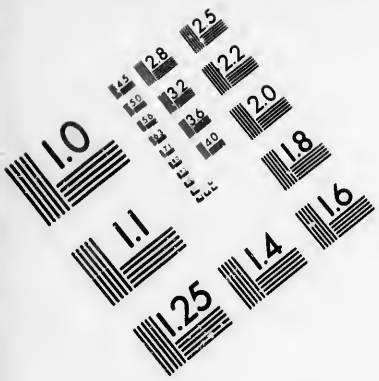

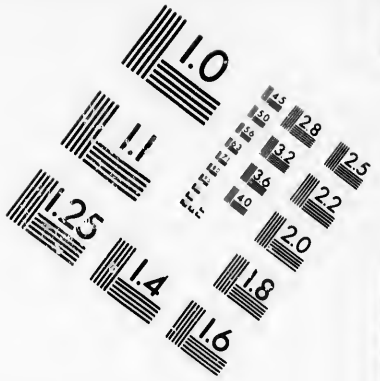

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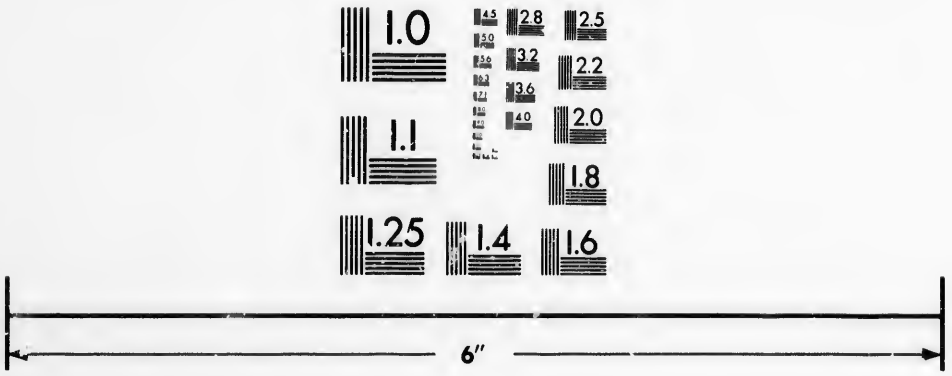

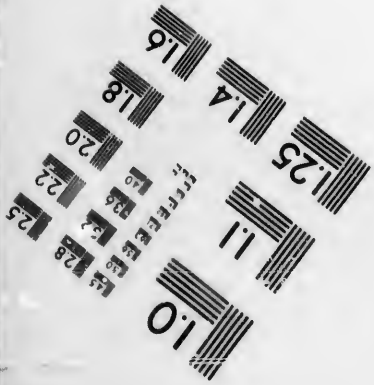

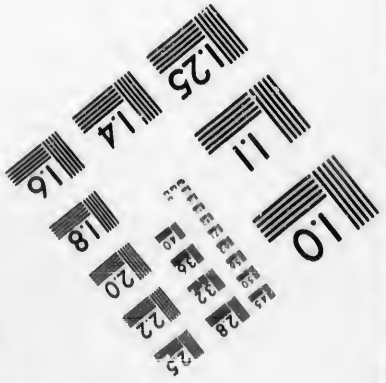

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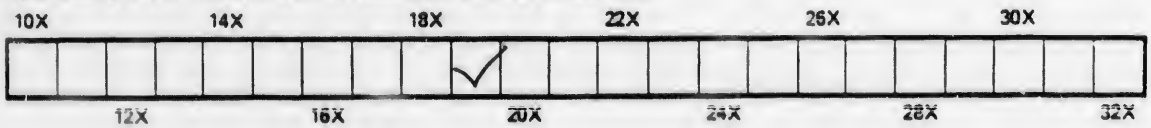

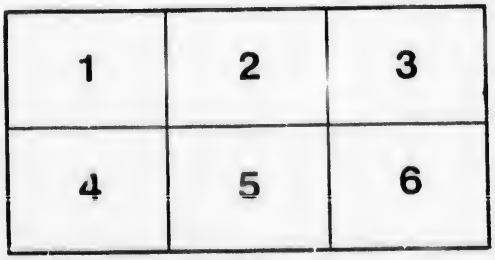

ARGUMENT,

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On the 10th day of August, 1850, an Act was passed by the Parliament of Canada, entituled "An Act to enable the Municipal Corporation of the City of Toronto to assist in the construction of the Toronto, Simcoe, and Lake Huron Union Railroad," in the terms following.

"Whereas the Municipal Corporation of the City of Toronto have, by almost an unanimous vote, resolved that so soon as legal authority shall have been obtained to enable them to assist the Railroad Company incorporated by Act of Parliament of this province passed in the 12th year of Her Majesty's reign entituled, *An Act to incorporate the Toronto, Simcoe, and Lake Huron Railroad Company* in the construction of their intended railroad: the said Municipal Corporation is prepared to do so on certain terms and conditions more fully set forth in a certain report of the Finance Committee of the said Municipal Corporation adopted in Council on the 29th day of July now last past. And whereas George Gurnett, Esquire, Mayor of the City of Toronto, hath, by his Petition to the Legislature, prayed, on behalf of the Mayor, Aldermen, and Commonality of the said city, that authority might be conferred on the said Municipal Corporation of the said city, so soon as responsible parties shall have subscribed to the amount of One Hundred Thousand Pounds in the Capital Stock of the said Railroad Company, and in other respects

shall have complied with the terms, conditions, and regulations required by the said Municipal Corporation, to issue Debentures of the said Municipal Corporation to the like amount or stock so subscribed. And whereas it is d sirable and expedient that power and authority should be given to the said Municipal Corporation to assist the said Railroad Company in such manner as the said Municipal Corporation shall deem advisable, and that similar power should also be given to each Municipality through whose jurisdiction the railroad of the said Company may pass: Be it therefore enacted, &c., that it shall and may be lawful for the Mayor, Aldermen, and Commonalty of the city of Toronto, in pursuance of any by-law of the said Municipal Corporation, in the name or on the credit and behalf of the said Municipal Corporation, to issue Debentures to an amount not exceeding One Hundred Thousand Pounds, nor in sums less than Five Pounds each, for and towards assisting in the construction of the proposed railroad of the said Company, and to provide for and secure the payment thereof in such manner and way as to the said Municipal Corporation shall seem proper and desirable: and furth that it shall and may be lawful for the said Municipal Corporation of the city of Toronto, and any other Municipal Corporation, within or through whose jurisdiction the proposed railroad of the said Company may pass, to assist otherwise in the construction and forwarding of the said proposed railroad in such manner as to any such Municipal Corporation may seem proper and desirable on grounds of public utility."

The second clause of this Act authorised other Municipalities through whose jurisdiction the said railroad might pass to issue Debentures in like manner to an amount not exceeding Fifty Thousand Pounds, and the third and last clause of the Act empowered the Municipalities so issuing Debentures to nominate Directors of the Company upon certain terms in the clause specified.

Upon the 25th day of November, 1850, the Common Council of the city of Toronto, upon the urgent request of

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divers inhabitants, and of the Board of Trade of the city of Toronto, adopted the following resolution :—

"Resolved that the sum of £25,000 in Debentures payable "twenty years after date, with interest at six per cent. per "annum, payable half-yearly, be granted in aid of the Ontario, "Simcoe, and Huron Union Railroad Company on the con- "ditions set forth in the second clause of the Report No. 21 "of the Standing Committee of Finance and Assessment; and "in order to extend the benefits of the said railroad to all "parts of the city, it be another condition of the above grant "that the terminus for passenger trains shall be erected on a "portion of the Market block property, now vacant, such "portion to be leased to the Company at a nominal rent for "99 years, and that the line of railroad shall be carried along "Palace and Front Streets to the full extent of the City "Water-lots."

The Report of the Standing Committee of Finance and Assessment referred to in the above resolution was dated 21st November, 1850, and was as follows:

"A deputation from the Board of Directors of the Toronto, "Simcoe, and Lake Huron Railroad Company, consisting of "Messrs. Boulton, Barrow, Capreol, and Morrison, waited on "the Committee with the following proposition, viz.: to "know if the Corporation would grant the sum of £25,000 to "assist in completing the Toronto and Lake Huron Railroad; "parties now being found willing to contract for the comple- "tion of the same in two years and a half from the present "time, (21st of November, 1850,) provided the Corporation "grant the above sum. The Committee are of opinion that "should £25,000 be granted by the Corporation, it should be "in either of the following proportions.—1st. That £25,000 "be granted to assist in completing the said road, advanced "as follows: £12,500 when £75,000 are expended and the "remaining £12,500 when £150,000 are expended. 2nd. In "the proportion as the work progresses as one is to ten "£100,000 to be expended on the road before any advance "is made by the Corporation; then Debentures *to be issued*

"*to the Contractors* for £10,000, and that all future advances "be made in the same proportion to the amount of £25,000."

The parties referred to in the above Report as "*the Contractors*" were Messrs. M. C. Storey & Co., who, more than £100,000 of Stock having been subscribed for and taken, had made a contract with the Railroad Company for the construction of the railroad conditional upon the above sum of £25,000 being granted by the Corporation of Toronto; and by the agreement between Messrs. Storey & Co., and the Railroad Company it was provided that the Debentures to be issued by the Corporation for the said sum, if granted, should be the absolute property of the said Messrs. Storey & Company.

Immediately upon the passing of the resolution of the 25th November, 1850, the agreement between the Railroad Company and Messrs. Storey & Company was finally concluded, and Messrs. Storey & Company proceeded with the construction of the Railroad upon the faith of the above resolution of the 25th November, 1850, and relying upon its terms being faithfully carried out.

After the passing of the resolution of the 25th November, 1850, and in the month of January, 1851, the general election for municipal officers took place, and the result of the election was in favor of persons throughout the city who had either in Council voted for or who approved of the vote in Council upon the Resolution of 25th November, 1850, and it was generally deemed that the ratepayers on the occasion of the said general election approved of the said resolution; the ratepayers of St. James' Ward, with full knowledge of the resolution re-elected Mr. Bowes as Alderman for that ward, and he was by the Common Council elected as Mayor of the city for the latter year.

In the summer, 1851, a public meeting of the ratepayers of the city of Toronto was held, presided over by John Arnold, Esquire, an inhabitant and ratepayer of the said city, at which meeting several resolutions were passed recommending the Common Council of the city to extend further aid by a loan to the Railroad Company, and on the 8th day of August,

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1851, the Manager of the Railroad Company aided by the resolutions passed at the said public meeting applied to the Common Council of the said city, of which the Appellant was then the Mayor, for the loan of £35,000 upon certain conditions set forth in the said resolutions passed at the said public meeting, which application and resolutions were referred to a select Committee of the Council. On the 18th day of August, 1851, the select Committee reported thereon as follows:—

"That upon the most attentive consideration given by your "Committee to the propositions signed by Mr. Arnold as "Chairman; and after frequent interviews with the Manager, "as well as with one of the Contractors of the Company, your "Committee would recommend that, in lieu of the propositions, "or either of them, the Council loan to the said Company their "Debentures to an amount not exceeding £35,000 payable in "twenty years, with interest on the same payable half-yearly, "issuable in the same ratio *as the Bonus of* £25,000, taking "as security for such Debentures the bonds of the said Com-"pany, to the same amount payable in *ten years* with interest "half-yearly secured on the road to the satisfaction of this "Corporation, upon the recommendation of the city Solicitor. "And further that it be a condition to this loan that the road "from this city to Lake Simcoe or the Holland river be com-"pleted in two years from the 1st of January next. And "further that as long as the loan of £35,000 continues the "Mayor of the city for the time being, if he be not a Director "in any other Company, be a Director of the above-mentioned "Company; and if he be a Director in any other Company, "then any Alderman of the city for the time being to be "nominated by the Council to be a Director in the said "Company."

The report was almost unanimously adopted by a resolution of the Common Council of the city of Toronto on the said 18th day of August, 1851.

At this meeting of the Common Council the Appellant acted only in his capacity of presiding officer as Mayor of the city. By the agreement made by Messrs. Storey & Company and the Railroad Company it was among other things provided,

that as a means of securing payment to the Messrs. Storey & Company for the construction of the road, the Railroad Company should secure private subscriptions of Stock in the Capital of the said Railroad Company to an amount of about £50,000 over and above an amount of Stock agreed to be taken by the Messrs. Storey & Company themselves. The Railroad Company failed in fulfilling this part of their agreement and succeeded in getting only £15,000 of such private Stock instead of £50,000 subscribed, and, by reason of such default of the Railroad Company, they were unable to pay the Messrs. Storey & Company in the manner agreed upon, and in consequence, the Railroad Company exerted themselves to get the Corporation of the city of Toronto to advance by way of loan the deficit of £35,000 and it was agreed upon between the Railroad Company and the said Messrs. Storey & Company that, upon the faith of the resolution of the Common Council of the city of Toronto which was passed on the 18th of August, 1851, they the said Messrs. Storey & Company should discharge the Railroad Company from their obligation to procure £50,000 of Stock to be subscribed, and should in lieu thereof accept the Bonds of the Railroad Company to the amount of £35,000, to be exchanged for the Debentures of the said city of Toronto when the same should be issuable under the said resolution of the 18th of August, 1851.

Upon the passing of the said resolution of the 18th day of August, 1851, and very shortly thereafter the said Messrs. Storey & Company acting on the faith and belief that the said resolution would be faithfully kept and adhered to, by and on behalf of the said city of Toronto, did discharge the said Railroad Company from the obligation to provide the said deficit of £35,000 of private Stock and did, in lieu thereof, accept the Bonds of the said Railway Company to the said amount of £35,000 and did use and pledge and hypothecate such Bonds as their own absolute property upon the assurance that, and upon the faith and belief that, they should be exchanged for Debentures of the said city of Toronto to be issued under the said resolution of the 18th day of August, 1851, as the works upon the said railroad should be proceeded

with. And upon the like faith and assurance the said Messrs. Storey & Company did raise and expend upon the construction of the said railroad divers large sums of money upon the security of their right to receive the said Debentures of the city of Toronto to the said amount of £25,000 under the said resolution of the 25th day of November, 1850; and from and after the agreement as aforesaid being made between the said Messrs. Storey & Company and the said Railroad Company in consequence of the said resolution of the Common Council of the city of Toronto of the 18th of August, 1851, they the said Messrs. Storey & Company regarded themselves and were regarded by the said Railroad Company, as, and the said Messrs. Storey & Company represented themselves to the public to be, and were treated with and regarded by the public as being, the parties entitled to receive the said Debentures of the city of Toronto to be issued for the said £35,000 in exchange for the said Bonds of the said Railway Company to the like amount: and that the right of the said Messrs. Storey & Company, or their assignees of the Bonds of the said Railroad Company, to the said amount of £35,000 to the Debentures of the said city of Toronto to be issued under the said resolution of the 18th of August, 1851, was absolute, and that under the said resolution the period only for the issuing of the said Debentures was postponed until the work upon the said railroad should be proceeded with, as contemplated by the said resolution of the 18th day of August, 1851. On the 15th day of May, 1852, Messrs. Storey & Company had performed work on the railroad to an amount which entitled them then to receive £10,000 of Debentures under the resolution of the 25th day of November, 1850, and and other £10,000 Debentures under the resolution of the 18th day of August, 1851.

On the 11th day of June, 1852, the Secretary of the Railroad Company made application to the Finance Committee of the Council to have the object of the resolutions of the 25th of November, 1850, and the 18th of August, 1851, perfected. This application was taken into consideration by the Finance Committee upon the 21st of June, 1852, and the Finance

Committee adopted thereon the following resolution contained in a copy of the minutes of the Finance Committee upon that occasion.

"The communication of the Secretary of the Ontario, Sim-
"coe and Huron Railroad was considered. The Committee
"agreed to report a By-law for the issue of £25,000 Grant,
"and £35,000 loan, in favour of the said Company; at the
"same time recommending the Council to issue the sum of
"£10,000 now asked for, so soon as the certificate of a com-
"petent Surveyor, unconnected with the Company, shall be
"furnished to the Council, to the effect that the sum of £100,-
"000 had been bona fide expended on the said road."

On the evening of the 21st of June, 1852, the Finance Committee made a report to the Council in the terms contained in the minutes of the proceedings of the Committee of that day, and the By-law reported by the Finance Committee was read a first time by the Council, and ordered to stand for a second reading at the then next meeting of the Council; and the report of the Finance Committee, which recommended the issue of £10,000 upon the certificate of an engineer, as mentioned in the minutes of the proceedings of the Committee, was adopted by the Council. Upon the debate in Council, on the first reading of the above By-law, it was, for the first time, suggested, that it would be necessary to comply with certain formalities, prescribed by the General Municipal Acts, which would cause delay in passing the By-law; and it was further suggested that a sinking fund would have to be provided, which was not provided by the By-law introduced into the Council. The majority of the Council were of opinion, that the general Municipal Acts did not apply, (in this particular case,) but that the Council, under the Act of the 10th of August, 1850, had the power of passing the By-law in the terms in which it was introduced, and without incurring the necessity of the delay suggested. Actuated as well by this belief, as by the belief that the suggested objections involved only form and delay, and that the Council was in morality and equity bound by the resolutions of the 25th November, 1850, and the 18th of August, 1851, to give legal effect to

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those Resolutions, the By-law, as introduced, was read by the Council a first time as above stated; but it was suggested that the Finance Committee should take the opinion of Counsel as to the validity of the suggested objections to the By-law. On the 23rd of June, 1852, the Finance Committee met, and merely came to the resolution, that the opinion of two gentlemen of the Bar should be taken. Two opinions were accordingly taken; and on the morning of the 28th June, 1852, the Finance Committee met, to take those opinions into consideration; and they came to the conclusion thereon, appearing in the following copy of their minutes of that day.

"The opinions of Messrs. Hagarty and Mowat, in relation "to the legality of the By-law for the issue of £60,000 De- "bentures, in aid of the Ontario, Simcoe, and Huron Railroad, "were considered. The substance of the said opinions being "adverse to the legality of the said By-law, unless advertised "for three months, and also drawn up in accordance with the "provisions of the Municipal Corporation Acts of 1849, 1850, "and 1851, including the imposition of a special rate for the "redemption of the principal and interest within twenty years. "The Committee authorised the Chairman, Mr. Thompson, to "communicate with the Directors of the Ontario, Simcoe, and "Huron Railroad Union Company, with the view of ascer- "taining their wishes on the subject."

The Chairman of the Finance Committee did accordingly, immediately, on the same 28th of June, wait upon the said Directors, and had an interview with them, and also with one of the members of the said firm of Messrs. M. C. Storey & Company, who were the parties immediately interested in the issue of the said City of Toronto Debentures.

The Messrs. Storey & Company relying upon the resolutions of the 25th November, 1850, and the 18th of August, 1851, being faithfully carried out by the Common Council of the City of Toronto; (previously to the said 28th of June, 1852, believing themselves to be entitled to a punctual receipt of the Debentures, in a ratio proportionate to the progress of the Railroad, as specified in the Resolutions of the 25th of November, 1850, and the 18th of August 1851;) had not only, for

the purposes of the said Railroad, already pledged and hypothecated some of the said Debentures, and their right to receive them, but had also, upon the faith of the punctual receipt of the said Debentures, purchased a large quantity of iron, for the purposes of the said Railway, at prices to be paid in cash, on delivery of the said iron. The iron so purchased was, on the said 28th of June, coming out from England, and a large portion of it was then at sea, on the way out, to the order of the said Messrs. Storey & Company. In the interval between the date of the purchase of the said iron, made by the said Messrs. Storey & Company, and the said 28th of June, the price of iron had risen, by an amount of about £50 or £60 per £100. With the view of meeting the sums payable for the iron so purchased, Messrs. Storey & Company, believing themselves to be entitled to sell the Debentures authorised to be issued by the Resolutions of the 25th day of November, 1850, and the 18th of August, 1851, (in anticipation of their issue, which was restricted in a ratio proportionate to the progress of the Railroad,) had offered the said Debentures for sale, previously to the said 28th of June, and had authorised the same to be sold at £85 per cent.; or if that sum could not be gotten at £80 per cent, besides a deduction for charge of agency upon sales effected. Upon Debentures of the City of Toronto, payable in twenty years, with interest, half yearly, £80 per cent. was the highest known value; and if any delay should have arisen on the issue of the said Debentures, for either of the objections suggested to the legality of the said By-law, the said Messrs. Storey & Company would have been deprived of their said beneficial purchase of iron, and to complete their contract with the Railroad Company, would have been obliged to delay proceeding with the said Railroad, until they should be able to purchase iron at ruinously advanced prices, and in the meantime the progress of the said Railroad would have been very injuriously postponed, if not indefinitely postponed or abandoned altogether. At the interview above mentioned, all these circumstances were explained to the Chairman of the Finance Committee, and subsequently to almost all the

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nembers of the Common Council of the City of Toronto, and with the view solely to their own interests. the said Messrs. Storey & Company agreed to accept the Debentures of the said City of Toronto, to be issued under the said proposed By-Law, notwithstanding the said suggested objections to its legality. The Directors of the Railroad Company concurred in this view, as appears by the following letter, addressed by the President of the Company to the Chairman of the Finance Committee, which letter was laid before the Council:—

TORONTO, *June 28th*, 1852.

TO MR. ALDERMAN THOMPSON,
Chairman of Finance Committee.

SIR,—On the part of the Directors of the Ontario, Simcoe and Huron Union Railroad Company, and the Contractors of the said Company, I beg to intimate to you, that we are prepared to take the Debentures of the Corporation under a By-law, without the form of advertising for three months, and to assume the entire responsibility of so receiving them. The Contractors acting under legal advice, agree to this course as the best that can be adopted under the peculiar circumstances in which they are placed.

Should the above mode not be adopted I submit as the next best course that a resolution should be passed by the Council similar to the draft enclosed.

CHARLES BERCZY, *President.*

Accordingly on the evening of the said 28th of June, 1852, all the above matters having been fully explained in Council, the said bye-law introduced by the Chairman of the Finance Committee of the said Council, on the 21st of the same month of June was finally passed and was, by the said Council, ordered to be signed by the Appellant, as Mayor of the city.

On the said 28th of June the Appellant only acted as presiding officer of the said Council in his capacity as Mayor of the city.

The Appellant, although as Mayor an *ex-officio* member of the Finance Committee, was no party, in any way, to the

proceedings of the Finance Committee of the 21st, 23rd, or 28th of June, he having been absent from the said city during that period, and not having returned thereto, so far as appears in the evidence, and as it is believed to be the fact, until the said 28th of June, on the evening of which day he took his seat as Mayor of the city, presiding over the meeting of the Common Council of that evening.

On the 24th of June, 1852, he was (as appears by the evidence) in Quebec, and by the evidence it appears that, on that day he proposed to Mr. Hincks who had only then just returned from England, and with whom, for that reason, he could have had no personal interview, for a period as appears by the evidence, of about three months, and it appears by the evidence further that until the said 24th of June, 1852, no communication verbal or written had passed between the said Bowes and the said Mr. Hincks relative to the purchase of these Debentures.

On the 24th of June, 1852, the Appellant believing it to be a fact as it was universally in Toronto believed to be a fact, that the said Messrs. Storey & Co. would be entitled to receive Debentures of the city of Toronto in a ratio proportionate to the progress of the railroad, under the resolutions of the 25th November, 1850, and the 18th of August, 1851, and stating that the Messrs. Storey & Company had, as the fact was that they had, offered to sell the said Debentures at the rate of £80 per £100, did mention such facts to the said Mr. Hincks, and the Appellant proposed, on behalf of the firm of himself and his partner one John Hall trading under the name of Bowes & Hall to join with the said Hincks in the purchase of the Debentures which the said Messrs. Storey & Company should be entitled to receive under the said resolutions of the 25th of November, 1850, and 18th of August, 1851, if they could purchase the same from the said Messrs. Storey & Company at the rate of £80 per £100 which was then the utmost known or legitimate value of Debentures of the said city having 20 years to run. Upon this occasion the said Hincks expressed his willingness to embark in the pur-

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chase of the said Debentures, but nothing further was then definitely arranged between the said Bowes and Hincks, nor had any proposition for the sale of such Debentures ever previously been made by the said Messrs. Storey & Company, or by any one for them, to the said Appellant, or to the said Hincks, although it may have been that the said Messrs. Storey & Company, or their authorised agent had previously mentioned to the said Appellant the fact of their offering the said Debentures, or their interest therein, for sale; and the importance to them the said Messrs. Storey & Company that the said Debentures should be punctually issued, for the reason that the said Messrs. Storey & Company had made such contract for iron as aforesaid, and that they would lose the benefit thereof unless they should punctually receive the said Debentures of the city of Toronto.

