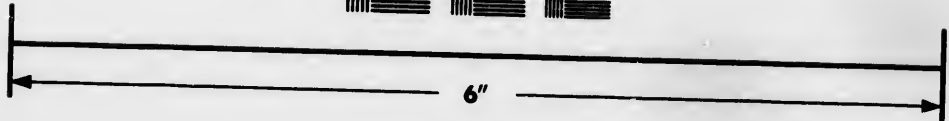
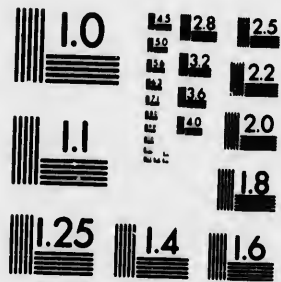


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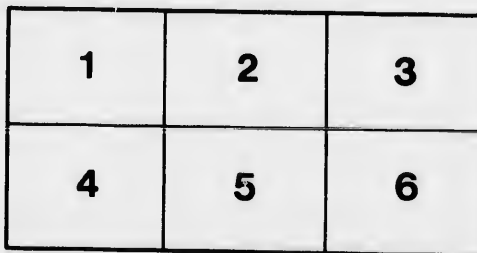
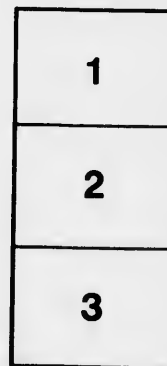
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REPORTS OF CASES

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SUPREME COURT
OF CANADA

IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

DURING THE YEAR 1858.

BY

ALEXANDER GRANT, ESQUIRE,
BARRISTER-AT-LAW.

==
SECOND EDITION.
==

VOLUME VI.

TORONTO:
R. CARSWELL,
26 AND 28 ADELAIDE STREET EAST.
1877.

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THE HON. SIR JOHN BEVERLY ROBINSON, BART., *Chief Justice of
Upper Canada.*

" " WILLIAM HUME BLAKE, *Chancellor.*

" " WILLIAM HENRY DRAPER, C.B., *Chief Justice of the
Court of Common Pleas.*

" " ARCHIBALD McLEAN, *Judge of the Court of Queen's
Bench.*

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

" " ROBERT EASTON BURNS, *Judge of the Court of Queen's
Bench.*

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

" " WILLIAM B. RICHARDS, *Judge of the Court of Common
Pleas.*

" " JOHN HAWKINS HAGARTY, *Judge of the Court of Common
Pleas.*

" " JOHN A. McDONALD, *Attorney General.*

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REPORTS OF CASES
 ADJUDGED IN THE
COURT OF CHANCERY

OF
 UPPER CANADA,
 COMMENCING IN MARCH, 1856.

IN APPEAL.

[Before the Hon. The Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice McLean, the Hon. Mr. Justice Draper, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Spragge, and the Hon. Mr. Justice Richards.]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

BOWES (DEFENDANT IN THE COURT BELOW) V. THE CITY OF TORONTO, (PLAINTIFFS IN THE COURT BELOW.)

Aug. 23, 25
 1855; and
 March 1, '56.

Trustees—Municipal Councillors.

The decree pronounced in this cause as reported ante vol. IV., page, 489, affirmed upon appeal: [The Chief Justice and McLean, J. dissenting.]

Mr. Connor, Q. C., and Mr. Gwynne, Q. C., for the appellant.

Statement.

Mr. Vankoughnet, Q. C., and Mr. Mowat, for the respondents.

SIR J. B. ROBINSON, BART., C. J.—The defendant was Mayor of Toronto in the years 1851 and 1852, Judgment.

v. Mc- 51

1856. and this suit was brought against him in March, 1853, not in the first instance by the City as plaintiffs, but by certain inhabitants of the city suing in their own names, on behalf of themselves and the other inhabitants.

Bowes
v.
City Toronto

By leave of the City Council, afterwards obtained, the city was substituted as plaintiffs in the room of the original plaintiffs.

The alleged ground of the suit is, that the defendant being Mayor, and a member of the Council, or governing body of the corporation, and as such, bound to consult the interest of the city, and to give them his assistance and advice, free from any bias of personal interest, he had, by his private dealings with other parties in certain transactions which are specified, placed himself in such a position that his interest conflicted with his duty to the Corporation; that, instead of making use in those transactions of whatever information and influence he possessed for the benefit of the city, and in such a manner as to obtain for it the most advantageous terms, he made use of them wrongfully for his own private gain, thereby acquiring a benefit to himself, which he might and ought to have procured for the city, or gaining for himself a sum of money which might and ought to have been saved to the city by the disinterested use of the knowledge which he possessed, and by his employing on behalf of the city, instead of for himself, the influence and credit which he derived from his official position; and that the council, ignorant of his having any personal pecuniary interest in the measures which he proposed for their adoption, were influenced by his judgment and advice, believing it to be unbiassed, and were thus drawn into measures which were injurious to the city. The bill sets forth the particular transactions referred to, and shows that they resulted in the corporation consenting to assume a liability

Judgment.

to certain individuals in the sum of 50,000*l.*, for which, under the sanction of a provincial statute obtained for that purpose, and under the provisions of a by-law of their own, they issued their debentures, binding the corporation to pay the 50,000*l.*

1856.
Bowes
v.
City Toronto

And the plaintiffs charge that by an agreement made with the individuals into whose hands these debentures came, or for whose benefit they were intended to be issued, the defendant and another with whom he was associated in the transaction, purchased the debentures from such individuals at a large discount, and afterwards sold them for their full nominal value, by which the defendant made for himself a profit upon the transaction of about 5,000*l.*

It is charged that the agreement made by the defendant (while Mayor) for purchasing these debentures was made not only before they were issued, but even before those measures which led to their being issued were matured, and in fact before such measures had been discussed, or proposed in the council, as they afterwards were by himself; that he concealed from the council his negotiations for the purchase of the debentures, and the knowledge which he had acquired of the terms upon which they could be sold in the English market; and used his influence as Mayor in procuring the passing of the resolutions and by-laws which led to the issuing of the debentures, though he knew that such debentures would, under the agreement which he had already made with those who were to receive them, pass into his own hands at a large discount.

The plaintiffs complain that this conduct of the defendant was a violation of the duties imposed by the fiduciary relation in which he stood to the city as Mayor and member of the Common Council; they assert that the profit which he has made by the sale of the debentures,

1856. *has been wrongfully and illegally diverted from the funds and uses of the city, and that he persists in illegally holding it to his own use and benefit without accounting to the corporation for it.*

Bowes
v:
City Toronto

They pray that he may be decreed to *restore and repay* to the corporation the funds which he had *so diverted* and misappropriated.

The defendant—while in his answer last filed he does not admit nor distinctly deny except in some particulars, not perhaps material to the decision of this case, that everything took place as the plaintiffs have set forth—denies that he used his official influence in any manner with a view to the promotion of his private interests, or that he did in any respect deceive or mislead the council.

He asserts that whatever was done by the council in the matters referred to, or by himself, as Mayor or member of the council, was done solely upon public grounds, and with a view to public interests; that the arrangements which the council did enter into respecting the matters referred to were clearly for the advantage of the city, and in no manner injurious to its interests, but very much the reverse.

He alleges that the corporation of the city, though they have sanctioned the use of their name in this proceeding, have been always in fact, and still are, well contented with the measures which led to the issuing of the debentures purchased by the defendant, or by the defendant and his partner, jointly with another person, and that they by no means desire to have the arrangement cancelled; if that were practicable.

He denies to a certain extent the concealment charged against him; and accounts for any degree of reserve

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which he did maintain in regard to the transaction by motives of delicacy towards the party associated with him, prompted by considerations having no reference, as he states, to the interests of the city, and not arising from any consciousness on the part of the defendant that his conduct in these matters was in itself improper upon any grounds.

1836.
Bowes
v.
City Toronto

He contends that notwithstanding his being Mayor, he was as much at liberty as any other individual to purchase the debentures from the persons whose property they were; and that the profit which he made upon the resale of them can, upon no principle, be claimed as belonging to the City of Toronto; for that he was not acting, and could not in the nature of things be supposed or expected to be acting, on behalf of the city in making such purchase.

He claims, in short, to have the purchase made by him of the debentures, on behalf, as he alleges, of himself and his partner, and of the other party to the transaction, *Mr. Hincks*, treated and considered as an ordinary transaction of business, into which he was as much at liberty to enter, notwithstanding his connection with the corporation, as any other person in the community; and insists that whatever profit he has made by it can give rise to no question, and can be a matter of no interest or concern except as between himself and the parties from whom he purchased; which parties he affirms were and always have been perfectly content with the sale which they made of their own property, and do not complain, or pretend that they have been treated in any respect unjustly in the transaction.

This is a more general outline of the case: the evidence is very voluminous, but the principal facts are exceedingly well stated in the judgment given by the Chancellor, when the case was disposed of in his

1356. court, in which he brings very clearly into view all that it appears to me it can be necessary for us to consider.

Bowen
v.
City Toronto

I have made, for my own satisfaction, a minute analysis of all the evidence, but it would be tedious, and is quite unnecessary to recapitulate it here. The whole of the testimony has been long in print, and can easily be referred to; and all the facts in it are already familiarly known to those whose interests are involved in the controversy.

I have carefully read all that has been laid before us; and have consulted the authorities to which we were referred, and any others from which I could hope to receive assistance.

Judgment. I have already intimated that in the short narrative of the transaction given in the judgment pronounced in the Court of Chancery I find the leading facts accurately stated; and I will add that I agree in the inferences drawn by the learned judges of that court from the evidence upon two points which it had been contended were not clearly established. I think with them that on a view of the testimony, it can scarcely be doubted that before the passing of the by-law of 28th June, 1852, the defendant had an understanding with the railway contractors, Messrs. *Story & Co.*, that he would purchase from them at a discount of twenty per cent. the debentures which should come into their hands on account of the 25,000*l.* bonus and the 35,000*l.* loan agreed to be made by the corporation; or, that he had at least ascertained that he might have them on those terms if he pleased. I think also that when the arrangement which was then in force between the company and city council was changed by substituting an agreement to take 50,000*l.* stock for the city, instead of the existing agreement respecting the donation of 25,000*l.* and the loan of 35,000*l.*, the

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defendant received, without any new agreement between him and the contractors, and therefore, as we must suppose, in pursuance of an understanding previously come to between them, the debentures for 50,000*l.*, which were issued in consequence of the adoption of the new measure.

1856.

Bowes
v.
City Toronto

I do not see how what was done by the parties can be reasonably accounted for upon any other supposition.

I do not think the learned judges below have stated at all too strongly the obligation which rests upon those who compose the governing body of a corporation to keep themselves free from such transactions on their own individual account as may place their private interest in conflict with their public duty; or that they have laid too much stress upon the injurious consequences which must result from a general disregard of the obligation; though they seem to have felt less difficulty than I confess I feel, as to the extent to which a court of equity can insist upon this salutary rule being observed. What I mean by this I shall endeavor hereafter to explain; only adding here that I apprehend there are many cases in which the directors of corporate bodies and persons acting in other public capacities are permitted to have transactions as individuals which it can be easily seen must, or at least may, have the effect of placing their own private interest in opposition to those public interests of which they are guardians.

In what has been said in pronouncing judgment in reference to the course pursued by the defendant in this particular case, I see nothing from which I would willingly be thought to differ—I mean in regard to its injurious tendency in shaking the confidence of all persons in the acts and resolutions of the council, and in impairing the confidence which ought to subsist between the mayor and

1856. those associated with him in guarding and preserving the public interests of the city. I say this not with reference to the mere fact of the defendant having purchased city debentures from the holders of them, but upon a view of the whole conduct of the defendant—considering what he did, and had agreed to do, and had concerted with others, not only before the debentures were issued, but before even the measures were passed or discussed which led to the creation of those particular debentures.

Bowes
v.
City Toronto

There are strong indications indeed, in the evidence, that those who were concerned in the transaction thought it desirable from some reason that it should not appear to the world to be just such a transaction as it was, for it was studiously kept from public view.

The discovery made afterwards of what had been laid open at the time was likely to excite such suspicions as it did excite. Yet I do not feel myself justified in inferring from the defendant's omission to disclose to the Council the exact position in which he stood, or even from his failing to do so when directly appealed to, that he was certainly under the impression that he was doing anything that was contrary to law or equity; or which the corporation, if it had been made known to them, would have condemned, or would have endeavored to prevent.

Judgment.

He assigns reasons for his reserve and for the denial of the position in which he stood, which are confirmed by evidence; and we can easily imagine other reasons which might incline him to that course without his being under the impression that in buying the debentures from the holders, he would be doing anything that was prohibited or that was inconsistent with morality or a proper sense of duty.

There would be more difficulty in understanding how

he could think it a proper course as regarded himself, or the Corporation, that he should, while certain measures were yet to be considered by the Council, and before he had proposed them, he engaged in a negotiation from which he hoped to derive a private gain, though the success of it must materially depend upon the adoption of measures by the Council which he was yet to propose to them, and which ought only to have been proposed by the Council, and disposed of by them on public grounds.

1856.

Bowes
v.
City Toronto.

I can readily believe, and indeed it is my impression from the evidence, that neither the defendant nor Mr. *Hincks* desired or imagined that the effect of the agreement which they were entering into with Messrs. *Story & Co.*, or what they proposed to do under it, would be injurious to the city, or to any one. There was no good ground, I think, for such an apprehension. I do not believe that they were contriving to procure a gain for themselves at the expense of the city; or that they have done so; nor do I infer from the evidence that the defendant intended or desired to draw the Council into any measure adverse to the best interests of the city; or that it can now, after we have seen everything, be imputed to him with any justice that he has done that, or attempted to do it. The evidence appears to me to shew the contrary very clearly.

Judgment.

But I must still say that, taking the transaction in all its parts, it was one which had far better not have taken place; and it is probable the defendant may have now the same opinion of it, seeing the suspicions, the discussions and contentions to which has given rise—the unfavorable inferences which have been drawn from the silence which he thought necessary to observe; and knowing, as we all must, the importance of mutual confidence and harmony in conducting the proceedings of these municipal bodies.

1860.
 Bowers
 v.
 City Toronto

But allowing their full force to all such considerations of morality and public policy, we have yet to consider the question in its legal aspect—I mean, in reference to the law which is administered in courts of equity.

To support the plaintiffs' case two things are necessary to be established: 1st. That the defendant has done something which a court of equity not only discounts and disapproves of, but which it cannot allow to stand, so far as the defendant's acts, or their consequences, are yet within the control of the court. 2ndly. That out of this conduct of the defendant an equitable claim arises to the plaintiffs to have the profit which he has made by his alleged wrongful conduct paid over to their use.

Upon the first point many cases were cited at the bar, and were relied upon by the court below as supporting their judgment. I have looked into them all—some of them are leading and familiar cases on the doctrine of constructive or implied trusts. They are, no doubt, cases of the highest authority; the language used in them by the courts is plain and unmistakeable, and, with one or two exceptions, perfectly consistent.

The doctrine which they establish is as well settled, perhaps, as any other known to the law. It was expressed by Lord Eldon in *Cook v. Collingridge* (a), in the most comprehensive terms, when he said, "the law will not permit parties invested with a trust to deal with it so as to benefit themselves." This rule of equity, as it has been ordinarily applied, is so free from doubt that any difficulty in dealing with a case like that before us must turn upon the question of the proper and reasonable application of the principle to the facts of the particular case.

I do not doubt that the principle, as I have just stated

(a) Jacob 620.

it in the words used by Lord *Eldon*, is not to be confined to the case of one or more private individuals who have been by some express appointment constituted trustees, or agents for others, to buy and sell property, or to transact any other business for them. An express appointment to be trustee is not necessary to constitute the relation of trustee in the view of equity, or impose the responsibility attached to it.

1856.

Bowes
v.
City Toronto

I think it clear, too, that the directors or members of the governing body of a corporation may be regarded and treated (as in some cases they have been), as trustees for those whose property and interests are committed to their management; for instance, as trustee for the shareholders in what are called trading corporations.

If such directors misapply the estates or funds of the corporation, "or deal with their trust" (to use Lord *Eldon's* words) "so as to benefit themselves," I have no doubt they are within the control of a court of equity, as other trustees are; by which I understand to be meant in general, though perhaps not exclusively, if *they deal with the estates or funds* of the institution so as to benefit themselves. Judgment.

In enforcing the doctrine that I have just stated, courts of equity have often used the very comprehensive language which the plaintiffs rely upon as supporting their case; and have declared it to be a plain violation of the duty of a trustee to place himself in any position which shall bring his own interest in conflict with that of his *cestui que trust*.

That language, however, we must remember, has been commonly, if not always, used in cases where the plainest principles of equity have been violated; as where a trustee or agent has sold to himself the property which he

1856. has been intrusted to dispose of—or has acquired from
 others for himself, what it was his duty to have acquired
 for his principal; or has bought from his principal, or
 has sold to his principal, which, according to circum-
 stances he may, or may not be permitted to do. In that
 class of cases I do not doubt that the principle is to be
 applied to the members of a governing body of a corpora-
 tion, viewing them in the light of trustees acting for the
 shareholders. And it is not in the case of trading corpora-
 tions only that the principle is to be applied, but equally
 to the members of the council of a municipal corporation
 created for the purposes of local government, but having
 also, all such bodies ordinarily have, property and pecuni-
 ary interests to preserve and manage.

I mean, that when a member of such a council
 violates the rule in any such particular as I have men-
 tioned, he would hold the estate or property of any
 kind which he has acquired subject to the same equity,
 as any trustee would hold it under similar circum-
 stances.

Judgment.

But I am not yet prepared to say that no act of such a
 trustee, by which his private interest may be said to be
 brought into conflict with his duty as trustee, can be al-
 lowed to stand; because in practice, I believe members of
 the governing body of a corporation are openly allow-
 ed, and without question, to do acts which one can
 easily see may place their private interest in conflict
 with their duty; and that such acts are not unfrequent-
 ly the subject of discussion in courts of justice, without
 its being contended or imagined that they are necessarily
 invalid.

For instance, the directors of a bank discount notes
 for a director as well as for others; and we have seen
 the expediency discussed of the legislature placing
 some limit to the extent to which directors shall obtain

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accommodation. So an insurance company, even when it is not established upon the principle of mutual assurance, will, I believe, as readily grant a policy to one of the directors of the company as to a stranger.

1856.

Bowes
v.
City Toronto

Yet it is quite evident that the director procuring the discount in the one case, or the policy of insurance in the other, may very possibly have a motive in misleading the board of which he is a member by inducing them to discount a note or accept a risk which he may know to be more doubtful in its character than they imagine it to be.

It would be easy to state other cases in which a member of the governing body of what are called trading corporations may have transactions which may place his interest in conflict with his duty to the corporation, and in which nevertheless, where no fraud can be shewn to have been practised, such transactions have not hitherto been taken to be void, nor could be so held, perhaps, without creating an inconvenience greater than any evil likely to arise from permitting such transactions. Judgment.

Without pretending to say where or how a line could be drawn, or even expressing a settled opinion that any of such transactions as I have just mentioned would certainly be held valid by a court of equity, I wish only to express my doubt whether we can safely give so universal an application as we are asked in this case to give, to the principle which is often announced in adjudged cases, "that he who is intrusted with the business of others cannot be allowed to make such business an object of interest to himself;"—for, though I can readily perceive that abuses are very likely to creep in where such conflicting interests are allowed to co-exist, still I am not yet satisfied that the doctrine has been, or is to be, applied so literally as to prohibit members of a municipal or other

1856. corporation from purchasing from the holder any of the debentures of the corporation which have been issued as public securities payable to bearer, and that upon the sole ground of the supposed disqualification under the general rule of equity, every such purchase must necessarily be void.

Bowes
City Toronto

When the objection to such dealings by the members of a municipal corporation is urged upon us as applying with greater force, on account of the important considerations of public policy which may undoubtedly with good reason be pressed into the argument, I confess I find the difficulty increased either in giving to the rule of equity relied upon an universal application, or in drawing any line which can enable us to distinguish satisfactorily, without reference to anything in the peculiar circumstances of the particular case, where the transaction can be allowed to stand, and where it cannot.

Judgment. As to certain classes of cases which might occur in connection with such corporations, I have already said that I have no doubt a court of equity should decide them to be within their rule for the protection of *cestuis que trustent*; so that the member of the council involving himself in such transactions could neither call in aid the powers of a court of equity to enforce them, nor be allowed even to retain any advantage which he had acquired.

The cases to which I now allude are such cases as might arise between ordinary agents and their principals—I mean cases where the member of a corporation may be found to have applied its funds in purchasing property for himself, or in carrying on any private speculation of his own, or when he has acted unfaithfully in alienating the property of the corporation; or has had transactions on his own account which he ought to have conducted on theirs.

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But when we come to corporations created for purposes of government, and having large legislative powers to be exercised in their locality, I find the difficulty increased in applying as an universal rule the maxim I have cited, though I have no doubt it has been most properly applied in every case in which I have seen it announced.

1856.

Bewes
v.
City Toronto

The same consideration of public policy which could be urged in the case of municipal corporations could be urged with greater force in regard to members of the supreme legislature of the country.—“That he who is intrusted with the business of others cannot be allowed to make such business an object of interest to himself,” seems a wise and reasonable rule; but it is, I apprehend, rather unguardedly expressed, if it was intended to be applied to persons intrusted with the interests of others in all situations, and under all circumstances, and without reference to the description of transaction or conduct by which they may make their dealing with the business of others an object of interest to themselves. Judgment.

Take, for instance, the case of members of the supreme legislature sanctioning by their votes a loan to be raised upon public securities; they are certainly not disabled from purchasing such securities when they are fairly in the market; though there is nothing impossible in their being actuated by the prospect of a pecuniary gain in sanctioning the measures which led to the creation of the securities.

In the location of county towns, and county gaols and court-houses, it would be absurd to expect that the votes of the legislators upon such questions should be always free from expectations of private gain. It cannot be denied, that the prospect of a particular advantage is constantly observed to produce an eagerness in promoting one measure or another of this kind, and sometimes an equal eagerness in opposing it.

1856.
 Bowes
 v.
 City Toronto

The imposition of particular duties of customs, or the abolition of them, or the encouragement of any branch of trade, can hardly fail to be an object of great and direct interest to many merchants who in Parliament vote upon such measures or even propose them. Railways and canals have not been promoted in England or in this country wholly by the votes of persons who could have no private interests which might conflict with their public duty, or who had not acquired rights and interests with the express view of being benefited by those improvements which they were publicly advocating, and while the question of their being undertaken and sanctioned by the Legislature was not yet determined.

It would be a very slowly progressing country, I apprehend, in which all public enterprises and improvements should be left to be suggested and advanced by those who neither had, nor believed they had, any personal pecuniary interest in pushing them forward, or who, while they were intrusted with the public duty, acquired no interest which could be affected by the course which they might publicly take on such occasions as I now allude to.

Doubtless wherever there is a conflict of interest and duty, there is much danger of abuse—much inconvenience indeed, to use no stronger term, of which the public is constantly feeling the effects; but this cannot be avoided, I fear, without confining men in their transactions within a narrower field than has been found practicable.

It may be said that there is great difference in principle between the supreme legislature of the country and these municipal corporations, although the latter have very important legislative authority within their respective municipalities. We know that the latter are subject to the supervision and control in many

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respects, of the courts of justice, while the former is not. We know also, that it is a maxim in regard to the Parliament of a country, that its public acts can never be impugned by surmising that they have been passed under any corrupt or undue influence. But, without being prepared to admit that this principle does not apply in any degree to the legislative measures of municipal bodies, I see other reasons which lead me to doubt at present whether the sound equitable principal which seeks to prevent, in all cases between agents and their principals, or trustees and their *cestuis que trust*, the acquisition of any interest which may conflict with their duty, can be applied to public bodies so indiscriminately as we are desired to apply it.

1856.
Bowes
v.
City Toronto

I say this, however, without meaning to express any opinion as to what conclusion certain circumstances of misconduct in this, or in any other case, may authorise a court of equity to come to, in regard to the validity of a particular transaction, by which a member of a municipal council has acquired property that may raise in him an interest in opposition to his duty. That is quite another question. Judgment.

I only say that I do not yet feel myself justified by any case or authority I have met with in holding, that a member of a municipal council in purchasing, after they have issued, debentures which he concurred by his vote in authorising to be issued, has made a purchase which cannot be allowed to stand.

Whether such a purchase should be held valid in a case in which the councillor making it had stipulated with the person to whom the debentures were expected to be issued for certain terms of evident advantage to himself, before the measures which required the issue of the debentures had been passed, and when he himself has afterwards proposed and advocated the mea-

1856. ^{Bowes}
v.
City Toronto

sures which enabled him to carry into effect his contemplated operation, is another question—whether a purchase made under such circumstances would inevitably raise the presumption of what is called legal fraud, which is an imputation distinct from any charge of actual fraudulent conduct or intention, would be the point to be determined.

As to any actual fraud being practised or intended by the defendant in this case, it was hardly meant, I think, to be insisted upon in the argument, except so far as the concealment spoken of may be looked upon as a fraud upon the corporation; and we can see, I think, very plainly upon the evidence, that nobody has been in fact defrauded by the defendant, and that neither the plaintiffs nor others have suffered any injury. While I say this, I must not forget to add, that in cases where the rule in equity plainly applies, I take it to be clear, that there is no necessity for proving any actual fraud or fraudulent intention, or to shew that any injury has been produced by the transaction which is complained of as violating the rule.

Judgment.

It is enough that in such cases courts of equity, from a jealous regard to the necessity of enforcing integrity of conduct under circumstances of peculiar temptation, and where individuals cannot adequately protect themselves, have determined to hold the transactions absolutely invalid; and this without having any proof of actual fraud, or of injury, which proof (whatever may have been the facts) it might in many cases be difficult to supply. The rule itself has in a multitude of instances been enforced and its necessity illustrated by eminent equity judges, in language of more than usual force and eloquence. If I could hold this to be as plain a case of constructive trust as any of those in which I have found such language used, I could have no doubt about the application of the rule; but at present I consider that the

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1856.

Howes
v.
City Toronto

purchase by the defendant from a third party of debentures which were no property of the corporation, but merely evidences of debts due by them, was not a transaction forbidden by the rules of equity, merely on the ground of a supposed relation of trustee between the defendant and those for whom, or with whom, he was acting, as a member of the council. In what I am now saying of a member of the council purchasing debentures, I speak without reference to the particular circumstances of this case, which it will be necessary hereafter to consider.

I understood it to be contended in the argument that any purchase of debentures of a corporation by a member of the corporation which had authorised them to be issued would, in the view of a court of equity, be illegal, more by reason of the fiduciary relation in which the member of the council stands to the corporation; but I apprehend that we should not be borne out by authority in taking such a position.

Judgment.

Whether we should be or not, depends upon nothing peculiar in the state of the law in Upper Canada.

If it would not be permitted in England, it should as little be permitted here; and there is no consideration of morality or public policy that would not apply as strongly in one country as in the other.

There have been, no doubt, enough of parallel cases in England. For instance, the various statutes that have been passed (51 Geo. III. ch. 64, and others,) authorising the East India Company from time to time to raise money upon their bonds, transferable by delivery, have given rise to securities of the same nature as the debentures of our municipal bodies. If it has been determined there, or has been generally assumed, that a director of the East India Company could not become the purchaser of such

1856. bonds from any holder of them, and if any one who has made such a purchase has been decreed to account to the Company for what he has made upon a re-sale of the bonds, that would go far to determine this case. But I do not imagine that any prohibition against such purchases and sales has been supposed to exist, or we could hardly fail to find some trace of it. The books are so full of cases which have arisen from the plainest and most flagrant breaches of trust, that it is not likely that there would not have been some instances either in regard to East India bonds or similar securities, in which the rules of equity (if they extended to the case) had been violated by making purchases that would have given rise to some proceeding like that before us. But I have found no such case.

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Judgment. The Imperial statute 5 & 6 Vic., ch. 104, in the first section, and in other parts of the act, seems indeed to afford evidence that the purchase by members of a municipal council of the securities issued by the corporation was not regarded by Parliament as being illegal, and was not intended to be made so. I am under the impression, though in that respect I may be in error, that there is no more legal impediment in the way of members of a municipal corporation in England purchasing in the market any transferable securities which the corporation may have been authorized to issue, than there is in the way of members of either house of Parliament purchasing exchequer bills, or the members of our own legislature purchasing provincial debentures.

As to what has been the practice in Canada upon that point, I believe there can be little doubt. From the extensive powers given to our municipal councils to carry on various expensive improvements, which can only be effected by means of loans, we see them in all parts of the province issuing debentures under regula-

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tions wisely devised to prevent improvidence, and to secure those who may advance their money upon them. I certainly have no particular knowledge upon the point; but from anything that I have heard judicially or otherwise I do not imagine that any member of these councils has thought himself precluded from dealing in these debentures. I mean, of course, in those issued by the corporation to which he belongs. I doubt not that such purchases have been frequent by members of county or township councils, as well as those of cities; and I am not aware that they have ever been thought open to doubt or question before this suit was instituted.

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Y.
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There are many gentlemen in these councils, I dare say, who have abstained from making such purchases as a matter of speculation, (as people deal in stocks,) from a feeling that it would not be delicate or proper, and from an unwillingness to expose themselves to such suspicions as an extensive traffic of that kind would be very likely to give rise to.

There are few municipal councillors, however, I believe, who would hesitate to purchase a debenture as an investment, and perhaps no one who would hesitate to receive one from his debtor in payment of his debt. But if such a purchase could in any case be made without violating the rules of equity, we could hardly draw a line as to the number of debentures that might be bought, or a line that would make the transaction legal or not, according to the inducements for buying them.

I think there is no rule of law or equity that prohibits such purchases; and if it be not unlawful for the members of municipal councils to buy debentures, (as I believe it is not), it cannot be unlawful for them to sell them; and any person by whom they can be lawfully bought and sold must be entitled to the profit which he

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may make on the transaction. And even if such transactions were, in view of a court of equity, inadmissible, though it would follow as a consequence that equity would not lend its aid to any person engaged in them, in order to give him the benefit of his contract; yet I do not consider that it would follow of course, as another consequence, that the profit which had been made by such a transaction, without any use of the corporate funds, would be held to belong to the corporation.

In any such case the profit would not be made upon funds of the corporation, applied by the individual for his own benefit, and the foundation would be wanting of such a decree as is usually made in cases of the description cited at the bar.

In the case before us the debentures acquired by the defendant were the property of Messrs. *Story & Co.*, from whom he bought them. Those parties were free to dispose of them to any one, and the defendant stood in no relation to them which could interfere with his buying from them their own property. When the corporation had issued them, and deposited them in the bank by the desire of the contractors, they had nothing further to do with them but to pay them when they fell due, and to pay the interest in the meantime.

They could never, under any circumstances, be made to pay more than the debentures bound them to pay, and could not expect to be relieved from their obligation by paying less.

It signified nothing to the Corporation at what price they might be sold by the contractors, except as they might feel sympathy with the efforts of the railway company to carry forward the great work they were engaged in, and sympathy with the contractors, who were laboring, as we see from the evidence, under perplexing om-

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barrassments; and as they might wish, for the sake of the work itself, that their debentures should be disposed of at as small a sacrifice as possible.

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But it is clear from the evidence that the City has nothing to regret on that point, for the contractors have declared themselves to be perfectly content with the price they got for their debentures. They never expected more; and having made allowance in their contract for the discount which there was every reason to suppose they would have to submit to upon the debentures which they agreed to take, they got in effect what they gave for them, and so were in reality not losers. It is of little consequence, however, to discuss here in a court of justice what the defendant, as a member of the common council, was or was not at liberty to do, except in connection with the relief sought by this bill. What we have properly to determine is, whether, taking the least favorable view of the defendant's conduct that can fairly be taken upon the evidence, it is within the province of a court of equity to direct that he shall pay over to the Corporation of the City of Toronto the profit which he admits himself to have made in the transaction complained of, as being money for which he should be held accountable to the Corporation.

Judgment.

The decree which has been made in the cause declares the defendant to have been, and to be, a trustee of the City of Toronto of the profit received by him from the sale of the debentures in question in this cause, (which profit has been ascertained, I think, to be 4115*l.* 17*s.* 3*d.*, and not 5000*l.* as assumed in the bill), and it directs that this sum, with interest from the time it was received to the date of the decree, shall be paid by the defendant to the plaintiffs within ten days after the service of the decree.

That sum, with interest, amounted at the time to 4522*l.*

1856. 10s. 3d.; and the interest that has been since running would bring it at present so nearly to the 5000*l.*, if not indeed beyond it, that we shall not depart much from the fact, if, for the convenience of round numbers, we speak of the sum in question as 5000*l.* which the plaintiffs assume in their bill.

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If the defendant had not yet received his contemplated profit, and had occasion to call in the aid of a court of equity to compel the performance by the contractors, or the railway company, or the city, of some engagement or duty, in order that he might be put in possession of his 5000*l.*; and if the question to be determined was whether he should receive the assistance of the court for that purpose or not, we might perhaps feel no reluctance, and find no difficulty in holding that the transaction was one which a court of equity should do its utmost to discountenance, and that the defendant might therefore properly be left to take his chance of his remedy

Judgment, at law.

There might even be found no difficulty (though that would require more consideration) in going further, and restraining the party by injunction from suing at law upon any such contract. I am not prepared to say that a court of equity would certainly find themselves warranted upon the evidence before us in thus interposing; but we must bear in mind that the probable effect of such a course would be simply to prevent the plaintiff from receiving his expected gain, though according to circumstances it might possibly leave him in a worse position; in which case the propriety of restraining the party from pursuing his legal remedy might be thought to require more consideration.

The defendant, however, in the case before us is under no necessity for applying for the aid of any court. The transaction is ended; he has received his expected profit,

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and as we now see, with the full consent, deliberately expressed after a knowledge of the circumstances, of the persons out of whose pockets that profit came. For all that we can judicially know in such a case, the defendant has not only received the money, but has spent it. It is no inconsiderable sum. The decree to pay that amount in ten days, or at any time, might be attended with ruin to some parties, while as to others its effect might only be to make them so much the less rich; but this, at any rate, we must consider, that whenever it is right to pronounce such a decree it will be right also, according to the ordinary practice in courts of equity, to imprison the defendant for contempt till he complies with it; at least, if no other means can be found for compelling payment of the money.

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We are bound, therefore, to satisfy ourselves that the claim of the plaintiffs in this case to have the 5000*l.* paid over to them clearly rests upon a good foundation, before we can give judgment in their favor.

Judgment.

I have already observed that I did not understand the plaintiffs' counsel on the argument to contend that the evidence established any actual, positive fraud on the part of the defendant, further than by urging that for the defendant to acquire the private interest which he did acquire, and under such circumstances as were proved, and to conceal the position in which he stood from the corporation of which he was a member, and indeed the head, was in effect a fraud upon the corporation, inasmuch as it left the council to suppose that in the propositions which he made to them, and in the discussions connected with them, he was like the other members, unbiassed by personal interest, and was consulting only the welfare of the city, while on the contrary, he was at that time contriving and forwarding a speculation out of which he expected to reap a large gain for himself.

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How far that argument can, in my opinion, be relied on for sustaining the plaintiffs' case, I shall endeavor to explain, but I will first consider the other and more general ground upon which the case has been put to us, and upon which it is contended that the decree may be supported without reference to the intention with which the defendant acted, or to the fairness or unfairness of his conduct in any particular part of the transaction, and independently also of any consideration as to whether the city did or did not sustain any disadvantage upon the whole arrangement.

Without doubt there are cases in which courts of equity, acting upon principles to which they will admit no exceptions, hold trustees to so stringent a rule, and constitute parties trustees by such rigid maxims, that without inquiring into their intentions, or whether they have gained, or others lost by the transactions complained of, they will, so far as they can, set aside all that has been done contrary to their established principles; will replace matters upon their former footing, and will deprive the trustee, or the person whom they resolve to treat as a trustee, of whatever advantage he may have acquired by violating the rules of equity.

Judgment.

If it be plain that this is one of those cases, then it can be easily disposed of; but that is a conclusion to which we must come quite clearly before we venture to act upon it.

In the argument of the case before us the plaintiffs' counsel took this broad ground, that the defendant being mayor of the city, and a member of the council at the time of these transactions, it was, in the view of a court of equity, absolutely incompatible with his position to engage in them; that any gain which he acquired for himself by buying and selling the debentures of the city, was acquired in violation of the duties imposed by the fidu-

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ciary relation in which he stood to the city, and that he cannot therefore be allowed to retain it, and must as an inevitable consequence be ordered to pay it over to the corporation.

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v.
City Toronto

If this view of the case be correct, then no doubt it is immaterial that we should look closely into the particular circumstances of the case. But I cannot say that I think the general principle relied upon has in this case been rightly applied; though I must and do distrust my own judgment when I express this doubt, because I am not sure that the argument to its full extent is not acceded to in the judgment which has been pronounced below.

What I mean to say is, that I do not think the plaintiffs' case can be supported upon this ground, for I am not satisfied that the defendant being mayor of the city, and a member of the common council, came so far within the rule which disables trustees or agents from dealing on their own account in the property intrusted to their care and management, that he could not be permitted to buy city debentures from the holder of them, and to resell them on his own account, but must be considered as holding them in trust for the city, on being paid what they cost him, and must be held accountable to the city for whatever profit he may have made on negotiating them. I am now supposing a case of such a purchase made under the most ordinary circumstances, and without any imputation of sinister management. Judgment.

I did not observe that much, if any, stress was laid in the argument upon the fact of the defendant being mayor. It seemed rather to be admitted that if the mayor could not traffic in city debentures, no other member of the City Council could do it. The mayor, as I gather from the evidence, votes in committee; but while presiding in the council he has no voice unless

1856. where the votes are equal. So far then, he has less direct influence upon the disposal of business before the council than the other members, while from the more elevated position which he occupies he may indirectly have more influence; and on some occasions the chief magistrate of the city, and no doubt as he is may be regarded as representing it, whatever it would be unbecoming in any member of the council to do, simply because he is a member, the mayor ought to be more above doing, because he fills in the eye of the public a more prominent position, and his example would be more pernicious.

But it is not assumed, I think, that the mayor is, in any peculiar manner, a financial officer of the city or that as to the legal consequences, there is any ground for making a difference in the matter which I am speaking of, between him and the other members of the council.

Judgment.

Then, in considering the question which I am now discussing, I do not apprehend, as I have already stated, that there is any difficulty occasioned by our being called upon to deal with the defendant not as a private individual standing in a fiduciary relation to some other individual, but as a member of a corporate body and employed with others in managing its affairs; if the corporation were what is called a trading corporation, we could imagine no good reason why its officers, and the members who compose its governing body, having under their charge the property and interests of those for whom they are acting, should not be within the salutary control of courts of equity, for the purpose of enforcing a correct performance of their trust.

The cases which have been cited are conclusive to shew that they are held to be within the rules and principles referred to, and in reason there should be no difference.

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So also I have already stated that as to municipal bodies, like the corporation which has been made plaintiffs in this cause, where similar questions are presented, as they may be, I can see no reason why they should not receive the same decision as in the case of other corporations. They may all have funds and property to manage, and interests to preserve and to promote; the same grounds may be afforded for suspecting abuse, and the same opportunities and temptations presented for dishonest practices as in trading corporations, though not in so many instances perhaps, nor to the same extent. I have already said that I do not doubt the correctness of the conclusions which were come to in the Court of Chancery upon those points. My difficulty is, that I apprehend that in directing the profit on the sale of the debentures to be paid to the corporation, the court have given a more wide and indiscriminate application than is supported by reason or authority to the principle, that whenever a man who stands in any fiduciary relation as trustee or otherwise makes use of his position to procure a gain to himself he cannot be allowed to retain it. Judgment.

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v.
City Toronto

To extend the application of that principle to the case of any member of the Common Council making a purchase under the same circumstances as any other individual might do of the debentures issued by the city would, I think, be pushing it too far. For, in the first place, his case is not analogous to that of a trustee or agent buying for himself the property which he is intrusted to dispose of to the best advantage for his principal. If it were, then it would be a perfectly plain case. But it seems to me that it would be a perversion of terms to say that in such a transaction the member of a city council is like a trustee selling the trust property to himself. He does not sell the debenture to himself; he buys it from the holders, who bought it from the corporation, or from some person to whom they had previously sold it, and

1856. who having given value for the debenture, as for a negotiable security payable to bearer, is at liberty to dispose of it as he pleases.

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v.
City Toronto

The debentures issued by the corporation are not their property—they are evidences of debt due by them—the corporation can have nothing further to do than to be prepared to pay them, as they fall due; they can under no circumstances be made to pay more than the debentures express upon the face of them, and could never expect to acquit themselves by paying less.

Then this case comes as little within another principle, which if it did apply, would make the case a clear one against the defendant. I allude now to cases in which a trustee has made a gain to himself by using the trust funds in making some purchase, or in carrying on some speculation or business; in all which cases, if the estate or property so purchased remains with the trustee, he will be treated as holding it in trust for the person or corporate body whose funds he had misapplied, if they prefer his being made to stand in that situation, rather than to have their funds replaced. If the property has been disposed of again to some third party, it may or may not, according to circumstances, be followed into the hands of such party, and claimed for the person with whose funds it was bought; and where trust money has been used in a business or speculation of any kind which can be shown to have produced a profit to the trustee, a court of equity will uphold the party whose money has been misapplied, when he says to the other, "You shall not be allowed to keep that profit; you made it with my money which you had no authority to use for your own purposes, and it belongs to me rather than to y.u."

The analogy, however, between such a case and the present fails in this—that here it is not pretended

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that the debentures were bought with the money of the corporation—it is clearly proved that they were not to any extent—that the corporation had not at the time any funds which could have been used for the purpose, and that if they had, they would not have been under the control of the defendant, but of the city chamberlain, and could not have been so applied by the defendant.

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Howes
v.
City Toronto

It seems to have been at one time suspected, while a mystery hung about the case, and before the facts were elicited, that the credit of the city had in some way been made use of for obtaining that advance to the contractors which made them content to part with the debentures ; and that either the bank or the government had in some way enabled the mayor, on behalf, as they supposed and intended, of the city, to make an arrangement by which he had put five or ten thousand pounds into his own pocket.

Judgment..

Whatever would have been the consequence of such a transaction, the surmise turns out to have been unfounded. The government had nothing to do with the matter, though one of its members was a party to it on his own account ; and so far as the bank was concerned, it is distinctly proved that the defendant was not looked upon as engaged in any negotiation with them as mayor, or in any respect on behalf of the city, and that the credit of the corporation was not conceived to be in any manner pledged or intended to be pledged to them ; but that the transaction took the shape of an ordinary transaction of an advance of money to individual parties upon their bills—which bills were drawn upon a previous understanding with a banking firm known to be of undoubted credit in London, so as to make the transaction a perfectly safe one. In fact, in the conclusion, it came to be a mere purchase by the bank of exchange ; and was transacted, it seems, as such matters, when of

1856. a less amount, usually are, through the officers of the
 bank alone, without being specially referred to the board.
 Bowes It is impossible to say upon the evidence that the profit
 v. City Toronto upon the debentures arose out of a purchase made with
 the funds of the city, or raised upon the credit of the
 city.

But there is another ground upon which the case has been rested—I mean another general principle— independent of particular circumstances in the case. It has been urged, that as one of the council the defendant was *quasi* trustee or agent for the city; and must therefore be looked upon as having bought the debentures for the city, and not for himself, because it was within the proper scope of his duty to the corporation that he should have made the purchase upon that footing.

There are many cases in the books where the principle Judgment. to which I now refer has been applied, and most justly, as in *Keech v. Sandford* (a), *Hamilton v. Wright* (b), *Benson v. Heathorn* (c), *Lees v. Nuttal* (d). There are others, as in *Norris v. Le Neve* (e), and *Randall v. Russell* (f), in which the court was asked to extend the application of the principle further than they thought they were warranted in doing.

In the case before us it appears to me that the ground for applying this principle fails, because I see no ground on which we could reasonably hold that a member of a city council, buying city debentures with his own funds from the holder of them—(admitting that he can make such a purchase at all)—should be supposed or expected as a matter of course, and without any engagement or instruction to that effect, to be

(a) Sel. Ca. in Ch., 61; 2 Eq. Ca. Ab. 741. (b) 9 Cl. & Fin., 111.
 (c) 1 Y. & Coll. Ch. Ca. 326. (d) 2 Russ. & M. 53.
 (e) 3 Atk. 37, 38. (f) 3 Mer. 190.

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making the purchase on behalf of the city ; any more than a member of the Government in England, or a member of Parliament, buying Exchequer Bills with his own money, should be supposed to have bought them on behalf of the Government which issued them.

1856.

Bowes
v.
City Toronto

I speak now only of purchases made from the holders of debentures under ordinary circumstances, and without reference to anything particular in the case except the fact of the purchaser being a member of the Common Council of the city.

Reference was made by the plaintiffs' counsel to the cases of *Ex parte James (a)* and *Ex parte Lacey (b)*.

In the former case, Lord *Eldon* said : " As to the purchase of debts (by the assignee of a bankrupt estate), I cannot distinguish that from the case of an executor, who cannot buy for his own benefit debts due from the testator's estate. Any stranger may, but the executor is bound to do his best for the estate, and the assignee is as much a trustee as the executor, and being entirely within the range of the same principle, cannot acquire the difference."

By this his Lordship means that his purchase will be looked upon as made for the estate, on whose behalf it was his duty to settle all the debts on as favorable terms as he could ; and consequently, that he shall not charge against the estate anything more than he actually paid for the debt which he bought up.

In *Ex parte Lacey*, Lord *Eldon* observed as to the purchase of the debts by the assignees,—“ As assignees cannot buy the estate of the bankrupt, so also they cannot for their own benefit buy an interest in the bankrupt's estate, because they are trustees for the creditors.”

“ He was a trustee for the benefit of those entitled

(a) 5 Ves. 337.

(b) 6 Ves. 625.

1856. to the interest of the residue. He must buy for them, and not for himself. As to the debts bought he must be a trustee either for the creditor or the bankrupt; for which, upon the circumstances, is doubtful.”

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v.
City Toronto

One sees so clearly the propriety of not allowing executors to buy up debts against the estate, that if it could be reasonably said that there is no distinction between such a case and that of an individual member of a municipal council buying the debentures issued by the corporation, then I should feel myself quite safe in holding that the profit which in the latter case may be made on a resale of the debentures must be paid into the funds of the city. But though these cases are in some degree analogous, the analogy is by no means perfect.

They both, it is true, buy up demands against the estate or interest which they are concerned in managing to the best advantage; but they differ in other respects so much that in the common apprehension of mankind, the executor, when he did not distinctly declare the contrary, would be thought as a matter of course to be making the compromise on the part of the estate, while the member of the city council buying from a third party a debenture payable to bearer, would never be imagined by any one to be buying it up for the city. He has not the affairs of the city under his control, to be managed in the same close way as the executor manages the affairs of an estate; he is one of a numerous body who are managing the public interests and affairs of a city very much as the general legislature manages the interests of the province—that is, by the votes of a majority taken upon questions as they arise, and after they have been openly discussed.

The debentures, again, are very different in their character from the ordinary demands of creditors on the estate of a deceased debtor; they are a sort of public security

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contrived and intended for general circulation, as freely current as the notes of a bank, except as their large amount tends to prevent it.

1856.

Bowes
v.
City Toronto.

They have a value in the market, as other public securities or stocks have, fluctuating according to circumstances, but very well known at any point of time to those who are in the habit of investing, either for speculation or otherwise.

I thought, however, during the discussion of this case, and have thought so since, that there was more force in the argument founded on the supposed analogy with the case of executors buying up claims against the estate, than in some of the others; but the difference between the two cases is so obvious, that the more I consider it, the stronger is the impression that we should not be warranted in saying to this defendant—
 “You stand on the same ground as an executor who has been buying up demands against the estate of his Judgment.
 testator. A debenture is a claim upon the city, whose interests, during your year of office at least, you have undertaken to assist in managing; and therefore, as the executor can make no profit by buying up the debt in his case, so neither can you in yours; but you must be looked upon like him, as having bought in your representative character; and if you have disposed of the debentures at a profit, you must account for that profit as money belonging to the city.” The principle relied upon cannot, I think, be extended so far; and if there were nothing more in the case than that the defendant, being a member of the council, had bought the debentures from the contractors, I think we should not be able to determine in favor of the plaintiffs upon that ground; and it may deserve consideration, as bearing upon the general question which we are discussing, to enquire what would be the case even with the executor buying up a debt of the estate at a discount, if he should

1856. sell the same debt to some third party at a considerable profit? Would he be held liable in equity to pay over that profit to the estate, on the ground that the transaction being one inconsistent with his position as trustee, he could not be allowed to retain the gain he had made by it, and so must make that gain part of the assets of the estate?

*Bowen
v.
City Toronto*

However that may be, I must say that I have come without much doubt to the conclusion that if there is any equity in the plaintiffs' case which is entitled to prevail, it must be found in the special circumstances of the transaction; and that we cannot, apart from those circumstances, hold that the defendant by merely buying the debentures from the contractors placed his private interest in conflict with his duty to the city, so as to bring him within that principle of equity on which it has been frequently determined that a person so acting cannot retain any profit which he has made.

Judgment.

I am strengthened in this opinion, as I have before stated, by the nature of the provisions made in the Imperial statute 5 & 6 Vic. ch. 104, secs. 1 & 2, as showing the acquiescence of parliament in members of municipal bodies holding securities of the corporation; and by the belief that till this case arose, their right to buy and sell such debentures was never questioned, though, as I also believe, such transactions have been of constant occurrence in all parts of the province. My conviction is, that a judicial decision that in every such case the purchase was illegal, and that any profit made upon a re-sale of the debentures might be claimed by the corporation which issued them, would take the commercial world wholly by surprise. I may be wrong, however, in my idea of what has been usual, for I must admit that I have no particular information on that point.

I am not sure that the learned judges who gave the

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1856.

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very able judgment in the court below concur with me in this view of the case. On the contrary, the general tone of their observations seems to me to be so far opposed to it, that I apprehend they were inclined to think the defendant liable to account for the profit made by him without reference to the question of whether the city has lost or gained by the arrangements he was concerned in, and also without reference to the particular circumstances connected with those arrangements; as tending to show that in his conduct, either before or after the debentures, he did in fact act unfaithfully by the city, and so subject himself to legal consequences to which he would not have been subject, if, being a member of the council, he had merely bought the debentures from the contractors, as any individual unconnected with the Corporation might have done.

That may not, however, be the conclusion to which the learned judges came, for they have made strong observations on the complexion of the case, and upon the manifest inducements which the defendant had, from the position in which he placed himself, to consult his own interest, however much it might be opposed to the interest of the city; and at all events, though the plaintiffs claim to be entitled to succeed on the broad ground that the defendant could not be allowed to make and retain a profit upon the sale of the city debentures bought from these parties—they have not by any means rested their claim exclusively upon that general principle; and even if they had, yet all the facts of the case are before us; and if we should think that by reason of any pecuniary losses which the defendant's conduct in the matter has thrown upon the city the plaintiffs have an equitable claim to receive the 5,000*l.* by way of recompence, or that upon any principle such a claim should be recognized as arising out of any misconduct of the defendant, then we could have no doubt that the plaintiffs should be held entitled to what they ask.

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I have with this view given to all the facts of the case the best consideration that I can. It is not, in my opinion, established by the evidence that the defendant's profit was made at the expense of the city; that is, I do not consider it to be made out that the corporation lost by the transaction which the bill complains of the 5,000*l.* (so to call it) which the defendant gained. I do not believe that from the arrangements which were carried into effect it sustained any loss; on the contrary, I am satisfied, upon a view of the whole case, that the corporation has been greatly benefited, and is now in a much better situation than it would have been if the defendant had abstained from taking any part in bringing about those arrangements, and had left the corporation to abide by the original agreement to place in the hands of the Railway Company city debentures to the amount of 60,000*l.*, of which 25,000*l.* was to have been a free gift, and 35,000*l.* to have been a loan to the company. This seems to me to be so plain upon the evidence as scarcely to admit of question. Besides forming my own opinion upon the nature of the case as set forth in the documents, I went carefully over the testimony of every witness, with the express object in view of finding what they thought upon the point. I made extracts of all that is said by them upon it, and I think I can venture to affirm that any one who will take that trouble will find that the witnesses on both sides, as well those called for the plaintiffs as those called for the defendant, admit that the arrangement which had taken place had been highly advantageous for the city; for though two or three of them seem inclined to represent the matter otherwise, yet when pressed they give such grounds for their opinion as seem anything but reasonable and satisfactory.

But then we have further to consider that the plaintiffs in one part of their bill ground their claim to the 5,000*l.* on the assertion "that the defendant,

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as mayor, might have made or procured an arrangement to save the city the 10,000*l.*, instead of obtaining the same for himself—but that he made no attempt to do so." The plaintiffs do not clearly point out how the defendant could have made the profit of 10,000*l.* for the city, but we must assume them to mean that he could have put the corporation in the way of doing it by some proceeding which would have been fair and becoming on their part. I can only say that to my comprehension such a method has not yet been pointed out. We cannot hold, I think, that there was any legal claim upon the defendant to use the private interest of himself with a friend, or of that friend with his friends, or to attempt to get Mr. *Hincks* to make that exertion for the city which we see he did make from the motive of profit to himself; nor do I see evidence that would warrant us in assuming that the thing could certainly have been managed otherwise than it was, so as to suit the exigency which required large funds to be instantly supplied to the contractors here for a particular purpose. And we cannot say that the means that were used were such as could be called into action on public grounds, to serve the city. Messrs. *Glynn & Co.* were correspondents of the Upper Canada Bank, and were also, it appears, correspondents of Mr. *Hincks*. They seem all to have placed confidence in each other, having knowledge of the grounds upon which they could venture to do so; and feeling that they were safe, and all having some interest in the transaction, either in the shape of interest or commission upon advances, or profits upon exchange, they seem to have been willing to unite in facilitating an arrangement by which Mr. *Hincks* expected to be benefitted. Whether they would have done so either to save the contractors from a discount upon their debentures which they had made allowance for in their contract, and were well content to bear; or to save them from embarrassment by enabling them to secure their iron,

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or to put the city in the way of making a profit by buying up their own debentures at a discount, (which would have been such a speculation as they had probably never entered into, or contemplated before), or to put it in their power to obtain from the contractors 50,000*l.* in stock for 40,000*l.* in cash, instead of giving them debentures in proportion to the stock, which is what the act of parliament seems to have intended,—is more, I think, than we can venture to pronounce.

The statute 16 Vic. chap. 5, sec. 5, by which the Legislature directed that 50,000*l.* of the 100,000*l.* loan which the city was authorized to raise should be applied to the payment of stock taken in the railroad, is in these words: "That the sum of 50,000*l.*, the remainder of the said loan so to be raised as aforesaid, shall be applied in payment of 10,000 shares," (the shares being 5*l.* each) "of the capital stock of the Ontario, Simcoe and Huron Railway Company, lately purchased by the said City of Toronto, under resolution of the Common Council passed 27th of July, 1852, in manner herein provided; and it shall be the duty of the chamberlain of the said city for the time being (and he is hereby authorized and empowered so to do), forthwith, with the consent of the shareholders thereof, to call in such debentures of the City of Toronto as may have heretofore been issued under any by-law of the Common Council of the said city, and taken in payment of such stock, and to substitute therefor so much of the funds received on account of the debentures to be issued under this act as may be necessary for that purpose." The Legislature may have meant by that, that if the city could buy up from the company their stock-debentures at a discount, they would have so much less of their loan to pay out for them, and they may have used the expression of substituting "so much of the funds as might be necessary for redeeming the debentures," in that sense. The

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language may receive that construction; but I do not believe that anything more was, in fact, meant by it than this—that to whatever amount debentures had been issued, on account of the stock, so much of the 50,000*l.* should be applied in redeeming them, as all such debentures are redeemed by the corporation that issues them—that is, by paying their full amount, which is always looked for as a matter of course, while the corporation is solvent.

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It seems by the statement published in page 184 of the printed case, that, when the act was passed, 43,000*l.* of debentures had been issued on account of stock. Whether that was then known in Quebec we cannot be certain, for 5,000*l.* of it had been paid in Toronto only five days before. There was ample time for it to be known, if the fact was instantly communicated.

How the last 7,000*l.* came to be issued, after the act was passed, is not sufficiently explained.

Judgment.

It is contrary to the letter of the clause; and from the questions that were put to witnesses respecting it, we cannot but see that it is suspected to have been a piece of management on the part of the defendant to give him the advantage of his bargain with the contractors to the whole extent of 50,000*l.* If that were so, it could only be the contractors who could reasonably complain of it; for if no debentures had been issued for the 7,000*l.* the defendant would have lost his discount of 20 per cent. upon so much of the 50,000*l.*—and the contractors must have been paid the 7,000*l.* in money, instead of 5,000*l.* which they got from the defendant; but I do not see how the situation of the plaintiffs would have been improved by it, or in any manner affected.

And when it is suggested that the defendant might, and ought to have managed matters so that the city

1856. instead of himself and Mr. *Hincks*, might have got the money from England, and might with 40,000*l.* in cash have got the 50,000*l.* stock, or taken up the debentures to that amount which had been issued for it, it must be remembered that long before the defendant and his associates turned the debentures into money by selling them in London to Messrs. Masterman & Co., the 50,000*l.* stock was by arrangement between the company and the contractors, (which formed part of the understanding when the latter gave up the 50,000*l.* bonus taken from the contractors, in order that they might receive the price of it), and some months before any money was, or could be raised in England by sale of debentures—the contractors had actually received through their arrangements with the defendant the money which paid for their iron, and relieved them from their difficulty.

By the end of August they had received in Toronto from the bank of Upper Canada 30,000*l.* in cash. We see how this was brought about.

Judgment.

Mr. *Hincks* had made such arrangements with the bankers in England as made them willing to engage to accept his drafts; and the cashier of the bank here being informed that such drafts would be accepted, and knowing besides that they were otherwise to a great extent secured by the deposit of debentures, cashed the sterling bills at once; and then the contractors were immediately put in possession of the necessary funds, long even before the statute was passed which authorised the loan of 100,000*l.*

The loan which the company were to have had from the city of 35,000*l.* could not be obtained on account of the difficulty which is complained of in the evidence. So early as in July the expedient of taking stock instead was suggested and agreed to, as a method of overcoming the difficulty. All were anxious to help

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the contractors, who were pressing, and to forward the work, which was likely otherwise to come most inconveniently to a stand. It was only by some such train being laid in advance of legislative measures as was laid by the defendant and Mr. *Hincks*, under the stimulus of personal gain, that the difficulty could have been met at the time; at least, whether it could have been otherwise managed or not, can only be conjectured; but it does seem certain that anything that could have been done by the city which required the aid of legislation, subsequently to the proposal made on the 29th of July, must have come too late for the object. And if we look at the whole case without prejudice, it appears to me we must admit that on whatever other grounds the plaintiffs can rest a claim to have the 5,000*l.* paid over to them, the evidence does not show that they have an equitable claim to it on account of any loss which the transaction has thrown upon them; or, on account of the defendant having deprived them of any gain which they could certainly and properly have made consistently with the object which there is no doubt they had in view.

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Something has been said in the case of the disadvantage of the city being obliged, under the provisions of the act 1 Vic. ch. 5, sec. 4, to leave the other portion (50,000*l.*) of the 100,000*l.* lying in the Bank of Upper Canada till it might be required for the purpose of taking up such small notes or debentures of the corporation as were standing out against them. That was a provision made by the legislature of the province upon what we must assume to be a just and proper view taken by them of the public interests of the city, and their knowledge of its wants.

We cannot, I think, ascribe that enactment to any corrupt influence of the defendant over the legislature, and upon that ground make him pay to the city 5,000*l.* because Parliament passed that act. We have

1856. besides no evidence that the city has been at any loss to apply the 50,000*l.* in the manner directed, so as to save themselves from the loss of interest, or that any dissatisfaction existed on account of this provision at the time of the act being passed or afterwards till the beginning of 1853, when upon statements made by Mr. Cotton it was discovered, or suspected, that the defendant had purchased the debentures. If it has been a disadvantage to the city, and to any considerable extent, we should no doubt have had that pointed out by some of the witnesses; and if when the act was passed its provisions ought to have been construed and applied in any manner different from what was assumed to be the proper application and construction, it would seem strange that that should not occur to any one till this suit was brought.

It is not shewn that the carrying out the details of the act rested in any particular manner with the
 Judgment. mayor.

I do not recollect any other suggestion of probable detriment to the city that was pointed out in the argument; and if I am right in my opinion that the mere purchase of the debentures by the defendant was not in itself prohibited by law or equity, and that it is not made out by the evidence that the city has sustained a loss in consequence of it, or missed a pecuniary gain that but for the defendant's conduct they might fairly have acquired—then it remains only to be considered whether the decree should be supported upon this other ground, that the defendant by what he did (taking the whole transaction into view) placed his private interest in conflict with the duty which he owed to the city, and disabled himself from giving an unbiassed opinion—that on that account and without regard to the effect upon the interests of the city, he cannot be allowed to retain any profit which he made by the transaction; and that therefore, as no one

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else claims, or can claim that profit, he must be held accountable for it to the city.

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In this view it would be of no moment to enquire what course he did take after he had placed himself in that situation, nor whether what was done by him did in fact to any extent prove injurious to the city. I have already stated that I do not think it a safe course to apply what we find said by courts of justice in disposing of cases of this description, or indeed of any other, without taking into consideration the facts of the case upon which the court was commenting.

A judge, for instance, having before him a person convicted of a violent assault, might naturally say to him, "You have allowed your passion to get the better of your reason, and by so doing have subjected yourself to a long term of imprisonment, to which it will be my duty to sentence you;"—but it would not be correct to look upon the judge who might say this as intending to lay it down as a principle of universal application, that whenever a man allowed his passion to get the better of his reason he is liable to be punished by a long imprisonment; he could not mean that, for he would know that there is no such universal principle.

No doubt what the plaintiffs rely upon may be found again and again stated in various forms of expression, in cases of undoubted authority, and by judges of the greatest eminence; and it is equally certain that there is nothing peculiar in our system of law or equity which makes the decisions in which this language has been used less binding here than in England.

But it is not safe, I think, wholly to separate this statement of the principle, wherever we may find it, from the facts of the case which called it forth. We must rather look upon the court as having announced

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the principle in connection with the particular facts as the conclusion which they have arrived at upon a view of those facts; as if they had said to a defendant in some such case of plain breach of trust as I have supposed—
 “ You were a trustee, bound to use your best judgment in disposing of this property so as to secure the best price for the person to whom it belonged, and instead of that you sold it to yourself, and afterwards upon a re-sale made a good bargain for yourself, which in common justice you were bound to make for the person whose interest it was your duty to protect. Such profit you cannot be allowed to retain, for it belongs rightly to him out of whose property you made it, and not to you.

Judgment. Of the many cases which have been cited, I have seen none in which the court has held the trustee accountable for profit in which the grounds for the decree could not be as distinctly traced as in the case I have supposed; none in which the order to pay over has rested simply upon the ground that the party had placed himself in a position in which his interests were, or might be at variance with his duty as trustee, and that he could not on that account retain any profit made by him by what had been done under such circumstances; but must pay it over without reference to the question out of what funds the profits had been made, or to any other claim of the party to whom he was decreed to pay it, or to any ground but this, that he had done wrong towards the principal, or *cestu 'que trust*, by acquiring an interest which might tempt him to act in a manner inconsistent with his duty.

I can find no case in this country, or in England, where a profit made has been directed to be paid over simply upon that ground, even in cases between individuals; but when we consider the matter in reference to the members of corporate or other public bodies, in which measures are carried after public discussion, I

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think I see more difficulty in making such an application of the principle. The legislature of the country is no doubt beyond the reach of courts of justice, so far as suits in equity are concerned; but if the principle be a sound one, that no one can be allowed to retain a profit which he may have made by a transaction which has created in him a private interest, which may conflict with his public duty, it would apply equally in its spirit to those who take part in the business of the legislature.

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I have already touched on that point, upon which much more might be said; and I shall only add, that to give an universal application to the principle that I have stated in regard to the members of municipal corporations, would be to exact from them such an entire freedom from considerations of personal interest while discussing public measures as is unknown in higher legislative bodies, and such it is obvious cannot be secured under any system that can be devised.

Judge

But, confining ourselves to municipal corporations. They have all of them, as we know, extensive powers in this province as to raising money by rates, and making various public improvements.

There is a wise provision made by statute, that no member of a council shall be concerned in any contract that it may become requisite to make for effecting such improvements. But if no such enactment had been passed, and the matter had been left as it would have stood at common law, and if a municipal councillor had contracted with the corporation to make a road or bridge, or erect a public building, and had completed the work out of his own funds, or by his own labor, he would have had his remedy at law to compel the corporation to pay what they had engaged to pay him,—though whether a court of equity would have interposed in his favor to enforce

1856. any stipulation in such contract, or to give any remedy which he could not obtain at law, I am not so certain. I think it likely they would not, because it is contrary to their rules to afford their aid to transactions which open so wide a door to abuse. But I doubt whether they would have interfered with his ordinary remedy at law upon this contract; and if, without any necessity of litigation, he had received what was to be paid to him, I have seen no case which appears to me to afford authority for holding that upon a bill filed by the corporation he would have been compelled to pay over to them any profit which he had made upon work and materials provided wholly from his own means.

If he could had been compelled, which at present I doubt, still the case supposed would be so far a stronger case than the present in favor of such a decree, that it might be urged as a reason for it that every shilling of profit which the party had made would undoubtedly have been so much taken directly from the funds of the corporation, and which, though another person might be allowed properly to take it, as a profit just and fair in itself, could not be allowed to be retained by him, because he had acquired it by a course of dealing with the corporation which had placed his private interest in conflict with his duty.

Let us suppose other cases. We have had judicially before us an occasion in which a municipal corporation of a newly constituted county had authority given to it to fix the site of the county town, and we know the contest and charge of irregular proceedings to which it gave rise.

We know also that by statute extensive powers are given to municipal corporations to lay out and open new roads and streets. Let us suppose that a member of a council in such a case, speculating on what was

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likely to happen, or upon what he might be able to effect by his vote and influence in the council, should secure a tract of land by a secret purchase from any individual, which would be materially enhanced in value if he could carry his point in locating the county town, or opening a new street, so as to suit his speculation. As things have been hitherto managed in this country, and I believe in most others, it would scarcely be thought necessary, I think, to conceal the fact of the purchase for any other reason than to diminish the chance of opposition to the scheme; but, supposing the fact unknown, and that while the member of the council was believed to be disinterested in his votes and arguments in the council, he was acting all the time under the influence of an expected personal advantage, and that the matter going as he had hoped it would, he was able in consequence to sell his newly-acquired estate for 5,000*l.* more than it had cost him; I do not imagine that the corporation could in such a case claim a right to the profit which he made by this application of his own money, in making a purchase from a third party, upon the ground that he had by making it placed himself in a situation which created a conflict between his private interest and his duty to the corporation, and to his constituents; and that he could not therefore retain the profit arising from such a transaction.

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If the merely having an opposing interest and concealing it would in every case raise an equity in favor of the corporation, without showing any relation of cause and effect, so as to entitle them to the profit which has been made without any misapplication of their funds, or any tampering with their property, or any use which has been made of their credit, then the mere delinquency of one of their members would be a source of profit to the body, which does not appear to me sensible, or reasonable. There was some force, I think, in the argument used at the bar, that upon

1857. such a principle as the plaintiffs contend for, if the defendant in this case had taken a bribe of 5,000*l.* from the contractors for getting their debentures made legal, the bribe ought to have become part of the public funds of the city.

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In the common class of cases to which I have alluded, which is by far the most numerous of those referred to, we do often find the court saying, and very reasonably: "You have made a profit to yourself by misapplying the money of your principal; or you have got into your own hands a property which you were entrusted to manage or dispose of for his benefit. We shall institute no inquiry as to your intentions, or whether you have taken any undue advantage, or have give given a fair price for what you sold to yourself: We shall look upon you as acting for him in the matter, and not for yourself. If he insists upon it, he shall have his property back, though you may have given double its value for it; or you shall give up to him the profit which you made by using his Judgment. money."

I can see clearly the reasonableness and good sense, if not the necessity, for using such language in such cases; but I think it not equally applicable in all cases in which nothing more can be said than that a member of a municipal council has made a profit by a transaction in which his private interest stood in opposition to his fiduciary relation. In *Norris v. LeNeve*, (a) we find Lord *Hardwicke* saying: "This is a transaction indeed extremely to be disapproved; and I must say that a counsel or agent taking a conveyance from the right heir for his own benefit, and which he discovered by his being a trustee, does a very wrong thing. But this is a case of the first impression, for it would be difficult to say for whom he was a trustee; and yet I should be extremely desirous of consid-

(a) 3 Atkins 38.

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ering him as a trustee only, if I could be warranted in so doing." There the complaint was, that a purchase had been made by a trustee under a settlement of a reversion from the heir of the party who made it, and that he should not be allowed to retain it; but the court did not consider that under the circumstances they could look upon him as acting for the other party in taking the conveyance, and did not grant the relief, though they disapproved of the act. There was delay, however, and other circumstances which concurred to prevent it.

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Among the cases unconnected with corporate bodies, the following appear to be the most material: *Whelpdale v. Cookson* (a), *Lord Lonsdale v. Arnold* (b), *Massey v. Davies* (c), *Gibson v. Jennings* (d), *Campbell v. Watkins* (e), *Whitcote v. Laurence* (f), *Keech v. Sandford* (g), *Hamilton v. Wright* (h), *Benson v. Heathorn* (i), *York Buildings Co. v. McKenzie* (j), *Cook v. Collingridge* (k), *Dorker v. Somes* (l), *Lees v. Nut-* Judgment tall (m).

They all afford ample illustrations of the strictness with which the principle of equity is enforced as between the trustee and *cestui que trust*, or between agent and principal, if it has been plainly violated; and in all of them, where an estate wrongfully acquired is directed to be conveyed, or a profit to be paid over which was improperly made through such a dealing with the trust property as is prohibited, we see as plainly the equitable claim which the one has to receive the money, as the obligation which the other is under to account for it, and the just operation of the decree is evident on the facts of the case.

(a) 1 Ves. Sen. 9.
(b) 3 Ber. Ch. Ca. 42.
(c) 2 Ves. Jnn. Jun. 317.
(d) 5 Ves. 236.
(e) 5 Ves. 681.
(f) 3 Ves. 740.
(g) Ca. Ch. 61—2 Eq. Co. 741.

(h) 9 Cl. v. Fin. 111.
(i) 1 Y. & Col. C. C. 326.
(j) 8 B. Par. Ca. 42.
(k) Jacob 620.
(l) 2 My. & Keen, 66.
(m) 1 Rus. & My. 53.

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The cases of the *Charitable Corporation v. Sutton (a)*, the *E. I. Co. v. Henchman (b)* the *North & York Midland R. W. Co. v. Hudson (c)*, and the case of the *Aberdeen R. W. Co. v. Blaikey (d)*, shew the application of the same principles to cases in which the interests to be protected are those of a trading corporation, and to be protected against the conduct of their own members. The case of the *E. I. Co. v. Henchman*, I think, when attentively considered, is unfavorable to the relief that is prayed for in this case.

The case of the *Aberdeen R. W. Co. v. Blaikey* is no otherwise important in its application, than as it tends to remove any doubt as to the power to grant redress in such cases against members of the corporation dealing on their private account with the body, in a manner that is prohibited by the principles which regulate trusts.

It decides no more than that when those principles have been violated, the court will decline to lend its aid in carrying a contract of that description into effect. They will say that this is such a transaction as you ought to have had nothing to do with, and we therefore will do nothing in it at your instance.

The cases of the Attorney-General *ex rel* Mayor and Aldermen of *Leeds v. Wilson (e)*, *Attorney-General v. Aspinall (f)*, and the case decided last year by the Lord Chancellor of Ireland, of *Attorney-General v. Belfast Corporation*, apply to the point, whether municipal corporations and their members are not subject to the same control by courts of equity in such cases as other corporations or as individuals are, and they establish clearly that they are; but they are all of them cases of gross and plain violations of a public trust in the manner of dealing with the property, and applying the funds which it was the duty of the defen-

(a) 2 Ak. 401. (b) 1 Ves. Jun. 287. (c) 16 Bev. 491.
 (d) 236, L. Times 315. (e) 1 Cr. and Phill. 1. (f) 2 Mil. & Keene 613.

dants to preserve and apply for the benefit of the public. There could not be cases of plainer breeches of trust or of a more ordinary character than are complained of in all of them, except as to the great criminality and the flagrant nature of the abuses which had taken place in some of them.

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In some one or other of these, all will be found I think, that is necessary to be considered in cases of this kind, which arise under ordinary circumstances.

The case of the Mayor and Commonalty of Colchester *v. Lawton* (a), belongs to the last class of cases which I have referred to; but it has no resemblance to the present case in the particular questions which it presents, as arising from the conduct of the defendant and the relief prayed for. There are, besides these, two other cases which I have already remarked upon—namely, *Ex parte Lacy* and *Ex parte James*, as bearing upon one point in this case, which is very necessary to consider.

It is contended that the defendant in buying these debentures from the contractors, being himself a member of the corporation which issued them, comes within the authority and reasoning of these cases. If, as these cases affirm, an executor cannot buy up demands against the estate at a discount for his own advantage, nor an assignee of a bankrupt the debts due by the bankrupt, but must be held to have bought them in for the estate which he is intrusted to manage, why, it is argued, should the members of a corporation be suffered to buy up debentures held by third parties, which are nothing but debts due by the corporation for which they are acting? There is in terms an analogy, but the cases are very different, as a little reflection upon the reasoning of the court in these cases will, I think, convince us. The executor, like the assignee,

(a) 1 Ves. and B. 282.

1856. is strictly a trustee for the creditors ; he has the whole control and management of the estate, and the abuses to which such a dealing on his part must lead, if it were permitted, would destroy all confidence, and would leave creditors in many cases but little chance of being paid in full, or as much as they might be, when there would be so obvious an interest in throwing impediments in their way and in discouraging their hopes of payment.

Bowes
v.
City Toronto

Taken literally and without discrimination, such cases might be cited to prove that a director of a bank cannot acquire the current bills of the bank, which are nothing else than evidence of debts due by them. I have already stated it to be my impression that it is not forbidden by any principle of equity to the members of these corporate bodies to buy up in the ordinary course of such transactions the bonds or debentures of the corporation, which are to be looked upon as public transferable securities, bearing a known value in the market, which fluctuates according to a variety of circumstances.

Judgment.

The Imperial statute 5 & 6 Vic. chap. 104, secs. 1 and 2, affords strong evidence that such a dealing in the securities of the corporation is not deemed incompatible with the position of members of the common council, and I do not think I err when I assume that in this province it has been openly and constantly done without a question being raised or a suspicion intimated of its being illegal. But I admit it to be a practice which may lead to great and obvious abuses ; and though I think it very probable that more good than evil has hitherto arisen to the public from this very general practice, yet I should willingly see the Legislature prohibit it, with regard to the character of these municipal bodies, and as a step towards freeing them from unworthy suspicions and imputations, though I am not sure such a provision would in fact prevent

effectually a continuance of the practice, where methods of evading it could so easily be resorted to.

1856.

Bowes
v.
City Toronto

On the side of the defendant it may be said that he did not buy the property of the Corporation when he purchased the debentures from the contractors, and that the only effect of the purchase was to make the Corporation owe to him or bearer a precise sum of money, which they must have paid to some one, and at the same time, and not a penny less or more than they must have paid if the debentures had never passed through his hands.

On the side of the plaintiffs it may be said that the case goes further than the mere fact of his having bought the debentures from the contractors; that he made enquiries and found that by enlisting the aid of Mr. *Hincks* he could dispose of Toronto debentures in England at par, and that he might, and most men will be ready to say he ought to have endeavored to avail himself of that assistance in raising money for the city by the sale of their debentures in England, rather than make it the source of profit to himself. If they could have been sold for anything beyond par, which seems not at all probable, a direct gain would have so far accrued to the city. If, as the event proves, they could have been disposed of at par, or nearly so, then at all events the credit of the city would have been better maintained both in England and here, as the defendant himself pointed out in his letter to Mr. *Wilson*, by avoiding the necessity of selling them at a large discount in Toronto; and the Corporation would have had the satisfaction that at the same cost to themselves they could have advanced a larger sum than they have done to the company or the contractors, in aid of the great work which they wished to promote.

Judgment.

But as to any direct pecuniary advantage to the city, it must be considered that the corporation would still

1856. have had to pay the same amount, 50,000*l.*, as they will have to pay now—unless, indeed, they had proposed to the contractors to take 40,000*l.* in money, or any other sum which they might have obtained themselves by selling the debentures, in satisfaction of the 10,000 shares of stock, instead of giving their debentures for 50,000*l.*, the nominal statute value of the stock.

Bowes
v.
City Toronto

If the assistance of Mr. *Hincks* could have been brought into the service for such considerations, and if he could have been induced (of which we cannot be certain) to use without the prospect of gain to himself, the same interest, and make the same exertions which he did under the expectation of making a good private speculation, still the question is whether we are at liberty to hold that to attempt to make that use of his friend Mr. *Hincks* was a duty thrown upon the defendant by any principles that can be enforced in a court of justice, and so clearly thrown upon him, that because he did not make that attempt, whatever he gained by negotiating the debentures after he had bought them from the contractors can be claimed by the Corporation as forming of right part of their funds.

Judgment.

Again: It may be said on the side of the plaintiffs, that the defendant, by the arrangements which he made, had in fact contracted for the debentures before they were issued; that their being deposited in the bank on behalf of the contractors was a mere matter of form, for that he had secured them beforehand, and was in fact a party to measures in the council which were to aid in making the Corporation debtors to himself, and that without their knowledge; and that all the measures that were taken from the 24th or 25th of June to the passing of the act are open to the suspicion of having been influenced by him with a view to his private advantage.

What is to be said in answer to that is, that the engagement by the Corporation to issue debentures to the company to the amount of 60,000*l.* by way of gift and loan, was entered into in 1850, before the defendant was mayor, and that it is not attributed to him, and is not complained of by anybody.

1856.

Bowes
v.
City Toronto

That if the defendant was not at liberty to buy these debentures, and must, on that ground simply, account for the profit which he made upon them, that of course makes an end of the case ; but if that be not so, then what followed was only the natural and proper course to be taken by the corporation under the circumstances that from time to time presented themselves :

That the intended loan was found not to be available to the contractors because the company could not give that security for it which the corporation felt it necessary to require ; that the proposition of the company, acceded to by the contractors, for relinquish- Judgment. ing the gift and loan, if the city would take 50,000*l.* stock, was the only method that could be thought of for overcoming that difficulty ; that it met with general assent : and while it was of no particular advantage to the defendant, was highly advantageous to the city, as from the terms of the agreement it had the effect of giving them the stock at half its value—but it still however, like the former agreement, required the issue of debentures, and could be carried into effect by the city in no other way ; that in regard to this arrangement as well as the former, it was by agreement between the company and the contractors, over which neither the defendant nor the city had any control, that the stock was to be taken from that which had been allotted to the contractors in order that they might be paid for it by the city, and so might still have debentures with which they could go into the market and raise money ; that the pressing necessity of the contractors to obtain money still continuing,

1856. they by a mutual arrangement turned those debentures over to the defendant, as they were to have done the debentures which otherwise would have been issued by the city for a loan, instead of for stock; that they could have done nothing better with those debentures, and could not have obtained in Toronto the large amount of cash which they did obtain upon them, in time to answer their purpose, if the defendant had not made the arrangement which he did with Mr. *Hincks*; that by what was done nobody was injured, and that the contractors, and the company, and the city were all so far served by it that the work proceeded, which might otherwise have been stopped.

It does seem that the defendant suggested to the finance committee of the council, or to some of its members, that it might be expedient for them to buy up the debentures. If he had made that proposition in the most formal manner, we see by the evidence that it could not have been acted upon. The corporation had not 40,000*l.* which they could have applied to such a purpose; and if they had had it, in the opinion of the plaintiffs' witnesses, would not have so applied it. If the defendant had not been kept back by any considerations affecting himself or others, from an open declaration of what he intended to do, or thought of doing, and if he had stated to the Corporation that he knew a friend who could advance the money, and would join him in buying the debentures at 80 per cent. (as high a price as the contractors had looked for), I see nothing in the evidence to satisfy me that the Corporation would not have been glad to find that the railway company would be enabled by such means to go on with the work, and the contractors be placed in a condition to buy their iron at once, which was an object of the utmost importance to them.

But they might, for all we can tell, have discountenanced it, and prevailed on the defendant to

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Leave the contractors to get through their difficulties as they could. In that case it seems abundantly clear that the contractors would not have got for their debentures more than they did get, and the position of the city would have been what it is now; for they must have paid as many thousand pounds as they contracted under their seal to pay, and neither more nor less.

1856.
Bowes
v.
City Toronto

As to that feature in the case which regards the substituting legal debentures for those whose legality had been questioned, I am unable to see what equity the plaintiffs can found upon that. It would be doing injustice to the city to suppose that they had originally contemplated giving debentures that would for any reason not be binding upon them. They did, it seems, and as we suppose without sufficient consideration, issue debentures which they were advised were valueless; objections were taken to them which were ascertained to be valid, and surely they could not hesitate, nor does it appear they ever did, to take such steps as they could for rectifying the error, and enabling them to hand over such debentures as would be legal. Judgment.

The contractors declare that they never doubted the Corporation would do this, and that in full confidence of it they bargained for the disposal of the debentures without submitting to any deduction on account of the alleged illegality in the form of them or in the authority under which they were issued. All the evidence on that point confirms this declaration of the contractors, and relieves the defendant from the charge of doing what certainly would have been monstrous—namely, proposing to the contractors to let him have the old debentures at a low price on account of their defects, while he had himself made or depended on making such arrangements as would remove the objection. In the relation in which he stood to the city, that would have been a very discreditable proceeding;

1856. but as the injury occasioned by such an unworthy contrivance would have fallen upon the contractors, from whom he bought the debentures, we may assume that they would not have been slow to complain, if there had been any foundation for such a complaint.

Bowes
v.
City Toronto

It seems to be glanced at in a part of the case, that if the defendant was enabled to dispose of his debentures on better terms from the steps which were taken to have them legalized, such profits more justly belonged to the city than to him. I can hardly suppose that the plaintiffs would counterance such a claim; but in truth any cause of complaint on this head appears to be imaginary. It was natural and inevitable that the plaintiffs should do all they could to enable themselves to issue legal debentures. They were in honor bound by their former agreement, and could not feel that they had any discretion about it, and it is very material to consider, in respect to this part of the case, that there can hardly be a stronger proof that the measures for legalizing the issue of debentures only took that course which was natural and just they should take, and were not corruptly made to serve the private interests of the defendant to the prejudice of the city, than the fact which is proved respecting the 50,000*l.* of debentures which the County of Simcoe had agreed to issue to the railway company in aid of the same work.

Judgment.

The municipal council of that county, it seems, fell at first into the error of issuing their debentures under a by-law which was informal, and whose legality was questioned. But when the difficulty was perceived, application was made to Parliament to remove it; and by the statute 16 Vic. ch. 51, sec. 12, the debentures which had been issued were legalized, and the company got from that county just what they or the contractors with their assent have got from the City of Toronto—50,000*l.* of debentures for 50,000*l.* of stock.

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Then, as to the obtaining the passing of an act by the legislature providing that the debentures might be made payable in Great Britain, if the Corporation chose, there was surely an obvious advantage in that. It is not a very easy matter to obtain a loan of 50,000*l.* or 100,000*l.* in Canada, upon any ordinary rate of interest; and to afford facility for making the loan in England, if that should be found more practicable, would seem to be both prudent and judicious. The Legislature of the province were competent to judge how far such an alternative might be advantageous. We cannot allow it to be inferred that they passed the act in that shape under any corrupt influence used by the defendant. The statute law of the province cannot be allowed to be impugned by any such assumption; and from what the witnesses state to have taken place in regard to attempts to raise loans both before this transaction and since, as well as from the information which the evidence furnishes of the effect of the whole arrangement upon the financial interests of the city, I think I am correct in saying, that if the plaintiffs have any claim to the 4,000*l.* or 5,000*l.* which it has been decreed the defendant shall pay to them, it cannot be on account of any loss which has fallen upon them in consequence of the measures which I have last spoken of.

1856.

Bowes
City Toronto

Judgment.

I have gone over the evidence to see what I could find in it that could fairly lead me to any other conclusion; not because I think there was any error in the judgment below on that point, for the judgment is professedly founded on higher considerations; but because my doubt being whether the direction that the defendant shall pay over his gains to the city can be sustained, I should feel less difficulty on that point if I could see that the city has incurred by the defendant's conduct a loss, which in good conscience at least, the defendant could be called upon to compensate by surrendering his gains.

1856.
 Boves
 v.
 City Toronto

Something was said in the argument of which I did not perceive the force, as to a disadvantage having accrued to the city from the manner or time of the debentures coming into the defendant's hands as if it was a departure from the original understanding, and to the prejudice of the city.

But I can see nothing that was done in consequence of the change by taking stock, which was not natural and proper in itself, and for the benefit of the city. The defendant, as I believe, had a clear enough understanding with the contractors before the by-law of the 29th of June was passed, that he might have all the debentures that would be from time to time issued under it at 20 per cent. discount. If the new arrangement had not been thought of, which was concluded in July upon the proposition of Mr. *Berczy*, the city would only have been obliged to issue their debentures in certain understood proportions as the work advanced; and ^{judgment.} so no doubt it would have stood in a more convenient position.

But when the contractors were driven by the pressure upon them for money to make the sacrifice they did, in surrendering a promised gift of 25,000*l.* and the loan of 35,000*l.* on condition that the city would take from them 40,000*l.* of their stock, it was obviously the intention of that arrangement that the price of the stock should be paid at once in debentures; for otherwise they could not have had that present command of money which was indispensable at the moment.

The act of parliament provided that the 50,000*l.* debentures in payment of the stock should be issued at once. And upon any other terms, we must be convinced that the new arrangement by which it appears to me the city has largely profited, would not have been carried out.

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The city seems certainly, by the evidence of those most competent to judge, to have found its account in acceding to Mr. *Berczy's* proposition; to say nothing of the advantage derived indirectly to it by establishing a credit in England, and by their obtaining a further loan of 50,000*l.* on most favorable terms, to pay off demands which they had not found the means of meeting.

1856.

Bowes
v.
City Toronto

On the whole, I look upon this case as one of the first impression.

In the defendant's conduct I see much occasion for regret, and some things to censure; but I cannot see the ground upon which the Corporation can fairly claim the money they are suing for. It is no sufficient foundation in reason, I think, for the specific order prayed for in this suit, that the defendant has done wrong. In every case that I have seen, whether the defendant has been trustee or agent for another individual, or has been a member of a body corporate intrusted with others to manage its affairs, if the court makes an order to surrender a profit that has been realized, or to compensate a loss, it is because the facts of the case show a connection between the redress prayed and the injury complained of.

In the *Charitable Corporation v. Sutton*, the corporation had been actually robbed by a portion of the directors of upwards of 350,000*l.* of the funds—and that through the most fraudulent contrivances. An inquiry was ordered into the amount of the losses which the Corporation had sustained, and the defendants were ordered to make it good.

There could be no plainer case than that. In *Benson v. Heathorn*, (a) a director of a steam naviga-

(a) 1 Y. & Co. Ch. Ca. 3263.

1856. *tion company bought a steam vessel for 1,340*l.*, and sold it to the company as from a stranger for 1,500*l.*, charging the company commission and other charges as upon a sale by a stranger. *Shadwell, V. C.*, decreed that he be taken to have bought for the company, as their agent, for 1,340*l.*, and that he should account for the difference and for the charges improperly received by him.*

Bowes
v.
City Toronto

This would be an analogous case, if instead of the Corporation of Toronto never, as I assume, having traded in a single instance in their own debentures, nor, as I suppose, ever thought of doing so, it had been their fair and ordinary business to traffic in them; and if the defendant, having bought the debentures now in question 'at 80 per cent. for himself, had pretended that he bought them for the Corporation at 90, and had charged them that price, pocketing the difference. In *Heathorn's* case, besides the positive fraud practised by him, all the profit that he made came directly out of the funds of the Corporation, and there was therefore a just meaning in the prayer that he should be made to restore and repay it. In the case before us not a shilling that the defendant received came from the funds of the City of Toronto, which would not have been a shilling richer or poorer if the defendant had bought the debentures at 50 per cent. discount, and sold them at a premium of 50.

Judgment.

The *York Building Company v. McKenzie*, was a case of the most ordinary description. A solicitor employed on behalf of the creditors of a bankrupt in Scotland, was held to be in the nature of a trustee, and as he bought for himself what it was his duty to sell to the best advantage for them, the sale was directed to be set aside; an account of the profits received by him was directed to be taken, and to be set against what he paid for the place, and for the improvements made by him since; and on payment to him of the balance in

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his favor, if any, he was to reconvey back the estate.—
 The principles on which, in such cases, the party is constituted by courts of equity a trustee were very extensively discussed in argument, and in the reasons of appeal; but, as in other cases in those reports, the reasons of the judgment were not given. The case, however, was one of the plainest kind, and except for the delay in applying, and the absence of anything like fraudulent intention in the defendant, there would have been nothing to argue about, at least not if it had occurred in England. It came from a Scotch Court to the House of Lords on appeal.

1856.

Bowes
 V.
 City Toronto

In the *North and York Midland Railway Company v. Hudson* (a), the defendant, *Hudson*, had as chairman, taken upon him to allot 5,000 shares of the stock to nominees of his own, and then he had them sold by brokers at a large premium (10*l.* on each share) and paid the profit thus made into his own private account at his banker's. It was objected, among other things by the defendant, that the stock was so much of the capital of the company, which was limited to a certain amount; and that they had no right to receive more than the value of the shares as settled by the statute, and could make no profit by them—that the premium could form no part of the property of the company; and that if the shares were allotted, and the deposits and calls paid, it was no concern of the company by whom they were paid, for that their capital would remain the same. Judgment.

The Master of the Rolls said that if the shares were the property of the defendant, no doubt the profit made by the sale of them would be his, but that if the shares belonged to the company, he was bound to account to them for every shilling of the profit derived from the sale of them. The shareholders had by a resolution expressly placed the shares at the disposal of the

(a) 16 Bev. 491.

1856. directors, for and on account of the company, knowing at the time that *Hudson*, the defendant, managed every thing for the directors. The court said the meaning of the resolution was that the shares were to be sold for the benefit of the company, not of the directors; and that it was immaterial to consider whether the profits on sale of the shares ought to be treated as capital or as income.

Bowes
v.
City Toronto

To make the decision in that case any authority between these parties, we must be able to hold that the debentures had by an express act of the Corporation been handed over to the defendant to sell on their behalf; and that when they were signed they were the property of the company. But the fact was that there was no agency of the kind either committed to the defendant, or undertaken by him. The debentures when complete were handed to the contractors, by being deposited in the bank under their instructions, that they might raise money upon them; and when sold they were sold by the contractors for themselves, and certainly not for the company.

Judgment.

Besides these cases of trading corporations, four cases, I think, of municipal corporations were referred to, simply for the purpose of shewing that when the acting members of such corporations have abused their trust, the same rules that would be applied to individual trustees have been applied also to them. It is only for establishing that point that they could be material to be referred to in the present case, for in each of them the abuse of trust was of the plainest, most direct, and most flagrant description.

The *Attorney-General ex parte Corporation of Leeds v. Wilson (a)*.—The acting members of that corporation existing under the old charter from the crown, issued in Charles the Second's time, when its powers were

(a) 1 Cr. & Phil.

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about to cease and a new municipal corporation to be substituted for it under the General Municipal Corporation Act 1853, took the extraordinary course of alienating a large portion of their stock and funds to purposes foreign to the objects of the corporation, in order to prevent their coming into the hands of the municipal council about to be formed under the new act, which was then apparently on the eve of passing; and the appropriation was actually carried into effect after the new act had passed. The court held it to be a gross violation of their trust by those members who joined in it; that each separately or all of them together ought to be sued; that the *stock* and money improperly transferred continued to be the property of the old corporation at the time of passing the new act, and was subject to the trusts and purposes of that act; that the alienations of such stock and funds were breaches of trust, and were acts fraudulent and void; and that the persons who took such assignment in trust, and the members of the corporation who contrived it, were liable to make good any loss which arose from it.

1856.
 ———
 Brown
 v.
 City Toronto

The case of *Attorney-General v. Aspinall* was a case of similar description; and the only question in either of these cases was how that misappropriation of the funds of the old corporation was to be dealt with, in consequence of the total change which had taken place in the constitution of the corporate bodies. The court held that the members of the old municipal body were trustees *quoad* the funds, under the 7th and other clauses of the new statute; and that they would have been trustees if there had been no such provision.

The Corporation of *Colchester v. Lawton*, was a case of a less flagrant kind; but it turned, like the others, upon what the court held to be a clear and direct misapplication of the funds of the corporation; and the order was to restore what had been wrongfully abstracted.

1856.
 Bowes
 v.
 City Toronto

In the late case of the *Attorney-General v. The Corporation of Belfast* (a), such excesses of authority and violation of trust (so to call it) were committed, though apparently from no corrupt motive, as seem almost incredible. Those who managed the affairs of that corporation, under pretence of the authority of an act of parliament which authorised them to raise 100,000*l.* for the purpose of purchasing up houses in order to widen streets, had raised and appropriated 84,000*l.* more than the statute allowed, and wishing to do still more in the same way, they took 50,000*l.* which they had been authorized by another act of parliament to raise for lighting the city with gas, and applied that also to buying up houses.

The court could have no hesitation in doing their utmost to redress such abuses. In the same case other misdeeds were complained of, and the manner in which the court dealt with one of the charges has some bearing on the present case.

Judgment.

"As regards these special respondents," the Chancellor said, "who are charged with having supplied the council with certain articles in the way of trade, and having thus improperly dealt with it, the matter is at most a small one; the goods furnished were not of any serious amount, nor has evidence been offered to show that the least advantage in the way of profit or otherwise was taken by those gentlemen in the course of these dealings. The corporation does not appear to have suffered in any degree, and when one of them, Mr. *Lewis*, was informed of an irregularity that had occurred between the council and his house, it was at once rectified. I believe, too, that they have all stated that they did not consider that there was anything illegal or improper in dealing with the council as they did. At the same time the furnishing of some of the goods in the names of the clerks,

(a) Irish Chancery Reports for 1855.

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partners, and the like, and the alteration of the check by the town clerk, indicate an absence of that plain and open avowal of the transactions which one might expect from parties perfectly free from blame."

1856.

Bowen
v.
City Toronto

I have cited those cases in which the defendants have been acting as members of corporate bodies, because they bear most upon the cases before us. The cases in which persons who have been acting in a private capacity, as trustees or agents for other individuals, have been held accountable for the monies or property of their principal misapplied, or for profits made by an improper dealing at their expense, are far more numerous. I have examined those that have been cited and all that I could find, and have found none in which an order has been made for paying over profits wrongfully made, or restoring property wrongfully appropriated, when the reason and justice of making such an order were not as apparent upon the facts in evidence as in those cases of which I have given the particulars. If there be any such case it has escaped my notice.

To recapitulate—these are my views of the points raised in this case:—

I think that for the mayor, or any aldermen of the city, to purchase city debentures from the holders of them in the ordinary manner in which such purchases are made, is not a transaction prohibited by any rule of equity, and therefore that the plaintiffs' bill cannot be supported on this ground merely; that the defendant having bought from Messrs. *Story & Co.*, the debentures in question, did what was absolutely prohibited by the rule of equity; and that having resold them at a profit, he cannot be allowed to retain the profit, but is accountable for it to the city. To hold this would be to advance a position which I think cannot be maintained, and which I do not take to have been assumed

1856. in the court below—though, perhaps, their judgments may be thought, and may have been intended, to go that length.

Bowes
v.
City Toronto

If, in order to sustain the plaintiff's suit, it be necessary to prove that in consequence of the defendant's transactions of which they complain they have suffered loss, which gives them a claim upon the defendant for compensation, then I think on that ground the case fails, for that the evidence on both sides shows plainly that nothing can be well conceived more groundless than the assumption that the interests of the city have suffered from the arrangements which have been effected.

It seems to me indeed to be so groundless that when we read the evidence of many of the intelligent men on whose behalf the suit appears to have been instituted, there is room to question whether it can have been sincerely urged, or whether the pecuniary claim has not rather been put forward as something necessary for giving an apparent legal object to the bill—the true object being to force out a disclosure of what had under one motive or another been too studiously concealed.

Judgment.

That the idea of the city having suffered in its pecuniary interests by these transactions is without any substantial foundation can hardly be more satisfactorily shewn than by comparing its present position in consequence of the aid given by it to the Northern Railway, with that of the County of Simcoe, to which repeated allusions have been made in the evidence and on the argument.

Both that county and the City of Toronto resolved to encourage this great work, from a conviction of its importance to the public interests.

The County of Simcoe seems from the first to have

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determined to extend its assistance by taking stock 1856.
which it did take to the amount of 50,000*l*.

Bowes
v.
City Toronto

The City of Toronto started upon another plan, apparently more generous, as regarded the Railway Co., but far less prudent as regarded the city—that is by giving to the company a large gratuity, and lending to them a larger sum.

By the change which was made in July, 1852, they agreed to become stockholders instead, and to the same amount as the County of Simcoe.

The railway has been long finished; and what is now the position of those two municipalities in consequence of the part they have respectively taken in promoting it?

Each owns 50,000*l*. of railway stock.

Judgment.

The County of Simcoe being left to take their own course, without, as we may suppose, any agency of the defendant, has given for their stock its full value in their debentures. Having issued them at first as the City of Toronto did theirs, in a form which made their legality questionable, they seem to have had no hesitation in applying for a statute to render them legal, and obtained it. The City of Toronto for the same amount of stock has given the same sum in debentures; and the only difference between the two is that by means of the 100,000*l*. loan obtained in 1852 in England upon the debentures sold there at par, the City of Toronto has been able to take up the whole of the debentures which had been issued for their stock; and thus those who advanced the large sum of money to the contractors in the summer and autumn of 1852 have been repaid with a profit; which profit has not come out of the city funds, but out of the contractors, to whom the debentures were issued.

1856.
 Bowes
 v.
 City Toronto

It was under these circumstances too, as we see, not really a loss to them; and the discount to which they submitted has not been considered by them as affording a ground of complaint either against the city or the defendant.

As to supporting the plaintiff's bill on the ground of a special agency having been committed to the defendant, in which he acted unfaithfully to the injury of the city—the most direct constitution of an agency between the plaintiffs and the defendants was that created by the provincial statute 16 Vic. chap. 5, or rather by the by-law of the City of Toronto, which was passed on the 1st November, 1852, in order to carry out what was authorized by that act. This by-law did make the defendant as mayor the agent of the city for raising 100,000*l.* by way of loan, out of which the railway debentures were redeemed. That agency resulted in what can hardly be intended to be complained of—namely, the raising the loan on the credit of the city at par, upon the legal rate of interest, which it seems was upon better terms than any such loan had been before procured. With respect to any agency with which the defendant was invested under the by-laws passed on 28th June, and in October, 1852, it was rather ministerial than of a kind that gave him any discretion to exercise.

Judgment.

If the plaintiffs' bill can be supported on the ground of any agency, it can only be, as I consider, by reason of the defendant's conduct in what was done by him as between the contractors on the one hand and the city on the other, in carrying into effect those by-laws, and in carrying into effect at the same time his own bargain with Messrs. *Story & Co.* But, if we are at liberty to look at the evidence in relation to these matters with a view to be governed by such convictions as they lead to, I cannot say that it establishes anything in my mind that affords just ground of complaint to the corporation, or that fixes an impu-

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tation of fraudulent or unjust conduct upon the defendant.

1856.

Bovis
v.
City Toronto

The city stood in the first place pledged by their own engagement to the railway company to give them 25,000*l.* and lend them 35,000*l.*

In consequence of the pressing wants of the contractors for money in the summer of 1852, the proposition came from the railway company that the city should take 50,000*l.* stock and take back their promised gift and the loan; and this was suggested because of the difficulty which was found in giving effect to the former plan of assisting the company by means of the intended loan.

Upon the least consideration of this proposal, it is evident that the only party who could hesitate upon the suggestion must have been the contractors, upon whom the sacrifice would fall of giving up the 25,000*l.* which had been made over to them by the company. The straits they were in at that moment drove them to consent, as Mr. Morrison's evidence and Mr. Berczy's fully explains. The Corporation of Toronto were so little likely to object, that some of the plaintiffs' witnesses say that there was no discussion that they remember upon it, though it was necessarily brought forward and resolved upon openly, as other matters are. Judgment

Then when it was agreed to and the change effected, what follows seems to have been the natural consequence of the change, and does not afford ground, in my opinion, for the very grave surmises which it has given rise to. Undoubtedly what was intended and desired by all parties was that the contractors should get the relief for which they were pressing.

That was not otherwise to be expected than from their chance of disposing of debentures for money

1856. without delay. The last plan, as well as the first, required that debentures should be issued.

Bowes
v.
City Toronto

If this defendant could legally purchase from the contractors one set of debentures, I do not see why he could not as well purchase the others, which were to answer the same object.

It was of no consequence to the contractors whether they obtained their money on debentures issued for stock, or for the gift and loan that had in the first instance been contemplated; nor do I see that it could be any particular object to the defendant whether the debentures which he had agreed to purchase were issued on the one account or on the other.

So far as concerns the amount to be ultimately paid upon the debentures by the city, the situation of the corporation was not prejudiced; nor as concerns the advantage which they got by issuing them.

Judgment.

The railway company were served as regarded the only object they had in view, when the contractors got debentures on which they could raise money, and were thus enabled to go on with their work.

The only persons that seem to have suffered were the contractors, who are not parties to this suit, and who have never complained. And they have not suffered by anything done by the defendant in regard to the debentures, for they obtained at least as much as they had counted upon.

This brings the case, as I view it, to the last ground on which it has been put—namely, that whether the plaintiffs lost money or not, the defendant did what was wrong in having this transaction, and more especially in concealing it; and that, having made profit by something improperly done by him towards the plain-

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tiffs, he cannot retain that profit, and is therefore accountable for it to them.

1856.

Bowes
v.
City Toronto

Taking the case on that broad ground, it appears to me to be a case of the first impression, not coming within any of the adjudged cases that have been cited; not because the circumstances are in their nature and combination different from those of any other case, for that will generally happen; but because they are not, as I think, analogous to those of any other case in which such a decree has been made, the defendant not having misapplied any of the funds of the corporation, nor directly or indirectly any of their property to himself, nor made for himself any profit which he ought to have made for them.

The bill was preferred, as is evident, under the impression that the defendant had obtained the money which he paid the contractors from the Bank of Upper Canada on the credit of the city, which he had in some manner pledged, and because it was thought to be unfair and unjust (as it would have been) that he should put into his pocket a profit made out of any funds thus procured. Judgment.

This suspicion led to inquiries, and no satisfactory answer being given, an excitement was naturally produced by what appeared to be mysterious. Before any clue to the transaction could be obtained, Mr. Cotton's statements directed suspicions to another quarter, and when it was found that Mr. Hincks had been connected with the debentures, his position in the Government led to surmises that there must have been something wrong of another kind.

No one can be surprised at the desire to get at the bottom of the matter, or can be disposed to find fault with the determination which was manifested to have the whole truth brought to light.

1856.
Bowes
v.
City Toronto

This suit has had in this respect the effect intended ; and the evidence that has been given in it has shown that the suspicions that had been entertained were not founded in fact, whatever might have been the appearances.

As to the effect of all that has been done on public opinion, or on the reputation of the defendant, who occupied and still occupies a public station of high standing, that is a matter which courts of justice have not to settle.

But, whatever may have led to the studied concealment by the defendant from the corporation of which he was the head, of the part which he actually took in connection with the negotiation of these debentures, the fact that he did not declare it when questioned in the corporation upon it has led to the institution of this suit, which might otherwise not have been brought ; and I think that on that account, though the bill should be dismissed, it should be dismissed without costs.

Judg ment.

I am sensible that, going into a consideration of this case in its different aspects, I have expressed my views of it at a length that must seem tedious ; not even shunning repetition when it seemed to me that it served to make any point clearer. The case is one of considerable public interest, and as I don't happen to have arrived at the same conclusion as a great majority of my brother judges, for whose opinion I have the greatest possible respect, I felt it to be my duty not less to them than to the parties in the cause, that the grounds on which I have formed my opinion, should be fully and distinctly stated.

DRAPER, C. J. C. P.*—I have arrived at a different

*Since the argument the Hon. J. B. MACAULAY had resigned, and the Hon W. H. DRAPER was appointed to the Chief Justiceship of the Common Pleas.

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conclusion from that expressed in the very elaborate judgment just pronounced; and, as in my opinion the judgment of the Court of Chancery should be affirmed, I shall limit my observations to the grounds on which I have adopted that view, without enquiring how far other reasons might or might not be relied on to sustain or confirm it.

1856.

Howse
v.
City Toronto

The rule in equity which governs trustees and all other parties whose character and responsibilities are similar, was fully stated and supported by the Court of Chancery in giving judgment. It has since its first recognition been more and more widely extended in its application, and has been enunciated in language more general and far-reaching in proportion as the number and development of the variety of cases which it was found necessary to subject to it, have demonstrated its soundness and the impossibility of preventing wrong, without giving it the utmost force, and the widest extension; and it may be summed up in the words of Lord *Cranworth*: (a) "The rule is based on a rule of human nature, that no person having a duty to perform, shall be allowed to place himself in a situation in which his duty and his interest may conflict." Judgment.

If the appellant's conduct in the transaction in question brings him within the operation of this rule, the decree is right.

Two enquiries suggest themselves—1st. How far his situation generally as a member of the governing body of the Municipal Corporation of the *City of Toronto* subject him to it. 2nd. How far the particular character in which he acted in the arrangement of these transactions make him amenable to it.

As to the first question, it will not be denied that all the funds or income of the Corporation of the City, whether arising from property or from sales, are ap-

(a) *Broughton v. Broughton*, 1 Jur. N. S. 966.

1856.
 Bowes
 v.
 City Toronto

Judgment.

applicable under our municipal corporation acts to purposes of a public nature, in which the inhabitants of the city have an interest—either from the benefit to result from these purposes being carried into effect, or because the larger portion of those funds and incomes is the result of the imposition of rates upon them. There is in the 12 Vic. ch. 81 abundant proof of this position; and I apprehend it is equally clear upon decisions on the municipal corporation acts in England that such corporations become trustees of all such funds, to apply them to the public purposes for which they are intended. I have looked with some attention at the leading difference between the Imperial statute (5 & 6 Wm. IV. ch. 76) and our own act, but I find nothing to cause any doubt in my mind that in this respect no solid distinction can be pointed out; and I arrive at the conclusion that under our act “The Mayor, Aldermen and Commonalty” of a city; “The Town Council” of a town; “The Municipality” of a village; “The Municipal Council” of a county; “The Municipality” of a village; “The Municipality” of a county, and “The Municipality” of a township, are collectively and individually trustees of such funds, and are liable to be called upon to answer for their or his dealings with, or disposition of, such funds in like manner as private trustees are in respect of breaches of trust. Of the numerous cases on this point, I will only mention the *Attorney-General v. Aspinall (a)*, *The Attorney-General v. Wilson (b)*, *Parr v. The Attorney-General in appeal (c)*, and the *Attorney-General v. The Corporation of Belfast (d)*.

In considering the second question, a reference to the particulars of the case becomes indispensable. I shall endeavor to make it with the utmost brevity.

On the 10th of August, 1850, the act 13 & 14 Vic. ch. 81 was passed. It empowered the corporation of

(a) 2 M. & C. 613.

(b) 1 C. & P. 1

(c) 8 C. & F. 409.

(d) 4 Ir. Ch. & C. L. R. 119.

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the city under by-law, to issue debentures not exceeding 100,000*l.* in amount, towards assisting in the construction of the Northern Railroad. On the 25th November in the same year the Common Council passed a resolution to grant 25,000*l.* in debentures payable in twenty years, with interest, on certain specified conditions.

1856.

Bones

C. ante

The appellants were then a member of the Common Council and was chairman of the standing committee on finance and assessment, whose report No. 12 is referred to in the resolution above mentioned. He was mayor of the city during the years 1851, 1852, 1853.

On the 18th of August, 1851, the Common Council resolved to lend the Railroad Company 35,000*l.* in debentures payable in twenty years, with interest, in addition to the previous bonus of 25,000*l.*, subject also to certain expressed conditions.

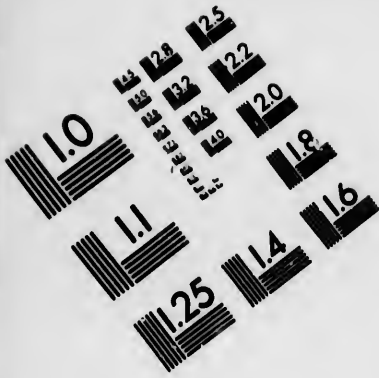
Judgment.

The Railway Company made over to *Story & Co.*, who were the contractors, the 25,000*l.* debentures—as a bonus over and above the price per mile which they were to receive. This was understood when the contract was entered into.

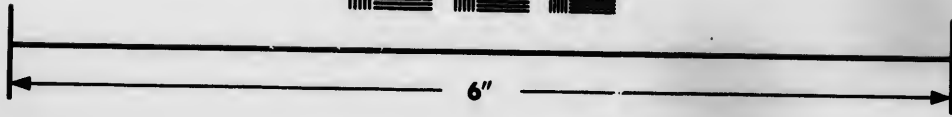
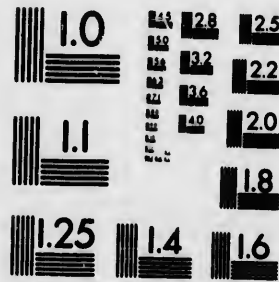
Before the 24th June, 1852, it was understood and agreed between the appellants and *Story & Co.* that they should sell to him whatever city debentures they should receive by virtue of pending arrangements, at a discount of twenty per cent.

On the 28th of June, 1852, the Common Council passed a by-law to provide for the issuing of debentures for 60,000*l.*, of which it was declared 25,000*l.* was a gift, and 35,000*l.* a loan to the Railroad Company. This by-law was well known by all parties concerned to be open to legal objections, and the necessity of an.





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1856. application to the legislature seems then to have attracted attention.

Bowes

City Toronto

The Railroad Company were unwilling to comply with a part of the conditions expressed in the resolution and the by-law respecting the loan of debentures for 35,000*l.* The contractors were under an urgent necessity to raise funds, and without the issuing of the city debentures they seemed to have no means of doing so. In this state of things, the president of the Railroad Company suggested to the appellant that he should propose to the contractors to surrender the bonus for 25,000*l.* on condition that the Railroad Company should surrender all claim to the proposed loan of 35,000*l.*, and that in lieu of the 60,000*l.* thus composed the city should take 50,000*l.* stock in the Railroad Company, for which the city should give 50,000*l.* of similar debentures. The contractors apparently at once agreed; and on the 29th of July, 1852, the appellant officially communicated the matter to the City Council, and they passed a resolution reciting that the contractors had accepted this proposition of the Common Council in view of the difficulties which existed in the giving security for the loan of 35,000*l.* in debentures, and resolving that the standing committee on finance and assessment, of which the appellant as mayor was one, should be authorized to complete this arrangement, retaining however the former conditions on which the bonus of 25,000*l.* was given.

Judgment.

Before this resolution, the issuing of debentures had commenced, for on the 22nd of July, 1852, 10,000*l.* of such debentures were lodged by the contractors in the Bank of Upper Canada, which Bank, in pursuance of an arrangement to which the appellant was party, paid to the contractors 8,000*l.* for the same. Similar deposits of debentures were made by the contractors, and proportionate payments were made up to 6th

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November, 1852, when 1,500*l.* of debentures were deposited, and 1,200*l.* was paid for them, completing a deposit of 50,000*l.* debentures, and a payment of 40,000*l.* The debentures were held by the Bank of Upper Canada, subject to the completion of their dealings for the appellant and parties interested with him as purchasers thereof. The larger part of these debentures were so lodged before the city by-law for taking the 50,000*l.* stock was passed.

1856.

Bowes
City Toronto

On the 23rd August, 1852, the City Council resolved on petitioning the legislature for authority to issue debentures for 100,000*l.* on terms differing from such as the existing law permitted, of which debentures 50,000*l.* were intended to be issued in exchange or payment for the railroad stock, and 50,000*l.* for other public purposes wholly unconnected therewith.

On the 27th August, 1852, the appellant, as mayor, called a special meeting of the City Council, when the petition was adopted.

Judgment.

On the 14th, October, 1852, the contractors released their right to the bonus of 25,000*l.*, and the railroad company theirs to the loan of 35,000*l.*

On the 18th October, 1852, the City Council passed a by law to take the 50,000*l.* stock, and the appellant was authorized to issue as many of the debentures authorized under the by-law of the 23th June, 1852, as were necessary for taking this stock—43,000*l.* of these debentures had in fact been then issued under resolutions of the finance committee.

On the 28th September, 1852, Mr. *Ridout*, the cashier of the Bank of Upper Canada, wrote to the appellant, making an offer in the event of the act of the Legislature, petitioned for by the City Council on the 27th of August, being passed, to take the debentures. This letter was

1856. brought under the consideration of the finance committee on the 11th October, 1852, on which day the appellant communicated the passing of the act of the Legislature to the finance committee. That body called on Mr. *Ridout* for information, which was given by him in a letter dated the 14th October, which was laid before the committee on the 19th October, and the chamberlain was instructed to include its provisions in the by-law to be passed under the statute authorizing the issue of the new debentures.

Bowes
v.
City Toronto

Judgment.

On the 7th October, 1852, this statute was passed. It authorized the city to raise a loan, not to exceed 100,000*l.* currency, on debentures to be issued not exceeding in amount 100,000*l.* currency. 50,000*l.* of the loan was expressly appropriated, and it was enacted that the sum of 50,000*l.* the remainder of the loan, should be applied in payment of the railroad stock lately purchased, and it was made the duty of the chamberlain "forthwith, by the consent of the holders thereof, to call in such debentures of the said City of Toronto as may have heretofore been issued under by-law of the Common Council of the said city and taken in payment of such stock, and to substitute therefor so much of the funds received on account of the debentures issued under this act as may be necessary for that purpose." That act also conferred authority on the City Council to repeal the by-law of the 28th June, 1852, to pass a new one for contracting the loan; issuing debentures, and to impose a special annual rate on the city for payment of principal and interest. On the 1st November, 1852, the Common Council passed the by-law to provide for the issue of debentures for 100,000*l.* Its provisions were — 1st, Authorizing the mayor (the appellant) to raise *by way of loan*, on the credit of the debentures, and of the special rate imposed, a sum of money not exceeding in the whole 100,000*l.*, and to cause the same to be paid

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and applied in the manner prescribed by the act authorizing the negotiation of the loan. The arrangement was finally perfected by debentures for 82,000*l.* sterling being issued, and placed by the chamberlain of the city in the Bank of Upper Canada, and thereupon the old debentures which had been issued for *Story & Co.* and by them sold to the appellant, amounting to 50,000*l.* currency, were delivered up to the chamberlain, and 48,760*l.* currency was placed to the credit of the city. The new debentures were sent to England to Messrs. *Glynn & Co.*, to be handed to Messrs. *Masterman & Co.*, on payment of 41,000*l.* sterling. The money which was paid to *Story & Co.*, viz., 40,000*l.* currency, had been obtained by arrangement made with *Glynn & Co.* by the parties joined with the appellant in buying from *Story & Co.* The appellant realized as his share of the profit on the negotiation of the debentures in England 4,115*l.* 17*s.* 3*d.*

1856.

Bowes
v.
City Toronto

The appellant not only never let his interest in the transaction of the purchase from *Story & Co.* be known, but on the 21st February, 1853, wrote the following letter (in reply to an application for information asked for from him by a committee of the City Council appointed to enquire into the matter), addressed to the chairman:

"Sir—I had the honor, in reply to your communication of the 17th instant, to refer you to the city chamberlain, the chairman of the standing committee on finance and assessment, the contractors of the Ontario, Simcoe & Huron Union Railroad, and the cashier of the Bank of Upper Canada, for information on the subject of the debentures issued to the contractors of the Ontario, Simcoe & Huron Railroad, as capable of giving much more satisfactory information than I might give. But, as the committee seem anxious that I should answer their questions, I cheerfully do so. I introduced the contractors to the Bank of Upper Canada, and rendered them any

Judgment.

1856. assistance in my power in the negotiation of the 50,000*l.* debentures, but received no remuneration, present or prospective therefor.

Bowes
v.
City Toronto

Your obedient servant,
J. G. BOWES, Mayor."

Though the City of Toronto originally dealt with the directors of the Railroad Company with the desire of aiding them in constructing their road, and though their contractors were at first no parties to the dealings between the Railroad Company and the city—yet the subsequent arrangement materially changed the relations of the parties, the character of their dealings and their position towards one another. At first we find the city binding itself to give 25,000*l.* of its debentures to the Railroad Company, and secondly, a further agreement by the city to loan 35,000*l.* of its debentures to them.

Judgment. We find also that the Railroad Company had agreed to transfer these debentures to their contractors, and as to the 25,000*l.* bonus had made it part of the understanding at the time of their contract for building the road.

It does not distinctly appear how the contractors became possessed of paid up stock on the railroad, whether by their original agreement that they should subscribe so many shares, paying for them by the performance of work in fulfilment of their contract, or taking them on a subsequent understanding as payment for work done. I believe the former to have been the case; but, however that may be, they were the owners of shares to a very large extent, at least to the amount of 50,000*l.*, as I understand from *Courtwright's* evidence.

It is in this state of things the appellant acquired, by agreeing to purchase the debentures which the contractors should receive from the Railroad Com-

pany, an interest that the city should furnish debentures to the company, which should be transferred to the contractors and be sold by them to him at a discount of twenty per cent.

1856.

Bowes
v.
City Toronto

Though *Story & Co.* held stock, yet the shares were not salable: persons could not be procured to subscribe nor to purchase, and through the medium of this stock they could not raise funds; and as to the debentures for the 35,000*l.*, not only were they, as part of the whole 60,000*l.*, liable to doubt, from the questionable legality of the by-law authorizing their issue, but they were subject to conditions affecting the terminus, the location of the railway along the front of the city, and the security required for repayment. Pressed as they were for money, as the evidence shows, they felt it necessary to make *immediate* arrangements by which debentures should be at their disposal, so as to raise a larger sum than by their bargain with the appellant the sale of the 25,000*l.* debentures would bring. Judgment.

But Mr. *Berezy's* evidence clearly shows there was an objection apparently insuperable on the part of the Railroad Company to take the loan of the 35,000*l.* on debentures, if they were to give the city the first lien on the road by way of security for the loan, and in consequence he suggested the giving up the bonus and the loan, and instead thereof the purchase by the city of 50,000*l.* stock for 50,000*l.* debentures. But in this transaction the city in fact dealt directly with the contractors. It was *ex* *gratia* stock the city bought, and to them the debentures were paid; and in this manner the thing must, as I take it, have been understood by every member of the Common Council. The appellant alone knew that the debentures to be issued under this arrangement were already sold to him, and that unless this arrangement was made he would lose the opportunity of purchasing more than the 25,000*l.*, the gift to the Railroad Company; and having *this* interest, he negotiated between the city and the contractors.

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Now, had the Council known of the appellant's purchase, they must have concluded that he saw a prospect of the debentures rising in value in some way, and shortly too, and this must have led to enquiries calculated to alter their proceedings. They must have been convinced that he expected a profit and a speedy one, and they would have examined how far that would affect the city interests. Or, suppose it possible for the city to have commanded 40,000*l.* cash at that moment, can there be the slightest doubt but that *Story & Co.* and the Railroad Company would have readily executed releases similar to those of the 14th of October, 1852, in consideration of that sum of 40,000*l.*, and that the stock to the extent of 50,000*l.* would have been transferred by *Story & Co.* to the city for that sum? I admit the city neither had nor could have raised 40,000*l.* on their debentures at the moment, but that does not affect the question how stood the appellant in point of interest, had it been practicable and for the interest of the city, whose mayor he was. The whole prospect of advantage to himself depended on the city debentures being issued. It was not only not his interest to endeavour to procure some other arrangement for the advantage of the city, but it was his interest to prevent the city making any arrangement but that of issuing the debentures, without which the substratum of his agreement with *Story & Co.* was destroyed. He was therefore urging for the contractors an arrangement with the city, and he had a direct pecuniary profit in prospect by succeeding,—can it be questioned that he placed himself in a situation in which his duty as mayor of the city and his interest as purchaser of the debentures were conflicting one with the other?

Judgment.

If, as trustee of private property he caused an advance to be made of any part of it, or its security to be pledged, so that third parties benefited, and he by an arrangement with such third parties gained a pro-

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fit, which induced him to exert himself to bring the affair to bear, he would not, I presume, be permitted to retain such profit to his own use; and if, as I have assumed to be the law, he is a member of the governing body of this corporation as a trustee of its property and funds, how can he be allowed to make a profit by negotiating a pludge of their credit secured on rates to be paid by them?

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And this, I think, affords a satisfactory answer to arguments deduced from the suggested analogy between the situation of the appellant and that of a member of the legislature, who might support and procure, or oppose and prevent, the passing of any given measure from a like interest and inducement, to profit in his own transactions by means of the adoption or rejection of such a measure. Besides, considerations of the highest constitutional policy intervene to prevent such an inquiry into the motives of a member before any tribunal but that of public opinion;—reasons which have no application in the case of a member of a merely municipal corporation. Judgment.

Nor ought we, I think, to omit to consider how far the concealment of his actual position by the appellant operated on those who were his fellow members in the City Council. In June (about the 24th) the appellant made his bargain with *Story & Co.* On the 28th of that month the by-law is passed for the issue of 60,000*l.* debentures. There must have been correspondence going on with parties in England, which came to maturity, so that on the 28th September, 1852, Mr. *Ridout* is authorised to offer to the appellant to take the anticipated loan of 80,000*l.* or 82,000*l.* sterling; while in the meantime every arrangement has been quietly got along with by which it was ensured that 50,000*l.* currency of debentures would, through the hands of *Story & Co.*, come into defendant's hands. And from the dates,

1856. the defendant knew the value of city debentures in London three weeks before the city by-law for taking the stock from *Story & Co.* was passed; and he did not lay the letter of the 28th September even before the finance committee until after the passing of the act of the Legislature authorizing the negotiation of the loan for 100,000*l.* was passed. It may be fully admitted that it was the interest of the city to promote the construction of the railroad; that the difficult position of the contractors imperatively required immediate help; that the railroad company were unable to assist them effectually, at least without complying with conditions which they thought prejudicial to their interests; that no just exception could or can be raised to aid being given by the city as first proposed by gift, and then by loan, nor yet to the substituted arrangement to take stock and pay for it by debentures; nothing of all this affects the fact, that during all the most important of these transactions the appellant had an interest in purchasing debentures, which it required a by-law to authorize the issue of, and that he concealed that interest while negotiating for the city and during the whole time those by-laws were before the city council; and that before the whole of the transactions were concluded he must have possessed knowledge with regard to the negotiability and value of city debentures in the London market, which he kept studiously to himself. It cannot, I apprehend, be necessary to say more, for the purpose of shewing that the appellant's position differed from that of every other member of the city council, both in the interest he had as to the debentures, and as to the knowledge he must have possessed as to their value in the English market. That his interest naturally suggested concealment, and that he practised it; and that he profited by the result, his profit arising from a dealing in the pledges of the city credit—pledges which his influence and example had some share in procuring; is equally clear.

Judgment.

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The sequel of these transactions further illustrates their mischievous tendency and bearing.

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City Toronto

I have already referred to the terms of the act 16 Vic. ch. 5; it seems to have been passed in contemplation that the debentures would be sold at par, authorising a loan not to exceed 100,000*l.* on the credit of debentures not to exceed in amount 100,000*l.*, and it clearly provides for the direct raising of money.

By the by-law of the 1st of November, 1852, the city place the whole power of negotiating this loan in the appellant's hands, while unknown to the Common Council he was expecting and actually obtained the profit he had contemplated out of the result of that negotiation, and was enabled to conceal his own connection with the matter through the unlimited confidence placed in him. It seems absurd to enquire, nay more, it would be unjust to the other members of the City Council to raise the question, whether, had they known all that was known to the appellant, they would have entrusted him with the exclusive power of negotiating the loan and of seeing on their part to its application. It is not easy to understand how it happened, unless to mystify and conceal the actual truth, that neither in the act of the Provincial Parliament, nor in the by-law of the 1st of November, are the terms of Mr. *Ridout's* letter of the 28th of September alluded to or used, to the effect that he proposed to take the loan for 82,000*l.* sterling, equal nearly to 100,000*l.* currency, the bonds (meaning debentures) to be taken at the par of 2*s.* 4*d.* currency to 20*s.* sterling, of which 50,000*l.* would be payable in City bonds. These 50,000*l.* City bonds refer beyond all doubt to the debentures purchased by the appellant from *Story & Co.*, and if it were merely intended that new debentures should be issued for the old, pound for pound, it would have been easy so to have expressed it in the statute and the subsequent by-law; whereas both of these speak of

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raising money and of substituting so much of the proceeds of the loan as should be necessary to call in the prior debentures. Perhaps it was feared, that to have used in the statute expressions corresponding to those in Mr. *Ridout's* letter might have led to inquiries which the appellant's conduct justifies me in saying he desired to avoid, though, as he appears to have been in Quebec while the act was in progress, and must then have been fully cognizant of the nature of Mr. *Ridout's* proposal, it would have been easy to get the words of the act changed.

Judgment.

In the words, however, that are used in the by-law we find the nature of the power given to be in accordance with the statute—namely, to raise a loan and make a disposition of the proceeds. It might perhaps have been properly contended that he should be bound by the strict letter of the power given to him, and be treated as having received 99,766*l.* 13*s.* 4*d.* under it; and then he accounts to the City for 50,000*l.* of this sum by returning to them debentures for that exact amount, all purchased about the 28th of June; and 7,000*l.* issued and received by him after the act had passed, and 25,000*l.* (including the 7,000*l.*) coming into his hands by the deposit thereof in the Bank of Upper Canada, after the Common Council had adopted the petition to the Legislature to have that act passed. It cannot be believed the City Council would not have interfered if they had known that the appellant, then mayor, was to have these very debentures at 20 per cent. discount, while they were petitioning for authority to loan a larger sum and to redeem these among other debts. This forcibly illustrates what may be the consequences of holding that such transactions do not come under the control of equity; and if one member of a corporation may with impunity thus make a profit, so may every other: a consideration of no slight significance in a country filled with municipal corporations as this is.

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I agree with the court below, both on the general principle and in the application of it to these particular facts. I regret that my little familiarity with the practice and principles administered in the Court of Chancery, hinders my putting so clearly to others as I feel them the conclusions at which I have arrived, and I must admit that I was at one time embarrassed with a consideration, which I have no doubt would not have delayed the judgment of those more conversant with those matters at all. Feeling a strong conviction that it never would be right, nor intended by the legislature to allow this corporation to go into the market to buy up their own debentures at a discount, it did appear to me that the decree in their favor was indirectly enabling them to obtain the same result by acquiring to themselves a profit arising from precisely such a dealing. I feel satisfied, however, that this is an incorrect mode of regarding the question, which is not whether they, *a priori*, should be allowed or encouraged to engage in such transactions, but whether the appellant, having made a profit under the circumstances *can* and ought to be permitted to retain it. If not, then to whom, or to what fund should it go? That question is answered by the application of principles well established, as between trustee and *cestui que trust*. The plaintiffs certainly sustained no direct loss. If such loss arose the contractors suffered it, and they do not complain, nor could they, for they appear to have reaped an advantage in one way equal in their own estimation to the discount at which they sold the debentures, for which they got all they expected when they became parties to the new arrangement.

The decree must therefore rest on the ground that there has been a profit made by the defendant out of dealings in which, while there is much ground for holding that he acted as the direct agent of the plaintiffs, it cannot be denied that he stood in a confiden-

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tial relation to them. This relation made it his duty to give them disinterested advice, to act for their advantage without personal bias, to procure for them the most profitable arrangement under every combination of circumstances which might arise: While under this obligation he placed himself in a situation in which it was his interest that the plaintiffs should sanction and adopt one particular course of action; that no arrangement, other than for the issue of debentures, should be resolved upon, and that he should not be known, or suspected, to be concerned in bringing about any one particular mode of dealing in preference to another. He therefore concealed his individual connection with the affair: he accepted the almost exclusive trust of carrying it fully out: he realized a profit from its completion, and when consummated he still denied that he had derived any advantage from it; shewing that in his own judgment his course was one of at least dubious morality.

Judgment.

It appears to me, under such circumstances, it has been rightly decreed that he should not retain the profit made.

McLEAN, J.—This is a case of great public importance, involving as it does a question in which not merely the parties litigating are concerned, but in which, as the whole province is governed to a certain extent by municipal corporations, all must feel deeply interested. Very important interests are committed to the care and management of these corporations in various sections of the province, and very extensive powers are given to them in order to enable them to deal with them satisfactorily. Upon the proper exercise of these powers the public welfare very largely depends, and it is much to be feared that the abuse of them cannot always be reached or repressed by any proceeding in any of the courts of justice. In this case the City of Toronto, a corporation,

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complains of the appellants, a member of its governing body and Mayor of the City, for having, while he held these important offices in the City government, used his influence to procure the issuing of debentures by the City Council for certain purposes, a previous arrangement having been made and then existing between him and the parties to whom they were to be issued for their purchase at a rate 20 per cent. below par; and for having while a member of the Council and Mayor subsequently sold other debentures payable in England, which under an act of the Provincial Parliament procured by him were substituted for those which he had agreed to purchase at such higher rate that a profit of 10,000*l.* was made by the appellants and those who were associated with him in the transaction; which profit thus made, the respondents contend, it was the duty of the appellants as Mayor to have made for the City and to have paid into the City treasury. The allegation in the bill is, "that the said Mayor might have made or procured an arrangement to save the City the said sum instead of arranging for obtaining the same for himself, but made no attempt to do so;" and in a subsequent part of the bill it is charged, "that the said sum has been wrongfully and illogally diverted from the funds and uses of the said City; and that since the discovery thereof, the said Mayor frequently and solemnly denied that he had any concern therein." I believe the substance of the complaint is contained in what I have stated; the other portions of the bill point out the different proceedings by which the result, or profit of 10,000*l.*, was arrived at; and the appellants is charged with having in his situation as a member of the Council, "been an active party and used the influence he had as Mayor and otherwise, to procure the passing of the several resolutions and by-laws of the Council with a view to facilitate the making of said profit," the Council being kept in ignorance of any private motive on the part of the appellants for desiring to advance these measures; and believing, as it is

Judgment.

1856. *alleged* in the bill, "that in the advice and recommendations he from time to time gave to the Council and members thereof, upon which they acted, or by which they were influenced, he was wholly disinterested except as he had an interest in common with all the other inhabitants and rate-payers of the City;" whereas, as it is alleged, "the whole proceedings were shaped, framed and carried out through his means, in such a way as might enable him, and under the hope that he would be enabled to possess himself of the profit of 5,000*l.* (one half of the amount alleged to have been made) without any discovery being made thereof by any of the parties interested therein, or entitled to call him to account therefor."

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Judgment. If indeed the appellant did make use of the influence which he possessed "as Mayor and otherwise," for his private gain, or if by any measures which he adopted while filling the office of Mayor he made money and put it into his own pocket, in which the City of Toronto had a shadow of interest, or to which he is not legally and equitably entitled; then this call upon him through the Court of Chancery to refund ought to be sustained, because the principle must be fully admitted that no person in the character of a trustee or agent can be allowed to use the means of his trust for his own advantage. That the appellant, as an alderman of the City and as head of the corporation, was an agent entrusted with the discharge of important duties on behalf of his fellow citizens cannot be denied, and that while he filled that character it was his duty at all times to preserve and promote the interests entrusted to him is equally undeniable. He is charged, however, with having so far disregarded the office which he filled and the duties which belonged to it, as to have induced the City Council, of which he was a member, to issue a certain amount of debentures concealing from them the fact that he had made a previous arrangement for their purchase at a large discount,

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and that he would probably realize a handsome profit out of them. Now the fact of such concealment cannot change the nature of the proceeding, or make it culpable if it were not otherwise so. If indeed the Council was induced to issue debentures or to do any other act in relation to them which they would not have done if fully informed of the facts, then such concealment might very justly be charged as a breach of duty. But if nothing has been done but what was fully intended by the Council; if they have only carried out the public desire in the course they have adopted, and the interests of the City have not been injuriously affected, the fact of a secret arrangement existing for the purchase of the debentures, ought not, as it appears to me, to be allowed to influence the question. It is well known, and it is shewn by the evidence, that when the Ontario, Simcoe and Huron Railway Company was organized there was a strong desire to aid them in a work in which the interests of the City of Toronto were considered to be particularly and deeply involved. A proposition was made that the City should take stock in the Company to the amount of 100,000*l.*, but that project being submitted to a vote of the ratepayers in the different wards, a majority of those who took the trouble to vote was found against it; still anxious to promote so desirable an object, the Council then resolved to aid the Company by a grant of 25,000*l.*, and placing at their disposal, subject to certain terms, a site for a terminus of the railway on the market block. The pecuniary aid thus intended to be bestowed was to be by debentures of the City, redeemable 20 years after their date. In August, 1851, after the works had been commenced, and when the contractors began to be pressed for means, application was made to the City Council by the Railway Company for further aid, and the Council agreed to extend such aid by a loan of 35,000*l.* in debentures, payable 20 years after date with interest half yearly, in the meantime the loan to be secured by a charge upon the road. In

Judgment.

1856. June, 1852, a by-law was passed for the purpose of giving effect to the views of the Council to provide for the issuing of debentures for the sum of 60,000*l.*, being the 25,000*l.* donation and the 35,000*l.* loan; but as security was required on the road for the latter sum a difficulty presented itself to the Company in giving that security, inasmuch as they were not in a position to forego the government guarantee, and it was well known that the government required that they should hold the first incumbrance for any advances which might be made. The Company had agreed to transfer all the debentures which they should receive to Messrs. *Story & Co.* the contractors for the road, who were also large holders of the stock of the Company—taken as part of the consideration for their labor and outlay in making it. Thus situated, and to avoid the necessity of giving a security on the road for the 35,000*l.*, which might jeopardize the government aid, a proposition was made to the appollant, as Mayor, that in lieu of making the donation and loan referred to, aid should be granted by the City taking to the amount of 50,000*l.* of the stock of the Company which was then held by the contractors, to be paid for in debentures payable in the same manner as the others which the Company or the contractors were to receive. That proposition, diminishing to the extent of 10,000*l.* the amount which the City had agreed to advance, was submitted to the Council and at once acceded to; and there is no doubt that it was an arrangement deemed advantageous to the City. A donation of 25,000*l.*, for which the City was pledged, was saved; and it may be said that for the 35,000*l.* loan the City was to receive 50,000*l.* in stock, and the amount of the City liabilities was to be reduced 10,000*l.* In submitting that proposition, therefore, and in recommending it to the Council, as he undoubtedly did, for he had accepted it conditionally, the Mayor of the City faithfully discharged his duty. It is alleged that prior to the passing of the by-law on the 28th June, 1852, for the

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issue of debentures for the 60,000*l.*, the appellant had entered into an arrangement with the contractors to purchase from them at 20 per cent. discount all such City debentures as they might receive. If that was the case, then undoubtedly his interests would have been better served by the issue of debentures for the larger amount; and yet it is manifest that he did not allow personal considerations to prevent him from urging upon the City Council the adoption of a proposition more favorable to its interests. As to the arrangement with the contractors to purchase the debentures at 20 per cent. discount, there can be no doubt that if a higher price could have been got in any other quarter they would not have been sold to the appellant at so low a rate. The contractors were satisfied with the sale they made, and still express themselves satisfied, and so far as they are concerned there is no room for complaint against the appellant. It is not alleged against the appellant that any view to his private gain prompted him as a member of the Council to accede to the donation of 25,000*l.* or to the loan of 35,000*l.*, the aid to be afforded by the issue of debentures, for these sums were such only as the whole community thought it becoming and proper to afford, and such as in all probability would have been given if the appellant had never been a member of the Corporation. In granting that aid however, few persons were sanguine enough to imagine that the Company or the contractors would be able to part with the debentures at par; it was well known that the contractors were anxious to get the debentures for the express purpose of disposing of them for the best price they could get for them; and it was open to anybody who chose to compete for them. Why the appellant, if he had means to invest in such debentures for himself or his friends, should be prevented from making such an investment, I have not been able to perceive. If he had proclaimed in the Council that the debentures which they were about to issue would be sold at 20 per cent.

1856. discount, or that the contractors would be willing to take 40,000*l.* in cash in lieu of 50,000*l.* debentures, would the course of the Council have been changed? or would they have raised the money upon their own debentures, in order to do which they must have submitted to the same rate of discount as the contractors?

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But it is said that if the appellant had communicated to the Council the knowledge which he had as to the probable sale of debentures in London, the Council could have raised the money and paid off their liabilities for less than their actual amount. Now this is assuming that he had himself such positive information on that subject as would have influenced the Council, and is assuming still further that it was his bounden duty to have communicated such information. But if the Council had been fully aware of it, it seems impossible to conceive that they could have availed themselves of it with any view of raising money to buy up their own liabilities at a discount; such a proceeding would not be in itself creditable, and could not fail to affect injuriously the credit of the City. If it were generally known that the City was buying up its own obligations at a large rate of discount, the conviction must at once have been established that they were paying for them all they were worth, or that they were taking advantage of the necessity of the holders. The contractors in this case were entitled to the debentures under an arrangement which was advantageous to the City, and being in want of means when they were assured that they would be issued they had a right to negotiate a sale of them to the best advantage; this they did to the appellant, not wholly for himself, because it is not alleged that he unaided could have made the purchase, and when the debentures were issued they were handed over in pursuance of such negotiation and deposited in a bank as security for the advance of money. Up to this time none could say how the investment would terminate; of course, the

Judgment.

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parties interested in it anticipated a favorable result, or they would not have embarked in it. What gave it weight and value was what subsequently occurred. But if the debentures were acquired correctly, nothing which took place afterwards which increased their value, can deprive the holders of the right to retain any profits made upon their being resold. No city funds or city credit were used in purchasing the debentures from the contractors; the means were furnished through the instrumentality of Mr. *Hincks*, who was associated with the appellant in the purchase, and without whose assistance it could not have been made. The debentures were in the possession of the parties, and were paid for at the stipulated price. Subsequently an application was made for an act of parliament to authorize the City of Toronto to consolidate 100,000*l.* of its debt, including the 50,000*l.* of debentures held by the appellant and Mr. *Hincks*, and such an act was passed, and the debentures authorized to be issued under it were made payable in London. These were sold at such a rate as to have realized the profit which the City of Toronto now claim to have paid into the treasury, and at the same time to have raised a considerable sum for the City at a rate never before or since realized.

