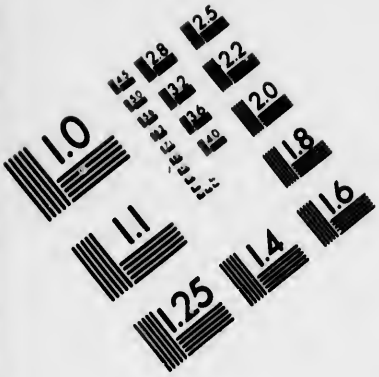

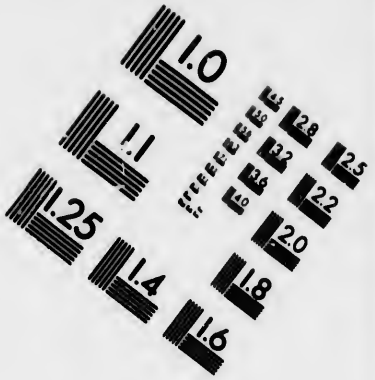

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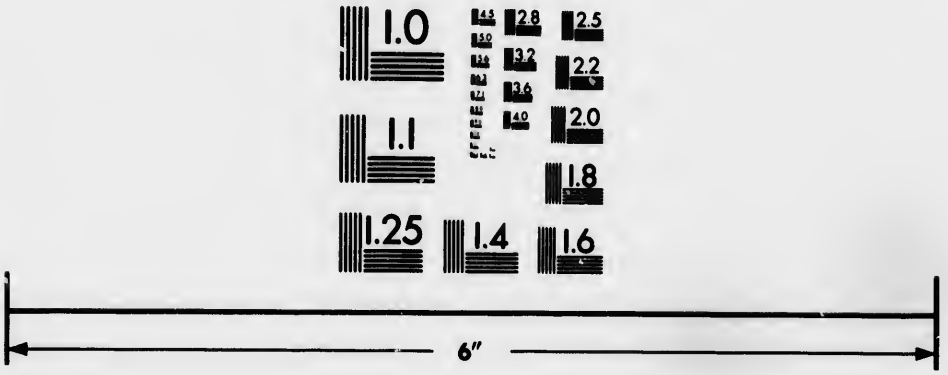

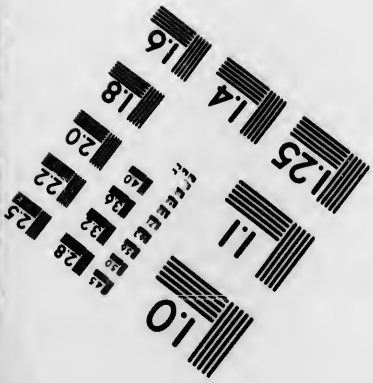

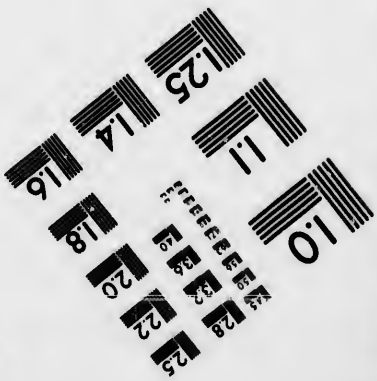

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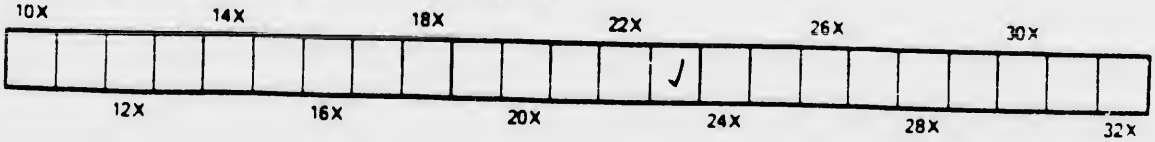

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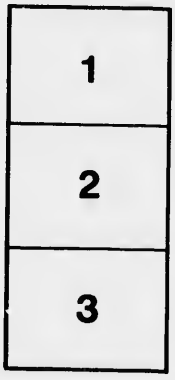

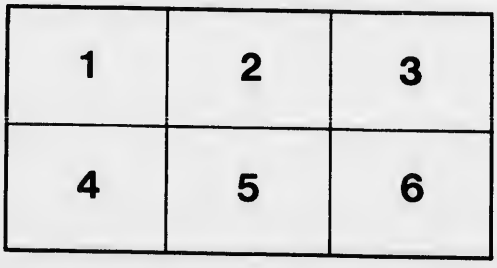

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1863.

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

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THE HON. P. M. S. VANKOUGHNET, *Chancellor.*

" J. CHRISTIE PALMER ESTEN, *Vice-Chancellor.*

" J. GODFREY SPRAGGE, *Vice-Chancellor.*

" JOHN A. MACDONALD, *Attorney-General.*

" JAMES COCKBURN, *Solicitor-General.*

A TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the plaintiff's name.

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING IN NOVEMBER, 1863.

DEWITT v. THOMAS.

Title—Supposed equity—Specific performance.

A supposed equity in a person who died in 1808, where the possession of the property since that time has been enjoyed by another, claiming it as his own, and having a perfect legal title to it, is no ground for refusing to enforce an agreement in which the condition precedent was, that a party should "shew, make, and complete a perfect legal title," as, even in the event of such equity existing, a court of equity would not enforce it after such a lapse of time, and under such circumstances.

Statement.—The facts giving rise to the present suit are stated in the report of a cause between the same parties at law, reported in Upper Canada Common Pleas Reports, volume VII., page, 563.

After the judgment there reported had been given, the plaintiff filed a bill in this court, asking a decree for payment of the £100 and interest, secured by the bond.

Mr. *O'Reilly*, Q. C., for the plaintiff.

Mr. *Proudfoot*, for defendant.

Judgment.—VANKOUGHNET, C.—It seems that some doubts existed as to the title of the plaintiffs to the lands sold at the time the sale took place, and in consequence the full value of the land was not then paid, but in lieu thereof the defendant gave his bond, which recited that if the said plaintiff should "*shew*, make, and complete a perfect paper title to the land within two years thereafter, conveying and assuring the same to the defendant, he, the defendant would pay to the plaintiff the further sum of £100," and the condition of the bond was, "that if the plaintiff did within two years from the date of the bond shew, make and complete a good and perfect title to the said land, in the opinion, and to the satisfaction of *Samuel B. Freeman*, Esquire, and should and did convey and assure the land to the defendant, perfectly and unimpeachably, then the £100 was to be paid." It seems that the plaintiff's title was considered doubtful because of the appearance on the registry of an outstanding mortgage to one *John Dewitt*, and because of some supposed equitable claim in one *Patterson*, the father of the plaintiff *Mary Dewitt*. Within the period of two years fixed by the bond, *John Dewitt*, the supposed mortgagee, with his alleged mortgage, was produced before the defendant and Mr. *Freeman*, and they both came to the conclusion that he had no claim upon the premises, and it is admitted on the argument that he had none. The only other objection to the plaintiff's title rested, and rests now, upon the supposed equity in *Patterson*. He died in 1808, and his equity must therefore have been created not later than that time. There is really no evidence that he had any claim upon the property. It is pretended that he had bargained with *Durham*, the grantee of the Crown, to purchase it, but this is not proved; and if it were, does any one imagine that after a lapse of forty years, the possession of the property all that time being in another claiming it as one having a perfect legal title to it, such an equity would be recognised or enforced in any court? I think that the supposed mortgage to *John Dewitt* having been

found within the two years, to be worthless or non-existent, to the satisfaction of the defendant himself, who then waived any release from *John Dewitt*, and the pretended equity in *Patterson*, having in fact no existence, or having long before disappeared, that the plaintiff did within the two years show a good and perfect paper title, consisting of the patent from the Crown, and the conveyance to him from the patentee in 1817. The legal title was perfect, and there was no equity outstanding, and Mr. *Freeman* approved of and was satisfied with it, as found by the jury in the action at law, and as appears from his endorsement on the bond. If it was not intended that I should take as evidence in this case the facts as reported in the case at law (which report was used y both parties on the argument) then I would give leave to examine Mr. *Freeman*, who, I think, could not have come to any other conclusion than the one stated. It was such a title as this court would have compelled the purchaser to take, within the language of his contract. And whatever technical strictness may have stood in the plaintiff's way at law in suing upon the bond, no such embarrassment exists here, in decreeing specific execution of the only remaining term of a contract, which the plaintiff has substantially, if not literally, performed. The decree must be for payment of the £100 and interest, according to the terms of the bond, with the usual legal rate interest from the time the last instalment was payable.

MILLER v. START.

Mortgagee—Evidence—Costs.

In a suit by a prior against a mesne encumbrancer on the argument of the cause, by consent, an affidavit was read which stated an agreement on the part of the prior encumbrancer to be postponed to the latter; when the court gave liberty to the plaintiff to cross-examine the deponent upon the statements contained in his affidavit, which permission not being acted upon by plaintiff, his bill was dismissed with costs.

Mr. *Gray*, for the plaintiff.

Mr. *Proudfoot* and Mr. *Wilkinson* for the defendants, other than *Start*, against whom the bill was taken *pro confesso*.

Judgment.—VANKOUGHNET, C.—In this case the bill must be dismissed with costs, as the equity which the plaintiff sets up against the defendant *Taylor* is displaced by the evidence. There is an unfortunate contradiction in the testimony of the two professional gentlemen, Messrs. *Start* and *Gray*, only reconcilable as to what occurred in Mr. *Start's* office, on the assumption that M .*Start* took it for granted that all parties present, including Mr. *Gray*, knew of the agreement by which *Leigh* had consented that the mortgage to himself should be postponed to the deed to *Start*. *Start* swears that this was well understood between the parties before they met in his office. It seems an extraordinary arrangement for *Leigh* to have made, and only explicable by his anxiety at once to get money, which Mr. *Start* was to advance and did advance out of his own means on the express understanding that he was to have a free title to the property to enable him to raise money on it to re-pay himself his temporary advances. While Mr. *Gray* and *Start* contradict one another as to what passed in the office of the latter, another witness, *John Start*, in his affidavit, which it was consented should be read as evidence, swears positively that *Leigh* agreed to be postponed to *Start*. When this agreement was made he does not say; I offered to the plaintiff the opportunity of cross-examining him under a commission, as he resides in Buffalo, but this was declined, and I must therefore assume the affidavit to be true, and so treating it, it turns the scale in favour of the defendants.

MUCHALL v. BANKS.

Champerty—Maintenance—Mortgagor and mortgagee—Assignment of right to impeach a prior mortgage.

Where an assignment was executed by a *puisne* incumbrancer to another, for the purpose of filing a bill to impeach a prior mortgage on the ground of fraud, and which bill was accordingly filed; the court, without determining what might have been the result of a suit brought simply to redeem, or one instituted by the *puisne* incumbrancer himself, dismissed the bill with costs, notwithstanding the right to redeem formed one alternative of the prayer, it being evident from the whole proceeding that the alleged fraud was the ground upon which the plaintiff principally relied.

Statement.—This was a suit by *Richard Muchall* against *William Banks*, the Hon. *George S. Boulton*, *Samuel H. Gibbs*, *George Ley*, *Francis Dixon*, *Edward Trevor Boulton*, and *James Sackville*, praying a declaration by the court, that, under the circumstances stated in the judgment, plaintiff was the first mortgagee of the lands in question in the suit: for a receiver of the rents and profits, or for liberty to redeem the defendant, *George S. Boulton*, and for further relief.

Evidence was taken by the late Chancellor *Blake* at Cobourg, in the autumn of 1860, when the defendants *George S. Boulton* and *Sackville* were examined on behalf of the plaintiff, and the plaintiff was called and examined on the part of the defendants.

Mr. *Boulton's* evidence was as follows:—

"I knew *William Banks* in 1834; he was then in my debt; I was employed to prepare a mortgage from *William Banks* to *C. P. Banks* in 1834. *William Banks* told me that he was authorised to draw upon his brother *C. P. Banks*; he resided in England; he never was in this country, as far as I know. *William Banks* told me that he was authorised to draw upon his brother, and instructed me to draw a mortgage from him to *C. P. Banks*, to secure the amount to be advanced. The mortgage now shown to me, marked "D,' is the mortgage which was prepared in my office, and is in the handwriting of Mr. *Wilcox*, then a clerk in my office. The bills [of exchange] now shown to me, marked

respectively A, B, C, were drawn by *William Banks* on his brother *C. P. Banks*, and formed the consideration for the mortgage; they were negotiated through me; I received the proceeds of them, and I have no doubt they were paid by *C. P. Banks* in due course; at least they were never returned to me. *William Banks* remained in this country five or six years after the execution of that mortgage. He was involved. I think he went to England in 1839, and returned subsequently for his wife, but I am not sure of that. I know the handwriting of *William Banks* and *James Sackville*. The paper now shown to me marked "E" is signed by those parties respectively. I cannot say that I ever saw that agreement before. The mill spoken of in that agreement is situated on the property in question. The paper now shown to me, marked "F," is a lease from myself to *William Banks*. It was duly executed by myself and *William Banks* about the day it bears date. I don't recollect that I knew at that time of the agreement between *Banks* and *Sackville*. I knew afterwards that there was some agreement under which *Sackville* carried on the mill, but I do not think I ever saw the agreement until now. I think it very likely that the rent in the lease from myself to *Banks* was intended to cover the interest on my two mortgages. The lease was made at *Banks'* request. He said I had it in my power to turn him off at any time, and wished the lease to secure him the possession for some time certain; the object was to secure him a right to redeem in the event of his being able to pay the debt. The paper now shown to me, marked "G," is *William Banks'* letter to me, asking for the lease. The paper now shown to me, marked "H," is in my handwriting, and I have no doubt was sent to me by Mr. *Banks*. I was not acting as Mr. *William Banks'* agent in paying his debts; I paid those debts no doubt, but I was not an agent to settle his affairs; I think I must have endorsed the notes for him. I have no clear recollection of the debts mentioned in the letter, but I am inclined to think that I had become responsible for the debts in some way or other. I do not know what the Bewdley lot spoken of in my letter means.* It may have been a lot in Hope on which

* On the evidence being read over, Mr. Boulton said, "I now recollect there was another lot near the one mentioned he assigned to me; I think it was 30, in the eighth concession of Hamilton. It was a 200 acre lot, but so much of it was under water that it was afterwards sold to me, I think, for 60 acres or thereabouts."

he had lived. He had also a claim to two other lots in Hamilton. I obtained a title to one of the lots in Hamilton from the Crown. I subsequently sold it. I cannot tell what I received for it. It was either 30 or 31, in the 7th concession of Hamilton. It must be now worth ten dollars an acre. There is no doubt that the lot in Hamilton was assigned to me to secure money due to me. I do not think I had an assignment of any other lots. Mr. *Clarke* got a title to the lot in Hope, I think, but I am not sure. I cannot say whether the lot in Hope was assigned to *Clarke* as a counter security. Mr. *Banks* was in debt to me at the time he executed the mortgage, and I credited him with the bills drawn upon his brother, but I have no account of these transactions. I paid other sums for *William Banks* since the mortgage, besides the sums mentioned in my letter of July, 1839, but I have no account of those transactions. The sums due to me by *William Banks*, exclusive of the mortage, must amount to £200; no part of that has been paid. The paper now shown to me, and marked "I," was signed by *William Banks* and myself, and that account was settled about the time it bears date. I was registrar of the county of Northumberland at the time the mortgages to myself and *C. P. Banks* were executed. I had large transactions with Mr. *Banks;* a large portion of the money advanced by me to him has never been repaid. The deed now shown to me, marked "K," is the deed of the land in question from one *Watson* to myself. I paid *Watson* the purchase money on behalf of *Banks*, and the mortgage from *Banks* marked "L," was given to secure that amongst other debts. It never was agreed that my mortgage should be subsequent to the mortgage to *C. P. Banks*. I would never have taken such security. The land was not worth it. At the time the mortgage was executed the property mortgaged was valued at either £1300 or £1500, but it is not now worth that amount. It has been greatly improved, but I would not give £1200 for it as it stands. The quantity of land falls far short of what it was supposed. It is not more than 200 acres. I don't think it would bring £1000. The property is not worth the debt and improvements. The mortgage from *William Banks* to *C. P. Banks* was not left in my possession. It was left with *Wilcox*, who is a friend of Mr. *William Banks*. Mr. *Wilcox* was at that time my articled clerk; he may have been at that time about twenty-three years old. I think that the property was valued before the

execution of the mortgage to *Banks*. It was valued, I believe, by *Sidey* and *Faulkner*. Mr. *Faulkner* was then the judge of the Newcastle district court. He was a friend, and connected, I believe, with the *Banks* family, and communicated, I believe, with *C. P. Banks* prior to the mortgage. The mortgage to me was executed prior to that to Mr. *C. P. Banks*. The subsequent advances to Mr. *Banks* were not paid except by the sale of the reserved lots. I cannot tell what the lots sold for, but I got at least $8 an acre. The papers now shown to me marked "M" and "N," are the mortgages from *Banks* to *Clark*, and the assignment of it from *Clark* to myself."

James Sackville, on his examination, stated—"I am one of the defendants. The paper now shown to me, marked "E," is an agreement entered into between *William Banks* and myself. *William Banks* wished me to work the mill. I heard that Mr. *Boulton* had some claim to it, and I saw him and enquired whether he had any claim. He replied that he had, and would expect to receive the rent if it was let. I saw Mr. *Banks* and said, I did not think I could have any thing to do with it, and in consequence Mr. *Banks* procured the lease from Mr. *Boulton*, which has been put in. I know the property in question well. The dam is not upon the mortgage property. There are not more than 75 acres of dry land upon the mortgage property. I paid Mr. *Boulton* for the mill privilege, consisting of about 42 acres, £580. The whole property, exclusive of the mill built by me, is not worth over £1000."

The plaintiff being called by the defendants, stated —I am the plaintiff. In the winter of 1857, I think February, I went to England, and knowing *William Banks* well, I went to see him. *C. P. Banks* then resided at Bewdley, and in the course of conversation he spoke a good deal of the money which he had lent to his brother and lost. He then wished me to try and get the money for him. I then declined to have any thing to do with the matter, but after I returned to Canada the assignment from *C. P. Banks* to myself was sent out to me. I did not purchase it. In truth it is not mine. I am carrying on the suit for him. I have no interest in it. I suppose he will pay the costs. If the debt is realised I suppose he will pay me something

handsome. We have not made any bargain. He trusts to my honour, and I trust to his. He made several proposals to me when I was in England, but I declined to accept them, and nothing definite was arranged. I was surprised when the papers were sent. They were sent to me. There was a letter with them. I gave all the letters to Mr. *Cockburn*. I can't tell whether it said anything about the costs. I have paid money towards the costs. I think that *C. P. Banks* proposed to give me half the debt if recovered, but I did not accept that. There was no arrangement as to the amount I was to receive when the papers were sent. I suppose he will carry out the proposal he made to me in England, but I have no binding agreement. Even if the suit fail, I expect something. I expect that I shall get my expenses; but I am trusting to his honour. If the suit should succeed, and *C. P. Banks* should refuse to pay me anything, I would send the whole amount recovered to him. I am not worth much, but I think I am able to pay the costs of the suit should it fail.

Mr. *Crickmore*, for plaintiff.

Mr. *G. D. Boulton*, for defendants.

Judgment.—VANKOUGHNET, C.—[Before whom the cause was heard.]—This is a bill filed by the plaintiff with the main object of postponing the mortgage held by the defendant *George S. Boulton*, to the one under which the plaintiff claims, on the ground that *Boulton* had obtained his priority by fraud—that he was the solicitor of the mortgagee (from whom the plaintiff claims by assignment) in the preparation of the mortgage, which bears the same date as *Boulton's*, and which it was *Boulton's* duty to have registered prior to his own, such being, as alleged, the intention of the mortgagor at the time.

The bill also states that *Boulton* did not advance to the mortgagor the amount secured to him by the mortgage, and prays to have this investigated, and an account taken, and that in the event of *Boulton* retaining his priority, plaintiff may be permitted to redeem; but the

bill does not contain any offer to redeem. Had the bill been filed by the original mortgagee simply to redeem *Boulton*, and to release his security out of the property, the court would have had to consider the two defences which *Boulton* makes now to redemption, viz., the Statute of Limitations, or the lapse of twenty years since he had possession of the property under his mortgage; and the appeal to the discretion to refuse redemption given to the court by the Chancery Act of 1837; the mortgage to *Boulton* having become absolute at law for non-payment of interest prior to the passing of that act. In the view I take of this case it is necessary to refer to those grounds of defences only to show how the mortgagor and mortgagee stood to one another, putting the assignment to the plaintiff out of sight, or treating it as void for the moment, at the time of bill filed; and again how they stood towards one another at the time of the assignment. It is clear that both at one period and at the other they were in an antagonistic position, and we are now to enquire how and under what circumstances the plaintiff intervened and has become the actor in this suit. So far back as the 7th of March, 1838, the mortgagor, *William Banks*, who had not up to that time paid any thing on the mortgage to *Boulton*, then overdue, writes to the latter that "the mill dam broke again and damaged the mill, so that it will take a deal of labour and expense to put into working trim. The uncertain kind of tenure by which I have for some time held the mill, has in a great measure cramped exertions in making it beneficial to me, but I find it is my best if not my only resource; therefore, if you would guarantee my quiet possession of it for three years upon my punctually paying you in shape of rent the interest on the balance I owe you, I would immediately take steps to repair the mill and dam, and I trust would liquidate a portion of the obligation I am under to you. The present state of the country forbids my recommending my brothers to invest more property in it. They had better lose all I owe them. If you agree to this propo-

sition I will come in a few days and make the necessary arrangements with you." In accordance with this request Mr. *Boulton*, by indenture dated the 9th of April, 1838, executed to *Banks* a lease of the property for three years from date, at a rental of £55 per annum; how estimated does not appear. The lease contains covenants for payment of the rent, and for yielding up to *Boulton* at the expiration of the term quiet possession of the premises without notice to quit, or other formalities. One of the defendants, *Sackville*, who was examined as a witness, says that *Banks* had proposed to him to work the mill, but on hearing of *Boulton's* claim he declined to do so, and that in consequence *Banks* procured this lease, when he and *Sackville* then came to an agreement. *Banks*, the mortgagor, appears shortly after this transaction to have left the country, and gone to England, whence he never returned. On the 15th of July, 1839, *Boulton* writes to *Banks* the letter which is relied upon as taking the case out of the Statute of Limitations. It contains the following passages:

"I should be glad if you could make some arrangement to pay my two mortgages, and if I got £350 or £400 down, I would wait two or three years if necessary for the balance. However, should you not be able to accomplish this, I trust you will authorize Mr. *Faulkner*, and that your brother will do so likewise, to relinquish all your and his claims to the 400 acres mortgaged. I could, by adopting proceedings in Chancery, foreclose my first mortgage of £600, unless the money, interest, and costs were paid, but I do not wish to resort to such a step, and as I said before I trust you and your brother will give me the relinquishment if you abandon the idea of redeeming the property. I annex a form of power (meaning power of attorney) for your signature and that of your brother, in the event of your adopting the latter course."

It does not appear that any response was made to this letter, or that any further communication ever passed between *Boulton* and *William Banks*, or his brother, the other mortgagee, and we hear nothing

further of them till we learn it from the evidence of the plaintiff. Subsequently, *Boulton* treating the property as his own, sold some portions of it to parties defendants in this suit, some of whom have made valuable improvements upon it. It is sworn that the property, exclusive of the mill erected on it by the defendant *Sackville*, is not worth more than £1000, and there is no evidence to increase this valuation.

The bill in this case was filed on the 14th June, 1859, under the circumstances detailed in the following evidence of the plaintiff. [Here his Lordship read the evidence of the plaintiff, above set forth.] The assignment has been lost or mislaid, and the letters referred to as accompanying it are not produced. I suppose it would not be argued that *C. P. Banks* could assign to the plaintiff the right to institute a suit to set aside for fraud the priority of *Boulton's* morgtage, or to impeach the consideration between himself and *Boulton*, on the ground that the latter had neglected his duty as solicitor, or had betrayed his client, or abused the fiduciary relation subsisting between them. *Prosser* v. *Edmunds* (*a*), and a long train of cases, in which this one shines as a clear elucidation of the doctrine by which the courts repudiate such transactions, would render any attempt of the kind idle. The most that can be argued for is, that the assignment to the plaintiff gives him a right to redeem the equity of redemption, it being in the eye of this court a substantial estate, which was conveyed away, even though the mortgagee disputes it. However that might be in an ordinary *bona fide* sale of such an estate for value, it was evidently not the chief object nor purpose of the assignment here. If the mortgagee, *Banks*, when he met the plaintiff in the month of February, 1857, wished merely to redeem the property, or to dispose of his equity of redemption as second mortgagee, why hold such a conversation as he then did with the plaintiff? Why then ask the plaintiff to try

(*a*) 1 Y. & C. 48.

and get his money for him? Of course from *Boulton*. Why hesitate in prosecuting his right to redeem, and then selling the property to repay himself, if the property would produce more than the first charge upon it? Because, I suppose, we may fairly assume from the evidence that the property was not worth it. It is clear, I think, from the evidence, that the equity of redemption was not looked upon as anything, and the frame of the bill leaves but little doubt of this. The object of *C. P. Banks* then, and the assignment which reached the plaintiff in the manner he describes, was not to redeem *Boulton's* mortgage, but to compel *Boulton* to redeem him. It is clear, too, that the mortgagee and his assignee contemplated and intended litigation for this purpose. The plaintiff says that when proposed to him, in 1857, he declined to have anything to do with the matter, and that he refused several proposals made to him in England, in reference to it, and he was surprised when the assignment was sent over to him here. He had not asked for it, had not purchased it, and yet we found him adopting it, and carrying on this suit on the strength of it. The mortgagee, *Banks*, was apparently unwilling or unable, though one would not infer he was poor, to carry on the suit. The plaintiff would not have anything to do with the claim; refused every proposal; has no fixed interest in it; has bargained for none; but yet in the end acts in it, making himself liable for costs, paying costs on account, expecting a share of what is recovered, himself treating the whole proceeding as a means, not by which money is to be paid out to *Boulton*, but by which money is to be recovered from him. If this be not both champerty and maintenance, or the latter, it savors so strongly of it that I think the court should not retain the case. It is not the *bona fide* effort of a claimant of an equity of redemption. It is an attempt to maintain a lawsuit which a party has purchased, contrary to law, or to the policy of the law; or in which he has no interest, but which the party having the interest, if any exists, will not prosecute for

himself. Even if it could be held that this transaction, though void as to the assignment of the right of action against *Boulton*, would yet pass the equity of redemption of *C. P. Banks*, and that the parties have a right to say that it was all it contemplated, it can be answered that any right to redeem in *Banks* was and is disputed, and must be treated on the evidence as having been considered both by *Banks* and the plaintiff as in dispute and a doubtful right, and that the assignment of it was a mere speculation, depending on the result of an anticipated or intended lawsuit. The remarks of the Master of the Rolls in *Cholmondeley* v. *Clinton* (*a*), shews how the court disapproves of the dealing with such equities; and other cases of similar import are to be found. I refer to the following cases, in addition to those mentioned before, to shew that the plaintiff should receive no relief. They but make clear the law which is to be found in the numerous cases referred to, and commented on there. *Wallis* v. *Duke of Portland* (*b*), *Reynell* v. *Sprye* (*c*), *Stanley* v. *Jones* (*d*), *Sprye* v. *Porter* (*e*), and Lord *Campbell's* observations at page 76. And also see the argument in *Jacob & Walker*, at page 55. Under these circumstances I think the bill must be dismissed with costs.

DUNCAN v. GEARY.

Practice—Venue—Imperfect description of premises.

The absence of a venue in the margin of a bill is not a cause of demurrer. Nor is a description of the premises which omits the township or county.

In a bill for foreclosure of a mortgage, it is not necessary to state the property or the parties to be within the jucisdiction of the court. If it be necessary that the one or the other should be within the jurisdiction that will be presumed in favour of the bill till the contrary appears.

Semble, that no venue being stated in the margin of the bill is an irregularity, and may be taken advantage of by motion to compel the insertion of a venue.

This was a foreclosure suit, the bill in which had been

(*a*) 2 Jacob & Walker, p. 135. (*b*) 3 Ves 494.
(*c*) 1 DeG. M. & G. 660. (*d*) 7 Bing. 369.
(*e*) 17 E. & B. 58.

demurred to, on the grounds mentioned in the head-note and judgment. On the case being called on for argument,

Mr. *Taylor* appeared for the plaintiff, and referred to *Story's* Equity Pleading, secs. 487, 489, *Drewy's* Equity Pleadings, page 37; *Daniel's* Practice, page 397, as shewing that the objections taken to the bill were not grounds of demurrer.

No one appeared in support of the demurrer.

Judgment.—VANKOUGHNET, C.—This bill is for the foreclosure of a mortgage. It describes the mortgagor as of the township of Aldboro, and proceeds in the usual way to the description of the premises, which is, however, imperfect, being stated to be lot A, in the 6th concession, without naming any township or county.

If it were necessary it might perhaps be assumed for the purposes of pleading that the lot must be taken to have been stated as in the township of Aldboro, that being the only township named in the bill, and that for this purpose it was sufficiently referred to by the article "the" in the description "the sixth concession." The defendant demurs to the bill on the grounds, 1st, that no venue is stated in the margin of the bill. 2nd, that it does not appear, nor is it stated that the property is within the jurisdiction of the court. There is nothing, I think, in either objection. The venue is no part of the bill, in no way affecting the matter of it, the relief prayed for, or the jurisdiction of the court. It is merely required under the orders to be inserted as fixing the place for the examination of witnesses, not even as denoting the county where the proceedings are to be carried on, or the cause heard. The absence of it may be an irregularity which can be taken advantage of by a motion calling upon the plaintiff to insert a venue, or to take the bill off the files for the want of it.

It is not necessary to state the property or the parties to be within the jurisdiction of the court. If it be necessary that one or the other should be within the jurisdiction that will be presumed in favour of the bill till the contrary appears. I do not think the imperfect description of the premises any cause of demurrer. In England when a claim is filed on a mortgage it is simply stated that by an indenture, &c., the plaintiff is mortgagee of certain premises therein described, and this, I think, is sufficient here, although the form given under our orders (which, however, are not imperative in regard to it) provides for a short description of the premises. It may be more convenient, and particularly for the plaintiff, that the form in this respect should be followed, but as the premises can be ascertained by reference to the deed, sufficient certainty for the purposes of the suit is afforded.

CORBETT v. MEYERS.

Stakeholder—Paying money into Court.

Although the rule of equity is, that money in the hands of a stakeholder held for the benefit of others, whose rights are to be disposed of by the court, will usually be ordered into court, still in such case it must be clear that some of the parties litigant are entitled to the fund or a portion of it. Where, therefore, certain moneys, the proceeds of a policy of insurance which had been deposited with the attorney of a bank, for the purpose of being held in trust for such bank, and with the proceeds to pay off the liabilities of the party making such deposit to the bank, had been paid to and were still in the hands of the attorney, and the depositor, without shewing what amount was due the bank, applied to have the money paid into court by the attorney; the court, under the circumstances, refused the application.

This was a motion for an order on *Archibald J. McDonnell*, the attorney for the Commercial Bank of Canada, to pay into court a sum of money in his hands, the proceeds of a policy of insurance on the life of the late *William H. Meyers*, which had been deposited in his hands, under the circumstances and for the purposes mentioned in the head-note and judgment.

Mr. *Roaf* for plaintiff, in support of the application.

Mr. *Strong*, Q.C., contra.

Wilton v. *Hill* (*a*), *Re Bridgman* (*b*), *Dubless* v. *Flint* (*c*), *Freeman* v. *Fairlie* (*d*), *McHardy* v. *Hitchcock* (*e*), *Whitmore* v. *Turquand* (*f*), were referred to by counsel.

Judgment—VANKOUGHNET, C.—In this case I refuse the application. When money is in the hands of stakeholders, having no interest in it, and held for the benefit of parties whose rights are to be disposed of by the court, it is almost of course to order the money into court that the fund may be secured, but even in such case it must be clear that some of the parties litigant are entitled to the fund, or a portion of it. Now what are the facts: *Corbett* receives from *William H. Meyers* in his lifetime an assignment of a policy of insurance on his life for £2000 sterling, absolute in form, but admitted by *Corbett* now to have been taken and held as security for moneys owing to him (*Corbett*), and for liabilities incurred by him for *William H. Meyers* the defendant and executor of *William H. Meyers*, denying that anything is due to *Corbett* on the security of the policy, or that there are any outstanding liabilities for which he can hold it, files a bill to restrain the insurance company from paying, and *Corbett* from receiving, the money.

The bill was filed on the 28th of September, 1857, and beyond getting in the answers of the defendants, by which *Corbett* claims a large sum to be due to him on the policy, nothing has been done in the suit, in which the respective claims of the parties on the policy might have been long since settled, till February, 1861, when there was a consent to a decree, which has never, however, been taken out. In the same year a decree for the administration of the estate of *William H.*

(*a*) 2 DeG. M. & G. 807.
(*b*) 6 Jur. N. S. 1065.
(*c*) 4 M. & C. 502.
(*d*) 3 Mer. 24.
(*e*) 11 Beav. 73.
(*f*) 1 J. & H. 296.

Meyers was obtained at the suit of *Corbett* and his wife, the sister and one of the next of kin of *William H. Meyers*, and on the 18th of January, 1862, a receiver was appointed. In the meantime *Corbett* and *Meyers* being respectively largely indebted to the Commercial Bank, who had recovered judgment against them, arrange with the solicitor of the bank, *Archibald J. McDonnell*, against whom this motion is made, and with the insurance company, that the insurance money shall be paid into his hands to be held by him and applied on the judgment of the bank so soon as the shares of it to which each party is entitled is settled; the money is accordingly received by *McDonnell*, who gives to *Corbett* the following note filed as exhibit "C" among the papers, and addressed to the plaintiff *Corbett:*

"My dear *Corbett*,—You assigned me a policy on your life, and a policy on Mr. *Meyer's* life. I hold them and the money to be received for them in trust for the Commercial Bank, and to pay off your liabilities to the bank so far as they go."

This is dated the 21st of June, 1859. *McDonnell* is liable to the Commercial Bank as endorser on the paper which forms the subject of the judgment against *Corbett*. The amount actually due to *Corbett* out of the insurance money is not yet ascertained. This, *Corbett* alleges, was to have been ascertained by arbitration, which has fallen through. There ought to be, and I imagine can be, no difficulty in arriving at this amount; it is not suggested that there is. In the meantime *McDonnell* acting for the bank to keep the judgment alive as a lien upon *Corbett's* lands, issues first execution against *Corbett's* goods, and obtains a return of *nulla bonâ*, with the object only, so far as appears, of obtaining a writ against lands, which accordingly issues. Beyond this nothing is done to enforce the judgment, which *McDonnell* swears was not to be pressed on these insurance moneys being placed in his hands for the bank; and

this would seem natural to be so, or why were the moneys paid to him? And now what takes place? *Corbett* and *Meyers* not having settled their dispute as to *Corbett's* share, and neither party apparently taking much if any trouble to ascertain it, *Corbett*, who has pledged, and in fact paid over, to the commercial Bank through their solicitor for them this share, whatever it may be, turns round and asks to have the money taken out of those hands in which he had placed it, and paid into court: the stakeholder himself as security for *Corbett* to the bank being personally liable, and as holding the money for the bank being also liable to it.

I cannot make such an order, and I refuse this application with costs to *McDonnell*. I give no costs to *Meyers*, who appears from the papers to have done everything to delay this suit, and who has made but little progress in the one instituted by himself. If the sole question were the paying in of the portion coming to *Meyers* as executor, after *Corbett's* claim was satisfied the case would be different, although *Meyers* has pledged whatever personal interest he had in it to the Commercial Bank, as *Corbett* has done.

As regards the question of interest, it is the fault of both *Corbett* and *Meyers* that the fund is not paying interest; or rather, has not long since been divided and applied to the payment of the debts of one if not of both of them. If it should eventually appear that the stakeholder has used the money for his own purposes (which is not pretended), he may be liable for interest.

McKenna v. Smith.

Fraudulent preference—Injunction

A debtor while indebted to one creditor, and alleged to be insolvent, assigned a note to another creditor for a *bonâ fide* debt. Subsequently both creditors brought actions to recover their respective demands, but in order to enable one of them to obtain a first judgment no defence was entered to his action, while the other action was defended. The court (following the decision of *Young* v. *Christie*, reported *ante* volume vii., page 312), refused an injunction to restrain the first judgment creditor from enforcing the execution sued out on his judgment.

In this case an *ex parte* injunction had been granted to restrain the defendant *Hutty* from proceeding to sell the goods of the defendant *R. C. Smith*, with liberty to move to continue the injunction to the hearing, and a motion for that purpose was accordingly made by

Mr. *Barrett*, for the plaintiff.

Mr. *M. C. Cameron*, Q.C., contra, referred to *Young* v. *Christie, and Ferguson* v. *Baird* (*a*).

Judgment—Vankoughnet, C.—This is a motion to continue an interim injunction to the hearing under the following circumstances as appear by the affidavits now filed on both sides.

R. C. Smith, one of the defendants, being indebted to the defendant *Peter Hutty* assigned to him as a means of securing and obtaining payment of his debt a note for $300, made by the other defendant, *J. M. Smith*, in favour of *R. C. Smith*, and by the latter endorsed. Upon this note *Hutty* brought two actions, recovering judgments severally against the maker and endorser; under the judgment against the latter, he has seized personal property to the value of about $1200, as alleged. At the time of the delivery of this note to the defendant *Hutty*, the defendant *R. C. Smith* was indebted to the

(*a*) 10 U. C. C. P. 493.

plaintiff on a note endorsed by defendant *J. M. Smith*, past due, for about $800. The plaintiff shortly afterwards put this note in suit. *R. C. Smith* entered a defence to it, as he swears, to enable *Hutty* to get a first judgment in the suit on the note endorsed by him *Smith*, to which no defence was made. The defendant *R. C. Smith*, it is alleged, was at the time of the transfer to *Hutty* insolvent, and it does not appear that he had then, or has now, any means out of which the plaintiff can obtain payment.

The plaintiff files his bill, claiming that the transfer of this note to *Hutty* was under the circumstances fraudulent and void, and shall be so treated under section 17, chapter 26, Consolidated Statutes of Upper Canada, and that the judgment obtained under it should be vacated; or that any thing realised under it should be paid over to him the plaintiff; or in effect that *Hutty* should lose his priority as against the plaintiff, and that *Smith's* goods should be subjugated to his, the plaintiff's execution. There seems no doubt at present of the indebtedness of *R. C. Smith* to *Hutty*, to an amount of about £500. Whatever question may arise as to the right of *Hutty* to press his judgment against *J. M. Smith*, it seems to me there can be no pretence for setting aside his judgment against his principal debtor *R. C. Smith*. He might have taken *R. C. Smith's* note and recovered judgment against him on that, or on the account which *Smith* owed him. I am asked to set aside this judgment against him, or to take such action in respect of it that another creditor may thus obtain priority. Why should that other creditor have priority? His debt does not appear to be entitled to any preference over *Hutty's*. He has a judgment against precisely the same parties, but later in point of time; and *Young* v. *Christie* very properly, I think, decides that one creditor facilitated, another delayed, by the recognized forms of law in obtaining a judgment, affords no ground for interference. Why should I hand over the defendant's, the principal debtor's,

goods to the plaintiff in preference to *Hutty?* What right have I to select one from the other as against the legal priority and right which that other has acquired? The statute never meant that. It meant to prevent fraudulent preferences and transfers of property, but it certainly has not furnished any machinery, nor indeed given any power, by which its apparent objects can be thoroughly effected. To take from one creditor whose legal proceedings may be at fault, or whose debt may have been preferred, and paid by the transfer to him of property of the debtor merely to give to another, who has an advantage in having pressed more rapidly than the other creditors—legal proceedings in themselves unimpeachable—does not afford a very satisfactory mode of preventing one creditor having the better of others, or applying a debtor's estate to the satisfaction of all his debts. While the act endeavours to prevent the debtor himself, when in insolvent circumstances, from helping a particular creditor by any act of his own to a portion of his property, it leaves it open to any such creditor by active proceedings on his part, the debtor being passive, to sweep away the whole estate from all the other creditors, however large and honest and old their claims may be. In this case, however, as I have already stated, I leave the plaintiff and the defendant *Hutty* to maintain their relative positions at law.

McDonough v. Dougherty.

Mortgage—Payment by mortgagor without notice of assignment.

A mortgage was held by an assignee for the benefit of the assignor, (the mortgagee,) and the mortgagor, without notice of such assignment, paid to the mortgagee the amount due on the mortgage, and obtained from him a discharge under the statute. Upon a bill filed by the representatives of the assignee, who claimed the assignment to have been absolute, seeking to enforce payment of the mortgage by sale or foreclosure, the court declared the mortgagor had acted *bonâ fide* in paying off, and obtaining a discharge of the security from the mortgagee, and ordered the plaintiffs to execute a release of the mortgage, it being doubtful whether under the circumstances the discharge from the mortgagee would have the effect of re-vesting the property in the mortgagor.

The bill in this cause was filed by the widow and

administratrix and the children of the late *John McDonough* against *Charles Dougherty* and *Frederick Louis Menning*, setting forth that in 1857 *Menning* and wife created a mortgage in favour of *Dougherty*, which was duly assigned by *Dougherty* to the deceased, with full power to use the name of *Dougherty* in suing for and discharging such mortgage. That the title deeds and papers were thereupon handed over to the deceased by *Dougherty*, who afterwards, and on the 23rd of April, 1859, fraudulently executed a certificate of discharge of the mortgage to defendant *Menning*, which was duly registered on the same day, and prayed the usual account, and order for *Menning* to pay, or in default foreclosure or sale.

Statement.—The defendants answered the bill, *Dougherty* alleging that he had not received any consideration for the assignment to the deceased, who held it only as trustee to sell for defendant's benefit. *Menning* denied all knowledge of the assignment, and stated that he had paid his money and obtained the discharge of the mortgage in good faith.

An affidavit was put in at the hearing, proving a letter written by the deceased to *Dougherty*, in which, under date of October 12, 1858, he wrote as follows:

"I received a letter from, [you,] dated September 18, stating to me to let you know if I had done any thing with the mortgage. I answered your letter directly, and stated to you how I got along. I got two or three promises at the time, and I am no better yet—I am trying my best. If you wish me to send it to you, or try some time further, let me know."

The contention of the plaintiff was, that notwithstanding this letter the mortgage belonged to the assets of the deceased, the expression in the letter not being sufficient to destroy the effect of the assignment.

Mr. *Brough*, Q.C., for the plaintiffs.

Mr. *Blake*, for defendant *Menning*.

Hiern v. *Mills*, (*a*) *Worthington* v. *Morgan*, (*b*) *Jones* v. *Williams*, (*c*) *Roberts* v. *Croft*, (*d*) *Jones* v. *Smith*, (*e*) *West* v. *Reid*, (*f*) *Hewett* v. *Loosemore*, (*g*) *Parr* v. *Jewell*, (*h*) *Engerson* v. *Smith*, (*i*) were referred to.

Judgment.—VANKOUGHNET, C.—In this case the bill must be dismissed, and with costs. There is no evidence to sustain the charge of fraud against either of the defendants; and the letter of *McDonough*, the intestate, proved by affidavit under order of the court, goes to shew that *McDonough* held the mortgage under the assignment to him for the purpose of disposing of it for the benefit of the defendant *Dougherty*. Whether he did so or not, however, there can be no claim against the defendant *Menning*, who, in ignorance of the assignment, paid off the amount of the mortgage to the mortgagee.

The assignment was not registered, nor was any notice of it given to *Menning*, nor any thing made known to him, sufficient to put him on enquiry. For all that appears he acted in good faith, obtaining from the mortgagee the necessary certificate of discharge of the mortgage, which had been registered, it seems, in the usual way. There may be some doubt as to the efficiency of this discharge under the circumstances, though the statute provides that it shall be given by the person entitled to receive the mortgage money. On the registry books *Dougherty* would appear to be so entitled, and if *McDonough* merely held the mortgage as his agent under the assignment made to enable him to

(*a*) 13 Ves. 114.
(*b*) 13 Jur. 316.
(*c*) 30 Law. T. 110.
(*d*) 30 Law. T. 111.
(*e*) 1 Hare, 43.
(*f*) 2 Hare, 249.
(*g*) 9 Hare, 449.
(*h*) 1 Kay & J. 671.
(*i*) Ante vol. ix, p. 16.

sell, then the statute would seem to be met by a discharge executed by *Dougherty*. As this, however, is open to question, let the plaintiffs execute a release of the mortgage. No relief is prayed against *Dougherty* alone. The bill is merely for payment of the mortgage by sale of the property, or foreclosure in the usual way.

MULHOLLAND V. HAMILTON.

Assignment for benefit of creditors—Stipulation for release of claim.

S., by deed of assignment, executed by two of his creditors, conveyed all his real and personal estate, except his household furniture, to trustees, for payment of his debts, stipulating that after paying all expenses, and until the trusts should be carried out, or the property exhausted, the trustees should, before payment of any of the debts pay to him out of the moneys released from the estate the sum of £375 a year for the support of his wife and family; that creditors, to have the benefit of the deed, must execute it within a limited time; that no dividend should be paid to the creditors till a sum had been released sufficient to pay them 2s. 6d. in the £, and that the creditors should release S. from all further liability. Two creditors only executed this deed, and subsequently S. made another deed to the same trustees, containing a similar release from his creditors, who should become parties to it, and upon similar trusts, with the exception of the reservation in his own favour, which was considered questionable. The trustees acted under the second deed, and though both were inoperative to pass real estate, they proceeded to sell the lands; and the plaintiffs, the City Bank, became the purchasers, but the purchaser was afterwards abandoned because of this defect in the deed of assignment. Afterwards a creditor who had lodged an execution in the sheriff's hands subsequently to the deed of assignment, filed a bill praying to have the first deed set aside, or in the alternative that he might be allowed to share in the proceeds of the estate without complying with the stipulation for a release.

Held, (in accordance with the *Bank of Toronto* v. *Eccles*, reported in Upper Canada Appeal Reports, volume ii., page 53.)

1st. That the stipulation for release did not invalidate the deed.

2nd. That the provision for payment of a dividend might, under certain circumstances, be considered unreasonable and fraudulent; and

3rd. That the second deed was not objectionable by reason of any thing appearing on its face; although the validity of the first deed might be open to question. Under these circumstances the plaintiff was allowed to share under the deed in such portions of the property as had not already been divided among the creditors assenting thereto, upon his executing the deed. All other creditors who had not deprived themselves of the right to come in admitted on same terms.

Statement.—This was a bill to set aside the deed of assignment made by the defendant *James H. Smith*,

for the benefit of creditors, on the grounds stated in the head-note and judgment.

Mr. *Galt*, Q. C., and Mr. *Morphy* for the plaintiffs.

Mr. *Blake* for defendants.

Judgment.—VANKOUGHNET, C.—In this case it appears that one of the defendants, *James Henry Smith*, being largely indebted to the plaintiffs and others, on the 28th of August, 1857, executed a deed by which he intended, and practically effected his intention, to convey to two others of the defendants, *Pollard* and *Hamilton*, all his real and personal estate, except his household furniture, (to be retained for his own use,) for the payment of his debts, according to certain priorities and provisions therein declared. By this deed, besides providing for the retention to his own use of his household household furniture, the debtor also stipulated as one of the trusts of the deed, that after paying all disbursements and expenses in executing the trusts, and carrying on or winding up the business in which he had been engaged, and until the trusts created by the deed should be completed or the property exhausted, the trustees should pay to him, before payment of any of the debts, out of the trust moneys released from the estate, the sum of £375 yearly, in such sums as they should think fit, for the support of himself and family. The deed also provided that to have the benefit of the deed the creditors must execute it within a fixed time, and that no dividend should be paid to the creditors in common till a sum had been released sufficient to pay them 2s. 6d. in the £, and for a release by his creditors to *Smith* of all his indebtedness to them. This deed contained no words by which the real estate would or did pass at law. Two of the creditors of *Smith* executed the deed as parties thereto. It is objected to this deed that it is unreasonable, and such as creditors ought not to be expected or called upon

to sign, because of the reservations and provisions in favour of the debtor, and also of the stipulation that the creditors must execute within the time fixed, and that no dividend was to be made till 2s. 6d. in the £ was realized, which might never happen; and because of the release insisted on. No fraud or improper motive in making the deed is charged. Subsequently to the execution of this deed, and on the 31st of October, 1857, the defendant *Smith* executed another deed in favour of the same trustees, containing the same provisions for a release by his creditors, parties to it, and upon the same trusts, with the exception that the reservations in his own favour are expressly disallowed, and are, as being of questionable validity, made in the recital among others the reasons for executing the second deed. The second deed contains the same provision against the distribution of a dividend until it reaches 2s. 6d. in the £; and it is equally inoperative with the first deed to pass an estate at law in the lands.

The bill is filed to set aside the first deed on the objections already stated, excepting that the insufficiency of the deed to pass real estate is not urged. Indeed the bill in effect alleges that it did pass. The second deed is not attacked by the bill. There does not appear to have been any judgment or execution against the defendant *Smith* at the time of the execution of either of the deeds. They both recite that he is unable to pay his debts, as certain debtors are pushing him and business is dull, and setting aside the provisions and reservations by the first deed in his own favour, seem to have been honestly made. At least nothing to the contrary appears. No creditor executed the second deed. The trustees entered upon the execution of the trust, and according to their allegations in their answer, have disposed of all the personal estate, and applied the proceeds in execution of the trusts as declared in both the deeds, and attempted to dispose of the real estate by a sale at public auction, at which sale

the plaintiffs, the City Bank, became the purchasers of the whole or the greater part thereof. The trustees are both insolvent. The debtor *Smith* states that he applied the furniture to the payment of a debt due to a judgment creditor. It is alleged by the plaintiffs that notwithstanding the second deed the defendants, the trustees, have paid to the defendant *Smith* about a half year's allowance reserved to him by the first deed, and that the trustees have squandered the property, and will render no account of it.

At the time of the filing of the bill the plaintiffs were judgment creditors of the defendant *Smith*, and had issued executions which they had been unable to enforce by reason of these deeds. The bill does not treat either deed as insufficient at law to pass real estate, though such is undoubtedly the case, and the objection was urged at the hearing on the production of the deeds.

I do not consider it necessary to pass any opinion on the validity of the first deed, beyond saying that it is questionable. If it was valid it is but confirmed by the second deed, which takes nothing from it, but adds to it: if it was invalid it passed nothing, and the second deed therefore stands by itself, which alone in either view it is necessary now to consider. It is true that there are none of the creditors parties to the second deed, but the two creditors parties to the first have not repudiated it, nor, if it be in itself good, can it well be understood how they should when the only additional effect of it was to add to the estate out of which alone they had consented to be paid. The trustees, however, acted under the second deed, and the plaintiffs the City Bank must, I think, be held to have acknowledged it, and assented to it, if not to the first deed, by the purchase which they made of the real estate exposed to public sale on the 9th of February, 1859, fifteen months after the execution of the deed; notwithstanding that on the 25th of August following they abandoned their purchase, on the ground, and only on the ground, that they could not get a legal

title to the land sold by reason of the defect in the deeds already adverted to. Writs against the goods and chattels, and against the lands of the defendant *Smith* appear to have been issued subsequently to the deeds of assignment, but nothing was done upon them. Those at the suit of the City Bank appear to have been returned at the instance of the bank, through its counsel or solicitor, by one or other of whom the sheriff swears he thought he was informed that the bank intended to proceed under the assignment. Subsequently both plaintiffs appear to have issued writs against lands, and to have kept them alive in the sheriff's hands, without however attempting to enforce them.

I am of opinion that the second deed ought not to be set aside; the length of time which has elapsed since its execution, the action which the trustees have been permitted in the meantime to take under it, the conduct of the plaintiffs, the bank, both in reference to the executions issued by them against the debtor and their recognition of the assignment itself thereby, and by the purchase at auction already referred to, would go a long way to remove any doubts which might have been raised and sustained as to the validity of the deed, if urged at an earlier period, and under other circumstances. But I do not think the second deed is objectionable by reason of any thing appearing on the face of it, or on the evidence. The stipulation for a release cannot, since the decision of the Court of Appeal in the *Bank of Toronto* v. *Eccles*, be treated as *per se* invalidating the deed; and there is nothing in the evidence to shew it to be more unreasonable than in other cases in which it has been sustained or permitted. The provision against the payment of a dividend until it will amount to 2s. 6d. in the £ might, under certain circumstances, having reference to the value of the estate, &c., be considered unreasonable, and even fraudulent: as, for instance, under the first deed, where the debtor had a direct interest in delaying or preventing the winding up of the

estate, in order that he might in the meantime receive the £375 per annum; but when there is no such apparent or possible object or effect, the provision can only be considered as one of management, not absolutely binding, and, if tending to unreasonable delay or retention of funds in hand, to be relieved against in this court, and I do not therefore think it furnishes a sufficient reason for setting aside the deed.

That the lands did not pass at law under the deed is, I think, sufficiently clear, but the deed being in other respects good, this defect creates no difficulty in this court which can have it remedied. (*a*) It does not appear when *Smith* disposed of or applied to payment of his debts his household furniture. If subsequent to the execution of the second deed, he and his trustees must make it good to the estate. If the trustees, subsequently to this latter deed, have paid any portion of the estate to *Smith*, by way of yearly allowance or otherwise, then he and they must be charged with it, and a declaration to that effect must be made, and proper enquiries directed.

The plaintiffs pray, and at the hearing ask to be allowed to come in under the assignment, in case it be held good. As the matter of this trust estate is now brought under the cognizance and jurisdiction of the court, I think I should deal with it completely, and, after all that has occurred, provide for the administration of the estate. As already remarked, the plaintiffs have not, by their bill, impeached the second deed, or taken any notice of it, though set up in the answers. The only action taken by them against the assignment, prior to the filing of the bill, was the issuing executions against the goods and against the lands of the defendant *Smith*, and this *certainly*, under ordinary circumstances, might be treated as an act so hostile as to deprive the plaintiffs of any right to the benefit of the deed. When, however,

(*a*) Dilbrow v. Bone, 6 L. T. N. S. 71.

it is borne in mind that the plaintiffs could not issue writs against lands until they had obtained a return to the writs against goods; and that as the legal estate in the lands remained in the assignor *Smith*, and that for their security, and to retain their priority and position with other creditors in case the deeds should not or could not be rectified by *Smith*, it might be necessary to issue these writs, and that they do no more than this, not urging the execution of the writs, I think I should not hold them thereby debarred from their share of the estate. As was said by Vice-Chancellor *Wood* in *Whitmore* v. *Turquand*, (*a*) each such case must depend on its own particular circumstances, and no rule can be so fixed as to apply to all. It is true that the bill attacks the first deed, and endeavours to get rid of it that the plaintiffs may be paid their debts in full, while it asks in the alternative that failing this they may be allowed to share in the estate without complying with the terms of the deed for a release. No authority has been cited to me to show that such a bill is properly framed, and I am not sure that in now allowing the plaintiffs to come in I am not extending to them an indulgence without, if not against, authority and precedent. It does not seem consistent with the rules or principles of pleading that a plaintiff should direct his whole statements to the purpose of setting aside a deed, and then merely by a prayer in the alternative ask, if in this he fails, to be allowed to have the benefit of the deed. (*b*) This objection is, however, not made by the answers, nor is any objection raised that any of the creditors who had assented to the deed should be made parties to the suit, and the plaintiffs do not attack the second deed, in fact make no allusion to it. Although the record is very imperfect for any relief, yet, looking again at the imperfection in the deeds, and the embarrassments

(*a*) 1 Johnson & Hemming, 444.

(*b*) Rawlings v. Lambert, 1 Johnson & Hemming, p. 458; Selby v. Jackson, 6 Beav. 192.

they have created, I am, with some doubt, inclined to allow the plaintiffs to share under the deed in such portions of the property as have not already been divided under the deed among the creditors who assented to it and became entitled under it, and I decree accordingly—the plaintiffs executing the deed. All other creditors who have not deprived themselves of the right to come in under it to be admitted on the same terms. (*a*)

I think the plaintiffs should not have any costs up to the hearing, and it may be right that they should pay costs to the defendants, but as that will depend upon the conduct of the defendants themselves, to be ascertained upon enquiry in the Master's office, I reserve their consideration and further directions. The decree will direct that *Smith* execute a proper conveyance, so as to pass the legal estate in the land for the purposes of the trust; will provide for a receiver; restrain the defendants from further meddling with the property; and direct all proper enquiries and accounts. Questions may arise with other judgment creditors who have executions against lands in the sheriff's hands, but they must be dealt with as they are presented.

MURNEY v. COURTNEY.

Practice—Motion in court which should be made in Chambers—Costs.

Where a party moves in court for what should properly be moved for in Chambers, the court will not allow the party so moving any costs of the application, even if the court feels itself called upon to grant the motion.

This was a foreclosure suit, and a reference had been made to the master, who made his report thereunder, finding an amount due the plaintiff, which report had become absolute, no exception having been taken thereto. A petition was afterwards presented by the defendant, setting forth that the account had been taken on an

(*a*) Broadbent v. Thornton, 4 DeG. & S. 65.

improper basis, and produced a statement signed by the mortgagee, under whom the plaintiffs claimed, shewing that an amount considerably less than that now claimed was due; under these circumstances the court directed a reference back to the master to re-take the accounts on the footing of the memorandum so produced by the defendant. In drawing up this order, the solicitor for the defendant, instead of referring it back to the master of the court, referred it to the master at Belleville, where all the parties, as also the witnesses to the transactions, resided.

The plaintiff, desiring to have the further accounts taken before the master who had already investigated them, moved on notice to set the order aside for irregularity, or to vary the same by directing the reference to be to the master.

Mr. *G. Boyd*, for the motion.

Mr. *Hodgins*, contra.

Judgment.—VANKOUGHNET, C.—This motion should have been to set aside the order for irregularity, and ought, strictly speaking, to have been made to the judge in Chambers, it being properly a Chambers application; and the fact that the plaintiff has chosen to apply in the alternative to vary the order by changing the reference, which could only properly be done by the court, I think, should make no difference. In strictness the motion should be refused, but the defendant consenting to waive the objection I have mentioned, I will grant the application to change the reference, instead of simply setting aside the order, which has been taken out. Under the circumstances, however, I will not give costs to either side. *

* In a case before Mr. Vice-Chancellor ESTEN, of Evans v. Parker, where a motion was made in court to set aside a decree for irregularity, his Honour, in granting the application, gave the party moving

In re Kemp and Henderson.

Construction of submission to arbitration—Want of finality.

Where parties bound themselves to submit to the decision and award of three arbitrators, concerning all matters in difference, provided the award were made in writing by the arbitrators, or any two of them, and it afterwards appears that one of the three arbitrators dissented from an award made by the other two, and that the arbitrators had made no decision regarding a promissory note in difference between the parties, which had been brought under their notice, the award was set aside.

Statement.—*Kemp* and *Henderson* having differences regarding some pecuniary transactions between them, submitted all these to the decision of three arbitrators chosen by them, and executed arbitration bonds to that effect. These bound the parties to submit to the decision and award of the three arbitrators, provided the same were duly executed by the three, or any two of them, by a day named. On the hearing before the arbitrators *Henderson* produced a promissory note which he had against *Kemp*, as to which the arbitrators made no decision, and *Kemp* was afterwards sued on it.

An award was made in due time, executed by two of the arbitrators, but the third dissented from it, and never had agreed to it. A large sum of money was awarded to *Henderson* in full payment and discharge of all matters in difference between the parties. The money was directed to be paid by instalments, and to be secured to the satisfaction of the arbitrators, or any two of them.

After the award had been made an order of court,

Argument.—Mr. *Blake* moved, on behalf of *Kemp*,

the costs, as of a Chambers application. On the point being mentioned to the learned Vice-Chancellor, he thought that in strictness the costs in court over and above a Chambers application of the person answering the motion, should be deducted from the costs of a Chambers application, and the excess, if any, only paid, but that the shorter method would be not to give costs to either side. In future, therefore, the rule will be acted on in Murray v. Courtney. See also, as to the question of apportioning costs, Cameron v. Bradbury, ante vol. ix, p. 61.

to set it aside, on the grounds that it should have been made by three arbitrators: that it was not final, by reason of the promissory note having been left undisposed of, and because the arbitrators had directed the money awarded to be secured to their satisfaction. He argued that although the award might have been good if executed by only two of the arbitrators, yet that the bond of submission required it should be the award of the three. He also contended that, as all matters in difference had been referred, and the arbitrators, had not disposed of the promissory note produced by *Henderson*, and on which it appears *Kemp* had afterwards been sued, the award was bad for want of finality. He further argued that it was bad because it required security to be given for the payment of the money satisfactory to the arbitrators, which possibly *Kemp* could not give.

Mr. *McGregor*, on behalf of *Henderson*, supported the award. He contended that, even admitting the bond of submission would bear the interpretation put on it by the counsel for *Kemp*, the better and more rational interpretation was, that the award was good if made by only two of the arbitrators, and that it was an unreasonable interpretation which required the three arbitrators to make it, while it was admitted that only two of them need execute it. He argued that *Kemp's* interpretation was wholly aside from the usual course in such cases, and that the intention of the parties was clearly otherwise upon the whole bond.

With reference to the alleged want of finality he contended that the award was final on its face, and that the court could not look behind that, unless there was either fraud or mistake, neither of which was pretended in this case, and that *Kemp* could not be allowed to raise such an objection, because the award might be pleaded to an action on the note, *Henderson* and not *Kemp* was the loser. He also argued that directing the giving of security no more avoided the award than

directing payment of the money, which might be quite as difficult for *Kemp*, and that, under the circumstances appearing in the affidavits, *Kemp* could give proper security, and it was right he should.

Judgment.— ESTEN, V. C.—[Before whom the motion was argued.] I think the award is void on the first and second grounds. I am inclined to think that the parties meant that any two might make an award, but they have not said so; and it is possible they might have required the concurrence of the three arbitrators in the judgment, but the execution by only two of the award, and the safer course is to pursue their expressed intention. The note for $160 was undoubtedly within the submission, and was not taken into account or disposed of. It is true that the language of the award being sufficient to include it, the award might be pleaded as a bar to an action on the note, and that the injury is to *Henderson*, and not to *Kemp*, but I cannot hear *Henderson* advance this argument while he is actually suing on the note and treating it as not included in the award. The note therefore, remaining unsettled, *Kemp* had not the consideration for which he agreed to the reference, namely, the settlement of all matters in difference, and therefore I think the award is void. The third objection, namely, the reservation of judicial authority would also, I think, be fatal to the award; but I do not see that the objection is open to *Kemp*, the provision as to the security being introduced entirely for the benefit of *Henderson*, who must be considered as confirming the award. I think that the award must be set aside with costs *pro tanto*. I may observe that the arbitrators clearly had notice of the note, and that it was claimed by *Henderson*, for they left him to his legal remedy.

Lowell v. The Bank of Upper Canada.

Equity of redemption—Sale of, under execution against executor of mortgagor.

Held, in accordance with the decision of the Court of Appeal, in the Bank of Upper Canada v. Brough, reported in the Upper Canada Appeal Reports, volume ii., page 95, that an equity of redemption in lands is not saleable under an execution issued against the executor of the mortgagor.

Statement.—The bill in this cause was filed by *William Lowell* against *The Bank of Upper Canada* and *The Roman Catholic Episcopal Corporation* for the Diocese of Toronto, setting forth that by an indenture, dated 29th September, 1855, the lands in question were mortgaged by *Charles Pierson*, *Ira Spaulding*, and *Roswell G. Benedict*, to one *John Thompson*, which in December, 1859, was assigned by him to the bank; that in July, 1857, *Pierson*, *Spaulding*, and *Benedict* sold and conveyed a small portion of the premises to the other defendants; that in May, 1858, *Spaulding* assigned his interest to *Benedict*, and in September, of the same year, *Pierson* and *Benedict* mortgaged the premises to plaintiff, for securing payment of certain moneys, on the 1st September, 1859.

The bill further stated that under writs of execution against the lands of *Benedict* and *Pierson*, respectively, the sheriff sold and conveyed the equity of redemption of these parties to the bank, who, it was submitted, should be compelled, as owners of the equity of redemption, to pay off the mortgage held by the plaintiff; the bank declining to do more than consent to be redeemed in respect of their mortgage of the 29th September, 1855, and prayed relief accordingly.

The bank answered the bill, setting up as a defence that the execution under which the interest of *Benedict* was sold was one issued upon a judgment recovered in an action against his executors; that under such sale no interest passed to the bank, and submitted that the executors of *Benedict* should have been made parties.

The bill was taken *pro confesso* against the other defendants.

The cause was brought on by way of motion for decree.

Mr. *Blake* for plaintiff.

Mr. *Roaf* for the defendants, *The Bank of Upper Canada.*

Judgment.—VANKOUGHNET, C.—I think I am bound to read the decision in *The Bank of Upper Canada* v. *Brough,* in appeal, as establishing that an equity of redemption is only saleable under a *fi. fa.* lands by the sheriff, when the judgment and writ are against the mortgagor. The judgment delivered by *Draper,* C.J., appears to have been the judgment of the whole court (high authority as his alone would have been) on this head. The 4th clause of chapter 78, 12th Victoria, seems to have had the especial consideration of the court, and it ranks heirs, executors and administrators with assigns, against whom expressly the court holds the remedy does not apply. In this case the judgment was recovered against the executors of the mortgagor, and the writ is against the lands and tenements of *Benedict,* the mortgagor, which were in their hands. We all know what doubts have been entertained by many of the judges, of the propriety of the early decisions which subjected the lands of deceased persons to execution, upon judgments recovered against their executors, and I think no judge or court would, now-a-days, be disposed to extend to their operation interests in lands of a kind not bound by them at the time those decisions were come to. Here the judgment is not against the mortgagor, nor his representative in the equity of redemption—not even against his assignee of it—but against his personal representatives, whose duty it is to remove, if they can, the load off the estate, and free it for the heir. The executors have no interest in the equity of redemption, and have no power to deal

with, and have no right to call for a release or conveyance to themselves of the legal estate. If it be not assailable in the hands of an assignee, who would have the control of it, *a fortiori*, it seems to me free from any process against the executors merely. I need not refer more particularly to the statute permitting the sale of such interests, as to do so would be but to repeat what already appears in the report of the case referred to, of *The Bank of Upper Canada* v. *Brough*. In my opinion, nothing passed to the Bank of Upper Canada under the sheriff's sale.

[Subsequently the same question came up before the full court, in the case of *Beamish* v. *Pomeroy*, when the like views were expressed by the three judges.]

SMART V. COTTLE.

Mortgagee and mortgagor—Sale for taxes—Effect of mortgagee purchasing land at.

Property which was subject to a mortgage, having been allowed to run into arrear for taxes, was offered for sale by the sheriff, under the wild land assessment law, at which sale the mortgagee became the purchaser, and subsequently obtained the usual conveyance from the sheriff. The mortgagee afterwards instituted proceedings against the mortgagor, to enforce payment of the mortgage money and interest, whereupon the mortgagor filed a bill in this court to restrain the action so brought against him, asserting that the sale by the sheriff had the effect of discharging him from all further liability in respect of the mortgage debt. The court, under the circumstances, refused the application, the effect of such purchase by the mortgagee being not greater than a decree of foreclosure; where, if after a final decree the mortgagee proceeds to enforce payment of the mortgage money, it will open up the foreclosure; and,

Semble, that after such a sale the mortgagor might have treated the mortgagee as liable to be redeemed, and have filed his bill for that purpose.

The bill in this cause was filed by *William Lynn Smart* against *Thomas John Cottle* and *Daniel G. Miller*, setting forth the purchase by plaintiff from defendant *Cottle*, of certain lands in the township of Blandford, upon which the plaintiff, after the conveyance to himself, executed a mortgage to *Cottle*, for securing the greater portion of the purchase money, upon which

mortgage *Cottle* had sued and recovered judgment for the portion of the money due. The bill further set forth the lands having fallen in arrears for taxes, and the sale by the sheriff, and conveyance by him to *Cottle* thereof; also, that *Cottle* had assigned his judgment to *Miller*, who was proceeding against plaintiff thereon, which the bill alleged was contrary to equity and good faith; the judgment, as also the mortgage having, by the purchase of the fee at sheriff's sale for taxes, become merged in the estate so acquired, and prayed an injunction against further proceedings at law, and for further relief.

The defendants both suffered the bill to be taken against them *pro confesso*. On the case coming on to be heard,

Mr. *O'Reilly*, Q. C., for the plaintiff, asked that a decree might be drawn up in accordance with the prayer of the bill, but

Judgment.—VANKOUGHNET, C.—I do not think there is any equity disclosed on this bill to warrant the court making the decree asked for. If the plaintiff proceeds at law, he will be treated as still mortgagee, and I think he has a right to maintain that position, and thus become trustee of the property bought at the sale, and I question if this court would not so treat him if the plaintiff had filed a bill, claiming a right, under the circumstances, to redeem.

MUNSON v. HALL.

Partnership—Principal and Agent.

By articles of agreement entered into by several persons, it was stipulated that one of them should furnish the premises, in which to carry on the business at a stipulated rental, and capital for carrying on the business at a certain rate of interest, and that he should receive a stipulated sum annually for his time and expenses, and the others certain stipulated sums, together with a certain proportion of the net profits. *Held*, this contract had the effect of creating a special agency, not a partnership, between the parties.

Statement,—The bill in this case was filed by *Roswell Carter Munson* against *Joseph Hall*, praying an account of certain partnership dealings between them and certain other persons; that an injunction might issue against the defendant from collecting, alienating and intermeddling with the assets of the partnership, and that a receiver might be appointed on the grounds stated in the bill; that defendant was a citizen of and resided in the United States of America, whither it was alleged he was about removing the assets of the firm, and had excluded the plaintiff from all arrangements of the partnership affairs.

The defendant answered denying that a partnership had ever existed between him and the plaintiff and the other persons mentioned in the pleadings, and that plaintiff, in acting under the agreement, was so acting only as the agent of the defendant. The agreement under which the transactions took place was as follows:

"This memorandum of agreement, made this first day of January, 1862, between *Joseph Hall*, of Rochester, New York, of the first part, and *R. C. Munson*, *Ira S. Otis*, and *C. R. Cook*, of the second part, of the village of Oshawa, Canada West, witnesseth, that for the purpose of carrying on a manufacturing business similar to that carried on by the party of the first part during the past three years, the party of the first part agrees to furnish the premises, machinery, and tools now owned and occupied by him in the village of Oshawa at an annual lease of $2,200, and also furnish

capital for carrying on the business at an interest of seven per cent.; said *Hall* determining the amount and kind of business to be done, and receiving a salary of $500 per annum for time and for expenses to Oshawa and about Rochester; extraordinary expenses to be charged additional.

"The parties of the second part agree to render their time and services in managing and conducting the business carried on, receiving therefor each as follows: Said *Munson* $500 and one-fourth net profits; said *Otis* $800 and one-eighth net profits; said *Cook* $800 and one-eighth net profits, at the expiration of each year. This contract to continue in force three years unless written notices be given by one of the parties within two months of the expiration of each year; said party of the second part agree to furnish a statement of the transactions of business each month.

"It is agreed between the parties that the machinery, except the natural wear and tear, shall be kept in repair at the expense of the business.

"It is further agreed between the parties that the portion of premises now occupied by *A. S. Whitney* & Co. do not come into the possession of said business, nor the rents, until the first day of July, 1862; but the business shall receive a proportional cost of expense furnishing power to said *Whitney* & Co.

"It is further agreed that the party of the first part shall receive the capital advanced by him out of the proceeds of the business first, and that the rent shall be paid on the 1st July and 1st January of each year."

It appeared that *Otis* and *Cook* had assigned all their interest under this agreement to the defendant.

The question principally discussed at the hearing was whether a partnership had existed between the parties, or whether they stood in relation of principal and agent to each other.

The cause came on to be heard before his Honour V. C. *Esten*, at the sittings of the court in the town of Whitby, in October, 1863.

Mr. *Blake*, for the plaintiff.

Mr. *Fitzgerald* for defendant.

After taking time to look into the evidence

Judgment.—ESTEN, V. C.—Upon the question whether the agreement in this case constitutes a partnership or special agency different minds might well arrive at different conclusions. The construction of the agreement is extremely doubtful, and either view might be adopted with much reason. I am bound to say, however, that I have great difficulty in distinguishing this case from *Kurtsch* v. *Schenck. (a)* I think the agreement must determine the relation of the parties, as the answer does not suggest that it was not correctly drawn or did not truly express their intention; and, even if it did, the evidence is altogether too slight to vary the written instrument. Upon the whole, however, I incline to the opinion that it created a special agency, and not a partnership. Fortunately the result is the same, whichever construction is adopted. The only difference that occurs to me is, that in case of a partnership and in regard to unfinished stock after a deduction for labour and expense bestowed upon it by Mr. *Hall*, the whole value would belong to the partnership, whereas in case of a special agency the agents would be entitled only to a share of the profit arising from the time, labour and expense bestowed upon it previously to the termination of the agency. I think the agents were entitled to shares of the profits, and were liable to third parties as partners upon the authority of the cases cited by Mr. *Fitzgerald*. Their right to a portion of the profits gave them an interest in the things from which the profits are to arise, namely, the debts and the stock unsold. They have a right to see that the debts are judiciously and

(a) 18 L. J. N. S. Ch. 386.

carefully collected, and the unsold stock, finished and unfinished, disposed of to the greatest advantage so as to yield the greatest amount of profit. This circumstance alone, it would seem, would give a right to a receiver and injunction. But Mr. *Hall*, acting doubtless in good faith, excluded the plaintiff from this interest—claimed the property as his own absolutely, and insisted that the plaintiff should look to him personally for his remuneration. With regard to the stock remaining at the termination of the business, I presume it must be now nearly if not entirely consumed. No good would be done to the plaintiff but much harm to the defendant by stopping his trade in order to separate what remains from the new stock, which, if effected, it would be difficult to dispose of, and it would be better for the defendant to use and account for it.

Declare that the agreement created a special agency with a right to a share of the profits and a consequent interest in the proper disposition of the stock.

Decree account of transactions to 1st of January, 1863, and of dealings with stock, finished and unfinished, since. Master to apportion profits of unfinished stock between old and new business, reserve further directions.

A receiver will be appointed, and an injunction will go as to debts due in respect of the year's business.

Carroll v. Perth.

Injunction against municipality—Void by-law.

Where parties complaining of the illegality of a by-law of a municipal corporation permit a term of the courts of common law to pass without moving therein to quash it, this court will refuse to interfere by injunction to restrain the municipality from proceeding to enforce the provisions of their by-law.

This was a bill filed by *John Carroll*, and others, on behalf of themselves, and all others, the ratepayers and

inhabitants of the county of Perth against the county of Perth; the Stratford gravel road, and several of the township corporations praying, amongst other things, to have the by-law therein mentioned (and known as by-law No. 91) of the county, passed for the purpose of constructing certain roads in the county, declared illegal and void, and to restrain the municipality from acting on such by-law, and from making, issuing, or negociating any of the debentures ordered by it to be issued.

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

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

Mr. *McLennan*, contra.

The judgment of the court was delivered by

Judgment.—VANKOUGHNET, C.—When this case was before me on the motion for an injunction to restrain the defendants from acting on their by-law, passed the 16th September, 1863, and numbered 91, I expressed an opinion that the by-law was bad, on the ground that it was not based on the assessment as made and revised last before the by-law was passed, but I refused the injunction at the instance of the plaintiffs, because I thought they had not come for it as promptly as they should have done, and had waited till after a term in the common law courts had elapsed, during which the validity of the by-law might have been tested before one or other of those tribunals, specially charged with the cognizance of such matters, and all necessity

for the aid or intervention of this court have thus been avoided. On this re-hearing my brothers, with myself, are of opinion that the by-law is invalid, on the ground mentioned, and we have not considered it necessary, therefore, to examine any other of the objections to it. They, however, think that the plaintiffs may have been misled by the action of the court in *Smith* v. *Renfrew*, before my brother *Esten*, and by the absence, hitherto, of any rule requiring parties to proceed at the earliest opportunity to obtain the action of a court of law, and that to refuse intervention, therefore, in the present case, might be acting somewhat hastily. I yield to this view, but with some reluctance. The bill in this case was filed on the 20th October. Nothing new has transpired since: nothing has been added to the plaintiff's case. A term of the common law court intervened before this motion was made, and a prompt application then and there would have rendered the action of this court unnecessary. Our jurisdiction in such matters, it seems to me, is essentially preventive, and, therefore, ancillary. It should only be invoked and employed where absolutely necessary; and this cannot be where the parties seeking it might have gone to the proper tribunal, and had removed or abolished the enactment which they ask this court to restrain the use of till its validity can be ultimately settled. The remedy by application to the courts of law is speedy and inexpensive, compared with proceedings in this court. That remedy might have been pursued last term in this matter, and this court relieved of the trouble, and the parties of the expense, of an application here. When there has been no opportunity to apply to a court of law, the exercise of the jurisdiction of this court, by way of prevention, may be most salutary, and even where there has been opportunity, and no default in the parties applying, the court may, under special circumstances, deem it right to interfere; but certainly not at the instance of any rate-payer who might have gone to law, and had the matter settled there, instead of coming into this court, and placing it in the

embarrassing position of restraining action on a doubtful by-law, which may be afterwards upheld by the court which is moved to quash it.

WRIGHT v. TURNER.

Injunction—Overflowing land by water of mill dam—When damage appreciable in equity.

The owner of land through which a stream flowed into land owned by another, on which a former proprietor had erected a mill dam, by which the waters of the stream were forced back and overflowed about two acres of the adjoining land, damaging it to the extent of about £2 per annum.

In an action of trespass brought against the former owner of the mill premises for the amount of the land so damaged had established his legal right, and now applied for a perpetual injunction.

Held, per Curiam, [ESTEN, V. C., dissenting,] that the small amount of damage occasioned to the owner was not a sufficient reason for withholding the aid of this court, and that the plaintiff having established a clear right both at law and in this court, was entitled to a perpetual injunction to stay further trespass.

The case of *Graham* v. *Burr*, in this court, considered.

Statement.—The plaintiff was owner in fee of the south-west quarter of lot No. 1, in the 4th concession of the township of Orillia, over which a stream flowed into land formerly owned by one *St. George*, who in 1854 enlarged a mill dam, formerly built on his premises, by which the water of the mill stream was made to overflow about two acres of the plaintiff's land.

In June, 1855, the plaintiff recovered judgment against *St. George* in an action of trespass for the damage so occasioned, after which the defendant purchased the mill site from *St. George*, and continued to keep the dam at its former height.

The bill, after stating these facts, prayed for a perpetual injunction.

The matters alleged in defence are fully stated in the judgment.

The cause was first heard by way of motion for decree before their Honours the Vice-Chancellors.

Mr. *Crickmore*, for plaintiff.

Mr. *Hector*, Q. C., for defendant.

The following cases were cited by counsel, *Graham* v. *Burr*, (*a*) *Attorney-General* v. *McLaughlin*, (*b*) *Wood* v. *Sutcliffe*, (*c*) *Wynstanley* v. *Ley*, (*d*) *Attorney-General* v. *Nichol*, (*e*) *Attorney-General* v. *Sheffield Gas Company*, (*f*) *Soltau* v. *DeHeld*, (*g*) *Thomas* v. *Oakley*, (*h*) *Goulson* v. *White*, (*i*) *Ridgway* v. *Roberts*, (*j*) *Sandys* v. *Murray*, (*k*) *Barry* v. *Barry*, (*l*) *Robinson* v. Lord *Byron*, (*m*) *Child* v. *Douglas*, (*n*) and *Adams'* Equity, 207.

After taking time to look into the authorities.

Judgment.—Esten, V. C.—Acting on the views expressed by him in *Graham* v. *Burr*, refused to interfere by injunction, the injury to the plaintiff being so trifling as compared with the damage that must result to the defendant by having a stop put to his works.

Spragge, V. C.—According to the evidence a portion of the plaintiff's land is overflowed by back water from the defendant's mill dam. The surveyors place the quantity at about an acre and a quarter. Other witnesses speak of the quantity as greater; the surveyors are probably the more accurate. A surveyor examined for the defendant says that surveys made as this survey was,

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(*a*) Ante vol. iv., p. 1.
(*b*) Ante vol. i., p. 34.
(*c*) 16 Jur. 75, S. C.; 2 Sim. N. S. [illegible].
(*d*) 2 Swans. 333.
(*e*) 16 Ves. 338.
(*f*) 16 Jur. 677, and 22 Law J. N. S. Chan. 811.
(*g*) 16 Jur. 326.
(*h*) 18 Ves. 184.
(*i*) 3 Atk. 21.
(*j*) 4 Hare, 106 and 116.
(*k*) 1 Ir. Eq. R. 29.
(*l*) 1 Jac. & W. 631.
(*m*) 1 Brown, C. C. 588.
(*n*) 5 De G. M. & G. 739.

by magnetic observation, are apt, in that part of the country, to be erroneous; but it is not shewn that this survey is otherwise than correct. The plaintiff recovered at law in respect of the same tort.

The defendant objects that the plaintiff has not shewn his title with sufficient particularity. It is in evidence that the plaintiff's father was seised in fee, and conveyed to the plaintiff, and that the father and son together have been in possession twenty-one years: the defendant so far from objecting to want of title, calls the land in question, in his answer, the plaintiff's land: and there is besides the recovery at law. I think that this objection fails.

The other question in the case is, whether the damage to the plaintiff is so small that this court ought not to interfere by injunction. The annual value of the land overflowed is sworn to be thirty-five shillings an acre. The mill was originally constructed with a view of having ten feet head of water; and at that head the plaintiff's land would not be overflowed; but after the mill was built it was found that it could not be worked to advantage without obtaining a greater head; such, at least, was the opinion of the millwright employed by the then owner, and he proceeded up the stream to ascertain whether raising the dam would back water upon other land than the defendant's, and he found, as he says, that the water was already backed to near the division line; and he thereupon advised his employer to get rid of the place. The then owner offered it for sale, and upon being asked as to the head of water said that he had ten feet, and was entitled to three feet more. The place was purchased, and the purchaser, Mr. *St. George*, raised the dam about four feet; and it was for the damage occasioned thereby that the action at law was brought. The present defendant purchased from Mr. *St. George*.

The state of the case then is this, a former owner of the

mill site built his mill knowing that he had ten feet head of water, and no more--his dam was built upon that calculation—and with only sufficient strength, as appears by the evidence, to resist the pressure of water of no greater height. Finding that they had proceeded upon a miscalculation, the owner sold, and the purchaser, upon the bare assertion of the former owner of his right to raise the water higher, constructed a dam four feet higher; and the answer to the plaintiff's suit for a perpetual injunction is, that his act occasioned the plaintiff but little damage.

In the case of *Graham* v. *Burr*, which has been referred to in this case, my brother *Esten* put the case of unsubstantial damage, when all that the plaintiff could really require, if not vexatious, was the preservation of his legal right, which could be kept alive by an action at law, brought once in twenty years, and my learned brother thought that in such a case—a case of inappreciable damage, as he called it in one part of his judgment—the court ought not to interfere by injunction.

I do not think that such a case has arisen in this court. I did not think *Graham* v. *Burr* such a case, nor do I think this such a case by any means.

The injury occasioned to the defendant, although not very great, is still a substantial injury. It would not be reasonable to expect him to forego his right to compensation, that would be barred after six years, and for that period would amount to about £13; to say nothing of the impossibility of saying to him that he ought to enforce it only once in six years. If left to his common law remedy it would be, to bring actions yearly, for that could not be said to be unreasonable, at least every six years, or lose the compensation to which he is entitled. I cannot but think the common law remedy inadequate, and I cannot say judicially that he ought to submit to this infraction of his ordinary right to have the stream

flow through his land unobstructed, and his land itself freed from backwater caused by the defendant's mill dam.

I may think, indeed, that the defendant would be acting in a more accommodating and neighbourly spirit if he accepted reasonable compensation, (which it is said at the bar had been offered to him,) for a not very grievous injury to the defendant, than by insisting upon his strict rights; but the court is not at liberty to refuse the ordinary relief administered in this court, merely because it may think the plaintiff unreasonable in insisting upon it; and I think the remedy by injunction in such a case as this, a case of ordinary relief. The case of *Marten* v. *Whichelo*, (*a*) occurs to me as a familiar one in illustration of this point.

I have omitted to notice one ground of defence to this bill, viz., that the land in question was overflowed by natural causes, independently of the defendant's dam. The evidence shews this not to be the case.

I think the plaintiff entitled to a perpetual injunction.

The Vice-Chancellors thus differing in their opinions, no decree was drawn up, and the case was afterwards brought on for argument before the Chancellor. The same counsel appeared for the parties. After taking time to look into the cases cited

VANKOUGHNET, C., after stating that he had postponed delivering judgment, in the hope that a settlement might have been effected between the parties, said, that the defendant had proceeded very incautiously in raising his dam without ascertaining, as his predecessor in the ownership of the mill had done, what the consequences might be to the land contiguous to the stream which supplied the mill, and proceeded:

(*a*) C. & P. 275.

I agree in the judgment of my brother *Spragge*. However hard the plaintiff's claim may be, and however exorbitant may be the terms upon which alone he is prepared to compromise, still we must recognise his right to deal with his own land as he pleases, and we cannot recognise a right in any stranger to deprive him of it, or the use of it even though the quantity be but an acre. It is a specific thing corporeal, capable of occupation, of enjoyment, of valuation; and if we say that it is in itself too insignificant for this court to look at, a man may lose his land to a trespasser acre by acre. The plaintiff succeeding in establishing what seems to me a clear right, must (following the ordinary rule) have his costs.

TOWNSLEY v. NEIL.

Void lease—Payment for improvements—Guardian of infant.

The guardian *ad litem* of an infant, tenant for life, without the sanction of the court, executed a lease for years, during the existence of which the infant died, and an application having been made in the cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into court of the amount of rent in arrear he was permitted to remove the buildings and erections put by him on the property, (doing no damage to the realty,) but the court refused to allow him out of such rents for any improvements made by him upon the premises.

The point in question appears in the judgment.

Mr. *Fitzgerald*, for the application.

Mr. *S. Blake* and Mr. *Taylor* contra.

Judgment.—VANKOUGHNET, C.—In this case an application has been made that the tenant *Gibbs* be ordered to deliver up possession of certain premises held by him under a lease executed by one *Dobson*, as the guardian appointed by this court of *Margaret Neil*, an infant, and in her lifetime one of the defendants in the case, but now dead. *Margaret Neil* having but a defeasible estate in the inheritance, it terminated on her death, and the

property goes over to two infant devisees. I have already ordered that *Gibbs*, having entered and claiming to hold under *Dobson*, as the guardian appointed by this court, should deliver up possession of the premises, and be allowed (doing no damage to the realty) to remove any buildings or erections put by him on the land, and any property he may have there, he first paying into court the rent in arrear. It is now asked that *Gibbs* may be allowed for any permanent and beneficial improvements he has made in or upon the land—not removeable—to be deducted from the rent. The premises have been used as a brick-yard, and *Gibbs* has now a quantity of material on them in preparation for brick. I have no reason to doubt that *Dobson* and *Gibbs* acted in good faith in the matter of the lease, though it is and was void *ab initio*. The guardian executed it without any authority, and *Gibbs* himself seems to have questioned his right at first to make it, but it appears to have afterwards satisfied himself that it was all correct.

Persons, either officers or guardians, appointed by the court, or those dealing with them, as such, have, however, very little claim to consideration if they act upon an exercise of power beyond authority, for it is very easy to ascertain beforehand what the court will or will not sanction. There have been several cases and decisions from Lord *Oxford's* case in 1 Chancery Reports, page 3, down to the case of *Clark* v. *Metcalf*, before Mr. Vice-Chancellor *Esten*, in which has been considered the right to an allowance for lasting improvements by a party who was in possession against the legal or equitable title. It seems from an examination of these authorities to be clear that where a party has wilfully and without colour of right, or any reasonable ground for believing he had a right, and where a party has by fraud procured possession of land, and has chosen to expend upon it his own money in improvements, however lasting or beneficial, or even necessary to the maintenance of the property, he will not be entitled to any allowance for them at law or in equity.

The cases, on the other hand, in which such allowances have been made are not so easily reconciled; nor is it easy to adopt or apply a rule for such allowance, which will govern under all circumstances. Where the legal or equitable owner of the estate stands by and encourages, or, without any objection or assertion of his own title, knowingly permits another, who believes himself entitled to the property, to expend money in improvements upon it, he will be made to pay for those improvements as a condition of his obtaining possession, and he may be compelled to this by a bill in equity filed for the purpose. (*a*) The cases in which a trustee actual or constructive will be allowed for such improvements were reviewed by this court in *Bevis* v. *Boulton*, (*b*) and there the trustee, although he became such by having purchase, with notice, the legal estate in a property subject to a trust whose existence he had disputed in the suit, was allowed for permanent improvements as against the infant *cestui que trust*. The case nearest perhaps in its character to the present one is that of *Edlin* v. *Battlay*. (*c*) There the devisee for a term of 100 years died, and no administration to his estate followed; the executor of the devisor, whose daughter he had married, then entered and enjoyed the term till 1650, when he sold to one who surrendered and took a new lease, and laid out £250 in building upon the premises. The defendant who had married the grand-daughter of the devisee, took out administration to her grand-mother's estate, and recovered in ejectment upon the term for 100 years. Upon bill filed against him by the person holding under the new lease, *Grimstone*, Master of the Rolls, decreed that the latter should be paid for his improvements, and hold the land till so paid. The authorities upon the question are cited in the case in 6th *Hare*, already referred to, but that case itself was disposed of upon its own facts, without laying down any general

(*a*) Lord Cawdor v. Lewis, 1 Y. & C. Ex. 627; Master of Clare Hall v. Harding, 6 Hare, 273.

(*b*) Ante vol. vii., 39.

(*c*) 2 Levinz, 152.

rule. In *Sedgwick* on Damages, at page 126, it is said that in an action for mesne profits, unless where a party has held by violence or fraud, he may shew in mitigation of damages the value of improvements made by him upon the property. Mr. *Mayne*, in reviewing this statement in his work on damages, at page 255, says that no English authority can be found for such a doctrine, and seems to think the only relief was in equity, as in the case of *Cawdor* v. *Lewis*.

The course pursued in the American courts seems the more reasonable one, and not wrong on any principle of law. In action for damages I do not see why the jury may not, as well as a court of equity, make all proper allowances. There ought to be no necessity to drive the defendant to another tribunal to obtain them.

The difficulty in the present case is, that the tenant had no legal or equitable title under the lease which *Dobson* executed to him, *Dobson* having no estate in the land, and having no authority to make a lease save with the sanction of the court, which he did not obtain. Then he could not make a lease for a greater estate than the infant had; and her estate having determined by her death, the lease, even if good in its inception, fell with it. If a party risks a lease dependent for its duration upon the life of the lessor, he can clearly have no equity as against the reversioner or remainderman for the value of any improvements he may have made while lessee. The lease in this case does not provide for the payment to the lessee of any improvements. On the contrary, it provides that the lessee shall drain and level the lot at his own expense, and also assist one *William Townsley* to fill in a certain gully referred to in the lease; and further, that he the lessee will leave the premises in good order, and will leave the ground fit for building purposes.

Upon the whole I think I cannot extend the order

which I have made allowing the tenant to remove his buildings, erections, and property from off the premises, on paying the arrears of rent into court, and doing no damage to the freehold.

Dickinson v. Duffill.

Mortgage—Fraudulent conveyance—Judgment creditor.

There being disputed accounts between A. and B. an action at law was commenced by the former against the latter prior to February, 1859. In December of that year B. executed a mortgage for £130 to one H., to secure to him the payment of a debt of £30, but principally with the object of raising money upon it with which to pay off another indebtedness. There being a mistake in the description, and B. requiring more money than this mortgage would cover, another mortgage (for £200) was executed for these purposes. Both of these instruments were held by H. for sale, in order to raise the required amount, and he withheld them from registration till he could find a purchaser. On the 22nd of September, 1860, A. recovered a judgment, which he registered the same day. Hearing that A. was about to enter judgment, H., on the day of entering the judgment, and before the entry thereof, though so far as appeared, without the knowledge of B., registered the mortgages for the avowed purpose of retaining his priority. Shortly after the registration H. returned the first mortgage to B., intending to use the second one only, and endeavoured immediately afterwards to sell it, and had contracted to do so for the *bonâ fide* purpose of raising money wherewith to pay off the claim of A., though the object was not accomplished. Besides the lands covered by the mortgages, B. owned other available real estate worth more than sufficient for payment of his debts, as also a quantity of household furniture. On a bill filed against B. & H., impeaching the mortgages as having been made voluntarily, without consideration, and with intent to defeat and delay creditors, *held*, that these charges were not supported, but the plaintiff was allowed to redeem on payment of the amount for which the mortgages were a subsisting security, and paying H. his costs of suit.

Esten. V.C., dissenting, who thought for all in excess of £30, and interest, the mortgages were fraudulent and void.

Statement.—The bill in this cause was filed by *William Dickinson* against *Henry Holland Duffill* and *Geoffrey Hawkins*, praying, under the circumstances therein stated, and which are sufficiently set forth in the head-note and judgment, that the mortgages held by *Hawkins* on the property of *Duffill* might be declared fraudulent and void, as against the plaintiff, and a sale of the premises embraced in such mortgages in default of payment of what might be found due to plaintiff in respect of his judgment against *Duffill*.

The defendants severally answered the bill, denying all fraudulent intent in creating the mortgages to *Hawkins*.

The cause was brought on for hearing before his Honour Vice-Chancellor *Esten*, when, after argument, a decree was made, declaring *Hawkins* entitled to be paid £30, and interest, and his costs as of a redemption suit; all other costs to be paid by defendants to plaintiff; and that the mortgage securities were fraudulent and void for all in excess of such sum of £30 and interest.

The defendant *Hawkins*, being dissatisfied with such decree, set the cause down to be re-heard before the full court.

Argument.—Mr. *Strong*, Q. C., for plaintiff, contended that not only was the plaintiff entitled to the relief given by the decree, but that both the mortgages should be set aside in *toto;* the transaction between the defendants is not truly set out in the instruments, which are clearly void as against creditors. The first mortgage, for £130, has been registered, although on the statement of *Hawkins*, it was shewn to have been superseded by the subsequent security for £200; and both having been registered on the very day that he, as attorney for *Duffill* was aware of the costs at law having been taxed prior to entering the judgment, the object could have been nothing else than to delay and hinder the plaintiff in the recovery of his judgments.

Mr. *Brough*, Q. C., for *Hawkins*.

The evidence in the case shews that *Duffill* thought, and always insisted, that plaintiff was his debtor; it is improbable, therefore, that the transaction between himself and *Hawkins* was entered upon with any such intention as is imputed to him. The bill charges that the mortgages were wholly void, as having been made without any consideration. Now it is shewn that as to

the £30, there was a good *bona fide* consideration. Under these circumstances, the decree should have been simply to redeem *Hawkins* on payment of principal, interest and costs, the amount of which, less the costs of contesting the validity of the mortgage deeds, must be repaid by *Duffill* to the plaintiff, together with what shall be found due in respect of his own claim, or in default, the property sold, or *Duffill's* interest therein foreclosed.

Judgment.—VANKOUGHNET, C.—Upon the amended bill in this case a decree has been made declaring fraudulent and void the mortgages which the bill impeaches except as to £30 and interest. It is important to examine certain of the allegations in the amended bill, and, in the view I take of the case, those also in the original bill. The first three paragraphs of the amended bill set out the recovery by the plaintiff on the 22nd of September, 1860, and the registration on the same day of the two judgments against the defendant *Duffill*. The fourth paragraph alleges that at the time of the commencement of the said action, the defendant *Duffill* was seised in fee of, or otherwise well entitled in fee to divers lands, tenements, and hereditaments in the city of Toronto, and in the county of York, and *amongst other parcels of land*, of the lands and heraditaments comprised in the two several mortgages hereinafter mentioned. The fifth paragraph of the bill alleges that *Duffill* is now the owner of the said lands, tenements and hereditaments, subject to the said judgments. The bill then sets out a mortgage, executed by *Duffill* to the defendant *Hawkins*, dated the 24th December, 1859, of certain other freehold property in the city of Toronto, to secure £130, and interest, and then another mortgage executed by *Duffill* to *Hawkins*, dated 23rd January, 1860, of certain freehold property in the city of Toronto, to secure £200, and interest, and that both the said mortgages were registered on the 22nd day of December, 1860. That at the respective times of making the said mortgages plaintiff was a

creditor of *Duffill*, for the debt in respect of which he afterwards recovered the judgment secondly before mentioned. The bill then proceeds in the tenth paragraph to state, "that at the respective times when the said mortgages were so made, *Duffill* was not in any way indebted to *Hawkins*, and there was no consideration given by defendant *Hawkins* to *Duffill* for said mortgages but the said mortgages were purely voluntary, and made and executed for the purpose, and with the intent of defeating and delaying the plaintiff, and other creditors of *Duffill*." The bill then alleges knowledge by *Hawkins* of the proceedings in the suits in which the plaintiff recovered judgments, and of the judgments, although it does not allege that those suits were pending when the mortgages were given, or that at the time of taking those mortgages *Hawkins* was aware of any indebtedness of *Duffill* to plaintiff, other than as such knowledge may be implied from the statements of the bill. The bill then proceeds, "Your complainant, therefore, charges that the said mortgages are fraudulent and void, as against your complainant, and the other creditors of the said *Duffill*," and it claims, at all events, a right to redeem the said mortgages. On looking at the bill, as originally filed, we find the eleventh paragraph of it putting the charge of the fraudulent concoction of the mortgages in different language, alleging that the mortgages were made by *Duffill*, and held by *Hawkins* for the purpose of defrauding the creditors of *Duffill*, and the tenth paragraph charges that before the mortgages were made, the actions wherein the judgments were recovered by the plaintiff were commenced, and that *Hawkins*, as attorney, therein for *Duffill*, knew of them. The twelfth paragraph of the original bill charges, that had the said mortgages been made in good faith, and for valuable consideration, *Hawkins* would not have kept them unregistered until the day on which plaintiffs' judgments were registered, and it does not set up any right to redeem. It will thus be seen that as against *Hawkins*, at all events, fraud and notice are more strongly charged in the original than in the amended

bill; and that the bill, as drawn originally, and as amended, charges fraud in the creation, not in the registration of the mortgages, the original bill alluding to the delayed registration, not as an act fraudulent in itself, but as an evidence of fraud in the inception of the instruments; and while the original bill seeks relief purely on the ground of fraud, the amended bill claims the alternative relief of redemption. Looking on the amended bill as that on which alone the plaintiff must succeed, we find that the whole statement or charge of fraud is contained in its tenth paragraph, already quoted, and consists of but two allegations, each of which is distinctly disproved. The first of these allegations, viz., that the mortgages were purely voluntary, and without consideration, is negatived, not merely by the evidence, but by the decree itself, which provides for redemption. The rule of this court, as indeed of all courts is, that a plaintiff must recover "*secundum allegata et probata*," and most emphatically was it enunciated by Lord *Westbury*, in 8 Jurist N. S.* I apprehend there is no case to which it applies more strongly than to a case where alleged fraud is made the basis for relief. I think the plaintiff is not at liberty to shift from the case which he has made by his bill, and at the hearing claim to have the mortgages avoided, because the act of registering them was calculated to hinder and delay creditors, and that it is, therefore, to be treated as a fraud, even if such an act, with such an intent, could avoid instruments good in their inception, and valid at the time of their completion, a question not necessary for me to consider in the opinion I have formed. I think the plaintiff's charge of fraud fails, and that the proper decree would have been simply to declare the mortgages a valid security for the amount due to *Hawkins*, and covered by them, and to have decreed redemption. This is in effect all the plaintiff now gets except the costs of an unsuccessful attempt to sustain his charge of fraud, and this he might have got, either

*Thomas v. Hobler, p. 125.

on bill and answer, or on filing replication, and setting down the cause to be heard on motion for decree without evidence, other than the answers afforded, for he would have found distinct passages in the answer of each defendant entitling him to such relief. Not content with this, however, the plaintiff went into evidence, and on that evidence we find the following facts sustaining in my judgment completely the statements in the defendants' answers—that there being disputed accounts between the plaintiff and the defendant *Duffill*, an action at law was commenced by the former against the latter, prior to February, 1859, to recover the balance which he claimed in his favour—that this was in April, 1859, referred to Mr. *Anderson*, as arbitrator, but the reference lapsed—that it was entered for trial at the fall assizes of 1859, and the record withdrawn—that *Duffill* commenced an action against the plaintiff, as I understand, in respect of the same matters claiming a balance in his favour—that both these actions were on the 21st and 26th of December, by judges' orders of those dates respectively, referred to Mr. *Dalton* as arbitrator, and went on together before him until the 13th September, 1860, when Mr. *Dalton* found a balance of £36 18s. 0d. in the plaintiff's favour—that this amount with the costs of both actions, interest, sheriff's fees, and some costs in Chancery swelled into a liability by *Duffill* for £112 10s. 4d—that *Duffill* did not acknowledge or believe in any such indebtedness to the plaintiff, but honestly thought the plaintiff owed him—that *Duffill*, residing in Quebec (the plaintiff also residing out of the jurisdiction) executed the mortgage of December, 1859, to secure the plaintiff, but principally with the object of raising money upon it to pay off an indebtedness (as stated by the answers) to the building society—that there being a mistake in the description of the property covered by this mortgage, and *Duffill* requiring some more money, the mortgage of January, 1860, was executed for the same purposes as the other mortgage,

and to obtain some more money than it would procure—that these mortgages were held by *Hawkins*, who resided in Toronto, (*Duffill* residing in Quebec,) for sale to raise money on them, and that he withheld them from registration till he could find a purchaser—that, hearing the plaintiff was going to enter judgment on the award in his favour on the 22nd September, 1860, he on the same day and before the entry of the judgments, though without, so far as appears, the knowledge of *Duffill*, caused the mortgages to be registered for the express purpose of keeping the priority he had over the judgments—that shortly after the registration he returned the first mortgage to *Duffill*, intending only to use the second one—that for £200—that he did endeavour immediately afterwards to sell this one, and had contracted to sell it for the *bona fide* purpose of obtaining money wherewith to pay off these very judgments of the plaintiff—that at the time of the execution of these mortgages no debt from *Duffill* to plaintiff was ascertained—that it does not appear that then or since *Duffill* owed any one but the plaintiff and the Metropolitan Building Society, to whom, on the 1st January, 1860, he owed $\$446\frac{67}{100}$—that as the bill alleged, he owned, besides the lands covered by these mortgages, divers other lands in Toronto and the county of York, and the whole of these lands, so far as they are shewn, were worth at least $1.400, subject only to the debt of the building society for $446—that at the time of the mortgage *Duffill* had also household furniture insured for $1,200, though it does not appear how long it remained in Toronto, but probably till Mrs. *Duffill* went to Quebec in the autumn of 1860. It thus appears that the mortgages were made as well to secure the defendant *Hawkins* the payment of £30, which *Duffill* owed him, as for the *bona fide* purpose of raising money to pay off the only other debt which *Duffill* then knew or thought he owed, viz., that to the building society, and of obtaining a small sum for other purposes of his own; and not with the slightest intent of defrauding the

plaintiff or any one else. And yet it is only upon allegations charging the contrary of these facts, as I at least find them, that the plaintiff can succeed. The law does not imagine fraud, nor for the purpose of establishing it will the court give the plaintiff the benefit of a case which he does not make. The charge of fraud here made is actual, positive fraud, viz., that the mortgages were voluntary, without consideration, and made for the purpose and with the intent of defeating and delaying creditors. I have shewn that this charge is not supported by the proof, and it is necessary that the charge should be treated as one of direct positive fraud, for every element of presumptive or constructive fraud is not only absent but is removed by the bill itself, for it alleges that *Duffill* had and now owns divers lands, etc., other than those covered by the mortgages; and it does not allege that these "other lands" were not amply sufficient for payment of his debts, or could not be got at and made available therefor just as readily as the lands under mortgage; and wanting in this allegation, it endeavours to fetter the disposition by the owner of his property on a charge that he has made it to hinder and defeat his creditors. Obviously a mere charge in the bill that such disposition was voluntary and without consideration would have been insufficient, and I doubt if the additional charge should be read, framed as this bill is, as anything more than that *Duffill*, having plenty of other property which from the allegation on the one hand, and the want of allegation on the other as to the sufficiency of it for his debts he may be fairly deemed to have had, chose to withdraw these particular lands from the reach of his creditors that they might not dispose of them. It is true that the purpose for which the mortgages were made have partially failed. Money has not been raised on them, and the plaintiff, as in any other case of a subsequent incumbrancer is entitled to redeem on payment of the amount for which they are a substituting security, and this I think should be the decree, the plaintiff paying all

costs—I must add that this litigation appears to me to have been very unnecessary, and might all have been avoided had the plaintiff before filing his bill inquired of the defendant *Hawkins* what he claimed on the mortgages; and if *Hawkins* had not told the truth or had refused information, neither of which courses, judging from the evidence, would, I think, have been pursued, he might fairly have been made responsible for the consequences thereof. The plaintiff chose, however, to assume the whole thing to be fraudulent, and hastily filed his bill.

Judgment.—ESTEN, V. C., while disclaiming any intention of imputing anything like moral fraud to either of the defendants, particularly in so far as any such charge would apply to the defendant *Hawkins*, against whom, if made, no one who knew Mr. *Hawkins* would for a moment believe; at the same time stated that subsequent discussion of the case had failed to satisfy his mind that the creation and subsequent registration of these mortgages under the circumstances appearing in evidence in this cause, could in the eye of a court of equity be considered otherwise than as a legal fraud; and as having been made to hinder and delay the plaintiff and others, creditors of *Duffill*. With all respect, therefore, for the contrary view, he retained his former opinion.

Judgment.—SPRAGGE, V. C., concurred with the CHANCELLOR.

TEETER v. ST. JOHN.

Usurious contract—Appeal from master's report—Property subject to mortgages ordered to be sold—Practice.

Although the court will not interfere with any bargain that parties competent to contract may, since the repeal of the usury laws, make for the payment of interest, still in case any dispute in reference to such contract exists, it is the duty of the court to see that the parties, to any agreement for the payment of exorbitant rates of interest, clearly understood what the bargain was before effect will be given to it. Where, therefore, on the loan of money it was agreed to pay at the rate of two per cent. a month in advance, and the lender in making up the account contended that the agreement being that it should be paid in advance was the same as two and a half per cent. a month, and insisted upon his right to charge that sum the court directed the master to allow at the rate of two per cent., the effect of the interest being payable in advance not having been explained to the borrower.

A decree for sale of property was directed at the suit of a surety of the mortgagor. In proceeding to take the accounts it appeared that the mortgagee had paid off such prior incumbrances, and the master in taking the account allowed him credit for the sums so paid, although no direction to that effect was given by the decree; the surety, insisting that as between him and the mortgagee he was entitled to receive credit for the gross amounts produced at the sale without any reference to the sums so paid to the prior incumbrancers, appealed from the master's finding in this respect; the court dismissed the appeal with costs.

Where the correction to be made in the Master's finding is simple, a reference back to him for that purpose need not be directed; the necessary alteration can be made by the order drawn up on the appeal.

By an agreement entered into by the lender, borrower, and a surety that a judgment against the surety should "*stand as additional or collateral security for the payment of such mortgages, to pay and make up any deficiency that might arise or exist should it at any time become necessary to sell the said forms, &c.*" *Held*, that the surety was entitled to have an account taken, the property sold and credit given on his judgment for the amount realized before he could be called upon to pay any thing: and that the surety was not bound in the first instance to pay off the creditor and take an assignment of the mortgages for the purpose of proceeding against his principal, the mortgagor.

Statement.—This was a suit by *Conrad Teeter* against *Samuel L. St. John, John E. Terryberry, William W. Henry,* and *James Henry,* the object of which sufficiently appears in the judgment.

Mr. *Blake* for the plaintiff.

Mr. *Strong,* Q.C., and Mr. *Hodgins* for *St. John.*

Mr. *Wells* for the defendants *Henry* and *Terryberry.*

Judgment.—VANKOUGHNET, C.—(Before whom the case was heard.) This is a bill filed by a surety against the creditor, the principal debtors, and co-surety, praying for relief in a variety of shapes, but mainly that the property of the principal debtors held by the creditor in security under an agreement made by all those parties on the 12th of December, 1859, may be sold and the proceeds applied in payment of the debt due to the creditor, and that the amount of that indebtedness may be ascertained and the principal debtors ordered to pay it off, and that the plaintiff may have contribution from his co-surety.

The defendants, the *Henrys*, having become largely indebted to the defendant *St. John;* and the other defendant *Terryberry* and the plaintiff being co-sureties for a portion of the indebtedness for which judgment at law had been recovered against them; and the *Henrys* being also indebted to one *Gibbons* on two judgments, and *St. John* having agreed to pay these off and to advance the defendants, the *Henrys*, some other moneys on their executing fresh securities to cover the old and the then created indebtedness, the following agreement was made between all parties to this suit:

"This indenture, made the 12th day of December, A. D. 1859, between *William W. Henry, James Henry, Conrad Teeter*, and *John E. Terryberry*, of Grimsby, of the one part, and *Samuel L. St. John*, of the town of St. Catharines, of the other part.

Whereas the said *Samuel L. St. John*, on or about the seventeenth day of September last, recovered a judgment against the said parties of the first part, for one hundred and fifteen pounds or thereabouts. And whereas one *William Gibbons* on or about the twenty-ninth of September last, recovered two judgments against the same parties for eighty-three pounds ten shillings and four pence each. And whereas the said judgments are wholly unpaid and unsatisfied.

And whereas the said *St. John* has agreed to pur-

chase and take an assignment of the said judgments so recovered by the said *William Gibbons*, and not to enforce the said judgments or any of them for one year from the date hereof as hereafter mentioned.

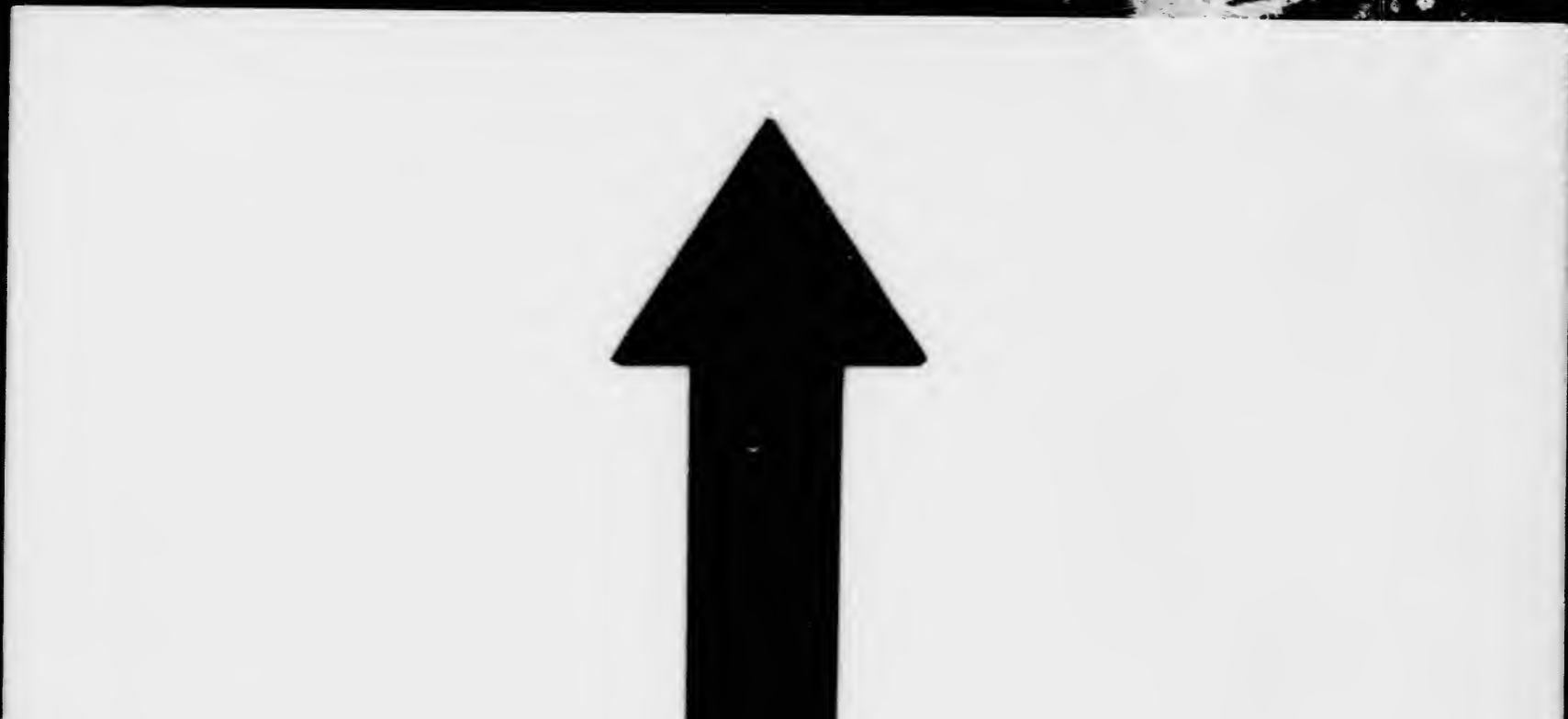
And whereas the said *St. John* has taken two certain mortgages on the farms of the said *William W. Henry* and *James Henry*, to secure said judgments and certain other debts that the said *William W.* and *James Henry* owe the said *St. John*, with the consent and concurrence of all the said parties of the first part, which is testified by their being parties hereto.

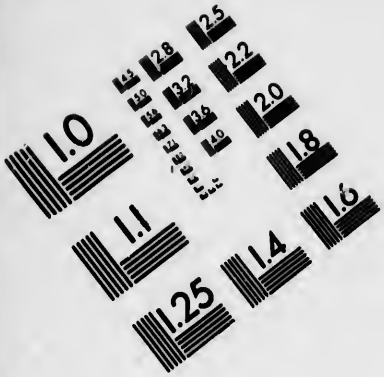
And whereas the said parties of the first part have consented and agreed that such judgments shall stand as additional or collateral security for the payment of such mortgages, to pay and make up any deficiency that might arise or exist should it at any time become necessary to sell the said farms or either of them on the said mortgages or either of them.

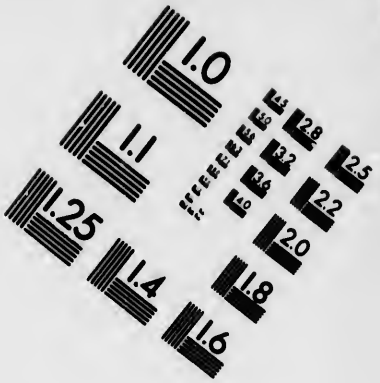
Now this indenture witnesseth that the said parties of the first part covenant and agree to and with the said *St. John*, that the said judgments shall and may stand for the purpose aforesaid, and be enforced for the purpose above mentioned at the expiration of one year from the date hereof. And that should any difficulty arise or exist on the sale of the said farms or either of them, that they will contribute to make up such deficiency to the amount of such judgments but no further.

And the said *St. John* covenants and agrees to and with the said parties of the first part, that he will not enforce the payment of such judgments, except for the purpose of making up any deficiency that may exist upon the sale of such farms in the said mortgages or either of them.

The property secured by the mortgage from *Wm. Henry* to *St. John* has been sold and produced the sum of $6000. The other property has not yet been sold, though a sale of it has been attempted. It is contended however for the defendant *St. John*, that the plaintiff has no right to force him to sell the property held in security, and that the only course the plaintiff can take is to







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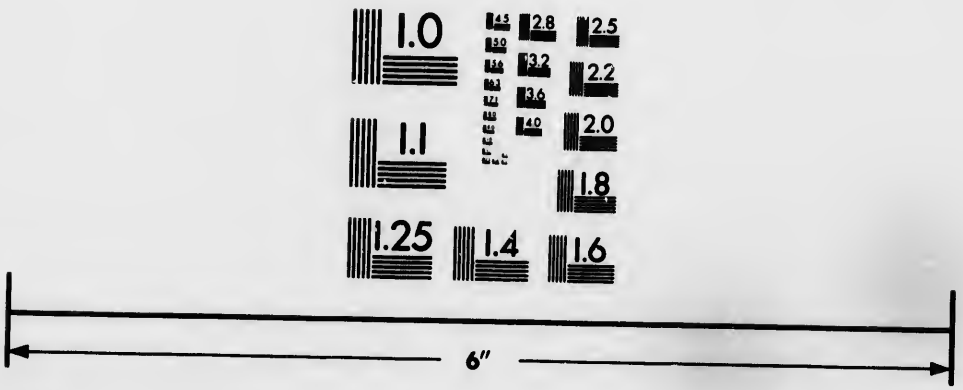

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redeem *St. John*, take an assignment of the securities, and then deal with them himself. However this might be in an ordinary case of principal and surety, and in dealing with the rights arising out of that simple relation, the cases of *Seabourne* v. *Powell*, (*a*) *Parsons* v. *Briddock*, (*b*) *Wright* v. *Morley*, (*c*) shew that a surety has more extended rights and remedies than the defendant here would give him. Yet, I think the rights of these parties should be disposed of by the agreement of the 12th December. The sureties are by its express terms only to pay the deficiency after the sale of the property. The judgments against them, and which may be incumbrances on all this property, outstanding as they still are, were to be paid at the end of the year, or so much of them as would cover the deficiency. Now surely it was not in the contemplation of the parties, nor can it be the fair intendment of the agreement that the sureties at the end of the year were to be called upon to pay the judgments, and that the property was not to be sold, the proceeds applied, and the amount of the deficiency thus ascertained. Every party to an agreement may be an actor under it, and I think that the plaintiff has a right to the action of the court upon the agreement in question. It is then contended for the defendant that the plaintiff must be bound by the amount stated in the mortgages themselves, subject to the alteration therein made by the endorsements on the mortgages, and that at all events the *Henrys*, and not the plaintiff, are the proper parties to ask for an account, as they cannot be bound by an account had at the instance of the plaintiff. This latter position must be abandoned, as the *Henrys* now, at the hearing, through counsel, consent to taking the account and to be bound by it. The *Henrys*, equally with the plaintiff, would be bound by the amount named in the mortgage, unless fraud or clear mistake was shewn. Then is there any evidence here by which the account can be opened?

(*a*) 2 Ver. 11. (*b*) 2 Ver. 608.
(*c*) 11 Vesey, 12.

The transaction of the 12th of December appears to have been a most hurried one; no account seems to have been prepared or rendered. The only information which the debtors, principal or surety received of the amount which *St. John* required the mortgages to be executed for, and of the mode in which it was made up, was given by *St. John* himself in the evening of the day on which the agreement was signed, he reading off the sums as he had calculated them from a small memorandum book in which they appear confusedly entered in pencil. The mortgages had been executed only a short time, when *St. John* himself discovered that they contained wrong amounts, and he sought to remedy this by an endorsement in one case and an additional mortgage in the other. Nor is this all: on his examination he admits that in mistake he has charged interest at the rate of two and a half per cent. a month for about two months longer time than he should have done. The account therefore must necessarily be re-opened and re-cast, and in doing this I direct that the interest be charged and allowed at only two per cent. per month, for it appears to me on Mr. *Currie's* evidence that the parties, the mortgagors, did not understand they were to pay more. Two per cent. a month was all that was spoken of, although it was said that it was to be two per cent. in advance. What this term advance meant or what was to be the effect of it does not appear to have been explained to or understood by the parties, and I certainly would not understand it if I had not been informed. It seems monstrous that the court should find itself called upon to order interest at two per cent. per month to be allowed; but as this was the contract of the parties there is no help for it. While I disavow any right or intention to interfere with any bargain parties competent to contract may now make for the payment of interest, I nevertheless think that, in case of any dispute, the court is called upon to see that the parties to such contracts for exorbitant rates clearly understand what their bargain is before effect is given to it. And

so with respect to the interest charged at the rate of four per cent. per month upon the judgments over due. I do not think it clear that the parties understood this estimate from the figures given them by *St. John*, and as to that I direct an enquiry. With reference to the $924.50 paid Mr. *Gibbons* as his claim upon the judgments recovered by him, it may or it may not have been too much, but as *St. John* paid this sum for the *Henrys*, and at their request, he cannot be made to lose by any overcharge Mr. *Gibbons* may have made. As regards the interest to be paid after the mortgage money falls due, I do not find any authority which, as the law now stands, would warrant me in deciding that parties may not agree that interest shall then become or be treated as principal, and bear any rate of interest stipulated for. I therefore direct that the account be taken for the purpose of correcting the error in the time for which interest was calculated; that that interest be reduced to two per cent. per month; that the master enquire whether the *Henrys* or the sureties understood they were to pay interest on the judgments overdue at the rate of four per cent. per month, or if not, then at what rate, and if no rate was understood or agreed upon then to calculate interest at six per cent. per annum up to the date of the mortgage, and add it to the original amounts; that the property be immediately sold under the authority of the court, and the proceeds properly applied; that the plaintiffs and defendants, other than *St. John*, pay to *St. John* the deficiency, if any, after such sale, to which he may be entitled; that any thing the sureties have paid or may pay be re-paid them by the *Henrys*; and that the sureties do make contribution, the one to the other, for any thing the one may have paid, or may pay, more than the other. All parties to have liberty to apply.

Under the decree drawn up on this judgment the accounts between the parties were taken by the master who made his report, from which both the plaintiff and

defendant *St. John* appealed on the grounds stated by the Chancellor in disposing thereof.

Mr. *Kerr* for the plaintiff.

Mr. *Downey* for *St. John*.

Judgment.—VANKOUGHNET, C.—The first ground of appeal is that the master has allowed four per cent. per month on the judgments referred to in the decree and pleadings. When the case was before me on the hearing, I did not consider the evidence sufficient to establish that the defendants the *Henrys* had agreed to pay four per cent., and I referred it to the master for enquiry. The same witness who was examined at the hearing was examined before the master, and he now swears positively that the *Henrys* agreed to pay four per cent. per month, and understood that they were to pay that rate. He was the only disinterested person present at the agreement. The master heard his testimony and gives it credence, and finds accordingly. I cannot say he is wrong.

The second ground of appeal is, that the master has allowed 20 per cent. on certain balances, whereas the decree does not direct any such rate. This also involves the last ground of appeal, which is, that interest has been computed on interest. The mortgage provides for payment of a gross sum on the 27th October, 1860, and interest thereon after the rate of 20 per cent. per annum from that date, so long as the mortgage money remains unpaid. In this gross sum is included interest at the rate of 24 per cent. per annum from December, 1859, when the mortgage was given, and it appears as part of the principal money. No doubt this under the old law would have been usurious. Now the legislature has left every party free to stipulate for such rate of interest as he pleases. The court should be astute to see that any party agreeing to such exorbitant rates fully understands what he is about, and is not the victim of duress, or undue influence in the sense in which that term is understood as giving a right to relief in this

court. The mere fact that a creditor refused to wait for payment of his debt, unless his debtor stipulated to pay a high rate of interest, the latter having the option of choice, would not constitute duress or undue influence. It is not pretended here that the *Henrys* did not understand that they were agreeing to pay this 20 per cent., or that they did not agree to pay it. This being so, the court, however much it may sympathise with the victim, cannot relieve him of the load with which he has burdened himself. It is true that the court will not allow a mortgagor, under cover of his mortgage, to secure any collateral advantage, not properly the subject of mortgage, as the cases cited by Mr. *Kerr* show;* but a rate of interest stipulated for is not a collateral advantage; it is the almost necessary incident to a loan and a proper subject of the security.

The third ground of appeal is, that the master has allowed to defendant moneys paid by him for the *Henrys* not authorised by the decree. These moneys were paid in this way: on the property of *William Henry* was a mortgage to a building society, and another to one *Osborne*, and on the firm of *James Henry* was a mortgage to *Osborne*. Both of these mortgages were paid off by the defendant *St. John*, and the result was that he got so much less from the sales of the property. The plaintiff contends that *St. John* is bound to give credit for the gross proceeds of the sale, without deducting the prior charges which it was necessary to pay. The defendant says that the property would have brought just so much less as was, or perhaps by a great deal less than was, the amount of the prior incumbrances. The master has allowed the defendants these payments, in effect, crediting only the difference between them and the proceeds of the sales, although the decree does not specially provide for taking this account, but direct the defendant to be charged with the sum of $6,000, proceeds of sale of *William*

*Thompson v. Leith, 4 Jurist, N. S. 1091; Cope v. Cope, 2 Salk. 449; Brodway v. Morecraft, Mosely, 247.

Henry's farm, without any provision for deductions. Still I think the master was justified in allowing them. The incumbrances had to be paid, and the property was worth just so much less than was charged on it. The master, too, has taken the account of them in the way most favourable to the plaintiff, for had he deducted them from the gross amount of the receipts, and credited only the balances, the remaining debt to the plaintiff would have borne interest at 20 per cent.; whereas the master deducts the gross receipts from the plaintiff's mortgage debt bearing 20 per cent., and carries on the credit to him of the amount of these incumbrances paid by him at only six per cent. It is admitted, as I understand, that in the account brought into the master's office by *St. John*, he shewed the credits were appropriated as allowed. But even if he had not, I do not see anything of which the plaintiff can complain in the manner in which the credits were appropriated. The plaintiff is only liable to the extent of the judgments against him, and upon those judgments the master has properly allowed the sum of £100, realized from the sale of the plaintiff's goods, thus leaving him liable only to the amount of the balance. I think this appeal must be dismissed with costs.

