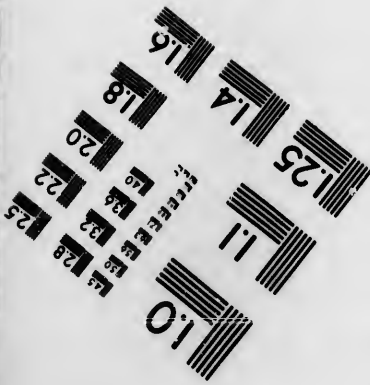
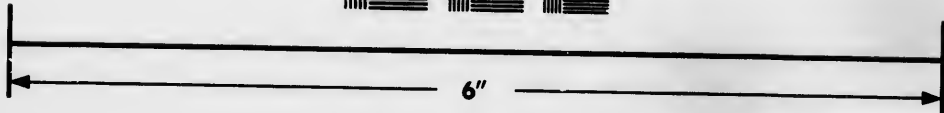
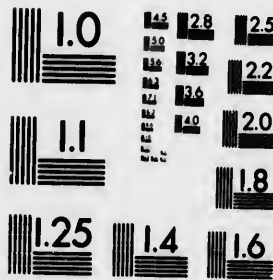


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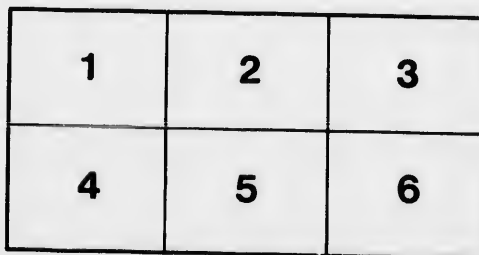
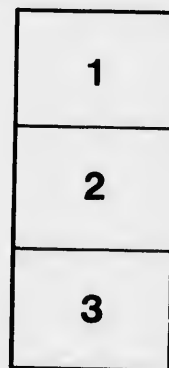
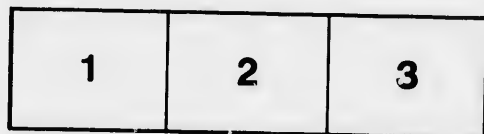
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REPORTS OF CASES

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IN THE

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OF

UPPER CANADA,

DURING THE YEAR 1859.

BY

ALEXANDER GRANT, ESQUIRE,

BARRISTER-AT-LAW.

SECOND EDITION, REPRINT.

VOLUME VII.

TORONTO:

R. CARSWELL, 26 & 28 ADELAIDE ST. E.

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REPORTS OF CASES
ADJUDGED IN THE
COURT OF CHANCERY
OF
UPPER CANADA.

COMMENCING IN NOVEMBER, 1858.

PATTERSON V. HOLLAND.

1858.

Limited partnership.

A large number of persons agreed to form themselves into a limited partnership under the statute in that behalf, but several of them, instead of paying in the amount of their contributions to the partnership fund in cash, the same was paid in by means of promissory notes. Upon a bill filed by some of the partners seeking to compel their co-partners to contribute towards making up a large deficiency, ascertained on the winding up of the affairs of the company: *Held*, that the circumstances which had transpired rendered the parties general partners not only as to third parties, but also as between themselves.—[*ESTEX, V. C. dissenting.*]

One of the members of a co-partnership established upon the principle of limited liability, was appointed manager of the business, and while acting in that capacity, furnished from his shop, goods for the use of the partnership, upon which he charged the usual trade profits: *Held*, that *prima facie* these transactions could not be sustained.

The circumstances giving rise to this suit are clearly stated in the report of the cause, *ante*, Volume vi., page 314, and the judgment on the present re-hearing.

Mr. *McDonald*, for plaintiffs.

Mr. *A. Wilson*, Q. C., for defendant *Bowes*.

Mr. *Hector*, for defendant *Roe*.

Mr. *Strong*, for defendant *Holland*.

Mr. *A. Crooks* and Mr. *Doyle*, for other parties.

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THE CHANCELLOR.—In the year 1849, several persons, to the number of eighty two, I believe, agreed to become co-partners as steamboat proprietors and common carriers, upon the principle of limited liability, authorised by the statute 12 Vic., ch. 75 ; and a certificate in accordance with the provisions of that statute was duly made and filed in the office of the clerk of the County Court of the united counties of York, Ontario, and Peel, on the 12th of August, 1850. That certificate states that the business would be carried on until the 1st December, 1856, under the management of *Donald Bethune*, the sole general partner. Five of the gentlemen connected with the enterprise, namely, *Duncan McDonnell*, *David Patterson*, *Joseph C. Morrison*, *John G. Bowes*, and *James Cotton*, were elected by their co-partners as a committee, to consult with and advise the general partner as to the conduct of the business, and matters were managed in that way until December, 1853, when *Donald Bethune* left this country, as it would now seem, to avoid his creditors, the affairs of the co-partnership being then in a state of great embarrassment. Prior to his departure, however, he executed a letter of attorney, by which he empowered the defendant *George B. Holland*, then one of the special partners, and the secretary of the advising committee, to carry on the business in his absence. The withdrawal of *Bethune* appears to have taken the committee by surprise. No one connected with the concern would seem to have anticipated it. His own assertion: "that he had been called away by important partnership business, and would shortly return," appears to have obtained credit, for some time at least, and the evidence does not enable me to say when the committee or the partners generally ascertained that he had really absconded to avoid his creditors, and was not likely to return to this country, or take any further part in the management of the affairs of the partnership. In the meantime the business was carried on by *Holland* with the sanction and assistance of the advising committee, until the 15th of January, 1855, when a resolution

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to dissolve was adopted at a meeting of the partners, and a deed empowering the advising committee to wind up the concern, was signed by all of them except three. At that time the partnership was, as it would seem, insolvent; the liabilities exceeding the assets by about £7000. But that did not arise, as I gather, from any mismanagement of the business subsequent to the withdrawal of *Bethune*. It is said that the liabilities were reduced in that interval, and that the condition of affairs was as bad, if not worse, at the time of *Bethune's* departure; and the statement seems highly probable; indeed, it is difficult to conceive how it should have been otherwise when it is considered that the general partner not only neglected to pay in any part of that large portion of the capital which he had agreed to contribute, amounting to £6000, but he had actually applied to his own use, from the proceeds of the partnership, a further sum of £4000, making together a sum of £10,000 and upwards, equal to the half of the entire capital, and much more than sufficient, if realised, to meet all liabilities. Judgment.

The brief outline which I have just given of the history of this unfortunate enterprise appears to me to be all that is necessary to a clear understanding of the questions before us. The bill is filed by the personal representatives of *David Patterson* and *J. Cotton*, and *McDonnell*, two other members of the advising committee, against the remaining members of that committee, and several of the special partners. It states that the capital subscribed by the special partners, which should have been paid in cash, under the provisions of the act of parliament, was not so paid, but that, by an arrangement between all the partners, it was paid by promissory notes, all, or at least some, of which were payable at distant periods; that the partnership, therefore, never was a limited partnership under the statute, but a general partnership; and that actions had been brought, and verdicts recovered against several individual partners for debts due from the partnership; and it prays that

1858. the partnership may be declared to have been from the first a general partnership; that it may be dissolved and the usual accounts taken; and that all the co-partners may be compelled to contribute in proportion to their capital, to the liabilities, consisting in part of debts still due, in part of debts which some of the individual partners have been compelled to pay, and in part of advances made by the committee of management.

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That relief was opposed at the hearing upon two grounds:—it was said, first, that whatever may have been the form of the transaction, the capital subscribed by the special partners was, in effect, paid in cash. This point was much pressed in argument, but we thought it perfectly clear then, as we do now, that the act of parliament had not been complied with either in form or effect, but that the whole capital had been advanced by means of promissory notes, some of which have not been paid to
Judgment. the present day, in direct violation of its provisions.

It was argued, in the next place, that the substitution of promissory notes for cash had not the effect of rendering this a general partnership for all purposes; that the only effect of the irregularity was to render each special partner liable for the debts of the concern, and in that sense, but in that only, it became a general partnership *quoad* third persons; but that as between the co-partners it continued to be a limited partnership, upon the basis of the certificate, and the act of parliament, and that, as a necessary consequence, each special partner was only liable, as between himself and his co-partners, to the extent of his capital, and could not be called upon to contribute in the way contended for.

This question, which turns, to a great degree, upon the proper construction of our provincial statute, is of considerable importance, and, so far as I have been able to discover, it is new. No authority having any important bearing upon the subject was cited in argument, nor am

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I acquainted with any such. The question before us must be decided, therefore, upon principle; and upon the best consideration which I have been able to give to the subject, I am of opinion that the argument advanced by the learned counsel for the defendants cannot be supported either upon general grounds of reason, or upon the particular language of the statute.

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Prior to the statute 12 Vic., ch. 75, each partner, however small his interest, was liable, according to the law of this country, to the whole extent of his fortune, for any debt of the partnership. The enormous responsibility thus incurred by co-partners was felt to impose unreasonable checks on the commerce and enterprise of the country, and the statute in question was introduced for the purpose of obviating that difficulty. The object of the statute, beyond all question, was to permit men to combine as partners for commercial and manufacturing purposes without incurring thereby any liability beyond the capital subscribed. To render such a change safe and just, it became obviously necessary to prescribe certain conditions in favour of the public upon which alone this privilege should be enjoyed; and to introduce certain alterations in the law, as between the partners themselves, without which the contemplated change would have been, as to them, unjust. It is therefore provided that the names of all the partners, general and special, the amount of capital subscribed by each of the latter, and the nature and duration of the partnership, must be stated in a document to be signed by all the parties, and deposited in a specified office, always accessible to the public. This provision was obviously necessary for the protection of persons dealing with the partnership, and it is therefore enacted, that upon failure to comply with any of these conditions, the partnership is to be treated, for some purposes, at all events, as a general partnership. Then as between the partners themselves it would have been obviously unjust that a special partner who incurs no liability beyond the amount

1858. of his subscribed capital, should be allowed to interfere
 in the management of the business with the general
 partner, who is responsible to the whole extent of his
 fortune for the success of the enterprise. And we find,
 consequently, that special partners under the act are
 deprived of many of the rights which belong to ordinary
 partners. They are wholly deprived of all their large
 and important powers in relation to the management of
 the business, and their rights in relation to the property
 itself, which belong to every partner at common law.
 The entire management of the affairs is confined to the
 general partner, whose responsibility remains unlimited,
 and the special partners are thus absolutely excluded
 upon principles which appear to me conformable to
 reason and justice.

The statute, therefore, introduces several important
 changes in the law, not only as between the partnership
 and the public, but also as between the partners them-
 selves. But all these changes are subsidiary to, and are
 intended for, the purpose of carrying out the main object
 which the legislature had in view, namely, the limitation
 of the responsibility of partners under certain conditions.

Now, the argument on behalf of the defendants is, that
 although the capital was not paid in cash, in this case,
 as the act requires, and although this partnership has
 thereby become a general partnership to this extent, that
 each partner is liable for every debt of the concern, to the
 whole extent of his fortune, still it is not to be regarded
 under that act as a general partnership for all purposes,
 but as a limited partnership in all other respects, upon
 the terms specified in the act and certificate, and that as
 a necessary consequence the liability of the special
 partners is limited as between themselves to the amount
 of the capital subscribed by each.

Now, when it is said that this is to be treated as a
 limited partnership to be conducted upon the terms

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specified in the certificate, and subject to the provisions of the statute, it is meant; I apprehend, that all the stipulations and provisions are to apply. To argue that this particular provision which limits the responsibility of the partners *inter se* is to apply, but that in all other respects the general law must govern, would be manifestly absurd. It follows, therefore, upon this argument, that the special partners in this case would have been bound to carry on the business *for the time specified in the certificate*, incurring thereby an unlimited responsibility for the debts, *whilst they would be excluded from all share in the management*. Such a consequence would be manifestly unjust. So long as the special partners enjoy the privilege intended by the legislature, so long it is reasonable that they should be bound by all the provisions of the statute; but being deprived of the protection which the legislature intended to confer, reason would dictate that these provisions can no longer apply—being subject to the unlimited responsibility Judgment. imposed by the common law, they must be entitled also to the privileges conferred by that law. In other words, such a partnership must be treated as a general partnership, governed by the general law of the land.

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Now, the conclusion at which I have arrived, upon grounds of reason, appears to me to be the proper conclusion upon the true construction of the statute also. The language of the 7th clause is indeed somewhat equivocal. It provides: "that if any false statement be made in such certificate, all the persons interested in such partnership shall be liable for all the engagements thereof *as general partners*." And there is room to argue that the legislature meant that they should be liable as general partners *quoad* third persons, but not *inter se*. But in the next clause, which provides for the continuance of such partnerships beyond the time limited by the certificate; and in the 9th clause, which provides against the alteration of any of the terms of agreement specified in the original certificate, the language is free from ambiguity

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In each case it is enacted, that upon any departure from the provisions of the act in these particulars, the partnership "*shall be deemed a general partnership.*" Now, if it be clear that a limited partnership is to be dealt with as a general partnership upon the alteration of the terms of agreement in any of the particulars required to be stated in the certificate, it can hardly be contended that the legislature intended that the consequences should be different when any of such particulars prove to be false. I apprehend, therefore, that the expressions used in these sections were considered equipollent, and that the 7th section is to be read as if the words had been "the partnership shall be deemed a general partnership." Now, the legislature having provided that in certain events these limited partnerships are to be deemed general partnerships, it would be an unsound interpretation, in my humble opinion, to hold that the legislature only meant that such partnerships should be deemed general partnerships, *quoad* third persons, but not *inter se*, especially when such a construction would lead to consequences manifestly unjust and inconvenient.

Judgment.

I apprehend, therefore, that this must be deemed a general partnership for all purposes, and that upon the principles applicable to ordinary partnerships, by which it must be governed, all the partners are bound to contribute to the liabilities of the concern in proportion to their capital.

With respect to the enquiries directed by the former decree as to the sales by some of the individual partners to the firm, it was argued that no such enquiries should be directed by the present decree, inasmuch as the evidence shews that Mr. *Smith* was interposed between the partnership and the partners, as agent, and that the sales being fair in other respects, cannot be impeached on the grounds urged in argument. I am not sure that the objection is obviated as to any of the sales objected to, and I am clear that as to many, the evidence furnishes

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no answer whatever. Mr. *Holland* admits that in many instances he supplied goods from his own stock, which he charged at usual selling prices, and that in other instances he purchased goods for the firm, which he charged, not at the prices paid, but at the price at which he would have sold them to any other customer. Now, *prima facie*, such a transaction cannot, I apprehend, be sustained. Over such sales, Mr. *Smith* had not, as I understand the evidence, any control. The same observation is applicable to the transactions of other partners as well as Mr. *Holland*, and I am of opinion, therefore, that the enquiries objected to were properly directed.

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I have not adverted to many things connected with the accounts, which appear highly objectionable, because questions of that kind will come more properly before the master; nor have I adverted to the frame of the suit, because no objection was made at the hearing, the parties being anxious to have the general question decided, regardless of formal objections. Judgment:

Under all the circumstances, the costs should be borne by the estate.

ESTEN, V. C.—Remained of the same opinion as expressed in judgment already reported.

SPRAGGE, V. C.—There has been no difference of opinion in the court upon the point, that the several persons who signed the certificate as special partners did not contribute in actual cash payments a specific sum as capital to the common stock, within the meaning of the act; their certificate of their having severally so contributed was therefore untrue; and the statute provides in the seventh section, that if any false statement be made in the certificate all the persons interested in such partnership shall be liable for all the engagements thereof as general partners, thus making each one liable for any statement, whether made in relation to his own

1858. contribution, or to any other fact stated in the certificate.
 It is the certificate of all and every one, and each is pledged to the truth of every part of it.

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 Holland.

It seems clear that upon the filing of this certificate each partner who had signed it became, whatever he may have thought or intended, liable as a general partner for whatever engagements the partnership might enter into. But it is contended that *inter se* they are not liable as general ordinary partners are; that we should look upon the certificate as articles of co-partnership among themselves, and that we shall there find that the liability of each is confined to the sum set opposite his name.

I cannot agree in this position. The certificate was not intended for the purpose suggested, but each and all who signed it intended to bring themselves within the protection of the statute. It was rather a statutory contract with the world, that the partners on their part had deposited a certain sum named, which they were liable to lose; and on the part of those dealing with them, that if in truth that sum was deposited, and the other parts of the certificate also true, they would not look to the special partners for any thing beyond; on the one side a limited liability; on the other, a limited remedy. Further, I see nothing in the language of the certificate importing a contract among those who signed it, as to their dealings or liabilities as between themselves. There is indeed, of course, nothing to prevent articles of partnership being entered into between all the partners general and special, defining their position, their liabilities, the conduct of the business, proportion of profits, and other matters of common interest; or they may, as they seem to have done in this case, leave these matters to those provisions of the statute which relate to the partners as between themselves. In my view the certificate does not relate to the partners, as between themselves, but only as between them and the world.

It may be that these parties believed that the mode of

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manufacturing capital which they adopted, was within the act, and that they were special partners. In such case they could have had no intention in regard to liabilities, beyond the loss of their assumed contribution, and of course there can be no contract between them in regard to it. They now find themselves in a position they never contemplated; they are general partners; but why or how with a portion only of the legal consequences of general partnership. If, on the other hand, they are to be taken as knowing that their acts made them general partners, I do not know where we find that they agreed among themselves, or ever intended any deviation from the ordinary legal result of their position; one liability would be to have large partnership debts levied upon one individual. Is it to be assumed that he was to be without remedy? If we assume any thing, it must be, I think, that if they contemplated a general partnership as the legal result of their position, they contemplated it with all its consequences. If we assume nothing, there was a general partnership, and necessarily, I think, with its legal consequences as between themselves as well as between them and the world.

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There may be circumstances, certainly, which should prevent partners from having the ordinary remedies against each other. It may be that a false statement in the certificate whereby one partner may deceive his co-partners, would disentitle him to such relief. It is the policy of the law to hold all responsible, to those dealing with the partnership, for the truth of the certificate; but as between the partners themselves, one may be guilty, and the others entitled to their remedy against him for the consequences; while he would not be entitled to any remedy against them. The statute makes all liable in such case "for all the engagements" of the partnership, leaving the rights of the parties, I presume, as between themselves, to be dealt with by the law, without any statutory provision in regard to them.

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There are other parts of the statute which seem to me to favour the same conclusion. The 9th clause provides that any alteration in the names of the parties, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and that any such partnership carried on after such alteration, shall be deemed a general partnership, unless renewed. This supposes a special partnership in the first place, properly constituted; an alteration in the capital or shares thereof, and carrying on the business afterwards, is provided for by making it a general partnership. I apprehend that if such alteration is visited with this consequence; if the capital or shares were never subscribed according to the act, the same consequence must follow; and that with all the consequences of a general partnership, for in this section the language is general, "shall be deemed a general partnership."

Judgment.

I think, however, it is not necessary to find any thing in the statute in favour of this view of the case; we find that certain persons associated themselves together to carry on a certain business, and (with one exception) professed themselves to be special partners; that they failed, however, to comply with certain conditions upon which alone they could be special partners; and the consequence was, that they were in law general partners in the business they so carried on. If we find nothing in the act, or in any contract among themselves, exempting them from the ordinary legal consequences of general partnership, it seems to me to follow that they are general partners for all purposes, and as one consequence, liable to contribution among themselves as one of the ordinary incidents of their position.

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 page 165.

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RUSSELL V. DAVEY.

Mortgage—Floating balance.

A trader being indebted to a wholesale merchant, for goods supplied, executed a mortgage in favour of the creditor, securing £3000, and the creditor having entered into a new partnership, the firm continued to make further advances for several years, during which time the debtor made several payments, much more than would have been sufficient to pay off his original indebtedness; and the firm in rendering their accounts to the mortgagor did not bring in the old debt; upon appeal from the Master's report it was held that these circumstances were sufficient to shew that the security was intended to cover a floating balance.

This was an appeal from the Master's report, finding a sum of £4620 14s. 4d., due to plaintiff, under the circumstances stated in the judgment.*

Mr. *McDonald* for defendant, who appeals, contended that under the rule in *Clayton's* case (a), and the decision in *Re Brown* (b), the mortgage must be taken to have been paid off.

Argument.

Mr. *Roaf* contra.

ESTEN, V. C.—In this case it is contended by the plaintiff that the debt due to *McKenzie & Geddes* was not assumed by the new firm, but is to be severed from all the subsequent transactions, the consequence of which would be that there would be due on the mortgage, which, it is also contended, was made to secure this old debt, the sum of £3219 4s. 7d., with interest, less such credits as may be proper on account of rents and profits, and the balance of £448 12s. 1d. carried to the credit of *J. G. McKenzie & Co's.* old firm, supposing such a balance really to exist, and to be properly disposable in that way. This would accord with the evidence of *J. G. McKenzie*, who states that the new firm never assumed *Donald McKenzie's* account. But I think it is impossible to reconcile this state of things with the manner in which

* The facts giving rise to this suit are fully stated ante volume vi. page 165.

(a) 3 Mer. 572.

(b) Ante vol. ii. p. 590.

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Davey.

Judgment.

the accounts were kept; and it is only necessary to inspect them to perceive this discrepancy at once. On the other hand the defendant insists that the old debt of *Donald McKenzie* passed to the new firm; that the mortgage was not made to secure a floating balance, and that it was discharged by the various credits which were carried to account after the date of its execution. This theory is wholly inconsistent with the evidence of *John G. McKenzie*, with whom it is quite evident that his co-partners are entirely agreed. There is no reason whatever for disbelieving *J. G. McKenzie*, when he says that the new firm did not assume *Donald McKenzie's* debt. When *Donald McKenzie* began to fail in his circumstances it was quite evident that heavy losses would occur on the whole transactions, and by arrangement between *J. G. McKenzie* and his co-partners, they appear to have thrown this loss upon *J. G. McKenzie*. In 1856, when he delivered his testimony, he might have been induced to give the evidence he did in order to support the assignment to *Colin Russell*, but it is in strict accordance with the arrangement made between him and his co-partners, in 1845, long before the assignment, whereby the loss which I apprehend at that time had become pretty certain, was agreed to be imposed upon, and borne by, *J. G. McKenzie*. I give credit to *J. G. McKenzie's* evidence, but am not satisfied that it is to be understood literally. I am disposed to adopt an intermediate view of the case, which I think will reconcile every thing. This is that the debt was not transferred to the firm, and that they continued the account with *Donald McKenzie* for the benefit of *J. G. McKenzie*. Accordingly, on the 28th of February, 1845, when a balance of £3386 10s. 3d. was due from *Donald McKenzie*, they transferred it to the account of *J. G. McKenzie*. There were no subsequent transactions between the new firm and *Donald McKenzie*; no further advances on their part, or payments on his: the subsequent items in the account are mere deductions from the previous transactions. This view would entitle

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the defendant to the benefit of the doctrine established in *Clayton's* case, upon which he insists; and the question would then arise, whether the mortgage was to secure a floating balance or a fixed sum. Now, at the time it was executed according to account A., which is used by the defendant, there was due from *Donald McKenzie* to *J. G. McKenzie* the sum of £1869 12s. 6d., and no more. The mortgage, however, is for securing the sum of £3000. Then it is quite evident that future dealings were contemplated, for advances to a large amount were afterwards made. A mortgage to secure a fixed sum, part of a debt continually fluctuating and varying, would be of little use or value, since the particular part of the debt intended to be secured would soon be discharged. I think it is a very reasonable construction to put on a transaction of this nature, when it occurs in mercantile dealings, that the intention is to secure a floating balance, unless something appears which militates against that view. The Master has proceeded upon this principle, which excludes the doctrine in *Clayton's* case. I think it is a reasonable view, and right under the circumstances; and as no objection is made to the Master's calculations, I think the report should be confirmed, and the appeal dismissed with costs.

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Davey.

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SPRAGGE, V. C.—A debt of £3219 4s. 7d. was due by the late *Donald McKenzie* to the firm of *J. G. McKenzie & Co.*, composed of *J. G. McKenzie* and *Charles Geddes*, at the date of the dissolution of that firm on the 31st March, 1842: the mortgage, which was for £3000, was given to *J. G. McKenzie* in the month of October following, he being at the time and having been from the time of the dissolution of March, 1842, senior partner in another firm carrying on business under the same name, composed of *J. G. McKenzie, Levisconte & Chamberlain*. At the date of the mortgage the debt to the old firm had been reduced to £2953 5s. 7d.

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Davey.

The new firm continued to deal with *Donald McKenzie* as the old firm had done; the dealing consisting principally in making various advances, and receiving produce from him, chiefly lumber, in return. Payments were made by *Donald McKenzie* to the new firm to an amount more than sufficient to pay off the mortgage, if such payments were properly applicable to that purpose: the question is whether they are to be taken to have been so applied, upon the principle of *Clayton's* case, that the first payments are applicable, in the absence of any specific appropriation, in the first place, to the discharge of the oldest debt. The mortgage money was made payable on the 1st day of November, 1843.

Among the accounts put in, is one which Mr. *Spears*, the accountant, swears, is copied by him from ledger C, of the new firm, the first item in which as a debit against *Donald McKenzie* is

Judgment. "1843, March 31. To balance brought down, due us this day. £3219 4 7," which was, no doubt, the debt to the old firm: and this item is followed in the same account by debits and credits between the new firm and *Donald McKenzie*, and a balance brought down, and the account is continued upon the foot of it to the 31st March, 1845. At this last date a balance is brought down to the debit of *Donald McKenzie* of £3397 15s. 3d.; against which is this entry

"1845, Sept. 7. By <i>John Ross</i>	6	5	0
Feb. 28. By balance due this date <i>J. G. McKenzie</i> , old firm, and transferred to their account	£3386	10	3
	<hr/>		
	£3392	15	3,"

and then follows:

"1848, Feb. 28. To balance due with interest, made up to 31st March	£3386	10	3."
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An item of the same amount appears in a paper put in and which is sworn by Mr. *Spears* to have been copied from a memorandum book of *J. G. McKenzie*, called by him a suspense ledger, in which *Donald McKenzie* is charged as follows :

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“ 1845, March 31. To balance due
31st Mar. 1845, per ledger
B., folio 364£3386 10 3.”

“ 1846, October. By sale of this property
to *John Russell*£650 0 0.”

The last item is not explained.

From the first of the above entries, it would appear as if the debt from *Donald McKenzie* to the old firm had been assumed by the new, at the time of the dissolution of the old firm and the formation of the new firm, and none of the entries to which I have referred appear to me to have been made with any other view ; upon the face, then, of these entries, the debt to the old firm is to be the first discharged and a mortgage taken to the same amount, unless taken as a continuing security would be discharged upon the receipt of credits to an adequate amount.

Still it does not appear to me that the old firm and *Donald McKenzie* dealt together upon that footing. *Donald McKenzie* might well desire to have future advances to correspond with his future payments, and that his debt to the old firm, secured by mortgage to the senior partner, should stand as a separate transaction.

In the evidence given by *J. G. McKenzie* he says that the two accounts, the accounts of the old and new firms, were always kept separate, the new firm not having assumed the debts of the old firm. The entries in ledger C. do not very well agree with this ; whether

1858. they could have been explained by Mr. *McKenzie* we cannot say, as they were not brought to his notice ; but other accounts are put in, purporting to be accounts between the new firm and *Donald McKenzie*, and sworn to be correct by Mr. *Levisconte*, in which certainly the debt to the old firm is not brought into account. In one, which is up to 31st March, 1843, a balance is brought down to the debit of *Donald McKenzie* of £981 8s. 0d. The balance to the same date appearing in ledger C. is £3962 9s. 2d. That in ledger C. includes the old debt, the other, I should say, cannot. This balance of £981 8s. appears as the first item in the next account as "balance as per account rendered," and so on the 31st March, 1844, a balance of £40 14s. 7d. is also carried to the next account as "balance as per account rendered," and so on the 31st March in each of the following years ; on the latter of which the balance had been turned in favour of *Donald McKenzie* to the amount of £485 11s. 5d.

Judgment.

It is not in evidence that these accounts were from time to time rendered, as upon the face of them they purport to have been ; but if the fact were so (and liberty, I think, should be given to prove it), the payments were appropriated as they were made, by the new firm to meet the advances made by them, and such appropriation was acquiesced in by *Donald McKenzie*, for he continued to deal with the new firm year after year upon the footing that it, the new firm, was to have the benefit of his payments. After this course of dealing, his assignee in bankruptcy finds entries in a ledger of the new firm, which, unexplained, seem to shew that the old debt was assumed by the new firm. I think the appropriation of payments made in the course of dealing must govern. Take the converse of the case, and suppose, after these accounts rendered, the new firm had sought to apply the payments to the old debt, and had sued *Donald McKenzie* for the large balance which would in such case be due to them, it is obvious that they could not do it ; and *Donald McKenzie* is, I apprehend, equally

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Russell
v.
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The mortgage not being brought into the account, is consistent either with its being given to secure the debt to the old firm—and that debt and the debt to the new firm being kept separate as I have supposed—or with its being given as a continuing security for the indebtedness of *Donald McKenzie* to the new firm, or to the old and new firms together. *Donald McKenzie* himself, as late as the 29th of January, 1846, treated the mortgage as a subsisting security. In his letter of that date he seems not to distinguish between the debt to the old and new firm. It is addressed to Messrs. *J. G. McKenzie & Co.*, and contains this passage: “Having given you security by mortgage on my property, which creates hard feeling in the minds of the best of my creditors, by securing you to their exclusion, &c.” At the date of this letter, the debt to the new firm, as appears by the Judgment. accounts current rendered, was more than paid off: *Donald McKenzie* must, therefore, have treated the mortgage as a subsisting security for the old debt; whether transferred to the new firm, or still due to the old firm, would not be material; or else as a continuing security for the debts to both firms.

In October, 1846, the mortgage was assigned to *Colin Russell* as a subsisting mortgage, and the assignee in bankruptcy, so far from treating it as discharged, executed jointly with *Donald McKenzie* a release to *Russell* of the equity of redemption.

The evidence leads me to think that the mortgage was given to secure the debt to the old firm. Mr. *J. G. McKenzie* states in his evidence that it was given to secure that debt; and Mr. *Levisconte*, a partner in the same firm, in the evidence given by him, speaks of his being sent up to the mortgaged premises by *J. G. McKenzie*, to take possession of them in his behalf. I

1858. therefore place my decision upon the ground that the payments from time to time made, were appropriated towards meeting the debt to the new firm. My learned brother and myself arrive at the same result, though upon different grounds.

Russell
v.
Davey.

FENTON V. CROSS.

Married woman—Appointment.

Property stood limited in trust for such purposes or persons as the wife should appoint, and in default of appointment, in trust for the wife and her heirs. The wife appointed part of her estate to her husband in fee, and the other part in trust for herself and children. *Held*, that these appointments were authorised by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband, further enquiry was directed.

The bill in this cause was filed by the husband and ^{Statement.} wife, and the children of the wife by a former husband, alleging the existence of a marriage settlement with her present husband, made before marriage, of which the defendants were the trustees, and that the settlement contained a proviso, that the trustees, or the survivor of them, should from time to time, and at all times thereafter, convey and assure, but without covenant for title, the lands embraced in the settlement, or such part thereof as she might direct or appoint: that shortly afterwards she and her husband conveyed part of the settled lands to a vendee, who afterwards conveyed them to her husband, upon two powers of appointment, executed by the wife, requiring them to convey these lands to her husband, and to reconvey the remainder of the settled lands to herself, for her life, and on her death, to her children by her first marriage. The trustees in their answer refused to convey, alleging coercion on the part of her husband.

The cause came on to be heard by way of motion for decree.

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Mr. *Roaf* for plaintiffs.

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Mr. *Brough* and Mr. *Read* for defendants.

Fenton
v.
Cross.

It was objected that the bill was improperly framed, as the wife and children should have been made defendants, instead of plaintiffs, the suit being in reality the suit of the husband. *Hughes v. Evans* (a), *Simons v. Horwood* (b), *Davis v. Prout* (c), *Reeve v. Dalby* (d), *Wake v. Parker* (e), *Roper* on husband and wife, volume 2, page 216, were referred to by counsel.

The judgment of the court was delivered by

ESTEN, V. C.—I think the property stood limited in trust for such purposes and persons as Mrs. *Fenton* should appoint, and in default of appointment, in trust for herself and her heirs, and that the power of disposition was not confined to a sale for valuable consideration, but that a voluntary appointment would be good. Judgment. Under this power Mrs. *Fenton* could appoint to herself, or her children, or her husband. She made two appointments to this effect respectively, which, so far as appears, were good and valid. The subsequent conveyance to *Armstrong* in trust for *Fenton* seems inoperative except in so far as regards the wife's life estate, but the bill merely prays a conveyance in pursuance of the appointments. A doubt, however, is suggested, and strongly supported by the affidavit of *Woods*, whether these appointments resulted from the free will of the wife, or from the exercise of undue influence on the part of the husband. This point seems to require investigation. No objection, however, could be made to the appointment in favour of the wife and children. I would suggest that an order should be made in pursuance of this appointment (unless the wife wishes both appointments to stand,

(a) 1 S. & S. 185.
(d) 2 S. & S. 464.

(b) 1 Keen. 7.
(e) 2 Keen. 59.

(c) 7 Beav. 288.

1858.
 Penton
 v.
 Cross.

or neither), and that the same order should provide for the wife's name being struck out as a co-plaintiff, and for her being made a defendant; and for the cause to proceed to a hearing in the ordinary way. The trustees to have their costs to the present time.

MERRITT v. STEPHENSON.

Mortgage on separate estate—Sale.

In a suit for the sale of mortgage property, it appeared that a mesne incumbrancer held a mortgage on other property of the mortgagor; the court ordered an account to be taken of what was due on both the securities, and in default of payment, a sale, but intimated that in the event of a sale taking place, the premises would be conveyed to the purchaser relieved of any lien of such subsequent mortgagee.

This was a motion in the nature of a re-hearing. The circumstances of the case are stated in the report, *ante* volume VI., page 567. The object of the present application was to have introduced into the decree the directions to take the account asked on the original hearing by the defendant *Howland*.

Mr. *Freeland* for plaintiff.

Mr. *Fitzgerald* for defendant *Howland*.

The court varied the decree, and directed that the master in taking the accounts was, as to the defendant, *W. P. Howland*, to take an account of what was due to him for principal and interest on both the mortgages mentioned in his answer; the amount of which the mortgagor was to pay, or in default, the mortgage premises to be sold; and in the event of a sale taking place, the title to be conveyed to the purchaser would be discharged of any claim or interest of *Howland*, notwithstanding the amount realised might not be sufficient to pay off his claim.

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MACKECHNIE V. MACKECHNIE.

Delivery of Deed—Mortgage—Notice—Registration.

A mortgage in favour of parties in Europe was executed in this country and left in the hands of the attorney who prepared the security, with directions from the mortgagor not to register it until further order; after the death of the mortgagor the mortgage was delivered up to the agent of the mortgagees, who had the same registered. *Held*, that there had been a sufficient delivery during the lifetime of the mortgagor, and that a person who entered into partnership with the mortgagor, and thereby acquired an interest in the mortgage estate, with a knowledge of the circumstances attending the execution of the mortgage, did so subject to the claim of the mortgagees.

A party with notice of an incumbrance upon leasehold property having obtained an interest therein by entering into partnership with the mortgagor, surrendered the lease, and obtained from the owner of the estate a substituted lease to himself for 999 years, which he registered, and afterwards created several mortgages thereon, the original incumbrance having, in the interval, been registered. *Held*, that as the lessee's title had been acquired with notice of, and subject to, the original incumbrance which was registered before the mortgages created by the lessee, the original incumbrancers were entitled to prevail over the claims of the mortgagees of the lessee.

The bill in this cause was filed by *Mary and Christian* Statement. *Mackechnie* against *Anna M. B. Mackechnie*, *Sir Edward Poore*, Baronet, *Edward S. Winans*, *George E. Castle*, *James Cockburn*, *James Mitchell*, *The Commercial Bank*, and *The Bank of Montreal*, setting forth that in the year 1844, *Stuart Easton Mackechnie* (since deceased), *Patrick Wallace*, and *Winkworth Tremain* owned in fee, subject to certain mortgages, certain lands in the township of Hamilton, known as "The Ham Estate," and that the same was held in the name of the said *Stuart Easton Mackechnie*, as trustee for the owners; that in that year *Stuart Easton Mackechnie* being such trustee, with authority to sell or lease the land, did, by his attorney *Patrick Wallace*, with the consent of the other owners, demise a portion of the said premises to one *John S. Wallace*, for the term of 999 years, with the privilege of purchasing the same.

That in 1845 *John S. Wallace*, with the knowledge and consent of all the owners, assigned the demised premises to *Stuart Easton Mackechnie*, not as trustee, but for his own use and benefit, who built a house on the

1858. same with various moneys borrowed by him from the
 plaintiffs: that by virtue of a mortgage of 1st November,
 Mackechnie 1846, made between *Stuart Easton Mackechnie* of the
 Mackechnie. first part, and the plaintiffs of the second part, the estate
 Mackechnie. of the said *Stuart Easton Mackechnie*, in the premises
 so demised to the said *John S. Wallace*, was mortgaged to
 the plaintiffs to secure £450 sterling, payable 1st of
 November, 1850; that defendant *Winans* became the
 partner in business of *Stuart Easton Mackechnie*, and
 acquired one half of his interest in the said trust property,
 and became a co-lessee with him of the said demised
 premises, and that he had then actual or constructive
 notice of the said mortgage to the plaintiffs.

That in May, 1853, *Stuart Easton Mackechnie* died,
 having bequeathed all his estate real and personal to his
 widow, the defendant *Anna M. B. Mackechnie*, and
 appointed her and the defendants *Winans* and *Poore*
 executrix and executors of his will.

Statement.

That in September, 1853, *Patrick Wallace*, to whom
 the trust had been previously assigned, with the
 knowledge and consent of the parties interested in the
 trust estate, executed another lease of the demised
 premises to the defendant *Winans*, in lieu of the lease to
John S. Wallace; *Winans* having expressed a desire to
 have a lease directly from the trustee, instead of holding
 the premises as assignee, or under-tenant of *John S.*
Wallace; that the last mentioned lease, though executed
 in September, was dated the 1st May, and although in
 the name of *Winans* alone, it was in fact given for the
 use and benefit of the firm of *Mackechnie & Winans*,
 of which he was the acting and surviving partner; that
 the lease to *Winans* was registered in the proper county
 soon after its execution.

That the firm of *Boulton & Cockburn*, in which
 defendant *Cockburn* was a partner, acted as attorneys
 for the plaintiffs, in the matter of securing their claim,

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 the mortgage to the plaintiffs was drawn by Mr. *Boulton*, the other member of the firm, and that *Cockburn* had had the mortgage constantly in his possession from the time of its execution; but had neglected to register it until December, 1853, when it was registered, previous to which the lease to *Winans* had been registered; that *Cockburn* acted as the attorney of *Winans* in the matter of the said lease to him, and that both of them were well aware of the mortgage to the plaintiffs as a subsisting incumbrance at and before the execution of the lease to *Winans*.

Mackechnte
 V.
 Mackechnie.

The plaintiffs, under the circumstances, submitted that their lien on the demised premises was not lost or impaired by the lease to *Winans*, and that they were entitled to have the same sold for the purpose of paying their claim.

Statement.

The bill further stated, that on the 20th September, 1853, the defendants, *Mackechnie & Winans*, executed a mortgage of all their interest in the Ham Estate, to the defendant *Poore*, who then assigned to the defendants, *The Banks*, but that this mortgage or assignment was not registered till January, 1855, and that *Cockburn* acted as attorney for *Poore* in reference thereto; that *The Banks* held another mortgage, executed by *Winans*, conveying the lands mortgaged to plaintiff, about the 23rd January, 1855. That *Cockburn* held another mortgage on the premises mortgaged to plaintiffs, executed by *Winans* to defendant *Castle*, and assigned by way of mortgage to *Cockburn*, registered December, 1854.

That the defendant *Mitchell* also held a mortgage on the same premises, executed by *Winans*, in January, 1855: that the mortgages to *Poore* and *Castle* were taken through the instrumentality of *Cockburn*, as attorney and solicitor for the mortgagees, and that through him and otherwise the mortgagees and their assignees had notice

1858. of the claim of the plaintiffs before the execution of the mortgages respectively.

Mackechnie
v.
Mackechnie.

The bill prayed an account of what was due the plaintiffs, and sale of the mortgaged premises in default of payment.

The defendants, *Castle* and *Cockburn*, put in a joint answer to the bill, setting forth in detail the several transactions, and asserting their title as purchasers for value without notice: *Mitchell* also answered, asserting a like title, and insisting that the mortgage to the plaintiff had never been fully executed during the life of *Stuart Easton Mackechnie*, never having been delivered, and that the same was intended to operate only as a security between the immediate parties thereto, and was intended to be kept secret from all other persons.

Statement. The other defendants, except *Winans*, against whom the bill was taken *pro confesso*, also answered, and the cause having been put at issue, evidence at a very considerable length was taken therein. The facts of the case, however, sufficiently appear in the foregoing statement, and in the judgment.

Mr. *Mowat*, Q. C., for plaintiffs.

Mr. *Roaf* for the defendants, *The Banks*.

Mr. *McDonald* for the defendant, *Mitchell*.

Mr. *Crickmore* for the other defendants, except *Winans*, who did not appear.

The judgment of the court was delivered by

ESTEN, V. C.—This is a foreclosure suit by a mortgagee prior in point of time, but whose mortgage was subsequently registered, to the incumbrances of the

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defendants. The late *Stuart Easton Mackechnie* was a trustee of an estate called "The Ham Estate," for himself and two other persons, with powers of sale, and other powers. He had made, as is alleged, a lease of the property in question, part of the trust property, to one *John Wallace*, for 999 years, with a right of purchase. This lease, it is alleged, *John Wallace* afterwards transferred to *Stuart Easton Mackechnie*, and there is no doubt that if it ever existed, it was originally intended as a trust for himself. The proof of this lease, and of the assignment, it is suggested is defective. A lease, however, is proved from *Stuart Easton Mackechnie* to *D'Arcy E. Boulton*, which was undoubtedly held in trust for *Mackechnie*, and this renders it unnecessary to enter into the question as to the proof of the other lease to *John S. Wallace*. Under one or other of these leases the property in question was effectually separated from the mass of the trust estate, and became the separate and individual property of *Stuart Easton Mackechnie*. Being so entitled, he made the mortgage in question of this property to the plaintiffs. Some doubt is thrown upon this deed as to whether there was a complete execution of it. We have no doubt upon the evidence that there was a complete delivery of this deed; but that *Mr. Mackechnie* directed that it should not be registered until further order. This direction was not fraudulent, and can have no other effect than would be produced by the omission to register pursuant to it. *Mackechnie*, after making the mortgage to the plaintiffs, and being entitled to the equity of redemption of this property, subject to it, entered into partnership with the defendant *Winans*, and his interest in the equity of redemption in this property became part of the partnership effects. There can be no doubt that *Winans* acquired an interest, as partner, in this property, subject to the plaintiffs' mortgage. There was no investigation of title upon the formation of the partnership, and undoubtedly *Winans* entered into it on the footing of becoming a joint owner of the property, which was to

1858.

Mackechnie
v.
Mackechnie.

Judgment.

1858. become the partnership estate, as it was. At least nothing is suggested or shewn to the contrary, and we must assume it to be so. Then it is equally clear that the lease granted by *Patrick Wallace* to *Winans* was intended merely to place *Winans* in the position of having an immediate lease from the trustee, and was not intended to alter his position in any other respect. Undoubtedly as between him and his co-partner's estate, his rights and position remained precisely the same as they were before. The concurrence of *Mackechnie's* personal representatives in the lease is sufficient to shew this, if any thing were wanting for the purpose. *Winans* then never could set up his registration of this new lease against any title created by his partner before the formation of their partnership, and to which the interest acquired by him on the formation of the partnership was subject. *Winans'* lease, however, and the registration of it form the key-stone of the title of the other defendants; and if they are obliged, as we think they are, to rest their respective titles on their own deeds, and the registration of them respectively, the plaintiffs' title must prevail over theirs, because before the title of any of the other defendants accrued, the plaintiffs' mortgage had been registered, and therefore these defendants acquired title to the property in question, with notice of the plaintiffs' title, and cannot rely on the prior registration of *Winans'* lease. It at first appeared doubtful, whether, independently of the notice conveyed by the registration of the plaintiffs' mortgage, they could avail themselves of the prior registration of *Winans'* lease, inasmuch as *Winans* derived title not from *Mackechnie*, but from *Patrick Wallace*, and the plaintiffs' mortgage would no doubt prevail over the conveyance to *Patrick Wallace*, although first registered, because it was not for valuable consideration. *Patrick Wallace's* deed followed the plaintiffs' mortgage, and *Winans'* lease necessarily followed *Patrick Wallace's* deed, and it also must have been postponed to the plaintiffs' mortgage, unless *Winans* could contend for what *Patrick Wallace* himself could

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v.
Mackechnie.

Judgment.

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not assert, namely, the priority of the deed to the plaintiffs' mortgage. But it seems to us that according to the true construction of the Registry Act, a purchaser or mortgagee for valuable consideration, registering, not only his own immediate purchase or mortgage deed, but also all deeds upon which it depends before the registration of a deed prior to them all, but unregistered, may contend that such unregistered deed is void as to him, although possibly some of the intermediate owners could not contend that it was void as to them, as if they were not purchasers for valuable consideration. He is within the words of the act, for he is a purchaser or mortgagee for valuable consideration, and the deeds under which he claims are all registered before the deed in question; and he is certainly within the spirit and meaning of the act, which meant that a purchaser or mortgagee for valuable consideration, consulting the registry, and tracing a good title upon its face to himself, should hold against any claimant whose title did not appear on the registry. Judgment.

We think, therefore, that at law, *Winans* being a purchaser for valuable consideration by the covenants which he entered into in his lease, and this lease and the conveyance to *Patrick Wallace* being registered before the plaintiffs' mortgage, *Winans'* lease, and all the titles of the defendants carved out of it prevail over the plaintiffs' mortgage; but that in this court, *Winans* himself, for the reasons already stated, not being able to set up his lease in opposition to the plaintiffs' mortgage, the other defendants cannot do so because they could only do so in support of their own titles respectively, which must fail before that of the plaintiffs, inasmuch as they were acquired with notice of it, arising from the fact of registration having previously occurred, and which I assume, under the provisions of the Registry Act, to constitute actual notice sufficient to countervail prior registration. The result is that the usual foreclosure decree must be pronounced. I believe the foregoing remarks answer all the points raised by the defendants in their answers, and in the course of the argument.

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v.
Mackechnie.

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LAUGHTON V. THOMPSON.

Steamboat—Injunction.

On the agreement for sale of a steamboat, the vendor delivered possession to the vendee, and executed a covenant binding himself to transfer the vessel with her machinery and furniture to the purchaser absolutely, upon payment of the balance of purchase money by certain instalments. And if default were made in payment of any portion thereof, it was provided that the vendor should be at liberty to resume possession of the vessel, with her machinery and furniture. The court granted an injunction, restraining the purchaser from removing the machinery from the vessel so long as any part of the purchase money remained unpaid.

From the pleadings and affidavits in this case, it appeared that a sale was made by the plaintiff to the defendant, of a steamboat on Lake Simcoe, called "The Beaver," with her machinery and furniture, and a piece of ground on the bank of the lake, used for the purposes of a wharf, for the sum of £2150, payable £800 in cash, and insurance stock at the time of the sale, and the remainder by annual instalments of £200. By the terms of the agreement, so much of the purchase money as should remain from time to time unpaid, was to be secured by mortgage of the piece of land, the steamboat "Beaver," and also another steamboat belonging almost wholly to the defendant, called "The Morning." The defendant paid £900 on account of the purchase money, and received possession of the piece of land, and the steamboat "Beaver:" something prevented the execution of an intended instrument relating to the land, and the steamboat "Morning," but a deed of covenant was made in relation to the steamboat "Beaver," by which, in consideration of the sum of £1250, payable with interest by instalments, and in manner after mentioned, the plaintiff bound himself to transfer that vessel, with her machinery and furniture to the defendant, absolutely, upon payment of that sum and interest, by the instalments, and in manner before referred to; that is to say, £200 per annum, with interest until fully paid, and it was provided that if default should be made in payment of such sum of £1250 and interest, or any part of them respectively, at the times, and in manner appointed for

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that purpose, the plaintiff should be at liberty to resume possession of the steamboat, with her machinery and furniture, as of his former estate, for his own absolute use and benefit. It appeared that the defendant *Thompson* and his partner *Bell*, who was a co-defendant, were engaged in removing the machinery from the "Beaver" to the "Morning;" and

1858.

Laughton
v.
Thompson.

Mr. *Morphy*, for the plaintiff, moved for an injunction to prevent such removal.

Mr. *Turner* contra, resisted the application on the ground that it was the intention of the parties, when the purchase was made, that the machinery should be transferred from the "Beaver" to the "Morning," and also that the plaintiff had been guilty of delay, having, as was alleged, been aware of the defendants' intention to remove the machinery some time before the application was made. The defendants, however, failed in establishing the points on which they relied, and the court being of opinion that it was the intention of the parties that the boat should remain as a security for the purchase money, so long as any part of it should remain unpaid, and in case of any default in payment, that the plaintiff should be able to retake possession of the vessel, and her machinery and furniture, just as she was, granted the injunction. Argument.

DOUGHERTY V. CARSON.

Will, construction of.

A testator devised all his real and personal estate to his wife for life; and upon her decease, his real estate to his daughter for life, remainder to her son in fee; with liberty to the daughter and her husband to occupy the land, provided they supplied his widow with a comfortable support and maintenance out of the same during her life, and if they did not do so to her satisfaction, that the executors should have power to sell or lease the land: *held*, that the duty of supplying the widow with maintenance was conditioned upon the parties occupying the land; and a sale effected by the executors in default of their supplying the widow with such support, although not occupying the land, was declared void.

This was a bill filed by *James Dougherty* and *Bridget*

1858. *Dougherty*, against *Charles Carson*, *Peter Quinn*, *Archibald Finlay*, *Jane* his wife, *John Finlay*, an infant, and *John Crenan*, setting forth that *Thomas McGinnis* by his last will and testament devised all his real and personal estate to his wife *Elizabeth*, for her natural life, and upon her death he devised the real estate to his daughter, the defendant *Jane Finlay*, and after her death, to the defendant *John Finlay*, in fee; and directed that his goods and chattels should be sold, and the proceeds given to his wife. And the testator further directed that the defendant *Jane Finlay* and her husband might occupy the real estate thereby devised, provided they would furnish his wife a decent and comfortable living out of the same during her life; and that in case they should not do so to her satisfaction and that of his executors, that the land should be sold or rented, as his widow and the executors might think best; and he appointed the defendants *Carson* and *Quinn* executors thereof; that the defendant *Jane Finlay* and her husband did not occupy the property, or support the widow, who from the month of December, 1850, until the time of her decease in November, 1855, resided with, and was supported by, the plaintiffs, under an agreement made with the said *Elizabeth McGinnis*. That no sum had at any time been paid to the widow from the estate for her maintenance, although the executors had sold and conveyed the land to the defendant *Crenan*, who had paid to the executors the whole, or a large portion of, the purchase money.

Statement.

That the plaintiff *Bridget Dougherty* had obtained letters of administration to the effects of *Mrs. McGinnis*, she having died intestate.

The bill prayed payment of the plaintiffs' demand out of the personal estate of *Thomas McGinnis*, but if that should prove insufficient, then that *Crenan* should be ordered to pay the amount claimed, or in default, a sale

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Dougherty
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The defendants *Carson* and *John Finlay* answered the bill. As against the other defendants, the bill was taken *pro confesso*. A motion was now made for a decree in the terms of the prayer, by

Mr. *Morphy* for the plaintiffs.

Mr. *Strong* for the infant defendant. *Finlay* and his wife not having occupied the farm, the right to maintenance, and power of sale in default, did not arise.

Mr. *Hodgins* for defendant *Carson*, contended, the power of sale arose notwithstanding the *Finlays* did not occupy the land.

The judgment of the court was delivered by

ESTEN, V. C.—I think that the *Finlays* not occupying the farm, were not bound to maintain the widow, and therefore the sale was not good, and should be set aside, which I hope may be done in the present case, in administering the estate. No debt accrued to the widow for her maintenance, nor to the administratrix. Of course she is entitled to an administration of the estate as a legatee: as the debts must be paid, the devisees are proper parties. I would give no costs to plaintiffs or defendant *Carson* to the hearing. Plaintiffs must pay the infant's costs, to be charged on the estate. Further directions, and subsequent costs reserved. Judgment.

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CARRUTHERS v. ARMOUR.

Practice—Costs—Injunction.

Where a motion for an injunction is refused, the proper course is not to give the costs of the application; as, if the suit fails, the plaintiff must pay the costs; and if it succeeds, the order pronounced at the hearing provides for the payment of them.

Mr. *Roaf* for the plaintiff.

Mr. *Strong* contra, cited amongst other cases *Wood v. Satliffe*.

The judgment of the court was delivered by

THE CHANCELLOR.—This was a motion for an injunction to restrain the defendant from proceeding to sell under a writ of *feri facias* issued upon a confession of judgment, signed by the plaintiff, upon the ground that the proceedings were contrary to good faith, and in violation of the understanding and agreement upon which the confession was executed.

The injunction was refused, but the costs remained to be considered.

The plaintiff contended that the practice in such cases is correctly stated by Vice-Chancellor *Parker*, in *The Great Western Railway Company v. The Oxford, Worcester and Wolverhampton Railway Company* (a). In which case that learned Judge observes: "The course of the court provides for the costs of these motions in a way that is most just. Nothing is to be said about costs. If the suit fails, the party moving must pay the costs; if the suit succeeds, then the order for taxation of the costs provides a better mode of obtaining them than any special order made by me would do." And it was argued, that according to the settled practice, the order in this case should be silent as to costs.

(a) 5 D. & S. 450.

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The defendant, on the other hand, contended that the costs of proceedings of this sort ought to be disposed of upon the hearing of the motion, in accordance with the opinion of Lord Cotton in *Lewis v. Smith* (a). The plaintiffs in that case moved for an injunction to restrain the defendants, who had been their solicitors, from acting against them. The injunction was refused, but the costs were reserved. The plaintiffs succeeded at the hearing, and the Vice Chancellor of England gave them the costs of the motion in which they had failed, as well as the costs of the cause. That case came before Lord Cottenham, upon appeal, when his lordship is reported to have said with reference to the costs of the motion: "that as a general rule the costs of a proceeding ought to be disposed of at the hearing of it; but that at all events he could not approve of the practice of reserving the costs of a proceeding for the purpose of eventually giving them to the unsuccessful party." And he ordered that part of the decree which directed the defendants to pay the costs of the motion, to be struck out; and the defendant argued that this motion should be refused with costs. Judgment.

That there is not any universal rule in accordance with either case, as the cases were understood upon the argument, is abundantly evident upon the authorities. Looking only at the decisions subsequent to *Lewis v. Smith*, we find that the costs have been frequently reserved. They are often made costs in the cause. Sometimes the motion has been refused without costs; and sometimes, but not frequently, with costs.

In *Waring v. The Manchester, Sheffield and Lincolnshire Railway Company* (b), decided in 1850, two years after *Lewis v. Smith*, Vice-Chancellor Wigram refused the motion, and in disposing of the costs he observes: "At present the whole case rests upon

(a) 1 McN. & G. 420.

(b) 14 Jur. 613.

1858. affidavits which may be displaced by evidence to be given in the cause. This is not like the case of a plaintiff moving on answer, because there he sees what the case is; and if he choose to bring on a motion upon an answer which, whether true or false, displaces the case, he does it with his eyes open. I know that in one branch of the court, the costs are commonly reserved, even in the latter case, upon the ground that the answer may be false; it is not, however, the general rule." From that statement it is plain that the practice of reserving the costs prevailed to a considerable extent subsequent to *Lewis v. Smith*, and was sanctioned by Vice-Chancellor *Wigram*, at least upon motions made before answer. That practice has been followed, indeed, by the ablest Judges, and is in many cases obviously convenient. I may mention as examples, that it was adopted by Lord *Cranworth* in *The Rochdale Canal Company v. King (a)*, decided in 1850:—by Vice-Chancellor *Turner*, in *Jones v. Boulton (b)*, decided in 1853;—and by the Lords Justices in *The Attorney-General v. The Sheffield Gas Company (c)*, decided in 1854. And many other instances might be cited.

Judgment.

When the costs are reserved, the order sometimes provides that the costs of the motion are to be costs in the cause in case the bill is dismissed before the hearing, the propriety of which is obvious. (*d*)

Frequently the costs are made costs in the cause by which, as I understand the expression, the costs of the motion follow the costs of the suit. I do not understand Lord *Cottenham* to disapprove of that practice. On the contrary, his Lordship's observations in *Stevens v. Keating (e)*, decided in 1850, indicate that he considered that mode of disposing of the costs just and convenient as a general rule. "The question I am now called upon

(a) 15 Jur. 962. (b) 10 Har. App. 11. (c) 17 Jur. 678.

(d) *Jones v. Batten*, 10 Har. App. 11, *Rumbold v. Forriaton*, 4 Jur. N. S. 608.

(e) 1 McN. & G. 659.

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to decide," he observes, "is whether, in a cause where an injunction has been obtained, which turns out to have been improperly granted, and the plaintiff has thus got a right which he cannot maintain, the defendant is entitled to the costs of a motion *in which he unsuccessfully resisted the granting of the injunction*. If the rule be such as has been stated, it is most unjust, and ought to be corrected. A plaintiff comes to this court and endeavours to establish a right to which *prima facie* he is entitled, but ultimately it turns out that he has no such right; the result, therefore, is, that he has taken that which he ought never to have had; and the defendant, in the meantime, has been deprived of his right, and exposed to an expensive litigation." The result was, that the defendant received the costs of the motion in which he had been unsuccessful. Now, that case appears to me to indicate that in Lord *Cottenham's* opinion the costs of injunction motions ought, as a general rule, to be costs in the cause; and if that be a correct judgment, *Lewis v. Smith* would be consistent with the case before Vice-Chancellor *Parker*, to which I have already referred.

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v.
Armour.

But whatever may have been Lord *Cottenham's* opinion, it is clear that this mode of disposing of the costs has been adopted as a general rule by one of the ablest Judges of the present day, I mean Vice-Chancellor *Wood*. In *Dawson v. Lawes*, (a) the application was for an injunction to restrain an action against a surety, who had been, as was argued, discharged. The Vice-Chancellor thought that the surety had not been discharged, and he therefore refused the motion, and in disposing of the costs, said: "The plaintiff is open to the offer made to him of an injunction, on paying the money into court, but I cannot make any order on this motion; and I shall do in this case, as I have done in other cases, where it is the whole question in the cause, make the costs

(a) Kay 307.

1858. costs in the cause." The same order was made in the *Attorney-General v. Wigan*, (a) in *Cox v. Cox*, (b) and in many other cases.

Carruthers
v.
Armour.

Frequently when the circumstances are favourable to the plaintiff, the motion has been refused without costs. I may mention as examples *Parratt v. Parratt*, (c) *The Lancaster and Carlisle Railway Company v. The North Western Railway Company*, (d) *The Warden of Dover Harbour v. The South Eastern Railway Company*, (e) and *Stephen v. Benning*, (f) and many other cases might be cited.

Sometimes when the plaintiff's case is viewed unfavourably, the motion is refused with costs. That was the form of the order in *Maclaren v. The Carron Company* (g) where the question had been previously decided, as the court thought, by the House of Lords; and in the *Judgment. Attorney-General v. The Sheffield Gas Company*, (h) when the motion was before Vice-Chancellor *Turner*, although when the case came before the Lords Justices, the costs were reserved.

I may mention further, that the order is in many cases silent as to costs, and that, too, in cases where, *à priori*, one might have expected a different result. I may mention *Bridson v. Benecke*, (i) and *Bullock v. Chapman* (j). In the cases just referred to, and many others might be cited, the reports are silent as to costs, and when that is the case I apprehend that the orders are silent also, but of that I am not quite sure. I am not clear as to the effect of an order of that sort. Whether it makes the costs of injunction motions costs in the cause when the party entitled to the general costs has succeeded upon the motion, and in that case only, according to the rules laid down by Sir *John Leach*, and to be found in all books

(a) Kay 279.

(b) 2 K. & J. 293.

(g) 2 Jur. N. S. 49.

(i) 11 Hare, 118.

(e) 9 Hare, 489.

(h) 17 Jur. 677.

(j) 2 D. & S. 214.

(c) 2 D. & S. 258.

(f) 1 Kay & J. 168.

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of practice; or whether it makes the costs of such motion costs in the cause, whatever may be the result of the motion, would seem doubtful. The observations of Lord Cottenham in *Stevens v. Keating*, seem to support the latter view. The observations of Vice-Chancellor Parker in the case already referred to, point to the same conclusion; because assuming the rules laid down by Sir John Leach to apply to injunction motions, the statement of the learned judge would be obviously inaccurate. If that be the true effect of such an order, it follows that the practice pursued by Vice-Chancellor Wood is the practice stated by Vice-Chancellor Parker to be in accordance with the general course of the court.

Looking at the circumstances of the present case, I cannot deny that they are unfavourable to the plaintiff. But I cannot say that they are sufficiently so to warrant us in refusing the injunction with costs. The better course will be, I think, to make the costs, costs in the judgment. cause.

BEVIS V. BOULTON.

Redemption—Trustee—Substantial improvements.

The principle, that when a trustee expends his money upon the estate, and thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant *cestui que trust*.

This was a suit instituted by *John Bevis*, an infant, by his next friend, against the Honourable *G. S. Boulton*, *John Brown* and *Andrew Armstrong*, praying that *Armstrong* might be declared a trustee of certain lands conveyed to him by *Boulton*. It appeared that *Francis Bevis*, the father of the infant, had purchased the property in question from *Boulton*, and had made an absolute deed thereof to *Brown*, who had executed a declaration of trust in favour of *Francis Bevis*; and

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Bevis
v.
Boulton.

Brown in his examination gave evidence of its contents, the instrument itself having, it was alleged, been lost. *Francis Bevis'* widow, in company with defendant *Brown*, waited upon *Boulton*, and effected with him an arrangement by which he was to pay a debt of £50 to *Brown*, and to make some small advances to the widow, and for these sums, together with the balance due to *Boulton* on account of the original purchase money, *Boulton* was to retain the land, and sell it for the benefit of the widow, and her son, the plaintiff, after paying the amount coming to himself. From the evidence of *Brown* it was made apparent that *Boulton*, at the time of taking the assignment was fully aware of the nature of *Brown's* claim upon the property. *Boulton* subsequently sold to the defendant *Armstrong* for £225, first by giving him a bond for a deed, and afterwards by executing a conveyance, and taking back a mortgage for £90, part of the purchase money, the whole of which remained unpaid, *Boulton* himself having prepared the several conveyances. The land, it appeared from the evidence given by the defendant *Boulton* in his examination by the plaintiff, had greatly increased in value, by reason of a railway passing near it, and *Armstrong* had made large and valuable improvements upon the property.

Statement.

Under these circumstances the court declared the plaintiff entitled to redeem upon payment of what was due to *Boulton* and *Brown*, and also of the amount expended by *Armstrong* in substantial improvements, less the rents and profits, plaintiff also to pay the costs, as of a redemption suit, the extra costs to be paid by *Boulton*.

The plaintiff being dissatisfied with this decree, in so far as it directed payment of the improvements, re-heard the cause, contending that if it were not clearly established that *Armstrong* had had notice of the title, that then *Boulton* should be directed to pay for the improvements.

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Mr. *Strong* for plaintiff.

Mr. *Brough* for defendants.

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Bovls
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The judgment of the court was now delivered by

THE CHANCELLOR.—I think that the decree in this December 8. case is substantially right. It finds that the property in question in the cause was vested in the defendant *Boulton* in trust for the plaintiff. That the defendant *Armstrong*, who purchased from *Boulton*, had notice of the trusts before he had either paid his purchase money or received his conveyance. And that the defendant *Armstrong* was consequently a trustee for the plaintiff, and bound to reconvey. The propriety of the decree thus far was admitted, of course, by the plaintiff, on whose behalf the cause was re-heard, but he contended that the Judgment. decree was erroneous in directing an allowance to be made to *Armstrong* for substantial improvements. That was in truth the only point seriously discussed.

At the hearing the decree did seem to me to bear hardly on the plaintiff in that respect; because, assuming the principle on which the court allows for substantial improvements, in such cases, to be that the owner of an estate who lies by and allows improvements to be made without remonstrance, ought not to be allowed to recover that estate without paying for such improvements: assuming that to be the principle, I could not discover anything in the evidence to justify the court in charging the plaintiff here, who is still an infant, with the improvements made by the defendant *Armstrong* upon any ground of that sort.

But an examination of the authorities has convinced me that the court proceeds upon a much broader principle in allowing for substantial improvements in such cases; upon the principle that when a trustee expends his money, and thereby increases the value of

1858. the estate, it would be inequitable to wrest it from him without re-paying the expenditure by which the estate had been substantially improved.

Bevia
v.
Boulton.

It is true that in *Kenney v. Brown*, (a) Lord Fitzgibbon, then Chancellor of Ireland, would appear to refer the jurisdiction to the former principle. In reply to the claim for improvements, he says; "If the person really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such an expenditure without apprising the party of his intention to dispute the title, and will afterwards endeavour to avail himself of such fraud, the jurisdiction of a court of equity will clearly attach upon the case. But does it follow from thence that if a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, that therefore he shall retain it in his hands against the lawful proprietor? If such a rule should prevail it would justify a proposition I once heard at the bar, that the common equity of the country was to improve the right owner ought of the possession of his estate."

Judgment.

But that was a case of very gross fraud, and if the Lord Chancellor meant to limit the jurisdiction to that class of cases to which he referred, as he may not, the observation was extra-judicial.

But it is plain, I think, that the later cases proceed upon the broader principle to which I have referred.

In *Ex parte Hughes* (b), the circumstances were shortly these: Mr. *Hughes*, a large creditor, was consulted by the assignees as to the manner in which the bankrupt estate should be brought to sale. He bought a portion of the property at the auction which ensued, and his purchase was set aside on account of the part he had taken in advising as to the sale. It was admitted

(a) 3 Ridgway, 518.

(b) 6 Ves. 617.

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on all hands that Mr. *Hughes'* conduct was in a moral point of view perfectly correct, but the sale was set aside on the general principle that a man cannot be at the same time seller and purchaser; and having taken some part, however trifling, in the management of the sale, his purchase was set aside. Mr. *Mansfield* supported the petition, and resisted the purchaser's claim to be allowed for substantial improvements. He argued that "the purchaser had notice on the same evening, that the sale could not stand. And having notice that it would be impeached, it was his own folly to lay out his money." But Lord *Eldon* said: "The question as to repairs is of some difficulty; and on that account I am afraid to go the length of determining that he should not be entitled to the value of the substantial improvements made, at the hazard, upon a question of considerable doubt, of doing substantial injustice. Suppose the assignee, instead of mingling himself in the sale, had kept the property, and had *bond fide*, with an honest Judgment. view of improving it, expended in the repairs of the machinery a considerable sum, which had been added to the purchase money; it would be hard dealing not to allow that to the assignee. I am the more disposed to think this right, recollecting that in *M'Enzie's* case, the House of Lords did allow him the value of improvements of all kinds, even in the instance of a mansion house erected, and plantations of shrubs."

It is impossible to conceive a stranger case than that. Acquiescence was out of the question; and the substantial improvements amounted to three times the price paid for the estate; yet they were allowed.

In *Ex parte Bennett*, (a) a purchase made by General *Harris* was set aside on the ground that he had directed the solicitor to the assignees, who was his own solicitor, to appoint some person to bid for him at the sale, but an account of repairs and substantial improvements was directed.

1858.

Bevis
v.
Boulton.

Judgment.

But *Mill v. Hill*, (a) recently decided by the House of Lords, is precisely in point. In that case Sir *Grover Hill*, who was only tenant for life, suppressed the settlement made upon his marriage, and claiming to be owner in fee, sold the property to *Mill*, who had no notice of the trust, at its full value. Upon the death of Sir *Grover Hill*, his son, Sir *John Hill*, who was tenant in tail under the settlement, filed a bill by his next friend, he being then an infant, to have that sale set aside, and the court, thinking him entitled to that relief, *Mill's* right to be allowed for substantial improvements was much discussed. The Lord Chancellor in delivering judgment upon that point says: "There arises the important question with regard to the improvements. Now, certainly, this gentleman stands in a situation entitled to as much benefit as any person standing in the position of a constructive trustee is entitled to. Without the parade of going through a number of cases, it will be found that there are several cases on that subject referred to in *Hill* on trustees. I have gone through all these cases, from the case of *Mackenzie v. The York Building Company*, (b) in which this House, setting aside a sale which had taken place, directed the individual to be allowed, upon a fair account, the improvements he had made, in the permanent value; and I do not find any case contrary to that except where the trustee had been guilty of fraud. It seems to me, therefore, that there should be an enquiry before the Master as to any permanent improvement in the pecuniary value of the estate. I do not apprehend that the appellant is entitled to be reimbursed at the expense of the infant for any improvement which he may have adopted as a matter of taste, or as a matter of personal convenience. But when he has added to the permanent value of the estate, it appears to me that he is entitled to a fair allowance."

That case appears to me to be precisely in point. The

(a) 3 H. L. 828.

(b) 8 Bro. P. C. 42.

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order pronounced by the House of Lords falls short of the relief to which Lord *Eldon* thought the purchaser entitled in *Ex parte Hughes* and *Ex parte Bennett*, but looking at the circumstances, it will be found, I apprehend, to agree substantially with the decision pronounced in the present case.

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Bevis
v.
Boulton.

 WHITEHOUSE V. GLASS.

Principal and surety—Costs of action.

Quære—Whether the principal is bound to refund to his surety costs of proceedings taken against the surety to enforce payment of the debt of the principal.

The bill in this case prayed, that under the circumstances stated in the judgment, the defendant might be ordered to refund to plaintiff the amount paid by him for principal and interest of the mortgage debt mentioned in the judgment, as also the costs of an action at law brought by the mortgagee against the plaintiff.

Statement.

The defendant had allowed the bill to be taken *pro confesso* against him; and now

Mr. *Blake*, for plaintiff, moved for a decree according to the prayer, citing *Stratton v. Mathews*, (a) *Bramley v. Chesterton*, (b) *Jones v. Brooke*, (c) *Grant v. Small*, (d)

(a) 3 Ex. 48. (b) 3 Jur. N. S. 104. (c) 4 Taunt. 464

(d) The facts of the case of *Grant v. Small* are shortly these: The plaintiff was the endorser of an accommodation note for the benefit of the defendant, who was the maker thereof, upon which proceedings had been taken at law; a judgment recovered against both the maker and endorser, and a *fi. fa.* against goods issued thereon under which the sheriff had levied on the goods of the plaintiff, who thereupon filed a bill in this court, praying that the defendant might be ordered to satisfy the writ, so far as the same affected the goods of the plaintiff. The bill had been taken *pro confesso* for want of answer. Mr. *Roaf* for the plaintiff submitted, that as a general rule an accommodation endorser was entitled to recover against the maker, costs which the endorser had been obliged to pay by reason of default in payment by the maker, and was not compelled, at the risk of losing such costs, to retire the bill on its maturing, if the maker failed to do so; but what-

1858. in this court, to shew that under the circumstances the plaintiff was entitled to this relief.

Whitehouse
v.
Glass.

The judgment of the court was now delivered by

THE CHANCELLOR.—The plaintiff being the owner in fee of certain premises, subject to a mortgage, sold them to the defendant, who covenanted to pay the mortgage debt. This the defendant failed to do, and an action was in consequence brought against the plaintiff, who thereupon filed the present bill, and the question is, whether the plaintiff is entitled to recover the costs of the action at law.

Grant v. Small was the case principally relied on.

The plaintiff stands in a position very analogous to that of an accommodation acceptor; and if the right of an accommodation acceptor to recover the costs of an action at law brought against him for the amount of the bill had been clear, I should not have hesitated to act upon that principle in the present case. But so far as I have had an opportunity of consulting the authorities, that point cannot be considered settled. *Stratton v. Mathews*, recently decided by the Court of Exchequer, would seem a distinct authority in the plaintiff's favour, and *Jones v. Brooke*, (a) to which Baron Parke refers, supports the judgment. But in *Beech v. Jones*, (b) a contemporaneous decision, the law is assumed by Mr. Justice Maule to be clearly otherwise, and in *Roach v. Thompson*, (c) and *Gillet v. Rippon*, (d) Lord Tenderden so ruled.

We are inclined to think that the plaintiff is entitled to recover his costs at law, as between attorney and

ever the rule of the court might be in this respect, the question did not arise here, as both parties had been sued in the action at law; the execution in the sheriff's hands was against both, and the relief sought in this court was simply a decree that the defendant should discharge the writ so far as the same affected the plaintiff. The court, under the circumstances, made the decree as asked, with costs.

(a) 4 Taut. 464.

(b) 5 C. B. 696.

(c) Mood & Mal. 437.

(d) Mood & Mal. 406.

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(a) Jones v.
(b) 1 Atk.
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client. It is said that the plaintiff should have paid the debt, and saved the costs. But the plaintiff was not bound to pay it. The defendant, as the purchaser of the equity of redemption, was bound to indemnify him against it. (a) And I do not perceive how the defendant can be heard to say that the plaintiff ought to pay a debt against which the defendant himself had agreed to indemnify him. The observations of Lord *Hardwicke* in *Ex parte Marshall*, (b) seems to me, I must confess, highly reasonable, and there are other authorities to the same purpose. (c) But as the cases are conflicting, the point must be argued for the purpose of having the numerous decisions upon the subject looked at and considered.

ARNOLD v. HULL.

Inquiry—Specific performance—Exchange of land.

In a contract for the sale of property, it was agreed to be paid for, in part, by an assignment of a mortgage to be obtained from a third party. Afterwards the purchaser alleged the refusal of the mortgagee to assign. The court, under the circumstances, refused to decree specific performance, but directed an enquiry, whether or not the mortgagee was still willing and able to assign the mortgage.

The bill in this case alleged that by an agreement dated 5th of May, 1857, the plaintiff agreed to assign to defendant certain leasehold premises for £1500, to be paid in manner following, that is to say, the defendant to assign to plaintiff a certain mortgage made by one *Moore* to one *Engerson*, securing £1100, and the balance by the conveyance of certain freehold property, not material to the case. The prayer was for a specific performance of the contract. The defendant, by his answer, admitted the contract as set forth in the bill, but asserted that he had objected executing the same, as he had only an agreement for procuring the assignment of the mortgage.

(a) *Jones v. Kearney*, 1 D. & W. 134.

(b) 1 Atk. 261.

(c) *Sparkes v. Martindale*, 8 East. 593.

(d) *Smith v. Compton*, 3 B. & Ad. 407; *Jones v. Williams*, 7 M. & W. 493; *Bramley v. Chesterton*.

1858.

Arnold
v.
Hull.

held by *Engerson*, to whom he was to convey certain lands, as a consideration for the assignment, and that in consequence of delays arising from the plaintiff having failed to carry out his portion of the agreement *Engerson* now refused to assign the mortgage. Under these circumstances defendant submitted he should not be compelled to complete any part of the agreement, as the assignment of the mortgage from *Engerson* to himself was the only inducement for his making the agreement with the plaintiff.

The effect of the evidence is stated in the judgment.

Mr. *D. G. Miller* for plaintiff.

Argument.

Mr. *Blake* for defendant.

ESTEN, V. C.—The agreement is admitted. I do not think it is proved that *Arnold* was to give the security to *Engerson* as part of the agreement, but some arrangement was made to that effect, probably after the agreement, and after *Hull* ascertained that *Engerson* would not accept the fifty acres, and it was voluntary on the part of *Arnold*. It appears that *Hull* and *Engerson* were at Woodstock on the 11th and 12th to perform the agreement as they say; but that was not the day fixed for the purpose, and they could hardly expect to meet *Arnold* on those days. *S. Cowan's* evidence shews that *Arnold* was certainly there on the 13th, the day appointed, and on his return met *Hull* at Princetown, and asked why he had not been at Woodstock to fulfil the agreement; when *Hull* answered that he had been unable to pay *Engerson* the £50, and that was the reason he did not attend, and asked *Arnold* when he could attend again. For aught that appears *Arnold* might have been fully prepared to fulfil the agreement on that day. He had furnished *Hull* with a note for £50 to give to *Engerson*, which *Engerson* refused to accept. I think the best course to adopt is to direct an enquiry whether *Engerson*

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is still able, and whether or not willing to fulfil his agreement, and what steps were taken by *Arnold* towards the fulfilment of the agreement on his part, and by the defendant on his part; with liberty to report special circumstances; reserving further directions and costs.

1858.

Arnold
v.
Hull.

SPRAGGE, V. C.—I have no objection to the enquiry which my brother *Esten* has indicated as proper under the circumstances. If, however, it should turn out that defendant cannot procure what is called the *Engerson* mortgage to be assigned to him, or to the plaintiff, I am not clear that the plaintiff can have any decree. The court will not, of course, decree that he shall procure such assignment any more than it would decree specific performance of an agreement to purchase a particular estate. (a) It appears that the plaintiff knew that the defendant had not at the time of the agreement an assignment from *Engerson*, and probably that he had not given to *Engerson* the consideration for it, whether he knew what the consideration agreed upon between the parties was, does not appear—it may not improbably turn out that he did. It may be said that the procuring an assignment of this mortgage was only a mode of paying an agreed amount of purchase money, and that the defendant should be compelled to pay according to that mortgage, and to give security upon other land of sufficient value; but that certainly would be a different thing from what was agreed to be done. The defendant agreed to pay part of the consideration in one particular way, and no other. This may properly be considered on further directions.

Evidence has been given of acts by the plaintiff since the burning of the mill, indicating ownership on his part of the property, especially his making sale of mill castings, but the fire occurred since this suit was

(a) Walker v. Barnes, 3 Wad. 245.

1858. commenced, and no supplemental answer has been put in, so that that point has not been raised upon the record.

Arnold
v.
Hull.

I am inclined to think with my brother *Esten* that the negotiation for securing or satisfying *Engerson* by the plaintiff was not part of the original agreement, but were endeavours on the part of the plaintiff to remove obstacles which were in the way of the defendant obtaining an assignment of the mortgage.

If the plaintiff should elect to proceed at law for damages, instead of further prosecuting this suit, I should be inclined to dismiss the bill without costs.

COTTON v. CORBY.

Rectification of deed—Specific performance—Staying proceedings on appeal.

Jan. 18, 20 &
21, Dec. 8, 16
& 17, 1855,
and January
29, 1859.

In suits for the rectification of deeds, the court is in the habit of allowing great weight to the statements made by the answer in opposition to the relief sought by the bill: where, therefore, on the sale of a steamboat, the vendors gave a bond binding themselves unconditionally to procure a conveyance of the vessel to be executed to the purchasers within three months thereafter, and delivered possession to them; but the conveyance was not made as stipulated, and two years afterwards the vessel was taken out of the possession of the purchasers, upon process issued against the owner, and under a mortgage previously existing upon the vessel; and a bill was filed by the vendors for the rectification of the bond, by introducing therein certain stipulations, set forth in a memorandum made by the holder of the incumbrance at the foot of the vendors' bond, and which the incumbrancer swore he had made in order that the purchaser might have notice of his claim, and also a receipt given by him when paid part of the claim he held against the vessel; the purchasers, in their answer, asserted that they never had intended to abridge their rights under the bond, and never would have consented to the introduction therein of any stipulations which would have had that effect; and as the alteration of the bond in the manner proposed would have had the effect of materially affecting the rights of the purchasers to their prejudice, and there was nothing inconsistent in the facts being as the purchasers alleged them to be, the court, under the circumstances, refused the relief prayed, and dismissed the bill with costs.

A steam-vessel owned by the members of a limited partnership was registered in the name of the general partner. During his absence from this country the special partners agreed for the sale of the vessel, and gave their bond conditioned for the obtaining of a good and sufficient transfer thereof to the purchasers, within three months from that date, and placed the purchasers in possession. Two years afterwards the vessel was sold under execution issued against the general partner, and was taken out of the possession of the

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purchasers by means of a writ of replevin, the purchasers giving to the special partners notice of these proceedings, who took no steps to prevent the removal of the vessel; and the purchasers thereupon instituted proceedings at law against the obligors in the bond, and recovered judgment against them, after which they filed a bill praying a specific performance of the contract; and an injunction to stay proceedings under the judgment. The court taking into consideration the great changes which had taken place in the position of the parties, and the depreciation in value of the steamer, refused specific performance, and dismissed the bill with costs.

A bill filed for the purpose of restraining proceedings at law to enforce a judgment, having been dismissed, the court continued the interim injunction, which had been obtained during the progress of the cause, until the decision of the Court of Appeal could be obtained, upon paying into court the amount of the judgment, or giving security to the satisfaction of the defendants, for payment of the money.

1859.

Cotton
v.
Corby.

The bill in this cause was filed on the 10th day of February, 1857, by *James Cotton, George B. Holland, Duncan McDonell, Peter Paterson, Elizabeth Paterson* and *William McMaster*, the three last named being the personal representatives of *David Paterson*, deceased; against *Henry Corby, Benjamin Fairfield Davey, George Neilson, Alexander Stewart, William H. Ponton*, Statement. *John McGill Chambers, David Shaw, Philip Low* and *Overton Smith Gildersleeve*, setting forth that in 1854, the defendants other than *Stewart* and *Gildersleeve* had appointed *Stewart* to act as their attorney in the purchase of a steam-vessel called "The City of Hamilton," with discretion as to price, and power to sign or endorse any note or bill that might be necessary for the purpose; the purchase thereof being intended for the joint benefit of *Stewart* and the other defendants, except *Gildersleeve*, and that *Stewart* acting under the authority so given to him, entered into treaty with the plaintiffs *Cotton, McDonell* and *Holland*, and the late *David Paterson*, who were acting in the winding up of the affairs of the co-partnership of *Donald Bethune & Co.*, for the purchase of the said steamer, when it was verbally agreed that he should purchase the same at £6000, £2000 to be paid in cash, and the balance to be secured by the promissory notes of *Stewart* and his constituents, payable at different dates, the last on the 1st of December, 1856; and the solicitor of *Stewart* prepared the necessary

1859.

Cotton
v.
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instruments for carrying the purchase into effect ; one being a bond from the vendors in the penal sum of £10,000, conditioned for their conveying, or procuring to be conveyed, by a good and valid deed, to the purchasers, within three months from that time, the said vessel *free from all claims, demands and incumbrances, legal or equitable, save and except such* as should thereafter be created *upon the said steamer by the obligees, or those claiming under them* ; the other being a deed covenanting on the part of the purchasers to execute and deliver to the vendors a mortgage on the steamer, so soon as the conveyance thereof should be completed, for the purpose of securing the payment of the sum of £4000, payable at the same times, and by like instalments as the promissory notes were made payable.

Statement. That at this stage of the proceedings, before the execution of either of these instruments, and before the payment of any money on account of the purchase, it was discovered that a mortgage for £5000 on another steamboat extended to, and encumbered "The City of Hamilton," which had been created in the year 1853, by *Donald Bethune*, as an indemnity to *Cotton*, for money borrowed by him for the purposes of the co-partnership, on the security of certain real estate of his own ; and that in April, 1853, £1250, part of the said sum of £5000, had been paid, thus reducing the incumbrance on both vessels to £3750 ; and that in February, 1854, *Cotton* assigned the mortgage so held by him to *John H. Cameron*, and others, as trustees, as collateral security for the money advanced by them on the security of the real estate of *Cotton*.

That in these circumstances the parties to the agreement repaired to the office of *Mr. Cameron* for the purpose of making some new arrangement, when some change was made, particularly as to the amount to be paid down, but the result of their interview with *Mr. Cameron* is fully stated in the judgment.

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That upon the execution of the instruments already referred to, and on the 23rd day of May, 1854, the steamer "The City of Hamilton" was delivered to Stewart and his constituents, who sailed the same during the years 1854 and 1855. And the plaintiffs submitted that under the circumstances, and upon the facts set forth, they were entitled to have the bond and deed of covenant rectified and reformed, so as to have imported into them the memorandum and receipt made and given by Cameron on the occasion referred to.

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v.
Corby.

The bill further alleged, that the notes given as part of the consideration for the purchase of "The City of Hamilton" were not paid at maturity, and that Cameron had sued and recovered judgment upon the second note, and that after default in payment of that note, and on the 29th of April, 1856, he duly assigned the mortgage on the steamer, and the judgment recovered on the said promissory note to *Gildersleeve*, who subsequently obtained, and still held, possession of the vessel by virtue of a writ of replevin.*

The bill further stated that *Gildersleeve*, after he became such assignee, and after he had taken possession of the said steamer "The City of Hamilton," and on or about the 12th day of May, 1856, took an assignment of a judgment against *Donald Bethune and Company* for the sum of £49, and sued out a *fi. fa.* thereon, under which the steamer was sold and bought in for him by one *Draper* for £10, who afterwards transferred the interest, if any, acquired under the sheriff's sale, to *Gildersleeve*. In the course of the evidence it appeared that the defendants other than *Gildersleeve* had instituted proceedings against the plaintiffs on the bond, and recovered judgment thereon. The bill alleged applications by plaintiffs to the defendants other than *Gildersleeve*, to accept a transfer of the vessel; but this they

* The facts in reference to this point are clearly stated in the report of the case of *Gildersleeve v. Corby*, 15 U. C. Q. B. Rep. 150.

1859. refused to comply with. The prayer of the bill was to rectify the bond and deed of covenant; a specific performance of the contract, and injunction to stay proceedings on the judgment.

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v.
Corby.

The defendants other than *Gildersleeve* answered the bill, denying any intention on their part to relinquish any claim which they were entitled to against the vendors under the bond; and setting forth that no tender of a conveyance of the vessel was ever made to them until after the possession had been taken from them by *Gildersleeve*, and that if any bill of sale had been executed by *Bethune*, it was after they had ceased to have any interest in the vessel.

It is believed that this statement of the case, and the facts set forth in the judgment of the court, will be sufficient for a clear understanding of the points in issue.

Statement.

The cause was first heard before His Lordship the Chancellor alone, and afterwards before the full court; but the judgments are reported as if given at the same time, His Lordship remaining of the same opinion after hearing the cause re-argued.

Mr. *Cameron*, Q. C., Mr. *McDonald*, and Mr. *Strong* for the plaintiffs.

Mr. *Crickmore* for the defendant *Gildersleeve*.

Mr. *A. Wilson*, Q. C., and Mr. *Richards*, Q. C., for the other defendants.

THE CHANCELLOR.—This bill is filed for the purpose of having a contract for the sale of a steam-vessel called "The City of Hamilton," rectified, and for specific performance under circumstances somewhat peculiar and complicated.

On the 23rd of May, 1854, the defendants in this suit

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agreed to purchase the vessel at £6000; £2000 of which was to be paid in cash, and the remaining £4000 in this way: one thousand pounds on the 1st day of December, 1854; fifteen hundred pounds on the 1st day of December, 1855; and fifteen hundred pounds on the first day of December, 1856, with interest. *Donald Bethune* was at that time the registered owner of the vessel, not in his individual capacity, but as the general partner in what was then supposed to be a limited partnership which carried on business in this city, under the style of *Donald Bethune & Co., (a)* and as he was then absent, in Europe as was supposed, and as a proper transfer of the vessel could not be, for that reason, then executed, it was arranged that the contract should be carried out in this way. The plaintiffs in this suit, who were partners in the firm of *Donald Bethune & Co.*, and who for brevity we may call the vendors, agreed to put the defendants, the purchasers, into immediate possession of the vessel, and to execute a joint and several bond in the penal sum of £1000, conditioned to be void upon the making to the defendants a perfect title within three months from the date, and the defendants, on their part, agreed to pay the £2000 in cash, and to secure the other instalments by a mortgage of the vessel, so soon as a proper bill of sale had been executed.

1859.

Cotton
v.
Corby.

Judgment.

After this agreement had been concluded, but prior to the execution of the necessary papers, the defendant *Stewart*, who acted throughout for all the other purchasers, discovered that the "City of Hamilton" was then subject to a mortgage for £5000, created by *Bethune* in favour of *Cotton*, one of the plaintiffs in this suit, and by him assigned to Mr. *Cameron* and others, as trustees for Mrs. *Bovell*. Upon this discovery *Stewart* waited upon Mr. *Cameron*, in company with his solicitor Mr. *Dalton*, and having ascertained that his information respecting the mortgage was accurate, and being impressed with a

(a) See *Patterson v. Holland*, ante page 1.

1859.

Cotton
v.
Corby.

notion, reasonably, it must be admitted, that the vendors had been attempting to defraud him, he wished to break off the negotiation, and to have nothing further to do with the parties.

Upon communicating these facts to Messrs. *Cotton & Holland*, by whom the sale was managed, principally at least, on behalf of the vendors, they professed to doubt that the mortgage in question affected the "City of Hamilton," and being anxious that the contract should not be broken off, they, that is *Cotton and Holland*, waited on Mr. *Cameron*, and having learned from him that the "City of Hamilton" was included in his mortgage with the "Maple Leaf," they proposed, and he assented to, such an arrangement as would, they hoped, prove satisfactory to the purchasers.

In consequence of the negotiation thus opened with Mr. *Cameron* by *Cotton and Holland*, Mr. *Stewart* again repaired to his office, at their request, in company with his solicitor Mr. *Dalton*. Upon their arrival, *Cotton and Holland* being present, Mr. *Cameron* said he was satisfied nothing wrong had been intended; and he then stated the terms to which he was prepared to assent. It is satisfactorily established, I think, that the terms stated by Mr. *Cameron* were reduced to writing, and are to be found in two papers, one a memorandum written at the foot of the bond, and signed by Mr. *Cameron*, and the other a receipt, also written and signed by him. The memorandum was written and signed by Mr. *Cameron* underneath the signatures of the obligors, and is signed by him alone. It is in these words: "I undertake to release the mortgage I now hold upon the 'City of Hamilton,' or to hold the same for the payment only of the notes in the bond mentioned, whenever the bill of sale is made by *Donald Bethune & Co.*" The receipt runs thus:

"Toronto, 23rd May, 1854."

"Received from Mr. *Alexander Stewart*, £1000 (one thousand pounds) in cash, three notes for four thousand

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1859.

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v.
Corby.

Mr. Dalton doubts whether the memorandum was made before or after the execution of the bond, but upon the whole, I incline to think that it was written before; and thereupon £1000 in cash, and three promissory notes for the credit instalments, made by the purchasers, were handed by *Stewart* either to the vendors or to *Mr. Cameron*. *Mr. Dalton* asserts that they were handed to the vendors, but I do not think that much turns upon that. All parties were present, and as it was known to all that £1000 in money, and the notes were to be handed to *Mr. Cameron*, it was quite unimportant whether he received them directly from *Stewart*, or through the medium of one of the vendors. Judgment.

I have no doubt that the receipt was prepared and signed at the same time with the bond, and as part of the transaction. *Mr. Dalton* swears that he neither saw that paper nor heard it read at the time the other instruments were executed, and that he only became acquainted with its contents upon seeing it stated in the bill in this cause. I am satisfied, however, that *Mr. Dalton* must have seen, or at least heard of it. The memorandum alone does not shew the terms of the arrangement. Taken alone, it is insensible, and it is only when read in connection with the receipt that we can understand the memorandum, or ascertain the terms to which *Mr. Cameron* assented. *Mr. Cameron* swears that the receipt was read over to the parties, and *Mr. Dalton* admitted fairly, when reminded of it, that he had heard something about substituting other securities for the notes given by

1859. the purchasers, a matter not alluded to in the memorandum, but fully explained in the receipt. It must be assumed, therefore, as it seems to me, that Mr. *Dalton's* memory was in that respect inaccurate.

Cotton
v.
Corby.

Now, the contention on the part of the plaintiffs is, that the real contract between the parties is not to be found in the bond and indenture executed by them respectively, but in the bond and indenture qualified by the memorandum and receipt, and as those instruments were executed in their original form improvidently, the plaintiffs argued that they ought to be rectified, and made conformable to the real intention.

If the memorandum and receipt were to be treated as parts of the agreement for the sale of the "City of Hamilton," it must be admitted, I think, that they constitute a very material alteration of the contract contained in the bond and indenture. If the four documents are to be treated as forming together the true agreement, then, instead of a contract to pay £2000 to the vendors upon the execution of the bond, it became a contract to pay one half of that amount to Mr. *Cameron*. Instead of a contract to pay the credit instalments to the vendors, it became a contract to pay those instalments to Mr. *Cameron* also, and instead of the agreement expressly stated in the bond and indenture that a perfect title should be made in three months, and that the purchasers should then execute a mortgage to secure the unpaid purchase money, it became a contract that in one event at least the old mortgage should remain in Mr. *Cameron's* hands as a subsisting mortgage to secure the unpaid purchase money at the time specified in the indenture. And if that can be considered the true agreement, then I am inclined to think, as was argued, that the contract for a perfect title within three months, and a mortgage to secure the purchase money, must be considered as abandoned in one event at least, and that the purchasers must be treated as having in effect cove-

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Cotton
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It cannot be denied that the probabilities in favour of that argument are of considerable weight. Just as the contract for the purchase of this vessel was on the eve of being consummated, a mortgage for a large amount was discovered. An impression was created that this mortgage had been fraudulently concealed by the vendors. And certainly there were the strongest grounds for that suspicion, inasmuch as this very mortgage had been assigned by *Cotton*, one of the vendors, just four months before, to *Mr. Cameron*, to secure a very large debt. When an arrangement was proposed under such circumstances, to obviate that difficulty, it was not to be expected that the purchasers would have been disposed to leave much to the honour of the parties with whom they were dealing. It would have been natural and highly reasonable that they should have resolved to have the terms of Judgment. the proposed arrangement stated explicitly in writing, and in such a way that all parties should be bound to their fulfilment, and it is argued that the memorandum and receipt were prepared for that purpose, and must be treated in all reason as forming parts of the contract between the parties.

The defendants, on the other hand, contend that they had no intention at any moment of altering the terms of the agreement contained in the bond and indenture. They swear that they were satisfied with, and meant to rely upon, *Mr. Cameron's* undertaking that he would not use his mortgage except as a security for the instalments which they were bound to pay, and that for the rest they meant to insist upon the strict conditions of the bond, and believed that the vendors would be enabled to carry them out in consequence of the facilities which *Mr. Cameron* had agreed to afford them.

There are strong probabilities in favour of that conten-

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v.
Corby.

tion.also. The provisions in the conditions of the bond respecting the title are of the strictest kind. An undefined apprehension of difficulty from some quarter appears to have existed, and nothing can exceed the anxious care with which they have sought to secure a perfect unincumbered title within three months. The condition of the bond is, that if the vendors do, within three months from the date, convey, and cause to be conveyed to the purchasers by a good and valid deed of conveyance, the said steamboat, called the "City of Hamilton," and the absolute title to the same, free from all incumbrances, claims, executions, or demands whatsoever, and so that the said purchasers shall thenceforth stand, and be absolutely possessed as of their own property, of the said steamboat, free from all claims, demands and incumbrances, legal or equitable, save incumbrances created by the purchasers. And if the purchasers shall from time to time, and at all times, from the making of the obligation, peaceably and quietly, have, hold, use and enjoy the said steamboat, without the let, suit, hindrance, or denial, interruption, molestation, claim or demand by any person whatsoever lawfully claiming the same, or any part thereof, or any interest therein, legal or equitable. And if the vendors do, and shall at all times thereafter retain, protect, warrant, and defend the purchasers in the full and quiet possession as of their own property of the said steamboat against all claims by any persons lawfully claiming, then the obligation to be void.

Judgment.

Now there is no evidence that the purchasers meant to abandon all these anxious provisions for the completion of their title within three months. They swear positively that nothing of the sort was contemplated. It is clear that the condition of the bond would not have been fulfilled so long as the mortgage to Mr. Cameron remained outstanding, and had it been the intention that the title should remain incomplete during that period, it is highly improbable that the vendors would have consented to execute the bond in its present form;

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while on the other hand, it cannot be said to be highly improbable that the purchasers should have rested satisfied with the undertaking of Mr. *Cameron*, intending to insist on the strict fulfilment of the bond, because viewed as a simple undertaking, that memorandum did afford the purchasers considerable protection, sufficient, perhaps, to satisfy the demands of ordinary prudence.

1859.

Cotton
v.
Corby.

Now, beyond the facts and documents as I have stated them, no evidence has been adduced on behalf of the plaintiffs. They rely entirely upon the argument derived from the facts and documents to which I have referred. But it may well be doubted whether, upon the case so stated, the probabilities do not preponderate in favour of the defendants, certainly it cannot be represented as conclusive in favour of the plaintiffs' contention. And that alone would have been sufficient for the determination of the case. For before I could have ventured to alter these written instruments I must have been fully convinced that there was in the minds of both parties an intention different from that expressed in the deeds. It is plain upon principle and authority, that if any doubt had remained, I could not have ventured to decide that ^{Judgment.} these deeds, deliberately prepared and executed, did not express the true intention of the parties.

But apart from the internal evidence, the direct testimony adduced on behalf of the defendants has great force. In the first place it must be recollected that the answer which always forms a very material element in the determination of cases of this sort, denies in explicit and positive terms the case made by the bill. The defendants swear that they had no intention whatever of departing from the bond in any particular, or of absolving the defendants from performing strictly its conditions. The statement in the answer is fully borne out by Mr. *Dalton*, the professional gentleman who conducted the business on behalf of the defendants, and who was present during the whole negotiation. And Mr. *Dalton* is

1859. confirmed in a very important particular by Mr. *Cameron*.
 Cotton v. Corby. Had it been the intention of the defendants that the memorandum which we find at the foot of the bond should form a part of it, and thus qualify its terms, had that been the case, no doubt the defendants, and Mr. *Dalton* on their behalf, would have insisted on having it written there. That would have been a *sine qua non*, but that does not appear to have been so; Mr. *Cameron* says: "The memorandum at the foot of the bond was put there at my suggestion. I wished that the papers should shew that the purchaser had notice of my mortgage." That evidence has great force. It negatives the plaintiffs' case, indirectly indeed, but for that reason, perhaps, in a way most calculated to command confidence.

Judgment. No evidence has been adduced in opposition to this direct testimony, which being uncontradicted and in other respects reliable, is quite sufficient for the determination of the case, and I am therefore of opinion that as to all the defendants except *Gildersleeve* the bill must be dismissed, but, under the circumstances, without costs.

The plaintiffs are entitled, I think, to redeem *Gildersleeve*.

It would seem to have been determined in the replevin suit (a), that *Gildersleeve* had acquired a title to the vessel by the sheriff's deed, under the 23rd section of the 8th Victoria, chapter 5.

But for that decision I should have doubted very much whether the statute in question had any such operation. The language is certainly very comprehensive. But then it is quite clear, I apprehend, that the object of that section was to relieve mortgagees from responsibility for repairs and supplies growing out of their position as

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legal registered owners. And I should have doubted whether a clause intended for that purpose, however general its language, could be held to authorise the sale of an equity of redemption in a ship under a writ of *fi. fa.*

1859.
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v.
Corby.

I should have doubted, moreover, whether such a sale could have been allowed to stand. The evidence of *Nosworthy* affords strong ground to infer collusion between the sheriff and Mr. *Gildersleeve*. But without pursuing the enquiry, surely it must be clear that the sheriff was bound to pause before he sold a ship probably worth some thousands, for ten pounds. What he might have been bound to do upon a writ of *Venditioni* I cannot say, but surely upon a writ of *fi. fa.* he was bound to pause. The disproportion is so shocking as to compel us to infer fraud.

The difficulty arose to some extent, I have no doubt, ^{Judgment} from the fact that the subject of sale was an equity of redemption. It does seem to me, I must confess, repugnant to reason and justice, that a right to redeem should be sold without ascertaining the incumbrances to be redeemed. Upon such a sale, the incumbrances form part of the purchase money, often by far the largest part. But the sheriff neither knows, nor has any means of ascertaining, the extent of the incumbrances, and yet the value of the thing depends entirely upon that. Such a sale must be a mockery. But that is an evil which the legislature must correct.

Had the determination of this case, therefore, turned upon the validity of this sale, I must either have set it aside upon the materials before me, or directed a further enquiry. But if I apprehend the matter rightly, that question may be left open, because it is admitted by Mr. *Gildersleeve* himself in his examination, that, after he had obtained an assignment of the mortgage, and after he had become the purchaser at sheriff's sale, he brought

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Corby.

an action upon one of the promissory notes, given as collateral security for the mortgage, and enforced a judgment already obtained upon another of the notes, thereby realising a very large amount, over £2000, as I gather from his evidence. Now, a mortgagor cannot both retain the pledge and recover the debt too. If he elects to proceed upon his collateral securities, after foreclosure, he thereby entitles the debtor to a restitution of the pledge. When restitution cannot be made, the action should be, I apprehend, restrained. But when the mortgagee is in a position to restore the pledge, the action is allowed to proceed, but the right to redeem is thereby revived. (a)

It is true that the proceedings taken by *Gildersleeve* were proceedings not against the plaintiffs, or against *D. Bethune & Co.*, but against the purchasers. But inasmuch as the contract has been rescinded, and the purchasers have recovered the whole amount of their purchase money, it follows, I apprehend, that the plaintiffs are entitled to stand in their place and enforce their rights.

Judgment.

This part of the case was little discussed, and if the right to redeem be doubted, that point may be spoken to again, indeed the whole case is one of importance and difficulty, and it would be very satisfactory to me to have it argued before the full court, if that is thought desirable.

ESTEN, V. C.—This case divides itself into two parts, namely, relief against an unjust verdict, and specific performance of an agreement. The former part, I think, perfectly clear. It was very well argued by Mr. *Richards*, but I could not agree with him in any respect. Under the circumstances, the mortgage must be considered as an incumbrance created by the defen-

a) *Loc khart v. Hardy*, 9 Beav. 349; *Haynes v. Haynes*, 3 Jur. NS., 501.

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dants themselves. It is in vain to say that *Cameron* was a mere trustee, and might have transferred the mortgage; so long as the agreement was faithfully observed, it would be monstrous to permit the defendants to avail themselves of this mortgage in augmentation of damages. The moment the agreement failed of observance, they were remitted to their original remedy. I do not think it would be necessary or proper to alter a single word of the bond. I am satisfied all parties intended to adhere to it in every respect; but under the circumstances, the mortgage was to be deemed an incumbrance, created by the obligees themselves, and therefore not within the terms of the condition. If this, therefore, were the only point in the case, I think it could be easily disposed of, but the other part of the case presents many difficulties, and the conclusion at which I have arrived upon it, if correct, renders the former part of the case wholly unimportant. To the specific performance of the agreement, which the bill Judgment. does and must pray, it is not objected any want of mutuality arising from the total absence of title in the vendors, and the impossibility of their fulfilling the contract unless *Donald Bethune* should choose to adopt it, but it is objected—

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1st. That it is void under the Ship Registry Act.

2nd. That the obligors cannot make a title.

3rd. That under the altered circumstances of the case the contract ought not to be specifically enforced. It is not necessary to express any opinion on the 1st and 2nd of these propositions, inasmuch as I think, on the 3rd ground, the defendants are entitled to prevail. Whether or not this contract is void under the Ship Registry Law, whether or not, it is quite clear this would be the case if all the partners were British subjects, and whether or not, the fact of some foreigners being interested as members of the firm, whose rights, if any, can be secured

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v.
Corby.

Judgment.

in the account of the partnership affairs, can prevent the application of the act; or whether or not, on the other hand, it can be contended that foreigners are not entitled to the benefit (if any) of the act, and that British subjects joining with foreigners must submit to the same exclusion, and whether or not, therefore, the moment this is the case the act is suspended and becomes inapplicable, it is unnecessary to determine. It is difficult to apply an act of parliament, wrested from its legitimate object, and diverted in all its rigidity and stringency to a purpose to which it is wholly disproportionate to the variety of cases that may arise. Supposing this contract not to be void under the Ship Registry Law, and supposing too (for I need not discuss the second objection) that *Donald Bethune* can make a title to the vessel, ought the contract under the altered circumstances of the case to be specifically enforced? It is true that the obligees had the possession of the vessel until the spring of 1856. It is true that any dispossession, proceeding from their own default in meeting their notes, could not be objected by them; but in the spring of 1856 they were deprived of the possession of the vessel. For a moment let us exclude the mortgage from the case. It was decided at law that the sheriff's sale conferred a legal title; and if it was a good sale, the title of *Donald Bethune* has become extinct. But suppose it liable to objection, and suppose it to be either void or voidable, it was too much to expect the obligees to maintain that defence, much more to institute proceedings, and if the obligors could not effect a sale of the vessel, (and it is not contended they could,) the obligees could not institute proceedings to impeach the sale, and having given notice of the replevin suit to the obligors, and made such defence as they could, they discharged their duty, and the loss of the possession is not attributable to their default. The result has been that the obligees have been deprived of the possession for two years, during which time it was boldly asserted, and not denied, and I must assume that the vessel has suffered great

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deterioration, the route has been occupied and the business greatly injured. All this mischief has arisen from the default of the obligors in making a title to the obligees. Can it be said that it would have been of no use to have procured such title, because *Gildersleeve* could equally have succeeded on his mortgage title; I think not, since it cannot be doubted that if the obligors had procured a title from *Donald Bethune* according to their bond, the possession would have been preserved. A circumstance which weighed much in my mind, was the omission of the obligees to give notice to the obligors of the seizure under *Dickey* and *Neil's* writ. Had they done so, it is probable this unfortunate case would not have arisen. The obligors would probably have paid the debt; the sheriff's sale would have been prevented, an assignment procured, and the possession maintained. But I cannot fix the obligees with this duty so as to make them liable for all the consequences of its omission. If *Dickey* and *Neil's* debt was a judgment. partnership debt, as I suppose it was, and the proceedings could be sustained at law, a Court of Equity would give no relief, as in the event partnership property was applied to the satisfaction of a partnership debt. An application is made for liberty to amend the bill so as to charge fraud against the obligees, grounded, however, altogether on the present evidence. As I think this evidence insufficient to sustain any such charge, I think leave should be refused. The plaintiffs may consider whether they are entitled to any and what relief against *Gildersleeve*, and whether they are not entitled to call upon him to refund the money received by him upon the mortgage, purchased by him from *Cameron*; I do not agree that his proceedings to enforce the mortgage render the vessel redeemable. *Gildersleeve* having purchased the equity of redemption, cannot repudiate it and enforce the mortgage, nor can *Donald Bethune* contend that he should be permitted to do so in order that his equity of redemption may revive. However, I do not think any relief of this sort can be given in this

1859.

Cotton
v.
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suit, which is directed to a wholly different object, and therefore, I think, this bill should be dismissed with costs, without prejudice to any suit the plaintiff may be advised to institute against *Gillersleeve*.

SPRAGGE, V. C.—Since the re-hearing of the cause, I have conferred with my brother *Esten*, upon the several points presented for consideration, and concur generally in the judgment which he has delivered.

I do not think that there is anything to shew that the purchasers of the steamer intended to forego the stipulation contained in the plaintiffs' bond for a proper and legal conveyance within three months.

I think it is putting it as favourably for the plaintiffs as it can be put, to take that part of Mr. *Cameron's* memorandum which refers to the mortgage held by him being continued at his option upon the vessel, (he calling for payment only according to the notes given by the purchasers,) as incorporated in the contract between the vendors and purchasers of the vessel; and as qualifying that part of it which provides for a conveyance free from incumbrances; but even then, I think the plaintiffs cannot recover in this suit.

Judgment.

If, indeed, the plaintiffs were right in their position that the vessel was lost to the defendants through their default in payment of their own notes, there would be no justice in allowing them to recover against the plaintiffs for that loss; but I think that position is not at all made out, but the contrary.

The vessel was sold under an execution against *Donald Bethune*, as managing partner in the firm of *Donald Bethune & Company*. If the vessel had been conveyed in pursuance of the terms of the bond, she would not have been liable to sale under the execution. The non-conveyance was the default which occasioned the loss of

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the vessel, and therefore I think the vendors became justly liable for all the necessary consequences of that default. In this view, if the contention of the plaintiffs as to the mortgage held by *Camero*, being exempted for the incumbrances provided against by the boat, and as to the effect of the Ship Registry Acts, were conceded to them, they would not shew the equity they contend for.

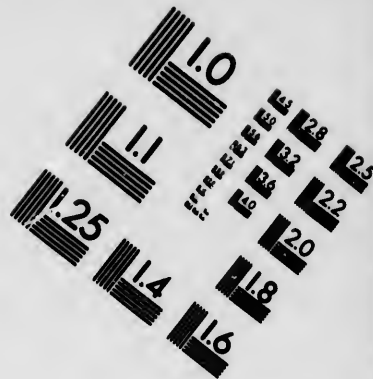
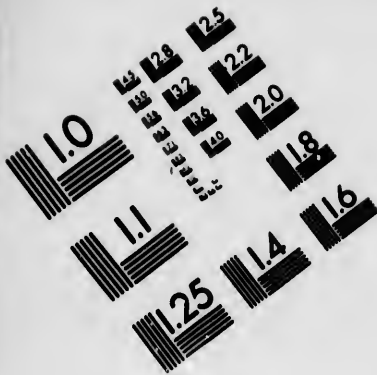
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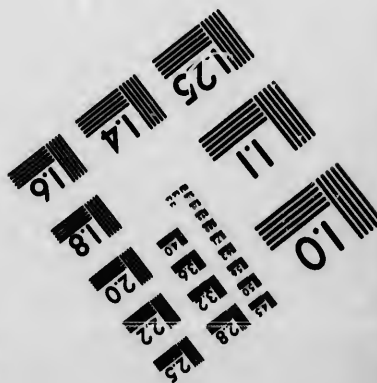
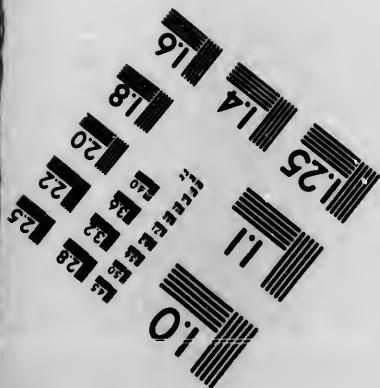
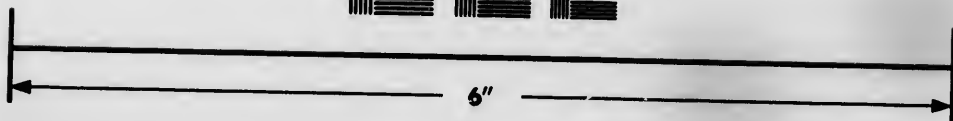
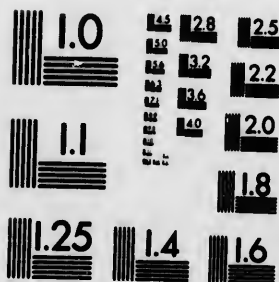
It is said there was a good sale, and that the title passed without any conveyance from *Donald Bethune*. But it has been decided in the replevin suit that an interest saleable at law remained in *Donald Bethune & Company*; and that that interest passed to the purchaser at sheriff's sale.

The consequence of all this has been, that the defendants lost the possession and use of the boat in the spring of 1856, and lost a whole season before the plaintiffs filed their bill. The court is now asked in effect to compel them to take the boat now. After the interruption in use and possession which has occurred, I do not think there would be any reason or equity in this; and that they would have much to complain of if such a decree were made. The greatly altered circumstances under which they would take the vessel now would make it inequitable to force her upon them. The plaintiffs contend that the defendants have had substantially all that they would have had if the terms of their contract had been carried out; but manifestly this is not so. If the purchasers had had continued possession and use of the vessel; or had lost possession and use through their own default, not through that of the plaintiffs, there would be something in that contention; but as the facts are, they have not had *substantially*, or in any shape at all, within that term, what they contracted for. I think this ground alone sufficient for the determination of that part of the case, which is directed to specific performance.





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1859.

Cotton
v.
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The plaintiffs contend that the damages recovered against them are excessive. I confess they seem to me to be large, but that was a proper ground for a new trial; there is, however, the further ground that they have, at the election of the plaintiffs at law, been assessed upon the breach as to which the plaintiffs here are right in equity. In the view that I take of the case they are wrong as to both.

Gildersleeve's position, I think, is not that which the plaintiffs have assumed it to be. Before the sheriff's sale he had taken an assignment of the mortgage, and was entitled to call for the mortgage money, according to the notes given by the purchasers of the vessel. What he purchased at sheriff's sale was the interest of *Bethune & Co.*, which was the right to redeem the vessel upon payment of the moneys which he was entitled to receive. If he had not acquired the mortgage he would have purchased subject to it; and his purchase money would, I apprehend, be the price he was willing to pay for it, as its value beyond the incumbrance; and he himself, consequently, would be the party to pay off the mortgage. That would be the case of a purchase by a stranger; and the holder of a mortgage must, I should say, purchase upon the same footing. He and the stranger bid against each other at auction: it cannot be that one is bidding for one thing, and the other for another thing; each must offer to purchase, and which ever may purchase, must purchase the same thing; the holder of the mortgage purchasing, his position differs from that of a stranger purchasing only in this, that the mortgage being at home he has to pay no one; but inasmuch as a stranger purchasing would have to pay off the mortgage, and not the mortgagor; so the holder of the mortgage purchasing cannot call for the mortgagor to pay, because he would be himself the person to pay, but for the circumstance of his being the party to receive.

Judgment.

The rights of *Gildersleeve* upon his purchase, appear to

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have been to hold the steamer as having purchased it for £10, beyond the amount due upon the mortgage, and if so, his purchase is not open to the objection that it was for a price so absurdly inadequate as £10 would be for the purchase of the vessel. He appears, however, to have so understood it himself, otherwise he could not have conceived himself entitled to call for the payment of the unpaid mortgage money. What he so received he had, I think, clearly no right to receive; and it may be the proper conclusion that he has waived his rights as a purchaser, and ought to be redeemed, or it may be that he is bound to pay back what he has improperly received; that point has not been argued. But however that may be, in my view he is not redeemable by reason of his having purchased for £10, because whatever he may have himself thought or intended, he did not purchase for that sum.

1859.

otton
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Mr. *McDonald* applied to extend the injunction already issued, until the judgment of the court of appeal could be obtained upon the question; the intention of the plaintiffs being to carry the case to a hearing at the next sittings of that court. The defendants having obtained judgment in an action brought against the executors of *Paterson*, alleging a *devastavit*, were prepared to issue execution, which rather than have done they were prepared to pay the money into court, or give such security as the defendants might approve, to pay the amount as soon as the cause might be disposed of by the court above.

January 29.

Motion.

Mr. *Richards*, Q. C., opposed this motion, on the ground that the statute (a) allowing appeals did not contemplate a proceeding of this sort, and that this court would not go out of its way to assist further in delaying the defendants in proceeding to recover their claim, and which this court, after two hearings of the case, have said they are entitled to enforce. The words of the act

(a) 12 Vic. ch. 63, sec. 60.

1859. are: "That where the appeal is from a judgment, order or decree, directing the payment of money, the perfecting of the security hereinbefore provided, shall not stay execution of the judgment unless the party appellant shall have further given proper security to the satisfaction of the court, from whose judgment he is about to appeal; that if the judgment appealed from, or any part thereof be affirmed, the appellant will pay the amount directed to be paid by the judgment," &c.: here no amount is directed to be paid by the judgment of this court, and he submitted that the bill being now dismissed, the case was no longer before this court; the court, therefore, had no power further to restrain the proceedings at law; but

Cotton
v.
Corby.

Per Curiam.—In *The Mayor of Gloucester v. Wood*, (a) the Vice-Chancellor, although he had dismissed the bill, directed the fund in court to be retained until the appeal from his decision could be heard. The orders of the Court of Appeal were not intended, nor do they interfere in any way with the equitable jurisdiction of this court; and as it cannot be said that the decision arrived at is free from doubt, and allowing the execution to be enforced, would undoubtedly be of great injury to these executors, if the court above should take a different view of the rights of the parties from what has been taken by this court, we think the safer course will be to stay proceedings. The order to be drawn up will therefore direct that upon the payment of the sum of £7300 into court, proceedings will be stayed for one week, so as to afford the plaintiffs an opportunity of proceeding with the appeal, by perfecting the necessary security. Upon the plaintiffs doing this, and undertaking to bring on the case for argument at the next sittings of the Court of Appeal, no execution at common law is to issue. The court, however, will not interpose so as to prevent the defendants from registering their judgment.

(a) 3 Hare, 150.

NOTE.—The appeal was subsequently abandoned, and the parties paid the amount of the judgment to the defendants.

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1859.

DUFF V. MEWBURN.

Trustee—Power of sale to pay debts.

Lands were devised to trustees for the purpose of carrying out the will of the testator, who reserved six lots, which he desired should be sold for payment of debts, not charged on lands; the residue to his grand-children. *Held*, that the trustees had a right to sell the whole of such property for payment of debts left unpaid by the personal estate, and the lots specially appointed to be sold for that purpose; and that in such a case a purchaser who has not notice that all the debts not charged on lands are paid, will be justified in assuming that the trustees are properly proceeding to a sale.

Dec. 24, 1858,
and January 14,
1859.

The bill was filed by *John Duff*, *George Duff* and *Margaret Duff*, setting forth that the late *Lockhart Duff*, by his will, had devised certain real estate, called "The Ainslie farm," to the plaintiffs, and two other persons, who disclaimed all interest under the will, in trust to sell and dispose of any part for the purpose of paying his debts, specifying certain lots which he wished to be sold for payment of such of his debts as were not specially charged as real estate, and desired that eight parcels, particularly mentioned, should be conveyed to one of his sons, and the surplus, if any, to be divided amongst his grand-children. The plaintiffs, as such trustees, and in pursuance of the will, contracted with the defendant for the sale to him of portions of the said real estate, comprising the greater portion of the land so specifically devised, and that defendant had paid a portion of the purchase money, but refused to complete the purchase, alleging as a reason for such refusal, that the plaintiffs had not power to sell the whole of the land, the subject of the contract, and that the power of sale contained in the will extended only to the lots particularly set apart for sale to pay debts, and that as to the residue of the real estate, the plaintiffs were trustees thereof for the use and benefit solely of the devisees mentioned in the will. The bill further alleged that the personal estate and the portions of the real estate specially devised for payment of debts, were wholly insufficient for that purpose; and plaintiffs submitted that the power of sale contained in the will extended, and was intended to extend, to the whole of the property

Statement

1859. with the exception of the eight lots devised to his son; that the trust in favour of grand-children had reference to the residue of purchase money of the said farm, after payment of debts, and to any other real estate not specifically devised; and pryed specific performance of the contract entered into between the parties.

Duff
v.
Newburn.

The defendant by his answer admitted the statements, and submitted to complete the contract if the court should be of opinion that the plaintiff's had a right to sell any portion of the property other than the parts particularly named by the testator for payment of his debts, defendant being ignorant, of what amount of debts the testator left unpaid; or whether any portion thereof still remained to be paid.

Mr. *A. Crooks* for plaintiffs.

Statement.

Mr. *Barrett* for defendant.

ESTEN, V. C.—I have no doubt that the trustees have power to sell the residue of the "Ainslie farm," (and indeed, if necessary, the whole) to pay any debts, left unpaid by the personal estate, and the six lots specially devoted to that purpose, and not charged on the lands specifically devised. The case of *Mather v. Norton*, (a) shews that in such a case no evidence need be adduced that debts remain unpaid—2 *Sugden*, 836, 11th edition, is to the same effect. I think in the present case, if the purchaser has not notice that all the debts, not charged on the lands, are paid, he will be justified in assuming that the trustees are properly proceeding to a sale, and may safely complete his purchase.

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1859.

CHAPIN V. CLARKE.

Reforming deed—Assignment for benefit of creditors.

A trader having become involved, made an assignment of his estate and effects to trustees, for the benefit of his creditors, some of whom were declared to have preferred claims, and to be paid in full. The claim of one of them was stated by the debtor to be "£3,500, or thereabouts," no account having been settled between the debtor and that creditor for a long time, and the sum so mentioned by the debtor was stated in the schedule as the amount, and the several creditors executed the deed of assignment. The creditor, afterwards, on balancing his account with the debtor, ascertained that his claim amounted to £5062, and demanded this sum from the trustees, which they refused to pay: whereupon the creditor filed a bill to reform the deed, by introducing the latter sum as his claim, on the ground that the words "or thereabouts," were sufficient to include the excess of that amount over and above the £3,500. The court refused the relief prayed, and dismissed the bill with costs.

The bill in this cause was filed by *Royal Chapin*, against *William A. Clarke*, *William McMaster*, *Robert James*, the younger, *James Mitchell*, and about thirty others, creditors of *Clarke*, praying, under the circumstances set forth in the judgment, a correction of the deed of assignment executed by the defendant *Clarke*, Statement. to the defendants *McMaster*, *James* and *Mitchell*, in trust for his creditors; and a motion was now made for a decree, in the terms of the prayer of the bill, by

Mr. *Eccles*, Q. C., for the plaintiff. The words "more or less," in deeds of conveyance of lands would cover 100 acres, although the deed might convey 80 acres. *Leeming v. Smith*, (a) *Brown v. Ware*. (b) If a creditor has been deceived by the statement of the plaintiff's claim, the execution of the deed by him goes for nothing, and he is at liberty to sue for his whole debt.

Mr. *Connor*, Q. C., for another preferred creditor. The plaintiff does not depend upon the words "or thereabouts," as he now seeks to correct the deed and include this enlarged demand.

Mr. *Strong* for *McMaster* and *Mitchell*. The words

(a) 16 Q. B. 275. (b) 5 Sarg. & R. 401.

1859. "or thereabouts," or "more or less," are wholly insufficient to cover so large an advance as is sought to be embraced in these words; and although plaintiff says it was a mistake inserting £3,500, that is no ground for altering the deed to the prejudice of the other creditors who joined in that conveyance upon seeing what the debtor's liabilities were stated at. The mistake, if such it were, must be the mistake of all parties. *Winch v. Winchester*, (a) *Purefoy v. Purefoy*, (b) *Sewell v. Musson*, (c) were referred to.

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Clarke.

Mr. A. Crooks for James; and

Mr. Doyle for Clarke, submitted to such decree as the court might pronounce, and asked for their costs.

The judgment of the court was delivered by

Judgment. THE CHANCELLOR.—This suit is instituted by one of the creditors of *Clarke*, an insolvent debtor, for the purpose of having a deed executed by the insolvent, for the benefit of his creditors, on the 19th of June, 1854, reformed, by striking out the words and figures "£3500 or thereabouts," the amount of the plaintiff's debt as stated in the deed, and inserting in lieu thereof £5062, which is now said to be the true amount of his claim.

The facts of this case are few, and I have no doubt as to the conclusions to be deduced from the evidence before us.

Clarke being in difficulty, being indeed, as it now seems, quite insolvent, proposed to assign his property to trustees, for the benefit of his creditors, and several meetings were held in the month of May, 1854, for the purpose of taking his proposal into consideration. The proposition was, that *Clarke* should be released on assigning his property to trustees, for the benefit of his

(a) 1 V. & B. 376. (b) 1 Ver. 28. (c) Ib. 210.

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creditors; that out of the proceeds, if sufficient, the plaintiff and *James* should be paid their debts in full; that out of the residue of the estate the other creditors should accept a composition of 10s. in the pound upon their debts payable in four years; but if the estate should fail to realize that amount, then that the remainder, whatever might be its amount, should be divided between them *pari passu*. *James* appears to have been an accommodation indorser, and to have been preferred on that account; but I have not been able to discover any ground upon which the plaintiff should have been placed in a more favourable position than the other creditors. However that may be, *Heacock*, who was by far the largest creditor, objected, naturally enough, to the proposed arrangement. He claimed to be paid *pari passu* with the plaintiff, and he insisted that the amount of the plaintiff's debt should be ascertained and stated in the deed. It was a matter of the utmost importance to *Clarke*, and indeed to the plaintiff, also, to obtain *Heacock's* assent, his debt being upwards of six thousand pounds. So important was it, indeed, that without it *Clarke* would not have executed the assignment. And to meet *Heacock's* views, it was agreed that his debt to the extent of £1025 should be paid in full, and *pari passu* with the plaintiff, and that the plaintiff's debt should be stated in the deed to amount to "£3500 or thereabouts." It was alleged that the amount of the plaintiff's debt could not be precisely ascertained, as the account had not been made out, and for that reason it was agreed that it should be stated in the deed as amounting to "£3500, or thereabouts." To that proposal *Heacock* agreed, and the deed was prepared and signed by all parties, on or after the 19th of June, 1854.

I have no difficulty in arriving at the conclusion that *Heacock* insisted upon having the amount of the plaintiff's debt ascertained before he would assent to the arrangement, and that the deed was drawn in its present shape

Judgment.

1859.

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v.
Clarke.

to meet his views. The statement is highly probable in itself. The proposition was, that *Heacock*, who was a creditor, for six thousand pounds and upwards, should release his debtor altogether, and look to the estate alone, after deducting thereout the large debts due to the plaintiff and to *James*, for payment of the proposed composition of 10s. in the pound. Now, on such a proposal as that being made, it was natural and highly reasonable that *Heacock* should insist on knowing the amount of the plaintiff's demand. Until that had been ascertained, no rational opinion could have been formed by any creditor as to the prudence or imprudence of acceding to the proposed arrangement. And, on the other hand, seeing how important it was both to the plaintiff and *Clarke* to obtain *Heacock's* assent, it was natural and reasonable that they should agree to limit the plaintiff's demand in such a way as to enable the creditors to form some rational estimate of this proposal.

Judgment.

Now, the evidence appears to me to lead very clearly to the conclusion that what we would have expected, *a priori*, did in fact take place. The *Heacocks* swear that when they executed the deed, they believed that the plaintiff's demand was limited for all practical purposes to £3500, and that if they had known that he claimed £5000, or any sum materially different from the amount specified in the deed, they would not have been parties to the assignment. Dr. *Connor*, who attended several, if not all the meetings of the creditors, on behalf of the *Heacocks*, swears that there were several discussions before the terms could be agreed upon; that *Heacock* was unwilling to come into the assignment while the plaintiff was so largely preferred, and then the affidavit proceeds in these words: "I remember there was some discussion that *Chapin's* claim should not be fixed, but should be paid in full, whatever it might be, but Mr. *Heacock* and I absolutely refused this, and I am certain *Heacock* insisted upon having a sum named as *Chapin's* claim, otherwise he would not have signed." Now, that statement, which is perfectly clear and con-

sistent, is corroborated by the statement, *Clarke* being asked to think that the amount of the assignment was material in the meetings, and some of the bias in his affirm the examination asked at the of *Clarke* £3500, he examination questioning to the amount willing to claim."

I have no accuracy of

It is said, that the plaintiff's amount, and exceed the increased; if material, per point. Now stated as being but that as the words, "inconsiderable if that be his construction the deed, an

sistent, is quite unopposed. Nay, it is materially corroborated. *Chapin*, who might have contradicted the statement, if untrue, has not filed any affidavit in reply. *Clarke* being examined upon the point says: "I don't think that *Heacock*, at any of the meetings, required the amount of *Chapin's* claim to be ascertained before signing the assignment." But *James*, who had a very material interest in attending to what passed at these meetings, who is said to have acted for the plaintiff at some of them, and who must be allowed to manifest some bias in his behalf, contradicts *Clarke*, and goes far to affirm the truth of *Dr. Connor's* statement. In his examination in chief he says: "I think *Dr. Connor* asked at the time what the amount of the indebtedness of *Clarke* to *Chapin* was, *Clarke* said it was about £3500, he could not tell exactly;" and on cross-examination he says: "There was a good deal of questioning by *Dr. Connor* and *Heacock* at the meeting, as to the amount of *Chapin's* claim. *Heacock* was not willing to sign until he knew the amount of *Chapin's* claim."

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Judgment.

I have no doubt whatever, therefore, as to the perfect accuracy of *Dr. Connor's* statement.

It is said, however, to have been agreed on all hands that the plaintiff's debt should be preferred to the full amount, and that if the amount, when ascertained, should exceed the amount specified in the deed, it was to be increased; if it fell short, diminished. *Clarke* is the material, perhaps I may say, the only witness upon that point. Now, if *Clarke* only meant that £3500 was stated as being for all practical purposes the true debt, but that as the amount had not been precisely ascertained, the words, "or thereabouts," were added to cover any inconsiderable difference which might be found to exist—if that be his meaning, and the words are capable of that construction, then it agrees both with the language of the deed, and with the witnesses for the defence. But

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if he meant to say that *Heacock* agreed to pay the plaintiff's debt, whatever might be its amount, then his statement is not only improbable and inconsistent with established facts, but it is moreover in direct conflict with the answer of *Heacock* and the evidence of Dr. *Connor*. For if it be true that *Heacock* insisted on having the amount of the plaintiff's debt ascertained, and refused to execute the deed until that had been done, and I think that established, it cannot be also true that he agreed to pay the plaintiff's debt in full, whatever might be its amount. I think it clear, therefore, that *Heacock* did not enter into that agreement, but positively refused to execute the assignment upon any such terms.

Judgment. This deed then, which was executed under the circumstances to which I have already adverted, provides that the trustees are "to pay and discharge in full, a certain debt due and owing by the said party of the first part to *Royal Chapin & Son*, such debt being hereby declared to be a preferred claim, and to amount to three thousand five hundred pounds or thereabouts, of lawful money of Canada."

Now, unless I have wholly mistaken the effect of the evidence, it must be perfectly obvious that to alter this deed by striking out the words: "*three thousand five hundred pounds, or thereabouts,*" and substituting in their room, the words: "*five thousand and sixty-two pounds,*" would be to alter it not in accordance with, but directly contrary to the clear intent of all parties. Indeed, such an alteration would be wholly unjustifiable even upon the plaintiff's evidence. It was never hinted to the creditors, by anybody, so far as I can discover, that there was a possibility of the plaintiff's debt amounting to £5000, or anything like that amount. On the contrary, *Clarke* stated to the creditors himself, that the debt, according to his calculation, amounted to £3500; and there is no evidence that the plaintiff ever informed them that the true amount would be in his opinion materially different. It is clear, I think, even upon the plaintiff's

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evidence, that the words "£3500, or thereabouts," were inserted in accordance with the clear and expressed intention of all parties.

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It was argued, however, that upon the deed as it stands the plaintiff is entitled to be paid his debt in full. I cannot accede to that proposition. Assuming the plaintiff to have known that his debt did, or would greatly exceed the amount specified, and to have represented it at that amount for the purpose of misleading the creditors, and of inducing them to come into the assignment, upon that hypothesis the case is one of gross fraud, and it would be a monstrous perversion of justice to permit the plaintiff to recover any thing beyond the amount at which, for the purpose of fraud, he had chosen to represent his debt.

I am inclined to think that this case has been brought within the principle to which I have adverted. It is difficult to believe that the plaintiff came to this country for the express purpose of obtaining a settlement of this debt without having first satisfied himself as to its amount. But, assuming him to have done so, still three weeks intervened between the negotiation and the execution of the assignment. The plaintiff had, therefore, an ample opportunity for ascertaining the true amount of his debt; and in the absence of all explanation must be taken to have done so; and having allowed the other creditors to execute the deed of assignment without declaring the truth, he cannot be heard now to say that his debt exceeds the amount specified, for that would be to allow him to take advantage of his own fraud.