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v.
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Judgment

In all this I confess that I have not been able to see any violation of duty, or of any obligation which the appellant owed to the City of Toronto, as an alderman or as Mayor; no portion of the public monies have been misapplied or diverted to the benefit of the appellant: no loss has been caused to the City, but on the contrary a considerable gain has accrued from the whole proceeding; and, admitting to the fullest extent that the appellant was in the character of a trustee for the City while he filled the office of Mayor, I do not find that the evidence brings home to him any violation of trust or any dereliction of duty which can entitle the City of Toronto

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to insist on his paying into its treasury an amount which has been derived from the use of the funds furnished by a third party. In coming to this conclusion, I must admit that I do so with some considerable doubt, knowing that the point has been carefully considered and ably adjudicated upon in the court below by judges much more experienced in the consideration of cases of trust; but I have not been able to satisfy myself that the appellants has done anything which can entitle the respondents to recover against him in this action. I am therefore of opinion that the judgment of the court below should be reversed, and that the bill should be dismissed.

Judgment.

BURNS, J.—I have based my opinion that the decree in the court below is correct upon the position which the appellants held at the time the act of Parliament 16 Vic. ch. 5, was passed, and the by-law of the Common Council of the 1st of November, 1852, to carry out the act, and what was done under these to effect the object and intention of both. We must see in what position matters stood on the 1st November, 1852, in order to get a clear view of Mr. *Bowes'* duty, and what was required of him as an agent of the Corporation of the City. The act of Parliament passed on the 7th October, 1852, and it enabled the Common Council to borrow 100,000*l.*, one half of which should be appropriated in payment of the promissory notes of the City then current, and in the redemption of such debentures of the City as were issued prior to the passing of 12 Vic. ch. 81, and the other half should be applied in payment of 10,000 shares of the capital stock of "*The Ontario, Simcoe & Huron Railroad Union Company,*" lately purchased by the City. Now on the 18th of October, eleven days after the act of Parliament passed, we find the Common Council passed a by-law, which, after reciting a resolution of the 29th of July, 1852, in which the standing Finance Committee were authorized to complete an arrangement with the railway contractors, by means whereof the contrac-

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tors were to surrender the grant of 25,000*l.*, and the Railway Company were to waive the loan of 35,000*l.* and the Common Council were to take stock to the amount of 50,000*l.*, to be paid for by the issue of debentures, authorized the Mayor to subscribe for, take, receive and hold stock in the Company to the extent of 50,000*l.* for and on behalf of the City. It appears that the Finance Committee had authority to complete the arrangement only upon certain conditions respecting the market block. The by-law of the 18th of October also recites that the contractors and the Railway Company respectively, by instruments dated the 14th of October, seven days after the act of Parliament, which states that the 10,000 shares had lately been purchased, had surrendered the 25,000*l.* grant and waived the 35,000*l.* loan. This by-law shews clearly that it was a condition precedent to the City taking stock that the contractors should surrender the 25,000*l.* grant, and the Railway Company should waive the loan. The by-law also provides that it should be the duty of the Mayor to appropriate so much and so many of the debentures authorized to be issued for the 60,000*l.* as might be requisite and necessary to subscribe for the stock. This appears to me a very strange matter; the Common Council of the City on the 18th of October, 1852, are found making provisions for taking stock in lieu of the 60,000*l.*, while the act of Parliament passed on the 7th of October, states that stock had been then lately purchased. Another thing which appears to me very strange, and I see no explanation of it, is, that on the 30th July, the day after the Finance Committee had been empowered to effect the arrangement, a certificate of shares, viz. ; 3250, was deposited with the Chamberlain of the City, and a certificate of 750 shares completing the 10,000 (other shares having been certified in the meantime) was deposited on the 22nd September. Taking it to be the fact that these shares were certified to the City at the times mentioned, and it appears that 4,500 shares

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1856. were certified directly to the corporation, and the others through the contractors; then the act of Parliament did truly state that the City at that time were the purchasers or proprietors of 10,000 shares of stock; and yet on the 18th October we find the Common Council taking means and steps to acquire stock or shares, which as appears by the evidence, the corporation already held, and held it too, anterior to the time of being released by the contractors and the Railway Company from the obligations to provide for the 60,000*l.* I cannot believe the City Council imagined that the corporation were the proprietors of 10,000 shares of stock in the Company on the 22nd September, 1852, at a time when neither the contractors nor the Railway Company had released the City from the 25,000*l.* or the 35,000*l.*; and also at the time, viz.: the 18th of October, when we find the Common Council stipulating that the Mayor shall subscribe for the stock subject to the same conditions relative to the passenger terminus of the railroad and other matters as contained in the resolution of the 29th of July previous. Another very singular circumstance is, that though on the 18th of October, when the Common Council were providing for stock being subscribed and stipulating that it should be done on certain conditions, we find on the 1st November after not one word said on the subject of the stock having been procured, though it must have been before the 18th of October, and not a word said about the previous conditions. Putting aside all these considerations, with which matters Mr. *Bowes* may have had much to do, and going to other matters to shew his true position, it seems that on the 15th of May, 1852, the contractors were entitled to debentures in proportion to the work then done to the amount of 10,000*l.*, and in June they became entitled to a further amount of debentures. Being desirous of selling the debentures, they negotiated with Mr. *Bowes*, and he agreed to give them cash less 20 per cent discount, the debentures having 10 years to run. Debentures

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were issued on the 15th of July, 1852, to the amount of 10,000*l.*; and there can be no question when these were issued they were on account of the sum which the City had agreed to advance to the contractors. Before any more of the debentures were issued, however—namely, on the 29th July—we find that the Finance Committee had authority to convert the grant and loan into stock on certain conditions. The evidence shows that not only the first 10,000*l.* of debentures, but that all the debentures issued up to the last, which was on the 10th of November, were converted into stock, and that the 10,000 shares were completely certified to the chamberlain on the 22nd of September. Mr. *Bowes* began his negotiations for the purchase of the debentures while they were the property of the contractors under the grant; and had the debentures so remained and those issued subsequently been issued upon the grant of 25,000*l.*, I do not see that any one could find fault with him for having purchased them. It is plain from the evidence that he purchased all the debentures issued upon the same terms; and that what had been issued to the contractors—viz. ; 10,000*l.* upon the grant and the remainder, which clearly upon the evidence, were issued for stock—were upon their issue converted at once into stock; so that in fact he as Mayor was issuing debentures for the City for stock in the Railway Company, and the contractors were taking the debentures so issued in anticipation, I suppose, of some future arrangement being made, and the contractors were handing them over as fast as received to Mr. *Bowes* at 20 per cent discount. Whether such a transaction should be upheld, I do not mean to express an opinion at present but it is quite clear to me the facts at the time of the passing of the City by-law on the 1st November, 1852, are as I have stated. This by-law authorized the Mayor to raise by way of loan a sum of money not exceeding in the whole the sum of 100,000*l.*, and to cause the same to be applied in the manner prescribed by the

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1856. act of Parliament. The second clause of the by-law authorized the Mayor to cause any number of debentures to be made out for such sum or sums not exceeding in the whole the sum of 100,000*l.* as any person or persons should agree to advance upon the credit of such debentures. It appears to me impossible to look at these provisions and do otherwise than say the Mayor, Mr. *Bowes*, was the agent appointed on behalf of the corporation to carry out the provisions for loaning the money, and having it appropriated in the manner expressed. It was made the duty of the Chamberlain of the City to call in the outstanding debentures. Various considerations present themselves upon the position of all parties at the time of, and after this by-law was passed. Mr. *Bowes* himself was the holder of those debentures issued for the stock held by the City at 20 per cent. discount, and the fact was not known to the members of the Council. If it had been, the Common Council might have thought it more prudent to appoint some other person as agent for the purpose intended, than Mr. *Bowes*, the Mayor. The debentures had ten years to run before they would mature, and the City Corporation was under no obligation to raise the money or to redeem them before the time of their falling due; it was a matter of expediency whether it should be done. The consent of the holders of the debentures to be redeemed was necessary, as well as the consent of the Corporation to redeem. It would have been perfectly legitimate transaction for the agent, whoever he might be that was authorized to negotiate the loan to redeem the debentures, to have asked the holders whether they would make any discount on obtaining prompt payment instead of waiting the ten years. It may have been to the advantage of the City, considering the debentures were no longer in the contractors' hands to allow the holders to retain them, instead of effecting a new loan to redeem. In truth and fact, I have no doubt the City did benefit by the transactions originally in procuring 50-

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000*l.* stock instead of the grant of 25,000*l.* to the contractors and the loan of 35,000*l.* to the Railway Company. But at the time I am now speaking of that matter had been accomplished, and Mr. *Bowes* was in truth the holder of the debentures and the creditor of the City, and the City were proprietors of the stock, and he was by the by-law appointed agent on behalf of the City to negotiate a loan to pay himself before his debt was due. The matters I have mentioned have not been so mentioned with any idea adverse to Mr. *Bowes*, for he may have at the same time he benefited himself also benefited the City; and I have no doubt he did. That, however, is not the question: the question is, whether he had not a duty to perform by virtue of that authority which would conflict with the interests of the City. As agent he would have to consult the holders of the debentures as to their redemption. In this instance he would be consulting with himself. The agent might have deemed it more advantageous to the City not to redeem the debentures. Suppose, instead of selling at an advance, he should have sold at a great discount: he had the power to do so, and had he exercised it at a discount, to pay himself as speedily as possible, the City might have been great losers. If such had been the case to pay a debt due to another, it would have been a question of prudent judgment to have made a sacrifice or not: to pay a debt due to himself is placing him in a position that the interests of the City might greatly conflict with his. An exercise of judgment under the by-law of the 1st November was required, and the interests of the corporation were committed to his hands. If his true position had been represented to the Common Council, and that body had entrusted him with the powers of negotiating a loan to redeem a debt he held against the corporation, the case might have been different; he, however, allowed the council to appoint him their agent to provide the means of redeeming a demand not due without knowing that he himself was the holder of that demand. This appears to

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me contrary to all principles of equity: the question never is, whether the agent has acted faithfully, but is, whether his position is such that he may act otherwise; and if he may, then his interests do conflict, and he cannot be allowed to retain a profit he may have made under such circumstances. The case may be thus shortly summed up: Mr. *Bowes* held a demand against the City Corporation of 50,000*l.* not due for some years, which he had purchased at 20 per cent. discount: the governing body of the corporation (he being one of them) deemed it would be prudent to contract a new loan, and amongst other demands redeem that demand; and the members of the governing body with the exception of himself being ignorant that he stood in that position, join with him in constituting him an agent for the purpose of effecting a loan on the best terms he could, to redeem the debt and enable the chamberlain to call in the debentures. Is such a transaction legal within the principles of equity?—I do not think it is. If not, then upon what principle should the case be dealt with, it may be asked, when the purchase of the City debt was made at a time when the purchaser was not the agent of the City. Supposing we concede the latter point, it appears to me the purchase was made with a full faith and idea on the part of Mr. *Bowes* but not on the part of the City Corporation, that means could be procured to redeem the debt in full without waiting the time it would have to run. This was done without the knowledge of the debtor. The debt was redeemed in full by and through the agency of the creditor, he becoming the agent for the purpose without the knowledge of the debtor of the previous facts. It appears to me the same rule must apply in such a case on the ground of fraud as it would undoubtedly apply if Mr. *Bowes* had been employed by the Corporation to purchase in the debt for them, in which case he would be entitled to be reimbursed only that which he had paid. On the same principle, here in this case he should refund the difference.

—Judgment.

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It may be said the complainants' bill is not framed to meet such a case, and that the claim is for the amount of profit made upon the sale of the new debentures. The charge is, that the new debentures were exchanged for the then existing debentures, the old debentures being taken at par. That as proved is the fact. The charge further is, that a profit was made by Mr. *Bowes* on the purchase aforesaid, and by that I understand not the exchange of debentures, but the first purchase made of those given for the stock; that as proved is also the fact. I carry that down to the time he was fraudulently appointed an agent to redeem the demand so contracted. I do not use the term *fraudulently*, because there was an active procurement of anything done by Mr. *Bowes*, though a good deal of stress has been laid upon portions of the evidence adduced to establish that point, but I use the term in this sense, that though Mr. *Bowes* may have been a passive agent, yet it was a constructive fraud in him to become so and be an agent under such circumstances. The bill prays that he may be ordered to restore and repay the money he made on the transaction to the City. This I think sufficient. Without considering the general question, how far he, as Mayor of the City, should be treated as a trustee disabled from dealing in the City debentures, it appears to me he was constituted an agent to redeem an outstanding debt of the City not due, by means of obtaining a loan for the purpose which the City was under no obligation to effect unless upon advantageous terms, nor to redeem the debt unless also upon terms favorable to the City, and that he was made such agent fraudulently, he himself being the holder of the debt to be redeemed; and as he contemplated being paid in full, having purchased at 20 per cent. discount he cannot retain, beyond what he paid, and therefore the decree is right.

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RICHARDS, J.—I have given this case my best con-

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sideration. The amount involved, and the importance of the questions which necessarily arise in disposing of the case, require that it should be well considered.

Looking at the arrangements entered into by the appellant on behalf of the City of Toronto (out of which this suit has arisen) and the objects that all had in view when those arrangements were made, I am quite satisfied they were for the advantage of the City.

The taking of stock in the Railway Company to the extent of 50,000*l.*, was, in my judgment, much more advantageous to the City than a gift to the Company of *twenty-five thousand* pounds and a loan of *thirty-five thousand* pounds, even although the latter were secured by a first mortgage upon the road. By the arrangement carried out the liabilities of the City to be incurred on behalf of the Railway Company were diminished by *ten thousand* pounds, and the City received stock of the Company at the par value of *fifty thousand* pounds, the amount of the debentures advanced; which stock Mr. *Thompson*,—a witness by no means favorable to the appellant,—says he would not sell for 25,000*l.*

Judgment.

The matter may be briefly expressed as follows :—

By the first proposition it was agreed that the Railway Company should get from the City as a free gift 25,000*l.*, and a loan, to be secured by mortgage, of 35,000*l.*, making in all an advance to the Company of debentures to the amount of 60,000*l.* By the arrangement carried out the City advanced debentures to the amount of 50,000*l.*, and received the stock of the company to the same amount, valued as before mentioned at 25,000*l.* at the least. Supposing the stock not to be worth more than the 25,000*l.*, and that it is worth that amount, then by the last arrangement the City in effect gave the Railway Company the gift of 25,000*l.*, as the stock, in the view suggested, must be of equal value to the other 25,000*l.* advanced.

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In consequence of the purchase by the appellant from *Story & Co.* of the 50,000*l.* of City debentures the contractors were enabled to go on and complete the railway, which was the chief object the City had in view; and the City afterwards raised 50,000*l.* in cash on their debentures at par, which is not probable they could have obtained through any other channel, except at a discount of from four to six per cent. The Railroad Company carried out what the City desired and required from them, in consideration of the loan and gift—viz., the completion of the railroad; and through the appellant's purchase of the City debentures from the holders at their market value, the City was enabled to raise the 50,000*l.* in cash, with which they much desired to carry out certain improvements and to pay off a portion of their debt.

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If these very arrangements had been suggested and carried out by any other than a member of the governing body of the municipality, it seems to me it would have been generally admitted, looking at the object the City had in view, that what was done was really very advantageous for the City; and whatever loss there was in the transaction was actually sustained by the contractors. It is hardly to be presumed that the members of the City Council would ever have issued the debentures of the corporation to the Railway Company with the intention of buying them back at a discount; and the purchase by the City of 50,000*l.* of the paid-up stock of the Railway Company at a discount of fifty per cent. would have had a tendency to injure the credit and interests of the Company, which the City were desirous of sustaining. Even if the City could at that time have raised the money on their own debentures, it is not likely they would have purchased the railway stock at a discount; and if the stock had been taken by the City it is probable that it would have been paid for either in money or debentures at par, in which event the contractors, and not the City, would have

Judgment.

1856. saved the discount, or a portion of it, which was lost on the sale to the appellant.

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If the appellant's object had been to make as much as he could for himself without regard to the interests of the City, he would have used his influence to have had the original proposition carried out so far as to have caused the issue of the City debentures to the amount of 60,000*l.*; for he would, if he had become the purchaser, have got the discount on that amount instead of on the 50,000*l.* which he bought; or, suppose he had proposed to the contractors, and they had accepted the offer, to give them *forty thousand pounds* in cash for 50,000*l.* of railway stock, and for their claim or that of the Company against the City—which is in fact what they have received for the 50,000*l.* of stock and the claim against the City,—his gains would have been thereby enormously increased, and the liabilities of the City enhanced to the extent of *ten thousand pounds* beyond what they are under the arrangement actually made.

Judgment.

It is urged, however, that the Railway Company could not have given the security on the road for the loan of 35,000*l.* required by the corporation, as the government guaranty or loan would have thereby been lost; and for that reason appellant could not have carried out such arrangement. But if, as was suggested in argument, the influence which the appellant could command, both in the City Council and in the Legislature, was so great that he could carry out such projects as were for his personal advantage without regard to the interests of the City, he could either have procured a modification of the law so far as to allow the lien of the City, to the extent of 35,000*l.* to be a first charge on the road by depositing a corresponding amount of stock with the government; or failing that, he could have induced the corporation to take for the 35,000*l.* a corresponding amount of paid-up stock in the Railway Company.

Being satisfied then, as I am, that the City has really largely benefited by the arrangement ultimately made and carried out by the appellant on their behalf, and that whatever loss was sustained by the sale of the 50,000^l. of debentures was borne by the contractors, I cannot but regret that the appellant did not, when properly called upon, by those who enquired into the subject on behalf of the City, frankly state the whole transaction. Had he done so I cannot doubt that the manifest advantages accruing to the City from the whole of the arrangements were so obvious that those who were at first dissatisfied with what had been rumored in relation to the transaction would have acquiesced, and this proceeding, so embarrassing to the court and so injurious to the appellant, would have been avoided.

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City Toronto.

Having thus expressed my opinion as briefly as I could as to some of the prominent facts of the case, I now come to the consideration of those rules of equity which I consider applicable in finally disposing of it.

Judgment..

It is a settled rule of equity, I take it, that an executor or assignee of a bankrupt cannot purchase even with his own monies debts due by or to the estate, of which he may be the executor or assignee, upon the broad principle that he is a trustee. The same rule extends to the purchase of the real estate or other property of the bankrupt. It is also stated that if a surety pays the debt for which he is bound for a less sum than the full amount, he can only recover from his principal the amount he paid to discharge his liability, although if it had been purchased by a third party it could have been enforced for the full amount. These decisions seem to show that whatever a trustee or person united in interest may do in relation to trust matters must insure for the benefit of the trust or of the party united in interest.

I was somewhat impressed with the force of the

1856. argument used by the appellant's counsel, that whatever the rule of equity may have formerly been in relation to the members of the governing body of a municipality entering into contracts with the corporation, the rule must now be considered as changed, and that since the passing of the Upper Canada Municipal Corporations Act, the 132nd section of which provides "that no person having any share or interest in any contract with or on behalf of a City shall be qualified to be or be elected alderman or councillor for the same," that provision was substituted for the former equitable rule. If this be admitted to be correct then this result would follow, that the seat of a person entering into such contract would be *vacated*, but that the contract itself, as decided in the case of *Foster v. The Oxford &c. Railway*, reported in 13 C. B. 200, would be good. Applying the principle to this case, it was further contended that if what was done by appellant must be considered in the nature of a contract entered into by him through another with the corporation, that although his seat in the City Council might have been vacated, yet the contract would be good; and if good, the respondents could not now claim that they were entitled to the benefit he made out of it. The remarks, however, of the Lord Chancellor and of Lord *Brougham*, which I shall quote hereafter, in relation to the case reported in 13 Common Bench, shew clearly that although the agreement may have been good at law it would be void in equity.

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 v.
 City Toronto

 Judgment.

I shall only quote from and refer to two or three of the latest cases on the subject of trusts and trustees, as the other numerous authority cited in argument have been referred to in the judgments of the other members of the court. In the case of *The Aberdeen Railway v. Blake*, reported 23 Law Times, page 315, decided in the House of Lords on the 20th July, 1854, the Lord Chancellor *Cranworth* says: "A corporate body can only act by agents, and it is of course the

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v.
City Toronto

duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal; and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or *can have a personal* interest conflicting or *which possibly may conflict* with the interests of those whom he is bound to protect: so strictly is the principal adhered to that *no question is allowed to be raised* as to the *fairness or unfairness* of a contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been *as good as could have been obtained* from any other person, *they may even at the time have been better; but still so inflexible* Judgment. *is the rule, that no enquiry on that subject is permitted.*" In his observations on another part of the same case he says—referring to the defendant, who was a director of the railway company: "As far as related to the advice he should give his fellow directors," (in this case aldermen and councillors) "he put his interest in conflict with his duty." As to the case of *Foster v. the Railway*, already referred to, he observes: "That the contract was good in law, although at the time it was entered into one of the plaintiffs was a director of the company: that the decision of the Court of Common Pleas was that the statute left the contract untouched, and that its operation was only to remove the director from his office. But," he observes, "the rule which we have been discussing is a *mere equitable rule.*" Lord *Brougham* concurs generally with the Lord Chancellor, and in reference to the case in 13 C. B. observes: "It does not apply to this case, because there the transaction was past

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 v.
 Clay Toronto

all doubt valid at common law, though not in equity." In *Broughton v. Broughton*, before Lord Chancellor *Cranworth* on appeal from the decision of *Stuart*, V. C., reported 19 Jurist, 965 (July 14, 1855), he says: "That the rule as stated at the bar, that a trustee is not to be allowed to make a profit of his trust, is not stated in a sufficiently stringent manner: the rule is based on a rule of human nature, that no person having a duty to perform shall be allowed to place himself in a situation in which his duty and his interest may conflict; and such is the case where a trustee, though he might employ others to do certain things and pay them out of the trust fund, does them himself and takes payment from the trust fund * * * * It is an obvious corollary, following from the rule that no person from whom fiduciary duties are expected shall be enabled to make a profit of the trust by employing himself."

Judgment. These cases, although not expressly deciding that a member of the governing body of a municipal corporation is a trustee, nevertheless seem to me to lay down principles equally applicable to all who are placed in a fiduciary capacity; and this case must be decided in view of that question, and whether the appellant in the transactions under discussion can be fairly considered as having the duties and responsibilities of a trustee cast upon him. By the very able judgment of the Lord Chancellor of Ireland in the recent case of the *Attorney-General v. The Corporation of Belfast (a)*, decided on the 19th of June, 1855, it is held that the members of the governing body of a municipal corporation for the time being are trustees in managing the monies and property of the corporation placed by law under their control, and are personally responsible for misappropriation. This decision appears to me to be fully sustained by the authorities therein referred to.

It may be urged that the appellant was not acting

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in the matters now under consideration as a trustee for the benefit of the city, but that he was more like a member of parliament exercising legislative functions; and although morally bound to do that which was most beneficial for the city, yet, in that view, not a trustee, and therefore not liable in this proceeding as such.

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I must confess I am not able to apply the distinction in this case. The reason for the rule, of excluding a man's personal interest from conflicting with his duty, is to a certain extent as strong in cases like the present as it would be in buying their bonds or other property directly from the corporation at a discount when he knew they were worth par or nearly so, and then selling them at a profit; in which case I cannot suppose there would be the least doubt as to the liability of the party.

Studded as this country is with corporations from one end of the province to the other, all having the power of contracting debts, and where the governing body of the municipality ought as a part of their duty to see that no unnecessary debt is created, I do not think we can safely relax the rule which has been so rigidly adhered to in England, that no person acting in a fiduciary capacity shall be allowed to put himself in a position where his duty and his interest may conflict: which rule, on the whole, is so manifestly advantageous that I do not see how we can with propriety hesitate to apply it to the individual members of the governing body of a municipality in this country. It appears to me that any member of such a body who has bargained for the purchase at a discount of a debt of the municipality about to be created, when he knows it can be sold at and it will produce to him a greater amount than he is about to give for it, has brought himself within the rule. When he is called upon to vote it may be his interest to have as large a floating debt as possible created, that he may purchase it at a discount and sell it at an advance; it may

1856. be his duty to the municipality not to have any debt created at all.

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I am of opinion that the facts of this case shew conclusively that the appellant had bargained for the purchase of the debentures to be issued by the corporation in aid of the railway before the by-law for that purpose was passed; and from that time forth in relation to all the matters connected with the arrangements made by or on behalf of the corporation in reference to these debentures he had voluntarily placed himself in a position where his interest and his duty might conflict, thus bringing himself within the equitable rule laid down in the cases referred to.

Judgment. I do not think the position at all tenable that the appellant, because he was mayor, was not subject to the same liabilities as a trustee as any other member of the city council. It is true that as mayor it was his duty to preside at the meetings of the council; but at the same time he took an active part in bringing about the arrangements between the City and the contractors, and ought to be considered precisely in the same light as any other member of the governing body of the municipality. If, being mayor, he did not advise his fellow aldermen and councillors in this matter, in which the interests of the City were concerned, because having agreed to purchase the debentures he felt he ought not to do so, then the City was deprived of the advice of its chief officer; or, if he did give his advice after having made such an agreement, he was placed in a position where his interest and his duty might conflict; and having assumed that position voluntarily, he must submit to the consequences flowing from it already suggested as attaching to him.

On the whole I am of opinion that in the transactions under consideration the appellant had the duties and responsibilities of a trustee cast upon him. Such being the case, if allowed the profit he made on the sale of these debentures, for the purchase of which he had bargained be-

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fore the by-law authorizing their issue was passed, he would make a profit out of his trust which the rule of equity forbids. I am therefore of opinion that the judgment of the court below must be affirmed.

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v.
City Toronto

Per Cur.—[The CHIEF JUSTICE and McLEAN, J., dissenting.]—Appeal dismissed with costs.

HUTCHINSON V. HUTCHINSON.

Statute of Frauds

A deed was taken in the name of two, as grantees of the property conveyed: one of the grantees afterwards claiming to be solely interested in the property, as purchaser, filed a bill to have his co-grantee declared a trustee of one moiety of the property for him. The evidence adduced shewed that the deed was intentionally drawn, in the manner it was; receipts for instalments of the purchase money were taken in the name of the two, and the mortgage for securing the balance of purchase money due was executed by both—*Held*, that if even the whole amount of purchase money was advanced by the one, it was not sufficient to shew that the purchase was made solely for his benefit.

March 11th
1856.

The bill in this case was filed by *Mark Hutchinson* against *Matthew Hutchinson*, for the purpose of having *Statement* him declared a trustee of certain property for the plaintiff, under the circumstances set forth in the judgment.

Mr. *Vankoughnet*, Q. C., for plaintiff.

Mr. *Roaf* and Mr. *Price*, for defendant.

Dyer v. Dyer (a), *Carpmael v. Powis (b)*, *Crabb* on Real Property, sec. 1785, *Saunders* on Uses, 323, *Roberts* on Frauds, 99, *Sugden* on Vendors and Purchasers 11th Ed., p. 909.

The judgment of the Court was delivered by

SPRAGGE, V. C.—As to certain facts the parties are agreed. They agree that the purchase money for the

(a) 2 Cox 92.

(b) 10 Beav. 36.

1856. land in question was 225l. ; that 75l. of it was paid before the giving of the deed and mortgage ; that the mortgage from both for the balance of the purchase money (150l.) was so drawn intentionally, and not by mistake ; and it would seem to follow that the deed was intended to be, as it was to both.

Hutchinson
v.
Hutchinson.

Looking at the deed and mortgage and the receipts for the purchase money, there is nothing from which an inference can be drawn other than that of a joint purchase by the plaintiff and defendant ; the conveyance acknowledges the receipt of the purchase money from both, and the mortgage makes the balance due payable by both. The plaintiff's case is that he was the sole purchaser, and that he paid the purchase money, and he accounts for the form of the deed and mortgage, by alleging that they were drawn in the name of both, because the defendant was to be a surety for him for the balance of the purchase money secured by the mortgage ; and his position is, that the defendant is his trustee for the estate conveyed to him, the defendant. The vendor of the property thought the plaintiff in fact the sole purchaser, but the receipts givor by himself do not bear out his opinion. Expressions used by the defendant on various occasions, and his agreeing to pay to the plaintiff a certain sum of money for the property, were given in evidence in support of the plaintiff's case ; the strongest evidence of this nature is that of Mr. *Vance*, a solicitor. The plaintiff stated before him, and in the presence of the defendant, his account of the transaction, in substance as stated by his bill, and Mr. *Vance* says that the defendant did not gain-say it. This has less weight as a piece of evidence, because the two parties went to Mr. *Vance* for the purpose of drawing out the necessary papers for effecting an agreement, which the parties had entered into for the purchase by the defendant of the entire property, which, if carried out, would leave it a matter of no

Judgment.

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importance how the property was originally purchased ; and the defendant therefore might feel comparatively little interest in insisting upon his version of the transaction or contradicting that of the plaintiff. The interview appears to have been contrived by the plaintiff in order to get from the defendant an admission of the truth of the plaintiff's account, and probably the agreement for sale which fell through was contrived with the same view. The plaintiff stated to Mr. *Vance* that he had never been able before to get him to make the admission. The defendant did not, however, admit upon that occasion, or upon any other, that the purchase money paid was the plaintiff's money paid as the purchase money to be paid by him solely for the premises in question, or anything to the same effect. Upon what ground can the plaintiff succeed ? There is no sufficient evidence to shew the papers drawn otherwise than as intended, so as to support a bill to reform the instrument, and for a specific performance as reformed. There is no evidence of the purchase money being the plaintiff's, paid for his sole purchase ; it does not appear upon the face of the deed, but the contrary ; it is denied by the answer, and is not shown (assuming that it can be shewn) by parol evidence. If this were shewn, there would be a trust raised by operation of law, which would not be within the Statute of Frauds ; but the point to which the greater part of the evidence is directed—viz., that the defendant has admitted by his words and conduct that the purchase was not a joint one, but a sole purchase by the plaintiff does appear to me to be within the statute ; for the trust in such case is not raised by operation of law, but evidenced by parol declaration, and is not manifested by writing.

1856.

Hutchinson
-v-
Hutchinson.

Judgment.

But, supposing the evidence given admissible to show the real nature of the transaction, it is by no means conclusive ; it is not convincing, as on a bill filed to establish a contract differing from that evidenced by

1856. writing it must always be, where any different contract
 can be shewn at all. Many of the expressions and much
 of the conduct of the defendant may be referable to
 other circumstances than the transaction being a sole
 purchase by the plaintiff. The whole evidence, suppos-
 ing it all receivable, would leave me not at all free from
 doubt as to how the purchase was made. One-third of
 the purchase money having been paid, and the property
 itself mortgaged for the balance, it would be strange for
 the vendor to require a surety, as the plaintiff says for
 the balance. The vendor does not say that he did re-
 quire it; and if he had, the course taken would have
 been a most roundabout way of giving such security.
 Further: Receipts taken by the plaintiff himself are ex-
 pressed as they naturally would be if the purchase were
 a joint one, and there is no letter or memorandum of any
 kind from which any contrary inference may be drawn.
 I have no doubt that the greater part of the purchase
 money was paid by the plaintiff; but where two pur-
 chase jointly that may often be the case; and if the
 plaintiff had paid the whole it would not follow that it
 was paid, because all payable by him; for all beyond
 his own proportion may have been an advance on ac-
 count of his co-purchaser. An expression used by the
 plaintiff, as sworn to by *Robert Sargent*, a witness for the
 plaintiff, I think very material: the witness says:
 “*Mark* (the plaintiff) claimed the property as his own,
 he said he had paid for it pretty much all through. I
 never understood from *Mark* that *Matthew* had partly
 paid for it, nor did I ever hear *Matthew* say so.” In say-
 ing this the plaintiff seems to have rested his claim upon
 some idea of his own of natural equity, quite different
 from the case he makes here. His idea may have been
 that, having paid the purchase money himself he ought
 himself to have what he so paid for; especially as upon
 the account between them, apart from his purchase
 money the balance was in his favor. It can hardly be
 supposed, perhaps, that the parties did not themselves

Hutchinson
 v.
 Hutchinson.

Judgment.

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fully understand what their agreement really was, but they seem to have differed widely upon the subject, and Mr. *Vance* in his evidence says: "I do not think either of them understood the position in which it (the joint deed) placed them, or that it gave *Matthew* any interest. I had spoken to both of them before, and could not understand from either of them what *Matthew's* claim was. *Mark* had told me that he had bought the place from Mr. *Bloor*."

1856.

Hutchinson
v.
Hutchinson.

What may be the real merits of this quarrel between these two brothers it is difficult to determine; but apart from any question arising upon the Statute of Frauds, I should think it most unsafe to disturb titles founded upon conveyances, upon such evidence as has been given in this cause.

NEVILLS. V. NEVILLS.

Setting aside deeds for fraud.

A person who had at one time been remarkable for strength both of body and mind, and was much respected, having become from habitual drunkenness imbecile, deranged, and fatuous, made a deed of valuable property to one of his sons who had been in the habit of furnishing him with drink; and about fifteen months afterwards executed a deed for the same property to the wife of the same son. A bill was afterwards filed to set aside these conveyances on the ground of fraud and incapacity on the part of the grantor to transact business. After the cause had been at issue, and evidence taken at great length, a release of the action was obtained from the plaintiff without the intervention of any legal adviser acting on his behalf. The court set aside the conveyances, as also the release which had been subsequently obtained, with costs.

The bill in this cause was filed by *James Nevills* against *Joseph Blooker Nevills*, *Sophia Nevills*, *Murdock McKenzie*, *Thomas D. Warren*, and others, for the purpose of setting aside certain conveyances executed by the plaintiff, under circumstances fully set forth in the judgment of the court.

1856. Mr. *McDonald* for plaintiff.

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v.
Nevills. Mr. *Crickmore* for defendant *J. B. Nevills*.

Mr. *Turner* for other defendants.

The judgment of the court was now delivered by

SPRAGGE, V. C.—The bill in this case is filed to set aside a conveyance of the east half of lot number 9, in the 9th concession of Yarmouth, made by the plaintiff on the tenth day of June, 1850, to his son *Joseph Blooker Nevills*, and a conveyance of the same land made by the plaintiff to the wife of the same son on the 5th of September, 1851. The consideration expressed in the first of these deeds is 250*l.*; in the second, 200*l.*

Both of these deeds are impeached upon the ground **Judgment.** that at the time of their respective executions the mind of the plaintiff had been and was so impaired by excessive drinking as to render him incapable of transacting business; that his son *Joseph* had supplied him with liquor for the express purpose of making him "an easy victim," as the bill expresses it, to his fraudulent design of obtaining these deeds; that these deeds were without consideration, and that the true value of the land was 750*l.*

Many witnesses have been examined on the part of the plaintiff; among them five medical gentlemen who were in the habit of meeting with the plaintiff frequently; several neighbors of the plaintiff; some of whom had known him for many years; three sons of the plaintiff, among them the defendant, *Joseph*, himself, and the plaintiff's son-in-law, *Hollingshead*. On the part of the defendant a medical gentleman, an acquaintance of the plaintiff, was examined, also the father and mother of

Joseph's wife, Mr. *Hamilton*, the law partner of the defendant *Warren*, and some others who had interviews with the plaintiff during the time when his sanity of mind is questioned.

1856.

Nevills
v.
Nevills.

The plaintiff is described in the evidence as having been formerly remarkable for strength both of mind and body; as well known much liked and much respected. He is described as having become imbecile, deranged, fatuous; and instances are given of conduct of which it is scarcely possible to conceive that a sane man would be guilty.

Dr. *Cyrenus Hall* visited him with the defendant *McKenzie*, in the summer of 1849. He then, he says, saw symptoms of approaching insanity, but did not consider him insane, but still not in a state to make a deed. In the autumn of the same year he pointed him out to Mr. *McKenzie* in St. Thomas as in a state which verified his prediction; and he says that he thinks his insanity has continued from the time he first noticed it, but better or worse, according as he took to drinking; and he doubts now (*i. e.*, when he gave his evidence in 1853) whether he will ever recover his reason; he describes the nature of his insanity as of that kind which in its worst form is idiocy; in its milder form imbecility; and says the plaintiff suffered under the latter. In the summer of 1850 he appears to have seen the plaintiff frequently, and says he thinks his insanity was then so apparent that most of his neighbors, as well as his son, might have known it, and that no man living with him at the time could have been ignorant of his insanity. He mentions as instances of his insanity, his going about without his hat or shoes, and with his pantaloons unbuttoned, and the like, and other instances are mentioned by other witnesses.

Dr. *Burgess*, speaking of his state of mind in June, 1850,

1856. says he saw him twice during that month, that the plaintiff spoke a few words to him, and that he was so pained by the state he was in that he avoided him; that he appeared to be childish or foolish; what he would call in a state of fatuity; that he appeared to be in bodily health, but not in his proper state of mind; in such a state as he thought that he would do almost anything he was asked to do.

Nevills
v.
Nevills.

Dr. Charles Spencer Duncombe also speaks of his state of mind, and of his incapacity to transact business; and traces the disease back to as early as the spring of 1848; and says, whenever he has seen him since he has never thought him in a fit state to sell or convey property; he says that he has noticed him several times, both when he was sober and when he had been drinking, and he always appeared out of his mind, that he did not talk rationally, that he was at times worse than at other times; but that he never saw him as he used to be.

Judgment.

Dr. Elijah Eli Duncombe was the plaintiff's medical attendant ever since 1822. In the fall of 1848 he says he was so very ill as to be insensible to the death of his son Wellington, who died in the same room; he attended him also in the spring, and he thinks in the fall of 1849, and again in the spring of 1850, and he describes him to have been exceedingly ill upon those occasions—occasioned, as he judged, by excessive drinking. He says there was scarcely a month that he did not see him, and that he was constantly under the influence of drink and did not appear rational; he thinks there were intervals when he might have known what he was about; that when his friends were endeavoring to keep him from drinking and to save him he was very stupid, but by giving him two or three glasses, to stimulate the brain into action, *while that lasted* he was more rational, and more capable of doing business; and he thinks he has seen him for a little time in such a state that he would feel justified in tak-

ing a deed of his property. He describes him as very ill in May, 1850; that he had symptoms of *delirium tremens* in May: "he was deranged, crazed." The same witness speaks of the influence exercised over the plaintiff by his son the defendant.

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v.
Neville.

Dr. *Southwick*, a practitioner in St. Thomas, and on terms of intimacy with the plaintiff, speaks of his state during the years 1849-50 and '51; and says that he considered him insane, but not always equally so; he certainly treated him as insane, for he instructed his clerk not to give him trifling articles from his shop which he was in the habit of asking for, and that, because he considered him not in a fit state to transact business. Speaking of the extent of his mental capacity in business transactions, he says that although the plaintiff might have known the difference between making a deed and writing a letter, he has serious doubts as to whether he was capable of taking in the whole subject connected with making a deed, the transfer and sale of property, and the protecting his own interests or not; and he adds that he does not think that he should have, himself, felt disposed to transact business of any kind with him during the years named. Judgment.

It appears from the evidence, that the plaintiff became addicted to excessive drinking upwards of 15 years ago, and several agree that he shewed indications of insanity as early as the spring of 1848. Some attribute the deranged state of his mind to drinking alone; others to drinking combined with other causes; but from whatever cause proceeding, we have the concurrent evidence of no less than twenty-one witnesses; physicians, members of his family, and neighbors, all bearing testimony to the plaintiff's unsoundness of mind, and most of them narrating instances of conduct indicative of unsoundness of mind.

The witnesses called by the defendant by no means

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Nevilla.

displace the facts or opinions deposed to on the part of the plaintiff: the opinion of Dr. Woods certainly is that when not under the influence of liquor the plaintiff was not insane, and that his insanity was *delirium tremens*. But he never attended him professionally, though he knew him upwards of 18 years. In 1848, 1849 and 1850 he says he saw and conversed with him frequently, but is not aware that the plaintiff was very ill in 1848 or 1849, a fact deposed to by several witnesses. At the same time he says that during the two years named he saw him perhaps twice out of three times in a state of intoxication. He says besides that he always drank freely since he knew him; but that it is only within the five or six years before he gave his evidence (September, 1853), that he became *so great a slave to drinking*. He speaks of having held conversation with the plaintiff sometimes for half an hour, and he is convinced that the plaintiff was *sometimes* in his right mind.

Judgment.

Mrs. Bradt, Joseph's mother-in-law, gives an account of what passed at an alleged bargain about the land in question some twelve months, it is said, before the execution of the impeached deed to Joseph. There were present, Joseph and his wife, and his wife's father and mother, and the plaintiff. All that she can say is, that the plaintiff was pretty steady, and appeared to understand what he was saying and to speak sensibly, and that he was "right enough, as he is now;" and she adds, "it was after that he got crazy. I mean the time he was brought to Hamilton, where I and my husband lived; he was then so mad that they had to watch him." She says further, "Joseph was in the habit of drinking with him, and of giving him liquor too, don't recollect whether they had liquor or not on the day of the bargain being made."

Simon Bradt, Joseph's father-in-law, confirms the

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evidence given by his wife, and says the plaintiff was sober on the occasion of the bargain ; but had been very ill and was in the habit of drinking about that time ; that when he went to Hamilton he was very much deranged, and that he had to be watched all the time he was there.

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Nevilla.

On cross-examination he said that *Joseph* had told him that he thought his father (the plaintiff) was not in his right mind when he gave him a deed of the farm ; on his re-examination he qualifies this by a doubt whether what *Joseph* told him was not that the neighbors all said so.

Benjamin Wetherall narrates a conversation with the plaintiff which he first fixes as soon after the death of his son *Wellington*, and in the same year, and then as in either 1848, '49, or '50 ; and he describes the plaintiff as perfectly rational and in perfect health, in fact as well as he ever was. That he was so during any part of that period is contradicted by many witnesses. He, however, states a circumstance of more weight than his opinion ; that at one time, he does not say when, " the plaintiff had harnessed up his horses at the barn, and his sons *Thomas* and *William* took the harness off again and hid it, and the plaintiff began to cry and said he thought it too bad he could not have his own horses and harness to go where he pleased."

Judgment.

Mr. *Hamilton*, another witness for the defendant, a partner of defendant *Warren*, is no doubt of opinion that the plaintiff was not insane ; but it is a point upon which, certainly, the great majority of the witnesses think differently ; and indeed on the occasion spoken of by him, when the plaintiff was questioned about the deed to Mr. *Warren*, he hardly appears to have been looked upon as a man of sound mind ; and he states a circumstance of

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Nevills.

at least as much weight as his opinion,—that this partner Mr. *Warren*, although not unwilling to draw a conveyance from the plaintiff to his son *Joseph*, would not suffer it to be executed in his office.

The defendant *Joseph Blooker Nevills* was examined by the plaintiff. It is suggested that he is more desirous of supporting the deed to his wife than the deed to himself; but, both in his answers and in his examination, he insists upon the deed to himself, and states circumstances calculated to support it; and we see nothing in his evidence to lead us to think that he shaped it so as to defeat his own deed, but the contrary. His description of the plaintiff's state, upon the whole, agrees with that of the plaintiff's witnesses. I will quote some passages. He says, speaking of his father: "Sometimes he was flighty-minded and wild-like after drinking, especially when he was without liquor for a day or two, when he would roar after drink again; this has been the case with him often." Again: "Different members of the family were in the habit of watching my father for fear he should run away; he had been watched occasionally for ten or twelve years back, lest he should slip away." He says also, that his father had not the control of his loose property, as his other sons managed it, and that his brothers would not allow his father to have any money because he would spend it. He relates an instance of his father going away by stealth; that at night after the family were in bed he left the house while undressed, and went away about a mile to the house of a neighbor named *Culver*; that he said afterwards that he was going to Port Stanley, and that when he left the house he was in his stocking feet, and without coat or trousers. His father at this time must have been nearly seventy years of age.

Judgment.

One of the strongest circumstances, perhaps the strongest, in proof of the plaintiff's unsoundness of

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mind is the domestic restraint to which he was subjected, and which is attested to by several witnesses. Persons even in frequent intercourse with a man may differ as to the soundness of his mind; some may suppose a man deranged in intellect when he is really stimulated to frenzy by drink, while others again may believe a man to be of sound mind, because his conversation may at times be rational; but it can hardly be possible that such a man as the plaintiff is described to have been could have been kept under restraint as he was, had not his mind been verging upon imbecility, if not actually imbecile. This restraint which he was not a man to have endured if his mental faculties had remained sound, was continued for years, and during a considerable portion of the time it was the sole employment of one of his sons to watch him. This is a weighty point; and were the evidence equally balanced as to opinions and facts otherwise, which we think it is not, but greatly preponderates in favor of the case made by the bill, that fact would turn the scale.

Judgment.

We think that general unsoundness of mind is established during the years 1849, 1850, and 1851: and if so, the onus of proving the plaintiff of sound mind, of shewing a lucid interval at any particular date, is thrown upon the defendants.

The date to which attention is most particularly directed is the month of June, 1850. I have already adverted to evidence of the plaintiff's state at that particular time, though, as I have said, it would rather lie upon the defendants to show the plaintiff's state at that period to have been an exception to his general state. The only attempt to do this is by the evidence of *John Caughill*, the tavernkeeper whose tavern was generally frequented by the unhappy father and son, who are opposing parties in this suit, and at whose place the deed of June, 1850, was executed. This

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1856. man speaks to the soundness of mind of the father ; but it is simply incredible, if the evidence of other witnesses be true, that the plaintiff's state of mind could have been such as *Caughill* describes ; and he is contradicted as to collateral circumstances by *Joseph* himself and by other witnesses. *Caughill* was witness also to the execution of the deed executed a few days before, the 29th of May, conveying by mistake a lot not owned by the plaintiff ; and *Benjamin Treadwell*, the other subscribing witness, speaks of the plaintiff's mind as then unsound. He would certainly have acted more properly by refusing to attest the execution of a deed by a person of mental incapacity ; but still his evidence appears more trustworthy than that of *Caughill*, and it accords with that of other witnesses.

Judgment.

It is represented that the conveyance of June, 1850, was only the carrying out of an arrangement made the previous year ; and that is made a principal ground of defence in the answers of the defendants. It is probable that some such bargain was made, but it could be of no value unless the plaintiff were shown to be of sound mind at the time : but the weight of evidence is certainly against it. Besides, the circumstances attending it are exceedingly suspicious, for the parties surrounding this shattered old man at the time were his own son *Joseph*, who often led him to drink, and who exercised great influence over him, his son's wife, and her father and mother. He appears to have been withdrawn for the time from the watchfulness of those who ordinarily took care of him ; and in the hands of such parties as these, he makes a bargain so little for his own benefit and so much for that of his son *Joseph*, as to be itself no small evidence of impaired intellect. I need hardly say that had his mind been sound at the time, this bargain could not have supported a deed made in pursuance of it when his mind was unsound. It should be observed too that about a year was suffered to elapse between the bargain and

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the execution of the deed ; and that the time chosen for the consummation of the bargain was a time when the plaintiff was if anything in a more than usually helpless condition, and when, as *Treadwell* says, he looked as if he could not live long.

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Nevills.

Some evidence is given by a young woman, *Lucinda Bailey*, in relation to the bargain which preceded the conveyance, to some admission by the plaintiff in regard to it, and she speaks of the plaintiff's wife being present at a bargain about a horse and set of harness which was to be part of the consideration, and objecting only to the harness : supposing all this quite correct, and that it is not confounded with some other transaction, that the plaintiff's wife in truth assented to it, which is very improbable, still it could of course make no difference if the competent assenting mind of the plaintiff was wanting. The time of this conversation she says was upwards of three years and less than four years, as she thinks, before she gave her evidence, which was in February, 1854. This would place it in a period when the plaintiff's mind was certainly unsound, and when his wife would be more likely to make a passing remark about the value of the harness, than to argue seriously about the bargain. Judgment.

I have treated this case as one of a conveyance made by a man incompetent from unsoundness of mind to do the act, rather than as a case of a deed obtained by one having influence over the grantor, and obtained from him while his faculties were obscured by drink administered by the grantee, and for a consideration wholly inadequate. There is much, however, in the evidence to support this latter view ; and in connexion with it I may observe that the bill of charges made up by *McKenzie* at the instance of *Joseph Blooker Nevills*, as due to him by his father, is unworthy of credit. The first item of charge by the son against the father is an item of 82l. 6s.

1856. *Ad.* upon a note discounted at the Montreal Bank, which is shown by the evidence of *Jeronimus Rapelje* and Mr. *Ermatinger* to have been a debt of *Joseph* himself, not of his father. The item of 42*l.* 0*s.* 9*d.*, the debt due to *Allworth & Company*, there is reason to believe is wrongly charged, for *Joseph* obtained from Mr. *Ermatinger* upon his father's order money belonging to the father, with which that debt was to have been liquidated. It is difficult to place faith in any item of this account. But were it all correct, and the amount expressed as the consideration of the deed all paid, that amount is less than half the value of the land even, upon *Joseph's* own showing; not more than a third, according to the evidence of others.

McKenzie and other creditors of *Joseph* claim to be incumbrancers upon the land in question for the amount of the mortgage given by *Joseph* to *McKenzie*, to secure the debt due to him and to the others for whose benefit it was taken. We think that this cannot be supported, as we are of opinion that *McKenzie* had notice of the unsoundness of the plaintiff's mind at the time the deed was given. In addition to what passed between Dr. *Hall* and *McKenzie* in relation to the plaintiff's state of mind, are the facts, that the family of the plaintiff dealt at *McKenzie's* store in St. Thomas, that *James Wilmot Nevills* when in charge of his father, was in the habit of preventing *McKenzie's* clerks from selling to the plaintiff useless articles which he asked for; and that when such articles had at other times been obtained by the plaintiff they were returned by his family to *McKenzie's* shop; and we have also the opinion of *McKenzie* himself, who, upon observing some strange conduct of the plaintiff, remarked to one of the witnesses, "How crazy he is."

There is reason to believe indeed that the state of the plaintiff's mind was well known in St. Thomas, and could scarcely have been a secret to Mr.

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McKenzie. Those for whom Mr. *McKenzie* is a trustee by their debts being secured along with his own in the mortgage to him are affected by the same notice; but there is nothing to shew that Mr. *Ainley*, or Mr. *Whitwam* his agent, had notice of this fact, and therefore the mortgage to him by Mr. *McKenzie* of the land in question comprised in a mortgage of land belonging to *McKenzie* himself, is not affected.

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The conveyance to the wife of the defendant *Joseph Blooker Nevills*, was made in September, 1851. By some of the witnesses it is supposed that the state of the plaintiff's mind had improved by that time, and that he had become competent to the transaction of business.

Joseph represents this deed as a contrivance on the part of his father to defeat the mortgage which he (*Joseph*) had given to *McKenzie*, and to preserve the land in the family, and that he (*Joseph*) was no party to that Judgment. contrivance.

But against this is the fact that at the time of its execution the plaintiff was away from home, and surrounded by the same persons who were present at the pretended bargain which preceded the deed of June, 1850—viz., *Joseph* and his wife, and his wife's father and mother: and the deed was registered the following day, *Joseph* himself accompanying the witnesses to London for the purpose. Mr. *Harvey*, who drew this deed, and in whose presence it was executed, appears to doubt whether the plaintiff even remembered the execution of the former deed; and there seems nothing to warrant the suggestion that any contrivance of the plaintiff had anything to do with it.

With regard to the state of the plaintiff's mind at that time, it appears that his habits had somewhat

1856. improved, and there may have been some amelioration in the state of his mind. Still it seems to be the opinion of those best capable of forming a judgment upon the subject, that his mind was still unsound, that he remained still incompetent to the transaction of business. Mr. *Harvey*, at whose house this deed was executed, thus speaks of his state at the time: that he did not seem in quite so bad a state as he had described him to be in formerly; that he would not consider him to be sane, so far as he could judge from his appearance and from observation; that his manner was raving and nonsensical.

I have reserved to this part of the case the remarks of eminent English judges upon the subject of insanity and the execution of deeds during alleged lucid intervals, or after the alleged unsoundness of mind had been supposed to have passed away; because, although applicable to the conveyance of June, 1850, some of the language applies with peculiar force to the conveyance to *Joseph's* wife in September, 1851, and the supposed improvement in the plaintiff's state of mind at that period.

The case of the *Attorney General v. Parnter (a)*, before Lord *Thurlow*, is a leading case upon this point, and lays down the rules of law applicable to it with great force and clearness. He says: "If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but if a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in sup-

(a) 3 B. C. C., 441.

port of any allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact as where the object of the proof is to establish derangement. The evidence in such a case applying to stated intervals ought to go to the state and habit of the person, and not to the occasional interview of any individual or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind which is deemed necessary in general to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general as that the party who had confessedly labored under a mental derangement was capable of doing acts binding on himself and others. The argument made by the *Solicitor General*, that after the removal of the disease, when the morbid affection no longer obscures or vitiates the judgment, the mind will labor under a languor and debility, which, with reference to its former sound and unaffected state, might render its exertion and decisions very unequal and inferior, carries along with it weight: for I agree that inferiority of mind would of itself be a degree of evidence to shew that the convalescent state would incline to look forward to the removal of the disorder, but would not of itself shew that the disorder was removed. It might allow of the party doing sound and discreet acts; but it would certainly require such acts to be watched and examined with jealousy."

1856.

Neville
v.
Neville.

Judgment.

Sir *William Grant* in *Hall v. Warren*, (a) refers to the case before Lord *Thurlow*, and says: "If general lunacy is established, they will be under the necessity of shewing according to the *Attorney General v. Parther*, that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of

(a) 9 Ves., 605-611.

1856. the mind sufficient to enable the party soundly to judge of the act."

Novills
v.
Novilla,

Lord *Erskine* in *White v. Wilson* (a) thus refers to the judgment of Lord *Thurlow*, which I have quoted: "The rule upon the subject of lunacy has never been so distinctly stated as in the case of the *Attorney General v. Parnter*—viz., where the party has ever been subject to a commission or to any restraint permitted by law, even a domestic restraint clearly and plainly imposed upon him, in consequence of undisputed insanity, the proof shewing sanity is thrown upon him; on the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side; which is not to be made out by rambling through the whole life of the party, but must be applied to the particular date of the transaction. A deviation from that rule will produce

Judgment, great uncertainty."

The judgment of Lord *Erskine* in the case last cited, was upon the application by the heir of Lord *Chedworth* for a new trial of an issue *devisavit vel non*, upon a bill by devisees to establish his will; a verdict had been found, as appears by the report of the case, establishing the will, upon very clear and strong evidence of capacity as to the conduct of the testator particularly as a magistrate, acting as chairman at the Quarter Sessions, and in the House of Lords; opposed only by some circumstances of eccentricity, and singularity in dress, carried back by Dr. *Parr*, the principal witness, as Lord *Erskine* says, to the time he was at school at Harrow; Dr. *Parr* not representing that he was near the testator about the time he made his will: and it is no doubt to the character of this evidence that Lord *Erskine* alludes in saying that insanity is not to be made

(a) 13 Ves., 87.

out by rambling through the whole life of the party, but must be applied to the particular date of the transaction ; and in that case to the date of Lord *Chedworth's* will.

1856.

Nevills
v.
Nevills.

The remaining point for consideration is the release of this suit set up by supplemental answer, and which was executed on the 24th day of February, 1854. It was drawn up by Mr. *Stanton*, the solicitor for *Joseph B. Nevills*, and counsel for Mr. *McKenzie* and other defendants, the plaintiff being without the assistance of any professional person. He is represented as being exceedingly apprehensive as to the costs of this suit, and to have expressed himself strongly in regard to his son-in-law, Mr. *Price*, to whom he attributed its prosecution. After several interviews between the plaintiff Mr. *Stanton* and Mr. *McKenzie*, a rather singular arrangement was made. The plaintiff was to convey to Mr. *McKenzie* one-half the land in question ; the debts secured by *Joseph's* mortgage were to be paid, together with a book debt due by *Joseph* to *McKenzie*, and the plaintiff was to receive a sum of money stated by one witness at 50*l.*, by another at 100*l.*, he having demanded 125*l.* ; and after agreeing to accept 100*l.* required that a mortgage of his own to Mr. *McKenzie* upon other land for 100*l.* (not elsewhere referred to) should be discharged by this new conveyance. The final arrangement is stated to have been that he should receive 100*l.* ; should release this suit, and convey the 50 acres to *McKenzie*, who should sell the same, and after satisfying *Joseph's* mortgage debt and book debt from the proceeds of the sale, and reimbursing himself the amount paid to the plaintiff and the costs of this suit, should pay any surplus to the plaintiff. The plaintiff released the suit and conveyed the 50 acres to *McKenzie* ; but so far as appears got nothing in return, not even the other 50 acres which remained in *Joseph's* hands or in *Joseph's* wife's as the case might be.

Judgment..

What part *Joseph* took in this arrangement so manifestly for his benefit, and so little for the benefit of

1856. the plaintiff, does not appear ; it only appears that he was present.

Nevills
v.
Nevills.

This release was taken since the evidence in relation to the plaintiff's state of mind was closed ; and we cannot judge with any degree of satisfaction whether it had improved materially, or at all, since.

A suit, the very groundwork of which was unsoundness of mind in the plaintiff, ought not to have been settled with that plaintiff himself, unaided by professional advice or even the presence of family or friends (for of course *Joseph* cannot be included in the latter category). The refusal to employ a solicitor was not a sufficient reason for acting as "his friend," as it is put, while the solicitor of his opponents.

Judgment. The plaintiff in his bill, it is true, alleges that he has recovered his reason ; but evidence subsequently taken, and taken in the presence of the solicitor and counsel who made this settlement and drew up this release, shew such recovery to be *at least doubtful*. It was peculiarly a case in which the presence of a solicitor on the part of the plaintiff should have been required, and in which no treaty for a settlement ought to have been negotiated with the plaintiff alone ; and we are of opinion that the release and the conveyance made in pursuance of it must be set aside, and with costs.

The proper decree will be, that the conveyance of 10th June, 1850, to the defendant *Joseph Blooker Nevills*, and the conveyance of 5th September, 1851, to his wife, be delivered up to be cancelled, and for re-conveyance ; that the mortgage to the defendant *McKenzie* should also be delivered up to be cancelled, and the mortgaged property conveyed to the plaintiff : and that *McKenzie* should procure a release of the property in question, from the mortgage to *Whitwam*. This should be done, however, only

after payment by the plaintiff of any sum that may be found due by plaintiff to *Joseph Blooker Nevills*; and of the value of any improvements made by him upon the property; charging against such improvements the rents and profits received by *Joseph Blooker Nevills*; and for this purpose accounts must be taken; and, inasmuch as the proper distribution of what may be found to be coming from the plaintiff upon these accounts may be a question between the different defendants, it will be proper that the money should be paid into court, and liberty to apply may be reserved in regard to it.

1856.

Nevills
v.
Nevills.

RADENHURST V. COATE.

Offensive trade, acquiescence in—Injunction.

It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right: to bar the right within a shorter period, there must be such encouragement or other act by the party afterwards complaining as to make it a fraud in him to object.

Nov. 3rd.
1856,
and
Jan. 26th,
1857.

A party had carried on the business of a soap and candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the party complaining; the court, under the circumstances, refused a motion for an interlocutory injunction; but reserved the question of costs to the hearing. Since the general orders of 1853 it is not necessary for a party to establish his legal right by an action at law before coming to this court.

This was a motion for an injunction to restrain the defendant from carrying on his works in such a manner as to create, and from permitting to be created, any nuisance or offensive smells therein to the inconvenience and annoyance of the plaintiff.

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

Mr. *Crickmore* contra.

1857. *Gerrard v. O'Rielly (a)*; the *Attorney General v. the
Sheffield Gas Company (b)*; *Bostock v. the North Stafford
R. W. Co. (c)*; *Cohen v. White (d)*; and 3 *Daniel's Chan-
cery Practice, 1860*, were referred to.

Jan'y 20th. The judgment of the court was delivered by

SPRAGGE, V. C.—The defendant carries on the business of a soap and candle manufacturer upon premises situated on the north side of King Street, in the eastern part of the City of Toronto; the plaintiff is the owner and occupier of two pieces of ground in the neighborhood: one of them used as a vegetable and pleasure garden adjoining the premises of the defendant; on the other is situated the plaintiff's dwelling house, which is situated from 150 to 160 feet from the factory of the defendant. The bill alleges that noxious and offensive vapors and smoke are emitted from the defendant's factory during the process of his manufacture, and are carried to the plaintiff's premises; and prays an injunction. The defendant denies that noxious and offensive vapors from his factory are carried to the plaintiff's premises, at least to the extent charged: attributes much of the annoyance felt by the plaintiff to other manufactories of various kinds in the neighborhood, though at a greater distance from the plaintiff's premises; and insists upon the acquiescence of the plaintiff and of her late husband as disentitling her to an injunction.

There is a good deal of evidence upon both sides; but upon the whole, we think it is established that the vapors arising from the business carried on by the defendant are so offensive in degree, in frequency, and in duration as to impair materially the ordinary comfort of life. Upon this point we have the evidence not only of the plaintiff

(a) 3 Dr. & W. 414.

(c) 5 De G. & S. 584.

(b) 3 De G. Mc. N. & G. 304

(d) 1 Drew 312.

herself and of her son-in-law, Mr. *Grant*, but of other persons of different classes of life in the neighborhood ; some of them living at a greater distance from the defendant's premises than the plaintiff, and who describe the vapors from the defendant's factory in various terms, but generally as causing a stench of a very noisome and sickening description. There is some evidence against this ; but upon the whole we think the fact proved, and to such an extent as to amount not only technically to a nuisance, but such as seriously to affect the comfort, if not the health of those residing in the immediate neighborhood and among them of the plaintiff. Indeed one fact relied upon by the defendant, his having erected a very high chimney, and a vent or air-hole to carry off the smoke and vapor from his factory, implies a consciousness that such smoke and vapor would taint and pollute the air unless so carried off. Upon the first point therefore our opinion is against the defendant.

1857.

Radenhurst
v.
Coate.

Part of the plaintiff's case is to the effect that the business carried on by the defendant is so offensive as to make the plaintiff's premises a most undesirable residence, so much so that persons of a class who would ordinarily inhabit such premises would not occupy them even if they could be had rent free. The defendant's counsel seems to have understood the plaintiff as using this evidence to shew that the acts complained of diminished the value of her premises, and to have made that circumstance a ground for objecting to the defendant's business as a nuisance, and he objects that it cannot be so used. If offered in this view, he is probably right ; but in another view it is important—that is as a matter of evidence, tending to shew how great is the inconvenience caused to those residing in the plaintiff's house, which, though otherwise a very desirable residence, is rendered almost worthless as a residence by reason of the acts complained of.

With regard to he acquiescence alleged. The defen-

1857.
 Radenhurst
 v.
 Coate.

dant states, and he is corroborated by the affidavit of his father, that he commenced his present business on the premises in question in October, 1848, and has carried it on there ever since; that he at first leased the premises for one year, and afterwards for a term of five or seven years at his option: that he has from time to time since the commencement of his occupation expended large sums of money in the building and erection of the boilers, furnaces, vats, receivers, &c.; and in the summer of 1849 erected a very high chimney, higher, as he believes, than any other manufactory of the same kind hath in the city, for the purpose of more readily carrying off the smoke from the premises; that the improvements he has made have had the effect of diminishing the smells which will at times issue or arise from the manufactory, and which he says have been less this year than formerly, but he does not admit that they ever caused inconvenience to the plaintiff. He states that the late Mr. *Radenhurst* saw his improvements in progress without any remonstrance or objection, and frequently used some of the refuse from the factory for manure.

Judgment.

I observe that in stating the improvements the last stated is the building of the high chimney in the summer of 1849, when he was, as I understand from his statement, a tenant, under a lease for one year only. What portion of the expense was incurred in the setting up of trade fixtures and what otherwise is not very material, for it is not made to appear that Mr. *Radenhurst* knew that such a manufactory would emit noxious and offensive vapors; and looking at the defendant's present account of it, it is most improbable that any inquiry of him upon that point would have produced any such information. But apart from that, we are not of opinion that where there is no concealment of any fact by the party afterwards objecting, and especially when, as in the present case, the nature of the business to be carried on is

best known to the party incurring the expense, the mere forbearance to warn him that his proceedings will be objected to will disentitle a party injuriously affected to relief.

1857.

Radenhurst
v.
Coate.

The omission to warn the defendant, and the subsequent forbearance to take any proceedings against him, are relied upon as disentitling the plaintiff to relief. We do not think that it is shewn by the evidence that there was any encouragement on the part of Mr. *Radenhurst*, or that the defendant took any step or incurred any expense upon the faith of anything said or done by Mr. *Radenhurst*, or that Mr. *Radenhurst's* conduct had any influence in determining the defendant to do anything in regard to his factory. Putting it most strongly for the defendant that the evidence will warrant, there was an acquiescence of several years in the defendant's carrying on his business as he did carry it on, but nothing more.

It is a plain common law right to have the free use of Judgment the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar that right within a shorter period there must be such encouragement or other act by the party afterwards complaining as to make it a fraud in him to object (a).

With regard to the point that the plaintiff should have established her legal right by action at law before coming to this court, it does not seem to be now, since the passing of the general order upon subject, that it can be taken as an objection. It is only a matter for the discretion of the court; and we do not think it necessary to put the plaintiff to her action at law, and the less so as the fact of public nuisance has been established against the defendant: first, upon summary proceedings before a magistrate, and afterwards by the verdict of a jury.

(a) *Gerrard v. O'Rielly*, 3 D. & W. 414.

1857.
 Radenhumt
 v.
 Coate.

One other point remains to be considered—viz., whether it is in accordance with the practice of the court to interfere in such a case upon interlocutory application. Ordinarily, relief of this nature is only granted at the hearing. It is granted upon interlocutory application, where the injury complained of is irremediable in its nature, so that there is a necessity for anticipating the regular formal disposition of the matter at the hearing for the protection of the property in the interim from irreparable damage, and in cases of this nature the court considers whether the balance of inconvenience is in granting or withholding an injunction. The court cannot, upon this application, dispose *finally* of the question between the parties. In the meantime to grant the injunction would probably involve the stopping of a manufactory which the defendant may yet shew that he has a right to continue; while to withhold the injunction until the hearing would be attended with the minor inconvenience of leaving the plaintiff to endure an inconvenience which, however unpleasant, is certainly not intolerable, inasmuch as it has been borne for several years. We see no objection to the plaintiff asking for a decree upon motion instead of going to a hearing in the ordinary course, and the defendant will of course have the opportunity of adducing further evidence and of cross-examining the plaintiff's witnesses, which has not as yet been done.

Judgment.

March 9th.

The case was now brought to hearing by way of motion for decree, as suggested by the court, upon the same evidence as was used upon the application for the injunction; when a decree was made for an injunction, in the terms of the prayer of the bill, with costs.

HURD V. BILLINTON.

1857.

Void deed—Cloud on title.

The owner of a large tract of waste lands of the province, resident in Canada, executed a power of attorney to an agent about to visit England, authorizing him to enter into contracts under seal for the sale of them; and in the power were specified several terms upon which sales were to be effected, and that the deeds were to be with bar of dower, but no power was given to the attorney to execute the deeds for either of the granting parties by express words, or to receive the money. The agent induced the defendant to become a purchaser of the whole for £2,500, making about five shillings sterling per acre and being about one-sixth of the lowest price set upon the lands by the owner by his private instructions to his agent; signed a contract for sale, which was not under seal, and subsequently executed a deed purporting to convey the lands to the purchaser.

October 6th
and 20th,
1856 and
Jan'y 26th
1857.

The owner having become aware of the facts, filed a bill to have the deed delivered up to be cancelled, as forming a cloud upon his title. The court refused the relief prayed, the rule being that instruments void upon the face of them will not be ordered to be destroyed as forming a cloud upon title; and under the circumstances dismissed the bill without costs, the purchaser having been guilty of great negligence and carelessness; accompanying such dismissal with a declaration of the reasons of the court for so decreeing.

This was a suit by *Thomas Gladwin Hurd* against *William Billinton* and *George Bright Thompson*, for the purpose of setting aside a contract of sale of lands owned by the plaintiff, entered into by the defendant *Thompson* with *Billinton*, and to order the deed executed in pursuance of such contract to be delivered by to be cancelled. Statement

The cause now came on by way of motion for decree.

Mr. Mowat, Q. C., and *Mr. Hurd*, for plaintiff.

Mr. McDonald and *Mr. Proudfoot*, for defendant *Billinton*.

Daniels v. Adams (a), *Helsham v. Langly* (b), *Bridger v. Rice* (c), *Wood v. Richardson* (d), *Millican v. Vanderplank* (e), *Atterbury v. Edwoods* (f), *Goodwin*

(a) 1 Amb. 495.

(b) 1 Y. & C. C. 175.

(c) 1 J. & W. 74.

(d) 4 Beav. 174.

(e) 17 Jurist 986.

(f) 3 Eq. Rep. 124.

1857. *v. Fielding (a), Manser v. Back (b), Hughes v. Morris (c),
 Hurl
 v.
 Billinton.* *Smith v. East India Company (d), Seaton v. Mapp (c),*
 were amongst other authorities referred to.

Jan: 20, 1867. The judgment of the court was now delivered by

ESTEN, V. C.—In this case the plaintiff, being the owner of some thousands of acres of the waste lands of this province, gave a power of attorney dated 12th February, 1855, to one *Thompson*, who was going to England, to “enter into contracts under seal for the sale of them at any time within four months of the date upon the terms specified in the power—that is to say, either for cash, or upon credit; and if upon credit, one-fourth cash paid down, and the remainder by four equal annual instalments with interest half-yearly; the cash to be paid on or before the 4th of July then ensuing; a deed to be given, and when sales partly upon credit, a mortgage taken for unpaid balance, both instruments being with bar of dower, and given free from incumbrances.” By his private instructions, *Thompson* was limited to seven dollars per acre as the lowest price for which a sale should be made. At a personal interview, before his departure, the plaintiff intimated to him that “if any purchaser should wish to make a payment on account of the lands, he had no objection to it, and which, if offered, was to be paid to the credit of *John Arnold, Esq.*, at his bankers, *Martin, Call & Co.*, London England, which payment would be considered as good as if made to himself. *Thompson* sold the land, with others belonging jointly to the plaintiff and one *John Thomas Arnold*, who had given a similar power of attorney, to the defendant *Billinton*, at one entire price of 2,500*l.* sterling, which made about 5*s.* sterling per acre, after demanding 30*s.* per acre, and dropping gradually from that price to the one which was ultimately fixed.

(a) 4 Deg. McN. & G. 90.
 (b) 6 Hare 443.

(c) 9 Hare 636.
 (d) 16 Sim. 76.

(e) 2 Coll. 556.

Billinton saw the power of attorney, but not the private instructions. He and his legal adviser, Mr. Duncan called for evidence of title, but *Thompson* having none to show, they contented themselves with receiving a representation from him as to the nature of the title and the law of Canada, and with preparing a declaration by him upon these points, which he was to, but did not in fact affirm, according to the statute. *Thompson* was introduced to the defendant by Sir *Cusack Rooney* and Mr. *Jackson*, gentlemen of the highest respectability, who had been in Canada, and upon his enquiring of *Jackson* what waste lands in Canada were worth, he informed him that if he gave no more than 5s. per acre he would be safe. The original contract specified the true consideration paid for the lands, but on the day of the execution of the conveyance, *Billinton*, at *Thompson's* request, signed another contract specifying a much larger consideration, taking at the same time a signed memorandum from *Thompson*, importing that this was done in order that the sale of other lands in Canada which he had for sale of the same description might not be prejudiced. After several attempts on the part of *Billinton* to defer the completion of the transaction until he had communicated with Canada, *Thompson* peremptorily insisting on its immediate completion, stating at one time that his principals wanted the money in England, at another, that they wanted it in Canada, the purchase was finally completed, *Billinton* paying the whole amount to *Thompson*, and receiving a conveyance from him. This conveyance was forwarded to Canada for registration. *Thompson* absconded with the money which he had received from *Billinton*, and the whole transaction speedily coming to light, the plaintiff has instituted the present suit, praying that the contract and deed from *Thompson* to *Billinton* may be set aside, and delivered up to be cancelled, as forming a cloud upon the plaintiff's title, and that the registration

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Hurd
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Billinton.

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 Hard
 v.
 Billinton.

of the deed may be enjoined. To this bill the defendant *Billinton* has put in an answer claiming the specific performance of the contract. The defendant's counsel contended that the power of attorney authorized the receipt of the purchase money, if not the execution of the conveyance, and insisted that the power of attorney was ambiguous, and misled the defendant, and therefore, that it was just that the loss occasioned by *Thompson's* misconduct should fall upon the plaintiff. There are other circumstances in the case which were touched upon in the argument, but which it is unnecessary to enumerate, although they have not been overlooked. We entirely acquit the defendant, *Billinton*, of all actual fraud in this transaction, with which he is not indeed charged; and although the purchase was concluded with a degree of precipitation and want of caution, which would have been wholly incredible had it not actually occurred, and which, I suppose, must be ascribed to some notion in the minds of Mr. *Billinton* and his legal adviser that waste lands in Canada are not to be dealt with in the same way as lands in England, we do not think the circumstances of the case are sufficient on the ground of constructive fraud to warrant the court in decreeing the cancellation of the contracts, and we think they must be left in the defendant's hands to make the most of them at law, if he should be so advised. With regard to the specific performance of the contract, we think it is out of the question, having regard to the misconduct of the agent, and the carelessness and want of prudence on the part of the purchaser. With respect to the remainder of the relief prayed by the bill, we think it would not be right to grant it in form, although we are prepared to accompany the denial of it with a declaration of our reasons for so doing, which will probably afford the plaintiff the relief to which, in justice, he seems entitled. We have no doubt that the power of attorney in question empowered the attorney to do nothing more than to make contracts. The language of the power is emphatic, and

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v.
Billinton.

seems designedly used in order to keep the authority of the agent within the desired limits. We think it authorized neither the receipt of money nor the execution of conveyances. The payment of cash or money down does not mean the payment of money at the instant of signing the contract. The purchaser can never be required to pay any money other than a deposit until a clear title is shewn, and the power evidently contemplates this practice, for it allows until the 4th of July for the payment of any money that it might be stipulated should be paid down; and even if a contract should be entered into on the last day allowed for that purpose—namely, 12th June, it was still possible to investigate the title and pay the money before the 4th of July. Then it was evidently contemplated that the conveyances should be executed by the vendor in person. The purchaser would be entitled, it is apprehended, to the benefit of the private instructions, although not communicated to him; but we think that the private instructions verbally given to Mr. *Thompson* respecting payments meant that the money should be paid into the bank by the purchaser, and not to him *Thompson* and by him into the bank. In short, we think the payment by *Billinton* to *Thompson* of the 2,500*l.* was not a good payment to bind the plaintiff, and that the conveyance executed by *Thompson* is a nullity, so far as it purports to affect the lands intended to be conveyed; and it is for this reason that we do not feel warranted in decreeing its cancellation or enjoining its registration. It is understood to be the practice of the court not to decree the destruction of instruments as forming a cloud upon title where they are void on the face of them. In the present case reference must necessarily be had to the power of attorney in order to support the deed, and when the power is referred to, it appears that the deed is void. It is true that a memorial registered may be supposed to form a cloud on the title, as a party seeing it might naturally conclude that the attorney had authority to execute the conveyance. No case of this sort has, so

Judgment.

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 Hurd
 v.
 Billinton:

far as we know, arisen. But we do not think this should vary the rule. Upon a reasonable examination into the facts of the case, it will appear that the deed registered is a void deed, and therefore forms no cloud upon the title. We do not therefore think that we should decree the cancellation of this deed, or enjoin its registration. In strictness, the bill must be dismissed; but we propose to accompany such dismissal with a declaration of our reasons for adopting that course; and we think it should be without costs, for the extremely negligent and imprudent conduct of the defendant may be said to have invited the suit. Moreover, justice, in our opinion, requires that we should give to the plaintiff such relief as a declaration of the rights of the parties will afford; and we think it fit to deny to the defendant the relief prayed by his answer of a specific performance.

Judgment.

HOGG V. WALLIS.

Mortgage—Notice.

June 18th,
 1856, and
 Jan'y 26th,
 1857.

A mortgagor conveyed his equity of redemption in certain lands, together with the absolute estate in other property, and took back a mortgage on the whole to secure part of the purchase money. The purchaser afterwards transferred his interest to a third party. The mortgagee, with a knowledge of the transfer by the mortgagor, filed a bill of foreclosure against him alone, in which suit he obtained a final decree of foreclosure, and afterwards sold and conveyed the estate to another party, who afterwards died intestate. The person really interested, considering that the foreclosure had the effect of binding his interest, rented the property from the grantee of the mortgagee, and also entered into a contract for the purchase of it from him; afterwards, upon discovering his rights, he filed a bill against the heir-at-law to redeem. The denial of notice was imperfect, and it appeared that what the purchaser paid for the property was just what was due on the mortgage and less than the fair value of the property. At the hearing, the court directed an enquiry as to whether the ancestor had notice, actual or constructive, at the time of his purchase of the title of the defendant or his vendor; as to the sufficiency and fullness of the consideration paid, and as to the circumstances generally attending the purchase; reserving further directions and costs.

The bill in this case was filed by *John Hogg* against *John Wallis*, praying, under the facts appearing in the judg-

ment, a decree of redemption in respect of certain lands in the township of York. 1857.

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v.
Wallis.

The evidence in the suit was taken before the court, and the cause now came on to be heard.

Mr. *Barrett* for plaintiff.

Mr. *Hallinan* for defendant.

*Naylor v. Winch (a), Bingham v. Bingham (b), Whit-
ley v. Halliday (c), Story's Eq. Jur. secs. 121-4; Sugden's
Vendors and purchasers, 10th Ed. vol. I, p. 383, were
cited.*

The judgment of the court was delivered by

Jan. 20th.

ESTEN, V. C.—This is a bill for redemption of a mort-
gaged estate. One *Hodgson* made the mortgage in ques-
tion to one *Humphrey*, and afterwards sold and conveyed
the equity of redemption in the lands in question, being
the west half of the east half of lot No. 7, in the third
concession of York, east of Yonge street, together with
the east half of the same half lot, to *James Hogg*, who
mortgaged back the whole half lot to *Hodgson* for the
purpose of securing 200*l.* and interest. *James Hogg* after-
wards conveyed his equity of redemption in the half lot
to the plaintiff *John Hogg*. *Humphrey*, after the convey-
ance by *Hodgson* to *James Hogg*, and with a knowledge of
that fact, filed a bill of foreclosure as to the west half
against *Hodgson* alone, and obtained a final decree of fore-
closure in that suit. He afterwards sold and conveyed
the west half to the defendant's father, upon whose death
intestate, it descended to the defendant. The defendant's
father appears to have paid 150*l.* for the property at the
time of the execution of the conveyance, and the defen-
dant denies to the best of his belief that at that or any

Judgment.

(a) 1 S. & S. 564.

(b) 1 Ves. Senr. 126.

(c) 4 Dr. & War. 267.

1857.

Hogg
v.
Wallis:

other time he had notice of any claim of the plaintiff. *John Hogg* and the plaintiff appear to have been in possession of the east half ever since *James Hogg's* purchase. The west half appears to have been occupied for some time by one *McSherry*, but for aught that appears, he was the tenant of *James Hogg* and the plaintiff. It seems that a foreclosure suit was commenced by *Hodgson* against the real and personal representatives of *James Hogg* after his death upon the mortgage for 200*l.* It does not appear whether the suit was prosecuted, or how it terminated. The decree of foreclosure obtained by *Humphrey* against *Hodgson* was, of course, a nullity as regards the ultimate equity of redemption vested in *James Hogg*, but *Humphrey* had the legal estate under his mortgage, and he conveyed it to *Wallis*, upon whose death it devolved upon the present defendant; and if the elder *Wallis* had no notice of the title of *James Hogg* or *John Hogg* at the time of his purchase, and if he paid a valuable consideration for the estate, it would seem that his title could not be disturbed. Another point occurs in the case: The plaintiff, considering that the decree of foreclosure obtained against *Hodgson* absolutely bound him, has rented the estate of *Wallis*, and has even entered into a contract for the purchase of it from him for 600*l.* *James Hogg* appears to have given 575*l.* for the half lot several years before the purchase by *Wallis*. *Humphrey* states in his evidence that the sum paid him by *Wallis* amounted to about the sum due to him for principal and interest on the mortgage. The defences raised were, that the defendant's father was a purchaser for value without notice, and that the plaintiff had recognized the defendant's title by renting the place of him, and contracting to purchase it from him as the absolute owner. Upon this latter point we are of opinion that the plaintiff ought not to be bound by what he has done. He has indeed contracted to purchase his own estate, and it is manifest from the nature of the case that it must have been under a misapprehension of his rights. No clearer or better evidence could be adduc-

Judgment.

1857.

Hogg
v.
Wallis.

ed of this fact than is afforded by the nature of the transaction. As to the other defence of a purchaser for value without notice, it is not very properly presented in the answer, which should have negatived the notice of the title once held by *James Hogg* as well as of the plaintiff. On the other hand, little or no evidence of notice is adduced on the part of the plaintiff: while the nature of the consideration paid by the elder *Wallis* being about the amount due on the mortgage, and less than the fair value of the property, is a circumstance calculated to awaken suspicion of notice and of the want of perfect *bona fides* on the part of *Wallis*. Under these circumstances, we think it would be right to direct further enquiry, for the purpose of ascertaining whether the elder *Wallis* had actual or constructive notice of the title of *John* or *James Hogg* at the time of his purchase, and as to the sufficiency and fullness of the consideration paid by him for the property, and as to the circumstances generally attending his purchase. A decree will accordingly be drawn up directing such enquiry, and reserving further directions and Judgment. costs. It may be observed that much irrelevant evidence has been adduced to shew that the conveyance from *John* to *James Hogg* was not *bona fide*. With this question the defendant has no concern; but it may be remarked, that we have no reason to think that such conveyance was otherwise than *bona fide*.

1857.

WAIT V. SCOTT.

*Injunction—Stoppage in transitu.*Dec'r 1st,
1856, and
Janu'y 19th,
1857.

The purchaser of saw logs to be delivered at certain specified times assigned the contract to a third party, to whom the vendor delivered one year's supply of the logs. Afterwards the original purchaser becoming insolvent absconded, and the vendor refused to complete the contract, asserting a right to stop the goods *in transitu* or to retain them before the *transitus* commenced in consequence of the insolvency of the purchaser. The assignee thereupon commenced an action at law in the name of the purchaser against the vendor, in which he recovered judgment, and the vendor filed a bill to restrain proceedings at law. The court refused him any relief, and dismissed the bill with costs.

The bill in this case was filed by *Griffin Wait* against *Reuben B. Scott*, *Andrew Jeffrey* and *John Allan*, the bill alleging that after the recovery of the judgment mentioned in the bill by *Scott* the same had been assigned and transferred to the other two defendants, and prayed an injunction against further proceedings with said judgment.

Mr. *Strong* for the plaintiff.

Mr. *Crickmore* for the defendants.

Bateman v. Willoe (a), *Behrens v. Sieveking (b)*, *Behrens v. Pauli (c)*, were amongst other cases referred to.

The judgment of the court was delivered by

Janu'y 19th. ESTEN, V. C.—In this case an agreement was made between the plaintiff and one *Scott*, for the former to supply the latter with all the saw logs of certain stipulated dimensions, that could be made off a certain piece of land, deliverable at particular times, and for which a stipulated consideration was to be paid in the manner particularly provided in the agreement. *Scott* became insolvent and absconded, after having transferred the benefit of this agreement to the defendant *Allan*. The plaintiff delivered the first year's logs to *Allan* and received the stipulated

(a) 1 S. & Lef. 291.

(b) 2 M. & C. 602.

(c) 1 Keen 456.

ed consideration for them, but neglected to deliver any more; whereupon an action was brought against him by *Allan* in the name of *Scott*, who had in the meantime returned. The object of the present suit is to stay proceedings in that action. This claim was placed on two grounds by the learned counsel who argued the case on behalf of the plaintiff: one, that *Allan* had discharged plaintiff from the further execution of the contract; the other, that *Scott* having become insolvent, the plaintiff might have stopped the logs in *transitu* had they been on their passage to the place of delivery, and therefore had a right at all events in equity to restrain them in his hands before the *transitus* commenced. Upon this latter point it may be remarked that *Scott* having before his insolvency transferred the benefit of the contract to *Allan*, and the plaintiff having recognized *Allan* and dealt with him as the assignee of the contract, could not upon the insolvency of *Scott* exercise any strict legal right which that fact might have given him against *Scott* to the prejudice of *Allan*, at all events in this court; and that had he made any such attempt this court would have relieved *Allan* against it. But we are at a loss to perceive the existence of any such legal right. It may be conceded that the bankruptcy or insolvency of the buyer confers on the seller the right to stop the goods in *transitu*, or detain them if the *transitus* have not already commenced: but this is not a right to rescind the contract. The buyer or his assignee would seem to be entitled to have the goods, the subject of the sale, within a reasonable time, on performing his part of the contract (a). Now in the present case, admitting for the sake of argument, that the plaintiff on the insolvency of *Scott* had a right to detain the goods, yet *Scott* having transferred the benefit of this contract to *Allan*, and he having brought an action against the plaintiff for his breach of contract, and having proved, as he must have done, in that action, to the satisfaction of the jury, his readiness and willingness to per-

1857.

Walt
v.
Scott.

Judgment.

(a) *Gibson v. Carruthers*, 8 M. & W. 321.

1857.

Wait
v.
Scott.

form the contract on his part, and having obtained a verdict and judgment, it would be quite impossible for this court to stay proceedings in that action. In short, it appears to us that any defence that the insolvency of *Scott* gave to the plaintiff was a legal defence, which he has either foregone, or, having raised, has failed to establish; and that even if such a defence existed, and had been raised successfully at law, *Allan* would under the circumstances of the case have been entitled in this court to be relieved against it. The other defence, which presented a question of mere fact, we think, has entirely failed in point of proof. The only evidence of discharge consists in loose conversations between *Allan* and third persons: no direct communication between *Allan* and the plaintiff is shewn. Then there is a good deal of evidence which goes to negative a discharge from the contract, and to shew on the contrary that both *Allan* and *Scott* were urgent with the plaintiff to complete it. On the other hand, some of the evidence seems to shew that the plaintiff, instead of being ready to fulfil the contract, had *Allan* and *Scott* been ready on their side to do the same, had disposed of the logs intended for *Scott* to other millers at an advance. Upon the whole, we are quite clear that the bill should be dismissed and with costs.

Judgment.

JACKSON V. JESSUP.

Reference as to title.

The contractors for the construction of a railway having entered into an agreement for the conveyance to them of certain lands for such an agreement for the conveyance of the land, erected a station-house, and made other improvements thereon in connection with the road; and disputes having arisen between the parties, the contractors filed a bill for specific performance of the agreement, and obtained a decree for that relief: *Held*, that what had been done by the contractors did not amount to an acceptance of the title of the vendor, and that they were entitled to a reference to the Master as to title.

The facts which gave rise to this suit are sufficiently stated in the report of the cause, *ante* volume v. page

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524. In drawing up the decree upon the judgment then pronounced, the solicitor for the defendant objected to the insertion therein of any direction referring the matter to the Master to enquire as to the title of the defendant, contending that what had been done by the plaintiffs amounted to an acceptance of the title, such as it was. The Registrar having settled the minutes of decree in accordance with this view, a motion was made to vary them, by

1857.

Jackson
v.
Jessup.

Mr. Strong for plaintiff.

Mr. Brough contra.

SPRAGGE, V. C.—*Prima facie*, a purchaser of real estate is entitled to an inquiry as to title, and it would have been proper for the Registrar therefore to have inserted in the minutes of the decree a direction for such inquiry, leaving it to the vendor to shew that there is something in this case to take it out of the general rule. January 19th.

This is not certainly an ordinary case of bargain and sale; but we see nothing in its circumstances to make it an exception to the purchaser's ordinary right. What may be the consequence in case the vendor cannot make a good title, is not now the question. The plaintiffs, the purchasers, are entitled to the inquiry, unless the defendant can shew that no duty can lie upon him in relation to the title, whatever may be the result of that inquiry. Judgment.

It is said that the plaintiffs tendered a deed of conveyance to the defendant for execution, and that execution was refused; and it is urged, that such tender was a waiver of the inquiry now asked for, and an admission that the title was good, or at least that the purchasers were satisfied with it. As to the fact of such tender it may appear, in some part of the voluminous evidence given in this cause; but it has not been pointed

1857.
 Jackson
 v.
 Jessup.

out, (and the defendant's counsel was to have referred the court to the particular passages in the evidence upon which he relied); we have looked over portions of the evidence where we thought the evidence of such a fact likely to be found, but without finding it. But, supposing the fact to be as stated, we think the plaintiffs did not thereby disentitle themselves to the ordinary inquiry. It was not a tender of conveyance after abstract of title delivered, or after the vendor's title being shown in any way, so as to leave it to be inferred that the title was satisfactory to the purchaser; but the vendor refused to make a conveyance at all, unless upon terms and conditions which the court has adjudged he was not entitled to impose. A tender of a conveyance for execution under such circumstances, for it was under such circumstances, if made at all, may be referred to a desire on the part of the purchasers to be *recti in curia* before commencing proceedings in this court, rather than to an admission of the goodness of the vendor's title, which they do not appear to have examined, or a waiver of an inquiry into it in the event of the execution of the conveyance being refused.

Judgment.

We think too that the execution of the conveyance being refused is important upon this point. The purchaser might be content to take the risk of the title provided he obtained an immediate conveyance; that may reasonably be considered the price for which he would waive the inquiry; but when the purchaser refuses him that for which he was willing to forego his clear ordinary right, it does not appear reasonable or just to hold him to the conditional waiver, after he had failed by the act of the vendor to obtain the benefit for the attainment of which the waiver was made.

With regard to the possession taken by the plaintiffs, and the works executed upon the property, it could scarcely be considered as a waiver of any right the

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defendants might have, for the works on that spot were only a small part of a very extensive work, and it was probably necessary that the works on the spot in question should be proceeded with at the same time as other works on the line. Besides which the plaintiffs had the right under the statute to take possession compulsorily, independently of any contract with the defendant.

1857.

Jackson
v.
Jeasup.

TOWERS V. CHRISTIE.

Specific performance.

A purchaser, when informed that the property, the subject of his purchase has been re-sold, may, although his contract is not ripe for execution, institute a suit to recover possession; still it would seem that in such a case all that is necessary for him to do is to notify the second incumbrancer that he intends to insist upon his rights, and that he is only waiting until the proper time arrives to institute proceedings for that purpose.

June 23rd,
1856,
February 2,
1857.

Where a purchaser, in consequence of the property, the subject of his purchase, having been re-sold, filed a bill to enforce specific performance, before his contract was ripe for execution, the court on that ground, dismissed the bill without costs, prefacing the order of such dismissal with a declaration of the rights of the parties.

The bill in this suit was filed by *George W. Towers* against *Henry P. Smith*, *Robert H. Stevens*, *Charles S. Mack*, and *Daniel A. Van Volkenburgh*, as joint obligators, and *John McIntyre* made defendant by amendment after the answer to the original bill was put in, and prayed for specific performance of the contract set forth in the bill, being for the sale, by the defendants to the original bill, of the south half of lot number 3 in the 11th concession of Dereham.

Statement.

The original bill was filed in October, 1855, and the amended bill in January, 1856.

Mr. *Eccles*, Q. C., for plaintiff.

Mr. *McDonald* for defendants.

1857. The judgment of the court was delivered by

Towers
v.
Christie.

Feb. 2nd.

ESTEN, V. C.—In this case the defendants *Smith & Co.* had contracted for the sale of the property in question to one *Woodward*, for a certain sum of money payable by instalments, the last of which became due in the month of August, 1856. A conveyance was not to be executed until the whole purchase money and interest should be paid. *Woodward* paid 10*l.* on this contract, and then transferred his interest under it to the plaintiff, with the sanction and consent of the defendants *Smith & Co.*, who upon that occasion credited *Woodward*, and charged the plaintiff in their books with the 10*l.* already paid. At this time one instalment was overdue, but no arrangement was made as to the payment of it at the time of the assignment to the plaintiff. No further payments were made under the contract before February, 1854, but the plaintiff cut wood on the property in the winters of 1852-3 and 1853-4. No demand seems to have been made upon him for the arrears of purchase money and interest—no notice was given to him calling upon him to fulfil his part of the contract—the only possession that was had of the property was by the plaintiff in the way I have mentioned. Under these circumstances, the defendants *Smith & Co.* sold and conveyed the land in question to the defendant *McIntyre* for valuable consideration: but it is not disputed that he had notice of the plaintiff's contract at the time of his purchase. Very shortly afterwards the plaintiff tendered to *McIntyre* all that was actually due, then all that would become due under his purchase, but *McIntyre* refused to receive it. The bill is for specific performance of the agreement with *Woodward*, which was transferred to the plaintiff; and the question is, whether at the time of the sale to *McIntyre* the title of the plaintiff under this agreement had become divested. We think, under the circumstances above detailed, it was not, and that consequently the plaintiff

Judgment.

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Towers
v.
Christie.

is entitled to a decree for specific performance. The difficulty is, that at the time of the institution of this suit the contract was not ripe for execution, the last instalment not having become due until the 14th of August, 1856. No doubt very great delay has occurred in completing the contract on the part of the plaintiff. But the obligation to be active is mutual. The defendants by returning the 10*l.* to the plaintiff on the assignment of the agreement, without making any arrangement or coming to any understanding about the payment of the instalment and interest that was overdue; by making no demand upon the plaintiff for the payment of the purchase money that had become due, and by not calling upon him to fulfil the contract on his part, contributed themselves to the delay upon which they now insist, and in fact led the plaintiff to believe that the prompt completion of the contract was not insisted on. Then, to sell and convey to *McIntyre* under these circumstances, without any communication with or notice to the plaintiff, was wholly unwarrantable. It is possible that we are not acquainted with all the circumstances of the case; but we must decide it according to the facts that are proved. The difficulty arising from the immaturity of the contract is embarrassing. A purchaser who is informed that the property, the subject of his purchase, has been resold by the vendor is sometimes blamed if he does not seek the aid of the court promptly, although his own contract may not be ripe for execution. He is no doubt entitled, if the possession be withheld from him, to institute a suit in order to recover it. My own opinion is, that if a purchaser, under such circumstances, notifies to the second purchaser that he intends to insist upon his rights, and is only waiting till the proper arrives to institute a suit for that purpose, he does all that can be required of him, and that although he is entitled, he is not obliged to commence a suit for the recovery of the possession; if in order to avoid a double litigation, he is willing to submit to the loss of the possession, and to wait until he can obtain com-

Judgment.

1857. *ploto relief.* In the present case we think it best to dismiss the bill without costs, prefacing that order with a declaration of the rights of the parties.

Towers
v.
Christie.

STRATHY V. CROOKS.

Practice—Partnership accounts—Executor.

February 2nd The survivor of two partners, after having continued to carry on business with the personal representative of the deceased partner, filed a bill for an account of both the partnership dealings, and a decree was made for that purpose; and in proceeding on that decree the Master directed the executor to bring in an account of the partnership dealings between the deceased and the surviving partner—*Held*, upon appeal from this direction, that the executor was bound to make up the accounts from the books of the partnership in his possession.

Statement. This was a motion to take the Master's certificate, that the defendant had made default in bringing in accounts, from the files of the court.

Mr. *Turner* for defendant.

Mr. *Brough* contra.

Judgment. SERAGGE, V. C.—The plaintiff and the late *James Crooks* were partners: the defendant, the Hon. *James Crooks*, is personal representative of the estate of the deceased partner: the decree directs an account of partnership dealings between the plaintiff and the late *James Crooks*, and between the plaintiff and the defendant the Hon. *James Crooks*; and upon the inquiry before the Master he has directed the defendant to bring in an account of the partnership dealings between the deceased and the surviving partner. From this direction the defendant appeals, insisting that he as executor is not bound to make up such accounts as would be necessary in order to comply with this direction.

I have looked into such authorities as I thought might probably furnish information upon the point; but have not succeeded in finding any general rule

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laid down as to what is incumbent upon an executor who is an accounting party in the Master's office, in relation not to his own dealings with the estate of his testator, but to the dealings of the testator with others. But I apprehend that generally an executor, as representing the estate, is bound to shew upon any accounting between the estate and one with whom the testator has had dealings, whatever the testator himself would, if alive, have been bound to shew; that is, to be an accounting party; and that his accounting is not confined to his own dealings with the estate.

1857.
Strathy
v.
Crooks.

There can be no doubt, I should say, that the executor of a mortgagee in possession would be bound to carry an account into the Master's office of rents and profits received by his testator; and that the executor of any agent or trustee would in like manner be bound to carry in accounts of the dealings of the testator with his principal or *cestui que trust*: and it could not, I conceive, be any answer to a direction to carry in such accounts that the doing so would involve the making them up from the books and papers of the testator, or that they are long or intricate. Judgment.

In the cases that I have put, the testator has been peculiarly the party to account, he and the party to be accounted to not standing in the same relative position one to another as is the case between partners; but I do not see that this makes any difference in principle. If the account had been directed during the life-time of both the parties, each would have been an accounting party in the Master's office to the other. Does the account being directed between the estate of the deceased partner and the survivor make any difference in that respect? Is the estate exempt from an accounting to which the testator, if alive, would have been subject? I should find great difficulty in holding it to be so.

Upon the general questions submitted, therefore, I

1857. think that reason and analogy are in favor of holding the executor bound to carry in his account of the partnership dealings of his testator.

Strathy
v.
Crooks.

At the same time he has, of course, corresponding rights against the surviving partner, who would be personally cognizant of the dealings which the executor ordinarily, at least, can only ascertain through the books and papers of his testator; and in directing the time and mode of this mutual accounting, the Master would of course be guided by what he found to be reasonable and just between the parties.

It might certainly, in some cases, operate as a very great hardship upon an executor to compel him to prepare and bring in such an account; and I am not prepared to say but that there may be circumstances which should exempt the executor from being compelled to do so; but no such circumstances are shewn in this case. It is indeed suggested that the books and papers carried into the Master's office are the only sources from which the accounts required can be made up, and that the Master refuses to allow them to be taken from his office for the purpose. I am compelled to think that there must be some mistake upon this point.

Judgment.

I cannot but think that the conclusion to which I have arrived may impose a very onerous duty upon the personal representative of the deceased partner; and if his counsel thinks that he can shew my conclusions to be erroneous, I shall hear him very willingly upon the subject.

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RUSSEL V. DAVEY.

1857.

Rectification of deed, evidence for.

The owner of a lot of land executed a mortgage on the west half thereof, at a time when it was supposed that the east and west halves of the lot were divided by a public highway. Subsequently it was discovered, upon a survey of the property being made, that a small gore or portion of the east half was embraced in what was always taken to be the west half only. At the time of the mortgage there was a grist and saw mill under one roof, about one-third of which was on the strip; there were also a tavern, store-house, barn and piggery all on the strip, and the west half and strip had always been occupied by the mortgagor as one property, who delivered up possession of the whole to the agent of the mortgagee. Afterwards the mortgagor sold the east half up to the road; and subsequently, having become bankrupt in the meantime, took a lease of the west half, "with a grist mill, saw mill, tavern, sheds, store," &c.; and no mention was made in the bankrupt's schedule of assets of any claim upon this property.

Sept. 10th,
1856, and
February 9th
1857.

On a bill filed against the mortgagor's assignee in bankruptcy, *Held*, that plaintiff was entitled to have the mortgage rectified; to a decree of foreclosure for the whole of the property, including this strip, but under the circumstances without costs.

The bill in this case was filed by *Sarah Russel*, who was the devisee of *Colin Russel*, against *Benjamin Fairfield Davey*, praying under the circumstances set forth in the judgment, the rectification of an indenture of mortgage, and foreclosure of the same as corrected. Statement

Mr. *Mowat*, Q. C., and Mr. *Roaf* for plaintiff.

Mr. *McDonald* for defendant.

The judgment of the court was now delivered by

ESTEN, V. C.—In this case a mortgage was made by *Donald McKenzie* to *John Gordon McKenzie* of the west half of lot No. 2, in the 6th concession of the township of *Madoc*, on the 20th October, 1842, to secure the sum of 3,000*l.* and interest. *Donald McKenzie* owned the east and west halves. The road from *Marmora* to *Hungerford* runs through the extreme northern part of the east half, as it proves on survey to have been; but at the time of the mortgage the line between the east and west half had

February 9th
1857.

1857.

Russel
v.
Davey.

not been run, and it is doubtful whether it was known where it lay, and whether it was not supposed that the road above-mentioned divided the two halves. The line was run in 1849, and it then appeared that the road was about $2\frac{1}{2}$ chains south of the boundary between the two halves of the lot; and between the road and the boundary line was the strip in question in this cause, which extends across the whole half lot, and contains about ten acres. At the time of the mortgage there was a saw and grist mill under one roof, about two-thirds of which was on the west half, and the remaining one-third on the strip. There were also a tavern, storehouse, barn and piggery, all on the strip, and the storehouse projected a little into the road. There were no other buildings then on the west half. The strip and the west half were occupied by *Donald McKenzie* as one property. The tail race of the mills was on the strip. The mortgage deed conveyed the west half and "all houses and mills thereon erected, lying and being." At this time about 3,000l. was due by *Donald* to *J. G. McKenzie*. In the end of 1842 or beginning of 1843, one *Lavisconte* was deputed by *J. G. McKenzie* to receive possession of the mortgaged premises from *Donald McKenzie* on his behalf. On this occasion he undoubtedly received possession of the entire strip as part of the mortgaged property, and upon the same occasion *Donald McKenzie* told him that all to the north of the road was the mortgaged property. In 1846 *Donald McKenzie* became bankrupt. The precise date of his bankruptcy is not ascertained. I presume it to have been not earlier than 31st March, because *J. G. McKenzie* says in his evidence that their dealings continued up to that day. Before this time *Donald McKenzie* had sold and conveyed the east half of the lot up to the road. On the 29th of January, 1846, he wrote to *J. G. McKenzie & Co.*, using these words: "Having given you security by mortgage on my property, which creates hard feelings in the minds of the rest of my creditors by securing you,

Judgment.

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to their exclusion." On the 6th of October, 1842-3, *J. G. McKenzie* transfers the mortgage to *Colin Russel*. On the 7th of the same month *Donald McKenzie* who had become bankrupt some time before, agrees to rent from *Colin Russel* the west half "with a grist mill, saw mill, tavern, sheds, stores," &c., for three years at 75l. a year. I have no doubt that this agreement included the strip of land, which, however, *Colin Russel* had no right to lease unless it was included in the mortgage. The strip of land is not mentioned in the schedule of the bankrupt's effects; but there is no imputation or suggestion that he intended to withhold any part of his property from his creditors. *Davey*, on the contrary, suggests that he was inclined to overrate it. The equity of redemption of the west half is not indeed mentioned either; but this is accounted for by the suggestion that that and strip were supposed to be mortgaged for their full value. The defendant *Davey*, who is the assignee of *Donald McKenzie's* estate, executed one or two deeds for the purpose of conveying the strip in question to *Colin Russel* as having been intended to be comprised in the mortgage. They were ineffectual, for want of compliance with the requirements of the statute in one instance, and for an error in the description in the other. *Davey* does not appear to have been personally cognizant of the facts of the case, and acted under the advice of his legal advisers, who, however, probably derived much of their information from *Donald McKenzie* and *Colin Russel*, although they probably tested and ascertained its correctness before they advised their client to take a step which would have been a breach of trust if the fact had not been as was supposed, and would have exposed him probably to serious damage. Evidence was offered on the part of the plaintiff of various admissions made by the bankrupt after his bankruptcy, tending to shew that he considered the strip to be included in the mortgage. We have rejected this evidence, as we cannot perceive any principle of the law of evidence on which it could be admissible against

1857.

Russel
v.
Davey:

Judgment.

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Russel
v.
Davey.

the creditors. It was contended indeed that these admissions were receivable as part of the *res gestæ*, but we think it would be an unwarrantable stretch of the rule to admit them upon that principle. No certain rule indeed has been established fixing any limit of time within which declarations may be received as part of the *res gestæ* (a) : but it is clear that they must be made during the continuance of the transaction to which they relate, and form part of that transaction. In the present case the admissions in question were not in any way connected with the mortgage, and were made to third persons six years after its completion, and upon occasions in no way connected with it. We have noticed particularly the case of *Mortimer v. Shortall*, before Sir *Edward Sugden*, Lord Chancellor of Ireland, reported 2 Drury and Warren 363, in which that eminent judge lays down the rule which governs cases of this sort. He states that to obtain the correction—that is, the alteration of the solemn deed of the party—something more than parol evidence is necessary. By parol evidence he evidently means evidence of declarations or conversations. He adds, that where the only evidence is of this nature, unsupported by facts, and the answer positively denies the mistake, no relief can be given. In that case the parol evidence was supported by a fact which the Lord Chancellor said was worth all the declarations in the world. This was an act done by the lessors, which would have been an act of utter folly if the case had not been as they represented. It was done with the knowledge and acquiescence of the lessees. We intend to act according to this rule in the present case. The parol evidence is the weakest part of the evidence, and we should attach but little weight to it standing by itself ; but, looking at the facts which are placed beyond dispute by the evidence, the position of the property, its enjoyment as one establishment, the sale of the east half up to the road and no further, the possible or probable uncertainty as to the true position of

Judgment.

(a) *Rawson v. Haigh*, 2 Bingh. 104.

1857.

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Davey.

the line ; the language of the mortgage deed ; the possession of the whole given to *Lavisconte*, combined with the declaration made to him by *Donald McKenzie* ; the lease taken by *Donald McKenzie* from *Colin Russel*, the letter of *Donald McKenzie*, and the acts done by the assignee in bankruptcy towards the rectification of the deed, we have a body of evidence consisting not of oral declarations or conversations or admissions, but of facts, sufficient to warrant the court in pronouncing a decree in favor of the plaintiff. The answer, as already mentioned, instead of denying the alleged mistake, almost admits it. True it is that the defendant was not personally cognizant of the facts of the case. Still the material point of denial in the answer is wanting. It does not appear under what circumstances the deeds granted by the defendant for the purpose of correcting the mistake were executed ; whether Messrs. *Bell* and *Ross* were concerned for any of the creditors, or whether they were executed with the knowledge and sanction of the creditors. It is not probable that the assignee would execute deeds so materially affecting the interests of the creditors without consulting them, or against their wishes. Upon the whole we think the plaintiff is entitled to a decree. It must be however without costs, for the mortgagee, in whose place she stands, should have been more careful in drawing his deed ; and it certainly is a case in which it was the duty of the assignee to submit the question to the consideration of the court.

Judgment.

1857.

MAGEE V. THE LONDON AND PORT STANLEY RAILWAY COMPANY.

Injunction—Railway—Private nuisance.

October 27th,
1856, and
January 26,
1857.

A railway company being about to construct their line of road along a public street, a bill was filed by the owner of property in front of which the railroad would pass, to restrain the construction of the road in the manner contemplated, on the ground, as alleged, that his property would be thereby greatly depreciated in value from divers causes, some of which were, that the property would be rendered greatly less eligible from the inconvenience and danger occasioned by the rail cars running immediately in front thereof, and that the present traffic is likely through the same cause to be diverted from that part of the road. Held, that the injury as alleged did not amount to a private nuisance, and that therefore the party complaining was not entitled to an injunction; and, Held also, that as the injury complained of was not irreparable, the court would not, if otherwise in favor of the plaintiff, have granted the application.

The bill in this cause was filed by *George Grier Magee* against the *London and Port Stanley Railway Company*, praying, upon the grounds set forth in the judgment, for an injunction to restrain the Company from proceeding with their works along a certain public highway in the City of London in this Province; and a motion was now made in the terms of the prayer of the bill by

Statement.

Mr. *Roaf*, for plaintiff.

Mr. *Strong*, contra.

The judgment of the court was now delivered by

Jany. 26. *SPRAGGE, V. C.*—The bill is filed by the owner of two adjoining lots of land in London, C. W., having one frontage on a leading thoroughfare called the *Hamilton Road*, and another on a street called *Horton Street*. The defendants at the time of filing the bill had commenced the construction of their railway along the *Hamilton road* on a curved line opposite the plaintiff's lots, and have since completed it. The bill prays for an injunction restraining the defendants from building their railway along the highway entitled the *Hamilton road*, or along any part thereof, and for further relief.

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The bill is filed on the ground of private nuisance, and upon that point the plaintiff alleges that there are upon his said property a frame cottage fronting on the Hamilton road, and a carpenter's workshop in rear of the cottage; and the damage apprehended to result from the construction of the road at the place is thus stated: "that the plaintiff's said property will thereby be greatly depreciated in value, from divers causes, some of which are, that the property will be rendered greatly less eligible from the inconvenience and danger occasioned by the rail cars running immediately in front thereof, and that the present traffic is likely through the same cause to be diverted from that part of the Hamilton road which is in question to other quarters." The plaintiff applies for an injunction in the terms of the prayer of his bill, and two questions are presented for our decision: the one, whether the defendants have authority to construct their railway *along* any street or only *across* it: the other, whether its effects upon the plaintiff's property set out in the bill amount to a private nuisance so as to entitle the plaintiff to come here individually for an injunction.

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Port Stanley
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Judgment.

The plaintiff contends that a line for the contemplated railway was settled by the defendants across his (the plaintiff's) lots and across the Hamilton road—not along it—and that the defendants are bound by it: but we do not think that they are bound by any contemplated line, nothing having been done upon the faith of it by the legislature or otherwise. There are also affidavits produced on both sides as to the relative merits of both lines, and as to the superiority of a third line, which, in the opinion of the engineer who suggests it, is preferable to either; but these are questions with which we have nothing to do. A railway company selects its route upon the judgment of its own engineers; and it is not left to the judgment of this court to pronounce that it shall not interfere with private rights within the scope of their powers, because they

1857. might construct their road equally well without such interference with private rights.

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As to the right of this railway company to construct their line of road along a public highway, it is admitted that they have only the same powers as are conferred by statute upon the London and Goderich Railroad Company, afterwards the Great Western, and the powers conferred upon the latter; and section 9 and 4 *William IV.* ch. 29, is the only enactment referred to upon this point. That section enacts that whenever it should be necessary to the construction of the road thereby authorized "to intersect or cross any stream of water, or watercourse, or any road or highway," between London and Lake Ontario, it should be lawful for them to construct their road "across or upon the same: provided that the corporation shall restore the stream or watercourse, or road or highway thus intersected to its former state or in a sufficient manner not to impair its usefulness."

Judgment.

These words, in their plain, ordinary meaning, certainly import nothing more than that railway companies should have authority to carry their road across a stream or road, but not along it; indeed the same provision being made as to streams of water as is made as to roads, is confirmatory of this, as carrying a line of railway along a stream is out of the question. The words "across or upon" do not alter the sense: the disjunctive *or* is used frequently in the clause "railroad or way," "intersect or cross," "streams of water or watercourse," "road or highway," and the words "thus intersected" sufficiently define the meaning of the words used.

It may be observed, too, that a private act of this nature, conferring powers which authorize to a certain extent an infraction upon private rights, and affect public rights also, should not be construed so as to

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confer any other powers than such as are conveyed by the express language of the act or by necessary implication.

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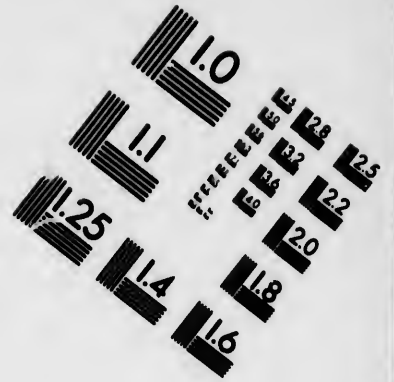
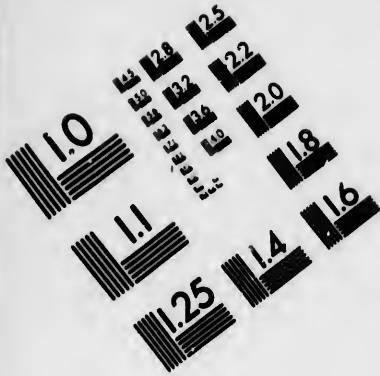
Magee
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In the Railway Clauses Consolidation Act, the distinction between carrying the line across a highway and along it is distinctly expressed: "The railway shall not be carried along any existing highway, but merely across the same in the line of the railway, unless leave be obtained from the proper municipal authority therefor." We think that it would be stretching the words of the act from which this railway derives its authority beyond their legitimate and proper meaning to hold them to convey authority to carry the line of railway *along* a highway.

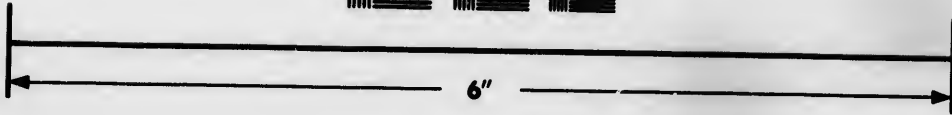
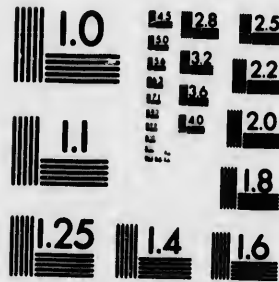
If we are correct in this opinion, that part of the defendants' railway which is objected to in this suit is a public nuisance, and may be objected to by information filed by the Attorney-General; but the question remains whether the plaintiff in this suit shows it to be a private nuisance to him, so as to give him a personal right to complain of it; and we think that this is not shewn in the bill nor by evidence. The injury complained of and apprehended is deterioration in the value of the plaintiff's property, not personal annoyance or damage to himself. Judgment.

It is not shewn or alleged that the plaintiff himself occupies the cottage upon his property, or that the construction or use of the railway would cause danger or inconvenience to its occupants. The inconvenience and danger referred to in the bill point to the property being thereby rendered less eligible, and as diverting traffic; which may mean, and in the connection in which it is used, seems to be intended to mean, that danger and inconvenience to those trafficking on that part of the highway will divert such traffic, and thus diminish the value of the property.





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1857. In the case of *White v. Cohen (a)* the nuisance complained of was occasioned by the manufacturing of glass bottles, which caused great annoyance to tenants of the plaintiff's houses, who were unwilling to continue their tenancy, and the value of the houses was thereby greatly diminished: but, inasmuch as it was not shewn to occasion any present annoyance to the plaintiff, it was considered not to amount to a private nuisance to the plaintiff: and the same doctrine was laid down in the well-known case of *Soltau v. DeHeld (b)*. There must be that which is a nuisance *at law* to entitle a party to come to this court. There is, as has been said, no such thing as an *equitable nuisance*; but this court only acts in order to give a *more* complete remedy where there is a legal nuisance.

It may be that the plaintiff may be able to shew that he is injuriously affected by the locality of the railway in such a way as to constitute it a private nuisance to himself; and we think it right to give him leave to amend his bill for the purpose, but this should be upon payment of costs. We have thought it right to give our construction of the act under which the defendants have proceeded, as we should not encourage the plaintiff to incur the expense consequent upon amending his bill unless we thought that the defendants have no authority to construct their road as they have done.

If we were otherwise in favor of the plaintiff we should not think it right to give him an injunction upon an interlocutory application. My observations in *Radenyurst v. Coate (c)* upon that point are applicable to this case.

(a) 1 Drew. 312.

(b) 16 Surist, 326.

(c) Ante p 139.

Magee
v.
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McCABE V. THOMPSON.

1857.

Sale of Equity of redemption by Sheriff.

The provisions of the statute 12 Victoria, chapter 73, making equities of redemption saleable under legal process, do not apply where the mortgage is created by a deed absolute in form. June 12th, 1856, and January 19, 1857.

Mr. K. Cooper for the plaintiff.

Mr. Mowat, Q. C., and Mr. Fitzgerald, for the defendant.

ESTEN, V. C.—This is a bill to redeem. The father of the plaintiff *Jane McCabe*, one *Elliott*, made a conveyance to the plaintiff his daughter, and afterwards mortgaged the same property to Mr. *Becher*, who transferred the mortgage to the defendant. The plaintiffs contend that the deed to the plaintiff *Jane McCabe* was for valuable consideration. The point appears to have arisen in an action of ejectment tried between these parties. It was proved by the subscribing witness that no money was paid at the execution of the deed, which purports to be for a money consideration, and the court probably refused to receive evidence of any other consideration, as inconsistent with the conveyance. If they did receive the evidence, they must have deemed it insufficient. We are of the same opinion. We think this deed must be deemed to be voluntary and a fraud upon creditors, and we are strongly inclined to think that it was merely colorable and never intended to operate between the parties. This conclusion establishes the priority of *Becher's* mortgage at all events. *Elliott* was afterwards sued by one *Caddy*, who obtained judgment, and sued out execution in the action and caused *Elliott's* interest in these lands to be offered for sale, when it was purchased by the defendant *Thompson* either for himself or for *Caddy*, whose attorney in the action he was, and who in that case must afterwards have made it over to *Thompson* the defendant.

Jan. 19th

Judgment.

1857. The bill, as I have already mentioned, is to redeem; and the question is whether the equity of redemption is in the plaintiff or the defendant. Had this been a mortgage in form as well as in substance, we should have held without difficulty that the equity of redemption of *Elliott* had passed to the defendant under the sheriff's deed. But the deed to *Becher* is absolute in point of form; and the question is whether the statute 12 Vic. ch. 73, which makes equities of redemption saleable under legal process applies, to such a case. After the best consideration we have been able to give to this question both on this and on former occasions, we think the statute does not extend to such a case, but only to cases where the equity of redemption clearly exists on the face of the mortgage; and therefore that nothing passed to *Thompson* under the sheriff's deed in the present instance, but that the equity of redemption remained vested in the plaintiffs, who are therefore entitled to the usual decree for redemption. I need not observe that the objection to the deed in favor of the plaintiff *Jane McCabe* can be made only by a creditor, and that it is binding on all other parties.

Judgment.

MOREY V. TOTTEN.

Sale of reversionary interest.

Sept. 16th,
1856, and
Feb. 2, 1857.

Although the number of persons, in this country, in the position of expectant heirs and reversioners is but small, still the same rule applies here as in England; the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men.

Where the tenant for life was the father of the reversioner, but the son was not dependent on him, and had no expectations from him, and both were illiterate persons: *Held*, that the father's knowledge of a sale of the reversion by the son did not render such sale unimpeachable.

The bill in this cause was filed by *John Morey* against *Daniel Totten*, praying, under the facts of the case, which are fully set forth in the judgment, a reconveyance of the property referred to and an injunction to restrain an action of ejectment brought

Statement.

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by *Totten* against *Morey* to recover possession of the premises in question.

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Mr. *Mowat*, Q. C., and Mr. *Morphy* for plaintiff.

Mr. *McDonald* and Mr. *Proudfoot* for defendant.

SPRAGUE, V. C.—The facts as far as they are material to the question in issue appear to be shortly as follow: February 2nd
the plaintiff, *John Morey*, was entitled in right of his mother to the land in question; she was dead before the crown patent issued, leaving the plaintiff her oldest son, and her husband, the father of *John Morey*, surviving her. The patent issued to *John Morey*, but he did not take possession of the land, but granted a lease of it at a nominal rent to his father for life, upon the suggestion, it would appear, of Mr. *Thomas W. Coleman*, to whom I shall have occasion to recur. The improvements upon the place had been made by the father, he was a very aged man, and the younger brothers and sisters of *John Morey* lived with him and assisted him in working the place. Judgment. It consisted of a farm of 108 acres, of which nearly a hundred were cleared. *John Morey* himself lived on a place which he had contracted to purchase from the crown, a clergy reserve lot.

This was the state of things in March, 1845; at that time *John Morey* applied to Mr. *Coleman* to purchase from him his reversionary interest in the property, as he wanted money in order to pay for the clergy reserve lot. A sum was agreed upon, between 110*l.* and 120*l.* *Coleman* saw the father, being desirous of obtaining his acquiescence, which the father readily gave, and *Coleman* then paid the money; part to *John Morey* himself, and the rest to persons to whom he was indebted, by his direction.

Two brothers of *John Morey*, *Cyrus* and *Hiram*, were
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anxious to have an opportunity afforded them of redeeming the place, as they termed it; they put it to *Coleman*, that as they had worked upon the place and had furnished the money to get out the patent, it would be hard that they should be turned off the place, and asked if he would let them have the place, on payment of the money he had paid to *John Morey* and interest. *Coleman* gave a verbal promise to that effect, and named two years, he thinks, as the time; this was two or three days after the arrangement with *John Morey*, and *John Morey* had conveyed to *Coleman* in the ordinary terms of a bargain and sale of an estate in fee in possession.

Matters remained upon this footing for about two years, when from some unexplained cause distrust arose in the mind of *Cyrus* and *Hiram Morey* and their father, most causelessly as far as appears, as to whether *Coleman* would perform his promise to convey the land upon payment of what he had paid to *John Morey* and interest, and the two sons sought to raise the money in some other quarter, and with that view applied first to a Mr. *Hamilton* and then to the defendant *Totten*. *Totten* saw not only the two sons upon the subject, but their father and *Hamilton* also; and it was agreed that he should pay off *Coleman*, and that *Coleman* should convey to him. *Hiram Morey* had ascertained that *Coleman* was willing to do so, and a deed was prepared and executed; to that deed *John Morey* was made a party, for the purpose, as explained by the conveyancer who drew it, Mr. *Penton*, of protecting him from the absolute covenants contained in the deed to *Coleman*: the sum paid by *Totten* to *Coleman* was 125*l.*; which Mr. *Coleman* thinks was the amount due to him for principal and interest.

It is quite clear from the evidence that something passed between *Cyrus*, or *Hiram* and *Cyrus* and *Totten*, of the same nature as had passed between

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them and *Coleman*; the expectation of redeeming the land was their motive for transferring it from the hands of *Coleman* to those of *Totten*. And afterwards *Cyrus* (*Hiram* having died) made repeated attempts to get *Totten* to allow him to redeem it; but *Totten* insisted that it was an absolute purchase, not subject to any right of redemption, and the evidence as it stands does not conclusively establish that right; and in fact the point is not in issue.

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This bill is filed to set aside the sale and conveyance from *John Morey* to *Coleman*, and from *Coleman* to *Totten*, on the ground that it was a sale by *John Morey* of a reversionary interest at an undervalue, upon the terms of paying to *Totten* the amount paid and interest. *Morey*, the father, died in the year 1855, at the age of ninety-five years, and *Totten* has not obtained possession.

It is contended that the law of the Court of Chancery in England, applied to alienations by expectant heirs and reversioners, does not apply to the circumstances of this country and the state of society in it. It is certain that the number of persons in the position of expectant heirs and reversioners is, in this country, but small; but the principle of the doctrine is, that such persons need to be protected against the consequences of their own imprudence in dealing with designing men; that they must necessarily contract on unequal terms (a), and generally under a pressure which may be considered as obstructing the exercise of that judgment which might otherwise regulate their dealings. There is nothing peculiar to the state of society in England in such a principle, but it is applicable wherever persons are to be found needing its application for their protection; and it is said to be upon this principle, as well as upon that of public policy, that seamen dealing for their prize money or wages, are con-

(a) Fonb. 135, note k.

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sidered entitled to as much favor and protection in equity as young heirs, they being, as Sir *Thomas Clarke* observes, "a race of men loose and unthinking, who will almost for nothing part with what they have acquired, perhaps with their blood;" and it is no doubt upon the same principle that the government and legislature of Canada has thrown round the Indians of this country a protection which they needed in their dealings with the whites; the principle is too just, and its application too necessary to be merely local, although it may certainly be pushed to an extent which may injure rather than protect the classes of men for whose benefit it is intended. It originated, as it appears, in the case of improvident heirs dependent upon their parents and dealing with their expectancies, but it is now well settled that it extends to the case of persons dealing with reversionary interests, and the settled rule now appears to be, that in such dealings the fair market value of the thing sold must be given. We agree that in applying the rule to the sale of lands in this country, we should not lose sight of the fact, that the market value of land in Canada is not ascertainable with nearly the same accuracy as in England; and that when its value several years back is to be ascertained, the difficulty is greatly increased, and men differ very widely in their estimates. This however, can only be an argument for the cautious application of the rule, not for a refusal to apply it in a proper case.

Judgment.

There is a good deal of evidence in this case as to value. After carefully considering it, and attaching the weight to the evidence of those well acquainted with the property in question, and who formed their opinion not only upon their judgment, but upon the less erring guide furnished by the sale of similar property about the same date as the sale in question, we have come to the conclusion that it was probably worth about 4l. 10s. an acre. We think that 400l. may be taken as its minimum value.

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The life estate to which it was subject was that of a man stated by a member of his family to have been then about eighty-five years old, and spoken of by others who judged from his appearance as between seventy and eighty. He is spoken of by several witnesses as a hale man of his age.

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The person dealt with for the purchase of his reversionary interest is described with considerable particularity by several witnesses, some of whom had known him well for several years. The general result of their evidence appears to be that in intellect he was below the average, and inferior in that respect to his brothers and sisters, and without education. In character and habits he is described as careless and thriftless, without foresight, and without care for anything beyond the present; leading an idle and irregular life, working very little, and spending much of his time in hunting and much in listless indolence. His father was a colored man, his mother an Indian woman; and he is spoken of as more of an Indian than anything else, in disposition and habits. Judgment.

It is objected that it is not shewn that the plaintiff entered into this contract under the pressure of necessity; the same objection was made in the case of *Gowland v. De-Faria* (a), and there it appears that no evidence of such pressure was given, but it appears to have been assumed; but whether from the nature of the bargain or from the circumstance of his not having yet come to his inheritance, does not appear. In *King v. Hamlet* (b) Lord Brougham puts the whole ground of the doctrine upon the pressure on the heir or the distress of the party dealing with his expectancies (c).

As to the pressure of necessity in this case upon the

(a) 17 Ves. 20.

(b) 2 M. & K. 456.

(c) Lord Aldborough v. Trye. 7 Cl. & Fin. 436.

1857. **Morey v. Totten.** plaintiff, none is shown of the nature usual in the case of expectant heirs ; but there appears quite enough to shew that he sold his premises because the money was necessary to him : he needed it to pay to the Government for the land he occupied, and to pay to creditors ; and the evidence shows him to have been a man sure to be almost always in want of money, and that in fact he was so. It was evidently not in the exercise of his judgment, doing a thing that was advisable, that he sold, but in order to procure sufficient money to meet particular occasions ; and it was the necessity to procure such money that induced him to make the sale.

The concurrence of his father is relied upon as taking this case out of the rule, and the judgment of Lord Brougham in *King v. Hamlet* is relied upon for the position. But in that case the son was supported by the father and dependent upon him ; the father was of ability to maintain him, and did maintain him. Lord Brougham **Judgment.** places the ground of the protection afforded by the court in such cases upon this : that it is the policy of the law to prevent the heir being seduced from a dependence on the ancestor, who probably would have relieved him, for which he cites *Cole v. Gibbons* (a), and to a similar effect the case of *Twisleton v. Griffith* (b) ; but such a circumstance can have no possible application where the relative position of the father and son is not that of support on the one side and dependence on the other ; and certainly relief is not confined to cases where such relative position exists.

We see nothing in the objection that the plaintiff by his own act had made himself a revorsioner after he had obtained the fee in possession. When he made the sale to Coleman he had nothing but a reversionary interest to sell, and needed protection none the less because his po-

(a) 3 P. W. 290.

(b) 1 P. W. 310.

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sition had formerly been otherwise. Besides, it would seem that his father was really entitled to the estate he granted to him, at least in equity, as tenant by the curtesy.

1857.

Morcy
v.
Totten.

As to the degree of inadequency which will entitle the vendor of a reversionary interest to set aside the sale, it is clear that it stands upon a different footing from a sale of an interest in possession. In the latter mere inadequency will not suffice. In the former the sale must be for fair value, or it will not be allowed to stand; not full value probably, but a reasonable price. In *Gowland v. DeFaria* the amount given by the vendee was about two-thirds of the value of the annuity granted by the borrower, and which was secured upon the reversionary estate of the borrower in certain freehold property expectant upon the death of his mother, then aged fifty-seven. The mother lived twenty-five years after this, and the bargain thus turned out a disadvantageous one for the lender; but after the mother's death the bill was filed and the agreement rescinded by the court.

Judgment.

It is too obvious to require any calculation that if a property be worth 400*l.*, its being subject to the life estate of a man of eighty years old cannot reduce its value to 125*l.* (the largest sum named by *Coleman*), or anything like so small an amount. It cannot be doubted, I think, that the plaintiff's interest was sold by him for less than half its value, and that no man of ordinary judgment, or common prudence or foresight would have made such a sale unless from some necessity which appeared to him a very pressing one, or possibly from sheer carelessness as to the future, so as his present wants were supplied.

The interest sold was not of a peculiarly unsaleable nature; and upon this point I may refer to the habits and state of society in this country, to which we were referred for another purpose.

It is a common practice for farmers, and others intend-

1857.

Morey
v.
Totten.

ing to bring up sons as farmers, to purchase land for them as opportunity may offer before they are of an age to occupy it; and it appears that in this very case the defendant spoke of the property in question as suitable for one of his sons. Property is often purchased not for the sake of any immediate return in rents and profits, but with a view to a future profit by increase in value or otherwise. Such an interest therefore as the plaintiff had was by no means unsaleable, particularly as the sum that he needed in hand was only a little more than 100*l*. At the same time we do not think that the court should apply an over-strict rule in getting at the value of such an interest; but we cannot help regarding the amount paid in this instance as manifestly and very greatly below its value.

The evidence leaves no room for doubt that *Totten* had notice of the nature of the interest sold by *John Morey* to *Coleman*. His interviews with *Cyrus Morey* and his father and with *Hamilton*, and *John Morey* being made a party for the particular purpose explained by Mr. *Penton*, show that he must have had such notice. Indeed he does not deny that he had; and besides, notice to Mr. *Penton*, who drew the conveyance to *Totten*, and who certainly had such knowledge, was notice to himself.

We think that there has been no acquiescence on the part of *John Morey*. His joining in the conveyance from *Coleman* to *Totten* would certainly, in the case of a person of ordinary intelligence, have afforded evidence of confirmation; but we hardly believe it possible that such a man as *John Morey* is described to be could have comprehended the purpose for which he was made a party to that deed. He was probably made aware that the matter had been brought about by his family with a view to preserve the property from an apprehended sale by *Coleman*, and joined in the conveyance with that view, and with that view only. We are satisfied indeed that he never understood that he had any rights to abandon, or that he was

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confirming in any shape the conveyance he had made to *Coleman*. There has been certainly a considerable lapse of time between the transaction now impeached and the filing of the bill; but as long as the expectation of the *Moreys* to redeem the property continued, and the privilege of redeeming was not denied to them, *John Morey* was probably content that they should have the benefit of it. That privilege does not appear to have been absolutely denied until recently. Besides, the death of the tenant for life, the father of *John Morey*, occurred a very short time before the filing of the bill. In *Gowland v. DeFaria* the bill was not filed until twenty-five years after the transaction which was impeached, the tenant for life having survived for that period. It does not appear from the cases that laches is imputable before the time of the reversionary interest coming into possession.

1857.

Morey
v.
Tollan.

With regard to costs, relief is only granted in such cases upon payment of costs. The defendant stands in the position of a mortgagor; he has been guilty of no fraud in the transaction or in resisting the plaintiff's case. The decree will be for a conveyance upon payment of the purchase money and interests and costs. The time for payment may be fixed at one month after the report of the Master.

Judgment.

1857.

COTTINGHAM V. BOULTON.

*Specific performance—Varying contract.*June 17th
1856, and
Feb. 2, 1857.

The owner of the west half of a lot of land, supposing himself to be the owner of the *east* half, and not the *west* half, entered into a contract with the owner of other lands to exchange for these the east half, and the east half was conveyed accordingly. He filed a bill to compel the other party to the agreement to accept a conveyance of the west half, and specifically perform the contract entered into between them by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of "east" instead of "west;" and it appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of either; but as the contract was for the east half, and the mistake was that of the plaintiff alone, the court held that the west half could not be substituted for the east half, and refused the relief asked.

Statement

The bill in this case was filed by *William Cottingham* against the Honorable *George Strange Boulton*, praying for the specific performance of a contract alleged to have been entered into between the plaintiff and defendant, and for an injunction to restrain an action of ejectment brought by defendant to turn the plaintiff out of possession of the land agreed to be conveyed by the defendant, and which plaintiff had been let into the possession of by the defendant.

Mr. *Strong* for plaintiff.

Mr. *Mowat*, Q. C., and Mr. *Crickmore* for defendant.

The judgment of the court was now delivered by

February 2nd

SPRAGGE, V. C.—This suit is for the specific performance of an agreement by the defendant to convey to the plaintiff the southwest corner of lot six, in the fourth concession of the township of Emily; and the bill states that although in form a sale, the real agreement between the parties was an exchange of lands; that the defendant was to convey the land in Emily and 100 acres in the township of Ops, in exchange for the west half of lot ten in the eighth concession of Elizabethtown. The east half of the last mentioned lot was conveyed by the plaintiff to the defendant (or rather to his son by his appointment)

Judgment.

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1857.

Cottingham
v.
Boulton.

by mistake, as the bill states, instead of the west half the latter being, as the bill charges, the real object of contract between the parties; and it is alleged that the plaintiff never represented himself as the owner of the east half, but of the west half, of which he was the owner, as was well known to the defendant.

The defendant by his answer alleges, that the defendant did represent himself as the owner of the east half, and that he had no reason to know or to believe that the portion of the lot owned by the plaintiff was the west and not the east half.

It was the east half that was conveyed, and it is admitted that the defendant had no title to it; and the matter in issue between the parties is, whether that or the west half of the lot was really the subject of the contract.

The agreement upon which the suit is brought, and the conveyance of the land in Elizabethtown, bear date the same day; the sixth of October, 1848.

As to the alleged mistake, it is put in the bill as having occurred in the drawing up of the conveyance; the word east having been inserted instead of west: but this is not borne out by any evidence. The deed was indeed filled up (it is a printed deed) by a clerk in the defendant's office, at Cobourg, but he cannot say from whom or in what manner he received instructions; he thinks both parties were in the office about the time, and his impression is that the draft of the deed was taken away by the plaintiff. In this impression there is reason to believe that he was right; the deed is not witnessed by him; and the letter from the plaintiff to the defendant, dated the day after the deed, and written at Port Hope, implies, I think, that it was executed not at Cobourg, but at Port Hope, or at the plaintiff's residence at Metcalfe. In the letter he says:

1857. "I called at Mr. *Ward's* office this morning, for the purpose of getting him to witness the deed from me to you, and leaving it with him; the young man in the office told me he thought Mr. *Ward* was at Cobourg. Mrs. *Cottingham* and I signed the deed in presence of Mr. *Robert Mitchell*," &c.

Cottingham
v.
Boulton.

The date of the deed is filled up in the same handwriting as the other parts of the deed; the reasonable inference is, that it was filled up at Cobourg on the sixth, and taken away by the plaintiff and executed by himself and his wife at Port Hope, and witnessed on the the seventh.

Judgment. The description, which is only of the number of the lot and concession, not by metes and bounds, is written most distinctly in the large space left in the printed deed for the purpose, and could hardly escape the eye of the most cursory observer of the deed. This deed, so written, and executed under such circumstances, is itself very strong evidence against the mistake alleged by the plaintiff. But the certificate of *Hoover*, dated 30th of March, 1846, is still stronger evidence that the east calf, the land conveyed, was in truth the subject of the contract. It commences in these terms: "This is to certify, that I lived in Elizabeth township for about fourteen years, on lot number 12, in the 8th concession of said township, and that I am well acquainted with the east half of lot number 10, in the said concession; "and he then goes on to speak to its quality and value. The body of the paper is proved to be in the handwriting of the plaintiff himself, and is produced by the defendant. This goes far to displace the plaintiff's position, that the mistake occurred in inserting the wrong parcel in the deed, and hardly leaves room for doubt that the lot conveyed was in truth the subject of the contract; and there is nothing leading to the conclusion that there was any mistake, with the exception of certain alleged admissions, which

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I will notice presently; so that the plaintiff desires us to believe that he, a man of business, as appears from the correspondence and other evidence, believed, and that the defendant also believed, that the west half was the subject of their bargain, and that it was inserted in the conveyance, when there is nothing whatever to show that such was the case, and much to shew the contrary. The real mistake, I can scarcely doubt, was in the plaintiff supposing himself to be the owner of the east half, when it was in fact the west half that was owned by him—a mistake, of a nature not by any means unfrequent.

1857.
Cottingham
v.
Boulton:

With regard to the alleged admissions: After it was discovered that *Cottingham* had no title to the land conveyed, an action was brought by the grantee, *Edward Trevor Boulton*, against *Cottingham* upon his covenant of *seisin*, and the cause was carried down to trial; the defendant in this suit being plaintiff's attorney. Admissions were made on both sides in court upon the cause being called on, with a view to raising the legal question to be argued in banc, whether the covenant was liable for anything beyond his own acts, the covenant being a qualified one, and upon that occasion the admissions in question were made: Mr. *Armour* says, it was admitted at the trial that the conveyance had been given for the east half of the lot by mistake instead of the west half and that *Cottingham* had no title to the east half, and that there was no fraud in the transaction. Mr. *Sidney Smith* says, that a verdict was taken for the plaintiff, subject to the opinion of the court upon a point reserved, and that it was stated and admitted that *Cottingham* had never owned the land for which the deed was given, and that the deed had been given by mistake; and he says the admissions were made with a view of their being binding on the parties afterwards in term.

The above admissions were made by council for the

1857. plaintiff in that suit, Mr. *Vankoughnet* : the defendant in this suit does not appear to have been present ; Mr. *Smith* thinks that he was not.

Cottingham
v.
Boulton.

I observe that these admissions were given for a particular purpose, to be binding as Mr. *Smith* says, upon the parties in term, in order to raise a legal question. The facts they desired to show were, that *Cottingham* conveyed a piece of land of which he was not owner, by mistake, without fraud, and that he had not himself done any act to affect the title to the land. If any more was admitted it was still only for the same purpose, to raise the legal question, and was probably immaterial to it ; but whether so or not, the admissions having been made only for the particular purpose, can not properly be taken as admissions of fact, to be used for all purposes. Then as to the strict accuracy of the recollection of these gentlemen who speak to these admissions, they appear to have been verbal, and they speak from recollection only, after

Judgment.

an interval of about three years ; and with every desire to narrate what passed with strict accuracy, it may well be that their memory is not strictly correct. Mr. *Smith*, who was attorney for *Cottingham* upon that occasion, may have had what passed then, and what his client may have told him as to the nature of the mistake mixed up in his recollection. The fact admitted to exclude fraud ; mistake in the lot conveyed, I have no doubt was admitted : as to the nature of the mistake, and which parcel of the land was really the subject of the contract, could scarcely be thought material, and I hardly think it would be safe to trust the unassisted memory, however trustworthy the veracity, of the gentlemen who speak to it.

It is material also that the admissions in question are not traced to the defendant in this suit, the only person, *Cottingham* excepted, cognizant of them. He has been examined by the plaintiff, but not upon that point, nor indeed at all upon the point in question in this cause.

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It is most unlikely, in the face of the facts proved by him in this cause, that *he* would have made such an admission as is alleged to have been made in the action at law, or that he would have authorized such admission to be made. For these reasons, we think that these alleged admissions ought not to be allowed to prevail against the evidence adduced by the defendant as to what parcel of land was really the subject of the contract between the parties.

1857.

Cottingham
v.
Boulton.