The cross appeal must be allowed. The judgments were to stand as a security for payment of any balance found due to *St. John* to the amount due on the judgments. The amount due on the latter being smaller than the amount due *St. John*, they must stand as a security accordingly, and the master was wrong in declaring them satisfied. It will not be necessary to go back to the master to make this correction. It can be done by the order to be made on this appeal, of which the respondent must have his costs.

STINSON v. MOORE.

Residuary estate—Re-division of estate.

A testator devised to his son a certain named lot; the residue of his estate, after certain other specific devises, he directed to be divided between his two brothers and sister, amongst whom, after the death of the testator, the property was divided, in which division by mistake the lot devised to the son was included, which was allotted to one of the residuary devisees as part of his share, who devised the same to his sons, and who, on discovering the mistake which had been committed, applied to those interested in the residuary estate to have the mistake rectified, when it appeared that some of the other residuary devisees had sold portions of the shares allotted to them, by reason of which a re-division of the estate was impossible, and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake in thus allotting the devised lot. The court, under the circumstances, ordered a valuation to be made of the residuary estate, at its present value, one-third of which, with interest from the date the first division was made to be contributed rateably by the other residuary devisees, or their representatives, or if desired by either of the parties with an account of rents and profits received.

Statement.—This was a bill by *Thomas Stinson*, *Abraham Stinson*, and *William Stinson*, against *Hugh Moore*, *John Robert Hunter*, *Richard Martin* the younger, *Ebenezer Stinson*, *William Hatton* and *Elizabeth* his wife, and *John Stinson* an infant, praying, under the circumstances set forth in the head-note for judgment for compensation for the loss sustained by them.

As against the infant defendant it appeared at the hearing that the bill was not sustainable on any ground.

Mr. *Proudfoot* for plaintiffs.

Mr. *R. Martin* for defendants *Martin* and *Moore*.

Mr. *Blake* for defendants *Hatton* and *Ebenezer Stinson*.

Mr. *Adams*, for the infant defendant. In addition to the cases mentioned in the judgment of *Gresley* v. *Morley* (*a*), *Uppington* v. *Bullen* (*b*), were referred to by counsel.

(*a*) 4 DeG. & J. 78. (*b*) 2 D. & W. 184.

Judgment.—VANKOUGHNET, C. (before whom the case was heard).—One *John Stinson* by his will devised to his son *John* a particular lot of land known as the Land Lot—having been purchased by him from one Colonel *Land*, and over which he had executed a mortgage. After certain other specific devises he devised the residue of his property to his executors to be equally divided between his brothers *Samuel* and *Ebenezer* and his sister *Elizabeth*, wife of the defendant *John Hatton*.

The devisor dying, a division of this residue was made between the brothers and sister with the sanction of the executors, but in it by mistake was included the Land Lot which had been specifically devised. This lot forming part of one of the parcels set apart as a third fell to the share of *Samuel*. *Samuel* died, having first devised this Land Lot so taken as part of his share to his sons the plaintiffs. After his death the mistake was discovered, and the plaintiffs sought to have it rectified; but the other residuary devisees under *John's* will having sold portions of the shares which had been allotted to them under the will, a revision of the estate was impossible, and hence the present bill is filed against the two surviving devisees of the residuary estate of *John* for compensation. The first question that arises is as to the right of the plaintiffs as devisees of *Samuel* of the Land Lot to demand this compensation.

It is contended that the heirs of *Samuel* alone can do this. The same question would of course arise in case a re-division were possible and were asked for. The ground on which compensation or a re-division of the estate would be granted is, that *Samuel* or his estate is entitled to something in lieu of the lot which had been in error assigned to him out of the estate of *John*. *Samuel* has devised this lot for which something is to be given in exchange. If, owning the lot, he had before his death agreed with a third party that that third party might at his option and by a time which had not

elapsed at his death acquire this lot, giving in exchange for it another, and had then devised this Land Lot, I suppose there could be no doubt that his devisee would take it, and on the option of the third party being exercised to acquire it, would be entitled to the lot to be given in exchange. The analogy is not a perfect one, but it helps to the consideration of the position in which the devisees here stand in relation to that which is to be given in the place of the Land Lot. That lot the testator intended them to have. They cannot have it, but there is something to be given to the testator's estate in lieu of it. It seems to me most equitable that that something they should have, and in the absence of any direct authority on the case, for it is said none is to be found, I am disposed to give it to them, and if necessary thus make a precedent; as was said by Lord *Cranworth*, in *Stump* v. *Gaby* (*a*), cited in the argument of this case, but distinguishable from it. Then as to the mode of estimating the compensation; the plaintiffs contend that they are entitled to be paid the sum at which this particular property was valued when the division was made with interest from that time, as was given in the case of *Dacre* v. *Gorges* (*b*). On the other hand, the defendants allege that all property has fallen very much in value since the division which took place in 1856, and that the shares then allotted to them are not worth the sums at which they were estimated. In England land does not fluctuate in value as it does here. The land in question in *Dacre* v. *Gorges* was apparently farm land, and I assume had not changed in value. It was not alleged that it had, and the defendants, although the mistake was palpable and easy of correction, and no difficulty by intervening death or change of ownership had taken place, refused all redress. If there is to be a re-division of the estate there would be necessarily a new valuation, unless the property to be divided was of equal value throughout. It is notorious that all real estate in cities and towns has greatly fallen

(*a*) 2 DeG. M. & G. 623. (*b*) 2 S. & S. 454.

in value since 1856, when it was much inflated. The plaintiffs should not get any more than they would get on a re-division of the estate, were that to be made, and I think, therefore, that, if desired by the defendants, the property must be estimated at its present value for the purpose of ascertaining the shares of each of *John's* devisees, and compensation made accordingly and rateably by the defendants, with interest on the amounts which may be thus awarded to the plaintiffs from the time the first division took place, or, if either party prefer it, with an account of the rents and profits received by the defendants; the plaintiffs' share of them to be ascertained.

Considering that the mistake was mutual, that *Samuel*, taking the Land Lot, was more to blame than the others in not having at once, when it became his, made himself sure of the title to it; that had this been done by him, all the expense, trouble and delay of these proceedings would have been saved; I will not charge the defendants with wilful neglect or default in taking the account of rents and profits: neither will I charge them with the costs of this suit. They do not appear to have denied the plaintiffs' right to something, doubtful as that right in the plaintiffs was: but neither they nor the plaintiffs appear to have been able to agree what the compensation should be, and the plaintiffs have claimed more than I think them entitled to. The plaintiffs can have no relief upon the mortgage already referred to as covering the Land Lot, and which has been assigned to the plaintiff *Abraham*. To mix up a claim of *Abraham* in his own right with the claim for compensation would be uniting demands totally distinct, and create confusion. Besides, the plaintiffs have already submitted to a demurrer to this head of relief. The only relief granted being that of compensation to these plaintiffs in their own right against the defendants, *Hatton* and *Ebenezer Stinson*, individually, the bill must be dismissed as against the executors and *John Stinson* with costs. The latter could not in any view have been a necessary party to the suit.

WEIHE v. FERRIE.

Specific performance—Death of vendor before completion of conveyance—Costs—Infants.

The vendor of real estate had died before the execution of the conveyances, and his infant heirs filed a bill praying for a specific performance of the contract, which the defendants (the vendees) admitted and expressed their willingness to carry out but for the obstacle created by the death of the vendor leaving his heirs-at-law infants. The court under the circumstances made a decree for specific performance of the agreement, but without costs to either party. The costs of the infants to be defrayed out of the balance of purchase money payable by the defendants.

This was a suit by the infant heirs of a vendor of real estate seeking specific performance of the contract entered into by their ancestor with the defendant. The defendants answered the bill, admitting the contract, and expressing their willingness to complete it, and alleging that they had always been ready and willing so to do, but from the circumstance of the vendor having died leaving the plaintiffs minors, they had been unable to execute the necessary conveyance. At the hearing of the motion for decree.

Mr. *Fitzgerald*, for the plaintiffs, asked that a decree might be made as prayed with costs to be paid by the defendants, who having been in default as to several of the payments of the purchase money should be held liable to bear the costs of the proceedings.

Mr. *Burton*, Q.C., for defendants, submitted that this was not a case in which to give costs, the inability of the plaintiffs to make a title rendered it advisable that the defendants should not pay up the instalments which fell due after the death of the vendor. The impossibility of obtaining a title except through the aid of the court was the reason why the contract had not been sooner completed.

Hanson v. *Lake*. (*a*) *Hinder* v. *Streeten*, (*b*) *Smith's* Chancery Prac., p. 1062, were referred to by counsel.

Judgment.—VANKOUGHNET, C.—In this case the vendor

(*a*) 2 Y. & C. C. C. 338. (*b*) 10 Hare, 18.

died, the vendees not being in default at the time. By the contract the vendees were to be entitled to a conveyance before payment of the instalments remaining unpaid at the death of the vendor, and these were to be secured by mortgage back. The vendor dying, the vendee or his assignee could not obtain a deed except through the instrumentality of this court, the heirs at law of the vendor being infants who have filed their bill for the completion of the contract. The defendants admit the contract and state they have always been ready and willing to carry it out, but for the reason above stated could not obtain a title. It is true that they might have filed a bill themselves for the purpose, but in that case costs would have been incurred as in this. The difficulty has been caused by the act of God, and not of either party, and I think there should be no costs on either side, the defendants not having unnecessarily occasioned any by their conduct. (*a*)

The infants' costs should be paid out of the balance of the purchase money payable by defendants.

HARRISON V. JONES.

11th clause of Chancery Act—Payment for improvements.

The allowance for improvements under the eleventh clause of the Chancery Act (7 Wm. IV., ch. 2) is discretionary with the court under all the circumstances. Where, therefore, upon a reference to the master to take the usual accounts under a decree for redemption, where the mortgagee had become absolute before 1837, the master had allowed to the mortgagee in possession the price of certain valuable improvements, amongst others, building brick dwelling on the mortgage premises, the master stating that he made such allowance solely under the provisions of the statute: the court on appeal referred the matter back to the master, leaving it open to him to allow or disallow such improvements.

This was a redemption suit, in respect of a mortgage which had become absolute before 1837, and a decree had been pronounced therein for the usual reference to the master in 1856; and in 1858 the defendant *Mulraney*, who, with *Bennett*, had become entitled to the mortgage security, built a brick dwelling-house on

(*a*) Purser v. Darby, 4 Kay & J. 41.

the property. The master made a report allowing credit to the mortgagor for payments made after the transfer of the mortgage.

On the cause coming on for further directions, the allowance of this payment was objected to. And it appearing that no enquiry had been made as to improvements, the decree then drawn up, amongst other things, directed the master to enquire as to improvements. The master considering himself bound by this decree and the act establishing the Court of Chancery to allow for improvements, allowed to the defendants the value of all they had made upon the property, stating that he did so because he considered himself so bound.

From this report the plaintiff appealed.

Mr. *Roaf* for the appeal.

Mr. *Blake* contra.

Judgment.—Esten, V.C.—It appears that originally the master made no allowance for improvements, and that he has allowed the improvements entirely on the footing of the act 7 William IV., chapter 2, and the decree or judgment of my brother *Spragge*. The decree or judgment did not direct any allowance for improvements, but committed the matter to the judgment and discretion of the master, and the act of parliament referred to appears to have no bearing on the case, as it only committed to the discretion of the court what decree to make under the circumstances of this mortgage, and others in the same plight, without a strict adherence to the rules of law; and it appears that these improvements were made more than twenty years after the passing of the act, and in the face of a decree ordering a redemption. It appears to me that this case must be governed by the ordinary rule, and I do not understand that that rule justifies an allowance in respect of a dwelling-house

built on the mortgaged premises without the consent of the mortgagor. It does not appear what *Bennett's* improvements were, but a larger amount is allowed to him than to *Mulraney*, and as the master originally disallowed them, and appears to have proceeded on mistaken grounds in allowing them by his subsequent report, I think it right to refer it to him to review such report in respect of the allowance for improvements, not meaning to express any opinion as to whether they should or should not be allowed wholly or in part, farther than I have already done. With regard to the interest, the case of *Walton* v. *Bernard* (*a*) settled that where the mortgagee has been in possession, and has, in consequence, been charged with rents, he must be considered as applying them to the discharge of arrears of interest, so far as he was entitled to charge such arrears upon the premises—that is, for six years previous to the accruing of the rent. The master should have computed interest for six years before the commencement of the suit; but in charging occupation rent he should have considered it as applicable to the arrears of interest chargeable at the time the rent accrued. I refer it to the master, therefore, to review his report in these particulars.

(*a*) 2 Grant, 358.

FERGUSON v. KILTY.

Mortgage—Notice—Demurrer—Practice.

In a bill filed by the administrators with the will annexed and creditors of B. it was alleged that on a sale of lands by B. to K. the latter executed a mortgage to secure the purchase money, but that by the fraud and design of B. such mortgage was withheld from registry, and that the lands were subsequently sold by K. to two purchasers—who, before the conveyances to them were executed, or, at all events, before the payment of their purchase money—had notice and were well aware that K. had not paid his purchase money and had given mortgage therefor, and that they, fraudulently intending to cut out such mortgage, had caused the conveyances to themselves to be registered. The bill further alleged that neither of these purchasers had yet paid their purchase money, and claimed that the mortgage to B. should be fastened on the land as a charge prior to their conveyances, and failing that relief that the amount payable by them to K. in respect of their purchase money respectively might be ordered to be paid to the plaintiffs on account of the mortgage money due under the mortgage from K. The purchaser demurred generally to such bill for want of equity, which on argument was overruled: the court holding that the plaintiffs were not bound to wait till the purchase money payable by the purchasers was over-due before taking proceedings; and that in case of notice before the execution of these conveyances the mortgage would take precedence thereof; or if only before payment, the purchase money payable by the purchasers could be claimed by the plaintiffs.

Where a bill has been amended, although usual, it is not absolutely necessary that a demurrer should be addressed "to the amended bill."

A bill was filed impeaching sales to purchasers on the ground of notice of the prior incumbrance—a mortgage for unpaid purchase money—and praying to have the conveyance to the purchaser postponed to such incumbrance, or in the alternative that the money still due might be paid to the plaintiffs. On the hearing it was made to appear that the purchases were made *bonâ fide* and without notice; that one of the purchasers had paid nearly all his purchase money at the time of sale and given his promissory notes for the balance; and that the other had given a mortgage to secure his unpaid purchase money; and both submitted at the hearing to pay such amounts as were still unpaid to the plaintiffs or as the court might direct. The court, under the circumstances, granted the alternative relief prayed; directing the money due by the one purchaser on his mortgage to be paid to the plaintiffs, and the amount due on the notes of the other to be also paid to them on production of the notes to be given up to the maker; but ordered the plaintiffs to pay to the defendants, the purchasers, their costs of suit, and refused to the plaintiffs any costs as against the vendor, he never having opposed the relief to which they were entitled.

The bill in this case was filed by *Duncan Ferguson* and *John McDonald* against *Henry James Kilty*, *Richard W. Towner*, and *William S. Wilkins* praying,

under the circumstances stated in the head-note, that the mortgage held by plaintiffs might be declared entitled to priority over the conveyances to *Towner* and *Wilkins*, or if not, then that plaintiffs might be declared entitled to the amount of purchase money still due by them in respect of their several purchases. *Towner* and *Wilkins* answered the original bill, which, as against *Kilty*, was taken *pro confesso*. On the coming in of the answers plaintiffs amended their bill, to which the defendants *Towner* and *Wilkins* put in a general demurrer for want of equity.

Argument.—On the argument Mr. *Morphy*, for the plaintiffs, objected that the demurrer should have been to the amended bill, the defendants having already answered the original bill, a demurrer to it therefore was irregular.

Mr. *Roaf*, in support of the demurrer, contended that there being no allegation in the bill that the money payable by *Towner* was overdue, the allegation contained in it was merely descriptive, that is, that money was payable, which, for all that appears, may be at a future day. He also contended that the plaintiffs had no equity to the relief prayed: they alleging that the conveyance to *Bradley* was fraudulent, and which they can only impeach as creditors of *Bradley*, not as his personal representatives, while as creditors they do not shew themselves entitled, the bill not alleging that executions have been placed in the sheriff's hands.

Ritchie v. *Aylwin* (*a*), *Smith* v. *Byron* (*b*), *Jones* v. *Strafford* (*c*), *Metcalf* v. *Hervey* (*d*), *Daniel's* Chy. Pr., vol. 1, pp. 276, 472-3.

Judgment.—VANKOUGHNET [before whom the demurrer was argued].—On reading the first three paragraphs of the amended bill one would suppose that the object

(*a*) 15 Ves. 79.
(*b*) 3 Madd. 428.
(*c*) 3 P. W. 79.
(*d*) 1 Ves. 248.

of the plaintiffs was to set aside the deed from *Bradley* to *Kilty* as fraudulent and void as against creditors, and certainly a case for that purpose is sufficiently stated; but the plaintiffs, the administrators, and also creditors of the estate of *Bradley* proceed in their bill to adopt this fraudulent transaction, and ask the benfit of it. It was not argued by Mr. *Roaf* in support of the demurrer, that it was not in the power of the plaintiffs, as administrators, to do this and so bind the other creditors; but the demurrer, which is general for want of equity, is rested on other grounds. The plaintiffs allege that on the sale by *Bradley* to *Kilty* the latter executed to his vendor a mortgage to secure the purchase money of £1750; that this mortgage was by the fraud and design of *Bradley* not registered until the plaintiffs themselves registered it after his death; that intermediately *Kilty* sold the land in two several parcels to the defendants *Towner* and *Wilkins*, respectively, and that they, before the conveyances to them, or before payment by them of their purchase money, were well aware that *Kilty* had not paid his purchase money, and that *Kilty* had given a mortgage therefor; and that, fraudulently intending to cut out the said mortgage, they caused the respective conveyances to them to be registered, and that they were registered prior to the registration of the mortgage. The bill charges that neither of these two defendants has yet paid his purchase money, and it claims that the mortgage should be fastened on the land prior to the conveyances to them, and that failing this, the purchase money payable by them respectively may be paid to the plaintiffs on account of the mortgage money. The demurrer is general for want of equity, and I think must be overruled. The plaintiffs, under the allegations in their bill, have at least a right to the purchase money due by the defendants *Towner* and *Wilkins*. It is objected, that it is not alleged that this money is overdue, but I apprehend the plaintiffs are not bound to wait for this event, and no authority is cited to shew that

they are. They may obtain a decree fastening this money as payable to themselves, though probably at the risk of costs, if t' ey have been precipitate, and the defendants have not improperly denied their right to it.

Notice of the existence of the mortgage is charged to have been had by them prior to the conveyances, *or* before payment of their purchase money. In the one case the mortgage would take precedence of the conveyance, as I understand the law of this court; in the other, only the purchase money payable by them could be claimed.

It was objected, that the demurrer should have been addressed "To the amended bill," as the original bill had been answered. A bill may be so amended as to be demurrable, and the defendant must have the right to demur to it in that state. In practice, it is usual for the defendant to apply his pleading to "the amended bill," but I am not aware that it is absolutely necessary to do so. There is but one bill in the cause. It is the bill, however or how often amended, and when a defendant demurs to an amended bill, he is demurring to the bill in the state in which it then is, and not as it stood originally, for as such it has ceased to exist.

After this judgment had been given on the demurrer, the cause was taken down for the examination of witnesses before his honour Vice-Chancellor *Spragge*, at the sittings of the court at Brantford, in the spring of 1863.

Mr. *Kerr* for the plaintiffs.

Mr. *Wood* for defendant *Towner*.

Mr. *VanNorman* for defendant *Wilkins*.

The defendant *Kilty* did not appear.

Counsel for defendant admitted that as between the deceased and *Kilty* the whole transaction was colourable; but that as between *Kilty* and the other defendants no ground was laid for charging them with notice. They contended, however, that neither *Bradley* in his lifetime, nor his representatives after his death, could be heard to assert that the sale by him was fraudulent.

The cases principally relied on are mentioned in the judgment of

Spragge, V.C.—At the close of the case, at Brantford, I expressed my views upon the case as it then appeared to me. I have since examined the authorities, and considered again the pleadings and evidence, and the result has been to confirm the opinion I then formed.

The plaintiffs come into court in two characters; as creditors of the estate of *Bradley*, charging the alienation from him to *Kilty* as void under the statute of Elizabeth; and as personal representatives of the estate of *Bradley*, being administrators with the will annexed.

To the first ground, it is a sufficient answer that the plaintiffs are not judgment creditors with execution issued, and so have no *locus standi* in this court, under the case of Smith v. Hurst, (*a*) and the cases which have followed this decision.

As representatives of *Bradley's* estate they come upon a mortgage made by *Kilty* to *Bradley* prior in point of date, but subsequent in point of registry, to the conveyances to defendants *Towner* and *Wilkins*. The bill alleges notice to both defendants, and some evidence is given of notice to *Towner*, none of notice to *Wilkins;* but plaintiffs ask a decree against both, on the ground that they have neither of them paid the whole of their purchase money. That point, however, is settled against

(*a*) 10 Hare, 30.

the plaintiffs, by the case of *Ferras* v. *McDonald*, *(a)* which decides that a purchaser having a prior registered conveyance does not stand upon the same footing as a purchaser, who has not registered, but that if he is a purchaser for valuable consideration he is protected; and it is immaterial whether the purchase money had been wholly paid at the time of notice given.

I understand it is not disputed that both *Towner* and *Wilkins* are purchasers for value; there is evidence of payment by *Towner* of a part of his purchase money, a mortgage being given for the balance. The bill treats both as purchasers for valuable consideration, and prays in the alternative that the unpaid purchase money be paid to the plaintiffs instead of to *Kilty*.

As to notice to *Towner:* there is no evidence of notice from a quarter which under the rules laid down in the authorities could affect him with notice as against his registered title, and he denies notice explicitly by his answer. Upon the question of notice, therefore, the case fails as against *Towner*, as well as against *Wilkins*.

With regard to the alternative prayer, *Towner* submitted at the hearing to pay to the plaintiff instead of to *Kilty* the unpaid purchase money secured by the mortgage, if such decree could properly be made. *Wilkins* in his answer states that the amount of his purchase money was $1150, of which he paid $1000 in hand, and for the balance gave two promissory notes each for $75, and he submits to pay the same under the direction of the court to the holders thereof or to the plaintiffs.

The bill alleges that the whole of the mortgage debt from *Kilty* to *Bradley* is unpaid, and it is taken *pro confesso* against *Kilty*. I think such order may properly be made. The debt from *Kilty* to *Bradley* is for

(a) 5 Grant, 310.

unpaid purchase money, and would form a lien upon the land, and I apprehend, upon the unpaid purchase money of the land so sold when sold to an innocent purchaser; unless as my brother *Esten* thought in *Baldwin* v. *Duignan*, (*a*) the lien is excluded by the taking of the mortgage for the purchase money; but even if so, the mortgage itself is an express charge upon the land, and the mortgage debt may, I apprehend, be followed into the unpaid purchase money of the land sold by the mortgagor to an innocent purchaser, and such would probably be the case whether the mortgage was for unpaid purchase money or for any other debt. The result is that the plaintiffs have an equity to receive the balance of the purchase money due from *Towner* and *Wilkins*; in the case of the latter, however, only on production of the notes.

THE DECREE drawn up on this judgment declared the plaintiffs entitled to so much of the purchase money agreed to be paid by *Towner* and *Wilkins* to *Kilty* as remained unpaid. Reference to Brantford to take accounts of what remains due on mortgage from *Towner* to *Kilty* and payment ordered in six months: in default a sale. Also an account of what is due by *Wilkins* in respect of his purchase money and payment to plaintiff's according to the terms of his promissory notes upon production and delivery thereof to *Wilkins*. Also an account of what is due on mortgage from *Kilty* to *Bradley* giving credit for what shall be paid by *Towner* and *Wilkins*, and what shall remain due to be paid by *Kilty* to plaintiffs. *Towner* and *Wilkins* to have their costs, including reference. No order as to other costs.

(*a*) Ante vol. vi., p. 595.

NICOL v. TACKABERRY.

Easement—Parol contract for conveyance of—Costs—Riparian proprietor.

A bill was filed by the owner of a mill, alleging a verbal agreement with the proprietor of land adjoining, for the right to pen back the water of a stream running through his land, and which was used for driving the mill of the plaintiff, in consideration of which he was to open up a road across his farm, for the use and convenience of such land-owner; but no writing was ever drawn up evidencing the agreement. The owner of the land subsequently sold and conveyed this estate, and his vendee instituted proceedings against the mill-owner for damages, by reason of the penning back of the water, which had the effect of overflowing a considerable portion of his land. The evidence in the cause being positive as to the agreement to permit the penning back of the water, and the road across the farm of the plaintiff having been used by the proprietor of the land, and his vendee, the court decreed a specific performance of the parol agreement, but, under the circumstances, without costs.

Statement.—This was a bill by *John Nicol* against *John Tackaberry*, seeking to enforce specific performance of a parol agreement, which it was alleged had been entered into in the year 1859, between the plaintiff and one *Charles Kinler*, whereby it was agreed that, in consideration of the plaintiff allowing a road to be opened up through his property from the land of *Kinler* to a point designated, he, *Kinler*, would give to plaintiff, his heirs and assigns, permission to pen back the stream used for driving the plaintiff's mill upon the land of *Kinler* to such an extent as might be necessary for the proper working of the mill. It appeared from the evidence in the cause that before the agreement, and since, during the time *Kinler* owned the property, plaintiff had been in the habit of damming back the water thereon, and instances given of *Kinler* using the road referred to after the agreement. It further appeared that *Kinler* subsequently sold to the defendant, who had instituted proceedings against plaintiff for flooding his land. Thereupon the present bill was filed, praying an injunction to restrain the defendant from proceeding at law, and that he might be ordered to convey the right of so penning back the water to the plaintiff, on the ground of notice, both actual and constructive, to the defendant, of the bargain between plaintiff and *Kinler*.

The defendant answered the bill, denying all knowledge of the alleged agreement, whereupon evidence was taken before his Honour Vice-Chancellor *Spragge*, and a motion was subsequently made before the Vice-Chancellor upon such evidence, as also several affidavits which had been filed in the cause for an injunction as prayed by the bill.

Argument.—Mr. *Blake* and Mr. *McCarthy* for the plaintiff.

Mr. *Strong*, Q.C., and Mr. E. *O'Brien*, contra, contended that this was a case in which, upon the evidence here adduced, specific performance would not be enforced, and the evidence having been taken *viva voce*, the case ought to have been brought on for hearing at this stage of the cause, the fact of the case being doubtful was not sufficient to warrant the court in interfering by way of injunction. *LeTarge* v. *D'Tuyll*; (*a*) *Ridgway* v. *Wharton*; (*b*) *Sugden's* Vendors and Purchasers, 13 ed., page 126; *Fry* on Specific Performance, secs. 229 and 335 were referred to, and commented on by counsel.

Judgment.—SPRAGGE, V.C.—The evidence before me in support of the case made by the bill is weak—so weak that if this were the hearing of the cause, and I had before me all the evidence that the plaintiff has to give, I should feel that it was not sufficient; not such as I could safely found a decree upon; and that I should be obliged to dismiss the bill.

The plaintiff's case at present rests mainly upon the evidence of *John Foster*, of whose desire to tell the truth I have no doubt. What I doubt is, whether I can safely trust to the accuracy of his recollection. He first speaks of a conversation between *Kinler*, the former owner of the land, since purchased by the

(*a*) Ante vol. i., page 227. (*b*) 3 D. M. & G. 677.

defendant and the plaintiff. He says they were making a bargain about the water and the road; the road being across plaintiff's broken lot ten, and the water spoken of being the right of the plaintiff to back-water. But he says that he did not pay much attention to what they said, and that they did not, so far as he knows, come to an agreement at that time. He proceeds to say that a short time afterwards he saw *Kinler* and asked him how he and the plaintiff had made out, when *Kinler* said that the plaintiff had given him the road and he had given the water. *Foster* says that at the earlier of these conversations others were present, and named *Brazil, Hough* and *Irvine*. To what extent this privilege of backing water was to extend he does not say.

The only other person who gives evidence of the alleged agreement is one *Samuel McConnell*, whose evidence certainly impressed me much less favourably than that of *Foster*, and whose veracity is moreover impeached. I do not think it safe to rely much upon his evidence. However, what he says is this, that he was working on the road on broken lot ten, and asked *Kinler* what he was giving *Nicol* for the road, and that *Kinler* said he was paying him no money, but giving him the privilege of the water for the road.

There is no doubt that the road across broken lot ten was opened, and that *Kinler* got the benefit of it, but I can hardly say that that is referable solely to the agreement set up by the plaintiff, for the plaintiff himself at the same time obtained the benefit of a road across a portion of *Kinler's* land, and the one may have been the consideration for the other. At the time spoken of by *Foster, Nicol* had built his grist mill and was putting up a saw mill, and a road from his mill across a portion of *Kinler's* land to a pinery was convenient if not indispensable to him, and by agreement between the parties he was to have the use of it for drawing saw logs to his mill.

The only material evidence at present in favour of the plaintiff is that of *Foster* and *McConnell*. On the other hand, there is the evidence of *Edward Lee*, *John Hayden*, and *Ann Kinler*, of language and conduct on the part of the plaintiff after the alleged agreement not consistent, as it appears to me, with the existence of such an agreement. There is, besides, the evidence of *Kinler*, to which, however, I am unable, from the manner in which it was given, to attach much weight.

There is also this circumstance, that of the three persons present at the supposed bargain, besides *Foster*, I have his evidence only; one *Hough* it is sworn is in Ireland, and a commission had been issued to take his evidence, the other two are not accounted for. It may be that the evidence of *Hough* will satisfactorily establish the agreement alleged. In the meantime the defendant should be allowed to proceed with his action at law to judgment. I think upon the case as it stands execution only should be stayed. The plaintiff should be prepared to bring on his cause for hearing at the next hearing term. If this were the hearing of the cause, I should go into the question raised by Mr. *Strong*. At present I think the bill sufficient, and I see no good reason why an agreement being in relation to an easement should for that reason not be specifically performed. There is on the other hand much force in his observation on the necessity of the plaintiff establishing an agreement definite in its terms before he can ask the court for its specific performance.

Subsequently the commission referred to in the judgment was returned from Ireland with the evidence of *Alexander Hough* taken thereunder, the effect of which appears in the judgment on the hearing of the cause, which was brought on to be heard upon the pleadings and evidence before his lordship the Chancellor.

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

Mr. *Strong*, Q. C., and Mr. *Osler* for defendant.

For the plaintiff it was alleged that in consequence of the agreement not having been reduced to writing, he had been under the impression that he had not the power of enforcing it against *Kinler*.

The answer of defendant, although denying knowledge of the agreement, admits that *Kinler* had made such an offer as is alleged in the bill; and although vague at first, the contract has been rendered certain by the use of the easements agreed to be granted by the parties respectively.—*Laird* v. *The Birkenhead Dock Co.* (*a*) The evidence, especially that taken under the commission, proves distinctly the agreement as alleged, and establishes clearly the right to the easement as against *Kinler;* and it is shewn that *Tackaberry* had notice sufficient under all the circumstances of the case to deprive him of the right to set up the defence of purchase for value without notice.

For the defendant it was contended that there was not evidence sufficient to enable the court to pronounce the decree asked for; that taken under the commission did not render the case much, if any, stronger than when it was before his honour the Vice-Chancellor. There is no evidence now of any one who was present at the contract which it is alleged was made, but only of casual conversations passing between the parties subsequently. Upon such evidence it would be unsafe to decree specific performance, but in this case there never was a binding agreement at any time. Whatever the arrangement may have been, it was intended that a writing should be drawn up evidencing the bargain between the parties before it should be considered as finally concluded.

If the bargain should be enforced in the unqualified

(*a*) 6 Jur. N. S. 140.

terms in which the witnesses speak of it, the defendant may lose the whole of his farm, for no limit is put as to the height of the dam or the duration of time for which plaintiff is to have the easement.

The utmost that is attempted to be established is a parol contract partly performed. Now possession to be considered a part performance of a parol agreement must be referable to that contract, and not to anything else; here it was admitted plaintiff was in the enjoyment of this same easement, before it is pretended any agreement was spoken of. Part performance does not apply to the acquisition of incorporeal rights; now here this is a mere easement, which by law could only pass by grant; it never could pass by livery of seisin.

But assuming that the court will apply the doctrine of part performance to easements, there is no evidence here to establish the agreement. No evidence is given as to the width or direction of the road: and the fact of defendant having used the road proves nothing, it may have been by permission of the owner of the soil; at all events, it is not necessarily referable to any contract. *Mortal* v. *Lyons*, (*a*) *Rice* v. *O'Connor*, (*b*) *Price* v. *Salisbury*, (*c*) *Reynolds* v. *Waring*, (*d*) *Pain* v. *Coombs*, (*f*) were referred to; the last mentioned case it is admitted makes against the defendant, but Lord *St. Leonards* disapproves of the view suggested by it, in his last edition of Vendors and Purchasers, page 152. Counsel also relied on the fact of the defendant's title being a registered one, which would be affected by nothing less than actual notice, constructive notice being insufficient for this purpose.

Mr. *Blake*, in reply, referred to *Webster* v. *Webster*, (*f*) as being a much stronger case as to the effect of notice than is sought for here. Here the road was actually

(*a*) 8 Ir. Ch. 112.
(*b*) 11 Ir. Ch. 510.
(*c*) 9 Jur. N. S. 838.
(*d*) Young, 346.
(*e*) 1 Del. & J. 46.
(*f*) 31 L. J. 655.

laid out and used, which does away with any vagueness in the agreement, if any ever existed. The registry acts do not apply, and besides, this defence is not set up by the answer, and the rule is, that it should be pleaded. He also referred to *Smith* v. *Baker*. (*b*)

Judgment.—VANKOUGHNET, C.—This is one of that unsatisfactory class of cases in which it is sought to enforce, specifically, performance of a parol agreement. Where parties will not reduce their agreements to writing, they ought not to be surprised that the court hesitates to perform them. The clearest evidence of the terms of the agreement must be furnished, and the mind of the court thoroughly satisfied of them, and the part performance relied upon to take the case out of the statute established to have been under and in pursuance of the agreement before the court will interfere. It is, I think, to be regretted that this exception to the application of the Statute of Frauds is now-a-days upheld. Looking at the fallability of human testimony, arising either from the bias of those who feel an interest in the matter, or from the want of attention and indifference of those who feel no interest in it, and are therefore looked upon as most reliable, though they have never sought to fasten in their memories facts to which they are called to depose, scarce any case will leave the judge free from more or less doubt in his mind. In times shortly after the passing of the statute, where part performance was permitted to remove a case from its operation, the art of writing was not so generally practised as now. Men had been accustomed by open acts of change of possession, unaccompanied by writing or deed, to deal with real estate, and it might well have been considered a hardship in many cases to deprive illiterate men of rights, which, notwithstanding the statute, continued thus to be created. Now, men have no difficulty in reducing or procuring to be reduced into writing their bargains. I suppose it would be impossible in any area

(*b*) 1 Y. & C. C. C. 223.

of four miles in this country to find even a small number of settlers or inhabitants not one of whom could write. Nevertheless the law which permits execution of parol or rather oral agreements partly performed, is as fixed now in our jurisprudence as the Statute of Frauds itself. I have then to enquire whether in this case the plaintiff's case is made out, and, after some hesitation, I have come to the conclusion that he is entitled to a decree, to which he is largely helped by the defendant's answer. The bill alleges the agreement to have been in consideration that the plaintiff would allow a public highway to be opened up through his lot ten, in the fifteenth concession of Tecumseth, from *Kinler's* lot on the south of it to the township line on the north of it; *Kinler* would allow the plaintiff, his heirs and assigns, the privilege of penning back the water of the stream up to and through *Kinler's* lot, to such an extent as might be necessary for the due and proper working of a grist mill and saw mill. The defendant in his answer does not deny that he ever had notice of this agreement, but that he never, at any time before or after his agreement with *Kinler* for purchase, was aware that any such agreement had been entered into. Now that the words "he never was aware" were used deliberately, and were not intended to cover want of notice, is manifest from the statement that up to and at the time of swearing his answer he was not aware of the agreement, though of course he had notice of it by the bill. It is true that he also says that he never heard anything about a road being given by plaintiff to defendant for the water privilege, but no weight can be attached to this paragraph of the answer, because it also covers the whole time down to the swearing of the answer. In the eighth paragraph of the answer, is the following statement: "I say that in the month of March, A.D. 1860, said *Kinler* came to me and said, that he had offered the privilege of flooding the north half of said lot number ten to plaintiff, either to sell it or to let it or to trade it for a road, but that plaintiff made him no answer except by abusive

language, and that he would therefore sell it to, and that he sold the said privilege to me." The importance of these two extracts from the answer will be seen when the fact is mentioned, that at least three years before this time a road had been constructed across the plaintiff's lot, from the defendant's lot, to the town line, thus giving the defendant access which he could not otherwise, than by a very circuitous route to the travelled highway, have had, and that the defendant himself did the main part of the work of making the road, and had actually been using it. Here then we have an absence of denial of notice by the defendant. We have an admission as against himself, that *Kinler* had offered the plaintiff the water privilege for the road, and we have the fact that *Kinler* actually had long before the defendant's purchase obtained the road. This seems to me to render the parol evidence of the alleged contract more reliable than it would otherwise have been. Can any one doubt that if *Kinler* had offered the water-privilege for the road, the plaintiff being ready to give the road as is proved by his having given it, would have refused that offer so important and so valuable to him; and does it not lead to the conclusion that the offer was actually made and was accepted; and that there was this trade of the water-privilege for the road? I think the evidence taken since the first examination of witnesses before my brother *Spragge* in connection with that evidence and the circumstances referred to above sufficiently make out the plaintiff's case. The evidence taken under the commission is very positive, but of itself would not to my mind justify a decree for the plaintiff. It is open to the objection, applying to all evidence so taken and standing unsupported, that it is given with the knowledge that however false, it subjects the witness to no penalty in human tribunals. It is objected that the extent of the water-privilege to be allowed to plaintiff is not clearly established. This is a difficulty, and will always be a difficulty, in such cases where the quantity of land which may be overflowed is not stated,

or where the height of the dam is not fixed, or the quantity of water that may be used is not ascertained beforehand; and in this case the plaintiff, in the absence of clear proof entitling him to anything more, must be content with a use of the water not more extensive than he had in 1856, when the bargain seems to have been made. It is also argued that the consideration is not properly stated—as it was a private not a public road that was bargained for. The evidence is that there was to be a road through plaintiff's lot; it does not appear from it whether it was to be a road for *Kinler's* exclusive use or not, and I read it that he was to have free egress and ingress from and to his lot by a road which the plaintiff declares to be a public road; and this seems to me to comply with the bargain on his part. Again it is alleged that there is here no such part performance as will take the case out of the statute, and Mr. *Strong* maintains this position very ably, but it is really not so much a case of part performance as of complete performance on both sides. It is true that the plaintiff did not enter upon the enjoyment of the water privilege under the agreement, as he had this by assuming it previously; and there was nothing for him to do after the agreement but to remain in possession or enjoyment of the easement. The defendant got the road, the plaintiff retained the easement: the agreement was performed. There may be in some cases difficulty in shewing a part performance when that rests merely in the enjoyment of an easement, and still more in proving constructive notice by the enjoyment which may not be of a character visible or tangible to the extent to which the right to the easement has been purchased; but that difficulty does not arise here, and the plaintiff is not put by the answer to proof of notice, of which, however, there is some evidence. I may observe in addition that the defendant does not allege by his answer that he has paid his purchase money.

Upon the whole case, I make the decree without costs, as it is not unreasonable in such a case for a

defendant to compel proof of his agreement by a party who has no writing to show for it, and who can only establish it by calling together witnesses scattered in all directions, and of whom or whose statements the defendant cannot be expected to know any thing; and in this case the more especially, where the testimony given at the first examination was, by my brother *Sprague*, considered insufficient to establish the case, and the plaintiff was let in to further proof.

KAINS V. MCINTOSH.

Principal and surety—Purchase by plaintiff in name of agent—Fraud and extortion.

A party secondarily liable, and entitled on payment of the debt to an assignment of the security held by the creditor, had agreed that that estate should be sold first, and his own estate liable only for the balance, and such estate was sold in a suit brought by the creditor to which both the parties primarily and secondarily liable were parties, and which estate was purchased by the creditor in the name of an agent: the party so liable, having forborne to apply to discharge the sale in that suit, and two years having elapsed, during which time the creditor sold the property, cannot, as a defence to a suit to enforce payment of the balance, insist that the sale in the former suit was invalid.

Where a party desires to impeach an instrument on the ground of fraud and extortion, the more convenient course is to institute proceedings in order to annul it, as it is rarely that effect can be given to a defence on such ground in a suit to enforce it.

Statement.—This was a suit by *William K. Kains* against *James McIntosh*, upon a mortgage given by defendant to plaintiff, for securing payment of the amount of a certain judgment against defendant and one *Matthew E. Annis* in favour of plaintiff, for £228 18s. 6d., with interest and costs, or so much of such judgment as might remain due after applying the proceeds that might be realized from the sale of *Annis'* interest in certain other premises; the bill then alleged the sale of such interest on the 2nd of March, 1860, for £170, for which alone defendant was entitled to credit on his mortgage, and asked for the usual reference and accounts, and sale in default of payment.

The defendant, by his answer, set up that in 1856 he had sold certain real estate to *Annis* for $3,000, $1,600 of which he paid and satisfied on the day of sale, thus leaving $1,400 due, for which *Annis* gave a mortgage on the property, payable in two instalments, and also giving his two promissory notes (for $1,000 and $400) collaterally with the mortgage; that plaintiff had bought the same from defendant, and as the notes were made payable to order, defendant had endorsed the one for $1,000 due to plaintiff, but which the defendant alleged was done solely for the purpose of transferring the note, and on the understanding that the defendant was not to be liable thereon, and that plaintiff had undertaken, after proceedings had been taken on such note, to stand between defendant and any proceedings in respect of it; that about six weeks afterwards defendant was served with a bill in this court to enforce the judgment which had been recovered by plaintiff against *Annis* and the defendant in that action in which defendant had made no defence, in consequence of plaintiff's undertaking and assurance. In that suit a decree was obtained for sale, and the property embraced in the mortgage assigned to plaintiff was sold, and knocked down at public auction to one *Thomas Kains*, a brother and agent of plaintiff, who conveyed shortly afterwards to plaintiff. In the meantime, and previous to such sale, defendant had executed the mortgage in question in this cause, but which the defendant alleged he had been compelled to execute, as his only chance of escape from utter ruin.

It appeared that plaintiff afterwards sold this property to one *Moore* for $2,100, plaintiff having had to pay $400 on a prior mortgage to one *Muir*, and the answer set up that *Annis* had given his note for $200, in order to obtain a stay of proceedings against him, which the plaintiff accepted, sued and recovered judgment upon against *Annis;* this the plaintiff, on his examination, denied, swearing that the $200 was given by *Annis* to obtain a stay of proceedings on the $400 note, not on the note for $1,000.

The defendant had also asserted in his answer that *Annis* had tendered to plaintiff $600, as part payment of the $1,000, but this the plaintiff positively denied on his examination. The evidence of one *George McIntosh* tended, however, to establish the fact, as he swore that he was present when *Annis* tendered some money to *Kains;* that he had counted $500 when, *Kains* saying he would not accept it, *Annis* rolled up the money and went away; and subsequently offered and paid *Kains* $20 for a stay of proceeding for three months, to enable *Annis* to make up the deficiency.

The case came on to be heard before his Honour Vice-Chancellor *Esten.*

Mr. *Blake* and Mr. *Abbott* for plaintiffs.

Mr. *Roaf* for defendants.

Argument.—The plaintiff's right to recover was objected to on the ground that defendant was not to be held liable for anything until *Annis'* property had been sold: that the sale which had been made was not a valid one, and that plaintiff having put it out of his power to assign to the defendant in the event of his paying the amount due by *Annis* under his mortgage, the effect was to relieve defendant from all further liability.

That time had been given in consideration of the $20 for three months: that this having been unknown to defendant until lately, and since the recovery of the judgment, the defence was now open to him: that the mortgage in this suit having been extorted from the defendant, the court would not enforce it, and that plaintiff should be bound to give credit to defendant in this suit for the amount realized upon the sale to *Moore,* if the court should be of opinion that plaintiff was entitled to any relief.

For the plaintiff it was contended that the objection

as to the invalidity of the sale under the decree against *Annis* and *McIntosh* could not be raised in this suit; if such an objection were tenable, it should have been raised in that suit, not now: that defendant is not in the position of a surety; his endorsement of the note, and in respect of which the judgment was recovered against him was for a consideration; and as to the amount received from *Moore*, plaintiff was now willing to treat that sale as having been made under the decree in that suit.

The other points relied on appear sufficiently in the judgment of

ESTEN, V.C.—I think the usual decree should be pronounced. During the time of the account and the six months allowed for payment, the defendant will have an opportunity of applying in the other suit to annul the sale, and then to apply in this suit to stay the proceedings, but at present I must deem that the security of *Annis* has been realised and that the balance is claimable on the mortgage in question. It is not contended that the defendant was not to be liable on his endorsement. No reliable evidence whatever exists of the fact, and the object could have been easily secured by an endorsement without recourse if such had been the intention. The plaintiff was justified in not accepting the $600 if it was ever tendered to him, and the refusal was indeed acquiesced in, for *Kains* offers $20 to delay proceedings for three months to enable him to raise the rest of the instalment. It is said, but not proved, that the plaintiff did not delay for the three months, which, if true, would have been a defence to the action. It is said, however, that this agreement discharged the defendant, who was only secondarily liable. Supposing such to have been the case, it afforded a complete defence to the action. It is said, however, that it has only recently become known. The defendant does not say this, and I think that with reasonable diligence it might have been known,

but the defendant does not raise the defence, but suffers judgment to be obtained against him, and when a suit is commenced on the judgment suffers the bill to be taken *pro confesso* against him, and when his property is about to be offered for sale makes this mortgage in order to gain time. I think that this objection cannot be allowed. It is said that a note for $200 was given in order to procure a stay of proceedings on the judgment for a year, but *Annis* and Mr. *Abbott* differed in their evidence on this point, and an instrument in writing which exists on the matter was not produced or accounted for, and under these circumstances it is impossible to attach any weight to this objection, which indeed was not urged in the argument. It is insisted, by the learned counsel for the defendant who argued his case with much ability that defendant paying $1000 was entitled to an assignment of the mortgage so far as it secured the $1000, and that the plaintiff having placed it beyond his power to perform this duty has discharged the defendant. But this view, I think, cannot be sustained. Defendant by giving the mortgage consented to a sale of *Kains'* lands subject to *Muir's* mortgage and to the plaintiff's mortgage as regards the $400, but free from the mortgage of $1000; and if a proper sale had been effected he could not claim the assignment of the mortgage which indeed he had waived. He says that the sale is improper and therefore this right has not been waived, but he refrains from applying to discharge the sale and thereby encouraged the plaintiff to deal with the property and to place it in its present position, and cannot therefore, I think, in this suit object that the sale was invalid, and insist upon the assignment of the mortgage as to the $1000, but the sale so far as it stands must be taken to be good and the right to an assignment of the security relinquished.

It is, however, insisted that the mortgage was procured by fraud and extortion, but of this fact I can see no evidence whatever, and I may observe that it is

rarely that effect can be given to such a defence; and that the more convenient course is to institute a suit in order to annul the mortgage, for which the defendant has had ample opportunity, the mortgage having been executed in February, 1860, and the present suit not having been commenced until May, 1862. It is complained that the balance remaining due after realizing *Annis'* interest has not been ascertained or notified, but defendant could easily have ascertained what it was and tendered the amount, or enough to cover what could be due, but he has not taken a single step for this purpose, and I do not see, therefore, why the plaintiff should not have the full benefit of his security. An offer was made during the argument to treat the sale to *Moore* as a sale under the decree, or to restore the land itself. If the plaintiff is willing to abide by this offer the defendant can avail himself of it, otherwise he must apply to discharge the sale in the other suit. The usual decree must be pronounced, in fact, perhaps, the plaintiff might fairly claim to be paid the costs occasioned by the defence, which has failed.

WHITTEMORE v. LEMOINE.

Ante-nuptial agreement—Trustee and cestui que trust—Parties—Costs.

A memorandum was produced, which was partially destroyed by fire, the purport of which was, that W. undertook to settle the property of his intended wife as her guardians should require; this was proved to be in the handwriting of W., and to have been seen in a perfect state since the decease of W., and, as the witness believed, signed by W., and that before the marriage he had produced and read a paper similar, so far as the memorandum went, to it. After the marriage the wife's property was all sold, and the proceeds applied by W. to the purpose of his business, who subsequently, and while in a state of insolvency, assigned to the cashier of a bank a policy on the life of himself (W.) in trust, to pay certain bills of his in the hands of the bank, and after payment thereof, to hold the moneys to be received on the policy for the benefit of his wife and children, but in the event of W. paying off the bills, to re-assign the policy to him, or as he should appoint. W. having died, the trustee received the insurance money, paid those bills, and claimed a right to apply the surplus in paying off other liabilities of W. to the bank. Upon a bill filed by the widow and children of W. against the trustee, the court thought the ante-nuptial agreement sufficiently established, and ordered the trustee to pay over the balance, with interest; and that the trustee, being the cashier of the bank, who had thus received the benefit of the moneys, he sufficiently represented the bank, and it was therefore not necessary to make the institution itself a party to the suit; but under the circumstances, directed all parties to the cause to receive their costs out of the fund.

Statement.—This was a suit by *Margaret Whittemore* and her four infant children, against *Benjamin H. Lemoine* and *John Herbert Mason*, setting forth, that in 1858 the late *Ezekiel Francis Whittemore*, the husband and father respectively of the plaintiffs, executed to the defendant, as cashier of La Banque du Peuple, an assignment on a policy of insurance on the life of himself for $5000, in trust first to pay certain acceptances of *Whittemore* then in the said bank, and the surplus, if any, to hold for the benefit of his widow and children; but if such bills were paid during his life-time, then to re-assign the property to him, or as he should direct. Some one or more of the bills having been paid by *Whittemore*, the defendant applied for and obtained payment of the insurance money after *Whittemore's* death, with which he paid off such of the bills remaining unpaid as the assignment was intended specially to cover, and applied the remainder towards payment of certain other liabilities of *Whittemore* to the bank; that

such application thereof was in violation of the trusts of the deed assigning such a life policy to *Lemoine*.

The bill alleged that the trusts declared in favour of the plaintiffs were made in compliance with an agreement executed by *Whittemore* previous to the marriage, and that relying thereon Mrs. *Whittemore* had surrendered a valuable real estate left her by her father.

The bill prayed that the trusts of the deed might be established, an account directed, and payment to plaintiffs; or that *Lemoine* might be ordered to account to the estate of *Whittemore*, of which the defendant *Mason* was the administrator, and as such made a party to the bill.

The main facts of the case, other than the antenuptial agreement, were not disputed. As to that, a portion of a written instrument, partially destroyed by fire, was produced, which was shewn to be in the handwriting of *Whittemore*, dated the 6th of April, 1843, and was as follows:—"*I hereby agree to sign a marriage settlement conveying and securing to my intended wife Miss Margaret Johnson, all the property made to her by the will of her father,* * * *late Mr. Robert Johnston,* * * *any time after our marriage that it may be required of me by her guardians, or either* * * *them, reserving to me* * * * *control of the.*"

Alexander Manning was examined as a witness. He swore, that shortly after the death of *Whittemore*, in looking over the papers of deceased, with his widow, he had found this writing, which was then complete, was in the handwriting of, and as he believed, signed by deceased: since that time a fire had occurred at the residence of Mrs. *Whittemore*: that Mrs. *Whittemore* had received under the will of her father some valuable real estate in the city of Toronto, all of which had been sold by *Whittemore*, and the proceeds applied by him

to the purposes of his business: that frequently, during his life-time, Mrs. *Whittemore* had refused to execute deeds either releasing her dower or for the purpose of alienating her estate, unless a proper settlement were made, when on receiving assurances that such would be done, she signed the necessary papers. Another witness, *Parks*, who was married to a sister of Mrs. *Whittemore*, swore, that before her marriage, Mrs. *Whittemore* resided in his house: that on *Whittemore* proposing to marry, he had waited on him and spoke as to securing his intended wife in her estate, when he said he would make provision for that; that a short time afterwards he came to the house of witness with a written paper which he read, the purport and effect of which were similar to the paper produced, so far as that goes; and that *Whittemore* had frequently during his life spoken to witness of the insurances on his life as a means of providing for his family.

It was admitted at the hearing, that at the time of executing the trust deed *Whittemore* was in insolvent circumstances.

Mr. *Hodgins*, for the plaintiffs, contended that it was sufficiently established that the marriage had been solemnised on the faith of the contract, and *Whittemore's* insolvency when the deed to *Lemoine* was executed was not material. Mrs. *Whittemore's* own property greatly exceeded in value any thing that could possibly be obtained from her husband's estate, including the property obtained by her in the suit of *Ross* v. *Mason*, *(a)* in this court.

Mr. *McGregor*, for *Lemoine*, submitted to pay the balance remaining as the court should direct, but contended the evidence was not sufficient to entitle the plaintiffs to succeed; the personal representative was the party properly entitled to it.

(a) Ante vol. IX., p. 568.

Mr. *McLennan*, for the administrator. The evidence is not sufficient to deprive *Whittemore's* estate of the benefit of this fund. He contended that the writing purporting to be an agreement to settle was not sufficiently proved, and the trusts of the deed itself provided that in the event of his being alive when the bills it was made to secure were paid, that the policy was to revert to himself. This could not be looked upon as a valid and binding deed of trust. Under all the circumstances, he contended that the fund properly belonged to the personal estate of the husband.

Thompson v. *Webster*, *(a)* *Harman* v. *Richards*, *(b)* *Jenkin* v. *Vaughan*, *(c)* *Goodwin* v. *Williams*, *(d)* *Buckland* v. *Rose*, *(e)* *Norcutt* v. *Dodd*, *(f)* *Shears* v. *Rogers*, *(g)* *Williams* on Exors. *(h)* were referred to by counsel.

Judgment.—VANKOUGHNET, C.—[Before whom the case was heard.]—I think the ante-nuptial agreement established; though in its terms it is somewhat doubtful in consequence of the destruction of a portion of the memorandum relating to them. It seems that the plaintiff, Mrs. *Whittemore*, owned a valuable property in Toronto at the time of her marriage with the deceased *Ezekiel Francis Whittemore;* and I think under the agreement referred to this was to be secured to her use. It was of course so far secured that it could not be parted with without her assent, but it seems from the evidence that at the solicitation and under the influence of her husband, she did part with it on the promise made by him that he would make it good to her by securing to her other property in lieu of it. No specific security was named, but it seemed that *Whittemore* looked to policies of insurance on his life as a means at least of

(*a*) 4 Drew. 628.
(*b*) 10 Hare 81.
(*c*) 3 Drew. 424.
(*d*) Ante vol. v., p. 539.
(*e*) Ante vol, vii., p. 440.
(*f*) Cr. & Ph. 100.
(*g*) 3 B. & Ad. 362.
(*h*) Vol. i., pp. 670 & 1557, vol. ii., p. 1560.

providing for his family, if not for executing the obligation he had come under to his wife. In January, 1858, he assigned the policy in question to the defendant *Lemoine*, in trust to pay off certain negotiable paper on which he was liable, and the balance, if any, to his wife and children in case he died before the paper was paid; and in case he in his life-time paid the paper, then to re-assign the policy to him. *Whittemore* died before all the paper was paid; and a portion has been paid out of the assurance moneys received by the defendant *Lemoine*, who has in his hands a balance which he submits to pay as the court may direct. There is no direct connexion between the promise of *Whittemore* to his wife and the trust declared in her favour in the assignment to *Lemoine;* but looking at all that had passed, I think I am justified in finding that *Whittemore* intended that trust as an execution of his promise, and that I should give the wife, or rather the widow and children, the benefit of it. It is true that *Whittemore* was insolvent at the time of the assignment, though he might not have been aware of it; but one of his highest obligations under the contemplated settlement, and his promises subsequently, was to his wife, whose property was sold for the purposes of his business. It is also true that in the assignment of his policy there is a provision that in case the paper was paid in *Whittemore's* life-time the policy was to be re-assigned to him. But I think no argument against the trust in favour of the wife can be drawn from this. *Lemoine* had been selected as trustee from the mere accident of his being cashier of the bank by which was held the bills whose payment the policy was intended to secure. He would not have been selected, and would most probably not have consented to have become trustee for the plaintiffs but for that circumstance, and had *Whittemore* got the policy back he could have appointed another trustee for his wife. I had some doubt as to whether *Lemoine*, who was the trustee for *Whittemore*, and also trustee for the bank, was entitled to his costs, as he admits that

the moneys in his hands were appropriated by the bank to other indebtedness of *Whittemore;* but considering the doubt which he might reasonably entertain as to whom the moneys were payable, and his submission to the order of the court, I think he should have his costs with the other defendant, the administrator, out of the fund, which I think, however, must be paid over with interest, as *Lemoine* admits that the bank has been using the money. It is not objected that the bank should be a party, and it seems to be agreed that they are sufficiently represented by their cashier *Lemoine.*

FINLAYSON v. MULLARD.

Redemption—Pleading—Costs.

Where a suit is brought for redemption and the defendant sets up an absolute conveyance by way of answer, to which the plaintiff simply files a replication, without amending his bill to impeach the conveyance, he cannot do so in evidence. Where, however, a cause was brought to a hearing under such circumstances, and the evidence was such as to create a strong suspicion of the *bona fides* of the transaction, the court gave the plaintiff, who had purchased from the alleged mortgagor, liberty to amend by making the mortgagor a party, with a view of impeaching the deed, and reserved the costs until the cause came on again; and the bill having been amended in accordance with such permission, and again brought on for hearing, the court, although unable upon the evidence to grant the relief asked, refused the defendants their costs up to the original hearing, in consequence of the untruthfulness of their answers.

The bill in this cause was filed by *Henry M. Finlayson* against *Jonah Mullard* and *Joseph Rogers,* praying redemption, under the following circumstances: it appeared that the land in question belonged to one *Ross,* under a purchase from government, upon which the whole purchase money had not been paid at the time of the transactions in question. *Ross* transferred his interest in this land to the defendant *Rogers* on the 13th of March, 1856, by an instrument absolute in form but intended by way of security. In July, 1859, *Rogers* sold and conveyed it to the defendant *Mullard* by way of absolute sale for $650, the whole of which is not paid. *Mullard* paid the remainder of the purchase money due to the government and obtained the patent. *Finlayson*

having obtained judgment against *Ross* for $70, purchased his interest in the land in question, and received a conveyance of it in March, 1860, in consideration of this debt and of some law expenses he had paid for *Ross*, and of two village lots worth $100, subject to the mortgage to *Rogers*, which he undertook to discharge, and which was supposed to amount to about $250. The consideration paid by the plaintiff amounted in all to $450. The bill simply stated that the conveyance to *Rogers* was made for securing a debt due to him by *Rogers*, without stating that it was absolute in form, and charged that *Mullard* had notice when he purchased the land from *Rogers* that he had only a redeemable interest, and prayed redemption in the usual form. *Mullard*, in his answer, insisted that he was a purchaser for valuable consideration without notice, and *Rogers* insisted that he purchased the land absolutely from *Ross*, as appeared from an instrument signed by him in October, 1859, and otherwise. Evidence was entered into at length, on both sides, from which it appeared, and was not denied by counsel, that the original transaction between *Ross* and *Rogers* was a mortgage. This also appeared from the fact that *Ross* remained in possession of the land after the transfer in 1856, and from the conduct of *Rogers* at an interview on the land, when *Ross*, *Rogers*, *Mullard*, and two persons of the names of *Bulmer* and *Taylor* were present; the fact was proved by the testimony of *Bulmer* and *Taylor*, who were disinterested and above all suspicion; and from *Roger's* behaviour on this occasion, it appeared that the transaction then existing between them with reference to this land was a mortgage, and it also appeared that *Mullard* then had notice that *Rogers* had only a mortgage title. *Mullard* at this interview offered to purchase *Ross'* interest for $650, and *Rogers* strongly pressed the sale, but *Ross* refused to accept less than $1000 for the land. Immediately after this, *Rogers*, behind *Ross'* back, sold and conveyed the land absolutely to *Mullard*, for $650, the sum that *Ross* had just before refused,

and in October following procured *Ross* to come to his tavern, where a settlement was sworn by a witness (*Copp*) to have taken place between them, when it appeared that a balance of $707 was due from *Ross* to *Rogers*, and an instrument was signed by *Ross* and *Rogers*, in form only a certificate, but capable of being used in connection with the former writings as evidence of an absolute sale of the property which *Rogers* had some time previously sold and conveyed to *Mullard*.

The cause came on to be heard before his honour V. C. *Esten*, upon the pleadings and evidence.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *A. Crooks*, Q. C., for defendant *Rogers*.

Mr. *G. D. Boulton*, for defendant *Mullard*.

The points relied on sufficiently appear in the judgment of

ESTEN, V. C.—The instrument which was signed by *Ross* and *Rogers* was of a somewhat singular character, in form a mere certificate, but designed, as I think, in conjunction with the previous transfer by way of security of March, 1856, to establish an absolute sale of the property which *Rogers* had a month or two before sold and conveyed to *Mullard*, and was probably procured by him in order to support the sale to *Mullard*, and perfect his title. Whether this transaction was a *bonâ fide* sale, as *Rogers* contends, or was intended by way of sale, in order to satisfy *Rogers'* debt in preference to *Finlayson's*, who was then proceeding against *Ross* for the recovery of his debt, and had obtained judgment; or was merely colourable, and intended solely to hinder and delay *Finlayson* in the recovery of his debt, it was equally binding upon *Ross*; and *Rogers* having previously sold and conveyed the land to *Mullard*, it would feed and support that sale, and the subsequent transfer to the

plaintiff must necessarily be inoperative. It is true that the transaction in question was attended by circumstances which make it very doubtful whether it could be sustained, among which I may notice that *Ross* was illiterate; that he merely desired *Copp* to draw up a receipt or certificate; that although it was read to him, it does not appear that it was explained to him that it would operate as an absolute sale, contrary to its natural import; that it is of an ambiguous character, and that the fact of the previous sale to *Mullard*, under the circumstances that have been proved, was not disclosed to *Ross* by *Royers* on this occasion. It would be premature, however, to express any decided opinion on this point. The transaction must stand until it has been impeached and overthrown, and so long as it stands it destroys the plaintiff's title derived from the transfer of March, 1860. It has been attempted to assail this transaction in evidence, although it has not been impeached by the bill, but this, I think, was not allowable. If a redemption bill be filed, and the defendant set up an absolute conveyance, and the plaintiff simply file a replication without amending his bill, he merely, I think, puts the fact of the sale in issue, and he cannot, when the fact is proved, shew that it is not in point of law what it purports to be, because it ought to be set aside. This is the course adopted by the plaintiff on the present occasion. The bill does not impeach the transaction in question. The plaintiff could not institute a suit for that purpose; he must join *Ross*, whose evidence would then be excluded. He asks leave, however, to amend his bill for the purpose of impeaching this alleged sale. I think it is a proper case in which to grant that indulgence. The suit will not be altogether new, for it will still be necessary to insist, and to prove that the first transaction was a mortgage. It is true that the plaintiff's neglect to amend his bill renders it necessary to revert to an anterior stage, and travel over the same ground a second time; but the conduct of the defendants has not been commendable. They should

have admitted the original transaction to have been a mortgage, and relied upon the transaction of October as constituting, in conjunction with the previous transfer, an absolute sale, and had the plaintiff's attention been directed to this case, he might have been led to amend his bill for the purpose of impeaching a transaction thus relied upon as forming the foundation of the defendants' title. I therefore think that the plaintiff should have liberty to amend his bill for the purpose of impugning the transaction of October, 1859, if he shall so desire, for which purpose he must join *Ross* as a party. I make no order as to costs, which will abide the event.

In accordance with the leave given to amend, the plaintiff amended the bill by adding *Ross* a plaintiff, impeaching the transaction of October, 1859, in the manner suggested, and the case was again brought on for hearing on the amended pleadings and additional evidence, when the same counsel appeared for the parties respectively.

Judgment.—ESTEN, V. C.—I have perused the original and amended pleadings, and the former and additional evidence in the case—I except, of course, the evidence of *Ross*, which was offered at the hearing but was decided by me to be inadmissible. *Ross* is, in form, the real plaintiff: *Finlayson* can be joined only for the purpose of obviating any objection which might be founded on the transfer to him of the subject matter of the suit. He had no interest, was not entitled to call a single witness, and could not of course call his co-plaintiff *Ross*, in form the real plaintiff. The case is not free from suspicion; but I think enough does not appear to warrant the court in annulling the sale to *Rogers*. I decided at the former hearing that the instrument of the 10th of October, 1859, combined with the previous transfer by way of mortgage, constituted an absolute sale of the property in question, and that it was incumbent upon *Ross* to overthrow this transaction

before any relief could be obtained such as was prayed by the bill

It appears that in July, 1859, when this property unquestionably belonged to *Ross* subject to the mortgage held by *Rogers*, as was perfectly known both to *Rogers* and *Mullard*, a sale to *Mullard* for $650 was pressed by *Rogers* and *Mullard*, when *Ross* however positively refused to consent to it or to accept less than $1000 for the property, and disputed the amount of *Rogers'* debt, who claimed to be due to him from *Ross* about $600, while *Ross* insisted that not more than $200 could be due to him. Immediately after this occurrence *Rogers* bargained with *Mullard* for the sale of the property to him for $650—the very sum that *Ross* had refused to accept. It is said by the defendants that *Ross* consented to this sale, but no evidence exists of this fact, for I reject *Albert Rogers'* evidence as insufficient on this point. Three months afterwards the transaction occurs between *Rogers* and *Ross* which forms the subject of this suit, upon which occasion *Ross*, who in July denied that he owed *Rogers* more than $200, seems to have been easily satisfied that he owed him $707.34, and to have been very willing to accept a discharge of that debt as a full consideration for the absolute sale of the property for which three months before he had demanded $1000. It looks very much as if *Rogers* was determined that a sale should be effected to *Mullard* for $650, *per fas aut nefas*, and as if having made such a sale behind *Ross'* back, he had procured from him the instrument of the 10th of October, 1859, in order to enable him to perfect it, perhaps by persuading him that it was necessary for the protection of the property against *Finlayson's* execution; *Ross* intending the transaction to be merely colourable but *Rogers* intending to avail himself of *Ross'* fears to make himself master of the property. This is the strongest light in which the matter can be placed for the plaintiff; and whether under such circumstances *Ross*

could obtain any relief I will not express any opinion. No legal adviser certainly was present on behalf of *Ross*, nor indeed on behalf of *Rogers*. *Rogers* states both in his evidence and in his affidavit upon production of papers, that he delivered to *Ross* upon this occasion a number of notes which he held against parties made to himself and others, and amounting to more than $707 39 cents. *Copp* on the other hand states that no papers were produced. The notes might have been delivered before *Copp* entered the room, but it is not probable that they would have relied on memory to furnish the items when the notes were at hand; either it is untrue that notes were delivered, or *Copp* must have entirely forgotten the circumstances. In point of fact the land was not seizable under execution. It had not been granted by the Crown. There was no reason to fear *Finlayson's* execution; but this might have been unknown to both parties. *Ross* might, fearing *Finlayson's* execution, have applied to *Rogers*, who might have convinced him by producing notes that he owed him $707.39, and *Ross* might have been willing to make an absolute sale of the land in consideration of the discharge of this indebtedness in preference to permitting a sale under *Finlayson's* execution. He must have known that he was dealing with the land on the occasion of making the settlement on the 10th October. The instrument, *Copp* says, was read to him. He afterwards admits to *Kidd* that he had sold the land in question to *Rogers*, and that he had paid him for it. At this time *Finlayson* was pursuing *Ross* keenly. He first endeavoured to obtain from him an order upon *Rogers*, no doubt supposing that *Rogers* had purchased the land, or owed part of the price. Failing in this attempt, he issues a judgment summons, examines *Ross*, and asks him whether he cannot furnish an order upon *Rogers*. Upon these occasions *Ross* resists *Finlayson's* efforts, and is evidently upholding the sale to *Rogers* with all his power. He afterwards sells to *Finlayson* for less than one-half of what he had insisted upon

getting in the July previous. He was conscious of having dealt with *Rogers* respecting the property in a manner that rendered it impossible to demand for it what he had previously required, and instead of impeaching the transaction with *Rogers* himself, he sells the right to do so to *Finlayson*, who is in fact the real plaintiff. Upon the whole, although the transaction in question is not, as I have already said, free from suspicion, I think the safer course is to dismiss this bill; which must be without costs to the original hearing on account of the untruthfulness of the answers in denying that the first transfer was a mortgage, and *Mullard's* knowledge of it; both which facts are clearly proved, but with costs from that time.

CRAIG V. THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Equitable defence—Effect of raising it at law.

If an equitable defence be properly raised at law, and adjudicated upon, the adjudication cannot be reviewed in this court; but a party will not be so precluded when the defence is not properly raised at law, and judgment, therefore passes against it.

Statement.—This was a suit against the *Gore District Mutual Insurance Company* and one of the directors thereof, seeking to impeach certain claims of the company, on the ground of constructive fraud, and alleging that improper charges had been made against the plaintiff, in respect of interest. In opposition to the relief sought, the defendants set up that the same facts had been raised by the plaintiff by way of defence to an action at law brought against him to recover these demands.

The facts of the case are wholly unimportant as regards the present report.

Mr. *Roaf*, for the plaintiff, now moved to restrain proceedings on the judgment at law.

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

Judgment.—ESTEN, V.C.—[Before whom the motion was made.]—It is contended that the matters urged in the bill were raised at law, by way of equitable defence to the action, and the judgment of a court of law passed upon them. If an equitable defence be properly raised at law, and adjudicated upon, the adjudication cannot be reviewed in this court. But when this equitable defence is not properly raised at law, and consequently judgment passes against it, I do not see that the party entitled to the benefit of it should be precluded from raising it in this court. The only equitable plea in the present case was the first one; the third is a legal plea of usury in contravention of 16th Victoria, chapter 80; the first plea does not offer the defence in the shape in which it is raised in this suit. It merely insists that *Hamilton*, as a director, was incapaciated from exacting excessive interest from the company, insisting that *Cooke* was a trustee for him, not insisting upon the incapacity of *Cooke*, as assignee of a *chose in action* to claim what his assignor could not claim, and not insisting upon the incapacity of *Cooke* to claim any benefit arising from his employing a director as his agent, and placing him in a position in which the duty to himself conflicted with his duty to the company. Moreover, I do not see how the court of law could administer effectual relief in the absence of *Hamilton*. The object of the present bill being to impeach transactions, on the ground of constructive fraud, arising from a fiduciary relation of an agent, he seems to be a necessary party to the litigation. The only remaining question is, whether the suit is properly constituted; but as a resolution is produced, authorising the prosecution of the suit in the name of the corporation, and the question is, therefore, only one of costs of the proceedings to this time, as I should certainly permit an amendment on proper terms; and as I am anxious to dispose of the injunction motion, and have little time at the present moment to consult the authorities on this point, which are numerous, I shall reserve the question permitting the record to be amended by the substitution of the corporation as plaintiff.

LEDYARD v. MCLEAN.

Specific performance—Construction of agreement—Cross-relief—Oil well—Examination of witnesses—Venue—Costs—Parties.

The court in adapting itself to the exigencies of mankind, as they arise from time to time, will deal with new subjects as they present themselves so as best to effectuate the intentions of the parties, and will not allow rules and principles applicable to a different state of circumstances to interfere with the exercise of its jurisdiction whenever in the opinion of the court it can be usefully exercised and where money has been expended upon the faith of an agreement, although otherwise the court might not have enforced the contract, it will not entertain objections to the form of the contract when it can execute it, and in doing so, will construe the agreement liberally.

Where, therefore, the owner of land made a demise of 50 acres for 14 years at a nominal rent for the purpose of boring for oil, and contemporaneously executed an agreement by which the owner agreed to convey at any time a road-way from any wells, the lessee might dig or bore to a certain road, and "*also sufficient land for the working of such well or wells*," the lessee agreeing to pay "$100 *for the first well he might work for oil, and the sum of* $50 *per acre for the land necessary for working such oil well on such road-way*," and "*the sum of* $50 *for any oil well he shall work after the first one, and the sum of* $25 *per acre for any land necessary for working said well or wells and the road-way*." The lessee having divided a portion of the 50 acres into acre lots, having a frontage of from 80 to 100 feet, sold his interest in one such acre to a third party who went into possession and opened a well, erected an oil refinery and constructed the necessary tanks and works for separating the oil from the water with which it is mixed when taken from the earth, and declared his option of purchasing within the time specified. The owner of the fee having sold and conveyed his interest in the whole 50 acres, his vendee objected to convey the acre except upon terms not warranted by the agreement, and subsequently refused to convey more than in his opinion was absolutely necessary for working the well in its then state, the produce of which had become greatly diminished, and filed a bill asking to have the agreement construed, and an injunction against the occupant continuing the refinery on the premises. The evidence in the cause shewed that by constructing tanks one above another a great saving of space would be gained, but at an expense greatly exceeding the value of the crude oil, and that the refinery occupied a space equal to about one-twenty-fourth of the whole acre. The court was of opinion that under the agreement the purchaser was not entitled to space for a refinery on the premises, but it appearing that the sinking of another well within the limits of such acre would tend to injure the well already sunk, and that an acre was not too large a piece for the purposes contemplated, refused the injunction as asked for; and the purchaser by his answer having asked cross-relief by way of specific performance of the agreement, a decree was made accordingly; the deed to be prepared under such decree to provide for payment of the sums stipulated for in the event of the opening of any future wells upon such acre: but in such a case the party so claiming specific performance will be liable to pay for any other well or wells opened and worked upon the whole 50 acres, by other persons; the assignee in this respect standing in no better position than his assignor, the original lessee, and the contract not containing any stipulation or agreement for the laying off of the 50 acres

into sub-divisions; and the master having required a list of all persons who had opened and worked wells upon the property with a view to making them parties in his office; and taking an account of what they owed respectively in order that they might be bound thereby; and that the defendant might thus acquire a lien on their portions of the land for the sums so to be paid by defendant. *Held*, on motion by way of appeal from this direction of the master, that such other purchasers were not proper parties: nor could the defendant thus acquire any lien upon their property, or, in the absence of a request, any claim against the parties for re-payment of the amounts advanced on their accounts, there being no legal liability on his part to make such payment. And, *Quære*, if even he could thus acquire such lien or claim, whether they would in that case have been proper parties.

Where the parties to a cause had produced and examined their witnesses at Toronto, all of whom resided at a distance therefrom, and in close proximity to one of the circuit towns, the court, while awarding the general costs of the cause to the defendant, refused him the costs of the attendance of his witnesses.

Statement.—This was a bill by *Thomas Douglas Ledyard* against *Thomas McLean*, setting forth that in the month of March, 1860, one *William Foord*, of Enniskillen, being seized in fee of certain lands in that township, agreed with one *James N. Scatcherd* to grant him the right and privilege to enter thereon to bore and dig for oil therein, which agreement was reduced to writing by *Scatcherd*, and was embodied in two separate instruments, which were executed by *Foord* and *Scatcherd*, and were in the words and figures following:

"This indenture made this the thirteenth day of March, in the year of our Lord one thousand eight hundred and sixty, between *William Foord*, of the township of Enniskillen, in the county of Lambton, and province of Canada, yeoman, of the first part, and *James N. Scatcherd*, of the city of Buffalo, in the state of New York, one of the United States of America, of the second part, witnesseth that the said *William Foord* for and in consideration of the rent and agreements hereinafter mentioned to be paid and kept by the said *James N. Scatcherd*, he the said *William Foord* hath demised and doth demise, and to farm let unto the said *James N. Scatcherd*, his executors, administrators and assigns the right and privilege to enter into and upon the east half of the east half of lot number eighteen in the second concession of the township of Enniskillen, in the county of Lambton and province aforesaid, for the term of fourteen years from

the date hereof, and to bore and dig for oil on any part of the said lot or hereby demised premises except as hereinafter mentioned, that is to say, the lessee, his executors, administrators and assigns, agrees that he will not bore or dig for oil on any part of the east half of the east half of lot eighteen that may be under crop of any kind, until the amount of damages likely to be sustained as to such crops shall be paid or tendered to the lessor, or the amount of such damage may by agreement of the lessor and lessee be referred to and estimated by three of the councillors of the said township, and in either case the amount of damages shall be paid or tendered before commencing to bore or dig where such crops may be, and the lessee is hereby given the privilege of egress and regress of and from said demised premises for himself, his executors, administrators and assigns, his and their servants and agents, horses and carriages, teams and conveyances at all times during the said term necessary for the free and ample enjoyment of the privileges hereby granted and the right to take for his and their own use and benefit all the oil he or they may find. To have and to hold the premises and privileges hereby demised unto the lessee, his executors, administrators and assigns, for the full and complete term of fourteen years fram the date hereof. Yielding and paying the sum of one dollar per annum if demanded, and the receipt of the first year's rent is hereby acknowledged. And the lessee covenants with the lessor to pay rent and to fill up any well he may dig or bore for oil and not use, and that he will deposit with the lessor the sum of fifty dollars before commencing to dig or bore: such sum to be held by him as a guarantee that the above mentioned wells or holes shall be filled up again by the lessee. And the lessor covenants with the lessee for quiet enjoyment of said demised premises free of all incumbrance and claim whatever during said term: proviso for re-entry by the lessor in case the lessee shall not commence to dig or bore a well within eighteen months from the date hereof. In Witness," etc.

"This agreement made between *William Foord*, of the township of Enniskillen, county of Lambton, and province of Canada, yeoman, of the first part, and *James N. Scatcherd*, of the city of Buffalo, in the state of New York, one of the United States of America, gentleman, of the

second part, witnesseth that whereas the said party of the first part hath leased unto the said party of the second part the privilege of boring and digging on the east half of the east half of lot number eighteen, in the second concession of the township of Enniskillen aforesaid, for the term of fourteen years, said lease being dated on the thirteenth day of March, one thousand eight hundred and sixty; the said party of the first part agrees to sell and convey by deed without incumbrance or dower, at any time or times during the said period of fourteen years he may be required to do so by the party of the second part, a good title unto the said party of the second part, his heirs and assigns, for the consideration hereinafter mentioned, a roadway from any wells the said party of the second part may dig or bore to the side road on the east side of the said half of the east half of lot No. eighteen: said roadway to be laid out in the most direct way from said well or wells to the side-road, providing the creek does not interfere; also sufficient land for the working such well or wells, said conveyance to be made when the said party of the second part complies with the conditions agreed to be performed by him. The party of the second part agrees to pay unto the party of the first part, his heirs or assigns, the sum of one hundred dollars for the first well he may work for oil, and the sum of fifty dollars per acre for the land necessary for the working such oil well or said roadway: the party of the second part agrees to pay to the party of the first part the sum of fifty dollars for any oil well he shall work after the first one, and the sum of twenty-five dollars per acre for any land necessary for working said well or wells: it is understood that boring or digging for oil is not to be understood as a working of wells for oil. In witness," etc. And the latter of such instruments was duly registered in the registry office of the county on the 5th of April following: that *Scatcherd* entered into possession, and without any title other than that obtained under these agreements, surveyed and laid off the premises into subdivisions, and that defendant claiming under *Scatcherd*, claimed the right to one of such subdivisions [lot No. 1]: that *Foord*, by deed of bargain and sale, in August, 1862, sold and conveyed the said fifty acres to plaintiff: that defendant, under such assignment from *Scatcherd*, claimed exclusive right of

possession to such sub-division, and had commenced certain permanent buildings for the purpose of refining the oil obtained on the land, which plaintiff insisting he had not the right to do, caused him to be served with notice, "that as owner of the east half of the east half of lot eighteen in the second concession of Enniskillen, fifty acres, I hereby forbid you to erect any buildings or structures whatever upon any portion of the said lot, (signed,) T. D. Ledyard," and caused a similar notice to be inserted in the newspaper called the *Oil Springs Chronicle*, published within half a mile of the premises. The bill prayed, amongst other things, to have the true construction of the agreement between *Foord* and *Scatcherd*, under these instruments declared, and the rights of plaintiff and defendant determined, and for an injunction to restrain continuing or using or suffering or permitting to be used or continued on the premises any buildings or erections put up or made thereon; or from sinking any tanks on the same, and from using any already sunk thereon.

The defendant answered the bill, claiming the right to do all that he had done on the property, as assignee of *Scatcherd*, from whom he had purchased in good faith and to whom he paid the price of $1200, and went immediately into possession under such assignment, which possession he had retained ever since, and had expended large sums in developing the well of oil on it, and erecting buildings, machinery, and tanks necessary for the efficient working of such well: that before bill filed, he offered to do all things necessary to become the absolute purchaser of the premises, and submitted by the answer to pay any thing plaintiff might be found entitled to under the instruments; and prayed a specific performance of the agreement so far as said acre is concerned, and a declaration that defendant was entitled to the full and undisturbed possession thereof.

The plaintiff having filed a replication putting the

cause at issue, evidence was taken before the court at considerable length, for the purpose chiefly of establishing whether or not the defendant was requiring a deed of a greater portion of the property than he was entitled to claim under the agreement.

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

Mr. *Roaf* for defendant.

Haywood v. *Cope*, (*a*) *Stuart* v. *The London and North Western Railway Company*, (*b*) *Hook* v. *McQueen*, (*c*) *McLaughlin* v. *Whiteside*, (*d*) *Webb* v. *The Direct London and Portsmouth Railway Company*, (*e*) *Milnes* v. *Gery*, (*f*) *Hall* v. *Warren*, (*g*) *Gourley* v. *The Duke of Somerset*, (*h*) *Jackson* v. *Jackson*, (*i*) *Meynell* v. *Surtees*, (*j*) *Sanderson* v. *The Cockermouth and Workington Railway Company*, (*k*) *Pembroke* v. *Thorpe*, (*l*) *Great Western Railway Company* v. *The Desjardins Canal Company*, (*m*) *Norway* v. *Rowe*, (*n*) *Chetham* v. *Williamson*, (*o*) *Bainbridge* on Mines, pp. 84 and 250; *Fry* on Special Performance, 90, were cited.

Judgment.—SPRAGGE, V.C.—The question in this case arises upon two documents; bearing date the 15th of March, 1860. The parties to which are *William Foord*, of Enniskillen, and *James W. Scatcherd* of Buffalo. By the one document *Foord* demised to *Scatcherd* the right and privilege for fourteen years to enter upon 50 acres of land in Enniskillen, the property of *Foord*, and to bore and dig for oil on any part of the land, and to take for his own use and benefit all the oil that he might find; the rent reserved was one dollar a year, if demanded.

(*a*) 25 Bear. 140
(*b*) 1 D. M. & G. 721.
(*c*) Ante vol. ii., p. 490.
(*d*) Ante vol. vii., p. 573.
(*e*) 1 D. M, & G. 521.
(*f*) 14 Ves. 400.
(*g*) 9 Ves. 605.
(*h*) 19 Ves. 429.
(*i*) 1 S. & G. 184.
(*j*) 3 S. & G. 101.
(*k*) 11 Beav. 497.
(*l*) 3 Swan, 437.
(*m*) Ante vol. ix., p. 503.*
(*n*) 19 Ves. at p. 156.
(*o*) 4 East, 469.

*Since reversed on appeal.

In one part of the instrument the 50 acres are called the demised premises. That instrument, taken by itself, conveyed valuable privileges to *Scatcherd* for a merely nominal consideration. By the second document *Foord* agreed to sell and convey to *Scatcherd* at any time or times during the said period of fourteen years, a road-way from any wells that *Scatcherd* might dig or bore, to a side-road on the east side of the land, "also sufficient land for the working such well or wells," and *Scatcherd* was to pay "the sum of $100 for the first well he may work for oil, and the sum of $50 per acre for the land necessary for the working such oil well, and the said road-way," and "the sum of $50 for any oil well he shall work after the first one, and the sum of $25 per acre for any land necessary for working said well or wells, and the road-way."

Scatcherd divided 25 acres of the 50 into acre lots, each lot running from the east side-road, to the rear of the land, forming a narrow strip, having a frontage of from 80 to 100 feet. The defendant is the purchaser from *Scatcherd* of his interest in one of these lots; the plaintiff is the purchaser from *Foord* of the 50 acres, subject to the interests created by the instruments to which I have referred.

There is an oil well upon this acre; it was at first, or soon afterwards, what is called a flowing well, producing as much as 500 barrels of crude oil in a day, when worked for twelve hours, from which the defendant's witnesses infer that it was capable of producing twice that quantity, if worked through the whole twenty-four hours. In the autumn of last year it gradually failed as a flowing well, and in January last ceased to flow, and has since been converted into what is termed a pumping well. While it was a flowing well, the defendant put up buildings and machinery for the refining of the crude oil, sufficient, indeed, only for refining a small proportion of the crude oil produced. At that period the demand for

oil was very small, in proportion to the quantity produced; and the price of crude oil consequently so low as in the opinion of some of the witnesses, not to be remunerative, while at the same time refined oil sold at a remunerating price.

The bill asks for a construction of the agreement, and for an injunction mandatory as to buildings, machinery, and tanks, already erected and placed, and to enjoin future erections. The prayer of the bill is obviously too large, and I understand what is asked at the hearing is only against the refinery, and that the defendant be confined to such space as is absolutely necessary for the working of the well, it being considered, as I understand, that the defendant is entitled to such space as may be necessary for separating the oil from the water, with which it is mingled when taken from the well, for which purpose tanks are necessary for handling and barrelling the oil, and teaming it off the premises.

The defendant, on the other hand, contends not only for a refinery, but for sufficient space to prevent the sinking of other wells; which might interrupt the supply of oil to the defendant's well.

The plaintiff contends that the effect of the instruments between *Foord* and *Scatcherd* is only to confer a license to dig wells on a certain piece of land, and that there remained in *Foord* a right, himself, to dig and bore wells for oil. Taking both the instruments together, for so they must be read, as forming one agreement, I incline against this construction, but practically, it makes no difference as to the defendant, for I think, upon the evidence, there being already one well upon the defendant's acre, the boring for a second within its limits would seriously endanger the continued production of oil from this well, and so be in derogation of the license.

On the other hand, I think the defendant claims too

much; and first, as to the refinery. Refining oil, and selling it refined, may be a more profitable use of the oil well than selling the crude oil, but the defendant must be confined to what has been stipulated for, viz., sufficient land for working the well, or, as is expressed in other parts of the agreement, land necessary for working the well. I think a refinery something beyond this and that it bears much the same relation to working an oil well as smelting ore taken from a mine does to working a mine. That it is not a necessary adjunct is proved by the circumstance of the greater number of the wells in the neighbourhood of the one in question, being worked without refineries, and of this well, when at its largest production being worked, as to the greater proportion of its produce, without the refinery. As a fact, too, many refineries are distant from the oil wells.

The evidence, as to the quantity of land necessary for the working of the defendant's well, is conflicting; but there is evidence that he does occupy and use fully an acre in working it, and that, according to the evidence of witnesses, without waste of space. It was put to the witnesses whether space might not be saved by making the tanks deeper, or by placing them in tiers, one above another; but I think it was shewn that neither one nor the other would be advisable. It may be possible that some small space might be saved, but in construing the words used in the agreement, "sufficient" and "necessary," we must look at them in connection with the value of the land, and of the article produced from it, which was the subject of the contract: for instance, if it were proved that twenty feet square might be saved by the expenditure of £100, I think the court ought not, for that reason, to say that the twenty feet square is not necessary for the working of the well. But then a portion of the land so occupied and used is covered by the refinery; upon calculation I find about one twenty-fourth of an acre. When the defendant's was a flowing well, he actually occupied about one acre and a half of

ground, he and his neighbour occupying portions of one another's land, and it is in evidence that one person having a well producing considerably less than the defendant's, and who already had half an acre of land with it, procured an additional half acre, and found it not more than sufficient. This included a refinery. If the defendant's well was now a flowing well, I should say upon the whole of the evidence that if I confined the defendant to less than an acre, I should be putting upon the agreement a more strict and straitened construction in regard to quantity of land than the parties themselves contemplated, and than was reasonable; and I may observe here that in fixing the price for the land that might be required, it was by the acre. I do not mean that if *Scatcherd*, or those claiming under him, should shew an acre and a quarter, for instance, to be necessary, he would be warranted in taking two acres; but it tends to shew that very few fractional parts of an acre were not in the contemplation of the parties. But apart from that, supposing it proved that a full acre was reasonably necessary, and was used, and that one twenty-fourth part of the acre was used by the refinery, I do not think that I ought to conclude that twenty-three twenty-fourths of an acre was all that was necessary for the well, without the refinery, and restrict the defendant to that quantity.

The defendant, doubtless, disposed his buildings and tanks, and his space for barrelling and teaming, and the like, with a view to the well and its produce continuing what it was when a flowing well. The parties, when they made this contract, and the purchaser, when acting under it, were dealing with a new thing, and ought not to be held to consequences which could not be foreseen.

From the evidence I judge that with the present capacity of the well half an acre of land would be sufficient for working it; but does it follow that the defendant is to be restricted to that quantity? So far

as the plaintiff's bill is concerned, apart from the cross-relief prayed by the answer, I should say, certainly not. The defendant properly occupied and used an acre; and supposing him only a tenant for the fourteen years, the court would not lend its aid to his landlord to compel the removal of buildings and tanks so properly put up, because, from altered circumstances, contemplated by no one, a less space and smaller buildings would not suffice. But there is another reason, it cannot be told that this well may not become again a flowing well by natural causes, by deeper boring, or otherwise, and be restored to its former capacity; or that the like quantity may not be obtained from another well upon the defendant's acre. There surely can be no equity in the plaintiff under such circumstances to have any of these erections removed. Further, the defendant elected and actually offered to purchase early in November, 1862, when the well in question was still a flowing well, and the plaintiff refused to sell, except upon terms not according to the contract. *Foord* agreed to sell and convey from time to time during the fourteen years, and the defendant's right to purchase is not denied. I should say the defendant's rights must stand now as they were then; otherwise the plaintiff would profit by his improper refusal to perform *Foord's* contract. For these reasons I have no doubt as to the propriety of denying the relief prayed by the bill.

With regard to decreeing specific performances to the defendant, as prayed by the answer, I do not think the case governed by *Smith* against the municipality of Port Hope. In that case specific performance was not prayed by the answer, but, as I understand from the note of my brother *Esten*, compensation in lieu thereof; and what was prayed was upon circumstances independant of the transaction upon which the bill was founded, and so not within the general order. This case seems to me to come within the general order, the right to relief (if any) growing out of the same transaction

which formed the subject matter of the bill. I think, too, that the facts necessary to make out the defendant's title to relief appear sufficiently in the answer; and I see no reason for putting the defendant to file a bill.

Specific performance is resisted on the ground that the contract is too uncertain to be executed by this court. I think this objection is not sustainable. In *Hook* v. *McQueen*, *(a)* the contract was for the sale of lot 16, and as much of lot 17, as should require to be flooded for the purposes of working a mill on lot 16. My brothern *Esten* held it not too uncertain to be executed, thinking that a jury or the master would be competent to determine the quantity of land on lot 17, which it would be necessary to flood for the purpose of working any saw mill that would be reasonably erected on lot 16.

In the cases of leases of mines or licenses to sink mines, it must be necessary to determine the same point, for such lease or license carries with it the right to use so much of the surface as may be necessary for working the mines.

Again, in contracts respecting oil springs, it was scarcely possible from their novelty to define beforehand what quantity of land would be necessary for working them. And the contracts would almost necessarily be in the shape, in that respect, in which this is made. And the court, adopting itself to the exigencies of mankind as they arise from time to time, ought, I conceive, so to deal with new subjects as they present themselves as best to effectuate the intentions of the parties, and not to allow rules and principles applicable to a different state of circumstances to interfere with the exercise of its jurisdiction whenever in its judgments it can be usefully exercised.—*Taylor* v. *Salmon*. *(b)*

There is another reason why this objection should not

(*a*) 2 Grant, 503. (*b*) 4 M. & C. 14.

prevail, namely, that the court will not entertain such objections when it *can* execute the agreement, after the expenditure of moneys upon the faith of the agreement, although it might otherwise have sustained the objection. Sir *William Grant* acted upon this principle in *Gregory* v. *Mighell*, (*a*) where upon an agreement for a lease, the rent was to be fixed by arbitration, the tenant was let into possession and expended moneys upon the land, Sir *William Grant* said, "he (the defendant) "must have known that the expenditure was made upon the faith of the agreement. It" (the agreement) "is in part performed, and the court must find some means of completing its execution." I refer also to the language of Sir *John Stuart* in *Meynell* v. *Surtees*. It is clear from the evidence that *Foord* was well aware that large and expensive improvements were being made by the defendant, and that he made no objection to them.

The defendant in this case cannot be recompensed except by the performance of the agreement in specie; and it is upon that ground I conceive that the court proceeded in *Gregory* v. *Mighell*, and also in *Storer* v. *The Great Western Railway Co.*, (*b*) in *Sanderson* v. *Cockermouth and Workington Ry. Co.*, (*c*) and other cases of that class, although in these later cases the court probably would not have decreed specific performance if the works contracted for had been upon the plaintiff's own land. In the latter case the matter to be ascertained was, as in this case, what was necessary for certain purposes. The railway company being about to sever the plaintiff's land by their railway, agreed to purchase the necessary portion of land, subject to the making such roads, ways and slips for cattle as might be necessary. Lord *Langdale* was not deterred by the difficulty of the enquiry. He observed, "It must be admitted that it is very difficult to execute an agreement

(*a*) 18 Ves. 328. (*b*) 2 Y. & C. C. C. 748.
(*c*) 11 Beav. 497.

expressed as this is; but the difficulty does not seem to me to be such as to make it proper for this court to decline exercising jurisdiction over the matter in dispute between the parties. The railway of the defendants severs the plaintiff's land—divides it into two parts. Under the agreement as expressed the plaintiff is entitled to have such road-ways and slips for cattle as may be necessary. The word 'necessary' must receive a reasonable interpretation; and I consider the expression to mean, such roads, ways and slips for cattle as may be necessary and proper for convenient communication between the several portions of the plaintiff's land."

What is to be determined in this case is less difficult than the enquiry directed in the case before Lord *Langdale*, and would be less difficult if the enquiry were at large, but all that I have to determine is, whether an acre is unnecessarily large. I think as I have already intimated, that I must measure the necessity and the sufficiency by what the well has been and what it was when the defendant elected to purchase, and what it may be again, and that not narrowly or illiberally, but, in the spirit of Lord *Langdale's* judgment, consider what may be necessary and proper for the convenient working of the defendant's well. In the case of lessees and licensees of mines, their rights to the use of surface land for working the mines are also construed liberally. I think the defendant entitled to a conveyance of the one acre of land purchased by him from *Scatcherd* upon the terms of the agreement between *Foord* and *Scatcherd*.

One point, however, ought to be provided for, namely, the payment to be made in the event of the opening of future wells: that I think may properly be made a charge upon the land conveyed.

The defendant is entitled to the general costs of the cause, but I must except from them, as I intimated that I should do at the hearing, the costs of the attendance of the witnesses at Toronto.

Decree.—DECLARE, that the plaintiff is not entitled to the relief prayed in his bill of complaint filed in this cause. Declare, that the defendant is entitled to the specific performance of the agreement in the bill in this cause mentioned, in so far as lot number one in the said bill mentioned is concerned, and that the said defendant is entitled to the full use and undisturbed enjoyment of the said lot number one in the said bill mentioned; order and decree the same accordingly. Order and decree that the said plaintiff do convey to the said defendant said lot number one in the said bill mentioned, free and clear of all incumbrances, but subject to a charge in favour of the plaintiff, giving him a lien upon said lot number one, for the payment by the defendant to the plaintiff of the sum of fifty dollars for each and every well which may be sunk and worked on said lot number one, in the said bill mentioned, the conveyance to be settled by the master, all proper parties to join, &c.; the master to take an account of what, if any thing, is due and owing from the defendant to the plaintiff, under and by virtue of the agreement in the said bill mentioned, and to tax to the defendant his costs in this suit, except witness' fees, &c.

In proceeding under this decree, the plaintiff brought into the master's office a claim for the opening of the several wells which had been opened and worked on the whole 50 acres, insisting that before he could be compelled to convey the acre to defendant he should be paid at the rate stipulated for by *Foord's* agreement with *Scatcherd*. To this the defendant objected, unless the accounts were properly taken in the presence of the parties so chargeable in respect of such working of the wells. Thereupon the master issued a direction that, "It appeared that there were other wells sunk on the premises in the agreement in the bill in this cause mentioned, by persons or parties to this suit who ought to be parties: the plaintiff is to bring in a statement verified by affidavit shewing the names of the persons who have sunk the said other wells." Whereupon the plaintiff gave notice of motion to rescind or vary such direction of the master, on the grounds that the said persons were not necessary or proper parties to this suit, either to be made in the master's office or otherwise; and that if necessary then, that the required statement of their names should be directed to be brought in by the defendant.

Mr. *Blake*, for the motion.

Mr. *Roaf*, contra.

Judgment.—SPRAGGE, V. C.—The decree does not seem to conclude the question now raised, though I judge from the wording of it, that it was assumed that all the defendant was liable for to the plaintiff was what is due in respect of the well or wells, roadway, and land necessary for working the wells upon the acre purchased by him. The master is directed to take an account of what, if any thing, is due from the defendant to the plaintiff under and by virtue of the agreement in the bill mentioned. If under the agreement the plaintiff is entitled before making a conveyance of this acre to be paid what is due under the agreement in respect of any part of the land, which is the subject of the contract in the bill mentioned, it must be payable by the defendant, as he is seeking specific performance, and in that sense be money due by him to the plaintiff under the agreement. There is nothing upon the face of the agreement to shew that the parcelling out of the 50 acres, the subject of the contract, was contemplated. No provision is made which would place the purchaser of a part in a different position as to payments or otherwise, than *Scatcherd* would have been if he had retained the whole; if there were, I might be able to come to the conclusion, that the sub-purchaser of a portion was to be dealt with in regard to that portion, apart from the rest; as there is not, I must see what *Scatcherd's* rights would be if he had made no assignment, and were not asking for specific performance in regard to the acre in question, for he cannot, of course, confer upon his assignee rights which he would not have himself: the rights of the other party to the contract cannot be affected thereby.

Supposing, then, no assignment; *Scatcherd*, besides working the well on the acre in question, would have opened and worked several other wells, and having paid for the well, roadway and necessary land comprising the acre, but having paid nothing in respect of the other wells,—for to test the question it is proper to assume nothing paid,—he comes for a conveyance of the acre:

and I may say here, that I incline to agree with Mr. *Roaf*, that upon a well being opened and worked, the stipulated amount for well, roadway and land became presently payable, and *Scatcherd* or his assignee became entitled to a conveyance. *Scatcherd* then, in the case I have put, having worked, say a dozen wells, and having paid for only one, comes for a conveyance of the acre comprising the one, being in arrear for the other eleven. This is unreasonable, and is not within the terms of the contract, but rather against them, for by the very words of the contract *Scatcherd* was only entitled to a conveyance when he had complied with the conditions agreed to be performed by him.

Scatcherd, as I read the agreement, was entitled to a conveyance as soon as he had opened and worked a well and had paid therefor, and for the roadway and necessary land; and so from time to time in regard to other wells, but not I think while in arrear for any; and *McLean*, deriving his rights from *Scatcherd*, can stand upon no better footing; he is not of course bound to pay the moneys, that as between himself and others, are due by others, but if he elects to have a conveyance he must pay the price which, by the agreement under which he claims, is stipulated for.

With regard to these others being made parties in the master's office, I understand the defendant to place it upon this ground, that if parties they would be bound by the amount which the master should find to be due from them respectively, bound that is, as between themselves and the defendant: and it is further put that the plaintiff would be entitled to a lien for moneys so paid upon the parcel of land in respect of which they are paid.

As to these other parties being bound by an account so taken; it is not shewn that moneys so paid would

create any legal liability on the part of such other parties. It would be if any thing money paid to their use; but unless there is a request or a legal liability to pay, no debt as a general rule is created by a payment, and of course no lien would attach. I am not prepared to say that they would be proper parties, if the account would be binding upon them; but if not binding upon them, to make them parties would be merely futile. If therefore what the master has required is in order to make these other persons parties, I think his direction is wrong. I do not find his certificate among the papers —I take it for granted that he has given one. There can be no costs of this application to either party.

The Bank of Upper Canada v. Shickluna.

Fraudulent assignment—13 Elizabeth, chapter 5—Provincial statute 20 Victoria, ch. 57—Seizure of mortgage by sheriff.

S., by arrangement between himself and H., the owner of the equity of redemption under a mortgage made by G., released the security without any consideration paid therefor by H. or G., and discharged H. from liability. On a bill filed by an execution creditor of S., charging that at the time of this release S. was indebted to him, and was in embarrassed and insolvent circumstances, praying that the discharge might be declared void, as being within the statute 13 Elizabeth, chapter 5, under the provisions of the provincial act 20 Victoria, chapter 57, and for foreclosure or sale, and an order against H. to pay the deficiency.

Held, that the interest of a mortgagee is of a nature to bring it within the statute of Elizabeth, if it can be seized under the 20th Victoria, or can be compulsorily applied to the payment of his debts, and that a discharge of it without consideration is "a gift or alienation" within the prior statute: that the mortgage would have been seizable had it not been discharged: that when the mortgage is actually seized by the sheriff, and the mortgage debt is to be received, the sheriff, perhaps, must sue, and the creditors are, under the statute, entitled to the same remedies (with that one exception) as an ordinary assignee: that when the mortgage debt was to be realized otherwise than by the sheriff suing, it lies upon the court to see that it is realized for the benefit of the party entitled: that the discharge of the mortgage, and the arrangement between H. and S. had the effect of releasing G. from liability, though the release might be declared void, and the mortgage set up again, and therefore, that G. would not have been a proper party.

Where a person in business being liable to a bank as endorser for others to about £6,500, and on his own account to about £3,500, and liable otherwise to a large extent, made a gift of a mortgage which he held upon real estate for £250, by releasing the claim to the owner of the equity of redemption, (his assets at the time being much more than £10,000,) and subsequently his indebtedness to the bank was doubled, and afterwards a judgment was obtained by the bank, and execution issued out against him for £6,855, in respect of moneys due at the date of the release. *Held*, that these facts did not bring the case within the 13th Elizabeth.

This was a bill by the Bank of Upper Canada against *Lewis Shickluna* and *Thomas Lees Helliwell*, praying to have a discharge of mortgage declared fraudulent and void as against the plaintiffs, who were execution creditors of defendant *Shickluna*, and that the same might be set aside; an account taken of what was due on their judgment and execution, and in default of payment, a sale.

The cause came on for the examination of witnesses,

and hearing before his honour Vice-Chancellor *Spragge*, at the sittings of the court at Niagara, in November, 1863.

Mr. *Roaf* for plaintiffs.

Mr. *Blake* for defendant *Helliwell*.

The bill was taken *pro confesso* against *Shickluna*.

The facts proved in the cause, and the points relied on by counsel, sufficiently appear in the judgment of

Judgment.—SPRAGGE, V.C.—The plaintiffs filed their bill under the statute 13 Elizabeth, as creditors of the defendant *Shickluna*. In September, 1857, *Shickluna* held a mortgage made by one *Gunning*, upon certain property in the town of St. Catharines, on the 2nd of August, 1855, in which property the defendant *Helliwell* acquired the equity of redemption between the above dates. On the 21st of September, 1857, *Shickluna* discharged this mortgage without any consideration paid by *Gunning* or by *Helliwell;* in fact made a present of the amount of the mortgage money to *Helliwell*. The bill alleges that at that time *Shickluna* was indebted to the bank in upwards of £6000, and was in embarrassed circumstances; and not possessed of sufficient means to pay his debts in full; and seeks to bring the transaction within the statute of Elizabeth, under the provisions of the Provincial Statute, 20 Victoria, chapter 57, which enables a sheriff, having the execution of a writ of *fieri facias* against goods to seize *inter alia* mortgages belonging to the execution debtor. The plaintiffs recovered judgment against *Shickluna* on the 7th of January, 1858, for the sum of £6,855 15s. 1d., being in respect of moneys due at the date of the release of the mortgage. A writ of *fieri facias* against goods was issued on the same day and placed in the hands of the sheriff. This was followed by a writ of *fieri*

facias against lands, and an *alias* writ against goods; and by an order attaching debts due from *Helliwell* to *Shickluna;* and plaintiffs state that they would have been entitled to a similar order against *Gunning,* but for the discharge of the mortgage.

The bill prays that the discharge of the mortgage may be declared void, as against the plaintiffs, for foreclosure or sale of the mortgaged premises, and for an order upon *Helliwell* for payment of deficiency upon sale.

I think first that the interest of a mortgagee is of a nature to bring it within the statute of Elizabeth, if it can be seized under the statute 20 Victoria, or can be compulsorily applied to the payment of debts, and that a discharge of it is a gift and alienation within the former statute. I think the question is whether the mortgage would have been seizable if it had not been discharged, and that the question must be answered in the affirmative. It is true that after the discharge no money was payable by the mortgagor to *Shickluna;* but if this discharge intercepted the operation of the common law writ, that itself, I apprehend, would be a ground for coming to this court.

I think a bill by the creditor is proper. Where a mortgage is actually seized by the sheriff, and the mortgage debt is to be recovered, the sheriff may under the statute, and perhaps must, be the party to sue. But I think the statute necessarily goes beyond this. It transfers the right of receiving the mortgage money from the mortgagee to the mortgagee's execution creditor; and with it I conceive by necessary implication the ordinary remedies of the mortgagee to enforce payment, with at most, this qualification, that if he sues for the mortgage debt it shall be in the name of the sheriff. The sheriff is only a trustee for those entitled, and his name is only prescribed to be used in one event. The

creditor or creditors are in effect beneficial assignees, under the statute, and entitled, I think, to the same remedies (with the one exception) as an ordinary assignee.

The mortgagor might be insolvent, so that an action against him would be a barren result of the seizure by the sheriff; or, he might remove or destroy buildings or otherwise impair the rights of the person holding the place of the mortgagee, if the rights and remedies of the mortgagee are not transferred by the seizure. It is clear that no rights remain in the mortgagee himself. His only right was to receive the mortgage money, and that (whatever hands it passed into) passed out of his hands. Those rights must continue to exist somewhere. I cannot conceive where, unless in the party entitled to receive the mortgage money. It is suggested that others may be entitled in priority to the plaintiffs, and that if the money came to the hands of the sheriff he would at his peril pay it to the party entitled. That is a good reason for the sheriff, being the party to sue where the mortgage money is to be sued for; but when the mortgage debt is to be realized otherwise, it only lies upon the court to see that it is realized for the party entitled.

It is contended that *Gunning*, the mortgagor, ought to be made a party, and that *Helliwell* is not a proper party. If *Helliwell* is properly a defendant for the purpose for which he is made a party, namely, to pay deficiency upon sale, then *Gunning* is not a proper party.

As a general rule it must be conceded that a mortgagee has no direct remedy against the assignee of the mortgagor, because there is no privity between them. But I should at least doubt whether the rule would hold good where the assignee had by his own act defeated the remedy against the mortgagor himself; and this

might be done with the concurrence of the mortgagee, and the mortgage afterwards pass into the hands of a third person by assignment from the mortgagee.

The rule against a direct remedy is only a technical one. Put the case of a sale subject to a mortgage. The original mortgagor is still liable to the mortgagee, and the purchaser of the equity of redemption is liable to him; he is bound to indemnify him against the mortgage debt; the mortgage debt is payable by him, but the person entitled to receive it cannot enforce payment against him, but suppose these two to concur in discharging the mortgagor, and the mortgagee then assign without notice to his assignee, I suppose this court would disregard the want of privity, and hold that the act of discharging the party primarily liable would raise an equity in the assignee, and make those, party to the act directly liable, otherwise a material part of the remedy of the holder of the mortgage would be gone.

To apply the case, I have put to this case; *Helliwell*, as between himself and *Gunning* was the party to pay *Shickluna*. By arrangement between *Shickluna* and *Helliwell*, both *Helliwell* and *Gunning* were to be discharged, (indeed unless *Gunning* were discharged, *Helliwell's* discharge would be only nominal,) and *Helliwell's* land was to be discharged from the incumbrance. The discharge as to the land, I assume for this argument, was ineffectual, the mortgaged premises remained liable; but *Gunning* was effectually discharged, a point which I assume for the present. The plaintiffs acquire the right to receive the mortgage money, and to enforce payment of it by the ordinary rights of a mortgagee, with the exception of the discharge of *Gunning* by the joint act of *Shickluna* and *Helliwell*. I hardly think it can lie in the mouth of *Helliwell* to set up the want of privity between the plaintiffs and himself, when he was party to an act which defeated the remedy

against *Gunning*, and when he was in any event the proper party to pay the plaintiff.

I incline to think that *Gunning* is effectually discharged from liability. The release of the mortgage may be declared void, and the mortgage set up again as between the parties to the release, and it yet may be inequitable to restore the liability of a third person, not a party to the release, and it would be so, I think, when his position if altered by the release, as it necessarily was if the mortgage was in arrear at the date of the release, or became so afterwards. His right was to pay off arrears in discharge of his own liability, and sue *Helliwell* at law; or to file a bill in this court to compel *Helliwell* to pay off the arrears. The release would prevent his taking the first course, and would, of course, be an answer to a bill in this court. To reinstate his liability after this lapse of time would be a great hardship upon him. He can only be reached through the right of *Shickluna*, and I should say it would be inequitable to revive *Shickluna's* rights against him. I should say, also, that he has, probably, a better equity, in regard to his liability, than the plaintiffs have; but it is not necessary to say that, for it is *Helliwell* who sets up that the plaintiff's proper remedy is against *Gunning*, and not against himself. If the sheriff had sued *Gunning* under the statute, for the recovery of the mortgage money, I incline to think that *Gunning* would, under the circumstances, have a good equity to restrain him. Further, if *Helliwell* is the proper person to pay, and not *Gunning*, it is an additional reason for the plaintiffs' coming to this court, for in no other court could they obtain any relief.

No point was made of the right of the plaintiffs to attach the mortgage debt as a debt due by *Gunning* to *Shickluna*, a right defeated by the release of the mortgage, and which debt could, through the attachment, have been compulsorily applied to the payment of *Shickluna's*

debt to the plaintiffs, and therefore I make no observation upon it, especially as I am with the plaintiffs upon the point that it is within the statute of Elizabeth, and that he has a remedy in this court when the mortgage is seizable by the sheriff.

To come now to the principal question in the case, whether *Shickluna's* liabilities and his means of paying them at the date of the release of the mortgage were such as to bring the case within the statute of Elizabeth. If I had examined this point of the case first, I should not have felt called upon to dispose of the question raised under the statute of Victoria, because I have come to the conclusion that the facts do not bring the case within the statute of Elizabeth.

The case is a peculiar one in more respects than one. In the first place the gift is to a stranger, which is said to be *prima facie* a badge of fraud. But on the other hand the gift is not, as is ordinarily the case, of the whole of the donor's estate, but of something like a fortieth part of it, if not less. Again, in most of the cases the donor or settlor is found supporting the gift and showing his solvency when it was made: but in this it is plain that he is trying to show himself insolvent; and that what he did was in fraud of creditors. And the donee labours under this further disadvantage, that the bank liabilities of *Shickluna* were increased (by endorsements shortly after the release of the mortgage) from $40,000 to $80,000, an amount largely in excess of his assets; and his solvency is spoken of by those who examined the state of his affairs after he became certainly insolvent—with reference, it is true, to the previous state of his affairs; but whose evidence could scarcely fail to be coloured by looking through the medium of their present insolvency: they gave their evidence with perfect fairness, but I apprehend if there had been no subsequent increase of liabilities, their impressions of the state of affairs might have been more favourable.

I have examined carefully what were the liabilities of *Shickluna* at the date of the gift, and what were his means of meeting them.

His liabilities to the bank amounted in round numbers to $40,000 : of which his endorsements for *Ranney* amounted to $13,000, for *Chisholm* to $12,300, and for Robinson to $600; making his own proper debt $14,000 and his liability as surety $25,900.

Near the close of the case, after witnesses on both sides had been examined, *Shickluna's* bookkeeper, Mr. *McKeown*, was re-called; having in the meantime, as I understand, prepared from *Shickluna's* books a statement of liabilities on other accounts, which was put in. This shows liabilities beyond those to the bank to a considerable amount—excluding the mortgage on the farm, the farm not being among the estimated assets, and excluding also a mortgage on two brick cottages, the estimate of their value being beyond the incumbrance.

The further liabilities shown by this paper amount in round numbers to.....	$7,500
Adding his own proper liabilities to the bank...	14,100
Makes his own debts amount to	21,600
Adding his liabilities as surety.....	25,900
	$47,500

Next as to *Shickluna's* means of meeting these liabilities: of these we have three estimates. I will take first one which I find upon the books of the bank, and which was prepared at the office at St. Catharines, for the information of the home office.

That makes *Shickluna's* assets of the value of.....	$47,300
To which should be added the mortgage in question.....	1,000
	$48,300

Mr. *Eccles*, the solicitor of the bank, thinks some of the items valued too highly. Taking their value at what they would probably have brought if sold in execution, he would reduce the estimate by about 9,000

Leaving the value at $37,000

He says at the same time, that if time were given upon sales, or opportunities waited for, the property would have brought much more.

The other two estimates were prepared by Mr. *Benson*, to whose judgment and opinion in the matter great weight is due. They were prepared in 1859, but would hold good, he says, for 1857. The first is, of what in his opinion the properties would have brought at sheriff's sale; the other was not, he says, what the properties would have brought upon a speculative sale, but what he thought could have been obtained, upon a sale on time, say, one-fourth in hand, and the balance by instalments at three or four years, as sales could be effected.

The first gives the value of the assets, (excluding the schooner *Pride of Canada*, which was acquired after the gift) at $33,600

This I take to have been a rather rigid estimate. Mr. *Eccles* seems inclined to value one of the properties, (the dry dock, ship-yard and houses in the ship-yard,) at a higher sum, by 5,000

And the schooner *Merritt*, at more by..... 500

To which add the mortgage in question ... 1,000

$40,100

Mr. *Benson's* other estimate, excluding the *Pride of Canada*, and the schooner *Mary*, acquired afterwards, and not in the other estimate, gives the value of the whole at.. $51,100

To which add the mortgage in question... 1,000

$52,100

All of these estimates leave out the debts due to *Shickluna*, which Mr. *Benson* thought to be considerable, but which *McKeown* thinks were of no great value.

Taking together the bank estimate, as reduced by Mr. *Eccles*, and Mr. *Benson's* sheriff's sale estimate, without Mr. *Eccles'* addition, but adding the mortgage in question, the value of the assets might be taken to be nearly..... $39,000
from which he withdraws the mortgage in question 1,000

$38,000

I propose first to try the case by the strict test of taking the value of *Shickluna's* assets at their sheriff's sale value.

The above sum exceeds his own proper indebtedness by the sum of $16,400, and is less than his whole liabilities, on his own account and as surety, by the sum of $9,500. I think a distinction must be made between a man's own proper debts and his liabilities as surety for others. The value of his estate is not diminished by the amount of these latter liabilities, but only by the amount to which his remedy over would be valueless; and so, if the assets of *Ranney*, of *Chisholm*, and of *Robison*, available to the creditor as surety, could realise the above sum of $9,500 *Shickluna* would not be insolvent. I have no evidence upon this precise point, but it does appear that *Shickluna's* estate suffered no actual loss by his suretyship for *Ranney* and *Robison*, and only a partial loss by *Chisholm*. *Ranney* made an assignment, and the $13,000 for which *Shickluna* was surety, was a preferred claim, and, as I gather from the evidence, was paid in full. The assignment, I believe, was after the gift in question; if before, it would have been stronger for the solvency of *Shickluna's* estate. *Robison* paid his note to the bank, and *Chis-*

holm's debt was compromised after *Shickluna* had doubled his liabilities to the bank. *Shickluna's* estate was in danger, because the principal debtors might fail him, and just to the extent to which they might fail him. It is scarcely possible to estimate how much the value of his estate was thereby diminished. Judging by the event, it was only diminished by so much of the *Chisholm* debt as *Chisholm* himself did not pay; but taking the whole of that amount from the value of the estate, there would still remain a surplus of over $4,000, after withdrawing the mortgage money in question.

But I have, thus far, taken a stricter view in regard to *Shickluna's* ability to pay his debts than, considering the real question at issue, ought to be taken. The question is not whether if his estate were brought to the hammer, upon a forced sale it would have realized enough to have paid off all his liabilities; but the question is one of fraudulent intent to delay, hinder or defraud creditors; and there being no direct evidence of fraudulent intent, as is the case in the majority of instances, the court looks at the circumstances under which the gift or alienation is made, and therein, the amount of debts, and the means of paying them are extremely important, as furnishing data from which the court may infer a fraudulent intent under the statute, or the absence of such fraudulent intent. I think upon that head, the true question is, what, in the sound and sober judgment of the owner of property he might honestly and reasonably believe it to be worth. To ascertain that, we must take the opinion of others, and in that view I doubt if the larger estimate of Mr. *Benson* is excessive.

It is not necessary, however, to go to nearly so large an amount to negative all inference of fraudulent intent under the statute.

The evidence does not lead me to believe that *Shick-*

luna, at the time of this gift doubted, or had reason to doubt, his own ability to meet all his liabilities, or the sufficiency of his estate for the purpose. Whatever his motive for making the gift, whether that imputed by the bill, or that alleged by the answer, or whatever it may have been, I do not believe that it was to defraud or delay his creditors; nor have I reason to believe that his then creditors were thereby defrauded or delayed in respect of any debts then existing.

What has occurred since is confirmatory of the view that I have taken. *Shickluna* had sold his dock, ship-yard, and appurtenances, for $60,000. If that money had been paid his resources would have been ample; if not paid, they would again fall into his hands. The latter event occurred, and he resumed his business. He has been and is a skilful and successful ship-builder, and he has reduced his liabilities at the bank from $80,000 to between $30,000 and $40,000 and he has done this, retaining the dock and ship-yard; and as far as appears, solely from the profits of his business. It is scarcely conceivable, that in September, 1857, he could in his then position have given away $1,000, in order to defraud his creditors.

This suit is rather his suit than that of the bank. This is manifest from the evidence of Mr. *Barwick*, and it is his interest, just to the extent of the mortgage money and interest, that it should succeed. I think the case made by the bill fails, and that the bill must be dismissed with costs.

In re Stewart.

Stewart v. Stewart.

Mortgage—Covenant—Execution creditor.

A mortgagee after the death of the mortgagor has a right to prove upon the general estate for the whole amount of his claim, and to hold his security for any amount that the general estate may be insufficient to pay; and the fact that a simple contract creditor has obtained judgment against the personal representative upon which he has placad an execution against lands in the hands of the sheriff will not affect such right.

Statement.—This was an administration suit, under an administration order made in Chambers. After the usual accounts had been taken, and a decree on further directions made, one *James Austin* presented a petition stating that under and by virtue of an indenture bearing date the 9th day of May, 1860, made between *Andrew Stewart*, the testator of the first part, his wife for the purpose of barring her dower of the second part, and the said *James Austin* of the third part, the petitioner was a mortgagee of the lands comprised in the mortgage for securing the sum of £250 and interest. And that in the said mortgage there was a covenant by the said *Andrew Stewart* for the payment of the moneys secured thereby, and praying to be allowed to come in and prove his claim notwithstanding the master's report and decree on further directions. On that petition an order was made allowing the petitioner to go in before the master and prove his claim against the estate of the testator. And it was referred to the master to take an account of such debt and to settle the priority of the said *James Austin*, between him and the creditors of the testator who had proved their claims, and to tax his costs properly incurred under the mortgage in the petition mentioned. And it was ordered that the said *James Austin* should have the same benefit of the deed as if he had proved his claim under the same and been included in the report.

The master made his report under that order on the 4th March, 1864, finding that there was due to the

petitioner £227 12s. 6d on his mortgage security and that as to the lands comprised in the mortgage he was first in priority: but in case the mortgaged premises were insufficient to pay the debt of the said *James Austin*, that the creditor *Thomas Haggart*, who had recovered judgment against the executor of the said *Andrew Stewart* on a simple contract debt, and placed an execution against lands in the hands of the sheriff, had priority over the said *James Austin* as to such deficiency, if any, on the general estate of the testator, and that the said *James Austin* had priority for such deficiency of his debt, next after the said *Thomas Haggart* on the general estate of the testator.

From this report the petitioner *James Austin* appealed on the ground—

1st. That the master should have found that the said *James Austin* had priority over the creditor *Thomas Haggart* on the general estate of the testator, and—

2nd. That the master decided that the said *James Austin* must first resort to the mortgaged lands for the payment of his claim, and that he had a lien on the general estate only for the deficiency after exhausting those lands.

Mr. *Roaf*, for *Austin* contended that he was entitled under the covenant in the mortgage deed to rank upon the general estate for the whole debt, and hold the mortgage for the deficiency, if any, after sale, *Mason* v. *Bogg*, *(a)* *Tipping* v. *Power*, *(b)* *Tuckley* v. *Thompson*, *(c)* are direct authorities in favour of the claim here set up. He also referred to *Williams* on Executors, 900, 901.

Mr. *Barrett*, for the plaintiffs, submitted to any order the court might make.

Haggart, the execution creditor, did not appear.

(*a*) M & C. 443. (*b*) 1 Hare, 405.
(*c*) 1 J. & H. 126.

Statement.—ESTEN, V. C.—It is very clear, upon the authorities cited, that a mortgage with a covenant may prove upon the covenant, against the general estate, and hold his security until he be paid all that is due to him. He cannot be compelled to realize his security, or have it valued and prove for the balance. Upon the other point, it seems clear that a creditor having obtained judgment against the executor does not thereby gain priority except over debts of equal degree; the executor being bound to pay the creditor, who has exerted the greatest diligence; but the priorities otherwise remain as they were at the testator's death. Supposing therefore a decree for administration after such a judgment, it would seem right to restrain execution for the benefit of specialty creditors entitled to priority. Supposing execution to have issued upon the judgment before the decree, I should still think it right to restrain proceedings at any time before sale, in order to protect the priority to which the specialty creditor is entitled. Indeed if a specialty creditor is entitled to priority over a judgment obtained against the executor, it would seem necessary at any stage of the cause to stay proceedings on the judgment so far as might be necessary to preserve the priority of the specialty creditor, which would be virtually gone if a sale were permitted.

This object would be obtained by ordering the sheriff to pay the money made on the execution into court; I have never, however, known an instance of such an interference; but at all events, in the administration of the assets, the specialty creditor, *Austin*, is entitled to priority over *Haggart*, the simple contract creditor, who has obtained judgment against the executor. The circumstance that he has delivered a writ to the sheriff if no sale has taken place can make no difference. Both exceptions, therefore, must be allowed.

MATHERS v. HELLIWELL.

Mortgagor and mortgagee—Assignee of equity of redemption—Agreement by mortgagee to extend time for payment of mortgage money.

On the purchase of an estate, subject to a mortgage, the purchaser agreed to pay off the security, and subsequently agreed with the mortgagee for an extension of time for five years, within which to pay off the incumbrance, agreeing in consideration thereof to pay an increased rate of interest, and covenanted that he would "*well and truly pay or cause to be paid unto the said W. M. (the mortgagee), his executors, administrators, or assigns, the said interest upon the said sum of £900, quarterly, as aforesaid, so long as the said forbearance shall continue, and until the said principal money is fully paid and satisfied.*" On a bill filed to enforce payment of the incumbrance, *held*, that the assignee was personally bound to pay only the interest on the debt, and that by reason of the extension of time to the assignee, who had become the party primarily bound to pay, the personal liability of the mortgagor therefor had been discharged.

Statement.—This was a bill by the widow and executrix of *William Mathers*, against *John Helliwell*, *Mary Townsley* and *Thomas Nightingale*, setting forth that in December, 1855, Mrs. *Townsley* had executed a mortgage to the testator on ten building lots in the village of Yorkville, for securing £500, with interest at six per cent., in five years: that in September, 1856, Mrs. *Townsley* executed a second mortgage on the same property for securing £400, and interest at the same rate, payable in December, 1860, the interest on both securities being payable quarterly: that in December, 1857, Mrs. *Townsley* agreed with the defendant *Helliwell* to sell him nine of the said lots so mortgaged, for the sum of £1,800, the respective sums of £500 and £400 so secured by the said mortgages being part of such consideration money: that in February, 1861, the testator, at the request of *Helliwell*, agreed to extend to him the time for payment of the principal sums of £500 and £400, and by indenture bearing date the 16th of that month, prepared and executed by *Helliwell*, he covenanted in consideration of such extension of time to pay to the testator interest on the principal moneys at the rate of eight per cent. per annum, on the respective days named for payment of such interest in each and every year, or until, within such five years, *Helliwell* should give three months' notice to determine such forbearance, and he thereby

charged the said premises with the said sum of £900, and interest thereon at eight per cent., such indenture containing a covenant by *Helliwell* as set out in the head-note.

The prayer of the bill was for payment of the amount to be found due under the two mortgages, and in default a sale of the nine lots so conveyed to *Helliwell*, and a personal order against him and Mrs. *Townsley* for any deficiency, and in the event of plaintiff failing to realise such deficiency against them personally, then that it might be raised out of the other lands conveyed to *Nightingale*.