But assuming the matter to have happened otherwise, assuming the plaintiff to have honestly believed, and therefore, to have innocently stated, that his debt amounted to £3500, or thereabouts, then I have no doubt that the plaintiff is bound to make that representation good, on the foot of contract, as conclusively as he would have

1859. *Chapin v. Clarke.* been on the ground of fraud, if he had chosen to misrepresent the true amount of his debt. The creditors had a most material interest in knowing the true state of the account. They had no means of ascertaining that fact except by enquiring from the plaintiff himself. And by this deed it is declared that his debt amounts to £3500, or thereabouts. Now that amounts, as I understand it, to a declaration that £3500 may be taken for all practical purposes as the true amount of the plaintiff's debt, and as against the creditors who acted on the faith of that representation, the plaintiff can have no right to recover any sum materially greater than that stated in the deed. (a)

Judgment. Suppose a mortgagor to sell the equity of redemption subject to the mortgage, and to covenant that the amount due upon the mortgage was "£3500, or thereabouts," can it be argued that there would not be a breach of covenant if the debt should turn out to be £5000 instead of £3500? Again, suppose a mortgagee to assign his security, with a covenant that the amount due on foot of the mortgage was £5000, or thereabouts, would it, or would it not, be a breach of that covenant if the amount due should turn out to be £3500, instead of £5000? I cannot doubt that there would be, in each instance, a plain breach of covenant; and the present case appears to me to be substantially the same.

For these reasons I have come to the conclusion that the bill must be dismissed with costs.

(a) Gregory v. Williams, 3 Mer. 581.

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GILLAM V. CLEGHORN.

Road Company—Arbitration.

In proceedings taken under the statute, 16 Victoria, chapter 190, for the purpose of ascertaining the amount to be paid by a road company for materials necessary for the construction of the road, the arbitrators cannot confer upon the company a prospective right to carry away the material, by awarding an amount as compensation for the materials to be taken at a future time.

Arbitrators appointed under this act, awarded damages for materials taken generally. *Held*, that the award was *ultra vires*, they having power to award damages in respect of materials taken for the purpose of the road only.

Quere—Whether the act gives the power to such companies to enter upon land distant two miles from the line of the company's road for the purpose of obtaining materials for the construction thereof.

This was a bill filed by *Alfred Gillam*, against *Allen Cleghorn*, *Thomas Botham*, *Philip Kelly*, *James Barr*, and *Garry V. Delong*, setting forth that the plaintiff was owner in fee of a parcel of land in North Norwichville, and that the defendants, who were trustees of the Norwichville, Burford, and Brantford Plank Road Company, (the Road Company being also defendants,) had by themselves, their agents, and workmen, from the 10th of October, 1856, continued to trespass thereon, by quarrying and removing therefrom, and applying to their own use (as such trustees) large quantities of stone, gravel, sand, and other material, which were on, and formed part of the soil, and that they continued, and intended to continue, to do so: that the plaintiff's land is situate at a distance of about two miles from the works of the defendants, and not adjoining or neighbouring thereto, and that there are quarries of such material on lands adjoining the defendants' works.

The bill further alleged that the defendants claimed a right to carry away such soil and gravel under an award alleged to have been made by certain arbitrators, but which the plaintiff objected was not a valid or binding award, notice never having been served on the plaintiff, according to the provisions of the statute, 16 Victoria, ch. 90. The prayer was for an injunction to restrain

1859. the defendants from removing the gravel, &c., and that the award might be set aside, and for further relief.

Gillam
v.
Cloghorn.

The defendants answered the bill, alleging several grounds of defence; amongst others, that before going upon the land, the defendant *Delong* had agreed with *John Gillam*, the father of the plaintiff, for the right to remove the gravel, and paid the consideration therefor; but the amount was afterwards returned by *John Gillam*, who expressed a desire to rescind the bargain, and leave the question of value to arbitration in consequence of the arrangement he had effected having been disapproved of by his family; that notice under the act was served upon *John Gillam*, and he having failed to name an arbitrator, one was appointed by the judge of the county court, and notice thereof and of the names of the other arbitrators and umpire was served on *John Gillam*, and an award had been made according to the provisions of the act; but no notice was shewn to have been served on the plaintiff. It was alleged that the defendants had been induced by the representations of *John Gillam* to believe that he owned the property; but the evidence established that before any proceedings were taken by the arbitrators, the defendants were aware to whom the property belonged.

Statement.

Mr. *Strong* for the plaintiff.

Mr. *Morphy* for the defendants. The bill states no case for the interposition of this court, for all that appears the plaintiff can obtain an ample remedy at law—the act, if illegal, is merely trespass, and no irreparable damage is alleged as likely to arise. The conveyance to plaintiff is dated in July, 1856; the award was made on the 28th of August, 1856, and although the defendants began to remove the gravel in October following, no step was taken by the plaintiff to prevent them until September, 1857. The conveyance from the father to the son looks very much like a contrivance to prevent

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the defendants obtaining the material wherewith to construct their road. The act does not require the company to take the ground from a place nearest to the road.

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Gillam
v.
Cochran.

The judgment of the court was delivered by

THE CHANCELLOR—I think the plaintiff entitled to succeed on several grounds.

The right of the defendants to interfere with the plaintiff's property in the way they have done depends entirely upon the act of parliament under which they exist. (a) To have entitled themselves to the privileges which that act secures to such companies, they must have shown a strict, or at all events, a substantial compliance with the provisions of the statute; but the defendants have failed to comply with either the letter or the spirit of the statute, and for that reason the parliamentary title on which they rely cannot, I think, be allowed to prevail. Judgment.

If this award is to bind the plaintiff, it must be because the arbitrator was appointed by the plaintiff himself, or by some person authorised to appoint for him under the statute. Now there are several cases in which the judge of the county court of the county in which the property lies is empowered to appoint an arbitrator who has authority under the statute to bind the rights of the contesting parties. That is a most important power, and to be exercised safely, it must be exercised with caution. The legislature cannot have intended to authorise the exercise of that sort of power behind the back of the party interested. The legislature intended, I apprehend, that the judge should proceed upon proper evidence—upon evidence sufficient to satisfy him of his jurisdiction in the given case, and calculated to guide his mind to a proper choice. The judge had authority, in

(a) 16 Vic., ch. 190.

1859. other words, to bind the plaintiff by an appointment made in presence of the contesting parties, or after due notice; but that step was taken in the present case upon the *ex parte* application of the defendants, and for that reason it was, in my opinion, wholly nugatory and void.

Gillam
v.
Cleghorn.

Again, the proceedings subsequent to the notice to arbitrate were not served upon the plaintiff, but upon *John Gillam*, his father. But the property was at that time the property of the plaintiff. The evidence shews that it was so, and that the defendants knew it. They knew it before the arbitrators met to consider the matter, perhaps at an earlier period. Now the notice to arbitrate served upon *John Gillam*, may have bound the property as a parliamentary contract, and the defendants may have had a right to enforce it against the plaintiff. But that right, assuming it to exist, cannot make proceedings taken against *John Gillam*, after his interest in the property had ceased, binding against the plaintiff. The arbitrators proceeded, therefore, without giving the plaintiff, the real owner of the property, notice, and their award, for that reason, cannot bind him.

Judgment.

But this award is bad in substance, as it seems to me, being unauthorised by the act of parliament. What has been done is this, the defendants are ordered to pay a certain sum as a compensation for the materials to be taken by them at any future period from the premises in question. There is nothing in the act to authorise that. The defendants requiring gravel to construct their road, had a compulsory right to take it for that purpose from adjoining lands, at a price to be fixed by arbitration. (a) And upon gravel becoming necessary for repairs, they would have had a right to acquire it, for that purpose, upon the same terms. (b) But there is nothing in the act which entitles the defendants to acquire, in this way, that sort of prospective right which

(a) See sec. 6.

(b) See sec. 21.

this award plaintiff's p some given public purp quantity—a property ag contingency estimated? an unknown but it may b dants had no under the co have purcha they had no power to acc in my opinio to take mate

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this award affects to confer—not a right to take the plaintiff's property, at the time of the award, and in some given quantity, because then necessary for a public purpose, but a right unlimited as to time and quantity—a perpetual right to take the plaintiff's property against his will at all times, and upon every contingency. Upon what data are the damages to be estimated? Can the arbitrators calculate the value of an unknown quantity of material to be taken, not then, but it may be a hundred years thereafter? The defendants had no power to acquire the property in fee simple, under the compulsory powers of the act. They might have purchased it, perhaps, in the ordinary way, but they had no right to take it. And as they had no power to acquire the fee, so neither have they any power, in my opinion, to acquire the perpetual prospective right to take materials.

1859.

Gillam
v.
Cleghorn.

The award appears to me to be *ultra vires* in another particular. The damages are awarded not for materials taken *for the purpose of the road*, but for materials taken for any purpose whatever, which would be clearly illegal. But that, perhaps, was not intended.

I may add, that I doubt very much whether the defendants have any power at all to enter upon the plaintiff's land under the act. Companies are only authorised to take material from "adjoining or neighbouring lands." Now these expressions "adjoining or neighbouring," were intended, I presume, to impose some limit on the powers intended to be conferred. The legislature, clearly, did not intend to allow materials to be taken from land wherever situate. Now, according to *Johnson*, to adjoin means "to lie next so as to have nothing between," and according to the same learned author, to neighbour means "to confine on." But the land in question certainly is not land adjoining or neighbouring on the road, according to *Johnson's* definition; and to hold that the powers of the act embrace

1859. *it*, would seem to reduce the words to which I have referred to silence, for if the defendants can enter upon lands distant two miles from their road, I know of no principle upon which any lands can be excluded, however distant.

Olliam
v.
Claghern.

For these reasons I think the plaintiff entitled to a decree. The master must be directed to ascertain the value of the materials taken by the defendants, and that amount with the costs of this suit must be paid to the plaintiff.

NOWLAN V. LOGIE.

Trustee—Breach of trust.

Lands were held in trust for the separate use of a married woman, and upon her death, in trust for her surviving children; and also to sell or lease any portion thereof with the consent in writing of the *cestuis que trustent*, attested by one witness, and reinvest the proceeds of such sales. In pursuance of a request to that effect, the trustees created a mortgage to a person for the purpose of negotiating it, in order to evade the usury laws. *Held*, that the trust for sale did not authorise the execution of this mortgage, and that the same was void as against the children. But it being alleged that the wife had participated in the misappropriation of the trust fund, further enquiry was directed on that point, with a view to making her life interest liable for the money advanced.

Statement. The facts of the case are sufficiently stated in the head note and judgment.

Mr. *Proudfoot* for the plaintiff.

Mr. *Roaf* for the defendants the trustees.

Mr. *Read* for the other defendants. *Stroughall v. Anstey*, (a) *Ball v. Harris*, (b) *Robinson v. Wheelwright*, (c) *Sejken v. Davis*, (d) *Coppin v. Fernyhough*, (e) *Page v. Cooper*, (f) were referred to by counsel.

The judgment of the court was delivered by

THE CHANCELLOR.—This is a bill by a mortgagee who

(a) 1 DeG. McN. & G. 635.

(c) 21 Beav. 214.

(e) 2 B. C. C., 291.

(b) 8 Sim. 485, S. C. 4 M. & C. 264.

(d) Appendix to Kay, 21.

(f) 16 Beav. 396.

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claims under a deed of bargain and sale by way of mortgage, executed by Mr. and Mrs. *Campbell*, and the trustees of their marriage settlement.

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Nowlan
v.
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Upon the marriage of Mr. and Mrs. *Campbell* the property in question was conveyed to *Logie* and *Ray*, the other defendants, in trust for Mrs. *Campbell* for life, for her separate use, and upon her death in trust for such of the children of the marriage as should survive her.

In the event of Mrs. *Campbell* not having children, or of their death in her lifetime, then in trust for Mrs. *Campbell* absolutely, if she should survive her husband; if not, then in trust for him in fee upon her death.

The trustees are authorised to lease or sell any portion of the trust property, with the consent in writing of Mr. and Mrs. *Campbell*, or the survivor of them, to be attested by one witness.

Judgment.

The trust for sale provides that the trustees may bargain, sell, transfer, convey and assure to any person or persons, with such consent as aforesaid, at and for such price or prices as shall be agreed upon, or can be reasonably obtained for the same, and upon payment of any money or moneys arising from such sale or sales to invest and place the same in such real or personal estate, or on such real or personal securities as they, the said *Campbells*, or the survivor of them, shall by writing under their hands executed as aforesaid appoint.

The mortgage in question is made between the trustees of the first part, Mr. and Mrs. *Campbell* of the second part, and one *Spohn*, the nominal mortgagee, of the third part. It recites the trust for sale, and the request of the *Campbells* that the amount specified in the deed should be raised by mortgage. Then in consideration of the premises and of £300 advanced, the property is conveyed to *Spohn*. *Donald Campbell* covenants for the

1859. repayment of the mortgage money, and there is a power of sale upon default.

Cotton
v.
Corby.

This mortgage was not created for the purposes of the trust, or with a view to investment, but, as the plaintiff well knew, at the instance, and for the benefit, of *Donald Campbell*, to whom, and not to the trustees, the money was paid by the plaintiff. Although *Spohn's* name was used in the deed as mortgagee, he had really no interest in the matter; but as the money was advanced to *Campbell* at an illegal rate of interest, the transaction took that shape at the instance of the plaintiff, for the purpose of evading the statute of usury.

The argument on behalf of the trustees is, that the trust for sale in this settlement does not authorise a mortgage; and that the deed under which the plaintiff claims is consequently void, and ought to be delivered up to be cancelled. (a)

Judgment.

The plaintiff contends, on the other hand, that *Stroughall v. Anstey* does not apply, and he argues upon the authority of *Ball v. Harris*, (b) and *Bennett v. Wyndham*, (c) that the trustees had power to raise money upon mortgage under the provisions of the present settlement.

Upon that question my present opinion is, that the trust for sale does not authorise a mortgage, and that, as against the infant at least, the deed is void. But it is unnecessary to decide that point, because whatever may be the true construction of the settlement, it is clear that the execution of this mortgage was a gross breach of trust. The settlement is no doubt in some respects informal. But the direction, that all moneys received by the trustees upon sale should be reinvested with the approval of Mr. and Mrs. *Campbell*, is explicit. The

(a) *Stroughall v. Anstey*, 1 D. M. & G. 635. (b) 4 M. & C. 264.
(c) 23 Beav. 521.

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(a) Major v.
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(b) Williams
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trustees had no authority to deal with the estate, either by sale or mortgage, except for the purposes of the trust, and with a view to its reinvestment. The mortgage in this case, however, was created not for the purposes of the trust, but to defeat it. The money was raised at the instance, and for the benefit of, *Donald Campbell*, and as the plaintiff was a party to the breach of trust, it is clear that his security, so far at least as it affects the infant, cannot be sustained.

It is argued, however, that, as the settlement does not contain any clause against alienation, *Mrs. Campbell's* separate estate is bound, and the plaintiff is entitled to have the mortgage money raised out of the life interest of *Mr. and Mrs. Campbell*.

This point was suggested upon the argument, but as no person appeared on behalf of *Mrs. Campbell*, it was not discussed. If it can be shown that this mortgage was created with the consent of *Mrs. Campbell*, and for the purpose of enabling her husband to receive the money raised upon the mortgage, then I am inclined to think that her separate estate is bound. The later cases are in favour of that conclusion. (a) But the evidence before us is not sufficient to establish that fact. And if *Mrs. Campbell* did not assent to the misapplication of the fund, but only joined in the mortgage for the purpose of carrying out the trust, I do not see that her separate estate is bound. Upon that point, therefore, further enquiry is necessary, and when the cause comes on again the question must be considered with reference to the earlier cases, (b) and to the effect of the provincial statute. (c)

(a) *Major v. Lansley*, 2 R. & M. 355; *Stead v. Nelson*, 2 Beav. 245; *Wainwright v. Hardisty*, 2 Beav. 363.
 (b) *Williams v. Duke of Bolton*, 4 B. C. C. . . *Aguilar v. Aguilar*, 6 Mad. 414; *Jones v. Harris*, 9 Ves. 486.
 (c) 1 Wm. IV., ch. 2.

1859.

McCLENNAGHAN V. BUCHANAN.

January 18. *Examining defendant before answer—Order to pay money into court.*

A defendant may be examined *visâ voce* in support of a motion, notice of which has been given, although the time for answering has not elapsed.

An interlocutory order for payment of money into court will be made only where upon all the evidence before it, the court is satisfied that at the hearing a decree must inevitably be made in favour of the party moving.

After the service of the bill in this cause, a notice was served upon the defendant of a motion about to be made for an order upon him to pay into court the sum of £50,000, alleged to have been improperly paid over to him by the directors of the Amherstburg and St. Thomas Railway Company; in support of this application it was asserted that it was necessary to examine the defendant *Buchanan* before the court; and a motion was made by

Argument. Mr. *Blake* for the plaintiff for an appointment to examine the defendant.

Mr. *A. Crooks*, contra, objected, that the time for answering not having expired, the application now made could not be granted; but

THE COURT thought that for the purpose of supporting an application, the notice of which had been already served, the orders of court (1853) warranted the proceeding, and made the usual appointment for the examination of the defendant. The examination of the defendant was accordingly had before the court; and upon the evidence then elicited, and the depositions of a witness taken before one of the examiners, a motion was now made under the circumstances set forth in the judgment for an order in the terms of the notice of motion.

Mr. *Strong* and Mr. *Blake* for the plaintiff.

Mr. *Gwynne*, Q. C., and Mr. *A. Crooks*, contra.

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The judgment of the court was now delivered by

1859.

McClennaghan
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ESTEN, V. C.—This is an application by the plaintiff, who is a shareholder in the Niagara and Detroit Rivers Railway Company, suing on behalf of himself, and all other shareholders, except such of them as are defendants, to compel the defendant *Buchanan* to pay into court a sum of £50,000 received by him by means of a cheque authorised by the directors, and signed by the president of the Amherstburg and St. Thomas Railway Company, to whom the money then belonged, and which company has since become incorporated with the Woodstock and Lake Erie Railway and Harbour Company, the two companies, so incorporated, forming the Niagara and Detroit Rivers Railway Company. The money is claimed as the property of the present Company, having, as alleged, been paid to *Buchanan* by the directors of the Amherstburg and St. Thomas Railway Company, in breach of their duty to the shareholders of that Company. Judgment.

It is claimed to be paid into court as trust money in the hands of the defendant. Hitherto, upon a defendant admitting himself to be a trustee for the plaintiff, and to have trust money in his hands, it has been almost of course upon an interlocutory application to order payment of such moneys into court. With some exceptions, only two, such admission has always been contained in the defendant's answer. The application in the present case is in point of form unprecedented, except so far as the cases of *Jervis v. White*, (a) *Vann v. Barnet*, (b) may be considered as affording some precedent for it. In those cases the applications were certainly made before answer, but the defendants answered the affidavits by which they were supported, and the court fastened upon the affidavits in answer, and upon those affidavits, in conjunction with the affidavits in support, made the order. In the present instance a notice of motion for payment of this large sum of money into court is served

(a) 6 Ves. 738.

(b) 2 Br. C. C.

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 McClennaghan
 v.
 Buchanan.

on the defendant *Buchanan* before he has had an opportunity of presenting his defence in the suit, through the medium of his answer in a connected form. He is put in the witness box and interrogated at large after service of a notice of motion, and upon such admissions as the plaintiff has been able to elicit from him in that situation, and upon the *vivâ voce* deposition of another witness, the application is based. From the same source alone has the court been able to deduce the nature of the defence which he proposes to raise to this suit. Motions for payment of money into court are often classed with motions for receivers, but in this court motions for receivers are made every day before answer, and supported by affidavits alone. It is a jurisdiction which may be very usefully exercised, to secure a fund in danger, until the hearing of the cause; on the other hand, if the order be wrongly granted, and the sum be very large, the defendant may be ruined. It is obvious that the court proceeds on safe grounds where the defendant's own answer, containing the defence, if any, which he means to offer to the suit in a precise form, admits him to be a trustee for the plaintiff, and to have a certain sum of trust money in his hands, because a decree must necessarily be made at the hearing that he pay it. Without deciding whether an application for this purpose can be made in the present form, I think the order can be granted only where upon all the evidence the court is satisfied that a decree must inevitably be made at the hearing.

The defendant *Buchanan* denies that he is a trustee; he claims title to the fund; and although this may not be true, when facts are confessed, which render a decree at the hearing inevitable, yet that cannot be predicated of the present case. The defendant *Buchanan* resists the suit on three grounds, perhaps on more, but certainly on three: 1st. That what has been done in this case was done with the consent of all the shareholders for the time being. 2nd. That it was done with the consent of the

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plaintiff. 3rd. That the condition on which the £50,000 in question, being the deposit on stock, was paid by *Buchanan*, warranted its repayment to him by the company, under the circumstances of the case, although the engagement may have been one into which the directors had no power to enter. Whatever may be thought of these propositions, or some, or one of them, can it be said that they do not admit of argument? and can it be contended that payment into court will be ordered in any case where it is reasonably disputed, and it is a matter to be seriously argued at the hearing, whether the defendant, against whom the order is sought, is a trustee at all?

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No amount of danger to the fund can warrant the court in effect hearing the cause, and making a decree on interlocutory motion.

I do not mean to express any opinion whether or not ^{Judgment.} an application for that purpose may be made in this form, on such evidence; or whether or not it may be made against a constructive trustee, or party merely liable.

I should be sorry if the power of the court were restricted to secure a fund in danger, in any case, where the evidence was of such a nature as plainly to shew that a decree must inevitably be made at the hearing. I think this motion must be refused; but I make no order as to costs.

1859.

HILLIARD v. CAMPBELL.

Setting aside decree of foreclosure absolute.

A decree of foreclosure absolute drawn up and entered, set aside at the instance of a purchaser of the equity of redemption, whose interest was acquired after the institution of the suit to foreclose, but without notice of it.

In this case a decree for foreclosure absolute had been issued for default of payment of the amount found due by the master's report; and a petition was now presented by one *Joshua Bates*, setting forth that he had purchased the equity of redemption from the defendant *Campbell* subsequently to the institution of this suit, but in ignorance of any such proceedings having been taken, and that he had not been informed of the progress of the cause, the first notice he had of it being sometime subsequent to the issuing of the order for foreclosure absolute, immediately whereon the present petition was filed.

Argument. Mr. *Roaf*, in support of the application, read the affidavit of the petitioner, verifying the statements of the petition, and asked that the order already made might be discharged, and a new day appointed for payment of mortgage money, interest and costs.

Mr. *Hector Cameron* contra. *Thornhill v. Manning*, (a) *Ford v. Wastall*, (b) *Booth v. Creswick*, (c) *Cottle v. Bevis*, (d) were cited by counsel.

The judgment of the court was delivered by

ESTEN, V. C.—I have perused the papers, and consulted the cases that were cited in argument, and I think that the petitioner ought to be admitted to redeem the estate on proper terms, namely, on payment of the costs of this application, and on payment of the amount reported due; when a reference will be made to compute subsequent interest, and tax subsequent costs.

A month will be allowed for the payment.

(a) 1 Sim. N. S. 451. (b) 6 Hare. 229. (c) 8 Sim. 352. (d) 1 Ch. Ca. 62.

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HART V. BOWN.

Compensation—Executor—Arbitration—Land-scrip.

W. sold and conveyed lands by metes and bounds to *B.*, who conveyed to *D.* by a deed containing absolute covenants for title. A portion of the lands so conveyed was subsequently claimed by one *R.*, and an action of ejectment was brought by him to recover possession of it, and *D.* instituted proceedings under the covenant against *B.* Under these circumstances *W.* executed to his vendee a mortgage to indemnify him against all damages, costs, and charges in respect of the action of covenant. *B.* subsequently compromised with *R.* respecting his claim. *Held*, that *W.*'s estate was only liable for what should be found to be the value of the piece of land so claimed, and not the amount paid by his vendee upon the occasion of the compromise.

Land-scrip was deposited with a party as collateral security, who sold the same at a discount. *Held*, that if on taking an account it should appear the sale had been effected before any default in payment, he must be charged with the amount of the present value, but if after default, then with the value at the time of the sale.

This was a suit for redemption, the facts of which appear sufficiently in the head-note and judgment, and had been heard before the two Vice-Chancellors.

Mr. *Barrett* and Mr. *Crooks* for plaintiff.

Mr. *Brough* for defendant.

ESTEN, V. C.—This suit is not properly constituted, Judgment. inasmuch as the plaintiff being only the personal representative of the late *James Winniett*, has not in that capacity any right to redeem. However, both parties seem agreed to waive this objection in order to obtain the opinion of the court on the only question at issue between them, namely, what amount ought to be allowed to the defendant on the mortgage in question in the cause. The plaintiff contends that the defendant ought not to be allowed the amount paid to Dr. *Rees* for the costs of the action of ejectment, and claims that the defendant shall be charged with the full nominal amount of the land-scrip in question, and with the amount of a registered judgment, and that it should be referred to the master to determine the true position of the periphery of the Garrison Reserve. On the other hand, the defendant insists that he is entitled to the whole amount paid to Dr. *Rees*, and the costs of the ejectment, and

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Judgment.

ought to be charged with the land-scrip, only according to the value that he received for it. With regard to the amount paid to Dr. *Rees* for the purchase of his claim, it does not appear to me to come into question upon this mortgage. It was in fact a purchase of Dr. *Rees'* interest, with which the executors of Major *Winniett* have no concern. They are not bound by the verdict in the action of ejectment, and I think it should be the subject of enquiry in this court, what is the true position of the periphery of the Garrison Reserve in the terms of the mortgage deed, and what effect it ought to have in determining the amount chargeable under this mortgage. As regards the costs of the action of ejectment, I think it extremely probable that all parties may have supposed that the projected arbitration would settle the whole dispute, and that they may have anticipated no further litigation. Indeed, this seems admitted on both sides. However, the intended arbitration failed without any fault, certainly, on the part of the defendant. The mortgage affirms in terms, the right, which certainly existed independently of it on the part of the defendant, to indemnity against all necessary costs occasioned by the imperfection of Major *Winniett's* title. It recognises this right also, in fact, for it provides for the repayment of £78, and for indemnity against the costs of the action then pending. It provides in fact for no other costs, because I think it was expected that the projected arbitration would put a stop to litigation. The arbitration, however, having failed, I think, under the circumstances of the case, the deed contains enough to warrant the court in declaring the defendant entitled to charge on the mortgage the costs of the action, if properly and necessarily incurred. With regard to the land-scrip, it appears to me that the defendant had a right, after default under the mortgage, to make a sale of it; and that in this case he would be chargeable with the market price at the time; but if the sale took place before default, it must be considered as still unsold, and he should be charged with its present value. The decree should be accordingly.

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SPRAGGE, V. C.—The points to be ascertained under the mortgage from *Winniett* to the defendant are, first, the true position of the periphery of the circle, where it touched the land sold; and 2dly, in case it cut off any land from that described in the conveyance from *Winniett* to *Ekerlin*, the value of the land so cut off, taking the description of the land in the conveyance with the qualification of the words "more or less." These points, which I abridge from the mortgage, where they appear to be clearly stated, were to be settled by arbitration in the mode pointed out. The mortgage bears date the 2nd of June, 1849. Major *Winniett* died on the thirteenth of August following. No arbitrator was named by either party. In the following year, the defendant, through his agent, Mr. *Brough*, named one arbitrator, and called upon the executors of Major *Winniett* to name another. This they declined, having been advised that it was not competent for them to do so. The defendant then compromised with Dr. *Rees*, the Judgment. claimant of the piece of land as to which the arbitration was to take place; the plaintiff claims that he is not bound by the compromise, and that the points to be ascertained by arbitration, must be ascertained under the direction of this court.

There is an ascertained sum of £78 which *Winniett* was to pay, together with the amount to be settled by arbitration, and any taxes that the defendant might pay, together with any costs that might necessarily be incurred by the defendants.

An action was at the time pending by *Dick* against the defendant upon the covenant for title contained in the conveyance from the defendant to *Dick*; and the mortgage is made to secure further, such sum or sums of money as the defendant should be obliged to, and should reasonably and properly, pay in respect of damages, costs, charges, or expenses in or about that action. The *recital* to the mortgage is more extensive, it is to the

1859. effect that Major *Winniett* had agreed to save the defendant harmless and indemnified as well from all costs, charges, and expenses in the said action, as from and against all other actions, suits, losses, damages, costs, charges, and expenses whatsoever which the defendant should incur on account of any defect in the title to the parcel of land conveyed, or to any part thereof.

Hart
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Bown.

The bill alleges, and it is not denied, that the compromise between Dr. *Rees* and the defendant took place after verdict recovered in an action of ejectment, brought by *Rees* against the defendant, upon which certain points were reserved, and without those points being argued. The plaintiff objects that the defendant resisted the action of ejectment for his own purposes, without any authority from Major *Winniett*, and improperly, and that large costs were thereby incurred which *Winniett's* estate ought not to be called upon to pay.

Judgment.

The occasion of the mortgage being given is thus stated in the bill: that Dr. *Rees* brought ejectment, and a verdict was recovered as above stated; that the conveyance from defendant to *Dick* contained an absolute covenant for title; that *Dick* thereupon informed the defendant of the ejectment, and the defendant thereupon called on Major *Winniett* and that it was agreed between them that, the error having arisen from the incorrect description in the deed to *Ekerlin*, the small angle thereof claimed by *Rees* should be valued, and that *Winniett* should pay the amount of such valuation. From this it might be inferred that the small angle claimed by *Rees* was conceded to belong to him; but the language of the mortgage is against it.

It does not appear what became of the action of covenant, but if any damages were given, *Dick* would of course forego them, as, by the compromise, he obtained the land itself. As to the defendant's costs in that action, I think the defendant indemnified against them by the mortgage.

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The question as to the costs of defending the ejection may admit of different considerations, and may properly be postponed, I think, until after the enquiry which it will be necessary to direct. If it should turn out that this claim was unfounded, there was no defect in title to any part of the land conveyed, and so nothing for which *Winniett* should have been answerable; but if there was such a deficiency as would come within the terms of the mortgage, it would seem to have been the intention as well of *Winniett* as of the defendant, that the latter should be indemnified. The plaintiff says that the defendant should have proceeded to ascertain the points by arbitration. I do not think there was any default on either side in that respect; if there were, it was as much that of *Winniett* as of the defendant, for either party might have proceeded in the mode pointed out in the mortgage; but such ascertainment, if it had been made, would of course not have affected *Rees*. If indeed the point had been ascertained, and it had been found that *Rees* was entitled to what he claimed, it would have been the defendant's folly to have defended the ejection. As it is, I cannot say that he was wrong in putting *Rees* to prove himself entitled. At the same time, should the estate of *Winniett* be held liable, it by no means follows that he is entitled to the costs paid in that action, or rather upon the compromise of it; which appear not to have been the taxed costs of that suit, but costs claimed to be allowed out of court between Dr. *Rees* and his solicitor Mr. *Gwynne*.

I cannot see that the estate of *Winniett* is bound by the compromise; what *Winniett* was to pay to the defendant was the money value of the quantity deficient, if any, to be ascertained in a particular mode. Suppose that mode had been followed, and an award made finding the quantity deficient, and £100, or £50 the value of it; had the amount of the compromise been ten times as much it could not have affected *Winniett*. Nor, indeed, does the compromise appear to have been at all necessary,

1859.

Hart
v.
Bown.

Judgment.

1859. or even available on the part of the defendant. All that
 { Hart
 v.
 Bown. } *Dick* could have been entitled to if the title to the whole
 had been defective, would have been the amount of
 purchase money paid by him to the defendant, and the
 title to a part only being defective, he would probably
 have been entitled only to the proportion which the
 value of that part bore to the value of the whole.

ELLIS V. ELLIS.

Trustee—Costs.

A trustee having refused to allow his name to be used as a plaintiff,
 was refused his costs of defence, although no blame attached to him
 in other respects.

This was a bill by *William Ellis* against *John Ellis*
 and *Joseph Ellis*, and stated that a mortgage had been
 made by the defendant *John* and his wife, to the other
 defendant as trustee for the plaintiff, securing £1000 and
 interest; that several instalments of interest became due;
 that plaintiff had applied to *Joseph* to become a co-plain-
 tiff for the purpose of enforcing the mortgage, and also
 to assign the same to the plaintiff, but he refused to do
 so. The plaintiff prayed foreclosure, and other relief
 founded on the covenants of the mortgage, and an assign-
 ment of the premises to himself.

The answers admitted the execution of the mortgage
 to *Joseph* as trustee, but alleged that the plaintiff was
 subject to fits of insanity, and unfit, in consequence
 thereof, to be entrusted with the management of his own
 affairs, on which account the trustee refused to convey.

Mr. Fitzgerald, for plaintiff, moved upon affidavits for
 a decree in the terms of the prayer of the bill.

Mr. Roaf contra.

The cause was heard before His Honour Vice-
 Chancellor *Esten* alone, who now delivered judgment.

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ESTEN, V. C.—I think I must consider the plaintiff as subject to fits of partial insanity, or in a morbid state of mind. This was probably the reason that the mortgage was put in *Joseph Ellis'* name. I think that *Joseph Ellis* was right, under the circumstances, in refusing, if he did refuse, to transfer the mortgage. I think it was reasonable that he should decline to sign the declaration of trust until he had taken legal advice upon it, which he was prevented from doing by the plaintiff's refusal to entrust him with it. I should therefore give *Joseph Ellis* his costs, as he only received Mr. *Fitzgerald's* letter on the 2nd October, the day on which he was served with the bill, which letter very properly required permission to use his name as a co-plaintiff; but on receipt of it he ought to have given his consent, and then he would have been made a co-plaintiff, and his costs would have been saved. He cannot therefore have them. I do not think I should order an assignment of the mortgage. It will be sufficient to declare *Joseph Ellis* a trustee by the decree.

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Ellis
v.
Ellis.

Judgment

ELY V. WILSON.

Injunction—Pleading.

A motion for injunction was refused, the allegations and prayer of the bill having been framed with a view to relief on other grounds than those upon which the application was founded, although the affidavits in support of it contained sufficient to warrant the court in granting the injunction.

The bill in this case was filed by *Theodore D. Ely*, and *Hiram Holcomb*, against *Samuel Wilson*, *Alexander Wilson*, and *William Wilson*, setting forth that the plaintiffs, in January, 1857, entered into co-partnership with the defendants *Samuel* and *Alexander Wilson*, in the business of lumbering, for one year, which was carried on until August following, when the sheriff of Hastings, under writs of execution issued in five several actions at law against the latter named parties for their personal debts, and not for any liability in respect of the partnership debts, seized a large quantity of lumber belonging

1859. } to the partnership, and sold the same by public auction to
 Ely } *William Wilson*, he being the plaintiff in one of the said
 v. } actions.
 Wilson.

That the defendants, *Samuel* and *Alexander*, had fraudulently sold to one *Henry J. Martin*, who was a person without means, about 800,000 feet of lumber at the mill, which he was about removing beyond the jurisdiction of the court.

The prayer was, that the co-partnership might be declared dissolved by reason of such sales: an account of the partnership dealings directed, and the affairs thereof wound up, and a receiver appointed; also an injunction to restrain the defendants from intermeddling with or selling the partnership effects, and from interfering with the assets. And that *William Wilson* might be restrained from removing from its present situation the partnership property purchased by him at sheriff's sale.

Mr. *Strong* for the plaintiffs, moved in the terms of the prayer.

Mr. *McDonald*, contra.

The facts of the case, as set forth in the affidavits used upon the motion before the Vice-Chancellors, are stated in the judgment, which was delivered by

SPRAGGE, V. C.—The application is based upon two grounds: 1st, the exclusion by the defendants *Samuel* and *Alexander Wilson* of the plaintiff *Ely*; and 2ndly, the sale by the *Wilson*s of a large quantity of lumber, 800,000, to one *Martin*, not a party, which sale is impeached; and the affidavit also states that the mill has been stopped, and the workmen discharged, and that they have since been hired by *Martin*.

The affidavits in support of the application are greatly

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wanting in precision and accuracy of language, and in positiveness of allegation. Upon the first point, it is stated that the authority and control of *Ely* was set at defiance, and set at naught, without shewing what authority or control he attempted to exercise. The affidavits state that the *Wilsons* were to manage the working of the mill—the articles of partnership shew the same—*Ely's* duties were in part keeping the books, and, together with *Holcomb*, effecting sales of lumber in the United States, and managing the financial affairs of the partnership. No exclusion of *Ely* from his proper duties, or from the exercise of any proper right is shewn.

The allegations in relation to the sale to *Martin*, which is impeached as a sham or pretended sale, are very vague, even taking into account that, as represented, it is a transaction that would not be disclosed to the plaintiffs, but carefully concealed from them. From the articles of partnership it would appear that it was part of the duty of the *Wilsons* to attend to the shipping of all lumber fitted for shipping, when necessary for them to do so; and that it was part of the duty of the plaintiffs to attend to the sale of marketable lumber. The *Wilsons* living at the mills, in Canada, and the plaintiffs at Watertown, in the United States; it seems that by marketable lumber, and lumber fitted for shipping, we are to understand the same thing; in other words, that lumber fit for the United States market was to be shipped for that country, and there sold by the plaintiffs. From the quantity of lumber sold to *Martin* it is probable that a portion of it was fit for the foreign market, but that is not alleged, so as to enable the court to see that the *Wilsons* were acting in contravention of the articles, by making sale of it in Canada. It is said, indeed, that *Martin* is shipping a portion of it, but not to what place.

The question whether *Martin* is the owner of this lumber cannot be discussed in his absence, and the only question material upon this application is, whether the

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*Wilson*s, in making the sale, were guilty of misconduct. The affidavit of *Orrin Jones* is certainly material upon this point. He speaks to a declaration by *Samuel Wilson*, that he and *Alexander Wilson* intended to take all the lumber from the plaintiffs, and the discharging of workmen, and their being hired again by *Martin*, the *Wilson*s still continuing in charge, though somewhat loosely stated, looks like misconduct on the part of the *Wilson*s, and I should be disposed to enjoin the *Wilson*s from disposing of lumber in any way, until, at least, they had answered these allegations, if the record were in a shape to enable me to do so. But the bill contains no allegations in relation to the matters upon which this application is made; and indeed was framed for a different purpose, viz., to restrain the removal of certain lumber purchased upon an execution against the *Wilson*s for a separate debt, and contains no prayer for an injunction against *Samuel* and *Alexander Wilson*,

Judgment. upon the grounds upon which this injunction is sought.

O'GRADY v. MUNRO.

Security for costs.

The plaintiff, a British subject, having gone to reside in the United States, where he had remained for several years, but had never taken any oath of naturalization, or exercised the rights of citizenship in that country, returned to this province, and some months afterwards filed a bill in this court; a motion for security for costs was refused, although several persons swore that his intention was to leave immediately on the decision of the case; the plaintiff having sworn that his intention was to remain in the country.

This was a motion by way of appeal from an order made in chambers, directing the plaintiff to give security for costs. In the affidavits filed in support of the application for security, it was sworn that the deponents had conversed with the plaintiff, who said he was an engineer in the United States, that it was a great loss to him to be here attending to the suit, and that the deponents believed he intended to return to the United States in the event of a decision adverse to him in this suit being

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arrived at. The plaintiff, in his affidavit, filed in opposition to the application, swore that although he had resided several years in the United States, he had always intended to return hither; that while residing in the United States he had never been naturalized as a citizen of that republic, or exercised in any way the rights of citizenship; and that his intention was to remain in this province. The learned judge in granting the application intimated that in his opinion the residence of the plaintiff in this province was merely temporary and colourable, in order to avoid giving security for costs; but at the same time suggested, that, as the case was not quite clear upon the authorities, the plaintiff might apply to the full court; and now

Mr. *Doyle*, for plaintiff, moved to discharge the order so made.

Mr. *Fitzgerald*, contra.

The cases cited are all mentioned in the judgment, which was delivered by

THE CHANCELLOR.—This is an application for security ^{Judgment.} for costs upon the ground, if I apprehend the matter rightly, that the plaintiff is about to withdraw from the jurisdiction of the court, or upon the ground that his residence within the jurisdiction was from the first colourable, for the purpose of avoiding the necessity of giving security. The plaintiff is a British subject. He was brought up in this province. He then removed to the United States, where he resided many years. But he returned to this country some months before the bill was filed; and he swears, in answer to this application, that he returned to the province with the intention of becoming a settled resident, and that he has no idea of withdrawing from the jurisdiction. Two affidavits have been filed in support of the application, in which the plaintiff is represented as having admitted that he came

1859. to the province to attend to this suit, and meant to leave when it had been decided. I am by no means clear that the case made by the defendant would not warrant us in refusing the application. (a) But however that may be, I am clear that admissions said to have been made by the plaintiff, in the course of casual conversations held, several weeks since, ought not to outweigh his clear and positive affidavit, filed upon this motion. And if the plaintiff must be regarded upon the evidence as a settled resident, it is clear the application cannot be supported upon the grounds stated. (b)

O'Grady
v.
Munro.

Judgment.

It is true that a plaintiff who has intentionally misdescribed his place of residence in the bill, may be compelled to give security in this court, when at law he could not be called upon to do so. That practice is of recent origin. It was not known when the orders of April, 1828, were framed. The 40th of the orders, which settles the amount for which security is to be given, only provides for cases where the plaintiff is out of the jurisdiction. *Saunders v. Long*, (c) appears to have been the first case in Chancery in which the plaintiff was compelled to give security, on the ground that he misdescribed his place of residence. That case has been repeatedly followed, (d) and in some instances extended to what seems to me an inconvenient length. (e) I am not sure that the case in 15 Simons ought to be followed. But it is unnecessary to pursue that point further, because no case of that sort has been made here. I am of opinion, therefore, that the application should have been refused with costs.

(a) *Tambisco v. Pacifico*, 7 Ex. 816, and the cases there cited; *Busk v. Beetham*, 2 Beav. 537; *Ainslee v. Sims*, 17 Bea. 57.

(b) *Green v. Charnock*, 1 Ves. Jr. 396; *Hoby v. Hitchcock*, 5 Ves. 699; *White v. Greathend*, 15 Ves. 2.

(c) 2 M. & K. 488.

(d) *Bailey v. Gundry*, 1 Keen. 53; *Manby v. Bewicke*, 2 Jur. N. S. 671; *Oldale v. Whitcher*, 5 Jur. N. S. 84.

(e) *Calvert v. Day*, 2 Y. & C. 217; *Player v. Anderson*, 15 Sim. 104; *Swanzy v. Swanzy*, 4 Jur. N. S. 1013.

The rule that settling the wife's temporary treatment to be adopted to be paid. Allowance of shown that as to justify

The facts hearing, and then pronounced account of the and fixed the alimony at the time been received been informed increased, a to £1200, paying that

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ESTEN, V. C. tation of alimony to the practice it is competent I apprehend of such an application determination

1859.

SEVERN V. SEVERN.

Increasing alimony after decree.

The rule that the conduct of the wife should weigh much in determining the amount of alimony is a reasonable one, still the court in settling the amount refused to regulate itself by the fact that the wife's temper had occasionally been of a violent character: her treatment by the husband having been unreasonably severe, but adopted the husband's income as the proper guide for fixing the sum to be paid.

Allowance of alimony increased from £25 to £200 per annum, it being shown that the husband's income had increased to such an extent as to justify the additional allowance.

The facts of the case fully appear in the report on the hearing, ante volume III., page 431. After the decree then pronounced, the master had proceeded to take an account of the defendant's annual income and property, and fixed the amount to be paid by him to his wife for alimony at the sum of £25 a year, and which had since that time been regularly paid to the plaintiff, but she having been informed that the defendant's property had greatly increased, and that his gross annual income amounted Statement. to £1200, filed a petition setting forth that fact, and praying that the allowance to her might be augmented.

The evidence used upon the application, which was made before the two Vice-Chancellors, is mentioned in the judgment.

Mr. *Blevins*, for the plaintiff.

Mr. *Mowat*, Q. C., contra.

The judgment was delivered by

ESTEN, V. C.—This was an application for augmentation of alimony. It is perfectly clear that according to the practice of the Ecclesiastical Courts in England, it is competent to the wife to make this application, and I apprehend it to be the duty of the court, on occasion of such an application, while having due regard to the determination of the master, not to be bound by it, but

1859. to examine the whole question, and to settle the amount proper to be allowed under the actual circumstances of the case at the time of the application. Several witnesses have been examined, and amongst them the defendant himself. An assignment to trustees by the defendant, and a lease by such trustees of the defendant to his two sons, were propounded. We cannot fail to see that these instruments were executed under very suspicious circumstances; it is not, however, necessary to pronounce a definitive opinion upon either of them. The assignment to the trustees has not been produced. We have only been informed that some assignment of some property had been made to trustees upon some trusts for the benefit of creditors. There would of course be considerable difficulty in disregarding an instrument of this nature, when we have no reason to doubt the reality of the debts intended to be secured, the principal and far greater part of which appear to be due to the trustees themselves, who are also alleged to have made advances since the execution of the assignment. The trustees, however, permit the defendant to remain in the possession and enjoyment of the property, subject to their security. The lease to the two sons we should have no hesitation, if it were necessary, in pronouncing colourable and fraudulent, as we are quite sure a jury would do, if called upon to express any opinion about it. It is not, however, necessary for us to express any opinion upon the lease. It is at an end; and we regard the defendant as in possession of all the property, subject to the security, whatever it may be, held by the trustees. We consider his gross income to amount to about £1200 per annum, from this we deduct £600 for the interest of debts, expenses, and necessary repairs and improvements. It is usual, we find, to make a deduction for the support of the children before estimating the net income of the husband. Deducting £100 a year for the support of the four children at present dwelling with their mother, the clear annual income of the husband would amount to £500. It was suggested by the learned counsel for the

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defendant, who argued this case with his usual zeal and ability, that the conduct of the wife should weigh much in determining the amount of alimony. On this point he referred to the text books, and the cases cited in them, without particularising any case. We were not able to discover any authority for this position. We think the rule, however, a reasonable one, and are prepared to act upon it. In the judgment delivered by the Chancellor at the hearing of the cause, he says: "That the plaintiff was altogether free from the debasing habit imputed to her cannot certainly be affirmed. That her language was at times gross and offensive, and her whole conduct unbecoming, is, I fear, too plain to admit of doubt. It must be admitted that such conduct would excuse considerable severity in the husband; but it affords no sufficient justification of the reckless and unmanly cruelty in which he so frequently indulged." Having regard to this state of things we think that £200 per annum would be a proper sum to be paid by the defendant to his wife ^{Judgment.} for her support, under existing circumstances. It is, no doubt, competent to Mr. *Severn* to apply to have the custody of his children, and it will have to be considered by any court to which he may make such application whether, under existing circumstances, he ought to have the custody of all or any of them. Liberty will be reserved to both parties to apply as they may be advised should the circumstances of the case alter; but should any application be made to this court to reduce the allowance to the wife, in consequence of the altered circumstances of the case, it will consider itself at liberty to consider the question anew, and to readjust the allowance proper to be made in the new state of affairs. The defendant must pay the costs of the application.

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SMITH V. THE LONDON GAS COMPANY.

Injunction—Corporation.

A company incorporated under the provisions of the statute 16 Victoria, chapter 173, for supplying a city with gas, will be restrained during the currency of a quarter from cutting off the gas from a house, the occupant of which has paid up the rent for the preceding quarter; but a special contract for continuing to supply the gas will not be binding on the company, unless in writing under the corporate seal.

This bill was filed by *Nathaniel Smith*, of London, hotel keeper, against *The London Gas Company*, setting forth that in July, 1853, the defendants became incorporated for the purpose of supplying the City of London and the inhabitants thereof with gas for illumination and other purposes, under the provisions of the act 16 Victoria, chapter 173, entitled "An Act to provide for the formation of incorporated joint stock companies for supplying cities, towns and villages with gas and water," and that the defendants had ever since, and still intended, to carry on such business for the time to come; that on the 18th of August, 1854, the plaintiff and defendants entered into an arrangement by which they agreed during the continuance of their business to cause and permit their gas to enter the City Hotel, kept by the plaintiff, for the purpose of illumination, on terms stated in the bill; namely, quarterly payments for the quantity consumed; that on the faith of this agreement the plaintiff went to a considerable expense in laying on the gas and putting up the necessary fittings, and that he had always paid all rents, rates, and charges due to the defendants in respect of such agreement. It further appeared that the plaintiff having intended to remove to another hotel, called the Robinson Hall, had given an undertaking to be responsible for the gas consumed therein, from a certain day mentioned in the bill, but that having been obliged to abandon the idea of carrying on business in the Robinson Hall, he notified the Company thereof, and asked them to release him from his undertaking, which they refused to do, and rendered him an account amounting to about £38, and demanded payment thereof from

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plaintiff, but which he refused to comply with, and in consequence thereof the defendants had threatened, and did accordingly, cut off, the gas from the City Hotel, although nothing was due in respect of the gas used there, the effects of which act of the defendants were very injurious to the plaintiff in carrying on his said business of hotel keeper. The prayer of the bill was, that an injunction might issue restraining the defendants from preventing the gas entering the premises of the plaintiff so long as he continued to make the stipulated payments therefor. Affidavits were filed, verifying the statements of the bill.

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Smith
v.
London Gas
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Upon this state of facts an injunction had been granted upon notice, restraining the defendants from continuing to withhold the gas from the City Hotel: the court being of opinion that during the currency of a quarter the defendants had no right to withdraw the gas from the house so long as the amount due upon the preceding quarter had been duly paid. Afterwards a motion was made, under the orders of 1853, for a decree in the terms of the prayer, which was heard before the two Vice-Chancellors.

Mr. *Blake*, for the plaintiff, cited amongst other cases *Dietrichsen v. Cabburn*, (a) *Lumley v. Wagner*, (b) *Whittaker v. Howe*, (c) *The Attorney-General v. The Weston Plank Road Company*, (d) *Chitty on Contracts*, 61, *Addison on Contracts*, 719.

Mr. *Hector*, contra.

The judgment of the court was delivered by

ESTEN, V. C.—We think the evidence of a special contract insufficient, being only the plaintiff's affidavit, and that not very full or satisfactory.

(a) 2 Ph. 52.

(c) 3 Beav. 383.

(b) 1 DeG. M. & G. 604.

(d) *Ante* Vol. IV., p. 211.

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v.
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If there were no special contract we cannot grant the plaintiff an injunction, and his bill must be dismissed, but he must have his costs up to, and inclusive of the argument already granted. As to the rest of the suit he must pay costs. Even if a special contract were proved on the part of the manager merely verbal or by writing (and none other is suggested,) we should think it insufficient to warrant a decree. We should not think such a contract, not being under the corporate seal, binding on the corporation, or within the authority of the agent, and nothing has been shewn in the present case to bring it within any class of exceptions to the general rule, which renders the corporate seal necessary to bind the corporation.

JACKSON V. JACKSON.

Principal and agent—Specific performance—Part performance.

Upon a bill filed by an infant claiming a conveyance from the defendant, on the ground of his having acted as agent for the ancestor, in obtaining the title, the evidence tended to establish the fact that the property had been purchased by the defendant for his son, and received payments from him, with the understanding that he should obtain a deed when his payments were completed. The court at the hearing, offered the plaintiff an issue as to the question of agency, or leave to amend the bill upon payment of the costs of the day, and the proceedings that would be thus rendered useless: and if this was refused, ordered that the bill should be dismissed without costs, the defendant's answer having been falsified.

The bill in this case was filed by *Sarah Ann Jackson*, widow, and *Rachel Jackson*, her infant daughter, by her mother, as her next friend, against *John Jackson*, and stated that in 1852 one *Daniel Williams* had assigned to the defendant, as the agent for, and acting on the behalf of his son, *John Jackson*, the younger, deceased, who immediately went into possession of the same, and so continued in possession until the time of his death, having, during his possession, made valuable and extensive improvements thereon; that the defendant wrongfully and in fraud of his said son, took a bond for a deed of the said lot in his own name; that at the death of *John*

Jackson, money of defendant name, an alleged relation to son, and remained of the said defendant ment to the young *Rachel Jackson* that letter other plain

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Jackson, the younger, a small balance of the purchase money only remained unpaid, which was paid by the defendant, who thereupon took a conveyance in his own name, and claimed to own the same in fee. The bill alleged that defendant had admitted that in acting in relation to the said land, he did so as agent of his said son, and not on his own account; that the plaintiff had remained in possession of the premises since the death of the said *John Jackson*, the younger; but that the defendant had recently instituted proceedings in ejectment to turn them out of possession; that *John Jackson*, the younger, had died intestate, leaving the plaintiff, *Rachel Jackson*, his only child and heiress-at-law; and that letters of administration had been granted to the other plaintiff.

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The bill prayed a declaration that the plaintiff, *Rachel Jackson*, was entitled to the land; that upon payment of any sum advanced by defendant he might be ordered Statement. to convey to her, and for an injunction to restrain proceedings in ejectment.

The defendant, by his answer, denied all fraud in obtaining the title, and claimed to own the property in fee—freed from any trusts or equity of the plaintiff, or any other person—that he had only allowed his son, the late *John Jackson*, to occupy the same, and not under any agreement as to his purchasing the estate.

The cause having been put at issue, evidence was taken *vidâ voce* before the court; the principal facts established by it, however, are clearly stated in the judgment.

The cause was heard before the two Vice-Chancellors.

Mr. *Roaf*, for plaintiff.

Mr. *A. Crooks*, for defendant.

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Jackson.

ESTEN, V. C.—I think there is not enough to warrant a decree for the plaintiff, and think the bill must be dismissed without costs, unless the plaintiff will take an issue, or amend her bill, in which latter alternative she, or her next friend, must pay the costs of the day, and of such proceedings as will thereby be rendered useless. My impression is, that it would be difficult to establish the fact of agency, at the same time I am convinced the defendant bought the property for his son, and received payments from him, and that it was understood he was to get a deed when his payments were completed. I think, too, the son went into possession immediately in pursuance of this design. Whether there is sufficient ground to conclude that an agreement was made between the father and son, which being partly performed, would entitle the heir to a decree, I will not pretend to say, and beg to be considered as not expressing any opinion whatever. I think if the bill be dismissed it should be without costs, as I am satisfied the answer is not true in all respects, and was intended to convey a false impression of the facts of the case.

Judgment.

SPRAGGE, V. C.—The facts of the case are shortly these : in the year 1851, the late *John Jackson*, the son of the defendant, and of whom one of the plaintiffs is the widow, and the other his only child, had recently come of age.

He thought of going to the west, as his father said, and with a view of retaining him in his own neighbourhood, the father (and the son with him) entered into treaty with the owner of the land in question; and it was purchased. A bond for conveyance upon payment of the purchase money was given to the father, and the payments made on account were made by the father up to 1852; the father and son together bargained for the land; the father saying that he was buying the land for his son; and one witness, *Daniel Williams*, from whom some interest in the land was purchased, says that the

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father said distinctly that he was acting for his son *John*, that he wanted to get the land for his son *John* to settle on. 1859.

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Between the autumn of 1851, and the spring of 1854, very considerable improvements were made upon the land, not, however, by *John* solely, but in conjunction with his father and brothers; twenty acres were put under fence, and ten acres chopped, but not cleared, and there was a barn on the place, put up by the father.

During this period the place was known in the family, and out of it, as *John's* place, though it is not said to have been spoken of by that name by the father, or in his presence.

In the spring of 1854, the son married, and as it would appear against his father's wishes. He seems to have apprehended that his father would resent this, to use his own words, as narrated by his brother-in-law *Stonehouse*, Judgment. he did not know whether the father would let him have anything to do with the place: he was afraid he would be disappointed about the place. A day or two after the marriage he went to his father by his desire, taking with him *Stonehouse*, also by his father's desire, to come to an understanding in presence of witnesses. *David*, another son, was present. *Stonehouse* thus narrates what passed: "His father said to him, I will give you a choice whether you will take wages for the time you have worked for me since you came of age, or whether you will go on to this place; he told him that he would give him a yoke of steers, seed for that season, and provisions till he could raise them for himself; he said he might have the place for three years, upon paying the two instalments, coming due against the place, he said they would not exceed with interest £20 a year; they were to be paid each year before the 20th October; there were ten acres of wheat in the ground, which he was to have; he said, now if you go on and do well by the place, I will do as well by you as I am able; he said

1859. he should want the instalments, as he had another son for whom he had made no provision. *John* seemed satisfied with what his father said; when the father gave *John* his choice, he chose at once to take the place instead of his wages; the father did not say whether *John* was to have the place after the three years expired." "Upon the agreement being made, it was understood that the lot was for *John*, as before; it was not understood that he was to leave at the end of the three years, or that he was not. If the father said anything, it was that if he did well by the place, he would do as well for him as he could, but I will not say that he said that. I think *John* accepted the place as soon as his father had spoken of the three years, without waiting for the rest, and that his father added the rest afterwards."

David Jackson, another son of the defendant, who was present at this interview, gives substantially the same account of it in his examination in chief; but in his cross-examination he says: "I think my father stated the terms upon which *John* was to have the place before *John* accepted it; my father said he had six other children to provide for. *John* asked if he was to have the place after the three years; my father said that it was not his place to give; that he had six other children, and could not give all to one, but if *John* did right by him, he would do right by *John*." "Something was said about buying a place for me in connexion with the payment of the instalments."

A few days after the above conversation, *John*, the son, went upon the place, and worked and improved it; he cleared up the ten acres which had been chopped, cleared ten acres more, and chopped five acres besides; he remained upon the place until his death, which occurred in August, 1856, and his widow and child continued in possession afterwards. Ejectment was brought by the father to dispossess them.

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father, according to the arrangement; and the father expressed his satisfaction at it to several persons, adding, that when he had completed his payments he would get or was to get, his deed; not very long before the death of his son, it is in evidence that he said his son was doing very well, that he had but one more payment to make, and then he was to get his deed.

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The wheat crop of 1854 appears to have been drawn away by the father, not used by the son.

After the son's death, the father made the last payment out of his own funds, and took a conveyance to himself.

The bill states only one ground for the relief sought, namely, that the original purchase was by the son, who thereupon went into possession; that the father wrongfully and in fraud of the son, took the bond for conveyance in his own name; that he made some payments to the owner on behalf of the son; that *Daniel Williams* conveyed his interest to the father in the fall of 1856, as agent for, and acting on behalf, of his son. Judgment.

The evidence given to shew that the father acted, in making the purchase, as the mere agent of the son, fails. I think, in establishing that point: that he made the purchase with the avowed intention, not of retaining the land for his own use, but that it should become the property of his son, I think, is established, and I think, too, from the evidence, that his son worked upon it in the belief that his father would carry out that intention, but I do not think the evidence carries it further; and what passed before and at the interview in the spring of 1854, is confirmatory of this; he speaks reproachingly of his father disappointing him about the place; makes no claim of right, or even alleges a promise either to *Stonehouse* or his father; his father dictates his terms to him; he speaks of his wages for labour since he came of

1859. age, (not that I think that too much stress should be laid upon that, for if the father kept the land that would follow,) and he accepts without a word of remonstrance the choice offered to him. I do not forget that he was speaking with his father, and that he was in a measure in his father's power; but allowing to that circumstance its due weight, I think his conduct goes far to shew that he did not feel that he had been the purchaser of the land, and was then its rightful owner; and that his father was assuming to deal with it as his own, without any right to do so.

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What passed at that interview, the arrangement then made, and the acting of the son upon it, presents the case in another aspect.

Judgment.

There was a valuable consideration moving from the son, for he agreed to forego his wages for, as nearly as I can ascertain, two years and a half; the father, on his part, not claiming re-payment of his advances, nor compensation for the labour of himself and other sons, intending these, probably, by way of advancement to his son. The two witnesses to the agreement do not agree very closely in their account of what passed. I believe that they did not recollect it accurately; they were both, as far as I could judge, adverse witnesses to the plaintiffs; and when their memory failed them, or was uncertain, their recollection would take a turn unfavourable rather than favourable, to the plaintiffs; so at least I should judge from hearing them give their evidence. They both agree that the wheat crop then in the ground was to belong to the son; that crop was taken away by the father, and that without any objection. It is a fair inference, I think, that they were in error upon that point; they do not agree as to what passed in relation to what was to become of the place after the expiration of the three years; and part of what *David* represents his father to have said is scarcely intelligible; he says *John* asked if he was to have the place after the three years;

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his father said it was not his place to give; *Stonehouse* does not speak of such a question being asked, or any such a remark made in answer, both very material, if correct. The necessity for providing for another child, as *Stonehouse* says, or for six other children, as *David Jackson* says, might very well refer to the instalments which the father required the son to pay, although he had paid the previous ones himself; and *Stonehouse* puts it in that way.

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v.
Jackson.

I cannot but think that the arrangement as to what was to become of the place after the payment by the son of the three annual remaining instalments, is best interpreted by what was said by the father himself in relation to it, viz., that after payment by his son of the last instalment he was to get his deed.

In saying this, I give only the impression produced upon me by the evidence, without much discussion upon ^{Judgment.} the point, as it is not a point sufficiently raised upon the pleadings, and in the absence of any argument as to the legal effect of such a state of circumstances, supposing that a correct conclusion as to the facts has been arrived at. In saying this, I do not intend to intimate that I consider the legal effect very doubtful.

The litigation in this case is of a very painful nature, both as regards the parties to it, and the subject of it. The plaintiffs are the granddaughter of the defendant, a child of tender years, and the widow of his son. That the son went upon the place in question, and spent his time and labour upon it, upon the faith of its becoming his when he had made his payments, appears to me at present, taking the whole of the evidence together, as pretty free from doubt.

Upon the present record, unless amended, I think that the bill must be dismissed, but without costs, as the defendant's answer is falsified in some particulars as to

1859. the improvements made after the son's possession, in
 March, 1854; as to the field of wheat, to which allusion
 has been made, and I should say also, though his mean-
 ing is not very clear, as to the payments of instalments
 after March, 1854.

Jackson
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The plaintiffs, I may remark, have improperly charged the defendant with fraud for taking a bond for conveyance in his own name, and this might have affected the costs, had the bill been so framed as to have presented the whole merits of the case; it has probably been framed as it has been, in consequence of insufficient instructions being given.

Framed as the bill is, the plaintiffs can only have such an order as the one pronounced by my brother *Esten*, but I have thought it might, nevertheless, be useful to
 Judgment. give my views as to the merits of the case, as the case has been argued upon its merits.

TUCKER v. THE PROVINCIAL INSURANCE COMPANY.

Insurance by agent of company in his own name, for a sum exceeding limit.

The agent of an insurance company effected an insurance upon wheat in the name of himself and partner for the sum of £3000, there being at the same time an insurance on the mill in which the wheat was stored, of £750; the rule of the company being, that not more than £3000 should be taken on any one building, and its contents. The usual proposal was transmitted by the agent to the head office on the 23rd, and on the 27th of the same month the premises and wheat were destroyed by fire, no action in the meantime having been taken by the company upon the application sent in by their agent, who in making the proposal had refrained from drawing the attention of the company to the fact of the previous insurance on the building; and the then secretary of the company swore that had he been aware, or had his attention been drawn to the fact of such prior risk, the second application would have been immediately rejected. After the loss occurred the company paid the sums of £750, (insured on the building) and £2250, (on the wheat) together making the sum of £3000 allowed by the rules to be on one building and its contents. Under these circumstances a bill filed by the agent and his partner to compel the payment of the additional £750 was dismissed with costs.

The facts giving rise to this suit are sufficiently stated in the marginal note, and judgment of the court.

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(a) 1 Y. & C. 518.

Mr. *Strong*, for plaintiffs, contended that the risk had been accepted by the company—the insurance on the building had been effected in the year 1852, and had continued ever since, up till the time of the fire, and in 1854 an insurance upon wheat to the amount of £3000 had been made by the company. On the whole, all the acts of the defendants in relation to this matter shew plainly that they had taken the risk.

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Insur. Co.

Mr. *Barrett*, for defendants. *Tucker* having acted for some years as agent of defendants, was well informed as to the regulation of the company not to insure for more than £3000 on any building and contents; having attempted to bind the company to what he knew was contrary to their established rules, should disentitle him to any relief. The company having paid to the full amount of £3000, have shown no desire to injure the plaintiffs, or withhold from them anything to which they were justly entitled. Under the circumstances the bill should be dismissed with costs.

Argument.

Wilmot v. Cox, (a) *Edwards v. Grand Junction Railway Company*, (b) *Marshall v. Corporation of Queensboro'* (c).

ESTEN, V. C.—It would seem that the corporate seal is required as a general rule in equity, as well as at law, to bind the corporation; but that this rule will not be permitted by the court to be made an engine of fraud, and therefore, if upon the faith of a contract not under the corporate seal, anything be done or suffered by the other party with the acquiescence of the corporation they will be bound to complete the agreement.

In this case there seems nothing to dispense with the use of the seal.* The contract required confirmation; it was not a provisional insurance, which, perhaps, could

(a) 1 Y. & C. 518.

(b) 1 M. & C. 650.

(c) 1 S. & S. 520.

1859. have been made by the agent, being void for infraction of the corporate regulation, and every confirmation would require to be under the corporate seal. It is not a case of consideration executed, for the money has not been received by the corporation, nor by *Tucker*, as their agent, the transaction being improper in its inception. No fraud can be imputed to the corporation, or any acquiescence or encouragement which would entitle the plaintiffs. An agent transgresses his authority, as is well known to the party dealing with him, and although the fact is communicated to the corporation, and although in the case of a private individual under the circumstances he might be called upon to repudiate, yet a corporation is not bound by its silence under such circumstances as is also known to all parties, and its silence, therefore, cannot be likened to fraud. In fine, it appears to me, that a private individual would be liable, under the circumstances, to the plaintiffs; but that a corporation cannot be made liable on the same ground; the intervention of its corporate seal being *prima facie* necessary to its contracts, and there being nothing in the present case such as fraudulent acquiescence or encouragement, or consideration received, or legislative implication to dispense with it.

Judgment.

SPRAGGE, V. C.—The wheat in respect of the loss of which this suit is brought was at the time of its being burned, in a mill, or mill premises of *Tucker*, one of the plaintiffs, which mill premises at the time of the fire stood insured by the defendants for £750; they had been first so insured, the answer states, in December, 1852, and continued by renewal up to December, 1855. The wheat was the property of *Tucker* and the other plaintiff, and the application for its insurance for £3000 was made through *Tucker* himself, he being the agent of the defendants for that part of the country; there appears to have been nothing unusual in this. The application is dated the 23rd of February, 1855: it does not appear when it reached the head office in Toronto; but in ordinary cases

the party applied for receipt, that application was made by the defendants' late Secretary, but has not been received, and an application for a copy speaks indeed of the president, and is not usual.

The fire occurred on the day of its being communicated. At that time it was received—neither

The difficulty proposed being of the compensation of the property, and having already stored in it shillings insured for £2000 paid by the corporation, excess, £750.

The rule is in its own guidance, been, relaxed, and it appears to be in question in themselves stand general limit of the rule could rule was contained the agents of the *Tucker*.

The application attention to the

the party applying stood insured from the date of the receipt, that is pending the acceptance or rejection of the application at the head office in Toronto. The defendants' late Secretary Mr. *O'Brien*, has been examined, but has not stated what has been the course taken upon an application being received at the head office. He speaks indeed of such application being submitted to the president, and does not say that any other course was usual.

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The fire occurred on the 27th of February, and notice of it was communicated to the head office on the following day. At that time the application had been merely received—neither accepted, nor rejected.

The difficulty is created by the amount of the risk proposed being larger than was warranted by the rules of the company, the limit being £3000 on any one property, and its contents; while here, the company having already insured the building for £750, the wheat stored in it should, according to these rules, have been insured for £2250 only. The above amounts have been paid by the company, and the question is as to the excess, £750.

The rule is of course one made by the company for its own guidance, and may be, and in some instances has been, relaxed, as appears by the evidence of Mr. *O'Brien*, and it appears that wheat had been insured on the premises in question in the year 1854, for £3000, the premises themselves standing insured at the time for £750. The general limit was, however, £3000, and any alteration of the rule could be made by the head office only. The rule was contained in the printed instructions sent to the agents of the company, among others to the plaintiff *Tucker*.

The application of February, 1855, did not direct attention to the fact of the previous insurance on the

1859. mill premises; Mr. *O'Brien* says that if it had done so the application would have been immediately rejected.

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Suppose the fire had occurred before the application had reached the head office in Toronto, and suppose no one interested in the property but *Tucker* himself, and putting out of the question the insurance of the previous year, would *Tucker* be in the same position as regards his right against the company as if he had insured for a stranger, ignorant of the rule as to the limited amount of insurance; that is, assuming that a stranger might, under such circumstances, recover against the company.

In such case there would be a proposal by the plaintiff *Tucker*, proposing to the company to insure for an amount exceeding the limit prescribed by the rules of the company, and there would be an acceptance of the proposal by the same individual, though in another capacity, that of agent of the company. I think it clear that such acceptance could not bind the company even temporarily; that it could not stand on the same footing as other proposals for insurance, binding the company until rejected.

Judgment.

The next question is, whether a previous insurance for the like excess, or the circumstance of *Tucker's* partner being jointly interested with him in the wheat, should make any difference. I think not; the previous insurance was not sufficient, I think, to constitute a course of dealing that would give *Tucker* reason to assume that he was to be considered an exception to the general rule; and his partner would, I apprehend, be taken to have notice of that which was known to him.

Whether the time which elapsed after the transmission of the proposal to Toronto, before the fire occurred, without any dissent to the insurance proposed, constitutes an acceptance of the proposal, may admit of more doubt. What would be a reasonable time for the head office at

Toronto, to which diffusions. Mr. evidence, t unanswerd stand, that that purpos action on r company wo during the ir would find it ordinary ca acquiescence contract, and exists in this right to draw to or dissent examined an say, reasonab through pres examined, the I think from to assume that rejected. Bes he says he has to get through a risk was rej accepted by an rejection forth lapse of the usu posed risk is c that the risk wa communicated t prescribed by hi be more free fro

Ordinarily, th proposal; in th *O'Brien* says, it It appeared tha

Toronto, to declare their assent or dissent, is a matter upon which different minds will arrive at different conclusions. Mr. *O'Brien*, the late secretary, says in his evidence, that he has known applications to remain unanswered for two days, representing, as I understand, that period as the maximum time taken for that purpose. This would seem to me very prompt action on the part of the company; but then the company would for its own sake act promptly, because, during the interval, it would be liable, in cases which it would find it advisable, upon examination, to reject. In ordinary cases the interval of delay would not be acquiescence, but liability, upon the agent's provisional contract, and liability by reason of that, we do not think exists in this case. Then what inference had *Tucker* a right to draw from receiving no answer either of assent to or dissent from his proposal. If that it had been examined and not dissented from, he might, I should say, reasonably presume acquiescence. If that it had, through pressure of business or otherwise, not been examined, then I think no such presumption would arise. I think from Mr. *O'Brien's* evidence *Tucker* had reason to assume that the proposal had been examined, and not rejected. Besides, speaking of two days as the maximum, he says he has known the clerk whose duty it was unable to get through in one day; and in another place, that if a risk was rejected by the head office after having been accepted by an agent, he would be informed of the rejection forthwith. I think, therefore, that after the lapse of the usual time, within which rejection of a proposed risk is communicated, *Tucker* had reason to infer that the risk was taken; and if he had with the proposal communicated the fact of its being in excess of the limit prescribed by his instructions, this part of the case would be more free from difficulty.

Ordinarily, this would appear upon the face of the proposal; in this instance it did not; if it had, Mr. *O'Brien* says, it would have been immediately rejected. It appeared that as many as forty applications some-

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Statement.

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times reached the head office in one day : it could hardly be expected that it would be a circumstance borne in mind by the officers of the company that an insurance had sometime before been effected upon the premises in which was stored the wheat, which it was proposed to insure; and Mr. *Tucker*, in proposing to insure this wheat for £3000, had reason to believe that if the risk were accepted it would be in ignorance of that material fact. I think if he had been acting as agent only, the party proposing to insure being a stranger, it would have been his duty as agent, if the fact of his previous insurance was present to his mind, to communicate that fact to the company; that if they chose to accept the proposal it should be with their eyes open to the fact of its being a departure from their ordinary rule; and I cannot think it less his duty when he was himself proposing to insure, as well as acting as agent. It may be urged that the previous insurance having been effected with the same company, the company must be taken to have knowledge of the previous insurance at the time of the second proposed risk. I doubt if such presumption can at all arise in the case of a corporate body, acting through its officers, such officers resigning from time to time; but taking it that knowledge can be imputed to such a body because the fact is within the knowledge of the proper officers, that is not shewn here; the previous insurance may have been effected through other officers; and even if through the same, their then knowledge of it is not made out, but rather rebutted. Mr. *O'Brien* merely saying that if he ever knew of it, he did not recollect it. In imputing knowledge through an agent, the rule is a reasonable one, and is only applied in cases where there is reason to presume that the fact of which the agent had notice was remembered by him.

I think it would be most unreasonable to assume such to be the case in the matter in question. Upon this part of the case, my individual opinion is, that the defendants having been led, as far as the evidence enables us to

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judge, by the improper suppression of a fact which it was the duty of *Tucker* to disclose, to take a risk which they would not otherwise have taken; he has no equity to bind the defendants to the consequences of that risk. I think we are warranted in assuming that they would not have taken the risk, with knowledge of the suppressed fact; first, because it was their general rule not to take such risks; and secondly, because we have the evidence of *Mr. O'Brien*, that if the suppressed fact had been known the risk would not have been taken. And I will here take occasion to say that I think the evidence of that gentleman entitled to the fullest confidence; his connection with the company has ceased, (not that he would have been less truthful if it had still subsisted,) and his evidence was given with great caution and fairness.

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The defendants rely upon an acceptance, as they allege, by the plaintiffs, of the sum of £3000, in full satisfaction of their claim. If the fact of its being so accepted were satisfactorily made out in evidence, the question would still be attended with considerable difficulty. The fact is attempted to be established by the evidence of *Mr. O'Brien*. I think his evidence does not make out the fact contended for; that the plaintiffs did not forego their claim to the whole sum, and that the acquittance usually given upon a settlement of a loss not having been given by the plaintiffs in this case is a strong circumstance to shew that they did not admit that the loss was satisfied. Judgment.

One question raised in this case was, whether the plaintiffs could recover against the defendants in the absence of any engagement by them under the corporate seal. Upon that point I entirely agree with the view expressed by my brother *Esten* in his judgment.

I think the bill must be dismissed with costs.

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PENLEY V. THE BEACON ASSURANCE COMPANY.

Interim insurance—Decree for payment of losses—Limitation of time for bringing action.

A person having applied to effect an insurance with the agent of an insurance company, obtained from him the usual interim receipt; after the expiration of the time specified in this receipt, but before any policy was completed, the property was destroyed by fire, after which the company refused to pay the amount assured, or to issue any policy; asserting that they had not approved of, or accepted the risk. The evidence of the agent shewed that the risk had been accepted, and that he had stated to the assured that it had been accepted. The court, under the circumstances, directed an enquiry as to the amount of loss sustained by the assured, and that the company should pay the same.

Quere—Whether the court could, under such circumstances, compel the company to issue a policy.

One of the conditions endorsed on the policies issued by an insurance company, stipulated that any proceedings to be taken against them in respect of any loss sustained by the assured, should be instituted within six months after such loss should happen. *Held*, that such condition did not apply to a case where the company refused to complete the policy, and a bill was filed to compel them to execute a policy, or pay the amount of loss sustained by reason of the destruction by fire of the property insured.

This was a bill by *William D. Penley*, against *The Beacon Assurance Company*, stating that on the 27th day of October, 1856, the plaintiff entered into a contract with the defendants for insurance to the amount of £500 on his stock in trade, and having paid the sum of £12 10s. payable to the company therefor, he obtained from the duly authorised agent, at Belleville, an interim receipt as evidence of such contract, as follows:

“Received of *W. D. Penley* the sum of £12 10s. currency, being the premium of an insurance to the extent of £500 currency, on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for 21 days from the above date, within which time the determination of the board will be notified. If approved, a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time insured.”

That the defendants did, within the time mentioned in the receipt, by their board at Kingston, approve

of the contract retained the policy.

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That accordingly they refused not approved into with the approved the therefore we plaintiff charged approve of omitted, made plaintiff, in the as if a policy the plaintiff.

That the plaintiffs, but the plaintiff according contract, evidence in which they

That by reason said, the plaintiff in this court, compelled to pay in consequence policy so that

The prayer was to make and do

of the contract so entered into with their agent, and retained the sum of £12 10s., promising to deliver a policy. 1859.

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Company.

That before any policy was delivered to plaintiff, that is to say, on the 1st day of December, 1856, a fire occurred upon the premises, which destroyed the stock of goods so insured, whereby the plaintiff became entitled to receive the amount of his insurance.

That accordingly he applied to the defendants, but they refused to pay the same, pretending that they had not approved of the contract of insurance so entered into with their agent, and that even if they had approved thereof, they had granted no policy, and therefore were not liable to the plaintiff. But the plaintiff charged that the defendants did in fact approve of the contract, and, as the plaintiff submitted, made themselves liable in this court to the plaintiff, in the same manner, and to the same extent, as if a policy had actually been issued and delivered to the plaintiff. Statement.

That the plaintiff had frequently applied to the defendants, but they refused either to deliver a policy to the plaintiff according to the intent and meaning of the contract, evidenced by the said receipt, or pay the amount in which they so insured him.

That by reason of no policy having issued as aforesaid, the plaintiff submitted that he had no remedy but in this court, and that the defendants ought to be compelled to pay him the amount of loss sustained by him in consequence of the said fire, or to deliver to him a policy so that he might bring an action thereon.

The prayer was, that the defendants might be ordered to make and deliver to plaintiff a policy of insurance

1859. according to the intent and meaning of the said contract;
 or that the plaintiff might be paid the amount of his
 insurance, that an account might be taken, and for further
 relief.

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The defendants by their answer denied that the board at Kingston approved of the insurance, or that they retained the amount of premium, or that they promised to deliver a policy, excepting the conditional promise in the receipt; and alleged that within twenty-one days from the date of the receipt they refused to accept the risk, and that the plaintiff knew this before the occurrence of the fire, and submitted that at the expiration of twenty-one days from the date of the receipt the contract between them and the plaintiff, thereby created, expired, and the plaintiff not having received, and having been refused a policy, was entitled only to a return of the premium: further, that the board at Kingston refused the risk, and communicated it to their agent at Belleville, who, they believed, informed the plaintiff of such refusal, and if he did not return the premium it was because the plaintiff would not receive it, and they submitted that if mistaken in the belief that the plaintiff had notice of their refusal, yet that the plaintiff had notice by the terms of the receipt; that the agent had no authority to continue the said insurance, or to subject them to any liability after they failed to deliver the policy within twenty-one days; and if the plaintiff had been in any manner prejudiced by the conduct of the agent, it was owing to his own gross carelessness, and not to any act of theirs.

Statement.

The answer further alleged that there is an endorsement on all the policies used by the company containing the conditions on which only they insure, and therein there is the following clause: "It is furthermore hereby expressly provided, that no suit or action of any kind against this company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in

any court shall be after the suit or after the or damages be taken the claim

That more than

By the the plaintiff at Belleville acting the proposed plaintiff agent hired plaintiff: that he insurance paid had credited that is at Kingston accepted the board position the letter account has been, the application information applying to from Belleville I informed should have that I was plaintiff's

any court of law or chancery, unless such suit or action shall be commenced within the term of six months next after the loss or damage shall occur; and in case any suit or action shall be commenced against said company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken as conclusive evidence against the validity of the claim, thereby so attempted to be enforced."

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That the plaintiff did not commence this suit until more than six months after the fire.

By the evidence taken in this cause, it was shewn that the plaintiff had called upon the agent of the company at Belleville, and enquired of him if the defendants, acting through their board at Kingston, had accepted the proposed risk, and that the agent then informed the plaintiff that it had been so accepted by them. The agent himself was examined as a witness on behalf of the plaintiff: in his evidence he stated, amongst other facts, Statement. that he had forwarded the plaintiff's application for insurance to the board at Kingston; that the premium paid had not been returned to the plaintiff, but had been credited to the agent in his accounts with the board—that is after the fire—"I was not advised by the board at Kingston before the fire, whether the application was accepted or refused." * * * "Some letters from the board to me have been destroyed. I am not in a position to say whether or not there was among them a letter accepting the plaintiff's application. My practice has been, upon the refusal of an application, to inform the applicant and return his premium. I did not send information to the plaintiff; on the contrary, upon his applying to me before the fire, when about to be absent from Belleville, to know whether he was insured or not, I informed him that he was, saying that otherwise I should have heard of it." * * * "I am satisfied that I was notified by the board before the fire, that the plaintiff's application was accepted. The practice of

1859.
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the board at Kingston upon rejecting an application, was to inform the agent promptly. I had a book in which I entered applications, and upon hearing from the board I entered, accepted or rejected, according to the fact. Opposite to the plaintiff's application I find an entry of its being accepted."

The gentleman acting as surveyor for the company was examined on behalf of the defendants: he swore that the plaintiff's application was not accepted, that if accepted it would have been through him, and that he would have notified the agent. The application was not accepted by his authority; and that after searching the books he could find no note or entry of its acceptance.

Mr. *Turner*, for the plaintiff.

Mr. *Roaf*, for the defendants.

Argument. For the plaintiff, it was contended that he had a clear title to relief in this court, either to compel the execution and delivery of a proper policy, or to a decree referring it to the Master to enquire as to the amount of damages sustained by plaintiff, and payment thereof, thereby saving the expense and delay of a second action. As to the limitation of time inserted in the conditions endorsed on the policy, within which any action was to be brought, that clearly had no application here; the plaintiff cannot be supposed to have been aware of any such condition until the policy should have been delivered.

Counsel for the defendants combated these positions, insisting on the points of defence raised by the answer.

After taking time to look into the authorities,

The CHANCELLOR—after stating the proceedings and facts in the case, remarked—This is a bill filed for the purpose of recovering a sum of £500, insured on the property of the plaintiff, contained in the shop and

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premises of the plaintiff, situate at Belleville, at which place the insurance was effected, with one *Newbury*, who had for sometime been acting as the agent of the defendants at that place. No policy of insurance, however, was ever executed, and the object of the present proceeding is to compel the company to perfect a proper policy of insurance, or to obtain in this suit the same relief as if the policy had been duly executed.

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It is not very clear what decree would be made under such circumstances in England, but in the United States from the earliest times the courts have always felt themselves at liberty to make a decree for payment of the money, and his lordship the Chief Justice, in *Jones v. The Provincial Insurance Company*, reported in the 16th volume of the Upper Canada Queen's Bench Reports, suggests that the plaintiff's relief would be in equity. In this state of the law, we think the safer course to adopt will be to assume jurisdiction until rectified by the court of appeal.

Judgment.

The defendants have raised two points of defence; 1st, it is said that the risk was never accepted at the parent office. 2nd. That proceedings against the company must, according to the conditions endorsed on the policies issued by them, be instituted within six months from the time of any loss happening. On the first objection the defence entirely fails; *Newbury* in his evidence states that he had received letters from the parent office respecting the risk, and that his belief is that the risk had been accepted, as otherwise he would have communicated the fact of its rejection to the party interested; while on the contrary it appears that he had actually informed the plaintiff that the risk had been taken: he states that the letters received from the parent office had been destroyed; now, if this destruction occurred through accident, the company must bear the responsibility, and if done intentionally to prevent their acts being known, the strongest presumption will be made against them.

1859. Penley v. The Beacon Assurance Company. After the fire one of the directors went to Belleville, to enquire into the circumstances attending the loss, and the nature of it, which would not have been done had the company not been interested. *Newbury* was agent for the defendants to say whether or not the assurance was accepted, he said it had been, and this was binding on the company. Indeed, looking at the whole evidence, no doubt can exist that the risk had been accepted by the company.

As to the limitation of six months, within which proceedings must be instituted, I thought at the time of the argument that we would have to hold it not binding, but on reflection, and looking at the case in the 16 Queen's Bench Reports, I incline to think it is binding on all persons dealing with this company; but then it has no application to this case—this is not a proceeding against the company upon an insurance, but it is one to compel the company to issue a policy on which proceedings may

Judgment. be taken.

Under these circumstances, I think the plaintiff entitled to a decree with costs.

ESTEN, V. C.—I doubt if there is any jurisdiction to compel this company to issue a policy. Clearly the limitation of six months cannot apply where the policy is wrongfully withheld by the company.

SPRAGGE, V. C.—I concur in the views expressed by his lordship the Chancellor. The local agent must, in my opinion, be treated as the officer of the company to communicate with persons effecting assurances, and what he says or does in that capacity within the proper bounds of his authority must be held binding on the company.

Per Curiam.—Decree for plaintiff with costs.

Decree. Reference to the Master to take an account of the loss actually sustained by plaintiff by reason of the fire in the pleadings mentioned, the amount of which defendants are to pay, also the costs of the suit.

WALKER

The owners agent of a risk, subj insurance, at once. credited the policy was vessel and insurance and a bill sustained,

The plain carrying entered in Provincial insurance schooner " Vincent. evidence, sh to take the Toronto, to which was send up the application November, a was filled u that a check returned, wh was not done day; and th their agent to Before anyth the plaintiffs 6th of the m defendants b payment of th to the agent to complete th

1859.

WALKER V. THE PROVINCIAL INSURANCE COMPANY.

Insurance by agent—Payment of premium.

The owners of a quantity of wheat on board a vessel, applied to the agent of an insurance company to insure the same, who took the risk, subject to the approval of the head office, who authorised the insurance, and directed the agent to remit the amount of premium at once. The owners of the wheat, instead of paying the premium, credited the amount to the agent in their books, and before any policy was delivered, information was received of the loss of the vessel and cargo, which had in fact occurred before the proposal for insurance was made: the company then refused to issue a policy, and a bill filed to compel them to do so, or pay the amount of loss sustained, was dismissed with costs.

The plaintiffs, *William H. Walker* and *Edward Berry*, carrying on business as merchants at Kingston, had entered into an agreement with the agent of *The Provincial Insurance Company*, resident there, for the insurance of 5000 bushels of wheat, on board the schooner "Leander," on a voyage from Racine to Cape Vincent. The facts, as detailed in the pleadings and evidence, shewed, that on applying to the agent he agreed to take the risk, subject to the approval of the board at Toronto, to whom he communicated the application, which was approved of, and the agent was desired to send up the premium, when a policy would be sent. The application for insurance was made on the 7th of November, and on the 10th or 11th an interim receipt was filled up and sent to the plaintiffs, with a request that a check for the amount of the premium should be returned, which, owing to the absence of the accountant, was not done, although applied for a second time on that day; and the defendants subsequently telegraphed to their agent to know why the premium had not been sent. Before anything further was done, information reached the plaintiffs of the loss of the vessel and cargo, on the 6th of the month, in the straits of Mackinaw, and the defendants becoming aware of the loss, and of the non-payment of the premium, which had only been credited to the agent in the books of the plaintiffs, refused to complete the insurance by issuing a policy, or to pay

1859.

Walker
v.
Provincial
Insur. Co.

the amount agreed to be insured. Under these circumstances the present suit was instituted for the purpose of compelling the payment of the amount agreed to be insured, or the issue of a policy under the corporate seal of the defendants, upon which the plaintiffs could proceed at law.

It was proved on behalf of the plaintiffs, that their custom with the different insurance offices was not to pay the amount of the premiums when the insurance was effected, but the same was charged in account. The defendants, on the other hand, set up by their answer, that they required the premium to be paid down in cash at the time of effecting the insurance, and that on that condition alone had they agreed to accept the risk, and that not having been paid before intelligence was received of the loss that they were not bound to carry out the agreement by issuing a policy.

Mr. Roaf, for plaintiffs.

Argument.

Mr. Burns, and Mr. Barrett, for defendants.

For the plaintiffs it was contended that the agent had authority to insure *ad interim*, and if satisfied with the mode of payment of premiums adopted by the plaintiffs the interim receipt which had been issued was binding on the company; that payment of the premium in cash was not a condition precedent, and all parties, before information of the loss was obtained, understood and acted on the principle that an insurance had been effected, and that under these circumstances the defendants were bound to perfect a proper policy of insurance, or pay the amount of loss sustained.

The defendants submitted that the evidence in the cause tended strongly to corroborate the points raised by the answer, and there being no entry in the books of

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Carpenter
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(a) 4 Sandford
(c) 5 Foster, N
(c) 4 B. & Ald

the agent charging the amount of the premium, was strong to shew that payment in cash was what was intended between the parties, and that, under the circumstances, no decree other than for dismissal of the bill could be made.

1859.

Walker
v.
Provincial
Insur. Co.

Carpenter v. Mutual Insurance Company, (a) Bodle v. Insurance Company, (b) Goodall v. New England Insurance Company, (c) Mead v. Davison, (d) Todd v. Read, (e) Russell v. Bangley, (f) were referred to by counsel.

The judgment of the court was delivered by

THE CHANCELLOR.—This is also a case to recover money agreed to be insured, where a policy has not issued. The insurance in the present instance was upon a quantity of wheat belonging to the plaintiffs on board a vessel; and the insurance, so far as it was effected, was effected on the seventh or eighth day of November, 1857; the loss, however, had actually occurred on the sixth of the month, intelligence of which was received in this country on or about the thirteenth or fourteenth.

Judgment.

[His Lordship then stated the facts as appearing on the pleadings and evidence, and proceeded.]

The case made by the plaintiffs, therefore, is, that *Bowen* gave credit for the amount of premium, the plaintiffs, it must be taken, knowing that this would be objected to by the company.

The defence set up by the answer is that *Bowen* had not authority to give credit. The plaintiffs have examined

(a) 4 Sandford's Ch. R. 408.
(c) 5 Foster, N. Hamp. R. 169.
(e) 4 B. & Ald. 210.

(b) 2 Comstock, 53.
(d) 3 Ad. & Ell. 303.
(f) *Ib.* 395.

1859.
Walker
v.
Provincial
Insur. Co.

Mr. *Anderson*, the clerk in the office of the agent, and his evidence, it must be admitted, is of the most reliable character, and from it no one can doubt that the intention was that the premium should be paid in cash; that the company authorised the insurance only on payment of the premium, and which they directed should be sent up at once. Upon his cross-examination he says: "When I took the receipt to the plaintiffs, I went there for the purpose of getting a check; I asked for one, saying I was instructed to send the money up to the head office. I was told that the plaintiff *Berry* and the accountant were engaged. I said I would call back again. I did so the same day; I did not succeed in seeing either Mr. *Berry* or the accountant," and in another part of his evidence he states: "We were afterwards telegraphed to know why the money was not sent up; our answer was, that the money was not received." The premium not having been paid, as stipulated for by the company, affords, in my judgment, an effectual defence to this proceeding; in other words, the premium not having been paid in money as stipulated for by the company, no insurance can be said to have been effected.

Judgment.

Under these circumstances I think this bill must be dismissed with costs.

Per Curiam.—Bill dismissed with costs.

A testator by his will and declared legatee of them, or the children, to make sale of the land, &c., either in private contract or otherwise, should seem to arise from the instrument or real estate, or trust, or power, or trust, also as to who

The facts of the case are set out in the note and judgment.

Mr. *Strong*

Mr. *Read*,
(ed. 1855);
Walter v. De
v. Mayor of
referred to.

The case was referred to the judgment was

ESTEN, V. (1855).
purpose of obtaining a judgment whether his father's estate was his estate; as, if the brother; if the sister in equity; if the intestate before the question turned on the trust for sale of the land. Mr. *Winstanley*, who is claimed by his

(a) 19 Ves. 102.
(d) 7 Hare, 477.

1859.

ROWSSELL V. WINSTANLEY.

Will—Construction of.

A testator by his will devised all his real and personal estate to trustees, and declared that it should be lawful for them, or the survivor of them, or the heirs, executors and administrators of such survivor to make sale and dispose of all or any part of the said farms, lands, &c., either together or in parcels, and either by public auction or private contract, and for such price and prices as to them or him should seem fit and reasonable, and to lay out and invest the money to arise from such sale or sales in the purchase of stocks, government or real securities, in the province of Canada. *Held*, that the power or trust was discretionary not only as to the time of sale, but also as to whether there should be a sale at all or not.

The facts of this case sufficiently appear in the head note and judgment.

Mr. *Strong* for plaintiff.

Mr. *Read*, for defendants. *Jarmin* on wills, ch. 19, (ed. 1855); *Vann v. Barnett*, (a) *Biggs v. Anderson*, (b) *Walter v. Denn*, (c) *Cornish v. Pearse*, (d) *The Queen v. Mayor of Harwich*, (e) were, amongst other cases, referred to.

The case was heard before the Vice-Chancellors, and judgment was delivered by

ESTEN, V. C.—This was an amicable suit for the purpose of obtaining the opinion of the court on the question whether the share of *Richard Winstanley* in his father's estate was at his death real or personal estate; as, if the former, it descended to his eldest brother; if the latter, it devolved to his brothers and sister in equal shares. *Richard Winstanley* died intestate before the passing of the Primogeniture Act. The question turns on the proper construction of a power or trust for sale contained in the will of the late Rev. Mr. *Winstanley*, under which the property in question is claimed by his children. The question was, whether

(a) 19 Ves. 102.
(d) 7 Hare, 477.

(b) 5 Sin. 424.
(e) 8 Ad. & E. 819.

(c) 2 Ves. Jr. 170.

1859.

Rowell
v.
Winstanley.

the power or trust for sale produced a conversion into personalty of the lands comprised in the will in which it was contained, so that at *Richard Winstanley's* death his share of those lands was personal estate; or whether the land in question continued real estate, and so *Richard's* share was also real estate at the time of his death. We have perused the papers, and consulted the authorities to which we were referred, and are very clearly of opinion that the power or trust for sale contained in the Rev. Mr. *Winstanley's* will was entirely discretionary, not merely as to the time of sale, but as to whether there should be a sale at all or not, and that it operated

Judgment. conversion of the land affected by it into personal estate until it should be exercised; that consequently *Richard Winstanley's* share of those lands continued real estate at the time of his death, and descended upon that event to his eldest brother and heir-at-law, *Edward Winstanley*.

HURD V. ROBERTSON.

Practice—Specific performance—Costs—Return of deposit.

Where a bill by a purchaser seeking specific performance of a contract for the sale of lands, is dismissed because a good title cannot be shewn, the court will order a sum paid on account of the purchase money, to be returned to the purchaser, and in default, give him a lien therefor on the estate agreed to be sold; but in such case, unless the vendor has been guilty of fraud in the transaction, the bill will be dismissed without costs.

This was a suit by *Thomas G. Hurd*, against *Arthur J. Robertson*, seeking to compel the specific performance of a contract, entered into by the agent of the defendant, for the sale to the plaintiff of a lot of land in the township of Raleigh, for the sum of £22,000, to be paid for in certain instalments. It appeared that a deposit of certain debentures amounting to £500, part of a payment of £2000, had been made and accepted by the vendor's agent as cash. A reference had been made to a judge in chambers to ascertain whether a good title could be made. The title having been

Statement.

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Mr. *Hurd* decision is, return the purchase m is an action established plaintiff wh court, and t court will n of the depos the ground t title, there t Here had th would have

Mr. *Roaf* *Williams v. v. Adams, (d) Sidebotham v and Purchase counsel.*

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THE CHANC facts of the ca question discu considerable st *v. Stewart (a)* that is *Greena* ence to ascerta favour of the p

(a) 3 Br. C. C.
(d) 12 Ves. 395.

found to be defective, the cause came on to be heard for 1859.
further directions, when

Hurd
v.
Robertson.

Mr. Hurd, for plaintiff. The only question now for decision is, whether the court will order the defendant to return the deposit of £500, made on account of the purchase money; or, whether the plaintiff's only remedy is an action at law on the contract. The distinction established by the cases on this point is, that where the plaintiff who is the purchaser has no *locus standi* in the court, and for that reason his bill is dismissed, then the court will not interfere on his behalf, and order a return of the deposit; but where he has a right to relief, and the ground for dismissing his bill is defect of his vendor's title, there the court will direct a return of the deposit. Here had the whole £2000 been paid into court, there would have been some order made for disposing of it.

Mr. Roaf, *contra*. *Bennet College v. Carey*, (a) *Argument*.
Williams v. Edwards, (b) *Gee v. Pearce*, (c) *Greenaway v. Adams*, (d) *Kendall v. Beckitt*, (e) *Wythes v. Lee*, (f)
Sidebotham v. Barrington, (g) and *Sugden's Vendors and Purchasers*, pages 44 and 531, were referred to by counsel.

The judgment of the court was delivered by

THE CHANCELLOR, who after briefly setting forth the facts of the case, stated that it must be admitted that the question discussed in this case is to some extent in a considerable state of uncertainty. The case of *Denton* *Judgment*.
v. Stewart (a) is the first one upon the point; following that is *Greenaway v. Adams*, where a decree for a reference to ascertain the amount of damage was directed in favour of the plaintiff.

(a) 3 Br. C. C. 390.

(d) 12 Ves. 395.

(b) 2 Sim. 78.

(c) 2 DeG. & G. 325.

(e) 2 Russ. & M. 88

(f) 2 Jur. N. S. 7, 130.

Hurd
v.
Robertson.

Then came the case of *Gwillim v. Stone*, (b) in which Sir *Samuel Romilly*, although offered a decree of that nature, declined to accept it, thinking, I presume, that it was such a decree as he could not maintain in case of an appeal.

Kendall v. Beckitt, and *Sainsbury v. Jones* (c) are authorities as to the right of having the deposit returned.

Damages for not completing the contract, and a right to a return of the deposit have been treated and spoken of as subject to the same rule, but in my opinion they stand upon a very different footing. It has never been contended that any lien existed for such damages, although it would seem but reasonable that a deposit on account of purchase money made in advance shall constitute in favour of the purchaser the same lien upon the estate as by the law of the court has always been held to exist in favour of a vendor for the unpaid purchase money.

Judgment.

Now, although I can well understand that, in cases where the deposit is of a mere nominal nature, the court would be slow to exercise this jurisdiction in favour of a purchaser; or, as was said by Lord *Brougham*, in *Kendall v. Beckitt*, that a plaintiff should not be permitted to introduce into a corner of a bill some secondary and trivial claim in order to catch at a decree; but when as in this case, the deposit is of a considerable sum, and forms a substantial portion of the relief sought, I can see no reason to doubt that it would be only an exercise of a sound discretion to order a return of the deposit, and in the event of default being made in payment, to declare the plaintiff entitled to a lien upon the estate contracted for.

The question as to the plaintiff's right to costs rests

(a) 1 Cox, 258.

(b) 14 Ves. 128.

(c) 5 M. & C. 1.

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on a very different principle; and, as I gather from the authorities, the rule is, that when a bill filed by a purchaser to enforce specific performance of a contract of sale is dismissed for want of title in the vendor, and no fraud can be attributed to him, the court refuses to give to either party costs; and such refusal to give costs proceeds, not from any want of jurisdiction to afford that relief notwithstanding the dismissal of the bill, but upon this principle, that as the purchaser could, and no doubt had, informed himself as to the state of the vendor's title, and knew that he could not obtain any relief, he had filed his bill without any expectation of success, and therefore could not be considered entitled to his costs.

1859.

Hurd
v.
Robertson.

Judgment.

RUSS v. MILLS.

Mortgagor—Waste—Injunction.

Although a mortgagor in possession will not be restrained from cutting timber for fuel, fencing, and repairs upon the mortgage premises, he will be restrained from felling trees for other purposes, if it does not clearly appear that the property, notwithstanding the removal of the timber, will remain of sufficient cash value to satisfy the mortgage debt.

This was a motion by Mr. *Fitzgerald* to dissolve an injunction, restraining a mortgagor in possession from felling timber and other trees growing upon the mortgage premises, which had been previously issued.

Statement.

The facts are clearly stated in the judgment.

Mr. *McDonald*, contra.

SPRAGGE, V. C.—I think that the circumstance of the mortgage money being past due, is not by itself a ground for restraining the cutting of the timber by the mortgagor, as long as he remains in possession; nor is it a sufficient ground that a suit has been commenced for foreclosure, or for sale of the mortgaged premises.

1869.


 Rum
 v.
 Mills.

The question then is, whether, as put by Sir *James Wigram*, in *King v. Smith*, (a) "the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced, that the act of cutting timber is not to be considered as substantially impairing the value which was the basis of the contract between the parties at the time it was entered into." In the same case the learned judge says: "No mortgagee who is well advised would lend his money unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage," and in the case of houses, a still larger proportion.

Judgment.

This property consists of between 180 and 190 acres, in the township of Yarmouth; it is a farm with a good orchard upon it; how much is cleared, and how much remains well timbered is not shewn. I judge from the whole of the evidence that the land is not well farmed; that the buildings are of small value, and that they and the fences are in bad condition, and indeed that the whole farm is year by year deteriorating in condition and value.

I do not find it easy to arrive at any safe conclusion as to the present value of the premises, the witnesses differing very much as to the amount of depreciation in the general value of land, and of this particular land within the last two or three years. About that time ago, it seems that \$11,000 dollars were offered for it. Upon the whole of the evidence I should not think it safe to place its present cash value higher than \$7,500, nor fair to the defendant to place it at a less sum. The mortgage debt with interest and costs may be stated at close upon \$4500, which with one-third added, would amount to, say—\$6000. The property then in its present state may be taken to be an ample security for the mortgage

(a) 2 Hare, 239.

debt. It is several times estimate the state at \$6000 too low, I think to be done. The court should the estate and render it realizable by a money.

The witness deterioration of timber; they it stated by would be worth much wood left for fuel, for all these cutting it decreases quantity for waste, like cutting not of proper finding it diminished in drive the owner he might require inclined to the restrained from without regard a scanty security of mortgage is from any act ordinary incident possessed at the

(a) Hampton v. 1 J. & W. 581.

debt. It is right at the same time to bear in mind that several witnesses, called on behalf of the defendant, estimate the cash value of the property in its present state at \$6000 only, and although I think that amount too low, I think at the same time that in permitting acts to be done by the mortgagor which impair its value, the court should take care that the cash market value of the estate is not diminished to such an extent as to render it reasonably doubtful whether the mortgagee can realize by a sale for cash the amount of his mortgage money.

1859.

Russ
v.
Mills.

The witnesses vary very much as to the amount of deterioration in the value of the land, if stripped of its timber; they vary from \$500 to \$2000. I do not find it stated by any of them what the diminution in value would be without the superfluous timber, that is, if so much wood were left upon the property as is ordinarily left for fuel, for fencing, and for repairs. Sufficient timber for all these purposes is obviously necessary for a farm: cutting it down so as to reduce it to an insufficient quantity for these purposes, would be in the nature of waste, like cutting timber at an improper time, or when not of proper growth, and I am not surprised at witnesses finding it difficult to say how much a farm would be diminished in value if entirely denuded of timber, so as to drive the owner to the necessity of purchasing whatever he might require for the purposes I have named. I am inclined to think that in England a mortgagor would be restrained from cutting underwood at unseasonable times, without regard to whether it left the mortgaged premises a scanty security. (a) And I think that when the subject of mortgage is a farm, the mortgagor should be restrained from any act which would deprive it of any of the ordinary incidents or conveniences of a farm which it possessed at the time of the mortgage being given.

(a) Hampton v. Hodges, 8 Ves. 106; Humphreys v. Harrison, 1 J. & W. 681.

1859.

Ross
v.
Mills.

In this case it is in evidence not only that the fences are in great need of repair, but that the rail timber is scanty. Upon the whole, I think that if sufficient timber and other trees be preserved to serve the several purposes which I have indicated, the premises will remain a sufficient security for the mortgage debt, but I am not satisfied that it will be so if the mortgagor be permitted to denude the premises of all the trees thereon. There may be some difficulty in determining what is a sufficient quantity to be preserved for the purposes to which I have referred. I think that in this case, the plaintiff having the injunction which the defendant is seeking to dissolve, the *onus* of shewing that if he continues to cut, a sufficiency for these purposes will still remain, should be upon the defendant. If it is an undisputed fact that there is much more cord-wood upon the place than is ordinarily retained, I think the defendant should be allowed to continue to cut it, perhaps under restrictions, so long as he does not thereby diminish the value of the premises as a farm. As to timber for fencing and repairing, at present the evidence is against him, and the injunction should stand against him until he displaces it. If the parties cannot agree as to the cord-wood, the defendant must apply, and I may say that I think it ought not to be left doubtful whether there is now more than sufficient, but that it should be made clearly to appear that there is a surplus. I suppose it is clearly understood that this injunction was not intended to restrain the defendant from himself cutting trees for fuel, fencing, and repairs upon the mortgaged premises. I think the cost of the application should be borne by the defendant.

Judgment.

Upon an application for more satisfaction, to have an argument on the expense to be incurred by the settlement of the parties, so far

This was a circumstance in the judgment. *Saunders v.*

Mr. Roaf,

Mr. Mc
the other parties

The judgment

THE CHANCERY COURT dealing with the matter partly to the benefit of the plaintiff and partly to the benefit of the defendants which has been drawn up

It would have been directed a re-argument discussed with evidence. But already incurred course, and was the voluminous being thereby to a close.

1859.

SAUNDERS V. CHRISTIE ET AL.

CHRISTIE V. SAUNDERS ET AL.

CHRISTIE V. SAUNDERS AND TRUEMAN.

Appeal from Master—Varying account.

Upon an appeal from the master's report, although it would have been more satisfactory to the court and also in accordance with the practice, to have referred the case back to the master, or directed a re-argument of the case; the court considering the great delay and expense to which the parties had been already subjected, undertook the settlement of the account, and made an order varying the finding of the master to suit the true state of the accounts between the parties, so far as the evidence would enable them to do so.

This was an appeal from the master's report. The circumstances giving rise to the suits are clearly stated in the judgment, and in the report of the case of *Saunders v. Christie*, reported ante volume I., page 137.

Mr. Roaf, for Saunders.

Mr. McCall, Mr. Morphy, and Mr. Hodgins for Argument.

The judgment of the court was delivered by

THE CHANCELLOR—We have had great difficulty in dealing with this appeal from the master's report, owing partly to the obscurity in which all the facts are involved, and partly to the difficulty of understanding the proceedings which have been had, and the decree which has been drawn up. Judgment.

It would have been very satisfactory to us, to have directed a re-argument, when the case might have been discussed with more attention to the pleadings and evidence. But considering the great delay and expense already incurred we did not feel at liberty to adopt that course, and we have therefore read through the whole of the voluminous pleadings and evidence, in the hope of being thereby enabled to bring this protracted litigation to a close.

1859.
Saunders
 v.
Christie.

The bill in the first suit, *Saunders v. Christie et al.*, was filed so far back as the month of December, 1848. That bill was filed by *Saunders*, first, as a creditor of the testator *John Christie*, for payment of a debt alleged to have been due from him out of his personal estate; secondly, as an executor of *Christie*, to have his will established, and the trusts carried out. *Elizabeth Christie* answered that bill, and insisted that *Saunders*, so far from having been a creditor, was largely indebted to her testator at the time of his death.

The bill in the second suit, *Christie v. Saunders et al.*, was filed on the 6th of August, 1851, by *Elizabeth Christie*, widow, and devisee of *John Christie*, for the purpose of having the interests of all parties claiming under the will of the testator declared, and the trusts carried out; and *Elizabeth Christie* submitted to account for her receipts. That bill was taken *pro confesso* against *Saunders*.

Judgment.

These causes appear to have been heard together on the 14th of January, 1853. That took place by consent, we presume, but we have not been able to ascertain the circumstances. It is clear, however, that no evidence was adduced in either suit.

The bill in the third suit, *Christie v. Saunders and Trueman*, was filed on the 6th of August, 1853. The only object of that suit was to obtain an injunction restraining *Saunders* from cutting timber on lot 24 in 5th concession of Bayham, which constituted, according to *Elizabeth Christie's* contention, part of the real estate of the testator. *Saunders* answered that bill, and insisted that he was the sole owner of the property in question.

The three causes appear to have been heard together on the 24th of November, 1854, when the decree was drawn up upon which the master has been proceeding. Having taken every pains to inform ourselves, which

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1859.

Saunders
v.
Christie.

Assuming the proceedings to have been hostile, *Saunders'* bill, so far as it prayed payment of a debt alleged to be due to himself, should have been dismissed, for there was not a tittle of evidence that any such debt existed. And it may be doubted, perhaps, whether that is not the true effect of the decree, because while the rights of all parties claiming under the will of *John Christie* are ascertained and provided for, nothing whatever is said as to the various claims advanced by *Saunders*, and no enquiry is directed respecting them. The decree does, indeed, contain a clause such as I have not seen before, by which the master is directed "to take such evidence as may be offered by the respective parties in the suit of *Christie v. Saunders* and *Trueman* touching their respective claims, (if any,) and allegations thereon, and to report thereon to this court." But the suit there referred to, is confined entirely to lot No. 24. It has no reference to the various claims advanced by *Saunders*. And the fact that this enquiry is directed, while the decree is silent as to the other claims, would seem to shew an intention that all other claims should be excluded.

On the other hand, the bill filed by *Saunders v. Christie et al.* is not dismissed in terms. The costs of that suit are, on the contrary, reserved; and all parties have acted on the hypothesis that all *Saunders'* claims were to be the subject of investigation. Considering the circumstances, and looking at the very unusual enquiry contained in the decree to which I have already referred, we are brought to the conclusion that these causes were heard in the way I have described, and the decree drawn up in its present shape by consent of parties, and that the decree was intended to embrace all the claims advanced by *Saunders*. We are driven to that conclusion, I say, because were it otherwise, it must be assumed

1859. that the objection would have been taken upon the argument of the appeal.

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Assuming that to be the proper construction of the decree, for the reasons just stated, the objections to the report may be divided into two classes, one relating to the general account between *Saunders* and *Christie*, the other to *Saunders'* claim in respect of the real estate in the pleadings mentioned.

Now *Saunders'* statement, both in his bill, and upon his examination in relation to the general account, is that some time prior to October, 1836, he had a settlement with *Christie*; that upon that settlement he was found to be indebted to *Christie* in a sum of £200; that he then agreed to sell *Christie* an undivided moiety of what I may call the mill lot, consisting of seventy acres, for £375; that the sum agreed upon was to be paid in this way, *Christie* was to release the £200 already mentioned, and was to pay besides two debts due by *Saunders*, the one being a sum of about £80 still due to *Trueman* for the mill lot; and the other consisting of a balance of three instalments due to the Canada Company on lot 24, *Saunders* having already paid, as he alleges, three instalments on that lot. *Saunders* swears that he was not indebted to *Christie* in any amount whatever, either at the time he left this province for the Island of Jamaica, in October, 1836, or at any time between that period and the date of *Christie's* death; but that *Christie*, on the contrary, was his debtor to a large amount, both on the general account, and in relation to his management of the lands already referred to.

Were this evidence reliable, it would be sufficient, perhaps, to sustain the master's report in those particulars to which exception has been taken, but it is in our opinion quite unworthy of credit. The inaccuracy of *Mr. Saunders'* memory is too clear to require comment. Being examined as to his purchase of the saw mill lot,

he swears that he concluded in he did not professional man clear that the a mortgage, attorney through remarkable, rise to a great which could assistance. furnished by he admits that for his own had never de in which some plainly disce instance, that instalments of that *Christie* was obviously because if untrue being inconsi upon this point the notes given of lot number instalments, I ment, which n them now, but possession." To support the ca untrue. For I entry in the t *Cull*, that the f before he left t in April, 1837, resident in Jan notes in his po have been imp

he swears that there was but one agreement, that it was concluded in 1834; that he gave no mortgage; and that he did not employ Mr. *Higginson*, or any other professional man in relation to the matter. Now it is quite clear that there were two agreements; that he did give a mortgage, and that *Higginson* was employed as his attorney throughout. And this forgetfulness is the more remarkable, because it is manifest that this contract gave rise to a great deal of difficulty, and some litigation, which could not have been arranged without professional assistance. Again, being interrogated as to an account furnished by him to his co-executors in September, 1848, he admits that he had wholly forgotten it, and that but for his own handwriting he would have sworn that he had never delivered it. But there are many particulars in which something more than inaccuracy of memory is plainly discernible. He had stated in his bill, for instance, that he had paid to the Canada Company three instalments on foot of his purchase of lot 24, and that *Christie* had undertaken to pay the balance, and it was obviously necessary to maintain that statement, because if untrue his whole story would fall to the ground, being inconsistent with itself. Being examined then upon this point, he swears: "I paid, I think, three of the notes given to the Canada Company on the purchase of lot number 24, two of these notes were for the first two instalments, I think, and the other for the last instalment, *which notes I think I destroyed; I have not got them now, but I am pretty sure I had them in my possession.*" That statement was intended, obviously, to support the case made by the bill. But it is wholly untrue. For I take it to be clearly established by the entry in the testator's books, and by the evidence of *Cull*, that the first two notes were paid not by *Saunders* before he left the province, as he asserts, but by *Christie* in April, 1837, at a time when *Saunders* was confessedly resident in Jamaica. And if *Saunders* ever had these notes in his possession, as I dare say he had, they must have been improperly abstracted from the papers of

1359.

Saunders
v.
Christie.

Judgment.

1859. *Christie*, with which he was entrusted as executor. Then, if that part of *Saunders'* narrative be displaced, as it clearly is, it is difficult to escape from the conclusion that the whole story is an invention gotten up for the purpose of this suit.

Saunders
v.
Christie.

Again, being asked how he came to omit any claim for timber in his account furnished in September, 1848, he says that he was not then aware of its value, and therefore omitted it; but being interrogated further upon the point by his own counsel, by way of explanation, he says that he omitted it because the amount was so large that he feared to advance the claim, lest the executors should be deterred from arbitrating. Now these two explanations are obviously inconsistent with each other, as they are both inconsistent with the statement made by the witness a little before, that he had no recollection whatever of having ever delivered any such account at all.

Judgment. I shall have to refer to other parts of this evidence on the second branch of the case, and shall content myself for the present with the observation that the statement made by *Saunders*, that *Christie* was largely in his debt when he left this province, and continued to be so up to the time of his death, appears to me to be wholly unworthy of credit; looking only at the relative position of the parties, the statement would be highly improbable: *Christie* was a man of substance, *Saunders* was in narrow circumstances, dependent for the support of himself and his family upon a scanty and precarious income. It is opposed, moreover, to the whole tenor of the correspondence between the parties, so far as that has been laid before us, which bespeaks *Christie* to have been the benefactor, not the party benefitted. But its falsity is conclusively established by the evidence of *Clements* and by the letter of *Saunders* himself, from which I cannot doubt that *Saunders* was *Christie's* debtor when he left the province, and continued to be so up to the time of *Christie's* death.

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It is true that the master has not adopted *Saunders'* evidence throughout; but he has adopted it in relation to the sale of the mill lot, and in respect to a large sum said to have been advanced to *Saunders* at Otter Creek; and the result is that the master's report agrees in the main with the statement of *Saunders*; he finds in effect that *Saunders* was the creditor of *Christie* throughout, sometimes to a very large amount. In my view of the case that cannot be correct; for I have already shewn *Saunders'* account of the sale of the mill lot cannot be trusted, and that is sufficient, of itself, to displace the conclusion at which the master has arrived.

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Christie.

But having perused the pleadings and evidence with care, and considering the great delay and expense to which these parties have been already subjected, we have thought it better to undertake the settlement of the account ourselves, so far as we have materials to do so, instead of directing a further reference.

Now, considering that the suit was not instituted until ^{Judgment.} after *Christie's* death; considering that the transactions in question took place more than two and twenty years since; considering that *Saunders* has failed to produce important documents of which he has not given us any satisfactory account; considering the extent to which the account of these transactions kept by *Christie*, in the book marked C, has been verified by *Saunders* himself, and the confidence to which it is in his opinion entitled; and considering that there are in that book at least two important entries in the handwriting of *Saunders* himself; considering all these things, we are of opinion that it is highly reasonable to treat the entries in that book, up to the 31st *May*, 1836, at least as *prima facie* correct.

Then it is asserted by *Saunders* himself, that he had a settlement with *Christie* sometime prior to the month of October, 1836. Now, assuming such a settlement to have been made, which I think highly probable, I have

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Christie.

little doubt that some trace of it would be found in that book. Not a formal entry, perhaps, but some entry sufficient for *Christie's* guidance. Well then we do find on the 30th of May, 1836, an important entry in the handwriting of *Saunders* himself, by which he is charged with the sum of £125. Looking at the examination of *Trueman* and *Saunders* before Mr. *Burwell*, there is little room to doubt that this sum was advanced on that day to *Saunders* to enable him to pay the amount then due to *Trueman*, for we find that on the next day a considerable sum in cash, about \$700, together with *Christie's* bond for the balance due upon the purchase, was handed to *Trueman*, who thereupon conveyed the mill lot to *Christie*. Now, taking all these circumstances together, I have little doubt that the settlement sworn to by *Saunders*, was made on the thirtieth of May, and that the name "*E. Saunders*" underneath the entry of which I have spoken, was written for the purpose of shewing that the account had been adjusted up to that date. Now, upon examining that book, it will be found that the balance due from *Saunders* on that day was £348 18s., and the question is, how was that account squared. Not by payment certainly, for *Saunders'* circumstances were then desperate. The sheriff was in possession of his property at the mill, and he was obliged to borrow from *Christie* the amount due to *Trueman*. It is clear, therefore, that nothing was paid. Then £200 appears to have been carried on. At the top of the next page there is a memorandum which states that *Saunders'* debt was then about \$800, and there is underneath an entry "*Saunders* continued \$800." There remained then a balance of £149, which is certainly less than *Saunders* can be supposed to have been willing to take for a moiety of the mill property. But if to that amount be added the sum of about £100 for which *Christie* gave his bond to *Trueman*, and which he subsequently paid, the amount then due from *Saunders*, besides the sum of £200 charged against him in the new account, will have been £250 or thereabout, being just one-half of the purchase

Judgment.

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money paid by *Saunders* himself. Now, I find that *Saunders* has not been debited any where with the amount paid to *Trueman* on foot of the bond, while the amounts paid to the Canada Company, on account of lots Nos. 20 and 24, have been charged against him. From all which I gather that *Christie* became a joint purchaser of the mill property, and that his moiety of the purchase money, £250, was paid in the way just described. But whether that be or be not the true explanation of the matter, I am quite clear upon the whole evidence, that the purchase money was arranged in some way or other prior to the departure of *Saunders*, and that so far from *Christie* being in his debt at that date, the balance was greatly the other way.

1859.

Saunders
v.
Christie.

With respect to the sum of £200, just referred to, we have little doubt that it is due to *Christie's* estate, but we do not feel that we should be justified in charging *Saunders* with the amount upon the evidence before us. Judgment.

We allow the exception as to the £36 remitted in 1847. In other respects the foot of the account will be in accordance with the master's report.

Before proceeding to examine the second branch of this appeal, I may observe generally that the manner in which the demands of *Saunders* have grown to their present dimensions during the progress of this litigation, is well calculated to excite suspicion as to the *bonâ fides* of his case. He made out and delivered to the executors his account against the estate in September, 1843, after he had been for some months in this province. The balance then claimed by him, exclusive of his share of the profits of the mill, was £445 16s. His present demand is £3135 16s. 3d. Again in his account dated in September, 1848, he makes no demand whatever in respect of timber. In his bill filed in December, 1848, he does not specify the amount of his demand on that account. He only alleges that timber had been

1859. cut by *Christie*. In his answer filed in October, 1853, he swears that the timber cut on lot No. 24, was worth £300, and upwards. And by his affidavit filed in March, 1856, he claims for timber cut on that lot alone £1250.

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Christie.

I would observe in the second place that I am by no means satisfied with the reasons assigned by Mr. *Saunders* for the non-production of papers, especially the letters of the testator, the importance of which must be obvious.

It is admitted that upon his arrival in this province, Mr. *Saunders*, as executor and trustee, had access to the testator's papers. It is admitted that he abused the trust reposed in him by abstracting papers with which he should not have intermeddled; and in his affidavit he professes to give a list of papers so abstracted. But being pressed upon this point in his examination he says: "I won't swear positively that I took no more papers." But why will he not swear? Is it that in doing what he must have felt to be wrong he took important papers, the nature and existence of which he has forgotten? Or is it that he abstracted important papers which he had determined not to produce?

Judgment.

Again, he swears in his affidavit, that he paid two of the five promissory notes given to the Canada Company, before leaving Canada; and speaking of these notes in his examination, he says: "I think I destroyed them; I have not got them now. But I am pretty sure I had them in my possession." Now it is abundantly clear that he did not pay these notes at all. They were paid by *Christie* long after his departure; and if he ever had them in his possession, they must have been abstracted from the papers of the testator. Then why were they not produced? or if destroyed, why were they destroyed? was it lest they should disprove a statement, the truth of which it was very material for him to maintain? and if that be the case, what reliance can we place upon his account of the loss of other important papers which he has failed to produce?

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Then he *admits* that he received several letters from the testator touching the matters in question in this cause, but he alleges that he lost them all at Rochester, "how, he cannot tell." He adds further, that he left his trunk at Buffalo, a year or two before his examination, with some woman, who deposited it with some other woman, from whom it had not been recovered. And in that way all the other papers about which he was interrogated were accounted for.

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Saunders
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Christie.

Now that mode of accounting for the non-production of important papers would have been unsatisfactory under any circumstances, but in this case it is not entitled to any weight.

Turning then to the second class of objections, we think it clear that the sum of £150 charged against the testator's estate for timber cut on lot No. 20 must be disallowed. No claim of that sort is advanced by *Saunders*, either in his bill or affidavit. Indeed, it is expressly disclaimed in his affidavit, and I do not understand upon what principle the charge is made in the face of that disclaimer.

Again, the master was clearly wrong in carrying on the account up to the date of his report. The decree, so far as *Saunders* is personally concerned, is a common administration decree, and provides for the payment of any debt due to him from the testator. But the account of timber cut or rents received since the death of the testator, which the master has taken, does not form any part of the account directed by the decree.

In considering the propriety of the charges made by the master on account of rent, and for timber cut on lots 24 and 25, it is necessary to determine in the first place the circumstances under which the mill was carried on. Upon that point every intendment ought to be made, under the circumstances of this case, in favour

1859.

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Saunders
v.
Christie.

of *Christie's* representatives. The demand is stale : *Christie* is dead, his letters, the importance of which is obvious, have not been produced, and their non-production has not been satisfactorily explained. But without straining the evidence in their favour, it is clear, I think, that *Saunders* knew and approved of the manner in which the mill was carried on between 1836 and 1841. There is no pretence of partnership. *Saunders* himself in his examination before the master, disclaims that. He was well aware that *Christie* resided one hundred miles from the mill, and neither did, nor could, give his personal attention to the business. He must have known that the timber was being cut, otherwise the mill must have been carried on at a loss during the period of which I speak. But this is placed beyond doubt by his own letters, for in one dated in January, 1847, I find this passage : "How does the mill get on ? *I suppose all the timber is cut off.*" He admits in his examination that the business for the past two or three years was unprofitable, and that the testator frequently pressed him to come to this country and attend to the business himself. Taking these circumstances together, I have no doubt that he knew and approved of the arrangement which had been made with *Jenkins*. That being so, the question is, what profit was realized during the period that *Jenkins* occupied. Or, rather, what profit did *Christie* receive, for he was not chargeable under the circumstances, as it seems to me, beyond his actual receipts. Now the only direct evidence upon that point is furnished by *Jenkins* himself, who certainly ought to know, as he conducted the business. *Jenkins* swears that nothing was realized. That the business was carried on at a loss. *Mr. Roaf* objects to the evidence of *Jenkins*. But I find that he was called by *Saunders*, and he is not impeached ; neither is there any contradictory evidence. On the contrary, there is a good deal of general evidence to shew that business of that sort was during the period in question unprofitable. For these reasons I am of opinion that the master ought not to

Judgment.

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have charged the estate of the testator with any amount between 1836 and 1841, either for rent or timber. It must be taken, I think, that the timber during that period was cut with the consent of *Saunders*, and for his benefit.

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Christie.

Subsequent to the year 1841, the mill was leased at a money rent, and the estate must be charged with a moiety of the sums received by the testator.

If any timber growing on lot No. 24 was sold by the testator, subsequent to 1841, the estate must be charged with the value.

If the parties cannot agree as to these amounts, there must be a further reference. But I would recommend Judgment an amicable arrangement of the matter last referred to, and of the rents since the death of the testator.

SCANE V. HARTRICK.

Heir and devisee commission—Grant from the crown—Demurre.

The commissioners under the Heir and Devisee Act, in deciding upon claims brought before them, are not bound by the strict rules applicable to courts of law. Where, therefore, a purchaser from the crown devised land, for which the patent had not yet issued, to his wife for life, with a power of appointment amongst his descendants in tail; and she by her will devised the estate to one of such descendants, in fee, who applied to the heir and devisee commission, and the commissioners recommended a grant in tail to the person named as devisee. The Crown, acting upon such recommendation, issued a patent in favour of such devisee. A bill was afterwards filed to set aside the patent, as having been issued in error, or through improvidence: a demurrer put in *ore tenus* at the hearing for want of equity, was allowed.

This was a bill filed for the purpose of having a patent issued under the circumstances stated in the judgment, declared void; and had been taken *pro confesso* against Statement. the defendant.

Mr. *Roaf*, for the plaintiff.

1859. *Mr. A. Crooks*, for defendant, waived all objection to the order *pro confesso*; and demurred *ora tunc* to the bill for want of equity.

Seane
v.
Hartick.

The case was argued before

ESTEN, V. C.—What is sought by this bill is, that the patent may be declared void, as having been issued in error, or through improvidence, consisting in the fact, that according to the strict rules of law, the plaintiff, as the heir at law, would be entitled to the land, as appears from the result of the action of ejectment, and that the heir and devisee commissioners, being some or one of them, the very judges or judge who presided at the trial of the action of ejectment, acknowledging the propriety of the judgment in that action, and the legal validity of the plaintiff's title, nevertheless recommended the Crown to grant a patent to the defendant, who is the devisee of the wife of the purchaser from the Crown, and who under the husband's will had the estate for life, with a power of appointment amongst his descendants in tail, but who by her will made a devise to the defendant (one of the descendants) in fee, thereby exceeding her power; in consequence of which the will was void, and the title of the heir-at-law, if the patent had issued, would have prevailed. I do not think I can declare the patent void under these circumstances. The commissioners in disposing of cases where no patent has issued, and a grant cannot be enforced (including these cases of purchase from the Crown) are absolved by 8 Vic., ch. 8, from observing the strict letter of the law; and if they thought in this case that it would be morally just to order a patent to the defendant, even in fee, much more if in tail, whereby a closer approximation was gained to the accomplishment of the intention of the testator, than by directing a grant to the heir-at-law in fee; and if the Crown have thought it right to follow this recommendation, I cannot say that such error or improvidence has occurred, as will justify me in declaring this patent void. The error or improvidence cannot be inferred from the

Judgment.

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ESTEN, V.
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mere fact that the grant is not according to the strict rule of law, because the commissioners are empowered to deviate from the strict rule of law, and the Crown must be deemed to know this fact, and to notice that this recommendation is not according to the strict rule of law, and to sanction the departure from it; and I cannot say that the recommendation is so unreasonable under the circumstances as to afford *per se* evidence of error and improvidence; nor does the act of 16 Vic., ch. 159, qualify the power given by the 8th Vic., ch. 8, because it only enables the court to avoid patents issued in error or improvidence. But under the circumstances, I cannot see that any error or improvidence has occurred. I do not think what is alleged about the payment of the consideration material. I think, therefore, the demurrer Judgment. should be allowed.

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v.
Hartick.

POMEROY V. BOSWELL.

Arbitration—Equitable defence at law—Injunction.

A defendant to an action at law pleaded by way of equitable defence an alleged agreement made for valuable consideration, to give time by the plaintiff, and a verdict was taken for the plaintiff in that action, subject to be increased or reduced, or a verdict entered for defendant by the award of an arbitrator chosen between the parties. Before the arbitrator had entered upon his duties further than making an appointment for the parties to attend before him, the defendant in the action filed a bill in this court seeking to restrain the proceedings at law, alleging as a ground for that relief the same facts as had been pleaded by him in the action at law. The court under the circumstances, refused the relief prayed, and dismissed the bill with costs.

Semble, that it is a contempt of a court of common law to proceed in this court after a reference to arbitration under an order of that court, which orders the parties to perform the award.

The facts of the case are clearly set forth in the judgment.

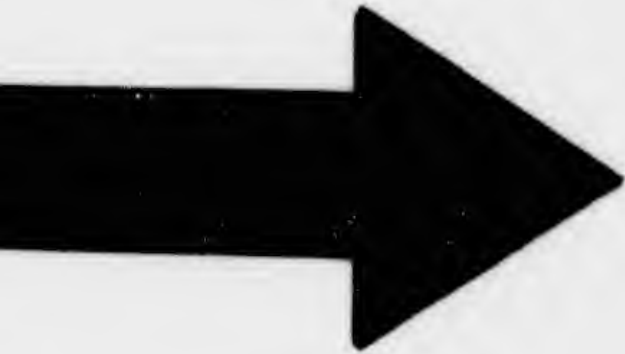
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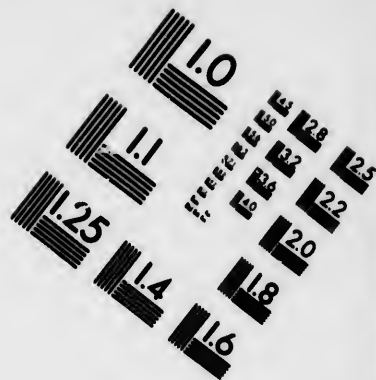
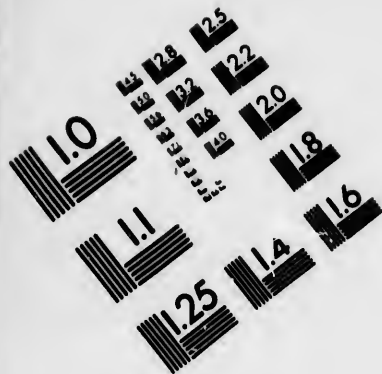
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Mr. *Crickmore*, for defendant.

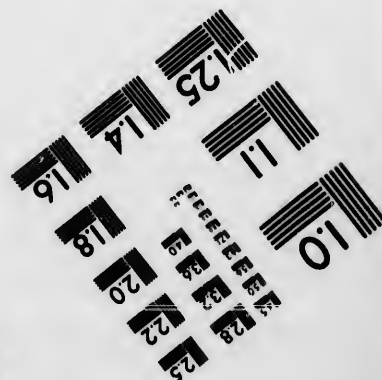
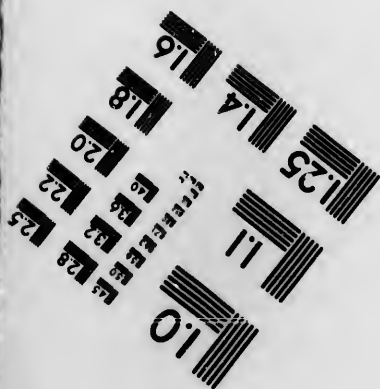
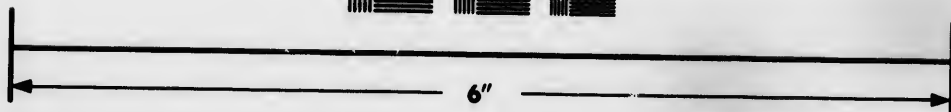
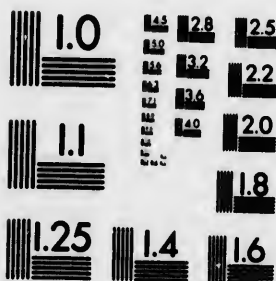
ESTEN, V. C.—A mortgage, it is alleged, was made by the plaintiff to the defendant, to secure the sum of







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1859.

Pomeroy
v.
Boswell.

