They are appointed to carry it into effect. It is obvious, therefore, (to repeat what I have just now said) that, though such a result in the case of a joint-stock company is not impossible, it is one much more difficult to be arrived at, and, in point of fact, much more rarely arrived at." The case *In re The British Provident Life and Fire Insurance Society Ex parte Grady (a)* is one in which the evidence of acquiescence by all the shareholders was deemed by Lord Westbury to be sufficient. *Brotherhoods Case In re The Agriculturists' Insurance Co. (b)*, *Straffon's Executors Case (c)*. Vide *In re Kent Benefit Building Society (d)*, *Taunton v. The Royal Insurance Co. (e)*, *Gregory v. Patchett (f)*.

1866.

Wilson
v.
U. C. Building
Society.

Judgment.

The defendants also complain of the disallowance of three items, amounting together to £25 15s. 4d.—being £18 7s. 5d. in respect of monthly subscriptions and interest before the date of the mortgage, and a sum of £12 7s. 11d. paid, about January, 1849, to Mr. J. H. Cameron in satisfaction of a debt due to him by the plaintiff.

(a) 1 DeG. J. & S. 488.

(c) 1 DeG. McN. & G. 590.

(e) 10 Jur. N. S. 291.

(b) 31 Beav. 335.

(d) 1 Drew & Sim. 417.

(f) 10 Jur. N. S. 1118.

1866. *Wilson v. U. C. Building Society.* These items were charged to the plaintiff by the Society sixteen years ago, with his knowledge; and numerous accounts were afterwards rendered to him by the Society, which he settled without making any objection or claim in respect of these items. His first objection to them was made in the Master's office in this cause. I think that, under these circumstances, it is sufficient to say that the plaintiff must be taken to have agreed to be charged with the items referred to; and that, as it is not pretended that there was anything illegal in making the charge with his consent, it is too late to resist the allowance now.

If it is admitted that the losses are so great that, when the Society is wound up, the assets will not be sufficient to pay the shares in full, the plaintiff can get no relief, except on terms of paying the full principal sum of £700, with all arrears of interest and fines, after getting credit for what he has paid already.

Judgment.

If the condition which the affairs of the Society will present when all the accounts are taken, is not admitted, I think that the plaintiff is not bound to await the taking of the accounts necessary to ascertain the fact; and that he is entitled to a reconveyance, without prejudice, by paying into court, if he chooses, the maximum amount for which he can be liable. The order to this effect cannot, however, be made on the present motion.

On the whole, my judgment on the appeal is in favor of the defendants, and the report will be sent back to the Master to be reviewed.

No costs of the appeal to either party.

BLAIN V. TERRYDERRY.

1866.

Administration—Interest when chargeable against Executor—Costs.

The report, in an administration suit, found £1403 chargeable against an executor. Blain
v.
Terryberry.

Of this sum £1247 was for the price of land claimed and received by the executor, the testator's son, as heir, and his claim to this had long been acquiesced in by the other parties interested, till held otherwise in this suit, when this purchase money was declared to pass under the testator's will to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property, left by this executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sum charged to this executor, except a balance of about £34.

Under the circumstances the executor was allowed his costs as of an administration out of the estate—was not charged with interest on the balance in his hands, which he was required to pay into court within a month, after deducting therefrom his share of the estate as legatee.

This was a hearing on further directions of the cause, *Statement*, reported ante vol. ix. 286, and vol. xi. 286.

The facts are fully set forth in the former reports, and in the judgment.

Mr. *Spohn* and Mr. *McKeown*, for the plaintiff.

Mr. *Freeman*, Q.C., and Mr. *Proudfoot*, for defendant.

SPRAGGE, V.C.—It is evident from the pleadings, and it has been made more evident, by what has been before the court in this cause, that the principal matter in contest between the plaintiff and the defendant *Terryberry*, was what is called the *Kramer* purchase money, which was claimed by *Terryberry* as *donatio mortis causa*. That question has been decided against *Terryberry*; and the costs in relation to it have been adjudged against him.

It is found by the Master that *Terryberry* is properly chargeable with the sum of £1828 1s. 4d., which includes the *Kramer* purchase money, and interest paid

1866. *Blain*
 v.
Terryberry.

to *Terryberry* upon a portion of it; and the Master credits *Terryberry* with £424 15s. 7d., as moneys properly applied by him as executor. The materials upon which the Master arrives at these results are not before me; but I gather from the papers that are before me, that the *Kramer* purchase money and interest amounted to £1247, the difference therefore between the amount with which *Terryberry* is charged, and the amount with which he is credited, is not made up solely of the *Kramer* purchase money and interest. It leaves about £157 yet to be accounted for. Chattels to the value of £132 19s. 6d., were received by the widow; and that amount is, I understand, included in the sum charged against *Terryberry*: this would reduce the balance against him to about £34. Further, he claimed as his own a sum of \$125, being the purchase money of a lot, the interest in which he claimed as heir of his father. Whether this sum is charged against him, I do not know. If it is, it turns the balance in his favour: if not, £34 is not accounted for. These facts are material upon the question whether he was a mere defaulter, or whether the balance against him was made up in the way I have supposed.

Judgment.

It is claimed against him that he should be charged with interest upon the *Kramer* purchase money, and that the account in relation to it should be taken with rests; and that, beyond the costs in relation to that purchase money, with which he has been already charged, he should be charged with the costs of this suit.

I think there is no room to doubt that *Terryberry's* claim to the *Kramer* purchase money was made in good faith. His father died in March, 1847. He treated the money as his own immediately; and upon the purchase falling through, sold the land to another, and received the purchase money. His right to it does not seem to have been questioned until 1855, when, as

is stated by his counsel, and not denied, it was brought in question by one *Van Wagner*, as interested in the estate, who filed his bill against *Terryberry*, when the widow of the testator was examined as a witness in regard to it, and the suit was abandoned. From that time until the filing of this bill, his right to it appears to have remained unquestioned. And upon the hearing of the cause before the late Vice-Chancellor, his right to it was established to the extent of \$900. He must have felt confidence in his right; for he reheard the cause claiming the whole; and then the right to any part was decided against him, his Lordship the Chancellor making, however, this remark: "I have a very strong belief that the testator intended that *Jacob* should have the moneys payable by *Kramer* as the purchase money of the land in question." It is impossible, in the face of all this, to contend that *Terryberry's* claim to the purchase money was not a *bond fide* one.

1866.
Blain
v.
Terryberry.

To take the account against him, in relation to it, with rests, is out of the question; and I think that, under the circumstances, he should not be charged with interest upon the sums he has received. He retained the moneys, in the honest belief, as I have no doubt, and not without reason for the belief, that they were his own; and the plaintiff has been guilty of very great delay in bringing him to account. *Bruere v. Pemberton* (a), is an authority for the position that an executor retaining moneys in his hands, under a fair apprehension of his right to retain them as his own, will not be charged with interest upon them; and *Bourne v. Cross* (b) and *Davenport v. Stafford* (c) are to the point of not charging with interest, when there has been great delay; but I think the two points may fairly be considered together. The report shews that there are five next of kin, besides the widow, interested in the personal, undisposed of, estate of the testator: of these one is the wife of *Terry-*

Judgment.

(a) 12 Ves. 386.

(c) Ib. 319.

(b) 14 Beav. 105.

1866. *berry's* co-executor; *Terryberry* himself is another; so that there have been five persons interested in bringing *Terryberry* to account for this purchase money. Some are named as under coverture, some as having been so; neither their ages nor time of marriage are given, except that it appears from the will that three of them were married at its date, December, 1846. It is offered as an excuse for the delay in calling *Terryberry* to account, that the plaintiff was, until lately, under coverture. But the question is not as to any forfeiture of claim of hers, by reason of her delay, but whether it is reasonable, and in accordance with the practice of the court, to make him pay interest upon moneys, his claim to which has been, not only uncontested, but, as he might well believe, acquiesced in. It is not merely that the plaintiff and the other next of kin had some right which they allowed to lie dormant; but it was this, that their right to shares of undisposed of personalty was unquestionable, unless *Terryberry's* claim, as *donatio mortis causa*, was a good one. It was an active claim set up by him to that, which was otherwise clearly theirs; and that claim they and their husbands did not contest. It remained undisputed, with the single exception to which I have referred, and which would tend to confirm its validity. What I have seen in this court does not lead me to think that the husbands of heiresses are usually careless or supine in regard to the rights of their wives; and in this case it would, indeed, until the recent Married Women's Act, have been the husband's own rights. Yet, *Terryberry* has been allowed from March, 1847, to the filing of this bill, to treat and enjoy as his own these moneys, which he had claimed as his own during all that time. He surely had reason to believe that his right to them was conceded by his sisters and their husbands.

It is hardship enough that *Terryberry* should be compelled to pay the principal under these circumstances. His scale of expenditure, his engaging in

enterprises, may have been based upon the assumption that the money was his own: to compel him besides to pay interest, would be an increased hardship, and would not, I think, be a sound exercise of the discretion which the court exercises in such cases.

1866.
Blain
v.
Terryberry.

As to costs: his fault has been, not accounting for the *Kramer* purchase moneys, and allowing his mother to retain chattels, principally furniture, to the amount of about £183; and beyond that, supposing the *Caledonia* land out of the question, in not accounting to the extent of £34; or being found chargeable to that amount. As to the first, I have nothing to add; as to the furniture, there were no creditors claiming upon it; and it is not going very far to presume that *Terryberry's* sisters and their husbands did not press upon the executors their duty to deprive their mother and mother-in-law of the furniture and other chattels; and as to the £34, the sum is not large, and after so great a lapse of time, the charge, or a large portion of it, may have been established, through loss of vouchers, the death of witnesses, or other circumstances. He is fixed with the costs occasioned by the question of the *Kramer* purchase money; and I think should have out of the estate the other costs of the suit, that is, the general costs of the administration of the estate. The plaintiff's costs, and the costs of defendant *Blackstone* should also come out of the estate.

Judgment.

Terryberry asks to have deducted from the balance found, or to be found against him, his own share thereof, as one of the next of kin, and the shares which the Master reports that he has acquired, viz.; that of *Margaret Spaun*, one of the next of kin, and that of the widow: I see no objection to this.

He also asks that he may be allowed time in order to raise the money which he is to pay in. The cases to which I have been referred, where time has been given

1866. are cases where the executor has invested the moneys,
 Blain but upon improper securities; and the court has given
 v. time to enable him to realize them. In such case, the
 Terryberry. money is secured in the meantime, only not upon
 such securities as the court approves of. Here it would
 remain wholly unsecured, and I cannot say that it
 would be just or safe in such a case to give time;
 besides, *Terryberry* has known ever since the decree
 on rehearing, that he would have to pay in this
 money, and has had sufficient time to procure it.

The decree will be for payment in a month after
 report finding the amount which he is to pay.

FLEMING v. PALMER.

Where a mortgagee assigned the mortgage, covenanting for the pay-
 ment of the mortgage money, and subject to an agreement between
 the mortgagee and assignee that the former might have a re-
 assignment of the mortgage on payment of principal and interest
 due thereon, and the mortgagee afterwards made payments under
 his covenant:

Held, that he was entitled to a lien therefor as against the mortgagor.

Statement. Foreclosure suit by assignee of mortgage. The
 cause came on upon further directions before Vice-
 Chancellor *Mowat*.

The only question discussed was as between the
 defendants, the original mortgagee and mortgagor.

Mr. *H. Murray*, for *Robert H. Smith*, the mortgagor.

Mr. *Edgar*, for Mrs. *Palmer*, the mortgagor.

Mowat, V. C.—In this case *Smith*, the mortgagee,
 assigned the mortgage to the plaintiff, covenanting for
 the payment of the mortgage money, and subject to an
 agreement between the mortgagee and assignee, that
 the former might have a re-assignment of the mortgage

on paying the principal and interest due thereon. The mortgagee was no party to the transaction. The mortgagee afterwards made default, and *Smith* paid to the plaintiff some of the instalments secured by the mortgage. The question now is, whether, as between the defendants the mortgagee *Smith* and the mortgagee, the sums thus paid constitute a lien on the property, or merely a personal debt due from the mortgagee. I am clear that they are a lien on the property. Vide *Pitt v. Pitt (a)*, and *Banks v. Whittall (b)*.

1866.
Fleming
v.
Palmer.

WARING v. HUBBS.

Foreclosure—Disclaimer—Costs.

A person interested in an equity of redemption informed the mortgagee before suit that he was willing to release to him his interest in the property. The mortgagee, notwithstanding, made him a defendant to a bill for sale of the mortgaged premises, and he filed an answer setting forth his willingness to release, and that he had before suit informed the plaintiff of such willingness: *Held*, that he was entitled to his costs.

This was a motion by a mortgagee for a decree for the sale of the mortgaged property. The bill did not pray for the payment by the defendants of any deficiency. Statement.

The bill was *pro confesso* against the mortgagee.

Mr. *Hector*, Q.C., for one of the defendants, *Alva Hubbs*, claimed costs, referring to *Ford v. Chesterfield (c)*, *Wood v. Shakeshaft (d)*.

Mr. *J. C. Hamilton*, contra, relied on *Hatt v. Parke (e)*.

Mowat, V.C.—This is a bill by a first mortgagee for the sale of the mortgaged property. The defendants

(a) T. & R. 180.
(c) 16 Beav. 516.

(b) 1 DeG. & Sm. 536.
(d) 1 Dru. & Sm. 269.

(e) 6 Gr. 553.

1866. are the mortgagor and *Alva Hubbs*, to whom the mortgagor had conveyed his equity of redemption, subject to the right of repurchasing on certain specified terms. The question is as to the costs of the defendant *Hubbs*, who has put in an answer expressing his willingness to release his interest to the plaintiff, and stating, as I understand his answer, and as counsel on both sides construed it, that he notified the plaintiff of this willingness before the filing of the bill. This being so, the rule is clear that he is entitled to his costs. His lordship the Chancellor held, in *Hatt v. Parke*, that where, in a suit like the present, a person made a party in the Master's office appears and disclaims, he is not entitled to his costs of doing so; but that is upon a ground which does not apply to this case. Where a person is made a party in the Master's office, if he does not appear, the Master is directed by the General Order (a) "to treat such non-attendance as a disclaimer, and the claim of such party is to be thereby foreclosed." In such a case, therefore, to appear for the purpose of disclaiming is a useless expense. But the rule does not apply to a defendant by bill.

Judgment.

BAKER V. RANNEY.

The Crown—Demurrer.

A bill was filed against the Attorney-General, and *A.*, the superintendent of certain slides belonging to the Crown, who was also the collector of the rates thereat, alleging that he had seized certain saw-logs of the plaintiff, and was about to sell them on the false pretence that the tolls thereon had not been paid. The bill prayed for an injunction to restrain the sale. *A.* demurred to the bill on the ground that being the agent of the Crown he was exempt from personal liability. The demurrer was over-ruled with costs.

This was a bill by *Sandford Baker* against *George W. Ranney* and *Her Majesty's Attorney-General* for Upper Canada.

(a) Order 6th of February, 1858, § 5.

The bill stated, that in the lumbering season of 1863-4, and 1864-5, the plaintiff had cut in the neighborhood of the river Trent a large quantity of saw-logs, which were collected together, and the plaintiff, in the early part of 1865, proceeded to transport the same down said river; that the logs numbered in all 44,803, and were of an average of seventeen inches diameter at the thick ends; that there are on said river certain slides erected by and belonging to the government of this province for the passage of timber, saw-logs and lumber, for the use of which certain tolls are by law payable; that the defendant *Ranney* is the government superintendent of the said slides, and the collector of the tolls thereat; that two of such slides are erected at Middle Falls and *Ranney's Falls*, respectively, on said river; that in the latter part of May, and early in June, 1865, the plaintiff passed these saw-logs through the slides at Middle Falls and *Ranney's Falls*; that the rate of tolls for the passage of saw-logs through the said slides on the Trent is by certain orders of the Governor in Council, dated the 28th of April, 1845, and made pursuant to the statute in that behalf, fixed at the sum of \$1.60 per crib, such crib to be under seventy feet in length, and not to exceed thirty feet in breadth for each slide, and there is no other mode of levying tolls on the passage of saw-logs authorized by any order in council, and consequently no other legal rate of toll than the said rate per crib; that although saw-logs are passed through the said slides loose, the invariable practice in calculating the tolls thereon is to estimate the number of cribs of the prescribed size of under seventy feet in length and thirty in breadth which the logs would form, and to charge the tolls on such estimated number of cribs; that there prevails in the lumber trade a well established custom of enumerating saw-logs, not by the actual number of logs, but by the equivalent of the actual number in standard logs of twelve feet in length and twenty inches in diameter at the thick end; that the plaintiff caused the parcel

1866.

Baker
v.
Ranney.

Statement.

1866. of logs hereinbefore mentioned, to be reduced to standard logs in the manner hereinbefore described, when it was estimated that the said 44,803 logs, were equal to thirty-six thousand one hundred and thirty-four standard logs; that the plaintiff estimating that 100 standard logs would form a crib of the prescribed dimensions of under seventy feet in length, and not exceeding thirty feet in breadth, represented and returned to the said defendant *Ranney*, as such superintendent and collector as aforesaid, that the said parcel of logs were equal to 370 cribs of 100 pieces (meaning standard pieces), and that the same consisted of 37,000 pieces, by which the plaintiff meant and intended 37,000 standard logs, the difference between the actual estimate arrived at of 36,134 logs, and 37,000 logs being made to cover any errors in calculation in reducing the logs to standard logs; that the fact was and is, that in whatever manner the said logs are counted, whether as standard logs or according to the actual number, the number of cribs for which the plaintiff had, as herein after stated, paid the full tolls as fixed by law, exceeds the number of cribs of the prescribed size which could be made up out of the said logs, whether the logs be reduced to standard, and estimated at 100 standard logs to a crib, or whether the cribs be estimated according to the actual number of logs of the size of the plaintiff's, which could be made into a crib of the prescribed dimensions, and by which last mentioned mode of calculation the said logs would only amount to 345 cribs, inasmuch as a crib of the size fixed by the said order in council would contain at least 130 logs of the actual size and average of the plaintiff's logs; that the plaintiff paid to the defendant *Ranney*, as such superintendent and collector, the sum of \$592, being tolls on 370 cribs of 100 logs each, as returned by the plaintiff, and by which the plaintiff intended 370 cribs of 100 standard logs each; that the said tolls to the amount of \$592 were settled by the plaintiff, according to the custom of dealing between

Baker
v.
Ranney.

Statement.

persons engaged in the lumber trade and the collector of slide dues, giving to the defendant *Ranney* his promissory note for the said amount, which note had since been paid; that the defendant *Ranney* having ascertained that the said logs were in number 44,303, insisted that the plaintiff had not paid the proper amount of tolls in respect thereof, but had falsely represented the quantity to him, inasmuch as he insisted that the plaintiff was bound to pay tolls after the rate of \$1.60 per crib of 100 logs actual enumeration, and he accordingly seized the said logs and insisted, before delivering the same to the plaintiff, on the plaintiff paying to him, in addition, to the \$592 so settled and paid as aforesaid, the following amounts, viz., double slide dues, to the amount of \$249.60; penalties for false returns, \$200; costs of counting, \$80; superintendent's time and expenses, \$40; bailiff's fees, \$21.45; and counsel fees, \$4; that for several of the said charges the defendant *Ranney* had no color of right what-
Statement.

ever; and although by certain orders of the Governor in Council, made on the 17th of May, 1865, authority is assumed to be given to the slide masters, or other officers in charge of slides, to impose and levy penalties for breach of the said orders, the plaintiff charges that such orders are wholly illegal and void, inasmuch as by the Consolidated Statutes of Canada, ch. 28, it is expressly enacted that all such penalties shall be recoverable only before a justice of the peace, and no authority whatever is given either to any government officer to impose or levy the same, or to the Governor in Council to confer such power; that the orders in council last referred to authorize the imposition of a penalty for such a breach as that wherewith the defendant *Ranney* wrongly charged the plaintiff of from \$20 to \$100, and the said *Ranney*, without ever having heard the plaintiff, or giving him an opportunity of being heard thereon, had fixed the penalty at the maximum sum assumed to be authorized by the said order in council; that no penalty, in respect

1866.

Baker
v.
Ranney.

1866. of the matters hereinbefore stated, has ever been imposed upon the plaintiff by any justice of the peace pursuant to the said statute, nor has the plaintiff ever been summoned or charged in respect of the same before any such justice; that the defendant *Ranney*, had advertised the said logs for sale, and he intended, and would, unless restrained by this court, sell the said logs by public auction on the 29th of January, 1866; that the said logs are of peculiar value to the plaintiff, and damages would not be an adequate compensation to him for the loss thereof, inasmuch as the plaintiff could not purchase the like quantity of logs in the market, and would, moreover, be incapacitated from carrying out contracts and undertakings which he had entered into, relying on having the said logs in his possession in the coming spring, and the sale of the said logs would be an irreparable injury to the plaintiff. The said logs are worth at least \$8000, but if sold in the way the defendant proposed to sell them, not one-third of that amount would be realized; and the plaintiff submitted that he was entitled to have the defendant *George W. Ranney*, restrained by the order and injunction of this court from selling the said logs upon the following several and distinct grounds:—That the plaintiff has paid the full amount of tolls for which he is or was liable, and has not committed any breach, nor been guilty of any non-observance of the said regulations or orders in council, or of the said act of parliament; and that, at all events, the defendant *Ranney* has no legal right to impose the penalties and make the charges which he has made against the plaintiff; and further, that in no event had the said *Ranney* any legal right to seize, detain, or sell the said logs.

Statement.

The prayer of the bill was: that the defendant *Ranney* might be restrained by order and injunction, from proceeding to sell the said logs; and that he might

be ordered and decreed to deliver up to the plaintiff the said saw-logs; and for further relief.

1866.

Baker
v.
Ranney.

The defendant *Ranney* demurred to the bill for want of jurisdiction and want of equity.

Mr. A. Crooks, Q.C., for the demurrer, cited *Miller v. Attorney-General* (a), *Manning's Exch. Practice*, 90, 102, 103; *Tobin v. The Queen* (b) *Fellows v. The Queen* (c), *The Secretary of State in Council of India v. Karnachee Boye Sahaba* (d), *Attorney-General v. Forbes* (e), *Buron v. Denman* (f), *Nichol v. Woodall* (g), *Broome's Maxims*, 57, 772 to 774, 788.

Mr. Strong, Q.C., contra, cited *Deare v. Attorney-General* (h), *Rankin v. Huskinson* (i), *Ellis v. Earl Grey* (j), *Bowyer's Constitutional Law*, 347; *Sutton v. Johnstone* (k), *Lord Canterbury's case* (l), *Attorney-General v. Halling* (m), *Reid v. Attorney-General* (n), *Cosberd v. Attorney-General* (o), *Priddy v. Rose* (p), *Manning's Exch. Prac.* 84, 89; *Burgess v. Wheate* (q), *Attorney-General v. DePlessis* (r), *Evans v. Solly* (s), *Colebrooke v. Attorney-General* (t), *Rogers v. Maule* (u), *Paulet v. Attorney-General* (v), *Attorney-General v. Lambeth* (w), *Fuller v. Richmond* (x), *Farwell v. Wallbridge* (y), *Holroyd v. Marshall* (z).

Argument.

MOWAT, V.C.—The bill in this case alleges, in effect,

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| (a) 9 Gr. 560. | (b) 16 C. B. N. S. 310. |
| (c) 12 Law T. N. S. 114. | (d) 13 Moo. P. C. 22. |
| (e) 2 M. & C. 123. | (f) 2 Exc. 167. |
| (g) 10 Ves. 155. | (h) 1 Y. & C. Exch. 208. |
| (i) 4 Sim. 13. | (j) 6 Sim. 214. |
| (k) 1 Term R. 784. | (l) 1 Phill. 85, 2 Ib. 306. |
| (m) 15 M. & W. 687. | (n) 2 Atk. 223. |
| (o) 6 Price, 411. | (p) 3 Mer. 86, 103. |
| (q) 1 Ed. 177. | (r) 2 Ves. 286. |
| (s) 9 Price, 525. | (t) 7 Price, 146. |
| (u) 3 Y. & C. Exch. 74. | (v) Hardres, 467. |
| (w) 5 Price, 386. | (x) 2 Grant, 124. |
| (y) 6 Grant, 634. | (z) 10 H. L. 191. |

1866. Baker
v.
Ranney. that the defendant *Ranney* is the superintendent of certain slides belonging to the government, and the collector of the tolls thereat; that he has seized the plaintiff's logs under the false pretence that the plaintiff had not paid the full amount of tolls payable in respect thereof; that *Ranney* is about to sell the logs to pay the amount claimed, with sundry other charges which he has no right to demand; and that the logs are of peculiar value to the plaintiff.

To this bill the defendant *Ranney* demurs, on the ground that this court has no jurisdiction in the matter, as *Ranney* is merely the servant and agent of the Crown, and, being so, is not personally liable to any suit in respect of the acts set forth in the bill. But I think his agency does not free him from personal responsibility for illegal conduct.

In *Rogers v. Rajendro Dutt (a)*, the court stated the law in these terms: "If the act which [the officer of government] did, was in itself wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortuous acts, could not be maintained with any show of justice, if its agents were not personally responsible for them. In such cases the government is morally bound to indemnify its agent, and it is hard on such agent where this obligation is not satisfied, but the right to compensation in the party injured is paramount to this consideration."

In *Feathers v. The Queen (b)* the Lord Chief Justice, in delivering the judgment of the court, observed: "The learned counsel for the suppliant raised an argument

(a) 13 Moor. P. C. 236. (b) 12 Law Times, N. S. 114.

upon the ground, that there could be no remedy by action against an officer of state for an injury done by the authority of the Crown. But we think that he altogether failed to make good that position. * * The case of *General Warrants*, in the reign of George III., and the case of *Sutton v. Johnston* (a), are clear and direct authorities that an action will lie for a tortious or wrongful act, notwithstanding it may have had the sanction of the highest authority in the state. But in our opinion no authority is needed to establish the proposition that a servant of the Crown is responsible in law for a tortious or wrongful act done to a fellow subject, though done by the authority of the Crown, a position which appears to us to rest upon principles too well established to admit of question, and which are alike essential to uphold the dignity of the Crown, on the one hand, and the rights and liberties of the subject on the other. We entertain no doubt, therefore, that if the effect of the letters patent was to exclude the Crown from the use of the invention, an action could be maintained by the patentee against any officers or servants of the Crown who infringed his patent". (b).

1866.

Baker
v.
Ranney.

Judgment.

It was not contended that the bill would have been demurrable, or that *Ranney* would not have been a proper party to it, if any private person or company had been entitled to the tolls and penalties, instead of the Crown; and, as the defendant's official position in relation to the Crown would not be an answer to an action at law after the wrong has been committed, it seems to follow inevitably, that the relation is no answer to a bill for an injunction to prevent the wrong. No authority was cited, and no reason was suggested, requiring me to hold that the remedy at law was sustainable, but not a suit in equity. In *Rankin v. Huskisson* (c), a bill was filed against the Lords of the Treasury,

(a) 1. T. K. 784.

(b) Vide *Madrigo v. Willes*, 1 B. & Aid. 353; *Tobin v. Regina*, 10 Jur. N. S. 1029; *Howard v. Gosset*, 10 Q. B. 386.

(c) 4 Sim. 13.

1866. ^{Baker}
v. ^{Ranney.} the Commissioners of Woods and Forests, the Attorney-General, and two other persons, in respect of buildings in course of erection under some contract with the Commissioners of Woods and Forests in contravention of the plaintiff's rights, and an injunction was granted to discontinue the work in progress, and remove the buildings which had already been erected.—See also *Ellis v. Earl Grey* (a), *Colebrooke v. Attorney-General* (b). Before the late statute (c), it would have been necessary to consider whether the equitable remedy in a case like the present should not be sought in the Court of Exchequer in England, and therefore in the common law courts here (d); but all occasion for this inquiry is now removed, this court having now “the same equitable jurisdiction in matters of revenue, as the Court of Exchequer in England possesses.”

I think the demurrer must be overruled with costs.

HAWKE v. MILLIKEN.

Mortgage—Absolute deed.

A mortgagee took a release of the equity of redemption, and thereupon an agreement was signed by both parties for the purchase of the property by the grantor for a sum exceeding the amount due on the mortgages, not giving the grantor a mere option to purchase, but binding him to buy and pay the stipulated price. *Held*, that the transaction was one of mortgage.

Motion for decree before Vice-Chancellor Mowat.

The bill was filed by *George M. Hawke*, against *Benjamin Milliken* and *Norman Henry Milliken*, setting forth a contract with the defendant *Benjamin Milliken*, dated 28th July, 1863, for the purchase of the property in question from the plaintiff for \$5,000, payable by instalments, time being declared to be of the essence

(a) 6 Simons, 214.

(b) 7 Pri. 146.

(c) 28 Vic. ch. 17, § 2.

(d) *Miller v. Attorney-Gen.*, 9 Gr. 558.

of the contract. The prayer of the bill was that the defendants might be declared to have forfeited all right under the contract; or if not, that an account of the purchase money might be taken and the amount ordered to be paid at an early day; and in default, that the contract might be rescinded, or the property sold.

1866.

Hawke
v.
Milliken.

The property formerly belonged to *Norman Milliken*, the father of the defendants. On the 1st of November, 1861, he agreed with the plaintiff for a loan of a sum of money to pay off existing incumbrances, and for a further advance. One *Davis* was at that time a creditor of *Norman's* and a debtor in a larger amount to the plaintiff, and it was agreed between the three that *Norman* should execute a mortgage to *Davis* for the debt due to him, and that *Davis* should assign this mortgage to the plaintiff. Accordingly, the prior incumbrances were paid off, and *Norman* executed a mortgage to the plaintiff for £915, with interest thereon half yearly, at the rate of 8 per cent. per annum, and another mortgage to *Davis* for \$672, payable in a year, with interest at the same rate; and the latter instrument was assigned by *Davis* to the plaintiff. Both mortgages bore date 1st November, 1861. On the 21st of January, 1862, the mortgagor transferred his interest in the premises to the defendant *Benjamin Milliken*, his son. On the 25th of July, 1863, *Benjamin Milliken* released his equity of redemption to the plaintiff; and the agreement was then entered into which was set forth in the bill. Both instruments were registered on the same day.

Statement.

The plaintiff was examined by the defendant, and in his deposition he stated that the sum of \$5,000, mentioned in this agreement, "was made up of the amounts mentioned in the two mortgages." He also stated that he considered the property a sufficient security for the two mortgages, and that he understood an offer had been made for the purchase of it at

1866. £1750. On the 3rd of November, 1864, *Benjamin Hawke v. Milliken* transferred his interest in the property to the defendant *Norman Henry Milliken*.

The bill had been taken *pro confesso* against *Benjamin Milliken*.

Norman Henry Milliken had put in an answer, claiming that the transaction of July, 1863, was not a sale of the premises to the plaintiff, with a right of repurchase by the defendant *Benjamin*: but was in effect a mortgage to secure the sum named.

Mr. J. C. *Hamilton*, for the plaintiff.

Mr. *Hector*, Q.C., for the defendants.

Coote on Mortgages, page 15 (Ed. of 1850). *Fry* on Spec. Per. p. 339, sec. 781, and the cases therein referred to, were cited; also *Gordon v. Gordon* (a).

Mowat, V.C. (after stating the facts to the effect above set forth)—

I think it clear that the contention of the defendant is well founded. The agreement does not merely give an option to *Norman* to repurchase, but it contains an express and absolute undertaking on his part to buy, and to pay for the property the sum specified. Now I understand that the distinction between an option to repurchase and an obligation to purchase, is the very distinction on which, in the absence of other circumstances, this question of mortgage or sale may depend; that a mere option to the grantee to purchase, though stipulated for at the time of executing the conveyance, is not sufficient to establish the transaction as a mortgage; but that when an obligation to purchase and pay the money

(a) 2 B. & B. 274.

is exacted from the grantee, that is sufficient to shew the real character of the transaction to be a mortgage, though the form of it is a sale. There is indeed nothing but the form to distinguish the latter case from a mortgage. In the present case, the plaintiff had every remedy which as mortgagee he could have. In case of default, he could enforce payment of the money, or bring an ejectment for the possession of the property. It was not contended that, had the transaction been in form a mortgage, the plaintiff would have been entitled to a more advantageous decree in any respect than he is now.

1866.

Hawke
v.
Milliken.

There will, therefore, be the usual decree for a foreclosure or sale (at the option of the plaintiff), except as to costs.

In taking the account, the defendant will have credit for his costs up to the hearing, for the answer would have been unnecessary but for the claim on the part of the plaintiff which I have adjudged against him. The plaintiff is entitled to his costs, except so much thereof as has been occasioned by his not admitting the transaction to be a mortgage. (a)

Judgment.

WILSON v. STEVENSON.

Insolvent Act of 1864.

One of two partners, a few days before a writ of attachment against both under the Insolvent Act of 1864 had issued, assigned his estate for the benefit of his creditors: *Held*, void as against the official assignee.

This cause came on to be heard by way of motion for decree. The plaintiffs were the official assignees of *Robert James Hamilton* and *Milton Davis*, insolvents. A few days before the issuing of the writ of attachment under the Insolvency Act, *Hamilton* had assigned

(a) See *Morgan & Davey on Costs*, p. 161.

1866. certain judgments and debts, the same constituting all his separate estate, to the defendant *James Stevenson*, for the general benefit of the creditors of the assignor "*pari passu*, and without any preference or priority, according to the provisions of the Insolvent Act of 1864." *John W. Murton* a creditor of *Hamilton* individually, and *Jacob Lowry*, a creditor of *Hamilton & Davis*, were also defendants, as representing the two classes of creditors to which they respectively belonged. The prayer of the bill was to have the assignment to *Stevenson* declared void as against the plaintiffs.

The bill was taken *pro confesso* against *Murton* and *Lowry*.

Mr. *E. Martin*, for plaintiffs, referred to *Graham v. Mulcaster (a)*, *Ex parte Pemberton (b)*, *Lindley* on Partnership, 27 & 28 Vic. ch. 17, sec. 5, sub-sec. 7.

Mr. *Bruce*, for defendant *Stevenson*.

Judgment. MOWAT, V.C.—[After stating the facts to the effect above set forth:]—The only question argued was whether the plaintiffs, as joint assignees of *Hamilton* and *Davis*, are entitled to claim the individual property of *Hamilton*. I think they are. In *Graham v. Mulcaster (c)* the point was expressly so decided under the English Bankrupt Laws; and I see nothing in our act requiring a different construction. The 7th sub-sec. (*d*) rather favors the claim.

It was admitted on the argument that the assignment to *Stevenson* was *bonâ fide*; that it had prevented some creditors, who had judgments against *Hamilton*, from attaching the debts assigned, before the issuing of the writ of attachment, and had thereby saved the estate

(a) 4 Bing. 115.

(c) 4 Bing. 115.

(b) 1 M. & D. 90.

(d) 27 & 28 Vic. ch. 17.

for distribution amongst all the creditors; and that the present suit had only been resisted by *Stevenson* so far as was necessary to obtain the opinion of the court for his security. Under these circumstances the defendant asked that the costs of his defence should be paid to him by the plaintiffs out of the estate. The learned counsel for the plaintiffs did not resist the claim; but, on the contrary, intimated the willingness of the plaintiffs to pay the defendant's costs, if the amount was reasonable.

1866.

Wilson
v.
Stevenson.

The decree will, therefore, declare the assignment to *Stevenson* void as against the plaintiffs, and direct the plaintiffs to pay the defendant's costs.

MURPHY V. LAMPHIER.

Infants—Guardians—Maintenance.

In a suit for the purpose (amongst other things) of having a guardian appointed, it is not the course of the court to direct a reference to the Master to appoint a guardian, but only to approve of one, to be afterwards appointed by the court if it sees fit.

In a suit for maintenance out of the property of the infants, the Master is usually directed to inquire and state what would be a proper sum to allow, but no authority is given for the payment, until the report is brought before the court for its approval, the object being the more effectual protection of the interests of infants.

It is irregular to give a reversionary guardianship of wards in court to the successors in office of any named person.

This was a suit by the infant children of *Daniel Murphy*, deceased, for the appointment of guardians, and for maintenance out of the estate of the deceased. By the decree made in November, 1863, it was referred to the Master, at Hamilton, to appoint a guardian or guardians to settle a scheme for the maintenance and education of the plaintiffs, and to fix an allowance therefor; and the amount so to be fixed was ordered to be paid to the guardian or guardians, at such time as the Master should appoint. The costs of all parties

Statement

1866. were ordered to be paid out of the estate ; and further directions and subsequent costs were reserved.

Murphy
v.
Lamphier.

On the 7th of March, 1864, a supplemental order was made by consent, that, in case the mother of the infants should be appointed guardian jointly with any other person, the allowance should be payable to the mother alone.

On the 28th of April following, the Master made his report, appointing the mother of the plaintiffs and the Roman Catholic bishop of the diocese of Hamilton for the time being, joint guardians of the plaintiffs ; and finding, amongst other things, that the deceased left real and personal estate to the value or amount of £24,531 ; that the same yielded an annual income of £1,500 ; and that £750 a year for two years from the 8th of March, 1864, would be a reasonable allowance for the maintenance and education of the plaintiffs, payable quarterly in advance.

Statement.

These two years being about to expire, the cause was brought on to be heard for further directions.

Mr. *McKeown*, for the plaintiffs.

Mr. *Bruce*, for the defendant.

MOWAT, V. C.—This is a suit by infants for maintenance out of property devised by their father. The expense of their past maintenance has been provided for by the proceedings already had in the cause ; and the cause now coming on upon further directions, the learned counsel asked for a reference to the Master to fix the allowance from time to time, so as to render any further application to the court unnecessary. But this, I apprehend, would be contrary to the course of the court in such matters. Indeed the practice is for the reference to direct the Master merely to approve of,

and not to appoint, a guardian; and he is usually directed to inquire and state what will be proper to be allowed for maintenance and education; but the court reserves in its own hands the appointment of the guardian, and the sanctioning of the sum which the Master may recommend; and, instead of ordering payment at the same time that the reference is made, I understand the usual course is, either to reserve further directions, or to declare that, after the Master shall have made his report, such further order shall be made as shall be just (a). I presume it was through oversight that the present decree was not in this form; for the court acts with great caution where infants are concerned, and would not, in a case of this kind, give to the Masters here an absolute power, which was not given to the Masters in Chancery in England. I have examined the notes of the late Vice-Chancellor *Esten*, who heard the cause, and I find they contain no indication of any intention of making a decree in the form of that drawn up by the parties.

1866.
Murphy
v.
Lamphier.

Judgment.

Instead, therefore, of following this form, I shall, in the decree now to be made, merely direct a reference to the Master to inquire and state what will be proper to be allowed, for the future (b). Under this order he may recommend various sums for successive periods, if he sees fit (c). After the Master makes his report, an application must be made in Chambers for carrying it out.

Applications afterwards for increasing the amount may, to save expense, be made to a judge in Chambers in the first instance, without an intermediate reference to the Master (d).

(a) See Seton on Decrees, 1st ed., page 277; Bennett's Master's Office, 105, 110; *Stafford v. Lord Canterbury*, 11 Simons, 99; *Bruin v. Knott*, 12 Simons, 450; 1 Ph. 572, S. C.

(b) See Seton on Decrees, 1st ed. 277.

(c) *Nunn v. Harvey*, 2 DeG. & Sm. 302.

(d) *Josselyn v. Josselyn*, 9 Sm. 65.

1866. It is also contrary to what I understand to be the course of the court, to grant a reversionary guardianship, as the Master has undertaken to do, whether the reversionary guardian is named, or is determined by the future succession to any particular office, civil or ecclesiastical. I must therefore vary the report so far as it purports to give the joint guardianship of the plaintiffs to the future Bishops of Hamilton. That must be matter of application to the court from time to time, as vacancies occur.

Decree. Decree, that the report be varied so far as the same professes to appoint the future Bishops of the Diocese of Hamilton to the guardianship of the infant plaintiffs; Decree, that the Master at Hamilton do inquire and state, what will be proper to be allowed for the maintenance and education of the plaintiffs respectively, from the 8th day of March, 1866, during the residue of their minorities. And after the Master shall have made his report, such further order shall be made as to the matters aforesaid, and as to costs, as shall be just.

CURTIS V. DALES.

Practice—Affidavits.

On a motion for an injunction against one defendant, the cross-examination of another defendant on his answer was held inadmissible in reply to the affidavits filed in answer to the motion, where the defendant, against whom the plaintiff moved, had no notice of the cross-examination, or of the plaintiff's intention to read the deposition on the motion.

This was a motion for an injunction to stay the cutting of timber.

Mr. *Bain*, for the plaintiff.

Mr. *Roaf*, Q. C., contra.

MOWAT, V.C.—The plaintiff claims to have an equitable lien on the land in question for the unpaid purchase money. The purchasers received from the plaintiff an absolute conveyance, and subsequently mortgaged the property to the defendant *Hamilton*, and *Hamilton* assigned his mortgage to the defendant *Currie*. In pursuance of a power of sale contained in this mortgage, *Currie* sold the property to the defendant *Oliver*, against whom alone the plaintiff makes the present motion.

1866.

Curtis
v.
Dales.

The plaintiff proposed to read, in reply to the affidavits filed against the motion, the deposition made by *Hamilton* when cross-examined upon his answer. No authority was cited in favor of the right to read it. The defendant *Oliver* had no notice of the cross-examination, and no notice of the plaintiff's intention to read the deposition on this motion. I think it inadmissible as against *Oliver*. Judgment.

The bill does not impeach the mortgage, and the defendant *Hamilton* denies that he had notice of the plaintiff's equity when he took the mortgage. *Currie*, the assignee, denies that he had notice of the plaintiff's equity when he took the assignment, and asserts that the assignment was for valuable consideration. The plaintiff has filed no affidavit questioning these statements. In the absence of any counter evidence I must assume, for the purposes of this motion, that these statements are not open to question. If they are true, *Oliver's* purchase is valid, even though when made he was aware that the plaintiff claimed the equity set up by the bill.

The motion must therefore be refused.

1866.

SMITH v. STUART.

Trust—What sufficient to perfect a declaration or deed of trust.

Parties claiming as *cestuis que trustent* under a deed of trust not completed by delivery, alleged in their bill filed to declare, and for the enforcing of the trusts, that the deed creating the trust, if any, was not executed by or assented to by the persons therein appointed trustees; that the contents of the deed were never communicated to them by the grantors. That when the contents were afterwards communicated, the trustees so appointed expressly renounced and refused to execute the trusts therein contained. The plaintiffs were volunteers. *Held*, on demurrer, that no interest passed by the deed, but that it was void.

The facts of this case are fully set forth in the judgment.

Mr. *R. Walkem*, in support of the demurrer.

Statement. The bill shews that no trust was ever properly created, the deed never having been duly executed. The grantee in the conveyance never assented to it, or acted under it in any way; and a man cannot be compelled to assume the duties and responsibilities of a trustee against his will. The trust not having been properly created, cannot now be enforced: at all events, the court will not be astute to do so in favor of volunteers which the *cestuis que trustent* here are. He referred to *Townson v. Tickell* (a), *Doe Chidge, v. Harris* (b), *Foster v. Roberts* (c), *Garrard v. Lauderdale* (d), *Meck v. Kettlewell* (e), *Dillon v. Coppin* (f), *Coningham v. Plunkett* (g), *Ellison v. Ellison* (h), *Searle v. Law* (i), *Bridge v. Bridge* (j), *Price v. Price* (k).

Mr. *McGregor*, contra, contended it was not necessary

(a) 3 B. & Al. 31.

(c) 8 W. R. 605.

(e) 1 Hare, 469.

(g) 2 Y. & C. C. C. 245.

(i) 15 Sim. 95.

(k) 14 Beav. 598.

(b) 16 M. & W. 517.

(d) 2 R. & M. 452.

(f) 4 M. & C. 647.

(h) 1 W. & T. 199.

(j) 16 Beav. 315.

the deed should be delivered to the trustee, or that he should assent to it. Here the conveyance was registered by the grantors, thus evidencing, as far as they could, their intention to create the trust; besides, the rule of this court is, that a trust shall never fail by reason of the want of a trustee. The court can itself name a trustee, rather than the bounty of the donors should be disappointed, citing *Fletcher v. Fletcher* (a), *Hall v. Palmer* (b), *Hope v. Harman* (c), *McKechnie v. McKechnie* (d), *Muir v. Dunnet* (e), *Sear v. Ashwell* (f), *Dos Garmon v. Knight* (g), *Bigelow v. Lord* (h).

1866.

Smith
v.
Stuart.

SPRAGGE, V. C.—The plaintiffs file their bill as *cestuis que trustent*, under an indenture dated the 6th of October, 1855, which purports to be made between the Venerable *George O'Kill Stuart* and *Ann Ellice*, his wife, of the first part, and *George O'Kill Stuart*, one of the defendants, of the second part, and which purports to convey certain lands in the city of Kingston, upon certain trusts therein declared. The grantee takes no benefit under the deed. The lands comprised in the deed are lands in which the grantor was seized in right of the wife. Judgment.

In regard to the execution of this indenture, there is no direct allegation in the bill that it was executed by the Archdeacon. The allegations are as follows:

3. "That the said deed was duly executed by the said *Ann Ellice Stuart* before the judge of the Surrogate Court, whose certificate is thereon indorsed; and was duly registered on the 23rd day of January, 1856."

4. "That the said deed was not executed by the said party thereto of the second part; and that neither of

(a) 4 Hare, 67.

(c) 11 Jur. 1097.

(e) 11 Gr. 85.

(g) 5 B. & C. 601.

(b) 8 Jur. 459.

(d) 6 Gr. 23.

(f) 3 Swan. 411 note.

(h) 8 Jur. N. S.

1866. Smith
v.
Stuart. the parties thereto of the first part ever made mention to him of their intending to execute such a document; and that the said party of the second part never consented to act as such trustee, and disclaims any interest as trustee in virtue of the said deed; and refuses to execute the trusts therein contained." The bill alleges the death of both the grantors; of Mrs. *Stuart* in November, 1856, and of the Archdeacon in October, 1862.

The question argued before me is, whether any trust in favour the plaintiffs has been validly created, the party named in the deed as grantee ever having assented to take, and having in fact actually dissented from taking under the deed. The plaintiffs are volunteers.

Judgment. The law is perfectly well settled, that when a gift is perfected, the court will enforce it in favor of a volunteer, but when it is not perfected, where the gift is not complete, the court will not lend its aid. Where there is a valuable consideration, the court will act, because it is against conscience that the party who receives a benefit should not complete that which he has agreed to do; but in the case of volunteers this does not apply.

The first and principal point in this case is, whether the indenture of October, 1855, is a valid or a void instrument, the person named as grantee never having assented thereto, but having dissented therefrom. The bill does not allege any delivery of the indenture either by word or in act, but only the due execution by Mrs. *Stuart* and the registration. No point is made in argument of the omission to allege delivery by the Archdeacon; the parties desiring, as is intimated, to raise only the substantial question whether the deed is valid or void. In *Sheppard's Touchstone*, I., page 70, the point is thus stated: "That in cases where the party named as grantee hath once by his agreement made the

deed good, he cannot afterwards by his disagreement make it void; and when once by refusal and disagreement he hath made the deed void, he cannot by agreement and acceptance afterwards make it good." 1866.

Smith
v.
Stuart.

In the case of a conveyance to a use the law is thus stated in the same work, at page 285: "All such acts as give estates directly, or by way of use, are good at first; and the thing granted, when the deed of grant is delivered to his use, shall vest in the grantee before he hath notice of the grant, or agree to accept of the thing granted; so that if lands be limited to a man by way of use, or granted immediately by feoffment, gift, grant, or lease; or goods or chattels be given or granted to a man; in these cases the thing granted shall be said to be in the grantee; and the grant good before notice and agreement, until disagreement, (the law presumes that every grant, &c., is for the benefit of the grantee, &c.) and therefore, until the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then, in construction of law, the grant is void *ab initio*, as if no grant had been made. (a) And in intendment of law the freehold never passed from the grantor." Judgment.

In the original text it is said, that it seems that the dissent by the grantee can only be in a court of record, and that point was discussed in *Townson v. Tickell* (b), which was a case of a devise of a freehold, and the devisee had disclaimed by deed, and it was held sufficient; *Holroyd, J.*, thinking that even a deed was unnecessary.

In *Siggers v. Evans*, it was held, that a conveyance executed by the grantor for the benefit of his creditors, and sent by him to the grantee, vested the estate in the grantee before he gave any assent to it. In the

(a) See *Thompson v. Leach*, 2 Vent. 193; 3 Mod. 296.

(b) 3 B. & Al. 31.

1866. elaborate judgment given by Lord *Campbell*, he made
 these observations: "Of this general proposition there
 can be no doubt, and it seems to have been adopted as
 a rule of law from the earliest times, for the purposes
 of convenience, that as generally grants are for the
 benefit of the grantee, he may come in at any time and
 say, 'I claim by the deed,' if he has done nothing to
 shew a dissent; but that he has the full power, if he
 has done no act to assent, to say that he declines, and
 will have nothing to do with the deed if he is charged
 with any burthen arising from it, or does not choose to
 take under it."

Smith
 v.
Stuart.

In *Doe Smith v. Smith (a)*, there was a devise of lands
 for life, and the devisee refused to take the estate,
 claiming by title paramount.¹¹ Afterwards, finding her-
 self mistaken in her claim of paramount title, she
 claimed under the will, and her claim was resisted on
 the ground that she had dissented from the devise.
 Judgment. The court thought it unnecessary to decide whether the
 dissent could be by parol, because there was not in the
 case before the court a disclaimer of estate in the land.
 The devisee claimed the land, and dissented only from
 taking it under the will; and they held her entitled to
 recover.

I do not know that it has been decided in any
 case that a grantee or devisee can effectually dissent
 by parol; but Lord *St. Leonards*, in the last edition
 of his work on Vendors and Purchasers, page 664,
 sec. 6, as well as in former editions, says: "The
 disclaimer may be by deed, or it should seem by
 parol:" and in reason I venture to think it must be so,
 for the assent is only a legal presumption until dissent,
 and the general rule is that a presumption may be
 rebutted or negated by parol. I suppose, indeed, that
 strictly, the question what is a sufficient dissent or

(a) 6 B. & C. 112.

disclaimer does not arise in this case ; as the bill alleges that the grantee never consented to act as trustee ; and disclaims any interest as trustee in virtue of the deed, and refuses to execute the trusts ; this disclaimer is not coupled, as in *Doe Smith v. Smith*, with any claim to the land by title paramount ; and I must therefore take the bill to mean that the grantee disclaims to take under the deed ; and as the mode of disclaimer is not stated, and there is no suggestion that it is in such a shape as to be ineffectual, I must take it to be alleged that the grantee has disclaimed validly and effectually.

1866.

Smith
v.
Stuart.

I think the necessary conclusion is, that this deed is void, and void *ab initio* ; that the person named therein as grantee and trustee, is neither one nor the other ; and that the legal estate in the lands, purported to be conveyed, is in the heirs of Mrs. *Stuart*.

A fair test of the position of the estate may be stated thus : the dissent of the grantee has relation back to the date of the grant ; its effect, therefore, must be the same as if he had dissented immediately. Suppose he had done so, and the grantors had thereupon conveyed the same land to another, upon the same or upon different trusts, could there be any question as to which conveyance should prevail ? The second must prevail, because the first was avoided, and the owners of the land had the power to deal with it as they pleased ; and if they could effectually grant it to another, they could, if they thought fit, abstain from parting with it all, and in that case where would be the trusts ?

Judgment.

But it is contended, that even if the disclaimer of the grantee should operate to avoid the deed, it does not follow that no trust has been created, for that the instrument may operate as a declaration of trust, binding on the creators of the trust ; and it is urged that this case falls within that class of cases where a trust has been held to have been perfected, although something

1865. remained to be done to vest the estate absolutely in the grantee or assignee. There are certainly cases of this kind, and we find language used by the courts to the effect that where the creator of the trust has done all that he could, the trust must be held to be effectually created, but I do not think that they apply to this case. They are cases where, from the position of the creator of the trust, and the nature of his interest in the thing which is the subject of the trust, it was out of his power to do more than he has done, as in *Kekewick v. Manning* (a) before the Lords Justices. But that is not the case here. The grantors were, between them, absolute owners in law and equity, of the land which they purported to convey, and it was in their power to convey it effectually. All that can be said is that they thought that they had done so, and that they intended it; but intention clearly is not sufficient.

Judgment. Mr. *McGregor* contends that even if the indenture of October, 1855, be ineffectual to constitute the grantee a trustee, or, by reason of his dissent, to vest in him any estate in the lands, it will still operate as a declaration of trust on the part of the grantors, and constitute them trustees for the parties named as objects of the trusts. I cannot accede to this. It was no doubt competent to the creators of the trust to make a declaration of trust, constituting themselves trustees, but they have not taken that course; but have attempted, ineffectually I think, to convey to a trustee for the benefit a *cestuis que trust*. The notes to *Ellison v. Ellison* (b), by *White and Tudor*, put this very clearly: "We must, however, carefully distinguish that class of cases in which the settlor constitutes himself a trustee for volunteers, from another class of cases in which a person has ineffectually attempted, by an imperfect gift, to confer the whole interest upon volunteers, or trustees for their benefit; for it has been repeatedly determined, that the

(a) 1 D. M. & G. 176.

(b) 1 Wh. & Tud. 181.

most clear intention to confer an interest, will not be sufficient to create a trust in favor of a volunteer." And this distinction is fully borne out by the authorities, and in none is it more distinctly enunciated than by Sir *William Grant* in *Antrobus v. Smith* (a). In that case a Mr. *Crawford* was entitled to certain shares in the Forth and Clyde Navigation Company; and wrote and signed upon one of the subscriptions an indorsement in the following terms: "I do hereby assign to my daughter, *Anna Crawford*, all my right, title, and interest, of, and in the inclosed call, and all other calls, of my subscription in the Clyde and Forth Navigation." Sir *Samuel Romilly*, while admitting that there was not a good assignment, contended that the paper was to be considered as a declaration of trust. Sir *William Grant* said, "This instrument, of itself, was not capable of conveying the property. It is said to amount to a declaration of trust. Mr. *Crawford* was no otherwise a trustee, than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed, in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect." The language of Sir *Launcelot Shadwell* in *Searle v. Law* (b), is very explicit upon the same point. "If that gentleman," a Mr. *Law* who had made an ineffectual assignment in trust for himself for life, and for a nephew after his death, "had not attempted to make any assignment of either the bonds or shares, but had simply declared in writing that he would hold them upon the same trusts as are expressed

1866.

Smith
v
Stuart.

Judgment.

(a) 12 Ves. 39.

(b) 15 Sim. 99.

1866. *Smith v. Stuart.* in the deed, that declaration would have been binding upon him; and whatever bound him would have bound his personal representative. But it is evident that he had no intention whatever of being himself a trustee for any one; and that he meant all the persons named in the deed as *cestuis que trust* to take the provisions intended for them, through the operation of that deed. He omitted however to take the proper steps to make that deed an effectual assignment, and therefore both the legal and the beneficial interest in the bonds and shares remained vested in him at his death." There are other authorities on the same point; among them are *Edwards v. Jones (a)*, and *Dillon v. Coppin (b)*, both before Lord Cottenham, and *Meek v. Kettlewell (c)*, before Sir James Wigram, and upon appeal before Lord Lyndhurst (*d*).

Judgment. The principle of this court, that a trust shall not fail for want of a trustee, is invoked on behalf of the plaintiff's; and it has been said in some cases that a *cestui que trust* shall not suffer from the caprice of his trustee, or because he may refuse to act. *Fletcher v. Fletcher (e)*, seems at first sight to resemble this case in its circumstance, but the resemblance is rather apparent than real. One *Ellis Fletcher* had two natural children, and some years before his death executed an indenture between himself, of the one part, and five trustees therein named, of the other part; whereby he covenanted with the trustees that upon certain contingencies as to survivorship, his executors should, twelve months after his death, pay to the trustees the sum of £60,000, which sum the trustees were to hold in trust for his two natural sons or the survivor of them. This paper was found among the

(a) 1 M. & Cr. 226.

(c) 1 Hare, 464.

(b) 4 M. & Cr. 647.

(d) 1 Ph. 342.

(e) 4 Hare, 67.

papers of *Ellis Fletcher*, almost by accident, some years after his death, and the surviving trustees hesitated in acting upon it, and by their answer said they had not accepted or acted in the trusts of the indenture; and they declined to accept or act in such trusts unless the court thought they were bound to act; and they declined to allow the use of their names in law or equity to recover the £60,000, except under the order of the court, and upon being indemnified. Among the questions raised was, whether, the surviving trustee, having taken this position, the rights of the *cestui que trust*, the surviving natural son, were thereby affected; and Sir *James Wigram* held that they were not, and he allowed the *cestui que trust* to sue for himself in the name of the surviving trustee, either at law or in equity, as the case might require. In the course of his judgment the learned Vice-Chancellor more than once repudiated the idea of the right of the *cestui que trust* depending upon the trustees consenting or refusing to act. He asks whether the right of the plaintiff is to depend upon the caprice of the trustees, and to be kept in suspense until the statute of limitations might become a bar; and says, in another place: "The rights of the parties can not depend upon mere accident and caprice." But the broad distinction between that case and this is, that there was in that case an element (or what for this purpose is the same thing, Sir *James Wigram* held that there was), which does not exist in this case. After observing, "According to the authorities I cannot, I admit, do anything to perfect the liability of the author of the trust if it is not already perfect," he proceeds, "This covenant, however, is already perfect. The covenantor is liable at law, and the court is not called upon to do any act to perfect it." If in the case before me there has been a completed gift, though voluntary, *Fletcher v. Fletcher* applies; but, if I am right in thinking the indenture of October, 1855, void, then *Fletcher v. Fletcher* has no application. *Fortescue v.*

1866.

Smith
v.
Stuart.

Judgment.

1866. *Barnet (a)*, and other cases, are referred to upon the same point, but do not come so near to this case as *Smith v. Stuart*. *Fletcher v. Fletcher*.

One of the most recent cases where the distinction has been taken and acted upon, between cases of completed gift, and cases where an intended gift has been left imperfect, is that of *Bridge v. Bridge (b)*, before Sir *John Romilly*. In that case there were instances of both, and the Master of the Rolls, in an elaborate judgment, distinguished between them. Upon one point of his judgment alone, he held that there was no effectual transfer of the settlor's equitable interest in real estate. Lord *St. Leonard* intimates a doubt of the soundness of the judgment (c); but it does not affect the question before me. There are, however, still more recent cases to the same points and to the same effect, among them are *Woodford v. Charnley (d)*, before the same learned judge, and *Jones v. Locke (e)*, before the present Lord Chancellor.

I have consulted a large number of cases besides those to which I have referred, most of them are reviewed in *Kekewick v. Manning* and *Bridge v. Bridge*.

In my judgment the whole case turns upon the question, whether the indenture, which purports to create the trust under which the plaintiff claims, is or is not void, by reason of the dissent and disclaimer of the grantee therein named. In my opinion it is, and therefore I must allow the demurrer.

(a) 3 M. & K. 36.

(c) V & P. 14th Ed. 719.

(b) 16 Beav. 315.

(d) 28 Beav. 96.

(e) 11 Jur. N. S. 913.

ROGERS V. LEWIS.

1866.

Mortgage—Pleading.

The rule is that a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage.

But this rule does not necessarily exclude the right of obtaining, in the same suit, against other parties, relief consequent on such redemption.

When a mortgagor had assigned the mortgage property and taken collateral security from the assignee for payment of part of the mortgage money, a bill by such assignee against the mortgagee and mortgagor was held not to be improper.

But where such a bill did not offer to pay what was due to the mortgagee, or pray redemption, and prayed relief against the mortgagor only in respect of the collateral security, a demurrer was allowed.

Demurrer to Bill.

The statements of the bill, so far as material for the purpose of the demurrer, were, in substance, that the defendant *Lewis* mortgaged certain lands to *Edward Penrose Irwin*, to secure \$6000 and interest, payable by instalments; that he afterwards sold and conveyed the same lands to the plaintiff, subject to the mortgage; that the plaintiff undertook to pay the mortgage money as it became due; that, as a further security to *Lewis* for the due payment of the first instalment and interest, amounting to \$2,860, the plaintiff mortgaged other land to *Lewis*; that the plaintiff duly paid to *Irwin* \$2000, leaving due \$360; that *Irwin*, with the concurrence of *Lewis*, agreed not to press for immediate payment of the remainder of the instalment; that shortly afterwards, however, *Lewis* commenced an action of ejectment for the land mortgaged to him by the plaintiff; that the plaintiff then tendered, first to the attorneys of *Lewis*, and then to *Lewis* himself, and afterwards to the defendant *Jared Irwin*, who had become the holder of the mortgage first mentioned, the balance due thereon, with a sufficient sum to cover interest and costs; that these tenders were all refused;

1866. that the refusal by *Irwin* was at the instance of *Lewis*; that the plaintiff had always since been ready and willing to pay the said sum of \$360, and was still prepared to bring the said sum into court for payment as might be directed; that *Lewis* had given notice to the plaintiff that, by virtue of a power contained in the mortgage to *Lewis*, he was about to sell the land comprised in it to pay the amount secured by the mortgage to *Irwin*. The bill prayed for an injunction to stay the action and the sale; that an account might be taken of what, if anything, *Lewis* had paid *Irwin* at the time of commencing the action and giving the notice of sale; that *Lewis* might be ordered to execute a discharge of the plaintiff's mortgage; that the defendants, or one of them, might be ordered to pay the costs of the suit; and for general relief.

Statement. To this bill the defendant *Irwin* demurred, because the plaintiff had not thereby stated such a case as entitled him to any relief against the demurring defendant, or shewn any ground for making him a party to the bill.

The demurrer was argued before Vice-Chancellor *Mowat*.

Mr. *Moss*, for the demurrer, cited *Audsley v. Horne* (a), *Dalton v. Hayter* (b).

Mr. *Donovan*, contra.

MOWAT, V. C.—I think that on the allegations of the bill there is sufficient ground shewn for making *Irwin* a party. There is no doubt that, as a general rule, a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage (c). But that does not necessarily exclude the right of obtaining from other

(a) 26 Beav. 195.

(b) 7 Beav. 319.

(c) *Tasker v. Small*, 3 M. & C. 69.

1866.

Rogers
v.
Lewis.

parties, under the same bill, relief consequent on such redemption. Thus, where one of two or more persons, interested in the equity of redemption, files a bill to redeem, the decree, after providing for the payment of the mortgage, may proceed to carry out the equities arising therefrom as between the other parties. Of this several examples will be found in *Seton on Decrees* (a). So, if payment by the plaintiff to *Irwin*, the mortgagee, entitles the plaintiff to a release of other land from the mortgagor, I do not see why, on the same principle, this relief may not be decreed in the same suit.

But the frame of the bill is defective as regards this defendant. In *Dalton v. Hayter* (b) the Master of the Rolls held it to be a settled rule, "that the owner of the equity of redemption cannot make a mortgagee a party in respect of the mortgage estate without offering to redeem him." In *Inman v. Wearing* (c) the Vice-Chancellor said: "The dismissal of a bill to redc^{em}, Judgment otherwise than for want of prosecution, operates as a foreclosure. It may be questionable whether it would have this effect if it did not pray for redemption;" and for want of such a prayer the demurrer was allowed (d).

In the present case, I do not say that the usual prayer for redemption was necessary; for the whole of the mortgage money is not due. But there is neither such a prayer, nor any equivalent prayer adapted to the case; nor is there any offer to pay *Irwin* what is due him. There is, indeed, a statement that he is "prepared" to pay into court \$360, but this sum appears from the bill itself to be less than is due *Irwin*.

I must therefore allow the demurrer, without costs; but the plaintiff is to have leave to amend.

(a) Page 475 to 478, 3rd ed.

(b) 7 Beav. 319.

(c) 3 DeG. & Sm. 734.

(d) See also *Knebell v. White*, 2 Y. & C. Ex. 15; *Attorney-General v. Hardy*, 1 Sim. N. S. 355; *Johnson v. Fesenmeyer*, 25 Beav. 96.

1866.

KEMP V. JONES.

Receiver—Bankruptcy.

An agent claimed to retain possession of property for his indemnification in respect of certain accommodation notes given to his principals before the bankruptcy of the latter, on which, however, he had paid nothing, and he disputed any liability to the holders in respect thereof. *Held*, that the assignee in bankruptcy was entitled to a receiver.

In such a case the defendant set up a defence founded upon a verbal agreement proved by his own affidavit only, and inconsistent with a written instrument which purported to contain the agreement entered into between the parties, such agreement having been drawn by the defendant himself, a practising attorney and solicitor, and executed by all parties. The verbal agreement was said to have been omitted from the writing through the confidence existing between the parties. *Held*, that the defence ought not to prevail on a motion for a receiver.

A receiver granted, with liberty to the defendant to propose himself as such, without salary.

This was a motion for a receiver.

Mr. *Fitzgerald* and Mr. *Snelling*, for the plaintiffs.

Mr. *Blake*, Q.C., contra.

Judgment. Mowat, V.C.—The plaintiff is the assignee in bankruptcy of Messrs. *John Gladstone & Co.*, of London, England. This firm and the defendant did business in Canada on joint account, for several years prior to the 15th of May, 1863, and in the course of such business suffered heavy losses. An agreement was entered into on that day, by which *Gladstone & Co.* accepted certain lands, to be conveyed to them by the defendant, and ten promissory notes for £821 18s. 4d. sterling each, payable at intervals of half a year—in satisfaction of the defendant's liability to *Gladstone & Co.* on account of the business or otherwise; and it was agreed between them that the defendant should wind up the business, and get in the proceeds, and remit them to *Gladstone &*

Co. as soon as received. The lands were conveyed and notes given in pursuance of this agreement. On the 10th of November, 1864, *Gladstone & Co.* became bankrupt, and on the 1st of December, 1864, the plaintiff was appointed their assignee, under the English bankruptcy law. The plaintiff desires to have possession of the property, real and personal, which was the subject of the agreement of the 15th of May, 1863; and the defendant claims a right to retain the possession. Hence the present application by the plaintiff for a receiver.

1866.

Kemp
v.
Jones.

Prima facie the plaintiff has a right to the possession. The intention of the transaction of the 15th of May is admitted to have been to vest in *Gladstone & Co.* all the assets of the business theretofore carried on with the defendant on joint account. The defendant thereafter held them, so far as appears from the document which was signed, as the agent of *Gladstone & Co.*; and on his refusal to deliver them over to the plaintiff, a receiver follows as of course, if the defendant has not some ground for resisting the demand, which the facts already stated by me do not afford. Judgment.

I think this would be so independently of the circumstances of the defendant—as to which, what appears is this: In the defendant's answer, filed in July, 1865, the defendant said he was solvent, if he was protected, in respect of the various transactions therein mentioned, according to the terms of his agreement with *Gladstone & Co.* In his deposition he says: "I am not prepared to state whether or not I would be insolvent in the event of my having to pay the ten notes mentioned in the deed of May, 1863." Five of these notes appear to have matured, and are unpaid. In the defendant's affidavit, he says that he is perfectly able to pay all the debts which he ought to pay, and all the claims which may be made against him, unless he is wrongfully forced to pay certain accommodation notes

1866. or bills given by him to *Gladstone & Co.*, in 1861, amounting to £12,000, against which he says, that, by the agreement of 1863, *Gladstone & Co.* were to indemnify him ; but, he adds, that in the event of his not being so indemnified, it might be that his assets would not meet the full amount of the claims against him. These are the principal statements of the defendant in reference to his circumstances.

Kemp
v
Jones.

Judgment.

The defendant meets the *prima facie* case which the plaintiff presents in favor of the application, by setting up that, notwithstanding what appears on the written instrument, it was verbally agreed that the ten notes, given in 1863, should be paid, not absolutely, but only out of the profits, if any, of the business which was to be carried on upon joint account thenceforward in the same manner as before ; and that the defendant should be at liberty to transfer, at his discretion, any of the assets of the old business to the new ; and he alleges, that the new business is indebted to him ; and claims, in virtue of the verbal agreement, the right of retaining the assets in question as an indemnification against the ten notes, which are said to be now in the hands of transferees for value, and to pay himself the debt due to him in respect of the new business. But, I think it impossible to give any weight, upon the present application, to the verbal agreement which is thus set up. It is at present supported by no other evidence than that of the defendant himself, and is inconsistent with the writing which was drawn by the defendant (a practising attorney and solicitor), and executed by all parties. The terms said to have been verbally agreed upon, are not alleged to have been omitted by accident or mistake, but merely from the confidence which the defendant had in Mr. *John Gladstone*, with whom the agreement was negotiated. This confidence did not induce the defendant to dispense with a writing altogether, so far as his part of the agreement is concerned ; and some of the terms introduced into the writing were less

important to the defendant than those which, it is said, were agreed to, but deliberately omitted through the confidence existing between the parties. As to this ground of defence, therefore, it seems to me unnecessary to make any further observation.

1866.

Kemp
v.
Jones.

The defendant further contends, that he is entitled to wind up the old business by express stipulation in the agreement of May, 1863; and that he is entitled under that agreement to be indemnified in respect of the accommodation notes or bills given by him to *Gladstone & Co.* in 1861, and he claims to hold possession until these notes are cancelled or delivered up to him. Is there enough in this contention to displace the plaintiff's *prima facie* right to a receiver?

The defendant admits that he has never paid any thing on these notes, and has never been called on for payment of them. As to £4,000 of the £12,000, he says he does not know what has become of the bills or notes representing this amount; and it does not appear that there is any reason for supposing them to be in the hands of transferees. The other £8,000 are in the hands of transferees, whose right to hold them as against the defendant he disputes. On the other hand, I have already mentioned that the defendant's ten notes for £821 1s. 4d. each, which, so far as appears from the written agreement, he ought to pay, are all unpaid, though half of them have matured. On what principle could I, under these circumstances, hold the defendant entitled to retain the possession of this property in his own hands? The defendant was a vendor of his interest therein to *Gladstone & Co.* Can a vendor claim to retain possession of property sold, whether personal or real, because part of the consideration was the indemnification of the vendor against certain outstanding notes? If such indemnity was part of the express contract, I am not aware of any authority that would entitle me to hold that the right to be

Judgment.

1866. indemnified carried with it the right of withholding possession in the absence of any stipulation to that effect, express or implied.

Kemp
v.
Jones.

Here there is an agreement that the defendant shall wind up the business. But it was not contended that the defendant could claim under this the right of winding up, except until indemnified; and the agreement does not say a word about indemnity, whatever the intention of the parties may have been in that respect; and evidently did not contemplate any such right as the defendant claims, for it provides that he shall remit to *Gladstone & Co.* the proceeds of the estate, as soon as received by him. Though there is a covenant on the part of the defendant that he will wind up the business, there is no corresponding covenant by *Gladstone & Co.* that they will allow him to wind up; and I take the arrangement about the defendant's winding up the business to have been for the exclusive benefit of *Gladstone & Co.*, and that they might, notwithstanding, take the winding up into their own hands whenever they chose; that, while it was left in the defendant's hands, he was bound, as any other agent would be, to obey their instructions in regard to it; and that they might at their discretion transfer the agency to any one else.

Judgment.

In short, the effect of the agreement was to put an end to any partnership interest which the defendant may theretofore have had in these assets, and every other interest, unless it may be an interest analogous in some way to that of a vendor for unpaid purchase money. But such an interest would clearly not entitle the vendor, under the circumstances of this case, to keep the possession from *Gladstone & Co.*, his vendees, or from their assignee. If the defendant has a right to be indemnified out of these assets in respect of the outstanding accommodation notes, the appointment of a receiver will not prejudice the right: nor will the appointment prejudice the right of any other

incumbrancer: but if there is any other he should be made a party to the suit; and the bill may require some amendment in its statements of the relation between the parties and otherwise (*a*). 1866.

Kemp
v.
Jones.

I think the order for a receiver must go. The reference may be to either the Master or the Accountant.

In drawing up the order under this judgment the solicitor for the defendant asked to have introduced into the order a direction that the defendant should be at liberty to propose himself as receiver, and minutes of the order were accordingly settled by the Registrar with such direction therein.

Mr. *Snelling* subsequently moved to vary the minutes in this respect.

Judgment.

Mr. *Blake*, Q. C., contra.

MOWAT, V. C.—It was assumed on the argument of the motion for a receiver, that the defendant should have liberty to propose himself as receiver. That point has since been spoken to on the minutes, Mr. *Snelling* objecting to a direction to that effect being introduced.

The liberty for a party to be appointed a receiver is by no means a matter of course (*b*); but the permission has been granted in many cases, of which *Sykes v. Hastings* (*c*), *Jeffreys v. Smith* (*d*), *Fingal v. Blake* (*e*), *Darley v. Baines* (*f*), *Hoffman v. Duncan* (*g*), *Davis*

(*a*) *Maur v. Coventry*, DeG. McN. & G.; *Fripp v. The Chard Railway Co.*, 17 Jur. 887; 22 L. J. ch. 1084; *Sullivan v. Sullivan*, 8 Irish Eq. 72.

(*b*) *Davis v. Duke of Northumberland*, 2 Swan, 118; *Lupton v. Stephenson*, 11 Irish Eq. 486.

(*c*) 11 Ves. 363.

(*d*) 1 J. & W. 303.

(*e*) 2 Moll, 80.

(*f*) 9 Hare, 374.

(*g*) 18 Jur. 462.

1866. *v. Barritt (a)*, and *Powis v. Blagrave (b)*, are examples.

Kemp
v.
Jones.

No doubt the defendant ought not to be appointed, if his appointment would be less beneficial to the plaintiff or the estate, than the appointment of some third person. But the defendant has an intimate knowledge of the assets, which can hardly fail to be of service in making the most of them; and his chief power as receiver will be to collect the outstanding debts. He cannot bring actions, or, I presume, release or compromise debts, without the sanction of the Master or the court. He is not shewn to have been chargeable with any misconduct in the management of the property heretofore; and his appointment, so far as I see, would not interfere with the thorough investigation of the books and accounts relating to the business, and of the past dealings of the defendant. In connection with these considerations is to be borne in mind the possibility that the defendant may, at the hearing, shew himself to be entitled to a lien on the assets, on one or other of the grounds stated in his answer. Viewing these circumstances in the light of the reported cases to which I have referred, and of others which I have examined, I am of opinion that I ought not to refuse to insert in the order a direction that the defendant be at liberty to propose himself as receiver, he undertaking to act without salary in case he is appointed.

Judgment.

The defendant, if appointed, will not be entitled, and, I presume, does not intend or desire, to make use for any time, however short, of the money he may collect; and the Master may fix short periods for paying it over from time to time. This, however, he will have authority to do without any direction in the order (c).

The permission to propose himself does not entitle the defendant to be appointed. It has no effect beyond this, as the Lord Chancellor of Ireland explained in

(a) 13 L. J. Ch. 304.

(b) 18 Jur. 462.

(c) See 63 General Order of 1825.

Fingal v. Blake (a): "to put aside the disability under which a party ordinarily is of becoming the receiver in the cause to which he is a party." In such cases, to adopt Lord *Eldon's* observation in *Sutton v. Jones (b)*, "in discussing the question many considerations may be laid before the Master with convenience and effect, and without mischief, which cannot have place here."

1866.

Kemp
v.
Jones.

MOWAT V. THE CORPORATION OF THE CITY OF TORONTO.

Esplanade Acts—Injunction.

Under the statutes 16 Victoria, ch. 219, and 20 Victoria, ch. 80, authorizing the construction of the esplanade in front of the City of Toronto, the city surveyor is not authorized to set any value upon the strips of land given to the owners of water lots, his duty being merely to estimate the value of the work done by the city in filling in the esplanade; nor have the city any right to obtain an arbitration in order to establish a claim to compensation for such strips, unless the owner of the water lot shall have given notice under the statute that he is dissatisfied with the price allowed for the portion of the lot taken for esplanade purposes.

The bill in this case was filed to restrain the defendants, *The Corporation of the City of Toronto*, from proceeding under the statutes 16 Victoria, chapter 219, and 20 Victoria, chapter 80, to obtain an arbitration in respect of certain pieces of land lying to the north and south of the water lot owned by the plaintiff. It appeared that the city had caused the plaintiff to be served with a notice or certificate of the city surveyor, in the manner prescribed by the above acts. Such certificate contained a statement of what the water lot owner ought to pay "for the construction and filling" contemplated by the acts, and also an estimated value placed on the land taken from the water lot owner for esplanade purposes, and on the strips of land north and south of his

(a) 2 Moll, 80.

(b) 15 Ves. 588.

1866. Mowat lot, given to the owner by the operation of certain letters patent to the city and of the said acts. This part of the certificate, it was alleged by the bill, was no part of the surveyor's duty, and was *ultra vires*, and the object of the present suit was to have such certificate amended, and to restrain proceedings on the certificate until amended. It was shewn that the esplanade ran "in front of" the plaintiff's lot, not across it; that the blank in the certificate of the city surveyor for value of land taken was filled up with an O—whilst a high value was placed on the land given under the letters patent.

Mr. *Blake*, Q.C., and Mr. *James McLennan*, for the plaintiff.

Mr. *McBride*, for the defendants.

Judgment. SPRAGGE, V.C.—In the year 1816 the Crown granted to one Cooper water lot A, in front of the city of Toronto. The plaintiff is the present owner of the lot, having derived title thereto through Cooper.

The defendants have constructed the esplanade across this lot, and the question presented for my decision is whether they are entitled to charge against the plaintiff, in addition to the cost of constructing the esplanade, the value of the strip of land between the water lot and the top of the bank and of the land covered with water in front of the water lot, and extending to a line south of it called the windmill line, the former piece of land being usually called the strip, and the latter the extension.

By Letters Patent of the 21st February, 1840, certain water lots were granted to the city of Toronto, together with a strip of land between the top of the bank and the water lots previously granted (and as I understand, the water lots thereby granted), and together with all the land covered with water southward

up to the line called the windmill line, the same being, 1866.
 in some instances at least, and among them in the case
 of water lot A, south or in front of the water lots
 previously granted.

Mowat
 v.
 Corporation
 of the City
 of Toronto.

The city received this grant upon this, among other trusts, "Upon the further trust that so soon as the proprietors of such water lots in front of the said city of Toronto, as had been granted previously to the date of the letters patent hereinbefore in part recited, should comply with the terms of the said letters patent, and build the said esplanade in front of their respective lots, according to the said plan adopted by the said city of Toronto, and in the place designated on the map annexed to the said letters patent, to convey to such proprietors the extension of the water lots adjoining to their respective lots, as by the said letters patent and the map annexed thereto is provided and described; and also to convey to the owners of the water lots, according to their respective estates, pieces of land at the foot of the bank, subject to such general regulations as to buildings and general improvements, under the direction of the corporation, as may be devised by the corporation of the said city."

Judgment.

By statute 16 Victoria, ch. 219, 1853, provision was made for the construction of the Toronto Esplanade, and by 20 Victoria, ch. 80, further provisions were made with the same object, and with the further view of providing for the construction of a roadway for the Grand Trunk and other railways along the esplanade.