The defendant *Helliwell* answered the bill, admitting the statements thereof generally, but denying that it was ever agreed between him and the testator that he, the defendant, should be liable for more than the interest on the principal sum of £900, and submitted that under the circumstances he was liable for no more than such interest.

Mrs. *Townsley* answered, admitting the execution of the several instruments, and alleging that under the arrangements between *Helliwell* and herself, she in effect became surety for *Helliwell* for the due payment of the principal money and interest, and submitted that the effect of *Mathers* agreeing to extend the time to him was to discharge her from the payment thereof.

The defendant *Nightingale* also answered the bill, but nothing material to the question turned thereon; and it is not considered necessary for a proper understanding of the case to state the facts at greater length.

The cause was set down for hearing on the pleadings and admissions of the several instruments.

Mr. *Gwynne*, Q.C., for plaintiff, referred to *Pordage*

v. *Cole*, (*a*) *Seddon* v. *Senate*, (*b*) *Bandy* v. *Cartwright*, (*c*) *Deering* v. *Harrington*, (*d*) *Sampson* v. *Enterby*, (*e*) *Saltoun* v. *Houstoun*, (*f*) *Earl of Shrewsbury* v. *Gould*, (*g*) *Webb* v. *Plummer*, (*h*) *James* v. *Cochrane*, (*i*) *Bacon's Abr. Covenant, B.*, *Addison on Contracts*, 49 and 50, to shew that under the circumstances a covenant to pay the principal would be implied.

Thimbleby v. *Barron* (*k*) establishes that an agreement to forbear suit does not suspend the right of action, the breach of the agreement only giving a right to maintain an action for damages; and that therefore Mrs. *Townsley* was not discharged, as she could at any time have compelled proceedings to be taken against *Helliwell*, or filed a bill in her own name to compel him to pay off incumbrances.

Mr. *Turner*, for defendants *Nightingale* and *Townsley*, contended that under the decision in *McPherson* v. *Dickson*, (*l*) Mrs. *Townsley* was clearly relieved from all further liability, she being a surety only for *Helliwell*.

Helliwell, in person, submitted the question to the court whether under the facts any relief could be given to the plaintiff, as against him, other than an order to pay the interest on the principal sum due, at the increased rate, and which was the only liability he ever intended to assume, and which the testator understood and knew was the effect of the arrangement into which he entered.

After looking into the cases cited

Judgment.—VANKOUGHNET, C.—In this case I am asked to make a decree for sale of the premises, and in

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(*a*) 1 Saund. 319. (*b*) 13 East, 63.
(*c*) 8 Ex. 913. (*d*) 3 Keb. 304.
(*e*) 9 B. & C. 505. (*f*) 1 Bing. 433.
(*g*) 2 B. & Al. 487. (*h*) 2 B. & Al. 746.
(*i*) 7 Exch. 170. (*k*) 3 M. & W. 210.
(*l*) Ante vol. iii, p. 183.

case the amount realised by such sale be insufficient to pay the charge, to order that the deficiency be paid either by the defendant *Helliwell* or by the defendant Mrs. *Townsley*. Mrs. *Townsley* having mortgaged the premises to the testator, subsequently sold them to the defendant *Helliwell*, he undertaking to pay off this mortgage as part of the consideration money for his purchase. Subsequently, the defendant *Helliwell* applied to the mortgagee for an extension of time for the payment of the money so secured, and this was agreed to on *Helliwell* covenanting to pay interest upon it at the advanced rate of eight per cent. until the principal was re-paid. Mrs. *Townsley*, the mortgagor, was no party to this arrangement. *Helliwell* did not undertake to pay the principal money, and he swears that he never intended to do so, and that it was not so understood between him and the mortgagee; and yet the mortgagee was not at liberty to exact the principal money under five years, as agreed upon, unless the interest was in default. *Helliwell's* liability, if any personally, to pay, is upon an implied covenant, and that a somewhat doubtful one, (*James* v. *Cochrane*,) or under his arrangement with Mrs. *Townsley*. I do not feel called upon to execute it here. I think under our orders that it is only in a plain case and one of actual contract that this court should exercise the functions of a court of law and direct payment of the mortgage money. The ordinary remedy of the mortgagee in this court is foreclosure or sale, and except under the orders referred to, he could have no other. Then as against Mrs. *Townsley*, I think I should give no relief. *Helliwell* undertook with her to pay off the mortgage money which she had contracted to pay. Her equity was to compel him to do this and relieve her. Behind her back the mortgagee agrees with him that this money shall not be exacted for five years, on certain terms. Her equity is to compel *Helliwell* to pay off the mortgage. The mortgagee, without her assent, binds himself that *Helliwell* shall not be compelled to do this, and that he will not receive it for five years beyond the time the money

is payable, and agrees with him that it shall be expressly charged on the land.

I think that in the face of this agreement he can no longer insist on any personal liability by Mrs. *Townsley*.

WATERHOUSE v. LEE.

Will—Setting aside—Uuduc influence--Practice—Opening publication.

The mere fact that influence was exercised by a wife or other person over the mind of a testator is not of itself sufficient to invalidate a will; such influence must amount to a control over his mind, subjecting his mental will to the desire of another, so that the document executed as his will is not in reality *his* will, but that of another; the question in such case is, in what sense is the document the will of the testator? Where therefore the testator, an infirm man 82 years of age, within the year preceding his decease made four wills, the two last on the 27th July and 8th September, and on the 14th of the same month died, and it was shewn that for some time he had been in a state of physical weakness, and suffering from disease of the brain; the medical and other testimony, however, going to establish that at the time of the execution of the will he was of a sufficiently sound and disposing mind to make a will; that the will of the 27th July was made by him while absent from his house, the latter while there, and under the control of his wife, who it was shewn had him entirely under subjection, and by whom the instructions for his will were given, and in whose presence the document was presented to him for execution, the evidence also shewing that for a long time he had been unable to resist her views with regard to any matters of business: and there being nothing to indicate any desire on his part to change the disposition of his estate made by the will of July· the court, upon a bill filed for that purpose, set aside the will of September, as having been obtained by the exercise of undue influence by the wife, and established that of July as being the proper last will of the testator, and ordered the widow, who was largely benefitted under the will of September, to pay the costs of the cause.

After judgment had been given in a cause, an application was made to open publication, on the ground that since the decree had been pronounced, it was discovered that a material witness in the cause was beneficially interested in the setting aside a will which it was the object of the suit to have declared void, and had entered into an agreement to indemnify the plaintiffs from the costs: but as the result would have been the same had that witness' testimony been out of the case, the court refused the motion; but offered the defendant who applied, liberty to give evidence to establish the fact of interest in the witness, in order that in the event of the cause going to appeal, his evidence should not appear there as that of an unbiassed witness.

This was a bill by *Ann Dawson Waterhouse*, wife of *Robert Waterhouse*, by *Garrett Lee*, her next friend, and their five infant children by their next friend, the said *Robert Waterhouse;* also *Sarah Jane Lee*, *Francis*

E. Lee, Mary C. Lee, William Lee and *Charles Lee*, infant children of *Edward R. Lee*, by their father, their next friend; also *Garrett Lee, Edward McCollum* and *Edward W. Nation*, against *Frances Lee, Henry Lee*, and his eight infant children, *Fanny Wood and Jane Donohue*, children of the late *Jane Wood, Edward Wood* and *Henry Wood*, also children of the said *Jane Wood* and *Farrell Donohue*, husband of the said *Jane Donohue, Edward R. Lee* and *Robert Waterhouse*. The parties, other than the plaintiffs *McCollum* and *Nation*, and defendant *Frances Lee*, being the descendants (and their husbands) of one *Edward Lee*, the testator in the pleadings named, the defendant *Frances Lee* being the widow, and *McCollum* and *Nation*, trustees and executors named in the will of the testator, praying to have a will made by him in July, 1859, declared to be his last will and testament, and a will signed or executed by the testator on the 8th of September of that year set aside and declared void by the decree of this court.

The facts are fully stated in the judgment.

Argument.—Mr. *McDonald* and Mr. *Blake* for the plaintiffs.

Mr. *Strong*, Q. C., for the infant defendants in the same interest.

Mr. *Mowat*, Q. C., Mr. *Crickmore*, and Mr. *McCrea*, for defendants.

Judgment.—SPRAGGE, V. C.—It is in evidence that the testator made no less than four wills within the year preceding his death, one in January, 1859, one in the following month, one on the 27th July, and one on the 8th of September. He died on the 14th of the same month.

The plaintiffs claim under the will of July, the principal defendants under that of September.

The mass of the evidence given has been in relation to the testator's state of mind at the time of the execution of the last of these wills. I have read this evidence over more than once, and have compared different passages in which there are real or seeming discrepancies, and I have found it exceedingly difficult to come to a conclusion entirely satisfactory to my own mind.

I have before me the evidence of four persons who were present at the execution of the will, and I have had the advantage of hearing the whole of the evidence given. All of the witnesses present at the execution of the will concur in stating that the testator was in possession of his mental faculties, and if what they narrate as passing did in truth occur, it will leave but little room for doubt that he was of sound and disposing mind; though of great age—in his 82nd year—in a state of great physical weakness, and suffering from disease of the brain.

The will is a short one, and may be read over deliberately in about four minutes. What is stated to have passed is this:—The will was twice read over to the testator by Mr. *George Duck*, who had been long and intimately acquainted with him, and who had acted for him in business matters for the previous twenty years, and the testator, it is stated, gave the following proofs of his mental capacity:

He desired Mr. *Duck* to sit on that side of him on which his hearing was least defective.

He desired a portion of the will to be repeated, in order to his seeing what provision was made for his wife.

He noted the clause which bequeathed to his son *Edward* $1,100, and a mortgage of $1,000, as giving $100 more to him than to his son *Henry*, and while

yielding to Mr. *Duck's* remark that it was as well to leave it, as it was but a trifle, he observed that it was more than *Edward* deserved.

He asked for the use of Mr. *Duck's* spectacles, in order to sign his name, and finding them unsuitable, sent for his own.

These circumstances are spoken to by Mr. *Duck*, and by the witnesses to the will, *Sexton* and *Mason*, though they do not agree perfectly in the whole of the narrative, the two latter stating that the question as to the provision for the wife was put after the reading of the first clause, while Mr. *Duck* places it after the first reading of the whole will. Mr. *Duck* also describes the physical condition of the testator, after the execution of the will, as one of exhaustion, while the others appear to have thought him but little fatigued. They also differ somewhat as to the time when the reading of the will commenced, and when its execution was finished, and as to the time occupied in the discussion, and there is an apparent difference between *Mason* and Mr. *Duck*, as to how and when the will was produced, occasioned probably, I think, by the testator having been in the room with Mr. *Duck* previously to his going in just before *Mason*, though I confess the greeting between him and Mr. *Duck*, as stated by *Mason*, looks as if the two were then meeting for the first time that day.

These differences, however, would not at all lead me to doubt the general accuracy of the narrative of all, still less to think that the circumstances deposed to were a mere fabrication. They are, of course, fair subjects for comment, but where the honesty of narrators is beyond question, we seldom find a perfect agreement in their recollection; and if we turn to the evidence of the medical witnesses in this case, we shall find an equally marked difference in recollection, and I may as well refer to it now. Dr. *Rolles* states that when he and

Dr. *Henderson* saw the testator on the 9th, he proposed, in order to test his consciousness, that he should be asked to lend the doctor some money, and that he answered with a vacant look, "money, money, what's money?" while Dr. *Henderson*, in reference to the same suggestion, says the question was, "will you lend Dr. *Rolles* five dollars, and that the testator made no answer whatever." There are other small points of difference between them, but no one would think on that account of questioning the perfect truthfulness of the narrative given by each.

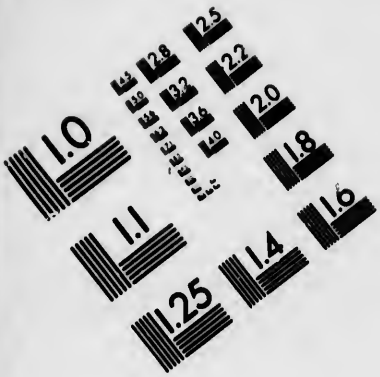
An attempt has been made to impeach the credit of two of the witnesses to whom I have referred, Mr. *Duck* and Mr. *Sexton*. With regard to the former, the sustaining evidence does, in my judgment, greatly outweigh that which impeaches him, and the latter rests upon no sufficient grounds, as explained by the witnesses themselves, and there is the fact of his having been elected to offices of trust and honour repeatedly by those who were the best qualified to judge of his respectability. I think the evidence fails to impeach his credit. I cannot say the same as to the evidence impeaching the character of *Sexton*. I think it is impeached so far that it would be unsafe to rely upon it. Some witnesses speak of him as wholly unreliable, and wilfully false; others, as of a gossiping disposition, careless whether what he said were true or false.

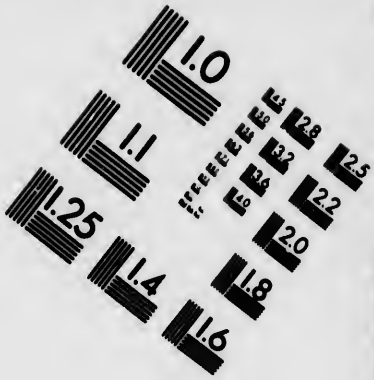
The characters of *Mason* and *Henry Lee* were not impeached. The evidence of the latter struck me as loosely and carelessly given; not in a way to command implicit confidence. *Mason* was a young man of considerable intelligence; he exhibited, I thought, a strong bias in favour of the widow *Lee*, but there was nothing in the evidence to lead me to the belief that his evidence was not truthful in the main, though somewhat coloured perhaps by his bias in favour of his mistress.

The validity of the will of September does, after all,

rest largely in my judgment upon the evidence of Mr. *Duck*; and it will be proper, therefore, before going further, to examine some points of his evidence, and see how it squares with that of others. He gives evidence of a visit which he paid to the testator on the 6th, two days before the execution of the will. He describes his mind as wandering on that day, and unfit for business; and as to his bodily strength, he says that he was sitting down, and was plainly unable to rise. *Sexton* and *Henry Lee* were both present on this occasion; they differ from Mr. *Duck* as to *Lee's* mental condition, but I do not think much of that, as they agree with him as to what *Lee* talked about, and a man of Mr. *Duck's* intelligence and education might detect mental aberration in a person conversing with him, while others, such men as *Henry Lee* and *Sexton*, might fail to observe it, but so far from agreeing that *Lee* was unable to rise, they say that he went with Mr. *Duck* out of the room, and *Sexton* says that Mr. *Duck* drew a note from him to *Lee*, which he, *Sexton* executed; and *Henry Lee* thinks that Mr. *Duck* drew a paper. The drawing the note may admit of this explanation, that it was for the interest on a mortgage, the time for payment of which it had been previously agreed should be extended, and this was a matter of a kind which Mrs. *Lee*, who was also present, had been in the habit of attending to as much, perhaps, as her husband. The other point I cannot reconcile; neither party could have any motive to mis-state the fact, and certainly it would not help Mr. *Duck's* theory of *Lee's* capacity on the 8th to shew his incapacity, mentally or bodily, on the 6th. *Sexton*, a reckless, untruthful man, and *Henry Lee*, a careless, weak man, might invent these circumstances, as lending probability to *Lee's* capacity on the 8th, or Mr. *Duck's* recollection may have failed him; but I feel it to be a difficulty in the case.

There are two other points upon which Mr. *Duck's* veracity is impeached, one his alleged denial of a will





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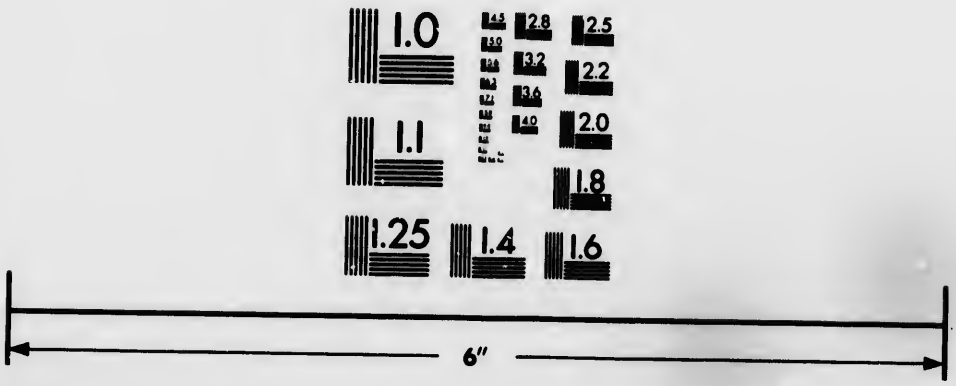

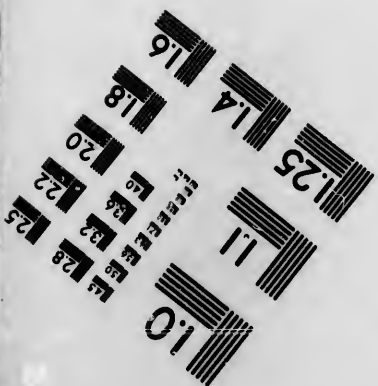

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having been executed; upon this he and *Edward R. Lee*, son of the testator, are at issue. It seems to me that such a denial is scarcely probable, for we find Mr. *Duck* on the 9th arguing with Dr. *Rolles* as to *Lee's* capacity the day before, when, as he acknowledged, a will had been made; but then *Edward R. Lee* was not present until after the discussion had commenced, and if *Duck* really felt great anxiety that the will of the 8th should stand, he might conceal it from *Edward*, lest the latter should use his influence with his father, in the event of consciousness returning, to supersede this will by another.

Mr. *Duck* is also impeached as to the fact of his going to *Lee's* house on the evening of the 8th. There is evidence that he did go up that evening, and with *Sexton*. He says himself he did go up the next evening or the evening following. He was not warned that he would be contradicted, nor were the circumstances pointed to of his meeting *Sexton* in Morpeth, and accompanying him up the lane, and besides, he may have meant by the "next evening" not the evening of the next day, but of the same day. He admits that he went up once, and it is not proved that he went up more than once.

A third contradiction may be mentioned, upon which he and Mr. *Wittrock* are at issue, Mr. *Wittrock* saying that at the meeting after the funeral, Mr. *Duck* advised Mrs. *Lee* not to have the will read in Mr. *Wittrock's* presence.

The evidence to show want of mental capacity on the 8th, consists in part of medical testimony, and in part of the evidence of members of the family and neighbours who visited *Lee*. Dr. *Rolles* and Dr. *Henderson* saw him together on the 9th. Dr. *Smith* saw him for a few minutes on the morning of the 10th. The two former agree that when they saw him his mind was a blank;

and judging from his then appearance, and from the description of his appearance when *Edward* saw him the previous afternoon, and when *Thomas McCollum* saw him the previous day, they considered it in the highest degree improbable that he could have been of disposing mind, at the time the will is supposed to have been executed; but still, Dr. *Rolles* adds, not impossible; and he gave an account of a remarkable case that had occurred in his own practice, of a man in the prime of life who met with an accident by which his skull was fractured: a portion of the brain was removed, and his pulse fell to forty-two. His family were anxious that he should make a will, and the doctor examined him repeatedly to ascertain if his mind was in a fit state for it; for a time he could not be got to collect his ideas sufficiently, and the doctor did not think that he would, but the doctor was afterwards sent for and found that he had become rational; his pulse was at fifty-two, and he stated clearly the manner in which he wished to dispose of his property; a lawyer was sent for, and to him he repeated his wishes clearly and rationally; in half an hour afterwards he was raving, and died in about three weeks of softening of the brain; Dr. *Rolles* adds that he thinks *Lee* being rational on the 8th even more improbable; taking into account his age, and the description of his state given by *McCollum* and by *Edward R. Lee*. He says at the same time he is satisfied that he must have been in a very different state on the 8th from what he was when he saw him on the 9th, as his signature to the will indicates memory. He says further that his state on the 8th as described by *Edward R. Lee* must have been different from his state on the 9th; that on the 8th there was action of the brain and excitement which might have followed the exertion of business in the morning; and his condition on the 9th may have been prostration following upon it. The brain certainly, he says, must have been in an exceedingly disturbed state, unfit for business at the time described by *Edward R. Lee* on the 8th, but it might have been

rational two hours before. He thinks, taking *McCollum's* account of him on the 7th, that half an hour's attention to business on the 8th was as much as his mind could bear; but still he adds, it is impossible to say. Upon Mr. *Duck's* evidence, as to the execution of the will, being read to Dr. *Rolles*, he says, that taking it to be correct, he should say that *Lee* may have been competent to make his will on the 8th at the time named by Mr. *Duck*, and that the mental exertion may have caused such disturbance of the brain as is described by his son *Edward*.

Dr. *Rolles* gave his evidence with becoming caution, and while giving his opinion as a man of science, spoke by no means positively. He observed before referring to the case in his own practice, that in some cases the brain will recover itself wonderfully for a time. And Dr. *Henderson*, although expressing a more positive opinion than Dr. *Rolles*, still observes: "Diseases of the brain are certainly almost incomprehensible, and some of the best physicians are at fault in relation to them." He mentioned that he had one case similar to *Lee's* in his own practice. Dr. *Smith* saw *Lee* for a few minutes only, and without being permitted to speak to him, his evidence coincides in general with that of the other medical men.

There are points upon which the medical men do not agree. Dr. *Rolles* thinks that a signature indicates memory, and that a man could not sign his name from mere habit. Dr. *Henderson* does not agree in this. He says a person might write his name without being conscious of what he was doing. They differ in opinion also as to the disease of the brain under which *Lee* was suffering. Dr. *Henderson* thinks it was effusion of *serum* upon the brain; Dr. *Rolles* thinks it was probably ossification of the arteries of the brain. And Dr. *Henderson* thinks a lucid interval more probable in the latter disease than in the former. The point is material not

merely as diminishing somewhat the value of the medical testimony, but in this, that if Dr. *Henderson* had thought with Dr. *Rolles* as to the nature of the disease, his opinion against the probability of a lucid interval would have been less strong than it is. And he and Dr. *Smith* differ essentially as to the effect of excitement upon a person labouring under disease of the brain; Dr. *Henderson* thinking that it would produce a lucid interval. He says the mental energy was due to the nervous excitement, and would fail with it; while Dr. *Smith* says, it is possible that after a sleep he might be conscious for a short time, but if so, any excitement would cause delirium and a relapse into stupor. There is one remark of Dr. *Henderson*, which may be applicable to this cause, "He would be more likely to be clear upon matters to which he had applied his mind before his illness than upon other matters."

The disease of the brain under which *Lee* was labouring had been of some standing, for some months in the opinion of Dr. *Rolles*, covering a period it would appear when *Lee* was considered rational by his neighbours, and capable of transacting business; it does not appear to have affected him very seriously until the end of August.

I judge from the evidence of the medical gentlemen, that as a mere matter of science apart from the evidence of what actually passed on the 8th, they would all have pronounced against there being an interval on that day during which *Lee* could have been rational for so long a period as is described by the witnesses. This, however, is after all only a matter of opinion, and that upon a matter of acknowledged difficulty. But I incline to doubt whether the time actually occupied could really have been so long. All that they describe as occurring, even if occurring with some pauses, and considerable deliberation, could scarcely have occupied more than half an hour: that is, from the commencement

of the reading of the will to its execution. And with the filling up of blanks and other preliminaries the whole time occupied could scarcely have reached an hour. It is not probable, indeed, that *Lee's* mind was applied to the business of making his will for so long a period. It is not likely under the circumstances that time would be needlessly wasted, and feeling the importance of getting the business completed, the time would naturally appear longer than it really was. No one seems to have consulted a time-piece: each estimates it for himself, hence the difference of their estimates; and hence, as I think is probable, the idea of a longer time than was really occupied.

The medical men formed their opinion not only from what they saw, but also from the evidence of what was seen by others both before and after the signing of the will, but still they had not some means of judging which, as they or some of them, say, would have been of material assistance in forming their judgment. None of them had previously attended *Lee* in his illness, and there was no *post mortem* examination.

I should myself, independently of medical testimony, have arrived at the conclusion, that neither on the morning of the 7th, when seen by *McCollum*, nor on the afternoon of the 8th, when seen by his son *Edward*, was *Lee* in a sound state of mind; but I am not convinced by the medical testimony, or otherwise, that he may not have been in such a state on the morning or at noon or early in the afternoon of the 8th, whichever may have been the time of day at which the will was executed. If the medical witnesses had said the thing was impossible, I must still have exercised my judgment between facts sworn to, and matter of scientific opinion; and facts may be established by such clear and convincing testimony in the face of opinion evidence by scientific men, that they must be accepted as established, although, in the opinion of those well

qualified to form a scientific opinion, they are held to be improbable or even impossible.

I think the medical testimony does establish the improbability of *Lee* being in a rational state of mind for more than a short time on the 8th. I should myself, from hearing the evidence of *Edward R. Lee* and *McCollum* and of *Coll*, to which latter I will refer presently, have thought it very improbable, and I must only form the best judgment that I can as to whether the evidence given is of sufficient weight to prove that that did in fact occur, which it is improbable should occur.

If the evidence in favour of the will had been only of its being read over and listened to, and assented to by *Lee*, and that in the opinion of those present he perfectly understood it, and was of sound and disposing mind, I should think such evidence insufficient to rebut the improbability. But several circumstances are stated which shew *Lee* not to have been a mere passive instrument; but to have himself exercised memory and will, and Dr. *Henderson* himself says, "If what has been read of the evidence of Mr. *Duck*, *Mason* and *Sexton*, be true, he must have had a disposing mind."

Now these circumstances did really occur; or they were matters of sheer fabrication, as to which it is well observed by Mr. *Best*, that "falsehood in human testimony presents itself much more frequently in the shape of misrepresentation, incompleteness, or exaggeration, than of total fabrication." There is this also to be taken into account, that *Lee* had been in the habit of doing business with Mr. *Duck* for some twenty years, and the disposition of his property by will, was a subject to which his mind had been frequently applied; and it is reasonable to suppose that applying his mind to a familiar subject, and with a person familiar to him as a man of business, there would be much less strain upon his mental faculties than if either the subject of

business or the person with whom it was transacted were new or strange.

With respect to the evidence of *Coll.* It is only material, if he is correct in supposing that his visit was on the 8th, and not on the 7th. I have no doubt of his honest intention to tell the truth, but he was upwards of eighty years old, and spoke of the 8th as the day only from memory. If he were correct no will was executed at all on the 8th, or if at all, it must have been in the interval between his leaving after dinner and the arrival of *Edward* about three o'clock. It is said that it could have been on no other day than the 8th that this visit of *Coll* was made, and the evidence is referred to as shewing that it could have been on no other day. I think there is nothing to shew that it was not on the 7th; the only difficulty is that he, in his evidence, and *Thomas McCollum* in his, each states that he went to *Lee's* about nine o'clock in the morning; but *McCollum* remained there only a few minutes, and *Coll* may have supposed it to be about nine, when it was a quarter or half past; and besides, the description of *Lee's* state as given by each very nearly corresponds.

Another point made in the case is that the will made by *Lee* on the 8th of September ought not to stand, by reason of the undue influence exercised over him by his wife.

The existence of a very considerable degree of influence on the part of the wife is shewn by the evidence, and such influence was manifested in various ways; the withdrawing his business from *McCollum*, who had managed it for him for some time; his revoking the power of attorney given to his brother *Garrett Lee*, are instances of it. It is possible, certainly, that *Lee* may have untruly attributed these things to the influence of his wife, but it is not probable. There are other circumstances which indicate the existence of such influence,

or rather perhaps a power in Mrs. *Lee*, which she felt enabled her to disregard his wishes: the servant man *Mason* being allowed to sit at table, although his doing so was distasteful to his master; the opening and destroying of letters addressed to him by his daughter while living at a distance; the same, as the evidence leaves no room to doubt, in regard to letters addressed to him by his son *Edward* from Iowa, and addressed by him to the same son; his being sent to his bedroom, although it was dark, when taken home by *Garrett Lee* and *Fanny McCollum;* and in proof of feeling his position in his own house irksome to him, is the fact of his seeking to live away from it, and making proposals to that effect at one time to his son *Edward*, at another to *Thomas McCollum*.

There is also evidence of much cruel neglect on the part of Mrs. *Lee*, which appears to me material in more views than one. It indicates a feeling on her part that her power was such that she could treat him as she pleased; and it is an argument against the probability of its being his own desire and will to deal very liberally with her in the disposition of his estate. Her answer to the suggestions made to her to call in medical advice, that it was no use, that doctors were only a bill of expense; and her bespeaking his grave-clothes several days before his death, were indications of callous indifference on her part: only material, however, as shewing an absence not of affection only, but of all kindly feeling, a state of feeling which he could scarcely have failed to have observed before, and which renders improbable a favourable disposition to her in his will. The will of the 27th July, made away from his own house, does not deal liberally with her, but the reverse; and he then, if the evidence is to be believed, evinced a desire to leave her as little as possible. There is also evidence that he felt keenly, at any rate before his last illness, the treatment which he received in his own house. During his last illness we do not find him in a state of

mind—unless indeed during the execution of the will—to express what his feelings were coherently, but some indication of them may perhaps be found in his answer to his son *Edward*, upon his reminding him that he was already at home upon his expressing a desire to go home, "No, I am not at home, this is a prison."

I take the law to to be that mere influence exercised by a wife or other person over the mind of a testator is not of itself sufficient to invalidate a will, that it must amount to a control over his mind, subjecting his mental will to the desire of another; so that the document executed as his will is not in reality the expression of *his* will, but that of another. The question is in what sense was this document the will of the testator?

In the first place I observe that the document was not drawn from any instructions given by the testator; they were given by the wife and consisted in a will, the one of February, being sent to a legal gentleman with instructions to draw a similar, substituting in a bequest to *Edward* a mortgage from one *Kitchen* for the one from *Sexton*. This would not invalidate the will provided the testator deliberately and of his own will adopted it, but it is all the more necessary that this adoption should be shown, and that clearly and satisfactorily.

In the next place it is material to consider who were present. There were present Mrs. *Lee*, Mr. *Duck*, *Henry Lee*, *Sexton* and *Mason*, not one unless it were Mr. *Duck* to counteract the influence of Mrs. *Lee*, or free him from such control as she had over him. *Henry Lee*, *Sexton* and *Mason*, as I have no doubt from the evidence, each for his own reasons desiring that the will should be executed. Mr. *Duck* probably having no interest one way or the other, but being nevertheless upon a friendly footing with Mrs. *Lee*, and this fact known to the testator.

In this presence and under these circumstances was the testator called upon to hear read, and execute the will placed before him. He was 82 years old; he was suffering from disease of the brain, which had then made such progress as to render him incapable, except at rare intervals, of transacting business, and his physical debility was extreme. He knew (if he had mental capacity to execute a will) that the document presented to him had been prepared under instructions from his wife, and that it was her wish, not to say her will, that he should execute it. I am quite satisfied from the evidence that he could not in his then state resist her dictation. The questions which he put, and the observations he made, while indicating mental capacity, are just such as he knew would be agreeable to her. The man who in health succumbed to her control in matters which he would fain have seen otherwise; and whose remedy was not to control his own house, but to look for an asylum elsewhere could not, it is morally impossible that he could, have opposed her will when the document which purported to be his will was presented for his execution.

Still it may be said, his will and intention as to the disposition of his property may have accorded with hers. But we have some indications of the contrary. There is every reason to think that the will of the 27th July made such disposition of his property as he really desired to make. It is true that he denied having made that will, but it is just what a man like him would do, to save himself from the importunity or persecution of his wife, just as he desired those who were cognizant of it being made to keep it secret; but he never cancelled it, or asked those who kept it to give it up to him, as was the case with the power of attorney to *Garrett Lee*; he took precisely that course which he would be likely to take if he wished to preserve it; he left it in the hands of those who would take care of it, and he concealed and denied its existence.

There is no evidence of any change of intention until

after his disease became so aggravated that he manifested unmistakable signs of a decayed intellect, nor indeed any whatever up to his death, unless upon the occasion of the execution of the will of September. I do not notice what he said on the 6th, for from *Duck's* account of his state on that day it would be wrong to attach any weight to it. So far, then, as we have evidence, his mind remained unchanged after making the will of July until he ceased to have a mind. Supposing his mind the same up to the time of this will being presented to him, we come to a time when we cannot ascertain what his mind or his intention was; we see what it had been up to that time, we see nothing to change it, and we see no more. The evidence, therefore, and the just conclusions from it are against the position that his will may have accorded with that of his wife.

We have nothing to shew that the document executed expressed his will. A good deal to shew the contrary. A good deal to shew that it expressed the will of his wife, and that she possessed and exercised a control which impelled him to give expression to her will in the paper to which he put his name. Upon the evidence, therefore, I feel obliged to pronounce against the will of the 8th of September.

I see nothing to impugn the will of the 27th of July; its due execution and the sound and disposing mind of the testator are sufficiently proved; that will therefore will be established.

The decree will be accordingly; with costs to be paid by Mrs. *Frances Lee:* the plaintiff must pay the infant defendants their costs, and have them over against Mrs. *Frances Lee.*

After this judgment had been pronounced, a petition was presented by Mrs. *Frances Lee* to open publication,

in order that evidence might be given, shewing that the defendant, *Edward R. Lee*, who had been examined on behalf of the plaintiffs, and was a material witness in support of the case made by the bill, had made an arrangement with the executors and trustees named in the will of July, whereby he was to be permitted to carry on proceedings in their names, he agreeing to indemnify against all costs, and upon such evidence being taken, the cause might be again set down to be heard.

Mr. *Mowat*, Q. C., and Mr. *Crickmore* in support of the petition.

Mr. *Strong*, Q.C., Mr. *McDonald*, and Mr. *Crickmore*, contra.

Judgment.—SPRAGGE, V.C.—This is a petition substituted by our general orders for a petition for leave to file a supplemental bill in the nature of a bill of review, upon facts discovered since the decree. The petition is presented by the defendant *Frances Lee*.

The decree establishes the will of 27th July, 1859, as prayed by the bill, the bill impeaching a subsequent will of the 8th of September in the same year on the ground of mental incapacity at the time of its execution, and of undue influence on the part of *Frances Lee*. I pronounced against the will of September on the latter ground, having arrived at the conclusion, after a good deal of hesitation, that the testator had mental capacity to make the will.

The petitioner now seeks among other things, to introduce evidence to impeach the mental capacity of the testator at the time of the execution of the will of July. By her answer she questioned the fact of its execution, and alleged that if executed, it was obtained through undue influence exercised by *Thomas McCollum*,

Garrett Lee, and others; it was no part of her case that he was mentally incapable, in fact such a position would have been suicidal, for it is certain from the evidence that his mental capacity was greater at the date of the will of July than at the date of the will of September. The point is not only not in issue but inconsistent with the issue, and the evidence offered is weak and inconclusive.

The petitioner proposes to introduce new evidence upon the fact of the execution of the will of July; the will was executed in duplicate, and one only was produced at the examination. It is now suggested that an inspection of the other will shew that the signatures of the two are not by the same hand, and both are now produced. To me the signatures appear to be the same, each page is signed, making five signatures on each duplicate. There are points of difference certainly, but they are as great between those on different pages of each instrument as between the two sets of signatures, with perhaps an exception, the last upon one of them, which looks as if written when the hand was weary. The suggestion is that the will is forged, and that the forgers took the extraordinary course of repeating the signature ten times, and using the hands of two different persons to do it. It is suggested that it is unlike what is his proved signature to other documents, none are produced, nor is there any evidence to the fact. I should be slow to believe in the forgery of this will in the face of the evidence as to the fact of its execution.

We have the express evidence of the subscribing witnesses, one of whom, *Matthew Scott*, seemed to me to be entitled to perfect credit, as above all suspicion of interest or motive in the matter, and I do not doubt the evidence of the other witness *Thomas McCollum*; and their evidence is confirmed by that of *Frances McCollum*, who deposes to the testator expressing his intention before, and his satisfaction afterwards in regard to this will.

Another point upon which it is sought to introduce new evidence is as to the absence of that controlling influence which I attributed to Mrs. *Lee* at the time of the execution of the will of September. Most of the evidence offered is mere matter of opinion, and most of it might with due diligence have been produced in the course of the examination which occupied four days; or at any rate before the hearing. Two instances of conduct are given in order to negative influence in the wife; one in the month of August, before his death, when one *Kitchen* asked him to endorse upon his mortgage an extension of time which he had agreed to g[illegible], and Mrs. *Lee* seconded the request; he is said to have turned to her and said, "*Fanny*, what have I done to Mr. *Kitchen* that he should doubt my word?" and to have refused to make the memorandum. Another instance is that Mrs. *Lee* was speaking boastfully of one of her sons being a banker in the States, when her husband told her to hold her tongue. The witness thinks this was in the summer of 1859, and he adds that he was a man of firm mind in his earlier days.

It was in the end of August, the last day of the month I think, that *Lee* was attacked with the serious illness that so soon terminated his life. The latest of these two occasions was before this, and they seem to me mere ebullitions of petulance that weigh almost nothing against the many circumstances which are disclosed in evidence shewing the existence of a controlling influence which at the time of the execution of the will *Lee* felt to be irresistible; and there is this to be said in regard to the character in which the petitioner now represents her late husband, that in her answer she swears, that if he executed the will of July, she believes that he was led and induced to do so by fraudulent and undue and improper influence and coercion, exercised over him by *McCollum*, *Garrett Lee* and others, and that if he executed that will he did so when in *McCollum's* house, and when wholly in the power

and under the influence of himself and others. It is hardly consistent with this that he was a man of so much firmness as to negative the idea of a controlling influence on the part of his wife, under the circumstances under which the will of September was executed. I doubt if any of the facts referred to in my judgment as evidencing such influence are so strong as these allegations in the sworn answer of Mrs. *Lee*.

Another point remains to be noticed. *Edward R. Lee*, a son of the testator, was a material witness for the plaintiffs. It now appears upon evidence laid before me upon this petition, that since judgment was given in this cause he has stated that an arrangement had been made between him and the executors named in the will of July, to hold them harmless as to costs if they would allow him to use their names as plaintiffs, and further, that if the suit were decided in favour of the plaintiffs, the executors were to assign their executorship to him, and that he was to have the winding up of the estate; and it is also in evidence that he has thrown out hints about making an arrangement with Mrs. *Lee* for a division of the property, and setting aside the will of July, and has indulged in threats, intemperate and absurd ones, against *McCollum* and *Garrett Lee*, two of the executors.

Certainly if such an arrangement as is spoken of had been *proved* before the hearing I should have attached less weight than I did to the evidence of *Edward R. Lee*, if I did not hold him to be an incompetent witness, but at the same time I should, as I have no doubt, have arrived at the same conclusion without his evidence; and now, upon reconsidering my decision, I am prepared to say that, putting his evidence out of the case, I should hold as I did hold, as to the exercise of undue influence by Mrs. *Lee* at the execution of the will of September.

Such an arrangement as is alleged between *Edward*

R. Lee and the executors is even now not proved; of course his statements are no evidence against the plaintiffs. But the petitioner may desire to appeal from the decree, and if she should, it is not fair to her that the evidence of that witness should form part of the evidence in the cause against her, with all the weight which should be attached to it as the evidence of an unbiassed witness, if in truth it was given under the circumstances alleged. I think my proper course will be to allow evidence to be given upon that point, and upon that point only, and the cause can be again heard *pro forma*, or such further evidence can be taken to form part of the evidence in the cause.

The order under the old practice would be for leave to file a supplemental bill in the nature of a bill of review, and would be made upon payment of the usual deposit.

HARROLD v. WALLIS.

Consideration of will—Exemption of personality from payment of debts.

Where a testator directed his debts to be paid out of his "estate," then bequeathed to his widow an annuity of £100, to be paid out of the proceeds of his "estate," and also bequeathed to her all his personal property; then directed that the whole of his property should be sold by his executor at the death of his widow, and finally, empowered his executor to sell such portions of his property as he might think best, for the purpose of liquidating any just claims due by the testator, at any time that the executor might find it necessary to do so. *Held*, that the debts were charged upon the real estate as the primary fund.

The bill in this cause was filed by some of the legatees of the testator, *Samuel Harrold*, against his executor, and some members of the testator's family, praying, among other things, for the construction of the following portions of the will, namely, "My will is that my funeral expenses and just debts shall be paid out of my estate by my executor. I hereby bequeath to my beloved wife the sum of £100 a year, to be paid to her out of the proceeds of my estate. I also give and bequeath to her all the personal property that I may be possessed of

at the time of my death. Also, my will is, that at the death of my wife the whole of my property shall be sold by my executor. I also authorise and empower my executor to sell such portions of my property as he may think best, for the purpose of liquidating any just claims which may be due or become due by me, and at any time that he may find it necessary to do so, and to give such titles as would be given by me if alive."

Mr. Hodgins, for the plaintiff, contended that under this will the debts should be borne by the real and personal estate rateably.

Mr. McGregor, on behalf of the widow, who was a defendant, argued that upon the whole will it was clearly the intention of the testator to throw the debts on the real estate, and exonerate the personalty.

Judgment.—VANKOUGHNET, C.—I think upon the whole context of the will the testator's intention was to exempt from payment of his debts the personalty bequeathed to his wife. He gives her the personalty absolutely. What then does he mean by the word "estate," out of which he directs his executor to pay his debts and funeral expenses? I think he means his real estate, which he directs his executor to sell. The word "property" in the clause immediately following the bequest to his wife means the same thing, because he does not intend his executor to sell at his wife's death the property which he had given her absolutely, and, moreover, in directing the application of the proceeds of the sale, he speaks of the improvements done by his sons on the property, and this could only refer to realty, and he gives his executor full power to effect sales. Though with some doubt, I think the debts are charged upon the real estate, as the primary fund.

CHRISTIE v. DOWKER.

Mortgage—Covenant to pay—Sale, order for deficiency on—Statute of Frauds.

M. being owner of the equity of redemption verbally assented to an arrangement that "In consideration of the said McInnes having promised to give his personal covenant for the payment of the said balance of £300 (due on the mortgage) in three years from 10th February last, with interest to be paid half yearly as a collateral security, I will procure him an extension of time, as aforesaid, on receiving said covenant from him," which was embodied in a memorandum signed by the solicitor of the mortgagee, but without his authority. Proceedings were accordingly delayed on the mortgage for three years, on the faith of this promise; and the mortgagee subsequently instituted proceedings in this court to obtain a sale of the premises, and that M. might be ordered to pay any deficiency arising on such sale of the premises. *Held*, that there was not any absolute binding agreement to give the time: that as part of the agreement (that as to giving the covenant) was to be performed within a year, but the mortagee's part embraced a period of three years, (as did also M.'s in regard to the time for payment,) whether the Statute of Frauds would stand in the way of the plaintiff's recovery. *Quære* that had M. performed his part of the agreement, the mortgagee could have been compelled to execute his, and that a personal order for payment of the deficiency is only made by the court to avoid circuity of action, and in aid of a legal right, but only when that right is clear.

Statement.—This was a suit seeking to obtain a decree for sale of mortgaged premises, and the usual order for payment of deficiency in the event of the sale not realizing sufficient to pay the amount which should be found due to the plaintiff under the circumstances stated in the head-note and judgment. The cause came on to be heard by way of motion for a decree.

Argument.—Mr. *Gwynne*, Q. C., for the plaintiff, contended that the defendant McInnes having agreed to execute the covenant to pay off the mortgage in three years, and having, by the forbearance of the mortgagee, obtained the time stipulated for, the court would compel him now to do so—the court, under such circumstances, will treat him as having performed his portion of the agreement, citing *Innes* v. *Dunlop*, (*a*) *Price* v. *Seaman*, (*b*) *White* v. *Parkin*, (*c*) *Foster* v. *Allanson*, (*d*) and *Addison* on Contracts, pp. 21 and 38.

(*a*) 8 Term R. 595. (*b*) 4 B. & C. 525.
(*c*) 12 Ea. 578. (*d*) 2 Term R. 479.

Mr. *Strong*, Q. C., for *McInnes*, resisted the decree asked for, so far as any personal relief against him was concerned, as there was nothing binding in the agreement as to either party until the covenant was executed. He relied also on the Statute of Frauds as being a complete answer to the case made by the bill; the agreement not being to be performed within a year, and the order of court under which relief was here asked only applies to an ordinary case between mortgagor and mortgagee, or, where the right is clear and undisputed. *McInnes* could not have compelled an extension of time until he had given the covenant; until then the plaintiff was at perfect liberty to proceed, and there is nothing to shew that the plaintiff would ever have given the time, although his solicitor had chosen of his own accord, but without his sanction or authority, to undertake that the time would be extended. The fact that the three years have been allowed to elapse without proceedings having been instituted was merely accidental, a forbearance which *McInnes* could not have claimed or enforced.

Under these circumstances, the only decree the court will make will be the ordinary one for sale or foreclosure, as the plaintiff may elect to take, giving no personal relief as against *McInnes*.

The other defendants did not appear; as against them the bill was taken *pro confesso*.

Judgment.—VANKOUGHNET, C.—The plaintiff asks for a sale, and that the defendant *Donald McInnes*, the owner of the equity of redemption, by assignment from the mortgagor, may be ordered to pay the deficiency, if any, on the sale, on the ground that he verbally assented to the arrangement contained in the following memorandum of receipt for arrears of interest, and £25 of the principal money secured by the mortgage, signed by the solicitor of the mortgagee, and delivered to *McInnes*, viz., "In consideration of the said *McInnes* having promised to

give his personal covenant for the payment of the said balance of £300, due on the mortgage, in three years from the 10th February, with interest to be paid half yearly, as a collateral surety; I will procure for him an extension of time as aforesaid, on receiving said covenant from him." Mr. *Robertson* swears that he several times afterwards called upon *McInnes*, who always promised to execute the covenant, and that on the faith of these promises he delayed taking proceedings on the mortgage until thereby *McInnes* has in fact had the three years' forbearance.

To this claim upon *McInnes* personally it is objected, first, that there was no absolute binding agreement by plaintiff to give time, but only an agreement to do so conditional on *McInnes* executing a covenant to pay, and that until that was done the plaintiff was at liberty to proceed at any time on the mortgage, and that it was only on obtaining this covenant that *Robertson* was to procure from the plaintiff the extension of time for three years: that had the plaintiff proceeded at once upon the mortgage, *McInnes* could not have set up the agreement, which was only to operate when he had done something which has never yet been done, and that the plaintiff might never have given the time, notwithstanding *Robertson's* undertaking.

Secondly, that the agreement, being for something to be done at a period beyond a year, required under the Statute of Frauds to be in writing; that *McInnes* never signed any writing, and it is not proved that *Robertson* had any right to sign for the plaintiff.

Thirdly, that a personal order, as it is called, for payment of the deficiency is of recent practice, and only made by the court to avoid circuity of action and in aid of legal right, but only when that legal right is clear.

I think I should not make any order in this case, and

that the construction put by the defendant upon the memorandum in writing, signed by *Roberison*, and its effect, is correct. It is true *McInnes* has had the benefit of the three years, but that was because the plaintiff chose to let the time run on without procuring the proper undertaking from him.

As regards the Statute of Frauds, *McInnes'* part of the agreement, as to the giving the covenant, was to be performed within a year, indeed at once, but the plaintiff's part was to embrace a period of three years, as was also *McInnes'* in regard to the time for payment, and it would probably be found that the statute stood in the plaintiff's way. Had *McInnes* performed his part by delivering his covenant, the plaintiff, I apprehend, could have been compelled to execute his. *Donellan* v. *Read*, (*a*) *Souch* v. *Strawbridge*, (*b*) *Cherry* v. *Heming*. (*c*) I do not think it a case in which I should do more than make the ordinary decree, leaving the plaintiff to proceed at law if he thinks he can succeed there.* I give no costs of this contention to either side. *McInnes* has evaded his engagement, and is only entitled to such consideration as I feel compelled to give him.

(*a*) 3 B. & Ad. 899. (*b*) 2 C. B. 808.
(*c*) 4 Exch. 631,
*See also Mathers v. Helliwell, ante p. 172.

THE CANADA PERMANENT BUILDING SOCIETY v. THE BANK OF UPPER CANADA.

Building Society—Injunction—Laches.

Held, following the ruling of the Court of Queen's Bench in the *Farmers' and Mechanics' Building Society* v. *Langstaff*, reported U. C. Q. B., volume ix., page 183, that a building society may properly sue in their name without using the name of their president and treasurer for the purpose.

Although plaintiffs had been guilty of great delay in applying to this court for an injunction to restrain the sale of lands under an execution at law, yet a sufficient case having been made out for an enquiry, the court granted the writ on an interlocutory motion; the plaintiffs undertaking to proceed to an examination of witnesses within one month after answer filed and hearing the cause forthwith thereafter, paying the costs at law incurred by reason of postponing the sale, and paying interest from the time the sale was to have taken place until the time of making a decree in the cause, in the event of the sale failing to realize enough to pay the full amount of the claim under the execution.

The facts appear sufficiently in the judgment.

Argument.—Mr. *Spencer*, for the plaintiffs, moved on notice for an injunction to restrain proceedings on an execution issued by the Bank of Upper Canada against the defendant *Bletcher*.

Mr. *G. D. Boulton* and Mr. *Hewson Murray* contra.

VANKOUGHNET, C.—On motion for an injunction to restrain the sale under execution in the bill mentioned, it was objected: 1st, That the plaintiffs should have sued in the name of their president and treasurer and not in their own name. 2nd, That by reason of laches they had lost their right to the special aid which an injunction affords. The first objection is disposed of by the case of the *Farmers' and Mechanics' Building Society* v. *Langstaff* (*a*), in which it was expressly ruled that the society might sue in its own name.

The second objection has great force, for no explana-

(*a*) 9 Q. B. U. C. p. 183.

tion is given of the delay in filing the bill. It is said that the plaintiffs never heard of the writ being in the sheriff's hands until recently, and that he could not, or at all events would not be likely to have known of it until the advertisement for sale by the sheriff, which appeared in a Port Hope paper on the 1st of August last, and in the *Canada Gazette* on the 9th of August, and was continued in these papers until the 24th of October last. The plaintiffs or their officers may not have seen this advertisement, but there is no affidavit to that effect; and there is on this ground very great difficulty in granting the present motion. On reading the different affidavits, I cannot but feel that it was the intention of all parties that the interest of *Bletcher* in the lands should be freed from incumbrances in order that a title might be made to the plaintiffs on the security of which, in part, money was to be advanced by them, whereout the bank was to receive $4,000 on account of *Bletcher's* indebtedness to them. This sum was according to one of the affidavits, the actual value of his interest in the property. Mr. *McLeod*, the agent for the plaintiffs, swears positively to the conversations and negotiations between himself and the solicitor and agent, with the express object understood, and assented to by all parties, of freeing *Bletcher's* interest in the lands from all charges thereon. In answer, Mr. *Rubidge* the solicitor swears that these had relation only to two of the judgments against *Bletcher*. But in this he seems to be mistaken, as he furnished Mr. *McLeod* with a memorandum of four judgments on the application of *McLeod* (as he swears) for a list of all incumbrances held by the bank on all lands of *Bletcher*. It is probable that both parties are right to some extent. While *McLeod* applied for and got a list as he supposed, and as I think it most likely Mr. *Rubidge* intended, of all judgments against *Bletcher*, Mr. *Rubidge* and Mr. *Smart*, the bank agent, in their interviews on the subject, spoke alone or chiefly in reference to two of the judgments on which the $4,000 was to be applied, and hence the

two things may be confounded. Mr. *McLeod* being principally concerned in getting a statement of the incumbrances which Mr. *Rubidge* gave as four in number, and not two, as he swears, and Mr. *Rubidge* and the bank agent being principally concerned in obtaining the $4,000 and applying it; each party being thus most intent upon, and now recollecting best, that which principally concerned him. Indeed, it will probably turn out that the judgment now in question and being against one *Bollean*, *Harris* and *Bletcher* was entirely overlooked. The bank agent swears he was not aware, until a year after the transaction with the plaintiffs, that this judgment formed a lien on *Bletcher's* land, and *Bletcher's* name being last in the suit as a party would not attract Mr. *Rubidge's* attention on looking at his docket. Upon the whole there seems a sufficient case made out for inquiry; but in consequence of the delay I can only grant the injunction on the terms that the plaintiffs shall proceed to the examination of their witnesses within one month after answer filed, such examination to be had before myself or one of the other judges if he will take it, and the cause to be brought on to a hearing forthwith afterwards; that the plaintiffs pay any costs which may be incurred at law in postponing the sale, and do also undertake to pay interest from the 25th of October to the time of decree made in the cause in the event of the plaintiffs in the execution failing to realize enough on their execution to pay. I do not understand *Bletcher's* part in the matter, as from his affidavits he appears desirous that the execution should proceed.

CAMPBELL v. SMITH.

Practice—Setting aside sale of lands by sheriff under fi. fa.

This court will, in a proper case, set aside a deed for lands improperly sold by the sheriff under common law process, and will not leave a party to his remedy at law alone.

Statement.—This was a bill filed by *Robert Campbell* against *Benjamin Walker Smith* and *Thomas Fletcher Park*, setting forth that the plaintiff, as a discharged soldier of the 48th regiment, had obtained a Crown patent for 100 acres of land in the township of Innisfil, situated within five miles of the town of Barrie, and had entered into the possession thereof, and subsequently became indebted to one *Thomas Craig*, who in the year 1857 recovered judgment against plaintiff for £126 3s. 11d.; and in March, 1858, issued a *fi. fa.* goods directed to defendant *Smith* as sheriff of the County of Simcoe, on which £10, part of the claim, was made; and that afterwards, and in December, 1858, a *fi. fa.* lands was issued on the said judgment directed to the same sheriff endorsed to levy £110 8s. 9d. debt, and £5 12s. 2d. costs, which was duly placed in the hands of such sheriff, under which writ the sheriff seized the said 100 acres; offered the land for sale, and knocked the same down to the defendant *Park* as such purchaser, for £12 10s., and subsequently executed to defendant *Park* a deed of conveyance thereof. The bill further alleged that *Park* was the bailiff of the sheriff, and that the sale to him at such sum was a sacrifice of the land, which ought not to have been made, and impeached the same as being fraudulent and collusive; and that plaintiff for a long time after such sale was not aware that it had been effected.

The prayer was to have the sale declared void and the conveyance set aside, or that payment to *Park* of £12 10s. he might be ordered to re-convey.

The defendant *Smith* answered the bill, denying the

fraudulent practices imputed to him, and as against him the bill had been dismissed for want of prosecution. As against *Park* the bill was taken *pro confesso*. On the cause coming on to be heard *pro confesso*,

Mr. *Tilt*, for the plaintiff, asked that a decree in accordance with the terms of the prayer might be drawn up.

Judgment.—ESTEN, V.C., after looking into the pleadings and authorities, directed the decree to go as prayed; and ordered the defendant *Park* to pay the costs.

FRASER V. LOCIE.

Appropriation of payments—Altering mortgage.

An appropriation of payments made by the creditor for the first time on bringing the account into the master's office and apparently on the very day on which it is brought in is too late.

If money is not expressly appropriated by the party paying it, the party receiving it may appropriate it even upon a claim which he cannot enforce by suit.

Before the face of a mortgage is altered by reducing the amount secured, there must be clear evidence by which to act.

This was an appeal from the master's report on the grounds stated in the judgment.

Mr. *Taylor*, for the defendant, who appeals.

Mr. *McGregor* contra.

Judgment.—VANKOUGHNET, C.—This was an appeal from the master's report on two grounds: first, that he should have disallowed £116 part of the principal sum mentioned in the mortgage on the ground that it was for usurious interest; and secondly that the master should have credited on the amount of principal and interest

actually secured by the mortgage the different sums paid on account by the mortgagor, and should not have allowed any portion of it in payment of the four per cent., excess of interest beyond six per cent., and which, after the mortgage fell due, the mortgagor had agreed to pay for forbearance. I think the master was right in treating the mortgage as a valid security for the amount appearing on the face of it, the evidence offered not being sufficient to impeach it. The only witness called was the mortgagor *Wilson*, who had a strong interest in reducing the amount; and he merely swears that he thinks that the £116 was for excessive interest; and he speaks of a book in which the manner the amount was made up is entered. But this book is not called for or produced. The mortgagee is dead, and before the face of the mortgage is altered, there should be clear evidence by which to act. On the second objection I think the master was wrong. Between the passing of the statute 16 Victoria, chapter 80, and the statute 22 Victoria, chapter 85, doing away with all limitation on interest, *Fraser*, one of the executors, agreed with the mortgagor not to enforce payment of the mortgage money then overdue in consideration of receiving interest at the rate of ten per cent. per annum. This agreement, though not absolutely illegal, was not one that could be enforced. Subsequently to it *Wilson* paid several sums on account of the mortgage debt or transaction to the plaintiff, not appropriating any of them to principal and interest. *Fraser*, on the part of the plaintiffs, brings an account into the master's office showing when these moneys were received and how he had credited them. And it was in this way: on the right-hand column of the account stands entered the principal money secured by the mortgage, and in the left hand column appear as credited on this principal sum the several sums paid by *Wilson*. No allusion is made in the account so far to the additional four per cent., or indeed to any rate of interest; but in a note on the paper brought into the master's office, as shewing

this account set out in the way I have mentioned, is a calculation of the four per cent. interest, the amount of which is there deducted from the gross sum credited to *Wilson*, and the balance there stated as the proper sum to be credited on the mortgage. This is done for the first time on bringing the account into the master's office, and apparently on the very day on which it is then brought in. In my opinion it was then too late for the plaintiffs so to appropriate the moneys paid to them. If they had as they received the moneys carried the balance, after deducting the extra four per cent. interest, to the credit of the mortgage, or perhaps if they had made the appropriation before bringing in the account, they could not have been called to account for the difference. But this is not what they did. They have expressly credited in the account kept by them all the moneys received upon the principal sum secured and bring the statement into the master's office, and then ask the master in effect to allow as set-off for them four per cent. extra interest. The master cannot do this, and they have not themselves done it when they could. If money is not expressly appropriated by the party paying it, the party receiving may appropriate it, even upon a claim which he cannot enforce by suit. Here the plaintiffs as they received it appropriated it in the manner I have mentioned; and the court will not help them now to what, but for the recent changes in the law, would be usurious interest. The report must therefore go back to the master to be dealt with in accordance with this opinion. (*a*)

(*a*) See Wright v. Laing, 3 B. & C. 165; Philpott v. Jones, 2 Ad. & Ell. 41; Mills v. Fowkes, 5 Bing. N. C. 455; Quinlan v. Gordon, vol. 7, U. C. L. J. 232.

CLARKE v. MCELROY.

Practice—Married woman's answer.

Until the time for answering has expired, the plaintiff is not at liberty to sue out an order for a married woman, defendant, to answer separately from her husband; and in such a case if the wife put in an answer jointly with her husband, it is binding upon her whether the suit be in respect of the wife's separate estate or not.*

Where husband and wife had jointly answered and demurred to a bill which demurrer was overruled, and the order drawn up allowing the same extended the time for the husband to put in his answer, but was silent as to the answer of the wife or the joint answer of husband and wife, *held*, notwithstanding, that under such order the husband and wife were at liberty to put in a joint answer.

Statement.—This was a motion adjourned from Chambers, to discharge an order, obtained *ex parte* by the plaintiff, for the wife of the defendant *McElroy* to answer separately. On the motion coming on in Chambers, counsel for the defendants contended that Mrs. *McElroy* having already put in a joint answer to the bill, could not be compelled to put in a separate answer, which view the learned judge who heard the motion was inclined to adopt; but it having been stated that his honour Vice-Chancellor *Esten* had adopted the view contended for by the plaintiff, the motion was adjourned into full court, and Mrs. *McElroy*, at the suggestion of the learned judge, put in a separate answer, subject to the right of the judge to call therefor.

Mr. Blake for the defendants.

Mr. *Proudfoot* contra.

Callow v. *Howle (a)*, *Clive* v. *Carew (b)*, *Griffith* v. *Wood (c)*, *Pawlet* v. *Delaval (d)*, *Hughes* v. *Evans (e)*, *Reeve* v. *Dalby (f)*, *Sigel* v. *Phelps (g)*, *Owden* v.

* See the same point, Elliot v. Hunter, Chancery Chambers Reports, page 158.

(*a*) 1 DeG. & Sm. 531.
(*b*) 4 J. & Hem. 199.
(*c*) 2 Ves. Sr. 452.
(*d*) 3 Ves. Sr. 663.
(*e*) 1 Sim. 185.
(*f*) 3 Sim. 464.
(*g*) 7 Sim. 239.

Campbell, (*a*) *Walker* v. *Parker*, (*b*) *Pudwick* v. *Platt*, (*c*) *Elston* v. *Wood*, (*d*) *Brown* v. *Hayward*, (*e*) *Cooper's* Equity Pleadings, 30, 31, *Story's* Equity Pleadings, sec. 71, *Smith's* Chancery Practice, 6th ed, 324, were, amongst other authorities, referred to.

The judgment of the court was delivered by

VANKOUGHNET, C.—In this case the husband and wife had put in a joint answer to part of the bill, and a demurrer to his residue. The demurrer was overruled, and an order taken out so declaring, and giving to the husband and wife leave to answer, limiting a time for the husband's answer to be put in, but not for the wife's, nor the husbands and wife's. On the same day the plaintiff obtained in Chambers *ex parte* an order for the wife to answer separately. We are of opinion that under the first named order the time for the husband and wife to answer was extended, and that under it they were at liberty to answer jointly, as they have since done. Until the time for so answering has expired, no practice or authority has been shewn to us which warrants the plaintiff in obtaining an order for the wife to answer separately, and we are therefore of opinion that the order obtained here for that purpose was improper, and must be discharged, and the separate answer filed under it, at the suggestion of the learned judge in Chambers, be taken off the file according to the understanding had at the time. The plaintiff contends that even though a joint answer be put in, yet it is, and is to be treated as the answer of the husband alone, and that, therefore, he is entitled, as a matter of course, to demand a separate answer from the wife. There is language in some of the books of practice which favours this view, and it appears that my brother *Esten* in one case on an *ex parte* motion

(*a*) 8 Sim. 551. (*b*) 2 Keen, 59.
(*c*) 11 Beav. 503. (*d*) 2 M. & K. 678.
(*e*) 1 Hare, 432.

adopted it; but it seems to us that it rests on no authority, for none such has been found, notwithstanding the great industry displayed by counsel on both sides in searching for precedents and cases. It is also contended by the plaintiff that the joint answer of husband and wife does not bind the wife, but that the separate answer would in matters relating to her separate estate. No authority for this position is to be had. According to the case of *Brown* v. *Hayward*, neither the joint nor separate answer would bind the wife; while, according to the cases of *Callow* v. *Howle*, and of *Clive* v. *Carew*, in neither of which was the case in 1 *Hare* referred to, the joint answer of husband and wife binds her. Considering the obscurity which surrounds the whole subject, and that my brother *Esten* did on one occasion follow the course which the plaintiff claimed the right to pursue here, we think the motion should be granted without costs.

Hope v. Beard.

Trustee—Costs.

A trustee of lands for payment of debts paid the debts without exercising the power of sale for that purpose, and took a release from the *cestui que trust* to himself, which release was held void, and an account directed. Under the circumstances, neither fraud nor neglect to account having been established against the trustee who had accounted as such in the master's office, and the property or the produce thereof being forthcoming for the benefit of the estate, the court directed the trustee to receive his subsequent costs as in ordinary cases, as between solicitor and client.

Upon this case coming on for further directions, Mr. *Roaf*, for plaintiff, asked that defendant might be ordered to pay the costs.

Mr. *Strong*, Q. C., contra, contended nothing had been established against the defendant, which would warrant the court, under the authorities, in charging the defendant with costs; but, on the contrary, the result of the enquiry before the master was such as entitled him to receive his costs.

Judgment.—VANKOUGHNET, C.—The facts of this case appear in the judgment of Mr. Vice-Chancellor *Esten*, as reported in the eighth volume of Mr. *Grant's* reports, at page 380. No costs were given up to the hearing, and the subsequent costs, which are now in question, were reserved. By the decree, the defendant was declared to be still a trustee for Mrs. *Hope* of the lands in the bill mentioned, which had been devised to him in trust to sell, if necessary, for payment of debts; although in 1851 Mrs. *Hope*, with the consent of her husband, had sold and released all her interest in the lands to the defendant by an instrument which the learned judge who pronounced the decree held to be inoperative, because it wanted the formalities required by law for the passing of the estates of married women. Notwithstanding that this instrument is set up in the answer, it is neither in the bill nor in the evidence impeached as having been improperly obtained, although in the judgment referred to, it is stated that it does not appear that the defendant, before obtaining it, had communicated to the plaintiff the receipt by him of a considerable sum, produced by the manufacture of bricks out of the land. The allegations in the bill of fraud, and of neglect to render accounts by the defendant, are not proved. The defendant has, as trustee, accounted in the master's office for these lands, or the produce of them. I think that he should have his costs, as in ordinary cases of an accounting trustee, as between solicitor and client, subsequent to the decree. He does not appear to have been guilty of any fraud. He might by a proper instrument, instead of the one he acted on, have obtained the wife's estate in the premises. There has been no loss, the property or its proceeds being forthcoming.

TEMPLETON v. LOVELL.

Wild land taxes—Sale of lands for—Setting aside.

In 1851 a party purchased 50 acres of land, upon which he settled and paid the assessments for 1852, and subsequent years, but the assessment for 1851 had not been paid, for the amount of which (£2 1s. 9d.) twenty-four acres of the property were sold in 1859 by the sheriff, under the warrant of the treasurer for the wild land assessment, when the same were purchased by one of the bailiffs in the employ of a former sheriff. The portion sold was worth £7 10s. per acre. Although there was not any direct evidence of combination amongst the audience to prevent competition, still their conduct was such as to lead to that opinion.

The court under the circumstances, following the cases of Massingberd v. Montague, (ante volume ix., page 92,) and Henry v. Burness, (ante volume viii., page 345,) set the sale for taxes aside upon payment of the amount which would have been required to redeem the land within the year, and interest since that time; or the amount might be applied in part payment of the amount due upon a mortgage created on the land by the purchaser at the sale for taxes.

Statement.—This was a bill by *Frederick Templeton* and others, against, *Samuel Lovell* and *William Willis*, the latter having become mortgagee of the property in question from *Lovell*, for the sum of twenty-five pounds.

The sale which it was sought to impeach took place at the same auction as the sale which was set aside in *Massingberd* v. *Montague*, in the report of which case the facts sufficiently appear.

Mr. *Blake* for the plaintiffs.

Mr. *Roaf* for defendant.

Judgment.—SPRAGGE, V. C.—The sale in question took place in April, 1859, being the same sale at which the lands of *Massingberd*, the sale of which was brought in question in the suit of *Massingberd* v. *Montague*, were sold.

The plaintiffs were the owners of a parcel of land a little over 50 acres, in the township of Dorchester, about six miles from London. The land was purchased in October, 1851. The taxes for 1852, and for several subsequent years, up to the year of the sale, as I understand the evidence, were duly paid. The sale was for non-payment of taxes for the year 1851. The taxes for

that year amounted to 26s.; adding ten per cent., the treasurer's warrant was for £2 1s. 9d., and for this sum twenty-four acres of the plaintiff's farm were sold; the defendant *Lovell*, formerly in the office of the late sheriff, being the purchaser. The value of the twenty-four acres is proved to be about £200.

In *Massingberd* v. *Montague*, the Chancellor characterized this sale as, though perhaps, in a less degree than some others, one of those in which the rights of owners are sacrificed to the cupidity of bidders, who, by arrangements among themselves, contrive to get for trifling sums, chargeable on the property, whole lots of land, when one-twentieth, and often one-fiftieth part should suffice for payment. I have not seen the evidence given in that case, but the evidence in this case does support what his lordship says in that case, that there is much evidence to shew that at periods of the sale arrangements were made by those present not to compete for particular lots.

There is not direct evidence of combination, as there was in *Henry* v. *Burness*, but there was that course of conduct among a large proportion of purchasers at the sale which led men of intelligence present at the sale to infer that there was such combination. I refer particularly to the evidence of *McBeth* and *Holland*. The evidence of *Barker* and *Wigmore* goes far to lead to the same conclusion; and what is stated by *McBeth* and *Holland* is sufficient to justify the inference they drew. Competition was not only discountenanced, but was, in some instances punished, by bidding against the offender, so as to reduce the quantity of land to so small an amount as to be useless. I think the language of the Chancellor is not too strong when he designates such a sale as a mockery, and a conspiracy to deprive the owner of his property.

I observe from the evidence that the sheriff had not made himself acquainted with the property to be sold.

He was unable to give any explanation to the audience, in regard to the land to be sold; or to discharge the duty imposed upon him by statute, to sell first that portion of the land which in his judgment it is most for the advantage of the owner to sell. I have already observed upon this omission on the part of sheriffs, and I am glad to find that the Chancellor has done the same in the case to which I have referred. Not only is the owner injured, but the purchaser is unable to exercise those rights which the law gives him; for suppose him to have purchased fifty acres out of one hundred, and waste and destruction to be committed over fifty acres, how is he to know that it is upon his purchase, when the part he purchased is left undesignated for a year after his purchase.

When the sheriff did designate the twenty-four acres that *Lovell* was to get, he assigned him the best part of the lot, and which was worth at the time £7 10s. an acre. One acre was worth more than three times over the amount of the taxes. I do not mean that a purchaser could be expected to pay the taxes for a third of an acre, or for an acre of the land, and I dare say the position is correct that less would probably be bid for a redeemable than for an absolute interest, but still the quantity sold in this case was in monstrous disproportion to the purchase money.

In *Henry* v. *Burness* (*a*) I commented at some length upon these sales for taxes; upon the proceedings at them, and upon the duties of the sheriff, and upon the law which, in my judgment, is applicable to them. I think this case is brought within the principles which govern such cases, and that the sale cannot be supported.

The defendant, *Willis*, is a mortgagee of *Lovell* for a small amount, £25. His denial of notice is not quite so specific as it ought to be. What he is charged to have

(*a*) Ante vol. viii., p. 345.

had notice of is of the facts constituting the plaintiff's equity to set aside the sale; not that the plaintiff had asserted any title or claim, I desire to express no opinion upon that; but the denial by the answer, though not specific, covers the whole period in which notice could affect him, and there is no evidence, whatever, of his having notice. I think I cannot properly remove this mortgage, but that *Lovell* should be ordered to pay it off. The decree can easily be put in such a shape as to enforce the payment of the money, by what is now the process of the court to compel payment. The plaintiff must pay *Willis* his costs.

The plaintiff must pay to *Lovell* the amount which he would have had to pay if he had redeemed within the year, with interest since; or he may pay it to *Willis* in reduction of his mortgage; and each party is to pay his own costs. The plaintiff has relief upon substantially the same terms as the plaintiff had in *Henry* v. *Burness*.

LOGIE v. YOUNG.
LOGIE v. AUSTIN.

Wild land taxes—Setting aside by sheriff for—Duty of sheriff at.

Where at a sheriff's sale of land for taxes practices were indulged in by the audience which had the effect of checking fair and free competition, and the lands offered for sale were sacrificed, the court in the absence of any direct proof of combination granted relief to the owner of the land by setting aside the sale.

Semble.—It is the duty of the sheriff when he sees the intention of the legislature thwarted, by such practices, to declare to those guilty of them that he will not continue the sale under such circumstances, and that he will postpone it until a fair sale can be effected.

In the first-named case the bill was filed by *Alexander Logie* against *Archibald Young*. In the other by the same plaintiff against *James Austin*, praying, under the circumstances stated in the judgment, to have certain sales of wild lands for taxes set aside on the ground of combination to prevent competition, and other

improper practices by the defendants and other persons attending the sale.

Mr. *Mowat*, Q.C., and Mr. *McLennan*, for plaintiff, referred to *Henry* v. *Burness*, (*a*) and *Massingberd* v. *Montague*, (*b*) contending that the present cases clearly came within the same principle as governed the court in disposing of those cases, and that the gross disproportion of land sold and the amount due thereon showed so great a case of hardship that the court would if possible grant the relief prayed.

Mr. *Roaf* for defendants. The mere inadequacy of price is not sufficient to invalidate the sale, and nothing appeared in the evidence to show that defendants had participated in any of the improper practices complained of.

Mr. *Mowat*, Q.C., in reply

Judgment.—SPRAGGE, V.C.—The land-tax sale at which the defendant was a purchaser of the lot of land in question was commenced on the 11th of October, 1859, and was continued on the following day, and by adjournment on the 4th of November. The lot in question was purchased on the second day. The amount of the taxes in arrear was $45.17; the purchase was of the whole lot, 200 acres, being lot 23, in the fourth concession of Sombra, sworn to be worth $800.

The sale is impeached on the ground of combination among the audience at the auction sale to prevent competition, and thereby obtain whole lots for the arrears of taxes, without regard to the value of the lots, on which the taxes were due.

The evidence of what took place on the two first days named is of very much the same character as in *Henry*

(*a*) Ante vol. viii., p. 345. (*b*) Ante vol. ix., p. 92.

v. *Burness*; but without any direct proof of actual combination, except among three individuals. The means taken to prevent competition were, however, of the same nature; and there is good reason for the inference drawn by some of the witnesses, that there was a tacit understanding among bidders not to oppose one another; to allow whole lots to be purchased whatever their value, upon the understanding that if they did so, they were to be allowed without competition to obtain whole lots themselves. The cries "it is not your turn," or "you got a lot a little while ago," "don't bid against me and I'll not bid against you," "wait for your turn," and the like, were frequent; and *Saul*, one of the witnesses, states that there were one or two instances of competition being checked by a remonstrance from one of the speculators: "Let us not cut each others' throats—let us each have whole lots—100 or 200 acres, as the case may be, and not run it down;" and the others, he adds, seemed to acquiesce in that. And there was also the same checking of competition by bidding down to so small a quantity as to be useless. Upon this point one witness, *Sullivan*, says, "there were frequent instances of persons bidding, as it was supposed out of their turn; and then the lots were run down to a small quantity, and they would throw them up." One witness was paid for bidding, the object being, as he says, to make the turn come round sooner to those who employed him.

I refer more particularly to the evidence of *Sullivan*, *Ireland*, *Saul* and *McMullen*, which I think is not very materially varied by other evidence. Others certainly speak of seeing less of such practices, and others of seeing none; and several express their belief that there was no combination, and say that *they* were not deterred from bidding; and that others had an opportunity of bidding if they pleased. But it appears to me very evident that such practices must have prevented that wholesome, fair, and free competition, which is the very essence of a sale

by auction. All the witnesses speak of the extreme eagerness to be the first bidder, if bidder it can be called, when a large number call out together at the earliest possible moment, "I'll take that lot." This is as unlike an auction sale as possible. It assumes the absence of competition, that a position of advantage will be conceded to him who is first in the field for the prize, and that unless he has too recently obtained a similar prize, he is to have this one unopposed. In such a case the amount of purchase money and the value of the land have almost nothing to do with one another, but there is instead a sort of division of spoils, so far as a set among the bidders can make it so.

It appears to me to be the plain duty of the sheriff when he sees the intention of the legislature thwarted by such practices, to declare to those guilty of them that he will not continue the sale under such circumstances, and that he will postpone it until a fair sale can be obtained. At the best, owing to the large quantities of land thrown into the market by these sales for taxes there will always be great sacrifices and great bargains; that ought to be enough, without increasing either, by the unfair, unscrupulous practices which are proved in this case.

Suppose a sale, not for taxes, but of large estates of many thousands of acres, brought to the hammer by trustees for their sale: suppose lands differing greatly in value, say from one to forty dollars per acre, as lands sold for taxes do vary in value: suppose them set up in lots of one or two hundred acres, and all at the one upset price of the minimum value, a dollar an acre: (an improvident course, but not more improvident than the offering for sale by the sheriff who is a trustee for their sale, of lands without being able to inform purchasers as to their quality or value:) and suppose further, a combination or tacit understanding among buyers not to compete with one another, and means employed to pre-

vent competition in others, such as are disclosed in regard to the sale in question, the object being, in the case I have supposed, to obtain lots the most valuable at a dollar an acre, without regard to their value being thirty or forty. Such proceedings would shock the conscience of any right thinking man, and I believe it is only because men have been familiarised for a number of years with the like practices at sales for taxes, that their perception of the wrong has been blunted.

In regard to these tax sales, I adhere to the views which I expressed in *Henry* v. *Burness.*

I must say, in justice to the defendant, that the allegation in the bill which charges him with being an active participator in the improper practices to which I have referred is entirely without foundation. It is clear from the concurrent testimony of many witnesses that his language and demeanour were unexceptionable. This, however, as I held in *Henry* v. *Burness*, does not alter the legal consequences of his purchasing under the circumstances that he did. Since I have decided that case, the same point arose in *Richmond* v. *Evans*, (*a*) and I desire to refer, in addition, to an authority cited in that case, *Jenkins* v. *Jones*. (*b*)

I think relief should be granted in this case upon the same terms as in *Henry* v. *Burness*, adding interest from the expiration of a year from the date of the sale.

In *Logie* v. *Austin*, his honor stated that the same observations as he had made in *Logie* v. *Young* applied to this case.

(*a*) Ante vol. viii., 320. (*b*) 6 Jur. N. S. 391.

LOGIE v. STAYNER.

LOGIE v. JAMIESON.

Setting aside sheriff's sale for taxes—Breach of duty on part of sheriff.

At a sale of land for taxes, the sheriff not having made himself acquainted with the land, its situation or the quality of the soil, was unable to correct an erroneous impression that prevailed among the audience at the auction as to the value of a lot, in consequence of which property that was worth £400 was sold as if doubtfully worth £20.

On a bill filed to set aside the sale, *held*, that such omission of duty on the part of the sheriff was not a sufficient ground to disturb the sale to an innocent purchaser.

Held, also, that it would not be inferred that a sale which took place according to adjournment in the month of November, was necessarily affected by practices, on the part of the audience to prevent competition, which had been carried on at the sale in the month of October preceding, and from which the sale in November was adjourned.

Statement.—In the first named suit the bill was filed by *Alexander Logie, Benjamin G. Garrett,* and *Robert R. Masterton* against *Thomas A. Stayner;* in the second, by *Alexander Logie* against *Thomas Jamieson,* praying to have certain sales of lands for taxes made to the defendants in the month of November, 1859, declared void, and the deeds thereof executed by the sheriff set aside on grounds similar to those mentioned in the last case.

Mr. *Mowat* Q. C., and Mr. *McLennan,* for the plaintiffs.

Mr. *Strong,* Q. C., for defendant *Stayner.*

Mr. *Blake* and Mr. *E. Crombie,* for defendant *Jamieson.*

The points relied on appear sufficiently in the judgment of.

Judgment.—SPRAGGE, V. C.—The sale complained of in this suit took place at the adjourned sale of the 4th of November, 1859. The evidence of practices on the part of the audience to prevent competition is very much weaker as to the adjourned sale than as to the sales which took place on the 11th and 12th October.

At the adjourned sale as well as at the previous one it was the practice of several of the audience, upon a lot being put up by the sheriff, to call out, "I'll take that lot;" but beyond that there was, I think, an absence of the devices to prevent competition which prevailed at the previous sale, if indeed that was a device to prevent competition, and not a habit acquired at the previous sale. I say this with the exception of one lot, a lot in the township of Dawn. The bidders for that lot were *William P. Vidal* and *Jehu Davis*, and perhaps some others; and as to that lot there was perhaps some little noise and confusion. Upon its being first put up, the sheriff was uncertain who was the last bidder, and passed it over for a while, selling some other lots in the meantime. *Davis* says that when he bid for the Dawn lot two or three told him not to break the lot—not to run it down. He names Mr. *Vidal* and another as having called out to this effect, and two others as having spoken to him privately. He says he was paid something to withdraw from competition. This however seems not to have been known either to the sheriff or to Mr. *Vidal*. Mr. *Vidal* states that, which is probably the explanation of what took place in regard to the sale of this lot, he had previously owned part of the lot; and that upon his shewing this it was recognised by the audience as a reason (I say nothing in favour of the soundness of it) for not bidding against him.

Davis says further, "some of the lots would be run down:" one would say, "I will let you have that lot and you must let me have another, or words to that effect, and the lot would not be bid down." But upon cross-examination he qualifies, if he does not contradict this; and upon re-examination he does not re-affirm it. He does not say whether he was at the previous sale; if he was, I think he was confusing them. I was not very favourably impressed with his evidence: there seemed some exaggeration about it, and it varied somewhat according to the party by whom he was examined.

David Brown, who was at both sales, and who was present during the whole time of the adjourned sale, says it was more quiet than at the October sale: that there was no shouting or clamour: that what he had stated as to the cry, "it is not your turn," and the like, was in reference to the October sale; and that he heard nothing of the kind at the adjourned sale.

Mr. *Adams* also was present at both sales, and says he heard no noise or dispute at the adjourned sale, except between *Jehu Davis* and Mr. *Vidal* about a lot in Dawn; and that he does not recollect at the adjourned sale any of the cries said to have been uttered at the previous sale. The evidence of *Stevenson*, who purchased for Mr. *Stayner*, but who gave his evidence very fairly, and of *Jamieson*, is much to the same effect. I do not think that upon the evidence I can come to the conclusion that at the adjourned sale there was any thing to prevent competition, except as to the Dawn lot, and as to that for a special reason.

It is urged that the sale in November ought to be affected by what took place at the sale in October. I cannot agree in this, even if it were open under the pleadings—which it is not. It is possible, certainly, that some may have been deterred by what took place in October from going to the sale in November, but I cannot say that such could be a legitimate consequence; or that I can infer that such would be the case. I think it would be going too far to set aside a sale upon such a hypothesis. The evidence was taken as a matter of convenience in all the four suits at once. If purchases at the sale in November had alone been impeached I should have had no hesitation in refusing to take evidence in regard to the conduct of the sale in October, unless more connexion had been shewn between them than is shewn by this evidence.

It remains for me to consider the effect of the omission

of duty on the part of the sheriff to acquaint himself with the lands that it is made his duty to sell; the situation of the land, the quality of the soil, whether improved or not, and the like. The importance of such information is well illustrated by the sale of the lot in question. *Stevenson*, who purchased for the defendant, thought it badly situated, and had not marked it for purchase. He was the only bidder. One of the audience observed that he could get a canoe from one of the Indians to visit the lot, and *Stevenson* thought he had made a bad bargain. It turns out to be worth something like $1,600; the taxes were about $77. The sheriff was unable to correct the mistaken impression about the lot, so that it was sold as if doubtfully worth $77, when in truth it was worth about twenty times as much.

It was brought to sale under circumstances which amounted in my judgment to a breach of duty on the part of the trustee for sale; but the purchaser was innocent, and such being the case, the sale, I apprehend, cannot be disturbed, and *Davey* v. *Durrant*, (*a*) before the Lord Justices, is an authority to that effect.

I cannot therefore see my way to granting any relief in this case, and must dismiss the bill with costs.

In *Logie* v. *Jamieson* his honour stated in addition that the foregoing observations applied to it, except that when the lot sold to *Jamieson* was offered for sale nothing appeared to have been said either in favour or disparagement of the property.

(*a*) 1 DeG. & J. 331, 558.

SCHOLFIELD v. DICKENSON.

Wild land taxes—Duty of sheriff at sales for—Practice—Laches.

Quære—Whether a sheriff at a sale of land for taxes ought to permit a whole lot or piece of land to be sold in the first instance, where the value is greatly disproportioned to the amount of taxes due, without adjourning the sale, or taking some steps to protect the interests of the owner.

Quære, also, whether a sheriff is justified in proceeding with a sale of land for taxes, when the audience evinces a determination to purchase nothing but entire lots, or act in any other way inconsistent with a proper sale.

The several cases which have occurred where sales for taxes have been set aside, on the ground of intimidation, or other undue practices preventing fair competition, approved of and concurred in.

Where the owner of land had not paid any taxes thereon for ten years and did not redeem within the year, and suffered four years after the sale to elapse before taking any steps to impeach the sale which had been made of his land, *held*, he was precluded by his laches from obtaining relief, supposing him to have been otherwise entitled to it.

It appearing on the evidence, though not mentioned in the pleadings, that the purchaser of land at a sheriff's sale for taxes was a mortgagee of the property, *held*, in dismissing a bill filed to set aside the purchase on the ground of undue practices at the sale, that it was unnecessary to reserve liberty to file a bill impeaching the sale on the ground that he was disqualified as mortgagee to effect the purchase for his own benefit.*

Statement.—This suit was instituted by *Chancey Scholfield* against *Joshua B. Dickinson*, setting forth that on the 13th of August, 1839, a patent for lot 14, in the 2nd concession of Enniskillen, had been issued in favour of one *William Green*, who, in February, 1846, sold and conveyed 100 acres thereof to the plaintiff.

That some time in June, 1861, plaintiff learned for the first time that the sheriff had, in November, 1857, sold the said 100 for arrears of taxes for the years 1847 to 1856, inclusive, at which sale one *William R. Hill* became the purchaser, for the sum of £8 17s. 7d., and who, on the 13th of February, 1860, obtained from the sheriff the usual deed of conveyance, which was duly registered in the registry office of the county on the

*See also Smart v. Cottle, ante page 59.

14th of February, 1861, and was only discovered in June following, as above stated, on the occasion of a search being made into the title when plaintiff was about to sell the land; that on the 29th January, 1861, *Hill* conveyed to the defendant by deed of quit claim, registered 14th February, 1861. The bill charged that at the sale an agreement had been entered into between the parties present, in order to prevent competition, whereby the land of plaintiff, worth £500, had been knocked down to *Hill* for the small sum of taxes due thereon; and that by reason of the alleged practices the sale was void, of which the defendant had notice before obtaining his conveyance; that defendant had in February, 1861, created a mortgage on the said premises in favour of the wife of one *John Scely*, for £75, which mortgage the plaintiff contended the defendant should be ordered to discharge.

Statement.—The prayer of the bill was in accordance with these statements, and that the defendant might be ordered to pay the costs of the suit.

The defendant, by his answer, denied all knowledge of any of the alleged undue or improper practices at the sale, or that such had taken place; and stated that after the sale, *Hill* had transferred his right to *Seely*, from whom the defendant had purchased; but afterwards, the deed by the sheriff having been made to *Hill*, he, in pursuance of the bargain between *Seely* and defendant, conveyed to defendant, whereupon defendant went into possession, where he has remained ever since, making large and valuable improvements: he also set up the defence of purchase for value without notice, and that the laches and delay of plaintiff had been such as to preclude him from obtaining relief.

The defendant had been examined on behalf of the plaintiff. In the course of his evidence he stated that "Mr. *Hill* said to me there could be no doubt about the

validity of the tax sale; that he could obtain the title cheaper by bidding for the lot than by foreclosing the mortgage he held. * * * I thought that if the sheriff's deed failed, I could rest on the mortgage. * * * I have *Seely's* bond to get the mortgage assigned to me."

The other portions of the evidence necessary for the understanding of the facts appear in the judgment.

Mr. *Roaf* for plaintiff.

Mr. *Blake* for defendant.

Henry v. *Burness*, (*a*) *Massingberd* v. *Montague*, (*b*) and the cases therein cited were referred to.

Judgment.—ESTEN, V.C.—The present case differs from those which have occurred previously, of the same nature in some degree. Here is no evidence of any conspiracy to prevent competition. On the contrary, there was much competition of a certain kind; that is, to be the first bidder when the lot was exposed for sale. There was also an understanding gradually adopted by the audience in the course of the sale, without previous concert, that there should be a sort of rotation in purchasing lots, and when this understanding or arrangement was infringed by a person endeavouring to get more than his share of land, or a lot out of his turn, the others, in order to punish him, and drive him into an observance of the arrangement, bid down the lot. The witness, *Watson*, seems to think that some sort of combination might have existed, but the other evidence tends to negative it, and I cannot say that anything of the sort is established, different from what I have mentioned. What certainly did exist was, a general determination not to purchase less than a whole lot, arising in a great measure from uncertainty as to the

(*a*) Ante vol. viii., p. 345. (*b*) Ante vol. ix., p. 92.

value of the lots, and an impression that they were of little value. Among, probably, several hundred sales, not more than two or three instances occurred in which the whole lot or piece of land offered for sale was not purchased for the taxes. The sheriff is authorized to sell only what is sufficient for the payment of taxes, and expenses, and he is directed to sell such part of the lot as may be most conveniently sold for the owner, and the part sold must be specified in the certificate which is to be given immediately after the sale. The sheriff, therefore, is supposed to be acquainted with the lands which he exposes for sale, and he is bound to exercise his judgment for the benefit of the owner, in selecting the part to be sold. His duty is also, no doubt, to exercise a sound discretion in conducting the sale, in order to prevent the sacrifice of the property, and to secure as good a sale for the owner as circumstances will permit. In the present case I am quite sure that Mr. Sheriff *Flintoff*, was only anxious to do his duty to the best of his power, and he probably found it a very difficult task, in the face of the difficulties created by the conduct of the audience, to maintain the requisite degree of order, or to conduct the sale in a proper manner. I consider it to be settled by previous cases, with which I entirely agree, that wherever an attempt is made to prevent fair competition, by concert or intimidation, any sale affected by it will not be sustained by this court. It may, indeed, be questioned whether the sheriff would, in any case, be justified in allowing the whole lot or piece of land, charged with the taxes, to go for a very small part of the value in the first instance without an effort, by reserving the lot, or adjourning the sale, to protect the interests of the owner; or in allowing a sale to proceed in the face of a determination manifested by the audience to act in a manner inconsistent with a proper sale as where they evince a fixed resolution to purchase none but whole lots, especially where it arises in some degree from uncertainty as to the value, it being the duty of the sheriff, as it appears, to make himself acquainted

with the value of the property. It is unnecessary, however, to decide these points on the present occasion. Supposing it to have been the duty of the sheriff, under the circumstances of this case, the audience appearing determined to purchase none but entire lots, not to have proceeded with the sale, and that a sale effected under such circumstances was improper, and ought not to be sustained, I think that the delay which has occurred is sufficient to preclude the plaintiff from obtaining the relief to which, perhaps, he would otherwise be entitled. The object of the suit is to set aside a sale, on account of the improper manner in which it was conducted. Such a suit should be brought with reasonable promptitude, but in the case of these tax-sales the obligation to proceed with promptitude is increased by the fact that the sale in the first instance is nothing more than a mortgage, and that by redeeming the estate within the year, the whole object of a suit may be gained. In the present case the plaintiff suffered ten years' taxes to remain in arrear, in fact I apprehend that he never paid any taxes at all upon the lot in question, or at all events not more than one year's taxes. He did not redeem the lot within the year, and he suffered four years to elapse after the sale before he sought to impeach it. It is of great importance that these sales, if liable to question, should be impeached with promptitude. They are public transactions, in which the public repose confidence, and dealings take place with respect to the property after it has become irredeemable, without apprehension, and much hardship may be inflicted upon purchasers who, perhaps, have not paid their whole purchase money, as in the present case, and who, therefore, cannot defend their purchase on the ground of the want of notice. The defendant does indeed insist that *Seely* had no notice, but it is not proved that he paid a valuable consideration for the property, although there can be no doubt that he did. I think that the bill should be dismissed with costs. It appears from the registrar's abstract that Mr. *Hill* held a mortgage on

the land in question at the time he purchased it at the sale for taxes. The bill does not proceed on the ground of any incapacity of Mr. *Hill* to purchase for his own benefit, or otherwise than subject to redemption. Indeed, it does not mention the mortgage at all. If the plaintiff should be advised that he is entitled to relief on this ground, the dismissal of the present bill will not preclude him from seeking such relief, nor is it necessary to reserve liberty to him to proceed for that purpose.

MORRELL v. WARD.
DOW v. WARD.

Mortgage payable in lawful money of the United States of America.

A mortgage being payable in *lawful money of the United States of America*, the holder thereof in seeking to foreclose is entitled only to claim the amount in the current money of that country, or its equivalent at the time of default made in payment, or at any time subsequently at his option.

Crawford v. Beard, 14 U. C. C. P. R., page 87, approved of and followed.

Statement.—This was a suit for foreclosure of a mortgage made at the city of New York, and which had, since the institution of the suit, been assigned to *Dow; Ward* being the person now interested in the equity of redemption.

The mortgage, which was sued upon, bore date the 3rd day of January, 1859, and purported to be made between *William Henry Morrell of the city of New York, merchant*, of the first part, and *Thomas Morrell* of the same place, of the second part, whereby *W. H. Morrell*, in consideration of $12,000, *currency of the United States of America*, conveyed to *Thomas Morrell* in fee certain lands in Ottawa, with a proviso thereunder written that the same was "upon the express condition that if the said party of the first part, his heirs, executors, administrators or assigns, or any of them, do and shall well and truly pay, or cause to be paid, unto the said party of the second part, his executors, administrators or assigns, the just and full sum of twelve thousand

dollars *lawful money of the United States of America*, with interest thereon after the rate of six per cent. per annum, on the days and times, and in manner following, that is to say, the said principal sum is to be paid as follows: one thousand dollars in two years from the date hereof, three thousand dollars in three years from the date hereof, three thousand dollars in four years from the date hereof, and five thousand dollars in five years from the date hereof. The interest on the above is to be paid to the said party of the second part *in lawful money of the United States of America*, annually on the third day of January in each and every year." In other respects the deed was in the usual form.

The defendant answered the bill, and the cause came on for the examination of witnesses and hearing before his lordship the Chancellor at the sittings of the court at Ottawa in September, 1868. The only question in the cause being whether the defendant was liable to be called upon to pay any greater amount than the sum due in American currency upon the face of the mortgage would produce, when converted into current funds of this province.

Mr. *Lewis* for the plaintiff.

Mr. *Campbell* for the defendants.

Judson v. *Griffin*, (*a*) *Trimby* v. *Vignier*, (*b*) *Anstruther* v. *Adair*, (*c*) *Mayne on Damages*, page 117, *Story's Con. of Laws*, vol. 2, pp. 254, 260, were referred to.

Judgment.—VANKOUGHNET, C.—[After stating the mortgage as above set forth.]—The only question presented to my notice in this case was whether or not the defendant was entitled to pay, and the plaintiff bound to receive, the amount secured by the mortgage in lawful money of the United States of North America, and according to the value of that money at the time the mortgage money became payable. I have delayed giving judgment

(*a*) 12 U. C. C. P. R. 430. (*b*) L. J. N. S. C. P. 246.
(*c*) 2 M. & K. 513.

in the case, as I have frequently intimated to the parties since it was heard before me, because I was aware that a similar question was engaging the attention of the common law courts, and it was of importance that there should in such a matter be, if possible, uniformity of decision, as a consequence of the daily and important business transactions between this country and the United States. It is only within the last week that I have been able to see the judgment of the court of Common Pleas, delivered last Hilary Term in the latest case in which the question has been discussed here, the case of *Crawford* v. *Beard*, and I concur in the judgment delivered in that case. The case before me is a stronger one for the application of the principle adopted in *Crawford* v. *Beard* than the facts in that case presented. This is evident on reading the language of the mortgage, as already set out. In addition, both mortgagee and mortgagor were residents of the city of New York at the time of the execution of the mortgage, which was made there. I am of opinion, however, that the mortgagee has this additional option or right after default, viz., either to take his money according to the value of the current or lawful money of the United States at the time of default made, and money payable, or at any time subsequently, when he is paid or tendered his mortgage money. It was contended before me for the mortgagee that he was entitled to be paid in Canadian currency, or in other words, to receive a dollar in silver or gold, according to the denominational value of such coin for every dollar in amount of or in the mortgage. This, I think, is not the contract of the parties, and that the mortgagee has no right to go to this extent; but short of this, he has a right or option, as indicated, which I do not see, if he desires to employ it, can be worked out at present, on any material before me. It has not been discussed, and I suppose the proper time for discussion upon it will be in the master's office, when it is ascertained there when default was first made. Then will also arise the question as to the consequences of any

one default, whether the whole mortgage money became payable then, and what would be the effect as to the rate of exchange at that time. None of these questions having been yet raised, it is only for the first time when a decree comes to be made that the difficulty of providing for them now is seen. The widest powers of enquiry should be given to the master, and further directions reserved, the plaintiff to have his costs.

STUART v. MCNAB.

Specific performance—Conditional rescission of contract.

In 1850 S. agreed with M. for the purchase of 100 acres of land, and they entered into a written contract. S. having paid part of the purchase money, applied to M. offering the remainder and requiring his conveyance. M. then stated that he had no title to convey, offered to pay back the money received, and allow S. to remain in quiet possession of the land. This was done, and the written contract was given by S. to M. to be rescinded. M. then conveyed the land to his son, who, with knowledge of these facts, brought ejectment against S. At the trial the written agreement was put in as evidence against S., and was held to be an admission by him of the title of the plaintiff at law, and a verdict was accordingly recovered against S.

On a bill filed for the specific performance of the original contract, and to stay the action at law, *held* that the rescission of the contract was only conditional, M then undertaking not to disturb the plaintiff in possession; that the use made of the contract at the trial at law re-established it as against M. and his co-defendant, and that the plaintiff was entitled to a decree for specific performance, and to a perpetual injunction against the action at law.—[SPRAGGE, V. C., dissenting.]

Statement.—The bill in this cause was filed by *John Stuart* against *John McNab*, the elder, and *John McNab*, the younger, and set forth that on the eleventh day of February, 1850, the defendant, *John McNab*, senr., contracted in writing with the plaintiff for the sale to him of the west half of lot No. 36, in the 5th concession of the township of Osgoode, for the sum of £60, payable in certain instalments. The plaintiff was then, and had since been in possession. The bill then alleged a fraudulent transfer from the elder *McNab* to his son, and stated that an action of ejectment had been by the son brought against the plaintiff, in which the said agreement had been used as an admission of the title of *McNab*, the elder, through whom the plaintiff at law claimed.

The bill stated nothing about the conditional agreement for rescission, referred to in the head note and judgment, and which the defendants in their answers relied in as an absolute rescission of the contract.

The bill charged that the younger *McNab* had notice of the agreement, and that the action at law was brought in fraud and collusion, and prayed that the contract might be specifically performed, and the action of ejectment stayed by injunction.

The cause was heard, and evidence taken by his honour Vice-Chancellor *Esten*, at Ottawa, during the spring of 1863.

Mr. *Lees* for the plaintiff.

Mr. *Campbell* for the defendants.

Judgment.—ESTEN, V.C.—The plaintiff has proved his agreement. It is admitted by the answer, and a copy of the instrument itself is proved by Mr. *Lees*. It was in the defendants' power, and should have been produced under the order. The agreement is complete and certain, and such an one as this court will enforce. It has been acted upon in the fullest manner to the present time. The possession taken previously was continued under the agreement, and it is not pretended that any notice was ever given, calling upon the plaintiff to fulfil the agreement, or in default, that it should be considered at an end. In fact no default could be imputed. I am inclined to think that the whole purchase money was paid; certainly a portion of it was, and the plaintiff was prepared to pay the balance, had it been required. The only defence that is or can be offered to the suit is, that the contract was absolutely rescinded. It was incumbent on the defendants to establish this fact by evidence. The evidence which they have adduced for the purpose was not of a satisfactory nature. It

consisted of admissions or statements made by the plaintiff many years ago, nine, seven, and two years. The evidence was, I think, truthful, but from the very nature of it could not be relied upon as accurate. There is no doubt, however, that the money which the plaintiff paid under the contract was re-paid to him, and this is the strongest fact in the defendants' favour. The defendants have produced in evidence certain affidavits of the plaintiff, and they must be taken as evidence, in conjunction with the other evidence in the case. These affidavits and the other evidence appear to me not to establish an absolute rescission of the contract, but rather to lead to the conclusion that it was agreed between the parties that the plaintiff should not require a deed from *John McNab*, the elder, which it appears he was unwilling to give, but that he should be permitted to remain in the undisturbed enjoyment of the property, under a previous title which he had acquired, and which was considered defective. The plaintiff continued in possession for more than ten years afterwards, and when, at the end of that time, *John McNab*, the elder, in violation of this understanding, proceeded to deprive the plaintiff of the possession, I think his rights under the contract revived, and no objection can be made to the specific performance of it, supposing it to have been still subsisting. The plaintiff has proved his case, and the defendants have failed to establish the absolute rescission of the contract upon which they relied as a defence to the suit. It was not incorrect, I believe, in point of pleading, to proceed on the original contract which had been re-established, without mentioning its suspension or conditional rescission, but the plaintiff ought not to have alleged the payment of the purchase money, and to have omitted all mention of its re-payment; on the contrary, he should have offered to pay what was due. I do not think that what occurred at the trial was of any importance. On the one hand the defendants were entitled to produce the agreement as evidence of an acknowledgment of title, without affirming

it, and on the other the plaintiff was entitled to defend the possession by any pleas which the rules and practice of the court permitted, without prejudicing his equitable rights. He should, however, have sought the aid of this court in the first instance, and therefore cannot be allowed his costs at law. Both parties have been wrong in their pleadings, the defendants far more wrong than the plaintiff. They have asserted in their answers an absolute rescission of their agreement, which their own evidence, so far as it proves anything, does not establish, but the contrary. The plaintiff has not, as he ought to have done, admitted the repayment of the purchase money, and offered to pay it. Under these circumstances, I think he is entitled to a decree, but without costs. The title being accepted a specific performance is decreed. The master is to ascertain what is due in respect of the purchase money and interest, which is to be paid, and a conveyance executed. The evidence of *John McNab*, the elder, was offered on behalf of his co-defendant, but rejected.

A decree for specific performance was drawn up in accordance with the judgment, with which the defendants being dissatisfied, they applied for and obtained an order to re-hear the cause, which accordingly came on to be argued before the full court.

Mr. *C. S. Patterson* and Mr. *J. C. Hamilton* for the plaintiff.

Mr. *Fitzgerald* for the defendants.

The following cases were referred to in the argument: *Robinson* v. *Page* (*a*), *Price* v. *Dyer* (*b*), *Clive* v. *Beaumont* (*c*), *Doe Boulton* v. *Walker* (*d*), *London and Birmingham Railway Co.* v. *Winter* (*e*), *Healey* v. *Ward* (*f*).

(*a*) 3 Russ. 114.
(*b*) 17 Ves. 356.
(*c*) 1 DeG. & S. 397.
(*d*) 8 Q. B. U. C. 571.
(*e*) 1 Craig & Ph. 57.
(*f*) Ante vol. viii., p. 337.

Judgment.—VANKOUGHNET, C.—Whether the agreement of 1852 is or is not to be treated as a substitution of the agreement of 1850, this much seems clear on the evidence; that the elder *McNab*, being doubtful of his ability to make to the plaintiff such title as was stipulated for by the agreement of 1850, agreed with the plaintiff that they should abandon that agreement, and that the plaintiff should receive back his purchase money, and *McNab* should not interfere with his possession; in other words, should not use his title for that purpose. What does *McNab* do? Ten years after this arrangement he makes a deed to his son, who thereupon commences an ejectment against the plaintiff, and at the trial supports his title to recover by bringing forward his father as a witness, who as such, produced the agreement of 1850, signed by *Stuart*, as evidence of the plaintiff's title at law to recover, and thereupon does recover. *Prima facie*, it was evidence of the plaintiff's title; but if the subsequent arrangement of 1852, as alleged in *Stuart's* affidavits (which the defendants here use), had been shewn, the first agreement would never have been treated at law as an admission of title. I think the defendants ought not to be allowed to use that agreement for the purpose of turning the plaintiff out of possession, and deny the plaintiff the protection of it in this court. I think we may fairly treat the defendants as having themselves considered the arrangement of 1852 as wiped out (as certainly it was violated by their action in attempting to disturb the possession); and that the agreement of 1850 was thereupon revived and in force. The defendants' answer is not supported, because, at most there was a substantial agreement, not an absolute rescission. I think the plaintiff should have his costs in this court, as the conduct of the defendants has been most inequitable.

ESTEN, V. C., remained of the opinion expressed by him on the original hearing.

SPRAGGE, V. C.—The conclusion as to the facts

arrived at by my brother *Esten*, who heard the evidence, is, that no absolute rescission of the contract of 1850 was proved. I think we ought not to disagree with this conclusion unless it is made very clearly to appear to us that it is erroneous. I think the conclusion correct.

What the defendants have set up by answer is an unqualified rescission; what they have proved is a substituted agreement by parol. This may be looked at in two views. The defendant may shew a parol agreement to rescind a prior written agreement; or he may prove any agreement or dealing which may shew the court that it would be inequitable to perform the agreement of which specific performance is sought. But suppose in shewing such agreement or dealing, or in evidence of other facts given by the plaintiff, it is made to appear that upon the case disclosed it is not inequitable that the plaintiff should have specific performance of his agreement, I apprehend the court might give it.

Another view is this; the defendant does not prove the absolute rescission which he sets up; but a substituted agreement, and an acting under it. And it is also made to appear that the defendant has himself violated the substituted agreement in a way which entitles the plaintiff to some relief. I incline to think that the court might properly give such relief, as under the substituted agreement and the facts proved, the plaintiff might appear to be entitled to, if satisfied that the whole facts are before the court. I do not think anything is proved in this case (unless it be the use made by the defendant of the original agreement at the trial, which I will refer to presently) which entitles the plaintiff to say that the original agreement is revived. There does not appear to have been any stipulation that it should revive upon the violation by either party of the substituted agreement. I do not think, as a point of law, that it did revive; and it might be very inequitable that it should. As far as appears, full justice would

be done to the plaintiff by giving him the benefit of the substituted agreement. I could not, therefore, in the face of the substituted agreement proved, give him specific performance of an agreement which he had agreed to set aside. I think the most he could be entitled to would be to put him to accept such relief as he would be entitled to under the substituted agreement under the penalty of the dismissal of the bill.

I think the course I have suggested the utmost the plaintiff can ask, if he can ask that, unless the court sees that it would be equitable upon the whole of the facts disclosed to decree specific performance of the original agreement; or feels that it can properly discard the evidence given in proof of the substituted agreement. That evidence was received, I believe, without objection. Perhaps it could not well have been objected to, because it was offered in proof of the alleged agreement to rescind absolutely, which it failed to substantiate. Upon the facts disclosed, I cannot see that it would be equitable to give specific performance of the original agreement.

With regard to the use made at the trial in the ejectment suit of the original agreement; the purpose for which it was used was to shew admission by *Stewart* of title in *McNab* at its date. He was not setting it up as a subsisting agreement; and the proceeding in which he used it was avowedly in opposition to it. In that respect it was like the receipt used by the lessor of the plaintiff in *Doe Boulton* v. *Walker*. *Boulton* used it to prove admission of title, and proved at the same trial that it was no longer a subsisting agreement. This shews, I take it, that using an admission contained in an instrument does not involve an allegation that the instrument is still in force as an agreement; and if Doe *Boulton* v. *Walker* is correctly decided, the court would have received the first agreement in question as an admission of title, even though the substituted agreement

had been also proved, because the substituted agreement did not displace, or in any way affect, the fact admitted by the first agreement. It might, if set up, have been an equitable defence, but that is all. I cannot see that *McNab* is estopped by anything that occurred at that trial from shewing the true facts of the case.

Unless the evidence of the substituted agreement is to be altogether discarded, I cannot see my way to decreeing specific performance of the first agreement; and I confess I do not think it ought to be discarded, although it did not prove precisely the issue set up by the defendants, for it nevertheless involved it, for the substitution of one agreement for another involves the rescission of that other.

The first difficulty that I feel pressed with in the case is the giving of any relief at all upon the present pleadings and evidence. The plaintiff proceeds only upon the original agreement, which agreement I think is proved to be not now subsisting. His bill is now more like a declaration at law, stating his case not as it is, but as it once was, leaving the defendant to plead in confession and avoidance. But as it is, upon the answer coming in, I think he ought to have stated upon the record by amendment (if he could do so) the whole case, as it ought to have appeared on the original bill. He would indeed be met by the difficulty that he was making a new case, a difficulty that actually occurred. But this only shews that he ought to have stated the whole case, the first agreement, and the one substituted for it, upon his original bill.

My difficulty is, that if specific performance of the substituted agreement were given, the court might be doing injustice to the defendants; for the substituted agreement is not set up by them as the true agreement, and is only proved incidentally.

I think both parties wrong. The plaintiff in setting

up an agreement, which was gone; and the defendants, in setting up a simple rescission instead of the substituted agreement. I think the best course, upon the whole, will be to dismiss the bill without prejudice to the filing of another, and to give costs to neither party.

Per curiam.—Decree affirmed; and petition of re-hearing dismissed with costs. [SPRAGGE, V. C., dissenting.]

ROGERS v. SHORTIS.

Ancient document—Proving deeds—Petition of right—Purchase for value without notice.

J. *McK.* having an order in council for 100 acres of land, executed in February, 1827, to *Shore* a bond for a deed. The petition for a location and the bond were executed by mark, and in the bond the obligor is described as of York, labourer. In May the patent issued to *McK.*, and was in the possession of *Shore* shortly after its date. *Shore* went into possession in 1828, cleared about seven acres, and after three years left it in the possession of the plaintiffs, who had the benefit of it up to within a short period of the death of *Shore*, which took place in 1849. The plaintiffs claiming as heirs at law of *Shore*, filed their bill to obtain a conveyance of the land, and produced the patent. The defendants *Shortis* and *McCabe* produced a conveyance purporting to have been made by, and signed "*James McKenny*," now of the township of Niagara, &c., yeoman, to *James Smith*, dated 7th September, 1833; and a conveyance from *Smith* to *Shortis*, dated in May, 1849: both of which were registered. No oral testimony was given of the identity of the grantor in the deed to *Smith* with the locatee of the Crown, and no evidence of its custody during the thirty years which had elapsed since its alleged execution: but the signature and death of one of the attesting witnesses were proved, and the absence of the other witness was accounted for.

Held, first, that the deed from *McK.* to *Smith* did not come within the rule that an ancient document proves itself.

Second, that there was sufficient *primâ facie* proof of its execution

Third, that such proof must be taken to include that the party by whom the deed purported to be executed was not only a person of that name, but the identical person in whom was vested the estate which the deed purported to convey.

Fourth, that a purchaser, although he may have notice, is entitled to the benefit of the position of the party under whom he claims where such party was a purchaser for value without notice.

As to whether the presumption that a man is presumed innocent of fraud until proved guilty is sufficient to rebut the presumption of the execution of a fraudulent deed raised by the proof of the handwriting of an attesting witness.—*Quære.*

In a proceeding to obtain relief in such a case, the proper course of procedure is by bill and not by petition of right.—*Semble.*

Under the circumstances above set forth the bill was dismissed, reserving liberty to the plaintiffs to file a new bill or to proceed at law without prejudice.

The bill in this cause was filed by *Alice Rogers*, *Margaret Shore*, and *Bridget Delaney*, claiming as co-heiresses of *John Shore*, deceased, against *Edward Shortis*, *Thomas McCabe*, her Majesty's *Attorney-General* for Upper Canada, and others, praying under the circumstances therein stated, and which are fully set

forth in the judgment, for a decree declaring that the alleged deed from *James McKenny* to *James Smith* was a forgery, and the same given up to be cancelled; that the defendant *Edward Shortis* did not take any interest in the premises under the conveyance from *Smith*; for an injunction to restrain cutting timber by *McCabe*, for an account, and for further relief.

The defendants answered the bill, and evidence was taken in the cause.

Mr. *C. S. Patterson* and Mr. *J. C. Hamilton* for the plaintiffs.

Mr. *Blake* and Mr. *Kerr* for defendants *Shortis* and *McCabe*.

Mr. *S. Richards*, Q.C., for the *Attorney-General*.

Judgment.—SPRAGGE, V.C.—The plaintiffs claim under one *John Shore*, and their case is that one *James McKenny*, being entitled as a settler in Upper Canada, to a grant of 100 acres of land, and having an order in council therefor, *Shore* purchased from him his claim; and that *McKenny*, on the 5th of February, 1827, executed a bond to *Shore* conditioned for the conveyance of the 100 acres to be located and granted. In the bond he is described as of York, labourer. The land was located in the township of Albion, being the east or north east half of lot twenty-one, in the sixth concession, and a patent therefor to *James McKenny*, described as of the town of York, yeoman, bearing date the 19th of May, was issued. It was in the possession of *Shore* shortly after its date, and was probably taken out by him. It is now produced by the plaintiffs.

Shore went into possession of the land in 1828, and cleared some seven acres; he left it after about three years, leaving it in possession of the plaintiffs and their mother, who had the benefit of it for a number of

years, how many does not exactly appear, but I think nearly up to the death of *John Shore*, which took place in 1849.

The execution of the bond from *McKenny to Shore* and the possession and dealing with the land are proved as I have stated. The plaintiffs, therefore, if heirs of *John Shore*, have made out a case of equitable ownership of the lands in question.

The case of the defendants *Edward Shortis* and *McCabe* is, that *Shortis* was a purchaser for value without notice, and that *McCabe* was so likewise. They produce a conveyance purporting to be made by *James McKenny*, described as "now of the town of Niagara," &c., yeoman, dated 7th September, 1833, to *James Smith*, of the township of Cavan, yeoman; and a conveyance from *James Smith*, by the same description, to *Edward Shortis*, dated 7th of May, 1849. Both conveyances were registered on the 8th of May, 1849. The consideration for the conveyance to *Shortis* was £150, and that sum is proved to have been paid at the time of its execution. There is no oral testimony of the identity of the grantor in the deed to *Smith* with the locatee of the Crown.

It is contended that the conveyance to *Shortis* proves itself. It is produced by the defendants and bears date a few days more than thirty years before its production in court. But there is no evidence of its custody in the meanwhile, and I think there is not sufficient to bring it within the rule that an ancient document proves itself. (*a*) There are the names of two attesting witnesses to the instrument, *William Hall* and *James King*. The signature and death of the latter are proved. As to the other witness the evidence of Mr. *Crowther*, taken in a trial at law between

(*a*) Doe Neale v. Samples, S. A. & E. 151; Evans v. Rees, 10 A. & E. 151.

McCabe and the plaintiffs and others, is received by consent. It proves, though not perhaps very strictly, that *Hall*, the witness to the conveyance, had been a clerk in the registry office; that he was a man of intemperate habits; that he had gone to the States long ago; and had not since been heard of. I suppose by the consent, and the absence of comment upon the evidence, that I am to take it as proof that the evidence of *Hall* is not procurable. I would refer upon this point to the case of Doe *Wheeldon* v. *Paul*. (*a*) This appears to be *prima facie* evidence of the execution of the conveyance, not only by a person calling himself *James McKenny*, but by *James McKenny* himself, and by the *James McKenny* who had the legal ownership of the land conveyed. This seems to be established by several cases. *Barnes* v. *Trompowsky*, (*b*) and *Adam* v. *Kerr*, (*c*) are among the earliest cases. In *Nelson* v. *Whittall*, (*d*) the question arose whether it was not necessary to prove the signature of the party executing the instrument. The action was on a promissory note attested by a witness, and Mr. *Tindal* contended for a distinction between such a case and the case of an instrument under seal, as in the latter case the witness undertakes to prove something beyond the mere signature, viz., that the instrument was sealed and delivered; and he admitted that in the case of deeds, proof of the handwriting of the witness when he is dead or beyond the jurisdiction of the court is sufficient. In that case Mr. Justice *Bayley* expressed the difficulty that he felt with regard to such proof; that it does not connect the party with the instrument. He observed, "If the attesting witness himself gives evidence, he would prove not merely that the instrument was executed, but the identity of the person so executing it; but the proof of the handwriting of the attesting witness establishes merely that some person assuming the name which the

(*a*) 3 C. & P. 613.
(*b*) T. R. 265.
(*c*) 1 B. &. P. 360.
(*d*) 1 B. & Al. 19.

instrument purports to bear executed it; and it does not go to establish the identity of that person; and in that respect the proof seems to me defective."

In that case there was some evidence of identity; but I have quoted the words of Mr. Justice *Bayley* because they go to the root of the objection in this suit. In *Page* v. *Mann* (*a*), decided some ten years afterwards, the instrument to be proved was an agreement for a lease; and the only proof was the handwriting of the attesting witness. This was objected to as insufficient; and the opinion of Mr. Justice *Bayley* in *Nelson* v. *Whittall* was referred to; but Lord *Tenterden* held the evidence sufficient. In *Mitchell* v. *Johnson* (*b*) the same learned judge held the same opinion. In *Kay* v. *Brookman* (*c*) the instrument to be proved was a deed constituting a mining company, in which the defendants were proprietors, and the only proof was the handwriting of the attesting witness, who was beyond seas; and it was held sufficient by Chief Justice *Best*.

In *Wallis* v. *Delancey* (*d*) there were two attesting witnesses to a bond executed in New York; and the first evidence offered was proof of the handwriting of one of them who was resident in America. It was objected that the handwriting of the obligor also should be proved. Lord *Kenyon* agreed to this, and it was proved. A second objection was that the other witness was not accounted for, and that was done. This case can hardly be taken as establishing that, when both witnesses are accounted for, it is necessary to prove the handwriting of the party to the instrument. That would be at variance with the principle of the other decisions. And in *Adam* v. *Kerr* the point expressly arose and was overruled, Mr. Justice *Buller* observing that the handwriting of the attesting wit-

(*a*) Moo. & Mal. 79.
(*b*) 1 Moo. & M. 176.
(*c*) Ib. 286.
(*d*) 7 T. R. 266, n. c.

ness, when proved, is evidence of everything on the face of the paper which imports to be sealed by the party. In a case before Sir *Nicholas Tindal*, Doe *Wright* v. *Tatham* (*a*), only one of the two attesting witnesses was accounted for, which the learned Chief Justice held insufficient, as not being the best evidence; and he placed the proof of the handwriting of attesting witnesses upon this ground, that it raises a presumption that the witnesses had witnessed all that the law requires for the due execution of the instrument.

In the Court of Probate the rule is the same as at common law, the court proceeding upon the maxim, *omnia presumunter rite esse acta*. I venture to think, therefore, that the objection of Mr. Justice *Bayley* is not sound in principle: for the identity of the party by whom the instrument imports to be executed *is* proved when the handwriting of dead or absent attesting witnesses is proved, though it is only proved by secondary evidence; otherwise, Mr. Justice *Buller* and Sir *Nicholas Tindal* must be wrong in the principle upon which they proceeded, and the Court of Probate is also wrong in the maxim upon which they proceed. Several of the cases to which I have referred are cited by Mr. *Stuart* in his book on conveyancing (vol. 3, p. 358), under the head of "Evidence necessary to support abstracts of title." If the same rules apply, as I see no reason to doubt that they do, in proving the execution of conveyance in a chain of title, the proof must be taken to include that the party by whom a deed is imputed to be executed is not only a person of that name, but the identical person in whom is vested the estate which is purported to be couveyed.

Having got thus far, it remains for me to consider whether there is anything in this case to rebut the *primâ facie* evidence that the conveyance to *Smith* was executed by *James McKenny* the locatee of the

(*a*) 1 A. & E. 21.

Crown. There are three points upon which doubt is thrown upon his identity—his signature to the conveyance, his place of abode, and the evidence as to his death. His petition for a location and his bond to *Shore*, both dated early in 1827, are executed by his mark, while the conveyance to *Smith* and the receipt for purchase money endorsed as signed "*James McKenny*." The signature is that of a person who writes slowly and with difficulty. We all know, from what we see frequently in court at the examination of witnesses, how apt such persons are to prefer making their mark to signing their names: but it is suggested also that between these dates, about three years and a-half, he may have learned to sign his name. I think it not improbable. He was a young man in 1827, and had just come to this country, where education was much more general than in the country which he had left; and there are some, probably many, who have learned to write their names and nothing more. It is a thing easily acquired, and relieves a man from the shame which some feel at being obliged to make their mark only. Or he may have learned more, though I should judge from his signature but little if any more. I observe in this connexion that one of the witnesses, *Benjamin Roadhouse*, who has signed his name to his deposition, says in his evidence that *Shore* had some writings which he told him were a bond and a deed, but that he, *Roadhouse*, could not read them; an instance of an illiterate man being able to write his name.

If this signature is not genuine, the person who got up this conveyance took a strange method of palming off a fictitious instrument for a genuine one. I will refer here to the difference of residence. In his petition for location he is described of the township of York; in his bond to *Shore*, "of York," meaning the then town of York, where, as appears by the evidence of *Bradley*, he was then residing; and in the deed to *Smith* he is described as now of the town of Niagara.

So, if this instrument be fictitious the concocter of it unnecessarily made difficulties in his own way. He would naturally make the points of resemblance as close as possible, and not unnecessarily raise questions for enquiry and doubt. At the Crown Lands Department he would find the petition of location presented by a marksman, and a patent issued to *James McKenny* of the town of York. The department was then in this place, and the enquiry easy both for himself and for the purchaser from him; why embarrass himself with the questions which might so probably arise upon these points of difference? The description of place of abode has to me an air of genuineness about it; he had lived in the township and in the town of York, and he is described as *now* of the town of Niagara, implying a former residence elsewhere.

It may be suggested that the concocter of a fictitious instrument may have made these points of difference advisedly, in the belief that if the instrument were called in question they would be viewed as I have viewed them. But it is obvious that such a person would desire to avoid any question at all; and would rather trust to apparent conformity than to a possible solution of difficulties.

The evidence of the death of *McKenny* the locatee is very slight. It consists only of reports that he was dead, and which may have arisen from his removal from Toronto. There is no evidence of his removal, but it consists with the description in the conveyance to *Smith*. If indeed he is dead, as is suggested, and without heirs, there would be an escheat to the Crown.

One question has occurred to me upon the point of the execution of the conveyance. If he executed it he was guilty of a fraud upon *Shore*, and the law presumes that a man is innocent of fraud until proved to be guilty of it; and the question is, whether that presumption is

sufficient to rebut the presumption of the execution of the deed by *McKenny* the locatee, raised by the proof of the handwriting of the attesting witnesses. The point was not raised in argument, and I incline against it, though I think I have seen it laid down that the presumption in favour of the genuineness of an ancient deed is rebutted where the execution of it would be a fraud in the party by whom it purports to be executed. The point I have suggested is not free from doubt.

Assuming it to have been proved that the conveyance to *Smith* was executed by *McKenny*, the locatee and patentee of the lot, *Shortis* was entitled to the position of a purchaser for value, without notice, and had the legal estate; and *McCabe* is entitled to the benefit of *Shortis'* position, although he may have had notice, of which there is some evidence.

In *Jones* v. *Powles* (*a*) the protection of a purchaser for value without notice was carried much further than it is necessary to carry it in this case. The rule was clear that the protection of the legal estate, and perhaps of an equitable estate also, extended to defendants purchasers for value without notice, where their title was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed, and who, but for such secret act, would have been capable of passing some estate; (*b*) and in that case, which was a case of title derived through a forged will, it was held to apply: also, in the words of Sir *John Leach*, to cases in which the title of such purchaser was "impeached by reason of the falsehood of a fact of title, asserted by the vendor, or those under whom he claims when such asserted title is clothed with possession, and the falsehood of a fact asserted could not have been detected by reasonable diligence." Lord *St. Leonards* puts it that a *bona fide* purchaser for value without notice

(*a*) 3 M. & K. 581. (*b*) Bowen v. Evans, 1 J. & L. at p. 264

is entitled to the peculiar favour and protection of a court of equity, as it is impossible to attach any demand upon the conscience of a man who so purchases.

It would have been an act of prudence and caution, certainly, in *Shortis* to have required the production of the patent from the Crown, but its absence may have been excused, and if not, the omission would not affect him with the plaintiffs' equity. It is said that he purchased at an undervalue. He purchased this land without seeing it, as he was in the habit of purchasing other lands, and forming his opinion of its value only from its locality. There is nothing very unusual in this, and if some of the land purchased should turn out of considerably more value than the price given for it, it is clear, I think, that the purchase cannot on that ground be impeached, provided it is *bona fide*, and without notice of the title of others.

Upon these grounds I have come to the conclusion that I must dismiss the plaintiffs' bill, and as against the defendant *Shortis* with costs. I shall give costs to *McCabe*, also, but I have no doubt, from the evidence, that he had notice of *Shore's* title and possession, and improvements, and his purchasing with such notice is conduct which I think should disentitle him to costs.

I dismiss the bill without prejudice to the filing of another. I do so because I have had to decide the question between these parties upon a legal presumption, and I desire to leave it open to the plaintiffs to shew, if they can, that the conveyance to *Smith* was not in fact executed by *James McKenny*, the locatee and patentee of the land. I think I ought not to conclude them by one trial, so to speak of that issue. If, however, they file another bill, they should first pay the costs of defendant *McCabe* in this suit. He ought not, I think to be called a second time to defend his title without payment of the costs attending his first defence;

and the time for filing such second bill must be limited to one year; and if, in the meantime, the plaintiffs desire to try the question at law, my judgment is to be without prejudice to their doing so. Indeed, apart from these points of the plaintiffs' case in which my opinion is against them, the question would be quite as proper for a court of law as for this court, but I wish to leave it open to the plaintiffs to proceed in either court, as they may be advised.

I have not felt it necessary to decide some other questions raised in this suit; but with regard to the mode of procedure by bill in this court, instead of by petition of right, as I give the plaintiffs leave to file another bill, it is proper to say, though without prejudging the question, that the inclination of my opinion is against the objection.

FRICHT v. SCHECK.

Setting aside Crown patent—Laches—Suppression of facts—Right of pre-emption.