The Messrs. Storey and Company having urgently requested that the By-law, so as aforesaid on the 21st of June, 1852, reported by the Finance Committee, should be passed on the said 28th day of June, to enable them to receive Debentures to meet their contracts, notwithstanding the alleged objection to the By-law; the Common Council of the City of Toronto, at the time of the passing of the By-law, pledged themselves, as also did the directors of the Railway Company, to take the necessary steps to have the By-law legalised, if the objections raised to its validity should prove to be sound. Upon the 30th June, Messrs. Storey & Co., in consequence of a conversation they had with the appellant, within a day or two previously, addressed to the appellant the following letter:

TORONTO, *June 30th*, 1852.

J. G. BOWES, ESQ.,

SIR,—We propose to sell you the twenty-four thousand pounds of Toronto Debentures, authorised by the City Council, on the 28th instant, to be issued in aid of the Ontario, Simcoe, and Huron Union Railroad; you to pay us eighty cents on the dollar, on the deposit of said Debentures, in such Bank in the City of Toronto as you may designate, and we

to deposit said Debentures, as soon as we receive the same. Let us know your acceptance or not of this proposition, in writing to-morrow.

Very respectfully,
Your obedient servants,
M. C. STOREY & Co.

The £24,000 here mentioned with £1000 already hypothecated elsewhere by Messrs. Storey & Co., constituted the £25,000 contemplated as a gift. Upon the Receipt of this letter, the Appellant immediately communicated its contents to Mr. Hincks; and on the 8th of July, the Appellant, on behalf of himself and his partner, the said Hall, and also upon behalf of the said Hincks, agreed with Messrs. Storey & Co., to purchase the said £24,000 Debentures; and Messrs. Bowes and Hall, in advance of, and in anticipation of the issue of the Debentures, upon their own security, procured an advance to the Messrs. Storey & Co. of £8,000; and on the 15th of July, Messrs. Storey & Co. deposited £10,000 of Debentures issued by the Common Council of Toronto, part of the £25,000 gift, in the Bank of Upper Canada, to the order of Mr. Hincks, who had undertaken to provide the means, and did provide the means, to repay Messrs. Bowes & Hall their advance of £8,000. Upon the 2nd of July, 1852, the Finance Committee had under their consideration an application of the Secretary of the Railway Company, the purport of which appears in the minutes of the Finance Committee of that day, viz.: "A letter of the Secretary of the Onta-"rio, Simcoe & Huron Railroad, applying for an issue of £14,-"000 Debentures, in accordance with the By-law in favor of "the said Company, and submitting a draft of a Bond to be "given in security for £14,000 portion thereof, by way of loan, "was considered, and the Committee resolved to instruct the "City Solicitor to draw up an instrument for securing the said "£14,000, as a lien on the road, next after the Government "guarantee, and that the Chamberlain do reply to Mr. Sladden's "letter, informing him that such an instrument will be required "and that the Committee will require, in addition, the ordinary

" Bonds of the Company for the same amounts as those issued
" by the Corporation, and not in any way restricted with re-
" gard to the right of the Council to transfer."

" The Committee further agreed to recommend that in
" consideration of the verbal assurance of Mr. Keefer, the
" Government Inspector of Railroads, given to the Chair-
" man of this Committee, that the sum of £100,000 is now
" actually expended on the Railroad: that such verbal as-
" surance, in addition to the certificate received from the
" Contractors, be deemed sufficient; but that the Board of
" Directors be noticed that before any further issue of De-
" bentures be made in their favor, a certificate will be re-
" quired, in accordance with the minutes of June 21st."

The £14,000 here referred to, was for a part of the contemplated loan of £35,000, and under the latter part of the recommendation of the Finance Committee, the £10,000, part of the gift of £25,000, was issued on the 15th of July.

In proceeding to carry out the instructions contained in the above minutes of the Finance Committee of the 2nd July, in respect of the said sum of £14,000 part of the said £35,000 contemplated loan, difficulties arose between the Railway Company and the Corporation, relative to the terms of the security to be given. The Chairman of the Finance Committee demanded of the Railroad Company, that the securities to be given to the Corporation should be *expressed to be a first lien on the Railroad.* The Railroad Company found themselves unable to give this security, because by so doing, they would forfeit the Government Guarantee, which was of the utmost importance to them, and divers interviews took place between the Directors of the Railroad Company and Messrs. Storey & Co., of the one part, and the Chairman of the Finance Committee of the other part, with a view to the procuring an alteration in the terms of security required. The Chairman of the Finance Committee being unwilling to alter the terms of the required security, the railway became again imperrilled, and so great was the danger of the project being defeated, unless some arrangement should be come to, that the President of the Railroad Company suggested to the Chairman of the Finance Com-

mittee and to the Appellant (the Mayor of the city) on the morning of the 29th of July, 1852, that a proposition should be made to Messrs. Storey & Co. that they should surrender all claim for the £25,000 gift, and that the Railroad Company should surrender all claims to the £35,000 loan, upon condition that the Corporation should take from the Messrs. Storey & Co., £50,000 of Stock then in their hands, and for such stock, should issue to Messrs. Storey & Company £50,000 city Debentures payable in 20 years. The Apellant made this proposition to Messrs. Storey & Co., who, under the circumstances in which they were placed, and with a view to meeting their engagements, acceded to the same; and in the evening of the said 29th July, the proposition, together with the fact of the Messrs. Storey & Co's readiness to accede to the same, was submitted by the Appellant, in his capacity of Mayor, to the Common Council, and thereupon the suggested plan, BEING MOST ADVANTAGEOUS TO THE CITY AND THE BEST POSSIBLE ARRANGEMENT FOR THE CITY THAT COULD HAVE BEEN DEVISED OR CARRIED OUT, the following resolution was almost unanimously adopted by the council.

Resolution of 29th of July 1852.

"Whereas his worship the Mayor has informed this coun-
"cil that the contractors of the Ontario, Simcoe, and Huron
"Railroad Union Company have accepted a proposition made
"by him, subject to the approbation of this council, in view
"of the difficulties which have existed in the execution of a
"mortgage bond by the way of security for the loan of £35,000
"formerly voted by this council to the effect that the contrac-
"tors shall surrender the grant of £25,000 made by the
"council and transferred to such contractors in part payment
"of their contract; and also that the Directors shall waive
"the aforesaid loan of £35,000 altogether on condition that,
"in lieu thereof, the council will take Stock to the amount of
"£50,000 to be paid by the issue of City Debentures in the
"same proportions as the Debentures for the above loan and
"grant were authorised to be issued. Be it therefore resolved
"that the Standing Committee on Finance be authorised to
"complete such arrangement provided that no legal difficulty

"shall occur in carrying out this resolution, and provided "also that no alteration shall take place in the condiditions "upon which a portion of the Market block was granted to "the said Company, particularly with regard to carrying "the railroad to the eastern limits of the city Waterlots."

This resolution was immediately communicated to the Board of Directors of the Railroad Company who sent the following reply thereto.

OFFICE OF THE ONTARIO, SIMCOE, AND HURON UNION RAILWAY COMPANY.

Toronto 30th *July*, 1853.

TO THE WORSHIPFUL THE MAYOR, TORONTO.

SIR,—The Board of Directors have had under consideration a Resolution of the Council, passed on the 29th instant, relating to a proposed new arrangement for the issue of Debentures to the Contractors, a minute of the Finance Committee thereon, and a letter from M. C. Storey & Co., stating their willingness to accept the proposition embodied in the Resolution of the City Council first mentioned. I now beg to send you a copy of a minute made by the Directors of this Company, in relation to the documents referred to:—*Resolved* —That the Board of Directors agree to the proposed arrangement between the City Council and M. C. Storey & Co., submitted in the Resolution of the City Council on the 29th instant, without prejudice to the existing agreements between the Council and the Board, and the Contractors, in the event of the one now proposed not being accomplished. And further, without prejudice to the other parts of the said existing agreements, which are not to be affected in any way by the substitution proposed for certain parts of those agreements.

I have, &c.

WM. SLADDEN, *Secretary*.

The minute of the Finance Committee referred to in the above communication, was as follows:—

July ~~June~~ 30*th*, 1852.

"The Resolution of the Council of July 29th, was consi- "dered. The Committee had an interview with C. Berczy,

"Esquire President of the Northern Railroad Company, and "Major Lawmond, one of the Contractors. It was then or- "dered that so soon as His Worship the Mayor shall have "receive from the Board of Directors of the Northern Rail- "way their sanction, in writing, to the conditions of the Res- "olution of the City Council of the 29th July instant, he be "authorised to issue the balance of the grant to the said Rail- " road viz : £10,000, £15,000 having been already issued to "the Contractors, upon receiving from them paid up stock, to "the amount of 25,000, in security for the completion of the "arrangement contemplated in the Resolution of Council "above mentiond."

There was never any agreement between Messrs. Storey & Co. and Messrs Bowes, Hall, and Hincks or any or either of them for the sale by the Messrs. Story & Co, of any City of Toronto Debentures other than the agreement contained in the letter of Messrs. Storey & Co. of the 30th June, which was as to the £24,000 therein mentioned concluded on or about the 8th of July, 1852, nor was there any obligation upon the Messrs. Storey & Co. to sell any other Debentures to Messrs. Bowes, Hall, and Hincks. However Messrs. Storey & Co. being perfectly satisfied, as the fact was, that eighty cents on the dollar was the full value of such Debentures and being unable to get a higher price therefor, did, from time to time, as the residue of the said £50,000 Debentures became issuable, and were issued, in persuance of the resolutions of Council for the said 50,000 Stock, deposit such Debentures to the credit of the said Hincks, and did receive payment at the same rate for all of such Debentures.

In so doing the said Messrs. Storey & Co. believed, that under the circumstances, they were absolutely entitled to sell the said Debentures to whomsoever they pleased, and they did sell them as their bona fide absolute property, as, they would any other negotiable security, transferrable by delivery.

The Debentures of the City of Toronto so issued were, like all other Debentures, issued by the said City, payable to Bearer and transferable by delivery.

The gist and substance of the statement of facts above detailed is,—that different Common Councils of the City of Toronto, having upon the solicitation of numerous Inhabitance and Rate-payers of the said City, by different resolutions upon mature deliberation, upon different occasions passed;—entered into pledges with the Railroad Company and Messrs. Storey & Co., the Contractors; upon the faith of the first, of which resolutions the Railroad, which it is believed has conferred and will confer very great benefit upon the City of Toronto generally, and its Corporate property, was commenced; and upon the faith of all of which Resolutions, pecuniary obligations were entered into by the Messrs. Storey & Co., which if not met, would have involved them in serious embarasments, and would have endangered the prospects of the completion of the Railroad, the Common Council of the City of 1852, believing themselves to be morally and in honor and equity called upon to fulfil those pledges did, albeit, as is now alleged upon behalf of the City of Toronto, not according to strict form of law, but, this informality forming no ingredient of inducement, pass the by-law of the 28th of June, 1852, and subsequently did, also, albeit not as it is alleged, in accordance with the strict form required by law, but such informality forming no ingredient of inducement, pass the resolution of the 29th of July 1852, which resolution being carried out, was admittedly much more beneficial to the city than the plans comprised in the previous resolutions; and the Appellant, although a member of the Common Council of the said City, conjointly with Messrs. Hincks and Hall who were not members of the said Common Council, and believing that the said Messrs. Storey & Co. had absolute right to sell such Debentures, did, in good faith, purchase from the said Messrs. Storey & Co, the Debentures so issued to them as aforesaid, at the full legitimate Market Value of such Debentures at the time. The above facts have been deemed sufficient by the Judges of the Court of Chancery to justify the following Decree:

IN CHANCERY.

Monday the Ninth Day of October, in the 18*th year of*

the Reign of Her Majesty Queen Victoria, and in the year of our Lord 1854.

Between the City of Toronto—*Plaintiffs.*
and John G. Bowes—*Defendant.*

This cause coming on to be heard and debated before this Court on the 27th and 28th days of June last, in the presence of Counsel learned on both sides and the pleadings in this cause being opened, upon debate of the matter and upon hearing, read the Evidence and Documents in that behalf mentioned in the minute entered in the Registrar's Book at the time of hearing, and upon what was alleged by Counsel aforesaid, this Court did order that this cause should stand for Judgement and this cause standing for Judgement this day in the paper of causes, this Court doth declare the said John G. Bowes to have been and to be a Trustee for the City of Toronto of the profit received by him from the sale of the Debentures in question in this cause.

And this Court doth further declare that the the said John G. Bowes being such Trustee as aforesaid was incapable of acquiring and did not in fact acquire any personal interest in the said Debentures.

And this Court doth find and declare that the amount of profit derived by the said John G. Bowes as aforesaid consists of the following particulars: that is to say of certain sums of money amounting together to the sum of £4115 17*s.* 3*d.*, together with interest on the same sums from the respective times which they were received by the said John G. Bowes until the day of payment and which interest up to the day of the date of this Decree amounts to the sum of £406 6*s.* 7*d.* such profit altogether to the day of the date hereof being the sum of £4522 17*s.* 3*d.* And this Court doth order that the said John G. Bowes do within ten days after service upon him of this Decree pay to the said Plaintiffs, or as they shall appoint, the said sum of £4522 3*s.* 10*d.* together with the interest on the said sum of £4114 17*s.* 3*d.* from the day of the date hereof until the day of payment.

And this Court doth further order that the said John G.

Bowes do pay to the Plaintiffs or the bearer hereof, their costs of this suit immediately after service upon him of this Decree and the Master's Certificate of taxation of the said Costs. And it is hereby referred to the said Master to tax the said Costs in case the parties differ about the same.

Signed,

A. GRANT.

Registrar.

It is true that the Bill of complaint, in a very vague, loose, insufficient and indefinite manner, stated other facts upon which it was attempted to establish actual fraud; but the evidence was altogether defective in establishing any such fraud, in fact, the evidence completely disproved any such fraud; and the judgements of the Judges of the Court, discarding all such matters, in respect of which a most tedious, prolix, and it is submitted, immaterial investigation took place, proceeds upon the simple fact, which was admitted in the answer, namely, that the Appellant, although a member of Common Council, was a party to the purchase of the Debentures from the Messrs. Storey & Co.

It may be proper, however, briefly to state the other facts proved, with the view of establishing, that, assuming the reasons given by the Judges to be found insufficient to warrant the Decree, there is nothing in the other facts proved, which can be construed so as to sustain that Decree.

The additional facts referred to were as follows: The Corporation of Toronto was indebted to a Mr. Cawthra in £20,000, for which he held not only debentures of the City, but also a mortgage upon the whole or the greater part of the real estate and buildings of the Corporation; these Debentures fell due on the first of January, 1854. The corporation were, upon similar securities, indebted to the British American Insurance Company in £10,000, also falling due on the first of January, 1854. The later Company were willing that their debentures should be redeemed before the period of their falling due. Besides these debts the corporation were liable to an amount of £16,000 upon promissory notes, issued by the Corporation, payable with interest. In consequence of these notes being outstanding, the Corporation,

found great difficulty in obtaining accomodation at the Banks to meet current demands; and from the fact that the real estate of the city was held in mortgage by Mr. Cawthra and the Insurance Company, the Debentures of the City which the Corporation might require to issue for purposes of public improvements, became so depreciated that £80 per £100 was the full negotiable value of Debentures having twenty years to run. The pressure of the evil arising from these causes was severely felt by the Corporation, and financial policy required, that a new loan should be effected for the purpose of redeeming the above mentioned debentures. With this view the Corporation in 1851 opened negotiations through the Bank of Upper Canada, with capitalists in England; but as the Corporation were unwilling to put their debentures on the English market otherwise than at par, and as no such price could be obtained for them in that or in any other market, all those negotiations fell through. In 1852, however, the Corporation resolved to apply for an act to authorise them to raise a sufficient sum, by the issue of new debentures, to enable them to redeem the above mentioned liabilities. At the same time the Corporation, believing themselves to be in honor bound to have rectified any defect which may have existed as to the legality of the debentures authorised to be issued to the Messrs. Storey & Co. in manner aforesaid, and deeming the opportunity to be favorable, caused the City Solicitor to prepare a Petition and Bill to be presented to Parliament to enable the Corporation to raise £100,000 to consolidate a part of the City debt. The Petition and Bill so prepared were sent to Mr. W. H. Boulton, a member of Parliament for the City, and who was also a member of the Common Council and an active party to the arrangement with Messrs Storey & Co., by virtue of which the By-law of the 28th of June had been passed; and the Bill was introduced by Mr. Boulton. This Bill was passed into a law by an act of the Parliament of Canada, passed in October, 1852, entitled "An Act to authorise the City of "Toronto to negotiate a loan to consolidate a part of the "City debt." A clause was inserted in this act providing for a sinking fund of two per cent, to meet the requirements

of the general policy of the Government in such cases. If this Act had not provided for the legalization of the debentures authorized to be issued to Messrs. Storey & Co., Mr. Joseph C. Morrison, another member of Parliament, and a Director of the Railroad Company, would have introduced a Bill for that purpose, as he did for the like purpose in respect of debentures which had been issued for the Railroad by the County of Simcoe. During the same session of Parliament acts of a similar nature to the act enabling the City of Toronto to negotiate the £100,000 were passed in behalf of the cities of Hamilton and Kingston.

After the passing of the act authorizing the City of Toronto to negotiate the £100,000 loan, Mr. Hincks being then part proprietor in the debentures purchased from Messrs. Storey & Co., and he having undertaken the disposal of these debentures upon behalf of himself and his co-proprietors, caused a proposition to be made through Mr. T. G. Ridout to the Corporation of Toronto to purchase the £50,000 required to be raised by them at par, upon the condition that new debentures should be issued in lieu of those issued to Messrs. Storey & Co., and that all the debentures to be issued should be in sterling amount, and be made payable in England. Had not Mr. Hincks as part proprietor of the debentures issued to Messrs. Story & Co. had control over those debentures he could not have offered par for the other £50,000, nor could he, except by a sacrifice upon the debentures issued to the Messrs. Storey & Co. have given or obtained par for the other £50,000 required by the Corporation; nor could the corporation in any other mode, or by any other operation, have procured par for the £50,000 debentures required to be issued to redeem the liabilities before mentioned. The offer was accepted and the operation was the most beneficial arrangement which by possibility could have been made for the benefit of the City of Toronto. The Corporation accordingly received £50,000 cash for the £50,000 debentures issued to redeem their liabilities, and they issued new sterling debentures payable in twenty years for the debentures which had been issued to the Messrs. Storey & Co

This is the substance of all the other facts which, it is submitted, have any bearing upon the case.

In making the decree above mentioned, the Chancellor, and both the Vice Chancellors, have in their judgments delivered, declared that their decision is based upon decided cases quoted by them in their judgments, and which they have pronounced to be identically analogous with the case now in discussion. Mr. Vice Chancellor Esten asserts the principles upon which the Court, in making the decree, proceeded, in the following language:—"This case seems to "depend upon two principles; one,—that an Agent, *con-* "*ducting a sale* on behalf of his Principal, cannot stipulate "for a private advantage to himself in the same transaction; "the other—that a corporate officer appointed *ad consul-* "*endum* cannot acquire an interest *in a matter* upon which "he is to deliberate in his official capacity for the benefit "of others."

Now it is submitted that the two principles thus enunciated are identically one and the same, and that the second principle upon which the decree in this case is based has no existence except in so far as the "*corporate officer appointed ad consulendum*" is "*an agent*" in the sense meant in the principle firstly enunciated, it will be therefore convenient to consider these two principles as *one and the same*, for the purpose of testing the application of the principle to the facts of the case in discussion.

The cases which the Court of Chancery have declared to be identically analogous to the present case are—Ex parte Lacey, 6 Ves. 625; ex parte James, 8 Ves. 337; ex parte Bennet, 10 Ves. 381; Cook vs. Collingridge, 1 Jacob, 607; Docker vs. Somes, 2 My. & K. 655; The Charitable Corporation vs. Sutton, 2 Atk. 400; The Attorney General vs. Wilson, Cr. & Ph. 1; The Attorney General vs. Clarendon, 17 Ves. 149; Benson vs. Heathorn, 1 Y. & N. C. 326; Hamilton vs. Wright, 9 Cl. & Fin., 111; and, The Governor and Company of the York Building Society vs. McKenzie, Bro. P. C. 84, also referred to in ex parte James and the note to the American edition of Ves. in exparte Lacey.

Most of the above cases, together with Downes vs. Grazebrookes, 3 Mer. 200; Sanderson vs. Walker, 13 Ves. 601.; The Attorney General vs. Aspinall, 2 My. & Cr. 613; Lees vs. Nuttall, 1 Rus. & My. 53, and the dicta of various text writers were quoted by Counsel for the Defendant in the Court of Chancery, the now Appellant, for the purpose of elucidating the principle upon which perrons placed in a fiduciary capacity are precluded from dealing with Trust Fun for their own benefit, and for the purpose of shewing the clear distinction which, it is submitted, exists between the facts of the decided cases and the present case, and of displacing all arguments to be deduced from any supposed analogy between them.

As, however, the Judges of the Court of Chancery have justified the decree which they have made in this case upon the precise analogy which, they allege exists between the circumstances of the present case and the circumstances of the cases above cited, it will be convenient briefly to review the circumstances of each of the cases cited and to draw attention to the principle involved in each.

In exparte Lacey, the Assignee of a Bankrupt estate had purchased for himself a portion of the Bankrupt's estate, and also several of the debts due by the Bankrupt to his creditors, and as to the purchase of the estate it was held that as the Assignee *was a Trustee to sell for the benefit of the Creditors and the Bankrupt, he could not buy for his own benefit*, for thereby the principle that a Trustee for sale, cannot sell to himself would be clearly violated, and as to the purchase of the debts due by the Bankrupt, it was held that the assignee of a bankrupt is in the same position as an Executor who cannot buy for his own benefit the debts of the creditors upon the principle that it is the duty of an assignee of a Bankrupt, and of an Executor to apply the assets of the estate for the payment of the debts due by the estate and to administer the assets for the benefit of the estate, and not for his own benefit, and it was further held as to the portion of the estate bought, that the assignee should be held bound by

his purchase unless on a new sale a higher price should be bid.

In exparte James the same principle was held in a case where the *Solicitor* for conducting the sale of a Bankrupt estate became purchaser of a portion of the estate, and had jointly with the assignee purchased several of the dividends payable to the creditors.

In exparte Bennett the same principle was held to apply to the *Commissioner* of a bankrupt estate, and in all these cases, as well as in other similar ones, Lord Eldon held that the rule that *a person employed to sell for the benefit of others* cannot buy for his own benefit any part of the estate which it is his duty to sell for the best price, for the benefit of his principals, viz., the Bankrupt estate and the creditors, applied more strongly to a commission of bankruptcy than to any other case of trust or agency.

The principle of these cases then is that, it is the duty of a Trustee or Agent '*appointed to sell*' to conduct the sale for his principal or cestui que Trust, precisely in the same manner as if the Trustee or Agent was selling his own property, and that he must not acquire an interest in the trust estate inconsistent with that duty.

The case of the Governor and Company of the York Building Society vs. McKenzie, was precisely similar to the three cases just mentioned, and the principle involved identically the same: it was the case of a purchase of part of an estate by the person specially delegated by the Court to conduct the sale to the best advantage for the benefit of the parties interested in the estate.

Sanderson vs. Walker, 13 Ves. 601, is a precisely similar case. There a Trustee appointed to sell, bought at an undervalue for himself, through the medium of a third person, a part of an infant's estate.

Cook vs. Collingridge, was a case where executors collusively conveyed to one of themselves and two others, their testator's estate, for the express purpose of being conveyed to another of the executors, and it was held that such a trans-

action was void, and it was so declared to be, as in fact a sale by executors of the trust estate to one of themselves.

Docker vs. Somes was a case of executors embarking their Testator's estate in their own trade, and it was held that the cestuisque Trustent were entitled to an account of the profits arising from the trade, in respect of the Testator's capital so invested, in preference to repayment of the capital with interest.

Downes vs. Grazebrook was the case of a Trustee *for the sale of an estate*, purchasing for himself through the intervention of his Solicitor, appointed by him to conduct the sale, and this was held to be void, *as a sale made by the Trustee for sale, to himself.*

Lees vs. Nuttall was the case of an agent employed *to purchase an estate*, and it was held that he could not, being the agent employed to purchase for another, purchase for himself.

The case of the Charitable Corporation vs. Sutton, requires a more extended notice, as the frauds complained of were of a very intricate and complicated nature, and Lord Hardwick draws a distinction between the acts of committeemen, done within their authority, although attended with injurious consequences, and acts which are plainly done in open violation of authority, and which are plain and manifest frauds.

In that case the acts complained of may be enumerated briefly as follows:

1st. The passing of notes in plain violation of the terms of the charter of incorporation.

2nd. Signing notes, in violation of the charter, for loans upon pledges, called renewed pledges, though the committeemen knew, at the same time, that the money originally lent was not paid.

3rd. Advancing money, upon pretended pledges, to the Warehouse-keeper, whose duty, under the charter, was to keep charge of the pledges, and to set a value upon all pledges deposited for monies lent, and who in the event of any defect in the value of the goods so deposited was, by the charter, to make it good out of his own estate, and thereby

lending large sums of money to the officer of the corporation who was not only himself the Custos of the pledges but the Appraiser, upon behalf of the Corporation, of their value.

