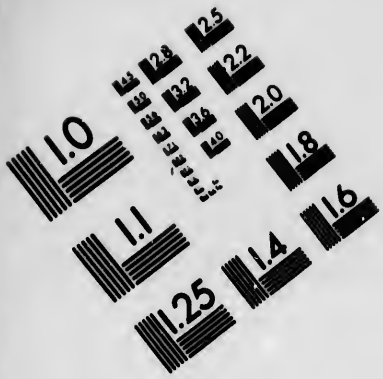

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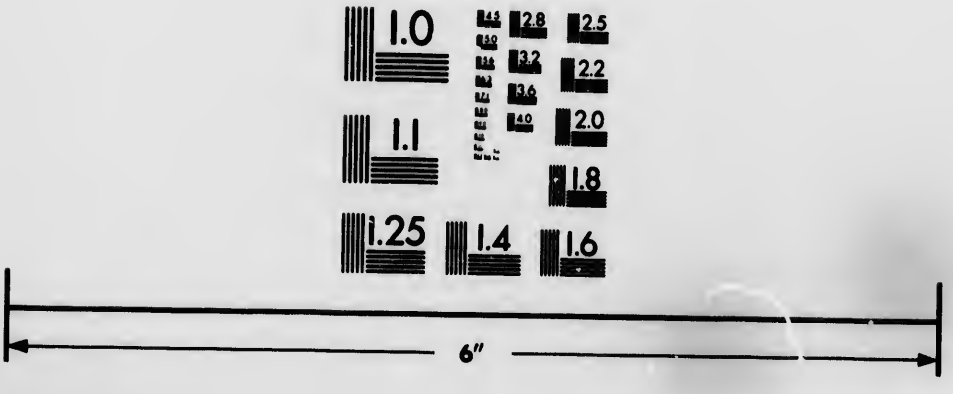

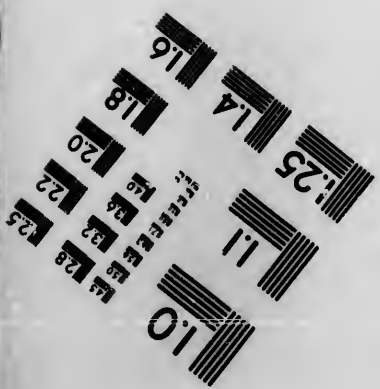

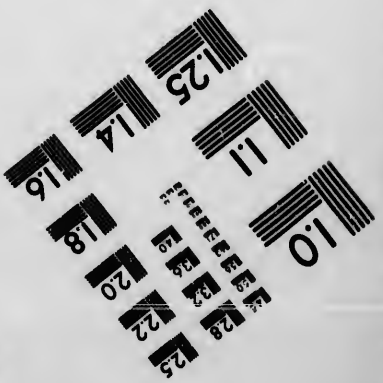

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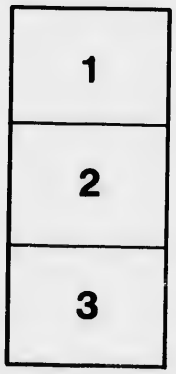

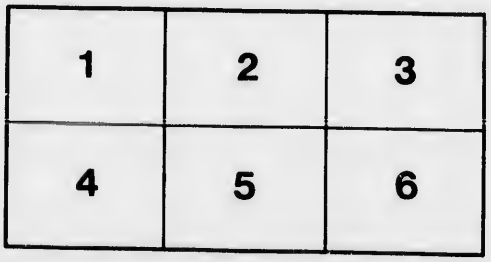

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ADJUDGED

IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1860.

BY

ALEXANDER GRANT, ESQUIRE,

BARRISTER-AT-LAW.

VOLUME VIII.

REPRINT.

TORONTO AND EDINBURGH:
CARSWELL & CO., LAW BOOK PUBLISHERS.
1883.

MOORE & CO. LAW BOOK PRINTERS.

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING IN MAY, 1860.

GRAVES v. HENDRSON.

An attorney retained to recover an estate for the heir-at-law of a former owner, bought up a paramount title to that of his client, and obtained possession of the property, which he conveyed to a brother of his client, as the heir-at-law, and he subsequently sold portions of it to several purchasers, all of whom but one had not paid their purchase money, and as to that one he had employed the same attorney in effecting his purchase. In fact the person in whose behalf proceedings had been taken was not dead, and the attorney had been made aware of it. On a bill filed for that purpose the purchasers were declared trustees for the heir-at-law.

This was a suit by *George Oliver Graves*, against *James A. Henderson, Henry Smith* the younger, *Wesley McRory, John McRory, Lewis Barclay, James Graves, Kenneth McKenzie, Daniel Bryant, James Bryant, George Bryant John Richard Clark*, and *Charles Edward Clark*, the bill in which set forth in detail all the circumstances appearing in the report of *Graves* v. *Smith*, reported ante volume 6, p 306, and set forth also the transfer of the property by defendant *Smith* to *James Graves*, and the subsequent dealings with the estate, not material to be now stated, by which

the other defendants became interested therein, and charging them all with notice of the title either before obtaining their conveyances or payment of their purchase money, and prayed a declaration that several defendants were trustees for the plaintiff of their respective portions conveyed to them, and conveyances accordingly.

The defendants other than *Barclay* answered the bill; *McKenzie* disclaimed. The *Bryants* set up want of notice until filing the bill; and that *Samuel S. Bridges*, to whom they traced the title of the said land, had in 1841 created a lease in their favour, of the portions claimed by them, in which was contained a clause giving them a right to purchase. The defendants *Clark* set up want of notice, and payment in full of their purchase money. The other defendants in like manner set up want of notice before purchasing, and their occupation and improvement of the land. Another objection taken to the plaintiff's right to recover was the bankruptcy of *Bridges* in Lower Canada, the effect of which was to vest all his estate in his assignee.

It appeared from the evidence taken in the cause that notice of the defect in the title had been communicated to the several defendants before payment of their purchase money, except the defendants *Clark*, and as to them it appeared they had acted through *Smith* and *Henderson*, as their attorneys, in making the purchase. It is believed that this statement, together with the facts appearing in *Graves* v. *Smith*, will be sufficient to a clear understanding of the points involved in the case.

Mr. Boyd, for the plaintiff. *Smith* was in reality the attorney of plaintiff, for though not retained by him he still acted under the directions of plaintiff's mother. There were no circumstances shewn to justify *Smith*, as trustee, in transferring the estate to the brother, as heir-at-law. [THE CHANCELLOR.—When as a trustee

warranted in presuming death of his *cestui que* trust, so as to authorise him in conveying to third parties? Would such evidence as would warrant a jury in presuming death be sufficient?] He should have refused to convey, unless by direction of this court.

As to the purchaser from *James Graves*, the *Clarks* alone have paid their purchase money, and as to them, they should be bound by the knowledge of *Smith* and *Henderson*, through whom it is shewn they negociated the purchase of their portions of the estate, and therefore are bound by the same equities as attach to *Smith* and *Henderson* or *James Graves*.

Mr. *Crickmore* and Mr. *A. Crooks*, for the defendants, contended that the plaintiff had no title, legal or equitable, the conveyance from *Bridges* carrying nothing, as all his estate had become vested in his assignee in bankruptcy, who alone could make a title to the lands in question.

They relied also on the want of notice before obtaining their conveyances by the purchasers, contending that the fact of notice before payment of all the price agreed upon was not sufficient to avoid their titles.

Colyer v. *Finch*, (*a*) *Attorney-General* v. *Wilkins*, (*b*) *Lane* v. *Jackson*, (*c*) *Hope* v. *Liddel*, (*d*) *Gomm* v. *Parrott*, (*e*) were referred to by counsel.

The judgment of the court was delivered by

ESTEN, V. C.*—I adhere to the judgment pronounced in the former case, in regarding Mr. *Smith* as a trustee of the estate acquired by purchase from *Bridges*, for the

(*a*) 5 H. L. Ca. 905. (*b*) 17 Beav. 285.
(*c*) 20 Beav. 535. (*d*) 21 Beav. 183.
(*e*) 3 Jur. N. S. 1150.

* The Chancellor was absent from indisposition.

plaintiff *George O. Graves*. The estate is conveyed by *Smith* to *James Graves* in performance of this trust; who of course became equally a trustee: first, because he paid no valuable consideration; second, because he knew that his elder brother, the plaintiff, if alive, was the heir-at-law. Part of the estate is reconveyed to, or retained by, Messrs. *Smith* and *Henderson* in satisfaction of their bill of costs. They necessarily become trustees of the lands so reconveyed or retained. Two different parts of the estate are conveyed by *Smith* or *Henderson*, and by *James Graves* respectively, to the other defendants, the *McRorys*, the *Bryants*, and the *Clarks*. The *McRorys* have confessedly not paid the whole of their purchase money, and therefore hold subject to the plaintiff's equity. The same remark applies to the *Bryants*, the last instalment on whose mortgage remains unpaid. They indeed attempt a defence to the suit on another ground, namely, on the ground of a right of purchase acquired by means of a covenant contained in a lease granted to them, or to two of them, by *Samuel Henry Bridges*, the former owner of the property. If this defence could be substantiated it might avail them; for the estate of *Bridges* appears to have been indefeasible, and this is the estate which *Smith* acquired, and of which he became a trustee for the plaintiff, who in reality had no estate whatever. If, therefore, the estate so acquired was specifically bound by a covenant for purchase, the plaintiff must have received it *cum onere*, and would be bound to perform the covenant, and this right on the part of the *Bryants* might form a bar to the suit under the General Orders of this court, so far as they are concerned. The covenant, however, as stated by these defendants themselves, appears to me to have expired in May, 1850. It conferred a privilege, and therefore required to be strictly pursued. It was incumbent, I apprehend upon the lessees to tender the purchase money and the conveyance before expiration of the time limited for that purpose, assuming them to have accepted the title. It is not suggested that this was done, and there-

fore the covenant became extinct. Even supposing *James Graves* to have intended to carry it into effect, his act cannot bind this plaintiff, to whom the estate really belonged, and for whom he was a trustee. It would be more proper, I think, that this defence should be raised by cross-bill, as the plaintiff may have some answer to it; as for instance, if *Smith*, when he purchased from *Bridges*, had no notice of this covenant, the plaintiff would be entitled to the benefit of that defence, but could not avail himself of it in this suit. The *Clarks* rely upon the defence of a purchase for valuable consideration without notice. One of their mortgages is certainly satisfied. As to the other, it is not quite clear. Supposing that one to be also discharged, the question would be, whether they had notice. Actual notice is not suggested that they had, although it is very possible, for the *Bryants* appear to have had it. They seem, however, to have had constructive notice through Messrs. *Smith* and *Henderson*, their attorneys. They employed these gentlemen to prepare their conveyance and paid them for it, and I think they must be regarded as their attorneys in the transaction. Taking the most contracted view of their retainer, and supposing them to have been employed only to prepare the conveyance, it was their duty, I think, to communicate to their clients the fact that *James Graves* was the heir only if *George O. Graves* was dead, and it was uncertain whether he was dead or not, and the clients must be deemed to have had notice of that fact, and to have purchased subject to the plaintiff's title. Upon this point I have referred to the cases of *Atterbury* v. *Wallis* (*a*), *Hewitt* v. *Loosemore* (*b*), and *Kennedy* v. *Green* (*c*). *Atterbury* v. *Wallis*, and *Hewitt* v. *Loosemore* were neither of them such clear cases of retainer as the present. In neither of them did an actual retainer occur: in the present case we have an actual retainer to a certain extent. The cases of *Hewitt* v. *Loosemore*, and *Kennedy*

(*a*) 27 L. T. 301.
(*b*) 9 Hare 449.
(*c*) 5 M. & K. 699.

v. *Green*, however, establish a qualification of the doctrine of notice to the solicitor being notice to the client. *Kennedy* v. *Green* establishes that the client will not be deemed to have had notice of a fraud committed by the solicitor himself, because it cannot be supposed that he would communicate it: *Hewitt* v. *Loosemore* establishes that when the plaintiff's own evidence disproves actual notice in the defendant, the implication of notice from the employment of the solicitor, having knowledge, is rebutted. If, however, the fact within the knowledge of the solicitor is not a fraud, its non-disclosure cannot be presumed from the improbability that the transaction would have proceeded, had it been communicated. Non-disclosure is intended only when a distinct substantive fraud has been committed. Where the non-disclosure is the sole fraud or breach of duty, it cannot be presumed. Here no fraud was committed. *Smith*, if he did not communicate to the *Clarks* the fact of *George O. Graves* being the heir, if alive, probably thought it unnecessary. There is no substantive fraud of which disclosure will not be intended, as in *Kennedy* v. *Green:* no evidence, rebutting the implication of notice, as in *Hewitt* v. *Loosemore;* and therefore I think the general rule must prevail, and that the *Clarks* must be deemed to have had notice, through *Smith*, their solicitor. *Barclay*, another defendant, has not paid his whole purchase money, and therefore stands in the same position as the *McRorys* and *Bryants*. *McKenzie* has disclaimed. I think the plaintiff entitled to a decree against all the defendants, with costs; but I think it would be proper to apportion them, as the suit seems multifarious, although the objection is not raised. *Smith* and *Henderson* are, I presume, necessary parties, as having the legal estate in the lands as mortgagees.

With regard to the point, suggested in argument, as to the rights of *Bridges'* assignee in bankruptcy, whatever they may be, we think that so long as he allows the present defendants' purchase to remain undisturbed, they must be taken to be trustees for the plaintiff.

CLARKE v. BEST.

Assignment of mortgage—Guarantee of Mortgage money.

On the transfer of a mortgage the mortgagee covenanted that if default were made in payment of the mortgage money, he would pay the same.

Held, that this did not constitute him a surety within the meaning of section 4 of the 32nd of the orders of 1853.

Statement.—The bill stated that *Best* and *Green* mortgaged certain real estate to *Alford*, and covenanted for the payment of the mortgage money; that *Alford* assigned the mortgage to *Mills*, and covenanted that in the event of *Best* and *Green* making default in payment of the money secured by the mortgage, or any part thereof, he would pay or make good the payment or payments of the mortgage, according to the stipulations and conditions therein contained, to *Mills*, his heirs, executors, administrators or assigns. Subsequently *Mills* assigned the mortgage to *Tiffany*, and covenanted with *Tiffany* that in the event of *Best & Green* making default in payment of the mortgage, after all due means as provided thereby in due course of law and equity should have been used and tried by *Tiffany*, to satisfy the same, and to fulfil the conditions therein as to the recovery of the money according to the tenor and effect thereof on the part of *Best & Green*, he, *Mills*, would make good the payment of the mortgage according to the conditions therein provided, and in that event the mortgage and security were to be reassigned to *Mills*. *Best and Green* afterwards assigned the equity of redemption of the mortgaged premises, with all their other property, to *Park & Tisdale*, in trust for their creditors. The plaintiffs were the executors and trustees of *Tiffany*. The bill further stated they had recovered in ejectment against the tenants in possession of the property, but had not taken possession, and that they had recovered judgment in an action of covenant between *Best & Green*, in the name of *Alford*, for the amount due upon the mortgage, and that a writ of *fi. fa.* thereon had been returned *nulla bona*. That

the property was an insufficient security for the debt and that the plaintiffs had applied to *Mills* to ascertain what further proceedings he required to be taken on the mortgage; and that he had directed a bill to be filed for the sale of the property, praying the usual relief against himself and the other defendants, in case the proceeds of the sale were insufficient to satisfy the mortgage debt, and agreeing that his guarantee should not be invalidated by reason of the plaintiff being unable to re-convey the mortgaged property, from complying with such direction. *Best*, *Green*, *Park*, *Tisdale*, *Alford* and *Mills*, were made defendants. The bill prayed a sale, and in case of a deficiency, that the defendants might be ordered to pay it.

The bill was taken *pro confesso* against *Best*, *Green*, and *Mills*. *Alford* answered alleging that *Park* and *Tisdale* had received large sums from *Best & Green's* estate, and praying that an account might be taken thereof, and that *Best* and *Green*, and *Park* and *Tisdale* might be ordered to pay any deficiency there might be after a sale.

Park and *Tisdale* answered, denying the receipt of any money under the trusts of the assignment, applicable to the payment of the mortgage.

Mr. *Proudfoot*, for plaintiff, asked the usual decree for sale, and an order for the payment of any deficiency by all the defendants; contending that *Alford* and *Mills* were, by virtue of their covenants, sureties for payment of the debt, and came within the Reg. Gen. 1853, 32, sec. 4. In *Turnbull* v. *Symmonds*, (*a*) an order of this kind had, indeed, been refused against the assignee of the equity of redemption, because there was no covenant for payment, and it was held that the general order did not apply to a constructive surety. But here the suretyship was express.

(*a*) Ante vol. vi., p. 615.

As against *Mills* the relief was asked pursuant to his own direction; and *Alford* did not object, but by his answer prayed the same relief against those prior to himself.

Mr. *Crickmore* for *Park* and *Tisdale*.

Judgment.—ESTEN, V.C.—I am quite clear that the relief sought against the mortgagee and his assignee, covenanting respectively for the payment of the mortgage money in default of payment by the mortgagor, cannot be obtained.

The mortgagee or his assignee, is not the surety of the mortgagor, within the meaning of the general order. The contract in such a case, is a contract of guarantee, and must be the subject of an action against the assignor.

FISKEN V. RUTHERFORD.

Chattel mortgage—Contract in restraint of trade—Notice—Registration.

On a sale of goods upon credit to a trader, the purchaser executed a deed, covenanting with one E. F., a clerk in the employ of the vendors, to buy all his goods from them, and that E. F. should be at liberty, at any time thereafter during the time such business might be carried on, to enter into the place of business and take possession of the goods and premises, and wind up the affairs. The business was carried on for two years and a half, during which time the vendors delivered goods to a large amount, in pursuance of the agreement.

Held, that the covenant not to purchase elsewhere was not binding on the purchaser, but that as he had received goods under the agreement, that there was a sufficient consideration for the covenant to purchase from the vendors alone, so as to entitle them to the remedies given by the deed; that this was not such an agreement as required to be registered under the chattel mortgage act, to enable the vendors to hold as against subsequent purchasers with notice.

Statement.—The original bill in this cause was filed on the 27th of December, 1859, by *James Fisken*, *William Ross*, *James Mitchell*, and *John Fisken*, against *Robert Rutherford*, setting forth that in July, 1856, the defendant being about to commence business in Guelph as a dry-goods merchant, applied to the plaintiffs, *Ross*, *Mitchell*, and *John Fisken* (composing the firm of *Ross*, *Mitchell & Company*), to enter into an arrangement

with him to supply him with such goods as should be required by him for the purpose of his business, which they agreed to do upon having the price properly secured. And for that purpose it was agreed that certain powers as to the management of the defendant's business should be given to the plaintiff, *James Fisken*, a clerk in the employment of the other plaintiffs, and thereupon an indenture purporting to be between the defendant of the one part and plaintiff, *James Fisken*, of the other part, was prepared and executed by defendant, and set forth that

"Whereas the said *Robert Rutherford* hath the intention of carrying on the business of a dry-goods merchant in the town of Guelph aforesaid by himself, under the style and firm of '*Robert Rutherford*,' and whereas the said *Robert Rutherford* having great confidence in the said *James Fisken*, hath agreed, with the approbation and consent of the said *James Fisken*, to vest in him the said *James Fisken* absolutely and irrevocably the rights, powers, and authority hereinafter to the said *James Fisken* given, so as to enable the said *James Fisken* to exercise a discretionary control to the extent hereinafter specified over the affairs and matters of the said *Robert Rutherford*, so trading as aforesaid, and (if he should think fit) wind up and close the said business as hereinafter specified; but the said *James Fisken* is not by any means or in any way or to any extent, to be a partner in the said business, or interested therein, or liable in any way therefor, or the debts thereof. Now, therefore, this indenture witnesseth that in pursuance of the premises and of the covenants, stipulations, conditions, and agreements herein contained he the said *Robert Rutherford* for himself, his heirs, executors, and administrators, doth hereby covenant, promise and agree to and with the said *James Fisken*, his executors and assigns, in manner following, that is to say,

That the said *Robert Rutherford* shall not, under any circumstances, take out, or withdraw from or receive out of the said business so carried on by him as aforesaid either money or stock, or other matter or thing whatsoever to a greater extent or proportion in the whole than at the rate of two hundred and fifty pounds

a year; that he shall so continue to draw the said sum of two hundred and fifty pounds, until such time as this stipulation shall be determined by endorsement on these presents. That all the cash, bills, drafts, notes, and moneys and securities to be received from time to time by the said *Robert Rutherford* in the course of his business, and otherwise in connexion therewith, shall (except such cash as shall be necessarily required to pay the current expenses of the said business) be regularly paid and handed over every week and from week to week, or as the same shall from time to time come in, unto the said Messieurs *Ross, Mitchell & Co.*, of Toronto aforesaid, who shall keep and retain the same for *Robert Rutherford*, and shall apply the same in payment to the said *Ross, Mitchell & Co.* of all debts and liabilities now due or owing, or accrued, or hereafter to become due or owing to the said *Ross, Mitchell & Co.*, so far as the same shall suffice for that purpose, and as to any surplus over what may be sufficient to pay the said *Ross, Mitchell & Co.* the same shall be held by the said *Ross, Mitchell & Co.* in trust for the said *Robert Rutherford*. That the said *Robert Rutherford* shall purchase all his stock in trade and all materials and stock required therefor of and from the said *Ross, Mitchell & Co.*, and not elsewhere from any other person or persons.

That it shall and may be lawful for the said *James Fisken* from time to time, and at all times in his discretion, to enter into and upon all premises whereon and wherein the said *Robert Rutherford* shall carry on business, and view and inspect the same, and examine thereinto, and overlook and investigate the transactions, business, books, papers, accounts and moneys thereof in such manner as he shall desire, and for those purposes the said *James Fisken* shall at all times have free and ready access to all the property, effects, books, papers, writings, accounts and moneys of the said *Robert Rutherford*, and shall be permitted to examine and scrutinise the same as he pleases. That in case the said *James Fisken* shall be of opinion that it will at any time be disadvantageous to continue or carry on the said business further or that it will be more advantageous to discontinue and wind up the same, then it shall be lawful for the said *James Fisken* at any time without further or any consent from the said *Robert Rutherford* to close and wind up the said business and take possession of all the stock and assets of the said business of the said

Robert Rutherford, and apply the same to pay and satisfy all and whatsoever there may be due and owing from the said *Robert Rutherford* to the said *Ross, Mitchell & Co.*, and then (after payment and satisfaction in full to the said *Ross, Mitchell & Co.* of all their claims and demands against the said *Robert Rutherford*) towards payment and satisfaction of all other creditors of the said *Robert Rutherford* share and share alike.

Or if it should seem fit to the said *James Fisken* at any time to take possession of and carry on the said business in the name of the said *Robert Rutherford*, with the view of ultimately winding up the same in an advantageous manner, it will be lawful and proper for the said *James Fisken* at his discretion so to do, and the said *Robert Rutherford* will at any time and at all times immediately, on being requested by the said *James Fisken*, give the said *James Fisken* full and undisputed possession of all the property, effects, moneys, premises, matters, and things belonging to the said *Robert Rutherford* for the purposes aforesaid, or any other, or either of them. And for the purpose aforesaid the said *Robert Rutherford* hath nominated, constituted, and appointed, and by these presents doth hereby nominate, constitute and appoint the said *James Fisken*, his executors and administrators, to be the true and lawful attorney and attorneys irrevocable of him the said *Robert Rutherford*, and in his name or otherwise at the discretion of the said *James Fisken*, to make, do, execute and perform and fulfil all and every act and acts, deed and deeds, writing and writings, matter and matters, thing and things in the discretion of the said *James Fisken* necessary and proper to be made, done, executed, performed and fulfilled, in and about all and singular or any or either of the matters, transactions, affairs, and things whereunto these presents relate, and from time to time, as in the discretion of the said *James Fisken* may be necessary and proper, to use the name of the said *Robert Rutherford* in and about any and every matter and transaction, affair, proceeding, action and suit touching all or any or either of the matters and things whereunto these presents relate, as may in the discretion of the said *James Fisken* be required. That the said *James Fisken* is by no means to interfere in the said business in any way that would render him liable as a partner, nor to receive any share or part whatever of the profits thereof, or pay or be liable for any of the debts thereof, or bear any portion of the

losses thereof, or have his name used in any way in connexion therewith.

That the said *Robert Rutherford* shall and will at his own proper cost and charges forthwith insure, and during the continuance of these presents, keep insured all his stock in trade, and all materials and stock required therefor, and which at any time may be in or about or upon his business premises, in such a sum of money as the said *James Fisken* shall consider necessary, and in some respectable office or offices of insurance, to be approved of by the said *James Fisken*, and that the said *Robert Rutherford* shall from time to time pay the premiums for keeping the said policy or polices on foot as the same shall become due, and produce the receipts therefor when required by the said *James Fisken*."

The bill then alleged that the defendant had continuously, since the execution of this instrument, carried on business at Guelph as a dry goods merchant; that when he established such business he was without means, and the only capital employed in the business was that of *Ross, Mitchell & Company*, who in pursuance of the agreement with defendant had furnished the whole of the stock with which he carried on such business up to the month of April or May, 1859, when he purchased goods to a small amount from certain wholesale merchants in Montreal and New York, in addition to his purchases from *Ross, Mitchell & Company*. That the whole of the supplies made by *Ross, Mitchell & Company* to defendant were made upon the faith of the agreement, and upon the security of the indenture above set forth. That defendant had kept and performed the covenants and stipulations in the indenture until the 19th of December, when he refused further to perform the same, and in particular refused to make payments to *Ross, Mitchell & Company*, except at unusually long dates; and threatened to make an assigment to parties out of the jurisdiction of this court; whereupon *James Fisken*, in exercise of the power so to do, conferred upon him by the instrument, and considering that it

would be disadvantageous further to carry on such business, and with the intent of winding up the same, and duly executing the trusts of the said indenture, on the 21st of that month took possession of the shop in which the business was so carried on, together with the stock and assets therein, and remained in such possession until he was forcibly ejected therefrom by the defendant, on the 23rd of the same month.

The bill further alleged that *Ross, Mitchell & Company* had no security for their advances, (alleged to be about £6000,) other than the said indenture, and some promissory notes to the defendant, who it was charged had threatened to sell all the goods remaining in his shop, the greater and more valuable portion of which had been furnished by *Ross, Mitchell & Company*, and the residue of which was purchased by means produced by the sale of goods so furnished by them, and by such sale to defeat the plaintiffs in the exercise of their rights under the said indenture, who were apprehensive that the defendant would, unless restrained by injunction, sell, incumber, or otherwise dispose of the said goods, &c., so as to seriously prejudice the rights of the plaintiffs.

The prayer of the bill was that the trusts of the deed might be carried out, and that defendant might be ordered to deliver up possession of the said stock, &c., to *James Fisken;* also an injunction to restrain defendant from selling, or in any way making away with the said goods and stock, and for further relief.

Upon affidavits verifying the bill, an injunction had been granted *ex parte*, which was afterwards dissolved upon motion by defendant, on the ground of the concealment of certain letters written by one *Daniel Hill*, a clerk, in the employ of *Ross, Mitchell & Company*, allowing *Rutherford* to buy goods otherwise than as stipulated in the assignment.*

* The letters referred to were dated respectively the 17th of December, 1858, and the 26th of March, 1859; in the first Hill wrote:

"My Dear Rutherford,—

"I intended writing to you long ago about the notes; I now send

Subsequently an injunction was granted on notice, but in the interval *Rutherford* executed an assignment to trustees for the benefit of his creditors, who were afterwards made parties defendants by amendment. Whilst the injunction so granted was in force, and *James Fisken* was engaged in closing and winding up, or in preparing to wind up the business, and on the 11th of January, 1860, he (*Fisken*) died.

The record having been amended by way of reviver, stating the fact of *Fisken's* death, and alleging that *Rutherford* was not induced to enter into the agreement of July, 1856, by any personal trust or confidence in *James Fisken*, but that he was in fact acting simply as the agent of the plaintiffs, *Ross, Mitchell & Company*, by whom the suit was afterwards continued: the plaintiffs thereupon gave notice of motion for decree, when, by leave of the court, several parties who had made affidavits in the cause were cross-examined before the court. Amongst others, the defendant *Rutherford*, the plaintiff *John Fisken*, *Daniel Hill*, and one *Seymour*, a clerk in the employment of *Rutherford*. These affidavits and examinations extend to a great length, but

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you all that is on hand; all your blanks were retired and burned except Denniston, Wood & Co., which you have a note of, and you need not fear but they are all right. If you want an assurance from Mr. Fisken you can get it. He thinks with me that I was very soft to let you down so easy, without charging you commission on your purchases, according to agreement, for if you could not buy on our credit, you certainly bought with our money, but as it is now closed we must try and make a better bargain next time. I have seen Douglas & Co. regarding the New York report, and am getting it made right for you; if you are going there let me know, and I will get you an introduction to them in New York.

In the letter, after referring to other matters of business, he stated: "I have made you all right with B. Douglas & Co., for references in New York and Montreal. I reported you as having a considerable amount of capital in the business, that you only owe us about £3000, for which you have 3 years to pay; that the present payments are met in advance; that you are doing a large cash business, and that you more than pay the expenses of your business by your produce; that you are quite clear of us, and that you are importing your staple dry goods from England this season through your brothers in Havre de Grâce, for whom you have been packing pork, but I will talk to you on this when you come down."

it is not thought necessary here to go into any detailed statement of them, but they were in many respects in direct opposition; *Rutherford* and his clerk swearing positively that *Hill*, who was the clerk, and accredited agent of *Ross, Mitchell & Company*, on effecting a settlement with *Rutherford* in December, 1858, when *Rutherford* gave his promissory notes to cover the whole amount of his liability to them, agreed to abandon the agreement entered into by the indenture of 1856, and that the letters before referred to were written by *Hill* for his employers, and were evidence of an abandonment of that deed, and that they had released *Rutherford* from all further liability thereunder.

Hill denied these statements, and said the letters were written only as private letters, and not with the sanction or authority of *Ross, Mitchell & Company*. *Fisken's* evidence was to the same effect.

Mr. *Proudfoot* and Mr. *Blake* for the plaintiffs. The point mainly relied on, and the only one that can be insisted upon to any extent, is the abandonment of the contract by the plaintiffs, but the facts elicited in evidence shew distinctly that this proposition cannot be maintained; the fact of the deed remaining in the hands of the plaintiffs, and other circumstances, shew that no abandonment ever took place, or was ever intended by the plaintiffs.

The death of *James Fisken*, though relied on as an objection, on the ground that no one else can exercise the discretionary power reposed in him by *Rutherford*, makes no difference in the circumstances of the case, which shew plainly that no personal confidence was reposed in him—he was merely clerk to the plaintiffs, and, as such, subject to their orders and directions. The proceeds of the sales being required to be paid over directly to the plaintiffs, and other circumstances, clearly shew that no peculiar reliance was placed in him, or any discretion given to him; but if any dis-

cretionary power were vested in him, then he had exercised it, and what remains to be done is simply ministerial.—*Sugden* on Powers, 7th ed., p. 324, Dyer 219 *a*; *Drayson* v. *Pocock*. (*a*)

Supposing, however, that *James Fisken's* death occurred without his having exercised the discretion, still no difficulty would arise, as this court would not suffer the security to fail.—*Lewin* on Trusts, 697, and cases there cited.

The deed executed by *Rutherford* was not a voluntary instrument, moneys or goods having been advanced on the faith of it.—*Wood* v. *Rowcliffe*, (*b*) *Pooley* v. *Budd*. (*c*)

Nor does the fact that it purports to assign future assets render it illegal, as assignments of that nature are good in equity, and here all were to be, and in fact were, bought by funds arising from sales made of plaintiff's goods, and therefore there was nothing unreasonable in giving security on them as well as those already in the possession of *Rutherford*.—*Douglass* v. *Russell*, (*d*) *Langton* v. *Horton*, (*e*) *Curtis* v. *Auber*. (*f*)

Forbes and *Lowrie*, who took an assignment as trustees, after suit, and with full notice of the rights of the plaintiffs, are bound by the deed of July, 1856, to the same extent that *Rutherford* is.

The defendants object that this deed was not registered according to the provisions of the chattel mortgage act. (*g*) But that statute does not affect our rights, as the act only applies to instruments passing the property in the goods. Neither could the plaintiff's here make the affidavit required by the statute, as the amount of indebtedness could not be stated.

(*a*) 4 Sim. 283.
(*b*) 3 Hare, 304.
(*c*) 14 Beav. 34.
(*d*) 4 Sim. 424.
(*e*) 1 Hare, 549.
(*f*) 1 J. & M. 526.
(*g*) 12 Vic., ch. 74.

Mr. *Roaf* and Mr. *Fitzgerald* for defendants.

The only, or at all events the main object of the deed was to secure the purchasing by *Rutherford* of all the goods required by him in carrying on his business at Guelph from the plaintiffs; thus affording them an outlet to a certain amount of the stock held by them. Deed is clearly void for want of consideration, for all the other provisions of the deed are merely ancellary to the object already stated, and fall with it.

The stipulations binding *Rutherford* to purchase from plaintiffs only, are in restraint of trade, and therefore void, and being so minutely interwoven with the agreement for security, they must all stand or fall together. —*Mitchell* v. *Reynolds*, (*a*) *Jones* v. *Edney*, (*b*) *Kimberly* v. *Jennings*. (*c*)

The fact that the deed itself provides for payment of surplus to the "other creditors," implies that *Rutherford* was to be at liberty to purchase from third parties, and if the intention of these parties, when entering into that instrument, was, that such purchases, although on credit, should be subject to the lien of the plaintiffs, then such agreement would be covinous and void; and the fact being shewn that plaintiffs never made any attempt to take possession until *Rutherford* had made large purchases from third parties, renders it not improbable that such an object was in the minds of the plaintiffs at the time. Counsel relied strongly on the letter of *Hill*, and the representations made by him having induced *Rutherford* to procure goods on credit from third parties, and which he had obtained to the amount of £9,000. For that the plaintiffs alone should suffer, not third parties, the plaintiffs trusted him, and by their conduct have enabled him to appear to the world as a responsible person, although at the same time every thing was under

(*a*) 1 P. W. 181. (*b*) 3 Camp. 586
(*c*) 6 Sin. 340.

their own control, by means of this secret and concealed security. Now secret chattel mortgages have always been considered fraudulent, and by the act are now required to be registered, and re-registered after the expiration of a year. If a mortgage, therefore, be not re-registered, it is void, although creditors and others have notice. The act never intended that notice should be carried back to the time the debt was contracted. The defendants, the trustees, and their *cestui que trusts*, it is admitted, claim as purchasers, and had notice; but that is not sufficient to postpone them to the plaintiffs, as nothing like bad faith is either alleged or proved, and the debts which constitute the consideration of the deed of trust were incurred in good faith, and without notice.

Judgment.—ESTEN, V.C.—The first question that arises in this case is whether the indenture of the 25th of July, 1856, was valid in its inception. It is said that the covenant for the exclusive purchase of goods from the plaintiffs was in restraint of trade, and, not being founded on any sufficient reason or consideration, was null and void; that this covenant formed the substance of the deed, and that the provisions accompanying it were only subsidiary to it; and that, it failing, the other provisions failed also, and the whole deed was null and void. I cannot agree to this reasoning: I think the deed was framed with a double object, one to procure an outlet for the plaintiffs' goods at Guelph; the other, to provide a sufficient security for the goods that might be furnished. Had the deed contained a covenant on the part of the plaintiffs to supply such goods as the defendant might require for the conduct of his business, it would not have been open to the objection that has been made to it, but would have been perfectly good, and instead of being in restraint, would have been in furtherance, of trade. It is true that the deed contains no such covenant, and the covenant in question, being founded on no consideration, may be void as being in restraint of trade, but I doubt whether it is; for the question in these cases is, whether the

restraint is reasonable, and certainly in the present case it was very reasonable, because it enabled the defendant to obtain capital of which he was quite destitute, and to commence and conduct a considerable business. It is a different question whether more than nominal damages could have been recovered for the breach of this covenant, or whether a court of equity would have restrained the breach of it. But supposing the covenant to be void, and that the defendant could have purchased where he pleased, does it necessarily follow that the whole deed is void? Suppose the plaintiffs, on the faith of it, furnished goods to the defendant to a large amount, would they not have been entitled to have the proceeds of such goods remitted to them in reduction of their debt, and to have taken possession of any goods that they had supplied and which might be remaining in the store for the time being, and convert them into money, although they could not intermeddle with goods purchased *aliunde*, or stop the business? If the plaintiffs have in good faith acted upon this security and made advances on the strength of it, should it not be supported as far as possible for their indemnity? If the deed had contained a covenant to supply the defendant with goods, I do not see but that it could have been supported and enforced in all its parts. Separate from it the covenant to purchase exclusively from the plaintiffs, does it not amount to an agreement on the part of the defendant that the goods which he might purchase from the plaintiffs should specifically be subject to their demands? and if the plaintiffs have in good faith made advances on the strength of this security, and if the defendant has, as he has, accepted such advances, knowing as he undoubtedly did know, that they were made in reliance on this security, should it not be supported and enforced as far as may be practicable for the plaintiffs' benefit? I conclude that even if the covenant to purchase exclusively from the plaintiffs cannot be impeached on the ground of unreasonableness, yet that its being without consideration would prevent the plaintiffs from recovering more than nominal damages

at law for the breach of it, and that in this court they could have no relief by way of injunction to restrain its infraction. Assuming, therefore, that the defendant might purchase goods from third parties, would it be impracticable to enforce the agreement to the extent of enabling the plaintiffs to fasten upon the moneys produced by the sale of their own goods, if they could be followed, or of enabling them to take possession of such of the goods furnished by them as might remain in specie, and converting them into money? It might under circumstances easily conceivable be difficult to enforce such rights, but so far as they might be capable of being enforced, I should think it would be the duty of the court to give effect to them.

It is true that the trustee could not exercise his discretionary power of stopping the business, although if the plaintiffs' goods bore a very large proportion to the whole, that might be the effect of his interference; but if the goods supplied by the plrintiffs could be identified, I see no reason why the trustee should not be aided by this court in taking possession of them, and converting them into money for the satisfaction of their demand; nor why this court should not, if necessary, interfere by injunction to restrain the diversion of the moneys produced by the sale of such goods, if capable of being traced and identified, to any other purpose than the payment of the plaintiffs; nor why it should not aid the plaintiffs to seize upon any fund clearly shewn to have been produced by the sale of the goods in question, and deposited in any bank, or otherwise capable of being traced and identified. Assuming then, that the deed could have been enforced to this extent on the 18th of January, 1860, the day on which the assignment in question in this cause was executed, if nothing had occurred in theinterim to prevent it, the question arises, whether, as alleged by the defendant, it had previously to that day been abandoned by mutual consent of the parties. In determining this question I

have duly considered all that passed at the interview on the 8th of December, 1858, as detailed in the not very satisfactory evidence which exists on the subject; also the notes then given having been passed to the credit of the defendant, (this not appearing to have been done on any previous occasion;) also the diminished remittances during the year 1859, their appropriation to meet particular notes, (such not appearing to have been the case before,) the diminution in the amount of purchases during that year, and the explanation given of it by Mr. *Fisken;* the conversations alleged to have occurred between the parties, in this respect; the letters of *Hill*, of *Fisken*, and of the defendant bearing on this question; the knowledge that the plaintiffs had of the defendant's dealings with other parties, (which I may remark was, I think, confined to the transaction with his brothers in April or May, 1859, which they overlooked until November of that year, beyond the mere suspicions entertained by the clerks, arising from the diminution of his purchases, which the plaintiffs would account for by the understanding which they understood to have been entered into that he should reduce his stock,) and the other circumstances adverted to and dwelt upon in argument on this point.

On the other hand, I have borne in mind the improbability of the plaintiffs relinquishing any security they had in December, 1858, when the defendant's debt was larger than it ever had been before; their power of putting an end to the arrangement existing between them and the defendant, if troublesome and onerous, not by surrendering the indenture of 1856, but by enforcing it, as they certainly thought they could, and as I think they could, to a certain extent, have done; the retention of this indenture in their possession; the absence of any application for its delivery, and the other circumstances material to this question. I may observe that I am quite satisfied that *Hill's* visit in December, 1858, had a reference to the possibility of the plaintiffs enforcing the provisions of the indenture of 1856, although not communicated to

Hill or the defendant; that this possible result was, however, present to the mind of the defendant; that the notion of his exacting any terms from the plaintiffs on this occasion was simply absurd; that although no doubt the plaintiffs were to retire the notes, yet, that it was perfectly understood that the defendant was to supply the means; that I cannot understand how he can be regarded as a surety with respect to these notes; and although it is difficult to understand how the holders of his notes could be permitted to enforce their rights against the defendant by proceedings at law, yet that the plaintiffs must be deemed to have had a control over these proceedings, and to have intended to interpose at the necessary moment, for the purpose of enforcing their rights under the indenture of 1856, for the benefit not only of themselves but of the holders of the notes, as indeed they did in the instance of *Dennistoun & Co.*, under whose execution the sheriff was actually in possession, when the plaintiffs put their rights in force. Upon the whole, although some of the circumstances which appear in the case may be difficult to reconcile with a continuance of the powers and rights of the indenture, I think enough is not shewn to warrant the conclusion that it was abandoned by the plaintiffs.

I may observe that *Hill* had clearly no authority to relinquish it, express or implied, and that no man of ordinary prudence would have acted on the assumption, from what passed in December, 1858, that it had been relinquished; and if *Rutherford* acted on that assumption (which I very much doubt,) and thereby has brought mischief upon himself and others, he has only himself to blame. I cannot assent to the argument that the plaintiffs ought to suffer rather than the other creditors, because they trusted *Hill*. This doctrine applies only to cases where the agent has acted within the scope of his authority, express or implied, although contrary to his duty. Here *Rutherford* confided in *Hill* to an extent which indicates the want of ordinary caution, and

the creditors were not misled by anything that occurred, because they were wholly ignorant of it. In fact the argument is not that they were misled, but that *Rutherford* was misled into dealing with them, an extent to which I never heard the doctrine pushed before; but certainly the plaintiffs did nothing to mislead *Rutherford*, and what *Hill* did was beyond his authority; and to trust in it was *crassa negligentia*. In truth, however, the rights of creditors, as such, are wholly unprejudiced and unaffected by this decision. The most obscure part of the case undoubtedly is the letter written by the plaintiffs to the defendant on the 21st of December, 1859. When they wrote this letter they knew that *Rutherford* had made large purchases from third persons. They must have been struck, if not astonished, at his wholly ignoring their rights under the indenture of 1856 in his letter, to which the letter I am considering was in reply. They appear to act and to write with caution. They first put in force their supposed rights under the indenture of 1856, and having taken this position, write the letter in question, which may certainly be considered as amounting to an offer to accede to a general assignment for the equal benefit of all creditors, provided they with another should be nominated trustees, making no allusion whatever to the indenture of 1856, and in this respect imitating the reserve of the defendant. It must be observed that they were ignorant of what had passed between *Rutherford* and *Hill*, and which, as *Rutherford* alleges, had induced him to believe that the indenture had been abandoned. This supposition on his part, if true, accounts for *his* silence as to the indenture, but it must have appeared not the less remarkable to the plaintiffs. Account for this letter, however, as we will, it is difficult to understand it. It is not however irreconcileable with a retention of the powers and rights conferred by the indenture of 1856, while on the other hand, if we consider that the plaintiffs were at that moment enforcing those powers and rights, and had

actually put them in force before they wrote the letter, and deferred writing the letter until they had done so, it is impossible to suppose that they had abandoned those powers and rights. I come to the conclusion then that on the 18th of January, 1860, the indenture of 1856 had not been abandoned by the plaintiffs, but that it was still in force, and binding on *Rutherford* to a considerable, if not to its whole, extent.

The next question that arises, is, whether it has become void in consequence of the assignment, which was executed on that day by *Rutherford* to the other defendants, *Lowrie* and *Forbes*, with reference to the Chattel Mortgage Acts (*a*). It was argued that the indenture in question was not a chattel mortgage within these acts of parliament. The legal effect of the indenture seems to resemble in some degree the contract of imperfect hypothecation. The property and possession of the goods both passed to *Rutherford*, and he could make a good title to a purchaser by his contract of sale, but the plaintiffs could at any time take possession as against him, and then the property would vest in them. Meanwhile they would have an equitable lien on the moneys produced by the sale of the goods. I am inclined to think that such an indenture may fairly be considered a "mortgage or conveyance by way of mortage," within the meaning of these acts of parliament, which are to be liberally construed. They were, I have no doubt, intended to guard against the evils of fictitious credit, arising from a man remaining in possession, and the apparent owner of the goods, after he had parted with them wholly or in part. Such a transaction as occurs in this case is within the mischief against the acts were intended to guard. It is true the affidavit required by the 13 and 14 Vic., ch. 62, could not be made in this case, because when the indenture was executed no debt existed. I am satisfied, however, that the effect of these acts was not

(*a*) 12 Vic., ch. 74, and 13 and 14 Vic., ch. 62.

to prohibit chattel mortgages for securing future advances altogether, and therefore the registration must be in such a case *cy pres*, the affidavit going as far as the nature of the case would admit, or the case was not within the statutes at all. Assuming for the sake of the question that this indenture was a mortgage within the act of parliament, I am satisfied their whole intention is answered by actual notice to the creditor, purchaser, or mortgagee, at the time of the debt contracted, and of the purchase and mortgage respectively. A creditor who contracts a debt with knowledge of an unregistered mortgage on his debtor's goods, cannot complain if the mortgage afterwards prevails over his execution, and a purchaser or mortgagee purchasing or accepting a mortgage with the same knowledge, stands in a similar position. They are all protected by the actual knowledge they possess against the evil, which the acts were intended to remedy, and under such circumstances a creditor taking the goods in execution, or a person purchasing or accepting a mortgage on them, for the purpose of defeating the prior unregistered mortgage, is guilty of a legal fraud. It may be more difficult to obtain relief against a creditor than against a purchaser or mortgagee, because notice must be proved against him at the time of contracting the debt, in the case of a purchase or mortgage it will be comparatively easy. What then is to be the effect of the clause requiring re-registration upon this doctrine? It cannot be that a mortgage unregistered is to have more effect than a mortgage registered. If a mortgage be registered and not re-registered, a creditor may safely contract a debt, or a purchaser or a mortgagee complete his purchase or mortgage, notwithstanding the notice conveyed by the previous registration. To entitle the unregistered chattel mortgagee to relief against a creditor, purchaser or mortgagee, such creditor, purchaser, or mortgagee must have actual notice, at the time of contracting the debt, or transacting the purchase or mortgage, of the unregistered mortgage. The question is what amounts to such actual notice at that time? and I

should say, conformably to the clause requiring re-registration of chattel mortgages, that it must be actual notice proved to have existed within the year previous to contracting the debt or transacting the purchase or mortgage. These mortgages, whether registered or not, are binding as between the parties, and the only object of the acts of parliament is to give notice of them, so that third parties may not contract with the mortgagor, supposing him to be the owner of the goods comprised in them when he has ceased to be so. This case is wholly unaffected, I think, by the subsequent statutes of 20 Vic., ch. 3, and the 22 Vic., ch. 96.

I agree with Mr. *Roaf* that the 20 Vic., ch. 3, avoids all mortgages for securing future advances, except those made according to that act, but I think the respective clauses in the 12 Vic., ch. 74, and 13 & 14 Vic., ch. 62, standing *per se*, and the corresponding clauses in the 20 Vic., ch. 3, combined with the clause relating to mortgages for securing future advances, must receive a different construction. I cannot agree, that *quoad* advances made after the passing of the 20 Vic., ch. 3, the deed is within the operation of that act. The deed remaining good, all advances under it would be supported. I think 22 Vic., ch. 96, throws no light upon the policy of the previous acts. It promulgated, in fact, a change of policy. I think, also, that the deed of 1856 continuing valid after the passing of 22 Vic., ch. 96, any fresh advances under it would be good, and could not be in contravention of that act, which however, avoids the acts affected by it only against creditors, and not against purchasers, who are bound by them, although trustees for creditors, according to the cases recently decided in this court (*a*).

In the present case, I repeat, I have nothing to do with the creditors as such. The rights they have in that

(*a*) See McMaster v. Clare, ante vol. VII., p. 550.

capacity are not affected by this judgment. I have only to deal with the trustees named in this assignment, and the creditors who may choose to become parties to it. These I must regard in the light of purchasers, notstanding Mr. *Roaf's* ingenious argument, by which he endeavoured to attribute to the persons availing themselves of this assignment, the double character of purchasers and creditors, and to clothe them with the rights and privileges of each character, and contended that as these creditors had no notice of this deed when they contracted their debts, they were entitled to take this assignment for securing their debts, and were purchasers in good faith. In fact this point is settled by the late cases in this court. to which I have already adverted, relating to Mr. *Hutchinson's* estate. The result is, that the creditors claiming the benefit of this assignment,take subject to the deed of 1856, although unregistered, and although it may have been capable of registration, because they had actual notice of it, through the medium of the trustees, or one of them,at the time of the execution of the assignment. The assignment is equally void against the indenture of 1856, on account of its being made *pendente lite*,according to the maxim *pendente lite nihil innovetur*,which doctrine, it appears, does not depend for its effect upon notice implied in the suit, but is an inflexible rule necessary to the administration of justice. If,indeed, the indenture had been destroyed by the effect of the assignment,and of the statutes requiring registration, the result would have been different, for if the subject matter of the suit be destroyed,howsoever its destruction be effected, the suit is at an end. But in the present case the indenture of 1856,even although it may have been capable of registration, was preserved by actual notice in the trustees, or one of them named in the assignment, and therefore the doctrine of *lis pendens* applies with full force.

In addition, I may observe that I can attach no other meaning to the words contained in the assignment,

"subject to all charges and equities, if any," than that the assignment was to be subject to the indenture of 1856, if binding on *Rutherford*. I attach no weight to the arguments drawn from the personal confidence reposed in *James Fisken*. I don't think any such personal confidence existed, but even if it did, it is quite impossible that the plaintiff's security should be defeated by the death of the trustee. The cour could not, indeed, carry on the business, but it would convert the goods into money, and pay the plaintiffs' debt. I think, therefore, that this deed must prevail over the assignment. The question then arises what effect is to be attributed to its provisions as regards the present position of the defendant's stock, purchased partly from the plaintiffs, but to a much greater extent from third parties, although for the most part probably with moneys which ought to have been remitted to the plaintiffs in pursuance of the agreement, and therefore with their moneys. I think the plaintiffs are entitled to a lien on all the goods purchased from them, and upon all goods purchased from other persons, and paid for with moneys the proceeds of their goods, and which should have been remitted to them, and I think under the circumstances of this case it should be presumed that all goods purchased from third persons, and paid for, had been purchased with moneys of the plaintiffs, unless the contrary be shewn.

A receiver should be appointed, and he should be directed to convert into money all the goods upon which the plaintiffs are entitled to a lien. The injunction should in the meantime be continued; probably some method may be suggested by the parties, if disposed to acquiesce in this decree, for carrying it into effect. If not, I must, myself, prescribe one. The object to be attained is to distinguish between the goods purchased from the plaintiffs, and the goods purchased from third persons, to ascertain which or how much of the latter had been paid for; and if necessary to make an apportionment.

I think the plaintiffs should have their costs to the hearing. I have prepared this judgment amid many interruptions, and may possibly not have mentioned some of the points urged in the argument, although I have duly considered them. If so, I shall be sorry, as they will deserve to be expressly mentioned, although they may not have prevailed to change my opinion.

I had written the foregoing judgment, and actually caused it to be handed to the solicitors for the parties, as I heard they were anxious to have my judgment as soon as possible. Upon reflecting upon the case afterwards, a doubt occurred to me whether I had been right in extending the doctrine of equitable notice to unregistered chattel mortgages; and my doubt was founded on the consideration that the legislature appears to have had two objects in view in making the enactments they have made with regard to chattel mortgages; one was to ensure notice of such mortgages being conveyed to purchasers, mortgagees, and creditors; the other, to provide for them some assurance that they were *bona fide*, and not made for any fraudulent purpose, so that they, especially creditors, might not be unnecessarily deterred from dealing with the goods comprised in them. The first object appears, and does still appear to me, to be answered by actual notice received *aliunde* by the purchaser, mortgagee, or creditor, at the time of his purchase, mortgage, or of contracting his debt respectively; but the other object is by no means effectuated by such notice; and it appeared to me on reflection, and still appears to me extremely doubtful whether it would be proper for the court to sustain an unregistered chattel mortgage against purchasers, mortgagees, or creditors on actual notice of its existence, within the year previous, as before observed, unless at all events the circumstances should shew that the purchaser, mortgagee, or creditor, not only knew of the existence, but could have no doubt of the *bona fides* of the unregistered chattel mortgage, which would in fact form a case of actual fraud. It

seems to me, however, that the question is precluded in this case, because this instrument, supposing it to be a chattel mortgage within the meaning of the acts, being of course good as against *Rutherford*, and not having become void as against any purchaser or mortgagee, and not having been avoided by any creditor in 1857, when the act 20 Victoria, chapter 3, repealed the acts of 12 Victoria, chapter 74, and 13 & 14 Victoria, chapter 62, without providing for the registration of chattel mortgages already made, but not registered, became thenceforth as good and valid as if the repealed acts had never existed, and consequently was valid and operative to the extent I have described, at the time of the execution of the assignment, and ought to prevail over it to that extent.

The point that excited doubt in my mind as to the correctness of my decision with regard to notice, was not suggested in the course of the argument: the learned counsel for the defendant appearing to concede the applicability of the doctrine of equitable notice to chattel mortgages, although he contended, that as to creditors notice must exist at the time of contracting the debt, and that a creditor not then having notice, might afterwards in good faith and with effect obtain an assignment as security for his debt. The plaintiffs' counsel has therefore had no opportunity of discussing the point which has occurred to me; while, on the other hand, I did not understand him to urge the argument from the repeal of the acts of 12 Victoria, chapter 74, and 13 & 14 Victoria, chapter 62, as so conclusive an answer to the objection of the want of registration, as it appears to me to be, and I am apprehensive, therefore, and I may have fallen into some misapprehension on the subject. If, however, it should appear that I have made no mistake on this point this judgment will stand, but if it should appear that I have misapprehended the effect of the repeal of the statutes 12 Victoria, chapter 74, and 13 & 14 Victoria, chapter 93, then the plaintiffs'

counsel should have an opportunity, if he should desire it, of answering the argument which had occurred to me from the requisitions of the act regarding the evidence of *bona fides* in the mortgages we are considering; and which argument, I may observe, appears to me at present so strong, that unless successfully combated, it will lead me, I think, to a different conclusion from what I have mentioned with regard to the effect of notice.

To sum up the argument in regard to the law of the cases, I may conclude by saying that as at present advised, I hold this instrument to be a chattel mortgage within the meaning of the acts of parliment in force at the time of its execution; that actual notice of it, derived from another source, would not remedy the want of registration; but that the acts of parliament which made registration of it necessary having been repealed before any purchase or mortgage of the goods comprised in it had been made, and before it had been avoided by any creditor, it thenceforth became good and valid without registration, and was good and valid to the extent I have mentioned, at the time of the execution of the assignment in question in this cause.

Decree.—Declare plaintiffs under deed of the 21st of July, 1856, entitled to a lien or charge upon all goods which belonged to defendant Rutherford before the execution of the assignment to the defendants Forbes and Lowrie, and upon all books and other debts and securities which before the execution of such assignment were due to or held by Rutherford in respect of his trade or business, except, &c., as hereinafter mentioned, for all moneys due to the plaintiffs, or to third persons, and for which plaintiffs are also liable, in respect of goods purchased by him from the plaintiffs, or third persons, upon their credit, or notes, or otherwise, with interest—order and decree the same accordingly.

Declare plaintiffs not entitled to any lien upon any goods comprised in said assignment, not purchased from the plaintiffs, or from third persons, with their money, or with the produce or proceeds of goods purchased from the plaintiffs, or upon their credit; or upon any book or other debts or securities comprised in such assignment, and owing or held in respect of any such goods—order same accordingly.

Declare plaintiffs entitled to a lien or charge on all goods, book and other debts belonging, owing to, or held by, Rutherford before the execution of said assignment, except such as shall be shewn to the satisfaction of the master not to have been purchased from the plaintiffs, or upon their credit, and except such book and other debts, &c., as shall be shewn to be held in respect of such goods—order same accordingly.

Declare that under the circumstances of this case the presumption as to goods, debts and securities affected by such lien ought to be in favour of the plaintiffs, and that it is incumbent on the defendants to rebut such presumption.

Reference to the master at Guelph to take an account of what is due to the plaintiffs, or to third persons, on notes or otherwise, and in respect whereof the plaintiffs are hereinbefore declared to have such lien or charge as aforesaid. And the master is also to take an account of the goods, book and other debts and securities upon which the plaintiffs are hereinbefore declared to have such lien or charge as aforesaid, and to separate the same from the other goods, debts, and securities comprised in such assignment; and in making such division the master, where it appears that a lot of goods, not purchased from the plaintiffs, or upon their credit, have been partly paid for, but not what particular goods have been paid for, is to make an equitable apportionment of such goods, and to refer the moneys paid thereon to a proportionate part thereof to be designated by the master.

Order that a proper person be appointed to receive the stock in trade, assets, book debts, bills, notes, securities and effects applicable to the payment of the plaintiffs' claim, such person so to be appointed receiver, first giving security to be approved of by the said master, to be answerable for what he may receive of the said estate and effects, and to pay the balances which he may receive into the bank, as hereinafter directed, or as this court may hereafter direct.

Order the defendants to deliver all goods, debts, and securities upon which the master shall ascertain that the plaintiffs have such lien or charge, to such receiver, and that he be quieted in the possession thereof.

Order such receiver to sell such goods, and to collect and enforce such debts and securities, and be at liberty to use the name or names of the defendants, or any of them, for that purpose, he first indemnifying them or him against the same; and he is to pass his accounts from time to time, and to pay the balances that shall be reported due from him unto the bank, &c., subject to the further order of court.

Order receiver to pay plaintiffs, or third persons entitled thereto, out of the moneys to be realized and collected, as aforesaid, all and every sum and sums of money in respect whereof the master shall find that the plaintiffs have such lien or charge as aforesaid, and he is to be allowed the same in passing his accounts. Order the master to report separately and without delay, as to what is due to the plaintiffs, or to third persons, and in respect of which it is hereinbefore declared that the said plaintiffs have such lien or charge.

All parties, including the receiver, to be at liberty to apply from

time to time as occasion shall require, by way of objection to the master's proceedings or otherwise.

Order that plaintiffs shall have their costs to the hearing. Reserve further directions and subsequent costs.

[After the decree had been completed the defendants intimated their intention of appealing, but the cause, it is stated, has since been settled by a deed of compromise, securing to the plaintiffs 10s. in the £ of their claim.]

The Church Society of the Diocese of Toronto v. Crandell.

Mortmain—Corporation authorised to hold lands without license.

By the act of incorporation, 7 Victoria, chapter 63, the Church Society of Toronto is enabled to hold real estate without any license for that purpose.

Statement.—This was a suit to foreclose a mortgage, the interest in which, as stated in the judgment, had, by devise, become vested in the plaintiffs. The defendant *Crandell* answered the bill, setting up the defence, amongst others, "that the devise or bequest is void, as being contrary to the form and intent of an act passed in the ninth year of the reign of his late Majesty King George the II., entitled, 'An Act to prevent dispositions of lands whereby the same become unalienable;' that the plaintiffs are therefore not entitled to receive from this court the relief sought," and claimed the same benefit as if he had demurred.

The cause came on to be heard by way of motion for decree, before His Honour V. C. *Spragge*.

Mr. *G. D. Boulton*, for the plaintiffs, relied upon

the words of the first and second sections of the statute, as clearly entitling the plaintiffs to the decree asked for.

Mr. *Hector Cameron*, for defendant, *Crandell*, contra, referred to Doe *Anderson* v. *Todd*, (*a*) and *Hullock* v. *Wilson* (*b*) contending that the devise was void under 9 George II., ch. 36, which contains no provision for the Crown giving a license to dispense with the formalities required by it. The Church Society Act only says that the Society may hold lands, &c, without a license, but that is not sufficient to render valid a devise, by the statute of George II. declared to be void. The act incorporating the plaintiffs refers only to the provisions contained in the earlier mortmain acts before 9 George II.

Judgment.—SPRAGGE, V. C.—The bill is for the foreclosure of a mortgage made by the defendant *Crandell* to one *Hall* and assigned by *Hall* to the late *Alexander Burnside*, who devised the same and the lands therein comprised to the plaintiffs. *Crandell* sets up that the devise is void, being in mortmain.

I think the objection is not tenable. The statute incorporating the plaintiffs together with the Church Society of the Diocese of Quebec, 7 Vic., ch 68, enables them to purchase, take, have, hold, receive, enjoy, possess and retain *without license in mortmain*, or *lettre d' amortissement*, all messuages, lands, &c., which had been, or should be thereafter given, granted, purchased, appropriated, devised or bequeathed in any manner or way whatsoever, to, for and in favour of the Church Societies respectively, and to do, perform, and execute all and every lawful act and thing useful and necessary for the purposes in as full and ample a manner to all intents, constructions and purposes as any other body politic or corporate by law might or ought to do.

(*a*) 2 U. C. Q. B. 82. (*b*) 7 C. & P. 28.

By section 2 all lands, &c., theretofore or thereafter given, granted, purchased, appropriated, devised, or bequeathed to, for, or in favour of the Church Societies respectively are vested in them respectively. I think the reason upon which a corporate body having a license of mortmain, was held entitled to hold land, shews that a statute dispensing with such license must enable the corporation to take and hold land. By the mortmain acts lands conveyed to corporate bodies were forfeited not to the donor, but to the Crown; and the Crown, by its license, could waive the forfeiture; and this was done by license of mortmain.

Many acts have been passed in England, enabling corporate bodies to hold lands; the language dispensing with the statute of mortmain varies in different acts—in one—39 Elizabeth, ch.5, it is "without license, or *writ ad quod damnum*, the statutes of mortmain or any other statute or law to the contrary notwithsanding"—in another, 4 Wm. IV., ch. 38, it is "without incurring the forfeitures of the statutes of mortmain," while in four different acts I find the language the same as in the one which incorporates the plaintiffs. These are 13 & 14 Car. II., ch. 12; 17 Car. II., ch.3; 51 Geo. III., ch. 105; and 10 Geo. IV., ch. 25, in all these the words are, "without license in mortmain."

I do not know indeed that it has been held that these words, or any words referring in terms to mortmain or to the statutes of mortmain, are necessary. An enactment enabling a corporate body to take and hold lands could scarcely be held to be a dead letter for want of them. In the act in question the enabling words are clear and explicit, and section 2 vests lands, &c., conveyed or devised, in the Society.

BURGESS v. HOWELL.

Vendor's lien—Priority of registered judgment over an unregistered mortgage.

A purchaser of real estate executed to his creditor a mortgage thereon for a balance of unpaid purchase money, but which was not registered until after a judgment recovered against the purchaser had been recovered and registered. *Held*, that the judgment had priority to the mortgage, although the deed to the purchaser had never been registered; and that under such circumstances the vendor did not retain any lien for the unpaid purchase money.

The facts are clearly stated in the judgment of His Honour V. C. *Esten*, before whom the cause was heard.

Mr. *Barrett*, for plaintiff.

Mr. *E. B. Wood* for defendants.

Judgment.—ESTEN, V.-C.—In this cause the plaintiff conveyed to one *Pichell* and received a mortgage for an unpaid balance of purchase money. The conveyance has never been registered. A judgment was afterwards obtained and registered against *Pichell*, and then the mortgage was registered, and afterwards *Pichell* made an assignment for the benefit of his creditors, and then the lands were offered for sale by the sheriff under the judgment and purchased by Mr. *Wood*. I think that although the conveyance was not registered the mortgage was void under the registration laws as against the judgment. The plaintiff, however, contended in order to obviate this consequence that the mortgage being to secure unpaid purchase money he has a lien for the amount which prevails over the judgment because incapable of registration; in other words, that the plaintiff, having taken a mortgage and neglected to register it, and thereby becoming postponed to the judgment creditor, has a right to resort to his lien, which is not affected by the registration laws, and thereby maintain his priority. But this would be extremely unjust. It never was or could be contended

that a vendor, taking a mortgage on the lands sold for an unpaid balance of the purchase money, retained his lien on the same lands for the same amount. The utmost that has ever been contended is, that the vendor taking a mortgage on other lands may possibly retain his lien on the lands sold; or taking a mortgage on part of the lands sold, may perhaps retain his lien on the remainder, or taking a mortgage on the lands sold for part of the purchase money may retain a lien for the residue, although it is difficult to imagine how the lien could be deemed to subsist in any of these cases: but it has never been suggested that a mortgage and lien could exist contemporaneously for the same sum on the same lands. The case of *Baldwin* v. *Duignan* (*a*) was decided on this principle, and the cases of *Hughson* v. *Davis*, (*b*) and *Davis* v. *Bender* (*c*) are not at variance with it. The plaintiff, by taking the mortgage, has become postponed through want of registration. It was the consequence of his own default, and he cannot repudiate it and revert to his lien, which he had abandoned.

Mr. *Wood* himself considered that he purchased nothing at the sheriff's sale, because the judgment debtor had previously conveyed the estate to trustees. But I think he conceded too much. He in fact purchased all the estate which the debtor had at the time of the registration of the judgment, which was in fact the absolute estate because it prevailed over both the mortgage and the estate conveyed to the trustees, and therefore in strictness the bill might be dismissed with costs, but Mr. *Wood* waiving his purchase and consenting to a sale, a decree may be made to that effect, giving priority to the judgment creditor.

(*a*) Ante vol. vi, p. 595.
(*b*) Ante vol. iv. p. 588.
(*c*) Ante vol. iv. p. 625.

LANGSTAFF v. PLAYTER.

Trusts—Statute of frauds—Parol evidence.

Parol evidence to establish trusts not shewn upon a conveyance absolute in form, is inadmissible.

The facts appear in the judgment of his Honour V.C. *Sprague.*

Mr. *Barrett* for plaintiff.

Mr. *Fitzgerald* for defendant.

Judgment.—ESTEN, V.C.—It is quite clear that the deeds of 1843 and 1845, were made to divide different parts of the estate, and that both of them being void for non-compliance with the requirements of the statute, the deed of 1849 was made to confirm them, or rather to make the partition which it had been attempted to make, ineffectually, by those deeds. It is quite clear that when the deed of 1843 was made, the intention was that the proceeds of the sale of the Dunwich lands should be divided between Mrs. *Playter* and Mrs. *Langstaff*. If *James Playter's* evidence was not read, I think it must be presumed that that intention continued at the execution of the deed of 1849, for there is nothing to oppose to that presumption but the evidence of the *Smiths*, to which little weight can be attached. If, however, *James Playter's* evidence was read, I am not satisfied that the fact was not as he represents, and I think it would be wrong to disturb the legal title.

But supposing it clear, as a matter of fact that this property was conveyed to Mrs. *Playter* on the understanding that the proceeds of the sale of it were to be divided between her and Mrs. *Langstaff*, is not the objection founded on the statute of frauds insuperable? Is not this a secret trust such as that statute was designed to invalidate? There is no writing, as in *Cripps* v. *Jee* (*a*), shewing the transaction to be different from

(*a*) 4 Br. C. C. 472.

what it purports to be, which would let in the parol evidence of the whole transaction; the case cannot be brought within the principle of those cases in which parol evidence of an agreement relating to land has been received in order to shew the consideration of a conveyance. The rule established by the case of *Podmore* v. *Gunning* (*a*), and other cases of that class has generally been applied to wills. If it should be extended to deeds, I do not know any case to which the statute would apply. Indeed the cases of *Cripps* v. *Jee*, and of *Leman* v. *Whitley* (*b*), seem to imply that without some special circumstance such as occurred in the former case, the statute bars the relief. The true distinction seems to be, not between deeds and wills, but between cases where the estate is conveyed simply upon an understanding that it is to be held on a certain trust, without which understanding it would never have been conveyed, which is not sufficient, as the cases of *Cripps* v. *Jee*, and *Leman* v. *Whitley* shew; and cases where the intention has been to comply with the requirements of the statute, as to declare the trust, or make the devise, and the party has been fraudulently prevented or dissuaded by the other party undertaking, if he get the estate to carry his intention into effect, with the intention however of keeping the estate. Nothing of that sort occurs here, and therefore I think the present case is not within the principle of that class of cases; but it would seem to be within Lord *Hardwick's* doctrine, in *Walker* v. *Walker* (*c*), and to be a parol agreement partly performed so as to call for its complete execution. Upon this point it may be reargued if desired.

Judgment—SPRAGGE, V.C.—The question raised in this case is whether it can be shewn by parol evidence that certain lands, to which parties were entitled in common, and which are called in the pleadings the Dunwich lands, were conveyed upon certain trusts not

(*a*) 7 Sim. 644. (*b*) 4 Russ. 423.
(*c*) 2 Atk. 99.

shewn upon the conveyance. Three several conveyances were executed at successive periods for the purpose of partition, and it is alleged that the Dunwich lands, which formed only a portion of the lands to be partitioned, were not to be retained by the party to whom they were in terms allotted, but were to be sold, and the proceeds of sale divided between the mother of the plaintiff and the defendant; and the plaintiff desires to shew by parol evidence the existence of such trust. Upon this point I have consulted the authorities to which we have been referred, and some others.

In some of the cases the bills were filed, not to carry out an alleged trust, but upon allegations by heirs at law stating a devise absolute in terms to third persons, but upon secret trusts for charitable purposes, not valid at law. *Addlington* v. *Cann* (*a*), *Muckleston* v. *Brown* (*b*), and *Strickland* v. *Aldridge* (*c*), were cases of this nature. In this class of cases the court could not be asked to interfere on the ground of fraud, for in none of them did the devisees attempt to keep for their own use that which they had received as trustees for others. The contention in those cases was, whether the defendants should be permitted simply to plead the statute of frauds, or should be compelled to discover the trusts; they were compelled to answer, and the court gave relief, interfering on behalf of the heir, on the ground that the secret trusts were of a nature which were contrary to public policy. These cases differ from the one before us in this cardinal point, that in none of them was the court asked to *carry out* a trust created by parol, but the contrary.

The case of *Cottington* v. *Fletcher* (*d*), comes nearer to this case; there, the plaintiff, a Roman Catholic, the owner of an advowson, assigned it to the defendant for the term of 99 years; he afterwards became a Protestant, and then filed his bill, alleging that he had as-

(*a*) 3 Atk. 141.
(*b*) 6 Ves. 52.
(*c*) 9 Ves. 516.
(*d*) 2 Atk. 155

signed in trust for himself, and in order to avoid the penalties of certain statutes, and prayed for a re-assignment. The defendant pleaded the statute of frauds, alleging that there was no declaration of trust in writing; but by his answer admitted that the advowson was assigned to him for the purpose stated in the bill. Lord *Hardwicke* overruled the plea. Lord *Eldon* expressed a doubt in *Muckleston* v. *Brown*, somewhat qualified afterwards in *Strickland* v *Aldridge*, whether Lord *Hardwicke* could properly give relief in that case, inasmuch as the plaintiff had to come to be relieved against his own act in fraud of the law; but he did not dissent from the principle of the decision in any other respect.

In the two cases before Lord *Eldon* to which I have just referred, he puts the case of devises without any trust being sufficiently declared under the statute. In *Muckleston* v. *Brown* he says: "Suppose the trust was to pay £100 out of the estate; and the devisee undertakes to pay it, if it is not inserted in the will, this court would have compelled an answer on the ground that the testator would not have devised the estate to him unless he had undertaken to pay that sum. The principle is, that the statute shall not be used to cover a fraud." In *Strickland* v. *Aldridge* he puts the case of "an estate suffered to descend, the owner being informed by the heir that if the estate is permitted to descend he will make a provision for the mother, wife, or other person," adding, "there is no doubt this court would compel the heir to discover whether he did make such promise. So if a father devises to his youngest son, who promises that if the estate is devised to him he will pay £10,000 to the eldest son, this court would compel the former to discover whether that passed in parol, and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000." Lord *Eldon* prefaces these two latter instances with this remark: "The statute was never permitted to be a cover for fraud upon the private rights of individuals; and though

within the intention, it cannot be said a trust is declared; under these circumstances, it is clear a trust would be created upon the principle on which this court acts as to fraud."

I take it that Lord *Eldon* meant in the instances put by him that the testator was induced by the promises made to him to leave the estate otherwise than he would have done but for those promises; and that having induced the testator to leave the estate to him by making a promise to hold it, and dispose of it in a particular way, it would be sanctioning a gross fraud to allow him to keep it himself. This, indeed, is going a step further than is done in allowing a person who has made an absolute conveyance to shew that it was intended by way of security only; for in such cases it is treated as a fraud in the lender not to take a mortgage in the usual way—*Cotterel* v. *Purchase*, (*a*) *England* v. *Codrington* (*b*)—while in the cases of trust the fraud consists in taking advantage of the statute against the trust. It may be said, perhaps, that the fraud shall have relation back to the promises which subsequent conduct demonstrates to have been made with a fraudulent intent, but this could hardly be said in *Cottington* v. *Fletcher*, and I do not know that it is any where placed on that ground.

In the several cases of trust to which I have referred, the trust was confessed by the answer, and in the cases put by Lord *Eldon* he supposes them disclosed by answer; and the court has certainly in some cases relied upon the answer as not a departure from the spirit of the statute of frauds, saying that there was no danger of perjury when the facts furnishing a title to relief was confessed by him against whom relief was sought: but in *Young* v. *Peachy*, (*c*) the conveyance was relieved against upon oral testimony; the case was, that a father, tenant for life, had prevailed upon his daughter, tenant in tail, to join with

(*a*) Ca. tempt. Talbot 61. (*b*) 1 Eden. 169.
(*c*) 2 Atk. 254.

him in suffering a common recovery, promising her that he would take the estate so to be created and execute a conveyance to declare the uses thereof, as a trustee for her and her heirs. The father afterwards became bankrupt and died, the daughter also died, and the bill was filed by the heir of the daughter, against the assignees of the father. The object of the conveyance to the father was to save the property from the consequences of the improvidence of the daughter's husband. Lord *Hardwicke* established the trust. His language is strong; comprehensive enough, I think, to cover such a case as this. I refer to the two passages which were quoted by the Chancellor in *LeTarg* v. *D'Tuyll.* (*a*)

In *Pedmore* v. *Gunning*, a very elaborate judgment was given by the Vice-Chancellor; he was against the relief, considering the alleged trust not proved; the answer in that case did not assist the plaintiffs. In concluding his judgment the Vice-Chancellor said, "My opinion is, that the plaintiffs, if they had proved their case, would have been entitled to the relief which they ask."

The cases seem to go this length, that the court has established parol trusts against defendants without any admission of the trusts in their answer, and although they set up the statute of frauds, and that relief has not been confined to cases where an intended devise has been intercepted by the promise of the heir; or a devise made upon a promise on the part of the devisee that he will apply the whole or part in a particular manner; but relief has been extended to cases of conveyances for a particular purpose not expressed in writing—*Cottington* v. *Fletcher*, and *Young* v. *Peachy*, are cases of the latter class.

The doctrine, to the full extent, I think, which I have stated, has been sanctioned by very high authority, but

(*a*) Ante vol. III. p. 375.

we cannot help feeling that it reduces the statute of frauds (I refer to the 7th section) to a dead letter. It is said the court will not allow the statute to be the occasion of fraud. The statute declares that all declarations or creations of trusts of any lands, &c., shall be manifested and proved by some writing, signed, &c., or by will, or else they shall be utterly void, and of none effect; a plaintiff comes into court not alleging that he was circumvented by fraud, or that any undue advantage was taken of him, but simply that there was a trust of which he is the object, and that he is prepared to prove it by parol evidence. To the objection that there is but one way of proving such a trust, for the statute has made it necessary that it should be manifested and proved by writing, he is allowed to say that to permit such an objection to prevail would give occasion to fraud, and "the statute shall not be used to cover a fraud," but this assumes that there is such a trust, for unless there be a trust there can be no fraud in holding the lands according to the conveyance or devise, or by descent, as the case might be. It must be first shewn that there is such a trust before it can be said to be a fraud to refuse to give effect to it, and shewn as the law requires it to be shewn, otherwise the fraud must consist in requiring that the trust be shewn, as the statute requires that it should be shewn. To take the case of the heir of the alleged trustees, who is wholly ignorant of the alleged trust, there can be no fraud—nothing in the least against good conscience, speaking generally—in his requiring that the alleged trust should be shewn in the solemn manner which the statute has declared to be proper, before his estate is affected by it. Now how is this met? In this way, we must ascertain whether there is such a trust, because if there is, and the *cestui que trust* were not allowed to shew it, the statute, by preventing his shewing it by ordinary evidence would serve as a cover for fraud, and in this way a party alleging a parol trust of real estate is, in a court of equity, in precisely the same position as if the 7th section of the statute of

frauds had no existence; he shews the same thing in the same way, only he gets at it in a less direct manner, by a process of reasoning appealing to the court to prevent a possible fraud.

Where the defendant is one acquainted, or stated to be acquainted, with the alleged trust, the reason for allowing him to shield himself behind the statute is less obvious, and the court would certainly feel that they could be doing him no wrong in fixing his estate with a trust admitted by himself; but, on the other hand, the temptation to deny the trust if he could not protect himself by pleading the statute, has been a fruitful source of false swearing.

The general question, whether a trust could be shewn by parol, arose directly in *Leman* v. *Whitley*, (*a*) and was distinctly negatived by Sir *John Leach*, in a case where, as he said, there could be no doubt of the moral honesty of the claim made by the bill. The case of *Podmore* v. *Gunning* is more recent, but it was only an expression of opinion the other way, not a decision; and in this state of the authorities we are at liberty to follow *Leman* v. *Whitley*, and in my judgment to do so is the sounder course.

In the case before us it is not admitted by the answer, that upon the execution of the last conveyance, made with a view to a partition, there was any trust in regard to the Dunwich lands not expressed in the conveyance. It is admitted that the conveyance of 1843, was taken with a trust in regard to those lands not expressed in the deed, namely, that Mrs. *Playter* should sell them, and divide the proceeds equally between herself and her sister, the plaintiff's mother, but it is alleged that between the execution of these two conveyances another arrangement was made by which the Dunwich lands

(*a*) 4 Russ. 423.

were to be the absolute sole property of Mrs. *Playter*. The plaintiff then, if he succeeds, must succeed in shewing the alleged trust by parol evidence. He has given such evidence, and there is some evidence the other way. Upon the whole, I think the evidence preponderates in favour of the plaintiff, I should say considerably so, and I have therefore thought it necessary to examine the authorities in regard to its admissibility, and the conclusion at which I arrive is that it is not admissible, and that the bill must be dismissed.

HOWLAND V. MCNAB.

Corporation—Injunction—Joint stock company—Subscription for stock—Payment on account of stock.

The act (22 Victoria, chapter 122), incorporating the North-west Transit Company, enacted that it should not be lawful for the Company to proceed with their operations under the act until £50,000 of the capital stock shall have been subscribed, and ten per cent. shall have been paid thereon. Subsequently, and before £50.000 had been subscribed or the percentage paid thereon, a proposition was made by one C. to certain stockholders in the enterprise that C. should sell a steam vessel belonging to him to the Company for £5,000 and that in that event he should become a subscriber to the amount of £50,000, and that the steamer should be paid for by taking her as a payment of 10 per cent. on the £50,000; which was acceded to, and the subscription and purchase made accordingly in compliance with a resolution of the Company.

Held, that this was an evasion of the statute, and an injunction was granted on motion restraining the Company from proceeding with any of the operations thereof until the conditions pointed out by statute had been complied with.

Statement.—This was a bill filed by *William P. Howland, William McDonnell Dawson, Lewis Moffatt, John McMurrich, John L. Vickers, Jean Charles Chapais, Joseph E. Turcotte*, and *Simon James Dawson*, against Sir *Allan McNab*, Baronet, *William C. Kepel*, commonly called Viscount *Bury, John B. Robinson, Clark Ross, David B. Read, John McLeod, John Cayley, Henry John Boulton, John McNab, Alfred R. Roche, Allan McDonnell, Angus D. McDonnell*, and the *North West Transit Company*, setting forth the passing of the act *

* 22 Vic., ch. 122, passed the 16th of August, 1858.

incorporating the company, and that by the sixth section thereof it was declared that it should not be lawful for the company to proceed with their operations under the act until fifty thousand pounds of the capital stock should have been subscribed, and ten per cent. paid thereon.

The bill further set forth the passage of a subsequent statute,* changing the name by which the company was orginally incorporated, and the passage of certain by-laws of the company in pursuance of its provisions, which it is considered unnecessary, so far as regards the questions raised in the present application, to state more particularly.

The bill further alleged, that although the company was not in a position to commence operations, owing to the fact of the sum of £50,000 not having been subscribed, the defendants, other than *John McNab*, had commenced, and were carrying on operations of the company, and had entered into a contract with one *E. W. Carruthers*, for the conveyance of mails, freight, &c., from Collingwood to Red River, and had entered into other arrangements, and expended the moneys of the company upon objects which would be within the scope of the charter of the company, if the company had been in a position to commence such operations, but that the same were in direct contravention of the charter, until the sum of £50,000 had been subscribed, and 10 per cent. paid thereon. The bill also charged that the defendants other than *John McNab* and *Angus D. McDonnell*, were acting illegally as directors of the company, charging their election to have been obtained by illegal votes.

The bill further set forth, that an arrangement had been entered into by the directors with *Carruthers* for his

* This act was passed on the 4th of May, 1859, and is ch. 97 of 22 Vic., (2nd session,) there having been, as the dates shew, two sessions of the legislature during that year of Her Majesty's reign.

becoming a stockholder in the company to the amount of £50,000, and paying the amount of his deposit by the transfer of a steam-vessel owned by him, at the price or sum of £5,000.

The other facts necessary to be stated are clearly set forth in the judgment.

Under these circumstances a motion was made before His Honour V. C. *Spragge*, for an injunction to restrain the defendants from carrying on the affairs of the company.

Mr. *Hector*, Mr. *A. Crooks*, and Mr. *Blake*, for the plaintiffs, cited in support of the application *Niagara Falls Road Company* v. *Benson*, (*a*) *Nelson and Nassagaweya Road Company* v. *Bates*, (*b*) *Patterson* v. *Holland*, (*c*) as authorities for requiring the payment of 10 per cent. to be a cash payment. That this payment was clearly a condition precedent to any action being taken by the direction for carrying on the affairs of the company; and if the transaction with *Carruthers* were *bona fide*, and not colourable, still the provision of the statute could not, by what is here attempted, be said to have been complied with. The act is clearly illegal, and if allowed to prevail as a compliance with the requirements of the statute, no protection whatever would be afforded to the public as to the solvency of a company chartered as this was; that the purchase of the vessel was plainly an operation within the act, and therefore *ultra vires:* such purchase, and the subscription for stock were concurrent acts, the one being in reality the consideration for the other—*North Shields, &c.*, v. *Davidson*, (*d*) *Domville* v. *Birkenhead*, (*e*) *Hodgson* v. *Earl Powis*, (*f*) *Charlton* v. *Newcastle, &c., Railway Comp.*, (*g*) *Gordon* v. *Cheltenham and G. W. R. R. Co.*, (*h*) were also referred to and commented on by counsel.

(*a*) 8 U C. R. Q. B. 307.
(*b*) 12 Ib. 586.
(*c*) Ante vol. vii., p. 1.
(*d*) 4 K & J. 686.
(*e*) 7 Ry. Ca. 932.
(*f*) 7 Ry. Ca. 956.
(*g*) 5 Jur. N. C. 1096.
(*h*) 2 Ry. Ca. 800.

Mr. *Strong*, Mr. *G. D. Boulton*, and the defendant *Boulton* in person, *contra*.

In opposition to the application it was contended that payment in a boat was within the meaning of the words used in the statute, none other could have been used if payment in kind had been contemplated, and intended to be authorised by the act. In Webster's dictionary the meaning of payment is given as being a satisfaction of a claim by money or money's worth. The company could certainly have received the amount from *Carruthers* in money, and afterwards paid it back to him as a purchase of the boat. The object of the sixth section of the act is simply to protect the public against a bubble company, and this is done as effectually by payment in a steamer to be used upon the route, as by payment in cash. If rent reserved in money be paid in kind, such payment is pleadable as a payment according to the terms of the lease. In the limited partnership act the words there made use by the legislature is, an "actual cash payment," and therefore the case of *Patterson* v. *Holland* is no authority here; and if the boat be receivable by the company as stock, it cannot be said to have been an operation within the meaning of section 6.—*Vermont Central Railroad Co.* v. *Clayes*, (*a*) *Corry* v. *Yarmouth and Norwich Railway Co.*, (*b*) *Clarence Railway Co.* v. *North of England, &c., Railway Co.*, (*c*) were also cited.

Judgment.—SPRAGGE, V. C.—The plaintiffs, eight in number, sue on behalf of themselves and all others, the shareholders in the North West Transit Company, except the defendants, against *Sir Allan McNab*, and twelve others, and the North West Transit Company.

The bill, so far as the injunction sought by the application is concerned, is based upon the 6th section

(*a*) 1 Am. Ry. Ca. 226. (*b*) 3 Hare, 593.
(*c*) 2 Ry. Ca. 763.

of the act of incorporation, (*a*), which provides that: "It shall not be lawful for the said company to proceed with their operations under this act until £50,000 of the capital stock shall have been subscribed, and ten per cent. shall have been paid thereon."

The bill alleges that up to the 4th of June, 1860, not more than £4,475 of the capital stock had been subscribed; that on that day the defendant *Carruthers* proposed to the defendants, other than himself, and defendants *Angus McDonell* and *John McNab*, that the company should purchase from him for the purposes of their business, the iron steamer Mohawk, at the price of £5,000, a sum alleged to be far beyond its value; and that he proposed that in the event of such purchase, he should become a subscriber to, or shareholder in the company to the amount of £50,000; and that the company should pay for the steamer by taking her as a payment of ten per cent. on such £50,000; that this proposal was agreed to and a resolution passed accordingly, and that thereupon, on the same day, *Carruthers* executed to the company an assignment of the steamer, and subscribed the stock book for £50,000; and the defendants other than the three named received the steamer as a payment of ten per cent. upon the capital so subscribed; those defendants acting as elected directors of the company.

The bill impeaches this purchase of the steamer as void under the circumstances, and prays that such purchase and the subscription of stock by *Carruthers*, and the fraudulent payment thereon, may be set aside; and for an injunction restraining the defendants from carrying on any of the operations of the company until the sum of £50,000 shall have been legally subscribed, and ten per cent. duly paid thereon.

The evidence bears out the allegations of the bill to which I have referred, except, perhaps, as to the value

(*a*) 22 Vic., ch. 122.

of the steamer, as to which it is conflicting. It is not established that it is worth less than £5,000. The evidence shews that the stock-book was subscribed by *Carruthers* after the resolution accepting his proposal had been adopted; the assignment of the steamer was also as a matter of course after the resolution. The plaintiffs contend that the assignment of the steamer was not a payment of ten per cent. within the meaning of the act, and that the purchase of the steamer was a proceeding with the operations of the company before the necessary capital stock had been subscribed and ten per cent. paid thereon. Upon the first point, it is said that the payment intended by the act is a money payment, and that a transfer of something in lieu of money and accepted instead thereof is not within the act. The question is not without its difficulties. The limited partnership act prescribing in express terms "actual cash payments," scarcely assists in their solution; and the cases referred to in the eighth and twelfth volumes of the Upper Canada Queen's Bench reports are cases of such obvious evasions of the acts under which the pretended payments there brought into question were made that they were plainly colourable; they were plainly mere attempts to seem to comply with the letter of the act, or to do what might be accepted as equivalent to what the act required.

A transaction where, though not money, that which is familiarly called "money's worth," is absolutely transferred, and the thing transferred is of a nature which the company would have to purchase for the conduct of its business, is of a different nature from the transactions in the cases referred to. Still even such a transaction is open to abuse; but, on the other hand; it must be able to bear the test of scrutiny, and is liable to be set aside if shewn to be other than *bonâ fide*. Still the question is not whether such a mode of satisfying the per centage of stock subscribed is open to objection, but whether it is a payment within

the statute.—*Re the North Shields Quay und Improvement Company.—Davidson's case* contains some indications of the view of an eminent judge, Sir *W. Page Wood*, in a somewhat similar case. Comissioners had been appointed under an act of parliament, for the formation of a quay on the river Tyne at North Shields, and to raise money for the purpose. They failed to raise the money, and a joint stock company was formed to take a transfer of the commissioners' act and to provide the requisite capital by means of shares. It was necessary under the standing orders of parliament to make up a certain amount of capital before the bill for the formation of the company could be introduced. *Davidson* was a contractor, and the requisite capital was made up by his subscribing for 620 shares, 300 of which was to be paid for in labour and materials upon the projected works. An act of parliament was obtained, but the company was unable to raise the necessary capital; the project was abandoned and the company wound up. Upon the proceedings under the winding-up acts the question was raised, whether as between *Davidson* and the other subscribers he was liable as a contributor for the shares which he was to pay for in labour, and it was argued in his behalf that the arrangement with him was that he should take only so many shares as might be necessary for the purpose of his contract, and as the contract had been abandoned by the company, the liability of the contractor was at an end. It was further argued that the arrangement did not infringe the standing orders of the House of Lords, inasmuch as the same amount would be contributed in labour which those orders required to be contributed in money.

It is the remarks of the learned Vice-Chancellor upon the latter argument that are material to the case. He says: "It was argued that the agreement on which Mr. *Davidson* relies, would not be a fraud upon the standing orders of the House of Lords, inasmuch as the amount which these orders require to be subscribed for in the shape of capital, before the house will sanc-

tion an undertaking of this nature, would be fully made up in the form of labour. To this there is an obvious answer: that the arrangement on which Mr. *Davidson* insists is not an absolute stipulation on his part to do £6,200 worth of work, but only to do so much work as might be required to carry out the contract. Whether that answer is sufficient, I will not stay to enquire, for this is not the pressing part of the case."

In another passage he says: "It might possibly have been open to them to agree with him, that as to the 300 of his 620 shares, whenever a call was made they would set off the amount of the call against work done by him, so as to entitle him to say eventually that those shares had been paid fully up."

In the first passage the arrangement not being an absolute stipulation on *Davidson's* part to do so much work, is given as the reason why it would be a fraud on the standing orders of parliament. In the second it is suggested that it might have been open to the parties to agree upon a present subscription of capital, that the calls should be paid for in work, to be done after the agreement. The standing orders required that a certain amount of capital should be subscribed for, and as put by counsel for *Davidson*, payable in money. Now, what Sir *W. Page Wood* suggests might be a good subscription of capital, would be less than was actually done in this case, (assuming the steamer to be of the value of £5,000), because here a chattel, useful to the company, in other words, money's worth, was actually transferred to the company, while in *Davidson's* case, what was suggested was an agreement to pay in work at a future time; or, at least it may be said that if taking stock, with an agreement to pay calls in work at a future time, would be a good subscription for stock, a delivery of a valuable and useful commodity *bona fide* transferred, and received in lieu of money, upon calls, would be also good.

Sir *W. Page Wood*, certainly does no more than suggest what might be good, and that in guarded terms; but I should hesitate upon an interlocutory application to pronounce that bad which he had suggested might be good. Besides, the point is one upon which different minds might not improbably arrive at different conclusions. The inclination of my mind (I can say no more) is rather in favour of the defendants upon this point; but were it otherwise, I think I should not do right, upon that point alone, to grant the injunction prayed for, when other members of the court might not improbably think differently.

There are passages in the judgment of Sir *John Stuart*, in *Burt* v. *The British National Insurance Company*, (*a*) which are also in favour of "money's worth" being receivable in lieu of money upon a subscription for stock.

But supposing such a commodity receivable in payment of a call upon stock, the question arises whether this purchase or acquisition could be made at the time it was made. I have already referred to the 6th clause of the act and the circumstances of the transaction. Mr. *Strong* contends that it was not a proceeding "with their operations," on the part of the company, but something preliminary thereto.

The proposed "operations" of the company are set out in sections 2 & 3. By the latter the company is authorized to enter upon lands within certain limits, to survey the same, to set out or ascertain such parts as might be considered necessary and proper for the "making of roads, railways, tramways, canals, and the improving and rendering navigable water-courses, and channels of water communications, and so forth, and all such other works, matters, and conveniences as

(*a*) 5 Jur. N. S. 355.

they shall think proper and necessary for making, effecting, preserving, improving, and maintaining all, and every the works contemplated by this act." They are further authorised "to construct, acquire, charter, navigate, and maintain boats, vessels, and steam vessels for carrying on trade, and conveying goods and other traffic, and passengers on Lakes Huron and Superior," and on lakes and rivers within certain limits. They are also empowered "to buy and sell and trade, and to make contracts and agreements with any person or persons whatsoever, for the purposes aforesaid, or otherwise for the benefit of the company."

From this and other parts of the act, it is apparent that the company was incorporated for the purpose of opening up one or more lines of communication within certain limits, partly through lakes, partly along rivers, and partly overland, of becoming carriers along its route, and traders within certain limits. The steamer purchased from *Carruthers* is intended, as it appears, for the conveyance of passengers, freight, and the mails. I do not suppose that the company is bound to proceed in its operations in the order in which they are set down in the act. But what appears obviously contemplated is, that the company should construct its line of communication, and then employ steam or other vessels upon it. What they have done is to employ one steamer by charter, and to purchase another to ply upon the natural waters of the lakes before constructing any part of their route, doing, in fact, what any individual might do without any special authority.

This they do as a company incorporated for the purposes specified in the act, and I cannot doubt that the employing of a steamer is a proceeding with operations under the act; it is one of the several "operations" authorized by the act. Then is the purchase, or by any other mode acquiring, a steamer for such purpose less so? I think not; that also is one of

the operations specified and authorised by the act. According to my reading of the 6th clause, nothing is authorised beyond the organization of the company until the required amount of stock is subscribed, and ten per cent. paid thereon.

Now, assuming that the arrangement respecting the steamer amounted to a valid subscription of stock and a payment of ten per cent. thereon, (as to which I express no decided opinion,) it was the arrangement itself that made up the stock subscription and the payment of the required per centage. The two things were concurrent; one did not precede the other, (or if there was any precedence, it was the purchase of the steamer,) and the statute requires the subscription and payment to precede any operation of the company. The company is not to proceed with its operations until the required capital "*shall have been subscribed and ten per cent. shall have been paid thereon.*" I would avoid placing a narrow construction upon the act, but its language is explicit, and I see no escape from the conclusion that a proceeding with operations, *not preceded* by the requisite stock subscription and payment of per centage, in an act forbidden by the statute, and that the arrangement in regard to the steamer, being, in my judgment, an act of that character, is void.

Some minor objections remain to be disposed of, and first as to the constitution of the suit—*Burt* v. *The British Nation Life Assurance Company* was constituted as this. The point was expressly raised, and the form of the suit decided to be correct. *Winch* v. *The Birkenhead, &c., Railway Company,* (*a*) is also an authority for the constitution of this suit. It is said that all the individuals composing the company ought to be made parties. In the cases I have referred to they were not made parties, nor does it appear that there was an allegation that they were too numerous; besides, in this

(*a*) 5 DeG. & S. 562.

case, it is impossible to say who at this time may be shareholders, or at any rate who who may become shareholders as the suit proceeds, as stock books are authorised to be opened in England.