The lessee of the Crown conveyed his intetest to other persons, the right to one portion, after going through several hands, became vested in one F., who died, leaving a widow and several children; the widow having married again, joined with her husband in assigning the portion of the land bought by F. to one C., who subsequently agreed to sell to S. On applying to a conveyancer to prepare the necessary writings he recommended that a transfer should be taken directly from the lessee of the Crown to S. for the purpose of simplifying the title, which was accordingly done, and thereupon S. applied to the Crown Lands Department to purchase, producing to the department his transfer, a certificate of a surveyor, and an affidavit by himself that there was not any adverse claim, no mention being made of the previous transfers or the possession of the intermediate transferees, or of the fact that the uncle of F's heir at law had intimated to S. that the heir did claim it. Upon this application S. was allowed to purchase, and a patent therefor was issued to him in January, 1853. In 1863 a bill was filed by the heir at law of F., seeking to set aside this patent, as having been obtained by the fraudulent concealment of the facts by S., when applying for the grant to himself. It appeared that the plaintiff had left this country before attaining his majority, and went to reside in California, and immediately on his return instituted proceedings. The court under the circumstances, although acquitting the defendant of all actual or intentional fraud in the matter, declared the patent void, in order that the Crown, with the full knowledge of all the facts, might deal with the case as should be deemed right, and ordered S. to pay the costs of the suit; the delay which had occurred in commencing the suit being accounted for by the inability of the plaintiff, arising from his poverty, and his absence from the jurisdiction.

Statement.—The facts of this case, as appeared from the pleadings and evidence, were, that one *Joseph Hughson*, in the year 1833, obtained from the government the promise of a lease of the lot in question—lot No. 10, in the 6th concession of Blenheim, a clergy reserve. He paid the patent fee, went into possession, and sold and transferred the east half of the lot to *Thomas Kitchen*, who entered into possession and made improvements on the south-east quarter of the lot, and then sold and transferred it to *George Clarke*, and delivered to him the transfer he had received from *Hughson*. He afterwards sold and transferred the north-east quarter to one *Molloy*. It was proved by the evidence of *Kitchen* himself, that written transfers were signed by *Hughson* to himself and by him to *Molloy*; and he and *Molloy* paid valuable considerations respectively for the land

purchased by them respectively. *Molloy* went into possession of the north-east quarter, and made improvements, and it was alleged sold it to one *Tripp*, who it was shewn had entered into possession of it and made improvements, and agreed for the sale of it to *George Fricht*, the father of the plaintiff, and delivered possession of it to him. Whether written transfers were signed by *Molloy* to *Tripp*, and by *Tripp* to *Fricht*, the evidence did not shew. *Tripp* and *Molloy* both left the province, and were supposed to be dead. *George Fricht* entered into possession of the north-east quarter, and remained in possession of it during the remainder of his life. After his death his widow, who had married a person of the name of *Schermerhorn*, joined with him in selling and conveying the north-east quarter to *Josiah Campbell*, who was examined as a witness, for a valuable consideration, which he paid. He entered into possession, and in the year 1846 agreed for the sale of the north-east quarter to the defendant *Scheck* for $450, which was paid. Upon this occasion *Campbell* delivered to *Scheck* some back transfers, as they were called, of the land, which he had received from *Schermerhorn* and his wife. A Mr. *Jackson* was employed to draw the writings on the occasion, and he recommended that for the purpose of simplifying the title a fresh transfer should be obtained from *Hughson*, which was done, and two dollars was paid to him for his trouble, and thereupon *Scheck* paid his purchase money to *Campbell* and obtained the transfer from *Hughson* and another from *Campbell*. *Scheck* stated in his answer and evidence that he handed the back transfers which he had received from *Campbell* to Mr. *Jackson*; but he stated to *George Clarke*, the uncle of the plaintiff, who was examined as a witness, that he delivered them to Mr. *Carroll*, the government agent. At all events, they were not forthcoming, and if they were delivered to Mr. *Jackson*, who died before the suit, were probably destroyed as useless, after the transfer was obtained from *Hughson*. The evidence shewed that there had been

several of them, and they were supposed to have been the transfer by *Kitchen* to *Molloy*, and the transfer by *Schermerhorn* and wife to *Campbell*, and probably transfer from *Molloy* to *Tripp*, and from *Tripp* to *George Fricht*. At the time of the defendant's purchase about twenty acres of the land had been cleared, some dry timber remaining upon about six acres of this twenty acres, and a log house had been built, and fences had been erected, and the land had been cultivated as a farm by the successive occupants. At the time of the hearing it was shewn to be in a much better state than it was at the time of the defendant's purchase; that it was nearly all cleared, and better fences had been erected. *Scheck*, in 1848, applied to the government to purchase the land, and upon that occasion presented the assignment he had obtained from *Hughson*, accompanied by a certificate of Mr. *Smiley*, a provincial surveyor, and an affidavit, merely stating the occupation of *Scheck*, the improvements, and that there was no adverse claim. These were the only papers presented by *Scheck* to the government, and no mention was made of the previous transfers of the land or of the occupation of *George Fricht*, or that the land was claimed by the heir of *George Fricht*, although *George Clarke*, the uncle of the heir, had, when *Scheck* was about to purchase from *Clarke*, gone to him purposely, and informed him that *George Fricht's* heir claimed the land; upon which occasion *Scheck* remarked, that he did not think much of the heir's title, or did not fear it. Upon this application *Scheck* was allowed to purchase at fourteen shillings per acre, and a patent issued to him in January, 1853. Patents had been previously granted of the other parts of the lot, all of them being granted to the patentees, as the assignees of *Joseph Hughson*, the original lessee, and by virtue of the promise made to him by the government, and its acceptance from him of the patent fees. The plaintiff, who is the eldest son of *George Fricht*, was born in February, 1838. In November, 1858, when he was twenty years and nine months

old, he left this country, and went to reside in California, where he remained five years, and whence he returned in the fall of 1863, when he immediately commenced this suit. His uncle, *George Clarke*, swore that he never had any means until his return from California, when he possessed $200. He was brought up by two uncles, and his brother and sister were brought up by *George Clarke* and their grandmother, respectively. The object of the suit was to set aside this patent, as having been obtained by fraud, and through error on the part of the government. The question was, whether *Scheck* was guilty of fraud in withholding from the government all knowledge of the previous transfers which he had in his possession, and of the occupation of *George Fricht*.

The cause came on for the examination of witnesses and hearing at the sittings of the court held at Woodstock, before his honour Vice-Chancellor *Esten*, in April, 1864.

Mr. *Wood* for the plaintiff.

Mr. *Barrett* for the defendant.

Judgment.—ESTEN, V. C.—It is perfectly clear that the sale was made to *Scheck*, as the supposed assignee of *Hughson*, by virtue of a right or privilege of pre-emption usually extended by the favour of the Crown to lessees of clergy reserves, and their assignees. It was as an assignee of *Hughson* that he was allowed to purchase. At this time, however, *Hughson* had made a transfer of the whole east half to *Kitchen*. The assignment of *Hughson*, therefore, to *Scheck* conveyed nothing. *Scheck* was not the immediate assign of *Hughson*. Had he disclosed to the government the transfer by *Kitchen* to *Molloy*, which he had in his possession, the occupation of *George Fricht*, the purchase of *Campbell*, from the widow of *George Fricht* and her second husband, and his own purchase from *Campbell*, all which facts he knew, the government would in all probability have

instituted an inquiry, and would have learned the assignment made by *Hughson* to *Kitchen*. The title, therefore, founded upon this assignment, would have fallen to the ground. *Scheck* would then have been obliged to build his title upon the purchase from *Campbell*, but the government would have seen that in the absence of a will of *George Fricht*, for which it would have called, that this was no title at all. We cannot say what the government would have done under these circumstances, but it is highly reasonable to suppose that they would not have granted *Scheck's* application, but would have protected the right of *Fricht's* heir. In this case a material suppression was practised by *Scheck*, and the government allowed him to purchase in error and mistake. I think that *Scheck*, being forced to make title under his purchase from *Campbell*, and being unable to rely on the assignment from *Hughson*, in fact claims under *George Fricht*, whose title was the only title that *Campbell* pretended to have, and therefore is compelled to admit the title of *George Fricht's* heir. This necessity obviates the objection raised to the deduction of the plaintiff's title, in consequence of the absence of assiguments from *Molloy* to *Tripp*, and from *Tripp* to *George Fricht*. No laches, I think, can be objected to the plaintiff. He was only eight years of age when *Scheck* purchased, and only fifteen when the patent issued. He departed the country before he attained his age of twenty-one years, and his departure seems to have been a reasonable and *bona-fide* act, and done, probably, with the intention of obtaining means to assert his rights, of which he was destitute. His uncle, although protecting his interests, and assisting with his advice and personal exertions, does not seem to have been able to extend to him any pecuniary assistance. He paid some of the witness' fees, but with money supplied to him by the plaintiff. *Scheck* must necessarily account for the possession until the plaintiff attained twenty-one, that is during twelve years, and may as well account for the remainder of the time.

It is probable that what he has done to the land was for the most part done during the twelve years. I think that it is my duty to declare this patent void, so as to enable the Crown to deal with the case with full knowledge of the facts, as in its justice and wisdom it may deem right. I cannot relieve Mr. *Scheck* from the payment of costs. He obtained this patent through what this court must regard as a fraudulent suppression of fact, although probably he thought in his ignorance that he was acting properly, and did not intend to commit any actual fraud.

I took an opportunity of reading over the evidence taken under the commission before I left the court-house, and the rest of the evidence was taken by myself, the most material parts of which were read and referred to several times during the argument. I therefore do not find it necessary to call for the papers before pronouncing my judgment. I may observe, with reference to some technical objections that were raised to the admission of the evidence under the commission, that I should have arrived at the same conclusion had that evidence not been taken.

GRAHAM v. THE NORTHERN RAILWAY COMPANY.

Riparian proprietor—Injunction.

The fact that a riparian proprietor has recovered nominal damages at law establishing his legal right, does not necessarily entitle him to an injunction to restrain the injury complained of. The exercise of this jurisdiction is discretionary, depending very much on the reality and irreparable nature of the injury complained of, and when no *mala fides* exists, on the balance of inconvenience; where, therefore, a railway company had constructed tanks which were filled from a stream running through the plaintiff's land for the use of their locomotives, in doing which they did not abstract more than one eightieth or one hundredth part of the water in the stream, the company refused to restrain the company from using the water of the stream, and dismissed a bill filed for that purpose with costs; notwithstanding that the plaintiff had for the same act, recovered a verdict at law, with one shilling damages.*

The facts of this case, and the authorities principally relied on by counsel, are stated in the judgment.

* But see Wright *v.* Turner, ante p. 67.

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

Mr. *Galt*, Q. C., and Mr. *G. D. Boulton*, for defendants.

Judgment.—ESTEN, V.C.—The facts of this case are, that the plaintiff owned in and before the year 1859 lot No. 77, in the 1st concession of the township of Whitchurch, through which the stream which is in question in this suit flows. This stream never fails, and seldom varies in depth or quantity. It flows also through lot 76, where it is crossed by the Northern Railway, on an embankment. The stream is conducted through this embankment by means of a culvert, which is faced with wood, stone, and iron, so that the water in its passage does not come in contact with the earth of the embankment. There is a flap at the mouth of the iron tube or culvert, connected with it at the top by one hinge, and capable of being fastened at the bottom, but which is never done except in cases of necessity, and it floats at all other times on the surface of the water, as it issues from the culvert. At this point there is a tank, hose, and wheel and pump hose, belonging to the defendants; the water-wheel driven, I presume, by the stream, works a pump by which the water is raised through an iron pipe, close to, and actually in the water, to a cistern sixteen feet from the ground. From this cistern it is conducted through pipes made of pine, under ground, along the railway, by the side of the track, to the station at Aurora, where it is discharged into a cistern used for supplying the engines with water. At the tank on lot 76 there is a water pipe which returns the water, not needed into the stream; and at the tank at the station there is what is called a bull-cock, by means of which, when the cistern is full, the ingress of the water is stopped, and the surplus water is then returned by the waste-pipes, at lot 76, into the stream. There is a drain at the station, by which the waste-water which drops from the hose after supplying the engine is carried off.

The plaintiff had, many years before the erection of these works, built a dam upon the lot, and thereby collected the water of the stream into a pond which he stocked with fish, and from which he obtained fish for the use of his family for many years: the fish have disappeared for the last four or five years. A Mr. *Gurnell*, who owns lot 79, lower down the stream than the plaintiff's lot, and has a tannery there, into which the water of the stream which crosses this lot also originally flowed from its natural height, and without any dam to heighten it, observed some years ago a failure of the water to the extent, as he thinks, of one half, and was obliged to construct a sort of dam, in order to raise the water, that it might flow into the tannery, as before, which it would not have done without the dam. Another witness, one *Hartwick*, states that he was in treaty with the plaintiff at one time, about a year and a-half or two years ago, for the purchase of his supposed mill site on this lot, but he made it a condition that the water should be no longer abstracted by the defendants. He states that the mill site was spoiled entirely by the abstraction, and that the quantity of water in the stream was diminished by it one-half. *Gurnell* thinks that the present diminution is to the extent of only one-third, and it is attempted to account for this variation by attributing it to the prevention of waste at the station. An action was brought by the plaintiff against the defendants for the abstraction of the water, and the injury to his fish pond, and he obtained a verdict, with one shilling damages. The evidence given at the trial shewed considerable waste at the Aurora station, and from that time the ball-cock has been in use in order to prevent it, and at present no waste occurs. We have the advantage on this occasion of the scientific evidence of Mr. *Keefer* and Mr. *Fleming*, and of Mr. *Risley*, who confirms the statements of the two former gentlemen. The statements of Mr. *Keefer* and Mr. *Fleming* substantially agree. Mr. *Keefer* gauged the water passing over the plaintiff's dam, and

which formed the whole body of the stream, except what was abstracted by the defendants. He then measured accurately the quantity of water which the pipe at the station was capable of discharging, if at work the whole time to the full extent of its capacity, and he ascertained that the defendants could not, with their present works in full operation the whole time, abstract more than one fifty-fifth part of the stream. Mr. *Fleming* makes the quantity which the works of the defendants, if in full operation the whole time are capable of withdrawing, one forty-second part of the whole stream. The quantity actually abstracted, however, is not much more than half the quantity which the works are capable of abstracting, as appears from the evidence of both these gentlemen. I have carefully examined the cases of Lord *Norbury* v. *Pitcher*, (*a*) and of *Miner* v. *Gilmour*. (*b*) The former case decides that water may be conveyed by a riparian proprietor to a distance, and to a different property from that in respect of which he is a riparian proprietor, and that a fortieth part of the stream was not an unreasonable quantity to abstract for this purpose. The latter case enunciates the doctrine, new so far as I am aware, that for the ordinary use of the water of a stream, that is, for domestic purposes, a riparian owner may withdraw any quantity of water from the stream he may require, without regard to the effect it may have on the riparian owners below him. The case, which is a very important one, and entitled to the greatest weight, draws a distinction, not that I am aware of so plainly stated any where else, between the ordinary and extraordinary use of the water of a stream, characterising the use of such water for domestic purposes, and for cattle, as the ordinary use which may be practised to the utmost extent that may be required, without regard to its effect on others, but distinctly intimating that the water of a stream may be used by the riparian owner for any purpose whatever, with this limitation,

(*a*) L. T. Rep. 1863, p. 685. (b) 12 Moo. P. C. Ca. 131.

however, that he inflicts no sensible injury on his neighbours above and below him. The doctrine respecting the ordinary use of water may, perhaps, require this qualification, that the use must be on the land in respect of which the riparian ownership exists, and possibly within a reasonable distance of the stream. It would seem unreasonable that the owner of a house situate several miles from a stream should, by bargaining with the owners of the intermediate lands, or even by conducting the water through his own land, abstract almost the whole water in the stream, for the purpose of supplying his house or his cattle with water at that distance. In the case of Lord *Norbury* v. *Pitcher* the water was used for domestic purposes, and therefore, according to the doctrine propounded in the case of *Miner* v. *Gilmour* it would seem that any quantity might have been diverted; but, inasmuch as it was required for the use of a dwelling house on another property, at a distance from the stream, it might have been considered that for this reason the abstraction must be confined to a reasonable quantity. In the present case the water is undoubtedly diverted for extraordinary purposes, namely, purposes of trade, and therefore, although the distance of the point at which the use takes place from the stream seems no objection, yet the diversion must be confined to a reasonable quantity, and must be such as not to inflict any sensible injury on other riparian proprietors above or below. The quantity that can be abstracted has been ascertained by scientific measurement to be at most about a fiftieth part of the stream, but the quantity actually withdrawn does not much exceed half that quantity. In the case of Lord *Norbury* v. *Pitcher*, it was decided that the abstraction of about one-fortieth part of a stream furnished no cause of action. The plaintiff has no mill power; he has only eleven-twelfths of a horse power, and a six horse power is required to drive a mill with one run of stones. He may have power sufficient to raise water for the supply of his house, or to drive a turning-lathe, but the diver-

sion practised by the defendants does not diminish the power for this or any other purpose. So says Mr. *Keefer*, whose opinion, I think, is conclusive on this point, and Mr. *Fleming* most fully concurs with him. The plaintiff's witnesses, so far as they are entitled to credit, must be mistaken on this point. It would be impossible, therefore, to sustain the right to an injunction on the mere abstraction of the water, and the learned counsel for the plaintiff, accordingly, based it upon the recovery of the verdict, arguing that the injunction followed as a matter of course upon the recovery, and that the legal right being established, any invasion of it, although attended with no sensible injury, and although only nominal damages would be awarded for it by the jury, will be enjoined, inasmuch as the only alternative is to bring action after action for the redress of the grievances thereby sustained, and the case of *Graham* v. *Burr* in this court was cited in support of that proposition. There are dicta in the case of *Graham* v. *Burr* which may, perhaps, countenance this doctrine, but the facts of the case did not call for a decision of the point. The majority of the court thought that the plaintiff had sustained substantial injury, or, at all events, such injury as the court ought to prevent by the exercise of its extraordinary jurisdiction, inasmuch as it appeared that he had a water-power on the land, which the acts of the defendant destroyed, or greatly deteriorated, which water-power, although that fact was not deemed essential, he was endeavouring to put to a profitable use. I do not, myself, accede to the doctrine that a recovery at law establishing the legal right necessarily infers the right to an injunction. I think the exercise of this jurisdiction is always discretionary, depending very much on the reality and irreparable nature of the injury complained of, and, where no *mala fides* exists, on the balance of inconvenience. I do not think that it would necessarily follow that an injunction must issue, even where substantial damages would be recovered at law, much

less where the damages would be merely nominal, and where no real injury had been sustained. I may remark, in reference to one observation that fell from the court, in the case of *Graham* v. *Burr*, that the darkening of an ancient window is deemed in this court not only a substantial, but an irreparable injury, inasmuch as it affects the daily comfort of life. Where, however, the damage is substantial, and the party aggrieved may reasonably bring continual actions at short intervals for the redress of the grievance, it may be very proper to grant an injunction after repeated trials, although the wrong act may not in the abstract be of such a nature as to be properly deemed irreparable. But my impression is that the court ought not to interfere by injunction to the great injury of the defendant where no *mala fides* exists, and where the injury is nominal, or very slight, although if real and substantial it would be deemed irreparable. The present case, however, does not call for the application of these principles. The verdict which has been rendered in the action at law must, with reference to the facts as established by the evidence in this case, have been founded on the waste of water which was proved at the trial to have taken place. It is utterly impossible that it could have been founded on the mere abstraction, which was not sufficient to furnish any ground of action. The verdict was recovered in October, 1851. Mr. *Cumberland* states in his evidence that remedies were immediately applied to prevent a recurrence of the waste for the future, and Mr. *Fleming* states in his evidence that no waste now occurs at the Aurora station. He also states that no diversion can take place to any material extent beyond what the present works are capable of effecting. In this statement he refers to the possible leakage between the tank on lot 76 and the station at Aurora. It is conceded that the injunction can be based only on the verdict, and must be confined to the jury which the verdict was intended to redress. But that injury has ceased to exist and had ceased to exist long before the

commencement of the present suit. It would be quite wrong, I think, to grant an injunction under such circumstances. With regard to the destruction of the fish, I suppose that the plaintiff had a right to make a pond on his property, and to stock it with fish, and that the operations of the defendants really caused the destruction of the fish by fouling the water, it would be proper to restrain the continuance of this injury, which could be effected, probably, without much difficulty or expense, by compelling the protection of the embankment at and for a short distance on either side of the stream by means of sods. But I think the evidence is wholly insufficient to show that the works of the defendants have caused the destruction of the fish, and therefore I think that the case of the plaintiff entirely fails; that he has shewn no title whatever to relief, and that the bill must, consequently be dismissed with costs.

HART v. BOWN.

Mortgage—Description of land—General and particular description.

Held, that a general description being wholly insufficient, and the particular description by metes and bounds which followed not being a *falsa demonstratio* added to a complete description, but an entire description in itself, governed.

Whether a boundary intended by a grant from the Crown might be varied or departed from by subsequent acts and acquiescence of parties interested in the position of such boundary, who would be accordingly bound.—*Quære.*

Statement.—This was a suit for redemption. The facts of the case sufficiently appear in the report on the original hearing, *ante* vol. vii., page 97. Upon the enquiries then directed, the accounts between the parties were taken, and with the view of ascertaining the amount due on the mortgage the master at Hamilton ascertained and stated the position of the periphery of the Toronto military reserve mentioned in the mortgage with regard to the parcel of land also mentioned and described therein by metes and bounds; and he found what effect

the position of the periphery had under the said mortgage in determining the amount chargeable thereunder. The description in the mortgage was as follows:—

"A certain parcel of land in the city of Toronto forming a portion of a block of land formerly granted to *William Halton*, Esq., which said parcel of land is described as containing by admeasurement one acre of land be the same more or less, being composed of part of lot denominated letter J., in the said township of York, now part of the said city of Toronto, and bounded on the north by Lot street, on the south by the garrison or military reserve, and on the east by the lands owned by *William Botsford Jarvis*, sheriff of the Home District, which said parcel or tract of land is butted and bounded or may be otherwise known as follows: that is to say, commencing at the distance of twenty-one chains, more or less, on a course south seventy-four degrees west from the north-west angle of Peter street, and on the south side of Lot street, thence south seventy-four degrees west three chains seventeen links along the south side of Lot street aforesaid, thence south sixteen degrees east three chains seventeen links more or less to Simcoe street, thence north seventy-four degrees east along the northern side of Simcoe street aforesaid three chains seventeen links, more or less to the western limit of the lands now owned by the said *William Botsford Jarvis*, thence north sixteen degrees west along the said limit three chains nineteen links, more or less, to the place of beginning."

The master held that there being a general certainty of the thing granted within certain defined limits followed by a further description, the first description governed, and he mentioned the following authorities as supporting this view and holding it to be the correct one, his report was based upon it. *Rawle* on Covenants, 523; *Doe* v. *Kennedy*, (*a*) *Joiner* v. *Colborne*, (*b*)

(*a*) 5 U. C. B. R. 402. (*b*) 11 U. C. B. R. 631.

Mahoney v. *Campbell*, (*a*) *McCollum* v. *Wilson* (*b*).

From this finding of the master the defendant appealed.

Mr. *Brough*, Q. C., and Mr. *Snelling*, for the defendant.

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

Argument.—For the defendant it was contended that there was a double reading of the above description—the plaintiffs contending and the master reporting that the general description applied to the specific acre, the defendant on the other hand arguing that it applied to the whole lot denominated letter J., and that therefore no conflict arose between the *general* and *particular* description, and it was contended on the defendant's behalf that, admitting the reading of the description by the plaintiff to be the correct one, the *particular* description was not erroneous—that it was necessary; that the general description only gave a *part* of a larger parcel referred to in the general description, and did not define what part; that the particular description by metes and bounds was necessary, the general description being imperfect because there was another part of the whole lot within the same general boundaries, and therefore that the particular description controlled the general description, and was intended to govern, and that the general description being wholly insufficient and the particular description which followed not being a *falsa demonstratio* added to a complete description, was an entire description in itself.

The following authorities were cited:

Doe d. Smith v. *Gallway*, (*c*) *Dyne* v. *Nutley*, (*d*) *Doe d. Ashford* v. *Bowe*, (*e*) *Doe Hubbard* v. *Hubbard*, (*f*)

(*a*) 15 U. C. B. R. 396.
(*b*) 17 U. C. B. R. 572.
(*c*) 5 B. & Adol. 43.
(*d*) 14 C. B. 122.
(*e*) 3 B. & Adol. 453.
(*f*) 15 Q. B. 227.

Thomas v. *Thomas*, (*a*) *Doe d. Parkin* v. *Parkin*, (*b*) *Brown's* Maxims, 562 *et seq.*

Judgment.—ESTEN, V. C.—It is evident that the particular description was intended to govern.

The government gave only an easement to the public. They might intend to reserve the 1000 yards, although it would pierce Dundas and other streets, intending to allow the public to use them as streets: that is, to have an easement.

I think that the intention of the mortgage was to secure the value of the corner, assumed, I think, to have been cut off at the time of the sale to *Eckerlin*, and all damages, costs, &c., which Mr. *Bown* might reasonably sustain by reason of that or any other action; as for instance, larger damages might be recovered from him than could be recovered from *Winniett*; and there might be extra costs. The parties were, however, not satisfied that the corner was sufficiently defined in the action, and therefore they agree to refer it to arbitration to ascertain how much it was; and if it exceeded what was comprised in the words more or less, that *Winniett* was to pay the value. They might find that nothing was cut off, or nothing exceeding what was signified by the words more or less, in which case *Winniett* would pay nothing; and I think it must be intended that *Bown* had conveyed to *Dick* in the same terms that *Winniett* had conveyed to him, and had covenanted in the same way, and was consequently liable under the same circumstances, and therefore if the periphery should be found to have cut off nothing material, *Bown* would incur no damages, &c., except, perhaps, extra costs. I think it must be intended that *Winniett* intended to secure *Bown* against all reasonable damages arising from that or any other action; although exceeding what might have been recovered for himself; and

(*a*) 6 T. R. 671. (*b*) 5 Taunt. 321.

that *Bown* took the mortgage, and refrained from legal proceedings on that understanding. The decree therefore seems to have been rightly conceived, and the true question is, whether the periphery cuts off any material quantity of land from the acre in question.

I have perused the evidence. I think that the grant to Sir *W. Halton* conveyed the land to Bathurst street, and that the reference to the distance from the garrison, even if untrue, did not vitiate this clear description, although the Crown, if deceived, might perhaps have avoided the grant; but that it is conclusive evidence of the centre of the circle. This view would by a short process of argument entirely support Mr. *Dennis'* view whose only mistake was, I think, not to have assumed a point a thousand yards from Lot street as the centre of this circle, and rejected Mr. *Crookshank's* information, so far as inconsistent with that state of things, as slightly inaccurate, or as shewing a slightly inaccurate position of the posts. But this point seems immaterial. The government seem in their subsequent surveys to have placed the centre of the circle further north; but this could not of course invalidate or in the slightest degree affect the grant to Sir *Wm. Halton*, and the land to the road between 18 and 19 still remains in him or his representatives, unless it has been surrendered to the Crown. Probably the facts would be sufficient to justify a presumption of a surrender to the Crown. Sir *Wm. Halton* evidently acquiesced in the result of the subsequent surveys. He conveyed to *Fitzgibbon* according to those surveys, therefore the land between the point at 26 chains and the road between 18 and 19, even if it remained in Sir *Wm. Halton*, did not pass to *Fitzgibbon*, and could not pass from him to *Winniett* or from *Winniett* to *Eckerlin*. In fact *Fitzgibbon* carefully follows the description in the deed from *Halton* to himself. A little care would have shewn both *Winniett* and *Eckerlin* that *Winniett* could not convey what he purported to convey, but probably the

deeds were only examined to ascertain that the title was good; and description was not accurately regarded. *Eckerlin* evidently intended to purchase to Simcoe street, for it was an acre square that he purchased, and unless the lot extended to Simcoe street it would be anything but a square that he would acquire. The mortgage admits that there was an error in the description, therefore *cadit questio*. *Brown's* survey admittedly accords with *Halton's* deed to *Fitzgibbon* and *Fitzgibbon's* to *Winniett*. The corner in question therefore was never in fact conveyed to *Eckerlin*, but was intended so to be, and therefore there cannot be a doubt that something is due in this respect on the mortgage. The matter must therefore go back to the master, who must determine what amount of damages *Rees* would have recovered had the action proceeded. The other accounts will follow *ex consequentia*.

TISDALE v. SHORTIS.

Specific performance—Costs.

Where a purchaser filed a bill alleging that his vendor could not make a good title to lands agreed to be sold, but at the hearing waived a reference as to title, admitting the same to be good, the court at the hearing ordered the plaintiff to pay costs.

This was a suit by the purchaser of lands seeking a specific performance of the contract which was entered into in the year 1856, when the plaintiff went into possession and so continued until 1861, when the last instalment of purchase money having fallen due the vendor *Shortis* instituted proceedings at law to compel payment according to the condition of the bond executed by the plaintiff securing the payment of the purchase money; thereupon the present bill was filed against the vendor and one *Jones*, to whom as collateral security he had assigned the bond of the plaintiff. Upon motion an injunction was granted restraining the action at law, the plaintiff paying into court the amount of purchase money and interest. In the bill the plain-

tiff charged that the vendor could not make a good title, but at the hearing, to avoid an enquiry as to the title admitted the same to be good.

Jones disclaimed all interest in the subject matter of the suit, and it appeared that after bill filed he had re-assigned the bond to *Shortis*.

The case was heard by way of motion for decree.

Mr. *McKenzie* for plaintiff.

Mr. *Roaf* for defendant *Shortis*.

Mr. *C. Jones* for defendant *Jones*.

Judgment.—ESTEN, V. C.—I think that the plaintiff should pay the costs of the suit. Although in his bill he asserts that the defendant *Shortis* cannot make a good title, at the hearing he waived the reference as to title, and admitted that the title was good. The defendant in his answer stated that he never informed the plaintiff that he was the absolute owner, and he believes the plaintiff knew at the time of his purchase that his title was equitable. He also states that the plaintiff never applied to him to perform the contract or shew a good title. Under these circumstances I think that I must intend the defendant could always shew a good title, and that if the plaintiff had applied to him to shew a good title with the *bona fide* intention of paying his money if the title should appear good the action at law and the suit in equity would have been prevented. This course he ought to have adopted, instead of which he suffers the action to proceed, and prefers filing a bill, probably for the purpose of gaining time. The only fault that can be imputed to Mr. *Shortis* is, that he did not before he commenced the action for the purchase money offer to produce an abstract, but the plaintiff should immediately have said that he was ready to pay the money upon a good title being shewn, which would have been immediately done before any costs of any consequence had

been incurred. Mr. *Jones* appears to have re-assigned the bond after the commencement of this suit, and was therefore a proper party to the suit at its commencement; when he simply re-assigned and disclaimed without more the plaintiff was justified in bringing him to a hearing, if he could have got costs against him; but as I think he must pay costs it is immaterial.

THE ATTORNEY-GENERAL v. JEFFREY.

Trustee and cestui que trust—Presbyterian Church of Canada in connection with the Church of Scotland—Kirk session.

In 1833 lands situate in Cobourg were conveyed to certain parties, and "*the Kirk session of the Presbyterian Church of Canada in connexion with the Church of Scotland in Cobourg*" upon trust for the use of that congregation, who erected a church thereon and used and enjoyed the same until the disruption of the Presbyterian Church of Canada, in 1844, similar to that which had previously occurred in Scotland. In Canada, as there, the Presbyterian Church became divided into two churches, one retaining its identity with the Presbyterian Church of Canada, in connection with the Church of Scotland; the other forming a new church, called "The Presbyterian Church of Canada," similar in principle to the Free Church of Scotland, and to which the congregation at Cobourg almost unanimously adhered, and they continued to use the same church as hitherto until 1857, there being in the interval no congregation of the Presbyterian Church of Canada in connection with the Church of Scotland. In this year certain residents professing to belong to that church applied to the surviving trustees to have the trust estate devoted to the purposes intended by the donor by allowing them the use thereof for the purposes of religious worship, which was refused. On an information and bill filed by the Attorney-General and certain persons so claiming to be entitled to the use of the said trust estate the court declared that the only persons entitled to the use of the said church were those in communion with the Church of Scotland, and the fact that there had ceased to be a "Kirk session" at Cobourg was immaterial.

Held, also, that the congregation for the use of whom the trust had been originally created having ceased to exist, any new congregation in connection with the Church of Scotland, which might be afterwards organized were proper objects of the gift; and to be such, it was not necessary that the present should be a continuation of any previously existing congregation.

This was an information and bill by her Majesty's *Attorney-General* for Upper Canda, and *Andrew S. Arnott, John McKenzie* and *William Buller* against *Andrew Jeffrey, Thomas Scott* and *Peter McCallum*, praying under the circumstances appearing in the head-note and judgment, that it might be declared that the

defendants held the lands in question in trust for the sole and exclusive use of the congregation at Cobourg in connection with the church of Scotland; that the defendants might be ordered to permit the said congregation to have such sole and exclusive use, enjoyment, and control of the trust property; and that the defendants might be ordered to give possession of the trust property to trustees duly appointed for that purpose by the congregation: an injunction to restrain the defendants from further misusing and misapplying the trust property, and that they might be charged with an occupation rent in respect of the possession of the premises since 1844.

The defendants severally answered, and a replication having been filed putting the cause at issue, evidence was taken before his honour Vice-Chancellor *Esten*, the effect of which is stated in the judgment.

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

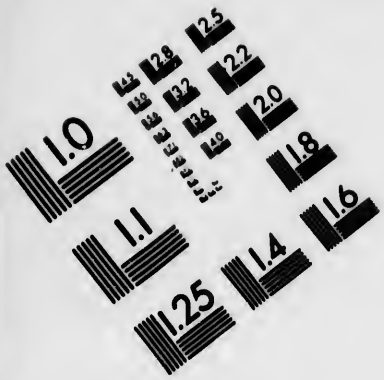
Mr. *Proudfoot* for the defendants.

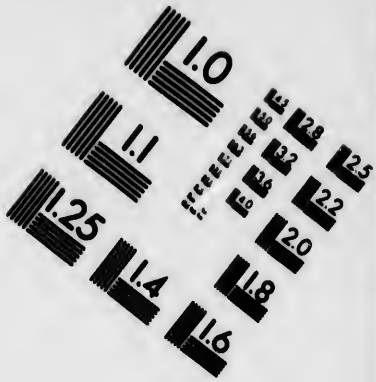
The *Attorney-General* v. The Earl of *Craven*, (*a*) The *Attorney-General* v. The *Ironmonger's Company*, (*b*) were, amongst other authorities, referred to.

Judgment.—ESTEN, V. C.—The facts of this case are, that in 1833, Mr. *Ruttan* conveyed the land in question, which is situate in the town of Cobourg, to the defendants and one *Burnett*, since deceased, and "the Kirk session of the Presbyterian Church of Canada, in connection with the Church of Scotland in Cobourg," upon trust for the use of that congregation. The church was built mainly by means of the contributions of the congregation, and used by it as a place of worship without dispute or difficulty until the year 1844, when a disruption occurred in the Presbyterian Church of Canada, following and resembling that which occurred in the Church of Scot-

(*a*) 21 Beav. 392. (*b*) Cr. & Ph. 208.

land; and the Presbyterian Church of Canada became divided into two churches, one retaining its perfect identity with the Presbyterian Church of Canada in connection with the Church of Scotland, the other forming a new church called "the Presbyterian Church of Canada," which is identified in principle with the Free Church in Scotland. The congregation at Cobourg adhered to the said church, almost if not quite to a man, and continued to use the church that had been built upon the piece of land in question without interruption until the year 1859, when a petition or memorial was presented by certain persons residing in Cobourg or its neighborhood, and belonging to the Presbyterian Church of Canada in connection with the Church of Scotland, to the Presbytery of that Church at Toronto, within whose jurisdiction Cobourg was, requesting them to re-organize the congregation at Cobourg in connection with the Church of Scotland, and to take steps for the recovery of the Church there for its use. In consequence of this application a deputation was appointed to meet the congregation at Cobourg, in order, in the language of the resolution, "to counsel and encourage them" in their present difficulties. This deputation, consisting of Mr. *McKerras*, Mr. *Douglas*, and Mr. *Dennistoun*, accordingly visited Cobourg, and met a number of persons, who assembled on the occasion at the house of Mr. *Butler*, when, after divine service had been performed, the usual and proper form was followed of re-organizing a congregation, and from that time the presbytery of Toronto has continually recognized this congregation, and has appointed ministers to perform divine service to them once in three weeks, but the sacrament has not been administered to them since their re-organization. It does not appear where divine service has been usually performed to the congregation since 1859, but it has not been performed in the church in question, which has been constantly used for divine worship since the disruption by the congregation of the new church in the same way as before until the present time. The congregation





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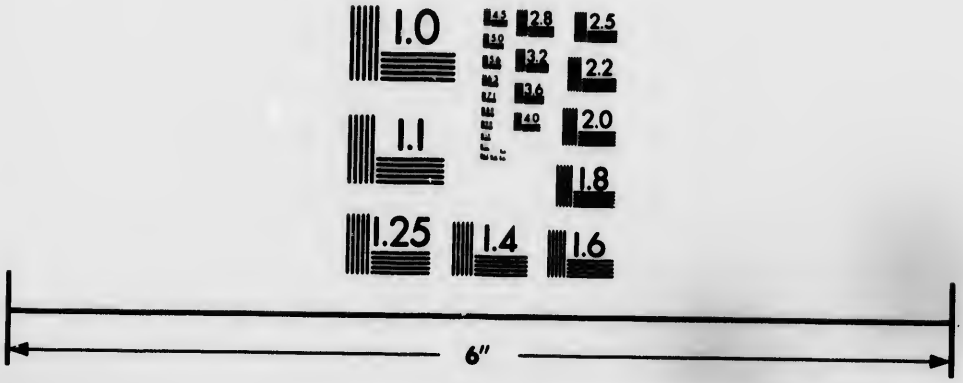

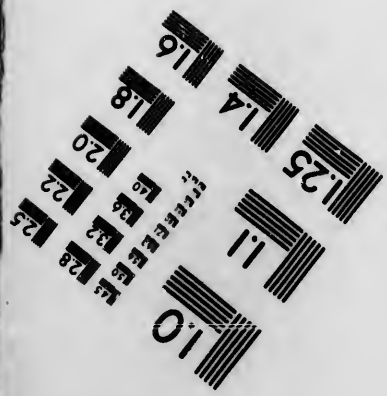

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at Cobourg in connection with the Church of Scotland consists of between twenty and thirty persons. It has no permanent minister or elders, and consequently no Kirk Session. It does not appear how many persons or indeed whether any persons in Cobourg adhered to the Presbyterian Church of Canada in connection with the Church of Scotland during the interval between 1844 and 1859. Many of the persons who subscribed the memorial which has been mentioned, in 1859, appear now to belong to the new church. Dr. *Barclay's* evidence shews that a congregation may subsist without a permanent minister or elders, without in short a Kirk Session; that many congregations exist in this state, and that it is the practice for the presbytery of the bounds to appoint ministers from time to time to officiate, and occasionally to administer the sacrament to them. The connection which subsists between the Church of Scotland and the Presbyterian Church of Canada in connection with it is, and always has been, simply one of regard and affection. It implies no spiritual jurisdiction or authority; the Presbyterian Church of Canada enjoys, and always has enjoyed, perfect independence. The question on which the Church of Scotland became divided was in this country purely abstract and speculative, namely, whether or not it was lawful for the church to submit to the interference of the temporal courts in enforcing the right of patronage: but I presume it is possible that the general question of the lawfulness of submitting to the interference of the temporal courts in spiritual matters might take a form in which it would interest the Presbyterian Church in all parts of the world. The Free Church congregation have professed to elect trustees in room of the defendants *Scott* and *McCallum*. The defendant *Jeffrey* has become personally liable for a portion of the debt incurred for the erection of the church; and he claims to be indemnified against this liability in case the court should think fit to grant any relief in accordance with the prayer of the information and bill. Upon these facts I do not doubt

that it is my duty to pronounce a decree according to such prayer. The case is, I presume, governed by that of the *Attorney-General* v. *Bain*, heard before the late Vice-Chancellor *Jameson*, in this court. It may be that the grantor in this case did not exact as a condition that a connection should be maintained with the Church of Scotland, and that if the Church of Canada had simply without any discussion discontinued such connection its title to the property might not have been affected. But it is an undoubted fact that the gift was to a branch of the Church of Canada in connection with the Church of Scotland. That church became divided into two parts, one of which has been erected into a new and different church, of which the congregation at Cobourg now enjoying the use of the building in question is part and parcel. It appears to me to be no more entitled to the benefit of the gift than a congregation of the Church of England, or of Methodists or Baptists would be. The power of alteration given by the trust deed does not extend this length; and I agree with Mr. *Strong* that if this had been the simple state of the case, the *Attorney-General* might require that the subject of the gift should be withdrawn from its present possessors and applied to some charitable purpose as cognate as possible to its original object.

I see no reason to doubt that the gift was made with a general charitable intent. The learned counsel for the defendants indeed did not contend that the congregation now in possession were legitimate objects of the donation, but that the original congregation which constituted its proper object had ceased to exist, and that the subject of the gift was a sort of *hæreditas vacans*, which might be seized and appropriated by the first possessor; but I do not agree to this argument, and I think that the only question is, whether the subject of this gift is to be applied *cy près*, or is to be surrendered to the congregation at Cobourg, in connection with the church of Scotland. I am satisfied that I shall be

acting according to the intent of the donor in holding that the gift was not confined to the congregation existing at the time it was made, or to any continuation of that congregation; that it will be perfectly within the scope of the gift to devote the subject of it to a new congregation in connection with the Church of Scotland, organised some years after the dissolution of the old one. The only question, then, is whether such a congregation exists. On this point the evidence of Dr. *Barclay* is material. No one can be more competent to express an opinion on the subject, and he states that a congregation has always been recognised by the presbytery of Toronto as existing at Cobourg since 1859. It is said that the congregation has no kirk session, but Dr. *Barclay's* evidence shews that a kirk session is not essential to the existence of a congregation. The circumstance that the grant was to the trustees and the kirk session seems unimportant. There was then a kirk session, but the estate, I apprehend, vested in the trustees alone. The trust, however, was for the Church of Canada, in connection with the Church of Scotland in Cobourg, and the congregation at present subsisting at Cobourg in connection with the church of Scotland seems to me to satisfy that description. It is contended that the bill in this case must fail, because the plaintiffs have all acquiesced in the breach of trust, of which it complains. And the case of *Cairncross* v. *Lorimer* (*a*) was cited in support of this position. I think, however, that no case of acquiesence is established. I attach no importance to these parties having been members of the Free Church congregation during the interval. It cannot be said that they acquiesced in what they could not prevent, and it would have been very hard that they should not be able to partake of the spiritual advantages to be obtained by uniting with this congregation in public worship, and in the Holy Communion, without forfeiting all right and interest under

(*a*) 7 Jur. 149.

this gift. For aught that appears they may have been the only persons in Cobourg desiring to be members of a congregation in connection with the Church of Scotland during the interval, and it must be deemed to have been, or at all events they might have deemed it to be, out of the question that the subject of this gift should have been dedicated to the use of three persons. I cannot hold their forbearance to institute proceedings under such circumstances to amount to acquiescence. The estate appears to be still vested in *Scott* and *McCallum*, in conjunction with *Jeffrey*. The congregation which affected to displace them, not being objects of the trust, their action in that respect must have been inoperative. No such relief can be granted to Mr. *Jeffrey* as he asks, with respect to his indemnification against the liability he has incurred. Whether he has any lien for his indemnification on the fabric of the church I express no opinion; but whatever remedy he ever possessed in this respect he still retains. He continues a trustee of the charity estate, and will not be divested of that trust without such indemnification, if any, as he might always have claimed. He cannot expect to stand in a better position than if he had always adhered to the trust upon which he held the estate; by departing from the trust, although I have no doubt he acted conscientiously, he cannot acquire a title to indemnification, which he would not otherwise have possessed. I think a decree should be pronounced, declaring the congregation at present existing at Cobourg, in connection with the Church of Scotland, and any congregation from time to time existing there in connection with the Church of Scotland to be the true objects of the trust, with the necessary directions.

No costs can be awarded against *Scott* and *McCallum*, and it is doubtful whether *Scott* must not be dismissed with costs. An enquiry seems necessary to ascertain whether or not he has ceased to be a trustee, nor do I

think that any costs can be awarded against *Jeffrey*. The decree, therefore, must be without costs to the hearing.

Decree.—DECLARE that the church, building, and hereditaments in the pleadings mentioned ought to be considered as bound in equity by the trusts and provisions of the indenture of the 14th day of August, 1833, in the pleadings mentioned, and that according to those trusts and provisions divine worship and service in the said church ought to be conducted by a minister or licentiate belonging to, and in full communion with, the Presbyterian Church of Canada, in connection with the Church of Scotland, and that no minister or licentiate of any other description ought to be upon any occasion allowed to officiate therein. Let the defendants, *Andrew Jeffrey*, *Thomas Scott*, and *Peter McCallum*, be restrained by the order and judgment of this court from wilfully or willingly permitting or allowing the said church to be used for any other purpose than divine worship or service in connection with, and according to the rites, forms, and usages of the Presbyterian Church of Canada, in connection with the Church of Scotland, by a minister or licentiate belonging to and in full communion with the Presbyterian Church of Canada, in connection with the Church of Scotland.

And let the said defendants be restrained in manner aforesaid from in any way hindering or interrupting any minister or licentiate in full communion with the Presbyterian Church of Canada, in connection with the Church of Scotland, from conducting divine worship in the said church, according to the rules, forms and usages of the said Presbyterian Church of Canada, in connection with the Church of Scotland.

Order that so soon as a kirk session of the Presbyterian Church of Canada, in connection with the Church of Scotland, is formed at the town of Cobourg, that the said defendants do then forthwith, deliver up the possession of the church to such kirk session.

Refer it to the master to enquire and state whether the defendant, *Scott*, hath ceased to be a trustee under the said indenture, and if so, when and how he so ceased to be such trustee; and if he has so ceased to be a trustee, whether any person, and who, has been appointed, and now is a trustee in his place or stead, and if the master shall find that the said defendant *Scott* has ceased to be a trustee, then reserve further directions, and the costs of the said defendant *Scott*; but if the master shall find that the said defendant *Scott* still remains a trustee, then let there be no such reservation; and in that case this court doth not think fit to make any order as to the costs of the defendant *Scott*. And this court doth not think fit to give any costs up to the hearing of this cause in any event as to the defendants *Andrew Jeffrey* and *Peter McCallum*.

THOMPSON v. LUKE.

Appeal from master's report.

An appeal from the master's report, after it has been absolutely confirmed by lapse of time, will not be entertained without leave first given on special application.

Parties who have no further interest in the matter to which the master's report relates cannot appeal from it.

This was an application made to change the priorities of incumbrancers found by a report of the master at London on the alleged ground that a change as to their priorities had been made in engrossing the report after it had been settled.

Mr. *S. Blake* for the incumbrancer who claimed priority.

Mr. *Freeland* contra.

Judgment.—EASTEN, V. C.—This application is in effect an appeal from the report after it has been absolutely confirmed by lapse of time, and should not be allowed without leave being first obtained on special application. It is also, I think, irregular, as being made in the names of parties who have no further interest in the matters to which it relates. I am sure it has been decided, and I think by the Vice-Chancellor of England, although I have been unable to find the case, that if it appears that a suit is prosecuted in the sole name of a party who has transferred his interest, it will not be permitted to proceed; this is a sound rule. Either of these grounds would be sufficient to make it proper to refuse this application with costs. If such a special application as I have alluded to should be made, it would be material to consider the effect of lapse of time which, unexplained, would amount to evidence of acquiescence, sufficient to make it proper to refuse such application. It would also be proper to ascertain the circumstances under which the schedule was amended,

as mentioned in Mr. *Abbott's* affidavit, since, if done with Mr. *McDougall's* consent, or with knowledge of, or the means of knowing, the circumstances, the parties whom he represents would be bound, and could not obtain any further alteration. As to *Miller's* judgment, it would not be proper under any circumstances to make any change, inasmuch as it appears from the affidavit of Mr. *Hamilton*, uncontradicted, to have been paid by the parties liable under it; in which case it has become extinct, even if paid by a surety, and can form no longer a charge upon this estate. Should an order be made upon any further application as to the other judgment, it would be proper to include in it a direction for enquiry as to payments, so as to afford parties interested an opportunity of contesting the claim.

McDougall v. Bell.

Infancy—Setting aside proceedings in former suit—Fraud—Costs—Infant plaintiff.

The general rule is clear that an infant plaintiff is, equally with an adult, bound by proceedings in a suit instituted by him.

On a bill filed by one of two infant plaintiffs in an administration suit, (after attaining majority) seeking to impeach the proceedings therein on the ground of fraud,

Held, that the fact that the plaintiffs in that suit, as also the trustees and the executor, had been represented by one solicitor; the omission from the decree of any direction as to wilful neglect or default on the part of the defendants therein; a material difference between the decree, and the decree on further directions as to the lands directed to be sold for satisfaction of debts; a purchase by the solicitor so acting for the several parties of a valuable portion of the estate, did not of themselves evidence fraud and collusion; and the plaintiff having in the same bill asked to have it declared that certain lands were held in trust for him, and that he was entitled to a conveyance thereof or an order of the court vesting the same in him, and to have certain title deeds delivered up to him, it appearing that the plaintiff would, in a suit framed for that purpose, have been entitled to this relief, made a decree in his favour to this extent, notwithstanding the misjoinder of parties not interested in this portion of the relief prayed, who did not object: the court desiring not to put the plaintiff to the necessity of filing a new bill, but under the circumstances ordered the plaintiff to pay the costs of all parties.

In a suit by *cestui que trust* against his trustees seeking, amongst other things, to obtain a conveyance of lands, it was alleged that three lots of land had been conveyed to trustees for the plaintiff and his sister, one of such lots having already been conveyed by the trustees to a purchaser at the request of the *cestuis que trustent*. The conveyance to the trustees, without expressing any trust. The court, under the circumstances, presumed that a trust had been declared as to all the lots, and gave relief to the plaintiff as to the two lots still vested in the trustees, and which the court held might be vested in the plaintiff by the decree in the cause, under the statute.

This was a bill by *George P. McDougall* against *Catherine Bell, John Bell, Charles Coxwell Small, George P. Dickson, John C. Griffith, Robert John Turner*, and *Edmund Mount; Catherine Bell* being sued as administratrix of *Thomas Bell*, deceased, who, with the defendants *Small* and *John Bell*, had been appointed executors and trustees of and under the will of the late *Peter McDougall;* the defendant *Mount* had been the husband of the deceased sister of the plaintiff, to whom and the plaintiff, their father, the late *Peter*

McDougall, had devised his estate as tenants in common. *Dickson* and *Griffith* were made parties, as executors of *Charles Thompson*, deceased, who had acted as the next friend of the infants in the administration suit now sought to be impeached, and the defendant *Turner* had acted as the solicitor for the several parties in the manner stated in the head-note and judgment, the purchase by whom was also sought to be set aside.

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

Mr. *Roaf* for defendant *Turner*.

Mr. *Crickmore* for the defendant *Small*.

Mr. *Turner* (Mr. *Roaf* with him) for the *Bell* estate.

The facts of the case, and the points relied on, sufficiently appear in the judgment of

SPRAGGE, V. C.—This bill impeaches the proceedings in the old suit of *McDougall* v. *Bell*, on the ground of fraud.

The bill in the old suit was filed as long ago as September, 1888. The present plaintiff and his sister then infants were named as plaintiffs, by *Charles Thompson* their next friend. The bill was filed against the trustees under certain settlements, and under the will of *Peter McDougall*; and against the same persons as executors of his will; against *Ross*, a trustee of a certain bond for £333, for the benefit of the widow and children of *McDougall*; and against *Christiana McDougall* the widow, mother of the plaintiff, as against the holders of certain mortgages against *McDougall*, one of whom had commenced suit upon his mortgage, making the other mortgagee a party defendant. The bill was for an account against the trustees and executors, and for other relief.

I do not find, from any of the papers, when the plaintiff came of age: he alleges that he was still an infant in February, 1852, when an order of revivor was obtained in the former suit by his sister, then Mrs. Mount, and her husband. This bill was filed in April, 1861: I gather from the evidence that he had been of age several years before that date. As to his not being bound by the proceedings in the former suit by reason of his infancy there is this passage in the bill: submitting that the proceedings in the former suit being collusive and fraudulent are not binding upon him, he adds, "he being at the time of said proceedings an infant under the age of twenty-one years, and having in no way consented to or adopted said proceedings," I take the general rule to be clear, that an infant *is* bound by proceedings in a suit in which he is plaintiff. If indeed this plaintiff was not bound by the former suit, he would be in a better position than if he had been a defendant; for the six months after attaining full age must have elapsed several times before he filed this bill.

This bill, then, as to matters adjudicated upon in the former suit, can be sustained only on the ground of fraud; and it is filed upon that ground: and seeks upon that ground the same enquiry and relief against the trustees and executors as if nothing had been disposed of in the former suit.

The bill states several charges of fraud; it charges that the next friend was a debtor of the estate, and filed the bill in the interest of *Thomas Bell* or at his instigation: of this there is no evidence whatever.

The bill refers also to the proceedings themselves, as evidencing fraud and collusion. One point is that the plaintiffs, and the trustees and executors, were represented by the one solicitor; that while the decree referred it to the master to take an account of the dealings of

those defendants with the real and personal estate, it omitted any direction as to wilful neglect and default; that no proper investigation was made into the accounts of the testator, and that a large amount of good debts are alleged to remain uncollected; that there is a difference in the decree, and in the decree on further direction, as to what lands of the testator are directed to be sold; that Mr. *Turner*, solicitor for the plaintiffs, and for the executors and trustees, was allowed to purchase a valuable portion of the estate for himself, and in trust for others, among them *Thomas Bell*, who made an affidavit in favor of the sale, *Turner* acting for all parties in the matter: then follows this allegation, the "said bill of complaint was filed by said *Charles Thompson*, in collusion with said trustees, or some or one of them, and in fraud of your orator, and of his said sister and mother, with a view to obtain certain property belonging to the estate of the late *Peter McDougall*, or for the purpose of obtaining a fraudulent account against your orator." The bill contains also a charge against *Thomas Bell* in respect of a leasehold property in King Street, in the city of Toronto, but which has failed for want of evidence, and is abandoned.

Upon the first point I must assume that the bill was properly filed, and inasmuch as a suit was pending upon mortgages against the estate amounting as appears by the pleadings to £1700, a bill for the administration of the estate would be advisable unless there was sufficient personality to pay off these mortgages. The bill was filed by Mr. *Price*, as solicitor; adult defendants chose afterwards to employ the same solicitor; and it is to be observed, and I think it a very important fact, that the mother of the infant plaintiffs chose to employ the same solicitor; no collusion is charged with her, but on the contrary in the passage I have just quoted from the bill, it is charged that the bill was filed in fraud of her and her children. If it were so, it was in her power, and it was her duty

to have applied to the court for an enquiry whether the suit was for the benefit of her children; instead of which she acquiesces in the suit, and appears in it by the same solicitor as filed the bill. The question before me is not whether it was advisable for a solicitor to represent the executors and trustees as well as the plaintiffs and their mother. The name of the same solicitor appears upon the records of the court as acting for these various parties. I believe it was a practice not discountenanced by the court either in England or here; and I can scarcely suppose that the fact of the solicitor so acting was unknown to the then head of the court, for it was the practice of those days, more than it is now, for the solicitors in causes to attend as such in court, especially at the hearing of causes. As an instance of solicitors being allowed to represent different interests, I may mention that upon the petition of June, 1844, presented in the name of the plaintiffs, to authorise the sale to Mr. *Turner*, Mr. *Turner's* own name appears on the petition as solicitor, and it appears also upon the petition of August, 1846, for the confirmation of that sale, and a modification of the first order; and in the body of the first petition it is stated that he had acted in the suit as solicitor, and for and on behalf of other solicitors for the plaintiffs, and other parties in the suit, and in prosecuting the decree. The common "answer" to both these petitions is signed by the then Vice-Chancellor. Nor is it a question before me whether the solicitor ought to have been allowed all the costs taxed to him, either in classes of costs, or in items: the question is simply one of fraud, with which the bill seeks to affect not the solicitor only, but the trustees and executors; and my opinion is, without expressiug any opinion as to the propriety of what was done, that it is no evidence of the fraud charged in the bill.

I think, too, that the omission in the decree to direct an enquiry as to wilful neglect or default is not evidence of fraud. The decree, indeed, could not have contained

such a direction, without a case being made for it by the bill. The bill was framed by the plaintiff's solicitor before, so far as appears, he was retained by the executors, and was settled by counsel.

That the accounts were not properly investigated, and that good debts were allowed to remain uncollected are mere assumptions. I asked the learned counsel for the plaintiff if he was prepared to point out any specific instances of mismanagement or neglect, and he said he was not.

The difference between the decree and the decree on further directions as to the lands directed to be sold for the satisfaction of debts, is no evidence of fraud; it was the act of the court, and I must assume was done upon good and sufficient grounds.

The sale to Mr. *Turner* was expressly authorised by the court, and I may add, that while objected to by the bill on the ground of fraud and collusion, it is not objected to as a sale at an undervalue, or that it was an improvident sale. The plaintiff has produced no evidence upon either point. The evidence that has been given upon it, in this cause, is by Mr. *Turner* in support of its being a sale for the value of the land.

The difference between the directions as to the land to be sold, and the sale to Mr. *Turner*, are points adjudicated upon, and can be no evidence of fraud; and I find no evidence of fraud—the only point before me, in the proceedings objected to by the bill, and to which I have adverted. Nor is there even any error pointed out. It follows that the decrees, order, and proceedings in the former suit, *McDougall* v. *Bell*, must stand as *res judicata*. I have not thought it necessary to discriminate between the three executors and trustees, though in truth *Thomas Bell* was the only one who took any active part in the proceedings, the others having, as

they alleged, never acted in either capacity; and having put in their answer and disclaimer, the accounts and discharges are in the name of *Thomas Bell* alone.

In addition to the charges of fraud to which I have adverted, the bill charges that the trustees or *Thomas Bell* neglected their duty in allowing waste upon real estate, and large quantities of timber to be wasted; and that, although a receiver was appointed in the suit, "yet that the said *Thomas Bell* continued to act therein, and to manage and control said estate." It is also charged that other real estate has been wasted or allowed to be sold for taxes, but of which there is no evidence.

The land as to which evidence of waste has been given consists of 500 acres in the township of Toronto, upon which there was a saw-mill, on the river Credit. By indenture of May, 1836, *McDougall* conveyed this land, together with some town lots in Niagara, to *Thomas* and *John Bell*, and Mr. *Small*, in trust, to apply the rents and profits, after his death, for the benefit of his infant children, until they should come of age. The bill prayed *inter alia* for an account of the rents and profits of the real estate come to the hands of the trustees, or of any or either of them, or by their, or any or either of their order, or for any or either of their use; and the decree directs an account of rents and profits in the same terms as the prayer of the bill: the trust deed is expressly referred to in the bill and the decree. The decree directs the appointment of a receiver of the rents and profits, with the usual direction that the tenants are to attorn; and the decree provides that the receiver is to be at liberty to let and set the estates from time to time, with the approbation of the master. The receiver was appointed on the 2nd of August, 1839. The master's general report under the decree was signed on the 6th of May, 1842. It appears to me that all up to that date is *res judicata*. It is sought to charge *Thomas Bell* with the waste after the appointment of the

receiver, on the ground which I have stated from the bill; but the evidence really amounts only to this, that the receiver frequently consulted Mr. *Bell*, and that Mr. *Bell* made some bargains with tenants. The receiver adds that he and *Bell* consulted Mrs. *McDougall*, who he says generally signed the agreements. I am afraid from the evidence that the timber on the property was consumed and the land thereby greatly injured by unscrupulous tenants; but this seems to have been chiefly, if not wholly, after the appointment of the receiver, and for that I apprehend *Bell* could not be answerable.

There was another trust deed, besides the one to which I have referred. It conveyed to the same trustees the land afterwards sold to *Turner*. Both of the trust deeds are set out in the old bill, with the trusts. The prayer of the bill, and the direction of the decree, which I have referred to, apply to both. It is urged now at the hearing that no account has been taken of the trusts, and that the plaintiff is now entitled to an account of the dealings of the trustees, at any rate, with the exception of those taken in the former suit. But the only objection taken by the bill is, that an account ought to have been directed as to wilful neglect and default, and it is plain that such direction would have comprised all that the plaintiffs could have been entitled to, or that the present plaintiff can be entitled to now, for the trust is only to receive and pay over rents and profits: to direct now an account of the dealings of the trustees with these lands, would be in effect to vary the decree made in the former suit.

It is said that the legal estate in the lands in the township of Toronto, and in the town of Niagara, is still in the trustees, and that it should be vested in the plaintiff; and that the title deeds should be delivered to him; the plaintiff seems entitled to this. I understand Mr. *Strong* is of opinion that a declaration of this court will be sufficient to vest the estate. I suppose the decree may properly contain a vesting order to operate under the

statute to vest the estate in the plaintiff. It does not appear that any application has been made for a conveyance.

By an amendment made to the bill long after the answers were in, and about two months after the hearing of the cause, it is alleged that two town lots in the City of Toronto were conveyed in March, 1844, by the late Mr. Justice *Hagerman*, to *Thomas Bell*, as trustee for the plaintiff and his sister, as co-devisees under the will of their father; and that *Bell* conveyed one of these lots to a purchaser at the request of the plaintiff and his sister. At the hearing plaintiff's counsel asked for the conveyance to *Thomas Bell*, but it was not produced. A copy of the memorial of it is produced by the plaintiff, but the memorial shows only a conveyance of the three lots to *Thomas Bell*, and express no trust. It is contended that a trust is to be inferred as to all the lots, from a conveyance of one of them by *Bell*, as a trustee. By indenture of 27th December, 1855, one of these lots was conveyed to a purchaser; *Thomas Bell*, the widow of *McDougall*, the plaintiff, and *Mount* and wife, (the latter being the plaintiff's sister,) being the granting parties, and the conveyance recites that *Bell* is a trustee of the lots conveyed, for the plaintiff and his sister.

The three lots being conveyed together to *Thomas Bell*, the inference would be, I think, that they were conveyed to him in one character; in his own right as to all, or as a trustee as to all. It is shewn that one of them was conveyed to him as trustee, and we have nothing to rebut the presumption that all three were so conveyed. *Bell's* devisee has put in no answer to the allegation that her husband was a trustee as to all, and does not produce the conveyance. The presumption, I think, is, not only that *Bell* held the lots as a trustee, but that the trust appears upon the face of the conveyance to him. The plaintiff seems entitled to relief as to

the two lots not conveyed; to have a declaration that they are held in trust, and to a conveyance or vesting order, and for delivery of title deeds. Strictly, the introduction of this matter into the bill was not proper. It is a misjoinder of suit, as it is matter with which Mr. *John Bell* and Mr. *Small* have nothing to do; but no objection is made on that ground, and I do not think it necessary to put the plaintiff to file a new bill.

It ought not, however, to affect the costs of the suit, The plaintiff fails in all that was really in contest between the parties, and must pay the costs.

BEDSON v. SMITH.

Mortgagor and Mortgagee—Agent—Practice—Costs.

An agent being appointed to receive money for another, must, in the ordinary course of business, be his agent also to give a receipt for the money.

The owner of an equity of redemption filed a bill impeaching the mortgagee's title on the ground that no money was advanced, but the court being of opinion that the evidence was sufficient to establish the fact of payment, directed, at the option of the defendants, that the bill should be dismissed with costs, or the usual decree made for redemption upon payment of what should be found due upon a reference to the master.

The facts appear sufficiently in the judgment.

Argument.—Mr. *McLennan* for plaintiff.

Mr. *Fitzgerald* for defendants.

Judgment.—SPRAGGE, V. C.—It is clear from the evidence that the mortgage, *Jones* to *Roach*, and the assignment by *Roach*, were only a mode of borrowing money from a third person for the use of *Jones*, *Roach* being only a nominal mortgagee, his assignee being the only lender, and *Jones* the only borrower; and it is clear also that the transaction took this shape in order to enable *Jones* to borrow at more than legal interest. Whether *Hirst*, the assignee, was cognizant of this is another question,

and would only be material in the event of the representatives of *Hirst's* estate being redeemed.

McLeod, whose misconduct has occasioned this suit, was the agent of *Jones* in negotiating the loan; the two leading questions that arise are, whether he was his agent to receive the mortgage money; and whether the mortgage money was in fact paid to him by *Hirst*. It is also made a question whether there was not that, on the face of the mortgage and assignment, which ought to have put *Hirst* upon enquiry.

I think that *McLeod* was the agent of *Jones* to receive the money. *Jones* himself, in his examination, speaks as if *McLeod* was not only to negotiate for a loan, but to receive the money. *Roach* is more explicit: he was a friend of *Jones*, and requested him to become a nominal mortgagee, to which he assented somewhat unwillingly. *Jones* explained to him why the transaction was to take that shape, viz., to evade the usury laws; and gave him to understand that the money he wished to borrow was to go to Mr. *Duggan* to pay for land; and *Roach* adds that the money was not to be paid to him, (*Roach*,) but that *McLeod* was to get the money and pay it to Mr. *Duggan*. *Roach* says this in his evidence in chief for the plaintiff; and I take it that his statement was acquiesced in, for he does not seem to have been questioned as to how he knew that *McLeod* was to get money. The inference, I think, is that he was so informed by *Jones*.

From the nature of the transaction, too, it must, I think, have been *McLeod* that was to receive the money. He had in his hands the mortgage and the assignment, the latter with the name of the assignee blank, but executed by *Roach*. *Roach* certainly was not to receive the money. He says so expressly; and *Jones* could not receive it from the lender, for it was essential to the arrangement that he should not appear as the bor-

rower. My conclusion is, that *McLeod* was *Jones'* agent to receive the money to be borrowed upon the mortgage and assignment.

Upon the question whether *Hirst* did in fact pay to *McLeod* the money which he was to advance, the only evidence, beyond the receipt in the body of the assignment, is a receipt in the handwriting of *McLeod* for £238 10s., the amount of the mortgage money. *McLeod* himself has absconded and is not to be found, and *Hirst* is dead. I incline to think the evidence sufficient. *McLeod* was *Jones'* agent to receive the money, and must have been his agent to give a receipt for it—for to give a receipt for money paid is in the ordinary course of business. It seems doubtful whether an admission of the receipt of goods, by an agent appointed to receive them, is evidence against his principal, the purchaser. It was held sufficient at *nisi prius* by Mr. Justice *Buller* in *Biggs* v. *Lawrence*, (*a*) but it went off in *banc* upon another point; and in *Bannerman* v. *Radenius* (*b*) doubt was thrown upon the ruling of Mr. Justice *Buller*. But this case seems distinguishable on the broad ground that the authority to the agent is always construed to include all the necessary and usual means of executing with effect the authority conferred, and the giving a receipt, being usual when money is paid, he had authority to give it, and if so, it is the receipt of the principal by his agent.

It is urged that the receipt is not for the amount which was to be advanced, but for the face of the mortgage, from which a discount was to be deducted; and that it therefore loses its value as an admission of money being paid. But is not proved against *Hirst's* estate that less than £238 10s. was to be advanced. I may suspect it, but I cannot say that it is proved; and if it were, the receipt would still, I apprehend, be evidence of the advance by *Hirst* of the amount, whatever it was,

(*a*) 3 T. R. 454. (*b*) 7 T. R. 663.

that was to be advanced, it being part of the arrangement upon that hypothesis that an acknowledgment was to be given for the sum expressed to be advanced, but which could not be given until the sum really to be advanced was actually advanced.

But I incline to think further that proof of the actual advance of the mortgage money does not lie upon the defendants, but is to be presumed from the circumstances. The mortgage and assignment were registered by *McLeod*, and a receipt by the registrar, dated 27th October, 1853, that he had received these papers for registration, is produced from the hands of *Hirst's* representatives. The presumption is, that *McLeod* would not have placed this paper in the hands of *Hirst* (as I have no doubt from the evidence that he did) without at the same time receiving the mortgage money. The receipt bears date the following day, and is strong evidence, beyond the presumption coupled with the registrar's receipt, its date, and its being found in the hands of *Hirst*, that the money was actually paid.

A statement put in writing by Mr. *Duggan*, and signed by *McLeod* on the 9th of March following, is put in. I do not see how I can even look at it.

In the assignment from *Roach*, which is a printed form, the name of the assignee was, as I have said, left blank, and the name of *John Hirst* was afterwards filled in as the party of the second part, I should say by *McLeod*, comparing the name with the name now in the receipt for the mortgage money, not by *John Hirst* himself, as suggested in the bill. In one of the recitals a blank left for the name of the assignee is not filled up, but it is quite intelligible without it. I have no doubt that it is a good equitable assignment.

But it is objected that there is that upon the face of it, and upon the face of the mortgage, which should

have put *Hirst* upon enquiry. I have no reason to suppose but that the assignment was taken to *Hirst* in the shape in which it now is, with the name of the assignee filled in as a party, and only omitted from a recital, which omission, if he observed it at all, would appear to be, as it really is, unimportant. The mortgage itself seems duly executed, and it is witnessed by *McLeod*. The only omission is the name of a witness to the receipt for mortgage money; the receipt is signed by *Jones*. I take it to have been simply an omission without any object, and that it passed unobserved, for *McLeod* would not have hesitated to put his name as a witness to the receipt by the mortgagor. But suppose *Hirst* had enquired, he would have been informed of nothing, either by *Jones* or *Roach*, to induce him not to advance the money, or not to pay it to *McLeod*, for the instruments were, I have no reason to doubt, intended to be perfect, and were placed in *McLeod's* hands in order that he might receive the money.

It is urged, further, that *Hirst* made no enquiries as to the property, its value, or other particulars; that he did not investigate the title, or examine the registry office. I suppose these points are urged as circumstances of a suspicious nature, and tending to throw doubt upon the *bona fides* of the transaction. But I do not know that he did not do all these things; and if he omitted any, I do not know that more can be said than that he acted with less caution than a prudent man of business would have done. It is said he did not get the mortgage and assignment into his possession, but that is explained; he got the registrar's receipt that he held them for registration, and the registrar sent them to *McLeod* incautiously, I should say, without production of the receipt. I do not see that *McLeod* had any authority to act for *Hirst* in any part of the transaction.

It may be, certainly, that *Hirst* did not, in fact,

advance the mortgage money, but I think, upon the evidence before me, I must come to the conclusion that he did advance it.

The defendants, representatives of *Hirst*, claim that the plaintiff should redeem, or that the bill should be dismissed, and the plaintiff foreclosed. Nothing was said about this at the hearing. It may not be intended to ask it. If it is it may be mentioned again; if not, the bill will be dismissed with costs.

Subsequently the case was spoken to by Mr. *Fitzgerald*, for the defendants, contending that they were entitled to a decree for redemption, without driving them to file a bill in another suit to foreclose. In the event of plaintiff not paying what should be found due, the bill would then be dismissed, the effect of which would be to foreclose the plaintiff of all title.

Mr. *McLennan*, for the plaintiff, contended that all the defendants were entitled to was a dismissal of the bill, leaving them to proceed in a suit to be instituted by them to foreclose the plaintiff's equity.

After taking time to look into the point, his honour said the decree might go as asked by Mr. *Fitzgerald*.

On proceeding to settle the minutes of decree, the solicitor for the defendants wished inserted a direction that plaintiff should at once pay the costs other than those of an ordinary redemption suit up to the hearing; and the usual reference to take accounts, &c., which the registrar declining to do, the point was mentioned to the Vice-Chancellor, but his honour thought that, under the circumstances, the proper course was to draw up the usual decree for redemption, if the defendants desired it, or dismiss the bill as stated in the judgment.

The defendants ultimately el d to take a de ce, dismissing the bill with costs.

McAnnany v. Turnbull.

Dower—Sale of widow's right to dower under fi. fa.—Costs.

A right to dower is not saleable under execution against the lands of a dowress. Till dower is assigned, she has not either an estate in the land, or even a right of entry; neither does her interest come within the meaning of the words, (in Con. Stat. U. C. ch. 90, sec. 5,) "a contingent, or executory, or a future interest, or a possibility, coupled with an interest."

Where the only defence set up by the defendant failed, and the ground on which the court decided against the plaintiff was not taken, or even pointed to in any manner by the answer, the court, though it dismissed the bill, refused the defendant his costs of the suit.

Statement.—This was a bill filed by the plaintiff as having acquired, by virtue of a sheriff's sale and deed, the title to dower of *Agnes Smith*, as against the defendant, who claimed under, or to whom *Robert Smith* had conveyed the land after his marriage with *Agnes*. The prayer of the bill was, that the dower of *Agnes* might be set out or assigned.

For the defence it was attempted to be shewn that the land had been sold by *Robert Smith* prior to his marriage, but this defence was not sustained in evidence.

The cause was originally heard by way of motion for decree, before his honour Vice-Chancellor *Spragge*, who pronounced a decree in favour of the plaintiff. The defendant thereupon set the cause down to be re-heard before the full court.

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

Mr. *English* for defendant.

Judgment.—Vankoughnet, C.—The only position taken before us by the defendant was, that the land out of which dower was sought had been sold by the husband prior to his marriage with the widow, whose right to dower the plaintiff claims to have acquired by virtue of a sheriff's sale and deed. As such assignee, he asks that

the dower may be set out or assigned. We were of opinion at the close of the argument that the alleged sale was not supported in proof, and that this, the only defence urged to us, failed. The court, however, doubted whether the sheriff could sell this right to dower, and having given the learned counsel for the plaintiff an opportunity of sustaining the sale if he could, and heard his argument thereon, we are of opinion that the sheriff's sale did not pass any interest to the plaintiff. It is clear that at common law such a right would not be saleable, nor would be under the statute 5 George II., providing for the sale of lands in the colonies. The widow has no estate in the land till the dower is assigned to her. She has not even a right of entry. The freehold falls at once upon the heir, who holds it in its entirety till the dower is assigned. Until then the widow really has nothing in the land. She merely has a right to procure something, *i.e.*, dower. She cannot, until assignment, enter upon the land, or any portion of it, or assert any description of right in it, except by action to procure an assignment. She is a mere stranger to it, and like any other stranger, a trespasser, if she ventures upon it.* The right she may never assert. She may not choose to disturb the heir or interfere with his freehold; and if she does not, who at law can do it for her? I asked in the argument if there was any instance to be found of an assignee of a dowress bringing a writ of dower in his own name. None such was shewn, and I am not aware of one. This being the position of a right to dower at common law, it is nevertheless contended that it may be sold under the 5th section of chapter 90, of the Consolidated Statutes of Upper Canada, as being a contingent, an executory, "or a future interest, or a possibility coupled with an interest in the land." We think not. Looking at the character of the inchoate interest which a widow has before the assignment of

*Park on Dower, 2 & 3, 268; Small v. Angel, 7 Mod. 40; Rex. v. Painswick, Burr. S. Ca. 783; Rex. v. Berkswell, 1 B. & C. 542; Rex. v. The Inhabitants of Northweald Bassett, 2 B. & C. 724.

her dower, we do not think it falls within the meaning of the words quoted. If it is an interest at all, it is not a future, but a present interest. It is not contingent or executory in the sense in which the legislature use those words, because it is only by reason of the exercise of the right being dependent on her own will that it can, if at all, be called contingent or executory. Those words we think must be treated as having been used by the legislature in reference to certain estates and interests well known to the law as expressed or conveyed by them, among which a right to call for an assignment of dower was never classed. It is clearly not a possibility coupled with an interest, nor is it a right of entry which does not arise till the assignment has been had.

We think, therefore, that the plaintiff has acquired no right to demand an assignment of dower, and that his bill must be dismissed, but without costs, as not only did the sole defence set up fail, but the ground on which our judgment rests was not even pointed to by the defendant.

INGLIS v. GILCHRIST.

Mortgagor and mortgagee—Re-borrowing—Parol agreement that original mortgage after having been paid off should stand as security—Appeal from master's report.

Two years after a mortgage had been in part paid off, the mortgagor applied to the mortgagee to re-borrow the money, agreeing verbally to return the receipts for the money paid, so that there should not remain any evidence of payment; and that the amount so re-borrowed should be considered of the original charge created by the mortgage. Some, but not all, of the receipts were returned to the mortgagee, and the money re-advanced by him upon the terms proposed by the mortgagor. Under this state of facts, the master, in taking the accounts, directed by the decree, allowed the mortgagee the full amount of the mortgage. On an appeal from the master's report,

Held, that the principle upon which he had taken the account was correct; and that the mortgagor was estopped from proving the payment of any portion of the original sum advanced. [VANKOUGHNET, C., *debutante*.

Statement.—This was a suit for redemption, in which, by consent, the usual decree had been drawn up, referring it to the master at Cobourg to take the account between the parties, in pursuance of which the master made his report, finding the whole amount of principal and interest secured by the mortgage deed due to the defendant. From this report the plaintiff appealed on the grounds appearing in the judgment.

Mr. *Roaf* for the appeal.

Mr. *Blake* contra.

Judgment.—VANKOUGHNET, C.—In this appeal from the master's report it is contended that the master was wrong in allowing to the defendant, the mortgagee, as properly secured by the mortgage, a certain sum which the plaintiff, the mortgagor, who seeks to redeem, had paid off on the mortgage, and had afterwards, at the distance of nearly two years, re-borrowed on the oral understanding that it was to be considered as of the original charge created by the mortgage; or in other words, as if it had never been repaid, the receipts of the mortgagee therefor having been agreed

to be returned to him, and some of them, but not all, having been in fact returned to do away with the evidence that any payment had been made by the plaintiff.

It would seem under such a state of facts, but equitable, that the plaintiff's estate at law, being forfeited, and gone irremediably (he having been ousted by an action of ejectment) he should not be allowed to enforce the recovery of it here except upon the terms of paying all moneys which he had received on the security of it and had agreed to charge upon it whether by deed or parol; and yet I do not feel myself at liberty upon the authorities as they stand to enforce any such doctrine. It is a maxim of equity that he who seeketh equity must do equity, but the application of this maxim has been very limited in decided cases. In earlier times it was indeed held that a mortgagor could not redeem without paying all that he owed to the mortgagee whether secured, or intended to be, or not to be secured by the mortgage. *Demandray* v. *Metcalf* (*a*). See also a review of the authorities in *Jones* v. *Smith* (*b*), the judgment in which case itself was however reversed by the Lords on appeal. This doctrine has, however, been exploded, but still remained the question, whether when there was an express agreement, though by parol, to charge the land with an additional sum, the mortgagor could redeem without complying with his promise. In most, indeed nearly all the cases, the contention has arisen on a bill filed by the mortgagee to foreclose, and in such case after the judgments in *Sheppard* v. *Titley* (*c*), and *Ex parte Hooper* (*d*), recognized authorities, it cannot be admitted that the parol agreement should have effect. It is argued, and with reason, that the mortgagor, coming to redeem, is in a different position; but I can find no authority, I mean no decided case for the distinction, much inclined as I am to make one for such cases. None such has been cited, and the nearest

(*a*) Pre. Ch. 421. (*b*) 2 Vesey, 372.
(*c*) 2 Atk. 348. (*d*) 1 Mer. 7.

in point that I have met with is that of *Newby* v. *Cooper*, (*a*) where there was a bill to foreclose, claiming an additional charge by parol agreement, and a cross bill to redeem on the foot of the original mortgage.

It is true that it does not appear that the parol agreement was proved, but still the account ordered was, without further enquiry, confined to the sum originally secured by the mortgage. None of the many learned text-writers on the subject draw any distinction on this head between a bill to foreclose and one to redeem, and yet one must suppose that the question would have engaged attention, and been discussed, and with some result, if the distinction was considered tenable. I cannot therefore admit it, and so far must disallow the master's report. This was the only objection argued before me, though I confess myself unable to understand how the master has calculated the amount he finds due to the defendant on the first mortgage. As I understand the evidence of the defendant, who was examined by the plaintiff, the second mortgage was given to secure as well as the sums which had been paid on the mortgage and re-advanced by the defendant to the plaintiff (though of course they were not the same specific moneys, the re-advance being nearly two years after the payment) as the additional sum advanced on the execution of the second mortgage. I suppose as the parties have raised no argument upon this portion of the evidence, it is understood between them how the fact is. I must say, however, that I think the defendant's evidence unsatisfactory.

The defendant being dissatisfied with this judgment, set the cause down to be re-heard before the full court.

Mr. *Roaf* for plaintiff.

Mr. *J. Armour* and Mr. *Blake* contra.

(*a*) Finch, 379.

Judgment.—ESTEN, V. C.—It seems to me that where parties agree for valuable consideration not to set up the real facts they are estopped. I think the effect of the conduct of the parties in this case is, that they agree not to prove the payments, not only upon the original transaction, but upon the consent decree. I am, therefore, of opinion that the master was right in the principle upon which he took the account.

SPRAGGE, V. C.—I have come, after some hesitation, to the same conclusion as my brother *Esten*. I think it is only an application of the principle that a party shall not be permitted to shew the truth of a matter, when his dealings and conduct have been such as to make it inequitable for him to prove it. It is in the nature of an equitable estoppel. What is necessarily to be implied from the giving up of the receipts is an agreement by the mortgagor that the payments evidenced by them were not to be proved, and I think that the position of the mortgagee was changed upon the faith of that agreement. It was intended that the mortgage should show upon the face of it a mortgage debt not diminished by the amount of the receipts, and that what the mortgage deed so shewed should be incontrovertible; the inference is, that but for the agreement the charge would have been preserved upon the land in some other way. I think that the mortgagor must be taken to have agreed that if the mortgagee would not require him to execute a further charge, he would not give evidence of the payments, and that the mortgagee, upon the faith of that agreement, abstained from requiring the execution of a further charge.

The plaintiff is not put as in *Shepherd* v. *Titley* to establish a charge upon parol evidence. The question of fact is, whether there has been a payment on the mortgage, which the mortgagor does not shew, and which the mortgagor attempts to establish by parol, and this attempt is met by the doctrine of equitable

estoppel. I do not very well see why it should not be applied to such a case; a party may be estopped by conduct, because, after such conduct, it does not consist with good faith that he should shew the truth. Here is an agreement by necessary implication from the fact of the surrender of the receipts, and founded upon valuable consideration. It is surely against good faith that he should shew the payments he had agreed not to prove, and thus defeat the object we must assume both parties intended to effect.

With regard to the rebate of interest during the interval between the payment and the re-advance we must assume, I think, that it was in some way provided for by the parties, whether by being taken into account in the interest to be paid on the re-advance, or in what way is not material.

Judgment.—VANKOUGHNET, C.—I find great difficulty in distinguishing this case on principle from *Shepherd* v. *Titley*, but I think the conclusion at which my brothers have arrived is in accordance with justice and honesty, and therefore I concur in it. The giving up of the receipts implies an understanding that the plaintiff would not insist upon the payments evidenced by them. This view was not suggested on the original argument before me; still it is carrying the doctrine of estoppel very far. If a man agrees not to set up the Statute of Frauds, that agreement cannot be urged against the statute; every man, when he makes a verbal promise, impliedly undertakes as much. Then this re-loan was more than two years after the payments. How is the interest in the meantime to be dealt with? Is the plaintiff not to be allowed to shew the payment and the time of the re-loan to get rid of the interest in the meantime, and if the evidence is admissible for this purpose, must it not be open to any and every use that can be made of it? I have great doubt, but, as already stated, yield to opinions which seem to me to enforce honesty.

AUSTIN v. STORY.

Mortgagor and Mortgagee—Application of insurance money paid to mortgagee.

Where a mortgage deed contains no provision as to the application or appropriation of insurance money coming to the hands of the mortgagee before the time appointed for payment of the money secured by the mortgage, he is not bound to apply it in reduction of the sum secured, or the interest accruing thereon, until the expiration of the time allowed for payment of the mortgage money. In such a case the mortgagor would be entitled to have the money expended in re-building the premises, and re-placing all parties as near as may be in the situation in which they stood before the fire occurred.

Statement.—The plaintiff in this cause filed a bill, praying, in the alternative, for foreclosure or sale of the mortgaged estate, setting forth that the buildings on the property had been insured for £250, and the policy of insurance had been assigned to the plaintiff; that the buildings having been subsequently destroyed by fire, the amount covered by the policy had been paid over to the plaintiff; that £155 for interest had accrued due, and was still in arrear, and unpaid. A demurrer for want of equity, on the ground that the insurance money should have been applied in payment of the overdue interest, and thus have rendered a suit impossible, had been, after argument before his lordship, the Chancellor, overruled, and thereupon the defendant filed the usual note or memorandum, disputing the claim of the plaintiff.

On proceeding to take account, and draw up the decree under the orders of January, 1863, a question arose as to the time at which the insurance money should be credited to the defendant, the plaintiff insisting that the proper course was to compute interest up to the day appointed for payment, and then give defendant credit for the amount so received. The defendant, on the other hand, contended that the interest accrued due before the insurance money was received should be first paid out of it, and the residue applied in reduction of the principal; or that the whole amount received should in the hands of the mortgagee carry interest at the rate of ten per cent., as reserved by the

mortgages, or if not entitled to this, that six per cent. should be allowed.

The mortgage deeds contained a covenant to keep the buildings insured; in other respects they were in the ordinary form.

There being no direct authority on the point, the registrar directed it to be spoken to before the Chancellor.

Mr. *Roaf*, for the plaintiff, referred to *Davidson's* Precedents, page 784, note *f*, where it is stated, "It is not very usual, and is not very fair towards the mortgagor to stipulate that moneys received under an insurance shall be applied in payment of a debt, as such an application may leave the mortgagor without the means of rebuilding his premises. Insurance moneys ought to be applied in replacing all parties in the situation in which they stood before the fire, and such is the rule in the absence of special stipulation."

Here the plaintiff is satisfied with the security he holds; and the advances having been made at a time when money carried a higher rate of interest than it now does, it may be impossible, or at least difficult, to invest at the rate secured by these mortgages. If the defendant desires to invest the insurance money, it is for him to take the trouble of procuring a suitable investment, and not throw upon the plaintiff the risk as well as trouble of looking out for one.

Mr. *Henry O'Brien* contra. The rule as enunciated by Mr. *Davidson* in the note quoted is avowedly for the benefit of the mortgagor. Here the difficulty is overcome by his seeking to have the money applied in such a way as is stated to be most prejudicial to his interests.

Judgment.—VANKOUGHNET, C.—I agree with Mr. *Roaf*

that under the circumstances of this case the mortgagee is entitled to interest without any abatement in consequence of his holding the insurance money paid over to him in respect of a portion of the mortgaged premises. The insurance money stands, or should stand, in lieu of so much of the security as it covered. It should properly be used to replace the property in the position as nearly as possible in which it was at the time of the fire. The mortgagee is entitled to have his security kept up in value by it as far as it will go; the mortgagor is entitled to have it expended on the property. The mortgagee, unless by express stipulation, cannot, I apprehend, himself lay out the money, at all events, when he is not in possession of the premises: neither, I think, can he invest it in any other way without the assent of the mortgagor. Here the mortgagor consents to the mortgagee taking the insurance money: no arrangement is made in regard to the use and application of it; it remains idle in the hands of the mortgagee, who, if he retains it, will be bound, however, to apply it in reduction of the amount found due him on his mortgage.

LATHAM v. CROSBY.

Conveyance obtained by fraudulent misrepresentation—Duty of intending purchaser as to making representations—Purchase by an agent.

L., as daughter of a U. E. Loyalist, had been granted a lot of land, but left Canada for the United States of America in 1825, where she has resided ever since. Various persons took possession of the land, and improved it so that it was worth £2,500. C. sent his agent to L. in Michigan, to treat for the purchase of her interest in the land. This agent made numerous false representations as to the position and value of the land, and as to the intentions of his principal in regard to the purchase, and thereby induced L. to convey her interest in the land to C. for an inconsiderable sum. On a bill filed to set aside this conveyance, as having been obtained through fraud and misrepresentation, *held*, that the representations made by the agent were material, and to be considered in weighing the *bona fides* of the contract, and under the circumstances was ordered to be cancelled.

Statement.—The original bill in this cause was filed by Mrs. *Mary Latham* against *Hiram Crosby*, and set

forth that the plaintiff was a British subject, the daughter and heiress of one *O'Brien*, a U. E. Loyalist, and as such was entitled to a grant from the Crown, and on the 5th of August, 1811, received a patent for lot No. 7, in the 7th concession of the township of Reach, which patent was issued through the agency of Mrs. *Latham's* former husband *Richard Bristol*, and without her knowledge; that in 1825 the plaintiff, then Mrs. *Bristol*, and her husband left the province, and she has ever since resided in the United States. Mr. *Bristol* soon after died, and his widow married one *Ira Latham*, whom she also survived; that about the year 1823 one *John G. Ensign* entered into possession of the premises, has since sold and conveyed various portions of them, and that by reason of the improvements upon the property made by *Ensign*, and such sub-purchasers, and the general increase in value of real estate, the lot was worth at least £2,500. The defendant, *Hiram Crosby*, in the month of March, 1859, sent his agent, *William Ketchum*, to Mrs. *Latham*, then residing in Fayette county, Michigan, to buy her right to the land, so granted to her. *Ketchum* informed Mrs. *Latham* that she had an old claim to the lot, but that for various reasons this was almost worthless, and that *Crosby* was willing to give £50 for the claim, in order to test the titles to other lands in which he was interested, and which were similarly situated, this being his sole object in the proposed purchase; that the land was a swamp, and worthless except to the owner of adjoining lands, to whom it might be useful for pasture, and the wood that could be got thereon, and that supposing a good title to the lands were obtained it would not be worth £150. The plaintiff, Mrs. *Latham*, being old and infirm, and having no knowledge of the land, except through the statements of *Ketchum*, on which she relied, executed a deed of quit claim of the premises in favour of *Crosby*, and received as the consideration therefor £6 5s. 0d., in cash, and the bond of *Crosby* for £50, payable when

quiet possession should be obtained. Mrs. *Latham* having been led to make enquiries discovered that the representations made by *Ketchum* were false, and that the land was in fact improved and very valuable.

Soon after obtaining the conveyance *Crosby* commenced an action of ejectment against *Ensign*, and the other occupiers of the lot. Mrs. *Latham* being informed of this, and at the solicitation of the several parties concerned, on the 20th of November, 1860, for £250, conveyed all her interest in the land to *Anson S. Button*, as trustee for *Ensign* and the sub-purchasers.

Mr. *Button* was added as a co-plaintiff to the amended bill, and *Ketchum* was made a defendant.

The bill prayed that the conveyance to *Crosby* might be cancelled, and the action of ejectment restrained.

The facts, as established by the evidence in the cause, are sufficiently stated in the judgment.

The cause came on to be heard before his honour Vice-Chancellor *Esten*.

Mr. *A. Crooks*, Q.C., Mr. *Blake*, and Mr. *Ince* for plaintiffs.

Mr. *McMichael* and Mr. *Fitzgerald* for the defendants.

Judgment.—Eston, V.C.—This suit is brought to set aside a sale made by the plaintiff, *Mary Latham*, to the defendant, *Hiram Crosby*, of a piece of land known as lot No. 7, in the seventh concession of the township of Reach. The purchase was made through the agency of the defendant, *William Ketchum*. It is alleged to have been effected by means of fraudulent misrepresentations and concealment, practised by the agent, *Ketchum*, and he is added as a defendant,

although having no interest in the property, in order to make him liable for costs. The plaintiff, *Mary Latham*, was the daughter of one *Osler*, a United Empire Loyalist, and as such was entitled to a grant of land, and this lot was granted to her in that capacity by letters patent a great many years ago. She married one *Bristol*, who became insane, and was removed to an asylum in the United States before the year 1825. The plaintiff, *Mary Latham*, was in this province in that year; but in the same year followed her husband to the United States, where he afterwards died without having recovered his reason, and the plaintiff, *Mary Latham*, never returned to this country after her departure from it in 1825. One *Ensign* entered into possession of the lot in question in the year 1823, and he, and others claiming under him, have been in possession of it ever since. He had cleared more than half of it by the year 1859. He had cultivated it as a farm, and had sold and conveyed portions of it in village lots, and in the year 1859, and at the time of the purchase in question, the purchasers of these lots were living in houses built upon them, as their homes, and they formed part of the village of Epsom. The lot is fairly estimated to have been worth at this time $10,000, that is $50 an acre. The conveyances to the purchasers of village lots had been registered and this was all that appeared on the registry in respect of the lot at the time of the purchase in question. There had been, many years before, a sale of the lot for taxes, and *Ensign* had upon that occasion purchased it, but had never succeeded in perfecting the purchase, or in obtaining a deed from the proper officer, who refused to make it on account of there having been on the lot at the time of the sale sufficient goods and chattels to yield the requisite amount for satisfaction of the taxes in arrear. There was, however, a certificate of the sale lodged in the proper office. This was the state of the lot as to value, title and possession in March, 1859, when the sale in question took place. The defendant, *Crosby*, heard in the end of 1858, that the rightful

owner of the lot could not be discovered. He immediately thought of purchasing it. He made enquiries; he examined the registry; the old county registry in Toronto, and the registry in Whitby, and made notes; he knew when he employed the defendant *Ketchum*, to purchase the lot, that *Ensign* had been in possession of it a long time; that part of it was cleared; that parts of it had been sold and conveyed by *Ensign* to other persons; that their conveyances were registered; that that part of a village stood upon the lot, and that a number of persons were living on it as their homes: he says that "he told *Ketchum* considerable of what he had mentioned about the lot." I think it must be intended that he told *Ketchum* all he knew about the lot, and that *Ketchum* knew as much as he did about it when he started on his mission. *Ketchum* proceeded to Michigan, and having discovered the plaintiff, *Mary Latham*, entered into a negotiation with her for the purchase of the lot and finally purchased it from her for the sum of $225, of which $25 were paid at the time of the purchase, or shortly afterwards, and $200 were secured by a bond, to be paid on *Crosby* obtaining possession of the property, or compromising with the persons in possession of it. There is some mystery about the terms of the purchase. The terms finally adopted were certainly not those originally proposed. Whether the purchase money originally offered was $600 or $300 is uncertain. *Ketchum* says that meeting with continual and unreasonable objections on the part of Mrs. *Weston*, the daughter of the plaintiff, *Mary Latham*, who was acting for her mother in the business, he broke off the negotiation, and threatened to depart, and that he renewed negotiations and concluded the contract on much less favourable terms than he had originally proposed, at her earnest solicitation. Whatever may be the truth of the matter, I am perfectly satisfied that *Ketchum* never had any intention of leaving Jonesville without getting the lot on some terms or other. During the negotiation it was perfectly clear

to *Ketchum* that neither the plaintiff, *Mary Latham*, nor Mrs. *Weston*, nor *Eugene Latham*, a son of *Mary Latham*, who also took part in the negotiations, knew anything about the lot. They applied to him for information about it. He doubtless might have refused to give any, saying that he was buying, and they were selling, and they must satisfy themselves. If he had done this, there would probably have been no contract; they would have put an end to the negotiation, and enquired for themselves. He undertook to answer their questions, and the question is, what information he, so undertaking, became bound to give, and whether he performed the duty that devolved upon him under such circumstances. I think that, undertaking to answer enquiries, and give information to enable the persons with whom he was dealing to contract with him, he became bound to tell them everything that he knew or had heard, and, of course, it was his duty not to misrepresent anything. Did he perform these obligations? I am satisfied that he knew everything that *Crosby* knew. He was his confidential agent; *Crosby* had no concealment from him; it might be important that he should be as fully informed as possible of the facts so far as they were known. *Crosby* had no motive for concealing anything from him; they certainly had conversations about the lot. *Crosby* admits that he told him that *Ensign* was in possession of it, and had sold portions of it, and *Ketchum* certainly knew that the purchasers were residing upon it, and I think he knew, also, that *Ensign* had been in possession for a long time; had cleared a portion of the lot; that part of a village stood upon it, and that the conveyances to the purchasers were registered. Is it credible that *Crosby* concealed from *Ketchum* the result of his searches in the registry? Mrs. *Weston* particularly enquired of *Ketchum* as to the occupation of the lot, and expressed unwillingness to deprive any one of his home. I am afraid she deserves little credit for this feeling. If it existed at all, it soon gave way to the love of gain. But

she put the question, and probably with some degree of sincerity at the time, and I think it became *Ketchum's* duty, if he chose to answer at all, to answer it correctly to the best of his information and belief. The substance of his communication we gather from the evidence of Mrs. *Weston*, *Eugene Latham*, Mr. *Barber*, the lawyer who prepared the instruments, Mr. *Gregory*, his clerk, and his own answer. I would not attach much weight to the evidence of Mrs. *Weston* if it stood alone; but in this respect it is corroborated by the evidence of the other witnesses, and is no doubt true. The evidence, combined with the answer, shews what he did communicate, and also what he did not communicate. I think he expressed to them that the lot was in a back and unsettled part of the country; that it was wild and in a state of nature, unfit for farming purposes; that there were some persons in possession who claimed under a sale for taxes, but that he considered them as squatters. He said that he had never seen the lot, and spoke entirely from information. His account is not perfectly intelligible. A squatter, I presume, is a person who settles on land without any title, or pretence of title to it; but a person who claims under a tax sale has a perfectly good title if the sale was a valid one. I presume, therefore, that *Ketchum* meant that although the persons in possession claimed under a tax title, it was to the best of his belief worthless. His description of the occupation seems to have removed all objection on the score of depriving people of their homes. On this representation Mrs. *Weston*, after much disputation on other points, entered into the contract, and concluded the sale. She must have been satisfied that the occupants were persons whom it would be no injustice to drive from their temporary dwellings. Whatever notion the description of a squatter claiming under a tax title ought to convey to any mind, she evidently considered from his representations that such an occupant was entitled to no consideration or indulgence. Was all this a correct representation

of the matter according to *Ketchum's* information and belief? I think not. What he certainly ought to have stated was, that a person was, and had been for some time in possession of the lot, and that he had dealt with it as the owner, and had sold portions of it, and that several other persons were also in possession. This information would have probably led to enquiry, which might have elicited material information; but, taken by itself, what would his hearers infer from it? certainly that in all probability the lot was to a certain extent cleared and cultivated, and that persons who had purchased and paid for portions of it were living upon it as their home. I think, also, that he knew, and could and ought to have stated that their conveyances were registered; that *Ensign* had been in possession for a long time, and had cleared part of the lot, and that part of a village stood upon it. In either case it was a very different state of things from what *Ketchum* had represented when he described the property as a wild lot, in a state of nature, unfit for farming purposes, with only some squatters on it, who claimed under a sale for taxes. I think this was a positive misrepresentation, and a concealment of the truth, and it is impossible to say that the plaintiff, *Mary Latham*, had she known the truth so far as *Ketchum* could disclose it, would have entered into the contract. It was, therefore, a material misrepresentation and suppression of fact, which vitiates the contract, and imposes upon the court the duty of annulling it, and the deeds founded upon it. I do not attach much weight to the inadequacy of the consideration. I think that some uncertainty may have attached to the title, and I think it is very probable that *Ketchum*, when he said he would not give $5 for the lot himself, alluded to the state of the title. At the same time, I do not think that either he or *Crosby* entertained any serious apprehensions as to the title, and the assertion of *Ketchum* with regard to the $5 was in fact a misrepresentation. It is indisputable that parties acting in good faith, and enquiring for themselves, must protect their own interests, and a

bargain will not be annulled, however advantageous it may prove to one of the parties; but if either party undertake to make a representation which is to influence the other party, he must observe the most perfect good faith in making it, and any departure from this in a material point will render the contract void in the eye of this court. It is also clear that whether a party represents a matter in a way which he knows to be untrue, or represent it in any particular way, without knowing whether it is true or not, the effect is the same. I should observe that *Ketchum* in the early part of his life had resided many years in Markham, which is the adjoining township to Reach, where this lot is situated. It is difficult to suppose that a man of his shrewdness and experience had not formed a tolerably correct idea of the value of this lot. He was as competent to judge of it as *Crosby*, and he certainly had formed some idea of its value, and thought it worth at all events $2,000. *Ketchum's* credit was impeached by evidence, and this evidence was met by counter evidence. I do not think it was of much importance. His evidence is indeed inadmissible. I have however read it. I have also read the affidavits and the letters. Some objection was made to the suit on the ground of the time that had elapsed after the commencement of the suit, and after a demand had been made for security for costs without any proceedings, and after the correspondence that occurred between the parties during the interval, with a view to a compromise, but I see no ground for the objection. The suit appears to have been commenced by Mrs. *Latham* before she had had any negotiations with *Button*. After the commencement of the suit she came to an agreement with *Button*, and made a conveyance to him of all her interest, in trust for himself, and the parties who became interested in the land, and then the suit was prosecuted in their joint names. It is, however, the suit of Mrs. *Latham*, as the right which she had of invoking the aid of this court to annul the sale could not be transferred to another, but must be enforced by

herself. *Button*, however, was joined as a co-plaintiff, in order to obviate any objection founded on the dealing between them. The conduct of Mrs. *Weston* and *T. W. Bristol* in the matter has been very reprehensible. They appear to have played one party against the other, in order to extort from each as much as possible for themselves; but it does not appear how far Mrs. *Latham* was a willing party to these proceedings. She is a very aged woman, and appears to be completely under the government of her children. I think the sale should be set aside with costs, as against both defendants. The money paid must be repaid, but may be set against the costs. The estate must be re-conveyed to Mrs. *Latham*, or as she may direct. No account of rents, I presume, is required.

The defendants being dissatisfied with the decree thus pronounced, petitioned for and obtained the usual order for rehearing before the full court. The same counsel appeared for the parties respectively.

Smith v. *Kay*, (*a*) *Reynell* v. *Sprye*, (*b*) *Nudel* v. *Atherton*, (*c*) *Rawlins* v. *Wickham*, (*d*) *Campbell* v. *Fleming*, (*f*) *Fry* on Spec. Per. 112, were, amongst other authorities, referred to by counsel.

Judgment.—VANKOUGHNET, C.—In this case I am of opinion that the decree must be sustained. I was, at the close of the able argument of Mr. *McMichael* for the defendant, much impressed with the manner in which he had dissected and presented to the court the evidence in relation to the representations of *Ketchum*, the agent of the defendant, in the negotiations with the plaintiff, Mrs. *Latham*. A full consideration since of that evidence has however convinced me that previously to the completion of the bargain for the purchase of the land,

(*a*) 7 H. L. Ca. 750. (*b*) 1 D. M. & G. 691.
(*c*) 7 Jur. N. S. 777.
(*d*) 4 Jur. N. S. 990, S. C., on Appeal, 5 Jur. N. S. 278.
(*e*) 1 Ad. & Ell. 40.

Ketchum misrepresented to the plaintiff both its condition and its character. That he knew the truth as to these, I cannot doubt, after the statements obtained from the defendant himself on his examination. *Crosby* swears that he and *Ketchum* had talked about the purchase of the land and discussed the price to be offered for it previously to the offer made by the latter to the plaintiff, and that he told *Ketchum* most of all that he knew about it (the land.) That he *Crosby* at the time knew all about it, its occupation, character, and the nature of the title asserted by those in possession of it, was, I think, established by his own examination. That the plaintiff was ignorant that she had any title or claim to this land, and was also ignorant even of its existence and of its character and situation, when *Ketchum*, as agent for *Crosby*, approached her with an offer of purchase, is also sufficiently clear from the evidence. That she relied wholly on *Ketchum's* statements in regard to them, also, I think, appears. *Ketchum* was under no necessity to give any information. He might have remained silent, and said if the plaintiff would sell on the chance or in ignorance he would purchase. But he does not do this. He withheld for a time information as to the locality of the lot. In answer to a remark of *Eugene Latham*, proposing to visit Canada and enquire about it, he tells him that he could not find the land, and that it would hardly pay him to visit it; that it was not worth while to bother about it; that it was in a state of nature, and hardly fit for farming purposes except a small portion of it; and he dissuades him from doing so. He speaks of the land as of little or no value, when *Crosby* himself admits that he considered it at the time worth from $2,000 to $3,000. It was argued that this representation related only to the value of the claim or title which might never be established; but it is clear from the evidence that this is not so, for *Ketchum* stated that *Crosby's* object in making this purchase was to use the title acquired thereby as a test title, by which I assume he meant that by means of

it he might ascertain whether other lands similarly circumstanced as to title could be secured; that for this purpose *Crosby* was willing to give $300 for the land; the land itself was of no value, not that the title was of no value, because we cannot suppose that he travelled from Canada into the state of Michigan to hunt up the owner of a title which was of no value and offer for it, as a test title, $300. *Ketchum* also misrepresented the nature of the occupation of the land. I have no doubt that he had learned from *Crosby* the truth as to this, but whether he had or not he chose to make statements in regard to it which were untrue, and his principal must suffer the consequences. *Ketchum* was several days employed in negotiating for the land, and appears to have skilfully used all the arts which those seeking to obtain a good bargain are in the habit of employing; and he succeeded at the time, though he had to deal with a shrewd, clever woman, Mrs. *Weston*, the plaintiff's daughter, with whom, acting for her mother, the negotiations were carried on. Mr. *Fitzgerald* urged very forcibly that the agreement of compromise made at the house of the plaintiff between her and the defendant in the early part of 1858, and before the agreement subsequently come to in the office of Messrs. *Cameron* and *McMichael*, in Toronto, although not reduced to writing, should be a bar to any relief, as though it was not in writing, *Crosby* was ready and willing and offered to carry it out, and the plaintiff therefore, having no difficulty in procuring its execution by *Crosby*, should be bound by it, and be taken to have abandoned her right to impeach the original transaction of purchase. I should have been much inclined, speaking for myself, to go with the defendant's counsel in this view, had I found that any such agreement had been proved. The evidence in regard to it is that of Mrs. *Weston*, and of her brother *Willard Bristol*. She swears that the proposed arrangement was made by the defendant and her brother *Willard* at her mother's house; that she herself took

little part in it, and was in and out of the room while the discussion was going on. The brother swears that there was no final arrangement there: that the negotiations then opened were continued and concluded at Toronto, but that Mrs. *Latham* did not assent to them. Although it is probable that the mother placed herself entirely in the hands of these two of her children in all the negotiations and transactions which took place in regard to this land, and that they acted with her full assent, if not knowledge, throughout, still the evidence is not sufficient to bind her by any act of either of them after the sale. She may or may not have known and approved of the letters written by Mrs. *Weston*, and put in evidence. I hope she did not approve of all that was written and done, for no language can be too strong to condemn the trickery and double dealing of both brother and sister throughout.

The other members of the court concurring, the petition of re-hearing was dismissed with costs.

McCULLOCH v. McCULLOCH.

Alimony—How far the English rule as to allowing one-third of income is applicable to this country.

The defendant was the owner of real estate of the annual value of about £112 16*s*., but subject to a debt of £100. He had also household furniture and farm stock, and he worked his farm: the plaintiff, with her eight children, lived apart from the defendant, on account of his cruelty, and with no means of support, save such as might be obtained by way of alimony. On a reference to the master to fix permanent alimony, he allowed £37 10*s*. per annum On appeal this sum was increased to $80 per annum.

Statement.—The bill in this cause was filed by his wife against the defendant, who was a farmer, owning a farm of 150 acres, subject to a mortgage of about £100; also a village lot, renting for £4 10*s*. per annum, and farm stock worth more than £110. Interim alimony had been allowed at the rate of £37 10*s*. per annum.

On a reference to the master at Whitby directed by

the decree, he had fixed the same amount as permanent alimony. This would be about one-third of the annual value of the defendant's estate, making no allowance for the value of his labour.

On appeal, it was shewn that defendant's eight children with the plaintiff, their mother, were forced by the defendant's conduct to live apart from him : that the eldest child was a girl of sixteen, the youngest an infant in arms; all of the eight are with their mother, dependent entirely upon the sum to be received as alimony for their maintenance, and that the sum allowed was insufficient for the support of the plaintiff alone.

It was argued that the rule usually followed in England of assigning one-third of the annual income to the wife is not invariably to be followed: though often a proper sum in England, where the husband's income is large, is not applicable to cases like the present, where the estate is small, and the personal industry of the husband is necessary for the family's support.

Mr. *A. Crooks*, Q.C., for the plaintiff, who appeals.

Mr. *Downey* for the defendant.

The additional facts of the case, and the authorities cited by counsel, appear sufficiently in the judgment of

SPRAGGE, V.C.—The bill, which is for alimony, is taken *pro confesso*, and a decree for alimony, by reason of the cruelty of the husband, was pronounced on the 9th of February last. It appears that the wife, with her eight children, the eldest a girl of sixteen, the youngest a child a little more than a year old, left her husband's house on the 3rd of November last, and that they have since lived with her father, except that recently the eldest girl has left. The health of the wife is, as appears by the evidence of her father, so bad

as to render her helpless, and to require medical attendance. Of the children, two only are boys, one eight, the other six years old.

The defendant is a farmer, the proprietor of 150 acres of land in the township of Scarboro,' of which about 110 are cleared, and under cultivation, the whole farmed by himself. He has also horses and farming stock, and implements. He has also a cottage, and small lot, worth, as he says, about $200, and which is worth, to rent, some $18 a year. He appears to be in debt to the extent of about $400, or perhaps a little more. The annual value of his property appears to be somewhere about $450; the interest upon its value exceeds that amount. The master has allowed for alimony $150 a year. This is complained of as too small, and I agree that it is so. It is suggested that the master has proceeded upon the principle of allowing for alimony a per centage upon the annual value of the husband's estate; it is said one-fifth, and it is conceded that what is allowed is about one-third. To proceed upon such a principle is, in my judgment, erroneous, and particularly so when the wife and family are in fact supported by the labour and skill of the husband; if any proportion were taken as the scale of allowance, the annual value of that labour and skill should be added to the annual value of the husband's property; in many cases it is the principal source of the income, and in many more it is the whole.

Regard must be had, as the decree expresses it, to the station in life, and position of the parties, and also to the nature of the property of which the husband is possessed. A per centage upon the annual value of the husband's property will very rarely, in this country, form a just measure for the allowance of alimony; it has been discarded in numerous cases, among them is the case of *Severn* v. *Severn*, (*a*) and is not followed in

(*a*) Ante vol. vii., p. 199.

England, where the adoption of it would not do justice to the wife, or the wife and children. Two instances of this are the cases of *Whildon* v. *Whildon*, (*a*) and *Wilcocks* v. *Wilcocks*. (*b*) The court now proceeds upon the sounder principle of looking to what is just and reasonable under all the circumstances. The language of the decree furnishes a proper and safe guide for the discretion of the master.

The adoption of the rule I have observed upon operates with peculiar hardship in this case. The wife is forced, by the cruelty of her husband, to leave his house, and to seek shelter in that of her father, where, with seven children—herself sick and helpless—he is now living. For the support of herself and children the scant sum of $150 a year is allowed, while to the husband, not burthened with the support of any children, double that sum is left besides the house which, but for his misconduct, would have continued a shelter for all, and besides, the value of his own skill and labour, as a farmer, to the benefit of which all are entitled.

It is a most unequal division, and, I apprehend, could only have been made by the master, under the idea that he was bound to fix the amount of alimony by a scale measured by the annual value of the husband's property. I think the sum proposed to be allowed is very reasonable. The plaintiff's father says he thinks it would take £75 or £80 a year to maintain herself and her family. I think the larger sum would be a moderate amount. It was suggested that I should fix the amount to be paid, instead of referring it back to the master. I therefore fix it at £80 a year, to be paid from this date, and at the times mentioned in the master's report. Liberty will be reserved, as was done in *Severn* v. *Severn*, to both parties to apply to the court, as they may be advised, should the circumstances of the case alter, and the defendant must, in that case, pay the costs of the application.

(*a*) 5 L. T. N. S. 138. (*b*) 30 L. J. Prob. 205.

What I see in this case leads me to remark that in cases of this nature the court looks to the possibility of the parties living again together. The husband, as I see by his affidavit, expresses an anxious wish that this should be the case. His cruel conduct is attributed to imtemperance: he is described by two of his neighbours as kind, affectionate, and inoffensive in his disposition. A thorough reformation in his habits may lead to that reunion with his family which he professes so earnestly to desire.

McCALL v. FAITHORNE.

Specific performance—Compensation for deficieney in quantity of land sold.

A parcel of land having been surveyed and laid off into building lots, the same was afterwards offered for sale by public auction, when *M.* became the purchaser of two of such lots at an aggregate sum of £70. The plan, by which the property was sold, contained a memorandum on the margin that the same was drawn upon a scale of four chains to the inch; in reality the plan had been made upon a scale of three chains to the inch, which however, was not discovered until after the conveyance had been executed, and the purchase money paid. Thereupon the purchaser *M.* filed a bill praying repayment of a proportionate amount of the purchase money; or a conveyance of a sufficient quantity of the adjoining land to make up the deficiency. The court, under the circumstances, considered that the plaintiff was not entitled to the relief asked, and dismissed his bill with costs; but

Semble, that if the conveyance had not been made, or the purchase money not fully paid, he would have been entitled to be relieved in this court.

Statement.—The bill in this case was filed by *David McCall* against *Robert F. Faithorne*, stating that in 1855 a parcel of land in the town of Sarnia, known as the *Maxwell* estate, and belonging to the defendant's wife, was surveyed and laid out in village lots by the defendant, and a plan of the property purporting to represent the premises in the proportion of four chains to an inch was made and duly registered in the proper office. That the plaintiff and others attended an auction sale of the property, and bid for various lots as laid down on the plan. The plaintiff became the purchaser of two of the lots for the aggregate sum of £70. The sum had been since paid by the plaintiff, and a conveyance made

to him; that upon measurement the plaintiff discovered that the plan was inaccurate, having been drawn on a scale of three instead of four chains to an inch, and the lots purchased therefore contained one-fourth less land than plaintiff was entitled to, but this had not been discovered until after the conveyance to the plaintiff had been executed and money paid as stated. The bill further alleged a demand made by the plaintiff to the defendant for re-payment of one-fourth of the purchase money and his refusal to pay the same, and prayed that the defendant might be ordered to pay such sum, being £23 6s. 8d., or make good the deficiency in the quantity of land by conveying a sufficient portion of the land adjoining.

The answer set up that the plaintiff had already sued the defendant in the County Court for damages caused by the alleged deficiency, in which suit a verdict had been given and judgment entered in favour of the defendant: that the words "scale four chains to the inch" were inserted by accident in the margin of the plan exhibited at the sale, but that the plaintiff was not thereby misled as he otherwise knew the quantity of land contained in each lot. The defendant denied that there was any ground for equitable relief on the case stated by the bill, and alleged that it was at any rate within the jurisdiction of the County Court.

Mr. *Fitzgerald* for the plaintiff.

Mr. *Crickmore* for the defendant.

The authorities cited are referred to in the judgment of

SPRAGGE, V. C.—This bill is filed by a purchaser of real estate, who has paid his purchase money and received his conveyance, with usual covenants for title. The bill is for compensation, on the ground of alleged deficiency in the quantity of land contracted to be sold;

the sum claimed is £23 6s. 8d; and the bill prays that the defendant, the vendor, may be ordered to pay that sum, or, in the alternative, to convey more land to make up the deficiency.

The sale was by auction, and was of town lots according to a plan, noted upon the face of it to be upon a scale of four chains to an inch: in fact the lots were laid out and staked on the scale of three chains to an inch. The plaintiff was the purchaser of one lot on one street and another lot on another street for the aggregate price of £70. It is not shewn that the defendant could make the lots of the size described in the plan—that he has now the adjoining land to do so: it is not alleged that he has, or that the contract was for anything but these particular lots. A money compensation, of which the amount claimed is the maximum, is all that can be had upon this bill.

I think the plaintiff cannot maintain a bill in equity for this purpose. The map which was distributed among the bidders at the sale is treated properly enough, I think, as a representation; and if the contract had not been executed—if the conveyance had not been made, or the purchase money not fully paid, I apprehend the plaintiff would be entitled to relief in this court. But here the contract is fully executed, and the plaintiff's remedy is, I think, at law. In *Newham* v. *May*, (*a*) Chief Baron *Alexander*, while deciding against the plaintiff upon the evidence, expressed a strong opinion upon clear and intelligible grounds, I think, against such a bill. The bill in that case was for compensation on the ground of untrue representation as to the annual rental of the estate sold. In that case, as in this, the bargain had been executed, and the purchase money paid; fraud was charged in respect of the representations made, as it is by this bill. The Chief Baron said, "The cases of compensation in equity have grown out

(*a*) 13 Price, 749.

of the jurisdiction of courts of equity, as exercised in respect of contracts for the purchase of real property, when it is often ancillary, as incidentally necessary to effectuate decrees of specific performance. This, however, appears to me to be no more than a common case of fraud by means of misrepresentation, raising a dry question of damages, in effect a mere money demand." I would refer also to the observations of Lord *Eldon*, in *Todd* v. *Gee*, (*a*) and of Lord *Cottenham* in *Sainsbury* v. *Jones* (*b*). Lord St. *Leonards* treats the law as settled that such a bill as this cannot be sustained; thus, "where the contract has been executed, a bill cannot be filed by the purchaser simply for compensation;" (*c*) and he gives *Newham* v. *May* as an example, and refers also to *Leuty* v. *Hillas*, (*d*) before Lord *Cranworth*.

It is now settled that compensation cannot be prayed, as an alternative relief, in a bill for specific performance. I cannot see any sound distinction between such a prayer, and a naked prayer for compensation after specific performance, on the ground of misrepresentation. It is put for the plaintiff that the whole contract has not been performed, inasmuch as a less quantity of land was conveyed than was contracted for. I do not agree in this: the subject matter of the contract was certain specific lots, and those lots have been conveyed: their *contents* was only matter of representation.

Upon these grounds I am of opinion that the plaintiff's bill ought to be dismissed. But apart from the question of jurisdiction, I doubt if upon the whole evidence the case made by the bill is sustained. Of one thing I am satisfied, and I think that I ought in justice to the defendant to say so, that the fraud charged against him by the bill is disproved. The bill must be dismissed with costs.

(*a*) 17 Ves. 273.
(*b*) 5 M. & C. 1.
(*c*) V. & P. 235 (14 Ed.)
(*d*) 2 D. G. & J. 110.

LAWSON v. MOFFATT.

Assignment for benefit of creditors—Priority of Claims—Accommodation debtor.

E. L. being embarrassed in business in June, 1857, made an assignment of his goods, lands, &c., to trustees, giving preference to certain creditors. Afterwards E. L., wishing to resume business, proposed that the goods and personal estate should be re-conveyed to him, and time given under certain conditions for payment of the debts, the lands being conveyed to two creditors in trust for all. This was agreed to by the trustees and most of the creditors, and re-conveyances were executed. The plaintiffs were endorsers on paper of E. L., held by M., a creditor, preferred in the first assignment. M. refused to execute the re-conveyances unless plaintiffs renewed their liability to him on the paper then overdue, which they did, and M. then signed the re-conveyances. Plaintiffs had afterwards to pay the notes held by M., whereupon they filed their bill, claiming to stand in the place of M., as preferred creditors under the original assignment.

Held, that under the circumstances they could not claim such priority, or the priority provided for them by the first assignment, but must rank *pari passu* with the other creditors.

Statement.—The bill in this cause was filed by *John* and *Joseph Lawson*, against *Lewis Moffatt*, *Alexander Murray*, and *Edward Lawson*, setting forth that on the 24th of June, 1857, the defendant, *Edward Lawson*, was indebted to *William McMaster* in the several sums of £225 0s. 8d, and £228 4s. 10d., secured by promissory notes, endorsed by the plaintiffs for the accommodation of *Edward Lawson*. That *Edward Lawson*, having become embarrassed in business, did, by indenture between said *Edward Lawson*, of the first part, *John Gardhouse*, of the second part, and the several creditors of said *Edward Lawson*, of the third part, convey all his personal estate to said *Gardhouse*, in trust. First, to collect and get in all the personal property, and convert it into money. Second, to receive the rent of the real estate, and to sell so much of it as might be necessary. Third, to pay all costs and charges incidental to the trust, and the winding up of the estate, and the wages then due to clerks, &c. Then follow trusts as to payment of several preferred creditors; then "*to pay to Messrs. John and Joseph Lawson*" (*the plaintiffs*) *the amount for which they have become liable for the said Edward Lawson, on endorsements to William*

McMaster, of the city of Toronto, Esquire, say about £456; and in the next place to pay to all the creditors of the said *Edward Lawson*, who shall execute these presents within three months from this date, the amounts which may be due to them respectively." These two promissory notes fell due respectively on the 27th of June, and the 27th of September, 1857.

In December, 1857, it was agreed between the parties to the assignment that the trustee should convey all the said real estate to the defendants *Lewis Moffatt* and *Alexander Murray*, as security for the payment to the several creditors who should execute such conveyance of the amounts due them; and such conveyance was executed accordingly by the defendants, and by *Gardhouse*, and several creditors, including Mr. *McMaster*. Messrs. *Moffatt* and *Murray* acted under this assignment, and collected a considerable sum for the benefit of the creditors. The remaining personal estate was also then given up to *Edward Lawson* in order that he might re-commence business. The defendants set up that Mr. *McMaster* refused to execute the last mentioned conveyances till the plaintiffs removed the notes held by him, then overdue, which they did, and that the plaintiffs, as well as *McMaster*, then abandoned the preferred position assigned *McMaster*, under the first assignment, and could only claim the position given by the second.

The plaintiffs had to pay the sums due on the two notes to *McMaster*, and claimed to rank on the estate in the same position as Mr. *McMaster* held under the first assignment.

The facts of the case are more fully set forth in the judgment.

The cause was heard first before his honour Vice-Chancellor *Esten*.

Mr. *McMichael* and Mr. *Fitzgerald* for plaintiffs.

Mr. *A. Crooks*, Q. C., for defendants.

The cause was then ordered to stand over, in order that certain creditors might be added to represent the creditors generally.

The bill having been amended by adding *John Gardhouse*, the younger, *Conyngham C. Taylor*, *James Stevenson*, and *William T. Mason*, as defendants, was again brought to a hearing when the following judgment was delivered by

ESTEN, V. C.—The facts of this case are that, *Edward Lawson*, one of the defendants, in June, 1857, made an assignment of his property, real and personal, to one *Gardhouse*, upon the usual trusts, for the payment of his debts, and the payment of the surplus to himself. One of his creditors was *McMaster*, who held his notes endorsed by the plaintiff for £453. Three or four of the creditors were preferred by the assignment, in the payment of their debts, and amongst them were the plaintiffs, who are brothers of *Edward Lawson*, and co-partners in trade, in respect of their endorsation on the notes held by *McMaster*. The plaintiffs were informed of the preference given to them by the assignment, and assented to it, as did most of the other creditors although only four or five, not including the plaintiffs, executed it. The assignment did not give satisfaction to the creditors, and another and different arrangement was planned, which consisted in the personal property comprised in the assignment being surrendered to *Edward Lawson*, for his own use, and in the conveyance of the lands to the defendants *Moffat* and *Murray*, subject to redemption on *Edward Lawson* paying the creditors the amount of their several debts, in three years, by six half-yearly instalments, to be secured by as many promissory notes. All the creditors

acceded to and executed this deed, excepting *McMaster* and two small creditors. It was greatly desired, however, by *Edward Lawson* to procure the concurrence of *McMaster*, and application was made to him for that purpose, but he refused compliance, unless the plaintiffs would endorse the new notes to be given to him in the same way as they had endorsed the notes which he held. The plaintiffs were requested to endorse the notes, but they refused, lest it should prejudice their position under the first assignment. Repeated applications were made to them for that purpose, but they steadily refused, for the same reason. At length it was suggested by *Edwurd Lawson* that Mr. *McMichael's* opinion should be taken on the subject, and he and his brother, *Thomas Lawson*, accordingly applied to that gentleman for that purpose. He give it as his opinion that the plaintiffs, by endorsing the new notes, would not prejudice their rights under the first assignment. This opinion being reported to the plaintiffs, they yielded, and endorsed the notes intended for *McMaster*, whereupon he became a party to the second arrangement. Every obstacle being now, as was considered, removed, the arrangement was carried into effect. The personal property that remained was delivered to *Edward Lawson* and thenceforth used by him in his business as his own, and the lands were conveyed to Messrs. *Moffatt* and *Murray*, subject to redemption on payment of the debts at the times appointed. The object of this arrangement undoubtedly was to allow *Edward Lawson* further time to pay his debts, and afford him an opportunity of retrieving his affairs: since it restored to him his personal property, and gave him a chance to redeem his real estate, of which he remained in possession in the meantime, so that he was enabled to continue his business as before, without much or any apparent alteration. The plaintiffs undoubtedly knew that their endorsation was required by *McMaster* before he would accede to the second arrangement, and they gave it in order to induce him to become a party to it. They knew the

general tenor and effect of this arrangement; that the personal property was going to their brother; the real property to the creditors. They knew, also, that their brother received the personal property, and continued to conduct his former business. Satisfied, however, with having reserved their rights under the first assignment, they did not interfere with the course that matters followed, but permitted them to proceed according to the will of the other parties concerned, until the notes held by Mr. *McMaster*, and endorsed by them, matured, when, after some delay, and the renewal of some or all of the notes from time to time, they finally retired them all, and then proceeded to assert their rights under the original assignment of June, 1857. Meanwhile *Edward Lawson* having attempted to rally from his difficulties, had failed, and the personal effects which had been surrendered to him in pursuance of the second arrangement had become dissipated. He had also, in the interval, made a further arrangement with his creditors, whereby he surrendered to them his equity of redemption in the lands, and they discharged him from their debts. A sale had also been effected of the lands, or part of them, to *John Gardhouse*, junior. These transactions had been conducted under the advice of the same gentlemen who act as solicitors for the plaintiffs in this suit. It does not appear that the plaintiffs knew anything of them until some time after they occurred. Having paid the notes upon which they were endorsers, the plaintiffs claim the priority provided for them by the deed of June, 1857. This claim is resisted by the trustees and creditors claiming under the deed of December, 1857.