4th. Taking off all the checks upon the Warehousekeeper, imposed by the charter of incorporation.

5th. Making several orders to put it in the power of the Warehousekeeper and others, his servants, to commit the frauds complained of, which appeared to be of a most gigantic nature, it having appeared that the value of the goods pledged was only £35,000 and £385,000 was the amount advanced upon the security of those pledges. Upon these points Lord Hardwick observes:—"As to the three first they "are actual breaches of trust." And again—"It was a "notorious fraud to suffer the Warehousekeeper, who was to "set a value upon all the pledges, to borrow money upon "them himself." "As to the fourth and fifth, they are not "so clearly breaches of Trust, though at the same time they "appear to me to have tended greatly to the loss and preju- "dice of the corporation." And with respect to the committeemen, he observes, "The committeemen are most properly "agents to those who employ them in this trust, and who "empower them to direct and superintend the affairs of the "corporation." And again "now where acts are executed "within their authority, as repealing by-laws, making orders, "in such cases though attended with bad consequences, it will "be very difficult to determine that these are breaches of "Trust." And the decree was to the effect of declaring those committeemen to be liable, who had issued notes upon loans called renewed pledges, without being signed, and directing an inquiry as to who were the committeemen who had signed the notes for loans to the Warehousekeeper.

Now in reference to this case it is to be borne in mind that charitable corporations were always the subjects of the special consideration of the Court of Chancery, and that breaches of trust in the case of such corporations are identical with cases arising between private individuals in the relation to each other of Trustee and cestnique trust; but it is submitted that there is a marked difference between such

cases and Municipal Institutions, exeept where a manifest misapplication of municipal funds to purposes not at all warranted by the Statute or Charter incorporating the Municipal Institution is the subject of complaint, and it is further submitted that it would be a most violent straining of analogy, upon the facts of the case of the Charitable Corporation vs Sutton, to justify the decree made upon the facts appearing in the case now in discussion.

In the Mayor and commonality of Colchester vs. Lowton, 1 Ves. & Bea. 226, the plaintiffs, by their bill sought to impeach certain securities as obtained under an abuse of Trust by the select body of the corporation of Colchester using the common seal for raising money to defray the expenses of actions against the Mayor and Town Clerk, relative to elections of the Recorder and a Representative of the Borough in Parliament, which, it was contended, were not corporate purposes. Much of the Judgment of Lord Eldon, in this case is valuable as enunciating the principles which governed the Court of Chancery in the case of Municipal Corporations prior to the passing of the General municipal Corporations act of 1835, since which time all the cases that have arisen depend upon the special terms of that act.

Lord Eldon in giving judgment says,—

"The bill in this case contends that all or part of the ex-"penditure which is the subject of this suit, was not for cor-"porate purposes; and if not, that it was not competent for "the select body to charge the Corporation with an expendi-"ture, not for corporate purposes; and therefore the select "body, if they have the capacity, could not pledge the pro-"perty of the corporation for purposes not corporate, at least "not without the assent of the body at large; and upon that "hypothesis they might go further; and contend that the "body itself could not pledge the property for purposes not "corporate." And again he proceeds, "Though all the "authorities upon what is not often the subject of considera-"tion here have been most usefully brought forward, I have "no doubt that independent of positive law as to the legal "powers of a corporation; Corporations, Civil, Ecclesiastical,

"or of whatsoever nature could in point of law, alienate "lands of which they were seized in fee; and the history of "what corporations, both aggregate and sole, did before the "restraining Statutes, is very useful. Civil Corporations are "at this day in the constant habit of making those aliena- "tions; their title to make which is asserted by Lord Coke. "In the course of my experience in this court, of my present "researches, and of my examination of authorities, which, "having had occasion to consider them formerly. this case "has brought back to my recollection, nothing has occurred "shewing that there ever was a case in which this court "attached the Doctrine of Trust, as applied under the words "'*corporate purposes*' to the alienation of a civil, or indeed, "of an ecclesiastical corporation. With regard to what was "stated by Sir Wm. Ashurst, a very respectable judge, and "who, I take this opportunity of saying, was a very usefu "Judge, as a commissioner in this court, I do not lay down "either that this is the subject of jurisdiction here, as Trust, "or of Information in the court of King's Bench. The "opinion, that this court has jurisdiction, is to be considered "as the opinion, not only of Sir William Ashhurst, but of "the whole court of King's Bench, stopping upon that "ground the argument upon that point, as to the breach of "trust. (*a*) Sir Samuel Romilly has put it fairly, that the "court is not to act upon the supposition, that corporations "are constantly abusing their duty by applying the property "not to corporate purposes; but on the other hand, when a "case is brought forward, the court is not to shut its eyes "against the practice that has prevailed in all times, and the "judgment upon it; for speaking of corporate purposes, if "the purpose, though the most worthy that can be represen- "ted, has not that character, the use of the seal is equally "improper, and as much an abuse in a court of justice, though "not in a moral consideration. As to what obtains, for in- "stance, in the ecclesiastical bodies, that have been men- "tioned, the Bishop, the Dean and Chapter, &c., The sta- "tutes, that lessees for more than twenty-one years of three

(*a*) 2 T. Rep. 200., Lord Mansfield was absent.

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"lives and not at the old rent, or more, shall be bad, do not "say, that any lease shall be good, which can be taken to "be an abuse of those corporate purposes, for which the pro- "perty was held; and I apprehend it would not be difficult "now to find bishops' estates, the old rent reserved being "£50 and the actual estate worth £1,000 or £2,000 per "annum. All the excess of that rent taken by the bishop "himself, should, if he is a trustee in a fair sense, be taken "from him by this Court; yet no such attempt was ever made "where the corporation was not holding *for charitable pur "poses. Even these corporations can alienate at law, but "the alienee will be a trustee; and the jurisdiction in those "cases must be regarded as a contrast to the other cases of "corporations, holding, not for charitable, but for corporate "purposes; demonstrating that this Court shall not be "called on in the latter case, as it is in the former.*"

The result of this case was that the Bill was dismissed with costs.

Now the case alluded to by Lord Eldon in his judgment in the "Corporation of Colchester *vs.* Lowten," as having been before the Court of Kings Bench,—viz. The King *vs.* Watson and others, 2 Term, Rep. 200; by no means justifies the assertion, that it was the opinion of Sir Wm. Ashhurst and of the Court of Kings Bench, that *even the application of a sum of money* by the select body of a corporation, *out of corporate funds, to purposes not corporate*, constituted a breach of trust, cognizable in a Court of Equity: much less can it be said, that there is any authority for holding, that it ever was the opinion of any Court of Justice, that a member of the select body of a civil corporation, could not purchase the Debentures issued by the corporation, of whose select body he was a member. All that the Court of Kings Bench, in the case referred to in 2 Term Rep. did intimate, was, that *in a case of Breach of Trust*, the Court of Chancery is the proper Court, to which, application for redress should be made, and not the Court of Kings Bench. The case was this: one Watson, a servant of the corporation of Yarmouth, had, in a very wanton and vexatious manner,

charged one *Hurry* with perjury, and after his acquittal, had in the public papers repeated the charge, attributing the acquittal to a defect of some form, and alleging that another Indictment would be preferred against him; Hurry prosecuted Watson in a civil action for a libel, and recovered a verdict of £3,000 which was compromised by Hurry agreeing to accept £1,500; after the compromise, the select body of the corporation, by an offensive resolution reflecting on the justice of the verdict, awarded to Watson £2,300 out of the corporate funds, to indemnify him against the recovery of damages in Hurry's action; under these circumstances, an application was made to the Court of Kings Bench, for a criminal information against the Mayor and others, constituting the select body of the corporation, upon the following grounds stated by counsel: 1st. That the payment of £2,300 by the defendants, as members of the corporation, to Watson, *was a gross abuse of their trust.* 2ndly. That the proceedings of the defendants, as members of the corporation, constituted a high contempt of the administration of public justice, and, 3rdly. That the manner in which the proceeding was carried on was a libel on Hurry, the prosecutor of the criminal information, and "The Court desired counsel not "to go on the first point which *might* be the subject of an "application to the Court of Chancery, but *could not* be the "ground of a criminal information in this Court," viz. in the Court of Kings Bench. It is worthy of remark that Lord Mansfield, Chief Justice, was not present at the argument, and that there is no trace to be found in the Books, of any application having been made to the Court of Chancery, in respect of the alleged breach of trust referred to in Rex vs. Watson, nor have I been able to find any other case of an application being made to the Court of Chancery, in any case of an alleged breach of trust similar, either to the case of the Corporation of Colchester vs. Lowten, or to that reported in Rex vs. Watson; much less have I been able to find such an application having ever been made, in a case of the purchase, by a Municipal Councillor, of Debentures of a municipality, at their accustomed known and current value in

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the market, from persons, *to whom they were intended to be issued, in respect of a matter within the Jurisdiction of the municipality.* The legitimate conclusion, deducible from the judgment of Lord Eldon, in the Corporation of Colchester vs. Lowten is, that in those times, a clear distinction, and not a plain analogy, was held to exist between the case of a member of the select body of a Municipal Corporation, acquiring corporate property ; and the common case of principal and agent, or ~~of~~ trustee and cestui que trust. Since the passing of the *general Municipal Corporations Act of* 1835 the decisions to be found in the Books of Report are based upon that Act, and must be read with due regard to the special provisions of that Act. The decision of a Judge in any case is not esteemed to come within the principal adopted by the courts, viz "*stare decisis*," except in so far as the decision is warranted by the facts of the case before the Judge ; and where the facts of the case to which the principle is purported to be applied are parrallel with the facts of the *decided ease.* In the consideration therefore, and in the application, to new cases arising of the decisions which have been made upon the "*general Municipal Corporation Act*," it is, all important that, the special provisions of that Act should be borne in mind. By that Act 5th and 6th Wm. 4 ch. 76 "*all Laws, Statutes and Usages, and so much of all Royal and other Charters, Grants, and Letters Patent* in force, relating to the several Boroughs (named in Schedules to the act annexed) or to the Inhabitants thereof, as were inconsistent with, or contrary to the provisions of the Act, were, by the first clause, repealed and annulled. By the 92nd clause it was enacted that all monies which the Treasurer of such Boroughs should receive, under the act, should be carried by him to the account of a fund to be called "the Borough Fund" and after providing for the claims upon that fund, it was provided that, "in case the Borough Fund shall be "more than sufficient for the purposes aforesaid, the surplus "thereof shall be applied, under the direction of the council, "for the public benefit of the Inhabitants, and improvement "of the Borough." By the 94th, 95th, and 96th clauses, the

powers of the Corporations over the Real Estate were defined and restrained within certain specially prescribed limits. By the 97th clause, provision was made for avoiding *all collusive sales, purchases. leases, demises divisions, and appropriations of money for undue consideration* made by the old councils of the Boroughs, not in accordance with the purposes and objects in the act specified. Now under this act the case of the Attorney General vs. Aspinall came up before Lord Langdale, Master of the Rolls, 1 Keen 513, and before Lord Chancellor Cottenham 2. My. and Cr. 613. The Bill was filed after the passing of the act, but before the first election of the new councils established by the act, and its object was to restrain the old corporation of Liverpool, as it existed before the passing of the act, from appropriating certain property of the Corporation, amounting to £105,000, to purposes alleged to be foreign to the objects of the act. Now the course of Lord Cottenham's argument in delivering his Judgment in this case is, *if the property in question be subject to any public trust, and if the appropriation complained of, be not consistent with such trust ; then that the fund should be recalled, secured, and applied for the public, or, in other words, "charitable uses, to which it is by the act devoted." But admitting that the power of the corporation, as it existed prior to the passing of the act, depended upon the law and usage then in force, and for that reason, could not be interfered with by the Court of Chancery, all those laws and usages are by the act expressly repealed, and so far therfeore as such law or usage authorised an exercise of power inconsistent with, or contrary to the provisions of the act, it was, from the time of passing the act annulled. Now the 92nd, 94th, 95th. 96th and 97th sections construed together, clearly made the corporate property, trust property, and therefore, in the legal sense of the term, property applicable to charitable purposes, from the day of the passing of the act. Assuming then that the corporate property was, from the very passing of the act, made trust property applicable to the several purposes prescribed by the act ; and the appropriation complained of being*

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directly at variance with, and made for the purpose of defeating, the object of the act,—the fund must be recalled. This is a brief synopsis of Lord Cottenham's Judgment.

The Attorney General vs. Wilson, Cr. and Ph. 1 is another case before Lord Cottenham, arising under the general Municipal Corporations Act. It was a most flagrant case of the select body of the Municipal Corporation of Leeds, as it existed prior to the passing of the act, which was passed on the 9th Septemper, 1835, attempting designedly to defeat the object of that act, as to the amount of £6,500 consols, the property of the corporation. Lord Cottenham in giving judgment in this case says, "from that moment, the 9th of September 1835, "whatever property belonged to the corporation became "affected with the trusts declared by the act, and all attempts "at alienation *for purposes inconsistent with the objects of* "*that act were illegal and void. This was the ground of* "*my decision in the Attorney General vs. Aspinall ; it fol-* "*lows that the alienation subsequently attempted of the pro-* "*perty in question, being obviously, and indeed professedly,* "*for the purpose of defeating the purposes of the act,* ~~were~~ was "illegal and void." Lord Cottenham, in other parts of his judgement, declares his opinion that "the proper view of "regarding the members of the governing body *of the* cor- "poration, that is, of a corporation *under the act*, is as its "agents, bound to exercise the functions of the corporation "*for the purposes for which they were given, and protect its* "*interest and property*, and if such agents exercise those "functions *for the purpose of injuring the interest of the* "*corporation and alienating its property* they shall be liable to the corporation." Again he approves of the distinction drawn by Lord Hardwicke, in "the charitable corporation vs. Sutton" between the acts of the governing body executed *within their authority*, as repealing Bye-laws and making orders, to which may be fairly added making Bye-Laws—and acts clearly in violation of, or in manifest excess of their authority. Now, with respect to these cases, it is confidenty submitted, that, having regard to the special circumstances of the cases before Lord Cottenham and the nature of

the breaches of trust therein complained of, no anology exists between the circumstances of those cases and the circumstances of the case now in discussion, upon which the judgement of the Court of Chancery has proceeded; indeed the language of Lord Cottenham, as appearing in those cases, never would have been, it is submitted, applied by himself to the case of the member of the governing body of a Municipal Corporation purchasing from a third person *or from the corporation itself*, debentures of the corporation legally issued, or intended to be legally issued, for a purpose specially authorised by an Act of Parliament.

By reference to the General Municipal Corporation Act of England, which became a law on 9th September 1835, it will be fouud, that under this act Municipal Corporations in England have not the power of raising money by the issue of debentures payable at a future period for any purpose whatever; as Municipal Corporations in Canada, from the necessities of the country, are, from time to time, empowered to do, for various purposes. The property of Municipal Corporations in England consists of gifts, grants, and investments made during a course of ages, the maladminstration of which (the Court of Chancery, except in the cases of gifts to charitable uses) having no jurisdiction or control, necessitated the act of 9th September, 1835, and by that act all the property of the Municipal Corporations was invested with a public, that is charitable use, for the express purpose of introducing the jurisdiction and control of the Court of Chancery,—that this is the view entertained by the judges in England before whom cases, subsequent to the passing of the act, have come, is apparent from the anxiety displayed in their judgements, of letting it be clearly apparent that they decide each case upon the especial provisions of the act, and with respect to *a fund, by the act, specially dedicated to charitable purposes*, to justify the decisions at which they arrive. Without that act then, it is apparent, that it never was the opinion of the courts that members of a Municipal Corporation, that is of the governing body thereof, were ever regarded in equity in the simple character of trustees or

agents, unless there was a charitable use; and since the passing of the Municipal Corporations Act of 1835, the result of the decisions is, that the members of the governing body of Municipal Corporations affected by that act, are made responsible to the Corporation, for any application of the funds of the corporation *to purposes foreign to the purposes of the act*, all such applications being in direct contravention of the act, *and for that reason*, illegal and void. Now the Municipal Corporations Act of England not conferring, as it is submitted it does not confer, any power of raising money by the issue of debentures, and no such securities having appeared in any of the cases which have arisen under the act of 1835; and the cases which have arisen under that act displaying, as they all do, gross and designed breaches of the act itself and of the trusts thereby established, by a *manifest appropriation of the trust funds, in direct contravention of the express provisions of the act;* it is improper to apply the language made use of by the judges in the cases which have arisen in England, to the case of the purchase, by a member of the governing body of a Municipal Corporation, of debentures of the corporation, from third persons, who, as in the case now in discussion, were always intended to have, and were supposed to have absolute control over them;—as if these cases were clearly analogous.—When Lord Cottenham speaks of the illegal attempt made by certain members of the governing body "*to alienate corporate property*" *to purposes foreign to the purposes of the act* establishing the corporation, as he does in the Attorney General vs. Wilson, and when he speaks of the "property in question" being *by the act* made subject to a public trust and of the appropriation complained of being inconsistent with such trust, *and designedly contrived in controvention of the act*, as he does in the Attorney General vs. Aspinall; it is impossible to concieve that he contemplated, as within his reasoning the case of the purchase of debentures of the corporation, by a member of its governing body from third persons, to whom they were intended to be issued *for purposes expressly authorised by an act of the legislature.* The more then that

the circumstances of the case now in discussion, appear to vary from the circumstances of the cases decided in England and upon which the Court of Chancery rest and found their judgment in the case now in discussion, the more it is submitted, will appear the impropriety of sustaining that judgment *upon the strength of the decided cases.*

Now the Attorney General vs. Lord Clarendon 17 Ves 491 was the case of a lease of a portion of a charity estate executed by the trustees of the estate to one of themselves. Hamilton vs. Wright 9 Cl. and Fin. 111, was the case of a trustee, (for the payment, out of the trust estate, firstly of £600 per annum for life to the creator of the trust, and for sale of the residue of the estate for the benefit of creditors,) acquiring an assignment of an annuity bond executed by the creator of the trust; and the trustee claimed the benefit of this annuity bond *in opposition to the provisions of the trust deed.* Both of those cases were clearly within the common rule, that a trustee for sale or management of a trust cannot himself purchase an interest *at variance with the duty he owed to the trust.* Benson vs. Heathorn 1 Y. and C.N.C. 326, was a similar case. There one of the directors of a Steam Navigation Company, *specially appointed to purchase a Steam Vessel for the Company,* not only charged the company a larger sum than the price paid by him, for the Steam Vessel, but commission also and other charges, and he further paid to himself, out of the company's funds, amounts ordinarily allowed to a ships husband, although the shareholders in the company had never made him ships husband, nor had authorised the charges, but on the contrary, allowed the directors a considerable annual sum to recompense them for their services as directors.

It is an exception to the rule referred to, which exception, it is submitted, is as universal as the rule itself, and is inseperable from it, that a trustee or agent may deal with his cestuique—trust, or principal if he put the latter in possession of all the information acquired in the execution of the trust. Mr. Vice-Chancellor Spragge in his judgment, says "my idea "is that in no case can an agent in the position of the defend-

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"ant contract with his principal; for who is the principal "to whom he is to make known all that is known to himself, "and who is to consent to treat with him notwithstanding "his character of agent? not the other members of the "same council; for it is not their agent that he is, but they "are his co-agents, and he and they are the agents of the "whole body of corporators—the Inhabitants of the city; "and it is manifest between them and their agent no such "communications could be made as are required in such "cases, between principal and agent; nor is there any mode "by which the assent of the corporate body to treat with its "agents could be ascertained."

Now it is submitted that this is a strong argument in favor of the position contended for on behalf of the defendant in the Court of Chancery, and now contended for in this Court, namely—that a rule laid down as applicable to the ordinary case of a trustee or agent *appointed to sell or purchase* property for the benefit of, and upon behalf of another, is not applicable to the circumstances of the case now in discussion; *for, if the peculiarities of the case now in discussion are such, as to exclude the possibility of the application ever of the exception to the rule*, and if the exception be, as it is submitted it is, as universal as the rule itself, and inseperable from it, with what propriety can it be held *that the peculiarities of the case can never exclude the application of the rule itself?* This is simply what is contended for by the appellant, that there are peculiarities in this case different from the common case to which the rule owes its origin, which exclude the propriety of applying *the rule* to the circumstances of the present case. But it is said, every member of the Common Council of a Municipal Corporation is *an agent* of the corporation, and there is no majic in the term. I admit that every member of such Common Councils is an agent of the corporation and that, as such, he is in duty bound to administer the property of the corporation *to the purposes of the act or acts of the Legislature conferring powers on the corporate body and which determine the nature and extent of the agency*, and that any application of such property *to purposes*

foreign to the purposes of those acts of the Legislature is illegal and void. But if any given act complained of, be not in contravention of the provisions of such acts of the Legislature; then I contend that, quoad the act complained of, the member of Common Council is not an agent of the corporation. A In the language of Lord Cottenham in the Attorney General vs. Wilson, Cr. and Ph. at page 24, I admit that a member of a Municipal Council is bound to exercise the functions of councillor *for the purposes for which they were given and to protect the interests and property of the corporation.* B but I contend, that when the majority of the members of the council have deliberately adopted resolutions upon a measure *within their jurisdiction*, it is the duty of the Municipal Council, and of all subsequent councils of the corporation, (especially if private interests have intervened upon the faith of those resolutions) to give legal effect to such a measure, in the proper mode pointed out by the Acts of the Legislature which delegate to the corporation its Corporate and Legislative powers. For example, if a Bye-law, and not a Resolution, is the proper mode indicated of effecting the purpose contemplated, and if upon the faith of a Resolution, private interests become affected, it becomes a *moral and equitable* duty upon the corporation through its council to give *legal* effect to the obligation comprehended in a resolution, upon the faith of which private parties had bona fida embarked their fortunes; and with respect to the office of Mayor of a Municipal Corporation, who is also, (a *ministerial officer* of the Corporation in certain events,) I contend that it is his duty to preside over the deliberations of the council in the same manner as the Speaker of the House of Assembly; and I contend that if a measure before the council is adopted by the council unanimiously, or without reference to a committee of the whole, the position of Mayor is similar to that of Speaker of the Legislative Assembly, and that, except in committee of the whole, he has no opportunity given him, of expressing his own opinion, and that, therefore, in the case assumed—of the council agreeing upon a resolution (involving though

it may, the issue of Debentures) without reference to a committee of the whole, the Mayor can in no way be held responsible for the propriety of such resolution, or be precluded from purchasing those debentures when issued whether his business be, or be not, that of a Broker specially dealing in such securities; even though as Mayor it be a part of his *ministerial duty*, as an *officer* of the corporation, to sign such Debentures. I contend also, that the acts incorporating those Municipal Institutions, making them, as they do make them, *open*, *deliberative* and *Legislative* Assemblies and establishing, as they do establish, the rule that the opinion of a majority shall prevail, the acts of a majority of such bodies *within the jurisdiction* conferred upon them by the Legislature, cannot be called in question in any court, *whatever personal or private motive may be assumed* to influence a *single* individual of the council in giving, or withholding his vote upon a question under deliberation, or in absenting himself altogether from the debate. And I contend that it is to the acts of the Legislature, which confer upon the corporation and upon its legislative, deliberative, council, their powers and which define their functions; that we are *alone* to look for the purpose of determining, in any given case, wherein the conduct of a member of the council is complained of by the corporate body; and that the sole question upon such an enquiry is, whether the measure itself in which the conduct complained of arose, is within the jurisdiction of the council—is authorised by the acts of the Legislature and *therefore* valid—or is in contravention of the acts of the Legislature giving powers to the council and *therefore* invalid and void? So that I say there are many things in the special nature of the agency involved in the position of being a member of a Municipal Council, which distinguish his position from that of *an ordinary agent appointed to sell or purchase property for another.*

Even in the ordinary case referred to, an enquiry into the nature and extent of the Agency delegated or assumed, is an essential requisite in determining, *whether any act* of

the Agent, complained of, by his Principal *is inconsistent with the duty owed* by the Agent to the Principal? For example, in the case of an Agent appointed to sell *Blackacre* for his principal; no trust or agency is imposed or assumed, affecting *Whiteacre*, the property of the same Principal; and yet, without attributing any magic to the term "Agent." The agent to sell Blackacre may purchase, for his own benefit, at any rate of discount, a mortgage which had been executed by his Principal, upon *Whiteacre*. So then in all cases it is essentially material to enquire; what is the the nature and extent of the Agency? What is the duty thereby imposed or assumed? It is not sufficient to argue thus—"An Agent *appointed to sell* certain property "cannot sell that property to himself, because his duty is to "sell for the best price, and his interest is to buy at the "lowest price—but every member of a Municipal Council "is *an Agent* of the Corporation—therefore, in any par- "ticular case, it is the duty of every member of Council "simply because he is a member of Council to buy in, or "sell upon behalf of the Corporation certain Debentures "(ordered to be issued by the Municipal Council, within "their authority, to strangers for work done or services "rendered), et, ergo: no member of such a Council can pur- "chase for his own account such Debentures, from the per- "sons to whom they were so ordered to be issued, and the "bona fides of the purchase is a matter of no consequence; "because an Agent appointed to sell, has an interest, if he "sells to himself, plainly inconsistent, and at variance with "with his duty." Now although I consider the course of reasoning adopted by the Judges of the Court of Chancery, in deciding this case, to be erroneous, I propose to enquire—whether the measure in respect of which the Debentures, referred to in the pleadings in this cause, were issued, comprehended a purpose within the scope and authority of the Common Council, or whether it was unauthorised by the Legislature, and *therefore*, illegal and void? What was the duty which, under the circumstances of this case, the

Appellant at the various stages, referred to in the judgment of the Judges of the Court of Chancery, owed to the Corporation in respect of the measure, for the time being, under discussion? Had he at any, and if any, at which of such stages, any, and if any, what interest in the passing of the measures so under discussion, inconsistent and at variance with such his duty? In discussing these questions, the argument will necessarily comprehend the consideration of all or most of them together, and in the course of my argument I shall contend that, assuming *the form* of the By-law of the 28th of June (introduced into the Council on the 21st of June 1852, in the absence of the Appellant,) to have been insufficient, yet such informality can form no part of the consideration of the present case; and further that there is not only no Statute or Rule of Law or Equity which precluded the Appellant, a whit more than any other Corporator not a member of Council, from embarking in the purchase of the Debentures referred to, in the manner in which he did; but that on the contrary, the Decree made in this case in Chancery cannot be sustained without a disregard, amounting to a Judicial Repeal, of Statutes of the Legislature in force.