£700, and 10 per cent. interest, which was added to the principal, and the mortgage given to secure the whole amount, £910, payable in three years from the date of the mortgage. The money became due on 28th November, 1856. The £210 interest, it is alleged, was not paid. On the 28th November, 1856, it is alleged an agreement was made to enlarge the time of payment for one year, on paying 12 per cent. interest, half of it in advance, which it was alleged was done. On the 28th November, 1857, it is alleged by the plaintiff, but denied by the defendant, that the time was further enlarged for a year, on the payment of 12 per cent. interest in advance. This interest, it is said, amounting to £84, was paid, notwithstanding which the defendant commenced an action on the covenant for the recovery of the whole amount secured by the mortgage, about eight months before the expiration of the enlarged time. At the trial, an order of reference

Judgment.

was made by consent, and a verdict being entered for £1000, the arbitrator, Mr. *Kirchhoffer*, was empowered to increase or diminish the verdict, or to order a verdict to be entered for the defendant. Before the arbitrator had entered upon this reference, further than to make an appointment for the parties to attend before him, the present suit was instituted. I should observe that, I find a reference in my notes to the defendant's examination, and to *Pomeroy's* evidence, neither of which I have been able to obtain. I shall assume, however, that the facts are as stated by the plaintiff. I do not find that the defendant, although he denies the agreement, denies the payment of the £84, nor was it argued before me, I think, that this money had not been paid, and it is difficult to suppose that this sum could have been paid without a definite agreement for enlargement. I think, therefore, the defendant must be under some misapprehension as to this fact. I should mention that the plaintiff in equity pleaded in the action at law, all the facts above mentioned, by way of equitable plea. The present bill is not for redemption of the estate, but simply to

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restrain the proceedings in the action; and in support of this claim it is contended that the excess of interest beyond legal interest paid by the plaintiff, amounting to £126, was recoverable by him, and that he had a right to proceed in this court for its recovery, although he may have insisted on the same right by way of defence to the action at law; that the agreement for the enlargement of the time was valid and binding, being founded on valuable consideration, but could not be noticed at law in an action on the covenant, as it was only by parol; and that the payment of interest in advance, although for this same reason not available at law, entitled the plaintiff to the injunction of this court restraining further proceedings. On the other hand, it is contended that the excess beyond legal interest, actually paid, is not recoverable since the statute 16 Vic., ch. 80; that the agreement for enlargement was void; and that the plaintiff having consented to the reference of the matters in question in the action to Mr. *Kirchhoffer*, is bound to proceed before that gentleman, and will be bound by his award. This last point is contested by the plaintiff, who contends that a verdict upon an award is like any other verdict, and will be controlled by this court in the same way. I think I should have little doubt, if it were necessary to decide the question, that after the passing of the 16 Vic., ch. 80, money paid in excess of legal interest could be recovered by the party paying it; I think also that an agreement by parol to enlarge the time for payment in consideration of the payment in advance of 12 per cent. interest must be deemed to be a binding agreement in this court, as founded on valuable consideration, although not the whole consideration for which the party stipulated; for the £84 includes legal interest paid in advance, which is sufficient to support the agreement, and the payment would be void only for the excess, which would, I apprehend, be applicable in reduction of principal, and I do not suppose that the mortgagee would be at liberty to treat the agreement as void, and to proceed before the expira-

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Pomeroy
v.
Boswell.

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Boswell.

tion of the time ; but that he would be restrained from so proceeding in this court, although the parol agreement might not control the legal effect of the covenant, according to the case of *Blake v. Whit.* (a) I have no doubt that previous to the late act a party having made payments in excess of legal interest under an usurious contract, could, in an action, obtain the benefit of, and would be bound to avail himself of, that defence, and could not, if he neglected it, afterwards obtain relief in equity, on that sole ground. In the present case all the facts, upon which the plaintiff relies in this suit, were pleaded by way of equitable defence to the action, and it is contended that he is bound to abide by the decision of the forum which he has chosen. The law upon this point is not settled, but I think if it were necessary to decide the point, I should, in conformity with what we can gather to be the opinion of the courts in England from the cases that have occurred on this subject, hold that the mere pendency of an equitable plea does not preclude the party pleading it from seeking relief in equity on the same ground, whatever may be the effect of a judgment upon it. I should also, I think, if necessary, hold that the reference to arbitration would not oust this court of its jurisdiction ; but in the present case something more has occurred. A consent order was made at *Nisi Prius*, referring the matters in dispute in the action to the arbitration of Mr. *Kirchhoffer* : the order directs the parties to perform the award : the very matters suggested by the equitable plea, and relied on in this suit, were included in the reference, as is clear from the fact that the arbitrator was empowered to order that a verdict should be entered for the defendant, which could only be on the ground of the agreement for enlargement. It appears to me that it is a contempt of the court of common law to proceed in this court after a reference to arbitration under an order of that court, which orders the parties

Judgment.

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(a) 3 Y. & C. Exch. 434.

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to perform the award, and I think the plaintiff should not, under such circumstances, be allowed to proceed, or obtain any relief in this court. I think he is bound to proceed before the arbitrator. If his award should not be binding, the plaintiff may be entitled to be relieved against it in this court; and when the proper time arrives he must be entitled to institute a suit for the redemption of the estate; but the present motion, which is for an injunction restraining proceedings in the action, must I think, for the reasons I have stated, be refused, and this bill dismissed with costs. It was contended by the learned counsel for the plaintiff that the reference to arbitration did not distinguish the case, and that this court would have the same jurisdiction over the verdict as if it had been entered in the ordinary way, and for this position he cited the case of *Chuck v. Cremer*, (a) which I think entirely supports it; but I apprehend that this rule applies only to cases where the legal rights of the parties are controlled by some paramount equity, Judgment, not in question of course at law, and not included in the reference, and not to cases like the present, where the whole rights of the parties both legal and equitable are in question in the action, and included in the reference, and in this way, I think, the present case distinguishable from the case in *Phillips*, and is not governed by it.

MORRISON V. MCLEAN.

A defendant in an action at law filed a bill in this court to restrain proceedings, alleging as grounds for relief, facts, which if they had been properly pleaded, would have afforded a good defence at law. The court, without enquiring as to the merits of the case, dismissed the bill.

A party mispleading at law is not thereby entitled to seek relief in a court of equity.

* The bill in this cause was filed to restrain proceedings in an action at law brought in the name of the defendants *Cook*, against the plaintiff, under the circumstances set forth in the judgment.

1859. Mr. *Connor*, Q. C., for plaintiff.

Morrison
v.
McLean.

Mr. *McMichael*, for defendant *McLean*.

The bill had been taken *pro confesso* against the defendants *Cook*.

Stephenson v. Wilson, (a) *Short v. Rattan*, (b) *Cummings v. Morgan*, (c) *Fuller v. Richmond*, (d) were cited.

ESTEN, V. C.—It is quite certain that two contracts were made between the plaintiff and the defendant *McLean*; that thirty-nine pieces were delivered on the first contract, and that a quantity of timber was inspected afterwards by the plaintiff and defendant, with reference, it would seem, to the second contract, but that a dispute arose with respect to it, and it was not delivered, or at all events it was not received by the defendant. An action was commenced by *McLean* in the names of the other defendants *Cook*, against the plaintiff, to recover the moneys paid on these contracts, or part of them, in which action a verdict was obtained, and judgment entered. The object of this suit is to restrain proceedings in that action. The bill states that the contract was performed, but to *McLean*, and not to the *Cooks*, and that the plaintiff could not plead such performance to an action in the name of the *Cooks*, and that in fact the contract was not made on behalf of the *Cooks*, and that the employment of their names was a fraud. I am clear that the second contract was not authorised by the *Cooks*, nor the action. *Duane Cook's* evidence is conclusive on this point. The defendant, however, swears that he made both contracts as the agent of the *Cooks*. As to the first, it is not so clear. It seems uncertain whether the *Cooks's* name was mentioned in the transaction; or whether the plaintiff knew that *McLean* was contracting on their behalf. I cannot see, however, that in any case

(a) 2 Ver. 325.
(c) Ib. 565.

(b) 12 U. C. Q. B. 79.
(d) Ante vol. 4, 657.

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SPRAGGE, V.
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complete justice could not have been done at law. The plaintiff appears to me quite wrong in supposing that he could not plead the performance he alleges, to an action by the *Cooks*. Either *McLean* was contracting as an agent without disclosing his principal, or it was understood that he was acting for the *Cooks*. In the former case, it is quite clear that a performance to *McLean* was good to the *Cooks*, the undisclosed principals; if the contract was on behalf of the *Cooks*, and so understood by the plaintiff, then it cannot be doubted that *McLean* was authorised to receive the delivery of the lumber. It cannot be supposed that any other course of dealing existed between the parties. The *Cooks* were merchants residing in Hamilton. They were not in the habit of receiving the delivery of lumber personally in the woods. *Duane Cook's* evidence shews that *McLean's* authority extended thus far. Then if the contracts, or either of them, were, or was not made with *McLean* as the agent of the *Cooks*, the plaintiff, when he found an action brought against him in their name, should have applied to them for information. They would doubtless have disclaimed the action, and the plaintiff could either have made an application to the court of common law, or examined the *Cooks* as witnesses, or filed a bill for discovery. I cannot suppose a state of things in which the court in which the action was brought could not have done complete justice. The error seems to have been in misleading on the part of the plaintiff, but this does not entitle him to seek relief in a court of equity. I think the bill should be dismissed, but without costs, on account of the falsity of the answer.

SPRAGGE, V. C.—This suit is instituted for the purpose of restraining the defendants from proceeding to enforce an execution at law upon a judgment recovered upon a verdict against the plaintiff, in a suit in the name of the defendants *Cook*; and, if the grounds of this suit could have been shewn by way of defence in that action, it is unnecessary, and I think would be

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McLean.

Judgment.

1859. improper, to examine the merits of the case between the parties here.

Morrison
v.
McLean.

The bill states two several contracts entered into between the plaintiff and the defendant *McLean*, for the sale to *McLean* of certain timber by the plaintiff; the delivery of a portion of the timber under the first contract, and an excuse for not delivering the residue; and a readiness to deliver under the second contract, upon payment of the money payable upon such delivery; that a sum of £150 was paid to the plaintiff upon the first contract, and £35 upon the second; that *McLean* afterwards brought an action in the name of the defendants *Cook*, but without their authority, pretending that they were his principals in the above contracts, in which action *McLean* was a witness, and that in that action a verdict was obtained for £165.

Judgment. It is not urged that *McLean* was not a competent witness in that action by reason of his entering into a contract as for himself; and if a competent witness, he could shew whether or not he entered into the contract, on behalf of any such undisclosed principal. In his evidence he did say that in entering into these contracts he was the agent of the defendants *Cook*, and the jury must have believed his evidence, or the fact must have been otherwise established before them, for they rendered a verdict in favour of the plaintiffs.

The record in the action at law is not before us, but the plaintiff in his bill states that his attorney, being instructed that the contracts were with *McLean* himself, simply pleaded such pleas as to put that fact in issue; and that he could not plead to an action by the *Cooks* the delivery of the timber, or any of the dealings between him and *McLean*, as he could have done, had the action been in the name of *McLean*. It appears, then, that the question whether *McLean* was the principal or only the agent for the *Cooks*, was directly in issue in

that suit; a principals, a then, clearly law, as here,

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that suit; and the jury found that the *Cooks* were principals, and *McLean* their agent only; that point, then, clearly, was as much available to this plaintiff at law, as here, and was found against him.

1859.

Morrison
v.
McLean.

The point thus raised by the plaintiff assumes that a different rule prevails at law and in equity, as to what may be shewn by a party who has contracted with the agent of an undisclosed principal; that in fact their rights, as between themselves, differ in the two courts.

I take the rule to be, that when a person, who is in truth only agent for another, contracts as a principal; or, where he contracts as agent, but without disclosing who his principal is; in either case the party with whom he contracts, can in an action brought by the real principal shew by way of defence any thing that would have been a good defence if the agent had really been the principal. But were the rule otherwise, the plaintiff in equity must shew that such matter may be shewn in this court against the contract, although it cannot be shewn at law. I confess I think he is wholly wrong upon the point.

No application was made for a new trial in the action at law; the plaintiff here, giving as his reasons, first, because he relied entirely upon his attorney in reference to the action; by which if he means, that he was not well advised, it can hardly be necessary to say that it can be no ground for coming here; and secondly, because he discovered, but too late, that the *Cooks* repudiate the action at law; that they do not pretend to be entitled to the fruits of the judgment, but decline to release it. This also, I think, can be no ground for coming into this court. It is the discovery of a material fact upon which a new trial might have been applied for, after the time when, by the rules of the common law courts, a new trial may be moved for; the fact being that the evidence of *McLean* was

1859. inadmissible, as the action was brought for his benefit, and not that of the nominal plaintiffs; but it is not proved, or even alleged, that *McLean* was the only witness, so that *non constat*, but that the court would have refused a new trial if it had been applied for upon that ground.

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McLean.

As to restraining proceedings because the nominal plaintiffs do not claim to be entitled to the fruits of the judgment; I think that they ought not, upon that ground simply, to be restrained. In many cases it would be inequitable to interfere, because by the rules of proceeding at common law, the names of persons having the legal right must be used by those beneficially interested.

Upon the whole, I think that the matters brought into question in this suit were properly cognizable at common law, and have been, or might have been, the subject of cognizance in the common law court, proceedings in which are sought to be restrained.

Judgment.

I have read the whole of the evidence, but taking the view that I do of the case, I abstain from expressing any opinion upon its merits.

LIGHT v. THE WOODSTOCK AND LAKE ERIE RAILWAY AND HARBOUR COMPANY.

Practice—Right to file bill.

Where in the course of a cause a question is raised whether the plaintiff is entitled to institute proceedings, the court will, in a proper case, decide that question without compelling the parties to proceed to a hearing.

This was a bill by *William Smart Light*, on behalf of himself and the other stockholders of the *Woodstock and Lake Erie Railway and Harbour Company* (except those made defendants) against the *Company*, *Henry DeBlaquiere*, *Hugh C. Barwick*, *Arthur Augustus*

Statement.

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J. Cornell, the plaintiff who had obtained the directors; into by *Zimmer* company, but tenders were re to favour *Zimm* improper act of

The bill further been paid to the from the stipulated purposes; that a to the directors of their having directors of another dants' road, which their own benefit of £5,000 had been directors for the although the land

The prayer was been parties to the to make good the interest; also to have been improper tractor, and also to by the bill to have several municipalities

The defendants and was a stockholder denied the receipt of as stated in the bill as charged against the

Farmer, Edmund Deedes, Andrew Thompson and Henry J. Cornell, the directors of the company, alleging that the plaintiff was a stockholder; that *Samuel Zimmerman* had obtained the contract for constructing the road from the directors; that a prior contract had been entered into by *Zimmerman* more favourable in its terms to the company, but that this had been abandoned, and fresh tenders were required for the contract, which was done to favour *Zimmerman*, and that the contract had by the improper act of the directors been given to *Zimmerman*.

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v.
Woodstock
and Lake
Erie R.H.C.

The bill further alleged that a sum of £12,500 had been paid to the directors by the contractor as a deduction from the stipulated price, which they applied to their own purposes; that a further sum of £25,000 had been paid to the directors by one *Isaac Buchanan*, in consideration of their having given to one of two rival boards of directors of another railway the control of the defendants' road, which sum the directors also applied to their own benefit. The bill also charged that a sum of £5,000 had been paid to *DeBlaquiere* by the other directors for the purchase of ground for a station, although the land was not worth more than £300.

The prayer was, that such of the directors as had been parties to these breaches of trust might be ordered to make good the sums of £12,500 and £25,000, with interest; also to make good certain sums alleged to have been improperly paid by the directors to the contractor, and also to make good certain amounts stated by the bill to have been advanced to the company by several municipalities.

The defendants answered the bill, denying that plaintiff was a stockholder at the time of filing the bill; they denied the receipt of the sums of £12,500 and £25,000, as stated in the bill; and denied all fraudulent practices as charged against the directors.

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v.
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and Lake
Erie R.R.C.

The facts appearing in evidence, taken in the cause, were, that by the statute 10 & 11 Victoria, ch. 117, the company had been incorporated for the purpose of constructing the said railway; and that shortly after the passing of that act the plaintiff and the defendants, (the directors,) took up all the stock of the company, the plaintiff having subscribed for 5,400 shares, upon which, however, nothing had ever been paid, although a pretended payment of five per cent. had been made by plaintiff and the other stockholders, by means of an alleged loan of the money for that purpose from the company; that under a resolution of the directors of the 6th of June, 1854, three calls were made upon the stock; and by another resolution of the 19th of December, 1856, the shares of the plaintiff had been declared forfeited for non-payment of the calls. The secretary of the company in his evidence, "stated that he believed the plaintiff had assigned his shares to the company, and consequently that he did not remain the owner of them after such assignment." It was further shewn that several of the directors had assigned their stock to the company, although the same had been previously declared forfeited for non-payment of calls at a meeting of the directors. Under these circumstances, the defendants submitted the plaintiff was not entitled to file the bill, and at their instance the cause was directed to be argued on this objection before any further evidence was gone into. This statement, together with the facts set forth in the judgment, it is believed will be sufficient for understanding the question raised.

Mr. Roaf for plaintiff, contended that notwithstanding the forfeiture declared by the directors, the plaintiff still continued to be a stockholder—*Marmora Iron Works v. Murney*. (a) That the 26th section of the statute, under which they proceeded to forfeit their shares, was in the nature of a penalty, and must be

(a) 1 U. C. C. P., 29.

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(a) 13 Ves. 428.

(b) 10 & 11 Vict.

(c) *Blundell v. W*

strictly construed. Here no proper call had been made ; it was in fact made by persons whose only object was to get rid of their own stock, upon which they had never paid any call, and which they proposed doing at a meeting called for that purpose, they themselves acting in the matter. He also insisted that the plaintiff's stock should have been sold upon non-payment of the calls, in compliance with the provisions of the section of the act referred to.

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Mr. *Eccles*, Q. C., Mr. *Strong*, and Mr. *A. Crooks*, for defendants. The plaintiff cannot be heard to say Argument. that his shares were not forfeited, and the company have a right either to sell them or compel payment of the calls, which was all that was decided by the case referred to. *Sparks v. The London Water Works*, (a) shews that the court will not relieve against the forfeiture of shares under a by-law of the company.

The judgment of the court was delivered by

THE CHANCELLOR.—It is very difficult to deal with this case, because the proceedings of this company, from its commencement up to the period when the transactions Judgment. in question occurred, are to so great an extent illusory, that it is scarcely possible to determine when fiction ends and reality commences.

I had a strong impression at the hearing, that the transactions of the 15th and 21st of June, 1854, constituted a bar to the plaintiff's right to institute this suit. The attempt then made to transfer the plaintiff's stock to the company was, I presume, inoperative, for this, amongst other reasons, that the stock of this company was only transferable, by the act of incorporation, (b) out of which the right to transfer must grow (c) upon

(a) 13 Ves. 428.

(b) 10 & 11 Vict., ch. 117, s. 23.

(c) *Blundell v. Winsor*, 8 Sim. 601.

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payment of the first call, which it is quite clear the plaintiff had not paid. And any attempt to surrender the plaintiff's stock, and thereby determine his liability as a stock-holder, would have been of course unavailing. (a) But the plaintiff had covenanted not to institute any proceedings against the company either at law or in equity, and his right to file the present bill in the face of that covenant seemed to me then, as it does still, more than doubtful. It is true that the attempt to transfer the plaintiff's stock, and thus get rid of his liability, failed; but then an act was passed in 1856, (b) at the instance of the company, by which the plaintiff might have surrendered his stock, and if he be still liable thereon, that does not arise from any fault of the company, but from his own neglect to avail himself of the benefits of that statute. But that defence, if it be one, is not now open to the parties. The answers do not even allude to it, and had they done so it is quite possible that the matter would have admitted of some satisfactory explanation, for in their subsequent dealings with the plaintiff the company would seem to have treated the compromise of June, 1854, as a nullity.

Judgment.

The case made by the answers, is that the plaintiff's stock was duly forfeited, that he then ceased to be a stockholder, and has consequently no right to institute this suit. In answer to that argument, the learned counsel for the plaintiff contended, that under the act of incorporation (c) the stock of this company can only be forfeited by a sale, and that as no sale has ever been as yet effected, the plaintiff has a perfect right to file the present bill. Were that argument well founded, the stockholder being entitled to exercise the rights and privileges of a stockholder, in the interval between forfeiture and sale, ought, it would seem, to be subject to the liabilities. But that clearly is not so. No action

(a). In re. The London and County Insurance Co., Jones's case, 4 Jur. N. S. 448.

(b) 19 Vic., ch. 74, sec. 7.

(c) 10 & 11 Vic., ch. 117, sec. 26.

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Erie R. H. C.

It was argued in the next place that the call upon which the plaintiff's stock had been forfeited was not a call made *bonâ fide*, and for a legitimate object, but a fraudulent contrivance of the directors to rid themselves of their enormous liability as stockholders, and was therefore wholly inoperative. There is great weight in that argument. If it be true that the enormous amounts of stock subscribed by several of the directors, amounts quite beyond their means, were so subscribed solely for the purpose of enabling those gentlemen to possess themselves of the charter of this company, and upon an understanding that they should be relieved from liability; and much of the evidence before me leads very distinctly to that conclusion; then there is strong ground for believing that the call of June, 1854, was not a call made *bonâ fide* for a legitimate purpose, but a fraudulent scheme concocted by the directors for personal objects, and if that be so, I concur in the argument that a proceeding of that nature cannot be allowed to affect the plaintiff's rights. I cannot hold at this stage of the cause, and upon such evidence, that the plaintiff's right to institute this suit has been displaced. But neither am I prepared to determine the point conclusively against the defendants. The case must therefore proceed, saving the benefit of the objection to the defendants at the hearing.

Judgment.

MURRAY V. HERON.

Alien—Mortgagor.

A deed of land in trust for an alien (executed before 12 Victoria, chapter 197,) and mortgages subsequently created by the alien, held good in this court.
By the statute 12 Victoria, chapter 197, section 12, aliens are enabled to hold real estate in this province as fully and effectually as natural born subjects.

This was a suit to foreclose a mortgage, created by a

1859. person alleged to have been an alien. The points relied on by counsel are stated in the judgment.

Murray
v.
Heron.

Mr. *R. Martin*, for plaintiff.

Mr. *Roaf*, Mr. *Crickmore*, and Mr. *Doyle*, for the defendants.

The judgment of the court was delivered by

THE CHANCELLOR. —The sole point in this case is as to the validity of the conveyance to *Heron* in trust for *Smith*, and of the mortgages subsequently created by *Smith*, under one of which the plaintiff claims. The learned counsel for the defendants admit that if those deeds be valid the plaintiff is entitled to the usual decree of foreclosure. But they affirm that at the date of the various conveyances to which I have referred *Smith* was an alien. And they argue that the conveyance to *Heron* in trust for *Smith*, and subsequent mortgages were, on that ground, void, both at common law, and under the various provincial statutes respecting aliens, and if that be so, it follows of course, that the plaintiff can have no right to maintain the present suit.

Mr. *Martin*, on the other hand, contends that *Smith* is not proved to have been an alien. But assuming that to have been proved, he argues that the conveyances in question are not void on that account, either at common law, or by statute, but are on the other hand perfectly valid and effectual, and capable of being enforced in this court subject only to the rights of the Crown upon office found.

The case cited by Mr. *Martin*, (a) to which I may add *Du Hourmelin v. Sheldon*, (b) and *Fish v. Klein*, (c)

(a) *Dumonceil v. Dumonceil*, 13 Ir. Eq. Rep. 92; *Barrow v. Wadkin*, 24, Beav. 1.

(b) 1 Beav. 79.

(c) 2 Mer. 431.

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go far to establish the proposition for which he contends. I have no doubt the conveyances in question are valid at common law, subject to the rights of the Crown on office found, and I can discover nothing in the statutes to which we were referred which affects their validity. All the statutes on this subject, with the exception of the 54 Geo. III., ch. 9, which has no application to this case, were framed for the relief of aliens, and cannot be held to have added any new disqualification. The constant policy of the legislature has been to relax the severity of the common law on this subject, and, under the act passed in the 12th year of her Majesty, (a) aliens are enabled to hold real estate in this province as fully and effectually as natural born subjects. Had it been necessary to decide the point, therefore, I should have had little difficulty in adopting Mr. *Martin's* argument. But in truth the point does not arise, for the evidence fails altogether to establish that *Smith* was an alien. The plaintiff is entitled, therefore, to the usual decree.

1859.

Murray
v.
Heron.

Judgment.

PAINE V. CHAPMAN.

Vendor's lien—Parties.

In a suit to enforce a lien for an annuity secured upon real estate it is not necessary to make the personal representative of the person bound to pay a party, unless an account of the personal estate of the deceased is asked.

Where a suit to enforce by sale a vendor's lien is instituted against the heirs at law of the purchaser, the widow of the vendee is a necessary party in respect of her right to dower.

This was a suit brought to enforce an agreement entered into by the purchaser of real estate to support and maintain the vendor during her life; as appears in the report of the case ante volume VI., page 338. After the decision overruling the demurrer, as there reported, the defendants answered the bill, raising thereto several

Statement.

(a) 12 Vic., ch. 197, sec. 12.

1859. points of defence, which are all distinctly given in the judgment; evidence having been taken, the cause came on to be heard before the full court.

Palne
v.
Chapman.

Mr. *Roaf*, for plaintiff.

Mr. *Strong*, for defendant.

The judgment of the court was delivered by

THE CHANCELLOR.—The main question in this case was decided upon the argument of the demurrer. It was then determined that the plaintiff was entitled, under the circumstances stated in the bill, to a lien upon the premises in question, for her support, in accordance with the bond of the intestate; and as the evidence establishes the case made by the bill, that point cannot be considered as now open. I must add, however, that

Judgment. *Richardson v. McCausland (a)* appears to me expressly in point.

But assuming that to be so, the plaintiff's right to a decree is resisted on several grounds. It is argued, in the first place, that the plaintiff is estopped from proving the agreement stated in the bill, inasmuch as such evidence would contradict the deed, in which the consideration is said to have been one hundred pounds. But upon that point *Clifford v. Turrell (b)* is a clear authority in the plaintiff's favour.

It is said next, that the agreement is not sufficiently proved. It must be observed, however, that the bond is admitted in express terms by both answers. The defendants admit the bond, and assert that it was determined by a new agreement between the plaintiff and *Anne Jean*

(a) Beat. 457, and Sug. 538, n. and see *Colborne v. Thomas*, ante vol. iv., p. 102, and cases cited, and *Mitchell v. McGaffey*, ante vol. vi., p. 361.

(b) 1 Y. & C. C. C., 138, and on appeal, 9 Jurist, 633, where see the cases cited by Lord Lyndhurst.

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1859.

Paine
v.
Chapman.

Chapman, after the death of the intestate. Still the plaintiff was bound to prove his case as against the infants, and although the evidence is not so satisfactory as I could wish, it is, I think, under the circumstances, sufficient. That the intestate executed some such bond as that stated in the bill I have no doubt. And the evidence as to the loss of the instrument and its contents, though not perfectly satisfactory, is upon the whole sufficient.

It is said, however, that there was an agreement between the plaintiff and *Anne Chapman*, upon the death of the intestate, that the property in question should be transferred to the plaintiff for her life, in satisfaction of the intestate's bond. The evidence fails altogether to establish that. The only witness upon the point is *John McKinlay*, and, assuming his evidence to be true, I very much doubt that it establishes a concluded agreement. There is no evidence either, that a written agreement was required, or that any steps were taken to have one prepared. In that respect the accuracy of *McKinlay's* testimony is shaken by the evidence of *Townsberry* and *Struthers*. But however the fact may be, it is clear that *Anne Chapman* had no power to enter into the alleged agreement. The estate was not hers. It belonged to her infant children, whose rights she could not bind. Judgment.

It is argued next that the personal representative of *John Chapman* is a necessary party to this suit. Had the plaintiff insisted upon an account of the personal estate of *John Chapman*, that objection must have prevailed. But there can be no doubt, I suppose, that she is entitled to abandon that relief, and to look to the land alone for payment, and in that view I cannot see that the personal representative of *John Chapman* is a necessary party. The plaintiff is in the position of a mortgagee who cannot be compelled to resort to the personal estate of the mortgagor, but is entitled to call upon the owner of the

1859.

Paine
v.
Chapman.

equity of redemption to pay or be foreclosed, and in that event it is clear that the personal representative of the mortgagee is not a necessary party.

It is urged, lastly, that Mrs. *Chapman* is not a necessary party, and that the bill as to her should be dismissed with costs. But the object of this suit is to have it declared that the plaintiff has a lien upon the estate in question for the unpaid purchase money, and to have the amount found due raised in the usual way. Now I do not see how such a decree could be pronounced in the absence of *Anne Chapman*, whose right to dower is not questioned.

I am of opinion, therefore, that the plaintiff is entitled to a decree. The amount due to the plaintiff to be ascertained by the master. The account to commence from the death of the intestate. There must be an enquiry as to the occupation of the premises since that period. If the plaintiff was let into possession by *Anne Chapman*, as is alleged by the answers, she must be charged with an occupation rent, and the amount found due from her on that account must be set off against her annuity.

Judgment.

LINTON V. MICHIE.

Trustee—Cestui que trust.

A debtor, in August, 1846, conveyed all his estate, real and personal, in trust, for the benefit of his creditors. Part of the property conveyed was a lot of land containing about 113 acres, which, in the schedule of assets, was valued at £100. In September, 1852, an intended sale by the trustees at £175 was objected to by the debtor, on which occasion he asserted that the front 20 acres of the lot were worth £200. After several fruitless attempts to sell both by the debtor and the trustee, a sale was effected in January, 1856, for £1300. In answer to a bill filed to set aside this sale on the ground of inadequacy of price, it was shewn that in March, 1855, the best price the debtor had been offered, after endeavouring for two years to sell the property, was £1500, payable partly in railroad bonds, and that the trustee and others interested had afforded the debtor ample opportunity of redeeming the estate upon the payment of the price for which it was agreed to be sold. The court, under the circumstances, refused to interfere.

This was a bill by *John J. E. Linton*, against *George*

Michie, praying, and which an agreement the other trusts of acted might

The cause Vice-Chancellor was directed Chancellor.

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THE CHA the plaintiff to the defence The trust property and debts due question in the being lot number township of been collected date is not share dividend of all 30th of January £1300 cash, or quite sufficient This is a bill to at such an amount court ought not

I was very enormous dispenditure the property, plaintiff's witness

Michie, James Mitchell, Daniel Home Lizars, and others, praying, under the circumstances stated in the bill, and which are distinctly set forth in the judgment, that an agreement for sale of land by *Michie* and *Mitchell* to the other defendants might be set aside, and that the trusts of the deed under which *Michie* and *Mitchell* acted might be administered by the court.

1859.

Linton
v.
Michie.

The cause had been previously argued before the Vice-Chancellors, and they differing in their views, it was directed to be re-argued before His Lordship The Chancellor.

Mr. *Roaf*, for the plaintiff.

Mr. *McDonald*, for the defendants.

THE CHANCELLOR.—On the 12th of August, 1846, the plaintiff assigned all his property, real and personal, to the defendant *Michie*, for the benefit of his creditors. The trust property consisted in part of the stock in trade and debts due the plaintiff, and in part of the property in question in this cause, which contains about 113 acres, being lot number one, in the second concession of the township of Downie. The personal estate must have been collected previous to the year 1852, the precise date is not shewn, and it sufficed to pay the creditors a dividend of about four shillings in the pound. On the 30th of January, 1856, the real estate was sold for £1300 cash, or equal to cash, an amount nearly, but not quite sufficient, as I gather, to pay the creditors in full. This is a bill to set that sale aside as having been made at such an undervalue, and so improvidently, that this court ought not to permit it to stand.

I was very much struck at the hearing with the enormous disproportion between the price obtained for the property, and the value of it as estimated by the plaintiff's witnesses; and, under a strong impression

1859. that this plaintiff would suffer severely and unjustly if
 this sale were confirmed, I inclined to the opinion that he
 was entitled to relief on two grounds. First, I doubted
 whether a sale negotiated and in effect made, not by
Michie the trustee, but by *Mitchell*, could be sustained
 as a proper exercise of the power of sale contained in the
 trust deed. Secondly, I doubted whether either *Michie*
 or *Mitchell* had used that diligence to inform themselves
 of the real value of the property, and consequently of
 the propriety of the proposed sale, which, as trustees,
 they were bound to exercise.

Linton
 v.
 Michie.

Since the hearing I have read the pleadings and
 evidence, including the voluminous correspondence laid
 before us, with attention, and I am now satisfied that
 my doubts upon both points were unfounded, and that
 the sale ought not to be disturbed.

With respect to the first point, it is clear, I apprehend,
 Judgment. that *Mitchell* was interposed between the plaintiff and
 his trustee at the plaintiff's own request. *Mitchell*
 acted in the matter with the consent of *Michie*, indeed,
 but at the special instance and request of the plaintiff,
 who cannot now complain of an interference which he
 himself desired, and brought about.

An attentive examination of the evidence, especially
 the letters, has brought me to the conclusion that
 the circumstances are not such as to warrant us in
 disturbing this sale upon the second ground. I am
 now satisfied that the trustees acted towards the
 plaintiff throughout with the greatest forbearance; that
 the price obtained was, under the circumstances, a fair
 price; and that the plaintiff has no just ground to com-
 plain of the time at which, or the manner in which, the
 sale was brought about. But as I have the misfortune
 to differ from my brother *Esten* upon this point, it is
 right that I should refer to the evidence with some
 minuteness, that the parties may understand the grounds
 upon which I proceed.

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Linton
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The deed of August, 1846, authorises the trustees to sell either for cash, or upon credit, and that option may have been introduced, as it is surmised, for the benefit of the plaintiff. But, looking to the schedules appended to the trust deed, it is clear that the assets, as estimated by the plaintiff himself, would barely suffice to pay the creditors 12s. 6d. in the pound, and for several years the utmost that the plaintiff expected, I should rather say hoped, was, that the property, if well managed, would enable him to make a decent settlement with his creditors. I have no doubt, therefore, that the option in question was intended solely for the protection of the creditors, and without any reference to the plaintiff's interest.

In the schedule of assets appended to the trust deed, this property is estimated by the plaintiff at £100; and in the course of the year 1852 *Michie*, the trustee, contracted for the sale of it to one *Matheson*, at £175. The property appears to have risen somewhat in value in the interval, for on the 10th September, 1852, we find the plaintiff objecting to the sale to *Matheson*, for inadequacy, and in his letter of that date he estimates the front 20 acres of the property as worth £200. At the date of the trust deed the legal estate of this property was vested in the Canada Company. The plaintiff had contracted for the purchase of it, but had not obtained a deed, and, being dissatisfied with the sale to *Matheson*, he proposed that the deed from the Canada Company should be made, not to the trustee, but to *Mitchell*. The plaintiff had no right to insist upon that. He was bound, of course, to do any act necessary to enable the trustee to get in the legal estate. But Mr. *Michie* did not object, and by an arrangement between the three, the legal estate was vested in *Mitchell*, who was thereby constituted in some sort a protector of the plaintiff's interest; and all his future communications respecting the sale of the property were addressed to *Mitchell*, to whom the principal share in the management of the matter was vested at the plaintiff's request.

1859.

Linton
v.
Michie.

Now it is observable that at that early period an immediate sale of the property in one lot was the thing contemplated by the parties, for on the 3rd of June, 1853, before *Mitchell* had obtained the deed, we find him addressing a letter to the plaintiff, in which these words occur: "I think it would be as well if you were to send me your of letter of license for lot 1, concession 2, and a transfer to myself which I shall hold as trustee until the matter with *Matheson* shall be arranged. You will see from what I wrote you that *Matheson* has no legal right to the lot, and all that passed between Mr. *Michie* and him could scarcely give him an equitable claim to it. I believe it could be sold for a good price just now, and I think the present a very good time to sell it; and I would sell it as a whole, and let the purchaser speculate on laying it out into town lots."

Judgment. From the date of that letter *Mitchell* appears to have been unceasing in his efforts, in conjunction with the plaintiff, to sell the property to the best advantage. On the 20th of February, 1854, he writes thus to the plaintiff: "I have been trying to get an offer for the lot from various parties, but there seems to be very little inclination now to speculate in your quarter. The speculative feeling has become very quiet of late, and I believe the Lynch farm parties are getting very sick of their purchase. The best offer I could obtain was £900, payable in a year, which I have to submit for your consideration. I think myself, if £10 per acre or thereabouts, could be had, I would not hesitate in selling."

On the 3rd of March, in the same year, he writes thus: "I wrote to you some days ago, and mentioned that I had been offered £900 at twelve months for the farm lot, now I think if the party could be induced to advance his offer to £1000, same terms, I would be disposed to sell. What would you advise?"

The plaintiff's reply to that letter is dated the 7th of

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March, 1854, and in it, speaking of a conference which the plaintiff had with Mr. *Lizars* on the subject of the sale, he goes on thus: "He does agree with me that if the summer speculation is waited on by you *say 3 months* when the bustle of improvement on the railroad is apparent, as the weather of winter has deadened things, and kept people from viewing land, &c., as is done in summer." A little further on in the same letter, he says: "From your earnestness in writing me I am afraid you will sell, but if a reversion by courtesy can be secured to me I only trust you will promote it. * * * * * Let me know, (try and find time for an old friend,) from Mr. *Michie*, how the balance sheet stands, and if any thing will come to me. There would be better hopes if £1400 or so was got for the lot, and I feel rather delicate, as you seem urgent."

1859.

Linton
v.
Michie.

In Mitchell's rejoinder, written on the 23rd of May, in the same year, he urges the propriety of an immediate ^{Judgment.} sale at such a price as could be then obtained, with great earnestness. He says: "I received your letter of the 7th March. I really am afraid we shall miss our market for the farm, if we have not done so already, and I feel convinced that the longer it is kept it will be getting worse to dispose of. The demand for investments of this kind being not nearly so good this spring as last year. This may in part arise from the present great scarcity of money, although I myself think that people are beginning to take a more rational view of these sort of investments, there never having been, according to my ideas, any real basis for a tithe of the villge lot speculations that were afloat. The party who offered £900 at six months, has, I believe, given up all idea of making the purchase, and that was the only real offer that I ever received for it. You will see from the foregoing that my opinion is, that we should realize as soon as possible, and I shall be glad to learn that you coincide with me in this, and you can be good enough to give me

1859. your ideas respecting the mode of proceeding to do so. I have been thinking of advertising and trying it at auction as a lot."

Linton
v.
Michie.

On the 24th of March, in the following year, *Mitchell* again addressed the plaintiff, pressing an immediate sale in very urgent terms: "We are desirous, he says, to have your old account settled: it is to be regretted, we think, that the sale of the lot was not closed a year ago, as we fear that the same price cannot now be obtained for it as we were then offered. If we can get the same offer repeated we are disposed to sell, as we really believe that the days of fancy prices are gone by for some time at all events. Please to let us have your views on the subject."

The plaintiff's reply to that letter, which is dated on the 30th of the same month, is important, because in it Judgment. I find the plaintiff stating an offer which had been made to him for the property, which must be regarded, I suppose, as the best the plaintiff had been able to obtain. "I was offered," he says, "£1500, lately, with £250 to be paid down in May, or so, (likely in railroad bonds) but I said I would write to you, though I had my own feelings and opinions that that would not do. All I hope is, that you will rather help me, even by a little delay, than see me suffer."

Mitchell's reply to that letter is dated the 25th of May, 1855, and runs thus: "We duly received your favour of the 30th March. We do not see that the prospects are any more favourable now for realizing the land than they were a year ago, but rather the reverse, and we do not believe that any thing will be gained by keeping it longer, we have therefore concluded to offer it by auction here, and shall advertise it to be sold sometime before the middle of June. * * * * *The terms will have to be prompt payment, as the proceeds are wanted for*

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1859.

Linton
v.
Michie.

On the 22nd of June, 1855, *Mitchell* again wrote to the plaintiff, informing him that an offer of £1200 cash had been made for the property. And on the 26th of the same month he presses a sale in the most urgent terms: "We fear," he says, "we have lost the customer at £1200, at all events he has withdrawn his offer for the present, as he says that the information goes to shew that the lot is all but a tamarac swamp. The owners of the Sargent property are preparing, we understand, to bring it into market immediately, and our opinion is, that it would be a favourable time to offer yours before they do so. As we have before mentioned, we have no confidence in the present, as we consider them, fancy prices of land being maintained, and we should feel rather annoyed, when a change does come, and come it must, to think that we allowed the opportunity to pass of getting our debt paid, and also of making a small reversion for your family, by selling at the right time. It is considerably more than a year since we wished to realize, and we think you can have no reason to complain that we have been too urgent to sell, and as you say truly, we require the money. We would therefore propose to offer it for sale some days before the other sale comes off. And if you would be good enough to send to us an extension of the plan you formerly sent, showing the situation and proximity to the other lot, we can have some lithographs struck off according to present fashion, and which we dare say would assist the sale. You can, of course, bid it in at any reserve you choose above the amount of the debts. Or if you are prepared now to pay these, we shall have it conveyed in any way you wish."

The sale spoken of in the last letter was postponed at

1859. the urgent request of the plaintiff, and on the 28th of July, *Mitchell* agreed to a further delay of six weeks, for the purpose of enabling the plaintiff to raise a sufficient sum to pay off his creditors, and redeem the property. The correspondence between the parties ceased then. We have no evidence of any further communication until the 30th January, 1856, when the contract to sell the property for £1300 cash, which it is the object of this suit to set aside, was concluded by *Mitchell*.

Linton
v.
Michie.

Now it is quite impossible, I think, to read the history of this transaction, as detailed in the correspondence to which I have adverted, without being convinced that the trustees acted with the utmost forbearance—with the tenderest care for the plaintiff's rights. And when it is considered that they enjoyed the benefit of the plaintiff's assistance, and acted throughout under his directions—that the estimated value of the property at the time of the assignment was but £100; that in 1852, the plaintiff himself valued it at £400 or £500 only; that in 1854 he expressed but a faint hope that it might realize £1400 or so, and that the best offer he had been able to obtain in 1855, after more than two years' exertion, was an offer of £1500, payable in the way I have already described; when these facts are considered, it would be monstrous as it seems to me, to interfere with the sale on the ground of inadequacy.

Judgment.

The witnesses differ so widely as to the value of the property, as is usual in such cases, that their evidence can hardly be considered as entitled to any weight. Mr. *Woods*, for instance, a witness for the plaintiff, places a very high value upon this property. But then he admits that he had himself purchased property within the limits of the town of Stratford in 1853, at a very small price, I think £7 10s. per acre. And on his cross examination he says: "I question whether any one in Stratford would have given £1300 for the property in question in cash in January last, and for want of funds, I think the land is

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about as valuable now as it was in January last." Now that destroys altogether the value of his previous testimony. The trustees had a right so sell for cash, and if £1300 was the highest price that could be obtained in cash, they were well warranted in accepting that amount. Again, Mr. *Eason* says: "I valued the front 20 acres, in an affidavit made on the 8th of February, at £100 per acre, cash. I adhere to that statement. I believe that £100 an acre could have been got for it in January last. I consider that when a man is to have time, but to pay interest, it is the same as cash." Now that statement is so contrary to the experience of every man of common sense in this province, that I cannot regard it as entitled to the least weight.

1859.

Linton
v.
Mitchell.

But fortunately we have evidence of the most conclusive kind. We know that the plaintiff, though resident upon the spot, and deeply interested in the event, was unable after more than three years' exertion to procure so good an offer as that which the trustees accepted. He might have redeemed the property at any moment for £1300 cash, and there is every reason to believe that any proposal to sell on reasonable credit, would have been favourably entertained, but none such was ever made, so far as I can learn. On one occasion, indeed, the plaintiff speaks of an offer of £1500, on time, payable in railroad bonds, whether valuable or valueless, is not shewn, but his conscience told him that that would not do. Surely that single fact is of more weight than all those idle dreams of speculation which have been conjured up in this case only to obscure the truth.

It is said, however, that *Mitchell* undertook not to dispose of the property without consulting the plaintiff, and that as the sale of the 30th of January was made without consulting him, it was a breach of trust, and must be set aside. I cannot agree in that conclusion. *Mitchell* undertook, I think, not to dispose of the property without giving the plaintiff a fair opportunity to make

1859.

Linton
v.
Miche.

the most of it. The letters show conclusively that the plaintiff so understood it. And that he had that opportunity is abundantly clear upon the evidence. The parties did all that the most even-handed justice could require, and much more than the law would have exacted.

JACQUES V. WORTHINGTON.

Principal and agent.

By the death of the principal the authority of an agent is determined. Where, therefore, an agent obtained on credit from parties with whom his principal had been in negotiation previously, a supply of furniture for the house of the principal, in which he had intended carrying on business; but, before any binding agreement was concluded, or the furniture delivered, the principal had died abroad; the court refused to decree a specific performance of the contract to purchase, and ordered the administrators, who had taken possession of the goods, to deliver them to the vendors, and pay the costs of the suit instituted for the purpose of obtaining possession of the furniture, or security for the price of it.

The bill in this case was filed by *John Jacques* and *Robert Hay*, against *George Worthington*, *James Miller*, *Anthony Copp*, *Robert Jarvis Hamilton*, *Milton Davis*, and *Edward C. Thomas*, sheriff of *Wentworth*, and Statement. as amended, set forth that the late *Thomas Davidson*, hotel-keeper, had, during the spring and summer of 1857, given verbal orders to plaintiffs for furniture to furnish a hotel, in the city of *Hamilton*, which *Davidson* was then erecting; that no terms of payment were agreed on when such orders were given, but it was well understood that the furniture was not to be delivered until paid for, or security for payment was given. That in the autumn of 1857 *Davidson* left Canada for the island of *Cuba*, where he died intestate on the 2nd of January following. That before his departure *Davidson* had appointed *James Stevenson* as his attorney, to manage his affairs during his absence, who had a full power of attorney to act in all matters connected with his business, and by which he was enabled to carry out his project for the erection and finishing of the hotel. That *Stevenson*, acting under the power of attorney, and in ignorance of

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the death of *Davidson*, procured the furniture to be delivered and placed in the said hotel, and on the 4th of February, 1858, executed a chattel mortgage thereon to the plaintiffs for the purpose of securing the price agreed to be paid for the same.

1859.

Jacques
v.
Worthington.

The bill then alleged that the defendants *Worthington*, *Miller* and *Copp*, being creditors of *Davidson*, had obtained letters of administration to his estate, and as such administrators, had taken possession of the hotel and furniture, intending to carry on business for the benefit of the estate; and that the defendants *Hamilton* and *Davis*, had recovered judgment against *Davidson*, and issued execution thereon, which they had placed in the hands of defendant *Thomas*, who, acting thereunder, had seized the goods so furnished by the plaintiffs, and had advertised the same for sale.

The prayer of the bill was, that it might be declared that under the circumstances the title to the furniture did not pass out of the plaintiffs, and that the defendants might be ordered to restore the same to the plaintiffs; or, that the defendants, the administrators, might be ordered to execute a mortgage thereon in the terms of that executed by *Stevenson*; an injunction to restrain the other defendants from proceeding to sell under the execution, and for further relief.

The defendants having answered the bill, a motion was made for a decree, when affidavits were filed by all parties. The important facts, however, sufficiently appear in the statement of the case, and the judgment.

Mr. *Read*, Q. C., and Mr. *Strong*, for the plaintiffs.

Mr. *Blake*, contra.

Argument.

The arguments of counsel, and cases relied on, are given in the judgment of the court which was delivered by

1859. THE CHANCELLOR.—It is perfectly clear that there was not any concluded agreement touching the furniture in question between the plaintiffs and *Thomas Davidson*, the defendants' intestate. Negotiations there certainly were. But there is no evidence whatever of any concluded agreement.

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The negotiations which took place in December, 1857, are open to the same observation. The terms of payment appear to have been then arranged between the plaintiffs and *Stevenson*, the agent of the intestate. But there is no proof that either the furniture to be sold, or the price to be paid, was then specified. There was, therefore, no contract. And though there had been, it was void for want of a written memorandum.

Until the delivery of the furniture, which took place between the 9th and the 28th of January, 1858, there was nothing by which either party was bound. But prior to the first of these days, *Davidson* had died, and the first question is, whether the contract entered into by *Stevenson* in the name of the intestate, after his death, binds his estate.

Judgment.

That a letter of attorney, such as that under which *Stevenson* acted, is necessarily revoked, upon the principles of the common law, by the death of the principal, appears to have been considered settled law from the earliest times, and I do not find any reliable authority to the contrary. *Littleton* says at section 66: "But if a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing." And *Coke* in his commentary on that passage, assigns the reason to be, that the death of the feoffor is a countermand, in law, of the letter of attorney. (a) In *Wynne v. Thomas*, (b) Chief Justice

(a) Co. Lit. p. 52. b.

(b) Willes' Rep. 565.

Willes says: revocable or certainly revocable, not appear for *Wallace v. C* to a sailor. paid to his a that fact. B defence. Th the power of legal." In contract with largely indebted attorney, by moneys then to him upon t received seven department a a bill filed by the money to had been rev amount consti the same poin more than a administrater a letter of att whom he was ship in quest power of sale that the sale so given to *Ward* Lord *Ellenborou* in the name of verdict. This ca the verdict wa ruling on this p

(a) 5 Esp. 118.
(c) *Mitchel v.*

Willes says: "Whether the warrant of attorney were revocable or not by *Alathea* in her lifetime, it was certainly revoked by her death, and her attorney could not appear for her, and in her stead, after she was dead."

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Wallace v. Cook (a) was an action to recover wages due to a sailor. The defence was, that the money had been paid to his attorney after his death, and in ignorance of that fact. But Lord *Ellenborough* said: "That is no defence. The death of the principal was a revocation of the power of attorney, and no subsequent payment was legal." In *Lepard v. Vernon*, (b) *Vernon* having a contract with the Ordnance department, and being largely indebted to his bankers, executed a power of attorney, by which he authorised them to receive all moneys then due, or that should thereafter become due to him upon that contract. Under that power the bankers received several thousand pounds from the Ordnance department a few days after *Vernon's* death. But upon a bill filed by his executors, Sir *William Grant* ordered the money to be repaid, upon the ground that the power had been revoked by *Vernon's* death, and that the amount constituted, therefore, part of his assets. And the same point had been determined by Sir *John Trevor* more than a hundred years before. (c) In *Watson*, administrator of *Maxwell*, v. *King*, (d) *Maxwell* executed a letter of attorney by which he empowered *Ward*, to whom he was largely indebted, to sell his interest in the ship in question in the suit. *Ward* exercised the power of sale after *Maxwell's* death, and it was argued that the sale so made was valid, in as much as the power given to *Ward* was a power coupled with an interest. But Lord *Ellenborough* asked: "how can a valid act be done in the name of a dead man?" And the plaintiffs had a verdict. This case is of the more weight because although the verdict was moved against, Lord *Ellenborough's* ruling on this point was not questioned.

Judgment.

(a) 5 Esp. 118.

(c) *Mitchel v. Edes*, Pre-Chan. 125.

(b) 2 Ves. & B. 51.

(d) 4 Camp 273.

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The authorities to which I have referred do not require confirmation. But for the reason of the decisions I may refer to *Hunt v. Rousmanier*, (a) a case which came before the Supreme Court of the United States, in which the whole subject was elaborately discussed, and the principle of the common law rule stated with great clearness and ability by Chief Justice *Marshall*.

Some recent decisions were referred to by the learned counsel for the plaintiffs, but they do not seem to me to support the proposition for which they were cited. *Campbell v. Anderson* (b) must be considered, I think, an authority in favour of the defendants, for it was a Scottish appeal, and turned entirely upon the law of Scotland. *Bailey v. Collett* (c) is open to the same observation, for although the surrender was by attorney, the purchaser was indemnified. (d) And that agrees with what I understand to be a settled rule, that a purchaser cannot be compelled to accept a deed executed, or a surrender made by attorney, for this amongst other reasons, given by Sir *Edward Sugden*: "that the vendor may be dead at the time the power is exercised, and in that case the execution would be void, as a power of this nature expires by the death of the principal." (e) The only other case referred to was *Ex parte McDonnell*, (f) which does seem, I must admit, to support the plaintiff's view. But I cannot consent, upon that case, to overturn what appears to me to have been the settled law for centuries.

I have no doubt, therefore, that the power under which *Stevenson* acted had expired, and that the contract into which he entered was wholly void.

It is argued, however, that *Stevenson's* contract was subsequently ratified by the administrators of the intestate,

(a) 8 Wheaton, 174.

(b) 4 Bligh, 513.

(c) 18 Beav. 179.

(d) See page 182.

(e) 2 Sug. V. & P. 693, (11th Ed.), *Webb v. Kirby*, 7 D. M. & G. 376

(f) Buck. 399.

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and that the contract is as binding now as if it had been originally authorised by them. I am not prepared to assent to that. The contract in question was not made in the name of the administrators, or for their behoof. Their appointment was long subsequent. I doubt whether the principle referred to has any application to such a case.

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But without determining that point, I am of opinion that the case fails upon the evidence. The purchase of this large amount of furniture for the purpose of carrying on the intestate's trade, or rather for the purpose of establishing a new trade, would have been, unless justified by necessity, a manifest breach of trust. Now, to justify us in holding that the defendants meant to ratify this contract, thereby subjecting themselves to serious personal responsibility, the intention must have been clearly made out. But the evidence fails to establish the intention imputed to them. The conclusion at which I have arrived is, that the defendants did not intend to subject themselves to any personal responsibility, or to bind the estate of the intestate to any greater extent than it had been bound by *Stevenson*. Judgment.

Assuming, then, that this contract was void in its inception, and has not been ratified, it follows, I apprehend, that the furniture in question is still the property of the plaintiffs, and they pray that the defendants may be ordered to deliver it up to them. In answer to this part of the relief, the defendants contend that this furniture being the property of the plaintiffs, their remedy is at law, and that this court, consequently, has no jurisdiction to order the restitution of the chattels in question. I cannot assent to that argument. The plaintiffs have failed to obtain a decree for specific performance because the contract is void—void in consequence of a mistake common to both parties. The defendants who set up and succeed upon that case can have no right to retain the property. In that state of things justice requires that the plaintiffs should be placed as far

1859. as possible in *statu quo*; and I have no doubt the decree
 Jacques we are asked to make is in accordance with the course
 v. of the court.
 Worthington.

I think the plaintiffs entitled to costs.

ROSSIN V. JOSLIN.

Lessor—Lessee—Injunction.

The proprietors of a house in the course of erection (which was intended to be used as a hotel) made a lease thereof for a term of five years, from the time of the completion of the building. The lease contained amongst others, a covenant in these words: "And the said lessee covenants further, with the said lessors, that he will furnish the said hotel in a substantial and good manner." Held, that this was a continuing covenant, and that the lessee was not at liberty, during the continuance of the term, to remove out of the house the furniture thereof which he had placed in it.

This was a motion made during the long vacation,
 Statement. before His Honour Vice-Chancellor *Spragge*, to continue an injunction which had been granted *ex parte*.

Mr. *Cameron*, Q. C., Mr. *Mowat*, Q. C., and Mr. *Adam Crooks*, for the plaintiffs.

Mr. *Strong* and Mr. *Blake*, contra.

The facts of the case, and the authorities principally relied on by counsel, appear in the judgment.

Judgment. *SPRAGGE*, V. C.—The affidavit evidence as to the intent with which the covenant in question was entered into is conflicting. I find no evidence of what the agreement was in respect to the furniture, except what is shewn by the lease itself, at least none of a character that can be safely acted upon. The meaning of the parties must be gathered from the whole of that instrument; and the court not only may look, but ought to look, at every part of it that may throw light upon the intentions of the parties.

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At the date of the lease, 13th May, 1856, the building was in course of erection, and it was contemplated that it would take nearly a year to finish it: the term was to commence on the 1st of May, 1857, and there was a provision that in case it should not be ready for the lessee's occupation by that time, the rent should not commence until it should be ready, until, in the words of the lease, "complete in every respect according to the certificate of the architect superintending the said hotel."

1859.

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v.
Joslin.

The building is described as being erected for the purposes of a hotel, and it is quite clear from the whole tenor of the lease that both parties contemplated its being used for that purpose; with the exception of the shops, which were excluded from the lease.

The lease is drawn under the act of 1851, to facilitate the leasing of lands and tenements; and after the ordinary covenants to pay rent and taxes; to repair; that lessors may enter to view state of repairs; not to assign or sub-let without leave; and for re-entry on non-payment of rent, or non-performance of covenants; the covenant is introduced upon which the plaintiffs ask their injunction. It is in these words: "And the said lessee covenants further with the said lessors, that he will furnish the said hotel in a substantial and good manner." It is suggested on behalf of the lessee, that the object of this covenant was to shew who was to furnish the hotel, that it was the lessee, not the lessors, a matter which was left doubtful from the terms of the provision in reference to the contingency of the building not being ready for occupation by the time contemplated. I cannot see that that provision raised any doubt. It was the building that was to be ready, and the architect was to certify, and his office surely could extend to the building only, not the furnishing of it; besides, if a doubt was to be removed a covenant would hardly be introduced for the purpose, and still less a covenant as to the manner of the furnishing. I have no doubt that it was introduced as

1859. ^{Rossin} ^{v.} ^{Joslin.} one of the terms of the lease, for the benefit of the lessors, and I think the only question as to its construction is, whether it is satisfied by its literal execution in placing in the hotel such furniture as would amount to furnishing it in a substantial and good manner; leaving it under the entire control of the lessee to take it away, or do what he pleased with it afterwards. It is sufficiently clear, I think, that a mere literal fulfilment of an agreement, at variance with its spirit, and the manifest intention of the parties, cannot be held to be a performance of it that will satisfy the law. The cases upon the subject both in law and in equity are numerous.

Passing by those cases where a mere evasion of what was intended was set up as a performance, as in the case of a contract to deliver so many yards of cloth, delivering it cut up into pieces; the case of a contract to pay so many pounds, delivering so many pounds of stone, and ^{Judgment.} cases of that kind; we find the courts requiring from the contractor such a performance as will satisfy what in the judgment of the court the parties really meant should be done; implying an agreement on his part to do nothing inconsistent with it, and to do whatever is incident to the thing agreed to be done; and in case of doubt adopting that construction which is most against the covenantor.

In *Aulton v. Atkyns*, (a) there was an assignment by one partner to another, of the effects of the co-partnership; among these was a bill of exchange in the name of and held by, the assignor, he assigned it to a third person, the court implied a covenant that he would not do this, because in derogation of his deed.

In the *Earl of Shrewsbury v. Gould*, (b) there was a lease of the limestone upon certain land, and a covenant by the lessee that he would sell lime at proper seasons, to the lessor, and the tenants of his estates, at a specified

(a) 11 C. B. 249.

(b) 2 B. & Al. 487.

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In *Webb v. Plumer*, (a) the case was put of a covenant by a tenant to fold his flock of sheep upon the demised premises, and it was said that an implied covenant would thence arise to keep a flock of sheep there.

Hodgins v. Field, (b) was a case where two proprietors of adjoining lands entered into an agreement for the purpose of enabling one of them to open and work a colliery under his land, and with that view the other granted him leave to make a *sough* upon his land. The grantee claimed, as incident to the grant of the sough, that he had a right to do every thing necessary to keep the sough in repair, and if necessary to open sough pits, and uncover the sough in the grantor's land, from time to time, as often as repairs to the sough should be required. On the other side it was contended that the liberty of opening sough-pits was granted but *for once*, that the sough having been once made, it was the intention of the parties that the grantee should use it no longer than it should happen to continue unimpaired by length of time or accident. Lord *Ellenborough* observed that such latter construction, it was obvious, would but ill accord with the views of one who was about to open a colliery intended to be worked as long as the coal might last. The court adopted the construction contended for by the grantee.

Turner v. Evans, (c) was the case of the sale of the premises, stock in trade, and good will of the business of a wine merchant; and he covenanted not to carry on the business of a wine merchant in either of three counties named. He plainly evaded the agreement, for although he kept no place of business within the prohibited limits, he solicited orders within them. In disposing of the

(a) 2 B. & Al 747.

(c) 2 E. & B. 512.

(b) 7 East. 613.

1859. case Lord *Campbell* said: "In ascertaining what the meaning of the contract is, I must look to the circumstances; and the language used is to be understood, with reference to those." So Mr. Justice *Erle*: "The language of all contracts must be construed with reference to the circumstances; and the intention is to be collected from the words as used with reference to these;" and the language of Mr. Justice *Crompton* is similar, he says: "Mr. *Bramwell* asks us to put the same sense on the words 'carry on business at a place,' that would be put on them by a person who does not know any thing about the contract. But I do not think that is the way in which contracts are to be construed. We are to look at the whole instrument, and the object of the parties, and see what is the intention to be collected from the whole of the language with reference to these."

Judgment. In the case of *Hunston v. Barry*, (a) a number of authorities are referred to in the judgment of the court upon the construction of contracts; which agree with those to which I have referred.

In the late case of *Stiff v. Cassal*, (b) Sir *Page Wood* adopted what he calls a reasonable construction of the agreement before him, in preference to another to which it was open.

Several other cases bearing upon the construction of agreements were cited, and I have examined them, but I have, perhaps, already discussed somewhat more at length than was necessary the law upon that point; for I do not understand the learned counsel for the defendant to have contended, as Mr. *Bramwell* did, that I should look at the words used, abstractedly, and without reference to surrounding circumstances. The case of *Dormay v. Bomerdale*, (c) was however cited as a case in which the court had declined to construe a covenant so

(a) 5 Irish Eqy. 294. (b) 2 Jur. N. S. 348. (c) 10 Beav. 335.

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as to extend it beyond the necessary meaning of the words used. The bill was for the administration of an estate. The deceased had effected an insurance on his own life, which was to be void upon certain contingencies, one of which was his dying by his own hand; he assigned the policy to trustees, and covenanted to pay premiums, &c., and do and perform all such acts as should be requisite for continuing and keeping the policy on foot. He committed suicide, and the assignees, after failing in a suit against the insurers, made a claim in the master's office upon the covenant in the assignment. The claim was allowed by the master; his report was excepted to, and a case was then sent to the Court of Common Pleas, who certified their opinion, that the assignees were not entitled to recover the amount of the policy from the executors of the deceased; and the same question was then argued upon the case coming on upon the equity reserved; and it was contended that the covenant applied negatively to those acts, the infraction of which would avoid the policy. Sir *John Romilly* thought he could not give the effect contended for to the words of the covenant, and proceeded to say: "The subject of the settlement was the policy, and the money payable thereon, and nothing else; that which he covenanted to do he did; and there are not, I think, words to which the negative effect contended for can be properly attributed. From the object of the settlement, and the words of the covenant, I cannot imply an intended obligation not to destroy his own life, or to pay so much money if he did destroy it; and I do not see any sufficient reason for not being satisfied with the opinion certified by the learned judges."

Judgment.

We have not the grounds of that opinion; but the case seems to have been treated by the Master of the Rolls as an exceptional one, standing upon its own peculiar circumstances. He proceeded upon the object of the settlement—this is not given in the report—but the learned judge reading it with the assignment, was

1859. convinced that the only subject of the settlement was the policy, and the money payable under it, and not in any event a claim against the estate of the settlor. If he had thought that the parties intended a resort to the estate of the settlor, or to any thing but the insurance money, he would certainly have allowed the claim of the trustees, for he does not deny the principle of construction contended for on their behalf, but commences his judgment with the remark: "It is said justly that covenants are to be construed according to the intent of the parties."

The other cases cited for the defendant fall more properly under another branch of the case.

And now, as to the covenant in question in this cause, I have hesitated, I confess, a good deal before forming any opinion as to its true construction. The covenant is not inconsistent with such communication between the parties as this; the plaintiff asking the defendant for a covenant to furnish the hotel, the defendant assenting, but with the express understanding that he was not stipulating for any thing beyond placing furniture there, leaving it to him to deal with his furniture afterwards as if the lease contained no covenant in regard to it; and again the plaintiffs on their part being content with such an arrangement, feeling satisfied that a great point was gained in having the hotel once well furnished; and that the lessee would for his own sake continue it so. I have no doubt that the parties contemplated, independently of the covenant, that the lessee would continue to carry on the hotel during the whole term, and keep it furnished in a style befitting such an establishment, but that does not shew what the parties intended should be expressly stipulated for by this particular covenant, except in so far as it may shew the object of the parties in entering into that covenant.

Some cases have been put by Mr. *Mowat* by way of illustration of a covenant to build a house; to build

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a wall between the premises of the covenantor and the covenantee; to open a road. I am satisfied that to pull down the house or wall, or to close the road, would be in derogation of the party's own covenant, but as more nearly analogous, he puts the case of a covenant by the *Rossins* with their lessee, to furnish the hotel. I think it would be clear beyond question that they could not, during the term, remove the furniture placed there in pursuance of the covenant; that is a clearer case than this, for such communication as I have supposed might have passed between the parties in this case could not have passed in the case supposed. The same may be said of the case put of a covenant by a third person to furnish a hotel, and of a covenant by one of two partners in the hotel business to furnish the hotel. These cases have less application, because the side from which the covenant proceeds is very material.

Still the covenant is an unusual one, and was ^{judgment.} inserted with some object, for without any covenant as to furnishing, the lessee would necessarily place furniture in the hotel, as he could not carry on his business without it. The object, I think, is manifest: the establishment, as we see from the lease itself, was contemplated to be on a scale unusually large, and it would be important to the proprietors for many reasons, to have it conducted in a suitable style, and for this, good and substantial furniture, using these words with reference to the kind of establishment contemplated, was essential; besides the lessee was to come from a foreign country, (he is described in the lease as of Albany, in the U. S.,) to take it, and furniture irremovable would be a security for rent. But without this last reason, which may or may not have been one of the lessors' objects in requiring the covenant, there were plain objects to be answered in requiring this, as I have said, unusual covenant.

Now if the lessee had complied with this covenant only literally by placing furniture in the hotel; and had the

1859. next day, or a week afterwards, removed it to another hotel in the same town, or away altogether, it is clear, I think, that the spirit of the agreement would not have been carried out. To adopt the language of Lord *Ellenborough* in *Hodgson v. Field*, it would but ill accord with the views of one who was about to have a large and extensive building opened as a hotel, built expressly for that purpose, and intended to be continued as such. It is true that in the case supposed bad faith might well be imputed to a person so acting, and it might reasonably be inferred that he carried the furniture into the hotel only to carry it out again. But were the plain objects of the proprietors of the hotel any more answered by the furniture remaining for a month, or a year? I confess I think not. It was the object of the proprietors to have the hotel conducted by one particular person who should not be at liberty to put in his stead any person not approved of by them; and this is provided for by the lessee's covenant, not to assign or sublet without their leave: that was one thing towards its being conducted in a proper style; its being well furnished was another thing tending to accomplish the same object. If so, its being stripped of furniture would in a large measure defeat that object. I am not prepared to say that the words "to furnish," necessarily import, to keep furnished during any particular period—and in this case it is not necessary to give them that meaning, though I incline to think that that is the meaning of the parties fairly to be gathered from all the circumstances.

Judgment.

I should say, before proceeding further, in reference to such communication between the parties as I supposed possible, because not inconsistent with the covenant, that looking at the terms of the covenant, I do not consider such a communication at all probable, for if it had occurred, it is reasonable to suppose that the covenant would have been guarded, as I have supposed the lessee's agreement to covenant to have been guarded.

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import of the words used, the covenantee is entitled to the benefit of the maxim, that while the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken most strongly against the party who stipulates. (a)

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I feel strengthened in the construction which I adopt by the provisions in the lease, in reference to a renewal of the term; which was to be at the option of the lessee upon giving twelve months' notice, in which case he was to continue "upon the terms last aforesaid;" among the terms were an increased rent, and no limitation as to amount of taxes, but I apprehend the whole of the terms of the then demise, with these modifications, were to be continued. This provision follows immediately the covenant in question in this cause, and is in the same paragraph. This goes far to shew that it was the meaning of the parties that the lessee should continue bound throughout the term, and throughout the renewed term, if renewed, to keep the hotel furnished.

But as I have said, it is not necessary for the purposes of this injunction that I should hold the lessee as covenanting to that extent. It is sufficient, if I hold him not entitled actively to undo what he has done in pursuance of his covenant; and that, upon the best opinion I have been able to form, he is not entitled to do.

I have not felt much pressed with the difficulties which have been presented to the interposition of this court. It is said that the bill is demurrable because it contains no express waiver of the forfeiture, which appears to have occurred upon the facts stated in the bill. The facts, however, are not stated with a view to forfeiture, and the frame and prayer of the bill would, I apprehend, preclude the plaintiffs from asking for a forfeiture; but I am not prepared to agree that under the present system of pleading every bill is a bill of discovery, I should say

(a) Per Holyrod, J., in *Webb v. Plummer*.

1359. rather that upon the oral examination which is substituted
 for the discovery by answer, a defendant would be
 protected from answering as to any matters, as to which
 he would under the old practice be protected from dis-
 closing by answer. But the question can at any rate
 be only a question of costs, for I should not hesitate to
 allow the plaintiffs to amend so as to waive the forfeiture.

Rossin
 v.
 Joslin.

I do not think that the rule of this court not to decree
 specific performance of an agreement for the delivery of
 chattels, (a rule, however, with some exceptions,) has any
 application to this case. The court has, as a general
 rule, refused to interfere in such cases, because the goods
 having no value but their money value, the plaintiff who
 says he is entitled to them, may just as well have their
 value in money, which he can obtain at law; and he has
 therefore an adequate remedy at law. But can any of
 these things be predicated of the furniture in question, or
 of the plaintiffs' rights in relation to it. They are not
 entitled to the possession of it; their only right is, that it
 be not removed from the hotel unless for the purpose of
 substituting for it other furniture of the character
 described in the covenant; and it is the avowed intention
 of the defendant to take it away for the purpose of dis-
 furnishing the hotel: that, in my view, entitles the plaintiffs
 to relief. I think the case of *Nutbrown v. Thornton*, (a)
 is an answer to this objection; but this case is much
 stronger, for there, there was some measure of damages,
 though an inadequate one, but here the plaintiffs are not
 entitled to the value of this furniture, but only to com-
 pensation for such loss as they might sustain by the
 absence of proper furniture from the hotel. The preven-
 tive jurisdiction of the court is invoked to prevent a con-
 templated breach of covenant. It is surely no answer
 that the covenant is in relation to chattels, unless, indeed,
 it can be added that the plaintiffs have an adequate remedy
 at law; which it is obvious they have not upon this covenant.

Judgment.

(a) 10 Ves. 159.

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It is also objected that this court should not interpose because it cannot perform the whole contract. That was one reason among others, given by Lord Cottenham in *Heathcote v. The North Staffordshire Railway Co.*, (a) but the subsequent case of *Lumley v. Wagner* (b) before Lord St. Leonards, followed by other cases, has settled the law in that respect. I take this principle to be now established, that if a party has agreed not to do an act, and is about to do it, or is about to do that which is inconsistent with what he has agreed to do, he will be restrained by this court, although it cannot enforce the specific performance of the entire contract. Lord St. Leonards, in the case last cited, puts what he calls the familiar case of a tenant covenanting not to do a particular act, and being restrained from its commission, the court, he says, does not ask how many of the affirmative covenants on either side remained to be performed under the lease, but acts at once, by giving effect to the negative covenant specifically executing it by prohibiting the com- Judgment.
mission of acts which have been stipulated not to be done.

1859.

Rossa
v.
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The case of *Hooper v. Brodrick* (c) was cited in *Lumley v. Wagner*, as it has been in this case, as an instance in which the court had refused the injunction, because it could not enforce specific performance of the whole contract; and it was said in this case that Lord St. Leonards approved of it; he did so, observing that the application in that case was in point of fact to compel the lessee to keep open an inn, and quotes the language of Sir Launcelot Shadwell: "The court ought not to have restrained the defendant from discontinuing to use, and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing, or permitting to be done any act which would have put it out of his power, or the power

(a) 2 McN. & G. 100.

(c) 11 Sim. 47.

(b) 1 D. M. & G. 604.

1859. of any other person, to carry on that business on the premises. It is not, however, shewn that the defendant has threatened, or intends to do, or to cause, or to permit it to be done, any act whereby the license may become forfeited or refused; and therefore the injunction must be displaced." And Lord *St. Leonards* then observes: "That, therefore, is an authority directly against the defendant, because it shews that if there had been an intention to break the negative covenant, this court would have granted the injunction."

Roslin
v.
Joelin.

Another case decided by Sir *Launcelot Shadwell* was also referred to by Lord *St. Leonards*, *Rolf v. Rolf*, (a) as, like *Hooper v. Brodrick*, inconsistent with the Vice-Chancellor's decisions in *Kemble v. Kean*, (b) and *Kimberley v. Jennings*, (c) and which two latter cases were overruled in *Lumley v. Wagner*. I think the law is now fully settled upon that point.

Judgment.

The difficulty of carrying out such an injunction as is asked for, and any order or the decree that may be made in the cause, is next objected, as a reason for refusing the injunction; and the alleged uncertainty of the contract, which is also objected, may be taken in connexion with it.

I may observe in the first place, that these objections are not properly to the jurisdiction; but to the discretion of the court, in the exercise of it; the court exercising or declining to exercise its power in such cases, according as its powers may or may not be properly and beneficially exercised in any particular case.

Taylor v. Partington, (d) is referred to on the question of uncertainty. The bill was for specific performance of an agreement for the lease of a house, and the Master of the Rolls decided for the plaintiff. Upon appeal, the

(a) 15 Sim. 85.

(c) 6 Sim. 341.

(b) 6 Sim. 333.

(d) 7 D. M. & G. 328.

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Lords Justices held the agreement too uncertain. The offer on the part of the proposed tenant, which was by letter, contained the words: "if put into thorough repair," and "the drawing-room we should require to be handsomely decorated according to the present style: paint is required both inside and outside, although perhaps for some parts one coat might be sufficient," and the Lord Justice *Knight Bruce* said shortly, that it appeared to him that these expressions imported uncertainty into what might otherwise have amounted to an agreement sufficiently definite for the court to enforce. The Lord Justice *Turner* concurred.

In *Collins v. Plumb*, (a) an application for an injunction was refused, partly because it could not be conveniently or properly carried out. Certain proprietors of water works, which were in part supplied from a well of water, sold certain freehold premises with the well; and took from the purchaser a covenant not to sell or dispose of the water from the well, to the injury of the proprietors of the water-works. Lord *Eldon* felt the difficulty of enforcing such a covenant, and said: "I never met with such a covenant as this, upon which I must try in each instance whether the act of selling the specified quantity of water is a prejudice to the proprietors of these water-works;" again, "upon every application to commit for breach of the injunction, the only mode of giving effect to the decree, a trial must in each instance be directed to ascertain whether that act which might be done without injury to the plaintiffs, has been done without injury. Upon these grounds, and the plaintiffs not having thought proper to reserve this well, but resting upon this covenant, there is the covenant," so Lord *Eldon* said, and left them to their remedy at law.

The case of *Collins v. Plummer*, (b) seems to have been decided very much upon one of the grounds taken

(a) 16 Ves. 454. (b) 1 P. Wm. 104.

1859. by Lord *Eldon* in the last case, the parties choosing to rest upon their covenant. Lord *Hardwicke*, after observing that the covenant being in the same deed with the settlement, proved that the conveyancer knew that the father might suffer a recovery; and that it was an entail in him, observed: "it is plain that the intention of the deed was that the parties should rely and depend on the security of the father's covenant; and equity ought not to vary or alter the security which the other side has agreed to accept of, for that would be going beyond, and consequently against, the intent of the parties." I have noticed this case somewhat out of its proper place.

In *Pollard v. Clayton*, (b) relief appears to have been refused principally on the ground of delay, taking into account the nature of the subject matter of the contract; but Sir *Page Wood* intimated certainly that he would have refused it from the extreme inconvenience of the court having to carry such a contract into execution, and which he states thus forcibly: "I should, therefore, have to make a decree on the one hand that the defendants continue the working of their colliery, involving the employment of their capital and men, and all the other preparations necessary to raise 500 tons per week; and on the other hand, that the plaintiffs continue the draining of the work so as to enable these 500 tons a week to be raised. I can scarcely conceive a contract more difficult to be executed through the medium of a court of equity, or one in which more incessant applications must necessarily be made, to know whether, on the one hand, the defendants are putting their best strength, in order to raise with a given number of workmen, at a given rate of wages, the stipulated quantity of 500 tons per week; and whether, on the other hand, the plaintiff is performing his contract with full effect, in draining sufficiently and adequately the works which are in operation."

On the other hand, there are cases which shew that

(a) 1 Kay & J. 462.

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difficulty, unless it amounts to something like impracticability, will not deter the court from directing specific performance in a proper case. In *Storer v. The Great Western Railway Company*, (a) the plaintiff had withdrawn his opposition to a bill before parliament upon the *Railway Company* agreeing to purchase so much land as was necessary for their purposes, at a price named, and to construct, and for ever thereafter maintain one neat archway, sufficient to permit a loaded carriage of hay to pass under the archway, at such place as the plaintiff, his heirs and assigns should think most convenient, in his pleasure grounds, and should form and complete the approaches to such archway. To a bill for specific performance, it was objected that the performance of the agreement was so difficult as almost to be impossible. But what is the answer of Sir *Knight Bruce*: "If the thing be reasonably possible, it must be done. The difficulty and expense of performing the contract do not necessarily form an objection." "There is no difficulty Judgment. in enforcing such a decree. The court has to order the thing to be done, and then it is a question capable of solution whether the order has been obeyed."

In the later case of *Sanderson v. The Cockermouth and Workington Railway Company*, (b) the court decreed specific performance of an agreement, which it was admitted was very difficult of execution. The marginal note sufficiently describes the nature of the case. "A railway company about to sever the plaintiff's land by their railroad, agreed to purchase the necessary portion of land subject to the making such roads, ways, and slips for cattle as might be necessary." In the course of his judgment the Master of the Rolls remarks: "It must be admitted, that it is very difficult to execute an agreement expressed as this is; but the difficulty does not seem to me to be such as to make it proper for this court to decline exercising jurisdiction over the matter in dispute

(a) 2 Y. & C. ch. 748.

(b) 11 Bev. 697.

1859. between the parties. The railway of the defendants
 severes the plaintiff's land—divides it into two parts.
 Under the agreement as expressed, the plaintiff is entitled
 to have such roads, ways and slips for cattle as may be
 necessary. The word "necessary" must receive a
 reasonable interpretation; and I consider the expres-
 sion to mean such roads, ways and slips for cattle, as may
 be necessary and proper for convenient communication
 between the several portions of the plaintiff's land."

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It may be conceded that the court would not have
 decreed specific performance in this case if the works con-
 tracted to be performed had been upon the plaintiff's
 own land; but that only shews that the court will
 not interfere when the party has a sufficient remedy
 without coming to this court, while the cases shew that
 when he has no such remedy, the mere difficulty of carry-
 ing out its orders will not be an obstacle in the way of
 the court interposing in a proper case. I see no insuper-
 able difficulty in this case; I doubt if there is any very
 serious difficulty, at least in the way of the present
 injunction.

Judgment.

BILTON V. BLAKELY.

Partnership—Rights of surviving, and of executors of deceased partner.

Although a surviving partner may not be chargeable with fraud or
 misconduct of any sort, still when there is a difference of opinion
 between him and the representatives of his deceased partner as to
 the mode of winding up the estate, it would seem that they are
 entitled to the assistance of this court for that purpose, through the
 medium of a receiver and sale: *ESTEN, V. C., aditante*, where the
 suit is unnecessarily instituted and the accounts and collection of
 outstanding debts will occupy some time, and an immediate sale of
 the estate would not be advisable.

This was a motion for a decree to wind up the part-
 nership business, which had, for some years, been carried
 on between the defendant and the late *George Bilton*.
 The facts giving rise to the suit appear sufficiently in the
 report of the case on the motion for injunction and
 receiver, reported ante volume VI., page 575.

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Mr. *McGregor*, for the plaintiffs.

Mr. *Fitzgerald*, for the defendant.

1859.

Bilton
v.
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The cases cited and points relied on appear in the judgment.

THE CHANCELLOR.—The plaintiffs' testator and the defendant entered into co-partnership as retail dealers in dry goods, in the month of March, 1855, for a period of seven years.

The written articles were not produced, but it was admitted that they contained no provision for winding up the affairs upon dissolution.

The capital was furnished, almost, if not altogether by *Bilton*, who died in May, 1858, largely indebted, and greatly in advance to the partnership.

Judgment.

Upon the death of *Bilton*, the plaintiffs, who are his personal representatives, proposed either that the assets of the partnership should be realized at once by an immediate sale of the stock, which was of considerable value, or that they should be admitted to some share in winding up the business.

The defendant refused to allow the plaintiffs to have any share in winding up the business except that he permitted them to inspect the books of account, and he insisted upon selling the stock by retail at the usual place, and in the usual course of business, that being in his judgment the most prudent mode of dealing with the property. The plaintiffs thereupon filed their bill for a sale and receiver.

It is surprising to find the law upon such a point still unsettled. That the partnership was dissolved by the death of *Bilton* is clear; and it may be now taken, I

1859.

Bilton
v.
Blakely.

think, as settled law, that the surviving partner and the personal representatives of the deceased became there-upon tenants in common of all the partnership effects. That point was expressly decided by the Court of Exchequer upon great consideration in *Buckley v. Barber*, (a) and upon that point at least, I see no reason to doubt the accuracy of their decision. (b)

But assuming death to be in some respects a dissolution, it is said that for the purpose of winding up the business the partnership must be considered as still subsisting, and that the surviving partner is invested for that purpose with a *jus disponendi* by which he has the right and power to dispose of the whole effects of the partnership. There is much to be found in text writers of deserved celebrity, (c) and in the opinions of eminent judges (d) to countenance that proposition, but it would seem inconsistent in some respects with settled principles. If it be true that the right of a partner to bind his co-partner is a branch of the law of principal and agent, (e) and if it be also true that the authority of an agent is determined by the death of the principal, (g) then it is difficult to understand how a surviving partner can make title to any thing more than his own share of the partnership effects. Upon that point the Court of Exchequer entertained very great doubt in *Buckley v. Barber* to which I have already referred, and I have not found any subsequent case which materially affects the question.

Judgment.

But, assuming the existence of such a *jus disponendi*, as the defendant contends for, a further question arises here as to the extent and duration of that power. Assuming that the surviving partner may dispose of the

(a) 15 Jur. 63.

(b) Story on Partnership S. 342; Collyer on Partnership, S. 129; Wilson v. Greenwood, 1 Swan, 482.

(c) Story on Partnership, S. 324 & 344.

(d) Harris v. Cricket, 5 M. & S. 341; *Ex parte* Williams, 11 Ves. 5; Crawshaw v. Maule, 1 Swan, 507.

(e) Ernest v. Nichols, 6 H. L. 417.

(g) Jacques v. Worthington, ante p. 192.

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effects with the consent of the representatives of the deceased, can he do so when the personal representative expressly dissents? It must be admitted that there are cases which go to shew that the personal representative of a deceased partner is not entitled to a receiver except in case of misconduct. (a) But I should have great difficulty in following those cases. Upon a dissolution by death or otherwise, each partner is clearly entitled to have the assets realized by sale where, no mode of winding up has been agreed upon. Now if the parties cannot agree as to the mode of sale, surely each must have a right to the assistance of this court for the purpose of having that accomplished in such way as the court may consider most beneficial for all. If there be such a right, then, when the dissolution has been by act *inter vivos*, as to which I have little doubt, (b) I am unable to discover any principle upon which it can be denied when the dissolution has taken place by death. Although the surviving partner may not be chargeable with fraud, or with misconduct of any sort, still his mode of winding up the business may be injudicious and injurious to the estate of the deceased partner. And where that is the case; in other words where there is a difference of opinion as to the mode of winding up, I am strongly inclined to think that the representative of the deceased partner is entitled to the assistance of this court, through the medium of a receiver and sale.

1859.

Bilton.
v.
Blakely.

Judgment.

But it is unnecessary to decide that point here, because I take it to be clear that the course which this defendant insisted upon following, is one which he had no right to adopt. These gentlemen were retail dealers. Mr. Bilton died in May, 1858, and from that time until November, 1858, that is for a period of six months, the shop was kept open against the will of the plaintiffs, and

(a) Hartz v. Schrader, 8 Ves. 317; Harding v. Glover, 18 Ves. 281, and see Freeland v. Stansfield, 2 S. & Giff, 470.

(b) Davis v. Amer, 3 Drew. 69; Fraser v. Kershaw, 2 K. & J. 502; Butchart v. Dresser, 4 D. M. & G. 545.

1859. the goods sold over the counter as if no dissolution had taken place; and the proposition then was, that that mode of disposing of the stock should be continued for twelve months longer. I express no opinion as to the prudence or imprudence of that mode of winding up the business. Mr. *Gilmour*, who is a much better judge than I can be, swears that he considers it prudent. But I am clear that it was not such a mode of winding up the affairs as the plaintiffs were bound to submit to, (a) and I think it clear that they are entitled to the usual decree and to a receiver.

ESTEN, V. C.—After reading his judgment on the former motion, proceeded as follows: The foregoing judgment I pronounced on the motion for an injunction and receiver, when I understood the only point to be argued before me was the abstract doctrine of law, applicable to the case of dissolution by death. I desire to add a few Judgment. remarks to that judgment in reference to the motion for a decree. I think, as I then observed, that it is the province of the surviving partner to settle the affairs of the partnership, out of court, subject to a right of inspection on the part of the representatives of the deceased partner, just as it is the province of the executor out of court to settle the affairs of the estate. Out of court the legatees cannot interfere with the executor; nor the representatives of the deceased with the surviving partner. The executor, in the one case, and the surviving partner in the other, may be acting as prudently as possible, and it may be wise in the parties to whom they are respectively accountable, to allow them to proceed without interference; but if they become impatient and commence suits, the court must entertain them, and at the hearing will order the assets to be realized, the debts to be paid, and the surplus or residue to be distributed in both cases, and will, if it see fit, and probably in general, appoint a receiver, and grant an injunction.

(a) Story on Part. Ss. 243, 347.

If, however preliminary ing, I apprehend that the executor himself, before the hearing of the matter, that the executor's affairs of the estate with as little interference as possible, and the court, in an administration in the other. winding up of the estate I apprehend of the debts, in this stage to have been the accounts occupy some is not advisable obliged to interfere in all cases it at the hearing tion granted. but if Mr. Blakeney in settling the estate not settled yet, hearing, an injunction. In other respects decree for an administration in partnership affairs.

If, however, an injunction and receiver are asked in a preliminary stage of the proceedings before the hearing, I apprehend the court will require it to be shown that the executor or surviving partner has misconducted himself, before it will accede to such an application; but at the hearing it has in general no choice, and must take the matter into its own hands. I think the law intends that the executor and surviving partner shall settle the affairs of the estate and the partnership respectively, with as little delay as possible, but with a due regard to the interests of all parties; but they are accountable have, of course, a right to invoke the aid of the court, which must sustain the suit, and decree an administration in the one case, and a winding up in the other. At the hearing, in a suit for the winding up of the dissolved partnership, it is of course, I apprehend, to decree an account, a sale, payment of the debts, and a division of the surplus; but even in this stage of the proceedings, if the suit appears to have been unnecessarily and wantonly instituted, and the accounts and collection of the outstanding debts will occupy some time, and an immediate sale of the effects is not advisable, I apprehend that the court is not obliged to interfere with the surviving partner, and as a matter of necessity to grant an injunction and receiver. In all cases it exercises its discretion, although in general at the hearing a receiver will be appointed and an injunction granted. In this case I know nothing of the facts; but if Mr. *Blakely* has been engaged eighteen months in settling the affairs of the partnership, and they are not settled yet, I think certainly the cause being at the hearing, an injunction and receiver would be proper. In other respects I think the decree should be the usual decree for an account and arrangement of the partnership affairs.

1859.

Bilton
v.
Blakely.

Judgment.

1859.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Sir James Buchanan Macaulay, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Spragge, and the Hon. Mr. Justice Richards.*]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

WRAGG (DEFENDANT IN THE COURT BELOW) v. BECKITT
(PLAINTIFF IN THE COURT BELOW.)

Trustee and cestui que trust—Dormant Equities.

The decree pronounced in this case as reported ante volume vi, page 454, reversed on appeal, and the bill in the court below dismissed with costs.

Held per Curiam,* [SPRAGGE, V. C., dissenting,] that the act relating to dormant equities (18 Victoria, chapter 124) applies as well to express trusts as to trusts created by implication of law.

The facts are clearly set forth in the report of the case in the court below.

Argument. Mr. Eccles, Q. C., for appellant.

Mr. Mowat, Q. C., and Mr. Roaf, for respondent.

SIR J. B. ROBINSON, BART., C. J.—The land in question in this suit is the west half of lot number 5, in the first concession of the township of York, and its broken front.

Judgment. The object of this suit was to procure a degree declaring the defendant to be a trustee of the premises, and compelling him to carry out the purposes of the trust.

It stands admitted in the case that on the 19th

* The Chancellor was absent when judgment was pronounced. It may be stated, however, that His Lordship is known to retain the views expressed in his judgment delivered in the court below.

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December, 1834, one *Christopher Elliott*, now deceased, was the owner in fee of the premises; that on that day he made a conveyance of the premises to *George Busby Willard*, who is also now deceased, for a consideration of £377 and upwards, and that *Willard* took this conveyance as agent of the defendant *Wragg*, and in February, 1835, made a deed of the land to the defendant.

1859.

Wragg
v.
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Willard had gone into possession of the land, about the middle of November, 1834, and for many years after the land was thus conveyed by him to *Wragg* he was in possession of it as *Wragg's* agent; and since he left it, *Wragg's* possession by himself, his tenants or agents, has continued to the present time, except that a portion of the land having been laid out into village lots, some parts of it have been sold by *Wragg*, through his agents, to other persons who have occupied and built upon them.

The bill in this case was filed on the 14th June, 1855; *Willard* having died about three years before.

Judgment.

It is complained on the part of the plaintiff, that the taking of the conveyance by *Willard* from *Elliott*, and his conveying the property afterwards to the defendants was a flagrant breach of a trust accepted by *Willard* and others for the benefit of the plaintiff and his creditors, under a deed executed by the plaintiff on the 13th of November, 1834, which is in evidence in the cause; and as it is alleged that *Willard*, throughout the transaction, acted for, and represented the defendant *Wragg*, it is insisted that there is sufficient in the evidence to affect the defendant with the trust, and to entitle the plaintiff to the aid of the Court of Chancery in compelling him to carry it out. The defendant maintains that whatever may be the facts of the case upon the merits, the plaintiff cannot support the suit, for that he is barred by the Statute of Limitations, 4 Wm. IV., ch. 1, secs. 28, 32, 33, 34; and 2nd, that our statute 18 Vic., ch. 124,

1859. included "An Act to amend the law as to Dormant Equities, prevents the defendant's legal title from being disturbed under pretence of the equities set forth in this bill; and 3rd, that if the plaintiff be not positively and absolutely barred by either of these statutes, he is precluded from successfully prosecuting his suit, by his laches, his long acquiescence in the transactions he now complains of, and by the fact that the plaintiff having instituted a suit in equity, in 1839, against this defendant and *Willard*, who was then living, upon the same alleged grounds of complaint, such suit was with the plaintiff's assent, and at his own instance, after it had been fully answered by *Willard*, dismissed with costs.

Now, in the first place, as to this suit being barred by the Statute of Limitations, 4 Wm. IV., ch. 1. The 32nd section of that act gives in effect the same time for bringing a suit in equity for any land or rent as is given Judgment. by the same statute for bringing an action at law for the recovery of land or rent, and with the same exceptions on account of disabilities, I assume, as are made in favour of a person having claims at law.

One of these disabilities is absence from the province.

The plaintiff, it is proved, left this province in October or November, 1834, and never returned to it for any period, however short, until some time in 1844, in which year he did return to Upper Canada.

The original bill in this cause was filed the 14th June, 1855, which was more than ten years after the removal of the disability on account of the plaintiff's absence from the province, and more than twenty years after the plaintiff's alleged equitable right accrued—which I take to be in December, 1834—when the conveyance from *Elliott* was taken, which the plaintiff complains of as being in violation of the trust.

Prima facie, therefore, this suit is barred by lapse of time, under the 28th clause of the statute.

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It certainly i land is vested made a trustee and others, of the land vested upon any trust. the parties of th the estate or int bond from *Ell* Co." was subscri can make no dif the signature ha one of his part authority, since named in the dec and it is not prov from *Wragg*, or t for them.

But it is contended for the plaintiff that the Statute of Limitations throws no such difficulty in his way, for that he is entitled to the benefit of the 33rd clause of that statute, which enacts "That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust* to bring a suit against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued at, and not before the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed only to have accrued against such purchaser, and any person claiming through him."

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Wragg
v.
Beckett.

Here *Beckett*, *cestui que trust* of *Willard*, is suing *Wragg*, not *Willard*, and the question is, whether this should be regarded as a suit brought against the trustee, or any person claiming through him, within the meaning of that clause.

Judgment.

If it should not be so regarded, then the plaintiff can have no advantage under that clause.

It certainly is not a suit against a trustee in whom the land is vested upon any express trust, for *Wragg* is not made a trustee by the deed from the plaintiff to *Willard* and others, of the 13th November, 1834, neither was the land vested in him by that deed, or by any other upon any trust. He is not named in the deed as one of the parties of the second part, who are to take in trust the estate or interest which the plaintiff held under his bond from *Elliott*; and though the name "*Wragg & Co.*" was subscribed by *Willard* as their attorney, that can make no difference, and it would have made none if the signature had been written by *Wragg* himself, or by one of his partners, or by any other person by his authority, since *Wragg & Co.* were not among the parties named in the deed. It was not in fact signed by himself, and it is not proved that *Willard* had any legal authority from *Wragg*, or from *Wragg & Co.*, to sign such a deed for them.

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Beckitt.

The estate, or rather *Beckitt's* interest in it, is granted upon certain trusts to the parties of the second part, of whom *Wragg* is not one.

But *Willard* was clearly made a trustee by the deed of the 14th November, 1834, because, though he did not execute the deed in his own name, but in the name of *Wragg & Co.*, yet by the deed the interest of *Beckitt*, under his contract, was conveyed to *Willard* and the others in trust, and he accepted and acted under the trust for some short period, and the interest vested in him and the others of the second part, although he did not in his own name sign and seal the deed.

Then *Willard*, being a trustee, and the defendant *Wragg* having taken a conveyance of the estate from him in February, 1835, should *Wragg* be regarded as a person claiming through *Willard*, the trustee within the 33rd clause, so that this suit against him can be held to be unlimited as to time? I am not clear that he can, for upon the evidence it is plain that *Wragg* took the estate in effect from *Elliott* upon a contract for purchase made with him through *Willard*, as *Wragg's* agent, and not by any means under a chain of title of which the trust deed forms any part.

Judgment.

The meaning of the 33rd clause is, that in the case of an express trust, there shall be no limitation of time, as against the *cestui que trust*, when he is seeking a remedy against his trustee, and that the heir, devisee, or assignee of the trustee, shall be no more protected by the Statute of Limitations than the trustee himself, until some one has purchased for a valuable consideration, under that chain of title.

Here it is true that *Wragg* does literally claim through *Willard*, who was one of the trustees, but he did not take from him, and does not claim through him any interest that had passed under the trust deed. On the contrary, he claims through *Willard* a legal title to the

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estate, which *Willard* took not from *Beckitt*, but directly from *Elliott*, and which was not accompanied with any express trust, or a trust of any kind, from *Elliott*. *Wragg* took, indeed, by his deed a title paramount to that of the trustees, and of the plaintiff, who had conveyed to them, and who did not affect to convey to his trustees the legal estate, for he had it not.

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Beckitt.

If, under these circumstances, *Wragg* can be held (which I doubt) to be claiming through *Willard* as trustee, within the meaning of the 33rd clause, merely because he took the estate from *Elliott*, through *Willard* as his agent, and, for all that appears, without any knowledge of the previous contract between *Elliott* and the plaintiff, or of the deed that had been executed between the plaintiff and the trustees in November, 1834; the effect of that would be that the Statute of Limitations would not run against the plaintiff *Beckitt*, as *cestui que trust*, until the time at which the interest, whatever it was, which the trustees took, had been conveyed to a purchaser for a valuable consideration. Now *Wragg*, on the 7th February, 1835, took for a valuable consideration, not indeed such land, which means any interest in land capable of being inherited, as had been conveyed by *Beckitt's* deed, under an express trust, but the whole and absolute legal estate in the land which *Beckitt* had contracted to buy—and this was more than twenty years before the filing of this bill—ten years also having elapsed since the ceasing of any disability on account of *Beckitt's* absence.

The 33rd clause does not in terms deprive the party who purchases for a valuable consideration of the protection of the statute, when he purchases with knowledge of the trust; and if we could add that qualification to the statute, as flowing from the principles of equity, and if *Wragg's* be a title which comes within the meaning of that clause at all, we should then have to consider whether the evidence warrants us in holding

1859. that *Wragg* did in fact purchase from *Elliott* with notice. He does not admit knowledge of the trust when he took his title, nor do I see it proved. But *Willard*, his agent, knew all about it, that is very clear; and I assume that if notice would be material, the defendant should be held bound by the knowledge of the facts which *Willard* possessed, since he accepted the title procured by *Willard's* agency, and transmitted through him.

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Beckitt.

But on the whole, for the reasons I have stated, I have not come to the conclusion that the defendant is not protected by the Statute of Limitations, 4 Wm. IV., ch. 1, sec. 32, notwithstanding the enactment contained in the 33rd section, the time having run out which is sufficient to bar the remedy, notwithstanding the temporary disability from absence, and the 33rd section, not seeming to me to apply under the circumstances of this case, where the defendant is not claiming under or through the deed which created the trust, but through a title paramount.

Judgment.

But, secondly, if my brothers should come to a different conclusion on this point, as the Court below has done, then we have to consider whether the defendant *Wragg* is entitled to avail himself of the protection of our "Dormant Equities Act," 18 Vic., ch. 124. That statute makes a peculiar provision, suggested by peculiar circumstances. It enacts, section 1, that "no title to or interest in real estate, which is valid at law, shall henceforward be disturbed or otherwise affected in equity, by reason of any matter or upon any ground which arose before the passing of the Chancery Act (7 Wm. IV., ch. 2), or for the purpose of giving effect to any equitable claim, interest or estate, which arose before the passing of the said act, unless there has been actual and positive fraud in the party whose title is sought to be disturbed or affected."

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claim under *Elliott*, and his seisin therefore stands admitted. He conveyed to *Willard*, who conveyed to *Wragg*; and as *Elliott* had made no legal title to any other person before he had conveyed to *Willard*, and has, so far as appears, conveyed to no one since, and there is no surmise of *Willard* having practised any fraud upon *Elliott*, I assume that *Wragg's* title derived through *Willard* is *valid at law*, and so far comes within the statute relating to Dormant Equities. Then this being so, can this suit be maintained in the face of that statute? I think it cannot. The statute is very peremptory in the part of it which I have cited, and which forbids the disturbing or seeking to affect, upon equitable grounds, a title to real estate which is valid at law, by reason of any matter or upon any ground which arose before the passing of the Chancery Act, and which act was passed on the 4th of March, 1837. The provision is absolute that it shall not be done, and one only exception is made—" *unless there has been actual or positive fraud in the party whose title is sought to be disturbed or affected.*"

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v.
Beckitt.

Judgment.

It has been argued that in addition to the only exception made in the statute, of cases of *actual and positive fraud in the party whose title is sought to be disturbed*, we should engraft upon the statute another exception—of cases of *express trust*, for that otherwise cases of such plain and palpable injustice might occur, as it is certain the legislature could never have intended should go without a remedy; as for instance, if this plaintiff, *Beckitt*, had been legal owner of the whole estate, and had, before the passing of the Chancery Act of 1837, conveyed it to the defendant, *Wragg* upon trust to sell, or to hold it for his use, and if the defendant in disregard of that trust had either before the passing of the Chancery Act, or since, insisted upon retaining the estate and applying the profits to his own use, it has been said it would be monstrous, and so it

1859. would, if the Dormant Equities Act should have the effect of leaving the *cestui que trust* without remedy.

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Beckitt.

Whenever a case of that kind shall arise, it will be time to determine whether the legislature has made a provision which will admit of such direct and positive injustice, and which would seem, as has been remarked, so inconsistent with the caution observed in framing the Statute of Limitations, 4 Wm. IV., ch. 1, sec. 33.

It will probably then be urged that the 18 Vic., ch. 124, cannot be made to shelter such gross injustice, for that the case of a trustee using and enjoying as his own, or alienating for his own purposes an estate which he held upon an express trust for the use and benefit of another, would be a case of *actual and positive fraud*, such as would come within the exception which the act does in terms contain; or that the case itself, without regard to the exception, should be held to be one which would not in fact come within the statute at all, which seems rather to point to equities growing and *arising out of* transactions and conduct of parties in acquiring or dealing with estates before the passing of the Chancery Act, than to the simple case of a direct and express trust accompanying the transmission of the legal estate. The language of the clause is, "by reason of *any matter or upon any ground which arose* before the passing of the said act." The mere trust itself, as it stood expressed in the deed, would not in such a case furnish the ground or occasion of resorting to a Court of Equity, but the ground of relief would be the breach of that trust, by doing or attempting something inconsistent with it, or by refusing or neglecting to carry out the trust. Unless such cause of complaint arose before the passing of the Chancery Act, the mere fact that the trust had been expressly created before that act would probably not be considered as bringing the case under the statute respecting Dormant Equities; and if the

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fact of the breach of trust in any such case having occurred before the Chancery Act should be determined to bring a case even of express trust within the act, so as to preclude relief, (which I do not now hazard an opinion on,) it might at least be observed as bearing upon the allegation of hardship, that the act or conduct complained of must in any such case have been submitted to for the long interval of eighteen years, between the passing of the Chancery Act in 1837, and of the Dormant Equities Act in 1855.

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Beckett.

But it was not material that I should have said so much upon this point, for the case before us is very far from being a case of *express* trust between these parties.

Whether upon the facts proved the defendant should, upon the principles which govern courts of equity, be decreed to be a trustee for the plaintiff and the creditors, although he was not constituted a trustee by any deed or instrument, it is a different question, and where the facts from which a trust would be *implied* took place before the passing of the Chancery Act of 1837, I think it is clear that the Dormant Equities Act will not permit the holder of valid legal title to be disturbed in his estate, on the ground of such implied or constructive trust, unless where we should be warranted by the evidence in holding that there had been actual and positive fraud in the party whose title is sought to be disturbed.

Then is there proof of such fraud, that is of actual and positive fraud, in the defendant *Wragg*; for it is his title, not *Willard's*, that is sought to be affected by this suit? The words are very express and emphatic. We must have proof of actual and positive fraud, as something distinct from implied and constructive fraud. We are to ask ourselves whether we see proof of any thing done by *Wragg* with a fraudulent design, or any thing done by his agent with his permission or

1859.

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Beckitt.

knowledge, that was actually and positively fraudulent. If *Wragg* were bringing an action upon his title derived from *Elliott*, and were resisted upon the ground that a fraud had been practised upon *Elliott* by his agent *Willard* in obtaining a conveyance from him, then no doubt he could no more resist the consequences of proof of any such fraud practised by *Willard* in obtaining the title for him, than if the same fraudulent means had been used by himself; for the effect upon the interests of the person aggrieved would be the same. But this is no case of that kind. The defendant has been left for very many years in possession of the estate. It is not *Elliott*, or his heirs, or any person claiming by subsequent assignment from him, that is objecting to the defendant's title, nor indeed is any one excepting to his legal title, but he is attacked on the ground of an equity, stated to have arisen from a trust by which the estate in his hands can be affected.

Judgment.

Now, as I have already stated, the defendant, *Wragg*, was not made a trustee by the deed of the 13th November, 1834, either expressly or by any implication or construction. The confidence placed in a trustee is personal. It depends on the opinion which those for whom he is to act have of his integrity, his diligence, and his fitness in other respects to execute the trust. No one would be appointed a trustee in such a deed as that made by the plaintiff on the 13th November, 1834, merely because he was a creditor. Persons may be and often are selected for such trusts, who are not creditors; and even where creditors only are appointed, such alone are usually selected as are willing to undertake the trust, and can conveniently attend to it, and of whom it is thought that they will act uprightly, and are capable of acting efficiently. The evidence shews that *Willard* was especially selected, and was relied upon from his personal knowledge of the lumber business. Notwithstanding *Willard* signed the name of "*Wragg & Co.*" to the deed, as if they were parties of the second part,

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to take under the deed, which they were not, yet neither *Beckitt* nor his creditors had on that account any pretence for regarding *Wragg* as a trustee; nor is it reasonable to suppose that they imagined they had, for he was no dealer in lumber, but was a hardware merchant residing in Montreal, more than three hundred miles from the property in question. It was not likely that he could or would have accepted such a trust, if he had been asked to do so.

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v.
Beckitt.

All that we hear of the relation between *Willard* and the defendant is, that *Willard* was employed by him in keeping a shop in Toronto, for disposing of the defendant's goods. That would not, upon the general principles of agency, give any right to *Willard* to place *Wragg* in the situation of trustee, by making him a party to a deed of this description, without special authority from *Wragg* to do so.

If therefore, it be essential to proof of actual and positive fraud in *Wragg*, to shew that there was a fiduciary relation between *Wragg* and *Beckitt*, or between *Wragg* and *Beckitt's* creditors, and that fraud existed in the breach of the obligation which such a trust imposed, the plaintiff's case fails, for there was no such fiduciary relation.

Judgment.

That *Willard* was a trustee is clear, and what is complained of as being done by him has the appearance of being altogether inconsistent with his duty as a trustee, and so a violation of the trust; but we must consider that the account we have of these transactions is given more than twenty years after they took place, and not till some years after *Willard's* death, who could best have told us what he did, and upon what grounds he acted.

It seems that there was a bill filed against *Willard*, and the now defendant, *Wragg*, by *Beckitt* and some of

1859. his creditors as plaintiffs, so long ago as 1839, which bill was answered by *Willard* upon oath, and was afterwards dismissed with costs at the instance of the plaintiffs. It is stated that the suit was abandoned for the want of funds to carry it on, but this does not seem a satisfactory account of the matter, if the answer of *Willard*, whose conduct was impeached, was such as to shew that the charge of breach of trust was one that he had it not in his power to repel.

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Beckett.

What answer was given to the suit by *Willard*, I confess I should like to have seen, if it could have been properly before us; for the case is certainly a very strange one, as it stands upon the evidence, and in the absence of explanations which I should have thought might have been elicited from some of the witnesses that were examined, but which are totally wanting in this case.

Judgment.

For all that appears, the amount *Beckett* owed when he made the deed may have equalled or exceeded the whole value of the interest and property he was assigning; for though he had made large improvements, he may not have paid for them, and it is probable that his debts were in a great measure incurred in making these improvements. He was apparently insolvent, for he left the province immediately after, and remained away for years, during which time we have no evidence that he made any inquiry, or exhibited any anxiety about the use made of the property that he had assigned. His creditors gave him a release when he executed the assignment, and in fact they seem to have given him a release in anticipation of the assignment, for the release is executed in July, and the assignment in November following.

The creditors, therefore, having given up all claim upon *Beckett* in consideration of the assignment, were the persons who we must suppose would be most injured

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by any misconduct of *Willard* in the trust, if indeed they were not the only persons who could be substantially injured. They, many of them, lived just at hand, and were men in business, and *Willard* also living here, and a Court of Chancery being open to them from 1837, we hear of no attempt by the creditors to call the trustees to account, except that the names of three of them were joined with that of *Beckitt* as plaintiffs in an abortive suit brought in 1839, and not persevered in, but allowed to be dismissed with costs ten or eleven years afterwards.

Ten or twelve years then elapsed without any further attempt to call either *Willard* or the defendant to account; and at last this suit, like the former, is instituted, as I infer from the evidence, at the instance of the plaintiff. It is not easy to understand this apparent indifference on the part of the creditors, if they were satisfied that there had been grossly fraudulent conduct on the part of *Willard*, and for which a Court of Equity could justly hold *Wragg* liable. That *Beckitt*,^{Judgment.} returning to this country after ten years absence, should have let ten years more elapse before he brought the present suit, and should have then proceeded in it after *Willard's* death, cannot surprise us; for about the time of the filing this bill there had taken place that extraordinary increase in the value of real property in and near Toronto which has, as we have seen, tempted many to advance what the legislature has called "dormant equities," upon very much lighter grounds than seem to have existed in this case.

What is insisted upon is, that *Wragg* should be made to give up the estate, because his agent, in obtaining it, committed what the law deems a fraud, not upon *Elliott*, from whom he obtained the title, but upon other parties, in regard to whom *he* stood in the relation of trustee.

Now, as to the transactions that took place in 1834, and the conduct of *Willard* and of the creditors, his co-trustees,

1859. it is altogether of so singular a character, and the evidence is so loose and obscure—especially upon points which one might suppose could have been made much more clear by the witnesses that were examined—that really I am far from satisfied that we should be safe, at this distance of time, in imputing either fraudulent conduct or fraudulent motives to *Willard*, with so little hesitation as the plaintiff desires we should.

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Beckitt.

And as to the defendant *Wragg*, I think it far from improbable that he may have been entirely innocent of anything wrong, either in intention or conduct. Consider how much out of the common course the circumstances were. *Beckitt* had no interest whatever in the property, further than that he held *Elliott's* bond to make him a deed, provided he should pay him £200 on the 14th November, 1834, and £157 more in two years from that time with interest.

Judgment. He had bargained for the property in 1832, and seems to have begun immediately to erect a steam saw mill upon it. As the iron work and machinery required for the purpose were in *Wragg's* line of business, it is probable that the debt to him was among the most considerable that he owed, though what the amount of that debt was, or of any or all of the debts against *Beckitt*, or what judgments there were against him in 1834 or afterwards is no where stated. But he seems to have been so much involved before the two years came round when he was to make his first payment to *Elliott* of £200, that he gave up in despair the hope of being able by any exertions of his own to pay for the property and keep it. His debts were pressing, and how did he propose to satisfy his creditors, or at least to quiet them so far that they would be content to let him depart from the province without paying them? Why, by the strange expedient of making over to his creditors all his interest in *Elliott's* property, for which he had yet paid nothing; nor, as it seems, was he able to pay any thing, although more than one half of the price which

he had agreed due. And November trustees to and premises doing so, a mill in operation the proceeds his £357 and all expenses the creditor himself.

There is in, or had 13th November receive from payment,) a saw mill *Beckitt's* credit well known can be paid that has been and may in provision his capital out provided by and kept go jurisdiction relieve *Beckitt* his contract and he was moment after his paying to circumstance make such an no effect which of which the that he was a

he had agreed to pay was then upon the point of falling due. And it is to be observed that the deed of the 13th November, 1834, does not give power to *Beckitt's* trustees to sell his interest, such as it was, in the lands and premises. On the contrary, it restrained them from doing so, and provides that they shall set the steam saw mill in operation as soon as they can, and shall, out of the proceeds of the lumber to be sawed, pay off *Elliott* his £357 as soon as they can; and after that shall pay all expenses attending the trust; and next, pay off all the creditors; and then pay the surplus, if any, to *Beckitt* himself.

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WRANG
Beckitt.

There is no proof whatever that *Elliott* was concurring in, or had any knowledge of this arrangement of the 13th November, by which the £200 which he was to receive from *Beckitt* on the 14th November, (his first payment,) was to be left to be paid out of the profits of a saw mill to be put in operation and kept at work by *Beckitt's* creditors out of their own funds. It is pretty well known, I believe, that the period when an estate can be paid for out of the profits of a steam saw mill that has been built upon it, must be exceedingly uncertain, and may in fact never arrive, especially where no provision has been made, apparently, for the supply of capital out of which the labour and stock are to be provided by which the saw mill is to be put in operation and kept going. There was at that time no equitable jurisdiction existing in Upper Canada, which could relieve *Beckitt* from the legal consequences of failing in his contract of purchase, by giving him any further day, and he was liable to be dispossessed by *Elliott* at any moment after the 14th November had passed without his paying the £200 due on that day. Under such circumstances it was absurd in *Beckitt* to pretend to make such an arrangement as he did, for it could have no effect whatever unless *Elliott* was concurring in it—of which there is no evidence, nor any evidence indeed that he was at all privy to the arrangement.

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v.
Beckitt.

What his conduct was when he became aware of it, does not seem to have been enquired into in this suit, though witnesses were examined who, I should suppose, must have been able to tell us.

It is remarkable how obscure the account is of what led to the abandonment of the trust deed. If *Elliott* altogether refused to pay attention to it, and gave proof that he intended to resume possession of his land, or to sell it to any other person who would buy,—since *Beckitt* had absconded, leaving him wholly unpaid,—that must have shown at once that the trust could not be carried out. The whole account of the *fi. fa.* said to have issued in *Lowe's* case, and what was done, or professed to be done under it, is strangely imperfect, and it seems surprising that more light could not be thrown upon that part of the case by the examination of the gentleman who was sheriff at the time of the transaction; or by some of his officers, or by documents that could be produced from his office.

Judgment.

If any object could have been answered by releasing *Beckitt's* property from the pressure of *Lowe's* execution for £40, it seems incredible that the other trustees and the creditors would have allowed the proposed arrangement to be broken up, rather than remove that difficulty by advancing so trifling a sum. It may, and I should think must, have been obvious to all, that without satisfying *Elliott*, the deed of the 13th November, 1834, must fall to the ground; and it may have been evident to *Willard* that the only chance any creditor had of securing his debt, was to place himself in *Beckitt's* position as regarded *Elliott*, and fulfil what *Beckitt* had failed in. Whether it was supposed that under *Lowe's* execution, or any other that might be expected, all the interest of *Beckitt* in the land was liable to be seized and sold, and that the person purchasing at such sale would have an advantage in dealing with *Elliott*, can only be conjectured; or whether *Elliott* himself may not have

supposed that he be protected endeavour to being brought *Willard*, we been in their they respectively as it stands aff sions; but I necessarily ac should come known to us. state of facts a proof of actual defendant *Wra* favour of the s protection of h And as to the g could be granted to the land, I th cap. 124, (if th suit, as at prese Chancery a disc think right un the lapse of tim in which it can the part of the have been best e

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supposed that he could only through a sale of that kind be protected against any claim that *Beckitt* might endeavour to make against himself. This suit not being brought until after the death of *Elliott* and of *Willard*, we do not see what explanation it might have been in their power to offer of the motives with which they respectively acted. As regards *Willard*, the case as it stands affords much ground for unfavourable impressions; but I do not feel at liberty to conclude that he necessarily acted with a fraudulent design, or that we should come to that conclusion if all the facts were known to us. And whatever may have been the real state of facts as regards *Willard*, I do not see any such proof of actual and positive fraud on the part of the defendant *Wragg*, as disentitles him to the effect in his favour of the statute 18 Vic., cap. 124, as regards the protection of his legal title to the property in question. And as to the granting any other relief to *Beckitt*, which could be granted without disturbing the defendant's title to the land, I think the second clause of the statute 18 Vic., cap. 124, (if the Statute of Limitations does not bar the suit, as at present I think it does,) gave to the Court of Chancery a discretion to interfere, or not, as they might think right under the circumstances; and considering the lapse of time, and the plaintiff's laches in this case, in which it cannot be said there was an express trust on the part of the defendant, I think that discretion would have been best exercised by dismissing the bill.

Judgment.

Some difficulty has been found in assigning a precise meaning to the words in the second clause of the Dormant Equities Act, "*In regard to any other claim or right,*" &c. I take this to mean, in regard to any equitable claim or right arising before the passing of the Chancery Act, to which effect can be given by the Court *without disturbing or otherwise affecting a title valid in law*. In regard to such claims or rights, I think the court is empowered to act as they may find to be just and reasonable, under all the circumstances of the particular

1859. case; and they are not prohibited from acting upon and enforcing such equitable claims, even in cases in which there has been no actual or positive fraud in the defendant. On the whole, my opinion is, that the judgment given should be reversed, and the bill dismissed with costs.

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It has been made a question by the reasons of appeal, whether the court below were right in refusing to allow the answer given by *Willard* to the bill filed against him in 1839, at the suit of this plaintiff, to be read in evidence. I dare say it was rightly rejected as a medium of proof in favour of the defendant *Wragg*, of any facts stated in it; but I am disposed to think it might have been properly received, for the purpose of informing the court what answer *Willard* had given to the alleged breach of trust charged against him, before the plaintiff *Beckitt* moved to have his own bill against him and *Wragg* dismissed with costs.

Judgment.

That, I confess, I should like to have seen. Where a plaintiff's action at law is met by a substantial defence on the merits pleaded in bar, and he then enters a *nolle prosequi* either as to the whole declaration, or to the part to which the defence is pleaded, he takes a step which, according to circumstances, may or may not conclude him. The plaintiff applying to dismiss his own bill, is more in the nature of a retraxt, which precludes all further proceedings for the same cause of action. As the practice in equity now is, both here and in England, the plaintiff could not afterwards have attacked *Wragg* upon the same matter of complaint. It was not so, however, at the time of *Beckitt's* bill in the first suit being dismissed; but I think it was material, and ought to have been allowed, that the court should know as a fact what statements had been advanced on the other side before *Beckitt* gave up his suit, and whether he gave it up before or after any evidence had been taken. The facts were then all recent, and the parties were living who could have given a clear account of transactions which are now so long gone by.

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SPRAGGE, V. C.—I have arrived at the same conclusion as a majority of the members of this court, retaining the same opinion as in the court below, namely, that the bill should be dismissed, but I do not come to this conclusion upon the same grounds as most of the other members of this court, so far at least as their judgment proceeds upon this, that cases of express trust are within the Dormant Equities Act.

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I cannot bring myself to the conclusion that express trusts are within the act. If they were, then if *Willard* were defendant instead of *Wragg*, the bill must have been dismissed as against him, and this even though the breach of trust had occurred just before the passing of the act. But the language of the act appears to me to be inapplicable to the case of express trusts, looking at that which is to be affected, and the grounds upon which it is to be affected. If within the act, the thing to be affected is the title to real estate in the trustee which is valid at law; the provision of the statute is, that such title shall not be disturbed or affected by any thing which arose before the passing of the Chancery Act, 1837. Suppose the section had ended there, and suppose a bill filed against an express trustee for a breach of trust occurring before 1837, could it with any propriety be said that the title of the trustee in the legal estate was sought to be affected by reason of the breach of trust? In truth the title of the trustee would not be sought to be affected at all; but the existence of that title, and the position in which it placed the holder of it relatively to his *cestui que trust* would be the plaintiff's *locus standi* in court. The clause goes on to provide that such legal title shall not be disturbed or affected for the purpose of giving effect to any equitable claim, interest, or estate which arose before the same date, 1837; now to take this literally and apply it to the case of express trusts, would make it necessarily apply to every case where the trust was created before 1837, however recently the breach of trust had occurred, or even if no breach of trust had occurred; for to a bill

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filed complaining of a breach of trust, or simply calling for an account of the trust estate, the short answer would be, this bill is filed for the purpose of giving effect to an equitable claim, interest, or estate, which arose before the passing of the Chancery Act.

The concluding words of the section, exempting from the protection of the act cases where there has been actual and positive fraud in the party whose title is sought to be disturbed or affected, would still leave the *cestui que trust* remediless in large classes of cases, *e. g.*, the common case of calling for an account of rents and profits; the case of the legal estate devolving upon the heir at law of the original trustee; and others might be suggested, cases where the right of the *cestui que trust* to relief is indisputably clear.

Judgment.

Take the case of a trust created by will or marriage settlement before 1837, to sell lands upon the youngest of several infants becoming of age, or afterwards, in the discretion of trustees; the right of suit might be barred, if express trusts are within the act, before even any right of suit accrued for not carrying out the trusts; for there is nothing in the clause to make the statute apply only to cases where there was a breach of trust before the passing of the act, or where the legal estate became vested in the trustee by breach of trust; and we cannot say that it shall apply only in such cases. If it applied to cases of express trust at all, it must apply in the cases which I have suggested. But not only would the consequence of so applying it be nothing less than monstrous, but for the reasons which I have offered, the language of the clause be, as it appears to me, altogether inapplicable to cases of express trust.

Other reasons were urged upon the same point by Mr. *Bennett*, one of the counsel for the plaintiff, in the *Attorney-General v. Grasett*, (the Hospital case,) which appear to me to be sound and weighty. He argued that the statute dealt only with adverse estates, where

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there was on the one hand an estate in land, valid at law, on the other, some equitable claim or interest, existing before 1837, hostile to it: that this is not at all the position of an express trustee, and his *cestui que trust*, where the estates of both co-exist by the same title, and the estate of the one is in equity the estate of the other. I think this a reasonable and just view of the statute, for though the statute does not use the word hostile, or any equivalent term, still its frame and language apply well to the position of parties having hostile interests in lands, and not to the position of an express trustee and his *cestui que trust*.

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For these reasons, and for those given by the Chancellor in his judgment in this case in the court below, I think cases of express trust are not within the act.

But for other reasons than because cases of express trust are within the Dormant Equities Act, I think this judgment plaintiff not entitled to relief.

Suppose *Wragg* a purchaser for value from *Willard*, but with constructive notice of the trust, would he be affected? *Willard* was an express trustee to whom, I think, the statute does apply. *Wragg* a purchaser for value, as to him, the statute would not, as a general rule, apply; but if he had actual notice his conscience would be affected, as with a purchaser under the registry acts; if he had constructive notice only, he would probably not be affected, as he is not under the registry acts.

As put by the defendant's answer, the conveyance from *Elliott* to *Willard* was taken by *Willard* as his agent. *Willard* paid *Elliott* for it with *Wragg's* money. *Willard* was a more trustee for *Wragg*, having purchased as his agent; there was then a resulting trust in favour of *Wragg* as between him and *Willard*, and *Willard* conveyed to him accordingly. Suppose *Willard* to have been at the same time a trustee for

1859. *Beckett* to rent this mill, and among other things, to pay the purchase money to *Elliott* for *Beckett*, he would be in the position of a trustee as to both *Beckett* and *Wragg*. Suppose he had been employed by two persons for the same purpose, *e. g.*, to purchase land; and suppose him to have taken the conveyance to himself and then conveyed to one of the two, (having used the money of that one in paying the purchase money,) and each being ignorant of his being a trustee for the other; the equity of the party receiving the conveyance would be at least equal to that of the other, perhaps better, having furnished the purchase money; and having the legal estate, he would have an advantage which the other would have no equity to deprive him of.

Judgment.

In the case above supposed, is he or not a purchaser for value? If he had purchased of the trustee innocently he would be protected; if he purchase through the trustee, the trustee not then having the legal estate, in ignorance of the trust, is he not entitled to the same protection, or is the knowledge of his agent *his* knowledge, so as to fix him with notice? I think not, because an agent is not assumed to disclose to his principal that which it is his interest to conceal from him. I do not think him affected with notice.

Wragg did not purchase from *Willard*. If he had, and with actual notice, he would, I assume, be affected with the trust with which *Willard* was affected. But he purchases direct from *Elliott* through an agent, and it happens that that agent was a trustee for another person of the same land. Can *Wragg*, under these circumstances, be an express trustee? He may be affected with notice, I think, not more, and unless affected with actual notice so as to affect his conscience; so as to make him a participator in the actual and positive fraud of the express trustee, I think he is not affected, and that this bill should be dismissed.

DRAPER,
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DRAPER, C. J.—Stated that he had prepared a written judgment, giving his views at some length upon the question raised by this appeal, but, upon conferring with his lordship the Chief Justice, and finding that the judgment which his lordship had just pronounced so fully and clearly expressed his own views, he thought it unnecessary to do more than express his concurrence in that opinion. However, the judgment just delivered by the learned Vice-Chancellor induced him to say, that, so far as his individual opinion went, he entertained no doubt that the language of the Dormant Equities Act embraced express as well as implied trusts.

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Beckitt.

Sir J. B. MACAULAY, and the other members of the court who were present at the argument, concurred.

Judgment.

Per Cur.—Appeal allowed, and bill in the court below dismissed with costs.

HARKIN v. RABIDON.

Vendor and vendee—Re-hearing.

The decree pronounced in this cause, reported ante volume VI., page 605, affirmed upon re-hearing.

A decree was pronounced setting aside a conveyance, and the defendant being dissatisfied therewith, obtained a re-hearing of the cause. Upon the re-hearing, the decree originally pronounced was affirmed with costs, and a further direction was made that the defendant should execute a conveyance to the plaintiff.

The court will, in a proper case, order a deed to be cancelled; or, if registered, a conveyance of the estate to the person properly entitled; and that, although his title may be such that he would succeed in defending any action brought against him at law.

The facts of the case sufficiently appear in the report of the original hearing, which took place before the Vice-Chancellors, during the absence of his lordship the Chancellor from the province. The defendant *Rabidon* having petitioned for, and obtained a re-hearing Statement..

1859. of the cause, the same came on to be heard before the three judges.

Harkin
v.
Rabidon.

Mr. *Hector*, for plaintiffs.

Mr. *Roaf*, for defendants.

The judgment of the court was delivered by

THE CHANCELLOR.—This is a suit to have a deed of bargain and sale, executed on the 19th July, 1855, by which the premises in question in this cause, being certain property in the town of Amherstburg, were conveyed by the defendant *Thibodo* to the defendant *Rabidon*, set aside for fraud, and as forming a cloud upon the plaintiff's title.

Judgment. It is admitted on both sides that by a deed of exchange, dated the 27th November, 1827, the property in question was conveyed by the defendant *Thibodo* to *Francis Belcour*, the younger, in exchange for a certain plot of land on Palace Street, in this city, which by the former deed *Belcour* conveyed to *Thibodo*. The bill asserts that upon the execution of the deed of exchange *Thibodo* was let into possession of the Palace Street property, and that he or his assignees continued in the uninterrupted occupation until the filing of the bill; that *Francis Belcour*, the younger, went into possession of the Amherstburg property, and continued to occupy it until his death; that upon his death intestate, and without issue, the plaintiff *Madeline Harkin*, who was his sister and heiress at law, entered, and has continued in possession ever since. The bill further states, that at the date of the deed of exchange, *Thibodo* had only an equitable title to the Amherstburg property, as locatee of the Crown, but that a patent issued subsequently in his favour; that the plaintiff *Madeline* intermarried with the plaintiff *Harkin*, many years before the filing of the

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bill; that they being desirous of obtaining a deed from *Thibodo*, but not knowing his place of residence, caused an advertisement to be inserted in the papers, in consequence of which *Thibodo* came to Amherstburg in July, 1855; but that instead of confirming their title, as he was required to do, *Thibodo* conveyed the property in question to the defendant *Rabidon*, who had full notice of the plaintiffs' title.

1859.

Harkin
v.
Rabidon.

Several issues are raised by the answers. The defendants admit that *Francis Belcour* the elder, was the owner in fee of the property on Palace Street, and that he died intestate; but then they assert that one *Jean Belcour* was his heir at law, and that *Francis Belcour* the younger had consequently no title to the Palace Street property, and that the deed of exchange was therefore void. They assert, secondly, that the plaintiff *Madeline* was not the sister and heiress at law of *Francis Belcour* the younger, but was an illegitimate child, and has therefore no right to maintain this suit. They assert lastly, that the Amherstburg property remained vacant until 1837, when the defendant *Rabidon* went into possession, and so continued until July, 1855, when he purchased from *Thibodo*. They say that all the improvements were made by him during his occupation, and that he purchased for valuable consideration without notice of the plaintiffs' title, and that his deed has been duly registered. In addition to the above grounds of defence, which are raised by both answers, *Thibodo* insists that *Francis Belcour* the younger was under age at the time he executed the deed of exchange; that on his attaining his age he refused to confirm that deed, and joined in a sale of the Palace Street property, and that those who claim under him have consequently no title to the Amherstburg lot.

Judgment.

I have not stated the circumstances minutely, because the case having been fully discussed before my learned

1859. brothers upon the former hearing, the facts are no doubt familiar, but what has been stated will be found sufficient, I hope, to render the few observations I am about to make intelligible.

Harkin
v.
Rabidon.

Upon the first two points I entertain no doubt whatever. Attending to the evidence of *Jean Marie Daubin*, and of *Davis, Meyers, Ross* and *Catherine Drummond*, it will be found perfectly clear, I apprehend, that *John Daubin* was an illegitimate child of *Madeline Belcour*, born before her marriage with *Francis Belcour* the elder, and that the only children of that marriage were *Francis Belcour* and his sister *Madeline*, the plaintiff in this suit. That *Francis Belcour* the younger, was, therefore, the heir at law of his father, and that upon his death intestate, his sister *Madeline* was his heiress at law, are points which do not appear to me to admit of question.

Judgment.

Upon the next ground of defence I have as little doubt. It is asserted in the first place, that the Amherstburg property remained vacant until 1837, when *Rabidon* went into possession; but upon that point the defendants have failed to adduce any evidence whatever, while the plaintiffs have established the contrary proposition upon evidence quite satisfactory. It is clear, I think, upon the evidence of *Daubin, Read, Kurl* and *Jackson* that the *Belcours* took possession shortly after the execution of the deed of exchange; that the plaintiff *Madeline* went into occupation upon her marriage with her first husband, in 1828, and continued to reside there in what has been called the old house, during his life, and that she has continued in possession, by herself, or her tenants ever since.

If it be true, then, that this property was not vacant and unimproved in 1837, as the defendants assert, but if it be true, on the contrary, that the old house had

been built by the plaintiffs, the possession? agreement with the property for ten years by *Read*, who it is quite clear admitted that this property plaintiffs were the occupants with the notice of the plaintiff truth there is surmise that of title to occupy no where suggest self to be the she or her husband acquired his interest by *Daubin* true. It is possible the statement is unsupported

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been built long before and occupied for years by the plaintiffs, the question arises how did *Rabidon* obtain possession? *Daubin* swears that he entered into an agreement with the plaintiffs to erect a new house upon the property on condition of being allowed to occupy it for ten years, free of rent. That evidence is corroborated by *Read*, whose veracity has not been impeached, and it is quite consistent with the established facts. It is admitted that *Rabidon* did build a dwelling house upon this property, and that when it had been finished the plaintiffs went into possession of it, while *Rabidon* became the occupant of the old house. That does not consist with the notion that *Rabidon* was acting independently of the plaintiffs and upon some title of his own. But in truth there is nothing in the evidence to justify even a surmise that *Rabidon* ever had, or asserted any colour of title to occupy, except under the plaintiffs. It is no where suggested that Mrs. *Rabidon* ever asserted herself to be the heiress at law of *Francis Belcour*, or that she or her husband ever supposed themselves to have acquired his title. The account of this transaction given us by *Daubin* and *Read*, must be taken, therefore, to be true. It is probable in itself, and uncontradicted, while the statement of the defendants is improbable and quite unsupported by testimony.

If I have been right hitherto, it follows, of course, that when *Rabidon* purchased in July, 1855, he purchased with full notice of the plaintiffs' title. Any other hypothesis would have been indeed highly improbable. There is no ground to suppose that the notice of the plaintiffs' title had been either kept secret or forgotten. To *Francis Belcour* and his mother it was, of course, well known, and there is no room to doubt that the plaintiff *Madeline* was equally well informed upon the subject, for besides the fact that she was of mature age when the exchange was made, and that she was let into possession of the property shortly after, we know that an advertisement

1859. was published shortly before the conveyance to *Rabidon* for the purpose of obtaining from *Thibodo* a confirmation of her title. Now that fact assumes that the plaintiffs were neither ignorant of, nor had forgotten the nature of her title. Now is it probable, I had almost said credible, considering the condition in life and circumstances of this family, that *Rabidon*, who was a near connexion, having married a daughter of *Madeline Belcour* by her second husband, remained ignorant of the title by which the family claimed this, to all appearance, their only property? To me such an assertion seems, I must confess, highly improbable. But the examination of *Thibodo* himself places that beyond doubt. He says that *Rabidon* told him he would be a fool if he gave the plaintiffs a deed for nothing. But what claim had the plaintiffs to ask or expect a deed for nothing, except on the ground of the deed of exchange? Again, he admits that *Rabidon* retained \$200, a third of the purchase money, to meet the costs of an anticipated chancery suit. Now how is it possible to reconcile that fact with the assertion that the parties believed *Thibodo* to have a perfectly good title, and that *Rabidon* purchased in ignorance of the plaintiffs' claim? They may have thought that it was in their power to defeat the plaintiffs' claim, but I have no conception that they were ignorant of it.