The case then stands thus; *Cottingham* on his part agreed to convey the east half of the lot in Elizabethtown to the defendant, in exchange for two parcels of land, one of which has been already conveyed to him, and he seeks in this suit the conveyance of the other. He has confessedly no title to the lot which was the consideration for that which he seeks in this suit; he can therefore have no equity to have it conveyed to him. He has been, and is, willing to convey the west half of the lot which he says he does own, and is of the same value. It seems Judgment. probable that such is the case, but we cannot say that the defendant is bound to take a parcel of land which he did not contract for; that would be making a new contract between the parties. The plaintiff's case is that the west half of the lot was the subject of the contract; that is the real issue between the parties, and upon that we are against the plaintiff, and his bill must be dismissed. My own individual opinion would be that it should be dismissed with costs, but my brother *Esten* thinks that the conveyance of the east half was so far adopted, by bringing of the action at law, that it would be right that each party should pay his own costs.

1857.

June 25th,
1856, and
Feb. 2, 1857.

McCANN V. DEMPSEY.

Solicitor and client—Breach of Trust.

An execution being in the hands of the sheriff against lands, the defendant therein applied to a solicitor to procure his services in obtaining a settlement of the demands against him: With a view of enabling the solicitor to raise funds for that purpose, the client at his solicitor's suggestion conveyed his lands to him in fee, taking back a defeazance stating the object for which the deed was made, but this defeazance was subsequently lost. In order to raise money the solicitor executed a mortgage for £245, and the mortgagee sold the same to another party for £150, which amount was handed to the solicitor, and thereout he paid the claims against the client, amounting in all to about £90. Afterwards the solicitor demanded from the client £245, and subsequently £300 as the price at which the client would be allowed to redeem; and this no having been complied with, the solicitor sold to a third party for £125 over and above the mortgage, but the purchaser had notice of the claim of the client.

Upon a bill filed for that purpose, the court declared the acts of the solicitor a plain breach of trust: that the client was entitled to redeem upon payment of what was actually expended on his behalf: that the purchaser of the mortgage was, under all the circumstances, entitled to hold the land only for what he had actually paid and interest; the excess of which, over and above the amount expended for the client the solicitor was ordered to pay, together with the costs of the suit to the hearing.

Statement.

The bill in this cause was filed by *Kerr Ward McCann* against *Richard Dempsey, John William Dempsey, John Crawford, George William Allan* (*Crawford & Allan* being the executors of *Alexander Burnside*, deceased) and *Edward C. Jones*, who had bid off the property in question at sheriff's sale at, as he stated in his evidence, a nominal bid, and who disclaimed any interest in the property.

The prayer of the bill was to have the absolute deed given by plaintiff to the defendants *Dempsey* declared to be a mortgage, and the premises conveyed to stand as a security only.

Upon taking the evidence in the cause, it appeared that the *Dempseys* had conveyed their interest to one *Thomas Alcock*, when leave was given to amend, by making him a party defendant, which was accordingly done and the allegations in the bill were to the effect that at the time of his purchase he had notice of the

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plaintiff's title, and prayed relief accordingly; but if it should be made to appear that he was a *bona fide* purchaser for value without notice, then that the defendants *Dempsey* might be ordered to pay to plaintiff the value of the property, less the amount advanced by them for plaintiff.

1837.
McCann
v.
Dempsey.

The material facts of the case appearing by the pleadings and evidence, were, that in July, 1849, the plaintiff was seized of 50 acres of land in Pickering, subject to several executions then in the hands of the sheriff; and that being desirous of borrowing money upon the security of the premises for the purpose of satisfying such executions, amounting together to about 80*l.* or 90*l.*, plaintiff applied to the defendants *Dempsey*, practising attorneys, for that purpose: that defendant, *Richard Dempsey*, undertook to obtain the money required, but stated that it would be necessary to have the title to the land conveyed absolutely to him; and that plaintiff confiding in the defendants *Dempsey*, did by an indenture of the 16th of the said month of July, convey the premises absolutely to them, for the expressed consideration of 500*l.*, although no money was paid to plaintiff otherwise than by discharging the executions; and that a memorandum was at the same time signed by them stating that the assignment was made to secure the *Dempseys* the repayment of all monies advanced for plaintiff, and all incidental and proper charges and expenses; that plaintiff continued to occupy a house upon the property with four acres of land; and that defendants had been in receipt of the rents of the remainder of the fifty acres,—the memorandum obtained by plaintiff from the *Dempseys* had been lost; that the *Dempseys* mortgaged the property to one *Mountjoy* on the 26th of the same month of July, to secure 245*l.*, which was assigned on the 29th of the same month to *Alexander Burnside* for 150*l.*; that frequent applications had been made

1857. to the *Dempseys* for a statement of their claim against plaintiff, in order to his obtaining a re-conveyance of the property, when they set up a claim to hold it absolutely, and demanded from plaintiff 300*l.* as the price at which they would consent to reconvey to him: this demand being resisted by plaintiff, the *Dempseys* sold to *Allcock* for 125*l.* over and above the mortgage given by the *Dempseys* to *Mountjoy*. Several of the most important parts of the evidence are fully set forth in the judgment.

McCann.
v.
Dempsey.

Allcock was examined before the court, and admitted that at the time of his purchase he was aware that plaintiff made a claim to the property in question.

Mr. *Brough* for plaintiff.

Mr. *Connor*, Q. C., and Mr. *Strong* for defendants.

The judgment of the court was delivered by

February 2nd SPRAGGE, V. C.—At the original hearing of this cause before *Allcock* the purchaser from the *Dempseys* was made a party, and on the cause coming on again to be heard after *Allcock* had been made a party, the court expressed a pretty strong opinion that the position of the *Dempseys* under the agreement between them and the plaintiff was that of mortgagees only, and that the plaintiff was entitled to redeem. A subsequent perusal of the evidence has not at all changed our view.

It is unfortunate certainly that the defeasance given by Mr. *Richard Dempsey* to the plaintiff should have been lost; but we think we shall be safe in looking at the account of the transaction given by Mr. *Richard Dempsey* in his examination in the cause, and in his conversations with Mr. *Jones*; at the nature of the transaction, and at the evidence given in relation to it.

First, as to the nature of the transaction: the *Demp-*

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seys advanced and were to advance nothing to *McCann*, but to raise money upon the security of the property conveyed to them for the purpose of paying off executions which were pressing upon *McCann's* property to the amount of something less than 90*l*. For this purpose the property in question, worth from three to four hundred pounds, was conveyed to the *Dempseys*, and they were to be repaid the amounts they had paid for *McCann*. It rather seems as if no definite period was fixed for repayment by *McCann*. *Richard Dempsey* says it was to be within a reasonable time, say four or five years. *Sterling* says that *McCann* was to pay as soon as he could; but *Dempsey* said he would not push him for five or ten years.

1857.
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McCann
 v.
Dempsey.

In the transaction there was nothing like a sale with a right to repurchase. The whole agreement was of a different character. The position of the *Dempseys* was rather that of agents for *McCann* to raise money for him upon the security of his property, and to apply it in a particular manner, and to hold the property themselves as a security for its repayment. If such was the character of the transaction, and we incline to think it was so, the *Dempseys* were the professional agents of *McCann*, and the relation of attorney and client existed between them; and in such case the court certainly would not allow the attorneys to hold the property as purchased by them, whatever the terms of the defeasance drawn up by themselves.

But if the *Dempseys* had not been attorneys, or had not stood in that relation to *McCann*, there appears to us quite sufficient in the nature of the transaction otherwise, and in the evidence, to warrant the conclusion that the *Dempseys* can stand in the position only of mortgagees.

Richard Dempsey in his first examination states:
 "From what I recollect of the paper gave to *McCann*.

1857.
 McCann
 v.
 Dempsey.

it was much, I think, to the same effect as the conversation we had at the door: that the property would be sold if the creditors had pressed it, and it would be in my power to buy it; and that we would pay off the executions if he thought proper to give us a deed of the property, and within a reasonable time, say four or five years, he could repay what we should pay or have to become responsible for, for him, the property would be returned, or we would come to terms about it. This was the purport of the conversation at the sheriff's office, and I embodied the effect of it in the memorandum which I gave to *McCann*: the writing was given after the deed was executed, the same day or the next day. The memorandum was signed by me in the name of our firm. * * * * * As far as I recollect, the memorandum fixed five years as the outside for the reconveyance of the property: whatever amount we became responsible for or laid out was to be repaid, and in that case we would sell to him or reconvey to him; that was the purport of the memorandum."

Judgment.

The defendant *Jones* in his examination says: "I saw *Richard Dempsey* shortly before the sale at which I purchased. He then said that he had a great deal of trouble in collecting the rent, and he offered to sell it to me for 10*l.* over the incumbrances. I then asked him if he had an absolute title, and if the plaintiff really had not a right to redeem; he said he had given the plaintiff a document entitling him to redeem, but he said he believed it had been lost, and that the right would never be exercised. * * * * * *Dempsey* may have spoken of the plaintiff's right as a right of repurchase; I think he spoke of it as a right to redeem."

The witness *Sterling*, in giving his account of the transaction between the plaintiff and *Dempsey*, says: "It was agreed that the plaintiff should give *Mr. Dempsey* a deed of the property on which he lived,

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1857.
McCann
v.
Dempsey.

and that Mr. *Dempsey* should give *McCann* some document; plaintiff said he would redeem it as soon as he could, but *Dempsey* said he would not push him for five or ten years." And in a subsequent part of his testimony this same witness says: "When I was at *Dempsey's* there was no sale of the property, nothing of the kind: it was a mere loan. I made the whole bargain myself. * * * * * The debts which the plaintiff then owed were about 80*l.* I had offered for the property some time before the transaction \$1,500."

The defendant *Allcock* admits notice, and his position is of course the same as that of the *Dempseys*.

There is a part of the transaction which I do not see explained. The executions to be paid off amounted to less than 90*l.*; but the *Dempseys* made their mortgage to *Mountjoy* for 245*l.*, and actually received 150*l.* The purpose for which the property was placed in their hands was to raise sufficient money to pay off the executions against *McCann*, the amount of which could be easily ascertained; not to raise money for the private use of the *Dempseys*. It must follow that pledging the property for any sum beyond what was necessary to pay off the executions was a plain breach of trust. Judgment.

Further, taking the position of the *Dempseys* to have been exactly as they state it, their plain duty was to furnish *McCann* with a statement of what they had paid for him and what they claimed from him in respect of it: but this does not seem to have been done. Mr. *Richard Dempsey* says that since the time of the original transaction he has had many conversations with *McCann*. "He would frequently ask for a settlement; at first I would say to him, that all he had to do was to repay the amount we had advanced for him or had become liable for him; he would say, 'well if I pay off the mortgage,' meaning

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the mortgage to *Mountjoy*." In another passage he says: *McCann* never asked him for an account; he would ask for some settlement, some arrangement: I would ask him to make some proposition and see what we would do." Again, in another part of his evidence: "Shortly after the deed was given we might have been willing to let *McCann* have the property on repaying us what we had paid or become responsible for; but latterly, after we had made payments for some time on the mortgage, we thought in justice to ourselves we ought not to let him have it for less than its value, although, perhaps, we might have taken less from him than anybody else. I think the year before last the plaintiff's daughter and the plaintiff called upon me and wanted to know what we would let the plaintiff have the property for. I said we would take 300*l.* for it. She said: 'Why that is the full value of the property; we may as well let it go.' I think she intimated that they had friends or could get friends to make some arrangement with us for the reconveyance or re-sale of the property. We brought an action of ejectment last year against *McCann* to turn him out of possession of his house and five acres. We did not proceed with it after we were served with the bill in this cause. *McCann* never asked me for an account; he would ask for some settlement, some arrangement. I would ask him to make some proposition and see what he would do."

In all this the *Dempseys* appear to have quite repudiated their true position towards *McCann*, and as far as appears from the first, before the expiration of the shortest period named for the payment by him of the monies paid by the *Dempseys* for him; and to have treated him, not as entitled to have his land back again upon any definite terms, but only, if at all, upon such terms as they might think fit to impose. The reference in two of the passages I have quoted from Mr. *Dempsey's* examination, to *McCann* having to pay to them what they had paid, or had

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become liable for, or responsible for, can only apply I think to the amount of the mortgage given to *Mountjoy*, and seems so to have been understood by *McCann*, and his so understanding it seems to have been acquiesced in by *Dempsey*.

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This was most oppressive: less than 90*l.* had been paid for *McCann*, and the price named for redeeming his land was 245*l.*, which included a sum received to the private use of the *Dempseys*, and the enormous interest agreed to be paid on both sums. But it is doubtful whether even this large sum would have been received, even at an early period; a larger sum was afterwards asked, 300*l.*; and at last the property was sold to a third party at the price as stated by *Mr. Richard Dempsey* of 125*l.* over and above the mortgage, which he speaks of as still due, no part of the principal, as I understand, being paid off.

The remaining question is as to the right of the execution-judgment. *Burnside*. The mortgage was for 245*l.*, payable in six years with interest; the sum advanced was 150*l.* This would yield the enormous interest of about 20 per cent. per annum for that period. In the short space of between three and four years the lender would, according to the terms of the mortgage, receive back his principal more than doubled, and have received besides more than 9 per cent. in the meantime upon the sum advanced.

Without saying that it was known to *Burnside* that the *Dempseys* were the real borrowers, there was that in the transaction that was calculated to excite suspicion: and the terms of the loan, and the enormous discount, look as if something was paid for the risk attending such a transaction beyond what was paid for the mere loan and forbearance of the money. We do not propose to decide between the *Dempseys* and the estate of *Burnside* upon this contract, but we do not think that the land should be

1857. held bound for more than the repayment of the sum advanced with interest; and the difference between the amount due as between *McCann* and the *Dempseys* and the amount so due upon the mortgage must be paid by the *Dempseys*.

The decree must be with costs up to the hearing against the *Dempseys*. Further directions must be reserved. Subsequent costs will also be reserved.

IN APPEAL.

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

[Before the *Hon. the Chief Justice of Upper Canada, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice McLean, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, and the Hon. Vice-Chancellor Spragge.**]

THE ATTORNEY GENERAL V. GRASETT.

Endowment of rectories in Upper Canada.

The decree of the Court of Chancery (reported ante volume V., page 412) declaring the endowment of rectories in the manner the lieutenant-governor had endowed them was valid, affirmed on appeal.

Mr. Connor, Q. C., Mr. Mowat, Q. C., and Mr. McDonald for the plaintiff.

Mr. Cameron, Q. C., Mr. Brough and Mr. Read, for the defendants.

The judgment of the court was now delivered by

SIR J. J. ROBINSON, BART., C. J.—The British statute 31 *George III.*, chapter 31, provided for the support of a Protestant Clergy in Upper and Lower Canada, by directing a reservation or allotment to be

* The Chancellor was absent from the Province, and *Richards* and *Hagarty, J. J.*, had been concerned in the case at the bar.

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made for that purpose out of the then ungranted lands of the crown within each of the said provinces, which reservation was to be in a proportion, as nearly as could be estimated, equal in value to the seventh part of the lands which had theretofore been granted, and of such lands as should thereafter be granted within each province respectively.

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The 37th clause of the same statute enacted that the rents, profits and emoluments, which should at any time arise from such lands so allotted and appropriated should be applicable solely to the maintenance and support of Protestant clergy within the province in which the same shall be situated.

The 38th clause provided for turning this allotment of lands to account in supporting a Protestant clergy; and as the question brought before us in this appeal mainly turns upon that clause, I will give it in its very words :

Judgment..

“ And be it further enacted by the authority aforesaid, that it shall and may be lawful for His Majesty, his heirs or successors, to authorize the Governor or Lieutenant-Governor of each of the said provinces respectively, or the person administering the government therein, from time to time, with the advice of such Executive Council as shall have been appointed by his Majesty, his heirs or successors, within such province, for the affairs thereof, to constitute and erect within every township or parish, which now is, or hereafter may be formed, constituted or erected within such province, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England; and from time to time, by an instrument under the great seal of such province, to endow every such parsonage or rectory with so much or such part of the land so allotted and appropriated as aforesaid, in respect of any lands within such township or parish, which shall

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have been granted subsequent to the commencement of this act, or of such lands as may have been allotted and appropriated for the same purpose by or in virtue of any instructions which may be given by his Majesty in respect to any lands granted by his Majesty before the commencement of this act, as such Governor, Lieutenant-Governor or person administering the government, shall, with the advice of the said Executive Council, judge to be expedient under the then existing circumstances of such township or parish."

The 39th and 40th clauses contain provisions not directly bearing upon the question to be determined by us, but applying to the presentation of incumbents or ministers of the Church of England to such parsonages or rectories, the rights they shall enjoy, the duties they are to perform; and the ecclesiastical jurisdiction to which they are to be subject.

Judgment. And the 40th and 41st clauses provide that the legislature of each province shall have power, under certain restrictions, to vary or repeal these enactments for the maintenance of a Protestant clergy; for the erecting and endowing parsonages or rectories, and respecting the presentation of incumbents, and their rights and duties.

To return to the 38th clause: It will be seen that the effect of that clause is to make it lawful for his Majesty to authorize the Governor or Lieutenant-Governor of each province, from time to time, with the advice of his Executive Council, to constitute or erect the parsonages or rectories spoken of; and by an instrument under the great seal of such province, to endow every such parsonage or rectory with so much of the lands reserved in respect of the lands granted within the township or parish in which such parsonage or rectory has been established, as the Governor or

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Lieutenant-Governor, with the advice of his Executive Council, shall think fit. The statutes does not of itself direct or allow the Governor of either province to create rectories or endow them; but it empowers his Majesty to give to the Governor authority to do both or to do either.

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On the 16th of January, 1836, during the administration of Major-General Sir *John Colborne*, Lieutenant-Governor of Upper Canada, letters patent were issued under the great seal of the province, and like other letters patent, in the name of the sovereign, setting forth the ecclesiastical arrangement by which Upper Canada had been made part of the diocese of the bishop of Quebec, and also the provisions of the British statute 31 *George III.*, chapter 31, respecting the constitution of parsonages or rectories, and then proceeding as follows:—"And whereas We," (that is, our late sovereign King *William the Fourth*, in whose name the patent issued), "having due regard to the spiritual welfare of all our loving subjects resident within the township of of York, in the Home District (or Upper Canada), and being desirous of making a permanent provision for their instruction according to the doctrine and discipline of the Church of England, and also for the support of a Protestant clergyman, duly ordained according to the rites of the said church, *have*, pursuant to the provisions of the said recited act, and by and with the consent and advice of our Executive Council of our said province of Upper Canada, determined to erect and constitute, and by these presents, and by and with the advice and consent aforesaid, *do* erect and constitute a parsonage or rectory at the city of Toronto, within the said township, according to the establishment of the Church of England, to be hereafter known, styled and designated as the first parsonage or rectory within the said township of York, otherwise known as the parsonage or rectory of St. James; and by virtue of the same

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authority, and by and with the advice and consent of our said Executive Council, we do hereby command that there shall be henceforth, and forever, set apart out of the lands which we now hold in our said province, by virtue of our royal prerogative, certain parcel or parcels of land situated in the said township, composed of (here specifying the lands,) as a glebe and endowment to be held appurtenant with the said parsonage or rectory: We intending, and willing by virtue of our royal prerogative, forthwith to present an incumbent or minister of the said established Church of England to the said parsonage, so (hereby) created and constituted as aforesaid, with its appurtenances; saving nevertheless to ourselves the right of hereafter erecting and constituting one or more parsonages or rectories in the said township. Given under the great seal of our province of Upper Canada. Witness our trusty and well beloved Sir John Colborne, K. C. B., Lieutenant-Governor of our said province, and Major-General commanding our forces therein, this 16th day of January, in the year of our Lord, 1836, in the sixth year of our reign."

Judgment.

Into the parsonage or rectory thus constituted, one of the defendants, the Rev. Mr. Grasett, has been inducted, not being, (as we all necessarily know,) the first incumbent; and after the lapse of more than sixteen years, this suit has been brought, not to call in question on any ground the validity of his title to the enjoyment of the rights or emoluments of the parsonage or rectory, but to try the validity of that act of the Governor of Upper Canada by which the parsonage or rectory was created.

An information in the name of the Attorney-General was filed in August, 1852, which was answered in January following. Whatever may have been the cause of the delay, the suit was not heard till September, 1855, when the Court of Chancery, by the unanimous

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opinion of the three judges, sustained the validity of the patent creating and endowing the parsonage or rectory, and dismissed the information with costs.

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This judgment being appealed from, the cause was argued before us at the sittings of this court in December last. The suit, it is well understood, has been instituted, has been instituted by the Crown not for the purpose of attacking this particular rectory, but in order, as we were told in the argument, to have certain question of general interest settled by a judicial decision. Forty-four rectories, it seems, were at the same time created in Upper Canada by the Lieutenant-Governor, Sir *John Colborne*, with the consent of his Executive Council, by patents similar to that which is set out in the present case; and they have been endowed in all, I think, with somewhere between 15 and 20,000 acres of the two or three millions which had been set apart under the British statute 31 *George III.* for the support of a Protestant clergy.

Judgment.

The objections which have been taken to this measure of the colonial government are stated as follows, in the reasons of appeal. It is maintained that the judgment of the Court of Chancery in favour of the defendants is erroneous:

1st. Because he Lieutenant-Governor, Sir *John Colborne*, had not at any time authority to issue the patent in question, or to establish the said rectory of St. James, in the township of York, or to endow the same with the lands contained in the said patent.

2nd. Because if he ever had such authority, it was, before issuing the patent, revoked, nullified, or suspended expressly, or by implication.

3rd. Because the issuing of the patent and the erection and endowment of the rectory, at the time

1857. it took place, "*were all against the mind and intention of his Majesty and his government.*"

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4th. Because the transactions complained of took place under such circumstances of mistake as are sufficient to avoid the patent.

5th. Because the patent is void for not defining the boundaries of the parish, and for not naming the guarantee.

These are the objections: and *first*, as to the authority to the Governor. In order to see upon what foundation Sir *John Colborne's* authority in this matter stood, we are to consider first, the statute 31 *George III.*, chapter 31.

2nd. The commission to Sir *John Colborne*, as Lieutenant-Governor of Upper Canada, (page 98 of the evidence), which empowered him, during the absence of the Governor-General from Upper Canada, to execute in the province the powers of the royal commission to the Governor-General for the time being.

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3rd. The commission to Lord *Gosford*, who was the Governor-General at the time when Sir *John Colborne*, as Lieutenant-Governor, created and endowed these parsonages or rectories—(page 71).

4th. The king's instructions which accompanied the commission to Lord *Gosford*—(page 215).

5th. The instructions to his predecessor Lord *Aylmer*; to which instructions Lord *Gosford* was referred—(page 214).

6th. The instructions to Lord *Dalhousie*, to which Lord *Aylmer* was referred—(page 194)—especially the 47th.

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These instructions are a mere transcript of the body of instructions under which Sir *George Prevost* administered the government in 1811, and I think all of them except such as were framed to meet the requirements of the statute 31 *George III.*, chapter 31, were of a much earlier date than the statute. (a).

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The commission to Sir *John Colborne*, as Lieutenant-Governor of Upper Canada, is printed in page 98 of the evidence. It shews us that we are to look at the royal commission to the Governor-General for the time being, in order to find what powers could be exercised in his absence by Sir *John Colborne* as Lieutenant-Governor. The commission to Lord *Gosford*, then Governor-General, is set out in page 71, and some following pages; it authorised (page 75) Lord *Gosford*, with the advice of the Executive Council for each province respectively, from time to time, to form, constitute, and erect *townships* or *parishes* within the said provinces, and also to constitute and erect within any township or parish which then was or thereafter might be formed within the said provinces, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England, and from time to time, by an instrument under the seal of the said provinces respectively, to endow every such parsonage or rectory with so much, or such part of the said land so allotted as by the said act (31 *George III.*, chapter 31) is mentioned, in respect to any lands within such *township* or parish, which shall have been granted subsequent to the commencement of the same acts, or of such lands as may have been allotted and appropriated for the same purpose by, or in virtue of any instructions which shall be given by his Majesty in respect of any lands granted before the commencement of the said act, as the Governor-General, with the advice of the Executive-

(a) Stokes on the Colonies, 156, 184, 199, 200, 235.

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Council of such province, shall judge to be expedient under the existing circumstances of such township or parish: "subject nevertheless (the commission adds) to such instructions touching the premises as shall or may be given to you by us under our signet and sign manual, or by our order in our Privy Council, or through one of our principal secretaries of state." And then the commission proceeds thus: "And we do also by these presents authorize and empower you to present, subject to the provisions in the above mentioned act in that behalf, to every such parsonage or rectory, and to every church, chapel, or other ecclesiastical benefice according to the establishment of the Church of England, within either of the said provinces, an incumbent or minister of the Church of England, who shall have been duly ordained according to the rites of the said church, and to supply from time to time such vacancies as may happen of incumbents or ministers of the said parsonages, rectories, churches, chapels or benefices, or any of them respectively."

Judgment.

I find nothing else in the commission to Lord *Gosford* which bears particularly on the subject of erecting or endowing parsonages or rectories in Canada.

But the commission also contains this clause: "And in case of your death or absence out of our said Province of Lower Canada, we do by these presents, in either of such cases, give and grant all and singular the powers and authorities herein to you granted, to our Lieutenant-Governor for the time being of such Provinces respectively, or of either of them, as the case may be."

If we compare with the statute 31 *George III.*, chapter 31, this commission to Lord *Gosford*, which, in the absence of any royal instructions to the contrary, was to be the guide of Sir *John Colborne's* conduct in his government, we shall find that the passages which I

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have extracted amount to much the same thing as a mere direction or authority to him to carry those provisions of the act which related to the erection and endowment of parsonages and rectories, and the presentation of incumbents into effect. But there are two peculiarities in the commission on which points have been raised in the discussion of this case.

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Gravett.

1st. The statute 31 *George III.* gave no directions respecting the formation of parishes or of townships: it mentioned them as divisions of territory which it was assumed did then exist or might thereafter be created in both or either of the provinces. But the commission to Lord *Gosford*, we see, authorises his Lordship, with the advice of the Executive Council, &c., "to form, constitute, or erect townships or parishes within the said provinces.

2ndly. The statute merely makes it lawful for his Majesty "to authorise" the Governor, &c., to erect and endow parishes, or rectories, not expressly saying that such authority when once given is to be subject to instructions that may be afterwards given by his Majesty to the governor. The commission to Lord *Gosford* however, as we see, did in express terms make the authority which his Majesty conveyed to him in regard to these matters subject to such future instructions touching the premises as shall, or may be given to the Governor under his Majesty's signet and sign manual, or by his order in his Privy Council, or through one of his Majesty's principal Secretaries of State." I am only pointing out this diversity in the language, without saying at present whether it does or does not create any difference in substance. Judgment.

Then as to the royal instructions to which Sir *John Colborne* was bound to confirm: none are shown to have been addressed to himself, personally; but Lord *Gosford*, whose

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commission and authority he was to execute in his absence, was referred for his guidance to the instructions which had been given to his predecessor Lord *Aylmer*, which we see were in reality the same as those which had been communicated to a former Governor General, the late Lord *Dalhousie*. This body of instructions which has been handed over by one Governor to another, is admirable for the judgment and care with which it was framed. It is an exact transcript of the royal instructions which accompanied the commission to Sir *George Prevost* in 1811; and I have no doubt, with some exceptions, they are to be traced back to a period long antecedent to the passing of the statute 31 *George III.*, chapter 31. The instructions sent to Canada after the passing of the act were necessarily somewhat modified, to suit its requirements; but in the main they were, I have no doubt, the same that had for a long period before accompanied the Royal Commissions to the Governors of Colonies. The articles which relate to religion and religious establishments are the 41st, and twelve following articles; none of which, it appears to me, have any legal bearing upon the questions raised in this suit. I refer, however, to the 47th article, because it was a good deal adverted to in the argument; it runs thus: "You shall recommend to the Legislative Council and General Assembly of the Province of Upper Canada to settle the limits of *parishes* in such manner as shall be deemed most convenient." I take that to be probably a mere repetition of an article which had long formed part of the code of royal instructions; and that it was not inserted with a view to any peculiarity in regard to the erection of parishes supposed to have been created in Canada by the statute 31 *George III.* I infer this, because we know that in many of the colonies—as, for instance, in Virginia and South Carolina, while they were still British Colonies; in Nova Scotia, and, I believe, in our West Indian Islands—acts of Assembly were passed from time to time dividing the colony into parishes; and Mr. *Stokes*, in his work on the

Judgment.

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British Colonies in 1783, tells us that in most of the colonies before the civil war (except in the New England Provinces, where the Independents had the upper hand) an act of Assembly was passed to divide the colony into parishes, and to establish religious worship therein according to the rites and ceremonies of the Church of England.

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It seems to have been left to the Colonial Legislature so to create the parochial divisions in such manner as it might seem to them would best accommodate the inhabitants; but I do not imagine that things took that course because it was considered that parishes could not be constituted by his Majesty alone in the exercise of his royal prerogative; and there seems no ground whatever for supposing that the 47th article of the royal instructions was framed with any idea of carrying out what was supposed to be required by the statute 31 *George III.*; for that act makes no provision whatever respecting the formation of parishes, *eo nomine*, but provides for the creation and endowment of *parsonages* or *rectories* in *parishes* or *townships*. Judgment.

There is nothing to be noticed, I think, under the head of instructions, or authority, besides what I have stated, except that we have some account in the documents before us of an instruction having come from the Secretary of State to Mr. President *Smith*, dated 2nd April, 1818, (conveying the authority of His Royal Highness the Prince Regent for erecting "*parishes*" (or *parsonages*) and *rectories* in conformity to the statute 31 *George III.*, chapter 31.

We have not before us the copy of that official document; but we have in evidence the following dispatch from Earl *Bathurst*, then Secretary of State for the colonies, to Major-General Sir *Peregrine Maitland*, dated 22nd July, 1825:

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"Sir,—I have received His Majesty's commands that you do, from time to time, with the advice of the Executive Council for the affairs of the Province of Upper Canada, constitute and erect within any township or parish which now is, or hereafter may be formed, constituted or erected within the said Province, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England; and that you do from time to time, by an instrument under the great seal of the said province, endow every such parsonage or rectory with so much, or such parts of the land so allotted and appropriated as aforesaid, in respect of any lands within such township or parish which shall have been granted subsequently to the commencement of a certain act of Parliament of Great Britain, passed, &c., intituled, &c., (31 George III., chapter 31,) or of such lands as may have been allotted or appropriated for the same purpose, by or in virtue of any instruction which may have been given by his said late Majesty before the commencement of the same act, as you shall, with the advice of the said Executive Council, judge to be expedient under the existing circumstances of such township or parish.

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"You shall also present to every such parsonage or rectory an incumbent or minister of the Church of England, who shall have been duly ordained according to the rites of the said Church; and supply from time to time such vacancies as may happen therein.

(Signed,)

BATHURST."

It has been said of this formal and separate instruction, which was given in 1825 to Sir John Colborne's immediate predecessor, that it could not be acted upon by Sir John Colborne, because it was given by a sovereign who was no longer reigning, and to a governor who was no longer governing at the time of the rectories being established. This is an objection altogether distinct from the question whether by anything that had taken place between 1825 and 1836, this instruction could in a court of justice, be held to have been cancelled either expressly or virtually. It turns altogether upon the legal effect upon official acts

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in a colony, produced by the demise of the sovereign, or by a change of persons in the office of governor of the colony. Questions of that nature have, as we may suppose, not unfrequently presented themselves; and from an early period a great deal of legal learning has been employed on both sides of the Atlantic in discussing them.

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Grasett.

If it could be of any moment (which under the circumstances it cannot be) to consider in the present case the effect of the change in the person of the sovereign or of the governor, or of both, upon an authority such as we are speaking of, I apprehend that upon a close investigation some difficulty would be found in coming to the conclusion that the authority of his late Majesty King *George IV.*, to Sir *Peregrine Maitland*, to carry the provisions of an act of Parliament into effect, had become legally of no force from the changes I have spoken of. My own opinion at present, so far as I have formed one, is the other way. But the existence of a much later authority equally explicit, and conveyed in a manner more formal, from the king who was reigning to the governor who was in office at the time the patents complained of were issued, makes it wholly immaterial to consider in what position Sir *John Colborne's* acts would have stood if this separate instruction to his predecessor had been his only authority.

Then, with the statute 31 *George III.*, chapter 31, before us, and with this evidence which we have of the royal commissions to the Governor of Canada after the statute, and of the royal instructions which accompanied or followed them, we are called upon to determine whether it can be properly held, as it is contended by the Attorney-General, "that the Lieutenant-Governor, Sir *John Colborne*, had not at any time authority to issue the patent in question in this suit, or to establish the rectory therein mentioned, or to endow the same with the lands contained in the patent."

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 Grasett.

It is true that the 38th clause of the statute does not enact that it shall be lawful for *his Majesty to constitute parsonages* or rectories, or to endow them; nor does it enact that the Governor of each Province might do so with the advice of his council. But it makes it "lawful for his Majesty to *authorise*" the Governor of each province, with the advice of his council, to constitute and endow parsonages or rectories; and under another state of facts it might have appeared rather a nice question for a court of justice to determine what degree of force it would be proper to give to the word "*authorise*," as used in the 38th clause; in other words, what evidence of the fact of the Governor having been "*authorised*" it would be reasonable to call for, after a lapse of sixteen years and upwards, during which the rectors had been in the enjoyment of their rectories and endowments, and suffered to build upon, improve, and lease them, without any proceedings having been instituted in any court of justice to question their right.

Judgment.

The statute 31st *George III.* was very ably and carefully framed; the different objects to be provided for are systematically arranged; and there is a clearness and precision of language such as might be looked for from the eminent men by whom it is known to have been prepared. There are some of the clauses of that statute in which it is distinctly specified with what degree of formality his Majesty is to authorise his Governor or Lieutenant-Governor to do certain acts. Thus in the 3rd, 13th and 14th clauses, it is provided that his Majesty may authorise the Governor, "*by an instrument under his sign manual,*" to do the several things mentioned in those clauses.

In the 25th, 26th, 36th, 39th, and 49th clauses in just the same form of expression as is used in the 38th clause, it is made "*lawful for his Majesty to authorise the Governor,*" &c., without pointing out any

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particular form or instrument by which the authority shall be conveyed. And again: the 8th and 31st clauses prescribe particular methods of making known his Majesty's permission or decision upon the matters to which they refer.

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It is not probable that these variations in the language were accidental and undesigned. I think I see reasons for the diversity and that it proves the careful discrimination with which the act was framed. For instance, Parliament having by its direct legislative authority constituted a Legislative Council for each province, it was intended that the members of it should be such persons as his Majesty (and not his Lieutenant-Governor) should think fit to appoint. The nomination was reserved to the Crown; and it was made necessary therefore, as in all other such cases, that the selection should be manifested by some form of appointment.

So by the 13th clause the foundation was to be laid of our representative form of constitution; and it seemed proper that the measures which were to be taken in the colony by the Lieutenant-Governor for calling these provisions into operation should be shewn by some solemnity of form to have emanated from his Majesty. In all these cases, therefore, the authority from the Crown to the Governor is expressly required by the act to be conveyed by an instrument under the sign manual.

By the eighth clause, it is enacted that a Legislative Councillor shall forfeit his seat if he resides out of the province for four years continually, without the permission of his Majesty, signified to the Legislative Council by the Governor. But by what formality, or in what manner his Majesty is to signify his permission, is not stated in the act. No one, I suppose, would

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think of enquiring what foundation the Governor had for communicating his Majesty's permission. Practically his announcing the permission in his Majesty's name would be taken as proof that it had been given, or, in other words, would be accepted as a compliance with the act.

In the 31st clause, which relates to disallowance of bills passed by the Legislature, the disallowance is required to be expressed in an order of his Majesty in Council, and to be certified under the hand and seal of the Secretary of State. These solemnities are evidently proper, both in regard to the nature of the act to be done, and also for the purpose of shewing by some written record of the precise day of disallowance, that it has taken place within the two years limited by the statute. So also, in providing by the 48th clause for fixing the time when this important constitutional charter should come into force, it was made lawful for his Majesty, *with the advice of his Privy Council*, to declare, or to authorise the Governor to declare, the day of the commencement of the act in each province.

Judgment.

That must be taken to imply, as I suppose, the necessity for an order in Council; a formality not unusual on similar occasions, and peculiarly necessary in this instance, since it could not, upon any general principle, have come within the sphere of duty of a Colonial Governor to fix the period of commencement of a British act of Parliament. But, with respect to those other clauses, in which, as in the 38th, nothing more is said than that his Majesty *may authorise* the Governor to do the acts mentioned in them—viz., the 25th, 26th, 36th, and 39th clauses—they respect matters which are all of them of internal concern, and some of them periodically recurring; and matters which, after the new Government should be organized and be in operation, it would, upon constitutional principles, have been competent for the representative

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of the Sovereign to deal with, by virtue of the royal prerogative. One is not therefore surprised that the regularity of such acts, when done by the Governor in the name of the Sovereign, is not by the statute made to depend upon the existence of an instrument executed with any prescribed degree of solemnity.

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Take, for instance, the constitution of the rectories, under the 38th, clause, which is the matter we have now to do with. If it had not been for public discussions and movements, not growing out of any such claim of interest in the subject matter as courts of justice can recognize, we can see plainly enough that the rectories might have existed without their validity being contested, from their establishment in 1836 to 1852, when this information was filed. Rectors would have been appointed, as indeed they have been, from time to time, throughout the whole period, notwithstanding the addresses and dispatches which are collected in the volume before us. The rectors would not have been likely to demand rigid proof of the manner in which his Majesty *had authorised* the Governor to constitute their rectories; but would, as we may suppose, have entered into possession of the lands which they found annexed to their livings as endowments, and would have improved or leased them, assuming that all was right. And, if in 1852, when it seems this information was filed, after large sums of money had been expended by the rectors or their lessees in building and improvements, the Colonial Government had either, upon, or without, an application from either branch of the Legislature, directed its Attorney-General to call the legality of the rectories in question, by filing an information for cancelling the patents, upon the mere ground of inability in the rectors to produce an authority under his Majesty's sign manual, or in any other shape more formal, I do not believe that such a suit could have received much countenance either upon legal or equitable principles.

Judgment.

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We should not, in that case, have had (nor have we now) the sovereign complaining that the patents had been issued in the name of her royal predecessor, but without his authority, and desiring on that account to abolish the rectories, and dispossess the rectors; but we should have had, as we now have, the Colonial Government praying a court of justice to bring things to that issue.

And when we look at the information itself, and all the documents submitted to us, we see very clearly that it is not because either the Legislature or the Governor of Canada for the time being advisedly denies the validity of the rectories, or maintains that Sir *John Colborne* in the use which he made of the royal authority, acted injuriously, or in error, that this proceeding is pending; but because one or both branches of the Legislature desires to have the question of validity determined.

Judgment. A court of justice, however, can dispose of no question as a merely abstract or speculative question, with a view to its bearing upon political considerations and without regard to the legal interest that may be involved. They must assume that the suit is brought in order to accomplish the object prayed for; and must deal with it accordingly. And if the question had been before us under such circumstances as I have supposed—that is, without any positive and direct evidence of authority having been sent to the Lieutenant-Governor—we shall have had to ask ourselves whether the rectories could be cancelled and the endowments resumed after such a lapse of time, on this ground only, that the rectors could not produce evidence of the Governor for the time being having been especially authorized by his Majesty to carry into effect the provisions of this public statute, to the extent he had done. We should have had in that case many things to consider, into which I need not now enter, because an

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express authority from his Majesty to his Lieutenant-Governor, to do what was done in his name is shown and is relied upon; and the question we are to determine is whether this authority, considering all the circumstances that are brought before us, is sufficient to uphold the patent.

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I may seem to have dwelt at an unnecessary length upon considerations which it is very clear this case will not turn upon; but it is because I have a strong sense of the inconvenience and injustice, and of the great public confusion which might follow, from giving an apparent countenance to an unreasonable construction and application of legal principles in cases of this kind.

When an act of Parliament provides, as in this case, that the sovereign may authorize certain public acts to be done by the Governor of a colony, without prescribing any particular formality as evidence of the authority, it does not seem to me to place such an act on any footing greatly different from those acts which upon principles of the common law the Governor would be competent to perform, if not restrained by the crown, in the general exercise of the powers inherent in him, in virtue of his commission: Judgment.
 I mean, not on a different footing as to the legal validity of the act, so long as the sovereign in whose name, and by whose authority, it was assumed to be done does not disavow it, and take measures within a reasonable period to resume what has been granted. Individuals or public bodies, whose rights may depend on the validity of the Governor's acts in such cases, can hardly be expected to be able at any distance of time to ascertain and prove what may have passed between the sovereign and his representative. I take it that such acts of government, especially if not attempted to be disturbed until large and complicated interests have grown up under them, are not to be looked upon by courts of justice in the same spirit as they would, in a case

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between individuals, look upon an appointment made in the execution of a power. It would be proper in any such case to consider that the common law favors all benevolent purposes, such as provision made for the support and advancement of religion and learning, and upholds them where it can; and when in consequence of restraining statutes, or of any imperfection in the manner of carrying out the pious or benevolent intention, it is likely to fail of its effect, courts of equity frequently lend their aid to supply what is wanting, and endeavor to accomplish the end in view by a disposition as nearly in accordance with the arrangement intended as the law of the land will permit.

Judgment.

If, at this distance of time, the only objection taken were that nothing can be produced to show a special authority actually given to Sir *John Colborne* to constitute these rectories, and if we were called upon to determine what must be the effect upon the validity of this public act, of the mere absence of any positive proof of a special authority to the Governor, my impression is that we could not on that ground have felt ourselves warranted in disturbing the existing order of things. For it must be considered that this was not a thing done in a corner. The creating of 44 rectories and the presentation, time after time, of as many incumbents, must have been acts perfectly notorious in the province. We know that in fact the measure was not passed over in silence; and if when the attention of the Colonial Government had been called to the very point of the validity of the patents, steps were nevertheless not taken till after the lapse of ten or fifteen years for calling in question the rights held under them, the presumption that a signification of the royal authority had been in some manner conveyed to the Governor would be at least so far entertained, I think, that the Colonial Government itself could be allowed to raise the question with any hope of success.

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But it is more to our purpose to consider whether it is or is not shewn by the evidence that Sir *John Colborne* had in fact authority sufficient, under the 38th clause of the statute, for issuing the patent in question in this suit. The defendants affirm that he had; the Attorney-General denies it. As the statute says nothing more particular in regard to the authority to be given, than that his Majesty "may authorize the Governor," without saying how he may authorize him, room is left for the question as to whether a verbal authority to the Governor, conveyed either by his Majesty or through the Secretary of State, would be sufficient, or whether it must not be by some formal instrument.

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But at least there need not be, nor could be, any more formal method of giving the authority than by an instrument under the great seal of England; and the defendants contend that proof of such authority is given; and so no doubt it is, not only in the documents before us, but in the admissions contained in the information—Judgment. for, though there is indeed an apparent inconsistency in the statements in this respect, yet it is plain how they are intended to be reconciled. In the first place, it is affirmed that this and all the other Rectory patents were issued without any "authority or instructions to Sir *John Colborne* from the then sovereign, King *William* the IV., under his sign manual, or by order in the Privy Council, or through any Secretary of State, or otherwise however, to constitute, erect or endow the rectory of St. James, or any of the other rectories." There could be no more complete denial than this of any authority from the Crown to Sir *John Colborne* in the matter; and yet a little further on in the information we are told that the authority of any Governor, or Lieutenant-Governor of Upper Canada, was always conferred by Royal Commission, addressed to each at the time of his appointment, "which

1857. commissions always had been, and were in the same form to every Governor, Lieutenant-Governor, &c., and amongst other things purported to authorize such Governor, with the advice of the executive Council, to erect parsonages or rectories in the terms of the 38th section of the said statute; and that the commission to Sir *John Colborne*, which was from his late Majesty King *William* the IV., declared such authority to be subject nevertheless to such instructions touching the premises as should or might be given to him by his Majesty, under his signature or sign manual, or by his Majesty's order in his Privy Council, or through one of his principal Secretaries of State."

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The meaning of this, I presume, is that, like his predecessors, Sir *John Colborne* was made Lieutenant-Governor of Upper Canada, by a commission which referred him to the powers, authority, and instructions contained in the commission to the Governor-General of both provinces for the time being, which, during the absence from Upper Canada of the Governor-General, he as Lieutenant-Governor, was authorized to execute in the name of His Majesty.

Judgment.

In January, 1836, the patent in question was issued by Sir *John Colborne*, while Lord *Gosford*, the Governor-General, was resident in Quebec and administering the Government of Lower Canada under a commission dated in June, 1835; and which, we see from the copy of it laid before us, did contain precisely such authority as it is admitted in the information the Governor of Upper Canada had always held. Not that the commission to any of the Lieutenant-Governors of Upper Canada had contained these words, as the information would seem to import; but that they were to be looked upon as in effect incorporated in the commission which authorized them to execute the powers committed to the Governor-General for the time being.

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The terms in which his Majesty authorized Lord *Gosford* to erect and endow personages are in exact accordance with the statute; and the authority being under the great seal of England, and given by the commission which was in force when the act was done, in cannot be material to consider what might or might not otherwise have been done, under the separate instructions sent by Lord *Bathurst* to the Lieutenant-Governor of Upper Canada in July, 1825, or under any other authority or instruction more or less formal than that. If any such previous authority differed nothing from that expressed in the commission to Lord *Gosford*, then it cannot, by possibility, be material. If, on the other hand, it differed in substance, then the latest declaration of the royal pleasure conveyed in the most authoratative form, is that which must govern. For I do assume that Parliament did not mean that when authority should be once given by his Majesty to the Lieutenant-Governor under the 38th clause, it should be an authority incapable of being recalled or modified. I do not mean that it could be annulled, so as to make void what had been done under it; but that a restraint might be placed upon the Governor in regard to any further proceedings upon it.

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Grasett.

Judgment.

It has been taken for granted in framing the Royal Commission to Lord *Gosford* that the authority would be subject, or at least might be made subject, to such instructions touching the matter as might afterwards be given by his Majesty, and so I think it might; but it is not shown or asserted that between the issuing of the commission in June, 1835, and the issuing of the rectory patents in January, 1836, anything had been done to cancel or abridge the authority given in this respect to Lord *Gosford*; and all that remains to be considered is, whether the fact of the authority being conveyed, *subject* to further instructions, makes it, as has been contended, an incomplete authority, one that can only be acted upon in

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case some further instructions shall come; or whether it be not the more obvious meaning and effect of those latter words, that his Majesty reserved to himself and his successors the power of interposing, by revoking the authority, or by sending such instructions as might in some particulars narrow the discretion of the Governor--as, for instance, in regard to the number of rectories, or the extent of the endowments.

Judgment.

I fully concur in the view taken of that point in the Court below. It is plain, I think, that under the authority given in Lord *Gosford's* commission, the Lieutenant-Governor of Upper Canada could, without further instructions, legally proceed in carrying out the provisions of the statute in regard to rectories and endowments, until he should be checked by some subsequent instructions. In the royal instructions accompanying the commission to the Governor-General he is told that he is to administer the Government according to the power and authority given by his commission, and by those instructions, and according to such further power and authority as he shall at any time hereafter receive, under his Majesty's signet or sign manual, or by order of his Majesty in his Privy Council. And in fact in the commission itself which issued to Lord *Gosford* we find that in regard to all other matters, as well as this of constituting rectories, he is told that he is to execute his powers according to the directions contained in his commission and in the statute 31 *George III.*, and according to the instructions which were then given to him, "or which may from time to time be hereafter given to him under his Majesty's sign manual, &c." These last words only express what would at any rate have been applied; and if this could be held to have the effect of keeping all his authority in abeyance till he should receive some further instructions, which might never come, there would be little use in the commission and instructions delivered to him.

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when they pass acts creating Joint Stock Companies with corporate powers and privileges, to reserve to themselves the power of modifying by future acts certain provisions of the charter. This is done in order to give fair warning to persons taking stock, of the position in which they will stand and that it may not be imputed to the legislature that they have acted improperly by the stockholders if they afterwards make any substantial alteration in the terms of the charter. So also in many acts of Parliament we find a clause reserving the power of amending it by any act to be passed during the same session. But it was never imagined that such reservations had the effect of making the first statute inoperative until some later statute on the subject had been passed—in other words, of suspending it indefinitely; for there might be no further occasion found for recurring to the subject. This seems to be so plain that I should have treated the point as one too clear to be discussed, which is the view taken of it in the court below; but in the argument before us it was insisted upon with so much earnestness that I cannot doubt it was meant seriously to be relied on. When it is stated in the information that Sir *John Colborne* issued the patents without any authority or instructions from his Majesty, what is meant. I think, is, that he issued them without any *other authority* or instruction than such as was in its terms suspended until he should receive further instructions, and that no further instructions ever came. But this is surely taking an incorrect view of Lord *Gosford's* commission. And if this cannot be denied, as I think it cannot, then it is abundantly proved, and is in fact admitted in the information itself, that so far from the Lieutenant-Governor of Upper Canada never having been authorised to erect and endow parsonages or rectories, he really was at no time without such an authority.

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The second, third, and fourth grounds of objection, as stated in the reasons of appeal, all turn upon the effect of the dispatches, addresses, and other documents in evidence, as being equivalent to a recall of the authority given in Lord Gosford's commission to act upon the statute in erecting and endowing rectories.

The effect that could fairly be given to the correspondence and documents relied upon for supporting that point in the argument was carefully considered, and is clearly stated by the learned judges of the Court of Chancery, in whose view of the matter I entirely concur. I shall therefore say but little upon it.

As to this measure of the colonial government in 1836 being "*against the mind and intention of his Majesty's government,*" if that were the fact it could not be made to affect the validity of the patent on any principle of law or equity, unless it were shewn that before the patents were issued the Lieutenant-Governor had been put in possession of the pleasure of his Majesty, decidedly expressed, that his royal authority which had been given should not be acted upon, but was to be considered as annulled or suspended.

Judgment.

The commission to Lord Gosford, and the instructions to which it referred, were the rules by which Sir John Colborne was to govern himself in his administration; and they were the latest declaration of his Majesty's will on the subject which we are discussing; the latest, I mean, of which we have any knowledge. They came to this province long after those dispatches of the Secretary of State, written in 1832, which it has been urged ought to have given the Governor of Upper Canada to understand that the power given by statute to establish and endow rectories should be regarded as having been withdrawn or suspended. Without desiring to add to what has been observed in the court below, upon the reasonableness of any such

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inference being drawn from the correspondence referred to, it seems obvious to remark that the question is, not what Lord *Goderich* or Lord *Henley* thought or wrote in 1831 or 1832, but what was the expressed intention of his Majesty's government up to and at the time of the patents being issued (which was in January, 1835), of which there could be no better evidence than the commission to Lord *Gosford* in 1835, there being nothing in the meantime that I can discover in the evidence to indicate a withdrawal of the express authority given by that commission.

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Grassett.

As to the alleged mistake on the part of the government of Upper Canada, in misconstruing the terms of Lord *Goderich's* dispatch of the 5th of April, 1832: any misapprehension of the kind supposed could signify nothing, unless it could be properly made to affect the validity of the act done. The governor of Upper Canada cannot be supposed to have been ignorant in 1836 of the commission and instructions under which he was then daily acting.

Judgment.

In a legal point of view those were more material than a correspondence with the Secretary of State, which had taken place more than three years before; and whatever authority those formal acts of the government contained can upon clear legal principles which are constantly acted upon, be advanced in support of the act, even though they were absent from the mind of the person acting at the moment, which we have no right to conclude these were.

It was made necessary by the 38th clause that the governor should advise with the council before he acted in this matter. This, it is clear from the evidence he did; and if it were indispensable that the council should concur in opinion with the governor upon the steps to be taken, it is clear that they did so concur.

It would be a dangerous doctrine to hold that the

1857. validity of any act required to be done with the advice of the council should be liable to be questioned in a court of justice many years afterwards, upon an allegation that the council, in making up their minds upon it appeared to have been influenced by a misconception, either of law or fact; especially when the dispatch or document which they are supposed to have misapprehended was fully before them, and called for, and could receive the same deliberate consideration from them as it can since have received from others.

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If we read the dispatches alluded to, and if we suppose that the Executive Council was certainly under the impression that Lord *Goderich* meant that dispatch to be in itself, and without reference to any other document or correspondence, an authority to create and endow rectories, rather than an approbation of what Sir *John Colborne* had suggested on that head, and an expression of a willingness to concur with him in improving the condition of the rectors, they would seem to have misunderstood the letter. But the council can hardly have been ignorant (and we may assume they were not) that authority of the most formal kind to erect and endow rectories was already in the possession of the government, and of a recent date: I mean, in the commission to the Governor-General, issued six months before. And unless the council had some other reason for imagining that the Secretary of State was unfavorable to the measure, they were certainly not likely to receive such an impression from perusing the dispatch of the 5th of April, 1832; for they could scarcely have imagined that Lord *Goderich* was contemplating with satisfaction the proposed endowment of rectories that neither had been or were ever likely to be established, or that he was desirous of aiding by his suggestions in making the endowments more valuable, in order to increase the future comfort of rectors, who were to have no real existence.

Judgment.

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A great deal of the evidence before us consists of proceedings in the House of Assembly; but the votes or resolutions or addresses of either branch of the Legislature can furnish no ground of legal argument on a question of right to property, however they may serve to exhibit the temper and feelings of the time. Such of them as were of later date than the issuing of the patent before us can have no possible effect upon the question of its legality; and such as preceded it could not in themselves be material, unless they led to some such act of his Majesty's government as can affect the question by its legal operation; and then it would be that act, and not what moved to it, that it would be the duty of the court to consider.

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General
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Grasett.

The communication which came from the Secretary of State in November, 1831, if it had led to legislative measures, such as his Lordship advised, would no doubt have placed the whole subject upon a new footing, and produced a decisive change; but, as his Lordship's recommendation was not adopted, it ended in nothing; and his Lordship, it is plain from his subsequent dispatches, considered himself in consequence relieved in a great measure from responsibility as to the issue of the question, and absolved from the necessity of making further attempts at a settlement. And after all there is this fact, that his Majesty's commission under which the government of Canada was conducted in 1836, contained an express authority to the Governor in the very words of the act to constitute and endow rectories; which authority could not be affected by anything that is shewn to have proceeded from his Majesty between the time of the commission being sealed and of the authority which it contained being acted upon by Sir John Colborne.

Within that short period (seven months) a letter was written by Lord Glenelg [that of 5th December, 1835,]

1857.
 Attorney
 General
 v.
 Crasett.

which treated of the Clergy Reserves and a variety of other matters, but it contained no restrictions upon the constitution of rectories, or the endowment of them; and announced no system of policy on the subject; neither did it make any allusions to the authority which a few months before had been given in unequivocal terms by his Majesty's commission to Lord Gosford. And besides, this dispatch being addressed to Sir John Colborne's successor after his recall, could not have been seen by either of them till after the patents had issued.

Judgment.

On a review of this part of the case, I will add to what I have said, that in pages 64 and 65 of the evidence we see the considerations stated, which induced Sir John Colborne to desire that the rectories should be established in the form in which they were established, and the date of the document then printed, 8th May, 1835, shows that the measure which he carried into effect in January, 1836, was not hastily resolved upon, but had been long in preparation; and that he had, as he asserts, the approbation of the Secretary of State signified to him in 1832. We see also in page 70 of the evidence that these communications of Sir John Colborne with his law officers were laid before the Executive Council in June, 1835, and from these the Council must have seen that Sir John Colborne had expressly affirmed that the course which he desired to pursue was sanctioned by the Secretary of State for the Colonies in 1832. The Lieutenant-Governor may or may not have alluded in that passage to Lord Goderich's dispatch of the 5th of April, 1832, which it is surmised was misapprehended by the Council; but it is clear that the Executive Council had the declaration of Sir John Colborne in unequivocal terms that the measure had been approved of by the government in England; and if they did suppose at the time that his Excellency certainly referred to that dispatch, and to no other,

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they could easily see, that with the knowledge which he must necessarily have had of the contents of his own dispatch, to which that was an answer, he might well be able to say that he had received in that dispatch the sanction of the Secretary of State, to the measure which he proposed to adopt. And 'it certainly is very material upon this part of the case to notice the evidence which is to be found in the documents submitted to us, of the acquiescence subsequently expressed by his Majesty's government in this moderate provision which had been made for a limited number of clergymen, and the declaration of the Assembly in 1837, that "they regarded as inviolable the rights required under the patents by which rectories had been endowed, and that they could not either invite or sanction any interference with the rights thus established." Nor can it be left out of view that in 1841 the royal assent was promulgated to an act passed by the two branches of the Legislature in Upper Canada, which had been specially reserved for her Majesty's consideration (3 Vic. ch. 74), in which various provisions are contained respecting parsonages and rectories and their incumbents, when certainly nothing of that kind existed in the province, otherwise than as they had been constituted by the patents issued by Sir *John Colborne* in 1836.

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 Attorney
 General
 v.
 Grasett.

Judgment.

The last objection taken against the validity of the rectories is one of a strictly legal character. The patent before us, it is insisted, is void in law, because it does not define the boundaries of the rectory or parsonage, and because it contains no name of a grantee.

In connection with this question, I have read the interesting report of the Attorney-General, Mr. *Sewell*, presented to the government of Lower Canada in 1801, which is printed as one of the documents; and also the opinions of

1857. the Attorney-General and Solicitor-General of Upper Canada, upon the proper form of the patent. And I have examined the copy of the patent which was issued in 1818 for erecting "the parsonage or rectory of the parish church of Montreal."

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General
v.
Craesett.

That patent, I observe, recites that the Governor "had been by her Majesty duly authorised to constitute and endow the rectory;" which recital was proper, but not indispensable. It creates a parish of Montreal, making it, as I apprehend, embrace the same territory as the existing Roman Catholic parish; and it creates within the parish so constituted by the patent one parsonage or rectory according to the establishment of the Church of England, of the parish Church of Montreal; declaring the precincts contained within the limits of the parish of Montreal to be the precincts of the parsonage or rectory of the parish church of Montreal; and by the same instrument *J. L. Clark* is nominated and presented to the parsonage or rectory and parish church; and the parsonage or rectory is endowed with the freehold of the church, and with a small parcel of land therein described, being the site, as I suppose, on which the church stood.

Judgment.

The patent prepared by the Attorney-General of this province differs from this in several respects; and it is contended that it is void for the two reasons I have mentioned:

- 1st. Because it fixes no bounds.
- 2nd. Because it names no grantee.

Upon the first point we must consider that when the 31st *George III.* was passed a great part of Lower Canada had long been settled and had been divided into parishes, though not with any reference to the Church of England.

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The civil divisions into townships did not prevail in the then settled parts of Lower Canada; while in Upper Canada (as it was afterwards constituted) there were no parishes, except, I believe, one or two Roman Catholic parishes in the Western District; but the organized territory was divided into townships of ten or twelve miles square.

1857.
 Attorney
 General
 v.
 Orssett.

The statute was framed, no doubt, with a perfect knowledge of these circumstances, as the 38th clause clearly shews; for it authorises the erection of one or more parsonages or rectories in each *parish* or *township*, that is, in each of the Roman Catholic parishes, where that was the territorial division, and in each township where the territory had been divided into townships only, and not into parishes.

Whatever were the considerations which led the Government of Upper Canada to prefer the course which the Attorney-General sanctioned by his opinion, but which was thought illegal by his colleagues, I think we cannot but hold that there was nothing in the statute, or in the commission to the Governor, that rendered it necessary to begin by constituting a *parish*. Judgment.

“To erect one or more parsonage or rectory, or parsonages or rectories in each township,” was what the statute expressly allowed; and in this case one parsonage or rectory, to wit, the rectory of Saint James, was erected in the township of York, and being erected, as the patent declares, with a view to the spiritual welfare of all the King's subjects, resident within the township of York, I think we must hold the rectory to be conterminous with the township, until his Majesty, or his successors should establish some other parsonage or rectory within the same township under the reservation of the right to do so which is contained in the patent.

1857. I think it would have been better, on several accounts, that the patent had given limits to the rectory; and I prefer in that respect the form of the instrument by which the rectory of Montreal was constituted; but there is nothing in the statute which requires limits to be assigned; and I do not think that any legal objection lies on that account.

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General
v.
Grasott.

A parsonage or rectory (we are told) is a parish church endowed with a house, glebe, tithes, &c., or a certain portion of lands, tithes, and offerings established by law, for the maintenance of a minister, who hath the cure of souls; and though properly a parsonage or rectory doth consist of glebe land and tithes, yet it may be a rectory though hath no glebe but the church and the church yard; also there may be neither glebe, nor tithe, but payment in lieu thereof." (Parson's Councillor 153; Hughes' Parson's Law 188).

Judgment. There was, as we have seen in the evidence, a reason which influenced the government of Upper Canada at that time, in preferring the course sanctioned by the Attorney-General, to that advised by the Solicitor-General; and whatever it may have been, it appears to me that the *rector of St. James* is sufficiently descriptive; and that the parsonage or rectory so constituted could be endowed as this has been in the same instrument which created it; and that the endowment could be annexed before any rector had been inducted or instituted. This refers to the last reason of appeal, and the principle on which the patent may, in that respect, be supported, is laid down in the case of *Sutton's Hospital*, 10 Co. 23.

The statute provides that parsonages or rectories shall be endowed with land, &c., and this patent specifies certain lands which are to be held as an endowment of the rectory of *St. James*, and as appertaining to the

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said rectory. It is clear that all may be done in one instrument, and that the land being set apart and declared by his Majesty to be granted as an endowment to this particular rectory, is a literal compliance with the statute; and must constitute a good parliamentary title, so far as any objection of this kind is concerned, though the ordinary operative words of grant are not used; and though the endowment was granted before any rector had been instituted, and therefore before the name of any individual as being at the time rector, could have been inserted.

1857.

Attorney
General.
v.
Grasett.

I notice another difference between the patents issued for constituting the rectory of Montreal, and that now before us, which it may be worth while to notice.

In preparing the patent for the Montreal rectory, it seems to have been thought best to take in its literal acceptation, the provision in the 38th clause, 31 *George III.*, "that it shall be lawful for his Majesty to authorise the Governor to erect parsonages, and to endow them," although the clause speaks of an instrument under the great seal of the Province, and instead of making the King to erect the parsonage and endow it, it is the Governor who is made to do both, though the great seal is used, and the letters patent run, as in all other cases, in the name of the King. Judgment.

This makes it rather an anomalous one. The patent before us seems to have been framed under another, and, as I think, a more correct view of the intention of the statute in that respect.

It assumes that the operative words of the instrument were intended to run as usual in all such instruments, in the name of the sovereign; that it was the King and not the Governor, who was to erect and to grant; and that what was meant by his Majesty

1857. authorising the governor to do those acts, under the great seal, was not that the form of great seal instruments was to be changed on this occasion, but merely that the governor must have the King's authority before he made that particular use of his name, and of the great seal.

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General
v.
Grassett.

But I do not apprehend that it can be very material to consider such objections as have been raised, or might be raised, to the validity of this patent upon the ground of any thing peculiar in its form. The King had in 1836 the title to the land, now held by the rector of St. James, and could grant it for the purpose for which he did grant it.

If there was any imperfection in the language of the patent which could afford good reason for contending that the instrument must fail of its intended effect, still the Court of Chancery could not, as I conceive, be called upon to use its active interference for enabling the crown on that ground to dispossess those whose title depended on the validity of the patent, and to resume possession of the endowment.

Judgment.

There would be as little justice or good conscience in the crown taking such a course, as there would be in a case between individuals; and if any individual should seek to have his deed annulled, not because he had been defrauded, or misled, or had made the title under a mistake, but because he had himself done informally and defectively what he intended to do, he would not find that the assistance of any court of justice or equity would be given for the purpose of enabling him to resume possession of the land.

Whether the proceeding in this case is to be regarded as an equitable remedy, or one that belongs more properly to the common law jurisdiction of the Chancellor;

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the ground that the patent is incapable of conveying a legal interest is not one, I conceive, that would incline the Court of Chancery to set aside the patent. Whoever claims an interest under it, would be left to support that interest without the active interference of the Chancellor against him, at the instance of the crown.

1857.

Attorney
General
v.
Grasett.

I speak now only of the objections which have been taken to the form of the patent; and which have been urged as reasons why the Court of Chancery should cancel the patent, and the crown be allowed to resume the land granted twenty years ago.

It is not probable that objections of that kind would have induced the government to question the validity of the act by which the rectories were established: but, however that may be, I agree in the view taken by the court below of this, as well as the other points made in the case; and am of opinion that the appeal should be dismissed with costs.

Judgment.

The Chief Justice of the Common Pleas, who heard the argument, requested me to state that he has considered this case, and is of opinion that the judgment given by the Court of Chancery should be affirmed.

SILCOX v. SELLS.

Dormant equities.

The statute 18 Vic., ch. 124, applies only to cases where the cause of suit arose before the passing of the Chancery Act, (1837). The locatee of lands of the crown, in 1824, contracted to sell a portion thereof, the consideration for which was paid, but he continued to hold possession of the lands until the year 1855, when the heirs of the bargainee filed a bill to enforce specific performance of the contract, the patent from the crown having been issued in 1830. The court dismissed the bill with costs.

May 4.

The plaintiffs in this cause claimed as the real representatives of one *Archibald Phillips*, and alleged

1857. that in the year 1824 the defendant being the locatee of the crown of lot No. 18, north, on the north branch of the Talbot road, in the township of Southwold, sold to their ancestor the north 50 acres thereof, for the sum of 30*l.*, which was paid by him to the defendant, who then, by an instrument in writing subscribed by him, bearing date the 24th day of April, 1824, agreed to convey the said 50 acres to the said *Archibald Phillips* by a good and sufficient deed, twenty days after the defendant obtained the patent from the crown of the said lot, No. 18: that the defendant had ever since continued in possession of the whole of the lands, the 50 acres agreed to be sold to *Phillips* being still wild and in a state of nature: that defendant had in 1830 procured letters patent to issue in his name for the said lot, by reason of which, the bill insisted, the defendant became trustee of the 50 acres for *Phillips*, or his representatives. The prayer was for specific performance of the contract.

Statement. The defendant by his answer admitted the principal facts stated in the bill, but relied upon the statute entitled, "An Act to amend the law as to Dormant Equities," as a defence to the suit.

Evidence was taken, before the court, tending to shew that since the death of *Phillips*, and after the plaintiff had attained twenty-one, *Sells* had made admissions of the agreement to sell and receipt of the consideration.

Mr. *Read* for plaintiffs.

Mr. *A. Crooks* for defendant, *Griffin v. Griffin (a)*, *Jones v. Kearney (b)*, *Vaughan n. Vanderstegen (c)*, was referred to.

Judgment. ESTEN, V. C.—The act 18, Victoria, chapter 124, affects only cases arising before the passing of the Chancery Act. Cases of actual fraud are still governed

(a) 1 Sch. & Lef. 352; (b) 1 Dr. & War. 156; (c) 2 Drew. 182.

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by the strict rules of decision prevailing in England; in other cases the court is to have a discretionary authority. As to cases of actual fraud the law remains unaltered; as to all other cases the court has a discretionary authority, but the suit must be brought within twenty years from the time the title accrued without any exception on account of disability.

1857.

SILCOX
V.
Sells.

SPRAGGE, V. C.—The act seems to apply to real estate only, which it divides into two classes, the one where there has been actual and positive fraud, the other where there has not. It applies only to cases where the cause of suit arose before the passing of the Chancery Act. The 1st section applies to cases of actual fraud, and provides that no suit shall be brought for causes arising before 1837, unless there has been actual fraud. The 2nd clause applies to cases where there has been no actual fraud, and enables the court to deal with them as they may deem reasonable and just, if the suit is brought within twenty years, and the suit must be brought within twenty years notwithstanding disabilities. If the two classes of cases contemplated by the act had been—1st, questions arising out of claims upon real estate—2nd, other cases not arising out of claims upon real estate, the case would have been at least equally clear, for the the cause of action arose before the passing of the Chancery Act, and it is not a case of actual or positive fraud. We see no ground for the position taken by plaintiff's counsel that the first class is confined to mortgages. And as to the position that the case was taken out of the statute by the alleged admissions made by the defendant within the last twenty years by analogy to the old rule in regard to debts, our opinion is, that the arising or accruing of the equitable claim, interest, or estate contemplated by the statute, is the original transaction out of which the equitable right arises, and not any subsequent admission or promise.

1857.

June 29th.

GREIG V. GREEN.

Practice—Demurrer.

A defendant appearing at the hearing, and waiving all objection to an order *pro confesso*, may shew that the bill is open to demurrer for want of equity.

This was a bill filed in November, 1856, by *John Greig* against *Alexander Green*, stating that from the first of April, 1840, to the first of March, 1844, the plaintiff and defendant had carried on business in co-partnership, which had been dissolved on the last mentioned day, and prayed an account of the partnership dealings between the parties; and the affairs and business thereof to be wound up under the directions of the court.

The defendant having failed to answer, an order *pro confesso* had been obtained, and the cause now came on to be heard accordingly.

Mr. *Blevins*, for the plaintiff, asked for a decree, as prayed.

Mr. *Strong*, for the defendant, appeared and waived all objection to the order *pro confesso*. The court will not on this record make the decree asked, the bill being clearly demurrable for want of equity, the right to relief being barred by the Statute of Limitations. By section 2 of order XIV., a defendant against whom a bill has been taken *pro confesso*, can argue the case upon the merits as stated in the bill, and here the defence appears on the face of the bill.

The court allowed the objection, giving the plaintiff leave to amend his bill, on payment of costs, if so advised.

LAMB V. McCORMACK.

Mortgage.

August 29th. A mortgage with power of sale, covenanted that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mortgaged premises without first giving three months' notice to the mortgagor, demanding payment. *Held*, that this did not prevent him filing a bill to foreclose without first giving such notice.

This was a foreclosure suit. By the mortgage deed,

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which contained a power of sale, the mortgagee entered into the following covenant: "And the said party of the third part doth hereby for herself, her heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part, his heirs and assigns, that no sale or notice of sale of the said lands, hereditaments and premises shall be made or given, or any lease made, or any means taken for obtaining possession thereof by the said party of the third part, until such time as three calendar months' notice in writing as aforesaid shall have been given to the said party of the first, his heirs, executors, administrators or assigns, or have been left at his last or most usual place of abode in this province, demanding payment of the principal and interest moneys, which at the end of that time shall be due, and the said party of the first part, his executors, administrators and assigns, shall have made default in payment of the same at that time."

1857.

Lamb
v.
McCormick.

A motion was now made for a decree, referring it to the master, to take an account of what remained due upon foot of the security.

Mr. Roaf for the plaintiff.

Mr. Crickmore, for the defendant McCormick, objected that no decree could be made, as the plaintiff had filed his bill without having given the notice required by the covenant to be given, demanding payment. Argument.

Mr. Morphy, for a second incumbrancer, asked that a decree might be made for sale.

Per Curiam.—We cannot doubt that mortgagees would be taken by surprise if they were to be told that this covenant prevented them from filing a bill to foreclose until three months after demand of, and default made in, payment of the amount secured. We think the plaintiff clearly entitled to the decree asked for.

1857.

Sept. 30, 1856,
and May 4,
1857.

IN APPEAL.

[Before the Hon. Sir J. B. Robinson, Baronet, Chief Justice of Upper Canada, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Spragge, the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

MCLEAN V. ARNOLD.

The decree made by the Court of Chancery in the suit of *Arnold v. McLean* (reported *ante* volume 4, page 337) reversed, and the bill in the court below dismissed with costs. [The Vice-Chancellors dissenting.]

After the decree pronounced by the court below had been appealed from, the plaintiff died, and by an order of the Court of Error and Appeal, dated the 11th day of December, 1856, the suit was ordered to be revived.

Statement. The appellant's reasons for appeal were: 1. Because there was no complete, certain, and sufficient contract in writing between the parties. 2. Because, if there was a complete contract, the effect of it was materially different from what the late Mr. *Arnold* insisted upon before the suit, and this wrong was the occasion of the suit; and under the circumstances, disentitled Mr. *Arnold* to the peculiar relief of a specific performance. 3. Because the alleged contract, as claimed by the late Mr. *Arnold* before suit, and even as interpreted by the court, was essentially inconsistent with the known and expressed object and intention of the appellant throughout the negotiation; and is therefore not such a contract as equity should enforce by a decree for specific performance. 4. Because, if there was a legal contract to the effect claimed by Mr. *Arnold*, or even to the effect ascribed to it by the court below, the peculiar and discretionary remedy of a specific performance should have been refused on the objections to which, in that branch of equitable jurisdiction, effect is given on the ground of, respectively, surprise,

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mistake, unfairness, want of mutuality, and the impossibility of enforcing all the terms of the supposed contract. 5. Because the manner in which the decree gives effect to the supposed rights of the parties is not in accordance with the intention, or authorised by the terms, of the supposed contract; and the directions of the decree are, besides, uncertain, indecisive, without precedent, and contrary to equity. 6. Because the delay in commencing the suit disentitled Mr. *Arnold*, under all the circumstances of the case, to specific relief upon the alleged contract.

1857.

McLean
v.
Arnold.

The respondent's reasons against appeal were: 1. Because the agreement in the said decree was duly proved to have been entered into by the appellant, and was and is such an agreement as, under all the circumstances, ought to have been decreed to be specifically performed. 2. Because the appellant has not, in the said Court of Chancery, alleged or established any sufficient ground of defence against the making of the said decree.

Mr. *Cameron*, Q. C., and Mr. *Mowat*, Q. C., for appellant. Argument.

Mr. *McDonald* and Mr. *C. Jones* for respondent.

THE CHIEF JUSTICE.—The plaintiff in his bill charged that by an agreement evidenced by letters and signed by the defendant, the defendant contracted to sell to the plaintiff certain freehold property therein referred to, being two town lots in the city of Toronto, for 1,000*l.*, payable in the manner therein mentioned, and he prayed specific performance of the agreement.

The defendant setting out in substance what he alleged had passed between himself and the plaintiff respecting the sale of the lots, denied that he made any such contract as the plaintiff desires to have enforced, that is to convey him the land free from incumbrances.

1857.

McLean
v.
Arnold.

After hearing the parties and considering the evidence produced on both sides, the Court of Chancery, on 6th February, 1854, made the following decree: "That the agreement in the pleadings mentioned ought to be specifically performed and carried into execution, if a good title can be made by the transfer by the defendant (with the consent of the University of Toronto,) of the mortgage made by him to the said University on the Niagara Street lots in the pleadings mentioned, from the said Niagara Street lots to any other property belonging to the said defendant; or in case the defendant should fail in procuring such transfer, then if the plaintiff will accept such title as the defendant can make upon the defendant giving to the plaintiff the bond of the defendant to hold the said plaintiff harmless, or to indemnify him in respect of the said mortgage now held by the said University on the said Niagara Street lots, being the land which the defendant agreed to sell to the said plaintiff. And it was thereby referred to the master to enquire and report whether the said defendant can procure the consent of the University to the transfer of the said mortgage to any other real estate belonging to the defendant. And that for that purpose the defendant shall submit a list and particulars of such real estate as belongs to him, and shall state what he has done towards procuring the consent of the said University to such transfer as aforesaid. And that if the master shall be of opinion that the said defendant cannot, after proper efforts, procure the consent of the University to such transfer, then if the plaintiff will accept such bond of indemnity as aforesaid, the master is to settle the same in case the parties differ.

Judgment.

The meaning of the several directions in the decree will be understood when I state what the court had before them.

The defendant appeals from this decree, denying that there was any certain and sufficient contract between

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him and the plaintiff, and insisting, among other things, that if there was any, it was different from that which the plaintiff insisted upon before he brought his suit, and that the decree is not in accordance with the intention or authorised by the terms of the supposed contract, and is uncertain, indecisive, and contrary to equity.

1857.

McLean
v.
Arnold.

This being an alleged contract for the sale of land, we have first to consider whether there was proof before the court of such an agreement or memorandum, or note thereof in writing signed by the defendant as is required by the fourth section of the Statute of Frauds. There is no doubt that by a liberality of construction, which some judges have regretted was ever admitted, the plaintiff in such cases is always allowed to make out, if he can, an agreement such as he sues upon, through the medium of a correspondence which has passed between the parties upon the subject-matter; and that he is not held to the necessity of producing any written instrument signed by both parties, and framed for the purpose of constituting a binding contract. Judgment.

The difficulty that attends the receiving this description of evidence, is that it may often happen that in the course of a protracted negotiation by letter, so many conditions may be started and discussed and met by counter propositions, that it becomes difficult at the close of the correspondence to determine whether any thing has been absolutely concluded; and if so, what are the terms to which each party is bound, or whether it can fairly be said that the correspondence amounts to any thing more than a treaty, which has not at last resulted in any thing specific being agreed to on both sides.

It was by a correspondence which had taken place in this case between the plaintiff's agent, and the defendant and his son, which latter the plaintiff treated as authorised to represent the defendant, that the plaintiff endeavored

1857. to make out what he asserts in this bill, namely, that the
 defendant had contracted to sell him the property refer-
 red to for 1,000*l.*, payable as mentioned in the letters
 which he relies upon.

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 Arnold.

Those letters, omitting what cannot be material to the question, are in substance as follows :

On the 8th January, 1853, the plaintiff's agent, Mr. *Hurd*, writes to the defendant that a party not named had offered 700*l.* for the lots in question, to be paid at once in cash.

No written answer to this note is shewn, but it is evident the offer was not accepted, for on 10th January Mr. *Hurd* writes to the defendant that a respectable person (whose name he does not mention) had authorised him to offer 1,000*l.* for the two acres, to be paid 500*l.* down, and 500*l.* by equal annual instalments with interest, to be secured by mortgage, and he begs to know whether it will be accepted—if it shall be, he says, he will have to look to the defendant to pay him the usual commission, unless he can get his friend to bear a part of it.

Judgment.

On 11th January Mr. *Hurd*, the plaintiff's agent, writes to the defendant's son, to communicate another offer ; he can give, he says (on behalf of his friend, who is not yet named) 900*l.* cash, or 1,000*l.*, paying 750*l.* cash, and 250*l.* in five equal yearly payments with interest ; and if 750*l.* should not be enough, the party would, perhaps, not object to paying 50*l.* more in cash.

On 17th January the defendant writes to the plaintiff a letter in which he states, that having some objections in view which he thinks might be accomplished with the proceeds, he feels inclined to sell at 1,000*l.* ; that that amount in hand would suit him better than to have a small portion, say 200*l.*, on interest for so long a period ;

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and that he supposes it would be quite the same thing for his friend to pay the whole (that is the 1,000*l.*) at once; he explains, that in order to raise money for his son to pay for a property in Albion he had given not long before a mortgage to the University of Toronto for 500*l.* on the lots for which Mr. *Hurd* was offering, to be paid in five years, and he adds these words, which are very material to be considered, "If your friend should decide on giving the whole (that is 1,000*l.* in cash) I have no doubt the University would take a security on the Albion property, and release the lots on Niagara Street. Perhaps as matters stand your friend would take other security to bear him harmless as to the 500*l.*; and so it might not be necessary to trouble the University on the subject."

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On the 18th January Mr. *Hurd* writes again to the defendant, telling him that "the party offering has agreed to give 800*l.* cash, and a mortgage for 200*l.*, and will close whenever convenient to the defendant." This, however, he adds, is upon the condition only that you pay $1\frac{1}{2}$ per cent. ^{judgment.} commission on the amount, as he will pay the other half. Should you think fit to do this, I can see your son about the papers, otherwise there will be an end of the matter.

On the same day the defendant sends this answer, "As to the 200*l.* proposed to remain on interest for five years on the Niagara Street lots I am disposed to yield. If I require to raise the amount in the interim I dare say I may be able to do so at a discount; but I do not like the notion of a discount on that, and a discount also in the shape of commission upon the whole amount. It was only in consideration of cash that I expected to pay 1 per cent., but I am not so anxious to sell as to induce me to pay an additional amount, and to take less cash than I anticipated."

On 22nd January Mr. *Hurd* writes to defendant:—

"Will you be good enough to instruct Mr. A. *McLean*

1857. *McLean v. Arnold.* to have prepared the deed and mortgage of the two acres of land on Niagara Street on the terms mentioned in your last note ; I gave him the names, and Mr. *Arnold* will be ready as soon as the papers are prepared." He then makes a remark about his proposed charge for commission to which the defendant had objected ; and intimates that he might reasonably expect the defendant to pay 8l. on the 800l. " Nevertheless," he says, " I do not intend this to affect the bargain."

It will thus be seen by the correspondence, when it had gone this length, that Mr. *Hurd* conceived he had the defendant bound by what had passed, to sell the property for 1,000l., that is for 800l. down, and 200l. with interest in five equal annual instalments secured by mortgage. And he assumes this, because the defendant had made no other objection to that proposition than that he was unwilling to pay the defendant a commission, and as Mr. *Hurd* had waived that as a condition, though he intimated that he might reasonably expect it, he supposed he was at liberty to hold the defendant bound by his letter of 18th January to sell the land for 1,000l., payable as mentioned in *Hurd's* letter of 18th January, to any person who Mr. *Hurd* might afterwards declare to be his principal ;—for he had not yet named him. And the first question presented in this case is, was there up to that time (22nd January) an agreement concluded upon these terms, that is, for selling the land free from the mortgage to the University, for that is what the plaintiff contends for, or was what passed only matter of negotiation which had not yet arrived at a conclusive result, so as to form a binding contract.

Independently of other considerations, we are to consider that this is not a mercantile transaction such as is usually contracted by brokers without disclosing a principal, till bought and sold notes are passed ; but it is an alleged contract for sale of land, and the question is what is there in writing up to that time to shew that the defendant was bound to sell and convey the land to Mr. *Arnold*,

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whose name had yet no where appeared either in any letter written by the defendant, or in any letter to which he was replying, or to which he referred.

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Could it be in the power of Mr. *Hurd* to make the defendant a contractor under the Statute of Frauds by afterwards naming any person as purchaser that he thought proper? or by naming the person on whose behalf he made the offer?

That may deserve consideration. Where a correspondence is resorted to in a case of this kind for supplying evidence of contract, it should contain all the essentials of an agreement, one of which I take to be the name of each contracting party; but here, if all the letters that had passed on both sides up to 18th of January inclusive are examined, we see no where in them, nor in any writing that then existed, and to which that correspondence referred, the name of a vendee. Mr. *Hurd*, it seems to me, up to that time had only been giving the information on which to found a contract, he had not yet made a contract, nor had he any power to bind the defendant who was on the spot acting and determining for himself; and according to what Mr. *Hurd* assumed to be the consequence of the letters that had passed between him and the defendant, if the subject of the offer had been a dwelling house, and he had made similar enquiries on behalf of a person not named as to the amount of rent payable annually which the defendant would take for a term of years, he might have held the defendant bound to accept as a tenant a person whose name was then unknown to him, and such person might maintain an action against him if he refused to make a lease. In all such cases it would be necessary to take the precaution of inserting in the letter "provided the tenant be approved of."

Judgment.

But this is independent of the substantial objection that is taken on the merits, namely, that the correspon-

1857. dence up to the 22nd January, at which time Mr. *Hurd* assumed that the defendant was legally bound by contract, was in its nature inconclusive.

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Upon that point it appears to me that when Mr. *Hurd* on 18th January specified a condition as to per centage which must be acceded to, "*otherwise there will be an end of the matter,*" and when in answer to that the defendant on the same day replied in substance that "*he was not so anxious to sell as to agree to that condition,*" the latter was in a position, I think, which left him quite free in the matter; for he had a right to take the agent at his word, and to consider that the rejection of his condition "*had made an end of the matter.*" Mr. *Hurd* on the other hand, seems to have assumed that he had the defendant nevertheless bound, or rather could impose a binding obligation upon him, by resolving in his own mind not to insist on the condition which the other had rejected. This is rather a nice point, but I take the law to be that the agent could not thus play fast and loose at his pleasure; but that when he wrote to the defendant on the 18th January, "if you do not agree to this there is an end of the matter," and when the defendant rejected his terms, the defendant was then as much at liberty, I think, as if nothing had ever passed between them, and had an option to determine whether he would or would not be bound by anything which he had before assented to either as to price or otherwise.

Judgment.

If that be so, as I think it is, it makes an end of the case, for it is only in the correspondence of the 18th January that we can find any evidence of such a contract as Mr. *Hurd* assumed he had made; and it is quite clear from what followed that if that treaty was put an end to by the defendant's rejection of what the agent had stated to be an indispensable condition, there was no bargain afterwards made. This indeed the plaintiff seems to accede to, for he admits that the subsequent letters cannot have the effect of abrogating the prior

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agreement, which he assumes to have been perfected, that latter part of the correspondence being, as he says, nothing more than an attempt by the defendant to procure a relaxation of the former terms for his own convenience, which attempt was not successful.

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The defendant, on the other hand, maintains that these later letters may be material in his favor, as tending to show that Mr. *Hurd*, when he wrote them, did not treat what had passed as forming a final agreement.

Those later letters of 12th, 14th, and 17th February, relate to the incumbrance which the University held upon the lots which Mr. *Hurd* was in treaty for.

The defendant had told the plaintiff, on the 17th January, for the first time, of this incumbrance, saying that he had no doubt the University would take a mortgage on the Albion property, instead of that which they held, but intimated a hope that Mr. *Hurd's* friend would be willing to take security against the mortgage held by the University, which would make it unnecessary for the defendant to trouble the University about an exchange of securities. Judgment.

Mr. *Hurd* takes no notice of this proposition in his letters of the 18th and 22nd January, and so leaves it unsettled whether he will or will not insist upon the mortgage to the University being removed. Whilst the defendant was left uncertain on that point, I do not think any contract can be said to have been concluded; for the defendant saying he had no doubt the University would exchange securities was a mere expression of opinion, and it was coupled with another proposition which I think we must understand him to have preferred, and to have intended by that note to submit to the consideration of the intending purchaser, whoever he might be.

Surely it could not be said that the defendant by what

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he said on that point had absolutely bound himself to have the University mortgage removed, provided they would assent; he had at the utmost only expressed a conviction that they would take a mortgage on the Albion property and release the other; but he accompanied that opinion with a proposition of another arrangement as one which would be more convenient.

How can we deduce from that an obligation upon the defendant not only to take up the mortgage by giving one upon the Albion property, but an obligation to mortgage instead, if it should be necessary, any other property which he might possess. The Albion property, as we must infer from the evidence, was a property in which the defendant's son was the person beneficially interested; and under the circumstances stated in the defendant's letter of the 17th, it was quite reasonable that the defendant should desire to substitute a mortgage upon that specific property to secure the 500*l.*, which had gone to pay for that property for his son, rather than that he should encumber any property of his own for the same purpose.

Judgment.

But the decree is founded upon a supposed agreement by the defendant to mortgage any of his own property if it should be necessary, in order to remove the incumbrance; and upon the assumption that the plaintiff could insist on that being done without even having communicated to the defendant that he rejected the alternative which the defendant had proposed, namely, the giving an indemnity against the mortgage rather than trouble the University with a request to exchange it.

Mr. *Hurd*, in his evidence speaks of the treaty about this incumbrance as if it were something new that the defendant had proposed for his own convenience, after the plaintiff had obtained his binding contract to make an unincumbered title for 1000*l.* If that were so, then the condition of the parties might have been such

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as Mr. *Hurd* imagined it to be, and this proposed qualification of an already complete agreement having fallen through, the contract would of course remain in force as before. But the defendant's propositions respecting the mortgage were made on the 17th January, and before Mr. *Hurd's* letter of the 18th, which contained the new proposition claimed to have been accepted on the same day. Both parties, therefore, must have had in their view the matter of the mortgage, and what had been said respecting it before that proposition was made which the plaintiff contends was accepted, and forms a binding contract.

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Now in these two letters of the 18th no notice is taken of the proposition that had been made respecting the mortgage, and the defendant had as good ground, for any thing that is before us in writing, to assume that Mr. *Hurd's* friend acceded to his proposal to indemnify against the mortgage (since he had said nothing to the contrary), as Mr. *Hurd* had to assume that the defendant was bound to give in exchange a mortgage on the Albion property, or on any other property. Judgment.

I think Mr. *Hurd's* letter of the 18th January is rather to be taken as an acceptance of the defendant's proposition of 17th January, in its most favorable sense for the defendant; for otherwise, as it cannot be said there had been any absolute contract yet formed, the defendant would be left to assume that his part of the proposition had been acceded to, according to his expressed wish; while Mr. *Hurd* on the other construction would be reserving to himself to say for the first time, after the contract was assumed to be complete, that he would only agree to the most stringent alternative.

As this was a matter negotiated upon before the contract was closed, there could be no complete contract, I think, till a certain understanding had been come to upon it.

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Mr. *Hurd's* letter indeed of the 12th February, written three weeks after the time at which he now assumes the defendant to have been absolutely bound by certain terms, shows that up to that time it had been unsettled between him and defendant, what should be done about the mortgage, for that letter first intimates that Mr. *Arnold* would not agree to let the mortgage stand, taking security against it, but he treats the defendant as if he were nevertheless bound by a complete contract that had been at some time made, before the mortgage has been mentioned, as if he had agreed to accept 1000*l.*, and bound himself to give a title free from incumbrance, and could not, therefore, be allowed to extricate himself from the difficulties about the incumbrance except on such terms as the other party chose.

But that was not, as it appears to me, the position of the parties; the mortgage had been mentioned particularly in the letter of the 17th January, before Mr. *Hurd* had even made the proposal which formed the basis of the alleged contract—the defendant had made his proposition respecting it, to which the other had not replied, and it is further to be remarked that in Mr. *Hurd's* letter of the 12th February he makes a new proposition as to terms of payment, and though he does in this allude to the proposition of substituting the mortgage on other property, he does not give the defendant to understand that he looked upon him as bound to propose any thing more to the College than to be allowed to put the Albion property in place of the other.

The defendant, when he is thus for the first time made aware that the other party would only agree to one of the alternatives which he had suggested respecting the mortgage (and that not such an alternative as the decree assumes the defendant to have submitted to), writes an answer which shows that then at least he was not willing to undertake absolutely to remove the incumbrance, but only willing to give indemnity against it; and he assigns

his reason that he had then of course do not get 18th January have been come to a done about sition on th it suggested given.

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The defendant a new proposition made about money, but the understood he desired it to be looked on one side, other.

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his reasons. If the other party could say with truth that he had agreed to that before, and could not retract, then of course that would be a difficulty in the way, but I do not gather from the correspondence that either on the 18th January, when Mr. *Hurd* assumed the contract to have been made, or at any time before, the parties had come to an explicit understanding as to what was to be done about the mortgage; there had been only a proposition on the one side, which required an answer, because it suggested a certain course, and no answer had been given.

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Neither can it be said that before that proposition was made on the 17th January, the defendant was bound by a contract to convey, free from incumbrance, or by a contract to any extent.

The defendant's note of the 14th of February accepts a new proposition that had just for the first time been made about taking notes alone for 200*l.* of the purchase money, but he could not be held bound by that unless on the understanding that the other party acceded to what he desired in regard to the mortgage. If the affair was to be looked upon as still under negotiation as to its terms on one side, it could not be treated as concluded on the other. Judgment.

Yet, on 17th February Mr. *Hurd* writes to the defendant that Mr. *Arnold* "will not consent to the 500*l.* mortgage remaining under any circumstances," as if while both parties had been in treaty in regard to one of the terms of the contract, his principal had it all the time in his power to impose other terms which must close the contract, and about which there could be no dispute, and the defendant could have no option. He says that his principal "declines any other arrangement than carrying out the terms of the sale made to him," namely, 800*l.* cash, and a mortgage at two years for 200*l.* balance of purchase money (which two years is, I suppose,

1857. a misprint for five), otherwise it is a departure from the terms which on 18th January defendant is assumed to have assented to.

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But we must ask when was the sale made that Mr. *Hurd* speaks of? Certainly not before the 18th January, for on that day new terms were proposed by Mr. *Hurd*; certainly not on the 18th January, for on that day the defendant rejected the new proposition that was made to him by refusing to accede to a condition which in that offer was declared to be *indispensible*. And *not afterwards*, for though on the 22nd Mr. *Hurd* expressed his willingness to give up that condition, yet he forgot that he could not by changing his mind deprive the other party of the privilege of changing his also, and after all, the letter of the defendant of 18th of January amounts only to this: as to letting 200*l.* of the price of my land remain out for five years upon mortgage, I should not be disposed to make a difficulty if you had not accompanied it by a proposition to which I do not assent; but you insist upon a condition without which you say there will be an end of the matter, and I object to that condition, and therefore I must take it that our treaty is at an end.

Judgment.

After that I should say the defendant was at liberty to sell the lots to any one else, or to rise in his price. And it is clear that so far as we can see in the writings which we must look to for proof of the contract, any attempt to prove a new agreement failed.

Taking this view of the case, I do not think it necessary to remark upon the verbal testimony or upon the particular terms of the decree.

As respects any legal questions involved in the case, it is laid down by Mr. *Sugden* (a), that where a contract is to be collected from a correspondence between the

(a) Ven. and Pur. 10 Ed. 165.

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(a) 3 Mer. 441.

parties the letters will not constitute an agreement unless the answer to the offer is a simple compliance without the introduction of any new term. Now, to apply this to the letters before us: in the defendant's letter of the 17th January he had introduced a new subject for discussion, that is, the incumbrance, which required to be finally disposed of before he could be held bound by any offer, and I see nothing afterwards but a fresh offer in regard to time and terms of payment, leaving the other subject undisposed of, which offer, moreover, was not acceded to. In *Kennedy v. Lee (a)*, Lord *Eldon* states, that in order to form a contract by letter the party seeking the specific performance of such an agreement is bound to find in the correspondence not merely a treaty, still less a proposal of an agreement; but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance which makes it no longer the act of one party, but of both."

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The case of *Cheveley v. Fuller (b)*, tends to show that so long as one party is desiring something which the other party has not in terms consented to, there cannot be said to be a contract absolutely formed. Judgment.

It would seem at first to be a material circumstance in this case, against the position that an agreement had been come to, that from first to last there is nothing to bind the proposed purchaser, no signature made by him or on his behalf, and that the defendant would be absolutely unable to enforce any agreement for acceptance against him. Hence, it has been argued in some such cases there cannot be a complete contract, for there is nothing binding except on one side, and so no mutuality. That is a point which has engaged much attention, and on which there have been inconsistent decisions, but in *Laythoarp v. Bryant (c)*, I take it to be settled that under this (4th) section of the Statute of Frauds, want

(a) 3 Mer. 441.

(b) 13 C. B. 122.

(c) 2 Bing. N. C. 735.

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of a mutual remedy is not fatal, and that it is sufficient in equity certainly, and one may say not less so at law, to show an agreement or memorandum in writing signed by the party charged in the action; but in the same case the necessity is distinctly recognized of having an agreement perfect in its terms: that is complete in all that is essential, and that an agreement for an interest in land cannot be held to be sufficiently shown if that is wanting, which nowhere appears in writing in the correspondence up to the 22nd January, before which it is assumed on the plaintiff's side a contract had been formed, that is, who the party was with whom the defendant made the agreement. "I admit," Chief Justice *Tindal* says in that case, "that an agreement is not perfect, unless in the body of it, or by necessary reference it contains the names of the two contracting parties, the subject matter of the contract, the consideration and the premises."

And in *Champion v. Plummer (a)*, Sir *J. Mansfield*, Chief Justice, says, "How can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties. That was an alleged contract for the sale of goods." "By this note," the Chief Justice said, "it does not at all appear to whom the goods were sold; it would form a sale to any other person as well as to the plaintiffs; there cannot be a contract without the parties."

In a note of the reporter to this case he remarks, "But it seems that a contract for the sale of an interest in land need only be signed by the party sought to be charged thereby, under the 4th section of the Statute of Frauds." That, I apprehend, is the true distinction, that though in a case like the present it is unnecessary to show that the plaintiff as well as the defendant signed the memorandum yet the memorandum must show either in itself or by reference to some other writing in which it will appear who the person is to whom the defendant is bound to sell.

(a) 1 New Rep. 252.

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I have thought in considering this case, that as the plaintiff is proceeding upon an agreement which he assumes to have been concluded on the 18th January, as it certainly must have been if at all, it would be necessary for us to find in the correspondence *down to that time*, some letter signed by the defendant which letter contained in itself mention of Mr. *Arnold's* name as a contracting party, or which referred to something else in writing in which that was stated. If that were necessary the evidence would fail in that particular; but no such difficulty seeming to present itself to the court below or on the argument, I conclude it has been taken for granted, and as I now think properly, that the defendant's letter of the 14th February supplies proof on that point, for he there recognises Mr. *Arnold* as the person proposing to purchase, and having that admission under his hand, we have that certain evidence which excludes the danger intended to be prevented by the statute, and it does not signify that it comes after that part of the correspondence which is relied upon as forming the contract. My only difficulty, therefore, in the case is upon the main question.

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I do not see that the correspondence goes beyond a treaty which has no final result.

In *Stratford v. Bosworth* (a), the Vice-Chancellor says, "The general character and description of this correspondence is applicable to treaty, preliminary proposals leading to, rather than constituting an agreement, which, if it exists, is not ascertained by one paper signed by both parties, but must be extracted from distinct papers containing proposals and answers on each side, to be put together, and the substantial result collected; whether it is clear that the parties understood each other and that the terms proposed by the one were acceded to by the other, as unless that is ascertained there is no agreement."

(a) 2 V. & Bea. 345.

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In *Huddleston v. Briscoe* (a), Lord Eldon observes: "The court is not to decree performance unless it can collect upon a fair interpretation of the letters that they import a concluded agreement. If it rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of the agreement be more or less, the court ought rather to leave the parties to law than specifically to perform (or rather to direct to be performed) what is doubtful as a contract."

The case of *Boys v. Ayerst* (b), is an instructive one on this branch of the law, and seems to me to have a strong application to the present case. It tends to show that the defendant's letter of the 17th January, required from Mr. Hurd information whether his friend would agree to what had been suggested about the mortgage. That was a point, I think, necessary to be cleared up, but Mr. Hurd proceeded as if he had the defendant absolutely bound to convey the estate with a good unincumbered title, while this matter was still unsettled, and that he was in a position to hold the defendant to the chance of being able to get rid of the mortgage by substituting any estate of his which the College would take. I think he came too hastily to that conclusion; for take the letters of the 18th January, and see how the thing stands.

Judgment.

1st. Mr. Hurd says, "in effect these are my terms of payment on the understanding that you will pay the $1\frac{1}{2}$ per cent. commission on the amount. Should you think fit to do this, I can see your son about the papers, otherwise there will be an end of the matter."

2nd. The defendant replies to this on the same day to the effect that as regards the price and terms of payment he was disposed to yield, but to the condition which he was told he must agree to, or he would make an end of the matter, he did object, and was not so anxious to sell as to accede to it.

(a) 11 Ves. 593.

(b) 6 Madd. 316.

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3rdly. Without anything more in writing, in the meantime Mr. *Hurd* asks him to have the papers prepared, for that though he might reasonably expect the commission it should not affect the bargain.

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And so assuming that he could place himself again in the same position as if he had not made an offer which had been refused, he reverts to his proposition respecting the price and terms of payment as if they had been absolutely accepted, and while he had given no answer to what the defendant had proposed about the mortgage, he claims to have the defendant compelled to have the college mortgage released by pledging any property he possesses if the University will accept it, and if not by giving security to the purchaser against the mortgage.

This does not seem to me to be in accordance with the law as it has been laid down in adjudged cases, and is this summed up in a late publication upon the law of Judgment Vendor and Purchaser (a): "If the original offer leave nothing uncertain on the face of it, and be met by a simple acceptance, the treaty is of course concluded; if the reply be either more or less than a simple acceptance, the variation must be acceded to by the original proposer or there is no agreement. And this state of things will continue until there is on the face of the correspondence a clear accession on both sides to one and the same set of terms."

This is obviously necessary, I think, because without such restriction courts of justice could never have ventured to accept a correspondence on detached papers written at different times as constituting the written agreement required by the statute. The question whether what had passed in writing between the parties terminated in an absolute contract, or amounted only to a negotia-

(a) Dart. 146.

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tion without a conclusive result, will be seen more clearly perhaps if we suppose the parties to have exchanged letters to the following effect, which shows, I think, the substance of the several notes.

T. G. Hurd to defendant—

“TORONTO, 18th January, 1853.

“*My Dear Sir*—The party who has made offers through me for your lots on Niagara Street, has agreed to give 800*l.* in cash, and a mortgage for 200*l.* payable in five years. But he would expect a perfectly clear title and would not consent on any terms to the 500*l.* mortgage which is now held by the University remaining on the property; and further, you will understand that this offer is made upon this condition only that you will pay 1½ per cent. commission on the amount; otherwise there will be an end of the matter.”

Yours very truly,

Judgment.

ANSWER.

“Defendant to *T. G. Hurd*, Esquire—

TORONTO, January, 18th, 1853.

“*My Dear Sir*—As to the 200*l.* proposed to remain on interest for five years I am disposed to yield, though from the reasons I have explained to you, I should rather have had the 1000*l.* paid down, in which case I should not have objected, as I told you, to pay a commission of one per cent.

“But I am not so anxious to sell as to induce me to pay an additional commission, and at the same time take less cash than I anticipated.

“You do not allude to what I have suggested respecting the University mortgage of my note of yesterday, which was written upon the supposition that I was to have the whole 1000*l.* in hand. I expressed my belief in that note that the University would agree to take a mortgage upon my son's lot in Albion for the 500*l.*, and

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release the Niagara Street lots, or (which I should have considered better as I should not have had to trouble the University with any such application), that you would be willing to take my bond of indemnity against that mortgage.

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"If we agreed on these points I would bind myself to take up the mortgage in eighteen months.

"But we need not trouble ourselves in discussing this point if, according to your letter to me, the whole matter is at an end."

Can it be said that out of this letter and answer a contract can be raised by which the defendant is bound to accept the 800*l.* down, and the 200*l.* in five years with interest, and to convey at once the lots on Niagara Street, giving an unencumbered title, or that he had bound himself to give the University a mortgage on the Albion property, if they would take it, or upon any other real property that he owned, or if they would not take that that he would indemnify the plaintiff against the 500*l.* mortgage, and that plaintiff had in such case agreed to accept the indemnity? I think not. Judgment

There was a case lately determined in the Queen's Bench in this country of *McPherson et al. v. Cameron*, which presented a similar question, and in which the correspondence relied upon was held not to constitute a contract, it not seeming to us in that case as it does not seem to me here that when one party proposes terms to another which were rejected for certain reasons stated, the party making the offer has it in his power, without any thing further passing, to recede in his own mind from the terms that had been objected to, and proceed against the other as if he had bound himself to accede to all the rest of the proposal.

I should have had more confidence in the opinion I have formed if the court below had been divided in their judgment upon it, but the learned judges seem all to have

1857. considered that there was a contract arrived at by the correspondence on which they could properly act, and I am very far from venturing to say that they were actually wrong in their view; but I must say that exercising the best judgment that I have been able to do in the matter, I have not been able to bring myself to the same conclusion, but am of opinion that this decree should be reversed, and the bill dismissed with costs.

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ESTEN, V. C.—The question which arises upon this appeal seems to be, first—whether there was a complete contract between these parties; second—whether the respondent has done any thing to disentitle him to the specific execution of it. The only evidence of the contract is contained in a correspondence which passed between the parties, and which, so far as it is material, may be considered as commencing with a letter dated the 11th of January, 1853, addressed by Mr. *Hurd*, the respondent's agent, to the son of the appellant. In this letter he offers on behalf of the respondent for the property in question, 900*l.* cash, or 1000*l.* with 800*l.* in cash. To this letter he received an answer from the appellant dated 17th January, 1853, in which, I think, he offers to take 1000*l.* cash for the lots. To this offer he adds an intimation that the property was subject to a mortgage granted to the University for securing 500*l.* and interest in five years, and then proceeds with these words: "If your friend should decide on giving the whole I have no doubt the University would take a security on the Albion property (the title of which is secured by the advance) and release the lots on Niagara Street. The Albion property will more than pay up the mortgage in five years." This amounted to a stipulation, I think, that the mortgage in question should not be paid out of the purchase money, and an offer to get it transferred to other specified property, and to have the property in question discharged from it. Upon this Mr. *Hurd*, as the respondent's agent, addressed a letter to the appellant, dated the 18th January, 1853, in which, on behalf of

Judgment.

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the respondent he offers for the property in question 800*l.* in cash and a mortgage for 200*l.* on condition that the appellant pay one half of his (the agent's) commission, being 1½ per cent. on the purchase money. To this letter the appellant replies by one of the same date, in which he objects to the payment of any part of the commission, but I think assents to the rest of the proposal. This letter is followed by one dated January 22nd, 1853, from Mr. *Hurd*, the agent, to the appellant, in which, on behalf of the respondent, he yields to the defendant's objection respecting the payment of one-half of his commission. The letters of the 12th, 14th, and 17th February, are perhaps material chiefly as amounting to a recognition of the contract after the disclosure of the name of the principal. It is observable that in none of the letters which I have mentioned subsequent to that of the 17th of January, 1853, is the mortgage to the University referred to, and it appears to me that the respondent must be deemed by his silence to have assented to the stipulation and offer contained in that letter. ^{Judgment.} I think that a contract was constituted between the parties by the letters I have mentioned, to this effect, namely, that the appellant agreed to sell and the respondent agreed to purchase the lots in question at the price or sum of 1000*l.*, of which 800*l.* was to be paid on the completion of the purchase, and 200*l.* was to be secured by a mortgage of the property, payable in five years with interest, by five yearly payments; and that it was also agreed between them that the appellant was to do his utmost to get the mortgage to the University transferred to the Albion property, but that the respondent was not to be at liberty to retain any part of the purchase money towards it. I think further, that when the letter of 22nd January, 1853, had been written and received, the parties stood in the same relation as if they had signed a written contract containing the very words I have mentioned, and no more. Had such been the case, either party could without doubt have maintained an action for any breach of this contract, and there would. I appre-

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1857. hend, have been no difficulty in framing the proper pleadings for the purpose. There can be as little doubt that had the appellant got the University mortgage transferred, and the lots in question released from it he could have filed a bill in the Court of Chancery to compel the respondent to accept a conveyance of the property in question, pay the 800*l.*, and grant a mortgage for the balance. It is true that if in the interval between the signing of the contracts and the commencement of any action upon it by the respondent, he had insisted upon the University mortgage being paid off, and refused to complete the contract upon any other terms, he might have precluded himself from recovering a verdict in such action. If, however, he had under such circumstances filed a bill in equity for specific performance, the question, I apprehend, would have been whether he had acted in good faith, and whether the vendor had been damnified by the delay, and if it should appear that the purchaser had acted in good faith, and that the vendor had not been damnified by the delay, the specific execution of the contract would not, I apprehend, have been denied. That the respondent acted in good faith in this matter is incontestable. He was always prompt and eager to carry the contract into execution, according to his understanding of it, and he has certainly been guilty of no laches whatever, and if he ever insisted upon the unconditional discharge of the mortgage, (which I very much doubt at least before the hearing of the cause), he must be deemed to have done so in good faith, as one of the judges of the court below agreed with him in opinion as to the construction of the agreement. Then, has the appellant been damnified by the delay? If he has, it might undoubtedly be a ground for refusing relief to the purchaser. All that appears, however, on the subject is as follows—first, in the answer it is said, “and that this defendant’s objects in selling or desiring to sell have thus far been defeated,” and in the affidavit it is said, “but the amount of money intended to be realized by the sale for particular objects not having

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been available, I am no longer willing to convey on any terms the lots in question to the plaintiff." I do not think these expressions raise a sufficient case to prevent the execution of this contract, and there is a total absence of all proof on the subject. On the point of relief being given by this decree to the respondent, different, as is supposed from what he asks, the rule in this respect seems from Mr. *Daniels'* book, volume I p. 300, citing *Lindsay v. Lynch (a)*, to be, that where the plaintiff states a particular agreement in his bill, and the answer denies that agreement, but admits a different one, the plaintiff may abandon his own agreement, and adopt that admitted by the defendant, and may amend his bill accordingly, but cannot amend his bill by continuing to insist on his agreement, and pray at the same time that if he should not establish that, he might have the specific execution of the one admitted by the defendant. To apply that rule to the present case, and supposing for the sake of argument that the respondent had ever insisted upon a different agreement from the one established by the decree of the court below, if the respondent had insisted upon a specific agreement by his bill, and the appellant had denied that agreement, but had admitted another, it might have been incumbent on the plaintiff to choose which agreement he would have enforced. But the rule can hardly be said to apply to such a case as the present. There is no dispute about the agreement, although the appellant in his answer submitted that the correspondence did not amount to an agreement. If there was any agreement at all, it was contained in the letters. About that both parties were agreed, and I see nothing to prevent the plaintiff in a suit from insisting upon a particular construction of the agreement, but if that could not be maintained, then to ask for specific execution of the agreement according to its true construction. In point of fact, however, I am not satisfied that the respondent in the present case ever insisted upon a different construction of the agreement from the one

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(a) 2 Sch. & Lef. 1.



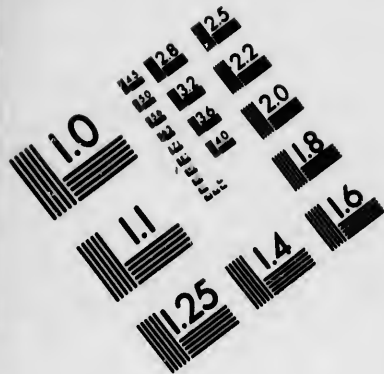
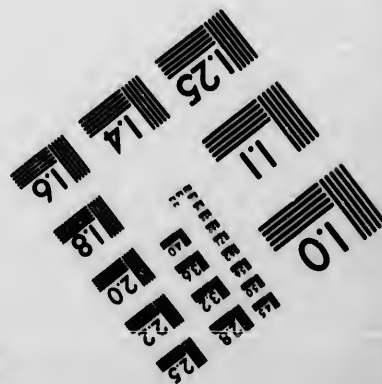
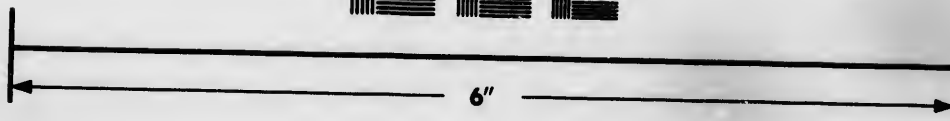
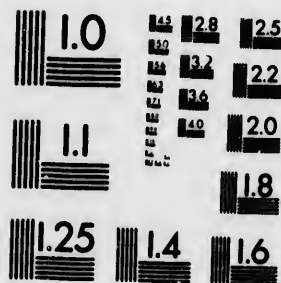


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1857. adopted by the court below ; at all events, previously to the hearing of the cause. In Mr. *Hurd's* letter of the 12th February, 1853, is this passage, "It is not an uncommon thing to change the security for a loan at the College Office, and one which I am aware they will do immediately, if the other security offered is sufficient." In his letter of the 17th February he declines on behalf of the respondent to permit the mortgage to remain on the property, and to receive security that the property should not be liable for the amount. Mr. *Jones* in his letter of March 26th says, "Mr. *Arnold* asserts that you sold him the property in question for 1000*l.*, 800*l.* of which was to be paid down, and the remaining 200*l.* to be paid in five years, and secured on the property, but that you now want to change the terms of the agreement and leave an incumbrance of 500*l.* on the land, Mr. *Arnold* taking other security for its ultimate payment. On examining and carefully considering the correspondence in question, I am of opinion that you are bound to convey the property to Mr. *Arnold* free from every incumbrance on the terms by him above stated." This was undoubtedly true, for he was bound, if he could, to get the mortgage transferred to other property, and the property in question released from it. Mr. *Hurd* in his affidavit states that on the 26th March (the same date as Mr. *Jones's* letter) he called on the appellant at Osgoode Hall and tendered him payment, and told him he was requested by Mr. *Arnold* to make him a formal tender of payment and an offer of readiness to complete the purchase. He further stated to the appellant, that he was bound to do so; and that the non-removal of the University mortgage was not a part of the bargain: that he was bound to convey the lots free of any incumbrance, and that he (*Hurd*) had ascertained from the University office that a change of security would be accepted. I am inclined to think, therefore, that the court below went too far in attributing to the respondent that he had insisted upon any thing not sanctioned by its decree, at all events previously to the hearing. Upon

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the whole, and although the contrary opinion that I gave the court below, duty to perform, however, is a question in any case.

SPRAGGE, V. McLean, I have a correspondence tract between cited on both come to the settlement given in

It is observed respecting the look for the sale in a formal instrument by learned judges not to have admitted a valid contract being now clearly so constituted, court to decide wanting in acceptance an agreement by the defendant from the orally expressed evidence.

The case of *Grant (a)*, and *b* is very illustrative of the estate merely sold, but if he should

the whole, although the case is one not free from doubt, and although I entertain the most unfeigned respect for the contrary opinion, I cannot, after the best consideration that I can give to the case, see that the judgment of the court below was wrong, and therefore feel it to be my duty to pronounce for its being affirmed. The decree, however, is undoubtedly wrong and would require alteration in any event.

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SPRAGGE, V. C.—Since the hearing of this case upon appeal, I have again carefully read over and considered the correspondence which is relied upon as constituting a contract between the parties; and have examined the cases cited on both sides, and I have felt myself compelled to come to the same conclusion as is expressed in my judgment given in the court below.

It is observed in the case that, in correspondence respecting the sale and purchase of an estate, we cannot look for the same accuracy and precision of language as ^{Judgment.} in a formal instrument; and doubts have been expressed by learned judges whether it would not have been wise not to have admitted mere correspondence as constituting a valid contract for the sale and purchase of land; but it being now clearly established that such contract may be so constituted, it has necessarily become the duty of the court to decide whether informal language and language wanting in accuracy and precision does not still constitute an agreement between parties; and it is abundantly evident from the cases that any language, however colloquially expressed in a letter, will suffice, provided it sufficiently evidences the assent of the writer.

The case of *Huddleston v. Briscoe*, before Sir *Wm. Grant* (a), and before Lord *Eldon*, upon appeal, is strongly illustrative of this. The first letter from the owner of the estate morely intimated that he was not anxious to sell, but if he should be so disposed he should not take

(a) 11 Ves. 553.

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less than 400*l.* In the next letter, which was from the intending purchaser, he consented to give the price asked provided the owner should be disposed to part with the property immediately. The letter in reply from the owner of the estate contained no definite agreement to sell, but the tenor of his letter implied his intention to do so, but there is nothing express. In another letter dated thirteen days after, the vendor observed to the purchaser that he the purchaser does not say that he is willing to purchase the land tax of part of the premises which he the owner had purchased for about 50*s.* In answer to this the purchaser's attorney wrote to the vendor, to the effect, that although not bound to pay more than the 400*l.*, yet, as the additional 50*s.* was so trifling, he would acquiesce.

The vendor appears to have taken umbrage at this, and declared that he had changed his mind, and refused to sell; and thereupon the bill was filed by the purchaser.

Judgment.

Upon the hearing before Sir *William Grant* he thought the case so plain that he stopped the reply and made the usual decree in favor of the purchaser.

Upon appeal to Lord *Eldon* this decree was affirmed, and in giving judgment, his lordship used language, justly applicable to all correspondence of this nature. He says, "I agree the court is not to decree performance unless it can collect upon a fair interpretation of the letters that they import a concluded agreement; that if it rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less, the court ought rather to leave the parties to law than specifically to perform what is doubtful as a contract. But it is also clear that the court is to put the same interpretation upon correspondence with reference to this subject as other persons would; reading the correspondence fairly with a view

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to collect the sense of it." He then goes on to express his opinion that the three first letters constituted an agreement.

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In another passage, speaking of the defendant's letters, his lordship says, "Whatever he might mean if the fair sense is, that he means to intimate that he agrees, he cannot afterwards set up a reserve made in his own mind; especially having followed it as he has, the third letter by another, stating a proposition about the land tax, which he could not possibly be at liberty to write unless he understood the bargain as concluded; upon which he had nothing more to say than to add that additional term."

I believe that the principles of interpretation thus laid down by Lord *Eldon* have not been questioned in any case, and indeed no other could be applied to documents of such a nature. The difficulty lies in determining what the parties mean, and sometimes in determining whether what has passed has been only treaty, or upon a reasonable construction of all that has passed, the parties have come to an agreement. Judgment.

I will (as briefly as I can, and avoiding as much as possible a repetition of what I said in my former judgment), give my view of the effect of the correspondence in this case—first, premising a remark of Lord *Eldon's* in *Kennedy v. Lee* (a), "I do not mean (because the cases which have been decided would not bear me out in going so far), that I am to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto*, arises out of the terms of the correspondence."

I read the defendant's letter of the 17th of January, as offering to sell the property in question for 1000*l.*, the

(a) 3 Mer. 441.

1857. whole of which he desired to have in cash ; as stating at the same time the existence of a mortgage upon the property and the mode in which he proposed to remove it with the assent, which he confidently expected, of the mortgagee, necessarily implying an application to the mortgagee for that purpose, and therefore engaging to make such application ; suggesting, however, that the intending purchaser might perhaps be satisfied to allow the mortgage to remain, upon being indemnified against it. I think that the letter fairly construed contained an offer to sell for 1000*l.* cash ; and to apply to the mortgagee for a transfer of the mortgage to other property named, unless the intending purchaser should be content with an indemnity ; and I think that if the intending purchaser had written simply accepting the terms proposed, the defendant would have been bound to apply to the mortgagee for such a transfer of the mortgage as he had mentioned in his letter : and that is precisely what is decreed by the court below.

Judgment.

Then does the subsequent correspondence change the position of the parties in that particular ; and does it reach a perfect agreement. If it removes the points in difference between the parties until they all disappear, the parties must become *at one* : and if the terms of their correspondence are such as to amount at the end to an offer on one side and an acceptance on the other, there is a concluded agreement.

The agent of the purchaser, Mr. *Hurd*, in his letter to the purchaser, of the following day, does not assent simply to the offer made by the defendant, but proposes a modification of it—viz., to pay 800*l.* instead of 1000*l.*, in cash, and that 200*l.* should remain upon mortgage, and that upon condition of the defendant paying $1\frac{1}{4}$ per cent. commission on the amount of the purchase money ; this was met by a letter of the same day's date from the defendant to Mr. *Hurd*, assenting to one of the terms proposed, the amount to be paid in hand and the amount to remain on

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mortgage, and rejecting the other term, the payment to Mr. *Hurd* of a commission upon the purchase money. So far clearly the matter was only in treaty with, however, only one term unassented to. How then are these two letters of the 18th to be read. I think, certainly as an offer by each of certain terms; by Mr. *Hurd* for the intending purchaser, to give 800*l.* cash, and 200*l.* secured by mortgage, the defendant paying a certain amount of commission; and on the other hand, as an offer by the defendant to take or to sell for 800*l.* cash, and 200*l.* on mortgage, and paying no commission; and I think it was as much an offer to sell upon those terms as if no other terms had been the subject of discussion between the parties. I think this can admit of no doubt.

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Taking it then, as an offer to sell upon those terms, an acceptance without any qualification would constitute an agreement, nothing further would be required on the part of the person making the offer; an offer and an acceptance is sufficient; any thing further would be a more acceptance of an acceptance which is clearly not necessary to constitute an agreement. If it would be necessary to quote authority upon this point, it will be found in the judgment of Lord *Eldon* in *Kennedy v. Lee*. where he says, "I have always understood the law of the court to be with reference to this sort of contract, that if a person communicates his acceptance of an offer within a reasonable time after the offer being made; and if within a reasonable time of the acceptance being communicated no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together, as constituting such an agreement as the court will execute." I do not venture to offer any remark upon the qualification made by Lord *Eldon* (if intended as a qualification) that no variation be made after acceptance, because no such circumstance has occurred here.

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The point is succinctly and clearly put by Mr. *Bell* in his treatise on contracts of sale: "An offer accepted is by the law of England as well as by that of France and Scotland binding from the moment of acceptance, such acceptance completing the contract of sale, and forming the reciprocal engagement on either party, which distinguishes the mutual contract from the unilateral engagement. The acceptance is duly made if it takes place before the offer has been recalled," being made, of course, within a reasonable time. The language quoted by his lordship the Chief Justice from Lord *St. Leonard's* treatise, and from Mr. *Dart's*, is to the same effect.

The acceptance in this case by letter dated the 22nd of the same month is clear and explicit: "Will you be good enough to instruct Mr. *Archibald McLean* to have prepared the deed and mortgage of the two acres of land on Niagara Street, on the terms mentioned in your last note. I gave him the names, and Mr. *Arnold* will be ready as soon as the papers are prepared." What follows is no qualification, for, while urging the reasonableness of his being allowed one per cent. commission on the money paid in hand, Mr. *Hurd* adds, "Nevertheless I do not intend this to affect the bargain." I quite agree that it would be wrong to put any strained construction upon epistolary correspondence; and that if after considering it carefully, there remains any reasonable question whether the party sought to be charged was making any offer, or only making an inquiry; or whether the matter rested only in treaty or had become an agreement by the unconditional acceptance of an offer, in either case, I should say, the court ought not to grant specific performance. But looking at this correspondence, having regard to these considerations, I can come to no other conclusion than that there was a deliberate negotiation for sale concluded by the acceptance of an offer: there certainly was no catching at that as an offer which was not meant as such, and indeed the conduct of the defendant himself clearly shews this,

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for after the letter of the 22nd of January, which clearly treats the matter as a concluded bargain, the defendant, so far from saying that he had been misunderstood, negotiates further, only as to the mode of carrying it out; and in no part of the subsequent correspondence makes any question as to the letter of the 18th being an offer to sell, and that of Mr. *Hurd's*, in answer, being an acceptance.

1857.
 McLennan
 v.
 Arnold.

To revert now to that which has been the occasion of the difficulty in this case—the mortgage to King's College—the defendant's proposal in regard to it was a term imported into the subsequent offers on each side, or it was not; the court below has treated it as a term in the subsequent offers; but suppose it not so, the offers would be independent of it, and the defendant would be bound to remove it at any rate, and the decree in that case is more favorable to him than he is entitled to. I think, however, that it would be unfair to the defendant to exclude that from the agreement; and that the decree upon that point ^{judgment.} is right.

It is objected that the plaintiff has asked for more than he is entitled to, in asking, as it is said, that the College mortgage should be removed at any rate, and that his doing so disentitles him to relief. The Chancellor held him entitled to have the incumbrance removed at any rate; my brother *Esten* thinks that he has not insisted upon its removal absolutely, but only upon the defendant making a proper application to effect its removal; but taking him to have required its removal absolutely, as I still incline to think he did, he has only interpreted his rights as arising out of the agreement in the same way as the Chancellor has done, and supposing him to have been in error upon that point, there is nothing unconscientious in his asking for that which he honestly thought himself entitled to.

If it be contended that the defendant did not under-

1857.
Mr. Lee
v.
Arnold.

stand himself to be bound to endeavor to effect the removal of the College mortgage, I would say, that if, by a fair construction of his letters he proposed to do so, he is bound by it, even though he could convince the court that he did not conceive himself to be bound to do so. Two passages in Lord *Eldon's* judgment in *Kennedy v. Lee*, are apposite to this point; one is, "The defendant, Mr. *Lee*, I am satisfied, was not aware of the precise effect of this correspondence; but I am afraid, be that as it may, if the letters amount to a contract, so considered, that the plaintiff has a right to have the contract specifically executed;" the other is, "There was an agreement on one side, and if accepted by the other, was binding on both, although it should turn out to be a surprise on the one or the other." Another passage from the same judgment which I have quoted before supports the same proposition.

I do not mean to admit that there is evidence to convince the court that the defendant did not believe himself bound to remove, or at least to endeavor to remove the incumbrance. In his letter of the 14th of February, he argues that it is unreasonable in Mr. *Arnold* to insist upon it, but he nowhere says that there was no agreement between them; or that Mr. *Arnold* was bound to allow the mortgage to remain upon being indemnified against it, without his even applying to get it removed.

The language of Lord *Eldon*, which I have quoted, was not, of course, intended to interfere, and does not interfere with the rule of courts of equity not to decree specific performance in case of mutual mistake, or where the effect would be to defeat the known declared object of the parties (taking this latter rule with some qualifications), and so, for the reasons given in the court below, a decree would not have been made which would have forced the defendant to pay off the incumbrance out of the purchase money, but the court saw no reason against requiring him to take such steps as might be necessary with a view to

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its transfer to other property named, inasmuch as in their judgment he had undertaken to do so; and his doing so would leave him in possession of the full purchase money to be paid in hand.

1857.

McLean
v.
Arnold.

I cannot agree with the counsel for the defendant that it is against any rule or maxim of the court to decree a party to make application to some third party where he has undertaken to do so. The court has refused it, certainly, when such application would interfere with the discretion of trustees, or with the free will of a wife as to the disposition of her dower or real estate; and it would probably be refused in any case where it would be against public policy to grant it, or it was open to any other serious objection. But it will be observed that it has been refused *because* objectionable upon some *special* ground; not as against any rule or practice of the court, and the court has decreed it in proper cases. The case of *Hawkes v. The Eastern Counties Railway Company* is an instance of this. In that case the defendant was decreed to apply for judgment. an act of parliament, and no such objection was made as has been made in this case. Upon the whole, with every respect for the opinion of the learned judges of the court who think differently, the judgment of the court below, ought, in my opinion, to be affirmed.

Per Curiam.—(The VICE-CHANCELLORS dissenting)—appeal allowed; the decree of the court below to be reversed, and the bill dismissed with costs.

ROSS v. HAYES.

Practice—Service of bill on solicitor.

Where a solicitor accepts service of an office copy bill of complaint, and gives a written undertaking to answer the same: or, in case of default, that an order *pro confesso* may be drawn up; the usual two days' notice of motion for that purpose must be given, and may be served on the solicitor. October 10.

In this case an office copy of the bill had been served upon the solicitor of one of the defendants, who signed a

1857.

Ross
v.
Hayes.

written acceptance of such service, and an undertaking to answer the bill in the usual time; or in default, that plaintiff should be at liberty to take the bill *pro confesso* for want of answer; default having been made in putting in an answer.

Mr. *McDonald* for the plaintiff now moved *ex parte* for an order to take the bill *pro confesso*, according to the terms of the undertaking, referring to the case of *Shaw v. Liddell (a)*.

Per Curiam.—Although it does not expressly appear, in the report, that notice of the application had been given in the case cited, and in some instances orders have been made *ex parte* under similar circumstances; in practice parties generally have thought it a safer course to serve notice, which, as affording some protection to defendants, we think should be done in every case. The usual two days' notice of motion will be sufficient, and may be served upon the solicitor.

WEBSTER V. O'CLOSTER.

Practice—Service of bill on attorney or solicitor.

October 10. Where service of an office bill is effected on the attorney at law of the defendant, a three weeks' notice of motion to take the bill *pro confesso* must be given; the notice may be served on the attorney of the party.

This was a motion by Mr. *Fitzgerald* for an order to take the bill *pro confesso* against the defendant *Powell*, a judgment creditor of *O'Closter*, for want of answer, the service of the bill had been effected by delivering an office copy to the attorney at law, under the provisions of the late statute (*b*).

Per Curiam.—The legislature has made service of an office copy of the bill or decree upon the attorney at law

(a) Ante. vol. IV., page 352.

(b) 20 Vic., ch. 56.

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of a judgment creditor, good service; by the fourteenth section of the statute it is declared that "it shall be sufficient to serve the process of the court, whether the same be an office copy of the bill or an office copy of the decree or decretal order upon the attorney of such creditor, in the action at law in which such judgment shall have been recovered, and personal service upon the judgment creditor shall not be requisite. By the third section of order XIII. (1853), it is directed that when an office copy of a bill of complaint has been duly served, *but such service has not been personal*, and the defendant has neglected to answer, the plaintiff is to give three weeks' notice of motion, to be served on the defendant or his solicitor, if he have one, for an order to take the bill *pro confesso* against such defendant. Now, treating the service which has been effected here, as due service, or in the words of the statute, as *sufficient* service, it is clearly one of those cases requiring the usual three weeks' notice to be given. The notice of motion, however, may be served on the attorney of the party or his solicitor, if he have one.

1857.

Webster
v.
O'Closter.

 MCKAY v. MCKAY.

Practice—Opening publication—Alimony suits.

The principles laid down by the court (in *Waters v. Shade*, ante vol. November 5. II. 218), in respect to opening publication, apply as well to suits for alimony as other cases.

This was an alimony suit, and evidence had been taken therein before one of the Vice-Chancellors; after the evidence was closed a motion was made on a previous day on behalf of the plaintiff for the purpose of re-examining a witness in the cause, and also to examine other witnesses upon certain points, as to which plaintiff stated in her affidavit she had been taken by surprise. The grounds of the application appear in the judgment.

Mr. Morphy for the plaintiff.

1857.

McKay
v.
McKay.Mr. *McDonald* contra.

Judgment was delivered by

SPRAGGE, V. C.—I have not been able to confer with my brother *Esten*, who took the evidence, but who is absent from illness, and have found it necessary to read the pleadings and evidence.

The case made by the bill is cruelty, exclusion, and adultery; and the answer denies all, and sets up desertion, on the plaintiff's part, of the defendant's house; that her absence was voluntary. The evidence is very voluminous. I could not read it without receiving an impression as to the merits of the case, but shall abstain at this stage of the cause from expressing an opinion upon it any further than is necessary for disposing of the application.

Judgment. The plaintiff desires to examine *Ann Moore* and *Mary Taylor* upon two points: one, that she did discharge her household duties while in the house. The answer to that is, that the defendant's answer does not set up that she did not, it is therefore not a point in issue. The other point is to an act of violence by defendant not charged in the bill, and besides no reason is given why these witnesses, if admissible, were not called at the proper time.

Mrs. *Seeley* and *Sarah Millard* are witnesses (so the plaintiff states) to an exclusion of plaintiff from defendant's house by his son *Walter McKay*. This exclusion was charged in the bill, and that *Walter* was acting by his father's authority; this latter point, a very material one, the plaintiff does not profess to be able to prove by these witnesses. She gives no reason for not calling them at the former examination.

The act of violence to be proved by *Lambton* and his mother is not charged in the bill, nor is that which the plaintiff says she can prove by *Clement*.

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These additional alleged acts of violence are not sworn to by the plaintiff as having occurred. If they had, and were of a serious nature, it is strange that they were not charged in the bill.

1857.

McKay
v.
McKay.

I think it would not be right to allow *Kelley* to be recalled to prove the alleged direction given to him by the defendant. It formed part of a transaction as to which he has already deposed; and as I read his evidence already given, he would be called to unsay that which he has already said.

I think the principles settled in *Waters v. Shade* ought to be adhered to, and I see no reason for exempting cases of alimony; though each case must be judged by itself. The defendant declares that he was always willing that his wife should live with him, and offers to receive her now. It may be doubted whether such a case as to cruelty is established upon the evidence as to entitle the plaintiff to alimony upon that ground; the adultery does not seem to be established. The refusal to receive this evidence would result in this, that if the plaintiff cannot succeed upon the present evidence something must occur in future to entitle her. She has not shown, I think, that her return to her husband would be attended with danger to her life, or limb, or health. Should she offer to return and he refuse to receive her; or should he receive her, and afterwards be guilty of cruelty such as should entitle her to alimony, she will have her remedy. I say this without intimating an opinion that the evidence does not shew her entitled, but if not, I think it better notwithstanding to refuse the admission of the evidence now. I should have been glad to have been aided by the opinion of my brother *Esten*, who took the evidence, but forming my judgment from reading it, with the pleadings, I think the application should not be granted.

1857.

Collins
v.
Swindle.

COLLINS V. SWINDLE.

Municipal Corporations.

A member of a municipal corporation agreed with another party to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between the parties. *Held*, that such a contract was in contravention of the Municipal Act (16 Victoria, chapter 181), and the court refused to enforce the agreement for a partnership; but, the defendant having denied the existence of the partnership, which was established by the evidence, the bill was dismissed with costs.

This was a bill praying for an account of certain partnership dealings alleged to have taken place between the plaintiff and defendant. At the hearing it appeared that the town council of Dundas, of which plaintiff was a member, had advertised for tenders for the execution of certain works, for which it was verbally arranged defendant should tender, and if successful in obtaining the contract that he and the plaintiff should divide the profits; and the defendant having obtained the contract and completed the work, and received payment therefor, he denied all right of the plaintiff to participate in the proceeds thereof, whereupon the present suit was instituted.

Argument.

The defendant put in his answer, denying the existence of the agreement for a joint interest in the contract; this fact, however, was clearly established by the evidence which was taken before the court.

Mr. *Barrett*, for plaintiff, asked for the usual decree for account.

Mr. *A. Crooks* for defendant, contended that the evidence of a partnership was not such as to establish the agreement relied on; but if sufficient, it was illegal, and such as the court would not enforce, the law expressly prohibiting any member of a municipality being interested in any contract with the council.

ESTEN, V. C.—It is contended that such a contract is against public policy, one of the parties being a member

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of a public body, and the claim being founded on a partnership in a contract which involved a violation of public duty, the court, in order to discourage such transactions and promote the policy of the act which renders such contracts a disqualification, should refuse its aid in enforcing them.

1857.

Collins
v.
Swindle.

We are of this opinion, and think, therefore, that the bill should be dismissed; but as we do not approve of the defendant's conduct in this matter, and as his answer, indeed, is contradicted by the weight of evidence, we think the decree should be without costs.

SPRAGGE, V. C.—The fact of partnership in the contract with the corporation of Dundas, as well as with *Ridley*, for stone for the bridge appears to be satisfactorily made out in evidence.

The next question is, as to whether this court ought to aid the plaintiff in obtaining the fruits of this contract. He was a member of the town council of Dundas, and Judgment moreover a member of the committee of roads and bridges, and was thus an agent of the corporation in entering into the contract in question. Supposing him to have been sole agent, and to have entered into a contract nominally with a third person, but his being himself the real contractor, there would be a glaring inconsistency in his entering into such contract, but the difference between that and the contract made is a difference in degree only, not in principle.

The contract in question was in contravention of the statute 16 Vic., ch. 181, sec. 25, as well as of the general policy of the law. Whether a member of a municipal corporation entering into such a contract vacates his seat, or is only disqualified for election, does not seem to me material; the enactment is equally a parliamentary prohibition of such a contract, and I agree with my brother *Esten* that it would be against the rules of this court to lend its aid in such a case.

1857.

STRACHAN V. MURNEY.

Practice—Pro Confesso.

November 10 Where after a bill has been ordered to be taken *pro confesso*, but before any decree is drawn up, the defendant intervenes and is a party to proceedings taken between the plaintiff and defendant, that is not such a case as is contemplated by section 7 of the thirteenth of the orders of 1853, where all further proceedings in the cause may be taken *ex parte*.

This was a suit for foreclosure of a mortgage, and had been brought to a hearing upon an order to take the bill *pro confesso*, on the 12th of December, 1855, when, in consequence of the necessary affidavits not being produced, the cause was directed to stand over for the purpose of being brought on before the presiding judge in chambers, on the 19th of the same month. Before any further proceeding was taken, however, the defendant arranged with the plaintiffs, paying them the amount of principal and interest then due on the security, together with all costs incurred. That recently a further instalment having become due, the solicitor for the plaintiffs applied to the registrar to draw up a decree of foreclosure in the usual form, but which, under the circumstances above stated, that officer refused to do; whereupon an application was made to the presiding judge (V. C. *Spragge*) in chambers, for an order directing the decree to be drawn up; his honor refused the motion on the ground, that as the defendant had paid all that was due before any decree actually made, it might be reasonably assumed that the defendant considered that the bill was thereby dismissed, which by section 5 of order XXXII., he had a right to call upon the court to do; but gave the plaintiffs liberty to bring on the motion again before the full court, and now on this day.

Statement.

Mr. Roaf, for the plaintiffs, renewed the motion; but

Per Curiam.—Where, after an order to take the bill *pro confesso*, and before the decree is drawn up, the defendant intervenes, and is a party to any proceedings

taken between such a case and future proceedings there can be no application of this application motion.

The managing agent (been offered to retire as cashier) would in like manner be made in doing which for his brother in order to effect the transfer was covered that the share £75 only those parties, retire from the by him, which wards filed a bill amounts on the acted as his agent. The defendant by ter, and asserted secured a share the cause was but, as the letter prehension of the

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Mr. Hallinan

Mr. Mowat,

The judgment

ESTEN, V. C.

taken between the plaintiff and defendant, that is not such a case as is contemplated by the orders, where all future proceedings may be taken *ex parte* in the cause: there can be no doubt the defendant must have notice of this application, whatever may be the result of the motion.

1857.

Strohan
v.
Murney.

ANDERSON V. CAMERON.

Principal and agent.

The managing shareholder and cashier of a joint stock company had been offered as a gift the share of one of his co-partners, who desired to retire from the partnership, or declining that, that he (the cashier) would permit his daughter to accept a transfer of the share in like manner, in which position the share stood when an application was made to the cashier by another member of the partnership, who was aware of these offers, to ascertain if the share could be obtained for a person desirous of entering into the company. It was stipulated that the intending purchaser should have the share upon paying £300, which was communicated by telegraph to the brother of the intending purchaser by the person applying on his behalf, and the cashier by direction of the same party, drew for the amount, and also wrote to him informing him of the purchase, in doing which the cashier stated that he had secured the share for his brother, and that he had drawn upon him for the amount in order to enable him to settle with the holder of the share; and the transfer was accordingly made. Afterwards the new partner discovered that the cashier had in fact paid the original holder of the share £75 only, in consequence of which differences arose between those parties, and it was determined that the new partner should retire from the partnership upon being paid the amount advanced by him, which was accordingly done. The retiring partner afterwards filed a bill against the cashier, claiming the difference in the amounts on the ground that in the matter of the purchase he had acted as his agent.

The defendant by his answer positively denied all agency in the matter, and asserted that he had inadvertently made use of the words "secured a share," instead of "sold a share," and the evidence in the cause was to the same effect. The court dismissed the bill, but, as the letter of the defendant had tended to create a misapprehension of the facts, without costs.

The facts of the case are clearly stated in the judgment.

Mr. *Hallinan* for plaintiff.

Argument.

Mr. *Mowat*, Q. C., and Mr. *Roaf*, for defendant.

The judgment of the court was delivered by,

ESTEN, V. C.—The material facts of this case are as

1857.
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 Anderson  
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 Cameron.

follows: the defendant and several other gentlemen, amongst whom were Mr. *Gzowski* and Mr. *Cotton*, formed a company called the "Port Perry Land Company," of which defendant was the managing cashier. Mr. *Gzowski* desired to retire from the Company, and the plaintiff wished to enter it. Mr. *Cotton* proposed to the plaintiff that he should obtain admittance into the Company by the purchase of Mr. *Gzowski's* share, and the plaintiff authorized him to effect that object. Mr. *Gzowski* was not on good terms with Mr. *Cotton*. This fact Mr. *Cotton* communicated to the plaintiff, and suggested that Mr. *Gzowski's* share should be obtained through the intervention of the defendant. The share in question was purchased by the plaintiff for 300*l.*, which was paid to the defendant. The purchase was effected through the instrumentality of Mr. *Cotton*, and the 300*l.* was paid by means of a bill for that amount drawn by the defendant upon the plaintiff's brother, which was duly honored by that gentleman. Some time previous to the commencement of this transaction Mr. *Gzowski* had offered the share in question to the defendant as a gift, and upon his declining to accept it upon those terms, had proposed to transfer it in like manner to his daughter. The share stood in this position when Mr. *Cotton* mentioned the plaintiff's proposed purchase of it to the defendant. Mr. *Cotton* knew that it had been offered to the defendant for himself in the first instance, and afterwards for his daughter, by Mr. *Gzowski*. Upon the matter being mentioned by Mr. *Cotton* to the defendant he said he would see Mr. *Gzowski* on the subject. He saw Mr. *Gzowski* accordingly, a day or two afterwards, and having arranged with him for paying him 75*l.* for the share, he again saw Mr. *Cotton*, and then the share was purchased by Mr. *Cotton* for the plaintiff for 300*l.* Immediately on the conclusion of the transaction Mr. *Cotton* telegraphed to the plaintiff's brother in these words: "Mr. *Cameron* takes title for your brother," and upon the same occasion the defendant, by desire of Mr. *Cotton*, addressed a letter by post to the plaintiff's

Judgment.