By each of these acts the cost of constructing the esplanade across water lots, the property of individuals, was thrown upon the owners, or lessees under the Corporation, each water lot owner or lessee having to bear the cost of its construction across his own lot. It was in his power under the first act to construct it himself, doing the work within a limited time. If not

1866. done within the time limited, it might be done by the city, and the cost was to be ascertained by the City Surveyor, and in case of disagreement, by arbitration, and was to become a charge upon the land. By the later act it was authorized to be constructed by the Grand Trunk Railway Company under contract with the city.

Mowat
v.
Corporation
of the City
of Toronto.

It is clear that under the Act of 1853, all that the city could claim was the cost of constructing the esplanade. It recites that most of the water lots granted to the city by the letters patent of 1840, had been leased by the city, and that the leases contained a covenant on the part of the lessees to build the esplanade within the time in the letters patent mentioned, and according to the plan adopted by the Common Council.

It authorizes owners and lessees of water lots to notify the Council that they will themselves construct the esplanade across their own premises; and to do the work within a limited time.

Judgment.

In case of the work being done by the city, section 3 provides that the City Surveyor shall, in a mode prescribed by the act, declare the amount which the owners and lessees of water lots ought to pay to the city *for the construction of such esplanade upon and across such water lots respectively*; and in case of the owner or lessee being dissatisfied with the sum declared by the City Surveyor, "as the sum payable by him in respect of the improvement made across or in front of his lot," arbitrators are to be appointed, whose award is to be final as to the sum chargeable for such improvement, and the amount so settled; and that only is made a charge upon the land. Under these provisions, I think, it is plain that the city could make no claim in respect of the value of the strips, or on any other account save the one specified, viz., what ought to be

paid for the construction of the esplanade; and I understand this to be confined to the cost of construction, and that the words "ought to pay," do not enlarge it, for the city is to be paid only for the work: and it being made the duty of the City Surveyor to declare the amount payable, shews that what was to be paid was a mere matter of calculation.

1866.

Mowat
v.
Corporation
of the City
of Toronto.

Section 7 of the same act provides, that after the construction of the esplanade by the city, the regulations as to buildings and improvements being complied with, as to which there is no question, the city should convey to the owners of water lots the strips of land set forth and described by the letters patent and designated on the map thereto annexed.

The statute of 1853 thus places the water lot owners upon the same footing as they stood under the letters of 1840, only substituting the construction of the esplanade by the city, across the lots of the owners, for the construction by the owners themselves. The act placed the owners and lessees of water lots upon the same footing as to what was to be paid to the city in respect of the construction of the esplanade.

Judgment.

The rights of the water lot owners under the act of 1853, are material in reference to the 4th section of the Act of 1857, and its proviso. It is as follows:

"And whereas the property directed by the Letters Patent of the twenty-first day of Febrary, one thousand eight hundred and forty, mentioned in the said act to be conveyed to the said water lot owners therein referred to, was intended as a compensation for the land which might be taken from them respectively for the esplanade, and for the expense of making so much thereof as should be made on the lands taken from them respectively be it enacted, that the owners be respectively charged with their respective shares of such expense, and if any

1866. such water lot owner or person having estate in any such water lot, shall be dissatisfied with any such compensation, his claim to a further allowance shall, if not agreed upon, be determined by arbitration as aforesaid; and in coming to such decision, the said arbitrators shall take into consideration the increased value of the lots, by means of the improvements contemplated by this act, as well as all other matters connected therewith, and also, the value of the strips of land between the same and the top of the bank, and of the land covered with water in front thereof, to be conveyed to the owners in fee of the said water lots, under the provisions of the act first above mentioned; and if such increased value of the said water lots, and the value of the said strips of land and portions of land covered with water, together with the expense of constructing the said esplanade, shall equal the value of the land taken for the esplanade, it shall be the duty of the arbitrators to decide in favor of the city generally; and if it shall exceed the value of the land taken, then to decide that such excess shall be paid to the city by said water lot owners, in manner provided by the said act hereinbefore mentioned, for payments to the city for the construction of the said esplanade. Provided always, that nothing in this section contained shall affect the right, if any, of any party who may claim any strip of land covered with water or otherwise adjoining the water lots granted by any patent issued prior to the twenty-first day of February, one thousand eight hundred and forty, but the rights of such party, if any, to such strips of land shall remain the same as before the passing of this act."

Judgment.

This section is somewhat obscurely worded, and the learned Judges of the Court of Queen's Bench have differed as to its interpretation. The proviso, I think it probable, was an afterthought, and was added by way of caution, lest its provisions might possibly, in some events, prejudice the rights of the water lot owners. Upon the whole, it seems to be, as I read it, in their favor.

The preamble and the enacting part of the clause do not entirely agree, the former reciting that the strips of lands to be conveyed by the city in pursuance of the letters patent, to the water-lot owners, was intended as a compensation for two things: for the land to be taken from them for esplanade purposes, and for the expense of constructing it upon the land so taken away. They lost the land taken; and the cost of constructing the esplanade upon it was at their expense. The enacting part departs from this by adding a third element in favour of the city, viz: "the increased value of the lots by means of the improvements contemplated by the act, as well as all matters connected therewith." All, however, that is made a direct charge upon the land, unless the water-lot owner himself initiates a claim, is the expense of making the esplanade over the portion taken; and, in the event of the owner of the land making a claim for further compensation, arbitrators were to decide upon the several elements of consideration to which I have adverted. It may seem strange, at first sight, that although the advantage might be greatly in favour of the water-lot owner, so that in case of an arbitration, an award might justly direct him to pay to the city a considerable sum of money, it should not be open to the city as well as to him to demand an arbitration. But it is to be remembered that the class of persons whose interests the legislature was dealing with, had rights conferred by the crown prior to any conferred upon the city. For the public interest those rights had been somewhat infringed upon; a portion of their land taken from them, and the residue burthened with a considerable charge. In regard to some of them the conveyance to them of the strips of land conveyed to the city in trust, might, from the position of their lots or other causes, be a compensation altogether inadequate, and it was reasonable that in such cases the city should make up a sufficient compensation, and this section seems to have been framed with a view to meeting such cases of hardship as might

1866.

Mowat
v.
Corporation
of the City
of Toronto.

Judgment.

1866. arise from the exercise of the powers conferred upon the city.

Mowat
v.
Corporation
of the City
of Toronto.

But it may probably have been considered by the legislature that it would be going too far to enable the city not only to claim to be reimbursed its expenses, but actual payment in money, for land which it had received by grant from the crown subsequent to the grant to the water-lot owners, such subsequently granted land being, too, in a sense, appurtenant to the land first granted. The provision entitling the city to any sum awarded in its favour upon an arbitration at the instance of the water-lot owners, was probably intended as a check upon unreasonable demands, on their part, upon the city.

Judgment. The proviso, at all events, makes the matter clear. The rights of water-lot owners, under the trust contained in the Letters Patents of 1840, and section 7 of the Act of 1853, are, upon the construction of the esplanade, and the compliance with certain city regulations not in question, to have a conveyance of the strips of land conveyed to the city in trust, and this right, saved by the proviso, would manifestly be impaired and encumbered if the city could add to the conditions upon the performance of which they are bound to convey, another condition imposed by themselves. Besides, the statutes provide no machinery for this claim. The City Surveyor has no authority conferred upon him to value the land taken, or the strips to be conveyed. In the one event, that these were to be valued; it was to be done by arbitration, not by the City Surveyor. His duty is limited to stating the expense of the esplanade construction—a duty for which, from his office, he is presumed to be qualified. His making a valuation of the land taken, and the strips, is *ultra vires*—a mere nullity. It is a course taken by the city, I presume, as the only mode in which they could initiate a claim of the nature which they make. I may add that I should have been surprised to find that the legislature had authorized the

city to claim against water-lot owners having grants before the Letters Patent to the city of February, 1840, the value of the strips granted by those Letters Patent to the city, as it would have been in manifest derogation of the previous grants to individuals. For what had been granted, was not merely so much land, and land covered with water; but what was granted was of a peculiar character—water lots—to which character it is essential that there be access for vessels navigating the lake and harbour. It is obvious that to grant a beneficial interest in the land in front of what had been granted, as a water lot, would be not merely to impair what had been granted, but by destroying its character and its usefulness for the purpose for which it was granted, in effect to abrogate the grant. Section 4, to which I have adverted, is not wholly free from this objection, but it is restricted in its operation; and I certainly think a Court of Equity would do wrong to extend it in the least degree.

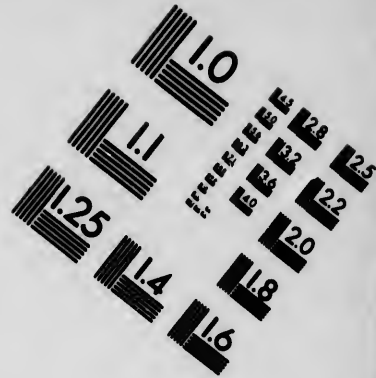
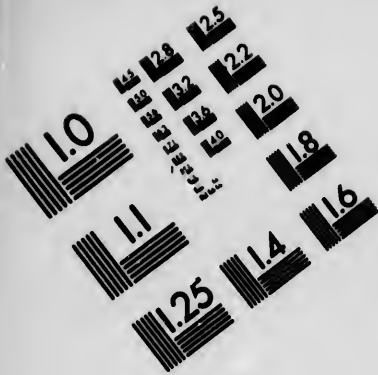
I think this court has jurisdiction in the matter upon this ground. It is the right of the water lot-owner to have an arbitration only in respect of such charges on the part of the city as the city can properly make against him. The plaintiff is not "dissatisfied," within the meaning of section 4. He is satisfied that the strips of land shall be received by way of compensation for the land taken, and for the expense of the construction of the esplanade upon it. He seeks no further compensation, but he retains the right to have the amount properly payable in respect of the esplanade work arbitrated upon, and that unmixed with other charges for which he is not liable, and in respect of which he is not bound and ought not to appoint an arbitrator. If he did appoint an arbitrator, it might be construed as an admission of the claim of the city. The arbitrators at least might so construe it, and award to the city compensation in respect of such claim, and upon the registration of their award an encumbrance, *prima facie* at least, would be created upon the plain-

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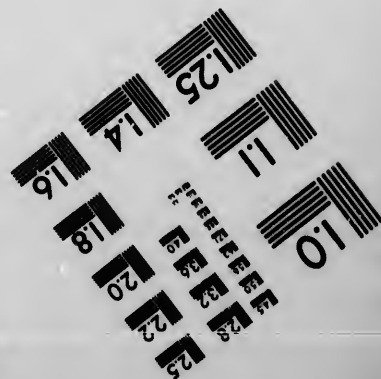
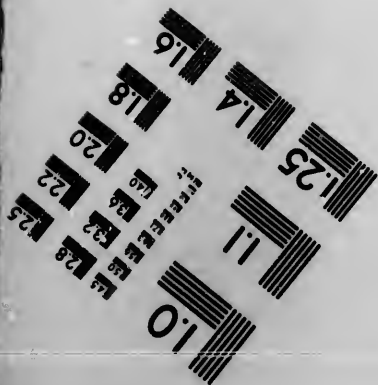
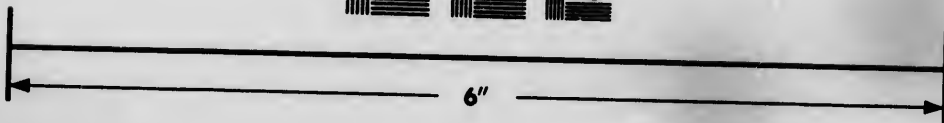
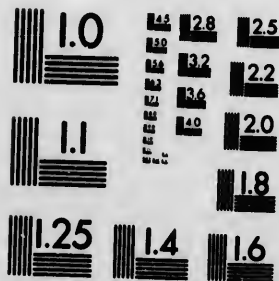
Mowat
v.
Corporation
of the City
of Toronto.

Judgment.





**IMAGE EVALUATION
TEST TARGET (MT-3)**



**Photographic
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1866. tiff's lot for an amount for which he is not properly chargeable. It is sufficient to state this ground of jurisdiction without saying that there is no other.

The plaintiff is entitled to a Decree, and with costs.

THE MUNICIPALITY OF ORFORD V. BAILEY.

Municipal Corporations—Mortmain Acts.

After the passing of the 27 Victoria, chapter 17, a municipal corporation invested on mortgage part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the security.

Held, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the statutes of mortmain.

The facts are sufficiently stated in the head-note and judgment.

Mr. Roaf, Q.C., and Mr. Douglas, for the plaintiffs.

Mr. McCrea, for defendants.

Judgment.

SPRAGGE, V.C.—This bill is filed to foreclose a mortgage made by Archibald Palmer and George Bailey, to the plaintiffs. The moneys invested by the plaintiffs in such mortgage were surplus clergy reserve moneys in the hands of the plaintiffs. The mortgage bears date 28th August, 1857.

It is objected by the answer that no by-law had been passed by the municipality, authorizing such investment, and that the mortgaged lands are within the limits of the corporation of the Township of Orford.

Whatever force there may have been in these objections before the passing of 27 Victoria, ch. 17, the objections

appear to be removed by the second section of that act, 1866. which is as follows: "And whereas several municipalities have heretofore invested moneys derived from the said fund, and set apart for special purposes in real estate security, be it enacted that such investments shall be legal and valid."

Municipality
of Orford
v.
Bailey.

It is not denied, that the moneys invested in the mortgage in question, were moneys derived from the fund referred to in the above 2nd section.

It is further contended, that assuming the mortgage to be validated by the 2nd section of the act, the remedy of the plaintiffs can be by sale only; and that the plaintiffs are not entitled to have a decree for foreclosure. It would be more in accordance with the policy of the mortmain acts if they could not acquire property by foreclosure; but the 27 Victoria not only validates past mortgages on real estate, but authorizes the investment of municipal funds in the same way, and places no restriction upon the remedies in default of payment. And there is probably no serious danger of municipalities holding lands so acquired to any alarming extent. If it should become a serious evil, the legislature can cure it at any time, by compelling a sale of the lands so acquired.

Judgment.

It is not for the court, upon any notion it may have of a possible evil resulting from this cause, to limit the remedies of the municipalities upon their mortgages, when the legislature has not felt it to be necessary to do so.

I suppose indeed I ought scarcely to treat this as an open question, for it appears that a bill was filed by these same plaintiffs against the mortgagors some six or seven years ago, and a decree for foreclosure was made by the late Vice-Chancellor. It was indeed upon the bill being taken *pro confesso*, but I cannot assume

1866. that he did so without satisfying his mind that it was a valid mortgage. The present bill is rendered necessary by the fact of one of the mortgagors having parted with his interest in the equity of redemption before the filing of the former bill, but still the former decree involved an adjudication upon precisely the same points as are raised by the defendants' answer in this case.

Municipality
of Orford
v.
Bailey.

DAWSON V. DAWSON.

Voluntary deeds—Undue influence.

It is essential, to the validity of a deed of gift in favor of a person occupying towards the grantor a relation of trust and confidence, that the grantee should shew that the grantor had competent and independent advice in the transaction.

Judgment. When a deed of gift is objectionable according to the doctrines acted upon in equity to guard against undue influence, the mere circumstance that the grantor had previously expressed an intention of at some time giving the property to the grantee, is not a sufficient ground for upholding the deed.

A deed of gift void against the grantor may be set aside at the instance of his heirs after his death.

A deed in favor of a third person, obtained through the influence of one occupying a fiduciary relation to the grantor, and not giving him the advice which he ought to have received, cannot be sustained.

Hearing before Vice-Chancellor Mowat, at the spring sittings, 1866, at Toronto.

Mr. Blake, Q.C., and Mr. Wells, for the plaintiffs.

Mr. Bell, Q.C., for the defendants George Dawson and Dennis Dawson.

Mr. Roaf, Q.C., for the defendant Frederick Dawson.

Mr. Tilt for the other parties.

Cases cited:—*Mason v. Seney* (a), *Clarke v. Hawke* (b), *Murray v. Murray* (c), *Grosvenor v. Sherratt* (d), *Hugeman v. Basely* (e), *Sharp v. Leach* (f), *Waterhouse v. Lee* (g), *Rhodes v. Bates* (h), *Gibson v. Russell* (i), *Harvey v. Mount* (j). 1866.
Dawson
v.
Dawson.

MOWAT, V.C.—This is a bill by some of the heirs of *John W. Dawson*, to set aside two deeds executed by the deceased about eleven weeks before his death. These deeds comprised all the real estate of the grantor, and at the time they were executed two projects were contemplated for or by the grantor, namely, a sea voyage, and the purchase of another lot of land in the name of his brother *George*, with whom he resided. Either of these projects, if carried out, would have exhausted all the remaining means of the deceased; and had he survived, would have left him entirely destitute. He was in poor health at the time, expected to die soon, and was in the deepest depression and despondency of mind. The deeds were obtained from him through the influence of his brother *George*, and without the advice of any other person. One of the deeds was in favor of his brother *Frederick*; and the other deed was in favour of *George* himself, and intended partly for *George's* benefit, and partly for that of his brother *Dennis*. *George* occupied towards the grantor, at and before the time the deeds were obtained, relations of trust and confidence of the closest description, and continued to do so up to the time of the grantor's death. Judgment.

It is quite clear, from the evidence of *George* himself, that the deed to him cannot be maintained consistently with the settled doctrines of the English courts. (k)

(a) 11 Gr. 447.

(b) 11 Gr. 527.

(c) 8 Grant. 293.

(d) 28 Beav. 659.

(e) 14 Ves. 2.

(f) 31 Bea. 491.

(g) 10 Grant, 176.

(h) 1 Weekly Notes, 15.

(i) 2 Y. & C. C. C. 104.

(j) 8 Beav. 439.

(k) *Vide* *Mason v. Seney*, 11 Grant, 447; *Clarke v. Hawke*, *ib.*

527; *Davies v. Davies*, 4 Giff. 417.

1866. *Indeed the rule laid down by the Lords Justices in Rhodes v. Bates (a), is of itself sufficient to decide the case:—"I take it," said Lord Justice Turner, "to be a well established principle of this court, that persons standing in a confidential relation towards others, cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the court that the persons by whom the benefits have been conferred, had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court; and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply, but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence." (b) His lordship then proceeds to shew that the principle is not applicable where the gift is trifling as compared with the means of the donor.*

Dawson
v.
Dawson.

Judgment.

It was argued that the doctrines of the English courts on this subject are not applicable to this country. But they have already been held to be in force here. The American state courts have taken the same view of them (c); and they are founded on principles which must be applicable everywhere.

The learned counsel for the defendant *Frederick Dawson* contended, on various grounds, that the deed to *Frederick* stood in a different position from the other deed.

(a) 12 Jur. N.S. 178. (b) Since reported 1 Law Rep. Ch. Ap. 252.

(c) *Vide* the American notes to *Huguenin v. Baseley, Wh. & T. Lead Co.*

He argued that there was evidence that the deceased had for years intended this lot for *Frederick*; and that this circumstance removes the difficulty in the way of supporting his deed. The evidence does not, I think, shew an intention that *Frederick* should have the lot before the grantor's death. A will would have carried out all that *John* seems, before the period of the impeached transactions, to have contemplated. But *George* objected to his making a will; induced him to execute the deeds in lieu of a will; and did not even suggest that they should contain powers of revocation (a), which would have saved the grantor from poverty, had he recovered his health, as every one but himself expected he would do. It has been held in many cases that such proof of antecedent intention as was given here is insufficient to sustain a deed which is open to the objections established against both deeds in the present case (b).

1866.

Dawson
v.
Dawson.

Judgment.

Then it was argued that the deed ought not to be set aside at the suit of the heirs of the grantor; and that the most which the heirs can claim is that the deed should be so modified in its operation as to conform to the long expressed intention of the grantor. This view, also, is negatived by the authorities (c).

It was further contended that *Frederick's* deed was valid because he occupied no fiduciary relation to his brother *John*, and did not aid in inducing him to make the deed. He was present at the execution of it, and was the subscribing witness to the other deed, *George*

(a) *Forshaw v. Welsby*, 30 Beav. 243; *Harvey v. Mount*, 8 Beav. 439.

(b) *Sharp v. Leach*, 31 Beav. 491; *Cooke v. Lamotte*, 15 Beav. 234; *Anderson v. Elsworth*, 3 Giff. 154; *Brown v. Kennedy*, 33 Beav. 147.

(c) *Vide Phillipson v. Kennedy*, 32 Beav. 628; *Cooke v. Lamotte*, 15 Beav. 234; *Anderson v. Elsworth*, 3 Giff. 154; *Brown v. Kennedy*, 33 Beav. 147.

1866. *Dawson*, on the other hand, being the subscribing witness to *Frederick's* deed. *Frederick* knew the state of *John's* mind at the time, and the relation of confidence which *George*, who obtained the deed, occupied. But it has been held in many cases that deeds of gift in favor of third persons, however innocent, cannot be maintained, if procured through influence on the part of another, which, under the circumstances, would have rendered a deed of gift to the latter void. The grantee in such a case cannot profit by the ignorance, or negligence, or unfaithfulness of the grantor's adviser (a).

Dawson
v.
Dawson.

I think it clear that both deeds must be set aside.

There remains the question of costs. In most of the cases to which I have referred the defendant was ordered to pay the costs; but sometimes the decree has been without costs, as in *Prideaux v. Ionsdale* (b), *Anderson v. Elsworth* (c), *Phillipson v. Kennedy* (d), and *Rhodes v. Bates* on appeal (e). The bill in this case, as originally framed, proceeded on the ground of the lunacy of the grantor, and actual fraud on the part of the defendants. After the defendants had been cross-examined on their answers, the plaintiffs amended their bill, retaining the allegations of lunacy and fraud, but setting up, in addition to these, the grounds on which I have held the deeds to be void. But the case of lunacy and fraud has been disproved; and the "court has always visited * * very severely a plaintiff who makes a charge of fraud against a defendant, and is afterwards unable to sustain the charge by

Judgment.

(a) *Huguenin v. Baseley*, 14 Ves. 273; *Espey v. Lake*, 10 Hare, 264; *Smith v. Kay*, 7 H. L. 760; *Grosvenor v. Sherrott*, 28 Beav. 659; *Rhodes v. Bates*, 12 Jur. N. S. 178; *Berdoe v. Dawson*, 11 Jur. N. S. 264; *Com. Bank v. Cooke*, 9 Gr. 524; *Clarke v. Hawke*, 11 Gr. 54, 27.

(b) 1 DeG. J. & S. 433.

(c) 3 Giff. 154.

(d) 32 Beav. 628.

(e) 12 Jur. N.S. 178.

evidence." (a) The learned counsel for the plaintiffs argued that the plaintiffs had reasonable grounds for making the disproved charges, but this has been held to be no sufficient reason for exempting from costs a party who ventures to make such charges when they are really untrue (b). On the whole, therefore, I think the decree in the present case must be without costs.

1866.

Dawson
v.
Dawson.

BRUMMELL v. WHARIN.

Injunction—Obstruction of view.

The owner of two adjoining shops leased one to the plaintiff and the other to the defendant. The plaintiff's shop window had been so constructed as to present a side view to persons coming down the street, the object being to attract their attention, and obtain their custom for the wares displayed in the shop; and the privilege was shewn to be a very important one. The tenant of the adjoining shop having placed a show case in an open space or door-way of his shop, so as to intercept the view of the plaintiff's window, was restrained by injunction from continuing the obstruction.

This was a motion for an injunction to restrain the defendant from placing a certain show-case, or any other show-case or article of a similar nature or description, and from retaining the same, in such a position as to darken and obstruct the window of the shop occupied by the plaintiff, or as to prevent a full and uninterrupted view of said window by persons passing along the south side of the street on which the shop is situate, or from in any way depriving the plaintiff of the full use, benefit and advantage of the said window.

Staten. 11.

The plaintiff filed an affidavit stating that this window was of great use to him for the purpose of displaying to the public his goods, and that it was of the utmost

(a) Straker v. Ewing, 34 Beav. 154.

(b) Theyer v. Tombs, 12 W. R. 512; see also cases cited in Morgan and Davies on costs, 72, 73.

1866. importance to him that all persons passing along the street should have a full and uninterrupted view of the window, and of the goods and articles displayed and set out therein, the window being in part constructed in the manner it is for the express purpose of presenting as large a space suitable for displaying goods as possible, and by that means attracting the attention of the public so passing along the street before and past the plaintiff's shop.

Brummell
v.
Wharin.

Other affidavits to the same effect were filed on behalf of the plaintiff.

The defendant filed several affidavits against the motion, but his cross-examination was held by the Vice-Chancellor to support the plaintiff's case as to the principal facts.

Argument. Mr. *Blake*, Q.C., and Mr. *Doyle*, for the plaintiff, cited *Riviere v. Bower* (a), *Curtis v. Union Bank* (b).

Mr. *Roaf*, Q.C., and Mr. *Ince*, contra, cited *Clark v. Clark* (c), *Smith v. Bowen* (d), *Curriers' Company v. Corby* (e), *Suffield v. Brown* (f), *Radcliffe v. Duke of Portland* (g), *Isenberg v. East India Company* (h), *Johnson v. Wilde* (i), *Jackson v. Duke of Newcastle* (j), *Yates v. Jacke* (k), *Deverill v. Pritchard* (l), *S.C. on appeal* (m).

MOWAT, V.C.—This is a motion for an injunction. The plaintiff is a druggist, and the defendants are jewellers. They occupy adjoining shops in the principal

(a) Ky. & Mo. 24.

(c) 1 Law Rep. Ch. 16.

(e) 11 Jur. N. S. 719.

(g) 3 Giff. 702.

(i) 9 Jur. N. S. 1333.

(k) 13 Law T. N. S. 17.

(m) 12 Jur. N. S. 16.

(b) 2 Giff. 685.

(d) Gale on Easements, 82.

(f) 10 Jur. N. S. 111.

(h) 10 Jur. N. S. 221.

(j) 10 Jur. N. S. 688.

(l) 12 Law T. N. S. 759.

street in Toronto. Both the shops belong to the same proprietor. The plaintiff's lease bears date the 24th of March, 1862, and the defendant's the 18th of April, 1864. The shops are each twelve feet wide, and the fronts have been constructed with a special view to affording the greatest possible advantages for displaying goods. With this object the door of each has been placed four feet back from the line of the street; and the plaintiff's window has been divided into three compartments, the westerly one forming an obtuse angle with the middle compartment, and extending from the line of the street to the partition wall between the two shops. It thus forms the easterly side of the defendant's doorway, and is valuable for attracting the attention of persons passing easterly, to the goods displayed in it. The plaintiff, and the previous tenants of the shop he occupies, had the free use of the window for this purpose, without obstruction, for ten years. Lately, however, the defendants, being desirous of attracting the attention of persons passing in the same direction, to their own wares, have procured a movable show-case of suitable construction, which they place during the day on the easterly side of their doorway, and which to a considerable extent intercepts the view which passers-by would otherwise have of that compartment of the plaintiff's window. This show-case extends from the line of the street to the partition wall, viz., about four feet. It is eleven inches deep, and three feet two inches high, and is placed on a stand thirty-two inches high, the height of both together being nearly six feet from the floor of the doorstep.

1866.
 Brummell
 v.
 Wharin.

Judgment.

The plaintiff complains that this show-case is an illegal interference with his rights, and is a serious injury to him in his business.

His lease demises to him the premises, "with the privileges and appurtenances thereunto belonging or used therewith;" and the evidence shews satisfactorily

1866. that the "privilege" of having this window free from obstruction, for the display of goods, is of great importance to him in his business. It was a privilege used and enjoyed with the shop at and before the time the plaintiff's lease was executed, and I know no ground on which I could hold that it did not pass with the lease.

Riviere v. Bowan (a) seems precisely in point as to the plaintiff's right of suit. That was an action on the case. The plaintiff was proprietor of a house which he divided into two tenements; one he retained in his own occupation, using it as a gun-smith's shop, with a window projecting so as to display his goods, by a side-view, to passengers going up and down the street. Afterwards he let the adjoining tenement to the defendant, who was a bookseller. The defendant was in the habit of fixing, by a screw to his door-post, a movable case containing books, which came so near to the plaintiff's window as to obstruct the view of the goods on one side of the window. *Abbott, C.J.*, held, "that the action was maintainable against a person holding as tenant for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and that although there should be no stipulation at the time of the demise against the obstruction."

Judgment.

The learned counsel for the defendants did not attempt to distinguish that case from the present, but contended that it had been overruled by the late case of *Smith v. Owen*, before Vice-Chancellor *Wood*. But the judgment, as given in the *Weekly Reporter* (b), contains nothing that would justify me in taking that view of the decision.

The learned counsel further contended that an injunction cannot be granted to restrain interference with

(a) R. & Moody, 22.

(b) Vol. 14, p. 422.

a prospect or view, and that that is substantially what the plaintiff seeks.

1866.

Brummell
v.
Wharin.

Now it is clear that a party cannot claim, either at law or in equity, a right by prescription to a prospect or view, as he may to light or air; for it has been long ago held in reference to such a claim that, "for a prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof" (a). "Why may I not build up a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light."—*Knowles v. Richardson* (b). But I apprehend that it is equally clear, that if the owner of property contracts, expressly or by implication, not to erect upon the property any building that would obstruct another's view, such a contract is binding, and should, if necessary, be enforced by injunction. If on such a point any authority is necessary, it is sufficient to refer to *Attorney-General v. Doughty* (c), and *Piggott v. Stratton* (d).

It was further argued, that the injury here is too small to be appreciable. But the defendant *Wharin's* deposition is of itself an unequivocal answer to that contention.

It is said also, that the plaintiff has been guilty of laches. This objection is not taken by the answer, and I think it is not sustained by the facts.

The defendant *Wharin* says he had no desire to injure the plaintiff by placing the show-case where it is; that he has had it so constructed as to interfere as little as possible with the view of the plaintiff's window; and that the show-case is of great service to the defendants in their business. I have no doubt as to the truth of these statements. But it is manifest, that if

(a) 9 Co. 58 b.

(c) 2 Ves. Sen. 453.

(b) 1 Modern, 55.

(d) 1 DeG. F. & J. 33.

1866. the plaintiff has a right to the view of his window free from obstruction, as I think it clear that he has, the defendants cannot be permitted to violate that right, though they do not do so in wantonness, but in order to make their own business more profitable.

Brummell
v.
Wharin.

The plaintiff being entitled to the window as a means of displaying and advertising his wares, I think the injunction must go as prayed.

McGREGOR v. BOULTON.

Improvvidence—Undue influence.

An improvident deed, obtained by a tavern-keeper from a boarder who was greatly addicted to intemperance, was set aside with costs.

This cause was heard before Vice-Chancellor *Mowat*, at the sittings of the court at Goderich, in the spring of 1866.

Mr. *Toms*, for the plaintiff.

Mr. *Blake*, Q.C., for the defendants.

Judgment. *Mowat*, V.C.—The plaintiff in this cause has for several years been greatly addicted to intemperance. On the 30th of May, 1864, he executed a deed of all his real estate to the defendant *Boulton*, a tavern-keeper, with whom he was living; and the principal question in the suit is as to the validity of this deed. The bill alleges that it was obtained from the plaintiff through influence which the defendant had obtained over him, and that it was without consideration, and executed in trust for the plaintiff himself. The defendant denies the trust, and alleges that there was a consideration for the conveyance, namely, the release of a mortgage which the defendant had obtained from the plaintiff a few weeks before on part of the property.

The property comprised in the impeached deed consists of four village lots in Bayfield. Three of these, on which there was a tavern stand, had been bought by the plaintiff from the defendant for \$1200, on the 18th of March in the same year, under an arrangement previously made by the plaintiff with another tavern-keeper, one *Haacke*, with whom the plaintiff lived before he took up his abode with the defendant, that *Haacke* should remove to this stand, and should give the plaintiff his board in lieu of rent. The plaintiff paid \$500 in cash on account of the purchase money, and gave a mortgage on the three lots for the remaining \$700, payable in two equal annual instalments, with interest. On the 22nd of April he paid \$56 on this mortgage, in advance. The fourth lot comprised in the impeached deed had been bought by the plaintiff on the 20th of April from one *Betz* for \$206.

1866.
 McGregor
 v.
 Boulton.

The plaintiff, who was present at the hearing, appeared to be a man well up in years. In 1862 or 1863, he sold his farm for \$3750, and moved into the adjoining village of Bayfield, where he has ever since lived, going from one tavern to another, intrusting the landlord who had his favor for the time with his money and means, and occupying himself day after day in gratifying his passion for strong drink. During all this period, and probably from an earlier date, he was an occasional visitor at the tavern of the defendant. On the 11th of May, 1864, he appears to have commenced going there occasionally to sleep, or for his meals. On every day of that month, from the first day to the last, it appears from the defendant's accounts that the plaintiff was there drinking and treating, on credit, and also receiving from the defendant small sums of money. On the 25th of the month he went there to live as a permanent boarder; and five days afterwards the deed in question was executed.

Judgment.

The intemperate habits of the plaintiff are spoken of
 VOL. XII.

1866. by the witnesses on both sides. What they say is, that
 McGregor he drank very hard before he went to live with the
 v. defendant; that he was drunk almost every day after-
 Boulton. wards; that he would get "mad" if anybody refused
 him liquor; and that he was always drinking when
 he could get it.

When the plaintiff went to live with the defendant,
 he had a considerable amount of personal means, viz.,
 \$700 in cash; a mortgage from one *Cowrie* for \$742,
 dated the 4th of March, 1864, and payable with interest,
 in five equal annual instalments; a span of horses, a
 yoke of oxen, some sheep, a cow, a waggon, and other
 personal property. All these particulars, except the
 money, the defendant appears to have got from the
 plaintiff, either immediately or subsequently. No credit
 has ever been given to the plaintiff in the defendant's
 Judgment. books, or otherwise, for what the defendant so received.
 As to the money, I do not see that it appears distinctly
 what became of it. We hear of one sum of, it is said,
 \$100 being on one occasion delivered by the plaintiff
 to the defendant's wife for safe keeping, and we have
 this description by the defendant of the plaintiff's
 habits: "When boarding with me he was at my house
 all the day nearly. He seemed to be spending a good
 deal of money or giving it away."

In the fall of 1865 he left the defendant's house,
 and left to all appearance penniless. On the 11th of
 December, 1865, the present bill was filed.

The transaction of the 30th of May, 1864, as it ap-
 pears from the papers, was certainly a most absurd and
 unaccountable one for a rational man to make. In order
 to get rid of a liability into which the plaintiff had, as
 we are assured, voluntarily entered two months before,
 but half of which liability would not have been due for
 a year, nor the other half for two years, he sold his
 property to the defendant for less than half what he had

bought it for. For the three lots purchased from the defendant, he was to give \$500 cash, and a mortgage for \$706. In order to get this mortgage released, he, two months afterwards, gave up the \$500 he had paid at the time, the \$56 he had paid on the mortgage afterwards, and all interest in the three lots themselves, and conveyed to the defendant another lot which cost the plaintiff \$206, and seems to have been fully worth that sum. This certainly has all the appearance of a very drunken bargain.

1866.

McGregor
v.
Boulton

Considering the character of the transaction, and the habits of the plaintiff, and the relation which the defendant held towards him, as the tavern-keeper with whom he was living, and who was daily supplying him with the strong drink that was destroying him, and considering in connection with these the other circumstances in evidence,—I think that such a transaction cannot be maintained in equity, without proof not only that the plaintiff was sober when he executed the deed, and that he knew the nature of it, but also that the transaction was entered into by him without the influence of the defendant, and under competent independent advice.—*Clarkson v. Kitson (a), Say v. Barwick (b).*

Judgment.

It is manifest that a man of intemperate habits, a slave to strong drink, when dealing with the tavern-keeper at whose house he lives, and from whom he obtains the liquor which he craves, and with which he daily stupifies or maddens himself, is as liable to be overreached, and needs for himself and his family or heirs the protection of this court at least as much as a client who deals with his solicitor, or as a patient who has transactions with his medical attendant. No man is more helpless than a drunkard is in the hands of those who obtain his confidence, and to whom he looks day by day for the

(a) 4 Gr. 244.

(b) 1 V. & B. 195.

1866. gratification of the morbid craving which has possessed
 him; and the modern doctrine of both law and equity
 is against giving up even a poor drunkard, or a
 drunkard's property, to be the prey of the rapacious
 and unprincipled.

It has often been laid down in cases in which a position of influence was held by a grantee, that proof of the grantor's having understood the transaction is insufficient; that in such a case the grantee must shew how the impeached transaction was brought about, and that the grantor had an adviser therein; that such adviser was a person competent to advise, was independent of the grantee, had a knowledge of all the facts necessary to enable him to advise properly, and gave the advice he ought to have given; and, to maintain the transaction, the court must be satisfied by this proof, in connection with such other evidence as may be necessary, that the transaction was the free and deliberate act of the grantor, and was not brought about through the influence of the grantee. These rules have been adopted for the same reasons, in part, as those which have induced parliament to make a writing indispensable to the validity of certain contracts, and two witnesses indispensable to the validity of wills; and they are binding on all, that they may be a check on those who, in the absence of such rules, would not refrain from dishonesty or fraud.

The evidence which these rules demand was not given in the present case.

It was said, indeed, in argument, though not by the answer, that the plaintiff had the advice of Mr. Davison, the attorney who drew the deed. But this is not so. The transaction was agreed to before the plaintiff saw Mr. Davison; and his advice was not asked or desired by the plaintiff, nor was it given. He does not even appear to have had an adequate knowledge of the case,

and of the condition and circumstances of the plaintiff, such as would have been necessary to enable him to advise properly; and he certainly did not receive the confidence of the plaintiff with a view to the plaintiff's being advised by him in the matter. All that he was employed to do was simply to draw the deed. For this purpose the two parties came to him together, and he was paid for his services by the defendant only. The advice of an attorney under such circumstances, if given, would not have been the independent advice necessary to give the transaction validity. Mr. *Davison*, from knowing something of the plaintiff's intemperate habits, very properly availed himself of an accidental opportunity he had of talking with the plaintiff alone, to assure himself that the plaintiff well understood the nature of the transaction; but the conversations which he relates shew no more than this.

1866.
McGregor
V.
Boulton.

The only evidence that the consideration for the deed Judgment. was the release of the mortgage, is the evidence given by Mr. *Davison*. But whether, as the defendant alleges, the plaintiff stated truly to Mr. *Davison* what the plaintiff understood to be the bargain, or merely, as the plaintiff asserts, what, for some special purpose he and the defendant had, at the suggestion of the latter, agreed to pretend to have been the bargain, it is impossible, upon the evidence, to say. The deed is absolute in its terms, contains absolute covenants for title, and is expressed to be in consideration of \$750 cash, the receipt for which is acknowledged both in the deed and by a memorandum endorsed upon it. The mortgage was not formally released, however, until long afterwards, nor was any writing executed shewing the real transaction to be as now stated by either party.

I am clear, therefore, that upon the facts in evidence the deed cannot be sustained.

The learned counsel for the defendant argued that

1866. the facts proved and relied upon are not stated, or not
 correctly stated, in the bill; and counsel for the plain-
 tiff applied for leave to amend his bill, if necessary, in
 order to remove the objection. I think he should have
 the leave, if an amendment is necessary. But where no
 new party is to be added, and a defendant has not been
 misled to his prejudice by the omissions or inaccuracies
 of a bill, and no further answer or hearing is required,
 I do not see why the actual amendment of the bill at
 the hearing may not often, under our practice, be
 dispensed with as an unnecessary formality, as it is in
 like cases at law under the express provisions of the
 Common Law Procedure Act (a).

In the present case I do not see, as I said at the
 hearing when the defendant's objection was taken, that
 the form of the bill can, under all the circumstances,
 have misled or prejudiced him; but I think he should
 have an opportunity of shewing, by affidavit, that it has
 done so; and, on being satisfied of the fact, I shall
 give such directions for amending the bill, and filing
 a further answer thereto, and for a further hearing
 of the cause, as justice may require (b). To afford
 time for such an application the decree is not to be
 drawn up for three weeks.

Otherwise, the decree will declare the deed of the
 30th of May, 1864, to be void, and order it to be
 delivered up to be cancelled. The defendant *Boulton*
 will reconvey to the plaintiff the *Betz* lot free from
 incumbrances, &c., by him, and will pay the plaintiff
 the costs of the suit up to the hearing, including the
 costs of the reconveyance. The Master at *Goderich*
 will take the accounts between the parties; and further
 directions and costs will be reserved.

(a) Consol. Stat. U. C., pages 221 and 232.

(b) See 2 Lush's Practice, 3rd ed., 550.

1866.

MCINTYRE V. SHAW.

Mortgagee.

A mortgagee of unpatented land, after certain judgments were registered against him, assigned all his estate for the benefit of his creditors. The trustee paid to the government out of the trust estate the balance of the purchase money. *Held*, that in respect of the sum so paid he was entitled to priority over the judgment creditors.

This was a hearing on further directions.

Mr. *Strong*, Q.C., for the plaintiff.

Mr. *Blake*, Q.C., for the defendant, referred to *McQuestien v Campbell (a)*.

MOWAT, V.C.—The plaintiffs in this case recovered two judgments against the defendant *Thomas Leckie*, one for £3008 15s., which they registered on the 30th of September, 1856, and the other for a like sum, which they registered on the 12th of May, 1857. On the 4th of November, 1859 they filed the present bill. Judgment.

Leckie was mortgagee of certain unpatented land purchased from the Crown by the defendant *Yuill*. The plaintiffs claim a lien on this mortgage.

After the registration of the plaintiff's judgments, viz., in January, 1858, *Leckie* assigned his property, real and personal, to the defendant *Shaw* and one *McIntyre* (since deceased), and *Shaw*, out of the trust estate, paid to the government the balance due on the lot. The question argued before me was, whether *Shaw* is entitled to priority over the plaintiff's judgments in respect of the sum so paid? I think he is.

I think the case of *McQuestien v. Campbell (a)*, cited

(a) 8 Gr. 242.

1836. for the defendant, cannot be satisfactorily distinguished from this case. *McIntyre v. Shaw*. *Meyers v. The United Guarantee and Life Insurance Company* (a) is quite in point. There the holders of a policy deposited it as a security. The depositors charged their interest in favor of certain of the defendants, and afterwards assigned all their property to trustees for the benefit of their creditors. The trustees sold the property to one *Brown*. *Brown* advanced money to carry on proceedings to enforce the policy against the Company; and it was held to be clear that, in respect of these advances, he was entitled to priority over the antecedent charges. See also *Pitt v. Pitt* (b), *Angell v. Bryan* (c), *Gedge v. Watson* (d), *Brice v. Williams* (e).

HOLLAND V. MOORE.

Registry act—Unpatented lands.

The only instruments executed before patent which can be registered in the County Registry Office are such as create a mortgage, lien or incumbrance on the land.

A. bargained with B., the locattee of the crown, for the purchase of an unpatented lot free from incumbrances, and obtained a bond for a deed, and paid B. the full consideration. B. afterwards borrowed money on the security of the lot from C., who took out the patent, and conveyed the lot to B., and received from him a mortgage without notice of A.'s claim. After the loan had been agreed to, but before it was carried out, A. registered his bond in the Registry Office of the county where the land was situate. A bill by A. against C. for specific performance of the contract was dismissed with cost.

This cause came on for examination of witnesses and hearing at Goderich, before Vice-Chancellor *Mowat*, at the sittings in April, 1866.

Mr. *Toms*, for the plaintiff.

(a) 7 DeG. McN. & G. 112.

(c) 2 J. & LaT. 764.

(b) T. & R. 180.

(d) 25 Beav. 310.

(e) Wallis, 325.

Mr. Blake, Q.C., for defendant *Watson*. The bill was taken *pro confesso* against the defendant *Moore*. 1866.

Holland
v.
Moore.

MOWAT, V.C.—This is a suit for the specific performance of a contract, entered into between the plaintiff and the defendant *Moore*, and set forth in a bond executed by *Moore* in favor of the plaintiff on the 29th December, 1862. The plaintiff's part of the contract has been performed. What the defendant, on his part, undertook to do, was to convey the land in question to the plaintiff, free from incumbrances, and to pay the plaintiff \$500 in money. He did neither.

Moore was locatee of the land, and entitled to a patent on paying the purchase money. Some months after making his bargain with the plaintiff, he applied to the other defendant *Watson* for a loan of money on the security of the lot. *Watson* agreed to advance the money applied for; and it was arranged that *Moore* should assign the lot to *Watson* to enable the latter to obtain the patent in his own name; that *Watson* should pay, out of the promised loan, the amount due to the government, and, on receiving the patent, should convey the lot to *Moore*, and pay him the balance of the money, receiving at the same time a mortgage on the lot to secure the loan. All this was done before *Watson* had any notice of the plaintiff's claim. Judgment.

The plaintiff did not register, or attempt to register, his bond in the Crown Lands Office, but registered it in the Registry Office of the County of Huron in the interval between the agreement for the loan and the carrying it out. He now contends that his claim to the lot, being first in point of date, has priority over *Watson's* mortgage; and this is the question I have to decide.

Against *Moore* the bill has been taken *pro confesso*. *Watson* has answered, setting up amongst other defences

1866. that he is, as mortgagee, a purchaser *pro tanto* without
 notice of the plaintiff's claim, and that this court will
 therefore give no relief against him.

Holland
 v.
 Moore.

The learned counsel for the plaintiff contended that there was nothing in the statute cutting out his claim to the property. But it is not necessary for the defence that there should be any such enactment. It rests on the general doctrine of equity in favor of purchasers or mortgagees without notice, and it is for the plaintiff to find some statutory enactment that deprives the defendant of this defence.

Judgment.

The learned counsel referred to the 24th section of the U. C. Consolidated Statutes, ch. 80, as establishing the plaintiff's priority. That section refers to transactions in respect of unpatented land, and enacts that if any person through whom the patentee derived his title had, before the issuing of the letters patent, granted any mortgage, incumbrance, or lien on the land, the registration of the instrument shall have the same effect as if the patent had issued before such instrument was executed. But the plaintiff's claim is not of the description provided for by this enactment. He claims to be entitled to the whole estate, and not merely to a "mortgage, incumbrance, or lien" upon it. The legislature has seen fit to allow registration in the county where land lies, of any instrument affecting the land in law or equity when executed *after* the granting of the patent (a), and to give effect to such registered instruments as against subsequent transactions, though the parties claiming under the subsequent transactions had no notice of the registered instruments, and dealt in ignorance to them (b). But in regard to instruments executed *before* patent, parliament has expressly confined registration in the County Registry Office to mortgages, incumbrances, and liens; and I have no

(a) 22 Vic. ch. 89, s. 17.

(b) 22 Vic. ch. 89, s. 44 and s. 47.

power to extend the effect of such registration to other cases. 1866.

Holland.
v.
Moore.

The learned counsel for the plaintiff referred also to the 18th section of the act 22 Vic. ch. 2, as shewing that the only assignments which can be registered in the Crown Lands Office are unconditional assignments; and it was argued that the plaintiff held no such assignment; and that, being therefore in no default for not registering, he cannot be deprived of his priority by the omission to register. But the defence of a purchase for value without notice, when well founded in fact, excludes all prior equitable claims whether incapable of registration, or capable of registration but not registered.

The plaintiff does not seek to redeem the mortgage, and the bill must therefore be dismissed with costs.

WEIR v. MATHIESON.

Practice—Repayment of money on reversal of decree.

Pending the re-hearing of a cause a sum of money, which before suit had been tendered by defendants to the plaintiff on account of salary, was ordered to be paid by the defendants to the plaintiff as a condition of staying proceedings under the decree already pronounced. On re-hearing this decree was affirmed, whereupon the defendants appealed to the Court of Error and Appeal, when the decree was reversed; the bill ordered to be dismissed, and the cause remitted to this court to carry out that order.

Held, That the plaintiff was bound to repay the money so paid to him by the defendants, the duty of this court being, in carrying out the order of appeal, to place the defendants in the same position, as far as possible, as if the bill had been dismissed at the hearing.

This case is reported ante volume XI., page 383. From the decree there pronounced the defendants appealed to the Court of Error and Appeal, when the decree was reversed and the bill ordered to be dismissed with costs, as reported in the third volume of the Error and Appeal Reports, page 130. By the order then

1868.

Weir
v.
Mathieson.

pronounced the cause was remitted back to this court to carry out the order made on appeal. After the decree pronounced by the Chancellor on the hearing of the cause before him at Kingston, a motion was made by the defendants to stay proceedings thereon pending the re-hearing, which stay of proceedings was granted by the Chancellor on payment of six month's salary to the plaintiff, which sum, it was shewn by the evidence in the cause, had been offered by the defendants to the plaintiff before bill filed, and which sum the defendants accordingly paid to the plaintiff.

Mr. *J. McLennan*, for the defendants, in moving for an order to carry out the directions of the Court of Appeal, asked that the defendant might be ordered to refund the amount so paid to him, as also all costs paid by the defendants.

Argument.

Mr. *Cattanach*, contra, objected to the order containing any such direction, the amount paid having been so paid as the price of an indulgence conceded to the defendants, not as any portion of the relief granted by the decree.

SPRAGOE, V. C.—The decree made by this court restrained the defendants, the trustees of Queen's College, at Kingston, from in anywise interfering with or impeding the plaintiff in the discharge and performance of the duties of his office as professor, and from withholding from him the salary and emoluments payable in respect thereof.

The order of the Court of Error and Appeal reverses the decree of this court, and refers it back to this court to carry out the order. The Court of Appeal held this court had not jurisdiction in the subject matter of this suit. It follows that the trustees were wrongly enjoined from withholding from the plaintiff the salary of his office; and this court, in carrying out the order made in appeal, must, as far as possible, place the

defendants in the same position as if the bill had been dismissed at the hearing. 1866.

Weir
v.
Mathieson.

The plaintiff does not deny that the trustees are entitled to receive back all moneys by them paid, whether into court or to the plaintiff, in respect of the salary of his office. The question that is raised is in regard to a sum of money ordered by the Chancellor to be paid to the plaintiff, upon the application of the defendants to stay proceedings in this court, pending the rehearing of this cause, as a condition to staying proceedings. The Chancellor's note in reference to this money is "upon payment or tender to plaintiff of the six months' salary tendered him, such payment to be without prejudice to either party, and payment into court of any arrears beyond that, execution of the decree to be stayed." The resolution for the removal of the plaintiff, after directing his removal, proceeds thus: "And that the treasurer do pay to him his salary in full to the end of the present session, and for six months thereafter in advance in lieu of notice." This is evidently the six months' salary which the Chancellor speaks of as tendered to the plaintiff. Judgment.

The plaintiff's contention is, that he ought not to be ordered to pay this sum, it being, as he says, the price exacted by the Chancellor as a condition for an indulgence. "Indulgence" is scarcely the proper word, as it has long been the practice of this court to stay proceedings pending rehearing, by analogy to the statute staying proceedings pending appeal. It was, however, a term imposed by the Chancellor as a condition for staying proceedings. But still it is put by the Chancellor, not as a sum of money arbitrarily fixed by him, by way of compensation, or as a condition,—as indeed it could not be,—but as salary, a portion of salary which he requires to be paid: considering it fair to the plaintiff and no hardship upon the defendants that it should be paid, inasmuch as it had, as his lordship put it, been

1866. Weir v. Mathieson. tendered to the one by the others. Then how would this court have dealt with this sum of money if at the rehearing it had come to the conclusion that it had no jurisdiction. It would find that it had erroneously assumed jurisdiction. It had enjoined the trustees from preventing the plaintiff from resuming his duties as professor, and afterwards had only stayed his doing so upon payment to him of a certain portion of his salary. All this was erroneous. If the first was erroneous, the second was necessarily so; and it would be the duty of the court to undo, as far as it could, what it had done in error. Besides, it had expressly, in regard to this very payment, saved the rights of the parties; "such payment to be without prejudice to either party." This must mean, that if upon re-hearing the court should hold that the plaintiff was not entitled to succeed he should repay the money; for otherwise the defendants would be prejudiced.

Judgment. The plaintiff contended, however, that he has a legal right to this sum of money. If he has, it would be because it is salary; and gets rid of the former objection, that it was not salary but a price paid for indulgence. But taking it to be salary, this court had no jurisdiction to enforce the legal right, and only directed its payment, as a consequence of holding the plaintiff not to have been removed from his office, and restoring him to the exercise of its functions. If the court had no jurisdiction to grant the major relief, it cannot grant the minor; and cannot now with any propriety try the legal right. Its plain course, I think, is to reinstate the parties in the position they would have occupied if this court had assumed no jurisdiction.

LATCH V. FURLONG.

1866.

Mortgage—Power of Sale.

It is the settled rule of equity, that a mortgagee in exercising a power of sale must take reasonable means of preventing a sacrifice of the property; hence, where a mortgagee took no means whatever for that purpose, and sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside.

This cause came on for examination of witnesses and hearing, at the sittings of the court in the Spring of 1866, before Vice-Chancellor *Mowat*, at Woodstock.

Mr. *Roaf*, Q.C., for the plaintiff.

Mr. *Blake*, Q.C., for the defendant *Joy*.

Mr. *Barrett*, for the defendant *Furlong*.

MOWAT, V.C.—This is a bill for a mortgagor to set Judgment.
aside a sale by a mortgagee under a power of sale contained in the mortgage. The mortgage bears date the 30th of September, 1863, and is made between the plaintiff of the one part, and the defendant *Furlong* of the other part, to secure \$300 and interest, payable in three annual instalments of \$100 each, the first payment to be made on the 1st of October, 1864. The property mortgaged is fifty acres of land in South Norwich, County of Oxford. By the power of sale, as appears from the pleadings, it was declared and agreed that in case the plaintiff made default in paying any of the instalments, and one calendar month should elapse thereafter, the said *Furlong* should be at liberty to enter into possession, and, whether in or out of possession, to sell and dispose of the land in such way and manner as to him should seem proper, and that he should convey the same when so sold, to the purchaser, and should stand possessed of the purchase moneys on trust, (1) to pay expenses, (2) to pay and retain for

1866. himself the mortgage money and interest, and (3) to
 Latch
 v.
 Furlong. pay the surplus to the plaintiff.

The plaintiff did not pay the first instalment when it became due, and the mortgagee, after making unsuccessful attempts to sell the mortgage, offered sheriff *Ross* to sell the mortgaged property, saying that "all he wanted was to get the money due him, and he would let the property go." On the 7th of January, 1865, the sale was made to the defendant *Joy*, through *Ross*, who says he acted in the matter for both parties; and the price accepted by *Furlong* was \$300.

The bill charges the mortgagee with fraud in making this sale, calls it a pretended sale, and alleges that he colluded therein with *Joy*, for the purpose of making and realizing for himself a large profit. I have no doubt that these charges are entirely groundless. Judgment. But the bill also alleges, that the price accepted was grossly inadequate, and that the mortgagee did not before selling make the reasonable exertions he was bound to make in order to obtain the fair value of the property, or in fact make any exertions whatever; and these charges are established beyond doubt or reasonable controversy.

Indeed the only evidence which the defendants have offered as to value, is that of the sheriff, who frankly says "he does not think \$300 was enough for the property in question," and that he thinks "the reasonable cash value of the property was \$500." But I have no doubt, from the whole evidence, that the cash value must be taken to have been over \$600. The defendant *Joy*, who had previously an interest in the adjoining fifty acres, refused after his purchase to take less than \$1000 for the land in question. The price accepted was therefore half, or less than half, the cash value of the property.

The defendants do not claim that the mortgagee made any exertions whatever to get a better price for the land. He himself admits, in his cross-examination, that he never advertised the property (a); and never tried to sell it to any one except to *Joy*, who made him, he says, an offer which he accepted. No intimation of the intention to exercise the power of sale was given to the plaintiff (b), or to his relative who was in possession of the property under him. This person is said to have a reputation that created difficulties in the way of selling the property advantageously. This is a very vague assertion, and no application was made to him for the possession, or for his concurrence in the sale, so as to remove any difficulty that his alleged reputation might create in obtaining a sufficient price.

1866.

Litch
v.
Furlong.

There is upon the evidence no room whatever for doubting, that, if proper steps had been taken by the mortgagee to obtain a fair price, \$600 cash, or more, would have been obtained for the property; and under these circumstances it is impossible to hold the transaction valid, so far as relates to the mortgagee. For "it is well settled that, though a mortgagee's power of sale confers a clear right, it must be exercised with a due regard to the purpose for which it is given. A mortgagee, with such a power, stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor, of any surplus that may remain" (c). Here the mortgagee was satisfied, as he told Mr. *Ross*, if he got what was due him. "All he wanted was to get the money due him, and he would let the property go."

Judgment.

(a) Vide *Marriott v. The Anchor Reversionary Company*, 7 Jur. N. S. 155; Sug. V. & P. 14th ed., p. 66, chap. 1, sec. 5, pl. 30.

(b) Vide *Anon.* 6 Madd. 10; Sug. V. & P. p. 62, 14th ed., ch. 1, sec. 5, pl. 13.

(c) *Jenkins v. Jones*, 2 Giff. 108. Vide *Mathie v. Edwards*, 2 Coll. 465; S.C. on appeal, 11 Jur. 761; and cases referred to *post*.

1866. He thus avowed, to the common agent of himself and the purchaser, a purpose of acting in entire disregard of the interest of the mortgagor, or of the value of the property, and to be satisfied with such a price as would secure himself." This conduct has often been reprobated, whether on the part of trustees for sale (a), or of mortgagees with a power of sale (b); for such trustees and mortgagees stand on the same footing (c).

Latch
v.
Furlong.

I think I must hold the purchase void as respects the purchaser, as well as a breach of duty by the mortgagee. Lord Justice Turner observed in *Davy v. Durrant* (d) that he could not "go the length of holding that, in the absence of fraud or collusion, a purchaser from a mortgagee with a power of sale, is bound to inquire what steps have been antecedently taken for the purpose of promoting the sale;" but the learned judge observed in the same case, that "of course he could not maintain a purchase at a fraudulent undervalue." Now I presume, that by a "fraudulent undervalue," in this connection, is meant a gross undervalue, such as shews either actual and intentional fraud, or gross negligence, constituting in the view of equity, a fraud on the mortgagor (e); and I think that the undervalue which is established in the present case is, under the circumstances, abundantly sufficient for this purpose (f). Had the mortgagee used any exertions, or, in the absence of such exertions, had there been any contrariety in the evidence as to the fairness of the price, I might have found reason to hesitate before avoiding the purchase; but under the actual circumstances, I see no room for hesitation.

Judgment.

(a) *Harper v. Hayes*, 2 Giff. 216; *Ord v. Noel*, 5 Madd. 438.

(b) *Faulkner v. The Equitable Reversionary Society*, 4 Drew. 355; *Richmond v. Evans*, 6 Gr. 508.

(c) See cases *supra*, Sug. V. & P. pp. 60, 65, 14th ed., ch. 1, sec. 5, pl. 1 & 26.

(d) 1 DeG. & J. 558.

(e) *Vide Oliver v. Court*, 8 Pri. 165; *Crawford v. Meldrum*, 3 U. C. Appeal, 113; and cases there cited.

(f) *Vide Oliver v. Court*, 8 Price, 165.

A good deal of evidence was given to shew that Mr. *Furlong's* position was one of hardship, and that he was guilty of no intentional wrong in the matter. It is not necessary to allude to this evidence further than to say, that it has satisfied me of his innocence in this respect. But the absence of intentional wrong is no excuse for having neglected, to the prejudice of the plaintiff, the plain duty which the law imposes on a mortgagee in the exercise of the rights which a power of sale confers upon him. The mortgagee's error may have been one of judgment, and from not having had his attention called to the propriety or the obligation of any other course than that which he pursued. But the rule is justly imperative—a mortgagee in these matters *must* act as a provident owner would; and *ignorantia juris non excusat*. What he is not familiar with, he must learn by taking counsel from those who can inform him. But as the plaintiff has failed to establish the fraudulent purpose which the bill alleges, the defendants may be excused from paying his costs Judgment of the suit up to the hearing (a).

1866.

Litch
v.
Furlong.

Declare that the sale to the defendant *Joy* is invalid, and should be set aside. Usual redemption decree. Plaintiff to pay costs subsequent to hearing.

(a) *Richmond v. Evans*, 8 Gr. 508; *Harper v. Hayes*, 2 Giff. 229.

1866.

YARRINGTON v. LYON.

Insolvency—Pleading—Administration.

A voluntary assignment to an official assignee under the Insolvent Act of 1864 (sec. 2), is not valid unless accepted by the assignee.

Every material allegation in a bill should be positive; and an allegation that, so far as the plaintiffs know, an assignee had not accepted the assignment executed by an insolvent, was held insufficient.

An assignment by an administratrix, of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed as administratrix.

Demurrer to bill.

Mr. *Blevins*, for the demurrer, referred to *Wilson v. Chisholm (a)*, *Davies v. Snell (b)*.

Argument.

Mr. *Boyd*, contra, referred to *Singleton v. Cox (c)*, *Torrance v. Winterbottom (d)*, *Hallock v. Wilson (e)*, *Battersby v. Rochfort (f)*, *Smith v. Stuart (g)*, *Ex parte Stephenson (h)*, *Ex parte King (i)*, *Lawrence v. Humphreys (j)*, *Story's Equity Pleadings*, sec. 153; *Fisher on Mortgages*, 190; *Cook's Bankrupt Law*, 287, 511.

MOWAT, V.C.—This is a demurrer by one of the defendants, *Lyon*, to the plaintiff's bill.

The plaintiffs are *Alvinza Yarrington* and the co-heirs of *James Sutherland*, deceased; and the bill is for the foreclosure of certain mortgages executed by the defendant *Lyman Lyon*, on the same property. The defendants are *Lyon* and *James McWhirter*, an official assignee in insolvency.

(a) 11 Gr. 471.

(c) 4 Hare, 326.

(e) 7 U. C. C. P. 28.

(g) 12 Gr. 246.

(i) 11 Jur. 4.

(b) 3 L. T. N. S. 394.

(d) 2 Gr. 487.

(f) 2 J. & La. 431.

(h) 3 Mon. & Ayr. 663.

(j) 11 Gr. 209.

The first mortgage was executed to one *Boice*, and by *Boice* assigned to the plaintiff *Yarrington*. No question arises in reference to this mortgage.

1866.
Yarrington
v.
Lyon.

The second mortgage was in favor of *Samuel B. Freeman* and *James Sutherland*. The third was to *Freeman* alone. *Sutherland* died intestate, leaving the plaintiffs *Sutherland* his co-heirs; his widow, *Margaret Sutherland*, took out letters of administration to his estate. *Freeman* thereupon assigned to the widow the mortgages to which he was a party and the lands thereby conveyed. The bill then states that, by indenture, dated as therein mentioned, the said *Margaret Sutherland* assigned to the plaintiff the mortgages and the moneys thereby secured, and professed to convey the mortgaged land to the plaintiff *Yarrington*.

The first ground of demurrer is, that *Margaret Sutherland* is a necessary party to the bill, and the reason offered in argument in support of it is, that the bill does not state that she assigned, as administratrix, the mortgage which was executed to her husband and *Freeman* jointly. I am clear that this was not necessary. If administrators assign what they have a right as administrators to assign, the assignment is valid, though it does not state that they assign as administrators. This ground of demurrer must therefore be overruled with costs.

Judgment.

The bill further states that *Lyon*, on the 5th of September last, executed an assignment of all his estate and effects to the other defendant *McWhirter*, an official assignee of the County of Oxford, under the provisions of the Insolvent Act of 1864; but the plaintiffs say that the said *McWhirter* has not executed the said assignment, or, so far as the plaintiffs know, accepted of the same, or in any wise acted under the provisions thereof, nor has the said assignment been deposited or

1866. filed in the office of the proper court in that behalf, or
Yarrington v. Lyon. enregistered in the registry office of the said county.

The second ground of demurrer is, that it appears by the bill that *Lyon* is an unnecessary party to the suit; and it is argued that execution or acceptance of the assignment was unnecessary to give it validity. I think the contrary clear, and this ground of demurrer must therefore be overruled also with costs.

It is objected, *ore tenus*, that the allegation that *McWhirter* has not accepted the assignment, should have been positive, and not merely "so far as the plaintiffs know." I concur in this objection. Every material allegation in a bill must be positive. In an answer it is necessarily otherwise, because an answer is sworn to. The objection should have been taken specially in order to entitle the defendant to the costs of it. I therefore allow this objection without costs.

It is further objected, *ore tenus*, that there is a misjoinder of plaintiffs, the plaintiffs *Sutherland* having no interest in the suit. This objection is good, but not having been taken on the record, it must be allowed without costs. The legal estate in the property was not in the deceased *Sutherland*, jointly with *Freeman* or otherwise, the same having passed to *Boice* under the previous mortgage, and it is now vested in the plaintiffs *Yarrington* under the assignment from *Boice*.

The plaintiffs must have liberty to amend.

1866.

ROWE v. THE LONDON AND LANCASHIRE FIRE
INSURANCE COMPANY.

Fire Insurance—Authority of Agents.

In the form of application used by an insurance company, and signed by an applicant for insurance, the following notice was printed: "Applications for insurance on manufacturing establishments where steam is used for propelling machinery, must be approved of by the head office at Montreal;"

Held, that this notice did not refer to a vacant distillery, which had not been in operation for some years, and which at the time of the application it was not contemplated to put in operation.

At the foot of a series of questions in the form of application, the following note was printed: "The applicant is requested to answer the above questions fully, as it is especially agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part, and be a condition of this insurance contract."

Held, that the request to give full answers could not be construed as a notice that such answers were indispensable to the validity of the contract, or to the authority of an agent to bind the company by an intermediate insurance, there being no pretence of the omission to give full answers having been fraudulent. When such is the intention of the company, distinct notice to that effect should be given.

This cause was heard before Vice-Chancellor *Mowat*, Statement.
at Goderich, at the sittings of the court in the Spring
of 1866.

Mr. *Blake*, Q.C., and Mr. *Macara*, for the plaintiff.

Mr. *Roaf*, Q.C., contra.

MOWAT, V.C.—In May, 1865, the plaintiff effected an insurance with the defendants' agent at Goderich, of a vacant distillery and its machinery, and received from the company a receipt for the premium, according to a form supplied to the agent by the company. The receipt was in the following terms: "London and Lancashire Fire Insurance Company, *Goderich* agency, *May 29th, 1865*. Mr. *James Rowe*, of *Elizabethtown*, having effected an insurance with this company (subject

1866. Rowe to all the conditions of its policies), upon *his distillery and Machinery, engine, boiler, &c., &c.*, for the term of twelve months from *May 27th, 1865*, to the extent of \$1000, and having paid the premium therefor, in the sum of \$45, this acknowledgment is given Insured until a policy be issued, agreeably to terms of application. This insurance is subject to approval of the head office, Montreal; if accepted, a policy will be immediately issued; if declined, the insured will be notified to that effect, and the premium returned, less the proportion for the time during which the risk was in force.

The Lon-
don & Lan-
cashire Ins.
Co.

H. B. O'Connor,
Agent at *Goderich.*"*

The application was enclosed to the head office at Montreal on the 1st of June, but, through some miscarriage, did not reach Montreal until November following; and before that date, namely, on the 27th of July, the premises were destroyed by fire. The company decline to grant a policy, or pay the insurance money. Hence the present suit.

Judgment.

The defendants do not dispute their liability in ordinary cases upon such a receipt as was given here, though it was not under the seal of the Company. The Court of Chancery in this country has repeatedly held that insurance companies are so liable (*a*). But the defendants dispute the plaintiff's right on several other grounds.

1. They contend, that, in the case of property like that in question, their agent had no authority to bind the

(a) Vide *Tucker v. The Provincial Insurance Co.*, 7 Grant, 122; *Penley v. The Beacon Ins. Co.*, *Ib.*, 130; *Walker v. Provincial Ins. Co.*, *Ib.*, 137; *S. C. on Appeal*, 8 Grant, 218; *Henry v. The Agricultural Mutual Ins. Co.*, 11 Grant, 125; *Molteux v. The Governor and Company of London Assurance*, 1 Atk. 545. See American cases to same effect, *Phill. on Ins.*

* The words in italics were the only ones written in the receipt, the other portion of the receipt being a printed form supplied by the company to their agents.

company by an intermediate insurance, and the liability of the company was not to arise until the approval of the head office should be given. This contention is founded on the following note, printed in the Form of Application supplied by the company, and a copy of which, after being filled up with the particulars desired by the agent of the company, was signed by the plaintiff's agent: "Applications for insurance on manufacturing establishments, where steam is used for propelling machinery, must be approved by the head office at Montreal before the company will be liable for loss or damage." But the distillery here was not in operation at the time of the application, and had not been for several years, nor was it in contemplation to put it in operation. There was a dispute about the title, which was not expected to be finally determined for six months after this time. The property, therefore, was not within the letter of the notice. This appeared from the terms of the application. It is obvious that the note did not contemplate a building or machinery not in use, for to such the reason for the extra caution did not apply; and it evidently did not occur to the company's agent, or to the plaintiff's agent through whom the insurance was effected, that the former had not the same authority in the case of this property as in ordinary cases. If the company meant the restriction to apply to buildings and machinery adapted, though not in use, for the purposes mentioned, it was their duty to employ terms expressing this distinctly, and without any ambiguity.

1866.
Rowe
v.
The Lon-
don & Lan-
cashire Ins.
Co.

Judgment.

If the effect of a policy, in the exact language of the application, would be to render the company liable, in the absence of an express stipulation to the contrary should the distillery be put in operation during the year, the company were free to guard themselves against any such possible increase of risk, by rejecting the application before the increased risk could have arisen.

1866.

Rowe
v.
The London & Lancashire Ins. Co.

2. The next objection taken on behalf of the company is, that some of the questions in the form of application were not answered; and the following note is relied on, which is printed at the end of the questions: "The applicant is requested to answer the above questions fully, as it is expressly agreed on the part of the applicant, that this survey, as well as the diagram of the premises, shall form a part and be a condition of this insurance contract." The defendants admit that Mr. O'Connor was their agent, but their contention is that his power to bind the company before the approval or rejection of an application at the head office must be taken to be confined to cases in which all the questions in the form are answered fully. But I do not see how I can assume that. The company have given no evidence of what the agent's instructions were.

Judgment. I think it impossible for me to hold, that when the company merely "request" full answers to all the questions, they meant to make, and have made, the giving of full answers to all a condition precedent to the validity of the contract. It is to the insurance contract that the note refers, and therefore rather to the insurance after it has received the approval of the head office than before; but it has not been contended, that a policy would be void wherever all the questions have not been answered; and if the policy is not rendered void in that case by the omission, how can I hold that the omission would avoid the insurance created by the contract of the local agent? The questions not answered are the following, to one or both of which it is contended that the plaintiff should have written an answer: "If mortgaged, have the principal and interest been regularly paid when due?" "If encumbered, state to what amount?" I do not perceive that these questions, or the answers to them, are referred to in any way in the policy or conditions indorsed. False answers would, notwithstanding, vitiate a policy; but in the absence of fraud, which is not

pretended here, the omission to answer some of the questions would have no such effect. On the contrary, I think that the note is quite consistent with its being the understood practice of the company that its officers may, in their discretion, dispense with written answers, or full answers, to any of the questions; and if this was contrary to the purpose of the company, they could easily have placed the point beyond doubt, by declaring that unless all the questions were answered fully, the company would not be liable for loss or damage occurring before the application had the approval of the head office, as they have stated in the note as to machinery.

8. It is further contended on behalf of the defendants that, in the answer to one of the questions, the title of the plaintiff is untruly stated to be that of "mortgagee in possession." A suit is pending as to the title of the property; and before the application in question was made, this court had pronounced a decree according to which the plaintiff was a mortgagee, as stated in his application. From this decree an appeal has been brought, in which the appellants insist that the plaintiff here has no interest whatever in the property. But as long as the decree remains unreversed, I must hold that the plaintiff truly stated that he was interested as a mortgagee. However, he is not entitled to receive an amount exceeding his interest, whatever it was; and the decree should be so framed as to prevent such a result.

Declare that the defendants are liable to pay to the plaintiff the loss sustained by him by the fire in the pleadings mentioned, or so much thereof as the defendants would have been liable for if a policy had been executed upon their application, in the terms and on the conditions of the printed form in evidence, with interest, as by the said conditions provided. Order, that, having reference to this declaration, the Master at Goderich do take an account of what is due the plaintiff for principal

1866.

Rowe

The London & Lancashire Ins. Co.

Judgment.

1866. and interest in respect of the said loss; and the amount is to be paid into court, with liberty to the plaintiff to apply in respect thereof as he may be advised. The defendants must pay the costs of the suit.

SMITH v. REDFORD.

Sale for Taxes—Collector.

To prove payment of taxes it is not necessary to shew that the collector was duly appointed; it is sufficient to shew that he acted and was acknowledged as such.

To a suit by an owner to set aside a sale for taxes, the plaintiff offering to repay the purchase money with interest, the corporation of the county municipality is not a necessary party.

Statement. This cause came on for the examination of witnesses and hearing, before Vice-Chancellor *Mowat*, at the sittings of the court at Stratford, in the Spring of 1866.

Mr. *Roaf*, Q.C., for the plaintiff.

Mr. *McCulloch*, for the defendant.

Mowat, V.C.—This is a bill to set aside a sale for taxes of certain unoccupied village lots belonging to the plaintiff in St. Mary's, County of Perth. The sale took place in 1861, and was for the taxes of 1854 and 1858. The defendant does not appear to have taken possession of the lots, and the plaintiff has continued to be assessed for them ever since the sale.

The plaintiff alleges that the taxes for 1858 were duly paid by him to the collector before the latter returned his roll to the county treasurer, and he claimed at the hearing to be entitled on this ground to a decree, on the authority of *Irving v. Harrington (a)*.

The learned counsel for the defendant did not dispute

(a) 12 Gr. 179.

the decision pronounced by my brother *Spragge* in that case, but contended that there was not sufficient evidence of the taxes having been paid. Payment was proved by producing the receipt of *Sparrow*, the collector, who is now dead, and also producing the roll returned by him to the treasurer, on which the payment is duly entered in *Sparrow's* hand-writing. It was contended that a by-law appointing *Sparrow* should be produced. But if he acted and was recognized as collector, the payment to him was good, even if there was an irregularity in the mode of his appointment. I think that the production of a by-law was not necessary.

1866,

Smith,
v.
Redford.

The only other objections taken to the plaintiff's right to a decree, were for want of parties. It was contended that *Sparrow's* representative was a necessary party; but for this contention there is no pretence. It was contended also, that the corporation of St. Mary's was a necessary party to the suit. The plaintiff offers by his bill to repay to the defendant the amount of his purchase money, with interest, receiving credit for some stone which the defendant is alleged to have taken from the lot since his purchase, without the plaintiff's knowledge. This offer seems to remove all occasion for the presence of either the county or village corporation as a party to the suit. Judgment.

As the sum is small, I hope the parties will agree as to the amount. The decree will declare that the sale should be set aside on payment of what is due to the defendant in respect of his purchase money; and if the amount is not agreed to, there will be a reference to ascertain it, and further directions and costs will be reserved. If the amount is agreed upon, the decree will direct a reconveyance on payment, or a vesting order, at the plaintiff's option; and the decree will direct the defendant to pay the plaintiff's costs.

1866.

GORDON V. YOUNG.

Insolvent Act—Preference.

The Insolvent Act of 1864 does not invalidate conveyances previously executed, and which were valid at the time of their execution.

A mortgage of chattels to a creditor by a person in insolvent circumstances, not made with the intent of giving such creditor a preference, but under pressure, and to obtain an extension of time, under the expectation of being thereby enabled to pay all his creditors in full—is not void under the enactments against preference—(22 Vic. ch. 26, sec. 18).

Examination of witnessess and hearing, before Vice-Chancellor *Mowat*, at *Goderich*, in the Spring of 1866.

Mr. Toms for the plaintiff.

Mr. Blake, Q.C., for the defendant.

Judgment. *MOWAT*, V.C.—The plaintiff in this case is assignee under the Insolvent Act of the estate and effects of *Thomas B. VanEvery* and *George Rumball*, forwarders and produce dealers, and the object of the suit is to impeach two bills of sale, by way of mortgage, executed by *VanEvery & Rumball* on the 29th of June, 1864, whereby they bargained and sold to the defendants *Young & Law* certain shares in two schooners, subject to redemption on payment of an antecedent debt due *Young & Law*, amounting to \$24,563.55, and which was, by the terms of the mortgages, to be paid, with interest, at certain future dates therein specified.

The plaintiff charges, and the evidence, I think, establishes, that, at the time these instruments were executed, the debtors were in insolvent circumstances, and unable to pay their debts in full. I think it proved, also, that the mortgages were executed by them reluctantly, and under great pressure on the part of *Young & Law*; that *Young & Law* were at the time aware of the embarrassments of the debtors; but had

reason to believe they were solvent, the debtors having taken the utmost pains to satisfy them that this was so. The evidence establishes, that the debtors expected they would be able, if allowed to go on with their business for 1864, to pay all their debts in full; that their object in consenting to give the mortgages was to secure the extension of time thereby given, so as to enable them to go on with their business; that they considered the transaction for the benefit of all their creditors; and that they had no desire to give a preference to *Young & Law*, if they could avoid it.

1866.

Gordon
v.
Young.

Relieved, by giving the mortgages, from the pressure of this large debt, they proceeded with their business, but the season proved a disastrous one to them. They met with heavy losses in their business; their property became depreciated in value; and on the 31st of December they executed a voluntary assignment to the plaintiff under the Insolvency Act (1864).

Judgment.

It is now contended on behalf of the plaintiff that the mortgages are void under this act. But it is admitted that they were executed before the act was passed; and I am clear that, if valid when executed, the statute has not the effect of destroying their validity.

The learned counsel for the plaintiff further contended, that the mortgages were void under the enactments against preferences by insolvent debtors (a). Conveyances of chattels by a person in insolvent circumstances, made "with intent of giving one or more of the creditors of such person a preference over his other creditors," are thereby declared void as against creditors. I think that, under this enactment, a mortgage made to a creditor without any such intent, and under the influence of pressure on the part of the creditor, is not void, under the circumstances in evidence

(a) 22 Vic. ch. 26, sec. 18.

1866. here, though the effect of the transaction may ultimately be to give a preference over the other creditors.—
 Gordon v. Young. Vide *Harrison v. Tuer* (a), *Gottwalls v. Mulholland* (b),
The Bank of Toronto v. McDougall (c), *The Bank of Australia v. Harris* (d), *Bills v. Smith* (e).

The bill must, therefore, be dismissed with costs.

KNAGGS V. LEDYARD.

Sale of lands for taxes—Sheriff.

At a sale for taxes, where less than the whole lot is sold, the sheriff should designate in some way the portion sold or offered for sale so that bidders may know what portion they are bidding for.

Where a sheriff sold 185 acres out of 200 for taxes, and gave a certificate merely describing the land sold as the west part of the lot, comprising 185 acres, and no further intimation was given by the sheriff of the portion of the lot he was to convey until the deed was executed, the sale was held invalid.

Statement. This cause came on for the examination of witnesses and hearing, before Vice-Chancellor *Mowat*, at the sittings of the Court, held at London, in the Spring of 1866.

Mr. *Blake*, Q. C., for the plaintiff.

Mr. *Roaf*, Q. C., for the defendant.

MOWAT, V. C.—This cause was heard before me at London, on the 18th of April, 1866.

The bill in the cause was filed on the 25th of May, 1865, and relates to a parcel of land in Enniskillen which was sold for taxes, on or about the 27th of October, 1863, and conveyed to the defendant as the

(a) 14 U. C. C. P. 449.