Judgment.

I have thus disposed of all the joint grounds of defence. But the defendant *Thibodo* asserts that *Francis Belcour* was not of age at the time he executed the deed of exchange, and that subsequently, on his coming of age, he refused to confirm that transaction, and resold the Palace Street property, thus rendering *Thibodo's* title void. I agree that the evidence fails entirely to establish that defence. Had *Francis Belcour* resold the Palace Street property, in violation of the deed of exchange, it is highly improbable that the Amherstburg property would have been left in possession of

himself and his wife. It is enough to say, that the deed is true, has been confirmed by evidence, and is a valid title, which this plaintiff has held for thirty years, of that sort, and the practice of the law.

It occurred to me that I should find that the deed was true, and assuming that it occurred to me to cancel a deed, it is ineffectual in a court of law. A satisfactory opinion of the plaintiffs' title upon the deed of exchange, and such evidence as is at least doubtful as to a valid legal title, has jurisdiction of the matter, and the plaintiffs' claim may be cancelled. In fact, practically the deed is cancelled. We find here, that a conveyance from the Crown, to *Rabidon*, would this court confirm, and that deed of exchange of that deed executed by the plaintiffs would be acted in good faith, and answer to such a claim, and themselves at law. It is right to say, that we have a right to say, that we cannot have a title for the purpose of the law.

himself and his heirs down to the present time. But it is enough to say that a fact quite capable of proof, if true, has been left to rest upon most unsatisfactory evidence, and that to permit the plaintiff's title, under which this property has been enjoyed for a period of thirty years, to be called in question upon evidence of that sort, would be contrary to the policy of the law and the practice of this court.

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Rabidon.

It occurred to me on the hearing, that it might be found that the plaintiffs had a good legal title by estoppel; and assuming the plaintiffs to have a good title at law, it occurred to me to doubt whether the court would interfere to cancel a deed which would be pronounced void and ineffectual in a court of law. It is impossible to form any satisfactory opinion as to the legal validity of the plaintiffs' title upon the materials before us, in as much as the deed of exchange has not been produced. Upon such evidence as we have, the point must be considered at least doubtful. But assuming the plaintiffs to have a valid legal title, I am clear, nevertheless, that this court has jurisdiction, and that it is bound under the circumstances of this case to direct the deed of July, 1855, to be cancelled. In this country the registry office is practically the root of every man's title. Now what do we find here. The plaintiffs' title has not been registered, but a conveyance from *Thibodo*, the patentee of the Crown, to *Rabidon* has been placed upon record. Now would this court have refused to decree the cancellation of that deed even though it had been established that the plaintiffs would prevail at law, and that *Rabidon* had acted in good faith? Would it have been a reasonable answer to such a bill that the plaintiffs could defend themselves at law. Would not the plaintiffs have had a right to say, true we can defend ourselves at law, but we have a right to come into equity for relief, which we cannot have at law—we ask to have that deed cancelled for the purpose of being placed beyond the reach of

Judgment.

1859. *Harkin v. Rabidon.* those dangers and annoyances which the improper use of it would at any moment entail, and for the further and more material purpose of having that removed which forms not only a cloud upon our title, but in effect an incumbrance, detracting, as it does, most materially from the market value of our property? I cannot say that I have much doubt upon that point. (a) But in the present case, where the deed has been procured by gross fraud, the duty and the jurisdiction of the court are, I apprehend, perfectly clear. (b)

Judgment. For these reasons, I am of opinion that the decree pronounced by my learned brothers was perfectly correct, with perhaps this exception, that it should have gone further, and directed a conveyance to the plaintiffs from *Rabidon*, to which they were in my opinion entitled.

THE COMMERCIAL BANK V. THE BANK OF UPPER CANADA.

Bank taking mortgage on real estate as collateral security.

Held, that under the provisions of the act 6 Victoria, chapter 27, section 19, amending the charter of the Bank of Upper Canada, the bank is authorised to take mortgages upon real estates, by way of collateral security, for sums advanced *bona fide* in the way of their business, and that such debts need not have been contracted previously, but the advance of money and the taking of security may be contemporaneous acts.

The facts of the case are clearly stated in the judgment.

Mr. *Roaf*, for plaintiffs.

Mr. *McDonald* and Mr. *Crickmore*, for defendants.

(a) *Hayward v. Dimsdale*, 17 Ves. 111; *Bromley v. Holland*, 7 Ves. 21, *The Mayor of Colchester v. Lowien*, V. & B. 44.

(b) *Simpson v. Lord Howden*, 3 M. & C. 97.

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(a) 7 U. C. Q. B.

(c) 4 Jurist, N. S.

For the plaintiffs, it was contended that when the mortgage to the *Bank of Upper Canada* was executed no debt whatever was due by *Bull* to them; that the debt now due that Bank was not the same as existed when the mortgage was created. The security in effect was to secure a floating balance. *McDonald v. The Bank of Upper Canada*, (a) *Silverlake Bank v. North*, (b) *Rolt v. Hopkinson*, (c) *Baird v. The Bank of Washington*, (d) and *Angel on Corporations*, pp. 156-7, were referred to.

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Com'l Bank
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The judgment of the court was delivered by

THE CHANCELLOR.—This is a suit to foreclose a mortgage made by *Henry Bull*, one of the defendants, in favour of the *Commercial Bank*, the plaintiffs, to secure a debt of six thousand pounds.

The defendants are *Henry Bull*, the mortgagor and *The Bank of Upper Canada*, who claim under two mortgages, also executed by *Henry Bull*, which, if valid, are clearly prior to the plaintiffs' security.

The plaintiffs contend, however, that these mortgages are void, because they were executed, not to secure debts contracted to the *Bank of Upper Canada* in the course of their dealings, but to secure moneys advanced by them on the credit of the land, contrary to their charter and therefore void.

The case turns, therefore, upon the proper construction of the 19th section of the act passed in the 6th year of Her Majesty, to amend the charter of the *Bank of Upper Canada*. That section, so far as it is material to our present purpose, provides that the said corporation shall not "either directly or indirectly, lend money, or make

(a) 7 U. C. Q. B. R. 252.

(c) 4 Jurist, N. S. 919.

(b) 4 Johnson, C. R. 370

(d) 11 Serg. & R. 416.

1859. advances upon the security mortgage or hypothecation of any lands or tenements; * * * * * Provided always that the said corporation may take and hold mortgages or *hypothèques* on real estate and property in this province, by way of additional security, for debts contracted to the corporation in the course of their dealings." Now the first clause distinctly prohibits the *Bank of Upper Canada* from advancing money upon the security of land, and I agree in the opinion expressed by his Lordship the Chief Justice, in *McDonald v. The Bank of Upper Canada*, that a mortgage executed in violation of that express prohibition, would be, unless helped by the proviso, void. That proposition is not, I believe, denied. The contest is as to the effect of the proviso. The plaintiffs contend that where the advance of money, and the execution of a security upon land for the sum so advanced, are contemporaneous acts, the case falls clearly within the prohibition, and is not helped by the proviso; and the argument in favour of that construction is undoubtedly of great weight; for, if the advance of the money and the execution of the security may be contemporaneous acts, it must be admitted that almost every case may be brought, by a little management, within the exception. But on the other hand, if the language of the proviso be clear, we have no authority to depart from its plain meaning for the purpose of creating a more effectual check than the legislature has seen fit to impose.

Now, upon the best consideration I have been able to give to the subject, I am of opinion that the construction for which the plaintiffs contend is not warranted by the language of the statute. The legislature have not provided that this bank may take mortgages for debts contracted at some previous time. Had that been so, it is probable that the conclusion for which the plaintiffs contend would have been correct. (c) But that is not

(c) But see *Baird v. The Bank of Washington*; *Silverlake Bank v. North*.

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the language of the act. The proviso is, that the corporation may take mortgages upon land, by way of additional security, for debts contracted to the corporation in the course of their dealings. The question, therefore, is not whether the creation of the debt and the execution of the mortgage were contemporaneous acts, but whether the debt was created upon a legitimate transaction, and the mortgage taken as additional security. Where that is the case—where there is a *bond fide* contract to advance money upon a legitimate transaction, and that is accompanied by an agreement for a mortgage on land, by way of additional security, the proviso applies, and the mortgage is valid. On the other hand, when the money is really advanced upon the land, and the other parts of the transaction are colourable, the mortgage is void.

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I cannot deny that upon this construction the statute is open to great abuse, and that when an attempt is made to defeat it, there must be considerable difficulty in determining whether the money was advanced upon the land, or the mortgage taken as additional security. But that difficulty is not sufficient, in my opinion, to justify an alteration of the plain meaning of the act. The recent decisions upon the acts for the amendment of the usury laws in England, appear to me to furnish an analogy for our guidance in the present case. By the 3 & 4 Wm. IV., ch. 98, bills of exchange and promissory notes payable at or within three months, were exempted from the operation of the usury laws, but all other contracts remained subject to the provisions of the statute of Anne, and were of course void when more than legal interest was reserved. A question soon arose, as might have been expected, whether the discount of a bill accompanied by a deposit of title deeds, or other real security, was within the statute, and it was argued with great force there, as here, that such a construction, if adopted, would have the effect of withdrawing every contract from the operation of the statute of Anne, as it

1859. would only be necessary to make the discount of a bill or note part of the transaction to bring every case within the exception in the statute of William. The court decided, however, that the validity of the transaction depended upon the question, whether the discount was real or colourable merely, and where the discount was a real transaction, and the mortgage was taken as collateral security, they held that the case was protected by the statute. *Lane v. Horlock*, (d) recently decided by the House of Lords, is a remarkable case to that effect.

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Had I been able to satisfy myself, on the one hand, that the legislature merely meant to prohibit this institution from embarking in land speculations, and that this transaction, which clearly was not of that character, ought, therefore, to be upheld; or, on the other hand, that they meant to prohibit mortgages in every case, except when taken as collateral security for a debt contracted at a previous time—had I been able to adopt either view, the law would have rested, I must admit, on a more satisfactory basis. But I have not been able to reconcile either construction with the language of the statute.

Judgment.

I cannot say, however, that the opinion I have formed is entirely satisfactory to my own mind, and as the question is one of great importance to the banking institutions of this province, I hope that it may be brought before a higher tribunal.*

Assuming the view I have taken of the law to be correct, I have little difficulty in applying it to the facts of the present case. Apart from the agreement to which I am about to refer, the validity of the first mortgage to

(d) 5 H. L. 580, and see S. C. in Queen's Bench, 4 Dow & L. 408; and *Doe v. King*, 11 M. & W. 333.

* Proceedings have been taken to have this case heard before the Court of Appeal, in December next.

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the extent of £2800 cannot be doubted. To that extent it was given to secure a pre-existing debt, and its validity in that respect is not questioned. Mr. *Roaf* contends, however, either that the debt for which this mortgage was given has been paid, or that it must be regarded as a mortgage to secure a floating balance, and, therefore, void under the statute. I cannot agree in either conclusion. The deed commences with a recital of the various debts due to the bank. The agreement to allow two years for payment of this debt, upon having security, is next stated. Then follows the clause upon which Mr. *Roaf* relies, which is in these words: "Upon the express condition that the said party of the first part shall within every three months of the said two years, computing from this date, or from the maturity of the notes set forth in the said schedule, and from time to time thereafter, as the party of the second part may require, furnish to the party of the second part for discount, every three months, at Belleville, aforesaid, good bankable promissory notes, or acceptances of the customers of the said *Bull Brothers*, * * * * * to be approved by the agent of the said party of the second part * * * * * and shall continue to renew the same as they shall mature and become due, during the said period of two years, paying the discount on each note or acceptance in cash, in advance, and paying the whole of the said sum of £3886 16s. 8d. on or before two years from this date." It is established, I believe, by the evidence of *Holden*, that the notes originally deposited with the bank were renewed, some, perhaps all of them, several times, but I do not perceive how that can affect the validity of this security. The whole object plainly was, to enable the bank to receive their interest quarterly in advance. It is very unlikely that prompt payment of the notes by the persons primarily liable, entered into the contemplation of either party. The intention, I have no doubt, was to renew or retire the old notes from time to time, by the substitution of new paper, and assuming that to have been done, the question does not seem to me, I

Judgment.

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confess, to admit of argument. On the other hand assuming some of the notes to have been paid by the persons primarily liable, I have no doubt that such payments were intended to enure to the benefit of *Bull Brothers*, for I take it to be clear that so long as fresh paper was supplied, in accordance with the agreement, the Bank of Upper Canada had no right either to demand or retain any part of the principal moneys secured by the mortgage previous to the expiration of the two years for which credit had been given. In either event, therefore, it appears to me that the mortgage is a subsisting security to the extent of £2800.

I take it to be clear upon the evidence that the remaining sum of one thousand pounds, being the residue of the amount secured upon the first mortgage, was not a debt created upon a legitimate banking transaction, within the act, but was a sum advanced upon the security of this land, and I am therefore of opinion, upon the principle already stated, that the security is to that extent void.

Judgment.

The same observation applies to the sum of £750 secured by the second mortgage. That sum was advanced without doubt upon the land alone; and if it be true that a mortgage executed in direct violation of the provisions of an act of parliament is void, it follows that no part of the amount advanced upon the execution of the second deed forms a charge upon the land embraced in that security.

But the second mortgage was given to secure not only the £750 then advanced, but also the sum specified in the first mortgage; and as to the latter amount I am of opinion that it may be maintained. With respect to the sum of £2800, of which I have already spoken, there cannot be, if my view of the law be correct, any doubt. With respect to the balance, being the sum of £1000 advanced upon the execution of the first mortgage, the

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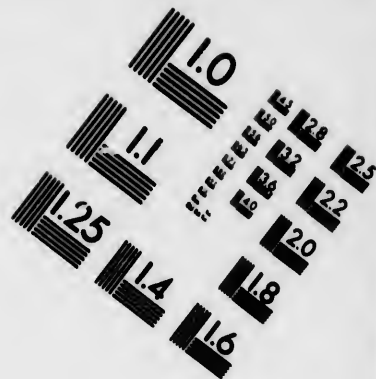
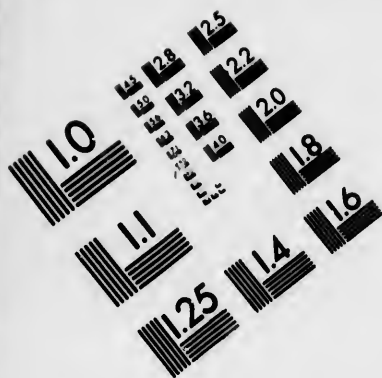
amount is in my opinion well charged upon the property comprised in the second mortgage. I have already stated that the first mortgage is to that extent void. But it is clear that at the date of the second mortgage the Bank of Upper Canada were the holders of bills or notes for the balance advanced upon the first. That £1000 was eventually paid upon paper discounted in the regular way. Now, although the first mortgage is void to that extent, because prohibited by the act of parliament, I see nothing in the statute to avoid the bills taken as collateral security; and if the bills were valid and available securities in the hands of the bank at the date of the second mortgage, as I think they were, there was nothing to prevent them taking a mortgage as collateral security.

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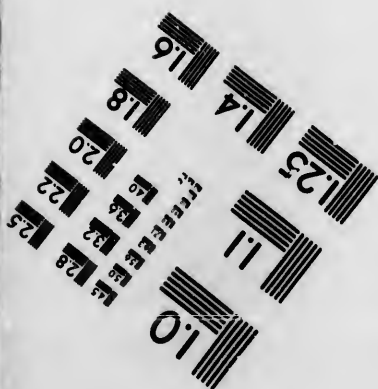
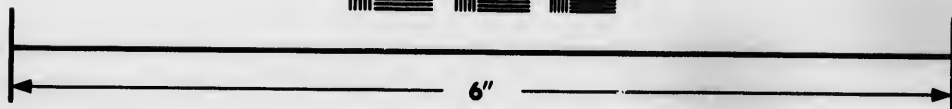
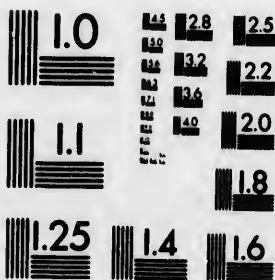
The Bank of Upper Canada have therefore, in my opinion, a valid charge upon the property comprised in the first mortgage for £2800, and upon the property comprised in the second for £1800, or for so much thereof as may be found due. Judgment.

I do not conceal from myself that this decision may be found to be injurious both to the banks and the public. But that is a matter for the consideration of parliament. Having placed upon this act the construction which appears to me most consistent with the language of the statute, a construction which cannot be characterised certainly as illiberal towards the banks, the inconvenience, if there be inconvenience, and I am far from intimating an opinion that there is not, may be remedied by parliament; and it is much fitter that it should be remedied in that way rather than by the adoption of an arbitrary interpretation inconsistent with the plain language of the legislature.





**IMAGE EVALUATION
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1859.

LAMONT V. LAMONT.

Grant from the Crown—Administrator.

The purchaser of land from the Crown died intestate, without having procured a patent for the land, or paid up the instalments of purchase money: a younger brother, without the knowledge of the heir at law, obtained letters of administration to the personal effects of the intestate, and subsequently applied to the Government for, and upon payment of the arrears of purchase money, obtained a grant of the land to himself, on the ground that the greater portion of the improvements on the land had been made by him; and that he had maintained his father and mother while residing on the property. Upon a bill filed by the eldest brother and heir at law against the grantee of the Crown, and others claiming under him, it was shewn that the deceased alone had cultivated the land, and supported the parents; and that the grantee had never made the property his settled place of residence, the court, under the circumstances, declared the heir at law entitled to the estate, notwithstanding the grant from the Crown, and decreed him relief in accordance with such declaration. And (per ESTES, V. C.) that under no circumstances could the administrator be allowed to purchase the property for his own benefit.

The bill in this case was filed by *John Lamont*, against *Peter Lamont*, *Sarah Elizabeth Hardman*, *Joseph A. Hardman*, *William Atkins*, *Mary Hardman*, *John Torrance* and the *Attorney-General*, setting forth that on the 12th of January, 1833, the late *Alexander Lamont* had contracted with the Commissioner of Crown Lands for the purchase of the front half of lot No. 6., in the 2nd concession of Puslinch, a clergy reserve, for the sum of £75; payable, one-tenth down, and the balance in nine yearly instalments; and that he went into possession thereof and effected great improvements thereon, but before the patent issued, or he was entitled to call for the same, to wit, in March, 1850, the said *Alexander Lamont* died intestate, leaving the plaintiff, his eldest brother and heir at law, also other brothers of whom defendant *Peter Lamont* was one, and sisters surviving him: that *Peter Lamont* had applied for and obtained letters of administration of the personal estate of the intestate, all of which he had possessed himself of, and applied to his own use; the same consisting principally of the stock and crops upon the premises. The bill then charged that in 1855 *Peter Lamont* had applied for, and by means of several false representations, had upon pay-

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1859.

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ing up the arrearages due upon the land, procured a grant thereof to be made to himself. One of the principal allegations upon which his claim to the grant was founded, having been that he was chiefly instrumental in maintaining his father and mother, and making improvements upon the property, in support of which he had procured affidavits from several persons, tending to corroborate such allegations, whereas the bill asserted that the intestate was the only one who had improved the premises, and expended money thereon, and solely maintained his father and mother during their lives and that *Peter Lamont* never worked on the property until the death of *Alexander*. The bill further stated that *Peter Lamont* had sold and conveyed the lot to one *Joseph T. Hardman*, who had since died leaving the defendants *Sarah Elizabeth* and *Joseph A. Hardman*, his infant children, and his heirs at law surviving, and charged that *Joseph S. Hardman* had notice of the rights of the plaintiff, and that the purchase money had not been paid, but a mortgage given for part thereof to *Peter Lamont*; that the mortgage had been assigned to the defendant *Atkins*, and purchased from him by the agent of the defendant *Torrance*, who was resident in Scotland.

Statement.

The prayer was that upon payment by plaintiff of all sums advanced by *Peter Lamont* for instalments and interest, the patent might be cancelled, and a patent issued therefor to plaintiff; that the deed to *Hardman* and mortgage back should be delivered up to be cancelled, and for further relief.

The defendants answered the bill. The defendant *Peter Lamont*, was also examined *viva voce* before the court.

The points of defence mainly relied on by the answers are mentioned in the judgment.

Mr. *Turner*, for plaintiff, contended, that under the

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circumstances, the court could not entertain any doubt that the patent now impeached had been obtained either by fraud, or through improvidence on the part of the government, and as such, should be set aside, or the defendant *Peter Lamont* declared a trustee for plaintiff.

Mr. *Roaf*, for the defendants the *Attorney-General*, *Lamont*, *Atkins*, and *Hardman*. The bill does not seek relief on the ground of any fiduciary relation between the parties, but solely on the ground of fraud. Here the facts were sufficiently brought under the notice of the government, and they decided in favour of the claim of *Peter*, although not the heir at law of the original grantee. *Boulton v. Jeffrey*, reported in the U. C. Jurist, (a) is an authority on this point. "Improvidently" issued does not mean that a patent has been "unwisely" issued; the court will not revoke a patent merely because it may appear to have been unwisely issued. In this case peculiar circumstances occur which should have weight with the court in its ruling of it, for the delay on the part of the plaintiff in asserting his claim had been the means of inducing *Hardman* to purchase to whom not the slightest want of good faith was attributable, and although all his purchase money was not paid, still it had been secured. Under these circumstances he submitted there was not sufficient shewn to induce the court to disturb a title derived through his purchase.

Mr. *A. Crooks* for *Torrance*, relied also on the defence of a purchaser for value, without notice.

The CHANCELLOR.—On the 12th of January, 1833, *Alexander Lamont*, through whom the plaintiff claims, purchased the front half lot of number 6, in the second concession of the township of Puslinch, the premises in question in this cause, from the government for the sum of seventy-five pounds. He paid a tenth of his purchase money, in accordance with the regulations then in force

(a) Vol. 2, p. 74.

respecting the usual contract *Alexander* took and continued his death in his barn had eighty acres tion. The price eight and nine farm his settlement the clearance carpenter, and He seems to be employment. contributed largely erection of the his examination that he did pecuniary advantage he never became the farming evidence which was managed ordinary care been an industrious his neighbours without issue, gratification were gathered the price amounted to £ of the farm until the plaintiff had letters of administration disjointed portions it is clear that rights, and it is December, 1855 them. Upon doubt.

respecting the sale of clergy reserves, and received the usual contract from the Commissioner of Crown Lands. *Alexander* took immediate possession of the property, and continued in the uninterrupted occupation of it until his death in March, 1850, at which time a good house and barn had been erected on the premises, and about eighty acres had been cleared and brought into cultivation. The property was then worth, as I gather, between eight and nine hundred pounds. *Peter* never made the farm his settled place of residence, and took no part in the clearance and improvement of the land. He was a carpenter, and worked where he could find employment. He seems to have made the farm his home when out of employment. He visited the family frequently, and contributed largely by his labour and otherwise to the erection of the house, and I have little doubt, although his examination upon that point is entirely unsatisfactory, that he did assist his brother from time to time by pecuniary advances. But it is clear, as I have said, that he never became a settled resident, and took no part in the farming operations. It is clearly established by evidence which does not admit of question, that the farm was managed by *Alexander* alone, and with, at least, ordinary care and intelligence. He is shewn to have been an industrious farmer, and as prosperous as most of his neighbours. *Alexander Lamont* died intestate and without issue, and in December, 1850, letters of administration were granted to the defendant *Peter Lamont*, who collected the personal estate, which is admitted to have amounted to £100 at all events, and received the profits of the farm until the sale to *Hardman*, in 1854. Whether the plaintiff had any notice of *Peter's* application for letters of administration does not appear, but from the disjointed portions of the correspondence laid before us it is clear that *Peter* was well aware of the plaintiff's rights, and it is manifest from the letter of the 14th of December, 1850, that he had no intention of abandoning them. Upon that point *Peter* cannot have had any doubt.

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v.
Lamont.

Judgment.

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Lamont.

Under the circumstances which I have just stated, *Peter Lamont* caused a petition to be presented to the executive government, on the 23rd July, 1852, praying, on grounds stated in the petition, that the sale of the lot of land in question to *Alexander Lamont* might be cancelled for his default in the non-payment of his instalments, and that the petitioner might be allowed to obtain a patent in his own name upon payment of the balance due upon *Alexander's* contract. The Commissioner of Crown Lands did not think it necessary to require that notice of this application should be given to the plaintiff, or that he should be called upon for any explanation, but relying upon the representations of *Peter Lamont*, and upon the evidence adduced by him, he recommended, in his report to the executive government, which bore date the 19th November, 1852, that the application should be granted. The last paragraph of the report which has been put in evidence, is in these words: "Whether the government under ordinary circumstances should annihilate such a claim as the late *Alexander Lamont* had to the land in question, with a view of preventing a claim thereto being established under the Heir and Devisee Statute, may be questioned; but it appears worthy of consideration, whether in this instance the purchaser may not be viewed as having forfeited the legal right to the land in consequence of having failed in paying the instalments of the purchase money as they annually became due; in which case the name of *Peter Lamont* might be entered for the lot, and allowed to assume the debt due thereon." The recommendation of the Commissioner of Crown Lands was adopted by the Executive Council, and an order to that effect was duly approved on the 26th November, 1852, in accordance with which *Peter Lamont* was allowed to pay the balance due upon the lot, and letters patent were issued on the 1st March, 1855.

Judgment.

The bill prays that *Peter Lamont*, and those claiming under him, may be declared to be trustees for the plaintiff

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The plea

of the property in question; or, in the alternative, that the letters patent may be cancelled, on the ground that the order in council of the 26th of November, 1852, was obtained by fraud and misrepresentation.

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v.
Lamont.

In answer to this bill, *Peter Lamont* says, in effect, that the plaintiff never contributed in any way to the improvement of the property, or to the support of his brother's family; that he, *Peter Lamont*, on the contrary, contributed largely to both; that he advanced to his brother from time to time in money and labour an amount equivalent, as he believes, to £500; that on the death of *Alexander*, the plaintiff being absent, and not taking any interest either in the property or his relations, he, *Peter*, for the purpose of assisting in the support of the family, and of preserving the property from ruin, took out letters of administration to his brother, and undertook the management of his estate; that he continued to work and improve the property and pay the taxes for some years, when finding that his brother had only paid one instalment of the purchase money, and that he had thereby forfeited his right to a deed, he made application to the Crown Lands department to be allowed to purchase the property himself; that at the request of the department he furnished the affidavits referred to in the bill; that the facts stated were true; that the Executive Council determined, in 1855, that *Alexander* had forfeited his right to the property, by default, and allowed the defendant to become the purchaser; and that upon paying the remaining instalments and interest, a patent issued in his favour, to the benefit of which he insists that he is entitled.

Judgment.

My observations are confined for the present to the case of *Peter Lamont*, and so far as he is concerned the above statement will be found to embody all the material allegations of the answer.

The pleadings, appear to me, therefore, to present

1859. these two questions : first, was the order in council of the
 26th of November, 1852, obtained fairly, or by fraud
 and misrepresentation? Secondly, must not *Peter
 Lamont* be declared, under the circumstances of this
 case, and altogether irrespective of the first question, to
 be a trustee for the plaintiff of the property in question?

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 Lamont.

The first question turns entirely upon documentary
 evidence, and principally upon the application of the
 23rd of July, 1852, upon which all the subsequent
 proceedings were based; and to determine it satisfactorily
 it will not be necessary, I think, to do more than state
 the material parts of the document itself. But before
 doing so, it may be proper to observe that the applica-
 tion is in the form of a letter to the Commissioner of
 Crown Lands, from a Mr. *Thomas Ellis* who acted in the
 matter as the agent of *Peter Lamont* and through whom
 the whole correspondence with the Crown Lands Depart-
 ment was conducted. The letter then written runs thus:

Judgment.

Puslinch, 23rd July, 1852.

"DEAR SIR,—Allow me respectfully to call your
 attention to a case in which the Crown Lands Depart-
 ment of this Province may have it in their power to do
 an act of special justice.

"Some eighteen or twenty years ago *two brothers*,
Alexander and Peter Lamont, the eldest and third sons
 of *Joseph and Jannet Lamont*, purchased the front half
 of lot No. 6, in the 2nd concession of *Puslinch*, and
 settled thereon with their aged parents.

John and William, the second and fourth sons, did
 not take up land, and subsequently *John*, the second
 eldest, left this locality and moved to *Chatham*, where
 he is now.

"*Alexander and Peter*, through many difficulties and
 privations in consequence of their aged and infirm
 parents, and also living remote from roads and markets,
 finally succeeded, after a number of years, in getting the
 lot well cleared, and getting good buildings thereon, the
 heaviest burden always falling to the lot of *Peter*, as

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Alexander had been bred a seaman, and had no taste for agriculture." 1859.

Lamont
v.
Lamont.

"I may here remark that early in the year 1850 *Alexander* said to *Peter* that as human life was very uncertain, and that he (*Peter*) had been the principal contributor to the *joint* property, that they should go to the Crown Land Office and get their names jointly entered for the lot, which had been too long neglected, as the location ticket had been taken out in *Alexander's* name alone. This being on Monday morning, they agreed to wait on the agent at Elora at an early date, but unfortunately after coming home on the following Thursday evening (having been engaged the preceding part of the week as township assessor) he retired to bed apparently in good health, but, alas, was found on the following morning a lifeless corpse.

"*Peter* being now left altogether at the mercy of *John*, who is the senior brother, and also the heir at law (as *Alexander* died unmarried) feels that as he has spent many years of hardship on the place, and has now got it in a condition by which he can work it to profit and advantage, and make large annual payments, that it would be a case of extreme hardship to be dispossessed by one who never was at one shilling's expense therewith. Judgment.

"My object, sir, in thus troubling you with this statement, is to know if the government would not secure to *Peter* the right of the improvement, and give him an opportunity to pay for the lot, as it is my disinterested opinion that it would be an act of justice.

"I find in glancing over 12 Vic., ch. 31, that the lot being a forfeited one in consequence of non-payment, is at the disposal of the government, according to the intent and meaning of that act. A favourable and early answer will oblige,

"Dear Sir,

"THOS. ELLIS."

"P. S.—Written by request."

Now, it cannot be necessary that I should enter into a minute comparison between the statements of the petition, and the actual facts, as disclosed in the evidence, because

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no person who has attended to the evidence can fail to perceive how grossly the material facts of the case have been misrepresented. It may suffice to observe that the defendant has not ventured to reiterate the statements of the petition in his answer, although this would have been obviously very material to his defence in a moral, if not in a legal, point of view. Had he done so, he must have signally failed. That the purchase was not joint, is admitted by the defendant himself. That the occupation was not joint, is proved by satisfactory evidence. And the sudden death of *Alexander*, whereby the agreement to correct the location ticket failed, appears to have been a mere fabrication. The tale told by the petition is one of great hardship, well calculated to create a strong prejudice in favour of the petitioner; such must have been its effect, for had it been otherwise, I am sure that the right of the present plaintiff to this valuable property would not have been intercepted without affording him some opportunity of defence and explanation. Had the case been stated truly, I am confident that the executive government would have directed the petitioner to apply to the Heir and Devisee Commission, where the matter would be decided by a judicial tribunal, in the presence of all parties, and with due attention to their equitable claims. I am of opinion, therefore, that the order of the 26th of November, 1852, was obtained by fraud and misrepresentation, and had the case rested there, I am clear that the patent made under that order must have been cancelled. But the case does not rest there. The plaintiff prays that the defendant, *Peter Lamont*, may be declared to have acquired this property in trust for him, and I am of opinion that he is entitled to that relief.

The plaintiff was entitled to this property as heir at law of his brother, who had an equitable fee simple under the contract of the 12th of January, 1833. The purchase money due upon the contract was a debt of the intestate, which the defendant, as his administrator, was

bound to pay the personal And the rents applicable to therefore a tr contract, and l of protecting l petitioned the was bound to himself might and having ac resentation, he paid the balan and obtained a right to relief stances, cannot

It is said, *Torrance* are a as such, entitled

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The *Hardm* money, and ca that they are p general doctrine has been too further discuss this case is dist *Sir Edward Su* a mortgage to with the usual

(a) *Keesh v. Sa* notes; *Foster v. Ves. 392*; *Fosbroc*
(b) *Gordon v. L*

bound to pay. The plaintiff had a right to require that the personal estate, if sufficient, should be so applied. And the rents and profits received by the defendant were applicable to the same purpose. The defendant was therefore a trustee for the plaintiff in relation to the contract, and bound to protect his interest. But, instead of protecting his interest, he plotted its destruction. He petitioned the government that the contract which he was bound to keep alive should be forfeited, that he himself might become the purchaser on his own behalf; and having accomplished his object by fraud and misrepresentation, he sold the estate for £850, out of which he paid the balance due to government, being about £150, and obtained a patent in his own name. The plaintiff's right to relief against *Peter Lamont* under such circumstances, cannot, I think, be doubted. (a)

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v.
Lamont.

It is said, however, that *Atkins* and *Hardman* and *Torrance* are all purchasers for value without notice, and Judgment. as such, entitled to protection.

It is clear, I think, that *Atkins* was not a *bonâ fide* purchaser at all. The assignment to him was a contrivance, devised probably by himself, to defeat the plaintiff's claim.

The *Hardmans* have not yet paid their purchase money, and cannot, therefore, be in a position to plead that they are purchasers for value without notice. The general doctrine upon the subject is too well settled, and has been too often followed in this court to admit of further discussion. (b) But Mr. *Crooks* contended that this case is distinguishable from the authorities cited by Sir *Edward Sugden*, inasmuch as *Joseph Hardman* gave a mortgage to secure the balance of the purchase money, with the usual covenants, by which his representatives

(a) *Keech v. Sandford*, 1 *White & Tudor*, 32, and the cases in the notes; *Foster v. McKinnon*, ante vol. v., p. 510; *James v. Dean*, 11 *Ves.* 392; *Fosbrooke v. Balgay*, 1 *M. & K.* 226.

(b) *Gordon v. Lothian*, ante vol. ii., p. 295.

1859. are bound; and as his representatives are bound to pay the mortgage debt, he argued that they must be treated as having paid the purchase money; and he cited *Tourville v. Nash*. (a) But *Tourville v. Nash* appears to me to be a clear authority for the plaintiff. The language of Lord *Talbot* is: "If the person who has a lien in equity on the premises, gives notice before actual payment of the purchase money, it is sufficient." Thus far the case is in exact accordance with the rule laid down by Sir *Edward Sugden*. But Lord *Talbot* proceeds to say: "And though the purchaser has no remedy at law against the payment of the residue, for which he gave his bond, yet he would be entitled to relief in equity, on bringing his bill, and shewing, that though he has given his bond for payment of the residue of his purchase money, yet, now he has notice of an incumbrance, under which circumstances the court would stop payment of the money due upon the bond." And the argument was, that *Tourville v. Nash* does not apply, inasmuch as the purchaser in that case was entitled to relief as to the balance of the purchase money, but it is not so here. But it is clear that there is no such difference between the cases as Mr. *Crooks* supposed. It is true that the mortgage binds the land here, because *Torrance* is a purchaser for value without notice. But the covenant in the mortgage deed is a mere chose in action, and the representatives of *Joseph Hardman* are entitled to be relieved from the payment of the purchase money secured by that covenant, just as the purchaser in the other case was entitled to be relieved from the payment of the money secured by his bond. That was determined in *Davis v. Hawke*. (b) *Tourville v. Nash* and *Storey v. Lord Windsor* (c) appear to me, therefore, to be authorities for the plaintiff.

Judgment.

ESTEN, V. C.—I think a decree should be pronounced for the plaintiff, on the ground that *Peter Lamont* being

(a) 3 P. W. 307.

(b) Ante vol. iv., p. 408.

(c) 2 Atk. 630.

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administrator, could not purchase for his own benefit. *Torrance* must receive his principal, interest and costs, but *Atkins* and *Peter Lamont* ought to discharge this incumbrance. *Peter Lamont* should be repaid any money he may have paid out of his own pocket for the land, and may have a right of retainer in respect of any debt due to him from *Alexander Lamont's* estate. The plaintiff should have his costs as against *Hardman's* estate, *Atkins* and *Peter Lamont*; and must pay *Torrance's* costs, and recover them from the other parties, unless the suit should appear to be in any respect a redemption suit, in which case the plaintiff should pay the costs of such a suit, receiving his other costs.

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Lamont.

Declare, 1st, That upon the issue of the letters patent Peter Lamont became a trustee for the plaintiff.

2nd, That the Hardmans not having yet paid their purchase money, are trustees for the plaintiff.

3rd, That *Torrance* is a purchaser for value without notice, and entitled to the benefit of his security, except as to the covenant of *Joseph Hardman*.

Minutes of
Decree.

4th, Refer it to the Master to take an account of the amount paid to the government, with interest.

5th, Of the substantial improvements, if any, made by *Joseph Hardman*, and those claiming under him.

6th, To fix an occupation rent; the Hardmans must be charged from the time they were let into possession; and *Peter Lamont* up to that time.

7th, The amount due to *Torrance* under his mortgage.

8th, The Hardmans are to be credited with the amount paid to the government, and interest, and with the value of the substantial improvements; and are to be charged with the occupation rent, and upon payment of the balance due to them, if any, they are to convey to the plaintiff, and the decree as to them is to be without costs.

9th, *Peter Lamont* and *Atkins* are to pay the amount due upon *Torrance's* mortgage, with the costs of this suit, and the occupation rent from the death of the intestate until the sale to *Hardman*.

10th, The bill as against *Torrance* is to be dismissed with costs, but the plaintiff is to add the costs paid to *Torrance* to his own costs, which are to be paid by *Lamont* and *Atkins*.

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IN APPEAL.

December
24, 1858, &
July 19, 1859.

[Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Sir James Buchanan Macaulay, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Spragge, and the Hon. Mr. Justice Richards.]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

ARKELL v. WILSON.

Mortgage—Redemption.

The owner of real estate created a mortgage which became absolute, for default of payment, before the passing of the Chancery Act, 7 Wm. IV., ch. 2. Proceedings were subsequently instituted to foreclose the mortgage, and in December, 1842, a final foreclosure was pronounced; and the mortgagor continued to reside in the neighbourhood of the property, until January, 1854, when he died, having devised all his real estate to his widow. The mortgage premises after passing through several hands, were purchased by the solicitor for the plaintiff in the foreclosure suit. It having been discovered that the mortgagee had died sometime before the day appointed for payment of the money, the widow filed a bill to redeem, but neither the solicitor nor his agent who conducted the suit to foreclose, nor either of the purchasers of the property was aware of that fact, or of any defect in the proceedings. The court, under the circumstances, held that this was a proper case in which to withhold redemption, under the discretion given to the court, by the eleventh clause of the Chancery Act, that the purchasers could not reasonably be held to have had constructive notice of the defect in the proceedings, and dismissed the appeal with costs.

The facts giving rise to this suit are clearly set forth in the judgment, and in the report of the case in the court below, *ante* volume v., page 470.

After the judgments there reported were pronounced, his Lordship the Chancellor, for the purpose of enabling the plaintiff to carry the case to appeal, concurred, *pro forma*, in the decree dismissing the bill with costs, from which *décree* the present appeal was brought.

Mr. *Eccles*, Q. C., and Mr. *Crickmore*, for the appellants.

Mr. *Mowat*, Q. C., and Mr. *Roaf* for the respondent.

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SIR J. B. ROBINSON, BART., C. J.*.—In this case one of the Vice-Chancellors having been formerly counsel for one of the parties was unable to give judgment, and the court being equally divided upon the question whether the plaintiff had a right to redeem, judgment was given *pro forma*, that the bill should be dismissed with costs, in order that the case might come before this court by appeal.

Arkell
Wilson.

July 19th.

The mortgage was made by *Henry Arkell*, husband of the plaintiff, under whom she claims by devise, to one *Lucius Bigelow*, on the 27th November, 1834, with condition to pay £850 with interest, at any time within two years from the date.

The estate, therefore, became absolute upon *Arkell's* default in paying before the 26th November, 1836, which was before the Chancery Act was passed, and consequently the case comes under the 11th clause of the act 7 Wm. IV., ch. 2, and we are called upon to consider "what decree it is just and reasonable to make under all the circumstances of the case."

My opinion is, that we should not allow redemption.

The property is not clearly proved to have been worth more than the £850 at the time it was mortgaged, or two years afterwards, when the estate became absolute, if, indeed, it was worth so much. It is not surprising, therefore, that *Arkell* should have made no effort to redeem, according to the condition of his mortgage, even if he had been able.

In 1839, it seems he was dispossessed by an action of ejectment, making, apparently, no effort, nor shewing any disposition to avail himself of the provisions of the statute 7 Geo. II., which enabled him at any time before

*His Lordship the Chancellor was absent when judgment was pronounced.

1859. judgment to stay the proceedings, on paying principal, interest, and costs.

Arkell
v.
Wilson.

Then in May, 1839, *Lucius Bigelow*, the mortgagee, filed his bill to foreclose, the court of Chancery having, in the meantime, been organised, and he obtained a decree of foreclosure in December, 1839.

In May, 1840, nothing having been paid on account of principal and interest, the master found £1202 16s. 10d. to be due for principal, interest and costs, which was appointed to be paid on a certain day in November, 1841.

On the 20th November, 1841, the time for payment was extended to 1st January, 1842.

Judgment. On the 30th December, 1842, the money not being then paid, a final decree of foreclosure was made. *Arkell*, the mortgagor, lived till January, 1854, and all that time in the neighbourhood of the property, but made no offer or effort to redeem. The plaintiff, his devisee, filed her bill in this suit, in October following, about eighteen years after the estate had become absolute.

In the meantime *Lucius Bigelow* had removed to a distant part of Canada, and had died, and, as it now appears, so long ago as in May, 1841, so that he was dead before the day last appointed for *Arkell* to make payment, and eighteen months before the final order of foreclosure.

His brother and heir at law, *Lawrence Bigelow*, conveyed all his interest in this land to one *Lavicount*, in consideration of a debt due to him by the mortgagee, which was thereupon released.

In 1852 one *Paul* bought this property from *Lavicount*, for £750, and has paid the consideration; and in 1854,

the value at that time, he sold it for £2000, which was paid in six months.

The defendant, in the foreclosure of the property and it had been having devised to *Lawrence Bigelow* and *Paul*.

The defendant, in the foreclosure, acquiesced in the sale, and *Paul*, as devisee, having received the proceeds of the foreclosure.

Of course, in three, the case was decided, it were true.

The plaintiff was held bound as mortgagee, and was pronounced arrived on the order of the court, in consequence of the concerned in the case.

Arkell lived in the property and not far from the period, he was proposed to redeem it by applying

the value of real estate having risen greatly in the meantime, he sold the property to the defendant *Wilson*, for £2000, which was all paid, £1000 down, and the balance in six months.

1859.

Arkell
7.
Wilson.

The defendant *Wilson* was the plaintiff's solicitor in the foreclosure suit, but he acquired no interest in the property until twelve years or more after the foreclosure, and it had in the meantime passed through several hands, having devolved, on the death of the mortgagee, upon *Lawrence Bigelow*, his heir, and having been sold or conveyed by him to *Lavicount*, and by *Lavicount* to *Paul*.

The defendant resists the redemption, relying upon the foreclosure, which in the long interval, has been acquiesced in by *Arkell*, and he assumes that *Lavicount* and *Paul*, as well as he, all purchased in reliance upon it, having no notice or knowledge that the decree of Judgment. foreclosure was on any ground open to exception.

Of course, if this be true with respect to any one of the three, the court would no more allow redemption than if it were true with respect to all.

The plaintiff, on the other hand, claims that she cannot be held bound by the decree of foreclosure, because the mortgagee, as it appears, was dead when the final decree was pronounced, and had been dead when the last day arrived on which the payment was to be made, by the order of the court. No doubt this is so, and that the suit in consequence abated, though none of the parties concerned in the proceedings had knowledge of the fact.

Arkell lived twelve years after the mortgagee's death and not far from the property. If, during that long period, he was ignorant of *Bigelow's* death, and was disposed to redeem, he might have made some effort towards it by applying to open the decree, if he imagined it to be

1859. binding upon him. If he was aware of the death, and that the suit had abated, and yet took no steps while he lived, to avail himself of his equity of redemption, it would be hard, indeed, that any innocent purchaser for good consideration should, after such a lapse of time, be made to suffer loss in order to give to his devisee the advantage of a sudden and unlooked for rise in the value of the property.

Arkell
v.
Wilson.

With regard to any objection to the foreclosure, founded upon the fact of Mr. *Maddock* having been retained by *Arkell*, or having acted for him in the suit, while at the same time he was acting in the same suit for the mortgagee, being the town agent of Mr. *Wilson*, his solicitor; I think it would be hard, indeed, that any one representing the title of the mortgagee should suffer from that circumstance. The employment of Mr. *Maddock* Judgment. was *Arkell's* own act. It is not suggested that there was any defence he could have offered, and it seems pretty obvious that the effect of Mr. *Maddock* being in his interest, as well as in that of the mortgagee, was beneficial to him, by procuring for him a longer delay in the proceedings than would apparently have been necessary in a perfectly plain case.

Upon the evidence, I think, *Lavicount*, *Paul*, and the defendant, are all to be regarded as purchasers for good consideration; that the proof of knowledge by either of them, when he purchased, of the fact of *Lucius Bigelow* having died before the final order, is not by any means established; and that it would be carrying the doctrine of constructive notice to an unreasonable length, to hold that each purchaser in succession was bound to enquire whether *Lucius Bigelow*, who had left Upper Canada, and removed to a remote quarter of Lower Canada, was, or was not certainly living at the time of the decree of foreclosure being made. They had a right, I think, to assume, in the absence of notice to the contrary, that the decree was valid and binding,

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and might fairly assume, that the mortgagor, who had so long acquiesced in it, was bound.

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Arkell
v.
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We can make no allowance for the alleged intemperate habits of *Arkell*. If he had been temperate and thrifty there is strong reason for believing that he would not at any time have desired to redeem the land, for it was not worth the incumbrance upon it; if he was drunken and reckless, he probably could not have done it, but that cannot give to him, or those claiming under him, any peculiar privilege.

If this were not one of those cases in which a peculiar discretion is given under our statute 7 Wm. IV., ch. 2, see. 11, to grant, or to withhold, redemption, I think I should still have declined to grant it, under the circumstances of the case; but, having regard to the position in which the court is placed by that statute, I am of opinion that we ought to hold it to be just and Judgment. reasonable not to allow the plaintiff to redeem at this distance of time—sixteen years after a recovery in ejectment upon the mortgage—and fourteen years after a decree of foreclosure, which, whether regular or not, was acquiesced in for more than twelve years by the mortgagor, without an effort to get rid of it in any manner; and when the land had, in the meantime, passed into the hands of successive purchasers for value, without proof or knowledge on their part that there was any vice or defect in the decree of foreclosure.

I am of opinion that the plaintiff's bill was rightly dismissed with costs; and that this appeal should be dismissed with costs.

1859.

Dec. 20, 1858,
and July 19,
1859.

SPRINGER, (DEFENDANT IN THE COURT BELOW), APPELLANT, V. GRAY (PLAINTIFF IN THE COURT BELOW,) RESPONDENT.

[ON APPEAL FROM THE SAME COURT.]

A party had entered into an agreement to accept a lease of land, but in preparing the conveyances in pursuance of such agreement, he insisted pertinaciously upon a stipulation being introduced into the lease which it was subsequently shewn he had not any right to call for, and he ultimately waived his claim to it; but, having previously declared he would never accept of a lease which did not agree with his interpretation of the contract, the owner of the land treated the agreement as at an end, and proceeded to erect a valuable building upon it. The proposed lessee thereupon filed a bill for specific performance of the agreement according to the interpretation put thereon by the lessor. *Held*, reversing the decree of the Court of Chancery, that the plaintiff was not entitled to the relief sought, and that his bill in the court below should be dismissed with costs.—[Spragge, V. C., dissenting.]

The transaction out of which this appeal arose, is fully set forth in the report of the cause in the court below, *ante* volume v., page 242.

Mr. *Mowat*, Q. C., and Mr. *Strong*, for appellant.

Mr. *Connor*, Q. C., for respondent.

The judgment of the court was delivered by

July 19. SIR J. B. ROBINSON, BART., C. J.—This is a contest upon a point of such trifling consequence that it never could have led to a suit in Chancery if the parties had been actuated by a reasonable spirit.

Judgment. It is not easy to understand from the evidence, to what extent each party would have been content to vary from the terms of the written agreement of the 18th of August, 1853, on which this suit is founded, for neither party seems to have exacted, or desired that it should be very closely followed, and from the drafts of proposed leases which are produced, they both appear to have suggested terms varying from the conditions of the agreement, which both had signed.

But this, I think, the plaintiff persevered in, the lease being so far from being a part of the McNab Street agreement. He would not differ about, but of land; but more of August is so evident leave no doubt contending for so and he insisted upon he would never in respect agree with or rather with was his misintention.

The defendant but he had right And after the negotiation upon this dispute to come into court of an agreement repudiated. It would should be allowed pleasure.

He continued firm upon a construction maintained, and it own witness, Mr. defendant's father, *Dan* all appearance made which should bind frontage occupied by pay rent for more the party wall. In writing he had signed plaintiff called for,

But this, I think, is plain upon the evidence, that the plaintiff perseveringly and continually insisted upon the lease being so framed as to exempt him from paying rent for a part of the frontage on King Street, between McNab Street and the centre of the wall referred to in the agreement. It was, to be sure, a very trifling matter to differ about, being the annual rent of only a few inches of land; but most certainly the agreement of the 18th of August is so explicit upon that particular point, as to leave no doubt that the plaintiff was in that respect contending for something not consistent with the contract; and he insisted upon it so pertinaciously that he declared he would never accept of a lease which did not in that respect agree with his interpretation of the agreement, or rather with what has been, and it must be admitted, was his misinterpretation.

1859.

Springer
v.
Gray.

The defendant, on his part, was equally obstinate, but he had right on his side, and I think reason also. Judgment. And after the negotiation for a lease had been broken off upon this dispute, it was not competent to the plaintiff to come into court, and ask for the specific performance of an agreement which he had himself renounced and repudiated. It would be unreasonable that the plaintiff should be allowed thus to play fast and loose at his pleasure.

He continued from the 15th of August, 1853, to insist upon a construction of the agreement which could not be maintained, and it is as evident upon the testimony of his own witness, Mr. Leggo, as it is upon that of the defendant's father, David Springer, that the plaintiff had to all appearance made up his mind never to accept a lease which should bind him to pay rent for more than half of the frontage occupied by the party wall; or, at any rate, not to pay rent for more than half of the frontage occupied by the party wall. If the defendant was not bound by the writing he had signed to execute a lease such as the plaintiff called for, then he had a right, when the plaintiff

1859. declined accepting any other, to consider himself at liberty to deal with the land as his own ; or, which was the same thing, to let his father know, by whom the term would otherwise have been created, that he might put the land to what use he pleased.

Springer
v.
Gray.

The defendant's father being so informed, did, in consequence, go forthwith to work, and built a house upon the lot, which he has since sold to the defendant. And the defendant has leased that building to a stranger, for seven years.

Now there may be little or nothing growing out of these changes, which cannot be provided for and compensated, by the terms in which the court may consent to give relief, but still when such changes have been made in the exercise of legal rights, it would be unreasonable in courts of equity to disturb them, upon the footing of affording pecuniary recompense, unless where there is a clear equitable claim to have the new arrangement set aside.

Judgment.

When the plaintiff, on the 12th of October, 1853, saw the defendant putting up a house on the lot which he might himself have been building upon—if he had been willing to abide by what his own agreement of the 18th of August plainly imports—he found fault with the arrangement of the outer doors, as if he had a right confidently to reckon that the defendant was building the house for him; and when he gave the defendant notice in his letter of that date that he was prepared even then to take the lease *as agreed upon*, it is clear on the whole evidence that what he meant by that was, that he would accept a lease only according to his own idea of its meaning upon the point respecting the party wall, which he had never yet given up.

In consequence of this early difficulty upon a point in regard to which the plaintiff was certainly in the wrong he never went into possession, and he received no lease

and has expended the other hand continued in possession have since made putting up a valuable tenant for a equitable to disturb the plaintiff, which the agreement have been in business

It is besides necessary sought to enforce and certain in this point in this agreement differed, and in view for a difference of chief, if not his own been all along written agreement own, which it seems it will not bear, have been negotiated a manner either which at least the

The subsequent from the nature of were put forward, agreement upon contents vary from but they shew content to abandon and to accede new additional reason specific performance tiff had so persevered least, and which by both parties.

1859.

Springer
v.
Gray.

and has expended nothing upon the property; while on the other hand, the defendant, and his father, having continued in possession, as they had a legal right to do, have since made a great change in the property by putting up a valuable building, which has been leased to a tenant for a term of years. It would surely not be equitable to disturb this state of things in order to let in the plaintiff, who cannot now be put in the same position which the agreement contemplated, but which he might have been in but for his own error and pertinacity.

It is besides necessary, that agreements of which it is sought to enforce a specific performance should be explicit and certain in their terms, and there is more than one point in this agreement on which the parties have differed, and in which it must be supposed there is room for a difference of opinion. It is plain that the plaintiff's chief, if not his only, pretence for this suit is, that he has been all along insisting upon a performance of the written agreement, according to a construction of his own, which it seems to be now admitted on all hands that it will not bear, and after both he and the defendant have been negotiating and settling upon other points in a manner either differing from the agreement, or of which at least the agreement gives no intimation. Judgment.

The subsequent documents to which I refer, may not, from the nature of them, and the manner in which they were put forward, have had the effect of creating a new agreement upon many points, in regard to which their contents vary from the contract of the 18th of August; but they shew clearly enough that both parties were content to abandon that contract in several particulars, and to accede new terms; and this, I think, is an additional reason for not holding the defendant to a specific performance of that agreement which the plaintiff had so perseveringly repudiated at one point at least, and which has been dealt with in such a manner by both parties.

1859.

Springer
v.
Gray.

In *Robison v. Page*, (a) it was held that the court may decree performance of an agreement about land, with some variations which have been agreed to between the parties by parol, if the parties will elect to accept them, otherwise they must take the agreement without such variations, unless the evidence shews that the subsequent variations agreed to amount to a dissolution or abandonment of the whole contract. *Davis v. Symonds* (b) is also a material case upon this point.

In *Wedgewood v. Adams*, (c) the court affirms what indeed is supported by very many cases, that in all applications for specific performance, the court has a discretion to grant or refuse it, according to their view of the conduct of the parties, and the real justice of the case.

Judgment. In *Carolan v. Brabazen*, (d) the court held that an agreement to make a lease was not waived merely because there had been some subsequent negotiations about a suggested alteration in the terms, in consequence of which the defendant had refused to adhere to the first agreement. They held that the mere suggestion of certain changes was not a waiver of the original contract. But here, besides that the parties not merely discussed, but agreed to certain variations, the plaintiff is calling upon the court to compel the defendant to execute a contract in his favour, by which contract he has steadily refused to be bound, according to what we take to be its obvious meaning; and by that refusal he has occasioned all the doubts and difficulty that have occurred, and has fairly warranted the other party, I think, in looking upon the contract as repudiated, and in dealing with the property as if he were relieved from it.

The case of *Carter v. The Dean of Ely* (e) is a strong authority to shew that this defendant should not be

(a) 3 Russ. 114.
(c) 6 Beav. 600.
(e) 7 Sim. 211.

(b) 1 Cox, 402.
(d) 3 J. & Lat. 200.

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Per Curiam.—
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(a) 2 Ves.

held to the agreement in equity, when the plaintiff, instead of being prompt and ready, or, as has been sometimes said, *eager* to carry out the contract on his part, has, by contending for something contrary to the agreement, produced delay in a case where the rent was to commence with the giving of the lease. I refer also to *Legal v. Miller*, (a) and to *Jordan v. Sawkins*, (b) and to *Fry* on Specific Performance, section 690.

1859.

Springer
v.
Gray.

In my opinion the judgment given in the court below should be reversed, and the bill dismissed. I observe that in the judgment given below, as reported in the fifth volume of the Chancery Reports, page 250, the Chancellor, who thought the bill should be dismissed, and dissented from his brothers, expressed no opinion about costs. I think in accordance with the general principle in such cases, the plaintiff failing should pay the costs, that is, the costs of the suit below, not of the appeal.

Judgment.

SPRAGGE, V. C.—Retained the opinion expressed by him in the court below.

Per Curiam.—[SPRAGGE, V. C., dissenting.]—*Appeal allowed; the decree in the court below reversed, and the bill dismissed with costs.*

RICHARDSON V. HAMILTON.

Cancellation of a note given in ease of a prisoner.

A person arrested for debt, while in custody of the sheriff's officer, delivered to him his promissory note, with an accommodation endorser, at the same time executing a bond with a surety for his appearance in the action, whereupon he was discharged from custody. *Held*, that the transaction was in violation of the provisions of the statute 23 Henry VI, ch. 9, and as such, that the transfer of the note to the bailiff was illegal and void.

This was a bill filed by *Hugh Richardson*, against *James Hamilton*, sheriff of the county of Middlesex, and

(a) 2 Ves. 299.

(b) 1 Ves. Jr. 402.

1859.
Richardson
v.
Hamilton.

Armenius A. Towns, his bailiff, setting forth that for the purpose of enabling one *Charles W. Robertson* to effect an arrangement of his affairs with the Bank of British North America, in London, the plaintiff had left with *Robertson* several blank notes, endorsed by the plaintiff, which *Robertson* was to fill up, and for which endorsements plaintiff had never received any consideration; but that on the 23rd of December, 1857, *Robertson* was arrested on a writ of *capias ad respondendum*, for a debt of £500, which arrest was effected by the defendant *Towns*, who agreed to release him from custody upon *Robertson* and one *Anderson* executing the usual bail-bond to the sheriff, which was done, and also delivering to *Towns* one of the said blanks filled up and signed by *Robertson* as maker, for £300, which he did accordingly, and *Towns* thereupon released *Robertson* from custody, who absconded the following day: that *Hamilton*, as holder of the note, intended to sue the plaintiff as soon as the same became due. The bill charged that *Towns* had full knowledge of the circumstances under which *Robertson* had possession of the blank notes endorsed by the plaintiff, who submitted that the defendants were not entitled to recover the amount of the note from him, because the making and delivery thereof to the sheriff was, under the circumstances, a fraud upon him; and also, because the note was taken for ease and favour by the sheriff to a debtor in his custody on mesne process, and therefore on a contract void, as being contrary to the policy of the law. The prayer of the bill was, that the defendants might be ordered to deliver up the note to be cancelled, and that they might be restrained from endorsing or transferring the same, and from suing the plaintiff thereon at law.

The defendants answered the bill, denying distinctly all knowledge of the manner in which *Robertson* had obtained possession of the note; or that the same was not filled up when endorsed by the plaintiff, but admitted that the same had been received by *Towns* as additional security for the appearance of *Robertson*.

Mr. Strong

Mr. McDon

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THE CHANCERY COURT
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Mr. McDonough
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(a) 23 Hen., VI.
(b) Fuller v. Pr
(c) Rogers v. Re

Mr. *Strong* for plaintiff.

1859.

Mr. *McDonald* and Mr. *D. G. Miller*, for defendants.

Richardson
v.
Hamilton.

The cases cited appear in the judgment, which was delivered by

THE CHANCELLOR.—It is not denied that the plaintiff endorsed the promissory note which is the subject of this suit, for the accommodation of *Robertson*, the maker. Then the case made by the bill is, that *Robertson* being in the custody of the defendant *Towns*, an officer of the sheriff of Middlesex, upon mesne process, at the suit of one *Thompson*, for a debt of £500, *Towns* agreed to discharge him, upon his executing a bail-bond in the usual form, with one *Anderson* as his surety, and assigning the promissory note in question to *Towns* as additional security. *Robertson* absconded shortly after, and bail has not been put in.

Judgment.

Mr. *McDonald* admits that the assignment of the promissory note to *Towns*, under the circumstances stated in the bill, would be in direct violation of the statute, (a) and therefore illegal and void. (b) But he insists that the promissory note here was not assigned to *Towns* as the officer of the sheriff, and for his security, as stated in the bill; but that it was assigned to *Towns* as the agent of the plaintiff in the action, and for the plaintiff's security; and he contends that the assignment to *Towns* under such circumstances, and for such a purpose, was neither contrary to the statute nor void. (c)

The law having, for the protection of the public, prohibited sheriffs from taking security from debtors confined on mesne process, except in the form prescribed by the act, I would have had great hesitation in holding

(a) 23 Hen., VI., ch. 9, secs. 3, 5, 7.

(b) Fuller v. Prest, 7 T. R., 109; Sedgeworth v. Spicer, 4 East. 568.

(c) Rogers v. Reeves, 1 T. R. 418.

1859. that a sheriff could legally take as agent of a plaintiff, a security which he is expressly prohibited from taking as sheriff. It is obvious that such a practice would be open to great abuse. But, certainly, the evidence must have been clear. No court would be justified in upholding such a security upon doubtful evidence. Now, had the point been open, I very much doubt whether this defence could have been sustained upon the evidence before us.

Richardson
v.
Hamilton.

Judgment.

But it is unnecessary to decide that, because I am of opinion that the defence is not open upon this record. The statement in the bill is: "That upon such arrest being made, the defendant *Towns* agreed to release the said *Robertson* from custody, upon the said *Robertson* and one *Alexander Anderson* signing the usual bail-bond to the sheriff, which was done; and also upon the said *Robertson* giving the said *Towns* one of the said promissory notes." And the bill goes on to impeach *Towns'* title to the note in question upon certain grounds stated in the bill, which the evidence fails to establish. "*And also because the same was taken for ease and favour by the sheriff to a debtor in his custody on mesne process, and therefore in pursuance of a contract contrary to the policy of the law, and void.*" Now, in answer to the plaintiff's case, stated thus fairly and distinctly by the bill, the defendant says: "I admit that I released the said *Robertson* from custody upon receiving the bail-bond in the said bill referred to, and upon the said *Robertson* giving me as security a promissory note drawn by the said *Robertson*, and endorsed by the plaintiff." And a little further on he says: "I say that the said defendant, the said *Hamilton*, holds me accountable for the amount of the said note, and that I intend to sue the above-named plaintiff at law for the amount thereof, when the same becomes due." Now the defence as set up in argument, is not only a defence which has not been made by the answer, but it is a defence which expressly contradicts it, for the answer contains,

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(a) 9 Ir. Eq. R.
(c) *Harrison v.*

as it seems to me, an explicit admission of the case made by the bill.

1859.

Richardson
v.
Hamilton.

It is argued, however, that the facts stated in the bill would, if true, constitute a perfect defence to any action upon the promissory note, and that the rights of the parties ought, therefore, to be settled at law. The learned counsel did not mean, I apprehend, to deny that this court has jurisdiction to restrain the circulation of a promissory note, and to direct its cancellation in a proper case. There is no doubt, I apprehend, as to the jurisdiction of the court. But the argument, if I understand it rightly, was, that as there is a defence at law, this court ought not, in the exercise of a sound discretion, to determine the question, but ought to leave the parties to settle their rights in an action at law. Two cases recently decided by the Master of the Rolls in Ireland, *Heath v. Heath*, (a) and *Anderson v. Dowling* (b), were cited for that position, but they are clearly inapplicable. In each of those cases the application was for an *interlocutory injunction*. The distinction is obvious, as may be gathered from the observations of the Master of the Rolls in *Anderson v. Dowling*. His judgment in that case opens with the observation that the plaintiff had refused to give judgment at law. Now to stay proceedings at law upon an interlocutory application at the instance of a plaintiff who refuses to give judgment at law, would be obviously unjust, and contrary to the settled practice. (c) In the course of his observations the learned judge pointed out clearly the distinction to which I have already referred. "The question is not" he says "whether the suit can be maintained, but whether I ought to stay the proceedings at law upon an interlocutory application." But the question before us does not arise upon an interlocutory application. It would seem, indeed, that no action has been as yet commenced. The

(a) 9 Ir. Eq. Rep. 635.

(b) 11 Ir. Eq. Rep. 590.

(c) *Harrison v. Baby*, ante vol. 1., p. 250, and the cases there cited.

1859. cause is in hearing. And the argument is, that although the cause has been brought to a hearing, and although ample materials for its decision have been furnished, the court ought not to determine the question submitted to it, but ought to leave the question to be settled by a new litigation, to be commenced in another court. I cannot accede to that argument. Such a decision would be, in my opinion, contrary to law, (a) and contrary also to the spirit of modern legislation, the aim of which has been to enable all courts, whether of law or equity, to dispose finally of all cases within their jurisdiction.

Richardson
v.
Hamilton.

I am of opinion, therefore, that the plaintiff is entitled to have the note in question cancelled. But as the greater part of the evidence is directed to a ground of relief, which the plaintiff has failed to establish, I think the decree should be without costs.

Judgment.

HAMILTON V. BEARDMORE.

Judgment creditor—Lien.

The statute 13 & 14 Victoria, chapter 33, section 26, making a registered judgment a lien upon the lands of the debtor, does not apply to judgments obtained against the personal representative of a debtor.

The bill in this case set forth that the plaintiffs on the 2nd of June, 1857, recovered judgment at law against the administratrix of one *Richard Fairlough*, deceased, with the will annexed, for £256 5s. 7d., which was duly registered in the registry of the county of Wentworth, on the 3rd of that month, at which time there were lands and hereditaments in that county, of which *Richard Fairlough* had died seised, and upon which the judgment attached: that the Commercial Bank of Canada subsequently recovered a judgment against the administratrix which was not registered, but a writ against lands of the testator, was, on the 19th of July, 1857, placed in the hands of the sheriff of that county, who, on the 19th of

(a) *Jervis v. White*, 7 Ves. 13; *Jackman v. Mitchell*, 13 Ves. 581; *Ware v. Horwood*, 14 Ves. 28.

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November, 1858, sold as the lands of the testator certain property in the city of Hamilton, to the defendant, for £187 10s.: that such land was subject to the lien of the plaintiffs' judgment, and so subject, had been bought by defendant, who was still the owner thereof, subject to the judgment of the plaintiffs; and prayed payment of the plaintiffs' judgment, and, in default, a sale.

1859.

Hamilton
v.
Boardman.

This bill was taken *pro confesso*, and at the hearing of the cause.

Mr. *Proudfoot* for the plaintiffs, asked that a decree might be made in the terms of the prayer of the bill, contending that by the registry of the judgment the plaintiffs had obtained a lien upon all the lands of the testator in the county of Wentworth, and that the sale by the sheriff of the land in question, could only be made subject to such lien; but,

ESTEN, V. C.—I think this bill must be dismissed. The only remedy of a creditor who has not obtained judgment for his debt before the death of his debtor, is to proceed against the executor or administrator at law, under the 5 George II., chapter 7, or in this court for an administration of the estate. He cannot by obtaining and registering a judgment against the executor or administrator, acquire a lien on the real estate of the debtor, of which the executor or administrator is not entitled for any estate or interest whatsoever, which he has no power to charge, and which if he had agreed to charge, by writing under his hand, such instrument would be a nullity.

1859.

DALTON V. MCBRIDE.

Specific performance—Conditions of sale—Signed agreement—Statute of frauds.

A testator devised his lands to trustees, to distribute and divide the same amongst his wife and children, so soon as the youngest surviving child attained twenty-one. The trustees professing to act in pursuance of the powers given by the will, put up portions of the property at auction, for an absolute term of twelve years, at the expiration of which the youngest child would attain twenty-one, with a privilege to the lessee of removing any buildings that might be upon the premises at the expiration of the term, and the lease as prepared by the trustees, gave to the lessee a right of purchase at the expiration thereof; or if he declined purchasing, stipulated that the improvements would be paid for by the lessors. On a bill filed by the trustees to enforce specific performance of this contract, *Held*, that the agreement was *ultra vires*, and the bill was dismissed without costs, the defendant having set up several grounds of defence which entirely failed.

A signed agreement expressed that the subscribers had purchased at auction the lots of land set opposite to their names respectively, according to the terms of sale, made known at the time of sale and they agreed to take the deed, bond, or agreement, or lease, as the case might be, to each of them individually, on condition of their having made the payments according to the conditions of sale. The conditions of sale, thus referred to, had been printed and distributed in hand bills, and were read to the purchasers at the auction. *Held*, that the conditions of sale were sufficiently referred to by, and incorporated with, the signed agreement, so as to constitute a binding contract in writing, within the statute of frauds.

This suit was instituted by *Joshua D. Dalton* and *John Carling*, against *Samuel McBride*. The bill set forth that the late *Henry Dalton*, being seised in fee of certain lands in the city of London, devised the same to the plaintiffs in trust to take possession of and divide the same among his children and wife, as soon as the youngest surviving child should arrive at the age of twenty-one years; that the plaintiffs being such trustees, proposed to lease the said lands for twelve years, being the period at the expiration of which the youngest child of the said *Henry Dalton* would become of the age of twenty-one years; that on the 19th of October, 1855, the plaintiffs, in pursuance of notice to that effect, put up the lands for sale, in lots, by auction, on lease for the term of twelve years, to be bid for per foot on the frontage thereof, at which sale the auctioneer employed made known the terms thereof; and the defendant at such sale became the purchaser of five several

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lots, set out per annum, agreement, such purchase sale prepared at a rent of at the instance that sum, a execution by thereto, other joined with contain a pro the land in fee tenancy, or improvement to which required and caused an which they agreed for his acceptance to execute the the sum of premises which and prayed a the defendant and execute the and conditions due, and for five

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1859.

Dalton
v.
McBride.

lots, set out in the bill, at an aggregate rental of £72 per annum, and thereupon the defendant duly signed an agreement, by which he acknowledged he had become such purchaser. That the plaintiffs shortly after the sale prepared a lease, which was duly executed by them, at a rent of £60 a year, the plaintiffs having consented, at the instance of the defendant, to reduce the rent to that sum, and tendered the same for acceptance and execution by the defendant, who made no objection thereto, other than that he desired another person to be joined with him as lessee, and that the lease should contain a proviso that he should be at liberty to purchase the land in fee at a valuation, on the expiration of the tenancy, or that the plaintiffs would purchase the improvements made on the premises, at a fair valuation, to which request of the defendant the plaintiffs acceded, and caused another lease to be prepared according thereto, which they also executed, and tendered to the defendant for his acceptance and signature; but that he had refused to execute the same, although he had paid to the plaintiffs the sum of £30 for the first half-year's rent of the premises which became due on the 19th of April 1856, and prayed a specific performance of the agreement, that the defendant might be decreed to accept the said lease, and execute the same on his part, according to the terms and conditions of sale, and pay the rent and taxes accrued due, and for further relief.

The defendant answered the bill, alleging that a few days after the lots mentioned in the bill, and other lands had been advertised, and before the sale, the plaintiff Dalton left with defendant a written paper, signed by Dalton, agreeing to lease the lots, in these words: "The executors of the late *H. Dalton* agree to lease to *Samuel McBride* and others, their property, situate at Lake Horn Bridge, containing five lots, for the period of twelve years, for the sum of sixty pounds per annum, payable half yearly, in the sum of thirty pounds, currency, with the privilege of purchasing at the end of the lease, by arbitration; or

Statement.

1859.
 Dalton
 v.
 McBride.

the executors purchasing the improvements at valuation."* And that on that occasion *Dalton* requested the defendant to attend the auction, and bid on the lots, so as not to injure the sale, at the same time assuring the defendant that nothing done at the auction should be binding on defendant; in consequence of which assurance the defendant attended the sale, bid off the lots, and signed the auctioneer's book on the same understanding, without enquiring or knowing what it contained; that he found the sale a puff, for he discovered that *William Dalton*, brother of the plaintiff, was the chief bidder, that he bid only for the purpose of enhancing the prices at the sale, and he also bade against the defendant for the said five lots: that the plaintiffs never held, or pretended to hold, the defendant to the sale at auction, but to the offer which had been made by the plaintiff *Dalton*, which he never accepted. The defendant denied taking possession of the lots, and payment of the £30 on account of rent, and objected that the will did not authorise the making of such a lease as the plaintiffs sought to compel the defendant to accept.

Statement.

The only terms of the sale were set forth in hand bills, printed and circulated in London, in which it was stated that the property of the testator would be leased "on very advantageous terms, viz., on a lease of twelve years, at a rental of ——— per foot, per annum to the highest bidder; all buildings remaining on the land at the expiration of the lease, will be allowed to be removed by the owners."

The answer having been replied to, evidence was taken in the cause, and the defendant was examined *viva voce*. The nature of the evidence is sufficiently stated in the judgment.

Mr. *Blake*, for the plaintiffs, cited *Fry* on Specific

* This was proved as an exhibit in the cause.

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(a) 2 DeG.
 (c) 3 Russ 1
 (e) 1 Ves. J

Performance, 157-8, to shew that when the Statute of Frauds is not set up as a bar, evidence may be adduced to connect the conditions read with the agreement signed, and here had the defence of the statute been raised, the agreement is sufficient within it, as the offer of the executors can be made use of to supply the defect existing in the memorandum signed by defendant. The offer previously made, but not accepted by the defendant, as set up in the answer, is displaced by the agreement afterwards signed by the defendant, and this although alleged by the defendant to have been only colourable, is not proved to have been so. The variation sought to be introduced by plaintiffs is unimportant, as they have a right to insist upon the terms of the written agreement, but admitting as against themselves that the rent was to be £60, not £72. He referred also to *Skinner v. McDougall*, (c) *Martin v. Pycroft*, (b) *Robinson v. Page*. (c)

1859.

Dalton
v.
McBride.

Mr. *Roaf*, for defendant, contended that the conditions of sale were not sufficiently referred to by the written agreement, which by itself was clearly insufficient. *Clinan v. Coke*. (d) Again the variations imported into the lease as to the amount of rent, and the right of purchase or payment for improvements, cannot be shewn by a plaintiff seeking specific performance, with such variations introduced. The additional terms here constituted in fact a new agreement. He also contended that the written contract was never intended to bind the parties, but was merely colourable, as set up by the answer, nothing having been done in accordance with it, but with the previous proposal only.—*Brodie v. St. Pauls*. (e)

The lease in itself is one which the plaintiffs have no power to grant, therefore the court cannot decree in their favour. The other cases cited by counsel appear in the judgment.

(a) 2 DeG. & S. 265.

(c) 3 Russ 114.

(e) 1 Ves. J. 326.

(b) 2 DeG. M. & G. 785.

(d) 1 Sch. & L. 22.

1859. THE CHANCELLOR.—On the 19th of October, 1855, certain building lots, part of the estate of the late *Henry Dalton*, were put up at auction, by direction of the executors and trustees of his will, in pursuance of an advertisement which stated that they would be leased for a term of twelve years. The several parcels now in question were knocked down to the defendant in this cause, who was the highest bidder, and he thereupon signed an agreement of which the following is a copy :

Dalton
v.
McBride.

“ London October 19, 1855 :—An agreement of lots of freehold and leasehold property of late Mr. *Dalton*.

“ We, whose names are herein set forth, acknowledge to have purchased at the City Auction, Dundas Street, London, the lot or lots set opposite our respective names according to the terms made known at the time of sale, to take place this day, that we are individually and not jointly liable for the fulfilment of the conditions of sale. And we agree to take the deed, bond, agreement, or lease, as the case may be, for the duly conveying the lot or lots to each of us individually on condition of our having made the payments according to the conditions of sale, and paying the taxes on our respective lots, from this date, and the sums we are respectively to pay, as set opposite to our names respectively.”

Judgment.

Underneath this memorandum there is a schedule of the parcels, and the amounts bid, and the defendant signed his name opposite to each lot, for which he was the highest bidder.

The bill then proceeds to state that the plaintiffs consented, subsequently, at the instance of the defendant, to vary the agreement so entered into, in the following important particulars. The rent was reduced from seventy-two pounds per annum, the amount bid at the auction, to sixty pounds. The defendant was allowed an option of purchasing the property upon the expiration

of the lease, and in the event of his failing to take the bid, he is to state that a lease varied, was entered into the defendant. It prays that the said lease,

The defendant is set out in the auctioneer's book, sale and bid, in this instance and in a puffier, and is bound by any. The next states that the auction question had been lastly submits power, under the lease as they set

The last ground construction of course, a pure answer is not by the evidence. this sale as a matter discovered after against him be obviously incongruous. But without entering matter, it may be fails to sustain the defendant himself goes far to dispr

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of the lease, at a price to be fixed by arbitration. And in the event of his declining to purchase, the plaintiffs agreed to take the buildings at a valuation. The bill goes on to state that a lease in accordance with the agreement, as varied, was executed by all the plaintiffs, and tendered to the defendant, but that he refused to accept it; and it prays that the defendant may be compelled to accept the said lease, and pay his rent in accordance therewith.

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The defendant denies that he executed the agreement as set out in the bill. He admits that he signed the auctioneer's book. But he asserts that he attended the sale and bid, and signed the auctioneer's book, at the instance and request of the plaintiffs, in other words, as a puffer, and upon the assurance that he was not to be bound by any agreement into which he might enter. He next states that he discovered, subsequent to the sale, that the auction was all a puff, and that the land in question had been bid up beyond its real value. And he Judgment. lastly submits the question, whether the plaintiffs have power, under the will of *Henry Dalton*, to make such a lease as they seek to compel him to accept.

The last ground of defence turns upon the proper construction of *Henry Dalton's* will, and raises, of course, a pure question of law. Upon the other points, the answer is neither consistent with itself, nor supported by the evidence. If it be true that the defendant attended this sale as a mere puffer, it cannot be also true that he discovered after the sale that the land had been bid up against him beyond its value. The statements are obviously incongruous and inconsistent with each other. But without entering into a minute investigation of the matter, it may be sufficient to say that whilst the evidence fails to sustain either statement, the examination of the defendant himself, which was extremely unsatisfactory, goes far to disprove both.

It was argued, however, that the paper signed by the

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defendant does not constitute a memorandum within the Statute of Frauds, and if that paper is to be taken alone it is clear that the objection must prevail, for it contains neither the names of the lessors, nor the terms of the lease. It is said, however, that the conditions of sale are referred to, and thereby incorporated with the signed agreement, and that taken together these documents constitute a sufficient memorandum. The cases upon this subject are inconsistent. That the signed paper must refer to the unsigned, is clear, both upon reason and authority, (a) but as to the nature and extent of the reference the cases differ. Sir *Edward Sugden* says: that "there must be a clear reference to the particular paper so as to prevent the possibility of one paper being substituted for another." (b) Upon principle that would seem to be correct, not only because a different rule would open the door to perjury, but also because of the difficulty of understanding how the unsigned paper can be said to have been signed by the party to be charged, even in a figurative sense, unless the reference is so clear that the one paper may be fairly said to have been incorporated with the other. The authorities for the proposition advanced by Sir *Edward Sugden* are entitled to great weight. I may refer to *Hinde v. Whitehouse*, (c) *Boydell v. Drummond*, (d) *Coles v. Trecothick*, (e) and *Kenworthy v. Schefield*. (f) In *Ridgway v. Wharton* (g) a case recently decided in the Court of Chancery, on appeal, it is said: "The statute is not complied with, unless the whole contract is either embraced in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper." That proposition is obviously too restrictive. It is well settled that when the reference is clear, parol evidence is admissible to identify the document referred to. That error was corrected in the House

(a) *Clia v. Cook*, 1 S. & L. 22.

(c) 7 East. 558.

(e) 9 Ves. 234.

(g) 3 D. M. & G. 677.

(b) *Sug. V. & P.* 111, 13th ed.

(d) 11 East. 143.

(f) 2 B. & C. 948.

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(a) 6 H. L. 257.

(c) 2 B. & P. 238

(d) *Ridgway v. W.*
3 A. E. 355.

of Lords. Lord *Cranworth* candidly admitted his mistake. But it is to be regretted that the case was not considered with reference to *Boydell v. Drummond*, and the authorities of that class, for it does seem to me, I must confess, that the proposition advanced by Lord *Cranworth* in the House of Lords, (a) is less consistent with the authorities than that which had been advanced by him in the court of Chancery.

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Looking at this case upon principle, I would be disposed to hold, following *Boydell v. Drummond*, that the conditions have not been referred to with sufficient distinctness. But such a decision would overrule many cases, which, so far as I can discover, have never been questioned. I may refer to *Western v. Russell*, (b) *Saunderson v. Jackson*, (c) and the late case in the House of Lords. (d) In all these cases the reference was much more obscure than in the case before us. In none of them was there any direct reference to the unsigned document at all. The court gathered from the import of the signed memorandum, that there were other terms, not expressed, to which the signer meant to assent; and finding these other terms reduced to writing, and clearly identified, they treated the memorandum as sufficient, holding that the party charged had in effect signed both documents. Judgment.

The conclusion at which I have arrived upon this cause is, that the reference to the conditions of sale is sufficient, and as those conditions were in writing, and have been clearly identified by parol evidence, I am of opinion that the memorandum signed by the defendant is sufficient to satisfy the statute.

This brings us to the last ground of defence raised by the answer, namely, the power of the plaintiffs to execute such a lease as they pray that the defendant may be com-

(a) 6 H. L. 257.

(c) 2 B. & P. 238

(d) *Ridgway v. Wharton*, 6 H. L. 239, and see *Dobell v. Hutchinson*, 3 A. E. 355.

(b) 3 V. & B. 186.

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pelled to accept. Upon that point my opinion is in favour of the defendant. I am inclined to think that the plaintiffs have no power under the will to execute an absolute lease of twelve years. But however that may be, I take it to be clear that the contract to sell upon the expiration of the lease, at a price to be fixed by arbitration, or to take the buildings from the lessee at a valuation, is quite unauthorised. And as the plaintiffs have bound themselves to grant a lease in that form, a contract which they have not power under the will to carry out, I think that the bill must be dismissed, but, under the circumstances, without costs.

Judgment.

ESTEN, V. C.—There seems to be a sufficient agreement in writing according to the cases of *Western v. Russell*, and *Saunderson v. Jackson*, which seem to establish that if the signed writing refer either expressly or by implication, however slight, to something else, which happens to be in writing, and with the signed writing shews the whole agreement, that is sufficient. The present is clearly within this rule. The subsequent parol variations seem not binding or available as a defence, being without consideration, and not acted upon, and as to one of them being *ultra vires* of the trustees, and not amounting to a substantive abandonment. It is proved, however, that before the sale a written proposal was delivered by the plaintiffs to the defendant, and it is remarkable that the variations in the agreement are in exact conformity with the written proposal. The defendant, indeed, says that he never accepted this proposal, and that it was understood that he was not to be bound by his bidding at the sale. I do not believe this statement to its full extent, because he afterwards paid £25 as rent; but I think the conduct of the plaintiffs themselves lends such colour to the supposition that he was not to be bound beyond the written proposal, that it would be wrong to decree the execution of the signed agreement, without further enquiry and an examination of Mr. Dalton. The case

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would then be similar to that of *Clarke v. Grant (a)*. The agreement for purchase was *ultra vires*; but in other respects the lease seems authorised by the power. I should not think it necessary to confine the term to the minority of the youngest surviving child.

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BROCKVILLE V. SHERWOOD.

Railway Company—Advances to.

The municipality of B. being interested in the completion of a railway, by a by-law of the municipal council agreed to loan to the company, in municipal loan fund debentures, the sum of £100,000; for securing the re-payment of which, the company executed to the municipality a mortgage on all the property of the company, and which, by an act of the legislature, was declared to be valid and binding against all the property of the company, *as well that already owned by them, as that which they might afterwards acquire*, and which by a subsequent agreement made for the settlement of certain suits pending between the parties, it was agreed, should be advanced to the company in certain proportions as the work progressed. In compliance with a requisition of the company for funds, "*for work done and materials furnished, and right of way, &c.*, for the use of the railway," the municipal council directed their bankers to hand over to the company an amount of the debentures, which, upon their being handed over, were immediately seized by the sheriff, under an execution at the suit of the bankers. Upon a bill filed for the delivery up of the debentures, *held*, that so far as the debentures were required for the payment of the right of way, rolling stock ready to be delivered, and other materials not yet become the property of the company, they were impressed with a trust to be applied by the company to the payment of those demands.

The bill in this case was filed by the Corporation of the town of Brockville, against *Adiel Sherwood, The Brockville and Ottawa Railway Company, The Bank of Upper Canada*, and others, having executions in the hands of the defendant *Sherwood*, as sheriff, against the goods, &c., of the Railway Company, setting forth that two several suits had been pending in this court by the Railway Company, against the plaintiffs; one for the purpose of compelling the present plaintiffs to advance to the Company certain municipal loan fund debentures, in pursuance of a by-law of the council, for the loan of

Statement.

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£100,000 of such debentures, to be applied in the construction of the railway; the other, to determine the respective rights of the parties to a portion of the market square in Brockville; and that for the purpose of settling those causes an agreement was, on the 16th of September, 1858, made between the parties to the suits, and others interested in the following words:

“ *In Chancery.*

“ BROCKVILLE AND OTTAWA RAILWAY COMPANY

vs.

“ THE TOWN OF BROCKVILLE, (DEBENTURE SUIT.)

“ SAME *vs.* SAME, (MARKET SQUARE.)

“ Memorandum agreed on for settlement of these suits:

Statement. “ 1. Defendants to retain overdue coupons and debentures to the extent, together, of £17,000 (the debentures to be estimated at the value of 92½ per cent.,) which sum is to be applied as follows, viz., £2000 for leave to take and appropriate for the use of the railway, as much of the market square in the East Ward of the town as lies between Water Street and the Saint Lawrence, under 16 Vic., ch. 106, sec. 15; also, for the right to construct and maintain the tunnel through and under the Market Square, and Market Street. The sum of £500 to be applied in satisfaction of costs of defendants in these causes, including all expenses of the railway committees, and deputations from Brockville to Perth, Smith’s Falls, and Toronto, in connexion with railway matters, and all expenses of the town in printing or otherwise, in connexion with railway matters; also, the cost of maintaining Main Street over the tunnel. The balance, viz., £14,500, on account of the interest and sinking fund, and compound interest, and charges to government, and payment of clergy reserve fund. The plaintiffs to indemnify the defendants against any liability on account of claims (if any) which individuals may have by reason of injury to their properties arising from the construction of the tunnel under the Market Street.

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buildings at Brockville, to be erected according to the plans prepared by *F. S. Scott*, and contracted for by *Taggart & Foster*; also, for completing the tunnel and wharfage at Brockville, and for paying the drawback to be retained by the defendants, and paid over by them to the contractors for those works as they progress, according to the terms of their contract with the company. The buildings in the contract of *Taggart & Foster*, to be erected south of Water Street; as also the machine shop and infirmary to be erected within the present limits of the town.

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"3. The balance of the debentures to be paid over by the defendants to the plaintiffs, or their order, as needed for the completion of the works, according to the proper estimates and necessary and proper expenditure of the company, the payments to be made rateably with the other municipalities, in the same proportions to the amount required as the said balance bears to the aggregate of loan fund debentures of the other municipalities remaining unexpended.

"4. In case the defendants shall dispose of the debentures which are to be paid to, or retained by them, as above stipulated in clause number one, or any of them, within six months from the date of this agreement, the plaintiffs are to have the benefit of any increase in the value of the said debentures over and above the now assumed value (92½ per cent.); and on the other hand, the plaintiffs are to bear the loss of any depreciation in value of the said debentures, upon any sale thereof, as aforesaid, unless they shall prefer redeeming or purchasing them, which they shall have the right of doing at the rate of 92½ per cent. in order to prevent a sale thereof to any other person, for a period of six months from the date hereof.

"5. In case of any difference in the carrying out of these terms, the difficulty is to be decided by *Benjamin Chaffey*, (or such other person as may be agreed on), whose decisions from time to time shall be conclusive between the parties."

"Entered into at Toronto, this sixteenth day of September, in the year of our Lord one thousand eight hundred and fifty-eight."

That in pursuance of such agreement, the Railway

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Company, on the 10th of November, 1858, applied to the plaintiffs for some of the debentures, to be applied in the construction of the works on the railway, and in acquiring materials and stock for the same; and the plaintiffs, in pursuance of the agreement, on the 3rd of December, 1858, gave to *Robert Harvey*, the treasurer of the company, an order on the agent of the said bank, at Brockville, with whom the debentures were deposited for safe keeping, to deliver to the said treasurer debentures and cash to the amount of \$33,076 $\frac{47}{100}$, to be applied according to the terms of the said agreement: that the plaintiffs were interested in having the debentures applied to the purposes for which they were so delivered to the treasurer, and the company were bound to apply them to such purposes only, and to hold them on trust therefor: that the defendant *Sherwood*, as such sheriff, attended at the office of the bank at the time *Harvey* attended to receive the debentures, and then seized the same under the writs of *feri facias* then in his hands, which the plaintiffs contended he could not properly do, as the debentures were held upon trust. And that the plaintiffs had applied to the defendants *Sherwood* and the Bank, at whose instance the same were seized, to restore the said debentures to the company or the plaintiffs, and informed them respectively of the trust, but they respectively refused to restore the same.

Statement.

The bill also alleged, that the plaintiffs held a mortgage to secure them, which by an act of the provincial legislature, was declared to be valid and effectual against all property of the company, acquired, and to be acquired by them, and prayed the restoration of the debentures to the plaintiffs, or to the company, and an injunction to restrain the sale or collection of the same; and that the defendants *Sherwood* and the Bank might be ordered to pay the costs.

The case came on to be heard by way of motion for decree, upon affidavits, the statements of which appear in the judgment.

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Mr. *Roaf*, for plaintiffs.

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Mr. *Brough*, Q. C., and Mr. *Bennett*, for the Bank of
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Mr. *A. Crooks*, and Mr. *G. D. Boulton*, for defendants
Cameron and *Lyall*.

The defendant *Sherwood* did not appear.

The Chancellor and Vice-Chancellor *Esten* differing
in their opinions, the judgment of the court was
delivered by

SPRAGGE, V. C.—Two suits in this court, wherein the
Brockville and Ottawa Railway Company were plaintiffs,
and the Municipality of Brockville, defendants, were
finally compromised, after certain orders had been made
by the court, by an agreement between the parties, Judgment.
dated the 16th of September, 1858, which made provision
for the application of the debentures, which under
previous stipulations between them were to be issued by
the municipality to the railway company.

After providing for the retention by the municipality
of a certain portion of the debentures, for certain specific
objects, the agreement provides, that "The balance of
the debentures, to be paid over by the defendants to
the plaintiffs, or their order, as needed for the comple-
tion of the works, according to the proper estimates, and
necessary and proper expenditure of the company ;" and
provision is then made for the proportion in which they
are to be paid.

In the month of November following, the company
applied to the municipality in the words of the bill : "for
some of the said debentures, to be applied in the con-
struction of the said works on the said railway, and in
the acquisition of materials and stock therefor ;" and on

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the third of December Mr. *Harvey*, the secretary and treasurer of the company, received from the municipality an order upon the agent at Brockville of the Bank of Upper Canada, with whom the debentures were deposited for safe-keeping, for \$33,076 $\frac{67}{100}$ a small part of which was in cash, and the residue in debentures: and which debentures were seized by the sheriff, as set out in the bill.

It is contended that the debentures reached the hands of the company clothed with a trust to apply them in a particular manner, under the agreement; that the company could have applied them in no other manner; for instance, to satisfy the executions upon which they were seized, and consequently that they were not liable to be seized in execution.

Judgment. It would be very easy to determine this point if the bill and the evidence were more explicit as to the purpose for which the debentures were paid over by the company. The purpose, as stated in the bill, I have given; the affidavit of Mr. *Harvey* says, generally, that they were given in pursuance of the agreement, and to be applied to the purposes therein mentioned, and upon the distinct understanding that the same was not to be applied to any purpose except according to the agreement. The letter from the managing director of the company to the cashier of the bank, states that they were issued for the purpose of paying the estimates due the contractors, and to provide certain rolling stock, which was required for the purpose of opening the road for traffic. The mayor of Brockville only says that the order for the issue of the debentures was given that the debentures and money mentioned therein might be applied to the purpose in the agreement mentioned, and to no other purpose whatever.

There must have been, I apprehend, some requisition or statement furnished by the company to the municipality

showing for what purpose the money was required. That it was for the purpose of opening the road was one of the considerations. The company, who were the company that issued the debentures to be issued, were to be paid from time to time, becoming entitled to be completed from time to time, absolutely the language of the what different, needed for the proper estimation of the company was meant as it was when the company they would cause certain work done furnished to the from the company become the pro-

How the par acted under it is of these debentures estimate of what for the road was sections for a given and the company or their proceeds and in getting then, I think the could apply them them over to judg-

shewing for what purposes this large sum of money was required. This document would shew, probably, whether it was for past or future work and materials that the money was called for; for I think, according as it was one or the other, the case may admit of different considerations. According to the agreement with *Sykes & Co.*, who were, I believe, the original contractors with the company for the construction of the road, the debentures to be issued by municipalities to the railway company were to be paid over by the company to the contractors from time to time as the work progressed, the contractors becoming entitled to debentures only as work was completed from time to time, and the debentures becoming absolutely theirs, and subject to their liabilities. The language of the agreement as stated in the bill is somewhat different, the debentures being to be paid over "as needed for the completion of the works, according to the proper estimates, and necessary and proper expenditure of the company." I incline to think that the same thing was meant as in the agreement with *Sykes & Co.*; that when the company desired to make a call for debentures they would cause an estimate to be made of the value of certain work done, and of rolling stock or other materials furnished to the road; and which, under the mortgage from the company to the municipalities, had already become the property of the latter.

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Sherwood.

Judgment.

How the parties to the agreement understood it, and acted under it is not shewn. If the order for the delivery of these debentures to the company was based upon an estimate of what certain rolling stock or other materials for the road would cost; of what work upon certain sections for a given period would amount to, or the like, and the company received the debentures to apply them or their proceeds in the purchase of such rolling stock, and in getting of such work done, and paying for it; then, I think they would receive them upon a trust, and could apply them in no other way; and if about to hand them over to judgment creditors, this court would restrain

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such misapplication of them. But if, on the other hand, the order was based upon a calculation shewing work already done, or materials furnished, or both; it would be asked for as a payment of a debt; upon the footing that so much money had been earned, and was payable under the agreement.

It would, even in that case, no doubt be a matter by no means immaterial to the municipalities how the money realised from the debentures should be applied; because they agreed to assist the railway company for the sake of the benefit expected to be derived from the road; and the diversion to other purposes, of moneys which should go to pay for work and materials, may cripple the company in the further prosecution of their work, by injuring their credit, and otherwise. As in the case of a private contract, say for building a house, the builder being entitled to payments from time to time as progress is made in the building; should the builder instead of paying arrears to his workmen, and paying for materials, apply the money received to pay off old debts, the proprietor might suffer seriously from the discontent of mechanics and tradesmen, and from delay in the completion of his house. He would feel, and really have, a strong interest in the proper application of the money; but it could not be said that it was received upon any trust as between himself and the person with whom he had contracted, that it should be applied in any particular manner. So in this matter, the municipalities had a reasonable and just expectation and desire that the debentures should be applied in payment for work and materials furnished, but the difficulty is to make out that they passed into the hands of the company with a trust that they should so apply them. A fair way of testing the question would be to suppose the municipality to insist upon paying them over, only upon condition that they should be so applied, and refusing to part with them upon any other terms; the company on their part, denying the right of the municipality to withhold them

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after the company had done all that by the agreement it was stipulated they should do to entitle them to receive them; the municipality would in that case be seeking to annex a condition or qualification to the payment, not contained in the agreement, and I think would clearly be in the wrong; that is as a matter of legal right.

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I do not suppose, but that it was quite competent to the parties before handing over the debentures, to stipulate that they should be applied in a particular way, and so to impress them with a trust for a particular purpose, (that they could be used by the railway company for no other purpose without a breach of trust;) but the bill does not rest the plaintiffs' equity upon any such agreement, and I only allude to it in reference to what Mr. *Harvey* speaks of as the "distinct understanding" upon which the debentures were issued. If there was any independent agreement beyond that set out in the bill, it should of course be stated in the pleadings, and be distinctly proved. Judgment.

If the fact was, that the debentures were due to the railway company for work done, or materials furnished, then I think there was no trust as to their application; and that the bill should be dismissed; but if, on the other hand, they were placed in the hands of the company in order to their using the proceeds in the purchase of materials, and getting work done, and paying for it, then I think that they passed into their hands subject to that trust, and could be used for no other purpose; and the same, I incline to think, would be the case, if, although demandable by the company as of right under the agreement, the parties stipulated for a particular application of them. If the plaintiffs think they can establish either of these positions, the bill may be retained for a month to enable them to do so; otherwise I think it should be dismissed, and with costs.

[After the delivery of this judgment, the plaintiffs

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adduced evidence showing the amounts applicable to the payment of stock yet to be furnished to, and work done for, the company, the items of which are particularly set forth in the following judgment of]

SPRAGGE, V. C.—The amount named by the railway company in their requisition of the third of December, 1858, as payable to them at that date, was \$66,699, as expended from October 20, to November 10; and the sum of \$33,076 $\frac{37}{100}$ was stated as the proportion payable by the municipality of Brockville. The requisition is in these words:

“ To the Town Council of the town of Brockville :

“ You are hereby requested to pay over to the treasurer of the Brockville and Ottawa Railway Company, thirty-three thousand and seventy-six $\frac{67}{100}$ dollars, (\$33,076 $\frac{37}{100}$ being your proportion of \$66,699.54, expended from Judgment. October 20 to November 10, (including \$38,637 of debts due) for work done, and materials furnished, and right of way, &c., for the use of the railway.”

(Signed,) “ THE BROCKVILLE & OTTAWA
 RAILWAY COMPANY, by
 “ GEORGE CRAWFORD,
 “ *President.*

Countersigned. “ ROBERT HARVEY,
 “ *Secretary B. & O.R.W.Co.”*
 “ Brockville, December 3, 1858.”

An opportunity has been afforded to the plaintiffs to shew whether the items composing the amount stated to be payable, or any of them, were for rolling stock or other materials for the road yet to be procured and paid for, or for work yet to be done on the road, or the like; and that the company received the debentures to apply them or their proceeds to such purposes; in which case I thought they would receive them upon a trust, and could apply them in no other way.

I think that the plaintiffs have established this as to

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some of the items. It is shewn that the sum of \$10,200 was due to one *Dickinson* for freight on iron for the road, and that he retained it by virtue of his lien as a carrier; that a sum of \$8,400 was due to various individuals for land or right of way for the road; that \$13,300 was due for rolling stock, ready to be delivered; and that \$6,277 was due for duty on iron, and without the payment of which it could not be procured; this, indeed, is said as to all the items. The aggregate of these items is \$38,177. It is not shown how the large sum stated in the requisition is made up. It is less by \$456 than the aggregate of the items mentioned in the statement upon which the requisition appears to be based. It would seem, I think, that the statement was intended as an approximate estimate rather than as an exact account of the sums payable.

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 v.
 Sherwood.

The items which I have enumerated had not become the property of the company, and as is stated in evidence, Judgment. could only become the property of the company by the payment of the several amounts payable in respect of them; and inasmuch as upon their becoming the property of the company, they became *eo instanti* a pledge to the municipality for advances made; the municipality had a direct interest in the proper application of the moneys, and the company received them upon trust so to apply them. I do not find this to be the case in regard to any other items; for all that appears, they were for work already done, and materials furnished, and the sums payable in respect of them were claimed upon the footing of a debt due—so much money earned and payable under the agreement.

I am confirmed in this from the figures appearing upon the requisition. A gross sum is stated as expended "(including \$38,637 of *debts due*)," being \$460 more than the amount of the items I have enumerated.

My conclusion is, that the proportion payable by the municipality of Brockville, should be computed upon

1859. \$38,177, and that the plaintiffs are entitled to receive back the amount arrived at upon such computation.

Brockville
v.
Sherwood.

I think the decree should be without costs; the plaintiffs have claimed much more than they are entitled to, and their order upon the cashier of the bank at Brockville was calculated to mislead, being expressed to be for debentures and money to be applied towards work done and materials furnished, and right of way, and freight. I except out of the general costs, the defendants' costs in relation to the enquiry after the hearing of the motion for decree, which I think should be paid to them by the plaintiffs. The sheriff has not defended, and I suppose has incurred no costs. If he has, I think the plaintiffs must pay them.

SIMPSON v. HUTCHISON.

Practice—Staying proceedings against receiver.

The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, and three days afterwards the bailiff was withdrawn. The tenant whose goods had been distrained, thereupon instituted proceedings in an action of trespass against the receiver. The court, under these circumstances, restrained the action.

This was a motion to restrain proceedings in an action of trespass brought by one *Fanny Bindley*, against *William B. Phipps*, the receiver in the cause, under the circumstances stated in the judgment.

Mr. *Barrett*, in support of the application, referred to *Trent v. Hunt*. (a)

Mr. *McBride* contra, cited *Lambert v. Marsh*. (b)

THE CHANCELLOR.—This is a motion for an injunction on behalf of Mr. *Phipps*, the receiver in this cause, to restrain an action of trespass brought against him by Miss *Bindley*, one of the tenants of the property over which he has been appointed receiver.

(a) 17 Ju. 899, S. C., 22 L. J. Ex. 318. (b) 2 U. C. Q. B. 39.

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(a) *Drewry* on
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The defendant, *March* being the owner in fee of the property in question, is said to have created a mortgage in favour of Mr. *Todd* in the year 1853. *March* having become embarrassed, assigned all his estate for the benefit of his creditors, to Messrs. *Philpotts* and *Hutchison*, by whom the property in question was leased to Miss *Bindley*. In that state of things a bill was filed by a creditor of *March* to have the trusts of *March's* assignment carried into execution, and Mr. *Phipps* was appointed receiver. Mr. *Todd* was not a party to that suit, and no notice was taken of his rights when the receiver was appointed. Mr. *Phipps* finding the rent greatly in arrear, put in a distress on the 16th of September; and on the 17th Mr. *Todd* gave notice that he claimed the rent as mortgagee, and on the 20th the bailiff was withdrawn, and Miss *Bindley* commenced the action of trespass, which I am asked to restrain.

1859.

Simpson
v.
Hutchison.

The argument against the motion is, that Mr. *Todd*, Judgment. as legal mortgagee, had a right to insist that the rent should be paid to him, that the possession of the bailiff after the receipt of notice from Mr. *Todd*, was consequently illegal; and that Miss *Bindley* has consequently a perfect right to maintain this action of trespass, with which this court cannot, or if it can, ought not to interfere.

The question discussed upon the argument does not appear to me to arise. The jurisdiction of this court to restrain proceedings at law against its officers, whether their proceedings are founded upon the irregular order, or the irregular exercise of its process, cannot be doubted. (a) Mr. *McBride* referred to *Aston v. Heron*, (b), in support of his argument, and that case contains, no doubt, some strong observations upon the anomalous nature of this jurisdiction; but notwithstanding those observations, Lord *Brougham* not only admitted the

(a) *Drewry on Injunction*, P. 127; *Danl. C. P.* 1 En. Ed. 665; 1 *Smith, C. P.* 2nd ed. 447, and the cases referred to therein.

(b) 2 M. & K. 390.

1859.
 Simpson
 v.
 Hutchison.

jurisdiction, but acted upon it in several instances there referred to, and the case itself appears to me to furnish the clearest authority in favour of the present application. His Lordship in speaking of the principle furnished by the case says: "That principle is, that in the first class of cases, those where the jurisdiction is disputed, the court has no choice, but must at all events, and at once, draw the whole matter to its own cognizance; but that in the other class, where admitting the court's authority, redress is only sought for irregularity or excess in the performance of its orders, and generally speaking, whenever the jurisdiction is not denied or resisted, the court has an indisputable right to assume the exclusive jurisdiction, but may, if it think fit, on the circumstances being specially brought before it, permit other courts to proceed for punishment or redress." And again, "The possession of the receiver is the possession of the court, and no one can disturb it but through an application to the court. The acts of the receiver, in the administration of the estate, are the acts of the court; and the court may, therefore, if it pleases, prevent any other jurisdiction from questioning those acts, because, strictly speaking, that would be to question the court's administrative proceedings."

Judgment.

Aston v. Heron would seem to show, therefore, that this is a case in which the court has no alternative, but is bound to restrain an action, the effect of which must be to bring the authority of this court under the immediate jurisdiction of a court of common law. (a) But to put the case upon the lowest grounds, it is quite clear that *Miss Bindley* has no right to institute such an action without the leave of this court: and it is equally clear that under the circumstances of this case an application for that purpose must have failed. The right of the receiver to distrain is not denied. Indeed no such argument was open to the defendant, because whatever

(a) *Russell v. East Anglican Railway Co.*, 3 McN. & G. 114.

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the general rule upon the subject may be, (b) the order in this case expressly directs the tenants to pay their rents in arrear, and growing, to the receiver, and empowers him to distrain. Then it is not alleged that the receiver was guilty of any oppression or misconduct in the course of his duty; on the contrary, it is admitted that the rent was due, and the bailiffs were withdrawn without any unnecessary delay. There are no circumstances in the case, therefore, which would have justified the court in permitting an action at law to be brought.

1859.

Simpson
v.
Hutchison.

But in another view, which was not referred to in argument, the impropriety of permitting this action to proceed is very apparent. The order, as I have said, directs the tenants to pay their rents to the receiver, and empowers him to distrain. The order is not made without prejudice to the rights of the mortgagee, if he have any. Now it is quite clear, I apprehend, that Mr *Todd* Judgment. has no power to interfere with the receiver, acting under such an order, without the permission of the court. It may be true that the order would have been drawn up differently if his rights had been brought to the notice of the court; and it may be true, also, that he could have obtained leave to assert his rights, by order, or otherwise, upon a proper application. But while that order remained he had no right, I apprehend, to interfere with the receiver. His first step should have been to apply to the court. (c) It follows that the distress as between Miss *Bindley* and the receiver, was perfectly regular. Miss *Bindley* was directed to pay the rent to the receiver. And Mr. *Todd* had not placed himself in a position to interfere with effect. His unauthorised interference was a contempt of this court; and I could not permit this action of trespass against the receiver to proceed under such circumstances without an obvious abandonment of

(b) As to which see Bennett's Master's Office, p. 93; Bennett's Office of Receiver; Brandon v. Brandon, 5 Mad. 473.

(c) Fisher on Mortgages, p. 236; Angel v. Smith, 9 Ves. 335; Brooks v. Greathed 1 J. & W. 176.

1859.

Simpson
v.
Hutchison.

the acknowledged jurisdiction of this court. There must be an injunction, therefore, as prayed, and Miss *Bindley* must pay the costs of the application, and the costs at law.

YOUNG v. CHRISTIE.

Fraudulent preference—Injunction.

The fact that a debtor defends one action brought against him by a creditor and allows judgment by default for want of an appearance in another suit, is not such an undue preference of one creditor as will render the judgment void under the statute 22 Victoria, chapter 96, sections 18 and 19.

The bill in this case was filed by *James Young* against *William Christie* and *James McMullen*, setting forth that plaintiff being a creditor of *Christie*, had taken
 Judgment. proceedings at law for the recovery of his demand, to which action *Christie* had put in a defence. That *McMullen*, being also a creditor of *Christie*, had taken like proceedings against him, in which *Christie* had suffered judgment to go against him by default for want of appearance. It appeared that *McMullen* was the father-in-law of *Christie*, and it was alleged that the action by *McMullen* had been arranged by the parties to be brought. No doubt, however, was suggested as to the *bonâ fides* of his demand.

Under these circumstances a motion had been made during vacation to his honour V. C. *Spragge* for an injunction to restrain *McMullen* from receiving from the sheriff of the County of York, the amount realised under the execution issued upon his judgment. The present application was to dissolve the injunction thus obtained.

Mr. *Strong* and Mr. *Barrett* for *McMullen*. The question chiefly, indeed solely, to be now discussed is whether the fact of a judgment having been obtained by *nil dicit* is within the 18th section of the 22nd of the

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Queen. That clause enacts that every confession of judgment, cognovit, or warrant to confess judgment, voluntary, or by collusion with a creditor, given under the circumstances enumerated in the statute, with intent to delay his creditors, or to give to one or more of his creditors a preference over his others, shall be treated as fraudulent.

1859.

Young
v.
Christie.

This language is greatly in favour of the view of the statute contended for by the defendants, as it invalidates, not the judgment, but the proceedings by which such judgment is obtained. According to the construction on the other side no judgment would be free from taint unless a defence, which the party making must know will fail, is made. In fact the creditor would have to solicit his debtor to make a defence, a course of proceeding which would lead to the encouragement of sham pleas, a practice discountenanced on every occasion by the courts of law. The court will not extend the statute beyond its express words. There was a race between the creditors for priority, which *McMullen* has succeeded in obtaining, and which priority this court will not deprive him of. The statute prescribes the times within which judgment by default may be obtained. The practice there pointed out has been strictly pursued. The validity of *McMullen's* demand is not attempted to be impeached in any, the slightest degree, and under all the circumstances, the proper course we submit is to dissolve the injunction, and which was granted, it is believed, only for the purpose of securing the fund until an opportunity had been afforded for full discussion of the point in issue. Counsel also referred to *Philpot v. St. George's Hospital*, (a), *Withall v. Tuckwell*, (b), *Dwarris*, 695, 616.

Mr. *Mowat*, Q. C., and Mr. *Ince* contra. The defendant does not deny the facts alleged by plaintiff, but relies solely on the point of law which it is contended is against the plaintiff's right to recover here. The

(a) 3 Jur. N. S. 1269.

(b) 5 Jur. N. S. 929.

1859. facts stated in the plaintiff's affidavit shew that in reality the action was *Christie's* own. It is sworn, and not denied, that he went to the attorney to have the action brought, asked Mr. *Ince* if he would institute proceedings, and what would be the probable expense of such a proceeding.

Young
v.
Christie.

Every act by which a debtor had previously made a fraudulent preference of one creditor to the exclusion of others is enumerated in the statute, and it is difficult to understand how it can, with any show of reason, be contended that the legislature did not intend to abolish every mode. Now, however, that the act has been acted upon, and it is ascertained that the ingenuity of debtors or their advisers has discovered a means of affording a fraudulent preference, the court will say that the legislature intended that such an evasion should not be permitted. *Columbine v. Penhall*, (a) *Lister v. Turner* (b) *Addison* on Contracts, pages 97 *et seq.*, *Chitty's Archibald*, Practice, 904, were, with other authorities referred to, and commented on by counsel.

The application had been originally made before his lordship the Chancellor, sitting alone, when the following judgment was delivered by

Judgment. THE CHANCELLOR.—This is an application to dissolve an injunction granted by my brother *Spragge*, which restrains the defendant *McMullen* from receiving certain moneys levied by the sheriff of this county upon a writ in his hands, issued upon a judgment recovered by the defendant *McMullen* against the other defendant *Christie*. The plaintiff, who is also a judgment creditor of *Christie*, insists that *McMullen's* judgment is void as against him under the recent statute, (a) because it is a judgment by default for want of appearance; or, if not void on that ground alone, he insists that it is so under the particular

(a) 1 S. & Gif. 228.

(b) 5 Hare. 281.

(c) 22 Vic., ch. 96, secs. 18 & 19.

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circumstances of this case, inasmuch as the affidavits prove, as he contends, that *Christie* defended one suit and suffered judgment by default in the other for the purpose of enabling *McMullen* to obtain the first judgment, thereby securing to him that undue preference which the statute was passed to prevent, quite as effectually as if he had executed a warrant to confess judgment.

1859.

Young
v.
Christie.

This is a question of great importance. The 18th and 19th sections are the only ones which have any application. The 18th section provides, "That every confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, voluntary or by collusion with a creditor or creditors, given by any person (such person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency,) with intent, in giving such confession, *cognovit actionem*, or warrant of attorney to Judgment. defeat or delay his creditors wholly or in part, or with intent thereby of giving one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors," shall be, in effect, void.

The 19th section provides that, "If any person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, shall make, or cause to be made, any gift or conveyance, assignment or transfer of any of his goods, chattels or effects, or deliver or make over, or cause to be delivered or made over, any bills, bonds, notes, or other securities or property, with intent to defeat or delay the creditors of such person, or with intent of giving one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, assignment, transfer, or delivery, shall be deemed and taken to be absolutely void as against the creditors of

1859. such person; provided always, that nothing herein contained shall be held or construed to invalidate or make void any deed of assignment, made and executed by any debtor for the purpose of paying and satisfying rateably and proportionally, and without preference or priority, all the creditors of such debtor their just debts. And, provided further, that nothing herein contained shall be construed to invalidate or make void any *bonâ fide* sale of goods, in the ordinary course of trade or calling, to innocent purchasers."

Young
v.
Christie.

Judgment.

It will be seen, therefore, that the question before me turns, principally at least, upon the 18th section. Now it is clear that judgments by default are not within the letter of the statute; and before I proceed to enquire whether they are within the spirit of the act, which was the argument addressed to me, I may observe, that, previous to the statute in question there existed no law in this province analogous to the Bankrupt Law of England. The legislature had not thought it necessary to make any provision for the realization and distribution of the estate of insolvent traders, and, as a necessary consequence, they were applied to the payment of a single creditor, or of a favoured class, at the mere will of the insolvent himself, without the slightest regard to the just claims of his creditors at large to an equal distribution of his effects. That state of the law having led, as might have been anticipated, to the most deplorable consequences, injurious alike to debtor and creditor, and highly prejudicial to the commercial interests and character of the province, the statute in question was passed during the last session of parliament for the purpose of affording creditors some relief. But in attempting to grapple with the great and growing evil, it will have been observed, that the legislature has not thought it right to provide for the equal distribution of the estates of insolvent traders. Much that was felt to be objectionable has been prohibited; but an action at law is still the only mode by which a creditor can compel

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payment of his debt, and as a necessary consequence the estate is swallowed up by them who are fortunate enough, in the general scramble, to acquire priority.

1859.

Young
v.
Christie.

That being the present state of the law, I have great difficulty in holding any judgment recovered in the ordinary course of law to be within the equity of the statute. The argument is that the present statute was passed to enforce an equal distribution of the estate of insolvent traders, and as the judgment in question contravenes that provision, it is within the equity of the statute, and ought to be declared void. But the statute cannot have contemplated an equal distribution of the estates of insolvents. Had that been the thing intended some bankrupt law must have been introduced. But nothing of that sort has been done. The legislature did not, certainly, mean to prohibit any creditor of an insolvent trader from bringing an action to compel payment of his debt. That, as I have said, is the only mode of procedure open to him. And, as the legislature did not mean to prohibit the creditor from suing, so it is, I apprehend, equally clear that they did not mean to prohibit the debtor from defending. But although the debtor must have a right to defend, if so minded, there is nothing in the statute which compels him to adopt that course. There is nothing in the act to interfere with his power to defend or refrain from defence at his option, and the necessary consequence, a consequence which must have been foreseen, is that the injustice complained of has been left to a great extent without a remedy. The power of the debtor to prefer some creditors and postpone others in the way pointed out, and the necessity of some remedy for that evil must have been foreseen; but the legislature felt, I presume, that no remedy could have been applied without providing creditors with some mode of getting at the assets of an insolvent trader otherwise than by action at law—without introducing, in other words, some modification of the bankrupt law; and as no such system has been

1859. introduced, it follows, I think, with reasonable clearness that there cannot have been any intention of interfering with judgments recovered in the ordinary course of law, and that such judgments, consequently, are not within the equity of the statute.

Young
v.
Christie.

Had the case been before me originally, therefore, I should have refused the injunction for the reasons just assigned. I would not have felt at liberty, I think, in the present unsatisfactory state of the law, to go beyond what is written; although I admit that the argument in favour of the plaintiff's view is of great force. But as my brother *Spragge* granted the injunction, and my brother *Eston* is said to have taken the same view of the statute in a case which came before him, I cannot with propriety dissolve the injunction, but I shall give the defendant leave to renew the motion before the full court if he chooses to do so. If not this motion must Judgment. be refused, but without costs.

[On a subsequent day the motion was renewed before the full court, when, for the reasons stated above, the court unanimously agreed in dissolving the injunction, costs to be costs in the cause.]

MACKLEM V. CUMMINGS.

Tenant for life paying off incumbrances—Practice.

A testator devised certain lands to his wife for life, remainder to such of his children as she should appoint, and falling issue to such child or children of J. C., as she should appoint. The property, it was alleged, was incumbered to its full value, which incumbrance the widow directed to be paid out of her own funds, and appointed the estate to the defendant M. C. Upon a bill filed to have the sums so paid by the widow declared a charge on the estate, evidence was directed to be given as to whether the estate was of considerably greater value than the claims so paid off, in which case it would be declared that the widow had a lien thereon for the amount advanced by her: but if otherwise, it would be intended that the appointment of the estate had been made freed and discharged of such claim.

It seems, that under the general orders, a party seeking to have a declaration of right, and who is not entitled to relief beyond such declaration, must file a bill for that only.

The facts are clearly stated in the judgment.

Mr. Roaf,

Mr. Brown,

Mr. Strong,

Judgment

SPRAGGE, heard.]—The dated the 23 property in the remainder to she should appoint son or daughter as she, the testator sole by deed executrix, and his wife's brother and his will v

At the date been mortgaged the will of the testator £500, and had £253 1s. 2d. i

It is alleged insufficient for his widow before months after the date to make good the hands, as executed accordingly paid moneys, and charged moneys in his hands

By deed-poll the testator appointed the estate so devised defendant, Margaret

Mr. *Roaf*, for the plaintiffs.

Mr. *Brough*, Q. C., for defendant *Street*.

Mr. *Strong*, for the infant defendant.

1859.

Macklem
v.
Cummings.

Judgment was delivered by

SPRAGGE, V. C.—[before whom the case had been heard.]—The late *James Henry Cummings*, by his will, dated the 25th of March, 1848, devised certain freehold property in the village of Chippewa, to his wife for life, remainder to such child or children, issue of his body, as she should appoint; and failing issue, unto such child, son or daughter, of the testator's father, *James Cummings*, as she, the testator's widow, should, whether covert or sole by deed or will, appoint. He appointed his wife executrix, and the defendant, *Thomas Clarke Street*, his wife's brother, executor. He died in April, 1848, and his will was proved by the executor only.

Judgment.

At the date of the will the property so devised had been mortgaged to the same *T. C. Street*, as executor of the will of the late *Samuel Street*, his father, to secure £500, and had also been charged with a further sum of £253 1s. 2d. in favour of the same mortgagee.

It is alleged that the estate of the testator was insufficient for the payment of his debts; and that upon his widow being so informed by the executor, some months after the death of the testator, she desired him to make good the deficiency out of moneys of her's in his hands, as executor of their father's will; and that he accordingly paid the debts of the testator out of such moneys, and charged the mortgage moneys against the moneys in his hands belonging to the widow.

By deed-poll of the 9th of June, 1858, the widow of the testator appointed the remainder, of and in the estate so devised, after her death, to the infant defendant, *Margaret Cummings*. It is not alleged or proved

9. that she is a daughter of the testator's father. It is alleged that the testator left no issue, and the fact is proved by Mr. *Street*. He also proves that the testator's estate was insufficient for the payment of his debts; that the widow knew it to be so; and desired him to pay the debts out of her private means.

Macklem
v.
Cummings.

This bill is filed by her and her present husband, *Thomas Clarke Macklem*, (the date of their marriage is not given,) against the executor Mr. *Street*, and the appointee *Margaret Cummings*, and prays that the plaintiffs may be declared to have a lien upon the property in question, for the amount of the payments made by the executor on account of the estate of the testator out of the moneys of the widow, including the mortgage money; that the estate and effects of the testator remaining unapplied may be sold, and the proceeds applied in reimbursing the plaintiff, *Caroline Macklem*; or, in the alternative, that she "may be declared to have a lien for the principal money upon the said premises, and the remainder thereof" after the determination of her life estate.

Judgmen

Upon the argument, Mr. *Roaf*, for the plaintiff, contended that the widow's position was the ordinary one of a tenant for life paying off an incumbrance upon the estate; in which case the general rule is, that the charge subsists for the benefit of the tenant for life.

The rule is thus stated by Lord *Eldon*, in the *Earl of Buckinghamshire v. Hebart* (a): "If a tenant for life, pays off a charge on the estate, *prima facie*, he is entitled to that charge for his own benefit, with the qualification of having no interest during his life." It is a question of intention, and the presumed intention of a tenant for life paying off an incumbrance, is not to exonerate the estate, because it would be against his interest to do so. (b) "The burden of proof is upon those who allege that in paying off the charge he intended

(a) 3 Swan, 186, 199.

(b) *Forbes v. Moffatt*, 18 Ves. 384.

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to exonerate the estate." (a) The principle is indeed too well settled to admit of dispute; the only difficulty lies in its application. It is obvious that in this case the intention of the testator's widow in disencumbering the estate devised to her, was not the ordinary intention and object of a tenant for life paying off an incumbrance, namely, to disencumber the estate for his own benefit in order to the preservation of his own enjoyment of it; personal advantage is in such a case the object; but here the widow of the testator applied her own means to the payment of her deceased husband's debts, with the full knowledge, as she herself states, that they would exceed his assets. She acted not as taking any beneficial interest under the will, not properly as tenant for life paying off an incumbrance, but rather from a motive which it is not difficult to understand, choosing to diminish her own individual property rather than to leave any of her husband's debts unpaid.

Some ten years afterwards she appointed the property ^{judgment.} in question to the infant defendant, *Margaret Cummings*, evidently, I should say, in pursuance of the will: whether any of the property left by the testator had been applied to the payment of his debts does not appear; this at any rate had been preserved; and the question is, was it this lady's intention to appoint the estate to *Margaret Cummings* charged with that, with which it was incumbered at the testator's death or not? or, it may properly be put, is there that in the circumstances which negatives the ordinary presumption, that she intended to keep alive the incumbrance as against her appointee.

The first question would be, what was her intention, as to this particular property, at the time of her paying off the incumbrance upon it? I should say from Mr. *Street's* evidence, that no distinction was made between the express charges on this property, and the other

(a) *Anthony v. Mills*, 1 Sim 198, 344.

1959. debts of the testator. It may be as to this property, and as to any other not applied in payment of debts, that she intended to keep as her own, that which would otherwise have fallen to creditors. As to this property, I think light is thrown upon her intention, by her subsequent dealing with it, for it cannot be assumed that her appointment in remainder was intended to be merely illusory, but beneficial; and if so, her intention could not have been to claim that against the estate appointed, which is now claimed by the first alternative of her will; because, upon her own shewing, that claim would entirely absorb it.

I am not sure that I understand what is meant by the words, "principal money," as used in the second alternative of the will. If the whole principal of the debt, then it is open to the observation I have just made; but if, as I rather take it, the principal of the mortgage money and further charge, is meant, then I think the value of the estate as compared with that amount is material. If the specific charge equals, or about equals the value of the estate, the appointment, if made subject to that charge, would be valueless and illusory, which, as I have said, cannot be presumed to have been intended; but if the property is of considerably more value than the specific charge, I do not think there is enough in the circumstances to negative the presumption that the widow, taking as tenant for life under the will, did intend to forego her right of keeping alive, as against the remainder man the incumbrance paid off by her. It is a point upon which evidence by affidavit may be received. I think, too, that evidence of any other parties shewing the intention of Mrs. *Macklem* in the matter may properly be given.

In the cases to which I have been referred, I think in all of them, the question raised in this case has been raised between the representatives of the personal estate of the tenant for life, and the person entitled in

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remainder. This suit is for administration, but only with a view, as I understand it, to charge the estate of *Margaret Cummings*, (with the other assets of the testator,) with a lien for the debts paid by his widow, and for a sale to satisfy that lien, as prayed in the first alternative by the bill. The second alternative also prays for a declaration that plaintiffs are entitled to a lien and for further relief, but not in terms, for a sale to satisfy the lien. If they desire more than a mere declaration of their right, I should like to hear them upon the point; and if satisfied with a declaration only, there is this to be said, that unless they must file a bill for the latter only, at least as I understand the practice of the court under the general order. My attention, however, was not drawn to the point at the hearing, nor did it occur to myself.

1859.
Macklem
v.
Cummings.

THE COMMERCIAL BANK V. MCCONNELL.

Specific performance—Acceptance of title.

Upon an agreement for the sale of real estate which had been previously laid out into building lots, the purchaser's agent signed a memorandum to the following effect: "The purchase from the bank is to cover the entire property of the C. estate, within the original boundaries, except that sold off, with appurtenances and privileges, so that the purchaser may make arrangements with the purchasers of lots to close the streets laid out if desirable." The purchaser refused to complete the purchase, on the ground that without the power of shutting up one of the streets, the object for which he had effected the purchase would be entirely frustrated, which object he had communicated to the agent of the vendors, at the time of negotiating for the purchase. *Held*, notwithstanding, that the purchaser was bound to complete the contract.

The purchaser of real estate, on which was erected a grist mill, in pursuance of the agreement for purchase, took possession, and while in occupation, made several alterations in the property; took the mill gearing and machinery from the premises, and removed the partitions in the mill, intending to convert the mill into a planing factory; and that the expense of restoring the property to the condition in which it was when he entered into possession, was variously estimated at from £100 to £500. *Held*, that by these acts the purchaser had waived his right to call for a good title.

The facts of the case, the arguments of counsel, and authorities cited by them, appear in the judgment.

1859. The case had been argued before his Honour V. C.
 Com'al Bank *Spragge.*
 v. McConnell. Mr. Roaf, for plaintiffs.

Mr. Crickmore, for defendant.

SPRAGGE, V. C.—This bill is filed by vendors seeking to enforce specific performance of an agreement for the sale of real estate. The subject of the contract is part of a plot of ground in the town of Cobourg, known as the Calcutt Property, which had been previously laid out into town lots, and several of which had been sold by auction. There was a dwelling house upon a part of the property, and a steam mill upon another. Streets had been laid out around and through the property; on the south, the property abuts upon Lake Ontario, and between the most southern tier of lots and the lake, is laid out a street called Calcutt Terrace.

Judgment.

The defendant resists specific performance, on the ground, that his object in agreeing to purchase, was to use a portion of the property next to the lake for a shipyard; that he declared such to be his object to the plaintiffs' agent who made the sale, explaining that the property would be useless to him for that purpose, unless he could close the streets, especially the one called Calcutt Terrace; and that thereupon the plaintiffs, by their agent, agreed to sell and to make a good title as well to the streets as to the rest of the property. The negotiation for the purchase was conducted by agents on both sides; on the part of the plaintiffs, by their bank agent at Port Hope, Mr. Harper; on the part of the defendant, by Mr. D'Arcy E. Boulton, a professional gentleman residing at Cobourg.

Each of them has given evidence as to the agreement, and although they differ upon certain points, enough, I think, is clear, taking the parol and documentary evidence together, to enable the court to act.

The position by their agent of the streets and the exception the exception been made; pointed out there had been. The evidence, whereas upon were the lots upon a fuller title, whatever streets, was to that occasion Boulton, in the

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"Payments—£500 in three years

Mr. Boulton after stating to Mr. Harper, he purchase, he there were but Boulton, observed defendant to wish the agreement case he arranged occupied by the passage: "The give to the defendant to make such arrangements for the purchasers."

The position taken in argument is, that the plaintiffs, by their agent, agreed that the defendant should have all the streets so as to be in a position to close them, with the exception, perhaps, of those upon which sales had been made; that Calcutt Terrace was particularly pointed out as necessary to the defendant; and that there had been no purchases of lots abutting thereupon. The evidence, in my opinion, does not go beyond this, that whereas upon a first agreement for sale, all that was sold were the lots remaining unsold from the auction sale; upon a fuller understanding between the parties, the title, whatever it was, remaining in the plaintiffs in the streets, was to be transferred to the defendant, and upon that occasion a memorandum was drawn up by Mr. *Boulton*, in the following terms:

1859.

Com'el Bank
v.
McConnell.

"The purchase from the bank is to cover the entire property of the Calcutt Estate within the original boundaries except that sold off, with appurtenances and privileges, so that the purchaser may make arrangements with the purchasers of lots to close the streets laid out, if desirable." Judgment.

"June 16th,

"D. E. B."

"Payments—£500 down, £500 in one year, £500 in two years, £500 in three years, £500 in four years, £625 in five years."

Mr. *Boulton's* evidence agrees substantially with this; after stating that he explained to the plaintiffs' agent, Mr. *Harper*, the defendant's object in making the purchase, he says, that upon *Harper* remarking that there were but few purchasers upon streets, he, Mr. *Boulton*, observed, that "it would of course lie upon the defendant to make arrangements with them, but he wished the agreement with the bank to be such, that in case he arranged with them, he should have the space occupied by the proposed streets." And in another passage: "The stipulation was, that the bank should give to the defendant a title to the streets, leaving him to make such arrangements as he could with the auction purchasers."

1859.
 Com'l Bank
 v.
 McConnell.

The defendant's claim went far beyond this—upon a conveyance being tendered to him, and a mortgage for his execution, he claimed that he only purchased on condition that the streets were guaranteed to him by the Bank; he required that the Bank should buy out those parties who had purchased lots, so as to close the streets; the Bank refused, on the ground that it was the defendant's business to do that. Mr. *Boulton's* evidence, and the written memorandum, both justify the plaintiffs in that position.

The defendant's counsel objects, however, that the streets in question were by the exhibition of the plan under which the lots were sold by auction, and by the sale by auction, dedicated to the public; and that the purpose for which the defendant avowedly purchased is thus frustrated, and that therefore specific performance ought not to be decreed. He cited no authority for this position. The case of *James v. Freeland*, (a) in this Court, appears to be analogous in its circumstances, and in principle. In that case, as in this, the purchaser while declaring to the vendor the purpose and object of his purchase, took upon himself to judge of the fitness, of the property purchased, to answer the end for which he designed it. Here the purchaser knew as well as the vendor, the circumstance of the sale of the lots; he does not pretend that any thing was concealed from him, or that he purchased in ignorance of any material fact. I do not think that he shews any sufficient reason why specific performance should be refused.

Another question between the parties is, whether the defendant has waived his ordinary right to an investigation of the plaintiffs' title. It appears that the defendant was in possession before the date of the written memorandum drawn by Mr. *Boulton*. The defendant paid about £425 of his purchase money. On the 20th

(a) Ante vol. v., p 302.

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of June, 1857, he addressed a letter to the plaintiffs' agent, Mr. *Harper*, apologising for his delay in paying the purchase money, and promising to be with him in a few days and, to use his own expression, "complete the business." It was after this, as I gather from the evidence, that the above sum was paid. A conveyance was to have been made on the payment of £500, and a mortgage to be taken for the balance of the purchase money. The property was held by the plaintiffs, under a decree of this Court, in *Bethune v. Calcutt*, and Mr. *Boulton* says that he knew that *Calcutt* had owned the property, and understood that the plaintiffs had foreclosed his mortgage.

1859.

Com'ral Bank
v.
McConnell.

The mill is described as the principal building on the property; and changes were made in it by defendant after he took possession; a witness, Mr. *Nichol*, says, that the mill gearing and the machinery or the principal part, except the engine and boilers, were removed by the defendant, and the partitions pulled down, not, as he believes, as a mere waste, but to convert the mill into a planing factory; part of the machinery, he says, is removed off the premises, that the packing machines are so, and the rest a good deal injured and pulled to pieces; and he estimates that it will cost about £500 to put the mill again in working order. Upon this last point Mr. *Boulton* differs widely, estimating the cost of restoration at £100 only. He represents the mill as a good deal out of order at the time of the purchase: as to the changes effected by the defendant, he says that he dismantled the gearing, and that what he did was with a view of converting the building into a saw mill and planing factory.

Judgment.

The vendor is bound, certainly, to displace the ordinary *prima facie* right of the purchaser, to require that a good title be shewn, before he is called on to pay the purchase money; to make out a case of exception to the general rule, and it seems that the acts of the defen-

1859. *Com'l Bank v. McConnell.* dant must be such, as to evidence an intention to be satisfied with the vendor's title without an investigation of it. The mere taking possession in this case does not seem to be such an act, as it appears to have been taken in pursuance of the agreement to purchase.

But other acts to which I have referred appear to be more material.