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brother, in which he says that he "had secured a share in the Company" for the plaintiff, and that by desire of their mutual friend Mr. Cotton, he drew upon him for 300*l.*, to enable him to arrange with the party. The letter then proceeds to state that further payments would soon become necessary on account of the share. The defendant discounted the draft for 300*l.*, and received the proceeds of it by their being placed to his credit sometime before he paid the 75*l.* to Mr. Gzowski. Upon plaintiff's discovering that the defendant had purchased the share in question from Mr. Gzowski for 75*l.*, and resold it to him for 300*l.*, he charged him with breach of duty as his agent, and differences having arisen between them and the other members of the company together, the defendant refunded all that he had paid on account of the share with interest, and received a transfer of it from him. Under these circumstances the present suit has been instituted by the plaintiff, who insists in his bill that the defendant was his agent to purchase the share in question for him from Mr. Gzowski; that it was his duty as such agent to procure the share for the smallest possible price for the plaintiff; and that having purchased it for 75*l.* from Mr. Gzowski and resold it to the plaintiff for 300*l.*, he was guilty of a breach of duty; and that consequently the purchase from Gzowski must be deemed to have been made for the plaintiff's benefit. The defendant in his answer entirely denies the agency imputed to him, and insists that, being the owner of the share, he sold it to Mr. Cotton as the agent of the plaintiff for 300*l.* He endeavors to explain the language of the letter addressed by him to the plaintiff's brother, informing him of the purchase of the share, by stating that he wrote it in a hurry instead of Mr. Cotton, and inadvertently employed in it his usual phrasology as a broker. If the facts are as the plaintiff contends they are, the legal consequences which he draws from them must inevitably follow. It is too clear for argument that the defendant had accepted the office of agent to the plaintiff for the purchase of the share in question, and

1857.

Anderson  
v.  
Cameron.

Judgment

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 Anderson  
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Judgment.

had afterwards purchased it for his own benefit for less than he asked and received from the plaintiff, he would be compelled to refund the difference, as he would be deemed to have made the purchase in trust for the plaintiff. The question is, however, whether any such agency existed. The plaintiff appeals forcibly to the language of the letter which has been mentioned, as utterly irreconcilable with any other hypothesis, and cites the case of *O'Brien v. Cornwall*, before the Lord Chancellor of Ireland (a). That case, however, was very different from the present. There the fact of agency was undisputed, and the agent having in his letter made a false representation to the principal, was held bound by it. Here the very fact of agency is disputed, and the letter in question, however strong the language may be, is merely evidence of that fact. No personal communication took place between the plaintiff and defendant, and they did not meet, nor did any correspondence occur between them before the purchase of the share. If the defendant was employed by any one as the plaintiff's agent it must have been by Mr. Cotton; but the whole tenor of Cotton's and the defendant's own evidence goes to negative the fact. Looking to the oral evidence exclusively, it would seem clear that Cotton alone acted as the plaintiff's agent, and that he negotiated with the defendant as with a third person having no connexion with the plaintiff whatever, and that he perfectly understood that defendant having refused the offer of the share from Mr. Gzowski, and having the opportunity of becoming the owner of it, on terms peculiarly favorable, did in fact purchase it himself and resell it to him on behalf of the plaintiff at an advance. Then is the mere language of a letter written perhaps in haste and inadvertently, sufficient to rebut this clear and uniform testimony? We think not, and therefore, that the fact of the agency is not established. I have not the least doubt that the plaintiff believed the defendant to have acted as his agent in the purchase,

(a) 3 W. Ch. Rep. 130.

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and that the manner in which Mr. *Cotton* spoke to him about the defendant, perhaps unintentionally, led him to that conclusion. But it does not appear that Mr. *Cotton* ever used a single expression to the defendant calculated to create any impression on his mind that he was to act as agent to the plaintiff. It is unfortunate that the parties did not meet before the purchase was concluded. Their communication was entirely through the medium of Mr. *Cotton*, who, I think, spoke inconsistently to the two parties on the subject, probably without intending it, as he could have no motive for acting in such a manner. He probably did not sufficiently weigh the effect of the expressions he used in his intercourse with the plaintiff, and thereby misled him into the belief that the defendant was his agent. Had he communicated to each party the actual expressions he had used in his intercourse with the other, it would have been manifest to the plaintiff that the defendant was not acting as his agent; and the defendant would have perceived that the plaintiff regarded him in that light, and so an explanation would have followed. It may be supposed that the defendant, not liking that the plaintiff should know that he had purchased the share for so much less than he asked for it, wrote the letter upon which so much stress was laid, in order to conceal that fact. If that was his motive for writing such a letter, it may be that the court would not allow the sale to stand, but that would be, I think, the utmost extent of the relief that the court would give: that it is to say, it would order repayment of all moneys that had been paid by the plaintiff on account of the share with interest, he accounting for the intermediate profits of the share. Now this is precisely what has occurred in the present case, the other members of the company having repaid to the plaintiff all that he had paid on account of the share, with interest, and received a transfer of the share from him. Upon the whole we are of opinion that as the plaintiff has failed to establish the fact of agency upon which his whole case turns, the motion must be refused; but as the plaintiff, we are con-

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vinced, acted under a misapprehension which the improper or imprudent letter of the defendant mainly contributed to occasion, we think it should be without costs. I may remark that the present suit is hardly consistent with the arrangement that was made upon the retirement of the plaintiff from the company, and that probably this consideration alone would have been sufficient to induce the court to dispose of the case in the way it has done, had our opinion on the other point been different, although we should have been loth to impute anything like bad faith to the plaintiff, whose conduct in other respects seems free from reproach.

GILMOUR V. CAMERON:

*Mortgage—Judgment Creditor—Collateral Security.*

A judgment creditor coming to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee, to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. Therefore, where judgment had been recovered and duly registered against a party who had a contingent interest in real and personal property, subject to a mortgage executed by way of security for advances, and the debtor having effected an insurance upon his life, which he had also assigned to the same person as an indemnity against loss in respect of a bond executed by him as surety for the debtor. *Held*, that the judgment creditor of the mortgagor upon paying the amount due under the mortgage and indemnifying the mortgagee in respect of his liability as surety, were entitled to a transfer of the policy of insurance, and also of the mortgage upon the contingent interest, and to foreclose the mortgagor in default of payment.

The bill in this case was filed by *Isaac C. Gilmour, George F. Coulson, Robert Gilmour, Duncan McDonnell, and Alfred H. Coulson*, against *Archibald Cameron*, and the Honorable *John Hillyard Cameron*, stating that on the 5th of February, 1849, the plaintiff's recovered judgment in the Court of Queen's Bench against the defendant, *Archibald Cameron*, for 3368*l.* 11*s.* 6*d.*, debt and costs, which was duly registered in the registry office of the county of York pursuant to the statute, on the following day; and on the 29th day of May, 1851, re-registered under the

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statute of 1850 in that behalf, and a writ against the lands of the defendant was issued and placed in the hands of the sheriff of York.

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Cameron.

The bill further stated that the late *Duncan Cameron*, the father of *Archibald*, by his will devised all his estate real and personal to trustees therein named upon trust for his wife for life, and after her death to his children then living, share and share alike, particularising a certain part of his real estate as the portion to be received by the eldest son, the said defendant, subject to the payment of any excess in value of such portion over and above the portions allotted to the other children. That the other defendant had become security for the defendant *Archibald*, in the Court of Probate, on his being appointed administrator of the estate of a deceased brother, and as an indemnity against such administration bond the defendant, *Archibald*, assigned to him a policy of insurance on his life for 500*l.*, and all his interest in the property devised by the will of his father—The plaintiffs offered to indemnify *John Hillyard Cameron* against any liability in respect of the said bond—claimed a right to redeem him, and to get an assignment of the policy of insurance, and also of the interest in the land devised.

The prayer was the usual one of redemption as against *J. Hillyard Cameron*, and subsequent account against *Archibald Cameron*, and relief consequent thereon.

The defendants answered, and the cause having been put at issue, evidence was taken before the court, the effect of which is clearly stated in the judgment.

Mr. *Vankoughnet*, Q. C., and Mr. *McDonald*, for the plaintiffs.

Mr. *J. Hillyard Cameron* in person.

Mr. *Brough* for the other defendants.

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The authorities referred to appear in the judgment of the court, which was delivered by

THE CHANCELLOR.—This is a bill of redemption and foreclosure under the following circumstances: the defendant, *Archibald Cameron*, being entitled to a contingent interest in certain property, real and personal under the will of his father, conveyed it, by an instrument, dated the 31st of January, 1849, to Mr. *John H. Cameron* as a security for a debt then due, and for future advances. A policy of insurance upon the life of Mr. *Archibald Cameron* was also assigned by this instrument as a further security. Previous to the date of this mortgage *Archibald Cameron* had been appointed administrator of his brother *Hugh Cameron*. Mr. *John H. Cameron* became his surety for the due administration of the estate, and by an instrument under his hand, the precise date of which is not shown, *Archibald Cameron* declared that the premises comprised in the previous mortgage should stand as a security to Mr. *John H. Cameron* against any liabilities which he might incur under the administration bond. The plaintiffs who recovered judgment for a large amount against *Archibald Cameron*, in Hilary Term, 1849, pray to redeem the prior incumbrancer and foreclose the mortgagor.

Judgment.

Had this case been governed by the statute 13 & 14 Victoria, ch. 63, there would not have been, I apprehend, any room for argument; but judgments entered up previous to the 1st of January, 1851, do not come within the operation of that statute, and it is therefore inapplicable to the present case.

The plaintiffs insist, however, that they are entitled to redeem under the provisions of the statute 12 Victoria, ch. 71, and 14 & 15 Victoria, ch. 7. The defendants, on the other hand, contend that the language of those statutes is not more comprehensive than the statute of

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Westminster (a) : that as the latter did not embrace contingent interests, so neither do the former : that the plaintiffs, therefore, could not have realised their debt by common law process, had the mortgage been out of the way, and, consequently, cannot come here to redeem.

There is no foundation for this argument. The statute of Westminster provides that when a debt is recovered or acknowledged in the King's Court, or damages awarded, an election is given to the creditor, to have a *feri facias* unto the sheriff to levy the debt of the lands and good, or that he should deliver to him all the chattels of the debtor (except his oxen and beasts of the plough), and half of the land until his debts be levied by a reasonable extent." This language obviously and necessarily excludes a contingent interest. But the recent statutes were expressly framed to embrace it. The 5th section of the 12th Vic., ch. 63, provides "that any person may convey, assign, or charge by any deed any such contingent or executory interest, right of entry for condition broken, or other future estate or interest as he shall be entitled to, in any freehold or leasehold land, or personal property." And the 13th section of the same statute provides "that any estate, right, title or interest in lands, which under the provisions of the 5th section of this act, might be validly conveyed or assigned by any party, shall be bound by the judgments of any court of record, and shall be liable to seizure and sale under any writ of execution against such party, in like manner, and on like conditions as lands of such party are now by law liable to seizure and sale under execution, and the sheriff selling, the same may convey and assign the same to the purchaser, in like manner and with like effect, as such party might himself have done."

Several sections of this statute, and amongst them the 5th, have been repealed by the 14 & 15 Victoria, ch. 7 ;

(a) 13 Ed. 1, ch. 18.

**1867.** but with reference to the question before us, the provisions of the recent statutes are equally extensive. The 5th section of the latter statute provides, "that a contingent, an executory and a future interest, and a possibility coupled with an interest in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments of any tenure may be disposed of by deed." The 9th section provides "that the 13th section of the previous statute shall extend and be applied to any estate, right, or title, or interest in lands which may be disposed of by deed under the 5th section of that statute."

Now, in the present case, the will of the testator vests all his estate real and personal in trustees in trust for his wife for life, and from and after the death of his wife in trust for such of his children as might be living at her death, share and share alike, with power to his trustees, *in their discretion*, to sell the realty before distribution. It is quite obvious, therefore, that the statutes embrace the defendant's contingent interest in the real estate of his father. The plaintiffs might have realized their debt, therefore, by common law process, had the defendant's interest been legal; and they have a right, consequently, to come here for redemption.

It is argued, however, that neither the life policy nor the contingent interest in the personality could have been reached by common law process, and that the plaintiffs, therefore, have no right to redeem so far as these interests are concerned. But the plaintiffs are clearly entitled to redeem as to the mortgage; and paying the defendant's debt in full, they have necessarily a right to an assignment of all his securities. They stand in his place, and are entitled to the benefit of his contract.

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gagee's claim, his liability as surety for *Archibald Cameron*, cannot be ascertained, and that the estate is therefore irredeemable. Assuming that the mortgagee cannot from the nature of the thing, be relieved from his liability as surety, it does not follow, even then, that the estate is, therefore, irredeemable. In this court it would be necessary to decree a sale or foreclosure subject to the defendant's incumbrance, in like manner as estates are sold subject to annuities, or other incumbrances of that character. But in our opinion the liability of the mortgagee as surety may be ascertained and satisfied by the administration of the estate of *Hugh Cameron* in this court, and we think the plaintiffs entitled to an order for that purpose if they desire it. If not, they may take a decree for foreclosure or sale, subject to the future claim of the mortgagee as surety for *Archibald Cameron*, under the administration bond.

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After this judgment had been pronounced a doubt arose whether *J. H. Cameron* could be foreclosed as to the contingent interest in the real and personal estate, and the cause was ordered to stand over on this point. Afterwards the judgment of the court was delivered by

THE CHANCELLOR.—We adhere to the opinion expressed in my former judgment, that the plaintiffs redeeming the mortgagee *Cameron*, are entitled to a decree of foreclosure against the mortgagor, unless paid the full amount due on foot of both their securities. That is the necessary consequence, as it seems to me, of Lord *Hardwicke's* decision in *Titley v. Davies (a)*. In that case *Jenyns* having mortgaged three estates to *Shepherd*, he mortgaged one of them afterwards to *Titley*, and then disposed of the two others severally, by way of mortgage and sale, to two other persons. Lord *Hardwicke* determined that *Titley* redeeming *Shepherd* could not be redeemed otherwise than entirely. He determined, in other words, that neither the purchaser of the one estate,

(a) 2 Y. & C. C. 399, 1743.

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nor the subsequent mortgagee of the other, could redeem *Titley* except on payment of the full amount due on both mortgages. That decree went obviously much beyond mere marshalling, because had the estate originally mortgaged to *Titley* proved insufficient, he would have had a right to the two other estates included in *Shepherd's* mortgage as an auxiliary security. The effect of which was, that upon redeeming *Shepherd*, *Titley* acquired security for his original mortgage debt upon two estates not included in his own mortgage, and which the mortgagor had never subjected to the payment of that debt.

The principle of that decision is clearly stated by Lord *Hardwicke*, in the course of his judgment. He says: "It is objected, how could *Titley* have a right to be satisfied out of an estate never made liable to his debt? By purchasing in the first mortgage, and thereby acquiring the right of the first mortgagee is the answer;" and again, "I do admit the right which *Shepherd* has to be redeemed entire, and the right which *Titley* has to be redeemed the whole; and that arises on the right of *Shepherd* which he has at the time redemption is called for." And Vice-Chancellor *Knight Bruce*, commenting on *Titley v. Davies*, in a recent case (a), says: "It was held by Lord *Hardwicke* that *Titley* redeeming *Shepherd*, must have the same right as *Shepherd* would have had, if *Shepherd* had bought *Titley's* mortgage, and could not be redeemed otherwise than entirely." Thus resting the case upon the principle to which I have adverted.

Now, *Titley v. Davies*, so far as it is material to the decision of the present case, has never, that I am aware of, been questioned. It is unnecessary for us to consider the only point in the case upon which any doubt has been entertained, because here the equity of redemption has neither been sold nor encumbered—the question is one between mortgagor and mortgagee. That the principle

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(b) *Shuttleworth v. Le Hooke*, 2  
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(c) 7 Hare, 367  
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upon which Lord *Hardwicke* determined that case, so far as it is at present material, had been acknowledged in Lord *Nottingham's* time (a), seventy years before, and has been acted upon as the settled rule of the court ever since (b).

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It is not quite correct, perhaps, to say that the decisions have been entirely uniform, for in two cases recently determined, I allude to *Holmes v. Turner* (c), and *Smeathman v. Bray* (d), an important qualification of the rule laid down by Lord *Hardwicke* appears to have been sanctioned. But *Watts v. Symes* (e), which came before the Court of Appeal in 1851, on an appeal from the Vice-Chancellor of England, affirms very distinctly the doctrine of *Titley v. Davies* in so far as it is material to our present purpose, and must be regarded as overruling the cases to which I have referred. In *Watts v. Symes* the defendant *Symes*, in November, 1844, assigned to Mrs. *Severne*, by way of mortgage, a reversionary interest to which he was entitled in the residuary personal estate of Mrs. *Pidsley*, which was vested in the trustees of her will. Judgment.

In May, 1845, he assigned the same interest, subject to the above security, to the plaintiff *Watts*, to secure 400*l.*, the security being in the form of an assignment upon trust for sale, and for payment of the residue to *Symes* after the payment of the 400*l.* and interest.

In July, 1846, *Symes* agreed to sell his reversionary interest to the defendant *Tanner*; but before the sale was completed Mrs. *Severne* required to be paid off, and *Tanner*, at the request of *Symes*, paid to her the amount of her mortgage debt and interest.

(a) *Purefoy v. Purefoy*, 1 Ver. 29, 1681.

(b) *Shuttleworth v. Laycock*, 1 Ver. 245; *Guilford* 1684; *Mayrabe v. Le Hooke*, 2 Ver. 207; *Serg. Maynard*, F. S. 1690; *Pope v. Ourion*, 2 Ver. 286; *The Rolls*, 1692; *Carter v. Charlton*, 2 Ves. Jr. 378, 1775; *Collett v. Mander*, 2 Ves. Jr. 378; *Lord Kenyon*, 1786.

(c) 7 Hare, 367, note. (d) 15 Jur. 1051. (e) 16 Jur. 114, and see *Thornycroft v. Crockett*, 2 H. L. 239.

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When the assignment was made to *Watts*, he was already mortgagee of other property to secure another debt of 200*l.*, which was quite unconnected with the subsequent loan of 400*l.*

*Watts* then filed his bill to foreclose *Symes* and *Tanner* in default of their paying up all that was due on both securities.

At the hearing *Tanner* insisted that he was entitled to the benefit of Mrs. *Severne's* security; and further, that he was entitled, at all events, to redeem the reversionary interest separately, on payment of the sum due, under the assignment of July, 1846. The Vice-Chancellor decided against him on the former of the contentions, and in his favor upon the latter.

Judgment. The plaintiff appealed from that portion of the decree which declared that *Tanner* was entitled to redeem one of the mortgages only; but *Tanner* did not appeal from the former part which was adverse to him. When the appeal was opened, however, the Lords Justices called the attention of the appellant's counsel to the former part of the decree, and reversed it without hearing the respondent's counsel; and when the counsel for the appellants were proceeding to argue the point on which they had appealed, their Lordships called upon the respondent's counsel to support that part of the decree. The learned counsel for the defendants relied upon the language of the deed of July, 1846, which indicated a clear intention, they argued, to keep the security for the payment of the 400*l.* distinct from the security for 200*l.* But Lord Justice *Knight Bruce* said: "It is clear on general principles, that if A. mortgages to B. an estate X., and then an estate Y., he must redeem both or neither. The particular instrument in this case does not appear to exclude that general principle." And in answer to the argument that the trusts in the power of sale were express to pay the surplus to the mortgagor, he says:

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"Do you argue, then, that if he exercised the power of sale, he could be compelled to pay the surplus, if there were a surplus, to the mortgagor, though the mortgagor owed him 200*l.* on another transaction? It is a clear case of set-off or retainer, and it would be a subversion of all equity and justice if that were not held to be so. Lord *Cranworth* says (a): "I thought it was quite settled that whether the suit was for foreclosure or redemption, the mortgagee was equally entitled to say to the mortgagor, you must redeem entirely or not at all. That is the general rule, and I have looked in vain in the deed in this case for any thing special."

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I take it to be quite settled, therefore, that when a subsequent mortgagee redeems a prior mortgage, he is entitled to hold the estates comprised in both the mortgages until he is paid both debts. He stands in the place of the prior mortgagee and has all his rights, and is therefore entitled to say to the mortgagor you must either redeem me entirely or not at all.

Judgment.

What, then, are the rights of a judgment creditor coming to redeem? It is clear that a judgment creditor is entitled to redeem a prior mortgage affecting his debtor's freehold; and it is equally clear, I apprehend, that redeeming, he stands in the place of the mortgagee, and is entitled to foreclose the mortgagor unless paid both debts (b). It is not denied, I believe, that this is the general rule. But it is said that a judgment creditor is only entitled to redeem in virtue of his lien: that the mortgage in the present case includes a contingent interest in personal estate, as well as freehold: and it is argued that the judgment creditor cannot acquire a security, by redeeming, upon any interest which was not subject to the lien of his judgment, and as the judgment

(a) See the Rep. 1 D. M. & G. 246.

(b) Seaton on Decrees, page 168; Coote on Mortgages, 45 & 500, 3rd edition; *Stileman v. Ashdown*, Amb. 14; *Lisk v. Hopkins*, Amb. 796; *Ford v. Wastell*, 6 Har. 229; S. C. 2 Phil. 591; *Jones v. Bailey*, 17 Beav. 581.

1857. did not constitute a lien upon the contingent interest in the personal estate, that interest cannot be subject to the payment of the mortgage debt, and the mortgagor must be entitled to redeem it, consequently, on payment of the mortgage debt only.

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I cannot accede to that argument. It is in my humble judgment inconsistent with settled principles, and contrary to numerous authorities. The plaintiffs redeeming *Cameron* stand in his place, and to borrow the language of Vice-Chancellor *Knight Bruce*: "Must have the same rights as *Cameron* would have had if he had bought the plaintiffs' judgment." And if *Cameron* purchasing the plaintiffs' judgment would be entitled to tack it to his mortgage, it is quite clear that the plaintiffs redeeming must have the same right, unless we are to overrule *Titley v. Davies* and numerous other authorities prior and subsequent to that case. Now, what would have been *Cameron's* right if he had bought the plaintiffs' judgment, or if he had himself recovered a judgment against his mortgagor? It is perfectly clear, I think, that he would have been entitled in either case to tack the judgment to his mortgage. That position is, I believe, doubted. It is said a tack is permitted with respect to judgments because the creditor is presumed to advance his money on the security of the mortgagor's land, upon which the judgment is a lien; and it is said that there is no room for any such inference when the judgment has been recovered adversely. But that argument cannot, I think, be maintained. Mr. *Coote* in his work on Mortgages (a), states the rule of the court, as I think, accurately. He says: "It is equity that the creditor shall not be dispossessed of his pledge without payment of all sums of money due to him from his debtor which form a general or specific lien upon the land." Now, without considering what the position of a judgment creditor would have been under the old law, it is plain

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(a) Page 389.

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that the recent statute "makes a registered judgment a charge upon lands." (a). It gives the judgment creditor the same rights and remedies as if the debtor had agreed by writing under his hand to charge the lands; and it cannot be doubted, I think, that a mortgagee who recovers a judgment against his mortgagor adversely, and registers it, has a right to tack. Then, if *Cameron* had recovered a judgment against his mortgagor under the circumstances of the present case, would the mortgagor have had a right to redeem the contingent interest in the personalty without paying off that judgment? Clearly not as it seems to me. Take a case much stronger for the mortgagor. If two mortgages had been executed upon distinct transactions, instead of one mortgage upon a single transaction, and if those mortgages had been quite distinct, would the mortgagor have had a right to redeem either separately? Certainly not, unless we are prepared to determine that *Watts v. Symes* and all the previous cases were wrongly decided. Then suppose *Cameron* to have recovered a judgment under these circumstances, could the mortgagee have redeemed the personalty without paying the judgment debt? I apprehend not. *Cameron* would have had a right to say, you must redeem me entirely or not at all; you cannot redeem the personalty without redeeming the freehold also, both the judgment and mortgage are blended together, and form in effect one charge on the freehold, and both must be paid before you can claim a reconveyance. Now, if *Cameron* would be entitled to that right in the case I have supposed, it must be admitted, I think, that his equity is at least as strong in the present case, where there is but one transaction and a single security; and, if that be so, it is clear that the plaintiffs' redeeming *Cameron* stand in his place, and are entitled to all his rights.

The argument against this view of the law, to which I have adverted, is not, I think, of much weight; but

(a) 13 & 14 Vic., ch. 63, sec. 1.

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whatever might have been its force if the matter had been *res integra*, it cannot prevail now, because it has been repeatedly decided that it is insufficient to outweigh the plaintiffs' equity. To say that a decision in the plaintiffs' favor would be to give them security upon property not subject to the lien of their judgment, is only to repeat what has been said in almost every discussion that has arisen upon this doctrine. It was much pressed, but without effect, not only in *Titley v. Davies*, but in *Stileman v. Ashdown*, reported in *Ambler (a)*, and in *Lisk v. Hopkins*, which will be found in Appendix B. of the same book.

But the argument involves, I humbly conceive, a misconception of the principle upon which the cases proceed. The right to be redeemed entire, to hold the mortgage property until both debts are paid, does not belong to the plaintiff in virtue of his judgment, but because he stands in the place of the mortgagee. He is allowed, to redeem, indeed, because the judgment is a lien, but in the act of redeeming he acquires new rights, which did not belong to him as judgment creditor, the judgment becomes thereby incorporated with the mortgage, and the judgment creditor as standing in the place of the mortgagee, is entitled to hold the estate until both debts, thus blended into one, are paid. *Baker v. Harris (b)* furnishes a striking illustration of what I understand to be the doctrine of the court upon this subject. In that case *Monday* had advanced a sum of money to *Sheppard*, which was secured by mortgage; and a further sum, which was secured by a bond and warrant to confess judgment. *Sheppard* became bankrupt before any execution had been issued upon the judgment; and the assignees contended that *Monday* was precluded by the express provisions of the statute of James, from tacking this judgment to his mortgage. Sir *Samuel Romilly* said: "The statute was decisive, declaring that a creditor hav-

(a) 1 Amb. 13.

(b) 16 Ves. 397.

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ing security by judgment, &c., whereof there is no execution served and executed, upon any lands, &c., shall not be relieved upon any such judgment;" and the language of the act is certainly very strong. But Sir Wm. Grant decided in favor of the right to tack. He said at the close of the argument: "As this is said to be a question that has never yet received a decision, it may be proper to give it some consideration: but I own, it appears to me, to be very difficult to conceive how a supervening bankruptcy can affect the right of the first mortgagee. The statute relates to judgments that are properly and merely judgments. The question will be whether this has not ceased to be such, and become in contemplation of equity, blended and incorporated with the mortgage; so as to make in effect one entire mortgage, for one entire sum. Then it comes to this, that there are two mortgages before the bankruptcy; and both are equally available against the assignees." And on a subsequent day, he said that subsequent reflection had confirmed him in the opinion he had previously expressed. Now, that decision was pronounced under a state of the law materially different from that which now prevails. As the law now stands a registered judgment is equivalent to an agreement under the hand of the debtor to charge his lands; a consideration which seems to me decisive of the present case.

1857.

Gilmour  
v.  
Cameron.

Judgment.

A question very analogous to the present case arose upon the Irish Registry Act (a). The 4th section of that act provides that all deeds, &c., are to take effect according to the order of their registration. That clause in effect precludes tacking as against a registered mortgage; but as there is no similar provision respecting judgments, a subsequent mortgage may be tacked as against intervening judgments. Then this case arose. The owner in fee made a mortgage which was duly registered. Several judgments were subsequently recovered against him, and he then executed a second mortgage which was not put

(a) 6 Ann, ch. 2.

1857.  
 Ollmour  
 v.  
 Cameron.

upon the registry. The second mortgagee purchased in the first mortgage, and of course if any question had then arisen he would have had a right to tack, and would have gained thereby priority over the judgment creditors. But, before any question arose, the mortgagor executed a third mortgage, which was duly registered, and it was determined that the second mortgage was thereby postponed not only to the registered mortgage, but also to the judgment creditors. It was admitted there that the second mortgage would have been entitled to priority over the judgments, by tacking, if the third mortgage had not been registered; but as the third mortgage had gained priority, by registration, and as the judgments were entitled to rank before it, the second mortgagee was compelled to pay both. A case much stronger as it seems to me than the present (*a*).

Judgment.

It is said however, that the case of *Cameron v. Pack* (*b*), is a direct authority against the plaintiff. But that case, as it seems to me, has not any application. Had the present case been similar in its circumstances—had the mortgage been confined to the reversionary interest in the personalty, the question now before us could never have arisen, because the plaintiffs would not have been entitled to redeem at all, and this equity clearly grows out of, and is the consequence of redemption. But here the mortgage includes freeholds; it is admitted that the plaintiffs have, for that reason, a right to redeem; and the equity which they claim is, in my humble judgment, the necessary consequence.

Into the reasoning upon which the cases proceed I have not allowed myself to enter, because I did not feel at liberty to question a doctrine so long and so firmly established. Governing myself by an unbroken series of decisions reaching to the time of Lord *Nottingham*, I think the plaintiffs clearly entitled to the relief for which they ask.

(*a*) *Latouche v. Lord Dunzany* 1 S. & L. 137; *Drew v. Earl Norbury*, 3 J. & L. 297.

(*b*) 6 Ves. 222.

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ESTEN, V. C.  
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## SHERWOOD V. FREELAND.

1857.

Sherwood  
v.  
Freeland.*Practice—Personal representation.*

By order XXX. (1853) the court may proceed without any personal representative of a deceased person where none has been appointed; or, may appoint some person to represent the estate for the purpose of the suit: this does not apply to cases where parties have a substantial or beneficial interest, but applies only to cases of mere formal parties.

This was a foreclosure suit, and had been brought on to be heard *pro confesso*: the mortgagee had made a mortgage of his interest and died; and his mortgagee assigned his interest to the plaintiff, who filed the bill, no personal representative of the original mortgagee being before the court.

Mr. *Strong* for plaintiff, asked for the usual decree of foreclosure, referring it to the Master to take an account, suggesting that the court might appoint a person to represent the estate of *Sanderson*, the original mortgagee. November 10  
The court having taken time to look into the point.

Judgment was now delivered by

ESTEN, V. C.—In this case one *Sanderson* having a mortgage upon the property in question made a mortgage of that mortgage to one *Moulson* with a power of sale. *Moulson* does not exercise the power of sale, but simply transfers the mortgage to the plaintiff. *Sanderson's* representative, he being dead, seems have a substantial interest, and is a necessary party to the suit. It was suggested that a person could be appointed to represent his estate, and that he could be made a party in the Master's office. The decree, perhaps, could be framed in such a way as to admit of his being made a party in the Master's office, but we do not think it a case to which the order of court applies, and which seems to be confined to cases of mere formal parties, having no substantial or beneficial interest.

1857.

Graves  
v.  
Smith.

## GRAVES V. SMITH.

*Attorney and client.*

An attorney during the progress of a suit, brought by him for the recovery of certain lands, with the sanction and approval of the family of the plaintiff, although without his knowledge, and without instructions from him or his agent, became aware of an outstanding legal estate which he purchased for 25*l.* and afterwards set this title up in opposition to the claims of his client. Upon a bill filed for that purpose the court declared the attorney trustee for the client, who was bound to pay the attorney the amount expended by him in buying up the legal title, and in improving the property; to be set off against the rents and profits received by him, and the costs of the suit; and the fact that the plaintiff was not aware of the proceedings taken in his name made no difference in respect of his rights as against the attorney.

The facts of the case, and arguments of counsel are clearly set forth in the judgment.

Mr. *Roaf* for plaintiff.

Mr. *Crickmore* for defendants.

The judgment of the court was delivered by

*Judgment.*

SPRAGGE, V. C.—The bill is filed for the purpose of having the defendants declared trustees of certain lands, the legal estate in which became vested in them, while acting in the prosecution of the rights of the plaintiff to those lands, as his attorneys, as it is alleged; and for consequential relief.

For several years before the year 1846, the present plaintiff had been absent from Canada, and at the above date it was uncertain whether or not he was still living. The defendants were partners in the profession of the law, residing at Kingston, and appear to have learned from a Mr. *George Graves*, a cousin of the plaintiff, that certain lands in the township of Pittsburgh had belonged to one Captain *Adam Graves*, the grandfather of the plaintiff, and of whom the plaintiff was heir; and that they were in the possession of mere trespassers; under

these circumstances proposed to be set off in Sorel, L. recovery of mother as upon brought possession.

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A second action

these circumstances Mr. *Smith*, one of the defendants, proposed to the mother of the plaintiff, who was residing in Sorel, Lower Canada, to take legal proceedings for the recovery of the lands. To this proposition the plaintiff's mother assented, and an action of ejectment was thereupon brought by the defendants against the parties in possession.

1857.

Graves  
v.  
Smith.

It seems clear that in taking this proceeding the defendants acted as attorneys of the plaintiff. In Mr. *Smith's* letter to Mrs. *Graves*, of the 6th of July, 1846, is this passage: "Should your son return to Canada it would be a fine property for him to get;" and in the action the plaintiff in this suit was named as lessor of the plaintiff.

Pending these proceedings and before any trial took place the defendants learned that there existed a deed from one *Doty* to a Mr. *Samuel S. Bridges* of Montreal, conveying to the latter the lands in question in the ejectment; but no conveyance from Captain *Adam Graves*, or any one claiming under him to *Doty* was then discovered. The defendant, *H. Smith*, being in Montreal in the year 1849, obtained a conveyance from *Thomas Henry Bridges*, heir-at-law of *Samuel*, of the lands in question, the consideration for which, 25*l.*, was paid by Mr. *Smith*. and he took the conveyance to himself.

After this conveyance the action of ejectment was proceeded with, and came down to trial in September, 1849, when a verdict was rendered for the defendant, upon the ground that the lessor of the plaintiff had been absent beyond seas, and not heard of for upwards of seven years. In fact he had been heard from in April, 1843, a fact of which Mr. *Smith* was aware, but from a reluctance in the family to produce his letter, the fact was not proved.

A second action of ejectment was then commenced.

1857.  
Graves  
v.  
Smith.

and this time in the name as well of this plaintiff as also of *James* his next eldest brother. It became unnecessary to carry this second action down to trial, as the tenants in possession offered no further opposition, but submitted to give up possession to the plaintiffs in ejectment. This was followed by an arrangement between Messrs. *Smith* and *Henderson* and *James Graves*; which resulted in the conveyance of the lands by Mr. *Smith* to *James Graves*; *James Graves* then conveying certain of the lands to Mr. *Smith*, and certain of them to Mr. *Henderson*, and retaining other portions himself. In 1852 certain adverse proceedings took place in the Court of Queen's Bench upon the complaint of *James Graves* against Messrs. *Smith* and *Henderson*, and affidavits were thereupon made by those gentlemen in which they explained at considerable length their connexion with the recovery of the lands in question. In 1853 the missing deed to *Doty*, from parties claiming under Captain *Adam Graves*, that is to say, from his widow and his heir-at-law, was discovered.

Judgment.

In the year 1854 the present plaintiff returned to Canada and claimed, and now claims, the land as heir-at-law of the late Captain *Adam Graves*.

The defence made by the defendants' answer is in effect, to set up the title of *Thomas Henry Bridges* against that of the heir of Captain *Adam Graves*: the defendants derive title from those entitled under Captain *Adam Graves* to *Doty*, and from *Doty* through *Bridges* to themselves; they rely upon that title, and upon the fact that the consideration for the conveyance from *Bridges* to Mr. *Smith* was paid by Mr. *Smith* out of his own moneys.

From the circumstances presented it is perfectly clear that at the time of the conveyance from *Bridges* to Mr. *Smith*, Mr. *Smith* and his partner *Henderson* were prosecuting a claim on behalf of the heir of Captain

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1857.

Graves  
v.  
Smith.

*Adam Graves*, for the recovery of the same lands of which he took a conveyance from *Bridges*, and that he then believed as the fact was that the present plaintiff was that heir-at-law. Further, it is clear that in acquiring the title of *Bridges*, he did so as buying in an outstanding title or legal claim, which might interfere with the claim which he was prosecuting, not as acquiring to himself a title adverse to it; this is clear from his position at the time, and from his continuing the proceedings at law in the name of *George Graves*; and afterwards prosecuting an action for the recovery of the same lands in the name of *George* and *James Graves*.

It is too clear for argument, that he could not while so acting repudiate his character of attorney, and assume the hostile position of purchasing adversely; any title got in by an attorney under such circumstances, even though it might turn out to be a better title than that of his client, must be taken to be acquired for the benefit of his client. A contrary doctrine would place the interest of the attorney in conflict with his duty, for while it would be his duty to support his client's title, it would become his interest to destroy it, the moment he could acquire an adverse interest in himself. Judgment.

The rule is clear: the attorney is the agent of the client to recover the land for him: it would be inconsistent with that agency to acquire it for himself; and if he does, the law will still fix him with the agency, and declare him, what in truth he is, a trustee for his principal.

It is contended that the defendants were not attorneys for the plaintiff, because the plaintiff did not retain them, and might have repudiated their proceedings.

Having assumed to act as his attorneys, they cannot deny that they were so; they cannot disclaim a character in which they professed to act; and the plaintiff's power

1857.

Graves  
v.  
Smith

to repudiate can make no difference : such power exists upon the coming of age of an infant in whose behalf proceedings have been taken during his minority, but the attorney who has acted for him cannot repudiate his character of attorney.

The distinction between acting for *George* and for *James* is equally without foundation, and in truth they were acting for *George*, and in his name ; but had they been acting in the name of *James* throughout as they did in fact after the failure of the first action of ejectment, we cannot see that it would make any difference : they were acting professedly for the heir of Capt. *Adam Graves*, and if they used the name of a younger grandson, supposing, mistakenly, the elder to be dead, they could not, we apprehend, acquire any interest in themselves while so acting, adverse to that of the real heir-at-law.

**Judgment.** There is another consideration which shews still more plainly the position of Mr. *Smith* upon getting in the title of *Bridges*, and which demonstrates that it appearing afterwards, if it did so appear, that the title of *Bridges* was the better title, can make no difference, and it is this : Mr. *Smith* being agent for another, should not have taken the title to himself. If uncertain whether the present plaintiff was alive, he should have taken it in trust for the heir-at-law whoever he might be.

Thus far I have treated of the law as resulting from the position of the parties, which would not have varied if Mr. *Smith* had purchased avowedly for his own benefit ; but in fact he did purchase, not for himself or his partner, but on behalf of those whose claim he was prosecuting. This appears from two passages in the examination of the defendant *Henderson* : " Mr. *Smith* told me on his return from Montreal that he had purchased the lands from *Bridges*. I understood that he had purchased on behalf of *Graves*—*James Graves*, I think ; but I cannot say that

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he said so. If we had had any idea that *George Graves* was then alive, we should certainly have conveyed to him \* \* \* \* *Bridges* title was ascertained before the trial in 1849, and, I think, negotiations were opened with *Bridges*, as soon as it was known that he had some title. I then thought *George Graves* was dead."

1857.

Graves  
v.  
Smith.

In the affidavits used by the defendants in answering the complaint of *James Graves*, the same fact is reiterated in express terms, especially in the affidavit of Mr. *Smith*; and these affidavits are of course binding upon both, as they were used by both upon that application—the long affidavit of Mr. *Smith*, is indeed, as well as Mr. *Henderson's* own affidavit, in the handwriting of the latter gentleman.

Upon the whole, we are clearly of opinion that the ground taken by the defendants is wholly untenable, and that they cannot hold any land which they recovered or required for the heir of *Adam Graves*, against the heir of *Adam Graves*; and that the lands acquired from *Bridges* Judgment. were acquired for such heir, which heir, it is not denied, is the plaintiff in this suit.

We think the defendants are answerable in this suit for all of these lands that they now hold. For any lands held by *James Graves* the remedy should be against him; and for any other lands, the parties in whose hands they may be, must be parties to suits for their recovery.

The defendants are entitled to be reimbursed the 25*l.* paid to *Bridges*, and for any other expenses incurred in protecting the title of the plaintiff, with interest, and to be paid their bill of costs in the recovery of the land, to be taxed. On the other hand, they will be accountable for rents and profits received; and be entitled to payment for repairs and improvements made. The costs of the suit must be paid by the defendants.

1857.

Gale  
v.  
Hubert.

## GALE V. HUBERT.

*Rescinding agreement.*

The owner of a mill property wrote to an intending purchaser, "I will sell the mill as it now stands, at Glenmorris, with all rights and privileges belonging to it, as sold me; and I will guarantee to give a head of five feet, by laying out about thirty pounds; but as it is there is four feet, and there is water enough to run ten run of stones if necessary." *Held*, that these representations amounted to express guarantees upon the several points embraced in them; and it being shewn a head of five feet of water could not be obtained except by an outlay of a large sum of money, and that raising the water to that height would have the effect of damming back the water on the lands of parties higher up the stream, and also of diverting water to which the riparian proprietor on the other side of the stream was entitled; the court ordered the agreement entered into to be rescinded, and the vendor to pay the costs of the suit and the amount expended in repairing the premises by the vendee, who was to account for rents and profits during his possession.

The bill in this cause was filed for the purpose of rescinding an agreement for the purchase of a mill property owned by the defendant, under the circumstances set forth in the judgment.

## Argument.

Mr. Mowat, Q. C., and Mr. Roaf for plaintiff, cited *Pulford v. Richards (a)*, *West v. James (b)*.

Mr. Strong and Mr. Matheson for defendant, referred to *Jennings v. Broughton (c)*, *Clapham v. Shillitoe (d)*.

The judgment of the court was delivered by

SPRAGGE, V. C.—In 1855 the defendant was the owner of a mill site on a tributary of the Grand River; and had put up, but not entirely finished, a grist mill thereupon. In April of that year the plaintiff and defendant were in treaty for the sale, by the defendant to the plaintiff of those mill premises. The state of the premises is described in substance to have been that the floor of the mill and the tail race were much obstructed by rubbish and offal, and that a large quantity of ice was in the tail race; that it was difficult to form any accurate judgment in regard

(a) 17 Beav. 87.  
(c) 17 Beav. 234.

(b) 1 Sim. N. S. 205.  
(d) 7 Beav. 146.

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to the mill and its capabilities: the owner was a millwright by profession; the intending purchaser had been engaged in mercantile business in Lower Canada, and appears to have been unacquainted with mills. Under these circumstances the plaintiff, before making his purchase, required, and the defendant gave, a written paper to the plaintiff in the following terms:—

1857.

Gale  
v.  
Hubert.

Mr. *John V. Gale* :—

SIR,—I will sell the mill as it now stands at Glenmorris, with all rights and privileges belonging to it as sold me; and I will guarantee a head of five feet, by laying out about thirty pounds; but as it is there is four feet, and there is water enough to run ten run of stones if necessary: the price for said mill as follows, is 6500 dollars, (the terms of payment are then given, and it is added), and it is moreover agreed that I wait for fourteen days for an answer as to whether you accept this offer or not, and which is binding on my part.

Dated at Blenheim, 4th April, 1855.

Judgment

GEORGE HUBERT.

On the 16th of April a formal agreement was entered into for the purchase; the plaintiff entered into possession, put the mill into working order, and worked it.

The above paper is insisted upon by the plaintiff as a representation in regard to the mill property upon the faith of which he entered into the contract of purchase, and an express guaranty in relation to the several points embraced in it. These points appear to be three—1st: that as the mill was then constructed "as it is," there were *four* feet head of water. 2nd: that by laying out about 30*l.* a head of *five* feet could be obtained; and thirdly: that there was water enough to run ten run of stones.

The stream upon which the mill is built is at that point

1857. divided into two channels by a long island, and the mill is situated on the smaller of the two channels; the water, therefore, can only be raised at the mill, to the same height as at the head of the island, without the water flowing down the other channel.

Gale  
v.  
Hubert.

We think that the representations contained in the paper cited are binding upon the defendant, and amount to express guaranties upon the several points embraced in them. We do not look upon either of them as mere expressions of opinion, but as given and received in order to guide the plaintiff as to whether he should or should not purchase the property, for the purchase of which he was in treaty.

Judgment.

Upon the first point—that there was a head of four feet, without the alterations by which it could be raised to five feet, there is a great deal of evidence, and it is conflicting. On the one hand, those who have worked the mill depose as to their inability to obtain as much as three feet of water; while two surveyors depose, that after taking levels at the head of the island, and the foot of the tail race, they found a difference of four feet; and they point to a defect in the construction of the tail race, and to obstructions in it, as giving less head of water than the mill site was capable of giving. It would seem, according to their view, that the mill and the head of the tail race should have been placed lower; but they made their survey at a time when the water was usually low; and besides the mill had been placed where it was by the defendant himself, and the words used in his guaranty are “as it is.” The evidence upon this point is not so clear one way or other; but that it would have been proper to direct further inquiry upon the point, if the evidence were not sufficiently clear upon other points.

Upon the second point then, the only mode suggested for giving the mill a head of five feet is by carrying a dam from the head of the island to which I have referred,

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to a small island in the opposite channel, and then to the opposite shore, and thus diverting a portion of the water naturally flowing down the opposite channel: the expense of this is variously estimated at from 50*l.* to 100*l.*; but the more serious difficulties are, that it could not be done without seriously infringing the rights of others, by backing water upon the lands of those higher up the stream, and by diverting water to which the riparian proprietor on the opposite side of the stream is entitled.

1857.

Gale  
v.  
Hubert.

The third point is also against the defendant: it is in evidence that there is not sufficient water to work ten run of stones, or nearly that number; at least without diverting the whole of the water from the opposite channel.

According to the evidence but one run of stones can ordinarily be worked; and it is not pretended that the water naturally flowing down the channel upon which the mill is built is sufficient for the the supply of a mill at all fitted to do the extensive business which one having ten run of stones, or nearly that number, is intended to do. Judgment.

It is contended that the difference between the mill as it was represented to be, and as it is proved to be, may be a proper subject of compensation. We cannot agree in this. It might be forcing upon a man a property which if truly represented to him he would not have thought of purchasing. A man desires to purchase a property which will enable him to carry on business on a large scale, contemplating the purchase of such a property, and no other—one calculated for a small business not suiting his views—and a certain property is guaranteed as fit for such large business; it would be unreasonable to compel him to retain a property quite unfit for any but a small business, only allowing him the difference between the value of the one and of the other. After contracting for one thing, it would be forcing him to take another; and we think the difference in this case between the mill property contracted for, and the mill property as it really turns

1857. out, is so great as not to be a mere difference in amount, but to be a substantial difference in the character of the property purchased; and that it is not a proper subject for compensation.

Gale  
v.  
Hubert.

We think the plaintiff entitled to the first part of the prayer of his bill, which is, that the agreement be rescinded, and that the defendant should be ordered to make good to the plaintiff the amount by him expended on the faith of the representations set forth in the bill. The decree must be with costs.

Decree.

DECLARE, that the sale by the defendant to the plaintiff, of the premises in the pleadings mentioned, ought to be cancelled and set aside, order and decree the same accordingly: order that it be referred to the Master of this Court to take an account of the amount paid by the plaintiff on account of the purchase money of the said premises, and of the amount expended by the plaintiff in repairing and putting in working order and condition the mill on the said premises, and to compute interest thereon; and the Master is also to take an account of the rents and profits of the said mill received by the said plaintiff since he went into possession thereof, or which but for his wilful default or neglect he might have received; and the Master is to deduct the amount of such rents and profits from the amount expended by the plaintiff as aforesaid, and report the balance to this court, and it is ordered that the said defendant do, within fourteen days after the service upon him of this decree, and of the Master's report, pay to the said plaintiff the amount of such purchase money, together with the balance aforesaid: Order defendant to pay costs of suit.

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CROOKS V. DAVIS.

1857.

Crooks  
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Davis.

*Specific performance—Puffing.*

A sale of lands by auction being about to take place, an intending purchaser in conversation with a person who had previously purchased a portion of the same property, was told by him that he intended buying additional portions thereof, and that he expected the property would fetch about 70% or 80% an acre, and that he was prepared to go as high as 100% per acre for that portion which he intended to buy. It was shewn that by an arrangement between the owner of the estate and this person it was agreed that he should have the lots desired by him, at the same price as he had paid for his first purchase, no matter at what price they might be knocked down to him; and they were accordingly bid off by him at a rate much higher than that formerly paid by him. *Held* that this was not *puffing*, although it might have the effect of misleading the intending purchaser, who swore that he had reliance on the opinion of this party: but as he did not swear that he had been influenced by the example of this person or the information thus given by him, the court decreed a specific performance of the contract for the purchase of certain portions of the estate bid off by him at the auction.

By the advertisement of an intended sale of land in lots, it was stated "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak, which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of ever-green, and various other kinds of trees." A purchaser at the sale, which took place upon the property, set up as a defence to a suit for specific performance, that the soil was not such as was represented, and was unfit for gardening purposes, and that the trees upon the property were not of the description set forth in the advertisement. *Held*, that these representations, having been made in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relieving the purchaser from the contract.

A paper used at the sale by auction of certain lands, contained the conditions of sale, and the numbers of the lots bid off by the several purchasers, upon which their names were written in pencil opposite the lots purchased, and afterwards covered over with ink by the auctioneer's clerk, it having been announced before the sale that he would sign for the several purchasers. *Held*, that this was a sufficient signing of the contract within the Statute of Frauds.

The bill in this cause was filed by *Robert Pilkington Crooks, Duncan McDonnell, and John Major*, against *William Davis*, praying for the specific performance of a contract for the purchase by the defendant of certain lots of land, bid off by the defendant at auction. Statement.

The facts of the case, and the points relied on by counsel, sufficiently appear in the marginal note, and the judgment of the court.

1857. *Mr. Connor, Q. C., and Mr. Strong for plaintiffs—Stanton v. Tattersall (a), Trower v. Newcome (b), Fenton v. Brown (c), Smith v. Clarke (d), Flint v. Woodin (e), Clapham v. Shillito (f)*, were amongst other cases referred to:

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v.  
Davis.

*Mr. Mowat, Q. C., and Mr. Roaf for defendant.* Counsel for defendant relied mainly on the fact of his having been misled into making the purchase; not said to have been intentionally misled, still having been so, the court would not, under such circumstances, compel a specific performance of the contract, but would leave the parties to their rights at law.

It was also objected that the auctioneer's clerk having once signed the contract in pencil, it was all he had any right to do, and that if even he could be treated as the agent of the party, his duty was then at an end, and had no power to act further in the matter; so that in strictness there was no contract within the Statute of Frauds. Counsel also contended that the purchase by *Henderson* was liable to serious objection, as being calculated to be more injurious than what is technically called puffing.

Judgment.

The evidence also shews that several lots had been bid off by one *Rossin* for one of the proprietors, *McDonnell*; and that another purchaser, one *Jarvis*, had been let off his purchase: all of which circumstances concurring, tend to create so strong a suspicion that something was wrong in the transaction, that the court would hesitate to decree a specific performance of the contract—*Warner v. Wellington (g), Mason v. Cole (h), Flight v. Booth (i), Brook v. Rounthwaite (j), Reynell v. Sprye (k), Cox v. Middleton (l), Hill v. Ruckley (m), Graham v. Musson (n)*, were cited and commented on by counsel.

(a) 17 Jur. 967; (b) 3 Mer. 704; (c) 14 Ves. 144; (d) 12 Ves. 447; (e) 9 Hare, 618; (f) 7 Beav. 146.  
(g) 2 Jurist, N. S. 433; (h) 4 Exch. 375; (i) 1 Bing. N. C. 370; (j) 5 Hare, 302; (k) 1 DeG. M. & G. 708; (l) 2 Drew 209; (m) 17 Ves. 394; (n) 5 Bing. N. C. 603.

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Crooks  
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ESTEN, V. C.—This is a bill to compel the specific performance of an agreement between the plaintiffs and defendant for the sale and purchase of certain lots, part of an estate called the Runneymede Estate, sold by auction in the month of July, 1856. The objections made to the suit are, first, that there was a misrepresentation on the part of the vendors, the property being represented in the advertisement as being about four miles from Toronto, whereas it was about six miles from the town-hall, and about two miles from the western city limits. The caption in the advertisement is "The Runneymede Estate, situate on Dundas Street, about four miles west of Toronto." I think there is nothing in this objection. It was impossible to say what was meant by this expression with any sort of precision, and it therefore invited enquiry, and if the defendant purchased without making such enquiry, it was his own fault. The expression is so indefinite that it could not deceive any one. If, indeed, it had been true, as defendant states, that the distance from the town hall to the western city limits was two and a quarter miles, the coupling that fact (which, perhaps, the court might presume the defendant to have known) with the representation on the plan that the property was distant from the western city limit a mile and three quarters, we might suppose the defendant to have been misled, in which case it would not have been proper to have compelled him to complete the purchase, but the fact is not as the defendant was informed it was. The distance from the city hall to the western city limit is nearly four miles, and we cannot in the absence of all evidence presume the defendant to have known or thought what was not the fact. The second objection is, that there is no sufficient contract in writing within the Statute of Frauds. It is not easy from the papers with which I have been furnished to gather the facts as they really are on this point, but as I understand it, there was a paper at the sale which probably, after some general reference to the property as the Runneymede Estate, contained the conditions of

Judgment.

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v.  
Davis.

sale, and the numbers of the different lots; upon this paper the names of the different purchasers were written opposite the lots they purchased by the auctioneer's clerk. That this person was the defendant's and the other purchasers' agent for this purpose, I have no doubt; it was audibly announced previously to the sale, and heard by every one, certainly by the defendant, that he would sign the names of the purchasers, and no objection was made. I think it is perfectly competent to shew by parol evidence what such and such lots numbered on this paper meant. It is always competent to shew by parol evidence what the subject matter of the contract is: that is to apply the description to the subject of it. The purchasers' names were signed in pencil, and afterwards covered with ink. An alteration was made in the conditions of sale, on the ground, and the alteration was written in pencil previously to the sale, and read aloud to the audience, and was certainly heard by defendant and others. Mr. *Walton*, the auctioneer's clerk, who wrote the alterations, and afterwards covered them and the signatures with ink, swears that it was correctly done. I think if I understand the facts rightly that there was a sufficient contract within the Statute of Frauds. With regard to the minor points: of the soil not being fit for garden ground as represented in the advertisement, or the property not being situate near the Carlton station of the Grand Trunk Railway, and of laches on the part of the vendors in commencing the suit; I have considered them, but I think there is nothing in them. The remaining objection, however, which is founded upon the arrangement that was made with *Henderson* previously to the sale, is more serious. *Henderson* was not a puffer: that is, he was not employed by the vendors to exalt the price of the property by false biddings; but it appears to me that the arrangement made with him was calculated to produce an equally injurious effect. He had purchased some of the land previously to the sale, and having expressed a wish to the plaintiff, *McDonnell*, to get another acre, Mr.

Judgment.

*McDonnell* said he had given as the new purchase at the sale should still have the price he paid and 13 were in *Henderson* at 63l. to be more than the acre. I have I impute no fault but the question of the sale. Mr. *McDonnell* this arrangement for the lots he previously fixed in the instance, a person had with their upon bidders, otherwise would into a disadvantage would not *v. Morrice (a)*, against vendor's agent, who, however, a puffer, and the inevitable consequence present is the contractually stimulated same tendency to be unreasonable chaser objecting influenced. Upon acquainted with reliance on his judgment question, and that of the sale that acre, and that he



*McDonnell* said he should have it at the same price that he had given for the land he had already purchased, but as the new plans were prepared he would have to purchase at the sale, but whatever sum he might offer he should still have the lots he should purchase at the same price he paid on the previous purchase. The two lots 12 and 13 were in fact, as I understand, purchased by *Henderson* at 63*l.* 15*s.*, and 65*l.* respectively, which I presume to be more than 50*l.* the acre, but he was to pay only 50*l.* the acre. I have no doubt that this was innocently done. I impute no fraud whatever to the vendors in the matter, but the question is, what effect might it have produced at the sale. Mr. *Henderson* of course, in consequence of this arrangement, might have bid any amount per acre for the lots he purchased, he would still only pay a price previously fixed. If *Henderson* were a land agent, for instance, a person skilled in the sale of lands, and acquainted with their value, his example might have an influence upon bidders, and induce them to bid more than they otherwise would, and they might thereby be entrapped into a disadvantageous bargain, which their own judgment would not have approved. In the case of *Twining v. Morrice* (a), the court refused a specific performance against vendors, because a person known to be their agent, who, however, was a real bidder, was mistaken for a puffer, and thereby the sale was damped. This was the inevitable consequence of such a misapprehension. The present is the converse of that case. The sale is unnaturally stimulated by a fictitious bidding. This has not the same tendency to mislead as the other, and it might not be unreasonable to require in such a case that the purchaser objecting should swear that he was misled or influenced. Upon this point the defendant says that he was acquainted with *Henderson*, and placed considerable reliance on his judgment as to the value of the property in question, and that he had informed him on the morning of the sale that it would probably fetch 70*l.* or 80*l.* per acre, and that he was prepared to give near 100*l.* per acre

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Crooks  
v.  
Davis.

Judgment.

(a) 2 B. C. C. 326.

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Davis:

for the lots adjoining his own. The defendant, however, does not say that he was influenced by the example or information of *Henderson* to offer anything more for the lots he purchased than he otherwise would. There is some danger in drawing inferences from facts which no doubt are true, when the party stating them does not venture to swear to the fact, which, perhaps, is intended to be inferred from them. I am inclined to think that in the absence of such an allegation on the part of the defendant this objection should also fail, and therefore that a specific performance should be decreed with costs.

Judgment. SPRAGGE, V. C.—The cases have been examined and considered by my brother *Esten* and myself together, and I think that upon the pleadings and evidence and the English authorities, no other conclusion could be arrived at than is contained in his judgment. Great latitude appears to be allowed to sellers, in setting forth the advantages and attractions of the property they offer for sale, and when the representations are not in regard to title, but in relation to matters which are objects of sense, and as to which an intending purchaser would, if prudent, examine for himself, the courts are unwilling to relieve the purchaser from his bargain, and have refused relief in cases where the representations made were much further from the actual sober reality than in this case. The cases of *Fenton v. Brown* (a), *Clapham v. Shillito* (b), *Scott v. Hewson* (c), are instances of this.

It is perhaps rarely the case that purchasers are misled by the florid descriptions that are usually to be found in such advertisements; and it is generally the purchasers' own fault if they are misled.

I do not think it necessary, or that it would be useful to go over the several points discussed in the judgment of my learned brother; I have considered them with him, and concur in his judgment.

(a) 14 Ves. 149.

(b) 7 Beav. 146.

(c) 1 Sim. 13.

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## LAZIER V. RANNEY.

1857.

*Practice—Foreclosure absolute—Delivering possession.*

The court, after the final order of foreclosure had been made and acted on by the plaintiff, granted an order for the delivering up possession of the mortgage premises, though not asked for, upon the final order being obtained. December 25

This was a foreclosure suit, in which the final order of foreclosure had sometime previously been obtained, and the mortgagor being in possession of a portion of the mortgage premises had refused to deliver up the property to the mortgagee; and was committing waste by felling the timber growing thereon.

Mr. Roaf for the plaintiff, now moved upon notice, under the XXXII. of the orders of 1853, that the defendant might be ordered to deliver up possession to the plaintiff of such portions of the estate as the defendant continued to occupy.

*Argument.*

Mr. McDonald *contra*, objected that after the final order of foreclosure had been drawn up and acted upon, the suit was out of court, and that no motion could be made in the cause; the words of the order are, that upon the final order for foreclosure, &c., possession may be ordered to be delivered up; the proper time, therefore, for the plaintiff to have asked for this direction was when the final order was pronounced; not having done so, the only course left open to him now, is to institute proceedings in ejectment.

The court thought the application within the clear intention and spirit of the order; and that the plaintiff was entitled to the order, together with the costs of the application.

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## MCGILL V. MCGLASHAN.

*Sheriff's sale of lands—Mortgage—Parol Evidence.*

November 10 *Semble*—That in a proper case this court has authority to declare void a sale of lands by a sheriff.

A person having a claim against the owner of a mill, brought an action against his executors, and recovered judgment; an execution against lands was, sued out and placed in the hands of the sheriff, under which all the lands of the testator, of which the mill and mill premises formed a portion, were duly advertised for sale by the sheriff. The testator by his will had devised his lands to his relations; the mill and mill premises to an infant, on his attaining twenty-one, his father during his minority being entitled thereto. By an agreement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the sheriff's sale and bid such an amount for the whole property as would cover the execution debt and costs; and that he should hold the same for the several owners; accordingly he attended at the sale and bid the stipulated amount, the proprietors and their agent also attending there and preventing any competition by openly announcing the arrangement which had been made; and only one bid was made for the property, which was duly conveyed by the sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate upon being paid a proportionate share of the amount bid at the sale, except the mill and mill premises, which the purchaser retained, occupied and improved during the minority of the devisee, who, on his attaining his full age, demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out the arrangement. The court under the circumstances, held the plaintiff entitled to redeem the mill premises; and that the arrangement under which the purchase was made at sheriff's sale was capable of being proved by parol evidence.

The facts appear in the judgment of the court.

Mr. *McDonald* for the plaintiff.

Mr. *Wilson*, Q. C., and Mr. *Hactor* for the representatives of *McGlashan*, the purchaser at sheriff's sale.

Mr. *A. Crooks* for the defendant *Hunter*, a mortgagee under *McGlashan*, submitted to be redeemed.

The judgment of the court was delivered by

ESTEN, V. C.—The property in question was with other property, purchased by the defendant, *J. A. McGlashan's* father, at sheriff's sale under an understanding existing between him and the owners of the property, excepting

the plaintiff, for sufficient repayment and a reason reconvey the this arrange the property tion and cost ed competitio for less than irregular man sheriff himse as he did had tiff was devis offered for sal same property father was a considered the The rest of ed by *McGlas* for the price instance, and i said, that as th caused the da the burden. ty to the plain made very cor and been in po him or made an however, appea suit very short ed upon two of the arrange mortgagee of one which the the plaintiff be which it was m the case are pu testably. Man

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v.  
McGlashan.

the plaintiff, who was then under age, that he should offer sufficient to cover the execution and costs, and upon repayment of that amount to him, with interest and costs, and a reasonable compensation for his trouble, he should reconvey the property to them. Both parties acted on this arrangement. The defendant's father purchased the property for a sum just sufficient to cover the execution and costs: the owners through their agent prevented competition at the sale. The property was purchased for less than its value; and the sale was conducted in an irregular manner owing to this arrangement. The then sheriff himself tells us that he would not have proceeded as he did had not this arrangement existed. The plaintiff was devised the remainder of part of the property offered for sale and purchased, subject to a devise of the same property to his father during his minority. The father was a party to the arrangement, and the sheriff considered the plaintiff sufficiently represented by him. The rest of the property was subsequently reconveyed by *McGlashan* to the parties originally entitled to it, for the price nominally offered for it at the sale in one instance, and in the other instance for less. *McGlashan* said, that as the mill property (the property in question) caused the damage, it ought to bear the chief part of the burden. Upon being applied to convey this property to the plaintiff he refused. He had in the meantime made very considerable improvements on the property and been in possession of it, and no one interfered with him or made any claim to the property. The plaintiff, however, appears to have claimed it, and commenced this suit very shortly after he became of age. Relief is prayed upon two grounds—1st. That *McGlashan* by force of the arrangement I have mentioned was virtually a mortgagee of the property. 2nd. That the sale was one which the court would not allow to stand, and that the plaintiff being no party to the arrangement under which it was made, was not bound by it. The facts of the case are proved on behalf of the plaintiff incontestably. Many of his witnesses were of the greatest

Judgment.

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 v.  
 McGlashan.

respectability, and all of them appeared deserving of entire credit, although many of them were closely connected with him. The proposition that a person purchasing property at a sheriff's sale under circumstances such as occurred in the present case, is virtually a mortgagee, was affirmed by this court in the case of *Papineau v. Gurd*, reported in Mr. Grant's reports. This court has established as its own rule to be observed, until made void by higher authority, that parol evidence is admissible to shew that an absolute conveyance was intended as a security only; and we consider this proposition to have been affirmed by the language of the privy council in the case of *Green-shields v. Barnhart*. As a general rule the court is indisposed to act upon evidence of mere conversations or declarations unaccompanied by facts corroborating such evidence. If, however, the court would ever be justified in acting upon mere evidence of conversations or verbal agreement, I think it would be in the present case. The direct evidence of the agreement between the McGills and McGlashan is so strong as to leave no doubt in my mind of its existence. It is, however, corroborated by the fact of the sale of the property: that competition was deprecated by the proprietors, and forborne by the persons present at the sale, and that only one offer was made for the property: that the sheriff conducted the sale in a manner which he himself considered irregular, and which he would not have permitted except upon the understanding that the whole matter had been arranged between the parties. We have also in fact the practical admission of McGlashan himself. The fact that Charles Magrath made the declaration which he states in his evidence, at the sale in the hearing of McGlashan cannot be doubted; and as little can it be doubted that McGlashan acquiesced in its correctness and acted according to it. In short, I think the fact of the agreement is proved beyond the possibility of doubt. The admissibility of the evidence is, indeed, objected to, but I think it admissible upon the doctrine above alluded to. It is true that some expressions occur here and there in the evidence,

Judgment.

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tending to shew that *McGlashan* purchased as the absolute owner, and that it was to be optional with him to permit the owners of the property to redeem it; it seems doubtful, too, whether the parties themselves considered that he was legally bound to reconvey to them on the prescribed terms; he declines to execute a bond, and they say they will be satisfied with his word, but I think these and any other circumstances of a similar nature which may occur in the case are insufficient to rebut the *prima facie* right of the plaintiff. Some acts are also proved on his part resembling a waiver of his rights, or tending to negative their existence, but I think they are wholly unimportant. We have it then incontestably proved that the purchase was made under such circumstance as would reduce *McGlashan's* interest in the property in question to a mere security. There is one objection which has occurred to me, to which this view of the case might appear to be open, which was not, however, suggested at the hearing. The letters mentioned in the answer and relied on in the argument are, I think, sufficiently explained. They shew, however, that their object was to prevent *Proudfoot* from again resorting to this property in case of any future recovery by him in any action he might afterwards institute. This might appear to be a fraud upon a particular creditor within the 13 Elizabeth. If the *McGills* retained an equity of redemption under their arrangement with *McGlashan*, it was part of their old dominion, and of *John McGill's* estate, and would be liable to any recovery by *Proudfoot*, upon any covenant entered into by the testator. This court always refuses to relieve debtors or the owners of estates against the consequences of their own acts, done with intent to defraud creditors. But to induce the court to deny relief under such circumstances to parties who would be otherwise entitled to it, it must be satisfied that they have been guilty of wilful fraud. In the present case the contrivance contained in the two letters I have referred to, formed no part of the original plan; on the contrary, the *McGills* wanted *McGlashan* to give a bond,

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McGILL  
v.  
McGlashan.

Judgment.

1857. which, if given, would have shown clearly the rights of the creditors. The contrivance was one of *McGlashan's* own suggestion, emanating, it appears, in the first instance, from his lawyer, for his protection, and, as I think, only acquiesced in by the *McGills* for that purpose, and without any fraudulent intent. In fact they were at first indignant at the letter they received, and remonstrated with *McGlashan* about it, and asked him what it meant. I do not impute any fraudulent intention to the *McGills* in this matter, and think that *McGlashan* must have been under the persuasion that if he purchased the property from the *McGills*, *Proudfoot* could, on any subsequent recovery, deprive him of it, without paying him what he had paid, and that it was to guard against this supposed danger that *McGlashan* proposed and the *McGills* consented to the contrivance in question. I should therefore think it right to grant relief to the plaintiff on the first ground stated in his bill: but it is unnecessary to decide that point, inasmuch as his title to relief on the second ground on which he relies appears to be incontestable. That a buyer at a sheriff's sale could collude with third persons and the sheriff, and arrange with them to have the sale conducted in such a manner as that he may obtain the estate for an amount just sufficient to cover the execution and costs, without reference to its real value, or the necessity of offering the whole or part of it for sale, and that such a sale could be binding on the owner of the estate, would be a monstrous proposition. Can it make any difference that the parties with whom the buyer made his arrangement intended to act for the benefit of themselves and the plaintiff, and that the sheriff merely sanctioned the proceeding on the supposition of such being the case. The result is that the owner if deprived of his estate by means of an improper sale arranged between the buyer, the sheriff, and third parties. That such a sale as took place in this instance could stand if not consented to, is a proposition that could not be maintained for a moment. The plaintiff has never con-

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 McGlashan.

Judgment.

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sented to it, for he was not of age when it occurred, and he has never relinquished his rights since. The sheriff himself admits the impropriety of the sale as such. An estate is offered for sale *pro forma* and only nominally—competition is prevented—the whole estate is purchased for an amount calculated to be just sufficient to cover the debt and costs without any estimate of its real value, or enquiry into the necessity of a sale of the whole or a part; and all this transaction is arranged between the buyer and third parties behind the back of the owner. That a court of equity has jurisdiction to interfere and declare void a sale of this description, I apprehend cannot be disputed. A court of law, it is presumed, could not give the whole relief, extending to the delivery and cancellation of the deed, the relief of the title from the cloud which had formed upon it, upon equitable terms towards the buyer of compelling the repayment of the purchase money and interest, and allowing him the value in a proper case of permanent improvements. The sheriff acting at the instance and under the direction of the execution creditor, stands in the place of a trustee. His duty is similar to that of a mortgagee intrusted with a power of sale, and his fiduciary character, invites the jurisdiction of this court. The American reports abound with instances of sheriff's sales declared void by the authority of courts of equity. I think the plaintiff should be admitted to redeem the property upon payment of a proportionate part of the mortgage money and interest.

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v.  
McClachlan.

Judgment.

HOLLYWOOD V. WATERS.

*Registration—Notice—Practice.*

To postpone a registered title on the ground of notice of a deed having been previously executed though not registered, the evidence of notice must be quite satisfactory and distinct upon the point. Documents used on the examination of witnesses before an examiner, must be properly marked by the officer, and referred to in the evidence, otherwise they cannot be read at the hearing.

The bill in this cause was filed by James N. Hollywood, Samuel S. Hollywood, and Samuel Burger, against

1857. *Peter Waters*, and *William Loots*, for the purpose of postponing the deed executed in favor of *Waters*, to that of *James N. Hollywood*, on the ground of notice by *Waters* of the existence of such conveyance at the time he obtained his conveyance. The facts appear in the judgment.

Hollywood  
v.  
Waters.

Mr. *Roaf* for the plaintiffs.

Mr. *Blake* for the defendants.

Judgment. ESTEN, V. C.—The deeds from *Thomas L. Hollywood* to *J. N. Hollywood*, and from *J. N. Hollywood* to the plaintiffs, are proved. That from *Thomas L. Hollywood* to *J. N. Hollywood*, as well as the other, purports to be a sale for valuable consideration, and not being impeached by the answer, must be so intended. Some documents are indeed produced on the part of the defendants apparently with the view of impeaching this transaction; but they have not been regarded by the court for two reasons: first, because the answer does not raise any such case; second, because the documents in question are not properly marked by the examiner, and therefore cannot be read. The bill itself supposes that the defendants are purchasers for valuable consideration; otherwise they could not prevail at law, and it would not be necessary to seek relief in equity. The case is thus reduced to a question of notice, the defendants' deed, although subsequent in point of date to that of *J. N. Hollywood*, having been registered before it. The question then is, whether notice of *J. N. Hollywood's* deed is so clearly proved against the defendant as to make it right to declare that in making this purchase and registering his deed, he was guilty of a fraud against the plaintiffs. The only evidence of notice consists in admissions alleged to have been made at different times, and to different persons, by the defendant *Waters*. All the evidence on this point may be disregarded except that of *Charles J. Hollywood*, who deposes to a conversation

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with the defendant *Waters*, which, if it really happened exactly or substantially as he describes it, would be sufficient to shew that *Waters*, when he purchased the property in question, knew that a deed of it had been made to *J. N. Hollywood*, and that it had not been registered. This witness says, that he wrote down this conversation on the door of his tan house, in red chalk, he thinks, on the day it occurred, and afterwards put it in writing. He does not, however, say when, nor is the writing produced. I apprehend the witness could not have written the whole conversation he details, in red chalk, on the side of his tan house. He is a brother of *J. N. Hollywood*. Notice is strongly denied by the defendants' answer. In his examination he contradicts the evidence of *Charles J. Hollywood* as to notice. There is a discrepancy between his answer and examination with respect to notice of the plaintiff's title in his answer, he states that it was not until the spring of 1851 that he became aware of the plaintiff's title; but in his examination he admits that he was informed of the deed to *J. N. Hollywood*, in November, 1850. He may, in his answer, have alluded only to the plaintiffs, *Samuel Hollywood* and *Samuel Burger*. Judgment.

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Hollywood  
v.  
Waters.

Upon the whole, I do not think the evidence of notice sufficient to prevail over a registered title; and that the safer course under such circumstances is not to disturb the legal title. I think the bill should be dismissed with costs.

**SPRAGGE, V. C.**—The defendant *Waters* seems to be a purchaser for value, and the conveyance to him from *Thomas L. Hollywood* is registered prior to that of the prior deed from the same grantor to *James N. Hollywood*. The question is, whether he had notice of the prior deed.

The evidence of notice consists wholly of alleged admis-

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sions; the material one, stated to have occurred in the autumn of 1850, that of *Charles J. Hollywood*, a brother of *James*, seems most to the point; he says in substance, that *Thomas L. Hollywood* and *Waters* went together to his house, in the fall of 1850, and stated to him, he then being in occupation of the land in question, the sale and purchase which they had made: that *Waters* stated to him that the first time *Thomas* came to him to induce him to purchase he declined; that the second time he called upon him to purchase, he said he would do so, provided the first deed was not registered, and he said he had written to the registry office to know if such was the case, and when he ascertained that the deed was not upon record, then he purchased; that he the witness said he thought *Thomas Hollywood* had burnt his fingers by conveying the land to *Waters*; that he then turned to *Waters* and said he must have known that there was a previous title to the land, from the fact that his brother had the deed over a year, and had cut from fifty to a hundred cords of wood on the land; that *Waters* said that *Thomas* had told him all about it and he cared not how many previous deeds there had been, knowing that the first deed upon record would hold the land. The evidence of *Samuel S. Hollywood*, a son of the last witness, does not go to so express an admission on the part of *Waters* as the evidence of his father: he speaks of a conversation between the same parties, and about the same time, and says that *Thomas* said to him that he had told *Waters* all about the property, and how it was situated; and he chose to buy it, and did buy it, and that *Waters* replied that he did not want to have any trouble with the *Hollywoods*, but that he bought the property because *Thomas* asked him to buy it; that he bought it on chance with the intention of making something by it. What *Thomas* said as above narrated, is very vague and general; but the answer of *Waters* would seem to point it to some transaction with the *Hollywoods*, and no other than the previous sale to *James* is spoken of in any part of the evidence.

Judgment.

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The evidence of *Burger* is rather as to what he understood, than what *Waters* told him. It would be of little value even if credit were to be attached to it, but his credit is impeached.

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Hollywood  
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Waters.

I think it would not be safe to attach any weight to what is deposed to by *McGill* and *McIntyre Fick*, who both speak to the same circumstance—a charge by *McGill* to *Waters* that when he purchased he knew of the previous deed to *James N. Hollywood*. It was in the course of angry altercation, and *Waters* desiring him, in answer, to mind his own business, could scarcely be construed into an admission that what he charged him with was true.

The evidence of *Alexander McDonald*, who drew the conveyance from *Thomas Hollywood* to *Waters*, as to what passed in the registry office, may be considered to strengthen somewhat the evidence of notice. He was the defendant's witness, and his own belief evidently was, Judgment. judging from what passed between the parties, that *Waters* was quite ignorant of the existence of the deed to *James Hollywood*. In several parts of his evidence he speaks of *Waters'* hesitation as to completing the purchase, and says: "I think that *Waters* objected because *Hollywood's* name did not appear in the registry books—*Hollywood* claimed as heir-at-law." In fact *Thomas L. Hollywood* did not claim as heir-at-law, but under a conveyance from *Thomas Hollywood*, which was registered. If, therefore, anything was said as to *Hollywood's* name not appearing on the registry books, it could not have been the *Hollywood* who was the grantor of these opposing parties. It naturally occurs to one that *Mr. McDonald*, recollecting what passed indistinctly, as he says he does, mistook the true import of what passed, and that it was the absence of *James'* name, not of *Thomas's*, that was spoken of, and not by way of objection on the part of *Waters*, but as making a conveyance safe on the part of *Thomas*. That would perhaps, be conjecturing

1857. too much ; still if Mr. *McDonald* is correct as to mention being made of the absence from the registry book of the the name of any *Hollywood*, it is very probable it was that of *James*.

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Waters.

Mr. *McDonald* speaks of the parties searching the registry office through him personally. *Charles J. Hollywood* represents *Waters* as having ascertained by written communication with the registry office, that the deed to *James* was not registered ; this may have been a misstatement by *Waters*, or a misunderstanding on the part of the witness, and is, perhaps, not very material.

Two witnesses were examined upon foreign commissions, the one, *John Quincy Emerick*, speaks of a conversation with *Waters* in which he spoke of the place in question being worth \$2000, but of his having given \$400 or \$500 for it, or for *Thomas Hollywood's* "chance" in it, he thinks the latter : he says this conversation took place in December, 1852 ; he says he asked *Waters* if he knew before he purchased that the plaintiff had a deed of the place : that he cannot exactly recollect his answer, but he concluded from his whole conversation that he had known of it : he thinks he first mentioned this conversation to the plaintiff, taking his evidence together, about April, 1854.

The other witness examined upon foreign commission, is one *Joseph L. Rose* : he appears to have been engaged by the plaintiff to visit *Waters*, and converse with him upon the subject of the purchase in question ; but it would be a waste of time to examine his evidence critically, when we find upon his own admission he has been four times indicted for criminal offences, and twice convicted, once for horse stealing, and once for burglary, and has spent seven years in states prisons. He swears that he was innocent of all the offences of which he was accused. I do not mean to say that we should disregard the evidence of a man convicted of crime. Such a man is made

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a competent witness by statute, but when such a man is selected for the office of going to another man, a stranger, for such a purpose as this man was sent, I, for one, should attach no weight to his evidence. His swearing to his own innocence, does not in my mind, make him at all the more credible, but the reverse.

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Waters.

I think I have stated the full effect of the evidence in relation to notice. I think the only evidence really to the point is that of *Charles J. Hollywood*, and that of *Emerick*, and if we could be satisfied of the entire truthfulness, and of the accuracy of recollection of these witnesses, *Waters* would seem to have admitted to them that he had notice of the plaintiff's prior purchase, but a very slight difference in words will alter the whole of a conversation; to take, for instance, the first alleged admission in the presence of *Charles J. Hollywood*, *Waters* is represented to have said that the second time he was called upon to purchase, he said he would do so, provided the first deed was not registered; if, instead of saying, provided the first deed was not registered, his words were, provided there was no prior deed registered, the whole sense would be different. In repeating a conversation after six years, can we be safe in trusting to the entire correctness of the witness's memory: he says, indeed, further, that after his telling *Waters* that he had burnt his fingers from what he must have known as to the title, &c., he makes *Waters* admit that *Thomas Hollywood* had told him all about it. *Waters* is a merchant doing business at Port Rowan, and after his purchase was impeached on the ground of his having notice of the first purchase, he is represented as admitting to the brother of the prior purchaser that he had been informed all about the prior purchase; and again, of making a similar admission afterwards to an American, casually visiting him in his shop. It may be, certainly, that the evidence comes to us after the lapse of several years without any perversion of truth and free from bias, and unmixed with the recollection or the suggestion of the plaintiff himself, but can we be sufficiently

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certain of this, and of the accuracy of the witnesses' memory, supposing them to be trustworthy, to act upon such evidence; looking, too, at the improbability of *Waters* making such admissions, and under such circumstances as he is alleged to have made them.

It has been doubted whether it was wise to allow a registered title to be defeated by evidence of notice of a prior deed, even when such evidence was quite satisfactory; and certainly no evidence short of that should be allowed to prevail. In this case I am free to admit that I am not without suspicion that *Waters* did know of the prior conveyance to the plaintiff; but I cannot say that I am satisfied of the fact, as I think I ought to be satisfied, before setting aside a registered title of a purchaser for value.

Judgment. I confess that I am the less satisfied with the purity of the evidence adduced, when we find the plaintiff so unscrupulous as to employ such a man as the convict *Rose* for the purpose of getting up evidence against the defendant.

Upon the whole, I think the bill should be dismissed with costs.

PHELAN V. FRASER.

Fraudulent conveyance—Trustee.

Property was conveyed to a trustee for the purpose of disappointing creditors, and afterwards the person claiming to be beneficially interested filed a bill for a conveyance to himself; under these circumstances the bill would have been dismissed, had not the defendant by his answer admitted that he was a trustee, and it appearing that the wife, who was not a party to the suit, and was living separate from her husband, was entitled to the beneficial inheritance, an enquiry was directed as to the cause of her separation, with a view of ascertaining how the court should direct the rents of the estate to be applied.

The bill in this case was filed by *Michael Phelan*, against *Alexander Fraser* and *John Stuart*, praying that

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the defendants might be declared trustees of certain lots in the town of Stratford, for the plaintiff. The nature of the case sufficiently appears in the judgment.

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Phelan
v.
Fraser.

Mr. *Eccles*, Q. C., for plaintiff.

Mr. *McDonald* for defendants.

The judgment of the court was delivered by

ESTEN, V. C.—The plaintiff, has by his evidence, proved himself out of court. The defence was, that the property conveyed to *Williamson* was the wife's, and that she consented to the exchange only on condition that the property in question should be conveyed to her brother, *Alexander Fraser*, to her use. To meet that case the plaintiff proves that the property in question was conveyed to *Alex. Fraser* in order to disappoint his creditors. The plaintiff by his bill claimed the lands in question as being purchased by him, and with his money, in the name of another person, the defendant *Fraser*, and on the ground that the defendant *Stewart* acquired it with notice of the trust. This case, if established, would have entitled the plaintiff to a decree. He calls a witness for the purpose of proving his own case, and disproving that of the defendant, and this witness gives some evidence which would tend to shew, certainly, that the property conveyed in exchange was the plaintiff's, and some evidence also tending to shew that it was his wife's, and at the same time proves the fact I have mentioned of the intention to disappoint creditors. Now this court never assists a person who has placed his property in the name of another, in order to defraud his creditors, and if the matter had stopped here, the plaintiff's bill must have been dismissed with costs. But the answer admits the defendant *Stewart* to be a trustee: he cannot, therefore, be permitted to hold the property for his own benefit. He is a trustee for Mrs. *Phelan*, but it is nowhere stated that the property was to stand

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Fraser.

limited to her separate use. She is entitled to the beneficial inheritance, and this state of things entitles the plaintiff to the rents and profits during the coverture, and during his life, if he be entitled to be tenant by the courtesy, unless he has acted in such a manner as to force his wife to separate from him; in which case, the rents and profits of the land, or part of them, will be sequestered for her support. I think the defendant *Stewart* is entitled to his costs; the defendant *Fraser* not, as he had no right to depart with the trust estate without the consent of the plaintiff. I think an enquiry should be directed as to the reason of Mrs. *Phelan* having separated from her husband, in order that the court may know how to apply the rents. Further directions and subsequent costs should be reserved. Mrs. *Phelan* is a necessary party, and in strictness the cause should stand adjourned in order to make her a party; but perhaps this declaration of the rights of the parties may be so satisfactory to them as to render it unnecessary to incur the expense and delay attendant upon these proceedings; in which case Mrs. *Phelan* may be made a party in the Master's office, in order to be present at the inquiry which is directed.

Judgment.

PAINE V. CHAPMAN.

Vendor's lien—Demurrer—Costs.

Land being conveyed in consideration of the vendee providing the vendor with maintenance, washing, &c., the vendor retains a lien for the consideration.
A demurrer having been held good one ground, though overruled as to the other: the defendant was allowed to answer without costs.

The bill stated that the plaintiff had conveyed certain lands to her grandson (since deceased), the father and husband of the defendants respectively in consideration of his agreeing to maintain the plaintiff, and to provide her with washing, lodging, wearing apparel, and other necessaries, which was secured by a bond executed by him for that purpose: that he had entered into

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possession of the property, and occupied it until his death, and that since his decease the defendants, his widow and children, had continued to occupy it, but that the defendants, as well as the deceased obligor, had wholly failed to supply her with the maintenance stipulated for; and prayed a declaration that plaintiff was entitled to a lien on the lands for the payment of the bond; an account of what was due to plaintiff in respect thereof, and a sale of the lands to raise the amount necessary for that purpose.

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Paine
v.
Chapman.

The widow answered the bill, and the infant defendants put in a demurrer thereto for want of equity, and for want of the personal representative of their father as a party to the suit.

Mr. *Strong* for the demurrer.

Mr. *Roaf* contra.

Argument.

ESTEN, V. C.—This is a new case, and no doubt every extension of the doctrine of vendor's lien in the way of application admits of much forcible argument on the score of inconvenience. It would have been, I think, very reasonable to hold, in the first instance, that a party who had not stipulated for any lien on the land should not have one; but this is not the law, and the argument is inadmissible. *Prima facie*, the vendor is entitled to a lien, and it lies on the purchaser to shew either an express waiver, or such an incompatibility as amounts to conclusive evidence that it was not intended to exist. I see no such state of things in this case. It does not appear that a re-sale was contemplated, and if it had been a sale subject to the lien, or free from it, would not have been impracticable, or attended with insuperable inconvenience. The lien could be conveniently enforced by the appointment of a receiver, or a sale subject to the lien; whereas if it should be deemed that the plaintiff's only remedy was at law on the bond, she

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would be reduced ultimately to a sale of the land under common law process, and would be incapacitated from again resorting to it for satisfaction of her claim. Upon the whole, the right having been considered by eminent judges as founded in reason, and as *prima facie* it subsists, and I do not see enough in the present case to rebut it, I think the demurrer ought to be overruled. I do not think the case resembles the cases that were cited in the course of the argument.

Judgment. SPRAGGE, V. C.—In *Colborne v. Thomas (a)*, in this court, the English cases then decided were reviewed in the judgment of the court delivered by the Chancellor, and the law upon the point, as understood by this court, stated. That case differed in its circumstances from the one now before us, but the principle there enunciated applies. As stated by Lord *Eldon* in *Mackreth v. Symons*: "The principle has been carried this length, that the lien exists, unless an intention, and a manifest intention, that it shall not exist, appears." So Lord *Redesdale*, also quoted in that cause: "It lies on the purchaser to shew that the vendor agreed to rest on the collateral security; *prima facie* the purchase money is a lien on the land."

It seems to be now settled in England that the circumstance of the purchase money consisting of an annuity, is not of itself evidence that the parties intended that there should be no lien. It would, no doubt, render the estate more difficult of sale, as would such an agreement as forms the consideration for the conveyance in this case; and the ability to sell the estate is called an incident in the dominion of the purchaser over his land; but I think two things must concur to negative the *prima facie* right of the vendor to retain his lien. one, that the difficulty of selling is so great as virtually to prevent a sale: the other, that the retention of the

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property for a time in the hands of the grantee was not incompatible with such dominion over the estate as the grantee was intended to have.

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v.
Chapman.

Here a conveyance of her estate was made by an aged woman to her grandson, a grown-up man with a family ; for which, he was to maintain her, and provide her with washing, lodging, wearing apparel, and other necessaries, and he immediately entered into possession of the land conveyed to him. Such arrangements are not at all unfrequent in this province, and they have occasionally been the subject of suit in this court. They are generally of this nature: an aged person who has become too infirm any longer to manage his farm, conveys it to some near relative, who is, in consideration of it, to maintain him during the remainder of his life, and generally upon the property conveyed ; an arrangement very beneficial usually to the grantee.

I cannot see that such an arrangement affords any indication of an agreement between the parties to it, that the aged grantor should trust to the personal engagement, in whatever form, of the grantee, for his support, at a time of life when he has become incapable of supporting himself. I think, rather, that he would be considered not by lawyers only, but popularly, as having a claim upon the land for his support. Judgment.

This, indeed, would be going further than is necessary ; the grantee must shew the agreement to be of such a nature that the retention of the lion would be contrary to what appears to have been the agreement of the parties. To shew this, we must presume it was intended by the grantor that the grantee should be at liberty to sell the place conveyed, and that without its continuing liable for his support. The nature of these arrangements, and peculiarly in this instance, from the age and sex of the grantor, appears to me to negative such a presumption.

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v.
Chapman.

I do not think, taking the allegation upon this point in the plaintiff's bill, that she relied upon the *agreement* of the grantee. The consideration is thus stated: in consideration of the said *John Paine Chapman* agreeing to maintain your complainant, and providing her with washing, lodging, wearing apparel, and other necessaries. Critically this would read: in consideration of his agreement to maintain her, and in consideration of his providing her with washing, lodging, and so forth; the agreement being only a part of the consideration; but apart from verbal criticism, I do not read the bill as stating that the agreement was the consideration, but the intended support under the agreement.

The case of *Dixon v. Gayfere (a)* is, so far as it goes, an authority against the lien. In that case Sir *John Romilly* thought that the consideration being an annuity for three lives indicated an intention against the existence of a lien. If, in his opinion, an annuity for one life would be so, it would, I think be against the weight of English authority, and we have only one to deal with in this case. I may remark, too, that the manner in which that decision is noticed by Lord *St. Leonards (b)* cannot fail to detract somewhat from its authority.

Judgment.

The American case, from the court of appeal in Virginia, *Brawley v. Carter (c)*, has also been cited. I cannot help thinking that there was much in that case to shew an intention to retain a lien, for the grantor stipulated for certain personal rights in relation to the premises conveyed. I cannot think that case consistent with the English decisions.

The cases of *Richardson v. McCausland* referred to in *Sugden*, and *Matthew v. Bowler (d)* are in favor of the lien claimed in this case. In the former, a lady entitled to a life interest in a house and land, conveyed it to her son, in consideration of his paying the rent of another house for her,

(a) 21 Beav. 118.
(c) 8 Leigh. 522.

(b) Sug. 201, 13 ed.
(d) 6 Hare 116.

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and supplying her with a sufficient quantity of hay and corn, and her lien for all was established by Lord *Manners*.

1857.

Palmer
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In the case in *Hare* the plaintiff was entitled for life to improved rents of leasehold premises assigned to defendant in consideration of a weekly annuity of fifteen shillings, and the assignee covenanted to insure and repair; held entitled to lien; the covenant to insure, &c., was dwelt upon. In *Sugden* (13th edition), this is not referred to, but the weekly payment only.

Mr. *Strong* on behalf of the infants was perfectly right in raising the question. I do not consider the point to be very clear; but upon the whole, my opinion is in favor of the lien.

Upon the other point raised by the demurrer, I think Mr. *Strong* is right. The plaintive asks in the alternative that she may be declared a creditor of the estate of the deceased. It is obvious that the personal representative must be a party to discuss that question. A portion of demurrer, therefore, being allowed, the defendant should be allowed to answer without costs. Judgment.

KERR V. MURRAY.

Mortgage—Parties—Trustee.

The owner of real estate being indebted, conveyed his lands to another for sufficient to pay off his liabilities without any reference to the value of the property, of which he remained in possession, and sold to third parties, subject "to a conveyance to the late Lieutenant-General Murray, intended to operate as a mortgage." It was proved by the evidence taken in the cause that the avowed object of General Murray was to relieve the owner from his embarrassments, and secure his lands from seizure; but the same having passed under the will of General Murray to trustees, one of them refused to allow a redemption except under a decree of the court. The court considered that the evidence clearly established the conveyance to have been given by way of security only, and the vendees had a right to redeem; that the trustees had not acted unreasonably in requiring the right to redeem to be established in this court; and that one of the trust being beneficially interested in the estate, the *cestuis qui trust* were sufficiently represented in the suit.

The bill in this case was filed by *Archibald Kerr*,

1857. *James Adams, and John Brown, against Ellen Butler Murray and Alexander Denoon, the devisees and trustees under the will of the late Lieutenant-General Murray, setting forth that one Frederick J. S. Groves, clerk, by a deed dated 12th August, 1840, conveyed in fee to General Murray 200 acres of land, in the township of West Oxford, which conveyance was in form absolute, and expressed to be made for a valuable consideration, but in fact no consideration was then, or at any other time, paid therefor, and was voluntary, and without any good consideration, but that the defendants asserted that the same was intended to secure the repayment, with interest, of certain moneys theretofore advanced by General Murray for Groves, amounting to about 264l. 15s. 9d. That a small portion of the land had been reconveyed by General Murray to Groves: that by deed dated 3rd November, 1250, Groves and his wife, for a valuable consideration, conveyed the remainder of the said premises to the plaintiffs, of which Groves and the plaintiffs*

Statement. by themselves and their tenants had always remained in possession, and in receipt of the rents and profits, and that thereby the plaintiffs became entitled to the said premises; but the deed to General Murray having been duly registered formed a cloud upon their title, whereas the plaintiffs submitted that the same was void as against the plaintiffs, and ought to be set aside. The bill alleged applications to the defendants to reconvey, and submitted to pay any sum that it should be held the defendants were entitled to recover.

The prayer of the bill was in accordance with these statements.

The defendants answered: Mrs. Murray saying that she has been informed, and believed, that the deed was intended to secure certain moneys advanced by her late husband to Groves, and submitted that an account should be taken. Denoven insisted that the deed should be taken to have been an absolute conveyance for value, but that

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being ignorant of all the circumstances, he could not say what the arrangement between *Groves* and his testator had been, and submitted an account should be taken of what sums had been advanced, if it should appear that it was intended to operate as a security only.

1857.

Kerr
v.
Murray.

Mrs. Murray was examined as a witness by the plaintiffs; on her examination she stated that her late husband "visited Canada in 1840, and I accompanied him. Before assisting Mr. *Groves* he asked my opinion about it. He advanced money to get Mr. *Groves* out of his difficulty. * * * I came into the room when the deed was being signed. The General said it was given to him to save it from future creditors. And that it was intended to be given up for the benefit of his (*Groves*') family when he should be married. The General had then paid all Mr. *Groves*' debts." Other witnesses were examined, some of them members of General *Murray*'s family, whose evidence tended clearly to shew that the deed was never intended to operate as an absolute sale to him.

Statement.

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

Mr. *Crickmore* for defendants.

ESTEN, V. C.—I am very clear that this is a mortgage, and that all the plaintiffs are entitled to is to redeem. Their own deed is sufficient, for by it the property is conveyed to them, subject to this mortgage, which is so called in it; independently of which, I think the facts were that General *Murray* endeavoured to procure Mr. *Groves*' relatives to assist him, and with that view offered himself to contribute 50*l.*, in expectation that they would raise the rest, and intending to take a conveyance for the full value of the property, to prevent future creditors from seizing it; which would not, of course, be good against future creditors for more than was actually advanced, but would be operative to that extent. Mr. *Groves*' friends did not meet General

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Murray's views entirely; they contributed only 76l. sterling but General *Murray* determines to endeavour by means of his own addition and a compromise with the creditors to make that answer the purpose, no doubt still intending to take the conveyance of the property. When he returns to Canada he finds the debts much larger than he supposed, but he determines to advance the requisite amount to liquidate the whole, intending, if Mr. *Groves* married, to settle the property upon his wife and children; if not, to take a clear title to himself or Madame *Petit*, which I apprehend was the same thing as he had before referred to as a mortgage or lien for the full value; the purpose being the same, to protect the property from the claims of future creditors. The latter course is adopted by the conveyance of the property to General *Murray* himself for the full consideration, copied from the previous deed, with the intention, however, of settling the property on Mr. *Groves'* wife and children, when he should marry, and of looking to Mr. *Groves'* sisters for repayment; which, probably, was the intention from the first. This intention was never carried into effect, and it would be too much to say that under these circumstances General *Murray* did not acquire a security on this property. The children and next of kin seem to have a beneficial interest in the property in question; but it seems so clear that General *Murray's* interest was no more than a mortgage, and Mrs. *Murray*, one of the trustees, has herself so large a beneficial interest that the *cestuis qui trust* are sufficiently represented by the trustees. I think there should be the usual decree for redemption.

SPRAGGE, V. C.—I think the conveyance from Mr. *Groves* to General *Murray* must be looked upon as taken by way of mortgage. I think it clear from the evidence that it was not a purchase: the sum advanced by General *Murray* had no relation to the value of the land, but to the amount of debts owing by *Groves* to creditors, from the difficulties attending which General

Murray was a remained with since that time not sufficient to gage. It appeared befriended Mr. sisters, to a con in his letters, f the conveyance serving it for his part, than nothing occurred would debar G of the sum adv part of General apparent intention though the tation on his pa reimbursed by that these were would be a gif sisters to Gener not think that it was advanced.

But the convey nishes conclusive subject "to a con *Murray*, intended tiffs come into co does not lie in the not intended to plaintiffs are entitled to the are entitled to the noon has acted un establish their rig

As to the making of them parties;

Murray was anxious to extricate him : possession always remained with *Groves* until his sale to the plaintiffs, and since that time with them. On the other hand, there is not sufficient to show this conveyance less than a mortgage. It appears certainly that General *Murray* actively befriended Mr. *Groves*, and was willing to join with his sisters, to a certain extent, in subscribing, as he termed it in his letters, for his relief; and it may be that he took the conveyance to himself more for the purpose of preserving it for Mr. *Groves* against future improvidence on his part, than as a security for his advances; but still nothing occurred, or at least nothing is shown which would debar General *Murray* from claiming repayment of the sum advanced by him; there was no gift on the part of General *Murray* of these moneys, but at most an apparent intention not to look to Mr. *Groves* for repayment though there does appear to have been an expectation on his part that he would at some future time be reimbursed by Mr. *Groves*' sisters; and this supposes that these were advances to Mr. *Groves*, otherwise there would be a gift to him, and an expected gift from his sisters to General *Murray* to replace the amount. I do not think that it was upon that footing that the money was advanced.

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Murray.

Judgment.

But the conveyance from *Groves* to the plaintiffs furnishes conclusive evidence upon the point, for it is made subject "to a conveyance to the late Lieutenant-General *Murray*, intended to operate as a mortgage." The plaintiffs come into court under that conveyance, and it surely does not lie in their mouth to say that the conveyance was not intended to operate as a mortgage. I think the plaintiffs are entitled to redeem, and that the defendants are entitled to their costs. I do not think that Mr. *Deacon* has acted unreasonably in requiring the plaintiffs to establish their right to redeem in this court.

As to the making the *cestuis qui trust*, or one or more of them parties; the suit is not defective for want of

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them, and it becomes a matter of discretion under the general order. One of the trustees is beneficially interested in the matter in question, and in the same interest as the other *cestuis qui trust*. The same was the case certainly in *Reed v. Prest (a)*, before Sir William Page Wood but in that case the Vice-Chancellor was influenced by the circumstance of fraud being charged by the bill; and inasmuch as fraud might exist and be capable of being proved, the trustee beneficially interested might have a strong motive, conflicting with the interest which he had in common with the other *cestuis qui trust*, that motive being the saving of his character from the imputation, or rather, perhaps, the exposure, of the fraud with which he was charged. As I understand the learned Vice-Chancellor's judgment, that was the reason why he considered the interests of the *cestuis qui trust* not sufficiently protected by one who was also a trustee being made a party to the suit.

Judgment. Nothing of the kind is charged or pretended here, and I concur, therefore, in thinking that it is not necessary to make any other of the *cestuis qui trust* parties to the suit.

MALLOCH V. THE GRAND TRUNK RAILWAY.

Jurisdiction of court.

The remedies pointed out by statute for the purpose of settling the claims of landowners to compensation for lands taken by a railway company becoming ineffectual, the court in such case will direct a reference to the Master for that purpose.

The bill in this cause was filed by *George Malloch* against the *Grand Trunk Railway Company of Canada*, praying a reference to the Master to ascertain the amount of compensation that he was entitled to receive from the *Company* in respect of land taken by them for the

(a) 1 K. & J.

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Mr. Brough

Mr. McDono

ESTEN, V. refuse to name Mr. Roblin, and upon nomination of either point respecting seems doubtful that the plaintiff the *Company*, the plaintiff, this claim and sub-contractors and sub-contractors, in evidence, is, upon this point.

Supposing, however, the dispute, it does not name an arbitrator on behalf of the plaintiff, who refused. The plaintiff alone, and Mr. Kilburn, and an arbitrator, notice he continues to appear, therefore, judgment, that in any case a

It is the case of the construction of the purpose, who and the damage done, such sum as may be

purposes of the road, as well as for damages done to his property in the construction of the railway.

1857.

Malloch

G.T.R.W. Co.

Mr. Brough for the plaintiff.

Mr. McDonald for the defendants.

ESTEN, V. C.—I think the plaintiff could properly refuse to name an arbitrator to act in conjunction with Mr. Roblin, and that the *Company* had a right to insist upon nominating Mr. Roblin. I cannot consider the conduct of either party unreasonable in this respect. The point respecting damages arising from wrongful acts seems doubtful upon the agreement. I cannot consider that the plaintiff was unreasonable in pressing, or that the *Company*, through Mr. Bell, were unreasonable in resisting, this claim. The agreement between the contractors and sub-contractors, *Elliott & Co.*, which is produced in evidence, is, I think, rather in favor of the plaintiff upon this point.

Judgment.

Supposing, however, this matter not to have been in dispute, it does not appear that the parties could agree about the appointment of arbitrators. The plaintiff would not name an arbitrator to act with Mr. Roblin. Mr. Bell says in one of his letters that he had proposed other arbitrators on behalf of the *Company*, whom the plaintiff likewise refused. The plaintiff objected to Mr. Kernahan alone, and Mr. Bell objected to Mr. Kernahan and Mr. Kilburn, and an umpire chosen by them; and in his last notice he continued to nominate Mr. Roblin. It would appear, therefore, judging from what had already occurred, that in any case an arbitration would have failed.

It is the case then, of an agreement to sell land for the construction of a railway to the *Company* formed for the purpose, who are to pay for the price of the land, and the damage done to the remainder of the property such sum as may be agreed upon, or if the parties cannot

1857. agree, then such sum as may be fixed according to the provisions of the act of parliament. The parties cannot agree, and the method provided by the act of parliament fails; but the agreement has been performed to such an extent that, in order to prevent injustice, it must be executed *in toto*, and this court has power under such circumstances to interfere in order to do complete justice between the parties, according to the case of *Gregory v. Mighell (a)*.

Malloch
v.
G.T.R.W. Co.

I think it should be referred to the Master to ascertain the amount which ought to be paid to the plaintiff by the *Company* in respect of the value of the land taken, and the damage done to the remainder of the property, by the construction of the railway.

Under the circumstances of the case I think there should be no costs to the hearing.

Judgment. Upon an attentive perusal of the agreement, and upon reference to the cases, we have come to the conclusion that the damage arising from wrongful acts was not intended to be the subject of arbitration, and therefore cannot be included in the reference to the Master.

SPRAGGE, V. C.—The points in difference between the parties appear to have been the naming of arbitrators to award compensation to be paid by the defendants to the plaintiff, and the matters to be submitted to the arbitrators.

The parties seem to have intended to proceed in part under the act, and in part under the agreement, the agreement referring to the act in relation to the construction of the railway; requiring the defendants to do the acts by law required, and authorised in building the same; and providing, in the event of their failing to agree upon compensation, that it should be ascertained and settled by the provisions of the act.

(a) 18 Ves. 328.

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Unfortunately the act was in that respect difficult of application to the position of these parties, the plaintiff being judge of the county court, and the statute making it the duty of the county court judge to name an arbitrator in two cases, one, where the landholder failed to name one, and the other, where the *Company* and the landholder having also named one, the two named should not agree upon a third. The agreement varies from the statute in not requiring compensation to be made, or that any proceedings should be taken to ascertain the amount before the *Company* should take possession of the land and proceed with their work, and in defining for what compensation was to be made.

1857.

Mulloch
v.
G.T.R.W. Co.

Supposing the statute to be entirely inapplicable in the mode provided by it for ascertaining compensation between these parties, the party entitled to compensation would necessarily come to this court. The parties, indeed, expected, as their agreement shews, to be able to act under the statute, and intending, probably, each to name an arbitrator, and expecting that the two named would agree upon a third, so that a resort to the county court judge would be unnecessary.

The agent of the *Company* and the plaintiff appear to have endeavored fruitlessly to agree to the nomination of a sole arbitrator or of arbitrators. The agent, no doubt, pressed the nomination of Mr. *Roblin*, in case more than one arbitrator should be appointed, and I do not find in the correspondence that he proposed the name of any other person, or agreed to any other, except as sole arbitrator; a good deal of evidence is adduced to shew that the plaintiff was right in objecting to Mr. *Roblin* as an arbitrator, on the ground that in many other cases he had acted rather as the agent of the *Company* in obtaining the lands for them at as low a rate as possible, than as an arbitrator exercising a proper judgment as to the just sum to be awarded for compen-

1857. sation. The evidence shews that he was arbitrator for the *Company* in a great many cases, in fact generally in that section of the country. It has been remarked, that arbitrators are nearly always to prone to advocate the cause of the party naming them ; and the almost certain tendency of one person acting as arbitrator for another in many cases of the same nature would be to increase the proneness to act as an advocate, or an agent, rather than as a judge. No less than seven different persons speak strongly upon the point in relation to Mr. *Roblin* ; and he is moreover spoken of as a person of undoubted ability. I think that the plaintiff was not unreasonable in objecting to Mr. *Roblin* as an arbitrator ; and although the agent of the *Company* pressed his appointment, and the defendants by their answer insist that he was a proper person to be appointed, they did not, as appears by the evidence of Mr. *Bell* and Mr. *Coleman*, refuse to name any other arbitrator, but named, or rather verbally suggested, others, as to whose fitness no objection is made.

Judgment.

But there was, mixed up with the naming of the arbitrators, another question, namely, whether the compensation claimed by the plaintiff for injury to his property in the course of the construction of the railway should be a subject of reference to arbitration.

It would not be probable, certainly, that two such persons as the plaintiff and the *Company's* agent Mr. *Bell*, should misunderstand one another as to what the former proposed should in that respect be submitted to the arbitrators ; but Mr. *Bell* says in his evidence, that " the plaintiff explained that he sought damages against the *Company* for the other parts of his property through the illegal acts, as I conceived, of sub-contractors ;" and again : " the road was built by sub-contractors, and by them the illegal damage, if any, was done. Mr. *Malloch* always insisted upon the reference comprising the damage

done to his property like ;" and Mr. *Malloch* is to be referred to arbitration to arbitrate upon the matter. I think that the contractor

Turning to the plaintiff claiming a side the written tober, 1855, and of his claim for ter of the 7th o however, to a c his words are : for damages acc I understand, th letter together, t for damages und arbitration ; and agreement, for da poses, but to whi the construction o insisted upon by ferred to the ar agreed to be refer would be a proper and I cannot see refer in the terms to exclude, by an which the plaintiff consideration of th

Upon the point, contractors was a proper arbitrators, I agree with and the Master, the action any damage o I think that the dec proper one.

done to his property by leaving the fences down and the like;" and Mr. Bell says he objected to leave that question to arbitration, at least to the same arbitrators, as he feared it might prejudice the *Company's* remedy against the contractors.

1857.

Malloch
v.
G.T.R.W.Co.

Turning to the correspondence, I do not find the plaintiff claiming a reference to arbitration of any matter outside the written agreement. In his letters of 27th of October, 1855, and 26th January, 1856, he speaks in terms of his claim for damages *under the agreement*. In his letter of the 7th of April, 1856, he does the same, referring, however, to a claim which Mr. Bell had sought to exclude; his words are: "you do not offer to submit all my claim for damages according to the terms of the said agreement." I understand, therefore, taking Mr. Bell's evidence and the letter together, that the plaintiff insisted that all his claims for damages under the agreement should be referred to arbitration; and that he was entitled to claim, under the agreement, for damage to his land not taken for railway purposes, but to which damage had been done in the course of the construction of the railway. If this be the case, the point insisted upon by the plaintiff was not what should be referred to the arbitrators, which would be the matters agreed to be referred by the written agreement, but what would be a proper subject of inquiry under that reference; and I cannot see that Mr. Bell was right in objecting to refer in the terms proposed by the plaintiff, or in seeking to exclude, by anticipation, that which might be, and which the plaintiff insisted, was a proper subject for the consideration of the arbitrators.

Judgment.

Upon the point, whether or not illegal acts by sub-contractors was a proper subject for consideration by the arbitrators, I agree with my brother *Esten* that it was not, and the Master, therefore, will not take into his consideration any damage occasioned to the plaintiff by such acts. I think that the decree indicated in his judgment is the proper one.

1857.

MCGREGOR V. ANDERSON.

Partnership—account.

A retiring partner obtained from one of the continuing partners a letter agreeing to reimburse the amount advanced by the partner so retiring, out of the one fourth of the profits to be derived from the business. Held, that the retiring partner had a lien on such fourth part of the profits, and a corresponding portion of the capital stock and assets of the partnership; and was entitled to an account of the partnership dealings.

This was a suit by *Daniel McGregor*, against *Robert Anderson*, *John Thompson*, and others, who were the representatives of a deceased co-partner of the plaintiff, *Anderson*, and *Thompson*; and one *George Thompson*. The bill in the cause stated that plaintiff, in 1852, was owner of lot number six, in the fourth concession of *Hullett*, and on the 26th of July, the plaintiff, and one *Stewart*, since deceased, and the defendants *Anderson* and *John Thompson* entered into a co-partnership for the erection and working of a saw mill, on this lot; which partnership was carried on as saw mill, on this lot; which partnership was carried on in the name of *Anderson* until the 17th of February following, when the plaintiff retired, before which time, however, plaintiff had conveyed twenty-five acres of the said lot number six to *Anderson* for partnership purposes, a portion of which, after the retirement of plaintiff, was conveyed to the defendant *George Thompson*, with full knowledge of plaintiff's claim upon the property. That on the plaintiff agreeing to retire from the partnership the defendant *Anderson* gave to the plaintiff a memorandum in the form of a letter in the following terms:

Statement.

"Mr. *Daniel McGregor*—Sir, In consideration that you have this day retired from and resigned all interest in the business known as the *Hullett Steam Saw Mill*, and as you have from time to time made investments in the capital stock of said company amounting to \$441.55, as exhibited by the books, it will give me much pleasure to reimburse you for the same on the following terms:—namely, that out of whatever profits may be hereafter derived from the said business, you will get one fourth part

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ESTEN, V. C.
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yearly, until the said amount of four hundred and forty four $\frac{5}{100}$ dollars is paid up. Always accepting [excepting] such debts as you may have personally contracted for the late company; and of which in writing I have personally assumed the responsibility this day, I am, &c., *Robert Anderson*," which proposals were acceded to in writing by the plaintiff.

1857.

McGregor
v.
Anderson.

The defendants answered the bill, and the cause having been put at issue, evidence was taken before the court, the effect of which appears in the judgment.

Mr. *Roaf* for plaintiff.

Mr. *Brough* for the defendants *Thompson*.

Mr. *McDonald* for defendant *Anderson*.

The other defendants submitted to the relief asked by the plaintiff.

Judgment.

ESTEN, V. C.—In this case, I think, the written agreement which was made between the parties must stand, and must regulate their rights. It is *prima facie* binding, and it has not been impeached in evidence. I think this agreement must be regarded as the act of all the continuing partners. In form, it is between the plaintiff and *Anderson* only, but it is difficult to conceive that the other partners could have been ignorant of the terms on which the plaintiff was retiring: *Mr. Anderson* professes to take them into partnership with him the next day, but it is manifestly a continuation of the same business; it is perfectly clear, I think, that *Anderson* was acting for the other partners.

It is quite possible, certainly, that an agreement for the plaintiff's retirement might have been made between the plaintiff and *Anderson* alone, which would be a sort of buying out of the plaintiff by *Anderson*, in that

1857. *Anderson* alone was to be responsible to the plaintiff for the performance of this agreement; and that a new partnership might have been formed between the remaining partners, upon different terms from those of the previous partnership. The form of the proceeding and some of the evidence points this way. It will be difficult, however, for the defendants to persuade any one that the other partners were not cognizant of, and consenting to this agreement. The result is the same in either case. The effect of the agreement was to create a charge or lien upon one fourth part of the profits, and the stock in trade and effects, from which they were to arise, for securing to the plaintiff the sum of money agreed to be paid to him as the consideration for his retirement. Any one purchasing such stock in trade, and effects, with notice of this agreement, would be bound by it. This agreement entitles the plaintiff to an account of the partnership business, and, under circumstances rendering it proper, to the appointment of a receiver. I think an inquiry should be directed as to whether the twenty-five acres formed part of the partnership property, and as to whether the debts of the first partnership were to be paid by *Anderson* personally, or out of the proceeds of the new business; and as to the writing across the face of the agreement, whether it formed part of the agreement or not. It is remarkable that none of the defendants refer to, or insist on it, and the principal difficulty is created by the bill stating that the agreement was fraudulently drawn with that limitation.

Judgment.

Further directions and costs should be reserved.

SPRAGGE, V. C.—The bill states a partnership to have been formed on the 26th of July, 1852, between the plaintiff and defendants *Robert Anderson, John Thompson, and Henry Stewart*, deceased, and that such partnership was dissolved on the 17th of February following. The partnership was formed for the erection and working of a steam saw mill, on certain property of the plaintiff's

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in the township of Hullet, and was to continue for five years; and the bill states that the plaintiff conveyed to the defendant *Anderson* twenty-five acres of land, upon part of which the mill was put up, for the purposes of the partnership; the mill was built, and when about in working order the partnership was dissolved, by the retirement of the plaintiff; and the bill states that it was thereupon agreed that the plaintiff should be indemnified against the debts of the partnership; that he should be paid the sum of 111*l.* 2*s.* 9*d.*, being the sum then found to be due from his co-partners; but, as the bill proceeds to state, the defendant *Anderson* drew up and delivered to him, plaintiff, a memorandum of agreement falsely and fraudulently drawn up, in such a manner as not to give him any claim except for a share of the profits for four years.

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 McGregor
 v.
 Anderson.

On the day after the dissolution, a new partnership was formed, consisting of the same parties, with the exception of the plaintiff, and the business was carried on Judgment. by them until September, 1855, when the mill, machinery, and plant were sold to the defendant *George Thompson*, who admits that he had notice of the written agreement entered into with the plaintiff on the dissolution of the first partnership, but not of any such agreement as is set forth as the true agreement in the plaintiff's bill; the written agreement is in the name of *Anderson* alone, and the plaintiff; but there can be no doubt that it was entered into with the concurrence of the other continuing partners. The defendants, in their answer, set out the written agreement, and insist upon it as the real and only agreement between the parties; and there is no evidence that it is not so.

As set out, it consists of a letter written by *Anderson* to the plaintiff, and copied by the plaintiff with his answer to *Anderson*, accepting the terms proposed. The original letter from *Anderson* to the plaintiff is proved by the plaintiff, and across it is written, in the handwriting of

1857. *Anderson*, but in a different ink from the body of the letter: "The obligation of this promise to terminate on 26th July, 1857—1111. 2s. 9d., cy." No explanation is given as to this. It is to be observed that the day named in this cross writing is the day on which the original partnership would have expired, according to the articles of partnership.

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v.
Anderson.

The first thing that has struck me is, that the plaintiff seeks by his bill to establish an agreement different from the written agreement, and asks relief accordingly. The answers deny the alleged agreement, and insist upon the written agreement; the plaintiff does not amend, and fails to establish the agreement alleged in his bill, and must rest upon the written agreement which he impeaches, if he is at liberty to avail himself of it. The defendants, however, have taken no objection on that account, but content themselves with claiming costs, by reason of the plaintiff having charged fraud in his bill. Assuming that the plaintiff may, upon this ground, in the absence of any objection by the defendants, have such relief as he may be entitled to under the written agreement, he would seem to be entitled to an account of the profits, if any made since the dissolution, as he was certainly entitled year by year to payment out of any profits made, and this disposes of the objection that the bill is in any view premature, as the plaintiff should have waited until February, 1857, before filing his bill.

Judgment.

It is not necessary, at this stage of the cause, to determine whether the plaintiff is entitled absolutely to be repaid the amount of his advances, or whether they were contingent upon profits being made out of the business by the continuing partners; the plaintiff himself, in his bill, treats it as contingent, and counsel for one defendant insists that it is so, while counsel for other defendants think the plaintiff entitled absolutely, but contends that no lien was retained by the retiring partner.

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If the plaintiff intended that his repayment of advances should be contingent upon profits being made, it was certainly a very strange agreement to make under the circumstances. The defendants try to account for it by saying that the concern was insolvent. It is not shewn to be so. The mill and machinery probably cost more than the parties expected, (taking the account given by defendants *John and George Thompson*, in their examination to be correct,) for *Anderson* had advanced from 100*l.* to 150*l.* beyond his proposed capital, and 175*l.* was due in other quarters; but all had been outlay, and the mill, though ready for work, had as yet made no returns: under these circumstances the plaintiff retired in consequence of a disagreement between himself and *Anderson* who was the managing partner, and the rest enter into a new agreement of partnership. It was, in short, getting rid of one partner, the rest continuing the business. The retiring partner might, of course, agree that the repayment of his advances should depend upon profits being made in a business in the management of which he retained no concern, Judgment. and a first reading of the agreement impressed me with the idea that such was its true meaning; but reading it as the language of *Anderson*, and construing it when ambiguous against him, I am led to doubt whether its true meaning is so. It is in restraint of the rights of the retiring partner, apart from the agreement, and it was necessary, therefore, to obtain his consent to give up his interest, and take payment of his advances by instalments, the continuing partners guarding themselves from any *personal* liability to pay, but undertaking for the application of so much of the anticipated profits.

The cross writing was evidently an after-thought, and being omitted from the letter which constituted the agreement, there may be room to contend that it was discarded by consent, and that the agreement is complete without it; but supposing it part of the agreement, it was probably made upon the assumption that on the day named therein the partnership would expire, being the day nam-

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Anderson.

ed for the expiry of the partnership from which the plaintiff was retiring; when, the business ceasing, the undertaking as to profits would cease with it. I cannot at least understand the naming of that particular day, in any other way. Supposing that view correct, and present to the minds of the parties, could it be intended that the corpus of the partnership property should then be divided among the continuing partners, without regard to the claim of the plaintiff for his advances, supposing them not paid off by the expected profits in the meantime. I do not mean to express any decided opinion as to this being the necessary or the proper construction of the agreement, but looking attentively at its terms, and at the surrounding circumstances, I incline to think that it is so.

Judgment. I do not think that the plaintiff gave up any lien that he had upon the partnership property, whether his right was limited to the contingency of profits, and to time, or not. The stock in trade was the mill with its machinery, and with or without the twenty-five acres of land, as the case may turn out upon inquiry to be, and the retiring partner as between himself and the continuing partners had a lien for his advances, which they treated as a debt payable by them as continuing partners; (I say this identifying *Anderson* with the other continuing partners;) and the defendant *George Thompson* purchasing with notice of the agreement, and of the circumstances under which it was made, as appears by his own evidence, is in the same position. His being ignorant, as he says, of there being any lien, can make no difference, being only ignorance of a legal consequence flowing from known facts.

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MITCHELL V. MCGAFFEY.

Sale of growing timber—Vendor's lien—Injunction.

1858.

Nov. 10, 1857.
and
Feb. 6, 1858.

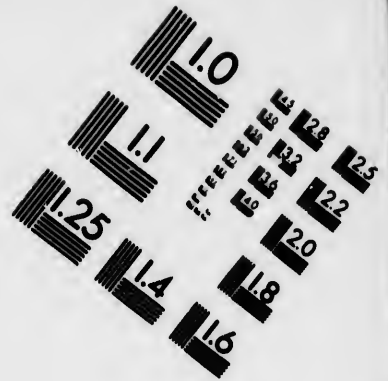
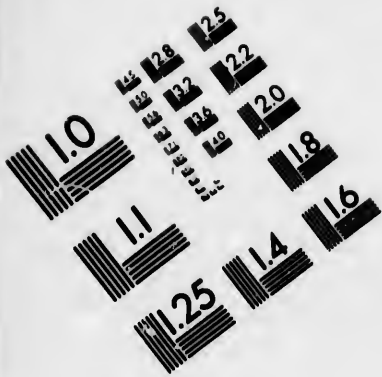
The owner of land agreed to sell the growing timber thereon by the terms of the agreement it was stipulated that the price should be paid by the purchaser's note, endorsed by a responsible party, renewable for half at its maturity, the delivering of such note within ten days from the date thereof to be the completion of the consideration for said agreement: Held, that this was only a mode of paying the purchase money, and was not substituted for it; and that upon failure of payment the vendor was entitled to an injunction to restrain the felling of timber, or the removal of such as had been already cut down.

This was a suit by *James Mitchell*, against *Albert A. McGaffey* and *Henry R. Searles*; and from the pleadings and affidavits filed, it appeared that *Mitchell* being owner of certain lands in the township of York, had agreed with *McGaffey* for the sale to him of the standing timber thereon, for securing the payment of which he took the promissory note of *McGaffey*, who had absconded from the province without paying the note, having previously to so absconding assigned and transferred his right to the timber to the defendant *Searles*, alleged by *Searles* to be for valuable consideration, that is to say, in part satisfaction of large liabilities which he had incurred on account of, and as surety for *McGaffey*: *Searles* also insisted in his answer that by the true construction of the terms of the agreement the promissory note agreed to be given was intended to be, and was given in satisfaction and for the said timber, and as the price thereof, and not merely as a mode of payment; and also that the agreement was for a sale of such a nature that no equitable lien could be implied therefrom. He did not deny notice of the claim of the plaintiff at the time of obtaining the assignment from *McGaffey*.

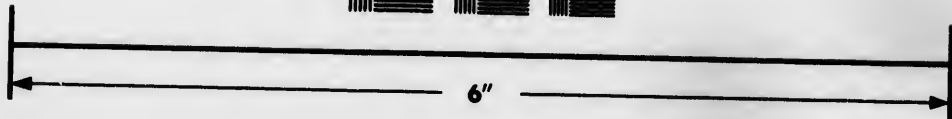
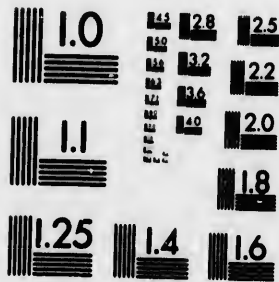
The bill prayed amongst other things an injunction to restrain the defendants from cutting down or removing any portion of the timber already cut and remaining on the premises.

On a former day an injunction had been granted, upon notice to *Searles*, as prayed.





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1858. Mr. *Strong* for defendant *Searles*, moved to dissolve the injunction then issued.

Mitchell
v.
McGee.

Mr. *McDonald* contra.

The cases cited appear in the judgment of the court which was now delivered by

February 6. THE CHANCELLOR.—I have no doubt that this court has jurisdiction to decree the specific performance of such a contract for the sale of growing timber, as has been entered into in the present case.

Such a bill was maintained in *Burton v. Lister*, (a), although at that period the sale of growing timber was considered to be the sale of a mere chattel; and in the course of his judgment in that case, Lord *Hardwicke* suggests many other cases in relation to chattels, (which he considered growing timber to be), in which a suit for specific performance would be proper.

But it is now well settled that such a contract for the sale of growing timber, as we have here, is a contract for the sale of an interest in land (b). The contract was a contract for an interest in the freehold, and I have no doubt that upon settled principles a bill for specific performance might have been filed by either party.

A bill of this sort was filed, and a decree for specific performance pronounced in *Mason v. Mason*, a case cited by Mr. *Lutwyche*, in his argument of *Clavering v. Clavering* (c); and in a recent case which came before Sir *John Leach*, the jurisdiction of the court was not questioned (d).

Assuming, then, that either party to the agreement might have maintained a suit for specific performance, it

(a) 3 Atk. 383. (b) *Seorell v. Boxall*, 1 Y. & J. 396; *Rhodes v. Baker*, 1 Jr. C. L. R. 488. (c) *Mosely*, 224.
(d) *Arkwright v. Stoveld*, Coop. tem. Cottenham, 499.

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follows, I think, that the plaintiff is entitled to file a bill for the purpose of enforcing his lien for unpaid purchase money, unless it can be clearly shown that the right has been abandoned by contract express or implied.

1858.

Mitchell
v.
McGaffey.

This proposition was not, I believe, questioned upon the argument, but it was argued that a contract to abandon the lien should be implied in this case either from the peculiar nature of the subject of the contract, or from some expressions to be found in the agreement.

Upon the general question, I do not know that I can add any thing to what has been already said in *Colborne v. Thomas* (a). The doctrines of equity in relation to the vendor's lien for unpaid purchase money, are founded, as appears to me, on the plainest principles of natural justice. What can be more unconscientious, more unjust, than the course pursued by the present defendant. His contention is, that he is entitled to strip the plaintiff's land of all the timber still standing, and to carry off what has been already cut, although he has neglected, in direct violation of his contract, to pay a single shilling of the purchase money, nay, although his present position is such as to exclude the notion that there remains even an intention to pay.

Judgment.

This equity being, then, well founded, it follows, in my opinion, that we ought not to refuse to give it effect except upon clear evidence of abandonment. If the present plaintiff is to be deprived of that protection which this court is in the habit of affording in such cases, upon the plainest principles of natural justice, that conclusion ought not to result from refined speculations, however ingenious, as to intention, suggested either by the conduct of the parties, or by incidental expressions to be found in their contract, but ought only to follow from evidence leading clearly and manifestly to the conclusion that the plaintiff had intended and agreed to abandon his right.

(a) 4 Grant, 102.

1858.
 Mitchell
 v.
 McGaffey.

Judgment.

I will not say that all the cases upon this subject are consistent with each other, or can be supported upon a just application of the principles to which I have adverted (a), but that principle has been laid down distinctly by judges of the greatest eminence, and by it our judgment in this case ought, in my opinion, to be governed. Lord *Redesdale* says: "It lies on the purchaser to shew that the vendor agreed to abandon the collateral security; *prima facie* the purchase money is a lien upon the land." Lord *Eldon* says (b): "The principle has been carried this length, that the lien exists unless an intention, and a *manifest intention*, that it shall not exist appears." *Winter v. Lord Anson* (c) was certainly a case which afforded strong ground for speculation as to the intention of the parties, had mere speculation been admissible; but in that case Lord *Lyndhurst* says, "In general, when a bill, note, or bond is given for the whole or any part of the purchase money, the vendor does not lose his lien for so much of the money, as remains unpaid. The circumstance that in these cases the money is secured to be paid at a future day does not affect the lien. In the present instance the land was taken as a security for the payment of part of the purchase money, twelve months after the death of the purchaser, with interest at the rate of four per cent. in the meantime. I do not think that the lien is affected by the fact of the period of payment being dependent on the life of the vendee. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge, and I do not perceive why it is at variance with the lien resulting from the rules of a court of equity." And again: "As in this case, then, there was no agreement for the extinguishment of the lien, and

(a) *Dixon v. Gayfers*, 21 Beav. 121.

(b) *Mackrath v. Symons*, 15 Ves. 329.

(c) 3 Russ. 490.

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as in my judgment there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference, that such was the intention of the parties, I think it should be declared that the plaintiff has a lien upon the estates in question for the residue of the purchase money."

1858.

Mitchell
v.
McGaffey.

Now, to apply that principle here, I am of opinion that there is nothing either in the nature of the contract in the present case, or in the language employed, which leads to the clear and manifest inference that the plaintiff intended to abandon his lien. It was not urged, I believe, that the nature of the contract alone, would be sufficient, and I am clear that it would not; but it was said that the nature of the contract, coupled with the language of the bill of sale, ought to be deemed satisfactory. The passage relied upon states that the plaintiff agrees to sell the timber in question to the defendant "for the price or sum of four hundred pounds cy. payable by said *McGaffey's* note at 3 mo., endorsed by a responsible party, renewable for half at its maturity." Now, had that been all, there could not have been, I presume, any doubt. There could not have been any just ground to argue that the parties intended that the note in question was to be accepted as a substitute for payment of the purchase money, and not as a mere mode of payment. The passage, however, does not end there, but proceeds thus: "the delivery of said note to *John Fiske*, merchant, of said city, within ten days of the date hereof, to be the completion of the consideration for said purchase." Which words import, it is said, an agreement that the plaintiff should accept the promissory note, not as a mode of paying the purchase money, but as something substituted therefor. Now, that is not, in my opinion, a fair and just inference, and certainly it cannot be represented as the clear and manifest inference from the passage referred to. The parties meant nothing more, I think, than this, that the defendant was to have ten days to procure the promissory note he had agreed

1858.
 Mitchell
 v.
 McGaffey.

to furnish. The agreement is in the handwriting of the plaintiff, who probably knew nothing of either the principles or language of the law beyond the jargon acquired from the occasional perusal of legal documents; and, did the matter admit of investigation, it would be found, I apprehend, that the parties had no notion whatever, of the distinction contended for, which they are supposed to have intended to embody in the agreement. Had the real intention been to extinguish the vendor's lien, that might have been expressed distinctly in a single sentence. But no such intention is to be found in the instrument, and to infer it under such circumstances from the language employed would be, in my opinion, quite unjustifiable.

Questions of this sort turn so much upon the circumstances of each case, that we cannot expect to find authorities exactly in point, but *Teed v. Carruthers (a)*, *Frail v. Ellis (b)*, *Richardson v. McCausland (c)*, appear to me to be much stronger than the present.

Judgment.

I am of opinion, for these reasons, that the injunction should be continued.

SCOTT V. SCOTT.

Will—Construction of.

A testator directed all his estate, real and personal, to be sold for the purpose of dividing the proceeds amongst his children, which sale was to take place in eighteen months from his death; but the will empowered the executors to withhold the sale of the estate, "*real and personal more than what is necessary to defray the above mentioned charges, if they should deem it for the benefit of my heirs, provided such sale shall not be delayed longer than five years from my decease.*" The real estate was not sold within the five years: *Held*, notwithstanding that the trustees could make a good title, the limitation of the time being only directory.

Oct. 6, 1857,
 and
 Feb. 6, 1858.

This was a motion for a decree declaring that the trustees under the will of *William Scott* were entitled and empowered thereunder to effect a sale of the real estate devised to them, notwithstanding that the time limited by the will for so doing had expired.

(a) 2 Y. & C. 31. (b) 16 Beav. 350 (c) Beat. 457.

Mr. A. C.
 v. Gardiner

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Mr. A. Crooks in support of the application cited *Pearce v. Gardiner* (a), *Smith v. Claxton* (b), *White v. Smith* (c). 1858.

Scott
v.
Scott.

Mr. Strong, for the defendant's infant children of the testator, suggested that an inquiry should be made whether it was for the benefit of the infants that a sale should be effected. He referred to *Lewin* on Trusts, page 416.

The judgment of the court was now delivered by

THE CHANCELLOR.—The sole question in this cause arises upon the will of *William Scott*, which, after providing for the payment of debts, proceeds in these words: "I give and bequeath to my beloved son *William*, and after him to my sons *John, Matthew, Robert, Wellington, David*, and my daughter *Susannah*, to all and each of them an equal share to, and in all the estate real and personal that I may be possessed of at my decease, after defraying the above mentioned charges, all which estate shall be sold within eighteen calendar months from my decease, to enable my executors to make the above mentioned division of my property among my heirs. And my executors are directed to place the shares of those of my heirs who are minors at interest, that they may have interest and principal when they come of age, except those of my heirs who may remain with their mother *Catharine*, my wife: she shall have the interest of their shares, to enable her to school, clothe, and otherwise take care of them. And my executors are further empowered to withhold the sale of my estate real and personal, more than what is necessary to defray the above mentioned charges, if they should deem it for the benefit of my heirs, provided such sale shall not be delayed longer than five years from my decease."

Judgment.

In consequence of some defect in title, as is alleged,

(a) 10 Hare, 297. (b) 4 Madd. 484. (c) 15 Jur. 1096.

1858. the real property has not been sold although the five years have elapsed; and the question is, whether the executors can make a good title. I am of opinion that the trustees can make a good title, notwithstanding the lapse of five years (a), and that they are entitled to a declaration to that effect (b).

Scott
v.
Scott.

CARSON V. CARSON.

Will—Construction of.

Dec. 1, 1857, A testator devised 100 acres of his estate to his son *Robert*, for which he was to pay the executors, by instalments, a sum of money which was to be invested for the benefit of another son, on his attaining the age of twenty-one years; the testator further declared that: "should my second son, *Robert Carson*, neglect or refuse to pay the before mentioned sums in the manner specified, then it shall be in the power of the executrix or executor to dispose of 50 acres of the said land for the benefit and use of the said *Thomas Carson*, or to give him, the said *Thomas Carson*, a deed for 50 acres of said lot; which 50 acres shall be such part of the said lot as the executrix or executor shall see fit." The legacy was not paid, and the executors conveyed 50 acres to *Thomas*. Held, notwithstanding such default in payment, that upon *Robert* paying the amount due for principal and interest on foot of the legacy he was entitled to a reconveyance of the 50 acres.

Statement.

The bill in this case was filed by *Robert Carson* against *Agnes Carson*, executrix of *William Carson* and *Thomas Carson*, setting forth the clause of the will referred to in the judgment; alleging that the plaintiff had made default in payment of the legacy given to the defendant *Thomas*; and that the executrix had by indenture dated 22nd November, 1855, conveyed to *Thomas* 50 acres of the land devised to plaintiff, against whom an action of ejectment had been brought by *Thomas*, to obtain possession of the land so conveyed to him.

The prayer of the bill was, that the plaintiff might be at liberty to pay the legacy; that the defendant *Thomas* might be ordered to reconvey to plaintiff, and an injunction to restrain the action of ejectment.

(a) *Pearce v. Gardiner*, 10 Hare, 237; *Cuff v. Hall*, 1 Jur. N.S., 972
(b) *Jackson v. Turnley*, 1 Drew, 617; *Rooke v. Lord Kensington*
2 Kay and Joh. 753.

Mr. A. C.

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VOL. VI.—

Mr. *A. Crooks* for plaintiff.

Mr. *Crickmore* for defendants.

1858.

Carson
v.
Carson.

The cases cited, and points relied on by counsel appear in the judgment.

THE CHANCELLOR.—The question in this case arises upon the following clause in the testator's will: "I give and bequeath to my second son *Robert Carson*, 100 acres of land, being composed, &c., for which he is to pay into the hands of the executrix or executor the sum of 34l. 3s. 5d. in manner following—that is to say, 10l. per annum for three years, and 4l. 3s. 4d. within the fourth year from the date of this will and testament, which payments are to be placed by the executrix or executor in one of the chartered banks of this province, for the use and benefit of my fourth son *Thomas Carson*, when he shall come of age. Nevertheless, it shall be in the power of the said executrix or executor, to pay to the said *Thomas Carson* any part or the whole of such sum of money before that time, should the said executrix or executor see fit so to do. And should my second son *Robert Carson* neglect or refuse to pay the before mentioned sums in the manner specified, then it shall be in the power of the executrix or the executor to dispose of 50 acres of the said land for the benefit and use of the said *Thomas Carson*, or to give him the said *Thomas Carson* a deed for 50 acres of said lot, which 50 acres shall be such part of the said lot as the executrix or executor may see fit."

February 6.

Judgment.

Had the question been whether the condition here was a condition precedent or subsequent, the case would not have admitted of argument, for the condition is manifestly a condition subsequent. But the question, in equity, is not so much whether the condition is precedent or subsequent, as whether being broken, it admits of compensation.

1858. tion (a). And assuming this to be a case of that sort, as I suppose it is, whether the will is to be read as a devise over on breach of the condition, or as providing means for securing *Thomas's* legacy.

Carson
v.
Carson.

The provisions of the will are no less peculiar than its language, and considered in connexion with the state of the testator's family, at the time of his death, leads fairly to the conclusion that the testator merely intended to provide security for *Thomas's* legacy.

In the first place the land is not devised to *Robert* "upon condition" that he pay, or subject to the payment of the legacy; but having devised the land to *Robert*, the testator goes on to say: "for which he is to pay into the hands of my executors;" a form of expression more consistent with the plaintiff's construction than with that for which the defendants contend. Then, both sons were under age at the time of the father's death. *Robert* was between 18 and 19, and *Thomas* between 15 and 16; and the legacy was not payable at once, but by annual instalments, which, when paid, were to be deposited in some chartered bank until *Thomas* should attain his age. Now, it is hardly possible, under such circumstances, that the testator meant to make *Robert's* right to retain the land devised to him dependent upon his punctual performance of the condition. The ages of his children, the manner in which the legacy was payable, and the purpose to which it was to be applied, all tend strongly to the opposite conclusion. Lastly the land is not devised to *Thomas* upon *Robert* failing to pay the legacy, but in that event the executor is empowered either to sell the land for the benefit of *Thomas*, or to convey it directly to him. That, again, savors much more of security than forfeiture; and the provisions, taken together, appear to me to lead naturally to that conclusion.

Judgment.

(a) *Hayward v. Angell*, 1 Ver. 222; 2 Fonb's Equity, 397. note h., page 398, and note k.

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Upon the whole, while I participate, to some extent, in the doubt expressed by my brother *Esten*, I am clear that relief has been given already in cases much less favorably circumstanced for the plaintiff than the present. I allude to *Woodman v. Blake (a)*, *Haywood v. Angell (b)*, *Popham v. Bamfield (c)*, *Bland v. Middleton (d)*. And I am of opinion, therefore, that the plaintiff is entitled to have the land reconveyed, on payment of the amount due for principal and interest on foot of the legacy.

1858.

Carson
v.
Carson.

ESTEN, V. C.—My opinion is in favor of the plaintiff, but with considerable doubt and hesitation.

The ground of my decision is that the provision in the will is merely to secure the payment of the money, and did not involve an ulterior gift on non-compliance with the condition. That the power of sale was for further security, and the alternative provision merely authorised *Thomas* to elect to take the land in lieu of the money, and thereby prevent a sale.

Judgment.

It would seem that had the power of sale been exercised no relief could have been given, but so it is in case of a mortgage with power of sale: but as long as the estate remains in the hands of *Thomas* I should hold it subject to this equity. The remaining questions are, whether the plaintiff has disentitled himself, by his laches, to relief, or by his refusal to pay the money when demanded. I do not think there is sufficient laches to preclude the plaintiff from relief. The suit was commenced promptly after the execution of the deed, and it does not appear when the payments were demanded of him; nor should I infer, nor is it stated, that material inconvenience has been sustained in consequence of the non-payment. The refusal to pay was not fraudulent, but grounded on alleged inability. Upon the whole, I think the plaintiff entitled to relief, but the case is new, and one of extreme doubt.