The Act of the Legislature of the 10th of August 1850 specially empowered the Municipal Corporation of the City of Toronto, to issue Debentures to an amount not exceeding £100,000 for and towards *assisting in the construction* of the proposed Ontario, Simcoe, and Huron Union Railroad, and to provide for and secure the payment of such Debentures *in such manner and way*, as to the said Municipal Corporation should seem proper and desirable. This power was by the Act declared to be given "upon the ground of the public utility" of the work and for the reason the Act authorised the aid to be given "*in any manner*"—either by taking of stock, by loan, or by gift. The Board of Trade, and numerous inhabitants and rate-payers of the City, immediately upon the passing of the Act, urged the Municipal Council, to avail themselves of the Act, and to grant assistance to the Railroad. The matter was referred to the

Finance Committee of the Council. This Committee took the matter into their consideration, and reported to the Council a recommendation to grant the aid desired, in one or other of two modes, suggested in the Report of the Committee. The Council took this Report into their deliberate consideration, and thereupon on the 25th of Nov. 1850, in accordance with one of the suggestions contained in the Report of the Committee, adopted a resolution approving of the issue of £25,000 of Debentures redeemable in 20 years as a gift to the Railroad Company, upon certain conditions. These conditions were accepted by the Railroad Company, and *upon the faith* of this Resolution, the Railroad Company entered into a contract with Messrs. Storey & Co as Contractors for the construction of the work. By this agreement the Railroad Company transferred to the Messrs. Storey & Co. their right to receive the said Debentures of £25,000. *Upon the faith of this agreement* Messrs. Storey & Co. proceeded with, and expended large sum of money in, the construction of the Road. Now, under these circumstances, I contend that both the Railroad Company and the Messrs. Storey & Co. acquired an indefeasible interest in those Debentures, and a right to call upon the Council to pass the necessary By-law in *good, sufficient and legal form*, to authorise the issue of the Debentures, and that the interest of Messrs. Storey & Co. in the Debentures was such, that they might, if they had pleased, have transferred to strangers, in anticipation of the issue of the Debentures, their right to receive them and to enforce their issue, to the same extent as they might have sold the Debentures themselves when issued. Except therefore the absence of compliance with *the form* of passing the necessary By-law, that transaction was completed in Nov. 1850.

Again in the month of August 1851 the Municipal Council of that year, yielding to an urgent appeal made by certain ratepayers of the City in public meeting assembled, referred to a Select Committee of the Council for their consideration, the subject of the propriety of granting further aid to the Railway. That Committee upon mature delibe-

ration Reported to the Council a recommendation to lend the Railway Company City Debentures to the further amount of £35,000, redeemable in 20 years, taking as security therefor, Debentures of the Railroad Company to the like amount payable in *Ten* Years, with interest half-yearly. The *Council almost unanimously* adopted the Report and passed a Resolution authorizing the loan, on the 18th of August 1851. *Upon the faith of this Resolution* the construction of the Railroad, which but for this Resolution, it was then believed, would have had to be abandoned, was proceeded with ; and by an arrangement then made between the Railroad Company and Messrs. Storey & Co. the right to receive these Debentures also, was transferred to Messrs. Storey, & Co. who thereupon expended further large sums of money in constructing the Railroad. With the exception of the absence here also of compliance, upon the part of the Council, with *the form* of passing the necessary By-law to authorize the issue of these Debentures, this transaction was completed in August 1851. The Railway Company accepted the conditions embodied in the Resolution authorising the loan, and upon the Railway Company transferring their right to receive these Debentures, as they did, to the Messrs. Storey & Co., for valuable consideration, the right accrued to the Railroad Company and Messrs. Storey & Co. to call upon the Corporation to pass the necessary By-law in due form of law.

Now the Chancellor, in his judgment, argues *to this effect* "That on the 28th of June 1852 there being no By-law then "in existence authorising the issue of the Debentures, and "the enactment of such a By-law depending on the Common "Council, and the legality of passing such a By-law being "then more than doubtful, it was the duty of the Appel-"lent, as a member of the Common Council, to bring to the "discussion of the question of passing a By-law for the "issue of the Debentures an impartial judgment, and in the "exercise of such judgment to open the question of the pro-"priety or impropriety of authorising the Debentures and "of assisting in the construction of the Road," and he contends

" that the Appellant had then such an interest in the issue of " the Debentures as precluded the possibility of impartiality " in determining that question." Now in answer to this mode of reasoning, it is to be observed *that the form only* and not the principle of the By-law was the matter in discussion on the 28th of June 1852. The question was not—whether the Corporation should or not extend aid, or in any particular mode, towards the construction of the Railroad? That question had been twice gravely deliberated on in Nov. 1850 and August 1851, and the aid was conceded by the Councils of those years, upon the urgent solicitation of the Ratepayers and the Board of Trade; but the question was—*whether the forms* required by law, in passing a By-law to give effect to the resolutions of Nov. 1850 and August 1851 had been complied with so as to make *the By-law* which had been introduced into the council on the 21st of June, sufficient in point of form? It was *the duty* of the council, as I contend, long previously, to have complied with all the necessary forms, and to have passed a valid By-law to give effect to those resolutions, and I contend that to hold that on the 28th of June 1852, notwithstanding the resolutions of Nov. 1850 and August 1851, and all that had been done upon the faith of those resolutions, it was the obvious duty of the members of the council of 1852 to open the questions determined in 1850 and 1851 and to deliberate anew upon the principle involed in the resolutions of those years, or (without the consent of the parties who acquired interests upon the faith of the resolutions of those years) to do anything else than give effect to those resolutions, would be to hold. That it was the obvious duty of the Municipal Council of 1852, and of every member of that body, to deliberate gravely, upon the propriety or impropriety of committing a fraud upon the Railroad Company and Messrs. Storey & Co., upon the propriety or impropriety of disapointing the hopes of the ratepayers, of the benefits universally expected from the construction of the road, by cancelling resolutions of the council upon the faith of which the road was built—to deliberate in fact, upon the propriety or impropriety of

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bringing the Railroad Company and Messrs. Storey & Co. probably to bankruptcy, by depriving them of the means of meeting most extensive engagements which had *only been entered into upon the faith of those resolutions.*

My Lords, I confidently submit that no such duty was imposed upon the Municipal Council, or upon any of its members, in June, 1852—that such a course of conduct would have been a gross fraud, and would have been prohibited and restrained in its operation, by a proper application to the Courts—that *private* interests, and indeed *public* interests, (having regard to the public benefit of the Railroad), were so affected by the Resolutions of 1850 and 1851, that in June, 1852, or prior thereto, the Courts of the Country, by process of Mandamus or Injunction, or, if necessary, the Legislature, would have found means to have compelled the Municipal Council to have perfected, by a good, valid and sufficient By-law, the objects of Resolutions, upon the faith of which, not only the existence of the Railroad, but the fortunes of innocent individuals who had embarked hundreds of thousands of pounds in its construction, depended. The unmeasured abuse, which has been, in public, so lavishly, and I submit, unjustly, vexatiously and maliciously heaped upon the Appellant, for his embarking as he did bona fide, in the purchase of these Debentures, from Messrs. Storey & Co. would have been most justly heaped upon him, and upon every member of the council of 1852 who, *under the pretence of a duty to the corporation*, would have taken part in the opening of such a question.

But my Lords, in any case wherein a question arises whether or not, in any given circumstances, an agent has acted, in a manner, at variance with *the duty* which he owes to his Principal; *the duty* itself must be *clear*, *manifest* and *obvious*. It must not admit of a question depending upon nice and refined reasoning—it must not be a question admitting a momentary doubt—*what the duty is?* For the rule applied to the determination of this case, is one which traces its origin to cases wherein, the *clear* and *obvious* nature of *the duty*, is the most essential condition to the

application of the *rule*. "Alius Emptor," "alius Venditor," is the expression of the meaning of the rule, in the days of its origin.—A purchaser is *one* person, a seller is *a different person*. "A purchaser buys at the cheapest rate, a vendor "sells at the highest rate" is another expression of the meaning of the rule. Therefore, *it is obvious*, that a man who sells to himself holds two antagonistic and inconsistent positions; and so the rule applies,—that a man who is an agent to sell, or buy for another, cannot sell to, or buy for himself. If then *the duty be not obvious*, of necessity, the application of the rule must cease. Now, whatever may have been the duty of the members of the Municipal Council in June 1852, in relation to the aid in question, and to the issuing of the Debentures authorised by the Resolutions of 1850 and 1851; it cannot be said that it was obviously a duty to call in question the propriety of the councils of 1850 and 1851 passing the Resolutions of those years—nor that it was *a duty* that they should suggest the propriety of imposing additional conditions or qualifications upon these Resolutions, as suggested by the Chancellor. If then such *was not the duty* of a member of the council in June 1852—or *if it is not obvious* that such *was* the duty of a member of council in June, of that year—and even if the Appellant *had then* contracted for the purchase of Messrs. Storey & Co's. right to receive the Debentures, under those Resolutions, and *had paid* them for such right—still it could not be said, that such purchase comprehended *an interest* in the issue of those Debentures, *obviously* at variance with *a duty, not in itself obvious.*

But the fact is, that on the 28th June, 1852, the Appellant had *not* made any agreement with Messrs. Storey & Co. for the purchase of these Debentures; *nor had he acquired any interest in their issue.*

The Chancellor, in his Judgement, argues *to the effect* "that it is quite clear that the Appellant's interest in the "issue of the Debentures accrued prior to the 24th of June, "1852". This view is not borne out by the evidence. Mr. Courtwright *swears* that prior to his letter of the 30th of June

1852, he had *but one* interview with the Appellant, relative to his purchasing any of the debentures; and that such interview took place *within two or three days preceeding* the said 30th of June; he having then just returned to Toronto, after an absence of several months; and that it was limited to the purchase of £24,000, the amount mentioned in the letter of the 30th of June. Now, by the minutes of the council, it appears that the Appellant was absent from the council on the 21st of June, and until the meeting in the evening of the 28th of June. By Mr. Hinck's evidence it appears, that on the 24th of June, 1852 the Appellant was in Quebec, and that he then informed Mr. Hincks, that Messrs. Storey & Co. had been, for some time back, trying to sell the debentures, but without success, and that he thought they would take £80 per £100 for them, (circumstances confirmed by the evidence of Mr. Morrison). Now, taking into consideration the necessary time spent by the Appellant in his going to, and returning from Quebec, on that occasion, and having regard to the terms of the letter of the 30th of June, which, if it alludes to any previous interview relative to the Appellant purchasing the Debentures, that interview must have been a then very recent one; and having regard also to the fact, of the Appellant immediately communicating to Mr. Hincks, the letter of the 30th of June, and of his waiting his reply, before answering that letter; and to the fact, also, of the Appellant and his partner on or about the 8th of July, procuring an advance to Messrs. Storey & Co. of £8,000, it appears *quite clear* that *Mr. Courtwright is right* in fixing his interview with the Appellant which took place prior to the 30th of June, relative to the Appellant purchasing the debentures, or any of them, at a period which *certainly was not* earlier than that *sworn to* by him; and it is equally clear that *no agreement was arrived* at between the Appellant and Messrs. Storey & Co., prior to the advance of the £8,000. So that *on the* 28th *of June* the Appellant *had not acquired any interest whatever* in the Debentures.

The evidence upon this point, is not only more to be depended upon than, but is subversive of, the presumptions

upon which the Chancellor arrives at the conclusion that, prior to the 24th of June, 1852, *the Appellant had acquired an interest in the debentures in question*. But, it is said, he certainly *contemplated* purchasing the debentures prior to the 24th of June, 1852. Well, (granting for the sake of argument that he had) I reply, independently of what I have urged as to the point of *duty* owed by him to the corporation on the 28th of June, 1852, that, *as his contemplation* of acquiring an interest in the debentures, by purchase from the contractors, who were entitled to absolute control over them, *could not give him an interest* in the debentures, or in their issue, until the Messrs. Storey & Co. *should consent* to sell them, and *should enter into an agreement* to that effect; and as no agreement was concluded until the 8th of July 1852, and then only as to £24,000, it is erroneous to say (within the meaning of the rule referred to,) that the Appellant had, on the 28th of June, 1852, acquired *an interest* which could *then be put in the scales*, in opposition *to his duty*. I contend, therefore that, both as regards *the duty*, which on the by-law of the 28th of June coming up before the council, *it is assumed*, the Appellant owed to the corporation, upon the debate of that measure; and, as regards *the interest* in the debentures, which, *it is assumed*, he had then acquired; all the ingredients, which make the rule in question applicable, are, under the circumstances of the case, absent from the transaction.

In 1852, it appears that a difficulty arose between the Railroad Company and Messrs. Storey & Co., of the one part, and the Finance Committee of the other part, relative to the security to be given for the £35,000 loan. (The £25,000 *gift* was deemed by all parties to have been concluded.) The difficulty appears to have arisen in this manner: the resolution of August, 1851, authorised City Debentures for £35,000, *redeemable in twenty years*, to be issued upon security of debentures of the Railroad Company, to the like amount, *payable in ten years*:—that is, payable ten years before the debentures of the City, to be issued by way of loan, should become redeemable. The Railroad Company, conceiving that their simple Bonds,

would satisfy the requirements of the Resolution, had made their arrangements with Messrs. Storey & Co. based upon this supposition. These arrangements were made in August, 1851, immediately upon the passing of the resolution of that month; under the arrangements then made, Messrs. Storey & Co. became entitled to the £35,000 debentures authorised by the resolution, and upon the faith of their receiving them, the road which, otherwise, would probably have had to be abandoned, was proceeded with. Mr. Thompson, Chairman of the Finance Committee, in 1852, seems to have called *for a first lien upon the road*; upon its being explained; that no such lien could be given, without sacrificing the Government Guarantee, which was to be secured by a lien on the road, the Finance Committee, by their minute of the 2nd of July, demanded a mortgage on the road, to take precedence next after the government lien. The Railroad Company did not wish to give any preferential Bonds, except for the Government Guarantee, and they contended that their bonds payable in ten years, which they were willing to give, would comply with the words of the resolution, as they would with the intention of all parties at the time of the resolution being passed. The words in the resolution and in the by-law of the 28th of June, viz, "*secured on the road*," were referred to, by the Chairman of the Finance Committee, as indicating a special lien or mortgage on the road. Indeed, it seems doubtful whether, notwithstanding the minute of the 2nd of July, the Finance Committee wholly abandoned the idea of a *first lien*. The Railroad Company conceived that their bonds would be, as they undoubtedly would be, *a security upon the road*, without being expressed to be a preferential lien or mortgage, and they were therefore anxious that the matter should be so arranged; but the Chairman of the Finance Committee, seems to have thought that the committee was under those words, entitled to special lien or mortgage. A difference of opinion as to the proper construction of the resolution, thus arose between the Railroad Company and the Finance Committee. The Railroad Company, however, were so situated, by their arrangement with Messrs. Storey &

Co., that the security required, by the minute of the 2nd of July, if insisted on, would have had to be given, not only in order to enable them to meet their engagements with Messrs. Storey & Co., but to secure the Government Guarantee, which, otherwise, would have been lost. Time thus became a matter of the utmost importance to the Railroad Company, as well as to Messrs, Storey & Co., for if the Railroad Company could not give the City Debentures, to Messrs. Storey & Co. they would have come upon the Railroad Company, for heavy damages which they would thus have sustained and which the Railroad Company never could have paid. Under these circumstances the contractors yielded to a suggestion, which emanated from the President of the Railroad Company to the effect, that in lieu of the £25,000 *gift* and £35,000 loan, they, the contractors, should, out of stock held by them in the Railroad Company, transfer to the corporation £50,000 stock, for £50,000 of Corporation Debentures redeemable in twenty years. The Appellant laid this proposition before the council on the 29th of July, 1852 and it was *almost unanimously adopted*, AS MOST ADVANTAGEOUS TO THE CITY. The transaction was, in fact, one of very considerable gain to the corporation, and therefore the resolution of the 29th July was passed almost unanimously—upon this point, Mr. Vice-Chancellor Esten, in his judgment says, "I have no reason to doubt *that the plan* "*itself* was beneficial to the city, and that Mr. Bowes thought "so and advised the council to the best of his judgment "and ability; and, perhaps the same remarks may apply to "the passing of the by-law of the 28th of June previous"; and the Vice-Chancellor proceeds to observe, "but Mr. Bowes "had the strongest interest to advocate the proposed arrange-"ment *right* or *wrong*, because upon its adoption by the "City Council depended the success of the speculation in "which he had engaged."

The argument of the Vice-Chancellor therefore is—what? That the arrangement itself shall be set aside? No such thing: but that the arrangement having been highly beneficial to the city shall remain good and obligatory, and that the

City shall have the £50,000 stock—well then it follows that the Contractors should have the £50,000 Debentures, the consideration agreed upon for the transfer of the stock to the City. What then does Mr. Vice Chancellor Esten hold? Why simply this, that although the city shall hold the stock, and although, therefore, the Contractors should have the Debentures, yet that *they* could not sell those Debentures *to Mr. Bowes*, and that *he* shall not be able to hold Debentures acquired *from* the Contractors, which Debentures became authorised to be issued *to* the Contractors by virtue of an arrangement, *right in itself, and highly beneficial to the interests of the City.*

Now I hold this to be a fair interpretation of Mr. Vice Chancellor Esten's argument and if it is, then I ask where are to be found in this argument the *elements* of the rule—"That an agent appointed to sell, cannot himself buy the "subject of his agency?" But with respect to these observations of the Vice Chancellor, I further contend, that the argument involved in them, when rightly considered, contains a complete denial, and displacement, of the application of the Rule which has been applied by the Court of Chancery in the determination of this case.

For what is the Rule?—*that a person in a fiduciary capacity cannot acquire an interest in the subject within his fiduciary control, adverse to his duty.*—Now if the arrangement of the 29th of July, 1852, was, as it clearly was an arrangement in itself most beneficial to the City, and more beneficial than the previously existing arrangements; and if, as is also admitted, the Appellant advised the Council to the best of his judgment and ability, when he laid the proposition before the Council, for their consideration; then it is clear that it cannot be alleged on the part of the City, that his conduct was *otherwise than identical with his duty.* But an agent who sells to himself *the subject* of his agency acts *in direct contravention of his duty.* How then can it be said that *a rule* for the application of which, it is necessary that *the conduct* of the agent shall be *plainly in contravention of his duty*, is applicable to a case wherein

the *conduct of the agent* is admitted to have been, for *the best interests of his principals, and identically conformable with his duty?*

But the Vice Chancellor argues, that "*right* or *wrong* the "Appellant had the strongest interest to advocate the pro- "posed arrangement, because upon its adoption by the City "Council depended the success of the speculation in which "he had engaged." Now here I submit is a plain confusion of terms and principles—for if the conduct of the Appellant in the matter here referred to—namely, advocating the adoption of the arrangement—*could by possibility* be *right*, then it is plain that it cannot be attended by consequences incident only upon wrongful conduct. But if the *supposed interest* was *not plainly at variance with his duty*, and it could not have been *at variance* with his duty if advocating the measure was *in itself* for the best interests of his principals and therefore conformable with his duty—then the rule applied to the determination of this case is inapplicable, *for the Rule presupposes an interest at variance with a duty.* However the truth is that in fact the Appellant had no such *interest* as is suggested by Mr. Vice Chancellor Esten. For in the first place the only agreement which on the 29th of July existed between the Apellant and Messrs Storey. & Co., relative to the purchase of Debentures, was limited to £24,000 part of *the gift*; and if the resolution of the 29th of July had been rejected, such rejection would not have affected the gift, so that in so far as the gift was concerned, and therefore, in so far as the *interest* of the Apellant can be said to have been concerned, the adoption or rejection of the proposed arrangement of the 29th of July could not have altered the position of the Appellant in any manner. But (assuming for the sake of argument) that, contrary to the evidence, there was, on the 29th of July, an agreement existing between the Appellant and Messrs. Storey & Co. for the purchase of the £35,000 Debentures also; then instead of the Appellant having had *an interest* in procuring the adoption of the proposed

arrangement of the 29th of July, he had, what, with more justice, might be termed *a strong interest* in bringing about the rejection of that arrangement, for, such was the position of the Railroad Company, that they would have had to yield to the terms of the minute of the Finance Committee of the 2nd of July, and the Appellant would have had £60,000 instead of £50,000, to receive from Messrs. Storey & Co. at £80 per £100. If the simple bonds of the company without any special lien or mortgage on the road, satisfied the terms of the resolution of August, 1851, then it was the duty of the corporation to have issued the £35,000 without requiring any such special lien, and if the special lien was properly demanded as a condition upon which the resolution was passed, the Railroad Company would have had to give the lien required by the minute of the 2nd July. So that it is incorrect to say, that, "*upon the adoption, by the City "Council, of the arrangement proposed on the 29th of July, "depended, the success of the speculation, in which the Ap-"pellant had engaged.*" If the Appellant was, in fact, at this time, the purchaser of Messr. Storey & Co's. interest in the £35,000 debentures, and if he took advantage of the peculiar position of the Railroad Company and of Messrs. Storey & Co., to procure an arrangement, much more favorable, for the corporation, then, his recommending to the Council, the adoption of such arrangement, so far from being an act of which the corporation could complain, was, in fact, a service and a benefit rendered to the corporation. Indeed, if the rule could at all apply, it must be upon the principle, that it was *the imperative duty*, of the Appellant, *to have resisted* the adoption of the arrangement, for, *if he had an interest in its adoption, which was inconsistent with his duty*, this could only be, by its being his duty to resist the arrangement; and *if such was not his duty*, his interest as purchaser of the debentures, from Messrs. Storey & Co., cannot properly be said to have been adverse to his duty. I say, then, that the conduct of the Appellant on the 29th of July, 1852, was perfectly conformable with that which Lord Cottenham, in the Attorney General vs. Wilson, lays down, to be the duty of that species of agent, which a member of

the council of a Municipal Corporation is, namely:—" that " he is bound to exercise his functions, for the purposes for " which they were given, and to protect the interests and " property of the corporation ; but that if such agents exer- " cise their functions for the purpose of injuring the interests " of the corporation and alienating its property, they shall be " liable to the corporation." But Mr. Vice-Chancellor Esten, in another part of his judgment, with the view of bringing this case within the rule applied to the determination of it, characterises the arrangement of the 29th of July, 1852, as " a sale of debentures *by* Mr. Bowes *to* himself, the transac- " tion was a *purchase* of stock and a *sale* of the debentures."