In *Fleetwood v. Green*, (a) the purchaser was to pay a nominal sum in hand, 10s., and to pay the purchase money, £525, in a year, on having a good title made to him: an abstract was delivered, and no objection taken to it: after the purchase money became payable the vendor endeavoured to get the purchaser to complete the contract; and between two and three years afterwards filed his bill for specific performance, the purchaser having in the meantime remained in possession and, as the report of the case says, "apparently, upon the defendant's admission by answer, in several instances treated the property as his own;" and having made payments on account amounting to less than the interest on the purchase money. He submitted to complete the contract upon having a good title. A decree for specific performance was made, and the reference as to the title was refused.

In the Margravine of *Anspach v. Noel*, (b) the same question was raised; the purchase money was £2400, of which £100 was paid in hand, and the balance was to be paid in one year; the purchaser was let into possession in accordance with the agreement, and, as the report says, made alterations in the premises, and let the same. After the purchase money was payable, he wrote a letter to his solicitor, to be communicated to the vendor's solicitor, in which he expressed his vexation with himself for the delay which had occurred, and that he was much gratified by the liberality and patience shewn to

(a) 15 Ves. 594.

(b) 1 Mad. 310.

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him in the business. Upon these acts of the purchaser Sir *Thomas Plumer* observed: "The alteration of the premises, and the letting of them, are acts strongly indicating an approval of the title." As to the letter, he said, it "seems founded on an approval of the title, for, if the title was objectionable, he could not excuse himself for delaying the payment of the purchase money; for, till the title was completed, the defendant was not bound to pay the purchase money," and after placing a similar construction upon his expression of gratification at the vendor's liberality and patience, he adds, "that letter amounts to an admission that the title was approved," and he refers to *Fleetwood v. Green*, as a strong authority in favour of the plaintiff. *Burroughs v. Oakley*, (a) was before the same learned judge, when Master of the Rolls, and in it he treats of the proper effect of a purchaser taking possession with the consent of the vendor, and of acts of ownership while in such possession; and in relation to the latter he asks, (using similar language to that of Lord *St. Leonards* in his treatise,) what would be the purpose or advantage of taking possession except to act as owner? The act of ownership insisted on by the vendor as evidence of an acceptance of title, was the cutting of underwood; and Sir *Thomas Plumer* designated it as the proper act of a person entrusted with possession, bound to take care of the estate, and not to leave the crops uncut and waste, an act of preservation, not of destruction. The conclusion, he says, depends on that distinction, adding, "a fall of underwood which must be cut by the person in possession at the regular season, is no more than gathering a crop of corn or hay." It appeared, too, that a further abstract of title had been delivered after the fall of underwood, and his Honour remarked upon it, as quite inconsistent with the supposition that the purchaser had precluded himself from an examination of the title.

1859.

Com'l Bank
v.
McConnell.

Judgment.

There are other authorities upon the same point,

(a) 3 Swan. 159.

1859. among them may be mentioned *Warren v. Richardson*,
 Com'l Bank (a) *Burnell v. Brown*, (b) and *Haydon v. Bell*; (c) but
 v. those to which I have particularly referred most resemble
 McConnell. the case before me in their circumstances, and in the
 principle involved.

The acts relied on in this case, as evidence of waiver of examination of title, are, the letter apologising for delay in the payment of the instalment of purchase money, upon which a conveyance was to be made; the actual payment of a large proportion of that instalment; and the alterations in the mill. As to the letter, the observations of Sir *Thomas Plumer*, in the *Margravine of Anspach v. Noel*, are applicable; it seems founded on an approval of the title; until the title was completed he was not bound to pay, and why apologise for delay, when there was no delay if the title was objectionable. The actual payment of the greater part of the instalment strengthens the same view. The alteration of the premises, and the letting them, were commented upon in the same case, as strongly indicating an approval of the title; the nature of the alterations is not shewn: it is only stated generally that the purchaser made alterations; as in the earlier case of *Fleetwood v. Green*, it is stated that the purchaser in several instances treated the property as his own.

In *Burroughs v. Oakley*, the same learned judge is careful to explain the character of the acts of ownership exercised by the purchaser in that case, and which he describes as acts of duty—acts of preservation, not of destruction; adding, that the conclusion depends on that distinction. Now I find it difficult to imagine acts indicating more unequivocally an approval of the title, than the alterations made in the mill by the defendant in this cause. Taking the evidence either of *Nichol* or *Boulton*, or of both, the alterations are shewn to be of a nature to change the character and purpose of the building, and

(a) 1 Younge, 1.

(b) 1 J. & W. 168.

(c) 1 Beav. 337.

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may well fall within the category of acts of destruction, so far as the building, as a mill of the description which came to the purchaser's hands, was concerned. Such a dealing with the property appears inconsistent with the idea that the person so dealing with it was not definitively the purchaser, but was only to be so, after an investigation of the title, and upon the contingency of its turning out good. Could he reasonably say, if the title turns out not good, I intend to return the property into the hands of the vendors in the state to which I have altered it? If he could not reasonably say this, the alternative seems to me to be, that he must be taken to have intended not to investigate the title.

1859.
Com'ral Bank
v.
McConnell.

In the English cases it generally appears that an abstract of title had been delivered before the acts relied upon as an acceptance of title; and I concede that there is more room to infer an acceptance of title when the title is disclosed, than when it is not; as in the case of *Judgment. Russell v. Brown* the abstract disclosed the reservation to a third party of the right of sporting over the property, the subject of the sale, and subsequent acts were held evidence of waiver, because that right was shewn by the abstract, and would not have been so held unless disclosed, (though if a title appear not to be good even after waiver, it will not be forced upon a purchaser.) In this case there does not appear to have been any abstract delivered or demanded. If a purchaser choose to assume the title to be good, or act upon his own knowledge or opinion without seeing, and without asking to see, how the title is made out by the vendor, I should think he would be bound by such acts as are shewn in this case; and I say this, having in view the circumstances of this country, the comparative simplicity of titles, and the absence in very many cases of the formalities which attend the transfer of property in England. In the case before me there is some evidence of the nature of the title being not unknown to the purchaser: his agent, Mr. *Boulton*, seems to have understood how

1859. *Com'l Bank v. McConnell.* the vendors acquired their title. The property appears to have been well known; and there had been sales of portions of it. The defendant, I think, can hardly be in a position to say that he was so wholly ignorant of the title as to negative the idea of its being his intention to accept it without investigation; if indeed a purchaser can ever say so.

I am, and always have been, very unwilling to deny the right of a purchaser to investigate his vendor's title, but it has appeared to me in this case that if ever a purchaser can be held to indicate by his acts his intention to waive such investigation the defendant has done so in this case.

Judgment.

JOSEPH V. BOSTWICK

Assignment for benefit of creditors—Time allowed for creditors to execute—Effect of creditor contesting deed.

Traders having become involved in their circumstances, made an assignment to trustees for the benefit of such of their creditors as should come in and execute the same within a time named in it. One of the creditors, instead of executing the deed, sued the debtors, and an issue under an interpleader order having been found against the creditor, a motion was made to the Court of Queen's Bench for a new trial, which was refused. Thereupon, after the time limited for signing, the creditor applied to the trustees to be allowed to execute the deed of trust, which the trustees permitted. Upon a bill filed by a creditor who had previously recovered judgment and registered the same against the trust estate, the court declared the plaintiff entitled to payment of his claim out of the proceeds of the estate in the hands of the trustees; and that the creditor who had contested the validity of the deed, had thereby forfeited all right to participate in the benefit of the assignment.

Statement. This was a bill by *Henry Abraham Joseph* against *Amos Bostwick* and *Hugh McDonell*—who had been engaged in business as co-partners with *John Maulson* and *George Bostwick*—to whom *Bostwick & McDonell* had made an assignment for the benefit of their creditors—*John Hutchison*, *The Commercial Bank of Canada*, and several other persons, creditors of the co-partnership who had executed the deed of trust, praying that under the circumstances set forth in the bill, and which are

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clearly stated in the judgment, a declaration that he was entitled to be paid the amount of his claim against the co-partnership in preference to the claim of *The Commercial Bank*, and that the bank had forfeited all claim to participate in the trust estate.

1859.

Joseph
V.
Bostwick.

Mr. *A. Crooks* for plaintiff.

Mr. *Brough*, Q. C., for the *Commercial Bank*.

Mr. *Hector* for defendant *Leslie*.

Mr. *Barrett* for *Amos Bostwick*.

Mr. *Boomer* for the trustees.

The points relied on by counsel, and the cases cited, are stated in the judgment of

THE CHANCELLOR.—This is a bill for payment of ^{Judgment.} the plaintiff's judgment out of the real estate of the defendant *Amos Bostwick*, and for a declaration that the plaintiff's judgment forms a lien upon that estate, and upon the proceeds thereof in the hands of the trustees, and is entitled to priority over the judgment of the defendants, the *Commercial Bank*.

The circumstances out of which this litigation has arisen are simply these; Messrs. *Bostwick & McDonell*, who carried on business in this city as co-partners, having become embarrassed in their circumstances, assigned all their estate in trust for such of their creditors as should execute the deed within two months. By the same deed the separate real estate of *Amos Bostwick* was conveyed to the trustees upon trust, that they should, in the event of the partnership estate proving insufficient, sell the real estate of *Amos Bostwick*, and apply the proceeds, in the first place, in payment of the separate debts of *Amos Bostwick*, and then in payment of the joint creditors

1859. *pari passu*. By this deed the debtors are released from all further demands, and the trustees are authorised to enlarge the time for its execution by creditors for a further period of two months, and they did enlarge it; so that the time eventually fixed for creditors to come in and execute was four months.

Joseph
v.
Bostwick.

The assignment was duly executed by Messrs. *Bostwick & McDonell*, and their trustees, on the 27th of October, 1857, and by the several creditors who have been made parties to this suit, except the *Commercial Bank*, within the time limited by the deed.

The plaintiff recovered judgment against Messrs. *Bostwick & McDonell* on the 10th of November, 1857, and a certificate of that judgment was duly registered on the same day, in the county of York, that being the county in which the lands of *Amos Bostwick* lie.

Judgment.

The *Commercial Bank* recovered their judgment on the 14th of January, 1858; and writs of *feri facias* against the goods of *Bostwick & McDonell*, upon their and other judgments having been placed in the hands of the sheriff of this county, he applied to the Court of Queen's Bench, under the interpleader act, and upon that application several issues were directed on the 14th of February, 1858, to try the validity of the assignment in question, in which issues the trustees were directed to be plaintiffs and the several creditors defendants.

In one of those issues the plaintiff in this suit was defendant; and in another the *Commercial Bank*. The issue in which the *Commercial Bank* were defendants was tried on the 18th of May, 1858, and a verdict was found in favour of the plaintiffs; and in the following term a motion for a new trial on behalf of the *Commercial Bank* was either refused or discharged, and the validity of the trust deed, so far at least as they were concerned, was thereby established.

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After the motion for a new trial had been discharged, but the precise time is not shewn, the *Commercial Bank* applied to the trustees to be allowed to execute the assignment, and they were permitted with the consent of the trustees to do so. It is said that the creditors who had executed the trust deed refused to consent; but the facts have not been brought out clearly; it is certain, however, that Messrs. *W. L. Perrin & Co.* did refuse to give their consent, and did insist upon the right to exclude the *Commercial Bank* under the circumstances; and it has not been shewn that the other creditors were consulted, or assented to the course pursued by the trustees.

1859.

Joseph
v.
Bostwick.

This bill is filed under the circumstances to which I have just adverted, and the plaintiff's contention is that he has a charge, in virtue of his judgment, upon the lands of *Amos Bostwick*, and upon the proceeds of those lands in the hands of the trustees, and that he is entitled to be paid his debt from that estate in preference to the *Commercial Bank*, who should not have been allowed to execute the assignment at the time and under the circumstances already stated, and who have not by executing it at such time and under such circumstances acquired a priority over his earlier charge.

It is true, as was recently observed by Vice-Chancellor *Wood*, that the law in relation to creditors' deeds is in an unsatisfactory state. It is difficult to determine upon the authorities whether the time limited for creditors to come in and execute such deeds is or is not material in the view of equity.

In *Raworth v. Parker*, (a) decided by Vice-Chancellor *Wood*, in 1855, that learned judge inclines, I think, to the opinion that such clauses are directory merely; but he does not decide the point; and he admits that there

(a) 2 K. & J. 168.

1859. is no modern authority in which relief has been given after the time fixed for the execution of the deed has expired. (a)

Joseph
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Bostwick.

But several cases have occurred within the last fifteen years, which, without deciding the point, tend to shew that time is considered material in equity as well as at law. *Collins v. Reece*, (b) decided by Vice-Chancellor *Knight Bruce*, in 1845, contains, perhaps, the strongest expression of opinion, that time is material; but *Johnson v. Kershaw*, (c) decided by the same learned judge, in 1847, *Emmet v. Dewhurst*, (d) decided by Lord *Truro*, in 1851, *Forbes v. Limond*, (e) decided in the Court of Appeal, in 1851, and *Watson v. Knight*, (f) decided by the present Master of the Rolls, in the same year, all tend more or less to support the same proposition.

The other cases of recent date to which I was referred, judgment. have, it must be admitted, an opposite tendency, but in none of these was this precise point decided. In *Biron v Mount*, (g) relief was refused; but opinions are attributed to the Master of the Rolls which I find it difficult to reconcile with his judgment in *Watson v. Knight*. In *Nicholson v. Tutin*, (h) relief was given by Vice-Chancellor *Wood*, although none of the creditors had executed the deed within the limited time, but that proceeded upon the ground that all the creditors had subsequently acted on the deed with the assent of the debtor himself. And *Padbent v. Thornton*, (j) proceeded upon the ground that the creditor had assented to the deed, although his assent had not been so explicit as to warrant the court in disturbing dividends already declared.

With respect to the earlier cases, it does not appear to

(a) See p. 170.

(c) 1 D. & S. 260.

(e) 4 D. Mc. & G. 298.

(g) 24 Beav. 642.

(j) 4 D. & S. 65.

(b) 1 Col. 678.

(d) 3 M. & G. 587.

(f) 19 Beav. 369.

(h) 2 K. & J. 22.

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me that either *Spottiswoode, v Stockdale, (a)* or *Dunch v. Kent, (b)* establish the proposition for which the defendants contend.

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But the abstract question does not arise in the present case, because, whatever may be the rule when a creditor lies by merely, it is abundantly clear, I think, that where he not only does not assent to such a deed, but actually opposes it, both before and after the time limited for its execution, he cannot be allowed to participate in its advantages. *Field v. Lord Donoughmore, (c)* is a very clear authority upon that point. There, as here, the creditor had been allowed to execute the deed, but he had previously refused to assent to it and he brought an action against the debtor. And Lord *St. Leonards* decided that having failed to observe the obligation imposed upon him by the deed, he had no just claim to share in its benefits. Nothing can be more satisfactory than the reasoning of Lord *St. Leonards* in that case. Judgment. Having decided that execution of the deed is not absolutely necessary—that assent, if clearly made out, will be sufficient. He says, but then this court in letting in one of a class of creditors to the benefit under such a deed as this, is bound to see that he has performed all its fixed conditions. This is a necessary preliminary to the right of such creditor to participate in the fund. The object of all such deeds is to protect the estate from being torn to pieces, and this court, when called upon to effectuate them, is bound, in the first instance, to enquire whether the arrangements to protect the estate, which were entered into between the debtor and his creditors, have or have not been faithfully performed; and in every case where it finds any creditor to have deviated from, and disturbed that arrangement, it is bound to deprive him of all benefit under the deed.

Now *Field v. Lord Donoughmore* appears to me to

(a) Coop. 102.

(b) 1 Ver. 260.

(c) 1 D. & W. 227.

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be expressly in point, and to be conclusive against the claim of the *Commercial Bank* in the present case. Mr. *Brough* contends that the opposition in the present case was forced upon the defendants—that it was not in fact the opposition of the defendants, but of the sheriff who obtained the interpleader order. But the sheriff's application was necessitated by the acts of the defendants. Instead of claiming under the deed, they thought proper to sue the debtors, in opposition to it. This was the whole extent of the opposition in *Field v. Lord Donoughmore*. But here, the defendants not content with suing the debtors, and obtaining judgment against them, issued execution, and insisted upon having the debt levied out of the trust property; and an issue being directed, they contended that the deed was fraudulent and void as against them; and when the jury decided in favour of the deed, they moved for a new trial, and it was not until every effort to defeat the deed had failed, that they applied to be permitted to execute it, and participate with the rest of the creditors whose rights under it they had been labouring to destroy. In none of the cases decided since *Field v. Lord Donoughmore* were the circumstances so unfavourable to the creditor as here. (a) Indeed I know of no case parallel with the present, except perhaps *McKay v. Farish*, (b) decided in this court, which it very much resembles.

Judgment.

I am quite clear, therefore, that a bill filed by the *Commercial Bank* to be allowed to come in and execute the deed, in May, 1858, must have failed. They had then forfeited all right to participate in the benefits of the deed. Their bill must have been dismissed. And that being so, it follows that the lands in question were the lands of *Amos Bostwick*, subject only to the charge in favour of the creditors, who had executed the assignment or assented to it. He had a perfect right to create a further charge upon the lands which would have

(a) See *Bush v. Shipman*, 14 Sim. 239; *Gould v. Robertson*, 4 D. & S. 509; *Watson v. Knight*, 19 Beav. 369.

(b) Ante vol. I., p. 333.

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(a) *Lane v. H*
(b) 17 Jur. 6

be binding against the *Commercial Bank*, and entitled to payment from the proceeds in the hands of the trustees, in priority to them, and if *Amos Bostwick* could have executed such a charge, it follows that the plaintiff having recovered judgment, is in the same position under the act of parliament as if a charge had been created, and is entitled to be paid out of the proceeds of the estate in the hands of the trustees. (a)

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v.
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 CLARKE V. HALL.

Practice—Time for setting down cause for motion.

Motions for decree may be set down at any time before the court enters upon the paper.

Leave had been granted under the 17th order, of the 3rd of June, 1853, to give notice of motion for decree before the time for answering had expired. Notice of motion had been served, but the cause had not been entered in the motion paper; after the paper was before the judge a precipe for setting down was handed to the registrar.

Statement.

Mr. *Ince*, for the plaintiff, before the cause was called, asked leave to move for a receiver, in terms of the notice of motion.

Mr. *Hodgins*, for the defendant, objected that the cause came on irregularly; it should have been set down with the registrar contemporaneously with giving notice of motion; and referred to *Boyd v. Jaggard*, (b) but

ESTEN, V. C.—These motions may be set down at any time before the judge takes the paper; but if a defendant to whom notice of motion has been given, comes to court and finds the cause not entered in the paper, he may, while the special motions are being disposed of, ask for the costs of the day.

(a) *Lane v. Horlock*, 1 Drew. 587; *Rew v. Lane*, 3 Jur. N. S. 125.

(b) 17 Jur. 655.

1859.

CASHIN v. PERTH.

Demurrer—Principal and Surety.

A person about to become surety for another, should be informed of all circumstances which may affect his suretyship, and if the party for whose benefit the security is given intentionally conceals such circumstances, the surety will be entitled to have the bond delivered up to be cancelled.

The facts are stated in the judgment of his Honour V. C. *Esten*, before whom the demurrer had been argued.

Mr. *Strong*, for plaintiffs.

Mr. *Blake*, for defendants.

ESTEN, V. C.—This bill is by sureties for a lessee of tolls, to be relieved from their bond of suretyship, as having been obtained through the fraudulent suppression of a material fact, and from legal proceedings founded upon it. The bill is against the lessors of the tolls, the lessee, and the sureties in a former bond, given for a similar purpose. The last named defendants have demurred to the bill on three grounds: 1st. For want of equity; 2nd. For want of interest in themselves; and 3rd. For want of parties; the ground of the last demurrer being in fact a misnomer of the corporation. It is stated by the Lord Chancellor in the case of *Owen v. Homans*, (a) that the creditor, contracting himself with the surety, is bound to make a full disclosure of all circumstances within his knowledge, which may affect the risk to be incurred, to the same extent as the assured is bound to disclose to the insurer circumstances of the same character. I have no reason to doubt the correctness of this statement, although it was unnecessary in that case to decide the point. The Lord Chancellor states it as settled law, and he was evidently inclined to think that the creditor not himself intervening, but the contract being procured entirely by the debtor, the creditor would be

(a) 3 McN. & G. 378.

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affected by misrepresentation or suppression practised by the debtor. In the present case the contract was procured by the intervention of both the creditor and debtor, and so consequently an obligation rested on the creditor to disclose to the sureties every fact within his knowledge which could affect the risk. The fact which the creditor is charged with concealing is a previous defalcation on the part of the principal debtor, in the previous year, during which he had been lessee of the same tolls, under a contract, in which these defendants were his sureties. The question is, whether this was a material fact which it was incumbent on the creditor to disclose. At the argument I thought it was not, but on reflection I am of a different opinion. The sureties would reasonably expect that the tolls would be applied to the payment of the rent, and had they been informed that a defalcation existed from the previous year, they would, I think, have insisted upon its being settled before they entered into the engagement of suretyship, knowing the strong probability that existed that the future tolls would be applied to the satisfaction of the old debt in the first instance. I think this fact should have been disclosed, and that its suppression vitiated the security. In addition to this fact, the bill imports that an intention existed at the time of the contract of applying the tolls to be received to the discharge of the old debt, and it is necessarily implied, I think, that this fact was also concealed. It is true that this fraudulent concealment vitiated the bond at law as well as in equity, and afforded a sufficient defence to the action commenced upon it. It would seem, therefore, that the plaintiffs cannot be relieved against the verdict that has been obtained, and that it is unnecessary, and would therefore be improper to interpose with respect to the action that is pending. But I presume that the plaintiffs are entitled to have the bond delivered up to be cancelled, and although this mode of relief would be dry and profitless, I think the demurrer must be overruled. *Pidcock v. Bishop* (a)

1859.

Cassin
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Perth.

Judgment.

1859. is not unlike this case; and the doctrine was also affirmed in the case of *Stone v. Compton*. (a)

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The second ground of demurrer is the want of interest, and I entirely concur with the learned counsel for the defendants, that his clients are in no way interested in the fate of the bond. They are represented, however, as parties to the fraudulent concealment, from which they were to derive a benefit, and therefore appear to have been properly made parties for the purpose of being made to pay costs, which relief is expressly prayed against them. (b) *Bowles, v. Stewart*, (c) *Bulkeley v. Dunbar*. (d)

The demurrer for want of parties must be allowed. Under the circumstances I give no costs on either side.

DENNISON V. KENNEDY.

Specific performance.

An agreement by letter was entered into by an intending lessee, to take a lease for years of a house; and that the rent agreed upon should be increased according to the amount which might be afterwards expended by the owner in improvements upon the property. In pursuance of such agreement the party entered into possession, and paid rent according to the stipulations contained in the letters. The municipal authorities afterwards constructed a bridge near the property, which the tenant asserted injuriously affected his occupation. *Held*, notwithstanding, that the defendant was bound to accept a lease in the terms agreed upon.

The facts appear sufficiently in the judgment and head note.

Mr. *Brough*, Q. C., for plaintiff.

Mr. *H. Cameron*, Q. C., for defendant.

Judgment. ESTEN, V. C.—[before whom the case was argued.]—
I think the plaintiff is entitled to a decree, with costs. No objection is or could be raised on the Statute of

(a) 5 Bing. N. C. 142.
(c) 1 Sch. & Lef. 209.

(b) 1 Dan. 344-5.
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Frauds, or the other statute relied on in the answer. The defences which are relied on are, the alleged abandonment, the alteration of the property, and apparently the laches. The last point is wholly untenable, and the alteration was made with the defendant's consent. The only evidence of it is supplied by the plaintiff's examination, who at the same time says that it was done with the defendant's consent, as he understood, and that he gave the defendant a piece of ground in lieu of the ground taken, of which he has made use, and has been in possession ever since. With respect to the alleged abandonment, it is not proved. From Mr. *Taylor's* evidence, I judge, that the plaintiff's offer was not accepted. This is corroborated by the statement in the plaintiff's letter, as stated by the defendant, in which he asserts this fact, and by the peculiar expression in the defendant's letter, as stated by himself, that he was "in earnest" when he accepted the plaintiff's proposal. In addition to this, we find Judgment. that the defendant continued in possession; that the plaintiff, after holding him by his own letter, according to the defendant's statement, to his agreement, proceeded according to that agreement, with the defendant's consent, to make the additional improvements, which perhaps he would not have done for a mere tenant at will; and that the defendant, in exact pursuance of the agreement, paid the original rent until the improvements were nearly completed, and thenceforth the increased rent stipulated by the same agreement, without insisting upon any deduction for the whole or the half of his own improvements. Under these circumstances, I am sure the sound conclusion is, not that the agreement was abandoned, and a new tenancy from year to year created, but that the original agreement was never abandoned. With regard to the bridge built by the corporation, there is no evidence of it, nor of its injurious effects to the land. Supposing this to be the case, however, it seems to have been done under the powers conferred on corporate bodies for the general good, and to the exercise of which,

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and the inconvenience thence arising, individuals must submit. I do not think such a circumstance should affect the execution of this agreement. There is no evidence whatever that it was by the plaintiff's procurement. I may fairly assume that it did not substantially alter the condition of the property, and the defendant continued in possession without, so far as appears, objection or complaint. The learned counsel for the defendant contended that the letter did not express the true agreement of the parties, as it threw the repairs on the defendant, which, he contended, was not the intention, as appeared by the plaintiff's conduct. But the letter is plain, and I put a different construction on the conduct of the plaintiff. When it was found that the house was not in as good order as it was supposed to be, the plaintiff, from a proper feeling, although perhaps not bound, promised to put it in good order, although he refused to keep it in repair during the tenancy. If, notwithstanding all that passed between the parties, the defendant can maintain an action against the plaintiff, for the house not being in good order when he took it, he will have that right under the lease to be executed, and I think he should be confined to that right and that under the circumstances, the house being in the state described by Mr. Hay three years after the commencement of the tenancy, and perhaps not being in good order when the tenancy commenced, should not affect the specific execution of this contract. With regard to the alleged dictation of the letter by the plaintiff, it is not suggested that the defendant did not write it voluntarily, and perfectly understand it. I agree with the plaintiff's counsel, that the defendant's second letter was so unreasonable that it did not require an answer, and that nothing is to be inferred from the plaintiff's silence.

Judgment.

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WILLIAMS V. FELKER.

Varying deed.

To induce the court to vary a written instrument, executed by the parties thereto, on the ground of alleged mistake, the evidence must be of the strongest character: where, therefore, a bill was filed for the purpose of rectifying an alleged error in a mortgage deed, by inserting "£225" instead of "£125," and the defendants in their answer denied the fact of any mistake having occurred, and the conveyancer who drew the deed swore that he had read over with distinctness the written portions of the conveyance: that the mortgagee had corrected him as to the time of the money being payable, and that he did not think he could have been understood as reading "two" when he read "one," and it also appearing that the instructions from which the mortgage had been prepared, had been given to another person in the absence of the conveyancer, and that the same were read over to the parties at the time.

The court, under the circumstances, dismissed the bill with costs.

The facts appear sufficiently in the headnote and judgment.

Mr. *Roaf* for the plaintiff.

The defendants did not appear.

Argument.

The cause was heard before his honour Vice-Chancellor *Spragge*.

SPRAGGE, V. C.—The bill is filed in this case to reform a mortgage, which it is admitted was intended to be given for the balance of the purchase money of certain premises, comprising a little over two acres, upon which was erected a steam saw-mill, sold by the plaintiff to the defendants *Amos* and *Daniel Felker*.

The points upon which the parties differ is as to what was the true amount of the purchase money; and for what amount the mortgage was to be given. The plaintiff's case is, that the purchase money was £525, of which £125 was paid in hand; that five notes were given on account, three for £25 each, and two for £50 each, and that the balance, £225, was to be secured by mortgage; whereas it was by mistake of the conveyancer made for £125. The defendants' case is, that the pur-

1859. chase money was to be £430, of which £125 was paid in hand, that five notes were given on account, one for £30, two for £25 each, and two for £50 each; and that the mortgage was properly given for £125. That this was the real transaction, and that there was no mistake in the mortgage is distinctly stated in the answer of each of the *Felkers*.

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Felker.

The parol evidence is strong in favour of the plaintiff's case; *Cortland White* was present at the bargain between the parties, and accompanied them to the house of the conveyancer, Mr. *Jonathan Davis*, to have the conveyance and mortgage prepared; he states the bargain clearly as stated by the plaintiff, and says that the instructions for the conveyance and mortgage were given in accordance with it. Mr. *Davis* was out, and the instructions were received and entered on a slate by his father, an aged and feeble man since dead. Judgment. The entry on the slate was the first written memorandum of the agreement so far as appears. It is not produced, and was probably effaced.

Other witnesses are produced to whom the *Felkers*, *Amos* particularly, stated the price of the land to be £525, explaining how it was payable; one, to whom he stated that the mortgage had been given by mistake for £125, instead of £225, another to whom he stated that £225 was payable under the mortgage; and these things were stated by the witnesses upon examination before me, with such particularity, and in such a manner as to wear all the appearance of truth. Mr. *Davis*, the conveyancer, also gives evidence and says, that he, by the plaintiff's instructions, prepared a mortgage for £225 which *Amos Felker* refused to execute. Mr. *Davis* said he neither admitted nor denied it, but said he would go by the writings.

No witnesses were examined on the part of the defendants, nor were the plaintiff's witnesses cross-

examined; attended the appeared for may have ar the *Felkers* v of the mortg a date subse stating also registered u party, and a against him.

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examined; no one on the part of the defendants having attended the examination of the witnesses; and no one appeared for them on the hearing of the cause. This may have arisen in this way: after the answers of both the *Felkers* were in, the bill was amended, stating a sale of the mortgaged premises to one *Luke McLinchy*, at a date subsequent to the filing of the last answer; and stating also that the pendency of the suit had been registered under the statute; *McLinchy* was made a party, and allowed the bill to be taken *pro confesso* against him.

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The *Felkers* in their answer do not deny having represented the purchase money to be £525, but state that they did so with a view to getting a better price on a resale.

The cause has come to a hearing in a manner very favourable to the plaintiff, and yet there are some Judgment. things that militate against his case. The entry on the slate was read over to the parties, and Mr. *Davis* says he prepared the conveyance and mortgage from that entry; again, the mortgage was not executed without the parties knowing its contents. It is a printed form filled up, the written part only was read over, so that there was nothing to weary the attention; and the plaintiff's attention as a fact, appears to have been alive to it, for in the proviso for payment, which is short, he corrected the date at which the money was made payable; and further, Mr. *Davis* said, in answer to a question from the court, that he read distinctly, and in such a way that he could not have been understood to say *two* when he was reading the word "one."

There is besides a matter stated by each of the *Felkers* in his answer, which, if true, is entitled to great weight; they say that the consideration expressed in the deed is £430. It is not in evidence how that is. If it were £525 the plaintiff would probably have shewn

1859. it to be so, though it would not have been so strong a circumstance in his favour as its being for the smaller sum would be in favour of the defendants; because a larger sum than the true consideration is sometimes inserted in conveyances in order to obtain a better price on a resale; while the mention of a smaller sum might have a contrary effect, and is probably never done. If the notes had been produced it would tend to clear up the transaction, but from the evidence I take them to have been paid, and so in the hands of the *Felkers*, who since the sale to *McLinchy* have ceased to defend the suit.

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There is one piece of evidence which I have not noticed—the remark of the plaintiff to the *Felkers*, that he did not like so large a sum remaining on mortgage because of the risk of fire. If the value of the premises after a fire would clearly exceed £125, it would tend to shew that the mortgage was supposed to be for a greater amount, though the plaintiff does not appear to have named any sum; but the value of the *land* is stated to be a little over £25, and the entire value of the premises after being partially dismantled, about £200. The remark, therefore, might have been made by a cautious man, if the mortgage money were indisputably £125, though not so probably as if £250. At all events the plaintiff did not reduce the amount, as he was thinking of doing, by taking some cattle on account, as he thought the prices high.

Judgment.

Now in regard to the evidence given it is to be remarked, that it is entirely parol, and all of conversations with the *Felkers*, or one of them; even as to the bargain itself it is of that character, for *White* was not a party or agent, only a listener. There is no evidence of circumstances or conduct: none at least that make for the plaintiff; such as there is, is the other way; the reading over the memorandum from the slate, and the reading the written part of the mortgage, and correcting

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(a) 6 Ves. 325.
(b) See also upon
Sugden, at p. 150.
(c) 2 D. & Wm.

a part of the proviso for payment, and, assuming it to be so, the consideration expressed in the deed. I should perhaps except the non-denial by *Amos Felker* to Mr. *Davis* of the alleged mistake in the mortgage.

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Upon the whole, I think, the evidence does preponderate somewhat in favour of the plaintiff, especially if I discard, as not proved, the consideration expressed in the deed; but I cannot say that it preponderates so decidedly, so convincingly, as entirely to satisfy my mind of the alleged mistake.

In all the cases in which instruments have been reformed, the evidence has been so conclusive, as to leave no room for reasonable doubt, and consisting, I think, in every case in part of documentary evidence. Lord *Eldon* in the *Marquis of Townshend v. Stangroom*, (a) quotes the language of two of his predecessors upon this point, in support of his own opinion, thus: "Lord *Hardwicke* saying the proof ought to be the strongest possible, leaves a weighty caution to future judges," and referring to Lord *Thurlow's* opinion in favour of the admissibility of parol evidence to correct a written instrument, (b) Lord *Eldon* says: "but he also thought it was to be of the highest nature, for he adds that it must be irrefragable evidence;" and the language of other judges is similar. I will only refer to that of Lord *St. Leonards* in *Mortimer v. Shortall*, (c) where he says; "Now is the evidence conclusive? I must be certain that there has been a mistake, and that the mistake is such as ought to be corrected. I do not mean to say that the evidence must be all one way, or that there must not be any conflict; there must, however, be such a preponderance as will satisfy my mind." And in another paragraph, "Now in cases of this nature the court cannot act except upon the very clearest evidence."

(a) 6 Ves. 325.

(b) See also upon this point *Alexander v. Crosbie*, L. & G. temp. Sugden, at p. 150.

(c) 2 D. & Wm. 363.

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There is also in the plaintiff's way the difficulty created by the distinct denial of the alleged mistake in the defendant's answers. Mr. *Roaf* says that they are not to be credited. If you believe the whole of the plaintiff's evidence, the answers can scarcely be true, but that is not the point, for upon this question you must read them with the evidence; upon the face of them they tell a plain story which is not self-contradictory, and may be wholly true. Lord *Eldon* attached great weight to the defendant's denial by answer, though I believe he did not go the length of holding it an insuperable obstacle even when the evidence was only by parol: such a case does not appear indeed to have arisen before him. In *Townshend v. Stangroom*, he says in one passage: "But the evidence must be taken, due regard being paid to the answer;" and in another, "I am to consider it (the alleged agreement) with reference to his answer, by which he has positively denied it." Lord *St. Leonards* seems to have gone further, and to have held the opinion that a denial by answer, in a case supported by parol evidence, was an insuperable objection; for in *Mortimer v. Shortall*, he said: "Where there is nothing but the recollection of witnesses, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff appears without a remedy." Upon the whole, I think that it would not be exercising the jurisdiction with that care and caution which has been observed by English judges in administering this branch of equity law, to reform this instrument upon the evidence before me. I think the bill must be dismissed, and with costs.

Judgment.

A second bill is filed by the same parties, making the same case, and praying a sale of the mortgaged premises, and a personal order against the mortgagors for payment of any deficiency. To this bill the defendant *Amos Felker* has put in a short answer, denying the alleged mistake in the mortgage; the other defendants have allowed the bill to be taken *pro confesso*. I think the

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WHITEHEAD V.

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plaintiff may properly be allowed to take a decree for sale, and the personal order asked for, the account being taken upon the face of the mortgage, with the ordinary costs of such a suit; deducting therefrom the costs of the answer of *Amos Felker* in this suit, and the costs of the answers of both the *Felkers* in the first suit.

1859.

Williams
v.
Felker.

WHITEHEAD V. (THE) BUFFALO AND LAKE HURON RAILWAY COMPANY.

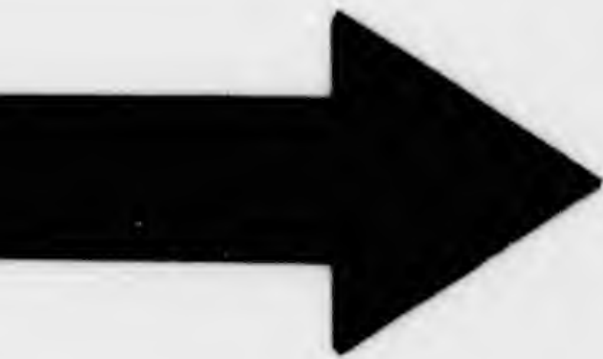
Contract with a corporation not under seal—Practice—Payment of money into court.

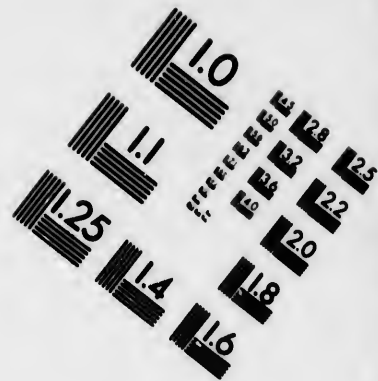
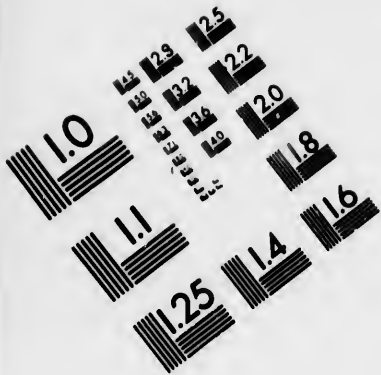
The managing director of a railway company entered into a contract in his own name, adding, "acting on behalf of the company," with a person for the execution of the works in the construction of the road, and also for keeping the road in repair. Under this agreement the contractor entered upon the execution of the works, and completed the greater portion thereof, when the company stopped the works, alleging that they had not been aware of the terms of the contract, and which they asserted were most extravagant in respect of the prices agreed to be paid. On a bill filed to enforce this contract. *Held per curiam*, [*Spragge*, V. C., dissenting.] that this contract did not require the common seal to render it binding on the company; that the company must be presumed to have had notice of the terms and stipulations of the contract; that the intricacy of the accounts was such as to render this a proper case to be disposed of by this court; that the company was bound to pay for the work at the prices agreed upon; and an enquiry was directed as to the damage sustained by the contractor by reason of the stoppage of the works, and the loss of the contract.

Where a bill was filed to compel a railway company to carry out a contract entered into by their agent for constructing the road, and the evidence taken in the cause shewed that, at the prices agreed upon, which the company insisted upon were most exorbitant, a balance of £12,500 was due the contractor, the court, at the hearing, ordered that amount into court without waiting for the master's report.

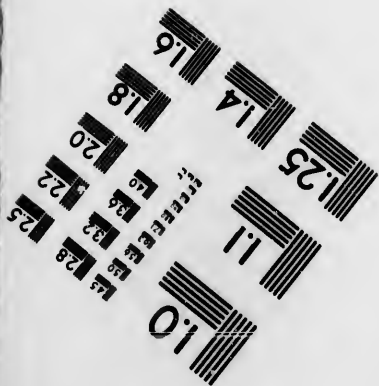
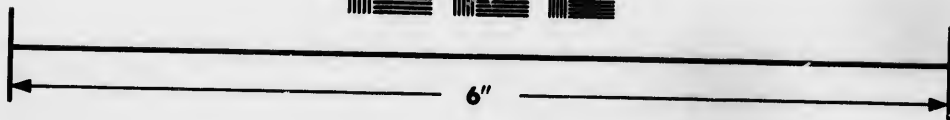
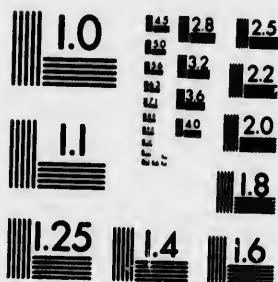
This was a bill by *Joseph Whitehead*, against the *Buffalo and Lake Huron Railway Company*, to enforce Statement. the specific performance of certain contracts made between the plaintiff and one *Hillero Barlow*, professing to act for, and on behalf of, the defendants, he being at the time of entering into such contracts their managing director and agent, for the construction and repair of the railway of the defendants from Fort Erie to Goderich; for maintenance of way, and for the erection







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1859. of station buildings between Stratford and Goderich. The bill alleged that after the execution of the contracts they were, or the purport and contents thereof were, transmittted to England, and were made known to the directors in this country; that immediately after the execution of the respective contracts, the plaintiff commenced executing the works respectively embraced in them, under *Barlow*, as agent of defendants, and had received from *Barlow* and other agents, on account of the contracts, upwards of £300,000; that plaintiff continued the construction of the works until the 2nd of September, 1858, when he received a letter from the secretary of the defendants, putting an end to all agreements between them and the plaintiff. Under the circumstances, which were fully set forth in the bill, the plaintiff asked a declaration that he was entitled to an account; that the corporate seal might be affixed to the contracts, or that they might be reformed and rectified; or that direct contracts between the plaintiff and defendants might be ordered to be executed under the corporate seal; or that the defendants might be restrained from setting up as a defence in any court, the want of the corporate seal, and for further relief.

Statement.

The answer of the defendants set up that *Barlow* was not authorised on behalf of the defendants to enter into any of the contracts in the bill mentioned, and that he had entered into them (if at all) without the authority, knowledge, or consent of the defendants: objected that the alleged contracts not being under the common seal of the company, they were not, even if the contracts had been entered into with them, bound to pay for the work at the rates stipulated for by *Barlow*, which they characterised as being most extravagant, and which the evidence in the cause tended to shew was much beyond what had ever been paid for similar work in other places. The defendants also asserted that the fact of a contract having been entered into for the completion of the works, had never been communicated by *Barlow* to

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them; and that although they were aware of the prices agreed to be paid to the plaintiff, they had been induced to believe, and were always under the impression, that those prices were to be paid only for such portions of the work as they might desire to have completed, but not that they were bound to go on and complete the works at those rates, and submitted to have a reference to the master to take an account of the work done, according to what the same are worth.

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This statement, together with the facts set forth in the judgment, it is believed, will be sufficient to a clear understanding of the questions raised.

Mr. *McDonald* for the plaintiff. *Barlow*, as managing director, had original authority to bind the defendants by his contracts. It is shewn that nearly all the shareholders in the enterprise reside in England, the board of directors at Brantford being under the control and direction of the governing body in England. *Barlow*, Argument. by his instructions, was authorised to enter into all contracts, subject only to revision by the directors. Here we have a written contract setting forth with great minuteness the works contracted for, as well as the prices at which they were to be performed; and although the work in many places has been completed, the defendants refuse to pay for it, and have interposed to prevent the full completion of the contract.

Mr. *Strong*. The defendants are now willing to consent to a decree being made giving to plaintiff an account of all work done by him, as on a *quantum meruit*.

Mr. *McDonald*. During the progress of the works monthly accounts were furnished by plaintiff, on which he received certain payments, these were sent in the form of monthly returns to the board at home, and therefore the defendants cannot now be heard to say they were not aware that plaintiff was executing the work, and the prices he was to receive for doing it.

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[The CHANCELLOR.—They admit that they were aware the work was going on, and at the stipulated prices, but not under a contract compelling them to proceed to a completion of the work.]

We contend that *Barlow*, as managing director, had full authority to bind the company; but if the powers vested in him did not authorise his entering into the contract which he has made with the plaintiff, the subsequent acts of the defendants have ratified it, and, being ratified, is as binding as if authority was originally given the agent. It is shewn that the terms of the contract were discussed by the directors, that it had been acted on by all parties, and money to a large amount paid under it.

It is contended by the other side, that relief is properly obtainable, if at all, at law; but this is clearly a case which could never properly enquired into before a jury; this court, under the circumstances, has authority to entertain the suit. *McIntosh v. Great Western Railway Company*, (a) *The Midland Great Western Railway of Ireland v. Johnson*, (b) *In re Insurance Society Ex parte Eagle Insurance Co.*, (c) *Smith v. McGuire*, (d) *Berviel v. Horsfull*, (e) *Brewster v. The Canada Company*. (f)

The evidence of the secretary of the company shews that according to the books of the defendants themselves a sum of £12,500 is due the plaintiff, this we ask now may be ordered into court, without waiting for the report of the master. *Costeker v. Horrox*, (g) *McHardy v. Hitchcock*, (h) *Jervis v. White*, (i) *Creak v. Capel*, (j) *Mills v. Hanson*, (k) *Richardson v. The Bank of England*. (l)

(a) 3 Sm. & G. 146.
(c) 4 Kay & J. 549.
(e) 4 Jur. N. S. 615.
(g) 3 Y. & C. Ex. 530.
(i) 6 Ves.
(k) 8 Ves. 68

(b) 4 Jur. N. S. 643.
(d) 3 Hur. & N. 554.
(f) Ante vol. iv., p.443.
(h) 11 Bea7. 73.
(j) 6 Mad. 114.
(l) 4 M. & C. 165.

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Mr. Proudfoot, on same side, referred to *Henderson* 1859.
v. The Australian Royal Mail Steam Navigation
Company, (a) The Royal British Bank v. Turquand,
 (b) to shew that acts for which a compensation is fixed
 do not require a deed.

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 Buffalo and
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At law no damage would be awarded for delay and not completing the works; this, it is submitted, forms a manifest ground for attracting jurisdiction to this court. *McIntosh v. The Great Western Railway Co. (c)*

This is a cause which had it been taken to trial at *Nisi Prius*, would have been referred by the judge, under the statute; wherever that is the case Chancery will entertain the suit. *Taff Vale Railway Co. v. Nixon, (d) North Eastern Railway Co. v. Martin. (e)* Counsel for plaintiff referred also to *Bigg v. Strong, (f) Gooday v. Colchester, (g) Reuter v. The Electric Telegraph Co. (h)*

Mr Roaf, for defendants. If plaintiff is right in asserting that the contract is complete, and could maintain an action at law, he is out of court, for he does not in his bill show a complication of accounts to give this court jurisdiction.—*The North Eastern Railway Company v. Martin. (i)*

The original bill stated that the works executed by the plaintiff had not been measured, and that the company's engineers were the only persons to measure, that none others could; as amended, it states that the measurements have taken place; this removes any pretence for restraining defendants from proceeding to complete the road by other contractors. The fact that the entries in the accounts are numerous forms no ground for removing the suit from a court of law, and the jurisdiction of this court attaching.

[THE CHANCELLOR.—You say you are not satisfied

(a) 5 E. & B. 409.

(c) 2 Mc. & G. 74.

(e) 2 Ph. 768.

(g) 17 Beav. 132.

(i) 2 Phill. at p. 762.

(b) 5 E. & B. 248.

(d) 1 H. L. C. 111.

(f) 3 S. & Giff. 692.

(h) 6 E. & B. 341.

1859. with the measurements that have been made. You are not here on demurrer, and the question, I think, may probably arise, whether, if under all the circumstances appearing in evidence, this must not be treated as a settled account.]

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What the plaintiff here seeks is in reality a decree for the specific performance of a contract to construct this railway. Now, specific performance of a contract to improve or build a house even, will not be decreed, much less a work of this nature. *Johnson v. The Shrewsbury and Birmingham Railway Company.* (a) And part performance of such a contract does not give jurisdiction to order a completion of it. *The Leominster Canal Company v. The Shrewsbury and Hereford Railway Co.*, (b) *Jackson v. The North Wales Railway Co.* (c)

Assuming, however, that the contract is binding at law, that does not give the plaintiff any right to insist on continuing to work after the opening of the road: under the terms of the contracts they terminated with the opening of the road.

There are strong grounds for imputing bad faith in the inception of this contract; the evidence of the secretary affords room for this. The contracts are all in *Barlow's* handwriting, although at that time he professed to have his time fully occupied with the duties of his office; they are shewn to have been executed in the office of the plaintiff, not in the company's office, where such an act might reasonably be expected to take place; they are witnessed not by any of the company's officers or employees, but by one *Donald McDonald*, who himself had effected a most lucrative contract with *Barlow*, and who was assisting plaintiff throughout all these transactions. The original contracts, after having been copied by *Barlow*, had all been destroyed, at least no trace can be found of them; and those now produced were

(a) 3 D. M. & G. 914.
(c) 6 Rail. Ca. 112.

(b) Jur. N. S. 930.

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not known to exist by any one in the employ of the company until after the removal of *Barlow* from his appointment, when, after his return to England, they were accidentally discovered in looking over other papers.—*Broom's maxims*, 843, (3rd edition,) citing a case from 1 *Vernon*, 452, was referred to. Then the disparity of prices is such, that if not sufficient to shock the conscience, is clearly such as to induce the court to withhold its hand from the exercise of this extraordinary jurisdiction. All the engineers whose testimony has been taken, concur in characterising the prices agreed upon as "absurd," "extravagant," and "such as no man in his senses would agree to give." The works were commenced before any contract was entered into, therefore the value of his services is all plaintiff is now entitled to receive—this the defendants have always been willing to give him.

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Railway Co.

Mr. Wood, on same side, referred to *Stock v. The Great Western Railway Co.*, (a) *Bartlett v. The Municipality of Amherstburgh*, (b) *McLean v. The Municipality of Brantford*, (c) *Clark v. The Hamilton and Gore District Building Society*, (d) as conclusively shewing the plaintiff had no claim to recover any amount, except as upon a *quantum meruit*. He also contended that the directors could not divest themselves of the power to make contracts.

Mr. Strong, also for defendants. As to the application for payment of money into court, he referred to *Daniel's practice*, pages 1297-8, *Quarrel v. Beckford*, (e) contending that money sought to be ordered into court must be trust money; where it is a mere debt, account must be first taken. *McClellan v. Buchanan*. (f)

The principal question involved in this suit is, whether

(a) 7 U. C. C. P. 526.
(c) 16 Q. B. U. C. 347.
(e) 14 Ves. 178.

(b) 14 U. C. Q. B. 152.
(d) 12 U. C. Q. B.
(f) Ante p. 32.

1859. the contract is a legal and binding instrument.—

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Boschetti v. Power. (a)

Kirk v. The Bromley Union (b) proceeded on grounds that apply here. The fact that a case may be considered a hard one, is no ground for the interference of the court. Persons entering into contracts with corporate bodies are bound to take the necessary steps for securing themselves. If the secretary had been applied to for the purpose of affixing the seal to these contracts, publicity would have been given to them, and the defendants could then have taken steps to withdraw from the bargain; under the circumstances that have arisen plaintiff can only recover on a *quantum meruit*.—*Fetterley v. The Municipality of Russell and Cambridge.* (c)

[THE CHANCELLOR.—The ground taken, as I understand, by the plaintiff is, that *Barlow* being the parliamentary agent of the defendants, his contract as such bound the company.]

Mr. *McDonald*, in reply, cited *Prothero v. Phelps*, (d) *Cox v. King*, (e) as to the power of the court to afford plaintiff compensation for loss sustained.—*Scott v. Milne*, (f) as to opening up account.—*Ayckbourn's* practice, 323; *Smith's* practice, 672. *Richardson v. The Bank of England*, (g) *Green v. Nixon*, (h) *Maxwell v. The Port Tennant Steam Fuel and Coal Co.*, (i) were also referred to by counsel.

Judgment. THE CHANCELLOR.—The bill in this case is for an account of moneys due to the plaintiff, under five contracts entered into between the plaintiff and the defendants, through their managing director, Mr. *Barlow*.

The first contract, which bears date the first of July,

(a) 8 Bev. 98.

(c) 14 U. C. Q. B. 433.

(e) 9 Beav. 530.

(g) 4 M. & C. 177.

(i) 24 Beav. 495.

(b) 2 Phil. 640.

(d) 2 Jur. N. S. 173.

(f) 5 Beav. 215.

(h) 23 Beav. 530.

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1856, is contained in an indenture between the plaintiff of the one part, and *Robert Hillero Barlow*, acting for, and on behalf of, the *Buffalo and Lake Huron Railway Company* of the other part. The plaintiff thereby covenants, for and in consideration of the covenants thereafter contained on the part and behalf of the *Buffalo and Lake Huron Railway Company*, to repair, make, construct, and complete the railway from Fort Erie to Stratford, according to any plans and specifications which might be furnished from time to time. He further covenants to execute a contract with the railway company at any time he may be called on to do so; and it is declared to be agreed and understood that until such contract should be executed that indenture should be read and construed binding upon the plaintiff and the said *Barlow*, acting for and on behalf of the railway company. And *Barlow*, acting for and on behalf of the said railway company, covenanted to pay or cause to be paid, to the plaintiff, monthly, for all work done during the previous month, according to the schedule of prices annexed to the indenture. Judgment.

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At the time this contract was entered into, the railway had been constructed and was in operation, although in need of extensive repairs, from Fort Erie to Paris; and considerable progress had been made between Paris and Stratford, although that portion of the road was not completed, and had never been used.

The second contract, which is for the construction of the railway from Stratford to Goderich, a distance of 45 miles, bears date the 27th of November, 1856. It is in form an indenture; and its frame and language closely resembles that already stated. The plaintiff thereby covenants to construct, and in every respect complete, the road bed of the section between Stratford and Goderich; and Mr. *Barlow*, acting for and on behalf of the *Buffalo and Lake Huron Railway Company*, covenants to pay at the close of each month, for the work

1859. done during that month according to the schedule of prices annexed to the indenture.

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The third contract is in the form of a memorandum signed by the plaintiff and Mr. *Barlow*, and dated the 1st of November, 1856. The meaning of this memorandum is not, I believe, in dispute. It provides for the maintenance of the way between Fort Erie and Stratford, upon the terms, and at the prices therein specified.

The fourth is a contract for the maintenance of way between Stratford and Goderich at a reasonable price.

The fifth was a parol contract between the plaintiff and the defendants, through their agent *Barlow*, for the construction of station buildings, and other works of that sort along the line of railway, in accordance with which the work was performed by the plaintiff, under the inspection of the managing director.

Judgment.

The plaintiff claims a large sum for work done under all these contracts, of which he prays that an account may be taken; and he claims to be entitled, moreover, to damages for various breaches of those contracts, of which the defendants have been, as he insists, guilty, and which he asks to have ascertained by action or otherwise.

The facts of the plaintiff's case are to a great extent admitted. That a vast amount of work has been performed by the plaintiff for the defendants is not denied. Neither is it denied that a large sum remains still due to the plaintiff if these contracts can be maintained. But the defendants submit, first, that the plaintiff's remedy, if he have any, is at law, not in equity. They insist, secondly, that the contracts in question cannot be maintained either at law or in equity, inasmuch as they are neither under the corporate seal, nor within any of the exceptions established by modern cases. And assuming

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the contracts to be void, they assert that the moneys already paid to the plaintiff are far beyond the real value of the work performed by him.

1859.

Whitehead
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I have no doubt as to the jurisdiction of the court. But as Mr. *Roaf* conceded that point upon the argument, it is only necessary to say that the authorities to which we were referred (*a*) appear to me to place the plaintiff's right to file a bill, under the circumstances of the present case, beyond question.

Upon the second objection, also, I am in favour of the plaintiff. My opinion upon that point is, that the contract in question was binding upon the defendants, though not under seal, because, being contracts with a trading corporation, relative to the purpose for which it was incorporated, and within the scope of its charter, they come within one of the exceptions to the general rule that corporations are not bound, except by contract, under the corporate seal. This point has been so much discussed in modern times, and the cases upon it are consequently so familiar, that a minute examination of them would seem superfluous; but the great importance of the question, and the state of the law upon the subject, make it proper that I should advert briefly to the authorities which appear to me to govern the present case. Judgment.

Prior to the case to which I am about to advert, a distinction had been taken between executed and executory contracts. The former had been treated as a class of contracts excepted from the general rule; and it had been determined that an action of *assumpsit* might be maintained, upon certain classes of contracts of that class, at least, though not under the corporate seal. In

(a) *O'Connor v. Spaight*, 1 S. & L. 305; *Foley v. Hill*, 2 H. L. C. 23; *Taff Vale Railway Co. v. Nixon*, 1 H. L. C. III.; *Ranger v. Great Western Railway Co.* 5 H. L. C. 72; *McIntosh v. Great Western Railway Co.* 2 Mc. & G. 74; *South Eastern Railway Co. v. Brogden*, 3 Mc. & G. 8.

1859. *Church against The Imperial Gas and Coke Company*, (1839,) (a) however, this distinction between executed and executory contracts was repudiated as unsound, and the action in that case, which was an action by a corporation, upon an executory contract to accept gas, was maintained, upon the ground that, when the contract relates to the supply of an article which is material to the purpose for which the corporation was created, assumpsit may be maintained, either for, or against the corporation, and whether the contract be executory or executed.

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I would not be understood as intimating an opinion that the distinction between executed and executory contracts has been abrogated, or is unsound; on the contrary, *Pim v. The Municipal Council of Ontario*, in appeal, has settled, so far as this province is concerned, that the distinction is well founded. All that I mean to say is, that the Court of Queen's Bench refused to acknowledge it in *Church v. The Imperial Gas Company*, and decided that case upon the principle to which I have adverted.

Judgment.

I need not advert more particularly to *The Mayor of Lullow v. Charlton*, (1840,) (b) or *Arnold v. The Mayor of York*, (1842,) (c) because although those cases do certainly militate against the principle laid down in *Church v. The Imperial Gas Company*, and seem in other respects objectionable, they have been distinguished, whether rightly or not I need not enquire, upon the ground that the actions in those cases were against municipal, not trading corporations, which are said to stand upon a different footing. (d)

But neither *Lamprell v. Billericay Union*, (e) which

(a) 6 A. & E. 869.

(b) 6 M. & W. 815.

(c) 4 M. & G. 86.

(d) Erle, J., in *Henderson v. The Australian Steam Nav. Co.* 1 Jur. N. S. 830.

(e) 3 Ex. 283.

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(a) 15 Jur. 70.

was decided in 1849, nor *Diggle v. The Blackwall Railway Company*, which was decided in 1850, is open, at least the latter is not open, to the same explanation. I cannot discover any sound principle upon which these cases can be distinguished. They plainly negative the principle to which I have adverted. If they be right, the cases in the Court of Queen's Bench in England, and in the Court of Appeal in this province, must be wrong.

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The Governor and Company of Copper Miners v. Fox, (a) decided in 1851, was an action of assumpsit upon an executory contract to supply the plaintiffs with sections, and the Court of Queen's Bench held that the action could not be maintained upon the ground that the contract was not within the scope of the plaintiffs' charter. But in coming to that conclusion, the principle upon which *Church v. The Imperial Gas Company* had been decided, was enunciated by Lord Campbell with great clearness: "Had the subject matter of this contract been copper," he says, "or if it had been shewn, in any way, ^{Judgment.} to be incidental, or ancillary to carrying on the business of copper mining, the contract would have been binding, although not under seal; for when a trading company is created by charter, while acting within the scope of the charter, it may enter into the commercial contracts usual in such a business in the usual manner."

Clarke v. The Cuckfield Union, (b) decided in 1852, was an action of assumpsit for work done for the guardians of a poor-law union. That must have been felt, as the authorities then stood, to be a case of great difficulty. The principle of *Church v. The Imperial Gas Company* had been negatived in the Exchequer, and had been limited by the Court of Queen's Bench itself, in the *Copper Miners' Company v. Fox*, to trading corporations, which the guardians of a poor-law union cannot be said to be; nevertheless the action was maintained.

(a) 15 Jur. 704.

(b) 16 Jur. 686.

1859. "The question," the learned judge observes, "is whether the demand in question comes within any of the recognised exceptions to the general rule. I am disposed to think it does, *and that whenever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied to carry such purposes into effect*, as in the case of the guardians of a poor-law union, and orders are given at a board regularly constituted, and having a general authority to make contracts for work, or goods necessary for the purpose for which the corporation was created, and the work is done or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or benefit of the work, and refuse to pay, on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract, and bind the rest, the formality of a deed or affixing the seal was wanting; and therefore no action lies, as a corporation is not competent to make a parol contract, and can avail themselves of their own disability."

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It will have been observed that the learned judge does not rest the case solely upon the principle to which I have adverted, although that is stated very distinctly in the early part of the passage which I have just cited. He goes on to add other considerations growing out of the fact that the contract had been executed. But these considerations cannot have been the ground of his decision, for he had expressly stated in the early part of his judgment that the distinction between executed and executory contracts had been repudiated. The case must have been decided, therefore, upon the principle stated in *Church v. The Imperial Gas Company*; and in *Henderson v. The Australian Royal Mail Steam Navigation Company*, to which I am about to refer, it is said to have been decided upon that principle by the learned judge himself. That case was decided in 1855. It was an action of assumpsit for work

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performed for the company. The plaintiff had been employed in England to proceed to Australia, and bring to England a ship belonging to the company, which was supposed to be unseaworthy, and having performed the work, he brought assumpsit for the price agreed to be paid by the company, and the action was maintained. *Wightman, J.*, says: "The general result of the cases mentioned in *Clarke v. Cuckfield Union* is, that in the case of a trading corporation, whenever the contract relates and is essential to the purpose for which the company was incorporated, it may be enforced, though not under seal. In deciding that case I reviewed all the cases, and adhere to the opinion which I then expressed, that in such a case as the present, when the contract is essentially necessary to the objects of the company, and distinctly within the scope of the charter, it may be enforced, though made by parol." *Erle, J.*, says: "I am of opinion that the contract is binding on the corporation, though not under seal, on the ground that it is directly within the scope of the company's charter." The learned judge enters next upon an enquiry whether ^{Judgment.} the validity of contracts by trading corporations within the scope of their charter, depends in any degree upon the extent of their importance, or the frequency of their recurrence, and he comes upon that point to this conclusion: "The notion that a set of contracts shall have their validity depending on the frequency and insignificance of the subject matter is of such extreme perniciousness that I do not think it can be adhered to, and must be considered as applicable only to municipal corporations."

Mr. Justice *Crompton* says: "I concur in the principle now adopted by my brothers *Wightman* and *Erle*. It is desirable that in the case of trading corporations there should be a relaxation of the rule, that the contracts of corporations should be under seal, where the contract is for the purpose of carrying on their trade. That principle was supported in the *Copper Miners' Company v.*

1859. *Fox, and Clarke v. The Guardians of the Cuckfield Union*, and it is an important principle, and may be the governing principle in these cases."

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Lastly, *Reuter v. The Electric Telegraph Company*, (a) which was decided in 1857, was an action of assumpsit upon a contract between the plaintiff and the chairman of the company, by which the company agreed to allow the plaintiff 50 per cent. on all messages containing public intelligence, sent by him through the company's lines. The answer to the action was, that the contract was neither under the company's seal, nor signed by two of the directors, as required by the deed of settlement. It was indeed a parol contract with the chairman. Lord Campbell delivering the judgment of the court says: "No reliance can be placed upon the objection that the defendants are a corporation, and that the agreement on which they are sued is not under seal. *They are a corporation for carrying on a particular business, and the services done by the plaintiff were in the direct course of the business which by their charter they were to carry on.* We adhere to the decision of the court in the *Copper Miners' Company v. Fox, and Henderson v. The Australian Steam Navigation Company*;" and when the latter case was cited, in the course of the argument, his lordship took occasion to say, "I most highly approve of that decision."

Judgment.

I have thus gone through a long series of decisions, extending over a period of more than twenty years, in all of which I find it affirmed with more or less clearness, that contracts by trading corporations, within the scope of their charter, are exempted from the general rule, that corporations cannot be bound except under their corporate seal. There are decisions in the Court of Exchequer I must admit, which cannot be reconciled, as it seems to me, with the cases to which I have adverted; and, in

(a) 2 Jur. N. S. 1246.

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(a) Beverley v. L.

that state of the law, this court is driven, as the Court of Appeal was driven, in *Pim v. The Municipal Council of Ontario*, to adopt the rule which seems upon the whole most consistent with reason and justice. In *Pim v. The Municipal Council of Ontario*, the Court of Appeal determined, in furtherance of justice, but contrary to the numerous decisions in all the English courts, that executed contracts are exempted from the general rule. I quite concur in that decision; but the principle upon which it proceeds is as plainly inconsistent with the supposed rule, and with the reason upon which that rule is said to be founded, and the principle enunciated by the Court of Queen's Bench in the case to which I have adverted, can be said to be; and had it been necessary here, I would not have hesitated upon such authority to adopt a rule by which the court would have been enabled to avoid, in the present case, the injustice which every body must feel to have been done in *Diggle v. The Blackwall Railway Company*, and other cases of that class.

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I have been considering this case, hitherto, with reference, exclusively, to the principle upon which the Court of Queen's Bench proceeded in the cause referred to—a principle which, if adopted, would have the effect of placing this important class of commercial contracts upon the same footing here as in the United States—(a) a footing at once intelligible and adapted to the age and country in which we live. But it must be remembered that to a great extent this case is governed by *Pim v. The Municipal Council of Ontario*. So far as the plaintiff seeks to recover for work performed for, and accepted by, the corporation, and that constitutes a very large part of his claim, this cause comes directly within the principle upon which the court of appeal proceeded, in the case referred to; and to that extent I know of no ground upon which his claim can be resisted.

But there is another ground, as it seems to me, upon

(a) *Beverley v. Lincoln Gas Light & Coke Company*, 6 A. & E. 337.

1859. which the plaintiff's case may be supported, irrespective of the principle to which I have been adverting. The 33rd section of their act (a) provides: That it shall and may be lawful for the directors of the said company to nominate and appoint a managing director or superintendent of the affairs of the said company, *with such powers*, and at such salary as shall be found or determined on by any by-law or resolution of the directors of the said company." Now that *Barlow* was appointed managing director, and entered, as such, into the contracts under which the plaintiff claims, is not denied; and the fair effect of the evidence, as it seems to me, is that he was authorised to do so. There is some difficulty in dealing with the facts, owing to the peculiar manner in which the business of the company was conducted. The company was in truth an English company. The stockholders were English, and the directors, who resided in England, claimed and exercised absolute control. In form, the

Judgment. Canadian directors were the governing body, but in that body *Barlow*, who held the proxies of the English directors, was supreme, and it became, in consequence, the mere mouth-piece of the English board. That anomalous state of things has given rise, as I have said, to some difficulty in dealing with the facts, but I have no doubt, upon the whole evidence, that the directors meant to empower *Barlow* to enter into these contracts. Between July, 1856, and July, 1858, vast works, amounting to nearly half a million of money, were carried on under his direction, and it does seem to me absurd to argue that during all that time he was acting without, or contrary to, the instructions given him. Looking at the form of the appointment, and the instructions with which it was accompanied, at the report of Mr. *Powell*, the chairman of the London board in September, 1857, (b) and at the letter of Mr. *McKirdy* the subsequent chairman, under date the second of December, 1857, (c) and reviewing the whole course of the dealings, I have no

(a) 10 Vic., ch. 21. (b) page 122. (c) page 125.

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doubt that the directors meant to invest *Barlow* with uncontrolled power in relation to the contracts, and that the company is consequently bound by them.

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But however that may be, it cannot be doubted, I think, that these contracts were subsequently affirmed by the directors, and became binding upon the company. The directors are authorised by the 32 section to invest their manager with such power as they should think it right to confer upon him, by resolution or by-law. Under that section they had power, in my opinion, to authorise their manager to bind the company by contracts not under the corporate seal; and as they might have authorised him to enter into such contracts, it follows, in my opinion, that their subsequent assent to contracts entered into in that form, renders them as binding upon the company as if there had been an original authority. Now in the present case the proof of confirmation appears to me to be complete. It is difficult to believe that the directors were not aware from the first, or from a very early period at least, of the nature of these contracts. Captain *Barlow* visited England in the early part of 1857, when the affairs of that company were freely discussed. That the road was being constructed under contracts with the plaintiff in the suit was certainly well known to the directors at that time, and that would be, perhaps, enough. It was their duty to have made enquiry. But *Powell*, the chairman of the English board, visited this country in the autumn of the same year, and had the fullest means of information; and it is difficult to believe that he remained ignorant of the contracts under which the road was being built. But however that may be, it is clear that all the contracts—the contracts for maintenance, as well as those for construction, were before the English board on the 3rd of March, 1858, and underwent considerable discussion, (a) and if it is to be assumed that they were not known all

Judgment.

(a) See Minutes of the London board, of that date, folio 133.

1859. along to the Canadian board, it is at all events clear that the Canada directors were aware of the contracts prior to the period of which I speak. Now, that all the directors both in England and here recognised and acted upon these contracts, subsequent to that period, cannot be for a moment denied. Captain *Barlow* was subsequently directed to return to this country for the express purpose of carrying out these very contracts into which he had entered with the plaintiff. (b) A great portion of the work was subsequently performed, not only with the sanction, but at the pressing instance of the directors; and large payments were subsequently made both for maintenance and construction. It is impossible to conceive a stronger or clearer case of confirmation, and to permit this company to repudiate the contract now, and thus escape from liability, under such circumstances, would be in my opinion to permit a gross injustice. (c)

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For the reasons I have given these contracts are, in my opinion, binding upon the defendants, and the plaintiff is entitled, consequently, to an account as to the work actually done, and to an enquiry of some sort as to the damage he has sustained by the breaches of these contracts of which the defendants have been guilty.

I have not alluded to the *vivâ voce* evidence, because in the view I take of the case it is wholly immaterial. Had the defence been fraud, it might have been to some extent pertinent. But that ground was abandoned upon the argument. It was admitted that no such case had been made by the answer, and the *vivâ voce* evidence is therefore for the most part unimportant.

Upon the motion for payment into court of the sum of \$50,451, admitted to be due to the plaintiff, in the examination of *Maclean*, the secretary of the company, I think the plaintiff entitled to succeed.

(b) See Minutes of London board, pages 133, 137.

(c) *Ridley v. Plymouth Grinding & Baking Co.*, 2 Ex. 717; *Smith v. Hull Glass Co.*, 7 Rail Co. 287; *Reuter v. The Electric Telegraph Co.*, 2 Jur. N. S. 1245, and see *Royal British Bank v. Turquand*, 5 E. & B. 248.

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The answer to the application was two-fold. It was said, first, that the practice of ordering money into court upon interlocutory applications is confined to cases of trust or *quasi* trust, and has never been extended to cases of debt. Secondly, it was said that the court never acts except upon admissions to be found in the answer, or something tantamount to the answer.

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That the power of the court to make such an order is not confined to cases of trust or *quasi* trust, is, I think, clear from the cases cited in the argument. In *Richardson v. The Bank of England*, (a) the plaintiff claimed to have the amount paid into court as a debt due from the defendants. Lord *Cottenham* says, "the claim in the present case is for payment of the sum in question as a debt due, or at least as a sum payable in order to its being applied to purposes in which the plaintiffs are interested." And one ground of his lordship's judgment was, that the amount claimed was not a debt due from the defendant, but an item in the account between the partners. In *Quarrell v. Beckford* (b) the amount was due from the defendant as mortgagee in possession. And in *Jervis v. White* (c), the amount ordered into court was a sum paid by the plaintiff to the defendant, upon a contract which the bill asked to have set aside for fraud. It is true that applications of this sort have arisen principally when the money has been in the hands of stakeholders, factors, or trustees, who did not themselves claim title to it; and when the practice of the court is considered, it is obvious enough that such applications must, ordinarily, fail in case of debt; not for want of jurisdiction, however, but for the want of the only evidence on which the court acts upon interlocutory applications.

The second objection has more force. It is true that the amount claimed and the plaintiff's title must be found in the answer, or something which the court is

(a) 4 M. & C. 165.

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entitled to treat as tantamount to an answer. That point is stated with great clearness by Lord *Cottenham*, in *Richardson v. The Bank of England*: "The ground must be found," he says, "on the defendant's admission; and this defendant has not only not admitted the accuracy of the statements in that account, but distinguishes it in many particulars, and has not admitted that there will be any deficiency to which he will be liable to contribute. I may be perfectly satisfied that there will; I may feel no doubt that he will have to contribute for more than the amount of his capital; but I am not, upon the motion, at liberty to act upon any such conviction or belief; and it would be most dangerous to do so. Neither party has had any opportunity of giving evidence of any fact. The court, therefore, has nothing upon which it can proceed upon the admissions of the parties. The defendant justly says, 'take my statement to be true, or give me an opportunity to prove it before you adjudicate against me.'" (a) It is obvious, therefore, that this motion if made previous to the hearing of the cause, must have failed. The answer distinctly denies both the right of suit and the debt. (b) But the plaintiff's right of suit has been established by the decree. The validity of the contracts has been affirmed. And assuming the contracts to be valid, the amount due upon them is clearly made out, upon the examination of *Maclean*, and the account annexed to it—an account extracted from their own books, by their own secretary, to the accuracy of which he has testified upon oath.

ESTEN, V. C.—This bill seeks an account and satisfaction on the foot of certain contracts, alleged to have been made between the plaintiff and defendants, and compensation for the plaintiff not having been permitted by the defendants to complete them. It is admitted that the contracts are equally binding at law and in

(a) 14 Ves. 177.

(b) 6 Ves. 737.

(c) And see *Boschetti v. Power*, 8 Beav. 98.

(d) *McHardy v. Hitchcock*, 11 Beav. 73

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equity, and that *prima facie* the remedy would be at law; but it is contended that owing to the complication and intricacy of the accounts which the subject of this suit involves, it is a matter properly cognisable in equity. I may remark *in limine* that the subject matter of the suit does certainly appear to be of such a complex and intricate nature as to be properly cognisable in this court, but that is the only ground on which it would be proper for this court to assume jurisdiction over it; and that although as regards compensation for the plaintiff not being permitted by the defendants to complete the contracts, the matter would certainly be more properly within the province of a court of law, yet that this court, having acquired jurisdiction over it, will not drive the parties to a double litigation, but will settle the rights of all parties, and direct issues for that purpose, if the intervention of a jury should be necessary or desirable.

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The contracts in question were four in number, one for the repair and completion of the defendants' railway from Fort Erie to Stratford, another for the almost entire construction of the road from Stratford to Goderich, and the other two for the maintenance of these two sections of this railway respectively. The contracts were not under the common seal: they were made between the plaintiff and Captain *Barlow*, the managing director of the company; and the instruments by which they are made do not appear to have been seen by the other directors until some time in 1858. The road however, has been completed by the plaintiff under the contracts, so far as the defendants would allow it to be completed by him, and accepted by the defendants, and has been in fact in operation throughout its entire extent since the 28th of June, 1858, and, as to the eastern section of it, between Fort Erie and Stratford, since the autumn of 1856. In fact all that remained undone when the plaintiff was stopped by the defendants was the completion of the ballasting of the road; which,

1859. however, the plaintiff contends was a profitable part of the work, to which he looked for remuneration, having completed other parts of the work, to meet the defendants' views, at a loss; and he complains much of the injustice done to him by the defendants in stopping the work in the manner they did. Large sums have been paid by the defendants to the plaintiff on account of the work, and there remains due to him on their own shewing, the contracts being assumed as the basis of the account, the sum of \$50,000; and part of the relief sought by the plaintiff is the immediate payment of this amount into court, for which purpose a motion was made previously to the hearing of the cause, but involving as it did all the points of the case, it was ordered to stand for argument and adjudication till the hearing.

Judgment. The defendants resist the suit on the ground, firstly, that the contracts not being under the common seal, are void, and that the plaintiff is only entitled to an account on the principle of *quantum meruit* for the work actually performed. Secondly, that even if the contracts are binding on the company, their terms are so extravagant that this court will not enforce them. Thirdly, that the accounts are not attended with such intricacy or complication as will give this court jurisdiction over the matter; and fourthly, that no sufficient evidence exists in the form of admission which according to the practice of the court, can warrant, in this stage of the cause, an order for the payment into court of any amount whatever.

To meet the first objection arising from the absence of the common seal, the plaintiff relies, firstly, on the alleged fact that Captain *Barlow*, the managing director, was authorised by the directors to make the contracts in question without the use of the common seal. Secondly, that if the managing director had not this authority from his mere appointment, the directors could have conferred it upon him by resolution, and their subsequent

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adoption of the contracts was equivalent to such resolution; and, thirdly, that the use of the common seal was not required for contracts of this description, being within the scope of the company's business, and that the contracts, although made originally with Captain *Barlow*, were so ratified and adopted by the company that they ought to bind them.

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On the first and second grounds taken by the plaintiff I need not express any opinion, inasmuch as I think the third ground sufficient to support a decision in his favour. It is well settled that when a contract is directly within the scope of the charter of a trading corporation, (which this is,) the common seal is not necessary to give it validity, but it may be made through the medium of a resolution or other authentic document containing the assent of the governing body of the corporation, and such a contract is capable of being ratified and adopted by the corporation, through the instrumentality of its governing body, if originally made without sufficient Judgment. authority. The questions, then, which arise with respect to this ground are two, first, whether these contracts were directly within the scope of the company's charter; second, whether if originally made without sufficient authority they have been ratified and adopted by the company, through its governing body, in such a manner that they ought to be bound by them. It cannot be doubted that these contracts were directly within the very purpose for which this company was incorporated. Its business was, first to construct, then to maintain and conduct this railway. If it be said that these contracts are of such rare occurrence that the principle does not apply, the answer is, that the element of frequency is expressly repudiated in most if not all of the cases which have been decided upon this subject. If any doubt could be entertained on this point it would be removed by the case of *Diggle v. The Corporation of Blackwall*, understood with reference to the comments passed upon it in

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subsequent cases. According to the best judgment I can form of the law as evidenced by these authorities, I must consider such a contract as occurred in that case one directly within the scope of the charter of a railway company, and capable therefore of being made without the use of the common seal. But the contract in that case is not to be distinguished from the more important contracts in the present case, and therefore I have arrived at the conclusion that the contracts in question are contracts which did not require the common seal to give them validity. It is quite clear, however, that if the common seal be dispensed with, the contract, originally made without sufficient authority, is capable of ratification by the governing body in such a manner as to bind the corporation. The case of *Reuter v. The Electric Telegraph Company* was decided upon this express ground. The second question, then, in the present case is, whether these contracts have been so ratified and adopted by the directors that they ought to bind the company. Of this fact I think no doubt will remain after an attentive perusal of the evidence. It is said that the directors did not know the terms of these contracts; had not seen the contracts themselves; that they thought the plaintiff was a mere inspector, and could be dismissed at any time. They knew, however, perfectly well that a contract had been made with the plaintiff of a very important nature; they permitted him to proceed in its performance for two years without interruption; they urged its completion when its completion by a certain day was considered essential to their interest; with the exception of one complaint respecting the contract for maintenance in a letter to their own agent, they never avowed any objection to it; and at the last, when driven by their disappointments and embarrassments they sought to free themselves from it, they did not pretend to repudiate, but only to put an end to it. Can they be permitted to say after this long and uniform course of conduct, they that never took the trouble to

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inform themselves as to the terms of these contracts? Their duty to the shareholders would necessarily raise the presumption that they had made themselves acquainted with them as soon as their existence was brought to their knowledge; and justice to Mr. *Whitehead* requires that they should not be allowed to adduce evidence of their culpable ignorance for the purpose of rebutting this presumption. The truth is, that if they were really ignorant of the terms of these contracts for any length of time, it arose from their sanguine expectations of large gains, which induced them to place implicit confidence in their managing director, and to disregard the most obvious dictates of prudence. But were they in fact ignorant? In a letter dated 2nd of August, 1856, and addressed by Mr. *Barlow* to Messrs. *Heseltine & Powell*, he says: "I hope to get the line between Paris and Fort Erie either opened or very forward between the 1st and 14th of September. The line from Paris to Stratford gives me no concern; it is in a position which enables me to command its progress, and already considerable progress is being made. In my next I will give you the particulars of the contract we have made with *Whitehead*, late of firm of *Mellish, Morrell & Co.*, to do the work, which I think the board will approve." In a report, dated the 16th of February, 1857, addressed by Mr. *Barlow* to the proprietors, he says, after describing the state of the road between Fort Erie and Paris: "Immediate steps were taken to effect the necessary repairs and construct the most important works. An agreement was made with Mr. *Joseph Whitehead*, a respectable and experienced contractor, to execute such works as might be required, on a schedule of prices, and the line was re-opened for traffic on the 1st of November last;" and after describing the state of the road between Paris and Stratford, he says, "The necessary works were at once commenced, and from the energy and attention displayed by Mr. *Whitehead*, the contractor, the line was sufficiently completed to open it for traffic on the 22nd of December

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1859. last;" then referring to the road between Stratford and Goderich, he says, "Such works are being carried on during this winter as will facilitate our progress in the spring." And in a report to the proprietors, dated the 19th of February, 1857, and signed by all the directors both in Canada and England they state the completion of the road between Fort Erie and Stratford, and its being opened for traffic in the same way. At this time, therefore, it was known to all the directors that the road had been completed between Fort Erie and Stratford, chiefly through the instrumentality of Mr. *Whitehead*, under a contract made with him for that purpose. In July and August, 1856, Mr. *Powell*, one of the principal members of the company, and apparently a gentleman of great shrewdness and intelligence, visited this country for the purpose, as appears from the report of a committee, approved at a special meeting of the company on the 17th of March, 1858, "of making the most searching investigation into the state of affairs in every department." It is impossible to suppose that this gentleman did not make himself thoroughly acquainted during his sojourn here with the terms of the plaintiff's contracts, and that in this way, if not otherwise, those terms did become known to all the directors and shareholders of this company. At this time the plaintiff was in the midst of the work between Stratford and Goderich, and Mr. *Powell* seems to have been in constant communication with him. Under these and other circumstances appearing from the correspondence and evidence in this case, it is impossible to doubt that the terms of these contracts become thoroughly known to the directors of the company more than a year before they attempted to put an end to them. With this knowledge they hold meetings in their corporate capacity, and no objection is made to these contracts, but they are allowed to continue and to proceed in course of execution without interference on the part of the directors, except to hasten their completion. Under these circumstances, I think these contracts must

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be considered to have been ratified and adopted by this company, and to bind them to the same extent as if they had been originally formed through the medium of a resolution of the board of directors, or other regular and formal proceeding. It is objected, however, that the prices of these contracts are so extravagant that this court will not grant its aid to the plaintiff to enforce these contracts. That the prices were high in some instances, very high, the evidence would certainly seem to shew; but I think it is equally clear that they were made *bonâ fide*, and as they have been deliberately confirmed, I think this objection, which certainly could not be maintained at law, should not prevail in this court, which has assumed jurisdiction over the case only in consequence of the intricacy and complication of the accounts. My opinion is, therefore, that the plaintiff is entitled to an account on the foot of these contracts, and to a reasonable compensation for not being permitted to fulfil them; and I think he is entitled to his costs of suit.

With regard to the payment of money into court, there cannot be a doubt that the court has power to make an order of this description at the hearing; and when it has the whole evidence in the cause before it, proceeds on the surest ground. The statement submitted by Mr. *MLean*, the secretary to the English board, must be deemed to be derived from the company's own books, which would be evidence against them, and no motive can be divined for their own secretary misrepresenting their effect. I think these statements are therefore safe ground on which to proceed, and from them it appears that, assuming the schedule of prices as the basis of the calculation, a sum of about \$50,000 is due to the plaintiff from the defendants. I apprehend it is clear that when these statements were submitted, the work performed by the plaintiff had been accurately measured. I think it would be extremely just to order payment of this amount into court.

SPRAGGE, V. C.—I am obliged in this case to say that

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I have not been able, in consequence of my other engagements in the court, to prepare myself, as I could wish, to give a judgment in this case; and I have thought it better, as his lordship the Chancellor and my brother *Esten* agree in the law of the case, and as it is a case in which delay may operate greatly to the prejudice of the plaintiff, that the giving of judgment should not be postponed on my account.

I have examined the cases to which we have been referred, and have discussed them with the other members of the court, but have been unable to arrive at the same conclusion as to the law of the case. I think that contracts by an incorporated railway company for the construction of their railway are not valid without the corporate seal. I incline to the opinion that contracts entered into by a trading company, in the course of the conduct of their business, are valid without the corporate seal, whether upon an executed consideration, or executory, and whether they be in relation to matters of ordinary daily occurrence, or in relation to matters out of the ordinary course, but still relating to the conduct of the business of the company; and no doubt the language of the judges in some of the cases referred to is comprehensive enough to include such contracts as are in question in this cause; such as, that the contract was in relation to matters within the scope and object for which the company was incorporated; but the language, I think, has not been used with reference to such a contract as this.

The doctrine, that the acts of a corporate body are to be authenticated by its seal, has never been formally abrogated; although numerous exceptions to it have been established; but, as a rule, each corporation aggregate has a seal which is emphatically the proper mode of expressing its assent to any contract, unless when the contract is of a nature which excepts it from the general rule; the exceptions in the case of trading companies

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must of necessity be very numerous, and have established a rule of convenience, which is, I think, as broad as I have suggested.

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I think a contract for the construction of a railway does not fall within the rule of exception. The business of a railway company is to carry freight and passengers, and it may be the public mail; they are common carriers on a large scale; and probably the rule as now established in England, is broad enough to comprehend all contracts which they may make in relation to the conduct of that business. But there is a wide difference between such contracts and the contract to *build their railway*.

It is true that contracts to build a railway are within the scope and object of the company's charter; but the building of a railway was not the trade or business which they were incorporated to carry on; it is of course a necessary preliminary to the exercise of their trade; but it is not their trade; and does not fall within any principle upon which the most liberal of the English cases have proceeded. *Diggle v. The Blackwall Railway Company* is an authority the other way, and although somewhat impugned in a later case, it is, I believe, the only direct authority upon such a contract as this; but putting that case out of the question there is nothing, I conceive, to bring such a contract within the rule applied to contracts with trading companies in the conduct of their trade. Judgment.

Neither can I agree that any authority was delegated to Captain *Barlow* to enter into such a contract. He was appointed superintendent and managing director under the clause in the act which enabled the company to delegate further powers to him. No further powers were conferred upon him; and I apprehend he could only have such powers as are implied *ex vi termini* from the name of the office to which he was appointed; and in my opinion such appointment gave him no authority to contract for the construction of the road.

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I am not prepared to express an opinion as to the other contracts; but I have thought it right to state, although briefly and imperfectly, the grounds upon which I dissent from the other members of the court as to the validity of the contract for the construction of the road.

The case of *Pym v. The Provisional Council of Ontario* was a case of executed consideration, and will of course apply to a large portion of the claim of the defendants upon the plaintiff.

Declare that the plaintiff is entitled to an account from the defendants of what is due to him under and by virtue of the several contracts and verbal agreements in the bill in this cause mentioned:—order and decree the same accordingly.

Declare that the plaintiff is entitled to an enquiry as to what breach or breaches of the said verbal contracts and agreements have been committed by the defendants:—order and decree the same accordingly.

Decree. Refer it to the master to take an account of what work has been actually performed, materials provided and money paid by the plaintiff for the defendants, under the said several contracts and verbal agreements, and what sum or sums ought to be charged to the defendants for the same, and what sum or sums the plaintiff is entitled to receive in payment of the same at the prices mentioned in the said contracts and agreements, and also to enquire and state what breach or breaches of the said several contracts and agreements have been committed by the said defendants; and what sum or sums ought to be charged to the defendants in respect thereof, by way of compensation to the said plaintiff, as aforesaid; such last mentioned enquiry to be reported on by the said master separately.

Order, that the defendants do within one month after the service hereof upon the manager, secretary, or other officer of the said defendants, resident within the jurisdiction of this court, pay the sum of fifty thousand four hundred and fifty-one dollars into court.

Defendants to pay costs.

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SANDERSON V. INCE.

Foreclosure—Parties—Judgment creditors.

In suits to foreclose the equity of redemption in mortgage property, the judgment creditors of the mortgagee are necessary parties.

This was a foreclosure suit. The defendant by his answer set up that the plaintiff had not made his judgment creditors parties to the bill, and submitted that in their absence no decree could be pronounced.

Mr. *English*, for plaintiff, moved on a former day for a decree under the orders of 1853.

The defendants did not appear.

After taking time to look into the authorities, and consulting with the other members of the court,

ESTEN, V. C.,—(before whom the motion had been Judgment. made)—said he thought the judgment creditors of the mortgagee were necessary parties to the cause; but that they might be made parties in the master's office.

THE BANK OF BRITISH NORTH AMERICA V. RATTENBURY.

Registered judgment—Fraudulent assignment—Issue.

A conveyance may be fraudulent and void as against creditors, although no debt may be in existence at the time, if made in contemplation of becoming indebted; where, therefore, the circumstances attending a transfer of real estate from one brother to another were such, that the court felt satisfied that a jury would have arrived at the conclusion that the sale was colourable and fictitious, and made for the purpose of defrauding creditors, the deed was declared void at the instance of a creditor of the assignor, the amount of whose claim was ordered to be paid in one month, or in default that the property in question should be sold.

The bill in this cause was filed by the *Bank of British North America*, against *John Rattenbury* and *Isaac Rattenbury*, setting forth that in November, 1856, the defendant *John Rattenbury* became indebted to plaintiffs

1859. in two sums—seven hundred pounds, and two hundred pounds respectively—being sums advanced on the paper of parties endorsed to him.

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That such indebtedness remained, and continued subsisting from November, 1856, until the 22nd of March, 1858, on which day the plaintiffs recovered a judgment in the Court of Queen's Bench for Upper Canada, in respect of one of the said debts, against the defendant *John* and others, for £715 17s. ; and on the same day they recovered judgment in the Court of Common Pleas, for Upper Canada, in respect of the other claim, against the defendant *John* and others, for £201 13s. 1d. ; that both of such judgments were duly registered in the registry office for the County of Huron, on the 24th day of the said month of March, so as to charge the interest of the defendant *John* in any lands in the said county, and still remained unsatisfied ; that the advances

Statement. on which the said judgment debts were founded, were made by plaintiffs in the faith that the defendant *John* was (as he was reputed to be, and as in fact he was) the owner of much valuable land in the said county, more particularly of the lands and premises thereafter described, of which lands and premises the defendant *John Rattenbury* had for many years previous to the date of the said advances been, at the said date was, has ever since remained, and is still in possession and occupation as the owner thereof ; that since the registration of the judgments the plaintiffs had discovered that by indenture bearing date the 20th of May, 1857, and made between the defendants, the defendant *John Rattenbury* did, for the expressed consideration of £1000, therein expressed to be paid, convey, or purport to convey, to the other defendant, the said lands and premises, being lot No. 20, in the first concession of Stanley, in the County of Huron, containing about one hundred acres. Also portions of lot No. 15, in the first concession of the said township, containing about three-fourths of an acre, the metes and bounds of which were set forth in the bill.

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That the defendants were brothers; that no money was paid by *Isaac* to *John* at the time of the conveyance, nor had any money been so paid since in respect of the expressed consideration; that the conveyance did not, nor was it intended to operate as an actual sale to *Isaac* of all the interest of *John* in the said premises; but on the contrary, was so made as aforesaid, while the said debts to plaintiffs were subsisting, with the view and intention of protecting the premises from the said debts to plaintiffs, and from judgments and other debts of the said *John Rattenbury*, and of delaying, defeating, or hindering his creditors, and that the said conveyance did in fact delay, hinder, and defeat the plaintiffs and others, the creditors of the defendant *John Rattenbury*, in the recovery of their lawful debts; that the defendant *Isaac* was in fact a trustee of the lands and premises for the defendant *John*, who had the beneficial interest in the same; and that the conveyance was fraudulent and void as against plaintiffs, (as such creditors as aforesaid) within the statutes in that behalf.

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That the defendant *Isaac* threatened, and intended, unless restrained, to dispose of, or encumber the whole or part of the said lands and premises, whereby plaintiffs' rights and remedies would be greatly complicated and impaired, if not totally destroyed; and therefore submitted that the deed should be declared voluntary and void as against plaintiffs, as such creditors, or as such registered judgment creditors; or that the said trust in favour of the defendant *John* should be discovered, and the said lands and premises by reason thereof or otherwise declared liable to the payment of the said debts; and that in the meantime the defendant *Isaac* might be restrained from disposing of, or incumbering, the said lands, or any part thereof.

The bill further stated, that the defendants alleged that the said lands were sold by the defendant *John* to the defendant *Isaac*, for a good and valuable considera-

1859. tion; and they also allege, and plaintiffs charge that the fact is, that the defendant *Isaac* had conveyed to the defendant *John*, in fee simple, two certain parcels of land in the village of Clinton, in the County of Huron, aforesaid, of which parcel the defendant *Isaac* was, prior to such conveyance seized in fee, and whereof by virtue of such conveyance the said defendants allege and the fact is, that the defendant *John* now is so seized, subject nevertheless to the said judgments; that they also allege that (as the fact is) the defendant *Isaac* had executed to the defendant *John* a lease of the said premises first hereinbefore set forth, and hereinbefore charged to have been conveyed by the defendant *John* to the defendant *Isaac*, and that the defendant *John* is now intitled to some interest in the said premises, under the said lease, subject, nevertheless to the said judgments. Also that the defendants had abstained from registering the conveyance of land in Clinton, and the said lease, and that plaintiffs were ignorant of and had no means of ascertaining the existence of the same until the examination of the defendants in this cause. And plaintiffs submitted that the land in Clinton is in any event subject to the judgments; and they submitted further, that in case this court should not set aside the conveyance of the said other lands from the defendant *John* to the defendant *Isaac*, then that the interest of the defendant *John* under the said lease should be declared to be subject to the said registered judgments.

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The prayer of the bill was, that the conveyance from the defendant *John* to the defendant *Isaac* might be declared voluntary and void as against plaintiffs, as such creditors, or as such registered judgment creditors. Or that the secret trust might be discovered, and the lands and premises by reason thereof, or otherwise, declared charged with, and liable to pay the said judgment debts: for an injunction and other relief.

The defendants having answered the bill, they were

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 V. C. *Esten*, before whom the case was heard.

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Mr. *Blake*, for plaintiffs.

Mr. *A. Crooks*, for defendants.

ESTEN, V. C.—I have no doubt that this transaction ought to be set aside as a fraud upon the plaintiffs, and perhaps the other creditors of *John Rattenbury*. It is true that the plaintiffs had not obtained judgment at the time of the execution of the deed, but their claims were subsisting, and *John Rattenbury*, finding himself liable to so large an amount, appears to have thought it desirable to put his property out of his hands. A conveyance may be fraudulent and void as against creditors, although no debt be in existence at the time, if made in contemplation of becoming indebted. When the circumstances attending this case are considered, so different from the circumstances which would attend a real *bond fide* transaction; the inconsistencies between the accounts given by the two parties; the unsatisfactory nature of each account, considered by itself; the unusual form of the transaction; the conduct of the parties; the unsatisfactory accounts given of the disposition of the money; *Isaac's* ignorance whether the farm was included or not; his ignorance with respect to the lease; *John's* continuance in possession just as before, without paying rent, (for such I consider to be the case;) the ignorance of the transaction amongst the neighbours for such a length of time; the admission by *Isaac* to *Adams* and *Mr. Elliott*; the chattel mortgages executed about the same time, and afterwards broken; these mortgages and the sale to *Isaac* covering the whole of *John's* property; the *McDonalds* indorsing for *John* after the failure of *McKenzie & Dalsell*, whether in ignorance of the sale to *Isaac* or not, is immaterial; and perhaps other considerations which might be enumerated, no difficulty, I think,

Judgment.

1859. can be felt in arriving at the conclusion that this sale was colourable and fictitious, and made for the purpose of defeating creditors. I am satisfied a jury would arrive at this conclusion. I therefore think that the sale should be declared fraudulent and void as regards the plaintiffs, and that the defendants should be ordered to pay what may be found due to the plaintiffs, within a month after the date of the master's report, and in default, a sale. Costs to the plaintiffs.

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SPORN V. RYCKMAN.

Specific performance—Judgment creditors.

Held, on appeal from the master's report, that a purchaser is entitled to call for a release from all judgment creditors who have registered their judgments in the county where the lands sold are situate, or that the creditors join in the conveyance to the purchaser, although it appears that the purchase money will be exhausted in discharging prior incumbrances. If the vendor cannot procure such release or concurrence in the conveyance, the court will not compel the purchaser specifically to perform the contracts.

This was an appeal from the report of the master, at Hamilton, finding in favour of the title of the plaintiff, the vendor of the property in question.

Argument. Mr. A. Crooks, for the defendant, (who appeals.)

Mr. Proudfoot, contra.

THE CHANCELLOR.—This was a vendor's bill for the specific performance of a contract for the sale of land.

There was a reference as to title; and, in the event of a good title being shewn, the master was directed to settle the conveyance.

Upon the enquiry the master found that the plaintiff was seized in fee, at the date of the contract, subject to an outstanding legal mortgage, and he proceeded, accordingly, to settle the conveyance.

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Several judgments had been registered against the vendor subsequent to the contract, and previous to the decree for specific performance, and the purchaser insisted that the judgment creditors, not being bound by the decree, must either release or be made parties to the conveyance. The mortgagee agreed to execute the deed upon being paid the purchase money, and he was accordingly made a party; but the purchase money being insufficient to pay off the amount said to be due upon the mortgage, the master refused to make the judgment creditors parties, or to require any release from them, and this is an appeal from the master's decision on that point.

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Under the recent statute 13 & 14 Vic., ch. 63, a registered judgment constitutes a specific lien upon all lands, tenements, and hereditaments, within the county where the judgment has been registered, of which the debtor is seized or possessed, or to which he is entitled, ^{Judgment.} for any estate or interest whatever at law or in equity, at the time of registering such judgment, or at any time afterwards. Where the estate of the debtor is legal, the judgment forms a legal lien, and the estate may be sold under common law process; and since the statute 12 Vic., ch. 73, an equity of redemption may be sold under a writ of *fiery facias* against lands; so that as the law now stands, a registered judgment constitutes a specific legal lien upon that species of interest which is subject to sale under common law process.

Now when land is sold under the decree of this court, for the satisfaction of incumbrances, the settled rule is, that any creditor who has a specific lien upon the estate, and who will not concur in the sale, must be brought before the court that he may be bound by the decree. That is stated very clearly by Chief Justice *Pennefather*, who assisted Lord *St. Leonards*, then Lord Chancellor of Ireland, in *Robertson v. Morton*, (a) a case decided

(a) 1 D. & W. 181.

1859. upon great consideration. "It is conceded," he says, "and indeed it could not be the subject of a moment's controversy, that if their be a specific lien upon property, which is intended to be sold under a decree, whether the specific lien be prior or subsequent to the demand of the person who files his bill, the specific incumbrancer must be made a party to the cause, and it is not that he may, but that he must be made a party; and otherwise if the objection appear on the face of the pleadings the bill would be demurrable." We acted upon that rule in *White v. Beasley*. (a) And *Knight v. Pocock*, (b) recently decided by the present Master of the Rolls, in England, is to the same effect.

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These cases proceed, I apprehend, upon this principle that persons holding specific liens upon property about to be sold under the decree of the court, are not bound by proceedings taken in their absence; and as they would not be bound by proceedings taken in their absence, it follows that the court would not be in a position to protect the purchaser under its decree; but as the court never sells when it cannot protect the purchaser under its decree, it follows that all persons having specific liens who will not concur in the sale, must be made parties, that their rights may be bound by the decree. Now if a purchaser under a decree of this court has a right to that sort of protection—if he cannot be compelled to accept the title unless every person having a specific lien upon the estate, and who will not concur in the sale has been made a party to the cause, and is bound by the decree—it is difficult to discover a principle upon which a purchaser by private contract can be compelled to accept a less perfect title.

Judgment.

It is said that the legal estate in this case was outstanding in a mortgagee long prior to the registration of the judgments in question, and that they do not for that

(a) Ante vol. II., 661.

(b) 24 Beav. 436.

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reason constitute a lien upon the land. But that circumstance is, in my opinion, quite immaterial, because the judgments constituted, as I have already shewn, a legal lien upon the equity of redemption. Every judgment creditor, therefore, having a legal lien upon the equity of redemption, would be entitled to compel the sheriff to proceed to a sale, because it is clear that at law the equity of redemption in the hands of the purchaser would be bound by the judgments which had attached at the time he acquired his title. But it is said that the purchaser would have a right in that case to file his bill in this court on foot of his prior contract, and upon proving the priority of his contract, and that the purchase money had been duly applied, he would be entitled to a decree restraining the judgment creditors from enforcing their lien upon the estate, or their charge upon the purchase money, through the medium of the vendor's lien.

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But there are two answers, as it appears to me, to that argument. In the first place, it is not enough to say that the purchaser has it in his power to defend himself against the claims of persons having specific liens upon the property, by means of a bill filed in this court. If there be persons having specific liens upon the property, whose rights can be bound by the decree of this court, the purchaser has a right, in my opinion, to require that the steps necessary to bind their rights should be taken by the vendor, not by himself; and that they should be taken before he is called upon to accept the title, or pay his purchase money. But in the second place, the argument assumes that the purchaser, to entitle him to relief, would be bound to establish the priority of his contract, and the due application of his purchase money; and there can be no doubt that he would be bound to do so; because the judgment creditors not being parties to the specific performance suit would not be bound by the proceedings taken in that suit. It would be open to every judgment creditor to contest both propositions; and the purchaser,

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to maintain his title, would be bound to establish both. Now this court will not compel a purchaser to accept a doubtful title. He has a right to an undoubted title; and having a right to an undoubted title, he cannot be compelled, in my opinion, to accept one which depends for its validity upon his being able to establish the propositions to which I have adverted. The vendor has it in his power to bind the judgment creditors as conveniently, at the least, as the purchaser can, and that being so, I know of no principle upon which he can be allowed to throw upon the purchaser a burthen which should be borne by himself. (a)

Judgment. The master appears to have assumed that when an estate subject to incumbrances is sold for its full value, and the legal estate can be got in, the vendor has a right to have the purchase money applied in discharge of the incumbrances according to their priority, and that when that has been done, the purchaser must accept the conveyance without any release from the subsequent incumbrancers, who, not having been paid, refuse to concur in the sale. But that in my opinion is not the law. The purchaser has nothing whatever to do with paying off the incumbrances. The vendor is bound to do that himself, and to procure a perfect conveyance before the purchaser can be required to part with one shilling of his purchase money. That was expressly decided, if I understand the case correctly, in the *Attorney General v. Cox*, in the House of Lords. (b) The purchaser is entitled to retain the purchase money until the estate is clear of all incumbrances; and if the vendor cannot clear the estate, the necessary consequence is, that the purchaser cannot be compelled to complete the contract.

The opinion of Mr. *Sergeant Hill*, to be found in a note

(a) *The Governor of the Green Coat Hospital v. The Westminster Improvement Commission*, 3 Jur. N. S. 1188, and 4 Jur. N. S. 17.

(b) 3 H. L. C. 240, and reversing the decree of the Vice-Chancellor of England, 14 Sim. 505.

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to *Foott v. The Duke of Norfolk*, reported in the 4th volume of *Maddock*, page 506, and a passage in Mr. *Lewin's* book on Masters, page 657, were referred to in support of the master's opinion. But the passage referred to does not militate against, but rather strengthens, the conclusion at which I have arrived. And my opinion upon the whole is, that the appeal must be allowed.

1859.

Spohn
v.
Ryckman.

ESTEN, V. C.—This is a vendor's bill for the specific performance of a contract for the purchase of an estate in mortgage. Since the contract two judgments have been obtained and registered against the vendor, and the question presented for our decision is, whether the vendor is bound to procure releases of these judgments. It is understood the whole purchase money will be absorbed in discharging the mortgage, and consequently that the judgment creditors will receive no part of it. Mr. Sergeant *Hill* was of opinion that judgments entered against the vendor, after the contract, and before the conveyance or payment of the purchase money; so bound the estate that they ought to be discharged out of the purchase money. Whether that was a correct opinion in the then state of the law, has been doubted; but it seems to be correct according to the law as it now stands, because these judgments attach upon the vendor's lien. My own individual opinion is, that the judgments in question have not attached upon the equity of redemption in the present case, because the vendor became a trustee of it from the date of the contract, and judgments will not attach upon an equitable trust estate either at law or in equity; a court of law being bound, as I think, to apply equitable principles to equitable interests, rendered saleable under its process. They attach, no doubt, upon the purchase money, either under the doctrine of Mr. Sergeant *Hill*, or under the law, as since altered; but supposing the purchase money to be properly applied in discharging the mortgage, this interest has become extinct. It is true that the purchase money may not be properly applied in discharging the

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mortgage, and the judgment creditors may be able to prove notice of this fact against the purchaser in a future suit; in which case the purchaser would be obliged to pay the purchase money for the lands a second time. This is a danger to which he ought not to be exposed. Again, it may be thought that the judgments attach upon the equity of redemption both at law and in equity, and if not in equity, yet at law. In this case it may become the object of legal execution, and a sheriff's sale. It is true that the purchaser from the sheriff will be obliged to have recourse to equity to make his purchase available, but in this case the purchaser under the present contract will be compelled, and may not be able, to defend his purchase. He will be subjected to a second account which may result in shewing some thing due to these judgment creditors, and it may appear that he had notice of it, and should the land increase in value, he will at all events be compelled to submit to redemption. On the other hand, should he desire to stop the dealings with his estate under legal process, he must institute proceedings in equity for that purpose, himself. These are certainly difficulties and dangers to which a purchaser ought not to be exposed. Mr. *Lewin* seems to think that where the legal estate is outstanding, and the money is properly applied in discharging prior incumbrances, the purchaser will be safe, and may dispense with releases from subsequent incumbrancers. He does not cite any authority for this position, but has probably been in the habit of advising his clients to that effect; and no doubt practically this course may in general be safely adopted; but it may not always be safe, and it is the duty of this court in compelling a purchaser to accept a title to protect him as far as it can from all risk. I have enquired of a gentleman of great experience, as to the practice in England in such cases, and he informs me that in practice, releases are required from all judgment creditors, although the purchase money be exhausted in discharging previous incumbrances. It is clear, I think, that such incumbrancers cannot be compelled to grant such releases, but

Judgment.

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it is the duty of the vendor to procure them, if he can ; and if he cannot, that fact forms a valid objection to the title. I think therefore that in the present case the plaintiff must procure releases from the judgment creditors in question.

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v.
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McDONALD v. PUTNAM.

Assignment for benefit of creditors, by insolvent.

An assignment by an insolvent for the benefit of creditors set aside, the deed containing a general release by the creditors, and having been made to avoid an execution about to be issued by one of them ; and the creditors generally were declared entitled, according to their priority, to the proceeds of the property which had been sold by the trustee.

The bill in this case was by *John McDonald* and *William B. Lyle*, against *George Y. Putnam*, *Francis M. Whitelaw*, *James Lockwood*, and *Jacob Putnam*, and as amended set forth that about the 16th of November, 1857, the defendant *George Y. Putnam* became indebted to plaintiffs in a sum of £330, being then possessed of considerable personal estate ; and that on the 12th of February, 1858, they recovered judgment against him for this sum, and costs, upon which they issued an execution against goods, which they placed in the hands of the proper sheriff ; that whilst the suit was proceeding, and before judgment was recovered, the said defendant being so indebted to plaintiffs and other persons, did, on the third day of January, 1858, make a conveyance to the defendant *Whitelaw*, of all and singular the goods and chattels, stock in trade, household furniture and effects of the said defendant, under the pretence of making provision for his debts, but in reality for the purpose of hindering and delaying his creditors, and particularly the plaintiffs, in the recovery of their respective claims, in consequence of which the sheriff had been prevented by the defendant *Whitelaw*, who was in possession of the goods, &c., under the assignment, from making the amount endorsed on the writ in his hands ;

1859. that no creditors of *George Y. Putnam*, or any other person except himself and defendant *Whitelaw* had executed or accepted the said conveyance, although the time for so doing had elapsed, by reason whereof the said conveyance and the trusts thereof were still revocable at the will of the assignor, and that *Whitelaw* had, ever since the execution of the said assignment, been the trustee of the property and effects comprised therein, for the advantage of the assignor, and submitted that the same was fraudulent, and should be set aside as regards the judgment in favour of the plaintiffs; that the defendants *Lockwood* and *Jacob Putnam* were alleged to be entitled to some benefit and advantage under the said deed, and prayed that the same might be declared fraudulent and void as against the plaintiffs, and that the defendants might be ordered to concur in all acts and deeds necessary to vacating and setting aside the said assignment; and that the plaintiffs might be at liberty to levy under their writ of execution on the goods, &c., comprised in the said conveyance; that the plaintiffs might be declared entitled to a lien on the said goods by virtue of the said writ; that the defendant *Whitelaw* might be declared accountable to the plaintiffs in respect thereof; and for an injunction to restrain any sale or disposition of the said goods, &c.

Statement.

The defendants severally answered the bill, denying all fraudulent intention on their parts in making the assignment; and alleging that the trusts of the assignment were, first, to pay the expenses of preparing and executing the deed. Secondly, to pay all sums due to clerks and servants of the defendant *George Y. Putnam*, and all debts not exceeding £10 then owing by him. Thirdly, to pay the debts and liabilities which *Lockwood* and *Jacob Putnam* had become bound and liable for as sureties of the assignor. Fourthly, to divide the remainder of the proceeds rateably amongst the creditors; and lastly, the balance, if any, should be paid to *George Y. Putnam*. The plaintiffs having filed a replication, thus putting the

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cause at issue, evidence was taken *viva voce* before the court. The material facts, however, appear in the judgment.

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v.
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Mr. A. Crooks and Mr. Blake, for plaintiffs.

Mr. Hector, for defendants.

The cases cited by counsel are mentioned in the judgment of

ESTEN, V. C., (before whom the cause was heard.)—
The facts of this case are, that *George Y. Putnam*, being indebted to various persons, and amongst them to the plaintiffs, and the plaintiffs having commenced an action against him for the recovery of their debt, *Putnam* having also made a chattel mortgage some time previous, extending to after acquired property, and granted a confession of judgment to Messrs. *Gilmour & Coulson*, whose debt amounted to about £2,500, and who also held the bonds of *Jacob Putnam*, and *Lockwood* and *Warren*, as sureties for the same debt or part of it, made the assignment in question, without any communication with his creditors, except that he had consulted *Warren* about it, to *Whitelaw*, not a creditor, under which *Jacob Putnam* would be entitled to a preference, and as he is liable to *Gilmour & Coulson* for their whole demand as surety for his son *George Y. Putnam*, the whole property comprised in the assignment would pass to *Gilmour & Coulson*. None of the creditors have executed the assignment. The plaintiffs have not acceded to, or acquiesced in it, but the contrary. *Lockwood* has, I think, assented to it in such a way as to be entitled to the benefit of it, even supposing it to be revocable in its inception. It is also asserted by Mr. *Lawder*, in his evidence, that Mr. *Currie* claimed the benefit of it, on behalf of *Jacob Putnam*; but he accompanied Mr. *Lawder*, who was acting on behalf of *Gilmour & Coulson*, and his claim seems to have been preferred for the benefit of *Gilmour*.

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& Coulson; while on the other hand *Whitelaw* states that *Jacob Putnam*, although informed by him of the assignment, never made any application to him about it. Further enquiry would be proper to ascertain, if it were necessary, to what extent *Jacob Putnam* and the other creditors had assented to it. If Mr. *Currie* was acting on behalf of *Gilmour & Coulson*, without authority from *Jacob Putnam*, his application would not amount to an assent on behalf of *Jacob Putnam* nor would it operate as an assent on the part of *Gilmour & Coulson*, who in fact have not assented to the assignment, but have acted in contravention of it, by placing their writ in the sheriff's hands; in fact they have attempted to claim both under and paramount to the assignment. As *Gilmour & Coulson* they are not entitled to any benefit under the assignment; but if *Jacob Putnam* has really assented to the assignment so as to preclude himself from asserting his legal remedy against *George Y. Putnam*, and he is liable to *Gilmour & Coulson*, and should pay them, he might *cæteris paribus* claim the benefit of the assignment; and so might any of the other creditors who had acted in a similar manner. What then would be the effect of the answer of *Jacob Putnam*, claiming the benefit of the deed, and yielding undoubtedly an unqualified assent to it so as to bind him? It seems to me that the plaintiffs having previously obtained judgment, and issued execution and placed it in the sheriff's hands, and the goods being therefore bound, no subsequent assent on the part of a creditor could sustain the deed, so far as they are concerned. I may add that such appears to be the law from the cases of *Wilson v. Kenny*, (a) *Maulson v. Topping*, (b) and *Siggers v. Evans*. (c)

I have carefully examined almost all the cases that were cited, and some other cases, with respect to the revocable character of creditors' deeds, and it may not perhaps be without its use, certainly to myself, although not strictly necessary, to state shortly the views

(a) 17 U. C. Q. B. 168.
(c) 5 E. & B. 367.

(b) *Ib.* 183.

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I have formed of the rules applicable to such cases. Lord Justice *Turner*, in the case of *Smith v. Hurst*, (a) well described the distinction between trust deeds in favour of particular persons, and trust deeds in favour of creditors, and stated that the latter class of deeds might be revocable or not revocable in their inception, and that the question to which class they belonged was to be determined by their contents and the circumstances attending their execution, and that although revocable in the first instance, they might become irrevocable as to all or some of the creditors, in consequence of subsequent dealings between them and the author of the trust, or perhaps the trustee. In the case of *Griffith v. Ricketts*, (b) V. C. *Wigram* evidently considered a deed of trust in favour of creditors not revocable in its inception where the grantor had covenanted with the trustee not to revoke the trusts, and to aid in their execution, and for further assurance—provisions for the most part utterly inconsistent with the idea of mere agency. As to the nature of the communication to creditors which would be sufficient to make a revocable deed irrevocable as to them, some difference of opinion perhaps exists, and the law does not seem to be settled. V. C. *Knight Bruce*, in the case of *Wilding v. Richards* (c) seemed to think that to make a revocable deed irrevocable, the creditor must have assented to such a degree as to become bound to accede to the deed; while *Wightman, J.*, in the case of *Harland v. Binks*, (d) inclined to the opinion that if the deed were made known to the creditor, and he might have foreborne suit in consequence, the deed could not be revoked as to him without affording him the option of acceding to, or repudiating it. I confess the opinion of Mr. Justice *Wightman* appears to me highly reasonable and just, and it seems to have been confirmed by what was said by Lord *Campbell*, C. J., in the subsequent case of *Siggers v. Evans*, before mentioned. There is another class of cases nearly allied to that which I am

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Judgment.

(a) 10 Hare, 30.
(c) 1 Coll., 655.

(b) 7 Hare, 299, 301.
(d) 15 Q. B., 721.

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considering, namely, that in which a trust is created for the payment of debts, or some debts, but not for the benefit of the creditor or creditors, who therefore cannot claim the execution of the trust but for the benefit of the parties to the deed. Such were the cases of *Gibbs v. Glamis*, (a) and *Simmonds v. Palles*. (b) To entitle a party to enforce such a deed, not only must a trust be created, but the plaintiff must be a *cestui que trust*. In the two last mentioned cases the plaintiffs did not fill that character, although an irrevocable trust had been created. In the case of a mere revocable deed of management, no trust is created, but a mere agency. The two classes of cases have in some measure been confounded, but they are rather alike than the same. I may add, that when the question is not whether the deed is revocable, but whether the plaintiff is entitled to be admitted to the benefit of it, he must be able to make it appear that he is in a situation to furnish what may be deemed to be the consideration for the deed, as in the case of *Lane v. Husband*, (c) where the deed containing a letter of license and release, and the plaintiff not seeking to accede to the deed, until seven years after the death of the debtor, who survived the execution of the deed three years, it was deemed that he could not furnish the consideration for which the deed was executed, and when the time for acceding to the deed has elapsed, so that it cannot now be executed, the plaintiff must be able to shew that he has done what is equivalent to an actual execution of the deed, so that if he attempted to contravene its provisions the court would restrain him by injunction, as in *Biron v. Mount*, (d) and *Cornthwaithe v. Firth*, (e) In the present case, had it been necessary to decide the point, I think I should have come to the conclusion that the deed was not revocable, at all events so far as *Jacob Putnam* and *Lockwood* were concerned.

Judgment.

(a) 11 Sim. 584.

(c) 14 Sim. 656.

(e) 4 DeG. & S. 552.

(b) 2 J. & La. 489.

(d) 24 Beav. 642.

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It is true that when the deed is made in favour of creditors generally, without any communication or bargain with them, it is *prima facie* revocable as a mere deed of agency. But it is to be judged by the surrounding circumstances. Now here the deed was made on the 1st of January, 1858; the plaintiffs had commenced an action in the previous autumn, which was then pending—*Gilmour & Coulson* had a chattel mortgage, purporting to include these very goods; they had also a judgment, and *Jacob Putnam*, the father, and *Lockwood*, were liable to them, the former for the whole, and the latter for part of their demand against *George Y. Putnam*. It seems to me that *George Y. Putnam's* object in making this deed was to protect his sureties, and especially his father, against the plaintiff's demand, and to the accomplishment of this object it was essential that an irrevocable trust should be created, for it is well settled that a revocable deed cannot be held against creditors. Under these circumstances it is not unreasonable, I think, to hold, it being a mere question of intention, that *George Y. Putnam* intended to create an irrevocable trust in favour of his sureties, and not to institute a mere agency for the payment of his debts. The deed, therefore, cannot be held to be void against the plaintiffs on that ground. It is, however, contended that it is void as against creditors in consequence of the general release contained in it, and reference is made to the cases of *Wilson v. Kenny* and *Maulson v. Topping*, in support of that position. It was unnecessary in those cases to decide the point, but the learned Chief Justice of the Queen's Bench expressed a strong opinion upon it, and so did Mr. Justice *Burns*; and the learned Chief Justice of the Common Pleas appears to have thought that the introduction of such a release might be evidence of fraud sufficient to vitiate the deed. Following these authorities, and thinking it highly reasonable that although a debtor will be justified in *bona fide* surrendering his property as far as it will go for payment of his debts, he ought not to be permitted to impose such conditions as will

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deter creditors from executing the deed. I must hold this deed void on account of the general release contained in it, which would deprive the creditors of all claim upon their debtor, and debar them from all recourse against his after-acquired property, while the property comprised in the deed would probably be in a great measure absorbed by the claims of the preferred creditors. The proceeds of the goods, therefore, belong to the creditors according to their priority. I think the plaintiffs entitled to their costs.

Decree.

Declare that the deed of assignment in the pleadings mentioned, bearing date the first day of January last, is void as against the said plaintiffs, and all other the creditors of the said defendant George Y. Putnam, and that the said plaintiffs and such other creditors are entitled to a lien on the estate and effects comprised in the said indenture, and to an application thereof for the payment of their respective claims according to the priority thereof respectively: order and decree the same accordingly:

Order defendants to join and concur in all necessary acts and conveyances, for the purpose of raising the amount due to the plaintiffs, and all other the said creditors, and that the proceeds of the said estate and effects be so applied:

Refer it to the master to take an account of what is due to the plaintiffs, and such other creditors, and to settle their priorities, and also to take an account of what has been received by the said defendant Francis M. Whitelaw, on account of the said effects.

Order, that what the master shall find to have been so received by the defendant Francis M. Whitelaw be within fourteen days after the service upon him of this decree, and of the master's report, paid by the defendant Francis M. Whitelaw into court.

Appoint receiver. Defendants to pay costs. Liberty to apply.

CAMERON V. McDONALD.

Set-off.

Where a plaintiff at law filed a bill in this court to enforce his judgment, the court, under the circumstances, directed a reference to the master to take an account between the parties, the defendant claiming to have had a set-off to a greater amount than the judgment, although the general rule is, that a party neglecting to set off his claim at law, cannot afterwards apply to this court to have the benefit of it.

This was a bill filed by *Donald Cameron*, setting forth

that on the judgment for £57, within the month; that the defendant; that the execution of the deed charged the defendant was indebted recovered judgment with a view to the plaintiff without any interest in the other defendant had continued the land so conveyed his father had

The bill filed in executing *Cameron*, for a fraudulent assignment of the defendant *John Arden* £80 upon the defendant £500, or thereabouts

The prayer of the bill might be decreed and that the bill be cancelled; that the defendant be relieved.

The defendant was indebted to the plaintiff attorney in the sum of £500, and the plea of set-off, and that the bill be all fraudulent in

that on the 15th of March, 1858, he had recovered judgment against the defendant, *Archibald McDonald*, for £57, which was registered on the 17th of the same month; that nothing was paid on account of such judgment; that the sheriff had returned *nulla bona* to a writ of execution issued upon such judgment. The bill then charged that in November, 1857, while *A. McDonald* was indebted to plaintiff in the amount for which he had recovered judgment, and also to other persons, he did, with a view of hindering, delaying, defeating, and defrauding plaintiff and such other creditors, voluntarily, and without any consideration whatever therefor, convey his interest in 100 acres of land to his son *John McDonald*, the other defendant, who then resided, and ever since had continued to reside, thereon with his father; that the land so conveyed was the only real estate in which his father had any interest.

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The bill further alleged that the defendants had joined in executing a mortgage on the property to one *Angus Cameron*, for £37 10s., which the bill charged was fraudulent and void as against plaintiff, and that the defendant *John*, with the knowledge and consent of the defendant *Archibald*, had executed another mortgage for £80 upon the property, which it was alleged was worth £500, or thereabouts.

The prayer of the bill was, that the plaintiff's judgment might be declared a charge on the land and premises, and that the conveyance from *Archibald* to *John* might be cancelled; payment of plaintiff's claim, or in default, that the premises might be sold; and for further relief.

The defendants answered the bill, alleging that plaintiff was indebted to defendant *Archibald*, but that his attorney in the action at law had neglected to plead a plea of set-off, although instructed to do so; and denied all fraudulent intention in the conveyance of the land by

1859. *Archibald to John*, and asked that an account might be taken between plaintiff and defendant *Archibald*, and that plaintiff might be ordered to pay any balance found due by him.

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McDonald.

Evidence had been taken in the cause, and the defendants had both been examined, but it is thought unnecessary to set out any part of the evidence, further than to state that the general effect of it was to negative any presumption of fraud on the part of the defendants in executing the conveyance.

Mr. *Fitzgerald*, for plaintiff.

Mr. *Barrett*, for defendants.

THE CHANCELLOR.—The specific relief prayed by this bill is, that the conveyance from *Archibald McDonald* to *John McDonald* may be set aside as fraudulent and void against the plaintiff, and that the estate may be sold to satisfy the plaintiff's judgment; and as the evidence negatives the plaintiff's right to that relief so clearly that his counsel declined to argue the point, the bill, to that extent, must be dismissed, as against both defendants, with costs.

But although this bill must be dismissed as against *Archibald McDonald*, the judgment debtor, so far as it seeks to have the conveyance to *John McDonald* set aside, yet it is admitted that this defendant has an interest in the property, as mortgagee of *John McDonald*, and it is clear that the plaintiff's judgment forms a charge upon that interest, he is entitled, in my opinion, to the usual decree for sale under the prayer for general relief.

But then the defendant swears that the plaintiff was indebted to him, at the time he recovered his judgment, in a large amount, and he prays that the master may be

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directed to take an account of the amount so due by him, and that it may be set off against the amount due upon the plaintiff's judgment.

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McDonald.

We had occasion to consider the subject of equitable set-off, with great care, in the case of *Smith v. Muirhead*, (a) and the conclusions at which we then arrived were, first, that the mere existence of cross demands does not of itself give a right of equitable set-off; and, secondly, that a defendant who, having an opportunity to set off his debt at law, omits to avail himself of that opportunity, cannot, as a general rule, come to this court for relief. If that case be correct, it follows that a bill by this defendant for an account and set-off must have failed. Upon the facts stated in the answer the court would have refused to interfere with the plaintiff's judgment.

But though this court would have refused to interfere with the plaintiff's legal rights upon a bill filed by the defendant, yet as the plaintiff has come here to enforce his judgment, it does seem to me reasonable, I confess, that the defendant should have the relief he asks, if it can be afforded without prejudice to the plaintiff's rights. I do not say that defendants have a right, as a general rule, to that relief, in cases of this sort. Such an account might materially prejudice the plaintiff by delay or otherwise. But when a proper case has been made by the defendant for that sort of relief, and it can be granted without prejudice to the plaintiff, the court ought not, I think, to refuse its assistance. (b)

The allegations in the present answer are, I must admit, vague, and in other respects unsatisfactory; but attending to the fact that the case made by the plaintiff's bill is a case of fraud, which he has wholly failed to establish, and for that reason his bill ought perhaps, in strictness,

(a) Ante vol. III., p. 610.

(b) *Dodd v. Sydall*, 1 Hare. 333.

1859. to be dismissed; (a) and considering how small the amount in dispute is, compared with the costs of this litigation, I cannot err, I think, in directing the account as prayed.

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PLACE v. SPAWN.

Trustee and cestui que trust—Separate estate of married women.

The owner of real estate conveyed the same to trustees for his daughter E. S., one of whom was her husband, to dispose thereof "in such manner as the said E. S., her heirs and assigns may at any time advise or direct, and to make such leases, and further, to make such conveyances in fee simple of the said lands, &c., as the said E. S., her heirs, &c., may at any time advise or direct." The trustees created a mortgage in which E. S. joined. Held, that the conveyance to the trustees effected a settlement to the separate use of E. S.: that her joining in the mortgage was a sufficient direction to the trustees: that the mortgagee was not, under the circumstances, bound to see to the application of the money, and that in default of payment he was entitled to the usual decree of foreclosure.

Statement. The bill in this case was filed by *Ebenzer B. Place*, against *Philip Spawn* and *Peter Bowman Spohn*, setting forth that by virtue of an indenture of mortgage, dated the 15th of February, 1856, and made between the defendants of the first part, *Elizabeth Spawn* and *Anne Spohn* of the second, (for the purpose of barring dower,) and the plaintiff of the third part, the plaintiff became and was the mortgagee of certain freehold lands in the township of Ancaster, containing 100 acres, securing £1000, and interest; that default had been made in payment of the principal money and interest so secured thereby, and prayed the usual decree of foreclosure.

The defendants answered the bill, setting up that by indenture dated the 19th of March, 1849, and made

(a) *Lang v. Glascott*, 2 Phil. 322; *Wild v. Gibson*, 1 H. L. 621; *Archibold v. Commissioners of Charitable Bequests*, 2 H. L. 450; *Stainland v. Willot*, 3 M. & G. 682; *Price v. Benington*, 3 M. & 498; *Espey v. Lake*, 16 Jur. 1109.

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between *Peter Bowman*, of the first part, and the defendants, of the second part, the lands in question in the cause had been conveyed by *Bowman* to the defendants "in trust and confidence nevertheless to dispose of the said lands in such manner as the said *Elizabeth Spawn*, her heirs and assigns, may at any time advise or direct, and to make such leases, and further, to make such conveyances in fee simple of the said lands and premises, as the said *Elizabeth Spawn*, her heirs, &c., or her or their counsel, may at any time advise or direct." And that the defendants were advised that they had no power to mortgage the lands; and submitted that *Elizabeth Spawn* was a necessary party to the bill.

The plaintiff thereupon amended his bill, making *Elizabeth Spawn* a party, setting forth the deed of trust, and that *Elizabeth Spawn* had joined in the mortgage to the plaintiff for the purpose of conveying the estate.

Statement.

Elizabeth Spawn answered the bill, setting up as a defence that the money raised by the mortgage had been misapplied by the trustees, and that the plaintiff was bound to see to the application thereof, he having been aware of the nature of the title. The plaintiff having put the cause at issue, evidence was taken *viva voce* before the court, when the magistrate who took the acknowledgment of *Mrs. Spawn* swore that he had explained the nature and effect of the conveyance to her, as usual on such occasions.

Mr. *Read*, Q. C., for plaintiff.

Mr. *C. Crickmore*, for defendants.

The arguments of counsel, and cases cited, are stated in the judgment.

THE CHANCELLOR.—This is a suit for foreclosure.

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On the 19th of March, 1849, the premises in question were conveyed by *Peter Bowman*, the father of the defendant *Elizabeth Spawn*, to the defendants *Philip Spawn*, the husband of *Elizabeth Spawn*, and *Peter Bowman Spohn*, her son, in fee simple, in trust, however, for *Elizabeth Spawn*.

By an indenture made the 15th day of February, 1856, between *Philip Spawn* and *Peter Bowman Spohn*, of the first part, *Elizabeth Spawn* and *Anne Spohn*, their respective wives, of the second part, and the plaintiff, of the third part, the property in question was conveyed by *Philip Spawn* and *Peter Bowman Spohn*, the trustees, "by and with the approval, direction, full knowledge and consent of *Elizabeth Spawn*, testified by her becoming one of the parties to, and executing the deed," to the plaintiff in fee, to secure £1000, then advanced by him, and paid to the trustees upon the execution of the deed.

Judgment.

This is a bill to foreclose that mortgage; and the defences set up by *Elizabeth Spawn* are, first, that she was ignorant of the contents of the mortgage at the time of its execution.

Secondly, that she authorised her trustees to make the mortgage in question upon an assurance given her by *Peter Bowman Spohn* that the money, when paid, should be applied in payment of a debt due by her son *J. V. Spawn*, upon land purchased by him; that the mortgage money was not appropriated to that purpose, but was applied by the trustees to their own use, with the plaintiff's knowledge, and that as the mortgage money has been misapplied, the plaintiff, who was bound to see it properly applied, cannot enforce his security.

Thirdly, that the settlement did not authorise her trustees to mortgage her property, and that the security was therefore a breach of trust, and should be set aside.

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(a) 2 R. & M. observation of V (c) 11 Ir. Eq (e) *Young* 1, see p. 22 and *Baggett v. Meuz* (g) 1 Wm. J.

The first ground of defence was abandoned. It is not set up with sufficient distinctness, and there is nothing in the evidence to support it.

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Upon the second point, which was the one principally discussed, the first question is, as to the effect of the settlement of 1849. Was the property in question settled to the separate use of *Elizabeth Spawn*? If we are at liberty to look at the whole deed for the purpose of determining that question, and it is difficult to understand why we should not, the case does not admit of doubt. But without presuming to question the accuracy of the observations attributed to Lord *Brougham* in *Tyler v. Lake*, (a) and to Lord *Cottenham* in *Massey v. Parker*, (b) confining ourselves to the words of limitation in that deed, I have no doubt that the property in question was settled to the separate use of *Elizabeth Spawn*. *Arthurs v. Arthurs*, (c) *Inglefield v. Coghlan*, (d) and ——— v. *Lyne*, (e) are expressly in point.

Judgment.

Then, assuming that the property in question was vested in these trustees, to the separate use of *Elizabeth Spawn*, her right to deal with it as if she were sole, under the provisions of this settlement, does not, I apprehend, admit of doubt. (f)

It is said that *Elizabeth Spawn* is not a granting party; that she only joined for the purpose of barring her dower, and that the deed has consequently no operation under our provincial statute, (g) for enabling married women to alien their real estate. But the statutes in question have no bearing upon the case. They were passed for the purpose of enabling married women more conveniently to alien their real estate, when a fine would have been necessary in England, (h) and have nothing to

(a) 2 R. & M. 183.

(b) 2 M. & K. 174; see the observation of V. C. Wigram in *Blacklow v. Laws*, 2 Hare. 49.

(c) 11 Ir. Eq. 511.

(d) 2 Col. 247.

(e) *Young* 562.(f) *Tullett v. Armstrong*, 1 Beav.1, see p. 22 and 32; S. C. in App. 4 M. & C. 377; see p. 393 and 405; *Baggett v. Meux*, 1 Col. 138, and 4 Beav. 322.

(g) 1 Wm. IV., ch. 2.

(h) 43 Geo. III., ch. 5.

1859. do with estates settled to their separate use, which could have been aliened at the time the statutes were passed without fine or examination.