(b) 15 U. C. C. P. 63.

(c) *Ib.*, 475.

(d) 8 Jur. N. S. 181.

(e) 11 Jur. N. S. 155.

purchaser on the 16th of February, 1865. The purchase money was \$144.73. This, I may observe, was not a sixth part of the value of the property at the time, as appears from the defendant's own deposition. Afterwards, and before he got his deed, he appears to have valued the land at more than twelve times what he had paid, and within two months after getting his deed he admits having valued it at twenty-five times its cost. The plaintiffs have entered into no other evidence as to value. The bill states that the lot belonged to one *William Knaggs*, of Etobicoke; that he died intestate in 1858; that the plaintiffs are his heirs; and that they had no notice of the sale until after the sheriff's deed was executed. The title of the plaintiffs is for the present purpose admitted on the part of the defendant. The lot is a wild lot, of which no one is in actual possession. The object of the suit is to set aside the sale as invalid.

1866.
Knaggs
v.
Ledyard.

The bill insists on several grounds of objection to the sale. As to most of these there was no evidence on either side, each party insisting that the onus of proof was on the other; and if the case had turned on these objections, I think it would be my duty to give to the party whom I should decide to be in default, an opportunity (on payment of costs) of supplying the necessary evidence on a new hearing of the cause, or in some other way. But my opinion being in favor of the plaintiffs on an objection in regard to which the evidence is full and clear, I shall pass by the other objections without further observation.

Judgment.

The sale was of 185 acres, part of a lot of 200 acres, the taxes in arrears being in respect of the whole lot; and the bill alleges that the sheriff, in making the sale, did not designate what particular part of the lot he offered for sale; that, at the time of the defendant being declared the purchaser, it was not ascertained where the parcel of 185 acres was situated, or how the

1866. same should be known or described; and that the
 Knaggs sheriff's certificate did not properly describe the por-
 v. tion sold. The truth of these statements is established
 Ledyard. by the defendant's depositions and the production of
 the sheriff's certificate given to the defendant at the
 time of the sale.

The defendant says in his deposition: "The sheriff did not specify what part of these lots was being sold. I first learned what part of the lot I was getting when I got my deed. * * Nothing whatever was said at the sale as to the part of this lot I had purchased. I left it to the sheriff to give what part he thought fit." The certificate merely says, "the west part of lot No. 31, in the second concession of the township of Ennis-killen, that is to say, 185 acres thereof."

Judgment. Now there was plainly no sale, and could be no sale, of any particular part until that part was designated; and, as it is confessed that this was not done until long after the alleged sale, an element essential to the validity of the transaction was wanting (*a*).

I must presume that the intention of the legislature was, that a sheriff should let bidders know what part he is selling and they are buying. This is the reasonable course; and I find in the statute no trace whatever of an opposite course having been contemplated.

The 137th section of the Act (*b*) provides, that "the sheriff shall sell by public auction so much of the land as may be sufficient to discharge the taxes, &c., selling in preference such part as he may consider it most for the advantage of the owner to sell first." To sell so many acres, to be thereafter selected by the sheriff, cannot be supposed to have been the intention of this enactment. Formerly a uniform method was prescribed by statute as to the portion to be sold, leaving the

(*a*) Vide *Templeton v. Lovell*, 10 Gr. 216.

(*b*) 23 Vic., ch. 55.

sheriff no discretion in the matter. The direction to the sheriff was then as follows: "He shall begin at the front angle on that side from whence the lots are numbered, and measure backward, taking a proportion of the width corresponding in quantity with the proportion of each particular lot in regard to its length and breadth, according to the quantity required to make the sum demanded." (a) This method can only be applicable where but a small part of the lot is sold. To set off in this manner 185 acres out of 200 would be absurd; the possibility of selling so disproportionate a part, I presume, was not in the mind of the legislature at that early period. In some cases the old method may still be the best; and whenever the sheriff considers that it would be more for the advantage of the owner that some other part of the lot should be sold, he is now authorized and required to sell that other portion. But if he makes no announcement at all of the part he is selling, he seems clearly to fail in the duty which belongs to the conduct of such sales. Judgment.

1866.

Knaggs
v.
Ledyard.

The 140th section of the present act (b) provides that the sheriff shall give a certificate to the purchaser, "stating distinctly what part of the land and what interest therein have been so sold (or stating that the whole lot or estate has been sold), and describing the same, and also stating the quantity of the land, the sum for which it has been sold, and the expenses of the sale." (c) Now, merely stating that the parcel sold is the west part is certainly very far from "stating distinctly what part of the land was sold," or from "describing the same," within the meaning of this clause.

The 141st section affords further express evidence in favor of the same construction. That section provides

(a) U. C. 6 Geo. IV. ch. 7, sec. 13.

(b) U. C. Consol. ch. 155, sec. 140.

(c) See also 16 Victoria, ch. 182, secs. 59, 60.

1866. that "the purchaser shall, on receipt of the sberiff's certificate of sale, become the owner of the land, so far as to have all necessary rights of action and powers for protecting the same from spoliation or waste," and that "he may use the land, without deteriorating its value." He cannot exercise these powers if the part he has purchased is not designated, or cannot exercise them without interfering with the owner's rights in the remainder of the lot.

Knaggs
v.
Ledyard.

If the express evidence afforded by these sections of the statute had been less strong than it is, the general principles of courts of equity in regard to trustees and agents for sheriff's sale would, I think, be sufficient to reach the case. It is well settled that those principles apply to public officers as well as to private trustees and agents.

Judgment. I think an objection like this is not removed by the statute of 1863 (a).

The sale must be set aside on the terms prayed. The plaintiffs having in vain before suit endeavored to induce the defendant to settle without a suit, I think that under all the circumstances of the case they should have their costs.

(a) Ch. 59, sec. 11.

1866.

HAMILTON V. DENNIS.

Will—Words of devise—What a sufficient seal.

A testator by his will, duly made and published in the year 1832, gave certain lands to his son J. D., "for his children," adding, in the concluding paragraph, "any other lands I may now or hereafter have I may add." *Held*, that the words of devise carried only a life-estate; and as to these words, that they expressed only, a possible intention of the testator at some future time of making a devise thereof.

A deed had been duly signed by the parties; but instead of any wax or wafer being affixed thereto for seals, slits had been cut in the parchment, and a ribbon woven through, so as to appear on the face of the document at intervals, opposite one of which each of the parties to the deed signed. *Held*, a sufficient execution of the instrument.

This was a suit by a judgment creditor, instituted for the purpose of rendering liable to sale certain lands alleged to be held by the defendant *Joseph Dennis*, in trust for his son *John Stoughton Dennis*.

The cause having been put at issue, evidence was taken therein before Vice-Chancellor *Spragge* at the sittings of the Court held in Toronto, in the spring of 1866, from which it appeared that by a will made in 1832, *John Dennis*, the father of *Joseph*, after giving a life-estate in his lands to his widow, devised certain of them, situate on the Humber, "to *Joseph* for his children;" and concluded with the words: "Any other lands I may now or hereafter have I may add;" that in 1854, the children of *Joseph Dennis* had executed a quit-claim to him of the Humber property; but the instrument had no seal other than those formed by running a piece of ribbon through slits in the parchment, thus causing a piece of the ribbon to appear on the face of the deed opposite each grantor's name. At the time of the testator's death he was possessed of real estate in the city of Toronto which was not specifically devised. The evidence further shewed that the defendant *Joseph* had himself looked upon the deed as inoperative by reason of the want of seals to it.

Statement.

1866.

Hamilton
v.
Dennis.Mr. *McGregor*, for the plaintiff.Mr. *Hillyard Cameron*, Q.C., and Mr. *Bell*, Q.C.,
for the defendants.

The points relied on by the plaintiff were, that the deed of 1854 was void for want of a seal, there being no impression or anything on which an impression could properly be made representing a seal; and being voluntary this court would not enforce it so as to deprive a judgment creditor of the means of enforcing his claim: also, that the lands in Toronto passed under the concluding words of the will, along with the property on the Humber; otherwise those words were rendered wholly inoperative, while the intention of the testator was clear that they should pass these lands.

Argument. These points were contested by the defendants, who contended that the instrument of 1854 must be deemed to have been duly sealed, as that appeared to be the intention of the parties—that the will passed only an estate for life in the Humber lands to the defendant *John Stoughton Dennis*, there being no words of inheritance used in the will which was executed prior to the statute effecting a change in the rules of construction in that respect (1834); and that the concluding words of the will expressed only a possibility that the testator would at some future time devise such other lands.

Clement v. Donaldson (a), *Stewart v. Clark* (b), *Warren v. Lynch* (c), *Challenge v. Sheppard* (d), *Smith v. Smith* (e), *Trent v. Hanning* (f), *Wilkinson v. Adam* (g), *Pillow v. Roberts* (h), *Foster v. Geddes* (i), *Jarman on Wills*, vol. 2, page 765, rule 16. *Cruise's Dig. Feoff*, sec. 6, vol. 4, were referred to.

(a) 9 U. C. Q. B. 2

(c) 5 John. 239.

(e) 11 C. B. N. S. 121.

(g) 1 Ves. & B. 466.

(i) 14 U. C. Q. B. 239.

(b) 13 U. C. C. P. 243.

(d) 8 Term. Rep. 507.

(f) 7 East. 97.

(h) 13 Ves. 472.

SPRAGGE, V.C.—The plaintiff is a judgment creditor of *John Stoughton Dennis*, a son of *Joseph Dennis*. *Joseph Dennis*, who is still living, being the eldest son and heir-at-law of the testator, *John Dennis*, who died in 1832.

1866.

Hamilton
v.
Dennis.

I have carefully and repeatedly read the testator's will, which is dated 28th February, 1832, and do not find that any estate other than for life is given by the will, construing it by the rules of construction which prevailed before the act of 1834. The devise of one parcel to the heir-at-law himself is a peculiarity. It would indeed seem absurd to devise it to him for life, when he would take the remainder as heir-at-law; but it is not stranger than the case of a devise to two or more, one of whom is the heir-at-law, share and share alike; and such devise has been repeatedly held to convey only an estate for life. I have very little doubt that the testator in this case intended that some at least of his devisees should take in fee; but under the old rule of construction the actual intentions of testators were, in very many cases, disappointed; and it was to remedy this that our act of 1834, and the corresponding act in England, were passed.

Judgment.

I cannot see that there is anything in the concluding words of the will: "any other lands I may now or hereafter have, I may add."

Assuming that the words, "I give to *Joseph Dennis*, for his children, all the lands I have on the Humber, being 556 acres more or less," make *Joseph*, the heir-at-law, trustee, and his children, among them the execution debtor, *cestuis que trust*, the question arises whether the instrument of the 9th August, 1854, is duly executed. By that instrument all the children of *Joseph Dennis* concurred in conveying the 556 acres on the Humber to their father in fee for the purpose, as the instrument recites, of settling doubts—the grantors relying upon

1868. his parental affection in regard to his disposition of it. The son *John Stoughton* was not then, it is in evidence, in embarrassed circumstances. There is no reason to believe that the conveyance was made for any other reason or purpose than those expressed.

Hamilton
v.
Dennis.

Judgment.

The objection to this instrument is, that it is not under seal; and the old rule, that it requires a wafer or wax, or at least something adhesive, is invoked. But that rule was denied, I may almost say scouted, by Lord *Denman* and Judges *Williams* and *Wightman*, in the *The Queen v. St. Paul's Covent Garden (a)*. The instrument there was an order of justices—a printed form filled up; and the seal was an impression of an emblematic group impressed in ink by means of wooden blocks upon the printed form, and intended to serve as seals for the justices who might sign the orders. Upon the objection being made, Lord *Denman* asked, "How do we seal our writs?" Upon its being urged that there must be a tenacious substance capable of receiving a visible impression, *Williams, J.*, asked, "How much substance?" And *Wightman, J.*, said, "Suppose a man with his seal impresses the paper." The order was held to be erroneous on another ground; but Lord *Denman* prefaced it by saying, "We do not wish to encourage the slightest doubt on this last point,"—the objection as to the seal. There has, no doubt, in former times been a great deal of technical learning upon this point. Afterwards substances, neither wax nor wafer, came to be in common use as the seals of parties executing documents; and counsel were forced to content themselves with arguing that there must be some tenacious substance; but even this was repudiated by the court. There must, I take it still, be something affixed to, or impressed upon the document, denoting that it is intended as a seal, or as standing for the seal of the party executing. Probably the word "sealed," in the

(a) 7 Q. B. 232.

attestation clause may not be sufficient, but there being something impressed or affixed in the position ordinarily occupied by a seal, and which is there for no other purpose than as a seal, I apprehend the Court will hold it to be a seal.

1866.

Hamilton
v.
Dennis.

In the document in question slits are made in the parchment, and a ribbon is passed through so as to appear at intervals on the face of the instrument, and the signatures of each of the parties is opposite one of these pieces of ribbon, the ends of the ribbon being fastened so that the whole should remain permanently affixed. An inspection of the document leaves no doubt of the intention of the parties signing their names to use and adopt these pieces of ribbon as their seals to the instrument; and I think it is now too late to contend that they are not the seals of the parties, because neither wax nor wafer, or other tenacious substance, is used.

Judgment.

My opinion, therefore, is, that *John Stoughton Dennis* did, by the instrument of August, 1854, effectually divest himself of any estate that he held in what is called the Humber lands, and that he has no estate in any other lands of the testator.

I must, therefore, dismiss the bill with costs.

1866.

GRIER v. ST. VINCENT.

Injunction—Practice—Raising money under by-law of Township Council—Assessment Acts.

Where a bill was filed to restrain proceedings by a township council on a resolution which named, it was alleged, a higher rate than was necessary to raise the sum required for county purposes, and the plaintiff allowed a term of the common law courts to pass before moving for an injunction, it was held—following the decision in *Carrol v. Perth*, ante vol. x, page 64—that he came too late, the proper course in such a case being to move at law to quash the resolution or by-law.

The Consolidated Assessment Act of Upper Canada, as affecting the question, considered.

The facts sufficiently appear in the head note and judgment.

Argument. Mr. *Strong*, Q.C., and Mr. *D. McCarthy*, for the plaintiff.

Mr. *Moss*, for the County of *Grey*.

Mr. *McMichael* and Mr. *A. Hoskin*, for the township of *St. Vincent*.

SPRAGGE, V. C.—This bill was filed on the 9th of March in the present year, and complains that the township of *St. Vincent* did, by its council, on the 30th day of September, 1865, pass a resolution authorizing the levying of certain rates upon the rate-payers of the township, for county and for township purposes, upon which the officers of the township have proceeded to levy rates. The gravamen of the complaint is, that the township by its resolution named a higher rate than, taking into account the value as revised of the assessed property of the township, was necessary for raising the sums required to be raised by the county for county purposes. The township by its answer admits the fact, and justifies it upon the ground that it was its duty to fix the rate, and in doing so to make "due allowance

for the cost of collection, and for the abatements and losses which may occur in the collection of the tax, and for taxes on the lands of non-residents, which may not be collected." The plaintiff denies this position. I refer to it here to shew that the question between the parties was raised directly by the resolution.

1866.

Grier
v.
St. Vincent.

In *Carroll v. The County of Perth (a)*, it was decided in this court, upon re-hearing, that a party complaining in this court of a by-law, came too late if he allows a term of the common law courts to pass before coming here. His lordship the Chancellor, by whom the judgment of this court was delivered, observing, "Our jurisdiction in such matters it seems to me is essentially preventive, and therefore ancillary. It should only be invoked and employed when 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." In this view all the members of the court concurred, and subsequent consideration has not led me to question its soundness. The Municipal Institution Act, section 195, in the Consolidated Statutes, places the resolution of a municipality upon the same footing in this respect as a by-law; the proper mode of impeaching either the one or the other is by application to one of the courts of common law to quash it, and the objection which was held fatal in *Carroll v. Perth*, applies, I apprehend, at the hearing as well as upon an interlocutory application for an injunction; for as at the hearing a perpetual injunction is asked, the reasons given in *Carroll v. Perth*, apply with as much force to the one as to the other.

Judgment.

There is a short point which would probably have

(a) 10 Grant, 64.

1866. been sufficient for the decision of the main question if
the plaintiff had come in time.
Grier
v.
St. Vincent.

The 11th section of "The Consolidated Assessment Act of Upper Canada" provides, that "the council of every municipality shall every year make estimates of all sums that may be required for the lawful purposes of the county, city, town, township or village, for the year in which sums are required to be levied, each local municipality making due allowance for the cost of collection, and for the abatement and losses which may occur in the collection of the tax, and for taxes on the lands of non-residents which may not be collected." The interpretation clause of the same statute has these words, "the words 'local municipality' does not include counties or union of counties, unless there is something in the subject or context requiring a different construction."

Judgment.

It is obvious that there is nothing requiring a different construction in this case; but, on the contrary, that the word 'local,' introduced where it is, was introduced advisedly, as committing to the local municipality a duty that more properly appertained to it than to a county. So read, section 11 has a direct application to what was done in this case. To apply it to its circumstances, it directs that the county shall every year make estimates of all sums which may be required for its lawful purposes, &c., each township making due allowance for the cost of collection, &c., which is precisely what has been done in this case. The bill does not complain that the county was wrong in naming gross sums for the amount required for county purposes; but that the township had no authority to make the allowance for cost of collection and losses, which it has done.

The interpretation clause of the act of 1856, which was

in force when *Fletcher v. The Township of Euphrasia* 1866.^a (a), was decided, does not contain the provision to which I have referred, nor indeed does section 31 of the Assessment Act of the same year, from which section 11 of the Consolidated Act is taken, contain the word "local," it seems to be a new provision introduced upon the consolidation of the statutes for the more convenient working of the act.

Grier
v.
St. Vincent.

Other points were raised in the case which it is not necessary to notice. The bill must be dismissed with costs. I observe that the same points of defence are taken at considerable length by the *Corporation of St. Vincent*, and by its officers, in separate answers. If the corporation and its officers appeared by the same solicitor, I do not see why this was done. It will be a proper matter for the Master to consider upon taxation. The costs of the application for the injunction are to go with the general costs of the cause.

Judgment.

McEDWARD v. GORDON.

Arbitrator—Award—Reception of affidavit evidence—Practice.

Where the umpire chosen upon a reference to arbitration had allowed an affidavit to be used in evidence, but he remarked, when it was read, that he would not attach any weight to it, and swore that in adjudicating upon the matters in difference he did not take such affidavit as evidence, or attach any weight whatever thereto, the award, notwithstanding, was set aside, but, under the circumstances, without costs.

This was a motion to set aside an award on the ground that the umpire named by the arbitrators had improperly allowed an affidavit made by a witness for the plaintiff to be used before him.

Mr. *Cattanach*, in support of the application.

Mr. *McGregor*, contra.

(a) 13 U. C. Q. B. 129.

1866. Amongst other cases—*Jekyell v. Wade (a)*, *Haigh v. McEdward* *Haigh (b)*, *Re Aitkin (c)*, were cited.
 v.
 Gordon.

FRAGGE, V.C.—Upon one of the grounds of objection taken by the defendant to the award, I cannot do otherwise than set it aside.

Judgment. An affidavit of *John McQueen* in support of the plaintiff's case, and upon the most material fact in question between the parties, was offered in evidence before the umpire, by the plaintiff's solicitor; the defendant's solicitor objected to its reception. It was alleged that the two arbitrators had agreed with the plaintiff to receive an affidavit from *McQueen*, because he lived at a considerable distance, and his personal attendance would involve trouble and expense; the umpire then allowed the affidavit to be read, but, as he says in his affidavit, remarked to the effect that he would not attach any weight to it in making his award, and he swears that in adjudging upon the matters in difference, he did not take *McQueen's* affidavit as evidence, or attach any weight whatever thereto. Mr. *Guthrie*, the defendant's solicitor, states the matter somewhat differently; he says that he objected strenuously to the reading of the affidavit, and when it was stated by the only arbitrator present that he had agreed to receive it, he, Mr. *Guthrie* still objected that it was improper; he then swears positively that the umpire said, that as the arbitrators had agreed to receive it he would receive it, but that he could not say what weight he might attach to it; that it was then read and put in, and as Mr. *Guthrie* believes, was taken away with the other papers by the umpire.

Whether the umpire or Mr. *Guthrie* is correct as to what passed, it is clear that the affidavit was read to

(a) 8 Gr. 363.

(b) 8 Jur. N. S. 983.

(c) 3 Jur. N. S. 1296.

the umpire, and it is conceded that it was not receivable in evidence. But it is contended that as the umpire declared he would attach no weight, and swears that he did attach no weight to it, its being read before him cannot affect the award.

1866:
McEdward
v.
Gordon.

The case of *Walker v. Frobisher (a)* is singularly like the case before me. The arbitrator in that case had closed the case, except that he was to be attended by some surveyors at a future day, the 10th of February; on that day, as he stated in his affidavit, several persons came into the room where he and the surveyors were, unattended by the solicitors on either side; and did mention some circumstances relative to the matters in dispute, of which the arbitrator, as he believed, made some minutes; but they were told by him that he had previously satisfied his mind on the subject, and that he would proceed to make his award. His affidavit further stated, that nothing which passed had the least weight with him; and that the award contained his decided opinion before that day and since. Upon this Lord *Eldon* said, that it did not appear to him that the arbitrator had by the award improperly exercised the authority given to him by the order of reference; but that on account of what took place on the 10th of February the award could not stand. After referring to what took place on that day, and the fact of the arbitrator taking minutes of what was said, so that it did not pass as mere conversation, his lordship added: "It does not appear that he afterwards held any conversation with the other party, or disclosed what passed to him; but the arbitrator swears it had no effect upon his award. I believe him. He is a most respectable man. But I cannot, from respect for any man, do that which I cannot reconcile to general principles. A judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind

Judgment.

(a) 6 Ves. 70.

1866. The award may have done perfect justice: but upon general principles it cannot be supported."

McEdward
v.
Gordon.

In the subsequent case of *Fetherstone v. Cooper (a)*, before the same learned judge, he referred to *Walker v. Frobisher*, and observed, that in that case he was of opinion that no court could permit an arbitrator to decide so delicate a business as whether a witness, examined without the knowledge of one of the parties, had an influence upon him or not.

In *Dobson v. Groves (b)*, which was before Lord Denman, C.J., and Williams and Coleridge, J.J., the arbitrator had received evidence improperly. I do not find that he made any affidavit, but Lord Denman, commenting upon what the arbitrator had said, viz., that nothing which passed at the meeting, where the improper evidence was received, could influence his decision, said, Judgment. "I think that on this subject we can draw no line, but must abide by the general principle, and oppose all attempts to explain by the bearing of particular points of evidence, whether the inquiry had, or by any probability might have had, an effect upon the arbitrator's decision. * * When once the case is brought within the general principle, by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection." Two cases from the Common Pleas, *Atkinson v. Abraham (c)*, and *Bignall v. Gale (d)*, were cited in support of the award. As to them Lord Denman said, that he would rather abide by the principle which Lord Eldon laid down in *Walker v. Frobisher*, than by those decisions.

I will add an observation of the late lamented President of the Court of Appeal of Upper Canada, in affirmance of the same principle (e). "If they (the

(a) 9 Ves. 67.

(b) 6 Q. B. 637.

(c) 1 B. & P. 175.

(d) 2 Man. & G. 830.

(e) *Boyle v. Humphrey*, 1 U. C. 1 fac. Rep. 159.

arbitrators by whom the award was made) had been informed of the substance of *Benedict's* statement, so that it could by possibility be supposed to have influenced their judgment, I should have felt bound to set aside the award, even had it been sworn, that it in fact did not influence the decision; because, in such cases, it is almost impossible to say with any certainty that the minds of parties, cognizant of certain facts sworn to, may not to some extent be guided and governed by them."

1866.
McEdward
v.
Gordon.

The application of this principle may operate inconveniently in some cases, but it is undoubtedly a sound principle; and I find it applied in cases where there was no reason to believe that the award was not a just one. I cannot do otherwise than apply it in this. The award must be set aside, but without costs.

Judgment.

1866.

CORNWALL V. HENRIOD.

Foreclosure—Marriage settlement—Costs.

C., the holder of two mortgages created by H., between whom and the niece of C., a marriage was about to take place, became a party to the marriage settlement, which embraced, amongst other property, the lands covered by the mortgages, and subsequently instituted a suit to reform the settlement, so as to leave his mortgages unaffected thereby, and also to reform a mortgage made by H. with the assent of C., after the marriage, to one J. M., for the benefit of creditors, or to postpone it to his own, and prayed a foreclosure or sale, but did not offer to redeem. After the hearing of the cause the plaintiff paid off this mortgage and other claims upon the estate, and thereupon filed a petition setting forth these facts, and praying a declaration that he was entitled to recover the amounts so paid by him, and the amount due upon his two mortgages, and in default of payment a foreclosure of the mortgage premises. *Held*, that all he was entitled to was a foreclosure against H., with the costs of an ordinary foreclosure suit, the plaintiff paying the costs occasioned by the other parts of his bill in which he was unsuccessful, as also the costs of the defendants appearing on the petition; the court being of opinion that he should, in the first instance, have drawn up a decree for redemption, and acted on it.

Quare.—Whether under the circumstances the plaintiff could, if objected to, even enforce his mortgage against H., or whether the plaintiff is not in the position of a mortgagee who had represented to the wife before marriage that he held no incumbrance on the settled property.

Although a bill does not pray redemption, but a decree for redemption is issued upon it, it would seem that a subsequent dismissal of the bill operates as a foreclosure.

Statement. The bill in this cause was filed by the holder of two mortgages created by the defendant *Henriod*, prior to his marriage with the other defendant, a niece of the mortgagee. The marriage of the defendants having been agreed upon, a settlement was drawn up and executed by the parties thereto, in which the plaintiff joined, he being one of the trustees of the settlement, and which embraced, amongst other lands, those on which the plaintiff held the mortgages. After the marriage, *Henriod* having become involved, created, with the assent of the plaintiff, a mortgage upon the settled

lands in favour of the defendant *James Magrath*, for the benefit of his creditors. For the purpose of carrying out the trusts, *James Magrath* borrowed a sum of money from the defendant *William Magrath*, to secure which *James* created a mortgage in favour of *William* upon his mortgage interest in the lands as such trustee, and the object of the present suit was to have it declared that the plaintiff, notwithstanding the existence of the marriage settlement, and the mortgage to *James Magrath*, was entitled to an absolute foreclosure of the premises, and for this purposes prayed that the settlement and mortgage might be reformed and corrected, so as to render each subject to the mortgages held by the plaintiff.

1866.
Cornwall
v.
Henriod.

The cause came on for the examination of witnesses and hearing before Vice-Chancellor *Spragge*, when the Vice-Chancellor held that the plaintiff had failed in his attempt to impeach either the settlement or mortgage to *Magrath*.

Statement.

After the hearing, and before any decree was drawn up, the plaintiff paid the defendant *James Magrath* his claim under the mortgage, also the claims of the creditors for whose benefit the mortgage had been created, and likewise paid to the defendant *William Magrath*, the amount due him under the mortgage created by *James Magrath* in his favor, and obtained assignments of their respective interests. Thereupon the plaintiff presented his petition setting forth these facts, and praying that he might be declared entitled to proceed to recover the amounts due upon his two mortgages, with the costs of a common foreclosure suit, increased by the correction of the marriage settlement, and the costs occasioned by the payment off or redemption of the several other parties, notwithstanding the marriage settlement, and also to recover the amounts paid to the creditors, and to *James* and *William Magrath*, and, in default of payment, that the equity of redemption might be foreclosed.

1866. Mr. *Fitzgerald* in support of the petition.

Cornwall,
v.
Henriod.

Mr. *Crickmore*, contra.

SPRAGGE, V.C.—The plaintiff is a mortgagee, upon two mortgages made by the defendant *Henriod*, prior to his marriage with *Mary Anne Cornwall*, a niece of the plaintiff. The mortgaged premises were, with other lands, the subject of a marriage settlement made prior to and in contemplation of the marriage; and to which settlement, the plaintiff was a party. The bill, conceding that the plaintiff's rights under his mortgages are affected by the marriage settlement, seeks to reform the latter, so as to leave the plaintiff's mortgages unaffected thereby. It also seeks to reform a mortgage made by *Henriod* (some time after his marriage) to the defendant *James Magrath* for the benefit of creditors, or to postpone that mortgage to his own. He was an assenting party to the mortgage to *Magrath*. The bill prays foreclosure (or sale) against all the defendants, and does not offer in any event to redeem any of them.

At the examination and hearing, I held that the plaintiff had failed to impeach successfully either the marriage settlement or the mortgage to *Magrath*. No decree was drawn up, but the plaintiff subsequently paid off or otherwise discharged the mortgage to *Magrath*, and the claims under it, so that that incumbrance is removed; and he now presents his petition in which he prays:—[Here the Vice-Chancellor read the prayer, as above set forth.]

That part of the prayer which refers to the marriage settlement, and the costs occasioned by the attempt to impeach it must of course be refused. All that the plaintiff can be entitled to is a foreclosure against *Henriod*, the husband, with the ordinary costs of a foreclosure suit, he paying the costs occasioned by the other parts of his bill in which he was unsuccessful.

It is objected that the plaintiff should have no relief; that his petition should be dismissed, on the ground that he did not by his bill submit to redeem *Magrath*, in the event of his failing in his impeachment of *Magrath's* mortgage. I think this objection cannot prevail.

1866.

Cornwall
v.
Henricd.

In *Connor v. The Bank of Upper Canada (a)*, the Chancellor doubted whether in a case somewhat similar it was not necessary to submit to redeem a mortgage, for the payment of which the plaintiff made a case to be discharged, in the event of that case failing. His Lordship's doubt was founded upon *Inman v. Wearing (b)*, in which Sir *J. L. Knight Bruce*, the Vice-Chancellor, held such submission necessary. He so held, as is plain from his language, in deference to the opinion of Lord *Langdale*, in *Dalton v. Hayter (c)*. But *Balfie v. Lord (d)*, before Lord *St. Leonards*, when Lord Chancellor of Ireland, a decision the other way, was not cited to the Vice-Chancellor. The learned Vice-Chancellor himself suggested only one reason in favor of the necessity of such a suggestion, which was this: "The dismissal of a bill to redeem otherwise than for want of prosecution, operates as a foreclosure. It may be questionable whether it would have this effect, if it did not pray for redemption; and that observation is certainly in favor of the *dictum* in *Dalton v. Hayter*." Upon this I venture to observe, that a plaintiff taking a decree to redeem, must thereby submit to all the consequences which, by the laws of the court, result from his failure to redeem. He does not by his *bill* submit to be foreclosed, in the event of his not redeeming, but only to redeem; so there is nothing in his bill more than in the decree which he takes, upon which the court can fasten, to foreclose him in case of default. As Sir *J. L. Knight Bruce* mentions in his judgment, a decree for redemption is not prefaced

Jur' ment.

(a) 12 Grant, 43.
(c) 7 Bea. 319.

(b) 3 DeG. & S. 733.
(d) 2 Dr. & War. 480.

1866. by reciting any submission to redeem. The court gives
 Cornwall him that relief, and if he takes a decree giving him that
 v. relief, it is a more solemn act than a submission by bill,
 Henriod. and I should apprehend cannot be less binding.

But however that may be, the objection cannot be made by the mortgagor, and in the present stage of the proceedings. The parties entitled, if any one, to take the objection, have submitted to be redeemed, and are in fact redeemed; and the mortgagor, against whom the prayer was correct, says now, that he ought not to be foreclosed, because the plaintiff did not take the proper position in his pleading, as to other parties. I should, if necessary, allow an amendment of the bill, the plaintiff submitting to redeem in the event of his failing in his case impeaching the marriage settlement and the *Magrath* mortgage; but I think it not necessary.

Judgment. Another point, however, has suggested itself to my mind: whether a foreclosure against *Henriod*, the husband, may not work an injustice to his wife? Whether the plaintiff is not in the position of a mortgagee who represented to the wife, before marriage, that he held no incumbrance upon the settled property? And whether he can enforce his mortgage against the husband, when the effect may be greatly to impoverish the husband, (the mortgages cover 100 out of 149 acres of land, which comprise the settled property), and consequently to affect her comfort and means of living? The point has not been raised in argument, and I have not looked into it. I only throw it out for the consideration of Mrs. *Henriod's* counsel.

The plaintiff is not entitled, in any event, to the costs of his petition, but the defendants to the costs of appearing upon it. He should have taken out his decree to redeem, and acted under it.

1866.

LOUCKS v. LOUCKS.

Demurrer—Multifariousness.

Although it would seem that a bill would be good, though relating to several transactions, if between the original parties to them; still, where a suit was instituted impeaching two separate and distinct transactions between the same parties, but one of the parties thereto was dead, and his interest in two several parcels of land, the subject matter of the suit, had passed to two separate sets of claimants, and who as such were made parties defendants, a demurrer for multifariousness was allowed.

Demurrer for multifariousness.

Mr. *A. Hoskin*, for the plaintiff.

Mr. *Read*, Q.C., and Mr. *J. A. Boyd*, contra.

SPRAGGE, V.C.—I have referred to a considerable number of cases, and my conclusion is, that this bill is multifarious. In *Campbell v. McKay (a)*, a leading case upon the point, in which Lord *Cottenham* reviewed most of the cases then decided upon the question, his lordship said:—"To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition is, upon the authorities, utterly impossible. The cases upon the subject are extremely various; and the Court, in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule." The bill in this case impeaches two transactions, both between the plaintiff and *William P. Loucks*, under whom the defendants claim: one took place in 1842, and was in respect of a parcel of land in Cumberland: the other in 1844, and was in respect of a parcel of land in Cornwall. The demurring defendants claim interests in the Cumberland land. Another set of defendants claim interests in the Cornwall land. The transactions impeached are entirely distinct. One

(a) 1 M. & C. 603.

1866. may be sustained and the other avoided. The only thing in common in regard to them is, that they were between the same parties.

Loucks
v.
Loucks.

If the plaintiff had filed his bill against *William P. Loucks* himself (and he lived about ten years after the later of the two transactions), I incline to think that he might have combined the two causes of suit in one bill. But the case is widely different under the circumstances that exist. It is a just ground of complaint with the demurring defendants that distinct matters, wholly unconnected, in which they have no interest, are united in the same record with the case which they have to answer; and that they are thereby put, in the words of the old form of demurrer, to great and useless expense; and that by combining the two causes of suit, they may be kept in court as litigants much longer than they otherwise might be.

Judgment. The objection is not a fanciful or merely theoretical one. The additional parties to be served, their answers to be got in, the obtaining of evidence for the two cases, the possible absence of witnesses on the one side or the other, to prove or meet the case in which the demurring parties are not interested, and consequent postponements or other delays, are all practical inconveniences to which it is unfair to subject them.

And, on the other hand, there are no compensating advantages of any account: separate answers, separate sets of evidence, and much of the machinery of two suits are inevitable; so that it is one suit in little more than in name: and is, almost necessarily, an inconvenient and unwieldy mode of procedure. In combining these two causes of suit, and in conducting them together, there may be much to impede, while there can be little to further the administration of justice.

The demurrer will be allowed.

1866.

TOMS v. PECK.

Amendment—Equitable interest subject to execution—Costs.

P. being in insolvent circumstances, and unable to obtain in his own name a lease of certain real estate, which he had previously held a lease of, procured one S. to apply for and obtain from the owner of the property a lease to him, S., under an agreement that P. should continue to work the same as a nursery, and from the profits reimburse S. certain advances, and also pay a debt due by P. to him, and that P. should retain any balance for his own benefit. On a bill filed by a creditor of P. seeking to have S. declared a trustee for P., and to have his interest sold. *Held*, that although there was no resulting trust, nor any trust manifested in writing, still that P. had such an interest under the lease as could be reached in this court by an equitable execution, on a proper case being made for such relief; and to enable the plaintiff to make such a case, leave was given to him to amend, with liberty to the defendants to speak to the cause after the amendments made; but the plaintiff was ordered to pay S. his costs; no costs being given against P., as he had not resisted the plaintiff's case, and the lease had not been obtained in the name of S. for any fraudulent purpose.

This cause came on for the examination of witnesses Statement. and hearing before Vice-Chancellor *Spragge*, at the sittings of the Court held at Goderich, in the spring of 1866.

Mr. *Toms*, for the plaintiff.

Mr. *Macara*, for the defendant *Sowerby*.

The bill was *pro confesso* against the defendant *Peck*.

SPRAGGE, V.C.—Several points were made at the hearing of this cause before me at Goderich. One only remains to be disposed of, viz., whether the defendant *Peck* has any interest in the existing lease from *McDonald* to the defendant *Sowerby*, which can be reached by legal or equitable execution.

I was referred to a case of *Hogan v. Vernon*, decided by the late Vice-Chancellor, at a previous sitting at Goderich. The bill was to set aside, as against credi-

1866. tors, a lease with right of purchase made by the Canada
 Toms Company to the wife of an insolvent debtor, at the
 v. Peck. instance of the debtor: the debtor paying certain rents
 in advance, and building a house worth £300 upon the
 land. The learned judge, I apprehend, in holding this
 lease and agreement void as against creditors, proceeded
 upon the ground that the debtor made in substance a
 voluntary settlement upon his wife of land in which he
 had an equitable interest by contract with the Canada
 Company. I am not informed of the grounds of the
 judgment; and I find, in the brief of the case given to
 me, a note that the decree was by consent; given, I
 suppose, upon an intimation of the opinion of the
 learned Vice-Chancellor.

That decision cannot govern this case, as proved in
 evidence. Here the intended lessee *Sowerby*, and the
 insolvent debtor *Peck*, both went to the agent of the
 owner of the land, *McDonald*. Each had his own
 Judgment. object in desiring a lease to be made to *Sowerby*. *Peck*
 was a nurseryman, and had worked the premises as a
 nursery for a number of years, under a lease from
McDonald, which had expired: and his object was to
 get it again into his hands; but being notoriously
 insolvent, and being also, as he well knew, distasteful
 to *McDonald*, he felt that it was useless for him to hope
 to get a lease from *McDonald* to himself. He owed
Sowerby some four or five hundred dollars, and sug-
 gested to him to apply for a lease of the place, which
 he did, and obtained it: agreeing with *Peck* that he
 (*Peck*) should work the nursery; that *Sowerby* should
 make him some advances for the purpose; and that
 the surplus of the profits, beyond what should be requi-
 site for the support of *Peck* and his family, should be
 applied in reimbursing *Sowerby* his advances and
 repaying him his debt; and that after that *Sowerby*
 should have no beneficial interest in the lease or the
 leased premises; but that the same should belong to
Peck. This is the agreement proved. *Peck* indeed

denies that the debt of *Sowerby* was to be repaid out of the profits, but, as he says, his advances for the nursery only, before the beneficial interest should accrue to himself; but I think, upon the evidence, the true agreement was the one I have stated. It was not reduced to writing. The agreement for the lease from *McDonald* was made with *Sowerby*, and it was agreed that it should be made to *Sowerby*. *McDonald* seems to have heard nothing of *Peck* in the matter; and his agent, *Mr. Gordon*, who partly surmised, and was partly informed by the parties of the nature of the arrangement between them, suggested that the position of *Peck* in the nursery would have to be that of a servant of *Sowerby*. No consideration moved from *Peck*, though it was attempted to be shewn. All that he did was to further the getting of the lease in interviews with *McDonald's* agent, with a view no doubt to the benefits to himself which he expected to flow from his arrangement with *Sowerby*. The lease was made to *Sowerby*, and he put *Peck* in possession of the place, who carried on the business of a nurseyman in his own name, without any objection on the part of *Sowerby*.

1866.

Toms
v.
Peck.

It is contended that *Sowerby* is a trustee for *Peck*. Judgment. I do not see how he can be made out to be so. There was clearly no resulting trust; there was no lease to *Peck*, intercepted by the promises to *Peck* to do any acts, if the lease was made to *Sowerby*; and there was no trust manifested in writing: the bill proceeds only upon the ground of trust. At the same time, I am inclined to think that *Peck* had, under his agreement with *Sowerby*, an equitable interest in the premises. It appears, by the evidence, that he was let into possession by *Sowerby*, under that agreement, and in part performance of it; and his position may be that of a purchaser (of a certain interest in the lease) under a parol contract partly performed. Such interest might be a very valuable one, and I apprehend that *Peck* does not stand upon the footing of a volunteer. Such

1866.

Tonis
v.
Peck.

interest, I incline to think, could be reached in this court by an equitable execution: the creditor alleging and proving a case which, if alleged and proved by *Peck* himself, would entitle him to specific performance. Such case, however, was not made by the bill, nor was it urged in argument. The case is rather peculiarly circumstanced. The bill is *pro confesso* against *Peck*; but its being so is only evidence: and it is disproved by the evidence in the cause. *Sowerby*, by his answer, states the case substantially as it is proved, and offers to be redeemed. He asks no more than he is entitled to; repaying of his advances, and payment of his debt.

Judgment.

To allow an amendment stating the case which is proved, would appear at first sight to be going a great way; but it would be in furtherance of justice, and cannot, I think, take either defendant by surprise, certainly not *Sowerby*, and I feel quite satisfied not *Peck* either. It would, however, be placing the plaintiff's right to sell his interest upon a new footing; and the defendants would be entitled to be heard upon it, if they should so desire.

If it is the desire of the plaintiff so to amend, in order to the sale, by this court, of such interest of *Peck* as, in my opinion, *Peck* has, he may do so; and the defendants are, in that case, to have one month to speak to the cause upon the case thus made and the case proved; such month to be computed from the service upon the defendants of the order to amend. The order to express that they have such leave to speak to the case.

Sowerby is entitled to his costs; and I cannot give costs against *Peck*, for he has not resisted the plaintiff's case; and the lease was not made to *Sowerby* instead of him to defeat creditors. It is clear from the evidence that it would not have been made to *Peck*, if he had desired it to be so.

1866.

MILLER V. OSTRANDER.

Infant—Exchange of lands—Costs—Fus Tertii.

An exchange of lands by an infant is not void, but voidable only, and as such may be rendered valid by acts of confirmation. Where, therefore, a party said to have been under age, and intoxicated when he made an exchange of lands, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was considered such confirmation as barred those claiming under him from impeaching the transaction.

Where defendants set up a defence to a bill, which if tenable would have formed sufficient grounds for their having taken steps to set aside the transaction, which it was now sought to enforce, but had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the court, under the circumstances, ordered them to pay the costs of the suit.

A bill having been filed by the assignee of the right to certain lands against the trustee thereof, without making the heir of the assignor a party, and the trustee set up a defence impeaching the assignment, and insisting that such heir was the party entitled to the conveyance, the court, at the hearing, ordered the cause to stand over, with liberty to amend by adding the heir as a party defendant.

The bill in this case was filed by *Richard Miller* Statement. against *James Ostrander*. From the pleadings and evidence in the cause, it appeared that the defendant, being the owner of the land in question as heir-at-law to his father, *Andrew Ostrander*, executed a bond in 1832 for the conveyance of them to his brother *Daniel Ward Ostrander*, on payment by him of various sums of money to different members of the family. The condition of the bond was to convey the lands in question to *Daniel Ward Ostrander* in fee, "at any time within ten years after the decease of *Jane Ostrander*, relict of *Andrew Ostrander*, deceased, or at any time as soon as the said *Daniel W. Ostrander*, his heirs, &c., shall have paid, without interest £50 to *James Ostrander*, £50 to *Andrew Ostrander*, £50 to *Loyal Ostrander*, to *Deborah Nevilles* £25, to *Elizabeth Erpingham* £25, to *Hannah Hilton* £25, to *Phæbe Calder* £25, to *Rachel*

1866. *Hewit* £25, to *Lewis Warner* £25, to *Charlotte Howe* £25, to *Martha Lafleur* £25, provincial currency; and to give the aforesaid *Jane Ostrander* one-third part of the produce raised on the aforesaid farms during her natural life, or £25 yearly, and one room for her own use; and if any of the now debts should appear against the aforesaid estate, then each of the aforesaid legatees should contribute toward the payment thereof according to the bequest they receive." *Daniel Ward Ostrander* entered into possession of these lands, and continued in possession of them until his death. He made a will, whereby he devised these lands to his son *Ward Ostrander*, in fee, absolutely, the same to remain under the control and management of his executors, whom he might thereafter appoint, until his son, *Ward Ostrander*, should arrive at and attain the full age of twenty-four years. He appointed, amongst others, *George Ostrander*, (whose real name was *George Munro Ostrander*,) son of *Andrew Ostrander*, executor of his will.

Statement.

After *Daniel Ward Ostrander's* death, *George Munro Ostrander* managed his estate as his acting executor. A sale of his chattels was made by his direction, and he managed the lands in question from the time of *Daniel Ward Ostrander's* death. *Ward Ostrander* sold and conveyed these lands to *George Munro Ostrander* on the 20th of June, 1849. It did not appear what the consideration for this sale was, nor was any evidence offered to shew whether it was paid. *Ward Ostrander* was a person of intemperate habits. He died in 1851, and probably before he had attained the age of twenty-four years, leaving his brother, *Warren Ostrander*, his heir-at-law. *George Munro Ostrander*, in 1859, sold and conveyed the lands in question to the plaintiff. It was shewn that there had been a continued possession under the bond to the time of the hearing, and some payments had been also made under it.

In the spring of 1859 *James Ostrander* demanded.

of *George Munro Ostrander* payment of what was due under the bond, who told him he had nothing to do with it, and referred him to the plaintiff, when *James Ostrander* said he had nothing to do with Mr. *Miller*, but should look to the property.

1866.
Miller
v.
Ostrander.

The bond was placed on its execution in the custody of one *Richard Warner* on behalf of both parties. In the spring of 1859 *James Ostrander* and *Warren Ostrander* applied to *Richard Warner* for the delivery of the bond, and *James Ostrander* having required *Warren Ostrander* to fulfil its provisions, and *Warren Ostrander* having declined to do so, the bond was delivered by *Richard Warner* to *James Ostrander*, who retained possession of it ever since.

This suit was instituted by the plaintiff, as the purchaser from *George Munro Ostrander*, against *James Ostrander* alone, to compel the specific performance of the agreement contained in the bond. Statement.

The defendant having answered the bill, the plaintiff filed a replication, when the cause was brought on for examination of witnesses and hearing before the late Vice-Chancellor *Esten*.

Mr. *Blake*, Q.C., for the plaintiff.

Mr. *James Boulton*, for the defendant.

The suit was resisted on several grounds, amongst others, that the bond was a voluntary one; that the purchase by *George Munro Ostrander* from *Ward Ostrander* was inoperative, and conferred no title; that *Ward Ostrander* was under age at the time it took place; that at all events he was under the age of twenty-four years, and that at any rate it occurred under such circumstances that a court of equity would not sanction or sustain it.

1866. The plaintiff, on the other hand, contended that the
 Miller bond was not a voluntary one, but founded on valuable
 Ostrander. consideration; that the evidence shewed that *Ward Ostrander* was of age when the sale took place from him to *George Munro Ostrander*; that he did not require to be of the age of twenty-four years in order to effect such sale, and without admitting that the sale was in any way objectionable, insisted that *James Ostrander*, the vendor and trustee, had no right to set up the *jus tertii*, or insist upon any defect in the sale from *Ward Ostrander* to *George Munro Ostrander*.

Statement. At the conclusion of the argument the Vice-Chancellor intimated that, in his opinion, the contract was founded on valuable consideration, and one which this court would specifically enforce. That it was a voluntary settlement as between *James Ostrander* and the other members of the family to whom sums were directed to be paid; but as between *James* and *Daniel Ward Ostrander*, it was a contract for valuable consideration. *Daniel Ward Ostrander* must have had the land on paying the money, and could have filed a bill against *James Ostrander* to compel him to convey on payment; so *James Ostrander* could have filed a bill against *Daniel Ward Ostrander* to compel him to pay on receiving a conveyance. If the money should be paid, the brothers and sisters must receive it, as the settlement was binding on *James Ostrander*; but they could never file a bill against *James Ostrander* to compel him to convey, but could have filed a bill against *Daniel Ward Ostrander* to compel him to pay, if he had received a conveyance.

That the contract clearly remained open; that the purchaser and those claiming under him had been in possession ever since it was made, and no step had been taken to put an end to it; on the contrary, it had been performed to a considerable extent, and so late as the spring of the year, 1859, *James Ostrander* acted

upon it, by demanding payment of the notes and back rents from *George Munro Ostrander*. That the scene enacted by *James* and *Warren Ostrander* before *Richard Warner* could avail nothing; that *James Ostrander* might have put an end to the contract if he had been so disposed, without the consent of his brothers and sisters, by means of a proper notice and default on the part of the purchaser, but if such a notice had been given to *George Munro Ostrander* after the sale to *Miller*, it would have been ineffectual even if *James Ostrander* had been ignorant of such sale; that *Ward Ostrander* must be deemed to have been of age when he made the sale to *George Munro Ostrander*, and that the execution of the deed executed on that occasion must be deemed to be sufficiently proved. The Vice-Chancellor also intimated the opinion, that it was competent to the purchaser to pay the sums stipulated to be paid at any time, and to claim his conveyance, which would require to be made subject to the provision for *Mrs. Ostrander*, although not free from doubt on this latter point, as possibly *James Ostrander* might not intend to part with the legal estate until the provision for his mother should have been fully satisfied; but that the other construction was a reasonable one, and fully secured the provision for *Mrs. Ostrander*, and comports with the form of expression, and the fair meaning of the condition of the bond; that the abstraction of the bond from the custody of *Richard Warner*, under the circumstances which have been mentioned, authorized a suit to restore it to proper custody. *Mrs. Ostrander* was not entitled both to her dower and the provision made for her by the bond, but that she had a lien upon the land for the amount of the notes; that *Ward Ostrander* could sell before he attained the age of twenty-four, at any rate he could disclaim the devise, in which case he would be entitled absolutely as heir-at-law.

On a subsequent day.

ESTEN, V. O., after stating the facts to the effect above

1866.

Miller
v.
Ostrander.

Statement.

1866. set forth, pronounced:—The important question however
 Miller
 v.
 Ostrander. remains, whether I can give any relief for the plain-
 tiff under the circumstances of this case, and in the
 present frame of the suit. It would be premature to
 express any opinion on the other points of the case
 until I had determined what course it would be right to
 adopt, in consequence of the defendant having im-
 peached the assignment from *Ward Ostrander* to *George
 Munro Ostrander*. The plaintiff, indeed, strongly
 disputes the right of *James Ostrander* to set up the
jus tertii. Upon this point I have read carefully the
 case of *Fulham v. McCarthy* in both reports of it (a).

Judgment. The bill in that case was filed by *Maria McCarthy*,
 a professed nun, and the two superioresses of the convent
 of which she was a member, to whom she had assigned
 her distributive share of her father's estate for the
 benefit of the convent, against *James McCarthy*, the
 brother of *Maria*, as the administrator of his father's
 estate, and the other children of the intestate, including
 one who had also become a member of the convent, and
 assigned her distributive share of her father's estate for
 its benefit, but who declined to be a co-plaintiff, although
 in her answer she expressed her desire that her assign-
 ment of the distributive share should take effect. In
 this case the brother, the administrator, distinctly raised
 the defence that his sisters were not free agents in
 making the assignments in question, and that those
 assignments had been unduly obtained; and the Lord
 Chancellor, in the House of Lords, expressly recognised
 his right to do so, although in the then frame of the
 suit, the contention must be unavailing, since both
 assignor and assignees were co-plaintiffs, and the
 defendant was certainly bound to pay one or the other.
 But it was decided that the suit was improperly consti-
 tuted; that the assignor was not a proper party; and
 that if the suit had been instituted by the assignee

(a) 1 House of Lords, 703, and 12 Jur. 757.

alone, the defendant could have raised the defence upon which he relied, since every defendant has a right to insist upon any infirmity in the plaintiff's title and probably, if he have notice, and neglect to do so, will be answerable to the injured party for the consequences. It is not very clear, from the judgment of the Lord Chancellor, how the case of the assignment of a legal chose in action is to be dealt with. In such case the assignor is confessedly a necessary party to the suit. If he be a defendant no difficulty will arise; but if he be a co-plaintiff, as he may be, the suit will be constituted as it was in the case of *Fulham v. McCarthy*, I presume that in such a case the defendant would be at liberty to shew that the assignor's name was used without authority or by coercion, and in that case the court would direct that he should be made a defendant. In cases of this description I apprehend the court will intend everything to have been *rite et solemniter actum* whether in the case of an assignment of an equitable interest, where the assignee is the sole plaintiff, or of a legal interest where the assignor and assignee are both parties; but if the defendant, liable to the one or the other, shews that the assignment was improperly obtained, or shews enough to induce the court to pause before giving effect to it, the court will decline to give relief to the plaintiff, or direct the assignor to be made a party, or a party defendant, in order that the question may be raised and properly discussed: in which latter case the result must generally, if not always, be that the assignor files a bill against the assignee in order to set aside the assignment, and the original suit be stayed until the cross-suit be ripe for hearing, and both suits be heard together. In the present case the transfer, which is impugned, is the transfer of an equitable interest. The legal estate in the lands is vested in *James Ostrander*. He is a trustee for some one; that is, either for *Mr. Miller*, or the heir of *Ward Ostrander*, who is *Warren Ostrander*, as already mentioned. *Warren Ostrander* is not a necessary, or, in the first

1866.

Miller
v.
Ostrander.

Judgment.

1866.
 Miller
 v.
 Ostrander.

instance, a proper party to the suit. If no difficulty had been suggested by the defendant, the court would have presumed everything to have been rightly done, and would have given the plaintiff, without hesitation, the relief that he seeks ; but the defendant has a right, according to the doctrine enunciated in *Fulham v. McCarthy*, to insist, and he has insisted, that an assignment, under which the plaintiff claims, was unduly obtained ; and if he has shown enough to create a well-grounded doubt of the *bona fides* and propriety of that transaction, it is the duty of the court to pause, and either to decline altogether to give the plaintiff the relief that he asks, or to direct such parties to be added, and such proceedings to be taken, as will insure a proper investigation of the matter in the first instance. Let me assume, for the sake, of the argument, that the assignment from *Ward Ostrander* to *George Munro Ostrander* was such an one as this court would not suffer to stand. Then if it were to order *James Ostrander* to convey the estate to *Mr. Miller* it might expose *Warren Ostrander's* title to danger, although he would not be definitively bound. If this is a correct view, the only question is, whether the defendant has shown enough to induce the court to hesitate before granting to the plaintiff the relief that he seeks. It would be premature to express any decided opinion upon the merits of the purchase between *George Munro Ostrander* and *Warren Ostrander*, but it is my duty to say, that having regard to the will of *Daniel Ward Ostrander* ; the age and character of *Ward Ostrander*, the relation in which parties stood towards each other ; and the circumstances of the transaction, I think I ought not to grant to the plaintiff the decree that he seeks, without further investigation and inquiry into the merits of that transaction. I shall, therefore, order the cause to stand adjourned, with liberty to the plaintiff to add *Warren Ostrander* as a party defendant, who will be entitled to answer the plaintiff's bill ; and the plaintiff is to be at liberty to file a replication to his

Judgment.

answer; and both parties are to be at liberty to go into evidence; but it is extremely probable, that in the event the court may require *Warren Ostrander*, if really desirous of questioning the plaintiff's title, to file a bill for the purpose; and no doubt much time would be saved by his doing so at once, if so advised. I reserve the costs for the present.

1866.
Miller
v.
Ostrander.

The plaintiff having amended his bill by making *Warren Ostrander* a defendant, the cause was again brought on for hearing, after the decease of Vice-Chancellor *Esten*, before Vice-Chancellor *Spragge*, when

Mr. Blake, Q.C., appeared for the plaintiff; and

Mr. Strong, Q.C., and *Mr. James Boulton*, for the defendants.

The objections urged by the defendants were similar to those taken on the first argument.

SPRAGGE, V.C.—In the judgment pronounced by the late Vice-Chancellor upon this cause being before him for judgment, before the addition of *Warren Ostrander* as a party defendant, he held the contract of sale between the defendant *James Ostrander* and *Daniel Ward Ostrander* a valid and subsisting contract; and that *James Ostrander* was a trustee for some one, that is, either for the plaintiff or the heir of *Ward Ostrander*, who is *Warren Ostrander*. He said that he thought *Ward Ostrander* must be deemed to have been of age when he made the sale to *George Munro Ostrander*; and intimated an opinion, which is not questioned, that it was competent for *Ward* to sell before attaining the age of 21, notwithstanding the provision in his father's will for placing the property under the control of trustees, until he should attain that age.

Judgment.

1866. *Warren Ostrander* would be entitled only in the event of his successfully impeaching the sale by *Ward* Miller
v. Ostrander. *Ostrander*, under whom he claims, to *George Munro Ostrander*, under whom the plaintiff claims; and in the event of the right to impeach it, first by *Ward*, and next by himself, remaining unaffected by confirmation, or by the dealings of one or the other of them, or other conduct.

I have considered the various points raised with a good deal of attention; but one or two seem sufficient for the disposition of the case: that is, the conduct and dealing of *Warren Ostrander*.

Ward Ostrander exchanged the land in question with *George Munro Ostrander* for certain land in the township of Crowland; and afterwards exchanged the land in Crowland for what is called in evidence, "the Judgment. tavern stand," and entered into possession of the latter and lived upon it for a considerable time. The exchange between *Ward* and *George* was open to the various serious objections pointed at in the judgment of the late Vice-Chancellor; besides which was the question, whether or not at the time of the exchange, *Ward* was not still an infant? Upon the whole of the evidence I incline to think that he had become of age, but whether he had or not, I think is not material, for it has been held that an exchange of lands to which an infant is a party is voidable only, not void; and, in this case, *Ward* having, after he became of age, occupied the land which he received in exchange; or, what is stronger, exchanged it for other land, and occupied the latter, the exchange became perfect (a).

The other grounds of objection, the relative situation of the parties, the alleged inequality of the contract, and alleged intoxication of *Ward* at the time he entered

(a) Co. Litt. 51 b.

into it, are grounds which go no further than to render a contract voidable, and it only voidable, capable of course of confirmation; and it follows necessarily that the party seeking to avoid them may, by his own acts, have disentitled himself to complain of them.

1866.

Miller
v.
Ostrander.

Ward Ostrander having exchanged the Crowland land, which he got from *George*, for the tavern stand, and having occupied the latter, made a mortgage upon it and died; and it came to *Warren*, who was his brother, as his heir; and *Warren* sold it to one *Robert Dougan*, who was then holder of the mortgage given by *Ward*, and the land was also subject to a judgment which had been recovered against *Ward*. *Dougan* paid *Warren* the purchase money. The date of the sale by *Warren* to *Dougan* is not given.

In the examination of *Warren* is this passage:—"I had heard that *Ward* was drunk and under age, when he gave the deed to *George*, and that *George* was his guardian; and I thought that gave me a claim as his heir." He does not say, when he first heard this, but that he had heard it when he, in company with *James*, got the contract of sale out of the hands of *Warner*. I think I may properly refer this knowledge or information to an early date. The conveyance from *Ward* to *George*, given upon the exchange, was made in June, 1849. *Ward* died in April, 1851. It was notorious in the family, of which *Warren* was a member, that *Ward* had been brought home by *George*, on the day of the execution of the deed, in a state of helpless intoxication; whence, and from some other circumstances, it was inferred in the family, that he was intoxicated when he executed the deed; the supposed infancy of *Ward* at the time would, it is morally certain, be a piece of information gained by *Warren* at no long interval afterwards. The fact of *George* being, as *Warren* terms it, guardian of *Ward*, was certainly known in the family; and *Warren* says he thought

1866. that these things (for so I understand his evidence),
 gave him a claim as heir of *Ward* to question the conveyance to *George*. He makes no distinction in point of time as to when he heard of these several facts, or as to when he came to the conclusion that they formed ground for questioning the conveyance to *George*. It would have been more satisfactory, if the evidence had been brought out more clearly upon this point. I think it is a proper conclusion, as to the facts, that he knew all before he himself came of age, and as to his rights arising out of them. The objection on the score of infancy, I must take to be known to every one of ordinary intelligence, and known to him therefore, at any rate, before he became of age. He does not say that he learned that drunkenness, or that the "guardianship," formed objections, at a later period, or after he himself dealt with the exchanged property, or rather the tavern stand, as heir of *Ward*. He came of age some two or three years after the death of *Ward*.
 Judgment. The exchange between *Ward* and *George* seems to have been spoken of in the family as a bad bargain for *Ward*; and it was thought that *Ward* had been taken advantage of. All the objections to it were probably canvassed and known to *Warren*; and, as he says, that he became acquainted with them, and does not say when; and as he became acquainted, as I conclude, with one or more of them before he dealt with the property, and he makes no distinction, I think I may properly conclude that he knew of these objections to the sale to *George*, and knowing them, sold the property to *Dougan*. The defendant *Warren* never asserted any rights arising out of these objections, or in any way questioned the validity of the exchange between *Ward* and *George*. *George* had been in continued possession of the land in question, and *Ward*, and after him *Warren*, had used and dealt with the land exchanged; and so matters stood when the bill was filed by a claimant under *George*, and then *Warren* is brought in by the vendor to contest the right

of the purchaser. These questions are raised for the first time, and then upon the answer of *James*, in June, 1859, ten years after the exchange, which is thereby brought in question. After this the bill was amended, and *Warren* filed his answer on the 17th of March, 1862.

1866.
Miller
v.
Ostrander.

There was then a completed contract perfected by conveyances in June, 1849; possession and acts of ownership by each in pursuance thereof for more than twelve years; the position of the parties and of the property changed in the meantime; and then the transaction impeached. *Warren* cannot be now in a better position than if he had filed his bill at the date that he filed his answer; and *James*, who has been adjudged to be a mere trustee to convey to the party entitled, has nothing now to say to the question. As between *Warren Ostrander* and *Miller*, *Warren* is in the position of a party filing his bill in March, 1862, to set aside the exchange made between *Ward* and *George Ostrander*, and the conveyances by which it was effected, so far as the property in question is concerned.

Judgment.

But what about the other property, and the terms upon which the conveyance to *George Ostrander* should be set aside, if at all. If *Ward*, before parting with the property which he received in exchange, had filed his bill to set aside the conveyance to *George*, I suppose he must have succeeded; but it would have been upon the terms of his reconveying to *George* the land in *Crowland*. His parting with that land is to be looked at in two aspects; as disabling himself and the court from re-instating *George* in his former position and as an act of confirmation; as to the latter, however, it cannot, from anything I see in the evidence, be said that he did the act with knowledge of his rights.

The same difficulties as to making a proper decree present themselves, and indeed added to, it may be, by the act of *Warren* himself in the sale of the tavern

1866. stand to a stranger; and it is not shewn that *Warren* is in a position to cause the land in Crowland to be reconveyed, and it would be very difficult to do complete justice even if it were, for both the lands exchanged may have undergone very substantial changes since the exchange was made.

Miller
v.
Ostrander.

The sale of the land, the tavern stand to *Dougan* by *Warren* himself, is a very unequivocal act of confirmation, or perhaps rather of abandonment; and if this was done after the knowledge, that he says he did at some time acquire, of his right to impeach the conveyance to *George*, it would, I apprehend, necessarily conclude him. I think, as I have said, that this knowledge must, upon the evidence, be taken to have been acquired before the sale to *Dougan*. But were it otherwise, I incline to think the circumstances to which I have adverted sufficient to disentitle *Warren*, if plaintiff, to any relief against *Miller*; and consequently that *Miller* is entitled to a decree for specific performance against *James Ostrander*.

Judgment.

As to costs, I think the plaintiff entitled to them, and against both the defendants; against *Warren*, because he has availed himself of this suit to set up a claim to the property in question, in which he has failed; and against *James*, because he resisted the plaintiff's right in toto, and acquired for his own benefit rights in the property from *Warren*: and, as appears by the evidence, set up *Warren* to assert rights which were for his own benefit, as well as for the benefit of *Warren*. At the same time, I think it right to say, in justice to *James*, that the agreement which he made with *Daniel* was for a just and praiseworthy object, and that he would probably have made no objection to carry out the contract, if *Daniel* had promptly performed his part of it. He might, no doubt, have put an end to it in the manner intimated by my late brother *Esten* in his judgment, but he chose to treat it as still subsisting.

There must be an enquiry as to the moneys payable under the contract, and the amount can be paid into court, and it will be convenient that the parties entitled should present a petition praying for payment thereof out of court. They might be made parties in the Master's office, but their interests will be sufficiently represented there by *James Ostrander*, their trustee.

1866.

Miller
v.
Ostrander.

McKNIGHT v. McKNIGHT.

Executor—Trustee.

Although the rule is, that an executor or trustee will not be permitted to deal on his own account with the trust estate, still where one of two executors empowered to sell, with the concurrence of the widow and the eldest son of the testator, aged eighteen or nineteen years, purchased part of the testator's property, the court refused to set aside the transaction; the Master having found that at the time the sale was concluded it was beneficial to the infants.

Appeal by the plaintiffs from the report of the Master, Statement.
and cross appeal by defendant.

The grounds of the appeal appear in the judgment.

Mr. *McMichael*, for the plaintiffs.

Mr. *Roaf*, Q.C., contra.

SPRAGGE, V. C.—The principal ground of appeal is from the Master's finding upon that part of the decree which directs him to inquire and state, whether or not the pretended sale in the pleadings mentioned was beneficial for the children of the testator.

The question for the Master was not therefore whether it would be for the benefit of the infants that that sale should be now confirmed, but whether the sale, at the time it was made and under the circumstances in which it was made, and taking into account all the terms of

1866. the sale, it was beneficial to the infants. The Master
 McKnight has found that it was ; and I cannot say that he has
 McKnight. come to a wrong conclusion.

There was evidence certainly of the value being, in the opinion of witnesses, larger than the price given; and there are some instances of sales of land given from which it might be inferred that the price given in this instance was below the value; but, on the other hand, there are the opinions of witnesses the other way; there is the fact that the executors advertised the land for sale; that they were in treaty with others from whom they could not get so good terms as the land was sold upon; that the will directed them to sell; and the exigencies of the estate rendered a sale imperatively necessary. Further, that the sale was not carried through hastily, but upon consultation with the widow, and with the eldest son then eighteen or nineteen years old, two of the plaintiffs, and with their approval; and that there appears to have been an entire absence of all practice, and management, so far as we can see, on the part of the purchaser; so that there is every reason to believe that both the purchaser and his co-executor endeavored to get the best price they could for the land; that the purchase does not appear to have been sought by the purchaser; but that it was an arrangement, viewed at the time by those competent to form a judgment, as a beneficial one for the family. I mention these circumstances only as having a tendency to shew that it is probable that as good and beneficial a sale was made as could be made; not certainly with any idea of suggesting that the purchase, being by one of two executors appointed to sell, can be supported in this court.

Then, in forming a judgment of the value of the evidence given, the Master had the advantage of himself hearing the evidence given, and of forming his judgment of the value and weight to be attached to it; depending

in a great measure upon who the witnesses are, and their capacity of forming a correct judgment of the value of the land; while I, reading the evidence, see no more than that *A. B.* thought the land worth so much, and that *C. D.* thought it worth so much; but I cannot see that the opinion of one is worth more than that of the other: while the Master may have justly attached great weight to the evidence of the one and very little to that of the other, or discarded it altogether. In other words, the Master, having before him materials for forming his judgment, which I cannot have, is much more likely to have arrived at a proper conclusion from the evidence than I can be. I ought to be able to see that he must be wrong in his conclusions of fact from the evidence before him, before I venture to say that he is wrong.

1866.
McKnight
v.
McKnight.

Upon the question whether the Master is right in fixing the times that he has done for the commencement and termination of the charge for rent is right or wrong, I have no materials for forming a judgment; he begins to charge from the 20th of April, 1859; the plaintiffs say rightly, because the executors took possession at that date. The defendant *Edward McKnight* says, the charge should commence from the date of his purchase, and so I agree it should, unless there be evidence of his having possession before: that fact can be easily ascertained; and so as to the rent ceasing on the 20th of April, 1865. The evidence may shew that the defendant did as suggested, deliver up possession on the decree being pronounced, which bears date the 6th of May, 1865, in which case the Master would be right in not charging for the short broken period. I cannot say that the Master is wrong in either of those points. I should assume that he is right unless the contrary is shewn.

The Master appears to have charged *Edward McKnight* with the rental of the five acres, which

1866. under the arrangement were left in the possession of the widow; that appears, however, on the face of the report, and can be dealt with on further directions.

McKnight
v.
McKnight.

The interest on the mortgage to *Joshua McKnight* can also be dealt with on further directions. *Edward McKnight* is not credited with it as paid, but if, as I incline to think was the case, he was to apply the purchase money to pay off the indebtedness of his testator at once, (and I so understood the 7th paragraph of his answer,) he ought, I think, in the event of his retaining the purchase, to be charged with the subsequent interest upon so much of the mortgage money as his purchase money would suffice to discharge; that, however, will more properly come up on further directions.

The plaintiffs, failing in their appeal, it must be dismissed with costs. I do not give the defendant the costs of his cross appeal; the costs will be the same as if there had been no cross appeal.

PATON v. THE ONTARIO BANK.

Simultaneous writs of fi. fa. against goods and lands.

A judgment creditor had issued at the same time, and placed in the hands of the sheriff, alias *fi. fas.* against goods and *fi. fas.* against lands, and the sheriff, by the direction of the creditor, made a seizure of goods, and the writs against goods were afterwards and before sale withdrawn; meanwhile the debtor had conveyed his land in trust for creditors; an injunction was granted at the instance of the grantee to restrain a sale under the writs against lands until the hearing of the cause.

This was a motion on behalf of the plaintiffs to restrain the defendants *The Ontario Bank* from proceeding to a sale of lands under certain writs of execution.

Mr. Blake, Q.C., for the motion.

1866.

Mr. Moss, contra.

Paton
v.
The Ontario
Bank.

The following authorities were referred to: *The Ontario Bank v. Kerby* (a), *The Ontario Bank v. Muirhead* (b), *Doe Spafford v. Brown* (c), *Oswald v. Keefer* (d), *Juson v. Gardiner* (e), *Andrews v. Saunderson* (f).

MOWAT, V.C.—This was a motion for an injunction to stay a sale of land under certain executions at law.

The execution debtor *James Hamilton* on the 17th of May, 1865, executed a conveyance of certain lands to the plaintiff *Paton*, to secure the payment, ratably, of the debts due by the assignor to the plaintiffs the *Bank of British North America*, and the defendants the *Ontario Bank*. The *Ontario Bank* had before this time recovered three judgments against *Hamilton* in the Court of Common Pleas, and had on the 22nd of April, 1865, issued on these judgments, alias *fi. fas.* against goods, and *fi. fas.* against lands, all of which were delivered to the respective sheriffs two or three days afterwards. On the 3rd of May the attorney for the *Bank* directed the sheriff of Wentworth to seize under the writs against goods, certain stock of the defendant *Hamilton*. The sheriff did so. The attorney says, that on the 10th of May he directed the sheriff to withdraw from the seizure; but, however this may be, it appears from the affidavit of the deputy sheriff that he did not in fact withdraw until the 22nd of May. On the 18th of May the attorneys for *Paton*, the trustee, gave notice of the deed to the attorney for the *Ontario Bank*, pointed out the irregularity of

(a) 15 U. C. P. (2 Vank) 35.

(c) 3 U. C. Q. B. O. S. 395.

(e) 2 U. C. Appeal Rep. 288.

(b) 24 U. C. Q. B. 563.

(d) 22 U. C. Q. B. 309.

(f) 1 H. & N. 725.

1866. *Paton v. The Ontario Bank.* issuing simultaneously writs against goods and writs against lands, and suggested that the writs against lands should be withdrawn, and that the two Banks should share ratably under the deed as thereby provided. This suggestion was declined, but the executions against goods were withdrawn on the 22nd of May, leaving the writs against lands still in the hands of the sheriffs.

The first question is, whether under these circumstances the writs against lands are irregular?

The transactions set forth in this suit have been before both the courts of common law (a). Writs were issued against *Hamilton* in two suits in the Queen's Bench under the same circumstances as the writs in the Common Pleas suits now in question; and applications were made in both courts to set aside the writs against lands. The applications in the Queen's Bench were successful, but those in the Common Pleas were unsuccessful and it is the failure in the latter court which has led to the present application. It is said that the Court of Common Pleas refused to set aside the writs from an erroneous supposition that the alias *fi. fas.* against goods had not been acted upon. But it is said, on the other hand, that the Court of Queen's Bench made the rules absolute under another mistaken supposition, viz., that the seizure had never been abandoned, and that the writs were still in the sheriff's hands. It has thus happened, according to the statements and admissions of both parties before me, that in neither court has it been decided whether in such a case, an execution creditor has the right of upholding his writ against lands by abandoning his writ against goods after acting upon it to the extent of seizing. The learned Chief Justice in pronouncing the judgment of the court in the Queen's Bench, it is contended, expressly guarded himself on this point, observing: "I will not say that the plaintiffs might not have abandoned

(a) *Ontario Bank v. Kerby*, 2 Vank. 35; *Ontario Bank v. Muirhead*, 24 U. C. Q. B. 563.

the seizure of these goods, and thus have upheld the writs against lands." The case of *Andrews v. Saunderson* (a), referred to by the learned judge who pronounced the decision in the Common Pleas (b), and the case of *Hodgkinson v. Whalley* (c), referred to therein, and in *Oswald v. Keefer* in the Queen's Bench (d), seem against the right of curing the irregularity in this way. In this state of the authorities, it would not be proper for me as an equity judge, on an application for an interlocutory injunction, to decide such a point, as it is quite sufficient to hold, that the question is, to say the least of it, not sufficiently clear in favor of the execution creditors here to entitle them to proceed with the sale before the hearing of the cause, it having been decided in *Doe Spafford v. Brown* (e), that a purchaser from the sheriff would not be affected by such an irregularity.

1866.
Paton
v.
The Ontario
Bank.

But it is said that the applications to the Court of Common Pleas were on behalf of the plaintiffs here, as well as of the execution debtor, and that the decision of that court estops the plaintiffs from afterwards raising the question of regularity in any other way. No authority was cited for this proposition, and I have not myself found any (f). I must therefore leave this point also to be discussed and dealt with at the hearing.

Judgment.

It was further contended that the execution debtor alone can set up the irregularity, if such it is. I think the cases cited (g) sufficiently answer this objection.

The injunction must therefore go as moved.

(a) 1 H. & N. 725.

(b) 2 Vank. 43.

(c) 2 Cr. & J. 86.

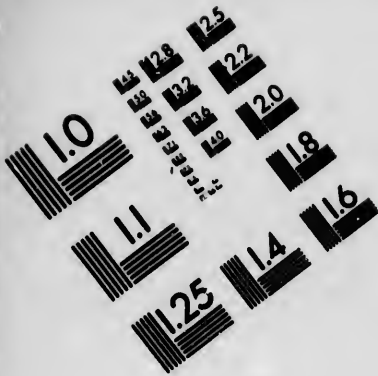
(d) 22 U. C. Q. B. 309.

(e) 3 U. C. Q. B. O. S. 95.

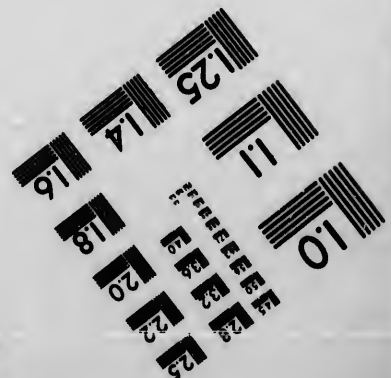
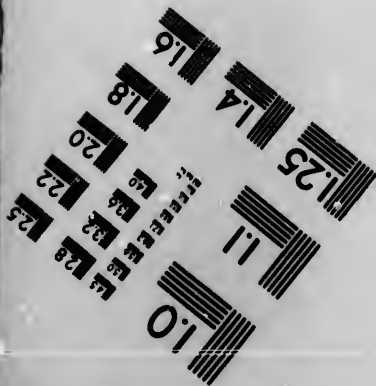
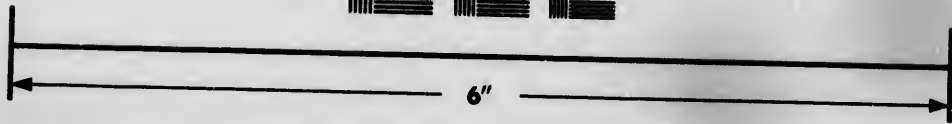
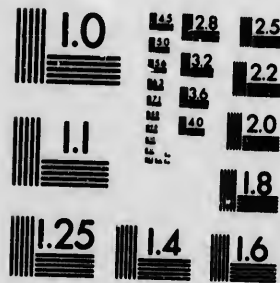
(f) See Taylor on Evidence, sections 1499, 1562, 1563; Russell on Awards, 655; Barrs v. Jackson, 1 Y. & C. C. C. 585; Tilt v. Dickson, 4 C. B. 736; Clubine v. McMullen, 11 U. C. Q. B. 246.

(g) Juson v. Gardner, 2 U. C. Error and Appeal, 238; Bank of Montreal v. Baker, 9 Gr. 298.





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1866.

PERRY v. WALKER.

Will—Construction of.

A testator by his will devised certain land to his wife for life, "subject to the conditions of supporting and educating therefrom my children until they are of age respectively," and after the decease of his wife, and his youngest child having attained eighteen years of age, he devised the same land to his son, *J. L.* The widow died, and *J. L.* also died before the youngest child attained the age of eighteen.

Held, that *J. L.* did not take the estate charged with the support or education of the younger children, nor was it chargeable in the hands of *J. L.* with arrears therefor, which had accrued during the life estate of the widow.

Hearing on further directions.

Mr. *Gwynne*, Q.C., for the plaintiff.

Mr. *Spencer*, for the infant children of *Jacob Lemon*.

Mr. *Hoskin*, for other parties.

SPRAGGE, V.C.—The plaintiffs are judgment creditors of *Isaac Lemon*, deceased, who was devisee of certain lands under the will of his father *Jacob Lemon*, among others of the north half of lot 6, in the Gore of Woodhouse.

The only question remaining undisposed of is in respect of that parcel of land; certain children of the testator claiming that it is chargeable with arrears due for their maintenance and education.

This parcel of land is devised by the testator to his widow, charged with the support of his children in these terms: "The above devise and bequest of the said north half lot are made to my said wife, subject to the conditions of supporting and educating therefrom my children until they are of age respectively, and whilst they may be living with their widowed mother."

The devise to *Isaac* is in these terms : " Item, after the decease of my dear wife *Mary Ann*, (my youngest child having attained the age of eighteen years,) I give and devise to my son *Isaac Lemon* the north half of lot number six, in the Gore of Woodhouse, with all the buildings, improvements and appurtenances thereunto then belonging, to hold the same to him the said *Isaac Lemon*, (when he shall have attained the age of twenty-one years, and after my youngest surviving child shall have attained the age mentioned in that behalf, and decease of his mother shall have taken place,) his heirs and assigns for ever ; " also, " after my youngest surviving child shall have attained the age of eighteen years, and after the decease of my dear mother, I give and devise to him, my son *Isaac Lemon*, the south half of lot number six, in the Gore of Woodhouse aforesaid."

1866.

Perry
Walker.

The widow is dead as well as *Isaac*. She did not marry again. The youngest child of the testator has not yet attained the age of eighteen. Judgment.