Now my Lords if the stock, *which was the thing given* for the debentures, had been *the property of the Appellant*, and not of Messrs. Storey & Co., and if the names of Storey & Co. had been imported into the transaction, for the purpose *collusively* of concealing, that it was the Appellant who was transferring the stock to the corporation, then perhaps, these observations, and the case of Cook vs. Collingridge might apply. The case, however, does not admit of this colour put upon it by the Vice-Chancellor, for the transfer of stock and the agreement to issue Debentures to Messrs. Storey & Co., in lieu of the stock was *one transaction ;* and the agreement for the sale of those debentures by Mesrss. Storey & Co., to the Appellant at £80 cash for each £100 of Debentures, was *an wholly independant and distinct transaction.* In the case for example, of Cook vs. Collingridge, if the executors, instead of *collusively* selling the property, in question there, *to one of themselves*, had bona fide, sold that property to a stranger for value received without collusion; and the executor who in Cook vs. Collingridge, was the purchaser, had by an wholly independant contract purchased the property, again from the Vendee of all the executors, then it never could have been held that the latter contract avoided the former, or made the former a *sale by executors to one of themselves.* So in this case, the transfer of the stock by Messrs. Storey, and their agreement made bona fide with the corporation to take Debentures in lieu of the stock, *being one independant transaction*, and much more for the

benefit of the city than the previously existing arrangements; and the agreement between Messrs. Storey & Co. with the Appellant being, as it was, an wholly independant and distinct transaction, it is erroneous to regard them as forming *but one transaction*; in the absence therefore of any, the slightest foundation for the suggestion of such collusion as I have alluded to, or of any collusion between Messrs. Storey & Co. and the Appellant, to bring about the issue of the Debentures for the mere benefit of the Appellant; I confidently submit that, looking back to the resolutions of 1850 and 1851, and having regard to everything that had been done by the Messrs. Storey & Co., upon the faith of those resolutions, it is unnecessary further to argue, that *this view*, in which Mr. Vice-Chancellor Esten regards the transaction of the 29th of July, 1852, is fallacious and erroneous. However much the Messrs Storey & Co. may have had reason under the circumstances, to complain of the arrangement of the 29th of July, however much *they* might have alleged that *certain* members of the Municipal Council had *wrongfully* taken advantage of the position in which the Messrs. Storey & Co. were placed, by the implicit confidence which they had reposed in the council, to give full effect to the intent of the resolutions of 1850 and 1851,—*to compel them to yield to terms much more beneficial to the corporation, than the terms involved in those resolutions*; certain it is, that the corporation, so far from having any reason to complain of the arrangement of July, 1852, had every reason to congratulate themselves upon the alteration involved in that arrangement.

B. see Appeal case page 58, as a just speaker of the views made in this case

TheChancellor *in his* judgement makes use of the following language: "It is enacted by a recent Statute, 16 *Vic. Ch.* 181 *Sec.* "25, *that no person, having by himself or partner, any in-* "*terest or share, in any contract with, or on behalf of the* "*Township, County, Village, Town or City in which he* "*shall reside, shall be qualified to be an, or be elected Alderman* "*or Councillor for the same, or for any ward therein.*" "Now that is a virtual adoption of the equitable doctrine

"Equity had already provided that no person being an "Alderman or Councillor could be allowed to make the "business of his municipality a matter of interest to himself; "and the Legislature has now declared that every person "who is in that position is disqualified, and cannot be elect- "ed Alderman or Councillor, thus adopting and extending "the doctroine long established by Courts of Equity."

Now, as I understand these observations, they purport, that the Act 16 Vic., Ch. 181, and other similar Acts passed in this country and in England, disqualifying certain persons having certain contracts with or on behalf of a Municipal Corporation, from being elected members of the councils of such corporations and disqualifying also persons who, *being members* of such councils, enter into such contracts, from *continuing to be* members of such councils, are simply affirmatory of a well established equitable doctrine, which doctrine made the contract itself illegal and void; and as to the application of the observations to the particular case before the court, I understand them to convey that, in the opinion of his Lordship, the Chancellor, the purchase by a member of the council of a Municipal Corporation, of Debentures of the Corporation, from strangers to whom they had been issued by the corporation of the council of which he is a member—for value, is not only such a contract as involves the disqulifications referred to, but is in itself illegal and void, as being in violation of a well established equitable doctrine, and contrary to the provisions of the Statutes that affirm such doctrine. Indeed I understand the observations to go further, and to convey it to be the opinion of the Chancellor, (the more so because it was so argued upon behalf of the Plaintiffs in the Court of Chancery) to be law, that the purchase by a member of a Municipal Council, of Debentures of the Corporation, no matter when they were issued, or whether they were issued by order of the council of which the purchaser is a member, or of some other council, or for what consideration they were issued, or through how many indifferent hands they may have passed to such purchasing member: upon

the very instant of the purchase by a member of council, becomes a *contract* which, not only under the Statute creates a disqualification, but is in itself an illegal and void contract of purchase, and cannot enure to the benefit of the purchaser, but that the latter must account to the corporation for the difference between the nominal amount appearing on the face of the Debentures, and any less amount at which he may have purchased them, and if they should happen to rise to a premium, he must account also to the corporation, for such premium on his effecting a sale, whereas, in the event of their falling to a rate less than the amount which he may have paid he must bear himself the loss so incurred.

Now, my Lords, with all due deference to his Lordship, the Chanceellor, I am constrained to join issue directly with the observations of his Lordship ; and I contend that the Statutes referred to are not only not affirmatory of the doctrine of equity contended for, but that the true construction to be put upon the Statutes is, that they *are* affirmatory of the legality and validity of those contracts, to which they attach the penalty of disqualification. And I contend further, that the purchase, by a MunicipalCouncillor, of Debentures of the Corporation, whether authorised to be issued by the council, of which he is a member at the time of the purchase ; or by any other council, from strangers to whom they were issued for value, or from third persons into whose hands they may have passed, never was prohibited by any doctrine of equity, or held to be invalid by any decided case ; and that unless the *simple purchase* of Debentures of a Municipal Corporation, by a member of the council thereof *without other attendant circumstances* from third persons, who may, from time to time, be the holders thereof, be *in itself* illegal and void ; there are no grounds upon which the decree made in this case, by the Court of Chancery can be, in the whole or in part, sustained.

Now to attribute to those Statutes pronouncing the disqualifications alluded to, such a construction as would be simply affirmatory of an established doctrine of equity which makes the contract void, is, in the first place, to say the

least, to attribute a very useless office to an Act of Parliament. For to what end should a statute pronounce that *a contract being entered into* shall create a disqualification, *which contract*, independently of the statute, is by the doctrine of equity, illegal and void? To what purpose should a statute declare that an act *in itself* illegal and void, and therefore, in the eye of the law, *incapable of being done*, should, *if done*, create a disqualification? To what end does the English Municipal Corporations Act 5th and 6th, Wm. IV., ch. 76, sec. 53, which Act contains a disqualification clause similar to that in 16th Vic., impose severe penalties upon a member of a municipal council, who, while such *having entered into* a contract with the corporation, *shall continue to act*, in the capacity of councillor, if the contract itself *could not have been entered into* as in violation of an established doctrine of equity? It is my Lords, I contend, to the fact of the contract being valid, that we are to attribute the statutory reason of the disqualification. The Statutes not prohibiting the acts, but attaching a disqualification to the acts and imposing also penalties in the event of persons continuing to assume and discharge the office of Municipal Councillors, after the commital of an act which creates a disqualification, afford evidence of a Legislative recognition of the validity of the acts in themselves. That this is the correct light in which to regard those Statutes imposing disqualifications in certain cases, is apparent from the Imperial Statute 5th and 6th Vic., Ch. 104.

This Statute recites that, " whereas, by an Act passed in " the Session of Parliament held in the 5th and 6th Wm. " IV., entitled &c. &c., it is, among other things, enacted " that no person shall be qualified to be elected, *or to be* a " Councillor or Alderman of any borough, during such time " as he shall have, directly or indirectly, by himself or his " partner, any share or interest in any contract or employ- " ment with, by, or on behalf of the council of such borough " or during such time as he shall hold any office or place of " profit other than mayor, in the gift or disposal of the " council of such borough; and whereas doubts have arisen

"as to the extent and meaning of the word '*contract*' and "'office or place of profit', and it is expedient that such "doubts should be removed." And the Statute enacts,

1stly "that from and after the passing of this Act the "word '*contract*' in the said enactment, shall not extend or "be construed to extend, to any lease, sale, or purchase of "any Lands, Tenements or Hereditaments, or to any "agreement for any such lease, sale, or purchase, or for the "loan of money, or to any security for the payment of "money only."

2ndly, "that it shall not be lawful for any member of the "council of any borough to vote, or to take part in the dis-"cussion of any matter before the council, in which such "member shall, directly or indirectly, by himself or his "partner or partners, have any pecuniary interest." And

7thly, "that from and after the passing of this Act, no "Councillor, Alderman or Mayor shall be deemed *to have* "*been*, or *to be*, disqualified to be elected, *or to be*, such Muni-"cipal Councillor, Alderman or Mayor, by reason only of "his having, or having had, directly or indirectly by him-"self or his partner, any share or interest in any lease, "sale or purchase of any lands, tenements or hereditaments, "or any agreement for any such lease, sale or purchase, or "for the loan of money, or in any security for the payment "of money only; but all elections of Municipal Councillors, "Aldermen or Mayors, as aforesaid, shall be deemed and "taken to be, and *to have been*, valid, unless in cases where "judgments may have been obtained before the passing "of this Act."

The latter proviso alludes to judgments already given in actions brought to recover the penalties imposed by 5th and 6th Wm. IV, Ch. 76, Sec. 53, or in applications by quo warranto under that act, for the removal of disqualified Councilors, &c. Now the Statute 5th and 6th Vict., does not *constitute* that to be valid, which, independently of Statutes, was illegal and void, as contrary to a well established doctrine of equity; it simply removes certain grounds of disqualification in respect of which doubts had arisen, and which the Legislature never contemplated to make grounds of disqualification; but the 5th and 6th Vic. does most

clearly recognise the validity, of those acts when it says, that they shall not be deemed to have created a disqualification, and when it provides far the future, that in the case of such contracts being in existence, or being contemplated, the Municipal Councillor shall only be excluded from voting or taking part in a discussion in council affecting *his pecuniary interest*. I have already I think, established, by the case of the Mayor of Colchester vs. Lowten, that members of the Councils of Municipal Institutions, as they existed prior to the passing of the act 5th and 6th Wm. IV., Ch. 76, were never treated as being within the jurisdiction of the Court of Chancery, as *simple trustees or agents;* the Attorney General vs. the Corporation of Carmarthen, Coop., Ch. Ca. 30 and the Attorney General vs. Heelis 2 S. & S. 67, are authorities to the same effect. I have, I think, also established by the Attorney General vs. Wilson and the Attorney General vs. Aspinall, that *since the passing of that act* they are only amenable for acts done in *contravention of the purposes of the act*, which acts were, *for such reason*, illegal and void. The Attorney General vs. the Corporation of Poole 4 My. & Cr. 17 and the Attorney General vs. the Corporation of Norwich 1 Keen. 700, and 2 my. & Cr. 406 are authorities also to this effect, so likewise the decisions of the Courts, upon cases brought before them by quo warranto to remove persons from the office of Municipal Councillors, for acts, which by the Statutes, create a disqualification, recognise the validity of the Contracts which create disqualifications, for, while they establish the disqualifications, they do so upon the very ground of the continuing existence of the contracts, creating the disqualification. In Reg. ex. rel. Smith vs. Francis, 16 Jurist, 1046, it appears that Francis was elected Councillor of the Borough of Swansea, in Nov. 1846, to hold office for three years; and that in Nov. 1849 he was re-elected to serve as councillor for a further period of three years. On the 9th of Feburary, 1849, a Resolution of the council of the borough was passed to the effect that the tender of Francis for completion of the sorting and binding certain documents for the council, should be accepted at a sum not exceeding £150, the work to be done under the superintendance of the Mayor and Town Clerk,

Under a resolution, made on the 13th July, 1849, Francis received from the Treasurer of the Borough Fund £50 on account of such employment and services rendered by him. In May, 1852, a quo warranto was moved for the purpose of removed Francis from his office as councillor, in consequence of the existence of this contract, and it was held that the act 5th and 6th, Wm. IV., disqualified him from being elected in Novr., 1849, and that his disqualification was a continuing disqualification which subjected him to removal in May, 1852, and it was so held *because* of the continuing existence of the contract; and further, that he would not have been removable if a year had expired from the fulfilment of the contract before the motion by quo warranto had been made. So in our own courts, in Reg. ex. rel. Lutz vs. Williamson, Practice Reports, Vol. 1, No. 2, p. 94, Mr. Justice Burns construes our Statute, 16 Vic., thus, he says "the words of the "act are so framed that if, *after* a person be elected, he "enters into a contract with the corporation of which he is "Alderman or Councillor, *he thereby* becomes disqualified to "sit any longer as a member of the council" and in Reg. ex. rel. Davies vs. Carruthers, Practice Report, Vol. 1, p. 114, his Lordship, the Chief Justice, says, "the question as "to each of these contracts is, did it exist at the time of the "election? if it did, Mr. Carruthers not only had an interest "in it, but was solely interested in whatever could be "claimed from the corporation under it." Now, it is submitted that the judgment of the Chief Justice would have been identically the same, if, as in Reg. ex. rel. Smith vs. Francis, the contracts had been entered into by Carruthers after he had been elected. In that case the contracts from the moment of their being entered into, would have disqualified Carruthers from continuing to act as a member of the council. *He would have held his contract but have lost his seat.* In Reg. ex. rel. Moore vs. Miller, 11 U. C., Report 465, it is held that a tender for a contract, if the tender be accepted by a committee of the council, will create a disqualification, even though no contract under the Seal of the Corporation be signed. Now, if all these and

such-like contracts were already, by well established doctrines of equity, illegal and void, it is submitted that both the Legislature and the Courts have been very fruitlessly occupied in pronouncing and imposing disqualifications arising from acts *in themselves* illegal and void, and therefore, in the eye of the law, incapable of being committed. What is to be inferred from the Statutes, and from the cases which have been decided under them, is, that the ability to enter into the contracts, and their validity when entered into, carries with it the disqualification for a person, *having the contract*, to be, or to continue to be, a member of the council, and this is the reason of the Statutes. But I submit that the purchase of Municipal Debentures, by a member of the council, from third persons, is not an act involving even a disqualification to sit as member of the Council. It may be said that this is a position not necessary to be argued in this case, if, as I have contended, a contract involving a disqualification, may be valid and subsisting, notwithstanding the disqualification thereby incurred; but having regard to the judgement of the Chancellor, the point may become important in this, that if such a purchase does not even create a disqualification, a fortiori, in the light the Chancellor regards the Statute, the corporation can have no right whatever to interfere with the purchase. I contend then, that a person who is the purchaser of a debenture executed by a Municipal Corporation, for work done, services rendered, or other consideration, is *not* "a person," within the meaning of the Statute 16th Vic., Ch. 181, "having by himself or part-"ner, an interest or share in a contract with or on behalf of "the corporation." The contracts alluded to in the Statute are, I contend, contracts whereby something is to be done, or has been done, by the person or persons having an interest, in respect of which, such person or persons, has or have a claim against the corporation for compensation, but when that compensation is satisfied by the payment of money, or by negotiable securities like debentures, for the payment of money at a future time, then no contract comprehended by the Statute exists. The debenture is a contract, it is true, in

a certain sense, it is an undertaking made *by* the corporation, but not made *with* any person or body of persons in particular, it is simply an obligation to pay at a fixed future period, the amount thereby secured, to whomsoever shall be the holder of the debenture ; and if the Legislature intended to disqualify the holder of such a security, the words—"having "an interest in any debenture issued by the corporation,"—would doubtless have been used by the Legislature instead of the words—"having by himself or partner any interest or "share in any contract with or on behalf of the corporation." When then such a debenture comes by purchase into the hands of persons altogether strangers to the original contract, in satisfaction of which it may have been issued, it becomes impossible to conceive why, property in such a security, should involve a disqualification, while there are strong reasons for contending (independently of the misapplication of the term "contract," in the sense it appears to be used in the Statute) to such a security, that attaching a disqualification to property in such a security, instead of tending to the benefit of the corporation, which must have been the object of the Legislature, would tend seriously to the injury of the corporation, and would have the effect of depriving it of the services of the most competent members of council. For these securities being intended to be, and having their only value in being merchantable, negotiable securities, it is into the hands of capitalists and men of business, that eventually they must come. To the man who has received them for work done, services rendered, or other valuable consideration, they are of no value, except in so far as they are readily negotiable and transferable into money. If then they are excluded from the transactions of men of capital and of business, unless attended with the disqualification to act as a member of council, then the debentures are rendered less negotiable, and therefore less valuable, or the corporation becomes deprived of the services of men whose property and business qualifications, point them out as the most fit persons to take part in the management of the affairs of the municipality. Take the case of a Banking Institution, Insurance Company, or other

corporation of many partners, having large sums of money, from time to time, to invest. If property in such securities involves a disqualification, then every individual Stockholder in these institutions or corporations would become disqualified, if any of the funds of the corporation should be invested in the purchase of a single Municipal Debenture, and so perhaps four-fifths of the corporators of the Municipality would be rendered disqualified; and thus those securities whose sole value consists in the facility of their being negotiated and transferred from hand to hand at their full and fair value, would either become depreciated by being excluded from the transactions of those monied institutions, whose directors and managers might not feel justified in embarking in their purchase to the prejudice of the municipal rights and privilege of each individual stockholder, or every individual stockholder would be deprived of the privilege of taking part in administering the affairs of the municipality. The privilege then, of conducting the affairs of the municipality would be limited to a class, having for their qualification mainly, the want of capital. Men of business would be unwilling to take such securities in the way of their trade, if property in them involved a disqualification; or if for reason of that disqualification, the monied institutions having capital to invest, should refuse to deal in them; and then a result most to be avoided would inevitably ensue, namely,—that securities, which it is the interest of the corporation, and of all men of capital and of business, should be readily negotiable at par would be banished from the market, and become the prey of usurers and others, whose interest it would be to depreciate them to the lowest possible amount, as instruments deprived of their vitality, namely, their negotiability, and which therefore, must needs be safely locked up till they should mature. In the case again of an individual man of capital, if he be willing to advance money to the corporation at par upon the security of its debentures, he not only cannot safely do so by reason of the difficulty of negotiating them; but let him be the fittest person in the world to be a member of council, *he cannot*

confer a benefit upon the corporation without subjecting the corporation to the loss of his services : *the attaching a disqualification to property in such securities is nothing short of a perpetual letter of discredit attending the issue of Municipal Debentures.*

Now upon what principle is it, that a member of council, being a man of capital should be prevented from conferring a benefit upon the corporation, by a loan at par, upon the security of the Municipal Debentures, to relieve the corporation from, perhaps, the most pressing difficulties, and the corporators from excessive taxation ? Take the case of Mr. Cawthra, a witness in this case. He was a large holder of Corporation Debentures ; secured by a collateral mortgage upon the whole of the real estate of the city. The British American Insurance Company, in like manner, held City Debentures to a large amount, secured by a similar collateral mortgage. The fact of the real estate of the city being mortgaged to secure these debentures, prevented the corporation from effecting other necessary loans upon the issue of debentures. The privileged debentures (having the collateral security) depreciated the value of all other City Debentures. Sound financial policy required a change from such a state of things, and imperatively demanded that these debentures so secured, should, if possible, be redeemed before maturity, with a view to relieving the real estate of the city from the special lien, to which it was subjected for the payment of those debentures. Now had Mr. Cawthra been a member of council in 1851, when the corporation failed in affecting a loan at par, what prejudice could the city have received if Mr. Cawthra had said to the council—"I will surrender the debentures which I hold, al-
"though they will not be due for some three years to come,
"I will release also the mortgage which I hold, and I will
"advance to you at par, all the money you may want to re-
"deem the other debentures which are secured also by a mort-
"gage, and your outstanding promisory notes, (the non-pay-
"ment of which latter so injuriously affects your credit,) and
"also what you may require for other municipal purposes,

"upon condition merely, that you give me new debentures "payable in Sterling in London, in twenty years, as well "for the debentures I now hold, as for the monies I am now "prepared to advance." It is manifest that in such a case Mr. Cawthra would be conferring a very great benefit upon the corporation; and it is difficult to conceive why he should not be permitted to do so, without forfeiting his seat as a member of council, which his possession of capital, and his business qualifications may have rendered him the most fit person in the city, to hold. Well, what I have suggested here, Mr. Cawthra might have legitimately done, for the benefit of the corporation, had he been a member of council, is in effect, simply what the Appellant and his co-proprietors of the debentures issued to Messrs. Storey & Co. have done. They have given to the corporation what they could obtain no where else, a loan at par, which has enabled them to redeem all those outstanding liabilities which had such an injurious effect upon the credit of the city; and now the corporation, having received the full benefit of this transaction, complain, *not of an injury inflicted, but of a most essential service rendered.* I cannot but think that, and therefore I submit that, when the Legislature was declaring, that no person, having by himself or partner, any interest or share in any contract, with or on behalf of this Municipal corporation, should be qualified to be elected or to be a member of council, it never contemplated attaching a disqualification to property in such negotiable instruments as Municipal Debentures. It seems beyond the limits of common sense to conceive, that the Legislature contemplated disqualifying every individual Stockholder, in banking or other institutions having capital to invest, in the event of such institutions making investments in the purchase of Municipal Debentures; and yet if property in such debentures involves a disqualification, it must be upon the presumption that the Legislature intended to inflict such a penalty upon the stockholders, for such investment by the institutions, a construction which, in the absence of precise and appropriate words, clearly and indisputably conveying the intention of

the Legislature, it will be difficult to put upon the Statute, upon any principle of reason or of sound policy. We have however the Imperial Statute 5th and 6th Vic., Ch. 104 which, in effect declares that the Imperial Statute 5th and 6th Wm. IV., Ch. 76, did not contemplate "an interest in any agree-"ment for the loan of money or in any security for the pay-"ment of money only" as involving a disqualification, and it seems but reasonable to conclude that the Provincial Legislature, when passing the Act 16th Vic., Ch. 181 conceived that the interpretation put by the Imperial Statute 5th and 6th Vic. upon the Imperial Statute 5th and 6th Wm. IV., would reasonably be put, by the courts, upon the terms of the Provincial Statute 16 Vic. However, whatever may be your Lordship's opinion upon this point it is immaterial to the decision of this case if I establish, as I submit I have established, that the purchase may be good and valid notwithstanding the disqualification which the peremptory terms of the Statute 16th, may, if they do, in your Lordships Judgment, attach to such purchase. I submit then, that there is no Statute, or rule of law or equity, which precluded the Appellant from purchasing from Messrs. Storey & Co. the debentures authorised to be issued to them, by the resolutions of 1850 and 1851, or under the substituted arrangement of the 29th of July, 1852.

The Court of Chancery assimilating the position of the Appellant to that of an executor of a testators' estate, or of a Commissioner, Solicitor or other agent appointed to superintend the administration of a bankrupt estate, has held that, by reason of the analogy existing between those cases and the present case, the Appellant was precluded from purchasing from Messrs. Storey & Co., those debentures, however rightly they may have been issued to them. But in truth there is no analogy between the cases, for the reason why an executor cannot purchase for his own benefit the liabilities of his testator is, that he is entrusted with the assets of his testator, and he accepts the trust for the express purpose of applying those assets, in the payment of the liabilities of his testator; he cannot therefore be permitted to apply

his own monies in the purchase of his testators' liabilities at a discount, and charge the assets in his hands for the payment of them, with a greater amount than he has himself paid. The same reason precisely, governs the case of a person employed in the administration of a bankrupt estate, and of every other agent who assumes the duty, *upon the retainer of another*, of purchasing up, on the best terms he can effect for his principal, the liabilities of his principal. Now, it cannot be said that either in fact, or by construction of law, there is any such duty imposed upon, or assumed by, a member of a Municipal Council, as that he shall purchase in, for or on behalf of the corporation, the debentures of the Corporation either before or after they are, by their terms, redeemable, nor can it be said that any assets of the corporation are placed in the hands of an individual member of council, for that purpose. The assets to redeem those debentures are taxes imposed by By-law upon the ratepayers, and these taxes cannot be raised in any other manner than the By-law authorising the issue of the debentures warrants. If then it be not, and it unquestionably is not, the duty of a member of council, out of his own funds, to redeem, upon behalf of the corporation, the debentures of the corporation, there is nothing which can preclude him from investing his own money in the purchase of them from the holders for the time being, for his own benefit, whether they are past due or are not redeemable for twenty years to come. If it be said that it is the duty of a member of council to mantain as far as he can, the general negotiability of the debentures of the corporation at par, and that if he be permitted to buy them himself from the holders, he has an interest plainly at variance with such duty, viz., an interest to depreciate them to the lowest possible amount; I answer in the first place, that it is a fallacy to suppose that any individual has it in his power, by reason of his being a member of council, to exercise any influence in depreciating such securities, whose value depends not upon an individual will, but upon the value of money, for the time being, and upon the character which such securities bear in the public market; and secondly, that it is a

fallacy to suppose that a purchaser of such securities has any such interest as that suggested, for these securities having their value solely in the facility of their being negotiated at par, it is the interest of every person investing money in their purchase to maintain that negotiability ; and so the interest of a purchaser and of the corporation are not at variance with each other, but are identically the same ; and as to a debenture *already authorised to be issued* ; I say that the corporation has no interest whatever in the rate of premium or discount at which such debenture may, at any particular time, be disposed of, by third persons into whose hands it may have come ; and so that in respect to a debenture *already authorised to be issued* by the corporation for value, as those to Messrs. Storey & Co. were, a member of council owes no duty to the corporation beyond the general duty which is identical with the interests of a purchaser, namely to maintain the general credit and negotiability of such securities.