(a) 2 Ver. 222.

(b) 1 Ver. 222.

(c) 1 Ver. 79.

(d) 2 Ch. Ca. 1, and see Fomb's Eq. Book 1, ch. 16, secs. 4 & 5.

1858.

GRAHAM V. GRAHAM.

Specific Performance—Tenant in tail.

A decree for specific performance will be made against a tenant in tail.

Joint tenants in tail executed articles of agreement for a division of the property; and each went into possession, and for thirty-six years continued to enjoy the portion allotted to him, when a bill was filed to enforce the agreement. *Held*, that the defendant could not set up as a defence to such bill, that the plaintiff had by possession acquired a perfect title at law.

The bill in this case was filed by *Peter Graham*, against *Adam Graham*, praying specific performance of an agreement entered into by them for the division of real estate in which they were interested as joint tenants in tail. The circumstances appear in the judgment.

Mr. *Brough* for plaintiff.

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

Judgment. The judgment of the court was delivered by

ESTEN, V. C.—This is a bill for the specific performance of an agreement between two joint tenants in tail, for a division of the property. The defendant resists the suit on three grounds—1st. That the parties were minors when they entered into it. 2nd. That the agreement was made for the purpose of taking from the trustees the management of the estate, and of preventing them from making a partition; and was made hastily, and without regard to equality either in quantity or value, and was not intended to be binding; and 3rd. That the division was in fact unequal and unjust. The defendant also insists, that if the plaintiff has been, as he alleges, in possession for more than twenty years, his title is complete at law, and he has no *locus standi* in equity. The agreement is proved by the subscribing witness, who was perfectly respectable and credible. It must be presumed that the parties were of age when they signed it, and competent to enter into such an agreement, and that it was fair and

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v.
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just, and intended to be binding. If the contrary is alleged, it must be proved by the party alleging it. The defendant, however, fails to prove any of the points on which he relies. The only evidence that he has adduced goes to show that lot number 19, in the 2nd concession, allotted to the plaintiff, was more valuable than either lots number 17 or 18 in the same concession, awarded, I presume, to the defendant. But these lots formed only a portion, and not a large portion of the property divided. This inequality does not prove that the general division was unequal or unjust. It is true that thirty-six years have elapsed since the agreement was signed, and if it had remained wholly in abeyance during the interval, the court would hesitate to carry it into effect, and would probably decline to interfere, concluding that a contract so stale, and so wholly disregarded, had been abandoned. But the evidence adduced on the part of the plaintiff goes far to show that the parties have, since the division, enjoyed their respective allotments according to its terms. There is no doubt that an agreement of this kind may be enforced as between joint tenants in tail, and it appears to me that a specific performance of this agreement should be decreed with costs. It may be true that the plaintiff has acquired a perfect title at law, by means of possession, and the time that has elapsed. This, however, is a title that may be disputed, and that must be established by litigation, and the defendant having agreed to execute a conveyance, cannot, I think, refuse to perform the agreement on any such plea.

Judgment.

McEDWARDS V. ROSS.

Husband and wife—Gift.

The only proof of the receipt of certain moneys by the wife during the life of her husband was in her own evidence, when at the same time she stated that the money had been given to her by the husband: the court considered her entitled to retain the amount, and that it formed no part of the testator's personal estate. Oct. 27, 1857,
and
Feb. 5, 1858.

This was an administration suit, and when the cause came on upon further directions, it appeared that upon the

1858.
 McEdwards
 v.
 Ross.

enquiry before the Master, it had been shewn that the plaintiff, Mrs. *McEdwards*, had, during the lifetime of her former husband, received from him a sum of money amounting to about 200*l.*, but it not appearing distinctly how, or under what circumstances she had received the money, the court directed her to be examined before the judges. Upon her examination she admitted having received the money, but she swore that it had been given to her as a gift by her deceased husband.

Mr. *Crickmore* for plaintiff.

Mr. *Brough* for the defendants the executors of the deceased husband, submitted that the evidence was not sufficient to entitle the plaintiffs to retain the money, and also claim the legacy left by the will.

This judgment of the court was delivered by

February 5. ESTEN, V. C.—The question in this cause is whether the plaintiffs, in right of the plaintiff Mrs. *McEdwards*, are entitled to retain a sum of 200*l.*, alleged by her to have been given to her by her former husband the testator, in his lifetime; or whether she must account for it as part of the personal estate of the testator. The case of *Mews v. Mews (a)*, decides that a husband may make a gift to his wife; but it must be by a clear and irrevocable act. In that case the master of the rolls considered the act insufficient, but said if the husband had stated to the bank that the money was for the wife, it would probably have been sufficient. Here we have no evidence but that of the wife to shew that the 200*l.* was received at all, and she states *uno statu* that it was given to her. Her statement is corroborated by the evidence of *McLennan*, who says that the testator told him there would be very little ready money. This statement seems to me to imply that that he had made an irrevocable gift to the wife. Upon

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the whole I think the gift is established, and therefore, that this sum forms no part of the personal estate.

1858.

McEdwards
v.
Ross.

I think the executors were quite right to take the opinion of the court on the point.

FOULDS V. POWELL.

Vendor's lien—Costs.

On a sale of land for 3000*l.*, the purchaser paid at the time of the execution of the conveyance 2750*l.*, and gave his promissory notes for the balance, payable in three and four years; afterwards he executed a mortgage to his father for the 2750*l.* alleged to have been advanced by him to his son to effect the purchase. The purchaser died intestate without issue, and before the notes fell due the vendor filed a bill against the father as heir-at-law, alleging that he intended to sell the property so as to defeat the vendor's lien, and praying that it might be declared that he had a first lien or charge upon the estate for the amount due him. *Held*, that he was entitled to a decree for that purpose, but without costs. Dec. 17, 1857, and Feb. 6, 1858.

The facts of the case and points taken by counsel are clearly stated in the judgment.

Mr. *Strong* for plaintiff.

Mr. *Crickmore* for defendant.

The judgment of the court was delivered by

The CHANCELLOR.—The plaintiff being owner in fee of the premises in question in this cause, sold and conveyed them to *Stewart Powell*, in May, 1856, for three thousand pounds. Of this sum 2750*l.* was paid upon the execution of the conveyance, and for the balance the purchaser gave his two promissory notes, payable, one, in three, and the other in four years; but no security was taken, and, so far as appears, nothing further passed upon the subject. *Stewart Powell*, the purchaser, died shortly after, without issue, and intestate, and the property thereupon descend- February 6.

1858.

Foulds
v.
Powell.

ed to the present defendant, his father and heir-at-law, against whom this bill has been filed to establish the plaintiff's line for the unpaid purchase money.

The answer denies that any lien exists, and sets up a mortgage executed by the purchaser for securing to the defendant a sum of 2750*l.*, and upon the grounds there stated, claims that the defendant is entitled to be satisfied that amount in priority to the plaintiff's lien, if any such should be found to exist.

Upon the argument the plaintiff's lien was not contested. His right seems perfectly clear in that respect (a). And it was conceded that the evidence failed altogether to sustain the grounds upon which the defendant claimed priority for his mortgage. But it was urged that, as the purchase money was not due, the plaintiff's right to sue in respect of it had not yet arrived; and further, that assuming such a right to exist, the plaintiff must be ordered to pay the defendant's costs.

Judgment.

Upon these points we all felt, I believe, considerable doubt at the hearing; we doubted the plaintiff's right to institute this suit under the circumstances, and we inclined to the opinion that he must, at all events, pay the defendant's costs. But I have come to the conclusion, upon the authority of the case cited (b), and upon general principles, that the plaintiff was entitled, under existing circumstances, to file a bill for the purpose of establishing and protecting his lien. The defendant was in law, and to all appearance in equity also, the absolute owner of the estate; and was in a position, therefore, at any moment, by a sale without notice, to destroy the plaintiff's security; and assuming the existence of such an intention to be established here, I cannot doubt that it is the duty of this court to interfere for the plaintiff's protection. But it is equally clear that the right to file such

(a) *Colborne v. Thomas*, ante vol. iv., p. 102; *Mitchell v. McGaffey*, ante 361.

(b) *Sporle v. Whayman*, 20 Beav. 607.

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a bill, at least the right to file it otherwise than at the expense of the plaintiff himself, must depend upon the proof of the fact to which I have adverted. A vendor of real estate who sells without taking security for his purchase money does so either because he wishes to avoid the expense, or other inconvenience of such security, or because he has perfect confidence in the personal responsibility of the purchaser. But, notwithstanding, the law implies a contract in his favor. He has a lien upon the estate unless there has been something more than mere neglect—unless there has been a waiver either by express agreement, or by circumstances from which such an agreement may be clearly implied. Now, any attempt on the part of the purchaser to defeat the defendant's lien, under such circumstances, would be, in my opinion, a fraud upon the contract implied by law, which this court ought to restrain, and which might justly subject the purchaser to the costs of a suit for that purpose. Suppose the purchaser to have entered into an express agreement to secure the vendor upon the land sold, and to have attempted to defeat such an arrangement by sale without notice, there would be no doubt, I apprehend, either as to the vendor's right to protection, or as to the consequence of the purchaser's fraud; and the vendor's right to protection against an attempt to infringe the implied contract, appears to me to be no less clear. But, in the absence of any such fraudulent design, what right can a vendor have to come here before the purchase money falls due—at least what right can he have to come here otherwise than at his own expense? The law does, indeed, imply a lien in the vendor's favor, and that lien, I think, is entitled to favorable consideration; but I cannot agree that a vendor who neglects to take any security himself, has any right to come here for the purpose of strengthening that which the law implies, thus subjecting the purchaser, who has been guilty of no wrong, to the costs of a suit in this court.

Judgment.

Now the evidence of improper design in the present

1858.

Foulds
v.
Powell.

case is certainly slight. That the defendant claimed priority for his mortgage upon grounds which evince a hostile feeling towards the plaintiff, is quite clear. But that is immaterial to the present point, except so far as it affords room for the inference of an intention to defeat the plaintiff's claim. But besides the question thus raised, the defendant explicitly declines to admit the existence of any lien; and there is some evidence, though slight, of his having expressed an intention to sell. Taken together, the evidence appears to me to be sufficient to sustain the bill, but I cannot give the plaintiff his costs.

STRACHAN V. MURNEY.

Practice—Dismissing bill in foreclosure suits.

February 25. When a bill is filed for the foreclosure of a mortgage, payable by instalments, and the defendant moves to dismiss on payment of the instalment and interest then due; the interest upon the mortgage money is only to be computed up to the day named for payment in the mortgage, and not to the time of making the application.

This was a foreclosure suit, and the bill had been filed upon default in payment of the last half year's interest. The defendant moved in chambers for an order to dismiss upon payment of the amount due pursuant to the XXXII. (a) of the orders of 1853; the judge in chambers directing the interest to be computed up to the time of drawing up the order. From the decision the defendant appealed to the full court, contending that the interest could only be computed to the time appointed for payment, and could not be apportioned since then.

Mr. *J. Morris* for the defendant.

Mr. *Roaf* contra—The words of the order are, that upon payment of what is due the bill shall be dismissed, not of what is due and payable; the interest is accruing

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due each day, and the plaintiff is entitled to have it computed up to the day of paying in compliance with the order of the court; but

1858.

Strachan
v.
Murphy.

Per Curiam.—The order authorises a defendant to move to dismiss the bill on payment into court of the amount then due for principal and interest. It is clear, we think, that a defendant could not be required to pay a fractional part of an instalment under the order. No part of an instalment falls due until the time fixed by the contract for payment of the whole. The same principle appears to us to apply to the payment of interest. It is payable on a fixed day, and until that day arrives nothing is due. Judgment.

The order must be confined, therefore, to the payment of the interest due on the last gale day.

STIMSON V. STIMSON.

Practice—Absconding defendant.

A party having absconded from this province, as alleged, to avoid service of proceedings in this court, and it being shewn upon affidavits that within a few months he had been resident at several different places, and that it was impossible to say any degree of certainty in which of them he could served with process: the court directed an advertisement to be inserted in a newspaper published at the place of the residence of the party in this province, and that a copy of the several papers containing the advertisement should be sent to his address at each of the places named.

This was an application for an order to advertise the defendant, *Edward Bowles Stimson*, calling upon him to come in and answer the bill in this cause. In the affidavits read upon the motion it was alleged that the defendant had left this province for the purpose of avoiding the service of the proceedings in this cause; that on first leaving this country he had gone to St. Paul's, Minnesota; that since then letters had been received from him by parties here, dated at Galveston, San Antonio, and Concrete, in Texas; and that in the opinion of the deponents

1858. it would be extremely difficult, if possible at all, to effect service of the bill upon the defendant personally. Under these circumstances

Stimson
v.
Stimson.

Mr. *Roaf* for the plaintiff now moved for an order dispensing with personal service of the office copy bill, and allowing the plaintiff to advertise for the defendant, calling upon him to answer the bill pursuant to the IX. (a) of the orders of 1853.

The court directed the usual notice to be inserted in one of the newspapers published in the city of London, where the defendant had been domiciled during his residence in this country for four weeks, and a copy of each paper containing such advertisement to be forwarded to the defendant, addressed to him at each of the three places indicated.

McKAY v. McKAY.

Alimony—Practice—Costs.

Dec. 14, 1857. Where in a suit for alimony, it appeared that the absence of the plaintiff from her husband's residence was voluntary; and that any grounds for annoyance to her, whilst residing with her husband, arose almost, if not entirely, from her own violence of temper, and that her husband was still willing to receive her back and support her. The court at the hearing dismissed the bill, but ordered the defendant to pay the costs of the suit to the plaintiff.

Feb. 6, and
March 10,
1858.

This was a suit for alimony. The bill filed charged several acts of violence and cruelty against the defendant, which charges, however, the evidence failed to establish; and at the hearing, counsel for the plaintiff relied upon the fact of desertion of the wife by the husband, as entitling her to a decree.

Mr. *Morphy*, for plaintiff.

Mr. *Proudfoot* for defendant.

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THE CHANCELLOR.—This case was in effect disposed of at the hearing, and only stood over for the purpose of considering the effect of the recent statute.

McKay
v.
McKay.

February 6.

The suit is for alimony. In the bill the case is rested principally on the ground of cruelty, but that wholly fails upon the evidence. Not only does that case fail, but the evidence establishes great, and as it would seem unprovoked violence on the part of the plaintiff herself.

The learned counsel for the plaintiff, however, abandoning the case of cruelty made by the bill, relied entirely, at the hearing, upon the recent statute, which authorises this court to grant alimony when the husband lives separate from his wife, under circumstances which would entitle her in England to a decree for restitution of conjugal rights; such alimony to continue during such separation, and until the further order of the court (a).

Judgment.

Now in a suit for the restitution of conjugal rights it is the practice to plead that the party complained of has withdrawn from cohabitation without lawful cause; and the prayer is, that such party may be compelled to return and treat the complainant with conjugal affection; and it is perfectly obvious, that in suits for alimony under this statute, the withdrawal of the husband from cohabitation without lawful cause, must be alleged and proved to the satisfaction of the court. Were it otherwise, a married woman by compelling her husband to leave his home; or by improperly absenting herself therefrom, might come here for a separate maintenance; a conclusion quite opposed to the whole spirit of the law upon this subject, and calculated to bring about results the most deplorable.

In this, however, as in the other branch of the case, the evidence wholly fails. Some proof, there is, indeed, of

(a) 29 Vic. c. 56, sec. 11.

1858.

McKay
v.
McKay.

harsh conduct, and harsh language on the part of the defendant—language and conduct highly unbecoming, no doubt, and well calculated to lead to the misery and degradation which has been the result. But it is equally clear that there was great provocation: *Davis*, apparently an impartial and credible witness, speaks of an occasion on which being accidentally at the house, her conduct was violent and unbecoming in the extreme, so violent and unbecoming, indeed, that it must have gone far to negative her right to relief, had the evidence on her behalf been much stronger than it is. But in truth she fails altogether to make out a case of exclusion. On the contrary, I am disposed to believe that her absence from her husband's house was the result, not of his misconduct, but of a premeditated scheme on her part, adopted with a view, and for the purpose of compelling a separate maintenance. The evidence so far from shewing that her husband withdrew from her, seems to me to establish that she withdrew from her husband without lawful cause.

Judgment.

Here, too, I find this passage in the defendant's answer: "I say that the plaintiff's absence from my house is entirely of her own seeking. That though she did not conduct herself in such a manner as to make my home a pleasant one, yet I have always been willing, and have frequently requested that she should return and reside with me, being desirous of discharging my duties to her, and hoping that she might come to fulfil her's to me. And since being served with the bill in this cause, I have caused an offer to maintain her in my own house, if she would return, to be repeated to her solicitor, which she declined."

Now, I do not mean to say that an offer of this sort can affect the plaintiff's right to a decree when the case has been established upon sufficient evidence: that would not be so, of course. But when the evidence fails to establish the plaintiff's case, as I think it does here, a statement such as I have read should not be overlooked.

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Her husband's house is open to her, and may become, I think, by prudence on her part, at least a comfortable house. But should his conduct, on her return, be such as to compel her withdrawal, that is the case for which the legislature has made provision. She must remember, however, that it is her duty as a wife to submit and accommodate herself as far as possible to the temper of her husband; but if instead of exercising patient forbearance, she allows herself to commit such acts of violence and misconduct as Mr. *Davis* has described, she cannot hope for relief here. In that event her misery and degradation will have been the unavoidable result of her own misconduct.

1858.

McKay
v.
McKay.

Therefore the defendant undertaking to receive and support his wife, the rule must be dismissed.

When this judgment was pronounced a question was raised, whether the defendant was liable to pay the costs of the suit notwithstanding the bill was dismissed; and now

Mr. *Proudfoot* for defendant, stated, that on consulting the recent authorities in the ecclesiastical courts, he considered he could not successfully contend that the defendant was entitled to be relieved from the costs.

March 10th.

Per Curiam.—The decree will therefore be drawn up directing the defendant to pay the costs, and must contain a recital that the husband undertaking to receive and support his wife, the bill is dismissed.

McCLURE V. JONES.

Practice—Service of pleadings by parties to suit.

The court will permit service of pleadings to be effected by parties to the suit, and allow the same fees upon taxation, as if served by February 26. third persons.

In this suit a decree had been pronounced *pro confess.*

1858. against the defendant. Upon proceeding to draw up the decree, the registrar, before entering the decree, desired the opinion of the court to be taken whether the service of the bill effected by the plaintiff himself was sufficient to entitle him to an order *pro confesso*, and whether, if sufficient for that purpose, the plaintiff was entitled to charge fees for mileage, &c., as if it had been served by a person not a party to the suit.

McClure
v.
Jones.

Mr. Blevins for the plaintiff now moved accordingly, that the taxing officer might be directed to allow these fees, and that the decree as pronounced might be drawn up; when

Per Curiam.—In this court no practice has ever obtained requiring the proceedings to be served by the sheriff, unless in the case of writs specially directed to him, and there is no good reason why the parties should not be permitted to effect service of their pleadings themselves, as well as by employing third persons to do so; and if allowed to serve the papers it would seem but reasonable that the same fees should be allowed therefor as if the service had been effected by any person other than the sheriff or his officer.

PHELAN V. PHELAN.

Practice—Examination of Witnesses.

February 9. Since the passing of the orders of February, 1858, the court will not direct the examination of witnesses to take place before an examiner, in a county where no resident master has been appointed, although consented to by the parties.

This was an application on behalf of the plaintiff to have the witnesses examined before one of the examiners of the court, in a county where no resident master had been appointed; the defendant consenting thereto, but

Per Curiam.—One of the chief objects in making circuits, was that all evidence might be taken before one

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VOL. VI.—

of the judges; the present application, if acceded to, would establish a practice that might have the effect of frustrating the object of the court in establishing the new practice. 1858.

This motion must be refused.

WATSON V. MUNRO.

Mortgage—Issue—New trial.

W. being interested in lands under an agreement for purchase made after the execution of his interest, absolute in form: and fifteen years after the execution of the instrument, filed a bill setting up that the transfer by him had been executed by way of security only. On the cause coming on to be heard, the court entertaining doubts as to the facts, directed the trial of an issue to ascertain whether or not the assignment in question had been originally intended to operate as an absolute transfer of the plaintiff's right, or whether the same had been intended to operate by way of security only: The jury found that the assignment had been intended to operate as a mortgage. The cause was brought on to be re-heard on the merits and also by way of motion for a new trial. The court, though strongly in favor of the plaintiff upon the evidence and verdict of the jury together, directed a new trial of the issue, the learned judge before whom the trial had taken place, having certified that he was not satisfied with the finding of the jury. January 13. and February 6.

The facts of this case sufficiently appear in the judgment, and the report on the hearing of the cause *ante* volume v., page 632.

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

Mr. A. *Wilson*, Q. C., and Mr. *Morphy* for defendant.

The judgment of the court was now delivered by

THE CHANCELLOR.—Although this case has been very fully discussed, and I have read through the pleadings and evidence more than once since the last argument, I cannot say that the conclusion at which I have arrived is perfectly satisfactory to my own mind. February 6.

The question is whether an assignment executed on the vol. vi.—26.

1858. 12th of October, 1840, was, what it purports to be, an absolute transfer of the plaintiff's interest in the premises in question, or a security merely.

Watson
v.
Munro.

The direct evidence upon that point is not entitled, in my opinion, to any weight. If the plaintiff is to succeed, therefore, it must be upon that ground that the circumstances of this case, either singly, or coupled with the verdict, leads fairly and clearly to the conclusion that the instrument in question was intended by all parties to operate as a mortgage, and not as a sale.

Now, although I cannot say that the circumstances taken alone, lend necessarily or clearly to the conclusion for which the plaintiff contends still, it must be admitted, I think, that they are of considerable weight; whilst the importance of the facts which were supposed, both here and at law, to have an opposite tendency, appears to me to have been greatly overrated.

Judgment. The evidence establishes satisfactorily, I think, that the plaintiff's improvements were worth at least three or four times the amount paid by the defendant. Had the question been as to the value of the property, we must have expected to find the discrepancy usual in such cases; but the material question here is, not the value of the property, but the value of the plaintiff's improvements. I have no doubt that the property itself had increased in value as Mr. *McCutcheon* and others have sworn. Real property in that locality has increased steadily in value every year from the date of the purchase up to the present time. But without pressing that point, assuming only that the plaintiff's purchase was an advantageous one, as it clearly was, the material question is as to the value of the plaintiff's improvements. Now, upon that the plaintiff has examined two witnesses well qualified, I think, to give us correct information. The first is *John Watson*, a carpenter, who himself put up and enclosed the frame of the main building. He swears that the plaintiff's improve-

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Watson
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ments were worth in 1840, two hundred and fifty pounds. Then Mr. *Stewart* who has been for many years a builder in this city, and who executed a part of this very work for the plaintiff, having surveyed the premises at the plaintiff's request, estimates their cost in 1840, at two hundred and thirty-nine pounds. Now the plaintiff's improvements remain to this day, and there are in this city several builders, Mr. *Ritchey*, Mr. *Harper*, and many others, who carried on business in 1840, and whose testimony on such a point would be entitled to the greatest weight. But instead of procuring some person of that class to survey the premises, and furnish us with an estimate of their value, the defendant has produced four witnesses, some of whom, at least, if not all, seem to have been selected for their ignorance rather than their knowledge of the matter in hand. First, Mr. *Bell* swears that the property was not worth more than 215*l.* at the time of the contract. But Mr. *Bell* is a professional gentleman who does not pretend to possess such a knowledge of the building trade as to be able to set a value upon the improvements, and as to the property itself, he admits on cross-examination that he was not even aware of its extent. Now, the size of a building lot is a material ingredient in determining its value. Then Mr. *Reynolds* was called upon to prove that he owned a good brick house in the neighborhood, which he leased for 25*l.* per annum, and that the rentable value of the house in question was not more than two-third of the rentable value of his house. But the house in question has always rented for 25*l.* a year or upwards, and that fact is much more material than Mr. *Reynolds*' opinion. *White* swears that he would be loth to give 100*l.* for the house; but then he is a mason, and admits that he has no knowledge of the value of carpenter work, and so I suppose he was not called as to value, but rather to prove that the house was in a state of perfect decay in 1844. But the house is still standing, and Mr. *Miller*, the present tenant, has been paying for some time a rent of 37*l.* 10*s.* per annum. Lastly, we have the evidence of *Hill*, for some years a carpenter, and now, as

1858. it would seem, a builder. But *Hill* was not required to survey the property and furnish the court with an accurate estimate of value. His evidence amounts to a little more than a guess, a guess certainly rather than an estimate of the value of the house alone. But upon *Hill's* testimony, and he was the only witness for the defence competent to form a correct opinion upon the subject, the disproportion was very great. He says that the house could have been put up in 1840 for 100*l.*, although he admits that at the present day it would cost much more. But this estimate does not include the shop or the well, or the fence, or the 400 feet of drainage of which *Stewart* speaks. These must have cost thirty or forty pounds more, so that upon the defendant's own showing the amount paid was not half the value of the improvements. But when it is recollected that those improvements remain to this day, and that the defendant, who is in possession, might have set this question completely at rest by procuring a survey to be made by competent persons, I cannot help thinking that the absence of such evidence ought to be regarded as the strongest confirmation of the plaintiff's case, and that the fair conclusion from the whole evidence is that the sum advanced does not exceed a fourth of the amount expended upon the property.

Judgment.

But the most important circumstance in favor of the plaintiff's contention is, that he continued to receive the rent of this property for more than two years after the supposed sale. The bare fact that the plaintiff had been suffered to retain the possession for so long a period after the alleged sale would have been strong, so strong indeed, that in *Cotterel v. Purchase*, Lord *Talbot* said: "Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage." But here the property had been leased for many months previous to the assignment. Some doubt was raised as to this point upon the argument, but I see no reason to question the accuracy of

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Smith's testimony, who swears that he entered in February, 1840, a few days after his arrival in the country. Now, that the plaintiff should have been suffered to receive this large rent, large I mean in proportion to the purchase money, for upwards of two years, must be allowed, I think, to raise a very strong presumption in his favor. It is extremely difficult, if not impossible, to reconcile that fact with the defendant's case. His allegation is that he purchased the property at its utmost value, a large proportion of the purchase money consisting of a debt which, although due for many years, he had been unable to wring from the plaintiff; and yet the vendor did undoubtedly receive the rent for more than two years, an amount nearly equal to the purchase money; and when possession was at length taken, under a writ of possession, it is conceded that no stops were taken to recover the mesne profits, or even the costs of the ejectment, although the tenant was perfectly solvent and continued to occupy the property subsequently for several years. Now that state of things is intelligible enough if the assignment of October, 1840, was taken as a security merely, but is very inconsistent with the notion that a sale was intended.

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Mears.

Judgment.

It is urged, however, that the form of the instrument furnishes a strong argument in favor of the defendant, inasmuch as the consideration stated in the assignment is nominal, and the defendant is thereby empowered to obtain, either a new bond, or a deed, from *McGill*, the original vendor. Now the particulars adverted to, have an important bearing, as it appears to me in favor of the plaintiff. Had this been a sale, the true consideration would have been stated, and the plaintiff would have been thereby released both as to the old debt and the new advance. But upon the deed as it stands, there is nothing to prevent the defendant from bringing an immediate action for both. And upon the same hypothesis the provision authorising the defendant to obtain a new bond or a deed, would have been omitted, for in that event the de-

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defendant would have had that right in the absence of any special authority, *McGill's* bond being conditioned to convey to the plaintiff, or his assignees. The conduct of the parties, too, appears to me to strengthen this inference. The defendant thought it necessary for his safety to consult *McCutcheon*, *McGill's* agent, and the assignment was prepared by *McCutcheon's* solicitor. Now, had a simple absolute sale been intended, I have no doubt that the assignment would have been prepared by Mr. *Bell*, the defendant's solicitor, who had the conduct of the litigation out of which this transaction grew. But assuming that a security was the thing intended, it was obviously material to have the instrument in such a form as would enable the vendor to deal directly with the defendant.

Again it is said to be incredible that the defendant should advance a further sum of 25*l.*, and make himself responsible for the original purchase money to secure so inconsiderable a debt. But the defendant did not make himself responsible for the original purchase money. The assignment contains no such provision. And when the circumstances are recollected, so far from thinking it incredible that the defendant should advance a further sum of 25*l.* to obtain a security which would repay the whole debt in three years, that step appears to me to have been highly prudent, and in accordance with daily experience.

Lastly, it is urged that the account has been long closed in the defendant's books, and he swears that he never heard of the present claim until three or four weeks before the filing of the present bill. But we have no evidence whatever as to the time when this account was so closed in defendant's books. Even the defendant is unable to speak either as to the handwriting or the date of the entries, which is remarkable. And unquestionably the plaintiff's case is not a new thought suggested by the increased value of the property, as was

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argued, because it is quite clear that Mr. *Duggan* was instructed to take proceedings so far back as 1847, and that he addressed a letter to the defendant on the subject, although he declined to proceed further, in consequence of the plaintiff's inability to supply the necessary funds.

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In that state of the evidence it becomes extremely material, of course, to consider the statements in the answer, because if the denial in the answer be clear and positive it would be a strong thing to grant relief, however strong the presumption from the facts, in the absence of direct testimony. Had it been true that a simple absolute sale was the thing intended by all parties throughout the transaction, as has been argued; and had it been true that a right to redeem was neither demanded nor conceded, in that case, the allegation in the answer would have been, I apprehend, positive and clear. No room for doubt would have existed. But the defendant does not venture to affirm positively that this was a sale. He swears only Judgment.
"to the best of his knowledge, recollection, information and belief," and so far from denying that a right to redeem was claimed and conceded, the answer goes far, in my humble judgment, to admit that fact. The statement is: "That though I have no recollection of the circumstance, it is quite possible I may have said in casual conversation at or subsequently to the time of the said transfer, that I had no particular desire for the premises, and would prefer having my money; not, however, that I considered myself in any way bound to give the plaintiff the privilege of redeeming."

The form of the answer does not appear to have been brought to the notice of the court on the former hearing. I do not find it adverted to either in the judgment here, or in the charge of the learned judge who tried the cause; and it was not noticed, so far as I recollect, in the last argument. But it does seem to me, I confess, of great weight; sufficient, probably, to turn the scale in favor

1858. of the plaintiff. It comes very near the answer in *England v. Codrington* (a), upon which the court thought the plaintiff entitled to relief.

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Upon the hearing, however, an issue was directed to try the question whether the assignment of October, 1840, was intended to operate as a sale or as a security merely. Upon the trial of that issue a verdict was found in favor of the plaintiff, with which, however, the learned judge who presided has certified that he is not satisfied; and, by arrangement between the parties, the case is brought before us upon a petition of re-hearing, upon a motion for a new trial, and for further directions.

At one time the practice was that after trial neither party could object to so much of the decree as directed the issue, upon the ground that if dissatisfied he should have either re-heard the case, or appealed at once, and in either event should have applied to the court to stay trial (b). Mr. *Smith* is very distinct upon the point, and the statement in Mr. *Daniel's* book is to the same effect (c); and Judgment. the dictum of Lord *Eldon* in *DeTastet v. Bordenave* (d), bears out the rule so laid. But it is said in *Butler v. Martin* (e), that the doctrine of Lord *Eldon* had been long overruled, and in the last edition of Mr. *Smith's* book the practice is laid down in accordance with that case (f).

Assuming that point, then, to be open to the defendant, my opinion is in favor of the plaintiff. To have set aside this assignment after so much delay upon the evidence as it stood, would have been, perhaps, too strong. But recollecting, that the habit of taking security in this form, with a parol defeasance, prevailed extensively throughout the province at the date of the contract, and led, as might have been expected, to frequent frauds, and looking at the facts of this case to which I have already

(a) 1 Eden. 169,

(c) 2 Danl. C. P. 757, 1 Eng. Ed.

(e) 2 Phil. 291, and see *Martin v. Price*, 1 C. P. Coop. 358.

(f) *Smith C. P.* 484.

(b) 2 *Smith C. P.* 82, (2 *En. Ed.*)

(d) 1 *J. & W.* 519.

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adverted, and the admissions in the answer, I am clear that the bill could not have been dismissed without further enquiry.

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Munro.

The question, then is, whether enough appears upon the evidence and verdict, taken together, to warrant a decree for redemption. Upon that point I have felt some hesitation, but upon the whole my opinion is in favor of the plaintiff. Irrespective of the verdict, the evidence would have been, perhaps, insufficient; but in a case circumstanced like the present, the finding of a jury upon a point peculiarly proper for their consideration under the direction of a very able judge, whose impression was unfavorable to the plaintiff, ought, I think, to be conclusive.

Upon the motion for a new trial it is unnecessary to make any observation, because Mr. *Wilson* requested that the matter might be finally disposed of by court; but I would say that the evidence appears to me to warrant the verdict, and I may add that the testimony of *Kendrick* Judgment. ought not in my opinion to lead to a different conclusion.

After this judgment had been pronounced, counsel for defendant desired that a second trial of the question might be directed to take place before a jury. Under the circumstances, the court ordered the trial accordingly.

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Dec. 14, 1857
Feb. 6, and
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1858.

DICK V. GORDON.

Principal and agent—Surety.

D. being about to leave this country for a time, executed a power of attorney in favor of an agent, thereby conferring very extensive powers upon the agent; amongst others he was authorized, for the principal, and in his name, and to his use, "to buy any freehold lands, or any ships, vessels, or steamboats, or any shares therein, as the said *John Bell Gordon* may think expedient and for my benefit." During the absence of his principal the agent purchased a leasehold property known as the "St. Nicholas Saloon," together with the furniture, provisions and business therein, for the payment of which he gave his own promissory note, endorsed by him in the name of his principal, under a clause in the power of attorney authorising him to make and endorse notes, &c., in the course of business, alleging that he had made the purchase for the joint benefit of himself, his principal, and a third person who also endorsed these promissory notes. *Held*, that this was a purchase which the agent was not entitled to make; and that standing in the position of a surety in respect of the promissory notes, the principal was entitled to a decree for indemnity in respect of his liability as endorser thereof, against his agent and the subsequent endorser, without waiting to take an account of all the transactions between the parties.

The bill in this cause was filed by *Thomas Dick* against *John Bell Gordon*, and *John Leys*, praying to be relieved from the payment of the amount of certain verdicts obtained against him, and from liability as endorser of a note then in suit.

The circumstances giving rise in this suit, and grounds upon which relief was sought, are stated in the judgment.

Mr. *Mowat*, Q. C., and Mr. *Roaf*, for plaintiff.

Mr. *McDonald*, for defendant.

ESTEN, V. C.—The defendant *Gordon* purchased the property which is in question in this cause, it is said for the plaintiff *Dick*, himself, and his co-defendant *Leys*, under a power of attorney, so far as *Dick* was concerned, received from him. In payment of the purchase money he delivered promissory notes, which he endorsed, in the name of *Dick*, under the power of attorney, on which it seems an action has been brought, and a verdict recovered against *Dick*. It is said however, that the learned judge who

tried the cause did not say that the verdict was a confession of the question of the trial, if not, it has to doubt that it was a confession of the benefit of the whole of which I think the party receiving the money and loose property force that the name of the party heard to insist his benefit. I do not authorize the party by way of exception in question in the argument of the party's correct understanding. It is as I am satisfied as I am satisfied, was not authorized, was not in all his transactions with *Leys*. Do the transactions which he would be very much expressed in the mentioned in an action satisfied the plaintiff me that the tr

tried the cause charged the jury that the power of attorney did not authorise the endorsement of the notes; and that the verdict was rendered upon some act of recognition on the part of *Dick*, which is not suggested to have been a confirmation of the whole transaction. Supposing the questions which arise to be unprejudiced by the result of the trial, they are—1st. Whether the transaction in question was authorised by the power. 2nd. Whether, if not, it has in any way been confirmed. I see no reason to doubt that under this power the attorney might purchase an undivided moiety in lands, although I do not think it authorised him to enter into a contract partly for the benefit of a third person, for the performance of the whole of which his principal should be liable. I do not think the power to purchase land was limited to the moneys received under the authority to dispose of vessels and loose property. I think it is an argument of great force that the power authorises only such purchases in the name of the principal, and that the attorney cannot be heard to insist that any purchase not in his name was for his benefit. I am very clear, however, that the power does not authorise the purchase of any leasehold interests, except by way of exchange, and I understand that the property in question in this suit was of that nature. I am surprised that this point was not more insisted on in the learned argument of the plaintiff's counsel. It makes one doubt one's correct understanding of the facts to find it almost unnoticed. It appears to me quite decisive of the case, as I am satisfied that the transaction, if originally unauthorised, was never subsequently confirmed. The plaintiff in all his transactions after his return dealt only with *Gordon*, and seems studiously to have avoided intercourse with *Leys*. Doubtless he confirmed a number of transactions which he might have repudiated; but I think it would be very unjust to extend this ratification beyond its expressed import. The property in question was never mentioned in any of the subsequent transactions. I am satisfied the plaintiff never meant to adopt it. It appears to me that the transaction being originally unauthorised

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Gordon.

Judgment.

1858. and never ratified, the endorsement of the notes was improper; that the debt created by them is the debt of the defendants; that the plaintiff is a mere surety for its payment; and that he has a right to call upon the defendants to pay the debt, and indemnify him against it; and I think this relief should not await the taking of an account of all the transactions between the parties, but should be granted at once, with costs.

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So far as the transactions which have occurred were originally binding on the plaintiff, or have been confirmed by him, the defendants may be entitled to the account which they pray. It is not relief, however, growing out of the case stated in the bill, and therefore does not seem to be within the general order. If they are entitled to such an account they had better institute a suit for the purpose. The present suit had better be disposed of at once by a decree for the plaintiff, with costs.

Judgment. SPRAGGE, V. C.—The bill states in substance that the defendants purchased jointly certain leasehold premises in the city of Toronto, known as the St. Nicholas Saloon; that the plaintiff was not interested in the purchase, and that the defendant *Gordon* was not authorised to make the purchase in whole or in part on his behalf; that *Gordon*, professing to act under a power of attorney given to him by the plaintiff, on the eve of his departure for England, in the spring of 1855, endorsed the name of plaintiff on five several promissory notes given for the purchase money of the premises; that the whole are past due; that verdicts have been recovered against the plaintiff upon four of these, and that a suit has been brought upon a fifth. The plaintiff therefore comes into court as a surety to compel the principal debtors to relieve him, by paying the notes.

The defendants set up that the purchase was made on behalf of the plaintiff and the two defendants, and that *Gordon* was authorised by the power of attorney already

referred to, by the plaintiff jointly with the plaintiff's name on the notes; and that in respect of the power, there is an amount of the purchase in the plaintiff's authorised to balance which and they ask

The clause to authorise *Gordon* is as follows: "to my use, to the vessels, or steamers of the *Bell Gordon*." The succeeding real property part of the purchase arising from the account of such in the purchase estate, ships and said, or in any shall think fit

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referred to, to make the purchase on behalf of the plaintiff jointly with the defendants, and also to endorse the plaintiff's name as it was endorsed on the promissory notes; and they claim that upon the whole of the dealings in respect of the purchase made by *Gordon* under the power, there is a balance against *Dick* exceeding the amount of the promissory notes; and they claim that even if it should appear that *Gordon* did not make the purchase in question on behalf of the plaintiff, or was not authorised to make it, they are entitled to set off the balance which they claim against the amount of the notes, and they ask for an account.

The clause in the power of attorney, which is supposed to authorise the purchase of the premises in question by *Gordon* is as follows: "and for me, and in my name, and to my use, to buy any freehold lands, or any ships, vessels, or steamboats, or any shares therein as the said *John Bell Gordon* may think expedient, and for my benefit." The succeeding clause relates to sales and exchanges of real property, steamboats, &c., authorised by a previous part of the power, and proceeds thus: "and the moneys arising from such a sale or sales respectively, or on account of such exchange or exchanges, to lay out or invest in the purchase for me, and in my name, of any lands, real estate, ships and vessels, or steamboats, or shares as aforesaid, or in any other good securities, or otherwise as he shall think fit and proper."

The *St. Nicholas Saloon* was a *leasehold* property, and I think it clear that *Gordon's* authority was confined to the purchase of *freehold* lands; it is so in terms under the first of the two clauses which I have cited; and assuming that the second clause is not so confined, it applies only to investments arising from the sale or exchange of other properties of the plaintiff to be effected by *Gordon*, and not to such a purchase as the one in question.

There is a good deal to shew that *Gordon* did not

1858. intend to make the purchase on behalf of the plaintiff; his omissions of that property from the schedules of lands referred to by Mr. *Davis*, is a strong circumstance, but it is unnecessary to determine that point; or the point raised, whether a purchase in his own name, instead of the plaintiff's was binding upon the plaintiff. Other points also were raised which it is not necessary to decide.

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Gordon.

I do not find any evidence of the plaintiff adopting this purchase after his return to Canada. He adopted other purchases made by *Gordon*, in which the power was not strictly followed; but that I regard rather as a repudiation of this, excluding it from the confirmation which he extended to others: unless, indeed there was any thing to show that the whole of the purchases must necessarily stand or fall together; and that does not appear to me to be the case.

Judgment.

I see nothing in this power of attorney to authorise the putting of the plaintiff's name upon the notes. In one clause *Gordon* is authorised, in the plaintiff's name, or otherwise, to "draw, accept or endorse any bill or bills of exchange, promissory note or notes in the course of business, as he shall see fit:" in another, "for the plaintiff, and in his name, to sign, seal and deliver any other deed, covenant or instrument, in writing whatsoever, which shall be, or appear to the said *John Bell Gordon* to be, for my benefit, or requisite to be done and executed concerning the premises, or any of my affairs whatsoever." I think it quite clear that the above words conveyed no authority to put the plaintiff's name to any paper in which the plaintiff's interest were not concerned.

It is true that verdicts have been recovered in two several actions against the plaintiff upon these notes, but it is not found by the judgment of any court of competent jurisdiction that the plaintiff authorised *Gordon* to affix

his name. not judgment not prove the was conveyed by promising the want of distinguishing was really at may be right do not exist notes.

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The court a *Dockstader v.* defendant got a proper means, she claimed in before she rested to have no ad own wrong, and sound doctrine.

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his name. In the first place, verdicts only are shown, not judgments; and in the next place the verdicts do not prove that in the opinion of the juries such authority was conveyed, for the plaintiff might have become liable by promising to pay the notes, or by not objecting to the want of authority in *Gordon*—perhaps from not distinguishing these notes from those to which *Gordon* was really authorized to put the plaintiff's name. There may be rights as between the plaintiff and *Gordon* which do not exist as between the plaintiff and the holder of the notes.

The position that the plaintiff is bound to await the result of an account as to other dealings, I think untenable. The plaintiff is seeking relief from the consequences of a wrongful act committed by *Gordon*, which, though it did not create the liability of the plaintiff upon the notes, occasioned it, as without such wrongful act it would not have existed. The plaintiff should be placed in respect to *Gordon*, as nearly as may be, in the same position as if this wrongful act had not been done; *Gordon's* position, certainly, as between himself and the plaintiff, should not be improved by it, and this would manifestly be done, if allowed to retain this money pending an account of other dealings.

Judgment.

The court acted upon this principle in the case of *Dockstader v. Dockstader*, in this court, where the defendant got a certain deed into her possession by improper means, and contended that certain rights which she claimed in relation to it should be secured to her before she restored it. The court thought that she ought to have no advantage from a position obtained by her own wrong, and refused what was asked. I think this a sound doctrine.

I think the defendant *Leys* cannot stand in a different position from *Gordon*. If *Gordon*, in fact, had no authority, his assuming it could not affect the plaintiff;

1858. *Gordon and Leys* really purchased together, *Gordon* untruly representing that he was purchasing in part as the authorized agent of the plaintiff, and using the plaintiff's name without authority as undertaking with them for the payment of the purchase money. It does not appear whether *Leys* saw the power of attorney; if he did, he acted with his eyes open; if he did not, he acted very negligently; he as well as *Gordon* used the plaintiff's name without his authority, to secure the payment of the purchase money which they (in whatever proportions) are bound to pay; and I think *Leys* equally with *Gordon* bound to indemnify him.

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In my view, the account sought by the defendants ought not to be taken at all in this suit. It is wholly independent of the relief to which we think the plaintiff entitled, and of the transaction out of which his equity arises. If the defendants desire an account of these other transactions, I think they should file a bill for it.

Judgment.

A point has occurred to me in considering this case to which I will advert shortly. The plaintiff seeks the ordinary relief of a surety against the principal debtor after default—this relief is founded ordinarily upon the liability of the surety to pay the debt of the principal. Here this is not shewn, but the plaintiff's case is, that he was not liable; and he does not shew that he has become so. According to his showing verdicts have been recovered against him which are erroneous, and his liability is not affirmed by any judgment; this as to four of the notes; as to the fifth, no verdict is stated to have been rendered. Again, supposing the verdicts properly rendered, the plaintiff must have made himself liable subsequently to the putting of his name upon the notes by *Gordon*, and voluntarily. As to the last point, actual liability though assumed voluntarily; I think it may admit of this answer; that the defendants having used the plaintiff's name in an undertaking to pay their purchase money, cannot

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But if he states himself not to have been liable by his name being placed upon the notes, (a point in which we agree with him,) and shews proceedings at law which only go part of the way to shew that he has been fixed with liability, his position is somewhat anomalous. The defendants' case might cure this, if sustainable consistently with relief to the plaintiff; they allege the plaintiff's liability, but rest it upon grounds which are negatived by our judgment; the plaintiff would thus be placed in this dilemma: if the plaintiff is liable, it is because he was a joint purchaser, or made himself so, and therefore cannot succeed. If not so, he is not liable to pay, and therefore cannot succeed.

The only solution of the difficulty that occurs to me is, that it does not lie in the mouth of the defendants to make such an objection, and it is not necessary for the court ^{judgment.} to take it as proper for the sake of the justice of the case or otherwise. The defendants used the notes, as I have observed, to secure the payment of their purchase money, they thereby held the plaintiff out as liable, and as far as they could, made him so; if he is not so, it is because their act was unwarranted, and they cannot be heard to urge their own wrong for their protection. I cannot say that this solution is entirely satisfactory to myself, but as the point was not taken by the defendants, and perhaps could not be because inconsistent with their defence, I think we are not bound to give effect to it.

1858.

YOUNG V. BOWN.

Specific performance—Lessor and lessee—Laches.

A lease was made of certain premises with a right of purchase, at a price fixed upon between the parties; being such a sum as the rent reserved would form the interest of. The lessee made default in payment of all principal and interest, abandoned the possession and left the premises for the United States, and the lessor being unable to ascertain the place of residence of the lessee so as to put an end to the contract, obtained possession by a writ of *habere facias* issued in an action of ejectment brought upon a vacant possession. The lessee after a third instalment of interest fell due caused a tender to be made of what had become due, which was refused, and about a year afterwards filed a bill to enforce the specific performance of the contract. The court considered the laches of the plaintiff such as to disentitle him to relief, and dismissed the bill with costs.

This was a bill filed by a lessee, with a right of purchase of certain premises, praying the specific performance of the contract, and a conveyance upon payment of the amount of principal and interest due. The facts of the case are fully set out in the judgment of the court.

Mr. Turner and Mr. McMichael for plaintiff.

Mr. Read for defendant.

The judgment of the court was now delivered by

Judgment.

SPRAGGE, V. C.—I think, and my brother *Esten* agrees with me, that contracts framed as is the one in question, are essentially contracts of sale; each party is bound to the other; the one to pay the purchase money, and the other, upon payment of the purchase money, to convey—the peculiar form of the instrument is adopted, I should judge, in order to give the vendor the remedies not of an ordinary vendor only, but of a lessor also.

The contract was made on the 25th of October, 1851, and the first payment of interest reserved by way of rent, fell due on the 25th of April, 1852. In the spring

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of that year the plaintiff left the province, and has resided in the United States ever since; the defendant availed himself of his remedies as a lessor, and in December, 1854, took proceedings in ejectment, as in the case of a vacant possession, in the absence of distress upon the premises; the plaintiff has had no part of the purchase money, principal or interest, and has left the defendant to pay the taxes, which he has done. In August, 1853, the plaintiff made a tender through an agent to the agent of the defendant, of 10*l.* 3*s.* 0*d.*, as the interest and arrears, and the money was refused, the agent saying it was no use, that the land was the defendant's. The bill was filed on the 16th of August, 1854; no laches is imputed to the plaintiff in the conduct of the suit, time having been employed in negotiations for a settlement.

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v.
Bown.

Two questions seem to arise upon this state of things, one, whether the plaintiff as a purchaser, apart from the peculiar nature of the instrument, has disintitiled himself from specific performance; the other, whether the form of the instrument or the remedy which the defendant has pursued should make any difference. Upon the first point, my opinion is against the plaintiff, he made no improvements upon the property; about 2,000 second-hand bricks were drawn to the premises soon after his purchase, which in 1853, he offered to *Gibson*, one of his witnesses, as of no use to himself. Soon after the purchase, also, he drew sand from the place, as I understand, the soil of the land purchased. To all appearances he abandoned possession in the spring after he purchased it, going to live in a foreign country, leaving no agent and giving no notification to the defendant of his place of residence, or of his intention to retain the lot; he made no payment upon the place, and the first indication of his intention to avail himself of his purchase was by his tender of August, 1853, about four months after the third payment of interest had fallen due, and upon that being absolutely refused, and his claims as a purchaser

1858. denied, he allowed about a year to elapse before filing his bill; I think that under these circumstances he is not entitled to relief in this court.

Young
v.
Bown.

Then does the form of the instrument or the remedy pursued by the defendant make any difference. I am not prepared to say that the defendant elected to avail himself of his character of lessor only, he pursued the remedy appropriate to that character, but with the intent of putting an end to the whole contract, as appears by the evidence of his agent Mr. *Leith*, and who claimed that it had been put an end to. Being vendor, and desiring to put an end to the contract of purchase, he took with that view a course which his position as lessor entitled him to take, and which may or not have been available to effect his object; whether it was so, is not the question; but whether his having taken that course in 1852, he is disabled now from standing upon the defensive as an ordinary vendor may, upon a bill being filed against him for specific performance. Did he by that step submit to stand as a lessor only, and divest himself of his rights as a vendor; or is the laches of the plaintiff less laches, and operative, to disentitle him to relief than if his vendor had not availed himself of one of the classes of remedies to which, under his contract, he was entitled to resort? I confess I think not.

Judgment.

In addition to this, and it weighs strongly with me, the plaintiff himself disabled the defendant from pursuing the ordinary remedy of a vendor—he was absent from the province, and his place of residence, so far as appears, unknown to the defendant—Mr. *Leith*, his agent here, through whom the contract was entered into, swears that he was ignorant of it; that he made inquiries after him, and found that he had left the province. It cannot now be objected by the plaintiff that the defendant should have given the ordinary notice giving a reasonable time to him, the plaintiff, for the performance of his part of the contract, and notifying him that in case of continued

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Vendor

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default he should hold the contract to be at an end ; nor can he object that no suit for specific performance or for rescission of the contract was brought against him. It is fair to presume that if the plaintiff had not placed himself beyond the reach of these remedies, these or one of them would have been used against him ; and in a late case in this court we acted upon that presumption, and refused specific performance. My own opinion is, that the course pursued by the defendant is not necessarily referable to an election to rest upon his character of lessor only, and the notwithstanding that course it is open to him as a vendor resisting specific performance to avail himself of the laches of the purchaser as a ground of defence, and that the laches of the plaintiff in this case has been such as to disentitle him to relief. We think the bill should be dismissed with costs.

1858.

Young
v.
Bow.

HARKIN V. RABIDON.

Vendor and Vendee—30 years' possession.

After 30 years' possession of land, by a person to whom the owner, who was the grantee of the crown, had conveyed the property in exchange for other lands, the vendor discovered a defect in the title by reason of the non-registry of the conveyance in the proper office, and executed a deed to a person who was in possession of a portion of the property for several years under the vendee's heir. To a bill filed to set aside this conveyance, the vendor and the second vendee set up the non-heirship of the plaintiff ; purchase for value without notice, and that the original vendee was a minor at the time of the exchange, and had repudiated the transaction on becoming of age ; and further that he had no title to the land conveyed in exchange. The court considered that the long possession and the absence of proof of the facts alleged by the defendants were sufficient to entitle the plaintiff to a decree with costs.

The bill in this cause was filed by the heirs of *Francis Belcour* against the defendant *Thibodo* and his vendee, alleging that *Belcour* and *Thibodo* in 1827 exchanged lands, *Belcour's* lot being in Toronto and *Thibodo's* in Amherstburgh ; and *Belcour* conveyed his lot to *Thibodo* and *Thibodo* his to *Belcour* ; but the last was not registered in the county of Essex, where the lands it embraced were situated ; but it was registered in the county of

1858. York in 1827 ; and it contained a proviso that if either of the parties should be evicted that the exchange should be considered as at an end, and each party was to resume possession of his lot. That *Thibodo* went into possession of the lot in Toronto, and remained there to the present time by his vendees ; and *Belcour* went into possession of his in Amherstburgh and remained there till his death in 1835. *Thibodo*, when he conveyed, had not obtained the patent from the crown, but subsequently did so and left Canada for the United States, where he was discovered by the plaintiffs through means of an advertisement, in July, 1855. He called on the plaintiffs, and afterwards executed a deed to the defendant *Rabidon* of the lot he had conveyed to *Belcour*. The bill further alleged that *Rabidon* being a relative of one of the plaintiffs who had allowed him to occupy a portion of the land. That *Thibodo*, when he came back in July, 1855, was induced by fraud on *Rabidon's* part to convey the premises to him, and prayed that this deed might be cancelled.

Statement.

The answer of *Rabidon* set up the plea of purchase for valuable consideration without notice, and that through illegitimacy, the plaintiff *Madeline Harkin* was not the heiress of *Belcour* ; also that she was not the plaintiff's lawful wife. The answer of *Thibodo* set up that *Belcour* was not of age when he conveyed to him, and that when he became of age he repudiated the contract, and that the heirs of *Belcour*, exclusive of the plaintiff, *Madeline Harkin*, conveyed the property to one *Hull*, and that *Belcour's* representatives were estopped from setting up the conveyance of the lot in Amherstburgh, and set up a contract to sell in 1837 to *Rabidon*, and the illegitimacy, &c., set up by the other defendant : also that *Belcour* never had any title to the land in Toronto.

Mr. A. Wilson, Q. C., and Mr. Hector for plaintiffs.

Mr. Roaf for defendants.

The judgment

ESTEN, V. C.
 a deed of exchange between the younger, and the elder, alleged indeed when this transaction was not proved : it was a session of 30 years to conclude that the defendant *Belcour* the plaintiff and that the plaintiff at law. It is an illegitimate, but to one's entire satisfaction that the heirship inherited the estate, and was impugned by the brother, one *J. H. H. H.* our judgment is consequently that it follows that the plaintiff is not at law also the defendant *Thibodo* in this state of the case in this province for the purpose of publication of this title, has taken property in America. That this individual is beyond question them for many years a transaction between the only remaining respects the transaction present involve respect to it is of course and not sufficient for further enquiry

The judgment of the court was delivered by

1858.

Harkin
v
Rabidon.

ESTEN, V. C.—It appears quite certain in this case that a deed of exchange was executed between *Francis Belcour* the younger, deceased, and the defendant *Thibodo*. It is alleged indeed in the answer that *Belcour* was under age when this transaction took place. This fact is certainly not proved: it was incumbent on the defendant to prove it; and this being so, and there having been a long possession of 30 years under this deed, I think we must conclude that the fact was otherwise. It is clear that *Francis Belcour* the younger died intestate and without issue, and that the plaintiff *Madeline Harkin* was his sole heiress at law. It is indeed asserted in the answer that she was illegitimate, but the evidence establishes the legitimacy to one's entire satisfaction. I should have mentioned that the heirship of *Francis Belcour* the younger who inherited the exchange property from his father, was likewise impugned on the ground that he had an elder brother, one *Jacque Dobin*, but the evidence establishes in our judgment satisfactorily the illegitimacy of *Dobin* and consequently the heirship of *Francis Belcour*, the younger. It follows that *Madeline Harkin* is entitled in equity if not at law also, to the property in Amherstburgh. The defendant *Thibodo*, however, after having acquiesced in this state of things for thirty years, and after arriving in this province from abroad, in compliance with an advertisement published by the plaintiffs in order to complete this title, has taken upon himself to sell and convey the property in Amherstburgh to the defendant *Rabidon*. That this individual had notice of the plaintiff's claim is beyond question; he held a part of the property under them for many years. We cannot help regarding the transaction between *Thibodo* and *Rabidon* as a gross fraud. The only remaining point that requires observation respects the transaction with *Hall*. This transaction is at present involved in obscurity, the evidence adduced with respect to it is of the most meagre and unsatisfactory kind, and not sufficient in our judgment, even to warrant a further enquiry.

Judgment.

1858. We think there should be a decree for the plaintiffs with costs. It was stated to the court by the counsel for the defendants that a verdict had been rendered for them in the action of ejectment which was pending. On what grounds the jury arrived at this conclusion we are ignorant. It may have been on a ground quite consistent with the plaintiff's equitable rights. At present we know judicially nothing even of the fact of there having been any verdict at all, and if the defendants should be advised, or should desire to avail themselves of it any way, it must be brought under the notice of the court in a regular manner.

Harkin
v.
Rabidon.

PARSONS V. KENDALL.

Trustee—Statute of Frauds.

The plaintiff had procured a lease of a farm for two years with the privilege of purchase, the lease having been taken by him in the names of two of the defendants, but without their knowledge, and was witnessed by the plaintiff; the bill alleging that this course was adopted for the benefit of the plaintiff, who, it was shewn, had before this time assigned all his effects for the benefit of his family, the plaintiff asserting that his intention was to pay the purchase money for the land out of moneys belonging to his wife, in the hands of trustees, in which, however, the plaintiff had no interest; but there was no writing to evidence the trust alleged by the plaintiff. One of the defendants, who was a trustee of the wife's money, subsequently bought the property, the price for which was paid out of his own funds, and gave to trustees a lease of it for the use of the plaintiff's wife and children. Upon a bill filed to have it declared that the purchase had been made for the benefit of the plaintiff, and to have the lease to the trustees cancelled, the court, under all the circumstances, refused the relief prayed, and dismissed the bill with costs, but with liberty to file a new bill if the plaintiff should be so advised.

Statement.

The bill in this cause was filed by *Henry Parsons*, against *John Kendall*, *Washington Boulton*, and *Henry Watson*, setting forth that in 1847 the plaintiff had agreed with one *Grange* for the lease of a farm for two years with a right of purchase, which lease was made to the defendants *Boulton* and *Kendall* for the plaintiff's sole benefit, and that it was made to them because the plaintiff intended to purchase with certain moneys of his wife and

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children, bequeathed to them by his wife's mother, and which moneys were at the date of the lease invested in Great Britain, in the name of the defendant *Kendall*, and one *Thomas Kendall*. That upon its appearing that these moneys could only be invested in Great Britain, the defendant *Kendall* agreed to advance sufficient funds to the plaintiff to complete the purchase, to be repaid when plaintiff's youngest child should attain majority, when the moneys invested in Great Britain could be withdrawn, or until plaintiff could repay the amount.

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Parsons
v.
Kendall.

The bill further alleged that the plaintiff paid the price of the said farm (500*l.*) out of moneys so supplied to him by the defendant *Kendall*, and a conveyance was taken from the vendor to *Kendall* absolute in form, but in reality for the benefit of the plaintiff, subject to *Kendall's* lien for the advance: the bill also alleged possession and improvements by the plaintiff up to April, 1855, when *Kendall* leased the property for nine years, to the other defendants, as trustees for plaintiff's wife, with the right of purchase by her children.

The defendant *Kendall* in his answer set up that he purchased the farm through the defendant *Boulbee*, with his own moneys, and received the deed therefor from him in April, 1849. Statement.

Boulbee by his answer set up that in 1847 the plaintiff had assigned all his effects to himself and *Kendall*, for the benefit of his wife and children, and stated that when he effected the purchase of the property for *Kendall*, he believed the same was so purchased for Mrs. *Parsons* and her family, who were allowed to occupy it under a certain rent paid out of the interest of the moneys invested in England, and that the lease was made by *Kendall* to *Boulbee* and his co-defendant *Watson*.

The cause was put at issue and evidence taken, the defendant *Boulbee* was examined *viva voce* before the

1858. court, and his examination, as well as the other evidence, tended to substantiate the statements in his answer.

Parsons
v.
Kendall.

Mr. *Brough* for plaintiff.

Mr. *Eccles*, Q. C., for defendants. *Molony v. Kennedy* (a), *Messenger v. Clarke* (b), *Bird v. Peagram* (c), were amongst other cases referred to by counsel.

The judgment of the court was delivered by

ESTEN, V. C.—The bill in this case commences by stating an agreement between the plaintiff and Mr. *Grange*, as the agent of Colonel *Young*, for a lease of the property in question, for two years, with a privilege of purchase. The lease was not granted to the plaintiff himself, but to the two defendants *Boulton* and *Kendall*, and in fact the plaintiff's name does not occur in the lease except that it is subscribed to it as of a witness. Judgment. the plaintiff, however, alleges that he made this agreement for his own exclusive benefit, and that *Boulton* and *Kendall* were named in the lease merely as his trustees. There is no reason, that I can see, to think otherwise than that this was a binding agreement in all its parts. The sum mentioned in this instrument as the purchase money of the property was 600*l.*, payable, 200*l.* down, and the balance by four equal annual instalments. The sum of 500*l.* was, however, all that was paid for the property: this reduction, the bill states, was in consequence of the whole amount being paid in cash, which is by no means improbable. It would seem likely that the subsequent sale by *Grange* to *Kendall* was in pursuance of this agreement; so far as *Grange* was concerned the cash payment would account for the reduction of the price; the sale was made to one of the lessees through the instrumentality of the other, and it was not likely that Mr. *Grange* after having made such an agreement

(a) 10 Sim. 254.

(b) 5 Ex. 388.

(c) 13 C. B. 639.

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would dispose of the property to another person without some communication with the person entitled to the pre-emption.

1858.

Parsons
v.
Kendall.

It is remarkable that the defendants *Boulbee* and *Kendall* do not appear to have been aware of the lease and agreement; *Boulbee* in his answer professes ignorance of it. *Kendall* makes no allusion to it. In his evidence, however, *Boulbee* says: "I suppose I knew at the time (of *Kendall's* letter) that the plaintiff had a lease of it;" and again: "I don't know whether I had then (when he told *Kendall* that *Grange* would accept 500*l.* for the farm) heard of the agreement between the plaintiff and *Mr. Grange*. It is probable I had: who told me I don't know: I went up in 1849: I think it is very likely I did hear of the agreement between plaintiff and *Mr. Grange*." The lease and agreement are not signed by *Kendall* and *Boulbee*, but are witnessed by the plaintiff himself. I am inclined to think it was the plaintiff who procured this lease and agreement from *Mr. Grange*, although probably Judgment. with the privity and sanction of his wife; and that the defendants *Kendall* and *Boulbee* were named in it, perhaps without their knowledge.

That they were trustees for somebody cannot be doubted; that they were trustees for the plaintiff exclusively, or at all, may admit of a great deal of doubt; at that time the plaintiff had failed, and owned little or no property; what had been relinquished to him by his creditors had been transferred by him to the same trustees for the benefit of his wife and children; he could not expect to pay for the farm in question out of his own means; it was undoubtedly the intention to apply the trust moneys to the purpose, in fact the plaintiff states such to have been the case in his own bill: in these trust moneys he had no interest whatever. One is led to believe that the will bequeathing them had been drawn in such a manner as to exclude him from all interest in them.

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v.
Kendall.

It is very improbable that it could have been intended or contemplated that this trust fund should be applied to the purchase of the land in question, to be conveyed to the plaintiff in fee; then the nomination of the trustees at all, and of the very persons who were already trustees for Mrs. *Parsons* and her children, is not, without its significance.

I am strongly inclined to agree with what Mr. *Boulbee* states in his answer; namely, that the lease and agreement in question were procured by the plaintiff for the benefit of his wife and family, and that the defendants *Kendall* and *Boulbee* were trustees for them, and not, as he alleges for the plaintiff.

Then, would such a trust be valid in law, there being no writing to manifest it? A lease for two years, with a privilege of purchase, was equivalent to the fee simple of the estate.

Judgment.

Can a trust of such an estate as this is be shown by parol? If indeed the plaintiff could shew that Messrs. *Kendall* and *Boulbee* were named in the lease merely as trustees for him, as he alleges in his bill, then, as there seems no reason to doubt the validity and binding force of that instrument, the purchase made by *Kendall* would be subject to the prior rights which it conferred, and upon payment of the 500*l.* paid by *Kendall* for the purchase of the property, he would be declared a trustee for the plaintiff. No such case, however, is made by the bill, and if any such case was made, it would appear from the foregoing observations, that it would, in my judgment, be open to much doubt both in point of fact, and in point of law.

With regard to the case that is stated; namely that the lease in question having been granted with the privilege of purchasing before mentioned to the defendants *Kendall* and *Boulbee* in trust for the plaintiff, *Kendall* afterwards advanced the necessary funds to the plaintiff to enable

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him to complete the purchase ; and that such funds were paid and applied by the plaintiff for that purpose, and a conveyance taken by him in the name of *Kendall*, I have not the slightest doubt that as a matter of fact it wholly fails in point of evidence. It is impossible to read the evidence of *Boulton v. H. K. Parsons* and *Elmslie*, and the correspondence and documentary evidence which has been produced without being convinced that Mr. *Kendall* purchased the property for himself, but with the intention of reselling it to his sister and her children, but to the utter exclusion of the plaintiff. It was probably the original intention to apply the trust moneys in England to this purpose, but that plan failing owing to the impossibility of investing them out of Great Britain until the children should attain their full age, Mr. *Kendall* purchased the estate for himself and with his own moneys, but with the intention of selling it to his sister and her children, in the first instance, perhaps at the same price he paid ; but if he did so intend he afterwards altered his mind, and this supposed alteration of intention produced a bitter quarrel between the brother and sister, in which, however, the plaintiff had no concern. Both joined in excluding him. That Mr. *Kendall* advanced one farthing to the plaintiff for the purpose alleged by him in his bill, or made the purchase in question with any reference to him, or consulted him about it in the least, or that he was to derive any benefit from it except so far as he must necessarily be benefited by whatever benefited his family, I am satisfied, was as far as possible from the truth. Under these circumstances I do not think the plaintiff has any *locus standi* in this court : this opinion we formed at the hearing of the cause, and it has been confirmed by a perusal of the pleadings and evidence. I think the bill should be dismissed with costs ; but without prejudice to any other bill that the plaintiff may be advised to file, if upon due consideration he thinks he can sustain such a bill either in point of fact, or in point of law.

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v.
Kendall.

Judgment.

1858.

PATTERSON V. HOLLAND.

Limited Partnership.

Although parties may enter into an undertaking intending to form a limited partnership only, still they may act in such a manner either knowingly or unknowingly, that a general partnership may be created as to third parties; and when this occurs with the consent and concurrence of all the parties, the effect may be to make them answerable not only as to third parties, but as between themselves.

Although the members of a limited partnership may act in such a manner as to create a general partnership not only as to third persons, but also *inter se*, still, if the acts whereby a general partnership as to the world is created are done by some of the partners without the knowledge or consent, or against the consent of the others, they will not be entitled to contribution from the others, but will be liable to indemnify them against the consequences of the acts so done.

This was a bill filed on behalf of certain members of a company known as the firm of *Donald Bethune & Co.*, of which the said *Donald Bethune* was the *general partner* formed under the provisions of the 12 Vic., ch. 75, known as the "Limited Partnership Act," alleging that the allegation in the certificate (required by the act to be filed with the clerk of the district court) that all the sums subscribed by the partners were contributed in actual cash was not true, but that notes for the larger portion of such stock were taken and partly applied towards the purchase of steamboats for the use of the company, and partly applied by the general partner and manager of the firm to the liquidation of its liabilities: the bill further stated that the partnership commenced in the spring of 1850, and carried on business as steamboat owners and carriers until January, 1855. By an instrument dated the 14th January, 1855, authority was given by the majority of the partners to a committee of the stockholders to advertise the dissolution of the concern and wind up its affairs, who sold the boats and effects of the firm; but the steps required by the statute (sec. 17) to operate as a dissolution were not taken; the bill further alleged that the committee in the course of such winding up of the concern became individually liable by indorsement of notes, &c., for the company, trusting to be relieved out of the as-

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sets : on completing an investigation of the affairs of the company there was discovered to be a large deficiency, which the committee sought to be relieved from : the plaintiffs by their bill submitted that under the above circumstances a general and not a limited partnership had existed, and prayed that the deficiency might be divided between the plaintiffs and defendants according to their respective shares in the co-partnership, and also for a dissolution thereof, and also for a receiver, and the usual accounts to be taken.

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Patterson
v.
Holland.

The defendants set up that a limited, and not a general partnership had been formed, and denied having giving authority for the acts alleged to have been done by the plaintiffs and the acting committee; and also that the plaintiffs had acted contrary to the provisions of the statute.

The cause now came on by way of motion for decree as against the defendants, who had put in answers, and *pro confesso* as against the others.

Argument.

Mr. *McDonald*, Mr. *Read*, and Mr. *Roaf* for plaintiffs.

Mr. *Hillyard Cameron*, Q. C., Mr. *Hector*, Mr. *Strong*, Mr. *Barrett*, Mr. *A. Crooks*, and Mr. *Doyle* for such of the defendants as had answered.

The judgment of the court was delivered by

ESTEN, V. C.—This case is one of considerable importance. We think that with reference to the act of parliament, upon which it turns, certain propositions may be stated as founded in reason and conformable to law, which are sufficient to dispose of it.

It seems to us that all the safeguards so anxiously provided by the act, and whereby a general partnership is created in certain cases, were intended for the security

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 Patterson
 v.
 Holland.

of the public. Parties may act in such a way that either knowingly or unknowingly a general partnership may be created. Where this occurs with the consent and concurrence of all the partners it appears to us that they should all be answerable for the consequences both as to third persons and as between themselves. But where acts whereby a general partnership is created as to the world are done by some of the partners without the knowledge and consent, or against the consent of the others, we think not only that they will not be entitled to contribution from the others, but will be liable to indemnify them against the consequences of the acts so done. In such a case a general partnership is not created for all purposes; it exists *quoad* third persons, but not *inter se*. A third case may be supposed; that is, where all the partners act by common consent so as to constitute a general partnership *quoad* third persons, but yet intend that a special partnership shall exist. In such a case they will be bound to observe their mutual agreement and understanding amongst themselves, and in all their dealings with one another, although they will be liable to third persons as general partners, and will be answerable amongst themselves for all the consequences following from the acts done by common consent.

Judgment.

But in such a case it seems to us that they will not be permitted by their own individual acts respectively to acquire claims against their co-partners in contravention of the agreement that a special partnership shall exist.

We think the present case belongs to the third class I have mentioned. It was conceded by the learned counsel for the defendants that acts had been done in this case which created a general partnership *quoad* third persons, but he contended that this fact did not vary the rights of the partners as between themselves, and we think that to a certain extent, and with some qualification, he is right.

No doubt all the partners will be answerable according

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to their respective interests for the consequences following from the acts done by common consent, whereby a general partnership was constituted *quoad* third persons; but the question we have to decide here is whether where the understanding and agreement among the partners themselves is that a special partnership shall be constituted under the provisions of the act of parliament, they can individually or respectively do any act whereby they can acquire a claim against their co-partners in contravention of that understanding or agreement: in other words, can any of them, by making advances to the firm, acquire a claim for indemnity against any of the co-partners who have not assented to such advances. We think not, but that they must look for payment to the assets of the firm and to the contribution of those with whose assent and concurrence they have acted. That it was the intention of the persons composing this firm to continue as amongst themselves special partners, conformably to the provisions of the act, I think cannot be doubted: to permit the plaintiffs, by making advances to the firm, to acquire any personal title to indemnity against such of their co-partners as have not assented to or concurred in such advances, would be in contravention of the agreement which we think continued to exist among themselves.

Judgment.

The bill is founded on the principle, that where a general partnership is created *quoad* third persons it exists for all purposes. We think this proposition untenable. We think that the rights and liabilities of the different partners will vary according to circumstances. It will be necessary to direct enquiries for the purpose of ascertaining under what circumstances the advances in question were made, with whose consent and concurrence, and to what purposes they were applied.

As we decide the case upon this broad principle, it becomes more necessary to consider the different circumstances appearing from the affidavits as affecting several

1858. of the co-partners individually. The necessary enquiries will be directed, reserving further directions and costs.

Patterson
v.
Holland.

My brother *Spragge* is not quite prepared to assent to the third proposition; the necessary accounts therefore will be directed without prejudice to the question, how many and which of the co-partners are liable to contribute to the plaintiffs' indemnity.

REES V. WITTRUCK.

Attorney and client—Setting deed aside.

An attorney who had acted for a party afterwards instituted proceedings against the client to recover his costs, pending which the client applied to the attorney for a loan, which the latter agreed to effect, provided the client did not employ one particular attorney to act on his behalf, desiring the client to obtain the services of some other professional gentleman, but which he refused to do, and the arrangement was completed: afterwards a bill was filed to set aside the transaction, on the alleged ground of fraud on the part of the attorney; but the defendant having denied all the allegations of fraud set up by the plaintiff, and the statements of the defendant being corroborated by the signature of the plaintiff to a memorandum prepared by the defendant at the time of the loan being effected the court refused to interfere on behalf of the plaintiff, although the attorney, they thought, should have refused to proceed with the loan without the appointment of a solicitor to act on behalf of the borrower.

The court, though it refused to set aside a purchase on the ground of fraud in the vendor, gave leave to amend the bill, alleging *over value* as a ground for relief.

This was a motion for an injunction to stay proceedings at law.

The bill stated that in June, 1856, the plaintiff being indebted to certain parties, whose names and the amounts of their claims were set forth, applied to the defendant, an attorney of the Queen's Bench, and a solicitor of this court, and who had frequently acted as attorney for the plaintiff, to procure a loan for plaintiff of 150*l.*, on the understanding that a sufficient portion of the proceeds of such loan should be paid to the sheriff in discharge of executions in

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his hands against the goods of plaintiff, estimated at about 50*l.*, and that the plaintiff should execute to the lender a chattel mortgage on the goods so seized by the sheriff; and the loan was further to be secured by the promissory note of the plaintiff at three months, and by a mortgage on the west half of lot number seventeen in the 6th concession of Uxbridge, and by a confession of judgment: for which loan plaintiff offered to allow interest at the rate of three per cent. per month, to be deducted from the amount lent, at which rate defendant stated to plaintiff he thought he could obtain the money, but stipulated that the plaintiff should not employ a certain solicitor. That some days afterwards plaintiff attended at the office of the defendant, without employing any legal adviser on his behalf, trusting and relying upon the good faith of the defendant to execute the necessary papers for the purpose of effecting the loan, which it was agreed between them should be disposed of as follows: 52*l.* or 53*l.* to be paid to the sheriff: that 40*l.* should be paid to one of the creditors who had an execution in the hands of the sheriff, who was then to withdraw the writ: that defendant should retain 30*l.* on account of a suit commenced by him against plaintiff to recover some bills of costs for business performed by the defendant for plaintiff, and that the surplus should be paid to plaintiff: that plaintiff relied completely on the defendant, and signed and executed whatever papers were placed before him by defendant, without reading or examining them; and the defendant did not read them or cause them to be read to plaintiff. That shortly after the execution of the papers the plaintiff ascertained that only 50*l.* had been paid to the sheriff, and that nothing had been paid to the execution creditor, and that defendant had left the province for some time, without any intimation having been given to plaintiff of his intention, and without leaving directions for paying the execution or paying balance to plaintiff.

That shortly after the departure of defendant his clerk handed plaintiff a deed of certain lott in the village of

1858.

Rees
v.
Wittrock.

Statement.

1858. Balmoral, which plaintiff refused to accept, not having ever bargained for or bought them, or had any intention of purchasing them.

Pees
v.
Wittrock.

That on the plaintiff's solicitor addressing the defendant, the defendant wrote to the effect that he, the defendant, was the lender of the money; that plaintiff had executed a mortgage on the whole of the Uxbridge lot, and given confession of judgment for the amount of the loan; and further stating that he was to retain 60*l.* on account of his claim against the plaintiff, and that the balance had been settled as shown by a receipt in his possession; and as to the lots in Balmoral, that they were sold by him to plaintiff, and that he would enforce the sale.

That the Balmoral lots had been purchased a few days before by the defendant, for 73*l.*, payable one-fifth down, the balance in five yearly instalments; and that the consideration introduced into the deed from defendant to plaintiff was 225*l.*, and for this amount he had taken a confession of judgment from the plaintiff, and which the plaintiff swore was a grossly exorbitant price for them.

Statement.

The defendant by his answer denied all fraudulent practices on the plaintiff; and alleged that the papers had been all duly read over to the plaintiff, except the confession which he had read himself: that defendant's clerk was not in his office, and plaintiff desired defendant to pay him the balance coming to him: that defendant then made a statement which he shewed to plaintiff by which it appeared that a balance of 40*l.* 10*s.* was coming, which amount he paid to the plaintiff, and requested him to sign the memorandum prepared by defendant, which he at first refused to do, stating as a reason that defendant had not yet paid the sheriff. The memorandum as set forth in the answer was as follows:

Amount of deed on Uxbridge
lot disposed of as follows... £150. 0 0

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Paid sheriff in suit of Noble.	£ 53	0	0
My indebtedness to you for costs now sued by you.....	50	0	0
Cash paid me.....	40	10	0
Expenses	6	10	0
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	£150	0	0

1858.

Rees
v.
Wittrock.

That upon defendant reminding plaintiff of his having entered into an undertaking to pay the sheriff whether the arrangement was carried through or not, the plaintiff signed the memorandum so prepared. Affidavits were made by the plaintiff and defendant corroborating the statement in the bill and answer respectively.

It is believed that the foregoing statement in connexion with the facts set forth in the judgment will afford a sufficient insight into the nature of the suit.

Mr. *Hurd* for plaintiff.

Mr. *McDonald* for defendant.

Judgment.

ESTEN, V. C.—I have not been furnished with the two affidavits of the plaintiff, nor with the affidavit of the defendant. They do no more, however, I suppose, than verify the bill and answer respectively, I must therefore conclude that the plaintiff has sworn that he never received the 40*l.* 10*s.* 0*d.*: that he never authorised the retention of more than 30*l.* out of the mortgage money; and that he never purchased the Balmoral lots. The defendant swears the direct contrary. It would seem to be useless to put the matter in course of further enquiry, for the facts are known only to the parties themselves—oath being balanced against oath—in this way we have the receipt and the deed for the Balmoral lots signed by the plaintiff. It is true the plaintiff alleges that he never read these documents; but the defendant asserts the precise contrary, and all probability is against conduct so extraordinary. I think, under these circumstances, we must in-

1858.

Rees
v.
Wittrock.

for that truth is on the side of the defendant ; in addition to which I may remark that I have no doubt the intention was to include the whole Uxbridge lot in the mortgage, as asserted by the defendant, but denied by the plaintiff. This circumstance shews, as the learned counsel for the defendant remarked, a failure of memory on the part of the plaintiff, which somewhat detracts from the weight which would otherwise be attributed to his statements upon oath. Then, is this security of that oppressive character that it ought to be set aside ? I cannot see that it is. A loan at three months is not necessarily oppressive ; the taking of a cognovit was, under the circumstances, not unreasonable ; the power of sale is an ordinary provision now in mortgage deeds, and although fourteen days is short notice, yet I should hesitate to pronounce it oppressive on that account. The defendant had indeed acted as the plaintiff's attorney, but that relation seems to have ceased, and the defendant had even commenced a suit against the plaintiff for the recovery of his costs. The plaintiff appears to have employed the defendant in this transaction more as an agent than an attorney, and when the defendant failed to procure the desired loan from third parties, the plaintiff appears himself to have proposed that the defendant should become the lender, and to have dealt with him at arm's length. It is true that the plaintiff employed no legal adviser ; and that the defendant drew the deeds, but I should hesitate to say that therefore the relation of attorney and client existed between them, or even if it did, that the security should, on that account, be considered as oppressive and fraudulent. The result is, that as regards the security the plaintiff must pay the amount of the principal and interest due on it, otherwise his bill, as to this part of the case, must be dismissed. With regard to the sale of the Balmoral lots, I think the only issue raised on these pleadings is, whether there was a sale or not, and this issue I am bound to determine, on the evidence we have before us, in favor of the defendant. In respect of this part of the case therefore, the motion must be refused—at the same time it is

Judgment.

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impossible to overlook some of the circumstances attending this transaction. It is impossible that we should fail to remark that this sale was essentially part and parcel of the same transaction with the loan; that the property was sold by the defendant to the plaintiff at a great over-value, as appears from the evidence of *Maulson* and *Dennis*; that notwithstanding the circumstance, the terms of payment are far more stringent than those on which the defendant himself purchased; these are very material facts, and I attribute so much weight to them that I think it right to give the plaintiff leave to amend his bill as to this part of the case, as he may be advised, with a direction that the suit shall be prosecuted to a hearing in the ordinary way, unless, which would be much better, the parties should think it best to settle it on equitable terms. Under these circumstances the plaintiff should pay the costs to the present time: but there are two circumstances in the defendant's conduct in this transaction on which I think it right, before I conclude, to make some remark: one is the objection he made to the plaintiff's employment of Mr. *Hurd* in the matter of the loan. What circumstance can shew more strongly the influence exercised by the lender over the borrower; what man of ordinary spirit would submit to such dictation? The borrower submitted to it because he was in the lender's power. It is true the defendant offered to act with any other legal gentleman, and appears to have suggested to the plaintiff to employ one, and so far so well, but (and this is the other circumstance I desire to remark upon) he should have gone further, and refused to proceed in the matter unless the plaintiff employed a legal adviser. In making these remarks I do not wish to make any imputation against the defendant's professional character, far from it, for I am convinced that in objecting to Mr. *Hurd* he was not actuated by any fraudulent motive; and that in proceeding in the matter of the loan without the employment of any other legal adviser on the part of the plaintiff, he did no more than is very common. But it is not the less to be

1858.

Rees
v.
Wittröck.

Judgment.

1858. discouraged because it is common, perhaps more so, and I had thought it right to mark our sense of the objectionable nature of the defendant's conduct in these particulars by refusing him his costs to the present time, to which he would be otherwise entitled; but my brother *Spragge* not concurring in this view, I do not think it right to press it.

Rees
v.
Wiltrock.

SPRAGGE, V. C.—I remember no case in which I was so much struck with the widely different account given upon oath by two educated and intelligent persons, of the same transaction, and as to matters of which they were both cognizant. I fear they are not reconcilable consistently with the truthfulness of both, unless we suppose that a great deal can be set down to evading and faithless memories than can reasonably be accounted for in that way.

Judgment.

I do not think that the plaintiff has succeeded in establishing against the defendant the gross frauds which he has imputed to him in his bill. I do not think that the plaintiff's affidavit can be said to sustain them, even if admissible for that purpose. In some points I think he is clearly incorrect. He has sworn that he did not know who was the lender of the money until informed by the defendant's letter to Mr. *Hurd* of the 20th July; this was material, as it was important to shew that he believed the defendant to be acting for him in the capacity of his solicitor only, and therefore trusted him implicitly, as he says he did; but Mr. *Hector Cameron* the barrister, swears that the plaintiff told him in the latter part of the month of June that he was about obtaining money from the defendant, out of which he would pay a certain sum to Mr. *Cameron*: there was certainly no concealment by the defendant of his being the lender, for he told the sheriff about the same date, as appears by his affidavit, that he was about to advance money to the plaintiff. Further, if he was not the lender but the solicitor only, how came the conversation to arise about

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the employment of Mr. *Hurd*? Then there were the papers signed, where the defendant's name appears conspicuously enough? The defendant himself swears that he applied for and failed to obtain the money elsewhere, and then agreed to lend it himself.

1858.

Rees
v.
Wittrock.

Another point is as to the statement which the plaintiff swears he took to be a statement only, and not a receipt. If a statement only, it was the defendant's statement, and the plaintiff signing it would be absurd; but he not only signed it, but objected to do so, without the money stated to be paid to the sheriff being first paid, and that stated as paid to himself being first paid to him, and he says his objections were overruled; but the objections themselves are inconsistent with the paper being any thing but a receipt, which the plaintiff swears he did not understand it to be.

The plaintiff swears further, that he did not know what papers he signed; the mortgage by him of the Uxbridge lot, and the conveyance to him of the Balmoral lots are both produced, his signature is to each, and in its appropriate place—to the former, opposite the upper of two seals; to the latter, opposite the lowest of three seals—they are both printed conveyances, and it would be supposing the plaintiff strangely ignorant of such matters, which we have no reason to suppose, to believe that in executing these two papers he believed that he was executing one mortgage of the Uxbridge lot; or of part of it, as he says in his original bill. Besides, his objections before signing the receipt do not look like such a blind and wholesale execution of papers as he represents to have taken place.

I will advert to one other point only. In his affidavit, sworn the eighth of October last, he says that Mr. *Dennis*, one of the vendors of the Balmoral property, informed him that no settlement had been made as to the defendant obtaining a title to the Balmoral property, and

1858.
 Rees
 v.
 Witbrock.

he insists upon that point not only in his original bill, filed the third of October, but in the amended bill, filed the eighteenth of February following, 1857. In Mr. *Dennis's* affidavit, sworn the sixth of November, 1856, is this passage: "In a conversation with plaintiff on or before the twenty-seventh of September last past, I informed plaintiff of such proposal being accepted by me, and that the title of and to such lots was in defendant:" the proposal referred to was, that the defendant should secure the purchase money of the Balmoral lots upon other property, receiving a conveyance of the Balmoral lots unincumbered, to which proposal Mr. *Dennis* says he at agreed.

I do not think that the somewhat modified denial contained in the amended bill of the matters set up in the defendant's answer, at all improves the plaintiff's position.

Judgment. I cannot but look upon the plaintiff's statements, so far as they rest upon his affidavit, as entirely unsupported, for I consider his affidavit unreliable; and if the rule of the court were to dismiss a bill which contained a gross charge of fraud unsustained, I confess I think this bill fully within that category, and ought, in such case, to be dismissed.

At the same time I am far from saying that the transaction looks clear, and above all suspicious on the part of the defendant; and the unwillingness of the defendant to give full explanation to Mr. *Hurd*, and to allow him to inspect the documents which had been signed by Mr. *Hurd's* client, looks as if the defendant felt that there was that about it which he thought would not bear investigation.

I think the plaintiff entitled to some relief. Upon the application for the injunction we intimated an opinion that so far as the bill of costs was concerned the bargain

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could not prevent their taxation; but as to the 40*l.* mentioned in the receipt as paid by the defendant to the plaintiff, I think the plaintiff ought not to be put to farther proof of it. The plaintiff has examined the defendant upon the point, and there is the receipt itself, not as I think at all impeached.

1858.

Rees
v.
Wittrock.

As to the purchase of the Balmoral lots, I quite agree with my brother *Esten*. In the present form of the bill we can give the plaintiff no relief; but if the bill be amended impeaching the sale upon the grounds indicated, my present impression is that it cannot be sustained.

As to costs, I think they should be paid by the plaintiff up to the hearing. He has imputed to the defendant very gross frauds; frauds so gross that if proved to be guilty of them he ought to be visited with direct punishment by this court. I have already commented upon these charges, and upon the defendant's evidence in relation to them. I cannot but think them not only unproved but groundless. Judgment

BOSTWICK V. PHILLIPS.

Mortgage.

A lessee of the crown being in arrear for rent, assigned his interest to another, taking a bond to reconvey one-half thereof, on payment of half the amount advanced, within a year, which time having been allowed to elapse without payment of this sum, the assignee refused to covey, alleging that the transaction was a conditional sale. Upon a bill filed to redeem, the court held that under these circumstances the transaction was *prima facie* one of mortgage, and that the onus of proving it to be a sale devolved upon the party attributing that character to the transaction, which having failed to do a decree was made for redemption with costs, except the costs of a redemption suit, which were reserved until after the Master's report.

This was a bill to redeem under the circumstances set forth in the judgment of the court.

Mr. *Roaf* for plaintiff.

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

1858. *ESTEN, V. C.*—This bill is for redemption, which is resisted by the defendant on the ground that the transaction was not a mortgage, but a conditional purchase, and that the time limited for the repurchase having expired, the plaintiff has no equity. The question to be decided is whether the transaction was a mortgage or a conditional purchase. It was effected by means of a conveyance, and a bond to reconvey. The conveyance, which was for the whole lot, purported to be for the consideration of 100*l.*; the bond to reconvey was for the south half, and on payment of 31*l.* 1*s.* The defendant admits the consideration named in the deed was fictitious, and the real transaction was that there being 62*l.* 2*s.* arrears of rent due on the lot, the plaintiff's father conveyed the whole lot to defendant, who was to pay the 62*l.* 2*s.*, and who gave a bond to reconvey the south half on payment of 31*l.* 1*s.* with interest, at the expiration of one year, free of all arrears of rent to the date of the bond, and of all other incumbrances, I think a transaction of this nature is *pr:ma facie* a mortgage. The onus lies on the party attributing a different character to it, to prove it. In the present case the parol evidence, such as it is, is in favor of the plaintiff. Mr. *Hanvey's* evidence, I think, rather counterbalances Mr. *Price's*. As to the facts, I think the amount of the sum to be paid on the reconveyance, 31*l.* 1*s.*, (an odd sum to be regarded as purchase money) being the exact sum to be advanced by the defendant in respect of this half of the lot—the fact of its being payable with interest, and of *Bostwick* being to pay the rent during the year from the date of the bond to the time of the reconveyance, all tend to shew that the transaction was a mortgage. Thus we find that the presumption of law, the facts, and the parol evidence all are in favor of the transaction being a mortgage. It is true, the possession seems to have been with the defendant, at all events after the time for payment and reconveyance had elapsed, but this is not inconsistent with the transaction being a mortgage, and moreover the possession was not of a very marked character, consisting only of the cutting of trees.

Judgment.

Boetwick
v.
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I think there should be a decree of redemption with costs to the plaintiff, except as of a redemption suit, and of so much of the evidence as relates to the account and the tender; and that these costs and further directions should be reserved.

1858.

Bostwick
v.
Phillips.

SPRAGGE, V. C.—I think the nature of the transaction was that *Bostwick* wanting funds to pay the rent in arrear induced the defendant to make the advance upon condition that the north half of the lot should be retained by him for one half of the amount paid, *Bostwick* retaining the other half, and repaying to defendant the amount to be paid by him in respect of it. I infer this from the documents themselves, independently of the oral evidence, which, I think, confirmatory of the same view. The evidence of *Daniel Hanvey*, who drew the bond for the reconveyance to *Bostwick* of the south half, is very material if admissible, and I understand oral testimony to be now ruled in this court to be admissible upon the question of mortgage or no mortgage. He says he understood from both parties that the north half was sold to the defendant out and out, but the south half was not sold like the north half, but was given as security, and was to be reconveyed. And again in another passage he says, "the simple arrangement was this, *Phillips* was to take an assignment of *Bostwick's* interest in the whole lot, and was to pay up the arrears due to the crown, and hold the south half until *Bostwick* should repay him one half of the purchase money advanced, and then was to reconvey the south half to *Bostwick*, and the north half was absolutely sold:" he says indeed that neither of the parties directly told him this, but that he understood it from the conversation of both; but it was not mere casual conversation before an indifferent person, but a business interview in the presence of the conveyancer who was to reduce their agreement into writing. The same witness, afterwards, on the 24th of June, ran the line between the north and south halves; this was at the request of both, and both were present assisting. The

Judgment.

1858.
 Bostwick
 v.
 Phillips.

evidence of Mr. *Price*, a witness for the defendant, is, upon the whole, conformatory of that of *Hanvey*, who says the parties were looking over the paper and talking of their arrangement, and that "*Col. Bostwick* wanted to buy back or redeem the land within twelve months. From what passed I understood it was agreed on, that the south part was to be redeemed within twelve months, and that if not redeemed (I think this was the word), the land was to belong to the defendant." If, by this latter clause, it was meant that *Bostwick* should have no time to redeem beyond the time stipulated, it is simply an agreement at the time of the advance that there should be no equity of redemption, and would therefore, of course be void.

The evidence of *Samuel Price*, the witness to the bond, seems unimportant; he deposes to nothing as said by either of the parties, but himself calls the arrangement "the sale, or conditional sale," which of course amounts to nothing.

Judgment.

The question is, what was the intention of the parties—as put by Lord *Lydhurst* in *Williams v. Owen* (a), "Was the original transaction a *bona fide* sale, with a contract for repurchase; or, was it a mortgage under the form of a sale;" or as put by Lord *Hardwicke* in *Mellor v. Lees* (b), "As to the contract, whether it is a transaction that is in its nature a mortgage, or a defeasible purchase and subject to a re-purchase."

Looking at the form of the instrument, and the oral testimony as to what passed between the parties, I can come to no other conclusion than that the transaction amounted to a mortgage, and that the plaintiff is entitled to redeem. An account will be necessary of the amount of advances made by the defendant. I think the defendant, entitled to his costs up to the hearing as costs of redemption, and the plaintiff entitled to his costs occasioned

(a) 12 L. J. c. 207.

(b) 2 Atk. 494.

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by the defendant resisting redemption; and in case the amount advanced with interest should not exceed the amount offered to be paid by the plaintiff, I think he should bear the whole costs of the suit.

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Bostwick
v.
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ROSS V. MUNRO.

Demurrer—Assignee of chose in action.

To enable the assignee of a chose in action to proceed in equity for its recovery he must shew the existence of some difficulty or obstacle in his way to prevent him from recovering it at law.

This was a demurrer for want of equity, the nature of the case and the authorities cited appear in the judgment.

Mr. A. Crooks for the demurrer.

Mr. Roaf contra.

The judgment of the court was delivered by

Judgment

ESTEN, V. C.—This question arises upon a demurrer to the bill. It is a suit to obtain payment of a bond given by the defendant and two sureties in Scotland to a bank in that country to secure a cash credit extended by such bank to the defendant. One of the sureties having made an assignment of his estate to trustees, they became bound, according to the law of Scotland, to pay, and did accordingly pay to the bank, on behalf of the defendant, the sum of 266*l.* sterling, and the bond was assigned by the proper officers of the bank to the trustees to the extent of the sum of 266*l.* sterling, so paid by them. The bill states that by the laws of Scotland this assignment authorized the trustees, or a majority of them, to recover the moneys paid by them on the bond: and that the assignment operated as a transfer of the security, giving to the assignees or a majority of them, the same right of suit and process against the defendant that belonged to

1858.

Ross
v.
Munro.

the assignors; and the bill prays payment of the 266*l.* sterling and interest. We have consulted the cases that were cited on the argument, and incline to think that if by the laws of Scotland, as alleged by the bill, and admitted by the demurrer, (for I need not observe that foreign law is a fact which the demurrer admits), the assignment vested in the assignees the interest in the bond to the extent to which it was intended to pass, and enabled them to sue upon it in their own names, they would possess a similar right in the common law courts of this country (a). It is, however, unnecessary to decide this question, for one of three results must necessarily arise here, and any one of them is sufficient to decide the case and establish the validity of this demurrer. First, the payment of the 266*l.* sterling by the surety, or any one standing in his place, would, by the law of England, extinguish the bond *pro tanto*, and it could not be transferred with effect so as to enable the assignee to recover the amount paid (b). If this be so here, the plaintiff, of course, has no *locus standi* in this court. But if by the law of Scotland the bond is kept alive under such circumstances for the benefit of the surety, and is capable of being transferred to him or any one standing in his place, in which case, we are inclined to think that the law of England *ex commutate gentium* would conform to the law of Scotland in this respect, and the assignees, or a majority of them, one of them having been denuded of the trust, would be entitled to sue upon it in their own names; then equally the plaintiffs have no *locus standi* in this court, because they have a full and adequate remedy at law, where matters of this nature are primarily cognizable. But if finally the law of England should adhere to its own rule and require the suit to be in the name of the original obligee, then it appears that the plaintiffs are equally out of court upon this bill, for the

(a) See the case of *Thompson v. Bell*, 18, Jur. 603; *Trimbey v. Vignier*, 1 Bought. U. C. 157.

(b) *Copis v. Middleton*, T. & R. 224; and *Hogson v. Shaw*, 3 M. & K. 183.

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VOL. V

cases of *Hammond v. Messenger* (a), *Dowbiggen v. Bourne* (b), and *Rose v. Clarke* (c), in our opinion clearly establish the rule that to enable the assignee of a chose in action to proceed in equity for its recovery he must shew the existence of some difficulty or obstacle in his way to prevent him from recovering it at law, such as the refusal of the assignor to permit the use of his name, or a threat on his part to execute a release of the debt, or interfere in some way with its recovery. Nothing of the sort is shown here, and therefore we must necessarily conclude that if the bond continues to subsist for the benefit of the surety or his trustees they have an adequate remedy for the recovery of what is due to them upon it in the common law courts of this country, and have therefore no right to proceed in this court for that purpose. The demurrer must be allowed with cost, but the plaintiff has liberty to amend, if he be so advised.

1858.

Ross
v.
Munro.

HUNTER V. MOUNTJOY.

Judgment.

Ne exeat.

M. having by fraud induced H. to advance money on mortgage upon the assurance that the title was correct, although well aware that the party executing the mortgage had no title, a writ of *ne exeat* was issued against him. A motion to discharge the writ on the ground that the bill alleged, that the debt arose out of the fraudulent conduct of the defendant, was refused with costs.

This was a motion to discharge a writ of *ne exeat provincie* issued against the defendant *Mountjoy*, one ground being, that the demand for which the writ had issued was was not an equitable debt, but arose out of certain alleged frauds stated to have been practised by the defendants on the plaintiff.

Mr. *Strong* for defendant.

Mr. *Morphy* contra.

(a) 9 Sim. 327. (b) 2 Y. & C. Ex. Ca. 462. (c) 1 Y. & C. C. Ca. 534.
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1858.

Hunter
v.
Mountjoy.

The judgment of the court was delivered by

SPRAGGE, V. C.—This is an application by the defendant *Mountjoy*, to discharge a writ of *ne exeat* issued against him marked for the sum of 451*l*.

The objections to the writ are, that the plaintiff is a resident out of the jurisdiction, and that the subject-matter is not an equitable debt, but a demand arising out of certain frauds practised by the defendant upon the plaintiff

Upon the first point, which is a question of fact, the defendant *Mountjoy* refers to the plaintiff's bill, in which he describes himself as of the city of New York, in the United States of America. To this it is answered, that at the time of the filing of the bill—the 14th May last—the plaintiff was resident in New York, but before the making of this application he had become a resident of Upper Canada, and the affidavits upon which the application was made are referred to, where, in the affidavit of the plaintiff, he is described as *late* of the city of New York, but now of the township of Gloucester, in the county of Carleton; and in the affidavit of *James H. Hunter*, his agent in the transaction in question, he is described as *then*, at the time of the transaction, residing in the city of New York, but the affidavits are sworn in the city of Ottawa, within the jurisdiction.

Prima facie, the plaintiff would be taken to continue to reside where he describes himself in his bill as residing, but if he shews himself to have subsequently become a resident within the jurisdiction, the objection on the ground of residence abroad ceases. I think he may shew it, and that by his affidavit filed on this application he does shew it in the same terms as by his bill he showed his residence abroad at the time it was filed.

As to the other point, it is not denied that the case made by the bill entitles the plaintiff to relief; that his equity

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is to have the money advanced repaid to him ; that it is therefore in the nature of a pecuniary demand, and that the court can see with sufficient certainty the amount in money to which the plaintiff is entitled—the facts upon all these points are supported by the affidavits, and besides the bill is taken *pro confesso*. As to the law of the case, my present opinion (subject to any alteration which might be made upon a formal argument of the case) is, that the plaintiff is entitled to the payment of the sum advanced without waiting for the time appointed for the payment of the mortgage.

1858

Hunter
v.
Mountjoy.

The pith of the objection is, that there is no debt, at least no debt now payable : that the contract between the parties was for a loan of money payable at a day not yet arrived, and therefore the plaintiff, in order to shew any equity for present payment, must base it upon the fraudulent conduct of the defendant, that his cause of suit arises out of the fraud : the existence of the debt by itself giving no cause of suit.

Judgment.

The authority chiefly relied on, in support of this position, is a case mentioned in Mr. *Beames'* work on the writ of *ne exeat*, (which I have been unable to procure), and which is referred to in *Daniel's Practice*, p. 1927. The reference does not give us the facts of the case ; it is merely stated that the plaintiff filed his bill on the ground of fraud, stating a large balance to be due to him from the defendant ; and that the writ was refused by Lord *Eldon*, who said : " Here I am called upon to grant the writ in a case of alleged fraud, and that by the fraudulent conduct of the defendant such a sum will be due ; this is going further than the court ever has gone." Mr. *Daniel* seems to suppose that the writ was refused in that case because the alleged fraud of the defendant was the ground of the suit ; and thinks that in *Leake v. Leake* (a), the writ was refused upon the same ground. In the latter case the bill was filed by a residuary legatee against the

(a) 1 J. & W. 605.

1858. executors, and a debtor to the estate, alleging collusion between the two defendants, and that thereby the debt was not got in, and that the debtor was about to leave the country. Lord *Eldon* did not give as his ground for refusing the writ the reason which Mr. *Daniell* supposes to have influenced him; but gave leave to move for the appointment of a receiver, in order that the *ne exeat* might be applied for by him. I rather take it that Lord *Eldon's* position was, that the writ could only be applied for by some person entitled to receive, which would be either the executor or some person specially appointed, as a receiver; not the residuary legatee, for until the estate was administered it could not be ascertained whether he would be entitled to any thing. Primarily the executor would be the proper person, and it would only be a upon failure of duty on his part through negligence or fraud, that the duty would be committed to another; and if a *ne exeat* were issued upon the application of the receiver, it would be in a suit where that application would be founded upon the alleged fraudulent collusion of the two defendants. My reading, therefore, of *Leake v. Leake* does not support the position of Mr. *Daniell*, but rather the contrary.

Judgment.

In the case referred to by Mr. *Beames* it may be that the writ was refused by Lord *Eldon* upon the ground assumed by Mr. *Daniell*; but it may have been that a large sum would be due according to the plaintiff if certain transactions which he impeached for fraud should be set aside; for instance, like the case of a bill filed to set aside the purchase of an estate in the West Indies, at a judicial sale, where the plaintiff applied for a *ne exeat* for the rents and profits received by the purchaser (a). In that case Lord *Eldon* states his objection to granting the writ to be, that the foundation of the equity was "alleged fraud, not particularly stated, but only upon information and belief;" not simply that the cause of suit arose out of fraud; nor do I find Lord *Eldon* or any other judge saying that down as a principle.

(a) *Jackson v. Petrie*, 10 Ves. 164.

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Upon referring to *Smith's Practice* and *Story's Equity Jurisprudence*, I find no such position stated; but both in the text books and in the cases I find it laid down that the writ will issue for an equitable debt or demand; I do not find the words equitable debt used in contra-distinction to any other equitable demand of a pecuniary nature, but only in contra-distinction to legal debts, and I have been unable to think of any good reason, and none has been suggested in argument, why, when the equity is in the nature of a pecuniary demand, and sufficiently certain as to amount, the writ should be refused, because the foundation of the equity is fraud on the part of the defendant against whom the writ is applied for.

1858.

Hunter
v.
Mountjoy.

In this case the defendant *Mountjoy* borrowed the plaintiff's money, assigning a mortgage upon property which he untruly represented to be the property of the mortgagor, and the plaintiff's agent, without time being given for investigation, advanced the money upon the faith of this representation; the representation was known to be untrue in most if not all particulars; the pledge upon which the money was advanced turns out to be worthless, and the plaintiff's equity under these circumstances is to have his money returned to him; there is no dispute as to the facts, and the plaintiff's equity seems clear; there could scarcely be a clearer case for a *ne exeat* against the defendant leaving the jurisdiction, unless the circumstance of the equity arising out of a fraud is an objection: my present opinion is that it is not, and that this is a proper case for the writ.

Judgment.

1858.

BISCOE V. VAN BEARLE.

Wild land taxes—Improvement by tenant for life—Tenant for life.

Semle : A tenant for life of the whole estate of the testator, consisting of an improved farm and of wild lands, is bound to keep down the taxes upon the whole.

This was a motion, by way of appeal, from the master's report, and hearing on further directions.

Mr. *Crickmore* for the plaintiff.

Mr. *Roaf* for the defendant.

The judgment of the court was delivered by

SPRAGGE, V. C.—This cause comes on upon appeal from the master's report upon some points, which I will notice presently, and upon further directions.

Judgment. The defendant is the widow of the testator *Thomas John Van Bearle*. The plaintiff is his child by a former wife—he left no children by the defendant.

By the decree it is declared that under the deed of compromise in the pleadings mentioned, dated the twenty-fourth of March, 1838, the defendant is entitled to *half* the real and personal estate of the testator, subject to the provisions and stipulations contained in the same deed, and to a life estate in the *other half*. The deed recites a claim on the part of the defendant arising out of the sale and receipt by the testator of the proceeds of certain stock belonging to the defendant before marriage, to the amount of 537*l.* 16*s.* 0*½d.* sterling, and which by an ante-nuptial settlement (without the intervention of trustees) was settled to the separate use of the intended wife, but which, after the marriage, was sold out with the consent of the wife, and the funds applied in the manner therein set forth; it also recites a will of the testator purporting to

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devise the whole of his property to his wife for her use during her natural life ; after that, that it should descend to his daughter and her heirs ; the will was not executed so as to pass real estate, but a codicil thereto appointing executors was so executed. The deed of compromise recited further, that doubts had arisen in regard to the claim of Mrs. *Van Bearle* to the proceeds of stock sold and also as to the execution of the will ; and proceeds to say, that the parties thereto being desirous of carrying into effect the provisions contained in the will and codicil had agreed for that purpose, and in order to remove the said doubts and to prevent litigation and waste of property, and to guard and secure the peace and quiet of the family, that the plaintiff, then Miss *Van Bearle*, should convey and assure the messuages, lands, tenements and hereditaments therein described, and all other the real estate, if any, of the testator, to the use of the defendant during her life, in manner hereinafter mentioned, and that in consideration thereof the defendant should accept and take one half of the real and personal property of her late husband in satisfaction of all claims on his estate, and should enter into the covenants on her part therein contained. The deed then proceeds to convey some parcels of land in Stamford, forming together what is called the Whirlpool farm, and several lots in Nottawasaga, comprising together several thousand acres, together with all the other lands, if any, of which the testator might be seized, to a trustee to the use of the defendant for life, remainder to the plaintiff in fee ; then follows a covenant from the defendant to the plaintiff, that she, the defendant, her executors, and administrators, shall and will accept and take one half of the real and personal estate of the testator in full satisfaction and discharge of her claim in respect of the sale of the stock, and shall and will, when thereunto requested by the plaintiff, her heirs, &c., after receiving moneys equal to the one half of the real and personal estate of the testator make, execute, and perform all such acquittances, releases, acts, and deeds, as in the opinion of counsel should be requisite and proper for

1858.

Blascoe
v.
Van Bearle.

Judgment.

1858.
 Bloos
 v.
 Van Bearle.

effectually discharging and exonerating such real and personal estate from all the defendant's claims and demands "for the cause aforesaid." There is also a covenant on the part of the defendant that she would, during her natural life, support the plaintiff, and provide necessaries for her according to her rank and condition in society, so far as her pecuniary circumstances should permit.

The plaintiff married about three years after the execution of the above deed, having resided in the meantime with the defendant, and has since resided in England, or at least out of Canada: the defendant has ever since the death of her husband resided on or near the Whirlpool farm.

The master finds by his report that personal estate of the testator to the amount of 996*l.* 1*s.* 7*d.* came to the hands of the defendant, against which he allows the sum of 360*l.* 7*s.* 7*d.* as properly expended by her: he charges her with 22*l.* 10*s.*, the proceeds of cordwood sold by her, and divides the sum with which he charges her into equal parts of 328*l.* 17*s.* each.

One item of the account allowed to the defendant is objected to by the plaintiff, a sum of 62*l.* 18*s.*, which the master reports to be a sum paid to on *Wm. Russell*, on the 16th August, 1832, for the erection of a barn upon the Whirlpool farm, which he finds to have been a necessary permanent improvement, adding to the value of the farm, and without which the same could not have been properly enjoyed by the defendant, or the tenant, or occupier thereof. I think that this sum is properly allowed; the expenditure was necessary, and being made at a time when, as the report finds, the plaintiff was a member of the defendant's family, living upon, or near the farm upon which the barn was built, it must have been made almost necessarily with her cognizance, and was without, so far as appears, any objection on her part, and she could not reasonably have expected that

the expense inasmuch as she placed in the defendant, and interest maintenance

The next what part of the property was forfeited, and also, whether the defendant, who had redeemed the property, was keeping it

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the expense would have been borne solely by the plaintiff, inasmuch as it was for the permanent improvement of a place in which she was more interested than the defendant, and in which she had a present as well as a future interest in respect of the provision in the deed for her maintenance.

1858.

Biscoe
v.
Van Bearle.

The master was directed to enquire whether any, and what part of the real estate of the testator had been forfeited, and lost; and how, and under what circumstances; also, what moneys had been expended by the plaintiff in redeeming land forfeited for non-payment of taxes, or in keeping down the taxes upon the real estate.

Upon this the master has reported that a portion of the Nottawasaga lands was sold for non-payment of taxes: that 295 acres thereof have been forfeited, and lost, the same not having been redeemed either by the defendant or the plaintiff, but that the plaintiff redeemed the residue by paying the sum of 35*l.* 4*s.* 9*d.* on the first of June, 1854, and the master reports the plaintiff entitled to re-
Judgment.

The plaintiff's counsel objects that the whole of this sum should be repaid by the defendant, that as tenant for life she was bound to keep down the taxes; and he claims that the land forfeited should be taken out of the half of the lands in Nottawasaga, to which she is entitled; in other words, that it was her duty to pay the taxes, and that her neglect to do so entails upon her the consequences of her neglect, and that she is compellable, therefore, to make good whatever loss has been sustained in consequence of it. I am referred to certain documents mentioned in the report, being a letter from the solicitor for Captain *Biscoe*, husband of the plaintiff, dated 18th September, 1845, and one from Mr. *Esten*, acting on behalf of the defendant, dated 24th March, 1846, addressed to the writer of the former letter: propositions appear to have been made for the sale of the Nottawasaga.

1858.

Biscee
v.
Van Bearle.

lands, which seem to have resulted in nothing: but in Mr. *Eston's* letter the position of those lands is pointed out as wild and unproductive, as subject to depredations from trespassers, and as liable to be sold for taxes which, it is stated, Mrs. *Van Bearle* had no means of paying. There is also an affidavit of Mr. *Campbell*, through whose intervention as agent for the plaintiff, moneys were paid in redemption of those lands which were redeemed: he states that the whole of the lands redeemable were redeemed; and that the whole of the lands sold would have been redeemed if they had been redeemable; he states also that the whole of the Nottawasaga lands, not a part only, had been sold for taxes.

Judgment.

It does not appear whether the Nottawasaga lands were, as stated in Mr. *Eston's* letter, wild and unproductive; no doubt he wrote only upon information, and it is probable they were so from the terms in which they are referred to in the deed of compromise. The defendant seems not to have been correct, however, in stating herself to be without means to pay the taxes, for besides the annual proceeds of the Whirlpool farm, and of the personal estate, she had the proceeds of the sale by auction, which took place in April, 1844; as to the latter, it may be said that she was not bound so to apply it, for under the will it belonged to the plaintiff, while she, the defendant, was entitled to the annual income thereof; and under the compromise deed she was entitled to retain it towards satisfaction of her claims upon the estate. The question remains, whether she was bound to pay those taxes out of the annual proceeds of the estate, and if so, what is to be the consequence of her having neglected to do so.

I should say, as a general rule, that a tenant for life is bound to pay the taxes as they accrue due, upon the same principle as he is bound to keep down the interest on a mortgage debt, the remainder man paying the principal; for as was said by Lord *Eldon* in *White v.*

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White (a), "the whole charge is upon the whole inheritance; and the natural division is that he who has the corpus shall take the burthen, and he who has only the fruit shall to the extent of the fruit of that debt." If this property were unproductive it may be said that it yielded no fruit, and therefore the tenant for life was not bound to pay; but the whole estate of the testator was devised together, and the whole fruit of the whole was appointed thereby to come to the hands of the tenant for life, and nothing to the hands of her to whom the inheritance was devised until after the death of the tenant for life. It is reasonable, therefore, that she should take the burthen with the benefit, and such, no doubt, was intended by the testator, for he placed no means at the disposal of the owner of the inheritance to pay the charges accruing upon it, but placed all, whatever they were, at the disposal of the tenant for life. If, therefore, she had paid the taxes on these lands, and the question had been, whether she was to be considered as making an advance to the owner of the inheritance, or as paying them out of the moneys coming to her hands as tenant for life, I think the proper conclusion would be that she had paid as tenant for life. But it is not the same question whether, having neglected to pay, and a portion of the land having been lost in consequence, she is bound to make it good, and I abstain from giving any decided opinion upon that point, simply because it has not been argued. I believe a tenant for life is not bound to renew a renewable lease which expires during his life: a lease may be forfeited by the non-observance by a tenant, for life of covenants to be performed by the tenant, and a mortgaged estate may be foreclosed for non-payment of interest by a tenant for life: whether in these cases he suffer any loss beyond that of his own interest, I am not prepared to say. These and other cases may bear some analogy to the present case. I am unwilling to decide the point upon its being barely claimed as a consequence of a default without its being argued.

1853.

Discoe
v.
Van Bearer.

Judgment

1858.
 Biscoe
 v.
 Van Bearer.

With my present view, however, as to the proceeds of the estate being properly applicable by the tenant for life to payment of taxes, I should say that the plaintiff is entitled to be reimbursed the whole amount, not half only, paid by her to redeem the land after the sale for taxes.

The bill asks for a partition of the estate, and I see at present no reason why a partition may not be made. If made, the plaintiff would be entitled to hold one-half in severalty expectant upon the death of the defendant, the defendant herself retaining the whole for life, and those claiming under her retaining one-half until she is paid, or until moneys come to her hands to the extent of one-half of the value of the real and personal estate of the testator.

Judgment. At the hearing on further directions, however, a partition was not asked for, but it was claimed that all moneys received by the defendant should be taken to have been received and applied towards the one half value of the testator's real and personal estate; and while it was admitted that less than the one-half value had been received, it was claimed that the moneys received should be applied *pro tanto* to relieve a portion of the moiety of the estate. This was objected to, and I think with reason.

The deed of compromise is a peculiar one, but its effect taken in connection with the declaration contained in the decree, I take to be this. The tenancy in common in fee of the defendant is a redeemable interest, and the right to redeem can only be exercised upon payment of such a sum as shall amount to the one-half value of the whole estate, or receipt of moneys by the defendant to such amount; I mean to say that in the event of moneys of the estate of such amount coming to the hands of the defendant, she would, at the request of the plaintiff, be bound to release the claims referred to in

the deed, and that she had agreed by her, but the estate agreed to any thing in order to redeem her

Upon such a claim under the will, the life estate is considered of her claims, and personal satisfaction of less such moneys

The master's account of a legacy by the defendant, strictly it does not which were on *Van Bearer*; but applicable to the plaintiff, if the plaintiff

The sum not payable, appears the amount of the amount of the think interest these sums in connection, or of a claim of the defendant with the non-payment

I observe that in the real property therefore only and in the half

the deed, and those claims being satisfied, the estate which she had agreed to take in satisfaction cannot be retained by her, but that in the meantime she is entitled to the estate agreed to be taken in satisfaction, and I do not see any thing in the deed which could entitle the plaintiff to redeem her piecemeal.

1858.

Biscoe
v.
Van Bearle.

Upon such amount as I have stated being received by the defendant, she would simply be remitted to her rights under the will, and the compromise deed, so far as her life estate is concerned; the moneys being in satisfaction of her claims, and in substitution of the half of the real and personal estate which she has agreed to accept in satisfaction of the same claims, until, and I suppose, unless such moneys do come to her hands.

The master reports as to a sum of 200*l.* being the amount of a legacy to the plaintiff, which has been received by the defendant, and he charges the amount against her; strictly it does not come within the matters referred, which were only those relating to the estate of Captain *Van Berale*; but this sum would appear to be properly applicable to the satisfaction of the claims of the defendant, if the plaintiff desires to have it so applied. Judgment.

The sum now in the hands of the defendant so applicable, appears to me to be the sum of 328*l.* 17*s.* The amount paid for the redemption of lands 35*l.* 4*s.* 9*d.*, and the amount of the legacy 200*l.*—upon the two latter, I think interest is properly chargeable. I have stated these sums in order that it may form the basis of a settlement, or of a decretal order in case the claim to fix the defendant with the loss of the lands forfeited and lost by the non-payment of taxes, should not be further urged.

I observe that by the deed of compromise, a life estate in the real property only is conveyed; the defendant has therefore only an equitable interest in the moiety in fee: and in the half personal estate, except for life.

1858.

THE ATTORNEY GENERAL V. THE ONTARIO, SIMCOE AND
HURON RAILROAD CO.

Tarif of Charges.

March 6.

The act incorporating a railroad company authorized the company to levy such tolls only as should be fixed by by-law of the company, to be sanctioned by the Governor, and that the same tolls should be charged at all times equally to all persons. The company, from the circumstance of a firm covenanting to furnish certain quantities of lumber to be transported over their line of railway, contracted to carry the same at a lower rate than that fixed by their tariff for the public generally; but no by-law to this effect had been passed by the company. The court, upon a bill filed, declared such contract illegal, and enjoined the company from continuing to carry at any other rates than were charged for the like services to the public generally.

Statement.

This was an information by the Attorney-General, at the relation of *Charles W. Lount*, against the Company and certain persons with whom the Company had contracted to carry lumber for them, and which the other defendants covenanted to furnish in certain quantities for transportation, alleging that the company had made a contract with the other defendants to carry the same for them at lower rates than those charged to the public contrary to their act of incorporation (*a*), and praying that the same might be declared illegal, and the Company restrained from carrying it out. The defence set up by the defendants, other than the Company, was, that the act did not apply to contracts of the kind complained of, and that though the act required the rates to be charged by the Company to others for the use of the road to be regulated by by-laws sanctioned by the Governor, yet this did not interfere with the Company as carriers: that these contracts were *bona fide*, and for the interest of the Company; and also, that the company had attempted to repudiate them before the information was filed.

Mr. *Strong* and Mr. *Fitzgerald* for the relator.

Mr. *A. Wilson*, Q. C., and Mr. *Crickmore* for the Company.

(a) 12 Vic. c. 119.

Mr. *A. Crook*.

The judgment

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Mr. A. Crooks and Mr. Blake for the other defendants.

1858.

The judgment of the court was delivered by

Attor'y-Gen.
v.
O.S. & H.R.R.

THE CHANCELLOR.—This is an information and bill filed by her Majesty's Attorney-General, at the relation of *Charles W. Lount*, for the purpose, amongst other things, of having it declared that certain contracts entered into by the defendants, the Ontario, Simcoe, and Huron Railroad Company, are illegal and void under their act of parliament. The particular provisions of the contract in question are not material to the determination of the question before me. It is sufficient to state that in consideration of covenants entered into by the other defendants, under which they bound themselves to supply a given quantity of lumber to be carried by the Railroad Company, the Railroad Company agree to carry such lumber at rates very much below those charged to the public, for a period of five years. The price to be paid by *Sage, Grant & Co.* is less than half the rate fixed by the authorized tariff; and the rates payable under the other contract are not materially greater. Judgment.

The information prays, in substance, that it may be declared that equal charges should be made to all her Majesty's subjects for the carriage of like quantities of lumber, propelled by like engines over the same portions of their road; and that the contracts between the Railroad Company and the defendants are illegal and void; and that the Railroad Company may be restrained from carrying lumber for the other defendants at lower rates than those charged to the public generally; or that they may be ordered to carry for the public at the same rates charged to the other defendants; and that the Company may be ordered to establish an equal and fair tariff for the carriage of lumber on the railway, applicable to all Her Majesty's subjects; and that the Company may be restrained from charging for the carriage of lumber in the unfair and unequal way specified in the information.

1858. The question turns upon the 38th section of the act
 (a), which provides, "that it shall and may be lawful to
 and for the said company, from time to time, and at all
 times hereafter, to ask, demand, take, and recover, to
 and for their own proper use and behoof, for all goods,
 wares, merchandise, and commodities of whatever description,
 transported upon the said railroad, *such tolls as they, with the approbation of the Governor, or person administering the government for the time being, may deem expedient, which said tolls shall, from time to time, be fixed and regulated by by-laws of the company, or by the directors, if thereunto authorized by the said by-laws * * **
 And the said company, or the said directors, shall have full power, from time to time, at any general meeting, with the like approbation aforesaid, to lower or reduce all or any of the said tolls, and again to raise the same as often as it shall be deemed necessary for the interest of the said undertaking: *provided always, that the said tolls shall be, at all times, charged equally to all persons after the same rate in respect of all passengers, and of all goods on carriages of the same description, and conveyed or propelled by a like carriage or engine, passing over the same portion of the line of railroad under the same circumstances, and no reduction or advance in any such tolls shall be made, directly or indirectly, in favor of or against any particular company, person or party travelling upon or using the railroad, or so as collusively or unfairly to create a monopoly, either in the hands of the said company, or of any other company, person or party.*"

Attor'y-Gen.
 v.
 O.S.&H.R.R.

Judgment.

Now it is said that this clause has no bearing upon the question at issue, inasmuch as it only regulates the toll to be levied by the company for the use of the railroad by others, but does not interfere with the rates to be charged by the company as carriers. In that respect the framing of the act is certainly imperfect. It does not

(a) 12 Vic., ch. 119.

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expressly authorise the railroad company, as it should have done, to act as carriers; but, looking at the various provisions of the act (a), I have no doubt that the legislature did intend to authorise them to act in that capacity; and, assuming that to be so, it is clear, I apprehend, that the clause in question is to be regarded as regulating the rates to be charged by the company as carriers.

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v.
O.S. & H.R.R.

It is argued, in the next place, that, assuming the clause in question to regulate the rates to be charged by the railroad company acting as carriers, the contracts in question are not thereby rendered illegal, inasmuch as the rates are only to be charged equally on goods *passing over the same portion of the railway, under the same circumstances*, while the lumber forwarded for these defendants passes over the road under very peculiar circumstances, not applicable to like transactions with the public, because the contracts in question were entered into *bona fide* with a view to the interests of the company; and on the faith of these contracts large sums were expended by the defendants, whereby an important traffic was in effect created, from which the company has derived great pecuniary advantage. Judgment.

It is clear, I apprehend, that the Company are not bound to establish a uniform rate upon every portion of the road; and there is room to argue that the interests of the Company are to be taken into consideration in determining whether there is that difference of circumstances which would authorise a different rate of charge under the act; but conceding these points, the illegality of the contracts in question cannot, I think, be doubted. The Company are authorised to levy such tolls, and such tolls only, as have been sanctioned by by-laws approved by the Governor of the province. Now that provision of itself goes far, I think, to prove that these contracts cannot be sustained. Had the legislature intended to

(a) See sections 1, 38, 40, 41 and 42.

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authorise the Company to contract with individuals, at different rates, according to circumstances, it is hardly to be supposed that a by-law approved by the Governor would have been required to render such agreements legal. It is plain, I think, that the legislature did not mean to authorise this Company to levy any rates except such as had been fixed by general rules, approved by the Governor, applicable to all her Majesty's subjects alike. But whatever doubt there may be upon that point is removed, I think, by the subsequent part of the section, which declares, "that the said tolls," that is, the tolls authorised by approved by-laws, as previously provided, "shall be, at all times, charged equally to all persons," &c., "and no reduction or advance in any such tolls shall be made, directly or indirectly, in favor of or against any particular company, person or party, travelling upon or using the railroad." It is not contended that this provision necessitates a uniform rate of charge. Different rates may be charged, even upon the same portion of the road, under different circumstances; but then those different rates must be sanctioned by approved rules, applicable to all her Majesty's subjects using the road under the same circumstances. But in the present case the established tariff has been reduced, most materially reduced, in favor of the defendants, not upon any principle recognised by the by-laws of the Company and applicable to the public generally, but in virtue of a private contract, in which no other member of the community has any right to participate. Now that is, in my humble judgment, a direct violation of the act of parliament.

Judgment.

It is said, however, that no by-law had been passed on the subject at the time these contracts were entered into, and that rather than invalidate contracts legal in their inception, this court will compel the Company to regulate its tariff in accordance therewith. But these contracts were from the first unauthorised. The directors had no power to bind the Company in that way. The contracts were *ultra vires*, and, obviously, cannot preclude the Com-

pany from being authorised and regulated as circumstances were done, though promulgated and carried for the reduction of tolls which this court

It is argued that the contracts are void for information, with costs. It is established in law that a notice that a contract is void upon the discovery of the information carry for the tolls after the institution pay more than the tolls been instituted agreements. The Attorney-General Company, with a decree as to tolls

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This suit was dismissed by the court. The bill of lading held by the

pany from establishing a proper tariff, in the way authorised and required by their act, or for altering such tariff as circumstances might require. And the moment that was done, the moment a properly authorised tariff was promulgated, the Company ceased to have any right to carry for these defendants at the contract prices. The reduction of the fixed rates in their favor was a wrong which this court ought to enjoin.

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v.
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It is argued on behalf of the Railroad Company that the contracts had been repudiated before the filing of the information, and that it must be dismissed for that reason with costs. But that allegation, if material, has not been established in fact. It is not denied that the Company acted upon the agreement for several years; and, although a notice that they intended to determine it was served upon the defendants some weeks prior to the filing of the information, still the Company continued to carry for the defendants until October, several months after the institution of this suit, although they refused to pay more than the contract price, and although suits had been instituted to compel specific performance of the agreements. I am of opinion, therefore, that the Attorney-General is entitled to a decree against the Railroad Company, with costs; but, under the circumstances, the decree as to the other defendants must be without costs. Judgment.

BANK OF UPPER CANADA v. SCOTT.

Foreclosure by a bank—Sales—Infants.

The chartered banks of this province have a right to a decree of foreclosure upon a mortgage held by them as security.

The court, where it is considered beneficial to the interests of an infant defendant, will direct a sale instead of a foreclosure, without requiring any deposit to cover the expenses of such sale. 16th March.

This suit was brought by the plaintiffs, upon a mortgage held by them against the infant heirs of the mort-

1858. *gagor*, and now came on by way of motion for decree, under the orders of 1853.

Bank of U.C.
v.
Scott.

Mr. *Crickmore* for the plaintiffs.

Mr. *Roaf* for the infant defendants: the other defendants had allowed the bill be taken *pro confesso*.

Judgment was delivered by

THE CHANCELLOR.—This is a suit for foreclosure by the plaintiffs against the three infant co-heirs of the mortgagor; and upon the hearing two questions were made, first, whether the plaintiffs are entitled, under their act of incorporation, 19 & 20 Vic., ch. 121, sec. 27, to a decree for foreclosure; secondly, whether this court will decree a sale against the wish of a mortgagee, in favor of an infant, under the recent order, without requiring the expenses of the sale to be paid into court.

Judgment.

Looking at the 27th section of the recent statute, alone, there might have been, perhaps, some room for doubt. But that clause is an almost literal copy of the 19th section of the previous act (*a*); the slight difference in the proviso strengthens the argument in favor of the plaintiffs. Now doubts having arisen as to the rights of the various banks, under such circumstances, a statute was passed, which declares that whenever a chartered bank has been authorised to take security by mortgage, it is to be held to be entitled to perfect such security by foreclosure (*b*). Now that being the construction placed by the legislature upon the 19th section of the previous act, which, for the purpose of this argument, may be considered precisely similar to the present clause, I have no doubt that the plaintiffs, so far as their charter is concerned, have a right to a decree of foreclosure.

It must be conceded, I think, that a sale would not have

(*a*) 6 Vic., ch 27.

(*b*) 13 & 14 Vic., ch 22, sec. 3.

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(*b*) *Harris v. Ha*
1 Kay, Appx. xxi.

been directed in favor of an infant, prior to the recent statute (a), without the consent of the mortgagee. That was the rule, so far as I have been able to ascertain it; but the cases upon the subject are obscure, and, as they furnish our only source of information here, the practice must be considered doubtful. But since the recent order of this court, which follows the Imperial Statute, the power to direct a sale, without the consent of the mortgagee, cannot be denied; and, speaking for myself, I have no doubt that the power there conferred ought to be exercised in favor of an infant defendant, whenever it can be made to appear that a sale would be for his benefit.

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Then, as to the terms upon which such an order should be made, it has been held more than once that when a solicitor is appointed guardian *ad litem* for an infant defendant in a foreclosure suit, the plaintiff must pay his costs, upon the ground, as it would seem, that it would be more unjust to deprive the solicitor of his costs than to compel the plaintiff, for whose benefit, and at whose instance, he was appointed, to pay them (b). These cases have been followed in this court; but they do not furnish a principle which would warrant me in decreeing a sale against the mortgagee, without having the means of indemnifying him against the costs thereby incurred. It may be just to make him bear the costs of a solicitor, appointed at his instance and for his benefit, but in directing a sale against his wish, the court acts entirely with a view to the interest of the infant, and to extend that relief to the infant at the expense of the plaintiff would be obviously unjust.

But in cases of this sort, the court may properly apply the fund recently placed at their disposal for the protection of infants. That fund is quite insufficient at present, but it is not improbable that the legislature may take steps ere long to render it effectual for the purpose

(a) 15 & 16 Vic., ch. 86. (Imp.)

(b) *Harris v. Hamlyn*, 3 DeG. & S. 470; and see *Sefkin v. Davis*, 1 Kay, Appx. xxi.

1858. for which it was intended ; and, looking to that fund as a means of indemnifying the plaintiffs against the possible cost, I think I may venture to order a sale in the present case, without ordering any deposit, if the judge, upon an inquiry, which I hereby direct, shall think a sale beneficial for the infants.

Bank of U.C.
v.
Scott.

BECKIT V. WRAGG.

Trustee—Dormant equities—Laches.

February 6. In 1832 a person who held a bond for the conveyance of a tract of land on which he had erected a steam saw mill and other buildings, at considerable expense, having become involved, made an assignment of his property and effects to certain of his creditors, as trustees to work the mill and sell the lumber, and apply the proceeds in payment of the owner's debts, &c., and then removed from this province to the United States, where he remained for some years : the trustees agreed among themselves that one of their number should take the sole management of the trust estate into his hands, and he accordingly went into possession : subsequently an execution against the goods of the owner was placed in the sheriff's hands, under which he proceeded to a sale of the steam engine set up in the mill ; at this sale the managing trustee, who was agent only for one of the creditors, attended and became the purchaser of the engine and machinery for his principal, at a great undervalue, and removed the same from the mill, and afterwards procured a deed of the property in his own name from the proprietor, which he also transferred to his principal. In 1855 the assignor filed a bill for an account of the trust property, alleging that his poverty in the meantime had prevented him enforcing his rights. *Held*, that he was entitled to the relief sought, notwithstanding the Statute of Limitations (4 W. IV. c. 1,) and the act relating to Dormant Equities (18 Vic. c. 124.)

Statement. The bill in this case was filed in June, 1855, by *John Becket* against *Thomas Busby Wragg* and *William Gooderham*, and as amended, set forth that on or about the 14th of November, 1832, plaintiff had contracted with one *Christopher Elliott* for the purchase of the west half of lot number five and its broken front, in the township of York, for 357*l.*, payable with interest in manner following: 200*l.* on the 4th of November, 1834, and the balance in two years after that date, with interest payable half yearly, and *Elliott* thereupon executed a bond conditional for the performance of the contract, and delivered possession of the premises to the plaintiff ; that during

the time paid of 800*l.* in a steam saw freehold of

That in several persons property, and *George B. V. dant Gooder* the plaintiff, sell such and land and pro- ture saleable be, set the r- ceeds and of debt and into expenses att- plaintiff to surplus, if a also to be re-

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the time plaintiff was in possession he expended upwards of 800*l.* in the erection of a tavern, with out-houses ; and a steam saw mill, the engine of which was affixed to the freehold of the premises.

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Beckit
v.
Wragg.

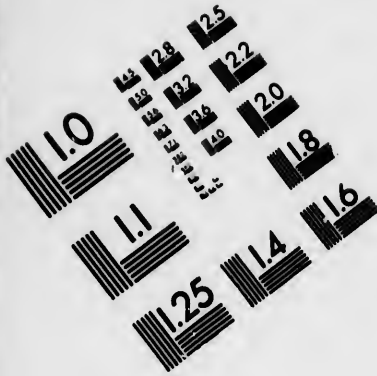
That in November, 1834, plaintiff being indebted to several persons, by deed assigned and conveyed the said property, and all his other real and personal estate to *George B. Willard Joseph Lee, Jacob Latham*, the defendant *Gooderham*, and one *John Anderson*, all creditors of the plaintiff, on the express trust that the grantees should sell such and so much of the said particulars, except the land and premises above described, as were in their nature saleable ; and should, as soon as conveniently might be, set the mill in operation, and should make sale and dispose of the lumber sawn at the mill, and apply the proceeds and other effects of the plaintiff, first, to pay off the debt and interest due on the bond ; secondly, to pay the expenses attending the trust, and then the debts due by plaintiff to the persons mentioned in the deed, and the surplus, if any, to plaintiff, to whom the premises were also to be reconveyed. Statement.

That in the deed *Willard* was described as a creditor of the plaintiff, but in reality he was merely agent or attorney for *Wragg* ; and *Willard* accordingly executed the said deed as attorney for the defendant *Wragg*, then carrying on business under the name of *Wragg & Co.*

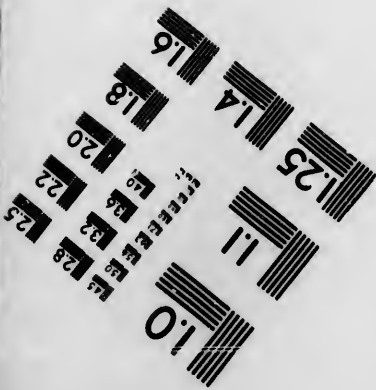
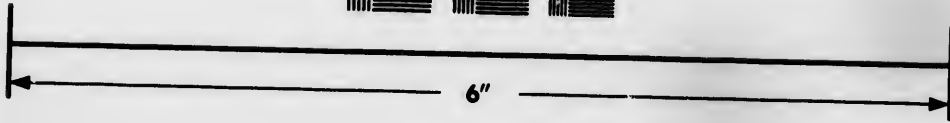
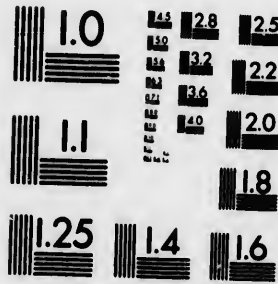
That afterwards, and before the 15th of December, 1834, it was agreed between the trustees that *Willard* should manage the trust affairs, and he was accordingly put in possession of the trust premises, and the other trustees never acted any further or otherwise in the matters of the trust.

That after the execution of the trust deed plaintiff left the province and went to the United States of America, where he continued to reside for many years ; that during





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such absence of plaintiff the sheriff of the Home District, under an execution, issued against the goods, &c., of plaintiff, for about 40*l.*, seized and took in execution the said engine, and on or about the said 15th of December, proceeded to a sale thereof, and at the sale *Willard* bid for and became the purchaser of the same for 45*l.* 9*s.* 5*d.*, and immediately afterwards removed the said engine from the premises; and two days afterwards, being on the 17th day of December, aforesaid, *Willard*, taking advantage of plaintiff's absence, and the inactivity of the other trustees, induced *Elliott* to enter into an agreement in writing with him to convey the said premises to *Willard* in fee, in consideration whereof *Willard* agreed to pay him 20*l.* 8*s.* 1*d.* in cash, to indemnify *Elliott* against a note of 200*l.* mentioned in the agreement, by paying each instalment thereof as it became due, and to secure to him the sum of 157*l.*, and *Elliott* accordingly, on the 19th December, conveyed the premises to *Willard* in fee.

The bill further alleged, that in all these transactions *Willard* acted merely as agent of *Wragg*, and in pursuance thereof did, on the 7th of February, 1832, convey the premises without consideration to *Wragg*, who, by *Willard* as his agent, had thenceforward had possession thereof, claiming and using them as his own; and that the rents and profits thereof received by, or under the circumstances chargeable against, *Wragg*; were sufficient many years before to pay the claims of all persons under the trust deed, and that a large surplus was due to plaintiff.

That at and before the time of the sheriff's sale there were on the premises lumber and cordwood sufficient to have realised the amount of the execution: that the premises were of great value, and might have been let when the trust deed was executed, for a sufficient sum to pay all the debts of the plaintiff, and the expenses attending the execution of the trust, in five years, but that *Willard*, in order to procure the property for *Wragg*, in contraven-

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Wragg.

tion of the express trusts of the deed, and at a great undervalue, induced the sheriff to sell the engine, instead of raising the money, or getting the sheriff to make the amount out of other property belonging to plaintiff, and thereupon *Willard* removed the engine from the premises, so as thereby greatly to diminish the value of the property, and thus facilitate the object he had in view; and charged that *Wragg* was personally, as well as through his agent *Willard*, aware of all the fraudulent practices alleged against the latter.

The bill then proceeded to state that *Willard* had died insolvent, and had no personal representative: that *Anderson* was resident out of the jurisdiction of the court, but where, plaintiff could not ascertain, but that neither he nor the other trustees ever received any part of the trust estate, or the proceeds thereof: that plaintiff had been ignorant of the conduct pursued by *Willard* until some years afterwards, since which time plaintiff had been endeavoring to obtain his rights in respect of the premises, but his poverty and other causes over which he had no control, had hitherto prevented his doing so. Statement.

The prayer of the bill was that *Wragg* might be declared a trustee of the property for the purposes of the trust; that the trusts of the deed might be carried out; or if the legal title to the premises could not be disturbed, then that the trusts might be carried into effect so far as they could be without disturbing the legal title, and that *Wragg* might be charged with all he had received, or might have received by way of rents, &c., as well as the purchase moneys, or values of such portions of the estate as he had sold; and for further relief.

Wragg answered the bill, in which he admitted the fact that *Willard* was his agent, in which capacity alone he was a creditor of plaintiff; that plaintiff went to reside in the United States, which he had been informed was for the purpose of avoiding his creditors in this province: that

1858. many years ago *Willard* had informed him that he had purchased the engine on account of defendant—and denied the receipt of any rents except through *Willard*, of which defendant knew nothing; that part of the property had been laid off into village lots, and several of them sold, and submitted that on account of the gross laches of plaintiff, he was not entitled to the relief prayed; for that some time in 1839 the plaintiff, together with the defendant *Gooderham* and *Joseph Lee* and *Jacob Latham*, filed a bill in this court against *Willard* and defendant for the same relief as prayed by the present bill, which, after answers had been put in thereto, was dismissed for want of prosecution.

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The cause having been put at issue evidence was taken *viva voce* before the court, the effect of which is stated in the judgment.

Mr. *Momat*, Q. C., and Mr. *Roaf* for plaintiff.

Argument.

Mr. *Eccles*, Q. C., for defendant *Wragg*.