It is further objected that the Attorney-General must be a party, on the ground that the sixth clause of the act is for the protection of the public; no authority is quoted for this position, and in none of the English railway cases I believe has the Attorney-General been made a party except where the interests of the Crown or of a charity have been brought in question. To make him a party upon the principle suggested, would involve the necessity of doing so whenever a provision of an act of parliament founded upon public policy was brought in question. I have seen nothing to warrant such a proposition. Another objection is, that one of the plaintiffs, *Vickers*, is not a shareholder in the company: his name appears to have been included among the others by mistake; I think it is amendable under order 9, sec. 14, and the plaintiffs applying as they do for leave to amend by striking out the name of *Vickers*, I think it should be granted.

Another objection, and I believe the last, is that the plaintiffs are not proved to be shareholders in the company; the objection that one individual of them, *Vickers*, is not a shareholder, is almost an admission that the others are so. In the stock book brought into court from the custody of the defendants, who are directors, their names appear as shareholders; and affidavits are now offered in proof of the fact.

Strictly, these affidavits should have been filed before the notice of motion, but I think I ought not to dismiss the application upon that ground. It has been twice enlarged at the instance of the defendants, and if the objection had been made instead of time being asked, the plaintiffs might have supplied the defect and given

fresh notice. I might, I suppose, upon the objection being made, have directed an enquiry upon the point before myself or otherwise, and the affidavits now offered might be used upon the enquiry. I think the proper course now will be to direct one day's notice to be given to the defendants who have made the objection, that the plaintiffs will prove the fact in question. I feel great difficulty in receiving and acting upon affidavits produced for the first time upon the hearing of the application.

With regard to the extent to which the defendants should be enjoined, I may be in error in the conclusion at which I have arrived, and, therefore, I ought not, I think, to grant an injunction in larger terms than is necessary for the protection of the interest of the plaintiffs. The act which I think illegal is the purchase of the steamer Mohawk. I think the defendants should be restrained from expending any money of the company upon her, and from purchasing that or any other vessel until the conditions provided by the 6th clause of the act are complied with. If this were a decree instead of an interlocutory order, the injunction would be to restrain the company from proceeding with any operations whatever until those conditions were complied with. But, as it is, I confine the injunction to what I consider necessary for the plaintiffs' protection.

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. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, and the Hon. Mr. Justice Richards.*]

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

MUNRO v. WATSON.

Mortgage by absolute deed—Laches—Redemption—Issue.

In October, 1840, the holder of a bond for conveyance to him of real estate, assigned over the same to a creditor in payment of his demand, the creditor paying at the same time a sum in cash, who two years afterwards obtained possession of the property, by an action of ejectment brought against the debtor, who had in the interim been in receipt of the rents. In December, 1855, the debtor filed his bill stating the transaction to have been by way of mortgage only, and praying to be allowed to redeem: issues were subsequently directed as to the question of mortgage or no mortgage, and found in favour of the plaintiff; after which, on further directions, a decree for redemption was pronounced in favour of the debtor, which, on appeal was reversed, and the bill in the court below ordered to be dismissed with costs; and *semble*, that such a question is properly one of law, not of fact, and not such as forms an issue to be tried by a jury.

The facts of the case and points raised are sufficiently stated in the reports of *Watson* v. *Munro*, ante volume V., page 662; volume VI., page 385, and in the judgment of the court on the present appeal.

Argument.—Mr. *J. Hillyard Cameron*, Q. C., Mr. *Gwynne*, Q. C., and Mr. *Morphy* for the appellant.

Mr. *Eccles*, Q. C., and Mr. *Strong*, for the respondent.

The judgment of the court was delivered by

SIR J. B. ROBINSON, BART., C. J.—The plaintiff in this case had entered into an agreement with the Honourable

* Was absent when judgment was pronounced.

Peter McGill, to purchase from him a certain town lot in the city of Toronto, containing 6,100 square feet, for the sum of £150, the interest to be paid half yearly, and the principal sum to be paid by instalments of £30, on the 1st of July, 1842, and the rest in seven equal yearly instalments of £17 2s. 10d. each. The plaintiff took a bond for a deed on the 1st of July, 1839, with a condition that the vendor should convey to the plaintiff, his heirs and assigns, upon these payments being fully made, according to the bond, and on further condition that the plaintiff should build upon the premises, within two years, a good substantial brick or framed house, not less than 25 feet by 25 feet, and should put up a sufficient fence around the premises.

On the 13th of October, 1840, the plaintiff by deed annexed to this bond, "in consideration of £10, to him paid by *George Munro*, [the defendant,] at or before the execution of the deed, assigned and set over unto the said *George Munro*, the annexed bond and condition thereof, and all (his) right, title and interest therein;" and he thereby authorised "the said *Peter McGill* in the said bond named, to grant unto the said *George Munro* a similar bond, or a deed, for the land mentioned in the annexed bond."

The plaintiff had paid to Mr. *McGill* only £4 10s. on account of interest, and no part of the principal at the time he made this assignment to the defendant. On the 23rd of September, 1844, Mr. *McGill* made a conveyance of the lot in fee to the defendant, taking from him a mortgage to secure the purchase money, which has since been paid in full, with interest.

On the 31st of December, 1852, the plaintiff filed a bill in which he alleged, that though the assignment of his interest was on the face of it absolute, it was in fact made for the securing a debt of about £30, which at the time he owed to the defendant, and a further sum of £20, which the defendant lent to him.

That his interest in the lands and house at the time he assigned them was worth at least £400, and that the same then produced a rental of £25.

That after the assignment, namely, in or about the year 1841, he paid the defendants £8 on account of the debt, which the assignment was intended to secure, and for which he took his receipt in writing,

That the tenant of the plaintiff in possession, at the time of the assignment, continued to pay rent for the property for nine months after the assignment, when he was induced by the defendant to attorn to him, and pay him the rent.

That the defendant has ever since received the rent, which has been more than sufficient to pay his debt and interest.

That the plaintiff has been prevented by his poverty from asserting his rights before.

And he prayed that the defendant should be compelled to allow redemption.

The defendant, in his answer, states that in and before 1834 he was carrying on business as a merchant, and the plaintiff became indebted to him in March, 1837, in £42, 12s. 7d.; that plaintiff being frequently applied to for payment, was at last informed, in 1840, that no further indulgence could be allowed, and that legal means would be taken to enforce payment; that in October, 1840, the plaintiff, for the purpose of settling his claim, which then amounted to £39 19s. 8d., proposed to transfer to him his bond for the conveyance of this lot, if he, defendant, would give him £25 in cash, and discharge the debt, to which defendant assented, and the assignment of the bond was prepared by a solicitor, conveying plaintiff's equitable interest absolutely to the

defendant, for the considerations above mentioned, though in the assignment £10 was inserted as the consideration, for what reason the defendant does not know.

That defendant afterwards paid the whole price for the lot (£150) to Mr. *McGill*, besides the unpaid interest.

That in defendant's belief the debt of £39 18s. 8d., and the £25 paid besides, was the full value of the plaintiff's interest in the land, including his improvements upon it, which consisted of a small frame dwelling house.

That it is quite possible (though he has no recollection of it) that he may have said at or after the time of the assignment, that he had no particular desire for the premises, and would prefer having his money, but if he did say so, it was not because he considered himself in any way bound to allow redemption.

That when he took the assignment he allowed the plaintiff to remain for a time, as his tenant, at a certain rent, as he believes, the amount of which he cannot state.

That in pursuance of that arrangement plaintiff paid him £8 10s., which he supposes is the payment mentioned in the bill.

That defendant being absent in England, the plaintiff took advantage of that to hold possession for a longer time than agreed upon, and without the defendant's consent.

That in May or June, 1842, finding the plaintiff still in possession, he brought an ejectment against him, and recovered possession in November, 1842.

That neither during that proceeding, nor at any

time till a few days before the bill was filed did the plaintiff, to the defendant's knowledge, pretend that the transfer had been made by way of security.

That the defendant has always since November, 1842, occupied the premises by himself or his tenants, improving it at considerable expense, and has never since the transfer claimed from the plaintiff the payment of any debt.

That he has made a lease of the said premises to one *Miller*, for the term of nine years, and that not long before he received the first intimation of any claim on the part of the plaintiff, he entered into an agreement with *Miller* to grant him a lease for sixty-three years. The defendant denies in positive terms that the bond was assigned to him by way of security; or that the transaction was so intended by either party; or that he had lent £20, or any other sum, to the plaintiff, or ever received £8, or any other sum, in payment, or on account of the debt that had existed before the transfer.

He claims to be absolute owner of the premises, by the terms of the assignment, having paid the full price to Mr. *McGill*, and received a title from him, and claims the benefit of the statute of frauds as a bar to the plaintiff's suit.

In September, 1856, the case came to a hearing before the two Vice-Chancellors, one of whom, for reasons which he assigned in his judgment (*a*), given in May, 1857, was of opinion that the bill should be dismissed, but the other Vice-Chancellor, preferring that an issue should be directed, they both concurred in that course, and an issue at law was accordingly directed to try "whether the conveyance made on the 12th of October, 1840 (that is the transfer by deed of the bond), was

(*a*) Ante vol. v., page, 662.

intended by the said *Richard Watson*, and the said *George Munro* to be a conveyance by way of absolute sale, or by way of mortgage or security."

In November, 1857, this issue was tried before the Chief Justice of the Common Pleas, upon evidence not materially varying from that given in the Court of Chancery, and which evidence, the Chief Justice states in the report of the trial, appeared to him to be insufficient to establish that the assignment had been made as a security only, and was not intended as an absolute transfer of the interest. The jury, nevertheless, found in favour of the plaintiff, with which verdict the Chief Justice declared himself not to be satisfied.

The defendant petitioned the Court of Chancery for a new trial of the issue, upon an allegation supported by affidavits of the discovery of new evidence, and a new trial was granted upon the terms that the costs should abide the event.

Afterwards the witness, whose testimony the defendant desired to have an opportunity of adducing upon the new trial, died, in consequence of which the defendant abandoned his order for a new trial, and consented to its being discharged, and on the 31st of May, 1859, both parties submitting that the cause should be considered as having been heard before the Court of Chancery upon further directions, and that the court should pronounce such decree thereupon as should seem meet (neither party, however, consenting to such decree), the court made a decree for redemption, reserving further directions as to costs.

This decree is appealed against.

The plaintiff resists the appeal on the ground that the defendant having waived a new trial of the issue, the Court of Chancery could not properly decree other-

wise than they did, and that the verdict and the evidence given in the cause were sufficient to warrant the decree.

With respect to the verdict upon the issue that was directed in this case, and the effect which it ought to have upon the judgment of the court under the circumstances, I think it probable, that after the discussion and consideration which this case has undergone, it would be thought better not to direct an issue at law in any similar case. I mean not an issue in order to take the verdict of a jury upon the main question in the cause upon the merits: that is, whether the deed of the 12th of October, 1840, which on the face of it was absolute, was intended to be subject to a trust that the defendant would re-convey upon his receiving payment of his alleged debt and interest.

In *Yates* v. *Hambly* (*a*), where the question to be determined was, whether the defendant was entitled to an absolute estate in certain messuages, as to which the defendant denied that there were any trusts declared in writing, Lord *Hardwicke* said: "I am of opinion the defendant is entitled to an absolute estate, though it is an exceedingly dark transaction; but yet it is not proper to direct an issue to try a trust, nor do I remember any instance of it, for as it depends upon the statute of frauds and perjuries, it is incumbent upon this court to determine it, and therefcre the bill must be dismissed as to any relief prayed with regard to five of the seven houses in question.

We must all be of opinion, I think, that it would weaken very much the protection which the statute of frauds was intended to afford, to call upon a jury to give their verdict upon the existence or non-existence of a fact, which is required by that statute to be proved by a particular description of evidence. They may not under-

(*a*) Atk. Rep. 360.

stand that they are not at liberty to pronounce a verdict one way or the other according to their moral convictions, but must be governed by certain statutes and rules of evidence which exact that the proof of the fact should be of a certain description.

In the present case, the learned judge who tried the issue, probably supposed that the court did not require the aid of a jury for determining whether the evidence which had been given in the case amounted to such proof as could be received, and acted upon consistently with the statute of frauds and the general rules of evidence, but rather that the court desired to have the satisfaction of knowing what a jury believed to be the real truth of the case.

His certificate given with the verdict, I think shews this, for he states in it that he felt no difficulty in forming an opinion; but that treating the case as one properly for the jury, he withheld the expression of his opinion on the fact. He then proceeds to mention that he pointed out to the jury certain circumstances that had appeared in evidence, all of which are independent of the legal question by what description of evidence the plaintiff's case could be supported, as if he wished to elicit from the jury an expression of their opinion upon the question of fact, unembarrassed by a particular regard to the legal quality of the evidence that was necessary to be given, and that was given. The jury receiving the learned Chief Justice's directions, which I have no doubt led them clearly to understand that it was not the conviction of his mind that the assignment was intended as a security, found nevertheless that it was so intended, with which verdict the Chief Justice declared to the Court of Chancery that he was not satisfied.

We see from what is submitted to us, and it was conceded in the argument, that the evidence upon the trial of the issue was not in substance different from that

which had been given in the Court of Chancery. And though it is true that the defendant does not seem to have resisted the sending an issue to a court of law, yet afterwards, when the verdict came before the proper tribunal, upon hearing of the cause, it was only one of the materials upon which the court was called upon to determine, and was by no means conclusive upon the court.

In *O'Connor* v. *Cook*, (*a*) Lord *Eldon* says: "Beyond all question it belongs to the constitution of a court of equity to decide upon matters of fact, if they think proper. But courts of equity have for a great number of years, where questions of fact have been disputable, thought it a more proper exercise of their jurisdiction to have them determined by a jury. *At the same time when administering the equitable relief afterwards, their own judgment ought to concur with the verdict to this extent at least, that they are not dissatisfied with the verdict.*"

This principle must surely apply with greater force when the issue that has been submitted to a jury involves the whole merits of the suit in equity, going in fact to the very foundation of it, and when that suit is of such a character that according to the doctrine of Lord *Hardwicke* in *Yates* v. *Hambly*, the question on which it turns should hardly have been made the subject of an issue. The parties before the hearing in the court below were called upon to give all the evidence they could there, in support of their case, and had no doubt every fair opportunity of doing so. And we cannot suppose that the issue at law was directed either for enabling him to give before a jury at *nisi prius* any evidence which he could not give in the proper court for disposing of the question; or for obtaining the opinion of a jury, whether such evidence as had been given could avail the plaintiff in the face of the statute of frauds.

(*a*) 8 Ves. 535.

I did not, indeed, understand it to be insisted upon in the argument, that the court was bound by the verdict in disposing of the case, any more than they would be by the opinion of a court of law upon any legal question referred to them, though in both cases no doubt the court does in general conform.

There is perhaps greater difficulty in going against the verdict in this case, from the fact that the court having ordered a new trial upon the petition of the defendant, the new trial has never taken place, the defendant having waived it. This, it has been strongly urged, not only leaves the verdict for the plaintiff in force, but should be taken as an acquiescence in the propriety of the finding; in other words, as the giving up of the only point in the case.

I think we cannot reasonably go the whole length of that argument. The new trial was moved for upon the discovery of new evidence, and the court thought the ground so strong that they granted the new trial. The reason, we are told, why the defendant did not avail himself of it, was that his witness whose testimony we see would have been directly to the point, and very strong, afterwards died. In any such case the new trial might not be proceeded with for other reasons also; the party might feel that he had little or no chance with the jury upon such a question; or that the facts as they have already been made to appear, could not be changed, and so that it would only be incurring an expense without the hope of any advantage; and at any rate I do not apprehend that the not taking advantage of the order for a new trial should necessarily be taken to relieve the court from considering the sufficiency of all that had been either proved or asserted in argument to have been proved in the case, for setting up an alleged agreement of a special nature, respecting real property, and in effect for making out an alleged trust, which it is the peculiar province of a court of equity to deal with.

Moreover, all has been placed before us that has been given in evidence at any time in the case, and has been reasoned upon in argument, and the judgment of the court has been pronounced upon the inference to be drawn from that evidence, and from the principles which should govern a court in applying it, and determining upon it. It seems to me, therefore, though upon this, as no other questions of practice with which I am not familiar, I farm my opinion with hesitation, that it would be taking too strong ground against the defendant to consider him precluded by the verdict from calling for the opinion of the court upon the bill and answer, and upon the only evidence by which the plaintiff has attempted to make out his case.

Then in regard to the propriety of allowing the redemption prayed for, I think, besides the verdict itself, of which the learned judge who tried the cause did not approve, there really is nothing that could be relied upon for cutting down the defendant's title.

In the cases which have been decided in this court of *Howland* v. *Stewart*, (*a*) *Greenshields* v. *Barnhart*, (*b*) *Matthews* v. *Holmes*, (*c*) and *Stanton* v. *McKinlay*, the authorities and principles have been fully stated by which we think ourselves bound in determining a question such as is now before us, upon the evidence given in the Court of Chancery. I think the English decisions referred to in those cases abundantly shew that the evidence given in this case was insufficient to support a claim for redemption in the face of the plaintiff's absolute assignment by deed, and of the consent expressed in the deed that an absolute title should be made to the defendant by Mr. *McGill*, and in the face also of the fact that besides discharging the plaintiff's debt, and paying the whole price of the land to Mr. *McGill*, the defendant also gave £25 as an additional consideration. It is hardly credible that

(*a*) Ante vol. ii., p. 61. (*b*) Ante vol. iii., p. 1.
(*c*) Ante vol. v., p. 1.

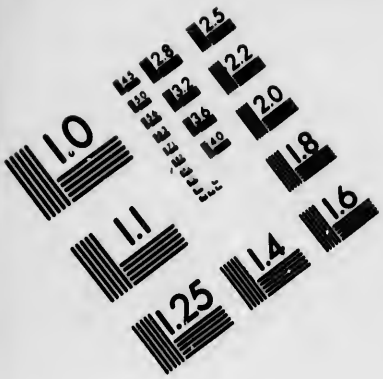
in order to secure a debt of £40 due by a customer, a merchant would make such an arrangement.

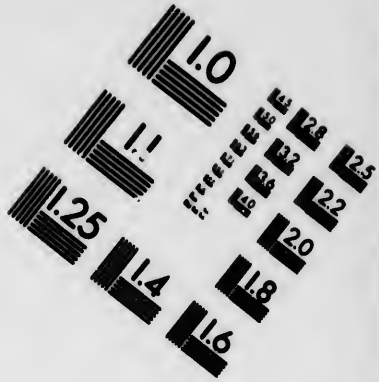
But besides this, there is not I think, any such evidence as could be allowed to prevail against the statute of frauds, and against the general rules of evidence, which will not allow of a written instrument being contradicted by verbal testimony. If a foundation had been laid for the reception of parol evidence by proof of any fraud charged against the defendant, in declining to execute a defeasance which he had agreed to execute, or in obtaining the deed in its present terms by any deception or contrivance; or if facts had been proved from which the court could see clearly that the conduct of the parties since the assignment had been inconsistent with such a transaction, as the deed alone would import, then parol evidence might have been admissible to explain the real intention of the transaction.

But it cannot be said that any such foundation was laid.

The payment of any sum after the assignment *on account of the previous debt* due to the plaintiff is not proved, and is denied. The plaintiff did not, as it appears, resist the ejectment, or attempt as a mortgagee to stay proceedings under the statute, but he allowed himself to be turned out of possession, and having acquiesced in all for many years until the property has become much more valuable, he now seeks by verbal evidence, only of admissions of the grantee, to reduce his interest to that of a mortgagee, which would be in opposition to the plain terms of the assignment.

My opinion is, that even if we were satisfied that the assignment was understood to have been intended to be by way of security only, we are disabled by the statute of frauds, and by the general rules of evidence, from





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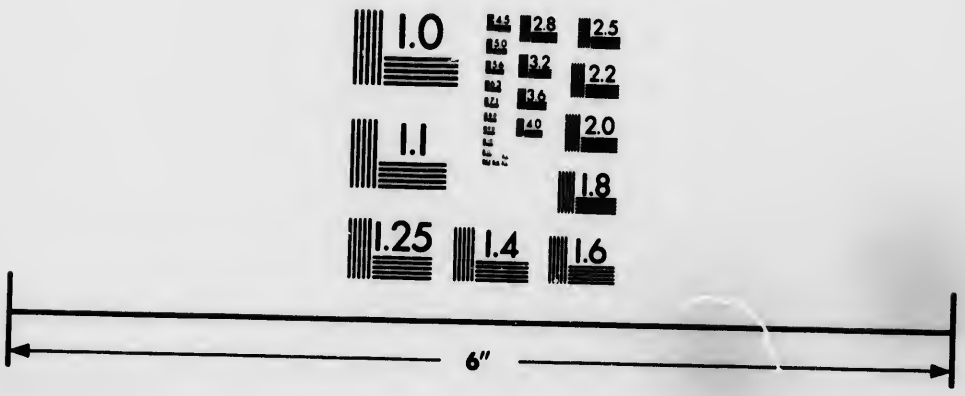

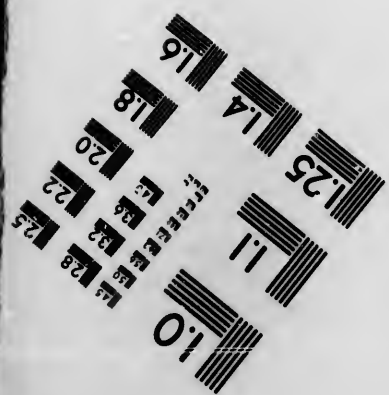

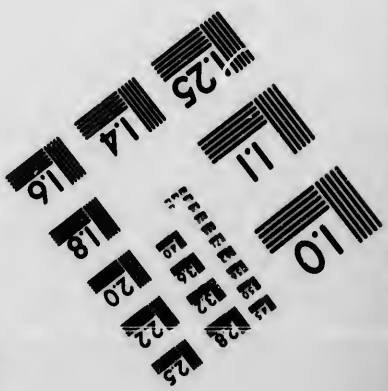

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treating the assignment as conditional only, upon any thing that has been shown in evidence; and especially when, as in this case, it is not even pretended that any time was set for redemption, or that the defendant had any remedy against the plaintiff as for a debt due, from the time that he took the assignment of the bond in 1840, to the filing of this bill in 1855.

In my opinion the judgment appealed from should be reversed, and the bill should be dismissed with costs.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada the Hon. the Chancellor,* the Hon. the Chief Justice of the Common Pleas, the Hon. Sir J. B. Macaulay,† the Hon. Mr. Justice McLean, the Hon. Mr. Justice Burns, and the Hon. V. C. Spragge.*]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

SAMPSON v. MCARTHUR.

Infancy—Interest in leasehold with right of purchase—Married woman—Examination of.

A married woman, the owner of a leasehold interest, with a right of purchase, joined with her husband in a conveyance thereof to a purchaser. The vendors afterwards filed a bill to set aside this deed, on the grounds that at the time of the execution thereof by the husband and wife, the wife was a minor; and also that she had not been examined under the statute touching her consent to alienate her real estate; or to declare the conveyance to have been by way of security only, and that the plaintiffs were entitled to redeem the same. *Held*, affirming the decree of the court below, that there was not sufficient to cut down the absolute conveyance to a mortgage interest. And *held* also, that the non age of the wife, or the fact that she was not examined according to the statute was of no importance, as the statute related only to real estate; and that the deed of the husband alone would have been sufficient to convey the leasehold interest;

And per *Robinson*, C. J., that although a party affected by a decree does not appeal from it, the court, upon the appeal of another party, may give such relief as the court may think the parties entitled to.

Statement.—The bill in the court below was filed by *George Sampson*, and *Elizabeth*, his wife, against *Charles*

*Was absent when judgment was delivered.
† Had died before judgment given.

McArthur, and the *Canada Company*, setting forth at length the circumstances dstailed in the judgment.

Judgment.—The decree pronounced by the court declared that "the promissory note in the evidence in this cause mentioned, the assignment from the said plaintiffs to the said defendant, *Charles McArthur*, and the possession of the premises in question by the said last named defendant, constitute evidence of an agreement by the said plaintiffs to sell the said premises to the said defendant, *Charles McArthur*, and that the said agreement should be specifically performed and carried into execution to the extent of the interest of the plaintiff, *George Sampson*, in the said premises, and doth order and decree the same accordingly. And this court doth further declare that the said defendant, *Charles McArthur*, is entitled to a lien on the said premises for the amount by him paid to the said defendants, the *Canada Company*, on account of the purchase money thereof, without interest during the continuance of his estate hereinafter mentioned, and doth order and decree the same accordingly; and it is ordered that the said defendants, the *Canada Company*, do convey the said premises to the said defendant, *Charles McArthur*, for an estate during the joint lives of the said plaintiffs, and after the death of the said plaintiff, *Elizabeth Sampson*, during the estate, if any, of the said plaintiff, *George Sampson*, as tenant by the courtesy, and after the determination of such estate until payment by the said *Elilabeth Sampson*, her heirs or assigns, of the amount so paid by the said defendant *Charles McArthur*, to the said defendants, the *Canada Company*, and, subject to such estate, to the said *Elizabeth Sampson*, her heirs and assigns, in fee simple, which said conveyance is to be settled by a judge of this Court in chambers, in case the parties differ about the same; and it is ordered that it be referred to the master of this Court at London, to take an account of the amount so paid by the said defendant, *Charles McArthur*, to the said defendants, the *Canada Company*; and it is ordered that the said plaintiffs, do immediately after the service upon them of this decree, and of the master's certificate of taxation, pay to the defendants, the *Canada Company*, or the person serving the same, their costs of this suit to be taxed by the master of this Court."

From this decree the plaintiffs appealed, assigning the following as reasons why the same should be reversed or varied, by declaring the assignment therein invalid, void and of none effect, and by declaring the appellant, *Elizabeth Sampson*, entitled to an immediate conveyance of the premises in the said decree referred to in fee simple, free from all incumbrances or claims of any kind on the part of the said defendant, *Charles McArthur*, and by declaring the appellants entitled to an account and payment of the rents and profits of the said premises, during the possession of the same by the defendant, *Charles McArthur*, and to payment of their costs of this suit.

Statement.—1. Because the promissory note, assignment, and possession, in the said decree in that behalf referred to, do not constitute sufficient legal evidence of an agreement by the said appellants to sell the said premises to the said defendant, *Charles McArthur*, or that such agreement can, or should be ordered to be specifically performed, and carried into execution to the extent of the interest of the said appel' *George Sampson*, in the said premises.

2. Because no such defence to this suit, as that above referred to, is properly set up by the said defendant on the pleadings, and because the said defendant, on the pleadings sets up, relies on the said assignment alone as the completion and performance of the alleged prior agreement for the sale to him of the said premises, and not only does not set up, but practically excludes the possibility of the existence of an uncompleted contract in respect of the same, and asks no relief on any such ground; and for these reasons no such defence was or is admissible.

3. Because the said promissory note must be taken to have been, and in fact was adduced in evidence, solely as proof of payment of the alleged purchase money of

the said premises under the said assignment, and is not set up or alluded to in the pleadings, and therefore should not have been admitted at the hearing as constituting evidence, nor is the same evidence, of any such contract as is in the said decree referred to.

4. Because the possession by the said defendant of the said premises, is by him set up and admitted on the pleadings to have been, and in fact was, and is referrable solely to the said assignment, and not to any such contract as is in the said decree referred to.

5. Because any prior contract of agreement in respect of the said premises, must, on the pleadings, be taken to have been, and in fact was, completed by and merged in the said assignment, and could not therefore be set up as a subsisting agreement for a specific performance.

6. Because the said assignment was and is invalid, and of none effect whatever within the statutes in that behalf, and for the reasons in the plaintiffs' bill set forth, and the same does not constitute legal evidence of, or respecting the alleged contract for the sale of the said premises, nor could any decree for the specific performance of such contract be founded on such evidence.

7. Because the alleged agreement in the said decree declared to be established (even if the same were by legal evidence established) being an agreement by a married woman and her husband jointly, for the alienation of the real estate of the married woman, and being destitute of the required statutory solemnities, is invalid and of none effect whatever, within the policy of the statutes of this province in that behalf, and the same cannot properly be the subject of a specific performance by the Court of Chancery.

8. Because it being impossible by reason of the coverture and infancy of the said appellant, *Elizabeth Sampson*,

to compel a specific performance of the said alleged agreement in its entirety and as to the interest of the said appellant, *Elizabeth Sampson*, the said alleged agreement cannot, and ought not within the rules of the Court of Chancery, be ordered to be specifically performed to the extent of the interest of the said appellant, *George Sampson*; and because, at any rate, no such relief is claimed by the defendant, *Charles McArthur*, on the pleadings, and consequently no such relief can be granted at the hearing.

9. Because it appears from the evidence that the true agreement or contract respecting the said premises was that the said defendant, *Charles McArthur*, should pay the purchase money due the defendants, the *Canada Company*, in respect of the said premises, and should hold the same as security for the re-payment of the sums to be by him paid, and interest; and that the said premises were assigned to and accepted by him for the purposes aforesaid only, and that there was, in fact, no agreement or contract for the absolute sale of the said premises to the said defendant.

The defendant *McArthur* assigned the following reasons for the decree being sustained, that is to say:

Because the interest vested in the appellants was a chattel interest, the subject of transfer by the deed of the husband alone, and became vested in the respondent by the assignment in the pleadings mentioned.

Because there was an agreement for the sale of the interest of the appellants to the respondent, which was executed and valid so far as the husband's interest was concerned.

Because there was sufficient legal evidence of such agreement.

Because the said agreement was partly performed, and evidence of its terms was admissible.

Because the appellants had no equity to deprive the respondents of the beneficial interest in the premises in question, and were not entitled to any relief except upon the terms of giving to the respondent such benefit of the contract as has been given to him by the said decree.

Because the assignment in the pleadings mentioned was either valid to convey all that it purported to convey to the respondent, or was void to all intents and purposes, and did not amount to a completion of the contract; neither was it valid to create any liability or disability on the part of the respondent, or to cause a merger of the contract.

Because, whether the defence is set up by the answer or not, the appellants cannot succeed to any greater extent than they prove themselves entitled.

Because the said respondent was entitled to a specific performance of the agreement to the extent to which it was in the power of the appellant, *George Sampson*, to perform it.

Because, even if the respondent could not have compelled specific performance as against *George Sampson*, the said appellants were not entitled to set aside the contract as against the respondent.

Mr. *Blake*, for the appellants.

Mr. *Roaf*, for the respondent, *McArthur*.

The judgment of the court was delivered by

Sir J. B. Robinson, Bart., C. J.—On the 1st of September, 1842, the *Canada Company* demised the land in question for twelve years, to *Peter Barr*, on payment of certain annual rents, and covenanted that at *the end of the term*, if he had during the time punctually paid the rents, and performed all his covenants, but not otherwise, they would make to him, his

heirs and assigns, a good title in fee simple, upon being paid the further sum of ten shillings. And according to the terms of this lease *time was expressly made to be of the essence of the contract.*

Peter Barr entered upon the land (100 acres) and lived upon it, and improved it, and he died upon the land in August, 1847, intestate, leaving a widow, his second wife, and an only daughter, *Elizabeth*, one of the plaintiffs, afterwards married to the other plaintiff, *George Sampson*. She was daughter of *Peter Barr* by a former wife.

On the 13th of April, 1849, *George Sampson* and *Elizabeth*, his wife, the said daughter of *Peter Barr*, made an assignment under seal to the defendant, *McArthur*, in consideration of £50, acknowledged to be paid, of all the right, title, and interest of them, or either of them, in this land, being, as the deed expresses, the land leased by the *Canada Company* to the said *Peter Barr*, father of the said *Elizabeth Sampson*, "to hold the same to the only use of the said *McArthur*, his heirs and assigns for ever." And in the said assignment it is stated that they thereby authorised the *Canada Company* to execute a new lease, or execute a new deed of agreement for the sale "of the said land to the said *Charles McArthur*, in the same way and upon the same terms as the same was held by the said *Peter Barr*, deceased."

According to testimony given in the cause, when *Elizabeth Sampson* executed this deed she was under the age of twenty-one years, being 19 years old, and about a month over.

She had been married to *Sampson* in June, 1848, at London, in this province.

Peter Barr married the mother of *Elizabeth Sampson* at Paisley, in Scotland, on the 18th of April, 1828.

When the assignment was made by *Sampson* and his wife to defendant *McArthur*, the covenants had not been fulfilled in regard to a stipulation in the lease from the *Canada Company* to *Peter Barr*, that he should clear and make fit for cultivation four acres of the land demised in each year; and the rents payable by the lease were largely in arrear.

In July, 1849, £23 5s. was paid on account by *McArthur*, the defendant, and in August and September, 1854, £91 10s. Whether *Barr* had paid any thing, and how much, did not appear.

Sampson never occupied the place.

The plaintiffs filed their bill in which they allege that *Elizabeth Sampson* being a minor, when she executed the deed with her husband, and having never been examined before magistrates regarding her free consent to alienate her interest, the deed executed by her is on both accounts inoperative to pass her interest. And they prayed the court to decree that the deed was void, and to direct that it be given up to them; and if the deed can have any effect given to it, then they alleged that it was given and intended merely as security for money which *McArthur* had advanced for them, and they prayed that *Elizabeth Sampson* might be let in to redeem upon payment of what might be due on an account to be taken, and that the *Canada Company* might be compelled to convey to the plaintiff, *Elizabeth Sampson*, upon being paid what sum, if any, is yet due to them for the land, and may in the meantime be restrained from conveying the land to *McArthur*, as assignee of the plaintiff.

Upon the hearing it was decided by the two Vice-Chancellors that the assignment was an absolute sale of the interest, so far as it was capable of operating, and was not intended to be by way of security only, and looking upon it as an agreement to sell, they decreed

that it should be specifically performed to the extent of *George Sampson's* interest: that *McArthur* is entitled to a lien for the money paid by him to the *Canada Company* for the purchase of the land, and that the company shall convey to him an estate to endure for the joint lives of the plaintiffs, *Sampson* and his wife, and after the death of *Elizabeth Sampson*, during the estate, if any, of *George Sampson*, as tenant by the courtesy, and after the termination of such estate until payment by *Elizabeth Sampson*, her heirs or assigns, of the amount paid by defendant, *McArthur*, to the *Canada Company* and subject to such estate, to the defendant *Elizabeth Sampson* in fee simple.

McArthur by his answer has denied that the assignment was made by way of security, and affirmed that it was an absolute purchase by him of all the interest of *Sampson* and his wife: that *Elizabeth Sampson* represented herself to be of age; that he had paid to the *Canada Company* all that was due upon the land, and paid to the plaintiffs £50 for their interest, and that he had entered upon the land, and had ever since improved it as his own.

And he prayed a decree that the *Canada Company* should convey the land to him in fee.

The *Canada Company*, who are also made defendants, set forth in their answer that notice had been given to them of the conflicting claims upon the land on the part of Mrs. *Sampson*, as heiress of her father; and by *McArthur* as assignee of all the interest of herself and her husband, and they declared themselves to be ready and willing to make their deed to the party properly entitled, on being paid the purchase money; and they submitted to what the court might direct.

The decree has been appealed from by *Sampson* and his wife, contending that the evidence shewed the deed by *Sampson* and his wife to have been intended as

security only; and that they should have succeeded in obtaining relief to the full extent of their prayer.

We entirely agree with the court below that there is nothing in the evidence given in this case which can be suffered to prevail against the express language of the deed, so as to enable the court to treat it as given by way of security only, and not as an assignment absolute in its terms, as it professes to be. The evidence given by Mr. *Hughes*, upon which the plaintiffs no doubt principally relied for establishing that the transaction was one of mortgage, is altogether unsatisfactory upon that point, for it is clear from his testimony that he had lost all distinct recollection of the real nature of the transaction, and had nothing in writing to refer to that would enable him to speak positively. So far as his evidence did go, it tended to disprove what the plaintiffs assert as to the qualified nature of the assignment, and if we are at liberty to give judgment according to our moral conviction upon the point, without regard to the legal character of the evidence by which the plaintiffs attempted to establish their case, I should have no hesitation in determining that this was not a case of intended mortgage.

But the plaintiffs by their bill prayed for even a greater measure of relief, for they alleged that the assignment could convey no interest whatever by reason of Mrs. *Sampson* being an infant, and under coverture, when she executed the deed, and of her never having been examined, as the law requires in the case of a married woman, in regard to her having freely and voluntarily consented to the alienation of her estate, and they ask that the estate should be delivered up to be cancelled; I apprehend, however, that there is no good foundation for a decree in their favour to this extent, nor even to the partial extent to which the court below did grant them relief.

As to *Elizabeth Sampson* not having been examined

according to the statutes, it is only to the alienation of the *real estates* of married women that the statutes extend; not to terms for years, which become the property of the husband, in right of his wife, and can be sold by the husband alone, and can be conveyed by his deed without her joining in or consenting to such deed.

I think Mr. *Roaf* placed the case in its true point of view, when he contended that the deed made by the *Canada Company* to *Peter Barr* created a term for twelve years; and that we must look at that as being the only legal interest of which he died seised, notwithstanding the deed contained a covenant on the part of the company that in case of the payments being made punctually with interest in each year, and all the other covenants being observed, they would convey the premises to the lessee, his heirs and assigns in fee. I cannot regard *Barr's* legal interest as being any thing but a term of years, and a court of equity, which must follow the law in determining upon the quantity of estates, could look upon it, I think, in no other light; and could not hold that the wife must be a party to the assignment of the lease, or could or need be examined as to her consent to its being alienated.

If indeed she was at the time an infant, which we cannot doubt upon the evidence was the fact, then it would be quite immaterial at any rate to consider the objection for want of her examination, for any deed by her would be voidable on account of her infancy. Though when, as in this case, where there is no appearance of fraud or imposition in obtaining the assignment, I doubt whether a court of equity would assist a married woman in getting back her estate, on the ground of infancy, under such circumstances as have occurred here. If the deed was clearly void on that ground, as of course it would be, there would be no necessity for a court of equity to interfere, and she and her husband might be left to their remedy at law, considering that

there is no evidence of the purchaser having any knowledge or reason to suspect that Mrs. *Sampson* was under age; that it was the alienee that paid for the property to the company; and that many years were allowed to elapse before any attempt was made to set aside the deed.

It would be certainly mischievous and unfair, I think if we were to give encouragement to the unsettling of titles, by interposing unnecessarily in cases of this kind. If, from any cause, the value of the land had become greatly depreciated, no attempt, I dare say, would have been made to disturb *McArthur's* title. The rise in value which may generally be looked for in this province, after a long lapse of time, will in most cases afford temptations to resort to any advantage that may have the effect of re-instating the seller in the property that he had really parted with, and thus give to him the advantage of the rise in value, contrary to the honesty of the case.

But whether a court of equity would or would not be justified in referring a vendor to his remedy at law in a case of this kind, and in declining any active interference in his favour, I think on other grounds the plaintiffs were not entitled to have a decree for relief to any extent in their favour.

Taking the legal interest of *Barr* to have been a lease for twelve years only, when he died, as he did when five years only of the twelve had expired, the land must have devolved upon his personal representatives, if there were any. He died intestate, it seems, and so there are no executors, and no one has administered to his estate. Under the statute of distributions his widow would be entitled to one-third interest in the term, and his only child to the other two-thirds, as in regard to personal chattels, provided the assets were not required for payment of debts. If the widow and daughter could take their respective interests, without distribution made by

an administrator of the estate, then whatever interest the daughter took, her husband, *George Sampson*, could alienate, subject to any restraint upon alienation, which the *Canada Company* had by their deed imposed. But whatever was the legal interest of *Elizabeth Sampson* in the term, her husband could, and did dispose of it. And if both or either of them assumed to sell what they had no right to sell, there being no sign of fraud in obtaining the deed, they have no equity, I think, after they have received the purchase money, (and her husband at least has none, if he alone was entitled to the land,) to call upon this court for any active interference, in their favour, but may be well left to pursue their remedy at law, especially after many years of acquiescence.

Then as to there being ground for a decree against them, at the instance of *McArthur*, or on his behalf, no such decree, I think, can be required. The assignment which he holds gives him all he contracted for—whatever could be sold to him, was sold, and the only difficulty he has met with, or is likely to meet with is, that the *Canada Company* hesitate to make a deed to him on account of the conflicting claims.

It may properly be left, I think, to the company as owners of the fee, to take such course as they may be advised to take, under the circumstances, with the knowledge of our opinion that the defendant *McArthur* held, when the term expired, whatever interest had been held by *Barr*.

It is quite clear that *Barr* had altogether failed in fulfilling the terms of his lease, but the company, it appears, are not inclined to make any difficulty on that account.

In my opinion the bill should have been dismissed with costs, and though neither *McArthur* nor the *Canada Company* has appealed, but the plaintiffs only, we are not on that account disabled from reversing the decree

altogether, for the statutes which were in force while these proceedings have been going on provided, as the existing law still provides, that this court in all cases of appeal should have power to dismiss the appeal, or to give such judgment or decree as the court whose decision is appealed against ought to have given, without regard to the party alleging error.

The other members of the court thinking the respondents, if dissatisfied with the decree, should have appealed therefrom.*

The appeal was dismissed with costs.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor,† the Hon. the Chief Justice of the Common Pleas, the Hon. Sir J. B. Macaulay,‡ the Hon. Mr. Justice McLean, the Hon. Mr. Justice Burns, and the Hon. V. C. Spragge.*]

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

FORD V. CHANDLER.

Trustee and cestui que trust—Breach of Trust—Liability of Trustee.

A *cestui que* trust of land created a mortgage by an assignment absolute in form for a nominal consideration, but neglected to intimate to the trustee that the transfer was intended to operate as a security only. In fact the lands purported to be conveyed to the trustee had already been sold and conveyed to a purchaser. The trustee without calling for the production of the assignment by his *cestui que trust*, executed a conveyance by way of quit claim to the original vendor, who conveyed other lots in their stead, absolutely to the assignee of the *cestui que trust*. *Held*, reversing the decree of the Court of Chancery, that the trustee was not under the circumstances answerable for any loss that had been sustained by the party beneficially interested.

Statement.—This was an appeal by the defendant

* See on this point Harkin v. Rabidon, ante volume VII., page 243, where a cause having been re-heard at the instance of the defendant, who was dissatisfied with the decree prononnced upon the original hearing, the court introduced into the decree additional relief in favour of the plaintiff, although he had not taken any exception to the decree originally made.

† Was absent when judgment was delivered.

‡ Had died before judgment was given.

David B. O. Ford, from the decree of the Court of Chancery made in the course of *Chandler* v. *Ford*, [reported *ante* vol. VI., page 607.]

Mr. *J. Hillyard Cameron*, Q. C., and Mr, *Blake* for the appellant.

Mr. *McDonald* and Mr. *Proudfoot* for the respondents.

Judgment.—Sir J. B. Robinson, Bart., C. J.—*Ford* was trustee of the eight town lots mentioned in the case under a conveyance from *Chandler*, to hold them for *Chandler's* convenience till Mr. *Ogden* had chosen six lots out of the eight, when *Ford*, as I suppose, was to make a deed to Mr. *Ogden* or his assigns of such six lots, and to re-convey the other two to *Chandler* or his assigns. This seems to have been the only object of the trust. The informal declaration of the trust that was executed by *Ford* and given to *Chandler*, only specified that he was to hold the two lots "*in trust for the said Thomas Chandler.*" *Ford* seems to have been no way mixed up with the transactions about these lots.

It is not asserted that he had any interest in the matter. For all that appears he only consented to be made use of, for the convenience of *Chandler*.

That, however, is commonly the position of a trustee.

It afterwards appeared that through mistake of Mr. *Ritchie*, from whom *Chandler* had obtained the land, the eight lots conveyed to *Chandler*, and which he had vested in *Ford*, were lots that *Ritchie* had already conveyed to somebody else, and it was eight other lots in the same two ranges that ought to have been conveyed.

Ford had therefore, by no carelessness of his own, been made in fact trustee of nothing, and so far as any interest in any of these lots was concerned *Chandler*

could suffer nothing by anything that *Ford* did or omitted as trustee; and it is not pretended that he did.

But *Chandler's* complaint is, that from *Ford's* want of caution, he has lost the title to two other lots, which never had been held by *Ford* in trust for him, and in regard to which, therefore, the relation of trustee, as between him and *Ford*, had never existed.

It seems not easy, under such circumstances, to find how *Ford* can be fixed with a breach of duty as a trustee.

But it is attempted in this suit to do so, on the following grounds:

After *Ford* had accepted the trust *Ogden* made a selection of six of the lots, and *Ford* at his request made a deed of them to *Tiffany*, in trust for one *McVicar*. This left lots eleven in the two ranges to be held by *Ford* for *Chandler*.

After this, the mistake that *Ritchie* had made was discovered, and it was found that all the eight lots were in fact the property of *Holmes*, to whom *Ritchie* had conveyed them by a deed prior in date, and prior in registration, to that which he had given to *Chandler*.

It would seem that *Chandler's* want of care in attending to his own interests, in taking a title which the county registry must have shewn him was good for nothing, embarrassed *Ford* in the execution of the trust, or rather made the trust a matter of no consequence to any body, and it would seem hard if *Ford*, acting throughout, as it is admitted he did, in good faith, for the correction of the error, on account of *Chandler* or his assigns, should be made to bear a loss which in such a case might be ruinous, because he had shewn a want of caution in acting under a gratuitous trust for *Chandler*, though a much less want of caution than *Chandler* had himself shewn in managing his own part of the business.

Ford, it seems, had been put in communication with *Tiffany*, as the person to whom he had been directed by *Ogden* to convey his six lots in trust for *McVicar*, the vendee, as I suppose, of *Ogden*, and on 16th of September, 1846, *Tiffany* wrote to *Ford*, informing him of the mistake that had been discovered, and telling him that so far as concerned *Ogden's* six lots, the mistake had been corrected by *Ritchie* conveying to him for *McVicar* six other lots in the same block of like value, and "the only lots," *Tiffany* says, "remaining to be arranged for are the two promised to Mr. *Codd* or *Chandler*; as you hold the title from *Ritchie*, it will be necessary for you to quit claim the two lots from Mr. *Ritchie*, and the lots are number ten (he meant to say eleven) fronting on Main street, and number ten fronting on Maiden lane, in the block of town lots situate between Main, Maiden lane, Ness, and Caroline streets, in *Tiffany's* survey of town lots in the town of Hamilton. *Upon your sending me such quit* claim I will return you your undertaking to *Chandler*."

Mr. *Ford*, about a month afterwards, in answer to this call upon him, sent to Mr. *Tiffany* a release or quit claim of the two lots eleven in favour of Mr. *Ritchie*, with the following letter to *Tiffany*: "As you request, I inclose a quit claim to *J. N. Ritchie* of the two lots in Hamilton conveyed by *Chandler* to me, not chosen by Mr. *Ogden*, but they are lots eleven and not ten as mentioned by you, *I send you this deed upon condition that you inclose to me the original undertaking which I gave acknowledging* to hold these lots in trust for *Ogden* and *Chandler*, properly transferred or discharged."

In the meantime, that is since March, 1838, when *Ford* accepted the trust from *Chandler*, it does not appear that any communication had taken place between *Chandler* and *Ford* on the subject of the trust until the 30th of June, 1843 (not quite three months before *Ford* got the above letter from *Tiffany*), when *Chandler*

wrote to him as follows: he began with setting out at the head of this letter an exact copy of the short declaration of trust which *Ford* had given to him in October, 1838, in which *Ford* recited the conveyance made by *Chandler* to him of the eight lots in March, 1838, and then added "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 *G. Ogden* of Waddington, in the State of New York, may choose, are 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*." And after this heading to his letter *Chandler* writes to *Ford* from Thorold in Upper Canada, under the date of the thirtieth of June, 1843, as follows: "Dear Sir,—Above I send you the copy of a receipt given by you to Mr. *S. B. Whitney* for a deed of eight lots of land in Hamilton, as therein described: *as I am about to transfer the two lots held in trust for me*, I would thank you to let me know which six lots out of the eight Mr. *Ogden* has chosen, in order that a deed may be prepared accordingly. *I would also thank you to mention if you require the return of this original receipt*, which was in possession of Mr. *S. B. Whitney* at the time of his death, and which it is most likely might cause me a journey to Chicago to procure."

The above letter having been written by *Chandler* to *Ford* on the thirtieth of June, 1843, the latter it seems overlooked it, or did not attend to it for several months, and on the thirtieth May following, according to the statement in his answer, he wrote to *Chandler* apologising for delaying to answer it, and adding, "Mr. *Ogden* has not yet made a choice of the six town lots which he is to have, but I have just written to Waddington about them, and dare say I shall be informed of his choice shortly, I should wish the original receipt or acknowledgment given by me if possible, (meaning his short declaration of the trust on which he held these lots,) I should think you might get it by writing to Chicago."

In the meantime, on the twentieth September, 1843, only four days after *Chandler* had written to *Ford* the letter to which this was an answer, telling him that he was about transferring the two lots which *Ford* held in trust for him,—*Chandler* went to *Codd* in Buffalo, and assigned to him the declaration of trust, or acknowledgment or receipt as he called it in his letter, which he had given to *Whitney* for *Chandler* when he accepted the trust, and which is pointed in the case as exhibit F. among the documents put in by Mr. *Ford*.

The assignment to *Codd* is written on the back of this declaration of trust, and is in these words: "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 or his assigns." This is dated twentieth September, 1843, and is signed by *Thomas Chandler*, and witnessed by *H. B. Ritchie*.

This document, with the assignment upon it, is what *Tiffany* must have had in possession when he wrote to Mr. *Ford* on the sixteenth of September, 1846, (three years after the assignment,) the letter which I have already referred to, and in which *Tiffany* says, Mr. *Robert Codd* of Buffalo has sent me your undertaking to *Thomas Chandler*, dated first of October, 1838, to convey to him two town lots out of the eight he had conveyed to you by deed dated twelfth of March, 1838, all situate in this town, Mr. *Chandler assigned this undertaking to Codd in September*, 1843," so that Mr. *Tiffany* clearly had this declaration of trust with *Chandler's* assignment of it to *Codd* written upon it when he asked Mr. *Ford*, as he did in the same letter, to send him a quit claim to *Ritchie* of the two lots eleven, in order that *Ritchie* might have the mistake corrected in the numbering of the two lots which he then looked upon as belonging to *Codd*, having had the error corrected in regard to *Ogden's* six lots, which it appears *Ogden* had selected in November, 1844.

It is now shewn by the evidence in this case that when *Chandler* on the 20th September, 1843, transferred to *Codd* the acknowledgment or declaration which *Ford* had given him, it was according to the understanding between them, not an absolute assignment or sale of *Chandler's* interest in the two lots, as the endorsement signed by *Chandler* imported, but *Chandler* it appears had borrowed upon it $150 from *Codd*, and *Codd* gave him on the same day a writing back, in which he stated that he had that day received *D. B. O. Ford's* voucher, dated first October, 1838, acknowledging to hold in trust for *Chandler* two town lots in the town of Hamilton *therein described*, which *Codd* adds, "*I will re-convey to you on the re-payment to me of* $150, *which I have by letter of credit of this date authorised you to draw on me.*"

Chandler had given no information whatever to *Ford*, his trustee, of this transaction of his with *Codd*.

The first knowledge *Ford* had of it was from *Tiffany's* letter of sixteenth September, 1846, in which he tells him that he has in his possession his, *Ford's* declaration or undertaking to *Chandler*, which had been assigned to *Codd*, and which he will send to *Ford* if he transmits to him a quit claim to *Ritchie* of the two lots which had been by mistake conveyed, in order, as he explained, that he might have the error corrected by the substitution of adjoining lots, as he had done in *Ogden's* case. Mr. *Codd*, by a letter to *Tiffany*, dated twentieth June, 1846, expressed his willingness to take the proposed lots in exchange. Mr. *Ritchie* seems to have communicated with him on the subject, and in this letter *Codd* says to *Tiffany*, "I now beg to enclose you the deed from *Ford* assigned to me, which you will give up to Mr. *Ritchie*, on his performing his engagement for another deed for lots ten and ten in the block you purchased, fronting, &c.," and he adds, "I request you to write to him that I have forwarded the contract to you for the purpose of completing the arrangement."

Mr. *Ford* being called upon, as we see he was, to release the two lots eleven to *Ritchie*, that he might correct the error by conveying the lots ten to *Codd* as *Chandler's* assignee, supposing all to be right, did so. Mr. *Ritchie* thereupon conveyed the two lots ten to *Codd*, and *Codd* having thus an absolute title in these lots, dealt with them, it seems, as if he were the absolute owner, disregarding the obligation he was under to *Chandler* to accept his debt, and give up his security on the other lots for which these had been substituted. In the writing which *Codd* gave back to *Chandler* in Buffalo, no time was set for *Chandler* to re-pay the loan, but *Codd* was to re-assign the security *on re-payment of the* 150 dollars. *Codd* might, perhaps, have been able to shew that a day had been understood between them, and that *Chandler* being unable to pay the money, he had given up any claim to the lots; or if the fact was so, it might have been shewn that *Chandler* had found out the mistake that had been committed in regard to the number of the lots, and knowing that *Codd* held only a security that was of no value, he might have been indifferent about redeeming it, in which case there would be little to be said in his favour, but *Codd's* answer to the bill gives no reason to suppose that he had any excuse of that kind to urge.

His statement appears to be disingenuous and evasive. Whether the value of the lots ten which *Codd* has thus disposed of, and as I assume, to some third party, ignorant of the fact, was much beyond the amount lent, is not stated. If *Chandler* has not sustained a considerable loss, he certainly ought not to have endeavoured, under the circumstances, to seek indemnity from *Ford*. If his loss has been a large one, we may be less surprised that he is trying to throw it upon *Ford* rather than bear it himself, though it seems not quite reasonable.

On one side, it may be said that if *Ford*, when he was asked to convey the lots eleven to *Ritchie*, had paused till he referred to his *cestui que trust*, *Chandler*, he

would have learnt that *Codd* could only claim a lien upon the lots proposed to be given by *Ritchie* in place of the others. and we must suppose that *Chandler* would have taken care that *Ritchie* should not give him an absolute title to those lots. If *Chandler* was then living in the country, so that *Ford* could, without difficulty, have communicated with him, it was a precaution very proper to have been taken.

On the other hand, I must say, that I think *Chandler* has much more reason to blame himself for what has happened than to blame his trustee. In the first place, if he had exerted in what was properly his own business a much less degree of caution than he exacts from *Ford* in a matter in which *Ford* had no interest, he would hardly have taken from *Ritchie* a conveyance of lots which the registry shewed had been conveyed by *Ritchie* to another person. The blunder would have been avoided which has given rise to this difficulty, and he would not have placed *Ford* in the absurd position of being a supposed trustee for him of lands in which neither he nor *Ford* could have any legal or equitable interest.

In the next place, if he had given any notice to his trustee of his transaction with *Codd*, and had made him aware that he had only pledged his equitable interest to *Codd*, and had not parted with it absolutely, as his writing implied, then the difficulty could hardly have happened ; or if it had, there would have been nothing unreasonable in looking to *Ford* for indemnity, for *Ford* with such knowledge of the fact, would have been culpably negligent if he had not given attention to it. And *Chandler* was the more remiss in not giving *Ford* an intimation of the truth, when he had, for his own protection, thought it necessary to take from *Codd* a separate writing to shew what the fact was ; and when he must have known that he had left in *Codd's* hands, written upon the very instrument of *Ford's* which declared the trusts, a written a[illegible]nment, signed by

himself, by which he professed to sell and assign his equitable interest to *Codd*, without any intimation that he was only pledging it.

He should have considered that *Codd* or any one holding an assignment from him, going with this declaration of trust and assignment in his hands, was likely to be recognised and treated as invested with the same equitable interest that *Chandler* himself had held; and he has little reason, I think, to complain that the transaction was so treated.

Considering that *Chandler* had omitted to give any information to his trustee of his transactions with *Codd;* that he had made an absolute assignment to *Codd*, and left *Ford's* declaration of trust in *Codd's* hands, with such an assignment endorsed upon it: that the trustee was assured, as the fact was, that *Ritchie*, who had been applied to to correct the error, had in his hands the declaration of trust ready to be given up to *Ford* as soon as he had released to *Ritchie* the lots, for which in truth he never had any title under the deed that *Chandler* had given him; and considering further, that the trustee did not let out of his hands his conveyance to *Ritchie*, without expressly making it a condition of its delivery that the declaration of trust should be given up to him properly discharged, the conduct of the trustee does not, I think, constitute a breach of trust, for which he can be held liable to make compensation.

He was led to the act complained of by the conduct of the *cestui que trust* himself.

It is not questioned that *Ford* acted in perfect good faith. What is imputed to him is want of proper caution —nothing more. That is no doubt a fault in a trustee which may often justly make him liable for the consequences, and in very many cases has been held to do so; but none of those cases that I can find were cases in which the trustee was so free from blame as in the present

case; and nothing can well be more unlike in substance and principle than this case is to those which were cited in the argument.

There is another view, too, in which this case requires to be considered. After Mr. *Ogden* had selected and received his six lots, there remained only the lots eleven in regard to which any trust could exist as between *Ford* and *Chandler*. But in fact the trust itself was from the first altogether a mistake. *Ford* never was seized of the lots eleven. He never held them for *Chandler's* benefit any more than if there were no such lots in the town of Hamilton.

He had no legal interest in them, and *Chandler* no equitable interest; and so far as any interest in those lots were concerned, it was impossible that *Chandler* could be injured by any thing that *Ford* either did or omitted. His position as regards those lots was just the same after *Ford's* deed to *Ritchie* was made as it was before. *Chandler* had in fact nothing to do with them at any time.

The complaint, however, is not that *Chandler* suffered any injury in regard to an interest in the lots eleven, but that he had lost an equity of redemption in the lots ten. In respect to those lots *Ford* was not at any time clothed with any trust; nor did he ever do any thing affecting them.

If *Chandler* had suffered from *Ritchie* having conveyed those lots absolutely to *Codd*, which he might just as well have done before he got a quit claim from *Ford* of the other lots as after, whose fault was it? Was it the fault of *Ritchie*, who trusted to the truth of *Chandler's* writing endorsed on the paper, which was the only evidence of his interest? or was it the fault of *Chandler*, who placed *Codd* in a situation that enabled him to present himself as the absolute owner of the equitable estate, and who had omitted to give

either to *Ford* or *Ritchie* any information of the contrary; or was it the fault of *Ford* that he did not make *Ritchie* aware of what he had no notice of himself, that *Chandler's* relation to *Codd* was in truth different from that which *Chandler* had enabled *Codd* to assume?

I must say that of all the parties concerned, with the exception of *Codd*, *Chandler* was the person most in fault, and *Ford* least, and I do not think that *Chandler* has any equitable claim to relief as against *Ford*, whatever other redress may be in his power.

I think the decree as it respects *Ford* should be reversed, and that the bill as against him should be dismissed with costs.

DRAPER, C J.C.P.—*Ford* in fact never had a legal title to, or estate in, the lots number eleven. He could not have conveyed such an estate either to *Chandler* or his appointee. Still, by his declaration of trust executed upon his getting an absolute conveyance thereof from *Chandler*, he acknowledged himself to be trustee for *Chandler* of these lots.

Chandler assigned *Ford's* declaration of trust to *Codd*, who acknowledging the assignment or transfer, gave *Chandler* an undertaking to re-convey to him on payment of a certain sum of money; *Chandler* wrote to *Ford* informing him that he *intended* to transfer the two lots, enquiring whether *Ford* would require the return to him of the declaration of trust. In fact at the date of that letter he had made the transfer. He never apprised *Ford* of his own right to redeem. He had a right to an absolute re-conveyance to himself, or to appoint it to be made to another; and *Ford* had every right to believe the appointment to *Codd* was absolute—there was nothing from which he could infer the contrary. Then the mistake as to the number of the lots is discovered, *Codd* desires to acquire the legal estate to lots numbers ten, in lieu of lots number eleven, and *Ritchie*,

who had made the mistake, is willing to rectify it, and to convey to *Codd*, provided he can be released from liability on his conveyance of lots eleven, and *Ford* is for this purpose applied to. Now, as appears to me, if lots number eleven had been legally vested in him, he would have been warranted in conveying those lots to *Codd*, without further evidence to *Chandler*, on *Codd's* delivering up to him his declaration of trust, and the assignment of it by *Chandler* to *Codd*, for there is no suggestion that this was not an absolute assignment. Instead of this he releases *Ritchie* on *Ritchie* conveying lots ten to *Codd*.

If he would have been guilty of a breach of trust in conveying lots eleven to *Codd*, (supposing he had the legal title,) then it may be admitted he was equally guilty of a breach of trust under the circumstances.

But unless he was called upon to enquire whether *Chandler's* assignment to *Codd*, absolute on the face of it, was subject to some agreement for re-conveyance or redemption, I do not understand how he has committed such breach. *Chandler* saw fit to convey absolutely, so far as his conveyance goes. He knew *Codd* must apply to *Ford* in order to obtain the legal estate. If the conveyance was clogged with a defeasance, surely the duty of notifying *Ford* of that fact devolved on him. To give him a right to make *Ford* responsible for consequences resulting, as appears to me, from his own neglect to give such notice, certainly does not seem equitable or just.

In my opinion the decree as to *Ford* should be reversed, and the plaintiff's bill against *Ford* dismissed with costs.

Decree below reversed, and bill dismissed with costs, as against the appellant.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada the Hon. the Chancellor,* the Hon. the Chief Justice of the Common Pleas, the Hon. Sir J. B. Macaulay,† the Hon. Mr. Justice McLean, the Hon. Mr. Justice Burns, and the Hon. V. C. Spragge.*]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

COTTON v. CORBY.

Variation of deed.

The decree of the Court of Chancery made in this cause refusing to vary the bond for the conveyance of a steam-vessel affirmed, and the appeal dismissed with costs.

Mr. *Eccles*, Q. C., and Mr. *McDonald*, for the appellants.

Mr. *Richards*, Q. C., and Mr. *Blake*, for the respondents other than *Gildersleeve*.

Mr. *Crickmore*, for *Gildersleeve*.

The judgment of the court was delivered by

SIR J. B. ROBINSON, BART., C. J.—The plaintiffs' bill has been dismissed but without costs against all the defendants, except *Gildersleeve*, in regard to whom a decree was made that he shall assign and deliver up the steamer City of Hamilton to the plaintiffs, upon payment of what may be found due to him as mortgagee of the said steamer.

Gildersleeve acquiesces in the decree, the plaintiffs have appealed from the decree dismissing their bill.

The plaintiffs' amended bill was filed ninth May, 1857, while certain actions were pending by the defendants (not including *Gildersleeve*) against the plaintiffs, for breaches of a bond given by the plaintiffs to them by which the plaintiffs had bound themselves "well and

truly to convey, and to cause and procure to be conveyed to the defendants, *within three calendar months* from the date of the bond, (twenty-third May, 1854,) the steam-boat City of Hamilton, with the furniture and equipments, and the absolute title to the same, free from all incumbrances, claims, executions, and demands whatsoever; and that they would at all times thereafter secure, place, retain, protect, warrant and defend the defendants in the full and free possession and quiet enjoyment of the said steam-boat as of their own property.

The plaintiffs complained in their bill that this bond and condition upon which they were sued at law, were by error not drawn up according to the mutual understanding of the parties, and were inadvertently executed without having the error corrected, and they prayed the court that the said instrument and also an agreement executed on the same day, between the plaintiffs and defendants, for carrying into effect the transaction between them, may be reformed by incorporating the meaning and effect of a certain memorandum and receipt referred to in the bill, which, they contend, shew that the bond and agreement, as they were executed, were at variance with the real terms and conditions of the transaction, which these deeds were intended to carry into effect.

And the plaintiffs prayed an injunction against the defendants to restrain them from proceeding in the said actions, and from prosecuting any other action against the plaintiffs, for the alleged breaches of the said bonds in not procuring for the defendants a good title to the steamer, within three months, free from incumbrances, and in not maintaining them in peaceable possession of the steamer.

The grounds on which the bill was dismissed are stated in the judgment of the Court of Chancery, reported in 7 Grant, 50, where the facts of the case are fully set forth.

In the pleadings and evidence, and in the argument of this appeal, frequent reference was made to actions and proceedings in the common law courts, growing out of the transaction between the parties, for the sale of the steamer. These will be found reported in *Gildersleeve* v. *Corby*, (*a*) *Corby* v. *Paterson*, (*b*) *Bethune* v. *Corbett*, (*c*) *Corby* v. *Cotton*. (*d*)

It will seem clear, I think, to any one who traces the contest between the parties through these several reports, that the plaintiffs, *Cotton* and others, placed themselves in a very unfortunate position in May, 1854, when they sold the steamer in question to the defendants *Corby* and others, for £6,000, not having at the time in themselves a legal title to the boat, but venturing to bind themselves in the penalty of £10,000 to give or procure a good title to the defendants within three months, free from incumbrance.

I have no doubt, however, that the plaintiffs acted in perfectly good faith when they entered into that engagement, expecting to get a title from Mr. *Bethune*, the registered owner of the steamer, who was connected with them in business, and who was at that time absent in England. How it happened that they were unable to procure the title which they had bound themselves to give to the defendants within three months, that is by the twenty-third August, 1854, has not, that I remember, been explained to us. We have heard nothing of any other incumbrance upon the boat, besides that created by the mortgage which *Bethune* had given to *Cotton*, for £5,000, and which was in the hands of Mr. *Cameron* and others, as assignees of *Cotton*, with £3,750 due upon it, at the time that the sale of the boat was being negotiated in May, 1854; and if the manner in which that had been provided against by the understanding come to with Mr. *Cameron* before the bond was executed, was afterwards explained by the plaintiffs to Mr. *Bethune*,

(*a*) 15 U. C. Q. B. 150. (*b*) 7 U. C. Q. B. 209.
(*c*) 18 U. C. Q. B. 498. (*d*) 7 U. C. C. P. 392.

it does not seem likely that it could have appeared to him that that mortgage, known as it was to all the parties, created any difficulty in the way of his making a transfer to the defendants of the boat. The defendants, by what took place at, or immediately before, the execution of the bond, were placed on a perfectly safe and convenient footing as regarded *Cotton's* mortgage, the only incumbrance that we have heard of—and they were content to take the boat on the understanding that their notes to the plaintiffs for £4000, (the unpaid portion of the £6000 which they had agreed to give for the boat,) were to go into the hands of the holders of *Cotton's* mortgage; that the notes of Messrs. *Noad & Co.* for £4000 and a sum beyond, if they could be procured, would be accepted as a substitute for the defendant's notes in which case the mortgage would be acknowledged to be satisfied, and would be discharged; and if *Noad & Co's.* notes should not be gotten, then the defendant's notes should be held for the mortgage debt, and the mortgage should not be enforced otherwise than for securing the payment of the notes in their due course.

This placed the defendants on safe ground, and made the incumbrance a burden of no consequence to them; for if they duly paid up their notes, the mortgage would be thereby discharged.

The first of the notes, that for £1000, did not fall due till December, 1854, some months after the defendants, according to the condition of the bond, were to have received a legal title to the boat. No such title was given to them; nor does any attempt seem to have been made towards giving them a title, though they had, it is true, the possession of the boat till May, 1856, when it was taken out of their possession by *Gildersleeve*, who claimed it as having bought it at a sheriff's sale, under an execution against the goods of *Bethune*, and also as the assignee of *Cotton's* mortgage, which he had purchased from *Cameron* and the other assignees.

The notes of the defendants have been all paid, but they were not paid punctually, either because it was not convenient to the defendants, or because the defendants were unwilling, if they could avoid it, to make these large payments while they were left without any title to the boat.

They could not, however, successfully resist the payments, and when they failed to pay punctually, the holders of the notes and of the mortgage felt themselves, as I suppose, released from their engagement, and at liberty to dispose of the unpaid notes and mortgage as they did to Mr. *Gildersleeve*.

The defendants being ultimately compelled to pay up all their notes, and having before that had the boat for which they had paid £6000, taken out of their possession by *Gildersleeve*, as I have mentioned, they brought their action against the plaintiffs upon their bond, charging as breaches of the condition that the plaintiffs had never given them a title to the boat, though they undertook to do so by the 23rd of August, 1854, and had failed to maintain them in possession; and they recovered back the £6000 which they had paid, and a further sum of £675 for interest on the money paid from the time they lost possession of the boat; and as compensation in part for some improvements made by them in the engine.

The plaintiffs (defendants in that action) moved against the verdict in the Common Pleas, where the suit was pending, upon several grounds, and among others, for excessive damages; but the court saw no good ground for interfering with the verdict, and judgment was obtained upon it, which it appears had been satisfied in full by the defendants.

But while the action was pending this suit was instituted, which we think was rightly disposed of in the Court of Chancery, by dismissing the bill; for it appears to us

that there is nothing in the evidence, or in the reason of the thing from the nature of the transaction, which would have warranted the court in reforming the instruments according to the prayer of the bill, which indeed was not quite specific as to the amendments desired.

It is clear, however, that what the plaintiffs were contending for, was such an alteration in the frame of the condition of the bond as would not have made it obligatory on them to procure a title free from incumbrance, until the time should have come when the incumbrance of *Cotton's* mortgage would be removed by the defendants having paid up their notes, which were to go in discharge of it. But there is nothing that would have warranted the court in putting the contract of the parties into that shape. It would have given the defendants no claim to call for a title for two years and a half after they had closed the contract and paid the £2000; and a further alteration in the instrument, which the plaintiffs, I suppose, where contending for, was such as would have made the defendants' continued possession of the boat dependent on their regular payments of their notes, so that the plaintiffs should not be held to indemnify them against any damage from the mortgage being enforced against them in consequence of their own default.

The parties might, if they were all willing, have placed themselves on that footing; and it would not, perhaps, have appeared unreasonable if it had been suggested that the contract should have been so modified in both respects, after the mortgage which *Bethune* had given to *Cotton* upon the boat, (and which escaped attention in the beginning of the negotiation,) had been considered and provided for as it was.

But before the court could take the liberty of making important changes of this kind in the written contract of the parties, they must have the very clearest evidence that a mistake was committed in framing it as it was framed;

or in leaving it as it was after it had been certainly agreed that it should be altered so as to correspond with the new views and agreement of the parties. No fraud is imputed, but the court is asked to infer the alleged mistake as if the inference of mistake was inevitable upon the very inspection of the memorandum and receipt. That we think it is impossible to concede. The receipt is not material to speak of. The minute signed by Mr. *Cameron* at the foot of the bond, before the bond was executed, was written there for the double purpose, as was explained, of placing, for his own sake, his incumbrance upon the boat in view of those parties whose rights were to be affected by it, and of binding himself to the arrangement which he had entered into for facilitating the sale of the boat.

That arrangement effectually removed any obstacle, by reason of the mortgage, which had nearly put an end to the negotiation. But that memorandum could have no influence or control over the construction or effect of the bond, for it was not the language of any of the parties to the instrument; nor can it be said, (if that would be decisive, which it would not be,) that in consequence of the arrangement described in the memorandum, a change must certainly have been termed to be made by all the parties in the terms of the bond, such as has been suggested by the plaintiffs. It was a collateral arrangement altogether between the obligees and Mr. *Cameron*. The effect was to prolong the time for paying off the mortgage, and in the mean time to restrain the holders of the mortgage from enforcing it; and the obligors might reasonably have objected before they executed the bond that they could not stipulate to give a title free from incumbrance, till the defendants by their payments had cancelled the mortgage; and that they should not be expected to secure the defendants in possession of the boat, except on condition that the defendants made no default upon their notes. The defendants might have agreed to a modification of the

bond, or they might not; but they were not asked to do it, and nothing of the kind was done, or talked of; nor, as it seems, thought of.

But the transaction was plain enough, and spoke for itself as it stood. The holders of the mortgage would not have been allowed to enforce it in a manner inconsistent with the memorandum; and therefore there was not any incumbrance of which the defendants need be afraid. They would hold the boat subject only in effect to a lien for the purchase-money, which they could not object to, as it was so agreed among them; and they could have made nothing of any complaint on account of this mortgage, as being an incumbrance upon the title. Neither Mr. *Bethune* nor the plaintiff need have hesitated to make the conveyance on account of that mortgage, and I see no reason to suppose that it was thought to be any difficulty in the way, or had anything to do with the failure to convey the boat.

And it is very plain that the defendants had a substantial reason for complaining that the title was not given to them at the end of three months, for if they had obtained it they might, for all we could tell, have been able to dispose of the boat, before that kind of property became depressed in value, and might have enabled themselves by the sale of her to pay the £6,000 for which they were liable, and possibly something beyond. The manner in which the payment of the mortgage had been arranged gave them great facility in dealing with the boat, if they had had it in their power.

It is clear, therefore, I think, that we cannot do otherwise than affirm the judgment given below, and dismiss the appeal with costs.

IN APPEAL.

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

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

NICHOLS v. MCDONALD.

Railway contractors—Appeal from Master's report—Practice—Costs.

Three persons having entered into several contracts in the name of one of the three, for the construction of portions of a railroad, without any written articles of agreement as to the share each should have, after the completion of the works, disputed as to the share each should have in the contracts, and a bill was filed by one of them to have an account taken, claiming a larger share in the profits than the master allowed him by his report from which all parties appealed, being dissatisfied therewith; and by arrangement the court below affirmed the finding of the master with a view of taking the opinion of this court thereon. The court, on affirming the order of the court below, refused the costs of the appeal to either party.

Statement.—The suit in the court below was brought to determine the interest which the plaintiff *Nichols* had in three several contracts taken from the Great Western Railway Company of Canada, in the name of the defendant, *McDonald*.

The first contract was for sections 11, 12, 13, 16, 17, let by the company in 1848.

The second contract for portions of sections 18, 19, 23, let by the company in December, 1852; and the third contract, for portions of sections 19, 20, 21, let by the company in February, 1853.

Nichols, by his bill, claimed that he and *McDonald*, in June, 1850, went into partnership on equal terms as to profit and loss, and had ever since been such partners in works in the State of New York and this province,

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* Were absent when judgment was given.

but all by verbal agreement, which extended to all such contracts as they had previously made, and were then engaged in, as well as to future contracts, either singly or in their joint names.

That before the agreement in June, 1850, viz., in 1848, *McDonald, Cameron, Buchanan, Hale, Wilson,* and *Sherwood,* had contracted with the Great Western Railway Company for the sections mentioned in the first contract.

That it was agreed between the plaintiff and *McDonald* that they should be partners in *McDonald's* interest under that contract.

That it should be carried on by *McDonald* by their joint means.

That *McDonald* should buy in as many of the shares of the other five as he could; and that the plaintiff, as soon as he could, should join *McDonald* in Canada in carrying on the work.

That *McDonald,* upon that understanding, came to Canada, in February, 1852, and bought for himself and plaintiff the greater number of the other shares in the contract.

That afterwards, in 1851, plaintiff joined *McDonald* in Canada, and contributed all his available means and his labour, and superintended in carying on the said first contract to its completion.

That during the progress of the works *McDonald,* for himself and plaintiff, and according to their agreement before they came to Canada, bought the whole of the remaining shares in the contract, and the greater part of that contract was executed, and it was completed *by the united means of plaintiff and McDonald, as co-partners.*

That in December, 1862, while plaintiff and *McDonald* were partners, *McDonald* in his own name, but acting for the partnership, contracted with the Great Western Railway Company to make portions of 18, 19 and 23, the subject of the second contract, and the same was executed with their joint means, and under their joint superintendence as partners; and that in February, 1854, he and *McDonald* being still partners, *McDonald* made a further contract (the third) with the Great Western Railway Company, for making portions of 19, 20, and 21, under the partnership agreement, and the same was executed with their joint means and exertions.

That plaintiff, during these works, contributed more money towards their execution than *McDonald* did.

That large sums of money so used were raised on their joint credit as co-partners, some on notes in their joint names.

That they entered into contracts in their joint names, with sub-contractors, for executing these works.

That both made themselves jointly liable as co-partners, to the sub-contractors, and for tools, materials, &c., and were both liable for losses.

That books were kept for the co-partnership by a book-keeper employed by plaintiff and *McDonald*, always accessible to *McDonald*, in which the work, expenditure, profits, &c., were accounted for as in a co-partnership business.

The plaintiff claimed *one half interest in the three contracts.*

He asserted that if the defendant *Ross* had, as he understood he claimed to have, an interest in the *first* and *third* contracts, it could only be an interest under *McDonald, i. e.,* part of *McDonald's* share, and that it could not go in diminution of the plaintiff's interest.

McDonald, by his answer, denied any such agreement as plaintiff sets out to share with plaintiff in all contracts which either had taken in the State of New York or in Canada in public works before or after 1850; but admitted an agreement that in whatever contract for public works their joint funds, care, and superintendence were used and employed they should share equally as to profit and loss.

That either was to be at liberty to take separate contracts in his individual name, and for his own exclusive advantage, and at his own risk, and these were not to be considered as co-partnership undertakings, when they were carried on by the sole and separate funds and exertions of either.

He denied that plaintiff had any greater interest in the first contract than to the extent of one-sixth (less one-fourth of the superstructure, to which one *Pearson* was entitled.)

He admitted plaintiff's interest to that extent, though he stated that plaintiff was to furnish him with $2,000 or $3,000 for the immediate necessities of the work, in consideration of his getting the one-sixth, but failed to do so.

He denied that he purchased out the shares of the other contractors for the sections upon any partnership agreement with plaintiff; that he had entered into no such agreement, but bought out those parties for his individual benefit, and now holds the greater portion of the same in his own right, *having made the purchase from his private funds*, assisted by *Ross* on certain agreements between them, *McDonald* and *Ross*, under which *Ross* holds one-half of a share bought from *Cameron, and portions* of other shares by arrangement between these two.

That plaintiff knew this to be so; and that he was

entitled to no interest in those shares as partner or otherwise; that plaintiff never advanced any money for those purchases, nor contributed to purchase the said shares, or to carry on the work; nor give more time and attention to the work than was proper in regard to his one-sixth interest therein.

He denied utterly the right of the plaintiff to share in the second contract upon any ground, and set out that that contract was carried through by him, *McDonald*, alone on his sole credit and exertions, and without any assistance from the plaintiff.

That the third contract was made by him, *McDonald*, for the joint benefit of him and plaintiff; and he admitted plaintiff's right to share in it equally with himself, thus admitting plaintiff entitled to one-sixth share in the *first contract*, and denying any greater interest in it: also to *one-half* of the *third* contract; and denied that plaintiff had any interest *in the second.*

As to *Ross's* claim, *McDonald* stated that he and *Ross* had been before 1847, and were then in business together in the State of Illinois, and heard that the Great Western Railway Company was to let contracts in October, 1847.

That they agreed that he, *McDonald*, should come to Canada, and endeavour to obtain contracts; that he did come, and with *Cameron, Buchanan, Hale, Wilson* and *Sherwood*, obtained the *first contract.*

That he and *Ross* agreed to take the work jointly, (that is as to the one-sixth plaintiff had acquired); and that whatever shares either of them could acquire from the other five contractors should be for their mutual benefit on terms of sharing equally.

That before *McDonald* came to Canada in 1852 to go on with the work, *Ross*, on an agreement with him,

bought out *Cameron's* one-sixth in the first contract for their mutual benefit.

That afterwards *McDonald* by agreement bought for himself and *Ross*, *Wilson* and *Sherwood's* two-sixths, and the other two-sixths (which belonged to *Hale* and *Buchanan*) were then held by one *Jacobs;* and that in March, 1852, this work was in progress under *Ross* and himself for their joint benefit as to four-sixths, under the name of *McDonald & Co.*, *McDonald* being principal manager.

That in March, 1852, plaintiff came to Canada, and *McDonald* admitted plaintiff to an equal interest in *McDonald's* share of the first contract, and books were opened in their joint names, but that plaintiff's interest was limited to one-sixth: in other words, a joint interest with *McDonald* in his two-sixths, viz., that taken by *McDonald* as one of the six, and that bought by *McDonald* and *Ross* from *Cameron*.

That if the books kept by plaintiff or his book-keeper were inconsistent with the true state of the facts *McDonald* ought not to be bound by them.

That in the summer of 1853, he, *McDonald*, bought from *Jacobs* the two-sixths which he had got from *Buchanan* and *Hale*, and that such two-sixths were bought by him for himself and *Ross*.

Ross, by his answer, asserted that plaintiff knew well of *his* arrangements with *McDonald* when he negotiated with *McDonald*, and therefore could not and did not by his agreements with *McDonald* affect *Ross'* share in any contracts.

That he, *Ross*, and *McDonald* were in and before 1847, engaged together in public works in the State of Illinois, and hearing that contracts were to let by the

Great Western Railway Company in October, 1847, they agreed that *McDonald* should go to Canada and get what contracts he could, which contracts should be for their joint benefit, to be shared in equally.

That *McDonald* came to Canada, and took one-sixth of the first contract, and he and *Ross* bought horses and other stock and materials, and came into Canada to go on with the works.

That the Great Western Railway Company were not ready to proceed, and they returned to the United States on the understanding that they were to go on as agreed whenever they were allowed to do so.

That in March, 1852, they returned to Canada, and commenced the work upon their original agreement.

That just before that *Ross*, for himself and *McDonald*, under their agreement, bought *Cameron's* one-sixth, and that afterwards *McDonald*, for their joint benefit, bought from *Wilson* and *Sherwood* their two-sixths.

That *Ross* up to this time had neither known nor heard anything of *Nichols*.

That *McDonald* and *Ross* proceeded with their first contract (in which they had then four-sixths interest) and entered into sub-contracts with others.

That *Nichols* did not come to Canada till a considerable portion had been done, and a large portion contracted for by sub-contractors, *i. e.*, in the *end of March*, 1852, which was the first *Ross* knew of him.

That plaintiff then wanted to buy through *McDonald*, *Ross'* share, being two-sixths, and that *Ross* refused to sell.

That *he believed* that *McDonald* to compensate

plaintiff for his disappointment, as he had come to Canada, agreed to give plaintiff some interest in his, *McDonald's* share of his first contract, but without altering or intending to alter *Ross'* interest in it.

That in the summer of 1853 *McDonald*, for himself and *Ross*, bought from *Jacobs* his two-sixths under their partnership agreement.

That *McDonald*, under his agreement with *Ross*, took the *third* contract from the Great Western Railway Company; that he had heard and believed that plaintiff was entitled by his agreement with *McDonald* to some interest under *McDonald* in that contract, but does not know to what extent, and that at any rate his, *Ross'* share, could not be diminished or affected by any such agreement.

That he, *Ross*, had given his *time* and *attention* to carrying out the said contracts, (the first and third,) and had advanced large sums of money, and the same had been completed.

That having implicit confidence in *McDonald*, he never interfered with the books or accounts relating to the contracts, which were kept by a brother of the plaintiff, (*Nichols*,) although *McDonald* sometimes requested him to do so, as he knew nothing of keeping books, and seemed suspicious that they were not correctly kept, but he, *Ross*, from delicacy did not inspect them.

He denied that plaintiff had any interest in the *second contract* that could conflict with his, *Ross'*, interest, which he asserted to be a one-half interest in the *second* contract.

The following schedule shews the claims of each of the

contending parties, and the finding of the master of the court at Hamilton, thereon:

First Contract.	Second Contract.	Third Contract.
Plaintiff claims one-half.	Plaintiff claims one-half.	Plaintiff claims one-half.
Report gives him $\frac{1}{6}$th and $\frac{1}{3}$rd of $\frac{2}{6}$ths.	Report gives him no share.	Report gives him one-half.
McDonald claims $\frac{1}{3}$rd of $\frac{2}{6}$ths.	McDonald claims the whole.	McDonald claims one-half.
Report gives him $\frac{1}{6}$th and $\frac{1}{3}$rd of $\frac{2}{6}$ths.	Report gives the whole.	Report gives him one-half.
Ross claims one-half.	Ross claims one-half.	Ross claims $\frac{2}{4}$ths.
Report gives him $\frac{2}{6}$ths and $\frac{1}{3}$rd of $\frac{2}{6}$ths.	Report gives him no share.	Report gives him none.
	Master's Report as Below.	
To plaintiff.	To McDonald.	To Ross.
$\frac{1}{6}$th and $\frac{1}{3}$rd of $\frac{2}{6}$ths in first contract.	$\frac{1}{6}$th and $\frac{1}{3}$rd of $\frac{2}{6}$ths in first contract.	$\frac{2}{6}$ths and $\frac{1}{3}$rd of $\frac{2}{6}$ths in first contract.
Nothing in the second.	The whole of the second.	No share in the second.
One-half in the third.	And one-half of the third.	No share in the third.

The master reported as he did upon the conviction, as to the first contract, that *McDonald* took one-sixth originally for himself and *Ross*; that *Ross* bought out *Cameron's* one-sixth for himself and *McDonald*; that *McDonald* bought *Wilson* and *Sherwood's* one-sixth for himself and *Ross*; and that he bought *Jacob's* two-sixths which had belonged to *Buchanan* and *Hale*, for plaintiff, himself, and *Ross*.

In his first report, the 2nd of June, 1857, the master had found, that the plaintiff and *McDonald* shared equally between them the first and third contracts; that *McDonald* held the second contract alone; and that *Ross* had no interest in any of the three contracts, except any interest that he might have derived under *McDonald*, and which could not affect the share held by the plaintiff.

All parties appealed to the court against this report of the master.

The plaintiff—because the master should have found that he held an equal interest with *McDonald* in the second contract; not objecting to the report upon the interest of the parties in the first and third contracts.

McDonald—because the master should have found the plaintiff only entitled to *one-sixth* interest in the first contract, and to one-third interest in the third contract.

Ross—because the master should have found that he and *McDonald* held equal shares in the three contracts, and that the plaintiff held no interest in any of them, except any interest which he might have taken from *McDonald* alone, which could not affect the interest of *Ross* in the contracts.

The court affirmed the master's report as it relates to the plaintiff and *McDonald*, and also as it regards *Ross'* interest in the second and third contracts, and his

interest in the first contract, with the exception of his report upon the one-sixth interest therein purchased from *Malcolm Cameron*, and referred to in the said report, and in regard to that one-sixth share in the first contract, the court ordered that it be referred to the master to make further enquiry in respect thereof, and if necessary to review his report.

By an order made on that day in the Court of Chancery the case has been opened, perhaps to a greater extent than was contemplated by the order of the 24th of August, 1857.

The case was now argued on the master's report, and the reasons of appeal of the respective parties, and the questions were, whether all three were not entitled to share in the *third* contract.

Nichols and *McDonald* may be considered as agreeing that they were to divide that equally between them, and that *Ross* had no claim to an interest in it. *Ross* claimed half the benefit of that contract.

As to the *second* contract, *McDonald* claimed that he alone was interested in it. *Nichols* and *Ross* each claim half of it.

As to the *first* contract, *Nichols* and *Ross* claimed each one half of it. *McDonald* admitting that *Nichols* is entitled to one-sixth, and that he and *Ross* hold the other five-sixths between them in equal shares.*

Mr. *Freeman*, Q.C., and Mr. *Proudfoot*, for *Nichols*.

Mr. *Connor*, Q.C., and Mr. *C. G. Crickmore*, for *McDonald*.

Mr. *Blake*, for defendant *Ross*.

*The foregoing statement I have extracted from a synopsis of the case made by His Lordship the Chief Justice.—A. G.

Judgment.—SIR J. B. ROBINSON, BART., C.J.—I have spent much time in considering the evidence in this case, hoping that I might find it lead more clearly and conclusively to a just solution of the differences that have sprung up between these parties, than it seemed to do, during the argument, or according to the view of it taken by the master.

But I confess I have been in a great measure disappointed. What the parties have either chosen, for some reasons, to leave unsettled and undefined; or have for want of common care and prudence omitted to define, cannot, I am now persuaded, be made out from the mass of evidence that has been before us, with so much certainty, as not to leave considerable doubt whether the real truth of the case has been arrived at.

The assertion of the plaintiff upon which his bill is founded is not very probable on the face of it, namely, that in June, 1850, it was agreed verbally between him and *McDonald*, in the State of New York, where they both then were, that whatever contracts they had entered into, or should thereafter enter into in their joint names, or individually, for the execution of any public works in Canada, should be shared equally between them as to profit and loss, and no such agreement can be said to be established by the evidence, except so far as *McDon[illegible]* qualified admission of it in his answer, should be taken as evidence against himself. The whole course of the plaintiff's conduct up to the time of his coming to Upper Canada, in 1852, and especially his correspondence, shews that at least he held himself at liberty to take, or to decline to take an interest in the works which were going on in Upper Canada, in which *McDonald* was concerned as a contractor; and that he did not look upon any contract which *McDonald* had taken, or might be disposed to take, as one in which he was necessarily to share as to profit and loss, unless he chose to place himself in that position, by coming forward under his alleged agreement, and uniting with *McDonald*

in devoting his time and means to the execution of the work.

Upon any other view of the case the conduct and correspondence of these parties would seem inexplicable, and that view of it is not inconsistent with *McDonald's* answer.

There is much less difficulty, I think, in forming an opinion of the plaintiff *Nichols'* position in regard to the several contracts, than of the position of the defendant *Ross*, in regard to whom the evidence is in general indistinct and contradictory, and some of it without doubt wholly unsafe to rely upon.

The master has made such observations upon the general character of the evidence, as any one, I think, who reads it must fully concur in, and he has been at great pains to state clearly the grounds upon which he has formed his several conclusions, while he admits that he has found it almost impossible to dispose of any one of the questions of fact that have been raised, without deciding in opposition to a good deal that is to be found in the evidence. It cannot be denied that the case is unfortunately one of that kind.

It does seem extraordinary that three persons, all experienced in railway contracts, should be content to engage more or less in the execution of works of great magnitude, which could not be carried through without an expenditure of many thousands of pounds, without an attempt at least to settle carefully the terms on which they united, and without having it in their power to prove what those terms were. On a half sheet of paper the whole might have been stated distinctly. But it is confessed by all that there was never anything in writing drawn up for the purpose of shewing how the parties stood.

And there is no appearance in the whole mass of evidence of the parties, or any two of them, having met

together with a view of declaring in the presence of other persons what their respective interests were to be. Perhaps they were content to rely on each other's sense of justice, and the good feeling which it is evident prevailed among them, not doubting that if all turned out well the gains would be divided according to the principle which we may suppose, (though the master I see doubts it,) was well understood among themselves. And as it is quite clear that they had all had experience of the difficulties and the uncertain results of such contracts, they may each have thought it prudent to keep their relative positions undefined, so that in case of reverses they might be able to save themselves from some portion of the liabilities that would be attempted to be enforced against them.

However this may be, after a full portion of the usual difficulties attending such undertakings, especially when they are entered into without the requisite capital, the several contracts were completed, more or less, by the exertions of all, though nothing can be more contradictory than the testimony upon this last point, as respects the several contracts, and several parties. At the end there are many thousands of pounds to be divided, and as might have been apprehended by persons having much less experience of mankind than all these gentlemen must have had, they cannot agree upon the cardinal point—what interest each of them had in the contracts that have been successfully carried through.

The defendant *McDonald* was the one of the three who took the contracts from the company. The work was done in his name, and he appears to have been the most prominent person in carrying it through. Yet if the claim of the plaintiff *Nichols* were true to the full extent, he, *Nichols*, was by agreement to have half of all the interest held by *McDonald* in the different contracts, whatever understanding there might have been between *McDonald* and *Ross* about the other half.

And so also, if *Ross'* claim be well founded to the full extent, then he held half of the whole interest of *McDonald* in the different contracts, whatever agreement *McDonald* may have chosen to enter into with *Nichols* about the other half. Between these two then, *Ross* and *Nichols*, the whole interest would be absorbed, for *McDonald* could have held only the excess above the two halves, and must have been a contractor with no other object in view than to apply his time and credit towards carrying on a work for the benefit of others, and to make himself liable for losses. It is abundantly clear upon the evidence that this was not the footing upon which they stood, though it is difficult to find from it what was the exact position of each.

McDonald alone contracted with the company, and must of course be regarded from that circumstance as solely interested, in the absence of evidence to the contrary, but there is abundance of such evidence, though it is difficult, and I fear it must be added impossible, to make out from it with certainty who were in fact partners in the three several contracts, and in what proportions.

As between *McDonald* and *Ross* there is little or no difficulty, for what *Ross* claims is half interest in all the work, and *McDonald* in his answer admits that *Ross* is entitled to share equally with him in all but one-sixth of the first contract. The difficulty is to fix the position of the plaintiff *Nichols*, for the evidence and *McDonald's* answer make it pretty clear that *McDonald* and *Ross* had a good understanding between themselves, which it is probable will be allowed to govern whatever conclusions the court may arrive at from the unsatisfactory evidence before them.

Nothing can be inferred from the manner in which the sub-contracts were given out, for *McDonald*, it is clear, was allowed to act as if he were solely interested, when it is certain the fact was otherwise, the others

seeming content to rely upon the understanding among themselves, of which no care was taken to preserve either written or verbal proof.

In such a case the accounts might be expected to afford important evidence, but they do not appear to do so, for in the first place *McDonald* and *Nichols* had been concerned together in contracts in one part of the United States, and *McDonald* and *Ross* in another, up to and during the time that the works on the Great Western Railway were in progress. They had difficulty in carrying on their undertakings in the United States, and the correspondence shews that there were money transactions unsettled between them connected with their operations there, so that when money was borrowed by either upon discount or otherwise in the United States or in Canada, it is difficult to ascertain whether it was money raised and advanced by either to the other as a contributien towards the works now in question, or a remittance or payment made on account of old claims. So also, as to the method of keeping the accounts, we find that accounts were kept in the names of *McDonald & Co.* as to the first contract, of *McDonald* only as to the second, and of *McDonald* and *Nichols* as to the third; but little attention can safely be paid to this, even if these distinctions should be found to have been uniformly preserved, because the "company" in the first contract might include *Ross* alone, or *Nichols* alone, or *Ross* and *Nichols*. and though the accounts regarding the several works might have been kept in the books in the name of *McDonald* alone; that would not make it safe to conclude that either or both of the others might not have been concerned with *McDonald* in carrying it on; and so also as to the third contract, it is plain that the manner in which the parties were content to have the accounts kept would lead to no certain conclusion that *Ross* had no concern in that contract.

It is sworn that all these parties, and especially *Nichols* and *McDonald*, were little conversant with

accounts, and that none of them appeared to trouble themselves about them, but left all in the hands of a brother of *Nichols*, who seems to have been implicitly trusted, and was probably deserving of such confidence, but he swears that he really did not himself know any thing of the footing on which the parties really were, and he candidly states that he made entries sometimes as he was told to do so by *McDonald*, and at other times by *Nichols*, so that little reliance can be placed on what the accounts might seem to import, though it might have been otherwise if they had been kept for men of business who understood accounts and were in the habit of frequently inspecting their books, and who could be proved to have had settlements of their mutual accounts from time to time upon the footing of that joint dealing which the books exhibited. From the beginning to the end of the evidence, in this case, there is no proof of any settlement or attempt to settle among these parties for any purpose, either as to the contracts generally, or as to any portion of them.

And it is an extremely unsatisfactory feature in the case, that *Ross* and *McDonald* are found to have confessedly united in a written statement which they intended, if it had become necessary, to use in supporting a claim of *McDonald* for damages against the Great Western Railway Company for detention, which statement is altogether at variance with what in this cause has been admitted and advanced by them both. I regret very much the appearance of this in evidence, because, but for it, I think the correspondence among the parties would lead me to conclude that they were all men acting ingenuously and in good faith, having confidence in each other, and acting without artifice or suspicion, though certainly without exactness or caution, to a degree hardly credible, when it is considered how large an expenditure was involved, and how difficult it must be without observing more method during the progress of the work, to come to a satisfactory adjustment of their interests at the end.