Counsel for all parties agree that the devise to *Isaac* operated by way of executory devise, and that he would not become entitled to the estate in possession until the occurrence of three events, the death of the testator's widow, the arrival at the age of eighteen of his youngest child, and *Isaac* himself becoming of age. One of those events did not happen before his death—the youngest child attaining the age of eighteen, and in fact has not happened yet.

The claim of the children for the arrears is based upon this, that the testator has by his will manifested an intention that his children should be supported until the youngest should reach the age of eighteen ; and that he has charged the land in question with their support, and consequently that any arrears due for their support are chargeable against the land in whatever hands the land may be. But the fallacy in this contention is

1866. that the land is not made so chargeable, but only the
 estate in the land devised to the widow of the testator :
 Perry
 v.
 Walker. "the above devise and bequest of the said north half
 lot are made to my said wife, subject to the condition of
 supporting and educating therefrom my children until
 they are of age respectively and whilst they may be
 living with their widowed mother, they using reasonable
 endeavors for the benefit of the family, and to assist
 their mother." All this, besides being in terms confined
 to the estate devised to the widow, points to its being
 limited in point of duration to her life, and whilst they
 were continuing to live as part of her household. The
 provision for the support of children is a condition
 annexed to the life estate devised to the widow : and not
 only is not annexed to the estate devised to *Isaac*, but
 from the nature of the provision in regard to its reaching
Isaac it could not be : for it was not to reach him until
 Judgment. the necessity for supporting and educating the children
 was in the mind of the testator, as we gather from his
 will, passed, *i.e.*, until the youngest child had become
 eighteen years old. It is indeed conceded that upon
 the happening of that event this provision was to cease,
 but it is contended that the land in the hands of *Isaac*
 was chargeable with arrears that accrued before that
 event. But this would be making the estate of *Isaac*
 answer for the defaults of a previous owner of the
 estate, and with which *Isaac* had nothing to do, and
 which he could not by possibility prevent.

It may be that the testator has but imperfectly carried
 out his intentions, but that can be no ground for the
 court operating the estate of a devisee with a charge
 with which the testator has not operated it; and I think
 the intentions of the testator are not frustrated by the
 interpretation I give to his will. He had three parcels
 of land, which as he says in his will had been used
 together, and all of which he disposes of so as ultimately
 to come to his son. He devises a life estate in one to his
 mother, with an executory devise to his son upon attain-

ing twenty one, and after his youngest child should become eighteen. He devises another to his son, charged with certain legacies, but not to come into his possession until he should become of age; and the third is the one in question, to the disposition of which I have already referred. He gives to his executors the control of the real estate devised to his son whilst he should be "debarred from the possession thereof in consequence only of minority," and in another clause of his will he makes it a request to his mother, his wife, and his executors, that they should, as long as it could be done satisfactorily, permit the whole land to be used together, as theretofore, for the general benefit of those who in his own time derived support therefrom; and enjoins upon his son to be faithful and obedient, to promote the best interests of the family.

1866.

Perry
v.
Walker.

In this way the testator probably considered that he had made sufficient provision for the support of his children other than *Isaac*. We are not led to the conclusion that he would, if he had taken into account all contingencies, have operated the estate in the hands of *Isaac*; because it was not necessary to do so in order to the accomplishment of his purpose in regard to the support and education of his other children.

Judgment.

It is however sufficient to say, that the testator does not by his will operate the land in question with the support and education of his children, beyond the estate for life therein devised to his widow, and I must therefore hold that the executory devise to *Isaac* would have reached him, if he had lived till the youngest child of the testator became eighteen, free from such charge; and consequently that it is free from such charge as against the plaintiffs.

1866.

LORING V. LORING.

Will—Construction of—Statute of Limitations.

A testator bequeathed his personal estate to his executrix and executors, in trust for the purposes of his will, and he gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children or child, if there should be but one, "the sum of £1,500, due to me by C. and secured by a certain mortgage," &c.

Held, that this passed the principal mortgage money (£1,500) but did not pass the interest then due or which should fall due before the testator's decease.

Held also, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the Statute of Limitations therefore not applying to the case.

This case came on before Vice-Chancellor *Mowat*, on an appeal from the report of the accountant, and for further directions.

Statement. The plaintiff was the only child of *William Campbell Loring*, deceased, and grandson of Colonel *Robert Roberts Loring*, deceased, and the bill was against the executrix and executor of Colonel *Loring*, to whom probate of his will had been granted, claiming to be entitled to two legacies under the will. His will was without date, and was not executed so as to pass real estate.

The first clause purported to devise and bequeath to his executrix and executors all his property and estate, both real and personal, that he then possessed or that might thereafter come to him, whether the same consisted of houses, lands, personal effects or money at interest, on trust for the purposes therein after declared; and, after sundry directions, he gave and bequeathed to his executrix and executors as aforesaid, but in the quality of trustees and for the use of his son, *William Campbell Loring*, during his life, certain particulars therein described, and including the following: "Also the sum of £1,500, due to me by Mr. *Clement*, of St.

Catharines, and secured by a certain mortgage, the particulars of which are in the hands of Messrs. *Strachan & Cameron*; also the sum of £150, due to me by Mr. *William Evans*, farmer of Cote St. Paul, near Montreal, and secured by mortgage, the particulars of which will be found in the office of *Henry Griffin*, Esq., notary public, Montreal, by whom such mortgage was drawn." All these particulars, after his son's death, the testator gave to his son's children or child, if he left but one; and other real and personal estate he gave to his wife and daughters. At the close of his will he named his executrix and executors, and added, "hereby devising and bequeathing unto them my executrix and executors all my property, real and personal, as well as all the stocks, funds and securities which I now hold or which may hereafter come to me, in trust for the purposes declared in this my last will and testament."

1866.

Loring
v.
Loring.

Testator's son died before the testator, leaving the plaintiff, his only son, him surviving. The will was proved by the executrix and one of the executors, who were the defendants in the cause.

Statement.

By the decree, dated 1st December, 1865, it was declared that the legacy of £1,500 was not adeemed (a), and that the plaintiff was entitled to receive the same; and it appearing that the testator's debts and funeral expenses had been paid, it was referred to the accountants to take an account of what was due to the plaintiff for principal money and interest in respect of the said legacy of £1,500, and to inquire and state what, if anything, at the time of the testator's death remained due on the mortgage from *William Evans* in the will mentioned; and it was ordered that the costs of all parties as between solicitor and client, up to and inclusive of the hearing, should be taxed and paid, and retained by

(a) Vide S. C., ante page 103.

1866. the defendants out of the personal estate of the testator; and the court reserved the consideration of further directions and subsequent costs until after the accountant should have made his report.

Loring
v.
Loring.

Statement.

The accountant by his report, dated 1st May, 1866, made in pursuance of this decree, found, amongst other things, that there was a mortgage bearing date on or about the 22nd May, 1844, and made between one *Ralph Morden Clements*, of the one part, and the testator of the other part, of certain property therein mentioned for securing the sum of £1,500, with interest at the rate of six per cent. per annum, payable as therein is mentioned; and that an indenture of mortgage, bearing date on or about the 14th day of August, 1847, was made and executed by one *George Hutt* and *Susannah* his wife of the premises comprised in the indenture of mortgage made by *Clement*, with other premises comprised therein, for the sum of £1,760, at the rate aforesaid, payable as therein is mentioned; that the said *Hutt* became the purchaser of the lands comprised in the mortgage from *Clement*, and that on the purchase thereof the interest due on the said mortgage (being the sum of £260) from *Clement* was added to the principal money, and together therewith formed the said sum of £1,760, the principal money secured by the mortgage lastly mentioned and passed to the plaintiff by the bequest in the will of the testator in favor of *William Campbell Loring* and his children; that the testator died April, 1848; that since his decease the defendants had received the said principal sum of £1,760, and all interest due thereon; and that there was due to the plaintiff for principal money on the said legacy the sum of \$7,040, (£1760), and for principal money and interest from the said 1st April, 1848, to the date of his report the sum of \$14,678.40; and no evidence having been laid before him of any mortgage existing at the time of the testator's death from *William Evans* to the

said testator, he did not find that any interest remained due thereon. 1866.

Loring
v.
Loring.

From this report the defendants appealed, on the following grounds :

1. Because the accountant had allowed to the plaintiff the full amount of the *Hutt* mortgage, £1760, as the legacy to the plaintiff in the decree mentioned, whereas the accountant should only have allowed the sum of £1,500, part thereof as such legacy.

2. Because the accountant had allowed to the plaintiff interest on the said sum of £1,760 from the death of the testator, whereas he should only have allowed six years' arrears of interest, and only on the sum of £1,500.

3. Because the accountant had allowed interest to the plaintiff on the sum of £1,760, whereas he should have allowed interest only on the sum of £1,500.

Mr. *Bain* and Mr. *Huson Murray*, for the appeal. Argument.

Mr. *Strong*, Q.C., contra.

Watson v. Saul (a), *Harcourt v. Morgan (b)*, *Tiffany v. Thompson (c)*, *Grout v. Jones (d)*, *Given v. Given (e)*, were referred to by counsel.

MOWAT, V.C.—This case came before me on an appeal from the accountant's report, and on further directions.

The defendants contended at the hearing, and again at the re-hearing of the cause, that a certain transaction with one *Hutt* was an ademption of the legacy which

(a) 1 Giff. 186.

(b) 2 Keen, 274.

(c) 9 Gr. 244.

(d) Eq. 303.

(e) 13 C. B. 205.

1866. the plaintiff claimed by his bill. On this point the judgment of the court was against the defendants (a).

Loring
v.
Loring.

But the defendants contend that the legacy was of £1500 only, and not of the mortgage itself to which the will refers, or of any interest which was then due upon it, or which should be due thereupon at the testator's death. The authorities are in favor of this contention.

The bequest is in these words: "The sum of £1500 due me by Mr. *Clement*, of St. Catharines, and secured by a certain mortgage, the particulars of which are in the hands of Messrs *Strachan & Cameron*."

The decision in *Hawley v. Cutts* (b), is quite in point as to the effect of this bequest. The report of that case is as follows: "A. is indebted to B. £300, B., by his will says: 'I give A. £300 which he oweth me upon bond,' and dies; and it happened that at that time there was near £20 for interest due besides the £300 principal; and the question was, whether or no these words should give the interest as well as the principal to A. It was agreed that if the words had been, 'I give or forgive the debt to A. of £300 which he oweth me,' that would have barred the interest as well as the principal to A. But here, per Cancellor, it was decreed, that A. should have only the £300, for that the interest is a fruit fallen from the tree in the life of the testator, and he shall have the £300 barely, as he gave it him."

Judgment.

The decision of Lord *Hardwicke* in *Roberts v. Kuffin* (c) was to the same effect. The bequest there was in these words: "I give to my son *Thomas Roberts* £200 secured by a mortgage on the estate of Mr. *Marriot*, and all the messuages, lands and tenements, securing the same." And the Lord Chancellor's judgment was as follows: "This entitles the devisee to the principal only of the mortgage, and not to the interest from the

(a) Vide 12 Gr. 103.

(c) 2 Atk. 112.

(b) 2 Freem. 24.

time of the execution of the will, nor from the death of the testator, or any other time whatever. If a man gives £800 due upon a bond by his will, this does not carry the interest incurred in the lifetime of the testator, because it is quite doubtful what it might amount to, from the uncertainty of the time the testator might live after making his will."

1866.

Loring
v.
Loring.

The cases of *Harcourt v. Morgan (a)* and *Gibbon v. Gibbon (b)*, in which the interest was held to pass, do not conflict with these decisions; but, on the contrary, fall within the class in which the court in *Hawley v. Cutts* said that the interest as well as the principal would pass. In *Harcourt v. Morgan* no reasons were given for the decree, but the bequest was this: "The amount of the bond I hold from Sir James Hoare for £1000." In *Gibbon v. Gibbon* the bequest was to the plaintiff, and was thus expressed: "all my interest and claim on household property in Percy Court, Newcastle-upon-Tyne.....on which I have a mortgage of £1500." In giving judgment, the Lord Chief Justice said: "The testator not only gives the plaintiff all his 'interest' in the household property in question, but also his claim thereon, which includes the interest as well as the principal mortgage money; and the effect of that is not varied by the subsequent words, 'on which I have a mortgage of £1500'; which, as it seems to me, was mere description. It was clearly a bequest of the interest." *Maule, J.*, stated the point thus: "This is the case of a mortgage. The testator has a claim, as mortgagee, for £1500, and a further sum for interest. He bequeaths to the plaintiff 'all my interest and claim on household property in Percy Court, Newcastle.' The affirmation that he afterwards makes, that he has a mortgage on it for £1500, does not cut down the bequest, and limit it to £1500. Cases have been cited of a testator leaving a sum due to him on bond or other

Judgment.

(a) 2 Keen, 274.

(b) 13 C. B. 205.

1866. wise, and mentioning the specific sum, in which case
 the sum mentioned has been held to pass and no more.
 Loring v. Loring. No doubt, where a man has a bond upon which there is due to him £200 for principal and interest, if he bequeaths £200 due on a bond, &c., £200 only will pass; but if the bequest had been of £220 secured by bond, &c., I think it cannot be denied that £220 would pass. Here the bequest is an unlimited bequest of all the testator's interest and claim on the property in question. I think the judge was clearly wrong in holding that this did not pass the interest as well as the principal."

So, in *Smith v. Fitzgerald* (a) Sir William Grant observed: "The same legacies may be specific in one sense, and pecuniary in another; specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself.....A gift of a sum of money, though with ever so plain a reference to the amount of the fund out of which it is given, is very different from a gift of the fund itself, with all the chances of its actual amount."

Judgment.

Here the bequest is not of "the debt," or of "the amount of the mortgage," or of all the testator's "interest and claim," on the property comprised in the mortgage, but of £1500; and the testator, therefore, must be held to have named the mortgage, merely as the source from which he desired the amount to be taken.

So, where stock is specifically bequeathed, the unreceived dividends accruing before the testator's death do not pass (b), nor does a bonus declared before his death (c). In contending against the legatee in the

(a) 2 V. & B. 2.

(b) *Barrington v. Tristram*, 6 Ves. 349; *Bristowe v. Bristowe*, 5 Beav. 290; *Shore v. Weekly*, 3 DeG. & Sm. 467; *Cleve v. Cleve*, Kay, 505.

(c) *Norris v. Morrison*, 2 Mad. 268.

latter case, Sir *Samuel Romilly* illustrated the argument in this way: "Suppose a female slave is bequeathed by will, and she has afterwards a son who grows up to a man, and then the testator dies, does the bequest of the mother pass her son? So, if a mare be bequeathed, which has a foal that afterwards grows up to a horse, and then the testator dies, does the gift of the mare pass also the horse? Surely not?"

1866.

Loring
v.
Loring.

Having reference to the authorities, I am clear that the first ground of appeal must be allowed.

The two remaining grounds of appeal relate to the interest to which the plaintiff is entitled. The defendants contend that they are chargeable for six years only (a). The plaintiff contends that the defendants were express trustees for the purposes of this legacy and the other provisions of the will, and cannot take advantage of the statute. This view seems supported by authority as respects the claim of a legatee (b), though a bequest of personal estate to executors as trustees to pay debts is not such an express trust as will keep alive a debt which would otherwise be barred by lapse of time (c). The second ground of appeal will therefore be disallowed; but the interest must be reckoned on £1,500 only, instead of £1,760, as suggested in the third ground of appeal. The computation may be made by the registrar.

Judgment.

I think the plaintiff is entitled out of the general estate to the costs subsequent to decree, including the costs of the appeal from the Accountant's report. The decree seems irregular in providing for the defendant's costs out of the estate, the decree not being for a general administration. The order to be now made is not to repeat this irregularity.

(a) Vide U. C. 4 Wm. IV. ch. 1, sec. 45; U. C. Consol. Stat. ch. 88, sec. 19; Impl. Act, 3 & 4 Wm. IV. ch. 17, sec. 42.

(b) *Obee v. Bishop*, 1 DeG. F. & J. 137; *Roch v. Callen*, 6 H. 536.

(c) *Scott v. Jones*, 4 C. F. 382; *S. C.* 1 Russ. & M. 255; *Freake v. Craneheldt*, 3 M. & C. 502; *Evans v. Tweedy*, 1 Beav. 55.

1866.

SHAW v. LEDYARD.

Pleading—Cloud on title—Sheriff's deed.

A bill by the owner of land will lie to set aside a registered deed as a cloud on his title, though no privity exists between him and the parties to such deed, and no fraud on their part is alleged in the bill.

Quære, whether a bill will lie to remove a cloud on the plaintiff's title unless it appears that the impeached deed, if valid, would affect the equitable title only, or unless it appears that the plaintiff is in possession, or that the lot is wild and not in possession of any one, so that there is no opportunity of first vindicating the plaintiff's title at law.

Statement.

The bill in this cause was filed the 5th of May, 1866, and stated that on the 20th of September, 1859, the plaintiff became, and from thenceforth continued to be, the owner in fee of the east half of lot No. 24, in the eleventh concession of the township of Enniskillen, in the county of Lambton, containing 100 acres; that by deed poll, dated the 16th of February, 1865, the defendant *Flintoft*, as sheriff of the said county, assumed to convey and assure the said lot in fee simple to the defendant *Ledyard*, in consideration of a certain sum of money pretended to be paid by *Ledyard* to the said sheriff for arrears of taxes upon the lot; that there was no sale of the said lot by the sheriff to the defendant *Ledyard*, or to any other person, to authorize the said conveyance, and the said pretended conveyance was and is wholly illegal and unauthorized; that the defendant *Ledyard* caused the said deed poll to be recorded in the registry office of the county of Lambton, on the 16th day of March, 1865, and that such registration formed a cloud on the title of the plaintiff to such lot; that by indenture dated the 8th of May, 1865, and recorded in the said registry office on the following day, the defendant *Ledyard* assumed to convey and assure the said lot, with other lands, to the defendant *Meredith*, by way of mortgage, to secure payment of the sum of \$1000, and the registration of the last mentioned conveyance formed a further cloud on the plaintiff's title; and the bill prayed

that the said pretended deed poll of the 16th day of February, 1865, might be declared illegal and void, and delivered up to be cancelled, and that the registration thereof might be vacated, or that the defendant *Ledyard* might be ordered to execute such instruments as should remove the cloud caused by such registration; and that the defendant *Ledyard* might be ordered to procure a release or other discharge of the mortgage to the defendant *Meredith*, so far as the same affects the said lot; and for general relief.

1866.
Shaw
v.
Ledyard.

The defendant filed a general demurrer for want of equity.

Mr. Roaf, Q.C., for the demurrer, referred to *De Hogton v. Money (a)*, *Ross v. Harvey (b)*.

Mr. McLennan, contra.

Mowat, V. C.—The bill alleges, that on the 20th of September, 1859, the plaintiff became, and still is, the owner in fee simple of the property in question; that on the 16th of February, 1865, the sheriff of the county assumed to convey the lot to the defendant *Ledyard*, for arrears of taxes; that there was no sale of the lot by the sheriff to authorize the conveyance, and that the conveyance was and is wholly illegal and unauthorized; that it has been registered; that *Ledyard* has executed a mortgage on the lot to the defendant *Meredith*; and that these two instruments are clouds on the plaintiff's title; and the prayer is that they may be cancelled.

Judgment

To this bill the defendant *Ledyard* has put in a general demurrer; and on the argument, two principal objections to the bill were urged by the learned counsel for the defendant.

The first objection was, that the bill does not allege

(a) 1 Law Rep. Eq. 154.

(b) 3 Gr. 649.

1866. any privity between the plaintiff and the defendants, or any fraud by the defendants; and that the bill in the absence of such privity or fraud will not lie. I am against this objection. No authority was cited in its support, and certainly reason is opposed to it. If two strangers, even through a mere mistake of fact or law, claim a man's property, and put on registry an instrument setting forth such claim, or purporting to deal with it, such a claim, however unfounded, must prejudice the sale of the property, and may create embarrassment otherwise; and I would be sorry, unless compelled by the authorities, to hold that the owner is in such a case without remedy. But a deed by a sheriff in his official capacity, professing to convey what he has no right to convey, presents grounds for relief which may not apply to a transaction between two entire strangers.

Judgment. The second argument urged against the bill was, that it does not state the objections to the sheriff's deed with sufficient fullness. The only objection which the bill makes to the deed, as I understand it, is, that it was executed without any previous sale to warrant it; not that there was an irregular sale, but that there was no sale. I do not see that in this view I could properly hold that the bill should be more full than it is. The defendant's contention on this point was not supported by any authority.

I suggested at the close of the argument whether the bill was not open to another objection, not taken at the bar, viz., that the bill does not allege possession in the plaintiff, or excuse the want of such an allegation by shewing that the lot is wild and unoccupied by anybody. Without some such allegation, is not a bill like the present in substance and effect an ejectment bill? and would not the effect of allowing it be to transfer to this court every ejectment suit in which the defence depended on some instrument impeached by the plaintiff? Does the principle on which these bills have been sustained

by equity courts warrant such a result? Is not the jurisdiction here, in the case of legal estates, ancillary and supplementary, only, to the jurisdiction of the courts of law? And to give this court jurisdiction, is it not necessary to shew that the plaintiff has done all that the case permitted for vindicating his legal right? or else to shew that it is not the legal, but the equitable title that the impeached deed can affect? Is there any authority to support the jurisdiction of the court in the absence of such allegations? Many bills are said to have been filed, and decrees thereon obtained, without this objection being taken; and therefore, in the absence of any argument on the point at the bar, I have not felt at liberty to give it further consideration in disposing of this demurrer. It was said at the bar that the lot in the present case is really a wild lot; and that, consequently, the plaintiff has really no means at law of establishing his title as against the defendants. If so, the point to which I have referred goes merely to the form of the pleading, and not to the merits of the controversy between the parties.

1866.

Shaw
v.
Ledyard.

Judgment.

Demurrer overruled with costs.

CITY BANK v. McCONKEY.

Evidence—Defendant, where a competent witness for a co-defendant.

The plaintiffs, as registered judgment creditors of the defendant *B.*, were declared entitled, subject to certain special circumstances, to the benefit of *B.*'s lien for the unpaid purchase money of certain real estate sold by their debtor *B.* to *M.*, and it was referred to the Master to find the amount due and to state special circumstances—*Held*, that *M.*, admitting something to be due on account of the purchase money to his co-defendant *B.*, was a good witness to prove payments on account, but not to shew special circumstances that would defeat the plaintiffs' right to any relief.

This was an appeal from the Accountant's report, and was heard by Vice-Chancellor *Mowat*.

1866. The bill was filed on the 22nd September, 1858.
City Bank v. McConkey. The plaintiffs were registered judgment creditors of Aaron Burnett, and the object of the bill was to obtain payment of their debt out of certain property conveyed on the 29th August, 1857, by Burnett to Thomas D. McConkey, and which conveyance the bill impeached as fraudulent and void against creditors. The defendants were McConkey and Burnett. The defendants alleged that the conveyance was in pursuance of a *bond fide* sale of the property for the sum of \$2000, and that promissory notes were given for the purchase money.

Judgment. The court held that the transaction was valid, but that the plaintiffs were entitled to a lien on the purchase money; and, accordingly, by a decree on rehearing, dated 19th December, 1865, it was declared that, subject to the special circumstances thereafter mentioned, the plaintiffs were entitled to a lien on so much of the purchase money as remained unpaid at the time of the filing of the plaintiffs' bill; and the court referred it to the Accountant to inquire and state what amount of the purchase money, if any, was unpaid at that time. The Accountant was to be at liberty to state special circumstances at the request of any of the parties; and further directions and costs were reserved.

The Accountant reported the whole purchase money to have been due at the filing of the bill.

The defendant *McConkey* had brought in an account, claiming that part, viz., \$521.59, was satisfied, and had tendered the defendant *Burnett* to prove this, with other matters. The Accountant rejected his evidence, and the defendant *McConkey* now appealed from this decision.

Mr. *Strong*, Q.C., for the appeal.

Mr. *Blake*, Q.C., and Mr. *Cattanach*, contra.

Dixon v. Parker (a) *Daniel's Chy. Prac.*, ed. of 1840, p. 446, were referred to.

1866.
City Bank
v.
McConkey.

MOWAT, V. C.—I think that, *McConkey* admitting somet' ing to be due on account of the purchase money, *Burnett* is a good witness to reduce the amount, because his interest is against such evidence. But I think that he is not a good witness to shew that nothing is due, or to shew any special circumstance that may wholly defeat the plaintiffs' right to relief on further directions. The effect of establishing such circumstances might be to entitle him to the costs of the reference, if not of the suit, or to free him from the chance of having to pay costs, on further directions; and I understand the rule to be as stated by Lord *Hardwicke* in *Barret v. Gore* (b): "If the defendant who is offered in evidence for another defendant may, not necessarily, but by possibility only, be liable to the costs, this is always a reason for refusing his evidence, because he is interested so far as to be swearing to excuse him- Judgment. self." But an interest in one matter does not necessarily disqualify a defendant as a witness in regard to other matters in which he has no interest (c). However, as Lord *Eldon* pointed out in *Murray v. Shadwell*, if, in the result of the cause or reference, it turns out that such defendant has an interest in the one matter by reason of his interest in the other matters, his evidence cannot be read.

I do not concur in the argument of the learned counsel for the plaintiffs, that the form of the account brought in by the defendant estops him from setting up the defence of part payment.

Appeal allowed, without costs.

(a) 2 Ves. Sen. 219.

(b) 3 Atk. 402.

(c) *Murray v. Shadwell*, 2 V. & B. 401.

1866.

FALLON V. KEENAN.

Undue influence—Mortgage—Sale with right of repurchase.

An improvident bargain for the sale of the plaintiffs' property, where the parties were very unequal as regards means, intelligence and otherwise, and the papers were drawn by the vendee, who omitted some important parts of the bargain, and the vendors had not the protection of competent independent advice, was held not to be binding on the vendors.

On making an advance of money on the security of real estate, it is not competent for the lender to bargain for the purchase of the property at a specified sum in case of default in repaying the advance at the time stipulated.

The plaintiffs executed an absolute assignment of their interest in certain real estate, and the assignee gave his note for £500, which he alleged to be the consideration for such assignment, payable in two years, subject to a condition expressed in the note, that the maker might retain thereout any advances he should in the meantime make to the assignors; no change of possession within the two years was intended, and none took place; the assignee alleged that the transaction was a sale to him with a right to the assignors to repurchase by repaying any advances he should make within two years; but no evidence of this being given, the court held that the transaction must be treated as a mortgage, and that the agreement for sale in case of default was therefore void.

Statement. This cause was heard before Vice-Chancellor *Mowat*, at *Lindsay*, at the sittings in June, 1866.

Mr. Hector Cameron for the plaintiffs and the defendant *Lawrence Fallon*.

Mr. Blake, Q.C., for the defendant *Thomas Keenan*.

MOWAT, V. C.—This cause was heard before me at *Lindsay*, on the 1st of June, 1866.

The plaintiffs are *John Fallon*, and *Bridget Fallon* his mother. The defendants are *Thomas Keenan* and *Lawrence Fallon*, the brother of *John*. The interest of *Lawrence* is the same as that of the plaintiffs, and

the bill was taken *pro confesso* against him. The controversy is with the defendant *Keenan* (whom for convenience I shall generally speak of as the defendant.) The bill was filed on the 20th of November, 1865.

1866.

Fallon
v.
Keenan.

The suit relates to the south half of lot No. 10, in the fifth concession of the township of Ops. On the 20th of November, 1858, *Keenan* obtained the patent for this half lot in his own name, as assignee of the *Fallons*, the devisees of the late *John Fallon* the elder, who was the locatee of the Crown. The plaintiffs claim that they are entitled to a conveyance of the property on payment of what, if anything, is due by the *Fallons* to *Keenan*.

The deceased *Fallon* located the lot in 1829, and remained in possession from that time until his death in 1842. By his will he devised the east fifty acres to the plaintiff *John*, and the west fifty acres to his widow, the plaintiff *Bridget Fallon*, for life, and after her death to their son, the defendant *Lawrence*. *John* was at this time about nine years old, and *Lawrence* about six. The widow remained in possession with her sons, cultivating and improving the lot, until after the transaction with the defendant *Keenan*, which is the subject of the suit. At the time of this transaction about sixty acres were cleared, and there were on the lot the necessary farm buildings.

Judgment.

The *Fallons* are, all three, ignorant and illiterate persons. They read but imperfectly, if at all, and it is doubtful if any one of them can write: all the documents in evidence are signed by them with a mark. The sons appear to have got into debt as soon as they came of age; and their only means were the farm and the stock upon it. Their debts, and their mother's, according to the defendant's account, amounted together to nearly \$2000. Being so indebted, the defendant *Keenan* says that they applied to him for a loan of

1866. money to pay their debts, offering the farm as a security.

Fallon
v.
Keenan.

Keenan was a resident of the same township, and had been so for many years. He was a man of wealth, influence and intelligence. He carried on the business of a merchant, and the *Fallons* had been in the habit of dealing occasionally at his shop. He was a leading man in the township, had the confidence of the people, possessed great influence amongst them, and they were in the habit of consulting him in their affairs. He seems to be a thorough man of business, and, though not a lawyer, did his own conveyancing, and occasionally did conveyancing for others. These things appear by the evidence.

Judgment.

What took place when the *Fallons* came to the defendant for aid in their difficulties, there is no evidence by any witness. Two documents, in reference to the transaction which resulted from the application, were prepared by the defendant, and signed; but it is admitted that these documents do not state the whole bargain, and do not state in all respects accurately even those parts of the bargain which they profess to state. They bear date the 13th of February, 1858. One of them is an absolute assignment by the *Fallons* to *Keenan* of all their interest in the property in question. The other is a note or memorandum signed by *Keenan*, and is in the following words:

“LINDSAY, February 13, 1858.

“£500, currency.—Two years after date, I promise to pay to *Lawrence Fallon*, *John Fallon*, and *Bridget Fallon*, or bearer, the sum of five hundred pounds, currency, for value received. This note to be subject to the following conditions, that is, that the maker thereof shall be allowed to settle the claims of *George Kempt*, *George H. Lemon*, and *John Healey & Co.*, and any debt that is now due, or that may hereafter come due, by the aforesaid *Fallons* to the said maker of the note, until such time as said note come to maturity.

T. KEENAN.”

The defendant says in his answer, that he declined to accede to the application which the *Fallons* made to him for a loan, and that in lieu thereof, he offered to buy the property for £500, that is, as he proceeds to explain, £250 for the undivided moiety of each of the brothers, and the interest of the mother, upon the terms following, viz.: that he should pay or assume the claims specified in the note, and make other advances, and pay, provide for, and assume other claims against the parties, to an extent not exceeding, with interest at twelve per cent, the sum of £500, or £250 for each of them the said *John Fallon* and *Lawrence Fallon*; and that, at any time at or before the expiration of two years from the date of the agreement, either *John* or *Lawrence* should have the right of repurchasing his moiety of the premises upon the payment of such amount as *Keenan* should then have paid, assumed, or provided for, on his account, or at his request, or in respect of his debts, with such interest as aforesaid; and that in case the said parties did not within that time make such payments, their option or right of repurchase should cease, and that *Keenan* should, at the expiration of the said time, pay what, if anything, should then remain due in respect of the said sum of £500, or £250 for each. This proposal *Keenan* says that the *Fallons* accepted; and he alleges that the documents referred to were prepared and signed accordingly.

1866.

Fallon
v.
Keenan.

Judgment.

It appears from this statement of the defendant, that, while the assignment which was obtained from the *Fallons* purported to make *Keenan* the absolute owner, he left to their confidence in him, or to the chances of parol evidence, the extent to which this apparent interest was to be cut down or limited; and that, in the writings which he prepared, he omitted to set forth, or inaccurately stated, some of the most important stipulations of the bargain. Thus, though the whole object of the *Fallons* was to get relief in respect of the debts, and though the bargain, as the defendant himself states it, was, that

1366. he should pay or assume the debts specified, yet the
note merely provides that he might do so if he chose,
and there was no undertaking to advance a dollar before
the expiration of two years. All reference was omitted,
also, to the right of the *Fallons* to retain the property,
or to get it back at the end of the two years, in case
Keenan made no advances, or in case the *Fallons* repaid
the amount of his advances within that time, though
this too is in effect admitted to have been part of the
bargain. These omissions the answer states. I have
no doubt, from the evidence, that it was also agreed
that the possession of the *Fallons* was not to be dis-
turbed for the two years. Whether any other stipu-
lations, now perhaps forgotten by the defendant, were
likewise omitted, it is impossible to say.

Judgment. The transaction as stated by the defendant, if the
Fallons understood it, is quite sufficient of itself to
shew that he must have had their unlimited confi-
dence. The omission of such important stipulations
can have no other explanation.

But the omission was most improvident on their part,
whatever their confidence was in the defendant. No
discreet adviser would have concurred in leaving to the
memory or fairness of any one, provisions so vital to
the plaintiffs. Apart from all other objections to so
unbusiness-like a course, it is obvious that the absence
of any writing to shew that they had any interest in
the property would embarrass them, and put them at a
great disadvantage, in effecting or negotiating a better
sale of the property, if they should have an oppor-
tunity of making a better sale, during the two years ;
and if the defendant died meanwhile, they might be
wholly without remedy against his heirs.

The price to be paid for the property, considering the
terms of payment, was not more than two-thirds, if it
was two-thirds, of the value, according to the evidence

of the plaintiffs witnesses, and the defendant has offered no testimony in opposition to this evidence.

1866.

Fallon
v.
Keenan.

In connection with all these facts, it is to be observed that the *Fallons* had no adviser whatever in the transaction except the defendant himself. He states that one *Patrick McHugh*, who is dead, acted as the plaintiffs' adviser. But there is no proof of this. *McHugh* was the intimate friend of the defendant; and, like himself, a leading man in the township. If *McHugh* did advise the *Fallons*, the evidence indicates that he was likely to do so, rather as the friend, and well-wisher of *Keenan*, and for his advantage, than as the *Fallons*' friend, attending to and considering their interests as opposed to the interest of *Keenan*.

Assuming, therefore, the transaction to have been a sale from the first, as alleged by the defendant, it is clear that the bargain is not one which can be countenanced in equity as against persons who, through their ignorance and confidence in the defendant, dealt with him at such a disadvantage. It is not at all necessary to suppose that he meant to do the *Fallons* any wrong; that any more can be said than that he made the best bargain he could; and that in the writings he had an eye to his own interests. But between parties so unequally situated, fraud, when designed, would, by the method of dealing adopted by the defendant, be easy. I am very far from supposing that the defendant had any fraudulent design; but it has been found necessary, in order to protect the weak against the strong, to hold that, even if fraud is not proved, a bargain with so many features of apparent improvidence, ignorance and misadvice as there are here, cannot be sustained in equity without express and clear evidence of deliberation, good counsel, and freedom from influence on the part of the person with whom the dealing takes place (a).

Judgment.

(a) See *Elgie v. Campbell*, 12 Grant, 132; and the cases cited in *Mason v. Seney*, 11 Gr. 447; and in *Clark v. Hawke*, 11 Gr. 527.

1866,

Fallon
v.
Keenan

But this is not the only ground on which the transaction of 1858 seems to me not maintainable, except as a security for the defendant's advances.

A sale with a condition that the vendor may repurchase at a stated price, within a fixed time, is, no doubt, valid, though "it is a transaction which the court will look at with the utmost care, jealousy and scrutiny." (a) In this class of cases, unless the right to repurchase is taken advantage of within the time stipulated, it is gone forever.

Judgment.

But a stipulation in a mortgage for the purchase of the mortgaged property by the mortgagee, at a stipulated sum, in case of the mortgagor's default in paying the mortgage money, is invalid. The cases of *Willett v. Winnell* (b), and *Jennings v. Ward* (c), are express decisions upon this point. So, in *Spurgeon v. Follyer* (d), it was observed by the court that "the policy of this court is not more complete in any part of it than in its protection of mortgages; and, as a general rule for that purpose, a mortgage once redeemable continues so till some act is done afresh by the mortgagor to extinguish the redemption; and a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. It would ruin the distressed and unwary, and give unconscionable advantage to those dealing with them." In *Vernon v. Bethel* (e) the rule was stated thus: "This court, as a court of conscience, is very jealous of persons taking a security for a loan, and converting such securities into purchases; and therefore I take it to be an established rule, that a mortgagee can never provide, at the time of making the loan, for any event

(a) *Gossip v. Wright*, 9 Jur. N. S. 592.

(b) 1 Vern. 488.

(c) 2 Vern. 520.

(d) 1 Ed. 59.

(e) 2 Ed. 110.

or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule; for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." (a)

1866.

Fallon
v.
Keenan.

Courts of equity thus recognize—to use the language of Lord *Hardwicke* in *Longuet v. Scawen* (b)—“a distinction in the nature of the transaction between a power of redeeming and repurchasing, obtained by usage, which governs the sense of words; but it is well known that the court leans extremely against contracts of this kind, where the liberty to repurchase is made at the same time concomitant with the grant, as it must be considered in this case, being part of the same transaction: the court going very unwillingly into that distinction, and endeavoring if possible to bring them to be cases of redemption.”

Judgment.

To which of these two classes, then, does the present transaction belong?

The defendant did not choose to insert in the writings this part of the bargain; and, the onus of proving its character being upon him (c), the parol evidence necessarily would have, under the circumstances, to be of the most satisfactory kind; and the defendant has really given no evidence of it whatever. He has proved, indeed, expressions used by the *Fallons*, shortly after the signing of the papers, to the effect of their having sold the property to *Keenan*. But these expressions obviously consist with either view of the transaction—a mortgage with an agreement for selling

(a) *Vernon v. Bethell*, 2 Eden. 110. See also *Mellor v. Lees*, 2 Atk. 495; *Toomes v. Conset*, 3 Atk. 261; *Seton v. Slade*, 7 Ves. 273; *Gossip v. Wright*, 9 Jur. N. S. 592.

(b) 1 Ves. Sen. 402.

(c) *Bostwick v. Phillips*, 6 Gr. 427.

1866. to the mortgagee, which would be invalid; or a sale
 Fallon to the grantee with an agreement for repurchase, which
 v. might be valid.
 Keenan.

The absence of a covenant to repay the money advanced or paid by the grantee is often of weight in his favor in a controversy of this kind (*a*); but the circumstance cannot be very material where he defendant drew the writings himself on behalf of both parties; and while, on the one hand, he omitted any such covenant on the part of the *Fallons*, so, on the other hand, he omitted any covenant on his own part to make the advances; and when he chose to make them, I see nothing in his note that prevented his suing for them before the two years expired, if he had elected to take that course, instead of setting off the amount against the £500 which he was afterwards to pay for the property.

Judgment. On the other hand, the insufficiency of the supposed price constitutes, according to one test, a material circumstance in favor of the transaction being treated as a mortgage (*b*).

Again, in, I think, all the cases in which a transfer with a right of repurchasing has been upheld, the grantee had immediately gone into possession, or receipt of the rents (*c*); and possession by the grantee seems of the essence of a sale as distinguished from a mortgage (*d*).

(a) *Hawke v. Milliken*, 12 Gr. 236.

(b) *Vide Stewart v. Horton*, 2 Gr. 45; *Douglas v. Culverwell*, 3 Giff. 262; *Thornborough v. Baker*, 3 Sw. 628; *Morley v. Elway* Cases in Chan. 107.

(c) *Vide Ensworth v. Griffiths*, 5 Bro. P. C. 184; *Davis v. Thomas*, 1 R. & M. 506; *Williams v. Owen*, 5 M. & C. 305; *Ogden v. Battams*, 1 Jur. N. S. 791; *Alderson v. White*, 2 DeG. & J. 97; *Cotterel v. Purchase*, Ca. Temp. Tal. 61; *Neal v. Morris*, Beat. 597.

(d) *Sevier v. Greenway*, 19 Ves. 413.

So, also, in such cases, the purchase money had been paid at the time of the alleged sale. Here the purchase money was not to be paid for two years; and if the defendant made no advances meantime, the plaintiffs were to get back their property; if he made advances within the two years, the sale was only to go into effect if the *Fallons* did not repay these advances before the expiration of that period.

1866.

Fallon
v.
Keenan.

On the whole, therefore, I think it impossible to hold that the transaction was a valid sale, subject to a mere right by the *Fallons* to repurchase. I think it manifest that I must treat the transaction as, in its inception, a mortgage, and nothing more (a).

This being so, does the plaintiffs' right to redeem still exist?

Courts of law always held that time was of the essence of the condition for redemption of mortgaged property, and that, however valuable the property compared with the debt, it was lost to the mortgagor, if he did not pay on the very day agreed upon; and this rule is still acted upon at law, subject to the provisions of the statute 7 Geo. II. ch. 20, and the Common Law Procedure Act (b). To correct this harshness, courts of equity adopted the rule "once a mortgage, always a mortgage;" and allow redemption until the right is barred by some subsequent dealing between the parties (c), or by a foreclosure, or by the Statute of Limitations.

Between the plaintiffs here and the defendant *Keenan*, there was no subsequent dealing which can give rise to any reasonable question. As respects *Lawrence*, there is more room for argument.

(a) Vide *Fee v. Cobine*, 11 Ir. Eq. 406.

(b) Consol. U. C. 22 Vic. ch. 27, secs. 74, 75.

(c) *Smythe v. Simpson*, (Priv. Col.) 5 Gr. 104.

1866. *Keenan* set up in his answer, and, without objection, gave evidence, to prove a variety of circumstances, which his counsel, arguing with his usual force and ability, claims to be sufficient to extinguish *Lawrence's* equity of redemption. This is an issue between co-defendants, and in which the plaintiffs do not appear to be interested; but, since the evidence upon it has been given and the question argued, without objection from any party, I shall not refuse to express my opinion between the defendants, and it is, that the circumstances relied on for the purpose are not sufficient to bar *Lawrence's* right. *Keenan* may, however, have a reference on the point if he wishes.

Judgment. The learned counsel for the defendant *Keenan* contended that the facts on which the plaintiffs rely for relief are not correctly stated in the bill; but I think the inaccuracies of the bill cannot have misled or prejudiced the defendant.

The decree will direct an account to be taken of the amount due to *Keenan* in respect of the claims mentioned in the paper signed by him, dated the 13th of February, 1858, and of any debt then due, or which thereafter became due to *Keenan*, by the plaintiffs and *Lawrence Fallon* (these being the terms of the paper referred to). The Master will have liberty to report special circumstances. Further directions and costs will be reserved.

I do not make any order as to costs now, nor have I fully considered how they should be disposed of, because any costs the defendant *Keenan* may be liable for should be set off against any debt owing to him, and any costs he may be entitled to receive should be added to his debt; and these matters can more properly be provided for on further directions than now.

1866.

CARTWRIGHT V. GRAY.

Nuisance—Injunction.

Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbour's house any impurity which there are known means of guarding against.

The defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse; he took no means to consume or prevent the smoke, and it being carried to the plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke.

Hearing before Vice-Chancellor *Mowat*, at Kingston, in June, 1866.

Mr. *Machar*, for the plaintiffs, cited *Rex v. Neil* (a), *Rex v. Ward* (b), *Rex v. White* (c), *Bradley v. Gill* (d), *Hole v. Barlow* (e), *Simpson v. Savage* (f), *Rich v. Basterfield* (g), *Bamford v. Turnley* (h), *Elliotson v. Feetham* (i), *Regina v. Train* (j), *Flight v. Thomas* (k), *Sampson v. Smith* (l), *Crowder v. Tinkler* (m), *Walter v. Selse* (n), *Bankart v. Houghton* (o), *Tipping v. St. Helen's Smelting Co.* (p), *Spokes v. Banbury* (q), *Goldsmid v. Tunbridge* (r), *Mitchell v. Steward* (s), *Soltau v. DeHeld* (t). Argument.

(a) 2 Car. & P. 485.

(c) 1 Bur. 333.

(e) 4 C. B. N. S. 334.

(g) 4 C. B. 805.

(i) 2 Bing. N. S. 134.

(k) 10 A. & E. 590.

(m) 19 Ves. 617.

(o) 27 Beav. 425.

(q) 1 L. R. Eq. 42.

(s) 1 L. R. Eq. 547.

(b) 4 Ad. & E. 384.

(d) Lutw. 69.

(f) 1 C. B. N. S. 347.

(h) 9 Jur. N. S. 377.

(j) 31 L. J. M. C. 160, Q. B. 179.

(l) 8 Sim. 272.

(n) 4 DeG. & Sm. 315.

(p) 1 L. R. App. 66.

(r) 1 L. R. Eq. 163.

(t) 2 Sim. N. S. 133.

1866. *Mr. R. Walkem*, for defendant, cited *Attorney General Cartwright v. Cleaver (a)*, *Walter v. Selfe (b)*, *Cavey v. Lidbetter (c)*, *Beardmore v. Treadwell (d)*, *Radenhurst v. Coate (e)*, *Mumford v. The Oxford, Worcester and Wolverhampton Railway Co. (f)*, *Clarke v. Clark (g)*, *Drewry on Injunction*, 238; *Mitford on Pleading*, 168; *Addison on Torts*, 16, 168.

MOWAT, V. C.—The facts appear to be these: In December, 1864, the plaintiffs sold and conveyed to the defendant a lot of ground in the city of Kingstone, near the residence of the plaintiff *Richard Cartwright*, and near the two other houses of which the two plaintiffs are joint owners. In the following year the defendant erected on this lot a carpenter's shop, with a planing machine and circular saw driven by steam. The plaintiffs complain of the smoke, noise and sparks produced in working the engine, as nuisances.

Judgment.

The defendant burns all the pine shavings and other refuse of his business, and only a small quantity of hardwood, and the smoke arising therefrom is described by several witnesses as pungent and disagreeable, and also as soiling linen hung out to dry. I think it proved that, from the prevalent wind being in the direction in which the plaintiff *Richard Cartwright's* residence lies from the defendant's shop, the smoke goes generally in that direction; that from this cause, as well as the height of the house and other local circumstances, the occupants are liable to suffer more from the smoke than the occupants of the neighboring houses; and, comparing the testimony on both sides, I have no doubt that the character of the nuisance, as affecting the plaintiff's

(a) 13 Ves. 111.

(c) 9 Jur. N. S. 798.

(e) 6 Gr. 135.

(b) 15 Jur. 416.

(d) 9 Jur. N. S. 272.

(f) 1 H. & N. 34.

(g) 1 Law Rep. Eq. 16.

residence, is not overstated by one of the witnesses, who says: "The smoke is a heavy black smoke. It has been heavy at times in the yard of Mr. *Cartwright's* house, such that I could not see or breathe as freely as when there is no smoke. The smoke was so thick that if the windows had not been down it would have injured fine curtains or wall paper or the like I have sometimes heard Mrs. *Cartwright* order the windows to be shut in consequence of the smoke. I saw the smoke two or three times a week, and sometimes every day of the week. It did not annoy me. It did not hurt the yard. It was like a heavy fog." This witness, a servant of Mr. *Cartwright's*, says the smoke did not annoy him, though he also says that it interfered with his seeing and breathing; but I think I must hold that such a degree of smoke as he and others describe is quite sufficient to justify the testimony of another witness, who, speaking from his own observation, pronounced it "certainly prejudicial to comfortable enjoyment, so far as respects the plaintiffs' houses." Judgment.

1866.

Cartwright
v.
Gray.

It is not alleged that the defendant has adopted any of the well known contrivances for consuming or preventing smoke. Now, according to the settled doctrine of the courts, as stated by Vice-Chancellor, now Lord Justice, Knight *Bruce*, in *Walter v. Selfe* (a), the plaintiff is clearly entitled to "an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family there; or, in other words, to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere * * * : meaning by 'untainted' and 'unpolluted,' not necessarily as fresh, free and pure as, at the time of building the plaintiff's house, the atmosphere there was, but air not rendered to an important degree less compatible, or at least not rendered incom-

(a) 4 DeG. & Sm. 321.

1866. Cartwright patible, with the physical comfort of human existence: a phrase to be understood, of course, with reference to the climate and habits of England." I think that the inconvenience made out by the plaintiffs in the present case is, in the language of the same learned judge, "more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people (a)."

Judgment. The statement of the law which I have thus quoted accords entirely with what was laid down in the late case of *St. Helen's Smelting Co. (limited) v. Tipping (b)*, which went up to the house of Lords: "A man may not use his own property so as to injure his neighbour. When he sends on the property of his neighbour noxious smells, smokes, &c., then he is not doing an act on his own property only, but he is doing an act on his neighbour's property also; because every man, by common law, has a right to the pure air, and to have no noxious smells or smoke sent on his land, unless, by a period of time, a man has, by what is called a prescriptive right, obtained the power of throwing a burden on his neighbour's property When great works have been created and carried on—works which are the means of developing the national wealth—you must not stand on extreme rights Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences—injuries which

(a) Vide also *Clarke v. Clark*, 1 Law Rep. App. 16; *Dent v. Auction Mart Co.*, 1 Law Rep. Eq. Ca. 244; *Curriers' Co. v. Corbett*, 11 Jur. N.S. 719; *Rich v. Basterfield*, 4 C.B. 805; *Rex v. White*, 1 Burr. 333.

(b) 11 Jur. N. S. 735.

sensibly diminish the comfort, enjoyment or value of the property which is affected." This was the language of Mr. Justice *Mellor*, and was held to be correct both by the other judges in answer to a question submitted to them in the House of Lords, and by the noble lords who took part in disposing of the appeal. Lord Chancellor *Westbury* said in his judgment: "If a man lives in a town, of necessity he must submit himself to the consequence of those obligations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town, and of the public at large." Here, the fault of the defendant's case is, it does not appear that the sending these clouds of smoke into his neighbours' houses is necessary at all, or that the defendant has taken any means to avoid it.

1866.
Cartwright
v.
Gray.

Lord *Cranworth* mentioned his charge, in a case he had tried while a Baron of the Exchequer, as an accurate statement of the law. The action, his lordship said, "was for smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfered with a certain person, but I said, 'You must look at it, not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town of Shields;' because if it only added in an infinitesimal degree to the quantity of the smoke, I thought that the state of the town rendered it altogether impossible to call that a nuisance."

Judgment.

This was a case at law, but the rule in equity is the same. *Beardmore v. Tredwell (a)* was a bill to restrain a nuisance; and in the course of his judgment the Vice-Chancellor observed: "Where a man is injuring his neighbour to a very material extent, in a way not abso-

(a) 3 Giff. 697.

1866. Cartwright lutely necessary and unavoidable in order to enjoyment
 v. Gray. of his own fair private right, this court is always dis-
 posed to interfere." The learned judge afterwards
 quotes with approbation the following language of Mr.
 Justice *Willes* (a). "The common law right which
 every proprietor of a dwelling house has, to have the
 air uncontaminated and unpolluted, is subject to this
 qualification; that necessities may answer for the inter-
 ference with that right, *pro bono publico*, to this extent,
 that such interference being in respect of a matter
 essential to the business of life, and being conducted in
 a reasonable and proper manner, and in a reasonable
 and proper place." The Vice-Chancellor adds, "If
 there be another place where it may be conducted
 without injurious consequences, or with less injury
 according to law, the right of a person complaining to
 have his air uncontaminated and unpolluted would be
 clear."

Judgment. These and other authorities shew that while the
 plaintiffs cannot insist upon the complete immunity
 from all interference which they might have in the
 country, the defendant cannot, on that ground, justify
 throwing into the air, in and around the plaintiffs'
 houses, any impurity which there are known means of
 guarding against (b).

It was proved, on behalf of the defendant, that
 there are other establishments of various kinds in
 the same part of the city from whose works more
 smoke is sent forth than from the defendant's mill;
 and, on the other hand, the plaintiffs have given
 evidence that the smoke from these establishments,

(a) *Hole v. Barlow*, 4 C. B. N. S. 334. Vide *Cavey v. Lidbetter*,
 9 Jur. N. S. 798; *Wanstead Board of Health v. Hill*, 13 C. B. 479.

(b) Vide also *The Stockport Waterworks' Co. v. Potter*, 7 H. & N.
 160; *Bamford v. Turrley*, 3 B. & S. 62; *Tipping v. St. Helen's*
Smelting Co., 4 B. & S. 608.

though they have been many years in operation, never reached the plaintiffs' houses so as to cause any inconvenience to their occupants. I have no doubt it is from the defendant's engine that the smoke now complained of comes; but, had it been partly or chiefly from the others, the fact would have been no justification of additional injury on the part of the defendant.—Vide *Rex v. Neil* (a), *Spokes v. Banbury Board of Health* (b), *Radenhurst v. Coate* (c), *Attorney-General v. Sheffield Gas Consumers' Co.* (d), *Spokes v. Banbury Board of Health* (e), and *Goldsmid v. Tunbridge Wells Improvement Commissioners* (f). 1866.
Cartwright
v.
Gray.

The learned counsel for the defendant argued that there could be no injunction except at the suit of the occupier, and that the other plaintiff was improperly made a plaintiff in respect of the other plaintiff's residence, and that no relief could be had in respect of a nuisance of this kind affecting the houses they have rented to others. But if the defendant is restrained as respects Mr. *Richard Cartwright's* residence, this renders the question immaterial as to the other houses, for the discontinuance of the nuisance, as to the former, would involve its discontinuance as to the latter; and if the one plaintiff is improperly joined, this does not under the present practice disentitle the other to relief. I do not find, however, that the rule at law which forbids an action for a nuisance like that here except by the occupier (g), is a rule of this court: the judgments in *Wilson v. Townsend* (h), *Cleve v. Mahany* (i), *Jackson v. Duke of Newcastle* (j), and *Goldsmid v. The Tunbridge Wells Improvement Commissioners* (k), contain some observations the other way. Judgment.

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| (a) 2 C. & Payne, 485. | (b) 1 Law Rep. Eq. 51. |
| (c) 6 Grant, 139. | (d) 3 DeG. Mc. & G. 332. |
| (e) 1 App. Eq. 50. | (f) 1 Law Rep. Eq. 169. |
| (g) <i>Mumford v. The Oxford, Worcester & Wolverhampton Railway Company</i> , 1 H. & N. 34; <i>Simpson v. Savage</i> , 1 C. B. N. S. 347. | |
| (h) 1 Drewry & Sm. 324. | (i) 9 Weekly Rep. 882. |
| (j) 10 Jur. N. S. 688. | (k) 1 Law Rep. App. 354. |

1866. As to the sparks, the defendant has given evidence to shew that a screen, which he has put on the top of the pipe since the commencement of the suit, has removed this cause of complaint. It is sworn that the screen is amongst the closest made, and closer than are generally made for this purpose. Sparks do still pass through, but not to the same extent as before, and there is no evidence that it would be possible by any contrivance to prevent them to a greater degree than the defendant has now done. No case was cited which would justify me in holding it a nuisance to make use of machinery driven by steam in this part of the town; and if a certain amount of danger to the houses in the neighbourhood is the necessary consequence, it seems to be a consequence which, as owners of town property, they must accept, subject to any right they may happen to have to damages at law in case of actual loss. The case is not the same as a corning-house to powder mills, as in *Crowder v. Tinkler (a)*, which was cited by the learned counsel for the plaintiff in support of this branch of his case.

Judgment.

The claim of the bill founded on the noise made by the engine, was not much pressed. The noise is less since the completion of the defendant's building than it was previously; and, on the whole evidence, does not appear to be such now as to interfere sensibly with the comfort of persons in average health living in the plaintiffs' houses (b).

My opinion on the whole case is, that the defendant has a right to use steam for propelling his machinery, but is bound to employ such reasonable precautions in the use of it as may prevent unnecessary danger to his neighbour's property from sparks, and unnecessary

(a) 19 Ves. 617.

(b) Vide *Soltau v. DeHeld*, 2 Sim. N. S. 133; *Scott v. Firth*, 10 Law T. N. S. 240; *Attorney-General v. The Sheffield Gas Consumers' Co.*, 3 DeG. McN. & G. 337; *White v. Cohen*, 1 Drew. 318.

annoyance or injury to them from the noise or smoke; 1866.
 that though he seems, since the bill was filed, to have
 performed this duty as respects the sparks and noise, Cartwright
 v.
 Gray.
 he has done nothing in respect to the smoke; and
 that the plaintiffs' complaint in reference thereto is
 well founded. The decree will therefore require the
 defendant to desist from using his steam engine in
 such manner as to occasion damage or annoyance to the
 plaintiffs, or either of them, as owning or occupying
 the houses mentioned in the bill (a).

The defendant must pay the costs.

TORRANCE v. CHEWETT.

Will—Set off—Husband and wife.

A father, before his daughter's marriage (in 1857), wrote a letter to her intended husband, saying he would give her £2,500 when she came of age, and one fourth of his residuary estate at his death. In 1858, and before the wife came of age, the father advanced money to the husband, for which he took his note, but which he charged in his ledger to the joint account of the husband and wife and intended, if the same was not repaid, to set off the amount against his daughter's share of his estate.

Held, in a suit by the wife in the husband's lifetime for administration of the estate, that the executors had a right to set off the advance against the wife's share.

Held, that such right was not affected by the fact that the father by his will, made after the marriage, but before the advance, had directed that any advances he should make were to be deducted from the £2,500; the reason of this provision appearing to be that the testator did not contemplate making any advances to an amount exceeding £2,500.

Held, that such right was not affected by the fact that on a demand being made on the father for the whole £2,500; when his daughter came of age, he, in time, reluctantly yielded to the demand, not releasing, however, or agreeing or intending to release, his right against the husband for his previous advance.

This was an appeal from the Accountant's report.

(a) *Walter v. Selfe*, 4 DeG. & Sm. 321.

1866. The bill in the cause was filed on the 26th April, 1864, by *Mary Elizabeth Torrance*, by *James Benson*, her next friend, against the defendants her brothers, *William C. Chewett* and *Alexander C. Chewett*, and her husband *Henry Torrance*. The decree, dated 24th March, 1865, directed the accounts usual in an administration suit to be taken in reference to the estate of the plaintiff's father, *James Grant Chewett*, Esq., who died on the 2nd December, 1862. The decree also contained a provision, inserted by consent of all parties, that a proper person should be appointed executor and trustee, in place of the defendant *Alexander C. Chewett*, who was thereby, at his own request, relieved of his trust.

The Accountant made his report, under this decree, on the 12th February, 1866. The appeal from the report was on the following grounds:

- Statement.
1. That the Accountant allowed the executors a commission of four per cent. upon all transfers of stock, and all moneys paid in and collected by them;
 2. That he charged against the plaintiff \$1101 30, lent by the testator, as the plaintiff alleges, to the firm of *Henry Torrence & Co.*;
 3. That he erroneously reported that the executors saved to the estate \$15,000, by means of their arrangement with the *Commercial Bank*;
 4. That he erroneously reported that the executors were not guilty of any breach of trust in releasing a portion of the real estate, covered by a mortgage to the testator from Messrs. *Rossin*; and
 5. That the Accountant was wrong in reporting that the executors had furnished a proper account before the commencement of this suit.

Mr. *McGregor*, for the objection as to commission,

referred to the Revised Statutes of New York, 4th ed. 1866.
 vol. 2, page 2171; and, as to the 2nd objection, cited *Torrance*
Bold v. Hutchinson (a), *McCormick v. Garnett (b)*, *Chewett*.
Peachey on Marriage Settlements, pages 83, 87.

Mr. *Wells*, contra, cited, as to the 1st objection, *McLennan v. Heward (c)*, *Chisholm v. Barnard (d)*, *Cockrel v. Barber (e)*, and the American notes to *Robinson v. Pett (f)*; and, as to the 2nd objection, *Kirk v. Eddowes (g)*, *Ravenscroft v. Jones (h)*, *Hall v. Hill (i)*, *Thellusson v. Woodford (j)*, *McMahon v. Burchell (k)*, *Chapman v. Salt (l)*, *Ranking v. Barnard (m)*, and *Peachey on Marriage Settlements*, 492 *et seq.*

MOWAT, V. C.—As to the first objection of the plaintiff, I think that, having reference to the commission which has been allowed to executors in other cases with the sanction of this court, and to all the items of the accounts here, one with another, and to all the circumstances of the estate, sufficient has not been shewn to justify me in interfering with the amount which the Accountant has seen fit to allow. Judgment.

The facts bearing on the 2nd objection are these: Before the plaintiff's marriage, her father, the testator, wrote a note to Mr. *Torrance*, to whom she was then engaged, and whom she afterwards married, in the terms following:

“ Toronto, 30th June, 1857.

“ My dear Mr. *Torrance*,—In reply to your letter of yesterday, I feel much pleased with your generous intentions with regard to my daughter, in respect

(a) 20 Beav. 259, 263.

(c) 9 Gr. 285.

(e) 1 Sim. 23.

(g) 3 Hare 509.

(i) 1 Dr. & War. 107.

(k) 5 Hare 325.

(b) 2 S. & Giff. 37.

(d) 10 Gr. 481.

(f) 2 W. & Tud. L. C. 206.

(h) 33 L. J. Ch. 483.

(j) 4 Madd. 420.

(l) 2 Vern. 646.

(m) 5 Madd. 33.

1866. to the settlement you propose. My daughter will receive from me when she becomes of age £2500. I have already given the like sum to my sons. The residue of my property will be divided into four equal parts at my death, between Mrs. *Chewett*, *William*, *Alexander*, and *Mary*, the value of which I consider, at the present time, worth £80,000. Mrs. *Chewett* will have the privilege of dividing her share as she thinks proper; and my wife and children will be my executors.

Torrance
v.
Chewett.

“Yours faithfully,

J. C. Chewett.”

The marriage took place shortly afterwards.

The testator subsequently, and before the plaintiff came of age, made certain advances to her husband, which the accountant has allowed us against the plaintiff's share of the residue. It is one of these advances to which the second objection refers as made to the firm of *Torrance & Co.*

Judgment.

Now, before the late statute (a) a husband had no right to release sums payable to his wife before they fell due, nor to accept payment in advance so as to bind the wife if she should survive him (b); but, I presume, that as the law then stood, such payments would be binding except in that event, subject to the wife's equity to a settlement; and might be set up in any suit brought to enforce payment during the husband's lifetime; and I think that a set-off for an advance made, or debt contracted, on the credit of the liability, must stand on the same footing as a payment. I say this was so as the law then stood; and it was not contended, and I apprehend could not have been maintained, that the Married Women's Act of 1869 referred to (c), varied the testator's rights in the present case as they stood before the passing of that act.

(a) U. C. Consol. Stat., 22 Vic., ch. 73.

(b) *Rogers v. Acaster*, 14 B. 445.

(c) U. C. Consol. Stat., 22 Vic., ch. 73.

Before the testator made the advance in question, he made his will, dated the 2nd of June, 1858, and thereby, amongst other things, bequeathed £2,500 and one-fourth of the residue of his estate to the separate use of the plaintiff for her life, free from her husband's debts, and from his control, and without power of anticipation or alienation; and the testator declared his will to be, that any moneys he might advance to the plaintiff or her husband on her account, should be deducted from the said sum of £2500; and that the provisions in his will in the plaintiff's favor, were intended to be in full satisfaction of any engagement which, by his letter to *Torrance*, the testator had become liable to fulfil.

1866.

Torrance
v.
Chewett.

In September, 1858, the testator advanced the sum of £261 14s. 6d., to relieve an execution in the sheriff's hands against Mr. *Torrance's* firm, and took by way of security the promissory note of *Torrance*, and an assignment of some wine belonging to the firm. The testator subsequently gave up the wine to *Torrance*, but retained his note.

Judgment.

At the time of the advance the testator charged the amount in his ledger to the joint account of the plaintiff and her husband. There is no evidence that the plaintiff knew anything of the advance; but that it was made with the intention, on the part of the testator, of deducting it from what the plaintiff was to receive from him or his estate, I think is clear, as well from the circumstances I have mentioned, as from the express evidence contained in the depositions taken by the Accountant. And I think the testator had the clear right so to deduct his advance, subject to the contingency of Mr. *Torrance's* surviving the plaintiff, and that effect should be given to his intention (a).

(a) Vide the Notes Exp. Pye, 2 W. & T. Lead Ca. 279; Ferris v. Goodburn, 4 Jur. N. S. 847.

1866. It is true that when the testator made his will he did not contemplate making advances to the plaintiff or her husband, to an amount exceeding £2500, the legacy he specified in his will, and he therefore directed his advances to be deducted from that legacy; but *expressio eorum quæ tacite insunt nihil operatur*; and since the right of set-off would have been implied as to both this sum and the plaintiff's share of the residue, without any express direction in the will, the direction as to the former does not take away the implied right as to the latter; the two bequests being otherwise on the same trusts, and to the same effect. In case, therefore, of the testator's subsequent advances exceeding the £2500, I see nothing in the form of the will to disentitle the executors to set-off the excess against the plaintiff's share of the residue.

Judgment. The testator's advances did really amount to £2761-14s. 6d., the additional advances having been made in 1860. The plaintiff had by that time come of age, and a demand was made on her behalf for the £2500 named in the testator's letter. The testator insisted for a time on deducting the £261 14s. 6d. from the £2500; but, this being peremptorily objected to on the part of the plaintiff, the testator at length reluctantly consented to advance the whole sum, not however releasing or intending to release his claim against the plaintiff's husband in respect of that sum. The testator's reason for not insisting on his claim to make the deduction from the £2500 appears to have been either a natural desire to avoid a prolonged and painful quarrel with his daughter, or rather with her husband (who was evidently the instigator of the demand, though it was made in his wife's name), or from a mistaken apprehension that the plaintiff's advisers were right in their contention that he could not insist on deducting the amount. Accordingly he paid the whole sum of £2500; but he entered into no agreement for the abandonment of his right to deduct his former advance from the plaintiff's share

of the residue of his estate; nor was anything said between them as to such an abandonment. In the absence of any agreement, I see no ground for holding that the right, as respects the residue, was affected by what took place at this time. I think, therefore, that the conclusion of the Accountant in regard to this item was correct.

1866.

Torrance
v.
Chewett.

In considering this objection, I have assumed that the plaintiff has a right to insist on the performance of the promises contained in her father's letter, notwithstanding that she was a minor when it was written, and that there is no evidence that she knew anything of the letter before her marriage. Some of the authorities bearing on this point are collected in *Fry on Specific Performance*, page 41, *et seq.*

[The Vice-Chancellor then proceeded to state at length his reasons for allowing the third and fifth grounds of appeal, and for disallowing the fourth ground of appeal; but as the judgment in regard to these objections involved no point of general interest, it is not reported.]

Judgment.

MULHOLLAND V. HAMILTON.

Practice—Re-hearing.

In a suit for the administration of a debtor's estate, under an assignment for the benefit of creditors, creditors who come in under a decree may rehear the cause, and this is the proper course where the alteration is such as might be effected in that way by a party to the cause.

This was a petition by two creditors of *James Henry Smith*, who had proved claims under a decree for administration of his estate assigned for the benefit of creditors, seeking to vary the decree which had been drawn up in the cause, with a view of enabling them to

1866. have the priority of their claims properly decided by
 Mulholland the Master.

v.
 Hamilton.

Mr. Roaf, Q.C., and Mr. Snelling, in support of the petition.

Mr. R. Sullivan, contra.

MOWAT, V. C.—This was a suit by creditors of *James Henry Smith*, who made an assignment for the benefit of his creditors, and the judgment (10th of October, 1862,) pronounced by his lordship the Chancellor, who heard the cause, was in effect for the execution of the trusts of the assignment. The decree as drawn up contains several directions on points not mentioned in the judgment as reported, and which are alleged to be inconsistent with the rights of other creditors. Two of these creditors, *Benjamin Walker Smith* and *David Morrow*, have filed a petition setting forth certain parts of the decree to which they object, and praying that the decree may be varied in respect to these.

I am of opinion that the proper course for the petitioners to take is to rehear the cause (a), and that the petition must therefore be dismissed with costs.

MCDONELL v. MCKAY.

Practice—Effect of amending bill on injunction.

After service of an injunction the plaintiff amended his bill, and added a new defendant, who was a mere trustee for the plaintiff, without, however, altering the frame of the bill or the prayer. Subsequently to the amendment the defendants committed a breach of the injunction, and the plaintiff moved to commit the defendants. *Held*, that the amendment was not a waiver of the injunction.

The defendants, who, as well as the plaintiff, were lumberers, were restrained by injunction from selling

(a) *Gifford v. Hort*, 1 Sch. & Lef. 409; *Osborne v. Usher*, 6 Bro. P. C. 20; 2 *Daniel*, Chancery Prac. 1604, 1739.

lumber which they had cut on timber limits claimed by the plaintiff, till such time as they should file proper security to account to the plaintiff for the value of the timber as it stood in the forest. After the defendants had been served with the injunction, the plaintiff amended his bill, upon præcipe, adding a new party defendant, but making no material alteration in the bill, and leaving the prayer unchanged.

1866.
McDonell
v.
McKay.

The defendants afterwards sold the lumber, and then filed proper security; before this was done, however, the plaintiff had incurred considerable costs for the purpose of having the defendants committed for the contempt. On being notified of the security having been filed the plaintiff offered to waive the contempt, provided the defendants paid the costs which he had incurred on account of the breach. This the defendants refused to do. The plaintiff thereupon moved that the defendants might be committed for contempt.

Statement.

Mr. *McGregor* appeared for the plaintiff, and referred to 1 *Smith's Chancery Practice*, 306, 627, 2nd. Ed., *Evans v. Root* (a), *Warburton v. London & Blackwall Railway Co.* (b).

Mr. *J. A. Boyd*, contra, cited. *Attorney-General v. Marsh.* (c).

VANKOUGHNET, C.—In the notes to *Morgan's Orders*, page 488, it is said that when an order to amend has been obtained, the injunction, whether expressly saved or not, is unaffected unless the record be changed and for this *Davis v. Davis* (d), and *Attorney-General v. Marsh* (e), are cited as authorities. In this case the record has been altered since the injunction issued by

(a) 1 Chan. Chambers Rep. 357.

(c) 16 Sim. 572.

(b) 2 Beav. 253.

(d) 2 Sim. 515.

(e) 16 Sim. 572.

1866. adding a co-defendant, but who is a bare trustee for
 the plaintiff. The rights of the plaintiff and the other
 McDonell defendants are in no way affected by or changed by
 v. McKay. this alteration, and upon consideration, I am of opinion
 that the whole suit is not so changed as that the
 injunction must fall. Unless this be the case the writ
 still subsists, and the parties affected by it have no
 right to disregard it.

The decision in the *Attorney-General v. Marsh* turned upon the peculiar wording and terms of the writ, which the change made by the plaintiff in the form of the record rendered it impossible for the defendants to comply with.

Judgment. The objection taken by Mr. *Boyd*, that in the notice of motion the injunction is referred to as of the 25th when it is dated the 26th of June, is not, I think, fatal. The date may be rejected altogether, as there is but one injunction in the cause, and the defendants could not have been misled. It is admitted that there has been a breach of injunction. The defendants must be committed unless within one week after taxation they pay the plaintiff's costs, which is all the plaintiff now requires.

COOK V. GINGRICH.

Practice—Further directions—Pro confesso.

When a decree *pro confesso* reserves further directions, and it is not necessary to serve notice on any of the parties, the cause may be set down on further directions at any time before the sitting of the court.

In this case a decree *pro confesso* had been pronounced which reserved further directions and costs. On the cause being called on, it appeared that the case had

been put upon the paper of causes the day preceeding the hearing, of which the court doubted the regularity.

1866.

Cook
v.
Gingrich.

Mr. *Livingstone*, for the plaintiff, stated that this practice had always been pursued in cases where the decree had been *pro confesso*.

After taking time to inquire as to the practice.

VANKOUGHNET, C.—The Orders of Court do not seem to make any provision specially as to setting down for further directions, causes which have been heard *pro confesso*, and in which the defendants remain unrepresented. Order 83, of Mr. *Taylor's* Orders, from the category in which it appears, was evidently not intended to apply to hearings on further directions. The only order which touches the case is the first part of Order 57, section 12, the latter part of which prescribes a time when notices is required, and which, as I read the order, must be given after the cause is set down. Under the first part of the order then in a case *pro confesso* the cause may be set down next after the causes already in the paper. but it should be done before the opening of the court. This would be, as I understand, in conformity with the old practice.

Judgment.

1866.

BERRY V. THE COLUMBIAN INSURANCE CO.

Set-off—Insurance.

An insurance company accepted a note for the premium, and the policy contained the following clause: "In case of loss, such loss is to be paid in thirty days after proof of loss; the amount of the note given for the premium, if unpaid, being first deducted." A partial loss having occurred, it was

Held, that the assured had a right in equity to set off the amount against the note.

The policy of insurance on a vessel provided that no partial loss or particular average should be paid unless amounting to five per cent. The vessel went on a shoal at Matanzas, but did not leak immediately, and was therefore supposed to have received no injury, and the contrary was not discovered until after she had sailed for Europe with a cargo. She touched at Queenstown for orders, and thence sailed for Stockholm, where she discharged her cargo and returned to England. On being examined there she was found to have sustained damage exceeding five per cent. The court, being satisfied that the injury was either wholly sustained at Matanzas or was the immediate and necessary consequence of what occurred there, it was *held*, that the insured was entitled to recover.

This cause came on to be heard before Vice-Chancellor *Mowat*, at the sittings of the court at Kingston, in the Spring of 1866.

Mr. R. Walkem, for the plaintiff.

Mr. Roaf, Q.C., for the defendants.

MOWAT, V. C.—On the 19th December, 1863, the plaintiff insured his barque the *Humberstone*, with the defendants, a foreign corporation, for \$15,000, for one year from the 5th of January, 1864. He gave his note for \$2101 25, being the amount of the premium with the charge for drawing the policy. The note bore the same date as the policy, and was at twelve months. The policy contained the following clause: "In case of loss, such loss to be paid in thirty days after proof of loss.....; the amount of the note given for the premium, if unpaid, being first deducted; but no partial loss or

particular average, shall in any case be paid unless amounting to five per cent." The controversy between the parties turns on this clause.

1866.
Berry
v.
Columbian
Ins. Co.

It appears from the evidence that the vessel sailed from Cardiff, in Wales, in perfect order and condition, for Nassau, in the island of New Providence; from Nassau she went to Matanzas in Cuba, and on entering the harbour she grounded on a coral reef, and continued on it, bumping, for upwards of twelve hours. She did not leak, however, and when examined by surveyors there she was pronounced sound, and got a cargo, with which she was to go to Queenstown, Ireland, and was there to receive further orders. It was on the 1st of April that she got off the shoal, she arrived at Queenstown early in June, and was then very leaky, but it was thought she might safely continue her voyage by being supplied with new pump gear, and three additional hands. This was done, and she proceeded with her cargo to Stockholm. From Stockholm she went to Sundswall, a neighboring port, where she took in a cargo of timber, with which she sailed to Sunderland, England, and there she discharged her cargo. This was in August. She was then thoroughly examined, and found to have been damaged by grinding on rocks. The damage was repaired; and the plaintiff claimed to be entitled in respect thereof under the policy in question. The company declined to pay, alleging that it did not appear where the damage was sustained, or that damage equal to five per cent on the amount insured had been incurred on any one voyage; and immediately after the plaintiff's note became due, viz., on the 6th of February, 1865, the company commenced an action therefor. The plaintiff pleaded by way of set off his claim under the policy. To this plea the company demurred; and before the demurrer was set down for argument, the bill in this cause was filed, viz., on the 23rd of May, 1865.

Judgment.

1866. Berry v. Columbian Ins. Co. The bill sets forth the facts, alleges that the plaintiff has no defence at law, claims in effect that he has a right in equity to set-off his claim upon the policy against the note, prays for an injunction against further proceedings at law on the note, and for other relief.

Judgment. The company did not demur to the bill, as they had to the plea at law, but filed their answer on the 19th September, 1865. On the 7th December thereafter the plaintiff gave notice of a motion for an injunction as prayed. The injunction was granted to stay execution, on the ground that the policy, having contained an express stipulation that in case of loss the note, if unpaid, should be deducted from the amount, the plaintiff was entitled in equity to insist on its being so deducted, or, if it exceeded the loss, to its being applied *pro tanto* towards meeting the amount. Judgment was afterwards entered for the company on the demurrer at law without argument. The company did not appeal from the order granting the injunction; and replication having been filed, a commission was issued by the plaintiff for taking evidence in England, and was executed; and the cause came on for hearing before me at Kingston, on the 7th June last.

I am quite satisfied that the damage was sustained at Matanzas. The vessel was surveyed there so far only as this could be done without examining her bottom; and as she did not leak, she was supposed to have received no injury. But the evidence shewed, as clearly as such a case admits of, that this was a mistake, and that either the whole damage afterwards discovered was sustained there, or that most of it was, and that the rest was the immediate and necessary consequence of that injury, and was sustained on the passage of the vessel thence to Queenstown; and I think that, under the circumstances, the latter is not to be distinguished, for the purposes of the policy, from the immediate injury done at Matanzas.

The learned counsel for the defendants contended that the sailing of the vessel from Matanzas without a survey of her bottom stops the plaintiff from contending that she had been injured there. But no authority was cited for this, and the proposition appears to me to be an unreasonable one. It does not even appear on the depositions, that there were any means at Matanzas of examining the vessel's bottom, or repairing the damages she had received.

1866.
Berry
v.
Columbian
Ins. Co.

The learned counsel further contended, that the plaintiff had no right to set-off the claim against the note; or that, if he had, this right was at law, and not in equity. The latter ground was not taken on the argument of the motion for the injunction.

The general doctrine of set-off has always been regarded in equity with great favor. It does not depend upon statute, but was recognized and enforced in Chancery before parliament dealt with the subject, and is recognised and enforced by equity courts still in many cases not within the statutes which regulate the subject at law. In *Freeman v. Lomas* (a) Sir James Wigram pointed this out, observing: "Questions as to the rights of debtors and creditors, in cases of cross demands between them, appear to have arisen and been determined in equity before the right of set-off was introduced into the statute law of this country, as will be found on referring to *Curson v. African Co.* (b), and *Peters v. Soame* (c), both of which cases were anterior to the statute 4 Anne, ch. 17, by which the first statutory provision for set-off in bankruptcy was introduced; and there are other cases in equity not falling within the provisions of the statute of Anne, between the date of that statute and the statute 2 Geo. II. ch. 22. by which the right of set-off at law was given.—*Downam v. Matthews* (d), *Jeffer v. Wood* (e).

Judgment.

(a) 9 H. 112.

(c) 2 Vern. 428.

(b) 1 Vern. 121.

(d) Prein. ch. 580.

(e) 2 P. W. 128.

1866.
Berry
v.
Columbian

It is clear, therefore, that the rights of debtors and creditors, in cases of cross demands between them, as those rights subsisted in equity, were not derived from or dependent upon any statutory right of set-off; and, on the other hand, it seems not to be improbable that the statutory rights were founded on the equitable rule."

For examples of cases in which a set-off has been allowed in equity of one legal demand against another legal demand, reference may be made to *Hawkins v. Freeman* (a), *Lechmere v. Hawkins* (b), *Vulliamy v. Noble* (c), *Taylor v. Okey* (d), *Hanford v. Moseley* (e), *Williams v. Davies* (f), *O'Connor v. Spaight* (g), *Beasley v. D'Archy* (h), *Piggott v. Williams* (i), *Baillie v. Edwards* (j), *The Unity Joint Stock Mutual Banking Association v. King* (k), *Story's Eq. Jur.* secs. 1484, 1435.