The points mainly relied on, and the authorities cited by counsel are mentioned in the judgment, which was delivered by

THE CHANCELLOR.*—Apart from the questions upon the Statute of Limitations, and upon the recent act "For the amendment of the law of dormant equities," this case would not admit of argument.

In the year 1832 the plaintiff purchased the property in question, then a pine forest, from one *Elliott*, for the sum of 357*l.*, payable as follows: two hundred pounds on the 14th of November, 1834, and the residuo on the 14th of November, 1836, with interest in the meantime half-yearly. The plaintiff was a sawyer, and for the pur-

* The case had remained for some time undisposed of, in consequence of the absence of His Lordship; the Vice-Chancellors having been unable to concur in giving judgment.

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pose of carrying on his trade, he erected on the premises a steam saw-mill, and made various other improvements, at a cost of eight hundred pounds. But on the 13th of November, 1834, being then in great embarrassment, he assigned all his property, real and personal, to trustees, of whom the late *George Busby Willard* was one, for the benefit of his creditors. The trust deed is made between the plaintiff, of the first part, the trustees of the second part, and the several creditors who had executed the release thereto annexed, of the third part. The only real property comprised in this deed is the property in question, which the plaintiff had purchased from *Elliott*, and his title thereto under the contract of the 14th of November, 1832, is explicitly stated in the deed. The assignment provides in the usual way for the conversion of every part of the trust estate, *except the land*; but with respect to that it was agreed that the trustee should, "as soon as conveniently might be, set the said steam saw mill in operation, and work the same for the purpose of sawing lumber therewith, and make sale and dispose of such lumber so sawn as aforesaid, for the best price in money that could be reasonably had or obtained for the same * * * * * and should stand possessed of and interested in the moneys to arise by such sales, and to be called in and received as aforesaid, upon trust and to the intent that they should in the first place pay the interest due on the bond above mentioned (meaning the bond for a deed from *Elliott* to the plaintiff) "and thereafter pay the interest and debt that might be due on the bond as the same should become due." And, after the usual clause as to the expenses of the trust and the payment of the debts, the deed goes on to provide that the trustees should pay the residue of the trust moneys, if any, to the plaintiff, "and should well and sufficiently reconvey the land and steam saw-mill, with all and singular the appurtenances thereto belonging, as above mentioned, and also all and singular the houses and outhouses, situate on the said land (casualties happening by fire always excepted), to the plaintiff."

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 Beckett
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Wright.

Judgment.

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The assignment and release were executed by all the trustees except *Willard*, but both instruments were executed by the defendant as *Wragg & Co.*, by his attorney *Willard*. This arose, I have no doubt, from the fact that *Willard* was not in truth a creditor of the plaintiff: the defendant, *Wragg*, was the creditor, and *Willard* had no interest whatever in the matter, except as his agent. It is clear, however, from the evidence of *Lee* and *Dew*, that all the trustees accepted the trust, and that the active management was, by general consent, devolved upon *Willard*. But before any progress had been made in carrying out the trusts, beyond negotiations for letting the mill or setting it in operation, a writ of *fi. fa.* against the goods of the plaintiff was placed in the hands of the sheriff of the district, which furnished the opportunity for that series of fraudulent practices of which the present bill complains. The evidence upon this part of the case is sufficiently obscure, but in the argument the writ in question was assumed on all hands to be, and I presume it was, a writ of *fi. fa.* against the plaintiff's goods, and entitled to prevail against the trust deed. But, assuming that to be so, no attempt was made to justify the conduct of the defendant's agent throughout the subsequent transactions; and, having perused the answer and evidence with attention, I am driven to the conclusion that such an attempt would have been hopeless.

Judgment.

In the first place, it is sworn by *Rodgers* that the steam saw-mill was dismantled by *Willard* prior to the sheriff's sale. The boiler and many of the heavy castings were removed. For what purpose? It cannot have been done with a view to setting the mill in operation, for the trustees were not consulted, and moreover the machinery had been just set up at great cost, and was on the eve of being set in motion when the assignment was executed. It certainly was not done to enhance the value of the property at the sale, for the effect would be, obviously, to depreciate it: to render it almost valueless. And if done for the purpose of bringing

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about that which was the natural consequence of the act; if done for the purpose of enabling the defendant to possess himself of this valuable property for a mere song, it was, of course, a flagrant fraud.

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Then, prior to the proceedings in the sheriff's office, which cannot with propriety be termed a sale, the trustees, *Gooderham* and *Lee*, were naturally and properly anxious to prevent the sacrifice of the trust property for so small a sum as 40*l.* the amount endorsed upon the writ of *fi. fa.*, and they accordingly waited upon the sheriff, and offered to guarantee the debt if he would postpone the sale. But the sheriff refused to accede to this proposition without *Willard's* consent; and *Willard*, on being consulted, refused to be any party to such an arrangement. The sale consequently proceeded, and the defendant, through his agent, *Willard*, became the purchaser of the whole trust property, so far as I can gather, at forty pounds. As to the precise property which the sheriff professed to sell, the evidence is not distinct, but, so far as I can gather, the sale was treated as passing every thing. Thus much at least is certain, that the defendant took possession of every thing; the land, the saw-mill, the houses, the cordwood, the saw-logs: he took possession, in short, of the whole trust property, and appropriated it to his own use. And of all this no explanation is offered. Why was not the sale postponed? *Willard's* consent would have sufficed for that. The chattel property, the cordwood and saw-logs, would seem to have been sufficient to meet the demand. Why was not that sold? At least why did not the sheriff begin with that? Nothing is explained. But the defendant's case is, that he purchased at 40*l.* property worth at least 800*l.* which had been assigned but a few days before to trustees for the benefit of himself and other creditors, under an express agreement that the business should be carried on, the debts paid, and the property reconveyed to the plaintiff; and that he so purchased through the

Judgment.

1858. medium of one of the trustees, who, if he did not force on, at least refused to postpone the sale.

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The moment this mock sale had been consummated, *Willard* applied to *Elliott* for a conveyance of the property on foot of the contract of Number, 1832. I say on foot of the contract of November, 1832, because the arrangement of December, 1834, differed from the contract of November, 1832, in this respect only, that *Elliott* was induced to execute a conveyance at once, instead of waiting for payment of the last instalment. In every other particular the one was in exact accordance with the other. *Willard* paid the interest then due on the previous contract, agreed to take up the note which the plaintiff had given for the first instalment, and to procure the guarantee of *Wragg & Co.* for the payment of the last instalment when due; and thereupon, by deed dated the 19th of December, 1834, between *Elliott* of the one part, and *Willard* of the other, the premises were conveyed to

Judgment. *Willard* in fee.

Upon the execution of that instrument *Willard* set up a claim to the absolute ownership of the whole property, not, as it would seem, on his own account, but on behalf of the defendant, for whom he acted as agent through out; and the property was accordingly conveyed by *Willard* to the defendant, by deed dated the 7th of February, 1835. This deed was not the result of any contract for the sale of the property between *Willard* and the defendant, nor did any consideration pass. That is not pretended. The deed of February, 1835, was a purely voluntary conveyance from an agent not claiming any interest to his principal.

For many years subsequent to the arrangement of December, 1834, the defendant carried on the business of this saw-mill through his agent *Willard*, and up to the present moment he has continued to deal with the property as absolute owner; and it is admitted, I believe,

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(a) *Hern v. M*
(b) 4 Wm. IV

that had the plaintiff applied promptly, his right to relief could not have been contested. How could it? The case is one of gross fraud. Had there been a court of equity in this province at that time, such a scheme would not have been countenanced in any quarter, for the conduct of these gentlemen was contrary to the plainest principles of justice, and in open defiance of the clear, admitted rights, which they were bound to protect.

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But it is said that the fraud was the fraud of *Willard*, with which the defendant is not shewn to have had any connexion. I cannot accede to this. Looking at the nature of these transactions, and at the statements in the answer, the proper conclusion would be, I apprehend, that the defendant was cognizant of, and acquiesced in, all the steps taken by his agent. But, though that conclusion were less apparent, it is quite clear, I presume, upon principle and authority, that the defendant, claiming through his agent *Willard*, must be civilly responsible for his fraudulent acts. (a).

Judgment.

But it is argued that however clear the fraud may be, this case is barred by the Statute of Limitations (b), more than twenty years having elapsed since the cause of suit arose.

But this, besides being a case of fraud, is also a case of direct trust, within the 33rd section of the statute. That clause is an exact copy of the 25th section of the English act, and is in these words: "Provided always, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *censui que* trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before, the time at which such land or rent shall have been conveyed to a purchaser for a valuable

(a) *Hern v. Nichols*, 1 Salk. 289; *Doe v. Martin*, 4 T. R. 39.

(b) 4 Wm. IV., ch. 1.

Upon the whole I am of opinion that this is a case of express trust, within the meaning of the 33rd section of the act; and that this being so, there is no case, I apprehend, which would justify the court in refusing relief on the ground of laches. In *Wedderburn v. Wedderburn* (a), *Chalmers v. Bradley* (b), and *Beaumont v. Boulton* (c), relief was granted after a much greater lapse of time, and under circumstances entitling the defendant to much more consideration than in the present case.

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v.
Wragg.

It is argued however, that the plaintiff is, at all events, bound by the recent statute for the amendment of the law as to dormant equities (d); but upon that point also my opinion is in favor of the plaintiff. The statute in question is very brief. It consists of two short clauses. But I have found it very difficult notwithstanding, to place upon it any construction entirely satisfactory to my own mind. Confining ourselves to the preamble, the intention of the legislature would seem sufficiently clear. It commences with a recital that, "Whereas by the act to establish a Court of Chancery in Upper Canada, it was provided that the rules of decision in the said court should be the same as governed the Court of Chancery in England; and whereas in regard to mortgages under which, before the passing of the said act, the estate had become absolute at law by failure in performing the conditions, the said act after reciting that from want of an equitable jurisdiction, a strict application to such cases of the rules established in England might be attended with injustice, did in effect enact that the court so established should have power and authority to make such order and decree as to the said court might seem just and reasonable under all the circumstances of the case."

Thus far the preamble contains, it will be observed, a mere statement of previous legislative provisions; but

(a) 4 M. & C. 41.

(b) 1 J. & W. 51.

(c) 5 Ves. 495.

(d) 18 Vic., ch. 124.

1858. the design was, no doubt, to propose the principle previously adopted in relation to mortgage transactions as a principle proper to be extended to other branches of equitable jurisdiction.

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The preamble thus proceeds: "And whereas, in regard to claims upon, or interests in, real estate, arising before the passing of the said act, it is just to restrict the future application of the said rules of decision to cases of fraud, and in regard to other cases, it is expedient to extend thereto, in manner hereinafter provided, the power and authority so given as aforesaid, to the said court in cases of mortgage."

It has been argued that the meaning of the passage just cited is, that in future the right to relief in cases growing out of claims upon, or interests in, real estate, when such claim arose before the passing of the Chancery Act, is to be restricted to cases of fraud; but that in regard to any cases other than those growing out of claims upon, or interests in, real estate, the court is to have a discretion.

Judgment.

But that construction is, I think, clearly erroneous. The statement is not that it is expedient to limit the right to relief to cases of fraud, but that it is expedient to restrict the future application of rules established in England to such cases, and having thus provided for cases of fraud by declaring it to be expedient that they should continue to be governed by the rules established in England, it was necessary, of course, to state by what rule other cases than cases of fraud should be governed, and as to such cases it is declared to be expedient that the court should possess the same discretionary power as in mortgage cases. The preamble is confined to claims upon, and interests in, real estate; and the plain meaning of the legislature is that in cases of fraud the English rule is to be strictly applied, in other cases the court is to have the same discretionary power already conferred upon it relative to mortgages.

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Thus far the meaning is, I think, perfectly clear; but it is much more difficult to deal with the enacting clauses. It is argued, on the one hand, that the first clause is confined to cases of fraud, and provides that they are to be governed by English decisions; while the second section provides for all other cases, leaving them to be dealt with according to the discretion of the court. That view of the statute is, no doubt, in accordance with the preamble, and is supported, I believe, by the decision of this court in *Silcox v. Sells (a)*; but I cannot reconcile it with the provisions of the enacting clauses. The first section is in these words: "No title to, or interest in, real estate, which is valid at law, shall henceforward be disturbed or otherwise affected in equity by reason of any matter or upon any ground which arose before the passing of the said act, or for the purpose of giving effect to any equitable claim, interest or estate, which arose before the passing of the said act, unless there has been actual and positive fraud in the party whose title is sought to be disturbed or affected." It is quite obvious that that clause is not confined to cases of fraud. It does, indeed, provide for cases of fraud, in one sense, because it declares that they are in effect excepted out of the statute. But it goes on to provide for all other cases except cases of fraud, by declaring that no title is to be disturbed in future upon any such ground. Now, if that be the true construction of the first section, about which I see no room for doubt, then it is impossible to hold that the legislature intended by the second section to vest in this court a discretionary power in cases unaffected by fraud. Such a construction would make the two clauses directly contradictory, and is, therefore, inadmissible.

It is argued on the other hand, that the first section provides for claims respecting land as to which relief is only to be granted in cases of fraud; while the second section provides for claims of a personal nature respecting which the court is to have the like discretion as in cases of mortgage.

(a) Ante, 237.

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But this view also appears to me to present great difficulties. The preamble professes to deal with claims upon land only, but according to the proposed construction the statute embraces every species of equitable right. Again, the preamble declares the expediency of vesting in this court a discretionary power in relation to all cases unattended by fraud, whilst according to the proposed construction the first section barred every claim of that sort the instant it received the royal assent. Lastly, upon the view contended for, claims upon land would be barred instantly, whilst two years would be allowed for prosecuting claims of a personal nature, thus reversing the natural order of limitation. This construction is certainly less objectionable than the former; but it is open to grave objections, and ought not to be adopted if any other can be suggested more consonant with the proposed intention of the legislature.

Judgment. Now, upon the best consideration I have been able to give to the subject, it appears to me that the first section is confined to cases where a perfect legal title had been acquired before the passing of the act, while the second section provides for merely equitable interests. And as under the Chancery Act a new rule was adopted when the estate had become absolute at law, so it is provided here that a perfect legal title acquired before the passing of the statute is not to be disturbed except on the ground of fraud; whilst in all other cases, the interest being merely equitable, a discretionary power is vested in the court under the second section. I cannot say that this view of the statute is perfectly free from objection, or that it renders the act quite consistent with itself throughout; but it does seem to me less open to objection than any hitherto suggested, and so far as that may be now necessary, I am disposed to adopt it as to the construction.

The question then is, whether the plaintiff is barred by this statute; and I am clearly of opinion that he is

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not; first, because direct trusts are not within the statute; secondly, because cases of positive fraud, as this is, are entirely excepted out of it.

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Previous to the imperial statute 3 & 4 Wm. IV., c. 27, equitable interests were not bound by the statutes of limitation, but courts of equity felt themselves bound, notwithstanding, to adopt that statutable limitation and equitable rights were concluded, by analogy, in the same manner as legal rights had been by the statute. But it is quite clear that express trusts were not governed by any such analogy. In such cases no time would have then operated as a bar between trustee and *cestuis que* trust. And when the legislature deemed it expedient to alter the previous system, and to lay down a rule binding courts of equity as well as courts of law, they too felt that express trusts must continue to be, as they had always been, an exception to the general rule. Indeed it is difficult to conceive how it could have been otherwise, for, certainly, to adopt the language of Lord ^{Judgment.} *Cottenham* the "the principles of justice and the interests of mankind require that the lapse of time should not enable those who are mere trustees to appropriate to themselves that which is the property of others." Our provincial statute 4 Wm. IV., c. 1, follows in this respect the provisions of the imperial act. Indeed the 33rd section, the only one which deals with express trusts, is an exact copy of the 25th section of the imperial statute. Prior, therefore, to this statute relating to dormant equities the legislature had declared that in the case of express trusts the statutes of limitation should not begin to run until there had been a sale to a purchaser for a valuable consideration, and this only as against such purchaser; thus in effect, enacting that time should not be a bar as between trustee and *cestui que* trust.

Such being the state of the law when the recent statute was passed, it is obvious that there was not

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any thing in the position of a trustee who became such before the passage of the Chancery Act to call for legislative protection. The position of *cestuis que* trusts may have been, I believe was, frequently one of great hardship, from the absence of any equitable tribunal to enforce their rights. But trustees were not placed in any such difficulty. And as time never was a bar to relief against them, it is difficult to conceive why the accident of the trust having been constituted previous to the passing of the Chancery Act, should be thought to entitle such persons to peculiar consideration.

A priori, therefore, we would not expect to find the statute in general applicable to direct trusts. Such cases were not, certainly, within the mischief intended to be remedied; and the language and provisions of the act shew, conclusively, I think, that the legislature had no intention of dealing with such cases.

Judgment. First, this is styled an act for the amendment of the law relating to *dormant equities*, a rather inappropriate title, had the legislature been about to deal with cases of *express trust*.

Again, the preamble recites that injustice was likely to arise from the strict application of the rules of decision established in England; but the rule as to express trusts had been established by the provincial legislature itself; and throughout this act there is not the least intimation of an intention to repeal any of the provisions of the statutes of limitation, and least of all those respecting express trusts, which are so consonant, as it seems to me, with every principle of justice (a).

But it is obvious, I think, that the construction contended for would be productive of the most monstrous consequences. The first section provides, in effect, that no title to real estate which is valid at law (and the title of every trustee to whom the legal estate has been conveyed is

(a) Hawkins v. Gathercole, 6 D. Mc. & G. 1.

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valid at law) should henceforward be disturbed for the purpose of giving effect to any equitable estate which arose before the passing of the Chancery Act. Now that clause, upon the construction contended for, would have the effect, obviously, of extinguishing every trust created prior to the passing of the statute in question; and that whether the trustee had been in the meantime actively discharging his duty, or openly violating it. Suppose wild land to have been conveyed to trustees, just before the passing of the Chancery Act, for the benefit of the children of an intended marriage, to be distributed when the youngest child should attain its age; or suppose real estate to have been conveyed to trustees for the maintenance of children; surely it is perfectly monstrous to attribute to the legislature an intention to confiscate the estate of the *cestuis que* trusts under such circumstances, and yet such, clearly, would be the effect of the clause in question, upon the construction we are asked to adopt; and that not at a period given by the statute, affording reasonable opportunity for bringing forward existing Judgment. claims, but on the instant, and without any allowance for disabilities.

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It is true, indeed, that this court has a discretionary power to grant relief in cases coming within the second section; *but that is only upon the proviso that the suit is instituted within twenty years without regard to disabilities.* Now such a provision as applied to cases of express trust, would be anomalous and unjust in the extreme. A trust created the day before the passing of the Chancery act would be barred by the lapse of twenty years, while time would be wholly immaterial in the case of a trust created the day after that event; and the effect would be that the rights of an infant born after the passing of the Chancery act, but claiming under a trust declared prior to that event, would be barred before such infant would have attained his age, and the estate would become the absolute property of a trustee to whom the legal estate had been conveyed solely for

1858. the benefit of such infant. The bare statement of such a proposition affords the most convincing proof that the language of the legislature ought not to be construed in a sense so contrary to every principle of reason and justice.

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Upon the whole then, looking at the letter of this statute, at the intention of the legislature as expressed in the preamble, or at the provisions to be found in the enacting clauses, I am clearly of opinion that it has no application whatever to cases of direct trust.

But had my conclusion upon this point been different, my opinion would have been still in favor of the plaintiff upon the ground that this, as a case of positive and actual fraud, is expressly excepted out of the statute. It is admitted on all hands that in acquiring this estate the defendant's agent was guilty of a very gross fraud; and, under such circumstances, the fraud of the agent is, in my opinion, the fraud of the principal within the meaning of this statute.

Judgment.

The merits, therefore, being with the plaintiff, and his claim not being barred either by the statute of limitations or by the recent act, it follows, upon the best consideration I have been able to give to the subject, that he is entitled to a decree with costs.

Decree.

Declar that the said defendant *Wragg*, upon the execution of the conveyance to him of the premises in question in this cause, became and was trustee thereof, for the purposes expressed in the trust deed in the pleadings mentioned, such premises being the west half of lot number five, and its broken front, in the first concession of the township of York. Order that it be referred to the Master, to take an account of the trust property in the pleadings referred to, come to the hands of the said defendant *Wragg*, or to the hands of any person or persons for him, or which without his wilful neglect or default, might have been received by him, and of the application thereof: and the plaintiff, by his counsel at the bar, waiving any further account against the defendant than as hereinafter directed, it is referred to the Master to enquire and ascertain what would be a fair occupation rent for the steam saw mill formerly situated upon the real property in question in this cause, and for the said real property as if the said real property and mill had been let to the defendant *Wragg*, with the privilege to cut timber for the use of the said saw mill, and to charge

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the said defendant *Wragg* therewith, so long as the said mill continued in operation, and from the time the said defendant ceased to work the said saw mill, the Master is to fix a fair occupation rent for the property, and to charge the said defendant *Wragg* therewith; and the said Master is also to take an account of the value of the timber cut upon the said property by the said defendant *Wragg*, or by any person or persons for him or for his use, and other uses than for the purposes of the mill, and for estovers, and to charge the said defendant *Wragg* therewith; and the Master is also to enquire and state whether the said defendant *Wragg* has made any valid and binding sales or sale of any and what portions or portion of the said property, and if so, to whom and for what considerations respectively, and when and to whom such considerations respectively were paid, and also to enquire what is the value of the portions (if any) so sold by him; and in case the Master shall find that any valid sales of any part of such lands and premises have been made, then he is to charge the said defendant *Wragg* with the present value thereof: and the Master is also to take an account of what is due to the several creditors of the plaintiff entitled to claim under the deed of trust in the pleadings mentioned, and an account of what (if any thing) has been properly paid by the said defendant *Wragg*, or by any other person for him, in pursuance of the trusts in the said deed contained. Master to tax *Gooderham's* costs, to be paid by plaintiff, and added to his own; *Wragg* to pay plaintiff his costs, &c.

COMMANDER V. GILRIE.

Specific performance—Infants' costs.

The general rule is, that in suits for a specific performance against the infant heirs of vendors the decree should be without costs. The same rule as to the costs of a solicitor appointed by the court guardian *ad litem* to infant defendants in suits for specific performance seems applicable as in mortgage cases; but where the purchase money has not been paid, the court will direct the payment of the guardians' costs from it.

The defendants in this case where the heirs at law and personal representatives of one *Gilrie*, deceased, and who during his lifetime had entered into a contract to sell the plaintiff certain lands. At the hearing a decree for specific performance was pronounced with a reference as to title, and the cause now came on to be heard on further directions.

Mr. *Blake*, for plaintiff, asked for the costs of the suit.

Mr. *Roaf* for the executor.

Mr. *Strong* for the infant defendant, contended that the guardian of the infant should receive his costs.

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THE CHANCELLOR.—This suit, which is for the specific performance of a contract for the purchase of land, was disposed of at the hearing, except as to costs. It has been settled by numerous decisions in this court that in such cases as a general rule the decree should be without costs (a), and I see nothing to take this case out of the general rule.

With respect to the costs of the solicitor appointed guardian *ad litem* for the infant I think the observation of the Vice-Chancellor in *Harris v. Hamlyn* (b) as applicable here as in mortgage cases, and but for the fund in court these costs must be borne by him, the fund appropriated by the Legislature being at present quite insufficient. But as matters stand the costs of the infant and of the personal representative must be paid out of the purchase money as far as it will go, the infant's costs being payable in the first instance.

Judgment. The costs of the reference must be borne by the vendor, who only perfected his title pending the enquiry, and the plaintiff is therefore entitled to deduct them in the first instance from the purchase money (c).

TIFFANY V. CLARKE.

Husband and wife—Donatio mortis causa.

The holder of a mortgage security while laboring under an attack of sickness, of which he subsequently died, indorsed under the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed, but did not affix his seal thereto, although the memorandum expressed it to be under seal. *Held*, that the wife took no interest under such assignment either as a gift *inter vivos*, or as a *donatio mortis causa*: and a bill filed by her to compel the executors to execute a formal assignment of the mortgage, was dismissed with costs.

This was a bill filed by *Eliza Ann Tiffany* against *William Clarke, William Proudfoot, and James Richard*

(a) *Hinder v. Stretten*, 10 Hare, 18.

(b) 3 D. & S. 470, and in *Sefkin v. Davis*, 1 Kay App. xxi.

(c) Sug. 85.

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Thompson, the executors of the late *George S. Tiffany*, setting forth that her late husband, the said *George S. Tiffany*, being the assignee, and possessed of a certain indenture of mortgage, securing the payment of 600*l.* and interest, transferred the same to her by a memorandum indorsed in the following terms: "Hamilton, 2nd October, 1855—I hereby assign the within mortgage to my wife, for the benefit of herself and my children, witness my hand and seal.

E. A. TIFFANY.
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GEO. S. TIFFANY.

1858.

Tiffany
v.
Clarke.

That the said *G. S. Tiffany* died on the 12th of November following, of the illness which he was then laboring under, and although no seal was actually affixed to the memorandum, still the same had been intended to be so affixed by *Tiffany*, or believed by him to have been executed by him in a manner that was tantamount to the affixing of a seal; and the said mortgage and assignment was thereupon delivered to plaintiff, and had since remained in her possession.

Statement.

The prayer was, that it might be declared that the said transfer was, under the circumstances, a valid gift or transfer, if not as a *donatio mortis causa*, yet as a *donatio inter vivos*, and that the defendants as trustees and executors should be directed to assign and transfer the said mortgage by a more formal instrument.

The defendants answered the bill, submitting that on the facts as stated by her no interest in the mortgage or money secured thereby passed to the plaintiff by virtue of such memorandum: that it was not valid as a gift *inter vivos*, as it was voluntary and incomplete and as no such gift could be effectual from husband to wife: that it was not valid as a *donatio mortis causa*, the apparent intention of the party, as collected from the memorandum, being to pass an immediate and unconditional interest, and because the interest of the plaintiff therein is coupled with a trust for the donor's children.

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Clarke.

The cause was heard on bill and answer.

Mr. A. Crooks for plaintiff.

Mr. Proudfoot for defendants.

ESTEN, V. C.—This case presents a question of extreme difficulty, owing to the apparent contradiction of the authorities relating to it. The great number of cases shew the doubtful state of the law upon the subject, and although the decisions profess to follow one another, it is impossible not to see that considerable conflict reigns amongst them. The question which arises, is respecting the rights conferred by a voluntary settlement or gift. In some of the cases the courts have gone the length of holding that when the assignment or gift does not carry the legal interest, so that it is necessary to resort to the aid of equity to give effect to it, such aid will not be extended to a mere volunteer. It is extremely doubtful, however, whether this proposition can be maintained in its full extent. In the late case of *Kekewich v. Manning* (a), all the authorities were reviewed by the Lords Justices in an elaborate judgment, and a deliberate intention expressed to adhere to the cases of *Sloane v. Cadogan* (b), *Pulvertoft v. Pulvertoft* (c), *Fortescue v. Barnet* (d), *Blakeley v. Brady* (e), *Elleson v. Elleson* (f) and *Ex parte Pye & Dubost* (g), in opposition, if necessary, to a long line of cases, supposed to clash with them, and a clear intimation given that if any conflict really existed between these two classes of cases, the former were to be followed in preference to the latter. From a mass of authorities in this state of contradiction it is no easy task to extract any general rules. I have endeavored, however, as well as I was able to ascertain, some general principles afforded by the cases. It appears to me that four general

(a) 1 De G. Mc. N. & G. 176.

(b) Sugd. V. & P. 11 Ed. 726.

(c) 18 Ves. 84.

(d) 3 M. & K. 36.

(e) 2 Dr. & Wal. 31.

(f) 6 Ves. 656.

(g) 18 Ves. 140.

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rules may be propounded as resulting from the authorities. First, a voluntary contract or agreement will not be enforced; that is, where the matter rests in agreement it will not be enforced at the instance of a volunteer. This rule is well illustrated by the case of *Jeffreys v. Jeffreys* (a), where there was a voluntary settlement by an actual conveyance of freeholds upon certain trusts, and a covenant to surrender copyholds upon the same trusts. The suit was entertained so far as regarded the freeholds, but dismissed as to the copyholds. Second, where property is transferred by one person to another in trust for a third, the *cestui que* trust, though a volunteer, may compel the performance of the trust. This rule is illustrated by the case of *Petty v. Petty* (b), where a person deposited money in a bank in the name of the defendant, but stated at the same time to the clerk that it was for the use and benefit of the plaintiff, who was his natural son. The trust was enforced in favor of the son, although a volunteer. These two classes of cases seldom present any difficulty. Two more rules, however, may be deduced from the authorities; one, that a person may declare himself a trustee for another without consideration, not merely by express declaration but by implication from his acts. This rule is exemplified in the cases of *ex parte Pye & Dubost* (c), and in *Wheatley v. Purr* (d).

Judgment.

In the former, a person had directed his agent to purchase a French annuity for a particular individual, and to draw upon him for 1,500*l.* for the purpose. The agent drew the money and purchased the annuity, but as the annuitant was of unsound mind and a married woman, he purchased it in the name of his principal, who afterwards transmitted to him a power of attorney, authorising him to transfer the annuity into the name of the annuitant, which was not accomplished until after his death. Lord *Eldon* held that he had by his acts de-

(a) C. & P. 138. (b) 22 L. J., Ch. 16th. (c) 18 Ves. 140. (d) Keen 551.

1858. *Tiffany v. Clarke.* declared himself a trustee of this annuity for the annuitant, whose claim was accordingly established against his assets. In *Wheatley v. Purr* the testator had deposited a sum of money in a bank in her own name, but expressly in trust for the plaintiff, and obtained a receipt, which she retained in her own possession, likewise naming her as trustee for the plaintiff. The trust was deemed to be effectually declared.

This class of cases often presents questions of great difficulty as to what amounts to a sufficient declaration of trust, or what acts are sufficient to make the owner of property a trustee of that property for another. The fourth rule to be deduced from the authorities is that where a gift is intended to be made of property, but in the mode in which it is intended to be made, it is imperfect, a court of equity will not compel the donor or his representatives to complete it. This class of cases also presents questions of extreme difficulty, and has been the fruitful source of litigation. In some instances the rule has been extended so far as to hold that in case the gift does not carry the legal interest the donee is not entitled to the aid of a court of equity in order to obtain it, although the gift is in other respects complete. But, as already observed, it is apprehended that the rule cannot be maintained to this extent. Then it has been stated broadly in some cases that an assignment of a chose in action by way of gift is void, because the assignment does not carry the legal interest, and a court of equity will not compel the assignor or his personal representative to permit the use of his name for the recovery of the property. This was expressly denied by Lord *Plunkett* in the case of *Blakely v. Brady*, in which case he decided that a voluntary donee of a chose in action, the gift being complete, as far as its nature permitted, was entitled to use the name of the donor in actions for its recovery. In the case of *Keke-wich v. Manning* before mentioned, the Lords Justices manifested the opinion that excessive restriction had

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been imposed upon voluntary gifts, and that they ought to be upheld to a greater extent than they had theretofore been, and intimated disapproval of cases in which validity had been denied to them. The case of *Sloane v. Cadogan* (a) is a clear authority that an assignment of an equitable chose in action is to be upheld in favor of a volunteer, although it does not carry the legal interest, if it is complete so far as the donor can make it so, he having no power to contest the legal interest. The case of *Kekewich v. Manning* is to the same effect. In the case of *Antrobus v. Smith* (b), before a very eminent judge, it was held that a mere assignment of canal shares, which did not pass the legal right, which, however, the assignor had the power of transferring, did not entitle the assignee, being a volunteer, to the aid of the court. There were other circumstances in the case sufficient for its determination; but the learned judge who decided it, asked whether any case had occurred in which a gift, imperfect in the mode in which it was intended to be made had been perfected at the instance of a volunteer. In *Fortescue v. Barnet* stress was laid on the circumstance that the gift was complete, and that nothing remained to be done by the assignor. These questions generally arise after the death of the assignor or donor, but their determination is governed by the same principles, whether they arise before or after his death. When relief would not be granted against the donor, it will not be granted against his representatives. In *Kekewich v. Manning* relief was given against the assignor; in *Ex parte Pye* against his representatives. In *Fortescue v. Barnet* relief was given against the assignor. It certainly cannot be maintained at this time of day, that when the gift does not carry the legal interest, it of necessity fails. Where the donor has done all that he could at the time to give perfection to the gift, it will prevail, although the legal interest does not pass. This is the only rule that

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Tiffany
v.
Clarke.

Judgment.

(a) Sug V. & P., 11 E.J. 1126.

(b) 12 Ves. 39.

1858.

Tiffany
v.
Clarke.

Judgment.

can be safely extracted from the authorities, as they at present stand. Where, however, the donor has done all that he could at the time to perfect the gift it will prevail, although he afterwards acquire control over the legal interest, and he will be compelled to transfer it. This was done in *Kekewich v. Manning*, and *Sloane v. Cadogan*. It has been attempted, however, in some cases to convert an imperfect gift into a declaration of trust; and it certainly does seem but a thin distinction which denies validity to it as such, where from its nature and circumstances it is clearly indicative of an intention to part absolutely with the property which is the subject of it. What can more clearly indicate this intention than an assignment of stock standing in the name of the assignor, such assignment being delivered to the assignee, and being absolute in its terms, and although as a gift it is incomplete, because the stock is not transferred into the name of the donee, why should it not operate as a good declaration of trust? If in *Ex parte Pye & Dubost* the direction to purchase an annuity in the name of the annuitant, and the transmission of a power of attorney for the purpose of its transfer into her name constituted a sufficient declaration of trust, why should such an effect be denied to an assignment absolute in its terms and delivered to the assignee, which is at least equally indicative of an intention to make the donee the owner of the property? The cases, however, in their present state, will not warrant this proposition, and perhaps the case of *Ex parte Pye & Dubost* may be referred to the consideration that the annuity having been originally directed to be purchased in the name of the annuitant, and a power of attorney having been given for the purpose of transferring it into her name, which had been done, was equivalent to an actual transfer.

To examine the present case by the rules which have been deduced from the authorities, it would appear that the claim of the plaintiff must fail. The gift in this

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SPRAGGE, V.
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instance cannot be regarded as otherwise than imperfect. A mortgage consists of the mortgage debt and of the estate in the lands upon which it is secured. To effect a complete disposition of the mortgage the debt should be transferred and the estate in the lands conveyed. Where the debt alone is transferred and the estate in the lands remains in the donor, neither he, nor after his death his representatives, can be compelled at the suit of a volunteer to convey the estate, or to dispose of it in such a manner as to enable the donee to recover the debt. The assignment could only operate as a declaration of trust, but the cases do not warrant us in attributing such an effect to it, whether reasonably or not is a different question. The case of *Mews v. Mews* (a) decides that a husband may by a clear and irrevocable act make a gift of property to his wife. In the present case the intention to make a gift was sufficiently manifested; but the gift was imperfect: all was not done that might have been done; and this court will not at the instance of a volunteer compel its completion. That Mrs. *Tiffany* was a volunteer within the meaning of the rule cannot be doubted. The consideration of blood or natural affection does not prevent the gift from being voluntary. It was conceded by the learned counsel for the plaintiff in the course of the argument, that the gift could not be supported as a *donatio mortis causa*. Indeed it was evidently intended to operate, if at all, *in presenti*. For these reasons I think the bill must be dismissed, and I cannot refuse the defendants their costs.

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Tiffany
v.
Clarke.

Judgment.

SPRAGGE, V. C.—My opinion is, that under the authorities the plaintiff is not entitled to succeed. She asks that the defendants, executors of the late *George S. Tiffany*, be decreed to perfect the assignment to her of a certain mortgage, of which Mr. *Tiffany*, her husband, was the assignee. Mr. *Tiffany* indorsed upon the mortgage these words: "Hamilton, 2nd of October, 1855. I hereby assign the within mortgage to my wife, for the benefit of

(a) 15 Bea. 529.

1858.

Tiffany
v.
Clarke.

herself and my children; witness my hand and seal." This document was signed by Mr. *Tiffany*, and attested by two witnesses: no seal was affixed. Mr. *Tiffany* was then ill of a disease which terminated in death on the twelfth of the following month, and was not, at the time of the execution of the paper, expected to recover. After making the above indorsement, he placed the mortgage in the hands of his wife, the plaintiff, where it has remained ever since.

The bill prays that it may be declared that the transfer of the mortgage was, under the circumstances, a valid gift or transfer; if not as a *donatio mortis causa*, yet as a *donatio inter vivos*; and that the defendants should be decreed as trustees and executors of the donor, to assign and transfer, by a formal instrument, the said mortgage to the plaintiff.

The bill assumes that the assignment is incomplete, and puts such incompleteness as the ground for coming to this court, stating that, by reason of the imperfection of the assignment, the defendants are doubtful of the rights of the plaintiff.

Judgment.

It was conceded, in argument, that what passed cannot operate as a *donatio mortis causa*; but it was contended that it was a good gift *inter vivos*, by reason of the meritorious consideration, the gift being to the wife of the donor, for her benefit and that of their children: and further, that there was a sufficient declaration of trust to constitute the donor a trustee for the objects of his bounty.

As to the first point, it certainly was thrown out by Lord *Thurlow*, in *Colman v. Sarrel (a)*, that although the court would refuse its aid in favor of an ordinary volunteer, the circumstance of there being a meritorious consideration might make a difference; and the language of Lord *Eldon*, in *Ellison v. Ellison (b)*, appears to point to the same distinction; and in *Pulvertoft v. Pulvertoft (c)*, he used the following language: "The question is not as

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(b) 6 Ves. 656.

(c) 18 Ves. 84.

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it is now put, whether if there is a contract for a wife or children, this court would execute that contract, as being for a meritorious consideration; but it must be considered as not resting in contract, but a trust, for consideration meritorious or otherwise, by an actual estate in trustees; and the distinction is settled that in a case of a contract merely voluntary (I do not speak of valuable or meritorious consideration) this court will do nothing." The point, however, was not necessary to the decision of any of those cases, nor was the point decided. The cases of *Dillon v. Coppin* (a), before Lord Cottenham, and *Jeffreys v. Jeffreys* (b), before the same learned judge, are cases where the court refused its aid, although the parties seeking it stood in a relation to the donor of child and parent; and in those cases the case of *Ellis v. Nimmo*, before Sir Edward Sugden (c), an authority for the distinction, was cited to the court. In *Antrobus v. Smith* (d), Sir William Grant refused the aid of the court in favor of the daughter of the donor, disposing of the case upon the same principle as if the object of the gift had been a stranger. Upon the authorities, then, as they stand, I think we should not be warranted in giving effect to the distinction contended for.

Upon the other point, that what passed constituted a declaration of trust; the language of Sir William Grant, in *Antrobus v. Smith*, is most apposite, and has been cited with approbation in subsequent cases. He says, "But this instrument of itself was not capable of conveying the property: it is said to amount to a declaration of trust. Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation: he meant a gift. He says he assigns the property, but it was a gift not complete. The property was not transferred by the act. Could he

(a) 4 M. & C. 647. (b) C. & P. 138. (c) 1 L. & G. temp. Sug. 333.
(d) 12 Ves. 39.

1859.



himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift which in the mode of making it he is left imperfect.

It is not necessary certainly to a valid declaration of trust that the words trust or trustee should be used; and in *Ex parte Pye*, and *Ex parte Dubost* (a), they were not used, yet it was held that a trust was created; but here Mr. *Tiffany* contemplated an actual present assignment by what he did, not a trust: the misfortune is, that he did not do effectually what he intended and thereby professed to do. I think that in this case there was no declaration of trust.

The authorities upon the points in question in this case were reviewed at considerable length, in *Kekewich v. Manning* (b), before the Lords Justices, in 1851. The Lords Justices in that case affirmed the doctrine, that the court will not aid a volunteer where the gift is incomplete; or rather when it is left incomplete by the donor, and where he might have done more to render it complete than he has done.

Upon the authorities, as they now stand, I understand the rule of the court to be, not to interfere in favor of a volunteer, whether with or without a meritorious consideration to perfect an incomplete donation, with the modification (if it can be considered a modification) introduced in *Kekewich v. Manning*; but that where a trust is sufficiently created, whether it be purely voluntary or not, the court will enforce the trust. My opinion is, with some reluctance, I confess, against the plaintiff upon both the points raised in argument.

I express no opinion as to whether what passed in relation to the transfer of this mortgage amounted to *donatio mortis causa*, the learned counsel for the plaintiff conceding in argument that it did not.

(a) 18 Ves. 140.

(b) 1 De G. M. & G. 176, 16 Jur. 625.

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THE ATTORNEY-GENERAL V. GRASETT.

Dormant Equities—Trusts—Trustees.

Held, Per Curiam.—That express trusts are not within the statute relating to dormant equities (18 Vic. ch. 124.)

In the year 1819, his Majesty, by letters patent, granted certain lands to trustees for different purposes; amongst the lands so granted was a block of six acres, being a reservation for a hospital for the town of York; upon the trust, amongst others, to observe such directions, and to consent to and allow such appropriations and dispositions of the said lands, or any of them, as the governor-general, lieutenant-governor, or person administering the government of the province, and the executive council therein for the time being should from time to time make and order, pursuant to the purposes for which the said parcels or tracts of land, or any of them, had been originally reserved; and also to make such conveyance or conveyances, deed or deeds thereof, or any part thereof, to such person or persons, and upon such trusts, and to and for such use or uses as the governor, &c., should from time to time, by order in writing, appoint.

Held, Per Cur.—That the trust in this case was not complete, and that by the terms of the grant the executive government retained the power of diverting the properties so reserved, to other objects—BLAKE, C., dissenting, who was of opinion that the trusts were sufficiently declared, and that a conveyance of a portion of the land so reserved, in compliance with an order in council to that effect, for the benefit of the Church of St. James, in the town of York and the incumbent thereof, was a fraud upon the original trusts declared. Statements.

The information in this suit was filed on the relation of the trustees of the Toronto hospital, against the Rev. *Henry J. Grasett*, and the Honorable and Right Reverend *John*, Lord Bishop of Toronto, setting forth that his late Majesty, King *George III.*, by letters patent under the seal of Upper Canada, dated 26th April, 1819, granted to the Honorable *William Dummer Powell*, the Honorable *James Baby*, both since deceased, and to the Honorable and Reverend *John Strachan*, (one of the defendants), their heirs and assigns, amongst other lands, block letter C. on the plan of the town of York, containing six acres, situate on west side of Church Street, being a reservation, as therein expressed, for the purpose of a hospital for the said town, upon the trust, amongst others, to observe such directions, and to consent to and allow such appropriations and dispositions of the said lands, or any of them, as the governor-general, lieutenant-governor, or person administering the government of the said province, and the Executive

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1858. Council therein for the time being, should from time to time make and order, pursuant to the purpose for which the said parcels or tracts of land' or any of them, had been originally reserved.

Att'y-Gen.
v.
Grasett.

That afterwards—in May, 1819—the said block was sold off by auction to divers persons, by the said trustees, (and others associated with them, in lots, into which it had been surveyed and laid out, for the benefit of the hospital, by direction of the Executive Council, but that the purchasers of the acre in question abandoned their purchases.

That on the 22nd November, 1824, an order in council was made requiring the trustees under the patent, to convey the said one acre to the Honorable *D'Arcy Boulton*, the Honorable *J. B. Robinson*, and the Honorable *W. Allan*, in trust for the use of the Church, afterwards called "St. James," and of the incumbent thereof for the time being; and by indenture dated 4th July, 1825, the said acre was conveyed to the said *Boulton*, *Robinson*, and *Allan*, by the then trustees of the hospital.

That at this time the defendant, the Bishop, was a member of the Executive Council, and incumbent of St. James' Church, upon the application and at the instance of whom the said order in council was made.

The information charged that the order so made in council was invalid, and should not have been acted upon or carried out by the then trustees: and that the defendant *Grasett* had notice of the trust in favor of the hospital; that the relators had within the year discovered the fact of the said acre having been so reserved for the hospital, and prayed that the defendant *Grasett* might be declared a trustee of the land for the relators, and ordered to convey the same to them, and that the defendants might account for the rents received by them respectively.

The defendants answered the information, setting forth

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(b) 3 Beav. 91.
(f) 18 Ves. 31

that the patent of 1819 contained further and other trusts than those set forth in the information; amongst others, that the lands thereby granted were conveyed to the grantees upon trust to make such conveyance or conveyances, deed or deeds thereof, or of any part thereof, to such person or persons, and upon such trusts, and to and for such use or uses as the governor, lieutenant-governor, or person administering the government of Upper Canada, and the executive council thereof for the time being, should from time to time, by order in writing, appoint; and they relied upon the Statute of Limitations and the act relating to dormant equities, as disentitling the relators to any relief.

1858.

Attor'y-Gen.
v.
Grasett.

The other facts of the case are clearly stated in the judgment.

Mr. A. Wilson, Q. C., and Mr. Crickmore, for plaintiff.

Mr. Movat, Q. C., and Mr. Strong, for the defendants.

Attorney-General v. Magdalen College (a), *Attorney-General v. Brettingham (b)*, *Attorney-General v. Davey (c)*, *Attorney-General v. St. Cross Hospital (d)*, *Attorney-General v. Hall (e)*, *Attorney-General v. Brooke (f)*, *Wedderburn v. Wedderburn (g)*, *Hill on Trustees*, 264, and *Dwarris on Statutes*, 668, were referred to by counsel.

THE CHANCELLOR.—The object of this information, February 6.
which has been filed by Her Majesty's Attorney-General, at the relation of the trustees of the Toronto hospital, is to have a conveyance, executed on the 4th day of July, 1825, by the then trustees of that hospital, by which an acre of land, being part of the trust property, situated on the corner of Church and Newgate (now Adelaide) Streets, in this city, was conveyed to certain persons in trust for the incumbents of St. James' Church in succession, set aside as a fraud upon the trust, and for an account of rents and profits.

(a) 18 Beav. 223, S. C. on appeal; 3 Jur. N. S. 675.
(b) 3 Beav. 91. (c) 19 Beav. 521. (d) 17 Beav. 435. (e) 16 Beav. 388.
(f) 18 Ves. 319. (g) 4 M. & C. 41.

1858. The cause depends ontirely, or nearly so, upon documentary evidence, from which the history of the matter may be deduced with suffieient clearness.

Attor'y-Gen.
v.
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Prior to the year 1817, but when more particularly, or by what authority does not appear, a block of land consisting of six acres, of which the acre in question forms a part, was marked in the official maps of the city of Toronto, preserved in the office of the Surveyor-General of the province, as land reserved for the purpose of an hospital.

The authority for making this reservation having been as it would seem, questioned, a communication was addressed to the Surveyor-General by the Executive Council, on the 4th of June, 1817, in these words :

" Sir,—You are requested to report to the council by 11 o'clock to-morrow, the date and authority for laying out and reserving certain blocks in the town of York for an hospital, church, gaol, and school-house, as also Simcoe Place and Russell Square."

Judgment.

To this communication the Surveyor-General replied on the next day as follows :

" Sir,—In obedience to the order contained in your letter of yesterday's date, I am to state to you for the information of the Honorable and Executive Council, that I do not find any specific order or authority in my office for reserving certain blocks of land in the town of York designated on the plan, hospital, gaol, school house, Simcoe Place, and Russel Square. It appears, however, that Mr. Smith, the late Surveyor-General, marked such reserves upon the plan, the original of which is preserved in his possession, and it is believed some authority may have been given him in council for so doing."

At this point there is an obvious hiatus, for the next document laid before us is a minute of the Executive Council, which bears date the 9th of June, 1818; but we have not been informed what steps were taken by the execute government upon the previous report of the Surveyor-General; and the reference and report upon which the order of the 9th of June, 1818, is founded

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" In Council, 9th June, 1818.

" The Surveyor-General in pursuance of an order in Council of the 2nd ult., laid before the board actual descriptions for grant of the several reserves in the town of York as they now exist. Whereupon it is ordered that the land attached to the government or Elmesley house in the town of York, Simcoe place in the town of York, the park or government reserve east of the town of York, the land and site of the old brick and government buildings adjoining the south-east angle of the town of York, *the hospital reservation in the town of York*, the site of the present gaol in the town of York, and the school reservation in the town of York, be granted to the Hon. Chief Justice *Powell*, the Hon. *James Baby*, and the Hon. and Reverend Dr. *John Strachan*, and to their heirs and assigns for ever, in trust, to observe such directions, and to consent to and allow such appropriations and dispositions of them as the Honorable Executive Council for the affairs of the province for the time being shall from time to time make and order, *pursuant to the purpose for which Judgment the said parcel or tract of land was originally reserved*, viz., for, &c., and to make such conveyance of the same to such persons and upon such trusts as his Majesty's said Executive Council for the time being shall from time to time direct."

On the 9th September, 1818, the following report of the Executive Council was read before and approved by his Excellency the Governor of the province :

" May it please your excellency : On your excellency's reference as to the best means of putting to immediate use *the hospital reservation in the town of York*, the committee have the honor to report, that by an order in council dated the 9th of June, 1818, and approved by his honor the administrator, the hospital reservation is granted to the Honorable Chief Justice *Powell*, the Honorable *James Baby*, and the Honorable and Reverend Dr. *John Strachan*, and to their heirs and assigns for ever, in trust, to observe such directions, and to consent to and allow such appropriations and dispositions of them

1858. as the Honorable Executive Council for the affairs of the province for the time being shall from time to time make and order, pursuant to the purpose for which the said parcel or tract of land was reserved, namely, for an hospital, and to make such conveyance of the same to such persons and upon such trusts as his Majesty's said Executive Council for the time being shall from time to time direct. Whereupon it is recommended that the said trustees, the honorable, &c., be directed to lay out lots along the three sides of the hospital square, which are bounded by streets (of 60 feet in front by 100 in depth) for building lots, to be given out on lease for 21 years, and on similar terms as those on which the market lots are now leasing, the said trustees to reserve 200 feet in the middle of the south front as an entrance to the interior part of the square, where the hospital is recommended to be built. *The committee beg leave to state that there are six lots, each containing one acre, which were set apart for French refugees, and have since been resumed by government, and are therefore at your excellency's disposal, with the consent of his Majesty's government, and may be given to assist in building and supporting the said hospital.*

Judgment.

The minute of council having been approved by his Excellency the Lieutenant-Governor, a resolution was adopted, as I gather, to build the hospital on the new block of six acres which the Executive Council had recommended to be granted to that institution, and to sell the entire block, formerly known as the hospital reserve. The precise steps by which this change was brought about are not apparent, because the papers connected with the matter cannot be found, or at least have not been produced. We have, however, a report of the Surveyor-General, dated the 26th of November, 1818, which is in these words :

Surveyor-General's Office, 26th Nov., 1818.

"Pursuant to the commands of his Excellency the Lieutenant-Governor, signified to me in your letter of the 16th instant, I have noted the six acres of land in the town, commonly called the Hospital Reserve, as appropriated for a hospital.

"And in order to prepare for sale (as directed) the land

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hitherto used for a hospital, I herewith respectfully submit to his Excellency a proposition for laying out the same into twenty eight lots, containing each about one-sixth of an acre.

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"Considering that the lots in the market square, whose dimensions are fifty-two feet by ninety-two, are leased for a term of twenty-one years by the magistrates for an annual rent of 10*l.* to 40*l.*, I should apprehend that a ground rent of 12*l.* 10*s.*, currency, per annum, might reasonably be expected for those in the square now projected, and which is immediately in the rear of that appropriated for the gaol and court house."

This letter was accompanied by a plan, laying out the whole block into lots, which was headed thus: "Projected for laying out six acres of ground in the town of York formerly called the Hospital Reservation, into lots containing one-sixth of an acre, respectfully submitted to his Excellency the Governor-General."

By letters patent, bearing date the 26th of April, 1819, all the lands specified in the orders of June and September, 1818, were conveyed to the trustees named in the former order, and for the purposes there stated. This grant embraces, I believe, nine distinct parcels, none of which, except the hospital and school blocks, are described as reserved for any special purpose. But, as to these two parcels, the deed, having described the land by metes and bounds, proceeds thus: "*being a reservation made for the purposes of an hospital in the said town of York.*" With respect to all the lands thereby conveyed, it is declared that they are so conveyed in trust "at all times thereafter to observe such directions and to consent to and allow such appropriations and dispositions of them, or any of them, as our Lieutenant Governor, or person administering the government of our said province, and our Executive Council therein for the time being, shall from time to time make and order, pursuant to the purposes for which the said parcels or tracts of land, or any of them, were originally reserved, as hereinbefore expressed, and to make such

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1858. conveyance or conveyances, deed or deeds, of the said parcels or tracts of land hereinbefore granted, or any part thereof; to such person or persons, and upon such trusts and to or for such use or uses as our Governor, Lieutenant-Governor, or person administering the government of our said province, and the Executive Council thereof for the time being, shall from time to time, by order in writing, appoint."

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Grasett.

Shortly after the date of these letters patent, and, as I gather from the documents laid before us, in the month of May, 1819, the whole of the original hospital reserve, except the acre in question, was sold by public auction, for the purposes of the trust. Still, the endowment must have been found quite inadequate; for I find that three years later, although 4,000*l.* had been contributed from the proceeds of the Loyal Patriotic Society, and although the building had been erected, the trustees felt that they were not even then in a position to organise the establishment, and it was consequently proposed, at a meeting held on the 14th of June, 1822, "*that until the funds of the hospital afforded means to furnish and organize the establishment, a matron should be put in charge of the building.*" And again in January, 1825, the building not having been yet applied to the purpose for which it was intended, was fitted up for the reception of the Houses of Parliament, by permission of the trustees.

Judgment.

On the 5th of November, however, in the year 1825, a meeting of trustees was held, at which it was resolved "that the trustees should address a letter to the secretary of his Excellency the Lieutenant-Governor, stating that the trustees would have it in their power within the ensuing year to make the hospital useful for the purpose for which it was erected. And at the same meeting it was resolved that two members of the board should be appointed to investigate and report upon the state of the funds of the institution, and also what real estate could

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Some few months previous to the meeting spoken of, namely, in July, 1825, the conveyance of which the information complains was executed under the following circumstances :

In the year 1822 the present Bishop of Toronto, who was at that time the incumbent of St. James' Church in this city, and also one of the trustees of the hospital, presented a memorial to Sir *Peregrine Maitland*, then governor of this province, stating that two acres of land formerly appropriated for the use of the said church had been conveyed to Mr. *Stewart*, a former incumbent of the said parish, for his individual benefit, and praying to have the loss thereby sustained made good.

On the 2nd of December, 1822, this memorial was transmitted to Lord *Bathurst*, then his Majesty's secretary of state for the colonies, by Sir *Peregrine Maitland*, with a recommendation that the endowment of St James' church should be made good "by the transfer of an equivalent selected from the reserve lots or other unappropriated land in the town plot." To which proposal Lord *Bathurst* signified his assent in a despatch dated the 10th of June, 1823. Judgment.

On the 5th of March, 1824, this despatch of Lord *Bathurst* was laid before the executive council; and on the 2nd of December in the same year a committee of that body made the following report, to which his excellency was pleased to assent: "May it please your excellency, the committee having under consideration an extract from a despatch addressed by Earl *Bathurst* to Sir *Peregrine Maitland*, dated 10th of June, 1823, stating that "whatever may have been the cause of so considerable a portion of the lands originally appropriated

1858. in the town of York for the use of the church, and for the use of the rector for the time being, there appears to be no other mode of remedying the evil than that which you have suggested, by making up the number of acres formerly set apart for these purposes, by a suitable transfer of any lots which may be still reserved or unappropriated in the town plot and township of York, most respectfully recommend that the town lot on which the old gaol now stands be appropriated for the purpose so soon as it becomes vacant, and that the trustees of the six acres of land situated near the church usually known as the hospital square, or block, be requested to release the south-east acre of the said block for the same purpose, these two acres being as nearly equivalent to the two acres granted from the church plot as can now be found."

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This order in council recites Lord Bathurst's despatch, and purports to be in accordance therewith. Lord Bathurst's letter is cited as the authority for the order. But the order so far from being in accordance with, is in direct violation of the despatch.

Judgment.

In pursuance of that order, the trustees of the hospital, of whom the present Bishop of Toronto was one, did, by a deed dated the 4th day of July, 1825, convey the acre in question to certain persons in trust for the benefit of the rector of St. James' Church for the time being, the present Bishop of Toronto being the then incumbent; and that is the conveyance which the present trustees of the hospital now seek to set aside as having been executed in fraud of the trust.

This deed commences with a recital of the trusts in the letters patent of April, 1819, but the clause upon which the title of the informants depends, and upon which the question now before us entirely turns is wholly omitted. The order of December, 1824, is referred to, but not recited; and the deed is made in consideration of the promises and of 5s. paid by the trustees.

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Now, apart from the consideration to which I shall presently advert, the case, as I have stated it, would appear to be free from doubt. The six acres of which the land in question forms a part was confessedly set apart for the purpose of an hospital prior to the year 1817. On the 9th of June, 1818, the executive government of the province ordered it to be conveyed to trustees for that purpose. On the 9th of September, 1818, the Executive Council recommended that a large part of the tract should be leased for the purpose of raising a revenue for the support of the institution; and on the 24th of November, 1818, a resolution to build the hospital elsewhere having been in the meantime adopted, the Surveyor-General was directed to prepare a plan for disposing of the whole block, for the like purpose, which plan was subsequently approved by the executive government. Matters remained in that state until the 26th of April, 1819, when letters patent were issued by which the land in question, described in the instrument as "*being a reservation made for the purpose of an hospital for the said town of York,*" was granted, with many other parcels, to the trustees upon trust that they should observe such directions, and consent to such dispositions and appropriation as the governor in council should order, *pursuant to the purposes for which the said parcels or tracts of land or any of them were originally reserved as therein-before expressed.*

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Judgment.

Now, had the declaration of trusts ended here, the case would not, as it seems to me, have admitted of argument. The conveyance of the 4th of July, 1825, would have been a manifest breach of trust; and the right of the Attorney-General to relief, irrespective of the question upon the statutes, to which I shall presently advert, would have been clear.

That point was, I believe, conceded upon the argument by the learned counsel for the defendants. But it was said that in addition to the passage to which I have

1858. referred, the letters patent go on to provide that the trustees should make such conveyances, or deeds of the parcels of land thereby granted, or any of them, to such persons, upon such trusts, and for such uses as the governor in council should, by order in writing, appoint; and it was argued that this further clause did in effect empower the governor in council to revoke the trusts thereby declared, and divert the land to any purpose which might be thought expedient; that the order in council of the 20th December, 1824, amounted to a revocation of the trusts in relation to the land in question; and that the order of July, 1825, was therefore consistent with the provisions of the letters patent of April, 1819, and consequently perfectly valid and legal.

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Judgment.

I cannot accede to that argument. The effect of the construction for which the defendants contend, would be to place the latter clause of the sentence in direct contradiction to the former. By the latter, the trustees were bound, it is said, to convey to any person, and for any purpose, which the executive government might be pleased to appoint; while it is quite clear that under the former they are only authorized to observe the directions and consent to the appropriations of the executive government, *when such directions and appropriations are consistent with the trusts thereby declared.* The obvious meaning of the whole passage is, that the trustees were bound to observe the directions and consent to the appropriations made by the executive government in relation to any part of the land thereby granted, and to carry the same into effect by executing proper conveyances; provided such directions and appropriations were consistent with the purposes for which the letters patent declared the land to have been originally reserved; in other words, provided such directions and appropriations were consistent with the trusts already declared. I am of opinion, therefore, that the deed of the 4th of July, 1825, was not warranted by any of the provisions of the letters patent; but was, on the contrary, a direct breach of the trusts thereby declared.

It was argued that the defendants have a right to be barred by the statute for more than 21 years. Assumed that the statute, a positive law, provides that the land has been in the consideration of the deed of the purchaser for a long time. Limitations have been made.

It was argued that the law as to the deed is not a suit. This was determined by the *Wragg*, of which that statute determined the grounds of the present occasion. The recent statute is the case.

This decision is no reason to be followed by all parties. It is clear that at this day more than which we proceed under circumstances.

It was argued in the next place, that the plaintiffs are barred by the Statute of Limitations, inasmuch as the defendants have been in the quiet enjoyment of this property for more than thirty years under the deed of July, 1825. Assuming that charities are within the provincial statute, a point which may not be concluded by the English decisions, and upon which it is not necessary to express any opinion—assuming that point for the purpose of the present argument, it is clear that this case comes within the provisions of the 33rd section. That section provides that in case of express trusts the right of the *cestui que trust* is not to be deemed to have accrued until the land has been conveyed to a purchaser for a valuable consideration. Now, this is a case of express trust; and the deed of July, 1825, was not a conveyance to a purchaser for a valuable consideration, and the Statute of Limitations has therefore no application.

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It was argued lastly, that the recent act to amend the law as to dormant equities (a) was a bar to the present suit. This question arose in the case of *Beckit v. Wragg*, of which we have just disposed. We there determined that cases of express trust were not within that statute; and having there stated at length the grounds of that opinion, it is only necessary on the present occasion, to say that for the reasons there given, the recent statute does not, in my opinion, apply to this case.

This decision may, I fear will, operate harshly. There is no reason to doubt that the deed of 1825 was treated by all parties as consistent with the letters patent; and had this objection been urged at an earlier period it is clear that a remedy might have been applied, which at this day may be impossible. But the principle upon which we proceed has been applied again and again under circumstances of much greater hardship—in cases

(a) 18 Vic. ch. 124.

1858. where although the original transaction was fair in every respect, and upon valuable consideration, the court has felt bound to relieve after an occupation extending through many generations.

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In the *Attorney-General v. Fishmonger's Company (a)*, where the defendants had been in possession 400 years, as owners in fee, Lord *Cottenham* says: "If there is no doubt as to the origin and existence of the trust, the principles of justice and the interest of mankind require that the lapse of time should not enable those who are mere trustees to appropriate to themselves that which is the property of others." And Sir *John Romilly*, speaking of an enjoyment which had subsisted for 150 years (*b*), says: "Presumption arising from time has nothing to do with this case. Undoubtedly when the whole origin of a charity or right is lost in obscurity the court will presume from the uniformity of the practice or use, that it is in accordance with the original foundation or right; and will presume that which may be necessary to give it validity * * * * but when the real origin is shewn and clearly ascertained, nothing can be presumed to the contrary of that which is established by evidence." Here the origin is clearly ascertained, as the enjoyment has only continued for thirty years.

Judgment.

Applying the law, then, strictly to the facts in evidence, and that is our duty in this, as in all other cases, I am of opinion that there must be a decree for the plaintiffs. But as to the extent of the account to be directed, and the question of costs were not alluded to at the hearing, these points may be spoken to again, if the parties desire it.

ESTEN, V. C.—I concur with the Chancellor that the statute of 18 Victoria, chapter 124, does not apply to express trusts. This act, howsoever it may be

(a) 5 M. & C. 16.

(b) *The Attorney-General v. the St. Cross Hospital*, 17 Beav. 464.

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construed, will produce cases of great hardship, not to say injustice; but it would be monstrous to apply its provisions to cases of express trust. I also agree that a volunteer under an express trustee can stand in no better position than the trustee himself, and in this instance the Church must be regarded as a volunteer, claiming under an express trustee. Supposing, therefore, a valid trust to have been created on behalf of the hospital, I should hold the statute of 18 Victoria, chapter 124, to be no bar to relief. But the question is, whether a trust was created which bound the crown, or which would have bound a private individual, had he been the author of it. The trust, if created at all, was created by the letters patent, which, after stating that the land had been reserved for the purposes of an hospital, conveyed the land to certain trustees upon trust, to allow such dispositions as the crown should direct.

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Now, if such trust had been declared by a private individual in favor of objects not charitable, I do not conceive that it would have been binding on him. He could not have been compelled to direct any conveyance or disposition, and until such direction should be given no trust would arise. The beneficial interest, would, I apprehend in the meantime, result to him, and no trust or implied gift would, I think, arise in default of appointment. Where a power of appointment amongst specified objects is given to a third person, and it is put upon him as a duty to make the appointment; should he neglect to perform this duty, a trust will arise in favor of the objects of the power; but in the case supposed, it could not be said that the author of the trust had imposed upon himself the duty of making the appointment. In another class of cases, where a power of appointment is given to a third person amongst certain objects, a gift in default of appointment is frequently implied in favor of the specified objects from the terms of the disposition. But in the supposed case I think the terms of the gift would manifest an intention to reserve to the donor the entire

Judgment.

1858. control over the subject of it, so that no trust would arise in favor of, the specified objects without his express direction. The grant in question, however, is a charitable disposition, and charitable gifts are certainly governed by different rules from gifts for other purposes. Thus, if a gift be made for such charitable purposes as the donor shall appoint, it is well settled that if he neglect to make any appointment, the gift will nevertheless prevail, and the subject of it will be devoted in some way to charity. This, however, it is apprehended, will occur only when the terms of the disposition manifest an intention on the part of the donor to depart absolutely with the subject of the donation, and the absence of appointment is presumed to have arisen from oversight. Cases of this kind have arisen almost always, if not always, upon wills; and this presumption may well arise, where the will has not been revoked, and the property has devolved upon the trustees, but no appointment can be discovered. Where, however, the gift is made by deed, and the entire control is reserved to the donor, so as to manifest an intention that no trust shall arise until some direction or appointment be given, there an inherent power of revocation is contained in the gift itself, and any alteration of intention will amount to a revocation of it, inasmuch as the donor cannot be compelled to make any appointment or give any direction. If a donation be made by deed to such charitable uses as the donor shall direct, and he gives no direction in his lifetime, it is possible that after his death the property may be devoted to some charitable purpose by this court; but would this power be exercised if the donor had manifested a change of intention, and made a different disposition of the property, in his lifetime? I think not. This appears to me to be a case of this description, and the crown having altered the destination of the property, I think the trust for the hospital was never perfected. It is true that a sale of this acre is common with the others was directed; but the sale having been abandoned, the property, I think, reverted to its former position. The

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Judgment.

present case the circumstances would be charitable and in the direction of the original trust use without except in default cannot arise an appointment reasons I think was competent church, and dismissed.

SPRAGGE, declare a trust case is, where 1819, a trust the charity *cestui que trust*

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present case is open to another consideration, owing to the circumstances of the donor being the crown. It would be impossible to devote this property to any charitable use for the benefit of the hospital without the direction of the crown. This court can only wrest it from the church, and restore it to the trustees upon the original trusts. It could not devote it to any charitable use without regard to the appointment of the crown, except in default of such appointment; but such a case cannot arise, because the crown never ceases to exist, and an appointment is therefore always possible. For these reasons I think this trust did not bind the crown, but it was competent to it to make the gift in favor of the church, and that consequently this information should be dismissed.

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SPRAGGE, V. C.—It is clear, I think, that the King may declare a trust by his letters patent. The question in this case is, whether by the crown patent of the 20th of April, 1819, a trust was effectually declared, so as to constitute the charity, on whose behalf this information is filed, a *cestui que* trust of the land in question.

Judgment

It is too well settled to be questioned that a trust in favor of third person, even though the third persons be merely volunteers, cannot be revoked; the question in such cases being whether the author of the trust has sufficiently manifested his intention to part with his dominion and control over the estate conveyed; and whether his intention to do so is effectually carried out. If it be so, then I conceive that the retention by the author of the trust of a power, of direction as to the mode of user of the estate conveyed can make no difference: for the estate would in such case be equally devoted to the purposes of the trust, as if the discretion reserved in himself by the author of the trust had been by him vested in the trustees.

If, on the other hand, where the act is voluntary, and

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not for valuable consideration, it is left imperfect, the donor not having done all that he might have done to perfect the gift, there however clearly the *intention* to make a gift, by way of trust or otherwise, is manifested; and however nearly the acts may have approached completion, and even though they may have been supposed by all parties to have been perfected, it is not enforceable against the supposed donor or his assignees, as it is the settled maxim of the court not to lend its aid to a mere volunteer.

My brother *Esten* and myself have had occasion to consider this point in the case of *Tiffany v. Clarke* (a), and I think that the position which I have stated will be found to be fully borne out by the cases referred to in our judgments in that case. The case of *Kekewich v. Manning* (b), in which former cases have been reviewed, has been since followed by the more recent case of *Wilkinson v. Wilkinson* (c). In the various cases referred to, the test is constantly applied, whether the alleged gift could have been enforced against the person who is charged to have made it.

Judgment.

It will not be disputed, I apprehend, that up to the issuing of the patent the appropriation of the six acre block, of which the one in question forms a part, rested in intention merely; and the designation of the block upon the official maps as a hospital reservation, the order in council for laying out the block in lots for sale for hospital purposes, and the laying out of the block in pursuance of that order (all which were before the patent), were only manifestations of intention, and were no more binding upon the crown than if the like acts of intended bounty had been done by a private individual in regard to his own estate. It is hardly necessary to observe that it is not at all a question of dedication, but of alleged breach of trust, to constitute which a complete trust must of course have been created.

(a) Ante page, 474. (b) 3 D. M. & G. 176. (c) 4 Jur. N. S. 47.

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It is material to a proper understanding of this case to keep in view two points, one that the trustees named in the patent were not hospital trustees; the other, that not lands intended for hospital purposes were alone conveyed, but that the six acre block called the hospital reservation was one of nine parcels of land conveyed by the same patent to the same trustees. If the hospital reservation had been the sole subject of the grant, there would have been room to argue that the crown could not have intended to vest the land in trustees for the barren purpose of changing the legal ownership from the crown to trustees; but that we must look for some intelligible purpose, some object to be thereby accomplished, and that that could only be found in treating the patent as intended to give practical effect to a previously intended appropriation, and to constitute the trustees, trustees for the hospital; but when we find nine different parcels of land conveyed to the same grantees, we find an intelligible purpose in the terms of the trust, which makes them channels of distribution of those several parcels, to such persons as the crown should from time to time appoint, they holding the lands subject to such directions, dispositions and appropriations as the governor in council should make.

1858.
 Attorney-Gen
 V.
 Grasett.

Judgment.

So far these trustees would be trustees for the crown only, their trust being to do with the lands as the crown should appoint. But there are other words in the patent which, it is argued, constituted them trustees for others than the crown. At the conclusion of the description of the "hospital block" are the words, "being a reservation made for the purposes of a hospital for the said town of York;" and at the end of the description of another parcel are the words, "being a reservation made for the purposes of a public school in the said town of York;" and the terms of the trust are "in trust, at all times hereafter, to observe such directions, and to consent to and allow such appropriations and disposition of them, or any of them, as our

1858. *Attory-Gen. v. Grasett.* governor, lieutenant-governor, or person administering the government of our said province, and our Executive Council therein for the time being, shall from time to time make and order pursuant to the purposes for which the said parcels or tracts of land or any of them were originally reserved as hereinafter expressed, and to make such conveyance or conveyances, deed or deeds, of the said parcel or tracts of land, hereinbefore granted or any part thereof, to such person or persons, and upon such trusts, and to and for such use or uses as the governor in council shall from time to time by order in writing appoint." The words at the ends of the descriptions, and the words "pursuant to the purposes," &c., are relied upon as constituting a trust for the hospital.

Judgment. Looking at the language of the trust, I find nothing to enable the trustees to sell or lease the hospital reservation, to receive any rents from it, or indeed to deal with it at all; nothing either in express terms or in any general words which would cover such a power; they were not made trustees of the hospital either in terms or by implication; (nor indeed were trustees for the hospital appointed until afterwards, as appears by one of the books of the hospital put in: six trustees were appointed on the 15th of June, 1822, of whom Chief Justice *Powell* and *Mr. Baby* were two; the others being *Mr. Smith*, *Mr. Dunn*, *Mr. Robinson*—the then Attorney-General—and *Mr. Allan*). The patent then, as I read it, gave to the trustees no present power of dealing with the land; they were to remain passive until set in motion by the order of the crown through the governor in council. In the meantime they were indicated as the intended instruments by which, among other things, a parcel of land reserved for a particular charitable purpose should be applied to that purpose. The crown by the patent reiterated formerly its declared purpose of appropriating what it had styled the hospital reservation to hospital purposes: it may be said perhaps

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to have taken a step towards carrying that purpose into effect; but had it done more? The trustees were to observe such directions and to consent to and allow such appropriations and dispositions of the land as the governor in council should from time to time make and order, pursuant to the original reservation of the land. Could these trustees or could hospital trustees when appointed have claimed this land simply upon the patent, without the contemplated further appropriation by the governor in council? or if not, could any such further appropriation be claimed as a matter of legal right? As to the latter I should clearly say not, as the claimant could only come in the character of an object of bounty, a mere *volunteer*. As to the former coming without the contemplated further appropriation, he must say that it is unnecessary, that the gift is perfect without it, but he must come upon the patent, and that in terms contemplates the perfecting of the gift by a future disposition of the lands. Is the claimant in a position to say, you are bound to make the promised disposition, or if you do not, I am entitled to the land without it?

1858.

Attor'y-Gen.
v.
Grasott.

Judgment.

The language of the patent appears to me at the most to import, that the trustees should dispose of the land according to instructions thereafter to be given, and which instructions, it was thereby declared, should be to dispose of it for hospital purposes. I cannot think that the charity would be thereby constituted a *cestui que* trust. The act must have been completed, not an imperfect inchoate act, to place a third party, an object of bounty, in that position.

This principle has been recognized in many English cases, most of which are collected in *Kekewich v. Manning*. The case of *Bayley v. Boulcott* (a), before Sir John Leach may serve to illustrate it. A Mrs. Bayley, a widow lady, having an only child, a daughter, was entitled to considerable personal property under the

(a) 4 Russ. 345.

1858. will of a relative: *Boulcott*, one of the executors of this relative, apprehending a second marriage of the mother, and in order to guard against its consequences, transferred a sum of 10,000*l.* stock to which she was entitled under the will, from the name of the relative to the names of himself and his co-executor, with a view to make this sum the subject of a settlement upon the daughter after the mother's death. This was done without previously consulting the mother, but *Boulcott*, the executor, afterwards acquainted her that he had made the transfer, and stated to her the object with which he made it; and he recommended a settlement upon the daughter accordingly. The mother assented to the suggestion, and requested *Boulcott* to call upon her solicitors and give them instructions to prepare a proper deed for that purpose. The deed was prepared accordingly, but when it was brought to her for execution she said she had changed her mind and refused to sign it; and she required the executors to transfer the stock into her name: and they having declined to do so without the direction of the court, she filed her bill.

Judgment.

Her claim was resisted on the ground that that which had been done by her amounted to a complete and irrevocable settlement of the 10,000*l.* stock upon the daughter after the mother's death: that to declare a trust of personal property, writing is not necessary: that the transfer of the stock into the names of the executors, and the unequivocal expressions by the mother of her intention that the stock so transferred was by way of a provision for her daughter created a trust in favor of the daughter which the mother could not destroy: that such trust was not affected by the circumstance that the deed for which instructions were given was not executed, for the deed was not necessary in order to create the trust. But the Master of the Rolls said: "It is true that with respect to personal property a declaration of trust may be by parol, and that a written instrument is not necessary for that purpose; but the conversation which

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took place between the plaintiff and the executor when he acquainted her with the fact of the transfer of the 10,000*l.* cannot be considered as being on her part a fixed and concluded declaration of trust in favor of the daughter. There was on the part of the plaintiff no more than an expression of her intention to make a future declaration of trust in favor of the daughter, by an instrument which she authorised the executor to have prepared by her solicitors; and beyond the general purpose of settling the 10,000*l.* upon the daughter after her death, the particular terms of that instrument were not even the subject of consideration. This inchoate intention being merely voluntary on the part of the mother, the execution of it cannot be compelled by this court."

1858.
Attor-y-Gen.
v.
Grasett.

In the case cited there was, as in this case, a step taken towards the creation of the trust, in the transfer of the stock into the names of *Boulcott* and another, instead of the name of *Mrs. Bayley*; this was acquiesced in by her and adopted as, I conceive, her own act. A parol declaration by her that the trustees should hold the stock in trust for her daughter, would have made her daughter a *cestui que* trust of the stock: and there was some color for contending that in giving instructions for a deed of settlement to be prepared, there was involved a declaration that the stock should be vested in trusts for her daughter. But a further act was contemplated, and that act was to be the perfecting of the intended gift: what was done therefore was inchoate only, and not "a fixed and concluded declaration of trust in favor of the daughter."

I have given the subject of this case much and anxious consideration: the principle involved is important, and the property very valuable; and I have the misfortune to differ with His Lordship the Chancellor.

Taking the view which I do of the question, it is

1863. unnecessary to give any opinion upon the other points presented in argument.

Attor'y-Gen.
v.
Grissett.

I may remark, however, that if in truth the land in question was conclusively appropriated for hospital purposes by the patent of April, 1819; not only did the executive council direct the commission of a very gross breach of trust by appropriating it to the living of the town of York, and that with their eyes open, for in the order making the appropriation, the despatch of Lord Bathurst is recited; but the trustees of the hospital have, for between thirty and forty years, acquiesced in the diversion of a large property from the charity over whose interests it was their duty to watch; and that also with their eyes open, for in the book in which are entered the proceedings of the board of hospital trustees up to 1843, there are entered, first, a copy of the order in council of 9th June, 1818, and next, a copy *in extenso* of the patent which is relied upon as creating the trust upon

Judgment. which this information is filed.

There is another view in which this case has presented itself to me. In 1834 we find the hospital trustees asking for further endowments from the provincial government, as the grant which they had was insufficient, and obtaining them; thus asking and obtaining further bounty from the same hand which had withdrawn a portion of a former intended appropriation, and which withdrawal it is now sought to cancel as inoperative.

It has been urged for the defendants that this further endowment must be looked upon as in lieu of the portion of the hospital reservation withdrawn from the hospital: I do not think this is made out. Nevertheless the application of the hospital trustees must, I think, be taken to be based upon the endowment which they had, which was in part composed of five acres of the six acre block originally appropriated: having this, the then trustees say, the hospital is insufficiently endowed;

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we pray for a further endowment: and a further endowment is granted to the them, and that of very valuable land.

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Attor'y-Gen.
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Grasett.

There can be no doubt, I apprehend, that the further endowment was asked for and granted in the belief that the one acre in question had been irrevocably withdrawn from its intended appropriation, and appropriated to another purpose: that it then formed no part of the hospital endowment. Whether the land granted by way of further endowment would have been so granted if the appropriation of the acre in question for hospital purposes had not been disturbed, it is impossible to say. It is certain from the documents before us that the making good to the living of York an equivalent for the land diverted from it was held to be of importance; apparently looked upon as an act of justice, to make good an act of spoliation; and this was to be done "by a suitable transfer of any lots which may be still reserved or unappropriated in the town plot and township of York." Judgment. We cannot tell whether this would not have been done out of the very lands which were granted by way of further endowment to the hospital; certain it is that those lands answered the description of the lands out of which the church endowment was to be made good; and it is also certain that the claim of the church would not have been postponed to that of the hospital, for it was a portion of a contemplated hospital endowment that was taken to make good the claim of the church.

I have no doubt, from the papers before us, that the equivalent to the church would have been made good out of some lands: and if the hospital trustees had remonstrated, and thereby succeeded in preserving the acre in question for hospital purposes, the church would have been compensated by a grant of other land; but that is, I conceive, by itself no sufficient reason for withholding the land from the hospital now. Whether the procurement of a farther endowment, under the circum-

1858. stances to which I have adverted, should bar their claim, I am not prepared to say: nor, with the view which I take as to no trust being perfected is it necessary to say.

Attor'y-Gen.
V.
Grasett.

Upon the best consideration that I can give to the case, I am of opinion that the information should be dismissed.

CONSTABLE V. GUEST.

Redemption—Parties—Improvements.

It being doubtful at what time the mortgagor died, his widow and all his children joined in a suit to redeem, in order that all questions under the act abolishing the law of primogeniture might be avoided; at the hearing, the court gave leave to furnish proof of intestacy by affidavit, with a view to making the decree, as asked.

Semble—that when a mortgagee is charged with rents and profits received from improvements made by himself, it would be unreasonable to refuse to allow him the expense of such improvements to a corresponding amount.

This was a suit instituted by the widow and children n. ent. of *Robert Constable*, praying a right (under the circumstances set forth in the judgment) to redeem the defendant.

The defence set up by the answer was, that *Robert Constable* had abandoned any right he ever had to the property; also, that the defendant had dealt with the property, believing he had made an absolute purchase.

Mr. Roaf for the plaintiff, cited *Ommanney v. Stihwell* (a), and the cases there referred to.

Mr. Crickmore for the defendant, objected that the evidence was not sufficient to prove the death of the mortgagor.

The judgment of the court was delivered by

SPRAGGE, V. C.—Nothing is shewn in evidence to

(a) 2 Jur. N. S. 1058.

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The prop mortgagor, entitled, in therefore, to continue al the presum the mortgag previously r him a wife evidence is heard of, or he left. A adduced as and I think been heard in Novemb rebutted, th any thing is

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bar the right to redeem, if we have before the court the party or parties entitled to the equity of redemption.

1858.

Constable
v.
Guest.

The proper person to redeem is *Robert Constable*, the mortgagor, if he is still living. The bill is filed by those entitled, in case he is dead, and it lies upon the plaintiffs, therefore, to prove that he is so, and he is presumed to continue alive unless the contrary is shown. To rebut the presumption of continued life, the plaintiffs prove that the mortgagor left the part of the province in which he had previously resided, in the summer of 1843, leaving behind him a wife and four children: and a good deal of evidence is given to show that he has not since been heard of, or only for a very short period, if at all, after he left. As much evidence to this effect has been adduced as the nature of the case could well admit of; and I think the reasonable inference is, that he has not been heard of since the year 1843. The bill was filed in November, 1856, and the presumption is, unless rebutted, that he was then dead. I do not think that any thing is shown to rebut this presumption. Judgment.

The whole of the children of the mortgagor, as well as his wife, are made parties plaintiffs, on the ground that it is uncertain whether he was dead at the time of the coming into operation of the act abolishing the law of primogeniture.

It has been assumed rather than proved, that he made no will—as to that, proof, I think, may be given by affidavit, without again bringing on the cause for a hearing. If he died intestate we have all proper parties before the court, inasmuch as the eldest son is one of the plaintiffs.

Upon the same evidence as is now adduced, the eldest son might, before January, 1852, have filed the bill to redeem as heir-at-law, as the ordinary legal presumption of death had then arisen; but it does.

1858. not appear to me to be necessary to discuss that point now, as the defendant's only right is to be redeemed by none other than a person entitled; and all difficulty even as to the mode of conveyance, is obviated by the consent of the plaintiff's counsel to accept, after payment of mortgage money, of the ordinary certificate of discharge; but had there been no such consent, there would have been no difficulty, I think, in framing such a decree, and such a conveyance, in case of redemption, as would meet the exigency of the case.

Constable
v.
Guest.

A good deal of evidence has been given as to the nature of the improvements made by the defendant, who has been in possession for a number of years. As the allowance for improvements is a matter of account, it would perhaps be premature in the present stage of the cause to express any decided opinion as to what ought to be allowed. I would only observe that to the extent at any rate to which improvements have yielded a return in rents and profits, with which a mortgagee in possession is charged, I decline to think that they stand upon a different footing from improvements not yielding such returns: they certainly are not open to the objection made to improvements which have yielded no return that they made it burthensome to the mortgagor to redeem: and it does appear to me unreasonable, while charging a mortgagee with rents and profits received by him from improvements made by himself, to deny to him the cost of the improvements at least to a corresponding amount.

Judgment.

As to costs; the case made by the answer, of abandonment by the mortgagor, and of the purchase by the defendant of what he took to be an absolute, not a redeemable, interest, is not sustained, and he should therefore only get the costs of an ordinary redemption suit.

The court, upon a notice although at ancient founda

This was Mayor, Alderforth that plaintiff the corporation 15th of May, lease the less or more two-entails on the to plaintiff, that plaintiff houses on the intention so t materials upon t finding that t property, pla the class he in to the corpora prayer of wh plaintiff refras commenced p for breach of stay the action

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Mr. Brough injunction in t his claim to th that it was im erected, until a authorities.

DENNISON V. THE CITY OF TORONTO.

1858.

Injunction—Practice.

The court, upon default made by the defendants in not appearing upon a notice of motion for injunction, directed the writ to issue although at the same time entertaining great doubt whether a sufficient foundation for the interposition of the court had been laid.

This was a bill by *George Taylor Dennison*, against the Mayor, Aldermen, and Commonalty of Toronto, setting forth that plaintiff had become lessee of certain lands of the corporation for a term of twenty-one years from the 15th of May, 1855, renewable; and by the terms of the lease the lessee was bound to erect, within one year, one or more two-story houses on each lot, but that owing to delays on the part of the defendants in preparing the lease to plaintiff, the same was not executed until June, 1856: that plaintiff determined on erecting three-story brick houses on the lots leased to him, and in furtherance of his intention so to do, had drawn a quantity of building materials upon the property, to the value of about 1000*l.*, but ^{Statement.} finding that there was no sewer in the neighborhood of the property, plaintiff found himself unable to build houses of the class he intended, and thereupon addressed a petition to the corporation for the construction of such sewer, the prayer of which was refused, in consequence of which plaintiff refrained from building; and the defendants had commenced proceedings to turn plaintiff out of possession for breach of his contract, and prayed an injunction to stay the action, and further relief.

The affidavits filed, bore out, in a great measure, the statement of the bill; and now

Mr. *Brough* for the plaintiff, moved upon notice for an injunction in the terms of the prayer of the bill; resting his claim to the interference of the court, on the fact that that it was impossible to drain any house that might be erected, until a proper sewer was constructed by the city authorities. [The Chancellor.—Many houses have been

1858. constructed, and no doubt many others are in the course
 of erection that have no means of drainage other than the
 natural formation of the land in the neighborhood.]

Demulson
 v.
 City Toronto

The motion having stood over for consideration, was
 now disposed of by

THE CHANCELLOR.—I have great hesitation in interfer-
 ing in this case. I doubt very much whether a suffi-
 cient foundation has been laid for equitable relief (a). But
 as the circumstances set forth in the affidavits, may be suf-
 ficient to take the case out of the general principle (b), and
 as the defendants have not thought it right to appear and
 contest the matter, let the injunction issue as prayed.

COMMERCIAL BANK V. POORE.

Principal—Surety.

The principal laid down in *Smith v. Fralick* (ante, volume v., page
 612) followed.

A mortgage was executed in favor of an accommodation endorser to
 cover his liability in respect thereof; this security was subsequent-
 ly assigned by him to creditors of himself and the principal debtor.
 In a suit brought to sell the mortgaged estate, subsequent incum-
 brancers sought to impeach this transfer, on the ground that the
 surety as well as the principal was insolvent; but as no such de-
 fence was raised by the answer, the court made the decree for a
 sale, as asked, leaving the question to be disposed of in a suit to be
 brought for that purpose.

February 8.

This was a bill by the Commercial Bank of Canada,
 and the Bank of Montreal, against Sir Edward Poore,
 Baronet, Anna M. B. McKechnie, Edward S. Winans,
 William Ross, James Mitchell, John Fishen, James Cock-
 burn; and Thomas Chadburn, setting forth that in Sep-

(a) *Bracebridge v. Buckley*, 2 Price, 200; *Elliott v. Turner*, 13
 Sim. 477; *Thompson v. The Home District Mutual Insurance Com-
 pany*, (before Executive Council of U. C.)
 (b) *Harman v. London Water Works*, 2 Mer. 65.

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That on the

tember, 1853, the defendants *McKechnie & Winans* by indenture conveyed certain real estate to the defendant *Poore*, subject to a proviso that if *Winans* should well and truly pay, or cause to be paid to the respective holders thereof, all and every the bills of exchange and promissory notes, drawn, made, accepted, or indorsed, or which might thereafter be drawn, made, accepted or endorsed by the defendant *Poore*, for the accommodation of the firm of *McKechnie & Winans* (of which *Winans* was the surviving partner), or of either of the members thereof, and if *Winans* should well and sufficiently save *Poore* harmless and indemnified against all such bills and notes, and against loss and damage in respect thereof; and also, if *Winans* should pay to *Poore*, his executors, &c., all such sum and sums of money as had been theretofore advanced by him to the firm; and all such sums as might thereafter become due to him from *Winans* on any account whatsoever, then that the deed should become void.

1858.

Comment B...
Poore

That on the 23rd of January, 1855, *Winans*, as such surviving partner, was indebted to the plaintiffs in about 22,000*l.*, and did, as surviving partner of the said firm, and using the name thereof, draw bills of exchange upon *Poore*, for the amount of such indebtedness, who, for the accommodation of the firm accepted the same, and the same were delivered to the plaintiffs, who on the said 23rd day of January were the holders thereof; and were afterwards with the consent of *Poore*, renewed.

Statement

That on the same day *Winans*, with the assent of *Poore*, by way of further security for payment of the said debts, and for all charges and disbursements by the plaintiffs in and about the premises, executed to them another indenture, conveying to plaintiffs the same property with certain leaseholds. And as a further security for payment of the said drafts and renewals *Poore* assigned the first mentioned indenture to the plaintiffs.

That on the same day *Winans*, with the assent of *Poore*,

1858. by way of further security for payment of the said debts, and for all charges and disbursements by the plaintiffs in and about the premises, executed to them another indenture conveying to plaintiffs the same property with certain leaseholds. And as a further security for payment of the said drafts and renewals, *Poore* assigned the first mentioned indenture to the plaintiffs.

Comment B.
v. 1
Poore.

That on the 7th September, 1855, the defendants, *Ross, Mitchell & Fiskin*, registered a judgment recovered by them against *Winans & Poore*, which remained unsatisfied, to the amount of 5,300*l.* and interest.

That *Chadburne* had also registered a judgment recovered against *Winans & Poore*, which also remained unsatisfied.

That the balance due the plaintiffs was about 18,000*l.* The prayer of the bill was for payment of the balance so due, or in default, a sale.

Statement. The defendants other than *Ross, Mitchell & Fiskin*, by their answers disclaimed all interest in the premises. *Ross, Mitchell & Fiskin* answered, setting up that their judgment had been recovered against *Poore & Winans* on bills, &c., accepted or endorsed, for the accommodation of *Winans*, by *Prore*, and claimed that under the indenture of September, 1853, the plaintiffs were trustees for them as well for themselves; and that as the debt was secured by mortgage dated 2nd January, 1855, and registered on the ninth of that month, upon the leasehold premises comprised in the indenture of the 23rd of January, 1855, they had priority, as respected the leaseholds, over the plaintiffs.

The cause came on to be heard on bill and answer.

Mr. *Roaf*, for plaintiffs, referred to *Smith v. Fralick (a)*, and cases there cited.

(a) Ante vol. v., p. 612.

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(a) 17 Jur

Mr. *McDonald*, for *Ross, Mitchell & Fiskin*, distinguished this from *Smith v. Fralick*, as here the surety as also the principal are insolvent, in that respect it more resembles the case of *Powles v. Hargreaves* (a). 1858.
Commer¹. B.
Poore.

THE CHANCELLOR.—I cannot distinguish this from *Smith v. Fralick*. Upon the argument, it occurred to me that the deeds were materially different, but upon examination I am satisfied that they are not so. In *Smith v. Fralick* the property was conveyed to *Fralick* upon trust, amongst other things, for securing payment of any sum for which *Fralick* should become liable on account of the *Linghams*, by reason of his having become security for them as indorser of any bill or note. Here the conveyance is subject to a proviso to be void, after payment by *Winans* to the holders thereof, of all bills, &c., made, &c., by *Poore*, for his accommodation. The deeds are substantially alike. The object in each was to indemnify the surety, who had agreed to indorse bills and notes for the accommodation of the principal debtor. I am satisfied, Judgment. therefore, upon the principles stated in *Smith v. Fralick*, that the equity of the bill-holders to enforce this security, if they have any, depends upon, and grows out of, the insolvency of both principal and surety. Irrespective of that event, no such equity would exist. That is clear upon all the authorities from *Ex parte Wairing* (b), downwards; and the doctrine is stated as clearly in *Powles v. Hargreaves* (c), as in any other case. That being so, it follows, I think, that so long as *Poore* remained solvent, he had a perfect right to dispose of this security in any way that might suit his pleasure or convenience, consistently, of course, with the purpose for which it was created. It was his own security, upon which no bill-holder, as such, had any equitable claim whatever, and it was competent to him, therefore, either to release it altogether, or to apply it to any part of his liability, as surety, which might be convenient. It follows that the assignment to

(a) 17 Jur. 614.

(b) 19 Ves. 345.

(c) 3 D. Mc. & G. 430.

1858. the present plaintiffs is perfectly valid as against all other billholders.

Dommerl B.
v.
Poore.

It was said however in argument, that here the principal and surety are both insolvent, and that *Powles v. Hargreaves* is therefore applicable. But no such case has been stated by the pleadings, or proved by the evidence; and, if present insolvency be the thing meant, the statement would be, as it seems to me, immaterial, because the present insolvency of *Poore* cannot invalidate a conveyance while he was solvent, and while, for that reason, he had a perfect right to deal with the security as he pleased. But if it was meant to suggest that both the parties were insolvent at the time of the conveyance to the plaintiffs, then, I repeat that no case of that sort has been either made or proved. If, therefore, there was such a double insolvency at the time of the conveyance to the plaintiffs as would bring this case within the principle established by *Powles v. Hargreaves*, the question must be raised, I think, upon an independent suit, instituted by some billholder, on behalf of himself and all other billholders, when the important point now suggested may be disposed of upon a record properly framed for the purpose.

Judgment.

CROOKS V. TORRANCE.

Specific performance—Executors.

By an agreement entered into between the executors of an estate in Lower Canada, and the residuary legatees, the former agreed to settle a particular legacy and indemnify the residuary legatees from it. According to the laws of that country interest is not recoverable upon a legacy, until suit brought to compel payment thereof, unless an express promise to pay interest is shown; and the legatees referred to having brought an action in that country, to enforce payment of a legacy, alleging an express promise on the part both of the executors and residuary legatees to pay such interest, in which action the executors denied such promise, and a verdict was rendered in their favor, but the residuary legatees allowed judgment to go against them by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred. The court, under the circumstances, refused the relief prayed, and dismissed the bill with costs.

This bill was filed by *Robert P. Crooks*, and *Leusia*

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his wife, *James B. Willoughby*, and *Elizabeth*, his wife, (claiming as residuary and pecuniary legatees and devisees of *Daniel Fisher*, deceased), against *John Torrance*, *John McKenzie*, *John Fisher*, and *William Lunn*, praying, under the circumstances set forth in the judgment, that the agreement referred to might be specifically performed; and the defendant *Torrance* ordered to execute to the plaintiff a full, complete, and effectual indemnity against the legacy left by the testator to his sister-in-law, one *Isabella Lockhart*.

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The defendants answered the bill; and evidence was taken in the cause to prove the execution of the agreement mentioned in the judgment.

Mr. A. Crooks for plaintiffs.

Mr. Roaf for defendants.

Argument.

The judgment of the court was delivered by

SPRAGGE, V. C.—The late *Daniel Fisher*, of Montreal, by his will, dated in the year 1825, bequeathed to *Isabella Torrance*, his sister-in-law, the sum of 1000*l.* currency, and directed the same to be paid to her (she being then under age) upon her attaining her majority; he also bequeathed an annuity of 120*l.* to a Mrs. *James Torrance*. To each of his two daughters, the female plaintiffs in this suit, he bequeathed a legacy of 1000*l.*, and made them the residuary devisees and legatees of his real and personal estate; he appointed the defendants, in this suit his executors; he died in the year 1826. *Isabella Torrance* became of age on the 17th of July, 1828, and in September of the same year married *James Lockhart*. Application was made to the executors from time to time for payment of this legacy, and interest upon it was formally demanded in various letters addressed to the acting executor, *John Torrance*, and his partner in business acting with him in the management

1858. of the estate, from 1841 to 1847. In the later communi-
 cations the acting executor declared his readiness to pay
 the legacy with interest, as demanded, if the consent of
 Mrs. *Crooks* and Mrs. *Willoughby* could be obtained.

Crooks
 v.
 Torrance.

In July, 1848, a suit was commenced in the court of Queen's Bench, at Montreal, by Mrs. *Lockhart* and her husband against the executors of Mr. *Fisher's* will, and against Mr. and Mrs. *Crooks*, and Mr. and Mrs. *Willoughby*, for the recovery of the legacy, and interest from the time at which it was made payable by the will, 17th July, 1828, the day of the legatee attaining her majority. The chief question raised by the pleadings in that suit, and the only question which it is necessary to notice here, was whether Mrs. *Lockhart* was entitled to interest upon her legacy before suit brought for its recovery.

Judgment. At the time of the institution of that suit, a suit was pending in this court in which the plaintiffs to this suit were plaintiffs, and the executors of *Daniel Fisher's* will were defendants, for the administration of his estate. On the 19th of October, 1848, that suit was compromised, the executors (*McKenzie* excepted) agreeing to transfer certain stock, and pay certain moneys to the plaintiffs, and other provisions not material here. The portion of the agreement which is the foundation of this suit is as follows: "*John Torrance* agrees to settle Mrs. *Lockhart's* legacy, and to indemnify the plaintiffs from it, and also to pay Mrs. *James Torrance* her annuity of 120*l.* from the 1st day of May last. All the estate and effects, except as above, to be conveyed to Mr. *John Torrance*, and the executors to have proper legal discharges from all liability."

This agreement having been entered into and signed by an agent of the executors, parties thereto, it was ratified and confirmed by their own signatures on the 23rd of the same month.

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On the 10th of October, 1854, the plaintiffs executed to the executors a full release of their claims in respect of the estate of *Daniel Fisher*, (with the exception of a claim to some lands in Upper Canada), and with respect to the matters in question here, that instrument contained the following clause: "It is hereby understood and agreed that nothing herein contained shall obviate or in any degree affect the liability of the said *John Torrance* under the said agreement to pay the legacy of *Isabella Torrance*, therein referred to as *Mrs. Lockhart*, and to pay the annuity of 120*l.* to *Mrs. James Torrance* therein also referred to, and to indemnify the said *Louisa Fisher* and *Elizabeth Fisher* from them, as contracted for in the said agreement," (the agreement of October, 1848), "but the liability of the said *John Torrance* in this particular is not hereby augmented or extended beyond what he has undertaken by said agreement, nor in any way diminished."

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It is necessary to recur to the proceedings in the court Judgment. at Montreal. The summons (with, as I understand from the papers, the declaration attached) was served on the executors at Montreal, on the 12th of July, 1848, and an order for the insertion of advertisements requiring the other parties, the plaintiffs in this suit, to answer within two months, was obtained on the 24th of the same month. The compromise took place between these two dates.

It is proved in this suit that by the by-laws of Lower Canada, interest is not payable upon a legacy until suit brought for its recovery, and service of process in that suit, unless a special agreement be proved for its payment, and it is then recoverable only as a personal liability incurred by the party making the promise.

It is stated in the bill, in this cause, that the declaration in the court at Montreal, charged that all the defendants to that suit did agree, bind, and obliged them-

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 Torrance.

selves to pay interest upon Mrs. *Lockhart's* legacy. The executors, with the exception of Mr. *McKenzie*, by their pleas, denied such promise on their part. *McKenzie* and the plaintiffs in this suit allowed judgment to go against them by default. Interrogatories were issued for the examination of all the defendants, and on the 12th of January, 1850, a commission was issued for the examination of the plaintiffs to this suit, in Upper Canada. The return to the commission states that they were notified, but neglected to attend: and thereupon a long and very explicit notice warning them of the consequences of their neglect was served upon them on behalf of the other defendants. One of the interrogatories was intended specially to relate to the alleged promise made by the executors, and the other defendants to that suit, to pay interest on the legacy.

Judgment. What answers were given to the interrogatories by the executors, or what evidence was given in the cause, I am not informed. But the Court of Queen's Bench at Montreal adjudged that the executors were not liable to pay the interest claimed; and further, that the other defendants, the plaintiffs in this suit, were liable to pay such interest. The sole ground for the judgment against the plaintiffs to this suit was, (as stated, and not denied) the failure by them to answer the interrogatories, which, by the law of Lower Canada, is taken as an admission of the truth of the facts interrogatively but by the interrogatories.

From the facts before me, then, it appears that the estate of *Daniel Fisher* was not liable to pay the interest claimed upon the legacy, and that the executors did not by promise or otherwise, make themselves liable in their representative capacity, or otherwise, to pay such interest; and that the plaintiffs in this suit are to be taken as having admitted in a judicial proceeding, after the 12th of January, 1850, that they had made such promise. It is not proved, except by such admission, that the plaintiffs in this suit ever made themselves liable to pay such interest.

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The agreement is: "to settle Mrs. Lockhart's legacy, and to indemnify the plaintiffs from it." The legacy was the creature of the will; just so much of the testator's estate as he chose to carve out of the mass of the estate, and to give a particular person; and if such legacy would bear interest, the words used would, I apprehend, cover it as an incident to the legacy. Here the title to interest rests upon an independent promise made by the plaintiffs themselves, and appears to me to be clearly no part of the legacy, nor any thing necessarily growing out of the legacy. I do not think the agreement to indemnify the plaintiffs from it, strengthens their case. It is urged that there could be nothing from which to indemnify the plaintiffs, unless from the consequences of a personal undertaking on their part. But I do not know how this may be by the law of Lower Canada. I rather infer from the pleadings of the suit instituted there, that the residuary legatees were made parties in that character; and not merely to fix them with a personal responsibility, by reason of their promise to pay the interest, (I confess, indeed, that from my own unaided reading of the pleading I should not have understood such promise to have been alleged against the plaintiffs to this suit). If proper parties to a suit for the legacy, an agreement to indemnify would mean no more than an indemnity against such suit. But even if they would not be proper parties to such suit, it would be straining words, which may have been introduced only *ex abundante cautela* beyond their proper meaning, to interpret them as contended for; the plaintiffs were to be indemnified from that which *John Torrance* agreed to settle, namely, the legacy.

Again, it does not appear that the executors know that these plaintiffs had agreed to pay interest; it is not shewn to have been communicated to them by the plaintiffs at the time of the compromise, or before that date. The allowance of interest on the legacy was a matter of little or no consequence to the executors; not so to the residuary legatees, as it diminished

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v.
Torrance.

Judgment.

1858. *pro tanto* the amount coming to them; and so in 1847, we find the acting executor declaring his readiness to pay the legacy with the interest claimed, provided the consent of these plaintiffs could be obtained, but it does not appear that it ever was obtained, or if it was, that the fact was communicated to the executors; so that supposing the consent given, a most important fact was withheld from their knowledge when the compromise took place, important that is, if the words of the agreement could be held to cover the payment of the interest; and in my judgment the withholding of that fact would be a *suppressio veri* which would, were there no other objection, disentitle the plaintiffs to the relief they seek.

I say this because I see no reason to think that the executors had any knowledge of any such consent or promise, or any reason to believe that such existed. It is true they had received the declaration which, as is stated, alleges it, but then it alleged also, and more strongly and circumstantially, promises and inducements held out by the executors, which were not sustained in evidence, and which, we may presume, were known by the executors not to be sustainable.

Judgment.

I think lastly, that the fact of the alleged promise by these plaintiffs is not proved, so as to affect the executors. After the compromise, it is said for them, that they did not feel any interest in defending the suit, yet all the evidence of the fact of the alleged promise consists in an implied admission from their silence in that suit, and even in their bill in this court they do not allege the fact of such promise, and in the answer, the fact of the making of such promise having been communicated, is expressly denied. In few words, there was no liability unless they promised, and their promise is only proved by their own admission made at a time when they had no interest in denying it.

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Two other points struck me in considering this case ; one, whether the defendants other than *John Torrance*, are interested in this suit : the undertaking to settle the legacy and indemnify from it, was by him alone ; all the executors are parties to other terms of the compromise It is ratified and confirmed by all, as it would necessarily be, but I do not see that the other executors incurred any joint liability with *John Torrance*, in regard to the legacy and annuity.

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Torrance.

The other point is, whether the plaintiffs have not a full remedy at law. It is purely a money demand, unless the plaintiffs are entitled to an instrument of indemnity to be executed by the executors, or by *John Torrance* alone. I do not see any thing in the agreement from which it would appear that any further instrument was to be executed for the indemnity of the plaintiffs. I think the bill should be dismissed with costs.

Judgment.

THE CITY OF TORONTO V. THE MUNICIPAL COUNCIL OF
THE COUNTIES OF YORK AND PEEL.

Dedication—Injunction.

The District Council of the Home District had a right, under the terms of the grant of the gaol and court house block and the provisions of the several statutes authorising them to sell the same, to set apart a portion of the land for the use of a fireman's hall and engine-house ; and having had the court-house square surveyed off into building lots and a portion thereof reserved for the site of an engine-house for the City of Toronto, upon which the city authorities erected a firemen's hall and engine-house : the county council some years afterwards proceeded to obtain possession thereof by action. The court restrained the action, and declared the land in question dedicated to the use for which it had been so set apart.

This was a suit brought by the corporation of the City of Toronto against the Municipality of the United Counties of York and Peel, the bill in which prayed that under the circumstances therein mentioned, and which are clearly set forth in the judgment of the court, that it might be declared that the property in question had been dedicated to the use of the plaintiffs, and that

1858. the defendants might be perpetually enjoined from proceeding against the plaintiffs to turn them out of possession.

City of Toronto
v.
Coates & P.

Mr. A. Wilson, Q. C., and Mr. Crickmore, for plaintiffs.

Mr. Strong for defendants.

The judgment was delivered by

THE CHANCELLOR.—This is a bill to restrain an action of ejectment brought by the defendants to recover a small parcel of land in the centre of what was formerly known as the gaol and court-house block, upon which piece of land a fireman's hall was erected some years since by the City of Toronto.

Judgment. The plaintiffs contend that the land in question was dedicated to this particular use not only by the magistrates of the Home District, but also by the district council in whom the property became subsequently vested, and cannot now be reclaimed. And, further, that the district council of the then Home District having acquiesced, or rather encouraged the expenditure of a large sum of money by the plaintiffs in the erection of a fireman's hall on the land in question, are thereby estopped from setting up an adverse title, and ought to be restrained from prosecuting the present action of ejectment.

The defendants on the other hand contend that neither the magistrates in quarter sessions, nor the district council of the then Home District, had any power to authorize a conveyance of this land to the city of Toronto for the purpose to which it has been applied; inasmuch as it had been granted to trustees for the purpose of a gaol and court house for the Home District to be erected thereon. And they argue that no intention to dedicate, and no

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acquiescence on the part of the magistrates, or the district council of the then Home District, however clearly established, can have the effect of legalizing that, which, if done directly, would have been a clear breach of trust, and, therefore, illegal and void.

1858.

City of Toronto
vs.
Col. Lee & Co.

The language of the grant is certainly somewhat ambiguous. It is declared that the land is held "in trust for the purpose of a gaol and court-house for the Home District, to be erected on the said parcel or tract of land under the direction of our justices of the peace in and for the said district for the time being, or the majority of them in quarter sessions assembled, and subject to such orders and appropriations as our justices so assembled shall from time to time make of or in respect to the same for the purpose aforesaid." Now had there been nothing further it would have been clear, I presume, that no part of the land in question could have been legally diverted from the purpose for which it had been granted; namely, the purpose of erecting thereon a gaol and court house for the Home District. But the instrument proceeds thus, "And upon the further trust, to convey the said parcel or tract of land or any part thereof with the appurtenances to such person or persons, by such deed or deeds, and to and upon such trusts and uses as our justices of the peace in and for the Home District for the time being, or the majority of them in general quarter sessions, shall by order in writing at any time hereafter direct and appoint." Now looking at this latter clause it is difficult to hold that the intention was to set apart the entire tract as the site of a gaol and court house, because the ample powers thereby conferred upon the magistrates would, upon that construction, be wholly useless. On the other hand, it is equally difficult to hold that the object was to invest the magistrates with an unlimited discretion, because upon that construction the clauses to which I have referred would be entirely repugnant. Looking at the grant alone, I would have thought that the intention

Judgment.

1858. had been to empower the magistrates to sell, for the purpose of the trust, such portions of the land as should not be required for the proposed buildings. But, advertng to the statutes subsequently passed (a), I am disposed to think that such a mode of defraying the expense of building was not then in contemplation; and upon the whole I incline to the opinion that it was the intention of the crown to invest the magistrates with an absolute discretion in relation to such portion of the land as should not be required for the convenient accommodation of the gaol and court house.

City Toronto
v.
Co'ties Y.&P.

Judgment.

A gaol and court house for the Home District were erected on the premises in question in the year 1824, or thereabouts, and the cost was defrayed, I presume from the general funds of the district: (b) but it is quite clear that the whole grant was not required; much of it remained unoccupied until subsequently sold; and at an early period the magistrates of the Home District erected a fireman's hall upon that portion of it bounded by Church Street. This building, upon the incorporation of the City of Toronto, in the year 1834, came into the possession of the city authorities, who continued to occupy it until the year 1842, and expended during that period a considerable sum, the precise amount is not shewn, in the erection of a belfry and other improvements: and it is argued that the plaintiffs acquired an equitable title to that portion of the property, in virtue of the occupation and expenditure to which I have adverted. I cannot accede to that argument. The building in question was erected by the magistrates of the Home District out of district funds; and assuming such an appropriation of this portion of the gaol and court house block to have been legitimate, the application of district funds to the purpose was I apprehend, both legal and proper. (c) But the district authorities,

(a) 4 Geo. IV., ch. 24, sec. 3 & 4. 4 Geo. IV., ch. 33. 6 Geo. IV., c. 4.

(b) 4 Geo. IV., ch. 24. 9 Geo. IV., ch. 4.

(c) 32 Geo. III., ch. 5. 57 Geo. III., ch. 2, sec. 2.

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were not thereby bound to apply the property in question to that use for one moment longer than such application of it might be convenient. Its destination might have been altered, I apprehend, at any moment. And if that be so, I know of no principle upon which the occupation and expenditure referred to, could be held to confer upon the plaintiffs any title legal or equitable.

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City Toronto
v.
Co'tice Y. & P.

In the year 1836, the magistrates of the Home District, considering the gaol erected in 1824 to be insecure, and the situation in other respects unsuited to the purpose, came to the conclusion that it was expedient to sell the whole block, except such portion as might be required for a court house, and to erect a new gaol in a better situation. In accordance with this resolution, Mr. Young, the district surveyor, prepared a plan by which the whole property, including the portion then used as an engine house, was divided into building lots, except a small plot in the centre, 97 feet by 90 feet, being the property now in dispute, which was described in the plan as reserved for an engine house. This plan was approved by the magistrates in quarter sessions, on the 6th of January, 1837, and has been acted upon by those successively entitled to the property. It remained in the office of the Clerk of the Peace until 1842, when the District Council of the Home District was constituted, by whom it was preserved as an authoritative document until 1849, all leases and sales having been effected in accordance therewith. Judgment.

In the mean time an application was made to parliament for authority to carry out the proposed plan, and in accordance with their petition, an act was passed on the 11th of March, 1837, by which the magistrates of the Home District were authorised to erect a new gaol on any site within the city of Toronto which should be approved by them, or a majority of them, in quarter sessions assembled. Under the authority of this act the magistrates proceeded to sell the old gaol and court

1858. house block in building lots, according to the plan previously adopted, for the purpose of raising a fund to defray the expenses of the new building; but the legality of such sales being questioned, as it would seem, a further statute was passed, on the 11th of May, 1839, by which all previous sales were confirmed, and provision was made for the application of such parts of the land as remained unsold or undisposed of.

City Toronto
v.
O'Brien Y. & P.

The building lots which front on Church Street, including the old engine-house, were sold to Dr. *Widner* in the year 1842, and as he desired to remove that structure for the purpose of erecting new buildings, the city of Toronto applied to the district council to have the "reserve" staked out so that they might proceed to build a new engine house. In consequence of that application, Mr. *Lynn*, the then District Surveyor, did, by direction of the warden, survey and mark out the plot described upon the map as the reserve for an engine house, and then, shortly after, the plaintiffs were let into possession. That is the property now in dispute. The engine house which now stands upon it was commenced in 1844, with the full knowledge and approval of the District Surveyor, and was carried on to completion under the eye of the warden, indeed of every person connected with the council. It was finished in 1845, at considerable cost, and the city of Toronto have continued ever since in undisturbed possession.

Judgment.

Now that there was a dedication in fact cannot, I think, be doubted. It is quite clear that this property was set apart for the purpose to which it has been since applied by the magistrates of the Home District; in furtherance of that purpose a large sum was expended with the knowledge and approval of the District Council; and the right of the city of Toronto to use it for that purpose was never questioned either by the district council or by the present defendants until shortly before the filing of the present bill. The justice of the case now

presented and assumed ready suggestion, law, is, I think, the condition being with the trust, thusly entitled, have adverse

But, assuming to be, it may be, frequent statute, ised the order. The legislation occurred, nor purpose. It seem, to plan disposal of, elared by the did not mean District, and construction of special trusts and the trust general power under the gift of the subject a clear right

Looking subsequent seem to have been already of the residence new gaol and comprehensive having affirmed trusts as to to affirm not

presented by the plaintiffs, is, therefore, perfectly plain; and assuming the construction of the letters patent already suggested to be correct, its sufficiency in point of law, is, I think, equally apparent, because the appropriation being upon that construction, legal and consistent with the trusts of the grant, the plaintiffs would be obviously entitled to relief on both the grounds to which I have adverted.

1858.

City Toronto
Y.
Co'tees Y.&P.

But, assuming that point to be doubtful, as I admit it to be, it may be useful to consider the effect of the subsequent statutes. The 7th Wm. IV., ch. 40, simply authorised the erection of a new gaol in a different locality. The legislature did not provide for the expense to be incurred, nor did they appropriate the old site to any new purpose. Now, the effect of that was, as it would seem, to place the old gaol and court house block at the disposal of the magistrates discharged of the trusts declared by the letters patent. The legislature certainly did not mean that there should be two gaols for the Home District, and therefore, whatever may be the proper construction of the letters patent, there was an end of the special trust thereby declared, as to the gaol at least, and the trustees held it, consequently, subject to the general power of disposition vested in the magistrates under the grant. If that be a correct view of the effect of the statute, the plaintiffs have, as it seems to me, a clear right to relief.

Judgment.

Looking at the preamble alone the object of the subsequent statute, the 2nd Vic. ch. 44, I mean, would seem to have been the affirmation of such sales as had been already made, and the appropriation of the proceeds of the residue of the block to defray the expense of the new gaol and court house. But the enactment is more comprehensive. In the first section the legislature, having affirmed the previous sales, go on to declare new trusts as to the residue. Now, had the intention been to affirm nothing beyond the sales, the new trusts would

1858. have been declared, of course, as to the residue remaining unsold. But that is not so. There is a material change in the language employed. The trustees are to hold not such portions of the land as remain unsold, but such portions as remain unsold *or undisposed of*, upon the new trusts; and the same form of expression is used in the subsequent clause of the same section. Now, it is not alleged that any part of the land had been disposed of otherwise than by sale, except the portion now in question, and it may be fairly implied, I think, that the intention of the legislature was to confirm all that had been done by the magistrates in relation to the land, including the appropriation of the portion for the purpose of an engine house.

City Toronto
v.
Co'ties Y. & P.

But however that may be, I am of opinion that the last clause of the first section had the effect for which the plaintiffs contend. It is not alleged that any part of the gaol and court house debt remains unpaid. Now, it is provided by the last clause of the first section that the trustees are to "dispose of the said land, or such part thereof as shall remain unsold or undisposed of, in such manner and for such public use of the said district as the magistrates of the said district, in quarter sessions assembled, shall from time to time appoint." Now, looking at the circumstances of this case to which I have already referred, recollecting, too, that up to the year 1837, the city of Toronto formed for fiscal purposes, an integral part of the Home District (a), and adverting to the fact that the defendants are, and always have been, the owners of valuable property within the City of Toronto, and that they had therefore, and have, a material interest in the establishment of a commodious engine house in a convenient situation, I am of opinion that the appropriation of this property for that purpose was a disposition of it for a public use of the district within the meaning of the act of parliament, and that there must be a decree for the plaintiffs with costs.

Judgment.

(a) See 7th Wm. IV., ch. 39, secs. 1, 3, 9.

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GILLESPIE V. VAN EGMONDT.

1858.

Judgment creditor—Setting aside deed—Administration.

The provisions of the statute 13 & 14 Victoria, chapter 63, apply only to judgment creditors whose judgments have been entered up since the 1st day of January, 1851; where therefore a creditor whose judgment was entered up in the year 1836, and registered in 1854, filed a bill in the year 1856 to set aside a deed executed by their debtor to his son in the year 1835, as having been done to defraud creditors, or as being voluntary, and therefore void as against purchasers for value, the court refused this relief, but gave the plaintiff liberty to amend by making the bill a bill in behalf of all creditors, and praying for an administration of the debtor's estate. A judgment creditor is not a purchaser for value within the statute 27 Elizabeth, Chapter 4.

This was a suit brought by *Robert Gillespie* and others, his co-partners in trade, against the *Canada Company* and *Constant Van Egmond*, setting forth at length the facts stated in the judgment, and thereupon praying that the deed to *Van Egmond* from his father might be set aside; the property comprised therein or a sufficient part thereof sold, and the proceeds applied to the satisfaction of the claim of the plaintiffs under the judgment recovered by them against the father.

Mr. *Brough* for the plaintiffs.

Mr. *Fitzgerald* for the defendant, *Van Egmond*.

The judgment was delivered by

THE CHANCELLOR.—The frame of this suit is peculiar. The bill is filed against *Constant Van Egmond*, the Judgment. eldest son and heir at law of one *Anthony Van Egmond*, who died in the year 1837, and against the *Canada Company*. The plaintiffs allege that they recovered judgment against *Anthony Van Egmond* in May, 1836, and that their judgment was duly registered in the registry office for the County of Huron in the year 1837: that *Anthony Van Egmond* mortgaged the premises in question to the *Canada Company* in the month of January, 1836: that the *Canada Company* filed their bill on foot of the said mortgage, against

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the defendant, *Constant Van Egmond*, as the owner of the equity of redemption, who had not made any defence, and that the Master had reported a sum of 1,366*l.* to be due to the company, and had directed the same to be paid on the 9th of October, 1852; that the defendant claims to be entitled to the equity of redemption under a deed executed by his father in the year 1835, but that the deed under which he so claims was made for the purpose of defrauding the creditors of *Anthony*, and was therefore void, or that it was at all events voluntary and so void against the plaintiffs, who were purchasers for value to the extent of their judgment. And the plaintiffs pray to be let in to redeem the *Canada Company*, or that a sufficient portion of the land may be sold to pay their debt.

Judgment. It is stated by way of supplement, that since the filing of the original bill in this case a portion of the land had been sold in the suit instituted by the *Canada Company*, and that their debt had been thereby discharged. As a redemption suit, therefore, the case necessarily fails, and the bill has been, I believe, dismissed as against the *Canada Company*.

As it now stands, therefore, this is a bill to set aside the conveyance from *Anthony Van Egmond* to the defendant, and for a sale of the lands comprised in that deed to meet the plaintiffs' debt; and it is obvious from the form of the bill, that the plaintiffs claim that right in virtue of their position as registered judgment creditors, under the provisions of the 13th and 14th Vic., ch. 63, sec. 2. But it is quite clear that the bill cannot be sustained on that ground, inasmuch as the statute in question only applies to judgments entered up after the first day of January, 1851, and has no effect, therefore, upon the judgment in the present case, which was entered up in May, 1836.

The defendant then contends that the plaintiffs having

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failed to sustain their case upon the only ground on which it was originally rested, have no *locus standi* in this court, because, the judgment on which they rely not having been revived against the defendant does not constitute a debt; and the debt not being proved, it is argued that the bill should be dismissed. No case was cited upon the point, and so far as my recollection serves me, the practice is not so well settled as might have been expected. The question was a good deal discussed in *Burroughs v. Elton* (a) and from the enquiries made by Lord *Eldon* in that case, it seems clear that a judgment creditor coming in under the decree in a suit of this kind, is not bound to revive, although incapacitated from taking any step at law until revivor, he is not required, as it would seem, according to the practice of this court, to take that course, but upon production of an office copy of the judgment with the usual affidavit, the debt is allowed. His lordship doubted, however, whether the plaintiff in such a suit was in the same position as an ordinary creditor, and he directed the point to be argued. Mr. *Bell*, who understood the practice of the court thoroughly, insisted that there was no record of any case in which a judgment creditor coming into equity for administration had been required to revive; an observation in which Lord *Eldon* seems to have acquiesced. And that seems to me, I must confess, correct in principle. It has been said that a *scire facias* is in the nature of a bill in chancery; (b) and it may be added, I think, that a bill of this sort is in the nature of a *scire facias*: such defences as would have been open upon the *scire facias* being equally open, I apprehend, upon the bill.

But the point does not arise in the present case, because the defendant has admitted, I find, that "the plaintiffs' judgment is still unsatisfied and undischarged;" and having admitted that fact it is difficult to understand the

(a) 11 Ves. 29.

(b) Latch, 112.

1858.
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Judgment.

1858. principle upon which the sufficiency of the plaintiffs' proof is now questioned.

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Van Egmond

It is argued in the next place that the bill should have been by the plaintiffs on behalf of themselves and all other specialty creditors of *Anthony Van Egmond*, for an administration of his estate, and that after so much delay, the plaintiffs ought not to be permitted to amend. No doubt the bill should have been framed in the way suggested. Formerly the practice was otherwise, (a) but it is now clear, I apprehend, that when there are real assots which the plaintiff seeks to charge generally as creditor, the bill must be filed on behalf of himself and all other specialty creditors (b). But I cannot agree that the present bill should be dismissed on that account. The delay has been, certainly, great, and had the case been in other respects unfavorable, the strict course which I am asked to pursue might have been adopted. *Neate v. The Duke of Marlborough* (c), *Marten v. Whicelo*, (d) furnish clear authority for that. But here I see no reason to doubt the perfect fairness of the plaintiffs' case, and under such circumstances it has not been usual to refuse leave to amend as prayed. In *Gregson v. Booth* (e) the suit was not instituted until fourteen years after the testator's death, and yet the bill was retained with liberty to the plaintiff to bring an action: and in *Blair v. Ormond*, (f) the plaintiff was allowed to amend the bill in this way, and to bring an action at law to establish his debt, although the bill had not been filed for nearly twenty years after the death of the intestate.

The remaining question is as to the deed of June, 1835. That deed is impeached on two grounds. The plaintiffs say, first, that it was made to defraud the creditors of *Anthony Van Egmond*, and is, therefore, void; or,

(a) *Stileman v. Ashdown*, 2 Alk., 477.

(b) *White v. Hillacre*, 3 Y. & C. 605--10, note. *Johnson v. Compton*, 4 Sim. 37.

(c) 3 M. & C. 407. (d) C. & P. 257. (e) 5 Ha. 536. (f) 1 DeG. & S. 428.

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(b) French v.

secondly, that it was at all events voluntary, and therefore void as against the plaintiffs, who insist that they are, to the extent of their judgment, purchasers for value within the statute (a).

1858.

Gillespie
v.
Van Egmond.

Upon the first point their evidence fails altogether to sustain the case made by the bill. At most it cannot be said to do more than raise a doubt. Had the transaction been recent, the evidence must have gone much further; but a decree setting aside this deed, on the ground of fraud, after an unexplained delay of two and twenty years, upon such evidence as has been laid before me, would be, I apprehend, without precedent.

And in truth this point was not discussed upon the argument. The contention then was that the deed in question was void under the 13th Eliz., ch. 5, as having been made with intent to delay creditors. Now that case is not made by the bill, and therefore was not open to the plaintiffs. But, had it been stated, the evidence is quite insufficient to support it. There is really nothing to show that the deed in question was not a sale for valuable consideration; and though that were otherwise, the evidence is altogether too weak to warrant me in holding that this deed is void against creditors under the statute of Elizabeth after a lapse of more than twenty years. Mr. *Macdonald*, the only important witness, admits that his only information was derived from public rumor. It is quite clear that the deed in question did not comprise the whole real estate of *Anthony Van Egmond*, for a large tract of land, which had belonged to him, was sold after his death in 1841; and assuming that to have been a merely voluntary conveyance, of which there is no proof, there is no evidence to shew that his circumstances at that time were such as to make such a settlement invalid under the statute, (b)—indeed there is no legal proof of the existence of any debt whatever.

Judgment.

(a) 27 Eliz., ch 4.

(b) *French v. French*, 2 Jur. N. S. 169. *Goodwin v. Williams*, Ante vol. v., p. 339.

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 v.
 Van Egmond

With respect to the last point, it is quite clear, I apprehend, that a judgment creditor is not a purchaser within the meaning of the 27th Eliz. In *Stone v. VanHeythusen* (a), indeed, the proposition for which the plaintiffs contend was asserted by a judge of great eminence, upon deliberation. But *Beavan v. Lord Oxford* (b) is a decision of the Court of Appeal upon the precise point, which shews that the dictum of Vice-Chancellor *Wood* cannot be sustained.

The result is, that the bill, so far as it seeks to set aside the deed of June, 1835, must be dismissed. But if the plaintiffs desire to amend by making this a bill on behalf of themselves and all other specialty creditors, they are at liberty to do so; and in that event the usual decree for the administration of the estate of *Anthony Van Egmond* may be drawn up.

Judgment.

MUNICIPALITY OF SAUGEEN V. THE CHURCH SOCIETY.

Crown patent, repeal of—Parties.

In laying off the town plot of Southampton, a reservation was made by the person employed to survey the land of a block for a market square, and marked the same upon the plan returned by him to the office of the Commissioner of Crown Lands, a copy of which was furnished to the local agent at Southampton by which he was to sell, and several sales were accordingly effected him; some of these lots fronting on the market square so reserved. On the plans finally adopted by the crown lands office, this market reservation was marked "Reserve" simply. Subsequently the executive government, under the impression that the block so reserved was at their disposal, granted part of the same to the Church Society for the site of a church. *Held*, on a bill filed to set aside the patent on the ground of error, mistake, or inadvertence on the part of the crown in issuing the same, that under the circumstances it must be presumed that had the crown lands department been aware of what had been done in reference to this reservation, the grant to the Church Society would never have been made, and that therefore upon a bill properly framed, the letters patent should be repealed; but that for that purpose the suit ought to have been instituted by the Attorney-General on behalf of the public.

The bill in this cause was filed by the Municipality of

(a) 11 Hare, 344.

(b) 2 Jur. N. S. 121.

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the township of *Saugeen*, against the Church Society of the Diocese of Toronto, setting forth that, in 1851, a portion of the town of Southampton, in that township was laid off into lots by the Commissioner of Crown Lands, and a map or plan thereof was furnished to *Alexander McNab*, the government agent, for the sale of these lands, upon which map was exhibited a reserve, containing about seven acres, and marked as "Reserve for Market." That the map was by the Commissioner of Crown Lands, and by the draughtsmen in that department, certified to be a true copy of the plan approved by the Governor in council, and deposited in the office of the Commissioner of Crown Lands, and was, by the agent at Southampton, exhibited in his office for the inspection of intending purchasers of crown lands in that town, in which numerous lots were offered for sale, and sold by the said agent in August of that year. That purchases were effected of lots around the said reserve, and also of other lots, by parties in the full expectation that the square so reserved would be employed as a market square, as marked on the map, but that through error, and on account of the officers of the government being in ignorance of the circumstances so set forth, a patent was in August, 1856, issued to the defendants for two acres, part of the said reserve, conveying the same to the defendants for the purpose of erecting a church thereon.

1853.

Saugeen
v.
Church So'y

Statement.

The bill alleged that the plaintiffs and the several purchasers of lots were aggrieved, and their equitable rights infringed by reason of the said patent having been so issued to the defendants, and that they would sustain great loss and injury unless the defendants were restrained from using any part of the reserve otherwise than as a market, and prayed an injunction for that purpose, and a delivery up of the patent to be cancelled.

The defendants answered the bill, objecting that the plaintiffs had not such an interest in the land as entitled them to maintain the suit; set up that the map furnished

1858. to *McNab*, the agent, was so furnished for his private guidance only, and set forth the manner in which the grant had been made of the two acres, the circumstances attending which, and the evidence in the cause are distinctly stated in the judgment.

Saugen
v.
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Mr. *Mowat*, Q. C., and Mr. *Roaf* for the plaintiffs..

Mr. *Brough* for defendants.

ESTEN, V. C.—It is clear that plan A. was furnished to *McNab*, as crown land agent, for the purpose of being exhibited to purchasers, and making sales: that it was so exhibited, and that numerous sales were made according to it. This plan shows the space reserved for a market-place, with an inscription to that effect, besides of course numerous streets and other public reservations. Map C., which comprised the whole town-plot, and which varied the inscription on the space of ground to "Public Reserve," was furnished a year afterwards. Both were subsequently used. The delivery of map A. to Mr. *McNab* must have been known to the parties immediately concerned; but not to many persons, it would seem. The original map from which was copied, was not used, and had been deposited among waste papers; and the existence of map A. and the fact of sales having been made according to it, was not as a matter of fact remembered when the letters patent in question were issued. Another map, designated as map H., had been finally adopted, and of this map C. was a copy. It appears to me, upon consulting the authorities, especially the American cases, that there was a dedication in this case, supposing the crown to be governed by the same rules as the subject, which it seems must necessarily be the case, where the dedication, as here, is express; although it may be different where the dedication is implied from long user, and the maxim of *nullum tempus occurrit regi* may apply in some degree to such a case, and greatly qualify the effect of the

Judgment.

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public user. The patent, however, has passed the fee simple subject to the easement, and no objection can be made to such a grant. It is true it was for the purpose of enabling the Church Society to erect a church, but this court cannot annul the grant on that ground, although it may restrain the erection of the church. I conclude that the erection of the church would be a nuisance, if there has, as I think there has, been a sufficient dedication, and that so soon as any steps are taken towards the erection of the church, it would be the duty of the court to interfere by injunction to prevent it. I am prepared to grant this relief, as I apprehend it sufficiently appears from the petition that the object of the grant was to enable the petitioners to build a church: or I am prepared to revoke the patent on the ground of mistake, as the public are aggrieved by it, although it cannot affect their legal rights. I have thought it right to make these remarks, although I think we cannot give any relief upon this bill. The party to complain is, I think the Attorney-General, as representing the public, and not these plaintiffs. This is not like the case of the municipality of *Guelph* against the *Canada Company* (a). There the public easement was vested in the corporation, which is not the case here, and when the public is aggrieved they must complain through the Attorney-General. I may observe that I do not think the act of parliament that was referred to deprives the crown of the power of dedication (b).

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v.
Church So'y

Judgment.

SPRAGGE, V. C.—The question presented in this suit for the decision of the court is a very important one, but is one, unattended, I think, with any great difficulty.

I think it convenient to consider the case first as if the map placed in the hands of the local agent, Mr. *McNab*, in July, 1852, were clearly the final governing map of the village of Southampton, and not merely what

(a) Ante vol. v., p. 533.

(b) 4 & 5 Vic., ch. 100.

1858. it is represented to be, a projected plan of an intended village; and then to consider what difference, if any, the circumstance of its not being the final governing plan, should make in the case.

Saugen
v.
Church Socy

The first point then is, whether there being a local crown land agent with a proper map placed in his hands for the sale of the town lots, and having sold town lots by that map, the map shewing all that is shown by the map marked A., and there being among the lots sold some facing upon a block of ground marked on the map with the words "Reserve for Market," others in its vicinity, and others more or less distant, the crown, if aware of the existence of such a map, and of sales under it, would have granted the land in question to the Church Society.

In forming our judgment upon this point, we naturally look at what has been the practice of the crown in similar and analogous cases, and at what the court holds to be equitable in dealing with the like transactions, where the crown is not concerned; because it would be dishonouring the crown to suppose that it would not govern itself by the same principles of equity and good conscience with its courts administrator between subject and subject.

First, then, as to what we find to be the practice of the crown. Upon this point, we have the evidence of those best acquainted with the fact, officers of the crown lands department of great experience; and first, of Mr. Russell, for many years senior surveyor and draughtsman, who says: "If the government had furnished a map to an agent to be exhibited to purchasers, and sales had been made under it, I don't suppose that the government would consider itself at liberty to make any alteration;" also the evidence of Mr. Spragge, the oldest officer in the department, after expressing his opinion that the government has the power to vary specific appropriations, he says: "but it having been appropri-

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ated, the government would be exceedingly reluctant to vary the appropriation." The evidence of Mr. *Tarbutt*, whose duty it has been to superintend the sale of lands, is to the same effect. He thinks the government has the power, but recollects no instance in which it has been done; he thinks in one instance reserved land was afterwards sold, but whether the ground was marked as reserved for a market on the plan, he does not know.

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v.
Church & Co.

What occurred upon the application for a church site confirms the testimony to which I have referred. The incumbent and churchwardens did not apply for the piece of land granted to them, but for another piece; upon this point Mr. *Spragge* says: "the piece of ground they desired they could not obtain,"—the reason is most important—"because it had been appropriated as a public square, and so marked on map H.: the piece of ground in question in this cause was suggested by the department as suitable for the purpose, because it was marked on the map only as a 'public reserve,' as applicable to such purposes as the government might sanction." And this is borne out by the report of the Commissioner of Crown Lands to the executive council, made upon the petition for a site for a church.

Judgment.

The conclusion appears to me irresistible, that if map H., the map referred to in the department as the governing map of the town plot, had shewn the block in question as a reserve for a market as it is shewn on map A., no part of it would have been recommended as a site for a church; for the same reasons would operate with at least equal force which induced a refusal to interfere with the block reserved as a public square.

So far then as appears by the evidence, it has been the invariable practice to respect appropriations of blocks of land appearing upon authentic maps, as intended for particular purposes, where sales have been made under

1858.
 Sargeant
 Church So'y

them: the crown lands department appears very properly to have regarded such blocks as dedicated to the particular purposes for which they were designated upon the map. I say the invariable practice, because the instance spoken of by Mr. *Tarbutt* does not appear to be an exception, and this practice has prevailed notwithstanding the opinion (well or ill founded) of officers of the department of the right of the government to alter such appropriations: assuming them to have had the right, they must have abstained from the exercise of it, because its exercise might interfere with the just expectations of those who had made purchases probably upon the faith of things remaining as they appeared upon the map.

I proceed to consider whether the circumstance of map A. not corresponding with the governing map, map H., ought to make any difference in our judgment. In connexion with this point I find these facts:

1st. That upon a local agent being instructed to sell lands, he was furnished with a map: Mr. *Russell*, a very good authority upon the point, says that he recollects no instance to the contrary. It is obvious, indeed, that he could not sell without a map, for the purchaser could not, without it, ascertain the position of the land; and besides, the statute then in force in relation to the disposal of public lands, 4 & 5 Vic., ch. 100, directed the local agent to "make the sales appear in his plans or maps in his office."

2nd. That in the words of Mr. *Russell* "it is the invariable rule and practice of the department not to furnish any plan until a final plan has been made and adopted by the government;" he adds that it has been the constant practice, and that map A. is the only instance, that he knows, of a deviation from it.

3rd. That map A. is, upon the face of it, a duly authenticated map regularly issued from the department

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to the local agent for the sale of lands. This is apparent upon an inspection of the map. It is certified by the surveyor and draughtsmen by whom it was copied, and is officially signed by the then Commissioner of Crown Lands, Mr. *Price*. In fact it is authenticated in precisely the same way as map C., which is undoubtedly an authentic and regular map. Further, Mr. *Russell* says of it: "there is nothing on the face of it to shew any irregularity in it to the public."

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v.
Church Soty

4th. That in fact map A. was placed in the hands of the local agent, Mr. *McNab*, in order to his making sales in Southampton, and as a map of reference to intending purchasers. Mr. *Tarbutt* says: "I suppose the map marked A. was given to Mr. *McNab* for him to shew to purchasers, and to enable him to make sales." The official notice from the crown lands department, of lands being open for sale in Southampton, directs application to be made to the resident agent, *Alexander McNab*, Esq., and inasmuch as he could not sell without a map, that notice virtually declared that he had a map under the authority of the department which issued the notice. Mr. *McNab's* own evidence upon this point is explicit: "The map marked A. was furnished to me by the government, for the purpose of exhibiting to purchasers of lots in the town plot of Southampton: the map was given to me as an official map." Judgment.

The conclusion that I draw from the above facts is, that purchasers were fully justified in believing map A. to be a copy of "a final plan made and adopted by the government," so far at least as the part of the town-plot exhibited upon it was concerned. It was put forth as such by the department to which, under the crown, appertained the duty of disposing of crown lands; and the most prudent and cautious person would hardly have questioned whether this official document was what it purported to be: whether it might not possibly be an exception to what had heretofore been the invariable

1858. practice of the department. The conclusion is, that purchasers bought upon the faith of its being a true copy of the map, or plan of Southampton, adopted by the government.

Saugen
v.
Church So'ly

In the following year, 1852, in the month of May, probably, the map marked C. was transmitted to Mr. *McNab*; upon that map the block in question was marked with the word "Reserve." After its receipt map A. and map C. appear to have been used indifferently by Mr. *McNab*, both maps being exhibited for the inspection of purchasers, so that upon one of the maps used the words "Reserve for market" appeared, upon the other, only the word "Reserve." Mr. *McNab*, says that he did not inform parties for whom he had taken up lots, as valuable because near the market square, of the difference. That he did not consider that there was any change in fact, or that it altered the appropriation. Mr. *Tarbutt* says, "If I had been furnished as an agent with plan A. and afterwards with map C. I don't know that I should have thought it necessary to notice the difference in omitting the word 'market' on map C., the space being still marked a 'Reserve.'"

Judgment.

It appears as a fact, by the evidence of Mr. *McNab*, and of purchasers of lots, that several lots, some facing upon, and some near the block in question, were purchased, because upon or near the market square: that map A. was the map referred to on the occasion of such purchases, and that the purchasers noted the words "Reserve for market" upon the block in question. It is said that in most instances the purchase money was not paid punctually: I do not think that that affects the question which we have to decide.

It appears further, that the crown lands department were unaware of the existence of map A. until after the grant to the defendants was made: that the original of it was regarded in the department as a projected map;

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and was found, after correspondence in relation to this grant had commenced, upon a search made by Mr. *Russell* and Mr. *Spragge*, among other maps which had been laid aside as of little importance.

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Saugeen
v.
Church Soc'y

Now, it does appear to me, that a bare enumeration of the facts to which I have adverted in relation to map A. and its use, shew clearly that the circumstance of map A., not being a copy of a final governing map can make no difference. The crown refused to grant the two acres prayed for, because part of a block appearing on the map as reserved for a public square. If the map on which this reservation appeared had been simply a plan never used for any purposes of sale, the crown could scarcely have felt any difficulty in granting it; at any rate not the difficulty which induced them to refuse it. It was refused evidently, because it was supposed that the sales in Southampton had been in pursuance of map H., and that it would be violating the usage and practice of the department to vary the appropriation—the reason applies with full force to whatever appears upon map A. Judgment.

In fact it is consonant to reason that it is not the mere approval and adoption of a plan; but the acting upon one, and dealing with purchasers upon it; holding it out to them as the authentic adopted plan, and leading them to purchase upon the faith of its being so, that constitutes the real valid reason for holding it sacred from innovation.

I cannot doubt, but that Mr. *Russell* is right, when he expresses the opinion that if the government had furnished a map to an agent to be exhibited to purchasers, and sales had been made under it, the government would not consider itself at liberty to make any alteration.

If similar circumstances had occurred in relation to a

1858. town plot laid out by a corporation aggregate, it is clear, I think, that a court of equity would restrain the corporate body from changing the appropriation.