As regards the first of the three contracts, I think the evidence best supports this conclusion—that *McDonald* came into Canada in 1848, and took in his own name and in company with *Cameron*, *Buchanan*, *Hale*, *Wilson*, and *Sherwood*, the contract in question, upon the footing that the six were to share equally.

That he did this, however, upon a previous understanding with *Ross*, one of the defendants, that they were to be partners on equal terms in such contracts on the Great Western Railway as *McDonald* should acquire.

That there was not at that time any agreement between *McDonald* and the plaintiff, that the plaintiff should have an interest either with *McDonald* or under him, in all such contracts as *McDonald* might take in Canada; and that no agreement is shewn or admitted to have been afterwards made between them, that the plaintiff should be a partner in all such contracts as *McDonald* had taken, or should take, upon public works in Canada, but only upon such contracts as the plaintiff might choose to share in, and might concur with *McDonald* in executing.

I think, therefore, that the one-sixth interest taken by *McDonald* in 1848, was held by him for the joint benefit of himself and *Ross*, as partners upon equal terms.

Also that the one-sixth share bought by *Ross* from *Cameron* in February, 1852, was bought by him for himself and *McDonald*, by agreement between them, to be held by them as partners upon equal terms.

Also that the *two-sixths* held by *Wilson* and *Sherwood* were bought by *McDonald* in February, 1852, to be held in like manner between him and *Ross*.

And that while *McDonald* and *Ross* thus held these four-sixths, *McDonald* parted with *one-sixth* to the plaintiff, by allowing him to come in as a partner with

him on equal terms in the purchase of the two-sixths made from *Wilson* and *Sherwood*, or rather by giving him that amount of interest in the contract; for if *Ross* had, as I think he had, one-half interest in the purchase from *Wilson* and *Sherwood*, *McDonald* could not let the plaintiff have one of the two-sixths acquired from *Wilson* and *Sherwood*, and at the same time retain an interest himself in these two-sixths.

Then as to the purchase made by *McDonald* in the summer of 1853, of the two-sixths then held by *Jacobs*, who had bought out *Buchanan* and *Hale*, that appears to me to be the most doubtful point in the case.

But on the whole I think the evidence supports the view taken by Mr. *Leggo*.

The questions are, has *Ross* a right to share in that at all, and if so to the extent of one-half or one-third.

I have more doubt as to *Ross'* right to share in that at all than I have as to the propriety upon the evidence of excluding *Nichols*. There is no proof of any special allotment of interests among the three; but the weight of evidence, I think, is in favour of all sharing; and as I cannot say that the evidence satisfies me that the report of the 13th of June, 1859, is wrong upon that point, I am not for varying the judgment of the court below, as it respects that or any other part of the first contract, though I think that no one, upon perusing carefully the whole evidence, can say confidently that it establishes either that or any other conclusion clearly, so as to leave no room for doubt.

As to the second contract, I have no doubt that upon the evidence it should be held to belong to *McDonald* alone.

And that *Nichols* and *McDonald* are jointly interested in the third contract, holding it as partners on equal terms, and exclusively of *Ross*. In other words, I

think the master's report is at least as well supported by the evidence as any other division of the interests would have been, and as he had the advantage of seeing and hearing the witnesses, and observing their conduct under cross-examination, his report should not be overruled merely because we may have doubts whether as to some one part of it the evidence preponderated most in favour of the view he took, or against it. He has shewn much judgment in his reasoning upon the weight due to the different classes of testimony, and has been at great pains to explain the grounds on which he formed his several conclusions. We ought to see clearly that he is wrong in some of his conclusions before we depart from the view he has taken.

For my own part, as I have already stated, I think his report is in accordance with that view which the evidence tends best to support, though undoubtedly there is much in the evidence, and much in testimony that little deserves the character of evidence, that if it stood alone would lead to very different conclusions.

Ross' right has been disputed as to anything more than a one-sixth share in the first contract.

McDonald, however, admits *Ross'* claim to one-half of five-sixths of that contract: in other words, his right to claim as partner on equal terms with him, *McDonald*, and to the exclusion of *Nichols*, in all but the one-sixth of that contract, to which *McDonald* admits *Nichols* to be entitled.

Then as to *Nichols*, who does deny *Ross'* claim, it is necessary to consider what there is in the evidence to shew *Ross'* right to any thing beyond the one-half of the two-sixths which *McDonald* and *Cameron* took in the first instance from the railway company. The master's report gives to *Ross* not only the half of the two-sixths, or a one-sixth share, but also one-half (sharing equally with *McDonald*), of *Wilson*

and *Sherwood's* two-sixths, and one-third of the two-sixths acquired by *Jacobs'*, from *Buchanan* and *Hale*, looking upon *Jacobs'* portion as held equally by the three.

This gives to *Ross* two-sixths and one-third of two-sixths in the first contract, and to each of the others one-sixth and one-third of two-sixths in the same contract.

So *Ross* gets one-sixth share more than either of the others, which is owing to *McDonald* having given to *Nichols* a one-sixth share, and to *Nichols* having had no interest in either *McDonald's* or *Cameron's* original share.

This arrangement cannot be said to be supported by precise and consistent testimony, but *McDonald* cannot complain, for he has admitted a greater interest in *Ross*. There is nothing of that kind to estop *Nichols*, but there is much in the evidence to support *Ross'* claim, and there is proof by witnesses not impeached of admissions by *Nichols* that *Ross'* interest in the first contract was greater than his own.

And as to any complaint of *Ross* that enough is not given to him, there is clear evidence that he concurred in a deliberate written statement which might have justified the decision that he was nothing but an agent, and not a partner in the work at all.

To find clearly, then, the position of *Nichols* in the third contract, is by no means easy, but I think the evidence justified his being assumed to have an equal interest with the others.

In my opinion the appeal should be dismissed, but without costs to any of the parties, for besides other reasons, all seem to have agreed to come with the case here for the first discussion upon the merits of the master's final report.

Judgment.—BURNS, J.—The correspondence shews, I think, that *Nichols* and *McDonald* at times contemplated before the month of February, 1852, that they would be concerned together in the work, and also with others, but I cannot gather anything definite between them, and I do not understand that up to that time there was in truth any partnership between *Nichols* and *McDonald* in respect to the Canada contract.

Then (17th February, 1852,) *McDonald* owned one-sixth of the 1st contract, and *Cameron's* one-sixth had been purchased out. As matters then stood these two-sixths belonged to *McDonald* and *Ross*. *McDonald* represents in his letter of the 17th of February, that *Ross* might then be got rid of for $500; but it seems that *Ross* did not go out. *Nichols* says in his letter of the 24th of February, 1852: "If I can fairly understand it, and see a fair prospect, I will go into it, and raise some money pretty soon, but I shall have to see you first."

McDonald bought out the *Wilson* share, two-sixths, before *Nichols* consented to join; and though it may suit both *McDonald* and *Ross* now to make out that *Nichols* only became interested with *McDonald* from that time, which would give him by an equal division of those two-sixths, the one-sixth of the whole contract, yet I look upon the correspondence as shewing that *McDonald* and *Nichols* were upon equal terms before that time, and then matters would stand thus: two-sixths in equal shares between *McDonald* and *Ross*, one-sixth to each. Then *Nichols* when he came in would have half of *McDonald's* one-sixth, that is one-twelfth of the whole, and half afterwards of the *Wilson* share, two-sixths of the whole, or then three-twelfths of the whole.

Ross would have then $\frac{1}{6}$ or $\frac{2}{12}$
McDonald " " $\frac{2}{12}$
Nichols " " $\frac{3}{12}$

I think the purchase of the interest of *Jacobs* was not one on account of *Ross* in any way. I look upon that

in the same light as the purchase from *Wilson* and *Sherwood* of the other two-sixths.

Whatever interest *McDonald* may have acquired it may be that as between himself and *Ross* they stood upon equal terms, and they desire to put the case in that way now, but this suit is brought by *Nicholas*, not for the purpose of settling the shares as between *McDonald* and *Ross*, but for the purpose of settling *Nichols'* own share.

I think the purchase of the *Jacobs'* interest was upon the same footing, as respects the plaintiff, *Nichols*, as that of *Wilson* and *Sherwood*, and that it was upon equal terms with each other as between *McDonald* and *Nichols*. Then it would stand thus:

Ross, one-sixth of the whole, or..... $\frac{2}{12}$
McDonald one-twelfth of the whole, two-twelfths from *Wilson's* share, and two-twelfths from the *Jacobs'* interest..... $\frac{5}{12}$
Nichols, the same..... $\frac{5}{12}$

The master gives it thus:

Ross..... $\frac{4}{12}$ and $\frac{1}{3}$ of $\frac{4}{12}$.
McDonald... $\frac{4}{12}$ and $\frac{1}{3}$ of $\frac{4}{12}$.
Nichols..... $\frac{2}{12}$ and $\frac{1}{3}$ of $\frac{4}{12}$.

Therefore he gave the largest share to the person who throughout the whole transaction was altogether in the back ground, and whom at the time the railway company gave orders for the work to proceed, would, according to *McDonald's* representations, have taken $500 and quit, though then the one-sixth had been bought from *Cameron* for $1000.

With regard to the 2nd and 3rd contracts I think the master's report is right.

RICHARDS, J., concurred in the views expressed by *Burns, J.*

HAGARTY, J.—I have arrived at the conclusion that

the plaintiff *Nichols* acquired no interest in the first contract until the time mentioned in the master's report, viz., April, 1852.

McDonald and *Ross* I think, thus owned each one-sixth, besides the two-sixths purchased, as Mr. *McDonald* says, by him and *Ross*.

McDonald admits in his answer he then gave *Nichols* one-sixth. This would leave *Ross* one-half of the *Wilson* and *Sherwood* two-sixths untouched.

After much hesitation I have also adopted the master's view in holding that the three partners acquired an equal one-third interest in the *Jacabs'* two-sixths, acquired in 1853.

I also adopt his view as to the 2nd and 3rd contracts.

I think it right to add that had it not been for the answer and depositions of *McDonald* I should not have gathered from the evidence that *Ross* had acquired so large an interest in the first contract. I am aware that this ought not to prejudice the plaintiff. But I have arrived at the opinion that plaintiff acquired no interest till April, 1852, irrespective of *McDonald's* evidence; and as to the previously existing interest *McDonald* and *Ross* could divide them as they pleased.

McDonald only excepts to the master's report on the ground that it should have awarded only one-sixth to *Nichols*, and not have given him an additional one-third in the *Jacobs'* two-sixths, and insisting that the remaining five-sixths belonged equally to him and *Ross*.

I think, on the whole, the master arrived at the safest conclusion in allowing plaintiff this one-third.

Agreeing with the report, I think the appeal must be dismissed, but under the circumstances, without costs

Per Cur.—Appeal dismissed without costs.

IN APPEAL.

[Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Sir J. B. Macaulay,† the Hon. Mr. Justice McLean, the Hon. Mr. Justice Burns, and the Hon. V. C. Spragge.]*

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

ATTORNEY-GENERAL v. GRASETT.

Trusts—Dormant equities.

The decree of the Court of Chancery as reported ante volume vi., page 485, affirmed on appeal.

Quære, whether the Dormant Equities Act, 18 Vic., ch. 124, applies to every case of express trust; or whether a case of express trust so direct and plain might not arise that the court would feel authorised to hold that the statute does not extend to it, though no exception of express trusts is contained in the act.

Statement.—The facts of the case, and the authorities referred to, appear in the former report, and in the judgment of the court.

Mr. *Adam Wilson*, Q.C., and Mr. *Bennett*, for the appellants.

Mr. *J. H. Cameron*, Q.C., and Mr. *Strong*, for the respondents.

SIR J. B. ROBINSON, BART., C. J.—The facts of this case are fully set out in the printed case.

I happened to be the attorney-general for Upper Canada, who prepared the patent of the 26th of April, 1819, under which the land in question in this suit was, with other lands, conveyed to trustees for the purposes mentioned in it. I was also one of those who were appointed by the government on the 15th of June, 1822, trustees for managing the affairs of the Toronto Hospital, and continued to be such trustee until the 23rd of February, 1841, when my resignation of the appointment was accepted by His Excellency the Lieutenant-Governor, Sir *George Arthur*.

* Was absent when judgment was delivered.
† Had died before judgment was given.

The deed which was made on the 4th of July, 1825, by the trustees named in the patent of the 26th of April, 1819, and which is complained of in this suit as being inconsistent with the trusts declared in that patent, conveyed the land which is now in question to myself and two other trustees on behalf of St. James' Church in the town of York. I accepted and acted under that conveyance, as the other grantees did, and on the 10th of February, 1841, I joined with my co-trustees in conveying the land to the incumbent of St. James' Church and his successors. It is under this title, which is set out in the printed case, that the defendants in this case now hold.

I have further, at the request of both parties to this suit, made a statement of such facts as I recollected bearing upon the subject matters in controversy, which statement it was agreed upon should be received as evidence. Under these circumstances, though I have never had the most remote personal interest in these matters, I should more willingly have avoided giving judgment in the case if the counsel for the relators and defendants had not concurred in a request that I should hear the argument and take part in the decision.

By the judgment of a majority of the judges in the Court of Chancery, which is appealed from, the information has been dismissed. I think that judgment should be affirmed; and that for other reasons besides those which have been given by the Vice-Chancellors, we should be doing wrong if we were to disturb the title of St. James' Church to the land in question.

The prayer for equitable relief is founded on the complaint that the grantees in the patent of the 26th of April, 1819, acted in disregard of the trusts contained in that patent when they conveyed this acre of land on the 4th of July, 1825, to trustees for the benefit of St. James' Church, in obedience to an order of the lieutenant-governor of Upper Canada and the Executive Council made on the 2nd December, 1824.

By the terms of the patent, which was framed in accordance with an order in council of the 9th of June, 1818, the three grantees held the several parcels of land thereby granted to them by his late Majesty, King George the Third upon trusts which are declared in these words, that is to say, "In trust at all times hereafter to observe such directions, and to consent to and allow such appropriations and dispositions of them, or any of them, 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 make and order, *pursuant to the purpose for which the said parcels or tracts of land or any of them were originally reserved as hereinbefore expressed:* and to make such conveyance or conveyances or 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 and for such use or uses* as our governor, lieutenant-governor, or person administering the government of our said province, and executive council thereof for the time being, shall from time to time by order in writing appoint.

The patent grants nine distinct parcels of land; with respect to five of which there is no intimation in the patent that they had been theretofore in any manner reserved by the Crown for any special purpose. The other four parcels it is apparent on the face of this patent had been reserved or intended for certain specific purposes. One tract of 386 acres is alluded to in the patent, as the *government "park reservation east of the town."* Another is called "the site of the old brick or government buildings." Another is described as being a reservation for the purpose of a public school, and the other that of six acres of which the acre now in question forms a part, is described as "*being a reservation made for the purposes of an hospital for the said town of York.*" No one of these tracts seems to have

been reserved by the government for the special purposes spoken of, in any manner more formal than by writing on the government plan of the town in the Surveyor-General's office, the purpose to which the government had thought of applying it, though there may have been, in regard to some or all of them, some minute in the books of the executive council explaining the intention.

It is not shewn, nor I think pretended, that up to the time of making this patent the government had done anything that affected the title, or that could interfere with the right of the Crown to dispose freely of the reserved tracts to any persons and for any purposes that might be thought desirable.

Upon this state of facts, then, the question arises, what construction is it fair to put upon the trust declared in the patent? Had the trustees a right, or rather was it their duty, according to the trusts on which they had accepted the estates, to refuse to obey the order of the governor in council made on the 2nd of December, 1824, to convey the south-east acre of the hospital block to the use of St. James' Church in the town of York, upon the ground that that would not be a grant made in "*pursuance of the purpose for which that land had been originally reversed* as expressed in the patent?" Or was it their duty under their trust to make the conveyance directed by the governor and council as being a conveyance *to such purposes* and *upon such trusts*, and *to and for such uses* as the governor and executive council had by their order in writing appointed?

For the relators it is contended that it was their duty to refuse, because the two clauses of the trust are, as they assert, dependent on each other, and inseparably connected. The defendants endeavour to maintain that they are distinct and independent, and that the trustees were bound, by the express words of the patent, to make such a conveyance as they were directed to

make by the order of the governor and executive council of the 2nd of December, 1824.

The leaning of my mind on this point is with the defendants.

No doubt where authority is given by a power of attorney to sell lands, or where lands are conveyed to a trustee to be sold, it is usual to insert an express authority or direction to make such conveyances as may be necessary for carrying out the sale; and whether in any such case there are or are not words (as there usually are) expressing that conveyances shall be made *in pursuance of the sale*, or in execution of the trust to sell, it would always be clear that such must be the intention, for it would be absurd to imagine that any thing else could be meant.

But it may well have been intended by this patent, under the words first used in declaring the trusts, that so long as the trustees continued to hold the hospital reservation in question they should observe the direction of the government in regard to the manner in which the land should be appropriated or applied to the purposes of an hospital, whether by managing it according to their directions, or by leasing or otherwise disposing of it for purposes connected with that object; that it should, for instance, be open to the governor and council at all times to exercise a control, as to the situation and description of buildings for hospital purposes, the improvements to be made in the grounds, the portions of land that should be retained in the possession of the trustees, and the portions that should be leased, or even sold for the purpose of creating an endowment.

And there is nothing unreasonable, when the facts of the case are considered, in supposing that, besides making that provision, the government, by the words last used in declaring the trusts, did intend further (what indeed is very plainly expressed) to impose upon the trustees the

duty of making (without reference to the purposes for which any of the parcels of land mentioned in the patent had been formerly set apart) "such conveyance of the same, or of any part thereof, to *person or persons*, and *upon such trusts, and to and for such use or uses* as his Majesty's governor, lieutenant-governor, or person administering the government of his said province, and the executive council thereof, should from time to time by order in writing direct." We certainly may say of this part of the letters patent, that it is not only without any words which restrict it to conveyances to be made *in pursuance of the purposes for which any of the lands had been originally reserved;* but that it contains words which denote plainly an intention that it shall not be so confined. And further, we must admit I think, that it is most reasonable to suppose that the Governor and Council would think it right to reserve to themselves the power of deviating in any case from their former intentions in regard to the use to be made of these lands.

It is well known that from the beginning of the government till long after the time when this patent was issued, the lieutenant-governor had exercised the right of granting, without the concurrence of the council, licenses of occupation to individuals under his privy seal to occupy certain lands during his pleasure, while grants of land in fee, or for terms of years, were only made under the great seal, and upon an order of the governor and council. The effect of this patent of 1819, would be to prevent any encroachment upon or interference with the tracts which it conveyed in trust except under the public orders of the lieutenant-governor *and council*, while the terms of the trust, if construed according to the plain import of the words used, would still leave it in the power of the governor and council to make such changes in the appropriation of them, as they might from time to time think desirable.

What might be necessary or expedient at one time

might not be so at another, and considering that all the parcels of land included in the patent were up to that time public property, which the Crown could have disposed of as it pleased, and was under no obligation, legal or otherwise, to devote to any one use or purpose more than to another, it would seem to be the more natural course that the government, when it vested in trustees, who were all members of the council, the several parcels of land in this town which had hitherto been withheld from grant, should retain a controlling power which would enable it not only to give directions respecting the appropriation and use of the several parcels of land while they remained vested in the trustees, but would also enable the government, according to exigencies, to make such arrangements, by exchange or otherwise, as would best suit the public interests and convenience.

If they meant to do that, then of course it would be necessary that power should be reserved to the governor and council in the patent, not merely to direct what appropriation and disposition of the several parcels of land the trustees should make while they continued to hold them in pursuance of, and for the purpose of furthering the objects for which such parcels of land or any of them had been originally reserved, but that the letters patent should reserve also to the government the power to direct the trustees to make such conveyances or deeds of any of the lands, "*to such person or persons, and upon such trusts*, and *to or for such use or uses* as the governor and executive council might from time to time, by their order in writing appoint." And this is precisely what the patent did in so many words, and what it did also in spirit, unless it be not only admissible but clearly proper, that the words, "pursuant to the purpose,&c.," should be understood to be applicable to the second part of the clause containing the trusts as well as to the first, although these words are not repeated in it, and can hardly, as it seems to me, be held necessarily

to extend to it, by the grammatical construction of the sentence.

It is in truth upon this question that the substantial merits of this suit must entirely depend, for if the patent fairly admits of that construction, then nothing wrong or irregular was done.

In the information itself, by which the title of the church to this lot is, after so long a lapse of time, sought to be disturbed, it is admitted that when the governor and council made their order directing the conveyance which is complained of, "it was assumed, supposed and believed by the executive council, that the acre of land in question was then at the disposal of the government for general purposes, as many of the lands included in the said letters patent were, whereas it was then held by the trustees for the purposes of the hospital."

This may either mean that the council were in error, in regard to the construction which they put upon the language of the trust deed, and which in this part of the information referred to is not fully and correctly set out, or it may mean that the trustees were ignorant of or overlooked the fact, that in the trust deed the tract of which this acre forms a part, had been described as a reservation made for the purposes of an hospital.

If the relators mean the former, that is, that the trustees erred in their construction of the grant, then at least no breach of trust was intended; and it would be material in that case to consider that the trustees, one of whom was at the time the chief justice of the province, were themselves the persons who, as members of the executive council, dictated and declared the trusts in the very words which are inserted in the letters patent. They were, therefore, the persons most likely to know what was intended by the language used, and there would be little equity in overturning an act done by

them under the order of the governor in council, and done in good faith according to their construction of a patent framed under their own direction.

If the contemporaneous construction given to an instrument by those who were parties to it, and whose duty it was to act upon it, should in any case be a circumstance of weight, as undoubtedly it is, it ought to be so, I apprehend, in a case like this; for all that the government did, or could intend to do in favour of the hospital was purely gratuitous, and the act which is now complained of, seems to have passed without doubt or question at the time, though no transaction could in its nature be more open and notorious. We see no proof of remonstrance or complaint during the thirty years that elapsed before the filing of this information; although during all that time there was a board of trustees for managing the affairs of the hospital, and since 1847 a corporate body constituted for that very purpose, with power to bring any suit at law or in equity for the protection of the interests committed to it; and though there had been for eighteen years a Court of Chancery in Upper Canada, the judge of which court, as the evidence shews, was for some years one of the hospital trustees.

If, on the other hand, by the passage in the information which I have referred to, it be meant, not that the executive council or the trustees placed an erroneous construction on the language of the patent while acting in good faith, but rather that they were ignorant of the fact that the tract out of which this acre was taken had been ever reserved for an hospital, that surely is a supposition which cannot be credited for a moment when we look at the evidence.

It is a peculiarity in this case, as I have already noticed, that the trustees in the patent were the persons who recommended, devised and framed the trust, after

calling for and obtaining all such information as the proper officers of the government could give them respecting the different parcels of land to which the trust was to apply; and there were besides among those gentlemen who composed the hospital board before and at the time, and many years after the acre of land in question was by order in writing of the governor and council transferred to the church, and this fact, while it gave to them as members of the council, as trustees in the patent, and as members of the hospital board, ample means of knowing all the facts as they existed at the time, may satisfactorily account for things being done which were perfectly understood and acquiesced in by all parties when they took place, but the reasons and progress of which it may be difficult now to trace and explain, from the want of that official communication between the respective parties which we may suppose would have taken place if the same gentlemen who were trustees in the patent had not at the same time been members of the executive council, and members also of the board of hospital trustees, and the most zealous promoters of the interests of that institution, as the evidence in this case shews.

Arrangements made in good faith under such circumstances, after so many years of acquiescence, and when other interests have become involved, would hardly have been disturbed, I think, by the court below, even if there had been no such legal considerations to be entertained as those upon which this suit has been dismissed; and certainly not unless that construction of the trust deed upon which this suit is founded is so obvious as to admit of no doubt.

It is true that this acre of land has now, at the end of thirty years, during which no suit has been brought, become of very great value, tenfold as great perhaps as it was in 1819; but if that could be taken as a circumstance in support of such suits as the present, as no doubt it very often is an incitement to them, yet it

could not be held to apply here, because it appears from the information itself and the evidence, that before the order in council of the 2nd of December, 1824, was made, the acre in question had been sold at the same time that the rest of the land was, under the direction of the hospital trustees, for raising a fund for the hospital, and that the vendees had given up their purchase. This was most probably done in order to enable the government to make the transfer which was desired, and we can hardly doubt that those who were managing the affairs of the hospital, were parties to the arrangement, or at any rate privy to it.

If no such arrangement had taken place, the price that had been bid for the acre is what the hospital trust would have had, and not the land itself, for that would have gone to the purchaser. If those who represented the interests of the hospital gave up their claim upon the purchaser without any equivalent received or stipulated for, before or at the time, then the amount of the price for which the land had been sold would have been the extent of their loss, and not the value of the land thirty or forty years afterwards. The amount might, as I gather from the evidence, have been some three or four hundred pounds.

When it is considered that besides the £4090 which were given by the Loyal and Patriotic Society for building the hospital, the government which directed this acre to be transferred to the church had, after the making of the trust patent, and before the order in council of December, 1824, given to the hospital six acres of other land in the town of York which had been once specially reserved for French royalist emigrants; and that afterwards, with a small exception, the large tract of land (more than three hundred acres) referred to in the patent of 1819 as the government park reservation, and another valuable lot of land on King street were added by the government to the endowment;

one can have little hesitation in thinking that the absence of any complaint till 1855, on account of what the government did in 1825 respecting the acre in question, is very reasonably accounted for.

Upon the merits of the case, therefore, I am of opinion that, independently of any answer given to the information upon the legal grounds of the Statute of Limitations or the Dormant Equities Act, or the general principle of equity on which the judgment of the court below was given in favour of the defendants, there is good ground for contending that by the terms of the trust deed the governor and council had reserved to themselves the right of directing the conveyance of the acre in question to be made as it was made: that is, to other persons upon other trusts, and to other uses than those immediately connected with the hospital, and that if that point were but doubtful and not clear, still the decree should have been as it is, in favour of the defendants, because the long delay in seeking a remedy affords good reason for supposing either that if there was an error it was the error of all parties, or if there were no such error, then for inferring that those who represented at the time the interests of the hospital were conscious that the institution had been abundantly recompensed for what had been devoted to another public object: in other words, that the charity having in truth no real ground of complaint, has no equity to urge. And indeed, if the inference is reasonable, as I think it is, that the hospital trustees (I mean the gentlemen who acted in the management of its affairs) had received an equivalent in the endowments added to the hospital by the government, either before or after the 2nd of December, 1824, and that the order of the governor and council was made upon any such arrangement or understanding, then, giving to the patent of 1819 the construction for which the relators contend, the transfer could well be treated as having been made "in pursuance of the purpose for which the land had been

originally reserved as expressed in the letters patent," for an exchange of that kind might be obviously and greatly for the interests of the hospital, and would in that sense be in advancement of that particular trust. Upon this point I refer to the case of the *Attorney-General* v. *Hungerford*, (*a*)

As to the application of our Statute of Limitations, (*b*) to this case, the legislature, we must suppose, must have contemplated the establishing a court of equity at no distant period when they passed that act, or they could hardly have allowed equitable rights or remedies to be barred by lapse of time, while there existed no means of enforcing them. However, there is no doubt about the effect to be given to the 32nd clause. There can only be a question upon the effect of the exception in the next clause, namely, "that when any land or rent shall be vested *in a trustee upon any express trust*, the right of the *cestui qui* 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 consideration*, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

If the six acres marked "Hospital Reservation" on the plan can be rightly held to have become vested in the trustees by the patent of April, 1819, upon an express trust such as is set up by the relators in this case, namely, to hold for the purposes of an hospital, notwithstanding any order that might be afterwards made by the governor and council to convey the same to other persons *upon such trusts and to such uses* as the governor in council might order, then the exception contained in the 33rd clause would require to be

(*a*) 2 Clk. & F. 357. (*b*) 4 Wm., IV. ch. 1, secs. 16, 17, 32 & 33.

considered in connection with the evidence. If that be not the fair construction of the patent, and if the conveyance of July, 1825, which it is admitted was not intended to be in violation of the trust, was really not a breach of the trust, as I venture to think it was not; then the defendants should have the benefit of the 32nd clause without the exception contained in the 33rd, and in such case the remedy would be barred. Admitting the plaintiff's construction of the trust, however, to be correct, and that the deed of July, 1825, was inconsistent with an express trust, the Statute of Limitations would have commenced to run "whenever, and not before, the land was conveyed to a purchaser for valuable consideration," and then the question would be whether the trustees in the deed of the 4th of July, 1825, should be regarded in the light of purchasers for a valuable consideration, the land having been confessedly granted to them on behalf of St. James' Church in satisfaction of a claim which had been preferred by petition to the Crown, and the justice of which claim had been recognized. I conceive that we can set up no intermediate class of persons between "purchasers" (which is a term in law of very extensive meaning) and volunteers, or persons holding under deeds or contracts merely voluntary.

The long acquiescence in the conveyance made to the trustees for the church, and the facts which preceded and followed it, raise a strong presumption, as it seems to me, that the transaction was founded on a valuable consideration as regards the hospital trust. I must say that I am not clear that this suit should not be held to be barred by the statute of 4 Wm. IV., ch. 1, if it were necessary to determine that question, for more than twenty years had elapsed before this suit was brought since the governor granted this acre to the Church, not as a mere act of bounty, but in satisfaction of an admitted claim for property lost to the Church by a former grant of the government, and upon which claim, after accepting the acre of land in question, the church could no longer insist.

Then another point made in the case was, that our Dormant Equities Act, 18 Vic., ch. 424, is a bar to the relief sought.

That act was passed on the 30th of May, 1855, and this suit was commenced, as it seems, in the year following, so that in point of time the case comes within the act.

Is it, then, within it? The provision is, "that no title to, or interest in, real estate, which is valid at law shall henceforward be disturbed or otherwise affected in equity by reason of the 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."

In the case of *Beckett* v. *Wragg* the effect of that clause came under consideration in the court of Chancery, and afterwards in this court (*a*), and I refer to it for the view taken by this court of the intention and application of that very important provision.

There is no imputation of "actual and positive fraud" in this case; any pretence of that kind has been indeed disclaimed. The question then arises here again whether the grantees in the letters patent of the 26th of April, 1819, held the six acres called the hospital reservation upon an express trust to hold it for the purposes of the hospital, notwithstanding any order made by the governor and council to convey these lands or any portion of them to third parties upon trusts, and to and for uses unconnected with the hospital.

If the trust deed should be so construed, and if besides it should not be held upon the evidence that there is ground for inferring that the conveyance of July, 1825, must have been made upon an arrangement of exchange or

(*a*) Ante vol. vi p. 454; and vol. vii., p. 202.

otherwise with the hospital trustees, and so in pursuance of the purpose for which the land was reserved, then, but for the considerations on which the judgment in the court below is founded, this should be taken to have been a case *of express trust:* and the argument for the relators is, that any case of express trust must be held by us not to come within the first clause of the Dormant Equities Act.

It is not necessary to determine that there can be no case of express trust so direct and plain that we might feel ourselves authorized to hold that the statute 18 Vic., ch. 124, does not extend to it, though no exception of express trusts is contained in that act. I must say that I do not take the present case to be one of that kind, and should therefore have thought this suit barred by the statute, and I do in truth so consider it, for the difference between it and such cases as the *Attorney-General* v. *Fishmongers' Company,* (*a*) is sufficiently obvious.

The breach of any trust, indeed, however express, can amount to nothing stronger than "actual and positive fraud," and yet the statute in terms directs that when the title to real estate is sought to be disturbed or affected by reason of any ground which arose before the passing of the act of 1837, (establishing the Court of Chancery,) the attempt shall not succeed, unless where there has been actual and positive fraud *in the party whose title is sought to be disturbed or affected.* The statute having made that exception is an argument to shew that without such exception the comprehensive provision in that statute would have barred the remedy even where the alleged equity was grounded upon an allegation of actual and positive fraud as well as in other cases. And if so, it would *a fortiori* bar the remedy for an alleged breach of trust, in regard to which class

(*a*) 5 M. & C. 16.

of cases no exception has been made, and more especially where the plaintiff in the suit has disclaimed the imputing any intended breach of the alleged trust, and where, moreover, there is ground for raising upon the construction of the deed a question as to the extent of the trust itself.

This is a case so different in its circumstances from ordinary cases of trust, and especially in one point, upon which the judgment of the Court of Chancery proceeded, that it is by no means necessary in disposing of it to determine whether there might or might not be a case of an express trust so manifestly violated, that although both the creation of the trust and the breach were before the passing of the Chancery Act in 1837, yet the remedy for such breach of trust would not be barred even by the Dormant Equities Act. For instance, if the patent of 1819 had been made to private trustees, between whom and the government there was no privity, and if the fact had been that such trustees had, before 1837, of their own authority and accord gone into possession of the land, and were at this moment enjoying it as if it were their own private property, without any thing to justify or excuse so flagrant a breach of their trust, it might be found possible, though I do not say that it would be, to find authority that would support us in holding that the legislature never could have intended by the Dormant Equities Act to bar the remedy of the *cestui que* trust against the trustees in such a case of an express trust so plainly violated, and that to prevent such injustice, we might refuse to apply the statute in any other manner than we should have applied it if it had contained an exception of express trusts, which it certainly does not contain.

Or it might be contended, I do not say with what success, that such a case would, without any strained construction, come within the exception in the statute of

cases of "actual and *positive fraud*," although the words "actual fraud" are generally understood to include the idea of deceit or circumvention through the suppression of the truth, or the setting up of some false pretence, and not to be applicable to all violations of right, either by the use of force, or in open and undissembled disregard of the claims of others.

And it is hardly necessary to observe how remote must be the resemblance which such a class of cases as I am now referring to would bear to the case before us, in which, besides any question that arises upon the true meaning and extent of the trust itself, what it complained of as a breach of it is an act directed by a public order of the government itself, which it is not denied the trustees supposed they were bound to obey, and an act done in the most open and public manner, and apparently acquiesced in with a full knowledge of all the circumstances for more than twenty years.

To an alleged Dormant Equity arising out of such a state of things, I think we cannot deny that the act extends, (*a*) and I should equally have been of opinion that the bill was rightly dismissed in the Court of Chancery if there had been no room for the application of that principle and of those authorities upon which the decision was chiefly founded. I mean the cases *Kekewich* v. *Manning*, (*b*) *Bayley* v. *Boulcott*, (*c*) *Wilkinson* v. *Wilkinson*, (*d*) and *Gaskell* v. *Gaskell*, (*e*) which bear upon the position in this case, that the Crown had not perfected the creation of a trust in favour of the hospital by divesting itself of the estate, and vesting it in trustees over whom it had no control; but had, on the contrary, distinctly reserved to itself a power to direct and appoint the uses to which the land should be applied.

On the whole, as to the merits, it appears to me that

(*a*) Wragg v. Beckett, ante vol. VII. (*b*) 1 D. McN. & G. 176.
(*c*) 4 Russell, 345. (*d*) 4 Jurist N. S. 47.
(*e*) 2 Y. & J. 502.

considering the facts of this case, much that was said in disposing of the appeal in the House of Lords in *The Attorney-General* v. *Hungerford*, is applicable here. I mean in regard to the alienation of trust property by a trustee, which may or may not, according to the facts of a case, have been inconsistent with the trust, and much also that was said by the court in giving judgment in *The Attorney-General* v. *Bretingham*. (*a*)

I think the decree made should not be revised; first, because I take it to be at least doubtful whether the governor and council had not by the very terms of the trust, a strict right to make the order which they did make on the 2nd of December, 1824, and if so, there has been nothing wrong done; for the trustees in that case could not only have no breach of trust to answer for in obeying that order, but, according to an express provision in the patent, the grant which the Crown had made to them would have become absolutely void if they had refused to make a deed according to that order, and the hospital might have lost everything.

Next, according even to the construction of the trust which the plaintiffs insist upon, the deed of the 4th of July, 1825, would at any rate have been rightly made, if the governor and council were led to make the appropriation by such considerations as shewed that they had in view the benefit of the hospital itself; and the evidence seems to afford much ground for inferring this, when we look at all the circumstances; for the interests of the hospital seem to have been far better taken care of by the government at that period than those of any other public institution, so much so, that it would probably be no exaggeration to affirm that the governor and council, whose particular order in council of the 2nd of December, 1824, is complained of, conferred upon the hospital land of twenty times the value of the acre in question.

(*a*) 3 Beavan, 91.

It is material also to consider that if there had been at that time a court of equity in existence in Upper Canada, there would have been an opportunity for applying to such court to sanction the alienation, if it were part of an arrangement which could be shewn to be advantageous to the hospital itself; for there is no doubt that where a considerable benefit would be gained by a charity, (as by exchange, indemnity or otherwise,) the Court of Chancery itself will sometimes order an alienation of trust property. (*a*) And there being no such opportunity, for want of a court of equity to resort to, and the acts of the government towards the hospital having been so manifestly and largely in its favour before and at the time of this transaction and since, and so many years having elapsed without any complaint on acccount of the alienation in question, the inference, I think, should be entertained that nothing has been done, which would not have been in fact sanctioned, and nothing which those connected with the hospital imagined could give them a claim to relief or compensation beyond what had been received.

These considerations tend to strengthen the defence set up under the Statute of Limitations, and under the Dormant Equities Act, 18 Vic., ch. 124, especially the latter. And in regard to both those defences, I will add that the late case of *St. Mary Magdalene College*, Oxford v. *The Attorney-General*, decided in the House of Lords, (*b*) established by the judgment of the highest tribunal, what upon the previous state of authorities there might have seemed room to doubt, that in cases of this kind, where the *Attorney-General* is suing not in the independent interest of the Crown, but on behalf of a charity whose interests he is merely assisting to protect, the limitation as to time applies, as it would in cases between individuals, and that the public charity has not the benefit of the principle that statutes of limitation or

(*a*) Goodson v. Ellison, 3 Russ. 583. (*b*) 6 House of Lord's cases, 189.

other statutes in which the king or sovereign is not named do not bind the Crown.

The case I refer to is very clear and express to that effect. And there being consequently no exemption in this case from the bar from lapse of time, my opinion is that the statutes of 4 Wm. IV., ch. 1, and 18 Vic., ch. 124, are both good legal defences to this suit, the latter, perhaps, more indisputably than the former, though I think the former, that is, the Statute of Limitations, would be alone a bar; for even admitting this to be a case of express trust, yet the defendants are not, I think, in the situation of persons holding under a voluntary conveyance, for the Crown gave the land to the church in satisfaction of a claim; in fact, for another acre of land understood to have been pledged to the Church, which the government had given away; and if it be correct to regard the defendants in that light, then it is of no consequence whether there was or was not notice of the trust to the alienees at the time of the conveyance complained of, since that would not under either of the statutes affect the question.

In my opinion the appeal should be dismissed with costs.

Burns, J.—This case presents two questions for decision, either of which, if determined in the defendants' favour, must decide the case. These questions are, first, whether any trust was created of which the relators can claim the benefit; and secondly, if there be any, whether the same is not now barred by the statutes.

First, then, was there any trust created in favour of any *body* now represented by the relators? The relators had no corporate existence before the statute 10 & 11 Vic., ch. 57, and in that statute the patent of the 26th of April, 1819, granting the land in question, is recited. The patent shews, with respect to the six acres of which the land in question is a part, that

these six acres were designated as *being a reservation made for the purposes of an hospital for the said town of York*, and at the same time shews another block of six acres *being a reservation for the purpose of a public school*, and the patent contains various other blocks of land without saying they are reserved for any particular purpose. Notwithstanding that these two blocks of land are designated as I have stated, yet the trusts to be declared applied to all the lands thereby granted, embracing these particular blocks with the others, and the trustees were to make such conveyance or conveyances, or deed or deeds of the said parcels or tracts of land, or any part thereof, to such person or persons, and upon such trusts and to and for such use or uses, as the governor and executive council should from time to time by order in writing appoint. It is clear beyond any question, the Crown had not parted with the control over any of the lands granted, and with respect to the lands which had not been designated as reserved for any particular object, we find that portions of them were subsequently appropriated to the purposes of an hospital. The act of parliament tells us that on the 19th of October, 1819, an order was made by the governor in council by which the lots of land on each side of the road from the town of York to the Don Bridge were granted in trust to the same trustees to sell, lease, or otherwise dispose of towards raising a revenue for the support of the town and county hospital. The act of parliament tells us further, and which, in the consideration of the present subject, has a very important bearing, that certain other portions of the said lands were by the like authority directed to be sold and conveyed to certain individuals in trust for the Roman Catholic Church in the town of York for a consideration specified, *which consideration was subsequently remitted.* It does not appear directly that these latter mentioned portions or the proceeds of the sales were set apart for the purposes of an hospital; but one is irresistibly led to think it must have been so, otherwise there was no

use in reciting the disposition made of the lands or the proceeds thereof in the act of parliament of a part only of the lands granted by the patent. If it were a breach of trust to direct the grant of the acre in question to the church, thus diverting it from the hospital, it must have been equally a breach of trust in once having sold a portion of the land in trust for the purposes of the Roman Catholic Church, which funds were to be devoted to the hospital, and then afterwards to remit the purchase money. Of course, it would be no answer to say that one breach of trust was cured by the committal of another, but it is important to see how the Crown has dealt with the lands mentioned in the patent, and the proceeds of sales made thereof, and that the same has been sanctioned by the legislature, in order to form a judgment whether in truth the Crown had parted with the lands in such a way as that no other disposition could be made than what the relators contend for with respect to the acre in question. In construing the whole patent I entertain not the slightest doubt we must treat it as a mere intention of the Crown that the six acres would be devoted to the purposes of an hospital, but the power remained to appropriate it to any other purpose. The Crown could not stand seized of the lands to uses, but having granted the same to trustees for such use or uses as the Crown thought proper to appoint, I see no breach of trust in the trustees conveying any portion of the lands as they were directed by the Crown to do. It is said the King may be a trustee, though the precise mode of enforcing a trust against him was not exactly ascertained; but in this case it is not lands conveyed or given to the King upon trust, but it is the Crown of its own mere motion dealing with its own lands. With regard to the six acres being said to be a reservation for the purposes of an hospital, I cannot look upon them in any other light than I do with respect to every other portion of the lands mentioned in the patent. No doubt it was the intention at the time that these six acres should be so

appropriated, but it is equally clear to me that nothing more was done in respect of them than evincing such intention. The habendum to the trustees was not to hold these six acres expressly as a reservation for the purposes of an hospital, but they were to hold them subject to such directions, and to consent to and allow such appropriations and disposition of them as the Governor in Council should make and order pursuant to the purpose for which the said parcels or tracts of land, or any of them, were originally reserved. I know of no rule of law or equity which prevents the Crown from revoking or altering its intention, or any rule which declares that the Crown can be guilty of a breach of trust with regard to its own property. When I say its own property, I speak of this case as being one in which the Crown had not by the grant of the 26th of April, 1819, parted with the lands mentioned in the patent, so that the Crown had no further control over them. I see nothing whatever which could have prevented the Crown from making an order in council the next day after the patent had issued, that the trustees should re-convey or rather surrender the lands again to the Crown; and surely, if the Crown could have done that, it might direct a conveyance to some one else. By the patent the Crown reserved the power to fill up trustees when any of them happened to die, or be desirous of being discharged of the powers or trusts, or become incapable of acting. In my opinion, much depends upon the subsequent provision, which is, that in case of default of all or any of such conditions, limtations and restrictions, and especially if the three trustees and the survivors and survivor of them, do not at all times observe and fulfil the trusts thereby reposed in them according to the true intent of the grant, then the said grant and everything therein contained should be null and void to all intents and purposes whatsoever, and the lands and premises thereby granted, and every part and parcel thereof, should revert to, and become vested in the Crown, in like manner as if the same had

never been granted. Any intentions expressed by orders in council, or to be gathered from plans and maps marked in any particular way, done before the patent issued, cannot control the construction of it, and I fail to see that the Crown in the patent itself has done anything more than indicate an intention with regard to the six acres in question; and looking at the whole patent, it is quite manifest to me the intention was that the Crown did not part with the legal estate in the land in such a way that it could not direct it again into other channels, that is, if it were done before declaring the trust to which each portion of the land granted should be applied. I think it impossible to contend otherwise than that the Crown contemplated a trust to be declared in respect of all the lands granted, to be done at a time after the patent had issued, and it is just as clear that in respect of the land in question subsequently, in 1825, given to the church, no trust had been declared with regard to it in favour of the hospital. The argument for a trust in favour of that institution must be founded upon the patent itself, and after considering the matter in every light, I can discover nothing more than an intention on the part of the Crown, which it appears to me the Crown was at liberty before making a declaration of trust, to alter at its pleasure. If the land could be resumed again, either by directing a surrender of it or by never making any appointment of trustees, or in fact not creating a body as *cestui que trust* as a public charity to take it, and making no declaration in favour of any such body, I do not see what there was which could prevent the Crown from devoting any of the land to such purposes as it pleased. The whole matter with regard to the hospital, previous to the act 10 & 11 Vic., ch. 57, rested with the Crown, and as appears from the recitals in the act of parliament, the charity was up to that time, both with respect to lands and funds altogether under the control of the executive government. When the act was passed it must have been as well known that the acre in question in this suit had been disposed

of to the church, as that a portion of the lands granted in the patent had been sold to individuals in trust for the Roman Catholic Church for a consideration, which consideration had been remitted, and I think we must take it for granted that no one ever imagined at that day that such a claim as the present could be made. I feel perfectly satisfied there are no legal grounds upon which to pronounce that the patent created a trust in favour of the hospital; it would require another instrument to do that, and that was done in regard of some of the lands on the 19th of October, 1819, without noticing these. The trustees were to observe such directions, and to consent to and allow such appropriations and disposition of the lands as should from time to time be made pursuant to the purpose for which the said parcels or tracts of lands, or any of them, were originally reserved as in the patent expressed. This shews clearly that something more was to be done with respect to the lands, and the Crown was to do it, and not the trustees. The trustees were to carry into effect the directions of the Crown, and not to carry out the intention which the patent would in respect of the six acres indicate. It appears to me the fallacy of the whole argument in favour of the relators, consists in assuming that the Crown could not vary its intention, and that such intention being apparent upon the patent, a court of equity would carry out that intention. The answer to it, I think, is very plain. The Crown intended to carry out its own intention; made provision in the patent to do so; kept the control of the lands and funds in its own power till handed over by the statute 10 & 11 Vic., ch. 57, and was dealing with its own lands in the meantime, and only handed over such portions of the property as had not been disposed of. The Court of Chancery, it is true, may be looked upon as the keeper of the king's conscience, but I see no reason to dispute the king's authority to deal with the crown lands under its control, when it is not complained there has been any imposition practiced, or the king been deceived in any way with

respect to the disposition. I am of opinion there was no trust created by the patent in favour of any person or persons whom the relators in this case can be said to represent; the intention was to create a trust by some subsequent order in council with respect to the land in question, and none such is shewn with respect to the lands in question in this suit in favour of the hospital.

Secondly, the next question is, whether the statutes have barred the claim of the relators, if they had any claim. If this case could be established to be that of an express trust, then, under the saving section 33 of Wm. IV., ch. 1, the statute of limitations would not run in this case, for the parties taking under the conveyance of the 4th of July, 1825, were volunteers, and not purchasers for a valuable consideration. I have already said that in my opinion no trust was declared by the patent originally; there appeared to be an intention towards doing it, but it required to be done by some subsequent order in council, and none such was made. Therefore I see no express trust created in favour of the relators, or any body whom they now represent. The case, then, comes within the provision of the 32nd section of the last mentioned act, unless, indeed, charitable trusts are not within the statute of limitations. The Chancellor seems to have had some doubt upon this point, notwithstanding the recent decisions in England. On perusing carefully the judgments of the Lord Chancellor and Lord *Wensleydale* in the case of the President and Scholars of *Mary Magdalen College*, Oxford v. The *Attorney-General*, (*a*) overruling the judgment of the Master of the Rolls, I confess I am unable to see any doubt upon the point. The case, I think, comes, clearly within the statute of limitations. Independent of that question, I think the statute 18 Vic., ch. 124, puts an end to all claim on the part of these relators. The decision of the House of Lords that charitable trusts, though not named in the statute of limitations, yet came

(*a*) 6 H. L. Cas. 189.

within its provisions, affords a strong argument upon the construction of the other statute that express trusts are within the provisions of that act. I can add nothing to what has been said in *Wragg* v. *Beckitt* upon this point. If it could, therefore, be successfully established that an express trust was created in favour of the relators, by the patent of 1819, the Dormant Equities Act, in my opinion, extinguished the claim.

Whichever way the case be treated, I think there is no case made against the defendants, and therefore the appeal should be dismissed.

Per Curiam.—Appeal dismissed with costs.

IN APPEAL.

[*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. V. C. Esten, the Hon. Mr. Justice Burns, the Hon. V. C. Spragge, the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.*]

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

THE BUFFALO AND LAKE HURON RAILWAY COMPANY v. WHITEHEAD.

Corporation—Contract under seal—Ratification of parol contract—Acquiescence in contract entered into by agent—Principal and agent.

The statutory agent and managing director of a railway company entered into contracts in his own name, *acting for and on behalf of the company*, for the construction of the road, erection of station houses, and maintenance of way, at certain prices set forth in the schedules, under which the contractor entered upon the execution of the works, constructed the road and some of the station houses, and during the progress of the work had been paid large amounts on account of his work, according to the scheduled prices, after which the company refused to allow him to complete the contracts, alleging that the prices agreed to be paid were exorbitant, and that the agent had not been authorised to enter into them. On a bill filed for that purpose, the Court of Chancery, [SPRAGGE, V.C., dissenting], declared the company bound by the contracts, on the

ground of ratification and for all the work that had been done according to the schedule of acquiescence therein, and that the contractor was entitled to be paid prices; and also to be paid for any loss he could shew he had sustained in consequence of not being allowed to proceed to a completion of the contracts. On appeal the decree was varied in so far as it allowed damages for not being allowed to complete the same; and

Per ROBINSON, C.J., the contractor was entitled to be paid a reasonable sum for damages sustained on account of the stoppages.

[SPRAGGE, V.C., dissenting,] who thought the only relief to which the party was entitled was to be paid for what had been done as upon a *quantum meruit*.

The facts of this case for the purposes of the present report appear sufficiently in the report in the court below, ante volume VII., page 351, and in the judgment of his Lordship the Chief Justice.

The cause now came on to be heard upon an appeal by the company from the decree pronounced by the court below, and upon a cross-appeal by *Whitehead* against an order refusing to pay over to him the sum of £12,641, ordered by the decree to be paid into court.*

Mr. *Cameron*, Q.C., for the appellants. The construction contracts are the principal matters in question in this cause. The respondent is not entitled to any relief in respect of those contracts *qua* contracts, for they were not contracts with the company; but sealed contracts with *R. H. Barlow*, the effect of which was to limit the respondent's remedies upon them, namely, against Captain *Barlow*.

These contracts were of such a nature as to require the corporate seal to be affixed to them, even if the appellants were a trading corporation; but the appellants in this case are not a trading corporation within the meaning of that expression, as used in the authorities upon this subject.

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* Parties desirous of ascertaining more fully the facts, will find a copy of the case as printed for the Court of Appeal, bound up with the present report, in the library of Osgoode Hall.

There is no different right at law and in equity. If the contract cannot be enforced at law, it cannot in equity. The nature of these contracts is such that they are invalid without the corporate seal.

Validity is claimed for them on the ground of adoption, but if the assent of the corporation without seal would be insufficient to make the contract originally binding, subsequent assent or acquiescence would be equally unavailing without the corporate seal.

It is further alleged that the statutory powers of Captain *Barlow* were sufficient to enable him to bind the company by such contracts. The necessary formalities for conferring such power, if it could be conferred were not observed. There was no resolution conferring it—no by-law for the purpose.

The mere appointing him managing director without by-law or resolution conferring the power expressly, would give him no authority beyond that implied by the name of official manager or superintendent of the affairs of the company: such as to superintend things going on under contracts, in the ordinary course of the company's business.

Directors, however, could not confer power by by-law or resolution to enter into such contracts. It was never the intention that the directors should have power to delegate all their own authority to the managing director, and such would be the effect if they could authorise the making of such contracts as these.

If these contracts had been made by the board of directors without affixing the common seal they would not have been binding. *Fetterley* v. *Municipality of Russell and Cambridge*, (*a*) *Bartlett* v. *Municipality of Amherstburg*, (*b*) *Doran* v. *Great Western Railway*

(*a*) 14 B. R. U. C. 433. (*b*) 14 B. R. U. C. 152.

Company, (*c*) *McLean* v. *Town of Brantford*, (*d*) *Great Western Railway Company* v. *Preston and Berlin Railway Company*, (*e*) *Pew* v. *Buffalo and Lake Huron Railway Company*, (*f*) *McDonald* v. *McMillan*, (*g*) *Stock* v. *Great Western Railway Company*, (*h*) *Marshall* v. *School Trustees of Kitley*, (*i*) *Beverley* v. *Lincoln Gas Light Company*, (*j*) *Church* v. *Imperial Gas and Coke Company*, (*k*) *Mayor of Ludlow* v. *Charlton*, (*l*) *Arnold* v. *Mayor of Poole*, (*m*) *Fishmongers' Company* v. *Robertson*, (*n*) *Paine* v. *The Strand Union*, (*o*) *Saunders* v. *St. Neots Union*, (*p*) *Lamprell* v. *Ballericay Union*, (*q*) *Diggle* v. *Blackwall Railway Company*, (*r*) *Homersham* v. *Wolverhampton Water Works*, (*s*) *Governor and Company of Copper Miners* v. *Fox*, (*t*) *Doe dem. Pennington* v. *Taniere*, (*u*) *Smith* v. *Hull Glass Company*, (*v*) *Clark* v. *Cuckfield Union*, (*w*) *Finlay* v. *Bristol and Exeter Railway Company*, (*x*) *Lowe* v. *London and North Western Railway Company*, (*y*) *Henderson* v. *Australian Steam Navigation Company*, (*z*) *Smart* v. *West Ham Union*, (*aa*) *Australian Steam Navigation Company* v. *Marzetti*, (*bb*) *London Dock Company* v. *Sinnott*, (*cc*) *Frend* v. *Dennett*, (*dd*) *Haigh* v. *Bierely Union*. (*ee*) The rule upon this point is the same in equity as in law. *Kirk* v. *Bromly Union*, (*ff*) *Leominster Canal Company* v. *Shrewsbury and Hereford Railway Company*, (*gg*) *Ambrose* v. *Dunmow Union*, (*hh*) *Jackson* v. *North Wales Railway Company*, (*ii*) *Midland Great*

(*c*) 14 B. R. U. C. 403.
(*d*) 16 B. R. U. C. 347.
(*e*) 17 B. R. U. C. 477.
(*f*) 17 B R. U. C. 282.
(*g*) 17 B. R. U. C. 377.
(*h*) 7 U. C. C. P. 526; 9 do. 134.
(*i*) 4 C. P. U. C. 373.
(*j*) 6 A. & E. 829.
(*k*) 6 A. & E. 846.
(*l*) 6 M. & W. 815.
(*m*) 4 M. & Gr. 860.
(*n*) 5 M. & Gr. 131.
(*o*) 8 Q. B. 326.
(*p*) 8 Q. B. 810.
(*q*) 2 Ex. 283.
(*r*) 14 Jur. 937.
(*s*) 6 Ex. 1317.
(*t*) 16 Q. B. 229; 15 Jur. 703.
(*u*) 12 K. B. 1013.
(*v*) 11 C. B. 897.
(*w*) 16 Jur. 685.
(*x*) 7 Ex. 409.
(*y*) 17 Jur. 375, & 18 Q. B. 632.
(*z*) 5 E. & B. 409.
(*aa*) 10 Ex 867.
(*bb*) 11 Ex. 228.
(*cc*) 4 Jur. N. S. 70.
(*dd*) 4 Jur. N. S. 897.
(*ee*) 4 Jur. N. S. 511.
(*ff*) 2 Ph. 640.
(*gg*) 5 Jur. N. S. 930.
(*hh*) 9 Beav. 503.
(*ii*) 6 Ry. Cases, 112.

Western of Ireland v. *Johnson* (*a*) *Whittemore* v. *Ridout*. (*b*)

Jurisdiction of the court founded upon complication of accounts does not give any equity apart from the legal right. The machinery of the court applied to the taking of the accounts upon the same principles upon which it would be taken by a jury. In this case the only claim would be for the value of the work done with the acquiescence of the company. Their acquiescence would give no further claim. The schedules of prices fall with the contracts. Besides these contracts did not exist until 1857, and there could be no acquiescence until the substitution was known.

Mr. *Strong*, on the same side. There is no equity in this case. The doctrines relating to specific performance do not apply. *South Wales Railway Company* v. *Wythes*, (*c*) *Johnson* v. *Shrewsbury and Birmingham Railway*, (*d*) *Holmes* v. *Eastern Counties Railway Company*. (*e*) The only ground of jurisdiction is the complication of accounts. The modern test of complication is the question whether a judge at common law would direct a reference to arbitration. In this case the respondent's principal claim is for damages for stoppage of works, and dismissal from execution of contracts, and the respondent shews that there remains no complication, for the works, he says, have been all measured, and nothing remains but to calculate the amount due for a certain amount of work at fixed prices.

The money ought not to have been ordered into court. Such an order is never made except in cases of trust, or *quasi* trust, as in the case of specific performance, not where there is a mere debt. It is never ordered in where the title is disputed. *Peacham* v. *Daw*, (*f*) *Richardson*

(*a*) 6 H. L. B. 798. (*b*) Ante vol. II., p. 525.
(*c*) 1 K. & J. 186; 5 DeG. M. & G. 880.
(*d*) 3 DeG. M. & G. 918. (*e*) 3 K. & J. 675.
(*f*) 6 Mad. 98.

v. *Bank of England*, (*a*) *Knight* v. *Haythorne*, (*b*) *McClenaghan* v. *Buchanan*. (*c*) It is only ordered in on admission. *Mills* v. *Hansen*, (*d*) *Boschetti* v. *Power*. (*e*)

Mr. *Freeman*, Q. C., and Mr. *A McDonald*, for the respondent.

As to the jurisdiction, it is conceded in the answer, and was admitted on the hearing. If, however, that should be denied, the question, upon the facts pleaded and proved, (*f*) is placed beyond dispute by the authorities. (*g*)

Barlow was the agent of the defendant with power to bind them by the contracts in question. The company was incorporated to finish a road already partly opened. They were bound under a penalty, and the payment of liquidated damages fixed in this contract, embodied in their act of incorporation, to have it finished by a certain day. *Barlow* is found acting for the defendants in the completion of this work, professing to be their duly authorised agent to carry that contract into effect, and actually engaged in carrying it into effect. Looking at sec. 32 of the Incorporation Act, the defendants are authorised to give him by resolution all the power he professed to have. It is submitted, that all persons dealing with him, under all the circumstances, were entitled to assume that the resolution giving him the power he professed to have had been duly passed. *The Royal Bank* v. *Turquand*, (*h*). Further, a similar power is conferred on the company by section 6, to be exercised by resolution. Subscription of new stock to a person professing to be the agent of the defendants, having their stock book in his possession in their office, and the money received and kept by the company

(*a*) 4 M. & Cr. 176.
(*b*) 4 Jur. 360.
(*c*) Ante vol. vii., p. 92.
(*d*) 8 Ves. 91.
(*e*) 8 Beav. 98.
(*f*) See printed case, Pt. I. pp. 16, 17, 79, 83, 94; Exhibits D. E. F., 34 to 39, 40 to 72, 91, 92, 93.
(*g*) McIntosh v. The Great Western Railway Co., 8 S. & G. 146; The Midland Counties Railway Co. v. Johnston, 6 H. L. 798.
(*h*) 6 E. & B. 327, 332.

would, it is submitted, entitle new subscribers to sue for dividends although the resolution referred to in section 6 had not in point of fact been passed. Persons dealing with the company are bound to look at their act of incorporation, but not further than the act. If the power assumed to be exercised is conferred by the statute, on the performance of a certain act by the directors, the persons dealing with the company are entitled to assume that such act was performed. Otherwise the statute would be but a prepared pitfall, or else the public would be bound to enquire into the minutes of the directors, nay, to ascertain that the directors themselves were duly elected, &c. Again, the Railway Clauses Act, 14 & 15 Vic., ch. 51, sec. 16, sub-secs. 6, 7, 8, 9, 22, exhausts all the powers conferred on an ordinary director or manager. But section 32 of the Incorporation Act is superadded. Why? Is it to confer the same powers over again? It can only be to enable the company to do something which the Railway Clauses Act did not reach. What additional power can be supposed, except that which all parties always believed to exist in this case? Besides, the reason for the existence of such power is obvious, and occurred in the case of the first Upper Canadian Railway, the Great Western. The funds were to be provided in England, and it was reasonable and desirable that an immediate control over the undertaking should be lodged in England too. In the case of the Great Western, (*a*) that object was attained by the interposition of a corresponding committee. In the case in question, it is attained more effectually by holding the managing director, under the resolution, instantly amenable to every letter from those in England who supplied the money. But if the law, so plainly stated in the *Royal Bank* v. *Turquand*, and subsequently approved of in the *Athenæum Life Assurance Company* v. The *Eagle Insurance Company*, (*b*) should not, as contended, govern these points in favour of the plaintiff, the resolutions on

(*a*) 9 Vic., ch. 81, secs, 3, 9, 33. (*b*) 4 K. & J. 549.

page 96 and 97 are submitted as an effectual compliance with section 32. If it be said these are not by the directors, then the resolution adopting them at p. 106 is not only by the directors, but by the legal general meeting, which can bind the company by its act. (*a*) *Berwick* v. *Horsfall*, (*b*) *Smith* v. *McGuire*. (*c*)

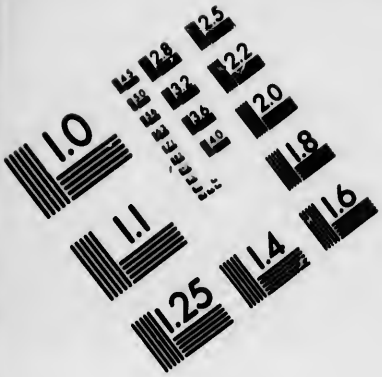
The ratification in this case is of itself sufficient to decide the whole cause on the merits. There is in the first place full and preparatory information, (*d*). Then the facts are deliberately discussed and canvassed. (*e*) Finally, with the contracts in question in their hands, after such information and discussion, *Barlow* is deliberately sent back to Canada, to complete the work under them, and he pursues the completion under these circumstances for five months, not only without objection, but with approval, and the payment of large sums of money on account, (*f*). Is not that ratification? and if it be a ratificaton of anything, is it not of the contracts in question? All this was done by the directors, at legal meetings at London and at Brantford. But in addition to this there is a distinct and higher kind of ratification by the shareholders at general meetings. As already noticed, the 4, 5 and 7 sub-sections of section 16 of the Railway Clauses Act, 14 & 15 Vic., ch. 51, enable the shareholders, at such meeting by a majority of those present, to bind the company by their acts. Now, it will be found that the contracts in question, and the work performed, and money paid under them, were brought before such general meetings; and reports adopted ratifying all that was done up to the date of each successive report, in February, July, and August, 1857, (*g*) in January, March, and July, 1858. (*h*) In fact such last-mentioned acts of ratification may be

(*a*) 14 & 15 Vic., ch. 51, sec. 16, sub-sec. 4, 5, 7.
(*b*) 4 Jur. N. S. 615. (*c*) 3 H. & N. 554.
(*d*) Pt. I, pp. 126 to 132. Pt. III. pp. 11, 12, 15, 17, 18, 23, 28.
(*e*) Pt. I., pp. 131 to 162.
(*f*) Pt. I., pp. 147, 160, 161, 162. Pt. II., p. 93. Pt. III., pp. 28, 33.
(*g*) Pt. I., pp. 109 to 115, and 116 to 124. Pt. III., pp. 4, 5, 6.
(*h*) Pt. III., pp. 11 to 51, 71, and 160.

distinctly seen on four several occasions, viz., in 1857, February, Pt. I., p. 115; July, p. 124; in 1858, January, Pt. III., p. 28, Pt. I., p. 160; in July, Pt. III., p. 71. But even that is not all. It will be seen from the answer, (*a*) that the defendants admit under the corporate seal, and so to speak upon record, that from the beginning up till March, 1858, they knew that the plaintiff was working upon scheduled prices, and from March, to the 1st of September, 1858, that he was working (as he had been from the beginning) under the contracts in question. If an individual made that admission he would be told that afterwards to repudiate such contracts was fraudulent. *Selway* v. *Fogg*. (*b*) It is submitted that the same answer must be given to this corporation, and that the admission under seal, in the answer, surmounts the technical objection, if of any force; *Range* v. The *Great Western Railway Company*, (*c*) *Williams* v. *St. George's Harbour Company*, (*d*) *Bigg* v. *Strong*, (*e*) *Gooday* v. *Colchester*, (*f*) *Laird* v. The *Birkenhead Dock Company*, (*g*) The *Quebec and Richmond Railway Company* v. *Quinn*. (*h*)

Although there is a conflict in English courts on the question, how far a corporation may bind itself by an executory contract not under the corporate seal, the better and more recent opinion is, that when, as in this case, the subject of the contract is so directly and essentially part of what the corporation was created to perform, that without the performance of it the corporation must inevitably cease to exist, then the corporation may bind itself without the corporate seal. *Reuter* v. The *Electric Telegraph Co.*, (*i*) *Haigh* v. *Bierly Union*, (*j*) *Bateman* v. *Mayor of Ashton*. (*k*) In one view, however, these are not executory contracts, but, as the answer, (*l*)

(*a*) Pt. I., pp. 10, 10, 11, 12.
(*b*) 5 M. & W. 83.
(*c*) 5 H. L. 72.
(*d*) 2 DeG. & J. 547.
(*e*) 3 S. & G. 592.
(*f*) 17 Beav. 132.
(*g*) 6 Jur. N. S. 140.
(*h*) 12 Moo. P. C. 232.
(*i*) 6 E. & B. 327.
(*j*) 5 Jur. N. S. 511.
(*k*) 3 H. & N. 340.
(*l*) Pt. I., p. 13.



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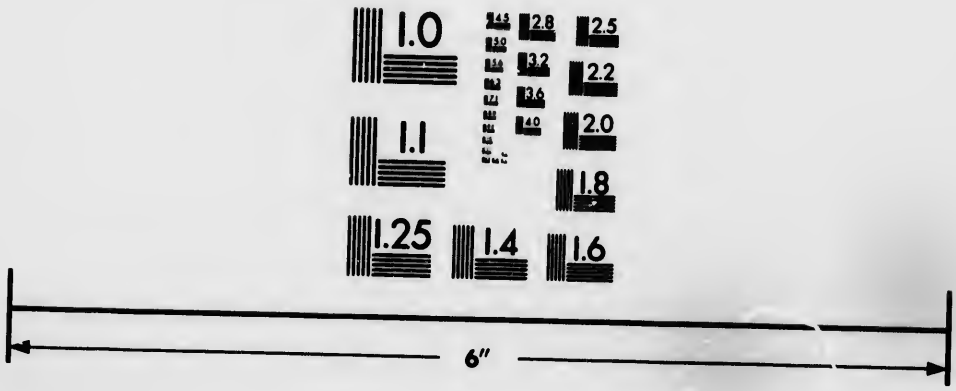

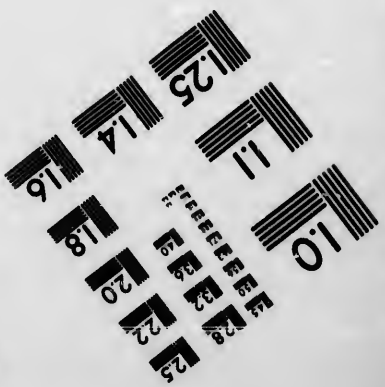

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affirms contracts "which have been terminated as well by the effluxion of time and the completion of the work to be performed under them, as by the acts of the plaintiff and ourselves." That on such contracts, though not under seal, the plaintiff may recover, was expressly decided on demurrer by the Court of Common Pleas in England in the case of The *Fishmongers' Company* v. *Robertson*. (*a*) Against this there is no decision, unless it be *Diggle* v. *Blackwall*, (*b*) which has been discredited everywhere. The plaintiff must therefore succeed on this ground alone, for work done under the contract according to the contract prices; the obligation which the law enforces is not that of a new contract, but that of the contract which has been executed or performed, and which, therefore, the law will not allow to be denied. The example given in all the cases of executed contracts, shews that this is the true understanding of the courts: the example, namely, of simple contracts executed, in which latter it is not denied that the written contract, though not pleaded, is given in evidence and governs the amounts. In all the decided cases the recovery for or against corporations has been on the same principle. A legal validity is undeniably presumed in the contract because it is executed; although, if it had remained executory it could not be enforced. This is surely more reasonable than supposing an entirely new contract, contrary to what every one knows to be a fact. And what is the necessity of supposing a fictitious contract when the real one has been fully performed? The plaintiff, though contending for the obligation of the contracts from the beginning, is entitled to found that argument on the defendants' own answer.

Mr. *Roaf*, in reply. The respondent has only cited two cases not cited by the appellants, *Laird* v. *Birkenhead Docks*, which differed from this case, because there the

(*a*) 5. M. & G. 131. (*b*) 5 Exch. 442.

relief was based upon an equitable, and not a legal right: and the case of the *Quebec* and *Richmond Railway Company* is different from this, for there it was held that the company were parties to the contract. The law is stated too broadly as to the liability of trading corporations on contracts not under seal. They are not bound by all simple contracts within the scope of their charter, but only by such as are likely to be of every day occurrence, such as are incidental to the carrying on of the trade for which they are incorporated. In this respect the argument upon the opening remains unshaken by any thing advanced by the respondent.

The argument based upon the wording of the statute is refuted by the very words of the act.

The statement that the jurisdiction was conceded below is not correct. It was conceded that courts of equity have a jurisdiction in cases of complicated accounts, but not that this is a proper case for its exercise.

The only argument possessing even an appearance of plausibility on the part of the respondent, is that based upon the acquiescence in his performing the work. The legal effect is only to entitle him to payment upon the *quantum meruit* for the work done. The effect is no greater in equity, for the argument was quite as strong as in *Kirk* v. *Bromley Union*, and other cases following that, as it is in this case.

There the work was performed on the very premises where the board met. The directors of these appellants lived in another continent. The argument is weakened in this case by the very elaboration of the counsel who argue it, and the immense mass of trivial proceedings which they read in the hope of showing some slight knowledge of there having been a contract. Every letter which they read, so long as they cannot find one com-

municating the contract or its terms, tends to show that the directors had in fact no knowledge. Without knowledge there cannot be acquiescence.

On the principle *omnia præsumuntur contra spoliatorem* there ought not to be any presumption made in favour of the respondent. He does not prove the identity of the schedules now produced with those which existed when the work commenced. He admits that the originals were burned. Why was that unless the new ones were more beneficial to him? The method in which the contracts were prepared, the unusual course pursued respecting their preparation and custody, and the studied concealment of them, all increase the suspicion that they are of recent fabrication. These circumstances were not known until after the suit was commenced, so that there really has been no acquiescence to which any weight is due.

With reference to the cross-appeal, all the arguments urged against the decree and the payment of money into court, apply with increased force against the argument in favour of ordering the money to be paid to the plaintiff below. If, however, those arguments are unsound, the decree ought not to be varied on this cross appeal, for the court will not take the account at the hearing, and it requires much stronger evidence to show that the amount is certainly due to the contractor than any that has been given in this case.

Mr. *Proudfoot* and Mr. *Blake* appeared for *Whitehead* on his appeal against the order refusing to pay the money out of court.

Mr. *E. B. Wood*, contra.

Sir J. B. Robinson, Bart., C.J.——Plaintiff filed his bill the 16th of September, 1858. The object of this suit is to obtain compensation, according to alleged contracts

made with the defendants' agent, Captain *Barlow*, for work done on the defendants' railway; and to obtain payment also of moneys claimed by the plaintiff to be due to him upon alleged contracts for keeping the railway in order, and for building station houses, and other extra works. And plaintiff also claims damages for being interrupted and delayed in the execution of his contract. The prayer of the bill is, that an account may be taken between him and the defendants; that the defendants shall be restrained from setting up as a defence the want of authority under the seal of the corporation, and if necessary, may be compelled to execute formal contracts under seal to the same effect as those which the agent entered into with the plaintiff, on the faith of which the plaintiff alleges he executed the several works.

The defendants, by their answer, deny the authority of their agent to enter into the contracts for construction referred to in the bill, and declare that they have never in any manner ratified, adopted or sanctioned them; that the prices which plaintiff claims as having been agreed to by Captain *Barlow*, their agent, are exorbitant, and although excessive; that the contracts for maintenance of way were entered into without their knowledge or consent; that they supposed the work was being executed by themselves through *Barlow*, as their agent, and under plaintiff as superintendent; that they have never refused, and do not refuse to pay him the full and fair value of all his works, labour, and materials; but on the contrary, allege that plaintiff has been overpaid; that the circumstances which they set forth in their answer justify the belief that there was some secret understanding, or agreement between the plaintiff and their said agent; that if the plaintiff had any remedy it is at law, and that he has brought an action which is still pending there, for enforcing the same claims.

By the statute 13 & 14 Vic., ch. 72, the powers given by statute 12 Vic., ch. 84. to form joint stock associa-

tions for making plank and gravel roads, and certain other public improvements, were extended so as to enable persons to associate in like manner, and with similar powers for making railroads; and it was made a condition that five years should be the time limited for completing any railroad, under the powers given by that act.

The legislature appears to have come soon to the conclusion, that it was not expedient to encourage persons to undertake the construction of works so important and expensive as railways, under the system established by these statutes for the government of joint stock companies, for in the next year, by statute 14 & 15 Victoria, ch. 121, they repealed the authority given by 13 & 14 Vic., ch. 72, for constructing railways by means of such companies; but as advantage had, in the meantime, been taken of the statute, by a joint stock company that had been formed for making a railway from Buffalo, or rather from Fort Erie to Brantford, called the Brantford and Buffalo Joint Stock Railway Company, it was felt that it would not be just to interfere with their operations; and it was provided that nothing in the repealing act should interfere in any manner with the rights which that joint stock company, or any person or body corporate had in any manner legally acquired under the former statutes, or should prevent the said joint stock railway company, or any other company organised under the repealed act, from proceeding to carry on its operations.

Then in 1852, an act was passed, 16 Victoria, ch. 45, which gave to that company the name of the Buffalo, Brantford, and Goderich Railway company, and gave them new and enlarged corporate powers; or rather incorporated them again specially under that name, and gave them authority to make and complete a railway, to be called "The Buffalo, Brantford, and Goderich Railway," from Fort Erie, on the Niagara river, to Brantford, and from thence through Paris and Stratford, to

Goderich and Lake Huron. This statute applied to this company the principal clauses of the railway clauses consolidation act; and enlarged the stock of the company to a million of pounds currency; and made various other provisions for facilitating its operations, making it obligatory upon them, however, to finish the road between Stratford and Goderich within three years from the 15th of *May*, 1853, otherwise their authority to construct that portion of the railway should wholly cease.

Afterwards by statute passed in 1856, (*a*) the legislature, reciting that the company had become embarrassed, and unable to complete the railway between Paris and Goderich, and that the completion of such portion, and the more perfect finishing and equipment of the first part of the line, from Fort Erie to Paris, would be of great advantage to the province, sanctioned an arrangement that had been proposed for organizing another company for the purpose of purchasing the property and privileges of the former, and going on with the work; and the legislature made various provisions for carrying this out.

The last act incorporated a new company, to be called "The Buffalo and Lake Huron Railway Company," whose object was declared to be the buying out the former company, and completing, maintaining, and managing for their own benefit, the Buffalo, Brantford and Goderich Railway.

The persons who had, in the first instance associated for these purposes, appear to have been all resident in England; and it is recited in the statute that *Robert Hilaro Barlow*, Esquire, late of England, but then of Brantford, on behalf of those persons, had entered into an agreement with the Buffalo, Brantford and Goderich Railway Company, dated the 11*th of February*, 1856, (three months before the passing of this statute,) for the purposes aforesaid, with the approval of the shareholders of the said company.

(*a*) 19 Vic., ch. 21.

The act then made provision for increasing the stock of the new company, if necessary, to two millions, and for conducting the affairs of the new company, as well as for the proper adjustment of the interests of the late company, and the claims of other parties upon them.

It was enacted that the directors should be *nine* in number; and should be annually chosen; that five should be a quorum, including such as might vote by proxy; but that there must be three directors personally present at every meeting.

It was provided that the meeting should be held at Brantford, and that the directors might vote by proxy, such proxies being themselves directors; and being authorised, according to a form given in the statute, to vote for the person giving the proxy, "at all meetings of the directors of the said company, and generally to do all that the shareholder could himself do as such director, if personally present at any such meeting."

All persons holding stock up to a certain amount might be directors, whether subjects or aliens, and wheresoever resident.

The directors are to be chosen at a meeting to be holden at Brantford in each year.

General meetings of the shareholders of the company to be held half yearly, on first Wednesdays of March and September in each year, at such *places* as the directors shall from time to time apoint; and it is not said whether these shall be in England or in Canada.

Provision was also made for calling special meetings.

The time limited for the completion of the railway to Goderich by the former company, was by this act extended "to two years from the time at which the Buffalo and Lake Huron Company should be put in possession of the

railway and lands, under the agreement" (which it appears from the evidence was on the 28th of June, 1856.)

By the 32nd clauses of the act it was made lawful "for *the directors of the company* to nominate and appoint a managing director, or superintendent of the affairs of the company, with such powers and at such salary as shall be fixed or determined, in or by any by-law, or resolution of the directors of the said company."

By section 33, certain portions of the Railway Clauses Consolidation Act are applied to this company.

By section 34 of the act, a provisional board of directors was appointed for the company, to hold office till the meeting in September, 1856, and afterwards till a board of directors should be elected under the statute. These were eight in number, all of whom resided in England, except two, *Brown* and *Rumsey*, the first of whom lived at Buffalo, and was often at Brantford, and the other lived at Goderich, and except also the agent Mr. *Barlow*, who was one of the eight directors thus appointed.

The 18th clause of the act, legalised and confirmed an agreement recited in the act, and set forth at length in a schedule to the act, dated the 11th of February, 1856, made between the Buffalo, Brantford, and Goderich Railway Company of the one part, and the said *Robert Hilaro Barlow*, acting "for and on behalf of certain persons intending *to become incorporated by the name and style of the Buffalo and Lake Huron Railway Company, of the other part.*" This agreement was come to as preparatory to the contemplated purchase by the new association which the legislature were expected to confirm.

It provided that if a statute should be passed, then after its passsing the agreement should have the same

effect as if it had been formally executed by the two companies.

It contains no provision that can affect this case or can be material to be considered, except that it is recited in it that the completion of the railway from Paris to Stratford, and from thence to Goderich, within the times mentioned in this agreement, formed a principal inducement for the Buffalo, Brantford, and Goderich Company to enter into the agreement, and it was therefore provided," that the new company should pay to them £100 a day, as liquidated damages, in addition to all other payments, *for every day* that the railway should remain unopened for public traffic, between Paris and Stratford, beyond six months after they shall have taken possession of the line under the agreement; and also £100 a day for every day the railway shall remain unopened for traffic between Stratford and Goderich, after two years from the new company's taking possession of the line."

There is no provision in that agreement respecting any continued agency to Captain *Barlow*.

An examination of the statutes which I have referred to, and of the agreement between the two companies shews, I think, that they contain nothing that can materially affect this suit.

But it is necessary to bear in mind that when the transfer of the railway took place from the former company to the defendants in this suit, (the newly formed Buffalo and Lake Huron Railway Company,) the portion of the line from Paris to Stratford was unfinished, if indeed any part of the line could be properly said to be then finished. The evidence shews that that portion of the line, 32 miles in length, was not yet all graded, though part of the track had been laid, and it was only by great exertions afterwards used that

the defendants were able to open it for traffic in December, 1856. And as to the portion of the line between Stratford and Goderich, 45 miles, it was yet to be almost wholly constructed, and the evidence shews that it was not without extraordinary exertions that it was completed and opened for traffic on the 28th of June, 1858, the day on which the defendants were bound to open it.

If the defendants had failed to have either portion opened by the day named in the agreement, we see the heavy penalty they would have been liable to pay, and it is therefore material to bear in mind that the directors and shareholders of the company, who were almost all resident in England, were under the necessity of vesting large discretionary powers in the person whom they might rely upon as their managing superintendent in Canada, and were not likely to have interposed delays by desiring to have his agreements for executing the work sent to them for their previous sanction.

2nd. The statute 19 Vic., ch. 21, shews that there need be only three directors actually present in Canada at any meetings of the board, one of whom might be the managing agent of the defendants, and who was competent to hold proxies from any or all of the English shareholders, by the use of which he could in fact do whatever the board could do, and so might have really all the power and control that the most comprehensive insrument executed by the company could possibly have given him.

It cannot be said that Captain *Barlow* derived either from the statute, 19 Victoria, ch. 21, or from the agreement executed between him and the old company, which the statute confirmed, any direct authority to represent the company in such transactions as took place between the defendants and this plaintiff, for though the transfer from the one company to the other was negotiated and settled, as appears, by Captain *Barlow*, on behalf of the

proposed new company, there is nothing in the statute, or in the agreement, that conveyed any authority to him to proceed with the execution of the work.

He was, it is true, afterwards appointed by the defendants to be their managing director, as any other person might have been; and being so appointed, his powers according to the 32nd clause of the act, would be such as the directors chose to delegate to him *by by-law* or *resolution;* and if the directors had omitted to specify in such manner what his powers were to be, but yet kept him in Canada as their superintendent, availing themselves of his services, and recognising his acts in that capacity, it is not to be assumed that the want of any by-law or resolution to mark the limits of his authority would have enabled the defendants to escape all responsibility for such acts of his as should appear to be within the scope of a general agency.

When the English association sent him out to Canada in 1855, though the immediate object of his mission was only to negotiate the purchase from the old company, and to prepare and obtain from the legislature such a statute as was desirable, and to make the preliminary arrangements connected with the proposed transfer from the old company, yet they had in mind the qualifications which would be necessary for their managing director, to be appointed pursuant to the 32nd clause of the statute, for going on with the work, and superintending the railway. The minutes of their proceedings shew that they selected Captain *Barlow* as a person well qualified to perform those duties. They knew him in England as a civil engineer who had been employed upon railways there, and who had also had the superintendence of a railway as manager; and it appears from the evidence that they had a high opinion of his qualifications, and entire confidence in his discretion.

They, that is the English shareholders, offered him the post of managing director, while he was yet in Eng-

land; but for some reason he declined in the first instance, and went out to Canada late in the autumn of 1855, solely as their agent for making all the arrangements that were to precede the formal delivering over of the line from the old company to the new.

In October, 1855, he was again requested to take upon him the duties of managing director, and in the meantime, and before he had accepted that office, his services were engaged till the 1st of June, 1856; and he was told that he was selected for that temporary appointment with the view of being appointed to the permanent office of managing director, on the passing of the act.

He was afterwards instructed, (5th of December, 1855,) that if he should have any leisure before the passing of the act, he might ascertain "*in what manner he would recommend contracts to be let for finishing the line*; but that no contract of any kind was to be entered into before the act was obtained; and that after the act should be obtained, the English directors *would wish* to give it as a general instruction that no important contracts should be entered into without being subject to confirmation in England."

While he still occupied that position of special agent only, and before he had accepted the office of managing director, he was written to (26th of March, 1856) that as soon as the company should get possession of the land, *he should, without the loss of a day*, take measures for putting the section to Paris in good order, finishing the line to Stratford, and *contracting* for the first necessary increase of rolling stock.

On the 9th of May, 1856, the English board of shareholders having been made aware of the arrangements for acquiring the line of railway, and all the interest of the first company; and of his success in having a suitable act passed by the two houses of the legislature, (though

it had not yet been formally assented to,) they renewed their offer to make him managing director in Canada, after the act should be passed that was to create the new company; which appointment he was to hold for a year from the 1st of June, 1856, when their temporary engagement with him would expire.

On the 16th of May, 1856, the act was assented to, which confirmed the agreement he had entered into for the purchase of the railway, and which incorporated the new company (the now defendants) under the name of "The Buffalo and Lake Huron Railway Company."

On the 22nd of May, 1856, Captain *Barlow* wrote to the English board, that the board as constituted under the statute (sec. 31) had held their first meeting at Brantford, which could only mean that he and Messieurs *Brown* and *Rumsey*, the only three of the directors named in the act who were then in Canada, had met. It seems that Messieurs *Brown* and *Rumsey* were the only stockholders on this side of the Atlantic; the others named as directors in the act being all resident in England.

On the 24th of May, 1856, Captain *Barlow* wrote to the board or committee of English shareholders that he accepted the office of managing director for one year, on the terms they had proposed; "that he supposed they desired him in addition to organize and superintend the construction of the works on the line until they could be placed in a finished state, under a person qualified to attend to the maintenance of the road, and works; and that under that impression he would prepare all the plans, specifications, and drawings to enable the works to be let by contract."

He suggested in the same letter, that the English board should confide their proxies to him, prescribing from time to time to him their views and line of policy.

On the 21st of *June*, 1856, he wrote to the English board about the affairs of the company, and about the work, chiefly about the cost of ballasting. He remarked to them that he had been for some years opposed to the plan of letting all works, however simple, to contractors; and had not changed his opinion. He tells them that "he fully realized his position in respect to responsibilty; and that they might rely on his not sacrificing a shilling unnecessarily." And he speaks in one of two letters, written on that day, of the plaintiff *Whitehead* as a person who had been recommended highly by a Mr. *Robson*, in England, with whom it seems the board there had been in communication.

He had received, he says, from him some information in regard to prices which he reports to the board.

On the 28th of June, 1856, a week after this, the line of railway was formally delivered over to Captain *Barlow*, as agents of the defendants; and it followed, from the 27th section of the statute 19 Vic., ch. 21, that the defendants were bound to complete the whole line of railway to Goderich by the expiration of two years from that date, and that according to the express terms of the agreement between the two companies, if the defendants did not, within six months from that day, complete the line from Paris to Stratford, (32 miles,) so as to have it open for traffic, they would be bound to pay to the Buffalo Brantford, and Goderich Railway Company £100 a day for every day it should remain unopened after the six months, and should pay also £100 a day for every day that the line of railway between *Stratford* and *Goderich* should remain incomplete and unopened for traffic after the 28th of June, 1858.

Considering the work to be done between Paris and Stratford within the six months, there was, we may suppose, no time to be lost in setting about the execution of it; and although the time was much longer for finishing

the portion of the line between Stratford and Paris, yet it may be that the call for expedition in respect to it was not much less urgent, considering that almost the whole work upon that forty-five miles was yet to be done.

The portion of the line between Fort Erie and Paris eighty-one miles, had been finished by the first company in 1853, and had been actually used for traffic nearly two years, but it had not been substantially and carefully constructed nor properly completed; and from the difficulties the first company were in, it had been a good deal neglected, and had received injury in consequence; so that there was much to be done along that part of the line before it could be in a proper state to be re-opened on the 28th of December, 1856.

At the time when the work was delivered over to the defendants on the 28th of June, 1856, Captain *Barlow* could not in strictness be called the managing director of the new company that had just been incorporated; for the appointment which he had accepted was made by the English shareholders only, and before the act of incorporation; and he could not in fact be the managing director of the defendants, within the meaning of the 32nd clause of the statute, until September, 1856, when the directors of the company at their meeting in that month, resolved, "that the appointment of Captain *Barlow* as managing director of the company, *from the 1st of June last*, which was made by the English board, should be, and the same was thereby confirmed."

Before that was done, however, viz., on the *1st of July*, 1856, Captain *Barlow* following almost literally the direction of the English shareholders *not to lose a day*, after getting possession of the line, in taking measures for putting the section to Paris in good order, and *finishing the line to Stratford*, entered into that agreement with the plaintiff, which is printed in the case as exhibit A., and may be called shortly the July contract.

To this instrument Captain *Barlow* signs his own name simply, and seals it with his seal, as any individual would do, in a matter of his own; and he is described in it as the party of the second part, "*acting for, and on behalf of the Buffalo and Lake Huron Railway Company.*

The plaintiff thereby contracts and agrees with *Barlow*, "acting for, and on behalf, &c., of the Buffalo and Lake Huron Railway Company," to make the railway by the time and in the manner mentioned in the agreement, from Fort Erie to Stratford, and to find all the labour and materials, except iron rails, sleepers, chairs and spikes, according to any plans and specifications which may be furnished from time to time.

A schedule is referred to in it, as attached thereto, and as "setting forth the descriptions of work to be executed, and according to which the value of all work is to be determined and paid for;" and he thereby "undertakes to execute a contract for the same with the Buffalo and Lake Huron Railway Company (defendants) at any time he may be called upon to do so, it being agreed and understood that until such contract shall be executed, this indenture shall be read and construed as binding upon the plaintiff and upon the said *Richard Hilaro Barlow*, acting for and on behalf of the Buffalo and Lake Huron Railway Company, as fully as if such contract had been actually signed, sealed and delivered."

The plaintiff, *Whitehead*, covenants with *Barlow* acting for and on behalf, &c., to execute and complete the railway between Fort Erie and Stratford, in such a manner as will enable it to be opened, and safely used for traffic, *on or before the 28th of December*, 1856. And *Barlow acting for and on behalf* of these defendants, covenanted with plaintiff that "he would pay him monthly the value of all work executed in the previous month, *computed from the schedule of prices*, and in the

manner prescribed by clauses 51 and 52 of the specifications referred to as attached to this indenture, and signed by plaintiff."

And the indenture concludes thus: "and for the fulfilment of all the conditions and covenants aforesaid" by each of the parties, *they respectively bind their legal representatives as well as themselves.*

This instrument is witnessed and signed by *Donald McDonald,* who the defendant allege in their answer was a partner with plaintiff in the work.

Annexed to this deed is a tender signed by *Whitehead* for the work mentioned in that agreement, in which tender he states that he will do the work according to the plans and specifications, and within the periods, and upon the terms and conditions mentioned in the specifications exhibited to him, and according to the schedule of prices annexed, and he undertakes to execute a contract within a fortnight from that date, (1st July, 1856,) or whenever called upon to do so.

Under this tender is a schedule of prices for every description of work, giving the prices in two columns, the one for the work between Fort Erie and Paris, the other for the work between Paris and Stratford, the prices being the same I think in both columns, except in one instance—fencing.

Then follows an elaborate specification in several pages, signed by plaintiff and Captain *Barlow,* describing the kinds of work to be done, such as clearing and grubbing, grading and masonry.

Besides this there was another indenture put in evidence, dated 27th November, 1856, executed precisely as that of July was by the plaintiff and by Captain *Barlow,* who in this deed describes himself as in the

other, as "acting for and on behalf of the Buffalo and Lake Huron Railway Company."

In this the plaintiff covenants that he will, under the inspection and direction of the engineers appointed to superintend, construct and in every respect complete the road-bed of the section between Stratford and Goderich, about 45 miles, finding the best materials of every kind, and completing it so as to be fit and safe for public traffic, "according to such plans and specifications *as may be furnished from time to time* by the engineers, and agreeably to the prices affixed to the schedule hereunto annexed, and that he will use all due diligence and exertion to complete the railway and works on or before the 28*th June*, 1858."

In other respects this agreement is in substance and form like that of the 1st July.

But there is a clause at the end, which is not in the other, but which is common in railway contracts, to the effect that if the plaintiff shall not go on with the work satisfactorily in the opinion of the defendants' engineer, and with such despatch as to ensure completion by the time specified, the work may be taken out of his hands by the company's engineer and completed at his expense; and also the usual condition that the work in its progress should be subject to the inspection of the company's engineer, who shall decide every question respecting its execution.

A schedule of prices is also given with the contract, closely corresponding, though not exactly, with the prices in the schedule referred to in the other contract, and there is also a tender signed by the plaintiff to do the work at those prices.

Notwithstanding these contracts are respectively dated the 1st July and the 27th November, 1856, it is

certain, (and it is indeed admitted by the plaintiff) that they were not executed till the fall of 1857.

Whether their not being executed at the times they bear date (so that it could be truly said that all the work was done *under them*) did or did not arise from mere inattention and neglect, or whether there was any design in it, can only be conjectured.

The plaintiff went on with the works mentioned in the bill, promptly, and prosecuted them as it appears with all possible activity and energy, under great disadvantages, as is clear from the evidence; and he executed in a satisfactory manner the whole work within the periods limited by the agreement *of the 11th February*, 1856, so that the defendants were able to open their line to Stratford on the 28th December, 1856, within the six months as required by that agreement, and the line from thence to Goderich within the two years, that is, on the 28th June, 1858, to the entire satisfaction of the defendants, and of the Government Inspector of Railways.

The plaintiff asserts that the whole of this work was performed for the defendants under the two agreements executed by Captain *Barlow* as their agent, and in the full confidence, on his part, that the defendants would pay him for the work according to the scale of prices referred to in the two contracts of the 1st July and the 27th November, 1856, and he claims a large balance as being yet due to him for the work so executed.

Besides these agreements, there was an informal memorandum, dated the 1st November, 1856, of an understanding between the plaintiff and Captain *Barlow*, respecting the maintenance of way, that is, the keeping the railway in repair, between Eort Erie and Stratford, for two years from the 31st December, 1856, according to which the plaintiff was to be paid at the rate of £205

per mile—said in the writing to be 60 miles, as if a part only had been agreed for.

And that afterwards on the 10th June, 1858, another contract was made between the plaintiff and Captain *Barlow*, which has since been reduced to writing, respecting maintenance of way between Stratford and Goderich, but for what time is not stated. And indeed the plaintiff's claim is set forth in his bill in such terms as regards the latter alleged agreement, that I cannot clearly make out what he is disposed to insist upon, or can with justice insist upon in reference to it.

The plaintiff also claims to have executed work under verbal contracts between him and Captain *Barlow*, in erecting station-houses and various other works along the line, upon which, as well as on the maintenance contracts, he claims that a large balance is due to him. And besides these claims for work done and materials found under alleged agreements verbal or in writing, the plaintiff claims damages for being delayed and interrupted by the defendants in carrying on the work; and he has proved that on two particular occasions he was so interrupted for several weeks each time, as is stated in the bill, the works being suspended by order of the defendants, and that he suffered great loss from having to discharge his men, and to collect others in haste, when he was allowed to resume work.

The defendants have insisted that the plaintiff's alleged claims are such as can only properly be prosecuted in a court of law, to which he has already resorted, and that *Barlow* should have been made a defendant, and also *McDonald*, because the latter, as they allege, was interested as a partner with the plaintiff in the contracts spoken of, or some of them. These objections will presently be considered.

But I will first apply myself to the case as it appears to stand upon the merits, independently of these objections.

The defendants have denied that they can be made liable upon the construction contracts made with Captain *Barlow*, dated the 1st July and the 27th November, 1856, or upon either of the contracts for maintenance of way.

They say that *Barlow* had no authority for entering into contracts for such purposes, without instructions from them; that they had no knowledge of his intention to enter into such engagements, and did not know that he had done so till some time in March, 1858, when all the work had been done that is referred to in the first of these construction contracts, and most of the work referred to in the second. They contend also that at any rate contracts entered into as those were by *Barlow*, cannot be held binding upon them, not being executed by them, or in *their name*, though expressed by their agent to be on their behalf, and not being under their corporate seal.

I must say, with reference to the opinion of the majority of the court below, that neither the two construction agreements, nor the agreements for maintenance of way, have in my opinion any binding force upon the defendants, being executed in the manner and under the circumstances that they were executed.