It is quite clear that the plaintiffs became entitled to the benefit provided for them by the deed of June, 1857. Their assent to this deed is clearly proved by the evidence of *Edward Lawson*. To deprive them of the benefit it provided for them, it must be shewn either that they agreed to abandon this deed, or that they

impliedly confirmed the deed of December, or that they acted in some way which would make it unjust to enforce the provisions of the deed of June in their favour. That they expressly adopted or confirmed the deed of December cannot for a moment be maintained, nor is it indeed pretended. It is said, however, that they ought to have objected to it, and that not having done so they must be deemed to have acquiesced in it. But surely it cannot be contended that the plaintiffs, by simply remaining quiet, and not objecting to the deed of December, adopted and confirmed it. If the plaintiffs, upon hearing of the execution of the deed of December, had simply remained silent, it could not have been contended that their rights under the deed of June had been affected. Any objection, therefore, to their enforcing these rights must be founded on their conduct in reference to their endorsation of the new notes given to *McMaster*. I consider them as stipulating when they affixed their names to these notes that it should not prejudice or affect their position under the first assignment; that their rights under that assignment should remain wholly unaffected by it. This is the sole act of theirs which can be urged as amounting to a renunciation of their rights under the original assignment; but how can it be regarded in that light when it was accompanied by an express reservation of those rights? The creditors and trustees must adopt the whole act, and cannot insist upon any part of it only to the exclusion of the rest. Suppose the plaintiffs had been wholly unaware of the execution of the second assignment, of course it must have been conceded that their rights under the first deed were wholly unaffected. They give their endorsation to the new notes to be delivered to *McMaster*, but stipulate *uno flatu* that it shall not prejudice their rights under the original assignment; must not the effect be the same? If it is not the same it must be because the act which they did was of such a nature as necessarily to prejudice their existing rights against their will, and contrary to their expressed

intention. It is said that they must have known that so soon as they gave their endorsation the deed would be carried into effect, and the personal property delivered to *Edward Lawson*. At the time they learned the execution of the new assignment, and were requested to give their endorsation, this assignment had been executed by all the creditors but themselves, *McMaster*, and two small creditors. The real property was already conveyed to *Moffatt & Murray*, the personal property already vested in *Edward Lawson*. *McMaster* and the plaintiffs, however, had a right to insist that the prior deed was still in force as to them, but *McMaster* being willing to give his adhesion to the new deed, upon having the endorsation of the plaintiffs, they gave it with that view, retaining their own rights under the prior deed. If they had not expressly reserved those rights, it might be deemed that they had renounced them in furtherance of the new arrangement, but such an inference cannot be drawn from what they actually did. The only difference was, that whereas before *McMaster*, as well as themselves, could insist upon the prior deed, that right was now confined to themselves, which, however, amounted to the same thing, for they and *McMaster* were identified. The other creditors had executed the deed, not knowing whether *McMaster* and the plaintiffs would execute it or not. They would have been bound by their execution had neither of them executed it, and must be equally bound if one of them executed it, and not the other. The other creditors could not be deceived or misled, for they had already fixed themselves when the transaction in question occurred. If they desired to prevent the surrender of the personal estate until the assent of all parties interested had been obtained, they should have enquired whether or not it had been obtained. If *Gardhouse* would not deliver the personal effects without the consent of *McMaster* and the plaintiffs, before *McMaster's* execution of the deed, he would equally withhold such delivery after *McMaster's* execution, until

the plaintiffs' assent should also be obtained. After *McMaster's* execution of the deed, the plaintiffs retained the right to enforce the prior deed, so far as they were concerned. It may be conceded that when the personal property was surrendered to *Edward Lawson*, this court might by a proceeding *quia timet* have interfered for its preservation. But the other creditors could not require this interference at their hands for their benefit. It was a matter which concerned only themselves. The whole estate was liable to them, and if the real estate was sufficient for their indemnification, they were not obliged to interfere for the benefit of the other creditors, in order to preserve the personal property. The other creditors could have thrown them on the personal property had it pleased them to do so. Not bestirring themselves to guard their own rights, they cannot complain that the plaintiffs did not interfere in their favour.

Upon the whole, I think the plaintiffs are in the same position as if they had been absent from the country when the whole business relative to the new arrangement was transacted, and had returned, and finding matters in their present state, had determined to assert their rights. Under such circumstances the existence of those rights could not be denied. But although the plaintiffs knew of this transaction while it was proceeding, and in a measure took part in it, yet they guarded their existing rights expressly, and have, I think, been guilty of no omission or neglect which should deprive them of them. I adhere to the views expressed upon the former argument on all points except the supposed acquiescence of the plaintiffs. I thought upon that occasion that the plaintiffs, not interposing until the personal property had been dissipated, had precluded themselves from seeking satisfaction out of the real estate. This point was thought not to have been effectually raised on the pleadings as they then stood, and the plaintiffs were directed to add some of the other creditors as parties;

very much in order to enable them to supply the defect. But it does not appear to me to be raised any more pointedly than it was. However, I think upon more mature reflection that it cannot be maintained, and that the plaintiffs are entitled to the preference which they claim in regard to the difference between the dividend to which *McMaster* would have been entitled under the second assignment had the plaintiffs not retired the notes, and the whole amount of his demand, which difference forms the whole matter in dispute. I do not think it can be contended that the demand secured by the first deed has become extinct, and a new debt constituted by the substitution of the new notes for the old ones. I think the plaintiffs are entitled to their costs.

The defendants, feeling aggrieved by the decree drawn up under this judgment, set the cause down to be re-heard before the full court, when the same counsel appeared for the parties.

Browne v. *Cross*, (*c*) *Stone* v. *Godfrey*, (*b*) *Graham* v. *Birkenhead, &c., Railway*, (*c*) *Loder* v. *Clarke*, (*d*) *The Life Association, &c.*, v. *Siddall*, (*e*) *Farrant* v. *Blanchford*, (*f*) *Lewin on Trusts*, 775, were referred to by counsel.

Judgment.—VANKOUGHNET, C.—I think the plaintiffs have by their own act disentitled themselves to the relief which they claim in this case. The facts upon which my judgment rests are few and simple. One *Edward Lawson*, being embarrassed in business, made an assignment to trustees for the benefit of creditors, and in so doing gave preference to certain claims against him, and to a liability which the plaintiffs had incurred for him as endorsers upon his paper, held by a creditor, *McMaster*. Subsequently *Edward Lawson*, desir-

(*a*) 14 Beav. 105.
(*b*) 5 M. D. & G. 76.
(*c*) 2 McN. & G. 146.
(*d*) 2 McN. & G. 382.
(*e*) 7 Jur. N. S. 785.
(*f*) 9 Jur. N. S. 424, S. C., 32 L. J. Ch. 237.

ing to resume business in the hope that on getting time from his creditors he might pay off all his indebtedness, proposed to them to give him three years for this purpose, and to restore to him his property conveyed by the deed of assignment. This property consisted of a stock in trade of merchandise and of real estate. The creditors generally and the trustees under the assignment, agreed to this proposition, and the latter executed a deed, to be signed also by the creditors, transferring back absolutely to *Edward Lawson*, the personal property and reconveying to him the realty subject only to the payment of his debts. *McMaster*, who was a creditor of *Edward Lawson* for upwards of £400, refused to sign the deed for carrying out this arrangement, unless the plaintiffs would renew their liability on *Edward Lawson's* paper, which he then held overdue, by endorsing fresh notes payable at the times proposed by *Edward Lawson* under the new arrangement referred to. The plaintiffs at this time were liable to be sued by *McMaster* upon the overdue paper; *Edward Lawson* applied to them to endorse the new notes which he was to give to *McMaster*. He was to give notes also to the other creditors payable at the same time. The plaintiffs at first refused, and for some time hesitated to comply with this request, and as they say, took legal advice, and were by it informed that by such endorsation they would not forfeit the rights secured to them by and under the deed of assignment. Being applied to several times, and being urged to endorse the notes to *McMaster* in order that his assent as a creditor might be obtained to the new arrangement, they ultimately did so, and then changed this liability from a present immediate one to one three years distant. It is abundantly clear on the evidence, and particularly on that of *Joseph Lawson*, one of the plaintiffs, that it was considered of the utmost importance, if not necessity, to get *McMaster's* assent to the new or second arrangement in order that it might be effectually carried through. It is certainly not stated by any witness in distinct terms that this arrangement would not have

been completed by the other creditors had not *McMaster* assented; but this at least appears that it was considered a very great object to procure his assent, and without it it was uncertain whether the proposed new arrangement would be effected; that the plaintiffs were aware of this, and for this reason, known to them, were importuned to endorse, and did endorse, the fresh notes to *McMaster* in order to induce and procure him to sanction this arrangement, and to sign the deed confirming it, that thereby the objects of their brother *Edward Lawson*, of which they had full knowledge, might, if possible, be accomplished. Of this object, and of the mode of accomplishing it, by restoring to him, *Edward Lawson*, the very property on which they, the plaintiffs had, under the deed of assignment, security, the plaintiffs, at the time they endorsed these new notes, were fully aware. They endorsed them for the very purpose of enabling *Edward Lawson* to get back this property from his trustees by procuring *McMaster* his creditor, to whom they were collaterally liable to sanction it; his objection, till removed by this endorsation, being the only obstacle in the way. And yet, after having brought this about, after having, in fact, done the only act necessary to effect it, they come into court, and say that this property thus given up to *Edward Lawson* is subject to the trust in their favor, under the first deed. I think they have no such right; they aided in procuring the restoration to *Edward Lawson* of the property which they now claim a right to, and to have been held in trust for them. They did not act in ignorance but in full knowledge of the facts, and their subsequent conduct shows that they were not surprised, but were really assenting, certainly not objecting, parties to the use and disposal by *Edward* of this very property. With their knowledge, almost immediately after these endorsations, he was in possession of it, dealing with it; and this continued without remonstrance or claim on their part until after the lapse of three years, when they had to pay the paper in full, and it then occurred

to them to file this bill. They consented to the compromise or arrangement of this debt, made by *McMaster*, when was obtained his signature to the deed, consequent upon the endorsation of the paper; and, in my opinion, they have as against the trustees, or the estate, only the same rights as *McMaster* himself has, or could have claimed as a creditor. It makes not the slightest difference in my mind that they intended to preserve or claim their position under the deed securing them. Parties cannot prosecute intentions or expectations inconsistent with their acts.

Judgment.—ESTEN, V. C., stated that although he was not prepared to retract the judgment delivered by him on the original hearing, he felt himself compelled to admit that the subsequent discussion of the case, and the clear opinion expressed by his lordship the Chancellor, and which was concurred in by his honor Vice-Chancellor Spragge, had tended to create much doubt in his own mind as to the correctness of the views then expressed by himself. He therefore desired to be understood as giving no judgment on this re-hearing.

SPRAGGE, V. C., concurred in the judgment delivered by the Chancellor.

Per Curiam.—Decree reversed, and bill filed in court below dismissed with costs.

Subsequently, on speaking to the minutes, counsel suggested, that as the bill was for an administration of the trust estate, as well as a declaration that plaintiffs were entitled to rank as privileged creditors, and it was desirable that the estate should be so administered, the decree might be allowed to stand for that purpose.

Ordered accordingly.

HYMAN v. ROOTS.

Mortgage tacking.

R. mortgaged lot 16 to E. to secure £2047. R. afterwards mortgaged lot 17 to C. to secure £100. R.'s equity of redemption in lot 17 was attached by *fi. fa.* lands in 1851, but before sale of it E. purchased and received an assigment of C.'s mortgage; after this the sheriff sold R.'s equity of redemption in lot 17 to L. On a bill filed by the representatives of E. to foreclose both mortgages, *held*, that they were entitled to tack and be redeemed, if at all, as to both mortgages.

Statement.—The bill in this cause was filed by *Ellis W. Hyman* and *Elijah Leonard* against *Henry Roots*, setting forth that by an indenture of mortgage dated the 19th of June, 1854, made between the defendant, of the first part, one *E. P. Ellis*, now deceased, of the second part, and *Sarah*, wife of the defendant, for the purpose of barring her dower, of the third part, the said *E. P. Ellis* became mortgagee of park lot No. 16, on the north side of York Street, in the city of London, which mortgage was registered on the 29th day of August, 1854, and was made to secure payment of £2047 10s., and interest, of which a large sum was overdue.

The said *E. P. Ellis* departed this life in the month of January, 1860, having first made his last will and testament, whereby he gave and devised the said premises, and all his interest in the mortgage, to the plaintiffs, who are the executors of the will.

That by another indenture of mortgage, dated the 27th of April, 1855, made between the defendant, of the first part, *Sarah*, his wife, to bar her dower, of the second part, and one *Thomas Carling*, of the third part, and under an assignment thereof from said *Carling*, the plaintiffs are mortgagees of certain other freehold premises, being the northern portion of lot No. 17, on the north side of York Street, west, in the said city of London, for securing the sum of £100, and interest, of which about £30 is still due.

The bill prayed that the amounts due on the mort-

gages might be paid and in default of payment for foreclosure.

The bill was taken *pro confesso* for default in answering, and the usual foreclosure decree, with reference to the master at London, was made on the 2nd of September, 1862. The plaintiffs soon after presenting a petition, stating that they had ascertained that since the making of the decree the defendant's interest in a portion of the mortgaged premises had been sold by the sheriff of the county of Middlesex, under writs of execution against the defendant's lands to one *William L. Lawrason*, who had, however, purchased in trust for *Lawrence Lawrason*, and praying that the said *William* and *Lawrence Lawrason* might be made parties.

William and *Lawrence Lawrason* having been added as parties, with liberty to plead, filed their joint and several answer, setting forth that under the writ against the defendant *Roots*, the sheriff had sold that part of lot No. 17, comprised in the said second mortgage, and that *William L. Lawrance* had purchased the same on the 16th of October, 1862, in trust for his co-defendant *Lawrence Lawrason;* that the said writ of execution had been placed in the hands of the sheriff for execution before the assignment of the said second mortgage from *Carling* to the plaintiff, and before the plaintiff had acquired any right or title to the premises sold.

The defendants contended that they were entitled to redeem the mortgage on lot No. 17, without redeeming the other, and that the one suit could not be properly maintained against both parcels of land; they also denied all knowledge of the assignment from *Carling* to the plaintiffs, and stated that the sheriff's deed was registered on the 17th of October, 1862, and before the assignment was registered, if it were registered at all.

Mr. *Roaf* and Mr. *Meredith* for the plaintiffs.

Mr. *Fitzgerald* for the defendants *Lawrason*, contended that although the rule was that a mortgagor, or those claiming under him, could not redeem one of several mortgaged estates without redeeming both, when held by the same person still, as here, the title of *Ellis* as to lot 16 was acquired subsequently to the lodging of the writ under which *Lawrason* purchased his interest, that rule would not hold good as against him.

Mr. *Roaf*, in reply, in addition to the cases mentioned in the judgment, referred to *Vint* v. *Padgett*, (*a*) to shew that no such distinction existed in favour of a party standing in the position of this defendant.

Judgment.—SPRAGGE, C.—The principal question argued is, whether the plaintiffs, as the holders of two mortgages on separate properties, made by defendant *Roots*, are entitled to insist upon being redeemed as to both, if at all, or whether *Lawrason* made a *quasi* party upon petition is entitled to redeem one of them.

The first mortgage, *Roots* to *Ellis*, was of one property which may shortly be called lot 16; date, 19th June, 1854. The second mortgage, *Roots* to *Carling*, was of another property, which may be called lot 17; date 27th April, 1855. Assignment of mortgage, *Carling* to the plaintiffs, 8th May, 1862. Sale by sheriff under execution of equity of redemption of *Roots*, in lot 17, *Lawrason* the purchaser, 6th September, 1862.

Conveyance by sheriff to *Lawrason* alleged in the answer to be registered.

It is admitted that the writ of execution was in the hands of the sheriff before the assignment from *Carling* to the plaintiffs.

It is not denied that as a general principle the holder

(*a*) 4 Jur. N. S., 454 C. S., on appeal Ib. 1 122.

of two mortgages, given for distinct debts, upon separate properties, is entitled to insist upon being redeemed as to both. In the early case of *Willie* v. *Lugg*, (*a*) it was confined to cases where the equity of redemption remained in the same hands; but it was subsequently held to apply to the case of a purchaser, without notice, of the equity of redemption in the premises comprised in one of the mortgages. It was so held in *Cator* v. *Charlton*, cited in *Jones* v. *Smith*; (*b*) in *Collett* v. *Munden*, cited in the same place, in which it is said, "the case of the assignee is not better than that of the original mortgagor;" in *ex parte Carter*, (*c*) and in *Ireson* v. *Denn*. (*d*) In these cases the mortgages were made to the same mortgagees, but the rule appears to be the same where they are made to separate mortgagees, provided they are united in the one holder, before the equities of redemption are separated. *White* v. *Hillacre*, (*e*) *Selby* v. *Pomfret*. (*f*)

In *White* v. *Hillacre* there was a mortgage of an estate called Mudgeon by the owner *James Hillacre*, then a devise of that estate, subject to the mortgage; the devisee had an estate called Westhay, which he mortgaged, and died entitled to the equity of redemption in both estates. He devised the one to one set of devisees, and the other to another set, and after his death the mortgage of Mudgeon became vested by assignment in the mortgagee of Westhay, and the holder of the two mortgages insisted upon redemption as to both; but this was denied, Baron *Alderson* holding that the rule did not apply to a case where the equity of redemption belongs to different persons, adding, however, this observation, "there might, perhaps, have been some ground for the plaintiff's argument if the assignment had been made in the life-time of *Thomas Hillacre*," the devisee of *James*; and *Selby* v. *Pomfret* establishes that in such a case the rule would apply: it goes further,

(*a*) 2 Ed. 78.
(*b*) 2 Ves. Jur. 377.
(*c*) Amb. 733.
(*d*) 2. Cox, 425.
(*e*) 3 Y. & C. 597.
(*f*) 7 Jur. N. S. 835.

indeed, for it was applied in that case against assignees in bankruptcy, although the mortgages did not become united until after the mortgagor was adjudged bankrupt.

The question then seems to turn upon the effect of placing the writs of execution in the hands of the sheriff before the assignment by *Carling* to the plaintiffs, for if *Roots* had sold to *Lawrason* at the date of the sheriff's sale, which was after the two mortgages had coalesced in the plaintiffs, the rule would apply in favour of the plaintiffs.

As to that, I do not think the lodging of the writ with the sheriff can have the effect contended for. The lands are bound thereby, but that is all; the equity of redemption was still in *Roots*, and the purchase by *Lawrason* did not relate back to the lodging of the writ.

I have referred to *Vint* v. *Padgett*, and *Tassell* v. *Smith*; (*a*) but, while affirming the rule as settled by authority, they turned upon points which do not arise in this case.

Lawrason does not set up that he is a purchaser for value without notice, and according to the cases to which I have referred, such a defence would not avail him. It is, however, certainly a great hardship if a purchase for value without notice will not protect the purchaser, for the purchaser of one parcel subject to a mortgage, cannot be taken to know that his vendor has mortgaged another property for another debt.

No point is made in argument upon the registry laws. I will, therefore, only observe that if the plaintiffs had registered their assignment from *Carling*, *Lawrason* would have had notice of the fact which constitutes the plaintiff's equity, in respect of the debt due upon the mortgage to *Ellis*; the assignment of the *Carling* mortgage did affect the land thereby mortgaged with an equity beyond any charge created by the mortgage

(*a*) 4 Jur. N. S. 1090.

itself, and no doubt was capable of registration. If counsel for *Lawrason* desire to speak to this point, they can do so, that is, if the sheriff's deed is registered. It is not among the papers.

It is contended that the plaintiffs are not in fact assignees of the *Carling* mortgage, *Carling* having assigned to *Jane* and *Catherine Ellis*; but I think, upon the evidence, there was no perfect assignment to them. There was a contract on behalf of the estate, of which the plaintiffs are the executors, for the purchase of that mortgage from *Carling*, and an assignment was prepared, not by them, or on their behalf, to *Jane* and *Catherine Ellis*, which was signed and sealed, and intended to be delivered by *Carling*. It was not in accordance with the contract and, in law, was to strangers; it does not seem to have reached them, but upon the error being observed, it was returned to *Carling*, who retained it, and executed the assignment under which the plaintiffs claim. If the paper had been a perfect instrument, it would probably have passed nothing, at least in equity, as *Jane* and *Catherine Ellis* would, upon the evidence, have been trustees for the representatives of the estate of *Ellis*.

Upon the principal point in the case I will only add, in the words of Lord Justice *Turner* in *Tassell* v. *Smith*, "The case is governed by the authorities, though there may be some difficulty in the question, whether the rule established by them is a just result of the principle on which they proceed."

Subject to the question which I have suggested upon the registry law, provided the sheriff's deed to *Lawrason* be registered, a fact which will appear upon inspection, I think the plaintiffs entitled to be redeemed as to both mortgages.

LEARY v. ROSE.

Specific performance—Representations made by infant binding on him —Estoppel—Acquiescence.

D.'s father died in 1847, having first made his will purporting to devise all his real estate to his wife in fee; this will was not executed in proper form, and therefore *D.* became entitled to the land as heir-at-law. Three months before *D.* became of age, he agreed with *P.* for the sale to him of the real estate for valuable consideration. A conveyance to *P.* was prepared by *D.* and executed by his mother, the devisee under his father's will, *D.* being the witness to it. *P.* afterwards sold and conveyed his interest, and *D.* brought ejectment against the purchaser. On a bill filed to restrain this action, it was shewn that *D.* had at various times acquiesced in the sale after he became of age. *Held*, that *D's* conduct with reference to the sale to *P.* was fraudulent, and was to be considered as an assertion that his mother was entitled as devisee in fee although he was then not of age, and that such conduct and his subsequent acquiescence after his attaining majority estopped him from denying the validity of the sale; and he was enjoined from proceeding with the action of ejectment, and ordered to execute a conveyance to the plaintiff, the vendee of *P.*

Statement.—The bill in this case was filed by *John Leary* against *David Rose* and *Elizabeth Rose*, praying, under the circumstances therein stated, and which are clearly set forth in the judgment, for an injunction to restrain an action of ejectment brought by *David Rose* against the plaintiff, and for an order for him to join in conveying to plaintiff the lands in respect of which the action was brought.

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

Mr. *Roaf* for the defendants.

Smith v. *Lowe* (*a*), *Franklin* v. *Thornbury* (*b*), *Mocatta* v. *Murgatroyd* (*c*), *Pearson* v. *Morgan* (*d*), *Thompson* v. *Simpson* (*e*), *Teynham* v. *Webb* (*f*), *Nicholson* v. *Cooper* (*g*), *Dunn* v. *Spurrier* (*h*), *Govett* v. *Richmond* (*i*), *Herrick* v. *Atwood* (*j*). *Raw* v. *Pote* (*k*), *Pickard* v. *Sears* (*l*), *Gregg* v. *Wells* (*m*), *Freeman*

(*a*) 1 Atk. 490.
(*b*) 1 Ver. 132.
(*c*) 1 P. Wm, 393.
(*d*) 2 Br. C. C. 385.
(*e*) 2 J. & L. 110.
(*f*) 2 Ves. Sr. 198.
(*g*) 4 M. & C. 186.
(*h*) 7 Ves. 235.
(*i*) 7 Sim. 1.
(*j*) 2 DeG, & J. 21.
(*k*) 2 Ver. 239.
(*l*) 6 A. & E. 469.
(*m*) 10 A. & E. 90.

v. *Cooke*, (*a*) *Banks* v. *Newton*, (*b*) *Wing* v. *Harvey*, (*c*) *Arnot* v. *Biscoe*, (*d*) *Stone* v. *Godfrey*, (*e*) *Davis* v. *Snyder*, (*f*) *Chambers* on Infancy 438; *Dart's* V. & P., p. 10; *Hovenden* on Frauds, 502, were, amongst other authorities, referred to and commented on by counsel.

Judgment.—SPRAGGE, V.C.—*Alexander Rose*, the father of the defendant *David Rose* and the husband of the female defendant, was seised in fee of a farm in the township of Westminster. He died in February, 1847, having two days before his death, by an instrument purporting to be his will, in terms devised all his real estate to his wife in fee. It seems agreed that this instrument, for some reason not explained, was invalid, and that the real estate descended to *David*, as the heir-at-law of his father. The will was set up in an action at law brought by *David*, and was not sustained.

For a time it appears to have been thought by both *David* and his mother that a life estate only was devised, but it was afterwards discovered that the instrument purported to devise in fee. *David*, however, claimed, in conversation among his friends, that he was entitled by title paramount; that the farm had belonged to his uncle, by whom it had been devised to his elder brother, who had died before his father, and that he, and not his father, was entitled.

David came of age on the 9th of July, 1855. In May of that year a bargain was made with *Peter Rose*, not a son of *Alexander*, for the conveyance to him of the Westminster farm, for the sum of twelve hundred pounds, the consideration to be paid partly in money, and partly in land and chattels. In regard to the land it was agreed that two parcels of land in the township of Warwick, of 100 acres each, to be selected by *David*,

(*a*) 2 Exch. 654. (*b*) 16 L. J. Q. B. 142.
(*c*) 23 L. J. Ch. 511. (*d*) 1 Ves. Senr. 95. (*e*) Ib. 767.
(*f*) Ante Vol. i., p. 134.

should be purchased and paid for by *Peter*, one parcel to be conveyed to *David*, and one to the widow; and that *Peter* should convey some town lots in London, and remove a mortgage given for part of the purchase money to one *McRoberts*, from whom he had purchased the same.

It is not made very clearly to appear by whom the treaty for this bargain was conducted, but I think partly by *David*, and partly by the widow. *David* spoke of it among his friends as made by him.

On the 13th of May a conveyance was executed to *Peter* of the Westminster farm. It is made by *Elizabeth Rose*, as widow, and sole devisee of *Alexander Rose; David Rose* is the only witness attesting its execution. It was registered on the 2nd of June following, and must have been registered on the oath of *David Rose*. In January, 1856, *Peter Rose* conveyed to *William Elliott*, and on the 9th of April, 1857, the farm having been advertised by *Mr. Elliott* for sale by auction, was purchased at auction by the plaintiff. *David Rose* has since brought ejectment against the plaintiff, and this suit is instituted to restrain proceedings at law, and to compel *David* to execute a conveyance to the plaintiff. The principle invoked is the familiar one that a party standing by and allowing another to contract on the faith of that which he can contradict, cannot afterwards dispute the fact upon the faith of which the other contracted; and the case is also made that *David* was himself a party to the arrangement; and acts of confirmation are alleged, and evidence is given in support of them.

The first branch of the case proceeds upon the ground of fraud. *David* was under age at the time of the execution and registration of the conveyance to *Peter Rose;* but it is conceded that if an infant is of sufficient discretion to be capable of committing fraud, he will be affected by it; and of this there can be no doubt, as

was said in the old case of *Watts* v. *Cresswell*, (*a*) "If an infant is old and cunning enough to contrive and carry on a fraud, his lordship thought in equity he ought to make satisfaction for it." In that case a loan of £300 was solicited and obtained, through an infant twenty years of age, for his father, the father being tenant for life, with remainder to the infant. The infant represented the father to be tenant in fee, and was a witness to the mortgage deed, and also to the payment of the money. Lord *Cowper* thought that his witnessing the deed would not bind him, because if he was made a party to the deed, and executed it, yet that, though a much stronger case, would not bind him; a position shaken, I think, by subsequent authorities; but his lordship thought that by reason of his representations and his being principally concerned in the fraud, knowing that he was entitled in remainder, he ought to make satisfaction to the mortgagee; and he decreed accordingly.

It is said that in this case *Peter* was not imposed upon, for he knew of *David's* claim. It is true that he knew that *David* claimed through his brother, and that he claimed to be entitled notwithstanding the will; but it does not follow that he knew or believed that the title was in *David* as heir, and not in his mother as devisee. He may be taken to have known at all events that by the death of *David's* elder brother the estate devolved, not upon *David*, but upon his father; and that *David* was mistaken in his claim of heirship. The result would then be that *David* was entitled as heir through a different channel from that which he supposed, and through which he claimed; and that *Peter* believed him not to be heir, and believed his mother to be devisee. Both probably believed the will to be valid. *David* believed that although valid he was entitled in another right; and *Peter* knew that if valid, *David* was not entitled at all. I am, however, stating

(*a*) 2 Eq. Ca. Ab. 515.

David's belief from what he had himself said as to his title; but I ought perhaps to assume that before the execution of the conveyance he discovered his mistake; and that otherwise he would have joined in the conveyance; for upon a contrary assumption he would be guilty of fraud. In assenting to and assisting at the conveyance to *Peter* he must be taken to have intended the conveyance to be valid, which it would not be if heirship from his brother gave him a title paramount. There is this peculiarity about the case that *David* did not know any fact that was not also known to *Peter*. They may or may not have differed in regard to *David's* title as a matter of law; but whether they did or not, I cannot see that *Peter* purchased upon the faith of any fact represented or concealed by *David*. *David's* representation as to his own title, assuming him to have continued it up to the execution of the conveyance, was calculated not to induce *Peter* to take it, but to deter him from taking it, unless *David* joined in it.

This case therefore does not seem to me to fall within the principle to which I have adverted, taking it in the terms in which it is ordinarily enunciated. But a case before Lord *St. Leonards*, when Chancellor of Ireland, *Thompson* v. *Simpson* (*a*) seems in principle to apply. Lands were limited to a father for life, with power to appoint among his children, and in default of appointment to his children in fee; the father joined with his son *Robert Thompson* in a fine and recovery; and they were advised that the consequence of this act was to vest the fee in the father. Afterwards the father sold and conveyed the estate, and the son was not required to join in the conveyance, but assented to the conveyance to the purchaser. The fine and recovery were not effectual to vest the estate in the father; but both the father and the son, and doubtless the purchaser also, believed that they were; and Lord *St. Leonards* declared that he would bind whatever interest the son

(*a*) 2 J. & L. 110.

had at the time of the conveyance by his assent to it. I do not see any distinction in principle between that case and the one before me, unless it arise from *David* not being of age. He was not of legal capacity to contract or assent to a contract. Where a contract is made upon the faith of assumed facts, an infant knowing the contrary, but yet assenting to the existence of the facts, the infant is guilty of a moral wrong, for he ought to disclose them; but he may intend no fraud at the time, and may never commit any actual fraud, for his latent rights may be asserted by the representatives of his estate; yet if they are asserted afterwards they are held bound. Does not the fraud then consist, not in the original standing by when the contract was made, but in the assertion of the right after so standing by? If so, *Thompson* v. *Simpson* would apply. I have no doubt, upon the evidence, that *David* did assent to the conveyance to *Peter*. The acts of assent were much stronger than in many of the cases cited.

But there are other acts by *David* which I think bind him. *Peter* did not carry out his part of the agreement; he failed to pay off the mortgage on the town lots, and to pay the purchase money on the Warwick lands, and left the country. *David* seems then to have revived his claim, or to have given out that he had some claim. A few days before the sale by auction the plaintiff, with *McRoberts*, went to look at the farm; they found *David* in the house, and *McRoberts*, who knew *David*, spoke of the intended sale, and told him that the plaintiff thought of purchasing, and said to him that he understood he made some claim, and if so, that he had better come in (I suppose to the sale) and make it. *David* merely said he supposed it did not make much difference. *McRoberts* says, on cross-examination, that he did not understand *David* to abandon any claim he had, and that *David* did not say anything to lead him to think that he had a claim.

I think this was, under the circumstances, a standing

by, by *David* after he came of age, that ought to preclude him from asserting any claim. There being an intending purchaser under a conveyance to which *David* was a witness and an assenting party, and being so, had assented to the character in which the conveyance was made, namely by his mother as entitled as devisee under his father's will; he is asked in effect to disclose his claim, if he has any, to such intending purchaser, and he says nothing to lead the enquirer to suppose that he has any claim. I take this to be a tacit assent to the goodness of the title acquired by *Elliott*.

There are also acts of acquiescence and confirmation by *David* after he came of age of the sale to *Peter*. He gave up possession to *Peter*, and necessarily as purchaser, for *Peter* had no other title; he made enquiries of *McRoberts* whether *Peter* had removed the mortgage from the town lots and he availed himself, so far as he could, of the benefit of the consideration to be paid by *Peter*; he selected the land in Warwick avowedly as part of the consideration for the Westminster farm, expressing his preference for it over the Westminster farm, and went upon it, and commenced to clear and cultivate it with some assistance, but slight probably, from *Peter*.

If *Peter* had completed his part of the agreement, it would be too clear for argument, I think, that he would be entitled to a conveyance from *David* of the Westminster farm; his failure to do this has probably been the motive with *David* for questioning now the title which he assisted in making to *Peter*. It is urged by Mr. *Roaf*, who argued the case for the defendants with great ingenuity and ability, that if *Peter* had been plaintiff the court would not decree him a conveyance, but upon condition that he should first make good all the engagements he entered into by way of consideration, and to this I agree. It is further contended that the plaintiff stands in no better position than *Peter*.

The plaintiff does not shew that either he or *Elliott* stands in the position of purchaser for value, in the sense in which purchase for value will avail a defendant against a plaintiff's equity; but the plaintiff's position is different, not only upon the record, but substantially different. His case is that *David's* conduct is fraudulent, and it cannot surely be an answer to such a case that the plaintiff does not bring himself within the strict technical rule in relation to purchasers for value. The defendant's position is, that the plaintiff must make good *Peter's* engagements as a condition of relief. Suppose the plaintiff, upon his purchase at auction, had paid his purchase money in full, it would be most unjust to impose such a condition; or suppose him to have paid afterwards the mortgage given on account of purchase money. Whatever has been innocently done by the plaintiff, induced by the defendant's conduct, the defendant cannot complain of. To make the plaintiff pay over again what he has already paid would be visiting the consequences of the defendant's conduct upon the wrong head. Whether *David* may have any equity in relation to purchase money which may yet remain to be paid, and may be applied to *Peter's* benefit, is another question. If he has such equity, it must be the subject of another suit, in which *David* should be the plaintiff.

The bill places the ground of relief in a great measure upon the footing of specific performance; but the ground upon which I have proceeded is sufficiently made by the bill.

The decree will be for a perpetual injunction restraining proceedings in ejectment, and for a conveyance from *David*, with costs against him.

CARPENTER v. WOOD.

Practice—Taking accounts before the master—General order XLII., sec. 13.

The XLII. of the General Orders (sec. 13) applies to all cases where accounts are directed to be taken before the master.

This was a suit, instituted by the plaintiff against the defendant, calling upon the defendant for an account of certain trust estates vested in the defendant, and charging him with certain acts of wilful neglect and default. At the hearing of the cause,

Mr. *Start*, for the plaintiff, asked that the decree to be drawn up might direct the master to enquire as to wilful neglect and default, the order of court, he submitted, being intended to apply to mortgage cases only.

Mr. W. *Proudfoot* for the defendant.

Judgment.—SPRAGGE, V. C.—The question raised is, whether upon the reference to be directed in respect of the dealings of the defendant with the trust estate the ordinary reference only should be made, or whether the master should be directed to enquire as to wilful neglect and default. Two specific acts of wilful neglect or default are charged in the bill: one the omission to collect a debt alleged to be due from Messrs. *Burton* and *Sadlier*, the other for not continuing to pay the instalments from time to time falling due upon the Hamilton Industrial Building Society stock; and a good deal of evidence has been given in relation to these, and also in relation to other alleged instances of wilful neglect or default. The order laid down by Lord *Eldon*, that the plaintiff must aver and prove at least one act of wilful neglect or default in order to obtain a decree directing an enquiry as to wilful neglect or default, has been lately affirmed and acted upon by Sir *W. Page Wood*, in *Sleight* v. *Lawson*, (*a*) and I am not prepared to say that either of the instances charged in this bill are

(*a*) 3 K. & J. 292.

sustained in evidence in the shape in which they are charged. I say this without meaning to say that there is no evidence of wilful neglect or default in respect of either of these transactions; but it is unnecessary that I should say more, because I think that the question of wilful neglect or default is open to the plaintiff in the master's office without any specific direction that he should enquire as to wilful neglect or default. The 13th section of general order number 42 gives the master that power, in my opinion. After instancing several matters of enquiry which it is ordered shall be within the cognizance of the master, the order proceeds, "and generally in the taking of accounts to enquire and adjudge:" that is in the taking of accounts in the master's office it shall be within the cognizance of the master to enquire and adjudge "as to all matters relating thereto as fully as if the same had been specifically referred." The taking accounts of a trust estate received, or which, but for wilful neglect or default, might have been received, or any wilful neglect or default in the dealing with a trust estate [illegible]e not, it is true, among the instances of enquiry enume[illegible]ed in the order, but certainly the matters of enquiry are not intended to be confined to those enumerated. The general words which I have quoted shew this, and in my opinion are large enough, when an account is directed of the dealing of a trustee with a trust estate, to authorise the master and to make it his duty to enquire as to wilful neglect or default on the part of the trustee. I believe it has been thought by some members of the profession that the section to which I have referred applies only to references in suits between mortgagor and mortgagee. I see no ground for this; unless it be that the instances enumerated are more applicable to such suits than to others, but they are only instances, and there is nothing in the section so to limit its application. The scope of the section, as expressed in the beginning of it, is as general as it could be made. "In the taking of accounts in the master's office," I think it embraces every kind of account

referred to the master. Taking this view of the authority and duty of the master, I think it would be neither necessary nor proper that I should express any opinion in regard to the wilful neglect or default alleged against the defendant in his dealing with the trust estate.

Bank of Upper Canada v. Thomas.

Setting off costs when parties jointly and severally liable.

A decree had been made in a cause giving the plaintiffs relief, and ordering the defendants to pay the costs, which, however, were not paid; the plaintiffs appealed from a portion of the decree with which they were dissatisfied, which appeal upon argument was dismissed with costs, to be paid to one of the respondents, thereupon the plaintiffs applied to set off the amount so ordered to be paid against the costs directed to be paid by the defendants in the court below to the plaintiffs, which was ordered accordingly.

Statement.—The decree in this cause, drawn up in pursuance of the judgment of the court, reported ante volume ix., page 321, directed, amongst other things, that the deed from *Thomas* to *Beatty* should be set aside, and the lands comprised therein sold for payment of the plaintiffs and other incumbrancers. The plaintiffs appealed from this portion of the decree, contending that all that was necessary for this court to do was to declare the deed void, and permit the plaintiffs to proceed at law under their execution to enforce payment of their claim; and also that the decree, if a sale should be ordered, ought to direct the sale to be free from the dower of Mrs. *Thomas*, who had joined in the deed to *Beatty* with her husband for the purpose of releasing her dower. Upon hearing counsel, the court dismissed the appeal, with £44 1s. 10d. costs to be paid by the bank to the defendant *Beatty*. The costs payable by the defendants *Thomas*, *Stephens* and *Beatty* had not been either taxed or paid. A motion was by leave of the court made by Mr. *G. D. Boulton*, in vacation, for an order to set off the costs of appeal against those ordered to be paid under the decree, it being alleged that *Beatty* was about to enforce payment of the costs in appeal.

Mr. *S. H. Blake*, contra, referred to *Wilson* v. *Switzer* (Chambers Reports, pp. 75, 160), where his honor *V. C. Spragge* had refused to order a set off under somewhat similar circumstances. He contended there was not any mutuality in the demand and cross demand, the costs under the decree being payable by three defendants to the plaintiffs, while those in appeal were payable by the plaintiffs to one only of the defendants.

He referred also, amongst other cases, to *Wright* v. *Mudie*, (*a*) *Harrison* v. *Bainbridge*. (*b*) *Smith* v. *Brocklesby*, (*c*) to shew that the court would not make the order here sought, where it would prejudice the lien of the solicitor.

Mr. *G. D. Boulton*.—The costs under the decree are payable by the defendants individually as well as jointly, which is a circumstance that would appear not to have existed in *Wilson* v. *Switzer*, or if it did exist, the attention of the learned judge, who disposed of that application, was not drawn to it.

Judgment.—VANKOUGHNET, C.—In this case the Bank of Upper Canada appealed from the decree of the court below. This appeal was dismissed with costs, and the order dismissing it has been made an order of this court. The original decree gave the plaintiffs costs against *Beatty* and the other defendants. These cost have not been paid, and it is now sought to set off against them the costs under the order in appeal, which has been made an order of this court. I think the set off should be allowed. It is not the case of one defendant being deprived of his costs against the plaintiff, because of another defendant having obtained an order for costs—a set off which, though allowed at law, I have refused to order here. In this case *Beatty* is singly as well as jointly liable to the plaintiffs for costs under the decree; and it seems most reasonable that he should pay these costs before he is allowed to collect those awarded to him from the plaintiffs, or that, if he does not, they should be set off the one against the other. I order the set off accordingly.

(*a*) 1 S. & S. 266. (*b*) 2 B. & C. 800. (*c*) 1 Aust. 61.

Langlois v. Baby.

Deed given for illegal purpose—Public policy —Pleading.

The owner of real estate, being under arrest upon civil process, conveyed his lands to a person for the purpose of enabling the grantee to justify as special bail in the action, and after the same had been settled the lands were re-conveyed; but, in the meantime, a writ against the lands of the grantee had been placed in the hands of the sheriff and a sale was effected thereunder, after such re-assignment, and a conveyance made to the purchaser (the plaintiff in the writ) who had notice of the claim set up by the original owner. *Held*, that the transaction was one against public policy and morality; and that the court would not lend its aid to the grantor in getting back his estate; but, the purchaser at sheriff's sale, having in his answer disclaimed any interest in the lands other than a lien thereon for the full amount of his judgment and expenses, the court decreed the plaintiff relief upon the terms of his paying the full amount of such judgment and expenses, together with interest and the costs of suit. And the defendant having also by his answer alleged that the conveyance was made for the purpose of enabling the grantee therein to justify as bail; and that he did justify as such bail upon the lands so conveyed, and submitted that "*the plaintiff, under the circumstances, ought to be estopped and precluded from saying that the said lands are not the lands*" of the grantee: *held also*, that, although the defendant did not object that the act was against public policy, there was sufficient stated to enable the court to give effect to the objection of illegality, notwithstanding the answer did not state that such use would be made of the facts stated.

Statement.—The bill in this case was filed by *Noe Langlois* against *Charles Baby*, setting forth that in May, 1859, plaintiff was owner in fee of lots 40 & 41, in the first concession of Sandwich. That on the second of that month he was arrested for a debt of $2,000, and, in order to put in special bail, plaintiff found it *necessary or expedient* to arrange with one *Dennis Moynahan*, to become one of such bail, plaintiff agreeing to convey to *Moynahan* the said lots, in trust merely, to secure *Moynahan* and one *Mercer*, the other special bail, against all loss or liability that might result from their becoming such bail; *Moynahan* to re-convey the property to plaintiff on the fulfilment of the object for which the same should be conveyed, which was accordingly done on the 10th of the same month, and *Moynahan*, at the same time, executed and delivered to plaintiff a declaration of trust or acknowledgment under seal, in the words following: "I hereby certify that I have taken from Mr. *Langlois*, of the township of Sandwich, in the county of Essex,

gentleman, a conveyance of lots number 40 and 41, in the first concession of Sandwich, aforesaid, for the purpose of securing myself and *Joseph Mercer*, Esquire, of Sandwich, as special bail for the said *Langlois* in an action in the Court of Queen's Bench, at the suit of *James Arthur Ford*, in which the said *Langlois* was arrested, and that upon the termination of the said action, and the clearing of me and my said co-bail from all loss, damage, charge or liability, by reason of our becoming such bail, I am to re-convey the lands. In witness whereof," etc.

That *Moynahan* registered the conveyance to him of the lands, but the declaration of trust or acknowledgment never was registered, and that thereupon *Moynahan* and *Mercer* became such special bail.

That afterwards, and in the month of May, 1862, *Moynahan* and *Mercer*, being relieved from further liability as such bail, *Moynahan* executed a re-conveyance of the lands to plaintiff.

The bill further stated that the defendant, prior to the conveyance by plaintiff to *Moynahan*, had recovered a judgment against *Moynahan* and one *Davis* for about $110; and upon such judgment a writ of *fi. fa.* lands had been duly issued, under which the said lands of plaintiff were sold by the sheriff (after a protest against such sale having been served on the sheriff and *Baby*, setting forth the claim of plaintiff thereto) to the defendant, to whom the same were conveyed by the sheriff. That after such sale and conveyance *Baby* commenced an action of ejectment against plaintiff, to which plaintiff put in a defence: that the lands sold were worth $6,000, and were bid off by defendant at the sum of $20.

The bill prayed an injunction to restrain the action and a conveyance of the land to plaintiff.

The defendant answered the bill, admitting the seizin of plaintiff and the execution of the conveyance

to *Moynahan* for an alleged consideration of $6,000, and alleging that the same was not executed solely, if at all, for the purpose stated in the bill, but the same was executed for the purpose of enabling *Moynahan* to justify as bail in the action; and that he, at the request of the plaintiff, had made an affidavit of justification as such bail, in which he swore, "*that I am a housekeeper and freeholder, residing at the town of Sandwich, in the County of Essex : that I am worth the sum of one thousand pounds over and above what will pay all my just debts,*" etc.; and that defendant believed the property referred to in such affidavit was the property so conveyed to *Moynahan* by plaintiff, and that independently thereof *Moynahan* could not have made such affidavit, as independently of those lands he was insolvent. That *Moynahan* made such affidavit at the request of plaintiff, plaintiff knowing all the facts, and knowing also that *Moynahan* could not justify on those lands if the same were merely his upon the trusts stated in the bill, and submitted that, under the circumstances, the plaintiff ought to be estopped from saying that the lands were not the lands of *Moynahan*, but that he, defendant, claimed no interest whatever in the lands except a lien thereon for the full amount of his judgment.

The cause was set down for the examination of witnesses and hearing before his Honor Vice-Chancellor *Spragge*, at the sittings of the court at Sandwich, in the fall of 1863, when the plaintiff examined his attorney in the action at law, in which he had been arrested, and *Moynahan*, both of whom proved that the conveyance from plaintiff to *Moynahan* was made for the purpose of enabling the latter to justify as bail, as set forth in the answer.

The defendant did not call any witnesses.

After the argument had proceeded some length the learned judge suggested that a difficulty had presented

itself to his mind, as to the plaintiff's right to succeed under the facts appearing; the question was, whether the evidence did not establish a case of fraud of such a character as disentitled the plaintiff to any relief: and he adjourned the further argument of the cause to be brought on before him at Toronto, which was accordingly done, immediately preceding the long vacation; when

Mr. *O'Connor*, for the plaintiff, contended that the defendant was not at liberty now to take advantage of the illegality of the transaction, after having answered the bill, without setting up that defence and disclaiming all interest in the property other than a lien for his judgment debt and costs. The transaction, he also contended, was not against public policy, *Moynahan* having, under the conveyance to him, taken a qualified interest in the lands so conveyed, citing *Fischer* v. *Naicker*, (*a*) *Thomson* v. *Thomson*. (*b*)

Mr. *Scott*, for the defendant, submitted that the defence was sufficiently raised by the answer, the plaintiff's conduct in the matter and the facts in relation to the whole transaction being distinctly set out in the answer. Had the bill stated the facts truly, it would have been open to a demurrer for want of equity. It is illegal to hire bail, but here the bail was in reality only colourable, while the plaintiff in the action was entitled to substantial bail. He referred to *McGill* v. *McGlashan*, (*c*) *Curtis* v. *Perry*. (*d*)

The defendant, however, has no desire to retain the property, and is willing to re-convey on payment of his claim and the costs incurred in his defence in this cause.

Mr. *O'Connor*, in reply

(*a*) 8 W. R. 655.
(*b*) 7 Ves. 470.
(*c*) Ante vol. vi., p. 324.
(*d*) 6 Ves. 739.

Judgment.—SPRAGGE, V. C.—After hearing argument upon the point which I suggested at the hearing of this cause at Sandwich, and examining the cases to which I have been referred, I remain of the opinion which I then expressed.

It is quite clear that the land was conveyed to *Moynahan* in order to enable him to qualify as bail for the plaintiff; and that *Moynahan* did, as such bail, make oath that he was possessed of property to the value of £1000, when, but for such conveyance, he was unable to make such oath; and that he took the value of this property into account in making such oath, having at the time no beneficial interest whatever in the land. He gave a declaration of trust to the plaintiff that he held the land for the purpose of securing himself and his co-bail from the consequences of their becoming such bail. The conveyance appears to have been taken with the double object of enabling, or rather inducing, *Moynahan* to qualify as bail, and to secure him and his co-bail.

The purpose of the conveyance, so far as it was with a view to *Moynahan's* qualifying as bail, was against the policy of the law. It was immoral, because it was the inducement to an oath which could not be made with a good conscience. I might use stronger terms, but this is sufficient. And its object was further objectionable, as imposing upon the plaintiff in the suit at law, as sufficient bail, a man who had only colourably, not really, the property qualification, which it was an object of the conveyance to enable him to represent himself as having.

I cannot doubt that such a conveyance must fall within the same category as a conveyance to enable a man to sit in parliament, but intended to convey no beneficial interest; a like conveyance in England as a qualification to kill game; a conveyance to defraud creditors, and the like: and the question that rem[illegible]s

is, whether the objection appears sufficiently upon the pleadings: or if not, whether, being founded upon public policy, the court will give effect to it, without its appearing upon the pleadings. Upon this point I am referred by counsel for the plaintiff to the language of Sir *John Coleridge*, in delivering the judgment of the Privy Council, in *Fischer* v. *Naicker*, where the objection was champerty. The learned judge stated the question to be, supposing the act open to objection, whether the point was so raised by the pleadings, or the points for proof recorded by the court, that it could be properly entered into: and he proceeded, "They, the court, will observe, however, in passing, that although it may be admitted that the court would have the right, perhaps even lay under an obligation, to take cognizance *motu proprio* of any objection, manifestly apparent on the face of the proceeding, which shewed that it was against morality or public policy; yet when, as here, that was only to be collected from the evidence by inference, and was capable of explanation or answer by counter evidence, it is highly inconvenient as well as contrary to the ordinance which regulates the practice of the court, and may lead to the most direct injustice if the issue has not been presented by the pleadings or the points recorded for proof." In the report of this case in the Law Times, the judgment is said to have been delivered by Lord *Kingsdown*.

In this case it is set up by the answer that the conveyance was executed for the purpose of enabling *Moynahan* to justify as bail, and that he did justify as bail upon the lands conveyed. It is true this act is not objected to as against public policy, but is set up by way of estoppel, the answer submitting that under the circumstances "the plaintiff ought to be estopped and precluded from saying that the said lands are not the lands of said *Moynahan*," except upon certain terms therein claimed from the plaintiff, and upon which he declares himself willing to re-convey.

So, though the bar to the suit is not placed upon the correct ground by answer, still the facts constituting a bar to the suit are set forth; that appears upon the face of the proceedings, and further, is made a ground of defence by answer, which shews that the transaction, from the effects of which relief is sought, was against morality and public policy. Quite enough appears, I apprehend, to bring the case within the rule referred to in the judgment in the Privy Council. The plaintiff was informed by the answer what facts would be relied upon, though not that such use would be made of them as they were open to, and upon which I proceed.

I should feel obliged to dismiss the plaintiff's bill, but that the defendant submits to re-convey upon certain terms. In one part of his answer he appears content if reimbursed certain expenses which he says he incurred in the belief that the land belonged to *Moynahan;* but he afterwards claims a lien for the amount of his debt, interest, costs, and expenses in his suit against *Moynahan*. The plaintiff is fortunate in getting back his land upon these terms, for the debt against *Moynahan* is of small amount, while the land conveyed is of considerable value. The plaintiff must pay the defendant's costs.

KING v. CONNOR.

Practice—Costs—Chambers.

Where a cause was set down to be heard on further directions, for the purpose of having remedied a defect in the master's report, the court, although it made the order asked, refused the plaintiff costs other than those of a motion in Chambers; the order being such as might have been obtained on motion there.

This was a foreclosure suit, and the usual decree for an account and enquiry had been issued. The master, to whom the reference was directed, had taken the account between the parties, but in his report omitted to appoint a time and place for payment of the amount

found due. The solicitor of the plaintiff thereupon set down the cause to be heard on further directions.

Mr. *McLennan*, for plaintiff. The difficulty which renders this application necessary is caused by a defect in the report; it would seem clear, therefore, that the plaintiff is entitled to have the defect remedied by a supplemental order. It may be questioned, however, whether what is now asked could not have been obtained by order in Chambers.

Judgment.—SPRAGGE, V. C.—In strictness the application should have been made to the judge in Chambers for an order supplementing what is now required: as the matter has been brought on in this manner, and is now before me, and as no costs appear to have been incurred by the defendants, I will make the order asked, but with such costs only as if the application had been in chambers.

YOUNG v. YOUNG.

Lunacy—Setting aside conveyance of land made by the lunatic.

A. Y. being the owner of valuable lands, became infirm in mind. He believed that he could control the elements, and asserted power in himself to recall from death, and in various other ways, for several years previous to his death, constantly exhibited indications of mental infirmity. While in this state the members of his family, by an arrangement between them, entered into possession of the real estate and severally worked it and enjoyed its profits. W. & P., children of A. Y., and M. his wife, obtained from him conveyances to them respectively of all his real estate, which were executed in presence of an attorney, and there was some evidence of a money consideration having been paid A. Y. for them. It was not shewn conclusively that these conveyances were executed in a lucid interval. A. Y. having died intestate, on a bill by the heir fraudulent, with costs, and W. P. & M. were ordered to account of N., one of A. Y.'s children, these conveyances were set aside as for rents and profits.

The plaintiff in this cause was *Margaret Young*, daughter and only heiress of the late *Nicholas Young*. The bill alleged that *Adam Young*, grandfather of the plaintiff, formerly of the township of Crowland, was seized in fee of 86 acres of lot number 9, in the broken

front concession of the township of Crowland, also of about 40 acres of lot number 7, in the same front concession. That in 1837, he, through sickness and intemperance, became seriously affected in mind, and the malady so commencing continued to increase until his death, so that for many years previous and until that event, which occurred in December, 1859, he was considered by his family and neighbours a lunatic. The said *Adam Young* had five children, viz., the defendants, *Walter Young* and *Philip Young*, *Nicholas* the plaintiff's father, since deceased, and two daughters, *Eliza*, who since died, leaving the infant defendants, *William*, *Mary*, *Emeline*, and *George McCracken*, her heirs-at-law, also *Emma Jane Young*, who died unmarried and intestate before the father.

By an arrangement between the several children of *David Young* the above lands were worked by, and their profits divided among, them during their father's life.

It was alleged that this arrangement was extended into an agreement between the heirs, that *Nicholas*, the plaintiff's father, should, at *Adam Young's* death, become owner in fee of the easterly third part of the said premises, and that he accordingly spent large sums in effecting permanent improvements on this part of the premises.

In August, 1858, the defendants, *Philip*, *Walter*, and *Margaret*, widow of *Adam Young*, caused conveyances to them, respectively, in certain portions of all the said premises, which were afterwards executed by *Adam Young*. The plaintiff alleged that these conveyances were executed when the grantor was incapable of exercising a sound disposing judgment, and that they should be declared fraudulent and void, and claimed that the defendants should be made to account for the rents and profits of the lands since they took possession.

The defendants, by their answers, alleged that the derangement of *Adam Young's* mind was not such as set forth in the bill; that he was at the time of the execution of the conveyances of sufficiently sound and disposing understanding, and that such conveyances were executed as desired by the grantor in good faith, and for valuable consideration.

The defendants also claimed that, in case the conveyances were set aside, they might have a lien in the land for the moneys paid by them for it.

The other facts of the case are fully set forth in the judgment.

Mr. *Blain* for the plaintiff.

Mr. *Proudfoot* for the infant defendants.

Mr. *Blake* and Mr. *Kerr* for *Walter*, *Philip*, and *Margaret Young*.

The Attorney-General v. *Parnther*, (*a*) *Steed* v. *Calley*, (*b*) *Waring* v. *Waring*, (*c*) *Dyce Sombre's Case*, (*d*) *Willis* v. *Jernegan*, (*e*) *Osmond* v. *Fitzroy*, (*f*) *Snooks* v. *Watts*, (*g*) *Creagh* v. *Blood*, (*h*) *Ball* v. *Manning*, (*i*) *McDiarmid* v. *McDiarmid*, (*j*) were, amongst other authorities, referred to by counsel.

Judgment.—SPRAGGE, V. C.;—The question is, whether the late *Adam Young*, of the township of Crowland, was of sound mind on the 9th of August, 1858. The plaintiff, who is the heiress at law of *Nicholas*, one of the sons of *Adam Young*, impeaches certain conveyances of parcels of land of which *Adam* was seized, whereby the same were conveyed to the defendants, *Walter* and

(*a*) 3 Br. C. C. 441.
(*b*) 1 Keen 620.
(*c*) 6 Moo. P. C. 341.
(*d*) 10 Moo. P. C. 232.
(*e*) 2 Atk. 251.
(*f*) 3. P. W. 120.
(*g*) 11 Boav. 105.
(*h*) 3 J. & L. 509.
(*i*) 3 Bligh N. S. 31.
(*j*) 3 Bligh N. S. 374.

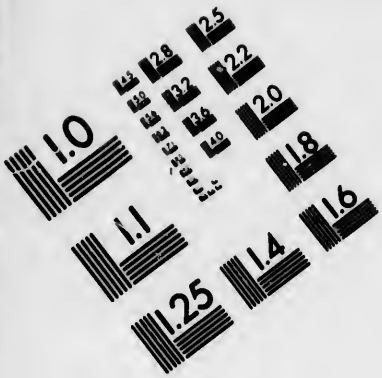
Philip respectively, they executing contemporaneously leases for life to *Adam* and his wife, the defendant, *Margaret Young;* the other defendants are in the same interest as the plaintiff. *Adam Young* died in December, 1859.

I think the evidence leaves no room for serious doubt that *Adam Young* was for a series of years insane. The evidence is, that he believed in things that were impossible; that is, as to his belief, so far as those who testified upon these points could judge of his belief from what he said and did. And his delusion took various shapes: one was his belief that he could control the elements, cause clouds to alter their course, that thunder should cease and rain be averted; another, that unfavourable weather was the fault of his neighbours or of some casual passer by. His unsoundness of mind manifested itself also in his disbelief in the reality of death. On two occasions, on the death of a son and of a grandchild, he said that although they were believed to be dead, and were actually buried, they would come back to him in a few days; his not attending their funerals may probably have been in consequence of the same delusion. There were other indications of insanity, among them the following: his talking of shooting a small steamboat that used to come up the river to take away produce, and which he imagined was doing an injury in taking it away; his talking of shooting his neighbours, and his belief that others were shooting at him.

These delusions were sworn to by a number of witnesses who believed him quite serious in his hallucinations; and upon whose minds his conduct produced the belief that he was insane. I do not go upon their opinions, but upon the facts they dispose to; though they added, as was to be expected, their own opinions of his insanity. One witness for the defendant, indeed, a Mr. *Reavely*, fancies that all this extraordinary conduct and

language was merely assumed, and that he was in fact sane. I see no ground for this theory. Some other witnesses were called for the defendant, but they do not at all shake in my mind the evidence of insanity deposed to by the plaintiff's witnesses: some of them had seen comparatively little of the deceased: and all of them, I think, take a mistaken view of the subject; they include that the doing of a rational act is proof of soundness of mind, even though the doing of irrational acts be proved. But as was said by Lord *Langdale* in *Steed* v. *Calley*: "Apparent sanity on some or many occasions is no proof that the mind may not be insane; * * * * an insane man may, and often does conduct himself rationally, both in society and in the transaction of business, so long as nothing occurs to call up or suggest the delusive notions which constitute or indicate insanity;" and Mr. *Smith*, the subject of the enquiry in that case, was a strong example of the justice of his Lordship's remark; and various instances are mentioned in the books. One of these witnesses, *Jeremiah Misener*, does, without intending it, exactly describe an insane man—he says that *Young* would talk rationally for hours, till something occurred to draw him off.

This unsoundness of mind commenced a number of years ago, after a serious illness, and is brought down to the time of his death. There was, I should say from the evidence, no restoration to reason. The rule is clear that after insanity proved, the burthen of proving the recovery from it rests on those who allege it.—*Dyce Sombre's* case. The defendants' evidence fails in this. On the contrary the plaintiff's evidence proves continued insanity past the date of the execution of the deeds in question. Whether there was a lucid interval at that time I will speak of presently. The evidence was taken in March, 1863. One of the occasions on which *Young* expressed his disbelief in the death of a member of his family is stated by a witness at three or four years before. His delusion as to controlling the elements is brought



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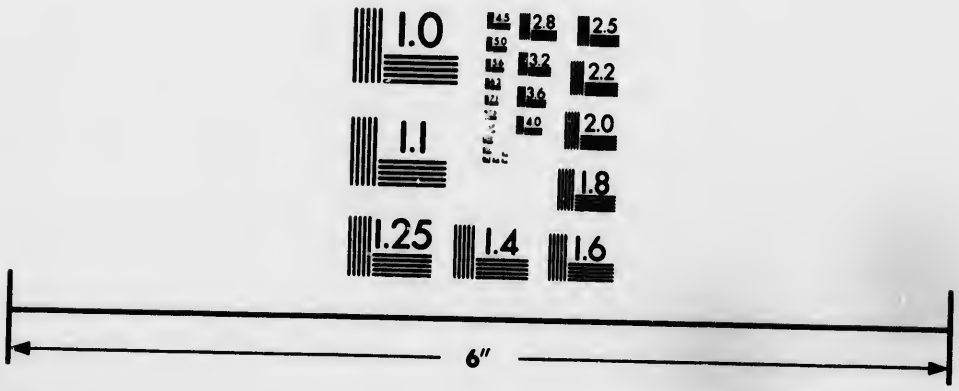

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down by one witness to within a year of his death. The weather being the fault of his neighbours was a delusion which he manifested a few days after the deeds were executed. One instance is mentioned, when he was met on his way to Chippewa to get, as he said, Mr. *Cummings* to change the weather; this was about five years before the examination, which would be a few months before the execution of the deeds. The talk of shooting at the steamer is placed at two or three years before his death. *Reavely* states that he continued much the same to his death; and *Joseph Misener*, another witness called by the defendants, describes his mind as growing weaker as he grew older, and wandering upon various subjects.

It must be very difficult, in the face of this evidence, to establish that *Young* was of sound mind in August, 1858, when the deeds were executed. I have no doubt that Mr. *Deverado*, the gentleman who attended professionally when they were executed, thought that he was so. He had heard it reported that he was of unsound mind, and had some conversation with him to ascertain whether such was the case; but he had heard little or nothing in respect of the particular delusions under which he laboured, and consequently was not capable of really testing the soundness of his mind; he conversed about hunting and fishing, and of persons and scenes connected with them of some twenty-five or thirty years before; *Young* himself commencing the conversation, and talking rationally, and appearing to have a good memory. In the course of conversation he observed that it was time that the business was settled, that it had been hanging on for a long time, and he directed an old deed to be got out. Mr. *Deverado's* previous acquaintance with *Young* had been slight; he had seen him before his illness, when he seemed right in his mind; after his illness he thought him peculiar, and that he seemed dull; he had never known him to be obscene or profane; in truth he had been so to a degree perfectly shocking, according to all the witnesses who knew most of him;

he had seen him only two or three times between his illness, some fifteen or twenty years before, and the execution of the deeds; he had last seen him five years or more before.

It will thus be seen that Mr. *Deverado* was far less competent than many others to form a correct judgment as to his mental condition; and, moreover, that he did not take the correct course to form such judgment; he said nothing that was calculated to test him.

In the leading case of the *Attorney-General* v. *Parnther*, Lord *Thurlow* referred to *Coghlan* v. *Coghlan*, where he said: "the judges seem to have thought that there was a clear interval, and this was proved by persons in the habit of watching the patient; such persons can best prove whether the derangement had entirely ceased, or whether there was a perfect interval. By a perfect interval I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit." I refer also to the quotations from the same case of the *Attorney-General* v. *Parnther*, which is to be found in *Nevills* v. *Nevills* (*a*) in this court.

In *Waring* v. *Waring* Lord *Brougham* quotes, with approbation from Dr. *Willis*' treatise on mental derangement, that men often mistake for a lucid interval the mere absence of the subject of delusion from the mind; he says that no madman can be said to have recovered his reason unless he freely and voluntarily confesses his delusion.

In *Dyce Sombre's* case Dr. *Lushington*, who delivered the judgment of the court, in commenting upon the evidence of Mr. *Desborough*, who was present profes-

(*a*) Ante vol. vi., p. 121.

sionally at the execution of *Dyce Sombre's* will, observes, "In estimating the weight to be given to this opinion, we must bear in mind that the deceased was an utter stranger to *Desborough* till that interview; that *Desborough* was most imperfectly acquainted with all the circumstances which had previously occurred with respect to *Dyce Sombre*; that *Desborough* made no attempt either to prove the mind of the deceased, or to ascertain whether he was free from past delusions." All this is opposite to what was done, or rather left undone by Mr. *Deverado*. I may observe here that Mr. *Deverado* did not do all that under the circumstances should have been done, supposing, as he did, that *Young* was not insane. He did not explain to him the object of his visit, and though he read the papers to him, he did not explain the effect of them, or ask if he understood them; the reason he gives is, that he thought that the object of his visit and the effect of the papers had been explained to *Young* before. He had not received his instructions from *Young* himself, but from one of his sons, so that test of soundness of mind was wanting. In *Dyce Sombre's* case the giving of instructions (in that case for a will) is spoken of by Dr. *Lushington* as "often, we might say generally, the most important part of the transaction, for frequently the execution is little more than a matter of form. It is therefore necessary to scrutinize closely the evidence applicable to the instructions—we mean the evidence applying to the state of mind of the deceased when he gave such instructions."

It will thus be seen that very little weight indeed can be attached to the evidence of *Deverado* in support of the soundness of mind of the deceased. What he says is doubtless true, but it really proves nothing that is material in this case.

In addition to the evidence to which I have referred, we have the testimony of *Philip* and *Walter* themselves, that their father was of unsound mind. He was returned

to the assessor as insane by *Philip* in 1855 or 1856, and *John Shafer* deposes that about a year before his examination he was present at a conversation about taking care of lunatics; that *Walter Young* was present, and said he knew what it was, for he had been almost worn out with taking care of such a person: it is not suggested that he could have alluded to any other person than his father.

With all this evidence before me, I can come to no other conclusion than that *Adam Young* was of unsound mind when he executed the conveyances which are impeached in this suit.

It is objected that the plaintiff cannot succeed in any event, because it is proved by the evidence of Mr, *Cummings* that *Young* executed a will many years ago before his illness. I do not think this objection ought to prevail. It is true that plaintiff comes as heiress-at-law, and has no *locus standi* unless she be so; but the defendants only question by their answer whether she is heiress of *Nicholas*, her father, and put her to the proof of it; they do not set up that, if heiress, she is not properly plaintiff by reason of there being a will, or otherwise. The only issue they raise are the fact of heirship and the sanity of the deceased, both of which are, in my judgment, proved against them. Besides, the will itself is not proved, nothing is proved beyond the facts of the execution; of a will, which fact came out casually from one of the plaintiff's witnesses, being of course no part of her case, and was not proved regularly. No proper secondary evidence was given of its contents; and its contents, as proved, do not necessarily affect the plaintiff, for it is not proved to dispose of the real estate in question, or of any real estate. I may add, that I greatly doubt the existence of such will, for, if in existence, it would almost certainly be in the possession of one of the defendants who contest this suit, and would have been set up in the answer.

It is asked that if relief be granted it be only upon the terms of repaying to *Philip* and *Walter* respectively what they paid as consideration for this land. The evidence of payment is not very satisfactory, that of *Philip* for *Walter*, and *Walter* for *Philip*: that the amounts of money passed, which were spoken of by them, is probably true, but whether they were the proper moneys of either is doubtful. They had each farmed a portion of their father's land, and these moneys, I am led to believe from the evidence, were in great part, if not wholly, the profits of this farming; and if so, they were only paying a man for his land with the profits of it, which belonged to himself; that is paying for his land with his own moneys. But if I am right in my judgment, the obtaining of these conveyances was a fraudulent transaction, and I do not think the plaintiff can be debarred from relief, except at the price of repaying moneys paid under such circumstances. There is another reason against this; that the money went to the personal estate of the deceased, and if repaid at all, and I doubt if it should, it ought to be repaid out of that.

The decree will be to set aside the conveyances in question with costs, to be paid by *Walter*, *Philip*, and *Margaret Young*. The plaintiff alleges in her bill a family arrangement for the division of the property, which is denied and not proved. So far as the costs are increased by such allegation they should be deducted.

With regard to the rents and profits since the death of *Adam Young;* nothing was said about them at the hearing. What occurs to me is, that the plaintiff and *Walter* and *Philip*, and the issue of the deceased daughter, are tenants in common; that the possession of *Walter* and *Philip*, claiming under these conveyances, was an ouster of the other tenants in common; and that they are bound to account for the proportion of the two-thirds remaining, after deducting the widow's dower, to which the plaintiff and the children of the deceased daughter are entitled.

SOUTER v. BURNHAM.

Mortgagor and Mortgagee—Redemption—Costs.

Although the general rule is, that in a suit to redeem, if a balance is found due to the defendant, he will be ordered to receive his costs, still, where on a settlement of certain land transactions between vendor and purchaser, the former, together with his solicitor, made up a ststement shewing a balance due to him of £417. for which the vendor, who was old and illiterate, executed a mortgage on his estate, but in taking the accounts in the master's office it was shewn that at the time of taking the security only £26 7s. 4d. was due; the court, upon a bill filed by the mortgagor against the executors of the mortgagee, impeaching the whole transaction for fraud, ordered his estate to pay all the costs of the litigation.

Statement.—The bill in this case had been filed by *William Souter* against *Mark Burnham* and others, executors, legatees, and devisees of *Zaccheus Burnham*, deceased, setting forth that in 1842 plaintiff had purchased certain lands from the testator, upon which he executed a mortgage for the unpaid purchase money, payable in 1847, upon which the plaintiff had paid several sums of money; that in September, 1853, plaintiff again effected a purchase of certain other lands from the testator, when his solicitor made up the amount due on the aforesaid mortgage, and after deducting therefrom, as plaintiff supposed, the sums paid on account, and adding to the balance the amount of such second purchase, made the amount due on the 5th of the said month £417, for securing which, plaintiff executed to testator a mortgage on certain lands set forth in the bill, payable in four years, with interest annually.

The bill alleged that the plaintiff at that *time was, and still is*, very old, illiterate, and unused to business and trusted to the accuracy of the solicitor, and supposed he had made up the amount due correctly; and plaintiff executed this mortgage, without inquiring as to the amount thereof, fully believing the same to be correct; that in January, 1859, the defendants, the executors, instituted proceedings against plaintiff at law upon the covenant in the mortgage, when, being alarmed and surprised at the sum claimed to be due thereon,

plaintiff caused the accounts to be investigated, when it was discovered that the solicitor had, in making up the amount, committed an egregious blunder and mistake, as in point of fact plaintiff had then paid sufficient to discharge the first mortgage, and pay the price of the second purchase effected by him; that defendants recovered judgment in the action by default, plaintiff, by advice of counsel, refraining from making any defence.

The prayer was for relief in accordance with these statements.

The executors answered the bill, stating their ignorance of the transactions between the plaintiff and testator, and insisting on their right to enforce payment of the judgment recovered by them in the action.

At the hearing a decree was made, referring it to the master at Cobourg, to enquire and report what, if anything, was due by plaintiff to the testator; and what was the state of the account between the parties at the date of the execution of the mortgage. In pursuance of this decree the master, by his report, dated in June last, found that at the date mentioned plaintiff was indebted to the testator in £25 7s. 4d.

At the hearing on further directions,

Mr. *S. Blake*, for the plaintiff, asked that the decree to be now made should direct defendants to pay the costs of the suit, their testator having, by his gross neglect, been the sole cause of the litigation.

Mr. *Crickmore*, for the defendants. The invariable rule is, that a mortgagee, when a balance is found due to him, receives his costs; citing *Alexander* v. *Sims*, (*a*) *Sentance* v. *Porter*, (*b*) and in *Long* v. *Glen*, (*c*) though a strong case against the mortgagee, the court only refused him his costs.

(*a*) 20 Beav. 123. (*b*) 7 Hare, 426.
(*c*) Ante vol. v., p. 208.

Mr. *S. Blake*, in reply, referred to *Cornwall* v. *Brown*, (*a*) to shew that the rule was not such as contended for by the defendants. Had the mortgage been taken for the proper amount due; no one can doubt that it would have been paid without suit. Under the circumstances appearing, he submitted, the proper decree to make was to give the plaintiff the costs.

Judgment.—SPRAGGE, V.C.—At the hearing I hesitated between giving costs against the estate of the mortgagee, and giving costs to neither party. Upon reflection, I think I shall not be going too far in giving costs against the mortgagee's estate.

Not only was his conduct as a mortgagee not reasonable, but it was unreasonable and oppressive in the matter of the taking of the mortgage. He claimed upon previous dealings between himself and the plaintiff, of which he ought to have kept a correct account, a large sum, £417. It was not a case where, upon large dealings between parties, they settled upon a sum as due from one to the other, and to secure which a mortgage was given by the debtor; such a settlement would almost certainly not be opened by the court but here accounts were presented by the mortgagee, setting forth the large sum I have named as due to him by the plantiff, and the plaintiff, upon the faith of that sum being due, gave the mortgage.

By the decree the amount due upon the mortgage is expressly re-opened, and the result is, that instead of the large sum claimed, only £26 7s. 4d. is found due. The defendants sued at law upon the covenant in the mortgage, and recovered the whole face of the mortgage, and by their answer in this suit insist upon the whole amount being due. They are not to blame for that, as they were not cognizant of the original transaction.

It is true that the plaintiff claims by his bill that

(*a*) Ante vol. iii., p. 633.

nothing was due, and was so far wrong; but still I must come to the conclusion that it was the fault of the testator, before as well as after he became mortgagee, that has occasioned the litigation, for if he had kept a correct account, instead of the grossly inaccurate one, upon the faith of which the mortgage was given, there would, I am justified in inferring, either have been no mortgage at all, or if a mortgage had been given, that no litigation would have arisen upon it. It is not a reasonable inference that because a man, after being misled by inaccurate accounts, and finding them grossly inaccurate, disputes them *in toto*, and claims that nothing was due, would make the like claim if a correct account, shewing the small sum really due, had been presented to him. I certainly cannot make such an inference in favor of the mortgagee.

I should necessarily charge his estate with the costs of taking the account, as was done in *Detellin* v. *Gale*, (*a*) and as I think the whole suit was occasioned by his conduct, judging of it from the light thrown upon it by the master's report, I think I ought to give the whole costs of the suit against his estate. In doing so I do not contravene the case of *Long* v. *Glenn* in this court, as although no costs were given to either party in a strong case against the mortgagee, it was because the bill was a common bill to redeem, and the reference was not of a nature to justify any inquiry bearing on the subject of costs in the master's office, and it was said, "had the question of costs been included in the reference to the master in this case, it is quite possible that the plaintiff might have been entitled to receive his costs." In this case the frame of the bill opened the whole question, and having, as I have reason to believe, the whole merits of the case before me, I can properly dispose of the question of costs, and I think I shall do no injustice in ordering that the whole costs of the suit be borne by the estate of the mortgagee. The plaintiff's

(*a*) 7 Ves. 583.

costs may, of course, be set off against the small balance found against him. If there be a balance found against the estate, and if the executors do not admit assets, there must be an iniquiry upon that point.

The Edinburgh Life Assurance Company v. The Municipality of the Town of Saint Catharines.

Injunction—Misapplication of rates.

By an act of the provincial legislature the town of St. Catharines was authorised to issue debentures to the amount of £45,248; for the liquidation of which a special rate was directed to be levied, the proceeds of which where directed to be invested and form a sinking fund for this purpose: by the same act the town was prohibited from passing any by-law to create any new debt extending beyond the year in which such by-law was passed, except for the construction of water works, until the debt was reduced to £25,000. The special rate authorised to be imposed had been duly levied and collected, but instead of investing the same to form a sinking fund for the payment off of the debentures, it was alleged, it had been applied to the general purposes of the town, and the debt had not been reduced. The defendants denied the misapplication of the fund, but did not show how it had been applied; and with a view of inducing the county council to remove the county town of Lincoln from Niagara to St. Catharines, the town council of St. Catharines, without any by-law authorising the same, contracted with certain builders to erect a gaol and court house for the use of the county, at an outlay of £3,000, to be completed in two years. Upon an application, made at the instance of certain of the holders of the debentures issued under the before mentioned act, the court restrained the town of St. Catharines from suffering or permitting the buildings to be proceeded with. On an appeal to the full court, the injunction was dissolved, it appearing that the contract which had been entered into between the corporation and the contractor had been cancelled, and that no liability had been incurred by the corporation extending beyond the year: but if it had been shewn that any act of the corporation would have had the effect of incurring a liability, payable in a future year, the injunction would have been retained to the hearing. On production of the contract in court, it appeared that the rescission referred to had been effected by cancelling the signatures to the document, which being objected to as not *legally* discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made.—Vankoughnet, C. *dubitante* as to any necessity therefor.]

The defendant in this case were, by the provisions of an act passed in the reign of her present Majesty, (*a*) empowered to consolidate the debt of the town, and to issue debentures therefor to an amount not exceed-

(*a*) 20th Victoria, chapter 90.

ing £45,248, which they did, and the debentures were taken up by various persons. By the 5th section of the act the defendants were directed to levy a special rate to form a sinking fund to pay off these debentures, and to invest the same in certain securities, by the act provided for. By the 10th section of the act the defendants were prohibited from passing any by-law to create any new debt to extend beyond the year in which such by-law was passed, except for the construction of water works, till they should have reduced the debt to £25,000.

The plaintiffs, in the month of May, 1864, filed their bill on behalf of all holders of debentures of the defendants under said act, setting forth that they were the holders of two thousand pounds of the debentures; that the rate for the sinking fund had been duly levied and collected each year; but charged that the same had not been legally invested, but had been used for the general purposes of the town, and in endeavours to have the town of St. Catharines selected as the new county town of the county of Lincoln; that the defendants passed a resolution and made an agreement with the county of Lincoln to provide them with the free use of a suitable court house and public offices, in case St. Catharines should be selected as the new county town; that immediately after such resolution and agreement the defendants contracted with persons unknown to the plaintiffs, for the erection of a court house and public offices for the county of Lincoln, in the town of St. Catharines, for the sum of £3,000; that various alterations had been made by the defendants to the said buildings since the contract; that no by-law had been passed to authorise the contract, though the same was not to be completed in one year; that the debt under the aforesaid act had not been reduced to £25,000; and the defendants, in making such contract, were acting in violation of the statute.

The bill further alleged, that on becoming aware of

these facts, in May, 1864, the plaintiffs through their solicitor, addressed a letter to *William Eccles*, mayor of the town of St. Catharines, asking for information regarding the sinking fund for the payment of the said debentures, and also with respect to the contract for the said buildings, and informing him that unless such information was given a bill would be filed; that on the 21st of the same month of May, the mayor of St. Catharines answered such letter, merely stating that the sinking fund alluded to had been duly levied, and regularly invested, and that with regard to the court house, there was an agreement; but that he was not aware of any violation of the act referred to.

The prayer of the bill was for a discovery, and that the defendants might be restrained from proceeding with said court house, and from levying any money for payment thereof.

The defendants answered, denying generally the charges made in the bill, and stated that the money levied for the sinking fund had been properly invested, without saying in what securities, and that the contract for the building of the court house was not in violation of the statute.

That no by-law had been passed in respect of the said building; and no debt created, payable in a future year, or which the defendants were bound to pay in a future year.

That they had, however, cancelled the agreement since the filing of the bill, and that there was none then in existence, and that they did not intend to make any further conlract; that they had not evaded and did not intend to evade the said act.

That the court house has been a long time building, and that it would be a great injury to stay the completion thereof.

Upon the coming in of the answer a motion was made, before his Honor Vice-Chancellor *Esten*, for an injunction to restrain the defendants from proceeding with the erection of the buildings complained of.

Mr. *Hillyard Cameron*, Q. C., for the plaintiffs.

Mr. *T. W. Taylor*, contra.

Judgment.—ESTEN, V. C.—The provisions of the act of parliament, that no new debt should be incurred extending beyond a year, until the existing debt should be reduced to £25,000, must have been introduced for the protection of the holders of debentures. It formed part of their security. The debentures were received on the faith of it, and it ought to be enforced by the court for their benefit.

The facts of the case are plain. A contract was made on the 29th October, 1863, and a sum, as I understand, of about $3,400 levied and paid to the contractor, who must have expended it in the collection of materials and otherwise, in the way of preparation for the erection of the building, which was not actually commenced till the month of April or May in the present year. The corporation, who appear to have thought, that by forbearing to pass a by-law, they had kept within the letter of the law, must have been advised that the contract was otherwise objectionable, and accordingly it was rescinded and cancelled on the 29th June last, and it is said that no contract at present exists, and no liability on the part of the corporation, and no right or claim on the part of Mr. *Dolsen*. He has no doubt been paid for all that was done, and if he should do any more, and the corporation choose to pay him for it, well and good; if they do not, he cannot make them: this I apprehend to be the state of things. As Mr. *Eccles* observes, the act of the council of 1863 does not commit the council of 1864 to anything; but the council of 1864, 1865,

1866, and 1867 will pay Mr. *Dolsen* what may become due to him according to the terms of the contract, as modified from time to time by mutual agreement. Mr. *Dolsen* does not doubt, nor does any one else, and accordingly the erection of the building is proceeding with great rapidity. Time was asked by the defendants upon the original application to furnish affidavits, and it was granted on the usual undertaking, that nothing should be done in the meantime. On the matter being mentioned again, an affidavit was produced by Mr. *Camp*, who could find, however, nothing better to say than ha been already said in the answer; and during the interval increased force had been put on the building by Mr. *Dolsen*, in contravention of the spirit of the undertaking, if not of the letter. I think that the proceedings of the defendants are in evasion of the act of parliament, and illegal, and that it is the duty of the court to restrain them. It appears, from the affidavits that have been produced, that the agents of the plaintiffs in this country had no idea of these proceedings until shortly or immediately before the date of the letter of Mr. *Cameron* to Mr. *Eccles*, mentioned in the bill. This appears to me to be a proper case for representation. The suit must be beneficial to all the bondholders; no difference of opinion can exist, and if it could, it would be a sufficient answer that the act complained of is illegal.

I propose to grant an injunction restraining the defendants from levying any rate, or receiving any money from any ratepayer for the purpose of paying any thing to Mr. *Dolsen*, or otherwise, for the erection of the building, and from permitting the building to be erected or proceeded with until further order.

Thereupon the defendants set down the case to be argued before the full court at the last re-hearing term, by way of appeal from this decision.

Mr. *Hillyard Cameron*, Q. C., for the plaintiffs,

contended that what had been done in this case was a clear evasion of the general act of the province respecting municipal institutions, (Con. Stat. U. C., ch. 54) by which it is enacted (sec. 224, page 575) that "every by-law for raising upon the credit of the municipality any money not required for its ordinary expenditure and not payable within the same financial year, shall, before the final passing thereof, receive the assent of the electors of the municipality in the manner provided for in the 193rd section of this act," as well as of the act authorising the issue of debentures held by the plaintiffs. True, it is said the contract has been rescinded, and that the builder is proceeding with the works without any contract for them; but this can make no difference as to the liability of the municipality who will, no doubt, accept the buildings when completed, and apply them to the uses for which they were originally designed. *Pym* v. *Ontario*, (*a*) shews that under such circumstances the builder would be entitled to execution, the effect of which might be to deprive the holders of the debentures of the power of enforcing payment of their claims. No one can doubt that if such a course of dealing is permitted, the security which the legislature intended should exist for the holders of debentures would be materially weakened.

Mr. *Blake*, contra. The act (ch. 54) was intended for the protection of the rate-payers, and the plaintiffs, as holders of the debentures, are not entitled to assert that the action of the council is illegal; or to question the *bonâ fides* of their conduct in the transaction. By the act, the corporation are empowered to levy a rate for any purpose within the financial year, and if the contract now complained of is contrary to the provisions of the statute the contractor cannot recover. *Pym* v. *Ontario* does not warrant such a construction as here contended for; all he could obtain would be payment up to the time he is discharged.

In this case there is no agreement for payment beyond

(*a*) 9 U. C. C. P. 304.

the year, and the plaintiffs, applying for an injunction, after answer setting up an abandonment and rescission of the contract, should have shewn that *Dolsen* was doing work for which no rate had been levied. He contended that there was not any evasion of the act of parliament in what had been done, the only object of the act being that no permanent debt should be incurred; and here it is not shewn that the rates struck for the present year were not sufficient to discharge any demand that *Dolsen* could have against the corporation in any one year. Suppose the corporation, deeming it for the advantage of the town that a general system of macadamizing the streets should be carried out, the whole expenditure on which would necessarily much exceed the rates for any one year, but the council, with a view of keeping within the amount raised, contracted for a portion of the work to be performed each year, for the payment of which sufficient was raised by special rate in the year, no one would argue that the corporation were not competent to do so, and were not acting clearly within the provisions of the act. So here, for all that appears, the council, finding that the contract they had made was open to objection on this ground, may have agreed with their builder to execute only such portions of the public buildings this year as the rates already levied would suffice to pay for. The plaintiffs are interested only in having the special rate for the liquidation of their claim raised; but the town may raise any additional sums they please, provided no permanent debt is contracted; and here it is not shewn that the council are contracting any debt that can be enforced against them.

Mr. *Hillyard Cameron*, Q.C., in reply. The cancellation which has taken place is not such as would relieve the defendants from liability under the contract: the instrument is under seal, and the only rescission of it has been by striking out the signatures to it. This would not prevent an action being maintained upon it. Without questioning the power of the corporation to enter into contracts under the general law, they clearly

had no right to do so in contravention of the act under which these debentures were issued.

VANKOUGHNET, C.—I think that so long as the corporation does not make itself liable for any rate to be paid in a future year, that it does not contravene the statute, which, in my opinion, merely intended to prevent the corporation pledging the rates of future years. If the corporation chooses to levy within any one year a sum of money for or towards the completion of any work, I see nothing which justifies these plaintiffs in complaining of it. As to the cancellation of the contract, I doubt if there is a necessity for any more formal rescission of it; but in order to aviod any question hereafter, it may as well be done as suggested by my brother *Sprägge*, in his judgment, which I have read.

Judgment.—SPRAGGE, V.C.—The tenth section of the act for consolidating the debt of the town of St. Catharines is manifestly framed for protecting the interests of the holders of the debentures issued under its authority, and to give the debentures a better market value. If, therefore, the acts of the corporation complained of impair the security, or are calculated to impair it, the holders of the debentures have an equity to restrain those acts. A contract has been entered into, upon which it is contended a legal liability would arise. That contract it is said has been rescinded, and it is urged that even if not rescinded, no legal liability would arise upon it. I think this ought not to be left in doubt. If it is a doubtful question, to be decided hereafter, whether a legal liability would or would not arise, I think the carrying out of the contract should be restrained: and as to the alleged cancellation, it does not appear to be so cancelled, as to be an answer at law to an action upon it. But supposing this done, and if there be no other difficulty it might yet be done, and the action of the court be provisional upon its being done, the contract may be put out of the case. The contract appears to have been an improper one; there was no by-law to warrant it, and the reason for

there being no by-law would seem to be that such a by-law would be in contravention of section ten.

Then what is forbidden by section ten? Until the happening of an event which has not yet happened, the corporation is forbidden to pass any by-law creating a new debt to extend beyond the year in which the by-law is passed (with an exception which is not material to this question.)

Supposing there is no contract, and no debt contracted payable beyond the current year, is the tenth section contravened? Not in terms certainly; but if it is contravened in spirit, and if the acts done are a mere evasion of the statute, the court may properly interfere, but then the securities held by the plaintiffs must be thereby impaired, and impaired in such a manner as the statute provides against.

Suppose the corporation were to pass a by-law for the expenditure of a large sum, but which still was to be met within the current year, it might involve very heavy taxation; it might be very improvident, but still I apprehend it would not be an act which the debenture holders would have any right to complain of in this court.

The matter now seems to stand substantially thus: a building intended for a county court house is in course of construction which, from the terms of the contract, is not to be finished during the current year, and so far as we see, is not to be finished any earlier if the contract is cancelled than if finished under the contract, and unless paid for in advance, will not be paid for during the current year, and so if this which is being done were done under the authority of a by-law, it would be illegal. This, I think, is putting the case as strongly for the plaintiffs as it can properly be put, and, it must be admitted, is coming very close to a contravention of the statute. But still, as it stands, is there any thing the

plaintiffs have to complain of as affecting their securities? Is there any debt created, any liability incurred, not payable within the year? If there be, either directly or indirectly, the plaintiffs have ground of complaint, but I cannot see that there is; the corporation, no doubt, contemplates that the building will be neither completed nor paid for during the current year, and they look to future assessments in a future year or years to complete the building. Suppose a building were contemplated with a centre and wings, and it was the avowed design of the corporation to build the centre one year, and one of the wings in each of the following years, providing for the expense of each year by year, I do not see that the fact of the whole not being to be completed in the current year would make it in contravention of the act: or suppose the design to be to put up the shell of a building one year, and to complete it the next, paying each year for what should be done in the year, I do not see that the provision of the act would be infringed; there would not, in either case, be a debt contracted payable in future years; there would indeed be an inducement or reason for future expenditure, which might operate upon the town council of future years to levy and expend moneys which otherwise they might abstain from doing, but still the same restriction would exist year by year, no debt would be contracted, not payable within the year; the revenue for coming years would not be forestalled, and so the debenture-holders would still have the protection which, as I judge from the terms of the act, the Legislature contemplated they should have.

Mr. *Cameron* invokes not only the act under which these debentures are issued, but the general municipal act. I incline to think Mr. *Cameron's* construction of section 224 correct and that any appropriation of moneys for other than ordinary purposes, whether payable within the year or not, and any appropriation for any purpose not payable within the year, requires the express sanction of the rate-payers. I am led to this conclusion

from the exception in regard to county councils. But suppose this construction correct, that provision of the statute was passed to give the rate-payers a check upon the improvidence of the councils; it was not to protect debenture-holders, and could not be, for nothing they could do would prevent the appropriation of the moneys, provided the council and the rate-payers willed it. They have nothing to say to it one way or the other.

I think, therefore, that upon the due and effectual cancellation of the contract the injunction should be dissolved. In case the parties differ upon the point of cancellation, the question can be disposed of in Chambers.

I desire to add, that if any act should be done by the corporation which will have the effect of incurring a liability payable in a future year, it will, in my opinion, be proper for the court to interpose.

It is only because I think that at present there is no act of the corporation that has that effect that I am of opinion the injunction should be dissolved.

In re McSherry.

Lunacy—Rights of purchaser under lunatic without notice of his state of mind.

The father *P.* and *J* died during the infancy of *J.*, leaving to them by his will 100 acres of land.

After they attained majority, this land was, by deed, equally partitioned between them. *J.* was a person of weak intellect, without knowledge of land or money, and unable to read or write.

P. afterwards obtained from *J.* a conveyance of his 50 acres, and executed a bond in his favour, charging these 50 acres with the payment of £50 per annum during *J.*'s life. *P.* then mortaged the 100 acres, and obtained from *J.* a release of the annuity bond which was executed in presence of the solicitor of the mortgagees without any good consideration therefor; on a petition filed to have *J.*'s lunacy declared, the evidence was taken in presence of the parties so interested in the land. *J.* was declared a lunatic, but as no sufficient evidence was produced to prove notice to the mortgagees or their solicitor of his imbecility when the mortgage was executed, this declaration was made without prejudice to the mortgage, but allowing the committee of the lunatic to impeach it by bill if so advised.

Statement.—This was a petition in the matter of *James McSherry*, of the township of Toronto, in the county of Peel, labourer, and in the matter of 9th Victoria, chapter 10, and 12th Victoria, chapter 56," and was filed by *Jacob Cook*, *Thomas King*, *David Messenger*, and *Joseph Wright*, of the township of Toronto, justices of the peace, and set forth that the father of the said *James McSherrg*, and of his brother, *Peter McSherry*, died, during their infancy, leaving them by his will the southerly half of lot No. 20, in the first concession north of Dundas Street, as tenants in common.

From the evidence of *Jacob Cook*, who was an executor of this will, and other evidence adduced, it appeared that *Peter* was the elder brother, that *James* had, from his childhood been deficient in intellect; he was sent to school, and special pains were taken to teach him, but he proved incapable of learning to read, or make other mental improvement. His mother also took great pains in endeavouring to instruct him, and these efforts were made till he was twelve or fourteen years of age. He then engaged sometimes in manual labor, generally on farms, sometimes working for his brother. He some-

times came to Mr. *Cook*, and complained of harsh usage from his brother, and that he refused to pay him for his labour. His memory was very defective, and he was incapable of naming the days of the month or week in succession. On the 16th of February, 1853, shortly after *James* became of age, *Peter* had a deed of partition prepared and executed, by which the 100 acres were equally and apparently fairly divided between them; *James* retaining the east half.

In February, 1854, *Peter* procured from *James* a conveyance of the east half, executing as the consideration therefor a bond securing £10 per annum during *James'* life. The bond deed of partition, and will were registered. In February, 1863, *Peter McSherry* applied to Messrs. *John* and *Gilbert Elliott* for a loan of £500 on his land. Their solicitor, upon investigating the title, discovered the bond to *James*, which he required to be released. A conveyance and release having been prepared, *Peter* brought his brother to the solicitor's office to execute them. The solicitor explained the documents to *James*, who, as he stated in evidence, seemed fully to understand their meaning, assented to and executed the release, and received instead of the bond, a fresh security for the sum of £10 per annum as a second charge on the premises, that of the *Elliott's* being the first. The solicitor giving his evidence as to the transactions in his office, said, "I observed nothing which would induce any one to believe that *James* was incompetent to understand what he was doing. * * * I had no reason to suspect it; there was nothing in his appearance or manner to indicate anything of the kind; he seemed an ignorant man, and for that reason I took pains to explain matters to him. * * * There was no debating with *James* as to what he was required to do; I explained to him what was required of him, and he assented. I cannot say I heard *James* make any observations beyond his answers to me. I had no suspicion of his being mentally deficient, and my attention was not, therefore, called to him particularly. Nothing occ d to arouse my suspicions. I noticed his hesitancy of

speech, but this did not strike me as any evidence of weakness of mind. * * * * I supposed the bargain had been made between him and his brother, and I thought it nothing extraordinary that one brother should consent to a postponement of a charge in his favor."

The *Elliotts'* mortgage having become due, a foreclosure suit was instituted against *Peter McSherry*, and a decree having been obtained, *James* was made a party in the master's office, and served with the usual process but failing to appear he was foreclosed of his interest in the premises. Before however, the final order was pronounced, the petition in this matter was presented, praying that *James McSherry* might be declared a lunatic, and that a committee of his person and estate might be appointed. His lordship the Chancellor directed the petition to be served on the solicitor of the *Elliotts* and on *Peter McSherry*.

On the return of the fiat *Peter McSherry* appeared in person, and the *Elliotts* by Messrs. *Gwynne* and *Hoskins*, their solicitors. At the request of parties his lordship consented to take the evidence *vvia voce*, and hear the case himself; and at their request the *Elliotts* were allowed to cross-examine the petitioners' witnesses, and to adduce evidence in their behalf, they agreeing to be bound by the decision in the matter, so far as it affected their mortgage.

Besides the evidence above referred to, that of medical gentlemen, and many others, was produced: *Henry Crewe*, M.D., R.C.S.E., said he "had examined *James McSherry* for the purpose of ascertaining his capacity for business in the ordinary affairs of life. In all respects, social and moral, I found him mentally deficient; I ascertained this by various questions on almost every subject. I was very careful, in my examination of him, in putting questions to him in all the every day affairs of life. From this examination I can assert that he is one of those individuals who have been always exceedingly deficient in mental capabilities. He could not give any satisfactory answer to any question however

simple, and he then had very great hesitation in giving any answer at all. I do not think him capable of making a proposition, or of considering a proposition made to him in any matter of business. I do not think he possesses any power of judgment. I think that in ordinary transactions he would be guided more by instinct than by any process of ratiocination. I do not think he has any great idea of his responsibility; nor do I consider him capable of forming any conception of a Superior Being, or of a future state. His knowledge of numerals is very circumscribed indeed. I have questioned him several times to ascertain this; he would begin to count, then stop and drop the enumeration, and begin again, not continuing from the number at which he had left off. I never could get him up higher than six or seven. I found that he could scarcely tell one printed letter from another; of writing he did not know one tittle. He does not understand the difference in value between the smallest and the largest pieces of coin. He would always, when tried, choose the coin largest in bulk, though inferior in value. He would choose an ordinary copper coin in preference to a small silver one. I tested his memory. He had a very vague idea of the loss of time. I tested his knowledge and memory of the days of the week respectively. He was unable to give them, and always in error when he attempted it. There is great imperfection in his powers of speech, arising from some defect in the organization of the brain. It is not a mere muscular defect. This imperfection of speech is a symptom of mental imbecility. It almost invariably accompanies a state of idiotcy. I have noticed him at times slavering at the mouth when questioned. This also denotes a deficiency in nervous power. His eye has that peculiar expression of idiotcy always noticeable when mental deficiency affects the optic nerves. I consider that this mental imbecility arises from mal-conformation of the brain. Judging from my various examinations of him, and I have had several, I should say that his present state of mental imbecility has existed from his birth."

Dr. *Dixie*, in his evidence, said, "I have known *James McSherry* for twenty-two years, and have always looked upon him as a person of weak intellect. This was patent to the whole neighborhood. He could not converse sensibly on ordinary topics. If you met him

on a rainy day and accosted him, he would remark 'a fine day.' He could not count continuously; he could not read, or recognize the letters of the alphabet. I was so fully convinced of his imbecility that I did not examine him with any great particularity. This imbecility is well known in the neighborhood, and has been for years back. I do not attribute his present mental condition in any respect to intemperance. His state of mind seems the same as it was before he acquired the habit of drinking. He has no knowledge of the value of money. I would consider him entirely at the mercy of those with whom he dealt. This has always been his state so far as I could know or judge."

The other evidence adduced by the petitioners was of a similar character with that above stated; after which the evidence of their solicitor, as above stated, was given on behalf of the *Elliotts*.

Mr. *George Murray* (with whom was Mr. *J. McNab*), in support of the petition, cited *In re Earl of Portsmouth* (*a*). *Ingram* v. *Wyatt* (*b*), *Thompson* v. *Leach* (*c*), *In re Windham* (*d*), and *Shelford* on Lunacy, pages 357 and 361.

Mr. *J. W. Gwynne*, Q.C., for the *Elliotts*, contra, cited *Adams* on Equity, pages 290 and 654; *Ex parte Tomlinson* (*e*), *Re Whitaker* (*f*), *Jacobs* v. *Richards* (*g*), *Campbell* v. *Hooper* (*h*). *Greenslade* v. *Dure* (*i*), *Elliott* v. *Ince* (*j*), *Exp. Richards* (*k*), *Story's* Equity Juris., secs. 234-7.

VANKOUGHNET, C.—In this matter I have, to avoid the delay and expense of issuing a commission, heard the evidence touching the ability of *James McSherry* to manage his person and property. It seems that the father of *James* and his brother *Peter* left by his will

(*a*) 1 Hagg. 355. (*b*) 1 Hagg. 401.
(*c*) Carthew, 435.
(*d*) 8 Jurist, N. S. 448; 6 L. T. N. S. 479.
(*e*) 1 V. & B. 57. (*f*) 4 M. & S. 441.
(*g*) 18 Jur. 257. (*h*) 1 Jur. N. S. 670.
(*i*) 1 Jur. N. S. 294. (*j*) Jur. N. S. 597.
(*k*) 16 Jur. 508.

to these two sons a farm of 100 acres, to be equally divided between them. On the 16th of February, 1853, a deed of partition between the brothers was prepared in the office of Mr. *Ritter*, a solicitor of this city, and was executed by *James* and *Peter*, whereby the east-half of the lot was allotted to *James*. The division seems to have been fair. On the 17th of February, 1854, *Peter* procured from his brother *James* a deed of this east-half, under circumstances which, in my opinion, made the act of *Peter* fraudulent, and the deed as between him and *James* void. *Peter* subsequently executed mortgages on this property, the last one being to certain persons of the name of *Elliott*, who, in a suit upon their mortgage, have obtained a decree for the sale of the whole farm. They were served with the petition, as was also *Peter McSherry*, to enable them to attend the inquiry at their own expense, if they so desired. *Peter* attended in person, and the *Elliotts* by their counsel, Mr. *Gwynne*, to whose assistance I am much indebted, as through it nothing has been left undone which could throw light upon the very important enquiry on which the court has entered. I am of opinion, after hearing and carefully considering all the evidence, that *James McSherry* has from his birth been of unsound mind, and incapable of managing his affairs—not a lunatic in the technical sense of the term—but rather an idiot, and yet not so entirely devoid of understanding as to warrant me in declaring him such in the legal and technical sense.

I think his unsoundness of mind is what medical writers call connate, and is of the character described as fatuous. He was incapable of receiving instruction in letters of the simplest kind, of learning to read or write, or of counting. He has never had any knowledge of the value of money, and the most limited knowledge of coins. He has learned, from frequently hearing it, to know that there were such pieces of money as are commonly called quarters, sixpences, ten cents, five cents;

but he does not seem to have been able even to recognize them, or to know whether a ten cent piece was a quarter of a dollar or five cents. He knew that he required money to buy whiskey, or such articles as he wanted, but the price of the article, the amount to be paid for it, or the difference he was entitled to have back between the price of the article and the money tendered for it, he appears to have, and to have had, no knowledge of. I examined him myself, and found him utterly wanting in mental capacity; he could not remember his father or his mother's name, or when the latter died, or whether she was dead or not, though he was a man in years at the time of that event. In answer to my question, would he take $20 for his fifty acres, valued at £500, he said, "Yes." His whole conversation, as the witnesses describe it, consisted of monosyllables. He appeared incapable to originate any idea himself, or carry on a conversation.

The Consolidated Statutes of Upper Canada, chapter 12, in section 32, provides that the word lunatic is to include idiot or other person of unsound mind. I therefore pronounced and declared *James McSherry* a lunatic, and that he has been so from his birth; of course neither the transactions or dealings of *Peter McSherry*, nor of the *Elliotts*, can be impeached in this proceeding unless they consent to it, and to be bound by any order I may make in regard to them. As regards *Peter's* dealings with his brother, I have already expressed my opinion.

As to the *Elliotts*, I find nothing to impute to them any knowledge or notice of the incapacity of mind of *James* at the time they took the mortgage from *Peter*. On the contrary, their solicitor has been examined as a witness, and he swears that the loan by them to *Peter*, which the mortgage was given to secure, was negotiated in part through him; that he prepared the mortgage and certain releases, which it was necessary to have to

make a clear title; and that *James McSherry* was required to execute one of them to get rid of an annual charge created in his favour by his brother *Peter;* that *James* was brought to his office for the purpose, by his brother and one *James Cotton;* that he never suspected he had any mental infirmity; that he explained to him what was required of him, and that he assented to it; that he read over to him the document and explained it, and he seemed satisfied with it, and then executed it by putting his mark to it; that not having heard of anything wrong with him, Mr. *Gwynne* paid no particular attention to him, as he supposed he and his brother had arranged the matter beforehand. *James* no doubt said "yes," and assented, as Mr. *Gwynne* says, to all that he asked him to do, and yet all this while, I have not the slightest doubt, he was entirely ignorant of what he was doing, and utterly incapable of understanding it; and that his brother well knew this. His silence and the few monosyllables he used imposed on Mr. *Gywnne:* at all events did not, and were not likely to arouse in him any suspicion.

With this evidence in their favor, and no evidence to the contrary, it would be impossible to impute knowledge of *James'* mental incapacity, or unfairness, to the *Elliotts.* When this is the case, the law seems to be settled that the mortgagee is entitled to the benefit of his security. *Elliott* v. *Ince*, *Greenslade* v. *Dure*, *Campbell* v. *Hooper*.

As I have already said, this question will be more properly raised on an independent proceeding by a committee of the estate of the lunatic. The latter being quite harmless and able to labour, and being in some kinds of work skillful, I do not think it necessary to appoint a committee of his person at present at all events; but only a committee of the estate, and that because there may be a surplus after paying the *Elliotts'* claim.

The money realized on the sale should be paid into court, or the security given for it deposited here.

GOODERHAM v. ROUTLEDGE.

Riparian proprietor—Grant of easement—Merger of easement.

The owner of a mill property, with the right to use all the water of the stream on which the mill was situate, sold a portion of the land, and by a separate instrument bound himself to permit his vendee to use a certain quantity of the water for the purpose of driving machinery to be erected on such portion. The owner of the mill finding, when he came to work it, that the quantity of water which the vendee withdrew from the stream reduced it to such an extent as to impair the effective working of his mill, re-purchased the lot and easement, receiving a conveyance thereof, and giving back a mortgage to secure part of the purchase money, (these instruments, however, were never registered,) and afterwards, the purchase money having been in the meantime satisfied, procured his vendee to make a deed direct to *R.*, who had purchased the lot and easement, with notice, however, of all the facts. On a bill filed by a person who had obtained title to the mill and premises under a mortgage executed by the owner before the re-purchase of the lot and easement. *Held*, that neither the original owner nor *R.* were entitled to use the water, the easement having become extinguished on its re-purchase, and the whole water having passed to the mortgagee.

Statement.—The bill in this cause was filed by *William Gooderham*, the younger, against *William H. Routledge* and *John Church Hyde*, setting forth that on the 29th of September, 1854. *Hyde* executed to plaintiff a mortgage of thirty-three acres of land in the township of Toronto, commonly known as "The Ramsom Mill property;" and also another parcel of land adjoining the same, containing seven and one-fifth acres, describing the several parcel by metes and bounds, and "excepting thereout the one-fifth of an acre heretofore sold to *William Grayden*, also the one quarter of an acre sold to *Hiram Caslor*, * * * as marked on a plan of the property made by *John Embleton*, and more particularly described in the deeds to the said parties," together with all ways, waters, water-courses, easements, &c., following the form of words generally found in conveyances,—conditioned for the payment of all notes, bills, &c., held or to be held by the plaintiff or his co-partners or their representatives; under which mortgage *Hyde* became indebted to plaintiff in $10,000; when the parties, being unable to agree as to the amount of indebtedness, consented to submit the ascertainment of such

amount to arbitration; and the same was accordingly referred to arbitration, and an award made by the arbitrators in favor of plaintiff, and his then co-partner, for £6000; which amount not being paid by *Hyde*, a bill was filed by plaintiff and his co-partners in August, 1858, praying a sale of the mortgaged premises, which were accordingly sold under the decree of the court, and purchased by *John Taylor*. one of the firm, for £3000, and duly conveyed to him, and he by deed of the 20th of March, 1863, sold and conveyed the same to the plaintiff.

The bill further set forth that by indenture dated the 25th of January, 1850, *Hyde* conveyed to *Joanna Caslor*, one rood and twenty-four perches, being the lot before mentioned, as excepted and belonging to *Hiram Caslor*, and that by a bond dated the 28th of the same month, *Hyde*, in consideration of £250, bound himself, his heirs, &c., to allow *Caslor* the privilege of drawing water from the mill pond for the purpose of propelling the machinery in the factory, to be erected on the piece of land so conveyed to his wife, by a spout or trunk with an aperture of three hundred inches, and the further privilege of a road across a portion of the mill property; that in October, 1852, *Caslor* and his wife reconveyed the said lot of one rood and twenty-four perches to *Hyde*, and the aforesaid easement or privilege so agreed to be granted by such bond, *Hyde* giving back a mortgage to secure part of the consideration; that on the premises conveyed by the mortgage to the plaintiff there were large and valuable saw and flouring mills worked by means of the said dam referred to in the bond, and which dam was also a portion of the premises conveyed by such mortgage; that the factory erected by *Caslor* had not been worked for upwards of ten years, and in fact the same had only been worked for a few months after its erection, and was nearly devoid of machinery and unfit for use, and the plaintiff submitted that under the said mortgage, the chancery sale, and the conveyances

above mentioned, the plaintiff was seized in fee of all and singular the lands and premises mentioned and described in the mortgage, except the lots referred to therein as excepted, and the easement or privilege, with respect to the three hundred inches of water, by the reconveyance by *Caslor* to *Hyde*, became merged in the property of *Hyde*, and the same passed, together with the premises and mill, to the plaintiff; and that *Hyde* after the mortgage remained seized of only the lot of one rood and twenty-four perches, free and clear of, and without having any right to such easement or privilege; that at the time of the agreement for creating the mortgage by *Hyde*, it was expressly understood and agreed that the land and premises, including the mill dam, unincumbered and unaffected by such easement or privilege of drawing water therefrom, should be conveyed to the plaintiff, and that *Hyde* should also convey to plaintiff the said lot of one rood and twenty-four perches, and that *Hyde* should not retain or have any right to such easement; submitted that if the court should be of opinion such easement did not pass to the plaintiff, the mortgage to him should be reformed so as to carry the same, for that if such easement were allowed to remain outstanding, the same would render the mill property of very little value.

The bill further alleged, that by indenture dated the 1st of March, 1861, but which was not executed for a year afterwards, *Caslor* and wife, by direction of *Hyde*, pretended to convey the said lot of one rood and twenty four perches to the defendant *Routledge*, together with the privileges and appurtenances thereto belonging; and thereunder *Routledge* claimed to be entitled to such lot and the easement and privilege of drawing such three hundred inches of water, *Hyde*, on the occasion of such conveyance to *Routledge*, having destroyed the conveyance from *Caslor* and wife to himself; and charged that such conveyance to *Routledge*, who was a brother-in-law of *Hyde*, was voluntary and without consideration,

and made to hinder and delay the creditors of *Hyde;* that *Hyde* and *Routledge* were about fitting up the flume for the purpose of withdrawing the three hundred inches of water from the dam; charged that *Routledge* had notice of all the facts and circumstances above set forth, and prayed *inter alia* an injunction to restrain such use of the water; that it might be declared that such easement or privilege was merged in the estate of *Hyde* and passed to the plaintiff under the conveyances mentioned, or that the mortgage might be reformed.

The defendants severally answered the bill: *Routledge* alleging that he had made advances to *Hyde* to the amount of £1800 and upwards, and had offered to purchase the lot with such privilege, which he did in the full faith and expectation that such privilege belonged to the lot, which lot, as also the factory theron, would be entirely useless as a manufactory if separated from such water power; that the plaintiff, before and at the time of obtaining his mortgage, was aware that the defendant claimed such water power as attached to the lot; and that he was aware of the existence of the bond from *Hyde* to *Caslor*, the same having been registered on the 25th of April, 1855.

The cause having been put at issue, evidence was given at great length, with a view chiefly, on the one hand, of shewing the impossibility of working the mills to advantage if the privilege asserted by the defendants were conceded; and, on the other, that the factory and lot would be rendered utterly useless if such right was taken from the owner thereof. It was also sworn by one witness, that a brother of the plaintiff, one of the firm, had stated that he was aware that the privilege was not embraced in the mortgage; this was contradicted by the brother in his evidence: and it was also shewn that Hyde had stated to members of the firm that all the water was conveyed to them, which was not the case, in a mortgage previously given to *Dean, Gillespie & Co.*

Hiram Caslor was also examined as a witness, and

proved that sometimes after he had been working the factory, it was ascertained that the supply of water in the dam was not sufficient for the working of both the mill and the factory, and thereupon *Hyde* determined to purchase the factory lot and privilege from him, which he accordingly did; but that subsequently the conveyances thereof were destroyed, and a deed made to *Routledge* direct, at the instance of *Hyde*, this being done, as *Hyde* alleged, in order to avoid the expense of two registrations.

The other material facts bearing on the case sufficiently appear in the judgment.

Mr. *McMichael*, Mr. *Fitzgerald*, and Mr. *Blake*, for the plaintiff, contended that the object of the defendant *Hyde* in introducing into the mortgage to the plaintiff the exceptions it contained, was simply to protect himself from any liability upon his covenants for title; the exceptions are simply of certain lots which had been previously conveyed by *Hyde* to the respective purchasers, naming them, and amongst them "*also the one quarter of an acre sold to Hiram Caslor*," but no mention is made of any exception or reservation of any portion of the water; and it must be taken that only those portions of the property were excepted which are mentioned. Then the conveyance to *Caslor* did not carry with it any easement or privilege to use the water of the river—that was secured to him by an instrument personal in its nature, separate from and subsequent to the deed of the lot itself. *Hyde* at the time that he executed the mortgage to plaintiff had re-acquired the estate and the privilege, and this for the express purpose of extingnishing the easement.

The evidence of *Caslor* shews that *Hyde's* object in effecting the re-purchase of the privilege was to extinguish the easement and to prevent injury to the mill. The deed passed all the power then used by the grist and saw mills; *id est* all the power, leaving nothing for the

former easement: and *Hyde* cannot now be heard to say that he had the intention of detracting from his own deed, although no intimation of it was given to the mortgagee: if he had any such intention it would have been a fraud upon the plaintiff, and the party guilty of it will not be permitted to derive any benefit from such fraudulent act.

The right to draw off water from the dam having been afterwards re-purchased by *Hyde*, had the effect of extinguishing the easement, which could only be set up again either by an express grant of it, or by a sale of the factory lot, and the easement being used with the premises at the time of the sale.

Great stress was also laid by counsel on the fact that the mortgage to *Dean, Gillespie & Co.*, had actually contained an exception of this easement, which was at that time in *Caslor*, and which fact *Hyde* had assigned as a reason why plaintiff's firm should have made larger advances than had been made by the other firm; *Hyde* contending that plaintiff had a greater security saying, "*You have all the water; they had not.*" *Gale* on Easements, 473, and following pages. *Woolrych* on Water Courses, 295.

Mr. *Gwynne*, Q. C., for *Routledge*. The conveyance to Mrs. *Caslor* of the quarter acre was comprehensive enough to carry this easement with it, and it passed under it. The re-purchase by *Hyde* from *Caslor* of the quarter acre lot had not the effect, he contended, of merging the interest in the easement; the privilege which a party has to the use of water is an exception from the general doctrine as to the merger of easements, and the easement having once become an appurtenance to the quarter acre lot, could not be extinguished.

The bill asks in one branch of the prayer to reform the mortgage to plaintiff. If the factory lot with the

privilege is not excepted in *Gooderham's* deed, then no decree is necessary, as the description without such exception is sufficient to cover this property, and if excepted from the operation of that conveyance, then no decree for that purpose can be founded on parol evidence such as is adduced in this case.

The legal estate in the factory lot was in *Caslor* at the time the mortgage to plaintiff was created, but had the estate been vested in *Hyde*, the words of reservation contained in that mortgage were sufficient to except it from its operation. The bill alleges that no consideration was paid by *Routledge* for the conveyance to him of the factory lot, and on that ground claims relief; this he submitted was wholly irrelevant: the objection can only be urged by a creditor, and when such a bill is filed it will be time enough to discuss the validity of his purchase. He contended that the privilege to use the water had never been re-conveyed to *Hyde* so as to prevent its being used by *Routledge:* it was not, as put by the other side, the case of a dominant and servient tenement; the rules applicable in such cases do not affect this case.

He referred amongst other authorities, to *Sury* v. *Piggot*, (*a*) *Nicholas* v. *Chamberlain*, (*b*) *Morris* v. *Edgington*, (*c*) *Lackersteen* v. *Lackersteen*, (*d*) Earl of *Bradford* v. Earl of *Romney*, (*e*) *Fowler* v. *Fowler*, (*f*) *Wilkinson* v. *Nelson*, (*g*) *Adams's* Treatise on Equity, 171, and cases there cited. *Woolrych* on Water Courses, 293-40.

Judgment.—SPRAGGE, V.C.—The earliest transaction which is material to this case is, the sale by *Hyde*, the owner of the premises in question, to *Hiram Caslor*, of the piece of land which, for convenience, may be called "The factory lot," together with the easement which

(*a*) Poph. 170; S. C. Palmer, 444.
(*b*) Cro. Jac. 121.
(*c*) 3 Taunt. 24.
(*d*) 6 Jur. N. S. 1111.
(*e*) 30 Bea. 431.
(*f*) 4 DeG. & J. 250.
(*g*) 7 Jur. N. S. 480.

is in question in this cause; the land was conveyed to *Joanna*, wife of *Hiram Caslor*, by deed dated the 15th of January, 1850, and by bond dated 28th of January, 1850, from *Hyde* to *Caslor* and wife, he engaged upon certain conditions to allow to them, for all time to come, for the use of a clothing factory to be by them erected, the privilege of drawing and using water from *Hyde's* dam for propelling the machinery of *Caslor's* contemplated factory, called "his machinery," by a spout or trunk, with an aperture measuring 300 inches and no more. *Hyde's* mill was at this time, as recited in the bond, in course of erection.

The next material fact is the re-purchase by *Hyde* from the *Caslors* of the factory lot and the easement. The conveyance is not produced, and was probably destroyed upon the subsequent conveyance by the *Caslors* to *Routledge*, at the instance of *Hyde*, in March, 1861. The date of the re-conveyance is stated in the bill to have been in October, 1852. It was probably in October, 1853, as that was the original date of the mortgage given by *Hyde* to *Caslor* for the re-payment of purchase money, and payment for improvements. The reason of this re-purchase by *Hyde* is material. *Caslor* had found the locality not suitable for his business, and *Hyde* had found, when he came to work his mill, which had four run of stones, that for the greater portion of the year he required the whole of the water of the river; and that the existence of such an easement in the hands of a third person was of serious detriment to his mill. Upon the re-purchase *Caslor* removed his machinery; the shell of the factory has remained on the lot ever since—not put to any use, as I understand from the evidence. When *Caslor* purchased, *Hyde* was constructing his mill dam, and was making a waste gate through the dam, and a channel through the lot purchased by *Caslor* to a lower part of the river, in order to divert the water while constructing the works of his mill: whether the waste gate and channel were intended for any other than a tem-

porary purpose does not appear. When *Caslor* purchased he drew through the waste gate, and by a flume the water required for his machinery. After the repurchase by *Hyde* the flume and waste gate remained, but, as I gather from the evidence, have been disused ever since; the mortgage from *Hyde* to *Caslor* bears date the 2nd January, 1854.

Upon the re-acquisition by *Hyde* of the factory lot and the easement purchased from him by *Caslor*, there ensued a unity of ownership in the mill property, and what had been the *Caslor* property; and it is contended that *ipso facto* the easement became extinguished; and such undoubtedly is the general rule. But Mr. *Gwynne* contends that the use of a water-course is an exception to the general rule, and that an easement of that nature is not extinguished by the unity of ownership; and that upon severance of the ownership, the easement will revive as an easement. This is true no doubt of water flowing in its natural and accustomed channels; it is appurtenant to the land, and passes with it as a riparian right. The distinction between such an easement not extinguished by unity of ownership, and the other class of easements which are, was thus taken by *Whitelock*, J., in *Shury* v. *Pigott* (*a*): "There is a difference between a way, a common, and a water-course. *Bracton*, lib. 4, f. 221, 222, calls them *servitutes prædiales*, those which begin by a private right, by prescription, by assent, as a way, common, being a particular benefit, to take part of the profits of the land; this is extinct by unity, because the greater benefit shall drown the less: a water-course doth not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, have taken this course naturally and cannot be averted." The other judges agreed in this; some placing it upon the ground that it is a matter of necessity, in which case, whether the easement be a way or water-course, the right to the easement will arise or revive, as the case may be, upon severance of ownership.

(*a*) 3 Buls. 339.

A case of easement by necessity in a water course, not a natural one, is put by *Woolrych* in his treatise on sewers and water courses. Two persons owned adjoining houses, the one had a gutter in the land of the other; both tenements fell into the one hand, and afterwards became again divided, and the one upon whose land the stream was, stopped the gutter. It was held that the easement revived after the severance, because of the necessity of the thing, and Mr. *Woolrych* adds: "For things which have an existence during the unity, are not extinguished by the unity:" an observation which applies to water courses flowing in their natural channel, as well as to any other easement in water, and probably on land, which, during the unity of ownership, has been used with the dominant tenement.

On the other hand, is the principle for which Mr. *Woolrych* refers to Lady *Browne's* case, (*a*) that if the owner of property upon which there is a water course—an artificial one in the case he puts—declares his intention that he will not enjoy the land and water course together during the unity, it may be thus extinguished. The same point from the same authority is thus put by Mr. *Gale*: (*b*) "When two tenements become completely united, and as it were, fused into one, the owner may modify the previous relative position of the different parts at his pleasure: if he exercises this right so that the part which previously served the other no longer does so: as, for instance, by changing the direction of a spout which emptied the rain water of one house on the adjoining one, it has never been doubted that by so doing he destroyed the easement forever. In Lady *Browne's* case, as reported in Noy, it appears that she had a waterpipe through Whiteacre running to her house, then purchased Whiteacre, and cut and stopped the pipe.

These are cases that go to the extent that easements, which Mr. *Gale* classes as intermittent easements; as

(*a*) Noy's Rep. 84. (*b*) On Easements, p. 471.

rights of way, and rights to draw water, may be lost without the owner of the servient tenement acquiring ownership in the dominant tenement, by non-user, accompanied by some act of the owner of the easement clearly indicating his intention to abandon it.

Assuming then that Mr. *Gwynne* is right in his position, that water courses are an exception to the general rule of extinguishment upon unity of ownership, even where the water course is an artificial one, it is only where its continued existence during the unity is matter of necessity; and it is, not that the easement revives upon severance, but that it was not extinguished during the unity.

To apply these principles to the facts in the case before me: the easement in question was a right to draw water, which, previous to the grant to *Caslor*, had no existence, in the owner of the factory lot as owner of the lot; this is clear from an inspection of the lithograph map proved in the cause. The easement was created by the instruments between *Hyde* and the *Caslors*. Upon the re-unity of ownership in *Hyde* the piece of land which, for the sake of brevity, I have called the factory lot, could no longer be called the factory lot with any more propriety, than it could be called the *Caslor* lot, that is as a mere designation. *Hyde* upon re-acquiring it unequivocally altered its use and character; he acquired it for the avowed purpose of doing so: and by leaving the building to be dismantled by *Caslor* of all that gave it the character of a factory, and by continuous non-user of the water power which he had granted, he reinstated it in the position in which it stood before the sale to *Caslor*, with the exception of not removing erections which could not be removed without expense. He had been taught by experience that he had to choose between a profitable use of a large and expensive grist mill, and a comparatively insignificant woollen factory; he chose the former, and necessarily

abandoned the use of the water power he had granted to *Caslor*, for the purpose for which he had granted it. It could not be an easement of necessity to the factory, for the factory had ceased to exist; and it was not water flowing *ex jure naturæ:* and the owner of the re-united property had so dealt with it that, in the words of Mr. *Gale*, the part which had previously served the other no longer did so. This being the case, it falls within no exception to the general rule.

Further, *Hyde* could not, and *Routledge* cannot, avail himself of any supposed right in *Caslor*. The land only was in terms mortgaged to him; and it was perfectly understood between them that no more was mortgaged; and upon the principle of the cases to which I have last referred, he and those claiming under him can claim no benefit of an easement, which he clearly indicated his intention to abandon. The form of the bond in which *Hyde* engaged to grant the easement, lends great force to these considerations: it was recited to be for the use of a clothing factory to be erected by *Caslor;* and what was stipulated for, was the privilege of drawing the agreed quantity of water from *Hyde's* dam, for propelling *Caslor's* machinery. When *Caslor's* factory and machinery were gone, and with the purpose on the part of *Hyde* of using the water which had been the subject of the easement, for a purpose inconsistent with the continued existence of the easement, I feel it to be impossible to assent to the proposition that it continued, or was revived.

In the view that I have taken of the case, it is not material whether there was an effectual grant of the easement by the conveyance to *Joanna Caslor*, or by the bond: by the re-conveyance to *Hyde* and the cancellation of his bond, in my judgment, there was, and was intended to be, with the unity of ownership, a cesser of the easement.

It is also unnecessary to consider the facts of the case

in relation to the alleged intention of the parties that the whole water power should be conveyed to *William Gooderham*. The impression left upon my mind by the evidence certainly was that such was the intention; but I have not considered the evidence since; and disposing of the case upon the ground that I do, I have not found it necessary to do so.

There is nothing in the case to entitle *Routledge* to stand upon a different footing from *Hyde;* the decree must be against both, for a perpetual injunction restraining them from using the water under the pretended easement. The decree to be with costs.

STEVENS v. COOK.

Rescission of patent—Error in the Crown—Notice.

In March, 1862, *S.* purchased land from the Crown, and with his family went to reside on it, but by mistake settled on the adjoining land, and made some improvements. In June following *C.* applied to the Crown Lands Department to know whether the land so purchased by *S.* was for sale; the patent had not issued to *S.* and through an error in the department, *C.* was informed that the land was for sale, and immediately became a purchaser thereof, and received a patent. He did not, however, take possession till December, 1863, when he brought an action of ejectment against *S.* and engaged the defendant, *B.* to take the timber off the lot. At the hearing the plaintiff failed to prove notice to *C.* of his claim and improvements, but the error on the part of the office being proved, and the attorney-general being a defendant, and submitting to the direction of the court, the patent to *C.* was rescinded, an injunction granted, and *C.* required to account for the timber cut.