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Elizabeth Spawn having, then, an unlimited control over this property, and her trustees having created this mortgage by her direction, as the deed states, and the answer admits, the plaintiff's right to the relief he asks cannot be questioned, unless it can be shewn, as has been argued, first, that the fund has been misapplied; and, secondly, that the plaintiff was bound to see to its application. But the misapplication of which the answer complains is not proved. There is no proof whatever that *Elizabeth Spawn* directed the money to be applied in payment of the debt due from her son *J. V. Spawn*; and though that had been shewn, it is clear, I apprehend, upon the recent statute, (a) that the plaintiff was not bound to see to the application of the mortgage money. The 10th section of the act provides "that the *bona fide* payment of any money to, and the receipt thereof by, any person to whom the same is payable upon any express or implied trust, or for any limited purpose * * * shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary be expressly declared by the instrument creating the trust or security." Now, apart from the question of fraud to which I shall presently advert, it cannot be doubted, I think, that the plaintiff having paid his money to these trustees, was discharged from seeing to its application. That was not doubted, but it was said that the trustees in the present case had committed a gross breach of trust; that the plaintiff colluded with them, and that this payment, therefore, was not a *bona fide* payment under the statute.

No case was cited upon this point; and I do not suppose that any are to be found, for the clause in the imperial statute, from which ours was copied, was repealed

(a) 12 Vic., ch. 71, sec. 10.

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(a) 7 & 8 Vic., ch
(c) *Caton v. Rideo*

almost immediately. It came into force on the 1st of January, 1845, (a) and was repealed upon the 1st of October, in the same year. (b) I have no doubt, however, that the act would not apply if any fraud or collusion were shewn to exist. But the evidence wholly fails to establish that. *Elizabeth Spawn* had a perfect right to dispose of this money as she might think fit, and there is nothing to shew that the plaintiff knew, or had reason to apprehend that the trustees were about to apply it contrary to her direction, if indeed it has been so applied, of which there is no proof. On the contrary, the acquiescence of *Elizabeth Spawn* for more than three years affords ground for the inference that every thing was done in accordance with her wishes. (c)

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The third objection fails for the reasons I have already stated, and I am of opinion, therefore, that the plaintiff is entitled to the usual decree. Judgment.

COBOURG AND PETERBORO' RAILWAY Co. v. COVERT.

Practice—Striking cause out of examination paper.

A cause was set down for the examination of witnesses, and when called on the plaintiff was not prepared to proceed. *Held*, (over-ruling the decision in *Wallace v. McKay*, reported in the Chambers Reports, page 67,) that the defendant was entitled to have the case struck out of the paper, with costs of the day. February 11

This cause had been set down for the examination of witnesses by the plaintiff, who, when the case was called on yesterday, was not ready to proceed. Mr. *McLennan*, for defendant, asked that the cause might be struck out with costs. The attention of the court was drawn to *Wallace v. McKay*, (d) as shewing that this was not the practice; but now, *ESTEN, V. C.*,—[before whom the case was]—I have consulted my brother *Spragge* as to the proper practice to be pursued under the circumstances of the case, and we think the proper course is to strike the cause out with costs of the day.

(a) 7 & 8 Vic., ch. 76, sec. 10.

(b) 8 & 9 Vic., ch. 106, sec. 1.

(c) *Caton v. Rideout*, 1 McN. & G. 559.

(d) *Chambers Reports*, p. 67.

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KERR V. LEFFERTY.

Principal and agent—Deed of gift—Sale by agent at undervalue.

A widow having a claim to certain lands belonging to the Six Nations Indians, prevailed upon a person to act as agent in procuring the acknowledgment by the chiefs of her title, which was done, after great trouble and expense on the part of the agent, and in accordance with such recognition the Crown patent for the land was perfected; whereupon the grantee of the Crown conveyed by deed of gift to the agent an undivided moiety of the estate as a reward for his services in procuring the grant, previously to which she had executed a power of attorney in favour of the agent, authorising him to sell or mortgage all her lands in Upper Canada, and subsequently went to England, where she continued to reside until the time of her death. During her residence there she urged the agent to dispose of her moiety of the property, and in the course of the correspondence stated that she would be willing to accept £1000 for it. The agent in 1844 having directed the property to be sold by auction, his sister became the purchaser for £628, having authorised the person who attended to bid at the sale, on her behalf, to go as high as £800 for the property. Upon a bill filed by the son and heir of the owner, in 1858, several years after the agent's death, seeking to set aside the deed of gift, as having been obtained by undue influence, and the sale by auction as having been made at a great undervalue; the court, under the circumstances, refused to disturb the title derived under the deed of gift; but set aside the sale by auction, as having been made at a price not warranted by the agent's authority. The infancy of the plaintiff at the death of his mother, and his absence subsequently on duty with his regiment, being deemed sufficient circumstances to excuse the delay which had occurred in instituting proceedings by him; and it was shewn that a suit instituted by his mother, during her residence in England, had been dismissed, owing to her inability to procure security for costs to be given.

Semble, that an act done by an agent within the scope of his authority, and before any notification of its revocation, is good, although it may be entirely revoked at the time.

The facts of the case appear sufficiently in the head-note, and judgment of the court.

Mr. Strong and Mr. Crickmore for plaintiff.

Argument. Mr. Brough, Q. C., for defendant.

ESTEN, V. C.—[before whom the cause has been heard.]—The subject of this suit is a piece of land, consisting of about 100 acres, situate near to, and, I believe, partly, within the town of Brantford, which was granted by the Crown to the late Mrs. Kerr, the plaintiff's mother, in pursuance of a previous surrender, made for that purpose by the Indian Nation. The late Mr. John W. Lefferty, the defendant's brother, was very instrumental in procuring the gift of the Indians to be perfected, and

Mrs. Kerr, made him a reward as a reward afterwards co moiety was execution of him a power way of sale Canada, at his attorney was September, 18 and never aft appears to hav England, in r been occasion The 100 acres which was ma believe, afterw the property, by J. W. Leffe gages to Mr. together to £6 to have amount have been oth Kerr received t these occasions, such was the fa Lefferty proceed moiety of Mrs. which occasion purchasers, but and this undiv her in the nam have no reason conducted. The mends the prop is possible that used all means t to employ, in or

Mrs. *Kerr*, after its completion by the royal patent, made him a present of an undivided moiety of the land, as a reward for his services. This undivided moiety he afterwards conveyed to his mother. The other undivided moiety was retained by Mrs. *Kerr*, who before the execution of the deed of gift to *J. W. Lefferty*, gave him a power of attorney, authorising him to dispose, by way of sale or mortgage, of all her lands in Upper Canada, at his discretion, for her benefit. The power of attorney was executed in June, and the deed of gift in September, 1839. In 1840 Mrs. *Kerr* went to England, and never afterwards returned to this province. She appears to have become involved in legal proceedings in England, in relation to another property, and to have been occasionally in great distress for want of money. The 100 acres were subject to several mortgages, one of which was made before the deed of gift; the others, I believe, afterwards, but they comprised the entirety of the property, and were made in the name of Mrs. *Kerr*, Judgment. by *J. W. Lefferty*, as her attorney. Two of these mortgages to Mr. *Blackstone* appear to have amounted together to £600; and two others to Mr. *Street*, appear to have amounted together to £285; and there seem to have been others. It does not appear whether Mrs. *Kerr* received the whole of the moneys advanced upon these occasions, but her counsel appears to admit that such was the fact. On the 16th of March, 1844, *J. W. Lefferty* proceeded to a sale by auction of the undivided moiety of Mrs. *Kerr* in the lands in question; upon which occasion the defendant and her mother became the purchasers, but it would appear for the defendant's benefit, and this undivided moiety was afterwards conveyed to her in the name of Mrs. *Kerr* by *J. W. Lefferty*. I have no reason to think that this sale was not properly conducted. The advertisement, I think, strongly recommends the property to purchasers. At the same time it is possible that Mr. *Lefferty*, as argued, might not have used all means that it was proper for him as an agent to employ, in order to secure a good sale. The defendant

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and her mother authorised their agent to offer as much as £800 for the property, but the biddings reached only £628, at which sum the defendant and her mother became the purchasers. The defendant says that she was aware of the mortgages, and purchased subject to them, and afterwards paid them off, and that she paid the £628 to her brother for the use of Mrs. Kerr. I think Mrs. Kerr repudiated this sale from the moment she became aware of it; she instituted a suit in this court in order to impeach it, certainly within two years after it occurred. In this suit an order was obtained for security for costs, which Mrs. Kerr seems to have been unable to furnish, and the suit was suspended, and, as I understand, finally dismissed for non-compliance with this order. Mrs. Kerr died in 1846, leaving the present plaintiff her heir-at-law, a youth of fourteen or fifteen. He afterwards entered the army, and did not re-visit this country until a year or two before the commencement of this suit. He was born in France. He attained twenty-one in 1852, or 1853. Mrs. Kerr appears to have instituted two suits, one against *J. W. Lefferty* and his mother, to impeach the deed of gift; the other against the defendant to impeach the sale in 1844. The present suit is directed to both these objects. Of course it naturally divides itself into two parts, one relating to the deed of gift, the other to the sale; which depend upon totally different considerations. To begin with the deed of gift, I understand the law relating to such transactions to be, that if a deed of this nature is impeached, it is incumbent on the donee to establish that the donor perfectly understood the nature and effect of the transaction, at the time that he entered into it, and if the donee stood in a position of confidence towards the donor, affording a presumption of influence over him, it is incumbent on him also to prove that the gift was not the result of such influence. Tried by these tests, the question is, whether this gift can be successfully impeached. In the first place there was a motive inducing to it. Dr. *Blackwell* proves that Mrs. Kerr prevailed upon *J. W. Lefferty* with some

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difficulty to undertake to procure the completion of this gift of the Indians in her favour, and promised him half the property in case he should succeed. There is much reason to believe that it was a task of difficulty, and *Lefferty* appears to have made great exertions in order to ensure success. No doubt a gift of half the property was a very handsome reward for his services, but when it is considered that but for those services the whole might have been lost to Mrs. *Kerr*, and that the property was originally a gift to herself, it will not perhaps appear excessive. That Mrs. *Kerr* fully understood that she had parted irrevocably with the property I think cannot be doubted. Her letters shew that she was a most intelligent person, and in one of these letters she tells *Lefferty* in the most emphatic terms that the moiety she had conveyed to him was his own, to do with it what he liked. These expressions seem to have been elicited from her by some suspicion expressed by *Lefferty* that she was desirous of cancelling the gift she had made. I Judgment. I am aware that it may be contended that these letters shew that a notion was entertained by both Mrs. *Kerr* and *Lefferty*, not correct, that she could recall this gift, and therefore that she mistook the legal effect of it. I, however, do not think so. In other letters she seems to speak of *Lefferty* as the owner of the moiety. With regard to the gift being the result of influence, I do not think it can be supposed for a moment that such was the case. Dr. *Blackwell* describes Mrs. *Kerr* as a person of superior intellect. He says that any one who was acquainted with her and with *Lefferty* could never suppose that he had any influence over her—that she might influence *him*, but that he could never influence *her*; and the correspondence between them fully corroborates this representation. Then the letter to which I have already adverted, in which Mrs. *Kerr* uses the strongest expressions to induce *Lefferty* to consider himself the absolute owner of this moiety, written as it was, at a distance of several thousand miles, strongly militates against the idea that influence

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could have been originally exercised in procuring this gift. Upon the whole, it appears to me that the circumstances of this transaction satisfy the rule of law, and that it must be deemed to have been the uninfluenced act of one, who was perfectly aware at the time of the legal effect of her own act. It is argued, however, that the subsequent mortgage made by *Lefferty* amounted to a repudiation of the gift. I do not think that this is the proper construction to be put upon his conduct. It was not unnatural, even supposing these mortgages to have been made for the exclusive benefit of Mrs. *Kerr*, that he should have been willing to encumber his own moiety together with hers the more readily to raise money for her benefit, trusting to her at some future time to exonerate his part of the property, without any intention of repudiating the gift; and I think that the letters in which his right to the moiety is recognised, were subsequent to these mortgages; that the mortgages were made in the name of Mrs. *Kerr*, by him as her attorney, is, I think, a circumstance wholly immaterial.

The other part of the case, namely, the sale to the defendant and her mother, admits of totally different considerations. It is argued that the authority was revoked before the sale in question, by the fragment of a letter which is produced; but I think this cannot be contended for a moment. It is quite clear from the internal evidence of the letter, that it could not have been received until after the sale, and I apprehend it to be clearly settled, that an act done by an agent within the scope of his authority, and before any notification of its revocation, is good, although it may be entirely revoked at the time. Then it is said that the sale was a very improvident one; that a sale in one lot, when the property had, as appears from the map, been divided into lots, was highly reprehensible in an agent; and that the circumstances attending the sale were such as to make it an improper one, and one that ought not to be sustained. I have already made a remark as to the manner of

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conducting the sale. Mrs. *Kerr's* property in these lands was peculiar; it was an undivided moiety. No doubt it was highly expedient with reference to the local situation of this property, that it should be divided into town lots, and disposed of gradually with the growth of the place; and Mr. *Lefferty* was probably very willing to lend his assistance in the prosecution of any such design, as it might appear ungracious to refuse it; but suppose he had been otherwise minded; suppose he had wished to reserve his moiety as a provision for any children he might have, until Brantford attained such a size that town lots had increased ten-fold in value, could even Mrs. *Kerr* have made any reasonable objection to such a course? and if he had refused at that time to concur in a sale of the property in town lots, how could Mrs. *Kerr's* undivided moiety have been disposed of otherwise than in one lot? I think, too, she authorised a sale of it in one lot. The fragment of a letter already alluded to amounts to such an authority, and if this sale had been for £1000 sterling, subject to the mortgages, I do not think I should disturb it. It was, however, Mr. *Lefferty's* duty to exercise a sound discretion in the sale of this property, and to act for Mrs. *Kerr* in the disposition of her share of it in the same manner that he would have acted for himself in the disposition of his own. No doubt it would have been advisable for Mrs. *Kerr* to have allotted to Mr. *Lefferty* a specific portion of the property, in the first instance, instead of an undivided moiety; but circumstances, perhaps, forbade this at the time. It would have been prudent, however, to have made a partition as speedily as possible after the gift, and no doubt Mr. *Lefferty* would have cheerfully acceded to any proposal to that effect; but such a step does not appear to have been suggested by Mrs. *Kerr* or by him, or to have occurred to either of them. Probably their concurrence in sales of town lots was contemplated by both parties, and no difficulty anticipated by either. Supposing no correspondence to have occurred between the parties since the execution of the power of attorney,

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what was the agent's duty with respect to the sale of this property under the peculiar circumstances of the case? Was it consistent with his duty to offer this undivided moiety for sale by auction, without communication with his principal? I think it cannot be so construed. It was, I think, his duty either to dispose of the property in town lots, himself concurring in the sales; or if he had been unwilling to dispose of his own share, to communicate with his principal, express his views with respect to the most expedient disposal of the property, and propose a partition to that end; and any sale of the undivided moiety, without a special instruction authorising it, would have been a breach of trust. Such, in the absence of any special authority, was the sale in the present instance. I think it was an improvident sale, and one inconsistent with the duty of the agent, and such as in the abstract cannot be supported. It becomes then important to enquire whether any authority can be discovered from the correspondence for the sale in question. I certainly think that Mrs. Kerr authorised the sale of her individual moiety for £1000 sterling, clear of the incumbrances. The fragment of a letter which has been mentioned, contains, I think, such an authority, but I cannot discover any other; and this of course would not justify the sale in question. Mr. *Lefferty's* letters, written just before the sale, so far from giving Mrs. *Kerr* any warning of what he intended, were calculated to mislead. She could not, from any letter that she received before the sale, divine his real intentions. Throughout his letters are scattered various allusions and assertions, pointing to pecuniary embarrassment and pressure on her part which might be contended to justify this sale; but supposing them adequate to produce this effect, these allusions and assertions are not evidence against the plaintiff, although no contradiction to them may appear; for in the first place her part of the correspondence has not been well preserved, and is extremely mutilated; and in the next place, she might not have thought it necessary to contradict every unfounded

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assertion or allusion contained in the somewhat reckless letters of her agent, if she apprehended no evil, and it would be too much to hold her bound by the truth of every such assertion or allusion which she had not specifically contradicted. It is true that *Blackwell* and *Burwell* both say that they saw before the sale letters from *Mrs Kerr*, pressing a sale upon any terms, with extreme urgency. They do not, however, prove these letters, much less do they account for their non-production. Their evidence, therefore, on this point is not admissible. But supposing that they could, as I dare say they could, prove the handwriting of these letters, and that evidence, as is probable, could be produced of an ineffectual search having been made for them, so as to render secondary evidence of their contents admissible, would it be safe to act upon such evidence? These gentlemen, perhaps, gave but a cursory perusal to these letters, about fifteen years ago: in such a case almost every word might be important; but they do not profess to remember a single word that they contained, but only state their recollection of their general purport. It is extremely odd that these letters were not preserved. Although *Mr. Lefferty* is represented as a careless man about papers, yet if he ever preserved any papers, one would think that he would have preserved these letters. They must have been received shortly before the sale and I think that from the first he entertained misgivings as to the propriety of this proceeding, and would be careful, one would think, to preserve any document that might appear to justify it. *Mrs. Kerr's* letter of the 20th of May, 1844, which he must have received in the middle, or towards the end of June, containing, as it did, very energetic remonstrances on the subject of the sale, was well calculated to make him careful to preserve any letters that he might previously have received, and that might afford any justification of his conduct. I have no doubt that *Burwell* and *Blackwell* saw the same letters. *Blackwell* says that he saw two or three; that the first, he thinks, was in 1841; that latterly *Mrs. Kerr* became very

Judgment.

1859.

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urgent ; but after stating that the first letter he saw was, he thinks, in 1841, he adds : " she urged him to sell in lots, and did the same in other letters ; spoke of her embarrassment from debts." Is it not extremely probable that these letters, however urgently they might press a sale, all pointed to a sale in lots, and afforded, therefore, no justification of the sale that actually occurred ; and is it not possible, that, instead of being preserved, they might have been destroyed for that very reason ? I think it would be certainly unsafe to act upon such evidence as that of *Burwell* and *Blackwell*, respecting these letters, supposing it to be legally admissible. It is probable that many letters that passed between these parties are not now forthcoming, and it is possible that with the incomplete data that we have for the decision of this case, we are in danger of falling into error ; but we must make the best use of the materials that we have ; and I must say, that judging from the tenor of Mrs. *Kerr's* letters that are produced, I think it extremely improbable that any thing could be found in any of her unproduced letters to justify this sale, and I cannot suppose that the letters of *J. W. Lefferty*, which are not forthcoming, would materially alter the view that I have formed of this case. However, if this case be erroneously decided in consequence of the loss or destruction of letters, it is the misfortune of the defendant upon whom it is incumbent to produce some special instruction authorising the sale in question, which, *prima facie*, involved a breach of duty on the part of the agent. If this be so, the only questions that remain, are, first, whether Miss *Lefferty* can be fixed with notice of her brother's misconduct ; and second, whether time or laches forms a bar to the present claim. Upon the first point, it cannot be doubted that Miss *Lefferty* must be deemed to have had notice of the invalidity of the present sale. It was indeed patent to every one dealing for the estate. The power of attorney was of course seen, imposing on the agent the duty of exercising a sound discretion as a prudent owner, in the disposition of the estate, and the local situation

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and advantages of the property made it plain that a sale in one lot of an undivided moiety was, in the absence of a special instruction authorising it, a breach of duty in the agent. It became, therefore, the duty of the purchasers to call for such a special instruction, and none such was produced. Then, is the time that has elapsed in the present case, and the inaction of the plaintiff and his mother, a sufficient bar to the suit? Upon this part of the case I have entertained much doubt. It seems a strong measure to disturb a purchaser, who has been in the undisturbed possession of the property for fourteen or fifteen years. And yet the circumstances on the other side are extremely strong to excuse the delay that has occurred. Mrs. *Kerr* repudiated the sale very decidedly from the first, and appears to have entertained hopes for some time that it would be voluntarily rescinded. She then instituted legal proceedings in order to have it annulled, but was stopped by an order for security, to which doubtless the defendants were entitled, but which it appears that Mrs. *Kerr* was unable to furnish. I think I must hold this obstacle to be the cause of the suspension of proceedings. They cease from the time the order is obtained; the same motive which induced her to institute, would have likewise led her to prosecute, the suit; and we find her stating in one or two of her letters that she could not name a single individual to whom she could apply in this emergency. She survives the sale only two years, and at her death, her heir-at-law, the present plaintiff, is a youth of fourteen, who does not of course attain his age for seven years afterwards, and who, being attached to the army, is probably absent on foreign service during part of the interval, and who, at all events, does not visit this country until a year or two before the commencement of this suit. All this Miss *Lefferty* certainly knew, and she knew that her title was insecure and might be questioned at any time.

It does not appear that any great change has taken place in the condition of the property, except that, no

1859.

Kerr
v.
Lefferty.

Judgment.

1859. doubt, it has progressively increased in value, like all other property in the country, especially that which is so favourably situated at the present. Under these circumstances, I think, I must hold that the delay which has occurred forms no bar to the present suit.

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v.
Lefferty.

It is true that the death of *J. W. Lefferty* has occurred in the interval; but if the suit had been commenced in his lifetime, would he not have been properly a party, or could he have given evidence? Even if he could, is it likely that it would have been material? It must have been by the production of letters, for the parties had never met. Upon evidence of this sort, which may formerly have existed, and may not now be forthcoming, I have already remarked. Then it is to be considered that the former suits were certainly commenced at a time when the evidence, if admissible, could have been obtained, but these suits were stopped; the plaintiff is a minor until 1853, and absent from the country until a year or two before the commencement of this suit.

Judgment.

I think the gift to *J. W. Lefferty* must be confirmed and established; but the sale to Miss *Lefferty* declared void and annulled. I shall give no costs. I think an enquiry should be directed as to the payment of the purchase money. I am not satisfied that more light may not be thrown on that part of the transaction. *William J. Lefferty* was present, but has not been examined on the point. The payment to *J. W. Lefferty* would be good.

Miss *Lefferty* will be entitled to be repaid what was paid, with interest, and must account for the rents and profits of the estate. Upon payment of what may be reported due, the undivided moiety must be reconveyed.

I omitted to state the way in which I arrived at the conclusion that when Mrs. *Kerr* authorised a sale of her undivided moiety for £1000 sterling, it was clear of incumbrances, so that she might

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receive that sum clear of deduction. It is clear that Miss *Lefferty* intended to pay £628 for her property, and to discharge the mortgages herself. She says she actually paid this sum to her brother, and I think Mrs. *Kerr* perfectly understood that she was to receive the £628 clear of the mortgages. This sum she calls "pitiful and paltry, and of no use;" but if the moiety of the mortgages had been deducted from the £1000 sterling, she would not have received much, if any, more, and therefore I am satisfied that when she authorised the sale of her undivided moiety for £1000 sterling, she meant clear of the incumbrances.

1859.

Kerr
v.
Lefferty.

IN APPEAL.

[*Before the Hon. The Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Sprague and the Hon. Mr. Justice Hagarty.*]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

THE COMMERCIAL BANK V. THE BANK OF UPPER CANADA.

Collateral security on real estate to bank.

Held, on appeal, affirming the decision of the court below, that the Dec. 25, 1859, and Feb. 3, 1860, chartered banks of this province are entitled to take, by way of security for debts contracted in the legitimate business of banking, mortgages on real estate, although where money is advanced at the same time that the mortgage is executed, it would be a question of fact for a jury to determine whether the mortgage was in truth taken to secure the transaction on the bill or note discounted; or the bill created for the mere purpose of upholding and giving colour to the mortgage.

A mortgage was created by way of collateral security for the sum of £2,800 debts, then past due to one of the chartered banks, and also £1000, then advanced by the bank to the mortgagor, who afterwards created a second mortgage to the bank for £750, and interest; that instrument expressly provided that it and every thing therein contained should be subject to the payment by the mortgagor of the amounts mentioned in the former mortgage. *Held*, affirming the decree of the court below, that the first mortgage was void as to the £1000, but was valid to secure the amount of £2,800, notwithstanding that the notes held by the bank at the date of the mortgage had been retired by the discount of other paper from time to time; and also, that the second mortgage was an existing security as to the £1000, though void as to the amount of £750 advanced at the time of its execution.

The bill in the court below was filed by the *Commercial*

lands, tenements, and premises, for the repayment of such sum, in addition to the sum of £2886 16s. 3d., and had agreed with the said party of the second part for the payment of all the said amounts as hereinafter mentioned. And reciting that it had been agreed between the said parties of the first and second parts, that the said parties of the second part should forbear, and give to the said party of the first part, two years for the payment of the said several sums, amounting in all to the sum of £3886 16s. 3d. on this express condition: that the said party of the first part should, within every three months of the said period of two years, computing from the date of the said indenture, or from the maturity of the notes set forth in the said schedule marked A., and from time to time thereafter as the party of the second part might require, furnish to the said party of the second part for discount, every three months, at Belleville, good bankable promissory notes or acceptances of the customers of the said *Bull Brothers*, which firm consisted of *George Lewis Toissant Bull*, and *Samuel James Bull*, to be approved of by the agent of the said party of the second part, and payable to, and endorsed by, the said *Bull Brothers*, and endorsed also by the said *H. Bull*, the younger, and should continue to receive the same, as they should mature and become due during the said period of two years, paying discount on each note or acceptance in cash in advance, and paying the whole of the said sum of £3886 16s. 3d. on or before two years from the date of the said indenture, and such portions thereof as might then be remaining unpaid; and that the sum of £1000 was then advanced by the Bank of Upper Canada, and the lands therein mentioned and described were conveyed to the bank by way of mortgage.

This bill further alleged, that on the 13th of July, 1855, *Bull* executed another mortgage upon other lands to the bank for securing £750, and interest, in which was contained a proviso that this conveyance and every

1859.

Com'l Bank
Bank of U. C.

Statement.

1859. *thing contained, shall be subject to the payments by the said Henry Bull, the younger, of the amounts mentioned in a certain other mortgage, bearing date, &c., being the one before referred to.*

Com'l Bank
v.
Bank of U.C.

The documentary evidence put in fully established the fact that the indebtedness of *Bull* at the date of the first mortgage had been all paid off by the proceeds of other notes discounted by the bank for him, although there still remained due an amount exceeding the sum that he was at that time indebted to the bank.

Mr. *Roaf*, for the appellants (the plaintiffs in the court below,) contended that the Bank of Upper Canada could not take security on real estate for notes then current; but if they could, then as to the £1000 the mortgage was clearly void. The second mortgage of the 13th of July, 1855, was void as being directly in contravention of the charter. The deed itself states the consideration for it to be a loan and advance by the bank of £750; being void on this ground, it cannot be held to make good the security for £1000, as to which the mortgage of the 21st of May was clearly invalid. The debt due by *Bull* in May, 1855, having been all wiped away by the discount of other paper, a decision in favour of their claim would be in effect deciding that the banks of this province may take security on lands to cover any floating balance.

Mr. *Crickmore* and Mr. *McDonald*, for the defendants.

The cases principally relied on by counsel are mentioned in the report of the case in the court below, *ante*, page 260.

The judgment of the court was delivered by

SIR J. B. ROBINSON, BART., C. J.—I concur in the

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judgment of the court below on the following points, namely: 1859.

Com'l Bank
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1st. That the first mortgage was valid as to the £2800, &c., debts before contracted, but not valid to secure the £1000 therein recited, as agreed to be advanced, though endeavoured to be maintained on the footing that it was given to secure a new loan made for better enabling the party to pay his then subsisting debt.

2ndly. That as to the £1000, that sum having become a debt due, and being outstanding in promissory notes &c., before and when the second mortgage was given, the same could be secured by such second mortgage, according to the intention of that deed.

3rdly. That as to the £750 advanced upon the second mortgage, though a note was given for it, at the same time, yet if the money was in fact advanced on the security of the land, the mortgage would be void as to that sum. Judgment.

I don't see that the accounts supply any material ground beyond what the evidence does.

It cannot be material that *Henry Bull*, junior, who gave the mortgages, was not a member of either of the firms of *Bull Brothers*, or *Henry Bull & Co.*, for a debt incurred by him to the bank, on account of third parties, could as well be secured by him by mortgage on his lands as a debt contracted on his own account; and besides, for the two sums first mentioned in the mortgage of May, 1855, viz., £1008 3s. 2d., and £1276 10s., the mortgagor does seem to have been liable as endorser.

For the smaller sums due on *Gordon's* and *Smith's* notes, for all that appears in the mortgage, or otherwise, he may have been liable upon them or not; he could equally, I think, have given a mortgage upon his lands

1859. *Com'al Bank v. Bank of U. C.* to secure the debts due to the bank upon them by any party, and by which I mean debts due before the giving of the mortgage, as all those yet referred to were.

I also agree with the court below in thinking that it is of no consequence that all of these debts which I have yet mentioned were kept afloat by the bank for a period beyond that when payment might have been enforced, either according to the terms of the bills or notes that had been given for such debts, or of the mortgage, which was taken as additional security. Neither the giving of such indulgence, nor the mode of giving it, can in my opinion affect the validity of the mortgage.

Judgment. Then as to the next sum mentioned in the first mortgage to the *Bank of Upper Canada*, namely, the £1000, which it is recited in the mortgage was a sum then agreed by the bank to be advanced by them to the mortgagor, that money, it appears by the evidence, was advanced afterwards, as it was required, upon cheques drawn for it, and it went to *Bull Brothers*, upon an arrangement between them and the mortgagor.

It was proved by the mortgagor, *Henry Bull*, junior, that this advance of £1000 "was made in order to obtain further security for the past due notes, of which the security was not considered good, and to enable the firm to carry on their business; that the overdue paper would not have been good without security upon real property: that the parties, including himself, were not good for the amount, there being competing claims which had priority; and that he objected to give the mortgage unless the bank would advance more money to the firms to enable them to carry on their business."

It is a nice question, and an important one to be determined, whether the chartered banks could at that time, and even now, (for the law has not been altered since 1855,) take a mortgage upon real estate to secure

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Com'l Bank.
Bank of U. C.

In the argument before us the 19th section of 6 Vic., ch. 27, was alone referred to, I think, as the enactment on which the question turned; but it is necessary also to look at the statute 13 & 14 Vic., ch. 22, an act applying to all banks chartered by our legislature. That may not be found to place the restriction or privilege (whichever it may be called) on which the question before us turns, upon any footing different from the statute 6 Victoria. But it is necessary to keep the statute 13 & 14 Vic., ch. 22, distinctly in view. Looking at both acts, I agree in thinking that the mortgage of May, 1855, was not valid as a security for the £1000 only then required to be advanced

For all that appeared the mortgagor was at liberty to draw that sum afterwards, and apply it in any way he thought fit; and that being so, it cannot, I think, signify that the object in view probably was to enable the firms, or either of them, the better to work their way out of their previous indebtedness, either by extending their business, or by paying off the more urgent creditors, or in any other way. judgment.

That would only shew what the motive was for acting against the provision of an act of parliament; it could not take the case out of the provision. But it is clear that it was contrary to the statute or statutes for the bank to agree to lend to the mortgagor £1000 upon security of real estate. It seems to me that cannot be denied. The words of the 19th clause of 6 Vic., ch. 27, are expressly against it, and there is nothing in 13 & 14 Vic., ch. 22, relieving banks from that restriction. The exception in the 19th clause, which is put more in the shape of a grant of privilege in the later act, allowing banks "to take mortgages on real property, by way of additional security for debts contracted by any such bank

1859. *in the course of its business,*" cannot, I think, be reasonably taken to sanction the taking the mortgage on real estate in this case to secure the £1000 then lent, and lent as it appears, upon that security; and the prohibition contained in the first part of the 19th clause of 6 Vic., ch. 27, which is not repealed by the 13 & 14 Vic., ch. 22, makes the point plain against the validity of the security.

Com'l Bank
v.
Bank of U. C.

It is quite true that whenever the money is advanced, whether it be just before or at the time of making the mortgage, then there is literally a debt due, but not a debt contracted in the course of the business of the bank, that is, of its legitimate and proper business, which the *lending money upon mortgage* of real property certainly cannot be, until the statutes are repealed or altered.

Judgment. When it is shewn that the mortgage in any case was taken by a bank "as an additional security for a debt contracted to it in the course of its business," then the question occurs whether that can only be taken to mean a debt that had been *previously* incurred with it in the course of its business, or whether a mortgage may not be taken as an additional security for a debt that had no previous existence, but which the bank were about to allow a party to contract, by advancing him money at that time in the proper course of their business; as, for instance, if any merchant had brought to the bank, on the 21st of May, 1855, for discount, a bill drawn by *Henry Bull, junior, on Bull Brothers*, and accepted by the latter, could the bank properly have taken a mortgage from either party to the bill, or from the person who brought it and got the money, to secure them in the money which they advanced upon the bill? That is not this case, and I shall only therefore say, that, as the words of the statute are not against it, so I think it might perhaps be held that the spirit and intention of the act are not opposed to it; and that a mortgage so taken might be upheld, when it appears that the mortgage

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was really and in truth taken to secure the transaction upon the bill, and not that the bill was created for the mere purpose of upholding and giving colour to the mortgage. That would be a question of fact, upon which the conclusion that a jury might come to would be in general so uncertain that I dare say the banks will not think it prudent to risk their money on a real security in any such case, where the nature of the transaction might appear to be at all equivocal—so long, I mean, as the present statutes continue in force.

1859.
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None of these observations, however, are intended to apply except to the question of maintaining the mortgage of the 21st of May, as a security for the £1000. I think it was rightly determined in the court below that it could not be maintained, because that money seems in this case to have been strictly "lent upon the mortgage."

But when the money was afterwards advanced to the firm from time to time by way of discounts, it became a debt due to the bank, though the mortgage given in anticipation of the advances was not available for enforcing it; and the notes which were held by the bank for the £1000 at the time of the mortgage subsequently given, could, I think, be legally secured by the mortgage upon real property given in July, 1855, as by the terms of that mortgage it was secured; the £1000 having, as Mr. *Holden's* evidence explains, been drawn from the bank, by discounts of paper after the first mortgage was given, and being thus due to the bank at the time of giving the second mortgage, and due to it for debts contracted in the course of its business. As to the sum of £750 advanced by the defendants on the second mortgage, I do not think that payment of it can be enforced under that mortgage.

Judgment.

I think, therefore, that the judgment below must be affirmed, and the appeal dismissed with costs.

1859.

CHANTLER v. INCE.

Vendor and purchaser—Sale of premises subject to incumbrance.

Where property is sold upon credit, and the vendor executes to the purchaser a bond for the due conveyance of the estate, free from incumbrances, on payment of the last instalment of the purchase money, the purchaser cannot, during the currency of the term of credit, call upon the vendor to remove a mortgage created by him upon the property, or to allow the purchaser to apply his purchase money as it becomes payable in discharge of the incumbrance.

This was a motion by Mr. *Barrett*, for defendant, to dissolve an injunction restraining an action at law brought to recover the price of a piece of land sold by the defendant to the plaintiff, on the ground that the property agreed to be conveyed was subject to a mortgage created thereon by the vendor

Mr. *Strong*, contra.

Judgment was delivered by

Judgment. THE CHANCELLOR.—On the 26th of June, 1857, the plaintiff purchased certain property in the village of Newmarket, from the defendant *Ince*, for one hundred pounds, payable as follows: one-fourth in hand, and the balance in three equal annual instalments, with interest. This agreement was carried out by means of two bonds. The plaintiff became bound to the defendant in the penal sum of £200, conditioned to be void on the payment of £100 at the times, and in the manner already stated, that is to say, one-fourth upon the execution of the bond, and the remaining three-fourths in three equal annual instalments, with interest. The defendant also became bound to the plaintiff in the like penal sum. This instrument recites the contract of sale, and the condition is, that if the purchaser shall pay his purchase money at the times and in the matter specified, then if the vendor shall convey the premises to the purchaser by a good and sufficient deed, free from incumbrances, the obligation to be void. One-fourth of the purchase money was paid upon the execution of the bond, and the purchaser was

let into possession when it fell brought upon was thereupon performance described: in to an outstanding which is said defendant motion that the purchase to that purpose from proceeding

An injunction defendant, I

It is unnecessary would have or questioned no case of the controverts asserts that the case made my purchase you have agreed incumbrances payment of the property is subject although the arrived, and money, I insist yourself, or the shall be applied which the plaintiff The defendant June, 1860, for the purchase order him to pay

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let into possession. The first instalment was not paid when it fell due, and an action was in consequence brought upon the plaintiff's bond, and the present bill was thereupon filed. The bill is not one for specific performance. The contract is stated in the way I have described: it is then alleged that the premises are subject to an outstanding mortgage, created by the defendant, which is said to be due, and the plaintiff prays that the defendant may be ordered to pay off the mortgage, or that the purchase money due from him may be applied to that purpose, and that the defendant may be enjoined from proceeding with his action at law

An injunction was granted upon motion, which the defendant, *Ince*, now asks to have dissolved.

It is unnecessary to consider what the consequence would have been if the bill had either stated an eviction, or questioned the validity of the defendant's title, because no case of that kind has been made. The bill neither controverts the validity of the defendant's title, * nor asserts that the plaintiff's possession has been disturbed. The case made by the bill is this,—I have agreed to pay my purchase money in three equal annual instalments; you have agreed to convey the property to me free from incumbrances, at the expiration of that time, and upon payment of the purchase money; I now find that the property is subject to a mortgage created by you, and although the time at which you agreed to convey has not arrived, and although I have not paid my purchase money, I insist that you must either pay off that mortgage yourself, or that the money which I am bound to pay shall be applied to that purpose. Now this is relief to which the plaintiff has not in my opinion any right. The defendant's agreement is to convey on the 26th of June, 1860, free from incumbrances, upon payment of the purchase money. Upon what principle am I to order him to pay off now, incumbrances which he has not

Judgment.

* See *Thompson v. Brunskill*, post.

1859. *Chantler v. Ince.* agreed to pay off until the time fixed for the conveyance? And if it would be contrary to the agreement to compel the defendant to pay off this incumbrance now, it would be equally so, I think, to compel him to apply the plaintiff's purchase money to that purpose.

Upon the merits, therefore, I am of opinion that the injunction should be dissolved. Mr. *Strong* objects, however, that the application must fail, first because the injunction having been granted on notice, cannot be dissolved upon motion, except by leave of the court; secondly, because the injunction being an injunction against *Ince* and *Kissock*, cannot be dissolved at the instance of *Ince* alone, or at least without having *Kissock* before the court.

The answer to the first of these objections, if tenable, is, that leave has been expressly reserved, and *Lewis v. Smith*, (a) cited by Mr. *Strong*, is a clear authority against the other objection.

Judgment.

LESLIE V. PRESTON.

Specific performance—Acceptance of title.

Where the vendor sells only such title as he has, the purchaser cannot require a good title to be shewn, but will be compelled to complete his purchase although the vendor does not shew a good title, or although the title appear to be not good. But where a vendor by the terms of the agreement, bound himself to convey only as good a title as he should obtain from his vendor, and it was shewn that neither of these parties had any title whatever to the property agreed to be sold, and that the vendor had misrepresented the state of the title, and had induced the purchaser to give the full value of the land: the Court [*BLAKE, C. diss.*] refused to enforce the agreement; but, under the circumstances, dismissed the bill without costs.

The bill in this case was filed by *Guy Leslie* and *John Simpson*, the executors and devisees in trust, and the widow and infant children of *James Donaldson*, against *Samuel Preston*, setting forth that in September, 1851, the testator had entered into an agreement with the defendant for the sale to the defendant of 100 acres of land,

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Mr. *Fitzger*

1859.

Leslie
v.
Preston.

in Garafraxa, for £100, which agreement was in the form of a bond from the testator, conditioned for the conveyance thereof by him to the defendant, on payment of the full amount of purchase money, therein stated to be payable by instalments, the last of which would be payable in 1858, by as good and sufficient a deed of conveyance of the said land "as he the said James Donaldson, his heirs, executors, or administrators, may obtain from the Commercial Banking Company;" that it was then doubtful whether Donaldson would obtain a good title from the bank, and for that reason the agreement was drawn binding him to convey only such title as he might obtain, and that in pursuance of that agreement the defendant was at the date thereof admitted into possession of the land, and has since remained in such possession.

The bill prayed an injunction to restrain an action brought by the defendant against the plaintiffs, *Leslie* Statement. and *Simpson*, on the bond, alleging as a breach that neither the Commercial Bank nor the testator had any title to the land, and for specific performance of the contract; the plaintiffs offering in the terms of the condition to convey all the interest held by the testator under the conveyance to him from the Commercial Bank.

The defendant answered the bill, denying any knowledge on his part of the title being doubtful, and alleged that he expected to receive a good title. The witnesses examined before the court proved that the price agreed to be paid by defendant was the full value of the land, if the title were good, and that at the time of the testator executing the bond nothing was said as to the existence of any defect in the title. It appeared that the title had never been vested in either the bank or the plaintiffs.

Mr. Fitzgerald, for the plaintiffs.

1859.

Mr. *Alexander Cameron*, for defendants.

Leslie
v.
Preston.

THE CHANCELLOR.—This case turns upon the proper construction of the contract of sale between *James Donaldson*, the plaintiff's testator, and the defendant.

The condition of the bond for a deed into which *James Donaldson* entered, recites the contract for sale, and the terms of payment, and then provides, that "if the said *James Donaldson*, his heirs, &c., shall, as soon as the last of the said instalments is paid, make and execute and deliver to the said *Samuel Preston*, (the defendant,) his heirs, &c., as good and sufficient a deed of conveyance of the said west half of lot No. 8, in the 14th concession of the township of Garafraxa, as he, the said *Donaldson*, his heirs, &c., may obtain from the Commercial Banking Company; then this obligation to be void," and the question depends upon the meaning and legal effect of
Judgment. that passage.

The defendant asserts that the plaintiffs have no title whatever to the property in question, inasmuch as the Commercial Bank had none, and that this court ought not to restrain him, under the circumstances, from proceeding at law to recover back his purchase money.

The plaintiffs, contend, on the other hand, that the defendant is not in a position to object to their title, inasmuch as *James Donaldson* only contracted to convey such title as he should derive from the Commercial Bank; and as they are prepared to fulfil that contract with the assistance of this court, to which they are entitled, they insist that the defendant ought to be restrained from proceeding at law to recover his purchase money.

It cannot be doubted that a vendor of real estate may contract to sell it with such title as he may happen to have, and when that is fairly and clearly stipulated, it is

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It is true that the condition expressed; and when the land is allowed to come to himself. (b) that the vendor that appears the meaning of the purchaser is in equity, and clearly shewn

It must be is the strongest advanced by the if it may not recent cases stipulates that title, the purchaser he can himself But these cases The plaintiffs' against being contracted to sell derive from the within the principle *Wilmot v. Wilmot* and by which it

(a) *Freme v. Wilmot*, 506; *Duke v. Barnard*, 562; *Rhodes v. Ilford*, & C. 207.
(c) 10 B. & C. 24.
(d) *Shepherd v. Farnham*, 722.

clear, I apprehend, that the purchaser is precluded from objecting to the vendor's title. (a) 1859.

Leslie
v.
Preston.

It is true that conditions of this sort, which have been termed conditions against common right, must be clearly expressed; and it is clear upon reason and authority, that when the language is ambiguous the purchaser must be allowed to construe them in a manner most advantageous to himself. (b) But when the contract expresses clearly that the vendor is only selling such title as he has, and that appears to me, I must confess, to be the undoubted meaning of the contract in the present case, then the purchaser is precluded from objecting, both at law and in equity, and must accept the vendor's title though clearly shewn to be bad.

It must be admitted that *Spratt v. Jeffrey*, (c) which is the strongest authority in favour of the proposition advanced by the plaintiffs, has been repeatedly doubted, if it may not be said to have been overruled; and recent cases go to shew that when the vendor only stipulates that he shall not be required to produce his title, the purchaser cannot be compelled to complete if he can himself shew *aliunde* that the title is bad. (d) But these cases do not appear to me to touch the present. The plaintiffs' testator did not merely guard himself against being called upon to produce his title; he contracted to sell the estate with such title as he might derive from the Commercial Bank. This case comes within the principle established by *Ferne (v.) Wright* and *Wilmot v. Wilkinson*, to which I have already referred, and by which it is in my opinion governed. Judgment.

(a) *Ferne v. Wright*, 4 Mad. 364; *Wilmot v. Wilkinson*, 6 B. & C. 506; *Duke v. Barnett*, 2 Col. 337; *Hurpe v. Bentley*, 5 D. & S. 520.

(b) *Symons v. James*, 1 Y. & C., C.C. 487; *Seaton v. Mapp*, 2 Col. 862; *Rhodes v. Ibbetson*, 4 D. M. & G. 787; *Southby v. Hut*, 2 M. & C. 207.

(c) 10 B. & C. 249.

(d) *Shepherd v. Keatly*, 4 Tyr. 571; *Tellich v. Trevor*, 11 M. & W. 722.

1859.

Leslie
v.
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I referred, during the argument, to Lord *Lyndhurst's* decision in *Warren v. Richardson*, (a) which created a doubt in my mind whether this court would compel a purchaser to accept a title shewn to be bad, even under a contract framed like the present. But, upon reflection, that case does not appear to me to apply. If a contract to sell an estate with such title as the vendor may happen to have be lawful, it follows that a purchaser who has entered into a contract of that sort cannot object to receive such a title as the contract calls for; such a title as he has deliberately agreed to accept; and when such a contract has been fairly and deliberately entered into, there is no principle, as it seems to me, upon which it can be determined that a decree for specific performance would be inequitable.

For these reasons I am of opinion that the plaintiffs are entitled to a decree for specific performance, but without costs, as it was the vendor's death which rendered the suit necessary.

ESTEN, V. C.—I do not think that there was any misrepresentation, or that *Donaldson* sold more than the title of the Commercial Bank, but I doubt whether equity will enforce such a contract, when it clearly appears that there is no title whatever; and whether, in the exercise of a discretionary jurisdiction, it will not rather leave the parties to law. It is true that where a vendor sells only such title as he has, the purchaser cannot require a good title to be shewn, but will be compelled to complete his purchase, although the vendor do not shew a good title, or although the title appear to be not good. But what I doubt is, whether, where it appears that there is no title whatever, as where A. first sells to B., and then to C., then C. sells such title as he has to D., and all this clearly appears, the court will compel the specific performance of the agreement on D.'s part, and will compel

(a) *Young* 1; see *Bentley v. Hume*, 5 D. & S. 527; *Cripps v. Reade*, 6 T. R. 606.

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SPRAGGE, V.

him to pay his money for nothing. No such case has occurred that I am aware of: but in *Warren v. Richardson*, where the title had been accepted, but it appeared in settling the conveyance that it was not good, the court refused to decree a specific performance. It is, however, unnecessary to express a decided opinion on this point, inasmuch as I think the plaintiffs are, on other grounds, not entitled to the decree. I think the circumstances of this case are such that the court ought not to decree a specific performance of this agreement. *Donaldson* sold the land for full value, making a representation as to the title, to satisfy the defendant; drew the writings himself and in such a manner as to make himself safe, without any explanation to the defendant, who is not protected by a legal adviser. At the same time it may be suggested that the peculiar form of the contract was owing to the way in which the title was circumstanced, the deed not having been obtained from the Bank. On the other hand, I cannot but think it highly probable that *Donaldson* became acquainted with the state of the title when he completed his purchase from the bank, because he procures the estate for exactly half the price he had already asked and obtained from the defendant for it, and he must at least have allowed the defendant to remain under the misapprehension created by his misrepresentations, even if they were made in good faith at the time. If he received the money from the defendant after he knew the truth; or if he knew the truth when he made the bargain, his conduct would in the one case be grossly fraudulent, in the other, highly reprehensible. At any rate this is not a case in which the court should be active in favour of the vendor or his representatives, nor is it necessary to the ends of justice that it should be, for doubtless complete justice can be done at law. I think the bill should be dismissed without costs. I do not think the defendant is affected by any acquiescence.

1859.

Leslie
v.
Preston.

Judgment.

SPRAGGE, V. C., concurs.

1859.

BUCKLAND v. ROSE.

Settlement on wife and children, made in anticipation of future indebtedness void under 13 Elizabeth.

The owner of real estate being about to enter into a business partnership, made a settlement of this property upon his wife and children. The evidence shewed that it was made at the instance of the settlor's wife, who thought the settlor ought to do so, "having regard to the uncertainties of business," and "was made with a view to save the property from any debts which might arise in consequence of the partnership." *Held*, that the settlement so made was void as against subsequent creditors: although at the time of the settlement the settlor was in perfectly solvent circumstances, and no intention of fraudulently withdrawing his assets could be imputed to him, and the property in question was partly paid for by money given to the wife by her father.

This was a foreclosure suit. On taking the accounts, and making the usual enquiries before the master, it was shewn that a settlement of the mortgage estate had been made upon the wife and children of the defendant *Rose*; the trustees of the settlement claimed to rank next in priority to the plaintiff, whose incumbrance had been created before the deed of settlement. The subsequent incumbrancers impeached this settlement as being a fraud upon creditors under the statute 13 Elizabeth, chapter v. The master overruled the objections made to the validity of the settlement. From his report the subsequent incumbrancers appealed.

Mr. *Strong*, for *Howland* and *Fitch*, incumbrancers subsequent to the date of the settlement, who appeal.

Mr. *Hodgins*, for defendant *Medcalf*, a judgment creditor.

Mr. *Fitzgerald*, for the parties interested under the deed of settlement.

Mr. *Hector*, for the plaintiff.

The circumstances under which the settlement was made are clearly stated in the judgment of

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SPRAGGE, V. C.,—[before whom the appeal was heard.]—The question raised upon this appeal is, whether a settlement made by the defendant *Rose* upon his wife and children, is void under the statute 13 Elizabeth. The opinion of the master was that it was valid.

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Rose was the owner of a distillery and premises near the city of Toronto. In the winter of 1853-4 negotiations were on foot between *Rose* and Mr. *Peter Morgan*, of Toronto, for a partnership, to carry on the business of distilling on these premises, when it was agreed that each party should put the sum of £400 cash into the business. In order to raise this sum, and to prepare the premises for business, and to purchase grain, *Rose* made the mortgage to the plaintiff (in which his wife joined for the purpose of barring her dower). The mortgage was made on the 28th of January, 1854, and is for £600. The settlement in question was made on the 28th of March, in the same year. The partnership commenced Judgment. on the 1st of May following, each partner putting in £400 in money, and there being then grain on the premises to the value of about £500.

In addition to the money borrowed from the plaintiff, *Rose* had £550 of his own from other sources; the whole of which appears to have been expended before the actual commencement of business, in altering the distillery, and in buying grain.

The defendant *Medcalfe* was an iron-founder, and was employed by *Rose* in making alterations in the machinery; he commenced in March, 1853, and his account extends to June, 1854, when it amounted to £134 13s. 4d., of this less than £7 was after the date of the settlement. About £38 is stated by *Rose* to have been paid on account, he does not say when. He states that all the persons employed in preparing the premises for business were paid in hand, at the time, with the exception of *Medcalfe*. The partnership was continued

1859. *Buckland v. Rose.* for about a year, when it was dissolved, *Rose* agreeing to repay to *Morgan* the capital advanced by him, and to pay the debts of the concern, which amounted to over £500. The judgment of the defendants *Howland* and *Fitch* was for a partnership debt. The distillery property at the date of the plaintiff's mortgage, as estimated by *Morgan*, was worth from £2500 to £3000, and does not appear otherwise incumbered.

The English decisions upon the point are conflicting. We have had occasion to consider it in two cases, in this court, *Gillespie v. Grover*, (a) followed by *Goodwin v. Williams*, (b) *Townsend v. Westacott*, (c) before Lord *Langdale*; *Skarf v. Soulby*, (d) before Lord *Cottenham* on appeal from Sir *Laucelet Shadwell*, and *French v. French*, (e) before Lord *Cranworth*, have placed the law upon a much more satisfactory footing than formerly—they are all referred to in *Grant's Reports*, and I need not recapitulate them now. The principles established seem to be that a voluntary settlement is not *per se* fraudulent; that fraud is always a question between those claiming under the settlement, and creditors; that the existence of indebtedness at the time, and the amount of that indebtedness considered with reference to the debtor's means of payment are most material considerations, and that a settlement may be fraudulent, even if there be no indebtedness at the time, if made with the intention of defeating those to whom the settlor intends to become indebted. Upon this last point the language of Lord *Hardwicke* in *Stileman v. Ashdown*, (f) is explicit. "It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement, to make it fraudulent, for if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside;" and again in *Townsend v. Windham*, (g) the same eminent

(a) Ante vol. III., p. 558.

(c) 2 Beav. 340, and 4 Beav. 58.

(e) 2 D. M. & G. 95.

(b) Ante vol. v. 559.

(d) 1 McN. & G. 364.

(f) 2 Atk. 477.

(g) 2 Ves. at p. 10.

judge says: estate or charge, though he a conveyance or badge of creditors, the collusion, or appears, that stand though late case of. to upon the appears need statute, which making covering provides that all intent or purpose or defraud creditors actions, &c.)

It is contended an indebtedness still contracted incurred since of the cases of indebtedness to the intent to defraud void.

Upon the first Chancellor in *J. v. J.* "Now the first indication that voluntary is the If the settlor made the settlement which his creditors themselves, but withdrawn; the

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judge says: "If there is a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards become indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to receive or defeat subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void; otherwise not, but it will stand though afterwards he becomes indebted." The late case of *Jenkyn v. Vaughan*, (a) may also be referred to upon the same point. Indeed such a conclusion appears necessarily to follow from the language of the statute, which, after reciting the prevalent practice of making covinous assignments to defeat creditors, provides that all feoffments, &c., of lands, &c., made for any intent or purpose before declared, (*i. e.*, to delay, hinder or defraud creditors or others, of their just and lawful actions, &c.,) shall be void.

Judgment.

It is contended that this settlement is void, there being an indebtedness at the time to *Medcalfe*; which indebtedness still continues, and there having been other debts incurred since; the ordinary ground upon which most of the cases proceed: and secondly, that apart from the indebtedness to *Medcalfe*, the settlement was made with the intent to defeat future creditors, and it is therefore void.

Upon the first point, the language of the Lord Chancellor in *French v. French*, is apposite. He says: "Now the first question is, what is to be held to be an indication that a person making a settlement which is voluntary is thereby intending to defeat or delay creditors? If the settlement is made by a person who, if he had not made the settlement, would have had property upon which his creditors might immediately fasten, and pay themselves, but which by the settlement being made, is withdrawn; that, *primâ facie*, is an act which must delay

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them;" and he then proceeds to put cases in illustration of his position, as, when the property of the settlor greatly exceeds the settled property and his debts, the settlement could hardly be said to be with intent to defraud creditors; but when the settlement left insufficient to satisfy debts, the settlement should be held void under the statute, although the settlor might have reversionary interests or property in the East Indies; or debts owing to him, which if he can, he may recover, or which he may not recover at all;" and he adds: "If the immediate effect is to withdraw assets that were immediately available, so that they are placed beyond the reach of the creditors, this is clearly a delaying within the meaning of the statute."

Judgment. What was withdrawn by the settlement was the distillery property, the settlor not having, so far as appears, any other real estate. What was left was the settlor's household furniture, the description and value of which are not shewn, and the interest of the settlor as partner in the grain and other chattel property connected with the business. Applying, then, to *Medcalf's* debt the test proposed in *French v. French*, I incline to think that the settlement should be held void; not that I think there was an actual intention that his debt should not be paid, but there was such a withdrawal of available assets as left him nothing tangible, but the furniture, for the satisfaction of his debt, and the sufficiency of that does not appear. I do not mean that the settlor's interest in the personal property of the partnership could not be made to answer his debts, but that would be more like the case of the reversionary interests, distant property and debts due to himself, put by Lord *Cranworth*, than assets immediately available.

Upon the second point, it is proper to refer to the evidence. There are two passages in the examination of *Rose* himself, which are material. In one he says: "In making the settlement of 1854, I was requested by

her (his wife) so, having regard to another passage in this matter in this matter in consequence of the her I mean—b debts." I believe purpose for which it was expected fully sufficient to no creditor would I think this was not think that the honest purpose But still the consequence their not being looked to; and that for that contingency

I have not seen to this. It must be principles upon which first the statute property with in creditors, or other &c., shall be void. to future creditors settlement, and also of the settlement,

In this case the contemplation; and reference to those settled property to creditors, who may property were placed contemplated that absolutely, but if t

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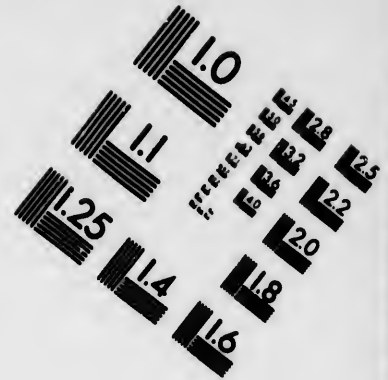
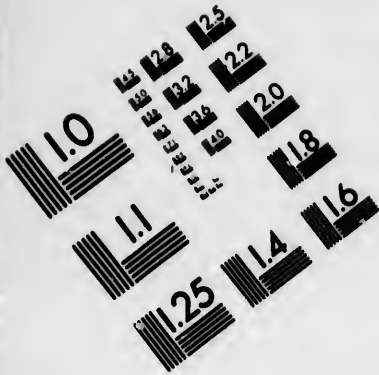
her (his wife) to do so—my wife thought I ought to do so, having regard to the uncertainties of business." In another passage: "The settlement on my wife (in question in this matter) was made with a view to save the property from any debts which might arise in consequence of the partnership—to save the property for her I mean—but at the time I did not anticipate such debts." I believe that these extracts shew, truly, the purpose for which this settlement was made. I believe it was expected that the partnership assets would be fully sufficient to answer the partnership debts, and that no creditor would go unpaid; and under the circumstances I think this was a very reasonable expectation. I do not think that there was in this case a deliberately dishonest purpose to contract debts and not to pay them. But still the contingency of debts being contracted, and their not being satisfied by the partnership assets, was looked to; and the object of the settlement was to provide for that contingency.

Judgment.

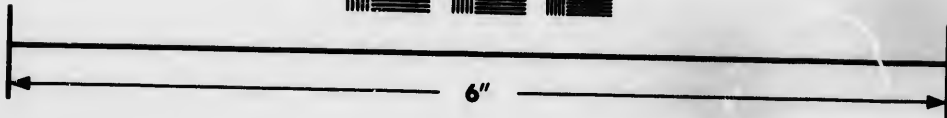
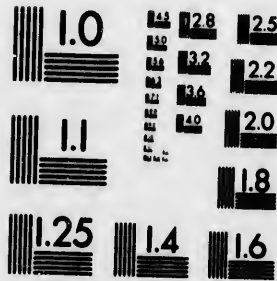
I have not seen any case similar in its circumstances to this. It must be decided by the statute, and the principles upon which other cases have proceeded. And first the statute; it enacts that alienation or gifts of property with intent to delay or defeat or defraud creditors, or others, of their just and lawful actions, &c., shall be void. The statute has been held to apply to future creditors, as well as creditors at the date of the settlement, and although there be no creditors at the date of the settlement, if made with intent to defraud them.

In this case the contracting of future debts was in contemplation; and the settlement was made with express reference to those future debts, and the liability of the settled property to satisfy them; there would then be creditors, who *might* be delayed or defeated, if this property were placed beyond their reach. It was not contemplated that they should be delayed or defeated absolutely; but if the partnership property should fail,





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1859. then they were to be defeated or delayed, because this property was to be beyond their reach, otherwise there was no meaning in the settlement. The settlement in fact was to answer this purpose. In the event of an unsuccessful business, leaving insufficient for creditors, those creditors were *quoad* the settled property to be defeated. If the business turned out successful, the occasion it was to serve would not arise. It was made in the words of the parties to it: "having regard to the uncertainties of business;" and "with a view to save the property from any debts which might arise in consequence of the partnership, to save the property for her," the settlor's wife.

Does it follow, if such a settlement be void, that no man in business, or about to enter into business, can make a settlement which will stand, however ample may be his means? I think the court must in each case judge of the intent and object with which it is made. Settlements are generally made upon marriage, either of the settlor or of his children, and in such cases are, as a general rule, valid. But even when made on other occasions, a man's income may be so ample as to exclude the idea of the object being to defeat creditors; yet, if it should afterwards have that effect, his position at the time, and his probable intent, would, I apprehend, be narrowly scanned; and if it could be made out that his real object was to defeat creditors, I think the settlement could not stand, although the settlor might think, and have reason to think, that the probability of the property being required as assets to pay those creditors, was very remote. What is the true position of the settlor? He contemplates a contingency that *may* arise; and upon its arising, that there will be two sets of claimants for the subject property, one, his children, the other, his creditors: he prefers the claims of his children; the *law* as between the two holds that the creditors have the better right; as it is sometimes put; "a man should be just before he is generous;" or, "the claims of affection must yield to those of justice."

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Rose.

Now, after that I have been distinguished between a naked case of indebtedness, and a settlor intends a difference in of flagrant dis creditors shall all is only this that in one ev intends that in necessarily a se defeat creditors is about to e therefore in m Elizabeth.

But it is urged voluntary, having which is thus s refused to join ment was mad make the settler mortgage." He a mortgage for daughter as her and brought out belonging to him not agree to co was invested in self and family. are only urged fraudulent char on the part of th mortgage money realised through benefit of the wi husband; but sti

Now, after giving the question the best consideration that I have been able to do, I confess I can see no sound distinction between such a case as this, and the bare naked case of making a settlement with a view to future indebtedness, and of defeating the creditors to whom the settlor intends to become indebted. There is, of course, a difference in degree, the last is a case of plain fraud, of flagrant dishonesty—the settlor intending that his creditors shall in no case be paid. But the difference after all is only this, that in the other case the settlor intends that in one event only his creditors shall be paid; he intends that in another event they shall not. It is then necessarily a settlement made with intent to delay and defeat creditors, in case the business in which the settlor is about to engage should prove unsuccessful, and is therefore in my judgment within the statute of 13th Elizabeth.

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But it is urged that this conveyance was not merely voluntary, having been made upon a good consideration, which is thus stated by *Rose* in his evidence: "My wife refused to join in *Buckland's* mortgage unless a settlement was made on her and children. I promised to make the settlement to my wife when she executed the mortgage." He states also, that his wife's father held a mortgage for £500 sterling, which he gave to his daughter as her portion; that the money was realised and brought out to Canada, together with other moneys belonging to himself individually; and that his wife would not agree to come to Canada unless £1000 or £1500 was invested in freehold property, for the benefit of herself and family. These latter considerations, I suppose, are only urged as tending to divest the transaction of fraudulent character, and as shewing moral claims on the part of the wife to a settlement. If, indeed, this mortgage money had been a sum which could only be realised through this court, some settlement for the benefit of the wife might have been imposed upon the husband; but still measured by the amount which was

Judgment.

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Rose.

to be obtained through her. But this mortgage money was the absolute property of her husband, and the wife is not in the same position as if her husband had done voluntarily what this court would have compelled him to do. Indeed, I do not understand any consideration to be urged, except that the wife parted with her dower upon condition that the property was to be settled upon herself and her children.

By the 6th section of the statute 13th Elizabeth, it is provided, that the act shall not extend to any estate or interest in lands, &c., on good consideration, and *bond fide* lawfully conveyed to any person, &c., not having notice of such covin, &c.

Lord *Hardwicke* observed in *Fitzer v. Fitzer*, (a) "where there is a valuable consideration paid or given, the court will not weigh it in too nice scales;" but it seems Judgment, to me that the barring of the wife's dower as to *Buckland*'s mortgage was not so much a consideration for the settlement as that the wife took that occasion to press her husband to make a settlement, which she had pressed upon him before; but however that may be, it is clear that the wife knew the purpose for which the settlement was made, and indeed urged it, with the very view and object which in my judgment makes it void under the statute. Suppose that the settlement was not wholly voluntary, the statute, as was observed in *French v. French*, "says not a word about voluntary settlement," but deals with settlements intended to defeat creditors; and upon this point the sixth section is material—the conveyances saved from the operation of the statute are only those made on good consideration, and *bond fide* without notice, and upon this, it is, I apprehend that the cases have proceeded which have avoided such conveyances, even though made for value.

The well known case of *Bott v. Smith*, (b) was one of

(a) 2 Atk. 511.

(b) 21 Beav. 511.

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great hardship. There was a valuable consideration, and the debt was one which the defendant at law ought not to have had to pay; but inasmuch as the object of the conveyance was to defeat that debt, it was held void under the statute. The case of *Colombine v. Penhall*, (a) was a peculiar one, but was decided, in part at least, upon the same principle. And cases have also been decided in this court upon the same grounds. The conveyance must be upon good consideration and *bonâ fide*; both must concur.

1859.
Buckland
v.
Rose.

In this case, if the settlement be void by reason of the purpose which in the mind and intent of the settlor it was designed to accomplish, or would be so if purely voluntary, it is equally so although the consideration be paid or given by reason of the same purpose existing in the mind and intent of the wife, from whom the consideration, such as it was, proceeded, and it cannot, I apprehend, be good as to the children, although no parties to the fraud, nor in deed was it urged that it should be. The instrument, I take it, was wholly void, Judgment.

I am obliged, on these grounds, to dissent from the judgment of the master, and the appeal from his decision will therefore be allowed.

GOODALL v. BURROWS.

HENDERSON v. RICHMOND

Mortgage—Foreclosure—Sale—Practice.

Where at the hearing of a cause, a sale instead of foreclosure had been asked for, and was directed by the decree, which omitted, however, to provide that in the event of the sale failing, the defendant should stand foreclosed. The court, upon petition setting forth the facts, and that the attempt at sale which had been made had proved abortive, ordered the defendant to pay the amount which had been found due, within one month, or in default, foreclosure.

In the first case, [before THE CHANCELLOR,] Mr.

(a) 1 S. & G. 228.

1859.
 Goodall
 v.
 Burrows.

McGregor, for the plaintiff; and in the other case, [before ESTEN, V. C.,] *Mr. Fitzgerald*, for the plaintiff, moved upon petition, that the defendants might be ordered, at a short day, to pay the amount found due by the master's report, or stand foreclosed. From the statements of the petition it appeared that at the hearing a decree for sale, instead of foreclosure, had, at the instance of the defendant, been directed, and in drawing up the decree it had omitted to provide that in the event of the sale failing to be completed, a foreclosure should be the result. The petition also stated that it was not probable that any further attempt to sell would be attended with any different result.

Under these circumstances, an order was made directing that in one month after service thereof, the amount found due should be paid, or the defendant stand

Judgment foreclosed.

HARRIS V. THE DRY DOCK COMPANY.

Joint stock company—Calls enforced for payment of debts of an incorporated company.

Where a trading company, incorporated by act of parliament, became insolvent, one of the partners, being also a creditor of the company, filed a bill for the payment of his judgment. *Held*, that he was entitled to a decree compelling the directors to make calls upon the stock of subscribers to the enterprise, notwithstanding a clause in the statute declaring the shares of defaulters should be forfeited; the forfeiture being cumulative to all other remedies to which a creditor was entitled for enforcement of his claim.

The bill in this case was filed by *Thomas D. Harris*, on behalf of himself and all other creditors of *The Toronto Dry Dock Company*, against the Company, and President and Directors of the Company, setting forth that certain persons had been incorporated for the purposes therein mentioned, with a capital stock of £10,000, in £5 shares, and that stock to the amount of £1,100 had been taken up and subscribed for, whereupon a meeting of the stockholders was held, and persons duly elected from amongst the shareholders to fill the office of directors. The bill

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further alleged, that plaintiff had supplied goods and merchandise to the company, which goods remaining unpaid for, the plaintiff had recovered judgment in the Court of Queen's Bench, and issued execution therefor which was returned *nulla bona*. That plaintiff thereupon applied to the defendants, the President and Directors of the Company, for payment, which was refused, and although they admitted that a sufficient amount was due, upon the share subscribed for, to pay the debts due by the Company, they refused to take any steps to enforce payment, pretending that they had not power to do so.

1859.

Harris
v.
Dry Dock Co.

The prayer was for an account of stock subscribed for, and what amount remained due, and that defendants might be ordered to collect and get in such an amount thereof as would pay the debts and liabilities of the company: or if not entitled to a general account of the debts and liabilities of the company, then that sufficient might be got in to pay plaintiff his claim.

Statement.

The defendant, the president of the Company, answered the bill, setting up that the Company was indebted to him also, for goods, &c., furnished, and seeking to have his claim set off against the amount of any calls that might be made upon the stock. The other defendants allowed the bill to be taken against them *pro confesso*.

For the plaintiff, it was contended that the only remedy against shareholders refusing to pay up their stock was not forfeiture of their shares; payment of calls may be compelled, and the party liable cannot be heard to say that he elects to forfeit his stock: such a proceeding is a privilege conferred upon the party seeking to enforce payment: and it is not pretended by the directors that any calls they make will not be promptly paid.

The defendants combatted these views, and insisted that forfeiture of the shares was the only remedy against the shareholders; but if there were any other, then it was by mandamus, or action at law.

1859. The authorities cited are all mentioned in the judgment.

Harris
v.
Dry Dock Co.

Mr. *Morphy*, for plaintiff.

Mr. *Brough*, Q. C., for the President of the Company.

Mr. *Strong* and Mr. *Crickmore*, for other defendants.

THE CHANCELLOR.—This suit is instituted by a judgment creditor of the Toronto Dry Dock Company, incorporated by act of parliament, (a) and the relief which he seeks, is that the directors may be ordered to call in the capital stock which the company has been authorised to raise, or a sufficient part of it to meet his debt. The bill proceeds upon the principle that the capital stock of such companies constitutes a trust fund for the payment of their debts, amongst other objects, and that the directors, who are trustees of the powers reposed in them by the act of incorporation, may be compelled to use those powers for the benefit of creditors, who have a material interest in the execution of the trusts; and that view of the plaintiff's case appears to me to be consonant to reason, and consistent with the authorities.

In the case of an ordinary partnership, creditors do not deal upon the faith of any arrangement between the partners as to the capital stock, because by the law of England the liability of partners is not limited to their interest in the capital stock; each partner is liable not only to the extent of his interest in the joint stock, but to the whole extent of his separate property, and any judgment creditor is entitled to realise his debt not only from the joint assets of the firm, but from the separate assets of each partner. In ordinary cases, therefore, creditors have no such right as that claimed by the plaintiff in the present case; it is unnecessary for their

(a) 10 & 11 Vic., ch. 85.

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protection, and would be contrary to a fundamental principle which has been steadily maintained, hitherto, in English jurisprudence. The soundness of this principle has been sometimes questioned; and it may be thought, perhaps, that the tendency of public opinion is in favour of limited responsibility. But if the principle of limited responsibility is to be adopted, it must be accompanied, I apprehend, by some further provision for the protection of the public. When partners are relieved from personal responsibility, and are permitted to contract on the faith of a joint stock, it follows, of course, that every creditor acquires a vital interest in that capital stock, and to deny his right to enforce the provisions by which it is to be raised, would be to deprive him of the only security on the faith of which he is supposed to contract—would be, in fact, to violate the principle of limited responsibility. And wherever that principle has been adopted, either in Europe or in America, it has been always accompanied, I apprehend, with some such provision for the security of society at large. (a)

1859.
Harris
v.
Dry Dock Co.

Now acts of incorporation like that under which the defendants exist, are based, of course, on the principle of limited responsibility. That is one, I suppose the principal, advantage which such charters confer. A capital stock is created, I should rather say authority is given to create a capital stock, which stock constitutes the only fund for the payment of debts; for beyond his interest in that stock no corporator incurs any personal responsibility. It is obvious, therefore, that every person who deals with such a company has a material interest in the provisions for the creation of the capital, and the right to have those provisions enforced for his security would follow, I think, on principles of reason and justice. But the right of the plaintiff to come here for relief does not depend upon the reason of the thing merely, for it has been long settled that an act of parliament of this

(a) See Imp. Statute 1 Vic., ch. 73, and 7 & 8 Vic., ch. 110, and Provincial Statute 12 Vic., ch. 75.

1859;
 Harris
 v.
 Dry Dock Co.

sort constitutes a contract between the company and the public, which the company is bound, and may be compelled to observe. This was put very clearly by Lord Eldon in *Blakemore v. The Glamorganshire Canal Company*, (a) "When I look upon these acts," he says, "I regard them all in the light of contracts made by the legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of parliament have become extremely numerous; and from their number and operation, they so much affect individuals, that I apprehend those who come for them to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else—that they shall do and shall forbear all that they are required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals." This principle was carried to a great length by the same learned judge in *Agar v. The Regent's Canal Company*, (b) and the books furnish numerous instances of its subsequent application. (c)

Now here the act of parliament under which the defendants exist, authorises them to raise a capital of £10,000, and provides that the company is not to go into operation until £1000 has been subscribed. It is said, however, that this clause confers a privilege, but does not impose any duty. But such a construction, as it seems to me, would be in direct violation of the principle established by the cases to which I have referred. Upon

(a) 1 M. & K. 162; but see as to Lord Eldon's language *The York and North Midland Railway Co. v. Reg. in Error*, 17, Jur. 696, and the cases there referred to.

(b) Cited 1 Swan. 250, and 3 M. & C. 444.

(c) *Cohen v. Wilkinson*, 12 Beav. 125; *Graham v. Birkenhead Railway Co.* Ib. 460.

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that view it would be competent to the defendants to refrain from raising any capital whatever, or to withdraw the capital when raised, and every person dealing with them would be left completely at their mercy. But such a construction would be repugnant to reason, and contrary to authority. That the legislature intended to relieve these defendants from individual responsibility, beyond the share of each in the stock, is certainly clear; but that they did not intend to deprive the creditors of the company of all redress, is, at least, equally clear; and therefore a capital stock is created to stand in the place of the individual responsibility of the defendants. To that fund the creditors are entitled to look, and it follows, consequently, that the company can have no right either to refrain from raising it, or to withdraw it when raised. And the capital being a trust fund, and the directors being trustees of the powers vested in them by the act, it follows that the plaintiff is entitled to come here for the relief which he seeks. (a)

1859.

Harris
v.
Dry Dock Co.

Judgment.

It was argued, however, that this court has no jurisdiction either to wind up the affairs of such a company, or to afford relief to an individual creditor, and the recent statutes of the Imperial Parliament for the accomplishment of that object were referred to as conclusive against the previous existence of such a jurisdiction. The object of these statutes, however, was not to confer any new jurisdiction upon the court, but to obviate technical, and as they were thought insuperable, difficulties growing out of the rules of pleading adopted in courts of equity. It had been long settled that companies of this sort were substantially partnerships, governed by the principles applicable to ordinary enterprises, modified in each case by the charter of incorporation, (b) but the practical difficulties in the way of working out such suits

(a) Attorney-General v. Wilson, 1 C. & P. 1; Shrewsbury and Birmingham Railway Co. v. The London and Northwest Railway Co. 4 D. McN. & G. 115.

(b) Simpson v. Denison, 10 Hare, 51, and the cases cited.

1859. were thought to be insuperable. To have made each individual member a party would have been impossible—such a suit would have been obviously unmanageable: (a) and it was found equally difficult to constitute it on the principle of representation, in consequence of the rules which had been adopted as to misjoinder; (b) and the winding-up acts were introduced for the purpose of obviating these difficulties. But it is thought that the recent order as to misjoinder has had the effect of removing the difficulties to which I have been adverting, and that the order in question will have the effect of bringing all such suits within the ordinary jurisdiction of the court. In *Clements v. Bowes*, a suit constituted on the principle of representation, Vice-Chancellor *Kindersley* determined that the recent rule was applicable, and, in answer to the objection that the plaintiff should have proceeded under the winding-up acts, he made these observations: “The first objection taken, Judgment. is that this is a case proper for a winding-up order, but not for a suit, and it is said that it is in the discretion of the court to refuse its interference by suit, and to leave the parties to proceed under the winding-up acts. Now, if there be such a discretion in the court, (though I cannot say that there may not be suits like this, which would be very dilatory and very expensive,) yet it must be a strong case which would induce me to prefer the proceedings under the winding-up acts (of which my experience while master has led me to form an opinion by no means favourable to its superiority) to the proceedings by suit in this court. But however that may be in a very complicated case, this appears to me to be one of the simplest of its class. It is not a case in which I think I ought to say I would refuse relief, and leave the parties to the winding-up acts.” It would be unsafe, perhaps, to hazard the opinion that this case has settled the practice in the English courts, but I have no hesita-

(a) *Van Sandau v. Moore*, 1 Rus. 458, 464.

(b) *Evans v. Stokes*, 1 Keen. 24; Official manager of Grand Trunk Railway Co. v. Brodie, 9 Hare, 829; *Clements v. Bowes*, 1 Drew. 692.

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tion in saying that it furnishes a very safe precedent for our guidance; and whether we consider the general tendency of the recent alterations in the practice of the court, or the course of proceeding sanctioned in particular cases, it is impossible, I think, to arrive at the conclusion that there are any difficulties of a formal or technical nature which should preclude us from affording the plaintiff the relief which he seeks.

1859.

Harris
v.
Dry Dock Co.

The question now before us has been repeatedly discussed in the courts of the United States, and the jurisdiction of equity in such cases is universally recognised, I believe, in that country. The whole subject is said to have been considered by Mr. Justice Story, with his usual ability in *Wood* against *Dummer*, which is to be found, I believe, in the third volume of Mr. *Mason's* reports. I have not had the advantage of reading that case, but from the note of it in *Angell* and *Ames*, page 541, it would seem that Mr. Story thought the point equally plain upon principles of law and common sense. I cannot say that I place much, or even any, reliance on the cases to which the learned judge is said to have referred, I mean *Solomon v. The Hamburg Company*, (a) and *Curson v. The African Company*, (b) but upon the principles to which I have adverted, and upon numerous authorities more or less applicable, (c) though not expressly in point, I think the plaintiff entitled to a decree.

ESTEN, V. C.—It was held in *Inglis v. The Great Northern Railway Company*, (d) that the act of incorporation enabled the company to sue for calls, forfeit shares, and cancel shares; and also issue new ones as cumulative remedies: but if the money due were raised

(a) Ca. Cha. 204.

(b) 1 Ver. 124.

(c) The cases already referred to, and see *Preston v. The Great Collier Dock Co.*, 11 Sim. 327; *Inderwich v. Snell*, 14 Jur. 727; *Clements v. Bowes*, *Supra*; *The South Yorkshire Railway and River Dunn Company v. The Great Northern Railway Company*, 3 D. M. & G. 576.

(d) 16 Jur. 895.

1859. by either of the other modes, the defendant was entitled to the benefit of it in the action, which would equally apply here.

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v.
Dry Dock Co.

The act is very similar to the act incorporating the *Marmora Foundry Company*. Under each a right of action would exist independently of the forfeiture clause.

The act incorporating the *Cobourg Harbour Company* is the same as the present. In the case of *The Marmora Company v. Pontin*, and other similar cases, the Court of Common Pleas decided that on this act an action could be maintained for calls; and in the case of the same Company against *Jackson* and *McElroy*, (a) the majority of the court, followed that judgment. The Court of Common Pleas expressed an opinion that the wording of the Cobourg act might make a difference, but Judgment. all the judges of the Queen's Bench were opposed to this view, and little weight seems to have been attached to the legislative expression of opinion, as evinced by the Cobourg acts; the real question was, whether a trading corporation could sue one of its own members; or whether, as they were in fact partnerships, the disabilities of partners did not attach to them.

Mr. Justice *Draper*, who differed from the other two judges of the Queen's Bench, did not, it is apprehended, mean to say it was the intention of the legislature to confine these bodies to the remedy by forfeiture, but that such remedy was in fact the only one, because they laboured under a disability to sue their own members. But however that may be, it is obvious that no such reason applies to this court.

From the case of *The Queen v. The Victoria Park Company*, (b) it would seem that it was determined that

(a) 9 U. C. Q. B. 505.

(b) 12 Q. B. 288.

where judgment, the court execution with its nature to compel the payment of them v. *The St.* that wherever and no adequate where a judgment of the corporation but neither can be taken the case of being sued in held not liable remedy, the reached either *Salmon v. The* having no tax enforce rates, bill, complain debt at law. on appeal to the back with direct debt, or, in debt, and collected, governing bodies capacity for debt the time to be levying the levy; and to be liable to defaults—and was taken progressively.

This case is

(a) 4 B. & Ad.

1859.

Harris
v.
Dry Dock Co.

where judgment had been entered up against a corporation, the court would not grant a mandamus, because the execution would produce no fruits, the remedy being in its nature sufficient. The court will grant a mandamus to compel the making of calls, and the enforcing the payment of them at the suit of a creditor. In *The Queen v. The St. Katherine Dock Company*, (a) it was held that wherever there is a legal right against a corporation, and no adequate legal remedy, a mandamus will lie; as where a judgment has been obtained against an officer of the corporation, which is binding on the corporation, but neither his property nor that of the corporation can be taken in execution under it. It would seem from the case of *Wormwell v. Hailstone*, (b) that trustees being sued in the name of their clerk, his goods were held not liable to execution, and there being no other remedy, the funds of the trustees could be effectually reached either by mandamus or bill in equity. In *Salmon v. The Hamburg Company*, (c) a corporation Judgment. having no tangible property, but being empowered to enforce rates, borrowed money; the creditor filed his bill, complaining that he had no means of realising his debt at law. The decree dismissing the bill was reversed on appeal to the House of Lords, and the cause remitted back with directions to order the company to pay the debt, or, in default thereof, to order levations to be made and collected, and the debt paid; the members of the governing bodies to be liable to process, in their individual capacity for default, if money levied was not paid within the time to be limited by chancery for making and collecting the levy; and the individual members of the company to be liable to process in their individual capacity for their defaults—and so *toties quoties* until debt paid; the bill was taken *pro confesso*, and decree pronounced accordingly.

This case is a clear authority that where a corporate

(a) 4 B. & Ad. 360.

(b) 6 Bing. 668.

(c) Ca. Ch. 204.

1859.
 Harris
 v.
 Dry Dock Co.

body having power to create property, and incurring debts upon the faith of an honest exercise of it, especially where they have no tangible property, may be compelled by decree of this court to create the property which they are enabled to produce, and that the exercise of this power and obedience to its dictates may be enforced against the members of the governing body, and individual members of the corporation, respectively in their private capacity, by process of contempt. It seems from the case against *The Victoria Park Company* that a mandamus will lie in the like case. And *Tindal*, C. J., says, in delivering judgment in *Wormwell v. Hailstone*, that a mandamus or bill in equity will lie against trustees, in order to reach their property, when it cannot otherwise be reached. This is a highly important and beneficent jurisdiction, and will sustain the present suit, but the individual members seem unnecessary parties. In *Wood v. Dummer*, (a) it was held that stock or trust funds were liable in the hands of holders with notice, or without consideration. *Briggs v. Penniman*, (b) *Slee v. Bloom*, (c) *Ward v. Griswoldville Company*, (d) *Hume v. Winyaw Canal Company*. (e) All these were cases in which creditors had proceeded in equity to compel the payment of stock for the satisfaction of their demands, and *Angell* and *Ames* on corporations, S. 600; 2 *Story* Eq. Jur. S. 1252, are to the same effect.

Judgment.

The case of *Curson v. The African Company*, reported in *Skinner* and *Vernon* (f) is not an authority to the same extent, as there seems to have been an express trust, and it was partly rested in argument upon the principle of foreign attachment. It seems clear, judging from the cases that have been cited, that the plaintiff has a right to file this bill against the corporation, and is entitled to a decree that calls shall be made, and their

(a) 3 Mason C. C. R. 308.

(c) 19 John Rep. 456.

(e) 1 Car. Law Jour. 217, 1 American Law Mag. 92.

(f) Skin, 84, 1 Ver. 121.

(b) 8 Cowan, 327.

(d) 16 Conn. Rep. 593.

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payment enforced, and his debt paid; and that the governing body will be liable in their individual capacity to process of contempt in case of default to perform the decree; and the members of the corporation will be similarly liable in case the calls are not paid within the time limited. It can, of course, make no difference that the plaintiff has obtained a judgment for his debt, or that he is a member of the corporation, except that he must pay his instalments with the rest, and he seems entitled to sue on behalf of himself and the other creditors; but the individual members seem to have been unnecessarily made parties, and the bill as to them must be dismissed with costs. The plaintiff seems entitled to his own costs to the hearing.

Harris
v.
Dry Dock Co.

HILL V. FORSYTH.

Mortgage—Foreclosure against several owners of equity of redemption—Practice.

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day for payment of the amount will be given to all the persons interested in the equity of redemption.

This was a foreclosure suit. It appeared that since the execution of the mortgage the mortgagor had sold and conveyed away portions of the mortgage estate to Statement. other persons, all of whom, together with the mortgagor, were defendants, and the bill had been taken *pro confesso* against all of them: at the hearing,

Mr. Fitzgerald, for plaintiff, asked for the usual reference to take accounts, &c., and that all the defendants might be given one day for payment of the amount that should be found due.

THE CHANCELLOR.—Since this case was first mentioned I have had an opportunity of speaking to the other members of the court, and as I find that both have been

1859. in the habit of making the decree as has been asked for here, I will, of course, follow the same practice, although, when the case first came before me, I entertained some doubt whether the rights of the several parties should not be first settled.—*Decree as asked.*

Hill
v.
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THE CITY OF TORONTO V. MCGILL.

Dedication to the Public—Pleading—Parties.

In 1836, the owner of a tract of land in the City of Toronto caused the same to be surveyed and laid off into building lots. A part of the property was enclosed within fences, forming a large garden and grounds on which the residence of the former owner of the property was situate, and which had always been occupied by the proprietor of the estate or his tenants. The surveyor in preparing the plans, represented this part of the property as being within fences, and wrote on the space, "McGill's Square." Around this were laid off building lots, subsequently sold to several persons. In 1857, a bill was filed by the City of Toronto, and the owner of one of the lots fronting on this space on behalf of himself and all the other purchasers of such lots, seeking to enjoin the proprietor from building upon or selling the space so marked, on the ground either that the same had been dedicated to the public or that the purchasers were entitled to free access thereto, or to have the same retained as an open space, alleging a verbal agreement to that effect at the time of the sales being made. *Held*, that what had been done did not amount to a dedication to the public: that the evidence was not sufficient to establish a grant of the easement claimed by the purchasers; and that if either claim had been established there was a misjoinder of plaintiffs.

This was a bill by the *City of Toronto* and *Angus Morrison* on behalf of himself and of all other purchasers of, or persons entitled to lots bought from *Peter McGill*, and situate on certain streets mentioned therein as fronting on McGill Square, against the Hon. *Peter McGill* and the *Bank of Montreal*; and as amended set forth that in 1836 the defendant *McGill* being then seized of a large parcel of land in Toronto, had the same laid out into building lots and a plan thereof prepared, in laying out which a certain portion known as McGill Square, bounded on the north by Shuter street, on the west by Bond street, on the south by Queen street, and on the east by Church street, and on which the lots laid out upon those streets fronted, was reserved as an open square or space for the use and benefit of the inhabitants

of Toronto shewn on the plan which were the plan was inspection of purchasers bought after correctness sale of these persons also designed for of the inhabit would not be square or pa on the sever all times hav names of eig streets, and title in fee purchased fr sentations m purchaser of they had pur relying on i *McGill's* age reserved as an inhabitants, a upon; and t the same was inhabitants, a out the land i

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of Toronto as a public park, was also delineated and shewn on the plan as an open square or park, across which were written the words "McGill Square," and the plan was duly deposited in the registry office, for the inspection of intending purchasers; * and that the several purchasers of lots on the before mentioned streets, bought after inspecting the same and relying on its correctness: that *McGill* also, by his agents for the sale of these lots, in many instances represented to persons about to purchase, that the open space was designed for a public square for the use and benefit of the inhabitants of the city, and that such space would not be built upon, but should be reserved as a square or park to which all persons who purchased lots on the several streets surrounding this space should at all times have free access. The bill then set forth the names of eight persons who had purchased lots on these streets, and that *Morrison* had acquired an absolute title in fee simple to one of those lots, originally purchased from *McGill* upon the faith of such representations made by him or his agents to the original purchaser of his lot and such other persons, and that they had purchased after having examined the plan and relying on its correctness, and the representations of *McGill's* agents that such square would always be reserved as an open space for the use and benefit of the inhabitants, and that the same would never be built upon; and that *McGill* had frequently declared that the same was reserved as an open public square for the inhabitants, and that such was his intention in laying out the land in the manner stated.

That McGill Square had, by the several circumstances thus enumerated, become dedicated to the use of the inhabitants of the city, and that an absolute title thereto was vested in the city; and that the plaintiffs and the

1859.
 City Toronto
 v.
 McGill.

Statement.

* This is an error, the exhibits shewed the words were "McGill's Square," and on the plan deposited in the registry office, no words were written on the square or reserve.

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other purchasers of lots fronting on the square were entitled to have free access to the same, and were, at all events, entitled to have it preserved as an open space and kept free from buildings; and were at least entitled to an easement to that extent by reason of the dedication alleged to have taken place, and that the same had always been theretofore enjoyed by the plaintiffs and the other purchasers of lots fronting on the square, and was of great value not only to the owners of lots fronting thereon, but also to the city as contributing to the public health thereof. The bill then stated that the defendants, the *Bank of Montreal*, had become interested in the whole of such square as mortgagees, but that they had full notice of the dedication before acquiring such title; and that the defendants kept the square enclosed with a fence, and threatened and intended to lay the same out into building lots, and to sell and dispose of the same to be built upon, by which the property of *Morrison* on such street would be greatly reduced in value, and that the whole of such square would thus be diverted from the purposes to which it had been dedicated and appropriated.

Statement.

The bill alleged that, owing to the number of purchasers of lots, they could not, without great inconvenience, be all joined as parties, and prayed that the square might be declared to have been duly dedicated to the use and benefit of the inhabitants of the city, and to be the absolute property of the plaintiffs, or that the said purchasers were entitled at all events to have such free access, or that it might be declared that the city or the purchasers of lots on the said streets were entitled to such easements; and that the mortgage might be declared void and ordered to be delivered up to be cancelled; and that the defendants might be restrained from laying out the square into lots, and from disposing of the square or any part thereof, and from building upon the same or any part thereof, or using the same in any way inconsistent with the objects to which the same

had been longer enclosed by the plaintiffs, and that the plaintiffs were hindered in their access thereto.

The defendants, however having refused to make an order for the bill, or that such by any would be kept any time closed to the public, and to hold the same all rights and

Several parcels of estate were their expectation reserved as a public square for the use of the city, who laid out the same cause: in his opinion the plans by which the space was let for 'Square' were to that effect and I put the same on the instructions to any name; not a public square like C* to Mr. I did not mean to be not object to the plan when a public

* The plan similar

had been so dedicated; from keeping the same any longer enclosed, and from hindering and preventing the plaintiffs from taking possession thereof; and from hindering the purchasers of lots on the said streets, and the plaintiff *Morrison* from having at all times free access thereto and for further relief.

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The defendants answered the bill: *McGill* denied ever having made, or authorised any one on his behalf to make any dedication of the kind insisted on by the bill, or that purchasers were ever induced to become such by any promise with his authority, that the same would be kept free from buildings; or that he ever at any time contemplated dedicating the plot of ground to the public, but on the contrary, that he always intended to hold the same as his own private property, free from all rights and easements of any description.

Several persons who had purchased portions of the estate were examined as witnesses, they all swore as to their expectation in purchasing that the land would be reserved as an open space, and some that it would be for the use of the public. Mr. *R. F. Lynn*, the surveyor who laid out the lots, was examined as a witness in the cause: in his evidence he swore that he had prepared the plans by which the lots had been sold: "the open space was left in the map, and the words 'McGill Square' were placed on the map without any directions to that effect from Mr. *McGill*. It was the homestead, and I put the owner's name on it. * * * I was not instructed to call the open space McGill Square or by any name; nothing was said between us as to its being a public square at any time. * * * I shewed a plan like C* to Mr. *McGill*: it was lettered like C; he did not object to the square or to the lettering upon it. * * * I did not mean the open space for an open square; when a public square is intended no lines are drawn

* The plan similar to the one by which many of the lots were sold.

1859. round it between it and the streets: this was the rule before 1836: I put the lines round the square because it was fenced in as private property.”

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McGill.

Mr. *Cameron*, Q. C., Mr. *Roaf*, and Mr. *Taylor* for the plaintiffs.

Mr. *Connor*, Q. C., and Mr. *Eccles*, Q. C., for the defendant *McGill*.

Mr. *Turner*, for the *Bank of Montreal*.

THE CHANCELLOR.—The bill in this case is filed by the *City of Toronto*, and by *Angus Morrison*, on behalf of himself and all other purchasers of lots fronting on the property in the bill mentioned, known as *McGill Square*. The prayer is that *McGill Square* may be declared to have been dedicated to the use and benefit of the inhabitants of the *City of Toronto*, and to be now their absolute property, or that the said purchasers, or the said purchasers and the inhabitants of the city, are entitled to have free access thereto; and that the defendants may be restrained by the order of this court from laying out the Square into building lots, and from selling or disposing of the same or any part thereof; and from building upon the same or any part thereof; or from using it in any way inconsistent with the object for which it was dedicated; and from keeping it any longer enclosed; and from hindering or preventing the plaintiffs from taking possession of it; and from preventing *Angus Morrison* and the other purchasers from having free access to it.

Judgment.

The suit is framed in a very singular way. There is no precedent for it that I know of. If such a suit may be maintained by the *City of Toronto*, representing the public, upon the grounds stated in the Municipality of *Guelph v. The Canada Company*, (a) upon what

(a) Ante vol. iv., p. 632.

principle a claim as represented to appear on other hand, and distinct misjoinder in virtue of suit be made himself and that case each and distinct distinct suit. present shape done, we have far as we have merits.

The case *Toronto* is, though a considerable in question, of year 1836. in question in direction: the prepared for the "McGill Square" that the "McGill Square" deposited in the intending purchaser, including was sold in such sales the a public square proceeds is, the to dedicate this it laid out as 1836; it was s

principle are the purchasers joined? If the purchasers claim as participators in the public right, they are represented by the *City of Toronto*, and have no right to appear upon the record as co-plaintiffs. If, on the other hand, the purchasers claim in virtue of a separate and distinct right, growing out of their contracts, the misjoinder is obvious. And assuming them to claim in virtue of such separate and distinct right, how can a suit be maintained by *Angus Morrison* on behalf of himself and all other purchasers, on that ground? In that case each purchaser's claim rests upon his separate and distinct contract, and must be the ground of a distinct suit. It is difficult to deal with the case in its present shape; but as all objections of form were abandoned, we have endeavoured to dispose of the case, so far as we have been able to understand it, upon the merits.

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The case made by the bill on behalf of the *City of Toronto* is, that the defendant *McGill*, being the owner of a considerable estate in this city, including the property in question, caused it to be laid out in building lots in the year 1836. That in the survey then made the property in question was laid out as a public square by his direction: that in the plan of that survey subsequently prepared for him, by Mr. *Lynn*, the surveyor, the words "McGill Square" were written upon the lot in question: that the plan, so prepared, with the words "McGill Square" written upon it, was subsequently deposited in the public registry office, for the use of intending purchasers: that a large portion of the property, including all the lots surrounding the square, was sold in accordance with that plan, and that upon such sales the property in question was represented as a public square. The reasoning upon which the bill proceeds is, therefore, this: The defendant intended to dedicate this land as a public square or park; he had it laid out as such in a survey of his property made in 1836; it was so described in the plan of that survey;

1859. and although that would not have bound the defendant,
 or prevented him from devoting the property to any
 other use, yet, having sold the property in accordance
 with the plan upon which it was described as a public
 square, the dedication became thereby complete; the
 defendant ceased, from that time, to have any right to
 devote the property to any other use, and the title of
 the plaintiffs to the relief they now ask was perfect.

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Now assuming, for the purpose of this argument, that
 the conclusion could be maintained, in point of law, if
 the premises were true, the question is, has that been
 shewn? Did the defendant intend to dedicate this land
 for the purpose of a public square? Did he cause it to
 be laid out as such? Was it so described upon the
 plan of that survey? And were the surrounding lots sold
 on the faith of that representation? Now, upon the
 evidence before us, every one of these questions must
 Judgment. be answered, in my opinion, in the negative.

The defendant swears distinctly that he never did at
 any time contemplate the dedication of the said plot of
 land, as an open square, or otherwise for the use of the
 public, but, on the contrary, always intended to hold
 the same as his own private property, free from all
 rights and easements of every description. He swears
 that he never authorised *Lynn* to designate the property
 in question as McGill Square, and if that designation be
 upon it in the map deposited in the registry office, he
 believes that it was placed there not to denote that the
 plot in question was intended as a public square, but to
 denote, on the contrary, that it was private property.
 And he swears that he never did represent to any pur-
 chaser that the land in question was intended for a
 public square, and that to the best of his belief none of
 his agents did so, but that if they did, they did so
 without authority from him. These statements in the
 answer are not of course evidence for the defendants;
 but they contain a very distinct denial of the case made

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by the bill, and throw upon the plaintiffs the burthen of proving their whole case. 1860.

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With respect to the survey of 1836, and the map of it and the intention of the defendant *McGill* in relation thereto, *Lynn* himself is the principal, if not the only witness. He swears that he had no instructions from the defendant to designate the lot in question "McGill Square;" that he found it fenced in and occupied as the homestead, and for that reason put the owner's name upon it; that nothing was ever said between them as to its being a public square; that he did not mean the open space for an open square; that when a public square is intended, no lines are drawn round it, between it and the streets; that this was the rule before 1836; and that he put lines round the square because it was fenced in as private property. Now so far from establishing the plaintiffs' case, the evidence goes very far indeed to establish the negative. The space in question was not laid out by *Lynn* at all. It had been the homestead, and he left it as he found it, fenced and occupied by the defendant's tenants. Judgment.

Then as to the words "McGill Square," said to have been written upon this lot in the plan deposited in the registry office, upon which, indeed, the plaintiffs' case mainly rests, it now appears that the words are not to be found upon that plan at all; and considering the importance attached to that allegation in the bill, the fact is very material, for that plan was no doubt the plan in general use as the bill asserts. But had those words been found there, as they were assumed in argument to be upon other plans in use, it would have been impossible, as it seems to me, to have deduced from that fact the inference which we are asked to draw from it. It is unnecessary to consider what the fair effect of these words might have been if the plaintiffs had been let into possession of the property, or even if it had remained vacant; because it is clear that at the period in

1859. *question* it was fenced in and occupied by the defendant, and has so continued ever since. Up to this hour the public have not enjoyed for one moment the easement claimed by the bill. Now, the inference that the defendant meant to dedicate this property to the public because he had chosen to call it "*McGill Square*," would seem to me, under the circumstances, unjustifiable. Suppose he had called it *McGill Park*, or *McGill Terrace*, or *McGill Crescent*, nobody would have dreamt, I suppose, of concluding that he meant to dedicate it to the public. The inference would have been, I think, that the defendant had chosen to designate his place by one or other of these names, and I see nothing in the name *McGill Square* to justify a different conclusion. But this is set at rest by the evidence. *Lynn* swears that finding the place fenced in and occupied by the proprietor, he put the name upon it and surrounded it with lines to designate that it was private property.

Judgment. And *Lynn's* evidence is quite borne out by the plan; for I find upon examination that the witnesses who speak of it are not accurate. The words are not *McGill Square*, but *McGill's Square*, and the space is not only surrounded by lines, but the proprietor's house and pleasure grounds are depicted upon it, so that the plan, when examined, negatives, instead of supports, the proposition for which the plaintiffs contend.

It is said, however, that all the sales were made with reference to the plan prepared by *Lynn*, upon which the property in question is described as a public square, and that the purchasers were induced to rely upon representations made by the defendant *McGill* and his agents that it had been dedicated to the public. I have stated already that this property is not described upon the plan as a public square; and the case must turn, therefore, entirely upon the representations said to have been made to the purchasers. I need not stop to enquire what the legal effect of such evidence, if clear and satisfactory, would have been, because, in this case the evidence is

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not, in my opinion, either clear or satisfactory. We are asked to declare that this valuable property was dedicated to the public in 1836, upon admissions said to have been made in some cases fifteen years, and in others twenty years before the taking of the evidence in this cause—admissions unaccompanied by a single act of enjoyment—opposed, I should rather say, to the exclusive and uninterrupted possession of the defendant during the whole period in question. Had it been otherwise satisfactory and clear, I should have had the greatest difficulty in acting upon such evidence. Evidence of admissions made under such circumstances would have been entitled to very little weight. But there is great difficulty in ascertaining the precise meaning of this testimony. *Price* says that *Logan* pointed to this property upon the map and said “that it would be of course an open square.” He goes on to explain that the word “public” was not used, only that it was to be an open space or square. *Preston* swears that *McCutchon* said, if he recollected rightly, “that the open space was to be kept open as a square.” And *Good* says that *Logan* said “it was to remain a square.” Now, if the witnesses only mean, as I think *Price* does, that the square was to be kept open, that is, free from buildings, the evidence obviously fails to establish any part of the case made by the bill. For a right to have the property kept open and free from buildings is something quite different from the right claimed by the bill. The other witnesses, however, that is, *Crooks* and *Hodgson*, use the expression public square, upon which some stress was laid in argument. Now, the expression square or public square, does not mean, I apprehend, certainly as applied to British cities, it does not mean a place to which all citizens have access. The inhabitants of each square have usually by arrangement a right of ingress and egress; but in all cases, I believe, certainly, as a general rule, the public are carefully excluded. Now, if that be what is meant, as I dare say it is, for at the time of which the witnesses speak the public did not enjoy

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Judgment.

1859. any right of ingress or egress, then they negative, instead of establishing, the case made on behalf of the *City of Toronto*, which fails wholly, as it seems to me, upon the evidence.

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It is difficult, as I have said, to gather the precise nature of the claim advanced on behalf of the purchasers. If the claim advanced on their behalf be a claim founded upon the supposed dedication, as I think it is, then it must fail, of course, because the fact of dedication has not been established. On the other hand, viewed as a claim founded upon contract, it must equally fail, because it is clear upon the authority of *Squire v. Campbell*, (a) and the cases there cited, that there is nothing here which amounts to a contract. The deeds contain no allusion whatever to the plan; and the deeds having been executed, the parol representations are excluded.

Judgment.

Peacock v. Benson, (b) and *Myers v. Watson*, (c) were cited for the plaintiffs, but they do not apply. The bill in each case was for specific performance. The contracts had not been executed. In *Peacock v. Benson* the plan was distinctly referred to in the particulars and conditions of sale, and formed, in the opinion of the Master of the Rolls, a part of the contract; and in *Myers v. Watson* the parol representations were proved not as a ground for specific performance, but as a defence to the suit.

Mr. *Cameron* relied on the recent statute 12 Vic., ch. 35, sec. 41, but it has no application to the present case. The clause in question after reciting that many towns and villages in Upper Canada had been surveyed and laid out by companies and by individuals, and by different owners of the lands comprising the same, and that lands

(a) 1 M. & C. 459, and see *Randall v. Hall*, 4 D. & S. 343; *Fewster v. Turner*, 6 Jur. 144.

(b) 11 Beav. 355.

(c) 1 Jur. N. S. 323.

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had been sold therein according to the surveys and plans thereof, goes on to enact that "all allowances for road, street or streets, common or commons, *which have been surveyed* in such towns and villages in Upper Canada, and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for road, street, or common, have been sold to purchasers, shall be, and the same are hereby declared to be public highways, streets, and commons."

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Now, assuming that clause to apply to a survey of this sort, and to a reservation of the kind in question here, it has no bearing on the question now before us, because it only applies when the road, street, or common has been *surveyed*, and *laid down on the plan*; but I have already said that the property in question here was neither *surveyed* as a square nor laid down on the plan as such. The surveyor found it fenced and occupied as private property, and he left it as he found it.

Judgment.

For these reasons I am of opinion that the bill in this case must be dismissed with costs.

ESTEN, V. C.—This is a suit by the *City of Toronto* and by several individuals, or by one individual, on behalf of himself and others standing in the same position to enforce a public dedication, and also a private contract with every one of such individuals, or those to whose rights they have succeeded, relative to an open piece of ground in the midst of this city. The rights asserted by this bill to their full extent are unconnected with each other, and the suit is improperly framed; but all objections of form are waived, and the opinion of the court is desired on the merits of the case. With regard to the public dedication the evidence resolves itself into two parts: the documentary evidence of the plans or maps which have been produced, and the oral evidence of the representations made by Mr. *McGill* or his agents, upon different purchases of lots.

1859. This evidence, in my judgment, is wholly insufficient for its object. The maps are three—one deposited in the registry office, which exhibits the ground in question as a vacant piece of land, but enclosed and without any inscription; another, which presents the same piece of ground with a house and grounds delineated upon it, and the inscription "*McGill's square*;" and the other precisely the same as the last, except that it has the inscription, "*McGill's cottage*," instead of *McGill's square*. The oral evidence is of conversations which occurred fifteen or twenty years ago, in which the mistake of a single word might alter the whole effect of the representation. Nothing can be more unsatisfactory than evidence of this description, and it is obvious that the plans tend rather to negative than to establish a public dedication. In addition to this, there is the fact that the ground in question has always been enclosed and used with the house as a private residence without

Judgment. any interference on the part of the public or of private individuals until the institution of the present suit. The case in its other aspect is that of a contract with every individual who purchased a lot, as a part of his contract of purchase, that the ground in question should be kept open and not be built upon, and that he should have right of access to it as a pleasure ground. Supposing such a contract to have been made, the stipulation in question would of course be comprised in the consideration of the purchase. It would appear, however, that such a contract would be within the statute of frauds, as a contract for a permanent interest in land; but in opposition to this objection, it might be urged that the conveyance of the land and the payment of the purchase money would be such a part performance as would render it a matter of justice to compel the observance of the remainder of the contract. It is true that the acceptance of a conveyance of the lot without any stipulation in regard to the easement might be represented as a waiver of the latter right. But on the other side, it might be contended that the payment of the

full consideration both the law and equity presumption decided, it is the present to establish an evidence of years ago, in word actual and detailed might alter the description; it is opposed to a covenant or having been and of the constantly u- nant to a pri- part of any i- of the prese- right. The apply to th- any thing h- dedication wi- to the doct- *The Canada (a) Rossin v. evidence in- bring it with- think the bill*

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full consideration, agreed upon as an equivalent for both the lot and the easement, would rebut any such presumption. However these several points might be decided, it is sufficient to observe that the evidence in the present case seems to me to be wholly insufficient to establish any such right as is contended for. The oral evidence of conversations occurring fifteen or twenty years ago, in which it is of great importance that every word actually used should be accurately remembered and detailed, as the mistake of a single expression might alter the whole sense, is of the most unsatisfactory description; while, weak and insufficient as it is of itself, it is opposed and counterbalanced by the fact of no covenant or stipulation regarding this alleged easement having been contained in any one of the conveyances, and of the piece of ground in question having been constantly used for a great number of years as appurtenant to a private residence without any attempt on the part of any individual concerned prior to the institution of the present suit to assert or enforce this supposed right. The statute 12 Vic., ch. 35, does not seem to apply to this case, as it cannot be contended that any thing has occurred which amounts to a public dedication within the meaning of the statute. I adhere to the doctrine laid down in the cases of *Guelph v. The Canada Company*, *Saugeen v. The Church Society*, (*a*) *Rossin v. Walker*, (*b*) decided in this court. But the evidence in the present case is wholly insufficient to bring it within the principle of any of those cases. I think the bill should be dismissed with costs.

SPRAGGE, V. C.—I agree in the conclusions arrived at by the other members of the court. I think the evidence falls short of establishing either the public dedication upon which the *City of Toronto* founds its suit, or the easement claimed by the plaintiff *Morrison* on behalf of himself and other purchasers similarly situated.

(a) *Ante* vol. VI., p. 538.

(b) *Ib.* 619.

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I need not follow the *Chancellor* in his analysis of the evidence. I have no doubt that the witnesses believed in the accuracy of their recollection as to what appeared upon the plans of the property exhibited to them, and as to what was said by *McGill's* agents.

Judgment. I am inclined to think that there must be an error in the taking down of the evidence, when the witnesses are represented as saying that the words on the map exhibited to them were "McGill Square;" even *Lynn* the surveyor is made to say this, although the map was before him with the words "McGill's Square" in the possessive case; and he furnished the plans to Mr. *Gamble* and Mr. *Logan*, and with the same lettering, as I understand his evidence. If this be so, the witnesses who speak of "McGill Square" as being on the map exhibited by *Logan*, are in error in their recollection, or the mistake which I have suggested has occurred in taking down their evidence, from the words being so nearly *idem sonans* as to be scarcely distinguishable. The evidence was taken by myself, but my attention was not called to the distinction, nor was the lettering on map C. shewn to me. If the witnesses meant to say what their evidence as taken down makes them say, it shews how unsafe it would be to rely on the correctness of their recollection. The evidence of Mr. *Good* is a strong example of this. He was shown plan A., the plan which was deposited in the registry office, and upon which there is no lettering in the open space; and upon seeing it he said, "If I had not seen plan A., I should have been ready to swear, I think, that the plan in the registry office contained words in the open space, but I could not do so now." Upon the evidence of Mr. *Crooks*, I would only remark, that he appears rather to speak from the impression remaining upon his mind than from any distinct recollection of the words used. He is the only witness who speaks of any representation made by Mr. *McGill* himself; and Mr. *McGill's* answer contains a very explicit denial of any such representation being made by him.

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Unfortunately the plan which was exhibited by *Logan* was destroyed by him after a quarrel with *Mr. McCutcheon*; the one which *Mr. Gamble* had was lent, as he says, to *Mr. Morrison*, and not returned, and the one held by *Mr. McCutcheon* has not been called for. I think the weight of the evidence is that the lettering on these was "*McGill's Square*." As to the words used by *Mr. McGill's* agents; to take first the evidence of *Mr. Good*, an intelligent and respectable witness, he is quite as likely to be in error in his recollection of the representations made to him by *Logan* and *McCutcheon*, as in his recollection of the map in the registry office. That the open space on the map was pointed out as rendering sites for residences around the more desirable, I have no doubt. *Mr. Gamble*, through whom the sales contracted for by *Logan* were carried out, says that he frequently told purchasers that the square would remain an open space for a long time to come; and *Logan* probably went further; and, to judge by the evidence, *Mr. McCutcheon* also; but all the witnesses, and probably all the purchasers, saw the maps in the hands of the agents as well as heard their representations. I do not think that any of the witnesses can at this distance of time be able to distinguish between what *Mr. McGill's* agents may have said as to his private intentions, and what as to his engagements, in relation to the piece of ground in question: then taking what they say with the maps exhibited, these maps depicted not a plain open space with any words importing a public dedication or an easement; nor a square in its prospective condition, with trees and walks; but an inclosure with a dwelling-house, and garden and grounds attached, and an open space to the north of them, all as they actually existed, and the words "*McGill's Square*."

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These maps appear to me to negative the idea alike of public dedication or of private easement as claimed; and taking the language of the agents with the plans

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they shewed, purchasers must, I should say, rather have relied upon what they looked for as probable, than upon what they understood to be pledged.

I think this open space, appearing as it did upon the maps, exceedingly material; for if these maps had shewn this space either simply as an open space or as a prospective square, with trees and walks, and with the words " McGill Square " upon it; and lots around it had been sold by such map and had been built upon, as the evidence shews these lots to have been, I do not think that Mr. McGill could now deal with property as he now claims a right to deal with it.

Whether these acts would amount to a dedication to the public, or an equity in the nature of an easement would have arisen to purchasers, it is not necessary to say, but I incline to think that it would have amounted to a dedication to public use, in the spirit of the act 12 Vic., ch. 35 sec. 41, and I confess I think that it would have made no difference if it were proved that Mr. McGill retained in his own mind an intention to exercise a control over the plan inconsistent with a public dedication; for if his overt acts were such as to amount to a public dedication, I do not think this court would hear him say that he had a mental reservation on the subject against a public dedication. If he had manifested the *animus dedicandi* by his acts, I think he would be estopped from saying any thing to the contrary.

But upon the evidence before us, and especially what appears upon the maps, I think the case made by the bill fails in both its aspects, and that the bill must be dismissed.

Sale of lands a

A plaintiff has money, registered, applied on lands made of the decree void as against the *mala fide* be best decided conveyance

The bill performance by the defendant made in Section entitled to have and to receive money and interest plaintiff.

The plaintiff a petition stating a decree which personal proceeds the decree, but had been filed defendant, by had assigned registration of was to set aside a sale of a share claim.

Mr. Strong

Mr. Roaf co

SPRAGGE, V
 plaintiff under

1859.

FISH V. CARNEGIE.

Sale of lands affected by registered decree—Statute 20 Vic., ch. 56, (Cons. St. U. C., ch. 12. sec. 68)—Practices.

A plaintiff having obtained a decree in this court for payment of money, registered the same pursuant to statute 20 Vic., ch. 56, and applied on petition for an order to sell the lands affected by such registration. By the same petition he impeached a sale of the same lands made by the defendant to his mother before the registration of the decree, and sought to have the sale declared fraudulent and void as against him, but the court, though strongly impressed with the *mala fides* of the transaction, thought the question raised would be best decided in a suit to be brought to test the validity of the conveyance by the son.

The bill in this cause was filed for the specific performance of an agreement to purchase certain lands by the defendant from the plaintiff; and by the decree made in September, 1857, the plaintiff was declared entitled to have the agreement specifically carried out, and to receive from defendant the amount of purchase money and interest, which he was ordered to pay to plaintiff.

Statement.

The plaintiff having proceeded under this decree, filed a petition stating the proceedings in the cause and the decree which had been made. That he had proceeded by personal process, and by writ of sequestration to enforce the decree, but had been unable to do so. That the bill had been filed on the 8th of May, 1857, and that defendant, by a conveyance made in February, 1858, had assigned all his lands to his mother previously to registration of the decree in this cause. The prayer was to set aside the deed as against the plaintiff, and for a sale of a sufficient portion of the land to pay his claim.

Mr. *Strong* for plaintiff.

Mr. *Roaf* contra.

SPRAGGE, V. C.—A petition is presented by the plaintiff under 20 Vic., ch. 56, (Consolidated Statutes, ch.

1859. 12, sec. 68,) for the sale of certain lands, affected, as it is alleged, by the registration of the decree in this cause, by which a sum of £91 13s., and the costs of the suit, were ordered to be paid by the defendant to the plaintiff. The decree bears date the 23rd of September, 1857.

Fish
Y.
Carnegie.

The petition impeaches a sale of certain lands of the defendant to his mother, *Isabella Carnegie*, which was conveyed by him to her in the month of February, 1858, and the conveyance for which was registered on the 25th of the same month, before the registration of the decree. The lands conveyed had been devised to the defendant by the will of his father, and consisted of a farm of 100 acres, a block of five acres, and either four or six (it seems uncertain which) village lots in the village of Ingersoll; the price was £600; £200 being, as stated by the mother, upon her examination, the price agreed upon for the farm, and £400 for the other property.

Judgment. The petition was served upon *Isabella Carnegie*, and she has appeared by counsel to support the conveyance to herself. I think the proper course would be for Mrs. Carnegie to give notice under order 41, for such relief as she may conceive herself entitled to. But as the evidence has been laid before me, I will state shortly in what light the purchase impeached appears to me; and first as to the price agreed upon, and its alleged payment.

The five acre block is described as worth £100 an acre, one witness estimates the block at £450; the village lots are estimated as worth from £22 to £25 each. Mrs. Carnegie says the price agreed upon for them was £25 each, this would make the five acre block and the village lots sold considerably under their value.

The farm is described as a good one, well watered, consisting of 100 acres, of which 60 are cleared, and lying close upon the railway, and near the village of St.

Mary's; and upon it in it at the t This farm appears from the vendor, being, as he worth \$100

The value the defend witnesses as have been o than £150 erected upon quate.

Then as accounted for were given years ago, up country, and with the kno she paid ther as moneys p her husband statement m the sovereign is incredible, the whole m self and her of any other Mr. Wenham, that the moth cash alleged t drew the con the memorial by the instru that he did no

Mary's; a barn which cost upwards of £100 was built upon it in the spring of 1857, and there was also upon it at the time of the sale, an unfinished frame house. This farm was purchased twenty-four years ago, as appears from the evidence of *Hiram Picard*, the son of the vendor, for five or six hundred dollars, his father being, as he says, pressed for money, and the place being worth \$1000.

1859.

Fish
v.
Carnegie.

The value of the farm at the time of the sale by the defendant to his mother, is stated by competent witnesses as about \$5000, and that \$3000 cash might have been obtained for it. The sale in fact was for less than £150 beyond the cost of the barn then recently erected upon it. The price is certainly absurdly inadequate.

Then as to the payment, a large portion of it is accounted for in this way; that three hundred sovereigns ^{judgment.} were given to Mrs. *Carnegie*, by an aunt, twenty-six years ago, upon the eve of her leaving Scotland for this country, and that she kept the same identical gold pieces with the knowledge of her husband, from that time until she paid them to her son. The balance she accounts for as moneys paid to her as executrix by persons, to whom her husband had sold land, and as to that balance her statement may be easily verified or disproved. As to the sovereigns, I am not prepared to say that her account is incredible, though certainly very extraordinary; but the whole matter is alleged to have passed between herself and her son, without the intervention or knowledge of any other person. The solicitor of the family and Mr. *Wenham*, who drew the will of the father, believed that the mother did not possess the means of paying the cash alleged to have been paid for the land. The solicitor drew the conveyances which are impeached; they and the memorials were drawn and prepared for registration by the instruction of the son only, and the solicitor states that he did not believe that any consideration passed.

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Fish
V.
Carnegie.

Then as to the intent and purpose with which these conveyances were made. It is clear from the evidence that the object of the son was to defeat the claim of the plaintiff. Mrs. Carnegie says in her examination that she had heard that there was some trouble between the plaintiff and her son, but that her son told her that he wanted the money to pay to the plaintiff.

I think the extreme inadequacy of the consideration a strong circumstance to shew fraud on the part of both the defendant and his mother. It would be strong evidence of fraud upon a question between themselves, and would not be less, I apprehend, when the question is between themselves and a third person.

Her story as to the sovereigns may be true; connecting it with the rest of the transaction, I cannot help feeling strong suspicion about it. Her examination, too, is not altogether consistent with itself, if it is correctly taken down as fixing the date of the bargain with her son in September, 1856; and if she is correct in that date, there would be the glaring absurdity of her son spending more than half of the purchase money upon a barn on the place which he had ceased to own. But I understand her to say that she purchased after the erection of the barn.

It appears by Mrs. Carnegie's affidavit that all the moneys beyond the gold paid for the purchase were the moneys of the estate of which she was executrix, and that she made the purchase for the benefit of those interested under the will. I think that they should be heard upon the question as to the validity of the purchase, and it may properly be raised in the manner pointed out by the 41st order.

Upon re-considering the matter, I am inclined to think that the question raised will be best decided in a suit to be brought by the plaintiff here, impeaching the sale as void as against him.

Discovery-Demurrer

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SPRAGGE, V

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1859.

HAMILTON V. PHIPPS.

Discovery—Demurrer—Statute 5 Wm. IV., ch. 1, [Consol. Statutes, ch. 42.]

Where several persons severally liable on a promissory note or bill of exchange, are jointly sued at law by the holder, one of the defendants in the action at law cannot obtain discovery against the plaintiff at law and the other defendants; the defendants as between themselves not being litigating parties, but witnesses; a bill filed for the purpose is demurrable.

The statute 5 Wm. IV., ch. 1, [Consolidated Statutes, ch. 42.] which permits the holder of a promissory note or bill of exchange to sue all parties liable upon it, in one action, does not affect the rights and liabilities of the defendants to such an action as between themselves, but leaves them in the same position as if they had been sued separately.

A bill will not lie for the discovery of facts which the plaintiff in equity may prove *aliunde* in his defence at law.

This was a demurrer for want of equity, the grounds of which are clearly stated in the judgment.

Mr. *Strong*, for the demurrer.

Mr. *Proudfoot*, contra.

SPRAGGE, V. C.,—[before whom the case was argued.]—^{Judgment.}
The suit at law, in aid of the defence to which discovery is sought by this bill, is brought by the holder of a bill of exchange for \$1470, drawn by the plaintiffs on the Bank of North America, at New York, in favour of one *Mewburn*, and by him endorsed to the defendant *Wright*, by him endorsed to defendants *Borst* and *Halliday*, and by them endorsed to the present holder, *Phipps*. The bill states that *Wright* applied to the plaintiffs to sell him a draft on New York, for the above sum, and obtained the same under circumstances of fraud and covin set out in the bill, to which fraud and covin *Borst* and *Halliday* were parties; and that *Phipps* gave no consideration for the endorsement to him, and had notice of the fraud of the other defendants; and that the indorsement by *Borst* and *Halliday* to *Phipps* was made with the intention of attempting to recover the

1859. amount of the draft in his name from the plaintiffs, for the benefit of *Borst* and *Halliday*; *Wright*, *Borst* and *Halliday* have demurred to the bill.

Hamilton
v.
Phillips.

In the action at law the plaintiffs in this suit, *Mewburn*, *Wright*, and *Borst* and *Halliday*, are joined as co-defendants under the provincial statute 5 W. IV., ch. 1, (Consol. Statutes, ch. 42.) The bill is for discovery in aid of the defence at law.

It seems to be now settled by the English authorities, (a) that a bill for discovery by a defendant at law, alleging that the suit at law is in fact brought for the benefit of the defendant to the bill of discovery, and that the plaintiff at law is only the nominal plaintiff is demurrable. The bill can only be filed against a party to the record at law. It has been urged in favour of such a bill, that the facts material to the defence at law may well be supposed to lie in the knowledge of the real plaintiff at law, and ought to be discovered by him; but Lord *Cottenham* in the *Queen of Portugal v. Glyn*, characterised such a proceeding as a very mischievous innovation in the rules and practice of a court of equity as to compelling discovery, and he added: "an inquisitorial power would be established by which persons not parties to any litigation, might be compelled in a contest between others to discover the secrets of their own affairs, upon an allegation which could not perhaps be denied, that they had some interest in the subject matter of a litigation between others; and as, if the defendant at law be entitled to the discovery in aid of his defence, the action cannot be permitted to proceed till such discovery be obtained, an easy expedient would be afforded of defeating the enforcement of legal rights by action at law, by filing bills of discovery against persons not parties to the

Judgment.

(a) *Fenton v. Hughes*, 7 Ves. 287; *Irving v. Thompson*, 9 Sim. 17; *Balls v. Maguire*, 3 Bea. 448; *Kerr v. Rew*, 5 M. & C. 154; *Queen of Portugal v. Glyn*, 7 C. & F. 466; *Few v. Guppy*, 13. Bea. 457.

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record and out of the jurisdiction, upon allegation of their being interested in the subject matter of the action." Such are the reasons given by Lord *Cottenham*, against allowing bills for discovery against persons not parties to the record at law; and who could, as a general rule, be examined in the suit at law by the party filing the bill for discovery. This decision indeed was given in a case where the demurrer was by the *Queen of Portugal*, whose evidence probably could not be obtained at all, or at least only at her own pleasure, and being given in such a suit shews the unwillingness of the court to interfere with the established rule. But it is said that all the parties against whom discovery is sought are parties to the suit at law, and therefore not within the rule.

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Hamilton
v.
Philpps.

By the statute under which the several parties to a bill of exchange or promissory note liable to the holder, may be joined as defendants to one action, it is provided Judgment. that the rights and responsibilities of the several parties to the bill or note, as between each other, shall not be affected by the act, (saving only the rights of the plaintiff as determined by the judgment,) and further, that every defendant shall be entitled to the testimony of any co-defendant as a witness in case the defendant calling the witness would have been entitled to his testimony had such co-defendant not been a party to the suit, or individually named in the record. I may say in passing, that I think this opinion is not affected by the statute 16 Vic., ch. 9, (sec. 5 of Consolidated Statutes).

If this act had not been passed; or if *Phipps* had thought fit to bring separate actions upon the draft, or only an action against the plaintiffs in this suit; it is clear, I think, that this bill could not have been sustained against the parties who have demurred; the question is whether the passing of the act, and the frame of the record at law entitle the plaintiff to sustain his bill.

I observe, in the first place, that the statute seems to

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v.
Philips.

contemplate the not affecting the rights and liabilities of parties made defendants under it, and leaving the law of evidence as between any of them and the plaintiff as it found it; and I was inclined to think that, as the same act which enabled the plaintiff at law to join these defendants in the same suit left the law as to their evidence the same as before, there was no defect at law, even for a moment, to give a court of equity jurisdiction to compel a discovery, where no right to a discovery existed before. But the case of *The British Empire Shipping Company v. Somes*, (a) before Vice-Chancellor Wood, is against that view, for he compelled a discovery in aid of proceedings before arbitrators, upon a compulsory reference at law, although the arbitrators had the power themselves of compelling a discovery.

Judgment. The English cases and the language of the judges and of text writers assist but little in the elucidation of this question, for they are applied to circumstances essentially different from those that exist under the statute to which I have referred. The true position of the plaintiff in this suit, as between himself and the demurring defendants, seems to me to be most material; they are parties to the same record at law; are they so in the sense in which that relation is treated in the English cases referred to? Are these defendants as to the plaintiff in equity litigating parties, or are they witnesses?

The bill treats them as litigating parties, alleging (though not very explicitly) that the suit at law is for their benefit; and their demurrer admits, for the purposes of the demurrer, the truth of the allegation. In *Fenton v. Hughes*, and the cases which have followed it, the demurrer admitted the truth of the same allegation. But the defendant is obliged to make his election either to make the discovery or to demur, (except when he is in a position to protect himself by answer from answering as

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to matter which may expose him to penalty or the like,) and the courts have allowed the demurrer, notwithstanding the admission by demurrer that the party was the real plaintiff at law. It was the only way in which the party could protect himself from making the discovery, and the courts do not seem to have felt such admission a difficulty in the way of refusing discovery; they do not treat the fact alleged as established by demurrer, against the defendant demurring. The passage which I have quoted from Lord *Cottenham's* judgment shews this clearly. If the court had considered it established by demurrer, in the same sense as established by evidence, that the demurring defendant was the real plaintiff at law, I can hardly doubt, looking, as they do, at the real position of the parties, not the position they occupy in a suit, that they would have compelled a discovery from him.

I think what is meant by litigating parties, is, parties ^{Judgment.} who are litigants as between themselves at law, and so appearing upon the record at law, and the word discovery *ex vi termini* imports something in the way of information sought from an opponent. Upon the record at law these parties are contesting nothing between themselves, and if I am correct in taking it as not established by the demurrer that *Borst* and *Halliday* are the real plaintiffs, then it follows that if this demurrer were overruled, the different defendants to an action at law under the act might file bills of discovery against each other; for the right to file the bill is rested upon this, that the defendant is a party to the same record at law as the plaintiff is, and indeed if the circumstance of the defendant to the bill of discovery being a party to the same suit at law as the plaintiff, entitles the plaintiff to a discovery, no allegation that the defendant in equity is the real plaintiff will be needed. The defendants at law do not, and cannot, in that suit, contest any thing as between themselves; they may use the evidence of one another against the plaintiff at law; but a bill for discovery by

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Phipps.

one against another is quite a different thing. I think the real position of the parties demurring as between themselves and the plaintiff is that of witnesses, and not of litigant parties, and I am unable to see why the circumstance of their being co-defendants at law should make a difference.

The evident intention of the act was to diminish costs in suits upon bills and notes, and its effect really is to combine several suits in one, leaving the rights and liabilities of the defendants the same as between themselves as if they had been sued separately.

It is material to consider whether the reasons which have weighed with the courts in England in refusing to compel a discovery when the defendant to the bill is not a party to the record at law, apply to such a case as this. The allegation that he was the real plaintiff at law appears to have had no weight; but the mischief is dwelt upon of persons not parties to a litigation being compelled in a contest between others to discover the secrets of their own affairs; that objection seems to me to apply with the same force to such a bill as this, and so does the objection that it would be an easy means of delaying proceedings at law.

Judgment.

The holder of a note brings his action against all parties liable to him. One of the defendants, upon a bare allegation of fraud by another defendant, and that the holder paid no value and had notice, files his bill against such other defendant and the holder; the holder may answer ever so satisfactorily, but his action at law is stayed until the co-defendant at law of the plaintiff has answered also. It may be to the interest of such co-defendant to defer a sufficient answer as long as possible, and the interest of the plaintiff in equity to connive at his doing so. If such bill were allowed, I should expect to see them often resorted to by dishonest defendants to delay the enforcement of the plaintiff's legal right.

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Then, there is no necessity as the law stands for such a discovery. It is true that such discovery may sometimes be more effectual than an examination at law, but that has never been admitted as a sufficient reason for compelling discovery when otherwise it was not compellable. If the same means of compelling discovery at law had always existed as exist now, I apprehend that equity would not have compelled discovery in aid of an action or defence at law, inasmuch as the court refused it in aid of proceedings in the Ecclesiastical Court, on the ground that the court had itself the means of compelling discovery.

This was decided in *Dunn v. Coates* (a), where Lord *Hardwicke* said: "This court will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, because they are capable of coming at that discovery themselves;" and in a subsequent case before the same learned judge he held similar language. (b)

Judgment.

The purposes for which discovery is sought, and the use that may be made of it when obtained, seem also material. It is sought as evidence, and as leading to evidence against the person against whom the bill is filed, and the answer to the bill can be used against him only, but by this bill it is sought in aid of a defence to a suit at law instituted by another person, and against whom it cannot be read. The utmost that can be said in its favour is that information may be obtained of facts which the plaintiff here may prove *aliunde* in his defence at law; but I think that is not the proper office of a bill of discovery. It is getting information from a witness who happens to be a party, but not an adverse party, on the same record. Upon these grounds, I think that the demurrer ought to be allowed.

The defendant, *Phipps*, the plaintiff at law, has put in an answer to the bill of discovery; and it is contended

(a) 1 Atk. 288.

(b) Anon. 2, Ves. 461.

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on his behalf, that he is not bound to wait until his answer has become *sufficient*, as under the old practice, before he can proceed in his action at law.

The question is raised upon a motion by the plaintiff for an injunction to stay proceedings at law.

The 27th general order of this court is in these terms: "No injunction to stay proceedings at law is to be granted for default of answer to the bill, but such injunction may be granted upon interlocutory application in like manner as other special injunctions are granted." "On any motion to obtain or dissolve a special injunction, affidavits may be used either to support or contradict the answer."

Judgment. In the English cases upon this point, I do not find any distinction made between injunctions in bills for discovery only in aid of proceedings at law, and in bills for injunction to stay proceedings at law and for relief in equity. The common injunction having been abolished, the plaintiff has been held entitled, upon making a proper case, and upon filing his bill and interrogatories, to stay proceedings at law until he has obtained the discovery he seeks by the defendant's answer. It is decided that he is entitled to make this application before any default by the defendant, and that when he has filed interrogatories, he is entitled to his injunction until answer, although his case is met by affidavits filed by the defendant, and the reason for this is thus given by Sir John Romilly in *Senior v. Pritchard* (a), which was a bill for discovery and relief: "When, therefore, the defendant has not answered the bill, but has filed affidavits stating facts, which, if there was nothing more in the case, would be sufficient to displace the plaintiff's equity, yet, as it is quite possible that additional facts restoring that equity may be brought out by the answer

(a) 16 Bea. 473.

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to the interrogatories, the court will grant an injunction till answer." He laid down the same rule in *Lovell v. Galloway* (a), which was a bill for discovery only. In the former case he stated that he had consulted two of the other equity judges who held the same view. Sir *Richard Kindersley* appears to have thought differently, for in *Magnay v. Mines Royal Company*, (b) after observing upon the change of practice, and that the plaintiff is bound to make a special application supported by affidavits, so as to shew on the face of the evidence that the allegations of the bill are well founded, he adds, "of course this involves the consequence that the defendant has a right to oppose on affidavits."

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This point appears material in this way: if the defendant can shew cause by affidavits he can shew cause by his own answer, using it as an affidavit. I do not mean to say that he may not do so if Sir *John Romilly* is right, but I think it clear that he may if Sir *Richard Kindersley* is right. Sir *John Romilly*, I Judgment, think, implies, in *Lovell v. Galloway*, that the injunction should continue not only until answer put in, but until the answer was *sufficient*, for he says, alluding to the extent of discovery which might be required of a defendant: "That, however, is a question to be determined on exceptions, which is the proper occasion for determining the extent of discovery to which the plaintiff is entitled." Until the answer has become sufficient, it is manifest further discovery *may* be obtained.