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v.
Church So'ty

In the Municipality of *Guelph v. The Canada Company*, my view was that the owners of the land on which Guelph was laid out not being a corporate body could only manifest their intention and speak their mind through their officers, and through official documents, of which maps were for such a purpose most material. I thought that *animus dedicandi* was manifested by the map under which the first sales were made; and that even if the officers of the company reserved an intention in their minds of retaining a controlling power over the land in question, it would make no difference, for I felt, and still feel satisfied, that no one can be heard to say that he retained in his own mind an intention at variance with that which his acts manifest to the world. The observations of Lord Denman, and of Justices Patterson and Littledale in *Barraclough v. Johnson (a)*, and of Lord Denman and Mr. Justice Patterson in the Queen against the inhabitants of *East Mark (b)*, are pertinent to this point.

Judgment.

The doctrine in relation to a principal dealing with third persons through an agent may serve to illustrate the point in question. The crown lands department may be regarded as the agent of the crown for the disposal of crown lands; and Mr. McNab as the sub-agent in a particular locality. The department having authority to lay out and sell the town-plot of Southampton according to either plan A. or plan H. transmits to its agent plan A. as the plan by which he is to sell, and which he is to shew to purchasers, and he does as he is instructed to do, and sells. It cannot, I apprehend, be doubted that a similar transaction between private individuals would fall within the familiar principle of a principal being bound by the authorised acts and representations of his

(a) 8 A. & E. 99.

(b) 11 Q. B. 877.

agent; and dealt with, first sent out afterwards sent; and the original

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agent; and that it would be no answer to the parties dealt with, seeking to bind the principal, that the plan first sent ought not to have been sent; that another was afterwards adopted varying in some points from the one sent; and that the agent had forgotten the existence of the original plan.

1858.

Saugen
v.
Church So'ty

I shall be understood, of course, as using the cases put by way of illustration only, and not as affirming that this case is to be decided on the ground of dedication, or that the law of principal and agent is applicable to it; but, as the courts deal with analogous cases, so it is fair to presume that the crown would govern itself in its dealings with the subject.

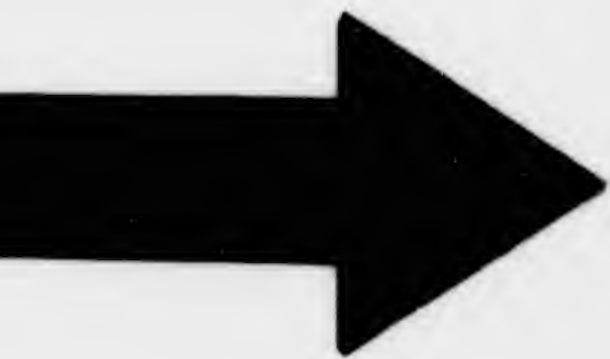
I think that if we find that the crown made this grant in ignorance of material facts which, if known, would, as far as we can judge, have influenced the crown to withhold the grant, we must adjudge it to have been made in error and mistake. I have, I confess, a very strong opinion, amounting almost to a moral conviction, that if all the facts which are disclosed in the evidence had been known in the proper quarters, I mean to the crown lands department, and to the Governor in council, the block marked in plan A. "Reserve for Market," would have been held as appropriated for market purposes, and not open to be granted for other purposes, as it was supposed to be from the entry on map II, upon which the Commissioner of Crown Lands reported.

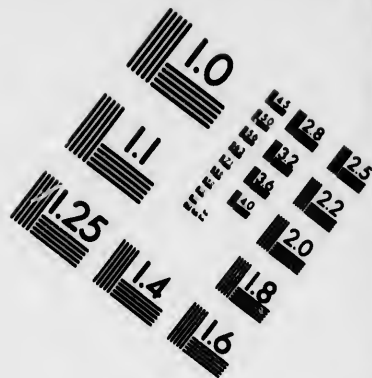
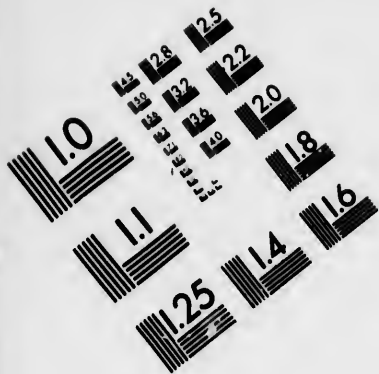
Judgment.

I think the facts are ample to warrant this opinion, and that the proper conclusion from them is, that the patent should be repealed.

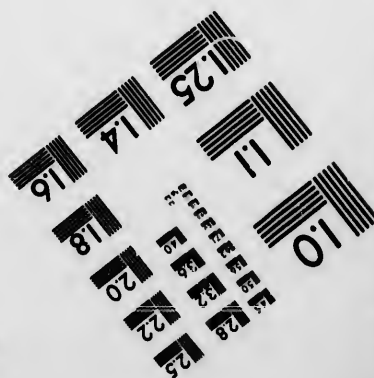
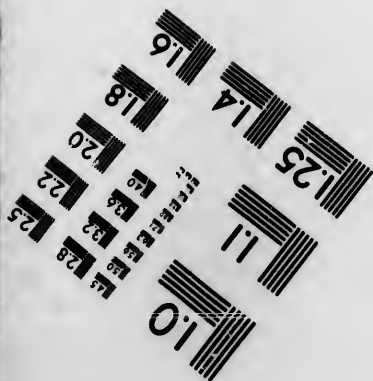
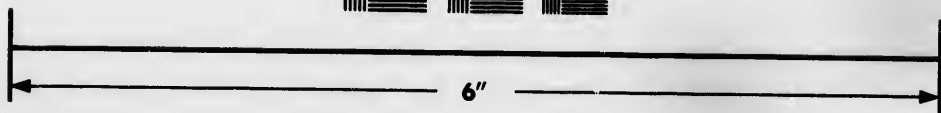
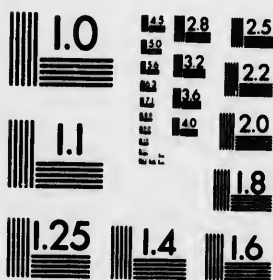
I have thought it right to give my opinion upon the merits of the case because they have been fully argued, although the objection was taken that the suit is not properly constituted. I agree with my brother *Esten* that the proper party to complain is the attorney-general.







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1858.
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The case of *The City of London v. Bolt*, which has been cited in the American courts as an authority for a municipality coming as plaintiffs in such cases appears to have been decided upon a different principle; Lord *Loughborough* putting his decision upon the ground of the parties being in the position of landlord and tenant, not that a municipal body can represent the public.

MOORE V. MERRITT.

Mortgage—Judgment—Damages—Practice.

The owner of property sold and took a mortgage to secure payment of the purchase money by instalments: default having been made in payment of the first instalment, an action was brought and judgment recovered upon the covenant, whereupon the purchaser filed a bill setting up that a tenant of the vendor had by virtue of a lease previously made by the vendor, carried away the crops from off the premises, and praying to redeem upon payment of the amount of the judgment, after deducting therefrom the value of the crops so taken away. The court, by consent of parties, directed a reference to the master to enquire as to the amount of damages sustained by reason of the removal of the crops, but refused to interfere with the judgment already recovered, the remaining instalments of purchase money being more than sufficient to cover any sum to which the purchaser could be entitled in respect of such damages.

March 10th.

Semble, that the relief given to a mortgagor by section 5 of the 32nd of the general orders of June, 1853, in a suit brought against him upon a mortgage, payable by instalments, would also be afforded him, or those claiming under him, upon a bill filed on their own behalf.

This was a suit for redemption, under the circumstances set forth in the judgment.

Mr. *Martin* for plaintiffs.

Mr. *A. Crooks* for defendant.

The judgment of the court was delivered by

THE CHANCELLOR.—This is a bill to redeem, and for other relief, under circumstances somewhat peculiar.

The plaintiffs purchased the premises in question from *Merritt*, in November, 1855, and took a conveyance

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from him, with absolute covenants for title. The purchase money was not payable at once, but by instalments, to secure which the plaintiffs executed a mortgage upon the same property in favor of *Merritt*. Previous to this transaction, namely in May, 1855, *Merritt* had leased the premises to one *Cook*, for two years, at a rent of 6l. 5s. per annum, payable in advance; but *Cook* had agreed to give up quiet possession in case *Merritt* should effect a sale during the term, and in that event a proportionate part of the rent was to be returned to *Cook*. The bill alleges that the lease was determined upon the sale to the plaintiffs, but that *Cook*, being in effect a tenant at will, under the agreement referred to, became entitled upon the determination of the lease to reap such crops as had been already sown, and that, in pursuance of such right, he did enter, in the autumn of 1856, and carried away ten acres of wheat which had been planted by him during the previous season, while his lease was still subsisting. In the mean time an instalment of the purchase money having become due, *Merritt* brought an action at law against the plaintiffs, and has recovered judgment therefor; and the plaintiffs pray that it may be referred to the master to take an account of the value of the wheat so removed by *Cook*, and that the amount thereof may be set off against the judgment so obtained by *Merritt*, and that, upon payment of the balance, they may be let in to redeem.

1858.
Moore
v.
Merritt.

Judgment.

Now as to *Cook*, the bill prays no relief whatever against him. Indeed, so far from stating a case against him, the bill alleges that his conduct was perfectly legal throughout. But had it been otherwise, it is perfectly clear that the value of this wheat could not have been recovered from *Cook* here. He was either entitled to enter and take the wheat, as the bill alleges, or he was not. If he had that right, and exercised it legally, the bill, of course, must fail. If not, then he was a trespasser, and the plaintiff's remedy is by action at law. In either event, therefore, the bill as against *Cook* must be dismissed with costs.

1858.

Moore
v.
Merritt.

Then as to *Merritt*, the bill prays that it may be referred to the Master, to take an account of the value of the crops taken by *Cook*, and that he may be let in to redeem on payment of the difference between that sum and the first instalment of the purchase money for which the plaintiffs have recovered judgment.

Now it is quite clear, I apprehend, that the plaintiffs could not have obtained this relief under the practice which prevailed previous to the new orders. The condition having been broken, *Merritt* acquired a right to foreclose, which could only have been resisted upon payment of the whole debt (*a*).

Judgment.

It is equally clear that this case does not come within the letter of the order (*b*), which only provides that a bill for foreclosure may be dismissed at the instance of any defendant, upon payment, not of the whole debt, which would have been necessary under the existing practice, but of the amount actually due, whether for principal or interest. But this case does seem to me, I must confess, to come within the spirit and compass of the order. If a bill of foreclosure may be dismissed at the instance of any defendant, on payment of the amount actually due; and if the effect of such dismissal would be, as I think it would, to place the parties in the same position as if no default had been committed, then it seems to me to follow that the mortgagor, or those claiming under him, should be entitled to the same relief, upon a bill filed on their own behalf for that purpose.

Thus far, therefore, my opinion is in favor of the plaintiffs, and assuming *Cook* to have had a right to the wheat in question, as emblements upon the determination of the lease created by *Merritt* prior to the sale to the plaintiffs, and assuming that to be a breach of *Merritt's* covenants, or of some of them, upon which points I

(*a*) *Sparks v. Redhead*, ante Vol. III. page 311.
(*b*) Order XXXII., Sec. 5 (of June, 1853.)

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purpose,ly refrain from expressing any opinion, then I agree that the plaintiffs have a right to be recouped out of the unpaid purchase money. But before any such right can be enforced, it is obvious that the damages which the plaintiffs have sustained must be ascertained, and that must be got at by an action at law upon the covenant. The enquiry for which the plaintiffs ask could not be granted properly, except by consent of both parties; and had the plaintiffs been in a position to bring an action at law, this bill would be, in my opinion, premature. But the plaintiffs allege truly that they are not in a position to bring such an action, in consequence of the outstanding mortgage; and, undertaking to bring such an action, they are consequently entitled to an order enjoining *Merritt* from setting up his mortgage (a).

1858.

Moore
v.
Merritt.

As to the judgment already recovered by *Merritt* for the first instalment of his purchase money, it is quite clear, I think, that we ought not to interfere with that. As yet the plaintiffs have neither established their right to recover, nor the amount of their damages; and it is quite clear that the unpaid purchase money, exclusive of the first instalment, is much more than sufficient to cover any sum to which they may be entitled. To restrain *Merritt* from enforcing his judgment, under such circumstances, would be palpably unjust. Further directions and costs must be reserved.

HATT V. PARK.

Practice—Foreclosure—Costs.

Where a person made a party to a suit in the master's office appears and disclaims he is not entitled to any costs, as by remaining inactive the same end will be attained as by his disclaiming.

In this suit a reference had been directed to the master to take an account of the amount due the plaintiff upon the mortgage security held by him; to make other

(a) *Therton v. Court*, 3 D. M. & G. 293.

1858. *Hatt v. Park.* incumbrances parties, settle their priorities, &c. In proceeding with this reference the master had directed parties who had registered judgments against the mortgagors to be made parties in his office, who, upon being served with warrants, had appeared before him and disclaimed any interest in the mortgage estate, and claimed to be allowed their costs, which he refused to give them, and now

Mr. *McDonald* for those parties, moved upon notice to refer back the master's report on the ground of such refusal to allow them their costs, citing *Gurney v. Jackson* (a).

Mr. *Morphy* contra, contended that no reason existed for giving a party under these circumstances his costs; under the rule of court, all that the creditor in such a case has to do is to remain silent, and the effect is the same as if he incurs the expense of appearing to disclaim; he referred to *Ford v. The Earl of Chesterfield* (b), *Cash v. Belcher* (c), 1 *Daniel's Chancery Practice*, 310.

Judgment.

THE CHANCELLOR.—This is a suit for foreclosure. Several persons made parties in the master's office, as registered judgment creditors, having appeared and filed disclaimers, insisted upon their right to costs, but the master disallowed them, and the present appeal is from that decision.

Gurney v. Jackson was cited by the learned counsel for the appellants, and that case must be admitted to support his view. But it proceeds upon principles long obsolete, and is quite contrary to the current of modern authority. *Ford v. The Earl of Chesterfield* (d), was re-argued upon this very point, before the present Master of the Rolls, who, upon an examination of all the cases, and amongst them *Gurney v. Jackson*, lays down the rule upon the sub-

(a) 1 S. & Giff. 97.

(b) 1 Hare 310.

(c) 16 Beav. 516.

(d) And see *Ford v. White* 16 Bev. 120.

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ject in this way, "The effect of all the late authorities is this: First. That in suits for foreclosure or redemption of mortgages, when a defendant disclaims, in such a manner as to show that he never had and never claimed an interest at or before the filing of the bill, then he is entitled to his costs. Secondly. If a defendant having an interest, shews that he disclaimed, or offered to disclaim before the institution of the suit, then, also, he is entitled to his costs. Thirdly. That when a defendant having an interest, allows himself to be made a party to the suit, and does not disclaim or offer to disclaim till he puts in his answer or disclaimer, in that case he is not entitled to his costs.

1858.

Hatt
v.
Park.

That case furnishes, I believe, a perfectly correct statement of the practice at that period in England; it certainly lays down the rule as it has been understood in this court for many years, and is conclusive against the appeal.

But, had the English rule been different, the defendants could not have had the costs in this court, because here judgment. inaction is equivalent to disclaimer. A defendant who does not appear in cases of this sort is thereby foreclosed. Now, that being the settled practice, it is clear, I think, that a defendant who adopts the useless and expensive course of filing a disclaimer must bear his own costs. The appeal must therefore be dismissed with costs.

THE MUNICIPALITY OF THE TOWNSHIP OF Ft. ERICKSBURGH
v. THE GRAND TRUNK RAILWAY CO.

Injunction—Railway Clauses Consolidation Act—Diversion of highway.

Semle. That under the provisions of the provincial statute 14 & 15 Victoria, chapter 51, a permanent diversion of a highway may be made upon the construction of a railway, where it is necessary or expedient.

Where the evidence, as to the injury done to a highway in the manner a railway was constructed, was conflicting, the court refused to interfere by injunction, leaving the two parties their legal remedy.

This was a bill by the municipality of the township of

1858. *Fredericksburgh* against the *Grand Trunk Railway of Canada*, stating that in the course of the railway through that township the defendants had carried it across several public highways, and diverted such highways from their proper course : and that though that portion of the railway was completed, the defendants had not replaced the highways, but that they had obstructed and continued to obstruct the original highways enumerated in the bill so as to render the same impassable : that the plaintiffs had applied to the defendants to replace the highways, and remove the obstructions existing thereon, which was refused ; and the prayer was that the defendants might be ordered to remove the obstructions and replace the highways ; and for an injunction restraining them from continuing the obstructions or keeping the roads diverted, and for other relief.

Judgment.

The defendants answered, alleging that as to the diversions complained of, the railway was carried over the highways, having been diverted for the purpose and replaced at the most convenient and practicable points for that purpose, setting forth with some minuteness the mode of so doing ; that the diversions had been effected in the way most advantageous for the public ; and if the prayer of the bill were granted, or the crossings made differently from their present position and construction, they would be unsafe and injurious to the public.

The defendants further asserted that the plaintiffs were aware of the works as they progressed, and had acquiesced in their having been carried out in the manner they had been, and insisted that by their laches the plaintiffs had disentitled themselves to relief.

The cause having been put at issue, evidence was taken before the court, Several witnesses, including the reeve of the township, were examined. They all expressed strong objections to the mode in which the highways had been diverted, and that in their opinion the railway could

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have been constructed without diverting the highways in the manner objected to, and with greater safety to the public travelling the same. On cross examination it appeared that the witnesses were farmers, and not in any way conversant with engineering. The witnesses called by the defendants were *Frederick J. Rowan*, civil engineer, the agent for the contractors for the construction of the railway; and two other persons named *Rowan*, also civil engineers: the effect of their evidence was to shew that owing to the position of the ground, at the points complained of, the railway had been constructed with a view to the public safety and convenience as much as reasonably practicable; and in some instances at considerably increased expenditure to the company: and that the alteration now of any of the bridges would necessitate the stoppage of the trains for several weeks.

1858.
Fred'kburg
 v.
G.T.R.W. Co.

Mr. *Roaf*, for the plaintiffs, contended that the manner in which the work had been constructed at the points complained of had created a nuisance of a nature that this court would restrain. As to the defence of consent, it is only alleged that the municipality have not objected; in fact they did object, and a resolution expressive of their views was passed by the council. Section 12 of the Railway Consolidation Act requires the company to replace the highway on completion of the works. He referred, amongst other cases, to *Oldaker v. Hunt* (a), *Attorney-General v. Luton* (b), *Manchester v. Worksop* (c), *Attorney-General v. Sheffield Gas Company* (d).

Mr. *McDonald* for the defendants. The acts complained of are not productive of any special injury to the plaintiffs, such as would authorise them to sue: if injurious at all they are so to all the Queen's subjects. Section 9, subsec. 5, qualifies to a great extent the provisions of the 12th section; by that it is provided that any highway, canal, &c., touched by the railway "shall be restored by

(a) 9 Beav. 455.

(b) 2 Jur. N. S. 180.
 (d) 17 Jur. 677.

(c) 3 Jur. N. S. 304.

1858. the railway to its former state, or to such state as not to have impaired its usefulness." As to acquiescence, it is contended that the plaintiffs, having looked on and allowed the railway to be completed without expressing any dissatisfaction until the works were finished, must be taken to have acquiesced.

Fred'kburg
v.
O.T.R.W. Co.

He referred to *Brewster v. The Canada Company* (a).
Caledonia Railway Co. v. Ogilvie (b).

The judgment of the court was delivered by

Judgment. ESTEN, V. C.—We are inclined to think that the act of parliament to which we were referred authorises a permanent diversion of roads upon the construction of a railway, where it may be necessary or expedient. The evidence in this case is conflicting: that on the part of the plaintiffs is the evidence of persons, who, however respectable and intelligent, are not engineers. Mr. Rowan, the witness examined for the defendants, is an engineer. He certainly gives reasons for the diversions that have been made, and which are complained of, which appear to be weighty. It would be impossible for us on the evidence which has been adduced to decide that the defendants as a matter of propriety and expediency were not justified in making the permanent diversions that have been made. At all events we are clear that the injury, if any, is not of sufficient importance to justify this court in interfering in the way proposed, and that this is a case in which the parties may be very properly left to their legal remedy; and we think that this bill should be dismissed with costs.

(a) Ante vol. 4 p. 443.

(b) 2 McQueen's Reports, 229-48.

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Judgment

KNAPP V. CAMERON.

1858.

Mortgage—Injunction.

By the terms of a mortgage to secure a sum of money by instalments with interest in the meantime quarterly, it was stipulated, in case of default in payment of the interest within ten days after any of the days or times when the same was made payable in any year, that the whole of the principal money should become payable immediately; and the mortgagor covenanted to pay the same accordingly: *Held*, that this was in the nature of a penalty only, and that the court would restrain an action, brought upon such covenant, to enforce payment of the whole sum due, after default in payment of one of the instalments of interest: and the mortgagee, having by arrangement between the mortgagor, himself, and the party to whom he had assigned, having drawn upon the mortgagor for the amount of a quarter's interest, but in consequence of some delay, which was not accounted for, the draft was not presented until after the expiration of the ten days, when it was accepted, but owing to some mistake the bill was not paid at maturity; and the holders of the mortgage insisted upon such non-payment as a default entitling them to call for payment of the whole mortgage money, and took proceedings at law to enforce it. *Held*, also, that this relieved the mortgagor from the necessity of tendering the next quarter's interest when it became due, and that the mortgagee, or his assigns, could not insist upon that default in answer to a motion to restrain the proceedings at law. March 16th.

The bill in this case was filed by *Alexander Knapp* and *Edein D. Kerby*, against *John Hillyard Cameron* and the *Commercial Bank of Canada*, setting forth at length the facts stated in the judgment, and thereupon praying that it might be decreed that the mortgage money had not become due and payable, and that the *Commercial Bank* or *Cameron* was bound to accept payment of the draft, and for an injunction to restrain proceedings at law to enforce payment of the whole amount of mortgage money, and to restrain the exercise of any power of sale under the mortgage, and for further relief. Statement.

The defendants answered the bill, admitting substantially the facts as set forth by the plaintiffs, and a motion was now made for an injunction as prayed.

Mr. *Hurd* for plaintiffs.

The defendant *Cameron*, in person, *contra*.

Judgment was delivered by

1858.

KNAPP
v.
Cameron.

THE CHANCELLOR.—This is an application to restrain an action at law, upon a mortgage executed by the plaintiffs, on the 29th of August, 1855, to secure a sum of 2,990*l.* to the defendant *Cameron*, and assigned by him to the *Commercial Bank of Canada*.

The proviso in the mortgage deed is in these words: "Provided always, and these presents are upon this express condition, that if the said parties of the first part (the present complainants) do and shall pay unto the party of the second part, his heirs, executors, administrators or assigns, the sum of 2,990*l.*, in five years from this date of these presents, and also the interest thereon, or on such part thereof as shall remain unpaid, at the rate of six per cent., so long as the said principal, or any part thereof, shall remain unpaid, quarterly on the first days of January, April, July and October, the first payment of interest to be made on the first day of October next ensuing the date of these presents, *and also in case of default in the payment of the said interest within ten days after any of the days or times when the same is made payable in any year, immediately thereafter pay the whole of the principal money, then these presents shall be void, otherwise remain in full force and virtue.*"

Judgment.

The covenant upon which the action has been brought runs thus: "And the said parties of the first part covenant with the party of the second part that they will pay the said mortgage money and interest on the days and times aforesaid, *and in default of the payment of the said interest within ten days after any of the days and times when the same is made payable, that they will immediately pay the whole of the principal money then remaining due.*"

It is admitted that the interest which fell due on the 1st of October, 1857, was not paid, either on that day or within ten day thereafter, and that a right of action

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has thereby accrued to the defendant; but the plaintiffs contend that they are entitled to the protection of this court, either on the general ground that the peculiar stipulation in this proviso and covenant is in the nature of a penalty, against which equity will relieve, or, at all events, under the special circumstances of the case.

1858.

Knapp
v.
Cameron.

The facts are, that, on the 26th of September, 1857, "by an arrangement between the parties," the defendant *Cameron*, who resides in this city, drew upon the plaintiff, who resided at Chatham, at three days' sight for the quarter's interest, to become due on the 1st of October then next. This draft was discounted at the *Commercial Bank*, but by reason of delay in the different bank agencies through which it passed, or from some other cause which has not been explained, it was not presented until the 17th of October, on which day it was duly accepted by the plaintiff. But although duly accepted it was not paid at maturity, the plaintiff being then, Judgment. as he swears, in this city on business, where he was detained until the beginning of the following month. That on the 31st of October, supposing the bill to be still in the hands of the agent of the *Commercial Bank* at Chatham, the plaintiff transmitted to that gentleman 50*l.* for the purpose of retiring his acceptance. Before that letter reached Chatham, however, namely, on the 29th of October, the bill had been returned to the *Commercial Bank* here, and the agent at Chatham was unable, consequently, to comply with the plaintiff's request; but out of the moneys which had been transmitted to him, he procured a bank draft, for the quarter's interest, which he enclosed to the plaintiff here, with a statement of the circumstances. By some accident that letter did not reach the plaintiff, who returned to Chatham in ignorance of what had occurred. On his arrival there he wrote to his agent here, Mr. *Hurd*, instructing him to apply at the post office for the missing letter, and to hand the bank draft to Mr. *Cameron*, in

1858. discharge of the quarter's interest; and Mr. *Hurd* did accordingly wait on Mr. *Cameron*, on the 10th of November, and offered to pay the interest as directed. Mr. *Cameron*, however, refused to accept the interest, on the ground that he had assigned the mortgage to the *Commercial Bank*, and he added, that, in his opinion, it would be useless for Mr. *Hurd* to apply to the bank upon the subject. In consequence of this information Mr. *Hurd* did not apply to the bank directly, but transmitted the draft to the plaintiff, by whom it was returned on the 15th of November, with a request that the amount should be tendered at the bank, and it was so tendered accordingly; but the bank refused to receive it, on the ground that they had determined to enforce payment of the whole debt, according to the proviso in the mortgage; and an action was accordingly commenced, on behalf of the bank, but in the name of *Cameron*, on the 12th of December, and the bill in this cause was filed on the 18th of the same month.

Judgment.

The defence is rested on two grounds. It is said, first, that the moment the bill drawn by *Cameron* on the plaintiff was dishonored, the defendants were remitted to all their rights under the mortgage deed, and are entitled therefore to insist that a forfeiture had occurred by the non-payment of the October gale of interest within ten eays after it had fallen due; or, secondly, that the non-payment of the January gale was a clear breach, upon which the right to call in the money was free from all doubt.

Upon the covenant alone, irrespective of the circumstances, I am very much disposed to think the plaintiff entitled to relief. It was assumed upon the argument that this case is not governed by the recent orders of this court (a). I am by no means clear of that. If the clause in question is to be regarded as in the nature of a penalty, the case must be admitted to be within the

(a) 13 June, 1853, Order xxxii, section 5.

equity, if order has determini vious to J close on n single inst of the con solute at la the whole had a righ be met by of the law the princip relation to order was i to stay pro the sum act it will be p comes absol condition, a close; and the court to Now the pro declare that be just what had no such deed; and it tion in the p jurisdiction o a jurisdiction to be just and

But, apart inclined to th nature of a pe cases of tha analogy. Ac covenants to p

(a) *Cameron*

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equity, if not the letter of order; and, at all events, the order has, as it seems to me, an important bearing in determining the proper construction of the deed. Previous to June, 1853, the law enabled a mortgagee to foreclose on non-payment of a single gale of interest, or a single instalment of purchase money. Upon any breach of the condition, the estate of the mortgagee became absolute at law, and he acquired thereby a right to call in the whole mortgage debt, in this sense at least, that he had a right to foreclose at once; a right which could only be met by payment of the debt in full (a). Now, that state of the law appeared to us to be unjust, and contrary to the principles upon which the jurisdiction of equity, in relation to mortgages, had been exercised; and the new order was introduced for the purpose of enabling this court to stay proceedings in foreclosure suits, on payment of the sum actually due for principal or interest. The law, it will be perceived, remains unchanged. The estate becomes absolute at law, now, as before, on breach of the condition, and the mortgagee may proceed at once to foreclose; and the only effect of the new order is to enable the court to relieve against the forfeiture thus incurred. Now the proviso in the present case does no more than declare that the effect of a breach of the condition shall be just what the law would have declared it to have been had no such special provision been introduced into the deed; and it is difficult to understand how such a stipulation in the proviso can have the effect of excluding the jurisdiction of this court to relieve against the forfeiture: a jurisdiction declared by the general orders of the court to be just and expedient.

But, apart from the recent orders, I am strongly inclined to think that the covenant in this case is in the nature of a penalty. *Strode v. Parker* (b), and the other cases of that class, appear to me to furnish a clear analogy. According to those cases, where a mortgagor covenants to pay interest at a lower rate, say four per

(a) *Cameron v. McRae*, 3 Grant 311.

(b) 2 Ves. 316.

1858. cent., to be raised, upon default in punctual payment, to a higher rate, say five per cent., in that case the agreement to raise the interest, upon default, is considered as a penalty to secure the thing actually contracted for, namely, the punctual payment of the interest at the lower rate; and the right of the mortgagor to relief is well settled. But where the mortgagor covenants for the higher rate of interest, with a stipulation that it shall be reduced to a lower rate upon punctual payment, in that case the higher rate of interest is regarded as the thing contracted for, and the mortgagor can only relieve himself from that contract by a strict performance of the conditions.

Now, to apply the principle thus established to the present case, it cannot be doubted, I think, that the substantial agreement between these parties is to pay the mortgage money in five years; and that the covenant to pay at an earlier day, upon default in the payment of any Judgment. gale of interest, is to be regarded in the light of a penalty to secure the punctual performance of the actual contract. *Bonafous v. Rybot* (a) may be regarded, I think, as an authority in point. There the bond was conditioned for the payment of the debt on a day certain, but by a separate agreement the obligee agreed to accept the debt by annual instalments, provided the instalments were paid punctually at the times appointed; and the question was whether the obligor, who had failed to perform the condition, was entitled to any relief. Lord *Mansfield* considered the case to which I have been adverting as analogous, and he came to the conclusion that the obligor there would not be entitled to relief in equity, inasmuch as the primary contract was for payment of the debt on a day certain, with a privilege to the obligor to have the time extended, upon punctual payment of the instalments, a privilege to which the obligor could only entitle himself by a strict performance of the condition. But had the contract been for payment of the debt in five years, with

(a) 3 Burr. 1370.

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(a) 2 Eden.
(b) Seton v.
(c) Stanhope

a stipulation that the whole should become due upon any default, his Lordship would have come to a different conclusion. *Stanhope v. Manners (a)*, is an authority, so far as I can gather, to the same purpose.

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v.
Cameron.

Upon the general question, therefore, my opinion is so much in favor of the plaintiffs that it would have been my duty, had there been nothing further in the case, to have granted an injunction till the hearing. But here the particular circumstances do furnish, as it seems to me, a distinct and clear ground for relief.

That time is regarded very differently, here, and at law, cannot be doubted. Still it is now clear that, even here, time may be made of the essence of the contract. But it is equally clear that any stipulation introduced for that purpose, however clear, and however strong, may be waived, either by express agreement or by conduct. And when either party has prevented the strict performance of an agreement in point of time, by his own conduct, it follows, *a fortiori*, that such person cannot be held to object that the other party has thereby forfeited his rights under the agreement (*b*). Cases of specific performance are strictly analogous: in truth this is a bill for the specific performance of the contract to allow the money to remain outstanding on mortgage for the residue of the time agreed upon (*c*).

Now it is quite clear to my mind that the defendants not only consented to the non-performance of this contract at the time specified, but they brought about that result by their own conduct. By arrangement between the parties, as it is admitted, Mr. *Cameron* drew for the quar-
tor's interest, on the 26th of September. It is not necessary to consider what the effect would have been had this bill been presented in due course. But here the bill was

(a) 2 Eden. 196.

(b) *Seton v. Slade*, 7 Ves. 265. *Hunter v. Daniel*, 4 Ha. 420.

(c) *Stanhope v. Manners*, 2 Ed. 156.

1858.
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not presented until the 17th, long after the time at which a forfeiture would have arisen under the provisions of the deed. Between the 1st and 26th of October, therefore, the plaintiffs were not only absolved from paying the interest to Mr. *Cameron*, but it became their duty to retain it for the purpose of meeting the bill. That being so, it is difficult to understand how the defendants can now maintain that a forfeiture arose by non-payment of the interest on or before the 10th: a non-payment not only consented to by themselves, but necessitated by their own act. This debt was not due on the 10th of October, by reason of the non-payment of the interest, because the payment on that day had been dispensed with by the defendants themselves; and having dispensed with payment on that day, I cannot understand how it can be now said that such non-payment worked a forfeiture.

Judgment. It is argued, however, that the failure to pay the January gale is, at all events, a clear breach of the agreement, and that the right of the defendants to call in the mortgage money, on that ground alone, cannot be doubted. I cannot agree in that conclusion. The bank refused to receive the October gale, upon the ground that the entire debt had become due. They commenced an action to enforce their claim on the 12th of December, and the plaintiffs filed their bill in this court for relief on the 18th of the same month. Now to have tendered the January gale under such circumstances would have been an idle form, which the defendants had by words and conduct declared to be unnecessary.

Upon the whole there is, at the least, sufficient doubt to make it proper that an injunction should be granted till the hearing. All interest now due must be paid, and the future gales as they become due. If the defendants wish to accept the amount it may be paid to them without prejudice; if not, it must be paid into court.

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MERRITT V. STEPHENSON.

1858.

Mortgage on separate estates—Sale.

The rule that a mortgagee of several estates may refuse to be redeemed in respect of one unless redeemed in respect of both, does not apply to a case where a sale is asked by a prior incumbrancer. October 12th.

This was a suit instituted for the purpose of compelling payment of the amount due upon a mortgage made by the defendant *Stephenson* to the plaintiff, and in default a sale of the mortgage estate. Several incumbrancers were made parties; one of them holding a mortgage on the estate now sought to be sold, and another mortgage upon other premises.

Mr. *Freeland* for the plaintiff now asked for the usual decree to take an account of what was due to plaintiff and the other incumbrancers, and in default of payment, a sale of the mortgage property.

Mr. *Fitzgerald* for *Howland*, asked that the decree might direct an account of what remained due on both mortgages, which amount *Stephenson* must pay, or in default, a sale. *Howland* could refuse to be redeemed in respect of one mortgage only, and the same rule, he contended, should be taken to exist when the object of the proceeding is a sale. Argument.

Mr. *Barrett* for *Hutchinson*, another incumbrancer, submits to decree.

The court after taking time to look into the pleadings and authorities, refused to insert the direction sought in favor of *Howland*.

1858.

SCHOFIELD V. TUMMONDS.

Specific performance—Costs—Practice.

To a bill for specific performance of an agreement to purchase lands, the vendee set up that he had been led into drink by the fraudulent contrivances of the vendor, and while in an insensible state of intoxication had been induced to sign the agreement, in which the price stipulated to be paid for the property was most exorbitant, and which was now sought to be enforced. At the hearing it was clearly shewn that the purchaser had been at the time of executing the contract, intoxicated, and that the price agreed to be paid was exorbitant, but the court exonerated the vendor from any fraudulent conduct, and therefore refused to give the defendant his costs on the dismissal of the bill.

This was a suit to compel the defendant specifically to perform an agreement entered into for the purchase by him from the plaintiff, of an acre of land and buildings thereon in the township of Reach, at the price of 873*l.*, payable in part by certain chattels agreed to be assigned to him by the defendant, and the residue by instalments with interest; the agreement entered into between the parties was set forth in the bill at length, but the decision of the court did not turn in any degree upon the form of the instrument.

Statement.

The defendant by his answer set up that he had been induced to drink by a person in the employ of the plaintiff, to such an extent that at the time of entering into the agreement he was deprived of his reason, and that he was not conscious of what he was doing when entering into the agreement. Also, that the price stipulated in the agreement that the defendant should pay for the property was exorbitant.

The cause having been put at issue, evidence was taken before the court at great length, and in many important points the statements of the witnesses were contradictory, but there could not be any doubt that the defendant at the time of entering into the agreement was greatly intoxicated, and that the price agreed to be paid was much beyond the reasonable value of the property. It was also shewn that the defendant, when under the influence of liquor,

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was inclined to enter into contracts of different kinds, and might be easily induced, while in that state, to enter into the most extravagant bargains.

1858.

Schofield
v.
Tummonds.

Mr. *Morphy* for the plaintiff. The evidence shews that defendant signed the contract, and although the witnesses for the defence state that he was incapable of understanding what he was doing at the time, that testimony is met by evidence of respectable persons on the other side, who swear that although he had been drinking, he was not in such a state as not to be quite competent of taking care of his own interests; under such circumstances it would be unsafe to decree against the written contract.

Mr. *Hector* for defendant. The case of *Clarkson v. Kitson (a)*, decided by this court, was the case of setting aside a deed duly executed at the instance of the representative of the party said to have been deceived; here the defendant only sets up the fact of his incapacity to contract, as a defence to resist the decree of the court passing against him, and although the evidence is in many respects lamentably contradictory, still no doubt can rest in the mind of any one who heard it given that the defendant was in a state of drunkenness such as no prudent man would have thought of contracting with him, and clearly such as this court would never exercise its jurisdiction of compelling him specifically to carry out any contract he may have entered into at the time, if even the consideration agreed to be paid was less extravagant than in this case it is shewn to be on the plaintiff's own evidence. Under these circumstances the only decree the court can safely pronounce, is a dismissal of the bill with costs.

Mr. *Morphy* in reply, this is not a case for giving costs: the falsity of the answer, and the utter discredit of some of the witnesses called by the defendant, one his son, are sufficient to deprive him of his costs if even the

(a) Ante vol. iv., p. 224.

1858. court should be of opinion that the plaintiff cannot enforce the agreement.

Schofield
v.
Tummonds.

The judgment of the court was delivered by

Judgment. ESTEN, V. C.—I think that we ought not to decree specific performance in this case. I think that the defendant was under the influence of liquor at the time of entering into the agreement, and not in full possession of his judgment; and the price agreed to be paid seems to be extravagant. I have no reason, however, to impute fraud to the plaintiff, while on the other hand I think the answer is untrue, and that the defendant has endeavored to support his case by untrue evidence, and therefore should not have his costs. I think the bill should be dismissed without costs.

TAYLOR V. MABLEY.

Assignment for benefit of creditors.

Debtors having obtained from their creditors an extension of time, the debtors covenanted to pay all debts in full, and not to part with their effects, except for the benefit of the creditors generally: subsequently the debtors made an assignment to one of their creditors for the benefit of all, the deed containing a release from all further indebtedness by the creditors executing the assignment. Upon a bill filed by some of the creditors on behalf of all, the court declared such assignment to be in contravention of the agreement, and that the creditors were entitled to participate rateably in the proceeds of the trust effects without releasing the balance of their claims.

The bill in this cause was filed by the plaintiffs, on behalf of themselves and all other creditors of the defendants *Mabley*, setting forth that on 21st November, 1857, they entered into an agreement, reciting amongst other things, that at a meeting of the creditors of *Mabley & Co.*, held on the tenth of the said month of November, it was agreed, upon a review of a statement of the liabilities and assets of the said *Mabley & Co.*, presented by them, to allow them to retain possession of

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all their assets, and to continue their business, and to extend the times for payment of their debts for periods of three, six, nine, twelve and fifteen months, it was witnessed that the persons and firms executing the said indenture, did thereby agree so to extend the times for payment of their said debts, as before set forth: by the agreement of their said debts, as before set forth: by the agreement the defendants *Mabley* covenanted to pay the said debts, and also, that they would not, until all their debts were paid, assign, part with, or make away with any of their personal property, or attempt so to do, unless by way of general assignment, to some one or more of their creditors, parties to the said agreement, for the benefit of all.

1858.
Taylor
v.
Mabley.

This agreement was signed by all the creditors of *Mabley & Co.*, except two of small amounts. The defendant *Fowler* being one of those who did execute it.

The bill further stated that although the time for payment of the first instalment had elapsed, *Mabley & Co.* had not made any payments; but on the contrary, and in breach of the stipulations of their agreement, had on the 16th day of January following, by an indenture of that date, purported to convey and assign to the defendant *Fowler*, all their real and personal estate and effects upon trust for the benefit of such of the creditors of *Mabley & Co.* as should come in and execute the said indenture, which stipulated that such of the creditors as should so come in should and did thereby discharge *Mabley & Co.*, from their indebtedness, and from all suits, claims, and demands whatsoever, and that *Fowler* had accepted the trusts of the said indenture, and held the property so assigned to him. Statement.

The bill further alleged that the plaintiffs had applied to *Fowler* to hold the said effects subject to the agreement of the 21st November, 1857, as being a party thereto, and having full notice thereof, but that he objected to do so without the sanction of this court; that the plaintiffs and other creditors refused to accept the indenture, as being

1868. in contravention of the agreement of 21st November, inasmuch as the indenture of assignment required them to release *Mabley & Co.* from all indebtedness.

Taylor
v.
Mabley.

The prayer was that it might be declared that the plaintiffs, and persons and firms executing the memorandum of agreement had a lien or charge for their respective debts upon the property so assigned to *Fowler*; that it might be applied accordingly; and that the indenture of assignment might be declared to be in contravention of the aforesaid agreement, and be cancelled and set aside accordingly.

The defendant *Fowler* answered the bill, admitting substantially the statements set forth in it, and submitting his rights and liabilities as a trustee to the court alleging that he had accepted the assignment in trust for the purpose of preventing *Mabley & Co.* from making away with the property in fraud of their creditors.

Statement.

The defendants *Mabley* also answered, admitting the most important statements of the bill, and setting forth that *Fowler* had sold the stock in trade of *Mabley & Co.*, and submitting that plaintiffs by reason of their laches and acquiescence in such sale without objection, waived their right to any relief.

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

Mr. *A. Crooks* for plaintiff.

Mr. *Freeland*, for defendant *Fowler*.

Mr. *Doyle*, for defendants *Mabley*, contended that the assignment which had been made to *Fowler* was in fact a carrying out of the agreement of 21st November, as in all assignments for the benefit of creditors a release of all further liability is always part and parcel of the assignment.

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ESTEN, V. C.—The assignment, I think, is not in accordance with the agreement, and should be declared void. The agreement is imperfectly drawn, but my impression is, that the *Mableys* ought to be deemed to have agreed either to carry on the business, or to make a general assignment, and as they have made their election, that the assignment may be corrected and made conformable to the agreement; or that the court can act in the disposal of the property, as if such an assignment had been made. At all events, an injunction may be granted to restrain the *Mableys* from disposing of the property, otherwise than by making a general assignment of it, which would in fact be tantamount to decreeing an assignment, and Mr. *Fowler* from applying the proceeds of the estate otherwise than for the purposes and objects contemplated by the agreement. The plaintiffs should have their costs to the hearing.

1858.
Taylor
v.
Mabley.

SPRAGUE, V. C.—I agree that the assignment to *Fowler* was in contravention of the agreement of November, 1857, between the *Mableys* and their creditors, and that it should be set aside. Judgment.

The only provision in the agreement in regard to the contingency which has occurred, that of a failure on the part of the *Mableys* to pay their creditors at the extended periods given by the agreement is, that their debts shall thereupon immediately become payable, and it would probably be in the power of each creditor to sue for his debt. No provision is made as to the assets which might at the time of such failure be in the hands of the *Mableys*. It seems clear, however, that there were only two ways in which they could deal with them; one, in the carrying on of the business; the other, by an assignment to one of the creditors for the general benefit of all; and I should think it inconsistent with the spirit of that agreement for any of the creditors to satisfy their debts out of those assets, except in common with the other creditors; for any creditor doing so would be doing that himself which he

1858. with the other creditors had bound the *Mableys* not to do with regard to any creditor.

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Mabley.

I find it difficult to ascertain from the agreement what the creditors contemplated in regard to the assets, in the event of a failure by the *Mableys* to pay. They enabled them to make one kind of assignment, and disabled them from making any other; but the *Mableys* are not in terms required to make that one kind of assignment, nor is an assignment made by the agreement itself upon the happening of any contingency. There is nothing in the agreement to prevent the *Mableys* from continuing the business after default, if their creditors chose to forbear to press their debts.

As events stand, they have discontinued their business and made an improper assignment. I confess I do not see my way clear to compelling them to execute a proper assignment, nor indeed do I think it necessary. As the matter stands, we have assets improperly assigned, and which assignment we set aside; we have in this way jurisdiction to deal with the assets. The *Mableys* cannot now deal with them, unless, perhaps, by making a proper assignment. I think that under the agreement the parties beneficially entitled to them are the creditors, and they should be realized through this court for their benefit; or the decree might be that unless the *Mableys* execute such an assignment as is authorised by the agreement within a time to be named, a receiver should be appointed; the assignment to be settled by the master or a judge.

Minutes. Declare assignment void. Declare that estate is applicable to payment of all creditors generally. Direct account and application accordingly. Appoint receiver. Injunction to restrain the *Mableys* from interfering with property. Costs to the plaintiffs to the hearing from the *Mableys*: reserve further directions, and subsequent costs.

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(a) 15 Jurist, 6

BILTON V. BLAKELY.

1858.

Partnership—Rights of surviving partner.

A surviving partner by reason of his liability to pay the debts due by the partnership, is entitled to receive all moneys, and collect all debts due to, and dispose of all the effects of, the firm for that purpose; the representatives of the deceased partner have a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclusion of them in these respects would entitle them to an injunction and receiver.

This was a suit brought by the personal representatives of *George Bilton*, deceased, to wind up the partnership business which had been carried on by the deceased and the defendant, for some years preceding the death of *Bilton*; and to restrain the defendant from disposing of the partnership effects, and collecting and getting in the debts due the firm. The bill and affidavits filed imputed to the defendant several improper acts and intentions, with respect to his dealings with the assets of the co-partnership; but on the affidavit of the defendant these circumstances were fully explained and cleared up, and the defendant disavowed all intention to act in any way to the injury of the plaintiffs; the question chiefly argued was whether the surviving partner of a firm had a right to conduct the business and sell the stock without being controlled in any wise by the representatives of the deceased partner; or whether the death of *Bilton* having worked a dissolution of the partnership, the plaintiffs, as his representatives, had not a right to compel the partnership business to be wound up, and to call for the appointment of a receiver, for the purpose of getting the moneys due the firm, and disposing of the stock in trade.

Mr. *McGregor* for plaintiffs.

Mr. *McMichael* and Mr. *Fitzgerald* contra. *Buckley v. Barber* (a), *Butchart v. Dresser* (b), *Crawshay v. Collins* (c), *Peacock v. Peacock* (d), *Collyer on Partnership*, p. 119, were, amongst other authorities cited.

(a) 15 Jurist, 63.

(b) 4 DeG., McN. & G., 542.

(c) 15 Ves. 218.

(d) 16 Ves. 49.

1858.

Bilton
v.
Blakely.

ESTEN, V. C.—I have looked at all the authorities that were cited, and at some others also, and I think the surviving partner has a right to pay all the debts, and for that purpose to receive all the moneys, collect all the debts, and dispose of all the effects of the firm. This right results from his liability for the debts and engagements of the partnership, and if it were denied to him, the result might be that he might be arrested for a joint debt, although the assets in his hands might be amply sufficient for the payment of all the debts of the firm. During this time, however, I think the representatives of the deceased partner have a right to inspect the books of the firm, and to be informed of all the proceedings of the surviving partner. Supposing all the debts of the surviving partner to be paid, and that joint effects remain unsold, I do not see that the surviving partner has a right, or indeed the power to dispose of them to the exclusion of the representatives of the deceased partner. It is clear that the survivor and the representatives of the deceased partner are tenants in common of the joint effects remaining unsold, and I do not see how the sale of the surviving partner could confer a title to more than an undivided moiety. Such a sale would be merely for the purpose of division, but it is a rule of equity, not of law, which prescribes a sale for this purpose, and the legal to an undivided moiety would appear to remain in the representatives of the deceased partners, notwithstanding the sale. I may add, that any exclusion of the representatives of the deceased partner from their due share in the arrangement of the partnership affairs, would entitle them to an injunction and receiver.

Judgment.

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VOL. VI.—

McMASTER V. CALLAWAY.

1858.

Injunction—Practice.

In moving for an injunction *ex parte*, the affidavits on which the application is founded, must set forth all the facts and circumstances material for the court to know, or the injunction will be dissolved; even although the party moving did not consider the circumstance to be material. November 9.

This was a motion to dissolve an injunction, which had been obtained *ex parte*, restraining the defendant from parting with, or disposing of his stock in trade and effects, otherwise than in the usual course of business.

It appeared that defendant, who had for some years been carrying on business as a dry goods dealer, became embarrassed in his circumstances, and unable to pay his liabilities, called his creditors together, and a large number of them, representing the major part in amount, attended at such meeting, when it was resolved that defendant's proposal to pay a composition of 7l. 6s. in the £, secured by such security as might be satisfactory to the creditors, and payable as follows: that is to say, in equal instalments of 3, 6, 9, 12, 15 and 18 months without interest, should be accepted by the creditors present; and defendant undertook that in the event of his failing to provide the security, or of all his creditors not agreeing to the proposition within ten days, he would make an assignment for the benefit of his creditors; and that he would not permit any creditor to obtain judgment by default, or otherwise, or give any preference. Statement.

That in pursuance of this resolution, a memorandum of assignment was drawn up under seal, and was executed by Callaway and several of his creditors, amongst them all the plaintiffs to this suit, which agreement contained an undertaking absolutely to discharge Callaway from all further liability on payment of the composition agreed upon.

Several of defendant's creditors were resident in New

1858. York and Boston, and defendant had sent a messenger to obtain their signatures, but all had not signed the deed when the ten days expired, but defendant had obtained a memorandum signed by two responsible persons, agreeing to endorse his notes for the composition, and that in consequence of such failure in obtaining the signature of several of defendant's creditors, the plaintiffs insisted that he was bound to execute an assignment for the benefit of his creditors, which he had refused to do, although applied to for that purpose by the plaintiffs. Under these circumstances an application was made *ex parte* for an injunction, but in applying for the writ the affidavits used, as well as the bill filed, were silent as to the preparation of the agreement, the execution thereof by the plaintiffs, and the undertaking of the sureties to guarantee the payment of the composition. On the ground the defendant now applied to dissolve the writ then issued.

Mr. *Strong* and Mr. *Blake* for defendant. The merits of the case have no bearing on the present application, although the deed which has been executed, would, we submit, be an effectual bar upon the merits. Although ten days are limited for procuring all the signatures, still in such a case time is not of the essence of the contract. In composition deeds the court will allow a creditor to come in and execute the deed, although the time limited for so doing has elapsed; and as this proceeding was in the case of the debtor, the court will be more ready to act in aid of carrying out the agreement. The inflexible rule governing the court in granting these *ex parte* application is, that the party moving is bound to disclose all the material circumstances to the court, or the writ will be dissolved; the fact that the party moving did not deem them of importance, or material to the question involved, will not affect the question. *DeFeucheres v. Dawes (a)*, *Lewis v. Cooper (b)*, *Re Walker (c)*, *Pooley v. Budd (d)*, *Langton v. Horton (e)*.

(a) 11 Beav. 46. (b) 10 Beav. 32. (c) 14 Beav. 227.
(d) 14 Beav. 34. (e) 1 Hare, 549.

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Mr. Crooks contra. Conceding the general principle that plaintiff is bound to state all circumstances in reference to the matters in dispute, still the fact not disclosed must be a material one. *Maclaren v. Stainton* (a). Had this bill alleged the perfection of the deed by Callaway, and the procurement of the undertaking to give security, and failure to obtain the signatures of the other creditors, the writ would have been granted. There has been a total failure of the conditions on which the resolution was arrived at by the creditors, and the plaintiffs were entitled to call for an assignment of the estate. The agreement which was signed, therefore, became a nullity, and the resolution was revived, so that there could not be any necessity under such circumstances to bring it under the notice of the court.

1868.

McMaster
v.
Callaway.

[*Esten, V. C.*—Even if you are right in that view, still, I think, it was a circumstance of such importance that it should have been brought under the notice of the court.]

Mr. Strong in reply. Even, if the deed had become an absolute nullity, still it was a subject that the defendant should have been heard upon before disposing of his rights. The case cited from 11 Beavan, is directly in point.

After taking time to look at the cases cited, the application was now disposed of by

ESTEN, V. C.—I think that what occurred in the in-^{Judgment}terim between the 5th of October, and the date of the application for the injunction was material to be mentioned to the judge to whom the application was made, although the plaintiffs may not have so considered, and therefore that the injunction granted in this case should be dissolved with cost.

(a) 16 Beav. 279.

1858.

ENGLISH V. ENGLISH.

Alimony.

October 12.

A married woman voluntarily left her husband's house, alleging as a cause, unkind treatment by the husband, but subsequently offered to return, when he refused to receive her. Upon a bill filed for alimony, the court made a decree referring it to the Master to fix an amount to be paid to the plaintiff for alimony, during such time as the parties continued to live separately.

This was a suit for alimony : the bill which was taken *pro confesso*, did not contain any charge of cruelty, but stated in effect that the plaintiff, owing to the unkind treatment of her husband, the defendant, had been obliged to leave him ; that subsequently she offered to return and reside with him ; that the defendant refused to allow her to do so, and that he has ever since refused to make her any allowance for her support. The prayer was, that a sum might be ordered to be paid her by way of alimony.

Argument.

Mr. Barrett, for plaintiff, now asked that the usual decree for alimony might be drawn up : the defendant did not appear. [THE CHANCELLOR.—What we entertain a doubt about is, whether a woman leaving her husband's house voluntarily, so far as appears, can have a decree for alimony.] By the 2nd section of the act, for increasing the efficiency of this court (20 Vic., ch. 56), it is enacted that the court shall have jurisdiction to decree alimony to any wife whose husband lives separate from her without any sufficient cause, such alimony to continue during such separation, and until the further order of the court. Now, although the bill fails to shew any acts of cruelty such as would warrant a decree, it alleges the offer of the wife to return to her husband, and his refusal to receive her ; and that he does not make any allowance for her support ; under these circumstances it is submitted, the plaintiff is clearly entitled to the decree asked.

Per Curiam.—This question was discussed a good deal

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in disposing of *McKay v. McKay (a)*, and that case may be said to govern the present. Under all the circumstances, the proper decree for us to make will be to refer it to the Master to fix the amount of alimony to be paid to plaintiff, which, in the words of the act, must continue during the separation of the parties, and until the further order of this court.

1858.

English
v.
English.

McMASTER V. NOBLE.

Judgment creditor—Foreclosure.

In this country, a judgment creditor is entitled, at his option, to a decree either to sell or foreclose the estate of his debtor.

This was a suit to foreclose, brought by a judgment creditor against his debtor. The bill had been taken *pro confesso*, and on the cause coming on to be heard, a doubt was suggested whether the plaintiff was entitled to the decree asked, or must take a decree for sale.

Statement.

Mr. A. Crooks for the plaintiff. The authorities cited appear in the judgment of the court, which was delivered by

THE CHANCELLOR.—The only question in this case is whether the plaintiff, who is a judgment creditor, is entitled to a decree of foreclosure.

The authorities are conflicting. In *Ford v. Wastell (b)*, the decree was for foreclosure, and when that case came before Lord Cottenham (c), he would not seem to have thought the decree wrong in form. In *Footner v. Sturgis (d)*, the precise point was raised before Sir James Parker, who decided that a judgment creditor under the recent statute had a mere charge, and therefore was only entitled to a sale, but not to a foreclosure. Having reference to the language of the statute (e), and the decisions upon

(a) Ante p. 380.

(b) 6 Hare, 229.

(c) 2 Phil. 591.

(d) 5 D. & S. 736.

(e) 13 & 14 Vic. ch. 65.

1858. it (a), it may be doubted whether the principle upon which the *Vice-Chancellor* proceeded can be sustained. In *Jones v. Bailey* (b), the present Master of the Rolls decided that a judgment creditor could not have a decree for sale, but was only entitled to foreclosure; and the same learned judge acted on that opinion in *Cox v. Toole* (c), and in *Messer v. Boyle* (d). I am inclined to think that in this country at least, a judgment creditor may have either a foreclosure or a sale. But however that may be, the authorities show that he is at all events entitled to a foreclosure, therefore let the decree be as prayed.

McMaster
v.
Noble.

SANSON V. MITCHELL.

Trustee—Church temporalities.

The act 3 Victoria, chapter 74, for the management of the Church temporalities, is not confined to parish churches, but embraces all churches in communion with the united church of England and Ireland.

The incumbent of a church, without the consent of the bishop or churchwardens, took a deed of lands in his own name as such incumbent, the property having been previously contracted for by the bishop and certain members of the congregation for the site of a church, and on his retirement, refused to execute a release of the premises. The court, under the circumstances, ordered the retiring incumbent to execute a release of the estate; and as his conduct in the matter had been unreasonable, refused him his costs, although in strictness the bill, so far as it sought a conveyance, ought to have been dismissed, title having already vested in his successor.

November 8.

The bill in this cause was filed by *Alexander Sanson*, the Right Reverend *John Strachan*, bishop of Toronto, *William Gooderham*, and *Enoch Turner*, setting forth that the Bishop had contracted with the Trustees of the Toronto Hospital, for the purchase of a piece of land for the purpose of a church, parsonage and school-house being erected thereon; that a church was subsequently erected thereon, and the defendant became incumbent thereof; that by indenture of 5th of June, 1851, the trustees conveyed to the defendant as such incumbent, reciting therein that they had agreed to sell and convey

(a) *Rolleston v. Morton*, 1 D. & W. 195, *Ex parte Boyle*, 3 D. M. & G. 515. (b) 17 Beav. 582. (c) 20 Beav. 145. (d) 21 Beav. 559.

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the same for the price or sum of 650*l.*, and that the interest accruing on the purchase money should be secured by way of rent charge; that subsequently defendant ceased to be the incumbent, and the plaintiff *Sanson* was duly appointed his successor, and is incumbent thereof.

1853.

Sanson
v.
Mitchell.

The bill further alleged, that for the purpose of carrying out the provision of the Church Temporalities Act, the land in question should have been conveyed to trustees for the uses and purposes referred to, and that the conveyance to defendant was so made by mistake or inadvertance; that notwithstanding the provisions of the act referred to, the land, except that part on which the church is erected, no burying ground being attached thereto, was not vested in fee, but that only a life estate was created by the conveyance thereof, and that the same remained vested in defendant; that the trustees of the hospital upon being applied to, had consented to execute any conveyance that might be necessary if defendant would join therein, but that he declined executing any instrument, alleging as a reason for such refusal, that having ceased to be the incumbent he had not any interest to convey; that the prayer was, that the defendant might be ordered to execute the necessary conveyances of the property, and that proper trusts might be declared: such conveyances to be settled by the Master.

Statement.

The defendant answered the bill, asserting his want of interest in the property, which had already vested in the plaintiff *Sanson*, the present incumbent, and that therefore he was not bound to execute any instrument.

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

Mr. *Morphy* for plaintiffs.

Mr. *Brough* for defendant, contended that it was not

1858. shewn the deed executed was incorrect. Clearly the property had become vested in the present incumbent, and no further conveyance therefore was necessary. The court will not unnecessarily direct parties to execute deeds.

Sanson
v.
Mitchell.

The judgment of the court was delivered by

THE CHANCELLOR.—This is a suit by the Lord Bishop of the diocese of Toronto, and by the incumbent and churchwardens of Trinity Church, in this city, to compel the defendant, a former incumbent of that church, to convey the property in question in the cause, said to be now vested in him, to Mr. *Sanson*, the present incumbent, upon certain trusts which are alleged to be the trusts upon which the property was purchased, and upon which it should have been conveyed.

The question turns upon the 16th section of the statute for the management of the temporalities of the United Church of England and Ireland in this province (a). That clause, so far as it is material to our present purpose, provides that every "deed or conveyance to any parson or rector, or other incumbent and his successors, for the endowment of such parsonage, rectory, and living, or other uses or purposes appurtenant thereto, shall be valid and effectual to the uses and purposes in such deed or conveyance to be mentioned and set forth, the acts of parliament commonly called the Statutes of Mortmain, or other acts, laws or usages, to the contrary thereof, notwithstanding." Looking at the whole act, we are of opinion that the section which I have just cited, is not confined to parish churches, but embraces all churches in communion with the united church of England and Ireland; and that it has the effect of giving validity to every conveyance to an incumbent and his successors, for any purpose appurtenant to such church.

(a) 3 Vic. ch. 74.

Now, the conveyance been made by Trinity Church, the hospital, incumbent as incumbent

We have in the meantime now vested in bill, therefrom from Mr. ness to be

But Mr. has been, I am sorry contract for Mr. Mitchell certain of endowment parties were applicable such circumstances and procure seem to be the proceeded no right to step without of the diocese was made, had been obtainable. Under reasonable execute such suit was instituted exist as to the

Now, the deed by which the property in question was conveyed to Mr. *Mitchell*, recites that the contract had been made with Mr. *Mitchell*, as incumbent of Trinity Church. The land is granted to *Mitchell*, as incumbent of Trinity Church, and his successors. The trustees of the hospital, the grantors, covenant with Mr. *Mitchell* as incumbent, and his successors : and Mr. *Mitchell* covenants as incumbent, for himself and his successors.

1858.

Sanson
v.
Mitchell.

We have no doubt that this is a good conveyance within the meaning of the 16th section, and that the estate is now vested in Mr. *Sanson*, the present incumbent. This bill, therefore, so far as it seeks to compel a conveyance from Mr. *Mitchell*, was unnecessary, and ought in strictness to be dismissed.

But Mr. *Mitchell's* conduct in relation to the matter, has been, in some respects, unreasonable, and in others, I am sorry to be obliged to add, quite unjustifiable : the contract for the purchase of this land was not made by Mr. *Mitchell*, but by the Bishop of the diocese, and certain other persons interested in the erection and endowment of Trinity Church. The intention of these parties was, that the property so acquired should be applicable to the general wants of the church. Under such circumstances Mr. *Mitchell* had no right to interfere and procure a deed to be made to himself, which would seem to entitle each incumbent of the church to apply the proceeds of this property to his own use. He had no right to interfere at all. But to have taken such a step without consulting either his Lordship, the Bishop of the diocese, or the gentlemen by whom the contract was made, and under whose instrumentality the church had been erected, was, as it seems to us, quite unjustifiable. Under such circumstances, it seems to us highly reasonable that the defendant should be ordered to execute such a release as was tendered to him before the suit was instituted, so as to remove any doubt that may exist as to the effect of the statute. Had a reconveyance

Judgment

1858. *Sanson v. Mitchell.* been necessary, the decree would have been with costs. But as no such conveyance is necessary, in our opinion, inasmuch as the estate has already vested in Mr. *Sanson* under the statute, we cannot order the defendant to pay the costs of the suit. On the other hand, his conduct having been both unjustifiable and unreasonable, we cannot give him his costs. The decree is therefore without costs.

With respect to that part of the bill which asks that the trusts of the deed should be rectified, it is obvious that no such decree could be pronounced upon the present bill. In our view of the case Mr. *Mitchell*, the sole defendant, has no interest whatever in that question. Such a decree as is asked would be a decree between co-plaintiffs, and could not bind Mr. *Sanson's* successors. If a decree is to be made to bind them, it must be in a suit properly constituted for that purpose.

Judgment.

BEAMISH V. POMEROY.

Fraudulent conveyance—Sale of equity of redemption by Sheriff.

The owner of lands, subject to several mortgages, made a conveyance thereof to his brother but without his knowledge; and the person by whose advice the deed was executed, stated in evidence that the deed, though absolute in form, was made upon trust for securing the incumbrances affecting the property, and for the benefit of the grantor's children; the grantor at the time being greatly involved, and having no other property except some book debts, and some household furniture. A sale of the grantor's interest was subsequently effected by the sheriff upon an execution, and the purchaser having filed a bill, impeaching the conveyance upon trust as a fraud upon creditors, and praying to be admitted to redeem, the court, under the circumstances, decreed in his favor.

The bill in this cause was filed by *John S. Beamish*, against *William Pomeroy*, setting forth that by indenture of 31st July, 1847, made between *James Pringle* of the one part, and *James Austin* of the other part, and a transfer thereof dated 4th March, 1854, from *Austin* to one *Joseph Hale Dean*, and a further transfer from *Dean* to defendant, dated 21st April, 1854: the defendant was a mortgagee of certain freehold premises

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comprised in the first mentioned deed, and being the rear part of lot No. 13, in the 1st concession of the township of Hamilton.

1858.

Beamish
v.
Pomeroy.

That by virtue of another indenture, dated 6th July 1850, and made between one *George Boyer* of the one part, and *Thomas W. Boyer* of the other part, and a transfer thereof to the said *James Austin*, and other transfers, the defendant was also entitled to a mortgage security on the same property, and on other lands situate in Hamilton, and in the town of Cobourg, and township of Dummer, as set forth in the bill for securing 300*l.*

That by another indenture dated 19th September, 1850, made between *George Boyer* of the one part, and *James Austin* of the other part, and the transfers thereof from *Austin* to *Dean*, and from *Dean* to defendant before mentioned—the defendant was entitled to a further mortgage for securing a further sum of 208*l.*

Statement.

That the defendant was entitled to the equity of redemption in the lands in Cobourg and Dummer, the same having been purchased by *Dean* at sheriff's sale, under a writ against lands of *George Boyer*, and by *Dean* conveyed to defendant.

The bill then alleged that plaintiff was entitled to the equity of redemption in the lands in Hamilton, the same having been purchased by plaintiff at a sale by the sheriff, under a writ of *venditioni exponas* against the lands of *George Boyer*, in the same suit as the previous sale had taken place.

That the lands in Cobourg and Dummer were of greater value than the sum of 300*l.* and interest, secured by the indenture of the 6th July, 1850. And the plaintiff insisted that the defendant's securities should be marshalled by making the mortgage debt of 300*l.* and

1858. interest a charge upon those lands only, and exonerating therefrom the lands in Hamilton, and that plaintiff might be let in to redeem upon those terms.

Bedford
v.
Pomeroy.

The bill further alleged, that the defendant set up that by an indenture of 25th September, 1850, made between *George Boyer* of the one part, and *Thomas W. Boyer* of the other part, and executed before the judgment under which the sales by the sheriff were effected had been recovered, *George Boyer* absolutely conveyed the lands situate in Hamilton to *Thomas W. Boyer*, who afterwards conveyed to *Auston*. And that at the time of the sale by the sheriff *George Boyer* had in fact no interest in the property sold.

The plaintiff charged that this conveyance of September was voluntary, and made without any valuable consideration being paid or given therefor, and was made with intent and design to defeat, hinder, and defraud the creditors of *George Boyer*, and that therefore the same was fraudulent and void as against the plaintiff.

Judgment.

The prayer was in accordance with these statements.

The defendant answered the bill, and the cause having been put at issue, evidence was taken at great length before the court, the material parts of which are sufficiently stated in the judgment of the court.

Mr. *Strong* for plaintiff.

Mr. *Mowat*, Q. C., and Mr. *Crickmore*, for defendant.

For the plaintiff, it was contended that the sheriff's sale was complete, and unimpeached in any way except on the ground that it was inchoate; that the consideration paid by plaintiff though small, was sufficient; at the same sale the defendant became a purchaser of other lands at a much lower price. Upon the evidence, the

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deed from *George Boyer* to his brother is clearly shown to be void as against creditors.

1858.

Reamish.
v.
Pomeroy

For the defendant, it was contended that after the conveyance to *Thomas W. Boyer* the lands could not be sold under writ against *George Boyer*. The statute (a) providing for sales of equity of redemption, does not apply to a case circumstanced as the present. The act itself is of doubtful policy, and should be rigidly construed: for the protection of creditors, not of debtors, it is necessary that property should not be sacrificed, as it is liable to be by the first creditor who proceeds. *Averall v. Wade* (b), and *Roedy v. Williams* (c), were amongst other cases cited.

The judgment of the court was delivered by

ESTEN, V.C.—This is a suit for redemption under a purchase of the equity of redemption in the lands in question, at a sheriff's sale. The lands were offered for sale as the Judgment lands of one *George Boyer*; and one defence raised to the suit is, that previously to this sheriff's sale *George Boyer* had conveyed the equity of redemption in these lands, which were subject to several mortgages, to his brother *Thomas Boyer*, and that consequently at the date of the sheriff's sale he had no interest in them. The bill impeaches this deed as a fraud upon creditors, and we think successfully. The deed is an absolute conveyance in form, but *Dr. Auston* with whose privity, and under whose advice it was executed, states that it was upon trust for securing the incumbrances affecting the property, and for the benefit of the grantor's children. No trusts are, however, declared. *Thomas Boyer*, the grantee, states that he did not know anything of it at the time of its execution, nor until sometime afterwards. *Auston* proves that *George Boyer* was considerable intebted at the time, and he appears to have had no other property, except some

(a) 12 Vic., ch. 73. (b) Ll. & Goold, 252. (c) 3 Jones & La.

1858. book debts, and some household furniture, which was sold and the proceeds of the sale remitted to him. We have no difficulty in pronouncing this deed a fraud upon creditors, of whom *Lyman & Co.*, the execution creditors in the present instance, were one. This equity of redemption was therefore *ceteris paribus* the property of *George Boyer*, available in execution for the payment of his debts at the time of the sheriff's sale in question. The next defence is, that the sheriff's sale was irregular and conferred no title, and that the debt for satisfaction of which took place having been transferred by the execution creditor to *Dean* who was averse to, and was trying to prevent, the sale before the execution of the sheriff's deed, the sale ought not to have been perfected, and the deed was in fact satisfied. We are of opinion that this defence ought not to prevail. Upon the circumstances appearing in evidence we have no reason to think that the sheriff's sale was irregular or inoperative. We say this with a due recognition of the doctrine that the sheriff in conducting sales of this description should pay proper regard to facts connected with the title to, or nature of, the property sold, which he either knows or of which he is credibly informed. But in the present case, it does not appear that the sheriff was furnished with any particular information respecting the title of the property sold. He offered for sale the interest of the debtor whatever it was, and we think that under the circumstances of the case he could not do otherwise; and we think the property was properly offered for sale in one lot, as it constituted one entire farm, and it would in fact have been improper to divide it. Then, although the execution creditor appears to have transferred his debt to *Dean* before the execution of the sheriff's deed, yet the sale does not appear to have been countermanded. Mr. *Boulton*, on behalf of *Dean*, had been endeavoring to postpone the sale, apparently on the ground that *Dean* was himself entitled to the equity of redemption, which formed the subject of it. Afterwards, when beneficially interested in, and having control over the judgment, his interest was to promote the sale;

1858.

Beamish
v.
Pomeroy.

Judgment.

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but if he had power to prevent it, he takes no step for that purpose and the sheriff having received no countermand from any authoritative quarter, proceeds to perfect the sale, which we think, under these circumstances, conferred a good title on the purchaser, the plaintiff in the present suit. It is probable that a purchaser for valuable consideration without notice would, under the provisions of the statute 13 Eliz., ch. 5, before the completion of the sale, have interrupted the title conferred by it; but no such circumstances occurred. It is not pretended that *Thomas Boyer* or *Auston* paid any consideration for this equity of redemption, and *Auston* was perfectly aware of all the facts connected with the execution of the deed from *George* to *Thomas Boyer*. *Dean*, indeed, paid some sort of consideration for it according to the account, upon which the compromise in the suit of *Dean v. Auston* was based; but before this purchase, if such it was, reached its completion, the sheriff's deed was executed, and the plaintiff had perfected his title. We think further, that the plaintiff cannot be affected by what Judgment. passed between *Dr. Auston* and *Dean*, nor by his knowledge of it; and that this case is not within the statute 32 H.VIII., c. 9. We therefore think the plaintiff entitled to a decree for redemption. *Dean* appears to have completed the purchase of part of the property from the college, and to have paid some money for this purpose. He will of course be entitled to have this with interest, in other respect I am not aware that any special directions are necessary, and the decree will be in the usual form.

1858.

Beamish
v.
Pomeroy.

1858.

THE ATTORNEY-GENERAL V. THE MUNICIPALITY OF THE
TOWN OF BRANTFORD.

Dedication—Injunction.

November 9. In the year 1830, when the site of the town of Brantford was laid out into building lots, a part containing nearly two acres was reserved for a public market square. In 1850, the Municipal Council of Brantford executed building leases of portions thereof, with covenants for renewal. Upon an information filed the court restrained the renewal of such leases, or the granting of any new leases; the Attorney-General assenting to the leases already made continuing for their respective terms.

This was an information by the Attorney-General of Upper Canada, against The Municipality of the Town of Brantford, *George Watt, William Hunter*, and several other persons, lessees of the municipality of certain portions of what was called the west market square, in Brantford, setting forth that in 1830, government had caused a survey of the site of the town to be made, and laid off into lots, which was accordingly done, and a portion thereof containing one acre and six-tenths of an acre, was set apart for a public market square, which had been used as such by the inhabitants, and was kept free from buildings, other than for market accommodation until the year 1850, when the municipality, without any authority from government, or the inhabitants, leased certain portions of this square to the other defendants, or those through whom they claimed, upon building leases, and that buildings had been erected thereon in compliance with such terms. The information charged that buildings so erected were a public nuisance, and that the municipality should be restrained from continuing the same—from granting any new leases, or executing renewals of those already made.

Statement.

The answers set up that the buildings were not prejudicial to the town; that sufficient of the block reserved for the market square remained for the purposes of a market; that the lands had been leased by auction, which was publically advertised, and that no act had been done to prevent such auction being carried out, and the

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leases perfected; and that the informant, as well as the Attorney-General had acquiesced in the erection of the buildings complained of, and were not entitled to any relief in respect thereof.

1858.
Attor^y-Gen.
Brantford.

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

Mr. *Gwynne*, Q. C., for plaintiff.

Mr. *Crickmore* for the municipality.

Mr. *Roaf* for other defendants.

The judgment of the court was delivered by

THE CHANCELLOR.—I have read all the affidavits laid before me, and, as might have been anticipated from the nature of the case, they are in direct conflict. Some ten gentlemen swear that the buildings complained of are highly injurious, and a precisely similar number swear that they are extremely beneficial to the public; so that had it been necessary to determine the point, its solution must have been sought by some mode of proceeding better calculated to elicit the truth than the production of affidavit evidence. But, fortunately, it is unnecessary to determine that question. The property in question was dedicated to the public as a market place, as far back as the year 1830, and it was used by the inhabitants of Brantford for that purpose for more than twenty years before the erection of the buildings complained of. Under such circumstances the municipality of the town of Brantford had no authority to deal with this as ordinary property of the corporation. They had not the power to lease it for building purposes, thereby diverting it from the use to which it had been dedicated, and to which the inhabitants of the town of Brantford had a right to insist that it should be applied. We acted upon that principle in *The Municipality of the Town of*

1858. *Guelph v. The Canada Company (a)*, and in the *Attorney-General v. The Inhabitants of the Town of Goderich (b)*, although in these cases the fact of dedication was much controverted. But here the fact is admitted, and I have no doubt, therefore, as to the right of the Attorney-General to a decree.

Attor^y-Gen.
v.
Brantford.

It was argued on behalf of the defendants, that the public had so far acquiesced in these leases, and the expenditure made on the faith of them, that a decree directing their cancellation would be unjust. But the Attorney-General intimated that he had no desire to interfere with the present leases, and the decree will therefore be confined, by his consent, to an injunction restraining the municipality of the town of Brantford from granting any further leases upon the property known as the west market square, and from renewing such as have been already granted. And I consider him clearly entitled to that decree with costs.

Judgment.

NICHOLS V. McDONALD.

Practice—Appeal from Master's report.

The Master's report is *prima facie* evidence of what it contains, unless appealed from. No motion founded on such report can be entertained while the appeal is unheard.

Mr. C. Crickmore for defendant, moved for an order for payment out of court of the difference between the amount found by the Master at Hamilton to be due to plaintiff, and the amount remaining in court; also to dissolve the injunction so far as it restrained defendant from disposing of the lands mentioned in the pleadings; and to restrain proceedings on an execution in a suit directed by the court to be brought on a note made by one Brown and one McDonnell to defendant. There was about 3000*l.* in court, and the Master had found \$9,000. due the plain-

(a) Ante Vol. IV. p. 631.

(b) Ante Vol. V. p. 403.

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tiff. The execution was in the sheriff's hands, and the property was advertised for sale.

1858.

Nichols
v.
McDonald.

Mr. Proudfoot contra. The plaintiff has appealed from the Master's report, and it cannot be held to be evidence. The motion cannot be granted until the appeal is decided, as it turns entirely on the Master's report.

ESTEN, V. C.—The report of the Master, if not objected to, is *prima facie* evidence that it is right; but being appealed against, a motion founded upon it is informal. I cannot dispose of this application without disposing of the appeal, and that is not before me. As to whether the lands were partnership property or not, that cannot be heard except on further directions. I cannot therefore entertain the first portion of the motion in regard to the payment of money out of court, or the dissolution of the injunction; and in regard to the execution, that also ought to be refused; but in consequence of its being in the sheriff's hands, and the property being advertised for sale, I will grant an order for the stay of execution on payment of the money into court. Judgment.

BALDWIN V. DUIGNAN.

Vendor's lien—Notice.

A vendor took from the purchaser a mortgage for part of the consideration money, but did not register the conveyance until several months after the deed to the purchaser had been registered; in the meantime the mortgagor created a second incumbrance in favor of *bona fide* mortgagees, which was registered long prior to the first mortgage, without notice of the vendor's incumbrance. Held, that the want of a receipt for the consideration money, upon the deed to the purchaser was not sufficient to postpone the second incumbrance.

This was a bill by Connell J. Baldwin against Terence Duignan, Sidney Sanderson, and Charles Leveridge, setting forth that plaintiff had conveyed certain lands to Duignan in consideration of 1000*l.*; that 250*l.* was paid to plain-

1858. *Dalwin v. Duignan.* tiff, and a mortgage by *Duignan* and his wife for the remaining 750*l.* was given to plaintiff: that the conveyance to *Duignan* was registered in the proper office, on 2nd July, 1856, but in consequence of some difficulty arising in the way of Mrs. *Duignan* executing the mortgage, that instrument was not registered until the sixteenth of May following.

The bill further set out that by indenture bearing date 21st March, 1857, *Duignan* and his wife had executed a mortgage on the same property to the other defendants, *Sanderson* and *Leveridge*, securing 1547*l.*, which conveyance was duly registered on the 24th day of the same month. Under these circumstances the plaintiff submitted that he was entitled to a lien upon the premises for the unpaid purchase money; that no receipt was endorsed upon the conveyance from plaintiff to *Duignan*, and that *Sanderson* and *Leveridge* must therefore be taken to have had notice of the prior claim of the plaintiff.

The prayer of the bill was that plaintiff might be declared to have a lien for the purchase money remaining unpaid; that he was entitled to priority in respect thereof over the mortgage to *Sanderson* and *Leveridge*; an injunction to restrain them from proceeding to sell under a power of sale contained in their conveyance, unless subject to plaintiff's claim; an account of what remained due to plaintiff; and the usual decree of foreclosure in default of payment.

The defendants, *Sanderson* and *Leveridge*, answered, denying any notice either by themselves or solicitors, of the claim of plaintiff until long after the advance of their money on the mortgage, and the execution thereof, to them; submitted that the want of the receipt was not sufficient to bind them, they being purchasers for a valuable consideration without notice, and that the lien for the unpaid purchase money which the plaintiff originally

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held had been extinguished by reason of their incumbrance, and also by reason of the plaintiff taking security therefor. As against *Duignan* the bill was taken *pro confesso* for want of answer.

1858.

Baldwin
v.
Duignan.

Mr. *Hector* for plaintiff. The mere fact of delivering the deed to *Duignan*, is not sufficient to destroy the vendor's lien for unpaid purchase money, and the want of a receipt upon the conveyance was sufficient to put the parties upon enquiry, when the true position of the title would have been ascertained.

Mr. *Roaf* for *Sanderson* and *Leveridge*. For aught that appears in this case the deed to *Duignan* may never have been seen by the defendants before the transaction was completed: they have pledged their oath to this fact, and there is not the slightest ground to impute *mala fides* to them in taking their security. The question for decision is simply one of lien or no lien, this we submit the plaintiff has deprived himself of. The following *Statement* cases were referred to by counsel *Colborne v. Thomas* (a), *Davis v. Bender* (b), *Mitchell v. McGaffey* (c), *Wennick v. Atkinson* (d), *Carter v. Carter* (e), *Ferrass v. McDonald* (f), *Colyer v. Finch* (g), *Hewitt v. Loosemore* (h), *Lee on Abstracts* 420; *Dart on Vendors and Purchasers*, 481; 5 *Jarmin*, 481.

ESTEN, V. C.—I do not think the plaintiff has any *locus standi* in this court, and I think he must be postponed to *Sanderson* and *Leveridge*, and must redeem them. There is I think, no lien; it is excluded by the mortgage, although not executed by Mrs. *Duignan*, and for that and other reasons perhaps, not registered. The plaintiff must therefore rely on his mortgage, which is clearly void at law, and also I think in equity, as against the subsequent incumbrancers. The absence of an endorsed receipt being

(a) Ante vol. IV., p. 102.

(d) 4 Jur. N. S. 101.

(g) 5 H. L. Ca. 905.

(b) Ib. p. 620.

(e) Ib. 83.

(h) 9 Hare 440.

(c) Ante, 361.

(f) Ante vol. V. p. 310.

(f) Ante vol. V. p. 310.

1858. constructive notice of the money not being paid, and consequently of the lien, if there was one, which there was not. The defendants are not driven to rely on the surrender of the deeds, which, however, assisted the legal fraud, although all the title deeds may not perhaps have been delivered.

Baldwin
v.
Dugan.

SPRAGGE, V. C.—I think that this case is governed by the registry laws. Apart from the circumstance of the plaintiff's mortgage being made to secure unpaid purchase money, it is the ordinary case of the subsequent of two mortgages being first registered, and so obtaining priority—which priority could only be affected by actual positive notice; and which notice is not shown in this case. Then, does the circumstance of the first mortgage being for unpaid purchase money take it out of the ordinary rule? I cannot see that it does, or indeed how it can, for registration without actual notice is, to a purchaser for value, a protection against prior claims, legal or equitable. It is difficult to put a stronger case than the one of most frequent occurrence: that of a prior purchaser who has paid his purchase money and has a conveyance; of course the case of a prior mortgagee forms a part of the same rule, being a purchaser *pro tanto*. I do not see any ground for the exception contended for in favor of a vendor's lien, whether it rests upon the ordinary equity of a vendor whose purchase money has not been paid, or whether he has, for his more effectual protection, secured it by a mortgage. The absence of the endorsed receipt, could, at most, be constructive notice not affecting the purchaser having a registered conveyance.

Judgment.

I have not thought it necessary to consider the effect of a vendor, being, as here, also mortgagee, allowing the title deeds to remain in the hands of the mortgagor, or rather delivering them into his hands, for the purchase and the mortgage appear to have been one transaction.

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LEONARD V. BLACK.

1858.

Payment of money into court—Judgment creditors.

A confession was given to secure a second set of sureties of a county treasurer, but on an arbitration, it was found that defalcations had occurred under a former bond, a surety in which was also in the second. The evidence was conflicting as to whether the protection was for one set or for all. On a motion to retain moneys in the sheriff's hands, which had been made on the confession, it was ordered that the whole amount should be paid into court.

The defendant was formerly treasurer of the county of Elgin, and had, on his appointment, executed a bond to the county for the due performance of the duties of his office. The county council, a year or two afterwards, required securities to a larger amount, and a second bond was executed—one of the sureties in the first bond being also in the second. Defalcations having been discovered, the defendant gave a confession to the sureties on the second bond for 3,000*l.*, to protect them from any loss. The accounts of the treasurer were referred to arbitration, and it was found the defalcations occurred under the first bond; and an affidavit had been put in that the confession was intended to secure the sureties to both bonds. The sheriff had made 1,000*l.*

Mr. *Blake*, on behalf of the plaintiff, a subsequent execution creditor, moved that the sheriff be directed to retain the money until the hearing of the cause; and read the affidavits of the defendant, and of the surety who negated the confession, that no mention was made of the first bond, and the confession was given to secure the securities in the second bond.

Mr. *Roaf* contra. The motion should be refused on grounds stated in the first affidavit—that the confession was given to secure the sureties on both bonds. Where there is a jurisdiction at law, this court should not be applied to; and if this confession was given to secure a debt which was found not to exist, application should be made to the proper court to set it aside. The confession was expressly given to secure against defalcations gener-

1858. ally, and it would be hard if the party who was surety under both bonds was to be secured under one, which carried no responsibility, and not under the other which bore all.

Leonard
v.
Black.

The judgment of the court was now delivered by

ESTEN, V. C.—It appears to me that when the defendant was applied to for the confession, it was unknown as to which bond the defalcations had occurred; and though it may appear that the confession was given to secure those under the second, against such defalcations, the impression at the time seems to have been that it was for all. The question, however, is left in great doubt by the affidavits, and it would be scarcely wise in the court to allow the money to go beyond its control. Though it is moved that the money remain in the sheriff's hands, we may exercise, a discretion, and order the money into court; and as the amount due the other judgment creditors is small, and the case will shortly be decided, I will grant an order directing the sheriff to pay the whole amount into court.

Judgment

CAMPBELL V. CAMPBELL.

Will—Construction of—Registry Act.

A testator made the following devise: "To my dearly beloved wife *Catherine Campbell*, it is my will and desire, that of what property I possess she shall have her lawful support in food and clothing during her natural life, in such manner as she received while I was yet with her." *Held*, that lands of which the testator had only the equitable title were subject to the charge of her support and maintenance.

The recent statute (13 & 14 Victoria, ch. 63) applies, only to instruments executed after the first day of January, 1851; therefore where a testator in 1831, by his will, created a charge upon lands, and the patent for the land issued to the devisees in 1852, who sold and conveyed the property absolutely, and registered the conveyance: the court held the land subject to the charge created by the testator, although his will had not been registered.

The bill in this cause was filed by *Catherine Campbell* against *Thomas Campbell, Anthony Campbell, Francis*

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Campbell, John Whyte, George McGuffin and James Hirst, setting forth that plaintiff was widow of the late *Bernard Campbell*, stating also at considerable length the fact giving rise to the suit, all of which are clearly set forth in the judgment; and prayed a declaration that the premises in question were charged with the support and maintenance of the plaintiff; and to fix the amount that should be paid for such support and maintenance.* Or, if the court should be of opinion that the premises were not so charged, then that it might be decreed that the defendants *Campbell* or some, or one of them, were or was liable for such support, and that she should be declared entitled to a lien or charge on certain lands conveyed to them in exchange for the devised lands, and for other relief.

1858.

Campbell
v.
Campbell.

Defendants answered the bill; all, except the defendants *Campbell*, denied notice of the plaintiff's claim, and the cause having been put at issue, evidence was taken before the court. It was shewn that the plaintiff had remained in possession of the property in question from the death of her husband, until she was turned out by process of ejectment at the suit of the defendants, *Whyte and McGuffin*. Judgment.

Mr. *Morphy* for plaintiff.

Mr. *Hector* for defendants.

THE CHANCELLOR.—*Bernard Campbell* died in the year 1831, having first duly made and published his will, by which, amongst other things, he devised as follows:—
“To my dearly beloved wife *Catharine Campbell*, it is my will and desire that of what property I possess, she shall have her lawful support in food and clothing, during her natural life, in such manner as she received when I was yet with her.”

The property in question in this cause, upon which the testator resided during his life, and which is the only real

1858. estate to which he was entitled, he devised to his three sons, *Anthony, Thomas, and Francis Campbell*, under whom the defendant *Whyte* claims; but at the time of his decease the legal estate was not vested in the testator: he had an equitable title to the land as locatee under the regulations then in force for the disposal of the waste lands of the crown, but the patent only issued in the year 1852, more than twenty years after his death.

Campbell
v.
Campbell.

In December, 1852, the property in question was conveyed to the defendants *Thomas, Anthony and Francis Campbell*, by letters patent of that date, which describes them as devisees under the will of *Bernard Campbell*. In the course of the following year *Francis Campbell* purchased the undivided shares of *Anthony and Thomas Campbell*, his brothers, and on the 22nd of December, 1856, he conveyed the whole to the defendants *McGuffin and Whyte*, and by indenture dated 1st of May, 1855, prior to the institution of this suit, *McGuffin* conveyed his moiety to *Whyte*, who then became, and still continues to be, the sole proprietor of the property.

Judgment.

Whyte resists the claim of *Catharine Campbell* on three grounds. He argues, 1st, that her maintenance is not made a charge upon his real estate by the will of her late husband. He contends, secondly, that he has at all events acquired a good title under the registry laws, in as much as the will of *Bernard Campbell* has never been registered, or at least, was not so at the time of his purchase. And lastly, he insists that he is a purchaser for value without notice.

Upon the first ground of defence, I am of opinion that the plaintiff is entitled to prevail. The language is clearly sufficient to embrace the testator's real estate, and looking at the whole will, I have no doubt that it was from that portion of his estate that he intended to provide for the maintenance of his widow.

Upon the second point there is no room for doubt.

The testator's patent is inapplicable to all the patents issued subsequent to the year 1852.

The evidence shows that *Whyte* has not been the plaintiff in the action, and is therefore not liable to be sued.

The defendant's claim is not barred by the statute, and the amount of the debt is not to be dismissed. The defendant's claim is to be paid, and the plaintiff is to receive the amount.

Where the court offers an issue, and the issue is dismissed, the court may order the plaintiff to pay the costs.

In this case the court has ordered the plaintiff to pay the costs.

(a) See the evidence of my father's will, which I sold the property in question with her support and writings were on the lot, he wished him the whole would not lease of his life lease of his life to these terms (b) *Arkell v. W.*

The testator died in the year 1831, many years before the patent issued, and the registry laws are, consequently, inapplicable, inasmuch as the recent statute is confined to instruments executed after the 1st of January, 1851, and all the previous ones apply only to instruments executed subsequent to the patent.

1858.
Campbell
v.
Campbell.

The evidence establishes, I think, that the defendant *Whyte* had both actual (a) and constructive (b) notice of the plaintiff's claim, and my opinion upon the third point also, is therefore in favor of the plaintiff.

The decree will be therefore for the plaintiff with costs, and there must be a reference to the Master to ascertain the amount to which she is entitled for maintenance. As to the defendants *Hirst* and *McGuffin*, the bill must be dismissed with costs. The bill must be dismissed against the defendants the *Campbells* also with costs, but the plaintiff is to be at liberty to add these latter costs to her own, and receive them from the defendant *Whyte*.

Judgment.

BAKER V. WILSON.

Conflicting evidence—Issue at law.

Where the evidence as to the fact of marriage was conflicting, the court offered plaintiff an opportunity of obtaining better evidence or an issue to try the question, and if refused, directed the bill to be dismissed.

In this cause the bill was filed by the daughter of *John*

(a) See the evidence of Francis Campbell, who was examined as a witness on behalf of the plaintiff, he says: "I have not the probate of my father's will: I got a copy of it for *Whyte*, and gave it to him. I sold the property in question to *Whyte*, the property in question was valued at £1500. I told *Whyte* that my mother had her support out of the property. I told him this ten days before the writings were executed. I had at first offered him fifty acres of my lot, he wished to purchase the whole; I told him that I could not sell him the whole, as my mother was entitled to her support out of it, and would not leave it; he said he would take the whole and give her a life lease of half of it, the front half with all the buildings. I agreed to these terms, and a life lease to my mother was prepared."

(b) *Arkell v. Wilson*, 5 Grant 477; *Coppin v. Fernyhough*, 2 B.C.C. 291.

1858. *Baker* deceased, setting out the following facts: *Baker* was seized of thirteen acres of land in Bayham, on which he borrowed 50*l.* from one *Jones*, and gave him a deed and a bond for reconveyance, on payment of the sum advanced. The bill further set forth that *Wilson* and *Collins*, as administrators of *Baker*, borrowed from the father of the defendant 53*l.* paid off *Jones'* claim for 50*l.*, and took from him a conveyance of the land, which they afterwards, without any authority, sold to one *Miller* for 200*l.* (stated to be much less than its value). The bill charged fraud by the administrators, and notice of such fraud to *Miller* when he purchased. *Miller* ejected the plaintiff from off the premises. The bill prayed that the conveyance made by *Wilson* and *Collins* might be declared void and cancelled, or if *Miller* had not notice, that he might be declared a mortgagee, and be ordered to convey to plaintiff on payment of the sum advanced. That *Wilson* and *Collins* might be declared trustees for plaintiff and ordered to convey the land to plaintiff; also an account. To this the defendants answer: that plaintiff is illegitimate; that the sale was *bona fide* and without fraud; and that the administrators had power to sell to *Miller*.

Judgment.

Mr. *Doyle* for plaintiff.

Mr. *Fitzgerald* for defendant.

ESTEN, V. C.—The only evidence impeaching the legitimacy of the plaintiff is *Wayne's* and his wife's, and as to their evidence, it seems of doubtful credibility; on the other hand, the only direct evidence of the marriage is the mother's, which cannot perhaps be more relied on. Other witnesses, apparently respectable, say that *Baker* treated her as his wife. Upon the whole, perhaps further enquiry and in the form of an issue would be desirable. That may be offered to the plaintiff, and if it is declined, the bill, I think, should be dismissed with costs, exclusive of the evidence, which for the most part is irrelevant,

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and of which each party should pay his own costs, except of relating that to the legitimacy, of which the defendants should have their costs.

1858.
Baker
v.
Wilson.

SPRAGGE, V. C.—I do not think that upon the present evidence we can decree for the plaintiff. The marriage of the plaintiff's mother with the mortgagor is not proved by direct evidence, except that of the mother herself, which is open to some suspicion; and if *Elizabeth Wayne* is to be believed, the whole tale of the marriage is a sheer fabrication, and the certificate of marriage a forgery. It is a suspicious circumstance that the marriage certificate is not produced, nor accounted for, except by saying that it was placed in the hands of Mr. *John Wilson*, a barrister of London; and he is not called on to say whether such was the case. The names of the officiating clergyman, and of persons present are given, but none of them are produced, nor is the existence of such persons shewn. On the other hand, and on the concurrent testimony of several witnesses called by the plaintiff, her mother was the reputed and acknowledged wife of *John Baker* from the time of her alleged marriage until his death. It is clear that they lived together during the whole of that period, and there seems no reason to doubt that the plaintiff is their child. But *Wayne* and his wife depose to repeated declarations by each of the two that they were not married; to the efforts of the woman to induce *Baker* to marry her, and *Baker's* refusal, and Mrs. *Wayne* gives a circumstantial account of the forgery of a marriage certificate by the woman. I cannot but think that the value of their evidence is diminished by the circumstance they relate of their going to live with *Baker* and his reputed wife immediately after their own marriage; for according to their own account *Wayne* and his newly married wife went to live with a man and his kept mistress, knowing at the time that she was so. Either their own standard of morality and decency was very low, or what they now say in regard to *Baker* not being married is untrue:

Judgment.

1853. besides, they are not spoken of as persons of good repute, though their credit as witnesses is not regularly impeached.

Baker
v.
Wilson.

But there is the testimony of *Ault* unimpeached, and he says that the plaintiff's mother told him that she was not married. I observe, however, that throughout his evidence he speaks of her as *Mrs. Baker*, and says that she was reputed in the neighborhood to be *Baker's* wife. I should not think it safe upon his evidence alone to decree against the marriage, but I think we are not in a position, as the evidence stands, to discard altogether the testimony of Mr. and Mrs. *Wayne*, and it is certainly strange that the direct evidence of a marriage solemnised in 1842, should be altogether lost. This marriage, if any took place, must have been under the statute 11 Geo. IV., ch. 36, which among other things requires an annual return to be made to the clerk of the peace by clergymen, authorised by this act to solemnise matrimony, of the marriages by them solemnised during the preceding year, giving the names of the parties married, dates, names of witnesses, and other particulars. It may help to a solution of the question of marriage or no marriage to search and ascertain whether any returns were made for the year 1842 by the person named by the plaintiff's mother as having married her to *Baker*, and if so, whether her's is among them. It may be well to ascertain whether such person as she names took out a certificate at the quarter sessions, as required by the statute, or from the religious denomination to which he belonged, as afterwards authorised by the statute.

Judgment.

I think upon the whole that the course indicated by my brother *Esten* is the proper one. If, however, the alleged certificate can be produced and proved to be genuine, or a return can be found of the alleged marriage under the provisions of the statute I have referred to, I should be disposed to admit it without putting the plaintiff to the expense of an action, or the trial of an issue.

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(a) 9 Hare 39
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CHANDLER V. FORD.

1858

Trustee.

Lands were held by one *Ford* as trustee for *Chandler*, who assigned, by a memorandum absolute in form for a nominal consideration, of 5s., but in reality by way of security to one *Codd*, the instrument declaring the trust; subsequently the agent of *Codd* wrote to *Ford*, November 8. stating that his writing had been assigned, and calling upon him to convey the property to *Codd*; *Ford* in compliance with such request executed a conveyance and transmitted it by post, without ever having called for the production of the assignment to *Codd*, who sold to a purchaser without notice. Upon a bill filed by *Chandler* against *Ford* and *Codd*, the court held that *Ford*, under the circumstances, had committed a clear breach of trust: that he was bound to make good the trust estate, and directed an inquiry as to the present value thereof, the amount of which, together with the costs of the suit, less what might be found due by *Chandler* to *Codd*, the defendants were ordered to pay; and that *Codd* was bound to reimburse *Ford* for any sum he might be compelled to pay under the decree.

The bill in this cause was filed by *Thomas Chandler*, against *David B. Ogden Ford* and *Robert Codd*, the statements of which, and the relief sought, are fully stated in the judgment.

Mr. *McDonald* and Mr. *Proudfoot* for plaintiff.

Argument

Mr. *Strong* and Mr. *Blake* for defendant *Ford*.

The defendant *Codd* did not appear. *Harrison v. Randall* (a), *Davey v. Thornton* (b), *Holford v. Phipps* (c), *Goodson v. Ellison* (d), *Angier v. Stannard* (e), *Evans v. Bicknell* (f), *Balguy v. Broadhurst* (g), *Bowes v. East London Water Works* (h), *Brice v. Stokes* (i), *Taylor v. Glenville* (j), were referred to by counsel.

THE CHANCELLOR.*—There is no doubt in this case as to any of the facts.

In the year 1837, one *Ritchie*, claiming to be owner

(a) 9 Hare 397.

(b) *Ib.* 222.

(c) 3 Beav. 434.

(d) 3 Russ. 533.

(e) 3 M. & K. 566.

(f) 6 Ves. 173.

(g) 1 Y. & C.C. 16.

(h) 3 Mad. 375.

(i) 11 Ves. 326.

(j) 3 Mad. 176.

*This case had been previously heard before the VICE-CHANCELLORS, who having been unable to concur in a judgment, directed it to be re-argued before his lordship the CHANCELLOR.

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 Chandler
 v.
 Ford.

in fee, conveyed eight building lots in the town of Hamilton, being lots 11, 12, 13, and 14, fronting on Main Street, and lots 11, 12, 13, and 14, fronting on Muirde Lane, in *Tiffany's* survey, to the plaintiff *Chandler*. On the 12th of March, 1838, *Chandler* conveyed these eight lots to the defendant *Ford* in fee. The conveyance was a deed of bargain and sale in the ordinary form, which purported to pass the estate to *Ford*, absolutely; but *Ford* was in truth, a mere trustee, having no personal interest whatever in the matter, and the trusts upon which the property had been conveyed were declared in a paper signed by him on the 1st of October following, which is in these words.

Judgment. "By deed dated 12th of March, 1838, and registered on the 2nd of April, 1838, *Thomas Chandler* conveyed to *David B. Ogden Ford* eight lots in the town of Hamilton, in the Gore District, which are particularly described in the said deed, as may appear thereby, and which said land was to be held in trust by the said *Ford*, as hereinafter specified. Now, these presents are to explain and acknowledge that I the said *Ford* am to hold the said land as follows, that is to say, such six of the said lots as *Governor Ogden*, of Waddington, in the State of New York may choose, to be held by me in trust for the said *Ogden*; and the remaining two of the said lots are to be held by me in trust for the said *Thomas Chandler*.

"Dated 1st October, 1838. (Signed) D. B. O. FORD."

On the 20th January, 1843, the other defendant, *Codd*, agreed to advance *Chandler* \$150 on the security of the property in question, and thereupon the declaration of trust was delivered to *Codd* with the following memorandum endorsed on it: "For the consideration of one dollar now paid me, I hereby make over and sell my interest in the within premises, as described to *Robert Codd* of Toronto, and his assigns." (Signed), *James Chandler*, 20th September, 1843." "Witness, *H. B. Ritchie*, Buffalo;" and for the purpose of shewing the nature of the transaction, *Codd* gave *Chandler* a receipt in these words: "I have received *D. B. O. Ford's* voucher, dated

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1st October, 1838, acknowledging to hold in trust for you two lots in the town of Hamilton therein described, which I will reconvey to you on the repayment to me of \$150, which I have by letter of credit of this date authorised you to draw on me. I have also received for collection your draft on *Edward Chandler*, Montreal, when paid, 62l. 10s. currency, the avails are to be credited to your account."

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 }
Chandler
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Ford.

On the 4th November, 1844, *Ogden* selected lots 12, 13, and 14 on Main Street, and the same numbers on Maiden Lane, and by his direction those lots were conveyed by *Ford* to the late Mr. *Tiffany* of Hamilton, in trust for one *Mc Vickers*, and the remaining lots, being 11 on Main Street, and 11 on Maiden Lane, were from that time held by *Ford* in trust for *Chandler*.

Subsequent to the period last mentioned, but when more particularly, does not appear, *Ritchie* discovered, or at all events alleged that in the deed from himself to *Chandler* the lots intended to have been conveyed were misdescribed, being designated 11, 12, 13 and 14, to which lots he had in truth no title at that time, having previously sold and conveyed them to one *Holmes*, instead of lots 7, 8, 9, and 10, which were those really intended to have been conveyed; and negotiations were accordingly opened for the purpose of having that matter corrected. The six lots selected by *Ogden* had been conveyed to *Tiffany*, as I have before stated, and their history is not material to the present case; but in respect to the two lots still vested in *Ford* in trust for *Chandler*, *Ritchie* applied to *Codd*, who agreed to release the two 11's, upon receiving a conveyance from *Ritchie* of the two 10's, and on the 20th of June, 1846, he instructed Mr. *Tiffany* to act as his attorney in having the arrangement carried into effect.

On the 16th of September, 1846, Mr. *Tiffany*, acting

1858. as the agent and attorney of *Codd*, sent to Mr. *Ford* a letter in the following words :

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v.
Ford.

Hamilton, 16th Sept. 1846."

" DEAR SIR :

" Mr. *Robert Codd* of Buffalo, has sent me your undertaking to *Thomas Chandler*, dated 1st October, 1837, to convey to him two town lots out of the eight he had conveyed to you by deed dated 12th of March, 1838, all situate in this town. Mr. *Chandler* assigned this undertaking to Mr. *Codd* in April, 1843. Mr. *Codd* is now desirous to get a title to the lots, but a difficulty has arisen in this way. *J. W. Ritchie*, who conveyed the eight lots to *Chandler*, had already conveyed them to *James Holmes* of Montreal, which latter deed is prior in date and registration. It appears that *Ritchie* made a mistake. He should have conveyed other eight lots in the same block, and he now offers to convey other two lots in the same block in lieu of them. He has also conveyed to me other six lots in the same block in lieu of the six you conveyed to me in trust for *Mc Vickers*. The only lots remaining to be arranged for are the two promised Mr. *Codd* or *Chandler*.

Judgment.

As you hold the title from *Ritchie* it will be necessary for you to quit claim the two lots to Mr. *Ritchie*. The lots are number 10, fronting on Main Street, and number 10 fronting on Maiden Lane, in the block of town lots situate between Main, Maiden Lane, King and Caroline Streets, in *Tiffany's* survey of town lots in the town of Hamilton: Upon your sending me such a quit claim, I will return you your undertaking to *Chandler*."

" (Signed), (GEO. S. TIFFANY.)"

" To D. B. O. Ford, Broekville."

That letter appears to have been the only communication between *Tiffany* and *Ford* upon this subject, and upon the confirmation which that letter contains, *Ford*, without communicating what had passed, either to *Chandler* or *Codd*, or asking any question respecting it, executed a deed by which he reconveyed the two 11's to *Ritchie* and transmitted the same to *Tiffany* on the 5th of October, 1846, with a letter in the following words :

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deed to *J. W. Ritchie* of the two lots in Hamilton, conveyed by *Chandler* to me, not chosen by *Mr. Ogden*, but they are lots 11 and not 10, as mentioned by you. I send you this deed upon condition that you enclose to me the original undertaking which I gave, acknowledging to hold these lots in trust for *Ogden* and *Chandler* properly transferred or discharged."

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Chandler
v.
Ford.

(Signed),

"To *Geo. S. Tiffany*."

"D. B. O. FORD."

Ritchie conveyed the two 10's to *Codd* in fee. This conveyance has not been produced, and the precise date of its execution cannot be clearly ascertained from the evidence, nor is it material, for the deed was executed clearly in pursuance of the arrangement between *Codd* and *Ritchie*.

There is no evidence that *Chandler* had any notice whatever of these proceedings. It is quite clear, I apprehend, that he had no communication on the subject with either *Tiffany*, *Codd* or *Ford*, until after the execution of the deed from *Ford* to *Ritchie*, and from *Ritchie* to *Codd*. Indeed the evidence does not shew when he became aware of the facts, but I take it to be clear that he remained ignorant of what had passed up to the 14th of September, 1849, for on that day he applied to *Mr. Ford* for a reconveyance of his two lots, through his agent *Mc Vickers*, and on that occasion *Mr. Ford* admits that he handed the agent a memorandum in writing to be transmitted to *Chandler*, in these words; "A writing was given by *Mr. Ford* to *Mr. Whitney*, when certain lots in Hamilton were conveyed to *Ford*, shewing how they were to be held. Has *Mr. Chandler* that writing?" Now, that memorandum not only did not give any information as to the real state of affairs, but it was well calculated to mislead *Chandler*, and to arrest further enquiry, although I do not mean to say that it was given with that intention.

This bill, filed under the circumstances I have just

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detailed, against Messrs. *Ford* and *Codd*, prays " that an account might be taken of what is due to the said *Codd* on foot of the said security, and that upon payment of the same, and the interest due and owing thereon, *Codd* might be decreed to deliver up the declaration of trust, and to release any interest he might have thereunder ; and that *Ford* might be ordered to convey the 11's to plaintiff ; or, if it should appear that the 10's were conveyed to *Codd* with notice of the trusts, then that the plaintiff might be let in to redeem these lots. And that it might be declared that *Ford* and *Codd* had been guilty of breach of trust, and might be decreed to indemnify the plaintiff from the consequences thereof, and might be ordered to pay the costs of the suit. And that the plaintiff might have such further and other relief as to the court might seem meet, and as the nature and circumstances of the case might require. That prayer is not, certainly, a logical deduction from the premises, nor is the relief sought against *Ford* stated explicitly ; but it may be regarded, I think, as in effect a prayer to redeem, and in default, to be indemnified by the trustee. Certainly the parties have not been misled by any ambiguity or generality in the prayer, for the plaintiff's right to relief against *Ford*, for breach of trust, was the point principally discussed on both hearings, indeed it was the only point argued on the last occasion.

Judgment.

In answer to that bill, *Codd* swears that it was agreed between Mr. *Ford* and himself, that he should assign all the interest he had in the 11's under *Chandler's* assignment of the declaration of trust to *Ford*, and that in consideration thereof *Ford* should convey to him the 10's in fee, and he prays to be dismissed with his costs. But there is not a shadow of evidence to support that case. It is palpably and plainly untrue. And we thought it quite clear upon the first hearing, that *Chandler* adopting *Codd's* acts, was entitled to redeem the 10's ; and a decree would have been pronounced to that effect, but for some intimation that *Codd* had sold

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those lots, and an enquiry was therefore directed by consent of all parties.

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The learned judge before whom that enquiry was prosecuted certified that *Codd* could not make a good title, inasmuch as he had sold the 19's to a purchaser for value without notice of the trusts, who for that reason could not be disturbed, and when the cause came on again upon that certificate, the discussion was confined to the question whether *Ford* had committed a breach of trust.

On behalf of *Ford*, his counsel argued, that he had acted throughout with perfect good faith; that as *Codd* had obtained an absolute unconditional assignment of *Chandler's* equitable interest, it would have been his duty as trustee, to have clothed that equitable interest with the legal estate if *Codd* had desired it, and that it was equally his duty to reconvey the 11's to *Ritchie*, as he did at *Codd's* request; that all his acts were therefore in accordance with his duty as trustee, and that the bill as against him must be dismissed with costs. Judgment.

Mr. *Ford* has stated all the circumstances in his answer with perfect fairness, and I have no doubt whatever that he acted throughout in good faith. But it is equally clear, I apprehend, that he has been guilty of a breach of trust, and is therefore bound to indemnify the plaintiff against the consequences which have resulted from his illegal acts.

Ford, as trustee, had an undoubted right to require *Codd* to produce clear and satisfactory evidence of the validity of the assignment from *Chandler* to himself. He had a right to call for the production of the assignment, and to be satisfied upon every point requiring explanation. Had difficulties arisen, he would have been entitled to call for the opinion of counsel at *Mr. Codd's* expense, and if these difficulties could not be removed, he

1838. would have had a right to refuse to part with the legal estate, except under the direction of this court (a).

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Now, if the law confers upon *Ford*, as trustee, the rights I have described, as I have no doubt it does, it will be found, I apprehend, that it imposes upon him corresponding duties. It was his duty to have satisfied himself of the validity of the assignment from *Chandler* to *Codd*. It was his duty to have seen the assignment, and to have called for such explanations as the circumstances seemed to require, and had the case, upon enquiry, presented doubts and difficulties which he could not solve, it would have been his duty, I apprehend, to refuse to convey except with the assent of the original *cestui que trust*, or under the direction of this court. But how has *Mr. Ford* discharged these duties in the present case? He took no steps whatever to satisfy himself as to the nature or validity of the assignment from *Chandler* to *Codd*. The assignment was not even produced to him. He made no enquiry of any sort from either *Chandler* or *Codd*. He acted upon the simple statement of the attorney for the assignee; nay, he did not pause to make a single enquiry even from him. Surely that was, it must be admitted, a great neglect of duty.

Judgment

But the present case is much stronger than I have yet stated. This is not a case in which the trustee was merely required to divest himself of the legal estate. He was required to do much more—to alienate the trust estate altogether, and substitute in its place another, and an entirely different estate. Now, if *Mr. Ford* had even paused until the assignment had been produced, he would have seen that it was upon the face of it voluntary. He would have seen, therefore, that it was an assignment which *Codd* could not have enforced against *Chandler* in this court, and which he as a trustee ought not to have carried out without *Chandler's* assent. And had he paused to on-

(a) *Goodson v. Ellison*, 3 Russ. 592; *Poole v. Parr*, 1 Beav. 604; *Holford v. Phipps*, 3 Beav. 640.

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quire even from *Codd*, we must assume that he would have learned the real nature of the transaction. We cannot deal with the case upon the presumption that *Codd* would have misled him (a). He would have learned, we must presume, that the assignment to *Codd* was not absolute but conditional, and that to do what he was required without *Chandler's* assent was a plain breach of trust (b).

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Chandler
v.
Ford.

For these reasons I am of opinion that the defendant *Ford* has committed a clear breach of trust, and as the estate has been lost by his act, the defendants must pay the plaintiff a sum equal to its value, and for that purpose the Master must be directed to take an account of the amount due from the plaintiff to the defendant *Codd*, and to enquire the present value of the two lots, being 10 on Main Street, and 10 on Maiden Lane, and deduct the plaintiff's debt, the defendants must pay the balance with the costs of the suit. And any sum which the defendant *Ford* may be called upon to pay under the decree, including the costs of the suit, must be repaid by the defendant *Codd*. Judgment.

TURNBULL V. SYMONDS.

Mortgagor—Assignee—Sale.

Where a suit is brought to enforce the sale of mortgage property against the mortgagor and his assignee, the order for payment of December 17 any balance of the mortgage debt which may remain due after such sale, must be against the mortgagor, and not the assignee.

This was a bill by the mortgagee of certain property against the mortgagor and his assignees, praying for a sale of the mortgage estate, and had been taken *pro confesso* for want of answers. Upon the bearing of the cause,

Mr. *Blake* for plaintiff, asked that the usual decree

(a) *Jones v. Williams*, 3 Jur. N. S. 1066.
(b) *Angier v. Stannard*, 3 M. & K. 571.

1858. might be made, and that it might contain an order for payment by the mortgagor, of any balance that remains due after the proceeds of the sale should have been applied in reduction of the mortgage debt.

Turnbull
v.
Symmonds.

The defendants did not appear, but a doubt being suggested whether the order for payment of the balance should be against the mortgagor or his assignees; the cause was directed to stand over.

THE CHANCELLOR.—This is a foreclosure suit. The defendants are the original mortgagor, and certain other persons to whom the equity of redemption was assigned, subsequent to the mortgage, and the question is, whether the decree, which is for sale, is to direct the deficiency to be paid by the mortgagor, or by his assignees.

This question turns upon the proper construction of the Judgment, 32nd of the Orders of June, 1853. Prior to that order the only relief which a mortgagee could obtain in this court was foreclosure or sale. He was obliged to proceed at law, by ejectment, to obtain possession, and by action of covenant in case the sale, where the decree was for sale, failed to realize a sum sufficient to pay the whole debt. That state of the law was productive of inconvenience and hardship to all parties. The mortgagee was compelled, without reason, to institute three distinct suits upon the same contract. And worse still, the mortgagor was subject to ruinous litigation, prosecuted frequently, it is to be feared, for the sake of the costs merely.

That was felt to be a great and growing evil, and the first and third sections of the order in question were introduced for the purpose of affording some relief. The third section, upon which the question now before us turns, provides, that "Instead of foreclosure, the bill in any such suit may pray a sale of the mortgaged premises,

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and that any balance of the mortgage debt which may remain due after such sale may be paid by the *mortgagor*, and the same may be decreed accordingly." The primary signification of that section cannot be doubted. It authorises an order against the mortgagor in express terms.

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Symonds.

That is not denied. But it is said that the term "*mortgagor*," as used in that order, may mean the assignee of the mortgagor, and as to assignee of the equity of redemption is bound in equity to pay the mortgage debt, it is argued that it would be inequitable to make an order against the mortgagor when the equity of redemption has been assigned, and that the decree in such cases ought, consequently, to direct the debt to be paid by the assignee.

There are several grounds upon which that construction appears to me inadmissible.

Previous to the order under consideration, a mortgagee had no right, legal or equitable, to compel an assignee of the equity of redemption to pay the mortgage debt. Now, the object of the order was not to create a new liability. The court had no power to do that. The object was to give the mortgagee the same relief here that he could have obtained by action at law upon the covenant. That is a personal decree against the mortgagor.

Again, it was not the intention of this order to curtail in any respect the rights of the mortgagee. That the court had no power to do. The intention was to substitute a decree of this court against the mortgagor, instead of the judgment at law, to which the mortgagee had previously a clear legal right. And I can perceive nothing inequitable in such a decree, unless it be inequitable to relieve the mortgagor from the costs of an action at law.

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Turnbull
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Symmonds.

Lastly, our order of the 6th of February, 1858, provides that a mortgagee who has proceeded at law shall not be entitled to his costs in equity. Now, upon the construction contended for, that provision would be obviously unjust. For if the mortgagee cannot obtain a personal remedy against the mortgagor in this court—if he is driven to law, it follows that he ought to receive his costs in both courts.

The decisions have not been uniform. We were referred to a case in which my brother *Esten*, with the concurrence of my brother *Spragge*, made an order upon the assignee of the equity of redemption. But in several subsequent cases which came before my brother *Spragge* and myself that decision was not adverted to, and the decree was against the mortgagor, although the equity of redemption had been assigned.

In that state of the authorities the question must be decided upon principle: and for the reasons already stated, Judgment. I am of opinion that the mortgagee is entitled under this order to a personal decree against the mortgagor in all cases.

ESTEN, V. C., concurs.

SPRAGGE, V. C.—When this question arose sometime ago in a cause heard before my brother *Esten* and myself, I thought that the court, having before it the mortgagor and his assignee, the purchaser of the equity of redemption, might apply the order to the person standing in the position of the mortgagor in cases where as between him and the original mortgagor, he was the person primarily to pay the mortgage money: the original mortgagor standing in such case in the position of his surety.

But further consideration has induced me to change my opinion. I think the terms of the order do not, without straining them beyond their legitimate meaning,

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warrant such a construction. A personal remedy is authorised against the mortgagor, the object of the order being to save the necessity of sending the mortgagee to law for remedy as he was entitled to upon his mortgage, beyond the remedy formerly given in this court, and to give him an equivalent remedy in this court. This would not be done if he were put first to seek his personal remedy against the purchaser of the equity of redemption, and the court would hardly be dealing justly with him in denying him his costs at law, without giving him at the same time an equivalent remedy in this court. Another objection to that construction of the order is, that it would be creating an equity between the mortgagee and the purchaser of the equity of redemption unknown to the law; that the mortgagor being personally liable to the mortgagee, and the mortgagor's assignee to the mortgagor himself, a direct liability should be created from the assignee to the mortgagee. The order, as I now construe it, gives a remedy in this court where there was before a remedy, but only at law; the other construction would do more than give a remedy, it would create a liability; and this, I am satisfied, was not intended, and I think is not given upon a correct reading of the order. For these reasons I think that the plaintiff in such a suit as comes within the order, is entitled to a personal order against the mortgagor, whether the mortgagor or his assignee, as between themselves, is to pay the mortgage money, and that he is not entitled to such order against the assignee.

ROSSIN V. WALKER.

Injunction—Building lots

Where building lots have been sold according to a plan, the portions of the property laid off as roads cannot afterwards be directed to other purposes.

It appeared in this case that the plaintiffs had become

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Rossin
v.
Walker.

entitled to a portion of a block of land originally laid off into lots by the Honorable *George Markland*, in the City of Toronto, and that defendant was interested in other portions of the same estate, and under the circumstances stated in the judgment, claimed a right to close up a lane adjoining the plaintiff's land, and had commenced to build a brick tenement thereon.

An *interim* injunction had been obtained, and the cause was now brought on to be heard.

Mr. *Roaf* for plaintiffs.

Mr. *McMichael* for defendants. *Woodyer v. Hadden (a)*, In Re *17th Street (b)*, *The King v. Lloyd (c)*, *Barlow v. Rhodes (d)*, *Ward v. The Great Western Railway Company (e)*, were referred to.

ESTEN, V. C.—The facts of the case are these :
 Argument, *Markland* owning lots 3 and 4, commonly called *Baby* place, laid them out in lots with *Scott Street*, and a cross open space admitted to be dedicated to the public, and the lane in question between lots numbers 8 and 9. A map was made and signed by *Markland*, and used by him in sales, and in the sale of those two lots, which showed this laying out of the ground : *McDonald* agreed for the purchase of lots 8 and 9, according to this plan, in 1835, and received a bond for a deed. In the same year he built a house partly over the lane, leaving an archway over the lane to admit free passage. In 1837, *Markland* sold and conveyed lot No. 9 to *Franklin Jacques* ; in this deed the lot is described with reference to the same plan : and the lane in question is called a passage by which the lot is described as bounded on one side. The corporation afterwards widened *Colborne Street*, and the house which had been built partly over the

(a) 5 Taunt. 125. (b) 1 Wend. 263. (c) 1 Camp. 260.
 (d) 1 Crompt. & M. 439. (e) 13 U. C. Q. B. 315.

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1858.

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lane was removed. *McDonald* obtained a deed from *Markland* of both lots, described with reference to the same plan; there has never been a fence on the eastern side of lot 8, dividing it from the lane, but there has always been such a fence on the western side of lot nine. As long as the house remained its eastern wall was in a line with this fence; and the lane has consequently appeared to form a part of lot 8, and has, I apprehend, been always used by the owner of that lot indiscriminately with the lot itself. Lot No. 9 does not appear to have been occupied at all, except that it was used by *McDonald* himself, and afterwards by *Brett* as a back entrance to premises in front of it on King Street. *McDonald* afterwards contracted with *Markland* for the purchase of the strip; and the defendant *Walker* has entered into a similar contract with *McDonald*. His deed was of course inoperative as to lot No. 9, but he appears either to have been convinced that he had no remedy against *Jacques* probably from want of notice in *Jacques*; or he resolved to abandon his claim as to lot No. 9. *Jacques* conveyed twenty feet of lot No. 9 to the corporation, who conveyed it to the plaintiffs. *McDonald* sold and conveyed first the west half, and then the east half of lot No. 8 to *Shewan*, who sold and conveyed it in effect to the defendant *Walker*, who is proceeding to build on the strip in question, and the object of this suit is to restrain him from so doing. The plaintiffs seem entitled to this relief, if what has occurred amounted to either a grant of a legal right of way, or an equitable representation that the strip in question was laid out as a passage. In either case, what was done was with a view to open a communication with King Street, at some future time. It would not, I think, be unreasonable to hold that what took place in this case amounted to a legal grant; the plan is incorporated with the deed, which is under seal, and there could be no other intention than that the strip should be reserved as a private passage until it should be dedicated to the public by being connected with King Street. If, however, enough did not

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Rossin
v.
Walker.

occur to amount to a legal grant, it seems to me that a representation took place on the sale to *Jacques*, that the strip in question was laid out definitively as a passage, which should preclude the owner of it from diverting it to any other purpose. The building of a part of the house over it, being an archway, is not inconsistent with this right. It is a point of considerable importance to determine the extent to which owners of property exhibiting maps and plans on the sale of property are bound by their contents; and we have decided in this court that when a map or plan is exhibited as a particular of sale, presenting on its face roads, streets, squares, and other advantages and attractions, and purchasers are made according to, and on the faith of it, he cannot afterwards divert the ground appropriated to such uses to other purposes, although he may not be bound to make or construct all the roads, streets and squares, and other things of the same sort which the map exhibits. *Shewan and Walker*, of course, stand in the same place as *McDonald*. If, indeed, their possession has been such as to amount to a bar in law; or, if they are purchasers for valuable consideration without notice of the plaintiff's rights, the defendant *Walker* may successfully resist this suit, but I do not understand him to stand in this position, from the pleadings and evidence. Apart from these grounds of defence, I do not think the enjoyment of the defendant, and those under whom he claims, has been such as to destroy the plaintiffs' rights. I think the injunction should be made perpetual with costs.

Judgment.

SPRAGGE, V. C.—I do not think that any answer is given to the plaintiff's bill. By a conveyance dated the 5th of August, 1837, Mr. *Markland*, the then owner of a block of land, subdivided into building lots, conveyed one of these lots to *Franklin Jacques*, through whom the plaintiffs claim. In the conveyance it is designated as a certain parcel or tract of land in the city of Toronto, called and known by the name of lot number nine, according to a survey or plan of the property lately

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belonging to the late Honorable *James Baby*, beginning at the south corner, where a stake has been planted, then westerly along the line of a passage to *Mr. Burnside's* lot, sixty-three feet, and so on. The defendant claims under a subsequent conveyance from the same grantor, dated 9th of December, 1841, to *Alexander McDonald*, in which the land conveyed is described as lots numbers 8 and 9, in *Baby* place, in the city of Toronto, "as laid down on a lithographic plan of the said place, which was conveyed to the said *George Markland* by the surviving executors of the late Honorable *James Baby*." A lithographic map is put in, signed *George H. Markland*, in which lots 8 and 9 are shown divided by a line or passage, the eastern side of which leads to property of a *Mr. Burnside*. *Alexander McDonald*, in his evidence, refers to the existence of a lithographic map, signed by *Mr. Markland*, shewing a line dividing lots 8 and 9; he says that he bargained for lots 8 and 9 with *Mr. Markland*, and was not aware of the conveyance to *Franklin Jacques*. As to the lane or passage, he says it was laid out with a view to its being continued with the expected assent of *Mr. Burnside* through to King Street, and that afterwards *Mr. Markland* failing to obtain *Mr. Burnside's* consent, verbally gave it to him, *McDonald*, and that he built over it, and used it with lot 8, until it was purchased by the city. It No. 9 appears to have been vacant, for *McDonald* says he used it as a way of access to the back of his premises. The principle upon which this bill is founded has been recognized, and acted upon in other cases in this court. I think the plaintiff entitled to a perpetual injunction.

CHENEY V. CAMERON.

Specific performance.

The fact of a sale having been effected according to a plan of the property, upon which were shewn certain roads leading to the several lots, does not bind the vendor to make such roads; although the court would restrain the diversion to any other purpose, of the land appropriated for such roads.

The bill in this cause was filed for the specific perfor-

1858. mance of a contract for the sale and purchase of land bid
 off at an auction or building lots which had been sold by a
 plan exhibited at such sale.

Cheney
 v.
 Cameron.

Mr. *Roaf* for plaintiff.

Mr. *A. Crooks* for defendants.

ESTEN, V. C.—The only defence offered to this suit is, that certain roads, represented on the plan which was used on the sale, and exhibited to purchasers of the property, have not been completed. This is one of those cases in which a plan has been exhibited as a particular of sale, representing the different lots with roads and other proposed improvements. We have decided that when a plan of this kind has been used for such a purpose, the vendor will not be permitted to divert the ground appropriated for roads to any other purpose, but we are not aware of any case in which it has been decided that such an use of a plan imposes on him the obligation of constructing such roads. We think the defence fails, and that a specific performance must be decreed with costs.

Judgment.

SPRAGGE, V. C.—The ground upon which specific performance is resisted, I think fails. Looking at all the evidence, I think there was no express agreement to make roads, unless the road leading to lots one and two, to which I will refer presently, and I think the mere exhibition of a plan upon which lots and streets are delineated, is not itself an agreement, or the holding out of an expectation that the roads will be actually constructed at the expense of the vendor.

As to the road leading to lots one and two, the only representation as to that road apart from the plan, was made after Mr. Cameron had purchased, so that as to that as well as the others he could have only the plan to rest upon. In regard to the alleged reservation of

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The judgment

ESTEN, V. C.
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(a) Y. & Jer. 117.
 VOL. VI.—4

road between lots F. & B. and C. & E., I think that the sale was according to plan A., not plan B., and that Mr. Cameron purchased by the former with full notice that that road was not to be continued.

1858.

Rossin
v.
Walker.

I should think myself that map A. shows it to be so, besides which, is the fact pointed out by Mr. Hector, that if that road were continued, he could not have purchased block C. & E., because in that case there would have been no such block, but lots C. and E., and the purchase in that shape he signed with his own hand.

MITCHELL V. GORRIE.

Purchaser for value without notice.

It is a clear and well settled rule of this court that equity will never deprive a purchaser for value without notice of any advantage he has arising from either a legal or equitable title, or even from mere possession, although as between or amongst mere equitable claimants it will enforce the rights of the prior against the subsequent claimants in point of time.

This was a bill filed by James Mitchell against William M. Gorrie, praying under the circumstances set forth in the judgment to have the conveyance under which Gorrie held possession of the property in question in this cause delivered up to him to be cancelled.

Mr. McDonald for plaintiff.

Mr. Hagarty, Q. C., and Mr. Strong, for defendant.
Wiseman v. Westland (a), Eyre v. Dolphin (b) Latouche v. Dunsany (c).

The judgment of the court was delivered by

ESTEN, V. C.—In this case a mortgage was made by John Somerville, in 1842, of the property in question

(a) Y. & Jer. 117. (b) 2 B. & Be. 290. (c) Sch. & Lef. 137.

1858.

Mitchell
v.
Gorrie.

to one *Radenhurst*. This mortgage was registered in October of that year, and prior deed relating to the same property had been already registered. In 1844 this mortgage was assigned by *Radenhurst* to *Thomas Somerville*. This assignment was not registered. In December of that year an arrangement was made between *John* and *Thomas Somerville* for the discharge of this mortgage. The arrangement was, that *Thomas Somerville* should retain certain of the lands comprised in the mortgage in satisfaction of the mortgage debt, and should discharge the remainder. Accordingly, on the 16th December, 1844, a certificate of discharge of the mortgage in the form required by the statute was prepared and registered in the registry of the county where the lands lie. A marginal note (I believe it was), was made in the register: at all events, some memorandum was made in the record, importing that the discharge was to be limited to the lands intended to be discharged from the mortgage. The certificate did not, according to the memorandum accompanying it, include the lands in question in this suit, and which were the lands intended to be retained by *Thomas Somerville* in satisfaction of the mortgage debt. On the same day a release of the equity of redemption in the lands in question was executed by *John Somerville* to *Thomas Somerville*. This release was not registered. In 1848, *Thomas Somerville* became bankrupt, and all his estate vested in the plaintiff, who was appointed his assignee. On the 25th of July, 1850, the lands in question were conveyed by *John Somerville* to one *Maulson* in fee. This deed was registered on the 30th of July, 1850. On the 17th January, 1851, *Maulson* conveyed the same lands to the defendant *Gorrie* in fee. This deed was registered on 21st January, 1851. *Gorrie* afterwards, on 2nd November, 1851, conveyed these lands to the other defendants *Shaw & Spreul*, and to the plaintiff as trustees for the payment of his debts; which have been all paid, and the defendants *Shaw & Spreul* have accordingly disclaimed all interest in the lands, and consequently the question which

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arises in this suit is to be discussed between the plaintiff and the defendant *Gorrie* alone.

1858.

Mitchell
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Gorrie.

The bill treats the whole legal and beneficial interest in the lands in question as vested in the plaintiff, and the deeds to *Maulson* and *Gorrie* as nullities, and passing no interest, and prays that they may be delivered up to be cancelled, as clouds upon the plaintiff's title, especially as being registered. *Gorrie* insists in his answer, that *Maulson* from whom he purchased, and he himself were purchasers for valuable consideration with notice of the plaintiff's title. It is conceded that this defence is properly raised on the pleadings, and it is admitted that *Maulson* has paid the full consideration that he was to pay for the lands. The questions raised and argued at the hearing were, 1st. What was the effect of the partial registration of the certificate, whether it was wholly inoperative, or vested the whole of the lands or only part of them in *John Somerville*; 2nd. Whether *Thomas Somerville* having the legal estate in fee, under the mortgage, Judgment. the release of the equity of redemption operating by way of extinguishment, although not registered, did not render *Thomas Somerville's* estate absolute, and thereby continue to him as absolute owner, the priority he had as mortgagee. 3rdly. Whether his title was not perfected by the agreement for satisfaction of the mortgage, independently of the release, and therefore, whether the non-registration of the release was not immaterial. 4th. Whether any relief whatever could be given against the defendant, as being himself and as claiming under a purchaser for valuable consideration without notice. Taking the view we do on the last point, it would seem to be improper to express any opinion on the first point, and unnecessary to express any opinion on the 2nd and 3rd points. With respect to the last point, it being admitted that *Maulson* has paid his entire consideration for the purchase of the lands in question, and there being no evidence of notice on his part, of the plaintiff's title, the question is, whether, supposing the deed to *Maulson* to be

1858.

Mitchell
v.
Morris.

a mere nullity, conferring no title, and simply forming a cloud on the plaintiff's title, the court can order it to be delivered up to be cancelled. It is well established by the cases which were cited on this point in the course of the argument, that a purchase for value and without notice, is a defence to a legal as well as an equitable title; or in other words, will protect an equitable as well as a legal title; or indeed no title at all either legal or equitable, but a mere possession or other advantage. It is at all events clear that this court will never deprive a purchaser for value without notice of any advantage he has, although as between or amongst mere equitable claimants it will enforce the rights of the prior against the subsequent claimants in point of time. In the present case the relief prayed is simply that the deed may be delivered up to be cancelled. This relief is not absolutely essential to the plaintiff: his title is perfect without it. But is it possible for this court to order a defendant to deliver up for cancellation that which is his property and for which he paid a valuable consideration without any notice of the plaintiff's title. It seems this cannot be done. We think the bill should be dismissed with costs, but without prejudice to any other bill which the plaintiff may be advised to file for the purpose of enforcing his claim, if any, as a mortgagee. The plaintiff, indeed, asked leave to convert this bill into a bill for foreclosure, but we think this would not be proper at this late stage of the suit, when at all events it could be done only on the terms of paying the costs to the hearing.

Judgment.

STROMAN V. FRASER.

Injunction—Right to cut timber.

The owner of land with a saw mill thereon, made a lease of the mill, with a right to cut timber during his lease; the lessee assigned the lease, and the assignee afterwards surrendered it to the proprietor of the freehold. *Held* that the right to cut timber was only commensurate with the lease itself, and the lease having been surrendered, the right of cutting timber was at an end, except for the use of the mill.

The bill in this cause was filed to restrain the cutting

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of timber on land owned by the plaintiff. It appeared that a lease of a mill had been made to the defendant for a term of years, with the right of cutting logs on land adjoining the mill property; the lessee assigned his lease of the mill, and the assignee of the lease subsequently surrendered to the lessor, notwithstanding which the lessee continued to fell timber as before; under these circumstances an injunction had been obtained to restrain further cutting; and a motion was made by

1858.

Stogman
v.
Fraser.

Mr. *McIntyre* to dissolve the injunction, on the ground that the right to cut timber had never been assigned by the defendant.

Mr. *McDonald* contra.

The judgment of the court was delivered by

ESTEN, V. C.—We think it right to continue the injunction till further order. It is clear that the cutting of timber must be restrained, so far as it exceeds the necessary supply of the mill. Supposing that the defendant when he transferred the lease, meant to retain this privilege, it was only commensurate in duration with the lease itself, and if that has been surrendered it is at an end, for no engagement was taken from *Etchman* not to surrender; indeed it is manifest that the defendant considered his privilege an absolute one. The bill asserts a surrender, and the answer does not insist that it was void in point of law. We must therefore take it for the present to be good, and in that case the privilege has ceased to exist. The injunction, therefore, should go to the whole extent, but we think it right to give the defendant liberty to move again to dissolve should he on further investigation be convinced, or have reason to think, that the privilege of cutting timber upon which he insists, continues to exist to the whole, or to any extent.

1858.

WILSON V. SHIER.

Fraudulent conveyance—Sheriff's Sale—Redemption.

A debtor conveyed his land in fee for a consideration greatly below its value, but continued in possession without paying rent: the heir of his vendee several years afterwards sold and conveyed the land, the sale having been brought about and managed by the debtor, and the purchaser was shewn to have had notice of the indebtedness and other material circumstances. A creditor afterwards sued out execution against the lands of the debtor, under which his interest in this property was sold for five shillings to the execution creditor, who afterwards filed a bill to set aside the sale by the original owner, and have himself declared the owner of the land. The court refused this, but gave him a right to redeem in virtue of his judgment, in accordance with an alternative prayer in the bill.

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

Mr. Connor, Q. C., and Mr. Hector for plaintiff.

Mr. Morat, Q. C., and Mr. Mathieson for defendant, Shier.

The other defendants did not appear.

The judgment of the court was now delivered by

Judgment. ESTEN, V. C.—*Doyle*, the owner of the land in question made a conveyance of it to one *Gates* in consideration of 50*l.*, in 1847, owing at the time a considerable amount of costs to Messrs. *Baldwin & Wilson*. *Gates* sold and conveyed to the defendant *Shier*, in consideration of 162*l.* 10*s.* in March, 1851. *Wilson*, who became solely entitled to the debt due from *Doyle*, had the land exposed to sale under a writ of *fi. fa.* against lands issued upon his judgment, and purchased them for five shillings, and a conveyance was executed to him by the sheriff in consideration of that sum. He also paid £5 for fees and disbursements. The present bill seeks to set aside the conveyance to *Gates* as fraudulent and void against creditors, and that plaintiff may be declared the owner of the land; or in default of this mode of relief that he may be admitted to

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Wilson
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redeem either as a purchaser of the equity of redemption, or as a judgment creditor. The case presents a difficult question of fact, and one very proper for a jury. The admissions of *Doyle*, which are important, seem inadmissible as evidence against *Shier*. We must intend, I think, upon this record that *Gates* paid 50*l.* to *Doyle* for the land; and his deed is *prima facie* valid. The question is, whether enough is shown to impeach it. The land appears to have been worth about 125*l.*, when *Gates* gave only 50*l.* for it. It is difficult to suppose that *Doyle* would have sold the land for so much less than it was worth, and it appears that *Wilson* was then pressing him; he remains in possession for four years after the sale without paying any rent, as it would seem: *Gates* refuses to sell in his lifetime. *Doyle* interferes in the sale to *Shier* very much, in fact manages it almost entirely: he receives money from *Gates* and his son afterwards: my impression is, that *Gates* paid *Doyle* 50*l.* to enable him to pay his debts, and held the land as security, but that as a sale was colorable, in order to defeat *Baldwin & Wilson*. *Shier* had notice of all the facts, at least the most material facts which lead to this conclusion, and must be deemed to have no-
Judgment.
tice of the fact they seem to shew. I think we must regard the sheriff's sale as a nominal sale, and one conferring no title. The price is nominal and stamps the same character upon the whole proceeding. *Wilson*, however, is a judgment creditor, and entitled to redeem the lands and this is part of the relief prayed by the bill. The representatives of *Gates* are parties to the suit, and the bill is taken *pro confesso* against them, but their mortgage appears to have been discharged. I think there should be a decree for redemption, or the more convenient method would be for the defendant to pay the plaintiff's demand. I think the plaintiff should pay the costs as of a redemption suit; for the rest the decree should be without costs on either side.

1858.

ANONYMOUS.

Testamentary guardians—Infants.

November 8. Although the court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where it is clearly shewn that a compliance therewith would be prejudicial to the happiness and moral training of the infants.

The testator by his will expressly excluded his widow from the guardianship of their children; forbade any communication being allowed to take place between them and nominated certain persons whom he desired should have the guardianship of the children. After the testator's death the mother continued the management and care of her children, and refused to give them up to the testamentary guardians; and a motion was now made upon their petition for an order declaring the infants wards of court, with a view of removing them from the custody of the mother.

Argument.

Mr. *Strong*, for the testamentary guardians.

Mr. *A. Crooks* for the mother, *contra*.

The judgment of the court was delivered by

SPRAGGE, V. C.—The statute 12 Charles II. gives the father of infant children power to appoint a guardian; and the power appears to have been sufficiently exercised by the testator, the father of these infants. Apart from the statute, and the appointment of a testamentary guardian under it, the mother of these infants would be entitled to be their guardian by nature, and for nurture. The will of the father of these infants excludes the mother from such guardianship, and interdicts all communication between her and her children.

This court as representing the sovereign in her capacity of *parens patriæ*, acts as in its judgment it deems best for the benefit of infants. Its discretion in

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so acting is not controlled by the express wishes or directions of their father; at the same time the court is in the habit of paying respect to such wishes and directions; but the cases show that the court will not do this at the expense of their happiness or moral training. The well known case of *Mr. Wellesley (a)*, is a strong instance of this; there the court interposed its authority for the protection of infants from the contamination of the evil influences and examples of their father; thus interfering with the natural rights of the living father over his own children. There are several instances of the court, in its discretion, preferring a course not in accordance with the testamentary disposition of the child made by the father; where the court has conceived such course necessary for the well-being of the child, or that its happiness would be endangered by following the directions or declared wishes of the testator. So the court while assuming that it would be the desire of the father that his child should be brought up in his own religion, and declaring that the child should be so brought up, will nevertheless refuse to commit the keeping of a child to ^{Judgment} any one with a view of its being in future so brought up, where the child has been already brought up in a different form of religion, and mischievous results would probably flow from an attempt to change it.