The statute 19 Victoria, as I have already said could give them no validity, for that only made Captain *Barlow's* agreement of the 11th February, 1856, for the purchase of the railway, binding upon the company as incorporated under the act, leaving the company at liberty to conduct their business afterwards through a managing director if they thought fit, but without placing Captain *Barlow* in that office or assuming that he was to be the person to fill it. Up to that time he had represented only the English shareholders, by whom he had been appointed; and before he could claim to exercise any power by virtue of the 32nd clause of the statute, respecting a managing director, it was necessary

he should be appointed after the act, and by the corporation which the act had created.

He clearly was not in that position when the first contract of the 1st of July, 1856, was dated, but it is true that he was made managing director in September, 1856, before even that contract was executed, so that in fact all the contracts in that respect do stand upon the same footing—being all executed by *Barlow* after his appointment by the defendants to be managing director.

Still I am not satisfied that Captain *Barlow* had power merely because he was managing director, and with his authority undefined by any by-law or resolution (as is provided in the 32nd clause of the statute) to enter into and execute contracts in his own name and under his own seal, for the construction of the road itself, and not merely for the management of it, which contracts should be legally binding upon the corporation as executory contracts, though they might involve the expenditure of the whole of their capital. Both the executing parties to those instruments contemplated that a formal deed under the seal of the corporation would be executed if the plaintiff should desire it; and the provision in each agreement, that in the mean time, "for the fulfilment of all the conditions and covenants aforesaid, *by each of the parties*, they respectively *bound their legal representatives* as well as themselves," looks as if *Barlow* was understood by the plaintiff to be giving his own personal undertaking, binding upon his executors in case of his death, and that the words "*acting for and on behalf of the company*," as there used, meant only that he was binding himself and his representatives for their benefit, and in transacting their business.

He trusted, it appears, to the individual undertaking of the plaintiff, without exacting sureties as usual in railway contracts or large contracts of any kind; and

even if he had power to contract for the construction of the road to the amount of £200,000 or £300,000 so as to bind the company by his deed, it does not appear to me that he did so; nor am I by any means satisfied that the plaintiff understood that he was assuming to do so. I think the plaintiff was probably content at the time to look only to Captain *Barlow's* undertaking, as Captain *Barlow* relied upon his, though not doubting, I dare say, that the company would abide by and perform what their agent had agreed to.

If it had appeared more clearly, however, than I think, it does, that Captain *Barlow* did by the two construction contracts mean and attempt to make the company directly liable through that instrument, then my personal opinion is, that those instruments, such as they are, had not in themselves that effect; and this not merely for the reasons I have stated, but also because I am not prepared to say that it is now, or ever has been the law of this province that a corporation can be bound by an executory contract, however special or important, made only by parol, even where the contract relates to matters clearly within the scope of the purposes for which they are incorporated. I think the principles maintained in The *Mayor of Ludlow* v. *Charlton*, and in numerous cases before and since, are not yet so wholly departed from, if indeed they could be without legislative interposition; though several of the recent cases cited by the learned judges in the judgment appealed from, seem to shake the doctrine which had always, until lately, been consistently maintained.

This is altogether a different question from that which has in several cases been before us, namely, whether a trading corporation cannot be held liable upon the principle of an implied promise to pay as upon a *quantum meruit* the value of work or goods furnished to them, and which they have accepted and used, although they have not by a covenant under their seal promised

to pay. That they can be held to be so liable was never, I think, doubted till the decisions in the Court of Exchequer in England in the cases of *Diggle* v. *The Blackwall Railway Company*, and another case of the same description had unsettled the law upon that point. We may be driven in some future case to determine whether some still later cases in the Queen's Bench in England should be conformed to here, which have not only overruled such cases as *Diggle* v. *Blackwall Railway Company*, but have gone to the opposite extreme by deciding that all contracts of corporations are binding upon them, though not under seal, and though wholly executory, and however special, or of whatever magnitude they may be, so long as they are in their objects clearly within the scope of the business which the corporation is authorized to conduct. At present I think the law is not so fully settled in England or here, though the cases of *Henderson* v. *The Australian Navigation Company*, and *Reuter* v. *The Electric Telegraph Company*, are cases decided by the Queen's Bench upon that principle.

But I do not go further into this question at present, because I fully concur in the judgment given below, that the evidence is such as entitles the plaintiff beyond all doubt, in the absence of proof of fraudulent collusion between him and the defendants' agents, to claim to be paid according to the scale of prices agreed upon between them. And indeed, if the evidence had been much less strong upon the point of ratification, and acquiescence on the part of the defendants, than it is, (and it really could not well be stronger,) we ought to have felt still a stronger inclination, I think, to give the plaintiff the benefit of that scale of prices in estimating the value of his labour and materials. I refer, when I say this, to the peculiar circumstances of this company. The line had been purchased and the road was to be completed almost wholly out of funds to be furnished

by the shareholders in England. It is evident that they had selected Captain *Barlow* for their agent, as a person known to them and in whom they had perfect confidence.

They relied on his judgment and skill as an engineer; and on his energy, tact and good management for giving them, as expeditiously as possible, an economical and substantial road. Delay was by all means to be avoided for reasons which I have already stated, and which are repeatedly alluded to in the evidence.

It would have been extremely injurious and might have been even ruinous to the defendants to have been behind the time limited in the agreement, and in the statute for completing the work; for though they might have obtained an extension of the time from the government, they could not certainly reckon upon the *Buffalo, Brantford, and Goderich Company* waiving the penalties in the agreement; and they would be at their mercy in that respect. Besides that, there was the fact that they had a series of large payments before them on account of the purchase, in addition to what would be required for completing the work; and it was therefore a great object to them to get into good working order with the least possible delay that large portion of the line between Fort Erie and Paris, and to carry the work through to Stratford and Goderich, which they believed would open to them a large remunerating traffic. It might well seem to the shareholders in England that the best plan for insuring the rapid and substantial completion of the railway was not to advertise, with the view of accepting the lowest tender, relying upon sureties for indemnity in case of failure; but to put the whole in the hands of a contractor of experience and good character, upon such terms as would fairly and liberally compensate him for a faithful and zealous devotion of his time and means

to the work, and to leave him no excuse for failure, nor expose him to any risk of failure, provided he acted honestly and with judgment; in other words, in a manner consistent with what they understood to be his known character.

It was easy for their engineer to ascertain what was the average price for the different descriptions of work that would be required, and they might feel safe in relying upon the plaintiff as regarded the cost of the materials which he was to provide.

To wait for results of correspondence on these points with the English shareholders would have been incurring a loss of time that must have been very precious, if the line to Stratford must be completed and put in good order between the 28th of June and the 28th of December. If, therefore, they preferred relying upon the activity and judgment of a good managing director, leaving every thing to his discretion, they perhaps took the wisest course. They appear to have been more than satisfied with the zeal and discretion of their agent in making arrangements for them with the other company, and in obtaining the act of parliament, and to have been most anxious to secure his services as their managing director after the bill passed. Considering that the hundreds of thousands of pounds which must be necessarily provided were to come from them, it could hardly have seemed reasonable to the two Canadian directors, whose stake in the work may have been small, that they should have insisted upon overruling the measures which the English shareholders or their agent thought most desirable.

Nothing of that kind indeed seems to have been attempted or thought of. "We never objected," Mr. *Brown* says, "to *Barlow's* assumption of authority, because we knew it was useless, as he held all the proxies of the English directors, and from what I had heard

from the chairman in England;" and the evidence seems to make it clear that the English shareholders intended that their agent should have full power and discretion to take his own course for repairing and finishing the work.

"The board have never interfered with the making of contracts," the secretary Mr. *McLean* states, "They saw that Captain *Barlow* was carrying on the work under the charter." "No man could have been sent out with greater powers or enjoying the confidence of those sending him out in a higher degree than yourself," is the language of one of the English directors to him. And everywhere in reports made by the board, and in the correspondence, we find acknowledgments that they had got into pecuniary difficulty, and found themselves in some respects greatly disappointed in the results of what had been done, and saw, as they believed, very injurious effects from their agent's want of cordial co-operation with the Canadian directors, and his remissness in keeping them informed of what he was doing, they wrote to the Canadian directors thus:

"The *past system* has certainly not worked well. The wood contract was no doubt a very great mistake, and involves us in a very severe loss." (That contract was not with plaintiff.) "For the future your approval of all contracts *is made indispensable.*" This is written so late as in March, 1858, and is an admission that the former system had not required such previous approval of contracts.

Somewhat later than this, viz., April, 1858, and not long before the whole railway had been finished, and after the English shareholders and all the directors knew perfectly well of the contracts in question, and of all their particulars, one of the two English directors, who had taken the most prominent and active part in

the business from the beginning, writes thus to the other: "I long foresaw that the system *we were pursuing* could hardly fail, sooner or later, to be very damaging to the best interests of the company as well as those of Captain *Barlow*, who was not the man to be safely trusted with such unlimited and uncontrolled power *as we very unwisely and incautiously gave him.*"

No language could be stronger than that as to the footing they both understood the agent to be upon. And it is but just to add that while complaining of defects of temper and faults of various kinds in their agent, the director who had thus expressed himself adds in the same letter: "You will be surprised to hear me say that I really feel some slight degree of gratitude to him (their agent) for having proved himself to be, as I very sincerely believe, an honest man; and although he has wasted some of the company's money, I see no cause for thinking that he has put one shilling of it into his own pocket."

Again, after all the work was done, (2nd July, 1858) the same English director writes: "We must again request that no *fresh contracts* of any kind be entered into."

The exigency which had led almost necessarily to the vesting an unlimited discretion was past; and as they believed the system was liable to abuse, they resolved to alter it.

Indeed the very notice sent from the London directors to the plaintiff, dated the 25th of June, 1858, is that Captain *Barlow* is *no longer* a managing director, and *that therefore he had no longer authority to sign contracts.* This was an implied submission to what he had hitherto done in that way.

And on the 1st of September, 1858, when the Canadian

directors sent a formal notice to the plaintiff, it was to this effect, "that all agreements between Captain *Barlow* and him for the construction of road, or maintenance of way, were *from that date at an end.*"

The evidence, indeed, contains so many proofs of an admitted consciousness on the part of the directors and shareholders, that they had left it entirely to their agents to bind them by such engagements as he might think necessary, for repairing and finishing the railway, that it would be tedious to go on citing them. I will only therefore add the following passage from the report of the committee of English shareholders, made after having investigated, as they declare, most fully all the past transactions of the company, and their present condition and prospects. They express in this their satisfaction that Captain *Barlow* had been requested by the London board to return to Canada, and resume his duties, and that he had been "instructed to finish forthwith the works to Goderich, so as to avoid the prescribed penalty for delay–to put the whole line in proper working order–*but not to undertake any new works, and carefully to avoid committing the company to any further engagements without* the sanction of the board being first obtained." This is a plain declaration of opinion from those who were most deeply interested that when the work should be finished, the exigency which had led to their vesting such large powers in their agent would be past; and that as the system had led, or might be expected to lead, to some inconvenient consequences, it should cease with the necessity that had occasioned it.

They could not have been so unreasonable, however, as to intend at that time that the change of system should operate retrospectively, so as to give a cheaper work than they had contracted for, at the expense of the plaintiff, whose exertions had been on all hands acknowledged in the most approving terms.

If the case of *Reuter* v. The *Electric Telegraph*

Company, which was cited in the judgment given in this case below, can in the existing state of the decisions in the courts in England be relied upon as authority that it would be safe to follow, such proofs of recognition as these would be abundantly sufficient to set up the contracts in question even as binding executory contracts, capable, notwithstanding the want of a corporate seal, of being strictly enforced as a matter of right, according to their letter.

And how much stronger is the present case, when it is considered that according to the statute 19 Victoria, ch. 21, sec. 7, it was necessary that there should be five directors at least at the Canada board, including such as might vote by proxy, and that three directors must be *personally present*.

The system was framed, no doubt, to meet the state of things that existed, while almost all the shareholders resided in a different country from that in which the business was to be carried on. There could be nothing done, or resolved upon, or sanctioned by the board, according to that provision, without the vote of Captain *Barlow*, the agent, who was one of the directors, and necessarily one of three who must be personally present; and without proxies being also used from two at least of the English directors, whose proxies he held; for without this the votes of five directors could not have been given upon any question before them, as the law requires. This inevitably made every act done by the board, the act in effect of the agent, as it was intended it should be, and it is therefore after all raising a question about forms and shadows rather than about anything substantial, when we discuss what the agent so placed was, or was not competent to do, without the express sanction of the directors, in other words, of the governing body of the company in Canada, for the agent was himself, in effect, that governing body.

Then the recognition of the agent's authority to agree

with whom he pleased, and on such terms as he might approve of, is not more plainly made out from the evidence, than is the ratification by all parties concerned of what he had done in the execution of that authority, in his transactions with the plaintiff; and their submission to it, and acquiescence in it, after they knew that he had made contracts with the plaintiff, and after they had every opportunity to know what the terms of the contracts were.

If it had been shewn that the directors had been misled by the agent, and that he had been fraudulently colluding with the plaintiff, with a view of secretly sharing with him the profits of extravagant contracts, then in the view of a court of justice, the acquiescence and recognition that I have spoken of would have signified nothing; and certainly no aid would be given to the plaintiff by a court of equity for enforcing contracts of that description, I mean contracts tainted with fraud.

But while courts of equity make the utmost use of their powers in defeating fraud, they uniformly discountenance the hazarding imputations of fraud rashly upon mere surmises; and they have sometimes refused to give relief upon other sufficient grounds which the bill and evidence furnished, where the relief had been claimed chiefly upon the grounds of fraud, which they found there was no pretence for imputing.

In this case, however, the defendants do not charge the plaintiff with fraud in other terms than by alleging that the circumstances stated by them in their answer *justify the belief* that there was *some secret understanding* or *agreement* between the plaintiff and the said *Robert Hilaro Barlow*. They do not venture to say that they do in fact *believe* that there was any such secret understanding, still less that in truth there was any. They have given no proof of fraud. And the acquittal by the

company, the directors individually and collectively, and the shareholders, of any wrongful intention, or want of integrity either in the plaintiff (as I think we may say) or in the agent, and that after the work had been all done and the whole expenditure investigated, is so strong and plain, and comes before us in so many shapes that I do not think it necessary to refer to particular testimony on that point. Even the engineers in the defendants' service, who were called by them as witnesses, Mr. *James* and Mr. *Sherwood*, speak in these terms of the agent. Mr. *James* says, "I know Captain *Barlow* well; I believe his intention was to promote the welfare of the road; I have no doubt that in entering into the contract with plaintiff, he meant to do the best for the company; if he erred it was through ignorance; he meant to act honestly."

Mr. *Sherwood* says, "I have no reason to think that Mr. *Barlow* acted otherwise than for the benefit of the company."

The defendants do however complain of the want of openness in letting the particulars of his contracts with plaintiff, the specifications and prices, be known. His conduct in that respect they insinuate amounted to a concealment of them from the company and its officers, and they complain also of extravagant allowances agreed to by him for most of the descriptions of work.

I must candidly say that there is a great deal in the evidence, bearing upon both of these points, which seems to me to call for more explanation than it has received. If the agent had been called as a witness by either party he could perhaps have furnished this explanation, and at any rate, taking the whole case as it stands, there really is nothing in evidence in support of either of these objections that can be suffered to stand in the way of the plaintiff's claim. I can easily conceive that the agent might have had good reasons

for not desiring that the particulars of his contract with the plaintiff should be publicly known, while the work was going on. He was perhaps conscious that he was giving more liberal terms to him than he was willing to encourage others to look for as a general rule, and therefore he might think it politic not to let these terms be made unnecessarily public; but upon that point, and the allowing the contract to lie so long unexecuted, and two or three matters in the case, there is in the testimony a good deal that is calculated to give rise to surmises in the absence of explanations.

Still, as to any complaint of the contracts with plaintiff being concealed, it does not seem that the defendants can complain with reason, for they had early intimation of the existence of them. The first is dated on the 1st of July, 1856, and on the 2nd of August, *Barlow* writes thus to the London board: "In my next I will give you the *particulars of the contract we have made with Whitehead, late of the firm of, &c.*, which I think the board will approve." If he did not afterwards send the particulars so soon as he should have done, they at least were told that the work was being done on a contract with the plaintiff; and it cannot be supposed that those English directors who went afterwards to Canada could have had any difficulty in learning the particulars of it, while they were upon the spot, if they had desired it. The Canadian directors do not allege that they ever desired information either from the plaintiff, or the agent, of the terms on which the work was being done, and that the information was withheld from them; though they complain of neglect and delay in supplying information of all kinds.

The recognition of the contract at later stages by payments made on account of it at the specific rates set down in the schedule is clearly shewn; and after all was fully before the directors, in detail, as it was in March, 1858, they allowed the plaintiff to proceed with

the work and expend thousands of pounds without any intimation of an intention to disclaim the contracts and resist the prices at which the defendants knew the work was being done.

And after all was finished the English shareholders are congratulated by the committee of investigation, and by the English directors, upon the fact that from the excellent conduct of the plaintiff, under extraordinary difficulties, and from the ability and zeal of their agent, they have had a road constructed which in point of solidity and convenience for passengers is second to none in America, while it has been obtained at a less cost than any other.

I do not, I confess, wholly understand the meaning of the distinction, which the defendants have insisted upon, of their being led to suppose that the road was not being made by contract, but by the plaintiff upon a schedule of prices under the direction of their agent. They had every means of knowing what the fact was, and that the road, though not contracted for in the lump, or at an average of so much a mile, was to be constructed within a certain time, and upon a schedule of prices. That surely was a contract in every sense of the term.

The plaintiff was bound by his written agreement to have the different portions of the work done by certain days, and we must suppose that the necessity of being up to the time must have entered into the plaintiff's calculation when he made his terms. If, therefore, he was stopped on several occasions, and the work suspended for many days, it undoubtedly gave him a claim to be compensated for the detention; for no one would bind himself to do work under that disadvantage on the same terms as he would if he was to be free from all interruptions.

That the plaintiff has a claim to some compensation

on this account has been acknowledged, as the evidence shews, and considering that acknowledgment, and also the apparent willingness to submit to the payment of whatever balance may be due to the plaintiff on a settlement of accounts, according to the terms of the contracts, I confess I am at a loss to account for the parties being found involved in this expensive litigation.

The prices contained in the schedules had been submitted to long after they were well known to all parties. It was in the power of the defendants to have made themselves acquainted with them earlier than perhaps they did; but if they forebore to exact the information or to insist upon it, that arose no doubt from their confidence at the time in their agent. When they did know it, however, they went on paying the plaintiff without remonstrance or difficulty; and at last they have admitted that their road is not only an excellent one, but has been constructed at a very reasonable cost, as compared with others. They cannot now resist payment with effect; and it is indeed plain on the evidence that they have been aware that they could not expect to succeed in the attempt.

Some of the items in the schedule do appear to be manifestly excessive, though these are not among the most important.

In other respects, that is, as to the charges in general, the evidence tends to shew that when the circumstances are fairly considered, there is no just ground for complaint. The defendants' agent has vindicated himself, as we see, by declaring that he found on enquiry that he could not get the work done for less.

However this may be, the plaintiff was entitled to make his own terms, the defendants had every means of knowing whether they were or were not excessive; and when the defendants knew what the charges were, and

allowed the work afterwards to go on upon the understanding that such were the prices to be paid, those prices so recognised and submitted to ought to govern between the parties in the absence of any proof of fraud on the plaintiff's part. We must hold this, I think, whether the agreements be binding intrinsically, though not made under the corporate seal, or whether we look upon the plaintiff as entitled to be compensated for his labour and materials upon the footing of giving him a *quantum meruit;* for he justly deserves to have what the defendants knew their agent had promised him, and what they have repeatedly acquisced in as reasonable charges, or at least charges which he was entitled to expect from them.

As to the objection that *McDonald* was jointly interested with the plaintiff in the work, and should therefore have joined in suing, there is evidence from which we might infer that he really had an interest, though it is inconclusive to what extent. That he intended at one time to take an interest is not denied, but he swears positively that he had given up that intention, and is not and never was interested in the contracts, or any of them; and the contrary certainly is not proved.

As to the necessity for making the agent a party, that was not insisted upon in the argument; and I do not think there was any such necessity. He was known to be acting for the company and not for himself, and the company have fully adopted and recognised his acts, although in this suit they endeavour to escape liability. The plaintiff is not seeking to hold him personally responsible, and there was no pretence for his making him a defendant, though if the plaintiff had charged the agent with any improper conduct, he might, if he chose, have made him a defendant, if it had only been with the view of making him pay the costs of the suit.

I do not see any ground for refusing to apply the

same principles to the work done under the contracts for maintenance, as to that done under the construction contracts; by which I mean that it would be fair that the defendants should be made to pay for the work that has been done under those contracts, according to the rates which the defendants sanctioned and submitted to, though they have complained of them as excessive; particularly the first, which estimates the maintenance per mile per annum at £205.

That contracts had been made by the agent with the plaintiff for maintenance of way, and that this was known to the defendants, appears plainly in the evidence. Nor can I clearly understand how the directors in Canada could have been ignorant of it; and as to the shareholders in England, they undoubtedly had notice that there were such contracts and what the terms were. I refer to pages 131 and 132 of the evidence.

In April, 1855, Mr. *McKirdy* writing to Captain *Barlow*, says, "As Mr. *Whitehead* seems to have obtained a most favourable contract for maintenance of way, we trust that you will insist upon the road being kept in first-rate order during *the term of his contract.*"

And again in May, 1858, he writes that he thinks it was an improvident contract, as was also another contract of which he complains; but he adds, "we have never attributed them to anything more than errors in judgment, and perhaps we ought to add, the fault of not consulting your colleagues."

In June, 1858, also, Mr. *McKirdy*, writing to the agent, says, "Mr. *Powell* says you are paying a great deal too much for ballasting the road, considering that you furnish Mr. *Whitehead* with locomotive power. Does this arise from an old contract entered into when wages and materials were high, or is it any recent mistake?"

The contract complained of as most excessive seems

to have been made by the agent in November, 1856, (*a*) The evidence on the whole leaves this impression on my mind as regards all the work done, that the company were so intent upon finishing the work early, and getting at once into the receipt of a large income which they expected, that they were not careful for a time to scrutinise closely the reasonableness of the rates at which the work was being done, but they trusted in this matter too unreservedly to their agent, though they really could not themselves be expected to interfere with advantage and safety if they had attempted it Afterwards, when they found themselves getting into difficulty, chiefly from the circumstances of the times, they looked more closely into matters, but when they knew all that could be told them, they acquiesced and went on paying, though they grumbled; and not, I fear in all respects, without reason. And not only so, but they deliberately acknowledged that they thought they could not do otherwise without breaking faith with the plaintiff and treating him with injustice, considering the exertions he had made under great difficulties; and finally, on taking a view of the general results, they expressed the conviction that the railway had been constructed well, and at less cost than others; and that they could not do otherwise than pay for it as soon as all the plaintiff's work should be measured, which it seems from the testimony it has been, and more perfectly than it ever can be again.

The court below not taking any different view, I think, of the merits of the case, have decreed relief to the plaintiff, feeling no difficulty on the question that had been raised as to their jurisdiction upon the pleadings and the facts shewn. It is indeed remarked in the judgment expressly that the defendants' counsel had conceded that point.

[*a*] I refer also to pages 155—6 158 9 and 161 of the evidence upon this subject, and to pages 52, 60, 63 of part 3, and pages 91 2 3 4 of part 2.

There was perhaps some misapprehension in that respect, for upon the argument of the appeal the counsel did take the exception that the case was one for a court of law only to deal with. I agree entirely in the opinion expressed in the Court of Chancery, that the court was competent to entertain the suit upon the authorities which were cited, and upon more grounds than one; and I concur in the propriety of the relief given by the decree so far as regards all the work done, and the measure of compensation to which the plaintiff is entitled under the circumstances, in which circumstances I include the inconvenience and expense to which the plaintiff has been put by being obliged to suspend his work and dismiss his men, on more than one occasion while the construction of the road was in progress, and this from no other cause than that the defendants found they would be unable to provide funds at the time for paying him. But the decree goes further, both in the manner of giving this relief, and in extending relief also, as I take it to have been intended, to the further grievance complained of by the plaintiff, in his being obliged to desist finally from proceeding further in the execution of some of his contracts. The court below has acted upon the authority of the cases of *Henderson* v. The *Australian Navigation Company*, and of *Reuter* v. The *Electric Telegraph Company*, and have treated the contracts executed by Captain *Barlow* as binding upon the defendants in the same manner, and to the same extent as any executory contracts would be binding upon them which they had entered into under their corporate seal.

If it were clear that the contracts for constructing the railway can be looked upon as matters in the ordinary transaction of the Company's affairs, which one of the learned judges in the court below seemed unable to accede to, then it does seem that the two late cases in the Queen's Bench in England, to which I have just referred, would fully support us in enforcing these

contracts as executory contracts, binding on the defendants, though not under their corporate seal, subject only to the doubt I have expressed, whether the written instruments themselves were intended between the parties at the time to be any thing more so far as the party of the second part is concerned, than the individual agreement of Captain *Barlow*.

Admitting, however, that the defendants could be looked upon as undertaking by those instruments, though not under the corporate seal, to make the payments mentioned in them, or admitting that at any rate the defendants had by their conduct adopted and sanctioned the terms of these agreements, and promised in effect by parol to perform them, still it appears that in giving effect to them as executory agreements binding on the corporation so as to make them liable in damages for a breach of them, we should be relying chiefly, if not wholly, on the authority of these two decisions of the Queen's Bench in England, which in the state of the authorities there upon this branch of the common law I do not think would be safe. The soundness of those decisions has been at least questioned in the case of *Ernest* v. *Nicholls*, (*a*) and they are somewhat shaken by the discussion that took place in the *London Dock Company* v. *Sinnott*, in the Queen's Bench, (*b*) and by the tenor of Lord *Campbell's* judgment in that case. And I do not find from a reference to the latest cases in the courts of Common Pleas and Exchequer, that we can assume their concurrence in the principles upon which the two earlier cases in the Queen's Bench seem to have been decided. The cases of *Mazetti* v. *The Australian Steam Navigation Company*, (*c*) and of *Smith* v. *The Hull Glass Company*, (*d*) certainly do not shew a disposition to depart so widely from what had for so many ages been the well understood doctrine of the law of England respecting corporations.

(*a*) 6 House of Lord's cases, 401-418. (*b*) 8 Ell. & Bl. 349.
(*c*) 11 Ex. 228. (*d*) 11 C. B. 897.

I do not mean by this the doctrine established by the cases of *Diggle* v. *The Blackwall Railway Company*, (*a*) and *Lamprell* v. *Billericay Union*, (*b*) but the more reasonable doctrine which is clearly stated in the judgment delivered by Mr. Justice *Pattison*, in *Beverley* v. *Lincoln Gas Company*, and which turns upon the just distinction always up to that time acknowleged between executed and executory contracts, though unfortunately, as I think, repudiated in a judgment soon afterwards delivered by Lord *Denman* in the same court in *Church* v. *The Imperial Gas Light Company*. (*c*) Since the former law was unsettled not by the judgment given in this last case, but by the grounds on which it was in part sustained, the greatest uncertainty has prevailed in the courts in England in regard to the law of corporations. I mean in regard to the liability to be sued in assumpsit upon executory contracts of a special and important nature, not coming within any of the exceptions which have been long held to render the use of the seal unnecessary.

In the present state of the authorities upon this point in England, I am not in favour of acting upon the decision in *Reuter* v. *The Electric Telegraph Company*, or other cases of that kind, until we can see that the other courts in England take the same course, or until we find that the principle acted upon in that case is confirmed in the House of Lords, or by the judicial committee of the Privy Council.

I think in this case that the plaintiff is entitled upon the evidence to be compensated, upon the principle of a *quantum meruit*, for the work which has been done, and the materials found by him in carrying out his agreements with the defendants' agent referred to in his bill, according to the scale of charges for the

(*a*) 5 Ex. 450. (*b*) 3 Exch. 283.
(*c*) 6 A. & Ell. 846.

different descriptions of work agreed upon between the plaintiff and the defendants' agent; in other words, that the prices paid to him on account of those works while they were in progress, are those which should be allowed throughout the several works, there being no reason as it appears for a difference, and no better criterion between the parties for estimating the value of the work. I think that this principle should be carried out also in regard to the work done under agreements with the defendants' agent for maintenance of way, and the extra work of all kinds stated to have been done under verbal contracts. And I am of opinion that in estimating on this principle the value of the work done, the master should be directed to enquire into and allow for the damage which the plaintiff shall appear to have suffered from having been interrupted in the progress of the work under the agreements dated the 1st July and the 27th November, 1856, by the orders of the defendants' agent, making the amount of damage, if any, an addition to the price of the work done under such disadvantage.

As to any claim of the plaintiff for loss of profit, or other damage in consequence of not being allowed to carry out any special agreement alleged to have been made with the defendants' agent, either verbally or in writing, I do not think we can properly decree in the plaintiff's favour for want of a contract by the defendants under the corporate seal, binding them to allow the plaintiff to execute such work. This would be holding an aggregate corporation liable on executory contracts not legally binding, as I think, for want of their seal, and in regard to which no contract could be implied on the ground of services performed and materials supplied and accepted, and used by the defendants.

I do not think it necessary to refer to the many cases in England, and in our own courts, which have turned upon the distinction between executed and executory contracts.

As to the cross appeal by the plaintiff against the order for paying into court the sum of $50,451 subject to the further order of the court, instead of directing it as he contends it should have been, to be paid over to plaintiff, we think the court were warranted by the evidence in the order they made; and that the money should remain in court to abide their further order. The appeal of the plaintiff is therefore dismissed, and so much of the appeal of the defendants as relates to the money paid into court.

In regard to one part of the defendants' case I am aware that the opinion I have expressed is not concurred in by the majority of the court. I mean the plaintiff's claim for compensation for having been interrupted several times during the progress of the work and obliged to dismiss his men, and suspend the work for many weeks until the defendants would announce to him that they would be in a condition to negotiate their bills on England and resume their payments. As I have already explained, I think the plaintiff fairly entitled to have the estimate of the value of his work enhanced by making whatever may be found to be a just additional allowance for prosecuting the work under that disadvantage; and it is clear from the evidence that the defendants have been themselves conscious that some additional allowance for work done under such circumstances was in fairness due from them.

But some of my brothers, I believe, take a different view of that matter, and the decree therefore that has been made will be so varied that the direction to the master shall be only to ascertain and report what sum is due to the plaintiff for work done and materials found by him under the several contracts between the defendants' managing agent and him, whether written or verbal, taking the prices according to which the plaintiff has been paid, so far as he has been paid, as the guide, and making what shall appear to him to be a

just allowance for such work and materials, if there have been any supplied by the plaintiff, at the request of the defendants, or their agent, for which no price shall appear to have been fixed or acquiesced in; and such part of the decree as directs an account to be taken, and any allowance to be made for damages sustained by the plaintiff in consequence of the interruption of the work, or of any breach of the agreements set forth in the plaintiff's bill, is reversed.

I think neither party is entitled to his costs of the appeal. The defendants' appeal is not dismissed in effect, for the decree as varied will be in some respects more favourable to them than that appealed against.

SPRAGGE, V. C.—Since judgment was given in this case in the Court of Chancery, I have seen the case of the *London Dock Company* v. *Sinnott*. The action was upon an alleged contract for scavenging the plaintiffs' docks. The defendant tendered for the work in writing, and the declaration alleged that the plaintiffs accepted the same. The defendant's sixth plea was that the acceptance of the plaintiffs was not under the seal of the company, and that it was not authorised by them under their seal; thus distinctly raising the question as to the necessity for a corporate seal to such a contract. The plaintiffs demurred, and judgment was given for the defendant. Lord *Campbell*, in delivering the judgment of the court, made these observations: "The contract is not of a mercantile nature; it is not with a customer of the company; it is not of a character which creates an impossibility that it should be under seal, as becoming party to a bill of exchange; on the contrary, such a contract may more conveniently be made under seal than by parol. Therefore we do not think that any power to enter into such contracts by parol is conferred upon the corporation of the London Docks, and that the plaintiffs do not bring themselves within any of the excep-

tions to the general rule that a corporation aggregate can only be bound by contracts under the seal of the corporation." It must be conceded, I think, that this judgment is a retracing of the steps taken in the more recent cases in the English courts, in the way of dispensing with the seal of incorporated companies to their contracts; at the same time it lays down a clear and intelligible rule as to all contracts out of the course of the business of the company—contracts not made between the trading company and its customers. The case has now been decided nearly three years, and I believe has not been impeached.

Frend v. *Dennett*, (*a*) before the Court of Common Pleas, though not disposed of upon precisely the same grounds, is a decision in the same direction, and the observation of Lord *Wensleydale* in *Ernest* v. *Nicholls*, (*b*) are apposite to the same point.

But it is said that even if the plaintiff cannot succeed upon the contracts *per se*, he is still entitled to succeed in equity, by reason of the adoption of, and acquiescence in, the contracts by the directors of the company. I think this position is not supported by reason, and is against authority. The plaintiff's demand in this case is a mere *legal* demand. His ground for coming into equity—his only tenable ground is, that the accounts between himself and the company are complicated in their nature. But for that his remedy would be confined to law; with that, the jurisdiction of equity is only concurrent. It is only that the machinery of a court of equity is better fitted for the investigation of such accounts that gives him a *locus standi*, and it follows, it seems to me, that that only can be held to be a contract in equity which could be held to be so at law; and that a contract can only be proved or set up by acquiescence

(*a*) 4 Jur. N. S. 97. (*b*) 3 Jur. N. S. 919.

or otherwise, by the same evidence. If this were not so the court would be dealing with a legal demand, upon equitable principles. And so in *Kirk* v. The *Guardians of the Bromley Union*, (*a*) Lord *Cottenham* very explicitly repudiated the notion of there being any *equity* to bind the defendants, by acquiescence in a contract, not binding by law. There was a contract in that case which was binding; it provided for the contractor doing extra and additional work without vitiating the contract; but no allowance was to be made to him for extra or additional work unless the same should have been ordered in writing. The contractor, therefore, had no remedy at law for such extra work, at least under the contract, and the contractor came into equity alleging in his bill that additional work had been done by him, and sanctioned by the defendants: as summed up by Lord *Cottenham*, "the bill alleges that divers alterations and deviations became necessary and were made in the progress of the works; and that although no orders in writing were given, the defendants knew of and approved, and directed through their architects and clerk of the works, all such alterations and deviations, and afterwards sanctioned them."

This was the plaintiff's equity: it was inequitable for the defendants after directing works to be done, works too contemplated by the contract, and after sanctioning them, to take advantage of the absence of a written direction. Lord *Cottenham* negatived this supposed equity, allowing the demurrer put in by the defendants for want of equity; and upon the ground that the plaintiff's was a legal demand, just as this is; he said, "The case was compared to bills for specific performance of parol contracts; but in that case the court has jurisdiction in the original subject matter, *i. e.*, the contract; and the question is, whether the want of writing shall deprive the court of it. Here the attempt is to make the want of writing the ground of jurisdiction."

(*a*) 2 Phil. 640.

The distinction is a very clear and obviously a sound one; and it can make no difference that the complication of the accounts may give the court jurisdiction, because the first step of the plaintiff is to shew that he is entitled to have accounts taken.

A familiar illustration of the principle that the court deals with legal rights upon legal grounds, occurs in the exercise of its administrative jurisdiction; where, while it disposes of equitable assets equitably, that is ratably, it deals with legal assets according to their legal priority.

The distinction taken by Lord *Cottenham* is the marked distinction between *Kirk* and the *Bromley Union*, and this case, and the case of *Laird* v. The *Birkenhead Railway Company*, which was much relied on by the plaintiff on the appeal. That was a case where the court had original jurisdiction of the subject matter; and the contract decreed to be executed was of a nature which the court could specifically perform; and there was part performance by the plaintiff, whereby he had incurred considerable expense, and which had been encouraged and acted upon by the defendants. It was not a case of legal demand, nor a case in which damages would be an adequate compensation.

I may add, that I concur generally in the comments of his Lordship the Chief Justice of Upper Canada upon *Reuter* v. The *Electric Telegraph Company*, and *Henderson* v. The *Australian Navigation Company*.

What I think the plaintiff really entitled to in this case, whether at law or in equity, is compensation for what he has done for the company, as upon an executed consideration, and I think the amount to which he is entitled must be *quantum meruit*. I cannot see my way to setting up the contracts as binding upon the defendants, and if they are not set up, I have difficulty in seeing how the schedule of prices can be

binding upon the defendants; they are parts of the contract, and unless a contract as a whole is binding, I do not see how a part of it can be so. I concede that they are entitled to great weight as *evidence* of the value of the work and materials; but there is a wide and practical difference between their going to the master as evidence, and going to him as conclusively binding. In the latter case no evidence would be receivable upon the question of value; in the former they would be only evidence which might be rebutted.

Neither do I think that it can be a proper ground for directing the master to estimate upon the scheduled prices, that evidence of the value of the work and materials is already before the court; that evidence may or may not be all that the defendants may have to offer upon the question of value. The evidence that has been given has been with a view of shewing rather by examples than in detail, as I think, that the scheduled prices were enormously high; to use it for another purpose, that of fixing the value of all the items of work, would, I think, not be in accordance with principle. It would be taking part of the account upon the footing of *quantum valebant*, upon evidence given for another purpose, and when further evidence may be producible upon the same point; and although the Court of Chancery might, I conceive, with propriety, itself decide the point of value if convinced that it had before it all the evidence that could be given upon the point, a course, however but rarely taken; it is, I think, hardly the proper practice for a court of appeal, because it cannot be said that the court below *ought to have* taken that course; merely that it might in its discretion take it in a perfectly clear case.

HAGARTY, J.—I am of opinion that the decree in favour of the plaintiff should be varied, and that an account should be taken of all the work actually done by the plaintiff for the defendants, and that he be paid therefor according to the schedule of prices so often referred to.

I do not think him entitled to an enquiry into damages alleged to have been sustained either by the defendants interrupting the progress of the works, or for their declining to permit him to carry them out to the extent agreed on by *Barlow*.

I adhere to the doctrine of *Pim* v. The *Municipal Council of Ontario*(a) as to compelling corporations to pay for work actually done for, and accepted by, them on contracts not under seal, according to proved value. In the present case I do not think we extend this principle much further by taking that value to be the prices proved to be fixed on by the defendants' manager, and on the bases of which large payments were from time to time made by defendants to plaintiff. Before a jury, I think prices so prescribed would be at once assumed, in the absence of fraud, as the admitted value. But it may be asked here, can the law infer a contract by defendants to pay specific prices, if all agreements not evidenced by their seal be ignored? I think this case free from the suggested difficulty. The defendants do not ignore all contract or connexion with the plaintiff. In their answer under their corporate seal, they use these words: "Although we knew that the works thereby contemplated were performed by, and under, the directions of the plaintiff, we did not know or believe that the plaintiff was the contractor therefor; and on the contrary, we believed that the company were, so to speak, their own contractors and executed the work through the intervention of the plaintiff, *by virtue of arrangements from time to time made with him*, without any agreement purporting to entitle the plaintiff to prosecute the works any longer, or to any greater extent, than we might from time to time see fit to employ him."

This appears to me to be a clear recognition of the plaintiff's position as working for them by virtue of arrangements from time to time made with him. In

(a) U. C. C. P. R., vol. 9, p. 302.

other words, an admission that he was executing work for them under some contract or agreement regulating that work, but subject to their right at any time to refuse to permit his further prosecution of the work.

I am willing to accept this definition by the defendants of the plaintiff's position and I then proceed to ascertain what these arrangements were. This, I think, is readily ascertained by the evidence, and I find plaintiff working from day to day for defendants, excavating rock and earth at so much per yard; chopping, grading, building, &c., at prices or wages openly stated, agreed, or acted on for long periods, by both parties.

I concede to defendants their right to dismiss plaintiff when they pleased; or in other words, at any time to notify him that they disclaimed all future responsibility as to work yet to be done.

I do not consider this case can be decided in plaintiff's favour on the principle of the doctrine of part performance, and that it is very distinguishable from *Laird* v. The *Birkenhead Railway Company*, even if this court considered itself necessarily bound by the decision of one of the English vice-chancellors.

As long as the law remains in its present unsettled state in England, I do not feel at all warranted in abandoning a distinction—wholesome and sensible, as I at present consider it to be—between executed and executory contracts of such magnitude as the construction of a line of railway, for a corporation not bound by their corporate seal.

I think that in dealing with persons who execute vast works for public companies without taking the trouble of obtaining the sanction of their corporate seal, we sufficiently protect their interests, and prevent corporations from taking the benefit of such person's labour without paying for it, by compelling payment for all

work actually done at a fair and reasonable price. In the case before us, I give the plaintiff the additional benefit of what is stated with great shew of reason to be a very favourable schedule of prices.

The plaintiff may be considered as harshly dealt with by the defendants' wrongful interruptions of his work from time to time. Opposed as I am to making this corporation responsible for all claims for prospective damages on the evidence before us, I do not see how the master can be directed to inquire into this alleged loss without holding the defendants liable without the seal, far beyond the principle sanctioned in *Pim* v. The *Ontario Council*. I must either adopt Mr. Vice-Chancellor *Spragge's* view of thinking the whole matter open upon an estimate of the true value of the work actually done; or value the latter strictly on the schedule of prices accepted and acted on by both parties. The latter I consider to be the preferable course.

DRAPER, C. J., MCLEAN, and BURNS, J.J., concurring in the views expressed by HAGARTY, J. The court, [SPRAGGE, V. C., dissenting,] directed the decree of the court below to be varied in the manner pointed out by His Lordship the Chief Justice and *Hagarty*, J., and thereupon an order to the following effect was drawn up :

Order.—Declare that the decree ought to be so varied that the direction to the master shall be only to ascertain and report what sum is due to the plaintiff for work and labour done, money paid, and materials found by said plaintiff, under the several contracts in the bill mentioned, whether written or verbal, made between the managing agent of the defendants and the plaintiff, taking as his guide in taking such accounts, the prices according to which the plaintiff has been paid by the defendants for the like work and labour and materials.

Declare as to work and labour, money and materials, (if there have been any,) done and supplied by the plaintiff at the request of the defendants, or their agent, for which no price shall appear to have been fixed or acquiesced in by the plaintiff and the defendants, or their agent, the direction to the master shall be to ascertain and report what shall appear to him to be due to the plaintiff upon a just allowance to him for such last mentioned work and labour done, money and materials supplied.

Declare that the plaintiff is entitled to be paid by the defendants what shall be found due and allowed to him by the master under the

preceding declaration, taking into account all payments made by the defendants to the plaintiff, and all matters of set-off by the defendants against the plaintiff properly arising out of the matters aforesaid, and which were incurred at the request of the plaintiff, and of which he enjoyed the benefit.

Declare that such part of the said decree as directs an account to be taken, and any allowance to be made for damages sustained by the plaintiff in consequence of the interruptions of the work, or for any breach of the agreements set forth in the plaintiff's bill, is to be reversed; and that the contracts and agreements in the said bill mentioned are not binding on the said parties, except as herein contained.

With the foregoing declarations the cause is remitted back to the Court of Chancery, to be proceeded with according to the said decree, as varied by this order. And the said Court of Chancery may, if it see fit, direct the said master to report separately in respect of any of the matters referred to him, in case either of the parties shall so require.

No costs of appeal to either party.

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. V. C. Esten, the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.]*

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

WALKER v. THE PROVINCIAL INSURANCE COMPANY.

Insurance—Lost or not lost—Payment of premiums.

Quære, whether if in a receipt for premiums the words "lost or not lost," are not inserted, and before the policy issues, a loss has occurred and become known to both parties, the insurers would be liable for the loss.

Held, affirming the decree of the court below that the mere fact of the agent of an insurance company sending a receipt for the premiums to the place of business of the assured, without actually receiving the money, although the receipt was left, relying on the amount being sent, was not sufficient to complete the contract of insurance.

This was an appeal by the plaintiffs in the court below, from the decree dismissing their bill with costs, as reported ante volume vii., page 137, where the facts are fully stated.

Mr. *Roaf*, for the appellants.

* Was absent when judgment was given.

Mr. *J. Duggan*, Q.C., and Mr. *Barrett*, for the respondents.

The judgment of the court was delivered by

Sir J. B. Robinson, Bart, C. J.—It is not necessary to be determined in this case whether, if the risk were taken and the premium paid before the loss of the vessel, but no policy executed till the loss was known to both parties, the insurers would be liable for the loss, there being no mention of "lost or not lost" in the receipt for the premium, and nothing to shew that in the contemplation of the parties it was desired and intended that the policy should be in that form.

I do not now speak of the possibility of maintaining an action at law against the corporation in such a case, as in ordinary cases claiming payment of the loss, where no policy had issued; for that I assume could not have been done, even if the vessel had not been lost. I only allude to the question as one that would require to be settled before a suit like this could be favourably entertained, if there were no other objection to the relief sought.

But I fully concur in the decision appealed from, on the grounds on which it was rested.

The evidence did not establish that the agent of the company had agreed to dispense with the actual payment of the premium as necessary to complete the contract; although it is true that he signed a receipt and left it at the house of business of the plaintiffs, without actually getting the money. It seems clear that he left it, relying on the money being promptly remitted. Under such circumstances it would not be more reasonable to hold the contract complete through the receipt alone, than to contend that a tradesman's bill was paid, because he ventured to send a receipt by the servant who took home

the goods, which receipt, in a moment of dangerous confidence, the servent left behind him, without actually getting the money.

In such a case the receipt could only be looked upon as an acknowledgment in abeyance—like a deed delivered as an escrow.

But if the agent had consented to wait for the money a certain time, or to charge it in account with the insurer, upon the understanding that he would pay his premiums periodically, or that the charge should stand as an item of general account either between himself and the assured, or between the company and the assured, the company would not be bound by any such course of dealing of their agent, unless it could be shewn that he was authorised by the company to bind them by insurances effected in that manner.

And I do not wish to be understood as giving an opinion that the company could be held bound even with the proof of such an assent. There has been a case very lately determined in the Privy Council in England, upon an appeal from Lower Canada, The *Montreal Insurance Company* v. *McGillivray*, (*a*) which is very much in point upon that question, and which is conclusive against the remedy which the plaintiffs are seeking by this bill.*

Appeal dismissed with costs.

(*a*) Weekly Rep., Vol. 8, p. 165, (No. for January 28, 1860.)
*Vide 12 Vic., ch. 167, sec. 17.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor,* the Hon. the Chief Justice of the Common Pleas, the Hon. Sir J. B. Macaulay,† the Hon. Mr. Justice McLean, the Hon. Mr. Justice Burns, and the Hon. V. C. Spragge, and the Hon. Mr. Justice Richards.*]

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

CROOKS v. TORRANCE.

Specific performance—Executors.

An action having been instituted by a legatee against the executors and residuary devisees of a testator, alleging an express agreement by all to pay interest upon a legacy which by the law was not recoverable, to which the executors pleaded, and judgment was given in their favour; but judgment was recovered against the residuary legatees by default, who afterwards filed a bill against the executors, claiming the specific performance of a covenant by the executors to indemnify against the claim of such legatee.

Held, affirming the decree of the court below, that their own default having been the cause of judgment passing against them, formed no ground for the residuary devisees coming into equity for indemnity.

The facts of this case sufficiently appear in the report ante volume VI., page 518; from the decree there pronounced the plaintiffs appealed.

Mr. *Strong* and Mr. *A. Crooks*, for the appellants.

Mr. *Roaf*, for the respondents.

The judgment of the court was delivered by

SIR J. B. ROBINSON, BART., C. J.—In my opinion the decree in this case should be affirmed. The plaintiffs are not claiming in this suit, except for breach of the defendants' alleged agreement, to indemnify them against any claim of *Isabella Torrance*, wife of Mr. *Lockhart*, in respect of her legacy of £1000.

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*Was absent when judgment was delivered.
† Had died before judgment was given.

The agreement referred to was that entered into in writing by Mr. *Galt*, on behalf of the defendants, in October, 1848.

Whether that agreement bound all the defendants, or only the defendant *Torrance*—it was to this effect only —or rather in these words: Mr. *John Torrance* agrees to settle Mrs. *Lockhart's* legacy.

It is conceded that though a remedy might have been had at law upon that promise, as upon an undertaking to indemnify, yet, that the suit might nevertheless be entertained in equity, if there is otherwise ground for it.

Then what does the writing import? it is no express promise to pay interest *eo nomine* on the legacy for any period—nothing is said in it about interest.

But it is in effect an engagement with these plaintiffs to settle whatever could be legally claimed on account of the legacy, and so to pay whatever interest would by the law of Lower Canada be demandable by the legatee.

It is to no purpose to consider what interest Mrs. *Lockhart* could have claimed under a will of the same kind made in Upper Canada—for in this case the law of Lower Canada governs—and in the suit in Lower Canada which *Lockhart* and his wife brought against the executors of *Fisher*, and against the plaintiffs in this suit, they failed to recover against the executors who resisted the action, because the court in Lower Canada, having competent jurisdiction to dispose of the cause, determined that interest on the legacy was not payable except from the time of a judicial demand, that is, from the commencement of a proper action for recovering the legacy; or, as appears, from the service of the process in such action.

That judgment established what *Torrance* had to

pay in order to "settle the legacy," and it is not denied that he has paid to the extent that he was adjudged liable. The plaintiffs do not shew that they have been harrassed, or are likely to be harrassed by reason of any claim for interest since the suit in Lower Canada was commenced.

And if the plaintiffs have not also been acquitted by the judgment in that action, we see plainly how that happened. The rights of Mrs. *Lockhart* could not be greater as against them, than as against the executors or trustees of the estate, unless indeed they had rendered themselves liable by an express promise to pay, and upon any promise of that kind, the plaintiffs alone would be liable. But no actual promise by these plaintiffs to pay any interest beyond what the law would allow, has been proved, or attempted to be proved. And if, nevertheless, they have been condemned by the judgment rendered in Lower Canada to pay interest on the legacy to Mrs. *Lockhart*, from July, 1828, (when she became of age,) it was not because they were held liable otherwise than by reason of an express promise on their part, to pay such interest; but because being charged with having made such express promise, they did not take the trouble to defend themselves; but on the contrary, submitted to having the action taken against them *pro confesso*, by failing to answer interrogatories when they were duly called upon to do so.

It seems to be surmised, on the other side, that the plaintiffs took that course in order to favour Mrs. *Lockhart*, by enabling her to recover the interest claimed in the first place from the plaintiffs, and eventually from the executors, or from *Torrance*, through a recovery over upon the alleged agreement to indemnify.

However this may be, the plaintiffs certainly shew no claim against Mr. *Torrance*, or any other of the defendants, on account of the position in which they, the

plaintiffs, have placed themselves by needlessly submitting to what, for all that appears, or rather from what does appear, was an illegal demand.

I think this appeal must be dismissed with costs.

IN APPEAL.

[*Before the Hon. the Chancellor,* the Hon. the Chief Justice of the Common Pleas, The Hon. Sir J. B. Macaulay,† the Hon. Mr. Justice McLean, the Hon. Mr. Justice Burns, the Hon. V. C. Spragge, and the Hon. Mr. Justice Richards.*]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

BOULTON V. GILLESPIE.

Vendor and purchaser—Lien for appeal purchase money.

A tract of land was bought by several parties with a view to laying off a portion thereof into building lots and selling the same to purchasers; for greater facility in doing so the legal estate was vested in one of them as trustee, however, for the several parties interested. Subsequently one of the owners sold out his share, receiving in payment notes of hand made by his vendee and endorsed by two other persons. *Held*, reversing the decree of the Court of Chancery, that the vendor did not, under such circumstances, retain any lien for the purchase money remaining unpaid.

Statement.—The bill in the court below was filed by *Robert Gillespie* and others, members of the firm of *Gillespie, Moffatt & Co.*, against the Hon. *George S. Boulton*, setting forth that in December, 1843, the defendant and his nephew, *D'Arcy E. Boulton*, were equally interested in three undivided fourth shares, and one *Benjamin Clark* to the remaining fourth share of certain lands in the township of Clarke known as the "Bond Head Property," containing in all about 500 acres; the legal title in which was vested in the defendant as trustee for the benefit of such owners in the proportions stated: that on the 5th of December, 1845, *Clark* sold and

* Was absent when judgment delivered.
† Had died before judgment given.

conveyed his share to one *William Henry Boulton* for £3,250, which consideration, however, was not then paid, but certain promissory notes made by *W. H. Boulton* and endorsed by *D'Arcy E. Boulton*, and *Clarke Gamble*, were delivered to *Clark* as a mode of payment, and that in March, 1845, *Clark* endorsed over to the plaintiffs, for value, two of such promissory notes for £500 each, after which, and in the fall of the same year, *Clark* became bankrupt.

The bill then alleged knowledge by defendant of all these facts at the time of their occurring, and that in February, 1857, he became the purchaser from Sir *John B. Robinson* of one half of such quarter share of *Clark*, the title to which he had acquired from *W. H. Boulton*, and that upon the occasion of the treaty for such purchase the defendant's attention was directed to the fact that the said two notes were outstanding unpaid in the hands of the plaintiffs, and defendant in fact withheld £500 out of the sum of £1,500 agreed to be paid by him for such one-eighth share, for the purpose of paying such notes, as they became due.

The bill further stated, that in August, 1857, the defendant purchased the remaining one-eighth share from *W. H. Boulton*, for the sum of £1,500, alleging a like retention of £500, as on the occasion of the previous purchase from Sir *J. B. Robinson*. That by indenture dated the 26th of January, 1858, *Benjamin Clark* conveyed to the plaintiffs his vendor's lien for unpaid purchase money.

The bill also charged that *Benjamin Clark's* share had been acquired by defendant not only with knowledge of the unpaid purchase money, but upon an express understanding and undertaking that he would pay the same.

The prayer of the bill was that plaintiffs might be declared entitled to the vendor's lien for unpaid purchase-

money which *Clark* had held against *W. H. Boulton*; an account of what moneys remained due thereunder, and a sale of a sufficient portion of the estate to pay the amount in case of default.

The defendant answered the bill, denying positively any promise or undertaking to pay such notes, or that any reference was made thereto on the occasion of his purchasing from Sir *John B. Robinson*, or *W. H. Boulton*; but, on the contrary, that he had agreed to pay, and did pay, Sir *J. B. Robinson*, for his interest the sum of one thousand pounds, and he was to have the benefit of what Sir *J. B. Robinson* had paid, amounting to upwards of £1,113, and to pay or account to *W. H. Boulton* for the residue of Sir *John B. Robinson's* purchase money. As to the amount agreed to be paid to *W. H. Boulton* for his share, which it was shewn had by various mesne assignments become vested in *John Boulton*, who, together with *W. H. Boulton*, joined in conveying such share to the defendant, that was paid by being taken into account upon a settlement of claims alleged to be due by *W. H. Boulton* to defendant. The defendant, however, admitted a knowledge of all the circumstances connected with *W. H. Boulton's* obtaining the transfer of *Clark's* share.

Benjamin Clarke had been examined in a suit of *Boulton* v. *Boulton*, brought by *D'Arcy Boulton* against the defendant to enforce payment of the same notes—the pleadings and evidence in which suit were by order directed to be used in this case.

In the course of his depositions *Clark* stated, "at the time I sold, I did not consider that I had any lien upon the property. Messrs. *Moffatt* and Company got [paid] some of the notes I negociated with them. I think it was in 1845 that I registered the notes with *Moffatt* and Company. It never occurred to me at the time of the sale and getting the notes, that I had the slightest lien

upon the land. I was not aware that there could be any lien upon the land, unless created by agreement. If the parties had at any time asked me to release the property from all claim, I should certainly have done so at the time, because it was understood I took the notes as my security."

Upon the hearing of the cause the court (SPRAGGE, V. C., dissenting) declared the plaintiffs entitled, as assignees of *Clark's* interest, to a lien upon the estate for the unpaid purchase money, and ordered a sale of the property, or a competent part in default of payment.

From this decree the defendant appealed, for the following, amongst other reasons, because the circumstances of the case are incompatible with, and repel or rebut the existence of any lien for the unpaid purchase money; because *Benjamin Clark* took the promissory notes endorsed to his satisfaction in payment, and not as a mode of payment of the purchase money; and because if *Clark* ever had any lien, it was never assigned, nor did it ever pass to *Moffatt* and Company, but would have vested in *Clark's* assignees in bankruptcy.

The reasons of the respondents were, amongst others, that *Clark* was entitled to the lien for unpaid purchase money, and had never waived the same, and under the circumstances there was not necessarily any incompatibility with the existence of such lien, the right to enforce which passed to the respondents by the endorsement of the promissory notes, and if such right did not pass, the same remained vested in *Clark*, as trustee for the benefit of the respondents, as the persons entitled to receive the purchase money, which lien he afterwards transferred to them by a valid instrument.

This statement, together with the facts set forth in the report of the case of *Boulton* v. *Robinson*, (*a*) it is

(*a*) Ante volume IV., page 109.

believed will be sufficient for a clear understanding of the question raised between the parties.

Mr. *Cameron*, Q. C., and Mr. *Crickmore*, for the appellant.

Mr. *McDonald*, for the respondents.

The following judgment, which has not been reported, was delivered in the court below by

SPRAGGE, V. C.—The opinion which I have always entertained in regard to the purchase of the land out of which this suit has arisen has been, that it is not a case for the application of the doctrine of lien for unpaid purchase money.

The subject of sale was a fourth share of a Mr. *Benjamin Clark* in a tract of land, a portion of which, some fifty or sixty acres, the proprietors intended to lay out as a village, and they had vested the legal estate in one of their number, in order to facilitate the sale of the property.

Upon the sale in question, promissory notes were given for the unpaid purchase money, and the vendor himself says in his evidence, that he did not stipulate for any security upon the property, or look to the property as security, but required notes, with good endorsers; that he was perfectly satisfied with the makers and endorsers, and was particular in getting good names to the notes, as the notes would be running for a number of years; that he had it not in his mind to look to the property as security; that it never occurred to him at the time of sale, or of getting the notes, that he had the slightest lien upon the land, and more to the same effect; and the evidence of Mr. *D'Arcy Boulton*, a party to the purchase, and lately a plaintiff to establish the same lien, is to the same purport; and he adds, that if *Clarke* had insisted at the time upon a lien upon the property, it would probably

have put an end to the treaty; that the object of the proprietors was to have it clear.

From the tenor of the evidence, I incline to think that the witnesses were examined by the defendant, under the idea that in the absence of intention to retain a lien, no lien could exist. This, I admit, cannot be contended for; and I think the opposite contention, that where all intention in regard to lien is absent from the minds of the contracting parties, that a lien must necessarily exist, is an error in the opposite direction.

Prima facie, certainly the lien exists, and it lies upon the grantee to rebut it. It is the vendor's "natural equity," as it has been termed, to have a lien on his estate until he has been paid for it; but the vendee may show, I apprehend, that under the circumstances of the purchase it is not equitable that such a lien should be retained, and if he can shew that the retention of such lien would defeat or even materially interfere with the known object of the purchase, so as to clog it with difficulties which it is reasonable to conclude that the parties could not have intended that the purchase should be incumbered with; then I think he rebuts the vendor's *prima facie* equity and establishes a state of things under which the retention of a lien would be the reverse of equitable. It is sometimes put —that the parties indicate an intention that the lien should not be preserved—sometimes that the intention to retain a lien is negatived; but inasmuch as the right to a lien does not grow out of contract or intention, but out of the natural equity of the vendor, it seems to follow that wherever it can be shewn to be more equitable that the purchaser should have his land free from the lien, than that the vendor should retain it, no lien for unpaid purchase money can exist, for the equity against it outweighs the equity in favour of it; and in this view, I think the evidence to which I have referred very material; I do not mean the mere absence of intention as to lien, but all the circumstances.

A higher price was of course given for the land, because it was available as village property; the vendor had occurred in being divested of his ordinary right as a joint proprietor, and having the whole legal estate vested in one of the proprietors, that the sale of village lots might be facilitated, a very unequivocal manifestation of his view that the sales should be as free from difficulty as possible; by the sale he puts another in his place, and is careful to have the purchase money secured to his satisfaction. Is it reasonable that the purchaser should receive the land, not as the vendor had held it, carefully freed from any difficulty that might possibly impede the free and ready sale of village lots, or create a difficulty in the mind of a cautious or timid purchaser; but subject to an incumbrance that would affect every lot offered for sale to an amount many times beyond its full value—an incumbrance that would deter any prudent person from purchasing at all? Its value to the purchaser was as a village property; the vendor sold it and received his price for it *as such*, and *necessarily*, as I cannot but think, it passed from the one hand to the other as available for that purpose; otherwise the purchaser did not get that which he purchased, but a thing substantially different. On which side in such a case lies the equity? With the vendor who meant to sell free from such a charge, and who received a higher price than he could have obtained if he retained the charge, or with the purchaser, who purchased as the vendor sold, whose known object in the purchase would be virtually defeated if he took the land subject to the lien, and who would not have purchased at all, as is clear enough from the evidence of Mr. D'Arcy *Boulton*, and I think clear enough without it, from the nature of the thing purchased, if such a lien as is now sought had then been insisted upon.

The same question arose in a case somewhat similar in its circumstances in the United States, (*a*) the

(*a*) Gilman v. Brown, 1st Mason, p. 218.

purchase of a tract of land with a view to its subdivision into lots and sale to settlers; and negotiable notes were taken for the unpaid purchase money. In giving judgment Mr. Justice *Story* said, "In applying the doctrine to the facts of the present case, I confess that I have no difficulty in pronouncing against the existence of a lien for the unpaid part of the purchase money. The property was a large mass of unsettled and uncultivated lands, to which the Indian title was not as yet extinguished. It was in the necessary contemplation of all parties bought on speculation, to be sold out to sub-purchasers and ultimately to settlers. The great objects of the speculation would be materially impaired and embarrassed by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain, and which might, by a subdivision of the property, be apportioned upon an almost infinite number of purchasers. It is not supposable that so obvious a consideration should not have been within the view of the parties, and viewing it, it is very difficult to suppose they could mean to create such an incumbrance; a distinct and independent security was taken by negotiable notes payable at a future day."

From the language of Mr. Justice *Story*, I should infer that in his court the doctrine of lien was understood to rest upon the presumed intention of the parties that it should exist, but from the whole of the passage there is no room to doubt that he considered the known object of the purchase in that case incompatible with the retention of a lien. We have, at any rate, the views of an eminent judge upon an analogous case.

In one case in this court I concurred with my brother *Esten* in negativing the existence of a lien. In that case the purchase was of land for a railway station, and we thought the known purpose of the purchase negatived the retention of a lien, inasmuch as it was inconsistent with its destined use that the vendor should

have a lien and with it the consequent right of selling the railway station to satisfy it. I cannot but think this case equally strong against the lien; that its retention and the consequent rights of the vendor are equally inconsistent with the use of the land sold, for the purpose for which it was sold. I do not think it is overrating the case to say that the existence of such a right in the vendor would almost certainly render abortive the very object of the purchase, the sale of the land in the village lots.

I can therefore, come to no other conclusion than that the vendor had not the equity which the plaintiffs contend for in this suit. I do not find in necessary to express any opinion as to other points in the case, as in my view of it, the whole foundation of it fails.

The judgment of the Court [of Appeal] was delivered by

DRAPER, C.J., C.P.—I thought, at first, the fact that *Clark*, when he sold to *W. H. Boulton*, took promissory notes from him, made by himself and endorsed by *D'Arcy E. Boulton* and *Clarke Gamble*, payable at distant dates, went a very long way to negative the idea of a lien upon his (*Clark's*) undivided share of the land sold, for the unpaid purchase money. For it would seem that the vendor, in accepting negotiable instruments endorsed by strangers to the purchase, plainly meant to rely upon the personal security thus given to him. The several endorsements were so many new, independent securities to him for the debt due by the maker.

In *Winter* v. Lord *Anson*, (*a*) Lord *Lyndhurst* says "In general where 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." But in that case the purchaser gave his own bond to pay the balance of the purchase money;

(*a*) 3 Russ. 488.

and the Lord Chancellor further observed, that there was no agreement for the extinguishment of the lien, and there was nothing in the transaction itself, as evidence by the instruments, leading to a clear and manifest inference that such was the intention of the parties. In *Parrot* v. *Sweetland* (*a*) *Winter* v. Lord *Anson* was approved of, but a distinction was recognised between cases, where a security for the price, and a substitution for the price, of the land was taken by the vendor; and in the latter case it was held that the vendor had no lien. It is very difficult to say that there is any authority in England in support of the proposition that such a transaction as the present would be treated as a substitution rather than as a security for the price, and the weight of authority there, I must admit, seems the other way, and therefore on that ground alone, I should perhaps feel compelled, though very reluctantly, to hold, that notwithstanding the taking these notes *Clark* had a lien for his unpaid purchase money. I should, however, before adopting that conclusion, feel called upon to consider how far English authority should guide us on that particular point, owing to one great difference between our respective laws. In England the registration of titles to real estate is the exception, with us it is the rule. Our legislature, by repeated enactments, have shewn their intention, that every conveyance of, or incumbrance upon, real estate, shall, in order to affect subsequent *bonâ fide* purchasers or incumbrancers for value, be registered, or as against them it shall be deemed fraudulent and void. And it is a strong thing to say, that notwithstanding this clearly expressed rule, by the effect of which a purchaser for value may defeat a mortgage given by his vendor to the party from whom he purchased, for part of the purchase money—a mere lien for unpaid purchase money, proved as it may be, in the face of a receipt in full endorsed on the conveyance, and established in despite of an acknowledgment of payment and release in the body of the conveyance, shall exist, and may be enforced against the vendee, and against any

(*a*) 4 M. & K. 655.

subsequent purchaser with notice. I am not yet prepared to hold that this difference in our laws may not afford a sufficient reason for denying this equity, at least where the purchaser has again sold, if not altogether.

But I do not feel it necessary to rest anything on this question, which was not discussed at the bar, for the purpose of disposing of this appeal, for I agree in the opinion of Vice-Chancellor *Sprague*, that the vendor, *Clark*, had not the equity on which the plaintiffs rely, and I adopt his view of the facts of this case, and with it the general doctrine enunciated by Mr. Justice *Story*, in a somewhat analagous case. (*a*) It is plain, I think, that this property was purchased on the speculation of selling it out in small parcels to a great number of purchasers, and that the "objects of the speculation would be materially impaired and embarrassed by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain, and which might, by a subdivision of the property, be apportioned upon an almost infinite number of purchasers. It is not supposable that so obvious a consideration should not have been within the view of the parties, and viewing it, it is very difficult to suppose they could mean to create such an incumbrance.

In this case, as well as in that in which Mr. Justice *Story* gave judgment, a distinct security was taken by negotiable promissory notes, payable at a future day, with endorsers, sureties for the purchaser. That circumstance, coupled with the objects of the original purchase by *Clark* and his co-partners therein, satisfies me that he did not intend to look to any lien on the land for his security, and that his vendee had no thought of there being any such incumbrance on the purchase, which, moreover, as all the original owners were tenants in common with *Clark*, (that is equitably,) would operate *pro tanto* to prejudice and embarrass, in selling in parcels in order to effect the objects of the speculation.

(*a*) Gilman v. Crown, 1 Mason, 215.

The most serious difficulty I have felt in disposing of this case has arisen from the apparent fact that one, or perhaps two sums of £500 have been retained by, and remain in, the hands of the appellant, being a portion or portions of the purchase money payable by him on acquiring the right to *Clark's* share. But assuming that the defendant is liable for one or both these sums, by reason of his own dealings with other persons in reference to this property, I do not see that it either creates a liability on his part to the plaintiffs as holders of the notes or assignees of *Clark's* equities or rights to payment, or that it alters *Clark's* position, nor, by consequence, that of the plaintiffs as to the lien now claimed for the balance of the purchase money unpaid by *W. H. Boulton*.

In my opinion the plaintiff's bill should be dismissed with costs.

Per Curiam.—Appeal allowed, the decree in the court below reversed, and the bill dismissed with costs.

WORTHINGTON v. ELLIOTT.

ELLIOTT v. WORTHINGTON.

Mortgage—Trustee—Costs.

A mortgage was created by a trustee with the view of being sold to raise money for the purpose of being distributed amongst the creditors of the owner of the property, who had created the trust; the mortgagee failed in effecting a sale of the security, and a suit having been subsequently instituted by the representatives of the mortgagee, who had died, to foreclose the mortgage, the court refused the relief sought, and ordered the mortgage to be delivered up to be cancelled; and the trustee having also filed a bill against the mortgagee's representatives, seeking relief on these grounds, was ordered to receive his costs of that suit, although the bill was not filed until after proceedings had been taken in the suit to foreclose the mortgage.

The bill in the first suit was filed for the foreclosure of a mortgage made by the defendant *Elliott* to one *Davidson*, deceased, for £2,600. The defence to that bill, and the foundation of the bill in the second suit was,

that the mortgage was made to *Davidson* at the request of the defendant *Elliott* in order that the former might negociate it, and hand over the proceeds to the latter for the purpose of distribution among the accommodation endorsers of one *Berryman*. To this it was answered, that although the arrangement might be so between the parties, yet, it was made in pursuance of a prior engagement between *Berryman* and *Davidson*, that this property should be mortgaged to secure an endorsement of *Davidson*; and that at any rate, *Davidson* being one of the *cestuis que trust* interested in the trust funds, was entitled to retain the moneys after negociation in respect of his own liability.

The evidence failed to show any knowledge on the part of *Elliott* of the alleged agreement between *Berryman* and *Davidson*.

The causes came on to be heard before his Honour V. C. *Esten*.

Mr. *Strong* for *Worthington*.

Mr. *Blake*, for *Elliott*.

Judgment, Esten, V.C.—I think the bill of foreclosure should be dismissed with costs, and the mortgage delivered up to be cancelled. I think that the cross-relief could have been obtained in the foreclosure suit, and therefore if the foreclosure bill was filed first, I think the decree in the cross suit should be without costs, as it was unnecessary; but if *Elliott's* bill was filed first, he is entitled to his costs in that suit also. *Miller's* evidence may be fairly excluded from consideration, because, amongst other reasons, he does not intend to be personally cognizant of the facts. *Dunn's* evidence is, I think, inadmissible. The agreement, he proves, would, if valid, entitle him to a large part of the £2,500 sought to be recovered in this suit. *Holden's* evidence, however, is equally free from objection and suspicion, and I think it

is clearly proved by his evidence that an agreement, such as he mentioned was made between *Berryman, Davidson* and *Dunn*. It does not appear, however, that so much of it as concerned the intended mortgage to *Davidson* was ever made known to either *Elliott* or *Jones*. It seems that *Berryman* was to procure the mortgage from *Jones* to *Davidson;* and *Dunn* and *Davidson* relied upon him for that purpose, and acting in good faith, he should have communicated the understanding to *Jones*. I conclude that he did not; but having procured the release from *Dunn*, that he afterwards procured the creation of the trust from *Jones*. To execute a mortgage to Davidson for the purpose of sale, and to pay *Dunn* would not have been according to the trust; and to indemnify *Davidson* against *Dunn's* claim, although, perhaps, not at variance with the trust, is not a probable fact; for *Jones* and *Elliott* were both endorsers for *Berryman*, and *Elliott* would naturally protect himself and *Jones*, in the first instance. I conclude, therefore, that the mortgage was not to *Davidson* in pursuance of the agreement between *Dunn, Berryman* and *Davidson*. It is agreed on all hands, however, that it was made for the purpose of sale, and the only question is, what disposition was to be made of the money to be thereby produced. It necessarily follows that it was to be paid to *Elliott* for distribution according to the trust, and that *Davidson* held the mortgage as a mere agent; that *Elliott* could have re-called it at any time; and that *Davidson* not having succeeded in executing his trust, the mortgage must be delivered up, and the foreclosure suit is utterly inadmissible. With this view all the conduct and expressions, and letters of *Davidson* agree. I do not think that either *Dunn's* or *Jones'* evidence is admissible; but *Waters'*, I think, is, and at all events *Clagett's*. When *Davidson* found that the agreement with *Dunn* had not been carried into effect, he seems to have received the mortgage from *Elliott* on the full understanding that he was merely to negociate it, and pay the proceeds to *Elliott*. He was in fact a mere

agent, and I think so understood himself to be. My view is, that *Dunn* having incautiously released his mortgage before the new one was made, and *Berryman* having procured the creation of the trust without communicating the whole of his agreement with *Dunn*, and the trust having been created and the mortgage executed *bona fide* by *Jones* and *Elliott*; and *Davidson* having received the mortgage on the understanding that has been mentioned, of course foreclosure is out of the question, and the purpose having failed, the mortgage must be delivered up, and all parties will stand in the same position as if the mortgage had never been made. The trust will remain in the same plight as if the abortive attempt that has been made to carry it into execution had not been made.

Whether, if *Dunn* released his mortgage, and *Davidson* assumed his debt on the understanding that it was to be collaterally secured by another mortgage, that agreement not having been carried into execution, *Dunn* for *Davidson's* representatives have any right to impeach this trust, is another question upon which I express no opinion, and which must be settled, if at all, in another suit; but this mortgage, having been made under this trust, and for the purpose that has been mentioned, must, in the event that has happened, be delivered up.

The question of costs was subsequently spoken to before his Honour, who decided that although the bill in that suit had not been filed until after the bill of foreclosure in which the plaintiff could have obtained all the relief to which he was entitled, yet, as the plaintiff in that suit could at any time have dismissed his bill, *Elliott* was justified in filing his own, and should receive the costs of his suit.

PATERSON v. HOLLAND.

Practice—Re-hearing—Adding parties in master's office.

Defendants presented their petition for a second re-hearing on the ground that certain persons, necessary parties, were not before the court, but as two opportunities of making the objection had been disregarded, and the interests of the parties complaining of the omission would be properly protected by making them parties in the master's office, the petition was refused.

The proper practice is to bring all necessary parties before the court, at the hearing, and not to add them in the master's office.

The facts giving rise to this suit appear in the reports thereof, ante volume VII.

Mr. *A. Crooks*, for some of the defendants, moved upon petition for an order to re-hear this cause a second time, on the ground that one *Kneeshaw*, or his representatives, had not been made parties to the suit.

Mr. *Hector* and Mr. *Blake*, for the other defendants.

Mr. *McDonald* and Mr. *Strong* for plaintiffs, *contra*.

Judgment—Esten, V.C.—This is a petition for a second re-hearing. The ground stated in it is that certain persons, necessary parties, were not before the court at the original hearing. These persons, however, with the exception of *Kneeshaw*, or his representives, were then out of the jurisdiction, and therefore their absence was not properly matter of objection, and the court made such a decree as it could properly make in the absence of those parties. Is then the fact of *Kneeshaw*, or his representatives, who were within the jurisdiction, not having been before the court at the original hearing, a sufficient reason for allowing a second re-hearing, and undoing all that has been effected under the decree, when two opportunities of making this objection have been disregarded, and all the ends of justice can be secured as regards the parties making this objection by adding the required parties in the master's office? I think not;

but at the same time I think that all necessary parties should be brought before the court at the hearing, and I am opposed to the introduction of any practice of adding such parties for the first time in the master's office, merely to remedy defects arising from the carelessness and negligence of the plaintiffs in the suit.

CROOKS V. GLENN.

Specific performance—Parties—Payment of purchase money into court before a title shewn.

The general rule is that only the parties to the contract should be parties to a suit for specific performance.

The vendor, after contracting with the vendee, had granted a lease with the right to purchase. It did not appear whether the option had been exercised, or the time for exercising it had arrived. The lease had been assigned, and the defendant, the vendee, objected that the assignee should be a party to this suit: but the court overruled the objection.

Possession and user of the premises do not deprive the vendee of his right to have a good title shown; but where unreasonable delay has occurred in requiring title to be adduced, the court will order the purchase money to be paid into the court, pending the investigation of the title.

Where promissory notes had been given in payment of the purchase money of land, and several years afterwards a bill was filed by a vendee of the original proprietor, against the heirs at law of the original purchaser, it was held that the promissory notes must be produced or satisfactorily accounted for before the purchase money would be ordered to be paid, even although a good title were shown.

Statement.—This was a bill by *Robert P. Crooks*, who had purchased the interest of the Hon. *George H. Markland* in certain real estate in the City of Toronto; *Markland* having several years previously sold the same property to the father of the infant defendants *Glenn*, taking his promissory notes for the amount of the purchase money, and executing to *Glenn* a bond for the conveyance of the property on payment of the stipulated purchase money. The present suit was to compel a specific performance of the contract, and payment of the amount of purchase money, or in default, that the contract might be cancelled.

Mr. *Cattanach*, for plaintiff.

Mr. *Strong*, for the infant defendants.

Mr. *Crickmore*, for other parties.

Judgment.—SPRAGGE, V.C.—The general rule is that in bills for specific performance, only the parties to the contract should be parties to the suit. In *Mole* v. *Smith*, (*a*) a person not party to the contract claiming a right to dower, was in a suit for specific performance by vendor against purchaser made a party by supplemental bill. It was objected to as multifarious, and Lord *Eldon* said that it was so, observing: "I apprehend that when a bill is filed for specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate," &c.; and, in *Wood* v. *White*, (*b*) Lord *Cottenham* proceeded upon the same principle. *Paterson* v. *Long*, (*c*) establishes that the necessity to have a third person a party to a conveyance, is not a reason for his being a party to the suit. What is the position of *Ross, Mitchell & Co.*? Mr. *Crooks* granted to one *Dixon* a lease, with power to purchase. It is so described in his affidavit, whether the option has been exercised, or the time for exercising it has arrived, I am not informed. The lease, though referred to as an exhibit, has not been put in. The lease has been assigned, it is alleged, to *Ross, Mitchell & Fisken*, and it is objected that they should be parties. If the fact of that lease having been given, will disable the plaintiff from giving a good title, it will be a good objection on the reference as to title, but making them parties would be making parties third persons merely because they are supposed to have an adverse interest, and would be multifarious upon the same principle as in *Mole* v. *Smith*. Whether making this lease with a right of purchase in the lease is a repudiation of the contract which the plaintiff seeks in this suit to enforce, is

(*a*) Jacob, 490. (*b*) 4 M. & C. 483.
(*c*) 5 Beav. 186.

a question which has not been raised, and probably the defendants do not desire to raise it, but to complete their purchase.

It is objected that *Mr. Markland*, the original vendor, is a necessary party in order to receive the purchase money, and to bind the legal right. I think as to the first reason, that his conveyance to the present plaintiff carried with it a right to receive the purchase money: as to binding the legal right, if there is any legal right to be bound, I think he should be a party for the purpose of binding it; but I do not find it stated that any contract was signed by the purchaser, or that Mr. *Markland* has in any shape a legal right of suit. All that he had, as far as appears, was the promissory notes given by the purchaser, and as to these notes, I agree that the plaintiff must produce or account for them; and in case he shows a good title, the purchaser will still not be bound to pay the purchase money unless the notes are produced or so satisfactorily accounted for that the purchaser can safely pay the purchase money without danger of molestation hereafter in respect to them. I may add, in regard to the legal right of Mr. *Markland*, if he had any, that it would probably suffice to make him a party in the master's office. This has been done in suits by assignees of mortgages without assignment of the legal estate. I am not sure whether it was intended to be objected that *Cameron* and *Smith*, the trustees of the plaintiff's marriage settlement, ought to be parties. They appear to be mortgagees only, and as such need not be parties.

As to the payment of the purchase money into court, this case does not seem distinguishable from that of *O'Keefe* v. *Taylor*. (*a*) In that case there was possession in pursuance of the contract and user of the premises in accordance with the intention and purpose of the purchase; and it was held that nothing had

(*a*) Ante vol. II., p. 395.

occurred whereby the right to an investigation of the title was waived. Yet the purchaser was ordered to pay the purchase money into court, on the ground of the unreasonable delay in payment of the purchase money. The delay in that case was not so great as in this. I think that this case is governed by it, and that a similar decree must be made, but the account being taken, should not be made to depend upon the contingency of a good title being shewn. The bill in *O'Keefe* v. *Taylor* was by the purchaser, while in this case it is by the vendor: but in the cases cited in *O'Keefe* v. *Taylor*, upon this point, the bills were by the vendors.

McQuestien v. Campbell.

Equitable interest in lands—Assignment of—Judgment creditor.

A person equitably interested in land under an agreement for purchase, agreed to convey portions thereof to purchasers for value, and subsequently a judgment was recovered against him, which was duly registered. Afterwards a party advanced a sum of money to complete the purchase, and the owner conveyed to the vendee, who conveyed to the person advancing the money, for the benefit of himself and the other purchasers. *Held*, that the purchasers had not thereby waived their priority over the judgment, and that the judgment held the land subject also to the sum advanced to perfect the title.

Statement.—This cause came on to be heard by way of motion for decree. The bill set forth that the plaintiff had recovered judgment on the 28th November, 1857, against the defendant *Campbell*, for £203 15s. 6d. damages and costs, and registered it on the following day in the county of Wellington. The bill stated that *Campbell* then had divers lands, tenements and hereditaments in that county, and in particular was equitably entitled to lot 14 in the 6th concession of Pilkington, west of the Grand River, under a contract for the purchase thereof from one *Tylee*. On the 4th November, 1858, *Campbell* purported to convey the land to *Snider*, in fee, by a deed registered on that date; this conveyance was alleged to be in trust, as to the greater part of the land, for *Campbell's* benefit, and the remainder *Snider* claimed as a purchaser. *George Bye*, *Edward McNeal* and

James Bilton were made defendants, as well as *Snider*, as claiming to be purchasers of portions of the property. The bill prayed a foreclosure.

The defendants answered, admitting the plaintiff's judgment, but alleging that while *Campbell* was so equitably entitled, and on the 26th July, 1849, he agreed in writing, under seal, with one *Stewart*, to sell him twenty acres of the land for £40, and that the £40 were paid by the 18th November, 1854, and on the 13th November, 1856, *Stewart* sold these twenty acres to *Snider* for £200.

They further alleged that previous to the 7th June, 1854, *Campbell* had contracted and agreed with one *Kingshot* to sell him six acres of the land for £45, which was paid by the 1st April, 1857. *Kingshot* assigned to *John Eber Lewis*, who assigned to *James Lewis*, who assigned to *Elizabeth Younger*, who afterwards intermarried with *George Bye*, one of the defendants.

That on the 4th August, 1849, *Campbell* agreed with *Edward McNeal*, by an instrument under seal, to sell to him fifteen acres of the land for £30.

That on the 16th of April, 1856, *Campbell* agreed with *James Bilton*, by an instrument under seal, to sell to him ten acres of the land for £37 10s.

That on the 4th November, 1858, *Snider* agreed to advance to *Campbell* £119 0s. 7½d., being the residue of the purchase money due to *Tylee*, to enable *Campbell* to get a deed of the land, upon *Campbell* executing to *Snider* a conveyance of the whole of the lot for the benefit of *Snider* and the other purchasers.

On the last-mentioned date *Snider* advanced the money, *Campbell* got his deed from *Tylee*, and executed a conveyance to *Snider*.

The defendants submitted that the plaintiff's judgment only formed a lien upon *Campbell's* actual interest, being the residue of the lot after deducting the portions sold to the defendants, and subject to the sum advanced by *Snider*, and that *Campbell* had other lands in that county, which they prayed should first be resorted to for payment of the judgment.

Mr. *Proudfoot*, for plaintiff.

None of the agreements with the defendants for sales of portions of the land being registered, they are void as against the plaintiff's judgment.

That has been decided in this court to be the true construction of the Registry Act, 13 & 14 Vic., c. 63, *Rice* v. *Wilson*, (*a*) notwithstanding the doubt thrown upon that construction in *McMaster* v. *Phipps*, (*b*) and the injustice which must often result from it. But that is for the consideration of the legislature.

Besides, neither *McNeal* nor *Bolton* have paid their purchase money, and the plaintiff must be entited to it.

Snider cannot have any priority for the advance of the £119, it is nothing more than a loan upon the security of the property, subsequent to the lien of the judgment.

Mr. *A. Crooks*, for the defendants.

The judgment only attaches on *Campbell's* interest; that was the view taken by his Honor V. C. *Spragge*, in *McMaster* v. *Phipps*, and it is submitted that it is the true construction of the statute. It is a harsh and unjust rule which would enable a judgment creditor, who contracts for no interest in the land, for no lien upon it, to realise

(*a*) 13th December, 1859, per Chancellor.
(*b*) 5 Grant, 253.

his debt out of the property of another than his debtor. It is making one man's property pay another man's debts; and it cannot be presumed that the legislature meant to perpetrate so gross an injustice.

But whatever may be the true construction of the 13 & 14 Vic., (*a*) it has no retrospective operation, and so far as *Snider's* twenty acres and *McNeal's* fifteen acres are concerned, the case must rest on the prior registry law the 9 Vic., c. 34 and under that act it is clear that the judgment only affected the debtor's beneficial interest.

As to the £119, *Snider* must have a right to a prior charge, as the plaintiffs could not have enforced their judgment without, paying, or selling subject to it. And on the ordinary rule as to salvage money it will form a first charge.

Judgment.—ESTEN, V. C.—I assume that the lands in question had been granted by the Crown, and that a memorial of some deed affecting them had been registered before the sale to *Stewart* in 1849. In this case the plaintiff's judgment when registered would affect those lands only subject to the contracts in favour of *Stewart* and *McNeal*, which occurred in 1849. But the contracts of *Bye* and *Bilton*, which happened in 1854 and 1856, respectively, not being registered, became void as against the plaintiff's judgment as soon as it was registered. If, however, *Kingshot's* contract was a verbal one, as I rather infer from the language of the answer, it would not be subject to the registry laws, supposing it to be valid at all, and would consequently preserve its priority over the plaintiff's judgment. Supposing *McNeal's* purchase money not to be paid, the plaintiff's judgment would attach upon it. I do not think that *Snider* or *McNeal*, by taking a conveyance of the whole lot from *Tylee* to *Campbell*, and from *Campbell* to *Snider*, intended to renounce any advantage or priority that

(*a*) Passed in 1850.

they enjoyed, and I think they retain the priority over the plaintiff's judgment that they previously had. I think *Snider* is entitled to priority over the plaintiff's judgment in respect of the £119 0s. 7½d.

BRANTFORD v. THE GRAND RIVER NAVIGATION COMPANY.

Municipal debentures—Foreclosure—Receiver.

The Municipality of B., being authorised by statute to make a loan to the extent of £40,000 to a navigation company in the debentures of the municipality, payable in twenty years, issued debentures to that extent, of which debentures to the amount of £16,500 were deposited by the Navigation Company in the bank. The municipality of B., with the consent of the Navigation Company, redeemed the debentures so deposited, and then instituted proceedings against the company to compel payment or foreclose the interest of the company under their act of incorporation. The court refused this relief, but granted a receiver of the tolls, &c., of the company, which he was to apply in maintaining the works and payment of salaries of the servants of the company, and then in payment of the arrears of interest paid, and payment of interest on outstanding debentures.

Statement.—This was a bill filed by the Corporation of the Town of *Brantford* against the *Grand River Navigation Company*, setting forth that by the act of the legislature of this province, passed in the 14th & 15th year of her Majesty's reign, (ch. 157,) entitled "An act to authorise the *Grand River Navigation Company* to raise by way of loan a certain sum of money, and for other purposes therein mentioned." The town of Brantford was authorised to assist the defendants by lending the credit of the town to the company by issuing debentures to the extent of £40,000.

By section 5 of the act it was "enacted that for the security of the said town of Brantford against loss by its so loaning its credit, the said debentures shall have the same effect as a mortgage upon all the property and income of the Grand River Navigation Company," with the exception of certain lands mentioned in this section, the proceeds of which, when sold, were to be applied to the payment of the interest on such debentures.

The bill further stated, that debentures for the full amount so authorised to be issued, were issued by the town, and a large portion of them deposited as security in the Bank of Upper Canada, which the company consented to the plaintiffs retiring, which was accordingly done, and the present bill filed, the prayer of which was that, under the circumstances now stated, and appearing more fully in the judgment, the company might be foreclosed of all right in the works of the company.

The bill having been taken *pro confesso*, a decree for taking the accounts between the parties was made, and the cause coming on to be heard on further directions.

Mr. *Wood*, for the plaintiffs, asked that the usual decree might be made; but after taking time to look into the cases,

Judgment, Spragge, V.C.—[Before whom the case had been heard.]—By statute 14 & 15 Vic., ch. 151, the plaintiffs were authorised to make a loan to the extent of £40,000 to the defendants, the *Grand River Navigation Company*, in the debentures of the municipality, payable in twenty years; and by the fifth section it was provided that for the security of the plaintiffs against loss, the debentures to be issued by them should have the same effect as a mortgage upon all the property and income of the defendants, with the exception of town or village lots, then or thereafter to be laid out, ("not meaning to except these lots on which there is, or may be, water power,") and that the proceeds of the sale of each lot which might thereafter be sold should be applied to the payment of the interest on the debentures.

Debentures to the extent of £40,000, were issued under this act, of which the master finds that to the amount of £16,500 they were deposited by the defendants with the Bank of Upper Canada, and which were on the 30th of December, 1851, redeemed by the plaintiffs, with the consent and approval of the defendants, at an expense

of £6,180 19s. 7d., and that debentures to the amount of £23,000 are now outstanding; and he finds that there is due to the plaintiffs in respect of interest on the debentures issued, £2,340 14s. 8d. He finds *McKinnon*, *McPherson*, and *Shaw* subsequent incumbrancers under a joint registered judgment to the amount of £462 8s. 6d.

I do not see that the plaintiffs are entitled to any present proceeding against the company in respect of the amount paid the Bank of Upper Canada, for redeeming debentures, or in respect of the debentures redeemed.

As to the money paid, they are not incumbrancers; as to the debentures they are in the hands of the makers of them, the plaintiffs.

As to the amount paid by the plaintiffs for interest due on the debentures to the holders thereof and which interest ought to have been paid by the company, the company is in default, and the plaintiffs are entitled under their statutory mortgage to some remedy. It is not contended that the effect of the default has been to make the whole amount of the debentures issued and outstanding fall due presently.

In *Simpson* v. the *Ottawa & Prescott Railway Company*, my brother *Esten* considered what would be the proper remedy in a case analagous to the present; and although the case did not call for a final decision upon the point; his opinion was, upon the authority chiefly of *Fripp* v. the *Chard Railway Company*, (*a*) that a receiver and manager should be appointed, "to receive all the moneys produced by the use of the railway, and after payment of all expenses attending its operation, to pay the balance into court," not however, disturbing the company in their management of the road unless it should become necessary to do so, and reserving liberty to apply to the court as occasion might require. In this way the power of the company might be exercised

(*a*) 17 Jur. 887.

in its own name, but under the supervision of the court, for the satisfaction of the plaintiffs' demand.

I am prepared to make a decree similar to the one indicated as proper by my brother *Esten*, and similar to that pronounced in *Fripp* v. The *Chard Railway Company*, going, however, somewhat further, as the court was not in either of those cases in a position to give any final direction upon the subject.

I think that a receiver and manager of the property and income of the Canal Company should be appointed, with authority to receive the tolls, and the income of the company, and all the rents and profits of their real estate, and the proceeds of the sale of town or village lots sold after the passing of the act; and to apply the same as follows:

1st. In maintaining the canal, and payment of the salaries of the servants of the company.

2nd. In payment of the arrears of interest, reported as paid by the plaintiffs, and in payment of interest on outstanding debentures to the holders thereof.

3rd. In payment of the judgment debt of *McKinnon*, *McPherson*, and *Shaw*.

4th. To pay any surplus into court.

The books and papers of the company, so far as they relate to the matters upon which the receiver is to act, to be handed to him by the company.

The present servants of the company may properly be allowed to continue to act in their present duties, but under the receiver and manager, and subject to any application for their removal, and the appointment of others in their place. The subordinate servants of the

company, such as toll-collectors, lock-tenders, and the like, may properly be appointed and removed by the receiver and manager in his discretion.

All parties, and the receiver also, to be at liberty to apply to the court from time to time, as occasion may require.

If the plaintiffs desire any further or other decree than this, they must speak to the matter again.

CURRAN v. LITTLE.

Specific performance—Purchaser's notice of defective title—Acceptance of title.

A. is the owner of 50 acres of land, the title to one acre of which is defective. B., with knowledge of the defect, agrees to purchase the whole for a certain sum. B., with others, has, at the same time, an independent interest in the one acre, and obtains a decree ordering A. to convey it to him and the others. A. then files a bill for specific performance of the contract with B. *Held*, that B. must pay the whole of the purchase money upon receiving a clear title to the remaining 49 acres.

The facts appear from the judgment.

Mr. *Strong* for plaintiff.

Mr. *Fitzgerald* for defendant.

Judgment.—ESTEN, V. C.—[Before whom the case was heard.]—The land in question, being 50 acres, had been granted to one *Connell*, the husband of the plaintiff *Jane Connell* and the father of the other plaintiffs; he had sold to *Patton* 49 acres; but, instead of conveying 49 acres, had conveyed the whole 50 acres, taking back a conveyance of the one acre retained, and also a mortgage for the balance of the purchase money on the 49 acres. *Patton* sold the 49 acres to *Monro*, and *Monro* to the plaintiff; but the conveyances to *Monro* and the plaintiff respectively comprised the whole 50 acres. The conveyances to *Patton*, *Monro* and the

plaintiff were registered before the conveyance of the one acre and the mortgage of the 49 acres from *Patton* to *Connell*.

Mrs. *Connell* and her children and the husbands of some of them commenced a suit against the plaintiff after the death of *Connell* to establish their title to the one acre, the plaintiff having brought an action of ejectment to recover the possession of it, and proceeded to judgment and issued a writ of *habere facias*, and delivered it to the sheriff for execution, and having proceeded with the sheriff's bailiff to the house on the one acre, two days after the commencement of this suit, in order to put the writ in force, Mrs. *Connell* summoned her son-in-law, *Little*, the present defendant, and in order to prevent Mrs. *Connell's* ejection, *Little* then agreed to purchase the whole 50 acres from *Curran* for £162 10s., being $13 an acre.

An article was then drawn up and signed by both parties, in which *Curran* agreed to convey the fee simple of the 50 acres to *Little* free from incumbrances. *Little* was a plaintiff in the suit which had been instituted.

Service of the bill had not been effected on the day the agreement was signed; it was made, however, seventeen days afterwards, being the 18th of May, and the bill having been taken *pro confesso*, a decree was obtained on the 24th of August directing a reference to the master, of which *Curran* had notice, but did not attend. The master made one report in October and another in November, on a second reference, of which the plaintiff does not appear to have had notice, and on the 30th of November a decree was made, on further directions, ordering *Curran* to convey the one acre to the plaintiffs in the suit, according to their respective rights and interests. *Curran*, afterwards, on the 24th March, 1859, made an application to set aside the proceedings, and on the same day filed the present bill.

I think the title was accepted by *Little*, and the objection to the title to the one acre waived; and that *Little* is bound to complete his purchase on receiving such a conveyance as *Curran* can give him; but *Curran* is bound to discharge all incumbrances on the estate. I think that if *Curran* be compelled to convey the one acre under the decree in the other suit before the contract in question in this suit is completed, *Little* must, nevertheless, pay his whole purchase money on receiving a conveyance of the 49 acres. I think it was intended at the time of the contract that the suit should be discontinued, and that it has been prosecuted against good faith, and that *Little*, having relieved his mother-in-law from the difficulty, has attempted to repudiate the agreement. His pretence that the contract was to be at an end unless *Curran* should procure a title to the one acre is incredible. I think the plaintiff is entitled to his costs. The decree will declare the rights of the parties and direct a reference to the master to enquire as to the amount of the purchase money, and as to any incumbrance on the estate which must be discharged out of the purchase money; and upon payment of the balance to *Curran*, he must convey the 49 acres to *Little*. Further directions may be reserved if necessary, and should any question arise as to interest or rents and profits, the parties may apply to me.