Judgment. The giving of this jurisdiction to the courts of law led to its disuse in equity in ordinary cases where a set-off could be obtained at law, which was plainly the more convenient, and probably the more expeditious, course; and Lord *Cottingham*, in *Rawson v. Samuel* (l), held the rule now to be that the mere existence of cross demands was not sufficient ground for the interference of a court of equity, and that it was necessary for the party seeking in equity the benefit of a set-off, as between two legal demands, to shew some other equitable ground for being protected against the demand of his adversary (m).

One such equitable ground is thus stated in *Freeman v. Lomas* (n); "It is not to be denied * * * that

(a) 2 Eq. Ca. Abr. 10, pl. 10.

(c) 3 Mer. 618.

(e) Cited 3 Hare 572.

(g) 1 S. & L. 305.

(i) 6 Madd. 95.

(k) 25 Beav. 78.

(m) P. 178.

(b) 2 Esp. 626.

(d) 13 Ves. 180.

(f) 2 Sim. 461.

(h) 2 S. & L. 403.

(j) 2 H. L. 74.

(l) C. & Ph. 171.

(n) 9 H. 114.

agreement, express or implied, may confer such a right, and that slight circumstances may be sufficient to warrant the court in presuming such an agreement." 1866.

Berry
v.
Columbian
Ins. Co.

In *Downam v. Matthews* (a) such an agreement was presumed from the course of dealing between the parties, and the Lord Chancellor said "that if there was but the least handle for directing such an account, it ought to be done."

In *Jeff's v. Wood* (b) the Master of the Rolls said: "It is true, stoppage is no payment at law, nor is it, of itself, a payment in equity; but then a very slender agreement for discounting or allowing the one debt out of the other will make it a payment, because this prevents circuity of action and multiplicity of suits, which is not favored in law, much less in equity. * * * The least evidence of an agreement for a stoppage will do; and in those cases equity will take hold of a very slight thing to do both parties right. And it is still more reasonable that where the matter of the mutual demand is concerning the same thing, there the court should interfere, and make the balance only payable. * * * Forasmuch as it is probable the Spiritual Court will not allow of the discount, therefore the suit here is very proper, in order to have such an allowance."

Judgment.

In such cases equity allows a set-off, although at the common law the party might be remediless (c).

Under the English Bankruptcy Law the plaintiff's claim would clearly be set-off against the defendant's, even in the absence of the express provision in the policy on which the plaintiff relies (d). Such would be the result also, I presume, under our own Insolvency Act (e); and that the natural equity of the plaintiff is

(a) 20 Ch. Prec. 581. (1721).

(b) 2 Story Eq. Jur. sec. 1435.

(c) 1 Deacon's Bankruptcy, 3rd Ed. 390.

(d) 27 & 28 Vic. ch. 17.

(e) 2 P. W. 128.

1866.
Berry
v.
Columbian
Ins. Co.

the same, though neither his estate nor that of the defendants is in bankruptcy, is obvious. But no doubt the rule of law is otherwise, and independently of the express provision in the policy on the point, neither party could claim at law that the one demand should be set-off against the other (a), though the circuitry of action which this rule compels has been referred to by the highest legal authorities as "a scandal and absurdity" (b); and I apprehend that he would be equally without remedy in this court, equity not having jurisdiction to correct every injustice which legal forms may create. In view, however, of the express provision referred to, the case is entirely different. In interpreting that provision it is to be remembered that the policy was prepared by the company, in an accustomed printed form, and every ambiguity in the instrument is therefore to be construed against the company (c). The policy speaks of deducting the note from the amount of loss, and does not specifically provide for the case of the loss being less than the note; but if the loss had been less than the note, I have no doubt the company could insist on the amount being applied on the note *pro tanto*. The converse must hold: whatever the company would have had a right to insist upon, it is, I think, perfectly clear that the plaintiff has in equity an equal right to insist upon. At law there may be technical difficulties in the way of this; but the authorities I have cited shew that there is no such difficulty here.

Judgment.

Such being my opinion as to the mutual rights of the parties, and the defendants having failed to shew me

(a) Luckie v. Bushby, 13 C. B. 864; Charles v. Altin, 15 ib. 46; Thompson v. Gillespie, 12 Jur. N. S. 779.

(b) Charles v. Altin, *ubi supra*.

(c) Notman v. Anchor Assurance Co. 4 C. B. N. S. 481; Fowkes v. Manchester & London Life Assurance Co., 32 L. J. 153, 157, 159; Anderson v. Fitzgerald, 4 H. L. 484; Braunstein v. Accidental Death Insurance Co., 1 B. & S. 799.

either that the same view would be taken at law of the right of set-off in this case as the authorities require to be taken of it in equity, and that the plaintiff could therefore have successfully defended himself at law; or that, if so, this court has not concurrent jurisdiction to enforce the agreement, the decree must be for the plaintiff.

1866.
Berry
v.
Columbian
Ins. Co.

In case of the decree being for the plaintiff the learned counsel for the company desired, I think, a reference as to the amount the company are liable for; and such a reference being asked must be granted.

The plaintiff desires that any reference which the court should direct might be to the Master at Kingston. The bill was filed in Toronto, and the venue laid there. The defendants employed a solicitor of the same place to attend to the defence; and it is not alleged that the witnesses in the matter of the reference reside in or near Kingston. The only ground on which the reference to Kingston was asked was, that the venue was subsequently changed to Kingston, and the cause heard there. But this was under an order imposing that as a condition upon the plaintiff, when he applied for a foreign commission, it being clear that the commission, if granted, could not be returned in time for the Toronto sittings. The plaintiff was also ordered to pay any additional costs the defendants might be put to in taking their witnesses to Kingston instead of Toronto. The reference must be to the Master here.

Judgment.

The plaintiff is entitled to the costs of the suit including the reference.

1866.

HAYBALL V. SHEPHERD.

Practice—Discovery—Form of bill.

The Orders of Court of 1853, which abolish all interrogatories in bills, do not apply to bills for discovery in aid of an action at law. In such a case the old practice still prevails.

This was a bill filed for discovery of a will of one *Francis Brock*, deceased, which it was alleged was in possession of the defendant, but which he refused to produce; the discovery being sought in aid of an action of ejectment. The bill also prayed relief.

Statement. The defendant had answered the bill without giving the discovery sought, and the plaintiff brought the cause down for the examination of witnesses and hearing, at the sittings of the court before Vice-Chancellor *Mowat* in Toronto, in September, 1866, when a number of witnesses were examined in support of the allegations in the bill on which the plaintiff founded his claim to the discovery sought. It was admitted that the object of the plaintiff was discovery only, and that he was not entitled to the relief prayed, but it was contended that he was entitled to discovery of the will.

On a suggestion from the court that the bill was demurrable as a bill for relief, and that for the purposes of the discovery sought, the suit should not have been brought down for hearing, but the plaintiff should have obtained the discovery by means of interrogatories, according to the practice existing before the Orders of 1853:

Mr. Bain, for the plaintiff, submitted that the words of the Order were general as to all bills, and that such being the case, the only mode of proceeding was that adopted by the plaintiff here.

Mr. McMichael and *Mr. Fitzgerald*, for defendant, were stopped by the court.

MOWAT, V. C.—I feel so clear upon the point that I do not think any good purpose would be answered by allowing counsel for the defendant to enter upon any lengthened discussion of the points in issue between the parties.

1866.

Hayball
v.
Shepherd.

By the 19th section of the 9th Order of 1853, bills for discovery in aid of actions at law, are clearly preserved, the words of that Order being, that "No bill is to be filed for discovery merely except in aid of the prosecution or defence of an action at law."

The bill must be dismissed with costs.

SCULTHORPE v. BURN.

Practice—Appeal from Master.

By the General Order (No. 42) the Master here has been given a greater discretion as to the conduct of references before him than the Masters in England have.

The Master overruled certain objections raised before him as to the regularity in point of form of certain proceedings in his office; On an appeal from this decision the court considered that if he had allowed the objections he would not have taken an improper view of them, but refused to interfere with the Master's ruling, and dismissed the appeal, but without costs.

This was a motion by way of appeal from the decision of the Master under the circumstances set forth in the judgment.

Mr. Cameron, for the appeal.

Mr. W. Burns, contra.

MOWAT, V. C.—The object of this snit was to try an interpleader issue directed in another snit by *Burn* (the defendant in this suit) against *Bletcher*. This issue was decided against *Burn*; and by the decree thereupon drawn up (*Sculthorpe v. Burn*) *Burn* was ordered to

1866. p. 7 the costs of the issue, and the sheriff's costs and expenses in *Burn v. Bletcher*, and the Master was directed to tax the same. The warrant he issued was entitled in *Burn v. Bletcher*, but was underwritten "To tax the sheriff's costs of interpleader application and his costs, charges, &c., and the claimant's costs of the interpleader issue, and the several costs mentioned in the decree made in the cause of *Samuel Sculthorpe*, the claimant, against the plaintiff herein."

On the return of the warrant the solicitor for *Burn* contended that the warrant was irregular, because entitled in *Burn v. Bletcher*, instead of *Sculthorpe v. Burn*, and that it was irregular to have issued the warrant, as a copy of the decree had not been filed with the Master. A copy of the decree was subsequently filed, and the Master then overruled both objections and proceeded to tax the costs, the solicitor for *Burn* declining to attend. The Master's certificate of the taxation and the subsequent proceedings are properly entitled in *Sculthorpe v. Burn*. An application is now made on behalf of *Burn* to set aside the taxation and subsequent proceedings, on the ground of the irregularities unsuccessfully complained of before the Master.

Ought I to entertain an appeal from the Master's ruling on such points?

I do not find any express statement upon the subject in the books either way, nor any case in which such an appeal was entertained; and I think the fair inference from the absence of any precedent for such an appeal is, that the understood practice is not to entertain such an appeal—a practice which seems to me extremely reasonable and proper. The Master is a judicial officer.

The object of the warrant here was to give notice of

the taxation to the defendant; and if the Master had taxed without notice, the taxation would, no doubt, have been set aside by the court. But the notice given was as distinct as a notice could be with respect to what the Master was about to do, and gave all the time which is customary.

1866.
Sculthorpe
v.
Burn.

The delay in filing with the Master the order for taxation is not more important than the informality in the warrant.

If the Master had allowed the objections I think he would not have taken an improper view of them; but as he has seen fit to overrule them, I do not find any authority requiring me to interfere. The Master has, by our General Order (No. 42), received a larger discretion as to the conduct of references than the Masters in England had.

Judgment.

Motion refused, without costs.

JONES V. THE BANK OF UPPER CANADA.

Practice--Parties--Master's office.

P., being a debtor of the plaintiff, deposited with him certain mortgages to secure such indebtedness; the plaintiff filed a bill against the parties entitled to the equity of redemption of one of those mortgages for payment of the money due thereon, and praying in default foreclosure; the defendants at the hearing objected that *P.* was a necessary party, but the court overruled the objection as it had not been taken by answer, and *P.* might be ordered to be made a party in the master's office.

Hearing before Vice-Chancellor *Mowat*, at the sittings in Toronto, September, 1866.

In this case a preliminary objection for want of parties was taken at the bar.

The facts bearing on the objection were these:

1866. *William Proudfoot* deposited with the plaintiff, as collateral security for a debt due him by *Proudfoot*, two mortgages theretofore executed by one *George Marcus Smith* to *Proudfoot*, and divers other securities: *Smith* afterwards released to *Proudfoot*. *Proudfoot's* interest in the property had since become vested in the Bank of Upper Canada. The bill was against the Bank, and a sub-purchaser of part of the property, and prayed that the plaintiff might be declared to be a mortgagee of the property, and for a foreclosure; an injunction to restrain alienation; a receiver; and further relief.

Jones
v.
The Bank of
U. C.

The answer alleged that the plaintiff held many other securities for his debt besides the two mortgages mentioned in the bill, but did not take any objection for want of parties. It was objected at the hearing that *Proudfoot* was a necessary party. It was admitted by the defendant that *Proudfoot's* interest in the questions raised by the answer was identical with that of the plaintiffs.

Judgment.

Mr. *Blake*, Q. C., and Mr. *Snelling*, for the plaintiffs.

Mr. *Roaf*, Q. C., and Mr. *G. D. Boulton*, for the defendants.

Mowat, V. C., overruled the objection, referring to the fact of its not having been taken by the answer, and to the General Order of June 29, 1861, for adding parties in the Master's office persons interested in the equity of redemption.

1866.

DONALDSON V. DONALDSON.

Undue influence—Will.

The plaintiff, being old and infirm, was induced by his son, with whom he resided, and who had great influence with him, to agree in writing to leave to the decision of two referees the terms of his will, and to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent, independent advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the court decreed the lease void, and the will revocable at the pleasure of the plaintiff.

This cause came on for the examination of witnesses and hearing before Vice-Chancellor *Mowat*, at the sittings of the court at Sandwich, in the spring of 1866.

Mr. *O'Connor*, for the plaintiff, referred to *Fraser v. Rodney (a)*, *Mason v. Seney (b)*.

Mr. *A. Cameron*, for the defendant, referred to *Dawson v. Dawson (c)*, *Rundall v. Willis (d)*, *Needham v. Smith (e)*, *Fortescue v. Hennah (f)*.

MOWAT, V.C.—The object of this suit is to set aside certain transactions which took place in February, 1865. Judgment. between the plaintiff, an old man of seventy-two, and his son, the defendant. At the time these transactions occurred the plaintiff was living with the defendant, and the latter was occupying the chief part of the property which is the subject of the impeached transactions, under a lease from the plaintiff which was about to expire. The property consists of a tavern stand and five acres of land within the municipal limits of the town of Sandwich, and was probably worth upwards of \$1,000. It appears to have comprised all the plaintiff's

(a) 11 Gr. 426.

(c) Ante page 273.

(e) 4 Russ. 318.

(b) 11 Gr. 447.

(d) 5 Ves. 266.

(f) 19 Ves. 67.

1866. means, except two annuities for his own life, amounting together to \$135.
 Donaldson
 v.
 Donaldson.

The defendant was his father's favorite child. *Margaret*, a married daughter of the plaintiff's, was a witness for the defendant, and anxious to assist his defence. She testified that the plaintiff "thought more of *John* (the defendant) than of any one else*John* and father (she said) have always been great friends. He used to take *John's* advice in his business. They always agreed first-rate. Father would do what *John* thought was right.....They agreed well until the will was made.....He always seemed to do what *John* and his wife wished." Evidence to the same effect was given by the plaintiff's witnesses.

Judgment. The plaintiff has been in delicate health for twenty-five years; for several years he has been afflicted with palsy, and the disease has been increasing gradually; for some years he has been subject to fits, and has them generally every month or six weeks; in one of these fits, which he had in October, 1864, he fell from a chair on which he happened to be standing at the time, and for some days was out of his mind from the shock; but, with this exception, he has always been rational, and has, when sufficiently well in health, been able to attend to whatever little business he had, but was weak in mind, and of deficient memory, arising partly from old age, and partly from bodily disease.

The impeached transactions consist of a will and lease. The lease is for the life of the plaintiff, and its terms are substantially the same in other respects as the lease which was about to expire.

The lease does not refer to the will; nor is there any written evidence that they formed parts of the same transaction, but both parties admit they did so. The will devised the property to the defendant, charged

with \$50 in favor of each of the other nine children of the plaintiff, payable after the plaintiff's death, without interest, there being an interval of a year between the payment to each child and that to the next, commencing with the eldest. The value or burden of this charge at the plaintiff's death would be very small, and would then probably be commuted for a mere trifle in cash. The defendant claims that the impeached transactions were valid; that the will was irrevocable; that the lease and will were executed in pursuance of one and the same agreement; and that the terms of the will were decided by an arbitration and cannot be altered.

1866.
Donaldson
v
Donaldson.

The defendant does not assert by his answer that the consideration which he alleges that he was to give for the lease and devise was the value of the property. On the contrary, he says that the object of the plaintiff was to benefit him, and to benefit him more than the plaintiff's other children, and he does not dispute that this will be the effect if the impeached documents are allowed to stand. Evidence on the part of the plaintiff to establish this point was therefore unnecessary, but evidence has been given; and I am satisfied from it that the property was worth considerably more than the defendant says he was to give for it; that the rent he was to pay, and the services he was to render, during the old man's life, were, as the lease declares, the consideration for the lease, and were regarded by both parties as a reasonable compensation for the use of the premises during the plaintiff's lifetime; that the devise of the property subject to the charge for \$450 was a gift to the defendant, and was so considered by both at the time, and was a gift of considerable value. If it had not been so, the defendant would hardly have been deaf (as he was) to the earnest and repeated entreaties of his old father to cancel the documents—entreaties made first, as we know, within a few days after the papers were signed,

Judgment.

1866. and continued until the plaintiff left the house. I find it impossible to suppose that the defendant would have made such entreaties the occasion of ill-treatment and abusive language towards his father, until the latter found it necessary to remove from the house, if the benefit which the defendant derived from the transaction was not, in the circumstances of the parties, so large as, unfortunately, to overcome in the defendant's mind all sense of filial duty.

Donaldson
v.
Donaldson.

The so-called arbitration was the proposal of the plaintiff; but was suggested by him as a means of satisfying the importunity of the defendant, who was insisting on a will in his favor, and was using every influence and every means in his power to obtain it, not even refraining from reproaches and threats. When the plaintiff suggested an arbitration as to his will, I see no reason for supposing that he meant to make an irrevocable will, or to put the reversion, subject to the lease, beyond his power. He wished arbitrators to say how he should devise his property, that their award might be his justification to his other children for making a will in accordance with it, if they should be dissatisfied with the will. But if he should choose afterwards to make any other disposition of the property, I see no sufficient reason for believing that he meant originally to place such a course beyond his power.

Judgment.

The plaintiff and defendant each chose a so-called arbitrator, and agreed in writing to abide by the decision of the two persons thus chosen as to all matters in difference between the parties "respecting the disposal of [the plaintiff's] land by testament." This curious submission mentions no consideration moving therefor from the son, or to the father, and gives no further explanation as to what the "matters in difference" were.

The so-called arbitrators thereupon conferred together

privately, and without calling witnesses or hearing the parties, made what is called their award. Either on the same day (17th of February), or a few days afterwards (21st of February), the lease and will were executed. Before executing them the plaintiff wished to take the papers away to obtain advice upon them. But this was refused—they must be examined at the office of the attorney who prepared them, and not elsewhere. The plaintiff then called in a friend to look at them, who read the will only, but swears that the plaintiff did not consult him about its substance, and who advised him only as to its being in legal form, supposing this to be all the plaintiff desired of him. I cannot, upon the evidence, regard Mr. *Fluett*, who prepared the papers, as an independent adviser, or, indeed, any adviser, of the plaintiff in the matter. He prepared the papers for both parties according to what he understood to be their instructions. That was all he was employed to do. Neither party asked his advice respecting the arrangements they contemplated, and he gave no advice upon them to either party. He took pains that they should understand the papers before signing them, and to prepare them in conformity with what was, or what he supposed to be, the bargain. But considering the relations of the parties, and the condition of the plaintiff, it was necessary for the defendant to establish much more than this, in order to maintain the transaction. It was necessary for him to shew (amongst other things) that the defendant had an independent adviser, one competent to advise him in the matter, and who did give the plaintiff all the advice he needed. So far was the plaintiff without this protection that no one seems even to have suggested to the plaintiff the question of whether the will was to be, or should be, revocable or not, either as affecting the defendant, or even as affecting the \$450 the defendant was to pay.

1866.

Donaldson
v.
Donaldson.

Judgment.

Almost immediately after the transaction, the plaintiff repented it, and begged the defendant to consent to its

1866. being cancelled; the defendant refused; bad feeling sprung up between them; and the plaintiff's life with the defendant becoming very uncomfortable, he left the house, and brought the present suit.

Donaldson
v.
Donaldson.

I have no doubt that he understood the general nature of the papers he executed, and that he was not in a state of mind that rendered him incompetent for the transaction of ordinary business. But between parties situated as these parties were, this is not enough. The defendant was bound to establish that the transaction was entered into willingly and deliberately on the part of the plaintiff, and without pressure from, or influence by, the defendant, as the recipient of the benefit; and these things the defendant has not established.

I think there must be a decree declaring the lease void, and the will revocable at the pleasure of the plaintiff; and restoring to the plaintiff the possession of the property. There will be no costs to either party up to the hearing.

There may also be a reference, at the instance of either party, as to rents or improvements, reserving, in that case, further directions, and the costs of the reference.

1866.

FOWLER v. BOULTON.

Practices—Examination of parties.

Where a plaintiff, though duly served with subpoena and the examiner's appointment, does not appear to be examined under 22nd Order of the 3rd of June, 1853, the defendant's motion that he do attend or stand committed, is made *ex parte*, unless the court sees fit to direct notice to be given.

A defendant has a right to examine the plaintiff as soon as his own answer is filed, though there may be other defendants who have not answered; and it is not necessary to serve such other defendants with notice of the examination.

The plaintiff by amending his bill does not postpone his liability to be examined until after the time for answering the amendments expires.

Service on the solicitor of a copy of the examiner's appointment for the examination of a party is a sufficient notice to the solicitor; and it is not necessary that the appointment should name the parties at length.

Two of the defendants in this case, having filed their answers, obtained an appointment from one of the examiners for the examination of the plaintiff under the 22nd General Order of the 3rd of June, 1853, section 7, as regulated by the General Order of the 6th of April, 1857. This appointment was served on the plaintiff's solicitors, and was served on the plaintiff himself with a subpoena *ad test*. The plaintiff did not attend at the time and place named in the appointment, but his counsel attended, and objected that his client was not bound to attend for several reasons which the examiner set forth in a certificate of the facts, and which are stated in the Vice-Chancellor's judgment.

Statement.

Mr. *McLennan*, for the defendants, thereupon moved *ex parte* for the usual order, that the plaintiff do attend at his own expense and be sworn and examined, or stand committed.

Mr. *S. Blake*, for the plaintiff, being present, was allowed to oppose the motion. He submitted, also, that the motion could only be made on notice.

1866.

Fowler
v.
Boulton.

MOWAT, V.C.—A motion of this kind is made *ex parte* where the person to be examined is a witness (a); and an *ex parte* motion has been allowed in several cases where the person to be examined was a party to the suit. In one case of the latter class notice is said to have been required; but this appears to have been, not on the ground that a notice was necessary, but that the court, in the exercise of its discretion, thought it to be expedient in the circumstances of that particular case. A different rule would increase expense and delay, and would afford additional temptation to unwilling parties to try the experiment of declining to attend, and to put opponents to the inconvenience, trouble and expense which such a course imposes.

Judgment.

The first objection which the plaintiff's counsel made before the examiner was, that the plaintiff had amended his bill since these defendants answered, and that the time for answering the amendments has not expired. I see nothing in the order to sustain this objection. The examination is a substitute for the old practice of filing a cross-bill for discovery; and in such case the rule was, that the defendant to the original bill was not entitled to an answer to the cross-bill until he had answered the original bill, but if the plaintiff in the suit amended his bill after the defendant answered, this was no ground for postponing his own answer to the cross-bill. I see no reason why the amendment should have a different effect in this respect under the substituted proceedings which have been adopted in this country.

The second objection was, that the plaintiff's solicitors had not been served with sufficient notice of the intended examination, but only with a copy of the examiner's appointment, and that this appointment was entitled "*Fowler v. Boulton*," instead of being entitled with the

a) 2 Daniel's Practice, Perkins' ed. 1057.

names of all the parties to the suit in full. In proceeding before the Master, before whom all examinations were formerly taken in this country, his warrant is the only notice that is served on the solicitors (a), and never gives the full style of the cause (b). There are many other notices and papers in a cause for which by the English practice this short title is sufficient (c). I think there is neither authority nor reason for holding the notice in the present case to be insufficient.

1866.

Fowler
v.
Boulton.

The third objection is, that the defendants who wish to examine the plaintiff have not served the other defendants with notice of his examination; but I see no ground for holding such notice to be necessary: the examination is not evidence against the defendants: the Orders of the Court do not declare that notice of it is to be given to them; if a cross-bill for discovery were filed under the old practice, the other defendants would not have been parties to it; and if, in addition to these considerations, I may compare the convenience of each course, as a guide for ascertaining what the rule is, I think that the balance of convenience is not in favor of what the plaintiff contends for. So also as to the expense. The rule contended for would add to the expense of almost every examination where the defendants do not appear in the suit by the same solicitor, and it would, I think, be very seldom, and only in very special cases, that the opposite rule would, in practice, render necessary the expense of a second examination of the plaintiff.

Judgment.

To these three objections stated to the examiner Mr. Blake, in his argument before me, added a fourth, viz., that the plaintiff is not liable to examination until the answers of the other defendants are in. This objection seems to me to have no better foundation than the

(a) 2 Smith's Pract. 149, 2nd Ed. 150.

(b) Bennett's Master's Office, p. 1, App.

(c) 2 Ayckbourn's Chancery Practice, pp. 73, 90, 93, 103, to 107.

1866. others. The analogy in case of a cross-bill is against it. The language of the General Order is not in its favor. This Order provides that any party plaintiff may be "examined at any time after answer; and any party defendant may be examined at any time after answer," &c. It is clear that the expression "after answer," in the second case referred to, does not mean after all the answers are filed; and the fair inference is, that the same expression in the first case had not that meaning either. I think that after any defendant files his answer, the plaintiff may, under the order, examine such defendant, and that the defendant may examine the plaintiff, whatever may be the position of the cause in reference to the other defendants,—over which the plaintiff, and not the defendant, has the control.

An affidavit must be filed of the service of the subpoena and appointment. The usual Order will then go.

FITZPATRICK v. WILSON.

Partition—Outstanding lease—Parties.

The fact that there is an outstanding term in lands to portions of which infants are entitled, is no defence to a bill of partition, although it may influence the court in deciding between a sale or a partition of the estate.

To a bill for partition, a lessee for years may be a necessary party.

This was a bill for partition, and the plaintiff applied on motion for the usual decree.

One of the defendants was a minor, and his answer set up that there was a lease of the premises outstanding, with about three and a half years of the time unexpired. Counsel for the infant defendant insisted that the existence of this lease prevented the court making the decree asked.

Mr. *Fitzgerald*, for the plaintiff.

1866.

Mr. *Crooks*, Q. C., for the infant defendant.

Fitzpatrick,
v.
Wilson.

MOWAT, V. C.—The existence of the lease seems to be no defence to a bill for partition, though it may be material in forming a judgment as to whether the relief should be a partition or sale.

The lease is not produced. If it does not affect the whole estate, including the infant's share, it may be necessary to make the lessee a party in the Master's office (*a*).

Usual reference directed.

ENGLISH V. ENGLISH.

Administration—Parties—Next of kin—Heirs.

Where the usual decree is obtained by one of an intestate's next of kin for the administration of his personal estate, the Master is not to make the other next of kin parties in his office, but is to see that all have been served with an office copy of the decree under the 6th General Order of June, 1853, before he reports, and, generally speaking, before he proceeds with the reference.

In such a case the court may dispense with service of the decree on any of the next of kin who are out of the province; and the application for this purpose may be made *ex parte*.

So, when the decree is for the administration of real estate, all the heirs must be served with an office copy of the decree, but are not to be made parties or served with the proceedings in the Master's office; though any of them may, by notice, require to be so served, if they desire it.

The rule is the same when some of the next of kin or heirs are infants.

This was an administration suit. The plaintiff was one of the next of kin of the intestate *Thomas English*.

(*a*) *Cornish v. Gest*, 2 Cox, 27; Story on Equity Pl., sec. 151; Daniel's Chan. Prac. (4 Ed.), 203, 204; General Orders of June, 1853, No. 42, sec. 15.

1866. the elder, and the defendant was the administrator to the estate. On the 6th of March, 1866, the usual decree was made, referring it to the Master at Brantford to take the usual accounts and make the usual inquiries. The Master ordered all the next of kin of the intestate to be made parties to the suit. Two of these, *Nicholas* and *Helen Hepherson*, resided in California, and Mr. *S. Blake*, for the plaintiff, applied for an order dispensing with service on them of the proceedings in the Master's office.

Judgment. MOWAT, V. C.—I think the Master was in error in making the next of kin parties. They should be served with an office copy of the decree under the 6th of the General Orders of June, 1853, rule 6, section 3, and will then be bound by the proceedings in the same manner as if made parties to the suit; and service of future proceedings on them will be unnecessary, unless expressly and formally required by themselves. When they desire such service, they have in England to take out and serve an Order of Course for liberty to attend the proceedings under the decree (a); but our rule varies in this respect from the English rule, and makes a simple notice to the plaintiff sufficient without an order.

The object of the General Order was, not merely to postpone making such persons parties until the cause reached the Master's office, but to dispense wholly with them as parties; a course which may diminish considerably the expense of the suit.

The 15th rule (General Order, No. 42) provides for the Master's adding parties in his office; and persons so added by him are thenceforth "to be treated and named as parties; and this rule has been assumed to be applicable to the present case. But this is a mistake. That rule refers only to cases for which there is no

(a) Morgan's Orders, 3rd Ed., 95; Seton on Decrees, 3rd Ed., 1213.

other specific provision, and has, ordinarily, no application to cases expressly provided for by the 6th Order. —Vide *Rolph v. Upper Canada Building Society* (a).

1866.

English
v.
English.

The decree here does not expressly direct the Master to inquire who the next of kin are, as such decrees in England generally do—Vide *Seton on Decrees*, 182, *et seq.*; but he has the right to make the inquiry under the General Order, No. 42 (June, 1863), rule 14, and in all such cases he ought to make the inquiry, and to report the result.

Under the old practice it was necessary to make all the next of kin parties by name to an administrative suit, as being all interested in it (b). It is the duty of the Master now, not to make them parties, but to see that all have been duly served with an office copy of the decree as provided for by the General Order, before he reports, and, generally speaking, before he proceeds with the reference on the other matters embraced in the decree (c). It is in view of this that, while the parties so served have by the rule a right within fourteen days to apply to vary or add to the decree, no special provision is made for their moving against the proceedings under the decree; the decree being made without notice to them, but the reference not being proceeded with until, by receiving a copy of the decree, they have an opportunity of electing to attend the subsequent proceedings. But if made parties, not only is the title of the cause inconveniently encumbered with a long and useless list of names, but the persons so named are, without any demand on their part, served with notice of all subsequent proceedings, and the suit also abates, and may have to be revived,

Judgment.

(a) 10 Gr. 275.

(b) Daniel's Practice, 264, Perkins' ed.; Story on Eq. Pl. sec. 89, and cases there cited.

(c) Daniel's Practice, Perkins' Ed., 264, 265, and 4th Eng. Ed., 397; Seton on Decrees, 4th Ed. 185.

1866. at the death of each of the new parties. The expense
 English and delay occasioned by this practice are obvious.
 v. English.

I have explained thus fully the object and effect of the General Orders, as I understand them, because I have reason to believe that the present is not the only case in which the error I have pointed out has occurred.

Judgment. With reference to the present application, I see no ground for supposing that the court by the 6th General Order, (rule 6, section 3), has surrendered its power under the old practice of dispensing in a proper case with service on any of the next of kin who are out of the jurisdiction of the court (a). The application seems properly to be made *ex parte* (b); and I think the affidavits shew sufficient ground for dispensing with service of the decree on the two absent next of kin under the 6th Order, before the reference is proceeded with. The plaintiff may therefore take an order to that effect.

Two subsequent motions were made in the same case in respect to parties added in the Master's office. Like motions were made in two other cases. The object of these motions is explained in the judgment of the Vice-Chancellor.

Mr. S. Blake, for the plaintiff.

MOWAT, V.C.—The order drawn up on the motion I granted in *English v. English* is wrong. It professes to dispense with service not merely of the office copy of the decree, but also of the proceedings in the Master's

(a) Vide *Rogers v. Linton*, *Bunbury*, 200; *Mirwin v. Daniel*, 7 *Hare*, 347; *DeBalinhard v. Bullock*, 9 *Hare*, App. 13; 1 *Daniel's Practice*, 4th ed. 113; *Story's Equity Pleadings*, sec. 89.

(b) 1 *Daniel's Practice*, 4th ed. 396.

office on the defendants *Nicholas Hepherson* and *Helen* 1866.
 his wife—the very thing I declined to grant. A motion English
 was subsequently made to dispense with like service on English.
 some other parties (*Robert Simpson* and *James English*),
 which I refused. Like motions were at the same time
 made under similar circumstances in *Devereux v.*
Devereux, and *Pepper v. Pepper*. I refused these
 motions also.

The three motions are now renewed on the ground
 that there are special circumstances, not then mention-
 ed to me, which justified the Master in making all the
 next of kin parties.

Two special circumstances are relied on in *English*
v. English. The one is, that it is intended hereafter,
 on further directions, to apply for the administration
 of the real estate. But the 3rd rule provides for
 proceeding without making all the heirs parties, just Judgment.
 as the first rule (Order VI., sec. 2) provides for pro-
 ceeding without making all the next of kin parties.

The other special circumstance is, that some of the
 parties added are infants, and (it is said) cannot be
 served with an office copy of the decree under the 6th
 Order. But this is a mistake; the contrary was
 expressly held in *Clarke v. Clarke* (a), and *Chalmers*
v. Lawrie (b).

Twenty-two new defendants have been added as
 parties in the Master's office in this case; and the
 Master has now certified that service on four of these
 may be safely dispensed with, and the solicitor has
 sworn in effect that the interest of the plaintiff and of
 all these parties is identical. It is quite impossible to
 sanction the order making such persons parties by
 name, and means ought at once to be taken to correct
 the irregularity.

(a) 20 Law T. 88.

(b) 10 Hare, App. 27.

1866. The so-called special circumstances in *Devereux v. Devereux* and *Pepper v. Pepper*, are of no greater force than those in *English v. English*; and I must again refuse to make any order in any of the three cases that will sanction the cumbrous and costly addition which has been made to these suits in the Master's office. The error in regard to the proper course has no doubt arisen from an oversight as to the practice, which has occurred in the offices of several of the Masters, but it is an error of which it is of great importance to suitors to prevent the recurrence.

RE OWENS.

Insolvency Act—Appeal.

Notice of the application for allowance of an appeal must be served within eight days from the day on which the judgment appealed from is pronounced, but the application itself may be after the eight days.

Where the notice was served in time, but named a day for the application, which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable in the discretion of the judge.

This was a motion in Chambers by creditors for the allowance of an appeal from the decision of the County Court Judge, in respect of the insolvent's certificate.

Mr. *Hodgins*, in support of the application.

Mr. *Cattanach*, contra.

MOWAT, V. C.—The 9th section of the Insolvency Act of 1864, sub-section 12, makes the order of the County Court Judge "final unless appealed from in the manner herein provided for appeals from the court or judge." This manner is pointed out in the 7th section, the 2nd sub-section of which provides that the party dissatisfied may in Upper Canada appeal "to either of the superior

common law courts, or to the Court of Chancery, or to 1866.
 any one of the judges of the said courts; first obtaining Re Owens.
 the allowance of such appeal.....by a judge of any
 of the courts to which such appeal may be made."

The 3rd sub-section provides that "such appeal shall not be permitted unless the party desiring to appeal applies for the allowance of the appeal, with notice to the opposite party within five days from the day on which the judgment of the judge is rendered." By the act of 1865, chapter 18, section 15, the delay of applying for the allowance of an appeal is thereby extended to eight days instead of five.

In the present case the order from which these creditors desire to appeal was made on the 2nd of June. The creditors reside in Montreal; the insolvent resides in Guelph; and the notice of application for the allowance of the appeal was served on the 7th, and was returnable on the 9th of June. The notice, therefore, was both served and returnable within eight days from the rendering of the judgment.

Mr. *Cattanach*, for the insolvent, objects, however, that the notice was insufficient on various grounds. The most formidable of these grounds is this: A subsequent section of the act of 1864, section 11, sub-section 9, provides "that one clear day's notice of any petition, motion or rule, shall be sufficient if the party notified resides within fifteen miles of the place where the proceeding is to be taken, and one extra day shall be sufficient allowance for each additional fifteen miles of distance between the place of service and the place of proceeding." Here, it is said, there has been but one clear day's notice; while the insolvent resides at Guelph, and was therefore entitled to longer notice: and that the notice served was therefore insufficient and irregular, and that the application for allowance should consequently be refused. The effect of yielding

1866. to this objection would be to prevent any appeal now
Re Owens. from the decision complained of.

The notice contemplated by this enactment, according to the construction of this and the other clause which is contended for, would render all appeals impossible where the party to be notified resides 120 miles from Toronto. It seems necessary, therefore, to hold that, according to the intention of the act, if the service is within the eight days, the application may be for a day subsequent.

It is to be observed also, that the notice specified is declared to be sufficient—it is not declared to be indispensable.

Mr. *Hodgins* answers these objections by referring to the 13th and 14th sub-divisions of the same eleventh section, which provide, amongst other things, that “no allegation or statement shall be held to be insufficiently made, unless by reason of any alleged insufficiency the opposing party be misled or taken by surprise;” and that “no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended under the rules and practice of the court.”

Judgment.

When the notice of allowance is served within the time required by the 7th section, can I amend the irregularity of the return day, not being such as to allow the time mentioned in the 11th section? I think I would not be carrying out the spirit or intention of the act if I should refuse to allow the amendment. The appealing creditors were guilty of no negligent delay; they served their notice with reasonable promptitude; the 7th section, as amended, seemed to require that not only the notice should be served, but the allowance moved for, within the eight days; and the notice, therefore, named the last day but one of the eight for the application (the last day, the 10th of June, being Sunday). I am satisfied that a mistake made under these circumstances, was not

such a mistake as the legislature intended to put beyond the possibility of correction. I say this after reading the enactments of the English Bankruptcy Law on the subject of amendments, and the English cases to which I was referred on the part of the insolvent.

1866.
Re Owens.

The other objections to the form of the notice are, that it is not entitled in any court, and that it does not mention on what evidence the motion is to be made. I think that, according to the practice of this court, the notice must be regarded as irregular in these respects, but I think that it may be amended.

It is further objected, that the notice should state the grounds of the appeal. I do not think this omission is an irregularity.

It is further objected, that it does not appear that the applicants have proved any debt against the insolvent. I think this omission may be supplied.

Judgment.

The appellants must pay the costs of the day.

If the respondent insists on the objections, the motion must stand over to a future day; the defective evidence to be supplied, and the notice for the allowance to be amended.

HARKNESS V. CONWAY.

Partition suit—Costs.

The costs decreed in partition suits are, as in other suits, party and party costs; and where any of the parties are not *sui juris*, costs as between solicitor and client are not decreed even by consent.

Hearing on further directions in a partition suit. Costs between solicitor and client to all parties were asked for.

1868.

Harkness
v.
Conway.Mr. *George Murray*, for the plaintiff.Mr. *W. Burns*, and Mr. *J. C. Hamilton*, for the defendants.

MOWAT, V.C.—On looking into the English cases and precedents, I do not find that any other than party and party costs are given by the decree in a partition suit, any more than in other suits. If in any instance costs as between solicitor and client have been allowed here, it has no doubt been through oversight. There being infants concerned in the present case, the consent of counsel for all parties does not affect the question.

CRAWFORD V. BINGLE.

Practice.—Sale decree—Judgment creditors.

According to the form of decree to enforce by sale the lien of a registered judgment creditor, and the practice under it, as sanctioned by the judges while the law for the registration of judgments was in force, the debtor had a day to redeem, and unless he made default no inquiry as to other incumbrances was made; but in case of default and an order for sale thereon, the Master then inquired as to other incumbrances, in order to the distribution of the proceeds under the decree.

This was an appeal from the report of the Master at Hamilton, by *Robert R. Waddell* and others, made parties in the Master's office.

The plaintiff was a registered judgment creditor of *Joseph Ruthven*, and the object of the suit was to make available the plaintiff's lien on the defendant's lands. The decree, which was made on the 24th of February, 1861, (amongst other things) gave the debtor six months to redeem the plaintiff, and in default ordered a sale of the debtor's lands; and for the purpose of effecting such sale, the Master was directed to inquire whether there were any incumbrances other than mortgages prior to the plaintiffs, and if so, to ascertain the amount due to each,

tax their costs, and settle their priorities; and the decree directed that the plaintiff and the other incumbrancers should be paid out of the purchase money according to their priorities. The Master, by his report, dated the 8th of October, 1864, found £597 6s. 2d. to be due to the plaintiff for principal, interest and costs, and ordered the same to be paid on the 8th of April, 1865, but did not find whether there were any other incumbrances. The debtor *Ruthven* having made default, a final order for sale was made on the 21st of April, 1865, and the debtor's lands were ordered to be sold "in pursuance of, and in manner directed by, the said decree."

1866.

Crawford
v.
Bingle.

In executing the decree the Master, in June, 1865, made *Robert R. Waddell* and others, parties to the suit, as having incumbrances subsequent to the plaintiff's, and on the 14th of April, 1866, the Master made his report, setting forth, amongst other things, that these parties had not proved before him any subsisting lien, charge or incumbrance on the lands aforesaid; and were therefore foreclosed of all interest therein; that he had made the appellants parties because they had a lien under a conveyance bearing date prior to the registration of the plaintiff's judgment, though ranking after it according to the decision in *Robson v. Waddell (a)*, but that they declined to prove any claim, insisting that their incumbrance was prior to the plaintiff's, and therefore not within the terms of the decree.

Statement.

Mr. *Hodgins*, for the appeal.

Mr. *Crombie*, contra.

MOWAT, V. C.—[After stating the facts to the effect above set forth, proceeded.]—The appeal is on two grounds: first, that the Master had no jurisdiction to make the appellants parties; and secondly, that the

(a) 24 U. C. Q. B. 574.

1866. Master should not have reported that the plaintiff had priority over the appellants.

Crawford
v.
Bingle.

Judgment.

The argument in favor of the first of these grounds is, that parties could not be added under the order for sale, and that the appellants should have been made parties, if at all, before the making of the first report. But I am informed by the Registrar, that the practice in this country, as contemplated and sanctioned by the learned judges who presided here at the time of the making of this decree, is against this contention. The decree differs in form from that in use in England in like cases, and was, it seems, much considered, and was adopted in consequence of the embarrassment created by the enormous number of incumbrances on many lands under the operation of the enactments respecting the registration of judgments—an embarrassment so great that the legislature, in 1861, repealed all the enactments which provided for such registration (a).

To alleviate the evil before parliament put an end to it, a judgment creditor was allowed to file his bill against his debtor alone; and if he redeemed the plaintiff the suit was at an end; if he failed to redeem, then the other incumbrancers were added *ex necessitate*, for the purposes of the sale of the property, and the distribution of the proceeds. The plaintiff here having pursued the course thus intended and approved by the learned judges, it is clear that I cannot hold his proceedings to be irregular, but must treat the appellants as having been properly made parties after the order for sale—subject to the point presented by the second ground of appeal.

The second objection which the appellants make to the report, is, that the appellant's lien is not subsequent to the plaintiff's; the 78th section of the late statute,

(a) 24 Victoria, ch. 41.

29 Vic., ch. 24, (passed the 18th of September, 1865), 1866. ^{Crawford}
 having, it is contended, remedied the defect which, ^{v.}
 according to *Robson v. Waddell (a)*, postponed their ^{Bingle.}
 conveyance. But that section is expressly subject to
 the proviso, that the same "shall not affect any case
 or cases now proceeding in any of the courts of law or
 equity in Upper Canada."

I must therefore disallow both grounds of appeal
 with costs.

MORLEY v. MATTHEWS.

Practice—Reference back to Master—Evidence—Correcting report.

Where a reference back to the Master to review his report is directed,
 the Master is as of course at liberty to receive further evidence.

Where the court, on a reference back to the Master, does not mean
 that he shall take further evidence, the order contains a direction
 to that effect; unless the reference back is expressed to be for a
 purpose on which further evidence could not be material.

The court will at almost any stage of a cause make a special order
 for the correction of slips in a Master's report.

Motion to quash the certificate of the Master at
 London, on the ground that one of the schedules
 prepared by the Master had been omitted from his
 report by mistake.

Mr. *Roaf*, Q.C., and Mr. *Chadwick*, in support of
 the application.

Mr. *Blake*, Q.C., contra.

MOWAT, V.C.—The Master at London made a report
 in this cause, dated the 10th of July, 1866, which the
 plaintiffs appealed against. The first ground of appeal
 was allowed by consent without argument, and was in
 the following words: "That the Master should have
 taken a separate account of the principal or corpus of

(a) 24 U. C. Q. B. 574.

1866. the estate, and of the income which by the testator's will is charged with legacies, and have allowed against such principal or corpus the proper charges affecting the same, and have allowed as against such income, first, such disbursements as were properly chargeable against the income; second, the annuity to the testator's widow and sister; and, third, the sums payable to the testator's children."

Morley
V.
Matthews.

Under the order allowing this objection (12th September, 1865), the Master has ruled that he may allow as income sums which by his former report he did not allow either as principal or income; but that he is not at liberty to allow any sums as principal which he did not allow by his former report.

No ground was suggested to me on which this distinction can be supported. If the Master can take an account of further sums of income, he can take an account of further sums of principal, and I think the practice does not require or authorize the exclusion of either. The general rule is, that on a reference back to the Master to review his report, he is entitled to receive further evidence. In *Twyford v. Traill* (a) Lord *Cottenham* said: "I have always been of opinion that the Master is entitled to receive further evidence. It seems to me nonsense to refer it back to the Master, unless he is at liberty to receive further evidence; because the conclusion afforded by the evidence already taken might have been drawn by the court without the assistance of the Master." The case of *Livesey v. Livesey* (b) is to the same effect. I apprehend, therefore, that where the court does not mean that the Master should take further evidence, the order must contain a direction to that effect, unless the reference back is expressed to be for a purpose on which further evidence could not be material.

(a) 3 M. & C. 649.

(b) 10 Sim. 331.

The objection of the appellants in the present case was that the Master should have taken "a separate account of the principal or corpus," and income, respectively, not that he should by his report have distinguished how much of the amount thereby found was for principal and how much for income. I know of no practice that forbids the Master, upon the allowance, simply, of such an objection, to charge for either principal or income sums he had not charged by his previous report.

1866.

Morley
v.
Matthews.

Whatever may have been the notion in the mind of the gentleman who drew the Reason of Appeal, or in the minds of the counsel who consented to its being allowed, all I can say is that the language employed, the meaning and effect of which alone I have to consider, is not such as by the practice of the court excludes additional charges.

It appears that the only item hitherto excluded by the Master was omitted from his first report by a mere slip, the receipt of the money having been admitted by the accounting party in his accounts brought into the Master's office. The court will at almost any stage of a cause make a special order for the correction of slips of that kind in a Master's report (a). But the items which may be added by the Master when a report is sent back to be reviewed do not appear to be confined to this class.

Judgment.

The question was argued before me by counsel for all parties, and I have followed the example of Lord Cottingham in *Twyford v. Traill* (b), and expressed my opinion on it by desire of the parties, though this is not strictly regular. No order can be drawn up on the motion except as to costs. I think the costs of the application should be paid by Mrs. Matthews, who has wrongfully resisted being charged with the item which has given rise to the Master's erroneous ruling (c).

(a) *Richardson v. Ward*, 13 B. 110; *Ellis v. Maxwell*, Ib. 287; *Prentice v. Mensal*, 6 Sim. 271; *Turner v. Turner*, 1 J. & W. 39; *Turner v. Turner*, 1 Swanst. 154.

(b) 3 M. & C. 649.

(c) See General Order No. 36, of December 20th, 1865.

1866.

SEIDLER V. SHEPPARD.

Practice—Principal and Surety.

Where there is only one principal and one surety, both must be made parties to a bill for foreclosure or sale.

Where a mortgage is given by a surety on his own property, the principal is a necessary party to a suit for the foreclosure of the mortgage.

This was a foreclosure suit against the heirs of the mortgagor, *Thomas Sheppard*, deceased; and the plaintiff applied on motion for a decree. The defendants set up by their answer, that the mortgage had been executed for the benefit, not of the mortgagor, but of his brother *Joseph Sheppard*, and that *Joseph* should therefore be a party to the suit.

The plaintiff produced a bond, bearing even date with the mortgage, executed by *Joseph Sheppard*, and witnessed by *Thomas Sheppard*, which recited that the loan was to *Thomas*, the mortgagor, and the condition was, that in the event of the plaintiff failing to recover the mortgage money with interest and costs from the mortgagor, he, *Joseph Sheppard*, would make good any deficiency.

Mr. *Donovan*, for the plaintiff.

Mr. *Hodgins*, for the defendant.

MOWAT, V.C.—The bond produced in this case treats the mortgagor as the principal, but the defendants have a right to shew that he was really but a surety. Their answer alleges such to be the fact, and on this motion I must assume their answer to be true.

Now the 6th General Order of June, 1853, rule 8, provides that, "in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary o

bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable." But it was expressly held by the Vice-Chancellor of England (*a*), that the corresponding English Order "applied to cases where several persons were liable in different characters, that is, some as principals and the rest as sureties; and then it was sufficient to make one individual of each class a party; but where there was only one principal and one surety, both of them must be made parties."

1866.

Seidler
v.
Sheppard.

This decision was followed by Vice-Chancellor, now Lord Justice *Knight Bruce*, in *Pierson v. Barclay* (*b*); and I do not find any case in which a different construction of the order was adopted. I must therefore allow the objection, and the motion must stand over. I reserve the costs of the motion.

Judgment.

BUCKLER v. BOWMAN.

Mortgages—Tacking.

Where the owner of property mortgaged it to *W.*, and then assigned an undivided half to *Y.*, subject to the mortgage, and at a later date executed a mortgage on his remaining undivided half to *B.*, who afterward obtained an assignment of the first mortgage. *Held*, that the representatives of *Y.* were not bound to redeem both mortgages, but only the mortgage to *W.*

Suit for redemption and foreclosure against *William Bowman, James Short*, the owner of the equity of redemption of one undivided half of the property, and *Samuel Dix*, the owner of one-seventh of the other undivided half. The plaintiff had a mortgage on the former undivided half, and was owner of the equity of redemption in six-sevenths of the latter undivided half.

The following were the instruments effecting the

(*a*) *Eloyd v. Smith*, 13 Simons, 457.

(*b*) 2 DeG. & S. 746.

1866. rights of the respective parties to the property in
 Buckler question.
 v.
 Bowman.

1. The Crown patent to the Canada Company, December 14th, 1840.
2. A deed from the Canada Company to *William Shortt*, dated the 3rd of February, 1848, conveying the whole of the property.
3. A mortgage from *William Shortt* to *Stephen Washington*, dated the 3rd of February, 1848, securing the payment of £100 on same premises.
4. A deed of bargain and sale from *William Shortt* and wife to *Dennis Jennings*, dated the 7th of February, 1848, conveying an undivided half of the premises, subject to the above mortgage.
5. A mortgage from *William Shortt* and wife o *William Bowman*, dated the 7th of November, 1857, securing the payment of \$1518 ⁰⁰/₁₀₀, on his remaining undivided half of the premises.
6. A mortgage from *William Shortt* and wife to *Aaron Buckler*, dated the 17th of January, 1860, securing £100 on same undivided half.
7. A deed of bargain and sale from *William Shortt* and wife to *Aaron Buckler*, dated the 12th of March, 1863, conveying the same undivided half of the premises.
8. An assignment by *Stephen Washington* to *John Cade*, dated the 31st of July, 1861, of the mortgage referred to above as No. 3.
9. An assignment of same mortgage, *John Cade* to *William Bowman*, dated the 20th of March, 1863.
10. Indenture, *Aaron Buckler* and wife to *James*

Shortt, dated the first day of October, 1863, conveying all interest under the deed of 12th March, 1863.

1866.

Buckler
v.
Bowman.

Mr. *Gwynne*, Q. C., for the plaintiff, cited *White v. Hillacre* (a).

Mr. *Fitzgerald*, for the defendant *Bowman*, cited *Vint v. Padgett* (b), *Hyman v. Root* (c), *Coote on Mortgages*, 401; *Fisher on Mortgages*, 682, 685.

MOWAT, V. C.—The question argued in this cause was as to the claim of the defendant *Bowman*, that the plaintiff is bound to redeem his two mortgages, one of which is prior and the other subsequent in date to the conveyance of the equity of redemption under which the plaintiff claims.

It appears from the admissions of both parties before me, that one *William Shortt* was the owner of the property in question; that he mortgaged it to one *Stephen Washington*; and then conveyed to one *Dennis Jennings* an undivided half of the property, subject to the mortgage; that *Jennings* is dead; that his equity of redemption is vested, as to six-sevenths, in the plaintiff, and as to one-seventh in the defendant *Samuel Dix*; that after executing the conveyance to *Jennings*, the mortgagor *William Shortt* executed another mortgage to the defendant *William Bowman*, who has since obtained an assignment of the *Washington* mortgage, and now claims by reason thereof to be entitled to hold the whole property as a security for his two mortgages.

The case on this claim is obviously the same as if the mortgage to *Washington* had been of two distinct properties, one afterwards conveyed to *Jennings*, and

(a) 3 Y. & C. 597.

(b) 4 Jur. N. S. 254, 1122.

(c) 10 Gr. 340.

1866. Buekler v. Bowman. the other, at a later date, mortgaged to *Bowman*, now the holder of both mortgages.

Now, when one gives two mortgages for separate debts on distinct properties, if both mortgages are given to the same person, or become vested in the same person, the rule (independently of the Registry Law) is, that the mortgagor is not entitled to redeem the one mortgage without also redeeming the other; so that, in effect, the holder of the two mortgages obtains a security on the property comprised in each mortgage, not only for the debt therein mentioned, but also for the debt mentioned in the other mortgage. This doctrine has been settled by a long series of binding decisions, commencing with a very early date; and the principle on which the doctrine was established was thus stated by the Lord Chancellor in *Willie v. Lugg* (a): "Every mortgagee, when the mortgage is perfected, has acquired an absolute legal estate. Upon what Judgment. terms can the court proceed to a redemption? By giving the mortgagee the value of his money, its fruit, and his costs, and upon those terms only; for it is obvious injustice to help to the restitution of the pledge, without a full restitution of what it is first pledged for. If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are separate; yet, if the mortgagor would redeem one, he cannot; because if you come for equity you must do equity; and the general estate being liable for both mortgages, this court will not be an instrument to take illegally from a mortgagee, that by which he will be defrauded of part of his debt. * * * If you come to redeem separately, you come for equity without doing equity; paying a debt, in lieu of which the mortgagee can hold both your estates until this court interposes." (b). Learned judges have occasionally intimated some

(a) 2 Ed. 79.

(b) Vide Fisher on Mortgages, secs. 689, 690; *Tassil v. Smith*, 2 DeG. & J. 714; *Selby v. Pomfret*, 1 Johns and Hem. 336.

dislike of the rule (a), but they have uniformly acknowledged it to be the law of the court (b).

1866.

Buckley
v.
Bowman

This being so, and every one being presumed to know the law, persons dealing with a mortgagor after both mortgages have been given, are deemed so to deal "with knowledge that the two mortgages on the two estates, though then belonging to different mortgagees, might coalesce, and with knowledge of the possible consequences of their coalition." (c). And such persons, therefore, by taking a subsequent conveyance or mortgage of one of the properties, take it subject to the chance of the holder of the prior mortgage thereon uniting with it any mortgage that the mortgagor may theretofore have given on any other property. To be safe, one who negotiates for a subsequent mortgage or purchase of any property, has thus to ascertain not only what prior mortgages there are on such property, but also what security the mortgagor has outstanding on other properties, unless he is himself prepared to buy up the prior mortgage on the property respecting which he is negotiating; or can secure himself against such prior mortgage being parted with by the holder (d).

Statement

This is inconvenient enough, but I am asked to extend the doctrine much further, and to hold that a man who takes a subsequent mortgage takes it subject to the chance of the prior mortgage coalescing with, not only any other existing mortgages (the particulars of which we may assume that he can ascertain), but also with any mortgages which the mortgagor may choose thereafter to execute, on other property. In other words, I am asked to hold, that a mortgagor, after he has parted

(a) But see *Sober v. Kemp*, 6 Hare 158.

(b) *Ireson v. Denn*, 2 Cox. 425; *Vint v. Padget*, 2 DeG. & J. 613; *Tassel v. Smith*, *ib.* 345; *Hyman v. Roots*, 10 Gr. 345.

(c) *Vint v. Padget*, 2 DeG. & J. 613.

(d) *Selby v. Pomfret*, 1 J. & Hem. 135; *Hyman v. Roots*, 10 Gr. 340.

1866. with his equity of redemption, may still raise money on the security of it, by the roundabout method of giving a mortgage on other property. After a release of his equity, a subsequent express mortgage of it, say to the original mortgagee, would of course be good for nothing; but the contention is, that a mortgage to him for a further sum on other property of the most trifling value, would give him a valid security on the released property. I need hardly say that no authority that was cited goes to this extent (a). To construe in this way the rule laid down in the cases cited, would be caricaturing the rule instead of fairly interpreting it.

The learned counsel for the plaintiff contended, that the 56th section of the Registry Act (b) had altogether abolished the old rule which the defendant intended to apply to this case; but I have not felt at liberty to adopt that view without further consideration (c). The statute, though it declared that "tacking had been found productive of injustice," yet did not in terms abolish tacking. The legislature contented itself with enacting that registered deeds should have priority according to the respective dates of their registration (d). Besides, has the term "tacking" a recognized application to the right to unite several securities on distinct properties? (e). Or is its use confined to the case of several securities on the same proper? 7?

After the defendant *Bowman* obtained his mortgage, and before he procured an assignment of the *Washington* mortgage, the mortgagor *William Shortt* executed a mortgage, and subsequently a release of his equity of redemption, to the plaintiff, who, again, after the assign-

(a) And see *Thornycroft v. Crackett*, 2 H. L. 239; *H. Sugden's Real Property*, H. L. 532; *White v. Hillacre*, 3 Y. & C. 597.

(b) *Consol. Stat. U. C.*, 22 Vic. ch. 86.

(c) See *Hyman v. Roots*, 10 Gr. 340.

(d) Section 56.

(e) See *Fisher on Mortgages* pl. 691.

ment of the *Washington* mortgage to *Bowman*, transferred his interest in this undivided half of the property to *James Shortt*, another defendant. Some slight reference to these transactions was made upon the argument, but no authority was cited for holding that they gave *Bowman* the right he now claims, if not entitled to it on the ground already considered.

1866.

Buckler
v.
Bowman.

The decree will be in substance according to the precedent in *Seton's Decrees*, vol. I., ch. 2, sec. 4, No. 13 Prec. 3, p. 425, 4th ed. (a).

ANDERSON v. McBEAN.

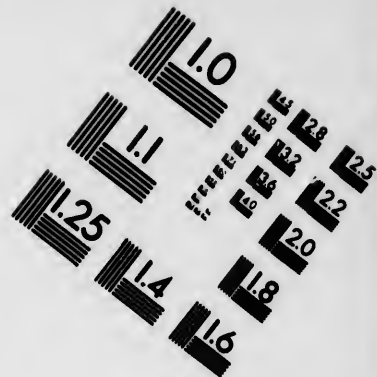
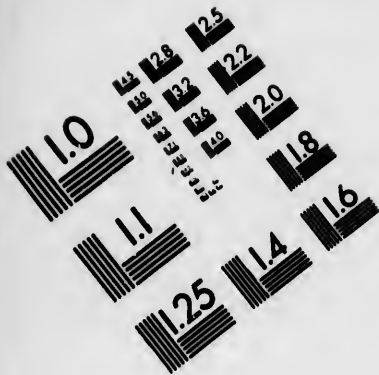
Principal and agent—Specific performance.

The owner of land in January, 1864, wrote to an agent requesting him to find "a purchaser" for it at \$600 cash, or \$800 on a certain specified credit. Nothing was done on this letter, and in December, 1865, the property, in the meantime, having risen greatly in value, and the owner having received an offer for the timber on the land, wrote to the same agent informing him thereof, and asking his opinion as to what "he (the owner) should take for the lot altogether." In February, 1866, the agent without further communication with the owner, contracted in writing to sell the property for \$600, "to be paid on the execution of a good and full warranty deed, clear of all incumbrances," on a bill filed for specific performance by the purchaser against the owner, the court considering that the letter of December, 1865, was a revocation of any authority contained in the letter of January, 1864, to sell the premises, refused to enforce the contract; and whether the letter of January, 1864, conferred upon the agent power to sell; *quære*. But if that letter did empower the agent to sell, he had not any authority for agreeing to give a deed such as that stipulated for.

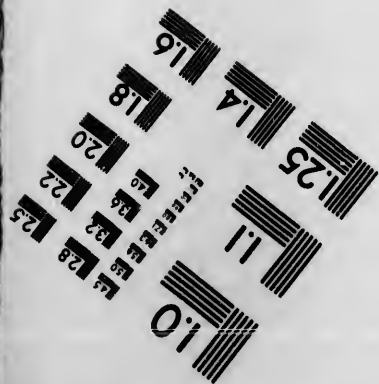
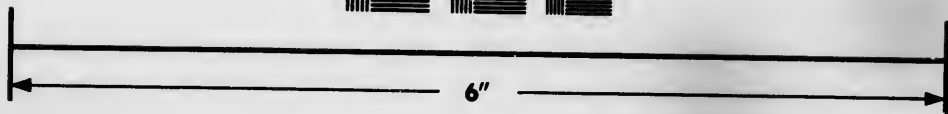
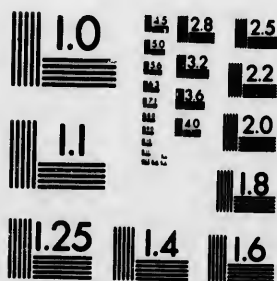
This cause came on for the examination of witnesses and hearing before the Chancellor, at the sittings of the court in Sarnia, in the autumn of 1866. The bill was filed by the purchaser to enforce specific performance of

(a) See *Barnes v. Raester*, 1 Y. & C. C. C. 401; *Bagden v. Bignold*, 2 Ib. 377.





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1866. a contract for sale of 100 acres of land in Plympton,
 Anderson under the circumstances stated in the head note and
 v. judgment.
 McBean.

Mr. McKenzie, for the plaintiff.

Mr. Blake, Q.C., and Mr. Scott, for the defendant.

VANKOUGHNET, C.—The defendant having been for many years the owner in fee of the land, and being desirous to sell it, on the 16th of January, 1864, wrote to one *Oxenham*, who would appear to have been then a friend of his, the following letter:

“DEAR SIR,—I received your letter about the farm of land, and on having your opinion on the price, I have concluded to sell the lot for \$600 cash, or \$800 on time; \$200 down, and five years to pay the remainder, in equal instalments, with six per cent. interest. If you can find a purchaser for me, I will be much obliged to you, besides satisfying you for your trouble. It is a far lower price than I expected to get, but it is too far away from me. You might put it in some papers up there if you thought worth while.”

Judgment.

Nothing having been done with the land in that or the following year, and the defendant having, about the close of 1865, received an offer for the timber upon it, on the 4th of December, 1865, wrote to *Oxenham* on the subject, and closed his letter with the language, “and give me your opinion what I should take for the lot altogether.” On the 21st of February, 1866, *Oxenham*, without further communication with the defendant, sold the land to the plaintiff for \$6 per acre, payable “upon the delivery to the plaintiff of a good and full warranty deed, clear of all incumbrances,” as evidenced by a memorandum in writing, then signed by *Oxenham*, as agent for the plaintiff. In the meantime, land in the neighborhood had risen generally in value, in consequence of expected oil discoveries. The plaintiff was evidently buying the land for speculative purposes,

and though *Oxenham* proposed to him to refer his offer to the defendant, plaintiff urged the completion of the bargain by *Oxenham*, saying that he considered he, *Oxenham*, had authority to sell under the defendant's letter of the 16th of January, 1864. The lapse of time since that letter was written, would have made a prudent man pause and inquire, and do what *Oxenham* suggested, viz., refer to the defendant himself. It is clear that *Oxenham* had no right to bind the defendant to give a warranty deed, as it is called, covenanting that the land was free from all incumbrances; and yet this is what the plaintiff now insists upon, asking for nothing less, and not offering to take anything less. On this point alone the bill should be dismissed with costs. But I think that *Oxenham* had not the right to bind the defendant to any sale at the time he signed the memorandum of contract with the plaintiff. If the letter of the 16th of January, 1864, gave *Oxenham* power to sell, which I doubt, I think the letter of the 4th of December, 1865, clearly shewed that the defendant did not intend him to so act, and qualified such power if it was conveyed by the first mentioned letter. It is difficult to believe that *Oxenham* did not know of the intermediate rise in the value of land. Every one else seems to have known of it, and the plaintiff doubtless knew it. I think the contract which *Oxenham* assumed to make, is not binding on the defendant; and even if he had received power on the 15th of January, 1864, to make a sale, it is not, I think, one which the court would feel bound to enforce, even freed from the stipulation as to the guarantee of title.

1866.

Anderson
v.
McBean.

Judgment.



1866.

Att'y-Gen'l
v.
Harrison.

THE ATTORNEY-GENERAL V. HARRISON.

Navigable river—Injunction.

Where relief would be given at the suit of an individual in respect of an injury to a private water course, an information will lie at the instance of the Attorney-General for an injury to a navigable stream.

What is a navigable river considered and defined.

The Crown, in making sale of a lot of land situate upon a navigable stream, stipulated that the purchaser should erect on the property a saw-mill, as well as a grist-mill.

Held, that this did not warrant the purchaser in creating a nuisance in the river by throwing into the stream the saw-dust and refuse of his saw-mill, the effect of which was to create obstructions in the river to such an extent as to injure or impede the free use of the river by vessels navigating the same.

This was an information by the Attorney-General for Upper Canada at the relation of *Alexander M. Stephens* and *The corporation of the town of Owen Sound*, against the defendants, setting forth that the river Sydenham, which flows through that town and empties itself into the Owen Sound bay, was and of right ought to be a navigable river and common highway for all her Majesty's subjects with schooners, barges and other boats and vessels of light draught, to navigate the same without any impediment or obstruction, from the mouth up to and as far as the saw-mill of the defendants, and especially up to and as far as where a certain bridge called the Union Street Bridge, within the limits of the town, crosses the river, and had been used and enjoyed as such navigable river before the erection of defendant's mill: that large sums of money, as well of the province as of the corporation of Owen Sound, had been expended in deepening the channel and clearing and freeing from obstructions, by dredging and otherwise, the bed of the river; that the corporation were empowered by act of parliament to impose and collect certain tolls on all goods shipped or landed on board or out of any vessel from or upon any part of the said river within the limits of the town, for the purpose of liquidating the debt incurred in improving the navigation of said river.

The information further stated, that the defendants were in possession of and working a saw-mill, situate near the bank of said river in the said town, and while working the same had been and still were in the constant habit of wrongfully and injuriously throwing from and out of said mill into the stream large quantities of chips, saw-dust and other rubbish, the effect of which was to greatly injure and impede the navigation of said river, so that the trade and navigation thereof had been greatly obstructed, the tolls payable to the corporation diminished, and the general prosperity of the town impaired, and that the corporation had been obliged to expend large sums of money in endeavouring to remove the deposit of such saw-dust and rubbish from the bed of the river; and prayed, amongst other things, an injunction to restrain the defendants from casting and throwing out of said mill any chips, saw-dust or other refuse or rubbish into the river, and from otherwise obstructing, impeding or interfering with the free and uninterrupted navigation thereof; an account of payments and disbursements necessarily made in removing or endeavoring to remove the deposit and accumulation in the channel of the chips, saw-dust and other rubbish, and that defendants should be ordered to repay the same; and for further relief.

1866.

Att'y-Gen'l
v.
Harrison.

Statement.

The defendants answered, admitting that the river had always been navigable for small boats up to within a short distance of the mill of the defendants, but at the time of the erection of the first mill upon the said premises the navigation was impeded by trees and logs in the river, and at the mouth thereof the water was not over three or four feet deep, owing to a bar of sand which constantly accumulated there; that when the lands were advertised for sale by the government one of the conditions on which the same were offered for sale was that the purchaser was to build "a good saw-mill within twelve months, and a good substantial grist-mill within eighteen months of the date of sale;" that at

1866. the sale so advertised one *Frost* became the purchaser, who erected a saw-mill thereon, and continued to work the same without any molestation or complaint from any one, although the saw-dust from the mill constantly passed therefrom into the river; that defendants in good faith purchased from *Frost*, with full knowledge that he had thus suffered the saw-dust to pass from the mill into the river, and that the natural capacity of the river was not lessened or interfered with by defendants; and insisted that government, in disposing of the said mill-site, did not intend to make any stipulation that the purchaser should not allow the saw-dust of the mill to pass into the river, on the contrary, it was well understood at the time that he might do so.

The cause having been put at issue was brought on for the examination of witnesses and hearing at the sittings of the court at Owen Sound in the spring of 1866. The effect of the evidence then taken sufficiently appears in the judgment.

Statement.

Mr. *Moss* and Mr. *J. Creasor*, for the relators, cited *Attorney-General v. Mayor of Bristol* (a), *Attorney-General v. Vivian* (b), *Attorney-General v. Crofts* (c), *Attorney-General v. Mayor of Southmolton* (d), *Anon.* (e), *Mayor of London v. Bolt* (f), *Regina v. Myers* (g), *Blundell v. Catterall* (h), *Leeking v. Montague* (i), *Gage v. Bates* (j), *Regina v. Perry* (k), *Carbyon v. Lovering* (l), *Crowder v. Tinkler* (m), *Attorney-General v. Forbes* (n), *Lord Advocate v. Hamilton* (o), *Attorney-General v. Chambers* (p), *Dickenson v. Shaw* (q), *Attorney-General v. Parmeter* (r), *Attorney-General v. Sheffield Gas Co.*

(a) 3 Madd. 319.

(c) 1 Bro. P. C. 236.

(e) 3 Atk. 750.

(g) 3 U. C. C. P. 305.

(i) 4 B. & C. 598.

(k) 15 U. C. C. P. 329.

(m) 19 Ves. 616.

(o) 1 MacQ. H. L. 46.

(q) Hales, R. C. 262.

(b) 1 Russ. 236.

(d) 5 H. L. C. 11.

(f) 5 Ves. 128.

(h) 5 B. & Al. 268.

(j) 7 U. C. C. P. 116.

(l) 1 H. & N. 797.

(n) 2 M. & Cr. 123.

(p) 4 D. M. & G. 206.

(r) 10 Price. 378.

(a), *Rex. v. Ward* (b), *Rex. v. Russell* (c), *Attorney-General v. Cleaver* (d), *Attorney-General v. Birmingham* (e), *Regina v. Bradford Navigation Co.* (f), *Goldsmid v. Tumberge Wells* (g), and the Cons. Stat. U. C. ch. 47, sec 2 (24 Vic. ch. 69). 1866.
Att'y-Gen'l
v.
Harrison.

Mr. R. Sullivan and Mr. Lane, for the defendants, commented on cases referred to in *Angell on Water-courses*, 552, 561.

SPRAGGE. V.C.—The evidence establishes beyond a question that saw-dust from the defendants' mill is carried down by the stream, and is deposited in portions of the river which now form the harbor of the port of Owen Sound. Witnesses differ as to the degree in which this has been the case, and some question the fact; but I have no doubt upon the evidence that the full and free navigation of the river has been injuriously affected to a considerable extent: to such an extent as, were this a private water-course, would entitle the proprietor to come to this court for relief. Not only has the navigation been impeded, but fish, which used formerly to frequent the harbor, have now disappeared, and their disappearance is attributed by witnesses to the saw-dust deposit.

Judgment.

That it would be a case for relief at the suit of a subject if this were a private water-course can scarcely be questioned. I refer to the exposition of the law by Sir W. Page Wood, in *The Attorney-General v. Birmingham* (h), because it states the law clearly and succinctly, and is not inapposite to this case. The defendants were commissioners authorized, among other things, by act of parliament to construct sewers for the

(a) 3 D. M. & G. 304.

(c) 6 B. & C. 566.

(e) 4 K. & J. 528.

(g) 1 E. C. R. 161.

(b) 4 A. & E. 384.

(d) 18 Ves. 211.

(f) 11 Jur. N. S. 769.

(h) 4 K. & J. 528, 540.

1866. drainage of the city of Birmingham. The application was for an injunction by a relator and plaintiff. The learned Vice-Chancellor thus defined the rights of the parties: "Now, the plaintiff's rights are these: he has a clear right to enjoy the river, which before the defendants' operations flowed unpolluted, or, at all events, so far unpolluted that fish could live in the stream, and cattle would drink of it, through his grounds for three miles and upwards, in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish which were accustomed to frequent it may not be driven elsewhere. He is entitled to the full use and benefit of the water of the river just as he enjoyed them before the passing of the municipal act, unless there be in that act something which says that he is not to enjoy them any longer. That is the only question I have to try, and when I have tried that question I arrive at the measure of the rights of the parties."

Judgment. The rights of the public in navigable waters are co-relative with those of a riparian proprietor, nor is it any answer or any justification in either case that the injury is not very great, or that it is compensated by some public benefits. It is said in this case that the defendants' mill is a public benefit, and in proof of its being so (as well as for another purpose which I will notice presently) the defendants' counsel point to the fact that in making the sale of the mill-site by the government it was made a condition that the purchaser should erect as well a saw-mill as a grist-mill thereon. But in *Rex v. Ward (a)* it was held, that if an erection in a navigable river be in fact a nuisance it is no answer to say that a resulting public benefit has counter-balanced the nuisance.

But the cardinal point made by the defendants is,

(a) 4 A & E. 354.

that the waters of the harbor, where this saw-dust has become deposited, are not navigable water, or were not so when certain rights of the defendants or of one *Frost*, under whom they claim, accrued. *Frost* purchased the mill-site in October, 1848, one of the conditions of sale being that to which I have adverted; and he put up a saw-mill in pursuance of that condition: he sold to the defendants, and the mill was destroyed by fire. Another mill, the present one, was erected in its place in the autumn of 1863. With respect to the stream being navigable, the defendants put it thus in their answer: "With respect to the capacity of the said river as a navigable stream, the facts are as follows, and not otherwise: the same has always been navigable, as we believe, for small boats up to within a few rods of the saw-mill belonging to us in the said information and bill referred to; but at the time the first mill was erected, as hereinafter mentioned, the navigation was impeded by trees and logs in the river; and at the mouth thereof the water was not over three or four feet deep, owing to a bar of sand which constantly accumulated there."

1866.

Atty-Gen'l
v.
Harrison.

Leaving out the words, "for small boats," the above is not an incorrect description of the state of the river. Sand has from time to time "accumulated" or been deposited at the mouth of the river, as is the case with many of the rivers of the province. But, that being removed, and the deposit of the washings of the soil up the stream, which had accumulated in the bed of the river, together with the trees and logs being also removed, the river was navigable up to and inclusive of the whole of that which now forms the harbor.

I think the case may be fairly stated thus: The river from the head of the present harbor was, apart from extraneous obstructions, navigable to the lake for vessels ordinarily navigating the lake. Under the term "extraneous obstructions" are, in my judgment, properly to be included, not only trees and logs that may

1866. have fallen into or have floated down the river, but also
 Atty-Gen'l silt, the washings of the soil or other substances during
 V. freshets or otherwise ; and also the bar, whether com-
 Harrison. posed of sand or other substance, and whether formed
 by deposit from the current not having force to carry
 it further or otherwise. It would be a palpable absurdity
 to say that a river is not a navigable river, merely
 because fallen trees may obstruct its present use :
 equally so, I think, if logs which have become saturated
 so as to become " water-logged," and have sunk to the
 bottom, have diminished its depth : and so of any other
 substance which is not properly the bank or bed of the
 river. In a new country, especially, no narrow inter-
 pretation should be put upon the word " navigable."
 To do so would be to exclude from public use rivers
 and harbors highly valuable for purposes of commerce
 and of safety. I am sensible of the possibility of carry-
 ing this too far. There are harbors that are entirely
 artificial ; but the one in question is not so, but only
 required the removal of foreign obstructions to make
 it fit for use.

Judgment.

The defendants say that they have been in the habit
 for a number of years of allowing their saw-dust to float
 down the river without any objection being made to it.
 There is clearly nothing in this ; for no length of time
 will legitimize a public nuisance, the soil being in the
 Crown, and the user the common inheritance of the
 public at large.

It is urged also that the dredging in the river and
 harbor has not been rendered necessary by the saw-
 dust. Granting that the accumulation of sand or silt
 from time to time has rendered dredging necessary, it
 would be bad reasoning to say that there is no wrong
 in causing in the river a deposit of that which renders
 additional dredging necessary. It is saying in effect :
 you have at any rate to expend five hundred dollars in
 dredging ; I do you no wrong if by my means you are

obliged to spend eight. Besides, it is in evidence that 1866.
 the sunken saw-dust is of a nature that it is very diffi- Atty-Gen'l
 cult to remove at all, even with the use of the dredging Harrison.
 machine.

The defendants make a more serious point of this, that by the conditions of sale (to which I have referred) they were bound to put up a saw-mill; that it is in the ordinary practice, in saw-mills worked by water, for the saw-dust to be allowed to drop into the stream, and that this being done must have been contemplated by the government when the sale was made. That, however, can amount to no more than this, that the obligation to erect a saw-mill imposed by the Crown, carried with it an implied license to drop saw-dust into the river. This position is open to more than one answer. One is that the Crown cannot grant a license to commit a public nuisance. It would be licensing an individual to do that which interferes with a right which is the common inheritance of the people. Another is, that such a license is not to be implied: it would be derogating from the honor of the Crown to assume an intention to do that which would be injurious to the people; and it would be assuming ignorance on the part of the Crown of its own powers and of the rights of the subject. These answers might not be sound if this river had been made a navigable river by artificial means; but my position is, that it was a navigable river before and at the time of the sale of the mill-site, and none the less so that it required the removal of foreign substances which impeded its present use. The defendants have not even the excuse of hardship, nor had *Frost*; for at the time of the sale there was a town plot, as is evident from the description in the advertisement and conditions of sale; and from its position it was manifest to every one that it was intended to be a lake port.

Judgment.

I think an injunction should be granted in the terms of the prayer. I am not disposed to grant the account.

1866. Paul It would be for the benefit of the relators, and they
 v. should have come more promptly, in order to settle
 Johnson. the question of right. The defendants must pay the
 costs of suit.

PAUL V. JOHNSON.

Agent—Mortgagee—Improvements.

The widow of an intestate obtained letters of administration, and her brother, a lawyer, acted for her as a friend, not professionally, in the management and settlement of the affairs of the estate. While so employed, the brother with his own money purchased a mortgage which had been created by the intestate: *Held*, that he was entitled to hold the mortgage for his own benefit.

Where the holder of a mortgage went to reside with his sister, the widow of the mortgagor, upon the mortgaged premises, but did not assert any claim or right to possession as mortgagee until some years afterwards, when the widow, being about to marry, desired her brother to leave; and then, for the first time, he set up a claim to hold possession as mortgagee. On appeal from the finding of the Master, the brother was charged with occupation rent from that period, not from the time of his going to reside on the property; and such assertion of right had not the effect of referring back his possession to the time when he first acquired the right or went to reside on the property.

The principle upon which improvements by a mortgagee in possession are to be allowed for, considered, and acted on.