I may here observe, that by our present orders, exceptions to an answer for insufficiency are not in terms abolished, the exceptions for scandal and impertinence are; and I apprehend that there is nothing to prevent a plaintiff in a bill of discovery excepting to an answer to his bill for insufficiency.

But that, as it appears to me, does not decide the

(a) 17 Bea. 1.

(b) 3 Drew. 130.

1859.

Hamilton
v.
Phipps.

question whether the answer may not be used to meet an application for injunction upon a bill for discovery.

The granting of the injunction is always a matter of discretion. Suppose the defendant to put in an answer not protecting himself from discovery, but giving a discovery upon all the points upon which discovery is sought, it would appear a very reasonable and sufficient answer to an application for injunction; the plaintiff, of course, being allowed sufficient time to examine the answer minutely and see whether or not it contained a full and sufficient discovery. If the plaintiff were unable to point out any defect, or any substantial defect; if, further, as is the case here, the assizes at which the trial was to be had were close at hand, would the court be obliged to say that the time for excepting must be allowed to elapse, and all the proceedings consequent upon exceptions; and that proceedings at law must be stayed in the meantime. I am not speaking of dissolving an injunction already obtained, but of resisting a motion for an injunction. The old practice, when an injunction to stay proceedings at law had been obtained by default, (the only way in which it could be obtained,) was for the defendant on filing his answer to obtain an order *nisi* to dissolve the injunction, cause might be shewn against this either upon the merits or for insufficiency. If the latter, the plaintiff was put to obtain the master's report in four days; so careful was the court not to stay proceedings at law longer than necessary. To assimilate to this as near as may be, the resisting an application for such an injunction, (a thing, however, which could not occur under the old practice,) the plaintiff should, if an answer by way of discovery is shewn for cause against his application, be put to argue it upon the merits, or to obtain the master's report upon the sufficiency of the answer within four days (the latter only, if the bill be for discovery only). But upon this, which is necessarily new practice, I think it would be open to the court, upon such application, to ask of the plaintiff if he objected to

Judgment.

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the discovery as insufficient, and if he did, to state and argue his objections, and in its discretion to dispose of the matter or refer it to the master.

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Hamilton
v.
Philippa.

In this case the question discussed before me was, what is the proper practice, not whether the answer really contains such a discovery as is required. I believe the parties were not prepared to argue that question, the answer being sworn, but not actually filed (the bill having been filed at Hamilton). I think the proper course for the plaintiff is, if he conceives the answer not to be sufficient, to speak again to his application for the injunction; if he is satisfied with the answer as a discovery, he has all that his bill seeks, and ought not to have an injunction.

It was contended in argument by Mr. *Strong*, that the facts alleged in the plaintiff's bill do not constitute a good defence at law, and therefore that a discovery would not be enforced. If these facts are clearly no ^{Judgment.} defence at law, I suppose discovery should not be compelled; but I am not prepared to say that they constitute no legal defence, they are pleaded at law, and the plaintiff has not demurred, but has taken issue upon them. Mr. *Strong* also objects to the delay which has taken place. The plaintiff's writ at law was issued on the 8th of November: declaration served on the 12th of December: the defendant pleaded on the 20th of the same month, and on the same day filed his bill of discovery. If the plaintiff in equity was entitled to receive a declaration at law and to plead to it, he has been prompt in filing his bill. The bill is in aid of his defence at law, and it would seem proper that his defence should be set up at law before he files a bill for discovery in aid of it; and the rule is so stated in *Story's Equity Pleadings*, and cases cited in support of it. In *Peel v. Kingsmill (a)* in this court, the same point seems assumed. I think the objection not sustainable.

(a) Ante, Vol. 2, p. 272.

1859.

Hamilton
v.
Phipps.

As the demurrer by the defendants, other than *Phipps*, and the motion for injunction to stay proceedings at law were argued together, I have thought it convenient to dispose of them in one judgment, though they are in fact entirely distinct questions.

HICKMAN v. LAWSON.

Riparian proprietor.

The owner of land on both sides of a stream sold and conveyed a mill property situated thereon, to a purchaser, and another portion of the land to another person, *held*, that the proprietor claiming under such conveyance had a right to retain the water in the mill-pond at the same height that it was at the time of the sale; although the effect of so retaining it might be in case of a sudden and temporary rise of the river, to overflow more land of the other riparian proprietor than had been usually overflowed before; and that in case the water in the stream should sink so as to leave uncovered land which had been usually overflowed at the time of the purchase, the present owner of the mill would be entitled to raise his dam so as to obviate the effect of the diminution of the water.

This was a motion for an injunction restraining the defendant from continuing a dam upon the river Humber, at such a height as to injure the premises owned by the plaintiff. It appeared that the land of the plaintiff, and the mill property, of which the defendant was the proprietor, had at one time been owned by one *James Bolton*, who sold to persons through whom the parties to this suit claimed title. In working his mill, the defendant, it was alleged, had raised the water in the pond to such a height as had materially injured the property of the plaintiff; destroying several fruit trees in his garden, and inflicting serious damage upon him in other respects. Under these circumstances the present application was made by

Mr. *Roaf*, for the plaintiff.

Mr. *McMichael*, contra.

ESTEN, V. C.—I think it appears clearly from the

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evidence of *Harrington* and *Wolfe*, strengthened by other evidence, which is not so material, that the water has been raised considerably, and so as necessarily to overflow the plaintiff's land, and to an extent sufficient to call for the preventive interference of this Court, by injunction, since the year 1849, when *Goodfellow* purchased the land in question from *James Bolton*. The evidence adduced on behalf of the defendant is not sufficient to countervail this weight of testimony. Without entering into the questions raised with regard to the acquisition and maintenance of prescriptive rights, and the effect of unity of possession, I think it must be intended that *James Bolton* conveyed, and *Goodfellow* purchased, in 1849, subject to rights that were then in exercise. The subject of enquiry, therefore, is, what was the height of the dam at that time; for I am of opinion that the right, which was reserved, was a right to maintain a dam of a certain height, and that if the water has risen from natural causes since that time, the plaintiff must submit to the inconvenience arising from the increased overflow on his land in common with all the other riparian proprietors. I am satisfied, however, by the evidence before us, that the dam has been heightened since 1849, and this the defendant does not deny. I think an injunction should go to prevent the defendant from raising or keeping his dam higher than it was when *Goodfellow* purchased. I think the plaintiff should have his costs. It may be useful to add, by way of explanation, that we think the defendant cannot raise his dam so as to overflow the plaintiff's land to a greater extent than it was when *Goodfellow* purchased; but if the dam be kept at the height at which it was then, the plaintiff must submit to the inconvenience of any sudden and temporary rise of the water; and should the water sink in the river so as to leave uncovered any part of the plaintiff's land, which was usually overflowed at the time of *Goodfellow's* purchase, that the defendant will be entitled to raise his dam so as to obviate the effect of the

1859.

Hickman
v.
Lawson.

Judgment.

1859. *Hickman v. Lawson.* diminution of the water. We think, however, that he has in fact raised his dam, and thereby overflowed the plaintiff's land unwarrantably.

GIBB V. WARREN.

Mortgage—Accord and satisfaction.

A mortgage was made for £1196, payable £200 in four months, £200 in eight months, and £224 in twelve months, the residue at later periods. The third instalment was paid. For the first and second instalment the mortgagor gave two promissory notes, bearing even date with the mortgage, and took the following receipt from the mortgagee: "Received from R. B. W. his notes for £200 at four months, and £200 at eight months from 1st June last, in full for the same amounts due on a mortgage made by him to me, maturing at same date." And the following endorsement was made on the mortgage: "Received from R. B. W. two notes of hand endorsed by L., for £200 each, to complete the two first payments on the within mortgage." The notes were not paid at maturity, and in a suit by the assignee of the mortgagee to foreclose in default of payment of the first and second instalments, held, that the right to recover upon the mortgage was only suspended, and not discharged by the taking of the notes.

Mr. Strong, for plaintiffs.

Mr. Hector, for defendants.

Judgment. SPRAGGE, V. C.—This cause was brought to a hearing by way of motion for decree.

The bill is filed by the assignees of a mortgage against the assignee of the equity of redemption, for the benefit of creditors, and the purchaser from the assignee, upon his sale, in pursuance of the trusts. The mortgage bears date the 1st of June, 1857, and the mortgage money, which was £1196, was made payable £200 in four months from date, and £200 eight months after date, £224 in one year after date, the balance at later periods, as to which no question arises. The third instalment has been paid, and no question arises as to any excepting those made payable at four and eight months from the date of the mortgage.

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date of the mortgage, and in the early part of July, of the same year, two promissory notes were given for the same amounts, and payable at the same times, and which were ante-dated to the date of the mortgage. They were made by the mortgagor, payable to the mortgagee. It was on the eve of the transfer of the mortgage to the present holders, and the notes were transferred with the mortgage, endorsed by the mortgagee.

1859.

Gibb
v.
Warren

Upon the giving of the notes a detached receipt was given by the mortgagee to the mortgagor, in these terms: "Received from *R. B. Warren*, his notes for £200, at four months, and £200 at eight months from 1st June last, in full for the same amounts due on a mortgage made by him to me, maturing at same dates." "Oshawa, 7th July, 1857;" and the following endorsement was made upon the mortgage by the assignee of the mortgage:—

"Received from *R. B. Warren* two notes of hand, endorsed by *Lockhart*, for £200 each, to complete the two first payments on the within mortgage."

Judgment.

"THOS. A. GIBB."

Default was made in respect of the payment of both these notes, and thereupon, as the plaintiff contends, the original liability of the mortgagor upon his mortgage revived. There was indeed no period of suspended right of suit occasioned by the giving of these two notes, as they were payable at the same times, as the like payments by the mortgage, but there appears to have been one or more renewals, and during their currency the right to sue on the mortgage was at least suspended. Whether the right was only suspended must depend, I apprehend, upon whether these notes were taken in satisfaction of the like amounts payable by the mortgage, or only on account, and I think it must lie upon the mortgagor to shew that they were taken in satisfaction; and that unless this be shewn they will be presumed to have been taken on account only.

1859.

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Warren.

It has been decided in our own courts (a) that a plea to an action, which was brought for the consideration of a promissory note, that the note was given in satisfaction is a good plea; or, what is the same thing, that a replication to such plea, that the note was past due and unpaid, was bad on demurrer; and there are English cases which support the same view. (b)

Negotiable paper being merely taken *in payment*, as it is ordinarily called, of an antecedent debt, operates only as a suspension of the right to sue for the original debt: it requires something more—an actual agreement that the paper should be taken in satisfaction and discharge of the original debt, otherwise that debt revives upon default in payment of the paper. This distinction is apparent in several of the cases. In *re Blackburne* (c) goods were sold which were to be paid for by a bill at three months, and the language of Lord *Eldon* was,

Judgment. "In a sale of goods the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill. In this instance it would be extremely difficult to persuade a jury, under the direction of a judge, to say an agreement to pay by bills was satisfied by giving bills, whether good or bad. The bills were only a mode of paying the debt of £3000; if they are not paid, the original debt arising out of the contract for goods sold and delivered remains."

In *Tempest v. Ord* (d) a bill for £800 at two months was given in payment for a steam engine; and the maker of the engine gave a receipt as for so much money received in discharge of his demand. Sir *Thomas Plummer* held this to be no payment. He said, "When a bill of exchange is given in payment of a debt, and the

(a) *Loomer v. Marks*, 11 Q. B. U. C. 16.

(b) *Sard v. Rhodes*, 1 M. & W. 153; *Sibree v. Tripp*, 15 M. & W. 23; *Belshaw v. Bush*, 11 Q. B. 191, and the other cases cited below.

(c) 10 Ves. 203.

(d) 1 Mad. 89.

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bill is not paid, the creditor, unless he has purchased the bill out and out, has a right to resort to his original cause of action." This was in the face of a receipt expressed to be for so much money received in discharge of the demand; and as to that the learned judge only observed, "The receipt was not properly drawn. It should have been for so much money when the bill of exchange was paid."

1859.

Gibb
v.
Warren.

To the same effect is the language of Lord *Kenyon*, C. J., in *Owenson v. Morse*: (a) "If the defendant had agreed to take the notes as payment, and to run the risk of their being paid, that would have been considered as payment, whether the notes had or had not been afterwards paid; and that is all that is proved by the cases that have been cited; but without such agreement the giving of such notes is no payment."

The case of *Price v. Price* (b) is the latest English case which I have seen upon the effect of a note given Judgment. generally upon an antecedent debt. The law is thus put by Baron *Parke*, who delivered the judgment of the court: after stating the pleadings, he adds, "and therefore, for any thing stated in the plea, the note remains overdue in the hands of the plaintiff; so that the suspension of his right of action for the original debt is at an end, and he may recover the amount."

In the same case the learned Baron quotes the language of Lord *Kenyon*, in *Stedman v. Goroch*: (c) "To this effect the law was clear, that if, in payment of a debt, the creditor is content to take a bill or note, payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable, or [and] default is made in the payment." It will be observed that in these cases the note is supposed to have been taken *in payment* of the debt, and yet upon default the remedy upon the original debt revives.

(a) 7 T. R. 66.

(b) 1 Esp. 3.

(c) 16 M. & W. 232.

1859.

Gibb
v.
Warren.

It is not material to notice the change in the law as to what is necessary to constitute accord and satisfaction. This point, I think, is clear at the present day, that a negotiable instrument may be taken in satisfaction of an antecedent debt, (though of a higher nature, at least in England, by the Common Law Procedure Act,) but there must be an agreement to forego all remedy except upon the note, or to take the note in discharge and satisfaction, and in lieu of the original debt; otherwise the remedy is only suspended, and some of the cases to which I have referred shew that taking it in payment simply is not enough, as it will be intended that it was to be in payment only upon the contingency of the note itself being paid at maturity.

The parol testimony in this case is conflicting. On the one hand *Lockhart*, the mortgagee, and his assignee, the plaintiff, concur in stating that the notes were taken for the accommodation of the mortgagor, in order that he might have an extended time for payment through their renewal; and not by way of payment or satisfaction of the instalments of mortgage money for the corresponding sums; and *Lockhart* adds, that they were dated on the same day as the mortgage to shew on the face as one transaction, and to prevent their being considered as payment.

On the other hand, the mortgagor states that the notes were given for the accommodation of the mortgagee and his assignee, and upon their reiterated request, and that he only consented to give them upon condition that they should be taken as payment, and in discharge of the first two instalments of the mortgage money, and that the assignees would endorse upon the mortgage the fact that he so received them. He also states the consideration of the mortgage differently from the plaintiff and his witnesses; that £400 of it was not for the purchase money of the mortgaged premises, as stated by the other side, but for *Lockhart's* interest in the stock in trade

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and other chattel property, in which the two had been interested as partners. Upon this point Mr. *Fairbanks*, a solicitor, states that the mortgage was given for the purpose of securing the due payment of the purchase money of the mortgaged premises, and for no other purpose; that he knows the facts stated in his affidavit from having been the solicitor of the parties in the several transactions of the mortgage and transfer thereof, in which transaction he acted as the solicitor of both parties. And the mortgagee and his assignee state the consideration in the same way. I find, however, upon referring to the original affidavits, that those filed by the plaintiff were sworn before the affidavit of the mortgagor, so that I am not clear that Mr. *Fairbanks* would have contradicted him as to the consideration of the mortgage, after seeing the explanation in regard to it contained in his affidavit. Mr. *Fairbanks* says nothing as to the taking of the notes. The affidavit of the mortgagor is full and explicit, and stands opposed to those of the mortgagee, and his assignee, the plaintiff. The mortgagor is a resident of the State of Illinois, and his affidavit is sworn there; and he could not be cross-examined, at least only upon commission, and with his assent: the plaintiff and his witnesses have not been cross-examined on their affidavits. The mortgagor states himself to be entirely disinterested, and probably is so; the mortgagee is an endorser on the notes, and has an interest in retaining the mortgaged premises as a fund for his assignee to look to for payment. Moreover the assignment (which is dated the 22nd of July, 1857) contains covenants on the part of *Lockhart* that the mortgage money was due and owing; that he had done no act whereby the same had been received, released, or discharged, and that the mortgage money should be punctually paid. One of the recitals to the assignment is in these terms: "and whereas there is now due upon the said indenture of mortgage for principal the sum of £1196," the whole mortgage money.

1859.

Gibb,
v.
Warren.

Judgment.

This assignment may be looked at in two views. It

1859. shews *Lockhart* interested ; but its being in the shape it is renders it improbable that the two parties to it had, two months before, agreed to that which was at variance with the recital, and in breach of the covenants.

Gibb
v.
Warren.

The mortgagor certainly was no party to the assignment, and is not bound by its contents, but the circumstance is not without its weight in looking at all the circumstances of the case.

I find this circumstance also: the parties are at issue as to the fact for whose accommodation it was that the notes were given. The plaintiff and his witnesses say, for the accommodation of the mortgagor, that he might renew; the mortgagor denies this; but we find as a fact that he did renew.

Judgment. In the conflict of evidence the probabilities of the case may fairly be looked to. It is quite intelligible that either party might have proposed the giving of the notes; and the giving of them with an understanding that they should be renewed, may well have been mutually advantageous; to the receiver of them, who might convert them into money; and to the giver, because he would obtain (as he did obtain) an extended time for payment. But it is hardly probable that the holder of the mortgage would forego his real security, for his share of the advantage, though it is of course possible.

But the documentary evidence is, after all, that which is most safe to rely upon; and first, the receipt taken by the mortgagor. It is for the two notes, and expresses that they are in full for the same amounts due on the mortgage. It is said that the words "in full" mean in full payment. Assuming this, is there any thing necessarily implying (for it is not expressed, and must be at least implied) that the notes were taken in payment of so much mortgage money, whether the notes themselves were paid or not? The mortgagor says the

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agreement was, that they should be taken in "discharge" of corresponding amounts of mortgage money; that word, or its equivalent "satisfaction," are not in the receipt. If the notes were given under the circumstances stated by him, he had it in his power to dictate the terms of the receipt, and we might expect to find it as explicit as possible; but it appears to me at least equivocal, and such as would probably be given if it were intended that the notes should be received as payment, if themselves paid.

1859.

Gibb
v.
Warren.

The mortgagor further represents that he made it a condition that the fact of the notes being taken in discharge should be endorsed on the mortgage, but he did not see this done, and the receipt which was endorsed is not so expressed. It is like the detached receipt, a receipt for the two notes, and is expressed to be to complete the two first payments on the mortgage: the words "to complete," can hardly be stronger than the words "in payment," but these words, according to the cases to which I have referred, would not be sufficient. But I observe that the word "payment" does not appear upon either receipt. I cannot help thinking that it was advisedly omitted lest it might operate as a discharge of the mortgage money.

Judgment.

I by no means say that the case is free from difficulty; but weighing the whole of the evidence, and looking at the circumstances, I do not think that there is sufficient to take it out of the rule that a note or bill given for an antecedent debt only suspends the remedy; and that upon default the original consideration revives.

Taking the view of the evidence that I do, it is not necessary to consider another point raised by Mr. *Strong*, that the mortgage money was in fact so much purchase money, for the payment of which the vendor retained a lien upon the estate sold, being the mortgaged premises; and that such lien remained, even if the notes were in fact taken in satisfaction of the first two instalments of the

1859. mortgage money. Upon the point of the lien being retained after mortgage upon the same estate for the same purchase money, I am concluded by the case of *Baldwin v. Dwignan*, (a) in this court; but there are other difficulties in the way of Mr. *Strong's* position; according to the evidence of the mortgagor, these two first instalments were not the purchase money of land, but of stock in trade and other chattels, and therefore no lien.

Gibb
v.
Warren.

But suppose these to have been a lien; the agreement, if sufficient to discharge so much mortgage money, would be sufficient to discharge so much purchase money; the essence of the agreement being that the land should be discharged *pro tanto*. If it were held that so much mortgage money was discharged by the agreement of the mortgagee—that mortgage money representing a corresponding amount of purchase money—it would be impossible for the mortgagee to contend in the face of such his agreement, that he still retained his lien for so much purchase money.

Judgment.

I think the plaintiff entitled to a declaration that the two first instalments of mortgage money were not discharged or satisfied by the taking of the promissory notes in the pleadings mentioned; and the terms of the decree will be as in an ordinary foreclosure suit.

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(a) Ante vol. vi., p. 695.

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RIDOUT v. GWYNNE.

Marriage settlement.

By an ante-nuptial settlement it was recited that the intended wife was seized in fee of certain lands, &c., and had also a claim to certain other property over which she had not at the time an absolute control or dominion; and that it had been agreed that her intended husband should enter into such covenants, &c., concerning all the real and personal estates as should or might be acquired from time to time, by the said intended wife, during the intended coverture, as were therein contained, concerning the lands of which she was then seized, and which were thereby conveyed to trustees. And the intended husband covenanted that he would allow his intended wife during the intended coverture, to receive to her own use the rents, and profits of the lands, &c., so conveyed; and also, if he should become interested, in right of his intended wife, in any real or personal estate which should thereafter be given or bequeathed, or descend to her, he would allow the same to remain at her entire dispositio, and that he would join with her in "*conveying, assigning, and assuring, all such property as shall hereafter descend to, or be given or bequeathed to her, to the trustees upon the same trusts, and subject to the same provisos, &c., as are expressed herein relative to the lands, &c., hereinbefore conveyed.*" Held, that this bound the wife to bring property afterwards given or devised to her into settlement, but that it did not bind lands of which she was then seized in reversion.

This was a suit to change trustees. In settling the statement. assignment to the new ones, the surviving trustee under the settlement insisted that all lands, &c., subsequently acquired by devise, &c., must be brought into settlement; on the other hand, the parties to the contract contended that the covenant of the husband bound him only to join in conveying such lands, if required to do so by the wife, and that without such request on her part, such estates were not bound by the trusts.

The authorities principally relied on by counsel are referred to in the judgment.

Mr. *Hurd*, for the plaintiffs.

Mr. *Morphy*, for the defendants, the retiring trustee, and the infant children of the marriage.

THE CHANCELLOR.—Two questions have been argued before me in this case, which turn entirely upon the construction of the settlement made upon the marriage.

1859.

Ridout
v.
Gwynne.

of Mr. and Mrs. *Ridout*. The first question is, as to the effect of the covenant entered into for the settlement of Mrs. *Ridout's* after acquired property; whether that covenant is to be regarded as the mere covenant of the husband, binding upon him alone, or as the covenant of both parties, and, consequently, equally binding upon both. The second question is, whether that covenant embraces certain real estate of which Mrs. *Ridout* was seized in fee simple in reversion at the time of her marriage.

The deed recites, that "whereas the party of the second part (Mrs. *Ridout*) is seized to her and her heirs in fee simple, of the messuages, lands, and hereditaments, hereinafter described, and hath also a claim to certain other property over which she hath not at present an absolute control or dominion; and whereas a marriage hath been agreed upon, &c., and upon the treaty for the said marriage it was agreed that the said messuages, &c., should be conveyed, &c., upon the trusts, &c., hereinafter limited, concerning the same, and that the said party of the first part (Mr. *Ridout*) should enter into such covenants and agreements, concerning all other real and personal estate as should or might come to the said party of the second part during the said intended coverture, as hereinafter is contained."

Judgment.

Certain real estates of which Mrs. *Ridout* was seized in fee simple in possession, are then conveyed to the trustees in trust for Mrs. *Ridout*, for life, for her separate use; then in trust for the children of the marriage, in equal shares; in default of issue, in trust for such person as Mrs. *Ridout* might appoint; and in default of appointment, in trust for Mrs. *Ridout* and her heirs.

The deed then proceeds in these words: "And this indenture further witnesseth, that in pursuance and performance of the said agreement, entered into upon the said treaty for the said intended marriage, by the said

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Gwynne.

party of the first part, in regard to the property to which the said party of the second part *is now, or hereafter may become entitled as aforesaid*, he the said party of the first part doth hereby for himself, his heirs, executors, and administrators, *covenant, promise, and agree* with the said party of the third part (the trustees) that he will not only permit the said party of the second part, during the said intended coverture, to have, receive, and enjoy to her own separate use and benefit, *the said lands, &c., hereby settled*, as aforesaid, and also all moneys, rents, and profits arising therefrom; *but also*, that if he, in right of the said party of the second part, *shall become interested in, or entitled to, any real or personal estate, which shall hereafter be given or bequeathed, or which shall descend to the said party of the second part*, he, &c., shall and will permit and suffer the same, and every part thereof, to be, and remain, at the entire disposition of the said party of the second part, either for her own use, or the use of any other person or persons whom she shall appoint. *And, for the better effecting the said purpose, he, &c., shall and will join with the said party of the second part* in conveying, assigning, and assuring all such property as shall hereafter descend to, or be given or bequeathed to the said party of the second part during the said coverture, unto the said parties of the third part, &c., upon the same trusts and subject to the same provisoes, &c., as are expressed herein, relative to the lands, &c., hereinbefore conveyed.”

Now the argument which has been addressed to me upon the first point, on behalf of Mr. and Mrs. *Ridout*, is, that the covenant to which I have just referred is the covenant of the husband alone, and that as Mrs. *Ridout* is not bound thereby, the court cannot compel her after acquired lands to be brought into settlement against her will, and *Douglas v. Congreve*, (a) *Thornton v. Bright*. (b) and *Ramsden v. Smith*, (c) were cited in support of that

(a) 1 Keen. 410.

(c) 2 Drew. 298.

(b) 2 M. & C. 230

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Gwynne.

Judgment.

position. But none of these cases decides the point now before me. The question in all of them was, whether, upon the proper construction of the settlement, the covenant was intended to embrace property settled to the separate use of the wife, and these decisions seem to me to turn entirely upon the fact that the property as to which the question arose had been so settled. In *Douglas v. Congreve*, Lord Langdale says: "The covenant, as it appears to me, could only relate to property which, in right of the wife, became subject to the contract of the husband, and not to property which by the will of the giver was to belong to her independently of him. And in *Thornton v. Bright*, Lord Cottenham says: "The covenant is the husband's only, and applies only to that over which he may have dominion." Mr. Hurd contends that *Ramsden v. Smith* has extended the principle of the former decisions to all the after acquired property of the wife, whether settled to her separate use or not; and he contends, upon the authority of that case, that the estates which have been bequeathed to Mrs. Ridout here are not bound by the covenant, although they are clearly designated, and have come to her unfettered by any settlement. The whole question is discussed very fully and ably by the Vice-Chancellor, in the case referred to, and although some passages in the judgment would seem to support Mr. Hurd's argument, it is clear, I think, upon the whole, that the decision turned upon the fact that the property had been settled to the separate use of the wife, and, had that been otherwise, I have no doubt that the Vice-Chancellor would have held that it was bound by the covenant. The argument is this:—the parties cannot have intended this covenant to embrace property settled to the separate use of the wife. The husband would have no control over such property—no power to bring it into settlement—and it is therefore absurd to suppose either that the husband himself intended to covenant or that the wife intended to covenant for him, that he would do what it must have been foreseen that he would have no power to

do, namely, her separate fact that the the separate have been abundantly close of his his own view "It appears instrument intention of property co property co as to the fo modified for mean as to the covertur the husband to which any property, sh himself, or b do the acts, settle any sep

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It is argued

do, namely, settle property bequeathed to his wife for her separate use. (a) That the case turned upon the fact that the property in question had been settled to the separate use of the wife, and that the decision would have been different had it been unsettled, appears abundantly evident from the following passage at the close of his judgment, in which the learned judge states his own view of the case irrespective of the authorities: "It appears to me," he observes, "that looking at the instrument itself, independently of any authorities, the intention of the parties was this, that inasmuch as any property coming to the wife being personalty, and any property coming to the wife being real property, would, as to the former, absolutely, and as to the latter, in a modified form, become the property of the husband, (I mean as to realty, become vested in the husband during the coverture,) the intention was, that the property which the husband would have any power over, or with respect to which any act of his might be necessary to vest that property, should by him, and by acts done either by himself, or by those whom he had a right to compel to do the acts, be settled; but that it was not intended to settle any separate property."

Judgment.

Now, in the case before me, the property in question is not separate property; and the frame and language of the covenant are very peculiar. The husband covenants in effect, that his wife shall enjoy all her after acquired property to her separate use, and for the better effecting the said purpose, that he will join with his wife in conveying it to the trustees upon the trusts of the settlement. I have no doubt, upon the whole instrument, that it was the clear intention and agreement of all parties that this property should be settled, and it follows, consequently, that the wife is bound equally with the husband. (a)

It is argued, in the next place, that the settlement, as

(a) At page 302.

1859. framed, does not include certain lands of which Mrs. *Ridout* was seized in fee simple in reversion, at the time of the marriage, and that these estates, consequently, ought not to be embraced in the conveyance to the new trustees. The language of the instrument is inaccurate throughout. But, looking at the recital alone, there is in it, I think, a clearly expressed intention that all Mrs. *Ridout's* property, whether in reversion or possession, should be settled. When we come to the operative part of the instrument, however, it is equally clear that that has not been done. The husband covenants, that if he shall become entitled to any real estate *which shall hereafter be given or bequeathed, or which shall descend to his wife, his wife shall enjoy it for her separate use; and he covenants, further, that he will join with her in conveying all such property as shall hereafter descend to, or be given or bequeathed to her during the said coverture, to the trustees upon the trusts of the settlement.* Now that language does not appear to me to admit of doubt. Whether the covenant has been framed in accordance with or contrary to, the intention of the parties, is not now the question. That must be determined upon a bill filed for the purpose of having the deed reformed. But I am clearly of opinion that the settlement, as it stands, does not embrace the estates of which Mrs. *Ridout* was seized in fee simple in reversion at the time of the marriage. (a)

Ridout
v.
Gwynne.

Judgment.

STIMSON v. KERBY.

Mortgage—Usury—Statute 16 Vic., ch. 80.

A mortgagor paid the mortgagee from time to time money, in pursuance of an agreement, contemporaneous with the mortgage, that 5 per cent. per annum in addition to the legal rate of interest should be paid on the amount loaned. In taking the account in a suit brought by the mortgagee to foreclose, the master gave credit for the money thus paid, as so much money paid on account of principal and legal interest. *Held*, on appeal from the master, that he was right in his mode of taking the account; and *held also*, that the second section of the statute 16 Victoria, chapter 80, did not bar the right to recover in an action of assumpsit for money paid in excess of legal interest.

This was an appeal from the report of the master, at

(a) *Wilton v. Colvin*, 3 Drew. 617; *Hammod v. Hammond*, 19 Beav. 29.

Hamilton, or judgment of the appeal w

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THE CHAN suit. In tak appeared tha from time to in pursuance mortgages in the plaintiff s loaned and se the legal inter ment illegal, pursuance of the plaintiff as legal interest, finding upon t

Prior to the present case, more than leg contract, had for money had the action for under such ci *Mansfield* in S that class of ca contract cannot *delicto*, he obse are calculated oppression, ext violated, and plaintiff's condi recover; and it

Hamilton, on grounds which are clearly stated in the judgment of his Lordship the Chancellor, before whom the appeal was argued.

1859.

Stimson
v.
Kerby.

Mr. G. D. Boulton, for plaintiff, who appea

Mr. Roaf and Mr. Walkem, contra.

THE CHANCELLOR.—This is an ordinary foreclosure suit. In taking the account directed by the decree it appeared that the defendant had paid to the plaintiff, from time to time, money amounting together to £111, in pursuance of an agreement contemporaneous with the mortgages in question, that the defendant should pay to the plaintiff five per cent. per annum upon the amount loaned and secured by those mortgages, over and above the legal interest. The master, considering that agreement illegal, I suppose, took the payments made in pursuance of it into account, and charged them against the plaintiff as so much paid on account of principal and legal interest, and this is an appeal from the master's finding upon that point. Judgment.

Prior to the statute 16 Vic., ch 80, which governs the present case, it is clear that a borrower who had paid more than legal interest in pursuance of an usurious contract, had a right to recover the excess in an action for money had and received. The principle upon which the action for money had and received was maintained under such circumstances, is clearly stated by Lord Mansfield in *Smith v. Bromley* (a) where, after noticing that class of cases in which money paid upon an illegal contract cannot be recovered, both parties being in *pari delicto*, he observes: "But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not

(a) Doug. 696.

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v.
Kerby.

distinguish between the violation of the one sort and the other." Then, commenting on *Tomkins v. Bernet*, (a) in which case Lord Holt is reported to have decided against the right to recover in usury cases, he says: "The reporter, not seeing this distinction, has given the absurd reason, that, *volenti non fit injuria*; and therefore, the man who from mere necessity pays more than the other can in justice demand, and who is called in some books the slave of the lender, shall be said to pay it willingly, and have no right to recover it back, and the lender shall retain; though it is in order to prevent this oppression, and advantage taken of the necessity of others, that the law has made it penal for him to take." He then cites *Astley v. Reynolds*, (b) where the excess above legal interest had been recovered, with this observation: "it is absurd to say that any one transgresses a law, made for his own advantage, willingly."

Judgment.

The principle upon which Lord Mansfield proceeded in *Smith v. Browley*, has not been questioned, I believe, since the decision of that case; and it appears to me to apply quite as forcibly to cases coming within the recent statute, as to those governed by the statute of Anne. It is true that the severity of the statute of Anne has been greatly relaxed. But that did not proceed, I apprehend, upon any notion that the borrower no longer required protection, but rather upon this, that the penalties and forfeitures imposed by the previous statute had failed of the effect, and instead of protecting the borrower, had subjected him to greater oppression. But whatever may have been the principle upon which the legislature proceeded, it cannot be doubted, I suppose, that the statute 16 Vic., ch. 80, is a statute intended for the protection of one class of men, namely, borrowers, against the extortion, deceit, &c., of another class of men, namely, lenders. It cannot be doubted, I think, that the third section was introduced for the protection

(a) 1 Salk. 22.

(b) 2 Str. 915.

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of borrowers. Had it been otherwise—had the legislature conceived that borrowers no longer required protection, it would have been only necessary to repeal the previous statutes. But having repealed the previous statutes, the third section goes on to provide: "That every such contract," that is, every contract for the forbearance of money whereby more than six per cent. per annum is reserved, "and every security for the same shall be void, so far, and so far only, as relates to any excess of interest thereby made payable above the rate of six pounds for the forbearance of £100 for a year; and the said rate of six per cent. interest, or such lower rate as may be agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid." Now that clause fixes six per cent. per annum as the maximum rate at which interest can be legally reserved, as it provides that every contract for a higher rate of interest, and every security made in pursuance of such contract, shall be void as to the excess; and if there had been nothing further in the statute, I would have thought it clear beyond doubt that any excess of interest paid under such void and illegal contract could be recovered back in an action for money had and received.

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v.
Kerby.

Judgment.

But it is said that the second section of this act bars the right which the borrower would have had, otherwise, to maintain an action for money had and received, for any amount paid on account of interest beyond the legal rate. That section provides: "That *no contract* to be hereafter made in any part of this province, for the loan or forbearance of money or money's worth, at any rate of interest whatsoever, and *no payment* in pursuance of such contract, shall make any party to *such contract* or *payment* liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury." Now under the law as it stood before the passing of this act, the lender who contracted for more than legal interest was subject not only to the loss or forfeiture of his debt and

1859.

Stimson
v.
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legal interest, but upon payment of the stipulated amount he became liable, further, to a severe penalty. As a party to the contract he lost or forfeited his debt, and as a party to the payment he incurred the penalty; and the whole object of the clause in question, as it seems to me, was to declare that the penalty, loss, and forfeiture, imposed by the previous statute, had been abolished. An action of assumpsit to recover the excess of interest, as money had and received to the borrower's use, is not in my opinion "a proceeding civil or criminal for usury" within the statute. These words designate an action upon the contract, to recover the legal interest, much more clearly, as it seems to me, than they do an action upon the implied assumpsit to recover the excess, but as the legislature did not mean to exclude the former, so neither did they mean, as I apprehend the statute, to bar the latter.

Judgment.

The decisions have not been uniform. The judgment of the Court of Common Pleas in *Kaines v. Stacey*, in which I am told that his lordship the Chief Justice concurred with some hesitation, is opposed to the decision of my brother *Esten*, in *Brown v. Oakley*.* In that state of the authorities, I am bound to act upon what appears

* *Brown v. Oakley* was a suit to foreclose for the amount due on a mortgage made in 1856, by the defendant, to one Parke, and by him assigned to the plaintiff for £360, and also on a judgment obtained by the plaintiff against the defendant upon a promissory note for £82 10s. It appeared that only £300 was advanced upon the execution of the mortgage, the mortgagor agreeing to give a bonus of £60, and to pay interest at the rate of 15 per cent. a year; that the mortgage was given for £360 without interest; that about a year afterwards the defendant gave the plaintiff his note of hand for £82 10s., being intended, as the defendant alleged, to cover the £60 bonus, and six months' interest at the agreed rate; at the hearing, Mr. Roaf, for the plaintiff, contended he had a right to foreclose for the full amount due on the judgment, and that defendant should not be allowed to call upon the plaintiff again to establish his right to recover upon the judgment. Mr. Blake, for the defendant, insisted that the mortgage not carrying interest, the sum actually advanced only with interest from the date of the default in payment should now be allowed to the plaintiff; and that the judgment having been recovered upon a note given for the illegal interest, no part of that could be allowed in taking the account. But Vice-Chancellor *Esten*, before whom the case was heard, directed the account to be taken with interest on the sum actually advanced from the date of the mortgage, and also on all sums included in the note due by the defendant to the plaintiff otherwise than for interest, from the date of the judgment.

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to me to be the true construction of the statute, and in my opinion, for the reasons already given, the master's report is correct.

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v.
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It may be that the report is maintainable upon the narrower ground taken by Mr. *Roaf* in argument, namely, that this is not a proceeding civil or criminal by the borrower against the lender, but an account directed at the instance of the lender himself, in taking which account the master is bound to apply all payments in discharge of the debt and legal interest, which constitute the whole amount that the lender can legally demand. But as my opinion is against the appeal on the broader ground, it is unnecessary to decide that point. This appeal must therefore be dismissed, but, under the circumstances, without costs.

McLAUGHLIN v. WHITESIDE.

Motion for decree—Practice.

A notice of motion for a decree is not to be treated as an ordinary motion in the course of a cause, which the plaintiff is at liberty to abandon on the usual terms.

The plaintiff having given a notice of motion for a decree, cannot, without leave, abandon that mode of hearing the cause, and proceed to a hearing in the ordinary way.

This was a motion by way of appeal against an order of his honour V. C. *Esten*.

The plaintiff had given notice of motion for a decree and having afterwards countermanded it, he set the cause down for the examination of witnesses. On motion of the defendant, the Vice-Chancellor ordered the cause to be struck out of the list of causes for examination, as reported in the Chambers' Reports, page 56.

Statement.

Mr. *Fitzgerald*, for the plaintiff, now moved to set aside that order on the grounds: first, that the practice pursued by the profession generally under the order

1859. in question, was that pursued by the plaintiff here. Secondly, that the motion was for a decretal order, which might be, and generally was, less extensive than a decree made at the hearing of the cause. The order to be made on these motions may be co-extensive with the decree, but plaintiff may ask for less than the prayer of his bill. Plaintiff may in some cases move in this manner for a portion of the relief to which he is entitled, and afterwards proceed to a hearing in the usual way.

McLaughlin
v.
Whiteside.

[THE CHANCELLOR.—I know of no such practice, and if it does exist, is a most unreasonable one.]—*Daniel's Ch. Prac.* 67; *Teague v. Richards.* (a)

Mr. Mowat, Q. C., contra.—No general practice can be said to exist upon this point, but if it had obtained, that would be no answer to the objection. Clearly the plaintiff cannot adopt both modes of procedure at the same time. If not, the same objections would apply to his taking them on different occasions. If this practice were to prevail, the result would be, that the plaintiff would thereby be enabled to see the defendant's evidence, and if he found it unfavourable to his application, could then stop the motion and proceed to a hearing of the cause, thus subjecting the defendant to be doubly vexed with litigation. In *Gill v. Rayner*, (b) after notice served, the plaintiff was allowed to amend; but if the motion had been set down, as is the case here, the Vice-Chancellor there said that even an order to amend would not have been granted. In *Drew v. Long*, (c) Vice-Chancellor *Kindersley* is reported as having stated that the Lord Chancellor had determined that motions for decrees were strictly hearings. *Ames v. Ames*, (d) *Maniere v. Leicester*, (e) were also referred to.

Judgment.

THE CHANCELLOR.—This is an appeal from an order of my brother *Esten*, ordering this case to be struck out

(a) 11 Simons, 46.
(c) 17 Jur. 173.

(b) 1 Kay & J. 395.
(d) 17 Jur. 664

(e) Kay Rep. App. 48.

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of the list of causes set down for examination during the last term, upon the ground that the plaintiff having given notice of motion for a decree, had thereby debarred himself from proceeding to a hearing in the ordinary way, except by leave of the court.

1859.
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 v.
 Whiteside.

Mr. *Fitzgerald* contends, that a motion for a decree differs in no respect from any ordinary motion in the course of the cause, and that the plaintiff is therefore at liberty to abandon it at any moment on the usual terms.

If that be the proper construction of the order—if it be true that the plaintiff is at liberty any moment to abandon his motion, and take the cause to a hearing in the usual way, it follows that the defendant also must be at liberty, notwithstanding such notice to move to dismiss; thus compelling the plaintiff to proceed with the cause in the ordinary way; for if it be not compulsory upon the plaintiff to proceed with his motion for a decree, the fact that notice of such a motion has been served, cannot, in judgment, reason, be an answer to the motion to dismiss. If the plaintiff is not bound by the mode of proceeding deliberately adopted by himself, the defendant cannot be so, and the cause must be allowed, consequently, to proceed to a hearing in two different ways at one and the same time, which is plainly absurd. Again, if the plaintiff may abandon his motion in the way contended for, he may do so, of course, at any time before the motion is heard, and therefore after the defendant has been compelled to disclose his whole case, contrary to the well settled practice of the court.

The construction contended for being productive of consequences so inconvenient and unjust, we ought not, I think, to adopt it, unless it can be shewn to be the plain, I had almost said the inevitable, meaning of the order in question. But so far from being the plain and inevitable meaning of the order, it will be found, I apprehend, that the construction contended for by Mr. *Mowat* accords much better with the language of the order itself, and

1859. with the course of the court in analogous cases. A motion for decree bears little analogy to an ordinary motion in the course of a cause. The hearing of such a motion is to all intents and purposes the hearing of the cause. A notice of motion for a decree is in effect a notice of the hearing of the cause; and in giving such a notice, the plaintiff must be taken, I think, upon a proper construction of the order, to have set down his cause to be heard. In form the cause is not set down, it is true, because the order does not require that step to be taken in such cases, but in giving notice of motion for a decree the plaintiff does all that is necessary for him to do in order to bring his cause to a hearing, and must be regarded, therefore, as having set it down to be heard. And if that be the meaning of the order, it is clear, I apprehend, that the plaintiff has no right to set this cause down for examination, and that my brother *Esten's* order, to strike it out of the list, was perfectly correct.

McLaughlin
v.
Whiteaide.

Judgment.

PROUDFOOT V. BUSH.

BUSH V. PROUDFOOT.

PROUDFOOT V. BUSH AND BUSH.

Partnership—Pleading—Usury—Registered judgment—Tenant in common—Injunction.

An agreement was entered into for a joint speculation in lands; A. to find the capital, and B. to select the lands and make purchases; A. to be allowed in the first place to retain out of each sale of any of the lands as made, his money expended upon the same, and the remainder, the profits, to be equally divided between them: B.'s trouble, experience and time, being considered equal to A.'s capital. *Held*, that the profits divisible between the parties was the value, whether ascertained upon re-sale or by valuation, after deducting the cost and incidental expenses.

For the purpose of raising money a sale of bank stock was made by the lender to the borrower at a premium, but owing to the bank books being closed the transfer was never completed, and the lender repurchased the stock at par: *held*, that an objection to this transaction on the ground of usury should have been taken by the pleadings. A registered judgment upon which a bill is filed in this court stands on the same footing as a mortgage, and the incumbrancer can hold his incumbrance, be it mortgage or judgment only for the sum actually advanced and interest.

A tenant in common, upon satisfying the court that the cutting of timber by his co-tenant operates to the destruction of the inheritance, is entitled to an injunction.

Mr. Strong, Mr. Barrett, and Mr. Blake for Proudfoot.

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Mr. *Hector* and Mr. *A. Crooks* for *Jonas T. Bush*.

Mr. *Crickmore* for *John L. T. Bush*.

Mr. *McDonald* for subsequent incumbrancers.

1859.

Proudfoot
v.
Bush.

SPRAGGE, V. C.—[Before whom the cause was heard.]
—The above three causes have been argued together. In the first the bill is filed by Mr. *Proudfoot*, as mortgagee upon several mortgages and as a judgment creditor. The defendants, being the mortgagor *Jonas T. Bush*, *John Lewis T. Bush*, who claims as to a portion of the lands covered by the mortgages and judgments as purchaser for value from *Jonas*, who is his brother, and as having priority to *Proudfoot* by prior registration, and against judgment creditors of *Jonas*. The second bill is by *Jonas* against Mr. *Proudfoot*, impeaching the consideration of some of the mortgages and the judgments, and praying an account of certain dealings between the two Judgment. in respect of the joint purchase of lands, and also in relation to an alleged partnership in a mercantile business and mill in the village of Angus, the latter being lot number thirty, in the third concession of *Essa*. The bill in the third suit is for an injunction against *Jonas* and *John Bush* to restrain the cutting of timber upon lots 31 and 32 adjoining the mill property.

In relation to the alleged partnership in the shop and mill in Angus, evidence was given on behalf of *Jonas Bush*, but is now conceded by his counsel that it fails to establish the partnership contended for. I should have had no difficulty in coming to that conclusion, and further, taking, as true, the evidence of *Henry Stewart*, formerly confidential clerk of *Jonas Bush*, (and I see no reason to doubt its truth,) that a fraudulent scheme is disclosed on the part of *Jonas Bush* to make out a partnership between Mr. *Proudfoot* and himself in order to fix the former with liabilities with which *Bush* was pressed.

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Proudfoot

v.
Bush.

The parties *Jonas Bush* and Mr. *Proudfoot* differ as to the terms upon which the first purchase of land was made. The purchase money was to be advanced by *Proudfoot*, and *Jonas Bush* was to travel through the country seeking owners of lands which he thought it desirable to purchase, and making purchases on the spot. *Jonas Bush* claims that before any division of profits a sum equal to the purchase money was to be added to it as his remuneration for his time and skill, and that the profits beyond that, and, as I suppose beyond the expenses attending the purchases, were to be equally divided. *Proudfoot's* contention is that after deducting the purchase money and expenses the profits were to be equally divided.

Bush rests his claim upon a written proposal dated 6th of October, 1854, made by him to *Proudfoot*, and which he says was accepted and adopted by *Proudfoot*. It was kept by him, and is endorsed "*Jonas T. Bush*. Proposal to buy lands with Mr. *Proudfoot*, 6th of October, 1854." This proposal after setting out a list of lands proposed to be purchased, and expressing the opinion that as much as 100 per cent. on the money expended might be cleared upon them, proposes these terms: "And will allow Mr. *Proudfoot* to retain in the first place, out of each sale, of any of the lands, as fast as made, his money expended upon the same; and the remainder, the profits, to be equally divided between us." The tenor of this experiment or partnership is considered in this wise: that is, that my trouble, experience, and time is equal to Mr. *Proudfoot's* capital, therefore we share alike in the profits, and there is to be no loss in the experiment, (that is upon the whole,) which I guarantee.

Assuming this for a moment to be the definite agreement under which the parties acted, I cannot agree with *Bush's* construction of it. The latter clause certainly does lend some colour to it, but the whole must be read

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I should, which he set ment; but the light upon the date of the 7 after that date the first page account of land with *Jonas*, 2 of February, for, and that purchases, pro all sales, in thereof, and *Bush* being in the first day of said *Proudfoot* him as the said

1859.

Proudfoot
v.
Bush.

together; and he has in the preceding clause stated explicitly what he means by profits—the remainder upon sale after reimbursing to *Proudfoot* his money expended. Again, *Bush's* estimate of profit was £100 per cent. upon the money to be expended, and as Mr. *Blake* remarked, if you adopt his constructions of the proposal, you must suppose him to propose to Mr. *Proudfoot*, as something very advantageous to that gentleman, that he should advance in cash upwards of £500 upon the first set of lots, and £125 upon the second. The first list contains ten parcels, lots or parts of lots; of these all but three, and perhaps a fourth, the purchase money was to be paid in hand, and supposing them to realise up to *Bush's* estimate, he was, according to his account, proposing an investment which, as to Mr. *Proudfoot*, was to return to him nothing, while to himself, these same parcels would return upwards of \$1000; the other lots, and the second set of lots would vary this somewhat, but still the proposal would be one which it would be almost Judgment a piece of effrontery to make.

I should, therefore, be against *Bush* upon the paper which he sets up as containing the terms of his agreement; but there are other documents which throw some light upon the subject. An agreement headed of the date of the 7th of October, 1854, but apparently written after that date, signed by both parties, written on the first page of a book, and described as containing "an account of lands purchased by *Wm. Proudfoot*, jointly with *Jonas, T. Bush*, from the 7th of October, 1854, to 1st of February, 1855," after stating that *Bush* had drawn for, and that *Proudfoot* had paid, the amount of such purchases, provides that *Bush* should pay the amount of all sales, in the first place, to *Proudfoot*, in liquidation thereof, and proceeds thus: "And in the event of said *Bush* being in arrears for such purchases at or before the first day of July, 1855, he promises and agrees with said *Proudfoot* to make such further arrangement with him as the said *Proudfoot* may deem expedient." This

1859. paper would not be at all in the spirit of the agreement ; contended for by *Bush*, for if he were right, the mere effecting of the purchases was his contribution to the purchase—he had in effect paid his share, and it would be a misuse of terms to speak of him as this document does as “in arrear for such purchases.”

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v.
Bush.

On the 18th of September, 1856, a settlement took place between the parties as to a large proportion of the lands purchased, *Proudfoot* retaining the lands embraced in the settlement, and crediting *Bush* upon an account stated and settled between them upon the same date, with what is called the “profits.” It does not appear very clearly whether these consisted of actual profits, ascertained by a re-sale, or estimated profits upon a valuation. I think the latter, or probably partly of both. In one column the cost of each parcel is given, in another, the profit also upon each parcel. It is to be assumed that the parties settled upon the foot of the agreement, as understood by themselves. If *Bush* were right in what he now contends for, the “profits” column would shew sums compounded of the cost of each parcel, and half the difference between that amount and the actual value, whereas in fact the major part of the items in the profits column and the aggregate also, are less than in the “cost” column. To take as an instance, the second item, the cost is stated at £56 5s., the sum, I take it, advanced by *Proudfoot*—his capital, as it is called in *Bush's* proposal; he says that his time, skill, &c., were to be taken as equal to *Proudfoot's* capital: upon any settlement by which *Proudfoot* took the land, he would, according to his position, be as much entitled to that, as *Proudfoot* would be to the money advanced, and to such further sum, if any, as the actual value should exceed the aggregate of these two sums, or rather the half of such further sum; but in this second item the profit is carried out at £27 10s., and besides, the aggregate profit, is, as I have said, stated at less than the aggregate cost, and that the cost of purchase without the incidental expenses, which are taken into account separately.

Judgment.

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It has been assumed in argument (though not as affecting this question) that by mistake *Bush* is credited in this account with full profits, instead of half the profits on the land. I do not think it likely that the parties made any such mistake; they have divided the incidental expenses and some other items, and in an account shewing what *Bush* was entitled to in the transaction, what is set down as profits may well be the profits to which he was entitled only.

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 Proudfoot
 v.
 Bush.

As to the lands comprised in this settlement, the terms upon which the purchases were made have become immaterial; but as to the residue of these lands, it has been necessary to determine that point, and my opinion is, that the profits divisible equally between the parties was the value, whether ascertained upon re-sale or by valuation, after deducting the cost and incidental expenses. I am confirmed in this view by the circumstance that in the case of subsequent purchases, it was agreed that each should advance half the purchase money, instead of the whole being advanced by *Proudfoot*, and this is treated by both parties as the only difference between the first and subsequent purchases.

Many of the questions raised upon the pleadings are properly matters of account for the master's office; some of them indeed are disposed of by the abandonment of the pretended partnership in the business at *Angus*, but there are one or two which may, I think, with advantage be disposed of now. One arises out of the transfer and re-transfer of the *Gore Bank* stock—among the items for which the largest cognovit was given are these :—

Gore Bank stock :

Reserve dividends.....£3000
 Add one-fifth premium..... 600

Powers of attorney are put in from *Proudfoot* and *Bush* respectively, dated the 8th of June, 1857, for effecting

1859. the transfer from the former to the latter, of 300 shares of Gore Bank stock, and powers from the same parties, dated the 8th of July, in the same year, for re-transferring the like quantity of stock. Mr. *Proudfoot*, who was called by *Bush*, gives this account of the transaction: "The Gore Bank stock was worth at the time, I think, the sum charged for it; it fell afterwards. He did not use the stock: the bank books were closed, and he got money instead," and proceeds to shew how, and says further, "*Bush* re-assigned the stock soon after; I took back the stock at par, and soon afterwards sold it at par; when the bank stock was assigned I had not money to spare. I told him I could only assist him by assigning the stock, which he could turn into money. I do not know that it was then saleable in the market above par; the premium charged on the bank stock was the rate agreed upon by *Bush*."

Judgment. Upon the re-transfer of the stock *Proudfoot* credited *Bush* with £3000, the amount of the stock at par; *Bush* claims to be entitled to credit for the amount of the premium. In his answer to *Proudfoot's* bill, he says he does not believe that the stock was ever assigned to him, or that there were more than 250 shares, amounting, at £10 a share, to £2500; and in his own bill against *Proudfoot* he states nothing further. The objection upon the pleadings amounts only to this, that there was no transfer, and that *Proudfoot* had only 250 shares to transfer. There appears to have been a transfer binding upon *Proudfoot*, though probably not perfected, owing to the transfer books at the bank being closed. *Proudfoot* was not asked, nor does he expressly say, whether he had the stock he professed to transfer. But he says he afterwards sold it. *Bush's* objection upon the pleadings appears then not to be sustained, but negatived.

Upon argument the transaction was objected to as usurious; that the premium on the stock was only

colourable with the pleadings, usurious.

My opinion taken upon to, but upon the premium the stock, usury; it of so much so much money converted into the money was necessary to replace the transaction an agreement and to secure was in substance both lender and which was as the evidence is easy to see might be a furnish himself incorporated company use such stock placing such they might a upon its market which it might I do not say I can understand not having which he would value in them to part with

colourable to obtain usurious interest, but this was met with the objection that no such ground was taken by the pleadings, and that at any rate the transaction was not usurious.

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Proudfoot
v.
Bush.

My opinion is, that the objection should have been taken upon the pleadings. The transaction is objected to, but upon other grounds. It is not even alleged that the premium charged was more than the market value of the stock, and if not more, it could not be a cover for usury; it would be only giving to the borrower, instead of so much money, that which he could convert into so much money, or which the lender might himself have converted into the same amount of money, and then lent the money itself. To constitute usury, I do not think it was necessary that there should have been a contract to replace the stock, as was contended, nor do I think the transaction was other than substantially a loan, not an agreement to sell so much stock at an agreed price, and to secure the purchase money by a cognovit. ^{Judgment.} It was in substance a loan of that which was understood by both lender and borrower to be convertible into money, and which was to be repaid in money, having, at the time, as the evidence assumes, an ordinary market value. It is easy to see how readily an advance in such a shape might be a cloak for usury; a moneyed man might furnish himself with bank stock or stock of other incorporated companies, as his occasions might require, and use such stock instead of money, in making loans, placing such value upon it in dealing with a borrower as they might agree upon, and which would be based, not upon its market value, but upon the rate of interest which it might be agreed that the borrower should pay. I do not say that that was the nature of this transaction. I can understand a person being applied to for a loan, not having money at his disposal, but say bank stock, which he would much rather retain than part with at its value in the market; that, being pressed, he might consent to part with it at what in his honest judgment he believed

1859.
 Proudfoot
 v.
 Bush.

it to be worth, though more than its value in the market; whether lending at such a price should be adjudged usurious, I am not in this case called upon to say. Mr. Coote, in his treatise on the law of mortgage, (a) referring to stock, English Government securities, says: "a lending of stock on an agreement to take it at more than the market price is clearly usurious." The case he cites, *Parker v. Ramsbottom*, (b) is somewhat different, and I do not know that the precise point is decided. I think that in this case the judgment upon the cognovit should stand as to this item, and I place my judgment upon this, that it is not impeached upon any ground which is sustained in evidence.

Another item in the same account is also objected to, a sum of £25, being a sum paid by *Proudfoot* for the purchase of land bought by *Bush* on joint account, the title of which turned out to be bad. The question is not now whether *Bush* ought to have been charged with that sum, but whether, having agreed to be charged with it, the account ought to be disturbed. I think that it ought not.

One of the items in another cognovit is £1200, being the amount of a note made by *Jonas Bush*, and endorsed by *Proudfoot* for the accommodation of *Bush*, in order to his getting the same cashed. The cognovit being given to indemnify *Proudfoot*. The note, according to Mr. *Cochrane*, *Bush's* agent, to whom it was given to be negotiated, was at twelve or eighteen months. Mr. *Cochrane* was unsuccessful in his attempts to negotiate it, and after failing elsewhere applied to Mr. *Proudfoot* himself to discount it, and this was done between *Bush* and *Proudfoot* themselves; a sum of £216 being, as Mr. *Cochrane* says, taken from the face of the note. I take it that a registered judgment upon which a bill is filed in this court by the judgment creditor stands upon the

(a) Page 278.

(b) 3 B. & C. 257.

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same footing as a mortgage, and that the incumbrancer can hold his incumbrance, be it mortgage or registered judgment only for the sum actually advanced, and interest. Had the note not been used by *Bush*, or used and retired by him, there would have been no debt to *Proudfoot*. *Proudfoot's* claim was limited to the amount he should have to pay for *Bush*. By a new arrangement his responsibility to pay *Bush's* debt to a third person, who might become holder of the note, ceased, and he advanced instead, directly to *Bush*, a smaller sum of money : instead of being surety to a lender, he himself became lender. I see no principle upon which he can be allowed to claim for that, for which he would have been liable, if his first position had continued instead of that which he actually advanced, when his new position was exchanged for the old one; his claim, indeed, must be founded wholly upon the advance, for the responsibility has ceased against which he was indemnified. The claim is for the reduction, only allowing the judgment to stand for the sum advanced, and I think this claim must be allowed. Another point raised is, whether the amount of the first mortgage, £300, was given for money lent or by way of security for the advance for purchase of land on joint account; the allegations of *Jonas Bush* upon this point are very vague: the application certainly was for a loan, and I see nothing to lead me to doubt that the loan was made. It is possible, however, that the contrary may be made to appear in the master's office, and I do not mean to preclude *Bush* from shewing this if he can.

Another question, and an important one, is, whether the conveyance from *Jonas Bush* to his brother *John*, of the mill property in Angus, and other property, is to be allowed to prevail against the judgments subsequently registered against *Jonas*. The conveyance is impeached as voluntary, and therefore fraudulent and void under the statute of 13 Elizabeth; and there is, moreover, evidence to shew that it was in fact fraudulent, concocted

1859.

Proudfoot
v.
Bush.

1859. to defeat the judgment to be entered on the larger
 cognovit. The evidence in support of the alleged
 consideration is very weak. The case of *John Bush*,
 and I may say *Jonas* also, is, that the conveyance was
 made in satisfaction of an indebtedness from *Jonas* to
John. *Jonas* states shortly, that he made the conveyance
 for a valuable consideration. *John*, in his answer, states
 that *Jonas* was largely indebted to him for cash and other
 matters, from time to time advanced, to the extent of about
 \$2000, more particularly in enabling *Jonas* to purchase
 lot 30, the mill lot. That no settlement took place until
 after this conveyance, when this property with certain
 other property was conveyed in satisfaction; the mill
 property for the consideration expressed of \$400, on the
 2nd of June, 1857, and the other property for the con-
 sideration expressed of \$1000, (the consideration in both
 being inserted by *Jonas*,) on the 8th of the same month.

Judgment. *John* was called as a witness by Mr. *Proudfoot*; he says
 that *Jonas* contracted to purchase lot 30 about seven years
 ago, for \$200, for himself and *John*, *Jonas* paying \$100 for
 his share, and *John* giving a horse for his, which horse
 he had bought of *Jonas*, giving more than £5, he cannot
 say more than £10, and paying for it partly in cash,
 and partly in work: that is all, that he shews upon his
 examination as to advances to enable *Jonas* to buy the
 lot. Until his examination he had not set up that the
 original purchase was a joint one. In his examination
 the amount of the indebtedness of *Jonas* is swelled from
 about \$2,000, the amount stated in his answer, to 8 or
 \$10,000; and his account of it is loose and unsatisfactory.
 Several witnesses were called in reference to the relative
 position of the two brothers; all of whom represent *John*
 as having been, to all appearance, for years, rather a
 dependant than otherwise of his brother, at one time a
 sort of bailiff on his farm, receiving from him presents
 of various kinds; the farm on which *John* lived is stated
 to have been represented by both as a gift from *Jonas*.
 In fact it is scarcely possible, consistently with the

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description given of the two men, that any such indebtedness could have existed as is now set up.

1859.

Proudfoot
v.
Bush.

But there is one circumstance which to my mind is convincing on the subject: after the execution of the conveyance *John* was sent for to the mill to appear as owner, and while there received so serious an injury from falling among the machinery that his death was apprehended. This made *Jonas* uneasy lest the property conveyed should go to *John's* children; he took counsel of his confidential clerk Mr. *Stewart*, who suggested a reconveyance from *John* to *Jonas*, but this *Jonas* said would not do, as his creditors would get it; and it was then suggested that *John* should make such disposition of it by will as *Jonas* should dictate, and this was done; *Stewart* drew the will as *Jonas* instructed him, devising the mill property, a farm in Sunnidale, (not the one conveyed as a gift to *John*, but one opposite to it,) and a lot in Innisfil to *Jonas's* mother; and then went to *John*.^{Judgment.} and took his instructions as to the disposition of the property which he claimed as his own; and that property he devised to his own wife and children. Both *Jonas* and *John* thus concurring in this supposed emergency in doing that which was quite consistent with a sham conveyance, intended to have no operation except to fence off creditors, and quite inconsistent with an actual change of ownership in the property from *Jonas* to *John*. The details connected with the making of the will I take from the evidence of *Stewart*, but *John* himself in his examination says, that he made a will disposing of the property; that he was very ill and did not expect to live; that he cannot tell what disposition the will made of it, and does not know where the will is.

The will appears to have been for some time in the possession of *Stewart*, who was appointed an executor, and was then replevied by *Jonas*.

There are other circumstances which make against the

1859. *bona fides* of this transfer. It was made in June, 1857. At that time, according to the opinion of the millwright, some where about \$6000 had been expended upon building the mill; according to the opinion of *Stewart*, who was likely to know, a much larger sum. The building was continued at the expense, so far as appeared, of *Jonas*; one item was a note of £1000 endorsed for *Jonas* by *Proudfoot*, and paid by the latter to the millwright, and it was one of the sums for which a mortgage was given by *Jonas*. The millwright too bought from *Jonas* a store of goods at Angus, which he says nearly paid him up for building the mill; they amounted to about \$2300; the whole cost of the mill, as estimated for insurance, was \$24,000.

Proudfoot
v.
Bush,

The first of these conveyances of June, 1857, appears to have been made by *Jonas* in Toronto, in the absence of *John*, on the same day that he, *Jonas*, had given the large cognovit to *Proudfoot*, and for the express purpose of defeating it, so far as these lands were concerned.

Judgment,

From the circumstances to which I have referred, I have really no doubt in my own mind that these conveyances to *John* were voluntary, and a mere fraudulent contrivance to defeat the creditors of *Jonas*, especially *Mr. Proudfoot*.

The *Bushs* have not asked for an enquiry as to the alleged consideration paid. If *John Bush* really desires an opportunity to prove before the master that he did in good faith pay a valuable consideration, by a settlement and satisfaction of an actual indebtedness, as alleged, I do not know that such an opportunity should be refused to him. I will at all events hear an application to that effect, if desired.

I understand that there is no difference between the parties in regard to what are called the subsequent purchases, either as to the terms of the purchases, or the

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accounts to be taken in relation to them. It is stated, in the evidence of *Stewart*, that certain crown lands receipts for the lands in *Vespra*, for which no patent has been issued, are in the hands of *Jonas Bush*. I think they should be brought into court under oath.

1859.
Proudfoot
v.
Bush.

An injunction is asked to restrain the *Bushs* from cutting timber off lots 31 and 32, adjoining the mill in *Essa*, of which *Proudfoot* is at the same time mortgagee and tenant in common. To entitle him as mortgagee, it should be shewn that continued cutting would render the property mortgaged defective security, and this is not shewn: upon the other ground, tenancy in common, it should appear, I think, that the effect of cutting is to operate to the destruction of the inheritance. It is in evidence that this land is valuable for the timber only, not as farm land, and if so, the taking of the timber is substantially a destruction of the subject matter, and not a legitimate mode of enjoyment of the right of occupation which arises out of the title of the tenant in common. *Christie v. Saunders*, (a) and *Dougall v. Foster*, (b) both in this court, were cited on the part of *Proudfoot*. No cases were cited on the other side. I think the injunction to restrain further cutting should go.

With regard to costs, the costs of the foreclosure suit, and the suit for the injunction, should be paid by *Jonas* and *John Bush*, and the costs of the suit of *Jonas Bush* against *Proudfoot* should be borne by *Jonas Bush*.

HARRISON v. MCGLASHAN.

Administration order—Wilful default.

Where an order for the administration of a deceased person's estate is granted upon the application of any person beneficially interested therein, the decree will not contain a direction to enquire as to wilful neglect and default.

This was an order for the administration of the estate of *Alexander McGlashan*, deceased.

(a) Ante vol. II., p. 670.

(b) Ante vol. IV., p. 319.

1859. *Mr. Fitzgerald*, for the plaintiff, asks for the usual administration order, to take an account of the testator's estate; of the assets come to the hands of the defendants, or which but for their wilful neglect and default might have been received by them.

Harrison
v.
McGlashan.

Mr. Hector, contra.

ESTEN, V. C.—As I understand the practice prevailing in England, under the order similar to the one under which this application is made, the representatives are not made answerable for wilful default; to obtain such a direction there must be a case made for it by a bill filed for that purpose. The account to be taken, therefore, will only be of what has actually come to the hands of the defendants.

Judgment.

LAKE V. MCINTOSH.

Infant trustee defendant—Day to shew cause.

In a decree against an infant defendant as trustee of real estate it is not necessary to reserve a day for the defendant to shew cause after attaining twenty-one.

A suit to redeem a mortgage alleged to have been created by an absolute deed, was instituted against the infant heir of the mortgagee the question raised by the pleadings was, whether the transaction was a mortgage or sale, which, at the hearing, was decided in favour of the plaintiff, and the infant was ordered to re-convey. On his attaining twenty-one an application was made for leave to put in a further answer, and make a new defence, which was refused.—[SPRAGGE, V. C., dissenting.]

The facts are clearly stated in the judgment.

Mr. Wilson, Q. C., and *Mr. Morphy*, for plaintiff, who appeals from order allowing defendants to answer.

Mr. Crickmore, contra.

THE CHANCELLOR.—This is, in part, an appeal from an order of my brother *Spragge*, in Chambers, by which certain of the defendants, who were infants at the date of the former decree, were allowed to put in a further

answer, and in the nature of the 9th

I do not support the case stands as instituted by *Intosh*, the had been de

The defence to *William* mortgage.

Upon the plaintiff was ordered to shew cause

The cause of the defendants, for the inserted, but the ground act, and had,

Thereupon *Spragge*, at which was ground of appeal from

If *Mair* v. how this order that when a infant defendant or make a new

answer, and make a new defence; and in part a petition in the nature of a bill of review, under the 18th section of the 9th order of 1853.

1859.

Lake
v.
McIntosh.

I do not see how the order appealed from can be supported consistently with previous decisions. The case stands thus: the suit was a suit for redemption, instituted by the devisees of *John Lake*, the mortgagor, against the widow and infant children of *William McIntosh*, the mortgagee, to whom the mortgage premises had been devised.

The defence was, that the estate had been conveyed to *William McIntosh* absolutely, and not by way of mortgage.

Upon the hearing, the court determined that the plaintiff was entitled to redeem, and the defendants were ordered to re-convey upon the usual terms. No day to shew cause was reserved to the infant defendants. Judgments.

The cause was re-heard, at the instance of the defendants, for the purpose of having a day to shew cause inserted, but the court refused to vary the decree, upon the ground that the infants were trustees under the act, and had, therefore, no right to a day to shew cause.

Thereupon an application was made to my brother *Spragge*, at Chambers, for leave to put in a new answer, which was granted, and the present application is by way of appeal from that order.

If *Mair v. Kerr* (a) was rightly decided, I do not see how this order can be supported: *Mair v. Kerr* decides that when a day to shew cause has not been reserved, an infant defendant has no right to put in a further answer, or make a new defence, and in that case the cause was

(a) Ante vol. II., p. 223.

1859. re-heard for the purpose of having a day to shew cause inserted, and the infants were thereupon allowed to put in a new answer. I did not hear the original application in *Mair v. Kerr*. That was decided by my brothers *Esten* and *Spragge*; and I was not able to concur in the order made upon the subsequent motion. My opinion then was, that an infant mortgagor was not entitled, upon foreclosure, to a day to shew cause, and that although entitled to a day to shew cause, he ought not to be allowed to put in a new answer, and to that opinion, with the greatest possible deference for the judgment of the Court of Appeal, I still adhere. But so long as those decisions remain unaltered they must be followed. I do not understand, indeed, that my brother *Spragge* meant, sitting in Chambers, to overrule *Mair v. Kerr*, but the present order does seem to me, I must confess, to conflict with that decision.

Judgment. Neither am I able to reconcile it with the decree made on the re-hearing of the cause. I was not present on that occasion, but my learned brothers concurred in thinking that the defendants were not entitled to a day to shew cause, and they refused to vary the decree. Now that was in effect a decision that the defendants had no right, under the circumstances, to put in a new answer; a decision quite inconsistent, as it seems to me, with the present order.

The learned counsel for the defendants contended, however, that the petition on which the order was made was not a petition for leave to put in a new answer merely, but was also a petition in the nature of a bill of review, and that upon the newly discovered evidence the defendants were entitled to have the decree reversed.

I cannot agree in that view of the matter. It is obvious that a petition in the nature of a bill of review could not have been entertained at Chambers at all. In point of form, therefore, the plaintiffs are clearly entitled,

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William devised the wife, until twenty-one son *James* present qu guardian to cause, whic behalf, and the conveya an absolute books of the intended as indebted to amount; tha to *Hiram* w sale to *Hira* and that *Hir* abandoned t of *John*. T original ans

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I think, to have the order reversed. But upon the merits also, I am of opinion that this petition, considered as a bill of review, should be dismissed.

1859.

Lake
v.
McIntosh.

The case made by the bill was, that the conveyance from *John Lake* to *William McIntosh*, although in form an absolute conveyance, was in truth a mortgage; that the conveyance from *William McIntosh* to *Hiram Lake* was a conveyance to him in trust for *John*, and that the re-conveyance from *Hiram* to *McIntosh* was made without *John's* consent, and ought not to affect his rights.

William McIntosh died in the year 1850, having devised the estate in question to *Elizabeth McIntosh*, his wife, until his youngest child should attain the age of twenty-one, a period not yet arrived, and then to her son *James*, upon certain limitations immaterial to the present question. *Elizabeth McIntosh* was appointed guardian to her infant children, and the answer in the Judgment. cause, which was the joint answer of *Elizabeth* on her own behalf, and as the guardian of her children, set up that the conveyance from *John Lake* was in form and substance an absolute conveyance; that there was nothing in the books of the testator to lead to the inference that it was intended as a security; that *John Lake* was not in fact indebted to the testator at that time to any considerable amount; that the subsequent conveyance from *McIntosh* to *Hiram* was not a conveyance in trust for *John*, but a sale to *Hiram* with the knowledge and assent of *John*; and that *Hiram* being unable to pay his purchase money abandoned the contract with the knowledge and approval of *John*. That is in substance the case made by the original answer.

Now the case brought forward upon this petition differs *toto cælo* from that presented by the answer. It is admitted that the transaction was originally a mortgage. It is admitted that the conveyance from *McIntosh* to *Hiram Lake* was a conveyance in trust for *John Lake*. And

1859. it is asserted that the deed from *Hiram* to *McIntosh* was not executed in pursuance of *Hiram's* determination to abandon his contract, as asserted by the answer, but was a *bonâ fide* sale made by *Hiram* at the instance of *John Lake*. The application therefore is, that the defendants may be allowed to bring forward a case which contradicts their answer in every material particular. Now, that is, in my humble opinion, a course which the defendants cannot be permitted to pursue consistently with the due administration of justice. A somewhat similar attempt in *Bennett v. Lee*, (a) was met by Lord *Hardwicke* with this observation: "I will lay it down so strong, that *Francis Lee* had better lose the estate if he had ever so good a right, than the public suffer from such a precedent. For in the last cause he brought a cross bill upon the very point of the sanity of Sir *John Lee*, and examined a multitude of witnesses to prove him sane; and to let him in the next day, and in the second cause, to contradict what he attempted to prove in the first, would introduce all the perjury in the world; for when the same point came in question, and when he endeavoured to prove a direct contradiction to what he does now, is a practice the court will never suffer." The circumstances differ no doubt. But the observations are at least as applicable here as they were in the case before Lord *Hardwicke*. And upon that ground alone, whatever might have been our opinion upon the merits, this application must have been refused, as a practice calculated to shake all confidence in the due administration of justice in this court.

Judgment.

Had that been otherwise, had the petition and answer been consistent, this application must have been dismissed, in my opinion, upon the merits. The evidence upon which we are asked to open the litigation is far too weak and inconclusive to sustain a bill of review. To be satisfied of that, one has only to consider the circumstances

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of the present case. And such as it is, it is not new in the proper sense of that word. It cannot be said that the evidence now laid before us might not have been brought forward with reasonable diligence at the original hearing. And if that be true, the observation of Lord Eldon, in *Young v. Keighly*, are conclusive against the application: "On the other hand," his lordship observes, "it is most incumbent on the court to take care that the same subject shall not be put in a course of repeated litigation; and that with a view to the termination of suits, the necessity of using reasonably active diligence in the first instance should be imposed upon parties. The court must not, therefore, be induced by any persuasion as to 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 experience of particular injury." For these reasons I think that this petition should be dismissed with costs.

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ESTEN, V. C., concurs.

Judgment.

SPRAGGE, V. C.—The bill which was to redeem, was filed in March, 1851, against the executrix and four infant children of the alleged mortgagee. They answered by guardian, and for defence set up that the alleged mortgage was executed in 1835, by the father of the plaintiff, and was absolute in its terms—was in truth a sale, and not a mortgage. Evidence was given on behalf of the plaintiff—none on behalf of the defendants. The court thought the transaction a mortgage, and decreed accordingly. The defendants, other than the executrix, now ask to be permitted to prove that though the transaction of 1835 was a mortgage, (the then mortgagee,) *William McIntosh*, their father, afterwards purchased the land. Their case is, that in 1839 he conveyed the land to *Hiram Lake*, son of the mortgagor, *John Lake*, at the instance of *John Lake*; *Hiram Lake* giving a bond to *McIntosh*, securing the payment to *McIntosh* of any present or future indebtedness to him on the part of

1859. *John Lake*; and that in 1844 *McIntosh* purchased the premises from *Hiram Lake*, and paid him the consideration therefor, and that this was done with the assent of *John Lake*. The above circumstances came out upon the evidence given by the plaintiff, with the exception of the now alleged assent of *John Lake*; and the petitioners now file a number of affidavits in proof of such assent; and state that the new facts and evidence contained in these affidavits were not known to the defendants, or to their solicitor or guardian at the time publication passed in the cause, nor until after the hearing. The affidavit of *William McIntosh*, the eldest of the petitioners, states that such new facts or evidence were not discovered or known to the petitioners, or, as he is informed and believes, to their solicitor or guardian, at the time publication passed, nor until after the hearing.

Mr. Crickmore bases his application principally upon the 15th section of the 9th order of this court, which authorises an amendment in cases where by the old practice a bill of review or supplemental bill, in the nature of a bill of review, would be the proper course. In that case the evidence desired to be introduced must be as to matters in issue; and it is clear that the assent of *John Lake* to a conveyance by his son *Hiram* in 1844, could not be material upon the issue, whether the conveyance of 1835 was intended to be absolute or by way of mortgage.

The conveyance from *McIntosh* to *Hiram Lake* in 1839 is referred to in the answer, but merely as a sale to *Hiram*, which *Hiram* afterwards abandoned; and that he afterwards in 1844 reconveyed to *McIntosh*, so that the facts to which the proposed evidence relates were not put in issue by the original answer.

But it is contended further, that after coming of age the infants are entitled to put in a better answer, and to give evidence upon the new facts put in issue. *Bennett*

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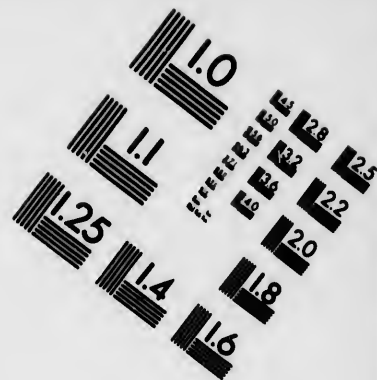
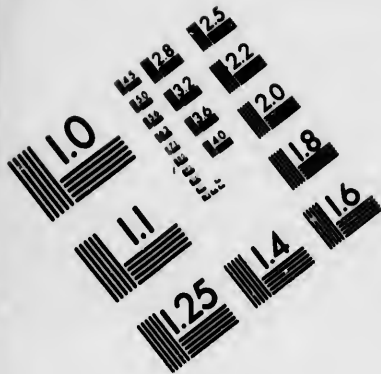
v. *Lee* is an authority in their favour, where Lord *Hardwicke* says, that an infant "comes upon the foundation of the right he has to make the best defence the nature of the case will allow; for when infants come of age they are certainly entitled to put in a new answer, and to make a better defence if they can;" again, "therefore he is justified in saying that his guardian has mistaken his case entirely; and I cannot in justice refuse him putting in a better answer, and making the best defence he can." This was followed by Lord *Brougham* in *Kelsall v. Kelsall*, who says that there is not any established exception to the rule, unless it be in foreclosure suits; and after reviewing previous cases, he says: "Upon the whole, there can be no doubt that the infant is entitled of right when he comes of age to answer anew, and make a better defence, and to support that defence by evidence."

The above case, although after the passing of the statute 1 Wm. IV., ch. 47, is not a decision upon the statute, the decree having been made before the passing of the act, and the 10th and 11th sections being prospective. Upon the effect of the statute Lord *Brougham* remarked, that "The fact that parol demurrer has been abolished by act of parliament, may possibly be deemed a reason why courts of equity should hereafter take away, or at least restrict, the privilege which they have hitherto allowed to infants upon a kind of analogy to the kind of advantage given them at law."

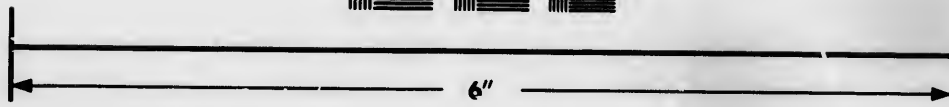
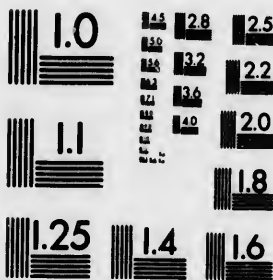
In this case, this court refused, upon a petition of re-hearing, to give the defendants a day to shew cause, upon the ground that a day was given to redeem before they would come of age—that upon redemption they would be trustees to convey to the plaintiff, and that under the 11th section of the act, an immediate conveyance by the infants was obtainable.

In the case of *Brown v. Whight*, (a) before Sir J. L.





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1859. *Knigh Bruce*, when Vice-Chancellor, a question was made whether in a decree for partition between infants, the infant defendants had a day to shew cause, and his honour held that they had not; the 30th section of the imperial act, to which I have referred, enabling the court to declare them trustees, and make such orders as to their estates, rights, and interests, as by the provisions of the statute the court might make as to the estates, rights, and interests of trustees.

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I cannot ascertain from any report of the case of *Mair v. Kerr*, in appeal, to what extent the court thought the infant entitled to make a defence on coming of age. I think, from recollection of the case, that he was held entitled to put in a new answer, and give evidence in support of it.

I find it stated generally in the last English edition of *Daniel's Practice*, published in 1857, that when an infant after coming of age is dissatisfied with the answer put in by his guardian, he may apply to the court for leave to amend his answer, or to put in a new one; and that it seems that this privilege applies as well after a decree has been made as before; and *Kelsall v. Kelsall* is referred to, and no subsequent case, either as confirming or qualifying the rule. The edition of 1854 of Mr. *Seton's* work on decrees seems to treat the right of an infant to make a new defence on coming of age, as standing on the same footing as formerly; except that in cases of partition among infants the case of *Brown v. Whight* has been followed by Sir *W. Page Wood* in *Abraham v. Wells*, 1853 and 1854, a person being, however, appointed to convey the estates of the infants; the Lords Justices, having, in 1852, in *Handcock v. Handcock*, also a partition case, reserved for further directions what might be done respecting the execution of conveyances.

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they probably express the understanding of the profession and the practice of the courts at the present day; and I was unwilling, until it had been decided that an infant defendant has no right in a redemption suit, upon coming of age, to make a new defence, to hold upon the application in chambers that he has no such right.

With respect to the objection that there has been laches in making the application, the case resembles somewhat that of *Bennet v. Lee*, before Lord *Hardwicke*; for supposing the eldest brother not to have come so promptly as he ought to have done, this objection does not apply to the second brother, and if he is entitled to succeed, it is impossible but that the eldest brother may avail himself of the same right.

Without thinking it by any means clear upon principle that infant defendants in a case like this are entitled to come in and make a new defence, I thought that I ought not, upon the present state of the authorities, to refuse the application. Judgment.

Upon the re-hearing of this cause I concurred in refusing to give the infant defendants a day to shew cause, upon coming of age, and I still think that decision right, because the decree in effect declared them trustees; and if trustees, they were not entitled to a day to shew cause. I see no inconsistency in admitting them to answer now, in order to enable them to shew that they were not trustees, that the court decreed against them in a character which in truth they did not occupy.

If they were now asking to put in a new defence being trustees, or urging that the decree was erroneous in its manner of dealing with them as trustees, they would be concluded; but it appears to me that their position is quite different, when what they desire to shew is, that the court has decreed against them as trustees, when in truth they were not trustees. If they are not trustees

1859. they are not concluded by the decree, and they ask to be permitted, on coming of age, to shew that fact.

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v.
McIntosh.

I cannot see that it is a good answer to say, the decree finds you to be a trustee, and therefore you have no day to shew cause; because he has a right to controvert the decree if he is not a trustee; and that is the very fact which he desires to be admitted to shew; and why the decree should be conclusive upon him, upon that point, I confess I do not see.

As a general rule still, as I understand from the books, an infant is not bound by the defence made for him by his guardian, or by the decree thereupon made by the court. To this there are exceptions, and the case of an infant trustee is one. I cannot see why it should not be open to the infant on coming of age, to shew that he is entitled to the benefit of the rule, and does not fall within the exception; and I must add, at the risk of repetition, I think it quite consistent with the rule that an infant trustee is bound by the decree, because he can admit that rule in making his application; his position is, that he is bound, but I am not a trustee.

Judgment

THOMPSON V. BRUNSKILL.

Purchase money payable by instalments—Investigation of title during term of credit—Rescinding contract.

On a purchase of land, the price for which is payable by instalments, the purchaser, although not entitled in the meantime to call for a rescision of the contract, may require his vendor to show a good title before parting with any portion of the purchase money; and in the event of the vendor taking proceedings to enforce payment, the purchaser, upon bringing into court the amount of principal and interest actually due, will be entitled to an injunction to restrain the action, until the title has been investigated; and the fact that prior instalments of the purchase money have been paid will not disentitle the purchaser to insist upon a good title being shewn.

Statement.

This was a suit by *Thomas Thompson* and *William Davis*, against *Thomas Brunskill*, setting forth that defendant claiming to be seized in fee of certain lands in the city of Toronto, had in July, 1857, offered the same

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for sale in lots, by auction; the terms of sale being ten per cent. down, and the balance payable on the 1st of January, 1867, with interest in the meantime half yearly: that plaintiffs had bid off certain lots and paid the ten per cent., and the defendant thereupon entered into articles of agreement whereby he agreed to convey the said lots on payment of the purchase money at the times and in the manner therein specified, and the plaintiffs covenanted to pay such purchase money accordingly; and had paid all interest accrued due upon such contract up to the first day of July, 1858; that plaintiffs had applied to the defendant for, and had obtained from him an abstract of the title to the said lots, to which they had made several objections, and to which the defendant had failed to furnish any answer, by reason of which, the bill alleged, the contract for sale and purchase was rescinded, and that defendant had acquiesced in such rescision; notwithstanding which the defendant had commenced an action to recover the amount due under the contract on the 1st day of January, 1860. The bill further alleged, that a good title for the lands could not be shewn; and that plaintiffs had offered to pay the amount of the purchase money of one of the lots upon receiving a good title thereto, but although the defendant had frequently promised to have a good title shewn, he had neglected to do so. The prayer was, that the contract might be rescinded and delivered up to be cancelled, repayment of the money which plaintiffs had paid thereunder, and an injunction to restrain proceedings at law. Or if the court should order the specific performance of the contract, then a reference of title; the plaintiffs, in that event, submitting to pay the interest now due, and to become payable under such agreement, either into court, or as they might be directed.

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v.
Branskill.

Judgment.

The defendant answered the bill, denying any rescision of the contract, or offer to pay by the plaintiffs. In other respects the important statements of the bill were either admitted by the answer, or proved by affidavit. The

1859. cause came on to be heard by way of motion for decree, before his honour V. C. *Spragge*.

Thompson
v.
Brunskill.

Mr. *Roaf*, for plaintiffs.

Mr. *Hector*, for the defendant.

Wallace v. Woodyear, (a) *Wild v. Hillas*, (b) *Clive v. Beaumont*, (c) *Morris v. Wilson*, (d) *Shaw v. Ross*, (e) were cited by counsel.

Judgment. SPRAGGE, V. C.—This bill, which is filed by the purchasers of certain real estate in the city of Toronto against the vendor, raises a question which has never, I believe, hitherto been brought up for discussion, viz., whether upon a sale, where the purchase money is made payable at a future day, by instalments or otherwise, and no conveyance is to be made until the purchase money is fully paid, the purchaser is entitled in the meantime to an investigation of the vendor's title; and to restrain proceedings at law for the recovery of the interest unpaid or instalments of the purchase money, until a good title be shewn. The cause has been heard on motion for decree.

The contracts of sale in this case, which are dated the 20th of July, 1857, contain a covenant on the part of the purchaser to pay a certain sum, the balance of the purchase money, (an instalment of ten per cent. having been paid at the time of the contract,) on or before the 1st of January, 1867, with interest in the meantime half yearly. The action at law which is sought to be restrained is for interest.

The vendor on his part covenants, upon payment, to convey to the purchaser, by a good and sufficient deed, in fee simple.

(a) 2 Jur. N. S. 179.
(c) 1 DeG. & S. 397.
(e) 17 U. C. Q. B. 257.

(b) 4 Jur. N. S. 1166.
(d) 33 L. T. 56.

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I may say at the outset that I think no question arises as to whether the covenants in the contract of sale were independent or otherwise. The payment of the balance of the purchase money by the purchaser, and the making of a conveyance by the vendor are, I have no doubt, intended to be contemporaneous acts, and neither can require of the other the act to be done by that other, unless prepared at the same time to do what is stipulated to be done by himself.

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Druskill.

Mr. *Hector's* contention is, that inasmuch as the conveyance is not to be made until the balance of the purchase money is paid, the vendor is not bound to shew a good title until that period arrives.

Lord *St. Leonards* (a) says: "It should be borne in mind that in contracts for the sale of real estate an agreement to make a good title is always implied, unless the liability is expressly excluded." In cases where the purchase money is payable presently, it is clear that its payment cannot be enforced, unless and until a good title be shewn. It is not the conveyance that is the equivalent for the purchase money, but a good title to the land to be conveyed, and the conveyance of it.

It is the ordinary *prima facie* right of a purchaser to require that a good title be shewn before he is called on to pay the purchase money. It is called by Sir *Thomas Plumer*, in *Burroughs v. Oakley*, (b) "An ordinary equity which the court is particularly careful to enforce, on the plain principle that a plaintiff seeking to compel a purchaser to accept an estate is bound to submit his title to such a scrutiny as satisfies the court that the defendant may safely part with his money." An instalment is clearly part of the purchase money; interest is for the use or forbearance of it. The purchase money is a present debt, though payable at a future time; and it

(a) Sug. V. & P. 13 ed., p. 14.

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 Brunskill.

must therefore lie upon the vendor to shew that although he cannot require payment of the whole, or of the balance of his purchase money without shewing a good title, he may nevertheless call for portions of it, or for interest upon it without shewing title. With regard to interest I may observe that I think it stands on the same footing as an instalment. Unless the vendor is entitled to receive the principal at the present or at a future time, he cannot be entitled to receive interest upon it.

It is admitted that the purchaser is entitled at some time to an enquiry, which is to determine whether the vendor is entitled to call for his purchase money; and the question is, at what time is he entitled to this enquiry. The contract of sale contains an implied agreement that the vendor will make a good title. Does this mean that he will shew a good title before he calls for his purchase money?

Judgment.

Contracts such as the one upon which this question arises, are, I believe, very rare in England; and Lord *St. Leonards*, in the passage I have quoted, was probably speaking of a contract where the purchase money was payable presently; in which case the vendor would necessarily make out a good title before he could call for any of the purchase money, at least beyond the deposit; so he is not speaking of making a title at some future time, but presently; and is not connecting the making of a title with the making of a conveyance; but as that which must be done before the purchase money is payable.

Now what is the answer which may reasonably and properly be given to a demand by a purchaser upon such a contract as this, that the vendor make out a good title? Can he say that it is sufficient for the purchaser, if he, the vendor, is in a position when all the purchase money is paid, to make out a good title then, even though he should have to acquire it in the meantime? I apprehend

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that such a position would not be tenable : a man cannot assume to sell property, speculatively, which he has not, upon the expectation of acquiring it afterwards. A contract under such circumstances would not be specifically enforced in equity : there would be no mutuality of remedy, and in the words of Lord *St. Leonards*, the seller would not be a *bond fide* contractor. (a)

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v.
Bruskitt.

I take it; then, that the agreement implied in the contract of sale is, that the vendor has at the time of the contract, a good title to the land contracted to be sold. The objection to make it out before the payment of the balance of purchase money is payable, must therefore rest upon some other ground. He calls for payment of purchase money, though indeed of a part only ; he has by his contract impliedly alleged that he has a good title at the time ; what displaces the ordinary equity of the purchaser to investigate the title ? There is nothing in the contract to do it. There is the circumstance that part of the purchase money is not yet payable ; but in reason how is that a ground for displacing the ordinary equity ? Judgment.

It appears to me that upon such a contract a purchaser is not bound to pay one shilling of the purchase money, or interest, unless a good title is shewn ; and that he stands upon the same footing in that respect as if the whole purchase money were payable in hand.

To hold otherwise would indeed work great wrong in many cases. In most contracts for the sale of land, when time is given for payment, the purchase money is made payable by instalments. To hold that the purchaser is bound to go on year after year, making his payments, leaving him to the last payment, perhaps a tithe of the whole, before he can demand that a good title be shown, would be a practical negation of his ordinary equity to have a good title shown, before he parts with his purchase

(a) Sug. 13 ed. 185.

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Thompson
v.
Branchhill.

money; and to leave him to his personal remedy against the vendor would often be a remedy only in name. It cannot be said that his contract has subjected him to all this, for there is nothing in the contract one way or the other, at least nothing expressed, and what is implied as against him here, is only a circumstance, the time for the payment of part of the purchase money, (or in some few cases of the whole of it,) but that circumstance in no way affects the principle upon which the equity is founded.

I have preferred to decide this case upon the broad ground upon which I have gone; though if I had thought differently as to what should be the general rule in such cases, there is that in the peculiar form of these contracts and the acts of the purchasers, as to one of the parcels of land purchased, which might give the purchasers a right to investigate the title. Besides which, an abstract of title was delivered, and correspondence passed between the solicitors of the vendor and the purchasers in regard to the title; but, entertaining the opinion which I do, it is unnecessary to consider those points.

Judgment.

One or two other points were raised which it is unnecessary to dispose of. The plaintiffs contend that the contract is rescinded. I do not think that a purchaser is entitled to file a bill to rescind a contract, or to have it rescinded. I had to consider that point in *McDonald v. Garrett*, disposed of some months ago; but I suppose when an action at law is brought for the purchase money, the purchaser might shew at law, upon an equitable plea, that the contract was rescinded, or file a bill to restrain the action.

I think, however, that there is no ground in this case for contending for a rescision of the contract. It is founded only upon a notice given by the purchasers, on the 2nd of December, 1858, that unless a full and perfect abstract of title were delivered before the 24th of the same month, they would hold the contract at an end.

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An abstract of title had been previously delivered, and a further abstract was delivered, and requisitions made in regard to it between those dates; and after the 24th the purchasers insisted that the contract was at an end. I think that it was not.

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v.
Dranskill.

On the part of the defendant, it is contended, that the investigation of the title was waived. There is some evidence of express agreement to waive it, if an action at law were discontinued, but this is expressly denied upon the oath of both the purchasers, and I think cannot be considered as established in evidence.

I do not consider that there was any waiver otherwise. There appear to have been no acts of ownership of any kind exercised by the purchasers, and the only other acts from which waiver can be inferred, were the payment of the first instalment at the date of the contract, and the payment of interest on the 11th of January following. Before the payment of the interest, an abstract of title had been asked for, and on the sixth of the same month a letter pressing for it, and expressing some dissatisfaction at the delay, was written; an abstract was delivered after this, and a good deal of correspondence ensued; the next payment of interest was made under peculiar circumstances, certainly negating any thing like waiver.

Judgment.

Waiver is clearly a question of intention, the payment at the date of the contract can furnish no evidence of such intention; neither do the subsequent payments of interest. I am against the defendant upon this point.

There must be an order of reference as to title, in the usual form; and an injunction restraining further proceedings at law upon the arrears of interest being brought into court.

As to costs, I think that up to the hearing there should be no costs.

1859. The plaintiffs, after the 24th of December, 1858, refused to go on with the contracts, insisting upon their rescission; and they also insist upon it by their bill, asking for a reference as to title only, in the event of the court holding the contract not rescinded.

Thompson,
v.
Brundskill.

The defendant, on his part, has resisted all enquiry into title, insisting that the plaintiffs are not entitled to such enquiry until the last of the purchase money is payable. The costs subsequent to the hearing will be reserved as usual.

MCMASTER V. CLARE.

Fraudulent assignment.

A trader being in insolvent circumstances, at a meeting of his creditors entered into a written agreement that he would execute an assignment, to trustees, for the benefit of his creditors, of all his real and personal estate and effects, (except certain policies of life insurance,) and on the second day afterwards he did execute the deed agreed upon, which the trustees accepted, and several of his creditors joined in and executed the same. Afterwards it was discovered that on the day intervening between the date of the agreement to assign, and the execution of the deed of assignment, the debtor had sold a valuable portion of his stock in trade at a credit running over three years, and had accepted as security the promissory notes of the purchaser. Thereupon the trustees filed a bill seeking to have this sale set aside as fraudulent, and void as against them. *Held*, that the trustees being in the position of purchasers, could claim only such rights as the debtor was legally entitled to at the date of the execution of the deed of trust, and that the sale being binding upon the debtor, and those claiming under him, the trustees were not entitled to the relief prayed. But, *semble*, that this sale would not have been sustained as against a judgment creditor who had sued out execution.

The bill in this suit was filed by *William McMaster, Samuel Benjamin, and Duncan Bell*, against *John K. Clare and Thomas Hutchinson*, and set forth that *Hutchinson*, in July, 1859, who was then carrying on business in Toronto, Hamilton, London, and Guelph, as dry goods merchant, having become greatly involved, was desirous of effecting an arrangement with his creditors, for which purpose he sent an agent to England, but it being found impossible to effect any arrangement, he did, on the 4th of August, call a meeting of his creditors at Toronto, for the 6th of September, at which meeting such

Statement.

of his creditors to execute their general assignment, he consented to a greater purchase price and release in full of the assignment submitted, that in pursuance of the 10th of September and made of the first joined their plaintiffs of *Hutchinson* ment, of the assigned to tenements, schedule the stock in trade in Toronto dwelling by chattels in accounts, and securities for estate of *Hutchinson* ance effected yearly, and the trusts and costs, charged the trusts, and effects the creditors to their claim to pay the amount also to execute the release," and

of his creditors as then attended requested *Hutchinson* to execute an assignment of his property and effects for their general benefit, which, after considerable difficulty, he consented to do, and on the 8th of the month, the greater part of his creditors having agreed to give him a release in full of their respective debts, he by an instrument under his hand and seal, agreed to execute such assignment, in the form, and according to the draft then submitted, to the plaintiffs, as trustees for his creditors, that in pursuance of such agreement, *Hutchinson*, on the 10th of September, by indenture bearing date that day, and made between the defendant *Thomas Hutchinson*, of the first part, his wife of the second part, who joined therein for the purpose of barring dower, and the plaintiffs of the third part; and such of the creditors of *Hutchinson* as should come in and execute such assignment, of the fourth part, granted, bargained, sold, and assigned to the plaintiffs, all and singular the lands, tenements, and premises, particularly specified in the schedule thereto annexed; and also all and singular the stock in trade of him the said *Hutchinson*, in his shop, in Toronto; and all the household goods, &c., in his dwelling house; also, the stock in trade, goods and chattels in the shop at Hamilton, and all book debts, accounts, credits, judgments, bonds, bills, notes, and securities for money, and all other the real and personal estate of *Hutchinson*, (excepting certain policies of insurance effected upon his life,) and all reversions, remainders, yearly, and other rents, issues and profits thereof, upon the trusts stated in such indenture, namely, to pay the costs, charges, and expenses attending the execution of the trusts, and apply the proceeds of the trust property and effects towards the payment and satisfaction of all the creditors of *Hutchinson* rateably, and in proportion to their claims, without any preference or priority, and to pay the surplus, if any, to *Hutchinson*. The assignment also contained a stipulation that any creditor might execute the indenture, and add to his signature "without release," and that creditors so executing should not have

1859.

McMaster
v.
Clare.

Statement.

1859.

McMaster
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Clare.

been taken to have discharged or released *Hutchinson* from any part of the debt remaining unpaid after the receipt of the dividends. And by the indenture *Hutchinson* covenanted with the plaintiffs for the further assurance of the lands and premises, and that he would execute all such *deeds, conveyances, &c.*, as might be requisite to convey to the plaintiffs any lands, tenements, goods, chattels, rights, credits, or other assets, (except the life policies,) omitted from the said indenture, or which were intended, or which should have been included therein; and that he had made a true and faithful discovery and assignment of all and singular his real and personal estate and effects to the best of his knowledge and belief. That this indenture was on the 10th of September accepted by the plaintiffs, and on the same day was executed by several of the creditors of *Hutchinson*, who thereby released him according to the stipulations of the deed, and amongst others the plaintiff

Statement. *Benjamin.* That the business carried on by *Hutchinson* in London was carried on in the name of the defendant *Clare*, but the business in reality was that of the defendant *Hutchinson*.

The bill further stated, that after calling the meeting of his creditors, before referred to, and when his difficulties and insolvency were notorious to the public at large, and well known to *Clare*, and after *Hutchinson* had executed the agreement for transfer, (of the 8th of September,) and in the interval between that day and the execution of the assignment, he had concerted and agreed with *Clare* to make a private sale to him of all the stock in trade, merchandise, and other effects of the said business so carried on in London, for the price of \$7,943.80, and to accept therefor thirty-five promissory notes of the said *Clare*, payable in monthly instalments, beginning at three months, and ending at thirty-six months from the 9th day of September, 1859, and without any further or other security for the payment thereof; and that at this time *Hutchinson* was then indebted to the plaintiff

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1859.

McMaster
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Benjamin, and several other persons, and was in fact insolvent. The bill charged that the sale so made to *Clare* was not *bonâ fide*, or in the ordinary course of trade, and was made with intent to delay and defeat the creditors of *Hutchinson*; and that the same was contrary to the statute 13 Elizabeth, chapter 5, and also contrary to the provisions in that behalf contained in the act of the legislature of this province, passed in the 22nd year of her Majesty's reign, chapter 96, and entitled an "act for abolishing arrest in civil actions in certain cases, and for the better prevention and more effectual punishment of fraud," and that the same should be set aside as fraudulent as against the plaintiffs and the creditors of *Hutchinson*. That the notes given by *Clare* had been delivered by *Hutchinson* to plaintiffs after the execution of the assignment; but they offered to return them to *Clare*, upon the sale being declared void; that *Clare* was a person of no capital or means, and being in possession of the stock and effects, might at any time dispose thereof, and thus defeat the equitable claims of the plaintiffs, unless restrained by injunction from so doing. The prayer of the bill was, that the sale might be declared fraudulent, and null and void as against the plaintiffs, and the creditors of *Hutchinson*; that the defendant *Clare* might be ordered to deliver up the goods, &c., to the plaintiffs, and to account for such as had been sold since the execution of the assignment of the 10th of September; that an injunction might be granted restraining *Clare* from selling or disposing of the goods, a receiver for the estate appointed, and for further and other relief.

Affidavits were filed verifying in all important particulars the statements of the bill; and thereupon an injunction had been granted *ex parte*, restraining *Clare*, as prayed, and a motion was afterwards made to extend the injunction so issued.

Mr. *Mowat*, Q. C., and Mr. *Blake*, for the plaintiffs.

1859. Mr. *McDonald* and Mr. *Fitzgerald*, contra.

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Clare.

In support of the application it was contended that it was not necessary for the plaintiffs to shew that *Hutchinson's* intention was to delay his creditors, but it was sufficient if that were the natural consequence of what had been done; here the sale was by an insolvent trader at a credit; the natural effect of such an act would be to delay creditors in enforcing their débt. If the sale had been *bonâ fide* and for value the creditors would not have been injured; but here there is only a promise to pay at a future day, extending over a period of three years; this, no one could say was such a sale as any dealer would make in the usual course of his trade.

The word "transfers," used in the statute 22 Vic., ch. 96, embraces sales; this sale must, under all the circumstances, be deemed to have been fraudulent as against these trustees, as it would clearly be void as against creditors.

[THE CHANCELLOR.—It is said the assignment to the plaintiffs does not cover those goods; if that be so, how can they complain of the sale ?]

As between the plaintiffs and *Clare*, the goods must be deemed to be the property of *Hutchinson*, although as between *Hutchinson* and *Clare* they may not be so considered; besides, at the time of the sale to *Clare*, *Hutchinson* had, the day preceding, agreed to make the assignment; and equity, considering that which is agreed to be done as done, will treat these goods as actually belonging to the trustees.

It is now desired to uphold this sale as having been made in compliance with a previous agreement to that effect; but such an agreement, if ever entered into at all, was not binding on either party, it being alleged to have been by parol only, and not to be performed within a year.

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On the other side, it was contended that the assignment did not embrace the goods in question; the general words being applicable only to the goods of the assignor in Toronto and Hamilton.—*Harris v. The Commercial Bank.* (a) The general words carry nothing.

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 McMaster
 v.
 Clare.

Trustees for the benefit of creditors are not in the same position as assignees in bankruptcy and insolvency. These goods did not pass, and the plaintiffs have no *locus standi* in this court. The statute under which this suit is instituted is mainly a re-enactment of the 13th Elizabeth, which does not apply to any sale made for value, as this was, and was also a very advantageous one. A creditor cannot be said to be delayed within the meaning of the words of the statute, because his debtor chooses to sell his effects at a long credit.

As to the agreement for sale with *Clare*, it may be void in law for want of writing; but if it be void, it takes away from it any taint of fraudulent dealing.

Ex parte Bushell, (b) *Leake v. Young*, (c) *Cook v. Caldecott*, (d) *Smith v. Harris*, (e) *Baxter v. Hill*, (f) *Butcher v. Harrison*, (g) *Grimsby v. Ball*, (h) *Norcutt v. Dodd*, (i) *Stone v. Van Heythusen*, (j) *Lister v. Turner*, (k) *Withall v. Tuckwell*, (l) *French v. French*, (m) *Goodwin v. Williams*, (n) *Holmes v. Penney*, (o) were referred to by counsel.

THE CHANCELLOR.—This is an application for an injunction to restrain the defendant *Clare* from selling certain goods purchased by him from his co-defendant

(a) 16 Q. B. U. C. 437.

(c) 5 Ell. & B. 955.

(e) 2 Ell. & B. 35.

(g) 4 B. & Ad. 129

(i) Cr. & Ph. 100.

(k) 5 Hare, 281.

(m) 6 DeG. M. & G. 95.

(o) 3 K. & J. 90.

(b) 3 M. D. & DeG. 615.

(d) 1 M. & M. 522.

(f) 1 Ad. & Ell. 456.

(h) 11 M. & W. 531.

(j) 11 Hare, 126.

(l) 5 Jur. N. S. 925.

(n) Ante vol. v., p. 539.

1859. *Hutchinson*, upon the ground that the sale is fraudulent under the statute 22 Vic., ch. 96, sec. 18 & 19.

McMaster
v.
Clare.

The plaintiffs are the assignees of the estate and effects of *Hutchinson*, for the benefit of his creditors, under a deed which bears date the 10th of September, 1859. *Clare* purchased the goods in question on the 9th of September. The reality of the sale to *Clare* is not questioned. The allegation is that it was void under the statute.

Mr. *Mowat*, for the plaintiffs, contends that *Hutchinson* was in insolvent circumstances, at the time of the sale to *Clare*, within the meaning of the statute; that all sales made by traders under such circumstances are avoided, except sales in the ordinary course of business to innocent purchasers; that this sale, at all events, which was upon long credit, was a sale to delay, if not also to defeat, creditors, and is therefore void under the statute.

Judgment,

Mr. *McDonald*, on the other hand, contends that *Hutchinson* was not in insolvent circumstances at the time of the sale to *Clare*, on the contrary, he asserts that *Hutchinson's* estate, if properly managed, would pay his debts in full and leave a surplus. He contends, further, that sales are not within the recent statute, as they are not within the statute of Elizabeth, and as the sale in question was a *bonâ fide* sale for valuable consideration, not calculated to defraud creditors, but, on the contrary, highly beneficial for them, he contends that the motion should be refused.

In the view which we take of this case it is unnecessary to decide several important points upon the construction of the statute, which have been very ably discussed in the argument; but as the questions are of great public importance, we think it right to say that our present opinion is in favour of the plaintiffs.

We have no doubt that *Hutchinson* was insolvent,

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within the meaning of this act of parliament, at the time he made the sale to *Clare*. His embarrassments were confessedly very great in the month of July. He sent an agent to England in that month to effect a loan, with instructions, if he failed, to call a meeting of his creditors. In the month of August he called a meeting of his creditors for the 6th of September. Before that day arrived, namely, on the 1st of September, all his goods, chattels, and effects, including of course his stock in trade, were taken in execution for upwards of £20,000. Actions to the number of 12 or 14 had been commenced against him. His real estate was heavily mortgaged, and the judgments registered against him amounted to forty thousand pounds. Lastly, he had agreed, on the 5th of September, to assign for the benefit of his creditors.

We think it clear upon these facts, admitted by *Hutchinson* himself, that he was insolvent, within the meaning of the act, at the time he sold the property in question to *Clare*, and that *Clare* must be taken, under the circumstances, to have known it. Judgment.

We agree with Mr. *McDonald*, that the language of the recent statute, so far as it deals with transfers intended to defeat or delay creditors, is not more extensive than the language of the statute of Elizabeth; but we have no doubt that both statutes embrace sales as well as voluntary transfers. The 6th section of the statute Elizabeth is in these words: "Provided, &c., that the act, &c., shall not extend to any estate, &c., had made, &c., which estate is or shall be upon good consideration, and *bonâ fide* lawfully conveyed or assured to any person, &c., not having at the time of such conveyance, &c., any manner of notice or knowledge of such covin, fraud, or collusion as aforesaid." Now looking at the statute apart from the authorities, that clause appears to us to remove every shadow of doubt. The first section is quite wide enough to embrace sales, and the exception in the 6th section proves conclusively the rule which the legislature intended to lay down.

1859. It is said, however, that *Wood v. Dixie*, (a) which has been followed both in England and here, lays down a different rule, namely, that where the sale is made *bona fide*, and with a full intention that the property should pass, it is not void, though made with the intent to defeat or delay creditors. The language of the court in *Wood v. Dixie*, is certainly broad; but as applied to the circumstances of that case, the rule there laid down appears to us to be perfectly sound, and in accordance with the received interpretation of the statute. *Wood v. Dixie* was not the case of a sale to a stranger. It was a transfer to a creditor in payment of a pre-existent debt. Now it has always been held that it is competent to a debtor, according to the law of this country, apart from the bankrupt and insolvent acts, to prefer one creditor to another. There is nothing in the statute of Elizabeth which prohibits that. Now when a debtor in insolvent circumstances sells his property, or a portion of his property, to one of his creditors, in payment of a pre-existent debt, the necessary consequence of such a transfer is to defeat and delay his other creditors. And the parties must be held to have intended that which was the necessary and obvious consequence of their acts; but to hold such a transfer void upon that ground, would be to hold that a debtor is prohibited by the statute of Elizabeth from preferring one creditor to another, which would be contrary to the settled rule of law.

Judgment

We must not be understood as meaning that a transfer to a creditor may not be void, under the statute of Elizabeth, as well as a transfer to a stranger. No doubt it may. The transfer in *Twyne's* case was a transfer to a creditor, and the reality of the debt was not questioned, but the transfer was held to be colourable, and therefore void under the statute. But what we mean to assert is, that a transfer of his property made by a debtor in insolvent circumstances, to a *bona fide* creditor, with a

full intention under the statute, to the minds of the other creditors, more than to the decision of the court, the transfer was generally, a confession to a creditor in *Pickstock* for the benefit of a

But a sale upon authority of the decisions since the statute, *fide*, and upon the statute,

But, which is contrary to ch. 96, as to the effect of the statute upon the debtor, except in ordinary course of business, to create a mortgage, and the actions of transfer, as it is to be clear, avoiding contracts, but upon proof of confession given, or perhaps a confession may be valid under the statute to hold that

(a) 9 C. & F.

(c) M. & S.

14 C. B. 410;

3 K. & J. 91.

full intention that the property should pass, is not void under the statute of Elizabeth, because of an intention in the minds of one or both of the parties to defeat or delay the other creditors. Now *Wood v. Dixie* decides nothing more than that; and it will be found upon examination that the decisions referred to in the argument of that case were all of the same class. In *Riches v. Evans*, (a) the transfer was an assignment for the benefit of creditors generally. In *Holdbird v. Anderson*, (b) it was a confession to a *bonâ fide* creditor after action brought; and in *Pickstock v. Lyster*, (c) it was an assignment for the benefit of creditors.

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But a sale to a stranger would seem in reason and upon authority to stand on a different footing. Recent decisions seem to establish that such a sale, though *bonâ fide*, and upon valuable consideration, may be void under the statute, if made with intent to defeat creditors. (d)

Judgment.

But, while we hold that sales are within the 22 Vic., ch. 96, as they were within the 13th Elizabeth, we do not accede to the argument that the recent statute has the effect of invalidating all sales made by an insolvent debtor, except sales to innocent purchasers, in the ordinary course of business. Such a construction would create a material discrepancy between the 18th and 19th sections, and would, moreover, interfere with the transactions of traders in this province, in a way not contemplated, as it seems to us, by the legislature. We hold it to be clear that the 18th section has not the effect of avoiding confessions of judgment given, not voluntarily, but upon pressure to a *bonâ fide* creditor. And if a confession given upon pressure to an importunate creditor, or perhaps as a security for money to be advanced, would be valid under the 18th section—we are strongly disposed to hold that a transfer of property made under the like

(a) 9 C. & P. 640.

(b) 5 T. R. 235.

(c) *M. & Sel.* 371; *Bott v. Smith*, 21 *Beav.* 511; *Graham v. Furber*, 14 C. B. 410; *Harman v. Richards*, 10 *Hare*, 81; *Holmes v. Penney*, 3 K. & J. 91.

1859. *McMaster*
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circumstances, and for the same purpose, would be valid under the subsequent clause. In other words, we think that the transfers which are declared to be void under the 19th section are transfers made with intent to defeat or delay the creditors of the transferor, or to give one or more of his creditors a preference over the others.

It is not necessary in our view of this case to determine whether the sale to *Clare*, which was, it will be remembered, a sale not to a creditor, but to a stranger, was a sale made with intent to defeat or delay creditors, within the meaning of the act, because assuming in the plaintiffs' favour, and for the purpose of the argument that it was so, we do not think them entitled to the relief which they seek.

Judgment. The plaintiffs come here either as creditors of *Hutchinson*, or as purchasers from him under the deed of the 10th of September, 1859. If they come as creditors, then it is clear upon the authority of several cases, of which I need only mention *Smith v. Hurst*, (a) which was followed by *Knapman v. Crawford*, in this court, that a creditor has no right to impeach a sale of goods as being fraudulent and void under the statute of Elizabeth, until he has obtained judgment, and issued out execution. And if the plaintiffs could not have filed their bill under the statute of Elizabeth, without having first obtained judgment, and issued out execution, neither can they, in our opinion, under the recent act. Until execution has issued the creditor's title is incomplete, and therefore he has no right to file such a bill.

Then if they come as purchasers under the assignment of the 10th of September, it is equally clear that they cannot succeed. It is clear that the conveyances and transfers which are declared to be covinous by the statute of Elizabeth, are not made void as to subsequent purchasers, but as to creditors only. The 27th of

(a) 10 Hare, 39.

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Elizabeth was framed for the protection of purchasers, but the 13th of Elizabeth was not so. To hold that a conveyance or transfer which would be void, under the 13th of Elizabeth, as against creditors, because made to defeat or delay them, is therefore void as against subsequent purchasers, would be obviously unreasonable and unjust. I have no doubt that such a conveyance would be perfectly valid as against the debtor himself and those claiming under him, and I do not apprehend that the recent statute makes any change in that respect. *Stone v. Van Heythusen*, (a) which was cited in argument, is an authority precisely in point. But the principle upon which the Vice-Chancellor proceeded appears to have been settled previous to *Twyne's* case.

1859.

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The plaintiffs fail, therefore, on both grounds. As creditors their title is incomplete, because they have neither obtained judgment nor sued out execution; and as purchasers they have no right to set aside the previous sale to *Clare*.

There is another ground also upon which the plaintiffs' case appears to us to fail. The deed of the 10th of September does not pass, or profess to pass, the goods in question. By that deed *Hutchinson* assigns his stock of goods at Toronto and Hamilton; but nothing is said as to the stock at London; and although the deed goes on to assign all his other real and personal estate, yet it is all other real and personal estate *now belonging* to the debtor; but at that time the stock at London had been sold to *Clare*, and therefore did not belong to *Hutchinson*, or pass by the deed.

It is said, however, that the contract of the 8th of September bound the goods, and that as the sale to *Clare* was in fraud of that contract, it is void as against the plaintiffs.

(a) 11 Hare, 126.

1859.

McMaster
v.
Clare.

It is enough to say that no such case is made by the bill. The sale to *Clare* is not impeached on any such ground.

But had it been, a very important question would have arisen upon the 20 Vic., ch. 3. Under that statute all sales of goods, not accompanied by possession, are required to be in writing. The goods and chattels must be so described that they may be readily and easily known and distinguished. There must be an affidavit of the *bonâ fides* of the transaction, and the due execution of the conveyance; and the conveyance must be, moreover, registered; and in default, it is declared to be void against subsequent purchasers as well as creditors. Now the only words either in the agreement of the 8th or the assignment of the 10th which would comprehend the goods in question, are the words: "all my real and personal estate," and it is quite clear that such a description is not sufficient within the statute. (a) Then if the contract of the 8th would be void against *Clare*, who purchased on the 9th, as a sale, can it be a binding contract in equity? Whenever that question may arise it will require much consideration, but for the reasons already given, it does not arise here.

Judgment.

ESTEN, V. C.—I think, on looking to the circumstances under which the sale to *Clare* took place, and the nature of the sale, it must be deemed to have been made with intent to delay creditors, and that *Clare* had notice, and that the sale was not in the ordinary course of business, and took place when *Hutchinson* was insolvent, or in expectation of insolvency, and would therefore be void as against the creditors of *Hutchinson*; but that he cannot defeat it by any act of his own, even by an assignment for the benefit of creditors; and therefore that the trustees stand in his place, and are bound by this sale, in the same manner that he was. The question then arises, whether the plaintiffs are entitled to relief

(a) Harris v. Commercial Bank.

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on the ground of the agreement made on the 8th. I think that an agreement of this nature, if founded on valuable consideration, is such an one as this court should enforce specifically. If, by the agreement, the creditors are to release the debtor, there would be a valuable consideration; and even if it contain no such stipulation, it necessarily arises, from the nature of the transaction, that the creditors will not be free to act in the same manner as if no such agreement had been made; must forego, to some extent, their remedies; are led in fact to forbear suit; and this circumstance, combined with the effect of the existing debt, is sufficient, in my judgment, to constitute such a valuable consideration as will attract the jurisdiction of the court. In the cases of *Siggers v. Evans*, (a) and *Harland v. Bincks*, (b) it was held that a deed of trust for creditors, originally revocable, became in consequence of communication to creditors, and their presumable forbearance, not voluntary or void against creditors. But the objection is, that no such case is presented by the bill, and I am of opinion, therefore, that the injunction which has been granted must be dissolved: costs to be costs in the cause.

1859.

McMaster
v.
Clare.

Judgment.

SPRAGGE, V. C., concurs.

PATERSON V. HOLLAND.

Practice—Partnership—Adding parties in master's office.

One of several partners being out of the jurisdiction and alleged by the bill to be insolvent, a decree to take the accounts and wind up the affairs of the partnership was made in his absence; and he, after the decree had been carried into the master's office, returned to this province, and was, by order of the master, made a party defendant in his office. From this order, the defendant so added appealed. *Held*, that under the 42nd of the general orders of 1853 (section 15.) the master had authority to add such party in his office, and the appeal was dismissed with costs.

This was a motion by way of appeal from an order of the master making *Donald Bethune* a party defendant in his office, he having returned to this province after the

(a) 5 Ell. & Bl. 367.

(b) 16 Q. B. 655.

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decree pronounced upon the hearing of the cause, (as reported *ante* page 1,) had been carried into the master's office.

Mr. *A. Crooks*, in support of the application.

Mr. *Strong* and Mr. *McDonall*, contra.

Sibley v. Minton, (*a*) *Darwent v. Walton*, (*b*) *Daniel's* Chancery Practice, 234-7-8, 337, 340 ; *Smith's* Practice, 191-3, 793-4 were, amongst other authorities, referred to.

THE CHANCELLOR.—The bill in this case was for an account of the partnership transactions of *Donald Bethune & Co.*

The plaintiffs moved for a decree. The partnership had been in effect dissolved, and the assets realised ; and the only question discussed upon the hearing was as to the proportion in which the partners were bound to contribute to the losses.

Judgment.

The original intention of the parties had been to constitute a limited partnership under the provisions of the statute 12 Vic., ch. 75, and *Donald Bethune* became the general partner. The contention on behalf of the plaintiffs was, that the attempt to form a limited partnership had failed, for the reasons stated in the bill ; that the partnership was, therefore, from the first, a general partnership ; and that each partner was liable, consequently, to contribute to the debts in proportion to his capital.

The court took that view of the case, and directed the accounts to be taken on that footing.

The bill had not been served upon *Donald Bethune*. The allegation respecting him was, that he was insolvent, and absent from the jurisdiction.

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directed *Donald Bethune* to be made a party, and this is an appeal from that order.

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In determining the propriety of the order appealed from, it is material to consider the changes which the practice has undergone since 1849.

In suits for account, or when an account was necessary before final decree, the court was authorised by the 77th order of May, 1850, to refer the matter to the master at any time after fourteen days from the service of the subpoena.

By the 1st of the orders of January, 1851, it is declared to be expedient to extend the principle of order 77, and to regulate the practice thereunder. The cases to which the principle of that order should be considered applicable, are then enumerated, and amongst them I find this to be one: "a person entitled to an account of the dealings and transactions of a partnership, dissolved or expired." The 4th of these orders provides that, "upon the hearing of any motion for a decree, under order 77, the court may, if it shall think fit, make an order granting or refusing the relief prayed, or may direct the examination of either parties or witnesses, or further enquiries, or other proceedings to be had for the purpose of ascertaining the plaintiff's title to the relief claimed; and further, the court may direct such (if any) persons or classes of persons as it shall think necessary or fit, to be made parties to the suit, or to be summoned to attend any proceedings before the master, with reference to any account or enquiries directed to be taken or made, or otherwise." Judgment.

The 5th order provides, "that if upon the proceedings before the master upon any such reference it shall appear to the master that some persons not already parties ought to attend, or to be enabled to attend the proceedings before him, he is to be at liberty to order the same; and there-

1859. upon the plaintiff may sue out a writ of subpoena requiring the persons named to appear to the writ, and such persons are thereafter to be named and treated as defendants to the suit, and bound thereby as other parties."

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These orders were repealed by an order passed on the 3rd of June, 1853; but orders 15, 16, and 17 of that series, by which the principle of the previous order was extended still further, was substituted in their stead.

By the 16th order, under which these proceedings were had, every plaintiff is enabled to move for a decree at any time after answer, *whatever may be the nature of his case*, and the order goes on to provide, "that upon hearing the application, the court, in its discretion, may either grant or refuse the motion, or may give such directions for the examination of either parties or witnesses, or for the making further enquiries, as the circumstances of the case may require."

The language of this clause follows closely, and no doubt was copied from, the corresponding clause in the order of 1851; but the latter part of the section by which the court is authorised to direct other persons to be made parties, either at the hearing or in the master's office, has been omitted. That omission did not arise, however, from any intention to abridge the power of the court, but because the matter had been sufficiently provided for by the previous part of the order. It has never been contended, so far as I am aware, that the power of the court is less extensive under the new order than it was under the old; and I am clear that it is not so. The court is enabled to deal with such cases in any way which it may deem most conducive to the ends of justice.

Now if an objection had been taken in this case at the hearing for want of parties, I have no doubt that it would have been competent to the court to have ordered *Donald Bethune* to be made a party either for the purpose of the

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Drew, 68.

hearing or in the master's office; or the court might have ordered the motion to stand over, with liberty to serve *Donald Bethune* with a copy of the bill, and of the notice of motion. The court had power to deal with the case, as I have said, in whatever way it might consider most conducive to the ends of justice; and as the decree which the court was asked to pronounce was one highly favourable to *Donald Bethune*, I have no doubt that the court would not have ordered the motion to stand over because of his absence, but would have directed him to be made a party in the master's office. (a) If the court, then, would have made a decree in this case, in the absence of *Donald Bethune*, directing him to be made a party in the master's office, I have no doubt that the master had power to make the order which he did under the 15th section of order XLII, and this motion must, therefore, be refused with costs.

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ESTEN, V. C.—I think a person who would be a proper ^{Judgment.} and necessary party at the hearing, but who is not a party at the hearing, because he is out of the jurisdiction, may properly be made a party in the master's office, if interested in the account. Such person, however, if aggrieved by the decree, should certainly have an opportunity, if necessary, of making a defence to the suit.

By the former practice of the court he always had that opportunity, if he became a party to the suit or his return to the jurisdiction. The new general orders of the court do not give that opportunity, they only enable a party becoming so for the first time in the master's office to object to the decree on the pleadings and evidence as they stand. They might work injustice in this way if indiscriminately applied, because the party added in the master's office becomes bound by the decree without having had an opportunity of making a defence to the

(a) See *Harris v. Dry Dock Co.*, ante p. 450; *Clement v. Bown*, 1 Drew, 684.

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suit. I think, therefore, he ought to have liberty to apply to discharge the master's order, and the order should be discharged, not as a matter of course, but on evidence sufficient to satisfy the court that the party so added is aggrieved by the decree, and has, or may have, a defence to the suit. The order being discharged, the plaintiff, if he wish to bind the party getting it discharged by the decree, must institute a proceeding equivalent to a supplemental bill against him, which will afford him an opportunity of making a defence to the suit. The present applicant was made a party by the master, who doubtless has power to bring before him parties interested in the account, although they would have been proper parties at the hearing. I also think that the court may sometimes properly direct persons who ought to have been, but are not, parties at the hearing, to be made parties in the master's office; but as a general rule, that this course ought not to be adopted, merely to remedy a defect occasioned by negligence or carelessness; but, on the contrary, where a cause is defective for want of parties at the hearing, it should be adjourned in order that the necessary parties may be added on proper terms, unless some good reason exists for overlooking the omission, and for adding the proper parties in the master's office. In the present case the order of the master is not wrong, but, on the contrary, right, because the applicant is interested in the account, and he does not shew that he is aggrieved by the decree, or that he has any defence to offer to the suit. I therefore think that the application should be refused with costs, but without prejudice to any other application which the party may be advised to make.

Judgment.

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1859.

BRADBURNE v. SHANLY.

Principal and agent—Tenant in common.

A power of attorney was prepared and executed by two of four tenants in common, appointing an agent to receive the rents and profits of the estate, and was transmitted to the agent, who had undertaken to procure its execution by the other owners. In fact, the power never was executed by the other proprietors, and the agent, more than a year afterwards, declined to act in the matter, alleging that the execution of the power by all the owners was necessary to enable him to receive the rents. The court, however, held him liable for the rents and profits received, or which, but for his wilful default, might have been received by him from the time of the power being sent to him, until his repudiation of the character of agent.

The facts of the case are clearly stated in the judgment of the Chancellor, before whom the case was heard.

Mr. *Read*, Q. C., for plaintiff.

Mr. *Fitzgerald*, for defendant.

THE CHANCELLOR.—This is a bill for an account.

Judgment.

It appears that in December, 1856, the defendants, *Rolph* and *Moore*, were joint proprietors (each being entitled to an undivided half) of a certain leasehold property, consisting of twelve houses, situated on Dundas Street, in the city of London. The number of tenants would seem to have been much greater, but, so far as I can gather, for the evidence is by no means distinct, there were twelve houses.

On the 31st of December, 1856, the defendant *Moore* conveyed an undivided half of his moiety to the plaintiff *Bradburne* and one *Hallowell*. And the parties became thereby tenants in common of the property in question, *Rolph* being entitled to one half, *Moore* to one-fourth; and the plaintiff and *Hallowell* to the remaining fourth.

It seems to have occurred to the parties, or some of them, that it would be convenient to have a joint agent appointed. It seems, I say, because the facts have not

1859. been distinctly brought out. The only evidence before me consists of certain letters which passed between the plaintiff and the defendant *Shanly*, but as the whole correspondence has not been put in proof, the case is involved in some degree of obscurity. But upon some such notion, as it would seem, Mr. *Shanly*, a solicitor residing at London, was directed to prepare a power of attorney from the proprietors to himself, authorising him, as their attorney, to collect the rents, pay the out goings, and distribute the surplus amongst the joint owners in proportion to their interest in the property.

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Shanly.

A power of attorney was prepared by Mr. *Shanly* in accordance with their instructions, and having been transmitted by him to the plaintiff for execution, on the 18th of April, 1857, it was returned to Mr. *Shanly*, duly executed by the plaintiff and *Hallowell*, within a day or two, and Mr. *Shanly* undertook to have it executed by *Rolph* and *Moore*, who, with Mr. *Shanly*, resided at London, where the property is situated.

Judgment.

Moore subsequently executed the power of attorney, but *Rolph* never did so. The defendant alleges that he refused to concur in the arrangement, and that would seem to be so, although the fact has not been proved.

Some short time after the execution of this power of attorney by the plaintiff he purchased *Hallowell's* interest, and acquired thereby a right to one-fourth of the rents from the 31st of December, 1856. Mr. *Shanly* was made aware of the plaintiff's purchase; and the present bill is for an account of the rents received by the defendant, or which, but for his wilful default, might have been received by him as the agent of the plaintiff.

The defence set up by Mr. *Shanly* is, that he agreed to become agent upon the express condition that all the owners should join in the power; that *Rolph* refused to

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join, and that the defendant consequently never became agent, and never received any portion of the rents in question.

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Shanly.

It may be inferred from the letters, as well as from the power of attorney itself, that the proprietors of this property were, in Mr. *Shanly's* opinion, joint tenants, and that he considered it expedient that there should be a joint power. But there is no proof whatever that he refused to become the plaintiff's agent unless all the owners would join in executing the power. It is clear, I apprehend, that these parties were tenants in common, and not joint tenants. (a) Each had a right to receive his share of the rent, and payment of the whole rent to any one, after notice at least, would not have been a good payment as to the rest, who would be entitled, notwithstanding such payment, to distrain for their portions of the rent. (b) That being the position of the parties, it is clear that the concurrence of the joint owners, however convenient, was not necessary. The defendant would have had a right, notwithstanding their refusal, to protect the plaintiff's interest by collecting his proportion of the rents; and the evidence shews, I think, that he undertook that task. Nothing can be clearer than his letter of the 21st of April, where he says, "from this day I assume the agency, and am of course responsible to the constituents in the power of attorney equally;" and there is nothing in the correspondence to shew that this acceptance was conditional. Had it been so, looking at the nature of the property, and considering that the defendant and the other joint owners resided upon the spot, whilst the plaintiff lived at a distance, I have little doubt that Mr. *Shanly* would have felt it to be his duty to put the plaintiff on his guard, by informing him that the other joint owners had refused to concur in the power, and that he had declined, consequently, to act as the plaintiff's agent. But there is no proof whatever of

(a) *Sym's case*, Cro. Eliz. 33. (b) *Harrison v. Barnby*, 5 T. R. 246.

1859. any communication of that sort previous to the 19th of July, 1858; on the contrary, we find Mr. *Shanly* admitting himself to be agent, and acting as such long subsequent to the execution of the power of attorney.

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Mr. *Fitzgerald* relied upon the letter of the 15th of June, 1857, as furnishing proof that the plaintiff then knew that the defendant refused to act as his agent. But no such inference can be deduced from that letter. The plaintiff does indeed complain of the defendant's refusal to act as his agent previous to the 21st of April. He insists that he had been his agent from the time of his purchase, in December previous; but there is not from the beginning to the end of the letter the slightest intimation of a doubt that the defendant was then his agent, and had been so from the previous month of April. It is assumed throughout that Mr. *Shanly* was then acting as the plaintiff's agent, and in Mr. *Shanly's* letter in reply that fact is admitted.

Judgment.

It is said, however, that, assuming the agency, the right to file a bill in this court does not follow. And that proposition is, no doubt, well founded. The authorities shew that when the transaction is single, and in other cases, where complete justice may be had at law, this court will not assume jurisdiction between principal and agent. (a) But besides that, the class of cases to which they belong has always been considered as exceptional. (b) I would have hesitated long before dismissing this bill on that ground, because the objection is not taken in the answer; and to dismiss the bill, under such circumstances, when the case has been heard, would be to defeat instead of promoting the ends of justice.