Statement.—The bill in this cause was filed by *Lambert Stevens*, against *Richard B. Cook*, *Thomas Buck*, and *The Attorney-General* for Upper Canada, and set forth that in March, 1862, the plaintiff became the purchaser from the Crown of the east half of lot 16, in the 9th concession of the township of Dummer. The purchase money was at once paid, but the patent was not then issued. Immediately after this, the plaintiff, with part of his family, removed to the lot and built a log shanty on it, as they believed. Deep snow covered

the ground so that it was impossible to find the land marks, and it was not discovered till the middle of June following that the shanty and clearing made by the plaintiff and his family were in fact on the west half of the lot, but a surveyor having so informed them, plaintiff's men at once commenced improvements on the east half. A few days after, the defendant *Cook*, with others, looking for land to buy, visited this lot, and *Cook* immediately after applied to the Crown Lands Department, asking if the east half was for sale. It had been omitted to strike the lot off the list of lands for sale in the books of the department, and *Cook* was therefore informed that it was for sale, and he immediately forwarded the price asked and received a patent therefor. *Cook* did not then claim possession, but wrote to one *William Cook*, living near the lot, asking him to act as his agent in looking after the land and selling the timber on it. In December, 1863, *R. B. Cook* agreed with the defendant *Buck* for the sale to him of the timber on the premises, and he, with a gang of men, commenced to fell and remove it, and *Cook*, about the same time, brought an action of ejectment against the plaintiff. The bill then filed, an interim injunction was granted, the cause was heard and evidence taken at Belleville.

Mr. *J. C. Hamilton*, for the plaintiff.

Mr. *L. Walbridge*, Q. C., for *Cook*.

The bill was taken *pro. con.* against *Buck*; and the *Attorney-General* did not appear at the hearing.

Martin v. *Kennedy*, (*a*) *Attorney-General* v. *McNulty*, (*b*) *Proctor* v. *Grant*, (*c*) *Lawrence* v. *Pomeroy*, (*d*) Con. Stat. of C. cap. 22, sec. 25.

(*a*) Ante Vol. 4, p. 1. (*b*) Ante Vol. 8, p. 324.
(*c*) Ante Vol. 9, p. 224. (*d*) Ante Vol. 9, p. 474.

Judgment.—VANKOUGHNET, C.—I think I cannot hold that defendant *Cook*, had any notice, or any sufficient notice of plaintiff's right or claim to the land, by which I can hold that he is chargeable with fraud in making a purchase from the *Crown*. 1st. There certainly was no such improvement on the land as would have sufficed for constructive notice, had the defendant known that the improvement was being made thereon. It seems about an acre of underbrushing had been done, but this, of itself, would hardly be considered such an evidence of title as should constitute notice. Squatters are every day burning brush, and man is constantly encroaching on his neighbour's lot while the country is still in forest. There is nothing, however, to shew that the defendant *Cook*, knew that his underbrushing was on the land, unless we believe the testimony of *Jackes*, the son-in-law of plaintiff, who gave his evidence in a very unsatisfactory manner. He, himself, admits that when he mentioned to *Cook* that the lot was the east half of sixteen, and belonged to plaintiff, the witnesses, *Rowley*, and *Thompson*, were with *Cook*, all together. These two last named witnesses, who appear most respectable men, and gave their testimony in a very straightforward manner, swore that they never heard *Jackes* allude to the number of the lot or *Stevens'* ownership of it; that they had but a passing word with him, asking him where they could find water. I think I cannot place sufficient reliance on *Jackes'* testimony to bind the defendant by it. Then Mrs. *Jackes*, a daughter of plaintiff, says that the *Rowleys*, *Thompsons*, and *Cook* were at her father's shanty, when her husband said that the land close by was plaintiff's, that it was lot sixteen; though the number of the lot she only mentioned on cross-examination, and not on her examination in chief, important as it was to the plaintiff that she should have stated it. Now, as regards this testimony, it is remarkable that *Jackes* says nothing of this interview or notice. If it occurred, why did he not mention it? Why was he not asked about it? The wife tells us what her

husband said, but he does not say a word about it. Again, the two witnesses, *Rowley* and *Thompson*, state that they did not see *Jackes* there at all, and did not hear any thing said about the land, or its ownership, at the time Mrs. *Jackes* refers to. If they did not hear, why should *Cook* have heard ? they were all together. I do not think I can safely rely on the testimony of Mrs. *Jackes*. Then we come to the only other occasion on which the plaintiff's claim to the land was mentioned. This was in young *Rowley's* house, when plaintiff came in, and the conversation turning on defendant's search for land, plaintiff said he had bought lot sixteen, and lived on it, and he hoped no one would meddle with it. He did not actually live on the lot at the time, as his shanty was, by mistake, on the road. What plaintiff then claimed was the whole lot. I should be inclined to think *Cook* heard this, though *Thompson*, who was present, and cannot be considered as too favorable a witness for *Cook*, (having intended to buy the land himself,) says that he did not hear plaintiff's remark. It is to be borne in mind that the habit of squatting was persisted in, notwithstanding repeated notices from the Crown that they would not treat it as giving any right, and it is clear that such squatting or improvements as the plaintiff had made here would never have been considered as sufficient at any time to establish a claim on the grace of the Crown. It would have been unimportant, therefore, if the Crown had been made aware of it; but I do not think there is any evidence to shew that defendant knew the improvements were on the east half of sixteen, unless I believe *Jackes'* testimony. The plaintiff claimed the whole lot : what he said was, that the plaintiff had bought sixteen, and was living on it. To ascertain whether he had bought the east half of sixteen, or, at all events, whether it was for sale, the defendant writes to the proper quarter, the Crown Lands Department, to enquire if the land is still for sale, and is informed that it is. He might fairly believe, on this, that the plaintiff had at all events not bought

the east half, and accordingly he purchases. Misstatements are frequently made by persons as to their claims to lands, and the only way really in which it can be ascertained whether they have or not bought from the Crown is by enquiry at the proper department. It would be always safer for parties so applying to state what they have heard, and what claims have been put forward, to avoid difficulty in the future; but I cannot say, under the evidence in this case, that the defendant misled the Crown. He pledges his oath that he had no notice of the plaintiff's purchase or claim, and I think I cannot say that there is sufficiently clear evidence that he had, to enable me to act upon it, and I must, therefore, acquit him of fraud; though one cannot help feeling a strong suspicion that in those enquiries about lands which he was seeking to purchase, he would have heard of the claimants to them, when claims existed. The other parties who were with him, however, and who seem very respectable men, say that they did not hear of plaintiff's claim.

It seems clear, however, that the patent issued in error. A sale to the plaintiff had been made and entered in the ordinary way in the sales book of the department, and the purchase money was paid by the plaintiff to the government: all that remained was to issue to him the patent. Unfortunately the officer of the department whose duty it was to strike this land out of the list or schedule of lands remaining for sale, neglected to do so, and when the defendant *Cook* applied to purchase, the land was sold to him as a matter of course, as it had been to the plaintiff, previously. Since the decision in *Martin* v. *Kennedy*, it must be considered as the law of the court that any individual aggrieved by the issue of a patent through error on the part of the Crown, may invoke the aid of the court to repeal it, and that this right is not given to the attorney-general alone. The attorney-general is in this case a party defendant, and submits to such a

decree as the court may make. I take it to be also decided that as against the patentee notice of the claim or right of the party aggrieved at the time of the issue of the patent is not necessary to be established, though one can easily see that great hardship might be occasioned when the patentee, in ignorance of such outstanding claim, had made improvements on the property. The court in such a case might not choose to interfere. The statute does not of itself give any protection to purchasers for value without notice. Here there has been no money expended by the defendant on the land—nothing done. The Crown cannot itself rescind the patent, there being an adverse claim; and yet there is error so manifest, and no injustice done by correcting it, that the court should interfere if it can. The patent can only be rescinded on the ground of error. I can only give relief in this shape, as I cannot hold the defendant a trustee for the plaintiff, he having obtained his deed without notice. The decree will be without costs, the charges of fraud not being proved on the one hand, and on the other, the defendant having resisted the cancellation of the patent after he became aware of the error, and his conduct throughout shewing that he endeavored to grasp the property from the plaintiff.

I have had some doubt as the claim of the plaintiff to the value of the timber cut by the defendant. It may be said that there is no certainty that the Crown will issue the patent to plaintiff; that they may cancel the sale to him, and so deprive him of all right in the land. The effect of the decree, however, is that the patent is void. The parties, therefore, stand to one another as if the patent had never issued, in which case the plaintiff would have the prior equity, as the first purchaser from the Crown, and would be entitled to come to this court for protection. I cannot assume that the Crown will now disregard his right. On the contrary, I must treat him here as the owner of the land, and I therefore order the defendant, *Cook*, to account for the timber cut.

WATSON v. MCCARTHY.

Setting aside sale of lands—Collusion—13th Eliz., ch. 5—Amendments allowed at hearing.

M. mortgaged lands to *B.* to secure $400, and afterwards caused the premises, consisting of a park lot, to be divided into village lots and plans thereof made. *M.* then became indebted to C. and others who obtained judgments against him and lodged writs in the hands of the sheriff of the county in which were the above premises: *W.* was also then a creditor of *M.* by simple contract. *B.* advertised the premises for sale under the power of sale contained in his mortgage, such sale to be in village lots according to the plan thereof. *M.* and the sheriff, in whose hands were the writs of execution, previous to the day of sale, agreed together that the sheriff should buy in the premises at the amount due *B.* and hold the same in trust for *M.* It was found difficult at the sale to sell the premises in village lots, and at the suggestion of the sheriff and with *M's.* consent, they were put up *en bloc* and bought by the sheriff for the amount due *B.*

W. afterwards obtained judgment and issued execution against lands, and on a bill by *C.* and W. against *M.*, the sheriff and *B.* the sale was set aside as collusive and tending to delay creditors, within 13 Eliz., ch. 5.

Where a bill was filed to set aside a conveyance as having been made to hinder creditors, on grounds which the plaintiff failed to substantiate, but the evidence of the grantee himself shewed that on other grounds the plaintiff was entitled to relief; at the hearing leave was given him to amend, setting forth such grounds, and a decree was made in his favor; but, under the circumstances, without costs.

Statement.—The bill in this cause was filed in June, 1862, by *Peter Watson* and *The Bank of Upper Canada*, against *John Augustus McCarthy*, *Robert Moderwell*, Sheriff of the county of Perth, and the President and Treasurer of *The Stratford* and *Perth Building Society*, and alleged that *McCarthy*, being the owner in fee of park lot number 436 in Stratford, except some parts of it sold previously for village lots, had by mortgage, dated the 15th day of March, 1854, conveyed said premises to the building society, to secure a sum, of which about £100 was still due in October, 1861.

The premises were, after the execution of the mortgage, surveyed and laid out into village lots, of which a plan was made and registered. For default in payment of the mortgage moneys, the building society advertised the premises for sale in village lots, to take place on the fourteenth day of November, 1861.

Previous to the sale, the sheriff and *McCarthy* made an arrangement with the building society to the effect that the sheriff should, at the sale, buy in the premises at the sum due the building society, and hold them in trust for *McCarthy*.

The manner in which this was accomplished and the other material facts of the case, are set forth in the judgment.

Mr. *Blake*, for the plaintiffs.

Mr. *A. Crooks*, Q.C., for defendants. *Prosser* v. *Edmunds*, (*a*) was referred to.

Judgment.—ESTEN, V. C.—In this case the defendant *McCarthy* had mortgaged the land in question to the *Stratford and Perth Building Society*, to whom about $400 was due at the date of the sale in question. After the mortgage, he had caused the property to be surveyed and divided into small lots, and the plan was registered according to law. At the time of the sale, the sheriff held writs against the land of *McCarthy* at the suit of one *Scott*, one *Boyd*, and the *Bank of Upper Canada;* and *McCarthy* was also indebted to the plaintiff *Watson* on simple contract. The building society advertised the property for sale, under a power of sale in their mortgage, in lots, according to the subdivision which had been devised and executed by *McCarthy*. On the day of sale it was exposed for sale according to the advertisement, in lots, but no bidders could be procured, although about fifteen or twenty persons were present. At this point, the sheriff, Mr. *Moderwell*, who is a defendant, entered the room and asked what the matter was, and hearing the facts, proposed that the property should be offered in one lot, or *en bloc*, as it is called. This proposal was acquiesced in by the agent of the society, provided *McCarthy*'s consent could be

(*a*) 1 Y. & C. 48.

procured. His consent in writing was accordingly obtained, and the property was exposed *en bloc*, and after some apparent competition, purchased by the sheriff for the amount due to the building society. The property has not been conveyed to him, and he claims to hold it for his own benefit. He has since the sale purchased or paid the execution of *Scott*, and he has paid the executions of *Boyd* and the *Bank of Upper Canada*. The judgment and execution of the bank were purchased by, and transferred to, the plaintiff *Watson*. It was not paid until after the answer became due, and by an understanding between the parties it is to be considered as not paid, as I understand. *Watson* brought an action for the recovery of his own debt, and obtained judgment after the sale, and he has a writ against lands in the sheriff's hands. It appears from the evidence of Mr. *Carroll* and Mr. *Daly*, that the sheriff, finding that Mr. *Carroll*, who attended on behalf of a creditor, and wished to prevent a sale at an undervalue, was offering bids for the property, had a private conversation with him, when an understanding was arrived at that the sheriff was to purchase for the benefit of *McCarthy*, subject to his own indemnity, and that *Carroll's* client's debt should be paid; whereupon Mr. *Carroll* desisted from further competition, and it appears from the sheriff's own evidence that he made known to the audience that he did not intend to derive any profit from the transaction; that he intended *McCarthy* to enjoy any benefit after re-payment of his advances; that he announced his intention generally at the sale; that there was no concealment about it, no disguise; that it was pretty well understood at the sale what his intention was; he adds, indeed, that he does not think that he stated at the sale that he did not intend to derive any profit from the transaction, but that he said it to Mr. *Daly* afterwards. These facts, however, appearing from the evidence of *Carroll*, *Daly* and the sheriff himself, are not stated in the bill. An agreement is alleged in the bill between the sheriff and

McCarthy, that the sheriff should purchase the property as *McCarthy's* agent or trustee, and should hold it for his benefit, subject to his own indemnity; and it is alleged, that, in pursuance of this agreement, the sheriff procured the property to be exposed for sale in one lot so as to be enabled to purchase it at a great undervalue. These facts, however are not proved. Both defendants deny them by their answers, and in their evidence they speak only of conversations after the sale, and although Mr. *McCulloch* and Mr. *Daly* speak to statements made to them by Mr. *McCarthy* before the sale, which excite a suspicion that something of the sort may have occurred, yet these statements are not evidence against the sheriff. If these facts had been established, I should have agreed with the plaintiff's contention, that he was entitled to equitable execution against what would in equity be *McCarthy's* property, and also that such a transaction would be fraudulent and void against creditors under 13 Elizabeth, chapter 5. Any relief, however, founded on these facts necessarily fails, as they are not substantiated, and I also think that the plaintiff cannot, without amendment, avail himself of the facts stated by Messrs. *Carroll* and *Daly*, and the sheriff himself. In the present state of the record, the plaintiffs are confined as a ground of relief to the improvidence and impropriety of the sale, which would justify this court in declaring it void as a breach of trust, and as hindering creditors within the 13th Elizabeth, chapter 5. It is impossible to suppose that such a sale could for a moment be maintained. The society advertised the property for sale in lots: this advertisement of course collected purchasers of lots, but not capitalists, who desire to purchase *en bloc* on speculation. Who can say that if the property had been properly advertised for sale *en bloc*, it would not have produced a considerable surplus applicable to the satisfaction of the subsequent incumbrancers? To advertise a sale in lots, and then suddenly, without notice or advertisement, to convert it into a sale *en bloc*, attractive of a totally different class of purchasers, is undoubtedly

an irregularity that would induce this court to declare such a sale void. The *Bank of Upper Canada* could undoubtedly claim such relief, and if I am to understand that the plaintiff *Watson* stands in the place of the *Bank of Upper Canada*, and as if their debt was not paid, he is, I think, entitled to the same relief. Upon this ground however, the plaintiff *Watson* would not appear to be entitled to relief by virtue of his own debt. Having obtained judgment after the sale, the surplus, after paying the executions, would have gone to *McCarthy;* and *Watson*, when he obtained his judgment, could not attach it in his hands. He can stand in no better position than *McCarthy*, who would be precluded by his consent from impugning the sale. If the plaintiff *Watson* were entitled to rely on the facts mentioned by Messrs. *Carroll* and *Daly*, and by the sheriff, he might be entitled to be relieved on the footing of his own judgment. It is impossible that a sale could be sustained under such circumstances. Whether the arrangement with *Carroll* would be sufficient to vitiate the sale, it is unnecessary to express any opinion; but the purchaser having declared at the sale that, subject to his own indemnity, he was purchasing for the benefit of the owner, and thereby preventing competition, could never be allowed to hold the property. On the ground of irregularity in the sale, or of fraud, or of trust:—on any of these grounds, relief would be given. *McCarthy* consented to a sale *en bloc*, and cannot object to it, but he consented to a fair sale *en bloc*, and when a fair sale is prevented by such declarations as the purchaser admits in his own evidence that he made at the sale, *McCarthy* himself could be relieved against it on the ground I have mentioned; and it appears to me that if *McCarthy* is unwilling to proceed, being satisfied with the state of things, a creditor having obtained judgment subsequently to the sale, may proceed to impeach it.

In such a case collusion may exist between the purchaser and debtor, whereby the debtor receives the benefit of

the purchase, while it keeps his creditors at a distance, and even if the purchaser should insist upon the purchase for his own benefit, and deny any participation to the debtor, it is a fraud upon creditors for the debtor not to assert his rights and recover the property for their benefit, or permit them to use his name for that purpose. If this is trust for *McCarthy*, then the plaintiff's writ has attached upon it, and if it is a right to annul the sale by reason of breach of trust or fraud, then the judgment creditor is not an assignee within the principle of *Prosser* v. *Edmunds*. Upon the whole, I should be prepared to relieve the plaintiff on the footing of his own judgment as well as that of *The Bank of Upper Canada*, by reason of what passed at the sale, as appears by the defendant's own evidence, provided it is proper to permit an amendment of the bill for that purpose. I think I cannot inflict any injury upon the defendant by permitting the bill to be amended, even at this stage, in accordance with his own evidence. It may be necessary to adopt this course as, if the sale be annulled on the ground of breach of trust at the instance of *The Bank of Upper Canada* alone, it would seem that as *McCarthy* could derive no benefit from that decree, so a creditor, having obtained judgment subsequently to the sale, would be in the same position. As to costs, the plaintiff, considered as standing in the place of *The Bank of Upper Canada*, would be entitled to his costs against all the defendants, so far as the suit sought to impeach the sale on the ground of irregularity, but so far as it proceeds on the alleged agreement, or trust, the bill should be dismissed with costs, and perhaps the best order to make is, that each party shall bear his own costs. So far as the plaintiff is obliged to amend his bill he stands perhaps in a less favorable position as to costs. Upon the whole, perhaps justice will be done by directing each party to bear his own costs. I have no doubt that Mr. *Moderwell's* intentions were friendly towards *McCarthy*, and that he always intended to pay the executions in his hands; and he

says that in this way he has paid a fair price for the property; but I cannot consider the executions as any part of the purchase money. In strictness he acquired a title paramount to the executions, and was not obliged to pay them; the Building Society could not have forced him to pay them. If Mr. *Moderwell* means to hold the property for his own benefit, it is one thing, but if he means to bestow the surplus on *McCarthy*, he is benefiting *McCarthy* at the expense of his creditors.

PENLEY v. THE BEACON ASSURANCE COMPANY.

Imperial act 7 & 8 Vic., ch. 110—Incorporated companies—Liabilities of Stockholders—Practice.

The 68th section of the Imperial Statute, 7 & 8 Victoria, chapter 110, provides a summary proceeding whereby a creditor of any company incorporated thereunder, who has obtained a judgment or decree establishing his claim against the company and failed to realize the same, may call on any shareholder or shareholders of the company, as representing the company and liable for its acts, by motion or otherwise, according to the practice of the various courts, to pay his claim. Upon such an application against certain of the shareholders resident in this country by a creditor who had obtained a decree of his favour, *held*, per, *Vankoughnet*, C., that the statute did not apply to proceedings in the courts of this province. *Spragge*, V. C., *dubitante*.

Statement.—This was an application in the suit reported, ante vol. vii., p. 130. The plaintiff having obtained a decree against the company for the sum of £575 17s., together with some interest and costs of suit applied by notice of motion directed to the Hon. *John A. McDonald*, *James Morton*, *M. H. Strange*, *A. J. McDonell*, *Thomas A. Corbett*, and *James Harty*, for an order to recover from them, or any of them, the amount of his claim. An affidavit of *R. P. Jellett*, solicitor of the plaintiff, was filed in support of the application, wherein he stated that the company formerly carried on business in the city of Kingston, in this province: that they had become insolvent, and that such insolvency was a matter of notoriety; that a writ of execution to recover the amount due the plaintiffs, had been issued to the sheriff at Kingston, and had by him been returned

"*nullâ bona;*" that the person named in the notice of mention, and others, composed the board of directors in Canada of the company: that the company was duly registered under the said Imperial Act, and that the plaintiff had ineffectually endeavored to realize the amount of his claim payable in this cause.

James Sidney Crocker was examined, and said, that he "was at one time the actuary and manager of the company at Waterloo Place, London, England, which was the head office. He was so engaged till the company ceased to do business in 1856. The company had no special act of incorporation, but was registered under the Joint Stock Company's Act. The business of the company was transferred to the Times Fire Insurance Company in 1856. * * * There was a branch of the company at Kingston, in Canada. There were sheriff *Corbett*, *M. W. Strange*, Mr. *John Mowat*, (since dead,) *Archibald J. McDo[illegible]* and *James Harty*. I do not at present recollect any particular acts done by these parties which would bind them as stockholders: but I believe them to have been stockholders. The five gentlemen I have named were appointed directors of the company at Kingston. Their duties were to receive applications and to issue policies and they had full power to manage the business of the company in this country, and continued to transact such business for two or three years. At the time of the business of the *Beacon* being transferred to the Times Company, its assets, books, and property were transferred: it did not reserve anything."

The clause in the Imperial Act under which the plaintiff moved (the 68th) is as follows: "In cases provided for by this act for execution on any judgment, decree, or order in any action or suit against the property or effects of any shareholder or former shareholder of such company, or against the property and effects of the company at the suit of any shareholder or

former shareholder in satisfaction of any moneys, &c., paid or incurred by him in any action against the Company, such execution may be issued by leave of the court or of a judge of the court in which such judgment or decree shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons consistent with the practice of the court,"

Mr. *A. Crooks*, Q.C., for the plaintiff.

Mr. *Strong*, Q.C., contra.

Judgment.—SPRAGGE, V.C.—The defendants are a joint stock company, incorporated under the Imperial Statute 7 & 8 Victoria, chapter 110. Every shareholder is liable for every debt of the company, and would be so, I apprehend, independently of any provision in the statute to that effect. The statute makes it unnecessary to sue all the shareholders, but provides that suits may be against the company in its corporate name. If the statute had stopped there, the creditors of the company would, I apprehend, be at liberty to proceed against shareholders by *scire facias* or otherwise, without any express provision enabling them to do so, and without proceeding first against the assets of the company. If this be so, the 67th section is a restriction upon the ordinary right of the creditor; but whether it be so or not, the existence of such a provision makes it necessary for the creditor to come to the court under the statute; not in exercise of his ordinary right.

He comes to the court to have his remedy against certain shareholders individually, and this he can do under the statute, only "if due diligence shall have been used to obtain satisfaction of such judgment, decree or order, by execution against the property and effects of such company." The plaintiff founds his application under this provision of the statute, upon two alleged facts deposed to by Mr. *Jellett*, solicitor for the plaintiff; the

one being the insolvency of the company, "and its consequent cessation from business;" the other the issue and return of *nullâ bona*, to a writ of *fieri facias* by the sheriff of the united counties of Frontenac, Lennox and Addington. The first point, Mr. *Jellett* speaks of as a matter of notoriety, and I understand from his affidavit that he speaks of it only as known to him as a matter of repute, and as far as he shews, a matter of repute in Belleville, in which place he is a practising solicitor. This alleged fact is met by the affidavit of *James Sydney Crocker*, manager of the Provincial Insurance Company in Canada, and of *Archibald John Macdonell*, of Kingston, who styles himself one of the directors of the company in Canada, during the time it carried on business "here," meaning, I suppose, in Kingston. They both deny that the company is insolvent.

The other fact, the return of "*nullâ bona*" to a writ of *fieri facias* has been held in England in more cases than one, not sufficient evidence of due diligence having been used to obtain satisfaction against the property and effects of the company.

In some of the English cases, execution against the individual shareholders has been refused, where the affidavits have been stronger than they are in this case; and where execution has been granted, the affidavits have been such as to convince the court that every diligence had been used unavailingly to obtain satisfaction of the debt, or of some portion of it, out of the effects of the company.

I am not prepared, at present at least, to go the length of saying that the plaintiff is bound to show more than that he cannot, with all due diligence, obtain due satisfaction from the effects of the company, within the jurisdiction of the court. I am aware that in *Hitchins* v. *The Kilkenny and Great Southern and Western Railway Company* (*a*), the affidavits negatived

(*a*) 15 C.B. 459.

the existence of any property or effects of the company in Ireland, as well as in England; the company having been established for the purpose of making a railway in Ireland, but having its place of business in England, information upon both points having been furnished by the secretary of the company; but the court made no comment upon the fact. What the statute requires is that due diligence shall have been used to obtain satisfaction of the plaintiff's judgment, decree or order, by execution against the property and effects of the company; which means, I apprehend, execution issued upon the plaintiff's judgment, decree or order. If more were required to be shewn, a creditor who has recovered judgment in Upper Canada would be driven to Montreal and to England, perhaps to Australia or India, before he could obtain his remedy against shareholders; and an English creditor would in like manner be driven to Upper and Lower Canada, and to all other places where the company might have property and effects: and the creditor would have in all these places, not to issue execution merely, supposing effects found there, but to commence actions as upon a foreign judgment. I do not desire, however, to express any decided opinion upon this point, but as it was raised I give my impression upon it.

There are two other points to which I will advert. The parties against whom the plaintiff seeks to issue execution are only shewn to be shareholders by being shewn to be directors in Upper Canada, the act requiring directors to be shareholders. I incline to think that those who are appointed, under the deed of settlement or otherwise, to manage the affairs of the company in places, where the company may establish branches or agencies for the more convenient management of its business, are not directors of the company within the meaning of the act, where the word "directors" is used. I refer to the interpretation clause, and the 27th, and other clauses of the act. I observe, too, that the affidavit of Mr. *Jellet* does not state when the persons named by him as directors were so.

As I refuse the application upon the insufficiency of the plaintiff's affidavit, it is not necessary that I should determine the question of jurisdiction raised by Mr. *Strong*. I may say, however, that I incline against it. There is no doubt as a general rule, that a foreign corporation may be sued in this court; and I see nothing in the statute to exempt the joint stock companies incorporated under it. If they can be sued, it must, I think, be competent to the court to enforce its decrees and orders against them, and against all liable under their contracts, by the ordinary machinery of the court, or by any other machinery that the statute may provide. But further, in this case the jurisdiction has been submitted to, the defendants having answered upon the merits without objection to the jurisdiction; and the 68th section of the act provides that such execution as is applied for here, may be issued by leave of the court, or of a judge of the court in which the plaintiff's judgment, decree or order shall have been obtained. I do not think it can admit of reasonable doubt that the defendants' submission to the jurisdiction is binding upon all the stockholders.

The present application is refused, with costs.

The plaintiff afterwards brought the motion upon additional evidence before his Lordship the Chancellor.

Mr. *A. Crooks*, Q.C., for the plaintiff.

Mr. *Strong*, Q.C., and Mr. *S. Blake* contra.

King v. *The Parental Endowment Co.*, (*a*) *Esdaile* v. *Smith*, (*b*.) *Bailey* v. *The Union Provident Life Assurance Co.*, (*c*) *Moss* v. *The Steam Gondola Company*, (*d*) *Lindley on Partnership*, (*e*) were, amongst other authorities, referred to.

(*a*) 11 Ex. 444. (*b*) 18 L. J. Ex. 120.
(*c*) 1 C. B. N. S. 557. (*d*) 17 C. B.
(*e*) pp. 453-4-9.

Judgment.—VANKOUGHNET, C.—This is an application under the Imperial statute of 7 and 8 Vic., ch. 110, to make liable, by summary proceedings, to pay an amount found due under a decree against "The Beacon Insurance Co.," certain persons who became, as alleged, stockholders in that company, and who then were, and still are, residents in Canada. I am of opinion that the summary jurisdiction conferred by that act which is invoked here, does not extend to the courts in Canada. The act provides for the formation of joint stock companies in Great Britain and Ireland only, although of course any person, whether resident there or abroad, may become a shareholder in them. It confers certain powers (though not expressly the power in question here) upon Her Majesty's Superior Courts, which are expressly desired to mean the Courts of England and Ireland. It provides for a summary remedy against the stockholders individually, when the amount awarded against the company cannot be recovered from it, and on these summary proceedings it makes a certain description of proof evidence. It allows these proceedings to be taken after ten days' notice to the party to be affected by them. I think it evident, from the act, that they were not intended for adoption out of the United Kingdom. But, on a broader ground, I cannot recognize the act here. While I admit the power of the Imperial Legislature to apply by express words their enactments to this country, I will never admit that, without express words, they do apply, or are intended to so apply. A constitutional government such as we have been liberally given by our sovereign, is an *Imperium in Imperio*, which, we know, the higher power interferes with as little as possible. We are entrusted with all the work of local self-government; which the creation and punishment of offences; with the establishment and maintenance of rights personal and otherwise; with the construction and constitution of courts, and the regulation of their jurisdiction and procedure. We cannot, then, suppose that the Imperial Parliament, in conferring in general terms new powers or jurisdiction upon Her

Majesty's courts, mean to touch the courts in Canada. Every year witnesses in the legislature of England some change in the law. The statute containing it does not say in express terms that it shall not extend to the colonies, and is confined to Great Britain; but surely, notwithstanding that omission, no one would for a moment suppose it in force here. I take as an illustration the 26th clause of the act under consideration. It makes it a penal act for any shareholder, before due registration, to sell his share in the company, and fixes the punishment and provides for its infliction by justices of the peace, or Her Majesty's supreme courts, with the assent of the attorney-general. Can it be said nowadays that this legislature meant to create a new offence in Canada? or to confer jurisdiction upon our magistrates here? or that they intended to declare what should be received as sufficient evidence in our courts here? I think the act no more touches our courts than it does any foreign court, and that I have therefore no power under it. Had I not felt it right to dispose of the case on this ground, I think there are objections taken by Mr. *Strong* which would have rendered it difficult for the plaintiff to succeed. The Act is, in the English courts, construed most strictly. I do not well see, for instance, how, on a decree against "The Beacon Assurance Company," a shareholder in the company registered as "The Beacon Fire and Life Assurance Company," can be made liable. The act makes liable any of the shareholders in the company registered under a particular name. It is not like the case of an individual submitting to be sued by a wrong name and thus adopting it, and estopping himself from objecting to it. The individuals here sought to be charged assumed no personal responsibility for the proceedings taken by the plaintiff against the company; as against them, he took them at his own risk.

Refused with costs.

ASHBOUGH v. ASHBOUGH.

Application of principal to education and maintenance of infants.

Although the general rule is that the court will not break in upon principal money for the maintenance and education of infant legatees, still in a proper case the court will so apply it, as well as to the advancement of the infants.

The facts giving rise to the present suit are clearly stated in the judgment.

Mr. *Gwynne*, Q.C., and Mr. *Dunne*, for the plaintiffs.

Mr. *Proudfoot*, for the defendants.

Judgment.—SPRAGGE, V. C.—The plaintiffs are two sons and three daughters and the widow of the testator, *William Henry Stanton Ashbough*, the sons and daughters being all infants. The defendants are administrators with the will annexed, being two brothers of the testator. The two sons, plaintiffs, are appointed executors by the will.

The testator left no real estate. His personal estate consisted of two sums of £1250 and £250 respectively, and of some furniture and chattels, the latter of which have been absorbed in the payment of debts and funeral expenses. By his will he leaves £375 to each of his sons, and £260 to each of his daughters, payable upon his youngest daughter, (whom he names) becoming of age: and in the event of her death during her minority, then upon the next youngest becoming of age; and in the event of any son or daughter dying before his or her legacy becoming payable, then the same to be equally divided among the survivors. He gives to his wife the interest on the above sums *durante viduitate*, until the principal should become divisible; and provision is made in that event for certain payments to her, by the children. The mother and children join in representing the insufficiency of the interest upon £1500 for their support and the education of the children, and pray that a portion of the principal may be applied for these purposes.

It is suggested on the part of the defendants, that although the court will in a proper case break in upon

the principal for the advancement of infants, it will not do so for their maintenance and education. The language of learned judges in some of the cases does certainly recognize such a distinction; but *Ex parte Green* (*a*) was an instance of the principal being applied to maintenance; and in *Ex parte Chambers* (*b*) where the will permitted the application of principal to the advancement of infants, the court directed its application to maintenance and education, as well as advancement.

The general point raised by the bill in this cause was before this court in the case of *Kerr v. Kerr*, and the court felt itself authorized to break in upon the principal of the infant's estate, for the purposes of maintenance and education.

The circumstance, that in the event of the death of one or more of the children, before becoming entitled to payment, the others will be entitled by survivorship, has been held not to be an obstacle to the principal being broken in upon; because although some of the principal will, in that event, have been applied for the benefit of one or more, who, as the event turns out, never became entitled to any part of it, still the chances among them are equal, and therefore no injustice is done to any. It is as likely in regard to one as to another, that he will have the present benefit at the eventual expense of another, as on the other hand, that another will have the present benefit at his eventual expense.

But it may be that all will die before any portion of this principal money becomes payable; and if, in that event any other person, a stranger to the bequest, would become entitled, the court cannot, without the consent of such third person, touch the principal. This was decided in *Ex parte Kebble* (*c*) where in such event the whole was given by the will to the sister of the legatees.

(*a*) 1 J. & W. 253. (*b*) 1 R. & M. 577. (*c*) 11 Ves. 604.

In the will before me there is no such bequest over; so that in the event supposed the whole principal will go to the next of kin. I think Mr. *Gwynne* is right in his contention that these will be the next of kin at the death of the testator, that is, his widow and children. The property being left undisposed of, in the event supposed, the next of kin take, subject to the legacies, which may fail; and these must be the next of kin at the death of the testator, and the same persons being the legatees and the next of kin, can make no difference.

It does not appear, however, whether they are the same. There may be other children of the testator, for neither in the will nor in the bill are they described as *all* the children of the testator. If they are so, then all entitled are before the court.

The sons and daughters are entitled in unequal shares. It may be that any portion of the principal applied to the purposes prayed for, should be so applied in proportion to the shares they are entitled to respectively. This point may properly come up after the Master's report upon the inquiries to be directed.

The following appear to me to be proper subjects of inquiry before the Master:—

1st. Whether the infant plaintiffs are all the children of the testator; if not, whether the other or others consent to what is prayed, assuming them to be capable of consenting. If there be no other child, or if consent be obtained, then

2nd. As to the necessity of what is prayed for. It is assumed that the interest of £1500 is insufficient for the maintenance and education of the plaintiffs, and it probably is so; but there should be an enquiry as to whether the mother or children, or any of them, have any other, and if any, what other means of subsistence.

3rd. What will be a proper sum to be allowed for the maintenance and education of the children and the support of their mother, having regard to their station in life, and the amount of their fortune.

It is advisable to break in upon the principal no further than is really necessary.

ASHBOUGH v. ASHBOUGH.

Costs—Executors.

Where executors had improperly dealt with a portion of the funds of the estate by allowing one of their number to retain it in his hands at a low rate of interest, the court refused them their costs prior to decree.

Costs given to plaintiff, notwithstanding fraud was charged against executors, which was not established, under the circumstances appearing in the judgment.

In this suit the bill was filed by the widow, one of the plaintiffs in the preceding suit and a legatee under the will, against the same defendants, as administrators with the will annexed, and charged the defendants with retaining large sums of money in their hands for considerable periods, and neglecting to invest the same on good and sufficient securities, and that *David Ashbough* had been permitted by the other defendant *Frederick*, to retain in his hands for the last four years $1,000 on interest at 6 per cent., while he, *David*, had loaned the same at 12 per cent., and that the defendants had lent the trust funds to their personal friends on insufficient securities, and at rates of interest less than had been offered to them, and with refusing to furnish accounts, though frequently demanded.

A decree was made ordering the usual account of the testator's estate, and the Master proceeding under the reference made all the children of the testator parties to the suit, and took the accounts of the estate, the result of which was that the plaintiff was found a debtor to the estate in the sum of $8.82, and that the estate had been properly administered.

The case coming on to be heard on further directions.

Mr. *Gwynne*, Q.C., and Mr. *Dunne*, for plaintiffs.

Mr. *Proudfoot*, for defendants, the administrators.

Judgment.—SPRAGGE, V.C.—The conduct of the adult defendants has not been quite correct, and their answer is not in all respects satisfactory.

Under the will they were to invest £1,500; of this sum they invested £250 in a loan to one of themselves —they say upon ample security, and upon the advice of

the solicitor to the estate. The charge in the bill upon this head is that one of them, *David Ashbough*, has been permitted by *Frederick Ashbough*, the other, to retain in his hands for the last four years $1,000 on interest at six per cent., and that he has lent the same money to other persons at twelve per cent.

In their answer they deny that *David* was permitted to retain in his hands for the last four years $1000 to be loaned by him at interest at six per cent., a thing not charged by the bill, it not being alleged that it was *lent for that purpose;* and as to *David* himself lending it to others he denies "ever having loaned out the said sum of $1,000 at twelve per cent.," and asserts that such a statement is wholly untrue. The denial is much less explicit than might have been expected, if the statement was in point of fact wholly untrue.

No evidence has been given upon the point, but the transaction, looking at the bill and answer only, was a very improper one. In *Passingham* v. *Sherborn*, (*a*) a lease had been taken by one of two trustees, under a clause of the will which not only authorised but requested it, and Lord *Langdale*, while acquitting the trustees of misconduct in the matter, and speaking of the lease as not only a proper but a valuable one to the estate, still made this comment upon it, "that unfortunate connection of interest and duty conflicting with one another, is very much indeed to be lamented; and if the trustees had voluntarily, spontaneously, and of their own accord done this for their own interest, I should have felt there was a good deal of ground for demanding costs against them."

The bill makes this allegation as to the non-rendering of accounts: "From the time of the death of the said testator up to the present period, no account has ever been rendered to the plaintiff or to any person or persons on her behalf by the said defendants, of the said trust, notwithstanding frequent applications have been made to them by the said plaintiff and on her behalf, but they

(*a*) 9 Beav. 424.

have refused and continued so to do." There is no doubt that under the will the plaintiff was the proper person for accounts to be rendered to. The answer is silent upon this point, and no evidence has been given upon it.

The answer is also unsatisfactory in this, that in giving credit for interest moneys received on investments, it omits a sum of $240 paid by one *Kirkendall* on his mortgage. Coupling this with the unanswered allegation in the bill, of the omission and refusal to render accounts, it looks as if the accounts of the estate were kept either very imperfectly or not at all.

The mere omission to render accounts upon demand has been held insufficient to deprive an executor of his costs, (*a*) although certainly accounts ought to be kept, and kept accurately, but the loan by the adult defendants to one of themselves was so improper, that I think I ought to refuse them their costs up to the decree.

The adult defendants, on their part, urge that the plaintiff should not have her costs, she having in her bill made charges of breach of trust against them, which have not been sustained. Besides the charge of a loan of trust funds to one of themselves, the bill alleges that they retained at various times large sums in their hands for considerable periods, instead of investing the same in good securities; also, that they have lent various sums to personal friends of their own on insufficient securities, and at less rates of interest than could have been obtained elsewhere.

Such charges should not lightly be made; and if charges of fraud or breach of trust are improperly inserted in a bill, it is a reason for refusing costs to the plaintiff; but here a portion of the trust fund had been improperly dealt with, and I should not say that the charges of other improper dealings with the fund have been wantonly inserted in the bill, with no motive but to wound the feelings of the defendants, as is sometimes the case. The plaintiff would not be personally cognizant

(*a*) White v. Jackson, 15 Beav. 191.

of how the fraud was dealt with unless informed by accounts rendered by the defendants.

I think the plaintiff and the infant defendants should have their costs, and the adult defendants should have their costs subsequent to the decree, all as is usual, as between solicitor and client. Nothing is asked as to the £250 invested with *David Ashbough*, nor is it stated in the report whether it is a good investment, and for the interest of the infants that it should be continued. The proper course would be to order it into court for re-investment, and the court, I think, should only abstain from doing this in case the present investment is a better one than could be procured elsewhere. This is not suggested, nor is it probable.

ATTORNEY-GENERAL v. CITY OF TORONTO AND MOLSON.

Dedication of property to public use—How evidenced—When court will interfere in favour of individuals interested to restrain improper conversion of such property.

A piece of land was in 1818 vested by patent in trustees for the benefit of the inhabitants of the city of T. Acts of the Provincial Parliament, afterwards passed, authorized the city to lease this land for any term of years or absolutely to sell and dispose of it, the moneys raised to be expended in the purchase, ornamentation, and care of other lands in the city.

The corporation afterwards had this plot of land fenced in and trees planted in it. C. was possessed of a dwelling house and lands adjacent to this plot, where she resided.

In 1862 the city corporation agreed to lease this plot to M. who undertook to erect works on it which would be of benefit to the city by increasing its revenue. C. then filed a bill to restrain the completion of the lease and appropriation of the gound, alleging that it had been fully dedicated as a public park, and that she, as an individual, and the public generally (represented by the attorney-general) would be injured by such appropriation.

Held, that the corporation had authority under cap 84, Con. Stats. U. C., to appropriate this land as proposed.

The bill in this cause was filed by the Attorney-General for upper Canada as informant, and *Hannah Maria Clark*, as plaintiff, against the corporation of the city of Toronto, *John R. Molson*, and *John Clark*, husband of the plaintiff, defendants.

The bill alleged that a strip of land in the eastern part of the city was, by patent, dated the 14th day of

July, 1818, granted to certain persons as trustees for the benefit of the inhabitants of the then town of York, as a public walk, or mall in front of the town, and near the margin of the bay.

By 16 Vic. ch. 219, sec. 8, the trustees were authorised to transfer this park lot to the Mayor, Aldermen, and Commonalty of the city of Toronto, to hold the same on the same trusts and conditions as expressed in the patent but they were also to have power to make such alterations and improvements in the land as they saw fit. By 20 Vic., ch. 80, sec. 6, it was enacted that the corporation of the city should have power to lease for any term of years, or to sell absolutely, the said lands, but the proceeds of such leasing or sale were to be expended in the purchase of and improvement of other lands to be held on the like trusts. This land was accordingly conveyed by the patentees to the city corporation. In 1859 this ground was by order of the city council, fenced in and otherwise improved, and received the name of the "Fair Green."

In May, 1860, the corporation by a by-law changed the name to "Prince of Wales' Park," and ordered a border of trees to be planted, and other improvements to be made in it.

The plaintiff is the owner of a dwelling in which she resides, and other valuable real estate adjacent to the park which lies between her house and the bay.

It was alleged that relying upon the above facts as forming a sufficient dedication of this ground to the public use as a permanent park, walk, or mall, expensive improvements have been made on the plaintiff's grounds, and that they would be deteriorated in value, and the public generally would be much injured should the park ground be converted to other uses.

On the 10th of February, 1862, the city corporation

passed a resolution to lease the park for a long term of years to Messrs. *Molson* & Bros., of whom the defendant, *John H. R. Molson*, is one, they agreeing to erect buildings upon this and other city property to cost $125,000, which were to be used as a brewery and distillery, or similar works.

The bill charged that this would be a mis-appropriation of this property, and would much injure the value of the adjoining premises, and especially of the plaintiff's dwelling.

No evidence was produced at the hearing, tending to shew that any insufficient consideration had been given by Messrs. *Molson*, or that any improper means had been used in obtaining the lease; but the plaintiff produced evidence shewing that certain improvements had been lately made in her premises, as referred to in the judgment.

Mr. *Strong*, Q. C., and Mr. *J. C. Hamilton*, for the informant and plaintiff.

Mr. *Blake* and Mr. *G. D. Boulton*, for the city.

Mr. *McLennan* for *Molson*.

Judgment.—VANKOUGHNET, C.—I doubt very much whether the City Council intended to allocate permanently to the purposes of a park, the piece of ground known as the Fair Green. I think they must be treated as concurring in the report of the Committee on Walks and Gardens, who recommended the appropriation of this piece of ground to the use of the public; but as it formed a portion of the belt or strip of land originally dedicated by the Crown as a public walk or mall for the use of the citizens, it in reality was, without any such action on the part of the city, already devoted to the use of the public, subject to be withdrawn therefrom under the powers conferred by the Act of 20 Victoria, ch. 80, sec. 6.

After the "green" had been fenced in and planted with trees and on the 13th of August, 1860, the Council passed a by-law for the sale of the land, and immediately thereafter advertised it for sale in the daily papers of the city. The plaintiff, Mrs. *Clarke*, alleges that on the faith of the dedication by the city of this piece of land as a park, she made upon her property situate to the north of it, and divided from it by a street, large improvements.

This statement is not borne out by the evidence, which merely shews that after the city had advertised the land for sale, a new fence, substituted for an old one, was built of such a height as to afford from the plaintiff's grounds a view of the park opposite. In my opinion, however, the Council had power under sec. 331, ch. 54, of the Consolidated Statutes of Upper Canada, to shut up this piece of ground, or take from it its use and character as a park. That section gives to the council power "to alter, divert, and stop up the roads, streets, *squares*, &c., &c., or other public communications." I do not think the word "*square*," so used, means a square of ground in the literal sense of the term, for hardly such a space would be any where found. Nor do I think it means merely an open space used as a means of communication like a street, contended for by Mr. *Strong*. The mischief which might be worked by shutting up such a piece of ground round which parties had built, or over which alone they had access to a tenement, would be much greater than shutting up a park or pleasure grounds. I think it must receive the wide construction which is given to the word in ordinary parlance, and that it includes a park; or an open or enclosed space devoted to such an use.

If parties, on the faith of a dedication by a corporation, have built or incurred expenditure, a case might be made for the interposition of this court to prevent the injury which they would sustain by any change in the action of the corporation in regard to it but no such case appears here, and the bill must be dismissed with costs.

WEBBER v. O'NEIL.

Mortgage—Covenant to release by mortgagee—Rights of assignee of mortgagor.

A mortgage contained a covenant that the mortgagee would release any portion of the mortgaged land which the mortgagor might sell during the continuation of the mortgage, upon payment of £200 for every acre to be released. An assignee of the mortgagor made a general payment upon the mortgage, and afterwards, upon selling a portion of the land, demanded a release therefor from an assignee of the mortgagee under the covenant contained in the original mortgage.

Held, that the benefit of this covenant would pass to an assignee of the equity of redemption, but the mortgagor, or his assignee, could not claim a release from the mortgagee unless the latter received the stipulated amount per acre upon the sale of the particular portion of the land required to be released; no general payment by a mortgagor on the mortgage would be sufficient.

In December, 1855, *George Munro* sold eleven acres of land to *P. R. Lamb*, who gave a mortgage back containing the following covenant: "And it is further provided that the said party of the third part, (*Munro*,) shall release any portion of the said eleven acres of land (excepting one square acre off the south-east corner) which the said party of the first part (*Lamb*) may sell during the continuance of this mortgage, upon payment to the said party of the third part of the sum of £200 for every acre, (save as aforesaid) so to be released and discharged by him the said party of the third part; and that the said party of the third part will release the said one acre at any time for the sum of £300."

Munro subsequently assigned his interest in the land to the plaintiff, and *Lamb* conveyed his equity of redemption to *O'Neil* and another, as tenants in common, who covenanted to assume the payment of the mortgage debt and interest. *O'Neil*, afterwards, by deed of partition, became solely seised of his moiety, and mortgaged a portion of it to *P.* and *B. Hughes*, to secure £300, and subsequently released his equity of redemption in the portion so mortgaged.

Before *Munro* made the assignment to *Webber*, *O'Neil* had paid him generally upon the mortgage several

hundred pounds, and *O'Neil*, after the sale to Messrs. *Hughes*, required *Webber*, in accordance with the above covenant, to give a release of the portion conveyed to Messrs. *Hughes*. This *Webber* declined to do.

The plaintiff had filed a bill for the sale of the mortgaged premises; and the Messrs. *Hughes* filed a petition in the cause praying that *Webber* might be ordered to execute a release of the lots they had purchased from *O'Neil*.

Mr. *Read*, Q. C., for the petitioners and *O'Neil*.

Mr. *Hector*, Q. C., for *Lamb*, and Mr. *Murphy* for plaintiff, *contra*.

Judgment.—ESTEN, V. C.—I have no doubt that the covenant was to release only upon a sale, on which the mortgagee should receive £200 per acre, except as to one acre at the south-east corner, and to release this acre at any time, whether sold or not, for £300. The petitioners therefore cannot claim a release, because no sum has been paid to the mortgagee on this sale. The mortgage to them was made to secure a debt, or advance, the whole of which *O'Neil* received and used for his own purposes, and the sale was made in satisfaction of this debt. The £600 was paid on former occasions:—an acre and one-seventh of an acre was sold and released, and no doubt part of the £600 was paid on this occasion—the balance seems to have been paid generally on the mortgage, and the mortgagor cannot, having so paid money, afterwards on a sale, where no money is paid, claim a release by virtue of the previous general payment.

Webber has a right to make the objection; and he makes it for the protection of *Lamb*, and it must prevail, because the petitioners have not brought themselves within the terms of the covenant, which, however, being founded on valuable consideration, and being to

be specifically performed, would, I think, pass to an assignee of the equity of redemption: and I think that the decree for sale would not affect or stop the operation of the covenant, although it would bind the property in favour of any incumbrancers between the original mortgage to *Munro* and the conveyance to the petitioners: nor do I think that default in payment of an instalment would affect the operation of the covenant; and I think that *Lamb*, who has a lien on it for his indemnity against the mortgage, could never object to a specific performance of a covenant taken by himself.

The petition must be dismissed with costs.

Heap v. Crawford.

Mortgage—Assignment—Indemnity—Set-off.

Upon the sale of land subject to a mortgage, the vendor covenanted to indemnify and save harmless from incumbrances, and the purchaser executed a mortgage over the premises bought, to secure part of the purchase money. The purchaser afterwards learned that before his purchase, these and other premises had been mortgaged to another person to secure a sum larger than what he then owed. The vendor had since assigned the purchaser's mortgage to the defendant C. The prior mortgagee having taken proceedings under his mortgage, and being about to sell the premises covered by the second mortgage, the purchaser filed his bill against the assignee of the vendor, and the vendor claiming a right to apply the amount due by him in discharge of the first mortgage, and for an injunction to restrain any action to recover the sum due from him until the premises bought by him should be released from the first mortgage. It did not appear clearly that C., the assignee, was a purchaser of the mortgage for value, but rather that he held it as collateral security for a debt due, and the vendor had become insolvent. Under these circumstances an *interim injunction* was granted upon payment of the amount due into court.

The bill in this cause was filed on the 16th of June, 1862, by *James Heap* against *David Crawford* and *Thomas W. Hastings*, and set forth that in 1857, *Hastings* sold to the plaintiff half an acre, known as lot No. 26, on the west side of Hastings-street, in the subdivision of lot No 11, in the 2nd concession of the township of Hope, and that by the deed conveying these premises the said *Hastings* entered into the usual covenant against incumbrances.

The plaintiff had then no actual knowledge of any other incumbrance affecting the premises, but afterwards learned, that by a mortgage made and duly registered in May, 1855, *Hastings* had conveyed these and other premises to *William Fraser*, to secure a debt, on which there was still due a larger sum than was due on the plaintiff's mortgage. *Fraser* had commenced proceedings in this court for the recovery of the amount due on his mortgage, and part of the premises covered by his mortgage had been already sold under a decree, and he threatened soon to proceed to sell the premises conveyed to the plaintiff. *Hastings* had assigned the mortgage, made by the plaintiff, to the defendant *Crawford*, and he had recovered judgment at law against the plaintiff for the sum remaining due as purchase money, secured by the mortgage. Plaintiff offered *Crawford* to pay all due by him, on being indemnified against *Fraser's* mortgage, but to this *Crawford* refused to accede.

Hastings was insolvent, and *Crawford* held the mortgage as collateral security for a debt due him by *Hastings*.

The bill prayed for an injunction to stay the action at law until the defendants should indemnify the plaintiff against the first mortgage, or until the premises conveyed to the plaintiff should be released from the charge created by that mortgage: and a motion was made upon notice for an injunction to restain proceedings upon the mortgage.

Mr. *Moss*, for the plaintiff.

Mr. *T. W. Taylor*, contra.

Judgment.—VANKOUGHNET, C.—The distinction between this case and *Tully* v. *Bradbury* (*a*) is, that the assignment of the mortgage here was to secure part

(*a*) Ante vol. viii., p. 561.

of a pre-existing debt. The bill also alleges that the vendor was ignorant of the prior mortgage when he took his deed, and gave back the mortgage upon which proceedings are being had against him; and that the vendor is insolvent. He charges no notice to the assignee of the mortgage, though if he had, I do not mean to say it would make any difference—they had both the same description of notice, viz.: by registration. It is difficult to say that there is in principle any distinction between this case and that of *Tully* v. *Bradbury*. It can only rest on the fact that the assignee is not a purchaser of the mortgage, but holds it merely as collateral security, and for all that appears, he will not, by depriving him of the benefit of it, be in a worse position as regards his debtor than he was before: on the other hand, the mortgagor has not paid off the prior mortgage, and as it covers several parcels of land, and is probably for a sum much larger than the purchase money of the parcel of land covered by the mortgage given to the plaintiff, he never will rest satisfied that the distinction may not be maintained, and a case for relief made out. I will grant the injunction on payment of the amount of the defendants' judgment at law into court.

OGILVIE v. SQUAIR.

Rectification of deed—Equities between parties affected.

D. having a mortgage over 23 acres, filed his bill to foreclose. A. B. and C. having liens, were made parties, and their position settled by the master. A. held a mortgage as executor of a deceased mortgagee.

B. redeemed and applied by petition to rectify an alleged mistake in C.'s mortgage, so as to make it a lien over an additional 25 acres prior to A.'s, over the same land.

B. failing to prove that A.'s testator had notice of the error at the time of taking his mortgage, the relief sought was refused.

The facts of this application, which came on by way of petition, are sufficiently set forth in the judgment.

Mr. *Crooks*, Q.C., for the petitioner *Mitchell*.

Mr. *Moss*, contra.

Judgment.—VANKOUGHNET, C.—In this case the plaintiff became the first mortgagee of twenty-five acres of land, described as the south-east half of lot No. 10, &c., and as such filed his bill against the mortgagor for foreclosure. In the master's office several incumbrancers were made parties, and the result was that the master settled the priority of all those who had proved, as follows: the plaintiff first, the executor of one *Donald Cameron* second, *Mitchell*, the petitioner, third, and *Whitney* and *Spratt* fourth. *Mitchell* redeemed the plaintiff, and he now files a petition alleging that the description in the plaintiff's mortgage was erroneous and by mistake; and that it should have been the south-east half of the whole lot, thus covering fifty acres, which the mortgagee professes to convey, and not merely the south-east half of the east-half, as stated in the deed, which only gives twenty-five acres, and praying that the mortgage may be reformed accordingly.

The executors of *Cameron* oppose the petition principally on the ground that notice to their testator of the error at the time he took, as he did, a mortgage upon the south-east half of the whole, is neither charged nor proved, and that it must therefore be assumed he took his security innocently, and that the mistake being that of the plaintiff, under whom *Mitchell* claims the first mortgage, which he has redeemed, cannot now be used to cut out *Cameron's* prior charge upon the twenty-five acres, omitted, as alleged, from the plaintiff's mortgage. I think the executors of *Cameron* have a right to this position, and that I cannot now rectify the deed so as to cut out the charge they have acquired on the twenty-five acres sought to be affected by this petition.

Cameron appears to have been the first mortgagee of this twenty-five acres, and to have the legal estate in it, but even if he had but an equitable title I think it should prevail against the equity set up by the petitioner. *Rice* v. *Rice*. (*a*)

The application must be rejected with costs.

(*a*) 2 Drew. 73.

Reid v. Whitehead.

Registered deeds—The law discussed—Notice—Description of lands.

A witness to a memorial was described as "of the city of London." Another witness described as "of London." *Held*, to be sufficient descriptions of the persons named. Also, *held*, sufficient for the witness' affidavit, proving execution of the deed and memorial to state that "he had seen the due execution of the deed."

A memorial described the land in the same words as the deed, which, however, did not sufficiently identify the premises, and concluded with a reference to a mortgage not imported into the memorial; *Held*, insufficient.

One of the witnesses swore the affidavit proving the execution of the memorial of the other witness, *Held*, no objection to the affidavit.

A subsequent mortgagee, who had not actual notice, *held* not bound by the registration of a prior mortgage, the memorial of which insufficiently described the premises.

The Trust and Loan Company being the holders of a mortgage bearing 8 per cent. interest, transferred the same to a private individual; *Held*, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the company only could legally have reserved such a rate of interest.

The facts of the case and the authorities referred to by counsel appear in the judgment.

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

Mr. *Freeland* for the defendant *Whitehead*.

Mr. *Strong*, Q. C., for *The Canada Life Assurance Company*.

Judgment.—Esten, V. C.—The facts of this case are, that in 1853 a mortgage was made of part of the lands in question in the cause by certain trustees who were seized of it, to the Trust and Loan Company, to secure the sum of £700, with interest at 8 per cent. This mortgage was transferred by the Trust and Loan Company to the defendant *Whitehead*, and one point for which the plaintiff contends is, that from the time of such transfer *Whitehead* can claim interest only at the rate of 6 per cent., the capacity to receive 8 per cent. being confined to the Trust and Loan Company. This mortgage was registered in 1854. Many objections

are made to its registration: one, that wherever the grantors are described in the memorial as "of the city of London," it is not added "in the province of Canada;" another, that one witness is described only as "of London;" another, that in the affidavit of execution he merely states that he witnessed the execution of the memorial "by one of the mortgagors." Such affidavit being contained in the same sheet of paper with the memorial immediately under the few last lines of it, and the attestation and signature of the grantor and witnesses; that objection I think unimportant; and lastly, that such affidavit does not mention the place of execution of the mortgage or the memorial. In the year 1855 one *Pomeroy*, the then owner, mortgaged the same, together with other parts of the land in question, to *Whitehead*, for securing £1000 and interest. This mortgage was registered, but the same objections are made to its registration as to the registration of the previous mortgage. Some questions are raised with respect to payments on the mortgage, which are mere matters of account. In the year 1857, on the 22nd of September, a mortgage was made by *Pomeroy* of another part of the land in question to Mr. *Bray*, of Hamilton. to secure £900 and interest. Mr. *Bray* was a broker, and frequently employed in the purchase and sale of mortgages. This mortgage was confessedly made for sale. *Bray* advanced no money upon it. On the 13th of May he transferred it to the defendants, *The Canada Life Assurance Company*. There is some obscurity as to the mode in which the consideration was paid; as to whether it was paid to *Pomeroy*, *Bray's* commission being deducted and paid to him; or to *Bray*, and by him to *Pomeroy*, he of course in that case deducting his commission; or as to whether it was not applied by the company on a previous mortgage held by them and made by *Pomeroy*. It is admitted that a considerable deduction was made from the apparent amount secured by the mortgage. It is insisted by the plaintiff that the loan was in fact made immedi-

ately to *Pomeroy*, and that the company can claim only what they advanced. This mortgage was not registered until 1859, but the assignment of it was registered in 1857. *Pomeroy* joined in the assignment as a confirming party. The same objections are made to its registration as to the registration of the other mortgages: but the objection principally relied upon to the registration of this instrument is founded on the description of the land comprised in it, which is copied from the description in the instrument itself; which description however is not sufficient to identify the property, and concludes with a reference to the description in the mortgage, which is not imported into the memorial. In 1858 the mortgage, upon which the suit is founded, was made by *Pomeroy* to the plaintiff of all the lands comprised in the previous instruments, for securing the sum of £2,500 and interest. This mortgage was duly registered before the mortgage from *Pomeroy* to *Bray*, but after all the other instruments: and the plaintiff claims priority over them all by virtue of the registration of his mortgage, relying upon its priority to the registration of the mortgage to *Bray*, and upon the defects in all the registrations. The defendants on the other hand, insist that the plaintiff had notice of the previous mortgages when he received his own mortgage and advanced his money. I think that the objections to the registration of the two mortgages held by *Whitehead* ought not to prevail. It is undoubtedly essential that the requisites of the Registry Acts should be strictly observed, and any material failure in that respect will vitiate the registration. The names, additions, and places of abode both of parties and witnesses must be particularly stated in the memorial. The object is, I apprehend, to enable all whom it may concern to trace the instrument and detect frauds. For this purpose it is extremely important that every facility should be afforded for tracing both parties and witnesses. The present case, however, furnishes an instance of a substantial compliance with the requisites of the act. The description of the place of abode is sufficient for all

practical purposes. The most meagre is of the places of abode of the witnesses, namely, "of London," and "of Hamilton." But no real difficulty could be experienced in tracing persons from any insufficiency in such description. In one of the cases the description "of Birmingham" was held to be sufficient, whatever the description "of London" or of "Westminster" might be. A different decision would, I apprehend, affect numerous titles, and if such a decision is to be pronounced, it must be by a different tribunal.

These remarks, I think, dispose of all the objections to the memorials. The other objections apply to the affidavits. If the matter was *res integra* I should be strongly disposed to think that it was not sufficient for the affidavit to state that the witness had "seen the due execution of the deed." I should have thought that it should describe the act performed, as in an ordinary affidavit of execution, so as to enable the registrar to judge of its sufficiency. But in this respect the affidavit follows the form prescribed by the act of parliament—it is probably a form commonly used—the affidavit is not the act of the party, but of a witness; and it is a matter transacted between the witness and the registrar, not intended for the information of the public, but for the satisfaction of the public officer. It would be perhaps not too much to hold that all the provisions respecting the proof are directory. The mention of the place of execution is, I think, intended to enable the registrar to judge of the nature of the proof required in that particular case, and which is different according as the instrument is executed in or out of Upper Canada. The legislature have not thought it of sufficient importance to require it to be stated in the memorial, although it might afford some clue to the discovery of the instrument, or the detection of any fraud connected with it. I do not think that any defects in the affidavits in this case affect the validity of the registrations to which they relate. In all the cases which were cited the office-copy

of the affidavit was the thing registered—it answered to the memorial in the registration of deeds, and was nothing like the affidavit of execution, which is a mere preliminary to the registration of the memorial, the principal thing.

It was also objected that one of the affidavits of execution by a subscribing witness was taken before the other subscribing witness.—I think this unimportant.

For these reasons I think that *Whitehead* is entitled to maintain his priority over the plaintiff. The only material objection to the registration of the deed from *Bray* and *Pomeroy* to the Canada Assurance Company is, that the description of the land contained in the memorial is insufficient. I think the objection is well founded, and that the defect upon which it is founded invalidates the registration, supposing the mortgage from *Pomeroy* to *Bray*, to which reference is made in the description in the deed in question, to contain a material extension or variation of the description in this deed. This description is not sufficient to identify the land, and concludes with a reference to the description in the mortgage, which therefore, if it materially varies or extends the description in the deed in question, is imported into and forms a material part of it. The description in the memorial follows the description in the deed to which it relates in words, but departs from it in substance, inasmuch as it does not incorporate the extension or variation in the description in the mortgage, to which it refers. I have not seen the mortgage, but assume the statement in the bill on this point to be correct. Supposing, therefore, the description in the mortgage to materially extend or vary the description in the deed in question, and the description in the memorial to follow the words of this description without incorporating the extension or variation from the mortgage, I think the registration ineffectual. I arrive at this conclusion on the authority of the case of

Regina v. *The Registrar of Middlesex*, (*a*) with which I think Mr. *Jarman's* note is inconsistent. Apart from the objection to the registration, I think the deed would operate as an immediate conveyance from *Pomeroy* to the company, on the authority of the case of *Hunter* v. *Kennedy*. (*b*) I think the evidence insufficient to fix the plaintiff with notice of the prior incumbrances. In this view his security would be postponed to *Whitehead's* mortgages, but would have priority over the mortgage of the Canada Assurance Company; and it is unnecessary to inquire whether the company were aware at the time of their alleged purchase of their mortgage from *Bray*, of the real facts connected with it, so as to make the transaction in fact an immediate loan to *Pomeroy*, instead of a purchase of a subsisting mortgage. Were it necessary however to express an opinion on the subject, I should be of opinion that the evidence was not sufficient for this purpose, unless it appeared that the money paid or advanced by the company was applied in or towards satisfaction of a previous mortgage of *Pomeroy*, held by them, which is a fact asserted in the bill, and apparently admitted in argument, but not so far, as I can see, proved by the evidence.

The decree therefore will be that the plaintiff redeem from *Whitehead*, and that the company redeem from the plaintiff. I see no reason to doubt that *Whitehead* is entitled to the eight per cent. reserved by the mortgage transferred to him by the Trust and Loan Company.

The defendants, the *Canada Life Assurance Company*, being dissatisfied with the decree so pronounced by his Honor, the Vice-Chancellor, set the cause down to be re-heard before the full court.

Mr. *Blake*, for the plaintiff.

(*a*) 19 L. J. N. S. Q. B. 537. (*b*) 1 Ir. Chy. 148.

Mr. *Strong*, Q. C., and Mr. *Burton*, Q. C., for the defendants who re-heard.

The other defendants did not appear.

The judgment of the court was delivered by

VANKOUGHNET, C.—The first act for the registration of deeds in Upper Canada was passed on the 10th of August, 1795, and contains this recital: "Whereas the lands now holden within this province, under the authority of the Crown, will be shortly confirmed by grant from his Majesty, under the seal of the said province, and whereas it seems to be a desirable measure to establish a register office in each county and riding within the said province, that when the said lands shall be so confirmed, if any or any part of the same shall be transferred or alienated by any deed of sale, conveyance, &c., a memorial of such transfer or alienation shall be made for the better securing and more perfect knowledge of the same."

I think that it has always been judicially considered that the object of the legislature in establishing in this country a system for the registration of instruments transferring or affecting property, was to enable any one dealing with that property, from time to time, to know whether it was affected by any existing deeds or conveyances, and to compel the registration of so much of such deed or conveyance as would afford this knowledge, on the penalty in default thereof of its being held void; and all the statutes subsequently passed relating to registration evidence the same purpose.

The provisions of the statute 7th Anne, ch. 20, for the registration of deeds affecting lands in the county of Middlesex, are the same as those in force here, so far as regards the requisites for registration; and the Irish Registrar Act, 6 Anne, ch. 2, contains similar provisions.

The objects of all these acts appear to have been identical.

In *LeNeve* v. *LeNeve* (*a*) Lord *Hardwicke* had occasion to consider the English Act and its objects: and the Master of the Rolls in *Scrafton* v. *Quincey* (*b*), had the same duty cast upon him. In the case of *Warburton* v. *Loveland* (*c*), commented upon by my brother *Spragge* in *Waters* v. *Shade* (*d*), Chief Justice *Tindal* delivering to the House of Lords the unanimous opinion of the judges, upon the construction and effect of the Irish Registry Act, enters fully into the consideration of the scope, policy, and object of that statute; and his remarks are in every way applicable to the statute law on the same subject in force here. He says: "We think it cannot be doubted but that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration, from the subsequent discovery of secret or concealed charges upon the estate. Now it is obvious that no more effectual remedy can be devised than by requiring that every deed by which any interest in lands or tenements is transferred, or any charge created thereon shall be put upon register under the peril that if it is not found thereon the subsequent purchaser, for a valuable consideration, and without notice, shall gain the priority over the former conveyance, by the earlier registration of his subsequent deed." Again he says: "The language of the act throughout, and more particularly in the fifth section, seems to establish this to have been its leading object, that, as far as deeds were concerned, the *register should give complete information; and that any necessity for looking further for deeds than into the register itself should be superseded*; and it is manifest that no construction of the act is so well calculated to carry into effect this, its avowed object, as that which forces all transfers and dispositions of every kind, and by whomsoever made, to be put upon

(*a*) 1 Vesey Sen. 64. (*b*) 2 Vesey Sen. 413.
(*c*) 2 Dow & Clark, 480. (*d*) Ante vol. II., p. 457.

the face of the register, so as to be open to the inspection of all who may at any time claim an interest therein." Again he says: "It is further urged in argument, that the Irish Registry Act never intended the register to contain a perfect history of the title, for that devises are not required to be registered by that act, and therefore the conveyance by the heir, although registered, may be always set aside by the devisee, claiming under a will subsequently discovered. It must be admitted that such is the necessary construction of the act, and it is to be regretted that it is defective in that particular. But, having that defect, affords no argument for so construing it in another of its provisions as to make it inefficacious against a former unregistered conveyance. If the act does not go far enough, at least the interpretation of the court of law should make it perfect as far as its enactments do extend." In speaking of the interpretations of statutes he says: "The only principle of decision is the fair construction of the statute itself, to be made out by a careful examination of the terms in which it is framed, and by a reference, in all cases where a doubt arises, as to the object which the legislature had in view when the statute was passed. When the language of the act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. If in any case a doubt arises upon the words themselves, we must endeavor to solve that doubt by discovering the object which the legislature intended to accomplish by passing the act;" and he recognizes the rules for the construction of statutes laid down in *Heydon's* case (*a*), and the distinction made in the report, and which he says never should be lost sight of in any case, and was peculiarly applicable to the case then in hand (as it is to the case now before us), "that the office of judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief,

(*a*) 3 Rep. 7.

and *pro privo commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the act *pro bono publico;*" and he adds: "this principle of construction has always been adopted by courts of justice."

Applying the observations made, and the principles enunciated in the cases referred to, to the one now under our consideration, I can come to no other conclusion than that the decision of my brother *Esten* should be upheld. I should have come to the same conclusion without the aid of the case of *Regina* v. *Registrar of Middlesex*, (*a*) or indeed of any decided case, for I think it gives true effect to the language, intent, and object of the act of parliament. The 3rd sub-section of section 19 of chapter 89 of the Consolidated Statutes of U. C., provides that every memorial for registration "shall mention the lands contained in the instrument or will, and the city, town, township or place in the county or riding where the lands are situate, in the same manner in which the same are described in the instrument or will, or to the same effect." I take these words to mean that the description of the land, as contained in the instrument, or such a description as shall identify or make them known as fully as that description itself, shall be contained in the memorial; and that is required in pursuance of the object and purpose of the act, as already explained. Now what are the facts here? The instrument sought to be registered purposes to assign a part of lot ten, in the city of London, as described in a certain indenture of mortgage thereto attached, and which was not on the registry books. The memorial uses precisely the same words, but without shewing what were the lands described in the deed referred to. The assignment and the deed, taken together, shew the lands, and for this purpose they become incorporated and form one instrument, but the assignment by itself, or the memorial by itself, would not shew what

(*a*) 15 Q. B. 976.

lands were assigned, or were affected by the deed assigned; and the memorial therefore has not done its work. It does *not* mention the land contained in the instrument sought to be registered, for that instrument adopts and incorporates, by reference to another deed, where the description is to be found; and the memorial, in order to describe the lands truly, should have gone to that instrument to which it referred and taken from it the description, stating that it had been so taken. What information as to the piece of land affected is afforded to an inquirer by telling him that part of lot ten, as described in another deed not on registry, is conveyed? Would a registry so constituted afford facilities to enquirers as to lands affected by conveyances? Would it give information? Would it not rather create doubts and difficulties in the investigation of titles and the transfer of property: evils which the legislature manifestly intended to prevent.

It seems to me that to uphold such registration as the present as sufficient would be to render the act worse than useless—it would be to make it a snare. I take the case of *Regina* v. *Registrar of Middlesex*, already cited, to be a clear authority, if authority be wanting, as to the form this memorial, to be valid, should have assumed. It was ingeniously argued that so long as the land, by whatever description, imperfect in itself, and the city and county where it was situate were mentioned, the register was perfect; but I don't agree in that construction of the statute. The legislature provides that the county, city, &c., in which the lands are situate, shall be stated in the memorial. This may have been *ex abundante cautela*, for it is difficult to see how in this country land can be described without such particulars, though there may possibly be a case where some long recognized or well known description of a particular tenement, without naming the city, town or township or county, may suffice. Of course there is also the case of

a general conveyance or devise of all a man's lands, and it may be intended that in such a case registration may be had in each county where lands are situate, though one does not very well see how a memorial for that purpose is to be framed. But however this may be, the necessity for stating the place where the lands are situate does not relieve the party from the necessity of also mentioning the lands conveyed, or affected by the instrument sought to be put on registry. Here they are only partially mentioned, but not to such an extent as to enable any one, looking at the memorial, to discover from it what lands they are, but he is told that if he goes somewhere else and can get an inspection of a particular deed, not in his own control, and which he may have no right to look at or call for, he can find out.

This is not, I think, what the legislature intended. I think it meant that as full information of the description of the land as could be procured through the instrument to be registered, should appear on registry, and here the party making registration could by means of that instrument, and the reference contained in it to the prior deed, extract from the latter the necessary information. It is not required that the precise words of description in the instrument should be used, but words to the same effect will suffice—here the same effect would have been given to the description in the instrument of assignment by taking the description from both deeds, and referring to them as containing it, and as this might have been done, it should have been done; for registration, to work out the policy of the law, must be effected whenever it is possible, and must then comply with the requisites in that behalf.

PORTMAN v. PAUL.

Practice—Adding parties after decree—When permitted.

A. having a mortgage, filed his bill to foreclose against *B.*, alleging that the mortgagor had died intestate, leaving him his heir-at-law, and so entitled to the equity of redemption. After decree. *A.* discovers that the mortgagor had by will devised the mortgaged premises to *C.*, and by petition, seeks to add him, and that he may be held bound by the past proceedings in the suit.

Held, that the plaintiff had not exercised due diligence in framing his proceedings, and leave to add C., by special order was refused.

This is a foreclosure suit brought by the Hon. *M. B. Portman* and others, against *Anson Paul*, as the alleged heir-at-law of the mortgagor now deceased. The bill was taken *pro confesso*, and the usual decree made; after which the plaintiffs filed this petition, alleging that they had lately discovered that by a will made by the mortgagor, the mortgaged premises were devised to other persons, whom the plaintiffs now seek to add as parties defendant, to be bound by the proceedings already had in the cause.

Mr. *English*, for the plaintiffs.

Judgment.—VANKOUGHNET, C.—In this a decree in the ordinary shape for foreclosure has been made against the defendant, as the heir-at-law of the mortgagor, and as owner of the equity of redemption in that right. Since the decree, the plaintiffs allege that they have discovered that the mortgagor died, leaving a will, and that the equity of redemption is in certain devisees thereunder, and they now apply by petition to have a reference to the master to ascertain who are, or is entitled under such will or otherwise to the equity of redemption, and to make him or them a party or parties to the bill, either with, or in substitution for the defendant. I think I should not make any such order. If parties will not take the trouble (more or less according to circumstances) to bring the proper parties before the court, they have only themselves to blame; but they have no right to cast that labour upon the court, and turn it into a court of enquiry for their convenience.

The plaintiffs here have chosen to run the risk of the heir-at-law being the owner of the equity of redemption, and have obtained a decree against him as such, and now seek by it to bind other parties who may turn out to be the owners, not claiming in any way under the defendant, and who had no notice of the proceedings in the cause. Suppose they had selected the wrong party as heir-at-law, because he had happened to have the same name, and he having taken no notice of the proceedings, because he had no interest in them, the plaintiffs obtained a decree, master's report and final order for foreclosure, or all but that; could they then ask the court to put the heir in the place of the stranger in the suit, and bind him by the proceedings? If the plaintiffs find that they can get on by adding parties in the master's office under the general orders, well and good; but I decline to make any order on this petition. I quite agree with the observations of my brother *Esten* in *Patterson* v. *Holland*. (*a*)

CUNNINGHAM V. CUNNINGHAM.

Account for rents and profits—Conveyance subject to payment of debts of grantor—Leave to amend—Costs.

Conveyances in fee were made by a father to his two sons of portions of his estate, taking back from them a life-lease for his own security, and a bond conditioned for the payment of his debts by his sons. They both went into possession, and after a portion of the debts was paid off, one of the sons died, having devised the greater part of his portion to his brother, to pay some of the remaining debts out of the profits. The father, however, claimed and entered into possession of his deceased son's portion under the life-lease, and subsequently put the surviving son in possession, in order that he might pay off the debts; but he having applied the rents and profits to his own use, a bill was filed by the infant heir-at-law of the deceased son, seeking an account, but as the bill did not set out the case truly, the existence of the life-lease being ignored by it, the court refused a decree in the existing shape of the bill; but gave leave to amend, and, under the circumstances, without costs.

The circumstances giving rise to this suit are fully stated in the judgment.

(*a*) Ante vol. VIII. p. 238.

The cause came on for the examination of witnesses and hearing before his Lordship the Chancellor, at Brantford.

Mr. *Fitzgerald* for plaintiff.

Mr. *Wood* for the defendants *George Cunningham* the elder and *George Cunningham* the younger.

Mr. *V. McKenzie* for the infant defendants.

The bill was taken *pro confesso* against the other defendants.

Judgment.—VANKOUGHNET, C.—The case made by the bill is, that *George Cunningham* the elder, being seized of the north half of lot number thirteen, in the first concession of Oakland, and owing certain debts, according to agreement in that behalf with his two sons, *Henry Cunningham*, since deceased, and *George Cunningham* the younger, conveyed to *Henry* the south half of the said portion of land, and to his son *George* the residue or north half of it, taking back from them a bond, by which they bound themselves to pay those debts; that the sons took possession of their several portions and paid off certain of the debts, when *Henry* died, having first made a will, by which he devised to his brother *George* the said south half (with the exception of a small parcel on which were the house, barn and garden) until he should, out of the produce and profits thereof, have paid off one-half of the amount for which *Henry* was liable under the bond to his father; that *George* entered into possession of the land so devised to him by *Henry*, and received the profits thereof, and refused to account therefor or furnish any statement of the debts paid under the bond. The bill was filed by the heir-at-law of *Henry*, and to it are parties, defendants, *George Cunningham* the elder, and his son *George*; the executors of *Henry*; his mother and his brothers and sisters, and prays an account.

The defendant *George Cunningham* the younger sets up by his answer a lease to his father for his life, executed by himself and his brother *Henry*, contemporaneously with the deeds and the bond, and alleging that he holds the lands devised to him by *Henry* under that life-lease, and by virtue of a lease thereof from his father to him; *George Cunningham* the elder also in his answer sets up the lease, and alleges that shortly after the death of *Henry* he took possession of the land conveyed to *Henry* under the said lease, and demised the same to his son *George*. He also alleges that the consideration for the deeds to *George* and *Henry* was this life-lease, and the payment of his debts as evidenced by the bond. The bill is *pro confesso* against the other adult defendants.

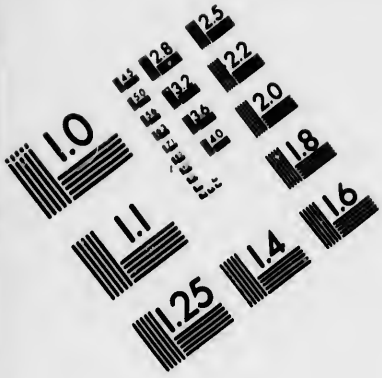
The cause coming on for examination and hearing, the deeds from the father to the sons and the life-lease back from them to him are proved, as is also the bond which is joint and several, obliging the sons to pay "all just debts and demands which the father may owe to any person or persons at the date of the bond, and to save the father, his heirs, executors and administrators, from all trouble and costs in consequence of said debts and demands." *George Cunningham* the elder is called as a witness for his son *George*, and he swears that "immediately after *Henry's* death he asserted his right to the land in question under the life-lease to himself, and that he thereunder put his son *George* in possession, telling him to go on and work the land and pay off the debts; he said it was part of the arrangement between himself and his sons at the time of the execution of the conveyances that they were to retain possession of the land and by the use of it to pay off the debts; that they had no other means of paying them, and that if he had interfered with them in the enjoyment of the land they could not have paid them, and that he took the life-lease for his own security."

Upon this state of facts it seems to me the plaintiff cannot succeed upon his present bill, which completely ignores the existence of the life-lease. According to the allegations in the bill, the case would be simple enough: conveyance in fee to *Henry*, devise by him to *George* as a trustee, and entry by *George*. But up comes the life-lease; the assertion of, and acting upon it, by the old man, the father, and subsequent entry by *George* under his father. Were the case to rest there, the conclusion would be that *Henry* and *George*, in consideration of the remainder, had undertaken to pay off the father's debts: in other words, that they had taken the fee subject to a life estate of their father in it. If this were so, there would be no pretence for filing a bill against *George* for an account. But there is this intermediate element in the case, "that it was understood and arranged that out of the produce of the land the sons were to pay the debts, and that the old man was not entitled to interfere with them." This agreement was partly acted on in *Henry's* life-time, and is admitted now by the father in his deposition signed by him. Whether this deposition, so signed after the entry by *George*, the son, under his father, claiming to act upon his life-lease, would bind *George*, so as to take the case out of the Statute of Frauds, or remove the objection that it is the introduction of a parol term, or whether the part performance in *Henry's* life-time is sufficient to enable the court to act upon it, are questions for the consideration of the plaintiff, should he be advised to amend his bill, upon which, in its present shape, he cannot have a decree as he does not set out the case truly; and the case, as made by him, is entirely displaced by the answers and the evidence in support of them. On the other hand, the answers have not set out the case truly,—the parol arrangement is not referred to by them; the life-lease is set up as if the father had had the right to use it free from any stipulation as to possession by his sons: freed in fact from this parol agreement, which he admits on his examination. Under

these circumstances the case must stand over, and I shall allow the plaintiff to amend within one month, and without costs, in consequence of the defendants not having disclosed the whole truth, and of the plaintiff being an infant, and not himself or his representatives cognizant of the facts. The plaintiff, however, must pay the infant defendants their costs of the hearing before amending. If this is not done and the bill amended within the month, then it is to be dismissed with costs. The defendants, *George* the father and *George* the son, may perhaps be able to establish such default in *Henry* as to have disentitled him to the use of the place, and to have justified the father in acting upon his lease, and *George* the son in claiming under him.

The net profits of the land, at the most, is all that *George* could be accountable for.

The bond being a joint and several bond, *George* is liable alone, and the estate of *Henry* is liable alone for the whole of the debts of the father, with the right of claiming contribution, of course, the one by the other. It creates much difficulty in any arrangement between the father and *Henry's* estate alone without the assent of *George* the son. All these questions and difficulties, and perhaps others, have to be well considered by the plaintiff before proceeding further with the suit.



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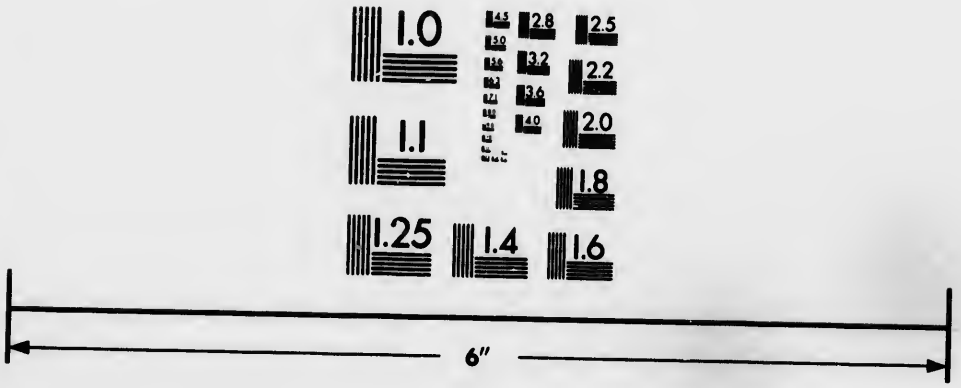

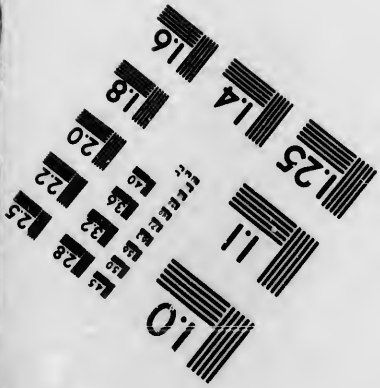

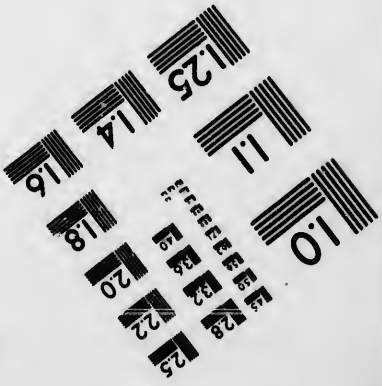

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McQuestien v. Winter.

Injunction—Redemption—Parties.

W. sold certain land to *M.*, giving a bond for a deed: *M.* assigned to plaintiff his interest in this bond, as also certain chattels in security, but retained possession of the instruments. Subsequently *M.* assigned absolutely the bond to *C.*, to whom (with notice of the prior security) *W.* conveyed the premises, taking back a mortgage for unpaid purchase money, upon which *W.* filed a bill of foreclosure against *C.*, making the plaintiffs, and their co-partners in business, defendants as incumbrancers by reason of a registered judgment, but they omitted to set up any interest in the premises by reason of the security given to them by *M.*, in which suit the bill was taken *pro confesso*, and a final order of foreclosure was obtained against all the other defendants. On a bill filed against *W.*, seeking to redeem, or that he should pay off the claim of the plaintiffs under the security from *M.*

Held, that *M.* was a necessary party to the suit; and also, that *W.* had a right to pay them off their claims against *M.*, and to call for an assignment of the other securities held by them for such claim, the amount of which *M.* was bound to pay to the plaintiffs or *W.*, in case of his paying.

Statement.—This was a motion to restrain the defendant from proceeding to take possession under a writ of *habere facias possessionem*, under the circumstances stated in the head note and judgment.

Mr. *Proudfoot*, in support of the application, cited *Cousins* v. *Smith*, (*a*) *Honeycomb* v. *Waldron*, (*b*)

Mr. *Fitzgerald*, and Mr. *McKenzie*, contra, referred to *Winterbottom* v. *Tayloe*, (*c*) *Fell* v. *Brown*, (*d*) *Palk* v. *Clinton*, (*e*) *Gurney* v. *Seppings*, (*f*)

Judgment.—Vankoughnet, C.—In this case the plaintiffs filed a bill claiming to redeem the defendant, or that the defendant shall pay off the amount for which the premises were pledged to the plaintiffs by one *Montford* in security, and they now move for an injunction to restrain the defendant from taking possession of the

(*a*) 13 Ves. 164.
(*b*) Str. 1063.
(*c*) 2 Drew. 279.
(*d*) 2 B. C. C. 276.
(*e*) 12 Ves. 48.
(*f*) 2 Ph. 42.

premises under a writ for possession issued on a judgment at law in his favour. The defendant *Winter*, being the owner of the premises, sold them to one *Montford*, giving him a bond to execute to him a deed in fee simple thereof, on payment of the balance of the purchase money. *Montford* being indebted to the plaintiffs, assigned to them his interest in this bond as well as certain chattels to secure the debt, but retained possession of the bond. Subsequently he assigned absolutely the bond and all his interest thereunder to one *Cole*, to whom subsequently, and as *Cole* swears, with knowledge of the previous security to the plaintiffs, *Winter* conveyed the premises, taking back a mortgage from *Cole* to secure the balance of purchase money then unpaid. This mortgage money falling due, *Winter* filed a bill to foreclose, making the plaintiffs and certain persons, partners of theirs in business, parties defendants as incumbrancers by reason of a registered judgment. Though so made parties to the suit, these plaintiffs did not set up any interest in the premises by reason of the mortgage thereof to them by *Montford*, but allowed the bill to be taken as against them and their co-partners, defendants *pro confesso*. A final order for foreclosure was made against *Cole* and all the other defendants (of whom there were several as incumbrancers) except the plaintiffs and their co-partners. Why foreclosure absolute was not had against them also does not appear. *Winter* thus became possessed of all *Cole's* equity in the land, or rather shut it out, and that of all others except the plaintiffs. Whether the plaintiffs may not have shut themselves out from relief, by reason of their not having set up in the foreclosure suit the rights which they claim in this, is not necessary to a decision of this motion, as I am of opinion that *Montford* is a necessary party to the suit. I think it clear that the defendant has a right, if the plaintiffs can make out a title to relief, to pay them off their claim against *Montford*, and to call for and obtain an assignment of the securities which they hold from *Montford* for this claim or debt,

and that *Montford* would be entitled to and must pay off the debt either to the plaintiffs or the defendants, and to have reconveyed to him these securities other than the land, or to be foreclosed as to them. This should all be accomplished in one suit, and the more certainly so after the plaintiffs have allowed the defendant to bring already one suit to a conclusion without asserting in it, as they might and should have done, the rights they now insist upon. I therefore refuse the present motion.

GORDON v. GORDON.

Pleading—Demurrer.

In a bill for dower the plaintiff alleged that her husband was in his lifetime, at the time of his death, and also at the time of making his last will, *seised or entitled* in fee in possession; and in another part of the bill that the husband had, in his lifetime, contracted for the sale of the premises out of which dower was sought.

Held, bad on demurrer, it nowhere appearing that the husband had been seised during coverture, or that the contract of sale had not been entered into before marriage.

Statement.—The bill in this case was filed by *Susannah Gordon* against *Murdoch Gordon*, *William Hill*, the Hon. *Malcolm Cameron*, *Malcolm Colin Cameron* and *The Edinburgh Life Assurance Company*, setting forth that the plaintiff was the widow of *Donald Gordon*, who was in his lifetime, at the time of his death, and at the time of making his last will, seised or entitled in fee in possession of or to certain lands in the township of Goderich (describing them); that the testator duly made and published his last will and testament dated 12th August, 1859, devising certain lands to plaintiff and his three children, and he thereby appointed the defendant *Gordon*, with others, his executor, all of whom, except *Gordon*, renounced probate, and the defendant, *Gordon*, alone proved the will; and that the testator died 21st July, 1860, without altering or revoking such will; that no devise in lieu of dower was made to plaintiff, nor was any settlement

or provision made in lieu thereof, and plaintiff, on the decease of her late husband, over and above the devise contained in his will, became and was entitled to dower in all the freehold estates of the testator; that on the 7th of May, 1861, one *Woods* recovered judgment against defendant *Gordon*, as executor, for £287, damages and costs, on which a *fi. fa.* lands was in due course issued, and placed in the hands of the proper sheriff.

The bill further alleged that the testator had, in his lifetime, contracted for the sale of the said premises to the defendant, the Hon. *Malcolm Cameron*, who afterwards had sold the said premises to defendant *Hall;* and after stating several circumstances not material to the point in issue, alleged a sale and conveyance by the sheriff under the before mentioned judgment to the defendant *Hall*, who subsequently conveyed the same, by way of mortgage, to the defendants *The Edinburgh Life Assurance Company;* charged several acts of mal-administration against the defendant *Gordon*, as such executor, and prayed, amongst other things, a declaration that plaintiff was entitled to dower, and that the same might be assigned and set out for her.

The defendants, *The Edinburgh Life Assurance Company*, demurred for want of equity.

Mr. *Strong*, Q. C., for the demurrer. The statements in the bill do not shew whether the widow is entitled to dower at law. For all that appears the husband may have been entitled to only an equitable estate; it is no where alleged that he was seised of a legal estate of inheritance; the words of the bill are, that he was "seized or entitled in fee simple in possession." Now it is unnecessary to quote the rule that the statements must be taken most strongly against the pleader, and for the purposes of this argument we have a right to presume that he was only equitably entitled; if that

were so, he did not die so entitled, and the widow is only dowable of equitable estates where the husband dies owning such equity; if, on the other hand, the allegation is taken to mean a legal seisin, then it is not alleged in any part of the bill that he was so seised during coverture; besides, it is stated that he had contracted to sell; this may have been before his marriage with the plaintiff, and in that case she would not be entitled.

Mr. *Gwynne*, Q. C., contra. The whole frame of the bill shews that a seisin in law was what was intended, and the allegation that the premises were sold under common law execution is sufficient, with the other statements of the bill, to shew that the interest held by the testator was a legal, not an equitable one only.

Mr. *Strong*, Q. C., in reply.

Balls v. *Margrove*, (*a*) *Vernon* v. *Vernon*, (*b*) *Williamson* v. *Flight*, (*c*) *Benson* v. *Hadfield* (*d*) *Mitford's* Pleading, page 62, *Daniel's* Chancery Practice, (Am. ed,) page 421, were with other authorities referred to.

SPRAGGE, V. C.—I have read over the allegations of the bill which state the plaintiff's title to relief, and still think, as I intimated was my impression at the close of the argument, that the plaintiff's title is not stated with sufficient certainty. It was necessary to shew a legal title to dower. Her title is so stated in the first paragraph that the title of her husband might be either a legal or equitable title, and the rule is clear that in such case the bill is demurrable; *Balls* v. *Margrove*. This is not helped unless by the allegation in the eighth paragraph, that by the deed from the sheriff, made upon the sale by him, and by force of the statute in that

(*a*) 3 Beav. 284.
(*b*) 2 M. & Cr. 145.
(*c*) 5 Beav. 41.
(*d*) 5 Beav. 546.

behalf, the legal estate became vested in the purchaser, which it is argued could not be unless the deceased owner, the husband of the plaintiff, had himself the legal estate. This is, however, rather the allegation of what the effect of the sheriff's deed was, and so a conclusion of law than an allegation of a fact, rendering certain the statement of title which, without it, was uncertain. Still it comes very close to what Lord *Langdale*, in the case cited, calls "such controlling expressions in the bill as will alter the construction arising from the former allegation."

But the statement of title is open to another objection. There is no allegation that the contract of sale was after the marriage of the plaintiff. If before, she would have no title to dower. Upon this ground, and I incline to think upon the first also, I must hold the bill demurrable. For the strictness and certainty with which the title of the plaintiff must be stated I would refer to the following cases, in addition to those cited for the demurrer, *Cressett* v. *Mytton*, (*a*) and *Gell* v. *Hayward*. (*b*)

(*a*) 3 B. C. C. 481. (*b*) 1 Ver. 312.

GLASS v. FRECKLETON.

Mortgage by deed absolute—Judgment creditor of alleged mortgagee—Parties amendment.

G., a creditor of *F.*, under a judgment recovered in 1856, filed his bill to redeem *W.*, the alleged mortgagee, under a deed of conveyance to him from *F.*, absolute in form. A creditor of *W.*, under a judgment recovered in 1859, and kept alive by *fi. fa.* lands, was made a party in the Master's office as an encumbrancer subsequent to plaintiff.

Held, that he could not properly be thus made a party; but the plaintiff was allowed to amend his bill by making him a party, in order that an opportunity might be afforded him of contesting the plaintiff's right to treat the conveyance from *F.* to *W.* as a mortgage as against him.

Where a conveyance absolute in form was executed as a security only, upon a verbal undertaking of the grantee to reconvey upon payment of his demand.

Held, that a judgment creditor of such grantee could enforce his judgment beyond the amount of principal and interest due the grantee.

Statement.—This was a suit by a judgment creditor seeking foreclosure, the decree in which had been pronounced by his Honor V. C. *Spragge*, as reported, ante volume VIII., page 522.

On proceeding under that decree in the Master's office, one *Buckley* was made a party defendant as an encumbrancer subsequent to the claim of the plaintiff; thereupon *Buckley* presented a petition setting forth the facts, which are stated in the judgment, and praying that under the circumstances that he might be declared prior to the plaintiff as encumbrancer on the premises in question.

Mr. *Fitzgerald* for the petitioner.

Mr. *Burns* contra.

Judgment.—VANKOUGHNET, C.—The plaintiff in this case files a bill against the two defendants, treating one as mortgagor and the other as mortgagee of the premises, and claims a right as judgment creditor of the mortgagor to redeem *Wilson*, the alleged mortgagee, under

a deed of conveyance to him from *Freckleton*, absolute in form. Defendants make default, and a decree *pro confesso* goes against them. The petitioner *Buckley*, a judgment creditor of *Wilson* under a judgment recovered and registered in September, 1859, and now alive by virtue of a *fi. fa.* against lands, issued prior to the 1st September, 1861, is brought into the master's office as an encumbrancer under that portion of the decree which directs the Master to make enquiries as to encumbrances subsequent to the plaintiff. The plaintiff recovered judgment against *Freckleton* on the 18th of December, 1856. It is objected by the petitioner *Buckley* that his encumbrance is not subsequent to the plaintiff's—in other words, that he is an encumbrancer prior to the plaintiff, his lien being on *Wilson's* estate and not on *Freckleton's* the mortgagor and vendor, and so not affected by the decree; and that at all events the deed to *Wilson*, being absolute in form, he is entitled to prosecute his judgment against the land as *Wilson's* he having no knowledge or notice of the transaction, being merely a mortgagee, as now admitted between the two defendants, and *Buckley* is much in the position of a mortgagee of *Wilson*, with notice that *Wilson's* title was only a mortgage. As a judgment creditor he can claim no more than his debtor has a right to in the land; he is bound by the same equities. A case, however, might be made out of a judgment creditor advancing money or goods, or incurring a liability which the judgment was to secure upon the faith of the absolute ownership of the land by his debtor, and the understanding that the judgment was to be a charge upon it when the court might think it inequitable to interfere, and would leave the creditor to enforce his judgment at law. I think it clear that the petitioner cannot properly be made a party in the Master's office, and that the order of the Master making him such party must be discharged with costs, unless the plaintiff will amend his bill by making the petitioner a party thereto, as he should have done originally, in order that he

might contest the plaintiff's right to treat the conveyance as a mortgage, as against him; and this I give the plaintiff leave to do: for this purpose setting aside the decree, the plaintiff paying all costs.

In pursuance of the permission thus given to the plaintiff, he amended his bill by making *Buckley* a party defendant, who put in an answer thereto setting up a claim similar to that put forth in his petition, and the cause was brought on to be heard upon the pleadings and evidence, when the same counsel appeared for the parties respectively. The points relied on by counsel appear sufficiently in the judgment of

Judgment.–VANKOUGHNET, C.–In this case the defendant *Freckleton*, being seised in fee of certain lands, conveyed them in fee by deed, absolute in form, to one *John Wilson*, against whom subsequently the defendant *Buckley* recovered a judgment. The plaintiff is a registered judgment creditor of *Freckleton*, and as such files his bill for the sale of *Freckleton's* interest in this land, alleging that *Wilson* only holds the land by way of security. *Wilson* is the only witness examined, and he swears that the deed to him was made merely to secure to him the judgment of £50 and interest, and that he holds it only as such security. The judgment of *Buckley* is for an amount larger than the sum payable to *Wilson* on the security, and he contends that he cannot be cut down to that sum, but is entitled to have his judgment paid in full. He argues that evidence given for that purpose (after registration of his judgment) of a party agreement, not reduced to writing, cannot affect the legal interest which, by virtue of such registration, he has acquired upon the estate absolute at law of *Wilson*. But the evidence is not of an agreement made subsequently to the registration of *Buckley's* judgment. The evidence is that the deed to *Wilson* was made upon that agreement, which was not

however reduced to writing. The agreement existed all the while, but was and is incapable of registration, and could not have been enforced without written evidence, which is not furnished by *Wilson* under oath and signature. The judgment at law has been enforced against this land specifically, and before any action has been taken on the writ of *fieri facias* against this particular land, *Buckley* has notice of the agreement under which the deed to *Wilson* was executed.

Under these circumstances, and acting upon the doctrine propounded in *McMaster* v. *Phipps*, (*a*) I think the defendant *Buckley* is entitled only to such interest as *Wilson* himself took in the land, and that he must submit to take from the plaintiff the amount so secured to *Wilson* for principal and interest, and his costs.

NICKLES V. MCROBERTS.

Lost deed—Suit to compel execution of new ones—Costs.

G., in consideration of his support and maintenance, conveyed to *McR.* certain land. The arrangement fell through, and the land, it was alleged, was re-conveyed by the deed, which was supposed to have been lost, and which contained a covenant for further assurance. Before such re-conveyance, however, *G.* made a similar arrangement with *R.*, and *McR.*, at the instance of *G.*, conveyed the same land to *R.* This arrangement was also abandoned and a new one, similar in its object, was entered into between *G.* and *N.*, which lasted for upwards of six years, and the conveyance executed pursuant thereto was considered effectual. With full notice of this, *K.* also entered into an arrangement with *G.*, and, with his assent, took a conveyance from *R.* which gave him the legal estate. *N.* having died, his son filed a bill, alleging the loss of the conveyance by *McR.*, and seeking to compel the execution of another deed by him to *G.* in place of the last one; or a conveyance to himself as claiming under *G.*, praying also that *K.* might be ordered to join in such conveyance. At the examination of witnesses the supposed lost deed came to light, in the hands of the attorney with whom it had been deposited, but its genuineness was denied by *McR.* *K.* had supported *G.* for some time, and in his answer sought to avoid the conveyance to *N.* by alleging insufficient support of *G.* Under these circumstances the bill as against *McR.* was dismissed with costs: but it being considered, that under the pleadings, relief might properly be given as against *K.*, although the bill was not

(*a*) Ante. vol. 3. p. 252.

filed principally with that object, *K.* was ordered to convey to the plaintiff on receiving compensation in respect of his support of *G.*, not exceeding the amount which *N.* had agreed to pay in the event of his failure to provide *G.* with support, the plaintiff, as against *K.*, being allowed only such costs as he would have been entitled to if the suit had been instituted against him alone upon the equity existing between himself and *K.*

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

Mr. *Fitzgerald* for the plaintiff.

Mr. *Blake* for defendant *Kennedy*.

Mr. *S. Blake* for defendant *McRoberts*.

Judgment.—SPRAGGE, V. C.—This case is brought on for hearing under peculiar circumstances. The bill alleges the loss by the plaintiff of a conveyance from the defendent *McRoberts* to the defendant *Graham*, of a certain parcel of land which had been conveyed by *Graham* to *McRoberts*, the consideration being the support and maintenance of *Graham* by *McRoberts* and the payment by *McRoberts* of certain debts due by *Graham*. The arrangement fell through, and the alleged lost deed, which bears date the 9th of June, 1852, would therefore be merely a re-conveyance from *McRoberts* to *Graham*.

Before this, however, *Graham* had made an arrangement with one *Rogers* of the like nature with the one made with *McRoberts;* and *McRoberts*, at the instance of *Graham*, conveyed the same parcel of land to *Rogers* by deed of 17th January, 1852, which it is alleged he afterwards re-conveyed to *Graham* himself.

The alleged lost deed contained a covenant for further assurance ; and the object of the bill as against *McRoberts* is to compel the execution from *McRoberts* to *Graham* of another conveyance in place of the lost deed, or a conveyance to the plaintiff as claiming under *Graham*. The defendant *Kennedy* claims under a conveyance from *Rogers*, and has the legal estate. *McRoberts* denies having ever executed the alleged lost

deed. The bill prays that *Kennedy* may be ordered to join in the conveyance to the plaintiff. The alleged lost deed was placed in the hands of Messrs. *Wilson* and *Hughes*, of London, in 1852, at first with a view to procuring its registration. Mr. *Hughes*, the gentleman personally communicated with, advised that another conveyance should be procured from *McRoberts*, and applications were made to *McRoberts* for that purpose, who after taking time to consider and advise about it, refused. Mr. *Hughes* was then instructed by the plaintiff, who, with *Graham*, had seen him on the subject, to bring an action against *McRoberts*, upon his covenant for further assurance, and an action was accordingly commenced, which was brought in the name of *Graham*. At the examination of witnesses before me at London evidence was given of searches having been made in the office of Mr. *Wilson* (Mr. *Hughes* having in the meantime been appointed a county court judge) for the missing deed. Among others, Mr. *Hughes* was called: he had not been requested to make any search; he was afterwards recalled and stated that he had made some search; other witnesses were examined, and Mr. *Hughes* made another and more effectual search for the missing deed: he found it in the draft of the declaration against *McRoberts*, and produced it in court.

Both before and after its production evidence was given as to its genuineness. *McRoberts* repeatedly and emphatically denied having ever executed it; and his son *William McRoberts*, who attested the execution of the conveyance from his father to *Rogers*, and whose name appears as a subscribing witness to the deed in question, denied that it was his signature, though with less positiveness than the denial by his father.

If the deed was not genuine, the case fails of course as against *McRoberts*; and if genuine, its finding and production satisfy that, which it was the object of the suit to obtain against him. But the plaintiff urges that

McRoberts ought not to have his costs, and indeed ought to pay the costs of his being made a party, because, as the deed he had given could not be found after diligent search, he was bound under his covenant to execute another. If the missing deed found and produced by Mr. *Hughes* is not genuine, that ground fails, of course: and if genuine, still it turns out that it was all the while in existence, and in the office of the solicitors with whom the plaintiff had deposited it: and the gentleman in whose hands it had been placed had not only, not been asked to search for it before the bill was filed, but not even before the case was called on for examination. If he had been applied to, it is to be assumed that he would have found the missing deed, and this suit would not have been brought; at any rate in its present shape. I think *McRoberts* entitled to his costs. I do not indeed very well see of what use a conveyance from *McRoberts* could be to any one; for, at the date of the missing deed, he had conveyed to *Rogers*, and thenceforward had neither the legal estate, nor any beneficial interest.

The primary object of the bill fails. But as to *Kennedy*, it makes a secondary case, though scarcely a case independent of the one arising out of the alleged execution and loss of the deed of June, 1852, but at the same time *Kennedy* has an equity quite from that deed.

Graham appears to have made successive arrangements of the like nature, first with *McRoberts*, next with *Rogers*, then with *William Nickles* the father of the plaintiff, and lastly with *Kennedy;* the two first were of short duration and were mutually abandoned. The agreement with *Nickles* was acted upon for upwards of six years, during all which time *Graham* was supported by *William Nickles* or the plaintiff, and the conveyance from *Graham* to *William Nickles* was intended to be an effectual conveyance, and was no

doubt supposed to be so. *Kennedy*, as the evidence shews, was cognizant of all this; and with notice of it, took a conveyance from *Rogers*, which gave him the legal estate with the assent of *Graham*.

If I were to dismiss this bill as against *Kennedy*, as well as against *McRoberts*, I should think it right to do so without costs as against *Kennedy*, for I think his conduct disentitles him to costs. My doubt has been whether I may not properly give relief against *Kennedy* though the bill is not framed with that object, or at least not principally with that object. I incline to think that I may. *Kennedy* has evidently understood the bill as stating an equity against him, founded upon the prior contract with *William Nickles*, and its being acted upon, and with notice to him, *Kennedy*.

The bill states shortly the conveyance from *Graham* to *Nickles* to have been for a valuable consideration. *Kennedy's* answer states what the consideration was, and seeks to avoid it by alleging insufficient support to *Graham*, thus raising an issue upon which evidence has been given as to whether or not *Graham* was in fact supported by *Nickles;* and upon that, the evidence is in favor of *Nickles*. The evidence of notice to *Kennedy*, besides the admission in his answer, is ample.

I suppose *Kennedy*, by raising the question of the support of *Graham* by *Nickles*, puts his defence upon this, that he has the legal estate, and as good, if not a better equity than *Nickles*, because support was a necessity for *Graham*, and inasmuch as it was not afforded by *Nickles*, he might properly support him, and get the legal estate in himself, for his protection; but the evidence is against him upon this point, that is, upon the fact of sufficient support by *Nickles*.

If the bill had been against *Kennedy* alone, and the only issue, that which is in truth the real issue between

the plaintiff and *Kennedy*, I could not but hold the plaintiff entitled to a conveyance from *Kennedy*, and I think I may properly decree that relief upon these pleadings, instead of putting the plaintiff to file a new bill, seeing, as I do, that *Kennedy* understood such to be the real issue between him and the plaintiff. It is indeed as between them a contest which shall get the parcel of land, the price being the support of an old and intemperate man, for what is probably the short remainder of his life.

Kennedy has supported *Graham* for some time, and has relieved *Nickles* from the cost of supporting him during that time. It may be referred to the Master to inquire what sum should be allowed to *Kennedy* in respect of such maintenance. Upon payment of that sum, or its being set off *pro tanto* against costs, plaintiff to be entitled to a conveyance. The plaintiff to be entitled to such costs against *Kennedy* as he would have been entitled to if this suit had been against him alone, and only upon the equity which I have referred to between these two parties.

In proceeding to draw up the decree upon this judgment, the Registrar settled the minutes, referring it to the Master generally to settle the amount of remuneration payable to *Kennedy* for the support of *Graham*. This the plaintiff objected to, insisting that under no circumstances ought the Master to be at liberty to allow more than at the rate of ten pounds per annum, that being the amount agreed on between *William Nickles* and *Graham*, that the former should be bound to pay for the support of *Graham* in case *Nickles* failed to furnish him therewith; and accordingly, a motion was made before his Honor Vice-Chancellor *Spragge* to vary the minutes in this respect, when it was determined that in settling a sum to be allowed, the Master must be restricted by the decree to the sum of ten pounds, which had been agreed upon between the parties.

CHISHOLM v. BARNARD.

Administration suit—Allowance to executors.

A retaining fee paid by the executors to their solicitor in an administration suit may, under certain circumstances, be a perfectly reasonable disbursement.

Where executors without any authority assumed to act in the management of the real estate of their testator, they were made to account for their acts, as if they had been duly empowered to act as trustees. In such a case it is their duty to keep accounts, and be ready at all times to explain their dealings with the estate.

While the court will not exact from trustees, in the management of the estate, more careful conduct than a prudent man would bestow in the management of his own property, still it requires from them full explanation of all their dealings, and the causes which may have led to outstanding debts not having been collected, or to the disappearance of property belonging to the estate.

Five per cent. commission on moneys passing through the hands of executors, may or not be an adequate compensation, or may be too much according to circumstances; but, in no case will an executor be entitled to allowance for services performed by an agent, and which were so performed by him gratuitously.

Statement.—This was an administration suit, a decree in which had been pronounced, referring it to the Master to take the accounts of the suit, who made his report thereunder, which was appealed from. The grounds of appeal and the points urged by counsel appear sufficiently in the judgment.

Mr. *Dunne* for the appeal.

Mr. *Crickmore* for the executors, contra.

Judgment.—VANKOUGHNET, C.—I agree with the Master in his disposition of the item of taxes and repairs. The tenant was not bound to pay the one or the other, and consequently the estate was bound to pay, and it could make no difference whether the executors received from the tenant the full rent and the amount paid for taxes and repairs, or whether they authorized him to pay for them out of the rent and hand them the balance. I think, as I stated at the time, that the charge for the retaining fee paid to the solicitors for the executors should be allowed; it was not an unreasonable disbursement for them to make. There is a great deal of trouble in

conducting administration suits at times, and many things are done and much time employed often for which no direct charge can well be made. I think, however, that some of the items with which it is sought to charge the executors require further investigation. As I understand the case, the executors, without any authority to do so, assumed the management of the real estate. That this was for the benefit of the parties interested I do not doubt, but having assumed such management, they must account for their trust as if they had been duly empowered. Now it seems that one of the lots was leased to a man named *Little*, and that at the expiration of his tenancy for a year there was due $120. The agent for the executors at that time swears that he called the attention of the acting executor, *Chisholm*, to this debt, and that *Chisholm* said to let it lie and he would see *Little* in parliament about it. *Little* being then a candidate for admission there:—nothing more is heard of it. I think that the executors, acting as trustees, are bound to give some explanation why this rent was not recovered; to shew that they tried to get it and could not, and why. It appears as an asset of the estate, and it devolves upon them to account for it. So also with regard to the five or seven acres of growing wheat left by *Riddell* when he gave up the place. It is shewn that he abandoned this to the executors. They must account for it. Then as to the balance of rent claimed to be due from *Robson*, I think some explanation is required from the executors, It appears that for one lot, at all events, *Robson* was to pay $60 a year, and there is evidence to shew that it was worth $90. This $60 a year is not accounted for. It would seem that *Robson* was able to pay. The claim for timber cut on the premises is sustained by evidence sufficient to put the executors on their defence as to it. It does not appear under what circumstances the executors permitted all this timber to be cut and removed, and the evidence shews that its loss was a damage to the premises. The

Master appears to have acted under the impression that it was the duty of the guardian to make out that the executors could have realized every asset of the estate, and wilfully made aw .y with any portion of it which had disappeared, and that unless this was done he was bound to presume that they had acted rightly, and could not better have discharged their duty. This is not so. While the court will not exact more from trustees than such conduct as a prudent man would pursue in the management of his own property, yet it requires from them full explanations of all their dealings, and of the causes why outstanding assets were not collected, or property of the estate had disappeared; and a trustee who cannot satisfactorily account for the one or the other will be chargeable with them. It is the duty of every one assuming the position of a trustee to keep accurate accounts, and to be ready at all times to explain his dealings with the estate, and to be able to shew why he has not got in any portion of it, whether due to it in the shape of rents or otherwise. The case must, therefore, go back to the Master.

As regards the allowance of a commission to the executors, I am not prepared to say that the amount fixed by the Master is too large. I think nothing should be allowed to the executors during the time *Wright* managed the estate for them, unless it can be shewn that they had labor and trouble during that time in the management. The discharge given to *Wright* assumes that all this fell upon him, and that he discharged it gratuitously. Of course the executors cannot have any allowance for work done by him without charge. Five per cent. commission on moneys passing through the hands of executors and trustees may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labor, anxiety, and time spent in managing an estate, when five per cent. would be a very insufficient allowance.

These executors appear to have managed this estate since 1848. What amount of personal trouble and time they expended I know not, and therefore it is that I am unable to say whether the sum allowed by the Master is or is not fair. But with the observations I have made as to the period of *Wright's* agency, I leave him to re-consider it. On the other items I agree with the Master.

DUNN v. ATTORNEY-GENERAL.

Foreclosure when Crown interested in the equity of redemption.

Where the Crown holds the equity of redemption of mortgaged premises no absolute order of foreclosure can be pronounced, but only that in default of payment the mortgagee be at liberty to enter into possession.

Statement.—In this case the plaintiff held a mortgage covering premises which had, since the making of it, become vested in the Crown.

On a bill being filed against the Attorney-General of Upper Canada, to recover the amount due, a question arose at the hearing as to the form of the decree to be drawn up.

Mr. *J. C. Hamilton*, cited *Reeve* v. *Attorney-General*, (*a*) *Hodge* v. *Attorney-General*, (*b*) and *Miller* v. *Attorney-General*. (*c*)

Mr. *McGregor* contra.

Judgment—VANKOUGHNET, C., stated that this court has no authority to decree relief in such cases against the Crown except such as is possessed by the Court of Chancery in England. If a decree were made for sale, the interest of the Crown might thus be wholly vested in the purchaser, but if foreclosure be asked, the court can, on default, only order that the plaintiff be at liberty to enter into possession of the mortgaged premises, and hold and enjoy the same, and receive the rents and profits thereof until the Crown think proper to redeem.

(*a*) 2 Atk, 223. (*b*) 3 Y. & C. 343.
(*c*) 9 Ante, Vol. ix,, p. 559.

HANCOCK v. MAULSON.

Mortgage—Proof of claim in Master's office.

To shew the balance due on a mortgage, the party proving the claim, in addition to swearing to the balance, produced certain books in the Master's office, and made affidavit that by these books the balance claimed on the mortgage could be discovered. Neither party asked him any question in reference to them, nor was he asked to explain them; and the Master stated that on looking at the books he could not from them understand the account.

Held, on appeal from the ruling of the Master, that the oath of the claimant, standing unimpeached, though not supported by the partial statement furnished by him, but which he offered to make complete, if required, from the books, the Master should have acted on it, and allowed the claim.

The point involved in this appeal appears in the head-note and judgment.

Mr. *Mowat*, Q. C., for the appellant *Woodside*.

Mr. *Roaf* for *Miller*, encumbrancer, added in the Master's office.

Mr. *Fitzgerald* for other parties.

Judgment.—VANKOUGHNET, C.—I think upon the evidence before him, the Master should have ranked the sum claimed on *Woodside's* mortgage next after the plaintiff's mortgage in priority. The mortgage, though made to *Woodside*, was for the security of the City Bank, to cover an indebtedness of *Maulson* to that institution at the time of about £3,548. *Woodside*, both in his affidavit and his evidence before the master, swears that of this sum so secured, the sum of $2,175 still remains due, and it is this sum *Woodside* or the City Bank claims should be allowed them in priority of the other defendants, *Miller* and *Robertson*. *Woodside* accompanies his first affidavit with a list of the notes represented as the notes of one *Miller*, endorsed by *Maulson*, and as covering this balance claimed on the mortgage, and he accompanies a second affidavit with a long list of other notes, at one time in possession of the bank, and used by *Maulson* in his transactions with

it. *Woodside* also produces in the Master's office the books of the bank in which *Maulson's* account and discount transactions are entered, and he swears that by these books can be discovered the balance now claimed on the mortgage. Neither party ask him any questions in reference to the books, nor is he asked to explain them, and the Master says that on looking at the books he cannot, from them, understand the account. Without explanation from Mr. *Woodside*, or some officer of the bank acquainted with the transactions, and the mode of keeping the books, the latter would not, by themselves, afford the explanation. The most that can be said, however, of the partial statement of *Maulson's* account and bill transactions, attached to *Woodside's* first affidavit is, that it does not explain, or by itself prove, Mr. *Woodside's* deposition, that the balance now claimed is part of the original amount secured by the mortgage, but it does not disprove it, as there is nothing unlikely or improbable in the balance claimed to be due of the original debt being covered in the bank by the notes of *Miller*, used by *Maulson* in his banking operations, and the same may be said of the books unexplained in evidence. This, however, cannot set aside *Woodside's* positive oath, which the other incumbrancers claiming priority over him might have got rid of, if they could by cross-examining *Woodside*, and by the books, or otherwise, disprove the allegation. This, however, they did not attempt, and standing, as I think, unimpeached, though not supported by the partial statements furnished by *Woodside*, and which he offered to make complete, if required, from the books, the Master should, in my opinion, have acted upon it, and allowed the claim. The appeal, therefore, must be allowed.

BURNHAM v. BURNHAM.

Promissory notes—Renewal—Indorser's indemnity.

The plaintiff indorsed notes for *W. B.*, since deceased, which were discounted at two different banks. To indemnify plaintiff against these indorsements *W. B.* mortgaged certain real and personal property to him. The notes were subsequently paid, when due, at these banks, with the proceeds of other notes of *W. B.*, indorsed by plaintiff, and discounted at a third bank.

Held, that the indemnity secured plaintiff against his indorsements at *W. B.'s* request, on paper discounted at the third bank to keep outstanding the amounts of the former notes.

Semble, that the indemnity given to an indorser will protect him against liability on any other securities, in whatever shape, to which he may become a party at the request of the maker to keep the amounts of the notes outstanding.

This was a suit by *Elias Burnham* against *Susan Burnham*, executrix of her late husband *William Burnham*, deceased, seeking an account and payment of what was due to plaintiff in respect of certain notes endorsed by him for the said *William Burnham*, under the circumstances stated in the head note and judgment.

Mr. *A. Crooks* for plaintiff.

Mr. *Fitzgerald* for defendant.

Judgment.—SPRAGGE, V. C.—The question is as to certain promissory notes of which the late *William Burnham* was maker, and the plaintiff indorser, discounted at the Ontario Bank. The plaintiff is in effect mortgagee of certain real and personal estate of *William Burnham*, conveyed to the plaintiff to indemnify him and *Zaccheus*, and *Harris Burnham*, for their indorsements upon certain paper of *William Burnham*, at the Bank of Upper Canada and the Niagara District Bank. The notes at the Niagara District Bank have all been paid off, and those at the Bank of Upper Canada partially so.

If the notes at these two banks were retired by the proceeds of notes discounted at the Ontario Bank for the purpose, I think the plaintiff is entitled to hold the

property conveyed to him to indemnify him against the notes at the Ontario Bank, and against any renewal of those notes. The substance of the contract of indemnity was that *William Burnham* should pay, and that his indorsers should be protected from paying the moneys for which the notes were a security. There could be no question that it would extend to renewals at the same bank; and as little doubt, I think, for the principle is the same, to notes at other banks, or any other securities, in whatever shape, to which the indorsers or any of them might become parties at the request of *William Burnham*, to keep the same moneys outstanding.

Then as to the fact; the defendant, after the death of her husband, was applied to by the Ontario Bank for payment; and she proposed that the plaintiff should be released, and that the bank should take the securities which he held for his indorsements for *William Burnham*. This is stated by the cashier of the Ontario Bank, and is confirmed by the defendant's brother-in-law, *Austen*, who says she described the property, and it is the same property, which was conveyed to the plaintiff to indemnify him for his indorsements at the Bank of Upper Canada and at the Niagara District Bank; and *Austen* adds, that the defendant proposed to the Bank to assume the plaintiff's liabilities, and take an assignment of the securities held by him. The defendant *might* certainly have made such a proposal to the bank even if the notes at the Ontario Bank had not grown out of the transactions at the other banks; but she seems to have put it upon the footing that the plaintiff held the securities as well against the notes she was proposing to settle as against others; and she proposed to the bank to take those securities instead of his personal liability.

The plaintiff himself was called by the defendant to prove that the notes at the Niagara District Bank were paid by *William Burnham*. It is objected that what he stated by way of explanation is not receivable. I

think that it is, so far as he speaks of the source from which the moneys were obtained with which the notes at the Niagara District Bank were paid. So far then as notes at the Niagara District Bank were retired, at or after the discount of the notes at the Ontario Bank, we have evidence which the defendant has thought fit to call for and use, that they were retired with moneys obtained by *William Burnham* for the discount of notes indorsed by the plaintiff, at the Ontario Bank.

There is also a letter of *William Burnham's*, dated the 6th of June, 1860, in which he speaks of one of his notes for $2000 to fall due on the 18th of the same month, and which he proposes to retire by a discount of a note at another bank, and asks the plaintiff to indorse it; and in a letter of the 14th of the same month he speaks of a note for $1000, falling due on the 25th, which he proposes to retire by the proceeds of two notes for $500 each, which he says he can get discounted at the Ontario Bank, and asks the plaintiff's indorsement.

I think the proper inference which, as a judge of fact, I may properly draw from all these circumstances is, that the notes at the Ontario Bank were indorsed by the plaintiff, not in the way of incurring a new liability for an additional sum: but of keeping alive the old liability in a different shape, and that the moneys for which he originally held the indemnity remained still unpaid.

As to one of the parcels of land, the one in the township of Hamilton, there is no evidence as to whether it was conveyed by way of indemnity or not—the conveyance is absolute; a paper is put in purporting to be executed by the plaintiff, declaring it to be held in trust to indemnify against all paper indorsed at any bank; and the bill states that it was so. I do not

know who produced the paper; it is not mentioned in the defendant's affidavit upon production, nor in any way proved; but it is in favor of the defendant as sole devisee of her husband; that the plaintiff admits that he does not hold the land absolutely. I think it should be taken as subject to the admitted trust.

The decree will be for the application, of the real and personal property assigned, to the purposes of the trust; and if insufficient, for the usual administration inquiries against the defendant as executrix; the plaintiff of course accounting for the chattel property which has come to his hands.

TAYLOR v. CRAVEN.

Practice—Master's report—Costs.

Where the costs of certain proceedings were allowed by the Master against the estate of a deceased person not a party to the suit at any time, without shewing why they were so allowed, the court at the hearing on further directions, notwithstanding the report had not been appealed from, refused to carry out that portion of the Master's finding, and directed the question to be spoken to and additional information furnished to the court.

This was an administration suit, in which the Master had made his report, and the cause was subsequently brought on for hearing on further directions.

Mr. *Blevins* for the plaintiff.

Mr. *Strong*, Q. C., for infant defendants.

Mr. *Hodgins* for *James Craven*.