Where a mortgagee in possession had planted out fruit and ornamental trees, suitable for carrying out improvements commenced by the mortgagor, he was allowed the price at which the same was purchased, and a reasonable amount for care and cultivation since setting out, but he was refused his claim to be paid the value thereof at the time of redemption.

A mortgagee in possession purchased at sheriff's sale, under an execution issued upon a confession of judgment signed by the administratrix in favor of the mortgagee, who was her brother, and acting as her counsellor and agent, in the matters connected with the intestate's estate, and who thereupon made large improvements on the mortgage premises, under the belief that his purchase at sheriff's sale had vested in him the absolute fee in the property. Under these circumstances, the court, considering the case one of some hardship on the mortgagee, refused on further directions to send the case back to the Master, although it was probable some

improvements had been allowed for, which had been made before such purchase at sheriff's sale, and which were not in strictness allowable as between mortgagor and mortgagee; the party complaining of the allowances not having objected to the report, and the report did not on its face shew at what periods the improvements were made.

1866.

Paul
v.
Johnson.

This was a creditor's suit, and came on upon appeal from the finding of the Master at London, and for further directions.

The points involved appear sufficiently in the head note and judgment.

Mr. *Stroug*, Q.C., and Mr. *Bruce*, for the defendants *Daniel* and The Canada Life Assurance Company, incumbrancers, who appeal.

Mr. *Blake*, Q.C., and Mr. *Meredith*, for plaintiff.

Mr. *S. Blake*, for infant defendant.

SPRAGGE, V.C.—I think the first objection should be allowed. The weight of evidence is in favor of the purchase of the mortgage being made by *Daniel* for himself and for his own purposes, and not as acting for the estate; there is no pretence that it was with the moneys of the estate. The little that he did was in accordance with this; he did not consult the administratrix about it, but merely told her that he bought it on account of her dower. The date of this purchase does not appear from any papers before me, but I have it noted as in March, 1857, and it probably was after he had entered judgment on the cognovit given by the administratrix; he, at that time, as appears pretty certain, contemplated becoming owner of the place, through the cognovit, by purchasing, as he afterwards did purchase, at sheriff's sale; and this makes his remark to the widow intelligible. His business connexion with the estate seems to have been in effect this: The widow was his

Judgment.

1866. Paul sister, and he, a professional man, attended to such
 v. Johnson. business matters of the estate as required his attention, *i.e.*, as her agent and counsellor, as a friend and brother, and not in a professional capacity. He no doubt soon discovered, if he was not aware already, that the estate was insolvent; and it is probable that he got the widow to take out letters of administration in order to her giving the cognovit upon which he entered judgment. I do not think that it can be said that he was in any sense a trustee of the estate.

But, apart from all this, no case is made by the bill of the defendant getting in this mortgage as trustee for the estate, but the only question raised is as to the amount due; nor could the question have been raised at the hearing; for the decree simply refers it to the Master to take an account of the amount due. I am clear that this is not matter of account, but a question
 Judgment. which must be raised upon the pleadings.

2nd objection.—Upon the whole of the evidence, I incline to think that *Daniel* should not have been charged with occupation rent, until, upon the marrying again of *Johnson's* widow, he claimed the possession in his own right.

The bill puts it, that sometime before the sheriff's sale *Daniel* obtained from the mortgagees, the *Grumbs*, an assignment to himself of *Johnson's* mortgage to them, "under which he entered into possession, and ever since then has been in the occupation or possession of the said lands." I have not the exact dates. Mrs. *Leonard* (who was *Johnson's* widow) says in her evidence that *Johnson* died in February, 1857, and that Mr. *Daniel* came to live at Mr. *Johnson's* house about three weeks after Mr. *Johnson's* death; that might be either in February or March. It was said in argument by Mr. *Daniel's* counsel, and not denied, that it was in February, and that the assignment of the

mortgage was in March ; if this be so, the allegation that *Daniel* went into possession under the assignment must be incorrect. But, however that may be, I understand from the evidence that *Daniel* did not go into possession under the assignment. Mrs. *Leonard* says, "Sometime after Mr. *Johnson's* death Mr. *Daniel* told me he had bought *Grumbs'* mortgage." The word "sometime" is certainly indefinite, but I understand the witness to have meant that it was after he had come to live in the house; probably some considerable time after. There is this peculiarity about the case, that we find a mortgagee living upon the mortgaged premises ; but such a position is quite possible, e.g., a brother and sister inmates of the same house, the property of the brother, and money of the sister borrowed by the brother, and a mortgage given; or money borrowed by a householder of a lodger; and other cases might be put. We must look in each case at the character of the occupation of the parties. Suppose *Daniel* had, in *Johnson's* lifetime, gone to live in the house with his sister and her husband, and had while there become assignee of the *Grumb* mortgage; or even if he had become so previously, it would be out of the question to charge him at the suit of a subsequent incumbrancer, as mortgagee in possession. This, I think, I must take to be proved upon the evidence. The mortgagor died in possession; and his widow, with her child, then had possession. Under these circumstances *Daniel*, an unmarried brother, went to the house. There was, as Mrs. *Leonard* says, no arrangement made; and as she says in another place, "When Mr. *Daniel* came, he said he was coming to stay there with me as I was alone; and he did so." Even supposing that he was then assignee of the mortgage, he did not, as I understand the evidence, make that known to her till afterwards. There was then no interruption of her possession. There are indeed passages scattered through her evidence to the effect that *Daniel* had acted as proprietor, and kept up the establishment; but it is evident she did not mean that he

1866.

Paul
v.
Johnson.

Judgment.

1866.
Paul
v.
Johnson.

assumed to be owner, or to be in possession in his own right. She appears to have been almost entirely ignorant of the state of her husband's affairs. She supposed *Daniel* had bought the *Grumb* mortgage for the benefit of the estate, though ignorant with what moneys; but supposed he was arranging everything for herself and her child. There was no change of possession, but everything was upon the same footing, as far as we can judge, as if the *Grumb* mortgage had no existence. A widow lady is left with her child, without any means of subsistence; an unmarried brother, of good means, as I gather from the evidence, goes to live with her, and out of his pocket defrays the expenses of the household; he becomes the assignee of a mortgage, which I will assume gave him the legal right to the possession of the place, but he does no act to reduce his right into possession or to enforce it in any way, and he derives no benefit, but assumes a burden from his position in the house, and all goes on as it commenced, as if he were not assignee of the mortgage. He made certain improvements on the place, but his brother-in-law had died suddenly, he was drowned, and the improvements were a carrying out of what had been commenced, the widow thought, generously, for her benefit, or with the means of the estate; the brother appears to have meant them for his own, contemplating the acquiring of the estate eventually for himself. I think, upon the whole, the proper conclusion is, that the widow, and not *Daniel*, was in possession. It is said that when *Daniel* took an assignment of the mortgage there was no arrear. I have nothing shewing how this is, but if there was no arrear it strengthens the position that *Daniel* did not go into possession under the mortgage.

Judgment.

What took place upon the widow marrying again is against there having been any change of possession. She was anxious, she says, that *Daniel* should leave the place, and that she should continue to live there; evidently considering that the possession had all along

been hers, and that her brother had been a guest in her house; and then for the first time, so far as appears, *Daniel* asserted his right to possession as a mortgagee. It has occurred to me that possibly this assertion of right should have relation back to the time of his acquiring the right; but I think not. It was competent to him, while having the right, to abstain from exercising it as long as he thought fit, and then when change of circumstances, or any other reason, or his own will might induce him to put it in force, to do so; and this is what he appears to have done. Being in point of fact in the house, and his sister desiring to bring her new husband in, and to have him out, he took the opportunity of asserting his right to be in possession. That was, I think, assuming a new character, and it was evidently so understood by the sister. He had long had the right, but he then for the first time exercised it.

1866.

Paul
v.
Johnson.

The 3rd objection is, that the Master has allowed too small a sum to *Daniel* for improvements made by him upon the mortgaged premises. Judgment.

I have read the evidence carefully, and cannot say that the Master has erred in the allowances that he has made. It is true that he has in some instances allowed less than improvements had cost; but the principle upon which I understand him to have proceeded, is to limit the allowance to the benefit which the property has derived from the improvement; and in this I think he was right, provided he did not proceed in a niggardly or over parsimonious spirit. He appears to have allowed items which probably would not be allowed to a mortgagee under ordinary circumstances, and that, I think, properly; but limiting the allowance to the benefit to the estate is also proper. Any other principle of allowance would be dangerous. Suppose, for instance, some great mistake to have been made, some utter failure, an expensive heating apparatus which had to be abandoned as useless; it would be hard to make the party

1866.
Paul
v.
Johnson.

who has a right to redeem bear the loss ; and so if an extravagant fancy were indulged in, and erections made out of keeping with the style and character of the place, the Master would not be wrong in reducing the allowance to that which a man of moderation and good taste would expend. Of course it would be very easy to err in that direction, and to allow too little, on the ground that something very plain and very cheap would have answered the purpose ; but it is not shewn that the Master has erred. I must see that he has before I can say that he is wrong. He took the evidence himself, and had better means than I can have of judging of the fitness of what has been done, and of the proper sum to be allowed, and it is a thing to be considered in allowing for these improvements, that they were many of them made with a view to the premises in question, forming with some other premises one house and grounds, and any person redeeming the mortgaged premises, necessarily takes them at a disadvantage ; and the evidence shews that this is actually the case. This objection must be disallowed. See the remarks of Lord Lyndhurst in *Sandon v. Hooper (a)*, on appeal.

Judgment.

The 4th objection is that the Master should have allowed "the full present value of the fruit trees and ornamental trees, and shrubs ; and should have classed all under the schedule of substantial improvements ; and should also have reported and allowed the full amount paid for gardener's wages, and classed same under said schedule."

The decree directs the Master, in reporting upon repairs and improvements, to distinguish the amount and value of ordinary repairs, substantial permanent improvements, and ornamental improvements separately, and I do not see that he was wrong in classing ornamental trees and shrubs as ornamental improvements,

(a) 14 L. J., Chy. 120.

though they may be substantial and permanent improvements also. The court probably desired to be informed of the proportions which the expenditure in each bore to one another. Practically it makes no difference whether the Master calls trees and shrubs ornamental or substantial improvements.

1866.

Paul
v.
Johnson.

It seems to me clear that Mr. *Daniel* cannot be allowed for the present value of these trees and shrubs, and also for the cost of bringing them to their present value. I do not see upon what principle he can be allowed for the present value at all, the land was all along the land of the parties entitled eventually to redeem. These fruit trees and shrubs planted, not as in a nursery for removal and annual profit, but for permanent use and ornamentation, became, upon being planted, part of the inheritance, and any additional value that they acquired by their natural growth from year to year, belongs to the owner of the land, not to the incumbrancer who put them in the ground. It is another question, whether he is not entitled to be reimbursed for such expenses as he may have incurred from year to year in bringing them to their present value. He claims "the full amount paid for gardener's wages," which wages, I find by the evidence, covered his board, so that what is claimed is the full expense of keeping a gardener. This seems altogether too much. I think that a moderate sum, say \$30 a year, may properly be allowed on this account. I think the item of \$120, paid to Mr. *Wyatt*, landscape gardener, should be disallowed, partly because it was somewhat beyond what was necessary or expedient, taking into account the nature of the place, and the propriety of confining the allowance to such expenses as a careful and economical person would go to, but principally because the benefit of having the services of a landscape gardener were, as appears by the evidence, and indeed necessarily must have been in a great measure, but for the circumstance of the grounds having been laid out, not for the mortgaged premises

Judgment.

1866. alone, but for those premises in combination with others adjoining. The plaintiff has not carried in objections to the report, but this objection appears upon the face of the report, and the cause being before me upon further directions, as well as upon appeal from the report, the question is properly before me.

Paul
v.
Johnson.

The Master has taken the account with rests. This the mortgagees object to. It is said that the interest was in arrear when the mortgage was assigned to *Daniel*. It was certainly in arrear at the time when, according to my judgment, *Daniel* took possession; and this being the case, it is the law of this court, as lately adjudged by the Chancellor, that a mortgagee taking possession is not chargeable with rests. But, apart from this, I think this is not a case for taking the account with rests. In the earlier part of the account, at any rate, the amount chargeable for occupation rent is less than the amount properly chargeable for interest on the mortgage, and on the moneys expended in repairs and improvements: the mortgagee is entitled to interest upon those, as well as upon the mortgage money.

Judgment.

It is urged on behalf of the plaintiff, and of the dowress and widow, that improvements made by *Daniel* before he went into possession should be disallowed; and that no improvements otherwise than of an ordinary character, should be allowed until he had by purchase at sheriff's sale acquired title as he believed. The parties objecting have not appealed from the report; and the report does not upon its face inform us what improvements were made before, and what after the periods named. The case of *Daniel* is, after all, a case of some hardship, for he thought, no doubt, that he was improving his own property, and I do not think that it would be conducive to the ends of justice to send the case back to the Master to make inquiries, in order to reduce further his claim for reimbursement for moneys expended. I think substantial justice is done as it is.

As to costs, I do not think that they should be thrown upon *Daniel*. He has not resisted redemption by misrepresenting any facts or circumstances, but has merely submitted to the court a question of law. It is not unlike the case of *Fee v. Cobine (a)*, where the court held against the contention of the defendant, that certain instruments amounted only to a security for money. In that case lasting improvements were allowed, and costs were reserved until the state of the accounts should be shewn by the Master's report: here the result of the accounts is before me. I think that *Daniel* and the Canada Life Assurance Company should have the general costs of the cause, with the exception of the costs of and incidental to the hearing, which should be paid by *Daniel*, and with the exception also of the costs of the appeal from the Master as to which each party should pay his own costs. The infant should have his costs as usual.

PATTISON v. MCNAB.

Practice—Witness—Costs—Putting off examination.

Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made diligent efforts to secure the attendance of such witness, who is residing within the jurisdiction, but fails to secure it, the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases, the costs will be disposed of according to circumstances and in the discretion of the judge.

This cause was set down for the examination of witnesses and hearing before the Chancellor at the sittings of the Court at Guelph in the autumn of 1865, and when called upon.

Mr. *Fitzgerald*, for the plaintiff, asked to withdraw the case because of the absence of one of the defendants, who had been subpoenaed, but was not in attendance. A letter had been received, addressed to the Chancellor, stating that the absence of the witness was caused in

(a) 11 Jr. Eq. 406.

1866. consequence of his duties as postmaster at Durham
 Pattison requiring his personal attendance. Under these cir-
 V. cunstances the Chancellor postponed the hearing,
 McNab. reserving the question of costs.

On a subsequent day,

VANKOUGHNET, C.—In this case the witness was unable to attend owing to his duties as postmaster. It does not however appear that the plaintiff used proper exertions to procure his attendance by notifying him or subpoenaing him a sufficiently long time beforehand to enable him to communicate with the Government and procure leave of absence, or provide, if he reasonably could do so, for the discharge of the business of his office in his absence.

Judgment. I have consulted with my brother judges as to the practice to be observed in such cases in regard to costs, and we have come to the conclusion that when a party has made diligent efforts to secure the attendance of a witness within the jurisdiction of the court, and fails to secure it from one cause or another which he cannot control, that the costs of putting off an examination and hearing should as a general rule be costs in the cause. In all other cases, the costs will be disposed of according to circumstances, and in the discretion of the judge. In this case I am not satisfied that the plaintiff did make every reasonable effort to secure the attendance of the witness, and I therefore order that the costs of the day be payable to the defendant if he ultimately succeeds;—making no other order. We think it makes no difference that the witness is a party to the record unless he is in the same interest with the party against whom it is proposed to call him, and then circumstances must govern.

BECKER V. HAMMOND.

1866.

Becker
v.
Hammond.*Will, Construction of—Dower, devise in lieu of—Election.*

A testator by his will gave to his wife a life interest in certain portions of his real estate, and also certain annual allowances, both in money and kind, such as to exclude the probability that she would require any other means for her support; the rents and profits of the real estate after payment of such annual allowances being insufficient to satisfy the widow's claim for dower:

Held, that the widow under the circumstances was bound to elect.

Where a widow insisted on her right to dower as well as to the bequests made by the will, the court allowed her her costs, although unsuccessful in such contention; the question having arisen from the terms of the will, dower not having been in terms excluded, and it was held to be excluded on extrinsic evidence.

The provision for the widow of testator and certain legacies being charged upon real estate which it was apprehended might prove deficient, the legacies, not the provision for the widow, were in such case ordered to be abated ratably.

This was a hearing on further directions.

Mr. *Spencer* for the plaintiff.

Mr. *Bain*, contra.

SPRAGGE, V.C.—The main question raised upon ^{Judgment.} argument is whether the defendant *Elizabeth Hammond*, widow of the testator *William R. Hammond*, is entitled to dower in addition to the provision made for her by her husband's will. The specific provision made for her by the will is in the following terms: "I give and bequeath unto my beloved wife, *Elizabeth Hammond*, all my household furniture. I will that she have the use of my dwelling in which she now lives, together with the present yard as now enclosed, together with the fruit now growing thereon, during her natural life; also to have the sum of fifty dollars to be paid from my estate, together with her firewood ready prepared at door, the use of two cows, the same to be well fed and kept during winter and summer; also, yearly, fifteen

1866. bushels of wheat, to be ground and delivered at the house; also, two hundred pounds of good and well fattened pork; also fifteen pounds of good wool—all the above articles to be delivered to her at their proper seasons as she may require them; also, ten bushels of good potatoes every year. And I also will and provide that all expenses in case of sickness, for attendance and nursing, shall be paid by my executors from my estate." Then, after bequeathing pecuniary legacies of \$150 and \$200 respectively to two daughters; after bequeathing to his second son all his interest in a bond or lease for the east quarter of lot 19 in the 10th concession of Townsend, and a legacy of \$400 to the same son, besides certain chattels specified upon a contingency; after providing for the education of his youngest son and bequeathing him a legacy of \$1200, and devising and bequeathing the residue of his estate, real and personal, to his eldest son, the will proceeds: "I also further will and determine that my beloved wife, *Elizabeth Hammond*, shall have all the fruit she may require for her own use from the orchard and garden."

Judgment.

The master finds that the real estate of the testator consisted of the farm upon which he resided, containing $78\frac{1}{2}$ acres, the greater part in a good state of cultivation, having upon it a frame house and barn and an orchard; also a one acre lot in the village of Waterford. The bond or lease for the east quarter of lot 19 in the 10th concession of Townsend the master classifies as personal estate, and fixes its value at \$500. The value of the residue of the personal estate he fixes at \$618, \$100 of this being for the household furniture, and \$100 for a set of carpenter's tools.

The master finds the annual value of the farm, over and above the house, garden and yard devised to the widow for life to be \$70, and the annual value of the village lot to be \$5. He finds further that the bequests to the widow directed to be given her in kind, and the

provision for her in case of sickness, and nursing, including the use of the dwelling house, garden, yard and fuel, and the \$50 annually, would amount annually to the sum of \$181 50. And he states the gross value of the sum, for such period as, according to the tables by which a life annuity is valued the widow is likely to live, at the sum of \$1,687. The master does not state the annual value of the piece of land for which the testator held what is called a bond or lease, and I infer was not asked by either party to do so: the annual value of the farm and village lot is stated, I presume, under the head of special circumstances, as the Master is not directed to find them.

1866.
Becker
v.
Hammond.

From the figures given, however, it is manifest to a degree of moral certainty that the real estate of the testator is not sufficient for the payment of the dower to the widow, and also for the payment of the particular provision for her given by the will, which is in substance an annuity. The Master has assumed that the \$50 was to be paid to the widow annually; and this is not questioned. The Master has in this probably found correctly, for though the will does not in terms direct an *annual* payment, yet looking at the place of this direction in the will, and at the other things to be provided, all of which it is plain were to be provided annually, although as to some of them it is not in terms so directed, I think the Master was right in taking the \$50 to be an annual payment. Now taking the annual value of the land for which the "bond or lease" was held, to be equal to that of the farm, though it was probably less, and assuming that the widow was dowable therein, which however has not been contended for, the annual value of the land of which the widow was dowable would be £145, one-third of which for the widow's dower would be say \$48 38. Adding thereto her annuity, \$181 50, would be within a fraction of \$290. Even supposing the \$50 to be one gross sum instead of a sum payable annually, it would

Judgment.

1866. Becker
v.
Hammond. leave the annuity and the dower considerably exceeding the whole annual value of the estate. Supposing the widow not dowable of the land held by the "bond or lease," it would make the excess still greater. Taking into account the personal estate, or rather that part of it, the farming stock and implements, out of which the testator may have contemplated that the annuity to his wife should be in part provided, it would still leave the annuity and dower in excess of the annual value of the estate.

Judgment. I think this point very important in disposing of this case. There is indeed much in the will to lead to the opinion that the testator did not intend that his wife should have dower, or if he thought of dower at all, that his intention was that she should not have it. There is the careful solicitude that he has manifested to provide for her every want and comfort, so that she could neither need nor wish for anything else, and the provision, liberal under the circumstances, of \$50 a year besides. There are also the legacies to other members of his family. One can scarcely read the will without the conviction, almost, that the testator intended the particular provision that he made for her to be her sole provision. But the cases in favor of the widow having dower in addition to the particular provision made by the will are very strong. I may refer among many others to *Foster v. Cooke* (a) before Lord Thurlow; to *French v. Davis*, (b) in which Lord Alvanley reviewed the previous cases; to *Gibson v. Gibson*, (c) and *Bending v. Bending* (d). These cases and others are strong in favor of the dower. On the other hand is the late case of *Parker v. Sowerby*, (e) and the case of *Hall v. Hill*, (f) before Lord St. Leonards when Lord Chancellor of Ireland. It has often been observed that the cases upon this subject are

(a) 3 B. C. 347.

(c) 1 Dy. 42.

(e) 4 D. M. & G. 321

(b) 2 Ves. Jur. 572.

(d) 3 K. & J. 257.

(f) 1 D. & W. 102.

irreconcilable; those in favor of the dower go mainly upon this, that the testator must be understood as disposing of his own, that is, of his estate subject to his wife's dower, the wife's dower not being his own. With great deference to the opinion of the learned judges who have insisted upon this point, I cannot but think that in some cases they have pushed the doctrine rather far. They all however agree that it is a question of intention. It is not perhaps settled law that the circumstance of the estate of the husband being insufficient to satisfy the wife's dower and also an annuity given to her by the will will put her to her election. Mr. *Jarman* (a), calls it a fluctuating and unsatisfactory rule, but *Pearson v. Pearson* (b) is in its favour, and Lord *Alvanley* in *French v. Davies*, referring to *Pearson v. Pearson*, spoke approvingly of the course that had been taken in that cause. Mr. *Roper* in his treatise on the Law of Husband and Wife, (p. 59), states as the result of the authorities that when the estate of the testator is insufficient to pay an annuity to the wife and to answer her dower, the intention will be apparent that her husband did not mean that she should be at liberty to enforce both her claims: and the same opinion is reiterated in the treatise on legacies (c). I ought to add that the learned judge who directed the inquiry in this case must, I apprehend, have been of the same opinion, otherwise the inquiry would be useless. It was, I believe, my late learned brother Vice-Chancellor *Esten*.

1866.

Becker
v.
Hammond.

Judgment.

Upon the whole I have come to the conclusion, after some doubt and hesitation, that looking at the particular provision made for the wife by the will, and to the circumstance of his estate being insufficient to satisfy that provision and also to answer her dower, that this is a case in which the widow should be put to her election.

It is conceded that the provision for the wife and the

(a) *Jarman on Wills*, 430.

(b) 1 B. C. C. 292.

(c) *Roper on Legacies*, p. 1427.

1866. legacies are charged upon the real estate devised to the eldest son. In the event of a deficiency the legacies, not the provision for the widow, must abate ratably. The plaintiff asks for a sale. There are no debts proved. The plaintiff claims to be entitled to his costs as between solicitor and client as a first charge upon the estate, and this is not questioned. The defendants are also, I think, entitled to their costs. The widow indeed has been unsuccessful in her contention, but the question has arisen from the terms of the will: dower is not in terms excluded; and I hold it excluded upon extrinsic evidence. The decree will be accordingly.

Bates
v.
Martin.

BATES v. MARTIN.

Injunction—Co-tenancy.

Although the general rule is that the mere fact of one tenant in common holding possession of the entire estate, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property, still where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year, or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds: but refused to interfere with the possession of the mother and her husband in respect of previous years; although as to such previous years the mother might have been accountable to her infant children as trustee for them.

Statement. This was a bill by *Mary Jane Bates*, against *George Martin* and *Jane Martin*, his wife, and her infant children, setting forth to the effect that the father of the plaintiff had some years before died intestate, leaving the plaintiff and the infant defendants, his children, and heirs-at-law, together with the said *Jane Bates*, their mother, him surviving: that their mother continued to reside on the premises owned by the intestate during his lifetime, and had since intermarried with the defen-

dant *George Martin*, who had since his intermarriage with the defendant *Jane Martin*, continued to reside on the same premises, applying the produce of the farm to his own use; prayed an account, and for an injunction restraining the defendant *George Martin*, who it was alleged was insolvent, from selling or disposing of the crops of the current year, and for further relief.

1866.

Bates
v.
Martin.

A motion was made for an injunction in the terms of the prayer of the bill.

On the motion affidavits were filed by the plaintiff setting forth certain acts of ill-treatment on the part of the defendant *George Martin* towards the plaintiff and the infant defendants, which it is not material to state more particularly.

Mr. Burns, for the plaintiff and the infant defendants, in support of the motion.

Mr. Blain, contra.

Henderson v. Easton (a), *McMahon v. Burchall (b)*, *Christie v. Saunders (c)*, *Paterson v. Reardon (d)*, and *Story's Equity Jurisprudence*, 466, were, amongst other authorities referred to.

VANKOUGHNET, C.—There is no doubt that the mere fact of one tenant in common holding possession of the whole property, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, *McMahon v. Burchall (a)*; and the court will not in such a case interfere with the dealings by the co-tenant in regard to the property; though where it was sworn he was insolvent and destroying portions of the property, an injunction against his so doing was granted. See cases cited at page 162 of *Drewry on Injunctions*.

Judgment.

(a) 10 Jur. 821.

(b) 2 Phil. 127.

(c) 2 Gr. 672.

(d) 7 Q. B. 326.

1866.

Bates
v.
Martin.

While this is the general rule there may be special circumstances attending the possession, which, as Lord *Cottenham* said in *McMahon v. Burchall*, will render the co-tenant in possession liable to account.

Now, here, it appears that at the time the defendants intermarried—the wife being owner as co-tenant of one-sixth of the property—the other co-tenants, her children, were under age, and with the exception at all events of two, who had been apprenticed or put out to labour by her, went to reside with the mother and stepfather on the property, and continued to do so as members of the family, until, as they advanced in years, they went out, or were by their mother put out to labor for themselves. It may be that the duties and support rendered to them by their mother and her husband would, during all this time, be considered an adequate compensation for their several interests in the property; but upon this part of the case there is contradictory evidence, as it is alleged that the stepfather cruelly treated the children and drove them out of doors. It is evident that they have been, with the exception of one, or perhaps two of them, too young, up to the present time, to enter upon the possession of the property, and enjoy it for themselves. The mother was their natural guardian, and I am not prepared to say on this motion, that she ought not to be, and would not be, made accountable to them for her and her husband's dealings with the property during their minority. She must be taken, I think, to have assumed the management of it for them, as well as for herself; and, if so, she would be accountable to them as a trustee, subject, however, to the consideration how far her care and maintenance of them should be considered a discharge of, or exoneration from such accountability. In speaking of her, I include also her husband. It may be said, that so far as the plaintiff is concerned this arrangement must be taken to have been long since at an end, as she is now twenty-two years of age. That must depend very much upon what occurred in

Judgment.

in the meantime. The nature of the defendants' possession may be treated as having undergone no change. The plaintiff is a female, and could not very well enter upon farming operations. For anything due by the defendants in respect of past years, there can be no specific lien or claim upon the crops of this year, but as the plaintiff and the other co-tenants, the infant children, may be found entitled to a share of the crops of this year, and as it is sworn that the defendant *Martin* is insolvent, I think I will be doing right in securing, say one-third of the proceeds of the sales of the crops of the present year; and I therefore grant an injunction restraining the defendants, *Martin* and wife, from parting with the crops of this year, or the proceeds thereof, unless they undertake to bring into court the one-third of such proceeds, on affidavit shewing how much such one-third is. It may turn out on account taken, that the *Martins* will not be found indebted to their co-tenants. I cannot restrain absolutely the sale of the crops, as that might cause irreparable damage.

1866.

Bates
v.
Martin.

Judgment.

STEPHENS V. SIMPSON.

Registration—Will—Mortgage—Parties.

The owner of real estate, held under a registered title, devised a portion thereof—his homestead—to his wife in fee, but the will, although known to all the members of the family, never was registered. At the death of the testator (1831) the eldest son and heir-at-law, was residing on a farm of seventy-five acres, which his father had conveyed to him, with one of his brothers, but after the death of his father he went with his wife and children, and his brother, to reside on the homestead with his mother; and some years afterwards, by arrangement among some of the members of the family, he conveyed the farm of seventy-five acres to the brother, who thereupon took possession of and occupied it; but the heir-at-law continued on the homestead until his mother's death, which occurred twenty-four years after the death of the testator, during all which time he acted as apparent owner of the homestead, building on and improving it; the taxes therefor being assessed in his name, and he voting at elections upon it. About eight years after the death of his mother, and in the year

1866.
 Stephens
 v.
 Simpson.

1862, the heir-at-law, who continued to occupy the homestead, created a mortgage thereon, which was duly registered, in favor of a person who was ignorant of the existence of the will: on a bill filed to enforce the mortgage:

Held that, under the circumstances, the possession must be treated as that of the heir-at-law; that his brothers and sisters could not, as against a *bond fide* purchaser or mortgagee, allege the possession to have been that of the widow, and thereby set up a title under the Statute of Limitations; and that as against such purchaser or mortgagee the will, under the registry laws, must be treated as fraudulent and void.

Where a mortgage is taken in the name of one partner to secure a partnership debt, and a bill is filed to enforce the security, the representatives, real or personal, of a deceased partner, are not necessary parties.

This cause came on for examination of witnesses and hearing before Vice-Chancellor *Spragge*, at the sittings in Brockville, held in the autumn of 1865.

Mr. *A. N. Richards*, Q.C., and Mr. *Blake*, Q.C., for the plaintiff.

Mr. *Roaf*, Q.C., and Mr. *Steele* for the defendants.

SPRAGGE, V.C.—*John Simpson* died in 1831, seized of the land in question, which he held by a registered title, and of other lands, among them of seventy-five acres, of which he had made a conveyance to his eldest son, and heir-at-law, *James Simpson*. *James Simpson* was married before his father's death, and before and at the death of his father was living on the seventy-five acres. Besides *James*, *John Simpson* left other two sons, *George* and *John*, and two daughters, to one of whom, *Mrs. Dalton*, he had given about seven acres of land, part of the same lot as the land in question. Immediately after the death of his father, *James* removed with his family from the seventy-five acres to the land in question, it being the homestead upon which his father had lived and died, and resided there; the widow also continued to live in the same house.

On the 22nd of November, 1862, *James*, having continued to live upon the homestead farm with his family, mortgaged it to the plaintiff, which mortgage was registered on the 24th of the same month. It afterwards turned out that *John Simpson*, the father, had left a will, devising the land in question to his wife in fee. This will was not registered.

1866.

Stephens
v.
Simpson.

Prima facie, the plaintiff's title is shewn, he is mortgagee, and his mortgage is registered, and the unregistered will is to be adjudged fraudulent and void as against his mortgage. The defendants are *James* and the other sons, and the daughters (with their husbands), of *John* and his wife; and all, except *James*, against whom the bill is taken *pro confesso*, claim to be entitled as heirs of the widow, and they set up title acquired under the Statute of Limitations. They claim that the possession after the death of *John Simpson* was that of the widow, and not of *James*. The difficulty that I have felt upon this head has been as to whether I ought to lay entirely out of view the fact of *John* having by will devised this land to his wife, and that fact being known both to the widow and the heir-at-law, as it certainly was, and in fact to all the family. I have felt no doubt, that it cannot be used as a part of the defendant's title; my doubt has been whether the fact could properly be used as giving a character to the possession. Before the death of *John*, his son *George* lived with *James* on the seventy-five acres. After his death both removed to the homestead, and together worked the farm; the object, as stated in evidence, being to pay off a mortgage to a *Mr. Shenston*, which was an incumbrance upon the homestead, and the seventy-five acres, and upon other land also. As between the parties themselves, at that date, I should say the possession was that of the mother; but I should say so simply because she was devisee; and the heir-at-law removing to the place and working it with the object, (with the assistance of *George*), of paying off the *Shenston* mortgage, was

Judgment.

1866. quite intelligible and consistent with his leaving his
 mother in possession as devisee. The transaction in
 Stephens relation to the seventy-five acres, and to the putting up
 v. Simpson. of buildings by *James*, may perhaps alter the character
 of the possession as between the parties themselves ;
 but the possession following the death of the father,
 was, I think, as between the parties themselves the
 possession of the mother ; the removal of *James* to the
 place being explainable upon other grounds than his
 taking possession as heir at-law. It is therefore, in my
 mind, very material to come to a right conclusion as to
 whether or not the will may be discarded as giving a
 character to the possession. If, in fact, there had been
 no will, I should have no doubt upon the evidence
 that, immediately after the death of his father, and
 from thence until after the making of the mortgage in
 question, the possession was in *James*, the heir-at-law.
 There being in fact a will, and the parties knowing it,
 is what creates the difficulty ; for the relative position
 Judgment. of each, for some considerable time at least, was quite
 compatible with the title being in the other ; and the
 law would, I apprehend, apart from the Registration
 Acts, attribute the possession to the one having the title.

After a good deal of consideration, I incline to think
 that the proper conclusion is that the will should be
 discarded from consideration ; that full effect should be
 given to the words of the statute, that it be adjudged
 fraudulent and void as against the subsequent purchaser
 or mortgagee for value, with a registered conveyance.
 It is manifest, that unless this be done the intention of
 the statute may often be frustrated, and the title of a
bond fide purchaser or mortgagee, who has used all
 ordinary caution, be defeated ; and this case furnishes
 a very strong illustration. *James Simpson* had been in
 sole possession, since his mother's death, for eight years,
 when he made the mortgage in question, his brothers
 and sisters having made no claim ; and for about twenty-
 four years before his mother's death he had been in

visible possession, working the farm, the widow, his mother, living also upon the place. Her living there, and being supported upon the place, could give no ground for assuming, or even surmising, that she was devisee. There was her right as dowress; there was the filial duty of her son, the heir-at-law; and there was frequent usage in the like cases to account for it, without any suspicion arising, in the breast of even a cautious man, that she was in possession by reason of title derived from her husband, and that the heir-at-law was a mere interloper, living upon the old homestead upon her sufferance. It would be a natural conclusion that he was in possession as heir at-law, if the mortgage had been made during her lifetime; but the case is immensely stronger when it is made eight years after her death. While she was living, it might be said, that an intending purchaser or mortgagee should have inquired of her as to the nature of her occupation; but after the lapse of eight years from her death, and an uninterrupted, unquestioned, sole possession during that period, no one could fail to attribute his whole possession from the first to his title as heir-at-law.

1866.
Stephens
v.
Simpson.

Judgment.

It is very important not to allow our registration laws to be frittered away by over-nice distinctions. The courts should so construe them, (an admitted axiom in the construction of acts of parliament,) as best to give effect to their intent and spirit. A construction that would give some effect to an unregistered will, the effect, for instance, that I have suggested as possible in this case, might certainly defeat a registered title. The only safe way, I think, is to give no effect to it at all.

In regard to the possession, I have said that the possession which followed immediately upon the death of *John*, the father, seemed to me, as between the parties themselves, the mother being devisee, to be in her. Some two or three years afterwards (the exact time is not stated,) an arrangement was made for the conveyance

1866. by *James to George*, of the seventy-five acres which had been conveyed to him, *James*, by his father. The conveyance was made, and *George* went into possession of the seventy-five acres; *James* and his family remaining upon the homestead. *James* speaks of making this conveyance seven or eight years after his father's death, his wife speaks of the arrangement as made two or three years after the death of the father. Probably the conveyance was not made for some time after the arrangement was made, I judge so from the evidence. It is not material as to the exact time. That was part of the arrangement; but it was not a gift by *James to George*; the other part of the arrangement was that *James* was to have the homestead. It is not very clear who were the parties to this arrangement besides *James* and *George*. *James'* wife speaks of it in these words: "The brothers and sisters all knew there was a will. There was an understanding spoken of that *George* was to have the seventy-five acres, and we were to have the other land. The old lady never spoke of it, but spoke of giving it to my eldest son." After *George* had left the farm some time, *James* built upon it; he pulled down the old house and put up a new one of stone: he also built a barn and other outbuildings at a cost altogether of some eight or ten hundred dollars. He and his family, and his mother also, moved into the new house. He appears also on several occasions to have voted at elections upon the homestead. Payments were made to *Shenston* on account of the mortgage, and when at last it was paid off, the discharge was taken in the name of *James* as heir-at-law, and that in order, as *James* says, that it might give him a title to the land; for previous payments, or some of them, receipts had been taken in the name of the widow. The assessment for taxes on the homestead was made in the name of *James*. *James* says in his evidence, "none of my brothers and sisters ever set up a claim to the land," adding very uncandidly I think, "I do not know why." Both he and his wife gave their evidence with an evident leaning to the case

Stephens
v.
Simpson.

Judgment.

of the defendants; still it is impossible to read their evidence without seeing that *James* knew perfectly well why the land was never claimed by any of his brothers or sisters, viz., that it was considered by all parties to be his. The entire control exercised over the place by *James*, dating, I should say, from the departure of *George* to the seventy-five acres; (*John*, the younger brother, had long before left the homestead and gone to Bowmanville;) or at any rate from the erection of the new buildings; and the various acts of ownership which he exercised, most of which it is to be inferred were known to his mother, together with the other acts to which I have referred, lead me to think that the proper conclusion is that the possession was in *James*, even as between the parties themselves; as it certainly was to the world: or if not exclusively in *James*, that it was a joint possession by him and his mother; and not a possession which can be set up by those claiming under her, as against those claiming under him. I incline to think, however, that the more proper conclusion is that it was the possession of *James*.

1866.
Stephens
v.
Simpson.

Judgment.

It is unnecessary, taking the view of the case that I do, to notice at any length the case disclosed by the evidence in regard to *George*. It is clear that he is excluded by conduct from setting up any case against the plaintiff's mortgage.

An objection is made for want of parties. The debt for which the mortgage was given was a joint debt due to the plaintiff and his then partner, since deceased, *William Stephens*; the mortgage was taken in the name of the plaintiff alone. It does not seem to me to be necessary to make the representatives of *William Stephens*, real or personal, parties; not the personal representatives, for the legal right survives to the surviving partner, and the plaintiff is a trustee for the estate of *William*, both for the debt and the land; and being

1866. trustee of the land as well as the debt, the real representatives are not necessary parties ; both being sufficiently represented in this court by the trustee.

Stephens
v.
Simpson.

MARTIN V. MARTIN.

Will—Disposing mind—Mental capacity of testator.

A testator was in an extremely low state at the time of giving instructions for and signing his will, and died soon afterwards ; but it appeared that he was considered of testamentary capacity at the time, and seemed to understand and approve of the document ; that it was prepared in good faith, in supposed accordance with his wishes and directions ; that no question had been suggested as to the validity of the will for more than a year after probate ; and his widow, to whom he had devised a life estate in part of his lands, died in the interval ; the court sustained the will notwithstanding some doubts suggested by the witnesses at the hearing, as to the mental condition of the testator, and the exact conformity of the will with his wishes.

The bill in this cause was filed by *Maitland E. Martin* of Lapier County, in the State of Michigan, yeoman ; *Hiram B. Martin*, of the same place, yeoman ; *Caleb E. Martin* of the town of Lindsay, in the county Victoria, doctor of medicine, *Minerva A. Tweedie*, of the township of Mariposa, wife of the defendant *Gilbert Tweedie*, (by *Philip S. Martin*, her next friend,) and the said *Philip S. Martin*, of the said town of Lindsay, Esquire, *Sarepta T. Martin*, of the township of Whitby, spinster, and *Albert F. Martin*, of the town of Whitby, druggist, against *Warner Coleman Martin*, *Hutton Starr*, *Gilbert Tweedie*, and *Eliza F. Martin*, and *George Martin*, the last two being infants under the age of twenty-one years.

Statement.

The object of the bill was to set aside the will of *Sandford Martin*, late of the township of Whitby, yeoman, deceased ; who died on or about the 18th day of December, 1854.

The bill alleged that the said *Sandford Martin*, many days before his death, had been attacked with typhoid fever, which continued to increase rapidly, and was the cause of his death; that the disease continued unabated from the time of his attack until his death; that shortly after he was attacked by the said disease, he became weak and languid; and his mind became quite incapable of continued thought; and he became wholly unable to understand any business transaction; or to transact any business; and he became and was wholly unable to understand the contents of a will; or to make a will; that while he was in that state, and while he was thus wholly incapable of understanding or making a will, a document in the nature of a last will and testament, was prepared by some person, and placed before the said *Sandford Martin*, and he thereupon executed the same, and the same was witnessed by two persons, and the same in form purported to be, and appeared to be, duly made and published as the last will and testament of the said *Sandford Martin*, who, within a day or thereabouts thereafter, departed this life; that the paper purporting to be such last will and testament, was in the words following, that is to say:

“Know all men by these presents, that this is the last will and testament of me, *Sandford Martin*, residing on lot No. 16, in the first concession of the township of East Whitby, in the county of Ontario, and in the province of Canada West, viz:

I give and bequeath to my son *George*, fifty acres of land, being that portion of the aforementioned lot, No. 16, in the first concession, on which I reside, with the buildings thereon, and also twenty acres on the south end of the eighty acres belonging to me on lot No. 17, in the same concession and township as aforementioned, which twenty acres, because of the water thereon, shall be held in entail.

Further that the aforementioned seventy acres herein granted to *George* (viz., fifty on lot No. 16, and twenty

1866.

Martin
v.
Martin.

Statement.

1866. on lot No. 17), shall be held and possessed by my wife *Fatima*, for her use and behoof, during her life, after which it shall come into the exclusive possession of *George*, who, during the lifetime of his mother, shall act in regard to said property only by and with her advice and concurrence.

Martin
v.
Martin.

I also give and bequeath sixty acres, situated in the first concession, and being part of the above named lot, No. 17, to my son *Warner*, subject to the following conditions, that is to say, that he shall pay to *Albert*, my son, the sum of one thousand dollars, in such instalments as he feels suitable, but within ten years from this date. Also that he pay to my three daughters, viz., to *Minerva*, wife of Doctor *Gilbert Tweedie*, to *Sarepta* and to *Eliza Fatima*, the sum of four hundred dollars each, said sums to be paid by him within eight years from the date hereof.

Also, I give and grant to my son *Warner*, the farm stock, implements, and whatever is connected with the operations of the farm, at present on the place, with the exception of what may be necessary to carry on the farm on lot No. 16, assigned to *George*, and left in possession of his mother; that is to say, what horses, cows, sheep, &c., may thus be required by my wife and *George*; nevertheless it is to be understood, and is hereby declared to be my wish, that the whole of the farming operations be carried on together for the space of five years, at the close of which they shall make such division of loose property as they may mutually agree upon.

Statement.

As witness my hand and seal this seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty-four. And I appoint *Hutton Starr*, my wife, and son *Warner*, my executors, to carry out the above named provisions of this my last will.

SANDFORD MARTIN, (L.S.)

R. H. THORNTON, }
HUTTON STARR. } Witness.

The plaintiffs charged that the said *Sandford Martin*

was, at the time of the signing of the said testamentary paper, and from thence to the time of his death, wholly incapable of understanding the contents of the said testamentary paper, or of dictating the same, and that he did not dictate the same, and did not understand the same, and the said testamentary paper was not properly his last will and testament.

1866.

Martin
v.
Martin.

The bill prayed that the said paper might be set aside, and delivered up to be cancelled, and that it might be declared that the said *Sandford Martin* died intestate; and for (if necessary) an administration of his estate by the court; and for further and other relief.

The infant defendants answered the bill in the usual form.

The cause, having been put at issue by the plaintiff filing the usual replication, came on for the examination of witnesses and hearing before Vice-Chancellor *Mowat* at the sittings of the court, held at *Whitby*, on the 4th of December, 1866. The substance of the evidence given appears in the judgment.

Statement.

Mr. Fitzgerald for the plaintiffs.

Mr. Roaf, Q.C., for the infant defendant *George Martin*.

Mr. Bain, for the infant defendant *Eliza F. Martin*.

The bill was taken *pro confesso* against the defendant *Warner Martin*.

Mr. Fitzgerald appeared for the other defendants, and on their behalf consented to the decree as asked.

1866. Martin v. Martin. MOWAT, V.C.—The object of the suit is to set aside the will of *Sandford Martin*, of the township of East Whithy, farmer.

Judgment. His farm was the principal part of his means; his personal property is said not to have exceeded \$600. The farm consisted of one hundred and thirty acres; seventy acres, on which his house and orchard were situated, he devised to his wife for life, with reversion to his youngest son, *George*, then about thirteen years of age. The other sixty acres he devised to another son, *Warner*, who was at home with him and is of age; and this part of his farm he burdened with legacies in favor of his daughters and another of his sons. He had ten children: eight of them are of age, and have a common interest, with the minor daughter, to have the will set aside. The boy *George* is thus the only real defendant to the suit; and his defence has necessarily been conducted at considerable disadvantage, his brothers and sisters having an adverse interest. His guardian *ad litem* is a Toronto solicitor, a stranger to the family, so far as I am aware, and in no situation to collect readily evidence, if there is any, which would weigh against that adduced by the plaintiffs. But there has been no attempt on the part of the plaintiffs to manufacture evidence. They have called but three witnesses, and these are as respectable as it would be possible to procure as witnesses for any purpose; they are the two subscribing witnesses to the will and the medical attendant of the deceased. No evidence on the part of the defendants has been given; and I have to adjudicate on the case upon the statements of the witnesses called by the plaintiffs; but it is my duty to consider the infant's interests as carefully as if his family were on his side. The just protection of minors is an important part of the jurisdiction of this court.

The case was argued without any reference to authorities. Having looked into these, and considered the

evidence, since the argument, I have come to the conclusion that my decree must be in favor of the will.

1866.

Martin
v.
Martin.

Whether the parties to the preparation of the will were right or wrong in the opinion, they certainly thought at the time the will was prepared and signed, that the testator had sufficient testamentary capacity; that the will was in substantial accordance with his wishes; and that he executed it, understanding it, and meaning to adopt it as his will.

What the plaintiffs contend is, that in all this these parties were mistaken, and that there is sufficient in their own evidence here to shew this. There is no allegation of fraud or undue influence in procuring the will; on the contrary, the good faith of all parties concerned in it is manifest from the evidence, and was expressly acknowledged by the learned counsel for the plaintiffs. Judgment.

The will was prepared in the presence of the deceased by the Reverend Dr. *Thornton*, admitted to be a clergyman of the highest standing, who lived in the neighbourhood, and had been visiting the deceased during his illness. Dr. *Thornton* had been expressly sent for by the testator himself for the purpose of drawing up his will, the testator's messenger being a brother-in-law and intimate friend of the testator, Mr. *Starr*, who is described by the medical gentleman, and I have no doubt correctly, as a respectable and an upright man, and a man of judgment. Mr. *Starr* was present when the will was being prepared, as also was the testator's widow, since deceased, and the testator's son *Warner*, the only one of age who lived with the deceased, or in the same part of the country. The will is not long or complicated, and contains no provision in favor of anybody but the testator's wife and children. The testator was in a weak state, and the preparation of his will was not proceeded with hastily;

1866. ample time appears to have been taken to enable the
 Martin testator to express his wishes with as much delibera-
 v. tion, and as little fatigue, as was possible; and accord-
 Martin. ingly, short as the will was, three hours were occupied
 in receiving the testator's directions and writing them
 down. By this time the testator being much ex-
 hausted, the completion of the will was postponed
 until the following morning. Dr. *Thornton*, mean-
 while, made a fair copy of his rough draft, and next
 morning brought it to the testator, and read it to him
 slowly, clause by clause, and understood him to assent
 to it, and thereupon added the formal conclusion. The
 testator was then raised up in his bed by Mr. *Starr*,
 and he signed the will with his own hand. Before the
 witnesses subscribed their names, the medical attendant
 of the deceased, who had now come in, asked him if he
 acknowledged that to be his will, and the testator as-
 sented. Dr. *Thornton* and Mr. *Starr* then subscribed
 their names as witnesses, in the presence of the testator
 and of one another. On the following morning, viz.,
 the 18th of December, 1864, the testator died.

Judgment.

The widow and the testator's son *Warner* and Mr.
Starr, the executrix and executors named in the will,
 then applied for probate. Dr. *Thornton* and Mr. *Starr*
 made the usual affidavits of the due execution of the
 will, and that the testator was of sound mind, memory
 and understanding at the time of executing it; and
 probate was granted on the 4th of February, 1865.

The widow died in May, 1866. The bill was filed
 in the month of September following.

It does not appear from the evidence that any question
 was raised by anybody as to the testator's capacity or as to
 the validity of the will, either before probate was granted
 or before the widow's death. This delay on the part of the
 plaintiffs is unfortunate; for the widow could probably
 have furnished important information on many parts of

the case; and the recollection of the witnesses, as to the circumstances on which the plaintiffs now rely as shewing the error under which the will is said to have been prepared and the testator allowed to execute it, cannot be as accurate or full at a distance of two years, as it would have been immediately after the testator's death.

1866.

Martin
v.
Martin.

It is to be observed, too, that the case is not of a will inconsistent with some previous will executed by the testator while in health, and of undoubted validity; or of a will inconsistent with the previously expressed intentions of the testator. He had never made a will before; and there is no evidence of his previous intentions, except a single observation of his wife, which is not evidence against the defendant, and which she is not here to explain.

Now, by our law, mere weakness of understanding is no objection to a man's disposing of his estate by will (a).

Judgment.

So, he may have testamentary capacity, though his mental faculties have been impaired by disease; though he is "of feeble and even of a decaying mind;" and though his state of mind is such "that fair, honest and reasonable persons might well hesitate about his competency." (b) The case to be made out "is not that the testator was not enfeebled in mind as well as in body; but the question is, whether it was to such an extent as to make him incompetent to make a will." (c)

An impaired intellect, short of incompetency, may make a man less capable of considering the proper disposition to be made of his property, and less capable of making a wise and just will; but proof of this merely diminished capacity is not sufficient to affect the validity of his act.

(a) 2 Wins. Exrs. 38, 5th ed.; Barry v. Butlen, 2 Moo. P. C. 480.

(b) Swinfen v. Swinfen, 27 B. 159.

(c) *Ib.* 160; see also S. C. 1 F. & F. 593; Constable v. Tuffnel, 4 Hagg. 489; Ross v. Chester, 1 Hagg. 227.

1866. Bearing in view these principles, I have now to consider the evidence.

Martin
v.
Martin.

I have said that of the three witnesses whom the plaintiffs have called against the will two are the subscribing witnesses of the will; and the courts are always indisposed to set aside a will on the mere testimony of the subscribing witnesses (a). If honest and intelligent, as here both gentlemen unquestionably are, their conviction at the time, as testified by their witnessing the will, even though they had not embodied that conviction immediately afterwards in affidavit, is much more to be relied upon than the doubts they may subsequently have and express, or than the circumstances which their recollection may two years afterwards supply in support of such doubts.

Judgment. The principal statements of Mr. *Starr*, as to what took place on the day the will was drawn, are the following:

“Mr. *Martin* spoke to me about making a will. He asked me whom I would recommend to him to write his will. I named almost all the lawyers here (Whitby). He selected Mr. *Cochrane*. I went for him, but he would not come.” [The continuation of this part of the narrative is in the cross-examination:] “As he could not get Mr. *Cochrane*, whom he had mentioned, I returned and told him. He then asked whom I could get. I asked if Dr. *Thornton* would do. He said, yes. I then went for Dr. *Thornton*. When he commenced dictating his will to Dr. *Thornton* I think he was quite alive to his ownership of property, and wished to make a will of it. His mind was feeble and articulation indistinct, and I am dull of hearing, and I could not hear what half the time he was saying to Dr. *Thornton*. I supposed he had a clear idea himself of what he wished done.” [I return to the examination-in-chief for some further particulars:] “After some part of the will was drawn his wife and

(a) *Wilson v. Beddard*, 12 Sim. 34; see also *Reece v. Pressey*, 2 Jur. N. S. 380.

son [*Warner*] came into the room. I think he sent for them. They suggested some things, I believe, but I cannot give any particulars. I staid outside of the room at this time. Mr. *Martin's* voice was very low, and could not be heard, unless by persons who were quite close to his bed. Dr. *Thornton* and Mrs. *Martin* were close to his bed. I could not say if he could have got through making his will if his wife and son had not been there to assist. He got very weak before the will was finished, and his mind was wandering; I therefore suggested that the finishing of it should be postponed until next morning. This was agreed to, and I went home."

1866.

Martin
v.
Martin.

Dr. *Thornton's* cross-examination elicited the following statements as to what took place on the occasion :

"The deceased was of sound mind, memory and understanding, so far as a single question was concerned. He gave me a good many of the items himself, without any suggestion. At other times Mrs. *Martin* suggested the subject, and he endeavoured to say what he wished done. For a single sentence he would express himself distinctly. He was *compos mentis*. I have no doubt he had at the time an intention of making a will. He sometimes was in doubt what to say, and did not define it. I did not write down what I did not understand. Sometimes when he had difficulty in explaining himself he would say to Mrs. *Martin* 'you know.' She would then explain, and he assented."

Judgment.

On the following morning (Sunday) the testator was very weak, and was not in a condition to dictate a will, but was, according to all the witnesses, quite rational, and competent to understand and execute an instrument prepared in accordance with wishes previously formed and expressed. On this point it will be sufficient to cite the evidence of Dr. *McGill*: "He could have understood what was written down; and if his previous arrangements were put in writing clearly, he could have understood and given his assent to them." The ability to dictate a will is no test of testamentary capacity. (a)

(a) Vide *Re Field*, 3 Curt. 752; *Wilson v. Baddard*, 12 Sim. 28.

1866.

Martin
v.
Martin.

Judgment.

The statements I have quoted from the evidence are strongly in favor of the will ; for the rules bearing on the case are founded on common sense and public convenience ; and it is plain that where an intelligent and educated man, whose motives and conduct are free from the slightest taint of suspicion, is desired by a dying man, (after unsuccessfully endeavoring to obtain the services of an attorney) to prepare his will, consents to do so, satisfied of his capacity ; honestly endeavors to ascertain the man's wishes ; thinks he has ascertained them ; writes them down in his presence ; returns next day with a fair copy of the draft ; reads it over carefully and slowly to the testator ; and the testator is understood to approve and adopt what is written, and to have mind enough for this purpose ; and signs the will in the presence of the drawer and of an intimate friend of the testator, who subscribe their names as witnesses in the presence of the medical attendant, without any question being suggested by the latter, and without any doubt on their own part at the time, as to the testamentary capacity of the testator or as to his knowledge of the contents of the will ; the witnesses embody their belief in an affidavit ; probate issues immediately afterwards, and is acquiesced in for more than a year, and until after the death of one of the principal parties, who was cognizant of all the facts,—it is obvious that, on proof of these facts, a very strong presumption is established in favor of the validity of the will.

There is not stated to have been any material change in the mental condition or testamentary capacity of the deceased for a week before the Saturday on which the will was prepared, and Dr. *McGill* states that a week before he had himself spoken to the deceased about making his will, and had offered to write it himself. He must therefore have believed him competent at this time to communicate his wishes ; at least, if he had before his illness considered what disposition he should make of his property. But Dr. *McGill* is of opinion that if the

deceased had not considered the matter before his illness, he would not have been competent to consider it during his illness. This is stating an opinion, not a fact, (a) and it does not appear when the Dr. formed or first expressed this opinion. If not formed at the time, it may be the result of a less accurate and less full recollection of the case than he had then, and may be partly formed on information. But if the opinion were entirely correct, I do not see how I could assume that the deceased had not considered before his illness what disposition he would desire to make of his property at his death; that is, of its main features, though not of its details.

1866.

Martin
v.
Martin.

In support of the other points urged on behalf of the plaintiffs, the following are the principal statements in the evidence of Dr. *Thornton* which are relied upon:

"I could not understand all he [the testator] said: Mrs. *Martin* and Mr. *Starr* helped me to understand his meaning. * * On the Saturday he was not always able to complete a sentence, and I had great difficulty in understanding him. Sometimes Mrs. *Martin* and Mr. *Starr* would tell me what they thought he meant. In such cases I would ask him if it was as they stated, and he would say "I suppose." He seemed to wish to get quit of it. I think he assented to all their explanations except one, and that was before I commenced writing. * * Mrs. *Martin* and Mr. *Starr* did not, I think, suggest any new matter. They merely said what they thought he meant, when I could not understand him. In no case but the one referred to did he qualify or vary the meaning suggested by Mrs. *Martin* or Mr. *Starr*. He would say, "I suppose that will do," or to that effect. They had frequently to help me to the understanding of his meaning. Without their help I could not, in many instances, have made out his meaning, he spoke so indistinctly and was so weak. * * Once or twice Mrs. *Martin* said to him, "Do you mean" so and so. This was when I could not make out his meaning. He assented. * * There were frequently sentences we could not fully understand. There were some points

Judgment.

(a) Vide *Evans v. Knight*, 1 Add. 239.

1866. *Martin v. Martin.* we did not put down at all, because we could not make them out. He spoke something of fifteen or twenty years, in connection with his youngest son and his wife which we could not make out at all, and there is, therefore, no reference to this in the will. * * * I asked him from time to time when I was drawing the will, if that was what he meant, or if that would suit. He would say, "I suppose so," or to that effect, as before, but in a tone as if he was incapable of applying his mind to the matter. One of the sums named in the will was suggested by Mrs. *Martin*. He assented by a nod, or by saying, "I suppose so;" I forget which. His assent throughout was generally given in one or other of these ways."

Now, on these statements the learned counsel for the plaintiffs pointed to the fact that the deceased acquiesced in all the explanations of his wife and Mr. *Starr* as to his meaning, when Dr. *Thornton* himself failed to make it out, or did so in all the instances which Dr. *Thornton* now recollects. But if the explanations were correct, the testator's acquiescence must have followed; and it was surely natural that his wife who was with him always during his illness and before, should understand him readily, though Dr. *Thornton* did not.

There are observations by the court in *Bird v. Bird* (a), where the will was upheld, which apply to this part of the case: "It is said, that it was a 'will by interrogation;' but it was not what is generally understood by the expression: it was not, 'will you give such a person such a sum?' and then a mere affirmative acquiescence; but in this case some of the persons were named, and the deceased freely and voluntarily declared what he would give. He himself began the instructions."

Again, in *Constable v. Tuffnell* (b) there is this statement of the law: "It is no part of the testamentary law of this country that the making of a will must originate with a testator, nor is it required that

(a) 2 Hagg. 158 (1828).

(b) 4 Hagg. 477.

the proof should be given of the commencement of such a transaction, provided * * it be proved that the deceased completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition."

1866.

Martin
v.
Martin

Then, reference was made to what appears as to the influence of the testator's wife in obtaining the will; but all that is proved is, that she was anxious he should make a will. It is not proved that she was importunate about it; but even importunity would not be enough. What the courts have to guard against is, importunity in obtaining a will in terms against the wishes of the testator, and not mere importunity to induce the testator to make a will expressive of his own uncontrolled wishes, whatever they may happen to be. The anxiety of the wife that her husband should not die without a will was natural; but it is plain from the evidence, that she had a wife's faith in his justice and judgment, in reference to its terms, and made no attempt to dictate to him the will he should make, or to substitute her own wishes for his. To shew how very far the plaintiffs are, under these circumstances, from having made out any case against the will on this ground, I shall cite the language of the courts in two cases:—

Judgment.

In *Williams v. Goude (a)* the court observed: "The influence to vitiate an act must amount to force and coercion, destroying free agency: it must not be the influence of affection and attachment: it must not be the desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear" (b).

(a) 1 Hagg. 577.

(b) See also *Constable v. Tuffnell*, above referred to; *S. C.* in appeal, 3 Knapp. 122; *Reece v. Pressey*, 2 Jur. N. S. 380; *Lovett v. Lovett*, 1 F. & F. 581.

1866.

Martin
v.
Martin.

Again, in *Stulz v. Schœffle* (a), the learned judge was satisfied "that the will, and all that relates to it, was done under the influence of" the testator's wife. He upheld the will, however, observing: "Can a will be pronounced invalid on that ground, in the absence of all evidence of coercion or positive fraud? What law can decide what is the degree of influence which a wife can exercise over a husband sufficient to invalidate acts done under it? What may be the motives upon the mind of the testator? Put the case in the strongest point of view—fear of displeasing, fear of future solicitation, love of peace, or, it may be, deference to superior judgment, or affection and regard: who is to dive into these motives? What evidence can any tribunal have? Coercion may indeed be capable of proof, and in such case no act would be valid. Influence may be proved, but what would be the legal result? Hundreds of wills have been made under the influence of wives, apparently unjust, sometimes towards children, sometimes towards relatives, &c."

Judgment.

Besides all this, it is to be remembered that a will may be "invalid as to the person who suggested it, but valid as to the other parties. Part of a will or testamentary paper may be good as to one part, and bad as to another." (b). That part of the will, in the present case, which relates to the wife, is not now in question: the life estate devised to her was at an end before this bill was filed.

The plaintiffs' counsel placed considerable stress, in his argument, on the fact that Dr. *Thornton* is not satisfied that he gathered the testator's meaning on all the points in the will; that, not being able to understand his meaning sometimes, he does not think that the will, as drawn, contains "all that was in the testator's mind,"

(a) 16 Jur. 909.

(b) *Trimblestone v. D'Alton*, 1 Dow. & Cl. 93, 95; *Wood v. Wood*, 1 Phillim, 359.

though he thinks that it does so "to a considerable extent ; and he did the best he could to ascertain and express the testator's intentions."

1866.

Martin
v.
Martin.

I have found no authority in support of the argument which was based on those statements. On the other hand, *Mitchell v. Gard* (a) is an express authority that an omission from a will of something which the testator wished and intended it should contain, does not affect the validity of the will in other respects ; and I am clear that a will cannot be invalidated by the doubt of the attorney or other person who drew it, as to whether it is entirely in accordance with the testator's wishes, he having done his best to ascertain and express such wishes, and not doubting that in the main he had succeeded. How often could an attorney say more than that ? I think also that where a man possesses a testamentary capacity in other respects, and is able to make known his wishes intelligibly as to most matters (which I think the evidence shews to have been the case here), his will is not rendered void by proof that there is reason for supposing there were matters, the importance or bearing of which it is impossible to know, which the deceased wished to introduce, but as to which he was too weak to fully or intelligibly explain his wish, and for which therefore, the will is believed to contain no provision. Testamentary capacity cannot depend on a clear utterance, or on ability on the part of the testator to express intelligibly everything in his mind. (b)

Judgment.

The witnesses express an opinion that the deceased was not, on either Saturday or Sunday, capable of continued or concentrated thought. But men in health possess that faculty in very varying degrees ; and the amount of thought which, according to the opinion of the three witnesses, and the facts they state, the de-

(a) 32 Law Jour. Prob. 129. (b) Vide Re Field, 3 Curt. 752.
VOL. XII. 33

1866. *ceased* was capable of exerting, is, in my opinion, sufficient, upon the authorities, to establish a testamentary capacity.

Martin
v.
Martin.

Dr. *Thornton* expresses an opinion, also, that the deceased was not capable of "grasping the will as a whole," though he did not at the time, and does not now, draw from this suspected inability an inference that the deceased wanted testamentary capacity. Such a suspicion would constitute a very vague and unsatisfactory test of a will's validity; and I apprehend many wills are proved every year which the testators, whether in strong or feeble health, might be said not to have been capable of "grasping as a whole," and the validity of which wills is notwithstanding beyond a question.

Judgment The learned counsel for the plaintiffs referred to the contents of the will, as affording an argument against its validity; and it certainly has been laid down that the evidence necessary to sustain a will giving effect to the probable intentions of the testator, may not be sufficient to sustain a will contrary to the testator's probable intentions, and savouring in any degree of folly or phrensy (a). But I am not able to say that this will is against the testator's real intentions, or that it savors in any degree of folly or phrensy. He could not give farms to all his children; he had not property enough to give farms worth the name to more than two of them; and if he was to make a will at all, what improbability can I say there was in his giving a farm to one, subject to a life interest in favor of his widow, and free from any other incumbrance? Or what improbability can I say there was in his selecting, as the devisee of this farm, his minor son, whom he was about to leave without the paternal care which all his other sons had enjoyed up to maturity?

(a) *Evans v. Knight*, 1 Add. 238; vide *Blewett v. Blewett*, 4 Fagg. 479, 450, et seq.; *Durnell v. Corfield*, 1 Rob. 63

This is the part of the will to which the plaintiffs object. There is no evidence of the circumstances of the plaintiffs respectively, or of what had been already done by him for any of them; and, in the absence of such or other evidence, it is impossible for a court to say anything as to what is or is not probable, in regard to the testator's antecedent intentions.

1866.

Martin
v.
Martin.

But, independently of this consideration, the Master of the Rolls, in *Swinfen v. Swinfen (a)*, observed, that "the contents of a will are a very dangerous ground to rest upon, even in connection with other testimony; but in cases where there is no unsoundness of mind (in the proper sense of that term), but rather an absence of intellect, and the only question is, whether the deceased person knew what he was doing, the contents of the will can rarely be brought to throw light on that subject."

On the whole, without further observing upon the expressions scattered through the evidence from which an inference of testamentary incapacity was contended for, I may say, that looking at the undoubted good faith of all parties concerned in the matter, the intelligence of the witnesses, the opinion they entertained and acted upon at the respective times of the will being prepared, executed and proved, when everything relating to the demeanor and conduct of the testator was either present to their eyes and ears or fresh in their recollection, and looking at the delay of the plaintiffs until after the death of the widow—I think it, under all the circumstances, the safer and more just course to adopt the opinion which was entertained at the time, and was acted upon until the institution of the present suit, rather than the view now contended for by the plaintiffs.

Judgment.

Where there is no ground to suspect fraud or bad

(a) 27 Beav. 155.

1866. *Gourlay*
v.
Riddell. faith in procuring the will, much less evidence than there is here has been held sufficient to establish the particulars necessary to the validity of a will, viz., the testator's testamentary capacity, his knowledge of the contents of the document, and his adoption of it. (a).

I think the plaintiffs' bill must be dismissed, with costs as against the infant defendant (b).

GOURLAY V. RIDDELL.

A widow, to whom dower had been assigned, agreed with the person by whom she was employed as housekeeper, to convey the same to him in trust for the benefit of his infant son, eight or nine years old, and to whom it appeared she was much attached, in consideration of a certain sum of money, for the payment of which the widow's lands were answerable, and were liable to be sold, and also an annuity secured to her; the consideration, however, not being at all equal to the value of the property. The court, in the absence of proof of any undue influence, oppression, persuasion, or fraud, refused to set aside the agreement as against the infant.

The bill in this case was filed by *Mary Gourlay* against *Joseph Riddell*, and *Robert Riddell*, his infant son, setting forth that the plaintiff was the widow of the late *Robert J. Gourlay*, of Dereham, deceased; and as such entitled to dower in a large portion of real estate, of which her husband had been seized in fee during their marriage, and in which dower had been allotted to her.

It appeared that she had agreed to convey the lands so set apart for her dower to the infant defendant, under the circumstances mentioned in the head note and judgment, and the present suit was brought to set aside that agreement on the ground of fraud and undue influence.

The defendants answered the bill, the elder *Riddell*,

(a) *Vide* Re *Field*, 3 Curt.; *Ross v. Chester*, 1 Hagg. 227 (1828).

(b) *Cowgill v. Rhodes*, 9 Law T. N. S. 595.

denying any fraud or undue influence exercised by him over the plaintiff; the infant submitted his rights to the protection of the court in the usual manner; and the cause was brought on for the examination of witnesses at the sittings of the court held at Woodstock, in October, 1866. The argument of the case was postponed to a later day, and came on at Toronto on the 29th of November following.

1866.

Gourlay
v.
Riddell.

Mr. *D. G. Miller* and Mr. *Finkle*, for plaintiff.

Mr. *Bain*, for the defendant *Joseph Riddell*.

Mr. *Totten*, for the infant defendant.

Harrison v. Guest (a), *Hunter v. Aikins (b)*, *Patterson v. Harrison (c)*, were referred to by counsel.

VANKOUGHNET, C.—If the question were one solely between the plaintiff and the defendant *Riddell* the elder, I should feel little hesitation in declaring the agreement between them at an end, in consequence of the conduct of this defendant after the agreement was made; but the interests of his son, the other defendant, a boy of eight or nine years of age are at stake, and as these cannot be affected by any thing said or done by his father, subsequent to the agreement under which the property in question was vested in him, as trustee for his son, I have to inquire into the circumstances attending the making of that agreement, and ascertain whether or not it was valid and binding on the plaintiff at the time it was made.

Judgment.

The plaintiff, as the widow of the late *Robert J. Gourlay*, was entitled to dower in about 1021 acres of land owned by him in the township of *Blenheim*. In 1864 she procured her dower in these lands to be set

(a) 6 D. M. & G. 424.

(b) 3 M. & K. 112.

(c) 11 Gr. 105.

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1866.

Gourlay
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Riddell.

apart : the costs of the sheriff and the commissioners in so doing being about \$800. Prior to the commencement of proceedings for this purpose, the plaintiff had for some three or four years resided off and on with the defendant *Riddell*, the elder, as his housekeeper. During the pendency of these proceedings, which were carried on for her by solicitors in this city of high standing, she does not appear to have resided with *Riddell*, or to have held any communication with him, nor does he appear to have been aware that she had adopted any such proceedings. Being threatened with the sale of the lands set apart for her unless she paid the expenses mentioned, she, after applying to at least one other person, sought aid from the defendant *Riddell*, and the negotiations between them resulted in an understanding that *Riddell* should procure for her the requisite amount of money, and that in consideration thereof, and of an annual payment of £20, the lands should be conveyed to him in trust for his son, the other defendant, to whom, it is alleged, the plaintiff had taken a great fancy. Not at all surprising, and nothing more natural, than that she, a childless woman, well advanced in years, should become attached to a child of such tender age, who was, I suppose, under her care while she was living with the father as his housekeeper. The plaintiff, and the defendant *Riddell* the elder, came into Toronto together to have the agreement reduced to writing and executed. *Riddell*, not having the money himself, applied to his son for it, and both he and the plaintiff told their son, a man apparently of means, what the agreement was, and that its object was to provide a small annuity for the plaintiff, and benefit his brother, the other defendant here. Upon this *Francis Riddell*, the brother, consented, not, as he says, to loan to his father or his brother, but to pay the money required by the plaintiff for his brother ; and, after the agreement had been signed, he did actually pay to his father for the plaintiff the amount agreed on. After the understanding come to with *Francis*, the plaintiff

Judgment.

and the father proceeded to the office of Messrs. *Bell, Crowther and Tilt*, and there the agreement prepared as Mr. *Tilt* says, from the instructions or conversations of both parties, was reduced to writing; was engrossed and prepared for execution, and, when the parties, later in the day, returned to his office, was read over to them, and executed; as was also a power of attorney in favor of *Riddell*, the elder, to enable him to obtain from the sheriff possession or delivery for the plaintiff, and to act for her as owner of the legal title. *Tilt* had some years before acted in some isolated transaction as the attorney for *Riddell*. It does not appear that the plaintiff had known him. He swears positively that both parties thoroughly understood the agreement. Considering the relation of master and servant subsisting at the time between the parties, though the evidence as to this is not very clear, it is a first duty to inquire whether the plaintiff voluntarily, and with knowledge of what she was doing, made this agreement which it is now sought to set aside. There is not the slightest evidence that she was imposed upon or influenced. She seemed to me, judging by her appearance, a sharp intelligent woman; and so the evidence, so far as it goes, says she is. She had friends in the neighbourhood of the defendant's house whom she had been in the habit of visiting while she was in his employ. She occasionally left his service and returned to it again. She was away for months, during the time she was carrying on the dower suit, and she would appear, so far as I can make out, to have returned to him at the time they came to the arrangement in question. Then, was there anything improvident or absurd in her making the provision she did for the boy she had been tending for several years? No advantage was secured to the elder *Riddell* by the arrangement. The elder brother paid the money for his younger brother. The plaintiff knew this—knew the source whence the money was coming; and she now seeks to repudiate the consideration; not only no fraud being shewn, no oppression, undue influence or persuasion appearing to

1866.

Gourlay

v.
Riddell.

Judgment.

1866. have been used, but she appearing fully to have understood what she was doing, and to have done it of her own free will. The relations which actually subsisted between the parties as master and servant were of a nature as little likely as any such connection could be to raise the presumption of influence having been exerted over her. To set aside this agreement now as against the infant, would be not only to declare such an arrangement improvident and one such as a woman of the plaintiff's intelligence, and experience, and knowledge, could not make without the imputation of imprudence or undue influence; but it would entirely disappoint the bounty of the brother, and set at naught the arrangement which the plaintiff must be understood to have made with him in consideration of his furnishing the money which she required. It is said the plaintiff ought to have been taken or sent to some independent solicitor: to the solicitors who had conducted the proceedings in dower for her, for advice, before she was allowed to sign the agreement. She probably had reasons for not caring to visit the latter gentlemen. No doubt the noninterposition of an independent solicitor will often weaken a case which such aid would have confirmed and made clear. But here it does not strike me that the objection is of any force. *Riddell* could not be called a client of *Tilt's*. *Tilt* had no such interest in him as would be likely to induce him to favor one party at the expense of the other. Years before, *Tilt* had acted for him in drawing a deed or something of the kind, which was the reason, most probably, why resort was had to him again. He does not appear to have had any conversation with the defendant apart from the plaintiff; or to have received any instructions other than those given to him when both plaintiff and defendant were together. The plaintiff appears to have been quite as intelligent as *Riddell*, and to have been able and prepared to act without his advice, assistance or influence. It is also said that the lands are of a value entirely disproportionate to the consideration received by the

Gourlay
v.
Riddell.

Statement.

plaintiff; admit this to be so, it would furnish no argument here; for the plaintiff intended, if she intended anything, to confer a benefit on the infant defendant, and this she could not have well done if she had received full value for the land. In considering the value, however, the plaintiff's age and the position of the lands consisting of long strips, composing the thirds of several parcels, have to be taken into account. A good deal of the elder *Riddell's* conduct since the making of the agreement may be explicable by the fact that the legal title still remained in the plaintiff; but much that he said and did is so entirely irreconcilable with his having any interest under the contract that I refuse him his costs.

1866.

Gourlay
v.
Riddell.

I think I cannot deprive the infant defendant of the benefit which the agreement gives him, purchased, as it was, with his brother's money. I must therefore decree the plaintiff and defendant, the elder *Riddell*, to be both trustees for him, and that the plaintiff execute the necessary conveyances for that purpose; that she be declared entitled to the £20 per annum secured to her by the agreement, to be a charge on the lands; that an account be taken of what she has received, or might have received, from the lands of which she has had possession and control, or of which she has prevented the elder *Riddell* from taking possession, or receiving the rents and profits, and that she be charged therewith; and that the defendant, the elder *Riddell* do pay her the balance. Plaintiff to pay the infant defendant his costs, with liberty to all parties to apply.

Judgment.

1866.

COATES v. JOSLIN.

Insolvent, sale by—Preferring a creditor.

A person in insolvent circumstances made a bill of sale of his property to one of his creditors' the consideration therefor being a pre-existing debt, and a sum of money in addition sufficient to make up the price agreed upon as the value of the property sold; the amount of money so received by the debtor being by him paid over with the knowledge of the purchaser, to another creditor; and three months after this sale was completed, the debtor made an assignment of his assets under the Insolvent Debtor's Act. On a bill filed by a creditor for that purpose the sale was set aside and a resale of the property ordered, the proceeds to be applied in payment of the plaintiff's claim and the residue, if any, to be paid over to the assignee in insolvency.

Statement

This was a bill by the plaintiff as one of the creditors of the defendapt *Joslin*, to set aside a sale of certain of his property made by him to the defendant *Knox*, as being void under the provisions of the Insolvent Debtors' Act. The cause came on for the examination of witnesses and hearing, before the Chancellor, at the sittings of the court held at Goderich, in October, 1866.

Mr. *Blake*, Q.C., for plaintiff.

Mr. *Fitzgerald*, for the defendant *Knox*.

Mr. *Toms*, for the defendant *Gordon*, the assignee in insolvency.

VAN KOUGHNET, C.—I think the evidence shews that the insolvent had not assets out of which enough could be realized to pay his debts at the time of the bill of sale, unless, at all events, by so long a delay as creditors were not bound to submit to. But I think, looking at the nature of the property, that enough could not have been obtained out of it at any time to pay the debts, which it seems to me, from *Joslin's* own showing, must have been \$10,000, or thereabouts. Within three months thereafter, his affairs not having changed in the meantime, he executed a voluntary assignment under

the Insolvent Debtors' Act, and shortly afterwards his creditors expressed their readiness to take fifty cents in the dollar in discharge of his assets. Upon this state of facts, I think that at the time of the transfer of the goods to the defendant *Knox*, *Joslin* was unable to pay his debts in full, and was really in insolvent circumstances, and that the transfer to *Knox*, so far at all events as it was made to secure or pay a pre-existing debt, is void. It was also made, however, in consideration of an additional sum to make up the agreed purchase money of the goods, and this it seems went in payment of a pre-existing debt. A deed made as this one was, not with the object of carrying out a sale but of securing a past debt, the sale being only part of the plan, is void, I apprehend, *in toto*, as being in contravention of the statute.

1866.

Coates
v.
Joslin.

The transfer of the goods was made with intent, not only to give *Knox* as a creditor preference over the other creditors, but was also made to give another creditor a preference by paying him the money which *Knox*, on the sale of the goods to him, paid as their price over and above the debt due to himself; and of the destination of this money *Knox* was aware when he paid it. I must therefore treat the transfer to *Knox* as void, and order a resale of the property freed from any charge of *Knox*; the residue of the proceeds, if any, after paying plaintiff, to go to the assignee. Costs against *Knox* and *Joslin*.

Judgment.

1866.

BROOKE V. CAMPBELL.

*Wild land Assessment—Description in Warrant—" Patented"—
" Granted in fee."*

For several years a parcel of land, containing 100 acres, was returned to the Treasurer of the County as non-resident lands. In 1860, fifty acres only of the 100 were returned to the Treasurer as non-resident.

Held, that this was sufficient to authorise the Treasurer in subdividing the 100 acres for assessment purposes.

The Statutes authorising the sale of lands for non-payment of taxes, requires the Treasurer of the County to issue his warrant to the Sheriff directing such sale, in which he is to distinguish lands " Granted in fee" from those under " lease " or " licence of occupation." In his warrant the Treasurer described the lands directed to be sold as " All Patented."

Held, a sufficient compliance with the statute as to describing the lands.