Now with respect to the suggested defect *in the form* of the By-law of the 28th of June, 1852, that defect, assuming it to have existed, can have no bearing upon this case, because, the defect having been the fault and wrong of the council itself, it would have been fradulent and unjust in the council, to have refused to pass the By-law, and to issue the debentures under it ; delay in passing a proper By-law and in issuing the debentures to which the contractors had become entitled by compliance with the terms of the resolutions, being the only consequences, and that delay affecting injuriously the Messrs. Story & Co. only, at whose special request the council was induced to pass the By-law in the form in which it was, and to issue the debentures under it. When the council afterwards petitioned the legislature to remove, and introduced a bill, for the purpose, among other things, of removing, all cause of objection arising from the suggested defect of form, they were only doing what in justice and equity they ought to have done, in discharge of a moral and equitable obligation. The petition and bill transmitted to the legislature were prepared by the city solicitor, under the direction of the council. The frames of the petition and bill were same

tioned by the spirit of justice and by a general public sentiment of approval. The council had not then contemplated consummating the wrong which they now, by the bill filed in this cause, seek to effect. It was not until upwards of a year after the filing of the original bill by one Paterson and others, against the Appellant and the corporation, as defendants, that the then council, and then only reluctantly and apparently under some pressure of compulsion, entered into an arrangement, savouring of maintainance, whereby the corporation consented to apply to the Court of Chancery to be made plaintiffs, instead of defendants, upon security being furnished them, that the corporation should be exempt from all liability for costs, whatever should be the result of the suit; and that the litigation should be carried on at the expense of others, with the view doubtless of those sureties, (in the name of the public) indulging, at their own expense, in the gratification of their private vindictiveness and malice. If the corporation was in reality wronged by the Appellant, the council should have instituted the suit at the expense of the corporation; and if the council felt, as they must have felt the injustice of the suit, and that the corporation was not only not wronged but benefited by the transaction complained of, then it does appear to me that the council were guilty of a high misdemeanor, in authorising the name of the corporation to be used, upon a condition of exemption from liability for costs, which the corporation alone should have incurred, if the suit was a proper one to be instituted.

The Legislature, by the Statute 16th Vic., Ch. 5, have recognised the justice and propriety of the application of the council of 1852, and have confirmed the taking of the stock in the Railroad Company under the resolution of the 29th of July, 1852, and the issue of the debentures under the By-law of the 28th of June; but it is argued in support of the relief prayed by the bill filed in this cause, that the Appellant wrongfully, and for his own benefit, issued £7,000 of debentures in direct violation of the terms of that Statute. That the corporation would have a cause of action against the Appellant for the wrongful issue by him, of debentures

in direct violation of a Statute of the Legislature, I readily admit, but in such a case, it will be seen that the remedy would be for the specific amount of Debentures, so wrongfully issued, and for neither more nor less, whatever premium or discount they may have been sold at; but such a cause of action involves an abandonment of all the other grounds upon which the decree, made in this case, is based. The suggestion however, that the Appellant did so wrongfully, issue, such or any amount of debentures, springs from an utter misconception of the 5th clause of the Statute, which enacts, "that the sum of fifty thousand pounds, the remain- "der of the said loan so to be raised as aforesaid, shall be "applied in payment of ten thousand shares of the capital "stock of the Ontario Simcoe and Huron Railroad Union "Company, lately purchased by the City of Toronto, under "resolution of the Common Council passed on the twenty "ninth day of July, one thousand eight hundred and fifty two, "in manner herein provided; and it shall be the duty of "the Chamberlain of the said City for the time being, (and "he is hereby authorised and empowered so to do,) forthwith "with the consent of the holders thereof, to call in such de- "bentures of the said City of Toronto, as may have hereto- "fore been issued under any By-law of the Common Council "of the said city, and taken in payment of such stock, and "to substitute therefor so much of the funds received on ac- "count of the debentures to be issued under this act as may "be necessary for that purpose."

This Statute, it appears, received the Royal assent upon the 7th of October, 1852, and it is contended (inasmuch as it also appears that £7,000 in debentures were issued to Messrs. Storey & Co. subsequently to that date,) that this sum of £7,000 was issued in violation of the Statute. Now the facts in relation to this issue, are, that as all debentures issued to Messrs. Storey & Co. were issued by the Chamberlain, with the sanction of the Finance Committee, in proportion to the progress of the railroad; and as the debentures had to be signed by the Appellant as Mayor, the signature of the Mayor was attached to them, and the

debentures so signed, were left in the hands of the Chamberlain to be issued, and were issued by him, when Messrs. Storey & Co., by reason of the progress of the road, became entitled to them; in the same manner as the other debentures for the same purpose were issued. But the Statute 16th Vic., Ch. 5, provides, that £50,000 of the loan to be obtained under that act, was to be applied in payment of the £50,000 stock in the Railroad Co. taken by the city under the resolution of the 29th July, 1852; and if at the time of the corporation effecting the loan contemplated by the act, only £43,000 had been issued under the By-law of the 28th of June, then it is apparent that other £7,000, proceeds of the loan at whatever discount it might be raised, would have had to be paid to the Messrs. Storey & Co. to complete the sum of £50,000 directed to be paid to them for the stock. Under the act then, if £43,000 had only been paid to the Messrs. Storey & Co. and if the corporation could have only succeeded in obtaining their loan at a discount, say of £10 per cent. and if the Statute intended to prohibit the issue of the balance of the debentures which Messrs. Storey & Co. had contracted to take from the corporation in payment of the stock, then the corporation would have been the losers, for out of the proceeds of the loan, they would have had to pay Messrs. Storey & Co. the £7,000 balance in money without any deduction, notwithstanding that the corporation had effected the loan at a discount on their debentures: now as the period at which the corporation might effect the loan contempleted by the act, was a period necessarily subsequent to the passing of the act, and as it is apparent that the Legislature, by the act, contemplated confirming the arrangement made between the corporation and Messrs. Storey & Co. by the resolution of the 29th of July, and did not contemplate prejudicing the Messrs. Storey & Co's. right to receive their debentures under that arrangement, the word "heretofore" in the last sentence of the 5th section must be construed to relate to *the future period when the corporation should effect their loan*, that is, that "when the corporation "shall effect their loan they shall call in such debentures

" which shall have then been issued to Messrs. Storey & Co. " under the arrangement exisiting between them and the " corporation," and in evidence of this being the intention of the Legislature, the 6th clause proceeds to enact that then, that is after the corporation shall have so called in those debentures, the corporation may repeal the By-law of 28th of June.

In the face of this Statute confirming the arrangement of the 29th of July,—referring to the By-law of the 28th of June,—and sanctioning, (as it was just that it should), the arrangement existing between the corporation and Messrs. Storey & Co. it cannot be held, without a violation of this Statute, as it has been held in effect by the decree of the Court of Chancery in this case ; that the Messrs. Storey & Co. were restricted in their choice of persons to whom they were at liberty to sell the debentures issued to them for their stock ; and that by their selling them to the Appellant, and others associated with him in the purchase, not the Messrs. Storey & Co. but the corporation shall derive the benefit of the terms of that sale, and that the corporation shall be entitled to any rise which debentures may in the market have attained subsequently to their sale by Messrs. Storey & Co. Now this is what in effect is held by the decree made in this cause, although it plainly appeared in the evidence that the corporation obtained *their loan* authorised by the act 16th Vic., Ch. 5, *at par*, and although the debentures issued under the authority, of that act *were sold at a discount.* I have already my Lords, said that, and I repeat that, as I believe it to be incontestible that, the Appellant and his co-proprietors of the debentures purchased from Messrs. Storey & Co., *by reason solely of their being the proprietors of those debentures, and by reason of their being willing to incur a certain loss upon the resale of those debentures or others substituted for them*, were enabled to confer upon the corporation the favor of making them their loan *at par*, which amount neither the Appellant nor any other persons could, or would, otherwise have given to the corporation, and which amount the debentures of the corporation were not then,

and never have been, either before or since, worth in the market. In this is contained the whole sum and substance of this case, namely, that although the corporation could in no other manner have obtained a loan at par, and although they have received that amount, an amount which their debentures were not worth, yet that the same corporation shall have a right to dispute the sale by the Messrs. Storey & Co. of debentures bona fide issued to them for value, from the mere circumstance that the Appellant is one of the persons to whom the Messrs. Storey & Co. so sold, and was thereby enabled to be a party to the conferring a service and benefit upon the corporation. There is one other point in the judgment of the Chancellor to which I desire to draw the attention of your Lordships, as further elucidatory, of what appear to me to be, the principles upon which the decree made in this cause is based.

With reference to the arrangement of the 29th of July, the Chancellor says: "now, had Messrs. Storey & Co. agreed to "pay the Defendant £4.000 for his vote in favor of the new "arrangement, every body will admit, I presume, that such "a contract would be corrupt and illegal—wholly void."

Now my Lords, I not only submit that there is nothing to be found in the present case having the remotest analogy to the offer by the Messrs. Storey & Co., or the acceptance by the Appellant, of a bribe for his vote, but I submit further that no argument or inference can be drawn in support of the decree made in this cause, founded upon this illustration. For however corrupt, illegal and void, I am prepared to admit the acceptance by the Appellant of a bribe for his vote in council would be,—however deserving of criminal prosecution—however offensive to the moral sentiments—and however incapable of being enforced between the parties to the bribe, an agreement for the payment of a bribe would be, I submit that even in the case of a bribe being received by a member of council for his vote, the corporation could not recover the amount of the bribe as money received to the use of the corporation, unless it be upon the principle that the corporation would have a right to contami-

nate themselves, with the guilt of the member of council, by recovering to their own use, from him, the price of his corruption, and this my Lords, is a right which is not, as I contend, to be found comprehended in the category of civil remedies. If then the bribe could not be recovered by the corporation as money had and received to their use, I submit that the illustration suggested, cannot in any manner elucidate the right, which it is contended the corporation have, of recovering from the Appellant the difference between the amount at which the debentures were purchased from Messrs. Storey & Co., and that at which the debentures substituted therefore under 16th Vic., Ch. 5, were sold, and for the purpose of elucidating which latter right, the illustration has been made.

But in truth the arrangement of the 29th of July was more prejudicial to Messrs. Storey & Co. and more favorable to the corporation than the then existing arrangement, and it is difficult to conceive upon what principle, Messrs. Storey & Co. should tender a bribe for the Appellant's vote in bringing about an arrangement so much more beneficial to the corporation than to Messrs. Storey & Co., that the fact of Messrs. Storey & Co. being willing to concur in it was no sooner mentioned in council, than the wonder of the members of Council was excited, and their unanimous adoption of the arrangement obtained, without the vote of the Appellant at all.

These, and similar arguments, are those which we have used in the Court of Chancery, and now urge here, in support of the view which we entertain namely,—that there is nothing to be found in the decided cases, nor in any Statute, or principle of law or Equity, which gives to the corporation the right contended for in this case, of interfering with the purchase of the debentures from Messrs. Storey & Co., which we contend was perfectly bona fide, and in which it was competent for the Appellant to embark. We submit that the decree is based upon erroneous assumptions, and upon a patent fallacy—namely, *that the fact of the Appellant embarking at all in the purchase, from Messrs.*

Storey & Co., of debentures which were authorised to be issued in pursuance of the resolutions of 1850 *and* 1851, *involved an interest which was (of necessity) plainly at variance with a duty owed by him to the corporation in* 1852, *which duty was, as plainly, disregarded and violated; and which interest was such as rendered it practically impossible, in the eye of the law, for the Appellant to discharge the duty which in* 1852, *it is assumed, he owed to the corporation.* And we confidently submit that the acknowledged rule—that an agent appointed to sell property for or on behalf of a principal cannot sell that property to himself—and that an executor cannot purchase the liabilities of his testator at a less sum than their nominal amount, and charge the assets of his testator with the full nominal amount of such liabilities, is not a rule properly applicable to the circumstances of the present case, and that the application of such rule to the determination of the present case involves manifest error. There is a case which appears to me, to be much more analogous to the present case, than any of those relied upon by the Court of Chancery in support of the decree, and which seems to me to sustain the view that a person in the position of a member of council, or in a somewhat though not identically similar position, (but the difference being in favor of the member of a Municipal Council,) as for example, a director of a Public Company, may purchase the debentures of the corporation of which he is a director, unless such a transaction is *expressly prohibited by positive statute;* and I believe I am correct in saying, that it is the constant practice in England, for persons in such a position, to invest their capital, in the purchase of such debentures, *unless when the purchase is prohibited by positive statute.* It is a well known fact, that several of the Directors of the Canada Company have been, at all times, members of the stock exchange, whose business is to invest, not only their own capital, but that of their clients, in such securities as debentures, and that almost all of the directors of that company have always been, and are, Bankers, or men of business, also dealing, more or less in the purchase of such securities,

as well for themselves, as for others their principals. It is a fact also, that for many years, that company borrowed money upon their debentures, for the payment of their annual dividends; and I have not the slightest doubt, but that all those directors have been in the constant habit of investing capital in the purchase of the debentures so issued, as well for themselves, as upon behalf of their clients, and that if it were not for those directors, (all of whom were so well known in the English money market,) expressing their confidence in the value of those securities, by purchasing them, the securities would never have obtained any confidence in the market, and money could not have been raised upon them; and yet if the principle, upon which this case is decided, be correct, all such transactions were absolutely illegal and void.

The case to which I allude is that of Feversham vs. Cameron's Steam, Coal and Railway Company, 5 English Railway and Canal cases 492.

This was a company established under the provisions of the Joint Stock Companies Registration Act, 7th & 8th Vic., ch. 110.

The bill was filed by certain directors of the company, (who had advanced monies, to the company, upon the securities of the company,) against the company for an account of monies due to the plaintiffs upon the footing of those securities. The suit was defended, but not upon any such principle, that such a transaction and loan was prohibited by, or at variance with, any well established equitable doctrine, but because the bill did not allege that the loan was approved, in the *special manner required by the Statute 7th & 8th Vic., ch.* 110; and leave was given to amend the bill in this particular, not upon any general principle applicable to all cases of loans made by directors of a company, to the company, which require the allegation to be made, which was omitted; but upon the principle that, inasmuch as the Plaintiffs had to come into court, claiming *under* the Statute, it was necessary that they should bring themselve *within the provisions and restrictions of the Statute.*

The 29th Section of the Statute referred to, provided,

" That if any Director of a Joint Stock Company, registered " under this Act, be either directly or indirectly concerned " in any contract proposed to be made by or on behalf of " the company, whether for land, materials, work to be done, " or for any purpose whatsoever, during the time he shall be " a director, he shall, on the subject of any such contract in " which he may be so concerned or interested, be precluded " from voting or otherwise acting as a director ; and that, if " any contract or dealing, (except a policy of Insurance, " Grant of annuity, or contract for the purchase of an arti- " cle, or of service which is respectively the subject of the " proper business of the Company, such contract being made " upon the same or the like terms as any like contract with " other customers or purchasers,) shall be entered into, in " which any director shall be interested then the terms of " such contract or dealing shall be submitted to the next " general or special meeting of the shareholders, to be sum- " moned for that purpose ; *and that no such contract shall* " *have force, until approved and confirmed, by the majority* " *of the votes of the shareholders present at such meeting.*"

The allegation wanting, in the Bill filed in the case alluded to, was an allegation that the contract sued upon, was confirmed in the manner required by this latter portion of the 29th section of the Statute, and the court found it impossible to get over this difficulty, appearing on the Bill, *created* by the peremptory terms of the Statute. Now this clause of the Statue would have been superfluous, if the contracts (*therein prohibited, unless confirmed in a particular manner,*) were already illegal and void by the doctrine of equity, independently of the Statute. And again, if the rules of equity independantly of the Statute, prohibited the transaction which was the subject of the suit in Feversham vs. the Coal and Railway Company, (namely, a loan, by directors of the company, to the company, upon the securities of the company) then it is not likely that in 1849 the Bill for the account would have been filed, or that, when filed, objection should have been made to the suit upon the peremptory terms of the Statute, and not upon a violation of a well

established equitable doctrine, or that such a ground of objection, if it existed, should have escaped both the Bar and the Court, ~~or that leave would have been given to amend the Bill so as to bring the case within the provisions of the Statute, if a still stronger objection, namely, the violation of a well established doctrine of equity [redacted] made to the suit.~~ The proper inference to be drawn from this Statute, and from the decision of the Court, in the case instituted under the Statute, is, that the transaction as set forth in the Bill would have been good, and relief would have been given in equity, in respect of it, *if it were not for the peremptory terms of the Statute prohibiting and restraining* parties so situated from entering into such contracts otherwise than in the mode required by the Statute. In the case then of Joint Stock Companies and in cases of transactions between their directors and the companies, a different rule seems to prevail, from that established as existing between ordinary trustees or agents, and their cestuis que trustent or principals; and the Statute incorporating Joint Stock Companies seems to afford, in such cases, the only guide in determining cases arising between directors of the company and the company. Now in transactions between Members of a Municipal Corporation and the Corporation, there is much stronger reason for holding, that the ordinary rule, regulating the dealings of a principal and his agent, is not the rule to be referred to; but that the Statute or Statutes under which the corporation is empowered to act, afford the only guide, in determining whether in any given case, an act complained of, is prohibited by the Statutes, and therefore is illegal, or is not prohibited by the Statutes and is therefore legal. For, in the case of Municipal Corporations, every act of council being attended with the same formalities as, (for example, reference to committees, reports thereon and debate of the measures before the council, at several and distinct stages, and every measure being openly conducted under the eye and in the presence of the corporators, and being attended with the same publicity as,) an Act of Parliament itself, and according to the practice and

usage of Parliament, there is not the same danger of injury being inflicted upon the Municipality or Corporators, by any act of a Member of Council, however interested his motives may be, as there is of injury being inflicted upon the Shareholders in a Joint Stock Company by their director[redacted]te upon, and mature their measures and transactions in secret, in the absence of the Shareholders. The forms then which prevail, before any measure of a Municipal Corporation is matured into a By-law or Resolution, being sufficient to protect the interests of the corporators, there appears to be no necessity for appealing to a rule, established for governing the conduct of persons, simply in the position of ordinary principals and agents, nor is there any reason why the same rule should not invalidate the purchase, by a Member of Parliament, of a Provincial Debenture, authorised to be issued by the Legislature, of which the purchaser is a member ; and yet the application of the rule to such a case has never hitherto been suggested. In a body so constituted as a Municipal Council, which exists only, and possesses its powers only, by the will of the Legislature, a Member of Council can be subject to no disabilities, not constituted such, by the Statute establishing the corporation, or by some Statute affecting its powers ; and it is but in accordance with natural law and reason to conclude, that the Legislature did not contemplate divesting any individual of his natural right to contract with a public Municipal body, unless the Statute or Statutes constituting, or relating to, the municipalty, *specially restrains the individual*, when a Member of Council, from dealing with the municipal corporate body. A disability imposed upon an individual from dealing with a corporate body, being in restraint of natural law, and the freedom of commercial transactions, can only be created by positive Statute. All the cases to be found reported in the books, wherein Members of Municipal Councils, have been held to be amenable to the corporation, for their acts in council, have been only where their acts were *in contravention of the express terms of the act constituting the municipality* ; and in the

absence of any such act of the Appellant, in contravention of an Act of Parliament, I confidently submit that the Decree made in this case must be reversed.

It was argued, on behalf of the Plaintiff's, in the Court of Chancery, as a reason why a Member of a Municipal Council could not be the purchaser, or holder of any debenture of the municipality; that, by being such holder, he would have an interest, (in the event of other bebentures being issued) to raise the character and value of *those* debentures, with the view of increasing, at the same time, the value of those held by himself; but it is plain, that such an interest, so far from being an interest at variance with, is perfectly coincident, and identical with, his duty, if it be his duty to raise the value of the debentures of the municipality: and it is a reason, which is clearly not referable to the rule in question, for the interest involved in the *rule*, is a *private interest* of the agent, which *conflicts with, and is opposed to, the interests of his principal, and therefore conflicts with, and is opposed to, the duty*, which, in respect of such interest the Agent owes to his Principal.

If the rule alluded to, be applied to a transaction, (like the one in question in the present case,) which is not prohibited by any positive Statute, it will be difficult to determine, what course a Member of Council is to pursue, in the very many cases of public improvements, which must come under his consideration in council; and to hold that such a rule, is applicable to all cases coming before the council, when a Member of Council has a distinct, individual interest, is to circumscribe the duties of a Member of a Municipal Council, within a very narrow compass, and in a manner which appears to be altogether inconsistent with, the object of the Legislature, in making the council an open, deliberative, Legislative Assembly. For it is sufficiently clear, within the meaning of the rule referred to, that an agent has no right to invest the funds of his principal, in the improvement of his, the agents, own property. Now, if upon the principle, that a trustee for sale, cannot sell to himself, it can be held that a Municipal Councillor cannot become the purchaser

of Municipal Debentures, from persons to whom they have been authorised, by resolutions in council, to be issued, in respect of a matter within the jurisdiction of the council, it must, with equal, if not greater, propriety, be held, that a Member of a Municipal Council cannot vote for the application of municipal funds, to a purpose, which, (however great the public benefit to be derived may be) at the same time confers a peculiar benefit upon the property of the Member of Council. Take, for example, the case of a question arising in council, of the propriety of making a sewer through a street, upon which, (to take an extreme case for the purpose of elucidation,) four-fifths of the members of council hold real estate. Assume that the street in question, presents the most desirable locality for the construction of a main sewer, into which all other sewers in the city might be most advantageously drained ; must the owners of property upon this street, who are in the council, vote against the construction of this public improvement, with the funds of the municipality, because, at the same time, it might increase, to an incalculble extent, the value of the property on the street held by a majority of the council ? The same question may be put in respect of paving, or macadamizing a street—the location of a market or other public edifice,—the construction of side walks—the erection of gas lamps, or any other public improvement. All these questions must be answered in the affirmative, if the rule applies; and yet the principle upon which, Municipal Councillors are distributed throughout several wards in a city, seems to be, that their private interests, as holders of property and as rate-payers within their ward, affords the strongest guarantee for the faithful discharge of their duty to their constituents in the ward, in seeing that the public improvements of the ward, shall not be neglected. Again, assume that a marsh, from which a very fatal miasma may arise, is owned, within the city, by several Members of council, shall it be held to be a breach of trust, in those members, to vote for the draining of this marsh at the public expense, because, by so doing, the owners of the soil would derive incalculable benefit from its being

reclaimed and made available for building purposes? With reference to the debentures in question in this case, the Appellant might have actually voted against their issue at every stage, and, according to the judgment of the Court of Chancery, this would have made no difference whatever,—he would still have been equally liable to the Corporation. As a matter of fact, he did not vote, and indeed, so unanimous was the council, he had no ~~opportunity of voting~~ occasion to vote upon any of the questions before the council in 1852, in relation to the debentures. All those questions were decided by the council upon their apparent merits, without the necessity of the vote of the Mayor being taken at all. Assume then, that some of the owners of the marsh, should vote against the municipal funds being applied to draining it, and should contend that the owners of the soil would derive sufficient benefit if they drained it themselves, and, notwithstanding, that the council should resolve upon the improvement being made, at the expense of the public; the objecting members of council, might, with equal justice, be made to pay, to the corporation, the amount of the increased value of their land, reclaimed by the draining of the marsh, or, at least, the cost of the work, proportionate to the quantity of land, held by them, as the Appellant in this case, may be made to pay to the corporation, the difference between the amount, at which, the debentures authorised to be issued to Messrs. Storey & Co., were sold by them, and the amount at which these debentures, or those substituted for them, under the Act 16th Vic., Ch. 5, were sold by the Appellant and his co-proprietors.

In relation to the duty, which, it is argued, that the Apellant owed to the corporation, in respect of the debentures in question, Mr. Vice-Chancellor Spragge, in his judgment, says:

"His duty as agent, was to advise and vote, in regard to "the issue of the debentures, with a single eye to the benefit "of the city, to have as few issued as might be consistent "with its engagements and its interests, and upon the best "terms possible; his interest was to have as large an

" amount issued as possible, and to have them issued upon " terms the most favorable, not to the city, but to the holder " of the debentures, that holder being himself. At the " least then, his position as agent, his fiduciary character, " as Sir J. Knight Bruce puts it, was *paralysed by his private* " *and conflicting interest.* I should say it was more than " paralysed, for he had made it his interest to advise and vote " against the interest of the city, wherever, in relation to " the issue of these debentures, that interest conflicted with his " own." And again—" It is a matter not affecting the " principle which must govern this case, whether the " Defendant did or did not, advise and act as a member of " the council, with a sole view to his private interest, or, as " far as we can see, with a view to the public benefit ; it is " enough that he entered into a transaction which placed " his private interest in conflict with the interests of the city : " any other ground of decision would be unsafe, and would " necessitate enquiries to which no court on earth is com- " petent."