Upon the whole, therefore, I think the plaintiff entitled to a decree. The defendant became his agent to collect

(a) *Navulshaw v. Brownrigg*, 1 Sim. N. S. 573; *Frietas v. Dos Santos*, 1 Y. & J. 574; *Cooper v. Hatton*, 12 Price, 462.

(b) *Dinnwiddie v. Bailey*, 6 Ves. 136.

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the rents of this property, on the 21st of April, 1857, and the master must take an account of the rents received by him, or which but for his wilful default might have been received by him while he continued agent. It was admitted upon the argument that the account could not be continued beyond the 19th of July, 1858. But the defendant may be able to shew that the agency was determined before that date, and I think he should be at liberty to do so. Further directions and costs reserved.

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McLAUGHLIN v. WHITESIDE.

Specific performance—Ambiguity of contract—Misunderstanding.

Specific performance will not be decreed where the terms of the contract signed by the parties are uncertain; nor will it be decreed where it is plain from the evidence that there was a misunderstanding; where, therefore, the terms of the agreement contained in a letter written by the intending purchaser were, we "will give you for your mill privilege in Laxton, with all the improvements including the saw logs, and your claim on the land you applied for, viz., the north-half of 6, in the 11th, and the north-half 7, in do.; lots Nos. 6 & 7 in the 10th concession, four thousand dollars," &c. In reality the premises mentioned comprised two mill privileges, but the vendor insisted that one only was embraced in this agreement, and filed a bill to enforce the specific performance of the contract according to this construction; whilst the defendant by his answer insisted that both were included in his offer to purchase: the court dismissed the bill, but without costs; the defendant insisting upon the case being heard by way of motion for decree, pursuant to a notice given by the plaintiff, from which he afterwards desired to withdraw.

This was a motion for decree made before his Lordship the Chancellor, under the circumstances stated in Statement. the head-note and judgment of the court.

Mr. Fitzgerald, for the plaintiff.

Mr. Mowat, Q. C., for defendant.

THE CHANCELLOR.—The bill in this case is for the specific performance of a contract for the sale of a mill site on Gull river, and certain lands adjacent thereto in the township of Laxton.

The evidence is voluminous and conflicting, but in my

1859. view of it the case turns principally upon the contract
 itself.

v.
 Whiteside.

To understand the questions which arise upon the contract, it is necessary to advert briefly to the nature and circumstances of the property in question at the time of the sale.

Gull river runs between the townships of Laxton and Somerville. The former lies on the west, the latter on the east bank of the river. Opposite to the property in question the river is divided into two channels by an island about 200 feet long, and from 20 to 60 feet broad. The eastern, or Somerville channel, is about 80 feet, and the western or Laxton channel, about 40 feet in width. The water flows in more abundance through the eastern than through the western channel, so that in dry seasons the western, or Laxton channel is almost dry. The Somerville side of the river affords facilities for storing lumber, but there is no land on the Laxton side suited to that purpose. It is not long since these townships were laid out, but previous to the survey one Cook took possession of the mill site in question, and of a tract of land on each bank of the river. The evidence is silent as to the nature and extent of Cook's improvements, if indeed, he made any, but beyond the possessory right, if any, acquired by occupation, it is clear that he had no title. The land had never been granted. The title was in the crown on the 27th of April, 1857, when Cook having, or supposing himself to have, a right of pre-emption in virtue of his occupation, assigned, or agreed to assign his claim to the lands on the Somerville as well as on the Laxton side, together with the mill site, to the plaintiff, for \$2000. Whether any improvement had been then made I am not able to say, but on the 26th of January, 1859, the date of the alleged contract, considerable progress had been made in the erection of a saw-mill, and other works connected therewith. The mill had been then built and was ready, as I gather, for the

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reception of the machinery. It stood on the Laxton side, partly on the western channel; but the dam, which was then complete, extended across the whole width of the stream, and by it the island, which forms in the centre a natural dam, was connected with the Somerville as well as with the Laxton side of the river. Beside the dam there was another structure termed in the evidence a break water, which extended to a distance of 150 feet from the island. The object of this work has not been explained; but the intention, so far as I can gather, was to divert the water into the western channel, and to ensure thereby a sufficient supply for the mill.

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McLaughlin
v.
Whiteside.

The works being in that state, and the title being such as I have described, it is alleged that on the 26th of January, 1859, the defendant addressed a letter to the plaintiff, in which he proposed to become the purchaser of the property in question, or some portion thereof, for £1000, and that the plaintiff accepted that proposal; and the offer so made and accepted constitute together the contract which this bill seeks to have specifically performed. The letter is in these words:

“LITTLE BRITAIN, January 26, 1859.

“To A. A. McLaughlin, Esq.

“DEAR SIR,—We have considered the matter about the mill, and will give you for your mill privilege in Laxton, with all the improvements, including the saw logs, and your claim on the land you applied for, viz., the north-half of 6, in the 11th; north-half of 7, in do., lots Nos. 6 & 7, in the 10th concession, four thousand dollars, payable in four years from the 1st of February, in four equal annual instalments of one thousand dollars each, as I mentioned to you and Mr. Sommers. The last two instalments not to be paid till I am satisfied that I can get a good title for the premises. If you think this offer all right you will give me possession when you return, and I will commence on my own hook.”

“R. F. WHITESIDE.”

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 McLaughlin  
 v. . .  
 Whiteside.

Judgment,

Now assuming that offer to have been accepted, upon which point I am by no means satisfied, but assuming it for the moment, the question is, whether the terms of the contract into which these parties intended to enter, can be gathered from that letter with sufficient certainty to warrant this court in decreeing a specific performance? What is the meaning of the words, "your mill privilege in Laxton?" The plaintiff contends that there are two privileges at the place in question; one on the Laxton side, and one on the Somerville side; and that he only intended to sell to the defendant the privilege on the Laxton side, reserving to himself the privilege on the Somerville side. In the plaintiff's view of the contract, therefore, the defendant is only entitled to the use of the water flowing naturally in the western channel, and he asserts that he meant to retain, and has a right to the use of the water in the eastern channel. The defendant, on the other hand, contends, that the expression, "your mill privilege in Laxton," means all your right in the water of the river at that point, as well on the Somerville as on the Laxton side. He swears that he used the expression in that sense; that the use of the water on the Laxton side alone would be comparatively valueless, and that he would not have thought of purchasing it at that price. The difference is extremely material. It is clear upon the evidence that the eastern is the principal channel, and that without a right; to use the water in that channel the privilege on the Laxton side would be comparatively useless; and the extent of the difference is apparent from the plaintiff's own statement, for he values his privilege on the Somerville side at \$2000. There has been, therefore, a plain misunderstanding. The plaintiff intended to sell one thing, the defendant to purchase another, and an entirely different thing; and that would be in itself a sufficient defence to the suit, for to decree specific performance under such circumstances would be obviously unjust.

But the case fails on the ground of uncertainty also.

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I cannot tell what the expression "your mill privilege in Laxton," means, and the meanings of the contract being uncertain, it cannot be specifically performed.

1859

McLaughlin

Whiteside.

There are other points upon which this contract appears to me to be too uncertain and imperfect to warrant a decree for specific performance. There is much in the contract itself and upon the evidence to shew that the plaintiff meant to guarantee that the defendant's title to the mill privilege would be acknowledged by the Crown—meant to guarantee, I mean, that the defendant would be allowed to purchase the land in Laxton, and with it the mill site, at the usual price paid for the lands of the Crown in that locality. Mr. *Gould's* testimony is extremely important upon that point. And I incline, further, to the opinion that it was the intention to import into the contract the terms of payment settled between the plaintiff and defendant in presence of Mr. *Sommers*, and that the words, "as I mentioned to you and Mr. *Sommers*," mean, in the way I mentioned to you and Mr. *Sommers*. The plaintiff's affidavit goes far to establish that. But my opinion being in favour of the defendant on the first point, I need not enter into any further discussion of the other objections.

Judgment.

Upon the evidence as it stands, I am inclined to think that the defendant is right in point of fact; and assuming it to be so, I would be disposed to dismiss the bill with costs. But it must be remembered, on the other hand, that the cause was heard at the instance of the defendant without affording the plaintiff an opportunity of cross-examining the defendant's witnesses as he desired. In justice to the plaintiff, therefore, I must consider the evidence as incomplete. And there cannot be any doubt that this litigation has grown to some extent at least out of the conduct of the defendant himself. Upon the whole, I am of opinion that the bill under all the circumstances should be dismissed without costs.



1859.

WHITEHEAD v. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

*Practice—Staying proceedings on appeal—Payment of money into court.*

*Held per curiam*, that an order for payment of money into court, pending a reference to the master to take accounts, &c., is an order upon which the court will stay proceedings upon the perfecting of security, in the event of the order being appealed from.—[BLAKE C., dissenting.]

At the hearing of this cause a decree, as reported ante page 151, was made in favour of the plaintiff, and the defendants were ordered to pay a sum of money into court, pending an account, directed by the decree, to be taken before the master.

From this decree the defendants appealed, and moved before his honour Vice-Chancellor *Spragge*, in Chambers, for an order to stay proceedings upon the order for paying the money into court, which was granted. Thereupon the plaintiff moved, by way of appeal to the full court, to rescind the order made at Chambers, on the ground that the order for payment of the money was not an order upon which proceedings would be stayed on an appeal.

Mr. *McDonald*, for plaintiff.

Mr. *Roaf*, contra.

THE CHANCELLOR.—The questions discussed upon this motion are difficult and of great practical importance.

The 16th section of the 13th chapter of the Consolidated Statutes provides, "that upon perfecting of such security execution shall be stayed in the original cause," and the question is, whether that extends to proceedings upon interlocutory orders.

It must be conceded, I think, that the words, "execution in the original cause," do not in strictness embrace proceedings upon interlocutory orders. If we are to extend

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the words to embrace such proceedings, that must be in furtherance of the plain intention of the legislature. But can that be affirmed? The power of this court to preserve the *status quo*, pending litigation, upon interlocutory application, is extensive and highly beneficial. For this purpose injunctions are issued, receivers appointed, and funds secured in court. The legislature did not mean to disable the court from administering that sort of preventive justice. But the construction contended for would have the effect of abolishing it in case of appeal. The interference of the court in such a case to be effectual must be prompt. But to hold that proceedings upon such order are to be stayed pending an appeal, not only to the Court of Appeal here, but to her Majesty in Council, for the same provision apply to both, would be in effect to abolish the jurisdiction in all cases of appeal, which I am sure the legislature did not intend. If it be expedient to empower the court to interfere with the rights of parties, before final adjudication, to prevent irreparable mischief, there must be, upon the same principle, a power to interfere pending an appeal. Judgment.

This is not denied. It is conceded on all hands that the section in question does not apply to such cases. But if the clause applies to interlocutory orders at all, what power has the court to make exceptions? Assuming the legislature to have said that proceedings upon all interlocutory orders are to be stayed, except in the case provided for, and that is the construction contended for, what right has the court to say that injunction and receiver orders are exceptions? We might think the provision highly inexpedient as to such orders, but upon that point we would be bound by the act.

If we are at liberty to look to the source from which the clause has been drawn, we cannot, I think, feel much doubt about the intention. The 16th section of the act was copied from a statute of the State of New York, which may be found in the 2nd volume of the Revised

1859. Statutes of that State, at page 503; and upon reference it will be seen that the clause in question refers only to final decrees. They are followed by certain other provisions applicable to interlocutory orders, but this provision was not introduced into the provincial statute.

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For these reasons I am of opinion that the expression "execution in the original cause," does not embrace proceedings to enforce interlocutory orders. If such proceedings are to be stayed, it must be upon a special application under the general jurisdiction of the court.

The next question is, whether the taking of the accounts directed by the decree comes within the words "execution in the original cause," and whether it is stayed by the appeal. In my opinion the taking of the accounts does not come within the words, and consequently is not stayed. Such a construction would place suitors in a most unfortunate position. A decree to account is not Judgment. a decree for payment of a sum of money, and consequently is not one of the cases in which the plaintiff is entitled to security. Upon the construction contended for, every accounting party, whether an executor or a trustee, or agent, would be in a position to hold the trust fund, not only pending the appeal, but during such further time as would be necessary to take the accounts, which was not, I think, intended. Such delay would be attended in many cases with ruinous consequences, and the plaintiff would be subject in the meantime to the risk of the total loss of the fund.

Upon the other construction, the plaintiff being at liberty to proceed with the accounts, would be entitled to an order for the payment of the amount found due to him, and then his proceedings to enforce payment would only be stayed upon security, and that is, in my opinion, what the legislature intended.

ESTEN, V. C.—I think the payment of the \$50,401

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into court is part of the decree; but that the act includes interlocutory orders, and stays proceedings on them. I do not think the application under the 5th order of the Court of Appeal is discretionary as to the staying of proceedings; but only as to the sufficiency of the security. The act being confined to orders or decrees of which the execution will take something—part of the subject of contest—from the appellant, either by way of absolute disposition or safe custody; and does not include proceedings by way of enquiry, for the purpose of ascertaining facts and accounts, with a view to the ulterior order; nor to orders conservative in their nature, such as injunction and receiver orders, and the like; and orders which operate by their own inherent force, and accomplish their object by their own mere operation, and do not require any act to be done for the purpose of carrying them into execution.

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SPRAGGE, V. C.—An order of this court for the pay-<sup>Judgment,</sup>ment of money into court is clearly appealable; and I think that upon the perfecting of proper security, the payment of the money should be stayed pending the appeal under sub-section 4 of section 16, chapter 13 of the Consolidated Statutes.

The words of the sub-section are: "If the judgment, order, or decree appealed from, directs the payment of money, the execution of the judgment or decree, (omitting, from oversight, I apprehend, the word 'order,') shall not be stayed until the appellant has given security to the satisfaction of the court appealed from, that if the judgment, order, or decree, or any part thereof be affirmed, the appellant will pay," &c.

Taking the sub-section by itself, an order for payment of money into court would be plainly within its terms, and the word "execution" would mean the carrying into effect the thing ordered to be done, as the word obviously means in the previous exceptions provided for in sub-

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sections 1, 2, and 3. But the difficulty is created by these sub-sections providing only for the exceptions to the general rule enacted by section 16, in which the language is different. It is, "upon the perfecting of such security execution shall be stayed in the original cause, except in the following cases." If that be read as confined to the execution of the final decree disposing of the cause, it would seem to follow that the exceptions apply only to the same execution, and the first three exceptions appear to provide for cases of final decree; and the language of each is: "If the judgment or decree appealed from directs." The 4th sub-section, however, appears to be not strictly an exception to the general rule, if the general rule applies to final decrees only. It introduces the word "orders," as well as judgment and decree, a term not applied to final decrees, and which is sufficiently general to comprehend all orders for payment of money.

Judgment. Again, if the general rule established by section 16 is not confined to final decrees, so neither will the exception be so confined; and the language of the whole clause, taken in connexion with the preceding sections, does leave room for doubt. All judgments, orders, and decrees of the Court of Chancery are appealable; upon the perfecting of security execution is stayed in the original cause; execution, it may be contended, of the judgment, order, or decree, appealed from; and that the word execution in that connexion must mean the carrying it into effect. The consequences of such a rule, however, would obviously be most mischievous, especially in cases where an injunction or a receiver is ordered. I referred to some of them in *Gamble v. Howland*, (a) and I do not think such an interpretation would be a sound one.

It may have been the intention of the legislature that all proceedings in the cause should be allowed to proceed pending the appeal, short of such as would place the

(a) Ante vol. 3, p. 281.

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appellant in such a position that he could not be reinstated in his rights; a payment of money into court would not have that effect; a payment of money by one party to another might, and in many cases would; and so also might an order for the payment of money out of court to a party; but if nothing is stayed except the execution of the final decree, an order to pay out money would not be included.

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Whitehead

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If, however, the payment of money into court cannot be stayed, the appellant would be in a worse position than when the court below finally had adjudicated upon the rights of the parties; and, as the result, directed the payment of money from one party to another; inasmuch as in the latter case he would only have to give security, while in the former, he would have to pay the money. It is difficult to suppose that the legislature meant that security without payment should suffice in the latter case and not in the former. Then there are the general comprehensive words of the fourth sub-section, which are <sup>Judgment.</sup> only opposed by its being called an exception to the statute.

I decided *Gamble v. Howland* upon the general provision of section 16, or rather, I thought it did not come within it, for if it did, I thought it was stayed by the perfecting of the security, without the party coming to the court for an order.

I do not think the question by any means free from doubt, but I incline to the opinion that sub-section 4 applies to orders for the payment of money into court.

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## LEDGERWOOD v. LEDGERWOOD.

*Administration order—Wilful default.*

Where an executor or administrator applies for an order to administer the estate of the testator or intestate, the account will be directed to be taken of what he has received, or which but for his wilful default might have been received.

This was a motion for an order to administer the estate of — *Ledgerwood*, deceased. On the application,

Mr. *McCarthy*, for the plaintiff, asked that the decree might direct the administration of the estate that had come to the hands of the plaintiff; not of what might have come to his hands but for his wilful neglect and default, referring to *Harrison v. McGlashan*. (a)

ESTEN, V. C.—In the case referred to, the application was made on behalf of a party interested in the estate, and adversely to the executor. A different rule prevails in England where the application is on behalf of the executor or administrator. The usual decree must be made.

Judgment.

## WATKINS v. MCKELLAR.

*Mortgage—Purchase by second from a prior mortgagee under a power of sale.*

A purchase by a second from a prior mortgagee under a power of sale contained in the first mortgage deed, was sought to be set aside, but the court upheld the transaction; and the purchaser submitting to be redeemed in respect of both mortgages, directed the cause to stand over for the purpose of making the mortgagor a party to the suit.

This was a motion for decree under the circumstances appearing in the judgment.

Mr. *Proudfoot*, for plaintiffs.

Mr. *Crickmore*, for defendant.

(a) Ante page 531.

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THE CHANCELLOR.—This is a bill by the judgment creditors of one *Priestly*, to have the premises in question in this cause sold, and their debt paid as the primary charge, under the following circumstances :

Watkins  
v.  
McKellar.

*Priestly* being seized in fee, mortgaged the property to Mr. *Cameron* on the 7th of December, 1852, to secure £100 and interest. This deed contained a power of sale upon default. On the 21st of February, 1856, he mortgaged the equity of redemption to the defendants, to secure £146 and interest.

A few days subsequent to the execution and registry of this last mortgage, the plaintiffs recovered judgment against *Priestly* for six hundred pounds, and they procured a certificate thereof to be registered in the proper office, on the 25th of February, 1856.

Judgment.

On the 7th of December, 1857, Mr. *Cameron* sold the property in question, under the power in his mortgage deed, to the defendants for three hundred and ninety-five pounds, and it has been conveyed accordingly.

This sale is not impeached. But the plaintiffs contend that the defendants were incapable of acquiring an absolute interest in this property under their purchase, both because of their position as subsequent mortgagees, and in consequence of the recent statute; and they argue that their judgment has become, under the circumstances, the primary charge upon the property.

I cannot assent to any part of that argument.

The proposition that the defendants, being mortgagees, were incapable of acquiring an absolute interest in the property in question, proceeds, I suppose, upon this that a mortgagee is a trustee for the mortgagor, and incapable,



1859. therefore, of dealing with the estate for his own benefit. That a mortgagee is a trustee for his mortgagor in some sense of that word, cannot be denied; but that he is not a trustee in the sense implied in the argument, is equally clear. Had it been true that mortgagor and mortgagee stand to each other in the relation of trustee and *cestui que trust*, then all dealings between the mortgagor and mortgagee in relation to the equity of redemption must have been regulated by the rules applicable to dealings between trustee and *cestui que trust*, and upon the same assumption every purchase of an incumbrance affecting the estate made by the mortgagee must have been held to be a purchase for the benefit of the mortgagor. But the falsity of both conclusions is apparent. And if it be true, as I apprehend it is, that a mortgagee is allowed to deal for the equity of redemption as a stranger; and if it be clear, as it no doubt is, that a mortgagee who gets in an incumbrance affecting the mortgage estate, is entitled to receive the full amount due upon such incumbrance, no matter how advantageous the terms upon which he may have acquired it, then I know of no principle upon which to hold a *puisne* incumbrancer incapacitated from purchasing the estate upon a sale by a prior mortgagee, under a power in his deed. (a)

Judgment.

The act, upon which some reliance was placed, (b) is certainly obscure. I am not sure that I understand either the mischief aimed at, or the remedy intended. It has been determined already, more than once, I believe, that this act does not enable a mortgagee to purchase from himself. And if it cannot be supposed that the legislature intended to empower a mortgagee to sell to himself, it is still more clear, I apprehend, that they did not intend to prevent his selling to a stranger. This is an act for the relief of mortgagees, and must be read, if possible, so as not to impose disabilities.

(a) *Dobson v. Land*, 8 Hare, 216. (b) 14 & 15 Vic., ch. 45.

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That being so, the question of merger does not seem to me to arise. The defendants are either absolute owners of the estate, discharged from the plaintiff's incumbrance, in which case the bill must be dismissed; or they are at the least assignees of *Cameron's* security. I am inclined to think, under the deeds, they are no more than assignees of a prior mortgage. But it is unnecessary to consider that, because they consent to be redeemed. But in that view the equity of redemption is still in *Priestly*, and the cause must stand over for the purpose of having him made a party.

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Watkins  
v.  
McKellar.

## BURNS V. THE CANADA COMPANY.

*Specific performance—Decree in absence of personal representative.*

The eldest son and heir-at-law of a person who had, in his life time, agreed for the purchase of land from the Canada Company, left this country without in any manner attempting to complete the purchase. The other children of the purchaser paid the balance of purchase money due on the land, and sold it in portions to three several purchasers. In a suit brought in the name of the several purchasers against their vendors and the Canada Company it appeared that the heir-at-law had not been heard of for upwards of twenty-five years. The court, under the circumstances, ordered the conveyance of the several portions to the purchasers, without requiring any administration of the estate of the heir-at-law; the Canada Company not objecting thereto.

The bill in this case was filed by *Martin Burns, Edward Kelly* and *John Grant*, (an infant, by his next friend,) against *The Canada Company, William, Edward, James* and *Catherine Russell*, setting forth that on the 23rd of March, 1827, *Thomas Russell* had contracted with the *Canada Company* for the absolute purchase from them of lot No. 15, in the 10th concession of the Gore of Toronto. That *Thomas Russell* had died, leaving his son *Michael* his heir at law, who in 1833 left this country and had not since been heard of, and was supposed to have died intestate, and without issue. That the four surviving children of *Thomas Russell* agreed to, and effected a partition of the said lot. That on the 10th of July, 1848, the defendants, other than

Statement.

1859. the *Canada Company*, sold the southerly half of the lot to the plaintiff *Burns*, subject to a certain annuity to the defendant *Catherine*, and her life interest in one quarter of an acre. That by an agreement in writing made in pursuance of a deed of partition between the said four children, the defendants *Russell* sold the north-east quarter of the lot to the plaintiff *Edward Kelly*. That by an agreement made in like manner between the said four children and *Samuel Peter Grant*, they sold to him the north-west quarter of the lot, and that he had since died intestate, leaving the infant plaintiff, his eldest son and heir-at-law, surviving.

*Burns*  
v.  
*Canada Co.*

Statement.

The bill further alleged, that the property in question had ever since 1827 been in the actual possession of the plaintiffs, or those under whom they claimed; that under the circumstances, the presumption was, that *Michael Russell* had died intestate, and without issue; that plaintiffs had applied to the *Canada Company* to convey the land to *William Russell*, the oldest surviving son of *Thomas Russell*, who would convey to the plaintiffs their respective shares of the property, which the *Canada Company* refused to do, although they admitted all the purchase money had been paid.

The prayer of the bill was, that the *Canada Company* might be ordered to convey to *William Russell*, and that he might convey to plaintiffs respectively, their respective portions. Or that the company might be ordered to convey to the plaintiffs their respective portions.

The defendants the *Canada Company* and *William Russell* answered the bill. The cause came on to be heard by way of motion for decree.

At the hearing, the company withdrew an objection for multifariousness and misjoinder of plaintiffs raised by their answer, and submitted to convey as the court might direct.

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(a) *Dowle*  
199; *Doe v.*  
*v. Griffin*, 15

Mr. *McDonald*, for the plaintiffs.

Mr. *Brough*, Q. C., for the *Canada Company*.

Mr. *Blake*, for the defendant *William Russell*.

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 Burns  
 v.  
 Canada Co.

The judgment of the court was delivered by

THE CHANCELLOR.—No objection is taken to the frame of the record. The *Canada Company* submit to convey as the court may direct; and it is obviously for the interest of the other parties, that their rights should be determined by one suit instead of three.

Had there been a suit for the distribution of the estate of *Michael Russell*, further enquiry might have been directed; and it may be doubted whether any final distribution could have been made now in the absence of any direct proof of his death intestate, and without issue. (a)

Judgment.

But this is a suit for the specific performance of a contract for the purchase of the property in question, made in the year 1827. *Thomas Russell*, the father of *Michael*, was the purchaser, and he died in 1831, intestate, having paid but one instalment of the purchase money, amounting to five pounds. *Michael Russell*, the eldest son, and heir at law of *Thomas*, left this province in the year, 1833, having first sold the real estate of which his father had died seized, but without having taken any steps to complete the contract for the purchase of the property in question, and he has not been since heard of. *Patrick Russell*, the eldest son of *Thomas*, died in the year 1837, without issue, and intestate. The surviving sons, *Thomas*, *William*, *James* and *Edward*, adopted the contract, paid the purchase money, and sold

(a) *Dowley v. Winfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Phil. 199; *Doe v. Jesson*, 6 East. 80; *Doe v. Deakin*, 4 B. & Al. 433; *Doe v. Griffin*, 15 East. 293; *Doe v. Richards*, 15 East. 294 note.

1859. the estate to the plaintiffs in this suit, who have occupied the property ever since, and dealt with it as their own.

Burns  
v.  
Canada Co.

Under these circumstances, I am of opinion that *Michael Russell* not having taken any steps in relation to this property for five-and-twenty years, not having been heard of, indeed, within that period, must be taken to have abandoned the contract, and that the plaintiffs, the *Canada Company* not objecting, are entitled to a conveyance according to their several interests.

The deeds under which the plaintiffs claim are so informal and incoherent; that it is very difficult to get at the intention of the parties. There is a great deal to show that the vendors only intended to sell such interest as they had. On the other hand, they expressly "bind and oblige themselves to give free deeds so soon as a conveyance can be obtained from the *Canada Company*," from which I gather that they were bound to procure a deed from the company. But assuming that to be so, I do not see that the plaintiffs were in a position to institute this suit under the circumstances. The time for obtaining a deed from the *Canada Company* is not fixed by the contract, and it is not shewn that any demand was made by the plaintiffs, or that any step was taken by them to put the vendors in motion. On the other hand, the suit is beneficial to the defendants, for they will now receive the balance of the purchase money. On the whole, I think that *Catherine Russell* must be paid her costs, and that as to the other defendants the decree should be without costs.

Judgment.

There must be a reference to the master to ascertain the amounts due from the purchasers.

*Catherine Russell's* annuity must be secured upon the portions conveyed to *Burns*.

*Thomas* is said to have died intestate prior to the institution of this suit; and his personal representative

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is not before the court. An enquiry must be directed upon that point. If there be a personal representative he must be made a party in the master's office. If not, I think that *James Russell* may be appointed to represent him in the suit.

1859.

Harris  
V.  
Canada Co.

## GRACE V. WHITEHEAD.

*Vendor and vendee—Infancy—Lien.*

The defendant, a minor, purchased an estate, and gave the vendor a mortgage for the purchase money. The mortgage was afterwards assigned to the plaintiff. On coming of age the defendant repudiated the mortgage, but adopted the purchase by bringing an action to recover possession. The mortgage being the deed of an infant was holden absolutely void. But it was also holden that the mortgage being void, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by the assignment of the mortgage.

The facts appear in the head-note and judgment.

Mr. *Crooks*, for plaintiff.

Mr. *Turner*, for defendant.

ESTEN, V. C.—[Before whom the cause was heard.]—  
I think the plaintiff entitled to the decree, which, indeed, Mr. *Turner* thought he could not resist. I wished, however, to examine the cases that were cited, the defendant being an infant at the time of the purchase. The judgment. estate, however, vested in him, as it was presumably for his benefit, and if it vested in him, it did so *cum onere* that is, with the obligation to pay the purchase money. He could disagree to this contract and estate during his infancy, and then its operation and vesting would have been suspended, as he could withdraw such disagreement when of full age. It does not appear that he did so in the present instance, but when he came of age he brought an action to recover the possession of the property, and thereby affirmed the purchase, repudiating only the mortgage, which, as the deed of the infant, appears to have been absolutely void, and so the court of law seems

1859. to have thought. I have no doubt that the mortgage being void, a lien resulted to the vendor upon the estate for the purchase moneys, and according to the case of *Gillespie v. Boulton* in this court, that lien would pass to the plaintiff under an assignment of the mortgage, the intention being the transfer of all the interest of the vendor in the purchase money of the estate. The decree should be for payment of the purchase money with interest, and in default a sale. The necessary account must be directed, and the plaintiff is, I think, entitled to his costs.

Grace  
v.  
Whitehead.

THE ATTORNEY GENERAL V. THE MUNICIPALITY OF THE  
COUNTY OF GREY.

*Practice—Demurrer ore tenus for want of parties.*

On a motion for injunction an objection was taken to the information, that certain necessary parties were not before the court, but counsel appearing for the absent parties and consenting to their being made parties, to be bound by the proceedings, and treated as if actually defendants on record. *Held*, that this cured the defect for the purposes of the motion.

This was a suit to restrain the defendants, the Municipality of Grey, from expending moneys of the county in the construction of a road in the county, and an injunction in the terms of the prayer of the information was moved for by

*Mr. Hodgins*, for the informant.

*Argument.* *Mr. Blake* contra, objected that the persons with whom the contract had been entered into for the construction of the road were not before the court. That this was a good ground of demurrer and might be taken *ore tenus*, when the motion came on, as well as by putting a demurrer on the file. Had the demurrer been upon the file the motion could not be made.—*Cousins v. Smith. (a)*

*Mr. Fitzgerald*, for the contractors, undertook to be bound by the order to be made on the motion, and consented to their being now made parties.

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Attor'y Gen,  
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of Gray.

The other objections taken and cases referred to are mentioned in the judgment of

SPRAGGE, V. C.—Upon the application for injunction preliminary objections were taken by *Mr. Blake*.

The first is that the parties with whom the county has contracted for the construction of the road, which is objected to by the information, are not parties on the record. It is not denied that they are necessary parties, and I assume that they are so as the effect of the injunction which is sought would be to annul the contracts and prevent the application of the funds of the county to pay them.

The objection is met by *Mr. Fitzgerald* appearing for them, and consenting on their behalf that they now be made parties upon the record for all purposes of the suit, and submitting to be bound by the order the court may make upon this application.

*Mr. Blake* objected that they should have been made parties before the application; that he shews the information to be demurrable by reason of their absence, and that its being demurrable is an answer to the application for an injunction. I cannot, however, distinguish this from the like objection taken upon the hearing of a cause where it is admitted that the objection may be met by the necessary parties appearing by counsel and consenting to be made parties, and to be bound by the decree. The court does certainly discountenance the objection when taken so late in the cause as at the hearing; but it is not, I think, for that reason that the omission is allowed to be supplied by the necessary parties being made parties then; but simply



1859.  
 Attor<sup>y</sup>-Gen.  
 v.  
 Municipality  
 of Grey.

because it removes the ground of objection. If it were refused upon applications for injunction it would be *in pœnam*, because the plaintiff ought regularly to have made them parties in the first instance, not because the purposes of justice would not be answered by their being made parties in the mode proposed by the plaintiffs. Besides, the court may well act with all reasonable indulgence in injunction cases where the plaintiff is often obliged to proceed with less deliberation than in ordinary cases.

Judgment.

Another objection is, that an information at the suit of the Attorney-General is not the proper course of proceeding in such a case; that the alleged wrong is not of such a public nature as that it is proper for the Attorney-General to complain of it; and the *Attorney-General v. The Birmingham and Oxford Junction Railway Company (a)* is cited. There a railway company was authorised to construct a line of railway and also a diverging line, and the object of the information was to enjoin them from opening the one for traffic before the completion of the other, and to compel them to open both simultaneously. Upon the argument of the demurrer the Vice-Chancellor observed that he was unable to perceive how the public at large could be concerned in preventing the opening of one railway until another was completed and he allowed the demurrer, and upon appeal to the Lord Chancellor, his judgment was affirmed.

This case does not, however, interfere with the doctrine that the funds of a municipal corporation, which are trust funds, are so far of a public nature that an information by the Attorney-General is a proper proceeding for their protection. This is recognised in *The Attorney-General v. The Mayor of Dublin, (b)* in *The Attorney-General v. Aspinall. (c)* And in the

(a) 7 Rail. cases, 972.  
 (c) 2 M. & C. 618.

(b) 1 Bligh N. S. 351.

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*Attorney-General v. Wilson*, (a) which was a case of 1859. alleged misapplication of funds of a municipal corporation after the passing of the Municipal Corporation Reform Act, *Lord Cottenham* affirmed in express terms that "all such property being in trust for the benefit of the public, the Attorney-General may assert the right of the public in an information." The same principle was also affirmed in *The Attorney-General v. The Corporation of Belfast*. (b)

Attor'y-Gen.  
v.  
Municipality  
of Grey.

In the cases to which I have referred the application of funds complained of was an application which was beyond the authority of the corporation to make. I do not see that it is less so in this case. The corporation cannot, without the separate additional authority of the rate-payers, levy a rate or appropriate moneys for the construction of a road. It is clear that moneys so levied are trust moneys for the specific purpose for which they are authorised to be levied, and that the corporation, without the rate-payers, have no authority to apply them to any other purpose; and if they appropriate them to any other purpose, it is as much an act *ultra vires* as the acts complained of in any of the cases to which I have referred.

Judgment.

The last objection is, that the information does not shew with sufficient certainty the locality of the road complained of.

The by-law designates, among the roads for which money is to be appropriated, "the Owen Sound and Saugeen Road," by that name, and by no other description. The subsequent resolution is, "that the road through Derby, as in by-law 57, be considered that part as near the line of Kepel and Derby as possible, and at present known as the North Road."

The language of the resolution is not very clear and

(a) C. & Ph. 23.

(b) 4 Irish Chy. 119.

1859.  
 Attorney-Gen.  
 v.  
 Municipality  
 of Grey.

precise, but it is argued that it is intended to apply to the Owen Sound and Saugeen Road, and the money appropriated for the construction of that road. Now, the defendants have, by the terms of their by-law and resolution respectively, treated "the Owen Sound and Saugeen Road," and "the North Road," as known and recognised roads, needing no further description than the names thus given to them. The allegation of the plaintiff is that the two roads are totally different; that the North Road is not yet opened, and that it has no outlet when it reaches the County of Bruce.

I think these allegations give sufficient information of what is complained of and what is sought by the information. I cannot assume that there is more than one road of each name, and the by-law and resolution assume that there is but one, and that such one is known by the name given to it. It may be that the name "North Road" is given to a part of "The Owen Sound and Saugeen Road," but the information denies this; and I think it was not necessary to shew how or in what respect they were different. The case shortly is, an appropriation was made for the "Owen Sound and Saugeen Road;" the corporation of Grey intend to apply this appropriation, or part of it, to the North Road, which is a totally different road. Hence, there is a contemplated misapplication of a trust fund.

I think that neither of the preliminary objections ought to prevail. The first, indeed, I think, was a good objection, but was cured by the appearance by counsel of the contractors for the construction of the North Road, who are, and are henceforth, to be parties to the

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## GRAHAM v. CHALMERS.

*Redemption—Quit claim.*

The plaintiff having a bond for a deed from one W., assigned the same to C. by way of security only. By a quit claim deed C. conveyed to K.

*Held*, that such a conveyance was a mere transfer to the purchaser of whatever title the grantor had, and did not place him in any better position than his assignor.

Mr. *Roaf*, for plaintiff.

Mr. *Strong* and Mr. *Blake*, for defendant *Scott*.

Mr. *A. Crooks*, for defendants *Chalmers* and *Knowlson*.

SPRAGGE, V. C.—I think that notice is not proved against *Scott*, and that as to him the bill should be dismissed with costs. As to him it is not necessary to shew prior registration to bring him within the protection afforded to those who have a registered title; the conveyance to him having been made and registered after the 1st of January, 1851, and so within the statute 13 & 14 Vic., ch. 63. No actual notice as to him is proved until after he had purchased and obtained a conveyance.

Judgment.

The assignment to *Chalmers* of the bond from *Williams* to *Graham* was in terms by way of security only; and the conveyance from *Chalmers* to *Knowlson* was by what is called a quit claim deed. I think such a conveyance is a mere transfer to the purchaser of whatever title the grantor may have, and does not place him in the same position as a conveyance in the ordinary mode. It would, however, I conceive, be only constructive notice of any defects that might exist in the grantor's title, and would not prevail against a registered title. *Chalmers* sets up that *Graham* assigned to him in satisfaction of a debt due to him by *Graham*, and of a debt due by him *Graham* to Mr. *Kirckhoffer*, and which was to be paid, and was paid by him, *Chalmers*; and *Knowlson* sets up that he was a purchaser for value without notice.

1859. We think that each of these defendants fails in his defence; and that standing in the position of mortgagees, and having placed the land in question beyond the reach of the mortgagor to redeem the same, they are bound to recoup him. *Knowlson* claims to be a judgment creditor of *Graham*, and evidence is given on behalf of the plaintiff with a view to fix *Scott* with notice, but which may be material in another view; I mean as a foundation for an enquiry whether *Graham* agreed to accept from *Knowlson* any sum of money in satisfaction of his claim to the land. I think there should be an enquiry as to the present value of the land; and, as I think, independently of the improvements made upon it by *Scott*; also the usual mortgage account; an enquiry also, if desired by the defendants, whether *Graham* ever agreed to accept any sum of money in satisfaction of the equity of redemption or otherwise. I think the plaintiff should have his costs up to the hearing against *Chalmers* and *Knowlson*, and that subsequent costs and further directions should be reserved.

Judgment.

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#### FISKEN v. WRIDE.

*Specific performance—Bond of indemnity against incumbrances.*

Upon a contract for sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to save harmless and indemnify the purchaser against the incumbrance, and a sum of £500 by way of liquidated damages for non-performance by either party was to be paid to the other. The court held that this did not enable either party to repudiate the contract upon paying to the other £500; and in a suit by the vendor a reference as to title was directed, but without the usual declaration that the plaintiff was entitled to specific performance, reserving a right at the hearing on further directions to refuse specific performance, in the event of the vendor failing to effect or endeavouring to effect an arrangement with the mortgagees, which the vendor alleged he could make; and held also that the fact of the vendor being a partner in a mercantile firm who, since the execution of the contract, had made a composition with their creditors, was not such an objection as could resist the claim to specific performance.

Mr. *McDonald*, for plaintiff.

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Mr. Turner, for the defendant.

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Fisken  
v.  
Wride.

SPRAGGE, V. C.—The agreement, specific performance of which is sought, bears date the 22nd of July, 1857, and is for the sale by the plaintiff to the defendant *Wride*, of certain farm and mill properties therein described, for the sum of £3,500, of which £1000 was to be paid on the 1st of January following, £500 on the 22nd of July, 1860, and the balance by instalments of £250 per annum, with interest half yearly on the unpaid principal. The vendor was to convey to the purchaser; and the purchase money was to be secured by a mortgage upon the premises; and the agreement contained this provision, "The said *Fisken* is to give a bond to the said *Wride*, to save him harmless, and the property indemnified from a mortgage of £2,500 to the Trust and Loan Company." The property belonged to a mercantile firm, in which the plaintiff and the defendants *Ross* and *Mitchell* were partners.

Judgment.

The purchaser resists specific performance on several grounds. First.—That he was to have had possession as soon as he required it, and that he could not obtain it. As to this, it is not shewn that there was any difficulty in the way of his obtaining possession. What evidence there is, is the other way. Secondly.—His chief objection is, the provision as to the mortgage to the Trust and Loan Company. As to this, he says that he had no professional advice; while the vendor was assisted by Mr. *Snelling*, who was in his employ, and who had received some professional education or training in England. That had the purchaser been aware of the effect of this provision, he would not have consented to it, but would have insisted upon legal advice. That he was not acquainted with legal matters and phraseology, and not competent to form any judgment thereon, and trusted to the integrity of the vendor, and that he was greatly imposed upon in that part of the agreement.

He states that the vendor and his partners have since

1859. failed in business, and have made an assignment of their estate and effects for the benefit of their creditors. This latter allegation appears to be true. At the date of the agreement, and up to the 7th of September following, the firm appeared to be solvent and indeed wealthy; and such is sworn to have been their condition. But in October their failure took place (through a brunch of their house in London), and they have since made an assignment of their estate for the benefit of their creditors, to the defendant *Crawford*.

*Fisken*  
v.  
*Wride*.

Judgment.

I do not think the purchaser sustains his objection as to his being imposed upon by the introduction of the provision as to the Trust and Loan Company mortgage. He is described by Mr. *Snelling*, whom he called as a witness, as a shrewd man, apparently quite capable of understanding the value of land, and what he was about. He does not, indeed, himself say any thing to the contrary of this. Mr. *Snelling* says he read the contract over to him more than once, and offered it to him to take away, and examine it himself. The purchaser does not in his answer say that he did not notice this provision; or noticing it, that he understood it as meaning something different from what it does mean. He speaks of his unacquaintance with law and legal phraseology. Now, the words are not wrapped up in a number of legal terms, but are plain, conveying to any person of ordinary intelligence that there was a mortgage to the Trust and Loan Company; the amount of that mortgage; that *Fisken* was to protect him against it, so that he was to be saved harmless and the land indemnified, and that his security for this was to be *Fisken's* bond to himself. An earlier part of the agreement was calculated to draw his attention to the same point, where the vendor agrees to convey "free from all incumbrance except as hereinafter mentioned." I do not think he was entrapped into signing what he could not comprehend, but that he had every opportunity of understanding it; and I see no reason to doubt that

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he did understand it. It is very possible that it did not occur to him at the time that that mortgage outstanding might occasion difficulties in the way of his selling the property, or portions of it, in case he should desire to do so, and I am not sure that he means more than that by his answer, or at least to be held as swearing to more than that, though he may have meant that more should be understood.

1859.

Fisken  
v.  
Wride.

It is further argued that *Fisken*, having failed in business, his bond could be of little or no value to indemnify *Wride*; that *Wride* thought he was obtaining the security of a man of wealth, but that he would have only the personal security of an insolvent. That is resting the defence upon this: not that there was fraud or mistake or surprise upon *Wride* in the making of the contract, or that it was a trick or unconscionable bargain upon him, but that something has occurred since, which would make it a hardship upon him that it should be enforced. Judgment.

Mr. *Turner* cited no authorities for this position; against it are several railway cases referred to by Lord *St. Leonards*, in *Hawkes v. The Eastern Counties Railway Company*, (a) and to some extent, perhaps, that case itself. But without saying that altered circumstances may not make it very inequitable to carry out a contract, which, but for such altered circumstances, would be a fit contract to be specifically enforced; I do not think that this is shewn to be such a case. The contract was made with a person in mercantile business, and the purchaser was content to rely upon his stability. The altered circumstance is, that the firm in which he was a partner, and for which he was trustee in this transaction, has made a composition with its creditors; but the firm it appears is still carrying on business, and although the security is less than he reckoned upon, it is

(a) 1 D. M. & G. 737.



1859. not shewn that the firm or the assignee has hitherto failed in paying the Trust and Loan Company, or that they will certainly or even probably fail in paying off the mortgage. Again, it is in evidence that a great deal of other property is included in that mortgage, a circumstance which, though it does not exonerate the land in question, diminishes the probability of its being made to bear the burthen. And further, it appears that arrangements have been made with the company by which they have agreed to accept payment from *Wride* according to his contract with *Fisken* for the time that *Fisken's* mortgage was to run. Whether the company has effectually bound itself to do this does not appear, but Mr. *Snelling* obtained their assent to this arrangement a few days after the contract was entered into, and long before the failure of *Ross*, *Mitchell* and *Fisken*, and it is not shown that any difficulty now exists in perfecting that arrangement, an arrangement which would place *Wride* in a position of safety; in a better position in fact than at the execution of the contract. Besides this, the title was investigated by solicitors for *Wride*, as well as the vendors, after the failure of *Ross*, *Mitchell* and *Fisken*.

Judgment.

Another point was taken in argument founded upon this clause in the agreement, "Penalty for non-performance of this agreement by either party £500, and to be recovered as and for liquidated damages." This is immediately preceded by a mutual covenant for the performance of all and every the covenants and agreements contained in the contract. I do not think it was the intention of the parties that each of them should be at liberty to repudiate the contract by paying to the other £500, and unless this was their meaning such a provision is no objection, I apprehend, to specific performance. Besides, this point is not taken by the answer. This I think it was necessary to do, and to submit to pay the £500, unless the court should think the purchaser entitled to be relieved from his contract.

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I think the plaintiff is entitled to a decree for specific performance, but at the same time that he ought, under the circumstances of the case, to perfect the arrangement spoken of by Mr. *Snelling* with the Trust and Loan Company, if it is possible for him so to do. I think I understood that *Wride* desired a reference as to title. I think the proper decree will be a reference as to title, not prefaced by the usual declaration that plaintiff is entitled to specific performance. If the plaintiff should not perfect the arrangement with the Trust and Loan Company, or at least endeavour to do so, it may be a proper exercise of discretion to withhold him the aid of this court. Each party should have liberty to apply. If the plaintiff can shew a good title and obtain or do his best to obtain the perfecting of the arrangement with the Trust and Loan Company, I think the decree should be against *Wride* with costs. Judgment.

WHITING V. LAWRASON.

*Attachment against absconding debtor—Simple contract creditor—  
Setting aside fraudulent conveyance.*

The fact that a simple contract creditor has sued out a writ of attachment against an absconding debtor, does not afford any ground for coming to this court to have a conveyance alleged to be fraudulent as against the creditors of the debtor set aside: before the court can be called upon to do so, the creditor must establish his right to recover at law.

The bill in this case was filed by *William Whiting*, against *Samuel P. Lawrason* and *Samuel Armstrong*, setting forth that the defendant *Lawrason* was indebted to plaintiff upon an account stated, and settled between them, in the sum of £179; and being so indebted he departed this province with intent to defraud plaintiff; that at the time of his so leaving *Lawrason* was possessed to his own use of certain real estate in this province, which was seized by the sheriff under a writ of attachment sued out for that purpose under the Common Law Procedure Act, when the defendant *Armstrong* claimed to be entitled thereto under a deed of convey-

1859. <sup>Whiting</sup>  
v.  
Lawrason.      ance from *Lawrason* to him, which conveyance the bill alleged was made without consideration, and for the purpose of defrauding the plaintiff. The prayer of the bill was that this conveyance might be set aside, and for an injunction to restrain the defendants from selling or intermeddling with the real estate comprised therein.

The defendant *Armstrong* answered the bill, denying the fraud, or that the deed was made without consideration, a part of which still remained unpaid. As against *Lawrason* the bill was taken *pro confesso*.

Mr. *Strong*, for plaintiff.

Mr. *A. Crooks*, for defendant.

*Holmes v. Penny*, (a) *Wakefield v. Gibbon*, (b) were, amongst other cases, referred to.

Judgment.      The judgment of the court was delivered by

THE CHANCELLOR—This is a bill filed by *Whiting*, a simple contract creditor of the defendant *Lawrason*, to have a conveyance of certain real estate from *Lawrason* to the other defendant *Armstrong* set aside as having been either colourable or voluntary, and in either case void against the creditors of *Lawrason*.

Had there been nothing more in the case it is quite clear, I apprehend, that the bill could not have been sustained.

*Neate v. The Duke of Marlborough* (c) establishes that a judgment creditor who comes into equity to enforce his judgment, must have first sued out execution at law. The argument there was that the judgment was a lien upon the real estate of the debtor, and that the creditor

(a) 3 Jur. N. S. 80, S. C. 3 K. & J. 90.  
(c) 3 M. & C. 407.

b) 3 Jur. N. S. 353.

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proving a lien had a right to file his bill for the purpose of having his debt paid out of the real estate on which his judgment formed a charge, but that argument did not prevail. Lord *Cottenham* held that in such cases equity only acts in aid of the legal right, and a demurrer was allowed, because the bill did not allege that an elegit had been sued out.

1859.

Whitting  
v.  
Lawrason.

The principle upon which Lord *Cottenham* decided *Neate v. The Duke of Marlborough* has been recently applied to a case precisely like the present. (a) There Messrs. *Smith & Pyne*, the bankers, having recovered judgment against one *Hurst* for £12,000, and sued out a writ of *fi. fa.* thereon, filed their bill for the purpose of having a conveyance from *Hurst* to one *Padwick* set aside, as being fraudulent and void against *Hurst's* creditors. The fraud was clearly made out, but Vice-Chancellor *Turner* held that the bill could not be sustained as to the real estate, as no writ of elegit had been sued out.

Judgment.

Now if a creditor who had obtained judgment and sued out a *fi. fa.* could not have maintained this suit upon the ground that he had not acquired a perfect legal right, upon what principle can it be sustained by the present plaintiff, who has not recovered judgment at all, and who therefore comes asking this court to aid him in enforcing a legal right which he has not yet acquired.

It is true that by a recent statute of this province judgments are declared to be a charge in equity upon the lands of the judgment debtor from the time of their registration, and it is clear that this court has acquired a new jurisdiction quite irrespective of the principle to which I have been adverting. But a jurisdiction which arises only upon a judgment recovered and registered, cannot authorise a bill by one who, not having obtained judgment, can have no title, inasmuch as he wants that out of which alone the jurisdiction grows.

(a) *Smith v. Hurst*, 10 Hare, 30.

1859.

Whiting  
v.  
Lawrason.

It is said, however, that the present plaintiff is not a simple contract creditor merely, but a simple contract creditor who has sued out a writ of attachment, and who has, therefore, a right to come here for the purpose of having the sale from *Lawrason* to *Armstrong* set aside. I cannot discover any principle upon which that argument can be sustained. If this court is to be called upon to assist the plaintiff to enforce his legal right, surely, in all reason, that must be after the legal right has been established. When that right has been established, the plaintiff will be in a position to ask this court to determine whether that conveyance ought or ought not to stand, but until then, I cannot see what title he has to involve the defendants in such a litigation. The attachment does indeed bind the property of the debtor, and thereby affords considerable protection to the creditor in the event of his recovering judgment; but to permit him to institute proceedings of this sort before he has recovered judgment, that is, before he has established any interest whatever in the property of his debtor, and at a time when the attachment might be put an end to at any moment, by the debtor putting in bail to the action, would be, as it seems to me, contrary to principle and highly inconvenient, nor can I discover any thing in the act of parliament to warrant it.

Judgment.

I am of opinion, therefore, that the bill must be dismissed with costs.

#### MCDONALD V. GARRETT.

*Specific performance—Time essence of contract, waiver of—Rescission of contract.*

By the terms of the contract for the sale of certain real estate belonging to infants, it was stipulated that if at the end of seventeen months the approval of the Court of Chancery had not been obtained to the sale then made, the contract should be at an end, thus rendering time of the essence of the contract. The sale was not completed by the time specified, and some months afterwards the purchaser acquiesced in proceedings then taken to perfect the title. *Held*, that he had waived the condition that time should be of the essence of the contract.

*Semble*.—A purchaser cannot file a bill for a rescission of his contract, but must wait until the vendor attempts to enforce the agreement against him.

The facts appear clearly in the judgments.

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Mr. *Proudfoot*, for the plaintiff.

Mr. *Blake*, for defendants.

1859.

McDonald  
v.  
Garrett.

*SPRAGGE, V. C.*—[Before whom the case had been argued.]—The contract, which was entered into in July, 1855, was for the sale of certain lands in the Township of Wawanosh and Colborne by *William B. Garrett* and *Almeda Garrett*, widow of *Robert Nelson Garrett*, the two *Garretts* having been joint owners, and the widow entering into the contract on behalf of her children, infants, and for herself as to dower. The contract, which was by a bond to the purchaser, provided that the vendors should within a reasonable time, not exceeding seventeen months, procure, execute, or cause to be executed to the purchaser such further conveyance or assurance as might be necessary to complete the title of the purchaser so far as the same was incomplete, or to cure any defect that might at the date of the contract exist in the title of the purchaser by reason of the infancy of the heirs of *Robert Nelson Garrett* or otherwise. It seems that *William B. Garrett* had made a conveyance of the lands, the subject of the contract; and an arrangement was made for the payment to him of his proportion of the purchase money, it being agreed that his proportion should be paid partly in cash and the residue at a short date, while the proportion coming to the infants was to remain upon mortgage for eighteen years, with interest payable half-yearly; and a mortgage for the infants' share, (£1650,) was executed by the purchaser, bearing the same date as the contract of sale, and which contains a proviso that the same was only to continue in force on condition that within seventeen months from its date the mortgagees should, on behalf of the heirs of *Robert Nelson Garrett*, perfect and make good the title of the purchaser to the lands purchased. The widow executed to the plaintiff a release of her dower.

It seems to have been intended that application should

1859. be made to this court on behalf of the infants under 12  
 McDonald v. Garrett. Vic., ch. 72, in order to obtain its sanction to the  
 contract, and with that view a petition was afterwards  
 presented, (as I find by my book in October, 1856,) and on  
 the 19th of May, 1857, the contract of sale was approved  
 of, but with modifications as to the mode of payment,  
 equalizing the payments between *William B. Garrett* and  
 the infants. *William B. Garrett* had received more than,  
 according to this, would be his due proportion, and he  
 would have been required to re-pay, but that he claimed  
 to have made considerable payments on behalf of the  
 estate of *Robert Nelson Garrett*. Some time was con-  
 sumed in vouching his accounts, and about January or  
 February, 1858, Mr. *Blake*, who had been acting in the  
 matter, having heard that *William B. Garrett*, who had  
 been appointed guardian to the infants, had become of  
 extremely intemperate habits, and having found it  
 impossible, as he states, to procure the necessary proofs  
 Judgment. or information in order to the completion of the  
 accounts, conceived that *William B. Garrett* was not a fit  
 person for the office of guardian, and declined to proceed  
 further in the matter, and so informed his principals,  
 Messrs. *Strachan* and *McDermott*, solicitors, and also  
 Mr. *Alexander McDonald*, who had been acting in the  
 matter of the purchase on behalf of the plaintiff. Mr.  
*Blake* says he desired that some other solicitor should  
 be appointed to act for *William B. Garrett*, as his interests  
 and those of the infants might conflict. It does not  
 appear that any thing has been done in the matter of the  
 infancy since that time.

Mr. *Blake* states that the plaintiff called upon him  
 both before and after the 19th of May, 1857, when he  
 informed him of the terms on which the sale had been  
 sanctioned by the court; that the plaintiff acquiesced in  
 and agreed to such terms, and urged the completion of  
 the matter; that upon *Garrett* proposing to pass his  
 accounts with a view to shew himself in advance to the  
 estate, he Mr. *Blake* communicated the same to the

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plaintiff, who was satisfied therewith, and acquiesced therein. A letter from Mr. *Alexander McDonald* is put in, dated the 30th July, enquiring as to the accounts, &c., and concluding thus: "After the money is paid in, the sheriff (meaning the plaintiff) will be entitled to a deed from the children, giving a mortgage to secure the credit portion of the purchase money, and so finally settling the whole matter."

1859.

McDonald  
v.  
Garrett.

The bill is filed by the purchaser, setting up that time was made of the essence of the contract by the terms of the agreement, appearing in the bond, and the proviso in the mortgage to which I have referred. That time is also of the essence of the contract from the purpose, made known to the vendors, for which the purchase was made, namely, the selling off of a portion in town lots, and which was frustrated by the inability to obtain a title, and the subsequent depression in monetary affairs, and the value of real estate, and he prays that the contract and the mortgage executed by him may be delivered up to be cancelled, and that he be re-paid the sums paid by him on account of the purchase money, or in the alternative, that a partition may be decreed between him as purchaser of the share of *William B. Garrett* and the infants.

Judgment.

The defendants deny that time was of the essence of the contract, and insist that if it were so, it was waived.

I incline to think that the parties intended that time should be of the essence of the contract; they seem to have intended to give time for obtaining the sanction of this court on behalf of the infants to the contract, and to have named seventeen months as the outside that would be reasonable for that purpose; and the proviso at the end of the mortgage provides, almost in so many words, that the contract shall be at an end unless that sanction should be obtained within the time named.



1859.  
 McDonald  
 v.  
 Garrett.

There is evidence of one purpose of the purchase being to lay out a town or village, on a portion of this property, and selling off lots. As long as it was uncertain whether or not the court would approve of the contract of sale, it would not be safe for the purchaser to carry out such intention; but as a mere question of time, it does not appear that he intended to carry out that purpose within, or at the expiration, of the term named for the completion of the title, or that his purpose was at all thwarted or interfered with by its not being completed within the time.

But however that may be, it appears to me that his waiver of time as the essence of the contract was unequivocal and complete; he acquiesced in proceedings being taken to complete his title long after the time named for its completion; and in his personal communications with the solicitor of the infants, and in the letter of his agent, the contract is treated as still alive. It is quite impossible, as it seems to me, that he can now say that the contract was at that time at an end. He recognised the contract as a subsisting agreement in May and July, 1857, and now claims to treat it as at an end in December, 1856. He named no day after this recognition by which he should require the contract to be completed, gave no notice that he should treat it as at an end, unless completed at a future reasonable time named, but rests upon this, that it was at an end in December, 1856. I think the waiver insisted upon by the defendants clearly made out.

There seems certainly to have been great delay in making out the title; and great laches since the purchaser recognised the contract as still subsisting as well as before; but this ground is not taken by the bill; if it had been, I cannot say that it would not have been met. If he had been answering a bill for specific performance it would have been necessary for him to have objected laches as a ground of defence, and it must, I take it, be

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equally necessary to state it as a ground of equity in his bill.

1859.

McDonald  
v.  
Garrett.

But there is another objection to this bill, which I apprehend must be fatal. The plaintiff seeks as his main ground of relief the cancellation of the contract, and repayment of moneys paid by him under it, not alleging fraud or misrepresentation or any cause of objection in its inception; nor even any fraudulent use made of it since, but simply that from subsequent circumstances he ought not to be bound by it. He admits that he finds no precedent for such a bill. If such a bill would lie, it is tolerably certain that such bills would have been filed, because it would be a great advantage to a man to be able to ascertain by the judgment of a court, whether he is not released from a contract into which he has entered, but it has always been supposed, I believe, that a man must wait until the contract is attempted to be enforced against him. Judgment.

The nearest case to this, that I have been able to find, is that of *King v. King*, (a) before Sir *John Leach*. There the plaintiff believing himself entitled to an undivided third part of certain premises, and being in possession of them, and the defendants being entitled to other two undivided third parts, the plaintiff contracted to sell his undivided third part to the defendants, and let them into possession. The plaintiff delivered an abstract of his title, to which objections were taken; and he found that he was unable to make out a good title; negotiations for taking such title as he had occupied a considerable time, and after the lapse of several years, during which the defendants kept possession, and received the rents and profits without paying any of the purchase money, the plaintiff gave formal notice to the defendants, requiring them to give up the agreement to be cancelled,

(a) 1 M. & K. 442.

1859.

McDonald  
v.  
Garrett.

to deliver up possession, and account for rents and profits. The defendants taking no notice of this, the plaintiff filed his bill. At the hearing, the defendants refused to abandon their contract, and the title was referred to the master, who reported against it. Sir *John Leach*, in giving judgment, designated the case as a very special one; he decreed for the plaintiff on the ground that the defendants were making an inequitable use of the contract, by retaining from the plaintiff the possession (obtained from him) of the estate which they had agreed to purchase, and the price which they had agreed to pay. He was without remedy against this injustice except in a court of equity. The judgment seems to have proceeded upon the very peculiar circumstances of the case, and I think is not an authority for this bill.

Judgment.

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# AN INDEX

## TO THE PRINCIPAL MATTERS.

### ABSCONDING DEBTOR.

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### ACCOUNT.

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### ADMINISTRATION ORDER.

1. Where an order for the administration of a deceased person's estate is granted upon the application of any person beneficially interested therein, the decree will not contain a direction to enquire as to wilful neglect and default.

McGlashan v. Harrison, 531.

2. Where an executor or administrator applies for an order to administer the estate of the testator or intestate, the account will be directed to be taken of what he has received, or which but for his wilful default might have been received.

Ledgerwood v. Ledgerwood, 584.

### ADMINISTRATOR.

The purchaser of land from the crown died intestate, without having procured a patent for the land, or paid up the instalments of purchase

money: a younger brother, without the knowledge of the heir-at-law, obtained letters of administration to the personal effects of the intestate and subsequently applied to the government for, and, upon payment of the arrears of purchase money, obtained a grant of the land to himself, on the ground that the greater portion of the improvements on the land had been made by him; and that he had maintained his father and mother while residing on the property. Upon a bill filed by the eldest brother and heir-at-law against the grantee of the crown, and others claiming under him, it was shown that the deceased alone had cultivated the land, and supported the parents; and that the grantee had never made the property his settled place of residence: the court, under the circumstances, declared the heir-at-law entitled to the estate, notwithstanding the grant from the crown, and decreed him relief in accordance with such declaration. And [per ESTEN, V. C.] that under no circumstances could the administrator be allowed to purchase the property for his own benefit.

Lamont v. Lamont, 258.

### AGREEMENT.

See "Specific Performance," 6, 7.

### ALIEN.

1. A deed of land in trust for an alien (executed before 12 Victoria,

chapter 197,) and mortgages subsequently created by the alien, held good in this court.

Murray v. Heron, 177.

2. By the statute 12 Victoria, chapter 197, section 12, aliens are enabled to hold real estate in this province as fully and effectually as natural born subjects. *Id.*

#### ALIMONY.

The rule that the conduct of the wife should weigh much in determining the amount of alimony is a reasonable one; still the court in settling the amount refused to regulate itself by the fact that the wife's temper had occasionally been of a violent character: her treatment by the husband having been unreasonably severe, but adopted the husband's income as the proper guide for fixing the sum to be paid.

Severn v. Severn, 109.

See also "Practice," 7.

#### AMBIGUITY OF CONTRACT.

See "Specific Performance," 13.

#### APPEAL.

(STAYING PROCEEDINGS ON.)

See "Practice," 1, 19.

#### APPOINTMENT.

Property stood limited in trust for such purposes or persons as the wife should appoint; and in default of appointment, in trust for the wife and her heirs. The wife appointed part of her estate to her husband in fee, and the other part in trust for herself and children. *Held*, that these appointments were authorised by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband, further enquiry was directed.

Fenton v. Cross, 20.

#### ARBITRATION.

1. In proceedings taken under

the statute, 16 Victoria, chapter 190, for the purpose of ascertaining the amount to be paid by a road company for materials necessary for the construction of the road, the arbitrators cannot confer upon the company a prospective right to carry away the material by awarding an amount as compensation for the materials to be taken at a future time.

Gillam v. Cloghorne, 83.

2. Arbitrators appointed under this act, awarded damages for materials taken generally. *Held*, that the award was *ultra vires*, they having power to award damages in respect of materials taken for the purpose of the road only. *Id.*

3. *Quære*—Whether the act gives the power to such companies to enter upon land distant two miles from the line of the company's road, for the purpose of obtaining materials for the construction thereof—*Id.*

4. A defendant to an action at law pleaded by way of equitable defence an alleged agreement made for valuable consideration, to give time by the plaintiff, and a verdict was taken for the plaintiff in that action, subject to be increased or reduced, or a verdict entered for defendant by the award of an arbitrator chosen between the parties. Before the arbitrator had entered upon his duties further than making an appointment for the parties to attend before him, the defendant in the action filed a bill in this court seeking to restrain the proceedings at law, alleging as a ground, that relief the same facts as had been pleaded by him in the action at law. The court, under the circumstances, refused the relief prayed, and dismissed the bill with costs.

Pomeroy v. Boswell, 163.

5. *Semble*, that it is a con

of a court of common law to proceed in this court after a reference to arbitration under an order of that court, which orders the parties to perform the award. *Ib.*

See also "Compensation."

#### ASSIGNMENT.

(FOR BENEFIT OF CREDITORS.

See "Deed," 3, 6, 8.

(VOID AS AGAINST CREDITORS.)

See "Deed," 7.

"Settlement," 1.

#### BANK.

(COLLATERAL SECURITY TO.)

*Held*, that under the provisions of the act 6 Victoria, chapter 27, section 19, amending the charter of the Bank of Upper Canada, the bank is authorised to take mortgages upon real estates, by way of collateral security, for sums advanced *bonâ fide* in the way of their business, and that such debts should not have been contracted previously, but the advance of the money and the taking of security may be contemporaneous acts.

The Commercial Bank v. The Bank of Upper Canada, 250.

[Affirmed on Appeal, 3rd February, 1860, 423.]

#### BILL.

(RIGHT TO FILE.)

See "Practice," 5.

#### CALLS.

(FOR PAYMENT OF DEBTS OF JOINT

STOCK COMPANY.)

See "Corporation," 3.

#### CANCELLATION.

(OF DEED.)

See "Deed," 4, 5, 7, 8.

(OF SECURITIES.)

See "Prisoner."

#### COLLATERAL SECURITY.

1. *Held*, on appeal, affirming the decision of the court below, that chartered banks of this province are entitled to take, by way of security for debts contracted in the legitimate business of banking, mortgages on real estate, although the money is advanced at the same time that the mortgage is executed, it would be a question of fact for a jury to determine whether the mortgage was in truth taken to secure the transaction on the bill or note discounted; or the bill created for the mere purpose of upholding and giving colour to the mortgage.

The Commercial Bank v. The Bank of Upper Canada, 423.

2. A mortgage was created by way of collateral security for the sum of £2,800 debts, then past due to one of the chartered banks, and also £1,000 then advanced by the bank to the mortgagor, who afterwards created a second mortgage to the bank for £750, and interest; that instrument expressly provided that it and every thing therein contained should be subject to the payment by the mortgagor of the amounts mentioned in the former mortgage. *Held*, affirming the decree of the court below, that the first mortgage was void as to the £1000, but was valid to secure the amount of £2800, notwithstanding that the notes held by the bank at the date of the mortgage, had been retired by the discount of other paper from time to time; and also, that the second mortgage was an existing security as to the £1000, though void as to the amount of £750 advanced at the time of its execution. *Ib.*

See also "Bank."

#### COMPENSATION.

W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing

absolute covenants for title. A portion of the land so conveyed was subsequently claimed by one R., and an action of ejectment was brought by him to recover possession of it, and D. instituted proceedings under the covenant against B. Under these circumstances W. executed to his vendee a mortgage to indemnify him against all damages, costs, and charges in respect of the action of covenant. B. subsequently compromised with R. respecting his claim. *Held*, that W.'s estate was only liable for what should be found to be the value of the piece of land so claimed, and not the amount paid by his vendee on the occasion of the compromise.

Hart v. Bown, 97.

#### CONDITIONS OF SALE.

See "Specific Performance," 7.

#### CONTEMPT.

See "Arbitration," 5.

#### CONTINUING COVENANT.

See "Lessor and Lessee."

#### CONTRACT.

(RESCISSION OF.)

See "Specific Performance," 12, 16, 17.

#### CORPORATION.

1. A company incorporated under the provisions of the statute 16 Victoria, chapter 173, for supplying a city with gas, will be restrained during the currency of a quarter from cutting off the gas from a house, the occupant of which has paid the rent for the preceding quarter; but a special contract for continuing to supply the gas will not be binding on the company, unless in writing under the corporate seal.

Smith v. The London Gas Company, 112.

2. The managing director of a railway company entered into a con-

tract in his own name, adding, "acting on behalf of the company," with a person for the execution of the works in the construction of the road, and also for keeping the road in repair. Under this agreement the contractor entered upon the execution of the works, and completed the greater portion thereof, when the company stopped the works, alleging that they had not been aware of the terms of the contract, and which they asserted were most extravagant in respect of the prices agreed to be paid. On a bill filed to enforce this contract, *held, per curiam*, [Spragge, V. C. dissenting.] that this contract did not require the common seal to render it binding on the company; that the company must be presumed to have had notice of the terms and stipulations of the contract; that the intricacy of the accounts was such as to render this a proper case to be disposed of by this court; and the company was bound to pay for the work at the prices agreed upon; and an enquiry was directed as to the damage sustained by the contractor by reason of the stopping of the works, and the loss of the contract.

Whitehead v. The Buffalo and Lake Huron Railway Co., 351.

[Since argued in appeal, and now standing for judgment.]

3. Where a trading company, incorporated by act of parliament, became insolvent, one of the partners, being also a creditor of the company, filed a bill for the payment of his judgment. *Held*, that he was entitled to a decree compelling the directors to make calls upon the stock of subscribers to the enterprise, notwithstanding a clause in the statute declaring the shares of defaulters should be forfeited; the forfeiture being cumulative to all other remedies to which a creditor

was entitled to claim.

Harris v. The London Gas Company, 45.

1. Where a company is not to be bound by the terms of a contract, if it is not aware of the terms of the contract, and which they asserted were most extravagant in respect of the prices agreed to be paid. On a bill filed to enforce this contract, *held, per curiam*, [Spragge, V. C. dissenting.] that this contract did not require the common seal to render it binding on the company; that the company must be presumed to have had notice of the terms and stipulations of the contract; that the intricacy of the accounts was such as to render this a proper case to be disposed of by this court; and the company was bound to pay for the work at the prices agreed upon; and an enquiry was directed as to the damage sustained by the contractor by reason of the stopping of the works, and the loss of the contract.

2. Where a company is not to be bound by the terms of a contract, if it is not aware of the terms of the contract, and which they asserted were most extravagant in respect of the prices agreed to be paid. On a bill filed to enforce this contract, *held, per curiam*, [Spragge, V. C. dissenting.] that this contract did not require the common seal to render it binding on the company; that the company must be presumed to have had notice of the terms and stipulations of the contract; that the intricacy of the accounts was such as to render this a proper case to be disposed of by this court; and the company was bound to pay for the work at the prices agreed upon; and an enquiry was directed as to the damage sustained by the contractor by reason of the stopping of the works, and the loss of the contract.

See also,

(ASSIGNMENT)

See

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In 1848, land in

was entitled for enforcement of his claim.

Harris v. The Dry Dock Company, 450.

## COSTS.

1. Where a motion for an injunction is refused, the proper course is not to give the costs of the applications; as, if the suit fails, the plaintiff must pay the costs; and if it succeeds, the order pronounced at the hearing provides for the payment of them.

Carruthers v. Armour, 33.

2. Where a bill by a purchaser seeking specific performance of a contract for the sale of lands, is dismissed because a good title cannot be shewn, the court will order a sum paid on account of the purchase money to be returned to the purchaser, and in default, give him a lien therefor on the estate agreed to be sold; but in such case, unless the vendor has been guilty of fraud in the transaction, the bill will be dismissed without costs.

Hurd v. Robertson, 142.

(SECURITY FOR.)

See "Practice," 6.

See also, "Principal and Surety," 1.  
"Trustee," 4.

## CREDITORS.

(ASSIGNMENT FOR BENEFIT OF.)

See "Deed," 3, 6, 8.

## DAY TO SHEW CAUSE.

See "Infant."

## DECREE.

(MOTION FOR.)

See "Practice," 10.

## DEDICATION.

In 1836 the owner of a tract of land in the city of Toronto, caused

the same to be surveyed and laid off into building lots. A part of the property was enclosed within fences, forming a large garden and grounds, on which the residence of the former owner of the property was situate, and which had always been occupied by the proprietor of the estate or his tenants. The surveyor in preparing the plans, represented this part of the property as being within fences, and wrote on the space, "McGill's Square." Around this were laid off building lots, subsequently sold to several persons. In 1857, a bill was filed by the city of Toronto, and the owner of one of the lots fronting on this space on behalf of himself and all other purchasers of such lots, seeking to enjoin the proprietor from building upon or selling the space, so marked, on the ground either that the same had been dedicated to the public, or that the purchasers were entitled to free access thereto, or to have the same retained as an open space, alleging a verbal agreement to that effect at the time of the sale being made. *Held*, that what had been done did not amount to a dedication to the public: that the evidence was not sufficient to establish a grant of the easement claimed by the purchasers: and that if either claim had been established there was a misjoinder of plaintiffs.

The City of Toronto v. McGill, 462.

## DEED.

(DELIVERY OF.)

1. A mortgage in favour of parties in Europe was executed in this country and left in the hands of the attorney who prepared the security, with directions from the mortgagor not to register it until further order; after the death of the mortgagor the mortgage was delivered up to



the agent of the mortgagees, who had the same registered. *Held*, that there had been a sufficient delivery during the lifetime of the mortgagor, and that a person who entered into partnership with the mortgagor, and thereby acquired an interest in the mortgage estate, with a knowledge of the circumstances attending the execution of the mortgage, did so subject to the claim of the mortgagees.

*Mackeechnie v. Mackeechnie*, 23.

2. A steam-vessel owned by the members of a limited partnership was registered in the name of the general partner. During the absence from this country the special partners agreed for the sale of the vessel, and gave their bond conditioned for the obtaining of a good and sufficient transfer thereof to the purchasers, within three months from that date, and placed the purchasers in possession. Two years afterwards the vessel was sold under execution issued against the general partner, and was taken out of the possession of the purchasers by means of a writ of replevin, the purchasers giving to the special partners notice of these proceedings, who took no steps to prevent the removal of the vessel; and the purchasers thereupon instituted proceedings at law against the obligors in the bond, and recovered judgment against them, after which they filed a bill praying a specific performance of the contract, and an injunction to stay proceedings under the judgment. The court, taking into consideration the great changes which had taken place in the position of the parties, and the depreciation in value of the steamer, refused specific performance, and dismissed the bill with costs. *Cotton v. Corby*, 50.

[Affirmed on appeal, 3rd Feb., 1860.]

3. A trader having become involved, made an assignment of his estate and effects to trustees, for the benefit of his creditors, some of whom were deemed to have preferred claims, and to be paid in full. The claim of one of them was stated by the debtor to be "£3,500, or thereabouts," no account having been settled between the debtor and the creditor for a long time, and the sum so mentioned by the debtor was stated in the schedule as the amount, and the several creditors executed the deed of assignment. The creditor, afterwards, on balancing his account with the debtor, ascertained that his claim amounted £5062, and demanded this sum from the trustees, which they refused to pay: whereupon the creditor filed a bill to reform the deed, by introducing the latter sum as his claim, on the ground that the words "or thereabouts," were sufficient to include the excess of that amount over and above the £3500. The court refused the relief prayed, and dismissed the bill with costs.

*Chapin v. Clarke*, 75.

4. To induce the court to vary a written instrument, executed by the parties thereto, on the ground of alleged mistake, the evidence must be of the strongest character: where, therefore, a bill was filed for the purpose of rectifying an alleged error in a mortgage deed, by inserting "£225" instead of "125," and the defendants in their answer denied the fact of any mistake having occurred, and the conveyancer who drew the deed swore that he had read over with distinctness the written portions of the conveyance: that the mortgagee had corrected him as to the time of the money being payable, and that he did not think he could have been understood as reading "two" when he

read "that the mortgagor had been in the and that to the court dismissed

5. The case, or, if the estate entitled; title may succeed brought

6. The involved in an assign benefit of should same with One of executing debtors, interplead found agreed was made Bench for refused. limited f applied to ed to ex which the a bill file previously registered trust esta plaintiff claim ou estate in and that tested th thereby fl pate in ment.

read "one," and it also appearing that the instructions from which the mortgage had been prepared, had been given to another person in the absence of the conveyancer, and that the same were read over to the parties at the time. The court under the circumstances dismissed the bill with costs.

*Williams v. Felker*, 345.

5. The court will, in a proper case, order a deed to be cancelled; or, if registered, a conveyance of the estate to the person properly entitled; and that although his title may be such that he would succeed in defending any action brought against him at law.

*Harkin v. Rabidon*, 243.

6. Traders having become involved in their circumstances, made an assignment to trustees for the benefit of each of their creditors as should come in and execute the same within a time named in it. One of the creditors, instead of executing the deed, sued the debtors, and an issue under an interpleader order having been found against the creditor, a motion was made to the Court of Queen's Bench for a new trial, which was refused. Thereupon, after the time limited for signing, the creditor applied to the trustees to be allowed to execute the deed of trust, which the trustees permitted. Upon a bill filed by a creditor who had previously recovered judgment, and registered the same against the trust estate, the court declared the plaintiff entitled to payment of his claim out of the proceeds of the estate in the hands of the trustees; and that the creditor who had contested the validity of the deed, had thereby forfeited all right to participate in the benefit of the assignment.

*Joseph v. Bostwick*, 332.

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7. A conveyance may be fraudulent and void as against creditors, although no debt may be in existence at the time, if made in contemplation of becoming indebted; where, therefore, the circumstances attending a transfer of real estate from one brother to another were such that the court felt satisfied that a jury would have arrived at the conclusion that the sale was colourable and fictitious, and made for the purpose of defrauding creditors, the deed was declared void at the instance of a creditor of the assignor, the amount of whose claim was ordered to be paid in one month, or in default that the property in question should be sold.

*The Bank of B. N. America v. Rattenbury*, 383.

8. An assignment by an insolvent for the benefit of creditors set aside the deed containing a general release by the creditors, and having been made to avoid an execution about to be issued by one of them; and the creditors generally were declared entitled, according to their priority, to the proceeds of the property which had been sold by the trustee.

*McDonald v. Putnam*, 395.

See also "Settlement."

## DEFAULT.

(WILFUL.)

See "Administration Order."

## DEMURRER.

The Commissioners under the Heir and Devisee Act, in deciding upon claims brought before them, are not bound by the strict rules applicable to courts of law. Where, therefore, a purchaser from the crown devised land, for which the patent had not yet issued, to his wife for life with a power of appointment amongst his descendants

in tail; and she by her will devised the estate to one of such descendants, in fee, who applied to the heir and devisee commission, and the commissioners recommended a grant in tail to the person named as devisee. The crown, acting upon such recommendation, issued a patent in favour of such devisee. A bill was afterwards filed to set aside the patent, as having been issued in error, or through improvidence: a demurrer put in *ore tenus* at the hearing for want of equity, was allowed.

Scane v. Hartrick, 161.

(ORE TENUS.)

See "Practice," 20.

See also "Discovery."

#### DEPOSIT.

(RETURN OF.)

See "Specific Performance," 4.

#### DISCOVERY.

1. Where several persons severally liable on a promissory note or bill of exchange, are jointly sued at law by the holder, one of the defendants in the execution at law cannot obtain discovery against the plaintiff at law and the other defendants; the defendants as between themselves not being litigating parties, but witnesses: a bill filed for the purpose is demurrable.

Hamilton v. Phipps, 483.

2. The statute 5 Wm. IV., ch. 1, [Consolidated Statutes, ch. 42,] which permits the holder of a promissory note or bill of exchange to sue all parties liable upon it, in one action, does not affect the rights and liabilities of the defendants to such an action as between themselves, but leaves them in the same position as if they had been sued separately.—*Ib.*

3. A bill will not lie for the discovery of facts which the plaintiff

in equity may prove *aliunde* in his defence at law.—*Ib.*

#### DORMANT EQUITIES.

*Held per curiam.*—[SPRAGGE, V. C., dissenting,] that the act relating to dormant equities (18 Victoria, chapter 124) applies as well to express trust as to trusts created by implication of law.

Wragg v. Beckett, (in appeal,) 220.

[And see Attorney-General v. Grasset, in appeal, decided 3rd Feb., 1860, *post* vol. VIII.]

#### EQUITABLE DEFENCE.

See "Arbitration," 4.

#### EXCHANGE OF LAND.

See "Specific Performance," 1.

#### EXAMINATION.

(STRIKING CASE OUT OF LIST FOR.)

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#### EXECUTOR.

See "Compensation."

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(LOSSES BY.)

See "Insurance."

#### FLOATING BALANCE.

A trader being indebted to a wholesale merchant, for goods supplied, executed a mortgage in favour of the creditor, securing £3000, and the creditor having entered into a new partnership, the firm continued to make further advances for several years during which time the debtor made several payments, much more than would have been sufficient to pay off his original indebtedness; and the firm in rendering their accounts to the mortgagor did not bring in the old debt: upon appeal from the master's report it was held that these circumstances were sufficient to show that the security was intended to cover a floating balance.

Russell v. Davy, 13.

## FORECLOSURE.

See "Practice," 4, 13.

## FRAUDS.

(STATUTE OF.)

See "Specific Performance," 7.

## FRAUDULENT ASSIGNMENT.

1. A conveyance may be fraudulent and void as against creditors, although no debt may be in existence at the time, if made in contemplation of becoming indebted; where, therefore, the circumstances attending a transfer of real estate from one brother to another were such that the court felt satisfied that a jury would have arrived at the conclusion that the sale was colourable and fictitious, and made for the purpose of defrauding creditors, the deed was declared void at the instance of a creditor of the assignor, the amount of whose claim was ordered to be paid in one month, or in default that the property in question should be sold.

The Bank of British North America v. Rattenbury, 383.

2. A trader being in insolvent circumstances, at a meeting of his creditors entered into a written agreement that he would execute an assignment to trustees, for the benefit of his creditors, of all his real and personal estate and effects, (except certain policies of life insurance,) and on the second day afterwards he did execute the deed agreed upon, which the trustees accepted, and several of his creditors joined in and executed the same. Afterwards it was discovered that on the day intervening between the date of the agreement to assign and the execution of the deed of assignment, the debtor had sold a valuable portion of his stock in trade at a credit running over three years, and had accepted as security the promissory notes of the purcha-

ser. Thereupon the trustees filed a bill seeking to have this sale set aside as fraudulent, and void as against them. *Held*, that the trustees being in the position of purchasers, could claim only such rights as the debtor was legally entitled to at the date of the execution of the deed of trust, and that the sale being binding upon the debtor, and those claiming under him, the trustees were not entitled to the relief prayed. But, *semble*, that this sale would not have been sustained as against a judgment creditor who had sued out execution.

McMaster v. Clare, 550.

## FRAUDULENT PREFERENCE.

The fact that a debtor defends one action brought against him by a creditor and allows judgment by default for want of an appearance in another suit, is not such an undue preference of one creditor as will render the judgment void under the statute 22 Victoria, chapter 96, sections 18 and 19.

Young v. Christie, 312.

## FRAUDULENT CONVEYANCE.

The fact that a simple contract creditor has sued out a writ of attachment against an absconding debtor does not afford any ground for coming to this court to have a conveyance alleged to be fraudulent as against the creditors of the debtor set aside; before the court can be called upon to do so, the creditor must establish his right to recover at law.

Whiting v. Lawrason, 603.

## GIFT.

(DEED OF.)

See "Principal and Agent," 3.

## GRANT FROM THE CROWN.

The commissioners, under the Heir and Devisee Act, in deciding

upon claims brought before them, are not bound by the strict rules applicable to courts of law. Where, therefore, a purchaser from the crown devised land, for which the patent had not yet issued, to his wife for life, with a power of appointment amongst his descendants in tail; and she by her will devised the estate to one of such descendants, in fee, who applied to the heir and devisee commission, and the commissioners recommended a grant in tail to the person named as devisee. The Crown, acting upon such recommendation, issued a patent in favour of such devisee. A bill was afterwards filed to set aside the patent, as having been issued in error, or through inadvertence: a demurrer put in *ore tenus* at the hearing, for want of equity, was allowed.

Scane v. Hartrick, 161.

See also "Administrator."

#### HEIR AND DEVISEE.

(COMMISSION.)

See "Grant from the Crown."

#### INCUMBRANCES.

(SALE OF PROPERTY SUBJECT TO.)

See "Vendor and Purchaser," 2.

"Specific Performance, 15.

#### INFANT.

1. In a decree against an infant defendant as trustee of real estate it is not necessary to reserve a day for the defendant to shew cause after attaining twenty-one.

Lake v. McIntosh, 532.

2. A suit to redeem a mortgage alleged to have been created by an absolute deed, was instituted against the infant heir of the mortgagee; the question raised by the pleadings was, whether the transaction was a mortgage or sale, which, at the hearing, was decided

in favour of the plaintiff, and the infant was ordered to re-convey. On his attaining twenty-one an application was made for leave to put in a further answer, and make a new defence, which was refused. —[SPRAGGE, V.C., dissenting.]—*Id.*

3. The defendant, a minor, purchased an estate, and gave the vendor a mortgage for the purchase money. The mortgage was afterwards assigned to the plaintiff. On coming of age the defendant repudiated the mortgage, but adopted the purchase, by bringing an action to recover possession. The mortgage, being the deed of an infant, was holden absolutely void. But it was also holden that the mortgage being void, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by assignment of the mortgage.

Grace v. Whitehead, 591.

#### INJUNCTION.

1. On the agreement for sale of a steamboat, the vendor delivered possession to the vendee, and executed a covenant binding himself to transfer the vessel with her machinery and furniture to the purchaser absolutely, upon payment of the balance of purchase money by certain instalments. And if default were made in payment of any portion thereof, it was provided that the vendor should be at liberty to resume possession of the vessel, with her machinery and furniture. The court granted an injunction, restraining the purchaser from removing the machinery from the vessel, so long as any part of the purchase money remained unpaid.

Laughton v. Thompson, 30.

2. Where a motion for an injunction is refused, the proper course is not to give the costs of the application: as, if the suit fails, the plaintiff must pay the costs; and

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if it succeeds, the order pronounced at the hearing provides for the payment of them.

*Carruthers v. Armour*, 34.

3. A defendant in an action at law filed a bill in this court to restrain proceedings, alleging as grounds for relief, facts, which, if they had been properly pleaded, would have afforded a good defence at law. The court, without enquiring as to the merits of the case, dismissed the bill.

*Morrison v. McLean*, 167.

4. A motion for injunction was refused, the allegation and prayer of the bill having been framed with a view to relief on other grounds than those upon which the application was founded, although the affidavits in support of it contained sufficient to warrant the court in granting the injunction.

*Ely v. Wilson*, 103.

5. Although a mortgagor in possession will not be restrained from cutting timber for fuel, fencing, and repairs upon the mortgage premises, he will be restrained from felling trees for other purposes, if it does not clearly appear that the property, notwithstanding the removal, will remain of sufficient cash value to satisfy the mortgage debt.

*Russ v. Mills*, 145.

See also "Corporation," 1.

"Lessor and Lessee."

"Tenant in Common."

#### INSURANCE.

1. The agent of an insurance company effected an insurance upon wheat in the name of himself and partner for the sum £3000, there being an insurance on the mill in which the wheat was stored, of £750; the rule of the company being, that not more than £3000 should be taken on any one build-

ing and its contents. The usual proposal was transmitted by the agent to the head office on the 23rd, and on the 27th of the same month the premises and wheat were destroyed by fire, no action in the meantime having been taken by the company upon the application sent by their agent, who in making the proposal had refrained from drawing the attention of the company to the fact of the previous insurance on the building, and the then secretary of the company swore that had he been aware, or had his attention been drawn to the fact of such prior risk, the second application would have been immediately rejected. After the loss occurred the company paid the sum of £750, (insured on the building) and £2250 (on the wheat) together making the sum of £3000 allowed by the rules to be on one building and its contents. Under these circumstances, a bill filed by the agent and his partner to compel the payment of the additional £750 was dismissed with costs.

*Tucker v. The Provincial Insurance Company*, 122.

2. A person having applied to effect an insurance with the agent of an insurance company, obtained from him the usual interim receipt; after the expiration of the time specified in this receipt, but before any policy was completed, the property was destroyed by fire, after which the company refused to pay the amount assured, or to issue any policy; asserting that they had not approved of, or accepted the risk. The evidence of the agent shewed that the risk had been accepted, and that he had stated to the assured that it had been accepted. The court, under the circumstances, directed an enquiry as to the amount of loss sustained by the assured,

and that the company should pay the same.

Penley v. The Beacon Assurance Company, 130.

3. *Quere*—Whether the court could, under such circumstances, compel the company to issue a policy.—*Ib.*

4. One of the conditions endorsed on the policies issued by an insurance company, stipulated that any proceedings to be taken against them in respect of any loss sustained by the assured, should be instituted within six months after such loss should happen. *Held*, that such condition did not apply to a case where the company refused to complete the policy, and a bill was filed to compel them to execute a policy, or pay the amount of loss sustained by reason of the destruction by fire of the property insured.—*Ib.*

5. The owners of a quantity of wheat on board a vessel, applied to the agent of an insurance company to insure the same, who took the risk, subject to the approval of the head office, who authorised the insurance, and directed the agent to remit the amount of premium at once. The owners of the wheat, instead of paying the premium, credited the amount to the agent in their books, and before any policy was delivered, information was received of the loss of vessel and cargo, which had in fact occurred before the proposal for insurance was made: the company then refused to issue a policy, and a bill filed to compel them to do so, or pay the amount of loss sustained, was dismissed with costs.

Walker v. The Provincial Insurance Co., 137.

[AFFIRMED ON APPEAL, FEB. 3, 1860.]

ISSUE.

See "Fraudulent Assignment," 1.

### JOINT STOCK COMPANY.

(CALLS FOR PAYMENT OF DEBTS OF.)

See "Corporation," 3.

### JUDGMENT CREDITOR.

1. The statute 13 & 14 Victoria, chapter 63, section 2, making a registered judgment a lien upon the lands of the debtor, does not apply to judgments obtained against the personal representative of a debtor.

Hamilton v. Beardmore, 286.

2. In suits to foreclose the equity of redemption in mortgage property, the judgment creditors of the mortgagee are necessary parties.

Sanderson v. Ince, 383.

3. *Held*, on appeal from the master's report, that a purchaser is entitled to call for a release from all judgment creditors who have registered their judgments in the county where the lands sold are situate, or the creditors join in the conveyance to the purchaser, although it appears that the purchase money will be exhausted in discharging prior incumbrances. If the vendor cannot procure such release or concurrence in the conveyance, the court will not compel the purchaser specifically to perform the contract.

Spohn v. Ryekman, 388.

4. A registered judgment upon which a bill is filed in this court stands on the same footing as a mortgage, and the incumbrancer can hold his incumbrance, be it mortgage or judgment, only for the sum actually advanced and interest.

Proudfoot v. Bush, 518.

### LAND SCRIP.

Land scrip was deposited with a party as collateral security, who sold the same at a discount. *Held*, that if on taking an account it should appear the sale had been

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effected before any default in payment he must be charged with the amount of the present value, but if after default, then with the value at the time of the sale.

Hart v. Bown, 97.

## LAW.

A party mispleading at law is not thereby entitled to seek relief in a court of equity.

Morrison v. McLean, 167.

See also "Injunction," 3.

## LESSOR AND LESSEE.

The proprietors of a house in the course of erection (which was intended to be used as an hotel) made a lease thereof for a term of five years, from the time of the completion of the building. The lease contained, amongst others, a covenant in these words: "And the said lessee covenants further, with the said lessors, that he will furnish the said hotel in a substantial and good manner." *Held*, that this was a continuing covenant, and that the lessee was not at liberty, during the continuance of the term, to remove out of the house the furniture thereof which he had placed in it.

Rossin v. Joslin, 198.

## LIMITED PARTNERSHIP.

1. A large number of persons agreed to form themselves into a limited partnership under the statute in that behalf, but several of them, instead of paying in the amount of their contributions to the partnership fund in cash, the same was paid by means of promissory notes. Upon a bill filed by some of the partners seeking to compel their co-partners to contribute towards making up a large deficiency, ascertained on the winding up of the affairs of the company: *Held*, that the circumstances which had transpired rendered the parties general partners not only as to third parties, but also as between

themselves.—[ESTEN, V.C., dissenting.]

Patterson v. Holland, 1.

2. One of the members of a co-partnership established upon the principle of limited liability, was appointed manager of the business, and while acting in that capacity, furnished from his shop goods for the use of the partnership, upon which he charged the usual trade profits: *Held*, that *prima facie*, these transactions could not be sustained.

—*lb.*

## LIEN.

See "Judgment Creditor," 104.

"Vendor and Purchaser," 3.

## LIMITATION.

(OF TIME FOR BRINGING ACTIONS ON POLICIES OF INSURANCE.)

See "Insurance," 4.

## LOSSES.

(DECREE FOR PAYMENT OF.)

See "Insurance," 2.

## MARRIED WOMEN.

(SEPARATE ESTATE OF.)

1. Property stood limited in trust for such purposes or persons as the wife should appoint; and in default of appointment, in trust for the wife and her heirs. The wife appointed part of her estate to her husband in fee, and the other part in trust for herself and children. *Held*, that these appointments were authorised by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband, further enquiry was directed.

Fenton v. Cross, 20.

2. The owner of real estate conveyed the same to trustees for his daughter E. S., one of whom was her husband, to dispose thereof "in





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Russell v. Davey, 13.

2. In a suit for the sale of mortgage property, it appeared that a mesne incumbrancer held a mortgage on other property of the mortgagor; the court ordered an account to be taken of what was due on both the securities, and in default a sale, but intimated that in the event of a sale taking place, the premises would be conveyed to the purchaser relieved of any lien of such subsequent mortgage.

Merritt v. Stephenson, 22.

3. In suits to foreclose the equity of redemption in mortgage property, the judgment creditors of the mortgage are necessary parties.

Sanderson v. Ince, 383.

4. A mortgage was made for £1196, payable £200 in four months, £200 in eight months, and £224 in twelve months, the residue at later periods. The third instalment was paid. For the first and second instalment the mortgagor gave two promissory notes, bearing even date with the mortgage, and took the following receipt from the mortgagee: "Received from R. B. W. his notes for £200 at four months, and £200 at eight months from the first of June last, in full for the same amounts due on a mortgage made by him to me, maturing at same date." And the following endorsement was made on the mortgage:

"Received from R. B. W. two notes of hand, endorsed by L., for £200 each, to complete the two first payments on the within mortgage." The notes were not paid at maturity, and in a suit by the assignee of the mortgagee to foreclose in default of payment of the first and second instalments, held, that the right to recover upon the mortgage was only suspended, and not discharged by the taking of the notes.

Gibb v. Warren, 496.

5. A mortgagor paid the mortgagee from time to time money, in pursuance of an agreement, contemporaneous with the mortgage, that 5 per cent per. annum, in addition to the legal rate of interest, should be paid on the amount loaned. In taking the account in a suit brought by the mortgagee to foreclose, the master gave credit for the money thus paid, as so much money paid on account of principal and legal interest. Held, on appeal from the master, that he was right in his mode of taking the account; and held also, that the second section of the statute 16 Victoria, chapter 80, did not bar the right to recover in an action of assumpsit for money paid in excess of legal interest.

Stimson v. Kerby, 510.

6. A purchase by a second from a prior mortgagee, under a power of sale contained in the first mortgage deed, was sought to be set aside, but the court upheld the transaction; and the purchaser submitting to be redeemed in respect of both mortgages, directed the cause to stand over for the purpose of making the mortgagor a party to the suit.

Watkins v. McKeller, 534.

See also, "Bank."

"Collateral Security."

"Practise," 13.

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## MOTION FOR DECREE.

See "Practice," 10.

## NOTE.

(CANCELLATION OF.)

See "Prisoner."

## NOTICE.

See "Registration."

## PARTNERSHIP.

1. Although a surviving partner may not be chargeable with fraud or misconduct of any sort, still when there is a difference of opinion between him and the representatives of his deceased partner as to the mode of winding up the estate, it would seem that they are entitled to the assistance of this court for that purpose, through the medium of a receiver and sale; *ESTEN, V. C., dubitante*, where the suit is unnecessarily instituted and the accounts and collection of outstanding debts will occupy some time, and an immediate sale of the estate would not be advisable.

*Bilton v. Blakely, 214.*

2. An agreement was entered into for a joint speculation in lands; A. to find the capital, and B. to select the lands and make purchases; A. to be allowed in the first place to retain out of each sale of any of the lands as made his money expended upon the same, and the remainder, the profits, to be equally divided between them; B.'s trouble, experience and time, being considered equal to A.'s capital. *Held*, that the profits divisible between the parties was the value, whether ascertained upon re-sale or by valuation, after deducting the cost and incidental expenses.

*Proudfest v. Bush, 518.*

See also "Practice," 18.

## PARTIES.

1. In a suit to enforce a lien for an annuity secured upon real estate it is not necessary to make the personal representative of the person bound to pay a party, unless an account of the personal estate of the deceased is asked.

*Paine v. Chapman, 179.*

2. Where a suit to enforce by sale a vendor's lien is instituted against the heirs at law of the purchaser, the widow of the vendee is a necessary party in respect of her right to dower. *Id.*

3. In suits to foreclose the equity of redemption in mortgage property, the judgment creditors of the mortgagee are necessary parties.

*Sanderson v. Ince, 383.*

See also "Dedication."

## PART PERFORMANCE.

See "Specific Performance," 3.

## PAYING MONEY INTO COURT.

See "Practice," 1, 3, 11, 19.

## PERSONAL REPRESENTATIVE.

(DECREE MADE IN ABSENCE OF.)

See "Specific Performance," 14.

## PLEADING.

See "Injunction," 4.

"Dedication."

"Usury."

## POWER OF SALE.

(TO PAY DEBTS.)

Lands were devised to trustees for the purpose of carrying out the will of the testator, who reserved six lots, which he desired should be sold for payment of debts, not charged on lands: the residue to his grand-children. *Held*, that the trustees had a right to sell the

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whole of such property for payment of debts left unpaid by the personal estate, and the lots specially appointed to be sold for that purpose; and that in such a case a purchaser who has not notice that all the debts not charged on lands are paid, will be justified in assuming that the trustees are properly proceeding to a sale.

Duff v. Mewburn, 73.

(IN MORTGAGE.)

See "Mortgage," 6.

(PURCHASE UNDER.)

See "Trusts," 1.

PRACTICE.

1. A bill filed for the purpose of restraining proceedings at law to enforce a judgment having been dismissed, the court continued the interim injunction, which had been obtained during the progress of the cause, until the decision of the Court of Appeal could be obtained, upon paying into court the amount of the judgment, or giving security to the satisfaction of the defendants, for payment of the money.

Cotton v. Corby, 50.

2. A defendant may be examined *vivo voce* in support of a motion, notice of which has been given, although the time for answering has not elapsed.

McClennaghan v. Buchanan, 92.

3. An interlocutory order for payment of money into court will be made only where, upon all the evidence before it, the court is satisfied that at the hearing a decree must inevitably be made in favour of the party moving. *Id.*

4. A decree of foreclosure absolute drawn up and entered, set aside at the instance of a purchaser of the equity of redemption, whose interest was acquired after the

institution of the suit to foreclose, but without notice of it.

Hilliard v. Campbell, 96.

5. Where in the course of a cause a question is raised whether the plaintiff is entitled to institute proceedings, the court will in a proper case, decide that question without compelling the parties to proceed to a hearing.

Light v. The Woodstock and Lake Erie Railway and Harbour Company, 172.

6. The plaintiff, a British subject, having gone to reside in the United States, where he had remained for several years, but had never taken any oath of naturalization, or exercised the rights of citizenship in that country, returned to this province, and some months afterwards filed a bill in this court; a motion for security for costs was refused, although several persons swore that his intention was to leave immediately on the decision of the case; the plaintiff having sworn that his intention was to remain in the country.

O'Grady v. Munro, 106.

7. Allowance of Alimony increased from £25 to £200 per annum, it being shown that the husband's income had increased to such an extent as to justify the additional allowance.

Severn v. Severn, 109.

8. The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, and three days afterwards the bailiff was withdrawn. The tenant whose goods had been distrained, thereupon instituted proceedings in an action of trespass against the receiver. The court, under the circumstances, restrained the action.

Simpson v. Hutchison, 308.

9. *Seemle*, that under the general orders, a party seeking to have a declaration of right, and who is not entitled to relief beyond such declaration, cannot file a bill for that only.

*Macklem v. Cummings*, 318.

10. Motions for decree may be set down at any time before the court enters on the paper.

*Clarke v. Hall*, 339.

11. Where a bill was filed to compel a railway company to carry out a contract entered into by their agent for constructing the road, and the evidence taken in the cause shewed that at the prices agreed upon, which the company insisted were most exorbitant, a balance of £12,500 was due the contractor, the court, at the hearing, ordered that amount into court without waiting for the master's report.

*Whitehead v. The Buffalo & L. Huron Railway Co.*, 351.

12. A cause was set down for the examination of witnesses, and when called on the plaintiff was not prepared to proceed. *Held* (overruling the decision in *Wallace v. McKay*, reported in the *Chambers Reports*, page 67.) that the defendant was entitled to have the case struck out of the paper, with the costs of the day.

*Cobourg & Peterborough Railway Co. v. Covert*, 411.

13. Where, at the hearing of a cause, a sale instead of foreclosure had been asked for, and was directed by the decree, which omitted, however, to provide that in the event of the sale failing the defendant should stand foreclosed. The court, upon petition setting forth the facts, and that the attempt at sale which had been made had proved abortive, ordered the defendant to pay the amount which had

been found due, within one month, or in default, foreclosure.

*Goodall v. Burrows*, 449.

14. Where portions of an estate under mortgage are conveyed away by the mortgagor, one day for payment of the amount will be given to all the persons interested in the equity of redemption.

*Hill v. Forsyth*, 461.

15. A plaintiff having obtained a decree in this court for payment of money, registered the same pursuant to the statute 20 Vic., ch. 56, and applied on petition for an order to sell the lands affected by such registration. By the same petition he impeached a sale of the same lands made by the defendant to his mother before the registration of the decree, and sought to have the sale declared fraudulent and void as against him, but the court though strongly impressed with the *mala fides* of the transaction, thought the question raised would be best decided in a suit to be brought to test the validity of the conveyance by the son.

*Fish v. Carnegie*, 479.

16. A notice of motion for a decree is not to be treated as an ordinary motion in the course of a cause, which the plaintiff is at liberty to abandon on the usual terms.

*McLaughlin v. Whiteside*, 515.

17. The plaintiff having given a notice of motion for a decree cannot, without leave, abandon that mode of hearing the cause, and proceed to a hearing in the ordinary way. *Ib.*

18. One of several partners being out of the jurisdiction, and alleged by the bill to be insolvent, a decree to take the accounts and wind up the affairs of the partnership was made in his absence; and he, after the decree had been carried into

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the master's office, returned to this province, and was, by order of the master, made a party defendant in his office. From this order, the defendant, so added appealed: *Held*, that under the 42nd of the general orders of 1853, (section 15,) the master had authority to add such party in his office, and the appeal was dismissed with costs.

*Patterson v. Holland*, 563.

19. *Held Per Curiam*, that an order for payment of money into court, pending a reference to the master to take accounts, &c., is an order upon which the court will stay proceedings upon the perfecting of the security, in the event of the order being appealed from.— [BLAKE, C., dissenting.]

*Whitehead v. The Buffalo & L. Huron Railway Co.*, 578.

20. On a motion for injunction an objection was taken, that certain necessary parties were not before the court, but counsel appearing for the absent parties and consenting to their being made parties; to be bound by the proceedings, and treated as if actually defendants on record. *Held*, that this cured the defect for the purposes of the motion.

*Attorney-General v. The Municipality of Grey*, 592.

See also "Injunction," 1.

### PREMIUMS.

(PAYMENT OF.)

See "Insurance," 5.

### PRINCIPAL AND AGENT.

1. By the death of the principal the authority of an agent is determined. Where, therefore, an agent obtained on credit from parties with whom his principal had been in negotiation previously, a supply of furniture for the house of the principal, in which he had intended carrying on business; but before

any binding agreement was concluded, or the furniture delivered, the principal had died abroad; the court refused to decree a specific performance of the contract to purchase, and ordered the administrators, who had taken possession of the goods, to deliver them to the vendors, and pay the costs of the suit instituted for the purpose of obtaining possession of the furniture, or security for the price of it.

*Jacques v. Worthington*, 192.

2. Upon a bill filed by an infant claiming a conveyance from the defendant, on the ground of his having acted as agent for the ancestor, in obtaining the title, the evidence tended to establish the fact that the property had been purchased by the defendant for his son, and received payments from him, with the understanding that he should obtain a deed when his payments were completed. The court, at the hearing, offered the plaintiff an issue as to the question of agency, or leave to amend the bill upon payment of the costs of the day, and the proceedings that would be thus rendered useless; and if this was refused, ordered that the bill should be dismissed without costs, the defendant's answer having been falsified.

*Jackson v. Jackson*, 114.

3. A widow having a claim to certain lands belonging to the Six Nations Indians, prevailed upon a person to act as agent in procuring the acknowledgment by the chiefs of her title, which was done, after great trouble and expense on the part of the agent, and in accordance with such recognition the crown patent for the land was perfected; whereupon the grantee of the crown conveyed by deed of gift to the agent an individuated moiety of the estate as a reward for

his services in procuring the grant, previously to which she had executed a power of attorney in favour of the agent, authorising him to sell or mortgage all her lands in Upper Canada, and subsequently went to England, where she continued to reside until the time of her death. During her residence there she urged the agent to dispose of her moiety of the property, and in the course of the correspondence stated that she would be willing to accept £1000 for it. The agent, in 1844, having directed the property to be sold by auction, his sister became the purchaser for £628, having authorised the person who attended to bid at the sale, on her behalf, to go as high as £800 for the property. Upon a bill filed by the son and heir of the owner, in 1858, several years after the agent's death, seeking to set aside the deed of gift, as having been obtained by undue influence, and the sale by auction as having been made at a great undervalue; the court, under the circumstances, refused to disturb the title derived under the deed of gift; but set aside the sale by auction, as having been made at a price not warranted by the agent's authority. The infancy of the plaintiff at the death of his mother, and his absence subsequently on duty with his regiment, being deemed sufficient circumstances to excuse the delay which had occurred in instituting proceedings by him; and it was shown that a suit instituted by his mother, during her residence in England, had been dismissed, owing to her inability to procure security for costs to be given.

Kerr v. Lefferty, 412.

4. *Semble*, that an act done by an agent within the scope of his authority, and before any notifica-

tion of its revocation, is good, although it may be entirely revoked at the time.—*Ib.*

5. A power of attorney was prepared and executed by two of four tenants in common, appointing an agent to receive the rents and profits of the estate, and was transmitted to the agent, who had undertaken to procure its execution by the other owners. In fact, the power never was executed by the other proprietors, and the agent, more than a year afterwards, declined to act in the matter, alleging that the execution of the power by all the owners was necessary to enable him to receive the rents. The court, however, held him liable for the rents and profits received, or which but for his wilful default might have been received by him from the time of the power being sent to him, until his repudiation of the character of agent.

Bradburne v. Shanly, 569.

See also "Insurance."

#### PRINCIPAL AND SURETY.

1. *Quere*—Whether the principal is bound to refund to his surety costs of proceedings taken against the surety to enforce payment of the debt of the principal.

Whitehouse v. Glass, 45.

2. A person about to become surety for another, should be informed of all circumstances which may affect his suretyship, and if the party for whose benefit the security is given intentionally conceals such circumstances, the surety will be entitled to have the bond delivered up to be cancelled.

● Cashin v. Perth, 340.

#### PRISONER.

(SECURITIES GIVEN IN EASE OF.)

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delivered to him his promissory note, with an accommodation endorser, at the same time executing a bond with a surety for his appearance in the action, whereupon he was discharged from custody. *Held*, that the transaction was in violation of the provisions of the statute 23 Henry IV., ch. 9, and as such, that the transfer of the note to the bailiff was illegal and void.

*Richardson v. Hamilton*, 281.

#### PURCHASE MONEY.

(PAYABLE BY INSTALMENTS.)

See "Specific Performance," 12.

#### QUIT CLAIM.

See "Redemption," 3.

#### RAILWAY COMPANY.

(ADVANCES TO.)

The municipality of B., being interested in the completion of a railway, by a by-law of the municipal council agreed to loan to the company, in municipal loan fund debentures, the sum of £100,000; for securing the re-payment of which, the company executed to the municipality a mortgage on all the property of the company, and which, by an act of the legislature, was declared to be valid and binding against all the property of the company, *as well that already owned by them, as that which they might afterwards acquire*, and which by a subsequent agreement made for the settlement of certain suits pending between the parties, it was agreed, should be advanced to the company in certain proportions as the work progressed. In compliance with a requisition of the company for funds, "*for work done, and material furnished, and right of way, &c.*," for the use of the railway," the municipal council directed their bankers to hand over to the company an amount of the debentures, which,

upon their being handed over, were immediately seized by the sheriff, under an execution at the suit of the bankers. Upon a bill filed for the delivery up of the debentures, *held*, that so far as the debentures were required for the payment of the right of way, rolling stock ready to be delivered, and other materials not yet become the property of the company, they were impressed with a trust to be applied by the company to the payment of those demands.

*Brockville v. Sherwood*, 297.

#### RECEIVER.

(STAYING PROCEEDINGS AGAINST.)

See "Practice," 8.

#### REDEMPTION.

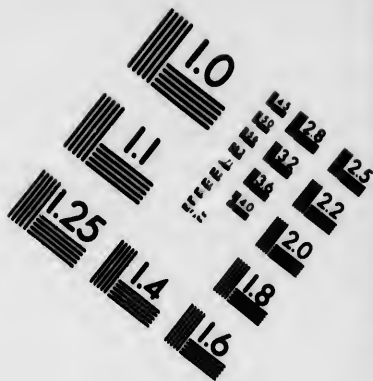
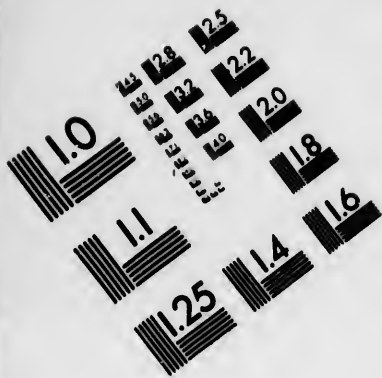
1. The principle, that when a trustee expends his money upon the estate, and thereby increases its value, the property will not be wrested from him without re-paying him the expenditure by which the estate has been substantially improved; acted upon in the case of an infant *cestui que trust*.

*Bevis v. Boulton*, 39.

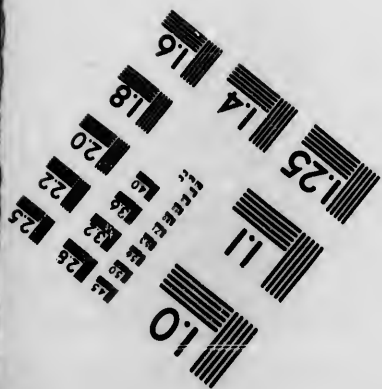
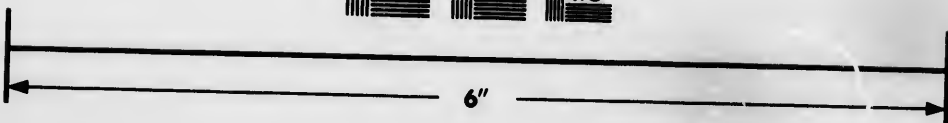
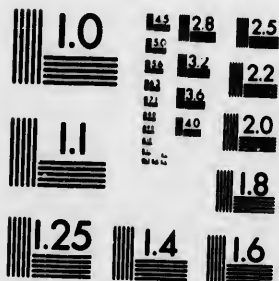
2. The owner of real estate created a mortgage which became absolute, for default of payment, before the passing of the Chancery Act, 7 Wm. IV., ch. 2. Proceedings were subsequently instituted to foreclose the mortgage, and in December, 1842, a final foreclosure was pronounced; and the mortgagor continued to reside in the neighbourhood of the property, until January, 1854, when he died, having devised all his real estate to his widow. The mortgage premises, after passing through several hands, were purchased by the solicitor for the plaintiff in the foreclosure suit. It having been discovered that the mortgagor had died some time before







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the day appointed for payment of the money, the widow filed a bill to redeem, but neither the solicitor nor his agent who conducted the suit to foreclose, nor either of the purchasers of the property were aware of that fact, or of any defect in the proceedings. The court, under the circumstances, held that this was a proper case in which to withhold redemption, under the discretion given to the court, under the eleventh clause of the Chancery Act; that the purchasers could not reasonably be held to have constructive notice of the defect in the proceedings, and dismissed the appeal with costs.

Arkell v. Wilson, 270.

3. The plaintiff having a bond for a deed from one W., assigned the same to C. by way of security only. By a quit claim deed C. conveyed to K. Held, that such a conveyance was a mere transfer to the purchaser of whatever title the grantor had, and did not place him in any better position than his assignor.

Graham v. Chalmers, 597.

#### RE-HEARING.

A decree was pronounced setting aside a conveyance, and the defendant being dissatisfied therewith, obtained a re-hearing of the cause. Upon the re-hearing, the decree originally pronounced was affirmed with costs, and a further direction made that the defendant should execute a conveyance to the plaintiff.

Harkin v. Rubidon, 243.

#### SALE.

1. In a suit for the sale of mortgage property, it appeared that a mesne incumbrancer held a mortgage on other property of the mortgagor; the court ordered an account to be taken of what was due on both

securities and in default a sale, but in the event of a sale taking place, the premises would be conveyed to the purchaser relieved of any lien of such subsequent mortgagee.

Merritt v. Stephenson, 22.

2. On the agreement for sale of a steambot, the vendor delivered possession to the vendee, and executed a covenant binding himself to transfer the vessel with her machinery and furniture to the purchaser absolutely, upon payment of the balance of purchase money by certain instalments. And if default were made in payment of any portion thereof it was provided that the vendor should be at liberty to resume possession of the vessel, with her machinery and furniture. The court granted an injunction, restraining the purchaser from removing the machinery from the vessel, so long as any part of the purchase money remained unpaid.

Laughton v. Thompson, 30.

See also, "Landscrip."

"Practice," 13, 15.

#### SECURITY FOR COSTS.

See "Practice," 6.

#### SET-OFF.

Where a plaintiff at law filed a bill in this court to enforce his judgment, the court, under the circumstances, directed a reference to the master to take an account between the parties, the defendant claiming to have had a set-off to a greater amount than the judgment, although the general rule is, that a party neglecting to set-off his claim at law, cannot afterwards apply to this court to have the benefit of it.

Cameron v. McDonald, 402.

#### SETTLEMENT.

(ON WIFE AND CHILDREN.)

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about to enter into a business partnership, made a settlement of his property on his wife and children. The evidence shewed that it was made at the instance of the settlor's wife, who thought the settlor ought to do so, *having regard to the uncertainties of business,*" and "was made with a view to save the property from any debts which might arise in consequence of the partnership." *Held,* that the settlement so made was void as against subsequent creditors; although at the time of the settlement the settlor was in perfectly solvent circumstances and no intention of fraudulently withdrawing his assets could be imputed to him, and the property in question was partly paid for by money given to the wife by her father.

Buckland v. Rose, 440.

See also, "Marriage settlement."

#### SIMPLE CONTRACT CREDITOR.

See "Fraudulent Conveyance."

#### SPECIFIC PERFORMANCE.

1. In a contract for the sale of property, it was agreed to be paid for, in part, by an assignment of a mortgage, to be obtained from a third party. Afterwards the purchaser alleged the refusal of the mortgagee to assign. The court, under the circumstances, refused to decree specific performance, but directed an enquiry, whether or not the mortgagee was still willing and able to assign the mortgage.

Arnold v. Hull, 47.

2. In suits for the rectification of deeds, the court is in the habit of allowing great weight to the statements made by the answer in opposition to the relief sought by the bill: where, therefore, on the sale of a steamboat, the vendors gave a

bond binding themselves unconditionally to procure a conveyance of the vessel to be executed to the purchasers within three months thereafter, and delivered possession to them; but the conveyance was not made as stipulated, and two years afterwards the vessel was taken out of the possession of the purchasers, upon process issued against the owner, and under a mortgage previously existing upon the vessel. A bill was filed by the vendors for the rectification of the bond, by introducing therein certain stipulations, set forth in a memorandum made by the holder of the incumbrance at the foot of the vendor's bond, and which the incumbrancer swore he had made in order that the purchaser might have notice of his claim, and also a receipt given by him when paid part of the claim he held against the vessel; the purchasers, in their answer, asserted that they never had intended to abridge their rights under the bond, and never would have consented to the introduction therein of any stipulations which would have had that effect; and as the alteration of the bond in the manner proposed would have had the effect of materially affecting the rights of the purchasers to their prejudice, and there was nothing inconsistent in the facts being as the purchasers alleged them to be; the court, under the circumstances, refused the relief prayed, and dismissed the bill with costs.

Cotton v. Corby, 50.

[Affirmed on appeal, 3rd Feb., 1860.]

3. Upon a bill filed by an infant claiming a conveyance from the defendant, on the ground of his having acted as agent for the ancestor in obtaining the title, the evidence tended to establish the fact that the property had been pur-

chased by the defendant for his son, and received payments from him, with the understanding that he should obtain a deed when his payments were completed. The court, at the hearing, offered the plaintiff an issue as to the question of agency, or leave to amend the bill upon payment of the costs of the day, and the proceedings that would be thus rendered useless; and if this was refused, ordered that the bill should be dismissed without costs, the defendant's answer having been falsified.

Jackson v. Jackson, 114.

4. Where a bill by a purchaser seeking specific performance of a contract for the sale of lands, is dismissed because a good title cannot be shewn, the court will order a sum on account of the purchase money to be returned to the purchaser, and in default, give him a lien thereon on the estate agreed to be sold; but in such case, unless the vendor has been guilty of fraud in the transaction, the bill will be dismissed without costs.

Hurd v. Robertson, 142.

5. A party had entered into an agreement to accept a lease of land, but in preparing the conveyance in pursuance of such agreement, he insisted pertinaciously upon a stipulation being introduced into the lease which it was subsequently shewn he had not any right to call for, and he ultimately waived his claim to it; but, having previously declared he would never accept of a lease which did not agree with his interpretation of the contract, the owner of the land treated the agreement as at an end, and proceeded to erect a valuable building upon it. The proposed lessee thereupon filed a bill for specific performance of the agreement according to the interpretation put there-

on by the lessor. *Held*, reversing the decree of the Court of Chancery, that the plaintiff was not entitled to the relief sought, and that his bill in the court below should be dismissed with costs—Spragge, V. C., [dissenting.]

Spinger v. Gray, 276.

6. A testator devised his lands to trustees, to distribute and divide the same amongst his wife and children, so soon as the youngest surviving child attained twenty-one. The trustees professing to act in pursuance of the powers given by the will, put up portions of the property at auction for an absolute term of twelve years, at the expiration of which the youngest child would attain twenty-one, with a privilege to the lessee of removing any buildings that might be upon the premises at the expiration of the term, and the lease as prepared by the trustees, gave to the lessee a right of purchase at the expiration thereof; or if he dec<sup>d</sup> purchasing, stipulated that improvements would be paid for by the lessors. On a bill filed by the trustees to enforce specific performance of this contract, *Held*, that the agreement was *ultra vires*, and the bill was dismissed without costs, the defendant having set up several grounds of defence which entirely failed.

Dalton v. McBride, 288.

7. A signed agreement expressed that the subscribers had purchased at auction the lots of land set opposite to their names respectively, according to the terms of sale made known at the time of sale, and they agreed to take the deed, bond, or agreement, or lease, as the case might be, to each of them individually, on condition of their having made the payments according to the conditions of sale. The con-

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ditions of the sale, thus referred to, had been printed and distributed in hand bills, and were read to the purchasers at the auction. *Held*, that the conditions of sale were sufficiently referred to by, and incorporated with, the signed agreement, so as to constitute a binding contract in writing, within the Statute of Frauds. *Ib.*

8. Upon an agreement for the sale of real estate which had been previously laid out into building lots, the purchaser's agent signed a memorandum to the following effect: "The purchase from the bank is to cover the entire property of the C. estate, within the original boundaries, except that sold off, with appurtenances and privileges, so that the purchaser may make arrangements with the purchasers of lots to close the streets laid out if desirable." The purchaser refused to complete the purchase, on the ground that without the power of shutting up one of the streets, the object for which he had effected the purchase would be entirely frustrated, which object he had communicated to the agent of the vendors at the time of negotiating for the purchase. *Held*, notwithstanding, that the purchaser was bound to complete the contract.

The Commercial Bank v. McConnell, 323.

9. The purchaser of real estate, on which was erected a grist mill, in pursuance of the agreement for purchase, took possession, and while in occupation, made several alterations in the property; took the mill gearing and machinery from the premises, and removed the partitions in the mill, intending to convert the mill into a planing factory; and the expense of restoring the property to the condition in which it was

when he entered into possession, was variously estimated at from £100 to £500. *Held*, that by these acts the purchaser had waived his right to call for a good title.—*Ib.*

10. An agreement by letter was entered into by an intending lessee, to take a lease for years of a house; and that the rent agreed upon should be increased according to the amount which might be afterwards expended by the owner in improvements upon the property. In pursuance of such agreement the party entered into possession, and paid rent according to the stipulations contained in the letters. The municipal authorities afterwards constructed a bridge near the property, which the tenant asserted injuriously affected his occupation. *Held*, notwithstanding, that the defendant was bound to accept a lease in the terms agreed upon.

Dennison v. Kennedy, 342.

11. Where the vendor sells only such title as he has, the purchaser cannot require a good title to be shown, but will be compelled to complete his purchase although the vendor does not shew a good title, or although the title appears to be not good. But where a vendor by the terms of the agreement, bound himself to convey only as good a title as he could obtain from his vendor, and it was shewn that neither of these parties had any title whatever to the property agreed to be sold, and that the vendor had misrepresented the state of the title, and had induced the purchaser to give the full value of the land: the Court [BLAKE, C., diss.] refused to enforce the agreement; but, under the circumstances, dismissed the bill without costs.

Leslie v. Preston, 434.

12. On a purchase of land, the price for which is payable by instalments, the purchaser, although not entitled in the meantime to call for a rescission of the contract, may require his vendor to shew a good title before parting with any portion of the purchase money; and in the event of the vendor taking proceedings to enforce payment, the purchaser, upon bringing into court the amount of principal and interest actually due, will be entitled to an injunction to restrain the action, until the title has been investigated; and the fact that prior instalments of the purchase money have been paid will not disentitle the purchaser to insist upon a good title being shewn.

*Thompson v. Brunskill*, 542.

[See also, *Crooks v. Glenn*, post vol. 8.]

13. Specific performance will not be decreed where the terms of the contract signed by the parties are uncertain; nor will it be decreed where it is plain from the evidence that there was a misunderstanding; where, therefore, the terms of the agreement contained in a letter written by the intending purchaser were, we "will give you for your mill privilege in Laxton, with all the improvements, including the saw logs, and your claim on the land you applied for, viz., the north-half of 6, in the 11th, and the north-half of 7, in do.; lots Nos. 6 & 7, in the 10th concession, four thousand dollars," &c. In reality the premises mentioned comprised two mill privileges, but the vendor insisted that only one was embraced in this agreement, and filed a bill to enforce the specific performance of the contract according to this construction; whilst the defendant by his answer insisted that both were included in his offer to pur-

chase: the court dismissed the bill, but without costs; the defendant insisting upon the case being heard by way of motion for decree, pursuant to a notice given by the plaintiff, from which he afterwards desired to withdraw.

*McLaughlin v. Whiteside*, 573.

14. The eldest son and heir-at-law of a person who had, in his life time, agreed for the purchase of land from the Canada Company, left this country without in any manner attempting to complete the purchase. The other children of the purchaser paid the balance of the purchase money due on the land, and sold it in portions to three several purchasers. In a suit brought in the name of the several purchasers against their vendors and the Canada Company it appeared that the heir-at-law had not been heard of for upwards of twenty-five years. The court, under the circumstances, ordered the conveyance of the several portions to the purchasers, without requiring any administration of the estate of the heir-at-law; the Canada Company not objecting thereto.

*Burns v. The Canada Company*, 587.

15. Upon a contract for sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to save harmless and indemnify the purchaser against the incumbrance, and a sum of £500 by way of liquidated damages for non-performance by either party was to be paid to the other. The court held that this did not enable either party to repudiate the contract upon paying to the other £500; and in a suit by the vendor a reference as to title was directed, but without the usual declaration that the plaintiff was entitled to specific per-

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formance, reserving a right at the hearing on further directions to refuse specific performance, in the event of the vendor failing to effect or endeavouring to effect an arrangement with the mortgagees, which the vendor alleged he could make; and held also, that the fact of the vendor being a partner in a mercantile firm who, since the execution of the contract, had made a composition with their creditors, was not such an objection as could resist the claim to specific performance.

Fisken v. Wride, 598.

16. By the terms of the contract for the sale of certain real estate belonging to infants, it was stipulated that if, at the end of seventeen months, the approval of the Court of Chancery had not been obtained to the sale then made, the contract should be at an end, thus rendering time of the essence of the contract. The sale was not completed by the time specified, and some months afterwards the purchaser acquiesced in proceedings then taken to perfect the title. *Held*, that he had waived the condition that time should be of the essence of the contract.

McDonald v. Garrett, 696.

17. *Semble*—A purchaser cannot file a bill for a rescission of his contract, but must wait until the vendor attempts to enforce the agreement.—*Ib.*

See also "Judgment Creditor," 3.

### SUBSTANTIAL IMPROVEMENTS.

See "Redemption," 1.

### TENANT IN COMMON.

A tenant in common, upon satisfying the court that the cutting of timber by his co-tenant operates to

the destruction of the inheritance, is entitled to an injunction.

Proudfoot v. Bush, 518.

See also "Principal and Agent," 5.

### TENANT FOR LIFE.

#### (PAYING OFF INCUMBRANCES.)

A testator devised certain lands to his wife for life, remainder to such of his children as she should appoint, and failing issue to such child or children of J. C., as she should appoint. The property, it was alleged, was incumbered to its full value, which incumbrance the widow directed to be paid out of her own funds, and appointed the estate to the defendant M. C.—Upon a bill filed to have the sums so paid by the widow declared a charge on the estate, evidence was directed to be given as to whether the estate was of considerably greater value than the claims so paid off, in which case it would be declared that the widow had a lien thereon for the amount advanced by her; but if otherwise, it would be intended that the appointment of the estate had been made freed and discharged of such claim.

Macklem v. Cummings, 318.

#### TIME.

(ESSENCE OF CONTRACT, WAIVER.)

See "Specific Performance,"

#### TITLE.

(ACCEPTANCE OF.)

See "Specific Performance," 9, 11, 12.

### TRUSTEE AND CESTUI QUE TRUST.

1. Lands were held in trust for the separate use of a married woman, and upon her death, in trust for her surviving children; and also to sell or lease any portion thereof with the consent in writing of the *cestui que trustent*, attested by one witness,

and reinvest the proceeds of such sales. In pursuance of a request to that effect, the trustees created a mortgage to a person for the purpose of negotiating it, in order to evade the usury laws. *Held*, that the trust for sale did not authorise the execution of this mortgage, and that the same was void as against the children. But it being alleged that the wife had participated in the misappropriation of the trust fund, further enquiry was directed on that point, with a view to making her life interest liable for the money advanced.

Nowlan v. Logie, 88.

2. A debtor, in August, 1846, conveyed all his estate, real and personal, in trust, for the benefit of his creditors. Part of the property conveyed was a lot of land containing about 113 acres, which, in the schedule of assets, was valued at £100. In September, 1852, an intended sale by the trustees at £175 was objected to by the debtor, on which occasion he asserted that the front 20 acres of the lot were worth £200. After several fruitless attempts to sell both by the debtor and the trustee, a sale was effected in January, 1856, for £1300. In answer to a bill filed to set aside this sale on the ground of inadequacy of price, it was shown that in March, 1855, the best price the debtor had been offered, after endeavouring for two years to sell the property, was £1500, payable partly in railroad bonds, and that the trustee and others interested had afforded the debtor ample opportunity of redeeming the estate upon the payment of the price for which it was agreed to be sold. The court, under the circumstances, refused to interfere.

Linton v. Michie, 182.

3. The decree pronounced in the case of *Beckett v. Wragg*, as report-

ed ante volume VI., page 451, reversed on appeal, and the bill in court below dismissed with costs.

*Wragg v. Beckett*, 220.

4. A trustee having refused to allow his name to be used as plaintiff, was refused his costs of defence, although no blame attached to him in other respects.

*Ellis v. Ellis*, 102.

5. The owner of real estate conveyed the same to trustees for his daughter E. S., one of whom was her husband, to dispose thereof "in such manner as the said E. S., her heirs and assigns, may at any time advise or direct, and to make such leases, and further, to make such conveyances in fee simple of the said lands, &c., as the said E. S., her heirs, &c., may at any time advise or direct." The trustees created a mortgage in which E. S. joined. *Held*, that the conveyance to the trustees effected a settlement to the separate use of E. S.: that her joining in the mortgage was a sufficient direction to the trustees: that the mortgagee was not, under the circumstances, bound to see to the application of the money, and that in default of payment he was entitled to the usual decree of foreclosure.

*Place v. Spawn*, 406.

See also "Infant."

"Power of Sale."

"Redemption," 1.

## USURY.

For the purpose of raising money a sale of bank stock was made by the lender to the borrower at a premium, but owing to the bank books being closed the transfer was never completed, and the lender re-purchased the stock at par: *Held*, that an objection to this transaction on

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the ground of usury should have been taken by the pleadings.

Proudfoot v. Bush, 518.

See also "Mortgage," 5.

### VARYING DEED.

See "Deed," 2, 3, 4.

### VENDOR'S LIEN.

1. Where a suit to enforce by sale a vendor's lien is instituted against the heirs as law of the purchaser, the widow of the vendee is a necessary party in respect to her right to dower.

Paine v. Chapman, 179.

2. The defendant, a minor, purchased an estate, and gave the vendor a mortgage for the purchase money. The mortgage was afterwards assigned to the plaintiff. On coming of age the defendant repudiated the mortgage, but adopted the purchase by bringing an action to recover possession. The mortgage, being the deed of an infant, was holden absolutely void. But it was also holden that the mortgage being void, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by assignment of the mortgage.

Grace v. Whitehead, 591.

### VENDOR AND PURCHASER.

1. A decree was pronounced setting aside a conveyance, and the defendant being dissatisfied therewith, obtained a re-hearing, of the cause. Upon the re-hearing, the decree originally pronounced was affirmed with costs, and a further direction was made that the defendant should execute a conveyance to the plaintiff.

Harkin v. Rabidon, 243.

2. Where property is sold upon credit, and the vendor executes to the purchaser a bond for the due conveyance of the estate, free from

incumbrances, on payment of the last instalment of the purchase money, the purchaser cannot, during the currency of the term of credit, call upon the vendor to remove a mortgage created by him upon the property, or to allow the purchaser to apply his purchase money as it becomes payable in discharge of the incumbrance.

Chantler v. Ince, 432.

### WASTE.

See "Injunction," 5.

### WILFUL DEFAULT.

See "Administration Order."

### WILL.

#### (CONSTRUCTION OF.)

1. A testator devised all his real and personal estate to his wife for life; and upon her decease, his real estate to his daughter for life, remainder to her son in fee; with liberty to the daughter and her husband to occupy the land, provided they supplied his widow with a comfortable support and maintenance out of the same during her life, and if they did not do so to her satisfaction, that the executors should have power to sell or lease the land: *Held*, that the duty of supplying the widow with maintenance was conditioned upon the parties occupying the land; and a sale effected by the executors in default of their supplying the widow with such support, although not occupying the land, was declared void.

Dougherty v. Carson, 31.

2. A testator by his will devised all his real and personal estate to trustees, and declared that it should be lawful for them, or the survivor of them, or the heirs, executors, and administrators of such survivor, to make sale and dispose of all or any part of the said farms, lands, &c., either together or in parcels, and

either by public auction or private contract, and for such price and prices as to them or him should seem fit and reasonable, and to lay out and invest the money to arise from such sale or sales in the purchase of stocks, government or real securities, in the province of Canada. *Held*, that the power or trust was discretionary not only as to the time of sale, but also as to whether there should be a sale at all or not.

Rowse v. Winstanley, 141.

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Stanley, 141.