PATON v. WILKES.

Principal and surety—Assignment by surety of securities held by him—Mortgage in trust for sale—Foreclosure—Sale.

A person who is surety for another and holds collateral securities is not bound to wait until he has paid the debt of the principal before he assigns such securities, but may do so at any time to the creditor, in discharge of his liability.

A person holding mortgages in trust for sale to indemnify him against loss on account of the mortgagor is not entitled to foreclose in case of default; the only decree to which he is entitled is to sell, allowing the mortgagor the usual times for redemption.

On the 24th of November, 1856, the defendant *G. S. Wilkes* conveyed to one *Coleman* 54 acres of land

and 500 horse-power of water in the Hydraulic Canal on the Grand River, *upon trust* to sell by public auction or private contract, and subject to special or other conditions, and out of the rents and profits, and also of the proceeds of the sale of the mortgaged property, to pay the costs and expenses of the sale and of any suit or auction for obtaining possession of the property, or of enforcing any contract for sale, *and upon the further trust* to retain and pay to himself, his heirs or assigns, every sum and sums which he *Coleman* might be obliged to pay in any way on account of acceptances of *Coleman* for the accommodation of *Wilkes* either as principal, interest, costs, expenses, &c., and also every sum which should be due from *Wilkes* to *Coleman* on the balance of account current, either for money paid or advanced to *Wilkes* at his request or which should be secure by any bond, bill or note drawn, endorsed, made or accepted by *Wilkes* or *Coleman* for his accommodation, with interest, &c.; *and upon further trust* to pay any surplus moneys to *Wilkes*, and to re-convey to him any unsold property. And it was declared that *Coleman's* receipt should be a discharge for any money paid to him in pursuance of the trusts of that indenture.

Coleman covenanted on ten days' request in writing to render to *Wilkes* a true and particular account of all sums of money which should be due on the balance of the account current, and on payment thereof to re-convey the lands to *Wilkes*. And he further covenanted not to sell till default had been made in payment of the balance of account current for thirty days after notice; and that including a draft for £1000, then already accepted, he would accept drafts or bills drawn on him by *Wilkes* through any of the chartered banks of the province, but not otherwise, to the extent of £6000, and would allow *Wilkes* to keep a floating debt to that amount constantly existing until *Wilkes* should make default in payment of the said bills and drafts at maturity, or until *Coleman* should give notice of his

intention to determine the arrangement, it being agreed that if *Wilkes* permitted any bill or draft accepted by *Coleman* to become due and unpaid, the transaction should, at *Coleman's* option, cease and determine without requiring any notice. And *Wilkes*, after the ordinary absolute covenants for title, covenanted with *Coleman*, his executors, administrators and assigns, that he would immediately on demand or within thirty days after notice, pay to *Coleman* or his assigns all sums of money which should be due from him on the balance of the account current and costs, and expenses of the trusts,&c.

By another indenture of the same date as the last *Wilkes* conveyed other property to *Coleman* upon trusts similar to the other as a security for £400. *Coleman's* covenant was that he would accept drafts, &c., to the extent of £500, until the building then in course of erection on this property should be completed, insured to the amount of £3,500, and the policies assigned to him, when he would accept for the further sum of £3,500. *Wilkes* covenanted to pay, as in the other deed.

Coleman having become involved, assigned these mortgages with other property to the plaintiff *Paton*, in trust for his creditors, and by an indenture made in February, 1859, these mortgages became vested in the plaintiff *Paton* in trust for the other plaintiff, the *Bank of British North America*, to whom *Coleman* had become indebted in the course of the usual business of the bank, in discharge of that indebtedness.

The amount due by *Wilkes* for acceptances and endorsations and upon the account current was £12,334, and interest; and he had made default in meeting the drafts and bills at maturity.

G. S. Wilkes' equity of redemption was sold by the sheriff to *James Wilkes*, who executed a declaration of

trust in favour of *Vanbrocklin*, and ultimately of *G. S. Wilkes*.

G. S. Wilkes, *James Wilkes*, and *Vanbrocklin* were the defendants.

The bill prayed a foreclose as to both properties in default of payment of the amount due.

The defendants answered, alleging an agreement between *G. S. Wilkes* and *Coleman* that each property was only to be a security for the amount advanced on it, and that *Paton* had notice of it; and prayed that separate relief might be given as to each.

The case was heard upon a motion for decree, and affidavits of *Coleman* and *Paton* were read denying the agreement set up in the answer.

Mr. *Proudfoot* for the plaintiffs.—The deeds of November, 1856, are mortgages; they were given as securities for acceptances; they contain covenants to pay, and absolute covenants for title, such as are usual in mortgages. The trust for sale was not to arise till default had been made. *Coleman* had all a mortgagee's remedies; he was not confined to the land for his security, nor was it taken in satisfaction. The plaintiffs as assignees of *Coleman* are therefore entitled to a decree for foreclosure.—*Goodman* v. *Grierson*, (*a*) *Alderson* v. *White*, (*b*) *Bell* v. *Carter*, (*c*) *Sampson* v. *Pattison*, (*d*) *Jenkin* v. *Row*, (*e*) *Taylor* v. *Emerson*, (*f*) *Balfe* v. *Lord*. (*g*) Plaintiffs are entitled to hold both properties till the whole debt is satisfied. The agreement set up by the answer is denied. *Vint* v. *Padgett*, (*h*) *Gilmour* v. *Cameron* (*i*)

Mr. *Roaf* for the defendants. The securities are mere trusts for sale and there can be no foreclosure.

(*a*) 2 Ba. & Be. 274.
(*b*) 4 Jur. N. S. 125.
(*c*) 17 Bea. 11.
(*d*) 1 Hare 533.
(*e*) 5 DeG. & S. 107.
(*f*) 4 Dr. & W. 117.
(*g*) 2 Dr. & W. 480.
(*h*) 4 Jur. N. S. 254, 1122.
(*i*) Ante vol. VI., 290.

There never was any debt due to *Coleman*. He gave his acceptances, which were discounted at the bank, but he never paid them; and he was therefore not in a position to assign the securities.

The mortgages cannot be united so as to exclude a separate right to redemption. They were both executed on the same day, and for distinct sums, which is strongly corroborative of the agreement set up in the answer that they were to be separate securities.

Proudfoot in reply.—*Coleman* was surety to the bank on this paper, and could transfer to the bank the securities he held for his own indemnity.

Judgment.—ESTEN, V. C.—The defendant *Wilkes* made two mortgages in the form of conveyances in trust for sale to *Coleman* to secure him against certain endorsations and upon a general account. I conclude that all the paper upon which *Coleman* was liable for *Wilkes* was in the hands of the *Bank of British North America*. Several deeds were made by *Coleman* to the plaintiff *Paton*, as a trustee for this bank and other creditors, the ultimate effect of which, so far as the *Bank of British North America* is concerned, was, that the securities in question were transferred by *Coleman* to *Paton* as a trustee for this bank, and in satisfaction of his liability on behalf of *Wilkes*; and the question is, whether the surety, having paid nothing, he can transfer his securities to the creditor in consideration of the release of the debt, so as to confer on the creditor the right to avail himself of those securities. It appears to me that he can do so: that as he could pay the debt and then avail himself of the securities, so he can transfer the securities at once; and that the creditor will have all the remedies that the surety would have if he were to pay the debt and then put the securities in force. To hold that because the surety had paid nothing and had become exonerated from liability,

therefore the security was at an end, is to subvert the intention of the parties. Whereas it is the duty of the court if possible to put such a construction upon their acts as will effectnate their intention. In *Wright* v. *Morely* it was considered clear by a very great judge that the creditor as a matter of course was entitled to the benefit of all securities held by the surety, and although the doctrine perhaps has not been sustained, yet it shews that there is nothing inequitably in such a transaction, and when an express transfer is made of the securities, the result must be to entitle the creditor to enforce them. I should think if these mortgages had been in the common form the plaintiff might have had the usual decree, but the question is, whether, as they are in the form of trusts for sale, he has any right to apply to the court at all, and whether he must not exercise his power of sale contained in the deeds. It is quite clear that the security being in the form of a trust for sale, there can be no foreclosure, and that a covenant for payment and a conveyance makes no difference; but the creditor is entitled to a decree for sale, allowing the debtor the usual time for redemption.

FIELDER V. BANNISTER.

Right of way—Way of necessity to grantee over lands of grantor.

A. being entitled at his own expense to make a road for himself across *B.*'s farm at the most convenient point, it was agreed between them that *A.* should use *B.*'s road on certain terms. *Held*, that this agreement was a mere license, not coupled with any interest, or incident or auxiliary to a sale or grant, and was therefore revocable and, being revoked at law, no equity arose to interfere with *A.*'s legal right on the ground of encouragement on the part of the one, or forbearance and irreparable inconvenience on the part of the other.

Semble, [Per ESTEN, V. C.,] that a way of necessity to a purchaser of land is the one most convenient to the grantee by the shortest cut over the lands of the grantor, but, [per SPRAGGE, V. C.,] that the right to select such a way of necessity is qualified by the effect which the selection of a particular line would have upon the interests and convenience of the grantor.

Statement.—This was a bill filed by plaintiffs, the widow and children of *James Fielder*, deceased, against defendant, for a right of way over the north-half of the north-

half of lot No. 22, in the 1st concession in the township of Onondaga, in the county of Brant. The plaintiffs claimed title to the south half of the same half lot, through the deceased, who purchased from the defendant, the present owner of the north-half.

The plaintiffs' only access to the highway is across the north-half. The deceased and defendant had agreed that he should use defendant's own road over the north-half, upon certain conditions; which the defendant alleged the plaintiffs neglected to comply with. Defendant then obstructed this road, and forcibly prevented plaintiffs from using it; but assigned to plaintiffs a road-way over another part of the land. This roadway plaintiff refused to accept on the ground of unfitness and inconvenience, and brought this suit to restain defendant from continuing such obstruction, or to compel him to assign some other good and sufficient way.

An application for an injunction to restrain defendant from obstructing the old way was made by

Mr. *E. B. Wood*, for the plaintiffs.

Mr. *A. Crooks*, contra.

When owing to the want of preper parties, the application was refused by,

ESTEN, V.C.—It would seem that a way of necessity is the one most convenient for the grantee.

Osborne v. *Wise*, (*a*) shews that if a way is granted, and proves to be of no use, a way of necessity passes to the nearest highway by the shortest cut over the grantor's lands, and the grantee must at his own expense make and repair it.

Fielder's strict right was to make a road for himself

(*a*) 7 C. & P. 761.

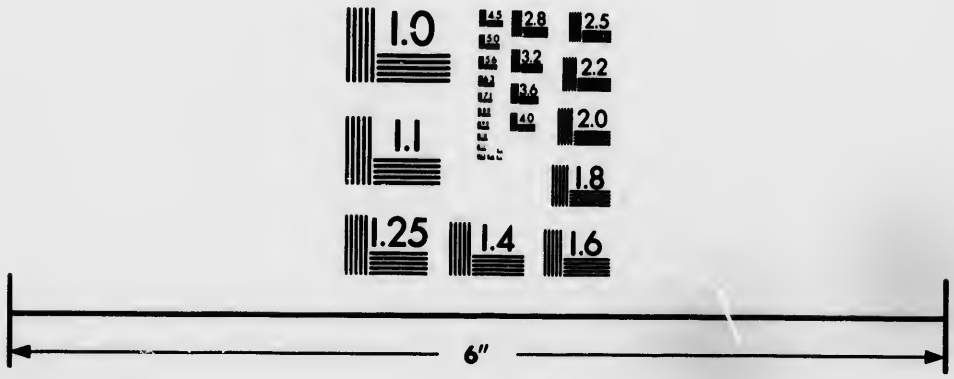
at his own expense, at the most convenient spot across the defendant's land; in lieu of this they agree that he shall use the defendant's road on certain terms, this operates, I apprehend, as a mere license; it seems to have been a temporary arrangement; it was, however, material advantageous, as it saved *Fielder* the expense of making the road and the defendant the inconvenience of having two roads on his farm. I apprehend that *Fielder* could, and the plaintiffs can, make a road at any time across the defendant's land at their own expense, and that the agreement about the roads operated as a mere license, not coupled with an interest or incident, or auxiliary to a sale or grant, and therefore revocable, and that it has been revoked; and that being revoked at law, no equity arises to interfere with that legal right on the ground of encouragement on the part of the defendant, or forbearance and irreparable inconvenience on the part of the plaintiffs. But it may be that the defendant's road pre-occupies the ground on which the plaintiffs would be entitled to make a road, and that on this account they may be entitled to use it on equitable terms, and that the defendant may have no right to obstruct it even by bars, in which case an injunction would be proper to restrain irreparable injury. But under the circumstances. I would not grant such an injunction, except on the terms of observing the agreement between the defendant *Fielder*.

Now the person to be bound is *Barber*, the tenant, who, indeed, is the only person sustaining any inconvenience from the alleged wrong, and he is not complaining.

I think I cannot grant the injunction at present, but would strongly recommend that *Barber* should appear by counsel, and undertake to shut the gates and put up the bars; also, the plaintiffs; and then the injunction should go to the bearing, reserving the costs.

I think the new road is no satisfaction of the plaintiffs' right. It seems to be wholly insufficient.

IMAGE EVALUATION
TEST TARGET (MT-3)



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Subsequently the cause was brought on to be heard before his Honour V. C. *Spragge*, upon evidence taken *viva voce* before the court; when the same counsel appeared for the parties respectively. The points relied on, and authorities referred to, appear in the judgment of

SPRAGGE, V. C.—The defendant was the owner of one hundred acres of land, being the north half of lot No. 22, in the first concession of Onondaga. The highway runs along the north part of the lot. By indenture of the 14th of February, 1848, he conveyed to one *James Fielder*, under whom the plaintiffs claim the south-half of his one hundred acres. To this there was no way of access to and from the highway, but over the north fifty acres retained by the defendant.

The easement of the plaintiffs to have a right of way over the defendant's fifty acres is not denied; but the question which arises is, whether a certain way assigned to the plaintiffs by the defendant, along the westerly side line of his land, is such a way as they are bound to accept; or whether they are not entitled to use a road-way made by the defendant, from the highway up the centre of his lot, to the premises sold by him to *James Fielder*. The defendant has refused the use of this latter road—has obstructed it and forcibly prevents the use of it.

The plaintiffs' farm buildings are a little to the westward of the line of this centre road produced; and they insist that they are entitled to that line of road as the most direct and convenient; also because the soil is more suitable than the side line of road for the construction of a road, the latter being in parts wet and marshy, and liable to be overflowed, and there being a hill which would be a serious obstacle to its construction.

It becomes necessary to enquire what are the relative

rights of the grantor and grantee, upon such a sale and purchase; and first as to the principle upon which a right of way passes to the purchaser. It has been ordinarily called a way of necessity. Mr. Sergeant *Williams* in his notes to *Pomfret* v. *Ricroft*, (*a*) finds fault with the term as too indefinite, and says, that when the nature of it is considered, it will be found to be nothing else but a way by grant; that it derives its origin from a grant, "for there seems to be no difference;" he adds, "when a thing is granted by express words, and when, by operation of law, it passes as incident to the grant."

This seems material, as it places the grantee in the same position as if his conveyance stipulated in terms for a convenient way over the land of the grantor, as long as the necessity for it should exist. But the question remains, whether the grantee has the right to select the locality of the way, or the grantor. It appears from the judgment of the court in the old case of *Packer* v. *Walsted*, (*b*) that at all events if the grantor do not assign a way, the grantee may take one. The judgment was that the grantee might take a convenient way without permission of the grantor, and the law would then adjudge whether such way was convenient and sufficient, or otherwise. In *Oldfield's* (*c*) case it was considered that the feoffee should have a convenient way over the lands of the feoffor; and that he was not bound to use the same way that the feoffor used. In *Rolle's* abridgment, after stating the right of the purchaser to the easement, it is added, "and the grantor shall assign the way where he can best spare it." It seems clear that the grantee is the party to make the road.

Morris v. *Edgington*, (*d*) has been referred to, for the language of Sir *James Mansfield*: "I say nothing," he said, "of what is a way of necessity; I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the

(*a*) 1 Sand. 323, n. *o*.
(*b*) 2 Sid. 111.
(*c*) Noy's Rep. 123.
(*d*) 3 Taunt. 24.

most convenient and reasonable mode of enjoying the premises could not be had." In *Osborne* v. *Wise* Lord *Wensleydale* said: "If the way granted by the lease is of no use, the law would give as a way of necessity, the nearest passage along the land of the grantor, to the nearest public highway."

In neither of these cases, however, was it necessary to determine what were the rights of a grantee, under such a purchase; or as to the sufficiency of a way assigned by the grantor: the passages quoted are no more than dicta of the learned judges who uttered them, and appear to be qualified by other cases.

Holmes v. *Goring*, (*a*) was a case the converse of this; the easement arising to the grantor upon his conveying land, not reserving in terms any access to that retained by him. At one time the grantor had clearly had a right of way over a certain close, but upon his purchasing an adjoining close, he was enabled, though by a less direct route, to get from one of his closes to another; and it was held that the pre-existing right way was thereupon extinguished. The case is different from this; but the observations of *Best*, C.J., are not inapplicable; he refers to the note of Mr. Sergeant *Williams*, that "a way of necessity when the nature of it is considered, will be found to be nothing else than a way by grant," and adds, "but a grant of no more than the circumstances which raise the implication of necessity require should pass. If it were otherwise this inconvenience might follow, that a party might retain a way over 1000 yards of another's land, when by a subsequent purchase he might reach his destination by passing over 100 yards of his own. A grant, therefore, arising out of the implication of necessity, cannot be carried further than the necessity of the case requires, and this principle consists with all the cases which have been decided."

(*a*) 2 Bing. 76.

In *Pheysey v. Vicary*, (a) the question was, as to a certain right of way, claimed as appurtenant to a house, and also as a way of necessity: a certain carriage way which had been used by two houses, when owned by one person, was obstructed by a fence, which, however, left a drive up to the house of the plaintiff, though not in the same way as before, and, as I gather, not in so direct a way; the court negatived the right of the plaintiff to the way formerly used, and claimed by the plaintiff as a way of necessity; and the language of Lord *Wensleydale* is by no means so broad and unqualified as in *Osborne* v. *Wyse;* he says, "the only question is, whether the nearer and more convenient way for a carriage to come to the plaintiff's door is a way of necessity." And *Alderson*, B., says: "a way of necessity does not necessarily mean the most convenient way that could by possibility exist."

I believe there is an absence of any direct authority, as to the right of the grantee having a right of way of necessity, himself to select over what portion of the grantor's land the way shall pass; unless, indeed, the grantor refuse or neglect to assign to him a convenient and reasonable way: the passage which I have quoted from *Rolle's* abridgment, is against such right in the grantee: and looking at the nature of the right, limited, as was said by Chief Justice *Best*, by the necessity for it, it would seem to be answered by the grantor assigning the way where he could best spare it; if a convenient way to the grantee. Suppose a way answering these conditions assigned by the grantor, it would be unreasonable to allow the grantee to reject it, merely because he preferred another way. Even in *Morris* v. *Edgington*, the word "reasonable" is coupled with the word convenient, importing that the interests of the grantor are not to be disregarded in determining what is a proper way; and I think the language of Chief

(a) 16 M. & W. 484.

Justice *Best* in *Holmes* v. *Goring*, gives a sound rule, for decision in such a case as this. It would be unsafe to follow the dicta of even such an eminent judge as Lord *Wensleydale:* he said, or is reported to have said, in *Osborne* v. *Wyse:* "the law would give as a way of necessity the nearest passage along the land of the grantor to the nearest public highway." The consequences of such a doctrine would be mischievous; it would enable the grantee to have his "way" diagonally across the farm or other property of his grantor, to cut it up, and "spoil" it, as it is familiarly called. Looking at the language, and the spirit of the authorities to which I have referred, and the reason of the thing, I think that the interests of the grantor as well as the grantee are to be taken into account, in determining what, as between them, is a convenient and reasonable way; and that if a way answering these conditions be assigned by the grantor, the rights of the grantee are satisfied, and he is bound to accept it; and at his own expense to make it fit for his own use.

To apply these considerations to the case before me. As on the one hand the grantee is not bound to use the same way as had been used by the grantor; so on the other hand I think the grantor is not bound to assign the way previously used by himself, provided another way *naturally* equally convenient can be assigned. There are manifest inconveniences in both parties using the same private road; it is not necessary to go out of this case to establish that point; the grantor may well say that to assign his own road would be a disadvantage to him; rather than suffer which, he would lose the use of the land occupied by a second road. I do not think, though I confess I find no authority for the point either way, that it is any part of the grantee's right to have the benefit of the money and labour expended by the grantor upon the road which he has himself constructed; and if the way offered to him be as good and convenient as the grantor's own way, apart from its improvements;

if not substantially worse in fitness of soil, or in the formation of the land, or more difficult or expensive to construct, and keep in repair; and if also it affords convenient access to the grantee's land, I think such a way is one that he is bound to accept.

In this case the defendant's old line of road, and the line he proposes to assign, are naturally alike in their general characteristics; each of them is crossed by low flat land, which extends from one side to the other of the defendant's fifty acres; a stream flows across the whole; the flats on both roads are alike in soil, black loam varying in depth from two to six inches or more, next the surface with stiff clay underneath; by each road a hill of about equal height, twenty-five feet, has to be surmounted to get to the plaintiffs' farm buildings. The defendant has built a bridge over the creek on the new line of road, and has expended some labour in the improvement of the road.

There are, however, some points of difference between the two lines against the new line proposed by the defendant. The flats are of considerably greater extent on the new line, and are lower on the new line than on the old. They are subject to freshets on both lines, but when they occur a larger space is overflowed on the new road, and they continue overflowed for a longer time. The creek crosses both lines of road at about a right angle, but in addition it runs nearly parallel with a considerable portion of the new road. Moreover, in the opinion of some witnesses an embanked road along the new line would probably be carried away, or at least damaged, when freshets occur. It is not said whether this would be the case with an embanked road on the old line, or whether it has been embanked; if on higher ground, as is said to be the case, it may be less necessary to embank it. Some witnesses give it as their opinion that it would cost more to keep a road in repair along the new line than along the old, and this is almost certainly correct,

taking into account the points of difference to which I have adverted.

The hill is represented by some witnesses as a very formidable obstacle on the new line of road; and one thinks it naturally more difficult than it was on the old line; but upon the whole evidence, I think this is doubtful; and as the expense of making it practicable could not exceed £10 or thereabouts, I should not be disposed to condemn the proposed line on that account. Neither do I think the space that it would occupy on the *Fielder* farm, or the circumstance that the proposed line would not lead so directly to the farm buildings a sufficient objection. They would be inconveniences no doubt, but not serious ones; and it would in my judgment be better for both parties that they should be endured than that they should use the same road in common. I think the right of the plaintiff is not to the best possible line of road, (as was put by Mr. *Baron Alderson*,) but that it is qualified by the effects which the selection of a particular line would have upon the interests and convenience of the defendant.

The extent and position of the flats form therefore, in my opinion, the really serious objection to the line of road proposed by the defendant; and in my opinion they are objections which warrant the plaintiffs in refusing to accept it in satisfaction of their right of way.

It does not follow that the old road is the way to which the plaintiffs are in future entitled, for some other way equally good, if such there be, may be assigned by the defendant; but that way being in existence and no way which the plaintiffs were bound to accept having been assigned to them, the defendant was in the wrong in obstructing that way.

The bill is framed rather for obstructing a way

assigned by the defendant, than from obstructing their easement independently of assignment. I think there was no assignment, but agree with my brother *Esten's* opinion upon the application for injunction, that the tacit acquiescence of the defendant in the use of the road by *James Fielder*, and after his death by the plaintiffs, could amount to no more than a license which was revocable, and which has been revoked.

I do not find upon the evidence that the difficulty in the way of the plaintiffs sustaining the suit has been removed. There is a lease unexpired to one *Barber*, and no injury to the reversion is shewn. It was suggested that it is part of the agreement with *Barber* that the plaintiffs should continue to live upon the place during his term, in which case they would not be mere reversioners, but would have a present interest in the easement. If this be so it was probably a mere omission that it was not shewn; and it is a fact that may properly be allowed to be proved by affidavit evidence; but it must be at the expense of the plaintiffs.

With respect to the jurisdiction, I think it clear, the remedy by damages at law for disturbance of the easement is plainly inadequate. The preventive jurisdiction of the court in cases of easements *e.g.*, running water and right of way is a matter of ordinary exercise; and it would be difficult to conceive a class of cases in which it was more necessary for the court to interpose; or any case in that class of cases than where the way obstructed is from the plaintiffs' premises to the highway.

The evidence convinces me that if this question had arisen between reasonable people of a conciliatory disposition, there would have been little or no difficulty, either in using the same road, the plaintiffs taking care to do, and to occasion no damage to the defendant, or in agreeing, with the aid perhaps of neighbours acquainted

with the premises, to another line of road, but it could of course only be such a way as would satisfy the plaintiffs' rights, or it would not be binding upon the infant plaintiffs.

As yet the plaintiffs have not established a present right of possession in the premises; upon their doing so I think they will be entitled to a decree for an injunction; but I feel some difficulty as to the injunction that should be granted: if perpetual, it would establish a perpetual right of way. The plaintiffs have no such right, as the right will cease with the necessity for it. And besides, I do not mean to decide that it is not competent to the defendant to assign another way to the plaintiffs, so as it be a reasonable and sufficient one. I think the injunction should be to restrain interference with the way now used unless and until this court shall make order to the contrary. I think the plaintiffs must have their costs.

Fraser v. McLeod.

Partners—Agency.

A member of a partnership firm cannot bind his co-partner for transactions out of the usual scope of the business of the co-partnership; nor for things which are sometimes done by it, but are of unusual or rare occurrence; where, therefore, one member of a mercantile firm, without the knowledge of his co-partner, purchased lands from a debtor of the firm in his own name, which were subject to incumbrances, and for the purpose of discharging such incumbrances gave promissory notes signed by him in the name of the firm, but without the knowledge of his co-partner, the partnership was held not liable to pay the notes, although it was alleged that the arrangement had been effected for the purpose of more effectually securing the debt due the firm.

The bill in this cause was filed by *John Fraser*, against *Duncan McLeod, William Ross, James Mitchell, John Fisken*, and *R. D. McPherson*, praying, under the circumstances stated in the judgment, to restrain the defendants other than *McLeod* from proceeding in the action at law stated in the bill to have been brought

against *Fraser* and *McLeod* to enforce payment of certain notes stated in the bill, to have been given by *McLeod* to the other defendants. Also, from negociating any of them, or if already negociated, that the defendants might be ordered to pay and retire the same, and deliver them up to the plaintiff to be cancelled; and for further and other relief.

The cause was heard upon the pleadings and evidence before his Honour V. C. *Spragge*.

Mr. *Roaf*, for plaintiff.

Mr. *A. Crooks*, and Mr. *Blake* for the defendants.

Judgment.—SPRAGGE, V. C.—The material facts in this case are shortly these: one *David Crippen* being indebted to the defendants, *Ross, Mitchell, Fisken & McPherson*, carrying on business in Toronto, under the name of two firms, *Ross, Mitchell & Co.*, and *R. D. McPherson & Co.*, executed to *McPherson* on behalf of the firms, in which he and the others were partners, on the 2nd of July, 1855, a mortgage on certain property in the village of Enniskillen, and half an acre of land in the township of Darlington, by way of security for his then indebtedness, and as a continuing security, to the extent of £600. On the 26th of March, 1856, *Crippen* was also indebted to a firm composed of the plaintiff and the defendant *McLeod*, carrying on business at Port Hope, in the sum of £173 5s. 8d., and to a brother of *McLeod's*, carrying on business at Bowmanville, in the sum of £161 4s. 2d., and to secure these amounts, and any future indebtedness to the firm at Port Hope, *McLeod* took from *Crippen* a mortgage for £500 upon the village property mortgaged to *Ross, Mitchell & Co.*, payable in one year from the date of the mortgage. *Ross, Mitchell & Co.* also recovered judgment against *Crippen* for £1003 13s. 2d., and registered the same, at what date is not shewn, but stated in the answer to have been before the registration of the

mortgage to *McLeod*. At this time, and from the formation of the partnership between *Fraser & McLeod* in 1852, *McLeod* was the managing partner of the business, *Fraser*, who resided at Kingston, visiting Port Hope occasionally, and inspecting the books as he saw fit; the business carried on was that of hardware merchants; the purchase of stock, the collection of debts, and the general business of the firm was conducted by *McLeod*.

In the fall of 1856 *McLeod* proposed to *Crippen* to purchase from him the mortgage property; and a purchase for £1600 was the result; *McLeod* says he paid no money, that the consideration consisted of the mortgages against the property, the balance in the books of *McLeod & Co.*, and he *McLeod* assuming the debt of *McPherson & Co.*; that the purchase was by him in his own name, intending to keep the property for himself.

Such was the position of the several parties when the notes were given, which are of the subject of this suit; *McLeod*, with a view to getting in the charges against the property, held by the defendants, the Toronto firms, negotiated with them for a compromise of *Crippen's* indebtedness to them, which appears to have amounted at that time to £1,100. *Crippen* seems to have been looked upon by the Toronto firms as insolvent.

The correspondence is not complete, but several letters are put in, some written by *McLeod*, in the name of his firm, and one in his own name, "*D. McLeod*," some also by *Crippen* himself; one in the name of *Crippen* was written by *McLeod*. *Crippen*, I should say, was used by *McLeod* to get the Toronto firms to accept as small a sum as possible for their debt.

The amount was finally settled at £725. The Toronto firms agreeing to forego what they at first demanded, *Crippen's* own notes for the difference. For the amount agreed upon *McLeod* in the name of his firm proposed

to give the notes of his firm at six, twelve, eighteen, twenty four, and thirty months; the Toronto firms asked an endorser; this was refused by letter of 28th of February, 1857, and the Toronto firms were informed that the plaintiff was a partner in the firm of *McLeod & Co.* Annexed to this letter is a telegram from Kingston to the effect that the plaintiff was good for £1000. The notes agreed upon were inclosed to the Toronto firms by letter dated the 6th of March, 1857, and the same letter directed that the necessary transfers should be "in favor of our Mr. *McLeod*, (*Duncan McLeod.*")

The transfer, the assignment of the mortgage as I understand, appears to have been sent with portions in blank, and a short note is put in, signed "*D. McLeod,*" requesting the blanks to be filled up; and requesting also an assignment of the judgment. The assignment of the judgment is put in and bears date the 4th of April, 1857—the assignment of the mortgage is said to be mislaid. It is probably of the same, or about the same date. All this appears to have passed without the cognizance of the plaintiff. If he heard of the purchase it was as a purchase by *McLeod;* he first learned, as it would seem, of the notes of his firm having been given, about a twelvemonth afterwards, when he was sued upon the one at that time falling due. He insists that he is not liable upon the notes given under these circumstances. The bill has been taken *pro confesso* against defendant, *McLeod;* the other defendants have answered.

It is contended on behalf of the defendants, the Toronto firms, that the transaction, so far as made known to them, was within the scope and objects of the firm of *McLeod & Co.*, and in the course of its trade and business; and that they had no reason to suppose or suspect it to be otherwise; they contend that the managing partner of the firm of *McLeod & Co.*, that

firm being creditors of *Crippen*, but subsequent to themselves, proposed to them to purchase from them their debt and the securties held by them against *Crippen's* estate, in order to better the position of *McLeod & Co.*; and that the assignment being asked to be made to the managing partner, and not to the firm, was not a circumstance to excite suspicion, as it is an ordinary practice in Upper Canada so to take such securities when the partners do not live in the same place.

For the plaintiff, it is contended that not only was the purchase in fact by *McLeod*, for himself, but that the Toronto firms had reason to believe, or at least to suspect that it was so, and that even if this is not shown, there was enough to make it appear as a purchase of *Crippen's* property by *McLeod & Co.*, not merely of their securities, by subsequent incumbrancers; and that in either case they were bound to ascertain whether the plaintiff was an assenting party to the transaction. The plaintiff also puts it as a guaranty by one member of a firm in the name of the firm, to pay the debt of a third person.

Upon a careful perusal of the correspondence I think that the Toronto firms were made aware that *McLeod* was their correspondent, and that the plaintiff, the other member of the firm, lived at Kingston; that *McLeod* represented that his firm contemplated a purchase from *Crippen*, in case they could make an arrangement with themselves and that their object in making such purchase was to better their own position as subsequent creditors. In *McLeod's* letter of the 26th of February, is this passage: "We must be at liberty to do what we choose with the property to secure ourselves;" and in that of the 28th of February is this: "our reason for clearing up the property is, that we may be in a position to sell, if we can in any way get rid of it at a shade over our claim."

McLeod's objecting to *Crippen's* being called upon to-

give notes for the balance of his debt to the Toronto firms, beyond the amount to be paid by *McLeod & Co.*, seems to imply a purchase from *Crippen*, and that as one of the terms; and indeed the answer seems to imply that it was so understood by the Toronto firms. Referring to the negotiations for the purchase of their claims. the answer adds: "there being some arrangement between the said firm of *McLeod & Co.*, and the said *Crippen*, for the purchase of the said property, but the particular nature of this arrangement we were not aware of," and in setting up this as an ordinary mercantile transaction the answer says, "it is common and usual in business transactions throughout for lands to be purchasd, as well as to be taken in security, for the purpose of thereby realizing claims."

I do not think that the Toronto firms suspected that *McLeod* was purchasing from *Crippen* on his own private account; the instruction to make the transfer in the name of one partner, he residing at the seat of the business of the firm, they would look upon probably as in accordance with their own practice; the note written by *McLeod* in his own name is merely to correct a clerical error in the assignment, and to get assignment of the judgment, not professing to bind his firm to anything; I do not think it showed anything more than that *McLeod* was their correspondent in the transaction, and this is not denied. I do not mean here to say that the taking the assignment in the individual name of *McLeod* is according to mercantile usage.

My conclusion from the evidence then is that *McLeod* represented to the Toronto firms that he on behalf of his firm contemplated a purchase from *Crippen*, which could be carried out if he could procure an assignment of their mortgage and judgment upon such terms as would render the purchase an advisable one; that they understood *McLeod's* proposal in that light, believed that they were selling their incumbrances to *McLeod &*

Co., the purchasers from *Crippen*, and in that belief took the notes of the supposed purchasers in payment. According to my view of the case, the representations of *McLeod* are essentially untrue; but the Toronto firms believed in their truth; and the question to be decided is, whether *McLeod* had any implied authority to act for his firm in such a transaction; either from its being within the scope of the trade and business of the partnership, or from his position as managing partner, or from acquiescence in other similar transactions; or whether the plaintiff acquiesced afterwards.

The liability of partners for the acts of their co-partners rests, I apprehend, upon the ground of agency, each being vested with a power enabling him to act at once as principal for himself and as the authorised agent of his co-partner. (*a*) In an elaborate judgment in an American case, *Gansevoort* v. *Williams*, (*b*) it is put upon the ground of fraud between the individual partner dealing in the name of his firm, and the person with whom he deals. Where a partner deals with the partnership effects, or pledges its credit for purposes unconnected with the firm, and this is known to the person dealt with, they are jointly guilty of fraud against the firm, and there may be cases of constructive fraud, but there are cases in which a partner has been held not liable upon dealings entered into by his co-partner in the name of his firm, in which there was neither actual nor constructive fraud on the part of the person dealing with the partner; and which I conceive could be decided upon the ground of agency only. I shall have occasion to refer to these cases presently.

The ground of agency seems intelligible and satisfactory. It is necessarily implied from the nature of the connexion of partners, for without it the object for which they are associated could not be carried out; the

(*a*) Exp. Agace, 2 Cox 312; Story on Partnership, S. 111; Watson on Partnership, 167.

(*b*) 14 Wend. 133.

obtaining the actual assent of each partner to the ordinary dealings of the firm being incompatible with the prompt and effectual prosecution of business. But then this implied authorityof each partner as agent of his co-partners, must, I apprehend, be limited to that which is properly a matter of implication from the nature of the business jointly carried on; just as in any other implied agency it is confined to that which is necessary to the effectual carrying out the purpose for which the agent is appointed, as is well expressed by Mr. Justice *Story:* (*a*) "An implied agency is never construed to extend beyond the purposes for which it is apparently created. The intention of the parties deduced from the nature and circumstances of the particular case constitutes the true ground of every exposition of the extent of the authority; and when that intention cannot be clearly discerned, the agency ceases to be recognised or implied."

The cases upon implied agency are very numerous, and I think partly bear out the doctrine enunciated by Mr. Justice *Story*. The presumed agency from partnership must rest upon the same principle, and I think the cases which have been decided upon contracts entered into between individual partners and third persons will be found to recognise the same limitation of implied authority.

Smith v. *Craven* (*b*) was different from this case in the circumstances, but the language of the court is apposite. I refer particularly to that of *Bayley*, B: "A party is not liable as a partner except he give to his partner express or implied authority to pledge his credit in the transaction out of which the claim arises." *Hawtayne* v. *Bourne*, (*c*) was not a case of partnership, but of agency, for the management of a mine. The agent borrowed money to pay the workman, who had

(*a*) Story on Agency, S. 87. (*b*) 1 C. & J. 500.
(*c*) 7 M. & W. 595.

seized the effects of the company, the owners of the mine; the action was by the lender against one of the proprietors; the learned judge stated to the jury that if it became absolutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so to the extent of that necessity; and he left it to the jury to say whether the pressure on the concern was such as to render the advance of the money a case of such necessity; and the jury found for the plaintiff. A new trial was moved for on the ground of misdirection; on shewing cause against the rule counsel put the case among others of the master of a ship, who has an implied authority to borrow money for the necessary use of the ship, upon the credit of the owner; upon putting other cases by way of illustration, Baron *Parke* observed: "*The law provides for that which is common, not for that which is unusual;* on that principle it is that the master of a ship has authority to charge his owners, because ships are ordinarily exposed to casualties."

The case of the acceptance of a bill of exchange for the firm of the drawer he met with the remark, "that is by the custom of merchants;" and in giving formal judgment the same learned judge, referring to the case of a master of a ship, says: "*The law which generally provides for ordinary events, and not for cases which are of rare occurrence,* considers how likely and frequent are accidents at sea," &c. The court held that the direction to the jury could not be supported, and granted a new trial.

The drawing and accepting bills of exchange is in the ordinary course of business in most mercantile concerns, and one partner has implied authority to draw or to accept, but if the partnership be in some business in which the drawing and accepting bills is not in general necessary, there is no such implied authority. *Dickinson* v. *Valpy*, (*a*) was the case of a mining company, and

(*a*) 10 B. & C. 128.

one of the questions was, whether the partners were liable upon bills accepted by the directors. Upon this point Mr. Justice *Bayley* says: "Now upon that point the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills? or whether it was absolutely necessary for the purpose of carrying on the concern that there should have been such a power?"

There are observations by other judges to a similar effect, Mr. Justice *Parke* putting the case of farmers carrying on business in partnership. The defendant was held not liable.

In *Hedley* v. *Bainbridge*, (*a*) the defendant and one *Spurrier* had been in partnership as attorneys, a sum of money was received by *Spurrier* from a client of the firm to be laid out on mortgage, and he gave the plaintiff a promissory note in the name of the firm, for the amount, and the question was, whether *Spurrier* had authority to bind the firm by the note, and it was held that the other partner was not bound, although as Lord *Denman* said, "no doubt a debt was due from the firm."

I may also refer to the case of *Lloyd* v. *Freshfield* (*b*) as an authority upon the same point.

In *Hasleham* v. *Young*, (*c*) the defendants were attorneys in partnership; one *Dick* was in custody under a *ca. sa.*; one of the defendants, in order to procure *Dick's* discharge, gave an undertaking in the name of the firm for the payment of the debt and costs, and it was held that the other partner was not liable, because the guaranty was not given in the usual course of business.

The case of *Sandilands* v. *Marsh*. (*d*) is much relied

(*a*) 3 Q. B. 316.
(*b*) 2 C. & P. 325.
(*c*) 5 Q. B. 833.
(*d*) 2 B. & Al. 673.

upon the defendants, but I think the judgment went clearly upon this, that although the guaranty which was the subject of the action was not made in the ordinary course of the general business of the partners, yet that it was given in a transaction in which one partner acted professedly for the partnership, and the other was cognizant of it and made no objection. Their general business was that of navy agents and being agent for a Mr. *Howden*; one of them, *Creed*, proposed to him that they should sell out stock of his, and invest it in the purchase of an annuity, the partners guaranteeing its payment. It was left to the jury to find whether the other partner, *Marsh*, was cognizant of the transaction as to the purchase of the annuity, although he might be ignorant of the facts of the guaranty itself, and the jury found in the affirmative. They were thus found to be partners in that transaction, and in that were brokers or factors for *Howden*. Mr. Justice *Holroyd* puts it thus: "It was properly left to the jury to say whether *Marsh* was cognizant of the contract to lay out this money in the purchase of an annuity, and then whatever engagement *Creed* might make with reference to it would bind *Marsh*; for by his knowledge of it being found by the jury, it becomes for this purpose part of the partnership business, as much as any transaction in the ordinary course of dealing;" and Mr. Justice *Best*, says: "In this case it appears that *Marsh & Creed* acted not merely as navy agents, but also in the procuring of this annuity, and that they have received an advantage from the transaction," and the judgments of the other members of the court are in accordance with the same view. They decided in effect that, granting it was no part of the business of navy agents to give such guaranty, still it was part of the business of factors to do so, and that they were partners in that transaction of factorage.

It must be apparent, I think, from the authorities to which I have referred, and to which *Sandilands* v. *Marsh* seems no exception, that there are dealings which

it would be for the interest of the partners should be entered into, but which one partner has no implied authority to enter, into, *e.g.*, for farmers or for attorneys, in partnership, to give promissory notes, or accept bills of exchange, for the latter to give undertakings for payment of the debt of a client, and these things are occasionally done, and are received by the person dealt with in perfect good faith; and sometimes done in fraud of the other partners, but inasmuch as they are not *incident* to the business carried on, they do not bind the partnership. The authority of a partner to bind his co-partner in the *ordinary* business of the firm, is not unfrequently abused, but it is a hardship incident to the connexion: to make partners liable upon the unauthorised dealings of one partner, out of the ordinary scope of business, and when the assent of each partner might be obtained without at all impeding the ordinary transaction of business, would be imposing an unnecessary hardship, and would be, I think, not consonant with reason; the implied authority flows from the necessity of the case, the necessity only exists in the conduct of the ordinary business, beyond that there is no authority to be implied, and he who trusts the one partner trusts him, not from necessity or because he must be trusted in the ordinary business of the firm, but because he has faith in the integrity of the individual: and such I think is the position of the defendants, the Toronto firms, in this case.

The remark of Baron *Parke*, in *Hawtagne* v. *Bourne*, "The law provides for that which is common, not for that which is unusual, the law provides for ordinary events, and not for cases which are of rare occurrence," seems apposite to cases of this nature. His remarks, applied as they were, to a case of alleged implied agency, could only mean that the law presumed authority in the common ordinary course of busines only, not in matters of unusual or rare occurrence. Now it may in some cases be judicious in a partnership to purchase the land

of a debtor, and pay off incumbrances upon it, as was supposed to be the case in this instance by the Toronto firms; but it would be straining the meaning of words greatly to say that such a purchase and the giving of notes running over thirty months, to pay off incumbrances, was within the ordinary scope and objects of the business of hardware merchants. Such a transaction might be a wise and judicious one, but it is certainly one of unusual or rare occurrence, that is, compared with the ordinary business for which the partnership was constituted; and in this particular case they knew that the plaintiff was the partner, and that he resided at Kingston. If they had communicated with him they would have learned that the firm was making no such purchase, and that *McLeod* had no authority to give, as he proposed, the notes of the firm to pay off the incumbrance. I think it was negligence on their part not to make the enquiry; or to require the assent of the plaintiff to the dealing proposed by *McLeod*.

I think the circumstance of *McLeod* being the managing partner should make no difference. His partner living at Kingston, within a few hours' communication personally or by letter, and a few minutes by telegraph, there could be no necessity, for the due conduct of business, that one should act in such a transaction as this without consulting the other; and there was no room, I conceive, to presume a general authority to act in such cases. I have come to this conclusion, bearing in mind that transactions of this nature are of much more frequent occurrence in this country than in England.

The circumstance of *McLeod* asking that the transfer should be in his own name is entitled to some weight. It offered a fair opportunity to the Toronto firms to ask, as a matter of business precaution, for the assent of the plaintiff, for although I incline to think they did not suspect any thing wrong, still there was not the same reason as existed for their own practice in that respect,

the residence abroad of one of the partners. I think, indeed, that in all dealings with a member of a firm, out of the ordinary scope of the business of the firm, the parties dealing with the individual partner should require the express assent of all the partners; and that if he neglect to do so, he does it at his own risk.

With regard to acquiescence by the plaintiff in a mode of dealing by *McLeod*, such as was supposed here, it does not appear that there were during the partnership more than two, or perhaps three instances of the purchase of land, if indeed of the purchase of land at all, and in them the mode of taking the title did not appear upon the books. *McLeod* says they were taken in his own name, and that he informed plaintiff of it many times, but he is unable to specify any occasion on which he did so; he speaks then only from general recollection. I do not think his conduct in this transaction, or his evidence upon his examination, such as to warrant faith in that assertion.

There was bad faith towards his own partner throughout this transaction, and in the only other matter which is brought under my notice, the *Crippen* mortgage, there was bad faith also. It was taken in his own name; taken to cover *Crippen's* debt to his brother as well as that to the firm; it was assigned to *Meredith*, with a covenant that the whole amount was due—the whole transaction, if not concealed, at least was not honestly explained to his partner; and his account of it upon his examination is uncandid: on his explaining under what circumstances the mortgage was taken, he adds: "I informed Mr. *Fraser* of the transaction." Afterwards he says he did not mention that it was taken to secure the debt of his brother; afterwards, "I did not give him the particulars of this tran[illegible]ion." And again: "I do not know that I informed him that I had taken the mortgage in my individual name."

I much doubt whether the plaintiff was ever cognizant of purchases of land by the firm, still less of conveyances to *McLeod* in his own name; and the instances given, even as represented by *McLeod* were of a different character from the one in question; he says: "I frequently purchased property to secure the debts of the firm, taking the conveyance in my own name;" he then gives three names, two of whom were debtors of the firm; the third though not himself a debtor, "gave his land for *McFaul's* debt;" so *McLeod* states it. I take it, that these lands were taken in satisfaction of debts, without, as far as appears, any payments for them by the firm; and it is not asserted or suggested that the notes of the firm were given upon the transactions.

I think, further, that there was no acquiescence in this particular transaction; the plaintiff denied his liability upon the notes. It is true that while blaming his partner for what he had done, he was willing to assist him in his difficulty. He was still his partner, and for his own sake, as well, perhaps, as from a disposition to deal leniently with one with whom he had been in business connexion for several years, he would have been glad that legal proceedings should be avoided, but I see no adoption of this dealing as a partnership transaction, or assuming by the plaintiff of liability in respect thereof.

I think the plaintiff is entitled to the relief he asks —for an injunction as prayed, and the cancellation of any notes in the hands of the defendants, the Toronto firms; and an order against all the defendants to pay any notes that may be in the hands of innocent holders for value. The decree to be with costs.

The Great Western Railway Company v. The Galt and Guelph Railway Company.

Bonds—Mortgages—Breach of covenants on bond.

Where bonds were given for the payment of a certain sum of money and interest, in twenty years, and also mortgages of lands, redeemable in ten years, as security for the payment of the principal money of the bonds; *Held*, that a breach of the covenant, to pay interest, on the bonds did not accelerate the right of the mortgagees to proceed upon the mortgages; but they were entitled to a decree for sale of other bonds given as collateral security.

The bill in this cause which was filed under the circumstances set forth in the judgment, was taken *pro confesso*, and the cause was heard before his Honour V. C. *Esten*.

Mr. *Irving*, for the plaintiffs, submitted that under the facts appearing in the bill, the plaintiffs were entitled to the relief prayed; but after taking time to look into the authorities on the subject,

Esten, V. C.—I see no reason to doubt the validity of the agreement of the 2nd of October, 1855, or of the bonds, or of the mortgages, except, perhaps, that the agreement to purchase at the end of ten years may be *ultra vires*.

The agreement is, that the defendants will pay to the plaintiffs £20,000 provincial debentures; that the plaintiffs shall acquire the lands, and construct the road, and exercise the powers of the defendants for that purpose; that the defendants shall give the plaintiffs their bonds for the amount so expended to form a primary charge on the railway; that the plaintiffs shall work the road for ten years, and until repaid; for which purpose defendants are to pass all necessary by-laws, &c.; that the earnings while the road shall be so worked shall secure the interest on the bonds; that at the end of ten years defendants may resume, on paying what is due, unless plaintiffs shall desire to purchase.

The plaintiffs acquired the lands and built the road, and the defendants gave them their bonds under their corporate seal, for the amount so expended, payable in twenty years, with interest, and executed three mortgages of their lands and railway plant, to secure the amount, redeemable in ten years. The defendants also gave the plaintiffs £4,300 municipal bonds of the city of Hamilton and town of Preston, by way of collateral security, but afterwards exchanged £2,500 of them for their own bonds.

I do not see how there can be any sale or foreclosure under the mortgages, as there has been no breach of the conditions, which are, to pay all that may be due on the 2nd of October, 1865. The covenants in the mortgages, indeed, are to pay the moneys due under the agreement, that is, the bonds, but this will not accelerate the remedy under the mortgages. The plaintiffs may sue on these debentures, or the covenants, but cannot have either a sale or foreclosure until there has been a breach of the conditions. Then what is their remedy on their bonds? As to the bonds of the defendants, the plaintiffs can sue upon them, or sell them, but a court of equity can give no remedy upon them, by way of ordering a sale of them.

Then with regard to the £1,800 bonds of Hamilton and Preston, they are pledged, and are meant, as collateral security for the debt, which is the amount secured by the defendants' own bonds, and default having been made in payment of the interest, the plaintiffs are entitled to the usual decree for sale.

KERR v. HILLMAN.

Injunction—Specific performance—Fraudulent conveyance.

In a suit for the specific performance of an agreement for the sale of lands, or, to set aside a conveyance for fraud, the plaintiff is not of right entitled to an injunction to restrain alienation, unless it is alleged by the bill, and proved that the holder of the land threatens, and intends to convey the lands.

This was a motion for an injunction to restrain the defendant from alienating or incumbering in any way certain lands alleged to have been contracted to be sold by the defendant to the plaintiff.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *McLennan*, contra.

Judgment—SPRAGGE, V. C.—The bill is by the judgment creditor of the defendant *William Hillman*, to set aside a conveyance of certain land to the defendant *John Hillman*, as fraudulent and void under the statute of Elizabeth.

The bill alleges that *William Hillman* was in insolvent circumstances, and that the conveyance was voluntary and without consideration, and made for the purpose of hindering and defrauding creditors. The bill is taken *pro confesso* against both defendants, and an injunction is now asked to restrain *John Hillman* from alienating the land.

This is opposed, on the ground that the bill contains no allegation of any intention or threat on the part of *John Hillman* to alienate the land. It is likened to a bill for specific performance by a purchaser, the bill in such case seeking to charge the defendant as a trustee of the land for the plaintiff; and it is said that a vendor will not be restrained from alienation in the absence of allegation and proof that he threatens and intends to alienate.

Pechell v. *Fowler*, (*a*) is one of the cases referred to. Lord *Cottenham* said of t' is case in the *Attorney-General* v. The *Mayor of Liverpool*, (*b*) that he believed it had been overruled, as often as it had been considered, and added, that it had become the invariable practice, when any acts involving breach of trust were intended to be done, though not in its consequences irremediable, to apply to the court to prevent them.

Eckliff v. *Baldwin* (*c*) was a bill by vendor of real estate for specific performance. It is very shortly reported, and does not shew whether there was any threat or intention to alienate; an injunction restraining alienation was granted.

In *Curtis* v. *The Marquis of Buckingham*, (*d*) it appeared, that the estate to be conveyed to the plaintiff had actually been advertised to be sold by auction, and a similar injunction was granted by Lord *Eldon*.

In *Spiller* v. *Spiller*, (*e*) also before Lord *Eldon*, he granted an injunction under the circumstances, but added: "I wish it to be understood as my opinion that in general on a bill for the specific performance of an agreement to sell, the plaintiff is not entitled to restrain the owner from dealing with his property; a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed."

Turner v. *Wight*, (*f*) before Lord *Langdale*, was a similar bill; and it alleged that the defendant had since the contract let the estate; and that he threatened to sell the estate to another purchaser; and an injunction to restrain letting or selling was asked for. Mr. *Turner*, contra, contended that there was no valid contract, and

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(*a*) 2 Anst. 549.
(*b*) 1 M. & C. 210.
(*c*) 16 Ves. 267.
(*d*) 3 V. & B. 168
(*e*) 3 Swan. 556.
(*f*) 4 Beav. 40.

that the injunction asked would be nugatory. The motion was refused, his lordship observing that he could not then decide on the validity of the contract; and as to the injunction, that a purchaser *pendente lite* would take subject to the rights of the plaintiff. It does not appear whether the earlier cases to which I have referred were cited in *Turner* v. *Wight*, but two of them, *Echliff* v. *Baldwin*, and *Curtis* v. *The Marquis of Buckingham*, were referred to by Lord *Cottenham*, in his judgment in the *Attorney-General* v. The *Mayor of Liverpool*, not indeed to shew under what particular circumstances the court would intervene, but generally that the court would interfere in such cases.

If *Turner* v. *Wight* were to be taken as settling the law upon this point, it would exclude the interfering by injunction in any case upon bill by a purchaser for specific performance, for in that case the vendor had let the premises, and threatened to sell them; and the judgment went upon this, that the purchaser needed no injunction, being sufficiently protected by his *lis pendens*. But the observations of Lord *Eldon* as to refusing an injunction upon that ground, in *Hood* v. *Aston*, (*a*) directly impeach the ground taken by Lord *Langdale*.

The bill was to restrain the negotiation of a bill of exchange improperly accepted by the plaintiff's partner in the name of the partnership, and Lord *Eldon* said: "It is true that even if the court were not to act, they would still have the security of *lis pendens*. But it is quite new doctrine to me, that a security like that, which is far from being the best that a prudent man could wish to have, is to deprive the suitor of the more effectual protection of an injunction; or that the court, because its acts on the doctrine of *lis pendens*, will not prevent (if possible) the necessity of proceeding on such a principle."

Still there is a wide difference between such a case

(*a*) 1 Russ. 416.

and *lis pendens* for specific performance of a contract for the sale of land. In the case of the note the doctrine would be applied as a matter of necessity, and it would be extremely improbable that the person affected by it would have actual notice; but in the other case the *lis pendens* must be registered, where every prudent purchaser searches for title, and if he buys, he buys with his eyes open.

Upon the English cases I think the weight of authority is in favour of granting an injunction where it appears that the vendor threatens or intends to alienate; and to refuse it in the absence of such threat or intention being shewn. The court will only interfere, I apprehend, where it is necessary for the protection of the purchaser. It will not needlessly restrain the owner from dealing with his property; the agreement sought to be enforced may not be established; or it may not be an agreement proper to be enforced; and the interference would operate to control the rights of ownership; as was intimated by Lord *Eldon* in *Spiller* v. *Spiller*.

With our law of registration of instruments affecting lands, and of registration of *lis pendens* affecting lands, in the same place, and in the same books, I doubt much the propriety of interfering, except perhaps in a very plain case. On the one hand is the danger pointed out by Lord *Eldon*; and against this is to be set the possibility that some person may be found to purchase in the face of the registration of *lis pendens*, and that in a case where the vendor had no right to sell. In the face of *lis pendens* registered, it is far more likely that parties would be deterred from purchasing where the owner could properly sell, than that they would purchase, where the owner could not properly sell.

In this case, however, there is nothing to weigh in favour of the defendants; they have admitted that the conveyance impeached by the bill was voluntary, with-

out consideration, and made for the purpose of hindering and defrauding creditors; and it may be that the man who has taken this conveyance, may convey to another whom it would be necessary to make a party; and there is no danger of doing injustice in enjoining him from doing so. I think therefore that an injunction may properly go. But I do not at all accede to the plaintiffs' proposition that it is the ordinary right of a plaintiff in a suit such as this, or on a bill by a purchaser of land, for specific performance, to have an injunction restraining alienation.

GALBRAITH V. MORRISON.

Assignment of mortgage—Payments by mortgagor—Notice.

Where two persons were mortgagees, and one of them assigned his interest to the other; the mortgagor was allowed credit as against the assignee, for goods delivered to the assignor, until notice of the assignment.

This was an appeal from the finding of the master at Hamilton.

The plaintiff and one *Waddell* were co-mortgagees of the defendant *Morrison*. *Waddell* had an account with *Morrison*, who upon the inquiry before the master applied to be allowed credit for the amount of his account against *Waddell*, subsequent to the assignment.

The master allowed the whole of the defendant's account. There were two mortgages in question between the same parties, one assigned in November, 1857, by deed, registered; the other assigned at the same time by deed, not registered.

Mr. *Spohn*, for plaintiff.

Mr. *Freeland*, for defendant.

Judgment.—ESTEN, V.C.—It appears to me that I must overrule these exceptions on the short point that *Galbraith quoad* one moiety of this mortgage claims in right of *Waddell*, and can stand in no better position than he would if he were present, and it is quite clear that if *Waddell*, instead of *Galbraith*, were seeking relief in respect of his moiety of this mortgage, he would be compelled to allow all the payments that have been made, and *Galbraith* to the extent of one moiety of the mortgage, the moiety which he claims in right of *Waddell*, is equally bound to allow them.

The first account was rendered in April, 1857, and the first mortgage was not assigned until November, in that year, so that the first account is clearly applicable to that mortgage. The second mortgage was not transferred until April, 1859, and the second account of goods was delivered in the course of 1858 and 1859. I think that *Galbraith* would be bound to allow all that *Morrison* delivered before he had notice of the assignment of the second mortgage. This point is involved in some obscurity, but in order to avoid further expense, and perhaps fruitless enquiry, I think all the goods delivered after the 30th of June had better be disallowed. I give no costs, as, upon the grounds discussed before the master, I should have thought the report wrong.

McDONALD v. GARRETT.

Infant's estate, sale of—Evidence—Waiver of title.

Where a contract for the sale of an infant's estate had been approved of by the court, it was holden unnecessary for the purpose of obtaining a decree for the specific performance, either to allege or prove that the sale was a proper one under 12 Victoria, ch. 72.

An objection to evidence for insufficiency must be taken at the hearing and cannot be taken on motion to vary the minutes.

Writing a letter apologising for non-payment of purchase money; accepting a release of dower from a person whose title is identical; or, giving a mortgage to secure the payment of the purchase money, are circumstances indicating that the title of the vendor is approved of.

The facts of this case appear in the report of the cause on the hearing, ante volume VII., page 606.

The present motion was made on behalf of the plaintiff to vary the minutes of decree drawn up upon the judgment then pronounced.*

Mr. *McDonald* in support of the application.

Mr. *Blake*, contra.

Judgment.—SPRAGGE, V.C.—I do not think there is any ground for varying the minutes. The principal grounds taken are that the bill makes no case to bring the matter of the sale of the infant's estate within the statute 12 Victoria, and that no evidence has been given in the cause shewing that the sale was a proper one under the statute.

It is true that the bill makes no such case but it sets out a contract made with the owner of a moiety of the state, and with the guardian of infant owners of the other moiety, for the purchase of the whole by the plaintiff; and one of the provisions of the contract is, that seventeen months were given for the perfecting of the title to the purchaser, "by reason of the infancy of the said infants." This must be understood as meaning, by such proceedings in this court, as would enable the infants to convey.

The answers of the infants, and of *Alexander Garrett*, state, that proceedings were taken in this court under 12 Victoria, and that the contract set out in the plaintiff's bill with certain modifications, which were assented to by the plaintiff, was approved and confirmed by this court, and these allegations are supported by the affidavit of Mr *Blake*, which was received as evidence. It was not

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* They were to the following effect:
Declare that it is for the benefit of the said infant defendants that the agreement in the proceeding mentioned should be specifically performed and carried into execution: Decree accordingly.

Order that the said infant defendants do forthwith execute to the said plaintiff a conveyance of their interest in the lands and premises, in the pleadings mentioned, from time to time as and when the same become due and payable into this court to the credit of this cause, plaintiff to pay costs, &c.

necessary, I apprehend, for either the plaintiff or the defendant to state, or to show by evidence, that the sale was a proper one under the statute, for they have the judgment of the court that it was a proper case for such sale. It is said that the proceedings in the infancy matter were not in evidence in this suit. The best evidence of those proceedings certainly was not given; but the evidence was not objected to on that ground at the hearing, and I think it cannot be taken on motion to vary minutes. Besides the best evidence was easily within reach of this court, being its own proceedings.

The plaintiff claims that if there is a decree for specific performance, one of the alternatives prayed by the bill and a relief prayed by the answers, he is entitled to a reference as to title; he says he has not waived such investigation, except as to the title of *Wm. B. Garrett*, from whom he took a conveyance. I think that waiver is a question of intention, as I said in the *Commercial Bank* v. *McConnell*, (*a*) where I considered the question at some length. The bill alleges that *Wm. B. Garrett*, and *Robert Garrett*, the father of the infants, were in August, 1854, seised in fee, or otherwise well entitled to the lands in question as tenants in common; and that *Robert Garrett* died on the 2nd of that month. Perhaps it would be hardly right to bind him by this allegation, unnecessarily introduced by the pleader into his bill; and I think his taking a conveyance from *William B. Garrett* is no waiver, inasmuch as the tenants in common may have derived title from different sources.

But there are other circumstances which I think manifest an intention to accept the title of the infants; one is, the giving a mortgage to secure the purchase money which would be payable to them; the other is his accepting a conveyance from the mother of the infants of her

(*a*) Ante vol. VII. p. 326.

dower in the moiety, as descended to the infants. Writing a letter apologising for non-payment of purchase money, although making no reference to the title, was considered by Sir *Thomas Plumer*, in the *Margravine of Anspach* v. *Noel*, as indicating an intention to accept the title, "for," he says, "if the title was objectionable he could not excuse himself for delaying the payment of the purchase money; for till the title was completed the defendant was not bound to pay the purchase money;" and he added, "that letter amounts to an admission that the title was approved." The giving of the mortgage in this case was a much more unequivocal act, than the writing of such a letter, evidencing an intention to accept the title; and the taking a conveyance of dower from the widow, was also evidence of approval of title, her title and the infants being identical. The terms of the agreement moreover, as set out in the bill, seem to imply that the title was approved; the seventeen months were given in order to the procuring such further conveyance or assurance as might be necessary to complete the title to the plaintiff, by reason of the infancy of the infants; as if such further conveyance or assurance was all that remained to be done; and as if, but for such infancy, all would have been completed at the time; all these circumstances, the terms of the agreement, the mortgage and the conveyance of dower, concur in evidencing an approval of the title.

I think the motion to vary the minutes should be refused, with costs.

MURRAY v. MURRAY.

Gifts.

Where a gift is impeached it is incumbent upon the donee to establish that the donor thoroughly understood the nature and effect of it; and if any doubt exists on this head the gift cannot be supported, and it is not incumbent upon the parties impugning the transaction to shew that the donor did not thoroughly understand the nature and effect of his own act.

The facts of the case are stated in the judgment of

his Honour V. C. *Esten*, before whom the cause had been heard.

Mr. *Strong* and Mr. *Miller* for plaintiffs.

Mr. *Turner* for defendant.

Judgment.—ESTEN, V. C.—The facts of the case are, the *Robert Murray* had several children; some, amongst whom was the defendant, by his first wife; the others, amongst whom were the plaintiffs, by his second wife, who is still alive, but *Robert Murray* is dead. In March, 1837, he made a deed of the half lot in question, being all his real estate, and of all his personal estate, to the defendant absolutely, reserving a life interest to himself, and the defendant covenanting to pay £50 to his brother *Robert Murray*, which was money lent by him to his father, twenty years before, to pay on this very land. The stipulation about the £50 was the voluntary act of the old man, and was unknown to *Robert Murray* the son. Old *Murray* had resided on the land in question a great number of years: the plaintiffs had resided with him, and cultivated the farm, and contributed greatly to the improvements made upon it, and I think an understanding at one time existed in the family that they were to have it after their father's death. For three or four years before his death old *Robert Murray* was not on very good terms with his family. The defendant removed to the adjoining lot in 1856, and thenceforward paid great attention to his father. In his last illnes old *Robert Murray* caused himself to be removed to the defendant's house, where, on one occasion, his wife visited him, and the defendant caused her to withdraw. His death happened in the defendant's house. At one time he intended to make a will of the land in favour of the plaintiffs, having in a fit of illness summoned a person to prepare his will, and stated to him what his intentions were, although becoming better, he deferred the execution of his purpose. At another time, he is said by a

witness to have expressed an intention to divide the property among his children; and by others to have intimated that he intended it for the defendant so long ago as 1852, and 1855. I think old *Robert Murray* had the full use of his faculties to within a day or two of his death, and exhibited no signs of imbecility. I think he knew the difference between a deed and a will. I do not think that the evidence shews that any undue influence was exercised over him by *David*. I think the utmost that can be considered proved is, that *David* having won his good will while he was not on the best terms with the rest of his family, procured the disposition in question to be made in his favour under these circumstances.

But there is no evidence of coercion or fraud. The disposition in question was the free exercise of his will, although induced possibly by suggestion, solicitation, or even urgency, or importunity, none of which would be sufficient to invalidate it. It is argued, however, that old *Robert Murray* did not thoroughly understand that he was making a deed, and not a will, when he executed the instrument in question. It is said that he and his son repaired to Messrs. *Ball & Carroll's* office apparently with the intention of effectuating the proposed gift by means of a will; that a deed was unexpectedly proposed after the arrival of the interpreter in a conversation between Mr. *Carroll* and *David*, which probably the old man did not thoroughly comprehend; that the task of explanation was committed to the interpreter, who may have performed this duty to the best of his ability and judgment, but that he cannot undertake to say that he "told the old man that it had been determined to substitute a deed for a will," and that it is not clear that the old man ever consented to such substitution; that *Sutherland* merely says that he told him it could not be changed, and that he had better not execute it if he thought he should change his mind, although he adds,

that he thought he understood that he was irrevocably conveying the property to *David*, reserving a life interest to himself.

Whatever force this view may have, I do not think the plaintiffs are at liberty to insist upon it. The bill presents the single case of imbecility and undue influence, which are not established; and although it may be inferred from what is stated, that the disposition which is impeached, was a gift, and that the old man was not fully aware of the nature and effect of what he was doing when he executed the deed, yet the case is not presented in that way; nor do I feel warranted in permitting an amendment of the bill for the purpose of enabling the plaintiffs to present that case, lest I should exclude the defendant from some defence or evidence of which he might otherwise avail himself. I must therefore dismiss the bill with costs.

If, however, this disposition was substantially a gift, and if any doubt exists whether the old man thoroughly understood that he was making a deed, and not a will, when he executed this deed, I apprehend it could not be supported. The rule established by the cases, I apprehend, is, that where a gift is impeached it is incumbent on the donee to establish that the donor thoroughly understood the nature and effect of his own act. It is not probable, perhaps, that any further light can be thrown on this transaction. It would not be right for me to express any decided opinion at present, but I think it right to dismiss the bill without prejudice to any other suit that the plaintiffs may be advised to institute, and to recommend the parties strongly to end this protracted and ruinous litigation by some equitable compromise. I may add that the suit does not appear to be properly constituted in the absence of the other co-heirs, supposing at all events the deed to be void at law; and that the deed itself has not been produced on this occasion. In my view of the case, however, I presume that nothing

turns upon its peculiar form or effect. I may also observe that I have been unable to procure the answer of old *Robert Murray* to the first bill, to which Mr. *Turner* refers. If, however, as he states, it merely represents the deed to be the voluntary act of *Robert Murray*, I should not think it material.

McDONALD V. WEEKS.

Fixtures.

The intention, object and purpose, for which articles for the purposes of trade, or manufacture, are put up by the owner of the inheritance, are the true criterion by which to determine whether such articles become realty or not, not the mere fastening to the soil.

If the true owner of goods or chattels so conduct himself as to enable another, who has the possession, but not the property, of such goods or chattels,to hold himself out to the world as the real owner, the true owner is estopped from denying the title of an innocent purchaser for value. The possession of property attached to the realty, which thereby becomes realty, is a sufficient indication of ownership to estop the real owner as against an innocent purchaser for value.

Statement.—This was a bill filed by the plaintiffs, mortgagees of one *Westman*, to restrain defendants, or some of them, from taking in execution, or otherwise, certain machinery in and about a mill situated upon the estate embraced in the plaintiff's mortgage, and claimed by them as fixtures passing with the realty. One of the defendants claimed a portion of the machinery under an agreement for the sale thereof to *Westman*, whereby it was agreed that the vendor should not part with the ownership of the property agreed to be sold, until the purchase money was fully paid, and that he should have the right to enter into *Westman's* premises, and take away the same property, and to charge for the use thereof, in default of payment.

The case came on to be heard before his Honour V. *C. Spragge.*

Mr. *A. Crooks*, for plaintiffs.

Mr. *Barrett*, Mr. *McMichael*, and Mr. *Fitzgerald*, for defendants.

The authorities mainly relied on, appear in the judgment.

Judgment.—SPRAGGE, V. C.—The plaintiffs are mortgagees in fee of 50 acres of land in the township of King, described in their mortgage as the south-east quarter of lot 21, in the 5th concession, "and also all and singular the steam mill and the machinery and appurtenances thereof, whether the same be in the nature of fixtures, appertaining to the reality; or whether the same be in the nature of chattels, and all other the houses, outhouses," &c. The mortgage was for the benefit of creditors, the plaintiffs themselves being creditors. The granting parties are described as lumber merchants; and there is a provision for an advance of £150 "for the purpose of enabling them, or one of them, to carry on the said lumber business to more advantage."

The defendants are execution creditors under whose writs of *fieri facias* against goods, certain machines in the steam mill mortgaged, have been seized by the sheriff, and the principal question is, whether the machines seized are fixtures passing with the realty, or mere chattels. The instrument has not been registered under the chattel mortgage act, but has been registered as a conveyance of real property.

The articles in question are, a planing machine, a tenoning machine, a moulding machine, a power morticing machine, and a foot morticing machine, and the manner of their being placed or affixed in the steam mill is thus described in the evidence. The planing machine was screwed into the floor by screws at the foot, and driven by a belt connected with the main line shaft.

The tenoning machine stood on the floor, with guards about it, consisting of strips of wood nailed to the floor to keep it from slipping, the machine itself not being fastened to the floor. It was driven by a belt from a

counter shaft, which was driven by a belt from the main shaft.

The moulding machine was braced from above by timber braces resting on the top of the machine, and driven tight into it; these braces, as I understood the evidence, being joined, how is not explained, to the beams above, but not fastened. When driven so as to be perpendicular, they kept the machine firmly on the floor, but the machine was not fastened to the floor in any way; it was driven from the counter shaft.

The power morticing machine rested on the floor, and was fastened by a screw bolt and nut which passed through a small timber above. The machine was driven from the counter shaft.

The foot morticing machine was fastened to the floor by screws at the bottom, and tied to a "spring" above by a leathern string.

It is in evidence that the machines in question could have been removed without injury to the building; that such machines are, or may be, put in after the building is put up, and may be removed and replaced by others.

There were in the building a boiler and steam engine, shafts and belting, several saws, and three lathes.

There are several authorities upon the point in question, and they are somewhat conflicting; but it is clear, I think, that this case must rest upon the old rule of law, quite apart from the question of trade fixtures as between landlord and tenant; upon this point I will only refer to the case of *Fisher* v. *Dixon*, (*a*) in the House of Lords, and the very late case of *Walmsley* v. *Milne*, (*b*) The language of Lord *Cottenham* in *Fisher* v. *Dixon* is apposite to this case. "The individual who erected

(*a*) 12 Cl. & Fin. 312.

(*b*) 6 Jur. N. S. 125.

the machinery was the owner of the land, and of the personal property which he erected, and employed in carrying on the works; he might have done what he liked with it—he might have disposed of the land—he might have disposed of the machinery—he might have separated it again. It was therefore not at all necessary in order to encourage him to erect these new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favour of trade, as applicable here; the whole being entirely under the control of the person who erected this machinery."

This is of course apart from the question raised by defendant *Westman* as to the interest which he claims to have retained in the machines in question.

In some of the cases cited, the machinery was put up for the more beneficial enjoyment of the land itself; it was so in *Fisher* v. *Dixon*, where the testator was a coal and iron mine owner; and in *Mather* v. *Fraser*, (*a*) where the machinery was over a copper mine; but in the former of these two cases Lord *Brougham* repudiated any distinction between such a case and the ordinary case of the owner of land erecting machinery upon it, instancing as examples of the latter, the great London breweries. "Can any man say," he asks, "that one of the great brewhouses would belong to the executor because it is created for the purpose of manufacture, and wholly unconnected with the land." Sir. *W. Page Wood*, in *Mather* v. *Fraser*, expresses his entire assent to Lord *Brougham's* view. In *Walmsley* v. *Milne*, and in other cases to which I shall have occasion to refer, the machinery was not for the purpose of working the soil upon which it was erected.

It was urged in this case in argument that the fifty acres mortgaged were covered, or partially covered, with

(*a*) 2 K. & J. 536.

pine lumber, and that the mill was placed upon it for the purpose of manufacturing such timber into lumber, and manufactured articles; but I find no evidence to that effect, but as I think it not a necessary element it is not material.

The previous authorities were reviewed at considerable length in *Mather* v. *Fraser*, and the result was, in the judgment of the very able judge by whom the cause was disposed of, "that every thing connected with the working of the mill," (a copper rolling mill, and attached to the soil,) passed by the mere conveyance of the land; and that with the exception of the dictum of Mr. Baron *Parke*, in *Hellawell* v. *Eastwood*, there is not a single authority in the way of that conclusion." The dictum of Mr. Baron *Parke* was: "The machines would have passed to the executor: per Lord *Lyndhurst*, C.B., in *Trappes* v. *Harter*. (*a*) They would not have passed by conveyance or demise of the mill. They never ceased to have the character of moveable chattels, and were therefore liable to the defendant's distress." The question in that case was between landlord and tenant: the landlord distrained upon trade fixtures which, as between him and his tenant, the tenant was entitled to remove, and the distress was restrained. The dictum of Baron *Parke* was obviously unnecessary for the decision of the case, for even if the machinery would have gone to the heir, and would have passed by demise or conveyance of the mill, if put in by the owner, still if put in by the tenant they would be liable to distress for rent, because as between him and his landlord they were chattels. "According to the old rule of law," as expounded by Sir *W. Page Wood*, "if that which would otherwise have been a chattel had been affixed to the soil, whether by nail, screw, or otherwise, it passed along with the soil to which it had been so fixed. In the relation of landlord and tenant, but in that relation alone, the rule of law was relaxed for the encouragement of trade."

(*a*) 2 Cr. & M. 178.

The point has been a good deal discussed in two cases decided in the Court of Queen's Bench of Upper Canada, *Carscallen* v. *Moodie*, (*a*) and *Gooderham* v. *Denholm*. In the former, a building originally a storehouse was converted into a steam saw mill, and then again into a sash and blind factory. The question arose, as in this case, between an assignee for the benefit of creditors of the owner of the property, and certain execution creditors; and the articles in question were, some of them, similar in character to those in question here, and affixed to the building in much the same way. The court certainly inclined to the opinion that they were chattels, and gave judgment for the defendant; but in a large measure upon the ground that in the assignment to the plaintiff they were treated by both parties as chattels; for in the assignment the grantor, after conveying the land, conveyed and assigned also "all the goods and chattels, stock in trade, plank road stock, and steamboat stock,' set forth in a schedule attached to the deed; and in this schedule the machines in question were set down as so many chattels, and thus classed with the personalty in the deed of assignment itself.

The learned Chief Justice also laid great stress upon the circumstance of the changes in the character and purposes of the building. His remarks upon that point are material: "If," he says, "the building had been put up for the accommodation of any one of the various branches of business that were afterwards carried on in it; and the engines and boilers, and the machinery adapted to that business had all formed parts of one whole, constituting a manufactory of some one kind, it would have been, and is strongly my conviction, that the sheriff coming with an execution against the goods of the owner of the building, could not have taken away the shingle-machine, or carding-machine, or circular saw, or whatever it was, with a view to which the engine and

(*a*) 15 Q. B. U. C. 304.

boiler had been put up in the building, and the whole thing made such as it was; because these, I think all, even the minutest part of the machinery, would have partaken of the freehold character of that with which it was connected, and of which it formed a part; and I could give no good reason why in such a case it should be lawful to seize a spindle or a shaft, as a chattel merely, because it could be detached without injury to the building, any more than it would be lawful to take away a mill-stone or a saw from a building in which it was in use as part of a grist mill or saw mill." Now it is not shewn in this case that the original destination of the building was not precisely that for which it was used, at the time of the seizure by the sheriff; the only passage in the evidence upon the point is in that of *William Anderson*, who says, "I believe this building was first put up for a saw-mill," without giving his grounds of belief, or explaining whether he means that its original purpose had been changed or added to. We are not to assume that it has been; the number of saws in the building, and the description of the parties in the deed of assignment as lumber merchants, would indicate the contrary. The description of machinery seized would seem to shew that something more was done than the simple manufacture of lumber, some of it at least was prepared by being planed, morticed, tenoned, and moulded, whether put together in any manufactured article does not appear, but whether so or not, or whether the whole of the lumber sawn was so prepared or manufactured, or only part of it, and part sold in boards and scantling, the remarks of his lordship the Chief Justice equally apply; the whole was one connected business, and there is no evidence that any alteration was ever made in it from the first.

This latter point noticed by his lordship is material in considering the weight to which the case is entitled as an authority in a case where the peculiar circumstance of the change in the destination of the building and machinery does not occur. The like circumstance had

occurred in *Mather* v. *Fraser*, but Sir *W. Page Wood* does not appear to have made any remark upon it.

The general question again came up for decision in our Court of Queen's Bench, in a late case, *Gooderham* v. *Denholm*, (*a*) the business carried on was an iron foundry, and the question arose between mortgages in fee of the owner, and subsequent assignees of his estate and effects for the benefit of creditors. A number of articles were in question, and in disposing of them the court appears to have proceeded upon the same general principles as were enunciated in *Mathers* v. *Fraser*. I will refer to some of the articles. The cause came up for decision upon a special case stated by an arbitrator: "No. 4, lever punch, with dies and punches, was fastened by bolts and nuts to a large stick of timber which was let into the ground. The machine was about a ton in weight. The power was communicated as before by a belt leading from a shaft driven by the steam engine. The bolts were left in the timber when the machine was taken by the defendants."

"No. 7.—Blacksmith's crane. It was fastened to the beams of the building, and to a post let into the ground by bolts and nuts. It could not be removed except by unscrewing the bolts."

"No. 9.—Four vertical drilling machines. One of them was fastened with bolts and nuts to a post in the second floor of the building. Another was fastened with bolts and nuts to a beam, and to the joists of the building. Another was fastened to a wooden block, which was fastened by screws to the floor of the building. The fourth was not bolted nor fastened in any way. All these drills are necessarily fastened in some way, when in use, to keep them steady."

The court held the fourth of the articles comprised in No. 9 to be a chattel; the other three, and numbers four

(*a*) 18 Q.B.U.C. 203.

and seven, a description of which I have abstracted, to be of the realty.

I will add two more of the articles:

"No. 23.—One wood planer—was screwed to the floor of the building. The power was communicated by belting from the main shaft of the engine."

"No. 24.—Ripping saw—the power was communicated by belting as before. It was not fastened in any way. It was steady from its own weight, but a cap of wood was nailed round the feet on the floor, to prevent lateral shifting." This was held to be a chattel. These examples will suffice to shew the distinction taken by the court: all articles that were fastened to the buildings by bolts and nuts, or by screws, were held to be of the realty—all that stood by their own weight, even though as in the case of the ripping saw kept in place by pieces of wood nailed round the feet, were held to be chattels. The same distinction was taken in *Mather* v. *Fraser*, where cisterns kept in place by their own weight were held to be chattels.

In the late case of *Walmesley* v. *Milne*, in the English Court of Common Pleas, there appears to have been room for the same distinction, but no such distinction was taken. The question arose between a mortgagee and the assignees of the mortgagor, who had become bankrupt, and who had carried on the business of an hotel keeper, and bath keeper. The articles in question are described in the judgment as consisting of "a steam-engine and boiler, used for the purpose of supplying with salt water the baths which had been erected on the premises; also, a hay cutter and malt mill, a corn crusher and grinding stones, all (except the grinding stones) being secured with bolts and nuts, or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the building, or to the things themselves. The upper

mill stone lay in the usual way upon the lower grinding stone; all the fixtures were put up for the purpose of trade." The position of the grinding stones is given more fully in the statement of the case, thus: "The grinding stones were in a room over a coach house, the floor of which required strengthening to carry them and the pillars in question to support it. The pillars are secured both to the floor on which they stand, and to that which they support. Neither of the stones are fixed at all; there is a strong rim or hoop fixed on the floor of the upper room, into which the lower stone is dropped, and in which it works, the upper stone being placed upon it, and both could be taken out without disturbing anything."

The court took time to consider, and in delivering judgment examined the case of *Hellawell* v. *Eastwood*, (*a*) and the grounds upon which it was decided: they observed that in that case it was considered as a question of fact, whether the machines in question were parcel of the freehold, that it was there said that whether a chattel attached to the soil was a fixture, was always a question of fact depending upon the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil, or fabric of the building; and whether it could be easily removed without injury to itself or the building; and secondly, the object of the annexation, whether for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, and the more complete enjoyment and use of it as a chattel; that the judgment of the Court of Exchequer had proceeded upon both considerations; that they said that the mules (cotton spinning machines) never became part of the freehold, as they were only attached slightly, and could be easily removed without any damage: "and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machinery steadier, and more capable of convenient use as chattels." It will be

(*a*) 6 Exch. 295.

remembered that the case was one between landlord and tenant. The court there in the principal case, without expressing any opinion upon the decision in *Hellawell* v. *Eastwood;* but assuming it to be well decided, held it to be no authority for holding that the disputed articles in question before them were not fixtures, forming part of the freehold, "for" they say, "we are of opinion as a matter of fact, that they were all firmly annexed to the freehold, for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the premises, subject only to a mortgage, which vested the legal title in the mortgagee, until the re-payment of the money borrowed. The mortgagor first erected barns, stables, and coach house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement." The court evidently takes as a test the object and purpose with which articles for the purpose of trade are put up; and they take the relation of the party putting them up to the place where they are put up, as the key to that intention: assuming that it may be a proper inference where they are put up by a tenant, that his object was not to improve the inheritance, but that they were affixed merely to render the machinery steadier, and more capable of convenient use as chattels; on the other hand, where they are put up by the owner of the inheritance they come to the conclusion from that circumstance, for there was no other circumstance to warrant the conclusion, that the object and purpose was to improve the inheritance; and that they belong to the inheritance.

Mr. Justice *Willes* intimated through Mr. Justice *Crowder*, that he entertained serious doubts whether the articles in question were not chattels; there were other points in the case, and whether his doubts rested upon them or upon the general question, is not explained.

In the old case of *Lawton* v. *Salmon*, (*a*) the case of

(*a*) 1 H. & Bl. 260, in the note.

the salt-pans, Lord *Mansfield* rested his decision mainly upon the same principle, he said, "The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor," &c., "on the reason of the thing therefore, and the intention of the testator, they must go to the heir."

So in questions between tenant for life or in tail, and remainderman or reversioner, the court looks at the intention, and will hold that to belong to the executor of the tenant of the particular estate, which if put up by the owner of the inheritance would be adjudged to belong to the heir.

Lancaster v. *Eve* (*a*) was a case the converse of this: a wharfinger had driven down a pile eight feet into the soil under the river; the owner of a barge ran against and injured it; and upon action brought for the injury, contended that the pile was affixed to the soil; but the court proceeded upon the *intention* of the wharfinger in affixing the pile, and held that it remained his chattel.

If the true criterion be the intention, the object and purpose with which an article is put up, as I think it is, it goes far to remove any reason for the distinction that has been taken between things screwed, bolted, nailed or otherwise affixed to the soil, and things not so affixed; a strong instance of such distinction is that of the four vertical drilling machines in *Gooderham* v. *Denholm*, two of them were fastened by bolts and nuts, one by screws, and the fourth was not fastened at all. So of the ripping saw; a cap of wood was nailed round the feet on the floor to prevent lateral shafting—the thing itself was not fastened in any way—it was steady from its own weight; this ripping saw, and the fourth drilling machine were held to be chattels. It seems perfectly clear that the fastening in some instances and not in others (and in that case there were several instances both ways) did not

(*a*) 5 Jur. N. S. 683.

arise from any difference of intention, but from circumstances quite apart from intention, the necessity or absence of necessity to fasten the article in order to the better or more convenient working of it; take the ripping saw for instance, if one smaller or of lighter construction had also been introduced it would have required to be fastened in some way, supposing it to be one that would not be steady from its own weight; could it for a moment be said that the intention of the owners was as to the lighter one that it should be a portion of the inheritance; and as to the heavier, that it should be a mere chattel; the consequence would be that the more substantial machines which from their weight and solidity could be worked without support from the building would be chattels, while the lighter ones fastened to the building because light, would be realty.

It is obvious that intention has nothing to do with the fastening or not fastening in such cases, but the weight of the machine, and the purpose to which it is to be applied, and it is fastened or not fastened, not according to any intention in the mind of the owner that it should be personalty or realty, but according to the opinion of a skilled artisan that it needs, or does not need, to be fastened, in order to work well.

A distinction based upon the fastening or not fastening of the article to the soil must necessarily lead to the greatest incongruities, and actually did so in the case to which I have last referred. But it may be said, we are dealing with fixtures, and that is not a fixture which is not affixed, and that it requires that the affixing in fact, and the intention that it should become realty, should concur, otherwise the article must remain a chattel. There is certainly authority for this position; but it is founded upon very technical reasoning the use of the word fixtures and its signification. If indeed it were law that nothing could pass with the soil, but that which is affixed to the soil, it would have a legal principle in its support, but

the law is not so. The case of heir looms is an instance to the contrary; the case of deer in a park is another, and seems founded on the presumed intention; for while domestic animals, and even deer in a pen or yard are held to be chattels, the park and the deer in it are inherited by the heir, or go together to the purchaser of the land. I do not instance the case of the detached mill-stone, because ordinarily affixed or worked with the one affixed, and detached only for a temporary purpose. The word fixtures appears, indeed, to be of comparatively modern introduction, there is no such title in *Comyn's* digest, or in *Bacon's* abridgement. It appears to have been introduced in the cases between landlord and tenant; but as far as I have been able to ascertain the question did not turn, in the older cases, upon whether the articles in dispute were affixed or not affixed to the freehold, when they were put in by the owner of the inheritance, but upon the intention with which they were put in.

A very familiar illustration occurs in this country; the common rail fence is in no way affixed to the freehold; but that may be said of it which has been said of machines adjudged to be chattels; it is simply placed upon the soil, and is removable without damage to the soil, or to the thing itself: judge by that test, it would be a chattel; judged by the test of intention, it would go with the land. I believe the question has never been raised: I suppose it was never doubted that it was part of the realty.

A treatise on fixtures by *Amos* and *Ferard*, is referred to in some of the English cases. It is there laid down that to constitute a fixture, the article must be actually affixed; but none of the cases referred to as authority for the proposition are cases where the owner of the inheritance has put up the article in dispute. What is the true principle upon which machines introduce into a building for the purposes of trade are held to be either realty or personalty, is material in the case before

me, because one of the machines in question, the tenoning machine, is not itself fastened to the building, but kept in its place by pieces of wood nailed to the floor in a manner not to be distinguished from the ripping saw in *Gooderham* v. *Denholm*, and would, I apprehend, fall within the principle upon which the cisterns were held to be chattels, in *Mather* v. *Fraser* I should not have ventured, therefore, to hold the tenoning machine in question in this case to have belonged to the realty, but for the case of *Walmesley* v. *Milne*, where the grinding stones not fastened were not distinguished from those articles which were fastened; consistently with the principle of the decision in that case they could not be distinguished, and finding that principle recognized as the ground of decision in earlier cases, I have felt myself warranted by authority, and upon principle, in coming to the conclusion that the tenoning machine, as well as the other machine in question in this cause are to be taken to belong to the realty. As to the others, the later case in the Upper Canada Queen's Bench, and the rules of decision laid down in *Mather* v. *Fraser*, as well as the case of *Walmesley* v. *Milne*, are sufficient authority.

In the later case *Trappes* v. *Harter*, *Waterfall* v. *Penistone*, (*a*) *Winn* v. *Ingilby*, (*b*) and other cases, are commented upon. I desire only to refer to those comments upon repeating them, or adding any of my own.

I by no means mean to say that the point is a clear one; the authorities are conflicting, and I shall be very glad to be set right, if I am wrong, by a higher tribunal.

It remains to consider the special claim set up by defendant *Weeks*, in relation to the tenoning machine, and the two morticing machines; they were all sold upon the same terms, and a printed receipt given, that for the tenoning machine is as follows:

"Received from *Weeks & Warren*, one tenoning

(*a*) 6 Ell. & Bl. 880. (*b*) 5 B. &. Ad. 625.

machine, delivered to me this day under a bargain for the sale thereof, and for which I have given note at six months for one hundred and thirty dollars, and it is expressly understood that said *Weeks & Warren* neither part with, nor do they [I] acquire any title to said machine until said note is fully paid; and in case of default in the payment thereof at maturity, said *Weeks & Warren* are hereby authorised to enter said premises, and take and remove said machine, and collect all reasonable charges for the use of the same."

"JOSEPH WESTMAN."

It is in evidence that the notes given in payment of these machines have not been paid; eighty dollars has been paid upon one of them.

The words nor do *they* acquire, should be, nor do *I* acquire; it is so in the other receipts.

I think that upon these instruments there was only a conditional sale, the property in the articles sold remaining in the vendors until payment of the price agreed upon. It was competent to the parties to make such a bargain, and as between themselves, I think the property remained in the vendor; but the question is, whether as against the plaintiff they are not estopped from alleging that the property remains in them.

And first, do the plaintiffs occupy a position to set up estoppel; are they purchasers for value? I think they are; they are creditors of *Westman;* they gave time for payment, and agreed to join in further advances in order to the carrying on of the business.

Upon the simple case of a sale of chattels by a person having possession and right of possession, but not having property, the purchaser, though an innocent purchaser for value, does not, according to the English cases, acquire the property by his purchase.

In the old case of *Loechman* v. *Machin*, (*a*) the

(*a*) 2 Starkie's Rep. 311.

plaintiff was a piano-forte maker, he let one piano to one *Brown* on hire, and placed another in his possession for sale, *Brown* sent both to the defendant, an auctioneer, for sale. The defendant refused to deliver them to the plaintiff unless certain expenses in relation to them were paid, and upon trover being brought the value of both was recovered. *Abbott*, J., before whom the case was tried thus stated the law. "The general rule is, that if a man buy goods, or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser; except indeed in the case of a sale in market overt. With that exception it is incumbent on the purchaser to see that the vendee (vendor) has a good title;" and so *Bayley*, J., in *Boyson* v. *Coles*: (*a*) "It is laid down as a general rule that the pawnee cannot have a better title than the pawner; and so it is of vendor and vendee except in the case of a sale in market overt."

Loechman v. *Machin* was recognised and adopted as a rule of decision in *Cooper* v. *Willomatt*, (*b*) and in the later case of *White* v. *Garden*, (*c*) in the same court, the court proceeded upon a distinction which could not have been necessary if they did not recognise the same rule.

This rule appears to prevail except where the true owner has, by language or conduct led third persons to act upon the belief, that the person having the possession has also the right of property. The exception is thus put by *Bayley*, J., in *Boyson* v. *Coles*. "But the rule will certainly not apply where the owner of goods has lent himself to accredit the title of another person, by placing in his power those symbols of property which have enabled him to hold himself out as a purchaser of the goods." The "symbols of property" here referred to, evidently were bills of lading, invoices, and such

(*a*) 6 M. & S. 14. (*b*) 1 C. B. 672.
(*c*) 10 C. B 919.

other documents as are ordinarily held by the owners of goods only.

The rule and the exception are well illustrated by the case of *Dyer* v. *Pearson*, (*a*) The plaintiffs got one *Smith* to import for them thirty bags of wool from Holland. *Smith* transmitted the invoice to the plaintiff, but delivered the bill of lading, which was endorsed in blank, to the defendants *Pearson* and *Price*, who were warehouse keepers, to enable them to enter and warehouse the wool; the wool was entered in their books as the property of *Smith*. *Smith* improperly procured a sum of £200 to be advanced through him on the security of the wool, which with the sum paid for duties and other charges by *Pearson & Price* amounted to £528. *Smith* transmitted twenty-five bags of wool to the plaintiffs, and sold ten bags to defendant *Clay* for £579. *Clay* paid to *Pearson & Price* the amount due to them, and the balance to *Smith*; and the question was, whether *Clay* was entitled to hold the wool as against the plaintiff; they, *Pearson* and *Price* and *Clay*, appear not to have known the plaintiff in the transaction, and to have acted *bonâ fide* in the belief that *Smith* was the owner of the wool. The case was tried before Lord *Tenterden*, and the manner in which he left the question to the jury was disapproved of in *banc* by himself and the other judges of the court, as too favourable to the defendants. He told the jury that "if a man takes upon himself to purchase from another under circumstances which ought to excite his suspicion, and to induce him to distrust the authority of the person selling, such a purchaser could not hold the property, if it afterwards turned out that the person from whom he bought had no authority to sell; and he left it to the jury to say whether *Clay* had purchased under circumstances which would induce a reasonable, prudent and cautious man to believe that *Smith*, of whom he purchased, had authority to sell. If they thought that he had purchased under such circum-

(*a*) 3 B. C. 38.

stances, they were to find for the plaintiff; if otherwise, for the defendants: the jury found for the defendants. A new trial was moved for and granted. Lord *Tenterden* said, "We all think there ought to be a new trial in this case. The question which I left to the consideration of the jury does not appear to me to have embraced the whole case. The general rule of the law of England is, that a man who has no authority to sell, cannot, by making a sale, transfer the property to another. There is one exeception to that rule, viz., the case of sales in market overt. This was not a sale in market overt, and therefore does not fall within the exception. Now this being the rule of law, I ought either to have told the jury, that even if there was an unsuspicious purchase by the defendants, yet as *Smith* had no authority to sell, they should find their verdict for the plaintiffs; or I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled *Smith* to hold himself forth to the world as having not the possession only, but the property; for if the real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of property, then perhaps a sale by such a person would bind the true owner. That would be the most favourable way of putting the case for the defendant; and that question, if it arises upon the evidence, ought to have been submitted to the jury. It is unnecessary to consider what would be the effect of the evidence upon that question. The rule for a new trial must be made absolute."

The principle is established with more or less force and distinctness in other cases referred to in those which I have cited; also in *Gosling* v. *Birnie*, (*a*) and in *Pickard* v. *Sears*. (*b*) In the latter case Lord *Denman* observed: "But the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces

(*a*) 7 Bing. 339. (*b*) 6 A. & E. 469.

him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The case in judgment justified the remarks as strongly as they were put by Lord *Denman*.