Now, my Lords, it is apparent that these observations, are with equal, if not greater, force, applicable to the cases I have suggested, of a question in council, as to the making a public improvement, in a locality where members of the council have peculiar private interests, as the holders of property to be benefited by the public improvements ; but, having regard to the circumstances attending, the passing the resolutions of 1850 and 1851, I submit that in 1852 it was *not* the duty of the members of council, to advise or vote that any less amount of debentures than the amount authorised by the resolutions of 1850 and 1851, should be issued to the Messrs. Storey & Co. ; nor was it the duty of the members of council of 1852 to advise or vote for any variation being made in the terms of the issue of the debentures, differing from the terms comprehended in those resolutions; and if such was not an incontestible, *imperative duty*, as plainly apparent as that it is the duty of a trustee for sale, *not to sell to himself*, then, no interest which the Apellant may have had in the debentures, as one of the purchasers of them, from

Messrs. Storey & Company, can be said to be in con*flict with or opposed to*, his duty to the corporation, or can make a rule established for governing the conduct of a trustee or agent *appointed to sell property*, applicable to this case. But I ask, to what stage of the proceedings—to what act of the Appellant, do these observations of the Vice-Chancellor apply? What transaction is it that placed the private interest of the Appellant *in conflict with* the interests of the city? What were the interests of the city, with which, the interest of the Appellant was so in conflict? Upon what question in council, in relation to the issue of the debentures, did the the Appellants *interest in them*, "*paralyse his fiduciary character*"?

The observations cannot apply to the period of the passing of the resolutions of 1850 or 1851, for, it is not pretended that the Appellant, at either of those periods, had acquired any interest in the debentures. I have already contended, that under the circumstances, attending the passing of those resolutions, nothing further remained to be done by the council, but to give effect to them, by passing a legal By-law, and that the only duty owed by the members of council, in respect of the debentures authorised to be issued by those resolutions was to perfect them by passing such a By-law. When then, the Vice-Chancellor says, "it was the Appellants duty "so to advise and vote in council, as to have as few deben-"tures issued *as might be consistent with the engagements* of "the city;"—the engagements involved in the resolutions of 1850 and 1851, were not to be lost sight of, and it cannot be held that it was *the duty* of the Appellant, to advise or to vote for a diminution of the amount of the debentures so authorised to be issued to Messrs. Storey & Co., either those contemplated to be issued as a gift, or those contemplated to be issued as a loan. For the same reasons, the observations cannot apply to the debate *on the form* of the By-law of the 28th of June, 1852, for, although the Appellant then contemplated purchasing the debentures, he had not yet done so, nor could he have done so, without the consent of the Messrs. Storey & Co., which had not been then obtained, nor if he

had then already purchased the debentures, was the duty of the members of council, in relation to giving effect to the resolutions of 1850 and 1851, in any respect changed. It still remained an imperative duty, imposed upon the members of council, to pass a legal by-law to give effect to those resolutions. The observations cannot apply to the matter before the council on the 29th of July, 1852, for without the consent of Messrs. Storey & Co. the alteration then proposed could not have been brought before the council, nor, with any propriety, have been entertained ; and the *duty*, of the members of council, still remained obligatory upon them, —either to pass a legal by-law to give effect to the resolutions of 1850 and 1851, or to adopt the arrangement proposed in substitution for those resolutions, which was consented to by Messrs Storey & Co., and was much more beneficial to the city. If it was at any time the *duty* of the Appellant " to advise or vote," in regard to the issue of the debentures so as to have " as few issued as might be consistent with the " engagements of the city and its interests ;" it must have been upon this vote in council of the 29th of July. Now, that was a duty imposed upon the members of council, solely because the Messrs. Storey & Co. had consented to the arrangement then proposed ; without this consent it would not have been proper for the council to have altered the terms, upon the faith of which, Messrs Storey & Co. had embarked in the construction of the railroad. Now the duty thus imposed, did not extend to require the members of council to propose any further diminution of the debentures, or to advise or vote for any alteration in the contract existing between the corporation and Messrs. Storey & Co., differing from that involved in the proposition then submitted to the council, with the consent and approbation of Messrs Storey & Co.. Now, it is admitted that, (although the Appellant, from the unanimity of the council, had no ~~opportunity of voting~~ occasion to vote one way or the other,) he recommended to the council the adoption of the arrangement comprehended in the proposition of the 29th of July, as highly beneficial to the interests of the city. That it was so, is unquestionable,

and is admitted on all sides. It cannot, therefore, with proproiety, be said that, on this occasion, the Appellants interest in the debentures, by his purchase of them from Messrs. Storey & Co., "*paralysed him in his position as* " *agent*," nor can it be said that--" his position as agent and " his fiduciary character *was more than paralysed*, for that " he had made it his interest to advise and vote against the " interests of the city ;" when the interests of the city, and the prejudice of Messrs Storey & Co., was the sole thing involved in the proposition recommended by the Appellant, to the council, for its adoption. Now " the interest" comprehended in the rule as conflicting with a "duty" is an interest in the subject matter in respect of which the duty is owed ; in the case of an agent appointed to sell property, becoming himself the purchaser, the property to be sold is the subject matter, and the interest alluded to in the rule, which prohibits such a transaction, is an interest in the estate or thing which is the subject matter of the sale. So on the 29th of July, 1852, if the rule could apply, the interest of the Appellant, assumed to be *in conflict* with his duty, would be, to make the cases parallel, an interest on the subject matter, or proposition then before the council, that is —an interest in having the proposition of the 29th of July adopted by the council. I have already shown that if he was then one of the purchasers, from the Messrs. Storey & Co., of the £60,000 of debentures, his interest was to prevent the adoption of that proposition, which contemplated only the issue of £50,000 of debentures, and that, having regard to the interests of the city, he waived such his interest. However, it may, perhaps, be argued that the Messrs. Storey & Co., having consented to the Apellants making the proposition to the council, were, in fact, the applicants for the adoption of the proposition, and so, it may be argued, that they had an *interest* in its adoption, although much to their prejudice, and it may, perhaps, then be argued, that the Appellant, as one of the purchasers of the debentures from Messrs. Storey & Co., had, through them, as the applicants for the adoption of the proposition of the 29th of July, also

an interest in its adoption, and so an interest in the subject matter then before the council, in respect of which, it is contended that he owed a *duty* to the corporation ; but if it was, and it undoubtedly was, the interest also of the city, to adopt the proposed arrangement in preference to the then existing one, then, it cannot be said, that the *interests* of the Messrs. Storey & Co. and of the Appellant, *through them*, was, *in conflict with* the interests of the city ; and so the rule cannot apply. Again, the proposition of the 29th of July suggested a diminution on the amount of debentures to be issued, from £60,000 to £50,000, if then, it was the *duty* of the Appellont to advise and vote for a diminution in the amount of debentures to be issued, as suggested by Mr. Vice-Chancellor Spragge ; in recommending to the council, the adoption of this proposition, it is manifest that he complied with such duty, and so it cannot, with any degree of propriety, be said, that on this occasion, the *interest* of the Appellant so *conflicted with his duty as to paralyse him in the discharge of the latter.* It is one thing to hold, if an agent appointed to sell property, sells that property to himself, that *his interest*—namely, to obtain the property at the lowest possible amount, is so paramount to his *duty*—namely, to obtain for his principal the highest possible amount, *as to paralyse* him in the discharge of that duty ; but it is a very different thing, and it is by no means referrable to the same principle, to hold, that the interest of the Appellant, as one of the purchasers, from the Messrs. Storey & Co., of the debentures in which they had become interested, under the resolutions of 1850 and 1851, was so paramount *as to paralyse* him, in the discharge of any duty, owed by him to the corporation, in respect of these debentures, when such duty, without the consent of Messrs. Storey & Co. to any substituted terms, must have been, unless the resolutions of 1850 and 1851 were a delusion and a snare, *simply to give effect to those resolutions.*

If then, the observations of Mr. Vice-Chancellor Spragge, cannot, as I contend they cannot, apply to any of the previous occasions, they clearly cannot apply to the only

subsequent question in council, namely, the raising the loan under the Act 16th Vic., Ch. 5 ; nor indeed is relief prayed by the bill as founded upon this latter transaction, and if it were, no such relief as that granted by the Decree in this cause could have been given. Now, with respect to the loan, the only duty which, it can be said, the members of council owed to the corporation, was, to obtain the loan upon the best possible terms upon which, in the best exercise of the judgment of the members of council, it could be obtained. This, it is proved, has been done, and that, in fact, so favorable terms, could not have been obtained if the Appellant and his co-proprietors of the debentures, purchased from Messrs. Storey & Co., had not, by submitting to *a discount upon those debentures*, been enabled to give to the corboration a loan at par. The only alteration made, was, that sterling debentures, payable in London, were substituted for those already issued to the Messrs. Storey & Co., this was an alteration beneficial to the city. Now, with respect to this transaction it is sufficient to say, that not only is no relief prayed in respect of it, nor is the bill framed in respect of it, but no relief could be prayed in respect of it, because it was a transaction specially authorised by an Act of Parliament, and having solely for its object the benefit of the city. If the Appellant could have been the holder of the debentures purchased from the Messrs. Storey & Co., there can be no objection to his having Sterling Debentures, equal in amount, substituted for them, and even if the corporation had not obtained their loan of £50,000 at par, by means of the discount submitted to, by the Appellant and his co-proprietors, upon the debentures issued in lieu of those issued to Messrs. Storey & Co., the corporation could not, upon any principle of equity establish a claim against the Appellant, founded on the mere circumstance that, under the Act 16th Vic., Ch. 5, Sterling Debentures, payable in England, were substituted for those which had been issued to Messrs. Storey & Co. If then, the mere fact of a member of council, purchasing, from third persons, debentures of the municipality, legally authorised to be issued to them, does not constitute a

fraud upon the corporation, every particle of the foundation, upon which, this Decree is based, must fall to the ground. Avoid opposite

Upon a careful reading of the bill, answer and evidence, it will be found, that every allegation, not admitted by the answer, is disproved by the evidence, and that there is nothing admitted in the answer which can support the decree ; although it is upon matters admitted in the answer that the decree has been based. Indeed the bill itself, I submit, contains nothing, assuming every allegation in it to be true, which can support the decree made in this cause.

The statements of the bill, are :

1. "That on the 25th day of November, 1850, the City "Council of the City of Toronto aforesaid, passed a resolution "agreeing to grant as a gift in aid of the Toronto, Simcoe "and Huron Union Railroad Company, on certain conditions "therein mentioned, the sum of £25,000 in Debentures of "the said City payable in Twenty Years, with interest half "yearly, in the meantime, at Six per cent. ; the said deben- "tures to be delivered as the Railroad proceeded, and in a "proportion of one to ten upon the expenditure thereon. "That on the 18th day of August, 1851, the said Council "passed another resolution agreeing to lend the said Compa- "ny, on certain conditions in such resolutions mentioned, the "further sum of £35,000 in like Debentures, to be delivered "in like proportions. That by some arrangement between "the said Company and Messieurs M. C. Storey & Compa- "ny, the persons who were employed by, and who contracted "with, the said company, to build the said Railroad, the "said Debentures were to be delivered to the said Contrac- "tors ; and that divers private negotiations took place "between John G. Bowes, the Defendant hereto, Mayor of "the said City, and the said Contractors, for the sale of the "said Dedentures to the said Mayor. That Debentures of "the said City, payable in England, were worth par or a pre- "mium in the English Market, and could, as the said Mayor "knew or believed, be negotiated there at par or a premium, "if what he knew or believed to be the proper means for "that purpose were taken. That the City could have nego-

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"tiated the same, even in Canada, at a higher rate than for "Eighty per cent, on the amount thereof. That, however, "the said Mayor, being desirous of making a profit out and "by means of the said Debentures, and to facilitate the pur- "chasing legalising and paying for the same, secretly proposed "to, and prevailed upon the Honorable Francis Hincks, who "resides in the City of Quebec, in Lower Canada, out of the "jurisdiction of this Honorable Court, and then was and is "still Inspector Generol of the Province of Canada, and a "Member of the Parliament and Executive Council respec- "tively thereof, to join him in the purchase of such Deben- "tures as the City would issue to the said Contractors, and "that half the profits of the transaction should be paid to or "retained by the said Hincks, for his agency in the matter."

With respect to the allegations in this paragraph, the evidence proves, that debentures of the City of Toronto, even though payable in England, *were not* worth par or a premium, in the English, or in any other, market, and that they *could not* be negotiated, in England or elsewhere, at a premium, or at par; and that, if negotiated in Canada, £80 per £100 was the full value of debentures having 20 years to run. It is not in this paragraph, nor in any part of the bill, nor in the evidence, alleged or pretended, that the Appellant was the agent of the city, for the purpose of negotiating the debentures, upon behalf of the city, either in the English, or in any other market; *on the contrary* it is, in this paragraph, alleged and admitted, that, by the resolutions of 1850 and 1851, and by an arrangement, existing between Messrs. Storey & Co. and the Railroad Co., the Messrs. Storey & Co. were to be the absolute proprietors, of the debentures, by those resolutions, authorised to be issued, and, unless those resolutions, were a delusion and a snare, it follows that, Messrs. Storey & Co. were intended to have, and of right, ought to have had, and had, full power to sell them to the Appellant, or to any other person; it is not alleged or pretended that, nor is it a fact that, the Appellant had any power, or owed any duty to the corporation, to rescind, or vary, the will of the councils of 1850 or 1851, as

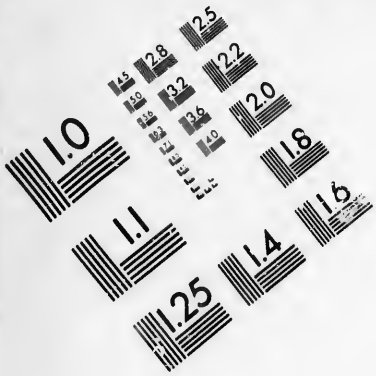
conveyed and expressed in the resolutions of those years: all, then, that this paragraph, in fact, alleges, is, that the Appellant and Mr. Hincks, contracted with Messrs. Storey & Co., to purchase from them, at a certain rate, debentures of the City of Toronto, of which, the Messrs. Storey & Co. were the absolute proprietors, and, in which, or in the rate at which, they might be sold by the Messrs. Storey & Co., the corporation of Toronto, had not, and could not have had, any interest. The admission, involved in this allegation, displaces every particle of claim to the relief, prayed by the Bill, and granted by the Decree.

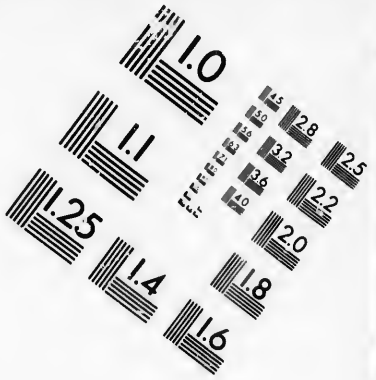
The bill proceeds to state,

2. "That afterwards, and on the 28th day of June, 1852, a "By-law was passed by the said Council, embodying the "effect of the said two resolutions, but not providing any rate "for the payment or redemption of the said Debentures, and "without the prior publication of such By-law, as the law re- "quired, and though the attention of the said Mayor and "Common Council had been called before the passing of the "said By-law, to the illegality thereof by reason of the said "circumstances, and though some members of the Council "objected to the passing thereof on the ground of such ille- "gality. That on the Thirtieth day of June aforesaid, the "said Contractors, in pursuance of the said negotations with "the said Mayor, addressed a letter to him at his request, "proposing to sell to him £24,000 of the said Debentures (to "which sum thereof they supposed themselves to be imme- "diately entitled under the said By-law,) he paying them "Eighty per cent. therefor on the deposit of the said Deben- "tures in such Bank in the City of Toronto as he might de- "signate. That the said Mayor secretly accepted the said "proposal, in his own name, but really in pursuance of the said "arrangements between him and the said Hincks, and com- "municated the said letter and acceptance to the said Hincks. "That the intention and agreement of all parties to the said "sale were, that the whole of the Debentures to be issued to "the Contractors by the said City should be sold under the "arrangement and at the rate referred to in the said letter.

" That the said Mayor managed to defer the issuing of any of " the said Debentures until the Twenty-first day of July, in " order to afford time for the raising of the money by the said " Hincks. That on that day £10,000 of the said Debentures " were issued and deposited by the Chamberlain by direction " of the said Contractors in the Upper CanadaBank at Toron- " to, being the Bank where the Cash account of the City was " kept, and through which the money transactions of the " City always took place; and that the sum of £8,000 was " paid by the said Bank as agents, to the said Contractors " therefor, through the instrumentality of the said Bowes and " Hincks, and partly on the security of the Debentures so de- " posited."

With respect to the allegations in this paragraph, the evidence proves, that the Appellant *did not*, either with the object, in the paragraph alleged, or with any other object, "manage" to defer, and that he *did not at all*, defer, and that he could have had no object in deferring, the issuing of the debentures until " the 21st of July," or until any other time; *on the contrary*, it is clearly proved, that any delay which took place in the issue of the debentures, arose, from a difficulty in getting them ready, as fast as Messrs. Storey & Co. became entitled to them, and that, they were issued, as fast as they could be got ready. In this paragraph, it would seem to be *insinuated*, although it is not alleged, that the Bank of Upper Canada, *as agents of the city*, paid the sum of £8,000 to the contractors, but this is contrary to the fact, and to the evidence. It was the Appellant and his partner Hall, who procured that advance, upon their own credit, and the city, not only had not any funds, from which the advance could have been made, but, if they had, no authority had ever been given, for any such, or any, advance being made, on the credit of the city, and, without such authority, no such advance, could have been made. The " *illegalities*," referred to in this paragraph, relating to the by-law of the 28th of June, are objections only *to the form* of the by-law, *not to its substance*; these defects *in the form* of the by-law, are only referred to,





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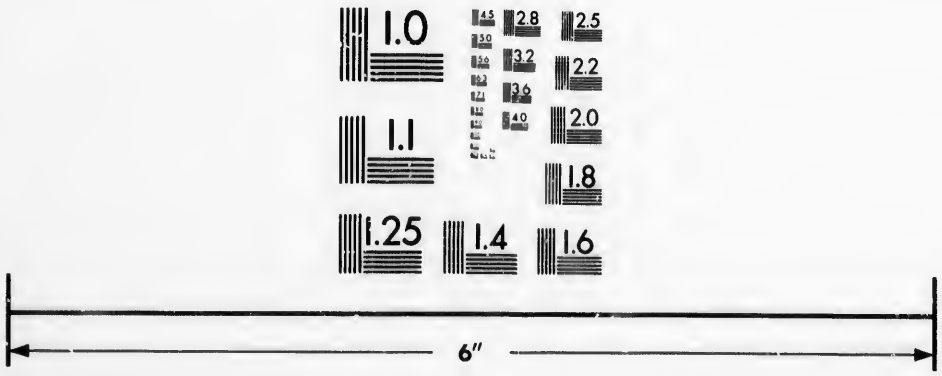

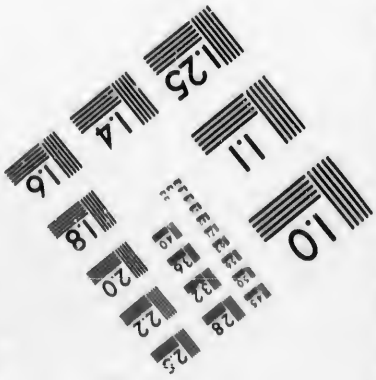

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incidentally, and, there is no allegation, founding any equity upon thes defects, nor could there be ; the defects, at most, arose, from an error in judgment or mistake of the council ; those defects have been, upon the application of the council, most properly rectified by an Act of Parliament ; and it would be preposterous, that now, the corporation should base their claim to relief, upon defects, which, the corporation ought not to have ever permitted to exist, and which, having existed, were, upon their own application, most properly rectified by Act of Parliament ; but further, it is in no way alleged, nor does it appear, how it is claimed, that any equity, in favor of the corporation, founded upon the alleged defects in the by-law, could arise. All, then, that this paragraph, in fact, alleges, is, that the Appellant, upon behalf of himself and others, accepted the proposition of the Messrs. Storey & Co., contained in their letter of the 30th of June, as to the £24,000, therein referred to, with a secret intent, or understanding, that the residue of the debentures, to which the Messrs. Storey & Co. were entitled, under the resolutions of 1850 and 1851, should be sold by them at the same rate.

The bill proceeds to state,

3. " That afterwards the said Railroad Company, being un-
" able or unwilling to grant the security required by the By-
" law, for the said loan, the said Mayor proposed to the said
" Contractors, and it was arranged between them (subject to
" the approbation and concurrence of the said Common Coun-
" cil, so far as such approbation and concurrence might be ne-
" cessary) that the said gift and loan should be abandoned, and
" that in lieu thereof, the said Contractors should sell to the said
" City 10,000 Shares of the Stock, which they then held in the
" said Railroad Company, and which was of the nominal but
" not actual value of £5 a Share, and could have been bought for
" cash at the time for less than half the nominal value thereof ;
" and that Debentures, or instruments purporting to be Deben-
" tures, of the said City, to the nominal amount of £40,000
" should thereupon be issued to the said Contractors, and that
" the same, with the said Debentures already issued, should

" be the purchase money of the said Stock ; and, that the pri-
" vate agreement hereinbefore mentioned for cashing the De-
" bentures at eighty per cent, should apply to the Debentures
" to be so issued as last mentioned ; and that such Debentures
" should accordingly be deposited in the Bank of Upper Can-
" ada, as mentioned in the said letter ; and that the said Con-
" tractor should receive therefor in cash, the sum of £40,000
" only, or four-fifths of the nominal amount of such Deben-
" tures, in full payment thereof and therefor, thus leaving a
" profit on the transaction of £10,000 or thereabouts, for the
" said Bowes and Hincks."

With respect to the allegations in this paragraph, the evidence proved, that the proposition, in this paragraph stated to have been made, by the Appellant, to the contractors, and accepted by them, emanated, from the President of the Railroad Co., and that the arrangement, involved in the proposition, was most beneficial to the city, and was only prejudicial to the Messrs. Storey & Co. A distinction is attempted to be drawn, between *the* "*nominal*" and "*the actual*," value of the Railway Shares. If there was anything in this distinction, it is of no importance, in so far as this case is concerned, for a like distinction, must be drawn between *the nominal* and *the actual* value of the City Debentures ; the "actual" value in both cases, being, the amount at which, the securities could be sold for cash, in the market, and the "nominal" value, the amount appearing on the face of the securities. But no argument, in favor of the Plaintiffs, can be urged, founded upon this distinction between the "nominal" and the "actual" value of Railway Shares.

1st. Because the Railway Shares were not in the market, nor had they any market price at all, different from the amount appearing on the face of the Shares.

2nd. No Shares were offered to the corporation, at any amount less than par, nor at all *for cash*.

3rd. The corporation had not any cash, wherewith to buy Shares at cash prices ; and if they had cash, they would not have so applied it, but would have purchased still with

debentures, and have applied the cash to the redemption of their liabilities, as appears by the evidence of Mr. Beard, a member of the council, and the Appellants successor in the Mayoralty.

4th. Neither the Appellant, or any other person, was employed by the corporation, nor, under the circumstances of the case, was it the duty of the Appellant, or of any other person, to purchase, for the city, shares in the Railway Company, at the lowest price they could be got from any discontented or needy holder, either with cash, or with City Debentures.

5th. There is no reason why the corporation should get, nor is it shewn how they could get, the Railway Shares *at cash prices*, by the transfer, *at par value*, of City Debentures, which were themselves subject to a very considerable *discount for cash.*

6th. Because not only was the Appellant, under no obligation, or duty, to obtain, for the city, the Railway Shares at a discount, but, such a transaction, would have been inconsistent with the Act of Parliament of August, 1850, under which alone, the corporation was empowered *to aid*, and not to *embarrass or injure* the Railway ;—would have been inconsistent also with the object of the corporation, and the interest of the corporators, whose object and interest also was, to aid and not to embarass the Railway;—and would have been a fraud upon the resolutions of 1850 and 1851, which, in reality, contemplated *aid and not embarrassment.*

And 7th. Because, from the interest the Messrs. Storey & Co. had acquired, under the resolutions of 1850 and 1851, and, having regard to the acts done by them, upon the faith of those resolutions, it would have been fraudulent and unjust in the council, on the 29th of July, to have entertained any other proposition, than the one submitted to them, with the assent of Messrs. Storey & Co. ; and therefore, neither the Appellant, nor any other member of council, was under any obligation, or duty, to the corporation, to vary

the terms of that proposition, or to endeavor to drive a hard er bargain with Messrs. Storey & Co.