Judgment.—VANKOUGHNET, C.—There seems to have been some confusion and misapprehension in this case from first to last; and on the motion before me for a decree on further directions, the counsel for the parties do not appear to have understood what the real position of the

case was; and, with the imperfect materials which have been furnished to me (a defect, I must observe, too frequent,) I am not sure that I understand it. The bill (which, or any of the pleadings, I have not seen) was filed, I understand, by *Anne Taylor*, sister of the testator *William Craven*, claiming payment of a legacy bequeathed to her and charged on the estate demised by him to his brother *John*, and for the administration of his estate. The two questions presented to me were as to whether the legacy was a charge on more than the estate which *John* took under the will; and whether the real estate of the testator, or a sufficient part of it, should not be sold to pay the costs of the suit, it having been assumed on the argument that there were no debts payable by the testator at the time of his death. As to the first question, I am of opinion that the legacies directed to be paid by *John* were chargeable only on the life estate demised to him, and not also on the remainder demised to his son. As to the second question, if there had been no debts of the testator for which his real estate was liable, I should have required authority to show that the costs of an unsuccessful litigation to establish a charge on the realty, and for the administration of his personal estate, which had all been properly disposed of before the bill was filed, could have been levied out of the real estate to which he was entitled at the time of his death. On looking, however, at the Master's report of the 20th February, 1861, made upon an order of the court of the 29th October, 1860, referring back to him his report of the 24th of September previously, I find that the Master reports that there is due to *James Craven*, one of the devisees, from the estate of the testator, the principal sum of £107 5s.; and by the decree, on further directions dated the 2nd of April, 1861, it is ordered that two sums of £69 and £14, found due by the Master's report of the 24th September from the defendants, *William Weins* and *Anne Weins*, his wife, as administrators of the

estate of *John Craven*, deceased, and derived from the rents and profits of the land devised to *John Craven* for his life, be deducted from the amount found due by the estate of *William Craven* to *James Craven*, and that for payment of the balance a competent part of the real estate of *William Craven* be sold. How the rents and profits of the land so devised to *John Craven* for life accrued after his death, and, so far as I can make out, received by his widow and administratrix *Anne Weins*, (for I assume her to be his widow, though this does not appear from any papers furnished to me,) or these rents and profits, if they accrued in *John's* life-time and were received by her after his death, could be made applicable to the payment of the debts of *William Craven*, I do not at present understand. The decree making them so, has not, however, been appealed against; and indeed none of the proceedings or facts which I have briefly noticed above were brought to my notice or discussed on the motion. Having thus called them to the attention of the parties interested, I think it desirable that the question of costs should be again argued and spoken to, and that I should also be informed whether there is an outstanding claim by *James Craven* against the estate of *William* as found by the master, or whether it has been satisfied, as the court might fairly presume it to have been from the absence of all allusion to it on the argument, its existence being of every importance to the question of the liability of the real estate to costs in the suit.

CULL v. THE GRAND TRUNK RAILWAY COMPANY.

Railway companies' rights as to constructing bridges over navigable streams—16th Vic., ch. 36, and 20th Vic., ch. 12, considered—The Attorney-General, when a necessary party.

The Grand Trunk Railway Company, in 1835, erected a fixed bridge over a navigable river, near the outlet. The plaintiff then owned land on the bank of the river, on which he had erected a factory, and contemplated building a dock and mills. It was material to him to enjoy the navigation unimpeded, in order to have the most beneficial use of the premises.

At the time the bridge was built the 20th sec. of 16th Vic., ch. 37, was in force, but before the bill in this cause was filed 20th Vic., ch. 12, was passed, by the 7th sec. of which it was enacted, "It shall be lawful for the Governor in Council upon the report of the said board, (*i.e.*, the board of railway commissioners,) to authorize any railway company to construct fixed and permanent bridges, or to substitute such bridges in the place of the swing, draw or movable bridges on the line of such railway, within such time as the Governor in Council may direct, and for each and every day after the period so fixed, during which the said company shall use such swing, draw or movable bridges, the said company shall forfeit and pay to her Majesty the sum of fifty pounds. Provided, it shall not be lawful for any railway company to substitute any swing, draw or other movable bridge in the place or stead of any fixed or permanent bridge already built and constructed, without the consent of the Governor in Council, previously had and obtained."

This section was not specially set up in answer, but was relied upon in argument as permitting a permanent and fixed bridge in cases authorized by the executive.

The plaintiff relied on the former act as providing for a draw-bridge, which would not impede navigation, and prayed that the company might be required to remove the present fixed bridge, and to erect in its stead a draw-bridge, which would not impede the navigation, or plaintiff's business. Also, that an account might be taken of all loss sustained by the plaintiff by reason of impediments caused by the present bridge, and that the same might be made good to him by the company.

Held, that if the river was not navigable the bridge had been properly erected; if navigable, the company were wrong in erecting the bridge, but that this was cured by the latter statute, and that plaintiff was not entitled to the relief asked.

Semble, that in such a case the bill should be by the Attorney-General, the statute referred to having been passed for the general benefit of the public.

Statement.—The facts of the case and the relief sought, are clearly set forth in the judgment.

Mr. *Hillyard Cameron*, Q. C., Mr. *Mowat*, Q. C., and Mr. *Morphy* for plaintiff.

Mr. *McDonald* and Mr. *Bell* for defendants.

Judgment.–SPRAGGE, V. C.–In the year 1855 the *Grand Trunk Railway Company* erected, as part of their railway communication, a bridge across the River Don, near its chief outlet into Lake Ontario, through the bay of Toronto. The bridge so erected was a fixed permanent bridge, as distinguished from a swing or draw-bridge.

The plaintiff's case is, that at the time of such bridge being erected he was lessee, by lease renewable in perpetuity, of several acres of land on the westerly side of the river Don, on which he had erected a starch factory, and contemplated the construction of a dock, and which premises were also suitable for the erection of mills and other works; that the river Don was and is a navigable stream, with sufficient depth of water from the bay to a point above the plaintiff's premises to float the largest vessels which navigate the lakes; and that it was material to the plaintiff to have the navigation unimpeded, in order to the most beneficial use of his premises, for the purpose for which he was using them or might thereafter use them.

At the time of the construction of the bridge the 20th section of 16th Victoria, chapter 37, was in force, which provided as follows, "that it shall not be lawful for the said company to cause any obstruction in, or to impede the free navigation of any river, stream or canal, over, across, or along which their railway shall be carried, and if the said railway shall be carried across any navigable river or canal, the said company shall leave such openings between the piers of their bridge or viaduct over the same, and shall construct such draw-bridge or swing-bridge over the channel of the river, or over the canal, and shall be subject to such regulations with regard to the opening of such draw-bridge or swing-bridge, for the passage of vessels and rafts, as the Governor in Council shall direct and make from time to time; nor shall it be lawful for the said company to con-struct any wharf, bridge, pier, or other work, upon the

public bank or bed of any navigable river or stream, or upon the lands covered with the waters thereof, until they shall have submitted the plan of such work to the Governor in Council, and the same shall have been approved by him in Council, as aforesaid;" so that if the Don was a navigable stream, within the meaning of the act, the railway company ought to have constructed a swing or draw-bridge, and the construction of a fixed bridge was not a lawful act within the powers conferred upon them. The prayer of the bill is, that it may be declared that the said company were bound, "pursuant to the provisions of the said act, to have erected a swing or draw-bridge over the said River Don, if they desired to cross the same with the said line of railway, so that the navigation thereof should not be stopped or obstructed, and that they are bound to make good the loss sustained by your complainant, and that the said company may be decreed to remove the said fixed bridge so constructed by them, and to erect instead thereof, one of such a description as directed by the said act; and that an account may be taken of all sums of money which your complainant has been obliged to lay out and expend by reason of the obstruction of the said river, caused by the said defendants, as aforesaid, and of all loss and damage sustained by your complainant thereby, and that the said company may be decreed to pay your complainant the amount which shall be found due on taking the said account, and also the costs of this suit, or that the value of your complainant's said premises may be ascertained by the Master, and the amount thereof paid to your complainant by the said defendants, with his costs."

The bill was filed in August, 1857. In May of that year the statute 20 Victoria, chapter 12, was passed, which altered the law in relation to the construction of bridges along the line of railway. By the 7th section it is enacted, "It shall be lawful for the Governor in Council upon the report of the said board, to authorize

or require any railway company to construct fixed and permanent bridges, or to substitute such bridges, in the place of the swing, draw, or movable bridges on the line of such railway, within such time as the Governor in Council may direct, and for each and every day after the period so fixed, during which the said company shall use such swing, draw, or movable bridges, the said company shall forfeit and pay to her Majesty the sum of fifty pounds. Provided, it shall not be lawful for any railway company to substitute any swing, draw, or other movable bridge in the place or stead of any fixed or permanent bridge already built and constructed, without the consent of the Governor in Council previously had and obtained."

It is contended for the plaintiff that this enactment did not authorize the retention of a fixed bridge over a navigable stream; but only required the retention of such fixed bridges as were previously lawful. I do not think the act admits of this distinction. It is general in its terms, and evidently contemplates the substitution of fixed for movable bridges across navigable streams; for it does in terms provide for such substitution, and it would be assumed that it was only across navigable streams that movable bridges had been erected. It would be insensible, at the same time, to enable railway companies and to make it their duty to do the opposite, and substitute movable for fixed bridges. The conclusion is inevitable that that part of the prayer of the bill cannot be granted which asks for a direction that the present fixed bridge be removed, and a movable bridge substituted in its place.

The plaintiff objects that this enactment is not set up by the answer. It is not, in terms, but the bill treats the erection of a bridge across the Don river as a lawful act by the company, insisting only that it should be a drawbridge, and refers to 16 Victoria, chapter 37, as providing for the case. It must be open to the defend-

ants to shew that the statute relied upon is no longer law, and what the law is. What the answer says is, that a drawbridge is not required from the situation of the bridge, and that if a drawbridge were erected, it would endanger the safety of passengers and traffic, and be injurious to the public.

The short sum of the case so far appears to be this: If the Don be not a navigable stream, the Railway Company properly erected a fixed bridge, and of course cannot do otherwise than continue it. If the Don be a navigable stream, the company, in the then state of the law, did wrong in erecting a fixed bridge; but nevertheless, in the altered state of the law, cannot do otherwise than continue it; and this court cannot interfere with its continuance.

It remains to consider whether the plaintiff has any other remedy in this court. The erection of a fixed bridge was lawful or unlawful, according to whether the Don was not, or was, a navigable stream; but I ought not to pronounce any opinion upon the latter point. unless, in one event, the plaintiff is entitled to some remedy in this court. Suppose the act unlawful, by reason of the river being navigable, the ordinary remedy of the plaintiff would be, at law, for the consequential injury sustained by him; and the company could not, in such case, protect itself under the acts authorizing the construction of the railway. On the other hand, supposing the erection of a fixed bridge lawful, the river being not navigable, the plaintiff's remedy, if any, would either be at law or by arbitration under the statute,—would probably be confined to the latter. *Cameron* v. *The Ontario, Simcoe, and Huron Railway Co.*, (*a*) *Wallace* v. *The Grand Trunk Railway Co.*, (*b*) *Knapp* v. *the Great Western Railway Co.* (*c*) I see no equity for coming into this court. It is said that the

(*a*) 14 U. C. Q. B. 612. (*b*) 16 U. C. Q. B. 551.
(*c*) 6 U. C. C. P. 187.

plaintiff has no adequate remedy at law, and the bill prays an account of all sums of money which the plaintiff has necessarily expended by reason of the obstruction to the navigation occasioned by the bridge, and of loss and damage sustained thereby. I do not think there is any precedent for such an account in a case in any way analogous. I do not find any reason alleged by the plaintiff for not prosecuting his remedies at law or under the statute. There are allegations of proposed compromise and compensation, but they are only introduced by way of accounting for the delay in coming into this court: they are put expressly upon that ground. In fact the whole bill proceeds upon the plaintiff's right to have the bridge removed, and the court having no possession of the matter, for an account of the losses sustained by the plaintiff by its unlawful erection, I do not understand the bill as seeking for an account as a substantive relief.

I think the bridge cannot be removed, and that the plaintiff's case therefore fails, and that his bill must be dismissed.

I have had some doubt as to the proper order in regard to costs. I am not satisfied that the plaintiff has been well used in the matter by the railway company; but I think he was wrong in filing his bill, and upon the whole, that the defendants are entitled to the costs of defending themselves. The bill therefore must be dismissed with costs.

I should be glad to see the plaintiff obtain redress in some quarter, for I cannot but think that the value of his property has been diminished by the construction of the bridge, though probably not to the extent claimed by him. Still, the evidence leads me to think that vessels navigating the lake, though not of the largest class, could, but for the bridge, ascend the river as far as the plaintiff's premises. Probably they could not do

so but for the dredging of a channel by the defendants from the mouth of the river to deep water in the bay; but this dredging appears to have been only through a deposit of soft mud brought down by the river itself. In this country there are probably many streams which are not presently navigable by reason of fallen trees or other substances, perhaps with accumulation of sand or other material obstructing the navigation; or, as in the case of the Don, with a deposit of mud or sand at their mouths. I should incline to think that such streams may properly be called navigable, and that such obstructions as I have referred to may properly be looked upon as only temporary impediments to navigation.

It has not been made an objection that the Attorney-General ought to be a party. I incline to think that he ought. The 7th section of statute 21 Victoria, chapter 12, was so manifestly passed for the protection of the public that it cannot be a question merely between a railway company and an individual whether a bridge over a stream shall be a fixed or movable one.

DENISON v. FULLER.

Specific performance—References as to title—Assignee of purchaser—Parties—Costs—Parol contract partly performed.

In May, 1860, a purchase was made by parol of a lot of land in addition to three other lots previously bought by the same purchaser from the same vendor, and the purchaser went into possession and erected thereon a coach-house and stable, and the other portion of it was used as a lawn to the house which he had erected on the other lots, which had been duly conveyed to him. In the year 1860, and again in 1863, the purchaser repeatedly asked for a deed, offering to give the vendor his promissory note for the purchase money, but which he refused to accept: a bill for specific performance was subsequently filed by the vendor.

Held, that the purchaser, by his conduct, had waived his right to compel the vendor to make out a good title; but that he was at liberty to shew that the vendor had no title, in which case he would be entitled to get rid of his contract; the onus of proof under such circumstances being shifted from the vendor to the purchaser.

A purchaser of land agreed, before conveyance, to assign his interest: in a suit subsequently brought by the vendor to enforce specific performance, the assignee was made a party defendant, and a decree was pronounced against him, with such costs as were occasioned by making him a party; in the event of his co-defendant (the purchaser) failing to pay the general costs of the suit which were awarded against him.

Statement.—The bill in this cause was filed in August, 1863, by *Robert B. Denison*, against *Thomas Fuller* and *Thomas Henry Ince*, setting forth that about the first of August, 1859, the plaintiff and *Fuller* entered into a verbal agreement for the sale by plaintiff to *Fuller* of a certain freehold building lot in the City of Toronto, setting forth in detail the metes and bounds thereof, the purchase money for which *Fuller* agreed to pay plaintiff at the expiration of three years, with interest annually in the meantime, plaintiff agreeing to admit *Fuller* into possession of the premises; and upon payment of the purchase money and interest plaintiff to convey to *Fuller* in fee: that plaintiff accordingly, in part performance of the contract, admitted *Fuller* into possession, and he had since remained in possession of the premises, and in receipt of the rents and profits, without ever having demanded any abstract of plaintiff's title; and had also erected a building and fences upon the property, and had exercised other acts of ownership thereon; and plaintiff submitted that, under the circumstances, the agreement had been

partly performed, and that *Fuller* had accepted the title: alleging a demand and refusal of payment of the purchase money.

The bill further alleged, that by an indenture between the defendants, *Fuller* leased the premises to *Ince* for three years, with a right of purchasing the fee by signifying his desire of so doing during the continuance of the term, which privilege *Ince* had availed himself of, and prayed specific performance, or in default, rescission of the contract.

The defendants answered the bill separately; *Fuller* denying any agreement to purchase, but alleging that he had the option of so doing, and admitting his lease to and agreement with *Ince*, as stated. *Ince* also admitted his agreement with *Fuller* as stated by the plaintiff, but denied any acceptance of the title. The cause having been put at issue by filing replication, evidence was taken *viva voce* before his lordship the Chancellor, which showed the dwelling-house of *Fuller* was on lots 1, 2, and 3, the stable and coach-house on lot 4 (the lot in question), which formed a lawn for the dwelling; that the four lots were all embraced within one fence, and that although the stable and coach-house could be removed from lot No. 4 to the other lots, the effect would be to spoil the property. The defendant *Ince* was also examined by the plaintiff, and he proved that he was in under a lease with right of purchase, and that he had signified his intention of purchasing in pursuance of the agreement between the defendants.

Mr. *Donovan* for the plaintiff.

Mr. *Blake* for defendant *Fuller*.

The defendant *Ince* in person.

At the conclusion of the argument, which turned principally on the question as to whether *Fuller* had waived his right to call for a good title,

Judgment.—VANKOUGHNET, C., said he thought the plaintiff was entitled to a decree for specific performance; for payment of £100, and interest from the 15th of May, 1860, and the costs of the suit.

That he thought the defendant *Fuller* had waived all inquiry as to title and was not entitled to it. The lot in question is one of several lots bought from the same person, the plaintiff, and apparently under the same title, and to three of which title has been made; it was bought as necessary to the others to form one plot of ground, on which the defendant *Fuller* had erected a dwelling-house. On this particular lot he has erected a stable and coach-house, and the residue of it forms part of the lawn adjacent to the house. In 1860, and again in 1863, he asks for a deed of the lot, offering his note for the purchase money, and his conduct throughout, his lordship thought, showed his intention to accept the title and not to insist on an exhibition of it. If he could shew that the plaintiff has no title, he may get rid of his contract, but that the onus was shifted on to him.

As to the propriety of making the assignee a party, his lordship thought the plaintiff in doing so took the safer course. It appears that Mr. *Ince* had contracted to purchase from the other defendant, and the plaintiff having notice of that, and of *Ince's* consequent claim, was justified in bringing him before the court. It is *Ince's* own fault that he has intervened in an unsettled disputed matter. He must stand or fall with the other defendant. His lordship did not think he was entitled to any costs, nor did he think he should pay any, except such as might have been occasioned by making him a party, in case the other defendant should not pay them with the plaintiff's general costs of the cause which were awarded against him.

MONTGOMERY v. THE GORE DISTRICT MUTUAL INSURANCE COMPANY.

Registry laws—Lien of Mutual Insurance Companies on property insured

By the 67th section of chapter 52, of the Consolidated Statutes of Upper Canada, all the right or estate of any party effecting an insurance with a Mutual Insurance Company, in the property insured, at the time of effecting the same, is subjected to all claims against the assured under such insurance; and a purchaser, taking a conveyance from the assured, will take subject to the charge of the company although without notice, and that although such charge does not appear on the registry affecting the property: the registry laws not providing for the registration of such charge.

Statement.—The bill in this case was filed by *George Montgomery* against the *Gore District Mutual Fire Insurance Company*, and stated that one *James Barclay*, on the 6th of May, 1849, being seized in fee of a lot of land in the town of Woodstock, on which were erected certain brick and frame tenements, effected an insurance upon such buildings for the sum of $2,000 with the defendants, an incorporated company, for the term of three years from the date thereof, whereupon *Barclay*, previously to his receiving his policy of insurance, made and deposited with the defendants his promissory note for $168, being the amount of premium on such insurance; that in February, 1863, plaintiff became the purchaser from *Barclay* of the said land and premises for a valuable consideration, and caused the conveyance thereof to be duly registered in the proper office, at which time the policy of insurance so issued by the defendants had ceased to exist, the same having expired on the 26th of May preceding; at the time of such purchase plaintiff was ignorant of the fact of such insurance having been effected; that since that period plaintiff had been called upon to pay an assessment due on such premium note of *Barclay*, the defendants claiming that under and by virtue of the statute, entitled, "An Act Respecting Mutual Insurance Companies," and of the conditions contained in their said policy of insurance, all the right and estate of the assured, at the time of effecting the insurance, on the buildings so insured, and the lands

on which the same stood, were pledged to the defendants, who claimed the right to sell, demise or mortgage the same, or any part thereof, to meet the liability of *Barclay* on such policy, for his proportion of any losses or expenses accruing to the company during the continuance of the policy, to the amount of his premium note and the assessment thereon. That at the time plaintiff so purchased he had not any notice, nor was he in any way aware that *Barclay* was indebted to defendants in any way; that the defendants never registered their said policy or any other instrument in the proper registry office, which the plaintiff submitted they might have done under the provisions of the Registry Act, had the defendants been desirous of giving notice to intending purchasers of their alleged lien or claim upon the land; and plaintiff insisted, that under the circumstances, the defendants were not entitled to claim any such lien or right on the said lands and premises, or any portion thereof, for any sum which might be due to them by *Barclay* under the said policy of insurance: and prayed an injunction to restrain the defendants from proceeding to a sale or other disposition of the estate, and for further relief.

To this bill the defendants demurred for want of equity.

Mr. *Roaf* for the demurrer.

Mr. Barrett contra.

Judgment—VANKOUGHNET, C.—The principal question raised on the demurrer in this case is one of great interest to the public. It is whether or not mutual fire insurance companies, organized under the statutes of the province relating to these bodies, are bound to register the policies of insurance granted by them, in order to preserve their lien on the premises insured against a subsequent purchaser from the assured without notice. Section 67 of chapter 52 of

the Consolidated Statutes of Upper Canada provides, that "all the right and estate of the assured, at the time of insurance, to the buildings insured by the company, to the lands on which the same stand, and to all other lands thereto adjacent, mentioned and declared liable in the policy of insurance, shall stand pledged to the company; and the company may sell, demise, or mortgage the same, or any part thereof, to meet the liability of the assured for his proportion of any losses or expenses accruing to the company during the continuance of his policy, which sale, demise, or mortgage, shall be made in the manner specified in the policy of the assured." The statute which gives such lien to such companies was passed in the sixth year of his late Majesty King William IV., and chaptered 18. The time when the policy of insurance in question in this case was effected appears to have been in 1849; but both before and since the statute of 1836, the registry law of Upper Canada required that all deeds and conveyances in anywise affecting in law or equity, any lands in Uppor Canada, executed after a grant of such lands by the Crown, must, to insure priority against a subsequent deed, be registered before that deed. In this case the policy of assurance has not, nor has any claim of the company arising out of any such assurance been registered; but the plaintiff, who purchased from the assured a title on registry, has registered his deed from the latter. The policy of the registry laws is, that every writing affecting lands shall be put on record. It is a wise policy, which the courts should in every way advance when there is machinery for the purpose provided. Nothing can be more important than to have in public offices a faithful record of title, so that no one in dealing with it may be surprised, and that, so far as such record affords evidence, the owner of the title may by it be compensated for the loss of deeds, etc., which too often go astray. I shall, so far as I can, extend the operation of this law, and subject to it every case that can be reasonably affected by it. While titles are comparatively

young it may be insisted on with great advantage, and it is the duty of the court, and the obvious intention of the legislature, to secure in the future as perfect a record of title as may be possible. Every succeeding year will attest its value in a country where land passes from one to another as rapidly as it does here, and almost as an article of commerce. While avowing these views, I regret, contrary to my first impression, to have to come to the conclusion that such a policy of assurance, or such an assurance as is made the subject of consideration here, does not fall within the operation of the registry laws. In the first place the legislature, in the act creating the lien, do not appear to contemplate that it should. They subject the right and estate of the assured in the land at the time of insurance to the claims of the company. Now, the insurance may be effected without the issuing of a policy. The policy is but evidence of the insurance. Section 21 of chapter 52 says, "Every person who becomes a member of the company by effecting insurances therein shall, before he receives his policy, deposit his promissory note," etc. It is quite true that if the party does not deliver his note he cannot claim the benefit of the insurance, but I take it that the note being delivered, and all other conditions complied with, the insurance is effected, though the policy may not be handed over, or even prepared. But, however this may be, suppose the policy made out, how are the company to register it? It is not pretended that they are to register anything else. The moment the policy is prepared, subject to the delivery of the note, and perhaps to the payment of the instalment by him, as provided for in the 22nd section of the act, it becomes the property of the assured. What right have the company to register it, and how can they register it? It is not a deed to them; it is a deed by them. It is the property of the assured from the moment it is ripe for delivery. But the chief difficulty lies in the machinery by which registration is to be effected. The registry laws require that the instrument

of which the memorial is to be put on registry shall, for the purpose of procuring such registration be produced to the registrar, and that he shall thereon, immediately after the registration, indorse a certificate thereof. I do not see how the company, after the policy has become complete, and the property of the assured, can insist on retaining it for the purpose of registration, and if they cannot do so, they are not blameable because it is not registered; and they cannot therefore be deprived of the lien which the law, without insisting on registration, has given to them. It may well be worthy the attention of the legislature whether some provision should not be made for a registration in such cases, particularly as any one of these localised companies may now effect insurances in any part of the province; and it is subjecting a purchaser to great inconvenience and expense to require him to ascertain from every company of the kind whether or not the premises he has bargained for, however distant from the seat of business of the company, is concerned in it by insurance.

The other grounds advanced in the bill for the interference of this court to prevent the threatened enforcement by the company of their lien are, that the company have given a notice that on a particular day they intend to sell, mortgage or demise, the insured premises under the policy which they describe as of a wrong date. The section of the Consolidated Statute already quoted provides that the company may sell, mortgage, or demise, "in the manner specified in the policy of the assured." Now, it does not appear whether any manner was specified in this policy, or what it was if specified; or that any notice was required, or that if required, the notice given is not in accordance with the provisions of the policy. I cannot therefore grant relief on this ground, but must allow the demurrer. Without fully considering these objections to the bill, and being at the time inclined to think that the policy of assurance might, and therefore should,

have been registered by the company, and that at all events no harm could be done by preventing for a time the then threatened sale of the property, I granted for the purpose an injunction, which should now, however, be dissolved. Looking merely at the papers which were then presented to me, but which, of course, cannot be considered now, outside of the pleadings, I thought the notice of sale given by the defendants bad.

HILL v. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Specific performance—Watercourse defined—Costs.

The owner of land agreed to convey to a railway company a portion thereof, the consideration for which was paid, on which to erect an embankment, on condition that the company would make a culvert through such embankment. The building of the railway passed from such company into the hands of another, who built the embankment, but without making a culvert therein, they having had no knowledge of the stipulation in respect thereof, and the owner having omitted to give them any notice in regard to it during the progress of the works. Upon a bill filed by him for the specific performance of the covenant to construct such culvert.

Held, that under such circumstances it would be a hardship upon the company to decree specific performance, there having been no wilful default on their part, and the cost of now constructing the culvert, would be very great, and that the parties ought now to be placed in the same position as if such agreement had not been entered into, in order that the company might proceed under the provisions of the Railway Clauses Consolidation Act; the court retaining the bill until such proceedings were taken, giving to each party liberty to apply, but, under the circumstances, refusing to either party any costs of the litigation.

Statement.—This was a bill by *Richard Hill* against the *Buffalo and Lake Huron Railway Company*, praying, under the circumstances set forth in the judgment, a decree for the specific performance of an agreement by the company to construct a culvert in a portion of their works adjoining the premises of the plaintiff.

Evidence was taken at great length before his Honor Vice-Chancellor *Esten* in Toronto, and again before his Honor Vice-Chancellor *Spragge*, at the sittings at Brantford, the effect of which is stated in the judgment.

Mr. *Roaf* for plaintiff.

Mr. *E. B. Wood* for the defendants.

Judgment.—SPRAGGE, V. C.—This case presents some peculiar features. The plaintiff in 1853 was the owner of Park Lot No. 37, in the village of Mitchell, through which the line of the Buffalo, Brantford and Goderich Railway was surveyed to run. By indenture dated the 21st of July in that year the plaintiff conveyed to the company (which, for the sake of brevity, I will call the old company, and the defendants the new company) for the expressed consideration of £7 4s., a strip of land four rods wide.

On the 29th of November, in the same year, the plaintiff was served with a notice under the statute, requiring a strip on each side of the strip already conveyed, the two strips being together of the same width as the strip granted, and the company offered by their notice to pay £18 therefor. The notice is accompanied by the usual surveyor's certificate, that the sum offered was in his opinion a fair compensation. At the foot of the certificate is this note by the surveyor: "The within named sum of £18 is deemed sufficient compensation, only provided the railway company provide a water course, mill-race, or tail-race under the railway, having a clear water-way eight feet wide; the bottom of such culvert or other water-course being on a level with the surface of the waters of the Thames, where said river crosses the southern boundary of the said lot No. 37." The additional strips were required because the strip already conveyed was not of sufficient width for the purposes of an embankment, required in that part of the road. The bargain for their purchase was made with the plaintiff by *Thomas Matheson*, then an agent under *William Smith*, a director of the old company, for acquiring land along the line of railway.

The engineer of the company had contemplated

making a culvert where the railway crosses the plaintiff's land, but of smaller dimensions than the one desired by the plaintiff; and *Matheson* offered the plaintiff first $500 for the additional strip, and then by authority of the engineer, a further sum of $100; but the plaintiff insisted upon the culvert, preferring the £18, with the culvert, to the sum offered in lieu thereof, and accordingly the plaintiff executed a covenant to convey the strips to the company for £18, which was paid; the covenant containing a proviso that the railway company should provide a water-course, which is described in the same terms as in the surveyor's note. This covenant, witnessed by *Matheson*, was placed in the hands of *Smith*, the director, where it got among some cancelled bonds, and remained unnoticed until after the commencement of this suit. The embankment was never proceeded with by the old company; but was constructed by the new company in the summer and autumn of 1857. No culvert or water-course was made in the embankment. The company built a bridge over an allowance for a street called St. George Street, which was about at right angles with the line of railway, a very short distance westward of the spot where the culvert was to be constructed; and the water which was intended to pass through the culvert passes under the bridge instead. The old company made some preparations for the construction of the culvert, and drew some materials to the spot. St. George Street is still in a state of nature. The embankment was constructed without, so far as appears, any knowledge by the new company of the contract between the plaintiff and the old company, and without any notice of the plaintiff's right. It is about thirty feet high and about one hundred feet wide at the base. It is in evidence that it would have cost at least $2,000 to build the culvert at the proper time, and more than twice that sum to construct it now. The bill is for the specific performance of the alleged contract, and the words used seem to me sufficient under the case of *Sanderson*

v. *Cockermouth*, (*a*) to sustain such a bill, if the contract be one proper to be specifically performed.

The plaintiff seems to have contemplated the erection of a grist mill on lot 37, before the line of railway was run. A stream of water called Whirl Creek runs through park lot No. 28, which lies north of 37, nearly parallel with the railway, and falls into the River Thames by two mouths forming an island at the head of St. George Street. The Thames, after running to the westward, crosses the south-westerly angle of the plaintiff's lot; and the plaintiff's intention was to tap Whirl Creek, and bring its waters, or as much of them as he might require, down in a southerly direction through his lot and so into the Thames. He had levels taken of the fall between Whirl Creek and the point of issue on the Thames, which was found to be between five and six feet, and he had commenced the digging of a ditch down the allowance for St. George Street, to form a channel for these waters. St. George Street divides park lots 28 and 29, neither of which was ever owned by the plaintiff. There is what some of the witnesses call a watercourse, or bed of a stream, or channel, the course of which is in the main southerly, and from the direction of Whirl Creek to the Thames, at the lower part of St. George Street, it curves into lot 37. The plaintiff was also getting out timber for a mill, and I have no doubt was quite in earnest in his intention to put one up. It was under these circumstances that he claimed to have a culvert through the railway embankment. The engineers themselves intended at first to construct a small culvert to carry off the water from the north side of the embankment, so as to prevent its being injured thereby; and the plaintiff claimed in effect, as a riparian proprietor, to have a larger one constructed.

I do not find that he made any misrepresentation to the engineers, as the defendants charge that he did;

(*a*) 11 Bea. 497.

but he practically asserted, and they conceded to him, rights which he did not possess. There was nothing on the ground to shew that the newly dug ditch was along the line of a street, and the engineers would naturally conclude that the plaintiff owned the land through which he was digging. St. George Street seems indeed to have been treated very unceremoniously on two occasions: first, by the plaintiff, as I have stated, and afterwards by the defendants, in using it as an outlet for waters instead of constructing a culvert.

Whether the plaintiff would ever have thought of constructing a mill unless he could have a direct race-way as he contemplated, instead of having only the irregular natural channel, I very much doubt; but he now seeks to shew that the natural channel furnishes sufficient water, and for a sufficient length of time, to give him what is commonly called a mill privilege; and he desires to establish this in order to shew that he ought to have specific performance in this court of his contract.

A good deal of evidence upon this point has been given, which is extremely, I must add, unaccountably, conflicting. Upon the whole, I should say the plaintiff does not make out his case. At the wish of both parties I made a visit to the spot; and there met, though not by appointment, a brother-in-law of the plaintiff, one of his witnesses, I believe, and one of the witnesses for the defendant. Both accompanied me in my inspection. I made a note of what I observed.

My inspection led me to concur in the opinion given by some of the defendants' witnesses, that the channel which runs through the plaintiff's lot is not the bed of a stream at all, but only a channel worn by the occasional overflowing of Whirl Creek, and in part, perhaps, of the River Thames. It is in evidence that when the waters of the Thames are swollen by rain the waters of Whirl Creek

are penned back, and are apt to overflow; and on such occasions the overflowing water has naturally found its way through the lowest land, and has worn a shallow channel in its course. I apprehend that the owner of land through which such a channel may run has no rights in regard to it as a channel for running water. It is not the channel through which the waters of the stream are accustomed to flow. The distinction is well expressed in an American case, *Shields* v. *Arnot*, (*a*) where Chancellor *Pennington* says, "There must be water as well as land, and it must be a stream usually flowing in a particular direction: it need not flow continually; many streams in the country are at times dry. There is a wide difference however, and the distinction is well known, between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which, in times of freshet, or melting of snow, descend from the mountains and inundate the country."

The question now is, whether the court ought to direct the culvert to be constructed. The statute constituting the new company, 19 Vic., ch. 21, enables the new company "if they think fit," to enforce contracts respecting lands required for the railway, entered into with the old company; and provides that, when they shall elect to enforce any such contract, they shall be liable thereon to the same extent as the old company. There is no express provision in regard to the contingency of the new company not electing to adopt any such contract; but the provisions of the Railway Clauses Consolidation Act in relation *inter alia*, to "lands and their valuation," are incorporated into the act; and I suppose that in cases where the contracts of the old company were not adopted by the new company, the new company was left to acquire the lands which were the subject of them under the powers of the general act.

(*a*) 3 Green's Chy. Rep. 246.

I think it very likely that the officers of the new company believed that the conveyance of July, 1853, covered all the land purchased from the plaintiff, and I think the supposition not a very violent one, when I find the plaintiff alleging in his bill that he had executed a conveyance to the new company of the additional strips in question. But supposing I must take the new company to have adopted the contract for these strips of land, I still am satisfied that, as a fact, they did so in ignorance of the stipulation for the construction of a culvert. I cannot therefore treat this contract as standing upon the ordinary footing. There is no contract wittingly entered into by the party against whom specific performance is asked, and therefore if I find that its execution would entail hardship upon the defendants, or would be unreasonable, I must not judge of the hardship by the same rules which govern ordinary cases.

I think it would be a hardship upon the defendants to decree them specifically to perform this contract. There has been no wilful omission to perform it, and it could now be performed only at about double the cost at which it might have been done if the new company had known of the terms of the purchase from the plaintiff: and here I cannot quite acquit the plaintiff of blame; he knew the enterprise was in new hands, and when a solid embankment was being constructed he would only have been acting reasonably and prudently if he had called their attention to the stipulation. The new company inadvertently missed the election given to them by the statute, in the belief, as I have no doubt from the evidence, that the land had been paid for by the old company. On the other hand, the plaintiff no doubt supposed that the covenant given by him for the conveyance of the additional strips, had passed into the hands of the new company, and if it appeared to be necessary in order to do justice to the plaintiff that the culvert should be constructed, I should be disposed to direct it, though with some hesitation, for the defendants need not have under-

taken to construct it; and it is only by implication that I can take them to have undertaken to do so.

I think both parties have been under misapprehension, and that I shall, under the circumstances, best do justice between them, if I leave them in the same position as if the arrangement with *Matheson* had not been made; or, if necessary, reinstate them in that position.

Upon looking at the Railway Clauses Consolidation Act, under the head "Lands and their Valuation," I do not find any time limited within which proceedings are to be taken, and I think it will be convenient that the course there prescribed should be followed, only modifying the notice to be given by the company, according to the circumstances.

I think it well to retain this bill until after these proceedings are taken, and to give to each party liberty to apply. I think it is a case in which costs should not be given to either party.

BUCHANAN V. CUNNINGHAM.

Fraudulent conveyance—13th Elizabeth, ch. 5—Cross relief.

A suit having been instituted by judgment creditors to set aside certain conveyances made by their debtor as having been made fraudulently and with a view to hinder and delay creditors, the debtor attempted, by way of defence, to show facts which, if established, would tend to annul the judgment altogether or to reduce its amount; such facts having been discovered since the trial at law and when it was too late to obtain a new trial:

Held, that the proper means of obtaining such relief was by cross bill; the order of court (Gen. Or. 12, sec. 4, of June, 1853) permitting cross relief to be given to a defendant against the plaintiff, applying only where the defendant is entitled to some relief growing out of the same transaction as forms the foundation of the suit, but not where the object of the defence is to obtain relief not growing out of such transaction, but against it.

The bill in this case was filed by Messrs. *Buchanan, Harris and Company*, against *John Thomas Cunningham, James Cunningham* his son, *William Riley*, his

son-in-law, and *John George Bowes*, for the purpose of enforcing payment of a judgment recovered by the plaintiffs against the defendant *John Thomas Cunningham*, out of his lands alleged to have been conveyed by him to his son and son-in-law in fraud of his creditors.

The defendants answered the bill, and replication having been filed, evidence was taken before his Honor Vice-Chancellor *Esten*, at Guelph, the effect of which, as also the leading facts of the case, are fully stated in the judgment.

Mr. *A. Crooks*, Q. C., and Mr. *Cattanach*, for the plaintiffs.

Mr. *English* for defendant *Bowes*.

The defendant *John Thomas Cunningham* in person.

Judgment.—ESTEN, V. C.—In January of the year 1857, the defendant *John Thomas Cunningham* entered into a guarantee with the plaintiffs, who were wholesale merchants, trading in Hamilton, to secure any indebtedness to them of one *John Gillespie*, his nephew, who was a retail merchant trading in Guelph. In the autumn of 1858 this indebtedness amounted to about $3,000. At the same time *John Thomas Cunningham* was indebted to the defendant *Bowes* in about the same amount, and to persons of the name of *Davis*, merchants, trading in the United States, in the sum of $500 and upwards: and it would seem that he had purchased a mortgage for about $700, made by a person of the name of *Smith* in favor of a person of the name of *Murray*, and had passed notes to *Murray* for the consideration which remained unpaid, for it appears from the evidence of Mr. *Sandilands* that afterwards *John Thomas Cunningham* received the notes from *Murray* and returned him the mortgage: so that the indebtedness of *Cunningham* in the latter part of the year 1858, must have amounted to

about $7,000. *Davis* and *Bowes* were both suing him in the autumn of 1858: *Davis'* action was brought to trial at that time, and the matters in question in that action were referred to arbitration, which was conducted and brought to a conclusion in the month of January, 1859: *Bowes* obtained judgment against *Cunningham* in the autumn of 1858, which was set aside for irregularity at the time. About the same time the plaintiffs, after an ineffectual negotiation between them and *Cunningham*, for his securing *Gillespie's* indebtedness to them, presented notes to *Cunningham* in terms of his guarantee for his indorsation, which he refused. It is quite clear that in the latter part of the year 1858, *Cunningham* was pressed by all his creditors except, perhaps, *Murray*. At this time he owned the lands in question in this cause, consisting of ninety-two acres of farm land, situate within the limits of the town of Guelph, and of lot 6, in Oliver's survey, lot 1016, and lot 385, which were town lots in the town of Guelph. These lands were estimated by competent witnesses, who were examined on this point, as worth at that time from ten to twelve thousand dollars. He owned at the same time some chattels, the value of which it is not easy to determine, but which are suggested to have been worth about $700, and were certainly, I think, not worth more; and some notes, bills and debts of the nominal amount of about $7,500 but of doubtful actual value, together with a note of his son *James Cunningham* of $560, and the *Smith* mortgage, above mentioned, which was no doubt good for the full amount. Under these circumstances *John Thomas Cunningham* first sells to his son certain farming implements and goods on and about the 92 acres for the sum of $560, and takes his note for that amount, being the note before mentioned. It seems doubtful whether these goods are not to some extent the same with the goods and chattels before mentioned to have been valued at $700. *John Thomas Cunningham's* next step is to sell and convey to his son the ninety-two acres for the price

or sum of $14,720, for which he takes a mortgage. This price is fixed by valuing the lands at $160 per acre. The witnesses who were examined on this point value them at about half that amount. This mortgage is not registered, but the conveyance was registered almost immediately. The son is a young man, a farmer, possessed of no means, apparently, but what he acquires by the labour of his hands, and by the cultivation of the farm. About the same time and as part of the same transactions, *John Thomas Cunningham* sells and conveys the lot No. 6 in *Oliver's* survey, 1016 and 385, to his son-in-law *Riley*, for the prices or sums of $1,300 as to lot 6; $1,000 as to lot 1016, and $5,000 as to lot 385. These lots are valued by *Davidson* and *Knowles* at less than half these sums in 1859, on the usual terms of credit. *Riley* gave a mortgage to *John Thomas Cunningham* for $2,300 in respect of lots 6 and 1016, and a mortgage for $5,000 in respect of lot 385. The conveyances to *Riley* were registered, but not the mortgages. *Riley* married the defendant's daughter on the 17th of March, 1359. Upon this occasion *Cunningham* made a present of lot 67 to him. On the 9th of January, 1859, *Bowes* obtained judgment against *John Thomas Cunningham*. Between this time and the 8th of February, *Cunningham* ascertained that a mortgage could be seized under execution. Upon receiving this information he indorsed a receipt on his son's mortgage for $11,720, thereby reducing that mortgage to $3,000, in which state it was delivered to the sheriff, who caused it to be registered, and *Cunningham* took a fresh mortgage from his son for $11,720, payable at the end of seven years, with two per cent. interest. The son says that the original mortgage was a mere matter of form, not intended to be registered, and not binding upon him at all unless he should die without issue, in which case it might be enforced against the lands; and that the new mortgage was held upon the same terms. An award was made in favour of *Davis* in the arbitration which has been men-

tioned, but not being paid, an action was commenced upon it, and judgment obtained, under which *Cunningham*, having undergone an examination before the county judge, was arrested on a *capias satisfaciendum*. Upon this occasion he procured *Riley* to make a mortgage of lot 1016 to *Davis*, for securing $524, the amount of his indebtedness to *Davis*, and thereupon returned to *Riley* the original mortgage for $2,300, and *Riley* says that he understands he is to have the land on payment only of this mortgage, for $224. The lot No. 385 does not appear to have been conveyed at the same time with the other two lots, but some time in February. A mortgage was made for securing the consideration, $5,000. *Cunningham* says that *Riley* was to have ten years to pay it, with interest. This mortgage has disappeared. *Riley* knows nothing of it. *Cunningham* says that when he went to the States, in September, 1859, to avoid being arrested he left it under a bed-tick, and has never seen it since, but has not inquired of his family about it. The plaintiffs commenced an action against *Cunningham* on the 1st of March, 1859, and having obtained judgment, issued execution against goods, which was returned *nulla bona*, and then issued execution against lands, which remained in the hands of the sheriff unexecuted, on account of the conveyances in question. In the autumn of that year they commenced proceedings in order to arrest *Cunningham*, who underwent three examinations before Judge *McDonald* at their instance, and a judge's order was obtained under which a *capias ad satisfaciendum* was issued, when *Cunningham* only escaped arrest by departing the country; under these circumstances the present suit has been instituted by the plaintiffs against *John Thomas Cunningham*, *James Cunningham*, and *Riley*, impeaching the conveyances in question as fraudulent and void against creditors under the statute 13 Elizabeth, ch. 5, and as colorable and actually fraudulent. I confess that my opinion is in favor of the plaintiffs on both points. *John Thomas*

Cunningham, owing about $7,000, makes over property of the value of about $10,000, which is at hand, and perfectly available for the payment of his debts, to his son and son-in-law respectively, when he is pressed by his creditors, taking in return mortgages at long dates, one of which bears only two per cent. interest. Supposing these transactions to have been real, their necessary effect is to delay creditors in the recovery of their debts, since instead of converting the lands immediately into money, and thereby obtaining satisfaction of their demand, they must wait in one case seven years, and in the other five and ten years respectively before the mortgages can be fully realized, and that which is the necessary consequence of an act must always be deemed to have been intended. It is true that *Cunningham* claims to have had at this time other property, consisting of chattels, a mortgage, notes and debts, of an apparent amount sufficient for the satisfaction of all his debts without resorting to his lands at all. The chattels were of little value, and as to the mortgage, notes and debts, the existence of such property, which the creditors must realize if at all with much difficulty, delay and expense, cannot protect such a disposition as was made of the lands, in the present instance from the charge of fraud under the statute 13 Elizabeth, chapter 5, even on the supposition that anything like the apparent amount of the property could have been realized; but with the exception of *Smith's* mortgage, it is extremely doubtful whether anything could have been realized from the property of any material importance. I think, therefore, that these conveyances would be clearly void under the statute 13 Elizabeth, chapter 5, unless the supposed purchasers can claim the benefit of the exception in the act in favor of *bonâ fide* purchasers without notice. The son could never claim to stand in this position. By his own confession the property was a gift to him, except in one event, namely, his death without children, in which case the mortgage was not to be binding on him, but might be enforced against the lands. It is

possible that the transaction detailed in the evidence may have been intended between the father and the son. The same circumstance, however, does not occur in the sale to *Riley*, and the question therefore arises whether this transaction was or not *bona fide* or pretended and colorable. If it were a real *bona fide* sale, then *Riley* became entitled in fee simple to the lands, and *John Thomas Cunningham* became entitled to mortgages amounting to $7,300, which he would enforce with more or less indulgence when they became due. The amount was fully double the value of the land: it was out of the question that *Riley*, a painter, making by his trade not much more than enough to support his family, should ever pay it out of his own means: it seemed impossible to realize it in any way from the lands themselves: *Riley* does not dispute about the price: he immediately accepts them at the price named by *Cunningham*. One mortgage is destroyed on another being given of little more than a quarter of its amount; and the other mortgage is not forthcoming, and no inquiry is made about it. Parties, although standing in the relation of uncle and nephew, or father-in-law and son-in-law, do not usually ask or agree to give double the value of the property bought and sold, and when it appears impossible that the price should ever be paid, the inference is inevitable that it was not intended to be paid. I have no hesitation in pronouncing this transaction colorable and fraudulent, and probably the transaction between the father and son was of the same nature. I therefore think that neither *James Cunningham* nor *Riley* is entitled to the benefit of the exception contained in the statute in favor of *bona fide* purchasers for value without notice, and that these conveyances must be declared null and void against plaintiffs, and other creditors of *John Thomas Cunningham*, who must be paid their debts in the order of their priority, and the necessary sums raised for that purpose with costs, to be paid by the defendants, the *Cunninghams* and *Riley*, if necessary. The plaintiffs

must pay *Bowes* his costs, and recover them from the other defendants, unless the estate is sufficient. If *Riley* has made any permanent improvements on Lot No. 6, it would seem right to allow them, although the transaction was in its inception, as I consider, colorable and unreal, yet as to lot No. 6 it was made a gift to him on his marriage, and he might consider himself the owner of it, and have made improvements upon it on that supposition. He is also entitled to complete protection against the covenant he has given to *Davis*.

The answers present a subordinate case on the supposition that the conveyances are to be declared void, impeaching the judgment itself obtained by the plaintiffs, and seeking to annul it altogether, or to reduce its amount on the ground of facts discovered since the trial at law, when it was too late to obtain a new trial. The facts said to be newly discovered are payments improperly appropriated, which, of course, if properly appropriated, would reduce the amount of the judgment, and time given to the principal debtor, which would operate the discharge of the surety. It is obvious that such a defence amounts to a bill to be relieved against the judgment, and it is compared to a bill for a new trial, which it is said cannot be maintained at this time of day, and that it was so stated in evidence on the commission issued with a view to the improvement of the practice of courts of equity in England. I dare say that a bill simply for a new trial cannot be maintained at this time of day, when the machinery for obtaining a new trial at law is so complete, a court of law being the proper forum for the adjudication of such cases. But that relief cannot be obtained in a court of equity against the judgment recovered against equity and good conscience, on the grounds of facts or evidence discovered since the trial, and too late to be used on the application for a new trial, is a proposition to which I cannot accede. I have no doubt that a court of equity would not grant relief in such cases, unless it appeared that

the new facts or evidence were unknown, and could not, with reasonable diligence, have been discovered in time to be used at the trial, or upon the application for a new trial. Thus, in the present case, if the wrong appropriation of payments, or the time given to the principal debtor were unknown to the surety, and could not, with reasonable diligence have been discovered by him in time to be used on the trial, or on the application for a new trial, I think he could maintain a bill to be relieved against the judgment on these grounds. The question is whether, if he desires to obtain such relief, he must not institute a suit for that purpose. I think such a course would be proper. The recent discovery of the facts or evidence would be part of the case presented by such a bill. The defendant could have instituted such a suit whether the present suit had been instituted or not. It does not appear to me that the general order of the court applies to such a case. That order is applicable to a case in which the defendant is entitled to some relief growing out of the same transaction as forms the foundation of the suit. Thus, if the defendants were entitled to any relief on the foot of the judgment upon which the bill is founded, he could obtain it in this suit without the necessity of a cross bill. But when the object is not to obtain relief growing out of the transaction which forms the subject of the suit, but to obtain relief against that transaction, to have it, in other words, annulled and declared void, wholly or in part, I think a cross-bill is still necessary. The issues proper to such a suit are not properly raised in the present case. Neither the facts of the wrong appropriation and time given, nor the fact of their recent discovery, or in issue in the present case in such a manner that they could be properly contested by the plaintiffs. I think, therefore, that even if these matters could properly be raised by way of defence to the present suit, it would be necessary, under the circumstances, that a suit in the nature of a cross- bill should be instituted. It would be premature, therefore, to

express any opinion on these points, although they were argued to some extent at the hearing. I may add that the defendant, *John Thomas Cunningham*, seemed to complain of the conduct of the plaintiffs in promoting the formation of a partnership between *Davis* and *Gillespie*, and after the stock of *Gillespie* had thereby become the joint property of that firm, then, upon its dissolution, of proceeding against him, *John Thomas Cunningham*, to enforce their claim. But I can see no just grounds of complaint that *John Thomas Cunningham* has in these transactions. *Davis* and *Gillespie* gave their notes for the stock to *John Gillsepie*, who endorsed them to the plaintiffs, in reduction of his indebtedness to them, and they were subsequently retained. It is said that they were wrongly appropriated, but in this case the matter would be properly discussed in the cross suit, although I suspect that in any event *John Thomas Cunningham* has had the benefit of this transaction in reduction of his liability. The decree, therefore, in the present suit will be such as I have mentioned.

CUNNINGHAM v. BUCHANAN.

Injunction—Action at law—Practice—Principal and surety.

A party to an action at law in coming into equity to obtain relief against a judgment therein and a stay of the execution issued against him on such judgment upon a state of facts which, had they been proved, would have constituted a good defence to the action, is bound to establish that there are facts which, had they been proved in the action, would have formed a good defence: but that at the time of such trial, and at the time he could, upon this disclosure, have obtained a new trial he was ignorant of them and could not with reasonable diligence, have ascertained them. When a long time has elapsed since the party so applying did ascertain such facts he is bound to make out as clear a case for an injunction as he would to obtain a decree to unravel the transactions which a court of competent jurisdiction has by its judgment closed.

A surety has no right to complain of the appropriation of payments by the creditor, when the principal makes no appropriation of them, but left them to be appropriated by the creditor as he pleased on the indebtedness.

A creditor is not bound to send the surety information as to the position of his principal. If the principal's statements or credit are doubted, the surety should inquire into them, and the very fact that a guarantee is called for by the creditor should put the surety on the alert.

The mere fact of a creditor abstaining from seizing under execution against the principal, his interest in the stock in trade does not of itself furnish a ground for suspending execution against the surety, and that the surety claims that the creditor shall forbear his remedy against him until the exact value of such interest is ascertained.

Statement.—After judgment had been pronounced in the preceding case, *John Thomas Cunningham*, in pursuance of the suggestion given by his Honor The Vice-Chancellor, filed a bill to be relieved from the judgment of *Buchanan, Harris and Company*, on the grounds mentioned in the judgment, and a motion was now made before His Lordship the Chancellor for an injunction to restrain the defendants from proceeding thereon.

The plaintiff in person.

Mr. *A. Crooks*, Q. C., for defendants.

Judgment.—VANKOUGHNET, C.—This is a motion by the plaintiff, in person, to restrain the sale of his land under a writ of *fieri facias*, now in the hands of the sheriff of the county of Wellington, upon a judgment at law, recovered

by the defendants against the plaintiff, as surety for one *John Gillespie;* upon a balance of account due by the latter to the defendants. The sheriff, or the defendants, finding it difficult to procure execution of the writ at law, in consequence of certain conveyances of his lands, made by the plaintiff, filed their bill against him in this court to have those conveyances set aside as fraudulent against creditors. That cause being at issue, a great deal of evidence was taken, and finally a decree was made in it by my brother *Esten* declaring the conveyances fraudulent against creditors. In his defence in that suit the present plaintiff endeavoured to impeach the judgment at law upon some, if not all, of the grounds upon which he seeks relief now, and the learned Vice-Chancellor was of opinion that if the plaintiff could establish a case for opening up the matters which had been so far concluded by the judgment at law, he could not do so by way of defence in the suit then before him, but must make it the subject of a cross bill; and hence the filing of this bill now. To entitle the plaintiff to any such relief as he asks for on this motion, he must first establish that there are facts which, if they had been proved in the action at law, would have constituted a defence there; and secondly, that at the time of the trial there, and at the time he might upon their disclosure, have obtained a new trial, he was ignorant of them, and could not, with reasonable diligence, have ascertained them. The facts which the plaintiff alleges he can prove in support of this motion form no independent ground of equity. They would, if they had been established in the action at law, have constituted a good defence there, and the defendant was bound therefore to have availed himself of them there, if he could or might with reasonable diligence have done so. The guarantee of the plaintiff to the defendants, and the facts connected with it, are set out in the judgment of my brother *Esten*, already referred to, and I need, therefore, only refer to such of them as will make plain the grounds upon which I dispose of the present motion.

The various heads of relief made by the plaintiff may be classed as follows:

1st. That an extension of time for payment beyond that stipulated for in the guarantee was given by the defendants to *John Gillespie* from time to time.

2ndly. That money and notes paid by the said *John Gillespie* to the defendants, or to the firm of *Buchanan, Harris & Co.*, at periods when the defendant, *Isaac Buchanan*, was in the firm, and when he was not, were wrongly applied by that firm, and this in two ways, 1st, that payments made by *Gillespie* after the plaintiff's guarantee were applied to a prior indebtedness of his; and 2nd, that while made to the firm during a period when *Isaac Buchanan* was not a member of it, they were yet applied to his indebtedness to the firm of which *Isaac Buchanan* was a member.

3rdly. That in fact the entire indebtedness of *Gillespie* was paid off, and if not entirely, that at all events it was reduced much below the amount claimed on the judgment, and this by payment before the verdict at law, for it is not pretended that any have been made since.

4thly. That the guarantee shewed that *Gillespie* had goods, viz., his share of the stock of *Davis* and *Gillespie*, out of which defendants might have made the debt, but that they purposely refrained from doing so by a fraudulent arrangement, whereby *Gillespie* left the firm, and his interest in the goods became the property of the defendants, and that any debt due by *Gillespie* was settled thereby.

5thly. That the guarantee was obtained fraudulently from the plaintiff, inasmuch as the defendants withheld from him the fact that *John Gillespie* was at the time largely indebted to them on account of *Gillespie & Brother*, and on his own account.

6thly. That under a writ against the goods and chattels of *Gillespie*, in respect of the same indebtedness, the household furniture of *Gillespie* was seized and secretly sold at a great undervalue, viz., at £75, which sum even has not been credited, and that the goods were delivered back to *Gillespie* after this mock sale. The plaintiff also alleges that the defendants have the books of *Gillespie*, and are collecting in his debts, and that he is entitled to the benefit thereof as surety. He also claims that he is not liable for any of the goods advanced to *Gillespie* in 1856, as in January of that year the defendants wrote *Gillespie* that they would no longer sell him goods except for cash.

Lastly. That none of the facts which present the heads above stated were known to the plaintiff till October, 1861; that they were peculiarly within the knowledge of the defendants and *Gillespie*, and that they both refused him any information, and that therefore he was not able to make any defence at law.

To take these different heads in the order in which I have placed them: as to No. 1.—It does appear that a greater extension of credit was given by the defendants from time to time to *Gillespie* than was stated in the plaintiff's letter of guarantee of the 16th of January, 1857, by renewing again and again notes which, according to the course of dealing between the defendants and *Gillespie*, were taken on the sales to him of goods, and I should have thought this sufficiently established, or at all events, admitting sufficiently of inquiry for the purposes of this motion were it not for two letters which the plaintiff himself has produced, one from the defendants to *Gillespie*, dated the 13th of May, 1857, and the other from the plaintiff to the defendants, dated the day following. These letters are respectively as follows:

"*Hamilton*, 18*th May*, 1857.

MR. JOHN GILLESPIE, Guelph.

Dear Sir.—We have your letter of the 12th inst., and in case of any misunderstanding regarding the renewals we sent to you on 8th inst., or signature, we enclose a letter, which please get Mr. *Cunningham* to sign. You will please bear in mind that we have no desire to extend the time of your credit, but simply that, instead of allowing money to lie idle in your store until the drafts drawn on you mature, we are anxious that you remit us toward said drafts semi-monthly or monthly, and we have no doubt you will find the plan very convenient for you. Please return us the letter within duly signed in course, and we are,

Yours truly,

BUCHANAN, HARRIS & Co.,
Pr. PLUMMER DEWAR."

"*Guelph*, 14*th May*, 1857.

BUCHANAN, HARRIS, & Co.

Gentlemen,—Referring to my letter of guarantee to you of the 16.h January, 1857, for Mr. *J. Gillespie*, I hereby agree that in case of your now or at any future time giving the said *Gillespie* an extension of time by renewing his bills, such as those three dated 1st May, 1857, @ 4 mos. for £250, 4 mos. for £250, and 5 months for £251 16s. 2d., they shall in every case and may be deemed by me as coming under said letter of guarantee of 16th January, and you will please consider this letter your authority for renewing said notes of 1st May, or any other bills at a future time which may be deemed necessary to renew.

I am, Gentlemen, your obt. servant,

JOHN THOMAS CUNNINGHAM."

Now as the first goods sold to *Gillespie* after the guarantee of January were sold on the 9th of April following, this letter of the plaintiff's of the 14th of May could not have relation to any indebtedness past

due, for which he was then liable, and must therefore be applied to future indebtedness or future bills. It cannot be read as confined to the three notes specified in it, but as a general license to the defendants to renew as often as they pleased, for the words are applicable to "any other bills at a future time which may be deemed necessary to renew." This letter was not, however, remarked upon by the defendants in argument, nor is it set up in the answer of the defendant *Isaac Buchanan*, perhaps because they considered the plaintiff too late, under any circumstances, for relief; but so long as it stands unexplained, I must hold it conclusive against the objection that extension of time was given without the consent of the surety.

As to No. 2, I think the plaintiff has no right to complain of this appropriation by the defendants of the moneys and notes received by them from *Gillespie*, who made no appropriation of them himself, thus leaving the defendants at liberty to apply them on his indebtedness as they pleased. As to the moneys received by the one firm being applied to the credit of the other, an examination of the accounts shews that the plaintiff, if otherwise he could object, has no ground for it. The debt due by *John Gillespie & Company*, it is admitted on all sides was paid, and therefore, none of the credits in question were applied to it. When *Issac Buchanan* went out of the firm in September, or the beginning of October, 1856, the amouut due by *John Gillespie* to the firm was about £180. *Isaac Buchanan* re-entered the firm in August, 1858. Between these two dates, in this interval, the whole additional indebtedness of *Gillespie*, so far, at all events, as the accounts in question here are involved, was contracted. During this interval divers sums were paid to the then existing firm, and after *Isaac Buchanan* re-entered, the notes for £1,860, made by *Davis and Gillespie*, were paid by the latter to the defendants; so that no matter whether the notes so received were made to cover the prior indebtedness to

the firm when *Isaac Buchanan* was a member of it, or the moneys received in the interval, when he was absent from it, were so applied, there would still remain the same uncovered balance for which the plaintiff was liable. Besides all this, *Gillesp.* , the party paying, made no objection to such appropriations, and acknowledged the account of December, 1857, (which shewed them,) to be correct, as is sworn by *Watson*.

As to 3, I do not see that there is any sum of money, or any note, paid over by *Gillespie* to the defendants which has not gone to his credit, or that there is any overcharge in the account against him. *Gillespie* swears that the only sums paid by him after January, 1858, were in all £97 6s. 2d., or thereabouts; the plaintiff also claims that the £75, proceeds of sale of *Gillespie's* goods, should be credited, and so it should if it has not been, but the plaintiff may not be entitled to the benefit of it if the claim on the judgment against *Gillespie* was for a larger or other amount than that against the plaintiff. This sale however took place on the 23rd of April, 1859, before the trial of the action at law, or at all events before the application for a new trial, and plaintiff does not swear that he was not then aware of it, or could not claim it as a credit then, if entitled to it all. In connection with this, I may as well dispose of head No. 6. It appears from the affidavit of the bailiff that the goods fetched their full price, and that on this ground there is no cause of complaint, and, so long as the price was credited, it cannot matter to the plaintiff what was done with the goods afterwards. Again, he does not swear that he did not know of all this at the time.

As to No. 5—It does not appear that the defendants applied to the plaintiff, or used any improper means to obtain his guarantee. He seems to have volunteered it. At all events he does not shew that the defendants had any conversation with him on the subject. It was

probably obtained by *Gillespie*. If he had any doubts as to *Gillespie's* credit, or as to any statement *Gillespie* may have made to him, he should have inquired into his position with the defendants, who were not bound to send him the information if he did not seek it; and in truth there is no foundation for the charge in respect of any indebtedness on account of *Gillespie & Co.;* for that was closed in 1856 by notes indorsed by the plaintiff. The plaintiff must also have known that *Gillespie* was dealing with *Buchanan, Harris & Co.*, and nothing more easy than for him, before signing a guarantee, to have inquired what *Gillespie* owed them. The very fact of a guarantee having been required should have put him on the alert, unless he was prepared, as he probably was, to place every confidence in *Gillespie*. There is no statement, certainly no evidence, from which I can infer any wilful or designed suppression of facts by the defendants. (*a*) As regards the proposition that plaintiff is not liable for the goods furnished to *Gillespie* in 1858, amounting to about £260, because they were furnished after a letter from the defendants to *Gillespie* that they would only supply him for cash, it is answered by the fact that the guarantee was not withdrawn, and that it was quite optional with the defendants, while they held it, to advance on the security of it or for cash, as they pleased. At all events it would have been a defence at law, if a defence. These goods sold were not sold for cash, but on credit in the usual way.

I have left head No. 4 to the last, because though it may furnish no ground for interposing by injunction, it may yet form the subject of substantial relief. I think the plaintiff cannot now have the operation of the judgment at law stayed by reason of it. It does not appear what the arrangement was at the dissolution as to *Gillespie's* interest in the stock of merchandise of

(*a*) Williams v. Rawlinson, 3 Bing. 71; Stone v. Compton, 5 Bing. N. C. 142; Hamilton v. Watson, 12 Cl. & F. 109.

Davis & Gillespie. *Gillespie* says, in his cross-examination, that *Davis* was to pay all the debts of the firm. Was the whole stock made over to *Davis* on that condition; or was it released to him by the intervention of the defendants at a greatly reduced value, or upon the understanding that *Gillespie's* share was to be sold for his benefit, or for the benefit of the defendants? How this was is not shewn; the mere fact that the defendants abstained from seizing it under their execution against *Gillespie*, would not of itself furnish a ground for suspending their execution against plaintiff. We know the difficulties attending the seizure of one partner's interest in a stock in trade, which is first subject to the partnership debts, and the surety could not claim that the creditor should forbear his execution against him till the exact value of his interest was ascertained. But it may turn out, upon proper inquiries, that the defendants have so acted or agreed to this release as to have made themselves liable for it to a greater or less extent, or accountable to the plaintiff as surety for any benefit they may have derived, or might have derived, or shall derive, by reason of it. And so also with the book debts alleged to have been assigned to, and to be in course of collection, by the defendants. The plaintiff may establish that he is entitled to these amounts as a surety, and as having paid the debt of *Gillespie;* but at present there is no evidence as to the one or the other to warrant interference with the claim at law.

I think the plaintiff establishes that, if the allegations made by him, as to the dealings between *Gillespie* and the defendants, had been facts, they have only come to his knowledge since the judgment at law, and as recently as October, 1861; and that considering the hostile attitude of the defendants, and of *Gillespie* to him up to that date, and their exclusive knowledge of the transactions, he could not be reasonably expected to have ascertained them sooner; and that so far as they were therefore grounds of defence to the defendants' claim at

law, he would, but for the reasons I have given, have been entitled to the aid of this court; but when so long a time has elapsed since the plaintiff did ascertain them, I think he is bound to make out as clear a case for an injunction as he would for a decree to unravel the transactions which a court of competent jurisdiction has by its judgment closed; and for this purpose the clearest evidence is required. I cannot make it a consideration in the plaintiff's favor that he is conducting his own case, and, being a layman, is ignorant of the principles of law and of the practice which govern the court, beyond the influence which this properly has in inducing the Judge to look more carefully into all the facts, and consider more closely any ground of relief they may afford, than he would feel it necessary to do where the case was conducted by skilled counsel on both sides.

BARNES v. BOOMER.

Vendee of the Crown—Arbitration—Excess of authority—Decision of Crown Lands Department—Computation of time.

Where a party having a possessory right assigned the same to another who applied to, and was, by the Crown Lands Department, allowed to become the puschaser of the land, after deliberately considering the claims of both parties:

Held, following the case of *Boulton* v. *Jeffrey* (1 U. C. Appeal Rep., p. iii), that this court had no jurisdiction to review such decision of the department.

Where the Crown Lands Department in deciding to allow one of two applicants to become the purchaser of land, directed that the amount properly payable by him to the other should be ascertained by arbitration, and the arbitrators by their award found a certain sum due, but directed that in the event of the party to whom it was payable, failing to deliver up possession to the other in two months, that $400 should be deducted from the amount so found to be due.

Held, that this was an act in excess of their authority; their duty, under the circumstances, being simply to find the amount payable by the one to the other.

By the terms of an agreement: dated the 20th of September, money was to be paid within one month, and on the 21st of October the money was tendered by the party who was to pay.

Held, sufficient, the day of the execution of the instrument being excluded in the computation of time.

The bill in this case was filed by *Edward Barnes* against *William R. Boomer, Alfred Boomer, George*

E. Boomer, (devisees of *John Boomer* deceased,) *George Taylor* and *John McKay*, (his executors,) and *Her Majesty's Attorney-General* for Upper Canada, praying, under the circumstances therein stated, and which are sufficiently set forth in the judgment, that the patent issued to the devisees might be declared to have been issued in error, mistake or improvidence, and that the same was void; or that the defendants *Boomer* might be declared trustees for plaintiff; or failing in that relief, that the plaintiff might be declared entitled to a lien on the lands in question for their unpaid purchase money agreed to be paid him, with interest thereon and the value of the improvements made by plaintiff on the premises since the date of the agreement (20th September, 1853,) and for an injunction to restrain the action of ejectment brought by such defendants against the plaintiff.

The plaintiff having filed affidavits corroborating substantially the allegations of the bill, a motion was made for an injunction to stay the action.

Mr. *A. Crooks*, Q. C., for the plaintiff.

Mr. *Hector*, Q. C,. contra.

Judgment.—SPRAGGE, V. C.—I have come to the conclusion that no injunction ought to issue in this case.

I cannot say that the patent was issued in error, mistake or improvidence. The Crown, under no misapprehension that I see, decided to allow the testator *Boomer* to become the purchaser of the land in question; the contest was between the plaintiff and *Boomer*, under assignment from the plaintiff, and at one time the claim of the assignee was disallowed by the Crown; but the plaintiff at no time attained the position of a purchaser from the Crown so as to bring himself within the case of *Doe Henderson* v. *Westover*.(a)

(a) 1 U. C. Appeal Rep. p. 429.

Upon a review of several claims the Commissioner of Crown Lands allowed the claim of *Boomer* as purchaser, and in order to do justice to the plaintiff, directed that the amount properly payable by *Boomer* to the plaintiff should be ascertained by arbitration. The plaintiff complains of the manner in which that arbitration was conducted, and that he was unrepresented before the arbitrators, and that the award does not do him justice. Upon the whole of the evidence upon this point, I think that if it was so, it was the plaintiff's own fault. There is, however, one part of the award in which I think the arbitrators erred in exceeding their authority, and also in awarding what was not just between the parties. I allude to their award that $400 should be deducted to deliver up possession to *Boomer* in two months; their duty was simply to ascertain the amount due between the parties; to affix a penalty for the non-delivery of possession within a limited time, or even to limit a time within which possession should be delivered, was beyond their authority.

I refer to the point here, not because I think that the conduct of the arbitrators in the matter of the award would afford any reason for staying proceedings at law; but because, if the parties are disposed to act reasonably, there may be no occasion for further litigation. I wished to see the instructions from the Crown Lands Department to their local agent Mr. *Huber:* copies of letters containing these instructions have been laid before me, and it appears that the agent acted in accordance with his instructions.

The Crown having deliberately, upon a consideration of the claims of both parties, decided upon selling to one; and there being no contract with the other, it not being shewn that the Crown acted in ignorance or misapprehension as to any material fact, the case comes within the principle of *Boulton* v. *Jeffrey*, and the court has no jurisdiction to review that decision.

The injunction must be refused.

After the motion for an injunction had been thus refused, the plaintiff prosecuted his suit, and the same was brought on for the examination of witnesses and hearing before his honor Vice-Chancellor *Spragge*.

Mr. *A. Crooks*, Q.C., and Mr. *Blake*, for the plaintiff.

Mr. *Hector*, Q. C., for the defendants, *Boomer* and *Taylor*.

Mr. *Hodgins* for the *Attorney-General*.

The defendant *McKay* had not put in an answer, and as against him the bill was taken *pro confesso*.

Judgment.—SPRAGGE, V. C.—This is a bill to repeal a patent issued to the defendants *Boomer* as heirs of *John Boomer*. An application was before me for an injunction to restrain ejectment brought by the *Boomers* to recover possession under their patent. I refused the injunction, and gave my views upon the cause, which I have carefully perused, together with the documentary evidence, and see no reason to change the view which I formerly expressed.

It is contended that the Crown, in granting patents, is bound by the principles which govern this court in decreeing specific performance; and that it is competent to this court to review the decision of the Crown, even when it has decided deliberately, and with knowledge of all material facts between rival claimants. *Boulton* v. *Jeffrey* concludes this court upon that point. I was referred to a statute passed since the decision of the case of *Boulton* v. *Jeffrey* (*a*), the twenty-first section of which provides that when patents have issued through fraud or in error or improvidence, this court, and the superior court in Lower Canada respectively, shall have jurisdiction to decree such patents to be void: but that act conferred

(16 Vic. ch. 159.)

no new jurisdiction upon this court, and leaves *Boulton* v. *Jeffrey* as binding as before.

But it is said that error is shewn in this, that the Commissioner of Crown Lands, by whom the claim of the *Boomers* was allowed, professed to be guided by the principles of this court; and that he erred in not following these principles. What passed was this: an agent of the plaintiff preferred his claim before the Commissioner, who said that the original transfer from the plaintiff was, as he considered, such an instrument as this court would enforce, if *Fergusson's* affidavit was true; and that if it were not true, the proper course was to have *Fergusson* indicted. This may have been a mere expression of opinion by way of strengthening the decision at which he arrived, without his meaning to say that if it were not so he would decide otherwise.

The transfer and affidavit of *Fitzgibbon*, alluded to, are not before me, but what purport to be copies are. The *Boomers* rest upon an agreement of the same date: and here I must notice another objection, that this court cannot look at anything that was not before the Crown; that if upon the evidence which was before the Crown the patent was wrongly issued, it is not open to the patentee to shew by other evidence that it was rightly issued. But I think the question is whether the patent was rightly issued; not whether the Crown proceeded upon all the evidence that is now adduced, or upon some evidence which turns out to be erroneous; unless indeed this court has reason to think that the decision of the Crown might have been different if the facts before the Crown had been precisely the same as before this court. This case affords a good illustration of this. The agreement, the due execution of which is not questioned, is as follows:

"*Wellesley, September 20th, 1853.*

I, *Edward Barnes*, agree to sell my right, title and claim in lot No. 10, in the fourteenth concession of

Wellesley township, county of Waterloo, for the sum of two hundred and twelve pounds ten shillings, currency, to *Henry Hawkins* and *Charles Randle*, of the same place; fifty pounds to be paid within one month, and the remainder by the first of April next, 1854, at which time full possession is to be given.

EDWARD $\overset{\text{his}}{\underset{\text{mark}}{\times}}$ BARNES.

Witness present,
EDWARD WELSH.

HENRY HAWKINS.
CHARLES RANDLE."

The transfer alluded to, purports to be an assignment from *Barnes* to *Hawkins* and *Randle*, and bears the same date and purports to be executed by *Barnes*, and to be witnessed by *Adam Fergusson* and *James Geddes*.

Now suppose the money paid according to the agreement, or payment tendered, can the court doubt that if the Crown would decide in favor of *[illegible]vkins* and *Randle*, or their assignee upon the assignment, they would do so upon the assignment?

It is clear from the correspondence that the Crown did not assume that *Barnes* had actually received the purchase money: the question was whether he had agreed to sell; and whether the assignees of the purchasers, or *Barnes* himself, had the best claim to the patent, and that appeared by the agreement, as well as by the assignment. In saying this, I am assuming the assignment not genuine; but it probably is genuine. I find a copy among the papers put in.

I think, in order to sustain the patent, it is not necessary that I should go further than to say that the Crown could properly issue a patent upon the agreement and the evidence in connection with it.

The plaintiff's position is, that the agreement was not delivered, but placed in the hands of the witness,

Welsh, as an escrow to be delivered to the one party or the other, according to whether the £50 was or was not paid within the month, and there is evidence of this. The bill further alleges that time, as to that payment, was of the essence of the contract: but the bill does not make that case; it states the agreement, as "entered into" by the plaintiff, and proceeds simply upon the default by *Hawkins* and *Randle* in payment of the two sums of which the purchase money consisted. But suppose the plaintiff's position admissible upon the pleadings; it is shewn by the evidence that one *Fergusson*, on the 20th of October, tendered the £50 to the plaintiff; he did this as on behalf of *Hawkins* and *Randle*, though without any authority from them. On the following day *Hawkins* himself tendered the money. On both occasions the plaintiff refused to receive it, saying that he had repented of his bargain and would not carry it out; on the latter, he said that the time had expired: when *Fergusson* made the tender, he told the plaintiff that was the day on which the money was due. I incline to think there was a sufficient tender on both days; on the 20th if, as I think, *Fergusson's* tender was recognized by the parties to pay; on the 21st, as being within time. It appears from the evidence that the month was understood by all parties to be a calendar, not a lunar month. *Welsh*, who held the agreement, *Hawkins* and *Randle* certainly so understood, and I think the plaintiff also; for when *Fergusson* told him the 20th was the day the money was payable he did not dispute it, but on the next day said the time had expired. In computing time upon such an agreement the day of its execution is excluded, and consequently in this case the 21st of October was within time.

But suppose the 20th the last day, could it possibly be said that the Crown would be so tied down by strict legal rules as to be unable to say that the contract was carried out in its spirit, and that the assignees ought to have the patent? I shall go further and say that the Crown could not in reason say otherwise.

As to the second payment; that payment by *Hawkins* and *Randle*, and delivery of possession by the plaintiff, were to be contemporaneous. From the 20th of October the plaintiff denied their right as purchasers; they, on their part, constantly asserted it; got their names put on the books of the local Crown Lands Agent, and paid the instalments to the Crown; the plaintiff also attempted to pay them, but was refused. When *John Boomer* became purchaser, the plaintiff still repudiated his bargain; and in July, 1855, a formal letter was addressed to him on behalf of *Boomer*, claiming the premises, and offering to fulfil the agreement on his part, upon the plaintiff giving up possession; and offering also to compensate him for improvements made by him after his agreement with *Hawkins* and *Randle*.

Under these circumstances, I do not see (though it is not necessary in my view to decide the point,) upon what grounds specific performance could have been refused to *Boomer*. It is said that he ought to have filed a bill in this court for specific performance, and that his omission to do so, and the delay that has occurred, are reasons for repealing the patent. There are two answers to this; one, that the patent not having issued, it was a proper matter for the consideration of the Crown; the other, that the Crown being able to exercise a wide discretion in the matter, wider probably than this court, and the merits being with the defendant, he was right in pressing his claim upon the consideration of the Crown.

I omitted to notice one objection to the decision of the Crown, that it was *ex parte*. It is clear, and indeed could not be otherwise, that any tribunal exercising judicial functions and adjudicating upon the rights of others, cannot do so *ex parte*; and if it does adjudge *ex parte*, that of itself will avoid the decision, without reference to what may be the merits of the case, but that doctrine does not seem to me to apply here. The

officer of the Crown was not adjudicating upon rights: the plaintiff was not a purchaser from the Crown, he was at most a claimant upon its bounty; and it was only the liberality of the Crown, in dealing with persons of his class, that enabled him to sell to another that which constituted his claim; and further, his case had been and was before the Crown; at one time it had been allowed, and that of *Hawkins* and *Randle* disallowed. Upon reconsideration this decision was reversed. The omission was to notify him in order that he might be heard upon the reconsideration of the case. I do not think it falls within the principle to which I have adverted.

It is objected further, that *Boomer* was a speculative purchaser, so as to bring him within the principle of *Prosser* v. *Edmunds;* I do not think the evidence shews this.

There is some evidence of the *Boomers* having claimed before the heir and devisee commission, and of the commissioners having reported in their favor, after hearing the plaintiff's case; but this has not been regularly proved, and I have therefore not noticed it. It was observed in argument that they did not fill a character which would entitle them to claim; but upon looking at the act I think that they did. No doubt they did, if *Hawkins* and *Randle* were the nominees of the Crown, and the papers put in, I think, shewed them to be so.

I think the plaintiff makes out no equity to have the patent repealed, and that the defendants are entitled to their costs.

In regard to the arbitration, I have nothing to add to what I have already said, except this, that the evidence since given shews that the plaintiff had abundant time and opportunity to name an arbitrator, and establish his case. I am not satisfied that justice has not been

done to him; and if it has not, it has been, as I have already observed, entirely his own fault.

The bill prays in the alternative, that failing the relief principally sought, the plaintiff may be declared entitled to a lien and charge for the unpaid purchase money, and the value of the improvements made by the plaintiff. The plaintiff cannot, I think, be entitled to this, unless there has been default in the defendants. The sum awarded was $919, from which the arbitrators directed to be deducted their own fee of arbitration $9, and the costs, fees and charges of the arbitration and award. The award was made on the 24th of October, 1859; on the 22nd of December, in the same year, it was directed by the Crown Lands Department that the amount awarded should be paid into the bank of Upper Canada to the credit of the Commissioner, to be held subject to the order of the party entitled to receive it; and on the 13th of January, the sum of $884 was paid into the bank accordingly: whether the difference, $35 was the correct sum to be deducted does not appear; but in a letter of the 6th of February following, (set out in the bill,) the department appears to recognize the sum paid in as the proper sum, but whether it is so or not the difference is too trifling for this court to direct an inquiry about it; nor would there be any justice in doing so, for the patent did not issue, as the bill states, until the autumn of 1860, the plaintiff in the meantime, and afterwards, retaining possession of the land.

At the same time, I think that no obstacles should be placed in the way of the plaintiff receiving so much of the money paid into the bank as he is properly entitled to. The defendants should assent to his receiving it, less the costs of this suit and of the action of ejectment, and possibly some further deduction may be proper in respect of the continued possession. The money stands to the credit of the Commissioner of

Crown Lands, and he, no doubt, will make a proper disposition of it. The defendants certainly ought not to receive it; and if they should, it would be proper to consider whether the plaintiff should not be declared entitled to a lien for the amount, less proper deductions.

The bill may be retained for three months, with liberty to apply. If no application be made, to stand dismissed with costs.

VANSTON v. THOMPSON.

Executors—Trustees—Wilful default—Interest on moneys not received.

Although the court will order executors or trustees to make good moneys lost by neglect or default, it will not also charge them with interest on those sums.

On this case coming on for further directions.

Mr. *Becher*, Q. C., for the plaintiff, asked that interest might be allowed against the defendants on certain rents and profits of the realty lost to the estate by the default of the defendants.

Mr. *Roaf*, contra. The utmost the court will do under the circumstances is to order defendants to make good to the estate the moneys thus lost: no case has gone the length of compelling them also to pay interest.

Judgment.—SPRAGGE, V. C.—At the hearing of this cause, on further directions, I disposed of the case with the exception of one point. The decree directed the defendants to be charged with the amount of certain rents which, but for their wilful neglect or default, they might have received; and Mr. *Becher*, for the plaintiff, asked on further directions that they should be charged with interest upon these amounts. I stated my impression to be against the claim, and Mr. *Becher* was to furnish authorities if he could find any in support of his position.

None have been furnished to me. The authorities that I have seen are the other way, *Lawson* v. *Copeland* (*a*), and *Tebbs* v. *Carpenter* (*b*), were both, like this, cases where executors were charged with the amount of rents which, but for their wilful neglect and default, they might have received: and in each case interest on the amount was asked for and refused by the court. The general rule seems to be that the court contents itself with charging trustees with the principal only of what they might have received, but have not received; and does not, in addition, charge them with interest.

GOTT v. GOTT.

Alimony—Retaining fund in court for payment of.

Although the statute (22nd Victoria, chapter 33, section 2, Consol. Stats. U. C., chapter 24, section 70) authorizes the arrest of a defendant in an alimony suit for not more than the amount of two years' allowance for future alimony and arrears, still if the court has obtained possession of funds of the defendant by reason of any default on his part it will, in a proper case, refuse the payment of them over to him without first securing the future payment of alimony.

Statement.—This was a motion by the defendant for payment out to him of the proceeds of the bond or debenture mentioned in the report of this case ante volume ix., page 165, and was adjourned by his Lordship the Chancellor into full court.

Mr. *C. Cooper* for the application.

Mr. *Read*, Q. C., contra, opposed the motion, except upon the terms of defendant securing the plaintiff the future payments of the allowance fixed by the Master. From what has already been done by the defendant, it is certain that if this money were now paid out to the defendant, he would set the plaintiff at defiance,

(*a*) 2 B. C. C. 159. (*b*) 1 Mad. 290.

by making away with the fund, and thus deprive her of all means of support.

Judgment.—VANKOUGHNET, C.—This is an application by the defendant to have paid out to him certain funds now in court, the proceeds of a bond brought into court under a writ of sequestration, issued for the non-payment by defendant of arrears of alimony decreed to the plaintiff, on payment of the arrears of alimony and costs, and thus, as he contends, purging his contempt. Although it is quite true that the court would have no means of fastening upon the defendant's property in his own hands, alimony payable in future, yet when the property of the defendant has come into possession of the court by the default and contempt of the defendant, in disobeying the order and process of the court, the court can restore it him when and on such terms as it thinks right. He is not entitled, as a matter of strict right, to purge his contempt by merely doing now that which in contempt of the court he neglected or refused to do before. The court may deal with him as it thinks just, and nothing certainly would seem more just than that the court should compel him to secure the payment of the future alimony, hypothecating for the purpose the property of his which it holds, or a sufficient portion of it; it is what the defendant himself in fairness should do. It is the only tangible property he has, and having once already attempted fraudulently to make away with it, to avoid this very claim for alimony, he will probably do the same thing again, and perhaps more successfully, if the court puts it in his power so to act. In *Maynard* v. *Pomfret* (*a*) the Lord Chancellor *Hardwicke* kept on foot a sequestration, issued for default of answer, in order to secure the attendance before the Master of the defendant, as an accounting party. In speaking of this case in *Show* v. *Wright* (*b*), Lord *Loughborough* says, "it goes the whole length of proving that though the sequestration issued as mesne process to compel an

(*a*) 3 Atk. 468.

(*b*) 3 Ves. 23.

answer which is the sequestration here, yet it shall remain, if there is any duty to be performed; but that was going a good way." I do not think we are going beyond the jurisdiction asserted in the case before Lord *Hardwicke*, although we apply its exercise in a different way when we order, as we now do, that the fund in court, or a competent part thereof, be invested to secure the payment of accruing alimony, or if the defendant prefer it, that a life annuity be purchased for plaintiff, all arrears of alimony and costs to be first paid. The affidavit shewing the release by *James Gott* of any claim on the fund should be filed, and then the balance of the fund, if not required for the purposes mentioned, can be paid over to defendant. We cannot, on this motion, inquire into the propriety of maintaining the decree.

Subsequently a motion was made by the defendant to reduce or discontinue the alimony, on the ground of adultery, alleged to have been committed by the plaintiff subsequent to the decree.

Mr. *C. Cooper* for the application.

Mr. *McLennan* for *James Gott.*

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

Judgment.—ESTEN, V. C.—This was an application by the defendant for the reduction or discontinuance of alimony, on the ground of subsequent adultery; and a cross application by the plaintiff, for the payment of arrears out of the fund in court, being the proceeds of a debenture belonging to the defendant, which had been seized under a sequestration, and paid, and the moneys lodged in court. Although, notwithstanding the peculiar circumstances of this case, subsequent adultery might afford a sufficient ground for reducing or discon-

tinuing the alimony, it is sufficient to observe that it is not established by proof. The only witnesses whose evidence is material are *Collins* and *Barrett*, but their evidence cannot be regarded. The marriage may be invalid, but it is a marriage *de facto;* has never been annulled by sentence, and the defendant was perfectly aware of the circumstances which may render it invalid when he persuaded the plaintiff to become his wife. I should not think it right to interfere on this ground. The question is, what disposition is to be made of the moneys in court. I should have thought, on the authority of the cases of *Maynard* v. *Pomfret*, and *Shaw* v. *Wright*, that it would be proper to detain these moneys to answer the claim for alimony past and future. The defendant was decreed to pay £65 in respect of past alimony, and £25 per annum in respect of future alimony. He paid £36, and no more. The plaintiff, might, I presume, have issued a *fieri facias*, and seized the debenture, out of which her arrears would have been paid, and probably the court might have ordered the surplus to remain in court to answer future payments. At all events the plaintiff preferred a sequestration, under which the moneys are in court, and the cases which I have cited shew that moneys thus brought within the power of the court, it will devote to the satisfaction of the plaintiff's demand, whether the writ that has been issued was *mesne* process, or by way of execution after decree; and it can make no difference whether that demand is a sum in gross, or an annual payment, where, if the court were to deprive the plaintiff of the advantage which she has obtained through the defendant's default, it would deprive her of all the future fruits of the suit, and enable the defendant to frustrate its decree. However, I am relieved from making any disposition, as that has already been done by the full court, which directed that the fund in court should be invested, and a competent part of it applied towards satisfaction of the plaintiff's alimony. If this order had

not been made, I should probably have pronounced one to the same effect. Both applications must be dismissed, and the defendant's with costs.

RIDOUT V. HOWLAND.

Specific performance—Trustees to sell—Personal confidence.

Land was vested in trustees by a deed which provided, "that all or any part of the said messengers, tenements or premises, shall or may be absolutely sold and disposed of by the said trustees or the survivor of them, his executors or administrators, with the consent in writing of the parties of the first and second parts (the *cestuis que trustent*) or the survivor of them, and after the decease of the said paries of the first and second parts, then in the discretion of the said parties of the third part, for any price which they, the trustees or trustee shall think reasonable, and that in case of such sale, the money to arise or be produced from the same shall be paid to the said trustees or the survivor of them, his executors or administrators, without any necessity or obligation on the part of the purchaser or purchasers thereof to see to the application of such money or any part thereof, so as he, she or they, shall take the receipt or receipts of the said parties of the third part or the survivor of them, his executors or administrators, or other only acting trustee or trustees for the time being for the same money." One of the trustees died and the other was released from the trust and two others were appointed by the court in their stead.

Held, [Per *Vankoughnet*, C., *Esten* and *Spragge*, V. CC., *dubitantibus*,] on objections taken to an attempted sale of the trust estate vested in the new trustees, with the consent of the *cestuis que trustent*, that the power to sell was a personal trust and not transferable to the new trustees: but it appearing that the sale which had been effected, with the consent of the *cestuis que trustent*, was in reality a sale *to* one of themselves the court dismissed a bill filed by the vendor seeking to enforce a contract for sale; but, under the circumstances, without costs.

Statement.—This was a bill by *Samuel G. Ridout* against *William P. Howland*, setting forth that plaintiff had agreed with defendant for the sale to defendant in fee of certain real estate in the city of Toronto, for $850, but which agreement defendant refused to carry into effect, alleging as a ground for such refusal that plaintiff's title was defective, inasmuch as the same was derived through one *John Ridout*, whose title was derived under a conveyance from one *John W. Gwynne* and others to one *Grant Powell* and one *Lawrence W. Mercer*, (deceased,) new trustees appointed by this court to the marriage settlement of the said *John Ridout* and wife, defendant

alleging that such new trustees did not under the conveyance to them take the power of sale which had been vested in the trustees originally named in the settlement or any other power of sale, there being infants interested in the trust property under such settlement; and the defendant further alleged, as a defect in plaintiff's title, that even if such power of sale existed in the new trustees, the said *John Ridout* could not become a purchaser, on the ground that he and his wife are, by the provisions of the settlement, necessary consenting parties to any such sale: and also, that by the trust deed to plaintiff, plaintiff should not sell either of the lots therein comprised, (one of which is the land in question,) for less than £500, without the consent of the said *John Ridout*, his heirs or assigns; that it was and is necessary for the plaintiff to procure the consent of certain judgment creditors of the said *John Ridout*, who have writs of execution against it.

The plaintiff contended that the objections to title were ill-founded, inasmuch as the new trustees had full power to sell, and *John Ridout* could properly purchase the land for which he had paid more than the value thereof: and prayed specific performance of the said agreement.

The defendant submitted to perform the contract, if, under the circumstances, the court should be of opinion a good title could be made.

The cause came on for hearing originally before his honor Vice-Chancellor *Esten*, who dismissed the bill with costs, grounding such decision principally on the fact, that *John Ridout's* consent to the sale to one *E. Powell*, was in fact a purchase by him, and that the transaction was an evasion of the trust. The plaintiff thereupon set the case down to be re-heard before the full court.

Mr. *Hurd* for the plaintiff.

Mr. *Fitzgerald* for the defendant.

Judgment.—VANKOUGHNET, C.—This was a bill filed to enforce specific performance of an agreement to purchase certain lands which were conveyed in trust as a marriage settlement to certain trustees, *John W. Gwynne* and *William D. Powell*, with the following power: "that all or any part of the said messuages, tenements or premises, shall or may be absolutely sold and disposed of by the said trustees or the survivor of them, his *executors or administrators*, with the consent in writing of the said parties of the first and second parts (being *John Ridout* and wife, in regard to whose intermarriage the settlement was made) or the survivor of them, and after the decease of the said parties of the first and second parts then, in the discretion of the said parties of the third part, for any price which the said trustees or trustee shall think reasonable, and that, in case of such sale, the money to arise or be produced from the same shall be paid to the said trustees or the survivor of them, his executors or administrators, without any necessity or obligation on the part of the purchasers thereof to see to the application of such money or any part thereof, so as he, she, or they, shall take the receipt or receipts of the said parties of the third part or the survivor of them, his executors or administrators, or other only acting trustees or trustee for the time being, for the same money." *William D. Powell*, one of the trustees, died, and since his death the surviving trustee, *Gwynne*, has been relieved of his trust by the court, and two persons, *Grant Powell* and *Lawrence W. Mercer*, appointed by the court to execute the trusts; and to them *Gwynne*, in accordance with the direction of the court, conveyed the legal estate in the premises in question. Subsequently these new trustees sold the trust property, of which these premises form a part, to one *Eliza Powell*, but as is admitted, for the use and benefit of the said *John Ridout*, the real purchaser, to whom she immediately afterwards conveyed. This course apparently was adopted to get over the difficulty thought to exist in consequence of the consent of *John Ridout* to

a sale by the trustees being required. The plaintiff being indorser on promissory notes of *John Ridout* for his accommodation to the amount of $5,000, *John Ridout* and wife conveyed to him, as security, the land thus sold by the trustees, with power to *Samuel* to sell and convey the said lands, which consisted of lots eleven and twelve on William Street, in Toronto, either together or separately, and either by private sale or public auction, &c.," but no sale to be made for any less a price than $4,000 for the two lots, or in like proportion for the lots separately, or either lot, &c., without the consent in writing of the said *John Ridout*, his heirs and assigns." *Samuel Ridout*, with the consent of *John Ridout*, has bargained to sell one of the lots, number eleven, for $850, to the defendant, who is willing to pay his purchase money and take a conveyance if *Samuel* and *John Ridout* can make him a good title. At the time of this bargain and consent there were in the hands of the sheriff of the county in which the said lands lie, several writs of execution against the lands of both *John* and *Samuel Ridout*.

The defendant questions the title on three grounds: 1st. That the trust to sell was one of personal confidence, and could not be transferred. 2nd. That the sale by the trustees being in reality a sale to *John Ridout*, whose consent thereto was required by the trust deed, is invalid or liable to be impeached. 3rd. That *Samuel Ridout* could not sell to the defendant without the consent of the execution creditors of *John Ridout*. In the first deed is a provision to this effect: "That if both of the trustees or the survivor of them, in case one shall die, shall by infirmity or absence from the province be rendered incapable of performing the trusts, &c., that it shall be lawful for the said trustees, or the survivor of them, to appoint by an instrument in writing under his or their hand and seal, two or more trustees to act in their stead and on their behalf, and the same trustees be invested with all the powers and

authority vested and imposed in and upon the said above-mentioned trustees, in as full and ample a manner and governed and restrained by the same conditions as they the original trustees are, until the disability to the said parties of the third part, acting under the authority thereby vested in them, shall cease and determine:" and then it provides for the trustees so appointed accounting with the original trustees for all their acts. Looking at this whole deed, I have seldom, if ever, read a power from which the word "assigns" is absent, which implies less of personal confidence, than does the one here: and yet, in the state of the authorities, I cannot compel the defendant to take the title against the objection raised by him upon the exercise of the power of the new trustees. The power is to "the trustees or survivor of them, his executors, or administrators;" not to him and his heirs merely, as was the case in *Cooke* v. *Crawford* (*a*), in which it was held that a devisee of the power could not act. It is, however, like the case of *Wilson* v. *Bennett* (*b*), where the power to sell was under a will given to the trustees: "and the survivors or survivor of them, his heirs, executors, and administrators, to sell, etc., as they shall see fit." The surviving trustee then by his will appointed three persons his executors, and to them devised the trust estates to hold, upon the same trusts as he himself had held them; one of these executors being also his heir. One of the executors, not the heir, renounced probate of the will and disclaimed. The other two executors sold certain of the trust estates, and the purchaser objecting that they could not make him a good title, a special case was submitted for the opinion thereon of the court. It was first argued before V. C. Knight *Bruce*, without its then appearing that one of the vendors was the heir of the last of the original trustees, the testator; and His Honor thought that the right of the vendors to make a good title without the concurrence

(*a*) 13 Sim. 91. (*b*) 5 Deg. & S. 475.

of the *cestuis qui trustent* too doubtful to be enforced. The case having been amended by stating the heirship of one of the vendors, was again argued before Vice-Chancellor *Parker*, who, however, refused to force the title on the purchaser as being too doubtful. The authorities are all reviewed in the recent case in the Queen's Bench of *Stevens* and *Austin* (*a*). The law, as left by that case, is in a very unsatisfactory state. It is probable that in confiding the power in this case, the grantor relied less upon the personal discretion of the trustees named, by reason of her own consent and that of her husband being required to a sale; and throughout the deed care is taken that the husband shall have nothing to do with the property beyond the mere naked right to give such consent, and to exercise the discretion which it was meant to call for. If so, it would render it in some degree doubtful whether, on the second objection alone, the purchaser should be compelled to take the title, notwithstanding the cases of *Howard* v. *Ducane* (*b*), *Beadin* v. *King* (*c*), *Grover* v. *Hugell* (*d*), *Greenlaw* v. *King* (*e*), cited in argument. It is not necessary, however, to consider this or the third objection. I think the bill should be dismissed without costs.

Judgment.—Esten, V. C.—After looking at a variety of cases, and maturely considering the matter, my brother *Spragge* and myself are of opinion that upon the second objection, viz., the husband, who is to be a consenting party, being the purchaser, the title is too doubtful to force upon a purchaser. Upon the first point, upon the authority of *Drayson* v. *Pocock* (*f*), we incline to the opinion that upon an ordinary power or trust for sale, where a sale is positively directed, and the trustees are merely to exercise their judgment as to the terms of sale, a trustee appointed by the court can exercise the power; and that sufficient doubt would not exist to

(*a*) 7 N. S. 873.
(*b*) 1 Tur. & Rus. 81.
(*c*) 9 Hare, 517.
(*d*) 3 Russell, 428.
(*e*) 3 Beav. 49.
(*f*) 4 Sim. 283.

induce the court to refrain from compelling the specific performance of the agreement. It is unnecessary to express any opinion whether this particular power is or is not pursued. We have not, however, seen the deed containing the power to sell.

Per Curium.—Bill dismissed without costs.

WILLIAMS v. HAUN.

Appeal from Master—Practice.

Where in taking the account upon a mortgage the Master had taken the same against the mortgagee with rests, and on appeal from the Master's report, it appeared that at the date of the mortgage a balance was due by the mortgagee to the mortgagor, and that the mortgagee went into possession of the property, part of the arrangement being that he should apply the rents, &c., to the paying off of two prior mortgages, but it was not shewn that they were due at the time of the moneys being received, so that the holder of the incumbrances could have been compelled to accept payment. The court, if desired by the mortgagee, ordered a reference back to the Master to ascertain this fact.

Where a report was referred back to the Master at the instance of the defendant, a mortgagee, to ascertain a particular fact, and the Master, without being directed so to do, called upon the defendant for an affidavit shewing what moneys he had received, &c.; and the defendant filed his own affidavit shewing that the moneys with which he was chargeable had been received by him at dates subsequent to what the Master had previously found by his report, and which he varied accordingly: *Held*, on appeal, that the Master was wrong in thus proceeding, and the report was sent back to be reviewed in this respect.

Statement.—This was a redemption suit, and the Master having made his report, finding a sum due by the mortgagee, he appealed therefrom, on the ground that the Master had improperly charged him with interest on the moneys received by him on account of the mortgagor.

Mr. *A. Brooks*, Q. C., for the appeal.

Mr. *Roaf*, contra.

Livesey v. *Livesey*, (*a*) *Brooke* v.————, (*b*) *Twyford* v. *Trail*, (*c*) were referred to.

Judgment.—VANKOUGHNET, C.—The arrangement be-

(*a*) 10 Sim. 331. (*b*) 4 Mad. 212. (*c*) 3 M. & C. 645.

tween these parties, mortgagor and mortgagee, was somewhat singular. It appears that on the 15th of June, 1857, the plaintiff conveyed to the defendant the premises in question to secure to him his indebtedness, and also on the same day executed to him a chattel mortgage: that immediately, as I judge, the defendant was by the plaintiff put into possession of both realty and personality; and yet, from the Master's report, I find that on this same day, while the entire indebtedness of plaintiff to defendant was £124,15s. 5d., the defendant was chargeable with £185 0s. 5d., realized from the plaintiff's property, leaving a balance due the plaintiff of £60 5s.; at least the Master fixes that date as the one on which the defendant should be made chargeable, as he received certain property then and realized out of it the amount charged against him, though he actually may not have received it till subsequently. Had this been the whole transaction between the parties, the defendant would on the day in question have been the plaintiff's debtor, and liable to pay interest on the amount then due by him, and on any sums subsequently received out of defendant's property. But it seems to have been part also of the arrangement, that the defendant was, out of what he received from the property, to pay off two prior mortgages. This I take to be the effect of the arrangement, as stated by the Master and the parties. The defendant taking and holding possession under such circumstances, must be treated as a bailiff or receiver for the plaintiff, and as such bound to apply all moneys which came to his hand, or with which he was properly chargeable, to the paying off the outstanding mortgages as fast as they could be paid, and for any neglect or delay in such application he is chargeable with interest, and with any loss that may have arisen therefrom; but he is not chargeable with anything more. He did not contract to invest the moneys of the mortgagor that came to his hands: the most he can be considered as having undertaken to do was to apply the moneys as quickly as they

were properly applicable, and until such application could be made he should not be charged with interest on moneys in his hands awaiting a proper disposal. I cannot tell whether he could at once have applied the money with which he has been charged to the reduction of the incumbrances, a consideration which does not appear to have engaged the attention of the parties or of the Master: the mortgage money may not have been due, and the mortgagees could not be compelled to take the moneys in advance. If the appellant desires it the case must go back to the Master on this ground.

The defendant availed himself of the option given to him by this judgment of having the report sent back to the Master, who, on proceeding under the order, required the defendant to produce a statement shewing the amount of moneys received by him on account of the plaintiff, and how the same were applied, which the defendant accordingly filed and verified by his own affidavit, and the Master proceeded to retake the accounts between the parties, and in consequence of the statements then laid before the Master, he varied materially his report in respect to the amount due by the defendant. Thereupon the plaintiff appealed from the report, contending that the Master was not at liberty, under the order referring back the former report, to vary the dates thereby fixed for the receipt of the moneys by the defendant, and that in any event the Master had improperly received the defendant's own affidavit, unsupported by any other evidence, for the purpose of doing so.

Mr. *Roaf* for the appeal.

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

Judgment.—VANKOUGHNET, C.—This case was before

me some time since, on an appeal by the defendant from the Master's report, and was sent back by me to the Master on grounds appearing in the judgment then delivered. It was not on that appeal, nor on any other objected by the defendant, that the Master had charged him with the moneys arising from the sale of the chattel property mortgaged to him as received by him at too early a period, and the Master's report in that respect stands confirmed.

On the case coming again before the Master under the order referring it back to him, the Master called upon the defendant for an affidavit shewing what moneys he had received, &c., and the defendant filed an affidavit (unsupported by any other testimony than himself) shewing that the proceeds of the sales of the chattels were received by him at times different from, and subsequent to, that which the Master had by his previous report fixed, and the Master in this respect has, acting upon that affidavit, altered in effect his former report. This, I think, he should not have done. The report was not sent back to him to make any such alteration. The defendant submitted to that portion of it without any objection, and it would be highly dangerous to allow him to escape from it on his own affidavit. The appeal therefore must be allowed, and the report go back to the Master.

The defendant subsequently brought the matter before the full court in re-hearing term, when the decision of His Lordship was affirmed; but permission was given to the defendant to again go before the Master, with liberty to produce evidence upon the point in question, otherwise the petition for rehearing to be dismissed with costs.

ROBERTSON v. SCOBIE.

Mortgage—Deed absolute in form—Trustee and cestui que trust.

In 1836, *R.* being under obligations to *S.* as accommodation indorser and being about to leave Canada, conveyed land to *S.* by a deed absolute in form. A bond was executed contemporaneously explaining the transaction and providing for re-conveyance of the premises on satisfaction to *S.* of any damages or loss that might be occasioned to him by reason of his liability as such indorser. A tenant occupied the premises till 1845, treating *R.* as landlord and paying the rent to *S.* as his agent. In 1846 *S.* sold the premises, the purchaser not having any notice of *R's* claim to them.

Held, on a bill filed by the representative of *R.* to redeem, that no relief could be granted as against the purchaser, but that the representative of *S.*, he being also dead, was bound to account as mortgagee from the time that he went into possession.

The bill in this cause was filed by the Executor of the late *Peter Robertson* against *Justina Scobie*, executrix of the late *Hugh Scobie*, and *Charles McBeth*, who purchased the premises referred to in the judgment from the testator, *Scobie*.

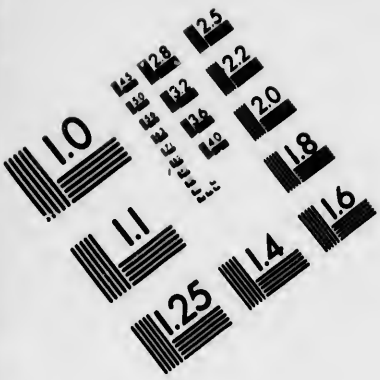
The facts are fully set forth in the head note and judgment.

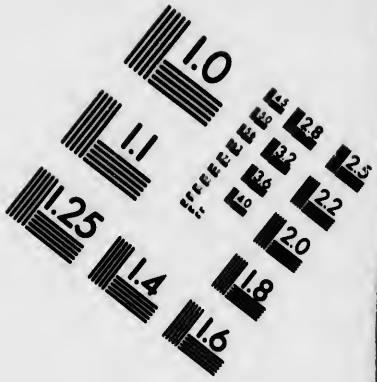
Mr. *Blake* and Mr. *Kerr* for the plaintiff.

Mr. *Brough*, Q. C., for defendant Mrs. *Scobie*.

Mr. *Hillyard Cameron*, Q. C., and Mr. *Roaf* for *McBeth*.

Judgment.—VANKOUGHNET, C.—In this case the facts on which the liability of the estate represented by the defendant, Mrs. *Scobie*, rests are few and simple. In July, 1836, one *Peter Robertson* proposing to leave, as he then or immediately afterwards did leave, Canada, to look after the estate of his brother, who had died in the island of St. Kitts, arranged with the deceased *Hugh Scobie* to convey to him a property which he had purchased in Canada, being the north-half of Lot number 18, in the 5th concession of West Gwillimbury, in order that he *Scobie* might be secured against certain obligations undertaken by him for *Robertson*, and might, as





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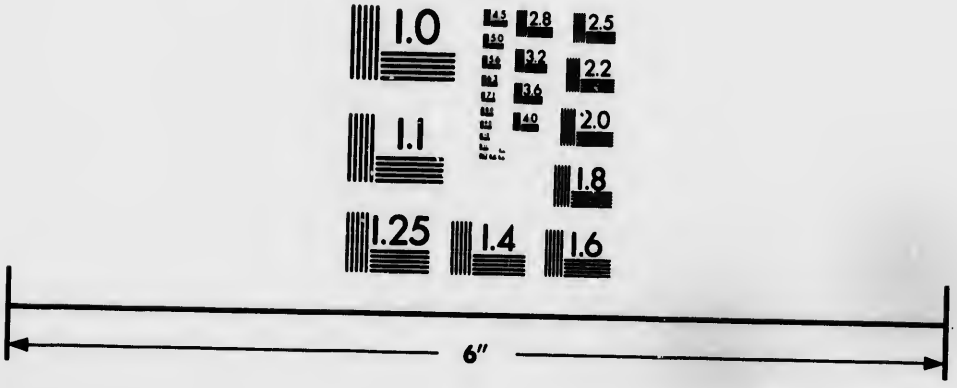

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agreed, manage it in his absence the more effectually. Accordingly by an indenture of bargain and sale, expressing a nominal consideration of five shillings, dated the 30th day of July, 1836, this conveyance was effected. *Scobie* was at the time indorser on promissory notes of *Robertson*, the last of which fell due on the 1st April, 1842, for £40, as part of the purchase money payable by *Robertson* on the land; and he was also surety for the payment by *Robertson* to his vendor *Bannerman* of £57 10s., payable on the 1st April, 1844. Contemporaneously with the deed *Scobie* executed to *Robertson* a bond of the same date, by which, after reciting his aforesaid liability, *Scobie* became bound to *Robertson* on being relieved and saved harmless from such liability to re-convey the land. These two documents appear to have been deposited with one *Thornberry*, a witness to both of them, and to have been retained by him till about the middle of July, 1838, when they were delivered to *Scobie*. About the time of the execution of these documents, but of date the 1st August subsequently, was made a lease from *Robertson* to one *Neil Matheson*, of the property referred to, for two years, at an annual rental of £12 10s. This lease was in the handwriting of *Scobie*. At the same time *Matheson* purchased from the lessor certain chattel farm property. *Robertson* went to St. Kitts and died there, without ever having returned to Canada. *Scobie's* only claim on the land was in respect of the liability already mentioned. *Matheson* entered into possession under his lease and remained in possession without any change of landlords or rights till 1845. On the 2nd July, 1841, *Scobie* writes to *Robertson* urging him to make arrangements to discharge this liability which he, *Scobie*, had assumed for him. He does not then pretend to be in possession of the land, on the contrary, he treats *Matheson*, as in his former letters, as the tenant of *Robertson*.

On a perusal of the whole correspondence and evidence, it appears to me that *Scobie* did not until 1845

pay off any portion of the liability which he had incurred from *Robertson*, or before that year assume to act as owner or possessor of the premises, but treated *Mattheson* as the tenant in possession of *Robertson*. In 1846 *Scobie*, dealing with the property as his own, sold it to the defendant, *Charles McBeth*, who, it is now admitted, was a purchaser for valuable consideration without notice, and against whom therefore the bill must be dismissed with costs. On the argument the defendant, the devisee and executrix of *Scobie*, elected to treat *Scobie* as a mortgagee of the property under the conveyance to and the bond by him, and set up as a defence the Statute of Limitations. Holding, as I do, that it is not proved that *Scobie* had ever entered into possession of the land or into the receipt of the rents and profits thereof prior to 1845, this defence must fail, and the defendant, as representing his estate, be held liable to account for the proceeds of the sale of the lands by the testator. It is alleged that nothing was due to *Scobie* at the time of this sale, as he had made out of *Mattheson*, the tenant, all that he had paid by reason of his liability for *Robertson*. This will form the subject properly of inquiry before the Master, and on it will depend the question of rents, costs, etc. Reserve further directions and costs.

SMITH v. BOGART.

Joint liability as sureties—Pleading—Demurrer.

J. & M, being liable as indorsers, agreed that the maker of the notes should convey to the holder thereof certain property in discharge of his indebtedness, which property was to be sold, and if the same did not realize sufficient to pay the amount for which they had indorsed, that they would pay the difference. Subsequently the holder of the notes sold the property to one of the indorsers, but he never paid the purchase money or any portion of it, in consequence of which he was sued and judgment recovered against him for part of the purchase money, and an action was also brought against J & M. on their agreement to pay, in which action judgment was recovered and writs against lands were sued out on both judgments, and placed in the hands of the sheriffs of several counties in which the defendants had equitable estates; whereupon a bill was filed against both the defendants to enforce these several judgments, to which they severally demurred on the ground of misjoinder; *Held*, that the bill against the two jointly was proper, and the demurrers were overruled with costs.

Statement.—This was a bill by *Robert Hall Smith*, against *Moses W. Bogart* and *John Bogart*, setting forth that one *Charles Eligh*, being indebted upon certain promissory notes made by him and indorsed by the defendants, it was agreed that the mortgages should be made to the plaintiff for the amount of the notes, and held by him collaterally with the said notes. That *Eligh* afterwards proposed to the defendants, and it was agreed between them and him, with the assent of plaintiff, that *Eligh* should convey to plaintiff certain property belonging to *Eligh* in consideration of being released from the said debt, and that plaintiff should sell and dispose of such property as soon as could conveniently and advantageously be done, so that it should be sold and disposed of within the term of three years from the 13th day of February, 1861, and that the defendants should, in case the property when sold did not realize and produce a sufficient sum to pay the amount of $4,890.85, with interest at the rate of six per cent. per annum, from the said 13th day of February, pay over to plaintiff the amount still due on the said debt, after deducting the sum realized out of the property. In pursuance of this agreement *Eligh* did convey to plaintiff certain property described

in the bill, and that thereby he satisfied and paid his said debt: that defendants, in further pursuance of such agreement, executed their bond to plaintiff and thereby bound themselves to carry out the agreement; and the defendants afterwards, by articles of agreement made between them and the plaintiff, and bearing date the 15th day of October, 1863, agreed with plaintiff for the purpose of procuring a better price for the property, that the said premises should be sold upon the following conditions: ten per cent. of the purchase money to be paid at the time of sale, twenty per cent. on the first day of February then next, and the balance in two equal annual instalments, with interest at seven per cent. per annum, to be secured by mortgages upon the property sold; that the plaintiff should be at liberty to sell and dispose of the mortgages to be so taken, and apply the net proceeds on the sale thereof, together with the portions of the purchase money which should be paid at the time of the sale and on the said 1st day of February, on the amount due upon the said bond. That in compliance with such agreement, the plaintiff, on the 10th day of November, 1863, offered the lands for sale, and the defendant, *Moses W. Bogart*, attended at the sale and bid for the whole of the property and was declared to be the purchaser thereof, and he executed agreements for the purchase of the several lots as they were respectively sold, the whole amount of the purchase money being far less than the amount secured by the bond: that *Moses W. Bogart* did not pay the deposit payable at the time of sale, nor did he pay any portion of the purchase money, except a small sum realized upon execution: that plaintiff subsequently commenced proceeding at law upon the agreement and upon the bond, and in respect thereof recovered judgments, one on the 9th of March, 1864, in her Majesty's Court of Queen's Bench, against the defendant *Moses W. Bogart*, for $663.47 and on the writ sued out thereon, a sum of $12.20 was made: that on the 17th of October, in the same year, a writ of *fieri facias* for the residue

was issued against the lands of the said defendant, directed to the Sheriff of the united Counties of York and Peel, in which counties the said defendant was seized of an equitable estate in certain lots in the village of Newmarket, in the County of York ; and that on the 28th of May, 1864, the plaintiff recovered in respect of the said bond a judgment in the same court against both the defendants for the sum of $5,584.9 damages and costs: and on the 17th of September, in the same year, the plaintiff caused a writ of *fieri facias* to be issued to the Sheriff of the County of Grey against the lands and tenements of both the defendant, and the same was still in the hands of the said sheriff for execution; that on the 22nd of October, 1864, the plaintiff caused a writ of *fieri facias* to be issued to the Sheriff of the United County of York and Peel against the lands and tenements of the defendants, and the same was still in his hands for execution, and that the said *John Bogart* had in the said counties divers lands and equitable interests in, and charges upon, lands. That both the said judgments remained unpaid and unsatisfied, save and except as to the sum of $12.26, and that plaintiff had not executed to the defendant, *Moses W. Bogart*, any conveyance of the said premises so purchased by him: and plaintiff submitted that he had a lien in respect of the whole amount due to him upon the said lands conveyed by *Eligh*, and that he had also a lien upon all the lands owned by the defendants, or either of them, in either of the said counties of Grey, or York and Peel. And prayed payment of the amount due the plaintiff, or in default sale of the lands, &c., affected by such writs.

To this bill the defendants severally demurred, *Moses W. Bogart* assigning as grounds of demurrer, that it appears by the said bill that the same is exhibited against this defendant and *John Bogart* for several and distinct and independent matters and causes which have no relation to each other, and in respect whereof the said

complainant in the said bill is alleged to have recovered two several and distinct judgments at law, and which two several judgments appear by the said bill to relate to several and distinct matters, and to be founded on several and distinct causes of action, and in respect of one only of which judgments is this defendant liable, or hath he any concern with the said *John Bogart*, and such several and distinct matters ought not to have been joined together in one bill.

And the defendant, *John Bogart*, demurred on the ground that it appears by the said bill that the same is exhibited against the defendant and *Moses W. Bogart*, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, by reason of which distinct matters the said complainant's said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining this defendant, and distinct matters together, which do not depend on each other in the said bill, the pleadings, orders, and proceedings will in the progress of the said suit, be intricate and prolix, and this defendant put to unreasonable and unnecessary charges in taking copies of the same.

Mr. *Donovan* in support of the demurrers.

Mr. *Roaf* contra.

Judgment—VANKOUGHNET, C.—*John* and *Moses Bogart* being liable to the plaintiff as indorsers upon the paper of one *Eligh*, agree with plaintiff that *Eligh* shall convey to him certain property in discharge of *Eligh's* indebtedness, and that plaintiff shall sell the property to the best advantage, within three years, and that in case it does not realize the amount for which the defendants were indorsers, they would pay the balance.

Subsequently the defendants agreed that the plaintiff should sell the premises on time, receiving ten per cent. of the purchase money down, and take mortgages for the balance, which the plaintiff was to be at liberty to sell or realize.

Accordingly, the plaintiff offered the property for sale, when the defendant, *Moses Bogart*, became the purchaser of it for a sum less than the amount due to the plaintiff. He neither paid the ten per cent., nor executed any mortgage; in fact he did not obtain a deed.

The plaintiff subsequently sued *Moses Bogart*, and recovered judgment for a portion of the purchase money.

He afterwards sued *Moses* and *John* upon their agreement with him to pay, and recovered judgment against them. Writs against lands upon these judgments have issued into the Counties of Grey, and York and Peel, in which it is alleged each of the defendants has equitable estates which should be subjected to the judgments, and the plaintiff claims a lien thereon, and on the lands conveyed to him by *Eligh*, and sold to *Moses Bogart*. As the debt of *John* and *Moses* appears to be a joint debt, and the payment of any portion by one would go in relief of the other, and as they are both parties to the agreement and transactions out of which judgment was recovered, and as *John* is interested in seeing that the monies which may be paid by or recovered from *Moses* in respect of his purchase are applied in reduction of the debt due by both, and that the property be realized for that purpose, I do not think there is any misjoinder of which either of these defendants can complain, or any matters introduced into the bill in which they have not a joint interest, and I therefore overrule the demurrers, with costs.

WEIR v. WEIR.

Alimony—Cohabitation.

The right of a wife is to reside with her husband, in his home or in the joint home of both: where, therefore, it appeared that the husband resided with his children, (by a former wife,) and compelled his wife to live at lodgings, the court, although no violence or other ill-treatment was shewn on the part of the husband towards his wife, made a decree for alimony in her favour; and that, although it was shewn that during such time the husband had been in the habit of visiting and remaining with his wife.

This was a suit for alimony, under the circumstances stated in the head note, and came on for examination of witnesses and hearing before his Lordship the Chancellor at the sittings of the Court at Ottawa in October last.

Mr. *Radenhurst* for the plaintiff.

Mr. *McLennan* for the defendant.

Judgment.—VANKOUGHNET, C.—This case is somewhat a singular one. The plaintiff sues her husband for alimony on the main and indeed only ground on which the right to it here can rest, that the defendant will not receive her into his own house and home, or does not receive her there under such conditions as enables her or makes it her duty to remain there with him. The facts are shortly these. The plaintiff and defendant were married some five or six years ago. The defendant then and ever since, has had his home at a place called Spencerville, on the line of the Ottawa and Prescott Railway, and a few miles in rear of Prescott. At the time of his marriage he was a widower, with a family by his former wife, some of whom had reached man's estate, and the others were in near approach to it. To his family his marriage with the plaintiff was most distasteful. His sons and daughters lived with him at what was known as the homestead—the home referred to—and from the evidence given by some of them before me they appear to have resolved from the first that the plaintiff should

neither enter nor live in their father's house. It does not appear that the defendant herself was unwilling to receive her there, but, overborne by his children of the former marriage, he seems to have acquiesced in their objections, and not to have exercised either his parental authority or his rights as *magister domi* to secure for his wife a place in his home. The result has been that for years he has been supporting and maintaining her at hotels, occasionally visiting her and having with her the intercourse which marital relations justify. In answer to the plaintiff's appeal for a fixed alimony this intercourse is set up in bar, and it is said that it amounts to, and answers all the obligations which are understood by co-habitation, and which marital rights demand. On a motion before me to dismiss this bill for want of prosecution (*interim* alimony having been granted), and again at the hearing of the cause, I stated emphatically my opinion that co-habitation did not mean simply the intercourse of the parties, and the more especially when that was accidental and occasional, as in this case, and that it means the living together of the man and woman as husband and wife in the home of the former, or in their joint home, wherever that might be, and that it never could be tolerated that a man, a husband, might dwell in his own ascertained home and compel his wife to live in an inn or boarding-house, or other place, visiting her as he pleased, and be at liberty to say that she was in full possession of her conjugal rights, and that he was doing his duty to her. Fancy for a moment what the state of society might be if such a monstrous doctrine were admitted? A man living, perhaps, in luxury, in his own house, stopping short of that crime which might entitle his wife to a divorce absolutely, and yet leaving her to live at a place of public entertainment, not only without his society and the privacy and comfort of that home for which every married woman bargains when she casts her lot in with him she weds, but exposed to an acquaintance with any and every one who may in such a place intrude himself

upon her. Forsaken, deserted and alone, under such circumstances, can any man dare to say he enjoys those rights which the married state confers upon her? In a suit in the ecclesiastical courts in England, for the restitution of conjugal rights, the common sentence of the court is, "That the husband receive his wife home as his wife, and treat her with conjugal affection." It is argued here that because the wife has in the different places in which the defendant has procured her an abode received him as her husband, and had sexual intercourse with him she has submitted to her condition and debarred herself from complaining. I think not. She has shewn but a desire to maintain her marital connection with her husband, to yield to him as such, to afford him no cause of complaint, and to prove to him her affection and her desire to continue to him the duties of a wife at any sacrifice. This the courts in England could not have enforced upon her any more than upon him: for while they can enforce co-habitation they cannot compel intercourse. I do not think that her submission in this respect can be urged against her plaint, or treated as any condonation of the wrong which her husband does her in not taking her to his home. It is also alleged that the defendant is quite willing to receive her into his house, but how? While there is proof that he once himself brought her there, and that he again told her she was welcome to come; what we find was, on the occasion he did bring her there, and would probably be again her treatment if she ventured a visit, the eldest son of the defendant, a young man of 24 years of age, tells us—he says, when his father and the plaintiff arrived in a carriage in the yard adjacent to the house, he, the son, took the horse by the head, turned him round, and led him, and the carriage, with the plaintiff and defendant in it, out of the premises. In fact he turned them out again; he would not let the plaintiff enter; and he swears that neither he nor his brothers and sisters will have her there. In fact, as I understand him, she has only to enter to be ejected. The defendant sub-

mits to this action of his children. Is the plaintiff bound to do so? I think not. If the defendant cannot protect her in his own house, she is justified in keeping out of it, and compelling the defendant to make to her a proper allowance to support her elsewhere. She is willing to go to him. It is his duty to receive her, and to maintain her in his house free from assault, and from the insults of others, even though these be his own children. If his parental authority be not sufficient to restrain them, then his duty is to remove them out of his wife's way. His first duty is to her, to cleave to her, leaving all others beside; and if he is not prepared to do this, then he subjects himself to the only penalty which this court can inflict, as it does now, namely, an order to pay to her a fitting sum (to be settled by the Master) for her permanent maintenance, by way of alimony.

I have delayed judgment in this case in the hope that the parties might come to some arrangement among themselves; though I confess, from what I heard in evidence, and what I saw myself in the case of the defendant's gross misconduct, I had but faint hopes of his doing anything that was proper.

BALL v. JARVIS.

Mortgagor—Mortgagee—Sold by mortgagee.

A mortgagor wrote to his mortgagee stating that a sale had been arranged of a portion of the property for £100, and urging the mortgagee to join in releasing the same to the purchaser on payment of that sum. Subsequently the mortgagee joined in such release upon receipt of £50 only.

Held, that the mortgagor was entitled to credit on his mortgage for £100, that being the sum mentioned in his letter.

This bill was filed by a mortgagor against the mortgagee, stating the purchase by the plaintiff from the defendant of 400 acres in the township of Colchester, and of certain lands in the townships of Gosfield and Mersea, and the execution on the same day of three several mortgages by the plaintiff to the defendant:

one of the Colchester lands to secure the sum of £200; the Gosfield lands to secure £500, and the Mersea lands to secure the sum of £300; that shortly afterwards the plaintiff sold his equity of redemption to one James Crawford, who executed to the plaintiff a bond to indemnify him against these mortgages; that James Crawford afterwards conveyed the equity of redemption, subject to these mortgages, to W. G. Crawford; that W. G. Crawford sold 100 acres of the Colchester lands to one Eaton, which lands the defendant released from his mortgage; that W. G. Crawford sold one of the Mersea lots to one French, which the defendant released from his mortgage; that the defendant had commenced an action of covenant upon the mortgages against the plaintiff, and praying that it might be declared that, by the dealing of the defendant with the mortgaged property, the plaintiff had been relieved from all liability upon the covenants, and for an injunction to restrain the action.

The defendant answered, claiming that the plaintiff had assented to the sales of the lands mentioned in the bill.

Mr. *Proudfoot* and Mr. *Blake*, for the plaintiff.

Mr. *O'Reilly*, Q. C., and Mr. *Jarvis* for the defendant.

Among the cases cited was *Hendrie* v. *Palmer*, (*a*).

Judgment.—VANKOUGHNET, C.—I regret to have to decide against the defendant upon the contention raised in this case, because I think he was misled by the plaintiff's letter of the 24th February, 1862, and that looking at the whole of the plaintiff's conduct, it was an afterthought claiming a credit, as he does, for the £50 not paid over by one *Crawford* on the sale by the defendant of the mortgaged lot. It seems that the defendant, being

(*a*) 27 Beav. 349, S. C. 28 Beav. 34.

mortgagee and the plaintiff mortgagor of the Colchester lands as well as of other lots, and the plaintiff appearing as mortgagor merely for the benefit of one *Ambridge*, in order that the name of the latter might not appear in the transaction, *Crawford* had arranged for the sale of one of the lots in Colchester for £100, and on proposing to the defendant to release it to the purchaser, in order that the sale might be carried out, the defendant objected, saying that he was willing that both of the lots should be sold and released at the price fixed upon it in the mortgage. The plaintiff, the mortgagor, and as such, the substitute and trustee for *Ambridge* in the matter, wrote the defendant the following letter:

"*Hamilton, 24th February*, 1862.

GEORGE S. JARVIS, ESQ., Cornwall.

Dear Sir.—Mr *Crawford* has informed me that he has an opportunity of selling one of the Colchester lots, and that you hesitate to release one lot unless £200 be paid, in which case you would release both of the Colchester lots. He states you appear to think there is a legal difficulty in the way.

"As to the latter, I would state that I am sec'ty. of the W. P. Building Society, which is closing up, and that acting under high professional advice, we have frequently released portions of the property which we were advised we could do without in any way interfering with or prejudicing the position of our mortgage.