Statement
The bill in this cause was filed by *Daniel Brooke* the younger, and *James Slaght*, against *Duncan Campbell* and *Henry Groff*, praying to have set aside a sale for taxes, and a conveyance made by the sheriff in pursuance thereof to the defendant *Campbell*, upon a warrant issued by the defendant *Groff* as Treasurer of the County of Norfolk; the plaintiff *Brooke* being interested therein as mortgagee, and *Slaght* as the owner of the equity of redemption. The bill stated that the premises in question (the south half of lot 11 in the 5th Concession of Windham) had always, with the exception of one year, been assessed in one parcel as non-resident lands, but notwithstanding this, the defendant *Groff* entered the same in his books as Treasurer, in two parcels, composed respectively of the south quarter and the north quarter of the said half lot, and assumed to charge thereon for statute labour larger sums than could be legally charged. It appeared that *Brooke* had transmitted to *Groff* a draft for a sum which plaintiffs alleged was sufficient to cover the taxes properly due and payable on the said half lot, although the same was about 12 or 13 dollars less than was claimed to be due in respect of the two quarter lots. The sale took place in November, 1864,

and the conveyance of the said quarter lots respectively, was made after the expiration of a year therefrom. 1866.

Brooke
v.
Campbell.

The defendants severally answered the bill, insisting upon the validity of the sale and denying all combination and fraudulent or improper dealing in respect of the said lands. The plaintiffs thereupon amended the bill, striking out all such charges, and the cause came on for the examination of witnesses and hearing, before the Chancellor at the sittings of the court at Simcoe in the autumn of 1866.

Mr. *Blake*, Q.C., for plaintiffs, contended that the Treasurer had no right, under the circumstances, to divide the 100 acres into two parcels, thus increasing materially the amount chargeable in respect of the several assessments; and in this view the sum which had been transmitted to the Treasurer was sufficient to cover all taxes properly chargeable; at all events the officer having received and retained the draft, the amount should have been appropriated to the payment of the taxes, and if insufficient to pay all that was claimed to be due, it might have been applied to the earlier portion of the demand, or to the payment of all the taxes on one of the quarter lots.

Statement.

It was also contended that the warrant which the Treasurer had issued was defective, as it did not properly describe the lands as having been granted in fee, the only description being "Patented," it appearing that all the lots offered were patented. The same objection applied to the advertisement of the Sheriff, which he also contended had not been published for three calendar months, as required by law, one more insertion being necessary.

Mr. *Livingstone* for the defendants. The use of the word "Patented" in the Treasurer's warrant is insufficient. Section 125 of the Assessment Act only requires the

1866. Brooke
v.
Campbell. Treasurer to distinguish lands which have been "granted in fee" from those which are under a "lease or licence of occupation," the two latter terms being synonymous terms, or at least used as such in the act. The Treasurer is only required to distinguish these *two* classes, and no mention whatever is made of any other estates, such as estates-tail, for or life, which the Crown undoubtedly has power to grant, and which, if granted, would require to be by patent, the reason evidently being that the Crown seldom, if ever, grants such estates; so seldom that they were not taken into consideration in framing this Statute. Then by referring to Con. Stat. Can. Cap. 22, Sec. 13, it will appear that all licences of occupation are to be under the hand and seal of the Commissioner of Crown Lands, and that section expressly puts the settler who holds possession of any lands, in the same position, as against a trespasser, as if he had a patent from the Crown. There a patent is clearly contrasted with a licence of occupation.

Statement.

Sections 11, 15, 17 and 22 all use the word "patent" as indicating a higher estate than a "lease or licence of occupation," by implication referring to that estate which is always granted by the Crown on sales of public lands, viz., an estate in fee, as the whole Act refers to the *sale* and management of public lands.

The 23rd, 24th and 25th sections of the same act also use the words "grants or letters patent," as referring to *sales* or appropriations of lands, which in the absence of restraining words must be taken to refer to sales or appropriations of the whole estate of the Crown, viz., the fee. Sec. 27 also contrasts patents with licenses of occupation.

Then by reference to the Registry Act (Con. Stat.) we find that no instrument can be registered affecting lands until after such lands have been granted by letters patent. On referring to 9 Vic. ch. 34, sec. 36, from

which the above clause is consolidated, we find it reads, that memorials may be registered "from and after the confirmation of any lands to any person or persons by grant from the Crown." But how is the Registrar of each county to be apprized of what lands have been granted? By the lists furnished him by the Provincial Registrar, under the 27th sec. of Con. Stat. ch. 22, above referred to, which requires him to furnish lists of the Crown lands sold or for which licenses of occupation have been granted; and, in like manner, lists of cancellations of any license of occupation or patent. or, as the amending act of 1860 expresses it, "a list of public lands patented yearly." And by the new Registry Act, sec. 18, the Registrar is to furnish abstracts "mentioning any lot of land as described in the patent thereof from the Crown," and is to enter in the "Abstract Index" each separate lot, &c., as originally patented by the Crown. By sec. 7 the Provincial Registrar is to furnish every three months a statement containing a list of names of all persons to whom patents have issued from the Crown for grants of land. Sec. 34 confirms the title of any patentee to lands theretofore granted by the Crown. In sec. 36 "patent" is again contrasted with "location, lease or license of occupation." Now, reading all the above references together as being *in pari materid*, I think it is not difficult to gather that the word "patent" is in some of the above cases used as equivalent to "grant in fee."

In the act respecting trespasses to public and Indian lands (Con. Stat. C. ch. 82, sec. 2,) "grants under the Great Seal" are apparently contrasted with "leases, tickets of location or purchase, or letters of license of occupation issued by the proper department in that behalf."

But the difficulty is to find any place in the statute book where the word "patent" is used as exactly synonymous with "grant in fee," meaning thereby fee-

1866.

Brooke
v.
Campbell

Statement.

1866. simple as contrasted with fee-tail or estate for life. I cannot find any instance where it is so used. But I contend that I do not need to go this length. The argument in brief then is, that the real requirement of the Assessment Act, so far as the Treasurer's warrant is concerned, is to distinguish lands, the fee of which is still in the Crown, from lands the fee of which has been granted away by the Crown; that the use of the word "patented," taking the sense in which it is used throughout the statutes (as illustrated above), designate, with sufficient legal precision, the one class of lands from the other; and, therefore, that the Treasurer has in this instance sufficiently complied with the requirements of the statute in that behalf. Besides this, there is no doubt that the word is universally understood, not only popularly, but also by the profession, in the sense specified, and the Crown Lands Department constantly use it in the same sense: and I can, therefore, call to our aid the support of the maxim "*communis error facit jus*," a maxim upon which the exemption of trust estates from dower depends. And, besides, unless my contention is clearly irreconcilable with the statutory provision, the court would scarcely feel justified in unsettling on that ground so many titles as depend upon it.

Statement.

Mr. Blake, Q.C., in reply:— The statute expressly points to "grants in fee" as the estate which the Treasurer's warrant should thus distinguish.

Patents do issue for estates in fee-tail, for life, and under various limitations, under the direction of the Heir and Devisee Commission. Why should not the Treasurer give the description required by law, stating whether the lands are granted in fee? "Patented" is nowhere used in the statute as synonymus with "granted in fee."

At the conclusion of the argument his Lordship

disposed adversely to the plaintiff of the argument as to the sufficiency of the sum remitted to the Treasurer, and its retention by him; and on a subsequent day

1866.
Brooke
v.
Campbell.

VANKOUGHNET, C.—As to the first objection, I think the Treasurer was warranted in acting as he did in treating the lot of one hundred acres as divisible into two parts for taxation purposes.

The one-quarter of the lot, containing fifty acres, was returned to him in 1860 as the only portion of it "non-resident land." Previously to this the whole lot had been returned as "non-resident" land. What then was the Treasurer to do? Lands, resident and non-resident, are treated by the statute as of different characters. The Treasurer accordingly treated the whole one hundred acres theretofore returned as non-resident land as having changed characters, and entered the two parcels separately in his books, apportioning the taxes accrued due between the two parcels, and keeping a separate account with each parcel from that time forward; the taxes thus varying in amount on each parcel. Whether the return to the treasurer of only the one fifty acres as non-resident was or was not correct or a mistake, was not contested before me; the Treasurer's right to make any sub-division of the lot, although only the one portion of it was non-resident, being alone questioned. But it seems to me that the plaintiff himself admitted the correctness of this sub-division, or waived all objection to it. He was advised of the sub-division by the Treasurer, in answer to his own inquiry for the amount of taxes due, and the Treasurer shewed him the sum charged on each portion. He made no objection to this, but remitted the amount; not, however, until a further charge had accrued on the property, which, though informed of, he neglected to pay: and hence the sale now sought to be impeached. At all events, I think, after such conduct, this Court will not aid him, whatever his strict legal rights may be; though in my

1866. view he has none, in respect of this objection on the case made. The second objection, as to the mode for rating for statute labour, falls with the first objection ; for if the sub-division by the Treasurer was right, so also was the sum charged on each parcel for statute labour.

Brooke
v.
Campbell.

Judgment.

In addition to the references to the statutes mentioned in the argument of Mr. *Livingstone*, are chapter 80 of the Consolidated Statutes of Upper Canada, and section 28 in the Schedule E of the Registry Act of 1865. The Statute, chapter 80, is entitled "an Act respecting claims to lands in Upper Canada, for which no patents have been issued." Now, if a patent issued for a life or any lesser term, it might be said that the lands affected by it could not be brought under the jurisdiction of the Commissioners though the fee was in the Crown, because a patent had issued for or in respect to such land. If it be the true construction that "patent" here means a grant of the fee, of the whole estate, then it goes far to shew that "lands patented" and "lands granted in fee" are used by the legislature in the same sense. The 8th clause says every person claiming lands for which no patent hath issued, may apply, &c. Of course it may be said that these words are applicable to the estate in the land, and are not descriptive, and that though a patent for a less estate had issued, still the fee remains unpatented. But is this the sense in which the legislature have used the expression "patent"? Again: section 28 of the Registry Act of 1865, directs the Registrar to enter each separate lot "as originally patented by the Crown," and the form of entry given in schedule E gives as the first entry for the purpose of shewing the land out of the Crown, in column No. 2, the word "Patent." I find from one or two returns which I have seen that the return made by the Crown Land Department to the Treasurers describes lands simply as "Patented," not as "granted in fee." Sec-

tion 108 of chapter 55, Consolidated Statutes of Upper Canada—the Assessment Act—requires the Commissioner of Crown Lands to transmit to every Treasurer a list of the lands, patented or leased, or in respect of which licences of occupation issued; and section 125 requires the Treasurer in every warrant to distinguish lands which have been granted in fee from those which are under a lease or licence of occupation.

1866.
Brooks
v.
Campbell.

Now, the Treasurer can only get this information from the returns furnished by the Commissioner of Crown Lands, who is told to make a return of the "*lands granted*," not saying in fee. The Legislature here seem to treat "grants" and "grants in fee" as meaning the same thing; and so they do in the Statutes relating to the management of the public lands. "Free Grants," for instance, are grants in fee. I suppose there is no instance of the Crown having granted an estate in tail upon an original sale. No such estate was evidently in the contemplation of the Legislature, when the words "grant" and "patent" were used. Judgment.

A grant to a man for life is a lease to him for that estate. It is so called in the books, and is always so expressed—"a lease for life." I agree with Mr. *Livingstone's* argument that the Legislature have distinguished lands patented from lands under lease or license of occupation, either of which interests might be conveyed by the Crown by patent. Indeed, leases would be so made. The Legislature had not in their contemplation, estates *tail* granted by the Crown. Leases, they have distinguished from lands patented; and "patents," as expressed in the different Statutes, I think they intended to mean in the popular sense in which the words "Patents from the Crown" are generally received, as grants in their fullest sense, that is grants in fee, or as covering such grants.

Here the Treasurer's warrant, and the Sheriff's adver-

1866. Christie v. Johnston. tisement described, the lands offered for sale for arrears of taxes, as "all patented." I think no one was misled by this description, though, as I have had occasion to remark in other cases, it is very annoying that the officers of the law will not use the language given them by the Statute.

I must dismiss the bill with costs.

CHRISTIE V. JOHNSTON.

Sale for taxes—Assessment of several lots in bulk.

Where three separate and distinct lots were rated in bulk by the assessor, and were sold for arrears of taxes, the sale was set aside;* and the purchaser, having stated at the sale that his object in buying was to secure the property for the person entitled, and afterwards claimed to hold the lands for his own benefit, he was ordered to pay the costs of the suit.

Statement. Where assessors or officers of municipalities omit to follow the plain directions in Acts of Parliament, and any loss thereby arises to the municipality, it would seem that the party causing such loss would be answerable therefor to the municipality.

This was a suit by the trustees of the estate of the late *William McKinlay*, seeking to set aside a sale of certain lots in the town of *Goderich*, which had been sold for taxes in the month of November, 1861.

It appeared that the plaintiffs were interested as mortgagees of the premises; the defendant, *Haldane*, being entitled to the equity of redemption, but he disclaimed all interest therein by his answer.

The cause came on for the examination of witnesses and hearing, at the sittings of the court, held in *Goderich*, in October, 1866.

The principal facts established in evidence appear in the judgment.

Mr. *Blake*, Q.C., for the plaintiffs.

* See also *Black v. Harrington*, ante 175.

Mr. Toms, for defendants.

1866.

Christie
v.
Johnston.

VANKOUGHNET, C.—In this case the sale for taxes is impeached for illegality on several grounds. The first is, that the three town lots sold were well known as separate lots in the town of Goderich by their respective numbers of 291, 340, and 341; and yet that they were assessed in bulk for one common sum.

2. That the Treasurer assumed to correct this mode of assessment by subdividing the sum among the three lots, and had no power so to do.

3. That the lands were described in the Treasurer's warrant as "patented," when the statute requires him to state whether they were granted in fee or on lease; and that the word "patent" is as applicable to a lease from the Crown which passes under the great seal, as to a grant in fee, and *Hill v. Hall (a)*, in appeal, is relied on. Judgment.

I think the sale bad on the first ground. These lots were well known to the assessors and collectors as separate lots, though they were all adjacent, and at times but not always, and not during the whole period in which the arrears of taxes for which they were sold accrued, occupied as one premise. They were entered in the town and county books as separate lots. One, 291, was much more valuable than the others, as on it were erected a house and out-houses. The other lots were occupied sometimes as a garden. The owner might be willing to redeem one or other of the lots, but not the three. For the taxes in one year, the land was assessed in the name of the occupant; for the other four years as non-resident lands. Section 19 of the Consolidated Statutes of Upper Canada, chapter 55, provides that in column three of the roll the assessor shall insert

(a) 2 U. C. Appl. R.

1866. the number of the lot, house, &c., and in column five
Christie the rental of each separate parcel ; and in column six
v. the yearly value when rental not assessed. Section 31,
Johnston. provides as to lands of non-residents, that if the assessors can obtain "correct information of the sub-divisions they shall put down on the roll, and in a first column all the unoccupied lots, by their numbers and names alone, &c., and in the second column, and opposite each lot, the quantity of land therein liable to taxation, and in a third column, and opposite to the quantity, the value of such quantity." Now, the Assessors, while they set down the numbers of the lots, thus shewing clearly that they knew them, did not observe any of the other directions of the statute. The Treasurer endeavoured to correct the blunder of the Assessors by acting upon and applying section 113 of the statute, and subdividing the taxes among the lots. It appears to me that this section of the statute does not apply to the case of town lots well known by, and returned to the treasurer by their number and local description ; the assessment was therefore invalid, and the sale consequently illegal. It is not necessary to consider the other legal objections. It is most provoking that the officers charged with the execution of the law in these cases, will not observe the plain directions of the statute, but pursue, at least, a most careless practice, by which they may on some occasion suffer. It will be well for them to consider whether they may not be liable for any loss which the municipality may sustain in consequence of their blunders ; or at all events whether they may not lose all compensation for their services, as well as any expenses they may have incurred.

Judgment.

Another branch of the case is, that the defendant *Johnson* purchased the property in for the mortgagor or the mortgagee, or the person bound to pay the taxes. I think this part of the case established, and that if the sale were valid, I should be compelled to treat *Johnson* as having by his conduct at the sale placed himself in

the position of a trustee for such person. It is, I think, plain that he intended to save the property for the owner; or spoke or acted in such a way as to lead the audience at the sale, and the officers conducting it, to understand that such was his intention. The sheriff's deed must be got rid of, as it is on registry and creates a difficulty in the title. *Johnson* must therefore release all interest in the land to the benefit of the mortgagee, the mortgagor having disclaimed all interest in it, unless a registration of the decree will serve the purpose. *Johnson* to pay plaintiff's costs, and also the costs of *Halaane*, who disclaims. The plaintiffs offer to pay the taxes paid by *Johnson* and the interest. *Johnson* may desire an account of repairs, &c., and will in that case be charged with the rents and profits.

1866.

Moodie
v.
Leslie.

As to the 3rd ground of objection, his Lordship referred to his views enunciated in *Brooke v. Campbell*, ante page 526.

MOODIE V. LESLIE.

Administration suit—Costs—Master's report.

In order to enable the Court the better to deal with the question of costs on further directions, the Masters to whom references are made should, in their reports, distinguish between sums received and sums which but for wilful neglect and default might have been received by the parties chargeable therewith,

Where a legatee filed a bill charging the executors with neglect and improper conduct in the management of the estate, all of which were by the Master's report shewn to be groundless, the executors having managed the estate to the best of their ability; and the case in reality being such as should have been proceeded with by a summary application for an administration order; the Court on further directions ordered the next friend of the plaintiff to pay the executors their costs up to the hearing; not the costs of the decree or of taking the accounts or of subsequent proceedings, but directed the plaintiff to pay her own costs thereof.

This was an administration suit. The usual reference had been made to the Master, who made his report. Subsequent references were directed, and the cause

1866. Moodie v. Leslie. finally came on for further directions upon his third report, before Vice-Chancellor *Spragge*. The facts of the case and the finding of the Master are clearly stated in the judgment.

Mr. *Fitzgerald* for the plaintiff.

Mr. *Scott* for the executors.

Mr. *McLennan* for the infant defendants.

SPRAGGE, V.C.—My conclusion in this case is that the suit was unnecessary; that the estate has not in any way been benefitted thereby; and that the plaintiff had no good reason for supposing that it would be.

	The master finds the sum of.....	£1460	4	2
	received or which, but for wilful default would have been received, by the acting executor, <i>Leslie</i> ; and for rents and profits received by the same executor	227	1	3
		£1687	5	5
	He finds properly expended.....	£1654	9	7
Judgment.	Besides a legacy, prematurely paid, of...	50	0	0

So that apart from the legacy the executor has £33 11s. 10d. in hand, and with the legacy he has paid £17 4s. 2d. more than he has received.

I may observe, that it would better enable the court to deal with the question of costs if the Masters to whom references are made would distinguish, in charging executors, between sums received, and sums which but for wilful neglect and default might have been received. In this case, as in many others, the accounting party is charged with a gross sum as for moneys received, and moneys which but for his wilful default might have been received, and the inference might be that he was chargeable with a portion of it by reason of wilful neglect and default. This inference is, however,

case by the finding of the Master (in his third report) that the executors managed the affairs of the estate to the best of their skill and ability.

1866.

Moodie
v.
Leslie.

The question upon further directions is principally one of costs. The executors are clearly entitled to their costs. The question is whether the plaintiff is so. I have noted it as stated by plaintiff's counsel, that the late Vice-Chancellor, at the hearing, gave costs to all parties, I do not find it so. On the contrary, the decree reserves further directions, and costs generally. If, however my late learned brother did give costs (which would of course be to the hearing only) his direction to that effect must stand; subject to that, I will dispose of the costs now.

The only ground upon which the plaintiff could be entitled to costs, would be that she is a residuary devisee and legatee entitled to the usufruct of the estate year by year; though the period for division has not yet arrived. This ground was not taken in this case, and I express no opinion whether it would be tenable. But at any rate, I should disallow costs in this case on the ground of the introduction into the bill of groundless charges of misconduct against the executors.

Judgment.

They are charged with conducting themselves carelessly and negligently in the management of the estate, a charge rebutted by the finding of the Master, to which I have referred; with not collecting as many of the debts as they could have collected; and with paying claims or portions of claims which were not legal or proper claims; of this there is not a tittle of evidence, and it is not consistent with the Master's finding.

An instance is then given of alleged improper conduct. The testator had contracted to sell to his brother, *Robert Donaldson*, lot 10, in the 14th concession of Garafraxa,

1866. and the charge is that the executors conveyed, or caused to be conveyed to him instead, lot 10, in the 16th concession of the same township, a more valuable lot. *Leslie* denies, in his answer, that the lot in the 16th concession was more valuable than the one in the 14th concession. The explanation of the transaction, which is given in schedule D, of the Master's report, is shortly this: that the testator's title to the lot contracted to be sold, turned out to be defective, and that the executors, with the concurrence of his widow, and of the plaintiff, agreed to substitute for it the lot in the 16th concession.

Moodie
v.
Leslie.

Another charge is, that the plaintiff has been unable to obtain from the defendants any satisfactory account of their dealings with the estate, although they had been requested to furnish such account, whereby the plaintiff has been disabled from stating particularly many other improper acts. There is no evidence whatever in support of this charge; and a circumstance is stated in the answer of *Leslie*, which shews misconduct on the part of plaintiff, and her husband in relation to the books of the estate: that certain of them not particularized were taken to the plaintiff, and left with her for a proper purpose connected with the interests of the estate; and were improperly retained by herself and her husband in spite of the requests of the acting executor that they should be delivered up. *Leslie* denies the charge of withholding accounts, and says that he, together with his co-executor, repeatedly gave such explanations as seemed satisfactory at the time to the plaintiff and her husband, and also gave them statements in writing from time to time.

Judgment.

There is also a charge against *Leslie* in connection with certain moneys due by the estate to the municipality of Garafraxa, in respect of dealings of the testator in the character of Treasurer of the township with moneys of the municipality. In regard to this it is unnecessary to say more than that the Master's report

affords a full exculpation to *Leslie* in regard to this charge. 1866.

Moodie
v.
Leslie.

In *Ashbough v. Ashbough (a)*, I stated my views in relation to charges honestly made by a plaintiff in regard to the dealings of an executor with an estate. In the case before me the charges, or at least some of them, appear to me to be wantonly made. Executors who have discharged their troublesome duties faithfully; and as far as I can judge efficiently, are brought into court not only to account, but to meet imputations of misconduct, which a little care and inquiry would have shewn to be groundless; and as to one of which (which is satisfactorily explained), the plaintiff herself, as well as the testator's widow, was an assenting party. The other children of the testator were and are infants. The improper introduction of these groundless imputations into the bill, seems to me sufficient to deprive the plaintiff of her costs, even if otherwise entitled to them.

It is to be observed too, that the case as it really Judgment.
stands, was a case for summary application, whereas these groundless charges have made answers and a hearing necessary, and this put the executors to additional unnecessary costs.

I think the plaintiff should pay her own costs; that the defendants, other than the plaintiff's husband, should have their costs out of the estate as between solicitor and client; that the plaintiff's next friend should pay to the defendants, the executors, their costs up to and inclusive of the hearing, but not inclusive of the decree itself. I do not think it is a case for charging the plaintiff with the costs of taking the account, or of subsequent proceedings.* It may be advisable that the suit should

(a) 10 Grant, 433.

* On searching the books of the late Vice-Chancellor (*Esten*), it was found that he had made a minute that the plaintiff should have her costs out of the estate, but in drawing up the decree further

1866. be retained for some purposes, and therefore it may be so, with liberty to all parties to apply.

ANDERSON v. THORPE.

Practice—Long Vacation.

It is irregular to proceed with references in the offices of the Masters unless by consent, during the Long Vacation.

This was an appeal from the finding of the Master at Barrie, on the ground that he had proceeded with the reference under the decree made in the cause during the Long Vacation, in opposition to the objection of the defendant to proceed therewith.

Mr. *Hodgins* for the appeal.

Mr. *Snelling*, contra, contended that the Masters have a perfect right to proceed with such references in vacation, although objected to by one of the parties. The orders of June, 1853, point out expressly in what cases the Long Vacation shall not be reckoned in the computation of the time allowed for doing certain acts or taking certain proceedings; but no mention is made of proceedings to be taken under a decree. In England the Long Vacation was formerly appointed by special order made each year, which order also regulated what business should be transacted in the several offices during the periods so fixed for vacation: but for these orders the offices would have been open during the

directions and costs generally were reserved, as stated in the judgment. The decree drawn up on further directions issued from this judgment so far as giving her costs up to the hearing: in other respects it was in accordance with the judgment, which is published in the shape it was originally prepared by his Honor, as it may serve to shew the views the Court entertain with respect to a party's liability to costs where charges of improper dealing are made against executors and other accounting parties, which turn out to be unfounded, and ought not to have been made.

whole of the vacation. Our orders specifying in what proceedings vacation shall not count, it follows that all others are unaffected by it.

1866.

Anderson
v.
Thorpe.

Mr. *Hodgins*, in reply :—The English orders in force in 1837 provided for the closing of the Master's office during vacation ; a vacation Master was always in attendance for the discharge of such services as could not remain over until after vacation, and for the purpose of granting appointments. If the view taken by the plaintiff be correct the long vacation will be rendered a mere nullity.

Lord *Suffield* v. *Bond* (a), *Angel* v. *Westcombe* (b), *Exp. Hunt* (c), *Daniel's* Ch. Prac. vol. ii. p. 1792 ; *Newland's* Ch. Pr. pp. 11-27 (ed. 1839) ; 9 Jurist pt. 2, page 305 ; *Taylor's* Orders, p. 36, were referred to.

VAN KOUCHNET, C.—This is an appeal from the report of the Master at Barrie, and the principal objection presented is, that the Master proceeded with the reference during the long vacation against the protest of the defendant. The statutory provisions in regard to the vacation between the 1st of July and the 21st of August in each year, do not extend to this court, and the question was argued before me as necessarily depending upon the practice in England at the time of its introduction here under the act of 1837. That practice is very imperfectly stated in the books ; but so far as I can ascertain it, the Master in England might if he pleased keep his office open during the long vacation. There seems to have been a vacation Master, who disposed of necessary work, such as making appointments, &c., to take effect before the Master in rotation when he opened his office, but did no more than was thus requisite. General or special orders,

Judgment.

(a) 10 Beav. 146.

(b) 1 M. & Cr 48.

(c) 4 Dea. & Ch. 503.

1866. provided that the long vacation should not count in the time allowed for certain proceedings; but with these exceptions I do not find that up to 1837 the Masters were prevented from proceeding with business if they saw fit. Doubtless they very seldom did so. The Accountant-General's office was open, except on fixed and recognized holidays, unless when closed for the vacation by the order of the Lord Chancellor. The Registrar's office was always open, except on special holidays, though only a clerk attended during the long vacation for routine work.

Anderson
v.
Thorpe.

Judgment.

The English orders of 1845—not in force here—provide for vacations, specifying what work may be done during those periods. The order in force here in regard to the long vacation is Order No. 4 of the 3rd June, 1853. It provides that “the long vacation” shall commence and end on certain named days. What long vacation is here referred to? It must be some long vacation previously established. It could hardly refer to the long vacation in England, the period of which had never been recognized here. The special holidays or fast days in England were not observed here. The Legislature had not provided any long vacation. How then had this long vacation been established here? On inquiry I find that an order made on the 25th of August, 1840, and numbered as 77 among the orders published in 1846—to which on the argument my attention was not called—established for the first time a long vacation in this court in the following words: “That whereas, it having been proposed by the profession and approved of by the Vice-Chancellor, that there should be a yearly vacation in this court, notice is hereby given that his Honor doth order and direct, that such vacation shall commence yearly, from and after the expiration of one week from the termination of the equity sittings after Michaelmas term in each year; and shall continue until the 1st day of November then next ensuing, during which period the court will

not sit, and the Master's and the Registrar's offices shall be respectively closed : except that the Registrar's office may at any time during the said vacation be opened for all purposes of making applications for special injunctions." 1866.

Anderson
v.
Thorpe

On the 3rd day of June, 1853, all pre-existing orders were abolished in express terms. But still order 4 of this series of orders, substituted for those abolished, says, "The long vacation is to commence on the first day of July, and to terminate on the 21st of August in every year." What long vacation? In my opinion the long vacation established by the order of 1840. But if, as it may be contended, that order was blotted out entirely, there would be no long vacation to which reference could have been made. The order must then, I think, have only been disturbed so far as order 4, of 3rd June, 1853, disturbed it ; or must have been recognized and re-established by that order, except in so far as it interferes with it. If the provision for, or creation of a long vacation depends upon this order 77, then also, I think, we must look to it to see what that vacation meant ; what was its character, purpose and object ; and these are defined by the order itself. Giving effect to these, I think that no proceeding *in iuribus* could or can be taken in the Master's office during the long vacation ; that the proceedings in this case were therefore improper, and that the matter must be referred back to the Master to proceed anew. The ordinary meaning of the word "vacation" is an intermission of proceedings—of ordinary work. It is true that subsequent orders provide that vacation shall not count in the time allowed for certain proceedings ; but this does not direct or imply that all or any proceedings may be taken in vacation. But for this provision time might well run in respect of proceedings had before vacation arrived.

Judgment.

1866. As, I believe, this is the first case in which objection has been taken to proceeding in the Master's office during the long vacation, and as it has been customary during that time to take such proceedings, I make no order as to costs.

SENEY V. PORTER.

Vendor's lien—Exchange of lands.

Y. & S., the owners of two distinct parcels of land, agreed to exchange the one for the other. S.'s land was subject to a mortgage, which he agreed to pay off, but did not; and Y. was compelled to redeem the same.

Held, that Y. was entitled to a lien on the land conveyed by him to S. as for unpaid purchase-money, for the amount paid to redeem the mortgage.

The bill in this case was by *James Seney* against *Thomas Porter, Samuel Seney, and David W. Taylor*; *Taylor* having at one time been interested as holder of a mortgage created by *Porter* in favour of *Samuel Seney*, upon the lands in *Hope*, which he had sold and conveyed to *Porter*, but having subsequently re-assigned to *Samuel Seney*, *Taylor* did not make any defence to the suit.

From the pleadings and evidence it appeared, that bargain had been entered into between the plaintiff and the defendant *Seney*, for the exchange of a parcel of land in the township of *Hope*, owned by the plaintiff, for another parcel in the township of *Dover East*. The land in *Hope* was valued between the parties at £600, that in *Dover* at £300; the difference in value (£300) being arranged for between the parties. The land in *Dover* was subject to a mortgage of £150, created by *Samuel*, and which he agreed to pay off; and conveyances carrying out this agreement were subsequently executed between the parties. The defendant *Porter* afterwards purchased the land in *Hope*, and plaintiff, in order to protect his interest, was compelled to pay off the

mortgage for £150. Thereupon the present suit was instituted by *James Seney* claiming to be entitled to a lien on the land in Hope, for the amount which he had been so obliged to pay to redeem the land in Dover, as in the nature of unpaid purchase money.

1866.
Seney
v.
Porter.

The defendant *Porter* answered; the other two defendants allowed the bill to be taken *pro confesso*.

The cause came on for the examination of witnesses and hearing before Vice-Chancellor *Spragge*, at the sittings of the court held in Cobourg in the spring of 1866.

Mr. *Hector Cameron*, for the plaintiff.

Mr. *Strong*, Q.C., for defendant *Taylor*.

Mr. *Spencer*, for defendant *Porter*.

SPRAGGE, V.C.—In April, 1857, the plaintiff was the owner of fifty acres of land in the township of Hope, being the south half of the north half of 14, in the fifth concession; and the defendant, *Samuel Seney*, his brother, was the owner of fifty-two acres of land in the township of Dover East, upon which there was a mortgage created in the January previous to one *Starks*, for the payment of £150, by instalments of £25 yearly, the first being payable in two years from the date of the mortgage. The two made an agreement for the conveyance by each, of the parcel owned by him, to the other. The land in Hope was valued at £600, while that in Dover was valued at £300 only; and it was agreed between them that *Samuel* should pay to *James* the plaintiff, the difference in value by annual instalments of £100, and should also pay off the mortgage to *Starks*. Each conveyed to the other the land agreed to be conveyed.

Statement.

1866.

Seney
v.
Porter.

In June, 1860, *Samuel* agreed with the defendant *Porter* for the sale to him of the fifty acres in Hope, together with another parcel of land in the same township, for \$8000 (£2000). *Samuel* conveyed the fifty acres to *Porter* on the 23rd of June, in the same year. For part of the consideration, \$6000, *Porter* executed a mortgage upon the property conveyed to him. For a further portion, \$1582, *Porter* agreed with *Samuel Seney* to pay certain debts of his, a schedule of which was made out; and the last item in which is, "Mortgage to *Henry Eberts*, 27th January, \$100, Chatham, \$100." The mortgage to *Starks* had been assigned to *Eberts* in March, 1857, and a third instalment of \$100, would fall due on the 27th of January, 1861; the two previous instalments having been paid by *James Seney*. There is no doubt of the identity of the mortgage, but there is nothing in the description of it in the schedule to connect it with the land purchased by him from *Samuel Seney*, or with the land in Dover.

Judgment.

The \$6000 mortgage given by *Porter* passed into other hands, but came again into the hands of *Samuel Seney*; and may be treated as if always in his hands and payable to him.

There is no question as to the notes given by *Samuel* to *James Seney* as for owelty of exchange. The question is whether a lien existed in favor of *James Seney* upon the land conveyed by him to *Samuel*, in respect of the mortgage money payable to *Starks*, in the nature of a vendor's lien for unpaid purchase money; and next supposing a lien to exist as between *James* and *Samuel Seney*, whether it affects the land in the hands of *Porter*.

I will consider the point in the first place as a question strictly between *James* and *Samuel Seney*, as if the land in Hope were still in the hands of *Samuel*. In this dealing between *James* and *Samuel*, what was the

consideration which *James* was to receive for the land in *Hope*? It was the land in *Dover* and £300, and the land in *Dover* was to be disencumbered by *Samuel*. The £300 may be put out of the case to simplify the question. Suppose the lands equal in value, say £300, but the land in *Dover* incumbered to half its value, the value of the land in *Dover* freed from incumbrance, is the consideration for the sale and conveyance of the land in *Hope*. The owner of the land in *Hope* did not receive the consideration for the conveyance of that land, by the amount to which it was incumbered. That amount was in substance and effect so much unpaid purchase money, and while it is an equitable principle, that a purchaser who has not paid his purchase money, shall not hold the land discharged from its payment, it must, I apprehend, apply in such a case as this. This case appears to me to fall clearly within the principle.

1866.

Seney
v.
Porter.

The case may be put in other ways. Suppose the existence of the mortgage concealed by *Samuel* from the knowledge of *James*. *James* would have supposed he had received his full consideration, while in fact he had received it, less the amount of the mortgage money: or again, suppose a sum of money payable on the exchange, and no mortgage, and *James* had appointed that sum of money to be paid to a third person; it would be unpaid purchase money, just as if payable to *James* himself; and the vendor's lien would attach. Here it was money payable by *Samuel* upon the appointment of *James* to a third person; and none the less so, because it was an incumbrance on the land conveyed to *James*; and the person to whom it was to be paid the mortgagee, and it was purchase money, because it was money payable by the purchaser of land conveyed to him; and its payment was part of the consideration for the sale and conveyance.

Judgment.

Some cases were cited by *Mr. Spencer*, who contested

1866. *Seney*
v.
Porter. the lien, which proceeded upon the principle that where the dealing between a vendor and purchaser amounts to, not the taking of a security for purchase money, but of a substitution for it, the vendor's lien shall not prevail; but nothing of the kind has occurred here. The parties may not have contemplated the retention of a lien, but that is obviously not necessary. As put by Lord *St. Leonard's (a)*, "It is immaterial that the vendor had no intention to reserve such a lien, or even intended to rest satisfied with the personal security; in either case the lien will be raised in his favor; if the security which he has accepted does not from the nature of it exclude the claim."

I see nothing upon which *Porter* can claim to stand upon a better footing than *Samuel Seney*. He sets up that he is a purchaser for value without notice; but he does not in his answer aver all that is necessary to entitle him to that position. He does not allege that he paid his purchase money before he had notice; and it is clear from the evidence that he had not. He admits in his examination that he had notice in the fall of 1860; his purchase was in June. He says, "in the fall of 1860 I first heard the terms of the trade. *James* told me. * * When I made my bargain with *Samuel* I did not know that there was any mortgage to *Eberts* on which any money was to be paid. I never knew so till *James* told me." As a matter of pleading the necessary allegation is not made; and the facts in evidence would not warrant it.

Another point is made by *Porter* arising out of circumstances, which however they may disclose a case of hardship upon him, cannot affect the rights of the plaintiff. *Porter's* purchase of *Samuel Seney* was of 100 acres besides the fifty purchased by the latter from the

(a) 14 Ed. V. & P. 676.

plaintiff, and *Samuel Seney's* title to that 100 acres has been impeached successfully. *Porter* alleges that he has paid to *Samuel Seney* more than such a proportion of the purchase money as would be payable in respect of the fifty acres. If he had paid this before he had notice from the plaintiff of the terms of his agreement with *Samuel*, I am not prepared to say that he could not protect himself as a purchaser for value; but this is not alleged, nor as far as disclosed do the facts warrant it. It is said by plaintiff's counsel that of the \$8000 purchase money, \$2000 was the purchase money of chattels to which *Samuel Seney* had good title. I do not know how this may be, but if it be as alleged, *Porter* will have to shew payments not only of that amount, but of that which would be as between him and *Samuel*, the proper purchase money of the fifty acres in *Hope*, before he received notice in the fall of 1860; and this I am satisfied cannot be shewn even if under the pleadings it were open to him to shew it. Indeed *Porter's* own letters shew that a considerable time after the fall of 1860, he had not paid the amount coming to the plaintiff, which was part of the purchase money as between him and *Samuel Seney*.

1866.

Seney
v.
Porter.

Judgment.

I think the plaintiff entitled to a decree in terms of the prayer of his bill, and it must be with costs. It is a case of some hardship upon *Porter*, and I regret it, but the hardship upon him can be no ground for denying to the plaintiff his right.

1866.

McDONALD v. WRIGHT.

Practice—Master's office—Appeal—Evidence.

Where the Master is directed to inquire as to incumbrances, and there is a dispute between two or more persons as to who are entitled to one of the incumbrances, it may according to circumstances, be his duty to decide the question himself, or to report the incumbrance, its priority as respects other incumbrances, and the dispute between the claimants, so that the Court may give proper directions for determining the question.

There may, in a proper case, be an appeal from the Master's ruling as to the inadmissibility of evidence, before the Master makes his report.

A bill was filed by *A.* and *B.*, to enforce certain registered judgments. *B.*'s interest was, as assignee of *A.* The assignment was for the benefit of creditors, but it did not appear that any creditor was party or privy to the assignment; and the assignee had sworn in one of the affidavits filed, that his only interest was as trustee for *A.*

Held, that any evidence admissible against *A.*, was admissible against both plaintiffs.

On the 31st day of May, 1866, the defendant *Wilcox* moved for an order directing the Master not to proceed further with the claim made before him by the plaintiff, for the purpose of impeaching, upon equitable grounds, the title of the defendant *Wilcox* to the mortgage security constituting his claim, for the following among other reasons:

Statement.

Because the Master had no jurisdiction to entertain or decide or report upon the questions raised by the said claim, and they were the proper subject for a bill; because neither the validity of the mortgage itself nor the legal title of the said *Wilcox* thereto was questioned, but admitted; because such claim was an attempt to impeach upon equitable grounds a valid legal title, without pleadings, and without any of the other safe-guards afforded by the rules and practice of the Court in such cases: because neither the finding of the Master upon the said questions, nor any decree which could be

founded on such finding, could do complete justice 1866.
 between the parties; because the proper proceedings McDonald
 in the cause were delayed and embarrassed by the Wright.
 said claim, and had already been delayed more than
 two years; and because it was not necessary to decide
 the questions raised by such claim in this cause, but
 the same could be decided more conveniently and
 speedily and less expensively in a separate suit.

Also for an order to discharge a direction the Master
 had made requiring the defendant *Wilcox* to attend
 before him to be further cross-examined upon his affi-
 davit filed in support of his claim, and that in default
 of his so attending, his claim should be disallowed, on
 the ground that, under all the circumstances of the
 case appearing before the Master he had not any
 power or authority to make such direction.

Mr. *McLennan*, for the defendant *Wilcox*.

Mr. *Barrett*, contra.

Mowat, V.C.—I think the depositions in this case 24 Dec.
 cannot be suppressed. Mr. *Brown* was clearly entitled Judgment.
 to show, if he could, that Mr. *Wilcox* did not own this
 mortgage, and should not be reported by the Master
 to be the owner of it. He has to report, not only what
 are the incumbrances, but who are the incumbrancers;
 not only what are the sums owing, but to whom they
 are due. Should the ownership of an incumbrance or
 other debt be disputed, and there appear two or more
 claimants of it, he is not, without further investigation,
 to report in favor of the person legally entitled, unless
 he is also the person equitably entitled, and is therefore
 the rightful claimant. If the original creditor has
 assigned the debt, he is to report that the assignee,
 and not the assignor, is entitled to it. Generally there
 is no dispute as to the assignment. At other times the
 dispute may be easily and promptly and inexpensively

1866. investigated and disposed of by the Master under a
McDonald decree like the present: sometimes a suit between
v. Wright. the parties may be necessary for the convenient and
satisfactory adjudication of the controversy (a). But
the course must always be for the discretion of the
Master, subject to an appeal to the Court. I cannot
say that the mere fact of there being such a dispute,
or of the allegation being, as here, that the assign-
ment was obtained by fraud, of itself necessarily
deprives the Master of jurisdiction over it. I find no
authority for so holding, and I find considerable reason
for holding the reverse.

Judgment. But after carefully reading the depositions in the
present case, and the exhibits that were handed in to
me, and which I presume were all that either party
considered it material for me to see, I think the con-
tention which has given rise to the present application,
cannot possibly be disposed of by the Master in the
present suit, consistently with the settled rules and
practice of Courts of equity; and had not the diffi-
culty occurred about the further cross-examination of
Mr. *Wilcox*, to which I shall refer presently, the Master
would probably himself have so held before making
up his report.

According to the testimony of Mr. *Crooks*, the prin-
cipal witness on the part of Mr. *Brown*, the mortgage
in question was with other securities assigned to *Wilcox*
under an arrangement with *Brown* to secure the payment
of certain claims or liabilities of *Wilcox*, and the surplus,
if any, was to be Mr. *Rigney's*, the late partner of Mr.
Brown. Mr. *Brown* alleges that the assignment to Mr.
Wilcox was obtained by fraud. It is plain that *Rigney*
is interested in this question, and that, according to
the rules of equity, the question cannot be litigated in a
suit to which he is no party. There are other difficul-
ties in the way of the matter being disposed of in this.

(a) Vide *Paynter v. Houston*, 3 Mer. 302.

suit. I shall only mention a few of them. The allegations upon which the assignment is impeached, are contained in an affidavit of Mr. *Brown's*, and are more general and indefinite than a bill would require; and I think it important that the claimant should be put in possession of the exact grounds, as distinctly as if the transaction was the only subject of the suit.

Then, again, the fraud affects the other securities transferred to *Wilcox*, and on which *Hay & Co.* had a lien, as well as the mortgage now in question. The Rules of this Court require that there should be one investigation for all, and not a separate litigation in respect of each.

I understand from Mr. *Crooks'* evidence that the deed of 24th January, 1863, releasing *Brown*, and the agreement for the assignment of these securities, were parts of one and the same transaction. All that the Master could do in the present suit, if he should endeavour to decide the dispute, and if his judgment should be against *Wilcox*, would be simply to disallow his claim—he has no power to impose terms and conditions; and yet, if the transaction was as Mr. *Crooks* states it, a decree simply disallowing the claim, or setting aside the assignment, would not be the proper decree to make. Can the assignment be cancelled, and Mr. *Brown* retain the release for which the assignment is stated to have been part of the consideration?

I see numerous other questions, some of which it would not be competent, and others of which it would not be convenient, for the Master to dispose of in executing the reference in the present suit; nor would it be just to the other creditors of *Wright*, that all these matters in which they have no interest whatever, should be litigated at the expense of the estate of *Wright*, or that the suit for the administration of that estate should be tied up until such a litigation is at an end.

1866.
McDonald
v.
Wright.

Judgment.

1866. I think the Master's proper course will be to report
 McDonald that this debt is due by the estate of *Wright*; to find
 v. Wright its priority; to state who claim to be entitled to the
 mortgage; and that, from the nature of the questions
 which the contesting claims involve, he is unable to
 decide them under the reference, leaving the respec-
 tive claimants to take such proceedings to settle their
 respective rights as they may be advised.

It was suggested that Mr. *Wilcox* should have waited
 until after the Master had made his report disallow-
 ing the plaintiff's claim, and then have appealed
 against it. On the other hand, it was alleged to be
 the constant practice to come here to set aside errone-
 ous directions made by the Master in the progress of
 a reference. It is necessary to dispose of this case
 to-day, and I have not had an opportunity of con-
 sidering with the other Judges of the Court as to this
 alleged practice, and no reported cases on the subject
 were cited on either side. The English practice,
 which is of course binding on us so far as it is appli-
 cable, affords some examples of applications bearing
 some analogy to the present which have been enter-
 tained by the Court during the progress of a reference.
 I refer to *Brace v. Ormond* (a), *Cotton v. Harvey* (b),
Jones v. Powell (c), *Routh v. Tomlinson* (d), 2 *Daniel's*
 Practice, 1362, 1363, *Perkin's* ed.

What the Master did here was to direct that the
 claimant should attend for cross-examination at his
 own expense, or that in default his claim should be
 disallowed. This I think was an erroneous direction.
 I do not think that under the circumstances the
 claimant was bound to attend again for cross-exami-
 nation at his own expense.

On the whole, following the course which I find

(a) 1 Mer. 412.

(b) 12 Ves. 391.

(c) 1 Sim. 387.

(d) 16 Beav. 251.

to have been taken in several English cases, I make no order on the present application. The observations I have made will no doubt render an order of any kind unnecessary.

1866.
McDonald
v.
Wright.

On the 19th of December, 1866, another motion by way of appeal was made by *Wilcox* from the ruling of the Master on the hearing before him, in rejecting entries in the books of account of the late firm of *James Brown, junior, & Co.*, of which firm the plaintiff *Brown* was a partner, as evidence on behalf of the defendant *Wilcox*, as against the plaintiffs or any or either of them: such books having been produced in the cause upon oath by the plaintiff *James Brown, junior*; and the entries tendered in evidence being in the handwriting of the said *James Brown, junior*, and relating to the judgments and mortgages in question before the Master.

Statement.

The same Counsel appeared for the parties respectively, as on the previous motion.

The cases cited were *Acton v. Woodgate (a)*, *Warren v. Coutts (b)*, *Ellison v. Ellison (c)*, *Garret v. Lauderdale (d)*, *Smith v. Keating (e)*, *Harland v. Binks (f)*, *Sagers v. Evans (g)*, *Maulson v. Topping (h)*, *Park v. Berczy (i)*.

Mowat, V.C.—This was an appeal by one of the defendants, *Timothy D. Wilcox*, against the Master's rejection of certain evidence.

Dec. 24.

Judgment.

(a) 2 M. & K. 492.

(b) 3 Mer. 707.

(c) 1 W. & T. 325.

(d) 3 Sim. 1.

(e) 6 C. B. 136.

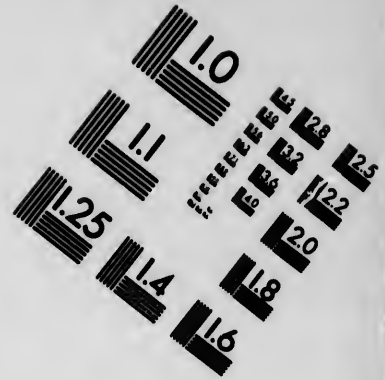
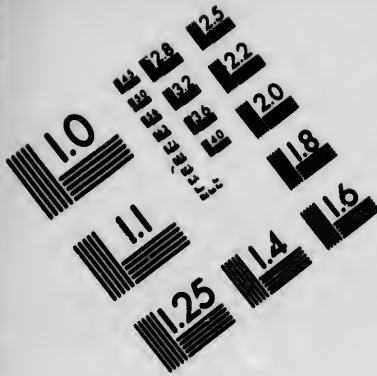
(f) 15 Q. B. 713.

(g) 5 E. & B. 367.

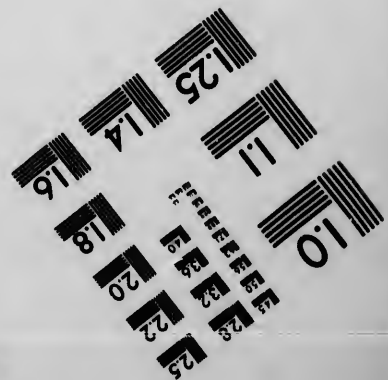
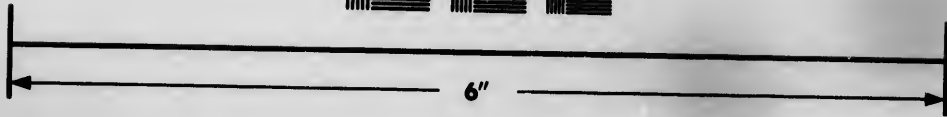
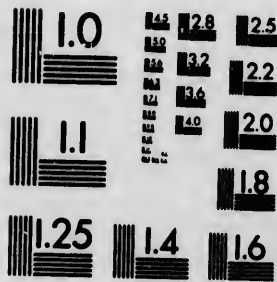
(h) 17 U. C. Q. B. 187.

(i) 8 U. C. C. P. 127.





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1866. It was stated by Counsel for both parties that the
McDonald object of the suit is to enforce certain registered judg-
v. Wright. ments against the real estate of the defendant *George
Wright*: that these judgments and a mortgage by
Thomas Rigney and the plaintiff *Brown* as partners
in trade; and that the judgments had become vested in
the plaintiff *McDonald* by assignment from *Brown*; and
the mortgage, in the defendant *Wilcox*. One of the
questions before the Master was as to the priority of
the judgments and mortgage *inter se*; and on the argu-
ment in the Master's office, the Solicitor for *Wilcox* relied
on certain entries in the books of *Rigney & Brown*
theretofore brought into the Master's office by *Brown*.
The Master rejected these entries, as inadmissible
against the plaintiff *McDonald*.

It is clear that all admissions and statements made
Judgment. by the holder of a security before assigning it are, as
a general rule, evidence against the assignee.

Some of the entries are said to bear date before the
16th June, 1862, the date of the assignment; some are
of that date; and some are subsequent. But the subse-
quent entries, as the matter now stands, cannot be
excluded any more than those of prior date, for no one
except the assignor appears yet to have any interest
under the assignment. The assignment is by deed
poll; it is admitted that there is no evidence, and
indeed no allegation in the pleadings or proceedings,
that any creditor was or is privy to the transaction;
and the assignee, *McDonald*, swears that his interest
in the suit is merely that of a trustee for *Brown*. The
plaintiffs, under these circumstances, are not in a posi-
tion to exclude any evidence that would be admissible
against *Brown* alone.

There is said to be an assignment from *Brown* to

McDonaldi of prior date to the one mentioned in the bill. This assignment has *Brown's* signature ; but there is no evidence of the fact of execution ; nor any evidence that the instrument was ever acted upon : the reverse rather appears. If this assignment is valid to any extent, it is open to the same observations as I have made on the instrument of 16th June, 1862.

1866.
McDonaldi
v.
Wright.

It is, of course, in the discretion of the Master to receive further evidence on either side at any time before issuing his warrant on the report.

It was further contended that the books were inadmissible, because, before the Solicitor for *Wilcox* stated any intention of using them, the Master had made the following entry in his book : " Nov. 24. Evidence on the part of the claimant *Timothy D. Wilcox* closed." The hearing was adjourned to a future day ; and, the discussion then taking place, the point now in question arose. But I think it clear that, on this discussion, each party had a right to make use of any papers theretofore produced by the other, and which, by the rules of evidence, were evidence for the purpose offered. There is no reason why an exhibit should be excluded, any more than the deposition of a witness ; and there is no rule rendering it incumbent on a party, before the close of the evidence, expressly to say what depositions or what exhibits in the Master's office he deems material, and means in argument to rely upon. When the evidence is declared by the Master to be closed, no further evidence can be given by either party without the Master's leave, but every piece of evidence already in his office in the cause may clearly be used.

Judgment.

The Master's rejection of the evidence did not proceed on this ground.

It was further contended that there could be no

1866. appeal on such a question until the Master had made his report. This would be a very inconvenient rule, and no authority for it was cited. I find that the practice in this country for many years has been to entertain an appeal at once, in such a case; and there are some English cases which, to a certain extent, support the practice. The Court can always take care that this right of appeal shall not be abused; and I think that the present case was one in which it was proper to take the opinion of the Court without waiting for the general report.

Appeal allowed with costs.

RE OWENE.

Insolvency—Appeal.

Fraud in contracting debts before the passing of the Insolvency Act, (1864,) is not to be excluded from consideration on an application for the confirmation of the insolvent's discharge.

Where a trader, all whose property was heavily mortgaged, and who had large over-due debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, falsely alleging that he was worth \$4,000 more than he owed, and that he had no engagements he could not meet; he was held to be guilty of such fraud as disentitled him to his discharge under the act.

Objections to the security on an appeal from the County Court Judge under the Insolvency Act, 1864, are to be made to such Judge.

Statement. This was an appeal by creditors from an order of the Judge of the County Court of the County of Wellington, whereby he ordered that the discharge of the insolvent should be suspended for six months, and that from and after the expiration of the said term of six months the said insolvent should be, and thereby was thereafter, finally discharged in accordance with the terms of the said act.

The appeal was on the following grounds:—

1st. That from the examination of the said insolvent, had before the said Judge, on his application for his discharge, and the papers and evidence filed thereon, and of the evidence of witnesses examined thereon, and the papers filed of the affairs, statements, conduct and proceedings of said insolvent with respect to his estate and affairs, the said insolvent is not under the act entitled to his discharge, or the order made by the said Judge above referred to.

1866.
Re Owens.

2nd. That the statements of the insolvent, as appears from his examination and the evidence taken before the Judge and filed, do not shew his affairs and the management of them to be free from the imputation and taint of fraud, deception and misrepresentation; and that since his assignment under the Insolvent Act, and before, he had the control of a business really his own but which he pretends, belongs to his former clerk, one *Bradley*.

3rd. That the grounds referred to in the judgment and decision of the said Judge are sufficient, under the provisions of said act, to disentitle the said insolvent to the benefit of the order made as aforesaid, such grounds being referred to in the five following clauses.

Statement.

(Sec. 1.) That the insolvent's representations respecting his affairs were false and fraudulent when he procured goods on credit in Montreal, in 1859, which are not paid for yet; and that he concealed the fact that he was then unable to meet his engagements, from the persons who became his creditors, with intent to defraud.

(Sec. 2.) That when the insolvent made a voluntary assignment, in 1860, he did not assign all his property, and that his conduct since respecting the property is fraudulent.

(Sec. 3.) That before the insolvent can obtain his discharge he should shew that he has given up all his estate: that he has secreted his interest in a certain

1866. property called the Drayton property : that having an
Re Owens. interest in this property in fact, he has so contrived
the title that it stands in another person's name, for
his benefit.

(Sec. 4.) That one *Ashbury*, though not a *bond fide* creditor, was allowed to recover a judgment, for the purpose of protecting the business at Drayton : that another judgment recovered by *Bradley*, though it could be by law recovered at the time it was obtained, had since been fraudulently used to put the insolvent's property out of the reach of creditors ; and that there is evidence of a secret trust respecting the Drayton mill property between the insolvent and *Bradley*.

(Sec. 5.) That a certain business done at Drayton, connected with certain mill property there, was the
Statement. insolvent's ; and that the sum of \$600, paid to one *Watson* at the time of the purchase of that property, was the insolvent's money.

4th. That, as appears from the judgment of the Judge, the conduct of the insolvent was considered by him such as to warrant the suspending of his discharge ; whereas sufficient grounds are shewn as to have disentitled and to disentitle the said insolvent from the same.

5th. That the learned Judge, in his judgment, erroneously considers that, even if the insolvent has an interest in the Drayton property and the management of the same, yet that such interest could be of no use to the Montreal creditors, because of the existence of the *Ferrie* mortgage thereon, which would wholly consume the same ; whereas, even if such were the case, the said insolvent should not be allowed to hold and keep concealed such interest, even from the said *Ferrie*, a creditor of the said insolvent.

6th. The learned Judge has overlooked the fact, as established by evidence and the examination, letters and

papers filed, that the insolvent has been conducting an extensive business at Drayton on the said Drayton property, and yet that the same is kept from the creditors of the insolvent. 1866.
Re Owens.

7th. That *prima facie* sufficient was established on the part of the opposing creditors to cast such suspicion and doubt on the *bona fides* of the insolvent in his connection with the Drayton property as should have warranted the said Judge in requiring the insolvent to clear up the same, which he did not even propose to do, by calling the party who with himself fraudulently, as alleged, protects the property at Drayton and the business for the benefit of the insolvent.

8. That the insolvent's affairs throughout, since his fraud on the Montreal creditors, and his conduct with reference to his debts and estate, shew him to have been so reckless, negligent, dishonest, and fraudulent, as should, if not disentitle him to a discharge, yet should be visited by a stronger mark of disapprobation than the learned County Court Judge has visited what, in his judgment, he expresses to be, if not fraudulent, within the meaning of the act, yet so grossly improper as to deserve condemnation. Statement.

Mr. Hodgins, for the appellants, cited—*McDonald v. Boice (a)*, *Re Mew and Thorne (b)*, *Exp. Deornford (c)*, *Exp. Stainer (d)*, *Exp. Rufford (e)*.

Mr. Crooks, Q.C., contra, cited—*Re Bar. . . (f)*, *Exp. Maw (g)*, *Exp. Quinn (h)*, *Re White (i)*, *Exp. Evans (j)*, *Re Keat (k)*, *Re Hart (l)*, *Gordon v. Young (m)*.

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|-------------------------|---|
| (a) 12 Gr. 48. | (b) 6 L. T. N. S. 732. |
| (c) 15 Jur. 278. | (d) 16 Jur. 1124, S. C. 2 D. M. & G. 263. |
| (e) 2 D. M. & G. 234. | (g) 11 Jur. N. S. 69. |
| (f) 5 L. T. N. S. 368. | (i) 10 Jur. N. S. 189. |
| (h) 10 L. T. N. S. 704. | (k) 6 L. T. N. S. 837. |
| (j) 6 L. T. N. S. 519. | (m) 12 Gr. 378. |
| (l) 5 L. T. N. S. 369. | |

1866. MOWAT, V.C.—This was an appeal by creditors of
Re Owens. an insolvent from an order of the Judge of the County Court of the County of Wellington, whereby he suspended the discharge of the insolvent under the act of 1864, for six months, and ordered that after the expiration of that period the insolvent should be, and thereby was, discharged in accordance with the terms of the act.

A preliminary objection was taken on the part of the insolvent, on the ground that the security for costs which the appellants had given was a bond of their own solicitors. I think the bond of their solicitors is not a proper security (*a*), for I see no sufficient reason why the rule recognized by the Courts in other cases should not apply to proceedings under this statute; and the answer to the objection is a reference to the same practice in other cases, which requires that objections to the sufficiency of the security should be made to the Court appealed from (*b*).

Judgment.

The case was argued on the merits, subject to this objection; and I shall therefore proceed to consider these.

The first objection urged by the appellants to the insolvent's obtaining his certificate, was that the insolvent purchased from the appellants the goods for which they are now his creditors, when he knew or believed himself to be unable to meet his engagements, concealing the fact from them with the intent to defraud them.

That he was unable to meet his engagements, in the sense intended by the act, and that he knew it, and that he concealed the fact from the appellants,—the

(*a*) *Panton v. Labertouche*, 1 Ph. 265; *Meyers v. Hutchinson*, 2 U. C. Prac. 80.

(*b*) U. C. Consol. Stat., ch. 15, sec. 67, p. 91.

Judge below thought sufficiently established by the evidence, and I entirely agree with him in that opinion ; but the Judge felt a difficulty in saying that the insolvent had an intent to defraud the appellants,—which is an element in the matter contemplated by the statute (a). But a man's intention, if not proved by his own admissions, can only be inferred from his acts ; and it is the rule of all courts that a man must be presumed to have intended the natural and probable consequences of his own acts. Here the insolvent was heavily indebted when he obtained credit from the appellants ; all his real estate had been mortgaged to various creditors for its full value, or more than its full value ; and large sums were overdue, which he does not in his examination pretend that he had made any provision for, or had any way of meeting, or expected to be able to pay. These being his circumstances, he went to Montreal, where he had never gone before to buy his goods,—the reason of his going, I cannot doubt, being because his credit elsewhere was more than exhausted ; and there, according to his own deposition, he told the appellants, on applying for credit, that he was worth \$4000 more than he owed, and was in no difficulty that he could not meet. This is his own account of the matter. He does not say that he told them he was in any difficulty, and I have no doubt that he did not ; nor did he tell them that he had large, or any, outstanding debts due and unpaid, or that his property was mortgaged.

1866.
Re Owens.

Judgment.

His real position was such that, if disclosed, it is manifest he would not have got a dollar of credit from the appellants or other Montreal merchants ; and he not only did not disclose to them his real position, but made representations, which, in the sense he meant them to be understood and in which it is clear that they were understood, were false ; and by reason of these

(a) section 8, sub-sec. 7.

1866. representations he obtained the credit he desired. The
Re Owens. probable effect at the time was, that the appellants
would lose the debt the insolvent was contracting with
them, or the greater part of it; and this was the actual
effect. How then can I refuse to say that the *intent* was
to defraud the creditors, within the meaning of the act?

The Judge below refers to the fact that a mill
which the insolvent built was burnt down shortly after
these Montreal debts had been incurred. The destruc-
tion of the mill may have increased the insolvent's
difficulties; but the suggestion that it occasioned them,
that the debts might, not to say would, have been paid
but for this fire,—is entirely unwarranted by anything
that I find in the evidence.

Judgment. The mill had been insured, and the insurance money
was paid. The debtor, though hopelessly insolvent,
rebuilt the mill, applying to the purpose, in part, goods
he had in the autumn obtained from the appellants and
others on credit; and he thereby withdrew so much of
his small assets from them, and from his general credi-
tors, for the benefit either of himself or of the mort-
gagees of the mill property; he then procured judg-
ments to be recovered against him by his two clerks
for doubtful debts; had every thing sold under these
judgments; supplied one of the clerks with money to
buy in a portion of the goods at the sheriff's sale; and
when everything was gone, he made an assignment for
the benefit of his creditors, within little more than a
year after contracting the debts now in question.
Under this assignment nothing was realized; and the
insolvent has since repurchased the mill property, and
carried on the business in the name of one of his two
clerks; but he did not disclose his interest in this prop-
erty as part of his assets, under the present proceedings.

I think that, whether his purchase from the plaintiffs-
is viewed with or without the light of what afterwards

occurred, not judicially to infer fraudulent intent in the concealment of his true position when he got credit from the plaintiffs—is impossible. 1866.
Re Owens.

The debt due the appellants was contracted before the passing of the Insolvent Act, and it was contended that the legislature did not mean to make misconduct a bar to a discharge unless such misconduct took place after the passing of the act. I do not so read the act; for I find that, in regard to another ground of opposition to an insolvent's discharge, which it was intended to make a bar in case only it should occur after the passing of the act, the statute makes use of language pointing clearly to this distinction. The enactment (a) is, that any creditor may oppose the insolvent's discharge "on the ground of fraud (b) or fraudulent preference (c) within the meaning of the act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, * * * or upon the ground that, subsequent to the passing of this act, the insolvent has not kept an account book, shewing his receipts and disbursements of cash, and such other books of account as are suitable to his trade," &c. I think it follows that no such restriction was intended as to acts of fraud or fraudulent preference. It would be difficult, indeed, to suppose that Parliament intended to confine the benefit of the act for the future, as far as legislative provision could do so, to honest debtors, while the purpose was to give the benefit of the act to the fraudulent, equally with the honest, whose transactions were before the act. Judgment.

It was said that this construction would be giving the act a retrospective operation: but what the insolvent invokes the act for is this very feature of its provisions. He wishes by its *ex post facto* enactments to get rid of debts contracted before the act passed, and when there was in

(a) Sec. 9, sub sec. 6.

(b) Sec. 8, sub sec. 7.

(c) Sec. 8, sub sec. 4.

1866. existence no law for the discharge of insolvents; and
 Re Owens. it is manifest that, if it is just for Parliament by an
ex post facto law to give debtors a release from their
 honest debts, it is at least equally just to confine the
 privilege to debtors whose conduct has been free from
 blame. In *Re Staner (a)* the Lord Justice *Knight*
Bruce refused to exclude from consideration for a like
 purpose what had taken place before the passing of
 the statute then in force.

It is not correct, either, to assume that misconduct
 like that complained of against this insolvent, had not
 previously been the subject of legislative interference.
 In the Insolvency Act which was in force in Upper
 Canada when these debts were contracted, it was en-
 acted, in terms differing more in form than substance
 from the enactment in 1864, that, in case it should
 appear "to the Judge that the debts of the petitioner,
 Judgment. or any of them, were contracted by any manner of
 fraud, * * * or without his having at the time a
 reasonable or probable expectation of being able to
 pay such debt or debts, * * * the Judge shall
 not in any such case name any day for making such
 final order, or renew such interim order," (b) extremely
 limited in its operation as such final or interim order
 was (c).

The enactments cited from both Insolvency Acts,
 as well as other considerations, distinguish the case
 from *Re White, (d)* though in that case *Re Staner*
 with which it seems to conflict, does not appear to
 have been cited.

I think, therefore, that the misconduct of the defend-
 ant was such a bar as the statute contemplated.

(a) 2 DeG. McN. & G., 263.

(b) Consol. U. C. 22 Vict., c. 18, sec. 30.

(c) *Ib.* sec. 37. See also Division Court Act, U. C. Consol., ch.
 19, sec. 165.

(d) 10 Jur. N. S. 189.

The subsequent conduct of the insolvent was relied upon as affording independent grounds of objection to his discharge, and it would have been my duty carefully to consider these, if I had come to a different conclusion on the first point submitted to me. 1866.

The appeal must be allowed.

DELESDESNIER V. BULTON.

Right of infant to his wages—Stat. 13 Eliz. ch. 5—Lease for life to debtor—Costs.

Where a minor enters into a contract of hiring, the wages he earns belong to him, and not to his parent.

In August, 1861, J. B. being indebted jointly with W. B. to T. in the sum of £88 for which judgment had been recovered, and to one R. in the sum of £10, agreed with R. B. who was his son, and was not then of age to convey to him 100 acres of land in consideration of his assuming payment of T.'s judgment and of his making a lease for life to J. B. or J. B.'s wife of 25 acres of the land being the arable portion thereof. R. B. was then the holder of a due bill for £20 given to him in satisfaction of wages earned by him as a hired servant with an elder brother, and in pursuance of the agreement transferred this to T. who received payment thereof, and also made a promissory note jointly with J. B. and W. B. for the balance of T.'s claim which note remained unpaid. No conveyance was executed by J. B. until June, 1862, and no life lease until March, 1865, when R. B. made a lease to his mother for life, it being made to her and not to J. B. for the purpose of preventing J. B.'s creditors from taking it in execution. In the winter of 1861, and spring of 1862, J. B. became indebted to the plaintiffs who afterwards recovered judgment and filed a bill to set aside the transaction as fraudulent within the Statute of Elizabeth.

Held, under the circumstances, that the conveyance to R. B. could not be deemed voluntary; but that the life lease was voluntary, and must be set aside. The bill was therefore dismissed as against R. B., but without costs, as by his conduct in making the life lease to his mother with the object mentioned, he had disentitled himself to costs; and as the plaintiff's idea that the conveyance of June, 1862, was not in pursuance of an anterior agreement, was not an unreasonable one.

An agreement may be allowed to stand, although a voluntary deed arising out of it may be set aside.

This case was heard at the sittings, at Ottawa, in the

1866. spring of 1866. The facts are set forth in the head
 Delesdernier note and judgment.

v.
 Burton.

Mr. *Blake*, Q.C., for plaintiff, cited *French v. French*, (a), *Holmes v. Penney* (b), *Corlett v. Radcliffe* (c), *Warden v. Jones* (d), *Crawford v. Meldrum* (e).

Mr. *Moss*, for defendant cited *Rex v. Chillesford* (f), *Eaparte Macklin* (g), *Perlet v. Perlet* (h), *Brittlestone v. Cooke* (i), *Whitmore v. Claridge* (j), *Pennell v. Reynolds* (k).

Judgment
 SPRAGGE, V.C.—I think the proper conclusion from the evidence is that an agreement was made between *John Burton* the father, and *Robert* the son, for the conveyance from the former to the latter of the land in question, being 100 acres in North Plantagenet, and that a lease for life of 25 acres thereof should thereupon be made by *Robert* to his father, or his father's wife, with or without (it is not clear) survivorship to the father himself, if to the wife; and that this agreement was made in August, 1861. The date is material as the debt to *Schneider* was contracted in the winter of 1861 and the spring of 1862. Some doubt is thrown upon the date by the examination of *Robert* himself, which was certainly not satisfactory. His manner was dull and hesitating; but he was by no means a reckless swearer in his own behalf; and upon the whole I think him not untruthful. The evidence of *Tucker*, a creditor, and the evidence furnished by the documents themselves, lead me to think that August, 1861, was the true date of the transaction.

(a) 6 De G. M. & G. 95.

(c) 4 L. T. N. S. 1.

(e) 3 Er. & App. 101.

(g) 2 Ves. 675.

(i) 6 E. & B. 296.

(b) 3 K. & J. 99.

(d) 2 De G. & J. 76.

(f) 4 B. & C. 94.

(h) 15 U. C. Q. B. 165.

(j) 8 Jur. N. S. 1059.

(k) 11 C. B. N. S. 709.

At that date *John*, the father was indebted to *Tucker* in the sum of £88 7s. 8d. *Tucker* had entered judgment and was in a position to issue execution. *John Burton* was also indebted to one *Roddy* in a small sum; about £10, as *Roddy* says. It does not appear that there was any other indebtedness against *John Burton* at that time. Two small Division Court debts are shewn, amounting together to less than £6, and of subsequent date. *Roddy* had asked for payment of his debt at different times; but emphatically the pressing debt was that due to *Tucker*.

1866.
Delesdernier
v.
Burton.

The consideration for a land to be paid by *Robert Burton*, was the debt to *Tucker* and the life lease to which I have referred. *Robert* says they took the value of the land at £200, and considered the *Tucker* debt and the life lease as equal to that sum; the 25 acres in which, comprised the arable part of the land. *Tucker* says the land was worth about £200, but that it was doubtful whether it would have realized more than half that sum at Sheriff's sale.

Judgment.

If this arrangement had been made and perfected by a conveyance in August, 1861, and had been with a son of full age, I do not see that it could be impeached under the Statute of Elizabeth. What creditors was it intended to defeat and delay? *Tucker's* was the only serious debt, and that debt it was to be the means of satisfying: *Roddy's* was not sued, and it cannot be supposed that the transfer of the land was intended to defeat his debt of £10. The consideration, if not adequate, was certainly substantial; and it was probably looked upon as better, apart from the relationship of the parties, than running the risk of a Sheriff's sale at the suit of *Tucker* which might sweep the whole away.

No conveyances, however, were made at the time. The conveyance to *Robert* was not made till the 2nd of June, 1862, and the lease for life not till the 27th of

1866. *Mareh*, 1865, and at the date of the arrangement
 Delesdernier *Robert*, the son, was under age. If it could be made
 v. out that the conveyance made to *Robert*, in June,
 Burton. 1862, was in pursuance of a mere voluntary agree-
 ment, made in August, 1861; then I apprehend that
 it would come within the mischief of the Statute of
 Elizabeth, under the ruling of the case of *Warden v.*
Jones. (a) And this is attempted to be made out by
 shewing that in reality no valuable consideration
 passed from *Robert* to his father, by reason of his min-
 ority. *Robert* had previously worked as a hired servant
 of an elder brother, at monthly wages; and upon
 leaving the service a sum of £20 was due to *Robert* for
 wages; and that sum by arrangement between the
 brothers, was to be paid by one *Hogan* to *Robert Bur-*
ton, *Hogan* being an assenting party and giving a due
 bill to *Robert* for the amount. Now if this £20 was in
 law the money of the father, its being paid to the
 Judgment. father or to his use, would not be a valuable considera-
 tion passing from the son to the father.

The arrangement for the payment of the debt to
Tucker was in substance this: that the £20 payable to
 the son by *Hogan* should be paid to *Tucker*; and
Robert, the son, gave to *Tucker* an order upon *Hogan*
 for the amount which *Tucker* says he believes has
 been paid; and the balance of the debt to *Tucker* was
 assumed by *Robert*, he giving *Tucker* his notes for the
 amount.

First as to the £20; I think upon consideration that
 it was the money of *Robert*, although earned by him
 while under age. The contract of hiring with his
 brother was voidable only, not void; and moneys
 earned under such contract was recoverable at the suit
 of the infant. The point was discussed in *Rex v. Chilles-*
ford and *Rex v. Winslow* (b), heard together before

(a) 2 De G. & J. 76.

(b) 4 B. & C. 94.

Lord *Tenderden* and Judges *Bayley*, *Littledale* and *Hobroyd*. The question was whether infants obtained a settlement in a parish by contracts of hiring with their respective parents, and it was held that they did. It was put by Mr. Justice *Bayley*, that a contract of hiring between a father and his infant son creates a new relation between them, giving to the father more right of control than he had otherwise, and to the son a right to wages, which was beneficial to him. This right as between the father and the son was illustrated by the case of a contract of hiring by an infant with a third person, in which case it was considered clear, that such a contract would give him a right to sue for wages.

1866.
Delesdernier
 v.
Burton.

The same point was discussed in *Perlet v. Perlet (a)*, in our Court of Queen's Bench, upon a contract of hiring between a mother and her son under age. There was no actual decision, but the Court evidently thought that such a contract, if made out, would be good against the mother. There is also the case of *ex parte Macklin (b)* a case of a claim by a young actress against the assignees in bankruptcy of her father, for salary earned by her while under age, and which was received by her father, she living with him at the time. Lord *Hardwicke* made some remarks upon the danger of admitting such claims, but still directed a reference, when the claim was compromised; and upon this Mr. *McPherson*, in his work on Infants, (p. 517) remarks: "It is evident that the daughter's claim was felt to be to a certain extent well founded, for in order to avoid an account it was agreed that she should be admitted as a creditor for a particular sum." I think upon these authorities, particularly the cases reported in *Barnwell* and *Cresswell*, I must hold in this case that the £20 in the hands of *Hogan* was the money of *Robert*, the son; and was a valuable consideration *pro tanto* paid by him, on the purchase of the land.

Judgment.

¹⁵
 (a) ~~25~~ U. C. Q. B. 165.

(b) Ves. 675.

1866. With regard to the residue of the debt due *Tucker*,
 Delesdernie v. Burton. the undertaking given by *Robert* for its payment was not of course enforceable against him; and in fact he has not paid it. The debt to *Tucker* was a joint debt due by the father and another son, *William*, upon a joint contract entered into by them with *Tucker*; and *Robert* says that they were parties to the note given by him to *Tucker* upon the settlement; that he assumed the debt, and that *William* was not to be called upon unless he, *Robert*, and his father, could not manage to pay them. I understand that as between the parties themselves, *Robert* was the party primarily to make the payment.

Taking the case now to stand thus: £20 of the money consideration paid by *Robert*, and his undertaking given for the residue; this in August, 1861; a deed given in June, 1862, could not be a voluntary deed; nor, notwithstanding the intervening of the plaintiff's debt, would it necessarily be fraudulent. If there was a *bond fide* intention on the part of *Robert* and his father, that he, *Robert*, should pay the balance of the debt to *Tucker*, an intention continuing when the conveyance to him was made, it would only be a carrying out of the agreement of the August preceding, and could not be fraudulent, although *Robert* had not made himself legally liable to pay. If it were voluntary, a mere gift, it would be evidence of a fraudulent intent to defeat creditors, though as has been observed, the word "voluntary" is not in the statute; but if it was the intention of all parties that *Robert* should pay the *Tucker* debt, of which he had already paid a portion, it would not be an evidence of fraud in the transaction that *Robert* would have a legal defence to any action that *Tucker* might bring if he chose to avail himself of it. I think, upon the evidence, it was the intention of the parties, that *Robert* should assume and meet the debt to *Tucker*. The proceedings of the plaintiff form a very probable reason for his not having done

Judgment.

so; one is naturally unwilling to pay for land of 1866. which he may be deprived by litigation. I use this only as rebutting the presumption that, because he has not paid it, it was never intended that he should pay it.

Delosdernier
Burton.

The conveyance not having been made until after litigation with *Schneider*; until after an unsuccessful defence to his suit; and after some family talk about preventing his recovering an unjust debt (as deposed to by *Robert*) exposes the conveyance of June, 1862, to some suspicion. If I thought it was a proper conclusion that the conveyance was to be made, or not to be made, according to whether it was necessary in order to defeat *Schneider's* execution; in other words, a fence to keep off creditors, I should think it ought to be set aside. But I think the evidence does not at any rate go beyond this, that a conveyance that was to be made at all events, was made at the time that it was, lest *Schneider's* execution should operate upon it, and this would not be within the case of *Bott v. Smith (a)*, or any other case.

Judgment.

Taking the agreement of August, 1861, to be proved, it seems to me, I confess, an honest and probable arrangement. It was a mode of extrication from a pressing debt; and would scarcely have been made to defeat the trifling debt to *Roddy*. It is not to be inferred that it was never intended to be carried out because not perfected by conveyance immediately. We know, by experience, that such delays often occur, especially in arrangements between members of a family. Then, when *Schneider* had succeeded in his suit, it would naturally become a question whether *Tucker* or he should be preferred; or rather whether the arrangement made in order to satisfy *Tucker's* debt should not be completed. It would be thought right that *Tucker's* debt should be satisfied, and it would not be reasonable

1866. that *Robert* should pay it unless he got the land. This would account for the conveyance to *Robert* being made when it was.

Delesdernier
v.
Burton.

I must however take a less favorable view of the lease for life made in March, 1865. From the evidence of *Robert* I find that it was agreed that it should be made to his mother, because if made to his father it could be taken in execution by creditors; and again, it was made some three years after the conveyance to *Robert*; for the purpose, I must infer, of the property appearing in the meantime to be only the property of *Robert*. In this I think *Robert* colluded with his father—perhaps with his mother also—in order to defeat creditors; and for this reason I think he should be deprived of his costs.

The lease for life cannot stand at any rate. The mother is a volunteer, upon the appointment of her husband, who at the date of the conveyance, as well as long before, was in such pecuniary circumstances as to make a voluntary conveyance void under the statute. It would not alter the case if this were part of the original agreement of August, 1861, as it was not then carried out: *Warden v. Jones*; and as in *French v. French*, it is quite consistent that this voluntary settlement should be set aside while the agreement out of which it grew is allowed to stand.

Judgment.