All, in fact, that this paragraph alleges, is, that the debentures of the city for £50,000 *being purchased*, by the Appellant, and others, for £40,000 cash, *thereby* and not otherwise, a profit, on the transaction, of £10,000, accrued to the Appellant and Mr. Hincks. The words of the bill, are, —"*thus leaving a profit on the transaction of* £10,000 *or* "*thereabouts, for the said Bowes and Hincks.*" Now, if there is any meaning in the bill, *this transaction*, from which, *in this manner*, the profit is alleged to have been made, must be taken to contain the *whole substance* of the Plantiffs asserted equity; but under the words, "*thus leaving*" &c., &c., in the bill, is plainly involved a *non sequitur*, if, as is clearly proved, £40,000 was *the cash value*, of the £50,000 Debentures; and further, the city, having gotten the £50,000 Stock in the Railway Co., which they contracted for, in consideration of the issue of £50,000 City Debentures having 20 years to run, cannot under any pretence, have any claim, to recover also, what is called in the bill, the difference between the *nominal* and *actual* value of the debentures, nor can the city make any claim, founded upon the rate at which Messrs. Storey & Co., may have deemed it to be, to their advantage, to sell those debentures. *Ld. and Appeals*

The Bill proceeds to state,

4. "That the said agreement, so far as communicated to the "said Common Council, was sanctioned by them in full faith "and confidence that the whole agreement had been commu- "nicated to them, and that the terms which were commu- "nicated were the best terms that it was possible to "make with the said contractors; but the said Mayor did "not communicate to the said, Common Council, that the "purchase money or amount for which the said Debentures "were to be sold was £40,000 only, or in fact any part of the "arrangement the said Mayor had made with the said "Hincks, or the said Contractors, for the purchase or cash- "ing of the said Debentures."

With respect to the allegations in this paragraph, the evidence shews, that the Appellant did submit, the whole of the proposition, to the council, and that the terms of the proposition so commuicated, were the best possible terms, for the city, which could have been made with the contractors, and much better terms for the city, than, under the circumstances, the corporation had any right to expect or demand.

There was no obligation upon, or necessity for, the Appellant to communicate to the council, any agreement existing between him and Messrs. Storey & Co., relative to the purchase of the debentures; the fact of any such agreement being in existence, should not have had any influence upon the council, in determining whether they should accept or reject the proposition, which was considered, by the council, upon its own sole merits, and was adopted as being highly beneficial to the city. The fact of the Appellant, not having communicated to the council, the agreement existing between him and Messrs. Storey & Co., displaces, altogether, the allegation, in another part of the bill, to the effect, that the Appellant had, and that he exercised, a powerful influence on the council, to bring about the arrangement for his own gain, to the prejudice of the corporation.

The Bill proceeds to state,

5. "That the object of the said concealment by the said "Mayor was to enable the said Mayor to obtain and appro- "priate to his own use, or such other illegal uses as he "might choose, so much of the said sum of £10,000 as should "not be required for paying disbursements connected with "the transaction, or for compensating the said Hincks for "his agency therein."

With respect to this paragraph, it is to be observed, that, inasmuch as there is not shewn to have been, and as there was not, any incumbent obligation, upon the Appellant, to communicate, to the council, the agreement which existed between him and the Messrs. Storey & Co., but the assent merely, of the Messrs. Storey & Co. to a proposition involving, an abatement of their claim, on the corporation; the object which, it is suggested, the Appellant had, in not com-

municating the agreement, is not properly attributable to him, nor is it a necessary consequence upon the alleged concealment, nor is there any *necessary connection* shewn to exist, between, the fact of the alleged concealment, and the adoption of the proposition submitted to the council, nor would, nor should, the council had rejected the proposition, had the nature of the agreement existing between the Appellant and Messrs. Storey & Co. been communicated; had the council, for such a cause, rejected the proposition, a culpable disregard of the interests of the corporation, might, with more justice, be attributed to the members of council, who, for such an insufficient reason, should have voted against a proposition so highly beneficial to the city.

The Bill proceeds to state,

6 "That the said Mayor might have made or procured an "arrangement to save the City the said sum, instead of ar- "ranging for obtaining the same for himself, but made no "attempt to do so."

With respect to this paragraph, it is only necessary to say, that, the city having lost nothing, by the transaction, but on the contrary, having gained, it is ridiculous to say that the Appellant, might have made an arrangement "to save the "city," a sum which it never lost, and it is not attempted to be shewn how, in the circumstances of the case, the Appellant could have saved the city the sum which, it is untruly, and contrary to the other parts of the bill, alleged, the city have lost. It cannot be held that it was the duty of the council, to purchase, upon behalf of the city, from Messrs. Storey & Co. their right to the debentures, authorised to be issued to them, under the resolutions of 1850 and 1851, by the payment £40,000 cash; in the words of Mr. Thompson, the Chairman of the Finance Committee in 1852, and a witness in this cause "*the city never would have shaved* "*their own debentures*;" but even if such an obligation, or duty, was imposed upon the members of council, it is not attempted to be shewn, how the corporation could have shaved their own debentures, in the absence of cash to do so. It seems, therefore, impossible to understand how it is con-

tended, by the Plaintiffs, that the Appellant, *should*, or *could* have done for the corporation, what the corporation *could*, *by no possible means*, *have done*, and what, other members of the same council say the corporation *never would have done*, and what, if the corporation could have done, and had done, would have been highly reprehensible, and a fraud in morals, if not in law, nor does the bill shew upon what principle it is, that the corporation should assert any claim, founded upon the application of the Appellant's own private funds, or the funds of himself, and his co-proprietors, in the purchase of the debentures.

The Bill proceeds to state,

7 "That after the making of the said agreement, and after "the same had been sanctioned by a resolution of the "said Council, but not otherwise, the Contractors in pur- "suance and part performance of the said agreement so "entered into with the said Mayor for the said City as "aforesaid, transferred to the City, through the agency "of the said Mayor, 10,000 Shares of the said Stock; and "that Debentures to the amount of £32,000 in the whole, "were from time to time issued, and were, upon being so "issued, deposited by the Chamberlain of the City in the "said Bank, by direction of the Contractors, given at the "request of the said Bowes, under and in pursuance of the "said agreement hereinbefore mentioned; and many of "the said Debentures were issued before any actual trans- "fer of the Stock therefor took place."

With respect to this paragraph, it is quite true, as stated, that the Messrs. Storey & Co., did not transfer stock to the city, until the city, by the resolution in council of the 29th of July, had agreed to take such stock; nor, in fact, until Messrs. Storey & Co. had released their claim under the resolutions of 1850 and 1851. It is also quite true, that previously to the 29th of July the Messrs. Storey & Co. had received debentures of the city, under the resolution of 1850, which they transferred to the Appellant and his co-purchasers, under their agreement, but in this paragraph, I can see nothing further than an allegation, to the effect that the

Messrs. Storey & Co. faithfully fulfilled the agreement, entered into by them, in pursuance of their letter of the 30th of June.

The bill proceeds to state,

8. "That the money agreed to be paid to the Contractors "on, and for, the said Debentures was, from time to time, "paid to them by the said Bank, through the security "and instrumentality of the said Hincks, in pursuance of "the said arrangement between him and the said Bowes, "and without the said Mayor's making any payment or "advance whatever for or on account thereof."

With respect to this paragraph, it is admitted that, with the exception of the first £8,000, procured to be advanced upon the credit of Messrs. Bowes and Hall, Mr. Hincks made all the other payments to Messrs. Storey & Co.; but, admitting the allegations in this paragraph to be true, namely, that Mr. Hincks advanced everything, and the Appellant nothing, then, I submit that there is nothing stated in the bill, or which could be stated in it, to shew how payments made by Mr. Hincks, in the purchase of City of Toronto Debentures, could give, to the City of Toronto, a right to upset the purchase, or to claim any interest in the transaction. It is not pretended that Mr. Hincks owed any duty to the corporation which prevented *him* from investing *his* money in the purchase of City Debentures; nor, is it alleged that the appellant owed a duty to the corporation, to compel Mr. Hincks to invest his money in purchasing the debentures of the corporation, for the benefit of, or on behalf of, the corporation.

The bill proceeds to state,

9. "That meanwhile, and on the 23rd day of August, 1852, "the said Council agreed to petition Parliament for an Act to "legalise the issue of £100,000 of Debentures of the said "City, one half for the purchase of the Stock, and the other "half for consolidating the City Debt; and a petition to that "effect was accordingly presented at the opening of the "Legislature."

10. "That on the 22nd day of September a bill for that pur-

"pose was introduced into the Legislative Assembly, and on "the 29th day of the same month, Mr. Ridout, the Cashier "of the said Bank, by direction of the said Hincks for the "joint benefit of the said Hincks and Bowes, offered the City "a loan of £100,000 under the act to be passed in pursuance "of the said petition, on condition that the said Debentures "should be taken in part payment thereof."

11. "That a certain Act of the Parliament of this province, in- "tituled, "An Act to authorize the City of Toronto to nego- "tiate a loan of £100,000 to consolidate a part of the City "debt," was then procured to be passed, and was passed on "the 7th day of October last. That on the 11th day of the "said month the said offer was accepted. Than on the 18th "or 19th of the same month, £7,000 of the illegal Debentures, "being the residue of the said £50,000 were issued through "the procurement and with the concurrence of the said "Mayor, and deposited in the said Bank, and bought from "the Contractors for £5,600 cash, which was raised and "paid as in the case of the Debentures previously issued "as aforesaid. That on the following day the said Com- "mon Council passed a by-law authorising the Mayor to "subscribe for, or take, receive, and hold Stock in the said "Company to the amount of £50,000 for and on behalf "of the said City."

12. "That there was no authority whatever for issuing "the said Debentures or purchasing the said Stock, except "as hereinbefore appears; and your complainants submit "whether, what hereinbefore appears, amounts to any "such authority."

The only observations, necessary to be made, as to the allegations, in these paragraphs, are: that, admitting that, on the 18th or 19th of October £7,000 of debentures, being the residue of £50,000, were issued to the Messrs. Storey & Co., (not, however, by any other "procurement or concur- "rence" of the Appellant, than that they were necessarily signed by him, as mayor,) I submit that, the allegations contained in these paragraphs, not only do not support the Plaintiffs claim to relief, but that, on the contrary, the Act

of Parliament, referred to in these paragraphs, has, and very properly has, rectified any informality or defect in the taking of the stock, or in the issue of the debentures, which, under the circumstances of the case, independently of the Statute, might have existed. What the bill intends, by the submision, in the 12th paragraph,—*whether or not, the facts stated, amount to a sufficient authority, for purchasing the stock*, —I cannot understand ; inasmuch as the bill does not ask to set aside the purchase, but attempts to establish a claim, founded upon the purchase, (inconsistent though the claim sought to be established is with the purchase); for, if the purchase stands, as stand it must, for anything in this bill contained, altogether independantly of the Statute, which confirms the purchase ; then the corporation can claim nothing, not comprehended, in the terms of the purchase; and having by those terms sanctioned the issue, to Messrs. Storey & Co. of £50,000 debentures for £50,000 stock, the corporation cannot claim back, as, in effect they do, a portion of those debentures, or rather, cash instead of them, from the assignees of Messrs. Storey & Co. who, unless *they* could have sold the debentures, could not have received the benefit of their issue. I submit then, that the decree, made in this cause, cannot be sustained, without an utter disregard of the Statute referred to, viz, 16th Vic, Ch. 5, and, even, if that had been proved, which, not only has not been proved, but is not a fact, namely—that any improper influence upon the Legislature, to procure the passing of the act, had been exercised, still, I submit, that, the Courts have no jurisdiction, to disregard an Act of Parliament upon the pretence or suggestion, that it was obtained, by a fraud upon the Legislature. The Legislature can alone investigate such a charge ; but in a case like the present, wherein the Plaintiffs are the recipients of all the benefit, in having themselves relieved from their original obligations to Messrs. Storey & Co., by the confirmation of their purchase of stock, and in having negotiated a loan upon the most favorable terms possible, it can, upon no principle, be argued, that the Plaintiffs should be entitled to the benefit of this decree, if the decree

cannot be sustained upon the naked circumstance that a member of a Municipal Council, is liable to account to the corporation, upon every occasion of his becoming the purchaser with his own funds, of debentures of the corporation, *legally issued to third persons for value.*

The bill proceeds to state.

13. "That on the 2nd November following, a by-law "was passed by the Council without any previous publica- "tion, authorising the said loan of £100,000, and the same "was effected according to, and in pursuance of, the offer "made through Mr. Ridout, and hereinbefore mentioned. "That the old Debentures were returned to the Chamber- "lain as part of the loan, at par, and the said Bank passed "the remaining £50,000 to the credit of the City agreeably "to the said statute. That the Debentures so issued were "immediately sent to England, and either immediately, or "before, sold to other persons, at or above par, for the joint "benefit of the said Bowes and Hincks. That there was "a profit made by the said Bowes and Hincks on the pur- "chase aforesaid, after deducting disbursements of nearly "£10,000, one half of which was retained by the said "Hincks for his agency in the matter, and the other half, "or the sum of nearly £5,000 was received by the said "Bowes, which the said Bowes improperly and illegally "and in breach of his duty in that behalf, to the city as Mayor "thereof, paid into the funds of the firm of Bowes & Hall, "of which the said Bowes is the principal partner, instead of "paying the same over to the said city. That the said Mayor "persists in illegally holding the said sum to his own use "and for his own benefit, without any account to the said "Corporation therefor, and will do so, unless prevented "by the decree of this Court, to be pronounced in this suit."

With respect to the allegations in this paragraph, the evidence proves, that the debentures therein alluded to, and which were issued, as admitted, in pursuance of, and in accordance with, an Act of Parliament, *were not* sold at par, but that, *on the contrary*, all were sold at a discount. The substitution of Sterling Debentures for those previously

issued to Messrs. Storey & Co., formed part of the terms, upon which, the corporation effected their £50,000 loan *at par*. The evidence shews, that the corporation, never could have obtained that loan at par, except through the medium of the discount which the Appellant and his co-proprietors submitted to, (on the debentures substituted for those purchased from Messrs. Storey & Co.,) for the purpose of giving to the corporation a loan at par ; and the evidence proves, that the transaction was a gain to the corporation ; for that, although the interest on the whole £100,000 cy., is payable in London, yet the expense of remittance is much more than balanced by the gain, which the corporation have made, in having gotten *par* for their £50,000 loan.

There is nothing in this paragraph contained, which tends to establish, or to confirm, the claim made on behalf of the Plaintiffs,—namely, that the Appellant, under the circumstances, is liable to be called to account, by the corporation, in respect of the transaction.

The bill proceeds to state.

14. " That throughout the whole of the said transactions " the said Defendant Bowes was an active party, and used " the influence he had, and which was considerable, as " Mayor, and otherwise, to procure the passing of the " several Resolutions and By-laws of the Council hereinbefore " mentioned, and to procure the several acts and proceedings " hereinbefore mentioned, to be performed and taken on the " part of the Council and its officers, respectively as aforesaid : " in all which the said Mayor had it in view to facilitate the " making of the said profit, but that through the contrivance of " the said Mayor, the said Common Council, until long " after the several matters hereinbefore mentioned had taken " place, was kept wholly ignorant, and did not even suspect, " that the Mayor had any such private interest therein as " hereinbefore appears, or had, or expected having, any part " or interest whatever, in the negotiation, or sale, of any of the " said Debentures, or in the profit thereof ; but, on the con- " trary, the said Council believed that, in the advice and " recommendations he from time to time gave to the Coun-

" cil, and the members thereof, and upon which they acted,
" or by which they were influenced, and in the active part
" he took from time to time in reference to the same mat-
" ters, he was wholly disinterested, except as he had an in-
" terest in common with all the other inhabitants and Rate-
" payers of the City, and that in fact the said agreement with
" the Contractors, and the said By-law and Act of Parlia-
" ment were all shaped, framed, and carried out through
" his means in such a way as might enable him, and under
" the hope that he would be enabled, to possess himself of
" the said £5,000, without any discovery being ever made
" thereof by any of the parties interested therein, or entitl-
" ed to call him to account therefor."

With respect to the allegations in this paragraph, the evidence proves, that all the resolutions, by-laws, and proceedings of the council, were adopted and passed, by the council, upon the *intrinsic merits*, of the seperate matters before the council, *solely*, and without any influence of the Appellant. The concealment alleged in the 5th paragraph of the bill, shews that the Appellant, exercised no personal influence, if he had any, to induce the council, for his gain and against the interests of the city, to pass any of the resolutions which were passed, or to take any of the proceedings which were taken.

Every proceeding of the council, was, (under the circumstances, even alleged in the bill,) upon public consideration, justifiable and proper, and being so, no personal motive can be imputed to the Appellant, nor, if any personal motive could be imputed to the Appellant, would that nullify the proceedings of the council. The council would be wholly divested of all power of exercising their discretion *for the benefit of the city*, if the mere circumstance of a member of council being, or contemplating becoming, the purchaser of Municipal Debentures, from third persons, to whom they were proposed to be issued, for value, should be pronounced to be a breach of trust, and to be, in law, conclusive evidence, of an improper exercise, by the council, of the confidence, and discretion reposed in them. This is what the decree, in effect,

declares; for, the whole argument, upon which, the decree is based, is comprehended in this syllogism, namely:—

1. The corporation is absolutely entitled, to the exercise, by every member of council, of an impartial judgement, in every matter, brought under the council; but,

2. If any single member of council, contracts with, or contemplates contracting with, parties, to whom, debentures of the municipality, are proposed to be issued, for value, for the purchase of those debentures, he thereby, acquires an interest, which the law, inexorably regards, as altogether inconsistent with the proper exercise of his judgement and discretion, upon the question of issuing the debentures.

Therefore, the resolution of the council, authorising the issue of the debentures, to the third parties, involves an improper exercise, by the council, of the confidence and discretion reposed in them, and amounts to a breach of trust.

Now, my Lords, this is a conclusion, which, I submit, is not deducible from the rule - that agents appointed to sell property for another, cannot sell that property to one of themselves. The sole remedy also, which the court applies to a case, involving a breach of the rule, is wholly inapplicable to the circumstances of the present case. When an agent buys from his co-agents, the subject of the agency, the court sets aside the sale made by the co-agents, not a sale made by third parties, and, at the same time, the court orders a re-sale under the eye of the court, and if more be not obtained upon such re-sale, than was given by the purchasing agent, it holds the agent to his purchase. Now, such a remedy is wholly inapplicable to the circumstances of the present case; for, not only does the interest of Messrs. Storey & Co., from whom the consideration given for the issue of the debentures proceeded, intervene; not only is the sale, which the decree professes to set aside, not a sale made by co-agents to one of themselves, but a sale made by third parties, whose interest in the debentures is neither disputed or sought to be affected; but there is no process, by which, the court could apply the only remedy

which is appropriate to a case involving a breach of the rule, for the court cannot place matters statu quo ante, as it can order a re-sale of property, sold by agents, to one of themselves, nor can it order a reconsideration of the whole matter, by the council, or give to the council any instructions to govern them, upon a reconsideration of the matter. The sole remedy, then, which is appropriate, to a case, involving a breach of the rule, being incapable of being applied, under the circumstances of the present case, it follows, as a natural consequence, that the rule is inapplicable to the determination of the case. The error in the decree seems briefly, to be comprehended in this, that, it is assumed that the council, of which the Appellant was a member, sold property belonging to the corporation, to the Appellant, and that, thereby, *an imperative duty* has been violated; whereas, in truth, the Appellant bought no property from or belonging to the corporation, and, on the matters before the council, *no imperative duty*, but only a *discretionary duty*, was imposed upon the members of council, for they might, if they had deemed it advisable, have made a free gift of all the debentures to Messrs. Storey & Co.

Lord Hardwicke says, that when a body has the power of making resolutions, or passing by-laws, there is no breach of trust, even though evil should result from the resolution, or By-law,—how much less, can there be said to be a breach of trust, where benefit to the corporation, and not evil, is the result.

The bill proceeds to state.

15. "That the said Contractors have not and do not pre-
"tend to have any claim to the said sum of £5,000, or any
"part thereof. That the said sum hath been wrongfully and
"illegally diverted from the funds and uses of the said City,
"and that since the discovery thereof the said Mayor fre-
"quently and solemnly denied that he had any concern
"therein."

With respect to the allegations in this paragraph, it is to be observed, that the fact of the contractors claiming no interest in the discount, to which they agreed, upon the sale of the debentures to which they were entitled; or the fact,

that they assert no claim at variance with their contract of sale, cannot give, *to the corporation*, a right to assert a claim to any portion of the difference between the amounts at which the contractors at one time, and their assignees at another time, sold those debentures. The contractors were the parties entitled to the debentures; they had then a perfect right to sell them to whom they pleased,—to the Appellant as well as to any one else; the contractors being the proprietors of the debentures, the corporation could not have been. The debentures were then, the *property* of the contractors, and the *liabilities* of the corporation; and as there was not, and is not, any obligation upon a member of council, to purchase, with his own monies, upon behalf of the corporation, the *liabilities* of the corporation, the latter can assert no claim against the Appellant.

The bill then prays,

16. "To the end, therefore, that the said John G. Bowes "may be ordered to restore and repay to the said Corpora- "tion, to be applied to the proper uses and purposes of the "City, the funds so diverted and misappropriated by him as "aforesaid; and that an account of the said funds may be tak- "en and all proper directions in respect of the said accounts "and funds respectively given. And that your Complainants "may have such further and other relief in the premises as "shall seem meet. Your Complainants pray that a subpœna "may issue under the seal of this Honorable Court directed "to the said John G. Bowes, calling upon him to appear to "this Bill and observe what this Honorable Court shall "direct in that behalf."

"And your complainants will ever pray, &c."

With respect to the prayer of the bill, it is to be observed, that *no funds of the corporation having ever been, or being capable of being, diverted or misappropriated* by the Appellant, no such funds can be restored or repaid; should the decree, made in this case, be sustained, then it would be established, that although the corporation have lost nothing, but, on the contrary, have gained considerably, they shall have the right, although claiming the benefit of the

full consideration contracted to be received by them for their debentures, to recover also a sum of money, in addition, which never did form, and which, by no imaginable process could have been made to form, a portion of the funds of the city. The right, in fact, *without the outlay of a single shilling* to shave their own debentures, without, at the same time, redeeming any of them. The whole gist of the bill is comprehended in an allegation, to the effect, that the Appellant might and should have made, (from which it is implied and assumed that, it was his imperative duty to have made,) for the corporation, the amount which the bill admits, he only could have made, and did make, for himself, by reason of the Appellant, Mr. Hincks, and Mr. Hall having purchased the debentures of the city, from Messrs. Storey & Co., at a discount; yet the bill does not allege or pretend, that the Appellant had any funds of the city under his control, which it was his duty to have, or which he could have, invested in such purchase. The bill does not profess to show how, that, which the bill alleges might have been done, could have been done, but, *on the contrary*, quite sufficient appears upon the bill to shew that *it could not have been done.* That which is made the basis of the whole bill is, a purchase of debentures, which the bill throughout, *admits to have been purchased from Messrs. Storey & Co., in the ordinary course of business;* Messrs. Storey & Co's right to the debentures, and to the benefit of their issue, is no where disputed, and nothing whatever is stated in the bill, with the view of cancelling, or in any manner defeating the transactions, or any of the transactions, by virtue of which, such claim of Messrs. Storey & Co. arose, and yet relief is prayed which only could ensue upon a cancellation of those transactions. I submit then, that there is no equity stated in the bill, and that the allegations contained in it, are insufficient, even upon demurrer.

2nd point

There is one other point, not indeed of so much importance, but still a point wherein also, we contend, the Court of Chancery have erred in the Decree that they have made.

John Hall, the Appellants partner in business, was a party

to the purchase of the Debentures from Messrs. Storey & Co.; his credit, as well as the Appellants, was used in procuring the money, for the first payment of £8,000 made to the Messrs Storey & Co., and he was therefore interested in the transaction, which is the subject matter of this suit, and he is not a party to the suit; now it is an undoubted principle of equity, that the interest of a person, not a party to a suit, in the subject matter or object of the suit, cannot be, in any manner, affected by a Decree of the Court; and the principle is carried to this extent, that such an interest in an absent party, not only precludes the court, from making a decree, affecting the rights of such a person, but also from making any decree against the persons, who may be before the court, as parties to the suit; upon the principle that, as the decision with respect to the parties before the court, would still leave for adjudication, the rights as existing between the plaintiffs, and the person not before the court, equity will not adjudicate upon the matter at all, in the absence of the party not before the court, for equity abhors multiplicity of suits, and insists upon *all persons* interested in the *whole subject-matter or object of the suit* being before the court, before it will make *any Decree.* Now the Decree in this case, directs the Appellant to pay an amount, which includes not only his own proportion, of the difference between the amount at which the debentures, purchased from Messrs. Storey & Co., were purchased, and the amount at which, the Debentures substituted therefor in pursuance of the provisions of the Statute 16th Vic., ch. 5, were sold; but also John Hall's proportion or interest therein. For this reason therefore also, we contend, that the Decree made in this case, is erroneous. It is however, upon the more important objections referred to in the previous part of my argument, that we contend the decree ought to be wholly reversed, and the Bill of complaint should be dismissed from the Court of Chancery with costs.