Chancellor *Kent* in his commentaries, (*a*) puts the case of a conditional sale, the goods being delivered, but not to be considered as sold until security should be given for payment, he says that in such a case the property does not pass by the delivery, as between the original parties; though as to subsequent *bona fide* purchasers, or creditors of the vendee, the conclusion might be different; and in *Hussey* v. *Thornton*, (*b*) an American case to which he refers, the court say that in such a case the conclusion would be different; the case decided was, however, between the original seller and purchaser.

It appears to be a principle fairly deducible from the English cases, that the rights of the true owner of goods are protected save against a purchaser for value, unless the owner has done something which ought to estop him from asserting his ownership, and no doubt goods are, in the ordinary transactions of life, frequently in the possession of those who are not the owners; and there is after all no good reason why the owner should forfeit his goods because he parts with his possession mere possession: therefore, is not such an index of property as will enable a third person to buy without risk; but if the owner does more than is necessary as between himself and the possessor, he enables the possessor to appear as owner by his own act, and is estopped from asserting ownership. So when the fixture is of such a nature as to imply ownership as the possession of goods, by a trader in goods, the true owner cannot, as against a purchaser from the trader, set up that the sale to the trader was conditional, and that the property is still in himself.

(*a*) Vol. II. p. 497. (*b*) 4 Mass. 405.

And in regard to the circumstances appearing in the English cases: in none of them in which the owner's right was upheld, was there a departure from the ordinary course of dealing: there are cases of bailment of various kinds, but no case of conditional sale; but I am not prepared to say that in a conditional sale the right of the seller would not necessarily have been sustained upon the principles upon which the English cases have been decided.

There is one branch of the law, however, upon the sale of goods which may have some application, the right of stoppage in transitu,—while it is good as between seller and purchaser, it is not allowed to prevail as against a purchaser for value if the seller has the usual evidence of purchase, but otherwise it is. A bill of lading in the hands of the first purchaser, and an assignment of it to the purchaser from him would seem to be necessary to enable him to hold the goods against the original seller, so that it seems to stand upon much the same footing as a conditional sale.

If these were goods of a different nature, not intended to form part of the realty, I think the proper conclusion would be that the true owners, *Weeks & Warren*, retained their right to them, and that they did not pass by the assignment to the plaintiff. Then is there any thing in the nature of these articles, and the purpose for which they were sold to *Westman*, that ought to make a difference? I think it may fairly be assumed that they were sold in order to their use, in the way in which they were used and applied, and to be affixed so far as they were affixed; and here I think the question arises whether the principle applies which is deducible from *Dyer* v. *Pearson*, and the other cases of that class. Did *Weeks & Warren* by selling them for the purpose of being used as I have indicated, bind themselves to accredit *Westman* as the owner? I have intimated my opinion that they became part of the realty. I must conclude that they were

sold with the knowledge that they should become so, subject, however, to the right of the seller to detach them. The owner of the land and building would be ostensible owner of the machinery as part of it, the land, building, and machinery forming one whole. The machines, as I think, ceased to be chattels, and it must be taken that the seller as well as the buyer contemplated this. Then does the law in relation to chattels, and their purchase from an apparent, not the real owner, apply in such a case? and next, is not the owner of land and building invested with all the indicia of property in the machinery as well as the land and building, and that by the act of the seller of the machines? I am inclined to think that he is. The principle adopted in England appears to have proceeded in some measure upon the necessity of the thing; where the true owner of goods did no more than was necessary in the transaction between himself and the person in whose possession he placed them, he was protected; if he did more he was not protected. So in *Dyer* v. *Pearce* he was protected, although he allowed the bill of lading to be in the hands of *Smith*, because it was necessary in order to the entering and warehousing of the wool; but if he unnecessarily place documents in his hands so as to enable him to appear as the owner, it is imtimated in that case, in *Bryson* v. *Cole*, and in other cases, that he would not be protected; it would be negligence on his part which would not be allowed to prejudice a *bonâ fide* purchaser. If it would be a just inference in the mind of a stranger that these machines were the property of *Westman*, which it would not be in the case of an ordinary chattel, it was incumbent, I think, upon *Weeks & Warren* to negative that inference if practicable, and not doing so would be negligence. In suffering what was their chattel to become realty, they should have placed upon record their title to it by registering the instrument they took from *Westman*, if capable of registration, as to which I express no opinion. Or if the retention on their part of property in the machines sold was incom-

patible with the just inference to be drawn by a purchaser from *Westman*, then I think they must be taken to have relied upon their rights as between themselves and *Westman*, and cannot affect a purchase by a stranger. I say this considering the peculiar nature of the articles sold, and the purpose for which they were sold. I think also upon the chattels becoming realty, the law in relation to sale of goods ceased to apply.

It may be, indeed, that it was not a just inference in the mind of a purchaser from *Westman*, that these machines were his property, for I find it said by Chief Baron *Pollock* in *Hamilton* v. *Bell*, (*a*) that it was notorious that persons using machinery frequently hire it; and consequently that there is no presumption that machinery found in a manufacturer's premises belongs to him. He speaks of this as the practice in England at the present day. I have no evidence, nor do I know that it is notorious, or that it is a fact, that any such practice prevails in Canada, and therefore I think the presumption would be that the machine in question belonged to *Westman*.

The retention by *Weeks & Warren* of a right of property in these machines was a point very little argued. I have found it a point of considerable difficulty, and have not been able to arrive at a conclusion entirely satisfactory to myself. I think, however, that the law upon the sale of chattels does not apply at all, and that if it did, machines of this kind are of such a peculiar nature, that the presumption of property in them being in the owner of the building in which they are put up, arises, when it could not arise from mere possession of an ordinary chattel.

I think the plaintiffs entitled to a decree, but it would perhaps be more satisfactory if both the questions raised in this cause were carried to the Court of Appeal.

(*a*) 10 Ex. 545.

CHEVALLIER v. STRONG.

Specific performance—Infants.

In a suit for specific performance where there were infant defendants, the court held that the plaintiff's laches precluded him from obtaining relief, but directed an enquiry as to whether it would be beneficial to the infants to affirm or annul the contract. If found beneficial to affirm it the plaintiff might excuse his laches; but, *Semble*, all the parties beneficially interested must consent to the enquiry.

Statement.—The bill shewed that one *James Strong*, in his life time, as locatee of the Crown upon certain lands, in the year 1852, sold some portion of them to the plaintiff, and then executed a bond conditioned to convey the same in fee simple to the plaintiff upon the payment mentioned in the bond being made. That the plaintiff then left Canada, having put his father in actual possession of the premises, to remain therein until his return. In the year 1855, the plaintiff returned to Canada, and then, and again in the following year, tendered the purchase money to the widow of *James Strong*, who refused to accept it, or to perform the contract. The premises then being unoccupied, the plaintiff entered into possession, and has since remained therein, cut timber, and exercised other acts of ownership; that the personal representatives had brought an action of replevin for the timber cut, and were then also suing upon the promissory notes of the plaintiff, given collaterally with the bond; and prayed that the action might be restrained, and the specific performance of the contract decreed, as far as the same was possible.

Mr. *Blevins*, for plaintiff.

Mr. *John Crickmore* for the infants, and Mr. *A. Prince* for the other defendants.

Judgment.—ESTEN, V. C.—I think there should be no costs on either side to this time. The plaintiff is not entitled to the costs of any of the actions. There should be an enquiry as to whether it is more beneficial for

the infants to affirm or annul the contract. The plaintiff after his laches is not entitled to a specific performance, so far as he is concerned, and unless it is for the benefit of the infants, his bill should be dismissed, but without costs, as the defence of laches is not clearly raised.

The plaintiff may, on the enquiry, if it should appear beneficial to the infants to disannul the contract, allege anything in excuse of his delay. Further directions and subsequent costs will be reversed. It does not appear who is the guardian of the infants. If the plaintiff procured a guardian *ad litem* to be appointed, he must pay his costs, and is not entitled to be recouped.

In strictness, perhaps, the widow should be a consenting party to the enquiry above directed. Supposing all the debts paid, the land belongs, as personal estate, to the widow for life, and after her death, to the children. The contract is a subsisting one, but the parties beneficially interested may object to its being carried into execution. But they must all concur. If the widow refuses her consent to the rescission of the contract, although for the advantage of the infants, I do not know that the court, on their behalf, can insist upon it, or refuse to carry the contract into execution.

VANKLEEK V. TYRRELL.

Foreclosure—Parties.

One of the defendants, the assignee of the mortgagee, by his answer, stated that he was not interested in the mortgage, or at all events only by way of security; and that it belonged to A.; and that he and A. had concurred in an assignment of it to B. *Held*, that A. and B. were necessary parties; and that notwithstanding the defendant consented to withdraw his answer, a decree could not be made in their absence.

This was a motion for a decree under the circumstances stated in the judgment of his Honour V. C. *Esten*, before whom it was heard.

Mr. *R. Martin*, for plaintiff, produced a consent of

defendant to a decree going against him as prayed, and undertaking to withdraw his answer; but,

Esten, V. C.—A mortgage having been made by *Atkinson* to *Edward Tyrrell*, and transferred by him to *William Tyrrell*, and deposited by him with the Messrs. *Martin*, to secure their fees, and also what was due to the co-plaintiff, *Vankleek*; and default having been made in payment of the mortgage money and interest, and the Messrs. *Martin* being authorised to proceed whether the sums payable to *Vankleek* had all become due or not; and the bill having been taken *pro confesso* against the defendants *Atkinson* and *Ward*, the usual decree as upon a derivative mortgage can be pronounced against those defendants, and might have been pronounced against *William Tyrrell*, had the bill been taken *pro confesso* against him; but he has answered the bill upon oath, and has stated that he was not interested in the mortgage, or at all events only by way of security, and that it belongs to *Edward Tyrrell*, and that they had both concurred in an assignment of it to *Rowland Burr*. I think these persons are necessary parties to the suit, and although *William Tyrrell* has chosen to sign a writing by which he agrees to withdraw his answer, and consent to a decree, which the court could not pronounce, I cannot ignore his answer, which must remain on record, and shews that a decree cannot be made in the present frame of the suit. Upon *William* and *Edward Tyrrell*, and *Rowland Burr*, however, appearing by counsel, and consenting, the usual decree upon a derivative mortgage may be made; an enquiry is necessary as to who is entitled to the equity of redemption, as the bill does not ascribe it decidedly either to *Atkinson* or *Ward*.

Foy v. Merrick.

Sale of lands for taxes—Misrepresentation to prevent competition.

Where a person, in order to purchase lands to be sold at sheriff's sale for taxes, consented to representations which he knew to be untrue, and which had the effect of preventing competition, and so was enabled to purchase at less than the value of the land, the sale was declared void.

Statement.—The defendant sometime in the year 1837, had an interest as purchaser from the Canada Company in a certain lot of land, but had no deed thereof. He afterwards disposed of his interest in the south-west quarter of the lot for value, and gave a bond to convey in fee simple to the purchaser as soon as the Canada Company should have made the deed of the whole lot to himself. This bond was assigned to different persons, and finally to the plaintiff, who left this country in 1838, having first arranged with the defendant that he should keep possession of the plaintiff's portion for him until his return; the defendant receiving the rents and profits for his trouble. The plaintiff did not return until 1857. During plaintiff's absence the bond was lost, and the taxes upon the land having accumulated, it was offered for sale by the sheriff of the county.

The defendant, upon this occasion, it was alleged, by representing that he alone was entitled to the land, and that his title, being slightly defective, would be remedied by a sale, procured a sale to be made to himself.

The bill prayed that defendant might be declared a trustee of the premises in question for the plaintiff, and for other incidental relief.

Mr. *Blevins* for the plaintiff.

Mr. *Crickmore*, for the defendant.

Judgment.—Esten, V.C.—I think the plaintiff is clearly entitled to a decree with costs. On the sheriff's evidence alone it is clear that competition was prevented by repre-

sentation made with *Merrick's* consent that he had an interest. This representation was untrue, and thus the whole fifty acres were procured when otherwise a few acres would in all probability have sufficed to produce the requisite amount. A constructive trustee by a fraudulent misrepresentation procures an irregular sale to be made to him of the lands of which he is the trustee. I think the statement in the bill, although not precisely correct in this view, is sufficient. If *Merrick* had truly stated the case no doubt competition would have occurred *Monaghan's* evidence goes much further than the sheriff's who, however, according to his own account, permitted the whole fifty acres to go for £5, when the day before a few acres had produced the requisite amount, although the purchaser had subsequently withdrawn his bidding. There is much reason, however, to believe that *Merrick* was an agent, on *Edmund's* and *Swift's* evidence, which appears entitled to credit. In either case *Merrick* has been guilty of a fraud: in the latter a very gross one.

Declare the sheriff's sale void; and defendant a trustee for plaintiff. Order him to convey, and to account for rents and profits; enquiry as to lasting improvements by defendant; allow him for same; defendant to pay plaintiff his costs. This decree to be without prejudice to the rights (if any) of *Ling's* representatives.

The Attorney-General v. McNulty.

Crown lands—Right of pre-emption—Fraud in concealing facts from officers of government.

Patents issued to a purchaser upon a right of pre-emption obtained by fraudulent concealment of other existing claims to such right, are void.

If a party knowing that another person claims to have an adverse right to pre-emption of Crown lands, or that there are circumstances which may give the other such right, applies to the government to obtain these lands, and does not state the circumstances giving rise to such adverse claim in his petition, or otherwise to the officers of the government, such suppression of the facts, will, in the eye of a court of equity, be considered fraudulent, even if the circumstances were already known to the government, and if a patent be subsequently issued upon such application, it will be declared void.

This was an information by the Attorney-General,

upon the relation of *Anthony McNulty*, *Matthew Jamieson*, and *Thomas Brady*, against the Rev. *John McNulty* and *Richard Cuthbert*, to avoid three patents of land from the Crown, alleged to have been issued in error and mistake to the defendant *John McNulty*, and afterwards conveyed to the defendant *Cuthbert*.

In the year 1843, the relator *McNulty* and the defendant *McNulty*, settled in the township of Brougham in the county of Renfrew, and cleared about 500 acres of land. Differences having then arisen between them, a reference to arbitration was agreed upon for adjustment, and an award made, directing, *inter alia*, that *Anthony McNulty* should have the land, upon payment of £80 to *John McNulty*, the defendant, for improvements made by him upon a certain portion of them, and this portion he was to retain possession of until paid. In 1853 *Anthony McNulty* sold his right to *Jamieson*. In January of the same year defendant *McNulty* presented a petition to government for right of pre-emption of the cleared lands, but omitted to give any information of the award of the arbitrators, or that there might arise adverse claims to the same right. His right of pre-emption upon this petition, was allowed by order in council. The patents afterwards issued, bearing date, two of them upon the 10th of October, 1856, and the other upon the 17th of November, 1856, embracing all the cleared lands and others. This last one embraced the lands awarded to remain in possession of defendant *McNulty*, until payment of the £80, which had not been paid. The relator *Brady* claimed a right of pre-emption in lands included in the patents of the 10th of October, 1856, not claimed by the other relators.

The other facts are clearly set forth in the judgment of his Honour V. C. *Esten*, before whom the cause was heard.

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

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

Judgment.—ESTEN, V.C.—Two patents were issued to the defendant, the Rev. *John McNulty*, Roman Catholic priest, dated 10th October, 1856, comprising with another patent, also issued to him, and dated 17th November, in the same year, a tract of 1097 acres of land in the township of Brougham, in the county of Renfrew, upon which about 500 acres had been cleared. It is quite certain that the sale which was at 4s. the acre, and I presume on very favourable terms, was made, and the patents issued in consideration of these improvements. The tract of 1097 acres appears to have been designated by the Commissioner of Crown Lands as proper to be granted on this occasion, it being considered by him, I suppose, just that the overplus over and above the number of acres cleared, being probably convenient to be enjoyed with them should be granted with them, to the party who had made that improvement. The question is whether these patents were not issued in error and mistake. In the first place, is it not clear that they were issued on the supposition on the part of the Crown that no adverse claim existed to any of the lands comprised in them? Mr. *McNulty* had presented a petition in January, 1853, stating that he had cleared about 500 acres in the tract of country westward of the Ottawa River, and praying to be allowed to purchase on the most favourable terms. This petition was referred to the Commissioner of Crown Lands, who recommended that the petitioner should be permitted to purchase the 1097 acres designated, in consideration of such improvement, at 4s. the acre. This recommendation was adopted by the committee of the Executive Council by their report of the 14th January, 1853, and ratified by the Governor-General in council on the 19th. It is not pretended that Mr. *McNulty*, in his petition, hinted at any adverse claim in respect of the improvements upon which he relied. The facts respecting these improvements were these. The improvements on all the

lands in question, except the part of lot No. 1, had been made under the superintendence of *John McNulty* and *Andrew McNulty*, his brother, or purchased from other parties by them, or one of them. They both claimed the benefit of these improvements, and the dispute was referred to arbitrators, and the arbitrators had made an award, dated the 14th February, 1852, in which they adjudged the benefit of the greater part of the improvements under the name of the Mountain farm and the Mellotte farm, to *Anthony McNulty*. It is not pretended that *John McNulty*'s petition said a word about this award. It was, however, deposited with the bond of submission in the Crown lands office, in the autumn of 1853, by Mr. *Egan*. The lands in Brougham were opened for sale in the autumn of 1855. Upon this occasion *Jamieson*, to whom *Anthony McNulty* had transferred all his rights in the Mountain farm, applied to the agent, Mr. *Harris*, to be permitted to purchase the lands comprised in it, and produced copies of the submission and award, and of the assignment from *Anthony McNulty* to himself, or of some of those documents. Mr. *Harris* said that he could not recognise copies, but that upon production of the originals he would sell to him. Application was then made to the Crown lands office for the originals, and an answer was received stating that they could not be issued without an order from Mr. *Egan*, who was then in England. It does not appear that *Jamieson* knew of the order in council in favour of *John McNulty* previously to this time. The matter appears to have rested in this state until the autumn of the following year, 1856, when the patents issued. A month after the issuing of the first patents, *Anthony McNulty* procured memorials to be drawn for signature by the people of the neighbourhood, and for presentation to the government in support of *Jamieson's* claim. The question is whether the Crown did not sanction the sale, and issue the patents to *John McNulty* without adverting to the fact that the bulk of the improvements in respect of which this favour was

extended, had been adjudged by arbitrators to belong to *Anthony McNulty*. Is it possible to suppose that if this fact had been present to the mind of the Crown when the grants in question were made, it would have sanctioned them? Looking to the well known practice of the Crown, which, as it is in strict accordance with justice, I may judicially notice; to the fact that the sale and grant in question were founded on the improvements which formed the subject of the arbitration, and to the total silence of *John McNulty's* petition on the subject of the award, I am satisfied that this award was not present to the mind of the officer of government, through whose instrumentality these patents were issued; nor do I think the presence of the submission and award in the Crown lands office, or the application for their production in 1855 by *Jamieson* should countervail this fact. It was the imperative duty of *John McNulty* to mention in his petition all that had occurred with respect to the improvements, so as to submit the question fairly to the consideration of the government. His omission in this respect was a fraudulent suppression of the truth; and in order to make a presumption in favour of a party guilty of such misconduct, I should require the strongest evidence that the Crown, in issuing these patents, acted deliberately and advisedly, but none such is adduced, and the circumstances all tend to show the contrary. I think I must deem these patents to have issued in error and mistake, within the meaning of the act of parliament, and that they ought to be declared void.

There can be no doubt that all the lands comprised in the two patents of the 10th of October, 1856, and considered parts of the Mountain farm, were granted in consideration of improvements which the arbitrators allowed to *Anthony McNulty*, under the name of the "Mountain Farm." If these patents comprise other lands granted in respect of improvements made upon them, they need not be affected by the decree; but as to them the patents may remain good.

In pronouncing this judgment I would by no means be considered as intimating any opinion as to the justice of the award. It would not surprise me if it appeared that the award was very unjust towards *Mr. McNulty*. How far this may be the case, and how far notwithstanding it may be proper to bind the parties by it, I leave it to the government to determine. I am of opinion that the attention of the government ought to have been called to the existence of this award when the patents were issued: that they were issued without its adverting to, or considering the existence of, the award; and therefore that the patents ought to be declared void *pro tanto* at all events, in order to enable the government to act as it would have acted, had the fact of the award been brought under its notice when application was made for the patents. I do not pronounce any judgment as to who has the best right to those lands. It would be improper for me to do so, for my judgment would not bind the Crown, which is free to act in the disposal of these lands according to its own rules of equity and justice.

As to the case of *Brady*, it seems very clear. A portion of lot No. 1, in the 12th concession of the township of Brougham, is comprised in one of the patents of the 10th of October, 1856, consisting of about twenty-six acres. On these I apprehend the house of *Brady* stands, and the barn and stable on, probably, some cleared land; although *McNulty* in his answer seems to deny it. *Brady* states the fact in the bill, and also in the petition which he presented to the government. On reference to the evidence of *Goodwin* and *Virgin*, it is impossible, I think, to doubt that the house of *Brady* stands on the corner of the lot opposite to the church or chapel, which is in the 24th concession, and around which two acres were cleared by the parishioners for a churchyard. There can be no doubt that on these twenty-six acres were improvements in which *Brady* claimed an interest, and in respect of which he claimed to purchase a part of the lot. A dispute arose

at the sale, in 1855, between *Brady* and *McNulty*, which must have related to this part of the lot, because it was the very part of the lot which Mr. *McNulty* claimed to purchase, being the only part included in his order in council. An agreement was made between them to the effect that a clearance of about eleven acres, which had been made by *McNulty's* men, should be valued, and that *Brady* should pay the valuation, and should then be free to purchase the part of the lot in dispute. This agreement is clearly proved by *French*, whose evidence is corroborated by the answer given by *Harris*, the Crown lands agent, to an enquiry of the government respecting the same matter. It is not pretended that the petition of Mr. *McNulty* contained any mention of these particulars relative to *Brady*. But surely it was very material that the Crown should know them. Is it possible to suppose that the Crown would have granted this part of the lot to Mr. *McNulty* had it known that the improvements on it were claimed by *Brady;* that he claimed to purchase by reason of them; and that an agreement had been made between him and Mr. *McNulty* that he should be at liberty to purchase on a certain condition? Mr. *Hector* argues that this condition was not performed, and that consequently the agreement was at an end. I do not know whether the condition was performed or not, or if not, why it was not performed. But I am sure that Mr. *McNulty* had no right to take upon himself to decide that the agreement was at an end, and to forbear all mention of it in his petition. He should have stated all the facts, and left it to the government to determine what ought to be done between them under the circumstances.

I give no costs as against *Cuthbert*. No notice is proved against him. He may be an innocent purchaser for aught that I know, and every man having a patent has a right to defend it, and it can rarely happen that in cases of this sort some negligence or oversight has not occurred on the part of the officers of the government.

In *Martin* v. *Kennedy* (*a*) I thought it right to award no costs. In the present case I think Mr. *McNulty* ought to pay the costs. He was guilty of what is in the eye of this court a fraudulent suppression of the truth, although I am willing to believe that he did not view the matter in this light, and thought himself at liberty to omit all mention of the facts which he forebore to state in his petition. I cannot conclude without one remark on the evidence of *Anthony McNulty*. It is in fact a confession as incredible as it is disgraceful, and although probably it contains a considerable admixture of truth, yet, as it is impossible to distinguish what is true from what is false, it is wholly unreliable. The patents of the 10th of October will be declared void, either wholly or in part, according to the circumstances.

BLACKBURN V. GUMMERSON.

Trustee—Sale of Trust Lands under Execution.

A judgment was recovered against trustees of land held under a conveyance absolute in form, of which no trust had been actually declared. Execution issued on the judgment under which the sheriff sold the trust land, but the purchaser knew that the execution defendants were trustees only. Upon a bill filed by the *cestui que* trust against the trustees and the purchaser at the sheriff's sale, the sale by the sheriff was declared void; the plaintiff decreed to be entitled to the land, and the defendants were ordered to pay the costs of the suit.

The facts are clearly set forth in the judgment.

Mr. *McCarthy*, for the plaintiff.

Mr. *Harrison*, for the defendant.

ESTEN, V.C.—[Before whom the case was heard.]—I think this is a very clear case for the plaintiff. It appears that the plaintiff, being the owner in fee of the property in question, conveyed it to the defendants, the *Irwins*, on the 1st February, 1856, upon certain trusts, which were to be afterwards declared by a separate instrument. The declaration of trust, it appears, was not prepared at the same time, because the trusts were

(*a*) Ante vol. IV. p. 1.

not definitely settled, and because Mr. *McCarthy*, the gentleman who prepared the deed, did not wish to prepare the instrument declaring the trusts away from his own office, the deed being prepared and executed at the Holland Landing. However, he made a short memorandum of the intended trusts for his own guidance, and with commendable prudence, not common in this country, caused the intended trustees to sign an instrument, which sufficed to show that they were mere trustees of the land, although it did not declare the trusts upon which they were to hold it. The contemplated declaration of trust was never completed, and the consequence I apprehend was that the *Irwins* became mere trustees for the plaintiff. This was the state of things in the month of January, 1858, when the defendant *Gummerson* advanced £500 to the plaintiff on mortgage of this property, the mortgage being given by the *Irwins*, who, at the same time, granted a lease of the property to *Gummerson* for five years, the time during which the mortgage was to continue, at a reduced rent, the balance of the rent being applicable to the payment of interest on the mortgage; so that it is manifest that the land was not only charged with the principal, but also with the interest of the debt. Upon this occasion *Gummerson* received actual notice of the position of the property, namely, that it was held by the *Irwins* only as trustees for the plaintiff. This fact is proved by Mr. *Doyle*, the solicitor, who acted for both parties in the transaction, and by *Robert Irwin*, who was present, in the clearest manner. I am satisfied that *Gummerson* clearly understood the position in which the property was. The money was borrowed by the plaintiff, and a warm dispute occurred between him and *Gummerson* as to the timber, the plaintiff insisting that he should use the fallen timber before he felled any fresh timber, *Gummerson* contending for the unrestricted right to fell timber, and the plaintiff carried his point. *Robert Irwin* says that before they proceeded to Toronto at all, he explained to *Gummerson* how the property was circumstanced; and

in fact, if *Robert Irwin* is to be believed, it is impossible to doubt that *Gummerson* perfectly understood it. I see no reason to disbelieve his evidence. His credibility is not impeached. Neither he nor his father have the slightest interest in this suit, for if it should succeed the property will belong wholly to the plaintiff. The statute provides that one party to the suit may examine the opposite party, and our general orders direct the same thing, but that, when the parties are united in point of interest, the evidence shall be excluded. The plaintiff and *Irwin* are not united in point of interest. The defendants, the *Irwins*, have no interest. If the setting aside the sheriff's sale should involve the revival of their debt *pro tanto* their interest would be adverse to the plaintiff; but, as I presume the money paid to the sheriff would not be recoverable, they stand indifferent. Mr. *Harrison* contended that their evidence was not admissible, but I cannot see any reason for excluding it. When the mortgage was made to the defendant, the equity of redemption may be considered as residing in the *Irwins* in trust for the plaintiff. This was of course not applicable to the payment of their debts, and it would be a matter of course to set aside a sheriff's sale, made for that purpose, unless perhaps in favour of a purchaser for valuable consideration and without notice. In this case I am satisfied that *Gummerson* had notice of the plaintiff's title at the time that he purchased. It is unnecessary, therefore, to determine whether a purchaser at sheriff's sale, who purchases only the right of the party against whom the execution has been issued, is at liberty to avail himself of such a defence. It would appear from the argument of the plaintiff's counsel, but in no other way, that the conveyance of the moiety of *Isaiah Irwin* to the plaintiff was not registered, and he contended that it is incumbent on the party insisting upon the Registry Act to bring himself within it by showing that the land in question has been granted by the Crown, and that he has paid a valuable consider-

ation; and he cited the cases of *Casey* v. *Jordan*, (*a*) *Ross* v. *Harvey*, (*b*) and *Doe Skae* v. *Smith*, (*c*) in support of these positions. These cases show that a party insisting upon the Registry Act must show that he paid a valuable consideration, and that the act does not apply until the land has been granted by the Crown. I believe it has also been held that the party insisting upon the act must show that the land has been granted. But it is sufficient to observe here that no such defence has been raised by the answer as that to which this argument points. The defendant does not even allege that his sheriff's deed is registered, nor does he notice the deed from *Isaiah Irwin* to the plaintiff at all—in fact he ignores its existence. Had such a defence been raised, the plaintiff might have amended his bill, and presented a case to be relieved from the effect of prior registration, and it cannot be doubted from the circumstances of this case, that in such a contention he would have succeeded, for it is clear that if the defendant had not notice of the particular deed conveying the undivided moiety of *Isaiah Irwin* to the plaintiff, he had actual notice that the plaintiff was entitled to the whole lot. It appears that the mortgage having been made in 1858, for five years, will not expire until 1863. Meanwhile the defendant has made an attempt to acquire the equity of redemption, and claims to be the absolute owner of the land. Under these circumstances I think the plaintiff was fully justified in instituting the present suit in order to annul the sheriff's sale. I think the sale must be declared void, and it must be declared that the plaintiff is entitled to the lands subject to the mortgage, and will be entitled to redeem them, when the mortgage money shall become due and payable. I think the plaintiff is entitled to his costs.

(*a*) Ante vol. I. p. 467. (*b*) Ante vol. III. p. 609.
(*c*) 7 U.C.Q.B. 376.

BISHOP v. MERKLEY.

Specific performance—Sale of mill—Reference to master as to damages.

The vendor and vendee of a mill and water power, (the vendor using the same water for another mill,) disagree in their construction of the contract of sale, as to who had the first right to use the water, there not being enough water for both during the greater part of the year. The court was of opinion that the vendee had the better right to the first use of it, and that the vendor, by using the water and depriving the vendee of the use thereof, committed a breach of the agreement, and was liable in damages, the amount of which the master was directed to ascertain.

Statement.—This was a bill to restrain the defendant from using a water course to the injury of the plaintiff; to declare the intention of a written agreement, and to compel specific performance, and for damages for the breach of the terms of the agreement as alleged by the plaintiff.

By the agreement the plaintiff agreed to purchase from the defendant certain premises, "together with a grist mill thereon erected, and the privilege of water for two run of stones, during the season of water. Reserving the same quantity for the saw mill, or enough for the driving of two saws," for which upon paying the price, and performing the covenants of such agreement, he was to receive a clear deed from defendant, and in the meantime to have possession.

The saw mill belonged to the defendant, and appears to have been so situated as when, in operation, to use so much of the water that the remainder was not sufficient, except for a month or six weeks in the year, to keep the grist mill in operation. The defendant kept the saw mill in operation, and this was the breach complained of by the plaintiff, who contended that according to the terms of the agreement, he was entitled to the first use of the water to the extent mentioned.

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

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

Judgment.—ESTEN, V.C.—[Before whom the case

was argued.]—Although I have not been able to find two of the cases to which I was referred, yet I think it unnecessary to delay the decision of the case. Both parties erred in the construction of the agreement, and a suit was necessary to settle this dispute. Had a perfect title been shewn before suit, or had no dispute arisen about damages for withdrawing the water, a suit would still have been necessary to determine the true construction of the agreement, each party having committed the same error in supposing that he was entitled to be first supplied, and that the other was entitled only to the residue; and the expense of the suit to the hearing not having been appreciably increased by the dispute with respect to the damages, or the fact that a good title had not been shewn, I think that each party should bear his own costs to the hearing. A good title, however, not having been shewn before the commencement of the suit, the purchaser was entitled to a reference, and the vendor must pay the expense attending it; and the enquiry relative to damages having resulted in shewing that the plaintiff was entitled to sixty-four pounds, as compensation for the loss of water, the defendant should also, I think, pay the costs of this enquiry, and of the hearing on *further directions*, consequential on the reference as to title, and the enquiry as to damages. I think the defendant having acted in contravention of the agreement, as construed by the court, must submit to an injunction.

The costs, payable by the defendant to the plaintiff, and the sum of sixty-four pounds, adjudged by way of damages or compensation for loss of water, should be deducted from the amount payable by the plaintiff in respect of his purchase money, and the balance paid within a time to be limited for that purpose; when a conveyance should be executed by the defendant in conformity with the agreement, as construed by the court.

HEALEY v. WARD.

Specific performance—Costs.

Where a purchaser objected to the title offered by his vendor, and refused to pay the balance of the purchase money, but remained in possession of the premises, and the vendor brought ejectment to recover them, falsely denying the payment of part of the purchase money, the purchaser was held entitled to the costs of a suit in equity to restrain the action of ejectment, and compel specific performance, notwithstanding the vendor made out a good title when required by the court.

Statement.—The plaintiff purchased lands of the defendant paid £28 of the purchase money, and took a bond for a conveyance upon payment of the balance. When the time for payment arrived the plaintiff tendered the money, but objected to the title, because the deed to the defendant had not been registered, and one of the witnesses to it was dead, and the other was unwilling to make the affidavit necessary for registration. The defendant took no steps to remove the objection, but allowed the plaintiff to remain in possession until about two years thereafter, when he brought an action of ejectment to recover possession. It appeared also that, at the time when the tender was made of the balance of the purchase money, the defendant denied the fact of the payment of £28. The plaintiff filed this bill to restrain the action of ejectment, and to compel specific performance of the contract. The defendant, upon being required, brought in a good title to the land in question, and alleged that the plaintiff knew the title to be good when and after the tender had been made, and contested the plaintiff's right to costs.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *McDonald*, for the defendant.

Judgment.—ESTEN, V. C.—I have perused all the papers in the cause, and adhere to my original opinion that the plaintiff is entitled to his costs of the suit; and I think it would be useless to give the desired liberty

to adduce the additional evidence, which, as I understand, only goes to prove that the plaintiff knew the title to be good when he filed his bill. He could not, however, complete his contract, however willing he might be, because he asserted, and the defendant denied, that he had paid the £28, and while this dispute continued, the completion of the contract was impossible, and a suit became inevitable.

The defendant's conduct has been very bad in denying and endeavouring to disprove the payment of the £28. He having been detected in stating such an untruth, no credit can be attached to his assertions.

On the other hand. the plaintiff appears to me to have evinced a commendable desire to complete the contract. Punctually almost to the day the balance of the purchase money fell due, he proceeded to Wardsville, in order to pay it and complete the agreement, and I cannot doubt, whether a legal tender was made of the money or not, that he would then have carried the contract into execution so far as he was concerned, had a good title been shewn to the property. A reasonable objection, however, was made to the title, which the defendant makes no attempt to remove until eighteen months afterwards; and even supposing that upon the registration of the deed from *Lee* to the defendant, a good title was shewn, which is not certain, and that the plaintiff knew it, still the dispute about the £28 rendered the completion of the agreement impossible, and a suit absolutely necessary in addition to which the defendant attempted to deprive the plaintiff of the possession of the property to which he was entitled.

The decree affirmed the right of the plaintiff to a specific performance of the agreement, and to make every objection to the title to which it was open. The master reports the title good, and it must be intended to be so; but this implies that no title of dower exists which cannot

be removed; that the deeds have been produced, or satisfactorily proved; and that Mr. *Becher* is willing to release the land from his judgment, all which must be intended, as without it the report would not be true. I think the defendant's conduct has occasioned the suit, and all the expense attending it, which, therefore, I think he ought to pay.

FLINT V. SMITH.

Vendor's lien.

The lien of a vendor for unpaid purchase money is not waived by the fact of his suing and recovering judgment for the amount, although such recovery is subsequent to another judgment registered against the purchaser.

This was an appeal from the finding of the master of this court at Kingston, on the grounds stated in the judgment.

Mr. *Roaf*, for the appeal.

Judgment.—SPRAGGE, V. C.—No counsel appears in support of the master's finding, that defendant *Clarke* has no lien. He finds a sale by *Clarke* to *Smith*, the judgment debtor in 1855, while £75 of purchase money remained unpaid; a judgment recovered and registered by the plaintiff in 1856, and judgment recovered and entered by *Clarke* for the unpaid purchase money, and other moneys, in 1857, and upon these facts finds that *Clarke* has no lien. I think him wrong upon this point. The report is not quite as it should be. The question was, whether the lien of *Clarke* or the registered judgment of the plaintiff should prevail, and the report should have been to find the fact whether there was a lien for unpaid purchase money when the plaintiff recovered his judgment, and upon that the legal question would arise whether the registered judgment creditor would stand in the position of a purchaser for value, a position negatived by *Beavor* v. Lord *Oxford*. (*a*)

(*a*) 2 Jur. N. S. 121.

This appeal from the master would seem, indeed, hardly necessary, if further directions were reserved; as the master finds the facts which would enable the court to give *Clarke* the benefit of the lien, but I find further directions are not reserved, and it is necessary to set the master's report right.

I do not find that the report ascertains the amount due to the plaintiff or appoints a time for payment: and in appointing the time for other payments he does not state by whom, and to whom, the payments are to be made.

CROOKS v. WATKINS.

Statute of Limitations.

A mortgagee having obtained possession by ejectment, has a good title after twenty years, notwithstanding that, during these years, an administration order of the estate of the person, not being the mortgagor entitled to the equity of redemption, had been obtained.

Statement.—Previous to the year 1828, one *McCollum*, being entitled to certain lands, gave a mortgage upon them to one *Clarke*, and afterwards a second mortgage to one *Crooks*, through whom the plaintiffs claim. Afterwards, by virtue of an execution out of the King's Bench, the lands of *McCollum* were sold at sheriff's sale, and *Crooks*, the mortgagee, bought his interest in the lands in question, being the lands comprised in the mortgages, and obtained a deed and possession from the sheriff. In the year mentioned *Clarke*, default having been made in the payment of his mortgage, ejected *Crook's* tenant, and obtained possession. *Clarke* conveyed to one *Samuel Street*, of whom the defendant *T. C. Street* was heir-at-law, and the other defendants claim title through conveyances from *T. C. Street*.

Crooks, the original owner, dying, two suits were instituted, which were afterwards consolidated, for the administration of his estate, to which the defendant *T. C. Street* was a party in the master's office as a judgment creditor by virtue of a judgment obtained by *Samuel Street* against *Crooks*.

The plaintiffs charged that the administration suit, under which the debts of *Crooks*, and consequently *Clarke's* mortgage debt, were ordered to be paid out of the estate, operated as a suit to redeem, and the Statute of Limitations did not run from its commencement.

Mr. *Morphy*, for plaintiffs.

Mr. *Brough*, for the defendant *Street*.

Mr. *S. M. Jarvis*, for defendant *Jones*.

Mr. *Blake*, for defendant *Watkins*.

Judgment—ESTEN, V.C.—I think the bill ought to be dismissed with costs. A possession is clearly proved of the whole estate for more than twenty years by the mortgagee, and those claiming under him, without any payment of principal or interest, and without any acknowledgment.

There is nothing in any of the proceedings in the two suits to stop the operation of the statute. The documents or proceedings enumerating these lands, as part of the estate, were unobjectionable until 1858, and although the state of facts of the plaintiff was exhibited in 1849, when the title had become extinct, and although *Street* had, or could have had, a copy of this document, and attended the warrant on considering and proceeding upon it yet his silence could not be construed into acquiescence, much less could his conduct on this occasion be interpreted into such an acknowledgment as is required by the statute; independently of which, the document itself is immaterial in this view, as its only reference to the lands in question was in stating the conveyance to Mr. *McLean*, and in this respect it resembles the other documents referred to. Neither of the bills was in any respect a bill of redemption, or indeed could be; it is very doubtful whether they could have stopped the operation of the statute against the mortgage debt, even if it had been the debt of *Crooks*, for it is not a bill by a

creditor on behalf of all creditors, but a bill by the heirs at law; but supposing that any bill, under which the creditors must be paid, would be deemed a bill by such creditors, to prevent the estate from being destroyed by a multiplicity of suits, yet this debt, not being the debt of *Crooks*, could not have been paid in either of these suits; but had the case been otherwise, it would by no means follow, because a suit had been instituted which would arrest the operation of the statute against the debt, that therefore its operation in favour of the mortgagee against the estate must be arrested. If the mortgagee is not a party, and the bill does not seek redemption, it is *res inter alios acta*, and why should the mortgagee's title be affected? It is true that *Street* was a party to this bill, but it was not in his capacity of mortgagee, but in a totally distinct character as judgment creditor. As I am extremely clear upon this point, which is quite sufficient for the determination of the case, it is unnecessary for me to express my opinion upon the other points which were raised and discussed in the course of the argument. The bill must be dismissed with costs.

Bullen v. Renwick.

Mortgage—Purchase with right to re-purchase.

On an application by the owner of real estate to effect a loan upon the security thereof, the party applied to refused to advance the money, but offered to purchase the land, which proposal the owner refused to accede to. About two weeks afterwards, upon the parties again meeting, the owner consented to sell for £400, provided the purchaser would give a bond to re-convey on payment of £512 at the end of two years, which was agreed to, and a deed and bond executed accordingly. When the time for payment was approaching, an application was made to extend the time for payment, to which the purchaser assented on certain terms, which were not finally carried out. Afterwards the purchaser sued the vendor upon his covenant for good title, to which was pleaded a plea of usury, but which the jury by their verdict negatived; under circumstances the court held that the transaction was one of purchase with a right to re-purchase and not of mortgage.

Plaintiffs were heirs at law of one *Simeon Bullen*, with whom the transaction in question took place. The

bill alleged that defendant purchased of *Simeon Bullen* certain lands in the township of Lobo for the sum of £400, and received an absolute conveyance in fee simple thereof; but executed a bond back to *Bullen*, whereby he became bound to reconvey upon payment of £512 within two years thereafter; that the sum of £400 was a loan advanced upon the security of the property, and that the deed and back bond constituted a mortgage, and prayed that the plaintiff might be allowed to redeem.

The defendant on the contrary alleged that the rule was absolute.

Mr. *McDonald* for plaintiff.

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

Judgment.—ESTEN, V. C.—[Before whom the case had been heard.]—This is a question of mortgage or purchase with right of re-purchase. On the 1st of August, 1842, Col. *Renwick* wrote to Mr. *Bullen*, offering £525, for the purchase of the lands in question, or to lend him £500 for two years on such terms as he had instructed a friend (conjectured to be Mr. *Carey*) to offer to him. About three weeks after the date of his letter, Colonel *Renwick* met Mr. *Bullen*, and offered him £400 for the purchase of the same property. The £400 were clearly offered, I think, for the absolute purchase of the property, because *Bullen* declined it, and the negociation was broken off. This appears from *Wilson's* evidence. About a fortnight afterwards, *Bullen* again saw Colonel *Renwick*, and agreed to accept his offer, provided he gave him a right to re-purchase the property for £512. This proposal *Renwick* acceded to, and the deed and bond in question were thereupon drawn and executed, and the £400 paid. The property was then vacant, and much out of repair. Nothing was said about its occupation during the two years, nor does it appear how it was occupied, or if at all, during that time. In July,

1844, Colonel *Renwick* wrote a letter to Mr. *Bullen*, apparently in answer to an application from him to extend the time limited by the bond for another year. He thinks it advantageous to neither, but consents to it on receiving an equivalent in land or money at once; stating that he had an offer from Mr. *Carey's* brother, to rent the property for six years, from 1st January, 1845, without rent for the first three years, and at £30 a year for the other three years, and that Mr. *Carey* had stated that Mr. *Bullen* had given up all idea of using the bond given to him by *Renwick*; that except for deferring the time for looking for a tenant, he was indifferent; that he did not expect returns from the property for some years, and that if *Bullen* had been prepared to pay the money at the time appointed, he could have invested it at Toronto on good returns, and that the next best proposal for him was for *Bullen* to purchase and pay part of the price down, and secure the rest by mortgage, in which case it would be necessary to take into consideration some law charges he had incurred, and other additional charges. *Bullen* seems to have answered this letter on the 7th August, 1844. They evidently could not agree, for on the 16th October, 1844, Mr. *Becher* wrote a letter to *Renwick* on behalf of Mr. *Bullen*, threatening him with a *qui tam* action for usury. The action was not brought, but in 1845 *Renwick* brought an action of covenant against *Bullen* on the deed, alleging as a breach of the covenant for quiet enjoyment the existence of certain arrears of taxes, and a right of dower which had not been excepted from the deed. In this action *Bullen* offered a plea of usury, and at the trial the question was fairly raised, and the letters I have mentioned were produced. The jury returned a verdict for the plaintiff in that action, thereby negativing the fact of usury. With regard to the evidence, most of it has reference to the value of the property, which is no doubt, to a certain extent, material. *M. T. Wilson* considered £400 a fair cash price; *Robinson* thought the same; the other witnesses thought

it much higher. Mr. *Horton* was examined, and although his evidence was objected to, I think it admissible. He appears to have acted as the attorney of both parties; at all events, all that he deposes to occurred in the presence of both. He evidently thought that the transaction was a mode of obtaining 14 per cent. At the same time he cannot state anything positively as to the agreement of the parties. What he says on this point is merely an inference from what he knew. My conclusion as to the facts is that between the offer of £525, and the first interview between *Renwick* and *Bullen*, *Renwick* had changed his mind, and that the first offer of £400 was as purchase money for the absolute purchase of the land, and therefore the reduction is not imputable to an usurious loan. Upon the whole, considering the defendant's answer, the evidence of Capt. *Wilson*, the nature of *Horton's* evidence, and the result of the trial at law, I think I ought to decree for the defendant, and that the bill should be dismissed with costs.

HENRY V. BURNESS.

Sale of land for taxes—Combination to prevent competition at—Sheriff—His duty at such sales.

Upon a bill filed to set aside a sheriff's deed for land sold for taxes, it was shewn that by an arrangement between several of the parties attending and bidding at such sale, it was agreed that each should be allowed to bid on a whole lot for the amount of taxes due upon it; and others, not parties to this agreement, were prevented from bidding, by reducing the quantity to such a trifle as to be quite useless to the purchaser; under these circumstances the land in question, said to be worth £500, was bid off for £2 12s. The court upon this state of facts set aside the sale, but without costs, it being shewn that the purchaser was not a party to the combination complained of.

Where at a sale for taxes the sheriff discovers or has reason to believe that any combination has been entered into to prevent a fair competition therein, his duty is to adjourn the sale.

A sheriff has the means of ascertaining, to a certain extent, the value of land sold for taxes, and is bound to inform himself on the subject. He cannot be heard to say that he is so ignorant of its value, that he cannot tell whether it is worth £2 12s., or £500.

The bill in this cause was filed by *John Henry* and

John Moffatt against *William Burness*, setting forth that the plaintiff *Henry* was grantee of the Crown of the lot of land in question in the cause, and had contracted for the sale thereof to his co-plaintiff; and that the taxes thereon having been allowed to run into arrear to the amount of £2 12s. and the same was advertised and sold at auction by the sheriff of the county of Lambton.

The bill set forth several facts not material to the disposition of the case; and alleged further, that at the said sale there were other parcels of land sold as well as the plaintiff's lot, and before and at the sale at which the said lot was knocked down to the defendant, it was distinctly understood and agreed between the defendant and the other persons at the sale (but whose names the plaintiffs did not know) that there should be no competition at the said sale, and pursuant to such understanding and agreement each entire parcel of land, as it was put up by the sheriff, was knocked down entire and undivided without competition, to each of such persons, according to his turn; and the plaintiffs averred that their said lot, consisting of two hundred acres, and which they alleged to be of the value of £500 and upwards, was knocked down and sold to the defendant pursuant to such corrupt understanding and agreement, and without any competition for the price or sum of £2 12s.

The prayer was to cancel the sale and for other relief.

The defendant answered the bill, denying any agreement between himself and the other persons attending the sale; and the cause having been put at issue, evidence was taken *viva voce* before the court, the material points of which are fully set forth in the judgment of his Honour V. C. *Spragge*, before whom the cause was heard.

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

Mr. *J. H. Cameron*, Q. C., and Mr. *G. D. Boulton*, for the defendant.

SPRAGGE, V.C.—This bill is filed by the owner of land, sold for taxes, under the assessment laws of this province, in the month of October, 1858. The sale is impeached on the ground of the improper conduct of the sale by the sheriff, and of there being a combination among the audience, or a large number of them, to prevent competition at the sale. The sum due for taxes and for the expenses was £2 12s. 0d., and to satisfy this, 200 acres of land, being lot 12 in the 2nd concession of the township of Moore, were sold, and were purchased by the defendant. Their value is proved to be about £500.

The nature of the combination charged, and to some extent established by the evidence, was that the parties to it should not bid against one another. The object of the parties was to get whole lots knocked down to them for the taxes in arrear; and there appears to have been a sort of rotation agreed upon, or at least understood among them, according to which parties were to get entire lots without opposition. It is not brought home to the defendant that he was a party to such combination; and several bidders at the sale were called by the defendant to prove that they were not parties to any combination, and some express the belief that there was no such combination whatever; but the fact of such combination is proved by one of the parties to it, Mr. *Yeomans*, who says: "I got a whole lot for the taxes. There was an agreement between some purchasers about a dozen, I think, of whom I was one, that we should not bid against one another. We were to allow one another to get whole lots. If any one bid out of his turn it was said, let him have the lot, it is his turn," speaking of the person bid against. "The arrangement applied to both days." What occurred at the sale is perhaps best described in the witnesses' own words. *Michael Sullivan* says: "I bid for one lot and got it on the first day. There was some competition,

and there was a general understanding among those present that they should not bid against one another, but each take a lot, in his turn. This understanding continued to the end of the sale. If after a person got a lot, he bid for another, it was complained of, and it was openly remarked that he had no right to bid again out of his turn. At the sale, if any persisted in bidding, others would bid against him, so as to bring it down to two or three acres; few did persist after being told they were bidding out of their turn; there was an opportunity for others to bid if they liked; some bid on lots in order to perfect their title; I was not present at any arrangement that parties should not bid against one another, but I saw that there was such an understanding; the audience was rather riotous sometimes, and the sheriff threatened to postpone the sale." *Francis Creighton* says: "I tried to get a lot the first day, but could not; on the second day the bidders seemed to get lots a-piece; but when I tried they bid against me, and I did not go below fifty acres, but when I bid that, they would bid lower; other bidders were bid against in the same way. It appeared to me that the townspeople and speculators were combined together." This is confirmed by the auctioneer himself, who says: "On the first day a great many lots were cut down to small pieces which were not taken; I thought that it was to prevent others from getting the lots. On the second day more whole lots were sold than on the first. I thought bidders allowed others to get a lot under the idea that they would be allowed themselves to get one without opposition, there was nothing corrupt or fraudulent about the sale that I know of. Mr. *Thornton* acted as sheriff's clerk at the sale; he bought some lots. When they were put up he said he would take that lot, and there was no one who would bid against him."

The evidence for the defence does not materially change the character of the proceedings at the sale. The witnesses speak of more competition than the

witnesses for the plaintiff; and their evidence tends to exonerate the sheriff from complicity in any arrangement among purchasers to prevent competition, but even Mr. *Talfourd*, whose evidence is entitled to implicit confidence, says: "There was an attempt among bidders certainly to get lots in their turn, not opposing one another, but the sheriff I am satisfied had nothing to do with it. I bid for the sake of investment, rather than for the purpose of purchasing land. There was a good deal of noise part of the time." Other witnesses agree generally in the evidence of Mr. *Talfourd*. One of them, *McAvoy*, says: "There was a great deal of clamour and noise at the sale." The sheriff was also called for the defence. He says he was not aware of any agreement among the audience as to their bidding, but he adds, "I did not, however, like the way in which the audience conducted the sale. The practice of persons saying 'I will take this land,' and others saying 'let him have it,' was probably repeated a thousand times; such practices occur at all sales for taxes, I believe." He adds, that a number of young men of the place were scattered through the audience; that the greater part of the land sold the first day was thrown up—that purchased by persons in the neighbourhood principally; that purchased by persons at a distance was retained. Other witnesses speak of a combination to prevent what they call speculators from a distance from purchasing; others of purchases by such speculators through the young men of the town. It also appears from the evidence that whole lots were purchased by persons who professed their object to be to perfect their title; that lands not likely to be redeemed were preferred: that the sale was conducted amid much noise and confusion, and that a considerable portion of the audience interfered in the conduct of the sale, not only by a private combination or understanding among themselves, but by openly interfering with bidders to prevent their competition.

Now, to consider briefly the object of this portion of

the audience, the means they took to accomplish it, and its effect upon the sale. The object is palpable and was not disguised. It was to secure to themselves entire parcels of land for the taxes in arrear. The means taken to accomplish this object were by an arrangement not to compete with one another, and by silencing competition in others. So far as in them lay, they endeavoured to confine the biddings (with certain exceptions of which a purchase alleged to perfect a title was one) to a certain set. Those outside of this set were bid against, and the quantities of land run down to such a trifle as to be useless to the purchaser, and these generally not taken if the purchase, happened to fall to one of themselves. I do not mean that the evidence shows that this exclusion of others was universal. Mr. *Talfourd* and some others were not interfered with, but still this portion of the audience exercised such an influence upon the sale—it is not too much to say, such a control over it—as practically to exclude whom they would from purchasing. The effect of this upon the sale is evident enough, and we may look not only at the evidence to see what did occur, but at what must occur necessarily as a consequence of what was done. But the evidence shows much: some bidders deterred from the apparent hopelessness of being allowed to purchase; others induced to refrain from competition in order that, if they did not oppose others, they would be allowed to purchase a lot themselves.

Mr. *Mowat* contended, and with much force, that such conduct is against the policy of the law, as the law regards auction sales as a just and open method of selling property for the best price; and also against the policy of the assessment laws of the province, which appear to have been framed with an anxious desire that when land is necessarily sold for taxes, as small a quantity as possible should be sold, and that such part should be sold, as would injure the owner as little as possible; and he also insisted upon the extreme inadequacy of price as a ground for setting aside the sale.

Upon this latter point I hardly think that the grounds upon which the court acts upon inadequacy of price apply to such a sale as this. The fraud evidenced by the inadequacy of price is that upon which the court proceeds; but in a sale which the law makes the duty of a public officer, to collect revenue for public purposes, if the sale be duly and properly conducted, fraud on his part as an inference from inadequacy of price would seem to be excluded.

But I think that there is great weight in the other objection. On the one hand bidders at auction sales are protected by the rules against the employment of puffers, and on the other hand if a purchaser obtains his purchase by means which prevent a fair competition, he cannot hold it. A decision upon the latter point is that of *Fuller* v. *Abraham*, (*a*) where upon the sale of a barge a person who afterwards became the purchaser stated to the audience that he had a claim against the owner of the barge, by whom he had been ill used. He made a bid and was not opposed, the auctioneer refused to knock it down to him, when he got a friend to make a small advance upon his bid. The auctioneer still refused to knock the barge down to him, and the court sustained him in his refusal. The sum bid was about a fourth of the prime cost of the barge.

The books are, indeed, full of authorities to show that a party who obtains an advantage by unfair dealing cannot be allowed to hold it, and that, whether the advantage be in the shape of a purchase or not, or if a purchase, whether it be by auction or not; still it is obvious that a sale by auction cannot be that test of fair dealing which it is intended and taken to be, unless it is scrupulously kept free from undue influence from any quarter. And in regard to sales of lands for the payment of taxes, it may be said to be the avowed policy of the statutes that the least land possible should be sold; and

(*a*) Bro. & B. 116.

as a consequence that any contrivance that may be practised to procure the whole, or a larger portion than necessary of the land to be sold, is in contravention of that policy; and it is manifest that not only is the sale at which it is practised affected by it, but future sales, and at other places, as well as at the same; for bidders will be deterred from even going to such sales when they find that their attempts to purchase may be defeated by combinations or other contrivances. With regard to combinations, they may certainly be innocent, and instances are given where they may be so. One is where the thing sold is of such a nature as to be only within the reach of several combined. Another instance is where each of two parties requires a portion of a piece of land offered for sale, and agree that one shall bid for the benefit of both of them. But the combination which existed in this case was of a totally different character. It was to obtain land not offered for sale voluntarily by the owner, and where he might exercise some control, but through the process of the law, without competition. And why is competition excluded? Clearly under the apprehension that other bidders would pay the taxes for less land; in other words, that others are prepared to bid more for the land than they are; and in order that they may get it at as great an under value as possible, at a tenth, a hundredth, or, as in this case, at a two hundredth part of its value.

I can have no hesitation in saying that such combinations must, in the eye of the law, be looked upon as unconscientious. In the words of Mr. Justice *Story*, (*a*) "They operate virtually as a fraud upon the sale." The language of that eminent jurist, (*b*) Chancellor *Kent*, in just reprobation of a combination to prevent competition at a sale of lands in execution, is apposite to this case: "Such an agreement is against the policy of the law, dangerous to the rights of property, and fraudulent in its design." And he

(*a*) Story E. J. sec. 293. (*b*) 4 Johns C. C. 254.

quotes with approbation the language of the court in *Jones* v. *Carrol*: (*a*) "The law has regulated sales on execution with zealous care, and provided a course of proceeding likely to promote a fair competition. A combination to prevent such competition is contrary to morality and sound policy. It operates as a fraud upon the debtor and his remaining creditors by depriving the former of the opportunity of obtaining a full equivalent for the property which is devoted to the payment of his debts, and opens a door for oppressive speculation." I desire to add the words of another American Judge as expressing clearly and justly the policy of the law in regard to auction sales by officers of the law: (*b*) "It must be admitted that fairness in whatever is connected with auction sales should be encouraged. Vast amounts of property are and must continue to be disposed of at such sales. It is a mode of proceeding necessarily resorted to in the execution of decrees and determinations of courts of justice. The object in all cases is to make the most of property that fairly can be made of it. It is the policy of the law, therefore, to secure such sales from every species of undue influence. To allow bidders to buy off each other, which is but a species of bribery, and so to combine to prevent a fair competition as that a sale may be rendered iniquitously fruitless, cannot be admissible."

I need not say that in referring to decisions of American courts, I do not quote them as authority binding upon our courts; but the opinions of such men as Judge *Story* and Chancellor *Kent* are entitled to great respect; and I have quoted their language as, in my judgment, in accordance with the spirit of English law upon the same subject. There was one feature of the sale in question which I do not find to have existed in the cases referred to. Not only was there a combination among a portion of the audience not to bid against one another, whereby competition was bought

(*a*) 3 Johns. C.C. 29. (*b*) 25 Maine Rep. 143.

off, and that, as it would appear, not among themselves only, but on the part of others; but the combination extended to driving others from the field of competition by so bidding against them as to make a profitable purchase hopeless. This, if successfully carried out, would give to certain parties the entire control of the sale; they would purchase as they pleased, and in effect for such price as they pleased, and others would purchase only at their sufferance. It is manifest that such a sale would be at variance with the spirit and object of a sale by auction, and of our assessment laws, so far as they relate to the selling of land for taxes. It is, in truth, a mere going through the form of an auction sale, but in violation of its spirit. The very essence of an auction sale is fair and free competition. Where competition is bought off or silenced, it were a misapplication of terms to call a purchase, under such circumstances, a purchase at auction.

It is a principle of this court to have regard to the substance and reality of things; not to the shape which they are made to assume. I should shut my eyes to the real character of the sale in question if I held it sustainable, as in substance and good faith, as well as in name, a sale by auction.

Mr. *Cameron* did not contend (I think rightly) that the defendant was entitled to be protected in his purchase, because it was not proved that he was a party to the combination to prevent biddings. I do not think that the sale could be set aside as against a party to the combination, and sustained as to the defendant. It is true that in Lord *Cranstoun* v. *Johnston*, (*a*) a case in which Lord *Alvanley* took so strong a view against the defendant as to say: "I never saw a case in which relief sought was more clear; and I must forget the name of the court in which I sit, if I refuse to grant it;" still he made this remark, "It is said what if the sale had been

(*a*) 3 Ves. 170.

to a third person? I am glad I have not to determine that—a third person might have a great deal more to say than this defendant can." The purchase there was by an execution creditor, who had brought about the sale by means which the court held to be oppressive, but Lord *Alvanley* certainly thought that difficulty might exist in the way of relief against an innocent purchaser. But in the subsequent case of *Huguenin* v. *Baseley*, (*a*) Lord *Eldon* felt no such difficulty. He said: "I should regret that any doubt could be entertained whether it is not competent to a Court of Equity to take away from third persons the benefit which they have derived from the fraud, imposition, or undue influence of others." He referred to *Bridgeman* v. *Green*, heard first before Lord *Hardwicke*, and then before the Lords Commissioners, and cites the language of Lord Chief Justice *Wilmot*, which concludes thus: "Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." In both of these cases the property was affected in the hands of volunteers; here the defendant, though not standing in that position, is affected with notice. Indeed, he scarcely stands in so favourable a position as a purchaser for value with notice, because assuming that he took no part in the combination or in actively influencing the sale, he took the benefit, with his eyes open, of the improper practices of others to prejudice the sale. It cannot be urged that it may be that he would have obtained this whole lot, even if the sale had been fairly and properly conducted, and that it would be hard to fix him with the consequences of the misconduct of others. It is possible, certainly, that he might have obtained the whole lot without such misconduct, but he obtained it for a little over £2 10s., while it was worth £500; and obtaining it was a natural fruit of the absence of competition—a permissive purchase by the parties to the combination. The bare possibility, for it is a point incapable of ascertainment, that the defendant might have made the purchase, even

(*a*) 14 Ves. 273.

at a fair sale, would be a very weak reason for allowing him to hold it, when made at such a sale.

There is considerable conflict of evidence as to the conduct of the sheriff at the sale. Some of it points to his being an accomplice with those who combined to prevent competition. If this were made out, his conduct, taking his position into account, would be very gross—much worse than that of any of the audience. His duty was to discountenance, by every possible means, any combination among the audience. If in any way he lent himself, to such combination, it would, undoubtedly, be a very great dereliction of duty, a very gross perversion of his office. But I think this is not made out. He himself upon being examined, emphatically denied it; and those about him, who had an opportunity of observing his conduct, discredit it. I think that, in repressing the impatience of some of the audience, he used language which has been misunderstood. But, in acquitting the sheriff of complicity with others in improper practices at the sale, I cannot hold him wholly blameless in his conduct of the sale—at least, according to my judgment of what he ought to have done under the circumstances.

He is the officer appointed by the law to conduct the sale—in other words, a statutory trustee, his duty being to sell land to pay the taxes, and to sell as little as it was necessary to sell for that purpose: thus owing a duty, as such trustee, to the owner of the land as well as to the public. In executing his trust, so far as it affected the owner of the land, he found himself thwarted by a considerable portion of the audience; he was able to execute his trust to the public by realising the taxes from a sale of the land, but unable to execute his trust to the owner of the land, by selling as little as was necessary. I think he erred in continuing the sale amid the clamour, confusion, and combination which prevailed, and which rendered justice to the land-owner impossible. I believe, looking at all the evidence, that

he made as little sacrifice of the property offered for sale as he could, while permitting the sale to proceed under the circumstances: but when he saw that the essential element of an auction sale, competition, was virtually put down, so that his duty to the land-owner could no longer be discharged, I think he was wrong in continuing the sale. It may be said that at an adjourned sale he might be met with a repetition of the same conduct on the part of the audience, and that his duty to levy the taxes would thus be left unfulfilled. He would have no right to assume that an improper course of conduct would be repeated. I do not mean to say that the course proper for the sheriff to take may not be attended with difficulty, but the law has a right to look for the exercise of sound judgment, firmness, and discretion, as well as firmness in the execution of such duties.

Mr. *Cameron* put it that the sheriff cannot be taken to know that the value of a whole lot necessarily so greatly exceeds the arrears of taxes that a sale of the whole is improper. This implies that the sheriff is not bound to acquaint himself with what he is selling; that he may properly remain ignorant of the improvements, the quality of the soil, and of every particular beyond the number of the lot and the assumed quantity. I by no means concede that he can properly be ignorant of these particulars; he has peculiar facilities for becoming acquainted with them; and if he had not, still, if it is his duty to sell for the best price, as I take it to be, he cannot discharge that duty if so utterly ignorant of what he is selling as not to know whether it is worth £2 10s., or £500. Besides, the statute, in making it the duty of the sheriff to sell not only as little as possible, but that part which is least injurious to the land-owner, seems to contemplate his making himself acquainted with the land he is selling.

In the case before me, combination, for the two

purposes I have stated, has been proved; but I do not mean to say that actual combination is necessary to invalidate such a sale. The prevention of competition by any undue means, I apprehend, would be sufficient, because against public policy and a fraud upon the sale. The simple issue raised upon these pleadings is, whether the defendant's purchase, made under the circumstances it was, can be sustained. It is not objected that the plaintiff has not come promptly; and no ground is suggested for refusing relief if the sale was an improper one. I feel no difficulty in holding that the defendant's purchase cannot be sustained.

As to the terms upon which the plaintiff should be relieved: I think, as to the money payment, it should be the same as if he had tendered payment within the year. As to costs, I think each party should bear his own. The defendant cannot hold his purchase, but I think he did not obtain it through any undue practices on his part. The plaintiff, of course, ought not to pay costs. I have had some doubt whether he ought not to have them against the defendant; but, upon the whole, I think it is more just that each party should pay his own.

DAVIS v. CLARK.

Sale of land for taxes by sheriff—Costs.

Where at a sale of land for taxes a party became the purchaser of a lot of land at a trifling amount as compared with the value of the property by reason of a combination amongst some of the persons attending the sale, to prevent competition; and although it was not shewn that the purchaser was any party to such combination, still he acted in a manner so as to prevent competition, the court in setting aside such sale ordered the purchaser to pay the costs of the suit; and the sheriff having been joined as a party defendant, was, under the circumstances, refused his costs.

The bill in this case was filed by *Frederick Davis*, against *Antrobus C. Clark*, and *James Flintoft*, sheriff of the county of Lambton, setting forth that the plaintiff, in 1855, purchased the east half of lot No. 17, in the

10th concession of the township of Moore, from *Benjamin Butchard*, the grantee thereof from the Crown, which was sold by the defendant *Flintoft*, as such sheriff, on the 27th of October, 1858, for taxes alleged to be due thereon, at which sale the defendant *Clark* was declared to be the purchaser for £4 13s. The bill impeached the sale on the same grounds as are stated in the preceding case of *Henry* v. *Burness*; and alleged also that no taxes were due on the land, or at all events none such as would warrant the sale of the property by the sheriff for taxes: that the plaintiff on the 28th October, 1859, tendered *Clark* the full amount paid for the taxes, and ten per cent. interest thereon, which he refused to accept; whereupon the plaintiff tendered the same to the sheriff, but he also refused to accept it. The defendants answered the bill, denying all knowledge of any corrupt agreement respecting, or practices at, the sale.

The evidence in the cause was to the same effect as that given in the preceding case.

This cause also was argued before his Honour V. C. *Spragge*.

The plaintiff appeared in person.

Mr. *Hilyard Cameron*, Q. C., and Mr. *G. D. Boulton*, for the defendants.

Judgment.—SPRAGGE, V. C.—The sale impeached by the bill in this case took place on the same occasion as the sale for taxes in *Henry* v. *Burness*, which I have just disposed of.

The disparity in value is not so great as in that case, but still very great indeed; the taxes in arrear were under £4 15s., and the whole parcel of land on which they were due was sold to satisfy them. The defendant *Clark* made himself conspicuous in putting down competition, and whether he was or was not an actual party to

the combination proved to exist, it is in evidence that those who were parties to it would not bid against him.

I think the sale should be set aside upon the same terms as in *Henry* v. *Burness*, except as to costs, as to which I think, that inasmuch as the defendant *Clark* was an active participator in the practices, which in my judgment ought to avoid the sale, he should pay the costs of the suit to set it aside; the plaintiff to be at liberty to set off so much of the costs as may be necessary against the sum payable to the defendant in respect of the taxes.

In *Henry* v. *Burness*, I have given my view as to the duty, and the conduct of the sheriff, he is made a defendant in this suit. I think he should neither receive nor pay costs.

Galt v. Bush.

Vendor and purchaser—Rescission of contract—Judgment.

Where judgments are registered against the vendee of lands prior to the conveyances being executed in pursuance of the contract, the vendor is not entitled to a rescission of the contract in default of payment, but may obtain a decree of foreclosure or sale.

If a vendor conveys land to a purchaser under an agreement that he will execute a mortgage to secure the purchase money, which agreement the defendant neglects to register; and judgments are subsequently registered against the purchaser, they will prevail over the agreement. *Semble.*

This was a bill to enforce specific performance of an agreement to purchase land, and in default of payment of the amount due on account of the purchase, that the contract might be rescinded.

The defendant, the purchaser, allowed the bill to be taken *pro confesso*, abandoning all further claim upon the estate; several judgments had in the meantime been registered against the purchaser: under these circumstances,

Mr. *Blake*, for the plaintiff, submitted that he was entitled to the usual order for rescission of the contract in case of default; but

ESTEN, V.C.—[Before whom the case was heard.]—If Mr. *Galt* has not conveyed the estate, the judgment creditors must found their title upon the agreement, and Mr. *Galt* is entitled to a decree of foreclosure or sale. I do not think it right to rescind the agreement. *Bush's* abandonment cannot avail against the judgment creditors. If Mr. *Galt* has conveyed the estate to *Bush*, difficulty may arise, as the agreement has not been registered, the act of parliament making void unregistered deeds against judgments in the same manner as against deeds, although without the same reason, and if *Bush* had sold and conveyed the lands to a purchaser, and he had registered his deed, it would have prevailed over the agreement, and although the judgment creditor ought not to stand in a better position than the debtor, yet the act of parliament ignores this rule, unless the concluding clause of section 53 of 22 Vic., ch. 89, may make a difference which I doubt. The bill does not state that *Galt* had conveyed the estate to *Bush*, and the agreement, while it provides for a mortgage from *Bush* to *Galt*, reserves the conveyance until after payment of the purchase money.

HONSBERGER V. MARTIN.

Agreement for sale—Revocation by will.

A., by an agreement, disposed of all his real estate to one B., his son-in-law, who agreed to pay to A. an annuity for life, and after A.'s death to pay the purchase money in equal annual instalments to A.'s daughters. A., by his will, made some years thereafter, assumed to grant a legacy to his wife out of the real estate, directing the same to be deducted from the payments to be made to his daughters. *Held*, that the agreement was complete, and the proceeds of the realty could not therefore be charged.

This was a suit for administration of the estate of *Isaac Honsberger*, the testator mentioned in the pleadings. It appeared, upon enquiry before the master, that the testator had, about three and a half years before his

death, disposed of all his real estate to one *James W. Campbell*, who agreed to pay him one-third of the produce annually, during his life, and after his death to pay the purchase money in equal annual instalments to testator's three daughters, the first payment to be made at the expiration of two years from the testator's death. Shortly before his death the testator made a will, by which he assumed to devise to his wife, among other things, a house and barn, and one acre of the said real estate, for life, and a sum of money, also sundry articles which, under the circumstances, the personal estate being disposed of, would have to be paid out of the realty; and also charged it with the payments of his debts and funeral expenses, and directed the balance of the value of the farm, (the same as the purchase money mentioned,) after deducting these charges, to be paid to his daughters, as mentioned, and bequeathed his real estate, subject as aforesaid, to his son-in-law, the said *James W. Campbell*. The cause now came on to be heard for further directions.

Mr. *Roaf*, for the plaintiff.

Mr. *Blake*, for the defendants.

Judgment.—ESTEN, V.C.—I think I cannot but regard the articles of agreement between the testator and *Campbell*, as a perfect and complete act. It cannot for a moment be supposed that it had not this character, as regarded the sale of the property; that the equitable fee simple did not immediately become vested in *Campbell;* that the testator could afterwards have disposed of the estate by way of gift, sale or devise to any other person. The postponement of the commencement of the payments must be deemed to enter into the consideration: the settlement of one-third of the price on *Campbell's* wife, as a benefit to *Campbell*, must also be deemed a part of the bargain, and therefore to that extent the settlement was founded upon valuable consideration. I see no reason to doubt that as regards all the daughters, the settlement

was a complete act, and binding on the testator. No question arises as to the creditors, because all the debts are paid. The testator might have thought that his wife would not survive him, or not survive him long; or that he would have sufficient personal estate to make a suitable provision for her, and she appears to be entitled to her dower. I think *Campbell* was to continue in possession after the testator's death, as before. I think it would be very proper to make the costs payable out of the estate, as the doubt and difficulty has been entirely caused by the will, but in truth no estate exists, and every party must pay his own costs, except the executors, who must receive what remains of the estate towards their costs. I need not say that the £1,000 forms no part of the estate. It would be extremely dangerous to hold that the testator, by his will, made three years and a half after the agreement, and four years before his death, had given to the agreement a character of incompletness which did not originally belong to it. If the daughters should think fit to give effect to the provision intended for their mother, it would be highly commendable, but they are not in my judgment bound by the will, so far as it is in derogation of the settlement. As to all the instalments of Mrs. *Campbell's* share, which became due after the 4th of May, 1859, they are separate estate; the previous instalment must be considered duly paid to her husband.

JEKYLL V. WADE.

Awards.

Where an award was agreed upon between arbitrators, and afterwards one of them, having taken a new view of the case, dissented, and the others, after discussing by letter the dissenting arbitrator's views, made and published the award as formerly agreed upon, it was set aside, because the arbitrators should have met for the discussion; a correspondence on such a case being insufficient, notwithstanding the dissenting arbitrator did not object to that method.

Where the legal rights are not harsh, but the award disregards them entirely, it is void for inequality and partiality; and also where it is imperatively necessary that the award should determine whether a partnership was an ordinary one or not, and was not so clearly determined, the award is void for uncertainty.

This was an application on behalf of defendant to set

aside an award on the grounds stated in the head-note and judgment.

Mr. *McGregor*, for defendant.

Mr. *Hector Cameron* and Mr. *Blake*, contra.

Judgment.—ESTEN, V. C.—I think this award ought to be set aside, but without costs. I think that after Mr. *Smith* had declared his dissent to the award, that had been agreed upon, and suggested other principles, upon which they should arbitrate, the arbitrators ought to have met and discussed the matter again. It is true that it was discussed to some extent by letter, but that, I think, was not sufficient. If, after a thorough discussion of the matter, arbitrators, cannot agree, and one definitively withdraws, the others may dispose of the matters in dispute. But in the present case Mr. *Smith* did not finally withdraw after a thorough discussion of the matters in dispute. He expressed his dissent to an award that had been proposed, and suggested other views of the case, which were entitled to great weight. He certainly did not propose that they should meet to discuss his new proposition, and apparently was content to discuss it at a distance, through the medium of a correspondence; but this, I think, was not right, and it cannot become right, because the dissentient arbitrator acceded to it.

The arbitrators, after considering the matter in a light of natural justice, agree upon an award: before it is completed one of them, upon reflection, withdrew his assent to it. The matter is then at large, and the dissentient arbitrator having propounded new views, savouring more of regard to the legal rights of the parties, which were certainly entitled to great weight, they are insufficiently and unsatisfactorily discussed by letter, and the other arbitrators refusing to change their determination, established their original award without objection on the part of the dissentient arbitrator. I do not think an award so made can stand.

Again, supposing that the reference warranted such an award as has been made, I think that in the absence of any special agreement between the parties, an award so entirely disregarding the legal rights of the parties could not be sanctioned. An arbitrator, it is true, is not bound by the strict rules of law, but may relieve against a harsh right, or depart from the line of strict right in order to do substantial justice between the parties. But in the absence of any special agreement between these parties, the rights upon which the plaintiff insisted could not be characterised as harsh, nor was it necessary in order to do substantial justice, wholly to ignore those rights. An award framed upon that principle must be deemed unequal and partial.

The award is void, I think, on other grounds also. It is quite clear that the principal if not the only matter of difference between these parties, was the terms of their co-partnership agreement. It was imperatively necessary to decide this question, namely, whether the partnership was an ordinary one, or whether the special agreement, alleged by the defendant in his answer, really existed. It is perhaps impossible to gather from this award whether this question is determined or not, and the award is therefore void, I think, for uncertainty. My impression, however is, that it was not determined, in which case the award would be void for want of finality; but if it was determined, it was against the agreement, and the award in that case would, I think, be *ultra vires*. It is impossible, I think, not to see that the intention of the parties was, that if the agreement should be established in evidence, it was to be carried substantially and thoroughly into effect. Mr. *Wade* did not, I think, intend to abate his rights under the agreement one jot. On the other hand, if the agreement should be negatived, the plaintiff intended to insist upon his legal rights. There was no dispute, I think, as to what was partnership property. It was perfectly understood that all the property belonged to the partnership; but the question

was, whether it was to be divided according to the ordinary rule or not. This is the meaning, I think, of the expression "partnership property," in the submission. I think the intention was that if the agreement should be negatived, a fair and just division was to be made of the property. An award negativing the agreement, and containing this disposition of the property is, I think, *ultra vires*, under this submission. For these reasons I think the award should be set aside, but without costs.

In conclusion, I may remark that the gentlemen to whom this matter was referred, besides displaying a considerable share of ability, have evinced a very sincere and laudable desire to do justice between these parties; and when I use above the expressions, "unequal," and "partial," I am very far from imputing anything of this sort to them, but merely mean to intimate that in my judgment they have allowed too much weight to considerations of general equity, to the exclusion of the legal rights of the parties.

BURNHAM v. PETERBORO'.

Principal and surety—Municipal corporation.

Where a corporation, having a debt to pay, which it is their advantage to discharge immediately, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, promising to protect the note, or to repay, relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor.

Mr. *Adam Crooks*, for plaintiff.

Mr. *Hector*, for defendants.

ESTEN, V. C.—The facts of this case are clear beyond dispute. A sum of £700 was raised upon the note of the plaintiff, at the request of the mayor, and applied to

the use of the town in discharging a balance due upon its subscription to the railway, whereby its debt was paid, and it was enabled to recover interest on its stock, which it is doing by means of an action at law. The proceeding was sanctioned by resolution of the council. It is true that it was expected at the time that about £1800 would be recovered from Messrs. *Whitmarsh & Conger*, a balance on the debentures, which, however, is still unpaid. This circumstance is, I think, immaterial. The charges of embezzlement or misappropriation are clearly rebutted. I cannot imagine what Mr. *Sawers* means by saying that the debt was an unjust one, and one which ought not to be paid. The corporation owed a debt which it was unable to pay; a third person intervenes at its request, and pays this debt upon its promise to indemnify him. Can any demand be more just in the abstract than this demand of the plaintiff? It would be much to be regretted, if any technical difficulty stood in the way of the satisfaction of so just and equitable a claim. But I think none such exists. I cannot doubt that it would be competent for the corporation to apply any surplus moneys it might have, not applicable to any particular purpose, to the satisfaction of this debt without resorting to a new loan. But even supposing none such to exist, and that a new loan would be necessary, it would require time to accomplish it, and the demand was urgent. The same remark is applicable to the alleged misappropriation of the £1500 sterling, with which, however, the plaintiff is no way connected. Under any of these circumstances it would be highly advantageous to the corporation that the debt should be paid at once, for it would not subject them to any liability, to which they would not be otherwise subject, and it would instantly entitle them to a large sum, by way of interest, on their stock. I have no doubt that if a third person under such circumstances were to pay this debt at the request of the corporation, or to raise money on his credit to enable them to pay it, on a promise of repayment with interest, or on a promise to protect the note, and the contract were per-

formed, and the corporation had the benefit of it, they would be legally liable. This is precisely that case. The plaintiff is, however, substantially, although perhaps not technically, a surety, and entitled to indemnity, and has a right, therefore, to the aid of this court. His right may be rested on another ground. It is an old and well known head of equity that although a loan to a married woman is invalid, yet if the money be actually applied in payment for necessaries, unprovided by her husband, the party furnishing the money may apply to this court to stand in the place of the persons who have supplied the necessaries, and to proceed against the husband in their names. It cannot be doubted that the corporation could have been compelled to pay the balance of their subscription, and this money having been applied to that purpose, the plaintiff may stand in the place of the railway company. I think the plaintiff should have a decree with costs.

THE CANADA PERMANENT BUILDING SOCIETY v. WALLIS.

Specific performance.

A clause in the conditions of sale that the vendors shall only produce certain title deeds and an abstract of the registers, and that the purchaser shall not be entitled to call for any other proof of title, does not exempt the vendors from shewing otherwise a good title.

This was a motion for decree. The bill was for specific performance of a contract for sale. The sale was effected by auction, and the conditions contained, amongst others, the following clause: "The purchaser shall within ten days after the day of sale, be entitled to an abstract of the registers, affecting the premises, shewing the title of the vendors, and shall be allowed to examine the following documents in the possession of the vendors, (documents enumerated,) but no purchaser shall be entitled to call for the production of any further or other proof of title, nor of any deeds, papers, or documents in relation to the property sold other than those above mentioned."

The defendant became a purchaser at the auction, but objected to complete the purchase on the ground, of insufficiency of title in the vendors, whereupon the present bill was filed.

Mr. *Blake*, for the plaintiffs.

Mr. *Read*, Q.C., contra.

Judgment.—ESTEN, V.C.—I think the plaintiffs are entitled to a decree for specific performance, on making a good title, which I think they are bound to do, notwithstanding the peculiar form of the conditions of sale, although they are exempted from producing or delivering any other title deeds than those specifically mentioned. A valid contract was concluded between the parties, which was not rescinded, and which the plaintiffs have been reasonably eager and prompt to perform. The arrangement respecting the costs of the action and the repairs was merely a settlement of a question arising under the contract from subsequent events, and a graft upon the original contract and not an entire renovation of the contract, and was, I think *nudum pactum*, as described by Mr. *Leith*, and not binding on the plaintiffs, and moreover seems to have been abandoned. Mr. *Jones* and Mr. *Leith* differ materially in their statement of the terms of this arrangement. Upon the whole I do not think it should vary the rights of the parties. The letters do not amount, I think, in terms to the rescission of the contract, and, if the terms were stronger, would not amount in fact to such rescission. My construction of the conditions is, that as the plaintiffs had only certain deeds in their possession, they stipulated that they should not be bound to produce other deeds, and should not be bound to furnish other than an abstract from the registry; but, if upon this evidence taken according to its fair meaning to be correct, the title should appear defective, the plaintiffs would be bound to remedy the defects, and the plaintiffs appear themselves to have taken this view according to the

terms of the letter of the 7th of November. The decree will declare the right of the plaintiffs to specific performance according to the conditions of sale, provided a good title can be made, and will refer it to the master to look into the title, reserving further directions and costs.

RUTHVEN v. ROSSIN.

Revocation of submission to arbitration.

Where the time for making an award under a submission made an order of court had expired, and the parties afterwards meet, by consent, such meetings operate as a mere parol submission, which is revocable; and if revoked, the time for making an award cannot afterwards be enlarged by the court; and the party making the revocation will not be restrained from merely prosecuting his suit from the point at which it was arrested by the reference.

Statement.—This was a motion for an order to stay the plaintiff from proceeding with his cause, on the ground that a reference had been made to arbitration, and that the plaintiff notwithstanding was now carrying on the cause to a hearing.

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

Mr. *Roaf*, contra.

ESTEN, V.C.—It appears, so far as I can gather from the papers before me, that an agreement was made between the parties in November, 1858, to refer the matter in dispute in this cause to the decision of Mr. *Mowat*, and that the submission was made an order of court shortly afterwards. The time appears to have been eventually enlarged until the 1st of March, 1859, but no further, and so the defendant *Marcus Rossin* treats it in his affidavit. The memorandum of enlargement to the 1st of July being unsigned, was an imperfect act, and so the arbitrator himself seems to treat it. The parties attended voluntarily several times after the 1st of March. The order expired on the 1st of March; the plaintiff re-

voked the submission on the 29th of March; and so the revocation was no contempt. The subsequent meetings by consent operated, I presume, as a parol submission, for a reasonable time for making an award; but such a submission was undoubtedly revocable. It was not within the 7th Wm. IV., ch. 3, sec. 29, and it could not be considered as containing an agreement that it should be made a rule of the Court of Queen's Bench. It is true the court could have enlarged the time for making the award under the 19 Vic., ch. 43; and when the submission is not revocable without leave of a court, it will not, I presume, preclude an application for that purpose. But the present submission would have been revocable even if the time had been enlarged. The law on this subject depended at that time upon the statute 7 Wm. IV., ch. 3, sec. 29, which did not apply to the Court of Chancery; and the 22 Vic., ch. 22, is not retrospective in its operation in this respect. This submission, therefore, having been effectually revoked, I cannot enlarge the time for making the award.

Then, should I restrain the party from proceeding with his suit? No case has gone this length, that I have seen. Where a submission is revoked against conscience, the court will refuse its extraordinary aid to restrain the other party from exercising any powers he may possess, as in *Harcourt* v. *Ramsbottom*, (*a*) and *Pope* v. Lord *Duncannon*, (*b*) and if a submission be revoked, which is an order of court, it is no doubt a high contempt, and will be punished as such, and probably the party guilty of such an act will not be permitted, while its effect continues, to prosecute his suit. But no case that I know has decided, that where a revocation is not a contempt of court, the party performing that act, if he do not desire the extraordinary aid of the court to restrain the opposite party, will be prohibited from simply prosecuting the suit from the point at which it was arrested by

(*a*) 1 J. & W. 505. (*b*) 9 Sim. 177.

the reference. At all events it would be impossible to make such an order without being convinced that the revocation was an unconscientious act, and upon the present occasion I have no data to decide this question. I may indeed infer from the high professional character of the gentleman who was chosen as arbitrator, that his proposed award was a just one, and that the plaintiff ought to have submitted to it. But I have no evidence on the subject, and it might not be an unconscientious act in the plaintiff to revoke the submission, even although the proposed award might appear to the arbitrator a perfectly just one. Probably it would not be in my power to decide this question. The plaintiff, and Mr. *Davis*, his solicitor, seem to have protested against the proposed decision. I cannot, therefore, pronounce the revocation an unconscientious act, and no authority has been produced to shew that if it were so, I could prohibit the party committing it from simply prosecuting his suit. I think, therefore, I must dismiss this application, and I see no reason for refusing the plaintiff his costs.

RUMSEY v. THOMPSON.

Mortgage—Equity of redemption—Rival claimants.

A mortgagee having filed a bill to foreclose against two rival claimants of the equity of redemption, the court directed the usual redemption by, and conveyance to, the person *prima facie* entitled to the equity of redemption, with a right to the other claimant, at any time before the day appointed for payment, to shew himself to be entitled.

The facts appear in the judgment of his Honour V. C. *Spragge*, before whom the cause was heard.

Mr. *Roaf*, for the plaintiff.

Mr. *Cattanach*, for defendants, *Thompson & Miller*.

Judgment.—SPRAGGE, V. C.—The plaintiff is the assignee of a mortgage made by the defendant *Thompson* to one *Edmund Edward Warren*, and which was made payable by instalments, with interest.

Instalments having fallen into arrear, successive suits were brought by the plaintiff in the name of *Warren*, upon the covenant in the mortgage deed for their recovery; the first of these appears to have been settled after verdict. Upon the second, the equity of redemption was sold in execution, and the defendant *Miller*, who was attorney-at-law for the plaintiff in the different suits, became the purchaser at the sum of £150, and the sheriff executed to him a conveyance. The bill states that *Miller* claims to be the owner of the equity of redemption; and that the defendant *Thompson* claims that the sheriff's sale was invalid, and ought to be set aside; and that the defendants, or one of them is entitled to the equity of redemption.

The answer of *Thompson* sets up that the purchase by *Miller* was as a trustee for the plaintiff, and states that "when proceedings were about to be instituted in this court to set aside the said sale on various good grounds, *Miller* agreed and submitted," (not saying how or with whom, but I suppose with *Thompson*,) "to hold his said purchase simply as a trustee for the plaintiff, and by way of security for the plaintiff's debt, and not otherwise." The defendant *Miller* claims to be entitled to the equity of redemption under his purchase at sheriff's sale, free from any claim by *Thompson*, and he says that the sale was regularly and properly conducted.

A statement of Mr. *Miller* has been put in, which by the consent of counsel for both parties has been received as evidence. In regard to his purchase at sheriff's sale, he says, "On the 28th of November, 1857, I bought in the lands described in the deed from sheriff *Hobson* to me: I did so with the intention of applying the proceeds of the property on a sale in satisfaction of my clients' claims, being *Warren* v. *Thompson*, *Lawrence* v. *Thompson*, *Graham* v. *Thompson*," * * "I had no arrangement with the plaintiffs in any of the suits that I should buy for their benefit; my intention to apply the pro-

ceeds, only existed in my own breast. I informed Mr. *Rumsey* afterwards of the purchase, not saying what my intention was."

The fact alleged in *Thompson's* answer is, that *Miller* purchased as trustee for the plaintiff. The evidence does not bear this out; but suppose it proved, it would not support *Thompson's* position that he is entitled to redeem, for in such case the plaintiff could in equity have got it in, *Miller* being his trustee to convey it to him, and all that *Thompson* could say would be that this suit to foreclose either himself or *Miller*, was quite inconsistent with his position. The answer says further, however, that *Miller*, upon proceedings in equity being threatened, agreed and submitted to hold his purchase simply as a trustee for the plaintiff, and by way of security for the plaintiff's debt, and not otherwise. I suppose what is here meant is, that *Miller* agreed to forego his purchase so far as he derived any personal benefit from it, using it only as a security for the plaintiff's debt. There is, however, no proof of such agreement or submission; but *Thompson* asks for an enquiry as to who is entitled to the equity of redemption, involving of course the validity of the purchase by *Miller*, or at least the proof of a binding agreement on the part of *Miller* to hold by way of security only. His answer does not state upon what grounds the sale is open to objection, but says generally that proceedings were about being instituted to set it aside upon "various good grounds," and puts the agreement and submission of *Miller* as by way of compromise.

I think it extremely hard upon a mortgagee that his proceedings should be delayed, while the right to redeem is being contested between rival claimants; but here he has brought both before the court; and the right to redeem must be decided in this suit before the court can give it to either of them; or else the court must give it to both, directing a conveyance from the mortgagee to be given to that one who may redeem, without first ascer-

taining whether he has a right to it, and leaving the proceedings open to the embarrassment that may occur in the event of both offering to pay the mortgage money.

I confess I should myself be disposed, if the question were now arising for the first time, to direct that the mortgage money should be paid into court, foreclosing both in the event of its being paid by neither, respiting a conveyance, if paid by both, until the question between the contestants was decided, or directing a conveyance to the registrar; allowing the mortgagee at once to receive his mortgage money; and if one only paid, directing a conveyance to that one; or else upon the contingency of payment by both or by one reserving further directions. But the point has been considered by the court in a case where the right to redeem was in contest between judgment creditors, and the grantees in what was alleged to be a voluntary conveyance—*Buckland* v. *Rose*, and I shall feel bound to follow what was done in that case whenever the point arises. This case differs in this: *Miller, prima facie*, has the right to redeem, having acquired it in his own right; and there was nothing, at least nothing has been suggested, to prevent his becoming a purchaser; *Thompson* has had an opportunity to show himself entitled instead of *Miller*, and has not done so; and it can only be a matter of discretion with the court whether or not to allow him a further opportunity. I think this indulgence ought not to be granted at the expense of further delay to the mortgagee. I think a decree may be made in this shape, referring it to the master to take the usual accounts, and to report; reserving the right to redeem in the usual terms to *Miller*, with a proviso, that if in the meantime, that is, before the day appointed for payment, *Thompson* shall establish his right to redeem, instead of *Miller*, then shall he redeem, as to which a reference to the master; but the master not to delay his report upon the account pending the enquiry. *Thompson* in such case would be entitled to attend upon t' taking of the

accounts, and should be allowed to establish his right by separate suit, if he desire it. All parties to have liberty to apply.

I do not think such a decree quite free from objection; but it is the only mode that occurs to me of giving *Thompson* a further opportunity of shewing his right to redeem, if he have any, without causing unreasonable delay to the mortgagee. If *Thompson* should fail to establish his claim, he should pay to *Miller* the costs of the enquiry; if he should succeed, the costs as between him and *Miller*, may be the subject of application, for which leave is reserved.

BAKER v. WILSON.

Application for new trial of issue—Proof of marriage.

The testimony of a woman of the ceremony of marriage having been performed, and evidence of respectable witnesses of the general reputation of the marriage, held sufficient proof of it, notwithstanding that it was not proven that the clergyman who performed the ceremony was duly authorised; and that evidence of reputation of marriage alone was sufficient proof.

Statement—The bill alleged that *John Baker*, deceased, in his lifetime, was seised in fee simple of certain lands, which he conveyed to one *Jones* for the sum of £50, and took from *Jones* a bond to reconvey upon payment of principal and interest. *John Baker* died without having redeemed, and the defendants *Wilson* and *Collins* obtained letters of administration of his estate. They then redeemed the land mentioned, took a conveyance in fee simple to themselves, and sold and conveyed to the other defendant, *Miller's* father who, dying, left the defendant *Miller*, his heir-at-law; that the plaintiff was the only surviving child of *John Baker*, and prayed that the conveyance by *Wilson* and *Collins* to *Miller* might be set aside.

The defendants alleged that *John Baker* was never lawfully married to the plaintiff's mother, and at the hearing an issue was directed to try the question. (*a*)

(*a*) See Ante Vol. 6, p. 603.

The jury found for the plaintiff; and now

Mr. *Fitzgerald*, for the defendants, moved for a new trial of that issue, on the ground that the verdict was contrary to evidence, and the charge of the learned judge, before whom the issue had been tried, and the discovery of further evidence.

Mr. *Doyle* and Mr. *Taylor*, contra.

Judgment.—ESTEN, V. C.—This was an application for a new trial of an issue, directed to ascertain the legitimacy of the plaintiff. The ground of the application is the discovery of new evidence since the trial, and that the verdict was against the learned judge's charge, and the weight of evidence. I think the application should not be granted. The evidence of the marriage of the plaintiff's parents, both in the cause and at the trial, consisted of the testimony of the mother to the ceremony of marriage having been performed between herself and the plaintiff's father, by one Mr. *Harris*, a baptist preacher, in the year 1843, and the testimony of several respectable witnesses to the reputation of the marriage, and that the parents of the plaintiff cohabited as man and wife from the year 1843, until the death of the plaintiff's father, which happened in 1847. It was objected that it was not shewn that Mr. *Harris* was duly authorised to perform the ceremony of marriage, and I think it is not shewn that he was duly authorised to perform the ceremony of marriage according to the provisions of the 11 Geo. IV., ch. 36, the act then in force. However, it is quite clear that evidence of reputation of the marriage was sufficient to entitle the plaintiff to a decree. (*a*) The evidence of the actual performance of the ceremony was unnecessary, and it cannot be objected, therefore, that the evidence was incomplete. The only evidence in opposition to what I have mentioned was that of *Wayne* and his wife, and one *Ault*. The evidence of *Wayne* and his wife appears

(*a*) Doe dem. Fleury v. Hening, 4 Bing, 266; Taylor on Evidence, 150, 360, 450.

wholly undeserving of reliance. *Ault* deposes to an improbable admission made to him by the plaintiff's mother, which is at variance with another part of his testimony, in which he states that *Baker* treated the plaintiff's mother as his wife, and introduced her as such to his family.

This evidence was entirely outweighed by the evidence on the other side. The jury evidently believed the plaintiff's witnesses, and I think the verdict was in perfect accordance with the weight of evidence. Nothing can more strongly shew this than the fact that notwithstanding the judge's charge, which was adverse to the plaintiff, they gave a verdict in her favour. If the application, therefore, rested entirely on the state of the evidence adduced in the cause, and at the trial, I should refuse it without hesitation. The only question, then is whether the newly discovered evidence should vary this determination. Four affidavits are produced, one by a person of the name of *Lake;* another by one *Dennis;* a third by a person of the name of *Tozer;* and the fourth from *Thompson*, the hotel keeper, at whose hotel Mrs. *Baker* states that the marriage was celebrated, and who was stated by her to have been present at the ceremony. The affidavits of *Dennis* and *Tozer* are entitled, I think, to no weight whatever. I am satisfied that if these individuals had given evidence to the same effect before the jury, it would not in the slightest degree have affected the verdict. The affidavits of *Lake* and *Thompson* are entitled to more attention. *Lake* was employed by *Gilbert* to seek *Thompson*, and his affidavit seems entitled to perfect credit, and probably the evidence of *Thompson* was elicited more fairly by him than by either of the other parties, who applied to him for the purpose. I do not doubt that everything passed between *Lake* and *Thompson* that *Lake* relates in his affidavit, and it is certainly unfavourable to the plaintiff, for the tendency of what *Thompson* stated to him was to shew that he had never heard of *Baker's* marriage, and that he was so

intimate with him that it could hardly have happened without his knowledge.