As to costs, I think the proper course will be to leave each party to pay his own costs. The plaintiffs do not succeed upon that which is the real matter in contest between the parties, or at any rate upon only a subordinate matter. I do not give costs against them, firstly because *Robert* has, as I think, disentitled himself by conduct from receiving them, as I have intimated; and partly because the case is not free from suspicion; and the plaintiffs' idea that the conveyance of June was not in pursuance of an agreement anterior to their debt, was not, under the circumstances, an unreasonable one.

AN INDEX

TO THE

PRINCIPAL MATTERS.

ABATEMENT.

(OF LEGACIES.)

The provision for the widow of a testator, and certain legacies being charged upon real estate which it was apprehended might prove deficient, the legacies, not the provision for the widow, were in such case ordered to be abated ratably.

Becker v. Hammond, 485.

ABSOLUTE DEED.

See "Mortgage," 4.

"Sale, with right of re-purchase."

ACCOUNT.

(RIGHT OF)—BETWEEN PARTNERS.

See "Partnership," 1.

ACTION.

(RIGHT OF)—AGAINST PARTNERS.

See "Partnership," 2.

ADEMPTION.

See "Will," 1.

ADMINISTRATION.

An assignment by an administratrix, of a mortgage, part of the assets of the intestate was held valid, though not therein stated to be executed as administratrix.

Yarrington v. Lyon, 808.

ADMINISTRATION SUIT.

1. Where the plaintiff had, at the request of the mother and natural guardian of infant heirs, advanced money to pay debts of their ancestor to save the costs of suits therefor. *Held*, that he was entitled to sustain a suit for administration as creditor.

Glass v. Munsen, 77.

2. The report, in an administration suit, found £1403 chargeable against an executor.

Of this sum £1247 was for the price of land, claimed and received by the executor, the testator's son, as heir, and his claim to this had long been acquiesced in by the other parties interested, till held otherwise in this suit, when this purchase money was declared to pass under the testator's will, to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property, left by this executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sum charged to this executor, except a balance of about £34.

Under the circumstances the executor was allowed his costs, as of an administration suit, out of the estate—was not charged with interest on the balance in his hands, which he was required to pay into court within a month, after deducting therefrom his share of the estate as legatee.

Blain v. Terryberry, 221.

3. Where a legatee filed a bill charging the executors with neglect and improper conduct in the management of the estate, all of which were by the Master's report shewn to be groundless, the executors having managed the estate to the best of their ability, and the case in reality being such as should have been proceeded with by a summary application for an administration order, the Court, or further directions, ordered the next friend of the plaintiff to pay the executors their costs up to the hearing—not the costs of the decree or of taking the accounts or of subsequent proceedings—but directed the plaintiff to pay her own costs thereof.

Moodie v. Leslie, 537.

See, also, "Parties," 4, 5, 6, 7.

"Practice," 1.

AFFIDAVITS.

See "Practice," 16, 19.

AGENT.

See "Mortgage," &c., 11.

"Specific Performance," 3.

(OF INSURANCE COMPANY.)

See "Fire Insurance."

AMENDING DECREE.

See "Practice," 10.

AMENDMENT.

1. P. being in insolvent circumstances, and unable to obtain in his own name, a lease of certain real estate, which he had previously held a lease of, procured one S. to apply for and obtain from the owner of the property a lease to him, S., under an agreement that P. should continue to work the same as a nursery, and, from the profits, reimburse S. certain advances, and also pay a debt due by P. to him, and that P. should retain any balance for his own benefit. On a bill filed by a creditor of P., seeking to have S. declared a trustee for P., and to have his interest sold. *Held*, that although there was no resulting trust, nor any trust manifested in writing, still that P. had such an interest under the lease as could be reached in this Court by an equitable execution, on a proper case being made for such relief; and to enable the plaintiff to make such a case, leave was given to him to amend, with liberty to the defendants to speak to the cause after the amendments made; but the plaintiff was ordered to pay S. his costs; no costs being given against P., as he had not resisted the plaintiff's case, and the lease had not been obtained in the name of S. for any fraudulent purpose.

Toms v. Peck, 345.

(OF BILL)—EFFECT OF ON INJUNCTION.

See "Practice," 22.

(OF DECREE.)

See "Practice," 10.

INDEX TO THE
APPEAL.

(FROM CHAMBERS.)

See "Practice," § 3, 4.

(FROM COUNTY COURT.)

See "Costs," 1.

"Insolvency Act," 4, 5.

"Practice," 42.

(FROM MASTER.)

See "Practice," 25, 26, 40, 41.

ASSESSING.

(MODE OF.)

See "Wild Land Taxes," 1.

ASSESSMENT.

(OF SEVERAL LOTS IN BULK.)

See "Taxes," 3.

ASSESSMENT ACTS.

See "Township Council."

ASSESSORS.

See "Municipal Officers."

ATTACHING ORDER.

See "Interpleader," 1.

AWARD.

See "Practice," 19.

BANKRUPTCY.

1. An agent claimed to retain possession of property for his indemnification in respect of certain accommodation notes given to his principals before the bankruptcy of the latter, on which, however, he had paid nothing, and he disputed any liability to the holders in respect thereof.

Held, that the assignee in bankruptcy was entitled to a receiver.

Kemp v. Jones, 260.

2. In such a case the defendant set up a defence founded upon a verbal agreement proved by his own affidavit only, and inconsistent with a written instrument which purported to contain the agreement entered into between the parties, such agreement having been drawn by the defendant himself, a practising attorney and solicitor, and executed by all parties. The verbal agreement was said to have been omitted from the writing through the confidence existing between the parties.

Held, that the defence ought not to prevail on a motion for a receiver.

Kemp v. Jones, 260.

BILL.

(AMENDMENT OF)—EFFECT OF, ON INJUNCTION.

See "Practice," 22.

[FORM OF.]

See "Discovery."

BREACH OF INJUNCTION.

See "Injunction," 2.

BUILDING SOCIETIES.

1. Where a Building Society should, if properly managed, have terminated in ten years, but did not terminate then:

Held, that borrowing members, as well as non-borrowing members were bound to continue paying their monthly subscriptions, if necessary, until they reached the amount of their shares.

Wilson v. The Upper Canada Building Society, 206.

2. Where a mortgage given by a borrowing member recited that he had become the purchaser of seven shares of £100 each, and the mortgage was conditioned for the payment of the monthly subscriptions upon such shares, and of interest upon the said sum of £700, by equal monthly payments of £3 10s. each, and contained a provision for the sale of the property in case of default and for the Society's retaining out of the proceeds the remainder of the principal sum of £700 then remaining unpaid, and all interest, fines and other sums due or payable to the Society, giving credit for subscriptions theretofore paid and interest thereon at six per cent. from the time of such respective payments, and for payment of the surplus to the mortgagor:

Held, that the mortgagor was not liable to pay £3 10s. a month, or 10s. per share, for interest for the whole period, but only at that rate on so much of the £700 as from time to time was due, after giving credit for the monthly subscriptions paid.

Wilson v. The Upper Canada Building Society, 206.

3. A rule of the Society declared, that, in case of default in paying the monthly subscriptions, the defaulter should pay a fine of three-pence per share for the first month, six-pence for the second month, one shilling for the third month, doubling the fine for each succeeding month till the expiration of the first six months; and that, after that time, if the same remained unpaid, the share should become forfeited:

Held, that no fine was chargeable after the expiration of the first six months.—*Ib.*

4. Such a rule for paying of the fines cannot be waived by the directors.—*Ib.*

5. Where the members ceased paying their monthly subscriptions in ten years after the establishment of the Society; under the supposition on the part of all, that the Society should then terminate, and did not resume paying the same, but it was subsequently found that, from mismanagement and losses, further payments were necessary:

Held, that the rule as to fines was not to be enforced as regards monthly subscriptions falling due after all had ceased to pay.—*Ib.*

CHAMBERS.

(ADJOURNING APPLICATION FROM.)

See "Practice," 8.

CLOUD ON TITLE.

See "Pleading," 9.

COLLECTOR.

To prove payment of taxes it is not necessary to shew that the collector was duly appointed; it is sufficient to shew that he acted and was acknowledged as such.

Smith v. Redford, 316.

CONTEMPT.

See "Injunction," 2.

CONVEYANCE.

(TO DEFEAT CREDITORS.)

The owner of real estate worth \$4300, subject to a mortgage on which the sum due was \$1950, sold the equity of redemption for \$500, for the purpose of avoiding executions at the suit of his creditors, he being insolvent, and his vendee aware of that fact, and that his object was to place his property out of the reach of his creditors. The purchaser resold the property for an advance of \$1000, after the institution of proceedings to set aside the transaction, of which the party purchasing was aware.

Held, that the transaction was within the statute 13 Elizabeth, and should be set aside, as having been made to hinder and delay creditors.

Forman v. Hodgson, 150.

CORRECTING REPORT.

See "Practice," 35.

COSTS.

1. Where a party filed a bill on the equity side of the County Court, which on the hearing was dismissed with costs, and the plaintiff appealed to this Court, when the ruling of the Judge was reversed, the Court gave to the plaintiff the costs of the appeal, as well as of the Court below.

Farquhar v. The City of Toronto, 186.

2. Where a mortgagor subsequently executed a lease of part of the mortgaged property, and one of the two owners of the lease mortgaged his interest therein, such mortgagee was made a party in the Master's office to a suit by the original mortgagees for the foreclosure of their mortgage.

Held, on further directions, that, in case the mortgagor redeemed the plaintiff's mortgage, he was not entitled to claim against his co-defendants, or any of them, the costs occasioned by the mortgage of the leasehold.

McMaster v. Demmery, 193.

3. Where defendants set up a defence to a bill, which if tenable would have formed sufficient grounds for their having taken steps to set aside the transaction, which it was now sought to enforce, but had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the Court under the circumstances, ordered them to pay the costs of the suit.

Miller v. Ostrander, 349.

INDEX TO THE

See also "Administration Suit," 2, 3.
 "Amendment," 1.
 "Disclaimer."
 "Master's Report."
 "Partition," 3.
 "Practice," 9, 12, 38.
 "Trusts," 3.

 CO-TENANCY.

See "Injunction," 8.

 COUNCIL.

(MUNICIPAL.)

See "Township Council," 1.

 COUNTY COURT.

A County Court has no equitable jurisdiction where any of the defendants do not reside in the county.

McLeod v. Miller, 194.

(APPEAL FROM.)

See "Costs," 1.

 CREDITORS.

(CONVEYANCE TO DEFEAT.)

See "Conveyance."

 CROWN, THE.

(AGENT OF.)

See "Demurrer," 1.

 CROWN LANDS.

This Court has jurisdiction in a proper case to give relief against a fraudulent assignment by a locatee of the Crown, before

the issuing of the letters patent, but a bill for the purpose must shew why it is necessary to come to this Court.

Bull v. Frank, 80.

DECREE.

(AMENDING.)

See "Practice," 10.

(REPAYMENT OF MONEY ON REVERSAL OF.)

See "Practice," 17.

—— (FOR SALE.)

See "Practice," 32.

DEED OF GIFT.

A deed of gift void against the grantor may be set aside at the instance of his heirs after his death.

Dawson v. Dawson, 278.

DEEDS.

(VARYING.)

An instrument under seal may be varied in equity by an agreement for valuable consideration, not under seal.

Brown v. Deacon, 198.

DEFENCE AT LAW.

See "Vendor and Purchaser," 1.

DEFENDANT.

(WHERE A COMPETENT WITNESS FOR A CO-DEFENDANT.)

See "Evidence," 1.

of the

94.

relief
before

DEMURRER.

A bill was filed against the Attorney-General, and A., the superintendent of certain slides belonging to the Crown, who was also the collector of the rates thereat, alleging that he had seized certain saw-logs of the plaintiff, and was about to sell them on the false pretence that the tolls thereon had not been paid. The bill prayed for an injunction to restrain the sale. A. demurred to the bill on the ground that being the agent of the Crown he was exempt from personal liability. The demurrer was overruled with costs.

Baker v. Ranney, 228.

 DEVISE.

(WORDS OF.)

See "Will," 2.

 DISCLAIMER.

A person interested in an equity of redemption informed the mortgagee before suit that he was willing to release to him his interest in the property. The mortgagee, notwithstanding, made him a defendant to a bill for sale of the mortgaged premises, and he filed an answer setting forth his willingness to release, and that he had before suit informed the plaintiff of such willingness: *Held*, that he was entitled to his costs.

Waring v. Hubbs, 227.

 DISCOVERY.

The Orders of Court of 1853, which abolish all interrogatories in bills, do not apply to bills for discovery in aid of an action at law. In such a case the old practice still prevails.

Hayball v. Shepherd, 426.

 DISCRETION.

(OF JUDGE.)

See "Practice," 2, 3, 8.

(OF MASTER.)

See "Practice," 12, 25.

DISPOSING MIND.

See "Will," 6.

DOWER.

Where a widow insisted on her right to dower as well as to the bequests made by the will, the Court allowed her her costs, although unsuccessful in such contention; the question having arisen from the terms of the will, dower not having been in terms excluded, and it was held to be excluded on extrinsic evidence.

Becker v. Hammond, 485.

See also "Will," 5.

ELECTION.

See "Will," 5.

EQUITABLE ASSIGNMENT.

Where a person having a demand against another, gave to a creditor of his own an order on his debtor for a portion of his demand, notice of which was duly given to the debtor, but this order the debtor did not accept:

Held, notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which it covered.

Farquhar v. The City of Toronto, 186.

See also "Interpleader," 1.

EQUITABLE EXECUTION.

See "Amendment,"

"Vendor and Purchaser," 2.

EQUITABLE INTEREST.

(SUBJECT TO EXECUTION.)

See "Amendment," 1.

EQUITABLE JURISDICTION.

(OF COUNTY COURT.)

See "County Court."

EQUITABLE MORTGAGE.

See "Practice," 15.

EQUITABLE SET OFF.

See "Injunction," 6.

ESPLANADE ACT.

Under the statutes, 16 Victoria, ch. 219, and 20 Victoria, ch. 80, authorizing the construction of the esplanade in front of the City of Toronto, the city surveyor is not authorized to set any value upon the strips of land given to the owners of water lots, his duty being merely to estimate the value of the work done by the city in filling in the esplanade; nor have the city any right to obtain an arbitration in order to establish a claim to compensation for such strips, unless the owner of the water lot shall have given notice under the statute that he is dissatisfied with the price allowed for the portion of the lot taken for esplanade purposes.

Mowat v. The Corporation of the City of Toronto, 267.

EVIDENCE.

1. The plaintiffs, as registered judgment creditors of the defendant B., were declared entitled, subject to certain special circumstances, to the benefit of B.'s lien for the unpaid purchase money of certain real estate sold by their debtor B. to M., and it was referred to the Master to find the amount due, and to state special circumstances:

Held, that M., admitting something to be due on account of the purchase money to his co-defendant B., was a good witness to prove payments on account, but not to shew special circumstances that would defeat the plaintiffs' right to any relief.

City Bank v. McConkey, 385.

2. A bill was filed by A. and B. to enforce certain registered judgments. B.'s interest was as assignee of A. The assignment was for the benefit of creditors, but it did not appear that any creditor was party or privy to the assignment; and the assignee

had sworn in one of the affidavits filed, that his only interest was as trustee for A :

Held, that any evidence admissible against A., was admissible against both plaintiffs.

McDonald v. Wright, 552.

See "Practice," II, 33, 34.

EXAMINATION.

(PUTTING OFF.)

See "Practice," 38.

EXAMINATION OF PARTIES.

See "Practice," 28, 29, 30, 31.

EXCHANGE OF LANDS.

An exchange of lands by an infant is not void, but voidable only, and as such may be rendered valid by acts of confirmation. Where, therefore, a party said to have been under age, and intoxicated when he made an exchange of lands, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was considered such a confirmation as barred those claiming under him from impeaching the transaction.

Miller v. Ostrander, 349.

See also "Vendor's Lien."

EXECUTOR.

Although the rule is, that an executor or trustee will not be permitted to deal on his own account with the trust estate, still where one of two executors empowered to sell, with the concurrence of the widow and the eldest son of the testator, aged eighteen or nineteen years, purchased part of the testator's property, the Court refused to set aside the transaction; the Master having found that at the time the sale was concluded it was beneficial to the infants.

McKnight v. McKnight, 363.

(WHEN CHARGEABLE WITH INTEREST.)

See "Administration Suit," 2.

FIERI FACIAS.

(SALE OF LANDS UNDER, PREVIOUSLY CONTRACTED TO BE SOLD.)

Where a debtor had entered into a binding contract for the sale of his land, before execution against his lands had issued :

Held, that his interest as vendor was not saleable under the execution.

Parke v. Riley, 69.

[But see this case on Appeal.—3 Err. & App. 215.]

 FIRE INSURANCE.

1. In the form of application used by an insurance company, and signed by an applicant for insurance, the following notice was printed: "Applications for insurance on manufacturing establishments where steam is used for propelling machinery, must be approved of by the head office at Montreal."

Held, that this notice did not refer to a vacant distillery, which had not been in operation for some years, and which at the time of the application it was not contemplated to put in operation.

Rowe v. The London and Lancashire Ins. Co., 311.

2. At the foot of a series of questions in the form of application, the following note was printed: "The applicant is requested to answer the above questions fully, as it is especially agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part, and be a condition of this insurance contract:"

Held, that the request to give full answers could not be construed as a notice that such answers were indispensable to the validity of the contract, or to the authority of an agent to bind the company by an intermediate insurance, there being no pretence of the omission to give full answers having been fraudulent. When such is the intention of the company, distinct notice to that effect should be given.—*Id.*

 FORECLOSURE.

See "Costs," 2.

"Disclaimer," 1.

"Practice," 20.

 FRAUD.

See "Undue Influence," 1, 8.

FRAUD ON CREDITORS.

See "Insolvency."

"Voluntary Settlement."

FRAUDULENT CONVEYANCE.

In August, 1861, J. B. being indebted jointly with W. B. to T. in the sum of £88, for which judgment had been recovered, and to one R. in the sum of £10, agreed with R. B., who was his son, and was not then of age, to convey to him 100 acres of land in consideration of his assuming payment of T.'s judgment, and of his making a lease for life to J. B., or J. B.'s wife, of 25 acres of the land, being the arable portion thereof. R. B. was then the holder of a due bill for £20, given to him in satisfaction of wages earned by him as a hired servant with an elder brother, and in pursuance of the said agreement transferred this to T., who received payment thereof, and also made a promissory note jointly with J. B. and W. B. for the balance of T.'s claim, which note remained unpaid. No conveyance was executed by J. B. until June, 1862, and no life lease until March, 1865, when R. B. made a lease to his mother for life, it being made to her and not to J. B., for the purpose of preventing J. B.'s creditors from taking it in execution. In the winter of 1861, and spring of 1862, J. B. became indebted to the plaintiffs, who afterwards recovered judgment, and filed a bill to set aside the transaction as fraudulent within the Statute of Elizabeth.

Held, under the circumstances, that the conveyance to R. B. could not be deemed voluntary, but that the life lease was voluntary, and must be set aside. The bill was therefore dismissed as against R. B., but without costs.

Delesdernier v. Burton, 569.

FRAUDULENT JUDGMENT.

A judgment, recovered at law, by the fraudulent acquiescence of the defendant in the action, will be inquired into in this Court at the instance of a subsequent judgment creditor; although the rule at law is that only the party to the action can move against the judgment there.

McDonald v. Boice, 48.

FURTHER DIRECTIONS.

See "Practice," 23.

INDEX TO THE
GOODS AND CHATTELS.

(AND LANDS)—SIMULTANEOUS WRITS AGAINST.

See "Lands."

GRANTED IN FEE.

See "Wild Land Taxes," 4.

GUARDIANS.

1. In a suit for the purpose (among other things) of having a guardian appointed, it is not the course of the Court to direct a reference to the Master to appoint a guardian, but only to approve of one, to be afterwards appointed by the Court if it sees fit.

Murphy v. Lamphier, 241.

2. It is irregular to give a reversionary guardianship of wards in Court to the successors in office of any named person.—*Id.*

HEIRS.

See "Parties," 6.

HUSBAND AND WIFE.

A father, before his daughter's marriage (in 1857), wrote a letter to her intended husband, saying he would give her £2,500 when she came of age, and one-fourth of his residuary estate at his death. In 1858, and before the wife came of age, the father advanced money to the husband, for which he took his note, but which he charged in his ledger to the joint account of the husband and wife, and intended, if the same was not repaid, to set off the amount against his daughter's share of the estate.

Held, in a suit by the wife in the husband's lifetime for administration of the estate, that the executors had a right to set off the advance against the wife's share.

Held, that such right was not affected by the fact that the father by his will, made after the marriage, but before the advance, had directed that any advances he should make were to be deducted from the £2,500; the reason of this provision appearing to be that the testator did not contemplate making any advances to an amount exceeding £2,500.

Held, that such right was not affected by the fact, that on a demand being made on the father for the whole £2,500, when his daughter came of age, he, in time, reluctantly yielded to the demand, not releasing, however, or agreeing or intending to release, his right against the husband for his previous advance.

Torrance v. Chewett, 407.

IMPROVEMENTS.

1. The principles upon which improvements by a mortgagee in possession, are to be allowed for, considered and acted on.

Paul v. Johnson, 474.

2. Where a mortgagee in possession had planted out fruit and ornamental trees, suitable for carrying out improvements commenced by the mortgagor, he was allowed the price at which the same was purchased, and a reasonable amount for care and cultivation since setting out, but he was refused his claim to be paid the value thereof at the time of redemption.—*Ib.*

3. A mortgagee in possession purchased at Sheriff's sale, under an execution issued upon a confession of judgment signed by the administratrix in favour of the mortgagee, who was her brother, and acting as her counsellor and agent, in the matters connected with the intestate's estate, and who thereupon made large improvements on the mortgage premises, under the belief that his purchase at Sheriff's sale had vested in him the absolute fee in the property. Under these circumstances, the Court, considering the case one of some hardship on the mortgagee, refused on further directions to send the case back to the Master, although it was probable some improvements had been allowed for, which had been made before such purchase at Sheriff's sale, and which were not in strictness allowable as between mortgagor and mortgagee; the party complaining of the allowances not having objected to the report, and the report did not in its face shew at what periods the improvements were made.—*Ib.*

IMPROVIDENCE.

Where a woman of sixty, who had a first charge on property for her maintenance for life, was induced to exchange it for a life lease of part of the property, subject to conditions which rendered the transaction an improvident one on her part; and it appeared that she was illiterate and dull of intellect, and had no professional or other competent adviser in the matter, and did not in some

important respects understand the nature or effect of the transaction:

Held, that it was not binding on her.

McLaurin v. McDonald, 82.

2. An improvident deed, obtained by a tavern-keeper from a boarder who was greatly addicted to intemperance, was set aside with costs.

McGregor v. Boulton, 288.

INFANTS.

See "Exchange of Lands."
 "Guardians."
 "Maintenance."
 "Parties," 7.
 "Practice," 14.
 "Specific Performance," 2.
 "Undue Influence," 8.
 "Wages."

INFANTS' ESTATE.

(MONEY PAID TO SAVE.)

See "Administration Suit," 1.

INJUNCTION.

1. A servant after leaving his master's service continues bound by an injunction issued while he was a servant against the master and his servants to restrain waste.

Brown v. Sage, 25.

2. Where an injunction forbids the cutting down of trees, it is no answer to a motion to commit for breach of the injunction, that the trees cut down in contravention of the writ were of little value.—*Ib.*

3. A servant who has notice of an injunction may be committed for breach of it, though he has not been served with the writ.—*Ib.*

4. An injunction may be granted in a proper case, though the bill is defective in respect of parties and form.

Dumble v. The Peterborough and Lake Chemung Railway Company, 74.

5. A bill was filed by a rate-payer seeking to restrain the trustees of a school from allowing the school house to be used for religious services, but the bill did not allege that it was filed on behalf of the plaintiff and all other rate-payers; two of the three school trustees consented to the injunction being granted as asked. The Court refused the application on the grounds first, that the suit was not properly constituted; and if it had been, it appearing that a majority of the trustees were in favor of the views of the plaintiff, they had, themselves, the power to do that which they consented to the Court doing. And if the bill had been by the plaintiff on behalf of himself and all other rate-payers whether then the suit would have been properly constituted. *Quære.*

Rabian v. The School Trustees of Thurlow, 115.

6. This Court has no jurisdiction to restrain execution or other proceedings at law on a legal demand upon a written instrument, on the ground that the defendant at law has a counter claim for unliquidated damages for the violation, by the plaintiff at law, of covenants contained in the same instrument.

Smith v. Wootton, 200.

7. Under the statutes 16 Victoria, ch. 219, and 20 Victoria, ch. 80, authorising the construction of the esplanade in front of the City of Toronto, the city surveyor is not authorized to set any value upon the strips of land given to the owners of water lots, his duty being merely to estimate the value of the work done by the city in filling in the esplanade; nor have the city any right to obtain an arbitration in order to establish a claim to compensation for such strips, unless the owner of the water lot shall have given notice under the statute that he is dissatisfied with the price allowed for the portion of the lot taken for esplanade purposes.

Mowat v. The Corporation of the City of Toronto, 267.

8. Although the general rule is that the mere fact of one tenant in common holding possession of the entire estate, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the Court will not in such a case interfere with the dealing of such co-tenant in regard to the property, still where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year, or the proceeds thereof, unless they undertook to bring into Court one-third of such proceeds; but refused to interfere in the possession of the mother and her husband in respect of previous years;

although as to such previous years the mother might have been accountable to her infant children as trustee for them.

Bates v. Martin, 490.

See also "Navigable River."

"Nuisance," 2.

"Obstruction of View."

"Practice," 22.

"Township Council," 1.

INSOLVENCY.

1. Fraud in contracting debts before the passing of the Insolvency Act, (1864,) is not to be excluded from consideration on an application for the confirmation of the insolvent's discharge.

Re Owens, 560.

2. Where a trader, all whose property was heavily mortgaged, and who had large over-due debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, falsely alleging that he was worth \$4,000 more than he owed, and that he had no engagements he could not meet; he was held to be guilty of such fraud as disentitled him to his discharge under the act.—*Id.*

INSOLVENT.

(SALE BY.)

A person in insolvent circumstances made a bill of sale of his property to one of his creditors, the consideration therefor being a pre-existing debt, and a sum of money in addition sufficient to make up the price agreed upon as the value of the property sold; the amount of money so received by the debtor being by him paid over, with the knowledge of the purchaser, to another creditor; and three months after this sale was completed, the debtor made an assignment of his assets under the Insolvent Debtors' Act. On a bill filed by a creditor for that purpose, the sale was set aside and a resale of the property ordered, the proceeds to be applied in payment of the plaintiff's claim, and the residue, if any, to be paid over to the assignee in insolvency.

Coates v. Joslin, 524.

INSOLVENT ACT,

(1864.)

1. One of two partners, a few days before a writ of attachment against both under the Insolvent Act of 1864 had issued, assigned his estate for the benefit of his creditors:

Held, void as against the official assignee.

Wilson v. Stevenson, 289.

2. A voluntary assignment to an official assignee under the Insolvent Act of 1864 (sec. 2), is not valid unless accepted by the assignee.

Yarrington v. Lyon, 308.

3. The Insolvent Act of 1864 does not invalidate conveyances previously executed, and which were valid at the time of their execution.

Gordon v. Young, 318.

4. Notice of the application for allowance of an appeal must be served within eight days from the day on which the judgment appealed from is pronounced, but the application itself may be after the eight days.

Re Owens, 446.

5. Where the notice was served in time, but named a day for the application, which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable in the discretion of the Judge.—*Id.*

See also "Practice," 42.

 INSURANCE.

1. Where a fire policy provided that the same should be void if a new policy was effected without the consent of the Insurance Company, and an assignment was subsequently made of the policy to a mortgagee of the property with concurrence of the Company, after which the mortgagor effected another insurance without the consent required by the policy:

Held, on the premises being burnt down, that the policy was not void in equity as respected the mortgagee. [SPRAGGE, V.C., dissenting.] *Held*, also, that on paying the amount of the debt the company was entitled to an assignment of the mortgage.

Burton v. The Gore District Mutual Fire Insurance Company, 156.

[Affirmed in Appeal, 21st January, 1867.]

2. An insurance company accepted a note for the premium, and the policy contained the following clause: "In case of loss, such loss is to be paid in thirty days after proof of loss; the amount of the note given for the premium, if unpaid, being first deducted." A partial loss having occurred, it was

Held, that the assured had a right in equity to set off the amount against the note.

Berry v. The Columbian Insurance Company, 418.

3. The policy of insurance on a vessel provided that no partial loss or particular average should be paid unless amounting to five per cent. The vessel went on a shoal at Matanzas, but did not leak immediately, and was therefore supposed to have received no injury, and the contrary was not discovered until after she had sailed for Europe with a cargo. She touched at Queenstown for orders, and thence sailed for Stockholm, where she discharged her cargo and returned to England. On being examined there she was found to have sustained damage exceeding five per cent. The court, being satisfied that the injury was either wholly sustained at Matanzas, or was the immediate and necessary consequence of what occurred there, it was *held*, that the insured was entitled to recover.—*Ib.*

See also "Fire Insurance."

INTEREST.

A written promise by a mortgagor, after default, to allow more than the six per cent. interest reserved by the mortgage, was held to be binding, on the authority of *Alliance Bank v. Brown*, 10 Jur. N. S. 1121; though there did not appear by the writing to have been any consideration of forbearance or otherwise for such promise.

Brown v. Deacon, 198.

See also "Administration Suit," 2.

"Trusts," &c. 3.

INTERPLEADER.

One G. recovered a verdict against the plaintiff, in March, 1863, in the county court of P., which G. assigned during the same month to D. & R., of which assignment notice was given to the plaintiff in the November following. In April, the month after the recovery of the verdict, the debt was attached by certain creditors of G., and they, as well as D. & R., pressed the

plaintiff for payment, but took no step as between themselves to test the question as to which had a right to payment. An execution in the suit having been placed in the hands of the Sheriff, the plaintiff paid the amount to the Sheriff, which was immediately paid over to D., the Attorney in the action. In the meantime a writ had been ordered to issue at the suit of the attaching creditors, by the Judge of the County Court of N., which action D. refused to defend; and judgment was entered by default the same day that the debt and costs had been paid to the Sheriff.

Held, under the circumstances, that the plaintiff was not bound to take upon himself the responsibility of deciding between the rival claimants, and that he was entitled to file a bill in this Court, calling on them to interplead, without paying the money into court.

Davidson v. Douglas, 181.

JUDGMENT.

(FRAUDULENT.)

See "Fraudulent Judgment."

JUDGMENT CREDITOR.

The lien of registered judgment creditors is not preserved by a bill filed before the 18th of May, 1861, but to which they were not made parties until after that date. *The Bank of Montreal v. Woodcock* (Ante vol. ix, page 142), overruled.

Shaw v. Cunningham, 101.

See, also, "Practice," 32.

JUS TERTII.

A bill having been filed by the assignee of the right to certain lands, against the trustee thereof, without making the heir of the assignor a party, and the trustee set up a defence impeaching the assignment, and insisting that such heir was the party entitled to the conveyance, the Court, at the hearing, ordered the cause to stand over, with liberty to amend by adding the heir as a party defendant.

Miller v. Ostrander, 349.

LANDS.

(AND GOODS AND CHATTELS)—SIMULTANEOUS WRITS AGAINST.

A judgment creditor had issued at the same time, and placed in the hands of the Sheriff, alias *fi. fas.* against goods and *fi. fas.* against lands; and the Sheriff, by direction of the creditor, made a seizure of goods, and the writs against goods were afterwards, and before sale, withdrawn; meanwhile the debtor had conveyed his land in trust for creditors; an injunction was granted at the instance of the grantee to restrain a sale under the writs against lands until the hearing of the cause.

Paton v. The Ontario Bank, 366.

See this case on hearing, post vol. xiii, p. 107.

LAW.

(DEFENCE AT.)

See "Vendor and Purchaser," 1.

LEASE.

(OUTSTANDING.)

See "Partition," 1.

LEGACIES.

See "Abatement."

LIEN.

See "Judgment Creditor."
"Vendor's Lien."

LIMITATIONS.

(STATUTE OF.)

See "Will," 4.

LONG VACATION.

See "Practice," 39.

MAINTENANCE.

In a suit for maintenance out of the property of the infants, the Master is usually directed to inquire and state what would be a proper sum to allow, but no authority is given for the payment until the report is brought before the court for its approval—the object being the more effectual protection of the interests of infants.

Murphy v. Lamphier, 241.

MARRIAGE SETTLEMENT.

C. the holder of two mortgages created by H., between whom and the niece of C. a marriage was about to take place, became a party to the marriage settlement, which embraced, amongst other property, the lands covered by the mortgages, and subsequently instituted a suit to reform the settlement, so as to leave his mortgage unaffected thereby, and also to reform a mortgage made by H. with the assent of C., after the marriage, to one J. M., for the benefit of creditors, or to postpone it to his own, and prayed a foreclosure or sale, but did not offer to redeem. After the hearing of the cause the plaintiff paid off this mortgage and other claims upon the estate, and thereupon filed a petition setting forth these facts, and praying a declaration that he was entitled to recover the amounts so paid by him, and the amount due upon his two mortgages, and in default of payment a foreclosure of the mortgage premises:

Held, that all he was entitled to was a foreclosure against H., with the costs of an ordinary foreclosure suit, the plaintiff paying the costs occasioned by the other parts of his bill in which he was unsuccessful, as also the costs of the defendants appearing on the petition; the Court being of opinion that he should, in the first instance, have drawn up a decree for redemption, and acted on it.

Quere—Whether under the circumstances the plaintiff could, if objected to, even enforce his mortgage against H., or whether the plaintiff is not in the position of a mortgagee who had represented to the wife before marriage that he held no incumbrance on the settled property.

Cornwall v. Henriod, 938.

MASTER.

(APPEAL FROM.)

See "Practice," 25, 26.

(REFERENCE BACK TO.)

See "Practice," 33, 34.

INDEX TO THE
MASTER'S OFFICE.

See "Practice," 26, 33, 34, 40, 41.

MASTER'S REPORT.

In order to enable the Court the better to deal with the question of costs, on further directions, the Masters to whom references are made should, in their reports, distinguish between sums received and sums which, but for wilful neglect and default, might have been received by the parties chargeable therewith.

Moodie v. Leslie, 587.

(CORRECTING.)

See "Practice," 35.

MENTAL CAPACITY.

(OF TESTATOR.)

See "Will," 6.

MORTGAGE—MORTGAGOR—MORTGAGEE.

1. A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate, had had no Solicitor in the cause, and misunderstood the object of the bill, which was the only paper served on him; the mortgage bearing twelve per cent. interest, the property appearing to be three times the value of the incumbrance, and the whole or greater part of the property being still in the possession of the mortgagor.

Platt v. Ashbridge, 105.

2. It is no defence to a bill of foreclosure that the mortgage was given to secure the purchase money of the mortgaged property, and that to part of it the vendor (now the mortgagee) had no title.

Cockenour v. Bullock, 188.

3. Where a mortgagee assigned the mortgage, covenanting for the payment of the mortgage money, and subject to an agreement between the mortgagee and assignee, that the former might have

a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenant. *Held*, that he was entitled to a lien therefor as against the mortgagor.

Fleming v. Palmer, 226.

4. A mortgagee took a release of the equity of redemption, and thereupon an agreement was signed by both parties for the purchase of the property by the grantor for a sum exceeding the amount due on the mortgages, not giving the grantor a mere option to purchase, but binding him to buy and pay the stipulated price. *Held*, that the transaction was one of mortgage.

Hawke v. Milliken, 236.

5. The rule is that a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage.

Rogers v. Lewis, 257.

6. But this rule does not necessarily exclude the right of obtaining, in the same suit, against other parties, relief consequent on such redemption.—*Ib.*

7. Where a mortgagor had assigned the mortgage property, and taken collateral security from the assignee for payment of part of the mortgage money, a bill by such assignee against the mortgagee and mortgagor was held not to be improper.—*Ib.*

8. But where such a bill did not offer to pay what was due to the mortgagee, or pray redemption, and prayed relief against the mortgagor only in respect of the collateral security, a demurrer was allowed.—*Ib.*

9. A mortgagee of unpatented land, after certain judgments were registered against him, assigned all his estate for the benefit of his creditors. The trustee paid to the government out of the trust estate the balance of the purchase money. *Held*, that in respect of the sum so paid he was entitled to priority over the judgment creditors.

McIntyre v. Shaw, 295.

10. On making an advance of money on the security of real estate, it is not competent for the lender to bargain for the purchase of the property at a specified sum in case of default in repaying the advance at the time stipulated.

Fallon v. Keenan, 388.

11. The widow of an intestate obtained letters of administration, and her brother, a lawyer, acted for her as a friend, not

professionally, in the management and the settlement of the affairs of the estate. While so employed, the brother, with his own moneys, purchased a mortgage which had been created by the intestate.

Held, that he was entitled to hold the mortgage for his own benefit.

Paul v. Johnson, 474.

12. Where the holder of a mortgage went to reside with his sister, the widow of the mortgagor, upon the mortgaged premises, but did not assert any claim or right to possession as mortgagee until some years afterwards, when the widow, being about to marry, desired her brother to leave; and then, for the first time, he set up a claim to hold possession as mortgagee. On appeal from the finding of the Master, the brother was charged with occupation rent from that period, not from the time of his going to reside on the property; and such assertion of right had not the effect of referring back his possession to the time when he first acquired the right or went to reside on the property.—*Id.*

See, also, "Costs," 2.

"Power of Sale."

"Registration."

"Tacking."

MORTMAIN ACTS.

See "Municipal Corporations."

MULTIFARIOUSNESS.

See "Pleading," 1, 2, 8.

MUNICIPAL CORPORATIONS.

After the passing of the 27 Victoria, chapter 17, a municipal corporation invested, on mortgage, part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the securities. *Held*, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the statutes of mortmain.

The Municipality of Orford v. Bailey, 276.

MUNICIPAL OFFICERS.

Where assessors or other officers of municipalities omit to follow the plain directions in Acts of Parliament, and any loss thereby arises to the municipality, it would seem that the party causing such loss would be answerable therefor to the municipality.

Christie v. Johnston, 534.

NAVIGABLE RIVER.

1. Where relief would be given at the suit of an individual in respect of an injury to a private water course, an information will lie at the instance of the Attorney-General for an injury to a navigable stream.

The Attorney-General v. Harrison, 466.

2. What is a navigable river considered and defined.—*Ib.*

3. The Crown, in making sale of a lot of land situate upon a navigable stream, stipulated that the purchaser should erect on the property a saw-mill, as well as a grist-mill.

Held, that this did not warrant the purchaser in creating a nuisance in the river by throwing into the stream the saw-dust and refuse of his saw-mill, the effect of which was to create obstructions in the river to such an extent as to injure or impede the free use of the river by vessels navigating the same.—*Ib.*

NEXT OF KIN.

See "Parties," 4. 7.

NUISANCE.

1. Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbour's house any impurity which there are known means of guarding against.

Cartwright v Gray, 399.

2. That defendant erected in the City of Kingston a plaining machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse; he took no means

to consume or prevent the smoke, and it being carried to the plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke.—*Id.*

OBSTRUCTION OF VIEW.

The owner of two adjoining shops leased one to the plaintiff and the other to the defendant. The plaintiff's shop window had been so constructed as to present a side view to persons coming along the street, the object being to attract their attention, and obtain their custom for the wares displayed in the shop; and the privilege was shewn to be a very important one. The tenant of the adjoining shop having placed a show case in an open space or door-way of his shop, so as to intercept the view of the plaintiff's window, was restrained by injunction from continuing the obstruction.

Brummell v. Wharin, 283.

OCCUPATION RENT.

See "Mortgage," &c., 12.

OFFICERS.

(OF MUNICIPALITY.)

See "Municipal Officers."

OPENING FORECLOSURE.

See "Mortgage," &c., 1.

OPPRESSION.

See "Undue Influence," 8.

OUTSTANDING LEASE.

See "Partition," 1.

PAROL CONTRACT PARTLY PERFORMED.

The evidence of a parol contract for the purchase of land considered, analyzed and acted on.

Grant v. Brown, 52.

[Reversed by Court of Error and Appeal, 14th March, 1867.]

PARTIES.

1. After witnesses had been examined, and the cause heard at Sandwich, the cause was re-argued at Toronto. *Held*, that the defendant could not insist, as a matter of right, on an objection for want of parties not taken at the hearing at Sandwich.

King v. Keating, 29.

2. To a suit by an owner to set aside a sale for taxes, the plaintiff offering to repay the purchase money with interest, the corporation of the county municipality is not a necessary party.

Smith v. Redford, 316.

3. To a bill for partition, a lessee for years may be a necessary party.

Fitzpatrick v. Wilson, 440.

4. Where the usual decree is obtained by one of an intestate's next of kin for the administration of his personal estate, the Master is not to make the other next of kin parties in his office, but is to see that all have been served with an office copy of the decree under the 6th General Order of June, 1853, before he reports, and, generally speaking, before he proceeds with the reference.

English v. English, 441.

5. In such case the Court may dispense with the service of the decree on any of the next of kin who are out of the Province; and the application for this purpose may be made *ex parte*—*Ib.*

6. So, when the decree is for the administration of real estate, all the heirs must be served with an office copy of the decree, but are not to be made parties or served with the proceedings in the Master's office; though any of them may, by notice, require to be so served, if they desire it.—*Ib.*

7. The rule is the same when some of the next of kin or heirs are infants—*Ib.*

8. Where a mortgage is taken in the name of one partner to secure a partnership debt, and a bill is filed to enforce the security, the representatives, real or personal, of a deceased partner, are not necessary parties.

Stephens v. Simpson, 493.

See also "Practice," 27, 36, 37.

PARTNERSHIP.

1. One member of a co-partnership was entrusted with the sole management of the books and finances of the company. The

books, kept by the book-keeper of the company, shewed him in advance to the firm, while in reality they should have shewn a balance against him for a considerable amount. This partner sold out his interest to one of his co-partners. *Held*, that such purchase did not vary the right of the partner to call upon the other to account for moneys not appearing in the books of the co-partnership.

Kintrea v. Charles, 117.

2. Where one of several co-partners acts so improperly in the affairs of the co-partnership as to render it liable to an action for damages, the other members will be entitled to maintain a suit for the amount thereof against him; and this right will not be prejudiced by the fact that on the dissolution of the partnership the continuing partner gave to the one so acting a bond of indemnity, and to save him harmless from actions; if it appear that the fact of such improper acting of his partner was withheld from him.—S. C. 123.

PARTITION.

1. The fact that there is an outstanding term in lands to portions of which infants are entitled, is no defence to a bill of partition although it may influence the Court in deciding between a sale or a partition of the estate.

Fitzpatrick v. Wilson, 440.

2. To a bill for partition, a lessee for years may be a necessary party.—*Ib.*

3. The costs decreed in partition suits are, as in other suits, party and party costs; and where any of the parties are not *sui juris*, costs as between solicitor and client are not decreed even by consent.

Harkness v. Conway, 449.

PATENT.

(Jurisdiction of Court before patent for land issued.)

See "Crown Lands."

PATENTED.

See "Wild Land Taxes," 4.

PLEADING.

1. The purchaser of an estate which was subject to a mortgage created by way of security for a third party, of which the purchaser was ignorant, filed a bill to be relieved against it, stating two alternative cases for such relief; first, that the mortgage had been discharged by reason of time given by the holders thereof to the principal debtor; the second, that the mortgagor, who sold the property and had covenanted that it was free from incumbrances, was bound, and might be ordered, to pay off the mortgage and procure its discharge, but did not offer himself to redeem the holders thereof. On demurrer by the mortgagee, held that the bill was multifarious.

Connor v. The Bank of Upper Canada, 48.

2. Where a plaintiff, suing on behalf of himself and all other creditors, prayed for an administration of the estate, and specific performance of an agreement entered into with himself in case the defendants should elect to perform the same, the other creditors having no common interest in such agreement, the bill was held multifarious.

Glass v. Munsen, 77.

3. The rule is that a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage.

Rogers v. Lewis, 257.

4. But this rule does not necessarily exclude the right of obtaining in the same suit against other parties, relief consequent on such redemption.—*Ib.*

5. When a mortgagor had assigned the mortgage property and taken collateral security from the assignee for payment of part of the mortgage money, a bill by such assignee against the mortgagee and the mortgagor was held not to be improper.—*Ib.*

6. But where such a bill did not offer to pay what was due to the mortgagee, or pray redemption, and prayed relief against the mortgagor only in respect of the collateral security, a demurrer was allowed.—*Ib.*

7. Every material allegation in a bill should be positive; and an allegation that, so far as the plaintiffs know, an assignee had not accepted the assignment executed by an insolvent, was held insufficient.

Yarrington v. Lyon, 308.

8. Although it would seem that a bill would be good, though relating to several transactions, if between the original parties to

them; still where a suit was instituted impeaching two separate and distinct transactions between the same parties, but one of the parties thereto was dead, and his interest in two several parcels of land, the subject matter of the suit, had passed to two separate sets of claimants, and who as such were made parties defendants, a demurrer for multifariousness was allowed.

Loucks v. Loucks, 343.

9. A bill by the owner of land will lie to set aside a registered deed as a cloud on his title; though no privity exists between him and the parties to such deed, and no fraud on their part is alleged in the bill.

Shaw v. Ledyard, 382.

10. *Quære*, whether a bill will lie to remove a cloud on the plaintiff's title unless it appears that the impeached deed, if valid, would affect the equitable title only, or unless it appears that the plaintiff is in possession, or that the lot is wild and not in possession of any one, so that there is no opportunity of first vindicating the plaintiff's title at law.—*Ib.*

See also "Injunction," 5.

POWER OF SALE.

It is the settled rule of equity, that a mortgagee in exercising a power of sale must take reasonable means of preventing a sacrifice of the property; hence, where a mortgagee took no means whatever for that purpose, and sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside.

Latch v. Furlong, 303.

PRACTICE.

1. Although proceedings in the Master's office may, under the general order, be taken *ex parte* against a defendant, who has allowed a bill to be taken *pro confesso* against him, that mode of proceeding is irregular where an administration order has been obtained upon notice without bill filed.

Jackson v. Matthews, In re Pattison, 47.

2. In a suit of foreclosure after the cause had been at issue for more than three years, but no hearing or examination of witnesses had taken place, the Judge in Chambers allowed the personal representative of a deceased party to the cause, who had pur-

chased from the mortgagor, and against whom the bill had been taken *pro confesso*, to put in an answer setting up what in the opinion of the learned judge was a meritorious defence.

Anonymous, 51.

3. *Quare*, whether this was not a matter of discretion for the judge and was not the subject of appeal.—*Ib.*

4. Re-hearings, or applications to discharge Orders made in Chambers, must be set down for a day which falls within the periods prescribed by the Orders of the 9th of May, 1862, and the 20th of February, 1863, and it is not sufficient that the case should be set down and the notice thereof served within such periods.

In re D. G. Miller, 73.

5. When an Order was made in Chambers in December, and the full Court had a sitting in the following January, and another in February, and not another until June :

Held, that it was irregular, without leave to set down for hearing in June a motion to discharge such Order.—*Ib.*

6. Where a reference is made to the Master as to title, and objections are brought in thereto, the Master is not warranted in making a report, either for or against the title: his proper course is to mark each objection "allowed," or "disallowed," as the case may be.

Cockenour v. Bullock, 73.

7. A joint answer having been put in by a corporation under the corporate seal, and by their officer under oath, the defendants afterwards applied for leave to file a supplemental answer, alleging a material mistake in the original answer; and the Court granted leave to the corporation to file the supplemental answer on terms, but refused such leave to the officer, his explanation of the alleged mistake being unsatisfactory.

Walsh v. DeBlaquiere, 107.

8. A Judge in Chambers has a discretion to refuse to adjourn any matter to be heard in Court.—*Ib.*

9. A., an execution creditor of B., was made a defendant to a suit as claiming an interest in certain chattels which the plaintiff claimed as prior mortgagee. A. filed an answer and disclaimer, but it appeared that his solicitor had given instructions to the Sheriff to seize the interest of the debtor therein, if any. *Held*,

that before answering the bill he should have notified the plaintiff that he made no claim to the chattels, and that, not having done so, he was not entitled to the costs of the suit.

Lymburner v. Clarke, 180.

10. Where, on a bill praying foreclosure only, a decree for sale was drawn up with a direction that the mortgagor should pay any deficiency, the Court, at the instance of the mortgagor, four years afterwards amended the decree by striking out this direction, but ordered the mortgagor to pay the costs of the proceedings which had taken place under the decree.

Cockenour v. Bullock, 188.

11. The particulars stated that are necessary to be shewn in support of a petition to be allowed after the hearing of a cause to put in newly discovered evidence.

Mason v. Seney, 143.

12. Where the Master is directed by a decree to tax the costs of the suit, he has no jurisdiction to decline taxing them, even if he finds that the amount due does not exceed \$200, and that the suit might have been brought in the County Court.

McLeod v. Miller, 194.

13. A County Court has no equitable jurisdiction where any of the defendants do not reside in the county.—*1b.*

14. Where a bill by a mortgagee against the infant heir of the mortgagor prays a foreclosure, and the Court, for the protection of the infant, directs an inquiry whether a foreclosure or a sale is more for the benefit of the infant, it is not necessary to direct the Master to make the executor of the mortgagor a party in his office, in case of the Master's opinion being in favor of a sale.

Trust and Loan Company v. McDonnell, 196.

15. A subsequent incumbrancer is entitled to a sale upon the usual terms, where the plaintiff is an equitable mortgagee by deposit of title deeds, as well as where the mortgage is by deed.

Kerr v. Bebee, 204.

16. On a motion for an injunction against one defendant, the cross-examination of another defendant on his answer was held inadmissible in reply to the affidavits filed in answer to the motion, where the defendant, against whom the plaintiff moved, had no notice of the cross-examination, or of the plaintiff's intention to read the deposition on the motion.

Curtis v. Dales, 244.

17. Pending the re hearing of a cause a sum of money, which before suit had been tendered by defendants to the plaintiff on account of salary, was ordered to be paid by the defendants to the plaintiff as a condition of staying proceedings under the decree already pronounced. On re-hearing this decree was affirmed, whereupon the defendants appealed to the Court of Error and Appeal, when the decree was reversed; the bill ordered to be dismissed, and the cause remitted to this Court to carry out that order.

Held, that the plaintiff was bound to repay the money so paid to him by the defendants, the duty of this Court being, in carrying out the order of Appeal, to place the defendants in the same position, as far as possible, as if the bill had been dismissed at the hearing.

Weir v. Mathieson, 299.

18. Where a bill was filed to restrain proceedings by a township council on a resolution which named, it was alleged, a higher rate than was necessary to raise the sum required for county purposes, and the plaintiff allowed a term of the common law courts to pass before moving for an injunction, it was held—following the decision in *Carrol v. Perth*, ante vol. x. page 64—that he came too late, the proper course in such a case being to move at law to quash the resolution or by-law.

Grier v. St. Vincent, 330.

19. Where the umpire chosen upon a reference to arbitration had allowed an affidavit to be used in evidence, but he remarked, when it was read, that he would not attach any weight to it, and swore that in adjudicating upon the matters in difference he did not take such affidavit as evidence, or attach any weight whatever thereto, the award, notwithstanding, was set aside; but, under the circumstances, without costs.

McEdward v. Gordon, 333.

20. Although a bill does not pray redemption, but a decree for redemption is issued upon it, it would seem that a subsequent dismissal of the bill operates as a foreclosure.

Cornwall v. Henriod, 338.

21. In a suit for the administration of a debtor's estate, under an assignment for the benefit of creditors, creditors who come in under a decree may rehear the cause, and this is the proper course where the alteration is such as might be effected in that way by a party to the cause.

Mulholland v. Hamilton, 413.

22. After service of an injunction the plaintiff amended his bill, and added a new defendant, who was a mere trustee for the plaintiff, without, however, altering the frame of the bill or the prayer. Subsequently to the amendment, the defendants committed a breach of the injunction, and the plaintiff moved to commit the defendants. *Held*, that the amendment was not a waiver of the injunction.

McDonell v. McKay, 414.

23. When a decree *pro confesso* reserves further directions, and it is not necessary to serve notice on any of the parties, the cause may be set down on further directions at any time before the sitting of the Court.

Cook v. Gingrich, 416.

24. The Orders of Court, of 1853, which abolish all interrogatories in bills, do not apply to bills for discovery in aid of an action at law. In such a case the old practice still prevails.

Hayball v. Shepherd, 426.

25. By the General Order (No 42) the Master here has been given a greater discretion as to the conduct of references before him than the Masters in England have.

Sculthorpe v. Burn, 427.

26. The Master overruled certain objections raised before him as to the regularity in point of form of certain proceedings in his office. On an appeal from this decision the Court considered that if he had allowed the objections he would not have taken an improper view of them; the Court, however, refused to interfere with the Master's ruling, and dismissed the appeal, but without costs.—*Ib.*

27. P. being a debtor of the plaintiff, deposited with him certain mortgages to secure such indebtedness; the plaintiff filed a bill against the parties entitled to the equity of redemption of one of these mortgages for payment of the money due thereon, and praying in default foreclosure. The defendants, at the hearing objected that P. was a necessary party, but the Court overruled the objection as it had not been taken by answer, and P. might be ordered to be made a party in the Master's office.

Jones v. The Bank of Upper Canada, 429.

28. Where a plaintiff, though duly served with *subpœna* and the examiner's appointment, does not appear to be examined under 22nd Order of the 3rd of June, 1853, the defendant's motion,

that he do attend or stand committed, is made *ex parte*, unless the Court sees fit to direct notice to be given.

Fowler v. Boulton, 437.

29. A defendant has a right to examine the plaintiff as soon as his own answer is filed, though there may be other defendants who have not answered; and it is not necessary to serve such other defendants with notice of the examination.—*Ib.*

30. The plaintiff by amending his bill does not postpone his liability to be examined until after the time for answering the amendments expire.—*Ib.*

31. Service on the solicitor of a copy of the examiner's appointment for the examination of a party is a sufficient notice to the solicitor; and it is not necessary that the appointment should name the parties at length.—*Ib.*

32. According to the form of decree to enforce by sale the lien of a registered judgment creditor, and the practice under it, as sanctioned by the Judges while the law for the registration of judgments was in force, the debtor had a day to redeem, and, unless he made default, no inquiry as to other incumbrances was made; but in case of default, and an order for sale thereon, the Master then inquired as to other incumbrances, in order to the distribution of the proceeds under the decree.

Crawford v. Bingle, 450.

33. Where a reference back to the Master to review his report is directed, the Master is, as of course, at liberty to receive further evidence.

Morley v. Matthews, 453.

34. Where the Court, on a reference back to the Master, does not mean that he shall take further evidence, the order contains a direction to that effect—unless the reference back is expressed to be for a purpose on which further evidence could not be material.—*Ib.*

35. The Court will, at almost any stage of a cause, make a special order for the correction of slips in a Master's report.—*Ib.*

36. Where there is only one principal and one surety, both must be made parties to a bill for foreclosure or sale.

Seidler v. Sheppard, 456.

37. Where a mortgage is given by a surety on his own property, the principal is a necessary party to a suit for a foreclosure of the mortgage.—*Ib.*

38. Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made diligent efforts to secure the attendance of such witness, who is residing within the jurisdiction, but fails to secure it, the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases, the costs will be disposed of according to circumstances and in the discretion of the Judge.

Pattison v. McNab, 488.

39. It is irregular to proceed with references in the offices of the Masters, unless by consent, during the long vacation.

Anderson v. Thorpe, 542.

40. Where the Master is directed to inquire as to incumbrances, and there is a dispute between two or more persons as to who are entitled to one of the incumbrances, it may, according to circumstances, be his duty to decide the question himself, or to report the incumbrance, its priority as respects other incumbrances, and the dispute between the claimants, so that the Court may give proper directions for determining the question.

McDonald v. Wright, 552.

41. There may, in a proper case, be an appeal from a Master's ruling, as to the inadmissibility of evidence, before the Master makes his report.—*Ib.*

42. Objections to the security on an appeal from the County Court Judge, under the Insolvency Act, 1864, are to be made to such Judge.

Re Owens, 560.

See, also, "Evidence,"
"Injunction,"
"Parties," *i.*

PRINCIPAL AND AGENT.

See "Specific Performance," 3.

PRINCIPAL AND SURETY.

See "Practice," 36, 37.

PREFERENCE.

A mortgage of chattels to a creditor by a person in insolvent circumstances, not made with the intent of giving such creditor a preference, but under pressure, and to obtain an extension of time, under the expectation of being thereby enabled to pay all his creditors in full, is not void under the enactments against preference.—(22 Vic. ch. 26, sec. 18).

Gordon v. Young, 318.

See, also, "Insolvent."

PRO CONFESSO.

See "Practice," 23.

RAILWAY.

A company being authorized to construct a certain railway or part of it, built and put in operation part in due time; and after the expiration of the ten years limited by the Consolidated Railway Act (22 Vic. ch. 66, sec. 117) made calls, with a view of constructing the remainder:

Held, illegal; and that consequently any shareholder was entitled to restrain proceedings, though he might be the only shareholder objecting thereto.

Dumble v. The Peterborough and Lake Chemung
Railway Company, 74.

RECEIVER.

1. An agent claimed to retain possession of property for his indemnification in respect of certain accommodation notes given to his principals before the bankruptcy of the latter, on which, however, he had paid nothing, and he disputed any liability to the holders in respect thereof.

Held, that the assignee in bankruptcy was entitled to a receiver.

Kemp v. Jones, 260.

2. In such a case the defendant set up a defence founded upon a verbal agreement proved by his own affidavit only, and inconsistent with a written instrument which purported to contain the agreement entered into between the parties, such agreement having been drawn by the defendant himself, a practising attor-

ney and solicitor, and executed by all parties. The verbal agreement was said to have been omitted from the writing through the confidence existing between the parties.

Held, that the defence ought not to prevail on motion for a receiver.

Kemp v. Jones, 260.

3. A receiver granted, with liberty to the defendant to propose himself as such, without salary.—*Id.*

REDEMPTION.

See "Practice," 20.

REFERENCE AS TO TITLE.

See "Practice," 6.

REFERENCE BACK TO MASTER.

See "Practice," 33, 34.

REGISTRATION.

4. The owner of real estate, held under a registered title, devised a portion thereof—his homestead—to his wife in fee, but the will, although known to all the members of the family, never was registered. At the death of the testator (1837) the eldest son and heir-at-law, was residing on a farm of seventy-five acres, which his father had conveyed to him, with one of his brothers, but after the death of his father he went with his wife and children, and his brother, to reside on the homestead with his mother; and some years afterwards, by arrangement among some of the members of the family, he conveyed the farm of seventy-five acres to the brother, who thereupon took possession of and occupied it; but the heir-at-law continued on the homestead until his mother's death, which occurred twenty-four years after the death of the testator, during all which time he acted as apparent owner of the homestead, building on and improving it; the taxes therefore being assessed in his name, and he voting at elections upon it. About eight years after the death of his mother, and in the year 1862, the heir-at-law, who continued to occupy the homestead, created a mortgage thereon, which was duly registered, in favor of a person who was ignorant of the existence of the will: on a bill filed to enforce the mortgage:

Held, that, under the circumstances, the possession must be treated as that of the heir-at-law; that his brothers and sisters could not, as against a *bona fide* purchaser or mortgagee, allege the possession to have been that of the widow, and thereby set up a title under the Statute of Limitations; and that as against such purchaser or mortgagee the will, under the registry laws, must be treated as fraudulent and void.

Stephens v. Simpson, 498.

2. The only instruments executed before patent which can be registered in the County Registry Office are such as create a mortgage, lien or incumbrance on the land.

Holland v. Moore, 296.

3. A. bargained with B., the locatee of the crown, for the purchase of an unpatented lot free from incumbrances, and obtained a bond for a deed, and paid B. the full consideration. B. afterwards borrowed money on the security of the lot from C., who took out the patent, and conveyed the lot to B., and received from him a mortgage without notice of A.'s claim. After the loan had been agreed to, but before it was carried out, A. registered his bond in the Registry Office of the county where the land was situate. A bill by A. against C. for specific performance of the contract was dismissed with costs.—*Id.*

RE-HEARING.

See "Practice," 4, 21.

RE-PURCHASE.

See "Sale with Right of."

RESTS.

See "Trusts," &c., 3.

SALE.

See "Practice," 14, 15.

(WITH RIGHT OF RE-PURCHASE.)

The plaintiffs executed an absolute assignment of their interest in certain real estate, and the assignee gave his note for £500.

which he alleged to be the consideration for such assignment, payable in two years, subject to a condition expressed in the note, that the maker might retain thereout any advances he should in the meantime make to the assignors; no change of possession within the two years was intended, and none took place; the assignee alleged that the transaction was a sale to him with a right to the assignors to re-purchase by re-paying any advances he should make within two years; but no evidence of this being given, the Court held that the transaction must be treated as a mortgage, and that the agreement for sale in case of default was therefore void.

Fallon v. Keenan, 388.

SALE DECREE.

See "Practice," 32.

SALE BY INSOLVENT.

See "Insolvent."

SALE OF LANDS.

(UNDER FI. FA.) WHICH WERE PREVIOUSLY CONTRACTED TO BE SOLD.

See "Fieri Facias."

SALE FOR TAXES.

1. At a sale for taxes, where less than the whole lot is sold, the Sheriff should designate in some way the portion sold or offered for sale, so that bidders may know what portion they are bidding for.

Knaggs v. Ledyard, 320.

2. Where a Sheriff sold 185 acres out of 200 for taxes, and gave a certificate merely describing the land sold as the west part of the lot, comprising 185 acres, and no further intimation was given by the Sheriff of the portion of the lot he was to convey until the deed was executed, the sale was held invalid.—*Id.*

[The defendant appealed from this judgment to the Court of Error and Appeal, and the case now stands for judgment.]

See also "Taxes," 2.

SEAL.

(WHAT IS A SUFFICIENT.)

A deed had been duly signed by the parties; but instead of any wax or wafer being affixed thereto for seals, slits had been cut in the parchment, and a ribbon woven through, so as to appear on the face of the document at intervals, opposite one of which each of the parties to the deed signed.

Held, a sufficient execution of the instrument.

Hamilton v. Dennis, 325.

[Affirmed by the Court of Error and Appeal, 14th March, 1867.]

SERVANT.

See "Injunction," 1, 3.

SET OFF.

See "Husband and Wife."
"Insurance," 2.

SHERIFF.

See "Sale for Taxes," 1, 2.

(DEED BY.)

See "Pleading," 9.

SPECIFIC PERFORMANCE.

1. The evidence of a parol contract for the purchase of land considered and acted on.

Grant v. Brown, 52.

[Reversed on Appeal 14th March, 1867.]

2. Where in a suit by the personal representatives of a vendor for the specific performance of the contract of sale, an infant heir was joined as a co-plaintiff, the court refused to make a decree, although the bill had been taken *pro confesso* against the defendant, the purchaser, and ordered the cause to stand over, with a view to the plaintiffs amending their bill, by making the infant a party defendant, in order that the contract might be established against him.

Hamilton v. Walker, 172.

3. The owner of land in January, 1864, wrote to an agent requesting him to find "a purchaser for it at \$600 cash, or \$800 on a certain specified credit. Nothing was done on this letter, and in December, 1865, the property in the meantime having risen greatly in value, and the owner having received an offer for the timber on the land, wrote to the same agent informing him thereof, and asking his opinion as to what he (the owner) should take for the lot altogether." In February, 1866, the agent without further communication with the owner, contracted in writing to sell the property for \$600, "to be paid on the execution of a good and fully warranty deed, clear of all incumbrances," on a bill filed for specific performance by the purchaser against the owner, the Court considering that the letter of December, 1865, was a revocation of any authority contained in the letter of January, 1864, to sell the premises, refused to enforce the contract; and whether the letter of January, 1864, conferred upon the agent power to sell; *quere*. But if that letter did empower the agent to sell, he had not any authority for agreeing to give a deed such as that stipulated for.

Anderson v. McBean, 463.

SUPPLEMENTAL ANSWER.

See "Practice," 7.

SURETY.

(PRINCIPAL AND)

See "Practice," 37, 38.

TACKING.

Where the owner of property mortgaged it to W., and then assigned an undivided half to J., subject to the mortgage, and, at a later date, executed a mortgage on his remaining undivided half to B., who afterwards obtained an assignment of the first mortgage.

Held, that the representatives of J. were not bound to redeem both mortgages, but only the mortgage to W.

Buckler v. Bowman, 457.

TAXES.

1. To prove payment of taxes it is not necessary to shew that the collector was duly appointed; it is sufficient to shew that he acted and was acknowledged as such.

Smith v. Redford, 316.

2. To a suit by an owner to set aside a sale for taxes, the plaintiff offering to repay the purchase money, with interest, the corporation of the County Municipality is not a necessary party—*Ib.*

3. Where three separate and distinct lots were rated in bulk by the assessor, and were sold for arrears of taxes, the sale was set aside, and the purchaser, having stated at the sale that his object in buying was to secure the property for the person entitled, and afterwards claimed to hold the land for his own benefit, he was ordered to pay the costs of the suit.

Christie v. Johnston, 534.

TITLE.

[CLOUD ON.]

See "Pleading," 9.

(REFERENCE AS TO.)

See "Practice," 6.

TOWNSHIP COUNCIL.

(RAISING MONEY UNDER—BY-LAW OF.)

1. Where a bill was filed to restrain proceedings of a township council, on a resolution which named, it was alleged, a higher rate than was necessary to raise the sum required for county purposes, and the plaintiff allowed a term of the common law courts to pass before moving for an injunction, it was held (following the decision in *Carrol v. Perth*, ante vol. x, p. 64.) that he came too late, the proper course in such a case being to move at law to quash the resolution or by-law.

Grier v. St. Vincent, 330.

2. The Consolidated Assessment Act of Upper Canada, as affecting the question, considered.—*Ib.*

TRUSTS—TRUSTEES, AND CESTUIS QUE TRUST.

1. A. holding property in trust for B., for life, and then for B.'s wife and children, purchased B.'s life-estate at Sheriff's sale:

Held, that he was trustee thereof for B. only, and not for the other *cestuis que* trust.

King v. Keating, 29.

2. The Court has jurisdiction to decree a trust deed void, in the absence of the *cestuis que* trust; the Trustees sufficiently representing them under Order 6, sec. 2, rule 7 (1853); and it is in the exercise of the discretion of the Court under that rule, that in such cases the *cestuis que* trust, or some of them, are required to be made parties.—*Ib.*

3. The estate of a trustee, who had retained money in his hands for six years after he should have paid it over, and had rendered an account claiming a balance in his favor, was held chargeable with interest, at six per cent., with annual rests.

Small v. Eccles, 37.

4. A deed purporting to convey land to M. was executed by the plaintiff, under circumstances that disentitled the grantee to hold it as a valid deed entitling him to the beneficial interest in the property. The grantee, M., having afterwards sold and conveyed the land to R., receiving part of the purchase money, and a mortgage for the balance:

Held, affirming the decree reported ante vol. xi, p. 426, that on confirming the title of the purchaser (R.), the plaintiff was entitled to the balance of the mortgage money from R., and to a decree against M. for what M. had received.

Fraser v. Rodney, 154.

5. Parties claiming as *cestuis que trustent* under a deed of trust not completed by delivery, alleged in their bill filed to declare, and for the enforcing of, the trusts, that the deed creating the trust, if any, was not executed by or assented to by the persons therein appointed trustees; that the contents of the deed were never communicated to them by the grantors; that when the contents were afterwards communicated, the trustees so appointed expressly renounced, and refused to execute, the trusts therein contained. The plaintiffs were volunteers:

Held, on demurrer, that no interest passed by the deed, but that it was void.

Smith v. Stuart, 246.

6. Although the rule is, that an executor or trustee will not be permitted to deal on his own account with the trust estate, still, where one of two executors empowered to sell, with the concurrence of the widow and the eldest son of the testator aged eighteen or nineteen years, purchased part of the testator's property, the Court refused to set aside the transaction—the Master having found that at the time the sale was concluded it was beneficial to the infants.

McKnight v. McKnight, 363.

UNDUE INFLUENCE.

1. T., who owned a farm which he had mortgaged to its full value, executed a conveyance thereof to the defendants, and procured her to execute a mortgage thereon in his favor for £1125. The defendant was a woman of fifty or sixty years old at this time, and had been living for some weeks at T.'s house, who had her entire confidence. She had no other adviser in the matter, and there was no reliable evidence of the deeds having been read over or explained to her; and no evidence of any previous negotiation for a purchase by her.

Held, that the transaction was invalid.

Elgie v. Campbell, 132.

2. A sale at an undervalue to a person under whose influence the grantor is, is not objectionable as a gift would be under like circumstances.

Mason v. Seney, 143.

3. When a deed of gift is objectionable according to the doctrines acted upon in equity to guard against undue influence, the mere circumstance that the grantor had previously expressed an intention of at some time giving the property to the grantee is not a sufficient ground for upholding the deed.

Dawson v. Dawson, 278.

4. A deed in favor of a third person, obtained through the influence of one occupying a fiduciary relation to the grantor, and not giving him the advice which he ought to have received, cannot be sustained.—*Ib.*

5. An improvident deed, obtained by a tavern-keeper from a boarder who was greatly addicted to intemperance, was set aside with costs.

McGregor v. Boulton, 288.

6. An improvident bargain for the sale of the plaintiff's property, where the parties were very unequal as regards means, intelligence and otherwise, and the papers were drawn by the vendee, who omitted some important parts of the bargain, and the vendors had not the protection of competent independent advice, was held not to be binding on the vendors.

Fallon v. Keenan, 388.

7. The plaintiff being old and infirm, was induced by his son, with whom he resided and who had great influence with him, to

agree in writing to leave to the decision of two referees the terms of his will, and to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent, independent advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the Court decreed the lease void, and the will revocable at the pleasure of the plaintiff.

Donaldson v. Donaldson, 431.

8. A widow, to whom dower had been assigned, agreed with the person by whom she was employed as housekeeper, to convey the same to him in trust for the benefit of his infant son, eight or nine years old, and to whom it appeared she was much attached, in consideration of a certain sum of money, for the payment of which the widow's lands were answerable, and were liable to be sold, and also an annuity secured to her; the consideration however, not being at all equal to the value of the property. The Court, in the absence of proof of any undue influence, oppression, persuasion or fraud, refused to set aside the agreement as against the infant.

Gourlay v. Riddell, 518.

UNPATENTED LANDS.

See "Registry Act."

VACATION.

(THE LONG.)

See "Practice," 39.

VARYING DEEDS.

See "Deeds," 1.

VENDOR'S LIEN.

J. and S., the owners of two distinct parcels of land, agreed to exchange the one for the other. S.'s land was subject to a mortgage, which he agreed to pay off, but did not; and J. was compelled to redeem the same:

Held, that J. was entitled to a lien on the land conveyed by him to S. as for unpaid purchase money, for the amount paid to redeem the mortgage.

Seney v. Porter, 546.

VENDOR AND PURCHASER.

1. Upon a contract for sale of land the purchaser was let into possession; the vendor, instead of complying with his vendee's demand for an abstract of title, instituted proceedings in ejectment, so as to compel payment of the purchase money; and the purchaser defended that action, and did not proceed in this Court until the vendor had recovered judgment. On investigating the title it was found to be bad; the Court, although it gave the purchaser relief so far as restraining the proceedings in ejectment, refused him his costs of his defence at law, but gave him his costs in this Court.

Winters v. Sutton, 148.

2. W. had an interest in land as vendee, but had made default in paying the purchase money and otherwise. The plaintiff B. and one H. had executions in the sheriff's hands on judgments recovered at law against W., H.'s execution having priority. The plaintiffs B. and D. (the latter having the control of H.'s execution) severally inquired of the vendor, whether, if he purchased at Sheriff's sale, the vendor would give him the benefit of the contract; and each had received a favorable answer. The defendant D. became the purchaser at Sheriff's sale at a fair price. Meanwhile the vendor had brought an action of ejectment to put an end to the original contract; and, after the Sheriff's sale, executed a writ of *habere facias possessionem*, but subsequently received payment from D. of the arrears, without objection by B. Two years afterwards B., who had kept alive his execution against W.'s lands, filed a bill against D., claiming that he, B., was entitled to a lien on the interest acquired by D. in the land under this agreement with the vendor:

Bill dismissed with costs: affirming the decree reported ante vol. xi., p. 490.

Burnham v. Dennistoun, 135.

VOLUNTARY CONVEYANCE.

1. A. having received a large sum for the sale of a secret imparted to him and his wife by a relative of the latter, bought with part of it a farm, of which he took the deed in his own name; and afterwards gave instructions for the preparation of a settlement of the property for the use of himself for life, with remainder to his wife and children; but the settlement was not prepared or executed for a year. Shortly before it was executed, he had entered into a hazardous business, which proved disastrous—all his means not sufficing to pay its losses. The farm was the only

real estate he had in the Province. *Held*, at the suit of a creditor whose debt accrued before the settlement, that the settlement was void as against creditors.

King v. Keating, 29.

2. A deed having been executed by a husband and wife under such circumstances as to make the conveyance voluntary, the Court held that the onus was on the grantee, of proving that the grantors understood the nature and effect of the deed; and as it did not appear to have been explained before being executed, the deed was held invalid.

Fraser v. Rodney, 154.

3. It is essential, to the validity of a deed of gift in favor of a person occupying towards the grantor a relation of trust and confidence, that the grantee should show that the grantor had competent and independent advice in the transaction.

Dawson v. Dawson, 278.

4. An agreement may be allowed to stand although a voluntary deed arising out of it may be set aside.

Delesdernier v. Burton, 569.

VOLUNTARY SETTLEMENT.

1. When a debtor makes a voluntary settlement under circumstances that render it void as against creditors, the grantee is not entitled, as being in effect a surety for the debt, to hold the property exonerated from the debt, in consequence of time being given to the debtor, or of any like transaction that would free a surety from his liability in ordinary cases of suretyship.

King v. Keating, 29.

2. At and before making a voluntary settlement of real estate the settlor stipulated verbally with the trustee that the settlor's son should receive all moneys receivable under it, and should accumulate and dispose of the same by investment or otherwise, and that the trustee himself should have no trouble or concern in the matter. The son accordingly received the rents for several years, and, without the knowledge of the trustee, misappropriated them:

Held, that the trustee was not liable to make good the loss.

Mitchell v. Richey, 88.

3. A deed purporting to be a bargain and sale in consideration of £1000, and bearing date the day before the marriage of the

grantor to the grantee, was impeached by a creditor of the grantor. There was no evidence of any prior negotiation for a marriage settlement. The deed was not executed by the grantee, and there was no evidence that it was known to her, or to any one acting for her, until long after the marriage. The grantor, who was in trade, continued to deal with the property as owner, and the deed was not registered for three years afterwards, when the grantor had become insolvent:

Held, that the deed could only be regarded as a voluntary deed; and as it did not appear that the grantor was in circumstances at the time to make a gift of so much property, the deed was set aside as a fraud on creditors. [SPRAGGE, V. C., dissenting.]

Mulholland v. Williamson, 91.

WAGES.

Where a minor enters into a contract of hiring, the wages he earns belongs to him and not to his parents.

Delesdernier v. Burton, 569.

WILD LAND TAXES.

1. It is the duty of the assessors to assess village lots, the property of non-residents, separately, placing opposite to each the value and amount of assessment. Where, therefore, the assessor had included three village lots in one assessment, two of which only belonged to one person, the sale was set aside; but without costs, as the purchasers—the defendants in the suit—had not anything to do with the irregular proceedings which formed the ground for setting aside the sale.

Black v. Harrington, 175.

(See, to the same point, Christie v. Johnston, 534.)

2. Where a sale of land for wild land taxes was effected, and the taxes included one year's assessment which had been paid; the sale was set aside, notwithstanding that the number of years for which the assessment was in arrear was greater than was required to render them liable to sale.

Irwin v. Harrington, 179.

3. For several years a parcel of land, containing 100 acres, was returned to the Treasurer of the County as non-resident lands. In 1860, fifty acres only of the 100 were returned to the Treasurer as non-resident.

Held, that this was sufficient to authorize the Treasurer in subdividing the 100 acres for assessment purposes,

Brooke v. Campbell, 526.

4. The Statutes authorising the sale of lands for non-payment of taxes, requires the Treasurer of the County to issue his warrant to the Sheriff directing such sale, in which he is to distinguish lands "Granted in fee" from those under "lease" or "license of occupation." In his warrant the Treasurer described the lands directed to be sold as "All Patented."

Held, a sufficient compliance with the statute as to describing the lands.--*Ib.*

See also "Sale for Taxes."

WILL.

1. A testator bequeathed to W L. £1,500, "due to me by R. C., and secured by mortgage." After the making of this will, and in the testator's life-time, R. C. sold to one H. the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this property and other property, and a covenant to pay the amount; retaining in his possession the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for payment of the debt. The testator died without in any way altering his will in regard to this legacy: *Held*, that the legacy was not adeemed.

Loring v. Loring, 108.

2. A testator by his will, duly made and published in the year 1832, gave certain lands to his son J. D., "for his children," adding, in the concluding paragraph, "any other lands I may now or hereafter have I may add." *Held*, that the words of devise carried only a life-estate; and as to these words, that they expressed only a possible intention of the testator at some future time of making a devise thereof.

Hamilton v. Dennis, 325.

[Affirmed on Appeal, 14th March, 1867.]

3. A testator by his will devised certain land to his wife for life, "subject to the conditions of supporting and educating there-

from my children until they are of age respectively;" and after the decease of his wife, and his youngest child having attained eighteen years of age, he devised the same land to his son, J. L. The widow died, and J. L. also died before the youngest child attained the age of eighteen.

Held, that J. L. did not take the estate charged with the support or education of the younger children, nor was it chargeable in the hands of J. L. with arrears therefor, which had accrued during the life estate of the widow.

Perry v. Walker, 370.

4. A testator bequeathed his personal estate to his executrix and executors, in trust for the purposes of his will, and he gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children, or child, if there should be but one, "the sum of £1,500, due to me by C., and secured by a certain mortgage," &c.

Held, that this passed the principal mortgage money (£1,500), but did not pass the interest then due, or which should fall due before the testator's decease.

Held, also, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the Statute of Limitations therefore not applying to the case.

Loring v. Loring, 374.

5. A testator by his will gave to his wife a life interest in certain portions of his real estate, and also certain annual allowances, both in money and kind, such as to exclude the probability that she would require any other means for her support: the rents and profits of the real estate after payment of such annual allowances, being insufficient to satisfy the widow's claim for dower:

Held, that the widow under the circumstances was bound to elect.

Becker v. Hammond, 485.

6. A testator was in an extremely low state at the time of giving instructions for and signing his will, and died soon afterwards; but it appeared that he was considered of testamentary capacity at the time, and seemed to understand and approve of the document; that it was prepared in good faith, in supposed accordance with his wishes and directions; that no question had been suggested as to the validity of the will for more than a year after probate; and his widow, to whom he had devised a life estate in part of his lands, died in the interval; the Court sus-

tained the will, notwithstanding some doubts suggested by the witnesses at the hearing, as to the mental condition of the testator, and the exact conformity of the will with his wishes.

Martin v. Martin, 500.

See also "Husband and Wife."

"Registration."

"Undue Influence."

WITNESS.

See "Practice," 38.

by the wit-
e testator,

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