In the case before us the directions contained in the will seem cruel and capricious (unless justified by circumstances of which we are not informed), not to be mother only, but, what the court must regard most, to the infants also.

One of the guardians, a connexion of the family, has made an affidavit, in which he states it to be his opinion that the exclusion of the mother was a wise and judicious and not a capricious act, but does not state his grounds for this opinion.

(a) 2 Russ. 1.

1858. I think the proper course will be for the court to examine this gentleman in our private room as to the grounds of his opinion, together with any other persons whom the counsel representing the mother or the infants, may think it desirable to produce for examination.

Anonymous.

FAWRELL V. WALBRIDGE.

Saw logs.

The court will order the specific delivery of saw logs, when they are shewn to possess a peculiar value to the plaintiff, and can be identified as those claimed by the plaintiff, notwithstanding they have been intermingled with logs belonging to other parties.

The facts of the case are fully stated in the report of the application for an injunction, ante volume II., page 332. The issues mentioned in the judgment were tried, and those material to the question involved in them found in favor of the plaintiff; and the learned judge before whom they had been tried, granted his certificate approving of such finding; and the cause having been brought on for hearing.

Statement.

Mr. *Mowat*, Q. C., for plaintiff, the issues directed by the court having been found in favor of the plaintiff, and it having been shewn that the logs in question were of peculiar value to the plaintiff, the court will now decree specific delivery of them as prayed.

The defendant *Fox* had allowed the bill to be taken *pro confesso* against him, and did not appear at the hearing.

Mr. *Vankoughnet*, Q. C., and Mr. *Turner* for defendant *Farwell* referred to in *Binford v. Dommett* (a), *Bootle v. Blundell* (b), *The Freeman of Sunderland v. The Bishop of Durham* (c), and contended the peculiar value shewn in this case was not more than might be asserted in every

(a) 4 Ves. 756. (b) 19 Ves. 499. (c) 16 Jur. 370.

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case respecting chattels; and that the loss could be compensated for in damages by a jury. That the trial which had been had was not conclusive.

1858.

Farwell
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The judgment of the court was delivered by

ESTEN, V. C.—This case has stood over for some time for the purpose of the court being furnished with some additional papers which have not yet been fully supplied. We do not, however, think it expedient to defer the delivering of the judgment any longer, as we are quite satisfied as to the judgment which it is our duty to pronounce. Issues were directed for the purpose of trying whose property the logs in question were, and whether they were distinguishable from other logs with which they had been intermingled. A third issue was directed, which in the event became immaterial. The jury found both issues in favor of the plaintiff, namely, that the logs in question were his property, and that they were distinguishable from the logs belonging to the defendants, Judgment. with which they were intermingled. The learned judge who tried these issues certified that he was satisfied with the verdict. A motion was made, however, for a new trial, which was refused with costs. We have perused the act of parliament, which governs the case, and see no reason to doubt the correctness of the verdict. It appearing, then, that the logs in question belonged to the plaintiff; that they are distinguishable from the logs belonging to other parties with which they have become intermingled; that they possess a peculiar value for the plaintiff; and that the plaintiff had been wrongfully deprived of them by the joint act of the defendants, we think the plaintiffs are entitled to a decree for the repayment of the money deposited in court, and for the delivery of the logs remaining, in specie, with costs.

1858.

FRANCIS V. ST. GERMAIN.

*Specific performance—Doubtful title—Lunacy.*March 9, and
December 17.

Before the court will compel a purchaser to accept a title, it must be shewn that the title is reasonably clear and marketable, without doubt as to the evidence of it. Where, therefore, the deed to the vendor was executed on the 14th of February, 1854, and in December of that year a commission of lunacy was issued against the grantor in that deed, under which it was found that he was insane, and had been so from the month of February or March previous, the court refused to enforce the contract.

Where the lunacy of the previous owner, of the estate was relied on as an objection to the title, and the vendor alleged that if such were the fact it was shewn that he had purchased fairly, and without notice of the lunacy, as a ground for enforcing the contract; but, as the fact that the vendor had purchased without such notice, was one which from its nature was incalculable of proof, and notice on some future occasion might be clearly shewn, the court allowed the objection, and dismissed the vendor's bill with costs.

This was a bill by a vendor to enforce the specific performance of a contract for purchase of certain lands in the City of Toronto. On moving for a decree, the usual reference as to the title was made to a judge in chambers, which was taken before Vice-Chancellor *Esten*, who certified against the title. From this decision of his honor the plaintiff appealed.

statement.

Mr. *Fitzgerald* for plaintiff.

Mr. *Brough* contra.

The points relied upon by the counsel are referred to in the judgment.

THE CHANCELLOR.—This is an appeal from the decision of my brother *Esten*, who certified that the vendor's title was too doubtful to be forced upon the purchaser.

The rule that a purchaser cannot be compelled to take a doubtful title is well settled. Where the court enforces specific performance, is bound to see, in the language of Lord *Eldon*, that a purchaser has a reasonably clear, marketable title, without that doubt as to the evidence

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1858.

Francis
v.
St. Germain.

The first proposition advanced by the plaintiff is, that *Irving* was of sound mind at the time he executed the conveyance of the 14th of February, 1854, under which the plaintiff makes title to the property in question.

Now, that *Irving* became lunatic shortly after the date of the conveyance, and continued so to the time of his death, is not denied. A commission issued in December, 1854, under which he was found to have been insane from about February or March previous. Now, had that been all, I should have had great hesitation in deciding that the purchaser ought to be compelled to take such a title. But the evidence goes much further. Looking at the testimony of Dr. *Herrick* and Mr. *Barwick*, who are both in a position to form a correct judgment, I am inclined to think that the lunacy commenced long prior to February, 1854. But it is unnecessary to decide that, because if there be only a reasonable doubt of his sanity at the time he executed the conveyance, that is sufficient for the decision of the case; and that the evidence raises at least a reasonable doubt, cannot, I think, be denied.

There are two cases which appear to me to furnish a clear analogy for our guidance on this branch of the argument. In *Stapleton v. Scott* (a), the title turned upon a will by which the testator devised "his undivided moiety, or half part of the property in question, and all his other shares, proportions and interest therein" to the vendee. The devisee contracted to sell the whole estate; and the objection to the title was, that it was doubtful upon the will whether the testator owned the entirety, or only an undivided moiety. The peculiar form of expres-

(a) 16 Ves. 273.

1858. *Francis v. St. Germain.* sion was sufficient, unquestionably, to raise a doubt; but then, it was clear upon the evidence that the testator owned the whole, and the reason of the testator's doubt was satisfactorily explained. The master reported in favor of the title, and Lord *Eldon* thought the master right. But in dealing with the question, whether a title, subject to such a doubt, could be forced upon a purchaser, he says: "Taking the principle to be, that a purchaser shall have a reasonably clear title, can this be so represented? Admitting that it may be explained by extrinsic circumstances, that the testator's doubt can be accounted for, the true question is, whether this is a reasonably clear, marketable title, without the doubt as to the evidence of it which may always create difficulty in parting with it. I am satisfied that it is not."

The other decision to which I wish to refer is *Grover v. Bastard* (a). The vendor in that case was an attorney, who claimed through a will prepared by himself under which a large proportion of the testator's property was devised to the vendor, to the exclusion of the testator's family. The heir-at-law brought an action upon the ground that the will had been obtained by fraud, but the jury sustained the will, and the court refused a new trial. The Master reported in favor of the title, and Vice-Chancellor *Knight Bruce* sustained his report; but when the case came before Lord *Cottenham* upon appeal, his Lordship observed: "If there were no other means of disposing of the case, and I was obliged to say, whether, under the circumstances, the objection ought to prevail, I should feel considerable hesitation in saying that it should not."

Upon the question of sanity or insanity, therefore, I am clear that there is quite enough of doubt to warrant the conclusion that the purchaser ought not to be compelled to take this title.

(a) 2 Phil. 621.

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But the learned counsel for the plaintiff did not rely with much confidence, I apprehend, upon this branch of the case. He rested rather upon his second proposition, which was this, that whether *Irving* was sane or insane at the time of the conveyance, the plaintiff has a good title, inasmuch as the evidence establishes that he purchased fairly, and without having had any notice of the lunacy. It is unnecessary to consider whether the authorities to which the learned counsel referred support the proposition for which he contends; because, assuming that point in his favor for the purpose of the argument, I am quite clear that the title is not such as this court should compel a purchaser to accept. The proposition that the vendor purchased *without notice of the lunacy*, is, from its nature, incapable of proof. Notice, though denied in the present suit, may be satisfactorily established on a future occasion; and no instance can be found, I apprehend, where a purchaser has been compelled to accept a title which depends for its validity on a question of that sort. In *Freer v. Hesse* (a), the vendor made title as mortgagee with power of sale. The objection was that certain judgment creditors, whose judgments had been registered prior to the mortgage, were necessary parties to the conveyance. In answer to that objection the vendor denied notice of the judgments, and relied upon a lease for 1000 years, created prior to the judgments, which had been assigned to a trustee for his protection. And no doubt, as the law then stood, that would have been a perfectly good title, upon the assumption that the vendor had purchased without notice of the judgments. But upon the question, whether it was such a title as a purchaser would be compelled to accept. Lord Justice *Knight Bruce* observes: "The safety of the title depends for this purpose on the point, whether the vendor had notice of the incumbrances. The vendor says that he had not. His agents say that he had not. This is perhaps true; but I am not aware of any instance,

1858.

Francis
v.
St. Germain &c.

Judgment.

(a) 4 D. M. & G. 495.

1858. and counsel has not been able to supply any to the court, of a title depending upon such a fact being forced on a purchaser.

Francis
v.
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For this reason I am of opinion that the certificate of my brother *Esten* is correct, and that the bill in this case must be dismissed with costs, (a) unless it can be shown that there are special circumstances warranting a different order.

SPRAGGE, V. C.—I think that this is not a title to be forced upon a purchaser,

As to the fact of lunacy at the date of the contract between the present vendor and the late Captain *Irving*: I think the evidence of lunacy preponderates; and the question that remains is, whether a purchaser from a lunatic can compel a purchaser from himself to take a title so acquired.

Judgment

The counsel for the vendor has assumed in argument that he, the vendor, believed Captain *Irving* to be sane when he purchased from him. That is a point as to which the fact has not been found in any way; and it may yet be capable of proof that facts in proof of his insanity known to not a few others in the same town, were known also to him. But independently of that point I think the cases cited for the vendor to go no further than this, that where the lunatic has been a party to a contract with one, who at the time believed him sane, and had no reason to believe him otherwise, and the contract has been so far executed that the party contracting with the lunatic cannot be reinstated in his original position in case of the contract being rescinded, and the contract was fair and *bona fide*, then the court will not rescind the contract. Lord *Cranworth* in a late case,

(a) *Pyrke v. Waddingham*. 10 Hare 1.

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(a) 3 Jur. N. S. 51

• *Elliott v. Ince* (a), speaking of the leading case upon that point, calls it "a decision of necessity," and adds, that "a contrary doctrine would render all dealings unsafe." 1858.

Francis
v.
St. Germain.

In all the cases cited by the vendor, the suit has been by the lunatic, or his committee or his representatives. No instance is cited of a title acquired through purchase from a lunatic, being pronounced a good marketable title which a purchaser is bound to take.

The old rule, that a mind capable of contracting is essential to the validity of a contract, is not impeached by the decisions referred to; and in *Price v. Bennington* (b), Lord *Truro* went no further than to express a doubt whether lunacy in a grantor rendered a conveyance absolutely void. In *Frost v. Beavan* (c), where between a purchase and its completion, a commission issued upon which the purchaser was found lunatic for a period which over-reached the purchase, the court, upon a bill by the vendor for specific performance, or in the alternative to have the contract discharged, declared the contract null and void. Judgment.

In the late case of *Elliott v. Ince*, to which I have referred, a tenant in tail of copyhold lands had at a period during which she was afterwards found lunatic, appointed an attorney by deed for the purpose of surrender and barring the entail, and giving herself an estate in fee simple: and she was admitted on that surrender accordingly. The Lord Chancellor held that there was no valid surrender. It was not necessary for him to decide whether a conveyance executed in pursuance of a contract for valuable consideration would be void or not; but referring to the opinion of Lord *Truro*, in *Price v. Bennington*, he observed, that perhaps the principle of *Molton v. Camroux* would apply to sales or mortgages of land; that Lord *Truro* seems to have thought it

(a) 3 Jur. N. S. 597.

(b) 3 McN. & G. 486.

(c) 17 Jur. 369.

1858. would, as he, Lord *Cranworth*, collected from what he said in *Price v. Bennington*.

Francis
v.
St. Germain.

I do not take it to be *settled law* that a conveyance in pursuance of a contract, both being made during lunacy, is not void, though the better opinion probably is, that it is not void; but we have no opinion, I believe, of any common law judge upon the point, and the language of Sir *W. Grant* in *Niel v. Morley*, quoted by Lord *Turo* in *Price v. Bennington*, would imply at least a doubt whether *at law* such transaction would not be absolutely void. If so, the owner of an estate derived through conveyance from a lunatic, might find difficulties and impediments in asserting his title at law.

Judgment; Further, I do not see that the plaintiff has certainly a title which may not be impeached by the representatives of Captain *Irving*, for, as I before observed, it may yet be shewn that his vendor's insanity was known to him. But apart from this, the fact remains that he purchased from a lunatic, and that fact would probably affect the saleable value of the estate in the hands of the purchaser, and I may add that the opinion of my brother *Esten*, already expressed, will almost certainly have the same effect.

I do not feel pressed by the argument as to the peculiar hardship of the plaintiff's position; that he is bound by a purchase that he has made, and that he cannot sell again; the position is that of any one who is so unfortunate as not to get a good title, and is no reason for shifting the misfortune to another; and it would be hard to fix the purchaser with the consequences of a circumstance undisclosed at the time of his purchase. The plaintiff cannot reasonably expect to hold a purchaser to his bargain unless he discloses to him the fact of his vendor having been found lunatic at a period within which he purchased from him.

Mortgage—

A mortgage under ex- been conv- to enable of the mor- to hold th- dissenting. The equitabl- for a deed, mortgagee business for purchaser o- the mortgag- was ascerta- a large sum- the mortgag- deem chargi- the course o- (the mortgag- mind that th- per Curiam, notice of the An application granted if it- with any risk- lished by Ord-

The bill in- gust, 1856, b- Coombs, John- that in the ye- from the defen- of Victoria St- highway, in th- price of 6l. 5s. plaintiff in the- cure the convey- chased this prop- and it was unde- execute a deed a- paid the whole o- a short time aft- a house, a distill- to the value of 5-

AITCHISON V. COOMBS.

1858.

Mortgage—Unpatented lands—Sheriff's sale—Pr —A amendment.

March 9, and
December 17.

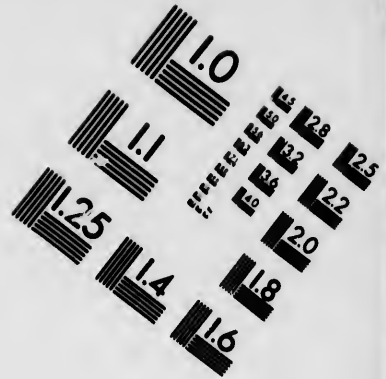
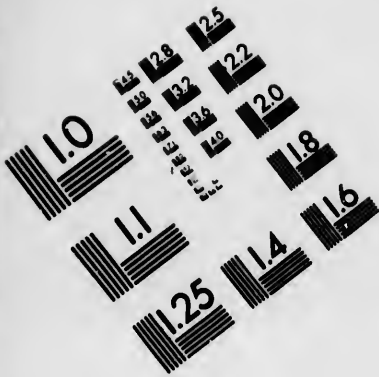
A mortgagee of lands, not patented, purchased them at sheriff's sale, under execution against the mortgagor, to whom the lands had been conveyed at the instance of the execution creditors, in order to enable them to take the lands in execution, during the absence of the mortgagor from the country, and the mortgagee then claimed to hold the lands absolutely. *Held, per curiam*, [Spragge, V. C., dissenting,] that the estate was still redeemable.

The equitable owner of unpatented lands, for which he held a bond for a deed, created a mortgage of his interest therein, and put the mortgagee in possession, whereon he and his partner carried on business for sometime, and subsequently the mortgagee became the purchaser of the lands at sheriff's sale, under an execution against the mortgagor. Upon the winding up of the partnership affairs it was ascertained that the mortgagee was indebted to his partner in a large sum, in payment of which he accepted a conveyance from the mortgagee of the mortgage estate, and a bill was filed to redeem charging him with notice of the nature of the title; and in the course of his examination he stated: "I had heard from J. B., (the mortgagee), that there was such a bond, but I thought in my own mind that the sheriff's deed had killed a good deal of that." *Held, per Curiam*, [Spragge, V. C., dissenting,] that he was affected with notice of the mortgagor's title, and therefore liable to be redeemed.

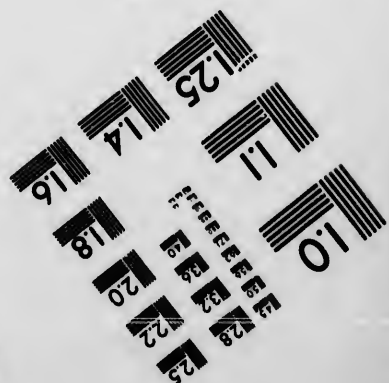
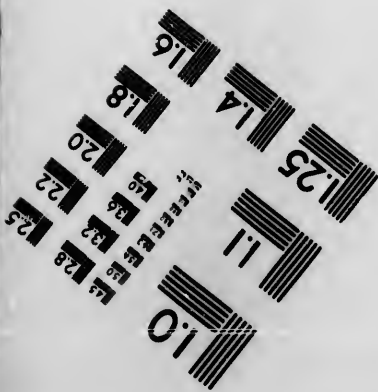
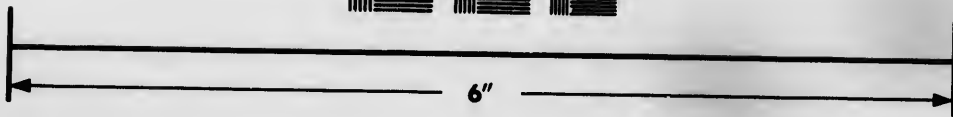
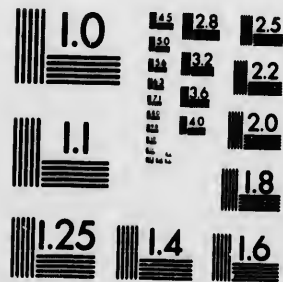
An application to amend at a late stage of a cause would not be granted if it appeared that such amendment would be attended ~~Statement~~ with any risk of doing injustice, notwithstanding the practice established by Order IX., section 14, of the orders of 1853.

The bill in this cause was filed on the 4th day of August, 1856, by James M. Aitchison, against Christopher Coombs, John Hawkins, and William Balkwell, setting forth that in the year 1836, the plaintiff contracted to purchase from the defendant Hawkins park lots Nos. 2 and 3, south of Vitoria Street, and lot No. 3, South of Wharncliffe highway, in the then Town, now City of London, for the price of 6l. 5s. per acre, and Hawkins executed a bond to plaintiff in the penal sum of one thousand pounds, to secure the conveyance thereof; that when plaintiff so purchased this property, the patent therefor had not issued, and it was understood and agreed that Hawkins should execute a deed as soon as the patent issued: that plaintiff paid the whole of the purchase money to Hawkins within a short time after the execution of the bond, and erected a house, a distillery, and other buildings on the premises, to the value of 500l. or thereabouts.





**IMAGE EVALUATION
TEST TARGET (MT-3)**



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1858.
Aitchison
v.
Coombs.

That subsequently, plaintiff having become implicated in the late rebellion, and designing to leave the province, and in the year 1838 delivered the bond to one *John Balkwell* to keep for him, but made no assignment thereof, * and also gave possession of the distillery and premises to him as the agent, and for the benefit of the plaintiff.

* NOTE—There is a mistake in this, as an assignment was produced and proved amongst the exhibits, and was as follows :

“ To all whom these presents shall come, I, James Mylne Aitchison of London, in the London District, send greeting, Whereas John Hawkins, of London, aforesaid, yeoman, in and by one bond or obligation, bearing date on or about the twelfth day of March, in the year of our Lord one thousand eight hundred and thirty-eight, became bound to the said James Mylne Aitchison in the penal sum of one thousand pounds, of lawful money of Upper Canada, conditioned for the conveyance in fee of lot number three, south of Vittoria Street (except one-fourth of an acre, as in the condition of said bond is set forth). Also, lot number three, south of Wharholiffe highway, and lot number two, south side of Vittoria Street, in the reservation for the town of London, containing in the whole about twenty-four acres of land, as by the said bond and condition thereof may appear.

Now, know all men by these presents, that the said James Mylne Aitchison, for and in consideration of the sum of one hundred and thirty-six pounds, of lawful money of Upper Canada, to him in hand paid by John Balkwell of London, aforesaid, brewer, the receipt whereof the said James Mylne Aitchison doth hereby acknowledge, hath assigned, transferred, and set over, and by these presents doth assign, transfer, and set over unto the said John Balkwell, the said recited bond or obligation, and all his right and interest thereof, in and to the same ; and the said James Mylne Aitchison, for the consideration aforesaid, hath made, ordained, constituted and appointed, and by these presents doth make, ordain, constitute and appoint the said John Balkwell, his true and lawful attorney irrevocable for him, and in his name, or in the name of the said John Balkwell, and to the only proper use and behoof of the said John Balkwell, his executors, administrators and assigns, to ask, demand, and receive of William Proudfoot, of London, aforesaid, minister of the gospel, the said within recited bond, and also to ask, demand and receive from the said John Hawkins, the conveyance in fee of the lauds in the said recited bond mentioned, and on refusal thereof, to sue for, recover and receive the same, and one or more attorney or attorneys under him to constitute : and whatsoever the said John Balkwell or his attorney shall lawfully do in the premises, the said James Mylne Aitchison doth hereby allow and confirm, and the said James Mylne Aitchison doth covenant, promise and agree, to and with the said John Balkwell, his executors, and assigns, that he the said James Mylne Aitchison hath not made, done, committed, nor suffered, nor will make, do, or commit or suffer any act, matter or thing, whereby or by reason or means whereof the said John Balkwell, his executors, administrators or assigns, shall or may be hindered or prevented in the obtaining the said bond from the said William Proudfoot, or in receiving or obtaining the full benefit and advantage of this assignment, according to the true intent and meaning thereof, but shall and will in all things, upon request, be aiding and assisting to them, and will do, perform, and execute all and every, or any other act, matter or thing,

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That *John Balkwell* was then in partnership with the defendant *Coombs*, as brewers and distillers, and they jointly entered into possession and use of the premises, and so continued for a number of years.

1858.

Aitchison
v.
Coombs.

That in the month of December, 1838, plaintiff was arrested, and early in the spring of 1839, tried for high treason, convicted, and sentenced to death, but afterwards, and in the last named year, received a conditional pardon, and was transported to Van Dieman's land: that the pardon so granted had the same effect as an attainder for the crime of high treason, so far as regards the forfeiture of estate real and personal.

That the patent for the said property was issued to *Hawkins* on the 26th day of August, 1839, and very shortly afterwards *Hawkins* made a deed of the same in which the plaintiff was named as the grantee, and delivered the deed to *John Balkwell*, and received from him the bond so placed in his custody by plaintiff. This deed was made and delivered without the knowledge of the plaintiff, and without any authority given by him: that on the 3rd day of September, 1839, a writ of *feri facias* against the lands of the plaintiff, at the suit of *John Jennings*, issued out of the District Court of the then District of London, was placed in the hands of the sheriff of that district, and shortly afterwards a like writ of

which they shall think needful or requisite, for the better or more speedy recovery of the said bond, and the conveyance in fee of the lands in the said bond mentioned. Provided always, nevertheless, that if the said *James Mylne Aitchison* shall, on or before the first day of August next ensuing the date hereof, well and truly pay unto the said *John Balkwell*, his heirs, executors, administrators or assigns, all and every sums or sum of money due and owing from the said *James Mylne Aitchison* to the said *John Balkwell*, on any account whatever, either as bail or agent, or attorney for or against the said *James Mylne Aitchison*, then this present assignment shall be void and of no effect.

In witness whereof the said *James Mylne Aitchison* hath hereto set his hand and seal, this seventeenth day of May, one thousand eight hundred and thirty-eight.

Signed, sealed, and delivered
in the presence of:
LEONARD PERRIN,
ROBERT SOWTER.

J. M. AITCHISON. [L.S.]

1858.

Albiston
v.
Coombs.

feri facias against the land of the plaintiff at the suit of *Richard Smith, George J. Goodhue and Lawrence Lawson*, issued out of the Court of Queen's Bench, was placed in the hands of the same sheriff. The amount required to be made on these writs, including interest, costs, sheriff's fees and expenses, was 105*l.* 4*s.* 6*d.*, under, and by virtue of which writs, or one of them, the said property was seized, and on the 12th day of September, 1840, exposed to sale by the sheriff, when the same was purchased by the said *John Balkwell*, for the sum of 107*l.* and a deed thereof made to him by the sheriff: that from the time when the plaintiff gave possession of the property to *John Balkwell*, he and the defendant *Coombs* occupied it, and continued in the possession of it, and in receipt of the rent and profits thereof, until about the year 1842, when disputes having arisen between them, they were referred to arbitration, and an award made, and the defendant *Coombs* has been ever since the reference to arbitration, or since the making of the award, and now is, in the sole possession of the property, and in the receipt of the rents and profits thereof, and claims title to the same in the same manner under the award, or by agreement with *John Balkwell*, but how particularly, plaintiff was unable to state, and charged that defendant *Coombs* had had full knowledge of all the facts as they occurred, and long before any purchase of the property, if such there were, was made by him from *John Balkwell*.

Statement.

That no deeds, conveyances, or instruments affecting the property subsequent to the grant from the crown had been recorded in the registry office of the county where the property is situate.*

That *John Balkwell* died some years before, intestate, and without issue, leaving the defendant *Balkwell*, his

* This is not correct; the deed from Hawkins to plaintiff was registered 16. a August, 1841. The sheriff's deed to Balkwell 27th April, 1841; the deed from Balkwell to Coombs 2nd January, 1843.

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oldest brother and heir-at-law surviving him *; and that before his death he became very much embarrassed in his circumstances, and died wholly insolvent, and without leaving any assets.

1858.
 Alcockson
 v.
 Coombs.

That plaintiff had been long detained in Van Dieman's Land, and had only been enabled to return to this province during the year 1856. The prayer of the bill was, that it might be declared that *John Balkwell* was the agent and trustee of plaintiff, and held the bond and received the deed made by *Hawkins* for the benefit of the plaintiff, and that the defendant *Coombs* had notice thereof, and that it might be decreed that the purchase of the property by *John Balkwell* at the sale by the sheriff, was in trust for plaintiff, and if no conveyance had been made by *John Balkwell* to *Coombs* that the defendant *William Balkwell* might be ordered to convey the property to plaintiff; or, if a conveyance had been made by *John Balkwell* to *Coombs* that it might be declared that *Coombs* purchased with notice of the title of plaintiff, and might be ordered to convey to plaintiff the property, and an account taken of the rents and profits received by *John Balkwell* and *Coombs*, and by *Coombs*, and that *Coombs* might be ordered to pay the same to plaintiff after deducting therefrom the amount paid by *John Balkwell* to the sheriff; or, that the deed by *Hawkins* was void, and that no title passed thereby; and that the defendant *Coombs* might be decreed to account for the rents and profits of the property, and that defendant *Hawkins* might be directed to make a conveyance of the property to plaintiff.

Statement.

*A short memorandum, intended as a will, was subsequently found, and was as follows :

Nov. 19th, 1847.
 " Be it understood that I, John Balkwell, wishes that all of my real and personal property be equally divided between my brothers and sisters, after all lawful debts are paid."

" Given under my hand, this 19th day of November, 1847."

" Witness :— " James Balkwell,"
 " John Cameron,"
 " Richard Balkwell."

" JOHN BALKWELL."

1858.
 Attchison
 v.
 Coombs.

The defendant *Coombs* answered the bill to the following effect: that some time before he entered into partnership with *Balkwell*, he (*Balkwell*) had his brewery destroyed by fire, and had rebuilt it, by a stone building at very considerable expense, during which time *Coombs* had advanced by way of loan to *Balkwell* considerable sums of money, until, and just before, the co-partnership was entered into, when *Balkwell* owed him about 350*l.*; that on the 22nd September, 1838, he entered into co-partnership with *Balkwell* to carry on the brewing and distilling business, but had no interest whatever in any of the real estate upon which either business was carried on: that the distilling business was carried on upon the premises mentioned in the bill, and the brewing business at another distinct place: that both businesses were carried on until the month of November, 1842, when *Coombs* desired to dissolve the partnership, *Balkwell* then owing him about 2,000*l.*

Statement.

That in order to settle their affairs, *Balkwell* on the 4th November, 1842, agreed to submit all matters in difference between them to arbitration, and during the pendency thereof it was suggested by one *Stiles*, (examined as a witness in the cause, by plaintiff) that inasmuch as it would be likely that *Balkwell* would owe *Coombs* a large sum of money, it would be better for him to take some of the real estate of *Balkwell* to pay part at least of the claim, and suggested that *Coombs* should take the distillery property, being the same lands and property in the bill mentioned, at the sum of 925*l.* To this suggestion both parties agreed, and consented that the arbitrators should award a conveyance: that *Balkwell* did convey the premises to *Coombs*, and the deed, though dated on the 14th March, 1842, was not executed or delivered till after the award was made, which was 31st December, 1842, and the erroneous date of the deed could not be accounted for, and that it was registered on the 2nd of January, 1843, the date, *Coombs* asserted, of its execution; *Coombs* distinctly denying all knowledge of the

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facts stated in the bill in reference to the mode in which *Balkwell* derived title to the premises; and asserted that the improvements made by plaintiff upon the property did not exceed 200*l*.

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v.
Coombs

The defendant *Balkwell* also answered the bill, and was afterwards examined as a witness in the cause on behalf of the plaintiff, but not having been personally cognizant of any of the transactions, no information of any moment was obtained from him.

Coombs was also examined under the Orders of 1853, upon the statements in his answer, before the master of the court at London, and again before the court. On the first occasion, he swore that from the time of his entering into partnership with *Balkwell* until the dissolution of it, he never had had any reason to believe or suspect that the plaintiff had any claim to the property. As *Coombs'* own statements were the principal facts relied on to prove notice as against him, it is thought advisable to insert *Statement*. them at length, as given before the court:—

“ I saw the plaintiff first in 1836. I think in the year 1837, I heard that a person named *Hawkins* had bought the land in question at a government sale, and that the plaintiff bought it from him. It may have been in 1836-7 or 8 that I first heard this. I heard about the same time that he was building or going to build a distillery or place. I was a baker in London at the time, and my men got bread from me upon his order: the place is about a mile and a quarter from my place in London on the road to Goderich. I saw the buildings before I bought from *Balkwell*. I knew that *Aitchison's* men were employed in building a distillery. It was notorious, every one seemed to know it. I heard it, and may have seen it about that time, but I do not remember. It is not improbable that I saw it about that time. I would not give 200*l*. for *Aitchison's* improvements upon the property: the improvements may have been worth about that, at the time that *Balkwell* bought the place, and before I went into partnership with him. This brewery was burnt down, and I lent him about 350*l*. in different

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 v.
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Statement.

sums, in addition to which I had a bill against him for bread, amounting, I supposed, to about 40l. or 50l. I heard that *Aitchison* got a bond from *Hawkins* to convey upon the time being expired: the purchase money was paid to government in four years, and *Aitchison* was to pay the government. I heard of *Balkwell* purchasing from *Aitchison* about a year before *Aitchison* left the country: it was notorious, and *Balkwell* got possession when he purchased. I have heard *Balkwell* say that he had given the government agent, Colonel *Askin*, 50l. to get the deed out, and that he had made a payment before; this was in the year 1840, or 1841. I remember the sheriff's sale, it was in or about the years I have last mentioned. I was present at the sheriff's sale; there was a conversation at the Hope tavern about the property in question: *Balkwell* was present, *John Stiles*, and a number of others whose names I do not recollect. This was after the arbitration between *Balkwell* and myself. I never heard it debated whether the sheriff could sell the property. I always thought that the sheriff could sell, and that his sale was good. I always considered that a sheriff's title was good. I never heard of the sheriff's sale being questioned until I was served with a bill in chancery. I understood that the land was bid off at sheriff's sale to *Balkwell* at a little over 100l. *Balkwell* was then in possession. I commenced partnership with *Balkwell* on the 1st October, 1838, it continued to the 28th of November, 1842. It was intended to be for seven years, but there was no writing to that effect, unless it may have been a memorandum taken down by our friends, who assisted at the bargain. We dissolved partnership in consequence of *Balkwell* becoming very much addicted to drinking and neglecting the business, which suffered very much in consequence: we were sued. I first spoke to *Balkwell* about it about six months before we dissolved. At that time I had no deed from *Balkwell*. I do not know the date of my deed from *Balkwell*, but it bears date a long time before it was made. I do not know how it came to be wrongly dated. I was not present when it was executed. I never said a word to *Balkwell* about putting it out of the way of creditors. The arbitrators allowed a large amount to me, and I agreed to take the distillery property in part payment; we agreed after altercation upon 925l. as the price. I thought the title was all good, as the deeds were registered, I never thought about *Aitchison* having any title. I did not ask

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anything about the writing between *Aitchison* and *Balkwell*. The arbitrators said nothing about it. I saw that paper before I put in my answer, and read a part of it. It was in the hand of *William Balkwell*, son of *John Balkwell*. I had heard from *John Balkwell* that there was such a bond, but I thought in my own mind that the sheriff's deed had killed a good deal of that, and therefore that it could not be very material to me whether there was such a bond or not, as the sheriff's sale and deed was a better title to me, and that the bond was not necessary to strengthen my title. I thought my title good enough without it. In explanation: About a twelvemonth after the sheriff's sale large improvements were made upon the place by *Balkwell*. A steam engine and other things in the distillery, amounting to more than 500*l.*, besides other improvements: this was before I bought, and without consulting with me. Defendant added, I never saw the paper from *Aitchison* to *Balkwell* before this suit was commenced: I never heard it read or knew of its contents. In answer to a question from plaintiff's counsel, he said: I heard of it as a writing about this land, but not what it contained. I understood it to be a paper transferring the land to *Balkwell*, though I do not know that I had heard so."

Statement.

A good deal of other evidence was taken in the cause: but it is considered that the foregoing statement, and extracts, together with the facts mentioned in the judgment of the court, will be sufficient for a clear understanding of the points involved.

Mr. *McDonald* and Mr. *Proudfoot* for the plaintiff. *Balkwell's* agency was only to procure a conveyance to himself; he was bound to have taken a deed in his own name, and in that event the writ, in the sheriff's hands could not have attached. *Story* on agency, 210; *Pariente v. Lubbock* (a): and plaintiff not being an assenting party to the conveyance, no estate can be said to have vested in him, *Siggers v. Evans* (b).

(a) 20 Beav. 538.

(b) 5 Ellis & B. 367.

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Admitting, however, that the title did vest in *Aitchison* under the deed from *Hawkins*, then *Balkwell* was a mortgagee, and as such, precluded from purchasing up the estate adversely to his mortgagor, *Attorney-General v. Tyndall* (a). Neither can a mortgagee put an end to the right of redemption without the consent of the mortgagor; but is bound to maintain the estate in the same plight in which he received it, except that he may deal with the mortgagor, and thus put an end to his interest. *Otter v. Lord Vaux* (b), *Dobson v. Land* (c), *Lord Cranston v. Johnston* (d), *Shephard v. Doolan* (e).

Coombs had notice, if not actual, clearly constructive, and constructive notice was sufficient, as the registry acts do not apply.

Mr. Roaf for defendants.

Argument. The power of attorney was only a matter incident to the assignment, which was intended for the benefit of *Balkwell* and imposed no duty upon him; it created no agency involving a fiduciary relation. The assignment to *Balkwell* was a sale with a conditional right of re-purchase in *Aitchison*. The peculiar position of plaintiff at that time, and the instrument not containing a covenant for payment, would naturally lead one to this conclusion, at all events strongly favor this view of transaction. *Alderson v. White* (f).

A court of law would no doubt hold the legal estate in fee to have been vested in plaintiff, and being so, was clearly saleable under execution; and there was nothing in *Balkwell's* position to preclude him from purchasing. *Morret v. Paske* (g), *D'Arcy v. Hall* (h), *Bromley v. Holland* (i). *Dart*, at page 22, lays it down, that

(a) 2 Eden. 207.

(d) 3 Ves. 170.

(g) 2 Atk. 54.

(b) 6 DeG. McN. & G. 638.

(e) 3 De. & War. 1.

(h) 1 Ver. 49.

(c) 8 Hare, 216.

(f) 4 Jur. N.S. 125.

(i) 5 Ves. 620.

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a mortgagee may purchase, if done *bona fide*. But if wrong in this respect, and it appears that *Balkwell* was redeemable, *Coombs* is not, as he had no notice, notice being denied distinctly by the answer, and in his examinations.

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 v.
 Coombs.

THE CHANCELLOR.—I do not feel much difficulty in disposing of this case upon the facts as they appear in evidence. I shall have to speak presently of the manner in which the plaintiff's case has been stated in the bill; but excluding that question for the moment, the facts upon which the plaintiff's equity rests, are either admitted or satisfactorily established, and the law applicable to these facts is not, it seems to me, open to any serious doubt.

The property in question was purchased by the defendant *Hawkins*, from the commissioner of crown lands some time prior to the 12th of March, 1838, and on that day, he assigned all his interest therein to the plaintiff. The consideration for that assignment was paid either at the time or shortly afterwards, and thenceforth *Hawkins* ceased to have any beneficial interest in the property, but the arrangement was, that the patent should issue in his name, in trust, however, for the plaintiff, or his assigns, and by bond of same date, *Hawkins* agreed to convey accordingly. The plaintiff took possession upon his purchase, and expended a large sum of money in the erection of a distillery, and other improvements, 500*l.*, as he asserts, 200*l.*, as *Coombs* admits, exclusive of plant.

On the 17th of May, 1838, the plaintiff conveyed the property in question to one *John Balkwell*, by way of mortgage, and *Balkwell* was let into immediate possession. The case turns, to a great extent, upon the instrument, by which the mortgage was created, which is very peculiarly framed. It is a deed poll. It begins by reciting the bond from *Hawkins* to the plaintiff, it

1858. assigns that bond, and all the plaintiff's interest in the premises in question to *Balkwell*. Then it empowers *Balkwell* to obtain a conveyance from *Hawkins* either in his own name, or in the name of the plaintiff. Next follow covenants for title, and lastly comes the proviso, which is in these words: "Provided always, nevertheless, that if the said *James Mylne Aitchison* shall on or before the 1st day of April, next ensuing the date hereof, well and truly pay unto the said *John Balkwell*, his executors, administrators, and assigns, all and every sum or sums of money due and owing from the said *Aitchison* to the said *Balkwell*, on any account whatever, either as bail, or agent, or attorney for or against the said *Aitchison*, then the present assignment shall be void."

Judgment. There is little direct evidence as to the nature of the transaction between the plaintiff and *Balkwell*, but from the language of the instrument itself, and from the admitted facts, I gather that the deed of the 17th of May, 1838, was intended to operate as an indemnity against any expense which *Balkwell* might incur, as the plaintiff's agent, in attempting to rescue him from the difficulties in which he was then involved, rather than a security for money advanced. The deed provides in express terms for the re-payment to *Balkwell* of all expenses incurred by him either as bail or agent for the plaintiff; and the fact that he was admitted into immediate possession, contrary to the usual course in mortgage cases, would seem referrible to his position as agent, rather than as mortgagee. And the probability that *Balkwell* was let into possession as agent, rather than as mortgagee, is greatly strengthened by the recollection that in the plaintiff's then circumstances some such step seemed imperatively necessary. For we find that the plaintiff was arrested on a charge of high treason shortly after, upon which charge he was convicted and transported to Van Dieman's Land, in the following spring, where he remained for many years. It is admitted, indeed, that he

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1858.

Aitchison
v.
Coombs.

On the 22nd of September, 1838, *Balkcell* and the defendant *Coombs* entered into copartnership as brewers and distillers, for a period of seven years. There was a written memorandum of this agreement, but it has not been produced, and its terms have not been satisfactorily established. *Coombs* swears, however, that the real estate employed in the business, including the premises in question upon which the distillery was conducted, was brought in by *Balkcell*, and was to remain his individual property upon the termination of the partnership: that statement has not been contradicted: its truth was assumed upon the argument.

By letters patent bearing date the 27th day of August, 1839, the premises in question were granted to the defendant *Hawkins*, by whom they were conveyed, by deed of bargain and sale, executed on the 2nd of September, in the same year, to the plaintiff. Judgment. The circumstances under which that conveyance was executed are not clearly shewn. The bill alleges that it was executed at the instance of *Balkcell*; but the evidence shews pretty clearly that it was the result of a contrivance between the plaintiff's creditors and *Hawkins* devised for the purpose of bringing the property within their reach, and thereby defeating *Aitchison's* claim. This point is not material, however, in my view of the case, for it is clear that *Balkcell* was aware of the deed which *Hawkins* had executed, and treated it as a valid conveyance.

On the 3rd of September, 1839, that is, on the day following that on which the conveyance from *Hawkins* to the plaintiff had been executed, writs of *fi. fa.* against his lands, at the suit of several creditors, were placed in the hands of the sheriff of London; and on the 12th of September, in the following year, the premises in ques-

1858. tion were sold under these writs, and *Balkwell*, the mortgagee, became the purchaser, at 107*l.*, that being the amount endorsed on the several writs; and in pursuance of that sale the property was conveyed to him by deed poll, dated the 17th of April, 1841.

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Coombs.

The partnership between *Balkwell* and *Coombs* was dissolved in the course of the year 1842, and by deed of bargain and sale bearing date the 14th of March, 1842, but which is said to have been executed in the month of December, in that year, *Balkwell* conveyed the premises in question to the defendant *Coombs*. That conveyance is stated in the deed to have been made in consideration of 925*l.*, paid by *Coombs* to *Balkwell*, but it is not quite clear upon the evidence whether that transaction was in reality a sale, or a partition of the partnership effects. The award certainly treats the real estate as partnership property, and upon the whole evidence that statement would seem to be correct.

Judgment.

John Balkwell died in the month of April, 1854, intestate, and the present defendant *William Balkwell* is his heir-at-law.

I was not present at the original hearing of this cause, but upon the re-argument, it was treated, so far as I recollect, as a redemption suit; the only points argued, being whether *Balkwell* had acquired an absolute title under the sheriff's deed, or was still redeemable; and, secondly, whether *Coombs* was not at all events a purchaser for value without notice. It was admitted that the attainder of the plaintiff may be laid out of the case, and that the rights of all parties are to be dealt with, in consequence of the recent statute, (a) as if no such proceedings had taken place.

Upon the first point, the argument was, that the

(a) 12 Vic. ch. 13.

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premises in question were vested in plaintiff in fee simple, on the 3rd of September, 1839, under the deed executed by *Hawkins* on the previous day; that the writs of *fi. fa.* against the lands of the plaintiff placed in the hands of the sheriff of London on that day, bound, consequently, the property in question; that the sheriff had power, therefore, acting under the writs, to sell and convey the fee simple; that there was nothing in *Balkwell's* position, as mortgagee, to preclude him from being the purchaser, and that having purchased and taken a conveyance, he has acquired a title paramount to that of the plaintiff, which the plaintiff has therefore no right to redeem.

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Atchison
v.
Coombe.

Assuming, for the purpose of this argument, that the fee, vested in the plaintiff, and that the writs of *fi. fa.* attached, and that the sheriff had power to sell unless restrained by this court, I cannot agree that *Balkwell* was in a position to purchase, or that he has acquired a paramount title, and is therefore irredeemable.

Judgment.

Balkwell's position at the time of the sheriff's sale was this, he was the owner in fee, in the contemplation of this court, subject to redemption—the equitable fee simple had already vested in him under the conveyance of the 17th of May, 1838. *Hawkins* was a mere trustee. When the patent issued he acquired nothing beyond the dry legal estate which he was bound to convey to *Balkwell*; and when, contrary to his duty, he conveyed that legal estate to the plaintiff, it is equally clear that the plaintiff also became a trustee for *Balkwell*, and that *Balkwell* had a perfect right to insist that the equitable fee simple already vested in him should be clothed with the legal estate. When *Balkwell* purchased at sheriff's sale, therefore, he purchased not a paramount title, but the very interest already vested in him. His title as against the execution creditors was perfectly valid. The court would have restrained a sale. And having acquired the estate from the plaintiff by a title perfectly valid, I cannot perceive how his election to purchase an

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invalid title, through the medium of an illegal sale, which this court would, at his instance, have enjoined, can impair the plaintiff's right to redeem. Again, what did *Balkwell* acquire by his purchase at sheriff's sale? Not the beneficial interest in the estate, certainly, for that he had already. He acquired, therefore, nothing, but the dry legal estate which he had a plain right to call for irrespective of the sale. His position, therefore, was this, having the paramount title, he elected to submit to a claim, as against him, plainly invalid; he purchased that which this court would have given him without purchase; such conduct, cannot, I think, affect the plaintiff's rights. Lastly, upon the execution of the conveyance from *Hawkins* to the plaintiff, *Balkwell* had a clear right to come into this court to restrain the sale by the sheriff (a), and to have the legal estate conveyed to himself, and any expenses thereby incurred would have been a charge upon the estate (b), and having that right, as against his mortgagor, it was his duty, I apprehend, to have pursued that course. In that view, at least, he was a trustee for the mortgagor. And having purchased the estate at sheriff's sale, contrary to his duty, instead of coming to this court for relief, the estate thus acquired must be regarded, I think, as acquired for the benefit of the mortgagor. For these reasons, I have no doubt that as against *Balkwell* and those claiming under him with notice, the plaintiff is entitled to redeem.

Judgment.

It is argued, however, that *Coombs* is a purchaser for value without notice of the plaintiff's equity, and has acquired, therefore, an irredeemable estate. But upon that point, also, my opinion is in favor of the plaintiff. It cannot be denied that the admitted facts of this case go far to establish actual notice. That the plaintiff was in possession claiming title, and had made large improvements shortly before the partnership, is admitted by *Coombs*. Shortly after the partnership had been formed

(a) *Langton v. Horton*, 1 Hare, 549.

(b) *Godfrey v. Watson*, 3 Atk. 517; *Langton v. Langton*, 18 Jur. 1093.

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the plaintiff was arrested, convicted of high treason, and transported. On the 27th of August the patent issued in the name of *Hawkins*. On the 2nd of September he conveyed to the plaintiff. On the following day the land was seized under writs of *fi. fa.* against the plaintiff's land, and on the 12th of September, 1840, it was sold by the sheriff to pay the plaintiff's debts; and *Balkwell* became the purchaser. Now *Coombs* was not an indifferent spectator of these transactions. He had a very material interest in supporting *Balkwell's* title; and the question is, whether he believed, at the time of the sheriff's sale, that *Balkwell* was the actual owner—had purchased the plaintiff's interest out and out, or whether he was aware of the actual state of the case. Had *Coombs* believed that *Balkwell* was the absolute owner, it is hardly possible to believe that these proceedings would have been submitted to. The sale of property, purchased and paid for by *Balkwell*, and on which a large sum had been expended in improvements, to pay the plaintiff's debts, would have been so grievous a wrong that I find it almost impossible to believe that some steps would not have been taken to avert such palpable injustice. On the other hand, assuming *Coombs* to have been aware of the real nature of *Balkwell's* interest, I can well understand that a purchase at sheriff's sale may have been thought a simpler remedy, in the then state of the practice, than a bill in this court to foreclose *Aitchison's* interest. The facts go far to prove actual notice; but the examination of *Coombs* places the point, I think, beyond doubt. He says: "I did not ask anything about the writing between *Aitchison* and *Balkwell*. The arbitrators said nothing about it. I saw that paper, (the bond from *Aitchison* to *Balkwell*), before I put in my answer, and read a part of it. It was in the hands of *William Balkwell*, son of *John Balkwell*. I had heard from *John Balkwell* that there was such a bond, but I thought in my own mind that the sheriff's deed had killed a good deal of that, and therefore that it could not be very material to me whether there was such a bond or not, as the sheriff's sale and

Judgment.

1858. deed was a better title to me, and that the bond was not necessary to strengthen my title. I thought my title good enough without it." Now, looking at that statement in connection with the facts to which I have already adverted, there is no room to doubt, as it seems to me, that *Coombs* had actual notice of the real nature of *Balkwell's* interest. But at the least he had notice of a fact affecting the the title. He knew of the existence of that bond, and should have perused it. And if he had perused it, he would have known that *Balkwell*, notwithstanding the sheriff's deed, was a mere mortgagee. He seems to have assumed that the purchase at sheriff's sale had killed the bond; that is, as I understand the expression, had foreclosed the plaintiff's equity. But he must be taken to have known the law, and consequently, he had, at the least, constructive notice of the plaintiff's title (*a*).

I am of opinion, therefore, that upon the case presented at the hearing, the plaintiff is entitled to relief.

Judgment.

It is now said, however, that the case made by the bill differs materially from that disclosed by the evidence and discussed at the hearing, and that under the circumstances, the plaintiff ought not to be permitted to amend; and although this point was overlooked at the hearing, it seems proper that it should be considered before disposing of the case.

I agree that the practice of permitting amendments at a late stage has been carried to an inconvenient length. The general order (*b*) sanctions an amendment at any stage of the cause; and considering the state of the practice, and the position in which the profession was placed when that order was passed, some such indulgence was absolutely necessary. But that state of things has,

(*a*) *Jones v. Smith*, 1 Hare, 43; *Ferrars v. Cherry*, 2 Ver. 383; *Bisco v. Earl Barbury*, 1 Ca. Arg. ch. 287, and 1 Hare. 59.

(*b*) Order IX., 14.

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to some extent at least, passed away; and I am prepared to decide that where an amendment would be attended with the least possible risk of doing injustice, it is much fitter that the suitor should suffer in the individual case, for his own negligence, than that the general interest of justice should be endangered by allowing the case made by the plaintiff to be materially altered after the evidence has been taken, and *a fortiori* after it has been discussed and considered. And I shall be ready to act upon that principle whenever a case calling for its application shall arise.

1858.

Atchiam
v.
Coombs.

But this is not such a case, and had an amendment been necessary, I should have acceded to the plaintiff's application upon the following grounds: First, because the defendants have contributed, in a great degree, to bring about the state of things of which they now complain; for although they were in possession of the assignment of the 17th of May, 1838, they not only did not set it up in their answers, but carefully avoided any allusion thereto. Secondly, because the defendants were not misled. They were from the first aware of the real nature of the plaintiff's case, and that formed the only subject of discussion at the hearing. Thirdly, because *Coombs* has had the benefit of his defence as completely as if the case had been differently stated. The defence is that he is a purchaser for value without notice, and the evidence to support that case would have been the same though the bill had been differently framed. Lastly, because there would not have been, under the circumstances, any danger of perjury. The plaintiff's case rests principally upon the assignment, and the examination of *Coombs*'s himself. No further examination of witnesses would have been necessary. The same evidence would have supported the amended bill, and the defence would have been the same. For these reasons I would have thought an amendment proper here. We could not have refused it consistently with decided cases.

1858.
 Altshon
 v.
 Coombs.

But I am of opinion that an amendment is unnecessary. The bill, as drawn, rests the case, it is true, on the ground of agency only, while the evidence shews that *Balkwell* was mortgagee as well as agent. But the evidence does not negative, on the contrary, it establishes the case of agency. The assignment is conclusive upon that. It provides for the repayment to *Balkwell* of all sums due to him as agent, bail, or attorney; and looking at the whole case, I have little doubt that *Balkwell* obtained possession as agent rather than as mortgagee. The suit, as constituted, is in substance a suit for redemption upon grounds sustained in proof, and if that be so, the additional ground for relief disclosed by the evidence, cannot impair the plaintiff's right to a decree upon the record as framed.

I am of opinion, therefore, that the plaintiff is entitled to redeem. The reference must embrace an account of the rents and profits on the one hand, and of the substantial improvements on the other; and the costs of the suit must be paid by the plaintiff.

Judgment.

ESTEN, V. C.—In 1838, the plaintiff, being the equitable owner of the lots in question in this cause, under a purchase from one *Hawkins*, whose bond he held, and who had purchased from the crown, no patent having issued, executed an instrument in writing to one *John Balkwell*, which amounted to a mortgage. At this time the plaintiff had in fact committed treason, for which he was afterwards apprehended and condemned to death, but his sentence was commuted, and he was transported to Australia, where he remained nearly twenty years. During his absence, Mr. *Wilson*, on behalf of some of his clients, to whom the plaintiff was indebted on judgments, procured *Hawkins*, in whose name a patent had issued, to execute a conveyance to the plaintiff, which was delivered to *Balkwell*, and executions having issued on the judgments, the lands in question were offered for sale by the sheriff, and purchased by *Balkwell*

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1858.

Aitchison
v.
Coombs.

for about 107*l.*, and an ordinary sheriff's deed was executed to him by the sheriff. *Balkwell* and the defendant afterwards entered into partnership, which they afterwards dissolved, and upon that occasion a balance appearing to be due the defendant, the lands in question were conveyed to him by *Balkwell*, in part satisfaction of that balance. The present bill is to redeem, charging that *Balkwell* was a mortgagee, and that *Coombs* purchased with notice of the plaintiff's equitable title. I understand it to be a fact, as it was stated, and admitted in the course of the argument, that an act of amnesty was passed sometime before the return of the plaintiff, which contained amongst other things, a reversal of the plaintiff's attainder, and provided that his civil rights should stand in the same plight as if it had never taken place. I apprehend that an attainder relates to the time of the offence committed, and avoids all intermediate acts. Moreover, it works an entire forfeiture, and no escheat. If this be so, the plaintiff's interest in the lands in question remained vested in the crown until the passing of the act of amnesty, and avoided the mortgage to *Balkwell*, and all other intermediate acts. Judgment. The plaintiff, however, was, I apprehend, capable of purchasing for the benefit of the crown, and therefore when *Hawkins* conveyed the legal estate to him, it vested instant in the crown and remained so vested until the passing of the act of amnesty. If, however, the attainder operated only from the time of conviction, then *Balkwell's* mortgage stood good, and the equity of redemption only vested in the crown, and afterwards the legal estate, when conveyed by *Hawkins*. In either view there was nothing for the sheriff's sale or deed to operate upon. However, as I understand, all this is immaterial in consequence of the provisions of the act of amnesty, and the case is to be considered precisely as if no attainder had ever occurred. In this view, while *Balkwell* had a mortgage on the property in question, and the plaintiff retained his equity of redemption, the legal estate is conveyed to the plaintiff by *Hawkins*. This circumstance did not substantially

1858.
 Atchison
 v.
 Coombs.

alter the rights of the parties. The plaintiff had the legal estate, but he was a trustee for *Balkwell*, to the extent of his security. Under these circumstances the property is exposed to sale by the sheriff, and purchased by *Balkwell*. Did this work any change in the situation of the parties? I think not. I think *Balkwell* continued a mortgagee, as he was before; except, that, perhaps, he might be entitled to add his purchase money paid to the sheriff to the amount otherwise due on the mortgage. In my judgment a mortgagee cannot acquire a title to the property mortgaged adverse to that of the mortgagor. It may be doubted whether he can acquire a title paramount for his own benefit: it may also be doubted whether equity would have permitted a sale by the sheriff of property so circumstanced; the interest of the plaintiff being in fact an equity of redemption, although he had accidentally acquired the legal estate. But independently of these considerations, it is impossible that a mortgagee can acquire an interest in the same estate as is the subject of the mortgage adverse to the mortgagor. The whole beneficial interest had already been mortgaged to *Balkwell*. The conveyance of *Hawkins* merely clothed that beneficial interest with the legal estate. *Balkwell* purchased the same estate at a sheriff's sale as had been previously mortgaged to him. Suppose a mortgage made of an equitable estate, the legal estate being outstanding at the time, and that the mortgagee afterwards procured it to be conveyed to him; can he set it up, against the mortgagor's equity of redemption? Such a proposition could not be maintained, and what difference can it make that the legal estate was procured by means of the sheriff's sale? If this be so, the only question that remains is, whether *Coombs* purchased with notice of the plaintiff's equitable title. It is to be observed, that he has registered his purchase deed, and therefore, the evidence of notice must be such as to overcome the operation of the act of parliament; but I think it is amply sufficient. His answer, I think, is enough, where he simply denies all knowledge of the

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SPRAGGE
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facts stated in the plaintiff's bill in reference to the mode in which *Balkwell* derived title to the land in question. This denial admits everything that is not denied, and admits, therefore, notice of the plaintiff's title, and merely excludes knowledge of the mode in which that title passed to *Balkwell*. But independently of this, he admits in his examination that he heard from *Balkwell* before he purchased, of the existence of a writing between the plaintiff and *Balkwell* relating to the land. It was his duty to call for this writing, and if he had done so, he would have known that *Balkwell* had only a mortgage title, and it could confer no other upon him. He chose to rely upon the sheriff's deed as conferring an absolute title, and must abide the consequence of not taking proper advice before he purchased. It may be a question whether the money paid at sheriff's sale should be charged upon the property. I doubt whether it was a valid sale even at law. If not, the defendant must found his claim to charge it, upon the ground that if he had not purchased, some other person would, and he purchased for the protection of the plaintiff's title, which might otherwise have been involved in difficulty. If the sale was valid at law, I think the amount paid to the sheriff should be allowed. It may be conjectured, indeed, that *Balkwell* purchased at the sheriff's sale not for the plaintiff's protection, but for his own benefit: but as we will not hear him say this, we must extend to him the benefit, as well as subject him to the disability involved in the assumption that he purchased for the protection of the plaintiff's title. I think, under the circumstances, all lasting improvements should be allowed. The decree should be on payment of costs, as of a redemption suit; I think the plaintiff entitled to the remainder of his costs to the hearing.

1858.

Atkinson
v.
Coomb.

Judgment.

SPRAGGE, V. C.—*Hawkins* was the purchaser from the crown, and contracted to sell to the plaintiff in March, 1838, at which time some instalments of the purchase money to the crown remained unpaid, and, as

1858.
 Aitchison
 v.
 Osmonds.

would appear, not yet due. At the above date *Hawkins* made his bond to the plaintiff, conditioned for the conveyance of the land in question. That bond is not before us, but it is not recited to the above effect in the assignment from the plaintiff to *John Balkwell*, which is dated the 17th of May in the same year. By the assignment, in which the consideration is stated to be 136*l.*, paid by *Balkwell* to the plaintiff, the plaintiff assigned to *Balkwell* "the said recited bond or obligation, and all his right and interest thereof, in and to the same," and appoints *Balkwell* his attorney to obtain the bond from a person in whose hands it is stated to be, and also to make demand and receive from *Hawkins* "the conveyance in fee of the lands, in the said recited bond mentioned," and on refusal, to sue for, and recover the same, and it is thereby provided, that the assignment should be void, on payment by *Aitchison*, before the first of August following, of all and every sum or sums of money due and owing from the plaintiff to *Balkwell* on any account whatever, either as bail or agent, or attorney, for or against the plaintiff.

Judgment.

Balkwell thereby became mortgagee of the plaintiff's equitable interest; and upon the patent being issued, it was intended that he should stand in the position of equitable mortgagee, by the deposit of the title deed from *Hawkins* to the plaintiff; or, that *Hawkins* should convey to him the legal estate: the words of the assignment, I think, rather point to the former.

The patent having issued to *Hawkins* on the 26th of August, 1839, (the instalments falling due after the assignment having been paid by *Balkwell*), *Hawkins* executed a deed of conveyance to the plaintiff on the 2nd of September following. He did this at the instance of Mr. *Wilson*, attorney for certain judgment creditors; Mr. *Wilson's* object being, to have the legal estate in the plaintiff, in order to the judgment debts being satisfied therewith. It appears in evidence that *Balkwell*

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was dissatisfied with this, as he would have preferred the conveyance from *Hawkins* to have been made to himself; the conveyance was placed in his hands. At this time the plaintiff had been transported from this province in accordance with the commutation of his sentence. The lands were sold at sheriff's sale on the 12th of September following, and *Balkwell* became the purchaser at the sum of 107*l*. He had been in possession from the time of the assignment, and so continued until the partnership with the defendant *Coombs*.

1838.
Althausen
v.
Coombs.

Apart from the question raised upon the effect of the attainder of the plaintiff, it would seem that the legal estate vested in him by the conveyance from *Hawkins*, and that the lands were saleable by the sheriff; unless the assignment to *Balkwell* made any difference. But it is said, that even if saleable, and if a purchase by a stranger, and conveyance from the sheriff would have carried a good title, and it is not denied that they would, still *Balkwell* could only purchase as a mortgagee, and any title he acquired would remain for the benefit of the mortgagor; and cases were cited for that position.

Judgment.

In *Fosbrooke v. Balguy* (a), one of the cases cited, the executor of a mortgagee purchased the equity of redemption, paying for the same with the mortgage debt, and a small amount added of his own funds, and he was held a trustee for his testator.

In *Otter v. Vaux* (b), a mortgage had been made by a tenant for life and a remainderman, which contained a power of sale; this mortgage was followed by a second; and subsequent mortgages were made by the remainderman alone. Upon default made on the first mortgage, the mortgagee exercised his power, and sold the estate, and the remainderman himself became the purchaser, and a question was made whether he could hold the first mortgage against the second mortgagee; and Sir *W. Page Wood* held that he could not; that his

(a) 1 M. & K. 226. (b) 2 Kay & J. 250.

1858.

Atkinson
v.
Coombe.

paying the first mortgage through the intervention of a sale, was only a mode of payment, and attended with the same effect as if he had made a direct payment to him.

Neither of these cases appear to me at all to support the plaintiff's position; the first went upon the principle that an agent cannot, in the matter of the agency, deal for his own benefit; the latter decided that a mortgagor whose duty it was to pay, should be held as paying, when he purchased under a power of sale by the mortgagee.

The case of Lord *Cranston v. Johnston* (a), was also cited, but not to the same point exactly; but rather to shew that the court will not sustain a sale, or a title obtained through it, where the sale takes place under circumstances which make it almost certain that a proper sale could not take place. The circumstances of the sale in the case cited, have scarcely a parallel any where; certainly not in this case, where it is not shown that the sale took place under any circumstances of disadvantage to the plaintiff; unless his absence consequent upon his treason is to be looked upon in that light; or that the price given was less than the value of the estate. Another case was cited from an American report, which I have been unable to find.

Apart from any special circumstances which may be supposed to have attended this sale and purchase, it was a sale by adverse parties, not with any connivance of *Balkwell* or even with his concurrence, but rather adversely, for he seems to have thought that his assignment gave him a title to the land, or at least a right to obtain a title from *Hawkins*. Was his position as a mortgagee such as to render a purchase by him improper, so that it should enure to the benefit of the mortgagor? No fiduciary relation existed between them; nor did he purchase in an adverse title; the sale of course went upon the assumption that the plaintiff had a good title; and that that title was saleable for the

(a) 3 Ves. 170.

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satisfaction of his debts, and transferrable to whomsoever might purchase it at sheriff's sale. It was then, as it appears to me, the very reverse of the purchase of an adverse title; the consideration went, not to a rival claimant, but to the plaintiff himself, inasmuch as it was applied to the payment of his debts.

1858.

Alcock
v.
Coombs.

Indeed the only ground upon which the plaintiff's title to relief is rested by the pleadings, is that *Balkwell* being a mortgagee, and purchasing at sheriff's sale continued mortgagee only, and that *Coombs* purchasing from him with notice, stands in the same position. It is not made a point that the interest of the plaintiff was not saleable; or that the sale is impeachable on any ground. Upon the single point raised, and the only one which we can properly consider, I am, for the reasons which I have given, against the plaintiff.

It was contended in argument that there was no delivery of the deed from *Hawkins* to the plaintiff; the point is not taken by the bill, and is inconsistent with it for it alleges that the patent was issued by the procurement of *Balkwell*, and with the understanding that *Hawkins* should immediately execute a conveyance to the plaintiff and deliver the same to *Balkwell*, and receive from him the plaintiff's bond, and that in pursuance of such agreement he did execute such conveyance and deliver it to *Balkwell*: the assignment made *Balkwell* the plaintiff's agent to receive such deed; besides, as I have already observed, it is not objected by the bill that the land was not saleable as the land of the plaintiff: which would have been the case if there was no valid conveyance from *Hawkins*.

The reversal of the attainder seems to place all parties in the same position as if there had been no attainder. The statute (a), provides "that the estates, property and effects, which immediately before such attainder were of, and belonged to, the offender shall be, and are hereby

(a) 12 Vic. ch. 13, sec. 2.

1868.

 Atchison
 v.
 Coombs.

vested in the same party or parties, in the same manner, and with the same effect to all intents and purposes, and with the same and no other consequence or effect as to the rights of third parties, or upon or with regard to the same, as if such offender had not been so attained." I believe this point is not disputed.

Upon the question of notice to *Coombs*, it is not material, if my view be correct as to the title acquired by *Balkwell*. But I incline to think that *Coombs* is not affected with notice of the contents of the assignment from plaintiff to *Balkwell*: he had notice of the existence of a writing between other parties in respect of this land, but it not shown that he had notice of its contents; he says that he had not, but that he understood it to be a paper transferring the land to *Balkwell*, though he does not know that he had heard so; he was present at the sheriff's sale. It is contended that certain expressions used by *Balkwell* ought to have set him upon enquiry as to the contents of the assignment, as, after expressing his anger with *Hawkins* for not conveying to himself, he purchased at sheriff's sale, he remarked that it would be just as good as the have a chancery suit about it; it is evident that he meant a chancery suit with *Hawkins* for not carrying out the arrangement between himself and the plaintiff, which was, as *Balkwell* understood it, to make a conveyance to himself, and it is clear, I think, from *Coombs*' examination, that he so understood *Balkwell*; the plaintiff at that time was undergoing his sentence in Van Dieman's Land. *Coombs* adds: "He thought he had a good, safe title to his property, and I thought so too when I bought two or three years afterwards."

The expression of *Coombs* that "He thought the sheriff's deed had killed a good deal of that," alluding to the assignment, has also been commented upon, as showing his belief that some right or interest of the plaintiff had been destroyed by the sheriff's sale. I think that could not be his meaning, for he adds: "and therefore that it could not be very material to me whether

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1858.

Aitchison
V.
Coombs.

It appears to me, then, that *Coombs* deduced his title independently of the assignment; that he thought that but for the sheriff's sale *Balkwell* would have had a title by the assignment; that the conveyance from *Hawkins* to the plaintiff, instead of to *Balkwell*, and the seizure by the sheriff of the lands, as the lands of the plaintiff, had driven *Balkwell* to another chain of title, or at least that he adopted it instead of filing a bill against *Hawkins*, and that the title upon which *Balkwell* relied, and upon which *Coombs* himself also relied was, the crown to *Hawkins*, *Hawkins* to the plaintiff, seizure and sale by the sheriff of *Hawkins's* lands, *Balkwell's* purchase at sheriff's sale, and the sheriff's conveyance to him.

Notice is not proved, unless proved by the examination of *Coombs*. The evidence of *Stiles*, who was instrumental in making the purchase from *Balkwell*, agrees with and confirms it. There is, I think, no actual notice proved of the contents of the assignment, and I think he had not constructive notice of it. Judgment.

I incline to think that constructive notice, if shewn, would be sufficient; and that *Coombs* would not be entitled to actual notice as a party having a registered title. The effect of the statute, as I take it, is, that after a memorial registered, a purchaser whose conveyance is executed after such registration is postponed to a subsequent purchaser, unless the prior of the two in point of time is also prior in registration; but if of those two, the one prior in point of time can shew that the other, prior in registration and subsequent in point of time, had notice of his prior conveyance, equity interferes and prevents the priority which, but for the notice would be given to the subsequent conveyance firstly registered; but such notice

1858. must be actual notice. But that is not the position of the parties here; the first registration affecting the lands in question is of the sheriff's deed; next the conveyance from *Hawkins to Aitchison*; next the conveyance from *Balkwell to Coombs*, so that after the first memorial registered, the registrations are in the same order as the conveyances, and there is no prior registration of a subsequent deed; and I have therefore looked at the question of notice with a view that constructive notice would be sufficient.

Aitchison
v.
Coombs

Upon both points, however, I am against the plaintiff; he has not shown that an equitable mortgagee, purchasing at a sheriff's sale, with which he had nothing to do as party or otherwise, acts improperly, or must be taken as acting for the mortgagor; or, that he thereby becomes a trustee for him: the cases cited establish no such position; and as to notice, I think that none is proved actual or constructive. I have therefore come to the conclusion, with great respect to the contrary opinion of the other members of the court, that the plaintiff has shown no title to relief, and that his bill should be dismissed.

Judgment:

I am told that the bill which I have had before me, is not, as I supposed, a copy of the bill upon the files, but a draft containing the proposed amendments. I should have come to the same conclusion, if a copy of the bill upon the files had been before me. What I have had has been a supposed record, in such a shape as the plaintiff himself wished to put it.

His Honor also referred to *Exp. Ashley (a)*, *Exp. Pedder (b)*, *Exp. Davis (c)*, *Exp. Turvill (d)*, *Exp. Rolfe (e)*, as to the right of a mortgagee to purchase the mortgaged premises in proceedings taken against the mortgagor.

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|-----|---|-------------|-----|---|---|-----------|------|
| (a) | 3 | Deac. & Ch. | 510 | ; | 1 | M. & Ayr. | 82. |
| (b) | 3 | Ib. | 66 | ; | 1 | Ib. | 327. |
| (c) | 3 | Ib. | 504 | ; | 1 | Ib. | 89. |
| (d) | 3 | Ib. | 345 | ; | 1 | Ib. | 689. |
| (e) | 1 | D. & C. | 77. | | | | |

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AN INDEX

TO THE

PRINCIPAL MATTERS.

ABSCONDING DEFENDANT.

See "Practice," 1.

ADMINISTRATION.

The provisions of the statute 13 & 14 Victoria, ch. 63, apply only to judgment creditors whose judgments have been entered up since the 1st day of January, 1851; where therefore creditors whose judgment was entered up in the year 1836, and registered in 1854, filed a bill in the year 1856 to set aside a deed executed by their debtor to his son in the year 1835, as having been done to defraud creditors, or as being voluntary, and therefore void as against purchasers for value, the court refused this relief, but gave the plaintiffs liberty to amend by making the bill a bill on behalf of all creditors, and praying for an administration of the debtor's estate.

Gillespie v. VanEgmond, 533.

AGREEMENT.

(RECISSION OF.)

The owner of a mill property wrote to an intending purchaser, "I will sell the mill as it now stands, at Glenmorris, with all rights and privileges belonging to it, as sold me; and I will guarantee to give a head of five feet, by laying out about thirty pounds; but as it is there is four feet, and there is water enough to run ten run of stones if necessary." *Held,*

that these representations amounted to express guarantees upon the several points embraced in them; and it being shown that a head of five feet of water could not be obtained except by an outlay of a large sum of money; and that raising the water to that height would have the effect of damming back the water on the lands of parties higher up the stream, and also of diverting water to which the riparian proprietor on the other side of the stream was entitled; the court ordered the agreement entered into to be rescinded, and the vendor to pay the costs of the suit and the amount expended in repairing the premises by the vendee, who was to account for rents and profits during his possession.

Gale v. Hubert, 312.

ALIMONY.

The principle laid down by the court in *Waters v. Shade*, (ante volume 11, page 218) in respect to opening publication, apply as well to suits for alimony as to other cases.

McKay v. McKay, 279.

2. A married woman voluntarily left her husband's house, alleging as a cause unkind treatment by the husband, but subsequently offered to return, when he refused to receive her. Upon a bill filed for alimony, the court made a decree referring it to the Master to fix an

amount to be paid to the plaintiff for alimony, during such time as the parties continued to live separately.

English v. English, 580.

See also "Practice," 2.

ASSIGNEE.

Where a suit is brought to enforce the sale of mortgaged property against the mortgagor and his assignee, the order for payment of any balance of the mortgage debt which may remain due after such sale, must be against the mortgagor, and not the assignee.

Turnbull v. Symmonds, 615.

ASSIGNMENT.

(FOR BENEFIT OF CREDITORS.)

Debtors having obtained from their creditors an extension of time the debtors covenanted to pay all the debts in full, and not to part with their effects, except for the benefit of their creditors generally: subsequently the debtors made an assignment to one of their creditors for the benefit of all, the deed containing a release from all further indebtedness by the creditors executing the assignment. Upon a bill filed by some of the creditors on behalf of all, the court declared such assignment to be in contravention of the agreement, and that the creditors were entitled to participate ratably in the proceeds of the trust effects without releasing the balance of their claims.

Taylor v. Mabley, 570.

ATTORNEY AND CLIENT.

1. An attorney, during the progress of a suit, brought by him for the recovery of certain lands, with the sanction and approval of the family of the plaintiff, although without his knowledge, and with-

out instructions from him or his agent, became aware of an outstanding legal estate which he purchased for £25, and afterwards set this title up in opposition to the claims of his client. Upon a bill filed for that purpose, the court declared the attorney trustee for the client, who was bound to pay the attorney the amount expended by him in buying up the legal title, and in improving the property; to be set off against the rents and profits received by him, and the costs of the suit: and the fact that the plaintiff was not aware of the proceedings taken in his name made no difference in respect of his rights as against the attorney.

Graves v. Smith, 306.

2. An attorney who had acted for a party, afterwards instituted proceedings against the client to recover his costs, pending which the client applied to the attorney for a loan, which the latter agreed to effect, provided the client did not employ one particular attorney to act on his behalf, desiring the client to obtain the services of some other professional gentleman, but which he refused to do, and the arrangement was completed: afterwards a bill was filed to set aside the transaction, on the alleged ground of fraud on the part of the attorney; but the defendant having denied all the allegations of fraud set up by the plaintiff, and the statements of the defendant being corroborated by the signature of the plaintiff to a memorandum prepared by the defendant at the time of the loan being effected, the court refused to interfere on behalf of the plaintiff, although the attorney, they thought, should have refused to proceed with the loan

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Rees v. Wittrock, 418.

BANKS.

The chartered banks of this province have a right to a decree of foreclosure upon a mortgage held by them as security.

Bank of U. C. v. Scott, 451.

BILL.

(SERVICE OF AN ATTORNEY OR SOLICITOR.)

1. Where a solicitor accepts service of an office copy bill of complaint, and gives a written undertaking to answer the same; or, in case of default, that an order *pro confesso* may be drawn up; the usual two days' notice of motion for that purpose must be given, and may be served on the solicitor.

Ross v. Hayes, 277.

2. Where service of an office copy bill is effected on the attorney-at-law of the defendant, a three weeks' notice of motion to take the bill *pro confesso* must be given; the notice may be served on the attorney of the party.

Webster v. O'Closter, 278.

BREACH OF TRUST.

An execution being in the hands of the sheriff against lands, the defendant therein applied to a solicitor to procure his services in obtaining a settlement of the demands against him: with the view of enabling the solicitor to raise funds for that purpose, the client, at his solicitor's suggestion, conveyed his land: to him in fee, taking back a defeazance stating the object for which the deed was made, but this defeazance was subsequently lost. In order to raise money the solicitor executed a mortgage for £245, and the mortgagee sold the same to another party for £150, which

amount was handed to the solicitor, and thereout he paid the claims against the client, amounting in all to about £90. Afterwards the solicitor demanded from the client £245, and subsequently £300 as the price at which the client would be allowed to redeem; and this not having been complied with, the solicitor sold to a third party for £125 over and above the mortgage, but the purchaser had notice of the claim of the client. Upon a bill filed for that purpose, the court declared the acts of the solicitor a plain breach of trust: that the client was entitled to redeem upon payment of what was actually expended on his behalf: that the purchaser of the mortgage was, under all the circumstances, entitled to hold the land only for what he had actually paid and interest; the excess of which, over and above the amount expended for the client, the solicitor was ordered to pay, together with the costs of the suit to the hearing.

McCann v. Dempsey, 192.

BUILDING LOTS.

Where building lots have been sold according to a plan, the portion of the property laid off as roads cannot afterwards be diverted to other purposes.

Rossin v. Walker, 619.

CHARGES.

(TARIFF OF, BY A RAILWAY COMPANY.)

See "Tariff of Charges."

CHOSE IN ACTION.

(ASSIGNEE OF.)

To enable the assignee of a chose in action to proceed in equity for its recovery, he must shew the existence of some difficulty or obstacle in his way to prevent him from recovering at law.

Ross v. Munro, 431.

CHURCH TEMPORALITIES.

1. The act 3 Vic., chapter 74, for the management of the Church temporalities, is not confined to parish churches, but embraces all churches in communion with the United Church of England and Ireland. *Sanson v. Mitchell*, 582

2. The incumbent of a church, without the consent of the bishop or churchwardens, took a deed of land in his own name as such incumbent, the property having been previously contracted for by the bishop and certain members of the congregation for the site of a church, and on his retirement, refused to execute a release of the premises. The court, under the circumstances, ordered the retiring incumbent to execute a release of the estate; and as his conduct in the matter had been unreasonable refused him his costs, although in strictness the bill, so far as it sought a conveyance, ought to have been dismissed, title having already vested in his successor. *Ib.*

COLLATERAL SECURITY.

A judgment creditor coming to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee, to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. Therefore, where judgment had been recovered and duly registered against a party who had a contingent interest in real and personal property, subject to a mortgage executed by way of security for advances, and the debtor having effected an insurance upon his life, which he had also assigned to the same person as an indemnity against loss in

respect of a bond executed by him as surety for the debtor. *Held*, that the judgment creditors of the mortgagor, upon paying the amount due under the mortgage and indemnifying the mortgagee in respect of his liability as surety, were entitled to a transfer of the policy of insurance, and also of the mortgage upon the contingent interest, and to foreclose the mortgagor in default of payment.

Gilmour v. Cameron, 290.

CONTRACT FOR SALE.

(VARYING.)

1. The owner of the west half of a lot of land, supposing himself to be the owner of the east half, and not the west half, entered into a contract with the owner of other lands to exchange for these the east half, and the east was conveyed accordingly. He filed a bill to compel the other party to the agreement to accept a conveyance of the west half, and specifically perform the contract entered into between them by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of "east" instead of "west;" and it appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of either; but as the contract was for the east half, and the mistake was that of the plaintiff alone, the court held that the west half could not be substituted for the east half, and refused the relief asked.

Cottingham v. Boulton, 186.

COSTS.

1. Where a party's own letter was such as to create a misapprehension of facts, and a suit was instituted in consequence, the court, although it refused the relief asked, dismissed the bill without costs.

Anderson v. Cameron, 285.

2. A good order ruled a defendant was out of cost.

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2. A demurrer having been held good on one ground, though overruled as to the other; the defendant was allowed to answer without costs. *Paine v. Chapman*, 338.

See also "Foreclosure," 3.

"Infants."

"Specific Performance," 11.

COURT.

(JURISDICTION OF.)

See "Jurisdiction."

CREDITORS.

(ASSIGNMENT FOR BENEFIT OF.)

See "Assignment."

CROWN PATENT.

(REPEAL OF.)

In laying off the town plot of Southampton, a reservation was made by the person employed to survey the land of a block for a market square, and marked the same upon the plan returned by him to the office of the commissioner of crown lands, a copy of which was furnished to the local agent at Southampton, by which he was to sell, and several sales were accordingly effected by him; some of them of lots fronting on the market square so reserved. On the plans finally adopted by the crown lands office, the market reservation was marked "Reserve" simply. Subsequently the executive government, under the impression that the block so reserved was at their disposal, granted part of the same to the Church Society for the site of a church. *Held*, on a bill filed to set aside the patent on the ground of error, mistake, or inadvertence on the part of the crown in issuing the same, that under the circumstances it must be presumed that had the crown lands department been aware of what had been done in reference to this

reservation, the grant to the Church Society would never have been made, and that therefore upon a bill properly framed, the letters patent should be repealed; and that for that purpose the suit ought to have been instituted by the Attorney-General on behalf of the public.

The Municipality of Saugeen v. The Church Society, 538.

DAMAGES.

See "Mortgage," 7.

DEDICATION.

The district council of the Home District, had a right, under the terms of the grant of the gaol and court-house block and the provisions of the several statutes authorising them to sell the same, to set apart a portion of the land for the use of a firemen's hall and engine-house; and having had the court-house square surveyed off into building lots, and a portion thereof reserved for the site of an engine-house for the City of Toronto, upon which the city authorities erected a firemen's hall and engine-house, the County Council, some years afterwards, proceeded to obtain possession thereof by action. The court restrained the action, and declared the land in question dedicated to the use for which it had been so set apart.

The City of Toronto v. The Municipal Council of York and Peel, 525.

2 In the year 1830, when the site of the town of Brantford was laid out into building lots, a part containing nearly two acres was reserved for a public market square. In 1850, the Municipal Council of Brantford executed building leases for portions thereof, with covenants for renewal. Upon an information

filed, the court restrained the renewal of such leases, or the granting of any new leases; the Attorney-General assenting to the leases already made continuing for their respective terms.

The Attorney-General v. Brantford, 592.

DEEDS.

(RECTIFICATION OF.)

1. The owner of a lot of land executed a mortgage on the west half thereof, at a time when it was supposed that the east and west halves of the lot were divided by a public highway. Subsequently it was discovered, upon a survey of the property being made, that a small gore or portion of the east half was embraced in what was always taken to be the west half only. At the time of the mortgage there was a grist and saw mill under one roof, about one third of which was on the strip; there was also a tavern, store-house, barn and piggery all on the strip, and the west half and strip had always been occupied by the mortgagor as one property, who delivered up possession of the whole to the agent of the mortgagee. Afterwards the mortgagor sold the east half up to the road; and subsequently, having become bankrupt in the meantime took a lease of the west half "with a grist mill, saw mill, tavern, sheds, store," &c., and no mention was made in the bankrupt's schedule of assets of any claim upon this property. On a bill filed against the mortgagor's assignee in bankruptcy, held, that plaintiff was entitled to have the mortgage rectified; to a decree of foreclosure for the whole of the property, including this strip, but under the circumstances without costs.

Russel v. Davoy, 165.

(SETTING ASIDE FOR FRAUD.)

3. A person who had at one time been remarkable for strength both of body and mind, and was much respected, having become from habitual drunkenness imbecile, deranged and fatuous, made a deed of valuable property to one of his sons who had been in the habit of furnishing him with drink; and about fifteen months afterwards executed a deed for the same property to the wife of the same son. A bill was afterwards filed to set aside these conveyances on the ground of fraud and incapacity on the part of the grantor to transact business. After the cause had been at issue, and evidence taken at great length, a release of the action was obtained from the plaintiff without the intervention of any legal adviser on his behalf. The court set aside the conveyances, as also the release which had been subsequently obtained, with costs. Nevills v. Nevills, 121.

3. The court, though it refused to set aside a purchase on the ground of fraud in the vendor, gave leave to amend the bill, alleging *over value* as a ground for relief.

Rees v. Wittrock, 418.

(VOID.)

4. The owner of a large tract of waste lands of the province, resident in Canada, executed a power of attorney to an agent about to visit England, authorising him to enter into contracts under seal for the sale of them; and in the power were specified several terms upon which the sales were to be effected, and the deeds were to be with bar of dower, but no power was given to the attorney to execute the deeds for either of the granting parties by express words, or to receive the money. The agent induced the

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defendant to become a purchaser of the whole for £2,500, making about five shillings sterling per acre, and about one-sixth of the lowest price set on the lands by the owner by his private instructions to his agent; signed a contract for sale, which was not under seal, and subsequently executed a deed purporting to convey the land to the purchaser. The owner having become aware of the facts, filed a bill to have the deed delivered up to be cancelled, as forming a cloud upon his title. The court refused the relief prayed, the rule being, that instruments void upon the face of them will not be ordered to be destroyed as forming a cloud upon the title; and under the circumstances dismissed the bill without costs, the purchaser having been guilty of great negligence and carelessness; accompanying such dismissal with a declaration of the reasons the court for so decreeing.

Hurd v. Billington, 145.

See also "Administration."

DEMURRER.

1. A defendant appearing at the hearing, and waiving all objection to an order *pro confesso*, may shew that the bill is open to demurrer for want of equity.

Greig v. Green, 240.

2. A demurrer having been held good on one ground, though overruled as to the other; the defendant was allowed to answer without costs. Paine v. Chapman, 338.

DONATIO MORTIS CAUSA.

See "Husband and Wife," 2.

DORMANT EQUITIES.

1. In 1832 a person who held a bond for the conveyance of a tract of land on which he had erected a steam saw mill and other buildings,

at considerable expense, having become involved, made an assignment of his property and effects to certain of his creditors as trustees, to work the mill and sell the lumber, and apply the proceeds in payment of the owner's debts, &c., and then removed from this province to the United States, where he remained for some years; the trustees agreed among themselves that one of their number should take the sole management of the trust estate into his hands, and he accordingly went into possession: subsequently an execution against the goods of the owner was placed in the sheriff's hands, under which he proceeded to a sale of the steam engine set up in the mill; at this sale, the managing trustee, who was agent only for one of the creditors, attended, and became the purchaser of the engine and machinery for his principal, at a great undervalue, and removed the same from the mill, and afterwards procured a deed of the property in his own name from the proprietor which he also transferred to his principal. In 1855, the assignor filed a bill for an account of the trust property, alleging that his poverty in the meantime had prevented him from enforcing his rights. *Held*, that he was entitled to the relief sought, notwithstanding the Statute of Limitations (4 W. IV., c. 1), and the act relating to Dormant Equities (18 Vic., c. 124.) Beckitt v. Wragg, 454.

2. *Held, Per Curiam*—That express trusts are not within the statute relating to dormant equities (18 Vic. ch. 124.)

The Attorney-General v. Grasett, 455.

3. In the year 1819, his Majesty,

by letters patent granted certain lands to trustees for different purposes: amongst the lands so granted was a block of six acres, being a reservation for a hospital for the town of York; upon the trust, amongst others, to observe such directions, and to consent to and allow such appropriations and dispositions of the said lands, or any of them, as the governor-general, lieutenant-governor, or person administering the government of the province, and the executive council therein for the time being, should from time to time make and order, pursuant to the purposes for which the said parcels or tracts of land, or any of them, had been originally reserved; and also to make such conveyance or conveyances, deed or deeds thereof, or of any part thereof, to such person or persons, and upon such trusts, and to and for such use or uses, as the governor, &c., should from time to time, by order in writing, appoint. *Held, Per Cur.*—That the trust in this case was not complete, and that by the terms of the grant the executive government retained the power of diverting properties so reserved to other objects — *BLAKE, C.*, dissenting, who was of opinion that the trusts were sufficiently declared, and that a conveyance of a portion of the land so reserved, in compliance with an order in council to that effect, for the benefit of the Church of St. James, in the town of York, and the incumbent thereof, was a fraud upon the original trusts declared respecting it, and, as such ought to be set aside.—*Ib.*

DOUBTFUL TITLE.

See "Specific Performance," 13-14.

EQUITY OF REDEMPTION.

(SALE BY SHERIFF.)

The provisions of the Statute 12 Vic., chapter 73, making equities of redemption saleable under legal process, do not apply when the mortgage is created by deed absolute in form.

McCabe v. Thomsor, 175.

See also "Fraudulent Conveyance," 2.

EXECUTOR.

1. The survivor of two partners, after having continued to carry on business with the personal representative of the deceased partner, filed a bill for an account of both the partnership dealings, and a decree was made for that purpose; and in proceeding on that decree the Master directed the executor to bring in an account of the partnership dealings between the deceased and the surviving partner. *Held*, upon appeal from this direction, that the executor was bound to make up the accounts from the books of the partnership in his possession. *Strathy v. Crooks*, 162.

2. By an agreement entered into between the executors of an estate in Lower Canada, and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that country interest is not recoverable upon a legacy, until suit brought to compel payment thereof, unless an express promise to pay interest is shown; and the legatee referred to having brought an action in that country, to enforce payment of the legacy, alleging an express promise on the part of both the executors and residuary legatees to pay such interest, in which action the ex-

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ecutors denied such promise, and a verdict was rendered in their favor, but the residuary legatees allowed judgment to go against them by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred. The court, under the circumstances, refused the relief prayed, and dismissed the bill with costs.

Crooks v. Torrance, 518.

EXHIBITS.

Documents used on the examination of witnesses before an examiner, must be properly marked by the officer, and referred to in the evidence, otherwise they cannot be read at the hearing.

Hollywood v. Waters, 329.

FORECLOSURE.

1. The court, after the final order of foreclosure had been made and acted on by the plaintiff, granted an order for the delivering up of possession of the mortgage premises, though not asked for upon the final order being obtained.

Lazier v. Ranney, 323.

3. The court, where it is considered beneficial to the interests of an infant defendant, will direct a sale instead of a foreclosure, without requiring any deposit to cover the expenses of such sale.

The Bank of U. C. v. Scott, 451.

3. Where a person made a party to a suit in the master's office, appears and disclaims, he is not entitled to any costs, as by remaining inactive the same end will be attained as by the disclaiming.

Hatt v. Park, 553.

4. In this country a judgment creditor is entitled, at his option, to

a decree either to sell or foreclose the estate of his debtor.

McMaster v. Noble, 581.

FRAUD.

(DEEDS SET ASIDE FOR.)

A person who had at one time been remarkable for strength both of body and mind, and was much respected having become from habitual drunkenness imbecile, deranged, and fatuous, made a deed of valuable property to one of his sons who had been in the habit of furnishing him with drink; and about fifteen months afterwards executed a deed for the same property to the wife of the same son. A bill was afterwards filed to set aside these conveyances on the ground of fraud and incapacity on the part of the grantor to transact business. After the cause had been at issue, and evidence taken at great length a release of the action was obtained from the plaintiff without the intervention of any legal adviser acting on his behalf. The court set aside the conveyances, as also the release which had been subsequently obtained, with costs.

Nevills v. Nevills, 121.

FRAUDS.

(STATUTE OF.)

1. A deed was taken in the name of two, as grantees of the property conveyed: one of the grantees afterwards claiming to be solely interested in the property, as purchaser, filed a bill to have his co-grantee declared a trustee of one moiety of the property for him. The evidence adduced shewed that the deed was intentionally drawn in the matter it was; receipts for instalments of the purchase money were taken in the name of the two, and the mortgage for securing the

balance of purchase money due was executed by both. *Held*, that if even the whole amount of purchase money was advanced by the one, it was not sufficient to show that the purchase was made solely for his benefit.

Hutchison v. Hutchison, 117.

2. A paper used at the sale by auction of certain lands, contained the conditions of sale, and the numbers of the lots bid off by the several purchasers, upon which their names were written in pencil opposite the lots purchased, and afterwards covered over with ink by the auctioneer's clerk, it having been announced before the sale that he would sign for the several purchasers. *Held*, that this was a sufficient signing of the contract within the Statute of Frauds.

Crooks v. Davis, 317.

3. The plaintiff had procured a lease of a farm for two years, with the privilege of purchase, the lease having been taken by him in the names of two of the defendants, but without their knowledge, and was witnessed by the plaintiff; the bill alleging that this course was adopted for the benefit of the plaintiff, who, it was shewn, had before this time assigned all his effects for the benefit of his family, the plaintiff asserting that his intention was to pay the purchase money for the land out of moneys belonging to his wife, in the hands of trustees, in which, however, the plaintiff had no interest; but there was no writing to evidence the trust alleged by the plaintiff. One of the defendants, who was a trustee of the wife's money, subsequently bought the property, the price for which was paid out of his own funds, and gave to trustees a lease of it for the

use of the plaintiff's wife and children. Upon a bill filed to have it declared that the purchase had been made for the benefit of the plaintiff, and to have the lease to trustees cancelled, the court, under all the circumstances, refused the relief prayed, and dismissed the bill with costs, but with liberty to file a new bill if the plaintiff should be so advised.

Parsons v. Kendall, 408.

FRAUDULENT CONVEYANCE.

1. Property was conveyed to a trustee for the purpose of disappointing creditors, and afterwards the person claiming to be beneficially interested filed a bill for a conveyance to himself; under these circumstances the bill would have been dismissed, had not the defendant by his answer admitted that he was a trustee, and it appearing that the wife, who was not a party to the suit, and was living separate from her husband, was entitled to the beneficial inheritance, an enquiry was directed as to the cause of her separation, with a view of ascertaining how the court should direct the rents of the estate to be applied.

Phelan v. Fraser, 336.

2. The owner of lands, subject to several mortgages, made a conveyance thereof to his brother but without his knowledge; and the person by whose advice the deed was executed, stated in evidence that the deed, though absolute in form, was made upon trust for securing the incumbrances affecting the property, and for the benefit of the grantor's children; the grantor at the time being greatly involved, and having no other property ex-

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cept some book debts and some household furniture. A sale of the grantor's interest was subsequently effected by the sheriff upon an execution, and the purchaser having filed a bill, impeaching the conveyance upon trust as a fraud upon creditors, and praying to be admitted to redeem, the court, under the circumstances, decreed in his favor. *Beamish v. Pomeroy*, 586.

3. A debtor conveyed his land in fee for a sum greatly below its value, but continued in possession without paying rent; the heir of his vendee several years afterwards sold and conveyed the land, the sale having been brought about and managed by the debtor, and the purchaser was shown to have had notice of the indebtedness and other material circumstances. A creditor afterwards sued out execution against the lands of the debtor, under which his interest in this property was sold for five shillings to the execution creditor, who filed a bill to set aside the sale by the original owner, and have himself declared the owner of the land. The court refused this, but gave him a right to redeem by virtue of his judgment, in accordance with an alternative prayer in the bill.

Wilson v. Shier, 630.

GUARDIAN.

(TESTAMENTARY.)

See "Infants," 3.

HIGHWAY.

(DIVERSION OF.)

Semble, That under the provisions of the provincial statute 14 & 15 Victoria, Chapter 51, a permanent diversion of a highway may be made upon the construction of a railway, where it is necessary or expedient.

The Municipality of Fredericks-

burgh v. The Grand Trunk Railway Co., 555.

See also "Injunction," 6.

HUSBAND AND WIFE.

1. The only proof of the receipt of certain moneys by the wife during the life of her husband was in her own evidence, when at the same time she stated that the money had been given to her by the husband; the court considered her entitled to retain the amount, and that it formed no part of the testator's personal estate.

McEdwards v. Ross, 373.

2. The holder of a mortgage security while laboring under an attack of sickness, of which he subsequently died, indorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed, but did not affix his seal thereto, although the memorandum expressed it to be under seal. *Held*, that the wife took no interest under such assignment either as a gift *inter vivos*, or as a *donatio mortis causa*; and a bill filed by her to compel the executors to execute a formal assignment of the mortgage was dismissed with costs.

Tiffany v. Clarke, 474.

IMPROVEMENTS.

Semble, That when a mortgagee is charged with rents and profits received from improvements made by himself, it would be unreasonable to refuse to allow him the expense of such improvements to a corresponding amount.

Constable v. Guest, 510.

INFANTS.

1. The general rule is, that in suits for specific performance against the infant heirs of vendors

the decree should be without costs.
Commander v. Gilrie, 473.

2. The same rule as to the costs of a solicitor appointed by the court guardian *ad litem* to infant defendants in suits for specific performance seems applicable as in mortgage cases; but where the purchase money has not been paid, the court will direct the payment of the guardians' costs from it—*Ib.*

3. Although the court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where it is clearly shewn that a compliance therewith would be prejudicial to the happiness and moral training of the infants.

Anonymous, 632.

See also "Foreclosure," 2.

INJUNCTION.

1. A party had carried on the business of a soap and candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the party complaining; the court, under the circumstances, refused a motion for an interlocutory injunction; but reserved the question of costs to the hearing.

Radenhurst v. Coate, 139.

2. Since the general orders of 1853 it is not necessary for a party to establish his legal right by an action at law before coming to this court.—*Ib.*

3. The purchaser of saw logs to be delivered at certain specified times assigned the contract to a third party, to whom the vendor delivered one year's supply of the

chaser becoming insolvent absconded, and the vendor refused to complete the contract, asserting a right to stop the goods *in transitu* or to retain them before the *transitus* commenced, in consequence of the insolvency of the purchaser. The assignee thereupon commenced an action at law in the name of the purchaser against the vendor, in which he recovered judgment, and the vendor filed a bill to restrain proceedings at law. The court refused him any relief, and dismissed the bill with costs.

Wait v. Scott, 154.

4. A railway company being about to construct their line of road along a public street, a bill was filed by the owner of property in front of which the railroad would pass, to restrain the construction of the road in the manner contemplated, on the ground, as alleged, that *his property would be thereby greatly depreciated in value from divers causes, some of which were, that the property would be rendered greatly less eligible from the inconvenience and danger occasioned by the rail cars running immediately in front thereof, and that the present traffic is likely through the same cause to be diverted from that part of the road.* Held, that the injury as alleged did not amount to a private nuisance, and that therefore the party complaining was not entitled to an injunction; and, *held*, also, that the injury complained of was not irreparable, the court would not, if otherwise in favor of the plaintiff, have granted the application.

Magee v. The London and Port Stanley Railway Company, 170.

5. The court upon default made by the defendants in not appearing upon a notice of motion for injunc-

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tion, directed the writ to issue, although at the same time entertaining great doubt whether a sufficient foundation for the interposition of the court had been laid.

Dennison v. City of Toronto, 513.

6. Where the evidence, as to the injury done to a highway in the manner a railway was constructed, was conflicting, the court refused to interfere by injunction, leaving the parties to their legal remedy.

The municipality of Fredericksburgh v. the Grand Trunk Railway Company, 555.

7. In moving for an injunction *ex parte*, the affidavits on which the application is founded, must set forth all the facts and circumstances material for the court to know, or the injunction will be dissolved; even although the party moving did not consider the circumstance to be material.

McMaster v. Callaway, 577.

See also "Dedication,"

"Lessor and Lessee,"

"Mortgage," 6,

"Timber," 1.

ISSUE AT LAW.

Where the evidence as to the fact of marriage was conflicting, the court offered the plaintiff an opportunity of obtaining better evidence or an issue to try the question, and if refused, directed the bill to be dismissed. Baker v. Wilson, 603.

JUDGMENT CREDITOR.

1. A judgment creditor coming to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee, to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. There-

fore, where judgment had been recovered and duly registered against a party who had a contingent interest in real and personal property, subject to a mortgage executed by way of security for advances, and the debtor having effected an insurance upon his life, which he had also assigned to the same person as an indemnity against loss in respect of a bond executed by him as surety for the debtor. *Held*, that the judgment creditors of the mortgagor upon paying the amount due under the mortgage and indemnifying the mortgagee in respect of his liability as surety, were entitled to a transfer of the policy of insurance, and also of the mortgage upon the contingent interest, and to foreclose the mortgagor in default of payment.

Gilmour v. Cameron, 290.

2. A judgment creditor is not a purchaser for value within the statute 27 Elizabeth, chapter 4,

Gillespie v. VanEgmond, 533.

3. In this country, a judgment creditor, is entitled, at his option, to a decree either to sell or foreclose the estate of his debtor.

McMaster v. Noble, 581.

4. A confession was given to secure a second set of sureties of a county treasurer, but on an arbitration, it was found that defalcations had occurred under a former bond, a surety in which was also in the second. The evidence was conflicting as to whether the protection was for one set or for all. On a motion to retain moneys in the sheriff's hands, which had been made on the confession, it was ordered that the whole amount should be paid into court.

Leonard v. Black, 599.

JURISDICTION.

(OF COURT.)

The remedies pointed out by statute for the purpose of settling the claims of landowners to compensation for lands taken by a railway company becoming ineffectual, the court in such case will direct a reference to the Master for that purpose.

Malloch v. The Grand Trunk Railway, 348.

LACHES.

See "Specific Performance," 10, "Dormant Equities."

LANDS.

(SALE OF, BY THE SHERIFF.)

Semble, That in a proper case this court has authority to declare void a sale of lands by a sheriff.

McGill v. McGlashan, 324.

LESSOR AND LESSEE.

The owner of land with a saw mill thereon, made a lease of the mill, with a right to cut timber during his lease; the lessee assigned the lease, and the assignee afterwards surrendered it to the proprietor of the freehold. *Held*, that the right to cut timber was only commensurate with the lease itself, and the lease having been surrendered, the right of cutting timber was at an end, except for the use of the mill. *Stegman v. Fraser*, 628.

See also "Specific Performance," 10.

LIMITED PARTNERSHIP

Although parties may enter into an undertaking intending to form a limited partnership only, still they may act in such a manner either knowingly or unknowingly, that a general partnership may be created as to third parties; and when this occurs with the consent and con-

urrence of all the parties, the effect may be to make them answerable not only as to third parties, but as between themselves.

Patterson v. Holland, 414.

Although the members of a limited partnership may act in such a manner as to create a general partnership not only as to third persons but also *inter se*, still, if the acts whereby a general partnership as to the world is created are done by some of the partners without the knowledge or consent, or against the consent of the others, they will not be entitled to contribution from the others, but will be liable to indemnify them against the consequences of the acts so done.—*Id.*

[But see this case on re-hearing, *post* volume VII., page 1.]

LUNACY.

See "Specific Performance," 13, 14.

MASTER'S REPORT.

See "Practice," 4.

MORTGAGE — MORTGAGOR — MORTGAGEE.

1. A mortgagor conveyed his equity of redemption in certain lands, together with the absolute estate in other property, and took back a mortgage on the whole to secure part of the purchase money. The purchaser afterwards transferred his interest to a third party. The mortgagee, with a knowledge of the transfer by the mortgagor, filed a bill of foreclosure against him alone, in which suit he obtained a final decree of foreclosure, and afterwards sold and conveyed the estate to another party, who afterwards died intestate. The person really interested, considering that the foreclosure had the effect of binding his interest, rented the

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property from the grantee of the mortgagee, and also entered into a contract for the purchase of it from him; afterwards, upon discovering his rights, he filed a bill against the heir-at-law to redeem. The denial of notice was imperfect, and it appeared that what the purchaser paid for the property was just what was due on the mortgage, and less than the fair value of the property. At the hearing, the court directed an enquiry as to whether the ancestor had notice, actual or constructive, at the time of his purchase of the title of the defendant or his vendor; as to the sufficiency and fulness of the consideration paid, and as to the circumstances generally attending the purchase; reserving further directions and costs.

Hogg v. Wallis, 150.

2. A mortgagee with power of sale, covenanted that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mortgaged premises without first giving three months' notice to the mortgagor, demanding payment. *Held*, that this did not prevent him filing a bill to foreclose without first giving such notice.

Lamb v. McCormick, 240.

3. A person having a claim against the owner of a mill, brought an action against his executors, and recovered judgment; an execution against lands was sued out and placed in the hands of the sheriff, under which all the lands of the testator, of which the mill and mill premises formed a portion, were duly advertised for sale by the sheriff. The testator by his will devised his lands to his relations; the mill and mill premises to an

infant, on his attaining twenty-one, his father during his minority being entitled thereto. By an agreement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the sheriff's sale and bid such an amount for the whole property as would cover the execution debt and costs, and that he should hold the same for the several owners; accordingly, he attended at the sale and bid the stipulated amount, the proprietors and their agent also attending there and preventing any competition by openly announcing the arrangement which had been made; and only one bid was made for the property, which was duly conveyed by the sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate upon being paid a proportionate share of the amount bid at the sale, except the mill and mill premises, which the purchaser retained, occupied and improved during the minority of the devisee, who on his attaining his full age, demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof, to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out the arrangement. The court under the circumstances, held the plaintiff entitled to redeem the mill premises; and that the arrangement under which the purchase was made at sheriff's sale was capable of being proved by parol.

McGill v. McGlashan, 324.

4. The owner of real estate being indebted, conveyed his lands to another for sufficient to pay off his

liabilities without any reference to the value of the property, of which he remained in possession, and sold to third parties, subject "to a conveyance to the late Lieutenant-General Murray, intended to operate as a mortgage." It was proven by the evidence taken in the cause that the avowed object of General Murray was to relieve the owner from his embarrassments, and secure his lands from seizure; but the same having passed under the will of General Murray to trustees, one of them refused to allow a redemption except under a decree of the court. The court considered that the evidence clearly established the conveyance to have been given by way of security only, and the vendees had a right to redeem; that the trustees had not acted unreasonable in requiring the right to redeem to be established in this court; and that one of the trustees being beneficially interested in the estate, the *cestuis qui trust* were sufficiently represented in the suit.

Kerr v. Murray, 343.

5. A lessee of the crown being in arrear for rent, assigned his interest to another, taking a bond to reconvey one-half thereof, on payment of half the amount advanced, within a year, which time having been allowed to elapse without payment of this sum, the assignee refused to convey, alleging that the transaction was a conditional sale. Upon a bill filed to redeem, the court held that under these circumstances the transaction was *prima facie* one of mortgage, and that the onus of proving it to be a sale devolved upon the party attributing that character to the transaction, which having failed

to do, a decree was made for redemption with costs, except the costs of a redemption suit, which were reserved until after the Master's report.

Bostwick v. Phillips, 427.

6. It being doubtful at what time the mortgagor died, his widow and all his children joined in a suit to redeem, in order that all questions under the act abolishing the law of primogeniture might be avoided; at the hearing, the court gave leave to furnish proof of intestacy by affidavit, with a view to making the decree as asked.

Constable v. Guest, 510.

7. The owner of property sold and took a mortgage to secure payment of the purchase money by instalments: default having been made in payment of the first instalment, an action was brought and judgment recovered upon the covenant; whereupon the purchaser filed a bill setting up that a tenant of the vendor had by virtue of a lease previously made by the vendor, carried away the crops from off the premises, and praying to redeem upon payment of the amount of the judgment, after deducting therefrom the value of the crops so taken away. The court, by consent of parties, directed a reference to the master enquire as to the amount of damages sustained by reason of the removal of the crops, but refused to interfere with the judgment already recovered, the remaining instalments of purchase money being more than sufficient to cover any sum to which the purchaser could be entitled in respect of such damages.

Moore v. Merritt, 550.

8. By the terms of a mortgage to

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secure a sum of money by instalments, with interest in the meantime quarterly, it was stipulated, in case of default of payment of the interest within ten days after any of the days or times when the same was made payable in any year, that the whole of the principal money should become payable immediately; and the mortgagor covenanted to pay the same accordingly. *Held*, that this was in the nature of a penalty only, and that the court would restrain an action, brought upon such covenant, to enforce payment of the whole sum due, after default in payment of one of the gales of interest; and the mortgagee, by arrangement between the mortgagor, himself, and the party to whom he had assigned, having drawn upon the mortgagor for the amount of a quarter's interest, but in consequence of some delay, which was not accounted for, the draft was not presented until after the expiration of the ten days, when it was accepted, but owing to some mistake the bill was not paid at maturity; and the holders of the mortgage insisted upon such non-payment as a default entitling them to call for payment of the whole mortgage money, and to take proceedings at law to enforce it: *Held*, also, that this relieved the mortgagor from the necessity of tendering the next quarter's interest when it became due, and that the mortgagee, or his assigns, could not insist upon that default in answer to a motion to restrain the proceedings at law.

Knapp v. Cameron, 559.

9. The rule that a mortgagee of several estates may refuse to be

redeemed in respect of one unless redeemed in respect of both, does not apply to a case where a sale is asked by a prior incumbrancer.

Morrill v. Stephenson, 567.

[But see this case on re-hearing, *post* volume VI., page 22.]

10. Where a suit is brought to enforce the sale of mortgaged property against the mortgagor and his assignee, the order for payment of any balance of the mortgage debt which may remain due after such sale, must be against the mortgagor, and not the assignee.

Turnbull v. Symmonds, 615.

11. A mortgagee of lands, not patented, purchased them at sheriff's sale, under execution against the mortgagor, to whom the lands had been conveyed at the instance of the execution creditors, in order to enable them to take the lands in execution, during the absence of the mortgagor from the country, and the mortgagee then claimed to hold the lands absolutely. *Held per curiam*, [*Spragge*, V. C., dissenting,] that the estate was still redeemable.

Aitchison v. Coombs, 643.

12. The equitable owner of unpatented lands, for which he held a bond for a deed, created a mortgage of his interest therein, and put the mortgagee in possession, whereon he and his partner carried on business for some time, and subsequently the mortgagee became the purchaser of the lands at sheriff's sale, under an execution against the mortgagor. Upon the winding up of the partnership affairs it was ascertained that the mortgagee was indebted to his partner in a large sum, in payment of which he accepted a con-

voynance from the mortgagee of the mortgage estate, and a bill was filed to redeem, charging him with notice of the nature of the title; and in the course of his examination he stated; "I had heard from J.B., (the mortgagee,) that there was such a bond, but I thought in my own mind that the sheriff's deed had killed a good deal of that." Held, per curiam, [Spragge, V. C., dissenting.] that he was affected with notice of the mortgagor's title, and therefore liable to be redeemed. *Ib.*

MUNICIPAL COUNCILLORS.

The decree pronounced by the Court of Chancery in the City of Toronto v. Bowes, as reported *ante* volume IV., page 489, affirmed on appeal. [The Chief Justice and McLean, J., dissenting.]

Bowes v. Toronto, 1.

(Afterwards affirmed on appeal to the Privy Council.)

A member of a municipal corporation agreed with another party to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between the parties. Held, that such a contract was in contravention of the Municipal Act (16 Victoria, chapter 181), and the court refused to enforce the agreement for a partnership; but, the defendant having denied the existence of a partnership, which was established by the evidence, the bill was dismissed without costs.

Collins v. Swindle, 282.

NE EXEAT.

M. having by fraud induced H. to advance money on mortgage upon the assurance that the title was correct, although well aware that the party executing the mort-

gage had no title, a writ of *ne exeat* was issued against him. A motion to discharge the writ on the ground that the bill alleged that the debt arose out of the fraudulent conduct of the defendant, was refused with costs.

Hunter v. Mountjoy, 433.

NEW TRIAL.

(OF ISSUES DIRECTED.)

W. being interested in lands under an agreement for purchase, made an assignment of his interest, absolute in form; and fifteen years after the execution of the instrument, filed a bill, setting up that the transfer by him had been executed by way of security only. On the cause coming on to be heard, the court entertaining doubts as to the facts, directed the trial of an issue to ascertain whether or not the assignment in question had been originally intended to operate as an absolute transfer of the plaintiff's right, or by way of security only. The jury found that the assignment had been intended to operate as a mortgage. The cause was brought on to be re-heard on the merits, and also by way of motion for a new trial. The court, although strongly in favor of the plaintiff upon the evidence and verdict of the jury together, directed a new trial of the issue, the learned judge before whom the trial had taken place having certified that he was not satisfied with the finding of the jury.

Watson v. Munro, 386.

NOTICE.

See "Mortgage," 1.
"Registration," 1.
"Vendor's Lien," 2.

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See "Injunction," 1, 4.

OFFENSIVE TRADE.

See "Trade."

"Injunction," 1.

PAROL EVIDENCE.

See "Mortgage," 3.

PARTIES.

See "Crown Patent."

"Mortgage," 4, 6.

PARTNERSHIP.

(ACCOUNT OF.)

1. The survivor of two partners, after having continued to carry on business with the personal representative of the deceased partner, filed a bill for an account of both the partnership dealings, and a decree was made for that purpose; and in proceeding on that decree the Master directed the executor to bring in an account of the partnership dealings between the deceased and the surviving partner. *Held*, upon appeal from this direction, that the executor was bound to make up the accounts from the books of the partnership in his possession.

Strathy v. Crooks, 162.

2. A retiring partner obtained from one of the continuing partners a letter agreeing to reimburse the amount advanced by the partner so retiring, out of the one-fourth of the profits to be derived from the business. *Held*, that the retiring partner had a lien on such fourth part of the profits, and a corresponding portion of the capital stock and assets of the partnership; and was entitled to an account of the partnership dealings.

McGregor v. Anderson, 354.

3. A surviving partner by reason of his liability to pay the debts

due by his partnership, is entitled to receive all moneys, and collect all debts due to, and dispose of all the effects of, the firm for that purpose; the representatives of the deceased partner have a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclusion of them in these respects will enable them to an injunction and receiver.

Bilton v. Blakely, 575.

PERSONAL REPRESENTATIVE.

By Order XXX. (1853), the court may proceed without any personal representative of a deceased person where none has been appointed; or may appoint some person to represent the estate for the purpose of the suit: this does not apply to cases where parties have a beneficial or substantial interest, but applies only to cases of mere formal parties.

Sherwood v. Freeland, 305.

POSSESSION.

(DELIVERY OF.)

The court, after the final order of foreclosure had been made and acted on by the plaintiff, granted an order for the delivering up of possession of the mortgage premises, though not asked for upon the final order being obtained.

Lazier v. Ranney, 323.

See also "Vendor and Vendee."

PRACTICE.

ABSCONDING DEFENDANT.

1. A party having absconded from this province, as alleged, to avoid service of proceedings in this court, and it being shewn upon affidavits that within a few months he had been resident at several different places, and that

it was impossible to say with any degree of certainty in which of them he could be served with process: the court directed an advertisement to be inserted in a newspaper published at the place of residence of the party in this province, and that a copy of the several papers containing the advertisement should be sent to his address at each of the places named.

Stimson v. Stimson, 379.

ALIMONY.

2. Where in a suit for alimony, it appeared that the absence of the plaintiff from her husband's residence was voluntary; and that any grounds for annoyance to her, whilst residing with her husband, arose almost, if not entirely, from her own violence of temper, and that her husband was still willing to receive her back and support her. The court at the hearing dismissed the bill, but ordered the defendant to pay the costs of the suit to the plaintiff.

McKay v. McKay, 380.

AMENDMENT.

3. An application to amend at a late stage of the cause would not be granted if it appeared that such amendment would be attended with any risk of doing injustice, notwithstanding the practice established by Order IX., section 14, of the orders of 1853.

Aitchison v. Coombs, 643.

(APPEAL FROM MASTER'S REPORT.)

4. The Master's report is *prima facie* evidence of what it contains, unless appealed from: No motion founded on such report can be entertained while the appeal is unheard.

Nichols v. McDonald, 594.

COSTS.

5. Where a person who is made

a party to a suit in the master's office appears and disclaims he is not entitled to any costs, as by remaining inactive the same end will be attained as by his disclaiming.

Hatt v. Park, 553.

DISMISSING BILL IN FORECLOSURE SUIT.

6. When a bill is filed for the foreclosure of a mortgage, payable by instalments, and the defendant moves to dismiss on payment of the instalments and interest then due; the interest upon the mortgage money is only to be computed up to the day named for payment in the mortgage, and not to the time of making the application.

Strachan v. Murney, 378.

7. *Semble*, that the relief given to a mortgagor by section 5 of the 32nd of the general orders of June, 1853, in a suit brought against him upon a mortgage, payable by instalments, would also be afforded him, or those claiming under him, upon a bill filed on their own behalf.

Moore v. Merritt, 550.

EXAMINATION OF WITNESSES.)

8. Since the passing of the orders of February, 1858, the court will not direct the examination of witnesses to take place before an examiner, in a county where no resident master has been appointed, although consented to by the parties.

Phelan v. Phelan, 384.

SERVICE OF PLEADINGS BY PARTIES TO SUIT.

9. The court will permit service of pleadings to be effected by parties to the suit, and will allow the same fees upon taxation as if served by third persons.

McClure v. Jones, 383.

See also "Bills."

"Demurrer."

"Executor."

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- "Exhibits."
- "Injunction," 2, 5.
- "Ne Exeat."
- "Opening Publication."
- "Possession."
- "Pro Confesso."
- "Specific Performance."

PRINCIPAL AND AGENT.

The managing shareholder and cashier of a joint-stock company had been offered as a gift the share of one of his co-partners, who desired to retire from the partnership, or declining that that he (the cashier) would permit his daughter to accept a transfer of the share in like manner; in which position the share stood when an application was made to the cashier by another member of the partnership, who was aware of these offers, to ascertain if the share could be obtained for a person desirous of entering into the company. It was stipulated that the intending purchaser should have the share upon paying £300, which was communicated by telegraph to the brother of the intending purchaser by the person applying on his behalf, and the cashier by direction of the same party, drew for the amount, and also wrote to him informing him of the purchase, in doing which the cashier stated that he had secured the share for his brother, and that he had drawn upon him for the amount in order to enable him to settle with the holder of the share; and the transfer was accordingly made. Afterwards the new partner discovered that the cashier had in fact paid the original holder of the share £75 only, in consequence of which differences arose between those parties, and it was determined

that the new partner should retire from the partnership upon being paid the amount advanced by him which was accordingly done. The retiring partner afterwards filed a bill against the cashier claiming the difference in the amounts on the ground that in the matter of the purchase he had acted as his agent. The defendant by his answer positively denied all agency in the matter, and asserted that he had inadvertently made use of the words "secured a share," instead of "sold a share," and the evidence in the cause was to the same effect. The court dismissed the bill, but, as the letter of the defendant had tended to create a misapprehension of the facts, without costs.

Anderson v. Cameron, 285.

2. D. being about to leave this country for a time, executed a power of attorney in favor of an agent, thereby conferring very extensive powers upon the agent; amongst others he was authorised, for the principal, and in his name, and to his use, "to buy any freehold lands, or any ships, vessels, or steamboats, or any shares therein, as the said *John Bell Gordon* may think expedient and for my benefit." During the absence of his principal the agent purchased a leasehold property known as the "St. Nicholas Saloon," together with the furniture, provisions, and business therein, for the payment of which he gave his own promissory notes, endorsed by him in the name of his principal, under a clause in the power of attorney authorising him to make and endorse notes, &c., in the course of business, alleging that he had made the purchase for

the joint benefit of himself, his principal, and a third person who also endorsed these promissory notes. *Held*, that this was a purchase which the agent was not entitled to make: and that standing in the position of a surety in respect of the promissory notes, the principal was entitled to a decree for indemnity in respect of his liability as endorser thereof, against his agent and the subsequent endorser, without waiting to take an account of all the transactions between the parties.

Dick v. Gordon 39

PRINCIPAL AND SURETY.

1. The principal laid down in *Smith v. Fralick* (ante, volume V., page 622) followed.

Commercial Bank v. Poore, 514.

2. A mortgage was executed in favor of an accommodation endorser to cover his liability in respect thereof; this security was subsequently assigned by him to creditors of himself and the principal debtor. In a suit brought to sell the mortgaged estate, subsequent incumbrancers sought to impeach this transfer, on the ground that the surety as well as the principal was insolvent; but as no such defence was raised by the answer, the court made the decree for a sale, as asked, leaving the question to be disposed of in a suit to be brought for that purpose. *Ib.*

PRO CONFESSO.

Where after a bill has been ordered to be taken *pro confesso*, but before any decree is drawn up, the defendant intervenes and is a party to proceedings taken between the plaintiff and defendant, that is not such a case as is contemplated by section 7 of the thirteenth of the

orders of 1853, where all further proceedings in the cause may be taken *ex parte*.

Strachan v. Murney, 284.

PUBLICATION.

(OPENING.)

The principle laid down by the court in *Waters v. Shade*, (ante volume II., page 218) in respect to opening publication, applies as well to suits for alimony as to other cases.

McKay v. McKay, 279.

PUFFING.

See "Specific Performance,"
PURCHASER FOR VALUE.

It is a clear and well settled rule of this court that equity will never deprive a purchaser for value without notice of any advantage he has, arising from either a legal or equitable title, or even from mere possession, although as between or amongst mere equitable claimants it will enforce the rights of the prior against the subsequent claimants in point of time.

Mitchell v. Gorrie, 625.

RAILWAY.

See "Highway."

"Injunction," 4, 6.

"Tariff of Charges."

RECISSION OF AGREEMENT.

See "Agreement."

RECTORIES.

The decree of the Court of Chancery [reported ante volume V., page 412,] declaring the endowment of rectories in the manner the Lieutenant-Governor had ordered them was valid; affirmed on appeal.

Attorney-General v. Grasett, 200.

REDEMPTION.

See "Fraudulent Conveyance," 3.

"Mortgage," 6.

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REGISTRATION.

To postpone a registered title on the ground of notice of a deed having been previously executed though not registered, the evidence of notice must be quite satisfactory and distinct upon the point.

Hollywood v. Waters, 329.

REGISTRY ACT.

The recent statute (13 & 14 Vic., ch. 63,) applies, only to instruments, executed after the first day of January, 1851; therefore where a testator in 1831, by his will, created a charge upon lands, and the patent for the land issued to his devisees in 1852, who sold and conveyed the property absolutely, and registered the conveyance: the court held the land subject to the charge created by the testator, although his will had not been registered.

Campbell v. Campbell, 600.

REVERSION.

(SALE OF.)

1. Although the number of persons, in this country, in the position of expectant heirs and reversioners is but small, still the same rule applies here as in England: the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men.

Morey v. Totten, 176.

2. Where the tenant for life was the father of the reversioner, but the son was not dependent on him, and had no expectations from him, and both were illiterate persons; *Held*, that the father's knowledge of a sale of the reversion by the son did not render such sale unimpeachable. *Ib.*

SALES.

See "Foreclosure," 2.

"Mortgage," 10.

SAW LOGS.

The court will order the specific delivery of saw logs, when they are shewn to possess a peculiar value to the plaintiff, and can be identified as those claimed by the plaintiff notwithstanding they have been intermingled with logs belonging to other parties.

Farwell v. Wallbridge, 634.

See also "Injunction," 3.

SHERIFF'S SALE.

(OF EQUITY OF REDEMPTION.)

The provisions of the statute 12 Victoria, chapter 73, making equities of redemption saleable under legal process, do not apply where the mortgage is created by a deed absolute in form.

McCabe v. Thompson, 175.

See also "Fraudulent Conveyance," 3.

"Mortgage," 11, 12.

SOLICITOR AND CLIENT.

An execution being in the hands of the sheriff against lands, the defendant therein applied to a solicitor to procure his services in obtaining a settlement of the demands against him: with the view of enabling the solicitor to raise funds for that purpose, the client at his solicitor's suggestion, conveyed his lands to him in fee, taking back a defeazance stating the object for which the deed was made, but this defeazance was subsequently lost. In order to raise money the solicitor executed a mortgage for £245, and the mortgagee sold the same to another party for £150, which amount was handed to the solicitor, and there-

out he paid the claims against the client, amounting in all to about £90. Afterwards the solicitor demanded from the client £245, and subsequently £300 as the price at which the client would be allowed to redeem; and this not having been complied with, the solicitor sold to a third party for £125 over and above the mortgage, but the purchaser had notice of the claim of the client. Upon a bill filed for that purpose, the court declared the acts of the solicitor a plain breach of trust: that the client was entitled to redeem upon payment of what was actually expended on his behalf: that the purchaser of the mortgage was, under all the circumstances, entitled to hold the land only for what he had actually paid and interest; the excess of which, over and above the amount expended for the client, the solicitor was ordered to pay, together with the costs of the suit to the hearing.

McCann v. Dempsey, 192.

SPECIFIC PERFORMANCE.

1. A purchaser, when informed that the property, the subject of his purchase, has been resold, **may**, although his contract is not ripe for execution, institute a suit to recover possession; still it would seem that in such a case all that is necessary for him to do is to notify the second incumbrancer that he intends to insist upon his rights, and that he is only waiting until the proper time arrives to institute proceedings for that purpose.

Towers v. Christie, 159.

2. Where a purchaser, in consequence of the property, the subject of his purchase, having been resold, led a bill to enforce spe-

cific performance, before his contract was ripe for execution, the court, on that ground, dismissed the bill without costs, profecting the order of such dismissal with a declaration of the rights of the parties. *Id.*

3. The owner of the west half of a lot of land, supposing himself to be the owner of the *east* half, and not the *west* half, entered into a contract with the owner of other lands to exchange for these the east half, and the east half was conveyed accordingly. He filed a bill to compel the other party to the agreement to accept a conveyance of the west half, and specifically perform the contract entered into between them by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of "east" instead of "west" and it appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of either; but as the contract was for the east half, and the mistake was that of the plaintiff alone, the court held that the west half could not be substituted for the east half, and refused the relief asked.

Cottingham v. Boulton, 186.

4. The decree made by the Court of Chancery in the suit of *Arnold v. McLean* (reported *ante* volume IV., page 337) reversed, and the bill in the court below dismissed with costs. [The Vice-Chancellors dissenting.]

McLean v. Arnold, 242.

5. A sale of lands by auction being about to take place, an intending purchaser in conversation with a person who had previously purchased a portion of the same property, was told by him that he

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intended buying additional portions thereof, and that he expected the property would fetch about £70 or £80 an acre, and that he was prepared to go as high as £100 per acre for that portion which he intended to buy. It was shewn that by an arrangement between the owner of the estate and this person it was agreed that he should have the lots desired by him, at the same price as he had paid for his first purchase, no matter at what price they might be knocked down to him; and they were accordingly bid off by him at a rate much higher than that formerly paid by him. *Held*, that this was not *puffing*, although it might have the effect of misleading the intending purchaser, who swore that he had reliance on the opinion of this party: but as he did not swear that he had been influenced by the example of this person or the information thus given by him, the court decreed a specific performance of the contract for the purchase of certain portions of the estate bid off by him at the auction.

Crooks v. Davis, 317.

6. By the advertisement of an intended sale of land in lots, it was stated "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak, which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of evergreen, and various other kinds of trees." A purchaser at the sale which took place upon the property, set up as a defence to a suit for specific performance, that the soil was not such as was represented, and was unfit for garden-

ing purposes, and that the trees upon the property were not of the description set forth in the advertisement. *Held*, that these representations, having been made in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relieving the purchaser from the contract. *Ib.*

7. A paper used at the sale by auction of certain lands, contained the conditions of sale, and the numbers of the lots bid off by the several purchasers, upon which their names were written in pencil opposite the lots purchased, and afterwards covered over with ink by the auctioneer's clerk, it having been announced before the sale that he would sign for the several purchasers. *Held*, that this was a sufficient signing of the contract within the meaning of the Statute of Frauds. *Ib.*

8. A decree for specific performance will be made against a tenant in tail.

Graham v. Graham, 372.

9. A joint tenant in tail executed articles of agreement for a division of the property; and each went into possession, and for thirty-six years continued to enjoy the portion allotted to him, when a bill was filed to enforce the agreement. *Held*, that the defendant could not set up as a defence to such bill, that the plaintiff had by possession acquired a perfect title at law. *Ib.*

10. A lease was made of certain premises, with a right of purchase, at a price fixed on between the parties; being such a sum as the rent reserved would form the in-

terest of. The lessee made default in payment of all principal and interest, and abandoned the possession, and left the premises for the United States, and the lessor being unable to ascertain the place of residence of the lessee so as to put an end to the contract, obtained possession by writ *habere facias* issued in an action of ejectment brought upon a vacant possession. The lessee, after a third instalment of interest fell due caused a tender to be made of what had become due, which was refused, and about a year afterwards filed a bill to enforce the specific performance of the contract. The court considered the laches of the plaintiff such as to disentitle him to relief, and dismissed the bill with costs.

Young v. Bown, 402.

11. To a bill for specific performance of an agreement to purchase lands, the vendee set up that he had been led into drink by the fraudulent contrivances of the vendor, and while in an insensible state of intoxication had been induced to sign the agreement, in which the price stipulated to be paid for the property was most exorbitant, and which was now sought to be enforced. At the hearing it was clearly shown that the purchaser had been at the time of executing the contract intoxicated, and that the price agreed to be paid was exorbitant, but the court exonerated the vendor from any fraudulent conduct, and therefore refused to give the defendant his costs on the dismissal of the bill. Scholfield v. Tummonds, 568.

12. The fact of the sale having been effected according to a plan of the property, upon which were

shewn certain roads leading to the several lots, does not bind the vendor to make such roads; although the court would restrain the diversion to any other purpose of the land appropriated for such roads.

Cheney v. Cameron, 623.

13. Before the court will compel a purchaser to accept a title, it must be shewn that the title is reasonably clear and marketable, without doubt as to the evidence of it. Where, therefore, the deed to the vendor was executed on the 14th of February, 1854, and in December of that year a commission of lunacy was issued against the grantor in that deed, under which it was found that he was insane, and had been so from the month of February or March previous, the court refused to enforce the contract.

Francis v. St. Germain, 636.

14. Where the lunacy of the previous owner of the estate was relied on as an objection to the title, and the vendor alleged that if such were the fact it was shown that he had purchased fairly, and without notice of the lunacy, as a ground for enforcing the contract; but, as the fact that the vendor had purchased without such notice, was one which from its nature was incapable of proof, and notice on some future occasion might be clearly shewn, the court allowed the objection, and dismissed the vendor's bill with costs. *Ib.*

See also "Executors."

"Infants."

STOPPAGE IN TRANSITU.

The purchaser of saw logs to be delivered at certain specified times assigned the contract to a third party, to whom the vendor deliver-

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one year's supply of the logs. Afterwards the original purchaser becoming insolvent absconded, and the vendor refused to complete the contract, asserting a right to stop the goods *in transitu*, or to retain them before the *transitus* commenced, in consequence of the insolvency of the purchaser. The assignee thereupon commenced an action at law in the name of the purchaser against the vendor in which he recovered judgment, and the vendor filed a bill to restrain proceedings at law. The court refused him any relief, and dismissed the bill with costs.

Wait v. Scott, 154.

SURETY.

See "Principal and Agent," 2.

SURVIVING PARTNER.

(RIGHT OF.)

See "Partnership," 3.

TARIFF OF CHARGES.

(BY A RAILWAY COMPANY.)

The act incorporating a railroad company authorized the company to levy such tolls only as should be fixed by by-law of the company, to be sanctioned by the Governor, and that the same tolls should be charged at all times equally to all persons. The company, from the circumstances of a firm covenanting to furnish certain quantities of lumber to be transported over their line of railway, contracted to carry the same at a lower rate than that fixed by their tariff for the public generally; but no by-law to this effect had been passed by the company. The court, upon a bill filed, declared such contract illegal, and enjoined the company from continuing to carry at other rates than were charged for the

like services to the public generally.

The Attorney General v. The Ontario, Simcoe & Huron Railroad company, 446.

TENANT FOR FIFE.

Semble.—A tenant for life of the whole estate of the testator, consisting of an improved farm, and of wild lands, is bound to keep down the taxes upon the whole.

Biscoe v. VanBearle, 438.

TIMBER.

(SALE OF GROWING.)

The owner of land agreed to sell the growing timber thereon, and by the terms of the agreement it was stipulated that the price should be paid by the purchaser's note, endorsed by a responsible party, renewable for half at its maturity, *the delivering of such note within ten days from the date thereof to be the completion of the consideration for said agreement*: Held, that this was only a mode of paying the purchase money, and was not substituted for it; and that upon failure of payment the vendor was entitled to an injunction to restrain the felling of timber or the removal of such as had been already cut down.

Mitchell v. McGaffey, 361.

(RIGHT TO CUT.)

See "Lessor and Lessee."

TITLE.

(CLOUD ON.)

1. The owner of a large tract of waste lands of the province, resident in Canada, executed a power of attorney to an agent about to visit England, authorising him to enter into contracts under seal for the sale of them; and in the power were specified several terms upon which the sales were to be

effected, and the deeds were to be with bar of dower, but no power was given to the attorney to execute the deeds for either of the granting parties by express words, or to receive the money. The agent induced the defendant to become a purchaser of the whole for £2,500, making about five shillings sterling per acre, and about one-sixth of the lowest price set upon the lands by the owner by his private instructions to his agent; signed a contract for sale, which was not under seal, and subsequently executed a deed purporting to convey the land to the purchaser. The owner having become aware of the facts, filed a bill to have the deed delivered up to be cancelled, as forming a cloud upon his title. The court refused, the relief prayed, the rule being, that instruments void upon the face of them will not be ordered to be destroyed as forming a cloud upon the title; and under the circumstances dismissed the bill without costs, the purchaser having been guilty of great negligence and carelessness; accompanying such dismissal with a declaration of the reasons of the court for so decreeing. *Hurd v. Billington*, 145.

(REFERENCE AS TO.)

2. The contractors for the construction of a railway having entered into an agreement for the conveyance to them of certain lands for such railway, took possession of the land, erected a station-house, and made other improvements thereon in connection with the road; and disputes having arisen between the parties, the contractors filed a bill for specific performance of the agreement, and obtained a decree for

that relief: *Held*, that what had been done by the contractors did not amount to an acceptance of the title of the vendor, and that they were entitled to a reference to the Master as to title.

Jackson v. Jessup, 156.

TRADE.

1. It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right; to bar the right within a shorter period, there must be such encouragement or other act by the party afterwards complaining as to make it a fraud in him to object. *Radenhurst v. Coate*, 139.

2. A party had carried on the business of a soap and candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the party complaining: the court, under the circumstances, refused a motion for an interlocutory injunction; but reserved the question of costs to the hearing. *Ib.*

TRUST—TRUSTEE AND CESTUI QUE TRUST.

1. The decree pronounced by the Court of Chancery in the cause of *The City of Toronto v. Bowes*, as reported *ante* volume IV., page 489, affirmed on appeal. [The Chief Justice and McLean, J., dissenting.]

Bowes v. The City of Toronto, 1. [Afterwards affirmed on appeal to the Privy Council.]

2. Property was conveyed to a trustee for the purpose of disappointing creditors, and afterwards

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the person claiming to be beneficially interested filed a bill for a conveyance to himself; under these circumstances the bill would have been dismissed, had not the defendant by his answer admitted that he was a trustee, and it appearing that the wife, who was not a party to the suit, and was living separate from her husband, was entitled to the beneficial inheritance, an enquiry was directed as to the cause of her separation, with a view of ascertaining how the court should direct the rents of the estate to be applied:

Phelan v. Fraser, 333.

Two lands were held by one *Ford* as trustee for *Chandler*, who assigned, by a memorandum absolute in form, for a nominal consideration of 5s., but in reality by way of security to one *Codd*, the instrument declaring the trust; subsequently the agent of *Codd* wrote to *Ford*, stating that his writing had been assigned, and calling upon him to convey the property to *Codd*: *Ford* in compliance with such request executed a conveyance and transmitted it by post, without ever having called for the production of the assignment to *Codd*, who sold to a purchaser without notice. Upon a bill filed by *Chandler* against *Ford* and *Codd*, the court held that *Ford*, under the circumstances, had committed a clear breach of trust: that he was bound to make good the trust estate, and directed an enquiry as to the present value thereof, the amount of which, together with the costs of the suit, less what might be found due by *Chandler* to *Codd*, the defendants were ordered to pay; and that *Codd* was bound to reimburse *Ford* for any sum he

might be compelled to pay under the decree. *Chandler v. Ford*, 607.

See also "Church Temporalities,"
 "Dormant Equities."
 "Mortgage," 4.
 "Solicitor and Client."
 "Statute of Frauds."

UNPATENTED LANDS.

See "Mortgage," 11, 12.

VENDOR'S LIEN.

1. Land being conveyed in consideration of the vendee providing the vendor with maintenance, washing, &c., the vendor retains a lien for the consideration.

Paine v. Chapman, 338.

2. The owner of land agreed to sell the growing timber thereon, and by the terms of the agreement it was stipulated that the price should be paid by the purchaser's note, endorsed by a responsible party, renewable for half at its maturity, the delivering of such note within ten days from the date thereof to be the completion of the consideration for said agreement: Held, that this was only a mode of paying the purchase money, and was not substituted for it; and that upon failure of payment the vendor was entitled to an injunction to restrain the felling of timber or the removal of such as had been already cut down. *Mitchell v. McGaffey*, 361.

3. On a sale of land for £3000, the purchaser paid at the time of the execution of the conveyance £2750, and gave his promissory notes for the balance, payable in three and four years; afterwards he executed a mortgage to his father for the £2750 alleged to have been advanced by him to his son to effect the purchase. The purchaser died intestate without issue, and before the notes fell due the

vendor filed a bill against the father as heir-at-law, alleging that he intended to sell the property so as to defeat the vendor's lien, and praying that it might be declared that he had a first lien or charge upon the estate for the amount due him. *Held*, that he was entitled to a decree for that purpose, but without costs.

Faulds v. Powell, 375.

VENDOR AND VENDEE.

After thirty years' possession of land, by a person to whom the owner, who was the grantee of the crown, had conveyed the property in exchange for other lands, the vendor discovered a defect in the title by reason of the non-registration of the conveyance in the proper office, and executed deed to a person who was in possession of a portion of the property for several years under the vendee's heir. To a bill filed to set aside this conveyance, the vendor and the second vendee set up the non-heirship of the plaintiff; purchase for value without notice, and that the original vendee was a minor at the time of the exchange, and had repudiated the transaction on becoming of age: and further that he had no title to the land conveyed in exchange. The court considered that the long possession and the absence of proof of the facts alleged by the defendants were sufficient to entitle the plaintiff to a decree with costs.

Harkin v. Rabidon, 405.

2. The vendor took from the purchaser a mortgage for part of the consideration money, but did not register the conveyance until several months after the deed to the purchase had been registered;

in the meantime the mortgagor created a second incumbrance in favor of *bona fide* mortgagees, which was registered long prior to the first mortgage, without notice of the vendor's incumbrance. *Held*, that the want of a receipt for the consideration money, upon the deed to the purchaser was not sufficient to postpone the second incumbrance.

Baldwin v. Duignan, 595.

WILD LAND TAXES.

Semble: A tenant for life of the whole estate of the testator, consisting of an improved farm and of wild lands, is bound to keep down the taxes upon the whole. *Biscoe v. VanBearle*, 438.

WIFE'S MAINTENANCE.

See "Trust," 2.

WILL.

(CONSTRUCTION OF.)

1. A testator directed all his estate, real and personal, to be sold for the purpose of dividing the proceeds amongst his children, which sale was to take place in eighteen months from his death; but the will empowered the executors to withhold the sale of the estate, "*real and personal more than what is necessary to defray the above mentioned charges, if they should deem it for the benefit of my heirs, provided such sale shall not be delayed longer than five years from my decease.*" The real estate was not sold within the five years: *Held*, notwithstanding that the trustees could make a good title, the limitation of the time being only directory. *Scott v. Scott*, 366.

2. A testator devised 100 acres of his estate to his son *Robert*, for which he was to pay the execut.

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ors, by instalments, a sum of money which was to be invested for the benefit of another son, on his attaining the age of twenty-one years; the testator further declared that: "should my second son, *Robert Carson*, neglect or refuse to pay the before mentioned sums in the manner specified, then it shall be in the power of the executrix or executor to dispose of fifty acres of the said land for the benefit and use of the said *Thomas Carson*, or to give him, the said *Thomas Carson*, a deed for fifty acres of said lot; which fifty acres shall be such part of the said lot as the executrix or executor shall see fit." The legacy was not paid, and the executors conveyed fifty acres to *Thomas*. Held, notwithstanding

such default in payment, that upon *Robert* paying the amount due for principal and interest on foot of the legacy he was entitled to a reconveyance of the fifty acres.

Carson v. Carson, 368.

3. A testator made the following devise: "To my dearly beloved wife *Catharine Campbell*, it is my will and desire, that of what property I possess she shall have her lawful support in food and clothing during her natural life, in such manner as she received while I was yet with her." Held, that lands of which the testator had only the equitable title were subject to the charge of her support and maintenance.

Campbell v. Campbell, 600.