With regard to *Thompson's* evidence, supposing his affidavits to be inconsistent with each other, it is to be remarked that on the 14th of February, 1860, he makes one statement upon oath; that on the 17th he makes another; and that on the 9th of March he reiterates the first. But I am not inclined to consider these statements as inconsistent with each other, or to impute perjury to *Thompson*. Of course if he had committed such an act, it would be worse than useless to examine him as a witness. But I think he merely means to say that he never heard of *Baker's* marriage, but that when he visited him at Vienna two or three times in 1843-4, he was residing in his own house, and he concluded that he was married. All that *Thompson* states in his affidavits, and in his conversation with *Lake*, is consistent with the marriage having been celebrated at the North American Inn at Dunnville, in June, 1842; when he might have been, and probably was, absent on the lakes, and his business was managed by his brother, whom Mrs. *Baker* supposed naturally enough to be the proprietor of the inn, and his wife, if he had one, the wife of the proprietor. When he returned home, perhaps some months afterwards, he may not have heard, or may never have heard, of *Baker's* marriage. This is possible, although not very probable.

With regard to his wife, it is not stated that she was absent from Dunnville during the month of June, 1842. If she was at home during that month, it is difficult to suppose that the marriage could have occurred in the house without her knowledge. Suppose her to state this fact to the jury, would they necessarily disbelieve Mrs. *Baker*, who must recollect minutely all that occurred, because Mrs. *Thompson* did not remember a circumstance in which she was in no way interested, and which occurred seventeen years ago? Mrs. *Thompson*, however, might not have been in Dunnville, in June, 1842, or she

may not be able to recollect whether she was or not; and it must be borne in mind that we have no statement on oath from Mrs. *Thompson*, only *Lake's* statement, of what she told him.

If, however, considerable doubt should be thrown upon Mrs. *Baker's* statement as to the celebration of the marriage, the unquestionable evidence would remain of *Baker* and the plaintiff's mother having co-habited from 1843 to 1847, the year of his death, as man and wife.

Upon the whole, I think my duty is not to grant a new trial of this issue, but to refuse this application with costs.

HOPE v. BEARD.

Trustee and cestui que trust—Married woman.

A conveyance not conforming to the solemnities required by law for the protection of married woman is not binding.

Quære, whether a married woman consenting to a breach of trust, can afterwards complain of it; and *semble*, that if she makes a representation and encourage another to act upon it, she will be compelled to make it good.

A trustee dealing with his *cestui que* trust is bound to communicate all facts at all material in the transaction: therefore where a trustee of lands for the payment of debts, paid the debts, without exercising the power of the sale for that purpose, and took a release from the *cestuis que* trust to himself, without informing them that he had previously caused a large number of bricks to be manufactured upon the land, the profits of which might have paid a large part of the claim of the trustee against the estate, the release was held void.

Mr. *Roaf*, for plaintiff.

Mr. *Strong*, for defendant.

Judgment.—ESTEN, V. C.—The facts of this case are, that one *Moore* died in 1843, having made a will, by which he gave all his personal estate to his wife, and also gave to her six park lots in Palace Street, and two park lots in King Street, Toronto, all purchased from the Hospital, subject to the payment of such of his debts as his personal estate, excepting his household furniture, and goods should be

insufficient to pay, with an executory devise of two-third parts of them in favour of his sons *John* and *Thomas*, or the survivor, or either of them, in case they or he should assume the payment of his debts, and make an arrangement to the satisfaction of his executors for that purpose, and he gave his Innisfil lands to the use of his son *James*, on his attaining 21 years of age; but in case of his death under that age, he gave them to the use of his wife, during her widowhood, with remainder to his sons *John* and *Thomas;* and he gave a power of sale to his executors and trustees over the park lots, for the payment of his debts; and over the Innisfil lands for that purpose, and for the support of his wife, and the support and education of her son *James;* and he appointed one *Elliott* and the defendant executors. They both proved the will, but *Beard* alone has acted, and *Elliott* is dead.

Beard paid all the debts, and realised the personal assets, but did not sell any of the lands, and in the result the estate was indebted to him in about £347. In 1845, after he had proved the will, *Beard* procured from *John* and *Thomas Moore*, their consent in writing to his purchase of the park lots, in Palace Street, for his own benefit, and a release of all their interest in them. In 1851 he procured a similar instrument from Mrs. *Hope*, and *James Moore* including, however, the King Street lots, which had probably been omitted from the other instrument, by mistake. He paid £39 on behalf of the estate in respect of the interest on the King Street lots before he procured the release from the sons. Almost immediately afterwards he purchased, or attempted to purchase, the park lots for his own benefit, and made a payment of £75 in respect of the Palace Street lots, and has since paid all the principal and interest which has become due in respect of them, and has paid the interest on the King Street lots. Previously to obtaining this written consent and release from the plaintiffs, he had put two persons of the names respectively of *Swanton* and *Beamish* in possession of the Palace Street lots, and

they manufactured upon them from 250,000 to 300,000 bricks, he furnishing the money for the purpose, and doubtless receiving the benefit of the transaction.

He does not appear to have communicated this fact to the plaintiffs, when he procured the instrument of 1851 from them, but I think it must be intended that he represented to them, according to the statement in his answer, that nothing had been paid on the park lots, and that a considerable sum, exceeding £200, was due in respect of them; and no doubt it was understood at the time that the personal estate was insufficient for the payment of the debts. In 1855 the plaintiffs and defendants met at Kingston, in pursuance, it would appear, of an appointment made at Toronto for the purpose, and an account was stated between them respecting the estate, and a general release executed by the plaintiffs; and upon the same occasion the defendant executed to *James Moore* a release in respect of the Innisfil lands. The correctness of the account, which was produced by the defendant on this occasion, is not impugned. No vouchers were produced, but the plaintiffs did not require their production, and were satisfied with the account itself.

Messrs. *Smith & Henderson* acted for the parties in the preparation of the instruments, but they seem to have settled the account between themselves. Messrs. *Smith & Henderson* appear to have been previously the attorneys of the plaintiffs and they were probably employed to prepare the instruments at their recommendation. This transaction was a somewhat singular one. The estate, as already mentioned, was indebted to defendant in £347, which had no doubt been applied to the payment of debts. The personal estate, excepting the household furniture and goods specifically bequeathed to the wife, had been exhausted: the park lots, charged in *sub sidium* with the payment of the debts, had been made over to the defendant; there was no reason why

Isaac Hope should have made himself liable for the payment of the amount due to the defendant. As regards the Innisfil lands the defendant might have filed a bill, and had them sold to pay the balance due to him, and *James Moore* therefore became liable to pay a moiety of that balance in order to save them. I do not understand the expression, which occurs in the two instruments of 1845 and 1851, that *Beard* had fully accounted to the estate for the park lots. Upon the whole I do not see any reason to doubt the validity of the release executed in 1853. The notes are paid, and no complaint is made for five or six years. *Isaac Hope* had power to give an effectual release *quoad* the personal estate, and it is only with respect to the personal estate, so far as *Hope* and his wife are concerned, that I think effect ought to be given to it. I do not think it was intended to embrace or affect the park lots. They had already been disposed of. The sons had given a release of their right in 1845; *Beard* had thereupon purchased, or professed to purchase them for his own benefit; Mrs. *Hope* had in 1851 professed to relinquish all interest in them; and *Beard* had actually sold the Palace Street lots to *Lee*, before the execution of the release in 1853. It cannot be supposed, therefore, that this instrument was intended to affect them, or that it was thought necessary that it should affect them. The principal object contemplated by it was the personal estate. *James Moore* released probably in respect of the Innisfil lands: words applicable to personal estate were used, and although some very general words are added, yet they cannot be deemed to affect what was not, I think in contemplation, and was considered as already disposed of. It is true that *Isaac Hope* had not signed the instrument of 1851, but it must have been because his execution was thought unnecessary; he assented to it, as the defendant himself alleges, and therefore would doubtless have signed it, had it been considered necessary. I cannot suppose, therefore, that his concurrence in the instrument of 1853 was intended to supply any supposed defect of that sort. But as entitled in

right of his wife, to the personal estate, his concurrence was absolutely necessary. He in fact was the only person who could give a release *quoad* the personal estate; and the parties were probably so advised by Messrs. *Smith & Henderson.* I consider, therefore, the park lots wholly unaffected by this instrument.

The matter then seems to stand thus: the two sons, *John* and *Thomas,* have no interest whatever either in the real or personal estate, for the executory devise of the park lots in their favour never took effect. The Innisfil lands became absolutely vested in *James Moore,* and the personal estate and the park lots became in the event which happened, the absolute property of the wife, for the personal estate was absolutely bequeathed to her by the will, and the park lots were given to her subject only to an executory devise in favour of *John* and *Thomas,* which never took effect. The question of the personal estate was settled by the release of 1853, and the only matter, therefore, that remains open to discussion is, the disposition of the park lots. It appears to me that the release of 1851 is wholly inoperative, as regards Mrs. *Hope.* It may be (although I think not) that a married woman consenting to a breach of trust, cannot afterwards complain of it; or making a representation and encouraging another to act upon it, will be compelled to make it good; but it is perfectly certain, I apprehend, that she can perform no act of alienation in respect of such estate, unless it be accompained by the solemnities prescribed by law for her protection. The requirement of the release of 1851 from Mrs. *Hope* pre-supposed that the park lots were her property, and if they were, she could not alienate them without the solemnities required by law. That they were her property is undoubted. A contract existed which had not been rescinded by the hospital; it was the duty of Mr. *Beard,* as an executor, to do his utmost to carry this contract into effect for her benefit, and he could not be permitted either to fulfil this contract, or to enter into another for his own benefit

without her consent; and such consent, which would be in fact an alienation of her estate, could not be given so as to bind her without observing the solemnities prescribed by law for the protection of married women. At any rate, therefore, Mrs. *Hope*, or after her death, her heir-at-law, would be entitled to question this transaction; and the only question is, whether *Isaac Hope* is bound by what has occurred, and precluded from seeking the relief which is prayed with respect to these lots.

It is alleged, and I have no doubt that, although he did not sign the release of 1851, he was aware of, and assented to it, and therefore *prima facie* should be bound in this court to the same extent as if he had affixed his hand and seal to it. But no man is bound by any assent or release that he gives, unless he be made aware of all the facts, which it is material for him to know, before he gives it. It was the duty of Mr. *Beard*, as a trustee, to put his *cestuis que trust* in possession of all material facts before he took from them a release of their right. It does not appear that he communicated to them the fact that he had at that time received from what was unquestionably their property, an amount which was probably sufficient to discharge all the arrears due upon it. This was a most material fact, and it is impossible to say what effect the knowledge of it might have had upon their determination. A release given in ignorance of this material fact, which it was the duty of Mr. *Beard*, as a trustee, to communicate, cannot bind, and I think, therefore, that he must be declared a trustee of the park lots, and must account for their full value, and for the rents and profits, being allowed all moneys that he has properly paid, with interest; and I give no costs to this time. It is true, and we so ruled in *Graves* v. *Henderson* (*a*) that a trustee cannot be made liable for the full value if the estate itself can be recovered; but *Lee*, the purchaser in this case, saw by the will that *Beard* had power to sell for the payment of debts, and

(*a*) Ante p. 1.

it was not his business to enquire whether a necessity for a sale had arisen; which, however, was the fact; nor is it suggested that anything entered into the sale, for which it could be successfully impeached.

HICKMAN v. LAWSON.

Arbitration—Setting aside award.

In the course of the proceedings under a reference to arbitration made in the suit, the defendant made a representation to the arbitrators which was to influence their conduct, but suppressed a material fact; the court set aside the award.

Where a witness for one party is examined in the absence of, and without notice to the other party, the award will be set aside.

Two out of three arbitrators took the evidence of B. in the absence of the plaintiff, and of the other arbitrator, by which evidence it appeared the two were influenced in making their award. *Held*, sufficient to invalidate the award.

Statement.—This was an application by the plaintiff to set aside the award made in the cause, on the grounds stated in the judgment of His Honour V. C. *Esten*.

Mr. *Roaf*, for the application.

Mr. *Fitzgerald*, contra.

Judgment.—ESTEN, V. C.—This was an application to set aside an award in a cause. The arbitrators originally appointed, were Mr. *Dennis* and Mr. *Gibson*, and they not agreeing in their arbitration, Mr. *Fleming* was appointed by the court to act with the other two. Much evidence was taken by the two arbitrators originally appointed, before the appointment of the third arbitrator. This evidence was taken in the spring of the year 1859. The last day on which evidence was regularly taken, was the 27th of May, upon which occasion it was understood by all parties that the evidence was closed. The plaintiff declined addressing the arbitrators, and it was understood that the defendant was to be at liberty to address them at a time to be appointed for that purpose, in his absence.

The day appointed was the 21st of June, and notice of

the meeting was given to the plaintiff, accompanied by a request from Mr. *Dennis* that he would attend, which, however, he declined, understanding from the person who gave the notice that nothing more was to be done than the defendant addressing the arbitrators, as was before arranged. At this meeting not only did the defendant address the arbitrators, but they also in the absence of the plaintiff re-examined a witness, one *Hughes*, who had been examined thrice before. The plaintiff did not become aware of this fact until after the publication of the award. The same witness was examined again after the appointment of the third arbitrator. In the spring of that year, and before the appointment of the third arbitrator, Mr. *Dennis* and Mr. *Gibson* had examined a witness of the name of *John McIntosh*, in the village of Bolton. He said that he could shew them marks on the old flumes of the grist mill which would determine the height of the water in 1849. He had himself been lessee of the mill for several years.

The arbitrators, and particularly Mr. *Dennis*, thought this evidence important, and they adjourned to the premises with the view of inspecting the flume. When this occurred, the plaintiff being present, and the object of their visit being understood by the defendant, he represented either that the flume had been removed and the penstock had subsided; or that the flume had subsided in consequence of being undermined by water, and from the weight of some ovens, which had been built upon it, and would afford no evidence whatever of the height of the water in 1849. The plaintiff insisted that if the flume were examined, some light would be thrown upon the matter; but the defendant denied it, and said it would be lost labour, and finally, by his opposition and representations dissuaded the arbitrators from persisting in their purpose. In point of fact the interior of the old flume could at any time have been easily inspected, but the defendant did not mention this circumstance, although some days afterwards he opened the flume for

the purpose of taking a level from it, of which he produced evidence before the arbitrators, it being, as he says, in his favour.

Mr. *Dennis*, who was particularly anxious to examine the flume, had no idea that its interior was accessible. Had he known it, he says, he would have insisted upon inspecting it. He was of opinion, from his own observation, and from the evidence, that the flume had not subsided. In the autumn of the year Mr. *Fleming* was appointed the third arbitrator. The three arbitrators met in Bolton village, on the 9th of September. They examined the flume a second time, but in the absence of the plaintiff; upon which occasion a cap of the old flume was uncovered, but nothing more than a partial examination of it effected. The defendant was present. The arbitrators met on the 18th and 19th of September, to discuss the evidence. Finding that they could not agree as to whether the fruit-trees in an orchard adjoining the plaintiff's premises, had or not been destroyed by the water, they determined to consult or examine Mr. *Leslie;* and they appointed the 21st for that purpose; on which day it was arranged that they should all meet in Bolton village. Messrs. *Fleming*, *Gibson*, and *Leslie* attended, but not Mr. *Dennis*, who was prevented from attending by a storm that occurred on that day. Some examination of the trees was made by Messrs. *Fleming*, *Gibson*, and *Leslie*, and the plaintiff, who was present, was informed that, as Mr. *Dennis* had not arrived, it would be necessary to examine Mr. *Leslie* on another day. Nothing like a regular examination occurred on that day in the presence of the plaintiff, nor did he receive any notice of the examination of Mr. *Leslie*, at which also Mr. *Dennis* was not present, and of which he received no notice. This examination was in fact nothing more than a conversation between Mr. *Leslie* and Messrs. *Fleming* and *Gibson*, on the subject of the trees. This conversation, Mr. *Dennis* states, influenced the determination of the other two arbitrators, and he had an opportunity of forming a judgment on this point from the

conversations and discussions which afterwards passed between them on the subject of the award. Mr. *Dennis* states that at a previous discussion on the 18th and 19th of September the arbitrators found that they could not agree about the trees, and it was determined to examine Mr. *Leslie* upon the subject. Mr. *Dennis* himself was particularly desirous that he should be examined.

One other point remains to be noticed. One *Evans* had been examined in the spring, but on the 9th of September, it having been suggested to the plaintiff that he could give additional evidence, he desired to re-examine him on the 12th, the day appointed for continuing the examination of witnesses; but the plaintiff not having *Evans* ready on that day, the arbitrators refused to adjourn the meeting in order to afford him an opportunity of procuring his evidence. This they did, I think, in a fair exercise of their discretion, and without any improper intention.

Upon these several points the award is impeached. With regard to the representation of the defendant respecting the flume, I think he failed in his duty. Undertaking to make a representation to the arbitrators which was to influence their conduct, he should not have suppressed any matter of fact. I am not sure that the flumes had not subsided; I am not sure that the defendant did not believe that they had, whether they in fact had or not, but he knew when he made the representation that the interior was accessible, and could have been inspected, and he ought to have mentioned this circumstance. It is impossible to suppose that had this fact been disclosed, the arbitrators would not have insisted upon inspecting the flume, and important evidence might thereby have been obtained which might have affected the whole award. I think this fact alone would have been sufficient to invalidate the award. But other grounds also exist. The examination of *Hughes* on the 21st of June, in the absence of, and without notice to the

plaintiff, was, I think, sufficient to nullify the award. It is true that *Hughes* was afterwards examined, and if the plaintiff with knowledge of the irregularity had proceeded in the arbitration, he might be deemed to have waived it; but he expressly states that he was ignorant of the fact of *Hughes's* examination on the 21st, until after the publication of the award, and there is nothing to contradict this evidence.

The examination of *Leslie*, under the circumstances which attended it, is equally, I think, fatal to the award. I cannot distinguish this case in this respect from that of *Dobson* v. *Groves*, (*a*) except that it appears to me to be much stronger. There the conversation related to a matter, upon which, as was considered, although not very directly, the arbitrator was to adjudicate, and the possibility that his mind might have been biased, was deemed a sufficient objection to the award. Here the conversation in question not only related to the matter upon which the arbitrators were to adjudicate, but formed a material part of the very foundation of the award; the minds of the two arbitrators who made the award were in fact biased by it; and it was held in the absence not only of the parties, but of the third arbitrator, who had no opportunity of putting questions to Mr. *Leslie*, or of discussing with the other arbitrators the effect of his evidence. It was attempted to compare this case to those in which counsel has been asked by the arbitrator of a skilled person, whose opinion he adopts as his own.

The cases that were referred to on this point are not considered by Mr. *Russell* in his learned work upon awards, as affording any safe rule. The instance put by Lord *Denman* in the case of *Dobson* v. *Groves*, as allowable and proper, is very different from what occurred here, and I cannot consider this case as coming within any principle which can be extracted from the adjudged

(*a*) 6 Q.B. 637.

cases. This objection would, I think, without any other, be entirely fatal to this award.

The fourth objection related to the rejection of *Evan's* evidence; I am not disposed to attach much weight to this objection. I am not sure that the arbitrators did not exercise a sound discretion in refusing to the plaintiff the opportunity he sought of producing this evidence, under the circumstances. I have no reason to think that they were actuated by other than proper motives in so acting. I do not say that in no case can an award be successfully impeached, because the arbitrators have acted unreasonably in rejecting evidence; but I do not think the facts connected with this part of the case would be sufficient without other grounds to invalidate this award. Under the circumstances, I think the award must be set aside, but without costs.

BLACHFORD V. OLIVER.

Practice—Foreclosure or sale.

Where the prayer of the bill is in the alternative for either sale or foreclosure, the court will, at the instance of the plaintiff, make a decree for sale, and in the event of a sale failing to produce sufficient to cover the claim of the plaintiff, order foreclosure.

This was a suit by a mortgagee. The bill was taken *pro confesso* for want of answer. The bill prayed that a sale or foreclosure might be ordered according as the plaintiff might elect at the hearing. On the cause coming on to be heard

Mr. *Hector Cameron*, for the plaintiff, asked that the decree might be drawn up directing a sale, and if that should prove abortive, then foreclosure; that being a benefit to the defendant, to obtain which he was usually called upon to make a deposit sufficient to cover the expenses of the sale. On the following day,

SPRAGGE, V. C.—I have spoken with my brother

Esten, and we are both of opinion that when the prayer of the bill is framed as here, no objection can reasonably be made to a decree for the alternative relief, in case the sale fail to realize sufficient to cover the amount found due the plaintiff for principal, interest and costs. The decree will therefore be in the form asked by Mr. *Cameron*.

METCALF v. KEEFER.

Assignment for the benefit of creditors—Payment of remuneration to the assignees.

A provision in a deed of assignment for the benefit of creditors, appointing a time within which creditors are required to come in and execute, in order to receive the benefit of the trusts, does not render the deed void under the statute 22 Vic., ch. 26.

Neither does a provision for an allowance of a reasonable commission or remuneration to the trustees, notwithstanding they may be creditors of the estate under the statute 13 Elizabeth. Nor does a provision for the employment of the assignor at a reasonable remuneration; but a provision for carrying on the business in such a manner as to render the creditors partners with the trustees *quoad* third persons, or one which may cause unreasonable or prejudicial delay to the creditors, does.

Semble, 22 Vic., ch. 26, has not altered the law except as to preferential assignments.

This cause came on to be heard by way of motion for decree, before his Honour V. C. *Esten*.

Mr. *A. Crooks*, for the plaintiffs. Here the purchaser is not affected by any original vice in the deed, if even the court should be of opinion that the objections made to it are well founded, as no notice can be proven against him; a judgment creditor may be in a position to impeach the assignment by *White*, but none such are complaining. But such right of the creditor, being only a right of action, is not such a thing as a purchaser is bound by. This conveyance cannot have the effect of delaying creditors, and the trusts in it being for winding up the business, cannot constitute the trustees partners either *inter se*, or as to third parties; neither can the allowance of 2½ per cent.

commission to the trustees, even if they were creditors, form any valid objection to deed, which he is bound to take notice of; notice to affect a purchaser must be something in existence and tangible.

As to the £300 a year to *White*, the deed only reposes that power in the trustees to give that sum should they think it to be a reasonable and proper allowance, and it is not such a provision as would, on the face of it, render the deed void.

Mr. *Strong*, for the defendant. If the deed of assignment is not void, it is still so doubtful that the court would never force a title, derived under it, upon a purchaser; and if upon the face of the instrument it is void as against creditors, no purchaser would be safe in taking under it, as at law he could be deprived of his estate by a sheriff's sale, the title of his vendee dating from the time of registration of the judgment.

The allowance of £300 is excessive, and the discretion given to the trustees is more nominal than real, and savours of fraud. *Pickstock* v. *Lyster*. (*a*)

The other points relied on, and cases cited, are stated in the judgment of

ESTEN, V.C.—This is an amicable suit, instituted in order to obtain the opinion of the court upon a doubtful title, the purchaser declining to complete his purchase without the opinion of the court expressed in favour of the title.

The question arises upon an assignment made by Mr. *White*, a builder, of his whole property, for the equal benefit of all his creditors. The instrument contained a provision that the creditors should execute before they

(*a*) 3 M. & S. 371.

should become entitled to the benefit of it; that the trustees should be at liberty to retain 2½ per cent. on all moneys received by virtue of the assignment, as a remuneration for their care and trouble in the execution of the trusts; that they might in their discretion employ Mr. *White* in the performance of the trusts at a salary of £300 a year; and that they should complete any building contracts already entered into by Mr. *White*, in order to the winding up of the estate, and they were authorised to employ workmen and mechanics for this purpose, and to make such advances as should be necessary, and to deduct and pay all salaries and wages that might become necessary, and repay all advances that might be made under this trust, before they should make any distribution of the estate amongst the creditors. The plaintiff purchased from the trustees the property in question in this cause, being part of the trust estate. Mr. *Keefer* has contracted with the plaintiff for the purchase of the same estate, and the question is, whether he can make a good title to it, which is considered to depend upon the validity of the assignment. The *bona fides* of the assignment is not impugned, but the question is, whether its provisions are not of such a nature, that it must be deemed fraudulent and void against the creditors under the 13 Elizabeth; or the 22 Vic., ch. 26; and whether the deed, bearing upon its face the marks of its own invalidity, any purchaser of the estate must not be deemed to have notice of it. I will consider the question with regard to the 22 Vic., ch. 26, first. In my opinion the statute has produced no alteration in the law except to avoid preferential assignments. In all other respects it is a transcript of the 13 Elizabeth, and if the assignment in question in any case contain no provision for preferring one creditor to another, I apprehend it cannot be deemed void on any ground on which it would not have been considered void previously to the passing of the statute. It is argued in the present instance, that the provision requiring the creditors to execute the deed makes a preference. I cannot agree to this opinion. Supposing the deed to be

wholly unobjectionable in all other respects, what can be more reasonable than that the creditors should intimate their assent to it, so that the trustees may proceed with confidence, and know whom to pay. It must be intended that the creditors will always be known; it will be the duty of the trustees to notify the assignment to them; and if it be wholly free from objection in all other respects, and the creditors distinctly refuse to execute or otherwise to intimate their assent to it, they postpone themselves; they are not postponed by the deed.

It is then argued that the provision of an allowance of 2½ per cent. to the trustees, who are creditors, is a preference within the meaning of the act. I must dissent likewise from this proposition. It is not a preference of their debts, but a recompense for their trouble. They yield a distinct consideration for it. To the creditors it may be a matter of great importance that competent persons may be induced to act as trustees by the prospect of remuneration, when otherwise it might be impossible to procure any persons to assume so onerous an office.

Suppose the trustees not to be creditors, the notion of a preference would be inadmissible. Can it make any difference that they are creditors, if their services as trustees constitute a distinct consideration for the allowance? If indeed it exceed in amount what is reasonable, the question may admit of a different consideration, but that cannot be said in the present instance.

These remarks dispose of the question so far as it regards the 22 Vic., ch. 26. As regards the 13th Elizabeth, the deed is objected to on account of the provisions relating to the employment of *White* at a salary; and the completion of the contracts, and settlement of the business. The first objection is, I think, untenable. Many cases have occurred in which a similar provision for the employment of the debtor has been considered unobjectionable. It is in fact a very common circum-

stance in these assignments. It may be advantageous to the creditors to secure the services of the debtor in the settlement, collection, and realization of his own estate, and it cannot be expected that he will render these services for nothing. He must be maintained during the time. The remuneration, it is true, must not be unreasonable in point of amount. In the present case the allowance is fixed at £300 a year as a maximum; this cannot be doubted, for as the trustees were not obliged to employ *White* at all, they could fix his remuneration at any sum they could mutually agree upon, not exceeding £300 a year. They could, however, go as high as this sum, and the question is, whether that would be excessive. In the abstract I should think it would not be so, considering the respectable station Mr. *White* occupied, the value of the estate, and the nature of the services he was expected to perform. It is impossible, however, not to perceive that Mr. *White's* services were required principally for the completion of the contracts into which he had entered, and therefore the provision for his employment and remuneration must be considered in some degree in connexion with the other provision contained in the deed in relation to these contracts.

The point chiefly relied upon as rendering the deed void, was the provision for completing the contracts and closing the business, viewed under the aspect of creating a partnership between the trustees and creditors *quoad* third persons, and rendering the creditors liable for the debts which might be contracted in carrying this provision into effect. I do not think this ground of objection tenable. The case was compared to that of *Owen* v. *Boddy*, (*a*) from which, however, I think it differs very materially in this respect. In the case of *Maulson* v. *Peck*, (*b*) it seems to have been suggested that a partnership *inter se* might exist in such cases.

(*a*) 5 Ad. & Ell. 28. (*b*) 18 U. C. Q. B. 113.

But of course no such result could occur under ordinary circumstances. The only objection that can be ordinarily made in such cases is, that the creditors accepting the benefit of the assignment, by subtracting from the fund to which third persons, giving credit to the trustees, look for the payment of their debts, become partners as to such persons, that it entitles them to treat them as partners, not that any partnership actually exists, or that any partnership *inter se* takes place. It is well known that any receipt of a share of the profits of a business, as such, makes the person so receiving a partner *quoad* third persons, upon the principle I have mentioned. This might have occurred in *Owen* v. *Boddy*. The business might have been carried on for years. The profits of good years would have been divided annually, and when a bad year came, or a loss occurred, the fraud would be gone, to which the creditors looked for the payment of their debts. The creditors, therefor, who had subtracted from that fund would be liable for such debts; in other words, would have been partners, *quoad* third persons, and this is a risk which a creditor cannot in reason be required to incur, and therefore a deed containing such a provision, or framed upon such a principle, is considered fraudulent and void against creditors. The case of *Hickman* v. *Cox*, (*a*) was a similar case to *Owen* v. *Boddy*, and stronger. In both these cases the trade might have been continued for years, and the creditors were to be paid their debts out of the profits.

The cases of *Jones* v. *Whitbread*, (*b*) and *Coates* v. *Williams*, (*c*) were distinguished from *Owen* v. *Boddy* on the ground that the continuance of the business was merely ancillary to its winding up. It is true some doubt was expressed in *Coates* v. *Williams*, and the court was divided in opinion, but perhaps the doubt had reference to the correctness of the construction put upon the clause in question, in *Janes* v. *Whitbread*, as to whether

(*a*) 18 C.B. 618. (*b*) 11 C. B. 106.

(*c*) 7 Ex. 205.

the continuance of the business was to be merely ancillary to the winding-up, or absolute at the option of the trustees.

Supposing, however, the principle enunciated in *Owen* v. *Boddy* and *Hickman* v. *Cox*, to be ultimately affirmed, it cannot apply to a case like the present, involving as it does only one transaction, or set of transactions. In this case the creditors becoming parties to the deed, can never subtract from the fund devoted to the payment of the debts incurred in completing the contracts. By the express provisions of the deed every possible expense incurred in the completion of the contracts, is to be paid before the creditors are to receive any thing. All salaries, wages, hire, and advances, and doubtless all debts incurred in carrying the contracts into execution, must be paid before any distribution can take place amongst the general body of creditors, who therefore can never diminish or subtract from the fund to which third persons giving credit to the trustees look for the payment of their claims. In the present instance the creditors, if the provisions of the deed were pursued, never could become partners with the trustees, and therefore this ground of objection to the deed appears to me entirely to fail. Viewed, however, in another light, the provision in question appears to me so objectionable, that, if it depend upon me, I cannot compel Mr. *Keefer* to accept the title to this estate. What I mean is, that this provision, as imposing upon the creditors an unreasonable delay in the distribution of the estate, must be deemed, so far as they are concerned, to render this deed void. The objection is not the same as the one I have been considering, although it is in one respect analogous to it. Where a partnership *quoad* third persons will be created, the deed is held void because the creditors cannot reasonably be required to incur such a risk, and therefore if the deed be upheld, they are delayed, inasmuch as they can neither take the property in execution, nor accept the benefit of the deed. It may be, however, that although no such result arises, the trusts are of such

a nature as to cause unreasonable delay in the distribution of the estate, and creditors are thereby directly delayed, and also justified in reason in declining to execute the deed, and thereby, if the deed be upheld, indirectly hindered. There is no doubt that in all cases of this sort some restrictions and delays are imposed upon the creditors, and nevertheless the deeds are upheld as tending to the general good of all. But it would not be difficult to imagine a case in which the distribution of the estate might be postponed for such a length of time, and so unreasonably that the courts would be compelled to infer an intent to delay and hinder creditors. Such a deed would doubtless be void as against them. Thus we have seen that a provision for the winding-up of the estate of the debtor, although it necessarily involves some delay and restriction, is held good, because it tends to the general benefit of all the creditors.

The stock in trade of a debtor, sold at once by auction, would be comparatively sacrificed; whereas if new goods were purchased from time to time, so as to make, in the language of trade, a proper assortment, good prices would be obtained, and the creditors generally benefited. The cases of *Maulson* v. *Peck*, and *Taylor* v. *Whittemore*, (*a*) were cases of this description, and probably the cases of *Janes* v. *Whitbread*, and *Coates* v. *Williams* were so likewise. I apprehend that the provision, involving delay must, upon the whole, turn to the advantage of the general body of creditors, otherwise the deed cannot be supported. If it tend rather to the benefit of the debtor than of the creditors; if it may occasion a delay in the distribution of the estate unreasonably great, or more than commensurate with the advantage expected to result from it, I should entertain great doubts of the validity of such a deed. In the present case I think nothing more is intended than that the subsisting contracts should be completed. Such part of the estate as may be necessary for the purpose are to remain unsold for the present. I

(*a*) 10 U. C. Q. B. 440.

do not attach any weight to this circumstance, because the materials on hand might be employed in this way perhaps more profitably than in any other; although probably the difference would not have been very great, and the other articles are not of so much importance but that they might be advantageously used in the same way. The only advantage, however, to the creditors that I can discover in this provision consists in the slight increase in the value of the materials, and in the profits to be derived from the completion of the contract. The former is hardly worthy of attention; the latter is problematical and uncertain; on the other hand it is impossible for me to say what delay may not be occasioned by the completion of these contracts. It may involve months or a year or more, for aught I know. During all this time the distribution of the estate may be suspended. At all events the trustees will not be compellable to pay a farthing to the creditors. It is true the rest of the estate may, and must be, realised and converted into money, and the trustees may be disposed to pay the expenses attending the execution of the contracts, and to distribute and divide amongst the creditors at the same time. But it may happen that such large advances may become necessary for the completion of the contracts, and their issue as regards profit and loss may be so doubtful, that the trustees may not in justice to themselves be disposd to make any distribution among the creditors. The advantage to the creditors of this provision is not very clear or decided; but to Mr. *White* it is considerable. If these contracts be not performed he will be liable to actions, and he might naturally stipulate for protection against them. Mr. *Crooks* argued that persons recovering judgments in such actions would be creditors under the deed, and that it would be advantageous to the other creditors to exclude them by performing the contracts. I doubt this; I mean I doubt whether they would be creditors under the deed. Upon the whole, I entertain so much doubt upon this point that I think I ought not to force this title upon the purchaser. At the same time this is

doubtless a question of fact, and I am quite in the dark as to the real facts of the case. The advantage to the creditors of the completion of the contracts may, according to the actual facts of the case, be so clear and decided as to bring the case within the principle of *Janes* v. *Whitbread* and *Maulson* v. *Peck*. This point, too, was not raised in argument, and when suggested by myself I doubt whether the learned counsel for the defendant was much impressed by it. I do not think it was taken in any other case, except in that of *Maulson* v. *Peck*, or *Taylor* v. *Whittemore*, by Mr. *Wilson*, Q. C., and then it did not seem to attract the notice of the court. It would be a great satisfaction to me if this case could be carried to the court of Appeal. My own impression is, that if in point of fact these contracts are so many, and of such a nature that probably much time will be consumed in their completion, and the trustees may incur such liabilities that they may not feel justified in distributing the estate until they are finally settled, or if the issue as to profit and loss is doubtful, the deed cannot be upheld. I should not entertain confidence in the validity of the deed, unless the circumstances were such as to make it clearly for the benefit of the creditors that the contracts should be completed.

Some discussion arose during the argument, as to when any judgments that might be obtained would attach upon the property, which is an equity of redemption. It is quite clear that under the 12 Vic., ch. 73, they would not attach until delivery of the writ to the sheriff. As to when judgments generally attach upon lands under the 13 & 14 Vic., ch. 63, it is unnecessary to express any opinion, although I have a very clear one, and shall be prepared to express it when necessary. In the present case any creditor whose debt existed at the date of the deed, may obtain judgment and deliver his writ to the sheriff, when, if this deed is void as to creditors, he will be entitled to treat the property as *White's* and proceed to a sale of it, and the sheriff's vendee will

be entitled as between him and Mr. *Keefer*, should he complete the purchase, to redeem the estate. *White's* concurrence in the sale to *Metcalf* does not seem to mend the matter.

CHERRY v. MORTON.

Purchaser for value, without notice.

A. held a bond for the conveyance of property, and assigned it absolutely to B.; but for the purpose of security only. B. sold the property to C., and C. sold to others. C. before his purchase had no notice that the bond to B. was a security merely: A. having become bankrupt, his assignee applied to redeem, and was held entitled, in the absence of any evidence that C. was a purchaser for value; but the court directed the cause to stand over with liberty to C. to give such evidence upon payment of costs; unless the plaintiff should desire also to give evidence, in which case the cause was to stand over without costs.

The facts of this case are clearly stated in the judgment of his Honour V. C. *Spragge*, before whom the cause was heard.

Mr. *Strong*, for the plaintiffs.

Mr. *A Crooks* and Mr. *Blake* for defendants.

Judgment.—SPRAGGE, V. C.—This bill is filed by *Stephen Cherry* and *Samuel Stevens* to redeem certain mill property in the township of Ameliasburgh. The plaintiff *Cherry* comes into court as the assignee of an undivided moiety of the property, from one *Robert Bird*, who himself purchased from one *Osterhout*, who was himself a purchaser from one *Forsyth*. *Bird* was then substituted for *Osterhout* as purchaser from *Forsyth*, *Forsyth* executing a bond to convey to *Bird* upon payment of £250, the balance of purchase money. The agreement by *Bird* to sell and convey to the plaintiff, which is in the shape of a bond, is dated the 18th of August, 1840. The penalty is £750. The consideration is recited to have been paid; and the condition is to convey in four years from the 1st of November following. *Bird*, who was called as a witness

for the plaintiff, thus states the consideration; "The real consideration was not £650; I got from *Cherry* a brick house and lot in Belleville; this was all I got. I was to pay about $400 that *Cherry* owed; by paying this sum, he would still owe me a sum for the mill; and I was to have the use of his half of the mill from the time I sold until two or three years—until it would pay the balance coming to me."

By an instrument dated the 24th of July, 1842, *Bird* assigned to one *Thirkell* the bond he held from *Forsyth*, and his interest therein, for the consideration, as expressed in the assignment, of £500 and by an assignment dated the 4th of February, 1843, *Thirkell* assigned to the defendant *Morton* his right, title, and interest in *Forsyth's* bond, and the premises therein mentioned; the consideration expressed is £500.

The plaintiffs' case is, that the assignment to *Thirkell*, although absolute in its terms, was only by way of security for a debt of £678 1s. 8d., due by *Bird* to *Thirkell*; (and this is proved by *Thirkell's* bond, by way of defeazance, shewing this;) and further, that the defendant *Morton* had notice of this, which is denied. The other defendants are purchasers from *Morton*.

Bird became bankrupt in or before the year 1855; the plaintiff *Stevens* was appointed his assignee in April of that year. The plaintiffs, then, one in his individual right, and the other as assignee in bankruptcy of *Bird*, claim to be entitled together to redeem this property, each claiming to be entitled to an undivided moiety therein.

The evidence of *Bird* appears to place *Cherry* out of court; for he shews an agreement between himself and *Cherry* for the rescission of the assignment to *Cherry*. He refers in his evidence to his schedule in bankruptcy, which appears to have been proved in the cause, but has

not been put in; he says: "Which reference to the £375 on the list or schedule, as owing to *Cherry*, I understood it was coming to me upon the mill property. I don't recollect how that amount was made up. I think it was a balance of the debt owing to *Cherry*. I turned *Cherry* over some notes before the bankruptcy, and that must have reduced the amount I owed him upon the mill property. The original amount was £650, the true value of his purchase. I was not in a position to give the deed to *Cherry* in 1844, the time specified in the bond, and the bond became forfeited; and after I lost possession of the mill, I turned over to *Cherry*, on account of the bond, some of the notes, which at the time of the bankruptcy had reduced his claim to £375. I made the turn of the notes to *Cherry* in consequence of not being able to give him a deed. I do not think there was any settlement between us when I gave the notes, but we knew about the amount, and I considered £375 as the true amount owing him. When the schedule was prepared *Cherry* was in the neighbourhood of Belleville, or at my place. When I turned over the notes to him, I did not pay him any cash then, or since. About a year after I became bankrupt, he applied to me to help him some. He knew at the time that I was a bankrupt—he had received notice of my bankruptcy. I did not tell him that I would pay him something on account, if he gave me time. He wanted me to try and get the property again. I told him it was out of my power, and that if any one could do it, it must be one of my creditors. He has made no application to me for the £375 since. The turn of the notes was only made on one occasion, some two or three months before my bankruptcy. I think he then knew the balance going to him. It strikes me that he had before made an offer to take the £375, and allow me still to keep the property, and do away with the bond. The notes were taken in payment, as far as they went. The schedule filed in the bankrupt court, marked D., was intended to include all debts then due by me. I can't positively say that at the time of the bankruptcy the claim of *Cherry* had been

reduced to £375, but from the schedule I suppose it must have been so." So that it appears that *Cherry* received back a portion of the consideration money, and claimed upon *Bird's* estate for the balance. Under these circumstances he can have no title to redeem. But the only effect of this would be, that the whole interest is in the assignee in bankruptcy; and that *Cherry* has been improperly joined as a plaintiff.

It was said in argument that one *Chauncey Cherry* is entitled to a moiety of the property, by an assignment from the plaintiff *Stephen Cherry;* and an assignment from *Stephen* to *Chauncey*, endorsed on the assignment from *Bird* to *Stephen*, is proved; this, however, is dated the 10th of March, 1846, which is after the agreement for rescission, and after *Bird's* bankruptcy, and I presume after *Stephen Cherry's* claiming as a creditor upon his estate, or at least after his name appearing in the schedule as a creditor. Besides, I find among the papers a paper purporting to be a re-assignment from *Chauncey* to *Stephen Cherry*, of the same premises, dated the 1st of April, 1848, the consideration expressed is nominal; that from *Stephen* to *Chauncey* is expressed to be "for value received." The re-assignment is not proved, but purports to be in some sort authenticated, and if material, might properly be allowed to be proved.

Taking the proper position of the case to be, that the assignee in bankruptcy of *Bird* is the only plaintiff entitled to redeem, how does the case stand? For the plaintiff, it is supported in a great measure by the evidence of *Bird*. The examiner before whom it was taken has noted it as unsatisfactory; he has been examined upon his *voir dire*, examined for the plaintiff, and cross-examined, and no objection can lie to his competency; but he comes so close to an incompetent class, those for whose immediate benefit a suit is brought, that his not being within it is rather nominal than real. It is plain from his own evidence that the suit is his; conducted

mainly, if not entirely, at his expense, the assignee merely permitting his name to be used, and *Bird* avowedly expecting to derive benefit from it. It appears even to have been brought in opposition to the advice of Mr. *Ross*, *Bird's* professional adviser. Besides his strong interest, he is obviously inaccurate in his facts; for instance, he says: "I had made the assignment to *Thirkell* before I assigned to *Cherry*," while in fact the assignment to *Cherry* is dated the 18th of August, 1840; the assignment to *Thirkell* the 14th of July, 1842, and there is no suggestion that they were executed at any other time than the days they bear date. I confess, too, that the impression that I derived from reading *Bird's* evidence was the reverse of favourable to him. Upon the whole I do not think it would be safe to give credit to his evidence in any part, when it is favourable to the plaintiffs, or unfavourable to the defendants, except when his evidence is of the execution of documents, the execution of which is not questioned.

At the same time I do not mean to say, that if entire credit were given to *Bird's* testimony, it would support the plaintiffs' case; I think it would not, for even he does not prove notice to *Morton* of the assignment to *Thirkell* by *Bird*, being by way of security, before the assignment from *Thirkell* to *Morton*, and the evidence of Mr. *Ross* to the same point also fails to establish notice.

If *Morton* being an assignee for value without notice afterwards received notice, as he appears to have done from *Bird* and Mr. *Ross*, and after such notice obtained the legal estate, he did nothing inequitable; (*a*) but *Morton* has not proved any valuable consideration as between himself and *Thirkell;* at the hearing he relied upon an allegation in the bill to the effect, as he contended, that *Thirkell's* indebtedness to *Morton* was the consideration of the assignment, but I do not find such indebtedness to

(*a*) Bissett v. Nosworthy, 2 W. & T. 1.

Morton alleged; the allegation is, that *Thirkell* being much involved in debt, not saying to whom, made the assignment.

The same evidence is necessary to protect *Morton*, under the registry law. Assuming the instrument of defeazance to be capable of registration, (as I think it is, agreeing as I do in the observations of his Lordship the Chancellor in *McMaster* v. *Phipps*,) (*a*) still the rule applies that the party having the prior registration must shew himself to be a purchaser for value.

The defendants have rested their defence also upon another ground, that *Morton* sold and conveyed to *Simpson*, and afterwards purchased back from him, and received a conveyance, the conveyance both ways being registered, and there being no evidence whatever of notice to *Simpson*, and the defendants claiming that *Morton* re-purchasing and receiving a re-conveyance from *Simpson*, is in the same position as if it were a purchase by, and a conveyance to, a stranger. However this may be it is sufficient now to say that there is no evidence of such alleged sale and re-purchase, or of the execution of any conveyance in relation thereto.

As the case stands upon evidence, each party has failed to prove the case made upon the pleadings; the plaintiffs having failed to prove notice to *Morton*, and the defendants having failed to prove *Morton* a purchaser for value, or to prove title through *Simpson*; upon this strictly the plaintiffs should succeed, because unless *Morton* were a purchaser for value from *Thirkell*, he can stand in no better position than *Thirkell* himself, whose bond of defeazance is proved; and as to the purchasers from *Morton*, it is admitted that they are not in a position to protect themselves as purchasers for value. But I think it right to give *Morton* an opportunity to supply the

(*a*) Ante vol. v. p. 253.

evidence which has been omitted, but as it is an indulgence to him, I think it should be upon payment of the costs of the day. But if the plaintiffs themselves should desire to give further evidence, then the cause should stand over without costs, the plaintiff to elect within ten days whether he will give further evidence, or take the costs of the day.

It will probably be convenient that any further evidence should be taken upon the ensuing circuit at Kingston or Belleville.

I observe that the evidence in the cause was taken before the special examiner at Toronto. It is evidently properly a Belleville or Kingston cause, and a cause in which it would have been well that one of the judges of the court should have heard the evidence given. The evidence has been well taken, I have no doubt, but there would have been an advantage in hearing and seeing *Bird*, at least, in the witness box.

It is not necessary, and probably may not become necessary, to give an opinion as to the effect of the delay and alleged acquiescence by the plaintiffs; but my impression is, that there has been no acquiescence, nor any dealing between the parties to disentitle the plaintiffs to redemption, if otherwise entitled: the delay certainly has been considerable, and apparently a knowledge of improvements without objection being made which should affect the terms of redemption, if redemption were decreed.

In re. Babcock's Estate.

Administration suit—Costs of defence—Paying money into court.

Under an administration order obtained by a creditor, the executors admitted a certain sum of money in hand, part of which they objected to pay into court, on the ground that it had been paid by them to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the master's office.

Held, that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these enquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character.

Where the executors are charged with misconduct, a bill must be filed.

This was an application by Mr. *Morphy*, for an order on the executors to pay into court a sum of money admitted in their accounts to remain in hand.

Mr. *E. B. Wood*, contra, read affidavits shewing that a large proportion of the balance so appearing in hand had been actually expended by the executors in the shape of costs, in opposing several claims brought in against the estate.

The fact of such expenditure having been made and that it had been made in good faith, was not disputed, but it was urged in support of the application that when accounting parties by their answer, or upon their accounts brought into the master's office, admit a balance to be in their hands, the invariable rule is to order the money into court.

Judgment.—Spragge, V. C.—In this matter the usual order was obtained for the administration of the estate of the testator, at the instance of a creditor. The executors *Gould* and *Rich*, in their accounts brought into the master's office, have admitted a balance in hand of £121 5s.; and this application is to compel them to pay that sum into court. The application is resisted as to £50, part thereof, on the ground that that sum has been paid by them to their solicitor in this suit, and that his costs

exceed that amount; and that a large portion of such costs have been incurred in watching and protecting the interests of the estate upon the claims of creditors brought into the master's office; that the estate is a large one, and a good deal complicated, and the number of creditors large. A receiver has been appointed in the cause on the ground, as is alleged and not denied, of the insolvency of the executors, not on the ground of misconduct; and this I apprehend must be the case inasmuch as if misconduct had been imputed, a bill must have been filed, instead of the proceedings being upon summary application.

The right of the executors to retain the sum in question is denied upon the general ground, that an accounting party is not entitled to retain as against the party to whom he is accountable the costs of defending himself in the suit brought for an account. But an administration suit seems to me to stand upon a peculiar footing: it is something more than a suit for an account; and that part of the decree which directs enquiries as to the debts and legacies, and outstanding estate of the testator, is for a purpose beyond the mere accounting of the executors, a purpose shortly expressed by the term administration of the estate: it is the duty of the executors to attend the master upon these enquiries, usually and properly by their solicitor, to look after and protect the interests of the estate; and this they do, not strictly as accounting parties, but in virtue of their representative character.

Suppose the like duties discharged, and costs and expenses incurred in their discharge, (to take one branch of these enquiries,) in respect of suits brought by creditors in the common law courts; it is quite clear that the executors would not be required to pay moneys so expended into court. The reason given by the court in *Humphreys* v. *Moore*, (*a*) for not allowing costs to executors or administrators brought before the court for

(*a*) 2 Atk. 108.

an account of assets, is, that they are supposed to reimburse themselves any charges or expenses they may have been at in the account of a testator's or intestate's estate, which is always kept by executors or administrators; and the general rule, as stated by Mr. *Daniels*, (*a*) in suits by a single creditor against an executor, that the court makes no order for the payment of the executor's costs, is founded upon the same reason; whether *Humphrey* v. *Moore* was a case of that kind, or a suit on behalf of all creditors for administration, does not appear by the report; but both the case and the general rule recognize the right of the executor to reimburse himself such costs. Indeed, it can hardly require the authority of a decision to establish so clear a right. I am speaking so far of costs incurred, out of equity; if the costs referred to in the case cited are costs in the suit in equity, it is all the stronger for the executor's position.

I find it difficult to understand why an executor should be allowed to retain, by way of reimbursing himself, moneys expended properly in costs for the benefit of the estate, when those costs are incurred in a different suit, whether at law or in equity, than the one in which he is an accounting party; and that he should not be allowed to retain them if incurred in the same suit. The moneys being properly applicable to such a purpose, would appear to be the proper test, and that they are so applicable is clear; and moneys so applied in an administration suit, are, not to defend the executors, but to protect the estate. Such a suit may properly be divided into two parts, in one of which the executor is personally and individually concerned; in the other, not. He is so concerned in so far as he is brought to account for what he has received; he is not so concerned, but as personal representative only, as to the other branches of enquiry. If these two points of the suit were made the subject of two suits, there could be no doubt, I suppose, of the right of the executor, upon an application in the suit to

(*a*) 3rd ed. 1064.

account, for payment of money into court, to retain costs properly expended in the other suit; and if so, the only question is, whether the circumstance of these two objects being combined in one suit ought, in reason, to make a difference: I do not see any sound distinction.

There is also this reason for the executors being allowed to retain in their hands moneys for such a purpose. The court holds it to be right that the estate should be protected, and throws upon the executors the duty, after suit, as well as before, of protecting it. It cannot reasonably expect the executors to do this out of their own pockets, and it does not require it, where the suit is in other courts; and it may be that the executors have not the means, and in fact it appears that in this case they have not the means, to protect the estate otherwise than by applying for that purpose the funds of the estate. The due protection of the estate, therefore, is placed in jeopardy, unless the executors are authorised to apply funds in their hands for its protection.

So far, as to what appears to be reasonable and just in the matter, I find no express authority, but the language employed by learned judges is not against it. In *Roy* v. *Gibbon* (*a*) Sir *James Wigram* observed: "that the rule on the subject of the order for payment of money into court was perhaps less strict at the present day than it was stated in *Freeman* v. *Fairlie*. (*b*) The practice now was, that when a party charged himself with the receipt of a fund, he was bound by that charge until he had relieved himself from it, by shewing a proper application of the money." In other words, a proper appli tion of the money is a sufficient reason for not paying it in. Now, applying it for the protection of the estate, is a proper application of it, unless the executor is bound to do that in an administration suit, which he is not bound to do under any other circumstances, apply his own private funds for the protection of the estate.

(*a*) 4 Hare, 65. (*b*) 3 Mer. 39.

The language of Sir *Anthony Hart*, when Lord Chancellor of Ireland, was more explicit than that of Sir *James Wigram*. In *Betagh* v. *Concannon*, (*c*) he said, "The Master of the Rolls, (*d*) I remember, always held the opinion that the executor should bring in all. When I was Vice-Chancellor I acted on a different principle. I thought the court had no right to cramp an executor who engaged in suits, by leaving him to carry on those suits upon his own funds, and Lord *Eldon* sustained my view in that respect. I do not mean merely costs already incurred; there never could be any doubt about them, but probably growing costs. I know it is said the executor can come to the court for money to be advanced as he wants it; but I do not think he is to be compelled to do that."

This seems reasonable, except of course, when there is danger of the money being misapplied, if allowed to remain in the hands of the executor; a danger which of course cannot exist where, as in this case, the money has been already applied.

Sir *Anthony Hart* was speaking probably of other suits than an administration suit in equity, but his reasons are just as applicable to the like application of moneys in an administration suit.

It may be said, that it does not yet appear whether the executors will be allowed these costs when the court comes to adjudge as to the costs of the suit; or whether the executors may not even be compelled to pay them; but I do not think this a good reason, if, in the meantime, the application of the moneys is a proper one; it amounts to this, the executors should not be permitted to apply the funds of the estate for the purposes of the estate, because the court may be of opinion that they should pay all the costs incurred in this suit out of their own funds, as a penalty for misconduct; and still less

(*c*) 2 Mol. 559. (*d*) Sir J. Leach.

can it be a reason where no misconduct is charged, and where the rule is that they are allowed their costs. There is besides the reason founded upon policy that nothing should interfere with the due protection of the estate by those whose duty it is to protect it.

It is urged as a strong reason against the retention of this money, that no authority is found in the books for such retention, and such a consideration is certainly entitled to great weight. From what was said by Sir *James Wigram* as to the earlier practice, and by Sir *Anthony Hart* as to the practice of Sir *John Leach*, executors would not, at one time, have been allowed to retain such moneys, but I think that those learned judges could hardly deny such right to executors consistently with their language which I have quoted.

I do not at all mean to affirm the right of an accounting party to retain moneys in his hands for the defence of a suit in equity to bring him to account; and in suits against executors I distinguish between costs of defending the suit, and costs incurred in protecting the estate; looking upon an administration suit as having two objects and offices, one to bring the executor to account, the other to administer the estate.

Upon this application it was alleged on the part of the executors, and not denied, that the estate was large and complicated, and that there were numerous creditors, who proved in the master's office; but I do not find anything upon this point upon affidavit, so as to enable me to say what amount it would be just and reasonable that the executors should be excused from paying in, as money expended, or that must be expended, for the protection of the estate; £50 is the amount said to be paid to their solicitor; whether the whole of that sum is necessary for the purposes I have indicated, I am unable to say. The executors may file an affidavit shewing how much is necessary for such purposes, and thereupon apply to be excused from paying so much into court.

CRAWFORD v. BIRDSALL.

Specific performance—Laches.

On an agreement for the sale of land the vendor let the purchasers into possession, but some years afterwards, in consequence of default in payment of the purchase money, the vendor obtained possession by means of ejectment. Subsequently the purchase money was tendered to the vendor, who refused to accept it, and the purchasers took no steps for eighteen years to enforce their claim, during all which time the vendor remained in possession as owner; the property, during the interval, having increased very much in value. Under these circumstances a bill filed by the purchasers, and subsequently revived by their representatives, was dismissed with costs.

The facts appear in the head-note and judgment.

Mr. *McGregor*, for the plaintiffs.

Mr. *Crickmore*, for the defendant.

Judgment.—ESTEN, V.C.—[Before whom the cause was heard.]—I think the former plaintiffs were entitled to a decree when they were ejected; but supposing the suit to have been regularly revived, the present plaintiffs cannot stand in a better position than the original plaintiffs would have done, if they had now brought the former suit to a hearing; for *Hugh Crawford's* minority was of a very short duration: but could the former plaintiffs, having taken their last step in 1840, and done nothing for eighteen years, during which time the parties were at arm's length, the purchase money having been refused, and the possession taken, now have a decree, the property having increased in value to an immense extent? I think not; and I think that the bill should be dismissed with costs.

The cases which were cited were perfectly distinguishable from the present. In *Sharp* v. *Milligan* (*a*) the agreement was acted upon by both parties to within two months of the filing of the bill; the delay was only in not seeking to clothe the equitable title with the legal estate. The same remark applies to the case of *Crofton* v. *Ormsly*,

(*a*) 22 Beav. 606.

(*a*) and *Clarke* v. *Moore*. (*b*) The case of *Dickenson* v. Lord *Holland*, (*c*) was the case of a *cestui que trust* seeking an account against his trustee, and differs materially from a case of specific performance of an agreement. In the case of *Moore* v. *Blake*, (*d*) and also reported on a re-hearing in 1 Ball & Beatty, 62, Lord *Manners* dismissed the bill on account of laches in the prosecution of the suit. This judgment was reversed on appeal on a ground which is perfectly intelligible, namely, that the agreement of which specific performance was sought did not stand *per se*, but was part of a larger agreement of which the plaintiff had performed his part, and the agreement in question in fact formed part of the consideration proceeding from the defendant.

It was considered that laches could not be imputed in such a case; the doctrine did not apply in fact; the plaintiff would have been in time had he commenced the original suit in 1801. In the present case the contract was unequivocally repudiated by *Birdsall*. It is true that the original plaintiffs tendered the money, and it was not their fault that it was not paid. But money tendered is not the same thing as money paid. If the money tendered is accepted the vendor is converted into a mere trustee, and if the claim be enforced at any time within the period prescribed by the Statute of Limitations, it is sufficient. But if the purchase money be rejected, it is the duty of the purchaser to proceed promptly to enforce the claim which has been denied. It is true, also, that *Birdsall* could have dismissed the bill, but we cannot wonder, under the circumstances, that he did not pursue this course. If the suit had been prosecuted it would probably have terminated in his defeat. He therefore remained quiet, and permitted the plaintiff's right to expire. There was no fraud in this. Meanwhile he was in the enjoyment of the property, and dealt with it as his own. He let it at a rent equal to the whole purchase

(*a*) 2 S. & L. 604.
(*b*) 1 Jon. & La. 723.
(*c*) 2 Beav. 310.
(*d*) 4 Dow. 242.

money reserved by the original agreement. Improvements have been made upon it of great value, and the property, independently of the improvements, has increased in value to an extent which is almost incredible. The former plaintiffs, on the other hand, had the use of it, which was very beneficial to them, for seven years, without paying any thing for it, and their improvements at the end of that time were of so little value that they were removed to make room for others. The doctrine enunciated by Lord *Manners* in the case of *Moore* v. *Blake*, I do not understand to have been denied, but merely its applicability to that case. I think my plain duty is to dismiss this bill with costs.

FINK v. PATTERSON.

Mortgage—Surrender of bond to re-convey—Right to redeem.

Where there was a conveyance of land, upon an advance of money, and a bond to re-convey, given by the pretended purchaser, with a condition that at the end of a year upon payment of the sum advanced, and an additional sum calculated upon the value of money for that time, the transaction was held a mortgage, notwithstanding the instrument expressed it as a sale and purchase; but the bargainor at the expiration of the year surrendered the bond to re-convey to the assumed purchaser, and took from him a lease of the premises. *Held*, that this operated as a release of the equity of redemption, and a bill to redeem was dismissed with costs, but without prejudice to another bill being filed; because it appeared, though not relied on by the present bill, that the bargainor was at the time in difficulties; that the assumed purchaser was supplying him with money, and paying money for him to the sheriff; that their relative positions were such as to give the assumed purchaser great influence over the bargainor; that the inadequacy of price was gross, and that the pretended purchaser's conduct was exacting and oppressive; and if it had been shewn that the assumed purchaser held other security for the advance, as if the amount of it was included in a chattel mortage, which he held against the bargainor, his right to redeem would have been clear.

The facts of the case appear sufficiently in the headnote and judgment.

Mr. *Blake*, for plaintiff.

Mr. *Strong*, for defendant.

Bulwer v. *Astley*, (*a*) *Lincoln* v. *Wright*, (*b*) *Bostwick* v. *Phillips*, (*c*) and *Fisher* on Mortgages, page 11, were referred to.

Judgment.—SPRAGGE, V.C.—I think that the original transaction between the parties was a loan of money. A conveyance was made by the owner of land upon an application made by him to borrow money—money was advanced, and the person advancing it gave a bond to re-convey the land at the expiration of a year, on payment of the sum advanced, and a further sum, calculated, as the defendant himself says, upon the value of money—the plaintiff remained in possession. The defendant, in his answer, does not explicitly deny that the transaction was a loan of money, but narrates what occurred, and insists that it was a sale, and not a mortgage. He says that the sum he advanced was £150, and that it was the purchase money of the land, and that he agreed that the plaintiff might re-purchase at the end of a year for £185. The plaintiff meantime remaining in possession. The subject of the contract was twenty acres of land in the township of Glandford, upon which a tavern was erected, and was shown in evidence to be worth at least £400.

The bond to re-convey, it is true, recites that *Patterson* had that day purchased from *Fink* the land in question; but I think that it was nothing more than the form into which the parties, or rather the lender, chose to put the transaction; and that it was still in substance and reality a loan.

But a difficulty is created by the dealing of the parties, at the expiration of the year. On that day, the 11th of March, 1858, an agreement was entered into in the following terms: "I, *Walter Fink*, of the township of Glandford, do hereby promise and agree to rent a tavern stand known as *Fink's* hotel, at Hirm's Corners, in the

(*a*) 1 Ph. 422. (*b*) 5 Jur. N. S. 1142.
(*c*) Ante vol. vi., p. 427.

township of Glandford, of *John Patterson*, for the term of one year from the above date. for the yearly rent of two hundred dollars, the tenant to pay the taxes on the same during this lease, the rent to be paid monthly or quarterly, as *John Patterson* may demand or require it."

"JOHN PATTERSON."

"WALTER FINK."

This paper may be viewed in two aspects, as evidence that the original transaction was in truth a purchase, and not a load; or if a load, an abandonment of the equity of redemption. I think it is not the first, but rather that *Fink*, perhaps both parties, thought that after the expiry of the year the property had become irredeemable. The plaintiff's allegation as to this paper is, that it was distinctly agreed that the £50 called rent was to go in reduction of principal and interest. There is no evidence of this; it is denied by *Patterson*, and appears to me in the highest degree improbable. It supposes that a man who had exacted £35 on a loan of £150 for a year, and procured a conveyance, and had his debtor at a disadvantage, was content to give another year for payment, at six per cent. interest. It is much more likely that the £50 was exacted for a year's interest, under the name of rent, but that is not alleged.

This paper was executed, and the bond given up to *Patterson*. The bill alleges, but without any evidence to support it, that it was lent to *Patterson* to make a copy. *Fink* now having taken a lease for a year, as *Patterson's* tenant, and having given up the bond, seeks to redeem. If there had been a mortgage in the ordinary form, and a release of the equity of redemption, could he come in to redeem upon such allegations as are contained in this bill? Treating the bond as a defeazance, which it must be looked upon as being, as it is a mortgage transaction, its surrender would, I apprehend, be equivalent to a release of the equity of redemption, and taking a lease would be confirmatory of it. The bill alleges no fraud

or misrepresentation or mistake as to the contents of the paper; nor does it make any case of fraud or oppression at the expiration of the year, or even of inadequacy of price. The case of *Purdie* v. *Millet* (*a*) is an authority in support of such a surrender or release of the equity of redemption. In that case the mortgage money was much less than the value of the property mortgaged, the only consideration for the release was the mortgage money. Sir *John Leach* in giving judgment said, that "he could not discover any principle upon which the court could give the relief prayed by the bill. The consideration was not adequate to the value of the property but the court would not, on that ground, set aside the agreement. It was also found that the plaintiff was in distress; but no advantage was taken of that circumstance, for no money was advanced at the time of signing the agreement; the paper was remarkably short, and the terms were so simple and explicit that the plaintiff could not have misunderstood them."

There are some points of difference in this case. *Fink* was at the time in difficulties, and *Patterson* was about the same time supplying him with money, and paying money for him to the sheriff; and *Fink* was also, as I gather from the evidence, carrying on business on the premises as a tavern keeper, and *Patterson* might have evicted him. The position of the parties was such as to give *Patterson* great influence over *Fink*, and the inadequacy of the price was gross. It is in evidence that *Patterson* asked £500 for the property after it had fallen in value. I have no hesitation in designating his conduct in this transaction as exacting and oppressive in the extreme, but the plaintiff does not rest his case, by his bill, upon the grounds to which I have referred, but upon allegations which he has failed to prove.

It was suggested that the sum for which the chattel mortgage was given, included the amount lent on the

(*a*) Tamlyn 28.

land. This is not made out, and I doubt if it is the fact, but I have no objection to grant an enquiry as to that point, because if it is the fact, the right to redeem the land would by that act be opened. I do not understand the plaintiff to ask a decree simply as to the chattel mortgage.

I do not think that relief can be given to the plaintiff upon his present bill; but that is shewn which I think would make it improper to shut him out from relief altogether. I do not think it a case for amendment, but I think the bill should be dismissed, without prejudice, however, to another bill being filed. The present bill must necessarily be dismissed with costs. The plaintiff should be at liberty to use in a future suit, if advised to institute one, the defendant's examination taken in this.

HUNTINGDON V. VANBROCKLIN.

Foreclosure—Judgment creditor—Priority—Costs.

A. being accommodation endorser for B. to a large amount, obtained from B., by way of indemnity, a confession of judgment, upon which judgment was entered up, and duly registered. C. also recovered a judgment against B., which was registered subsequently on the same day; contemporaneously with the confession. B. also assigned to A. all his personal chattels and effects, and all debts due him. On hearing of the assignment C. notified A. that he would be holden accountable for what was assigned to him, but A. nevertheless permitted B. to use the chattel property, and to receive the debts, just as if no assignment had been made, whereby C. was deprived of any benefit which he might otherwise have derived. On the usual reference to the master in a suit for foreclosure of lands of B., A. and C. both proved their debts, and in settling priorities the master reported A. prior to C. On appeal by C. from the master's report, the court declared A. to be trustee of the property assigned for C., and that having by his negligence permitted the property to become lost, A ought to be postponed as to the lands, the common fund of both.

The master by his report settled the priorities of incumbrancers as they appeared without determining whether the prior one had not lost his right in consequence of his conduct, leaving it to the party aggrieved to have the report set right on appeal. The court, under the circumstances, ordered the appellants to receive their costs of the appeal.

This was a bill to foreclose a mortgage made by *Van-*

Brocklin to the plaintiff. At the hearing of the cause the usual reference had been made to the master, at Brantford, to enquire as to incumbrancers, and settle their priorities. On the enquiry before the master, the Bank of British North America, and Mr. *Smith*, sheriff of the county of Brant, were made parties as incumbrancers, and the master having reported that *Smith* had priority over the Bank, the present motion was made by way of appeal from his finding, upon the grounds stated in the judgment of his Honour V. C. *Spragge*, before whom it was heard.

Mr. *E. B. Wood*, for the Bank.

Mr. *Strong*, contra.

The cases cited and points relied on by counsel appear in the judgment.

Judgment.—SPRAGGE, V.C.—The question raised upon this appeal is, as to the priority of two judgment creditors of the defendant *VanBrocklin*, the Bank of British North America being one, and the defendant *Smith*, sheriff of the county of Brant, being the other. The judgment of *Smith*, which was for £4582 13s. 2d. damages, and £3 12s. 6d. costs, was entered on the 12th of May, 1857, and registered the following day at 10 a. m. The judgment of the Bank, which was for £1076 11s. 4d., damages and costs, was recovered on the 13th of May, 1857, and registered on the same day, at 16 minutes after 11 a. m.; an hour and sixteen minutes after that of defendant *Smith;* and the Bank claims to postpone *Smith's* judgment to its own under the following circumstances:

At the date of *Smith's* judgment, he was accommodation endorser for *VanBrocklin* to the amount of the damages recovered; and in order to indemnify him, *VanBrocklin* gave him a confession of judgment for the amount, bearing the same date as the entry of the judgment, and upon which judgment was immediately entered

up, and registered the next morning. Contemporaneously with the confession, *VanBrocklin*, as a further indemnity to *Smith* for the same liability, made an assignment to him of all his personal chattels and effects, and of all debts due to him. Among the paper against which *Smith* was so indemnified was some held by one *Bown*, upon which *Bown* recovered judgment against *VanBrocklin* and *Smith*; and under the execution issued thereupon, the greater part of the chattel property assigned was sold by the coroner, and purchased by one *Capron*, in May, 1858. All the paper was paid off, with the exception of a note of £590, which together with £5 costs, was paid by *Smith*; and this is the extent of his present claim.

A short time after the recovery of the Bank's judgment, the Bank solicitor placed an execution against goods in the hands of *Smith*, as sheriff, who then informed the Bank solicitor of the assignment to himself; and thereupon the Bank solicitor notified *Smith* that he would be held accountable for what was assigned to him; the solicitor observing that not only the goods of *VanBrocklin* were placed beyond his reach by the assignment; but that he was thereby prevented from garnisheeing the debts due to *VanBrocklin* for the benefit of the Bank.

It appears clearly from the evidence that *Smith* left the subject matter of the assignment to be dealt with by *VanBrocklin*, just as if there had been no assignment; he allowed him to use all the chattel property assigned; and to receive the debts without any interference on his part, and *VanBrocklin* himself says, that with the exception of some £200, (not however received by *Smith*,) in which was included what is called the Costello note, all the moneys received by him were applied to his own use. No specific application of the moneys is shewn by the evidence; but it is probable, perhaps morally certain, that any considerable sum of the moneys so received was

applied in paying off the notes upon which *Smith* was endorser; for excepting *Bown's* judgment, £748, and the note paid by *Smith*, all the rest was probably retired by *VanBrocklin*, amounting in round numbers to about £3200. I find no evidence as to the value of the property assigned, except such estimate as may be formed from what was purchased at the coroner's sale, and the value of that left unsold; nor of the amount of the debts assigned, or what was realized from them.

First, as to the goods sold by the coroner: I do not understand that the Bank seeks to charge *Smith* in respect of them; they were sold to satisfy a note upon which *Smith* was liable, and might have been taken and sold by *Smith* himself for the same purpose; either way they would go to reduce the amount which was prior to the Bank judgment.

As to the residue of the chattel property assigned, and as to the debts, it is contended that *Smith* was guilty of negligence; that it was a fund peculiar to *Smith* by the assignment, and that he ought to have satisfied his debt out of that fund; or if he chose to resort to the fund common to both, he should have preserved the other fund so that the Bank might stand in his place; or at all events not allow it to be lost by his negligence. On the other hand, it is contended that *Smith* was not bound to use active diligence, and that he only exercised his right in restoring to either fund as he thought fit.

The effect of the assignment undoubtedly was, to interpose *Smith* and his interest under it, between the Bank execution and the property assigned. Suppose *Smith's* judgment not reduced by payments, (the effect of which I will consider presently,) *Smith* by holding his assignment, and yet not acting under it, would so deal with a fund which he might use in liquidation of his own debt, and which but for his so holding it, would have been applicable to the liquidation of the Bank

debt, as to defeat the latter without being applied to the former. Withdrawing, as he did, what would otherwise be a fund for the satisfaction of the Bank judgment, was he or not bound, while not using that fund for himself, to take any steps to prevent its being lost to another creditor, from whose execution he had withdrawn it?

In regard to the debts;—as between *Smith* and *VanBrocklin*, *Smith* was the party entitled to receive them, and it will assist the solution of the question at issue to consider what *VanBrocklin's* rights as against *Smith* would be if, through *Smith's* negligence, any of the debts assigned had been lost. *Smith* was, I take it, a trustee for *VanBrocklin*, and if so, would be answerable for any negligence to the detriment of his *cestui que trust*. An early case upon this point is, that of *Ex parte Mure*, (*a*) where a bond debt and a warrant of attorney to secure the same were assigned by a debtor to his creditor, with a power of attorney to collect and receive the same; and the creditor allowed five months to elapse without entering up judgment upon the warrant of attorney; in consequence of which, upon the death of the obligor, others of his creditors obtained a priority. The assignee was held chargeable to the amount of the loss occasioned by his negligence; and Lord *Thurlow* held this language: "It has been said not to be an admissible idea that in the case of an assignment of a bond as a security, you shall charge the assignee for negligence, in the same manner as you would charge an attorney employed to put the bond in suit. I answer that generally speaking that which would be negligence in one *employed* to make the bond available, must be so in one who has taken upon himself to make it applicable in payment of the debt of the assignee, and who is invested with complete authority for that purpose. * * * I think it very difficult to conceive a case where there has been anything like forbearance to the debtor, without the concurrence of the assignor, without involving the assignee in the conse-

(*a*) 2 Cox, 63,

quences of such conduct." Lord *Thurlow* laid stress upon the assignee having, as he termed it, made the bond his own.

This was followed by *Williams* v. *Price*, (*a*) before Sir *John Leach*. There a debtor had assigned to his creditor by way of security, a judgment which he had obtained against a third person. The creditor issued execution, but through the neglect of his attorney it was not placed in the sheriff's hands; a payment on account was then made to the creditor, and time was given by him, but only as it would appear by way of forbearance, not so as to be binding on the creditor; and Mr. *Sugden* and Mr. *Knight* contending for the discharge of the debtor, the assignor, distinguished between the case, and that of principle and surety, urging that while in the latter case it was necessary to shew that the creditor had actually tied himself up from suing, it was only necessary in the case in judgment to prove a general course of forbearance on the part of the assignee during which the circumstances of the debtor have been failing, and the debt ultimately lost. On the other hand, it was contended that the case was a new one, not a case of principal and surety; that besides the assignment, there was an independent covenant by the assignor to pay. That the defendant consequently had two securities for his money, and might have resorted to both or either of the remedies that the deed gave him. The learned Vice-Chancellor observed: "The question here is, what is the degree of diligence which a creditor accepting from his debtor by way of collateral security, the assignment of a judgment recovered by that debtor against a stranger, is bound to use for the purpose of enforcing satisfaction of that judgment. It is not necessary to determine whether such a creditor is bound at all events to use legal diligence to give effect to the judgment, or whether he may remain passive, until required by the assignors to resort to legal diligence. Here the creditor by suing

(*a*) 1 S. & S. 581.

out execution, assumed, as it were, the possession or control of this judgment in exclusion of the assignor, and is within the principle which charges the creditor in possession of property held by him as a security, not only with what he actually receives, but with what he might have received, but for his wilful default or neglect. I think it would be difficult to find a principle for charging such a creditor simply upon the ground that he gave time to the debtor upon the judgment; for it may be that the giving of time is a provident act, and affords the best chance for recovering the debt." His Honour referred it to the master to take an account of what was received, or but for wilful neglect or default might have been received, observing that in doing so he was in truth following the authority of *Ex parte Mure*, without thinking it necessary for the purposes of the case before him to adopt all the principles there stated.

In both these cases the judgment proceeded upon the assignee of the security having acted upon it, and in effect reduced it into possession; but still I think the circumstances of the cases, and the language of the eminent judges who decided them, material in this case; material, that is, if there be any equity as to the things assigned as between *Smith*, the assignee, and the Bank.

Smith had two funds; and if he chose to satisfy his debt out of the one which was common to the Bank and himself, the Bank had an equity to resort to the other fund, and if *Smith* by any improper act or conduct of his, disappointed that equity of the Bank, the Bank was entitled to look to *Smith* to make good the loss occasioned thereby; this much was decided in *Joseph* v. *Heaton* (*a*) upon the authority of *Aldrich* v. *Cooper*, and that class of cases. *Smith* has not actually satisfied his debt out of the common fund, but he claims a right to do so, in exclusion, or at least in priority, to the Bank, and that right must necessarily be tested by the same principles as if he had already satisfied his debt out of

(*a*) Ante vol. v., p. 636.

the common fund, for he cannot be adjudged entitled to that which if he had he would be adjudged to restore or make good.

If there exist any equity as between the Bank and *Smith* in respect of the things assigned to *Smith*, to entitle the Bank to resort to them, upon *Smith* being satisfied out of the fund common to both; it would seem to follow that if through any improper conduct of *Smith* they are gone, so that the Bank cannot resort to them, the Bank must have a prior right to the common fund: upon the principle which prevails as between principal and surety in regard to securities of the debtor held by the surety. If the surety pay the debt, he is entitled to an assignment of the securities, and if through the negligence of the creditor any of such securities be lost or get into the hands of the debtor, the surety is *pro tanto* discharged.

I will only refer to one case upon this point, that of *Capel* v. *Butler*. (*a*) Among the securities assigned were two vessels or trows employed in the coasting trade, and the creditor omitted to have an assignment registered, under the advice of counsel, that vessels so employed were not within the ship registry acts; and the debtor taking advantage of the omission, sold them, and applied the proceeds to his own use; and Sir *John Leach* held, that the value of the two vessels having been lost to the surety by such neglect of the creditor, the surety was entitled to deduct that value from the amount to be paid by him. *Law* v. *The East India Company*, (*b*) before Lord *Alvanley*, is an authority to the same point.

The conclusion at which I arrive is, that the Bank had such an equity as I have supposed against *Smith*, and I see no sound reason for holding that the Bank would not be entitled to look to *Smith* for the same degree of diligence as the assignor might; or that a less degree of

(*a*) 2 S. & S. 457. (*b*) 4 Ves. 82.

diligence would suffice in such a case than in a case between principal and surety: they all seem to fall within the one maxim, *sic utere tuo, ut alienum non lædas.*

The case, then, as to the debts assigned, appears to resolve itself into this; was it the duty of *Smith* to take any steps to prevent those debts getting into the hands of *VanBrocklin.* In *Wright* v. *Simpson* (*a*) Lord *Eldon* observed, that as to the case of principal and surety in general cases he had never understood that as between the obligee and the surety there was an obligation of active diligence against the principal. He adds: "The surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor. The holder of the security, therefore, in general cases, may lay hold of the surety; and till very lately, even in circumstances under which the surety would not have had the same benefit that the creditor would have had." It is nevertheless clear that he cannot disable himself from actively proceeding against the debtor, or even by negligence be the cause of a security to which the surety is entitled, being placed beyond his reach, and in the case to which I have last referred Lord *Eldon* adds: "But in late cases, provided there was no risk, delay or expense, as in the case put, of the money in the next room, indemnifying against the consequences of risk, delay, and expense, the surety has a right to call upon the creditor to do the most he can for his benefit; and the later cases have gone farther. It is now clear that if the surety deposits the money, and agrees that the creditor shall be at no expense, he may compel the creditor to prove under a commission of bankruptcy, and give the benefit of an assignment in that way."

To apply the law to this case. Did *Smith*, when called upon by the Bank, through its solicitor, do the most that he could for the benefit of the Bank, or the most that he

(*a*) 6 Ves. 714.

could do without risk, delay, or expense to himself? It is quite clear that he did nothing of the kind; he neither forbade *VanBrocklin* to receive, nor *VanBrocklin's* debtors to pay; nor required verbally or in writing that one shilling of those debts should be paid to himself; he neither allowed the Bank to receive them, nor did he receive them, or attempt to receive them himself. The Bank had an equity in regard to those debts, in regard to which he was not only notified, but was warned of the consequences of disregarding that equity; he had the control of those debts, and might have so exercised that control as to receive them himself instead of leaving them to be received by *VanBrocklin*. In short, he merely stood between the Bank and its taking legal proceedings itself to receive these debts, and thus by his conduct, passive, though it was, he at once ignored the Bank's equity, and prevented its proceeding at law. I do not think a person in the position of *Smith*, or any one as to whom there exists an analogous equity, can justify himself by saying he was only passive, whatever the loss his passiveness may inflict upon another; by taking the assignment he assumed certain duties not to *Van Brocklin* only, but to any others interested in the same fund, and if, through his negligence the fund suffered detriment, he ought, clearly, I think, to make it good, although his negligence be only of a passive character; for he may, and in this case he did, just as effectually defeat the legal proceedings of the Bank, or rather prevent their being taken, and disappointed its equitable right, as if he had been diligently active against the Bank. I feel clear, therefore, as to the equity of the Bank against *Smith*.

It occurred to me to consider whether it might not be the duty of the Bank to notify *VanBrocklin's* creditors to pay *Smith*, but I think it was not—the Bank was not in the position of a surety who had guaranteed payment. It was for *Smith* to say whether he would require payment to himself, and if so, to act upon it. The Bank did its

duty by giving the notice and warning to which I have referred.

It remains to be considered whether the circumstance of the notes upon which *Smith* was liable for *VanBrocklin* having been largely reduced, (as I infer from the evidence by *VanBrocklin* himself,) ought to make any difference. It is not shewn whether any portion of the debts received by *VanBrocklin* was applied in reduction of these notes; the only evidence of their application is that of *VanBrocklin* himself, who says generally, that he applied them to his own use. We have, then, only the probability, (and I suppose we have that,) that if *Smith* had debarred *VanBrocklin* from receiving payment of those debts, and had chosen to receive them himself, the amount of the notes would not have been reduced to so great an extent by *VanBrocklin* as it has been. But it does not follow that they would not in that case, between *VanBrocklin* and *Smith*, have been wholly paid off. I think it must lie upon *Smith* to prove, if indeed such a thing were capable of proof, that no more would have been paid off if he had not allowed *VanBrocklin* to collect the notes, because in excusing himself for breach of duty, he must shew that the Bank was not thereby prejudiced.

On the other hand, the amount of the debts which was received by *VanBrocklin*, and which might have been received by *Smith*, is not shewn, but if it exceeded the amount which *Smith* had to pay by reason of his endorsement, I think he should be postponed to the Bank, for I cannot see that *VanBrocklin* would not still have reduced the amount of the notes as much as he has done, and in that case they would have been wholly discharged.

Then as to certain goods, which were included in the assignment to *Smith*, but which it was alleged were not sold by the coroner to *Capron*; those goods may be still forthcoming, and may be available towards satisfying

the judgment of the Bank. This presents a somewhat different question. *Smith's* position would be this: he has by his negligence caused the loss of a fund in which the Bank had an interest, but there is another fund which may be available to the Bank after *Smith's* judgment is satisfied out of the land of *VanBrocklin*, and in the event of that fund not being, from whatever cause, available, then the Bank would have its personal remedy against *Smith*. I suppose the Bank would have such personal remedy from whatever cause, other than the fault of the Bank, these goods might not eventually be available, because the only answer of *Smith* against being wholly answerable now would be: "Granting that I have disappointed you of one fund, you are only prejudiced to the extent that you have not another," but if he cannot obtain that other, that answer fails.

He would then have a personal remedy against *Smith* if he failed to obtain it: but should he be left to his personal remedy? I think not; his equity was to a fund; of that fund part is gone through the negligence of *Smith*, and the rest may go while *Smith* is realizing his debt out of the common fund: *Smith* may apply these goods immediately towards the satisfaction of his debt; his assignment enables him to do so, while the Bank can only do so at a future day, if they are then forthcoming. I think that *Smith* should be postponed to the Bank, notwithstanding the circumstance of certain goods assigned to *Smith* still remaining, which may eventually be available towards satisfying the judgment of the Bank.

I do not disguise from myself that as to these goods I am compelling a party having two funds to abstain from the one common to both, and to resort to the other. I do so, however, only upon the ground that less would not be equitable to the Bank, under the circumstances which I have stated; not that it is the ordinary equity between creditors, the one having but one fund to resort to; the other, two, one of which is common to the other creditor.

For the reasons which I have endeavoured to explain, I think the Bank of British North America entitled in respect of the judgment against *VanBrocklin* to priority over that recovered by *Smith*, instead of the latter having priority, as reported by the master. With regard to the costs of this appeal; the ordinary course is, that when the judgment of the master is reversed, it is without costs, but from the master's note at the foot of the evidence I am led to doubt whether he exercised his judgment upon the question argued upon the appeal. His note is, that he decides to report the priorities as he finds them proved before him, leaving the defendants, the Bank of British North America, to appeal against his report. If, by this, the master means, as I think his words import, that he reports *Smith* first in priority only because first in order of time, leaving the Bank to raise the question by appeal, whether *Smith* had, by his conduct, forfeited the priority which he would otherwise have, without himself deciding that question; then I think the Bank should succeed upon this appeal, with costs to be paid by *Smith*: but if the master meant to dispose of the question, then the costs should follow the usual course, and there should be no costs of arguing the appeal.

SCHREIBER V. MALCOLM.

Fixtures.

A mortgagee filed a bill to restrain the assignees of a mortgagor from removing a steam boiler and engine set up by the latter, for the purpose of working planing machinery. The boiler rested on brick-work, without any fastening: the engine was firmly attached to the floor with bolts and nuts, to make it work steadily: the machinery propelled by it was all unconnected with the premises. *Held*, that the boiler and engine were not fixtures.*

One of the defendants in this case, had erected in his workshop a steam-boiler and engine, for the purpose of working planing machinery. He afterwards assigned all his property to assignees, for the benefit of his creditors, and the property in question was advertised for

* See also McDonald v. Weeks, ante 297.

sale under the assignment. The plaintiff, who held a mortgage on the premises executed by the assignor, prior to the assignment, then filed a bill against the debtor, his assignees and creditors, to restrain them from removing the boiler and engine, upon the ground that, as between mortgagor and mortgagee, they were fixtures, and could not lawfully be removed, or sold except subject to his mortgage.

Upon an application by the plaintiff for an injunction, conformably to the prayer of his bill, it appeared that the boiler rested on brickwork, to which it was not in any way fastened, its great weight rendering any fastening unnecessary. The steam engine was firmly attached to the ground by means of iron bolts and screw nuts, for the purpose of preventing it from shaking, and making it work steadily when in use. The machinery driven by it was all unconnected with the premises.

Mr. *G. D. Boulton*, for the plaintiff, cited *Fisher* v. *Dixon*, (*a*) and *Walmsley* v. *Milne*. (*b*)

Mr. *McGregor*, for the mortgagor and assignees; and Mr. *Barrett*, for the creditors, cited *Beck* v. *Rebow*, (*c*) *Hellawall* v. *Eastwood*, (*d*) and *Carscallen* v. *Moodie*. (*e*)

Judgment–ESTEN, V. C.–I think this injunction ought not to be granted. The boiler is not affixed at all, and the engine only in such a way as to be conveniently and easily removeable, and for its more perfect use as a chattel. I think there was no permanent dedication of the land to a particular use, and the annexation of the chattels for the better use and employment of the land; but the trade or business was the principal matter, and the land subsidiary to it, and the mere locality where it was carried on. The cases of *Hellawell* v. *Eastwood* and *Walmsley* v. *Milne*, seem to mark the boundaries of the law on this

(*a*) 12 Cl. & Fin, 312.
(*b*) 6 Jurist, N, S. 125
(*c*) 1 P. Will. 94.
(*d*) 6 Exch. 295.
(*e*) 15 U. C. Q. B. 304.

subject. I think this case resembles the former of these cases. As regards the evidence of intention, furnished by the circumstances of the transaction, I think it confirms this view. The price paid for the property was over £600. *Plenderleath* erected a house on it worth £600; the sum lent was £525, and I presume the steam-engine and boiler would be worth some £100. These chattels are not once mentioned throughout the deed, although, if intended to be included, some mention of them might have been expected both in the granting part of the deed, and in the power of sale, if not in the provision for insurance. I fully admit that in a conveyance by way of sale or mortgage every thing that is affixed to the freehold, and which on the decease of the owner would devolve to the heir, will pass. I ground my decision on the fact that these chattels were not so affixed.

KERR V. LEISHMAN.

Will—Construction of—Executions—Renunciation by—Election of widow—Dower.

A testator directed all the rents and income of his estate to be divided between his widow and children, one share to each of the children, and two to the widow, her heirs and assigns for ever, and proceeded as follows: "I hereby direct that each child on attaining his or her majority, receive his or her share, (after expenses of proper repairs are deducted,) for his or her sole use." *Held*, that this gave the widow an absolute interest in all his estate, and that a subsequent devise over of her share in the event of her dying intestate was repugnant and void; and that the children were entitled to the income only on attaining twenty-one: but, the testator by the same will directed "that no real estate be sold without the unanimous consent and direction of all my executors;" and also gave them power to buy and sell, give and take titles in fee simple in as full a manner as if he were living, and appointed his widow executrix, and F. and H. executors thereof; F. and H. renounced probate, and the widow alone proved the will. *Held*, that the powers conferred by the will were personal, and could not be exercised by the widow alone, and that being personal, they had become extinct, and that the division of the estate having been postponed only for the sake of the powers, that its distribution was accelerated by their extinction. *Held*, also, that the widow under the devises mentioned was put to elect whether she would take under the will, or claim her dower.

Samuel Kerr, by his will, made the 28th of August, 1844, devised and bequeathed as follows:—

"First I bequeath to my mother during her natural

life, the sum of £25 currency per annum, to be paid to her quarterly, on the 1st of January, April, July, and October, on condition that the said sum of £25 does not exceed one of the shares hereafter mentioned; but if said sum should exceed one of the shares hereafter mentioned, then the said annual sum to be reduced to an equal sum to one of the said shares. I also direct that if my sister *Margaret* is single at the death of my mother, said yearly stipend be paid to her in same manner so long as she remains single, and no longer. And I further direct that when, according to the above conditions, said yearly stipend shall cease, or on the death of my sister *Margaret*, if she outlive my mother, and remain single, then the above yearly stipend be apportioned to my dear wife and children in same manner as hereinafter named, for division of proceeds of my other property. I also direct and bequeath the proceeds or income which may be derived from all the property which it has pleased God to entrust me with, after paying my debts, the stipend above mentioned, and the expenses necessary in the opinion of my executors for building, and to keep my property in proper repair, be divided in equal shares to the number required, as follows, that is one share to each of my children at present or hereafter to be born, and two for my dear wife *Esther Maria*, her and her heirs and assigns for ever. I hereby direct that each child on attaining his or her majority, receive his or her share (after expenses of proper repairs are deducted) for his or her sole use. And I do ordain and appoint that my dear wife *Esther Maria* shall have the guardianship and tuition of our children during their minority, and that she shall have from their respective shares sufficient means to educate and support them. And I would suggest to my executors that if the proceeds derived from the property and personal property after paying my debts, should be sufficient to improve my property on King Street, and fill it with brick buildings, it may be judicious to do so, this I leave to their judgment to act as circumstances may warrant. I also direct that if my dear wife at her decease has not made a will, then the proceeds of her two shares shall be divided among our children, share and share as otherwise directed for such division and appropriation, and I direct that if any one or more of my children die during their minority, then such share or shares shall be divided as first herein directed, that is one share to each surviving child, and

two shares to my dear wife. I also bequeath [that] all my household property to my dear wife, to be absolute property. I also direct that no real estate be sold without the unanimous consent and direction of all my executors, and I also direct that when my children arrive at majority no property be sold without the unanimous consent of my executors, and the consent of the major part of the children. And I do hereby under the above restrictions vest in my executors full power and authority to dispose of any and all my property, to buy, or sell, to give titles or take titles in fee simple of real estate in as full and large a manner as I could myself do if I were living. If sales are made under the above provisions, and the parties empowered to make sales should not think it judicious to vest the proceeds, but should think the proceeds should be divided absolutely, then the division of such proceeds shall be in the same proportions as hereinbefore provided. And I also hereby make and ordain my beloved wife *Esther Maria*, executrix, and my esteemed friends *John Fisher*, of, &c., and *Urson Harvey*, of, &c., executors of this my last will."

The testator died in 1851, leaving his wife and four children surviving him, one of whom, *Mary Frances*, married *Malcolm Leishman*.

The will was proved by the widow, the executors *Fisher* and *Hervey* having renounced probate, and refused to accept the trusts of the real estate.

All the children were minors except *Mary Frances*.

The bill was filed by the widow, praying a declaration, that she was alone entitled to sell the real estate—that she was entitled to an absolute, and not a qualified interest in the two shares, and accruing shares given to her by the will—that she was entitled to her dower, in addition to the benefits given to her by the will, and that the division of the corpus of the shares allotted to the children was not compulsory at any particular period, but rested in the discretion of the plaintiff, and that the

children as they attained their majority were only entitled to require payment of a share of the annual produce or income of the estate in proportion to the share of the corpus bequeathed to them.

The infant defendants answered, submitting their interests to the protection of the court.

Mr. *Leishman* submitted by his answer, that the plaintiff was bound to elect between her dower and the bequests in the will. That by virtue of his marital right he was entitled to compel a division of the corpus of the estate, and to have the share of his wife paid to him, and prayed that the plaintiff, if she had the power, might divide or sell forthwith, and if she had not the power, that the division might be made under the direction of the court.

Mrs. *Leishman* answered separate from her husband, and submitted that the plaintiff ought to elect between her dower and the bequests in the will, and each of the testator's children as he or she attained majority, was entitled to compel a division of the estate, and to have their respective shares absolutely paid to them. She also alleged that no settlement had been made on her marriage, and prayed that she might be declared to be entitled absolutely to her share, and that her husband was not entitled to any interest therein, and that she was entitled to have the same settled absolutely on her, and that her husband might be ordered to do any act necessary to have the whole settled on her, and prayed that the plaintiff might sell or divide if she had the power; and if not, that the court might do so.

The case was heard before his Honour V. C. *Esten*, upon a motion for a decree.

Mr. *Proudfoot* and Mr. *Blake*, for plaintiff.

The executors took a fee simple under this will. There is no express devise to them, but the duties imposed could only be performed by their having the fee. They are required to pay an annuity to the testator's mother and sister—to pay debts and expenses, &c.—and these are to be paid out of the proceeds or income of all the property; they are to apply the remainder in building; and they have a power of sale, and are to collect and apply the rents. *Oates* v. *Cooke*, (*a*) *Doe* v. *Homfray*, (*b*) *Doe* v. *Woodhouse*, (*c*) *Burton* v. *Woodhouse*. (*d*)

All the executors, but one, renouncing, that one may exercise the power of sale. There is nothing to evince any intention to create a trust personal to these executors. It is indeed said that a sale must have their unanimous consent, but that merely provided for the contingency of their disagreeing, if all acted. In *Adams* v. *Taunton*, (*e*) a testator devised estates to two trustees, and their heirs and assigns, in trust to sell by public auction or private contract, either together or in parcels, and to apply the produce among his children equally. One of the trustees renounced, the other proved, the will, and sold the property by auction to the defendant, who refused to complete the purchase. Specific performance was decreed. In *Cooke* v. *Crawford*, (*f*) real estate was devised to three trustees, or the survivor, or the heirs of the survivor, as soon as conveniently might be after the testator's decease, *but at their discretion*, to sell the same, &c. Two of the trustees renounced, the third accepted the trusts, and devised the estates. It was held that a *devisee* was not *an heir* within the meaning of the power, and therefore that the devisee of the trustee could not sell. But the Vice-Chancellor of England says: "I have always understood ever since the point was decided

(*a*) 3 Burr. 1684.
(*b*) 6 A. & E. 206.
(*c*) 4 T. R. 89.
(*d*) Kay & John. 170.
(*e*) 5 Madd. 435.
(*f*) 13 Sim. 91, 96.

in *Hawkins* v. *Kemp*, (*a*) (or rather was, as the judges said in that case, properly abandoned by the defendant's counsel as not capable of being contended for,) that where two or more persons are appointed trustees, and all of them except one renounce, the trust may be executed by that one."