"Mr. *Crawford* tells me it is not convenient to pay more than £100, as he has to provide for the taxes before 10th March next, and as I am informed the lot sold is the worst of the two, I think you should endeavour to meet Mr. *Crawford's* wishes. You would get the £100 and the taxes removed, which, I believe, is what he intends. As to Mr. *Crawford's* giving you bank stock, I imagine he does not hold any, as I believe cashiers of banks are never permitted to hold stock in the bank of which they are cashiers.

I remain, &c. FRED. A. BALL."

Subsequently *Crawford* remitted to the defendant £50 as, or as part of, the purchase money received on

the lot, which the defendant then released to the purchaser. The plaintiff says that notwithstanding the wide language of his letter, and notwithstanding the evidence given before me that he knew that *Crawford* was bargaining for the sale of the lots, and that he interfered therein, leaving it to *Crawford*, yet that he did not consent to this particular lot being sold on any other terms than the receipt by the defendant as the purchase money for it of £100, to be credited on the mortgage. I must hold that he has a right to take this position, otherwise the latitude to be given to the language of his letter would amount to this, that if *Crawford* chose to sell the lot for 1s., without the consent of the plaintiff, the defendant would be at liberty thereupon to release it, and to hold the plaintiff responsible for the whole of the mortgage money and hand over the balance of the lands; or, disposing of them all at the instance of *Crawford*, have none at all to hand over on redemption, or payment of the mortgage money. Before the court can come to the conclusion that the mortgagor consented to put himself in this position, the evidence in support of it must be clear, and I cannot say that the letter referred to furnishes it. The plaintiff might be quite content to let *Crawford* pay the prices at which the land should be sold, these being within reason and not nominal, and yet not content that the defendant should part with his lien or charge on them, which he held as well for his own benefit as for the protection of the mortgagor, until he had received the purchase moneys. In this particular instance he assented to the defendant making a title on getting £100. The defendant did so on getting only £50; and I must therefore charge him with the difference, which, with a proper allowance for interest, and the costs of this suit, following, as I think they must do, the result, will de deducted from the amount of the defendant's claim at law, the balance only to be levied for under execution. Whether the defendant has any remedy against the land released or the vendee, I can-

not consider here. I do not feel called upon, under the circumstances in evidence, to direct any inquiry as to further dealings by the defendant with the mortgaged lands.

KRONSBIEN v. GAGE.

Specific performance—Public road.

The owner of real estate had permitted for many years a public road to be used across his land, which he subsequently agreed to sell; no by-law had been passed by the municipal council of the locality for closing up this road, although a resolution of the council had been passed for the purpose.

Held, on appeal from the Master's report that under the circumstances he should have reported that a good title was not shewn.

Statement.—The bill in this case was filed by the purchaser against the devisees of the seller, stating an agreement dated the 28th of May, 1862, by which the seller agreed to convey to the purchaser, in fee simple, free from all incumbrances, including dower, 15 acres of land for $1000, to be paid in the manner therein specified, all of which was paid in the manner agreed upon, and that a road had been open to the public for many years across the land agreed to be bought, which the municipal council had passed an informal by-law to close, and praying that it might be referred to the Master to inquire whether a good title, free from incumbrances, as stipulated in the agreement, could be made by the defendants, and if it could, that the agreement might be specifically performed, but, if such good title could not be made, then that the agreement might to rescinded, and the purchase money be repaid, with interest, and until paid, be declared a lien upon the property; or that the agreement might be performed with compensation for the defect in the title, and that the defendants should pay the costs of the suit.

A decree was made declaring that the agreement ought to be specifically performed if the defendants

could make a good title, and referred it to the Master at Hamilton, to inquire whether a good title could be made to the premises, and if so, when it was first shown.

In proceeding upon the reference, it appeared that the road across the premises had been used for many years, and statute labour done upon it, although it was not an orginal road allowance, and that the township council had some years before passed a by-law for closing the road, which was defective for want of the seal of the municipality. The abstract produced by the defendants to avoid this difficulty stated, that "If the court should be of opinion that the by-law, coupled with the resolution and order, is void or inoperative for want of a seal, the defendants contend that a court of equity will compel the corporation to affix its corporate seal to said by-law, or to pass a new by-law to the same effect, on the following grounds: Because the necessity which existed formerly to use the right of way across said premises has been removed by the road allowance having been put in a proper state of repair; that it was agreed by said corporation and the testator that when said road allowance was made fit for travel, the said right of way should be closed, and in pursuance thereof, and as part consideration therefor, the said testator, his servants, horses, and waggons, did a large quantity of work on said road allowance, which is now, and was at the time of the sale to the plaintiff, open for travel to the public, and in a proper state of repair, and said road allowance was accepted by said corporation, and said right of way was in fact closed."

Evidence was produced in support of these allegations in the abstract, and the Master, thinking that a contract had been proved with the corporation for closing the road, which the defendants were entitled to enforce, found that a good title could be made to the premises.

From this report the plaintiff appealed.

Mr. *Proudfoot*, for the plaintiff, contended that the title in this road was vested in the municipality or the Crown. If in the former, no contract had been shown binding on the municipality which could be enforced by the defendants; that the agreement with the members of the municipality, such as it was, only extended to closing the road, not to pass the title to the seller; that if the title were in the Crown, there was no shadow of a right in the defendants to compel or to procure a conveyance of it.

Mr. *Moss*, for the defendants, argued that the road was vested in the municipality, and that a contract was proved which this court would enforce; that there was an agreement to close the road, which he insisted was equivalent to a contract to sell the fee, and expenditure incurred upon the faith of it; that if the defendants were in a position to call upon the municipality to perform the contract, the report was correct in certifying that a good title was shown.

Mr. *Proudfoot* in reply.

The following authorities were among those referred to in the argument. Consol. Stats. U. C., ch. 54, secs. 313-336; Sug. V. & P. 13th ed., pp. 293, 296.

Judgment.—VANKOUGHNET, C.—I am inclined to think that the soil in the road in question here is vested in the Crown. I must, upon the evidence, find that the road was a public highway; statute labour seems to have been performed upon it for years. The vendor, in his application to the council to have it shut up, treated it as a highway. The answers of the defendants admit it to have been such. Section 314 of chapter 54, Consolidated Statutes of Upper Canada, enacts that unless otherwise provided for, the soil and freehold of every

highway shall be vested in her Majesty. Section 336, vests every public road in the municipality, subject to any rights in the soil which the individuals who laid out such roads reserved. How this road was originally laid out does not appear. That if laid out by any individual, he reserved any rights in the soil, is not shewn. It is not provided for otherwise than by the 314th section in whom the soil and freehold of the highway is vested, and that it is or was a public highway under section 313 I already have found. In whom then is the freehold if not in the Crown? It is quite consistent with this that the road should be vested in the municipality, which is charged with the custody and repair of it. If the soil be in the Crown, it is clear that the vendor cannot make a good title to it. If it be not in the Crown, it must be either in the municipality or in some individual, perhaps the vendor. If it be in the vendor, he does not shew it. If it be in the municipality, they have not agreed to surrender it. The most they have agreed to is that the road, as a road, may be closed; but even if this would cover all their right in the road and soil, I think it very doubtful, upon the evidence, whether the alleged agreement by them could be enforced. The consideration alleged to have been given by the vendor was one agreed upon in communication with individual members of the council. It was never embraced in any resolution, much less in any by-law. It is admitted there never has been any by-law enacted, for want of the seal of the corporation, which now refuses to act upon the resolution for shutting up the road, and in fact requires it to be opened. Sections 187, 188, 189, of chapter 54, dictate in what form the powers of the council are to be exercised. Where, in the investigation of a title, it appears there is some outstanding estate which it is in the power of the vendor to get in or get rid of, the Master will properly report, that subject to this being got over, a good title can be made; but then it must be clear that this estate can be got in. Now I do not think it at all clear that the vendor is in a

position to procure for the vendee an unincumbered title to the parcel of land covered by the road, and when this is the case, I think the Master should report that a good title is not shewn.

I therefore allow the exception.

The Master subsequently found that the defendants could not make a good title to the premises, and, upon further directions, a decree was made rescinding the contract, and ordering the re-payment of the purchase money, with interest.

CLOUSTER v. MCLEAN.

Appeal from Master—Form of report—Practice.

Where it appears by the will of a testator that the legacies left by it were payable with interest, and the order in which they are payable, it is not necessary for the Master to state those facts in his report; but he should state whether any payments have been made on account of them.

Where in a suit against executors a decree was made referring it to the Master to administer the estate, the Master is not required to take any account of such portions of the estate as are left to trustees to be administered.

Statement.—This was an appeal from the Master's report, made in pursuance of a decree to administer the estate of the testator in the pleadings mentioned.

The grounds of appeal are stated in the judgment.

Mr. *Fitzgerald* for the appeal.

Mr *McDonald* contra.

SPRAGGE, V. C.—The objections specified in the notice of appeal are for omissions to find matters

referred to the Master, rather than for erroneous findings.

As to most of them, the answer is that the point objected to was not presented for the decision of the Master. Where this appears to be the case, and the report, together with previous proceedings, furnishes sufficient material for further directions, I think I ought not to send it back to the Master.

The will of the testator leaves a portion of his estate therein specified to be disposed of by certain trustees therein named. The bill is filed against the executors, to whom the will commits the administration of the residue of the estate.

The first, sixth, and seventh grounds of appeal relate to that part of the estate left to be administered by the trustees, not by the executors. I think the decree must be understood as referring to the Master to inquire only as to that portion of the estate with which the defendants have to do, and therefore that those objections must be overruled.

The second objection is as to an omission. It is referred to the Master to take an account of the testator's legacies; he has omitted the one to *Margaret M'Tavish.* The will shews this legacy, and the omission was not brought under the Master's notice. I should not, on this ground alone, refer the report back to the Master.

The third objection is, that the Master should have reported more than he has done, in respect to the legacies; they are by the will made payable with interest. He is directed to take an account of them; if some were paid in whole or in part, it would be proper to show this, but it is not suggested. The omission complained of is, that the Master has not reported that which the court sees by the will itself.

Still the form of the report as to legacies makes it difficult for the court to act upon it. The Master reports that the testator's legacies are those mentioned in schedule A, and that the payments made by the defendants on account thereof are as stated in that schedule. No payments are stated in the schedule. I do not know whether no payments have been made, or whether the alleged payments have been omitted. The Master must state how this is.

The fourth objection is, that the title of the cause in the report contains the name of only one of the two plaintiffs. This would rather shew no report than an erroneous one. This must be corrected.

The fifth objection relates to a mortgage for £100 and interest, made by *J. B. Robinson*, junr. It is placed among the assets, with a note by the Master, that it is alleged by the defendants not to belong to the estate, and he refers to a consent as to the same by solicitors for plaintiff and defendant, attached to accounts filed. The Master should find the fact whether or not this mortgage belongs to the estate.

The eighth objection is, that the Master does not report as to the outstanding estate, which consists of debts, whether such debts are good, bad, or doubtful. It appears that this point was not raised before the Master, and I do not think that a report upon that point is necessary, to enable the court to give proper further directions, unless some of the debts are bad, though it is, I believe, usual to report as to the quality of the debts. As his decision upon this point was not asked, I should not call for a report upon it, if the report were not referred back for other reasons. The report assumes that the debts are good: if otherwise, it would be necessary to pursue the inquiries as to the real estate. I observe that the report omits to state as to the great proportion of the debts whether they are secured in any way. As the report must be referred

back, it will be proper for the Master to report this, and also to state whether the debts are considered good, or otherwise.

The ninth and last objection is, that the Master does not report the order in which the legacies are payable. The will makes them payable in an order prescribed, and that, I think, is sufficient. It is said, and not denied, that they are scheduled in the same order.

The report seems defective in two points not objected to. A debt to one *Spalding* was proved before the Master, and afterwards paid by the defendants. I do not understand from the report whether the amount of it is credited to the defendants, the amount is not stated. There also seems to be an error in relation to the *Westman* mortgage. The report states the personal estate to consist of a balance in the hands of the defendants, and of the several debts set out in schedule B. The *Westman* mortgage forms part of the personal estate, the balance of which is reported as in the hands of defendants, and is also reported as an asset in schedule B., this would make a discrepancy by that amount.

I cannot dispose of this appeal without observing that, with three gentlemen to attend to the inquiries directed, and to examine and settle the report, the Master, and a solicitor for each side, it is strange the report should be so imperfect. No costs to either party.

PHERRILL v. PHERRILL.

Appeal from Master—Assignment by devisee—Partition.

One of the devisees of an estate sold her interest therein to her brother, and executed with her husband an instrument in the form of a power of attorney, authorizing the assignee for his own benefit to demand and receive of and from the executor, &c., all moneys which might become due and payable to her and her husband, or either of them, *by virtue of all devises and bequests* under the last will and testament of her father; in fact, at the time of the execution of this instrument, she was entitled to a share of another brother's portion of the estate by assignment from him.

Held, on appeal from the report of the Master, that the instrument executed by the husband and wife had not the effect of transferring the share of the wife in the portion of the brother so assigned.

Statement.—This was a suit of partition of the real estate of the late *Stephen Pherrill*, in which a decree had been made referring it to the Master to ascertain the interests of the several claimants, and he made his report finding the proportion in which each party was interested. From this report the plaintiff appealed, on the grounds stated in the judgment.

Mr. *Morphy* for the appeal.

Mr. *McLennan* contra.

Judgment.—VANKOUGHNET, C.—Under the will of her father Mrs. *Rutherford* was entitled to a share in certain lots known as the homestead. *David*, her brother, was devisee in tail of a portion of this property. This portion, by arrangement between the parties, was set apart and confirmed to him: the other devisees on the partition agreeing to pay him a certain sum in addition. Subsequently and by deed dated 23rd November, 1850, Mrs. *Rutherford* (with her husband) conveyed to the plaintiff, her brother *William*, her share of the property which she took under the will. *Adna Pherrill*, another brother, claimed that he was entitled to 100 acres of the homestead under an agreement with the testator, evidenced by his bond, and in consideration that his claim

should be and was confirmed by his co-devisees, his brothers and sisters, he, on the 8th of June, 1852, by deed-poll of that date, relinquished to his brothers and sisters his share and interest in all the residue of the homestead property, directing that such share or the proceeds of sale thereof, and all proceeds accrued therewith, should be equally enjoyed by his sisters or their legal representatives, together with his brother *William*, the plaintiff, or his representatives, share and share alike. On the 8th November, 1853, Mrs. *Rutherford* and her husband executed an instrument in the shape of a power of attorney, whereby they authorize the plaintiff for his benefit "to demand and receive of and from the executor and executrix, or either of them, or from such other person or persons as may be legal representatives of the last will and testament of the testator, all and whatsoever moneys which shall or may be, or may become due and payable to them, or either of them, *by virtue of all devises and bequests* under the last said will and testament of lots, &c., [being the homestead property], and on payment of the moneys and proceeds of sale or disposal of the devises and bequests therein-before mentioned by the said executors, or either of them, or the said legal representatives, or either of them, acquittances or other discharges of the same to grant," &c. To this instrument is attached a certificate from the judge of the County Court, to the effect that Mrs. *Rutherford* had been by him examined apart from her husband, and had freely consented to part with her estate in the instrument mentioned. What may be the value of this instrument, executed as it is by a married woman, was not discussed before me. The contention of the plaintiff is, that under it has passed to him whatever interest Mrs. *Rutherford* took by virtue of the deed of release executed by her brother *Adna*. Certainly, looking at the shape in which this instrument of the 8th November, 1853, is drawn, it would seem reasonable to infer that the intent of the parties was to

pass that interest, for if it was only intended by it to confirm the deed of the 23rd November, 1850; the whole of the first part of the instrument was unnecessary and useless, as the second part of it, distinct as it is from the other, expressly confirms the latter deed, and empowers the plaintiff to use all proper means to give effect to it and realize its fruits. No explanation is furnished beyond what the deeds themselves shew, and I have therefore to interpret them by their own words. After some hesitation I have come to the conclusion that the instrument of the 8th of November, 1853, does not pass to the plaintiff the interest of Mrs. *Rutherford* in the property relinquished and assigned to her by her brother *Adna*. The descriptive words used are "all and whatsoever moneys which shall become due by virtue of all devises and bequests under the last will and testament, of lots" so and so. It is true that it does not say *devises to us*, but still the words amount to nothing more than saying all moneys which shall become payable to us under the said will. Now, does Mrs. *Rutherford's* interest in *Adna's* share become payable to her under the will? I think not. As to it, she is, as regards the will, as much a stranger as any one not named in the will, to whom *Adna* had assigned, would be. In dealing with real estate, or interests in it, parties must use apt words to dispose of or effect it, and it is their own fault if they are careless as to them. Here I do not feel that I can strain the words beyond the limits which the parties have assigned to them, and therefore, I think that Mrs. *Rutherford* still retains her interest in *Adna's* share of the property to the extent assigned to her by him, and the report must go back to the Master for correction in this respect.

I think that all *David's* interest in the homestead was disposed of by the agreement of June, 1852. The legatees therein named must mean the legatees other than *David*. It cannot be supposed that *David* was to

pay himself a portion of the £275, and yet it is "the said legatees" who are to pay it. I think the whole agreement shows his interest was disposed of, and it must govern.

PATTERSON V. JOHNSON.

Injunction—Trade fixtures.

The purchaser of the equity of redemption in certain mortgage premises erected thereon a machine shop, wherein he placed a boiler and engine, and introduced into the building three lathes, a wood-cutter, and a planing machine, all of which were worked and driven by such engine, but were in no way attached to the machine shop, except by belting or similar means, when in motion; being in every other way unconnected with it or any of the fixed machinery, and capable of being removed without disturbing the machinery, or doing any damage to the realty in any way.
Held, on a motion to dissolve an injunction which had been obtained *ex parte*, that these articles were removable as trade fixtures.

The distinction between chattels affixed with nails or other fastenings, and those resting by their own weight, remaining chattels or becoming part of the realty, considered and doubted.—*McDonald* v. *Weeks*, (ante Volume VIII, page 297) considered and approved of.

Statement.—In this case an *ex parte* injunction had been granted restraining the defendant from removing certain articles placed in the machine shop, in the pleadings mentioned by the defendant since he had gone into possession of the premises, he having purchased from the mortgagor his equity of redemption in the property upon which the shop was erected. The defendant now moved upon affidavits to dissolve this injunction, on the grounds stated in the head note and judgment.

Mr. *Tilt*, for the motion.

Mr. *Crombie* contra.

Judgment.—VANKOUGHNET. C.—This was a motion to dissolve an *ex parte* injunction, restraining the defendant

from removing from the premises certain machinery, among which are three lathes, a wood-cutter, a planing machine, and a circular saw. It is as to these articles that a dissolution of the injunction is sought. The plaintiff is the mortgagee of the land, and the defendant the assignee of the equity of redemption. The defendant, and not the original mortgagor, erected upon the land a machine shop, in which he placed a boiler, engine, and the articles above mentioned, with some others. Such of the machinery as can be treated as having been affixed to, and thus become part of the realty, are doubtless covered by the plaintiff's mortgage, though placed on the land subsequently to its execution. But the defendant contends that the articles above named never were in any way affixed to the realty—never became a portion of it; were but deposited in the machine-shop—worked there from time to time, but in no way attached to it except by belting or some such means when in motion—in every way disconnected with it, or any of the fixed machinery, and capable of being removed without disturbing it or doing any damage to the realty in any way—in fact portable. This contention of the defendant is, I think, established, although the affidavits on behalf of the plaintiff would lead to the contrary conclusion, and give the idea that all these portions of the machinery were fastened in and to the building, so as to be immovable without drawing nails or bolts. Yet I think the defendant's affidavits more explicit and reliable as to the exact state and position of the machinery, and accordingly I will, for the present, assume them to be true, giving to the plaintiff the opportunity to cross-examine the defendant's witnesses if he desire it, he proceeding promptly to do so.

Assuming, then the state of facts represented by the defendant to be true, I am of opinion that I cannot treat the machines in question as part of the realty, but must consider them as chattels removable at the will of

the owner, subject to sale by him and to execution against his goods. I have read carefully and with great interest the judgments of the Queen's Bench here in *Gooderham* v. *Denholm*, (*a*) and of my brother *Spragge* in *McDonald* v. *Weeks*. (*b*) I think there is strong reason and good sense in the remarks of my brother *Spragge* in the latter case. It does seem in many cases that could be put, but a flimsy distinction that articles are fixtures, when nailed or screwed or bolted into a building, and are not so when their own weight gives them steadiness in their place without such aid. Take the case of a house which by its own weight sustains its position on the ground; the owner does not want a cellar perhaps, has no need to let it into the ground, or to require any foundation for it other than the surface of the ground itself. Could it be said that this was a chattel which did not pass under a deed of the land, which the owner evidently intended to improve and benefit by the erection of it? But while there might be little difficulty in treating such a structure as part of the realty, the character to be given to such articles of less bulk, such as machines used on the realty or in connection with the fixtures (in the literal sense of the term,) erected on the land, is not so plain. Where such an article as a boiler or engine is built into a house or fastened upon the land, it may well be called a fixture: it literally is so, and the owner may be considered as having devoted so much of the realty, at all events, as is necessary for the use of such machinery, to the purpose of it, and of having thus intended to benefit the realty. But there is great difficulty in extending this character to articles of machinery which have not been actually affixed to the land, such as those in question here. As I understand the evidence, the defendant erected a machine-shop, into which he fastened a boiler and engine. With this engine, to the extent

(*a*) 18 U. C. Q. B. 203. (*b*) Ante vol. viii., p. 297.

of its power, he could drive any machinery for which the building was adapted, and which he chose to introduce into it. He has there at present a circular saw, a wood-planer, and lathes. He may choose to abandon this description of machinery and introduce something else. He has not in any way declared his intention of making these part of the realty: he has not in fact made them part by attaching the one to the other. The articles are all portable—can be moved by hand from place to place in the building, and out from the building. It is true they are there to be used with certain fixed machinery with which they can be connected from time to time for the purpose of moving them. But can I say that for this reason they have become fixtures? I have had the advantage, since the decisions in our own courts above quoted, of examining the following recent authorities bearing more or less upon this question.

Wilson v. *Whately*, (*a*) *Jenkins* v. *Gething*, (*b*) *Haley* v. *Hammersley*, (*c*) in which Lord *Campbell* approves of the judgment of Vice-Chancellor *Wood*, in *Mather* v. *Fraser*, (*d*) *Bates* v. *Beaufort*, (*e*) *Gibson* v. *Hammersmith*, &c. (*f*) While in many cases articles which have been merely attached to the freehold by nails or screws have been held removable as chattels, when this can be effected by simply drawing the nails or screws without doing damage, I find no case in which portable machines, such as the present, have been treated as fixtures irremovable, when they have not been fastened or attached in some way to the land. This distinction seems to be preserved, not merely for convenience, but because the law leans in favor of trade by treating, when it properly can, articles used in trade as disposable chattels. While, as I have already remarked, on the one

(*a*) 1 John & H. 436.
(*b*) 2 John & H. 520.
(*c*) 7 Jur. N. S. 765.
(*d*) 2 Kay & J. 536.
(*e*) 8 Jur. N. S. 270.
(*f*) 9 Jur. N. S. 221.

hand, the distinction between articles rested by their own weight in a particular position, and articles sustained in it by nails or bolts seems a flimsy one, and not readily sustained by any principle, (a distinction, however, not always observed, as pointed out before;) on the other hand, where this evidence of intention to make any article, in itself a chattel, a part of the realty, and when the act of affixing it there are wanting, it will be almost impossible, in any case, to say what things remain chattels, and what have become part of the freehold.

I think I must treat the machines in question here as chattels.

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TO THE

PRINCIPAL MATTERS.

ness, be his agent also to give a receipt for the money.

Bedson v. Smith, 292.

(PURCHASE BY PARTY IN NAME OF.)

See "Principal and Surety," 2.

AGREEMENT.

(TO EXTEND TIME FOR PAYMENT OF MORTGAGE MONEY.)

See "Mortgage, &c.," 4.

ALIMONY.

1. The defendant was the owner of real estate of the annual value of about £112 10s., but subject to a debt of £100. He had also household furniture and farm stock, and he worked his farm: the plaintiff, with her eight children, lived apart from the defendant, on account of his cruelty, and with no means of support, save such as might be obtained by way of alimony. On a reference to the Master to fix permanent alimony, he allowed £37 10s. per annum. On appeal this sum was increased to £80 per annum.

McCulloch v. McCulloch, 320.

2. Although the statute (22nd Victoria, chapter 33rd, section 2, Consol. Stats. U.C., chapter 24, section 10) authorizes the arrest of a defendant in an alimony suit for not not more than the amount of two years' allowance for future alimony and arrears, still, if the court has obtained possession of funds of the defendant by reason of any default on his part, it will, in a proper cas refuse the payment of them ov to him without first securing t future payment of alimony.

Gott v. Gott, 54

3. The right of a wife is to r side with her husband, in h home or in the joint home both: where, therefore, it a peared that the husband reside with his children (by a form wife), and compelled his wife t live at lodgings, the court, a though no violence or other il treatment was shown on the pa of the husband towards his wif made a decree for alimony in h favour; and that, although was shewn that during such tim the husband had been in th habit of visiting and remainin with his wife.

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See "Executors" 5.

ALTERING MORTGAGE.

Before the face of a mortgag is altered by reducing the amoun secured, there must be clear ev dence by which to act.

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AMENDMENT.

(AT THE HEARING.)

See "Absolute Deed," 1.

"Conveyance," 2.

"Practice," 16.

ANCIENT DOCUMENT.

J. *McK.* having an order in council for 100 acres of land, executed in February, 1827, to *Shore* a bond for a deed. The petition for a location and the bond were executed by mark, and in the bond the obligor is described as of York, labourer. In May the patent issued to *McK.*, and was in the possession of *Shore* shortly after its date. *Shore* went into possession in 1828, cleared about seven acres, and after three years left it in the possession of the plaintiffs, who had the benefit of it up to within a short period of the death of *Shore*, which took place in 1849. The plaintiffs claiming as heirs at law of *Shore*, filed their bill to obtain a conveyance of the land, and produced the patent. The defendants, *Shortis* and *McCabe*, produced a conveyance purporting to have been made by, and signed "*James McKenny*," now of the township of Niagara, &c., yeoman, to *James Smith*, dated 7th September, 1833; and a conveyance from *Smith* to *Shortis*, dated in May, 1849: both of which were registered. No oral testimony was given of the identity of the grantor in the deed to *Smith* with the locatee of the Crown, and no evidence of its custody during the thirty years which had elapsed since its alleged execution: but the signature and death of one of the attesting witnesses were proved and the absence of the other witness was accounted for. *Held*, first, that the deed from *McK.* to *Smith* did not come within the rule that an ancient document proves itself.

Second, that there was sufficien *prima facie* proof of its execution.

Third, that such proof must be taken to include that the party by whom the deed purported to be executed was not only a person of that name, but that identical person in whom was vested the estate which the deed purported to convey.

Fourth, that a purchaser, although he may have had notice, is entitled to the benefit of the position of the party under whom he claims, where such party was a purchaser for value without notice. Under the circumstances above set forth the bill was dismissed, reserving liberty to the plaintiffs to file a new bill or to proceed at law without prejudice.

Rogers v. Shortis, 245.

In a proceeding to obtain relief in such a case, the proper course of procedure is by bill and not by petition of right. *Semble Ib.*

As to whether the presumption that a man is presumed innocent of fraud until proved guilty is sufficient to rebut the presumption of the execution of a fraudulent deed raised by the proof of the handwriting of an attesting witness.—*Quære. Ib.*

ANTE-NUPTIAL SETTLEMENT.

A memorandum was produced, which was partially destroyed by fire, the purport of which was, that W. undertook to settle the pro-

perty of his intended wife as her guardians should require; this was proved to be in the handwriting of W., and to have been seen in a perfect state since the decease of W., and, as the witness believed, signed by W., and that before the marriage he had produced and read a paper similar, so far as the memorandum went, to it. After the marriage the wife's property was all sold, and the proceeds applied by W. to the purposes of his business, who subsequently, and while in a state of insolvency, assigned to the cashier of a bank a policy on the life of himself, (W.,) in trust, to pay certain bills of his in the hands of the bank, and after payment thereof, to hold the moneys to be received on the policy for the benefit of his wife and children, but in the event of his wife and children, but in the event of W. paying off the bills to re-assign the policy to him, or as he should appoint. W. having died, the trustee received the insurance money, paid these bills, and claimed a right to apply the surplus in paying off other liabilities of W. to the bank. Upon a bill filed by the widow and children of W. against the trustee, the court thought the ante-nuptial agreement sufficiently established, and ordered the trustee to pay over the balance with interest; and that the trustee, being the cashier of the bank, who had thus received the benefit of the moneys, he sufficiently represented the bank, and it was therefore not necessary to make the institution itself a party to the suit; but under the circumstances, directed all parties to the cause to receive their costs out of the fund.

Whittemore v Lemoine, 125.

APPEAL FROM MASTER'S REPORT.

See "Alimony," 1.
"Mortgage," 7.
"Partition."
"Practice," 6, 11, 12, 19, 20, 21, 22.

APPROPRIATION OF PAYMENTS.

1. An appropriation of payments made by the creditor for the first time on bringing the account into the Master's office and apparently on the very day on which it is brought in is too late.

Fraser v. Locie, 207.

See also "Principal and Surety," 3, 4.

ARBITRATION.

(CONSTRUCTION OF SUBMISSION TO.)

1. When the parties bound themselves to submit to the decision and award of three arbitrators, concerning all matters in difference, provided the award were made in writing by the arbitrators, or any two of them, and it afterwards appeared that one of the three arbitrators dissented from an award made by the other two, and that the arbitrators had made no decision regarding a promissory note in difference between the parties,

which had been brought under their notice, the award was set aside.

Kemp v. Henderson, 54.

2. Where the Crown Lands Department in deciding to allow one of two applicants to become the purchaser of land, directed that the amount properly payable by him to the other should be ascertained by arbitration, and the arbitrators by their award found a certain sum due, but directed in the event of the party to whom it was payable, failing to deliver up possession to the other in two months, that $400 should be deducted from the amount so found to be due. *Held*, that this was an act in excess of their authority; their duty, under the circumstances, being simply to find the amount payable by the one to the other.

Barnes v. Boomer, 532.

ASSIGNMENT.

(FOR BENEFIT OF CREDITORS.)

1. S., by deed of assignment, executed by two of his creditors, conveyed all his real and personal estate, except his household furniture, to trustees, for payment of his debts, stipulating that after paying all expenses, and until the trusts should be carried out, or the property exhausted, the trustees should, before payment of any of the debts, pay to him, out of the moneys realized from the estate the sum of £375 a year for the support of his wife and family; that creditors, to have the benefit of the deed, must execute it within a limited time; that no dividend should be paid to the creditors till a sum had been realised sufficient to pay them 2s. 6d. in the £, and that the creditors should release S. from all future liability. Two creditors only executed this deed, and subsequently S. made another deed to the same trustees, containing a similar release from his creditors, who should become parties to it, and upon similar trusts, with the exception of the reservation in his own favour, which was considered questionable. The trustees acted under the second deed, and though both were inoperative to pass real estate, they proceeded to sell the lands; and the plaintiffs, the *City Bank*, became the purchasers, but the purchase was afterwards abandoned because of this defect in the deed of assignment. Afterwards a creditor who had lodged an execution in the sheriff's hands subsequently to the deed of assignment, filed a bill praying to have the first deed set aside, or in the alternative that he might be allowed to share in the proceeds of the estate without complying with the stipulation for a release. *Held*, (in accordance with the *Bank of Toronto* v. *Eccles*, reported in Upper Canada Appeal reports, volume ii., page 53,) 1st. That the stipulation for release did not invalidate the deed. 2ndly. That the provision for the payment of a dividend might, under certain circumstances, be considered unreasonable and fraudulent; and 3rdly. That the second deed was not objectionable

by reason of anything appearing on its face; although the validity of the first deed might be open to question. Under these circumstances the plaintiff was allowed to share under the deed in such portions of the property as had not already been divided among the creditors assenting thereto, upon his executing the deed. All other creditors who had not deprived themselves of the right to come in admitted on same terms.

Mulholland v. Hamilton, 45.

2. E. L. being embarrassed in business, in June, 1857, made an assignment of his goods, lands, &c., to trustees, giving preference to certain creditors. Afterwards E. L., wishing to resume business, proposed that the goods and personal estate should be re-conveyed to him, and time given under certain conditions for payment of the debts, the lands being conveyed to two creditors in trust for all. This was agreed to by the trustees and most of the creditors, and re-conveyances were executed. The plaintiffs were indorsers on paper of E.L., held by M., a creditor, preferred in the first assignment. M. refused to execute the re-conveyances unless the plaintiffs renewed their liability to him on paper then overdue, which they did, and M. then signed the re-conveyances. Plaintiffs had afterwards to pay the notes held by M., whereupon they filed their bill, claiming to stand in the place of M., as preferred creditors, under the original assignment. *Held*, that under the circumstances they could not claim such priority, or the priority provided for them by the first assignment, but must rank *pari passu* with the other creditors.

Lawson v. Moffatt, 328.

(BY DEVISEE.)

See "Partition."

(OF RIGHT TO IMPEACH A PRIOR MORTGAGE.)

See "Mortgage," 2.

OF MORTGAGE AND PAYMENT WITHOUT NOTICE.)

See "Mortgage," 3.

See also "Mortgage," 11.

THE ATTORNEY-GENERAL.

(WHEN BILL SHOULD BE FILED BY.)

See "Railway Companies," 1.

AUTHORITY.

(EXCESS OF.)

See "Arbitration," 2.

AWARD.

(WANT OF FINALITY OF.)

See "Arbitration," 1.

BRIDGES.

(CONSTRUCTION BY RAILWAY COMPANIES OVER RIVERS.)

See "Railway Companies," 1.

BUILDING SOCIETY.

Held, following the ruling of the Court of Queen's Bench in the *Farmers' and Mechanics' Building Society* v. *Langstaff*, reported U. C. Q. B., volume ix.,

page 183, that a building society may properly sue in their name without using the name of their president and treasurer for the purpose.

The Canada Permanent Building Society v. The Bank of Upper Canada, 203.

BY-LAW (VOID.)

See "Municipality."

CHAMBERS.

See "Practice," 15.

CHAMPERTY.

See "Mortgage," 2.

CHANCERY ACT.

(11TH CLAUSE OF.)

See "Improvements."

CO-HABITATION.

See "Alimony," 3.

COLLUSION.

M. Mortgaged land to B. to secure $400, and afterwards caused the premises, consisting of a park lot, to be divided into village lots, and plans thereof made. M. then became indebted to C. and others who obtained judgments against him, and lodged writs in the hands of the sheriff of the county in which were the above premises: W. was then also a creditor of M. by simple contract. B. advertised the premises for sale under the power of sale contained in his mortgage, such sale to be in village lots according to the plan thereof. M. and the sheriff, in whose hands were the writs of execution, previous to the day of sale, agreed together that the sheriff should buy in the premises at the amount due B., and hold the same in trust for N. It was found difficult at the sale to sell the premises in village lots, and at the suggestion of the sheriff, and with M.'s consent, they were put up *en bloc*, and bought by the sheriff for the amount due B. W. afterwards obtained judgment and issued execution against lands, and on a bill by C. and W. against M., the sheriff and B., the sale was set aside as collusive, and tending to delay creditors, within 13 Eliz., ch 5.

Watson v. McCarthy, 416.

COMMISSION TO EXECUTORS.

See "Executors," 5.

COMPENSATION.

(FOR DEFICIENCY IN QUANTITY OF LAND AGREED TO BE SOLD.)

See "Specific Performance," 6.

COMPUTATION OF TIME.

See "Time."

CONSTRUCTION.

(OF AGREEMENT.)

See "Specific Performance," 2.

CONTRACT.

(CONDITIONAL RESCISSION OF.)

See "Specific Performance," 2.

COVENANT.

See "Execution Creditor."
"Mortgage, &c.," 5.

CONVEYANCE.

(SETTING ASIDE, WHEN OBTAINED BY FRAUDULENT MISREPRESENTATION.)

1. L., as daughter of a U. E. Loyalist, had been granted a lot of land, but left Canada for the United States of America in 1825, where she had resided ever since. Various persons took possession of the land, and improved it so that it was worth £2,500. C. sent his agent to L. in Michigan, to treat for the purchase of her interest in the land. This agent made numerous false representations as to the position and value of the land, and as to the intentions of his principal in regard to the purchase, and thereby induced L. to convey her interest in the land to C. for an inconsiderable sum. On a bill filed to set aside this conveyance, as having been obtained through fraud and misrepresentation, *held*, that the representations made by the agent were material, and to be considered in weighing the *bona fides* of the contract, which under the circumstances was ordered to be cancelled.

Latham v. Crosby, 308.

(SUBJECT TO PAYMENT OF DEBTS.

2. Conveyances in fee were made by a father to his two sons of portions of his estate, taking back from them a life-lease for his own security, and a bond conditioned for the payment of his debts by his sons. They both went into possession, and after a portion of the debts was paid off one of the sons died, having devised the greater part of his portion to his brother, to pay some of the remaining debts out of the profits. The father, however, claimed and entered into possession of his deceased son's portion under the life lease, and subsequently put the surviving son in possession, in order that he might pay off the debts; and he having applied the rents and profits to his own use, a bill was filed by the infant heir-at-law of the deceased son, seeking an account, but as the bill did not set out the case truly, the existence of the life-lease being ignored by it, the court refused a decree in the existing shape of the bill; but gave leave to amend, and, under the circumstances, without costs.

Cunningham v. Cunningham, 459.

COSTS.

See "Ante Nuptial Settlement."
"Conveyance," 2.
"Easement."
"Executors."
"Infants," 2.

"Lost Deed."
"Mortgage," 1, 6, 18.
"Practice," 8, 10, 13, 15.
"Redemption," 1, 2.
"Set off."
"Specific performance," 2, 5, 9, 10.

CROSS RELIEF.

See "Specific Performance," 3, 4.

CROWN.

(FORECLOSURE AGAINST THE.)

Where the Crown holds the equity of redemption of mortgaged premises no absolute order of foreclosure can be pronounced, but only that in default of payment the mortgagee be at liberty to enter into possession.

Dunn v. The Attorney General, 482.

(VENDEE OF THE.)

Where a party having a possessory right assigned the same to another who applied to, and was, by the Crown Lands Department, allowed to become the purchaser of the land, after deliberately considering the claims of both parties.

Held, following the case of *Boulton* v. *Jeffrey* (1 U. C. Appeal Rep. p. 111,) that this court had no jurisdiction to review such decision of the department.

Barnes v. Boomer, 532.

CROWN LANDS DEPARTMENT.

(DECISION OF.)

See "Crown (Vendee of.)"

CROWN PATENT.

(SETTING ASIDE.)

1. The lessee of the Crown conveyed his interest to other persons; the right to one portion, after going through several hands became vested in one F., who died, leaving a widow and several children; the widow having married again, joined with her husband in assigning the portion of the land bought by F. to one C., who subsequently agreed to sell to S. On applying to a conveyancer to prepare the necessary writings he recommended that a transfer should be taken directly from the lessee of the Crown to S., for the purpose of simplifying the title, which was accordingly done, and thereupon S. applied to the Crown Lands Department to purchase, producing to the department his transfer, a certificate of a surveyor, and an affidavit by himself that there was not any adverse claim, no mention being made of the previous transfers, or the possession of the intermediate transferrees, or of the fact that the uncle of F.'s heir-at-law had intimated to S. that the heir did claim it. Upon this application S. was allowed to purchase, and a patent therefore was issued to him in January, 1853. In 1863 a bill was filed by the heir-at-law of F.,

seeking to set aside this patent, as having been obtained through the fraudulent concealment of the facts by S., when applying for the grant to himself. It appeared that the plaintiff had left this country before attaining his majority, and went to reside in California, and immediately on his return instituted proceedings. The court under the circumstances, although acquitting the defendant of all actual or intentional fraud in the matter, declared the patent void, in order that the Crown, with a full knowledge of all the facts, might deal with the case as should be deemed right, and ordered S. to pay the costs of the suit: the delay which had occurred in commencing the suit being accounted for by the inability of the plaintiff, arising from his poverty and his absence from the jurisdiction.

Fricht v. Scheck, 254.

2. In March, 1862, S. purchased land from the Crown, and with his family went to reside on it, but by mistake settled on the adjoining land, and made some improvements. In June following C. applied to the Crown Lands Department to know whether the land so purchased by S. was for sale; the patent had not issued to S., and, through an error in the department, C. was informed that the land was for sale, and immediately became a purchaser thereof, and received a patent. He did not, however, take possession until December, 1863, when he brought an action of ejectment against S., and engaged the defendant, B., to take the timber off the lot. At the hearing the plaintiff failed to prove notice to C. of his claim and improvements, but the error on the part of the office being proved, and the Attorney-General being a defendant, and submitting to the direction of the court, the patent to C. was rescinded, an injunction granted, and C. required to account for the timber cut.

Stevens v. Cook, 410.

DAMAGE.

(WHEN APPRECIABLE IN EQUITY.)

See "Injunction," 2.

DEBTS.

(CONVEYANCE SUBJECT TO PAYMENT OF.)

See "Conveyance," 2.

DEDICATION.

(OF LAND TO USE OF PUBLIC.)

A piece of land was in 1818 vested by patent in trustees for the benefit of the inhabitants of the city of T. Acts of the Provincial Parliament, afterwards passed, authorized the city to lease this land for any term of years or absolutely to sell and dispose of it, the moneys so raised to be expended in the purchase, ornamentation, and care of other lands in the city. The corporation afterwards had this plot of land fenced in and trees planted in it. C. was possessed of a dwelling house and lands adjacent

to this plot, where she resided. In 1862 the city corporation agreed to lease this plot to M. who undertook to erect works on it which would be of benefit to the city by increasing its revenue. C. then filed a bill to restrain the completion of the lease and appropriation of the ground, alleging that it had been fully dedicated as a public park, and that she, as an individual, and the public generally (represented by the Attorney-General) would be injured by such appropriation. *Held*, that the corporation had authority under cap. 84, Con. Stats. U. C., to appropriate this land as proposed.

The Attorney-General v. The City of Toronto, 436.

DEED.

(GIVEN FOR ILLEGAL PURPOSE.)

The owner of real estate, being under arrest upon civil process, conveyed his lands to a person for the purpose of enabling the grantee to justify as special bail in the action, and after the same had been settled the lands were re-conveyed; but, in the meantime, a writ against the lands of the grantee had been placed in the hands of the sheriff, and a sale was effected thereunder, after such re-assignment, and a conveyance made to the purchaser (the plaintiff in the writ,) who had notice of the claim set up by the original owner. *Held*, that the transaction was one against public policy and morality; and that the court would not lend its aid to the grantor in getting back his estate; but the purchaser at the sheriff's sale having in his answer disclaimed any interest in the lands, other than a lien thereon for the full amount of his judgment and expenses, the court decreed the plaintiff relief upon the terms of his paying the full amount of his judgment and expenses, together with interest and the costs of suit. And the defendant having also by answer alleged that the conveyance was made for the purpose of enabling the grantee therein to justify as bail; and that he did justify as such bail upon the lands so conveyed, and submitted that "*the plaintiff, under the circumstances, ought to be estopped and precluded from saying that the said lands are not the lands*" of the grantee: *held also*, that although the defendant did not object that the act was against public policy, there was sufficient stated to enable the court to give effect to the objection of illegality, notwithstanding the answer did not state that such use would be made of the facts stated.

Langlois v. Baby, 358.

[Affirmed on re-hearing before *Vankoughnet*, C. *Spragge* and *Mowat*, V. CC. See vol. xi., page 21.]

DEFICIENCY.

(IN QUANTITY OF LAND SOLD—COMPENSATION FOR.)

See "Specific Performance," 6.

DEMURRER.

In a bill filed by the administrators with the will annexed and creditors of B. it was alleged that on a sale of lands by B. to K. the latter executed a mortgage to secure the purchase money, but that by the fraud and design of B. such mortgage was withheld from registry, and that the lands were subsequently sold by K. to two purchasers—who, before the conveyances to them were executed, or, at all events, before the payment of their purchase money—had notice and were well aware that K. had not paid his purchase money and had given a mortgage therefor, and that they, fraudulently intending to cut out such mortgage, had caused the conveyances to themselves to be registered. The bill further alleged that neither of these purchasers had yet paid their purchase money and claimed that the mortgage to B. should be fastened on the land as a charge prior to their conveyances, and failing that relief, that the amount payable by them to K. in respect of their purchase money respectively might be ordered to be paid to the plaintiffs on account of the mortgage money due under the mortgage from K. The purchaser demurred generally to such bill for want of equity, which on argument was overruled: the court holding that the plaintiffs were not bound to wait till the purchase money payable by the purchasers was over-due before taking proceedings; and that in case of notice before the execution of these conveyances the mortgage would take precedence thereof; or if only before payment the purchase money payable by the purchasers could be claimed by the plaintiffs.

Ferguson v. Kilty, 102.

In a bill for dower the plaintiff alleged that her husband was in his lifetime, at the time of his death, and also at the time of making his last will, *seised or entitled* in fee in possession; and in another part of the bill that the husband had, in his lifetime, contracted for the sale of the premises out of which dower was sought.

Held, bad on demurrer, it nowhere appearing that the husband had been seized during coverture, or that the contract of sale had not been entered into before marriage.

Gordon v. Gordon, 466.

J. & M. being liable as indorsers, agreed that the maker of the notes should convey to the holder thereof certain property in discharge of his indebtedness, which property was to be sold, and if the same did not realize sufficient to pay the amount for which they had indorsed, that they would pay the difference. Subsequently the holder of the notes sold the property to one of the indorsers, but he never paid the purchase money or any portion of it, in consequence of which he was sued and judgment recovered against him for part of the purchase money, and an action was also brought against *J. & M.* on their agreement to pay,

in which action judgment was recovered and writs against lands were sued out on both judgments, and placed in the hands of the sheriffs of several counties in which the defendants had equitable estates; whereupon a bill was filed against both of the defendants to enforce these several judgments, to which they severally demurred on the ground of misjoinder; *Held*, that the bill against the two jointly was proper, and the demurrers were overruled with costs.

Smith v. Bogart 560.

See also "Practice," 7.

DESCRIPTION OF LANDS.

1. *Held*, that a general description being wholly insufficient and the particular description by metes and bounds which followed not being a *falsa demonstratio* added to a complete description but an entire description in itself, governed

Hart v. Brown, 266.

3. Whether a boundary intended by a grant from the Crown might be varied or departed from by subsequent acts and acquiescence of parties interested in the position of such boundary, who would be accordingly bound.—*Quære. Ib.*

3. A subsequent mortgagee, who had not actual notice, *held* not bound by the registration of a prior mortgage, the memorial of which insufficiently described the premises.

Reid v. Whitehead, 446.

DOWER.

(SALE OF RIGHT TO, UNDER FI. FA.)

A right to dower is not salable under execution against the lands of a dowress. Till dower is assigned she has not either an estate in the land, or even a right of entry; neither does her interest come within the meaning of the words, (in Con. Stat. U. C. ch. 90, sec. 5,) "a contingent, or executory, or a future interest, or a possibility, coupled with an interest."

McAnnany v. Turnbull, 298.

See also "Demurrer," 2.

EASEMENT.

1, A bill was filed by the owner of a mill, alleging a verbal agreement with the proprietor of land adjoining, for the right to pen back the water of a stream running through his land, and which was used for driving the mill of the plaintiff, in consideration of which he was to open up a road across his farm, for the use and convenience of such landowner; but no writing was ever drawn up evidencing the agreement. The owner of the land subsequently sold and conveyed this estate, and his vendee instituted proceedings against the mill-owner for damages by reason of the penning back of the water, which had the effect of overflowing a considerable portion of his land. The evidence in the cause being positive as to the agrement to permit the pen-

ning back of the water, and the road across the farm of the plaintiff having been used by the proprietor of the land, and his vendee, the court decreed a specific performance of the parol agreement, but, under the circumstances, without costs.

Nicol v. Tackaberry, 109.

2. The owner of a mill property, with the right to use all the water of the stream on which the mill was situate, sold a portion of the land, and by a separate instrument bound himself to permit his vendee to use a certain quantity of the water for the purpose of driving machinery to be erected on such portion. The owner of the mill finding, when he came to work it, that the quantity of water which the vendee withdrew from the stream reduced it to such an extent as to impair the effective working of his mill, repurchased the lot and easement, receiving a conveyance thereof, and giving back a mortgage to secure part of the purchase money, (these instruments, however, were never registered,) and afterwards, the purchase money having been in the meantime satisfied, procured his vendee to make a deed direct to R., who had purchased the lot and easement, with notice, however, of all the facts. On a bill filed by a person who had obtained title to the mill and premises under a mortgage executed by the owner before the re-purchase of the lot and easement. *Held*, that neither the original owner nor R. were entitled to use the water, the easement having become extinguished on its re-purchase, and the whole water having passed to the mortgagee.

Gooderham v. Routledge, 398.

EQUITABLE DEFENCE.

(EFFECT OF RAISING IT AT LAW)

If an equitable defence be properly raised at law, and adjudicated upon, the adjudication cannot be reviewed in this court; but a party will not be so precluded when the defence is not properly raised at law, and judgment, therefore, passes against it.

Craig v. The Gore District Mutual Fire Insurance Company, 137.

EQUITY OF REDEMPTION.

(SALE OF UNDER EXECUTION AGAINST EXECUTOR OF MORTGAGOR.)

Held, in accordance with the decision of the Court of Appeal, in the Bank of Upper Canada v. Brough, reported in the Upper Canada Appeal Reports, volume ii., page 95, that an equity of redemption in lands is not salable under an execution issued against the executor of mortgagor.

Howell v. Bank of Upper Canada, 57.

(ASSIGNEE OF.)

See "Mortgage, &c.," 4.

ERRORS IN THE CROWN.

See "Crown Patent," 2.

ESTOPPEL.

See "Specific Performance," 7.

EVIDENCE.

See "Mortgage," 1.

EXAMINATION OF WITNESSES.

See "Practice," 8

EXECUTION CREDITOR.

A mortgagee, after the death of the mortgagor, has a right to prove upon the general estate for the whole amount of his claim, and to hold his security for any amount that the general estate may be insufficient to pay; and the fact that a simple contract creditor has obtained judgment against the personal representative, upon which he had placed an execution against lands in the hands of the sheriff, will not affect such right.

Stewart v. Stewart, 169.

EXECUTORS.

1. Where executors had improperly dealt with a portion of the funds of the estate, by allowing one of their number to retain it in his hands at a low rate of interest, the court refused them their costs prior to decree.

Ashbough v. Ashbough, 433.

2. Costs given to plaintiff, notwithstanding fraud was charged against executors, which was not established under the circumstances appearing in the judgment.—*Ib.*

3. A retaining fee paid by the executors to their solicitor in an administration suit may, under certain circumstances, be a perfectly reasonable disbursement. Chisholm v. Barnard, 479.

4. Where executors without any authority assumed to act in the management of the real estate of their testator, they were made to account for their acts, as if they had been duly empowered to act as trustees. In such a case it is their duty to keep accounts, and be ready at all times to explain their dealings with the estate. —*Ib.*

5. Five per cent. commission on monoys passing through the hands of executors may or may not be an adequate compensation, or may be too much, according to circumstances; but in no case will an executor be entitled to allowance for services performed by an agent, and which were so performed by him gratuitously.—*Ib.*

6. Although the courts will order executors or trustees to make good moneys lost by neglect or default, it will not also charge them with interest in those sums.

Vanston v. Thompson, 542.

EXTORTION.

(FRAUD AND.)

See "Fraud and Extortion."

FIERI FACIAS.

(SALE OF WIDOW'S RIGHT TO DOWER UNDER.)

See "Dower."

FIXTURES.

See "Injunction," 7.

FORECLOSURE.

In a bill for foreclosure of a mortgage, it is not necessary to state the property or the parties to be within the jurisdiction of the court. If it be necessary that the one or the other should be within the jurisdiction that will be presumed in favour of the bill till the contrary appears.

Duncan v. Geary, 84.

(AGAINST THE CROWN.)

See "The Crown."

FUND IN COURT.

(RETAINING FOR PAYMENT OF ALIMONY.)

See "Alimony," 2.

FRAUD.

See "Infants," 2.

FRAUD AND EXTORTION.

Where a party desires to impeach an instrument on the ground of fraud and extortion, the more convenient course is to institute proceedings in order to annul it, as it is rarely that effect can be given to a defence on such grounds in a suit to enforce it.

Kains v. McIntosh, 119.

FRAUDS.

(STATUTE OF.)

The "Mortgage, &c." 5.

FRAUDULENT CONVEYANCE.

1. There being disputed accounts between A. and B., an action at law was commenced by the former against the latter prior to February, 1859. In December of that year B. executed a mortgage for £130 to one H., to secure to him the payment of £30, but principally with the object of raising money upon it with which to pay off another indebtedness. There being a mistake in the description, and B, requiring more money than this mortgage would cover, another mortgage (for £200) was executed for these purposes. Both of these instruments were held by H. for sale in order to raise the required amount, and he withheld them from registration till he could find a purchaser. On the 22nd of September, 1860, A. recovered a judgment, which he registered the same day. Hearing that A. was about to enter judgment, H., on the day of entering the judgment, and before the entry thereof, though so far as appeared, without the knowledge of B., registered the mortgages for the avowed purpose of retaining his priority. Shortly after the registration H. returned the first mortgage to B., intending to use the second one only, and endeavoured immediately afterwards to sell it, and had con-

tracted to do so for the *bona fide* purpose of raising money wherewith to pay off the claim of A., though the object was not accomplished. Besides, the lands covered by the mortgages, B. owned other available real estate worth more than sufficient for payment of his debts, as also a quantity of household furniture. On a bill filed against B. & H., impeaching the mortgage as having been made voluntarily, without consideration, and with intent to defeat and delay creditors, *held*, that these charges were not supported, but the plaintiff was allowed to redeem on payment of the amount for which the mortgage was a subsisting security, and paying H. his costs of suit.

[*Esten*, V. C., dissenting, who thought for all in excess of £30, and interest, the mortgages were fraudulent and void.]

Dickinson v Duffill, 76.

2. S., by arrangement between himself and H., the owner of the equity of redemption under a mortgage made by G., released the security without any consideration paid therefor by H. or G., and discharged H. from liability. On a bill filed by an execution creditor of S., charging that at the time of this release S. was indebted to him, and was in embarrassed and insolvent circumstances, praying that the discharge might be declared void, as being within the statute 13th Elizabeth, chapter 5, under the provisions of the Provincial Act, 20th Victoria, chapter 7, and for foreclosure of sale, and an order against H. to pay the deficiency. *Held*, that the interest of a mortgagee is of a nature to bring it within the Statute of Elizabeth, if it can be seized under the 20th Victoria, or can be compulsorily applied to the payment of the debts, and that a discharge of it without consideration is "a gift or alienation" within the prior statute: that the mortgage would have been seizable had it not been discharged: that when the mortgage is actually seized by the sheriff, and the mortgage debt is to be received, the sheriff, perhaps, must sue, and the creditors are, under the statute, entitled to the same remedies (with that one exception) as an ordinary assignee: that when the mortgage debt is to be realized otherwise than by the sheriff suing, it lies upon the court to see that it is realized for the benefit of the party entitled; that the discharge of the mortgage, and the arrangement between H. and S. had the effect of releasing G. from liability, though the release might be declared void, and the mortgage set up again, and therefore, that G. would not have been a proper party.

Bank of Upper Canada v. Shickluna, 157.

3. Where a person in business being liable to a bank as endorser for others to about £6,500, and on his own account to about £3,500. and liable otherwise to a large extent, made a gift of a mortgage which he held upon real estate

for £250, by releasing the claim to the owner of the equity of redemption, (his assets at the time being much more than £10,000,) and subsequently his indebtedness to the bank was doubled, and afterwards a judgment was obtained by the bank, and execution issued out against him for £6,855, in respect of moneys due at the date of the release. *Held*, that these facts did not bring the case within the 13th Elizabeth. *Ib.*

4. A suit having been instituted by judgment creditors to set aside certain conveyances made by their debtor as having been made fraudulently and with a view to hinder and delay creditors, the debtor attempted, by way of defence, to shew facts which, if established, would tend to annul the judgment altogether or to reduce its amount; such facts having been discovered since the judgment at law, and when it was too late to obtain a new trial: *Held*, that the proper means of obtaining such relief was by cross bill; the order of the court (Gen. Or. 10, sec. 4, of June, 1853,) permitting cross relief to be given to a defendant against the plaintiff, applying only when the defendant is entitled to some relief growing out of the same transaction as forms the foundation of the suit; not where the object of the defence is to obtain relief not growing out of such transaction, but against it.

Buchanan v. Cunningham, 513.

FRAUDULENT MISREPRESENTATIONS

See "Conveyance," 1.

FRAUDULENT PREFERENCE.

See "Injunction," 1.

GENERAL ORDERS.

See "Practice," 14

GENERAL AND PARTICULAR DESCRIPTION.

See "Description of Land," 1, 2.

GUARDIAN.

The guardian *ad litem* of an infant, tenant for life, without the sanction of the court, executed a lease for years, during the existence of which the infant died, and an application having been made in the cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into court of the amount of rent in arrear he was permitted to remove the buildings and erections put by him on the property, (doing no damage to the realty,) but the court refused to allow him out of such rents for any improvements made by him upon the premises.

Townsley v. Neil, 72.

ILLEGAL PURPOSES.

See "Deed."

IMPERFECT DESCRIPTION OF PROPERTY.

See "Foreclosure," 1.

IMPROVEMENTS.

(PAYMENT FOR.)

The allowance for improvements under the 11th clause of the Chancery Act (7 Wm. IV., ch. 2) is discretionary with the court under all the circumstances. Where, therefore, upon a reference to the Master to take the usual accounts under a decree for redemption, where the mortgage had become absolute before 1837, the Master had allowed to the mortgagee in possession the price of certain valuable improvements, amongst others, building a brick dwelling on the mortgage premises, the Master stating that he made such allowance solely under the provisions of the statute: the court on appeal referred the matter back to the Master, leaving it open to him to allow or disallow such improvements.

Harrison v. Jones, 99.

INCOME.

The rule as to allowing one-third of income for alimony, how far applicable to this country considered.

McCulloch v. McCulloch, 320.

INCORPORATED COMPANYS.

The 68th section of the Imperial Statute, 7 & 8 Victoria, chapter 110, provides a summary proceeding whereby a creditor of any company incorporated thereunder, who has obtained a judgment or decree establishing his claim against the company and failed to realize the same, may call on any shareholders of the company, as representing the company and liable for its acts, by motion or otherwise, according to the practice of the various courts, to pay his claim. Upon such an application against certain of the shareholders resident in this country by a creditor who had obtained a decree in his favour, *held*, per *Vankoughnet*, C., that the statute did not apply to proceedings in the courts of this province. [*Spragge*, V.C., *dubitante*.]

Penley v. The Beacon Assurance Company, 422.

INDEMNITY.

See "Mortgage," 11.

INDORSER.

See "Promissory Notes."

INFANTS.

The general rule is clear that an infant plaintiff is, equally with an adult, bound by proceedings in a suit instituted by him.

McDougall v. Bell, 283.

On a bill filed by one of two infant plaintiffs in an administration suit, (after attaining majority,) seeking to impeach the proceedings therein on the ground of fraud.

Held, that the fact that the plaintiffs in that suit, as also the trustees and the executors, had been represented by one

solicitor; the omission from the decree of any direction as to wilful neglect or default on the part of the defendants therein; a material difference between the decree, and the decree on further directions as to the lands directed to be sold for satisfaction of debts; a purchase by the solicitor so acting for the several parties of a valuable portion of the estate, did not of themselves evidence fraud and collusion; and the plaintiff having in the same bill asked to have it declared that certain lands were held in trust for him, and that he was entitled to a conveyance thereof or an order of the court vesting the same in him, and to have certain title deeds delivered up to him, it appearing that the plaintiff would, in a suit framed for that purpose, have been entitled to this relief, made a decree in his favor to this extent, notwithstanding the misjoinder of parties not interested in this portion of the relief prayed, who did not object: the court desiring not to put the plaintiff to the necessity of filing a new bill, but under the circumstances ordered the plaintiff to pay the costs of all parties. *Ib.*

Although the general rule is that the court will not break in upon principal money for the maintenance and education of infant legatees, still in a proper case the court will so apply it, as well as to the advancement of the infants.

Ashbough v. Ashbough, 430.

See also "Specific Performance," 2, 7.

INJUNCTION.

1. A debtor while indebted to one creditor, and alleged to be insolvent, assigned a note to another creditor for a *bonâ fide* debt. Subsequently both creditors brought actions to recover their respective demands, but in order to enable one of them to obtain a first judgment, no defence was entered to his action, while the other action was defended. The court (following the decision of *Young* v. *Christie*, reported *ante* volume vii., p. 312) refused an injunction to restrain the first judgment creditor from enforcing the execution sued out on his judgment.

McKenna v. Smith, 40.

2. The owner of land through which a stream flowed into land owned by another, on which a former proprietor had erected a mill-dam, by which the waters of the stream were forced back and overflowed about two acres of the adjoining land, damaging it to the extent of about £2 per annum, brought an action of trespass against the former owner of the mill premises for the value of the land so damaged, in which he established his legal right, and now applied for a perpetual injunction. *Held, per curiam* [ESTEN, V. C., dissenting,] that the small amount of damage occasioned to the owner was not a sufficient reason for withholding the aid of this court, and that the plaintiff, having established a clear right both at law and in this court, was entitled to a per-

petual injunction to stay further trespass.

Wright v. Turner, 67.

3. Although plaintiffs had been guilty of great delay in applying to this court for an injunction to restrain the sale of lands under an execution at law, yet a sufficient case having been made out for an inquiry, the court granted the writ on an interlocutory motion; the plaintiffs undertaking to proceed to an examination of witnesses within one month after answer filed and hearing the cause forthwith thereafter, paying the costs at law incurred by reason of postponing the sale, and paying interest from the time the sale was to have taken place until the time of making the decree in the cause, in the event of the sale failing to realize enough to pay the full amount of the claim under the execution.

The Canada Permanent Building Society v. The Bank of Upper Canada, 203.

4. The fact that a riparian proprietor has recovered nominal damages at law establishing his legal right does not necessarily entitle him to an injunction to restrain the injury complained of. The exercise of this jurisdiction is discretionary, depending very much on the reality and irreparable nature of the injury complained of, and, when no *mala fides* exists, on the balance of inconvenience; where, therefore, a railway company had constructed tanks which were filled from a stream running through the plaintiff's land for the use of their locomotives, in doing which they did not abstract more than one eightieth or one hundredth part of the water in the stream, the court refused to restrain the company from using the water of the stream, and dismissed a bill filed for that purpose with costs; notwithstanding that the plaintiff had, for the same act, recovered a verdict at law, with one shilling damages.

Graham v. the Northern Railway Company, 259.

5. By an act of the provincial legislature the town of St. Catharines was authorized to issue debentures to the amount of £45,248; for the liquidation of which a special rate was directed to be levied, the proceeds of which were directed to be invested, and form a sinking fund for this purpose; by the same act the town was prohibited from passing any by-law to create any new debt extending beyond the year in which such by-law was passed, except for the construction of water works, until the debt was reduced to £25,000. The special rate authorized to be imposed had been duly levied and collected, but instead of investing the same to form a sinking fund for the payment off of the debentures, it was alleged, it had been applied to the general purposes of the town, and the debt had not been reduced. The defendants denied

the misapplication of the fund, but did not shew how it had been applied; and with a view of inducing the county council to remove the county town of Lincoln from Niagara to St. Catharines, without any by-law authorizing the same, contracted with certain builders to erect a jail and court-house for the use of the county, at an outlay of £3,000, to be completed in two years. Upon an application, made at the instance of certain of the holders of the debentures issued under the before-mentioned act, the court restrained the town of St. Catharines from suffering or permitting the buildings to be proceeded with. On an appeal to the full court, the injunction was dissolved, it appearing that the contract which had been entered into between the corporation and the contractor had been cancelled, and that no liability had been incurred by the corporation extending beyond the year; but if it had been shewn that any act of the corporation would have had the effect of incurring a liability, payable in a future year, the injunction would have been retained to the hearing. On production of the contract in court, it appeared that the recission referred to had been effected by cancelling the signatures to the document, which being objected to as not *legally* discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made. [VANKOUGHNET, C., *dubitante* as to any necessity therefor.]

The Edinburgh Life Assurance Company v. The Municipality of the town of St. Catharines, 379.

6. A party to an action at law in coming into equity to obtain relief against a judgment therein and a stay of the execution issued against him on such judgment upon a state of facts which, had they been proved, would have constituted a good defence to the action, is bound to establish that there are facts which, had they been proved in the action, would have formed a good defence, but that at the time of such trial, and at the time he could, upon this disclosure, have obtained a new trial, he was ignorant of them and could not, with reasonable diligence, have ascertained them. When a long time has elapsed since the party so applying did ascertain such facts he is bound to make out as clear a case for an injunction as he would to obtain a decree to unravel the transactions which a court of competent jurisdiction has by its judgment closed.

Cunningham v. Buchanan, 523.

7. The purchaser of the equity of redemption in certain mortgage premises erected thereon a machine shop, wherein he placed a boiler and engine, and introduced into the building three lathes, a woodcutter, and a planing machine, all of which were worked and driven by such engine, but were in no way attached

to the machine shop, except by belting or similar means when in motion; being in every other way unconnected with it or any of the fixed machinery, and capable of being removed without disturbing the machinery, or doing any damage to the realty in any way. *Held*, on a motion to dissolve an injunction which had been obtained *ex parte*, that the articles were removable as trade fixtures.

Patterson v. Johnson, 583.

The distinction between chattels affixed with nails or other fastenings, and those resting by their own weight, remaining chattels or becoming part of the realty considered and doubted. *Ib.*

McDonald v. *Weeks* (ante Volume VIII, page 297), considered and approved of. *Ib.*

INSURANCE MONEY.

(APPLICATION OF, PAID TO MORTGAGEE).

See "Mortgage," 8.

INTEREST.

(ON MONEYS NOT RECEIVED BY EXECUTORS.)

See "Executors," 6.

JOINT LIABILITY.

(OF SURETIES.)

See "Demurrer," 3.

JUDGMENT CREDITOR.

See "Fraudulent Conveyance." "Absolute Deed," 2.

KIRK SESSION.

See "Presbyterian Church."

LACHES.

See "Injunction," 3.
"Wild Land Taxes," 9.
"Crown Patent."

LEASE, (VOID.)

(PAYMENT FOR IMPROVEMENTS MADE UNDER.)

See "Guardian."

LOST DEED.

G., in consideration of his support and maintenance, conveyed to McR. certain land. The arrangement fell through, and the land, it was alleged, was re-conveyed by a deed, which was supposed to have been lost, and which contained a covenant for further assurance. Before such re-conveyance, however, G. made a similar arrangement with R., and McR., at the instance of G., conveyed the same land to R. This arrangement was also abandoned, and a new one, similar in its object, was entered into between G. and N., which lasted for upwards of six years, and the conveyance executed pursuant thereto was considered effectual. With full notice of this, K. also entered into an arrangement with G., and, with his assent,

took a conveyance from R. which gave him the legal estate. N. having died, his son filed a bill, alleging the loss of the conveyance by McR., and seeking to compel the execution of another deed by him to G, in place of the lost one; or a conveyance to himself as claiming under G., praying also that K. might be ordered to join in such conveyance. At the examination of witnesses the supposed lost deed came to light, in the hands of the attorney with whom it had been deposited, but its genuineness was denied by McR. K. had supported G. for some time, and in his answer sought to avoid the conveyance to N. by alleging insufficient support of G. Under these circumstances the bill as against McR. was dismissed with costs; but it being considered, that under the pleadings, relief might properly be given as against K., although the bill was not filed principally with that object, K. was ordered to convey to the plaintiff on receiving compensation in respect of his support of G., not exceeding the amount which N. had agreed to pay in the event of his failure to provide G. with support, the plaintiff, as against K., being allowed only such costs as he would have been entitled to if the suit had been instituted against him alone upon the equity existing between himself and K.

Nickles v. McRoberts, 473.

LUNATIC.

(SETTING ASIDE CONVEYANCE.)

1. A. Y. being the owner of valuable lands, became infirm in mind. He believed that he could control the elements, and asserted power in himself to recall from death, and in various other ways, for several years previous to his death, constantly exhibited indications of mental infirmity. While in this state the members of his family, by an arrangement between them, entered into possession of the real estate, and severally worked it and enjoyed its profits. W. and P., children of A. Y., and M. his wife, obtained from him conveyances to them respectively of all his real estate, which were executed in presence of an attorney, and there was some evidence of a money consideration having been paid A. Y. for them. It was not shewn conclusively that these conveyances were executed in a lucid interval. A. Y. having died intestate on a bill by the heir of N., one of A. Y.'s children, these conveyances were set aside as fraudulent, with costs, and W. R. and M. were ordered to account for rents and profits.

Young v. Young, 365.

2. The father of P. and J. died during the infancy of J., leaving to them by his will 100 acres of land. After they attained majority, this land was, by deed, equally partitioned between them. J. was a person of weak intellect, without knowledge of land or money, and unable to read or

write. P. afterwards obtained from J. a conveyance of his 50 acres, and executed a bond in his favour, charging these 50 acres with the payment of £50 per annum during J.'s life. P. then mortgaged the 100 acres, and obtained from J. a release of the annuity bond which was executed in presence of the solicitor of the mortgagees without any good consideration therefor: on a petition filed to have J.'s lunacy declared, the evidence was taken in presence of the parties so interested in the land. J. was declared as a lunatic, but as no sufficient evidence was produced to prove notice to the mortgagees or their solicitor of his imbecility when the mortgage was executed, this declaration was made without prejudice to the mortgage, but allowing the committee of the lunatic to impeach it by bill if so advised.

In re McSherry, 390.

MAINTENANCE.

See "Mortgage," 2.

MARRIED WOMAN.

(ANSWER OF.)

See "Practice," 4, 5.

MASTER.

(TAKING ACCOUNTS BEFORE.)

See "Mortgage," 12.
"Practice," 7.

MASTER'S REPORT.

(APPEAL FROM.)

A decree for sale of property was directed at the suit of a surety of the mortgagor. In proceeding to take the accounts it appeared that the mortgagee had paid off several prior incumbrances, and the master in taking the account allowed him credit for the sums so paid, although no direction to that effect was given by the decree; the surety, insisting that as between him and the mortgagee he was entitled to receive credit for the gross amounts produced at the sale, without any reference to the sums so paid to the prior incumbrancers, appealed from the Master's finding in that respect; the court dismissed the appeal with costs.

Teeter v. St. John, 85.

See also "Mortgage," 7.
"Practice," 6, 11, 12, 18, 21.

MASTER'S OFFICE.

(PROOF OF CLAIM IN.)

See "Mortgage," 12.
"Practice," 22.

MERGER.

(OF EASEMENT.)

See "Easement," 2.

MISREPRESENTATIONS.

(CONVEYANCE SET ASIDE ON GROUND OF, MADE BY AGENT.)

See "Conveyance," 1.

MONEY.

(OF UNITED STATES.)

See "United States of America."

MORTGAGE, MORTGAGOR, MORTGAGEE.

1. In a suit by a prior against a mesne incumbrancer on the argument of the cause, by consent, an affidavit was read which stated an agreement on the part of the prior incumbrancer to be postponed to the latter; when the court gave liberty to the plaintiff to cross-examine the deponent upon statements contained in his affidavit, which permission not being acted upon by the plaintiff, his bill was dismissed with costs.

Miller v. Start, 28.

2. Where an assignment was executed by a *puisne* incumbrancer to another, for the purpose of filing a bill to impeach a prior mortgage on the ground of fraud, and which bill was accordingly filed; the court, without determining what might have been the result of a suit brought simply to redeem, or one instituted by the *puisne* incumbrancer himself, dismissed the bill with costs, notwithstanding the right to redeem formed one alternative of the prayer, it being evident from the whole proceeding that the alleged fraud was the ground upon which the plaintiff principally relied.

Muchall v. Banks, 25.

3. A mortgage was held by an assignee for the benefit of the assignor; (the mortgagee) and the mortgagor, without notice of such assignment, paid to the mortgagee the amount due on mortgage, and obtained from him a discharge under the statute. Upon a bill filed by the representatives of the assignee, who claimed the assignment to have been absolute, seeking to enforce payment of the mortgage by sale or foreclosure, the court declared the mortgagor had acted *bona fide* in paying off, and obtaining a discharge of the security from the mortgagee, and ordered the plaintiffs to execute a release of the mortgage, it being doubtful whether under the circumstances the discharge from the mortgagee would have the effect of re-vesting the property in the mortgagor.

McDonough v. Dougherty, 42.

4. On the purchase of an estate, subject to a mortgage, the purchaser agreed to pay off the security, and subsequently agreed with the mortgagee for an extension of time for five years, within which to pay off the incumbrance, agreeing in consideration thereof to pay an increased rate of interest, and covenanted that he would "*well and truly pay, or cause to be paid, unto the said W. M., (the mortgagee,) his executors, administrators or assigns, the said interest*

upon the said sum of £900, *quarterly, as aforesaid, so long as the said forbearance shall continue, and until the said principal money is fully paid and satisfied.*" On a bill filed to enforce payment of the incumbrance, *held*, that the assignee was personally bound to pay only the interest on the debt, and that by reason of the extension of time to the assignee, who had become the party primarily bound to pay, the personal liability of the mortgagor therefore had been discharged.

Mathers v. Helliwell, 172.

5. M. being owner of the equity of redemption verbally assented to an arrangement that "In consideration of the said *McInnes* having promised to give his personal covenant for the payment of the said balance of £300 (due on the mortgage) in three years from 10th February last, with interest to be paid half-yearly as a collateral security, I will procure him an extension of time, as aforesaid, on receiving said covenant from him," which was embodied in a memorandum signed by the solicitor of the mortgagee, but without authority. Proceedings were accordingly delayed on the mortgage for three years, on the faith of this promise; and the mortgagee subsequently instituted proceedings in this court to obtain a sale of the premises, and that M. might be ordered to pay any deficiency arising on such sale of the premises. *Held*, that there was not any absolute binding agreement to give the time: that as part of the agreement (that as to giving the covenant) was to be performed within a year, but the mortgagee's part embraced a period of three years, (as did also M.'s in regard to the time for payment,) whether the Statute of Frauds would stand in the way of the plaintiff's recovery, *Quære.* That had M. performed his part of the agreement, the mortgagee could have been compelled to execute his, and that a personal order for payment of the deficiency is only made by the court to avoid circuity of action, and in aid of a legal right, but only when that right is clear.

Christie v. Dowker, 199.

6. The owner of an equity of redemption filed a bill impeaching the mortgagee's title, on the ground that no money was advanced, but the court being of opinion that the evidence was sufficient to establish the fact of payment, directed, at the option of the defendants, that the bill should be dismissed with costs, or the usual decree made for redemption upon payment of what should be found due upon a reference to the master.

Bedson v. Smith, 292.

7. Two years after a mortgage had been in part paid off, the mortgagor applied to the mortgagee to re-borrow the money, agreeing verbally to return the receipts for the money paid, so that there should not remain any evidence of payment; and that the amount so re-borrowed should be considered as of the original charge created by the

mortgage. Some, but not all, of the receipts were returned to the mortgagee, and the money re-advanced by him upon the terms proposed by the mortgagor. Under this state of facts, the Master in taking the accounts directed by the decree, allowed the mortgagee the full amount of the mortgage. On an appeal from the Master's report; *Held*, that the principle upon which he had taken the account was correct; and that the mortgagor was estopped from proving the payment of any portion of the original sum advanced. [*Vankoughnet* C., *dubitante.*]

Inglis v. Gilchrist, 301.

8. Where a mortgage deed contains no provision as to the application or appropriation of insurance money coming to the hands of the mortgagee before the time appointed for payment of the money secured by the mortgage, he is not bound to apply it in reduction of the sum secured, or the interest accruing thereon, until the expiration of the time allowed for payment of the mortgage money. In such a case the mortgagor would be entitled to have the money expended in rebuilding the premises, and replacing all parties as near as may be in the situation in which they stood before the fire occurred.

Austin v. Story, 306.

9. R. mortgaged lot 16, to E. to secure £2047. R. afterwards mortgaged lot 17 to C. to secure £100. R.'s equity of redemption in lot 17 was attached by *fi. fa.* lands in 1851, but before sale of it E. purchased and received an assignment of C.'s mortgage; after this the sheriff sold R.'s equity of redemption in lot 17 to L. On a bill filed by the representatives of E. to foreclose both mortgages, *held*, that they were entitled to tack and be redeemed, if at all, as to both mortgages.

Hyman v. Roots, 340.

10. A mortgage contained a covenant that the mortgagee would release any portion of the mortgaged land which the mortgagor might sell during the continuation of the mortgage upon payment of £200 for every acre to be released. An assignee of the mortgagor made a general payment upon the mortgage, and afterwards, upon selling a portion of the land, demanded a release therefor from an assignee of the mortgagee under the covenant contained in the original mortgage. *Held*, that the benefit of this covenant would pass to an assignee of the equity of redemption, but the mortgagor or his assignee, could not claim a release from the mortgagee unless the latter received the stipulated amount per acre upon the sale of the particular portion of the land required to be released; no general payment by a mortgagor on the mortgage would be sufficient.

Webber v. O'Neil, 440.

11. Upon the sale of land subject to a mortgage, the vendor covenanted to indemnify and save harmless from incum-

brances, and the purchaser executed a mortgage over the premises bought, to secure part of the purchase money. The purchaser afterwards learned that before his purchase, these and other premises had been mortgaged to another person to secure a sum larger than what he then owed. The vendor had since assigned the purchaser's mortgage to the defendant C. The prior mortgagee having taken proceedings under his mortgage, and being about to sell the premises covered by the second mortgage, the purchaser filed his bill against the assignee of the vendor, and the vendor, claiming a right to apply the amount due by him in discharge of the first mortgage, and for an injunction to restrain any action to recover the sum due from him until the premises bought by him should be released from the first mortgage. It did not appear clearly that C., the assignee, was a purchaser of the mortgage for value, but rather that he held it as collateral security for a debt due, and the vendor had become insolvent. Under these circumstances an *interim injunction* was granted upon payment of the amount due into court.

Heap v. Crawford, 442.

12. To shew the balance due on a mortgage, the party proving the claim, in addition to swearing to the balance, produced certain books in the Master's office, and made affidavit that by these books the balance claimed on the mortgage could be discovered. Neither party asked him any question in reference to them, nor was he asked to explain them; and the Master stated that on looking at the books he could not from them understand the account. *Held*, on appeal from the ruling of the Master, that the oath of the claimant, standing unimpeached, though not supported by the partial statement furnished by him, but which he offered to make complete, if required, from the books, the Master should have acted on it, and allowed the claim.

Hancock v. Maulson, 483.

13. In 1836 R. being under obligations to S. as accommodation indorser, and being about to leave Canada, conveyed land to S. by a deed absolute in form. A bond was executed contemporaneously explaining the transaction and providing for reconveyance of the premises on satisfaction to S. of any damages or loss that might be occasioned to him by reason of his liability as such indorser. A tenant occupied the premises till 1845, treating R. as landlord and paying the rent to S. as his agent. In 1846 S. sold the premises, the purchaser not having any notice of R.'s claim to them. *Held*, on a bill filed by the representative of R. to redeem, that no relief could be granted as against the purchaser, but that the representative of S., he being also dead, was bound to account as mortgagee from the time that he went into possession.

Robertson v. Scobie, 557.

14. A mortgagor wrote to his mortgagee stating that a sale had been arranged of a portion of the property for £100, and urging the mortgagee to join in releasing the same to the purchaser on payment of that sum. Subsequently the mortgagee joined in such release upon receipt of £50 only. *Held*, that the mortgagor was entitled to credit on his mortgage for £100, that being the sum mentioned in the letter.

Ball v. Jarvis, 568.

See also "Absolute Deed."
"Collusion."
"Execution Creditor."
"Fraudulent Conveyance."
"Improvements."
"Master's Report."
"Notice."
"Redemption."

MUNICIPALITY.

(INJUNCTION AGAINST.)

Where parties complaining of the illegality of a by-law of a municipal corporation permit a term of the courts of common law to pass without moving therein to quash it, this court will refuse to interfere by injunction to restrain the municipality from proceeding to enforce the provisions of their by-law.

Carroll v. Perth, 64.

(MISAPPLICATION OF RATES BY.)

See "Injunction," 5.

MUTUAL INSURANCE COMPANIES.

By the 67th section of chapter 52, of the Consolidated Statutes of Upper Canada, all the right or estate of any party effecting an insurance with a Mutual Insurance Company, in the property insured, at the time of effecting the same, is subjected to all claims against the assured under such insurance; and a purchaser, taking a conveyance from the assured, will take subject to the charge of the company although without notice, and that although such charge does not appear on the registry affecting the property; the registry laws not providing for the registration of such charge.

Montgomery v. The Gore District Mutual Insurance Company, 501.

NOTICE.

A bill was filed impeaching sales to purchasers on the ground of notice of the prior incumbrance—a mortgage for unpaid purchase money—and praying to have the conveyances to the purchaser postponed to such incumbrance, or in the alternative that the money still due might be paid to the plaintiffs. On the hearing it was made to appear that the purchases were made *bonâ fide* and without notice; that one of the purchasers had paid nearly all his purchase money at the time of sale and given his promissory notes for the balance; and that the other had given a mortgage to secure his

unpaid purchase money; and both submitted at the hearing to pay such amounts as were still unpaid to the plaintiffs or as the court might direct. The court, under the circumstances, granted the alternative relief prayed; directing the money due by the one purchaser on his mortgage to be paid to the plaintiffs, and the amount due on the notes of the other to be also paid to them on production of the notes to be given up to the maker; but ordered the plaintiffs to pay to the defendants, the purchasers, their costs of suit, and refused to the plaintiffs any costs as against the vendor, he never having opposed the relief to which they were entitled.

Ferguson v. Kilty, 102.

See also "Crown Patent," 2.
"Description of Land," 3.

OIL WELL.

See "Specific Performance," 2.

OPENING PUBLICATION.

See "Practice," 9.

OVERFLOWING LAND.

See "Injunction," 2.

PAROL CONTRACT.

See "Easement."
"Mortgage," 7.
"Specific Performance," 8.

PARTIES.

See "Absolute Deed," 1.
"Ante Nuptial Settlement."
"Redemption," 3.
"Specific Performance," 3, 9.

PARTITION.

One of the devisees of an estate sold her interest therein to her brother and executed with her husband an instrument in the form of a power of attorney, authorizing the assignee for his own benefit to demand and receive of and from the executor, etc., all moneys which might become due and payable to her and her husband, or either of them, *by virtue of all devises and bequests* under the last will and testament of her father; in fact, at the time of the execution of this instrument she was entitled to a share of another brother's portion of the estate by assignment from him. *Held*, on appeal from the report of the Master, that the instrument executed by the husband and wife had not the effect of transferring the share of the wife in the portion of the brothes so assigned.

Pherrill v. Pherrill, 580.

PARTNERSHIP.

By articles of agreement entered into by several persons, it was stipulated that one of them should furnish the premises, in which to carry on the business at a stipulated rental, and capital for carrying on the business

at a certain rate of interest, and that he should receive a stipulated sum annually for his time and expenses, and the others certain stipulated sums together with a certain proportion of the net profits. *Held*, this contract had the effect of creating a special agency, not a partnership, between the parties.

Munson v. Hall, 61.

PAYMENT.

(INTO COURT.)

Although the rule of equity is that money in the hands of a stakeholder held for the benefit of others, whose rights are to be disposed of by the court, will usually be ordered into court, still in such case it must be clear that some of the parties litigant are entitled to the fund or a portion of it. Where, therefore, certain moneys, the proceeds of a policy of insurance which had been deposited with the attorney of a bank, for the purpose of being held in trust for such bank and with the proceeds to pay off the liabilities of the party making such deposit to the bank, had been paid to and were still in the hands of the attorney and the depositor, without shewing what amount was due the bank, applied to have the money paid into court by the attorney, the court, under the circumstances, refused the application.

Corbett v. Meyers, 36.

(OF MORTGAGE—AFTER ASSIGNMENT.)

See "Mortgage," 3.

PERSONALITY.

(EXEMPTION OF FROM PAYMENT OF DEBTS.)

See "Will," 1.

PERSONAL CONFIDENCE.

See "Trustees to Sell."

PETITION OF RIGHT.

See "Ancient Document."

PLEADING.

See "Deed."
"Demurrer."
"Redemption."

POWER OF SALE.

(SETTING ASIDE SALE UNDER.)

See "Collusion."

PRACTICE.

1. The absence of a venue in the margin of a bill is not a cause of demurrer. Nor is the description of the premises which omits the township or county.

Duncan v. Geary, 34.

2. *Semble*, that no venue being stated in the margin of the bill is an irregularity, and may be taken advantage of by motion to compel the insertion of a venue.—*Ib.*

3. This court will, in a proper case, set aside a deed for lands improperly sold by the sheriff under common law process, and will not leave a party to his remedy at law alone.

Campbell v. Smith, 206.

4. Until the time for answering has expired, the plaintiff is not at liberty to sue out an order for a married woman, defendant, to answer separately from her husband; and in such a case, if the wife put in an answer jointly with her husband, it is binding upon her, whether the suit be in respect of the wife's separate estate or not.

Clarke v. McElroy, 210.

5. Where husband and wife had jointly answered and demurred to a bill which demurrer was overruled, and the order drawn up allowing the same, extended the time for the husband to put in his answer, but was silent as to the answer of the wife, or the joint answer of husband and wife, *held*, notwithstanding, that under such order the husband and wife were at liberty to put in a joint answer.—*Ib.*

6. Where the correction to be made in the Master's finding is simple, a reference back to him for that purpose need not be directed; the necessary alteration can be made by the order drawn up on the appeal.

Tecter v. St. John, 85.

7. Where a bill has been amended, although usual, it is not absolutely necessary that a demurrer should be addressed "to the amended bill."

Ferguson v. Kilty, 102.

8. Where the parties to a cause had produced and examined their witnesses at Toronto, all

of whom resided at a distance therefrom, and in close proximity to one of the circuit towns, the court while awarding the general costs of the cause to the defendant, refused him the costs of the attendance of his witnesses.

Ledyard v. McLean, 139.

9. After judgment had been given in a cause, an application was made to open publication, on the ground that since the decree had been pronounced, it was discovered that a material witness in the cause was beneficially interested in the setting aside a will which it was the object of the suit to have declared void, and had entered into an agreement to indemnify the plaintiffs from the costs: but as the result would have been the same had that witness' testimony been out of the case, the court refused the motion; but offered the defendant, who applied liberty to give evidence to establish the fact of interest in the witness, in order that in the event of the cause going to appeal. his evidence should not appear there as that of an unbiassed witness.

Waterhouse v. Lee, 176.

10. A trustee of lands for payment of debts paid the debts without exercising the power of sale for that purpose, and took a release from the *cestui que trust* to himself, which release was held void, and an account directed. Under the circumstances, neither fraud nor neglect to account having been established

against the trustee, who had accounted as such in the Master's office, and the property or the produce thereof being forthcoming for the benefit of the estate, the court directed the trustee to receive his subsequent costs as in ordinary cases, as between solicitor and client.

Hope v. Beard, 212.

11. An appeal from the Master's report, after it has been absolutely confirmed by lapse of time, will not be entertained without leave first given on special application.

Thompson v. Luke, 281.

12. Parties who have no further interest in the matter to which the Master's report relates cannot appeal from it. *Ib.*

13. Where the only defence set up by the defendant failed, and the ground on which the court decided against the plaintiff was not taken, or even pointed to in any manner by the answer, the court, though it dismissed the bill refused the defendant his costs of the suit.

McAnnany v. Turnbull, 298.

14. The XLII. of the General Orders (sec. 13) applies to all cases where accounts are directed to be taken before the Master.

Carpenter v. Wood, 354.

15. Where a cause was set down to be heard on further directions, for the purpose of having remedied a defect in the Master's report, the court, although it made the order asked, refused the plaintiff costs other than those of a motion in Chambers; the order being such as might have been obtained on motion there.

King v. Connor, 364.

16. Where a bill was filed to set aside a conveyance as having been made to hinder creditors, on grounds which the plaintiff failed to substantiate, but the evidence of the grantee himself shewed that on other grounds the plaintiff was entitled to relief, at the hearing leave was given him to amend, setting forth such grounds, and a decree was made in his favor; but under the circumstances without costs.

Watson v. McCarthy, 416.

17. A. having a mortgage, filed his bill to foreclose against B., alleging that the mortgagor had died intestate, leaving him his heir-at-law, and so entitled to the equity of redemption. After a decree, A. discovers that the mortgagor had by will devised the mortgaged premises to C., and by petition seeks to add him, and that he may be held bound by the past proceedings in the suit. *Held*, that the plaintiff had not exercised due diligence in framing his proceedings, and leave to add C., by special order was refused.

Portman v. Paul, 458.

18. Where the costs of certain proceedings were allowed by the

Master against the estate of a deceased person not a party to the suit at any time, without shewing why they were so allowed, the court at the hearing on further directions, notwithstanding the report had not been appealed from, refused to carry out that portion of the Master's finding, and directed the question to be spoken to and additional information furnished to the court.

Taylor v. Craven, 479.

19. Where in taking the account upon a mortgage the Master had taken the same against the mortgagee, with rests and on appeal from the Master's report, it appeared that at the date of the mortgage a balance was due by the mortgagee to the mortgagor, and that the mortgagee went into possession of the property, part of the arrangement being that he should apply the rents, &c., to the paying off of two prior mortgages, but it was not shewn that they were due at the time of the moneys being received, so that the holder of the incumbrances could have been compelled to accept payment. The court, if desired by the mortgagee. ordered a reference back to the Master to ascertain this fact.

Williams v. Haun, 553.

20. Where a report was referred back to the Master at the instance of the defendant, a mortgagee, to ascertain a particular fact, and the Master, without being directed so to do, called upon defendant for an affidavit shewing what moneys he had received, &c.; and the defendant filed his own affidavit shewing that the moneys with which he was chargable had been received by him at dates subsequent to what the Master had previously found by his report, and which he varied accordingly: *Held*, on appeal, that the Master was wrong in thus proceeding, and the report was sent back to be reviewed in this respect.—*Ib.*

21. Where it appears by the will of a testator that the legacies left by it were payable with interest, and the order in which they are payable, it is not necessary for the Master to state those facts in his report; but he should state whether any payments have been made on account of them.

Clouster v. McLean, 30.

22. Where in a suit against executors a decree was made referring it to the Master to administer the estate, the Master is not required to take any account of such portions of the estate as are left to trustees to be administered. *Ib.*

See also "Fraud and Extortion."
"Incorporated Company."
"Master's Report," 1.
"Mortgage," 6.
"Notice," 1.
"Principal & Surety," 1, 5.
"Wild Land Taxes," 10.

PRE-EMPTION.

(RIGHT OF.)

See "Crown Patent."

PRESBYTERIAN CHURCH.

(OF CANADA, IN CONNECTION WITH THE CHURCH OF SCOTLAND.)

In 1833 lands situate in Cobourg were conveyed to certain parties, and "*the Kirk session of the Presbyterian Church of Canada in connection with the Church of Scotland in Cobourg*," upon trust for the use of that congregation, who erected a church thereon and used and enjoyed the same until the disruption of the Presbyterian Church of Canada in 1844, similar to that which had previously occurred in Scotland. In Canada, as there, the Presbyterian Church became divided into two churches, one retaining its identity with the Presbyterian Church of Canada, in connection with the Church of Scotland; the other forming a new church, called "The Presbyterian Church of Canada," similar in principle to the Free Church of Scotland, and to which the congregation at Cobourg almost unanimously adhered, and they continued to use the same church as hitherto until 1857, there being in the interval no congregation of the Presbyterian Church of Canada in connection with the Church of Scotland. In this year certain residents professing to belong to that church applied to the surviving trustees to have the trust estate devoted to the purposes intended by the donor, by allowing them the use thereof for the purpose of religious worship, which was refused. On an information and bill filed by the Attorney-General and certain persons so claiming to be entitled to the use of the said trust estate the court declared that the only persons entitled to the use of the said church were those in communion with the Church of Scotland, and the fact that there had ceased to be a "Kirk session" at Cobourg was immaterial. *Held*, also, that the congregation, for the use of whom the trust had been originally created, having ceased to exist, any new congregation in connection with the Church of Scotland, which might be afterwards organized, were proper objects of the gift; and to be such, it was not necessary that the present should be a continuation of any previously existing congregation.

The Attorney-General v. Jeffrey, 273.

PRESUMPTION OF INNOCENCE.

See "Ancient Document."

PRINCIPAL.

(APPLICATION OF, TO SUPPORT OF INFANTS.)

See "Infants," 3.

PRINCIPAL AND AGENT.

See "Partnership."

PRINCIPAL AND SURETY.

1. By an agreement entered into by the lender, borrower, and surety that a judgment against the surety should "*stand as additional or collateral security for the payment of such mortgages, to pay and make up any deficiency that might arise or exist should it at any time become necessary to sell the said farms, &c.*" *Held*, that the surety was entitled to have an account taken, the property sold and credit given on his judgment for the amount realized before he could be called upon to pay anything: and that the surety was not bound in the first instance to pay off the creditor and take an assignment of the mortgages for the purpose of proceeding against his principal, the mortgagor.

Teeter v. St. John, 85.

2. A party secondarily liable, and entitled on payment of the debt to an assignment of the security held by the creditor, had agreed that that estate should be sold first, and his own estate liable only for the balance, and such estate was sold in a suit brought by the creditor, to which both the parties primarily and secondarily liable were parties, and which estate was purchased by the creditor in the name of an agent: the party so liable, having forborne to apply to discharge the sale in that suit, and two years having elapsed, during which time the creditor sold the property, cannot, as a defence to a suit to enforce payment of the balance, insist that the sale in the former suit was invalid.

Kains v. McIntosh, 119.

3. A surety has no right to complain of the appropriation of payments by the creditor, when the principal makes no appropriation of them, but left them to be appropriated by the creditor as he pleased on the indebtedness.

Cunningham v. Buchannan, 523.

4. A creditor is not bound to send the surety information as to the position of his principal. If the principal's statements or credit are doubted, the surety should inquire into them, and the very fact that a guarantee is called for by the creditor should put the surety on the alert.—*Ib.*

5. The mere fact of a creditor abstaining from seizing under execution against the principal his interest in the stock in trade, does not of itself furnish a ground for suspending execution against the surety, and that the surety, claims that the creditor shall forbear his remedy against him until the exact value of such interest is ascertained.—*Ib.*

See also "Master's Report," 1.

PROMISSORY NOTES.

The plaintiff indorsed notes for *W. B.*, since deceased, which were discounted at two different banks. To indemnify plaintiff against these indorsements *W. B.* mortgaged certain real and

personal property to him. The notes were subsequently paid when due, at these banks, with the proceeds of other notes of *W. B.* indorsed by plaintiff, and discounted at a third bank. *Held*, that the indemnity secured plaintiff against his indorsements at *W. B's.* request, on paper discounted at the third bank to keep outstanding the amounts of the former notes.

Burnham v. Burnham, 485.

Semble, that the indemnity given to an endorser will protect him against liability on any other securities, in whatever shape, to which he may become a party at the request of the maker to keep the amounts of the notes outstanding.—*Ib.*

PUBLIC POLICY.

See "Deed."

PUBLIC ROAD.

See "Specific Performances," 11.

PURCHASE.

(BY AGENT.)

See "Conveyance," 1.

PURCHASER.

(FOR VALUE WITHOUT NOTICE.)

See "Ancient Document."

(RIGHTS OF, UNDER LUNATIC, WITHOUT NOTICE OF HIS STATE OF MIND.)

See "Lunatic," 2.

(ASSIGNEE OF, MADE PARTY TO SUIT FOR SPECIFIC PERFORMANCE.)

See "Specific Performance," 9.

RAILWAY COMPANIES.

The Grand Trunk Railway Company, in 1855, erected a fixed bridge over a navigable river, near the outlet. The plaintiff then owned land on the bank of the river, on which he had erected a factory, and contemplated building a dock and mills. It was material to him to enjoy the navigation unimpeded, in order to have the most beneficial use of the premises. At the time the bridge was built the 20th sec. of 16th Vic. ch. 37, was in force, but before the bill in this cause was filed 20th Vic., ch. 12, was passed, by the 7th sec. of which it was enacted, "It shall be lawful for the Governor in Council, upon the report of the said board, (*i. e.*, the board of railway commissioners,) to authorize any railway company to construct fixed and permanent bridges, or to substitute such bridges in the place of the swing, draw, or movable bridges on the line of such railway, within such time as the Governor in Council may direct, and for each and every day after the period so fixed, during which the said company shall use such swing, draw, or movable bridges, the said company shall forfeit and pay to her Majesty the sum of fifty pounds. Provided, it shall not be lawful for any railway company to sub-

stitute any swing, draw, or other movable bridge in the place or stead of any fixed or permanent bridge already built and constructed, without the consent of the Governor in Council, previously had and obtained." This section was not specially set up in answer, but was relied upon in argument, as permitting a permanent and fixed bridge in cases authorized by the executive. The plaintiff relied on the former act as providing for a draw-bridge, which would not impede navigation, and prayed that the company might be required to remove the present fixed bridge, and to erect in its stead a draw-bridge, which would not impede the navigation, or plaintiff's business; also, that an account might be taken of all loss sustained by the plaintiff by reason of impediments caused by the present bridge, and that the same might be made good to him by the company. *Held*, that if the river was not navigable the bridge had been properly erected; if navigable, the company were wrong in erecting the bridge, but that this was cured by the latter statute, and that the plaintiff was not entitled to the relief asked. *Semble*, that in such a case the bill should be by the Attorney-General, the statute referred to having been passed for the general benefit of the public.

Cull v. The Grand Trunk Railway Company, 491.

RE-BORROWING.

"Mortgage," &c., 7.

REDEMPTION.

1. Where a suit is brought for redemption, and the defendant sets up an absolute conveyance by way of answer, to which the plaintiff simply files a replication, without amending his bill to impeach the conveyance, he cannot do so in evidence. Where, however, a cause was brought to a hearing under such circumstances, and the evidence was such as to create a strong suspicion of the *bona fides* of the transaction, the court gave the plaintiff, who had purchased from the alleged mortgagor, liberty to amend by making the mortgagor a party, with a view of impeaching the deed, and reserved the costs until the cause came on again: and the bill having been amended in accordance with such permission, and again brought on for hearing, the court, although unable upon the evidence to grant the relief asked, refused the defendants their costs up to the original hearing, in consequence of the untruthfulness of their answers.

Finlayson v. Mullard, 130.

2. Although the general rule is, that in a suit to redeem, if a balance is found due to the defendant, he will be ordered to receive his costs, still, where on the settlement of certain land transactions between vendor and purchaser, the former, together with his solicitor, made up a statement, shewing a balance due to him of £417, for which the vendor, who was old and illiterate, executed a mortgage on his estate, but on taking the

accounts in the Master's office, it was shewn that at the time of taking the security only £26 7s. 4d. was due; the court, upon a bill filed by the mortgagor against the executors of the mortgagee, impeaching the whole transaction for fraud, ordered his estate to pay all the costs of the litigation.

Souter v. Burnham, 375.

3. W. sold certain land to M. giving a bond for a deed: M. assigned his interest in this bond, as also chattels in security, but retained possession of the instruments. Subsequently M. assigned absolutely the bond to C., to whom (with notice of the prior security) W. conveyed the premises, taking back a mortgage for unpaid purchase money, upon which W. filed a bill for foreclosure against C., making the plaintiffs, and their co-partners in the business, defendants as incumbrancers, by reason of a registered judgment, but they omitted to set up any interest in the premises by reason of the security given to them by M., in which suit the bill was taken *pro confesso*, and a final order for foreclosure was obtained against all the other defendants. On a filed bill against W. seeking to redeem, or that he should pay off the claim of the plaintiffs under the security from M. *Held*, that M. was a necessary party to the suit; and also, that W. had a right to pay them off their claims against M., and to call for an assignment of the other securities held by them for such claim, the amount of which M. was bound to pay to the plaintiffs or W., in case of his paying.

McQuestion v. Winter, 464.

RECTIFICATION OF DEED.

D. having a mortgage over 23 acres, filed his bill to foreclose. A., B. and C. having liens, were made parties, and their position settled by the Master. A. held a mortgage as executor of a deceased mortgagee. B. redeemed and applied by petition to rectify an alleged mistake in C.'s mortgage, so as to make it a lien over an additional 25 acres prior to A.'s, over the same land, B. failing to prove that A.'s testator had notice of the error at the time of taking his mortgage, the relief sought was refused.

Ogilvie v. Squair, 444.

RE-DIVISION OF ESTATE.

See "Residuary Estate."

REFERENCE AS TO TITLE.

See "Specific Performance," 8.

REGISTRATION OF DEEDS.

1. A witness to a memorial was described as "of the city of London." Another witness described as "of London." *Held*, to be sufficient descriptions of the persons named. Also, *held* sufficient for the witness' affidavit, proving execution of the

deed and memorial to state that "he had seen the due execution of the deed."

Reid v. Whitehead, 446.

2. A memorial described the land in the same words as the deed, which, however, did not sufficiently identify the premises, and concluded with a reference to a mortgage not imported into the memorial: *Held*, insufficient. *Ib.*

3. One of the witnesses swore the affidavit proving the execution of the memorial before the other witness, *held*, no objection to the affidavit. *Ib.*

See also "Mutual Insurance Companies."

RELEASE.

(BY MORTGAGE OF PORTIONS OF MORTGAGE PREMISES.)

See "Mortgage," 10.

RENEWALS.

See "Promissory Notes."

RENTS AND PROFITS.

(ACCOUNT OF.)

See "Conveyance," 2.

RECISSION.

(CONDITIONAL, OF CONTRACT.)

See "Specific Performance," 4.

(OF PATENT.)

See "Crown Patent," 2.

RESIDUARY ESTATE.

A testator devised to his son a certain named lot; the residue of his estate, after certain other specific devisees, he directed to be divided between his two brothers and sister, amongst whom, after the death of testator, the property was divided, in which division by mistake the lot devised to the son was included, which was allotted to one of the residuary devisees as part of his share, who devised the same, and who, on discovering the mistake which had been committed applied to those interested in the residuary estate to have the mistake rectified, when it appeared that some of the other residuary devisees had sold portions of the shares allotted to them, by reason of which a re-division of the estate was impossible, and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake in thus allotting the devised lot. The court, under the circumstances, ordered a valuation to be made of the residuary estate, as its present value, one-third of which, with interest from the date the first division was made, to be contributed ratably by the other residuary devisees, or their representatives, or, if desired by either of the parties, with an account of rents and profits received.

Stinson v. Moore, 94.

RIPARIAN PROPRIETOR.

See "Easement."

"Injunction," 4.

SALE.

(ORDER TO PAY DEFICIENCY ON.)

See "Mortgage," &c., 5.

(OF LANDS FOR TAXES.)

See "Wild Land Taxes."

(BY MORTGAGEE.)

See "Mortgage," &c., 14.

SET-OFF.

(OF COSTS, WHEN PARTIES JOINTLY AND SEVERALLY LIABLE.)

A decree had been made in a cause giving the plaintiffs relief, and ordering the defendants to pay the costs, which, however, were not paid; the plaintiffs appealed from a portion of the decree with which they were dissatisfied, which appeal upon argument was dismissed with costs, to be paid to one of the respondents, thereupon the plaintiffs applied to set off the amount so ordered to be paid against the costs directed to be paid by the defendants in the court below to the plaintiffs, which was ordered accordingly.

Bank of Upper Canada v. Thomas, 356.

SETTING ASIDE CONVEYANCE.

See "Conveyance," 1.

SETTING SALE OF LANDS ASIDE.

(MADE UNDER POWER IN MORTGAGE.)

"See Collusion."

SETTLEMENT.

See "Ante Nuptial Settlement."

SHERIFF.

(SETTING ASIDE SALE OF LANDS BY, UNDER FI. FA.)

See "Practice," 3.

(SEIZURE OF MORTGAGE BY.)

See "Fraudulent Conveyance," 2.

(HIS DUTY AT SALES FOR WILD LAND TAXES.)

See "Wild Land Taxes," 3, 6, 7.

(BREACH OF DUTY ON PART OF.)

See "Wild Land Taxes," 4.

SPECIFIC PERFORMANCE.

4. A supposed equity in a person who died in 1808, where the possession of the property since that time has been enjoyed by another, claiming it as his own, and having a perfect legal title to it, is no ground for refusing to enforce an agreement in which the condition precedent was, that a party should "shew, make, and complete a perfect legal title," as, even in the event of such equity existing, a court of equity would not enforce it after such a lapse of time, and under such circumstances.

Dewitt v. Thomas, 21.

2. The vendor of real estate had died before the execution of the conveyances, and his infant

heirs filed a bill for a specific performance of the contract, which the defendants, the vendees, admitted and expressed their willingness to carry out but for the obstacle created by the death of the vendor leaving his heirs-at-law infants. The court under the circumstances made a decree for specific performance of the agreement, but without costs to either party; the costs of the infants to be defrayed out of the balance of purchase money payable by the defendants.

Weihe v. Ferrie, 98.

3. The court in adapting itself to the exigencies of mankind as they arise from time to time, will deal with new subjects as they present themselves so as best to effectuate the intentions of the parties, and will not allow rules and principles applicable to a different state of circumstances, to interfere with the exercise of its jurisdiction whenever in the opinion of the court it can be usefully exercised, and where money has been expended upon the faith of an agreement, although otherwise the court might not have enforced the contract, it will not entertain objections to the form of the contract when it can execute it, and in doing so, will construe the agreement liberally. Where, therefore, the owner of land made a demise of fifty acres for fourteen years at a nominal rent, for the purpose of boring for oil, and contemporaneously executed an agreement by which the owner agreed to convey at any time a roadway from any wells the lessee might dig or bore to a certain road, and "*also sufficient land for the working of such well or wells*," the lessee agreeing to pay "$100 *for the first well he might work for oil, and the sum of* $50 *per acre for the land necessary for working such oil well on said roadway*," and "*the sum of* $50 *for any oil well he shall work after the first one, and the sum of* $25 *per acre for any land necessary for working said well or wells and the roadway.*" The lessee having divided a portion of the fifty acres into acre lots, having a frontage of from eighty to one hundred feet, sold his interest in one such acre to a third party, who went into possession and opened a well, erected an oil refinery and constructed the necessary tanks and works for separating the oil from the water with which it is mixed when taken from the earth, and declared his option of purchasing within the time specified. The owner of the fee having sold and conveyed his interest in the whole fifty acres, his vendee objected to convey the acre except upon terms not warranted by the agreement, and subsequently refused to convey more than in his opinion was absolutely necessary for working the well in its then state, the produce of which had become greatly diminished, and filed a bill asking to have the agreement construed, and an injunction against the occupant continuing the refinery on the premises. The evidence in the

cause showed that by constructing tanks one above another a great saving of space would be gained, but at an expense greatly exceeding the value of the crude oil, and that the refinery occupied a space equal to about one twenty-fourth of the whole acre. The court was of opinion that, under the agreement, the purchaser was not entitled to space for a refinery on the premises, but it appearing that the sinking of another well within the limits of such acre would tend to injure the well already sunk, and that an acre was not too large a piece for the purposes contemplated, refused the injunction as asked for; and the purchaser by his answer having asked cross-relief by way of specific performance of the agreement, a decree was made accordingly; the deed to be prepared under such decree to provide for payment of the sums stipulated for in the event of the opening of any future wells upon such acre; but in such a case the party so claiming specific performance will be liable to pay for any other well or wells opened and worked upon the whole fifty acres, by other persons; the assignee in this respect standing in no better position than his assignor, the original lessee, and the contract not containing any stipulation or agreement for the laying off of the fifty acres into subdivisions; and the Master having required a list of all persons who had opened and worked wells upon the property with a view to making them parties in his office; and taking an account of what they owed respectively, in order that they might be bound thereby, and that the defendant might thus acquire a lien on their portions of the land for the sums so to be paid by defendant. *Held*, on motion by way of appeal from this direction of the Master, that such other purchasers were not proper parties: nor could the defendant thus acquire any lien upon their property, or in the absence of a request, any claim against the parties for the re-payment of the amounts advanced on their accounts, there being no legal liability on his part to make such payment. And, *Quære*, if even he could thus acquire such lien or claim, whether they would in that case have been proper parties.

Ledyard v. McLean, 139.

4. In 1850 S. agreed with M. for the purchase of 100 acres of land, and they entered into a written contract. S. having paid part of the purchase money, applied to M., offering the remainder, and requiring his conveyance. M. then stated that he had no title to convey, offered to pay back the money received, and allowed S. to remain in quiet possession of the land. This was done, and the written contract was given by S. to M. to be rescinded. M. then conveyed the land to his son, who, with knowledge of these facts, brought ejectment against S. At the trial the written agreement was put in as evidence against S.,

and was held to be an admission by him of the title of the plaintiff at law, and a verdict was accordingly recovered against S. On a bill for the specific performance of the original contract, and to stay the action at law, *held*, that the rescission of the contract was only conditional, M. then undertaking not to disturb the plaintiff in possession; that the use made of the contract at the trial at law re-established it as against M. and his co-defendant, and that the plaintiff was entitled to a decree for specific performance, and to a perpetual injunction against the action at law.—[SPRAGGE, V. C., dissenting.]

Stuart v. McNab, 234.

5. Where a purchaser filed a bill alleging that his vendor could not make a good title to lands agreed to be sold, but at the hearing waived a reference as to the title, admitting the same to be good, the court ordered the plaintiff to pay costs.

Tisdale v. Shortis, 271.

6. A parcel of land having been surveyed and laid off into building lots, the same was afterwards offered for sale by public auction, when M. became the purchaser of two such lots at an aggregate sum of £70. The plan, by which the property was sold, contained a memorandum on the margin that the same was drawn upon a scale of four chains to the inch; in reality the plan had been made upon a scale of three chains to the inch, which, however, was not discovered until after the conveyance had been executed, and the purchase money paid. Thereupon the purchaser, M. filed a bill praying re-payment of a proportionate amount of the purchase money; or a conveyance of a sufficient quantity of the adjoining land to make up the deficiency. The court, under the circumstances, considered that the plaintiff was not entitled to the relief asked, and dismissed his bill with costs; but *Semble*, that if the conveyance had not been made, or the purchase money not fully paid, he would have been entitled to be relieved in this court.

McCall v. Faithorne, 324.

7. D.'s father died in 1847, having first made his will purporting to devise all his real estate to his wife in fee; this will was not executed in proper form, and therefore D. became entitled to the land as heir at law. Three months before D. became of age, he agreed with P. for the sale to him of the real estate for valuable consideration. A conveyance to P. was prepared by D., and executed by his mother, the devisee under his father's will, D. being the witness to it. P. afterwards sold and conveyed his interest, and D. brought ejectment against the purchaser. On a bill filed to restrain this action, it was shewn that D. had at various times acquiesced in the sale after he became of age. *Held*, that D.'s conduct with reference to the sale

to P. was fraudulent, and was to be considered as an assertion that his mother was entitled as devisee in fee, although he was then not of age, and that such conduct, and his subsequent acquiescence after his attaining majority estopped him from denying the validity of the sale; and he was enjoined from proceeding with the ejectment, and ordered to execute a conveyance to the plaintiff, the vendee of P.

Leary v. Rose, 346.

8. In May, 1860, a purchase was made by parol of a lot of land in addition to three other lots previously bought by the same purchaser from the same vendor, and the purchaser went into possession and erected thereon a coach-house and stable, and the other portion of it was used as a lawn to the house which he had erected on the other lots which had been duly conveyed to him. In the year 1860, and again in 1863, the purchaser repeatedly asked for a deed, offering to give the vendor his promissory note for the purchase money, but which he refused to accept: a bill for specific performance was subsequently filed by the vendor. *Held*, that the purchaser, by his conduct, had waived his right to compel the vendor to make out a good title, in which case he would be entitled to get rid of his contract; the onus of proof under the circumstances being shifted from the vendor to the purchaser.

Dennison v. Fuller, 498.

9. A purchaser of land agreed, before conveyance, to assign his interest: in a suit subsequently brought by the vendor to enforce specific performance, the assignee was made a party defendant, and a decree was pronounced against him, with such costs as were occasioned by making him a party; in the event of his co-defendant (the purchaser) failing to pay the general costs of the suit which were awarded against him.—*Ib.*

10. The owner of land agreed to convey to a railway company a portion thereof, the consideration for which was paid, on which to erect an embankment, on condition that the company would make a culvert through such embankment. The building of the railway passed from such company into the hands of another, who built the embankment, but without making a culvert therein, they having had no knowledge of the stipulation in respect thereof, and the owner having omitted to give them any notice in regard to it during the progress of the works. Upon a bill filed by him for the specific performance of the covenant to construct such culvert. *Held*, that under such circumstances it would be a hardship upon the company to decree specific performance, there having been no wilful default on their part, and the costs of now constructing the culvert, would be very great, and that the parties ought now to be placed in the same position as if such agreement had not been

entered into, in order that the company might proceed under the provisions of the Railway Clauses Consolidation Act; the court retaining the bill until such proceedings were taken, giving to each party liberty to apply, but, under the circumstances, refusing either party any costs of the litigation.

Hill v. The Buffalo and Lake Huron Railway Company, 506.

11. The owner of real estate had permitted for many years a public road to be used across his land, which he subsequently agreed to sell; no by-law had been passed by the municipal council of the locality for closing up this road, although a resolution of the council had been passed for the purpose. *Held*, on appeal from the Master's report, that under the circumstances he should have reported that a good title was not shewn.

Kronsbien v. Gage, 572.

See also "Trustees to Sell."

STAKE-HOLDER.

See "Payment into Court."

STATUTES.

(13TH ELIZABETH CHAP. 5 AND PROVINCIAL 20TH VIC. CH. 57.)

See "Collusion."

"Fraudulent Conveyance," 2, 3, 4.

(IMPERIAL ACT 7TH AND 8TH VIC., CH. 110.)

See "Incorporated Company."

(THE 16 VIC. CH. 37, AND 20TH VIC. CH. 12 CONSIDERED.)

See "Railway Companies," 1.

STOCKHOLDERS.

(LIABILITY OF UNDER IMP. STATUTE, 7 and 8 VIC. CH. 110.)

See "Incorporated Companies."

SUPPOSED EQUITY.

See "Specific Performance," 1.

SURETIES.

(JOINT LIABILITY OF.)

See "Demurrer," 3.

TACKING.

See "Mortgage," 9.

TAXES.

(SALE FOR—EFFECT OF A MORTGAGEE PURCHASING IT.)

Property which was subject to a mortgage, having been allowed to run into arrears for taxes, was offered for sale by the sheriff, under the wild land assessment law, at which sale the mortgagee became the purchaser, and subsequently obtained the usual conveyance from the sheriff.

The mortgagee afterwards instituted proceedings against the mortgagor, to enforce payment of the mortgage money and interest, whereupon the mortgagor filed a bill in this court to restrain the action so brought against him, asserting that the sale by the sheriff had the effect of discharging him from all liability in respect of the mortgage debt. The court, under the circumstances, refused the application, the effect of such purchase by the mortgagee being not greater than a decree of foreclosure; where, if after a final decree, the mortgagee proceeds to enforce payment of the mortgage money, it will open up the foreclosure: and (*Semble*) that after such a sale the mortgagor might have treated the mortgagee as liable to be redeemed, and have filed his bill for that purpose.

Smart v. Cottle, 59.

TIME.

(COMPUTATION OF.)

By the terms of an agreement, dated the 20th of September, money was to be paid within one month, and on the 21st of October the money was tendered by the party who was to pay. *Held*, sufficient, the day of the execution of the instrument being excluded in the computation of the time.

Barnes v. Boomer, 522.

TITLE.

See "Specific Performance," 1,8.

TRADE FIXTURES.

See "Injunction," 7.

TRUSTEES.

(TO SELL.)

Land was vested in trustees by a deed which provided, "that all or any part of the said messuages, tenements or premises, shall or may be absolutely sold and disposed of by the said trustees, or the survivor of them, his executors or administrators, with the consent in writing of the parties of the first and second parts (the *cestuis que trustent*) or the survivor of them, and after the decease of the said parties of the first and second parts, then in the discretion of the said parties of the third part, for any price which they, the trustees or trustee, shall think reasonable; and in case of such sale, the money to arise or be produced from the same shall be paid to the said trustees or the survivor of them, his executors or administrators, without any necessity or obligation on the part of the purchaser or purchasers thereof to see to the application of such money or any part thereof, so as he, she, or they, shall take the receipt or receipts of the said parties of the third part, or the survivor of them, his executors or administrators, or other only acting

trustee or trustees for the time being for the same money." One of the trustees died, and the other was released from the trust, and two others were appointed by the court in their stead. *Held* (per *Vankoughnet*, C., *Esten* and *Spragge*, V. CC., *dubitantibus*] on objections taken to an attempted sale of the trust estate vested in the new trustees, with the consent of the *cestuis que trustent*, that the power to sell was a personal trust and not transferable to the new trustees: and it appearing that the sale which had been effected, with the consent of the *cestuis que trustent*, was in reality a sale *to* one of themselves, the court dismissed a bill filed by the vendor seeking to enforce a contract for sale, but under the circumstances without costs.

Ridout v. Howland, 547.

TRUSTEE AND CESTUI QUE TRUST.

1. In a suit by *cestui que trust* against his trustees seeking, amongst other things, to obtain a conveyance of lands, it was alleged that three lots of land had been conveyed to trustees for the plaintiff and his sister, one of such lots having already been conveyed by the trustees to a purchaser at the request of the *cestuis que trustent*. The conveyance to the trustees was not produced, and the memorial shewed only a conveyance to the trustees, without expressing any trust. The court, under the circumstances, presumed that a trust had been declared as to all the lots, and gave relief to the plaintiff as to the two lots still vested in the trustees, and which the court held might be vested in the plaintiff by the decree in the cause, under the statute.

McDougall v. Bell, 283.

2. While the court will not exact from trustees, in the management of the estate, more careful conduct than a prudent man would bestow in the management of his property, still it requires from them full explanation of all their dealings and the causes which may have led to outstanding debts not having been collected, or to the disappearance of property belonging to the estate.

Chisholm v. Barnard, 479.

See "Ante Nuptial Settlement."

"Executors," 6.

"Presbyterian Church."

"Mortgage, &c." 13.

TRUST AND LOAN COMPANY.

See "Usurious Contract,"

UNDUE INFLUENCE.

See "Will," 2.

UNITED STATES OF AMERICA.

(MORTGAGE PAYABLE IN LAWFUL MONEY OF.)

A mortgage being payable in *lawful money of the United States of America*, the holder thereof, in seeking to foreclose, is entitled only to claim the amount in the current money of that country, or its equivalent at the time of default made in payment, or at any time subsequently at his option.

Morrell v. Ward, 231.

Crawford v. Beard, 15 U. C. C. P. R., page 87, approved of and followed. *Ib.*

USURIOUS CONTRACT.

1. Although the court will not interfere with any bargain that parties competent to contract may, since the repeal of the usury laws, make for the payment of interest, still in case any dispute in reference to such contract exists, it is the duty of the court to see that the parties to any agreement for the payment of exorbitant rates of interest, clearly understood what the bargain was before effect will be given to it. Where, therefore, on the loan of money it was agreed to pay at the rate of two per cent. a month in advance, and the lender in making up the account contended that the agreement being that it should be paid in advance was the same of two and a-half per cent. a month, and insisted upon his right to charge that sum, the court directed the Master to allow at the rate of two per cent, the effect of the interest being payable in advance not having been explained to the borrower.

Teeter v. St. John, 85.

2. The Trust and Loan Company being the holders of a mortgage bearing 8 per cent. interest, transferred the same to a private individual. *Held*, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the company only could legally have reserved such a rate of interest.

Reid v. Whitehead, 446.

VENDEE.

(OF THE CROWN.)

See "Crown."

VENDOR.

(DEATH OF, BEFORE COMPLETION CONVEYANCE.).

See "Specific Performance," 2.

VENUE.

See "Practice," 1, 2.

WATER-COURSE.

(DEFINED.)

See "Specific Performance," 10.

WILD LAND TAXES.

1. In 1851 a party purchased 50 acres of lands, upon which he settled and paid the assessments for 1852, and subsequent years, but the assessment for 1851 had not been paid, for the amount of which (£2 1s. 9d.) twenty-four acres of the property were sold in 1859 by the sheriff, under the warrant of the treasurer for the wild land assessment, when the same were purchased by one of the bailiffs in the employ of a former sheriff. The portion sold was worth £7 10s. per acre. Although there was not any direct evidence of combination amongst the audience to prevent competition, still their conduct was such as to lead to that opinion. The court under the circumstances, following the cases of Massingberd v. Montague, (ante volume ix., page 92,) and Henry v. Burness, (ante volume viii., page 345,) set the sale for taxes aside upon payment of the amount which would have been required to redeem the land within the year, and interest since that time; of the amount might be applied in part payment of the amount due upon a mortgage created on the land by the purchaser at the sale for taxes.

Templeton v. Lovell, 204.

2. Where at a sheriff's sale of land for taxes practices were indulged in by the audience which had the effect of checking fair and free competition, and the lands offered for sale were sacrificed, the court, in the absence of any direct proof of combination, granted relief to the owner of the land by setting aside the sale.

Logie v. Young, 217.

3. *Semble.*—It is the duty of the sheriff when he sees the intention of the legislature thwarted, by such practices, to declare to those guilty of them that he will not continue the sale under such circumstances, and that he will postpone it until a fair sale can be effected. *Ib.*

4 At a sale of land for taxes, the sheriff not having made himself acquainted with the land, its situation or the quality of the soil, was unable to correct an erroneous impression that prevailed among the audience at the auction as to the value of a lot, in consequence of which property that was worth £400 was sold as if doubtfully worth £20. On a bill filed to set aside the sale, *held*, that such omission of duty on the part of the sheriff was not a sufficient ground to disturb the sale to an innocent purchaser.

Logie v. Stayner, 222.

5. *Held*, that it would not be inferred that a sale which took place according to adjournment in the month of November, was necessarily affected by practices, on the part of the audience to prevent competition, which had been carried on at the sale in the month of October preceding, and from which the sale in November was adjourned.—*Ib.*

6. *Quære*—Whether a sheriff at a sale of land for taxes ought to permit a whole lot or piece of land to be sold in the first instance, where the value is greatly disproportioned to the amount of taxes due, without adjourning the sale, or taking some steps to protect the interests of the owner.

Scholfield v. Dickenson, 226.

7. *Quære*, also, whether a sheriff is justified in proceeding with a sale of land for taxes, when the audience evinces a determination to purchase nothing but entire lots, or act in any other way inconsistent with a proper sale. *Ib.*

8. The several cases which have occurred where sales for taxes have been set aside, on the ground of intimidation, or other undue practices preventing fair competition, approved of and concurred in. *Ib.*

9. Where the owner of land had not paid any taxes thereon for ten years, and did not redeem within the year, and suffered four years after the sale to elapse before taking any step to impeach the sale which had been made of his land, *held*, he was precluded by his laches from obtaining relief, supposing him to have been otherwise entitled to it. *Ib.*

10. It appearing on the evidence, though not mentioned in the pleadings, that the purchaser of land at a sheriff's sale for taxes was a mortgagee of the property, *held*, in dismissing a bill filed to set aside the purchase on the ground of undue practices at the sale, that it was unnecessary to reserve liberty to file a bill impeaching the sale on the ground that he was disqualified as mortgagee to effect the purchase for his own benefit. *Ib.*

WILFUL DEFAULT.

See "Executors," 6.

WILL.

(CONSTRUCTION OF.)

1. Where a testator directed his debts to be paid out of his "estate" and then bequeathed to his widow an annuity of £100, to be paid out of the proceeds of his "estate," and also bequeathed to her all his personal property; and further directed that the whole of his property should be sold by his executor at the death of his widow, and finally empowered his executor to sell such portions of his property as he might think best, for the purpose of liquidating any just claims due by the testator, at any time

that the executor might find it necessary to do so. *Held*, that the debts were charged upon the real estate as the primary fund.

Harrold v. Wallis, 167.

(SETTING ASIDE)

2. The mere fact that the influence was exercised by a wife or other person over the mind of a testator is not of itself sufficient to invalidate a will; such influence must amount to a control over his mind subjecting his mental will to the desire of another, so that the document executed as his will is not in reality *his* will, but that of another; the question in such case is, in what sense is the document the will of the testator? Where therefore the testator, an infirm man, 82 years of age, within the year preceding his decease made four wills, the two last on the 27th July and 8th September, and on the 14th of the same month died, and it was shewn that for some time he had been in a state of physical weakness, and suffering from disease of the brain; the medical and other testimony, however, going to establish that at the time of the execution of the will he was of a sufficiently sound and disposing mind to make a will; that the will of the 27th July was made by him while absent from his house, the latter while there, and under the control of his wife, who it was shewn had him entirely under subjection, and by whom the instructions for this will were given, and in whose presence the document was presented to him for execution, the evidence also shewing that for a long time he had been unable to resist her views with regard to any matters of business: and there being nothing to indicate any desire on his part to change the disposition of his estate made by the will of July: the court, upon a bill filed for that purpose, set aside the will of September, as having been obtained by the exercise of undue influence by the wife, and established that of July as being the proper last will of the testator, and ordered the widow who was largely benefitted under the will of September, to pay the costs of the cause.

Waterhouse v. Lee, 176.

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