So in *Worthington* v. *Evans*, (*b*) a legacy was given on condition that the plaintiff married with the consent of the trustees, or the survivor, in writing—one refused to act in the trusts, and it was held that the consent was annexed to the office of the trustee, and that the consent of the one refusing to act was not required.

If only a power be conferred. and not an estate in fee, the same rule will apply. (*c*)

As to the interest of the plaintiff in the two shares: there is no express bequest of the corpus to her, but there is a devise over of her shares, and she is entitled to the proceeds of the sale in the same proportions, &c., so that there is a gift by implication. *Jordan* v. *Fortescue*, (*d*) *Bibin* v. *Walker*, (*e*) *Adams* v. *Adams*. (*f*) Her interest in these shares is absolute, the devise over being repugnant. *Lighthouse* v. *Gill*, (*g*) *Hughes* v. *Ellis*, (*h*) *Holmes* v. *Godson*, (*i*) *Barton* v. *Barton*, (*j*) *Re Mortlock's Trust*, (*k*) *Greated* v. *Greated*, (*l*) *In Re Yalden*. (*m*)

The plaintiff is entitled to her dower as well as to the

(*a*) 3 East. 410.
(*b*) 1 Sim. & Stuart, 165.
(*c*) 21 H. 8, ch. 4; 1 Sug. Powers, 7th ed. 142.
(*d*) 10 Beav. 259.
(*e*) Amb. 661.
(*f*) 1 Hare, 537.
(*g*) 3 Bro. P. C. 250.
(*h*) 20 Beav. 193.
(*i*) 2 Jur. N. S. 283.
(*j*) 3 Kay. & John. 512.
(*k*) 3 Kay. & John. 456.
(*l*) 26 Beav. 621.
(*m*) 1 DeG. & McN. & G. 53.

benefits given by the will. There is no case for election, unless it plainly appears that the testator intended to devise her estate, that he intended to deprive her of her dower—it is not enough that an intention that she should have both, is not expressed—it must appear that she is not to have both, *Noys* v. *Mordaunt*. (*a*) There is no express devise of the estates in this will, and there is therefore nothing from which it can be inferred that the estate implied in the trustees is any thing more than the estate of the testator, unless it be found in the powers conferred on the executors. None of these powers are such as to be inconsistent with the right of dower. In *Gibson* v *Gibson*, (*b*) a testator gave to his wife certain chattels and leaseholds, and pecuniary benefits. He gave *all his estate and interest* in his freehold lands, &c., upon trust, to sell, and divide the proceeds—one fourth to his wife, and three fourths to other persons. He directed that until sale, the rents and profits of his real estate should be applied in the same manner as the income of the moneys to arise from the sale. The widow was held entitled both to her dower and the benefits given her by the will. In *Bending* v. *Bending*, (*c*) it was held that powers of, or trusts for sale, created by will over real estate, are not inconsistent with a widow's right to dower. Nor is her claim affected by any direction as to the distribution of the proceeds, and therefore where the testator directed his trustees to sell "all his freehold and copyhold estate," and gave his widow half the proceeds, she was not bound to elect. *Wood*, V.C., remarks that different judges have come to different conclusions as to what is such an inconsistency with the assertion of the widow's right to dower, as to put her to her election. Where the land itself is to be divided, it cannot be done consistently with her right. There is no such inconsistency in a power of, or trust for sale. In *Ellis* v. *Lewis*, (*d*) *Wigram*, V. C., says, the law is

(*a*) 1 White & Tudor, L. C. 223. and notes.
(*b*) 1 Drew. 42. (*c*) 3 Kay & Johns. 257. (*d*) 3 Hare, 310.

clearly settled that a devise of lands, *eo nomine*, upon trust for sale, does not *per se* import an intention to pass the land otherwise than subject to the legal incident of dower; what the testator directs to be sold, being not his wife's estate in the lands, but his own; and then, if that be so, it is impossible that any direction for the application of the proceeds of such sale can affect the case.

Powers of leasing have been held to be inconsistent with the right of dower, but no such powers are to be found in this will. *Parker* v. *Sowerby*, (*a*) *Hall* v. *Hill*, (*b*) *Warbutton* v. *Warbutton*. (*c*)

As to the time for the division of the estate:—the proceeds or income of the property is to be divided into shares, and each child is to receive its share on attaining majority, after deducting expenses of repairs; that is, until majority, the executors are to receive the income, as each reaches majority he is to receive this share of the income. Again, the testator uses the word *proceeds* in the bequest over after his wife's death, so as clearly to mean annual proceeds or profits. Again, the power of sale subsists after all have attained their majority, the consent of the major part of the children being then required, and the proceeds are then either to be invested or divided, and there is a maintenance clause during minority. The true construction is, that the trustees are to be seized of the estate during the lives of all the children, unless they shall choose meantime to divide the property. It is true that a power of sale over a freehold estate without limit, might be void as transgressing the rule against perpetuities. But this is not co-extensive, for it is to be exercised with the consent of the children, and that is of itself a lawful limit. *Taite* v. *Swinstead*. (*d*) At all events it is good during the minority of the children, and so long as the trusts subsist.

Mr. *McDonald*, for the infants. The power conferred

(*a*) 1 Drew. 488, S. C. 4 D. M. G. 321.
(*b*) 1 Dru. & War. 94. (*c*) 2 Smale & Giff. 163.
(*d*) 26 Beav. 525, 2 Sug. Powers, 7th ed. 470, 471.

by the will has become extinct. The concurrence of all parties interested under the will is necessary, and this controls the provision in the statute of Henry VIII. *Brassey* v. *Chambers*. (*a*) As to the estates given to each, he contended that "proceeds," meant annual proceeds, in all parts of the will, other than the last clause, and that the corpus is not given to the wife, but only the annual income or proceeds; and so also to the children on their attaining twenty-one. And in the gift over "shares" and "proceeds of shares," are distinguished, and the corpus is not disposed of except by the last clause, which expressly disposes of the proceeds, and is also an implied disposition of the lands. By the will the widow takes two-thirds of the proceeds, and also of the lands, which is inconsistent with the claim of dower also, as she would, if entitled to dower, take the whole estate for her life. The division of the estate denoted by the testator is to take place when the youngest child attains twenty-one, not before, and therefore Mrs. *Leishman* is not now entitled to her share.

Mr. *McMichael* and Mr. *Fitzgerald*, for Mrs. *Leishman*. The defendants admit, and it is conceded by all parties that a division of the estate must take place at some time amongst those interested—the widow and children—the only question is, when that event is to take place. The testator in the devise over of the wife's shares refers to the corpus, and treats it as if a division of it had already been directed by the will. It must be intended that the lands, or the proceeds of them, should be divided, on the children attaining twenty-one; that is, that each child on attaining majority should have his share. *Bending* v. *Bending* is not unfavourable to the interests of the children; the *income* is given to the wife and children in certain proportions. This is a provision quite as inconsistent with any claim of dower as an actual division of the corpus in the same proportions.

ESTEN, V. C.—My opinion of this will is, that the

(*a*) 4 DeG. M. & G. 520.

property real and personal is given to the children and wife absolutely, in equal shares, the wife taking two shares, whether sold or not, and that any lands that might be purchased, were given in the same way; subject to powers exercisable by the executors unanimously, during the lifetime of the children, with the consent of the majority of them, after they became of age; that each child was entitled to the income only on attaining twenty-one; that the wife took an absolute interest, and that the ulterior gift of her share depending upon her intestacy was repugnant and void; that she was put to her election; that the acting executrix cannot exercise the powers; that such powers were personal; that they have consequently become extinct; and as the division of the estate was postponed only for the sake of these powers, that its distribution is accelerated by their extinction, and that Mrs. *Leishman* is consequently entitled to her share in possession; that the consent of her husband would have been unnecessary to the exercise of the power of sale; that the executors took an estate in fee, and not merely a power, and that the power of sale requiring the unanimous consent of all the executors, and not being exercisable therefore by a sole executor, and from its personal nature not being exercisable by any trustee appointed by the court, has become entirely extinct. The power of erecting buildings on the lot in King Street seems to be exerciseable by the sole executrix, but depending as it did under the circumstances of the estate, upon the exercise of the power of sale, it has become, like it, virtually extinct. The powers were annexed, I think, to the office, and to the estate, but the provision requiring the unanimous consent of all the executors countervailed the disposition. It is manifest, I think, that the property, real and personal, is given absolutely to the wife and children. The first gift is "to them and their heirs," and it is directed that should a sale be made, and those entitled should not think it expedient to vest the proceeds, but that they should be "divided absolutely," it should be in the proportions before mentioned. It might hap-

pen that the lands would remain unsold; the executors might not be unanimous, or the majority of the children might withhold their consent; or it might happen that lands might be purchased; but it is clear that the gifts and dispositions of the will were not contingent on these events, but that in whatever shape the estate might be, whether lands remaining unsold or purchased, or money, it was to devolve in the same channel. The wife is evidently placed on the same footing with the children, except that she receives a double share, and the gift to her is therefore in its terms absolute, and the ulterior gift depending upon her intestacy is repugnant and void according to the authorities that were cited upon this point. The lands, it is obvious, might remain unsold, in which case they would be divided in the way directed, amongst the wife and children, in equal shares, counting the wife as two persons. I am satisfied that the testator intended the lands themselves to be divided in this way, and not merely his estate in them, subject to the wife's dower; the allotment of which, therefore, by metes and bounds would disappoint the will. I have considered the case with all the attention I was able to give it, and have consulted the cases that were cited, and many others, and I have stated the reasons for my judgment as fully as time would permit. The suit is, I presume, for the administration of the estate. The usual decree for administration may be pronounced, declaring the rights of the parties, in accordance with the foregoing observations. The suit having been occasioned by the doubts created by the provisions of the will, it is proper that the costs of all parties as between solicitor and client should fall on the estate.

BENNETT v. BENNETT.

Infants' estate—Partition—Sale.

Where on the hearing of a cause for partition of lands, it was shewn that the estate was of such a nature that it could not be divided without prejudice to the owners: the court, without waiting for any return to that effect, ordered the lands to be sold by the master in the usual manner.

Statement.—This was a hearing by way of motion for a decree. The bill was filed by infant heirs, asking for a sale of the lands of their ancestor. From the pleadings it appeared that the ancestor had died seised of a farm of about one hundred and twenty acres, leaving him surviving his widow and eleven children, five of them minors—the plaintiffs in the cause—the defendants being the widow and adult children, together with the husbands of such of the daughters as were married. The evidence in the cause shewed that £100 was the utmost rent that could be obtained; that the family could not beneficially work the farm; that a mortgage created by the ancestor was outstanding against it; and that if partitioned between all those interested, the share of each would be almost valueless; under these circumstances.

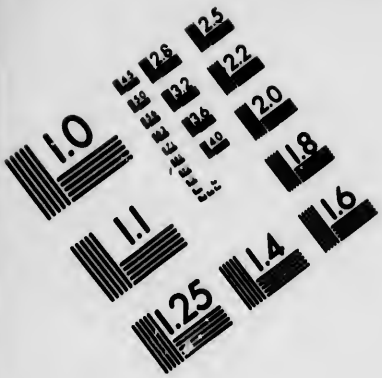
Mr. *Crickmore*, for the plaintiffs, submitted that under the provisions of the statute 20 Victoria, ch. 65, sec. 15, (Consolidated Statutes of U. C. ch. 86, section 21, page 861,) the court might make the decree as asked for. Here the evidence clearly established the fact that partition could not be effected without injury to the owners, all of whom were anxious that the estate might be sold under the decree of the court; the infancy of the plaintiffs preventing that being done voluntarily without suit.

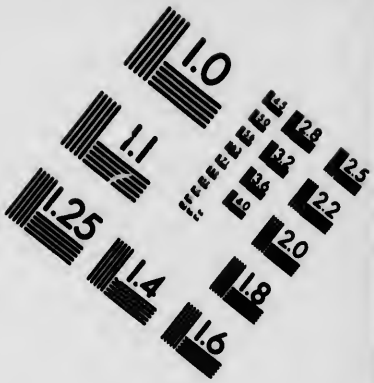
Mr. *Morphy*, for the defendants, consented to the decree prayed for; and suggested that if any doubt existed as to the power of the court to order a sale under the statute referred to; the provisions of the 12 Vic., ch. 72, (Cons. Statutes, U. C., ch. 12, sec. 50 p. 56,) which provides "that when an infant is seised or possessed of,

or entitled to any real estate in fee, or for a term of years, or otherwise, wheresoever in Upper Canada, and the court is of opinion that a sale, lease, &c., of the same or any part thereof is necessary or proper for the maintenance and education of the infant, or that by reason of any part of the property being exposed to waste and delapidation, or to depreciation from any other cause, his interest requires, or will be substantially promoted by such disposition, the court may order a sale," &c., would clearly enable the court to act in a case circumstanced like the present.

ESTEN, V.C.—The twelfth Victoria was passed for a purpose totally different from the object the plaintiffs have in view in this suit, and cannot govern in deciding it. The act under which the court must act, if at all, is that referred to by Mr. *Crickmore*, and I think no doubt can exist that the facts of this case are clearly such as would make it proper for the court to direct a sale, if the proceedings are such as are contemplated by the act.

By sections six and eight, any joint tenant, tenant in common or co-partner, or the agent of any person, or the guardian of a minor, may file a petition in any of the superior courts of law or equity, or in the county court, according to the position of the lands, praying for a partition or sale; and the truth is to be verified by oath or affirmation of the petitioner. Now here there is a bill which in reality is a petition; all parties interested have been served, and the evidence is such as leaves no doubt as to the advisibility of the decree being made as desired by all parties. The only question that can exist is, as to acting without the return of the "real representative;" but I think in a case like this, where the desire of all parties must be to save expense as much as possible, and when the facts are so distinctly shewn upon the evidence, there is not any necessity for any other proceeding than the usual reference to the master.





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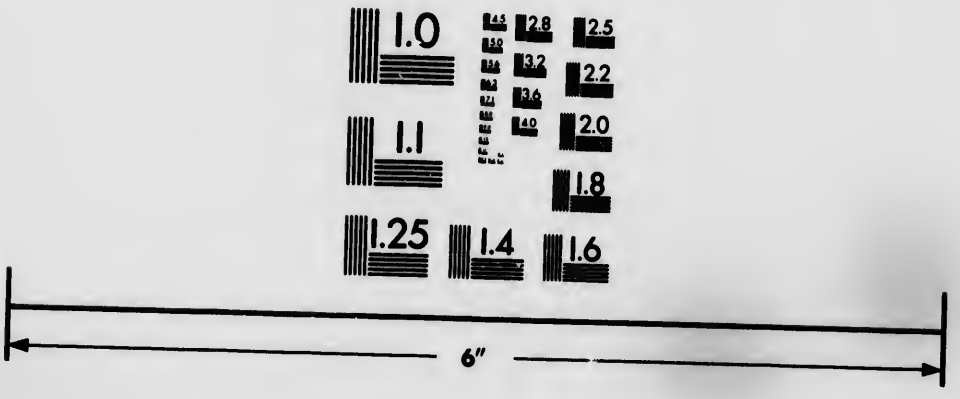

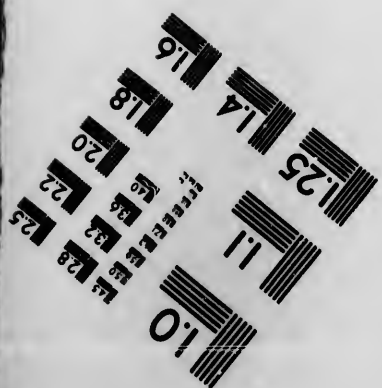

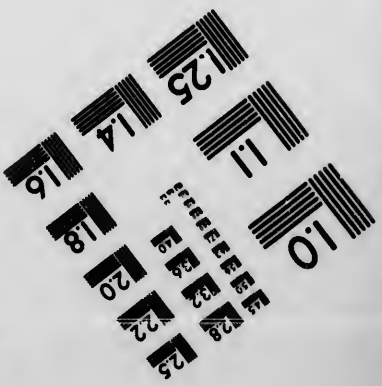

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Maulson v. Moore.

Vendor and purchaser—Mortgage—Lien for unpaid purchase money.

The vendor of lands having taken a mortgage upon them for the purchase money, accepted from the purchaser a transfer of other lands, the price of which he endorsed on the mortgage; and the lands so transferred being subject to incumbrances, the vendor took from the purchasers their bond to discharge them, which having failed to do, the vendor was held entitled to claim under his mortgage against the lands sold by him, the amount of the incumbrances so left unpaid, the rights of no third party having in the meantime intervened.

Statement.—This was a motion by way of appeal from the master's report, in a foreclosure suit. From the pl adings and evidence it appeared that one *Howcutt* was the original mortgagee, and while the holder of the mortgage took lands in Hamilton, at their full value, and endorsed the amount upon the mortgage; the mortgagors, the defendants, binding themselves to pay off certain incumbrances outstanding upon them. The mortgagors made default in this, and the present bill was filed by *John Maulson*, who held an interest in the premises, as assignee of *Howcutt*, claiming the whole amount, giving no credit for the lands. The answer of *Moore* alleged that *Howcutt*, when he took the assignment of the property in Hamilton, did so, agreeing to give credit absolutely for the price agreed upon. This was denied by the affidavits of *Howcutt*, and a witness present at the transaction.

On the reference, the master at Hamilton in taking the account charged *Maulson* with the full amount named as the price of the Hamilton land, and he thereupon appealed from the report.

Mr. *Boomer*, for plaintiff.

Mr. *Barrett*, contra.

Spragge, V.C.—The whole mortgage money was £9500, of this £1500 was to be applied to pay off the mortgage to *Cameron*, £8000 remained, and the Hamilton land was to be taken in payment of £2750 of that sum and this amount was endorsed on the mortgage; the Hamilton lands were themselves subject to mortgages

stated in *Howcutt's* affidavit to amount to about £1500, and a bond in a penalty of £3000, bearing date, so the affidavit states, on the same day as the mortgage was given by the *Moores* to *Howcutt*, conditioned to pay off these incumbrances—they have not been paid off, and no part of these Hamilton lands is free from incumbrances. The plaintiff now desires that these lands should not be credited on the mortgage, as in that case they, or rather *Howcutt*, will have to pay them off or be foreclosed; but these lands were actually received as a payment of so much on account of the mortgage money, and from the dates it looks very much as if the whole were one transaction; but even if not, they were taken as payment, and the agreed price of them was endorsed as so much paid on the mortgage; then is *Howcutt* to be compelled to allow such payment, or the amount, less the incumbrances? If he had now to pay the purchase money, he might out of it pay off these incumbrances; he has to pay them off, and he has to receive from the *Moores* certain moneys, can these moneys be treated as part of the purchase money of the Hamilton lands? I think that so much of them as represented the price of those lands may; and the circumstance of the mortgage to *Howcutt* being given, not for the balance after deducting that price, but for the whole amount, tends to shew the price was not fixed absolutely, but remained open. It was possible that *Howcutt* was to rely upon the bond given by the owner, to pay off the incumbrances but I take that to be only collateral, and to have been given for *Howcutt's* protection, the incumbrance falling due before the mortgage to *Howcutt* himself. If called upon in the meantime and obliged to pay for his own protection, he ought to be allowed to say, I have given a receipt prematurely for the whole amount; I have received so much less, as these incumbrances amount to, and am therefore entitled to claim it as still due from the land sold to you. Its being secured upon mortgage does not appear to me to weaken his position, for it is still unpaid purchase money, and the rights of no third parties intervene.

RAINEY v. DICKSON.

Guaranty—Rights of other creditors upon a representation made to one—Capital advanced by preferred creditor.

S. by letter informed R. & K. that his son was a partner in a firm, and that he had advanced to him £3000 as his share of the capital thereof. The firm having failed, made an assignment, in which S. was preferred, to the amount of £3565 5s. 3d., represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1000. *Held*, notwithstanding that S. was bound to make good his representation to R. & K. so far as they alone were concerned; but that other creditors could not participate, the representation being only to a particular creditor; unless it should appear that a portion of the preferred claim of S. was not a debt of the firm to him, but consisted of capital advanced to the son, in which event that portion would be applied on their claims, it not appearing that the goods furnished by them had been sold upon the faith of the representation to R. & K.: but if that had been shewn to have been the case, they would have had that right. (*Semble.*)

Held also, that under the circumstances such statement of S. operated as continuing guaranty so far as R. & K. were concerned.

Statement—The bill in this case as amended and re-amended, was by *George Rainey*, *Robert Knox*, and forty-five others, (composing several firms,) creditors of the defendants *William Dickson* and *William H. Scott*, against said *Dickson* and *Scott*, *Samuel Spreull*, *Henry Scott*, *John Crawford* and the *Bank of Montreal*, setting forth that the defendants *Crawford* and the Bank had, as creditors of *Dickson* and *Scott*, executed the deed of assignment in trust to *Spreull*, mentioned in the judgment, and praying, under the circumstances set forth in the judgment, that the said deed of assignment might be declared fraudulent and void so far as it purports to give priority or preference to the defendant *Henry Scott:* to restrain *Spreull* as such trustee from making any payment to *Henry Scott;* but that the deed in all other respects might be carried into effect; that the defendants *Spreull*, *Dickson* and *W. H. Scott*, might be restrained from proceeding so far as they could do so under an interpleader order obtained by the sheriff of the county of York and Peel to test the said assignment; and that *Henry Scott* might be postponed to all others the creditors of the firm of *Dickson* and *Scott*.

The defendants *Scott*, *Dickson* and *Spreull* severally

answered the bill, and the cause was brought on to be heard by way of motion for decree as against them, and *pro confesso* as against the other defendants.

The facts sworn to in the affidavits used upon the hearing, are sufficiently stated in the judgment.

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

Mr. *Murphy*, for the defendants *Dickson* and *Scott*.

Mr. *Blake*, for the defendant *Henry Scott*.

Mr. *Ince*, for defendant *Spreull*.

Judgment.—SPRAGGE, V.C.—The plaintiffs in this case are Messrs. *Rainey, Knox & Company*, merchants, carrying on business in the city of Glasgow, creditors of the late firm of *Dickson, Scott & Co.*, of Toronto; with whom are joined as co-plaintiffs numerous other creditors of *Dickson, Scott & Co.*; the defendants are *William Dickson* and *William H. Scott*, partners in the Toronto firm, *Henry Scott*, the father of *William H. Scott*, and *Samuel Spreull*, assignee of the Toronto firm, for the benefit of creditors, and certain creditors who have come in under the assignment. In the instrument of assignment *Henry Scott* is a preferred creditor for the sum of £3565 5s. 3d. The date of the assignment is the 11th of May, 1858.

The bill alleges that the defendant *Henry Scott*, the father of the defendant *William H. Scott*, made a gift or loan of a sum of £3000 sterling to his said son in order to its being invested in the business of Messrs. *Dickson, Scott & Co.*, as his share of the capital of the said firm; but the bill is founded mainly upon a letter written by *Henry Scott* to *Rainey, Knox & Co.*, and which is in these terms:

"LAWDER PLACE, EDINBURGH,
24th July, 1856.

"MESSRS. RAINEY, KNOX & Co.,
Glasgow.

"GENTLEMEN,—By a letter from my son-in-law, Mr.

Whiting, of London, this morning, to whom you wrote on the 22nd for information regarding Messrs. *Dickson, Scott & Co.*, of Toronto, successors to Messrs. *Perrin & Co.*; I now beg to reply, as he was not then made acquainted with the arrangement entered into, I have now to inform you that my son is to be Mr. *Dickson's* partner; to whom I have advanced £3000 as his share of capital; for any information you may require regarding myself I may refer you to Mr. *Arthur*, of Messrs. *Arthur & Fraser*, of Glasgow, or Mr. *Duncan*, manager of the National Bank in Edinburgh; from the former gentleman my son was purchasing goods two days ago. Be so kind as to inform me in course of post if you intend forwarding the goods that my son may have an opportunity of buying elsewhere if you decline."

"I am, gentlemen,
"Yours respectfully,
"HENRY SCOTT."

The allegation on the part of *Rainey, Scott & Co.* is, that relying on the representation contained in the above letter, they furnished *Dickson, Scott & Co.*, with goods to the value of £100 and upwards; that they have recovered judgment upon their acceptance for the value of such goods, and have placed an execution thereupon against lands, in the hands of the sheriff of the County of York. As to the other plaintiffs it is simply alleged that they recovered judgment against *Dickson, Scott & Co.*, for goods furnished by them respectively to that firm, and have placed executions in the hands of the sheriff. It is not alleged that the goods so furnished were sold upon the faith of the representations contained in the letter to *Rainey, Knox & Co.*, or of any other representation, or that they were cognizant of the letter to *Rainey, Knox & Co.* The answer of *Henry Scott* denies that he made any representation to any other than *Rainey, Knox & Co.*

As to the preferred debt of *Henry Scott*, the allegation is, that it is the same sum, or is in part composed of the sum of £3000, mentioned in the letter of *Henry*

Scott, and thereby represented to have been advanced by him to his son *William Henry Scott*, as his share of capital, to be invested in the co-partnership business of *Dickson, Scott & Co.*

Apart from the representation of *Henry Scott*, it is not contended that there is an equity to prevent *Dickson & Scott*, as the law stood at the date of the assignment, from preferring *Henry Scott* for any sum really due to him from the firm.

The claim, then, of the plaintiffs, other than *Rainey, Knox & Co.* rests upon their position as judgment and execution creditors, and upon the fact of the representation being made by *Henry Scott* to *Rainey, Knox & Co.*, for the purpose of inducing them to furnish goods to *Dickson, Scott & Co.*; and upon the fact, if it is a fact, that a portion of the preferred claim is not a debt of the firm to *Henry Scott*. As to the representation contained in the letter to *Rainey, Knox & Co.*, I do not see how the other creditors can avail themselves of that. If it had been made in general terms and placed in the hands of *Scott*, the son, or of his firm, to enable them to obtain credit, then I take it, any person furnishing goods upon the faith of it would have an equity to hold *Henry Scott* to make good his representation. *Pooley* v. *Budd*, (*a*) was a case of general representation. The Master of the Rolls put the case of a particular enquiry by one about to make an advance, and asks: "Are they less bound by this statement because it has been made generally to the world, instead of to one particular individual? I think not."

I am not prepared, indeed, to say what might have been the effect if this representation, made to *Rainey, Knox, & Co.*, had been communicated to others, who upon the faith of it furnished goods to *Dixon, Scott &*

(*a*) 14 Beav. 34.

Co., because it is not a mere engagement to the firm to whom it is addressed, but a statement of a fact: "I have advanced £3000 as his share of capital." There are some observations of Lord *Erskine*, in *Clifford* v. *Brooke*, (*a*) that would seem to give colour to such a claim: but I express no opinion upon it; for in this case there is nothing to support it: the material allegation is wanting that the goods sold and delivered to the firm were furnished upon the faith of any representation on the part of *Henry Scott*; and it appears to me, therefore, that the plaintiffs other than *Rainey, Knox & Co.*, have no *locus standi* in the court, unless a portion of the preferred claim is not a debt to *Henry Scott*.

With respect to the claim of *Rainey, Knox & Co.*, there could be no question, I apprehend, if their present claim is for the goods purchased by *Dickson, Scott & Co.*, upon the occasion of the letter in question being written, but it is contended that the goods then furnished have been paid for; that the letter was written only to procure that particular credit; and that the writer is not bound to make good his representation for anything out of that particular transaction. I do not agree in this view. The letter is not an engagement to be answerable for goods then about to be furnished; but of a different character. The son of the writer had applied to *Rainey, Knox & Co.*, Glasgow merchants, for a supply of goods, and the writer informs these merchants that his son is to be a partner with *Dickson*, that the firm are successors of Messrs. *Perrin & Co.*, and that he has advanced £3000 as his son's share of capital; there is no limitation of time or amount, or to one or more transactions; and such limitation would have been out of place; he says, in substance, my son proposes to deal with you, as to whether once or oftener he says nothing, but describes his position and means; he makes no guaranty, but a statement of a fact; a fact that from its nature would be a

(*a*) 13 Ves. 131.

continuing fact; *Rainey, Knox & Co.*, would have a right to assume that it would be so. It was not, and could not be a fact as to that particular transaction; and not a fact as to any future dealings. If *Rainey, Knox & Co.* had a right to treat it as a representation which *Henry Scott* was bound to make good as to that particular dealing, as I think unquestionably they had, when did it cease to be such a representation? I think indeed that the letter may fairly be read as pointing to a continued dealing. The letter was written with the very object of encouraging the merchants to whom it was addressed to furnish goods to beginners in business; it looks like the invitation of a business connexion or continued dealing; and the only allusion to the dealing is, where the writer requests to be informed whether *Rainey, Knox & Co.* would furnish the goods then proposed to be purchased, in order that if they declined his son might purchase elsewhere: there is nothing in this pointing to the proposed purchase as the only dealing contemplated between the parties.

As to the meaning of the words used, "I have advanced £3000 as his share of capital," I do not think it imports a loan of so much money, but that his son's capital in the concern was £3000, which sum had been provided by him; but suppose that it imports a loan, it is not a loan to the firm of *Dickson, Scott & Co.*, but to one partner, to be used, and as I think is implied, actually invested as capital, and I should say to answer the purposes of capital, and among others, to be applied, if necessary, in paying the debts of the firm: unless used in this sense, (even supposing the words used to import a loan,) it would be no better than a snare; it was held out as affording security to merchants advancing goods; but if it was to be converted or to be liable to be converted into a debt of the firm to *Henry Scott*, it would be no security, in that it would not be what it was represented to be. I think, therefore, that whichever be the meaning of the letter of *Henry Scott*, it contained a represen-

tation which bound him to make good his assertion that £3000 was the capital of his son in the concern, and that he could not withdraw that sum, or any part of it, to the prejudice of *Rainey, Knox & Co.*

The result is in my judgment that *Rainey, Knox & Co.* are the only plaintiffs who have any equity against *Henry Scott*, and that the other plaintiffs have no *locus standi* in this court, unless, indeed, as I have before stated, a portion of the preferred claim is composed of that which is not a debt of the firm to *Henry Scott*. Supposing this to be the case, there is a misjoinder of plaintiffs, but that is, under our general order, no reason for dismissing the bill, and *Rainey, Knox & Co.* must be entitled to the same relief as if they had been sole plaintiffs, but at the same time can only recover against the defendants such costs as would in that case have been incurred; and if the defendants have on their part incurred additional costs in resisting the case of the plaintiffs other than *Rainey, Knox & Co.*, beyond what they would have incurred if they had been sole plaintiffs, such costs should be deducted.

The actual arrangement between *Henry Scott*, and his son, and the firm of *Dickson* and *Scott* was not in accordance with his letter to *Rainey, Knox & Co.*, in whichever sense that letter is to be read, for in fact this sum of £3000, (which was sterling money,) was neither all lent, nor all a gift to the son, but £1000 of it was clearly intended as an absolute gift, and the other £2000 was a loan to the firm. This I think clearly established by the evidence; but in *Henry Scott's* letter no distinction is drawn, but the whole treated as the capital of the son in the firm. This in truth it never was, and was never intended to be, for by the articles of co-partnership, while £1000 is stated as the capital of *William Henry Scott*, the provision as to the £2000, is only that he is to procure from his father a loan of that sum to the firm.

It is alleged that the £1000 gift to the son forms no part of *Henry Scott's* preferred claim, but that it consists of the £2000 loan to him, of subsequent advances and interest; and if so, what *Henry Scott* would have to make good would be the additional £2000, if the claim of *Rainey, Knox & Co.* reached or exceeded that amount; but as it is less than that sum, the preferred claim of *Henry Scott* can only be affected to the extent of what is due upon the judgment of *Rainey, Knox & Co.*

The plaintiffs, *Rainey, Knox & Co.*, are entitled to their costs, with the qualifications I have indicated, against the defendant *Henry Scott*. Defendant *Spreull* is entitled to his costs as between solicitor and client from the plaintiffs *Rainey, Knox & Co.*, and the defendants *Crawford* and the Bank of Montreal, are entitled to their costs (if any have been incurred) against the same plaintiffs; who are entitled to such costs over against defendant *Henry Scott*. I do not think that I can properly give costs against *Dickson* and *William H. Scott*, but their conduct in the transaction has not been such as to induce me to give them their costs.

It appears that one *Alexander* was a partner with *Dickson* and *William Henry Scott*, in the firm of *Dickson, Scott & Company*, but he is not made a party, and no point is made upon it.

The plaintiffs, other than *Rainey, Knox & Co.*, can, if they desire it, take an enquiry as to whether the £1000 sterling, gift of *Henry Scott* to his son, *William H. Scott*, forms any part of the preferred claim. If it does, they are properly made plaintiffs, and the qualification as to costs, to which I have adverted, will not apply.

WIARD v. GABLE.

Trustee—Breach of trust—Costs.

An executor or trustee who has been guilty of negligence merely, in omitting to invest moneys, will be charged with interest at 6 per cent.

Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust funds to his own use; the court ordered the account to be taken against him with annual rests.

An executor or trustee will sometimes be entitled to his costs in a suit for administration, notwithstanding he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach.

This was an administration suit, the usual reference to the master at Hamilton to take accounts was directed, who having made his report, the cause came on to be heard for further directions, and as to the question of costs. The main facts of the report, and points in issue, appear sufficiently in the judgment of his Honour V. C. *Esten*, before whom the cause was heard.

Mr. *C. Crickmore*, for the plaintiff.

Mr. *A. Crooks*, for the widow and adult children.

Mr. *Doyle*, for the infants.

Mr. *Strong* and Mr. *Barrett* for the executors.

Judgment.—ESTEN, V.C.—The rules with respect to executors and trustees which prevail in England, appear to be, 1st, that when an executor or trustee is guilty of mere neglect; this is, where having money in his hands, which he ought to invest, he neglects this duty, but derives no benefit from the use of it, he will be charged only with interest at four per cent. Perhaps this rule does not apply when the will or settlement directs an investment, and his omission to make it is a violation of an express duty. 2nd. That where the executor or trustee is guilty of something more than mere neglect, as when the money is immediately payable or distributable, and he with-

holds it, or is otherwise guilty of a breach of trust, exceeding mere negligence; or when he has employed the trust money in his trade or otherwise for his own benefit he will be made to pay five per cent. interest; and 3rd, that where such a breach of trust, and the application of the trust money to his own use, concur he will not only be charged with interest at five per cent., but the account will be taken against him with annual rests, so that he will be charged with compound interest.

In this country we have not separate rates of interest applicable to different cases. An executor or trustee guilty of mere negligence, that is, omitting to invest moneys simply, will be charged with interest at six per cent., and he certainly ought to be visited with a severer penalty when he has committed a breach of trust, or has applied the moneys with which he has been intrusted to his own use. No other penalty can be inflicted on him in such a case than to make him pay compound interest, and this I think, should be the rule in this country. The other members of the court inclined to this opinion in the case of *Landman* v. *Crooks*, (*a*) although it being unnecessary to decide the point, they refrained from pronouncing an express decision upon it. Here the defendant, before the sale of the 22 acres to *Gordon*, had received £400 of personal estate, and £250 of rents, making together £650. The debts amounted only to £534, and therefore it was wholly unnecessary to proceed to a sale of any of the lands in order to satisfy the debts. The rental of the estate appears to have amounted to about £65 a year, of which he devoted only about half to the support of the family. How the widow and nine children contrived to subsist on this pittance it is difficult to understand. The £350 received from *Gordon* and the surplus rents ought undoubtedly to have been invested; but if the defendant had simply neglected this plain duty, I should have charged him only with interest at six per cent. It is not pretended, however, that he

(*a*) Ante vol.

retained these moneys in his own hands wholly unproductive; it is plain that he applied them to his own use, and I think, therefore, that he ought to be charged with compound interest; in other words, that if the parties claim it, the account should be taken against him with annual rests.

With regard to the costs, I am very clear that the defendant ought to pay the costs of the suit as between party and party, so far as it is a suit for the setting aside of the sale of the 22 acres. So far as it is a suit for the administration of the estate, he must have his costs as between solicitor and client. It is true that he has misapplied the moneys of the estate, but for this he is punished by being charged compound interest and every executor being entitled to have his accounts taken in this court, the suit would have been equally necessary had such misapplication not occurred, which cannot therefore be said to have occasioned it. In the case of *Williams* v. *Powell*, the executor, after the money in his hands had become distributable, employed it for his own benefit, and kept the parties at a distance by shifts and evasions, but he nevertheless had his proper costs as of an administration suit as between solicitor and client. This, I think, should be the order here. The defendant should receive his legitimate and proper costs as for an administration suit as between solicitor and client; the remainder of the costs he should pay as between party and party. The balance in his hands should be paid into court: the adult children are entitled to receive their shares. Those of the infants should be invested for their benefit, and the income applied to their subsistence and education, subject to the rights of the widow. The balance in the hands of the executor appears to be £725 1s. 1d. *Norman Wiard* submits that the £116 should be charged against him. An enquiry should be directed to ascertain whether a sale or partition would be most beneficial for the infants.

The Bank of British North America v. Moore.

Right to redeem—Judgment creditor—Assignment of judgment.

An execution at law against the lands of M. at the suit of K. was in the sheriff's hands, under which certain lands in the county of Oxford were advertised for sale. The Bank of B. N. A., who were registered judgment creditors of M., but subsequent to K., offered R., the assignee of K.'s judgment, to pay the same if he would assign it, but the assignee refused to do more than discharge the judgment. The Bank of B. N. A. then filed their bill against M. and R. praying to redeem R. and foreclose M., and moved for an injunction to restrain the sale by the sheriff. The court held a prior judgment creditor bound to submit to be redeemed by a subsequent judgment creditor, and to assign the judgment, and ordered that upon payment to R. (if he would receive and assign K.'s judgment) of the amount of that judgment, and subsequent costs, and if not, then upon payment into court of the same amount, an injunction should issue to restrain the sale by the sheriff.

Where a party made defendant as incumbrancer put in an answer, putting up that he had assigned the judgment in respect of which he was made a party, notwithstanding which he was retained as a party to the hearing, when, it not distinctly appearing that any effectual transfer of the judgment had ever been made, the court refused to make any order giving him his costs, otherwise than as an incumbrancer.

Statement.—This was a bill by the Bank of British North America against the defendant *Moore*, against whom they had recovered judgment, and the defendants *Wilson*, *Ganson*, *Waterous*, *Bennett*, *Ketchum*, *Carnell* and *Robinson*, incumbrancers on the estate of *Moore*, seeking to enforce their judgment by sale of the lands of *Moore*. It appeared that the defendant *Ketchum* had recovered and registered a judgment prior to that of the plaintiffs, who applied to the defendant *Robinson*, to whom the *Ketchums* had assigned their judgment offering to pay the amount upon obtaining an assignment to themselves: this offer *Robinson* refused to accept otherwise than in discharge of the judgment, as he held a mortgage on the lands in question subsequent to the judgment of the plaintiffs. Thereupon a motion was made by Mr. *E. B. Wood* for an injunction to restrain the sale of *Moore's* lands under a writ of *venditioni exponas* issued upon the judgment held by *Robinson*.

Mr. *Barrett*, for defendant *Carnell*, who were also incumbrancers subsequent to this judgment.

Mr. *VanNorman*, for defendant *Robinson*, contended for the right set up by his client to refuse to accept the amount of the judgment otherwise than as a payment thereof.

The cases principally relied on are mentioned in the judgment of

SPRAGGE, V.C.—[Before whom the motion was heard.]—The plaintiffs file their bill as registered judgment creditors of the defendant *Moore*, to redeem prior judgment creditors, the *Ketchums*, of whose judgment the defendant *Robinson* is assignee, and to foreclose *Moore*. The lands of *Moore* in the county of Oxford, affected by both judgments, are about to be sold, upon the judgment of the *Ketchums* against *Moore*, upon a writ of *ven. ex.* The sale is advertised for the twelfth of the present month.

The plaintiffs have offered to pay the prior judgment debt, upon receiving an assignment of the judgment; but this has been refused by the assignee *Robinson*, who declines to receive the money otherwise than in satisfaction of the judgment. He is assignee of (besides the judgment) a mortgage of *Moore*, which is subsequent to the plaintiffs' judgment. I understood it to be stated in argument that *Robinson* was assignee of a judgment against *Moore* subsequent to the plaintiffs', and that he hoped and expected that if the sheriff's sale proceeded, enough would be realised to satisfy the *Ketchum* judgment, the plaintiffs' judgment, and the subsequent judgment, or part of it, of which he is assignee; and I supposed that writs against lands in all these three suits were in the hands of the sheriff; and I could understand *Robinson* being unwilling first to redeem the plaintiffs in respect of his subsequent judgment, when he was expecting to obtain payment through the sale by the sheriff; and I am not prepared to say that he would be making an inequitable use of his position as first judg-

ment creditor in refusing to be redeemed, and to assign under the circumstances, because by assigning he would forego a fair advantage of his position. The affidavits filed on his behalf state only that he is assignee of a subsequent mortgage, upon which it is not stated that any proceedings at law or equity had been taken.

To put out of view for a moment the subsequent mortgage: *Robinson* objects that he was not bound, upon payment of the *Ketchums'* judgment, to assign it; and in support of his objection the rule is cited that a mortgagee is bound only to convey the mortgage premises, not to assign the mortgage debt. This is established as between mortgagee and mortgagor, in *Dunston* v. *Patterson* (*a*) and *Smith* v. *Green;* (*b*) and the rule may also apply as between prior and subsequent mortgages; but the ordinary form of decree, upon a judgment creditor being redeemed by a subsequent incumbrancer, is, that he assign the judgment to the party redeeming him; and the succeeding directions show that the right to receive the mortgage or judgment debt paid, passes to the subsequent incumbrancer, who pays it.

Then, is the registered judgment creditor justified in refusing to receive payment of the judgment debt, and to assign the judgment? *Smith* v. *Green* was the case of a first mortgagee, to whom notice was given by a second mortgagee of his intention to pay off the mortgage at the usual period, six months. Before the expiration of the time, the first mortgagee filed his bill to foreclose; and the second mortgagee, just before the expiry of the six months, tendered to the first mortgagee his mortgage money, with costs incurred up to that date. This was refused, and the foreclosure suit proceeded with. Sir *J. L. Knight Bruce* intimated as his opinion that a prior mortgagee ought, without suit, to receive his mortgage money from one entitled to redeem him. His language is: "To say that a first mortgagee ought not, without a

(*a*) 2 Phil. 345.

(*b*) 1 Col. 562.

judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor, when the second mortgagee does not desire the mortgagor's concurrence, is too much." And he deprived the first mortgagee of his costs incurred after tender of his mortgage money.

If a first mortgagee ought, without suit, to receive his mortgage money, and convey the mortgaged estate to a second mortgagee, redeeming him, so a prior judgment creditor ought, without suit to redeem him, to receive his judgment debt, when offered by a subsequent incumbrancer, and to assign to him his judgment. Vice-Chancellor *Knight Bruce* thought the taking of proceedings to recover his mortgage debt inequitable after such tender; and it cannot be doubted that if the first mortgagee could have taken, and were taking, proceedings that would put the mortgaged estate beyond the reach of the subsequent incumbrancer to redeem it, he would have restrained such proceedings, as was done by Sir *John Romilly* in *Rhodes* v. *Buckland*. (*a*)

A refusal by a judgment creditor, pressing a sale of his debtor's lands to satisfy his debt, to receive payment and assign his judgment to a subsequent judgment creditor, would appear simply unreasonable and vexatious. As soon as he registered his judgment, and another creditor registered a judgment after him, the right of the latter was to redeem the former—a right clearly enforceable in equity; and an offer to redeem refused, would, I have no doubt, be at the peril of costs, and the court would see that the right to redeem was preserved to the incumbrancer making the offer. A refusal by a judgment creditor to be redeemed would indeed be almost unaccountable, unless redemption would in some way operate to his prejudice. It remains to consider whether the reason offered on behalf of *Robinson*

(*a*) 16 Beav. 212.

for his refusal in this case is a sufficient one. The rights of the parties are clear, according to their priorities; the bank to re.eem *Robinson* in respect of *Ketchums'* judgment, and *Robinson*, if he desires it, to redeem the bank as subsequent incumbrancer under the subsequent mortgage assigned to him. Then does this interfere unfairly with any legal right of *Robinson?* The land cannot be sold by the sheriff to satisfy this subsequent mortgage; but if the bank pay off the *Ketchum* judgment, not getting an assignment of the debt, a prior incumbrance will be removed at the expense of the bank, and the subsequent mortgage will be relieved of so much of prior incumbrance. This would be an undoubted advantage; but is it a just one? If *Robinson* desires to use his legal process to force the bank into such a payment, I think such use of it would be inequitable. I see nothing in the circumstance of *Robinson* being assignee of a subsequent mortgage, to alter his position from what it would be if he were only first incumbrancer sought to be redeemed by a second incumbrancer. I may possibly be under a misapprehension as to some of the facts, for the counsel for *Robinson* did not seem to expect that the argument would be proceeded with when it was. I have intimated what view I should probably take of the matter, if *Robinson* held a judgment subsequent to the plaintiff's, which might be satisfied at the sheriff's sale; but finding upon the affidavits a subsequent mortgage stated, with, so far as appears, no proceedings taken to enforce it. I have taken such to be the facts, and my judgment proceeds upon such being the position of the parties. The order will be, that upon payment to *Robinson*, if he will receive it and assign the *Ketchum* judgment, of the amount of that judgment and subsequent costs, or if not, then, upon payment into court of the same amount, an injunction should go to restrain the sale of *Moore's* lands in the county in which the plaintiffs' judgment is registered, in satisfaction of the *Ketchum* judgment.

After the injunction was granted, *Robinson* agreed to accept the money and assign the judgment. In the meantime until the assignment could be obtained the money was paid into the hands of his solicitor, but it being alleged that *Robinson* never had any proper assignment from the *Ketchums*, and that the bank had reareason to doubt whether the amount claimed by *Robinson*, if n y sum, remained due upon the judgment, no assignment was ever executed, and the bank gave notice to *Robinson's* solicitor, forbidding him to pay over the money to his client until the rights of the several parties interested in the suit were disposed of.

Upon this state of facts the cause was brought on to be heard by way of motion for decree as against the defendants *Moore*, *Ketchum*, *Carnell* and *Robinson;* and *pro confesso* as against the other defendants, when

Mr. *E. B. Wood*, for the plaintiffs, asked for a decree referring it to the master at Brantford to take the usual accounts, and directing a sale of the premises affected by the judgment, in default of payment; agreeing to waive the injunction which had been granted.

Mr. *Barrett*, for the defendants *Carnell*, who held a prior mortgage on a portion of the property affected by the plaintiff's judgment, consented to a sale, the bank undertaking to make good any deficiency if it should appear that the lands embraced in their mortgage did not realize sufficient to pay their claim.

Mr. *Spencer*, for the defendants *Robinson* and *Ketchum*, contended that the *Ketchums* were unnecessary parties, as they allege their judgment against *Moore* having been assigned, they can now neither discharge nor release it, and the court cannot make any decree against them; under these circumstances he asked that they should receive their costs from the time of putting in their answer.

The assignor of a mortgage should not be made a party, *Chambers* v. *Goldwin*, (*a*) and the same rule should apply where it is a judgment that is transferred.

As to *Robinson*, the plaintiffs are bound to redeem him, otherwise the bill as to him should be dismissed with costs, as otherwise incumbrancers should be made parties in the master's office, not by bill as provided by the general orders. He also referred to *Plummer* v. *May*, (*b*) *Todd* v. *Sterritt*. (*c*)

Mr. *E. B. Wood*, in reply. No transfer of the judgment has been proved, the only evidence of it is a letter from Messrs. *Ketchum* to *Robinson*, in which the judgment is spoken of as *Robinson's* but no regular assignment is shown, and none such, it is almost certain, was ever made: these facts appearing, the plaintiffs would not have been warranted in omitting the *Ketchums* as parties and the court will not make any order in their favour as to costs, but will direct the usual reference to take the accounts and tax the costs of all parties.

SPRAGGE, V. C., thought there was nothing shown to call for any special direction as to costs: the decree, therefore, will be the usual one to compute interest and tax the costs of all parties, and settle their priorities; and in default a sale of the premises affected by the judgment recovered by the bank.

(*a*) 9 Ves. 269. (*b*) 1 Ves. 426.
(*c*) J. J. Marsh, 432, and Story's Equity Pleadings, sec. 231.

GRANT v. MCDONALD.

Personal representative—Foreign administration—Injunction at suit of heirs—Statute of Limitations.

Powers and obligations of foreign administrators dealing in Canada with foreign assets, and settling claims of Canadian creditors, considered.

Injunction awarded at suit of the heir, to restrain execution against the lands of a deceased person in the hands of his administrator, the defendant having administered to the estate in England only, and there being at the time no Canadian administrator.

Where a cause of action accrues in the life time of the debtor, the statute begins to run against him, and continues to run against his estate notwithstanding there is no executor or administrator; but where the cause of action does not accrue until after his death then the time does not begin to run until there is a personal representative who can sue and be sued.

An executor *de son tort*, cannot, by given a confession of judgment, or making payments on account of a debt, or by any other act of his give a new start to the statute, as against the rightful administrator, or the parties beneficially interested in the estate.

Statement.—This was a bill for an injunction to restrain proceedings against the lands of *John McDonald*, deceased, on a judgment entered up by the defendant, *James McDonald*, against the defendant, *Finnan McDonald*, his brother.

It appeared that the deceased had died intestate in Februrary, 1828, leaving the plaintiff, *Catherine*, his only legitimate child, then three years old; that he had, when he died, a good deal of land in Upper Canada, and shares in the Hudson's Bay Company to the extent of several thousand pounds. In order to recover these shares *Finnan McDonald*, soon after the intestate's death, took out administration in England, but did not do so in Canada. One of the sureties he gave to the Prerogative Court was dead, and the other had become insolvent. On the 19th of December, 1832, an action having been commenced by *James* against *Finnan*, as administrator, a reference to arbitration was made between them and the arbitrators, the Hon. *John McGillivray*, *John McDonald*, of Grey's Creek, and *Hugh McGillis*, of Williamstown, (all of whom had been in the Hudson's Bay Company's service,) awarded to the plaintiff in that action the sum of £949 13s 9d.

This award was impeached by the bill. Some payments on it were made by *Finnan* to *James*. In 1842, *Catherine* married the other plaintiff, *Angus Grant*. Until this time she had lived with the defendant *Finnan*, but had never been informed that she had any claim to any money or property. Hearing something of the truth subsequently, negotiations were entered into, and the result was a partial disclosure by *Finnan* on the 12th June, 1845, of the large amount of money and property to which she was entitled. He stated that he had spent and wasted whatever he had realised, and was then insolvent. On this occasion, and before the disclosure was made, *Angus Grant* signed a memorandum agreeing to pay the claim of *James*, under the award, out of the moneys of the estate remaining in the hands of the Hudson's Bay Company, and which *Angus Grant* swore in his affidavit, *Finnan* insisted upon being signed and given to *James*, and without which being given *Finnan* declared he would not afford the plaintiffs any assistance in getting information respecting the estate of the deceased.

The following year *Finnan*, styling himself administrator, confessed the judgment in question, in the cause, without any notice to the plaintiffs. The judgment was impeached by the bill on several grounds, and one of the alternative prayers of the bill was for an administration of the estate.

By the decree made on the hearing, a perpetual injunction was awarded in respect of the judgment; the usual directions in an administration suit were given; *Finnan* was ordered to pay the plaintiffs' costs up to the hearing, and further directions and costs, save as aforesaid, were reserved.

James claimed under this decree to be a creditor of the deceased *John McDonald*, and the claim was, by arrangement, argued before the two Vice-Chancellors.

Mr. *Brough*, Q. C., for *James McDonald*. The chief objection relied on in opposition to this claim is, that the brothers *James* and *Finnan* fraudulently combined to misapply the assets of the intestate; but there is no reasonable ground for this charge, as had there been a fraud concocted, a much more simple method would have been for *Finnan* at once to have paid *James* the amount of his claim, and charged the same in his account with the estate. But the circumstances of the case are opposed to any combination between the two, for the award itself refers to the difficulties which had arisen, and speaks of "unhappy family differences." Now at this time there could be no differences between any other members of the family than the two brothers.

Admitting that the administration taken out in England did not apply to the assets of the intestate in this country, *Finnan* must be treated as executor *de son tort* at the lowest. Now every act performed by such which would be proper by an executor, is binding on the creditors of, and all others interested in, the estate. Persons selling goods of the intestate, and having moneys in their hands at the time of action brought, will be liable as executors *de son tort*, although they have paid over the sum in their hands to the rightful administrator after action brought; it would be otherwise, however, if the money was paid over before proceedings were taken.

Coulter's case, (*a*) *Padget* v. *Priest*, (*b*) *Mountford* v. *Gibson*. (*c*) He can also plead *plene administravit* in an action brought against him. *Parker* v. *Kett*, (*d*) *Oxenham* v. *Clapp*. (*e*) A judgment therefore recovered against him will be conclusive evidence of the debt, and will prevent the statute running against it.

An executor may refer a disputed claim to arbitration, so also may an executor *de son tort*. (*f*) But even the

(*a*) 5 Rep. 30.
(*b*) 2 T. R. 97; S. P. Plow, 282.
(*c*) 4 East, 444.
(*d*) 1 Ld. Ray, 661.
(*e*) 2 B. & Ad. 309.
(*f*) Russell on Awards, p. 30.

judgment thus recovered does not begin to run until administration obtained, Doe dem. *Lyon* v. *Legé*, (*a*) *Maltby* v. *Russell*. (*b*) Again it is not clear that the debt to *James* was due at the death of the intestate, for if there were a complete cause of action at that time, it may be contended that the statute then began to run, and would not be stopped. *Jolliffe* v. *Pitt*, (*c*) *Murray* v. the *East India Co.*, (*d*) *Douglas* v. *Forrest*. (*e*) This court will now, acting in the place of a jury, decide upon all the circumstances whether a debt did accrue, and to what amount.

He also claimed interest on the amount awarded, as on a judgment; but if treated as a simple contract, still entitled to interest, as there was a stated account between the parties, or what must be taken to be equal to it.

Mr. *Mowat*, Q.C., contra. Here the Statute of Limitations will apply notwithstanding no personal representative appointed, *Rhodes* v. *Smethurst*. (*f*) A judgment against an executor *de son tort* can bind only such assets as are in his hands; otherwise any person, no matter how insolvent he might be, taking possession of any trifling portion of the estate belonging to an intestate, might by confessing a judgment, or suffering a judgment to go against him by default render liable the whole of a large estate. Here the object is to affect the assets in the hands of the parties beneficially interested.

It has been held in our own courts that an executor *de son tort* cannot sue, *White* v. *Hunter*. (*g*) An admission made by him, or by a foreign executor will not bind the rightful or native executor. The admission by a surviving maker of a joint note, or by the representative of the other will not keep the debt alive as against the

(*a*) 4 U. C. Q. B. Rep. 360. (*b*) 2 S. & S. 227.
(*c*) 2 Ver. 694. (*d*) 5 B. & Ald. 204.
(*e*) 4 Bing. 686.
(*f*) 4 M. & W. 42 S. C., in appeal 6 Ib. 351.
(*g*) 1 U.C.Q.B. Rep. 452.

estate of the deceased, or the survivor, as the case may be. Neither can the executor by any admission he may make bind the heir of his testator, *Atkins* v. *Tredgold*, (*a*) *Slater* v. *Lawson*, (*b*) *Putnam* v. *Bates* (*c*)

The memorandum signed by *Angus Grant* cannot be binding upon the plaintiffs, having been signed in ignorance of their rights, and by force of *Finnan's* threats to injure them in the manner stated.—[ESTEN, V. C. Admitting that to be so, still would it not, in the event of *James McDonald's* debt against the estate being proved, have the effect of keeping it alive?]—There is nothing shown here that can be considered as a sufficient reason to induce *Grant* to make the admission of that debt, he in fact knew nothing about the affairs of the estate at that time. The probabilities are altogether against the *bona fides* of this claim, and no one can believe that *James McDonald* during all the years it is asserted that this debt was being incurred, would have gone on from year to year allowing that debt to increase without receiving payment. Yet during all this time, a period of eleven years, *Finnan*, with the knowledge of his brother, was in the constant receipt of moneys belonging to the estate from England: the inference is irresistible either that no debt ever existed, or if one originally, that it had been paid off.

However that may be, the amount which *James* has actually received is shown to be greater than the principal claimed, so that if the claim does not bear interest the whole is paid off; the executor *de son tort*, by his act, could not alter the nature of the debt so as to make it carry interest. And money payable under an award does not bear interest until payment has been demanded, nor can it be added to a petitioning creditor's debt in suing out a commission of bankruptcy, *Cameron* v.

(*a*) 2 B. & C. 23. (*b*) 1 B. & Ad. 396.
(*c*) 4 Russ. 188.

Smith. (*a*) If it is a matter of discretion with the court to give interest, it will not be ordered under the circumstances of this case, the delay in enforcing the claim having enabled *Finnan* to waste the estate.

Wedderburn v. *Wedderburn*, (*b*) *Walker* v. *Symonds*, (*c*) *McCarthy* v. *Decaix*, (*d*) *Lester* v. *Garland*, (*e*) *Pinhorn* v. *Tuckington*, (*f*) *Marten* v. *Wichelo*, (*g*) *Bush* v. *Peacock*, (*h*) *Tullock* v. *Dumo*, (*i*) *Scholley* v. *Walton*, (*j*) were, amongst other cases, also cited by counsel.

Judgment.—ESTEN, V. C.—The decree in this cause, pronounced at the hearing, having directed an account and administration of the effects of the deceased, *John McDonald* with liberty to the defendant, *James McDonald*, to make such claim against the estate as he might be advised; he, under this direction, claimed the whole amount of the award mentioned in the pleadings with interest, less the payments from time to time made by the other defendant, *Finnan McDonald*, on account of that debt. To this claim the plaintiffs relied upon the Statute of Limitations as a defence; and the question is, whether, under the circumstances of the case, the whole or any part of this claim can be substantiated. The rule, in regard to the operation of the Statute of Limitations, when the debt of the debtor has intervened, seems to me to be, that when the cause of action accrues in the lifetime of the debtor, the time begins to run against him, and continues to run against his estate, notwithstanding there is no executor or administrator; but that where the cause of action does not accrue until after his death, then the time does not begin to run until there is an executor or administrator, who can sue or be sued. To apply this rule to the present case, and assuming, for the sake of argument, that the whole debt established

(*a*) 2 B. & Al. 308.
(*b*) 2 Keen, 722.
(*c*) 3 Swans, p. 44.
(*d*) 2 R. & M. 614.
(*e*) 15 Ves. 248.
(*f*) 3 Camp. 468.
(*g*) Cr. & Ph. 257.
(*h*) 2 Mood, & R. 162
(*i*) 1 R. & Moo. 416.
(*j*) 12 M. & Wel. 510.

by the award (and certainly the defendant, *James McDonald*, claims no more) to have been due to him, excepting the £5 13s 6d paid for taxes, and £75 for the mother's annuity, which there is no evidence whatever to support, it seems that the agreement, to be implied between the intestate and *James McDonald*, was, that the intestate should pay him so much per annum for the maintenance of his children, which is in accordance with the tenor of the award. In this case a cause of action accrued as each annual instalment became due *quoad* that instalment, and therefore the cause of action, as to the whole demand, accrued in the life-time of the intestate, except the instalment which was accruing in the year of his death, and the proportionate part of which instalment, therefore, did not become due until his death, and the cause of action respecting it did not accrue until afterwards. I have made a calculation, founded upon this principle, and find that the accruing instalments, which became due at the instant of the intestate's death, amounted in the aggregate to £80: that is to say, for *Angus*, six months, £15; *John*, eleven months, £27 10s; *Donald*, seven months, £17 10s, and *Ellen* and *Amelia*, six months, £20, amounting in the whole to £80. To this amount the Statute of Limitations has not applied according to the rule above referred to, and this sum, with interest, (if interest would be recoverable, which is extremely doubtful,) may be claimed by *James McDonald* against the Canadian estate, unless it has been discharged by the payments made by *Finnan McDonald*, and admitted by *James McDonald;* but no more can be claimed by *James McDonald* against the Canadian estate, unless something has occurred to except the remainder of the debt, equally with the instalments accruing at the intestate's death, from the operation of the Statute of Limitations. The only facts that can be relied upon for this latter purpose, are the arbitration, the payments, the judgment, and the memorandum signed by *Angus Grant*, and they can have an effect on the claim as affected by the Statute of Limita-

tions only by changing the nature of the debt, or by creating a new starting point, from which the time is to commence. Now, the arbitration, the payments and the confession can, *quoad* the Canadian assets, be regarded only as the acts of a stranger or of an executor *de son tort*, and in neither view, in my judgment, can they have any effect, so as to bind the estate or the rightful administrator, or the parties beneficially entitled, either by altering the nature of the debt, so that the statute would case to apply to it all, or by giving a new start to the statute. The memorandum signed by Mr. *Grant* we think, ought not to bind him or other parties, or the estate, for any purpose whatever; regard being had to the circumstances under which it was obtained, and respecting which it may be remarked, that this memorandum must have been in some measure extorted from him, inasmuch as it was not at all proper to have been given upon that occasion; that it was evidently given under the supposition that *Finnan McDonald* was the proper representative of the intestate, and that the award was binding, and (what was the most serious objection of all) upon an assurance that the whole amount claimed was justly due; whereas in regard to the Canadian estate against which this document is now attempted to be used, there was at that time due, that is, unbarred by the statute, only £80 of principal money, and whatever interest, if any, might have been recoverable in respect of it. I think, therefore, that the whole claim must be considered, *quoad* the Canadian assets, as barred by the Statute of Limitations, except the amount which became due at the time of the intestate's death, and which we estimate at £80, and any interest which may be demandable in respect of it; and the only question which remains is, whether this amount is to be considered as discharged by the payments made by *Finnan McDonald*. Upon this point it was contended by the learned counsel for the defendant, *James McDonald*, and perhaps rightly, that the English administrator, disposing of the English assets in Canada, must

be considered as having all the powers of a rightful representative. That as regards the English assets, the whole amount claimed must be deemed to have been due since the Statute of Limitations had not applied to it, and *Finnan McDonald* might have been compelled, either in an action at law or bill in equity in England, to pay it in full; that the payments made by *Finnan McDonald*, all of which were out of the English assets, must, therefore, be considered applicable, firstly, to arrears of interest, and then to the earlier instalments of principal; and that the arbitration being the act of a rightful representative, must be deemed equivalent to a stated account, and to have had effect both in substantiating the claim, and in making interest payable in respect of it. Conceding all this to the defendant, *James McDonald*, for the sake of argument, and I admit that the claim may, to a certain extent, be well founded it is obvious that any thing being due depends upon interest being chargeable since 1834. Upon this point it has seemed to my brother *Spragge* that, under the circumstances of this case, regard being had to the delay in pressing the claim after 1834, and from that time to 1843, and to the disgraceful conduct of this administrator in wasting the fortune of this lady intrusted to his care, interest would not have been allowed to *James McDonald* in any proceeding at law or in equity in England after 1834. Now, the utmost that upon this principle could have been claimed by him in 1845, when the last payment was made, was £380; but that payment amounted to £360. The £380 included the £80 principal money claimable against the Canadian estate, in respect to which it is difficult to conceive that interest would be recoverable. The remaining £20 may have included part of the claim for the taxes and annuities not chargeable against the Canadian assets at all. In much of this I agree; although I am not satisfied that it would be just to deny interest to *James McDonald* on the last instalment of the award after 1834, or that a court of law or equity in England would have adopted

that course. But upon the whole I think that *James McDonald's* claim against the estate ought to be disallowed, without costs.

Judgment.—SPRAGGE, V. C.—Upon the hearing of this cause the court was of opinion that the execution against the lands of the intestate sued out upon the judgment obtained by *James McDonald*, whose claim as a creditor is now the subject of adjudication, was not sustainable. That judgment was entered upon a *cognovit actionem* given by *Finnan McDonald*, who took out letters of administration in England, to the estate of the intestate, and who assumed to act in the administration of the estate in this country; but not having taken out letters here, he can stand in no better light, so far as Canadian assets were concerned, than as one acting without authority, and can only be treated as an executor *de son tort*.

It is contended for the claimant that an executor *de son tort* may do all lawful acts which a rightful executor may do, and therefore that the submission to arbitration and subsequent confession of judgment by *James McDonald*, were lawful acts, and binding upon the estate.

But the character of a rightful executor, and of an executor *de son tort* are essentially different; the one lawfully represents the estate; the other only incurs personal responsibility by intermeddling with the estate; that intermeddling is itself wrongful, and cannot confer a right. Such lawful acts as a rightful executor is compellable to do, an executor *de son tort* may justify, or more strictly, perhaps, may excuse the doing of, by himself, and that only, as it appears to me, as limiting the extent of his liability: thus, being liable to the extent of assets come to his hands, and no further, he may show their application in payment of debts, or delivery over before action brought, to the rightful administrator; but the absence of all right on his part

is apparent from this, that to an action against him by the rightful executor he cannot plead even the payment of just debts, but can only shew such payment in mitigation of damages. When a creditor receives from him payment of his debt, or sues him to recover it the creditor does this, because by intermeddling, the executor *de son tort* has made himself liable to pay, or because he is *ostensibly* representative of the estate; but when the creditor deals with him as entitled to represent the estate, he is bound, I apprehend, to see that he is so entitled, just as a debtor to the estate would be bound to ascertain it before paying his debt to him; as to that portion of the estate which he does not get into his hands, he is a stranger, he has incurred no responsibility in regard to it, and can have acquired no right to represent it; and if upon being sued by a creditor, he and the creditor agreed to refer the claim to arbitration, or if upon being so sued he chose to admit the debt, and to confess judgment, in either case it appears to me his acts could have ne effect beyond what he had in his hands to administer. If they could, it would seem to follow that a creditor might sue the rightful executor upon an award founded upon a submission by an executor *de son tort*, or upon a judgment obtained upon his confession.

These considerations are very important, because if the judgment entered upon *Finnan McDonald's* confession has no validity against the estate, *James McDonald's* claim is a mere simple contract debt, and the question arises upon Statute of Limitations. The rule stated by my brother *Esten* is, I think, the result of the cases; that when the statute begins to run before the death of the debtor, it continues to run after his death, although there be no executor or administrator; but where the cause of action does not accrue till after his death, the statute does not begin to run until the appointment of a rightful representative of his estate. Taking then the charges for the maintenance of the children of *John McDonald* to have accrued due at annual periods, (a

longer time would be unusual, and a shorter time less favourable to the claimant,) the charges for so much of the year current at the date of his death, as was then unexpired, were not payable at the date of his death, and so would not be barred, but all claims for antecedent periods would be barred. But there was a payment in the summer of 1853 of £365, and this payment, in the absence of any application by either the payer or receiver, would be applicable, I conceive, to the earliest debt not barred by the statute; and so applied, it would more than suffice to discharge, as my brother *Esten* has shewn, all that *James McDonald* could at the date of that payment legally demand against the estate of *James McDonald*.

So far as to any claim upon the Canadian assets advanced by *James*, as founded upon what has taken place between him and *Finnan*, the latter assuming to act as rightful administrator in Canada, and not confining his administration to the English assets: but *Finnan* was rightful administrator of the English assets and it becomes necessary to consider what effect his filling that character has upon the transactions between himself and *James*.

John McDonald having died in February, 1828, *Finnan*, in March, 1830, administered in England to his estate. In 1832, *James* sued *Finnan* for board and maintenance of *John's* children. The suit was referred to arbitration by rule of court, and an award was made on the 15th of December, 1832, for £1023; this included £75 for an annuity to the mother, and £5 for taxes, which was not paid, deducting these will leave £943. The money awarded was made payable in three instalments, one-third payable in twenty days after the date of award, one-third in one year, and the balance in two years, say £314 each. *Finnan* paid *James* £365 in the summer of 1833, £300 in the summer of 1834, and £360 in 1845. All these payments were made out of

the English assets, and the questions are, were such payments rightful? and how are they to be applied? The administrator in England might properly remit moneys to a foreign country to satisfy debts there, or go there and pay them. His being resident there can make no difference; but how as to debts barred by statute in the country where the debt was contracted? If *Finnan* had been resident in England, and sued there, he could not set up the statute, and if he could, would not have been bound to do so. He might whilst resident in Canada, have been brought to account in England by suit in equity and if debts were proved could not have set up the statute there.

The debt then being proved, and moneys paid generally, they would go first to pay the oldest debt, if that be material. He did not pay, but disputed the debt, or at least the amount claimed, and referred the matter to arbitration. None of the evidence tends to show that this was collusive: clearly it was not improper to refer. If he had agreed without reference to pay a sum corresponding in amount, with the sum awarded for board, &c., it would have been an account stated between himself and a creditor of the estate, and he might have agreed to pay by instalments. Such agreement would be an admission of assets, so was the submission to arbitration. Why a future day was named does not appear; perhaps that assets might be realized, and that perhaps upon *Finnan's* representation. I should think without more, and apart from any consideration arising from complicity with *Finnan*, or from unreasonable delay, that *James* might claim interest from the date the instalments were respectively payable, but not before, and this is the outside of what he could claim.

To apply this, £365 was paid, say in July, 1833, there being due £314, and six months' interest, say £323, making £42 over paid. In the summer of 1834, £360 was paid, there being then due on the second

instalment, less the sum over paid, together with interest, about £280. In December, 1834, the last instalment, say of £314, (or less the sum over paid, £280,) became due; it was not paid, nor was any further payment made till 1845, when a payment was made of the £360 by draft on England, and the question arises whether *James* ought to receive interest on that last instalment due under the award. Before the end of 1833 *Finnan* had drawn a very large proportion of the English assets, it would appear as much as five or six thousand pounds; *James* declares an almost entire ignorance as to the amount, an ignorance that, all things considered, appears scarcely credible. *Finnan* in his evidence says that on more than one occasion, he used *James'* name in drawing on England, but does not mention for what amounts, and *James* in his answer says that in the summer of 1836 he endorsed one of *Finnan's* drafts, on England, for £831 18s. sterling; he knew therefore at that date that *Finnan* had ample funds to pay him, and indeed there can be no reason to doubt that he knew perfectly well from first to last that *Finnan* had funds at command to pay him, but at this last date he knew further, though probably not for the first time, that he was about to bring such funds to Canada. Yet it no where appears that he then insisted upon being paid, nor does he even allege it in his answer, but only says generally that he pressed *Finnan* from time to time. Now if this were a simple case between individuals, it may be doubted under the authority of the case in 3rd *Bingham*, whether the creditor could recover interest. Taking this to have been an account stated, and so, in an ordinary case, one in which interest would be allowed there is no contract for interest, but interest could be allowed as damages in a proper case, and the allowance of it is discretionary. Here is a person having an ascertained debt against an estate, the deceased, the creditor, and the administrator, all brothers, the creditor perfectly aware that the estate is sufficient to pay him, having the means of enforcing payment. Cognizant also

that large sums of the moneys of the estate were drawn by the administrator to this country. Now whether his not insisting upon payment and enforcing it, arose from mere supineness and negligence, or from forbearance to his brother, the administrator, or from his being satisfied with the administrator's promise that he should have interest from the date of the award, or from whatever cause, it is pretty clear that the estate has suffered by his delay—an improper delay under the circumstances, and would suffer further from the same cause to the extent of any interest allowed to him.

There is this further view—supposing a debt carrying interest, *Finnan* was guilty of a *devastavit* in not paying that debt, having moneys of the estate in his hands applicable to its payment. Has not *James* by his delays with the knowledge of the circumstances, and being personally mixed up with some of them, abetted *Finnan* in such *devastavit?* The conclusion that I draw from the whole evidence is, that *James'* forbearance to enforce payment of the sums awarded, was forbearance to his brother *Finnan*, not forbearance to the estate; that he knew that *Finnan* had the means of paying him both out of the estate, and at that time out of his own means; he does not deny that he knew that the estate was large, and the circumstance of his going to Montreal with a view to administer with *Finnan*, (though upon advice he abstained from doing so,) probably made him acquainted with the value of the estate. Further, when put off, as he says, by *Finnan*, he was told there were plenty of funds, and he would be paid. In 1839 it appears by two receipts put in, that he paid *Finnan* two sums expressed to be in return for money lent by *Finnan*, one for £200, the other for £500. Now he knew that in 1836, at any rate, *Finnan* had received moneys of the estate which were then sufficient to pay him, yet it does not appear that in 1839 he made any attempt to retain, out of the money borrowed, the balance due on the award; when this money was lent does not appear, but if after 1836,

or even after 1834, it is strange that he did not require a portion of it to be taken as a payment of the balance due instead of as a loan. He admits by his answer that if he had enforced payment of the award *Finnan* had sufficient property whereof it could have been levied until a comparatively recent period; the consequence of his not enforcing it, then, has been that £360 of the moneys of the estate have been paid on this award, which he might have obtained from *Finnan*, the party who ought, as *James* well knew, to pay it. Under all these circumstances, to charge the estate with interest in his favour, would, I conceive, be unjust to the estate. By the last payment made to him he has received the whole principal due, and nearly five years' interest besides; that is, interest to the close of 1839. In my view of the case he was entitled to less, instead of more, than he has received.

CRAIG V. TEMPLETON.

Dower in unpatented lands—Evidence of Marriage—Parti—Costs. es.

A widow is entitled to dower in lands purchased from the Crown by her deceased husband, and whereof he died possessed, although no patent issued therefore, and the purchase money had not been all paid. She is also entiled to one-third of the rents and profits for six years before the commencement of suit.

A separation deed executed by the deceased husband, wherein he acknowledged the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of registry of marriage, from the parish registry in Ireland: *held*, sufficient evidence of marriage against infant defendants, the adult defendants, by their answer, admitting the marriage.

Where a testator divided land to A. for life or till marriage, and after A's decease or marriage, to the testator's executors, in trust to sell the same, and apply the proceeds for the benefit of infant children of the testator, and in payment of certain legacies: *held*, that the children were not necessary parties, and the plaintiff was ordered to pay them their costs. If the suit is simply for dower and the title is admitted no costs will be allowed, but where a defendant makes an unreasonable defence and fails, he will be ordered to pay costs.

A testator holding a patent for 50 acres, and being the purchaser from the Crown of 27 acres more, of the same lot, a part of the purchase money of which was then unpaid, devised the whole to A. for life, or till her marriage; and after her decease or marriage, to his

executors, in trust to sell the same, and distribute the proceeds, after paying certain legacies, equally among some of his children. His widow afterwards filed a bill for dower in all the lands, to which A. and the executors, and certain children of the testator (who were infants) were made parties.

A. and the executors answered the bill, admitting the marriage, and the possession and the decease of the testator, but setting forth that no patent had ever issued for the 27 acres, and that part of the purchase money was still unpaid, and submitting that the plaintiff was not entitled to dower therein. The infant defendants filed the usual formal answer.

Mr. *McGregor*, for the plaintiff, contended that the widow was entitled to dower in the unpatented, as well as in the patented lands, under the act 4 Wm. IV., ch. 1, secs. 13, 14, & 15, Consolidated Statutes of Upper Canada, ch. 84, sec. 2; and also to one-third of the rents and profit of all the lands, since the testator's death. In proof of the marriage, he produced a separation deed, (proved by the subscribing witness,) wherein the testator acknowledged the plaintiff as his wife, with proof of the payment to her of an annuity thereby granted to her, and a certified copy of the registry of the marriage in Ireland, in the year 1829, from the registry of the parish in which the parties were married.

Mr. *Strong*, on behalf of the infants, contended that the evidence of the marriage was insufficient.

Mr. *Fitzgerald*, for the adult defendants, argued that the widow was not entitled to dower in the unpatented lands, as the testator had never been seised.

Esten, V.C.—This is a suit for dower against the trustees and devisees named in the will of the husband. The lands out of which dower is sought are given

by the will to the trustees in trust for the other defendants, who are the infant illegitimate children of the testator, and their mother. The lands in question consist of 50 acres, of which the legal estate in fee was vested in the testator; and 27 acres, for the purchase of which he had contracted with the Crown, and upon which the whole purchase money had not been paid at his death.

The mother of the infants and the trustees admit the marriage, but dispute the right of the plaintiff to dower out of the 27 acres purchased from the Crown. I think the infants were not necessary parties, and that the court would not require them to be parties; and I think that the admission of the trustees and mother of the infants is, under the circumstances, sufficient proof of the marriage. I think also, that plaintiff is dowable of the 27 acres, the infallible justice of the Crown being equivalent to the right to compel specific performance in ordinary cases. With regard to costs, the rule in equity seems to be, that if the bill is simply for dower, and the title is admitted, no costs will be given; but where the defendant makes an unreasonable defence and fails, he will be made to pay costs. No vexatious opposition has been offered to the plaintiff's claim, and therefore I think no costs should be awarded to her. On the other hand, she must pay the infants' costs. She is entitled to a decree for dower, with arrears for six years before the commencement of the suit.

Bank of British North America v. Matthews.

Attachment of share of joint annuity—Trustee.

A testator having bequeathed the sum of £500 per annum, payable out of the rents, income and profits of his real and personal estate indiscriminately, for the support of his widow and family, (the widow having become sole executrix,) her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate, against her as executrix, to be recouped for breaches of trust and the like: and *semble*, that where there is no form of legal proceeding or process whereby such a fund can be reached, this court has power under 22 Vic., ch. 22, sec. 288, to apply a remedy as in this case by equitable attachment.

Statement.—This was a motion for decree upon the facts stated in the pleadings and evidence, all of which clearly appear in the judgment.

Mr. *Blake*, for the plaintiffs.

Mr. *J. Wilson*, Q. C., for the widow and infant defendants.

Mr. *Fitzgerald*, for the defendants, the assignees of *Pomeroy*, and wife.

Mr. *Hodgins*, for *Morely* and wife.

For the plaintiffs, it was insisted that none of the other defendants having ever claimed any portion of the annuity bequeathed to Mrs. *Matthews*, of which they were joint tenants, and it having been given to her and the sister of the testator, who had died during the life time of the testator, Mrs. *Matthews*, became entitled to the whole fund.

By the will the children are not given any specified share of the fund, but are entitled only to support and education, which, on their attaining 21, or marriage, ceases. If the widow refused to apply any portion of the fund to the support of the children, an application could be made to this court to apportion it; and the same

course would be open if for any reason it became necessary for the widow and children to separate.

On the other side, it was contended that on the death of the sister of the testator, and marriage or death of the children, the widow would become entitled to one-half the annuity only. In the event of Mrs. *Matthews* becoming bankrupt, it was conceded that there would be an apportionment, but it was contended that the plaintiffs, as judgment creditors, had not the same right as assignees on the bankruptcy would have had.

Younghusband v. *Gisborne*, (*a*) *Lord* v. *Bunn*, (*b*) *Page* v. *Way*, (*c*) *Rippon* v. *Norton*, (*d*) *Kearsely* v. *Woodcock*, (*e*) *Harris* v. *Davison*, (*f*) were referred to and commented on by counsel.

Judgment—ESTEN, V. C.—The plaintiffs obtained three judgments against the defendant *Catherine Matthews*, one on the 24th of December, 1859, for the sum of £131 9s. 1d.; another on the same day for the sum of £356 11s. 10d.; and the other on the 9th of January, 1860, for the sum of £130 10s. 5d.; which judgments have been registered in the counties of Oxford and Middlesex, and in the city of London, where all the lands of the testator are situate; and writs of *fieri facias* against the goods of the defendant *Catherine Matthews*, have been delivered to the proper sheriff, which, however, remain inoperative and unproductive, owing to the fact that the only property of *Catherine Matthews* applicable to the payment of her debts, consists, in her share of an annuity of £500, bequeathed to her by her husband, for the maintenance of herself, and the maintenance and education of his children payable out of the income and rents of his real and personal estate indiscriminately. The defendants to the suit are *Catherine Matthews*, the widow of the testator

(*a*) 1 Coll. 400.
(*b*) 2 Y. & C. CC. 98.
(*c*) 3 Beav. 20.
(*d*) 2 Beav. 63.
(*e*) 3 Hare, 185.
(*f*) 15 Sim. 128.

Edward Matthews, a married daughter and her husband, two unmarried daughters, and the assignees in trust of another married daughter and her husband, who was a step-son of the testator, and together with his own children, a legatee and devisee under his will. The testator by his will gave the annuity in question of £500 per annum "to his wife and sister, for the support of themselves, and the education and support of his children." He then bequeathed to his sister *Sophia* £50 per annum during her life, and directed the residue of the income of his estate to be invested at interest. He then directed that an equal share to each of his children, or the survivor or survivors of them out of the interest and profits of his estate that might be over and above the beforenamed £550 per annum should be paid to them severally, when they should become married, and the same share to his step-son *Samuel Saxton Pomeroy*. In a subsequent part of his will he directed that if his wife and sister should disagree and live separately, or in the event of either or both becoming married, his wife should keep her own children, and his sister and children which he had by a former wife, and each of them should receive £250 per annum of the £500 before mentioned. He appointed his wife and his sister *Elizabeth*, and the Rev. *Benjamin Cronyn*, then rector of London, executor and executrices of his will. His sister *Elizabeth* died in his lifetime. Mr. *Cronyn* renounced probate, and the widow alone proved the will. The defendant *Catherine Matthews* resists the suit, firstly, on the ground that in the event which has happened, she was entitled only to an annuity of £250 per annum; secondly, that to the extent to which she may have overdrawn the annuity, the estate is entitled to be recouped in priority to the plaintiffs; thirdly, that neither the annuity of £500, nor the annuity of £250 was more than sufficient for the support of herself, and the support and education of her daughters; and fourthly, that her interest in the annuity is not separable from theirs, and that consequently no specific portion of the annuity can

be severed from the rest, and applied to the satisfaction of the plaintiffs' demand. I think the widow and sister were joint-tenants of this annuity; and that upon the death of the sister in the testator's lifetime, the widow became entitled to the whole annuity of £500 for the support of herself, and the support and education of the testator's children. The annuity is payable out of personal as well as real estate. The widow and sister are trustees for the children, as well as beneficially entitled themselves; and the manifest intention of the testator that the entire annuity of £500 should be applied to the support and education of the two families of children, will be promoted by the survivorship incident to a joint tenancy, while it would be defeated by the severance and extinction of a moiety of the annuity consequent upon a tenancy in common. The division to be made in case of disagreement or marriage and separation depended on an event which never happened; but at all events constituted, I think, a mere mode of enjoyment, which did not affect the continuance of the joint-tenancy. An annuity given to two persons as joint-tenants must be paid half to one, and half to the other, as it becomes payable.

When an annuity payable out of real and personal estate is given to two persons, who are both beneficiaries and trustees, I think we should hold them to be joint-tenants, or tenants in common, according as either construction will best effectuate the intention of the testator and when such a result points to a joint tenancy, it may fairly be considered such an indication of intention as is required by the act of parliament, which bears upon this matter: in addition to which it may be observed that this annuity is not issuing out of land, but that rents of land and houses are incorporated with the annual produce and income of different kinds of personal property, so as to form one fund, out of which the annuity is payable. Assuming, then, that Mrs. *Matthews* is entitled to the whole annuity of £500, the next question which arises,

is, whether any part of it can be separated from the rest, and applied to the satisfaction of her debts? Upon this point I have referred to a number of cases, most of which were cited in the argument. The rules to be extracted from these cases, I think, are, first, that where the rents and income of personal and real estate are given in effect to a male adult of sound mind during his life, so that they cannot be withheld from him, but must be applied in some way for his benefit, although their application may be wholly in the discretion of trustees as to the times, the sums, and the manner, if he become bankrupt or insolvent, his whole interest will pass to his assignees, notwithstanding a declaration that it shall not be liable to his debts and engagements, and that it shall not be anticipated, and the discretion of the trustees will cease, as having become useless and unnecessary: second, that where rents and income are directed upon the bankruptcy or insolvency, or certain acts of the donee to be applied to the maintenance and benefit of himself, his wife and children, in such manner as the trustees may think fit, their discretion continues after the bankruptcy or insolvency of the husband, but to whatever extent it is exercised in his favour his appointed share goes to his assignees; third, that where the discretion of the trustees extends to the choice of the objects the husband may be entirely excluded; but where all must be included in the application, a reasonable share must be appointed to the husband, which will belong to his assignees; although the case of *Kearsley* v. *Woodcock* seems contra: fourth, that where an estate is given to one for life with a clause of cesser or forfeiture, and with or without a limitation over on his bankruptcy, insolvency, or attempted alienation, it will cease on the event specified, and if the rents and income are thereupon directed to be applied to any extent for his benefit, to that extent they belong to his assignees. In short it is quite clear that if rents or income, or an annuity, be given for the support of a person, it will be liable to his debts, if it

can be taken under any form of legal or equitable process.

It is also clear that if rents or income, or an annuity, be directed to be applied to the support of a person and his family, his share will be liable to his debts if any sort of process will reach it. Formerly, when it was provided that upon the bankruptcy or insolvency of a tenant for life, or his composition with his creditors, or other similar event, his interest should cease, and the rents and income should be applied by trustees to his support and benefit, there was nothing in the nature of this interest to exempt it from liability to debts, but there was no form of process by which it could be reached, and, except in case of bankruptcy or insolvency, it remained intangible.

If this annuity of £500 had been bequeathed to Mrs. *Matthews* for her support, it would undoubtedly have been liable to her debts, if it could have been reached by any form of process, and being given to her for the support of herself, and the support and education of the testator's children, her share is equally liable. I think she is entiled to the whole £500 for her own benefit, subject only to the trust of providing for the sufficient and proper support and education of the testator's unmarried children, and, due provision being made for the discharge of this trust, I think the residue is liable to Mrs. *Matthews'* debts, provided any form of legal proceeding or process exists through which that object can be attained. It is true that if a proper residence should be provided for his daughters, she would be permitted to reside with them, and such a benefit would not be separable or available for this purpose; it is true, also, that if all that is not required for the maintenance and education of the daughters be sequestered for the satisfaction of her debts, she will retain no visible means of subsistence: but similar results followed in the cases of *Page* v. *Way*, *Rippon* v. *Norton*, *Kearsley* v. *Woodcock*. In all these

cases respectively the husband and father was deprived of the means of subsistence by the appropriation of his share of the fund to the satisfaction of his debts.

The only question that remains is, whether any form of legal proceeding or process exists whereby this fund can be reached by the creditors. It is clear that so far as this annuity is payable out of the rents of lands it is charged by these registered judgments by virtue of 22 Vic., ch. 89. sec. 49. This I think is the case, although this annuity may not be land within the meaning of the 22 Vic., ch. 82, sec. 10. In the case of *Harris* v. *Davison*, the annuity was a mere personal annuity collaterally secured by an assignment of leaseholds upon trust, in case of default for a certain time, to sell, and with the proceeds to purchase an annuity of equal amount: which interest, however, was held to be lands or hereditaments, within the meaning of 1& 2 Vic., ch. 110. This conclusion would not help the plaintiffs, unless it should become necessary to resort to the lands for the payment of the annuity. But it appears to me that the 22 Vic., ch. 22, sec. 288, supplies a remedy under such circumstances, and that such remedy is to be obtained in this court. If Mrs. *Matthews'* share of this annuity were separated from the rest, and if she were not the executrix, a debt would be due from the executor to her, and if the fund were clear, and the executor had assented to the bequest, I presume that she could maintain an action against him at law for the recovery of the annuity, as it became due. At all events an equitable debt would be created from the executor to Mrs. *Matthews*. If the executrix were directed to pay Mrs. *Matthews* for her support an annuity of specific amount; as this debt, if recovered at law, would be attachable under that act 22 Vic., ch. 22. sec. 288; so if by reason that it cannot be recovered at law, or by reason of the annuitant and the executrix being the same person; or by reason of the annuity being connected with a trust for which it is necessary to make provision, the plaintiffs

are unable to proceed at law, I apprehend it is the duty of this court to give them an equitable attachment under the provisions of the act 22 Vic., ch. 22, sec. 288, as in other cases it would give them equitable execution. In short, here is an equitable debt, which if it were legal, could be attached under the provisions of the act 22 Vic., ch. 22, sec. 288; and I think it is the duty of this court to clear the case of the difficulties with which it is embarrassed, and to extend to the plaintiffs the same remedy that they would have at law, in case those difficulties did not exist. On the principle of attachment, according to the provisions of this act of parliament, I think the plaintiffs entitled to have the share of Mrs. *Matthews* in this annuity sequestered for the satisfaction of their demand.

It should be referred to the master to fix a proper sum to be allowed out of this annuity for the maintenance and education of the unmarried daughters, which amount should be paid to Mrs. *Matthews* for that purpose, and the balance should be paid to the plaintiffs until their judgment debts and costs be satisfied. A receiver should be appointed of the income and rents of the real and personal estate, and these payments must be allowed to him in passing his accounts, the balance to be paid into court; but this relief is subject to any claim the estate may have to be recouped in respect of any breaches of trust Mrs. *Matthews* may have committed; and, so far as the annuity is payable out of lands, before the registration of the judgments. I think married daughters have no interest in this annuity. The cross-relief prayed by Mr. and Mrs. *Morley* cannot be extended to them in this suit.

LEACH v. SHAW.

Dower—Verbal agreement as to—Not within Statute of Frauds.

A widow having again married, she and her husband verbally agreed with the devisees, that she and her husband should enjoy a certain portion of the estate during her life, in respect of her interest therein. *Held*, that this was binding on all parties interested, as being an agreement not within the Statute of Frauds: and the court restrained a purchaser of portions of the estate from disturbing the doweress and her husband, during her life-time.

The facts are fully stated in the judgment.

Mr. *Hector*, for the plaintiffs, contended that *Shaw* having had notice of the arrangement mentioned in the bill, is bound by it, in addition to which the deeds from two of the devisees to *Shaw* clearly recognised the rights of the plaintiffs, as they are made expressly subject to dower.

Mr. *Fitzgerald* for *Shaw*. The widow is not entitled to dower in one portion of the estate, there being no equitable seisin; a dealing with the Crown not being equivalent to a contract with a private individual under which specific performance may be enforced, a right to which cannot be said to exist as against the Crown; and if otherwise the will itself defeats the right to dower. The agreement cannot be treated as an assignment of dower, and the right to dower, if dower had not been duly assigned, would be barred by the Statute of Limitations.

The following amongst other cases were referred to by counsel: *Stapilton* v. *Stapilton*, (*a*) *Rex* v. The *Inhabitants of North Weald Bassett*, (*b*) *Germain* v. *Grooms*, (*c*) *McDonald* v. *McIntosh*. (*d*)

ESTEN, V. C.—*John Chrysler* was at the time of making his will, and at the time of his death, seised in fee of the north-east quarter of lot No. 8, in the 9th concession

(*a*) 2 Wh. & Tud. 684.
(*b*) 2 B. & C. 724.
(*c*) 6 U. C. Q. B. 414.
(*d*) 8 U. C. Q. B. 388.

of the township of Townsend and equitably entitled in fee to the west-half of lot 9 in the same concession, (a clergy reserve,) having purchased for £175, which he had paid, the interest in it of one *Claus*, who was a lessee under the Crown, and afterwards contracted for the purchase of it, and gave a bond to *Chrysler* to convey to him the fee simple of it as soon as he procured a patent of it from the Crown, and having paid two instalments of the purchase money in *Chrysler's* life-time after his death paid the balance to his executors, who no doubt paid it to the Crown, and a patent issued to the three children of *Chrysler*, to whom he had devised the same half lot by will. I have no doubt that the widow of *John Chrysler* was dowable in equity of this half lot under the circumstances which I have detailed, and if I am not mistaken it has been already so decided in this court in a similar case. (*a*) *Chrysler* enjoyed both these pieces of land as one farm, and by his will devised them to his three children, *William Henry*, *Margaret*, and *Anne Mary*, in fee, reserving one-third to his wife so long as she should continue his widow. He died without altering or revoking his will. His widow married the plaintiff *Leach*, and thereby her life estate, created by the will, terminated. *Leach* and his wife remained in possession of the whole farm until 1853, under a bond from the surviving executor, which is not produced, and which was evidently intended to continue until the eldest child *Margaret* attained 21, which was in 1853. In this year, and at the expiration of the bond, *Leach* and his wife relinquished possession of the west-half of lot No. 9, 100 acres, and continued to occupy only the 50 acres, being the north-east quarter of lot No. 8, upon which they had previously built a house and barn. It had always been matter of talk in the family that this 50 acres should be allowed to the widow, and at the expiration of the bond the subject was revived. In 1855 *Peter Chrysler*, the heir-at-law of *John Chrysler* brought an action of eject-

(*a*) See Craig v. Templeton, ante p. 485.

ment against *Leach* for the whole 150 acres originally, but it was afterwards confined to the 50 acres. Upon this occasion a formal but verbal agreement was made between *Leach* and his wife, *William Henry Chrysler*, and *Margaret*, then the wife of Dr. *Bowlby*, and her husband, and *Anne Mary*, who was at the time under age, to the effect that Mr. and Mrs. *Leach* should enjoy the 50 acres during her life, in respect of her interest in the property, and should relinquish all claim to the 100 acres. *Anne Mary* married one *Moore* in January, 1856, who immediately assented to the agreement. The agreement is established satisfactorily by incontestible evidence. In the spring of 1856 *William Henry* sold and conveyed his undivided third part in the 150 acres to the defendant *Shaw*, who was informed of the agreement, and acquiesced in it, and purchased subject to it, paying £87 10s. less for the undivided third part than he otherwise would have done in consequence of it. This fact is established by the clearest evidence. *Shaw*, indeed, pretends that the £87 10s. was deducted in respect of Mrs. *Leach's* dower in the 50 acres, but in the first place the contrary is proved by the unexceptionable testimony of Dr. and Mrs. *Bowlby;* by that of *William Henry Chrysler* himself, and of Mrs. *Moore*, met only by some very weak evidence of *Franklin* and *Baldwin Shaw;* and in the next place, the defendant's pretence would make Mrs. *Leach's* dower in the 50 acres worth about £250, nearly half the value of the property, she being a woman in weak health, and her interest being considered small; while the contrary hypothesis would make her interest equal to one-sixth of the whole value of the 150, which is much more probable. In 1856 *Shaw* purchased also Mrs. *Moore's* undivided third part of the 150 acres for £420, which evidently involved a similar deduction of £80 but as Mrs. *Moore* was then under age a bond was given in the meantime, and the deed was not executed until 1857. Mrs. *Moore* must be deemed to have assented to the agreement with her mother after she became of age, and before she conveyed

to *Shaw*. The deeds of *William Henry* and of Mr. and Mrs. *Moore* each convey 50 acres, being the undivided third parts of the parties respectively in the 150 acres, subject as to *William Henry's* deed to dower generally, and as to Mr. and Mrs. *Moore's* deed to dower in 50 acres of the 150 acres. These reservations mean substantially the same thing, namely, subject to Mrs. *Leach's* life interest in the 50 acres, the expression in the *Moores'* deed locating the dower, as it were, on the 50 acres; at least I am satisfied this was the meaning of Mr. and Mrs. *Moore*. The bond from *Moore* to *Shaw* is not produced; but that from *Shaw* to *Moore*, made upon the same occasion, is; and it mentions that the undivided third is to be conveyed free from incumbrances; but this is evidently and confessedly a mistake, for the conveyance of the undivided third is subject to dower in 50 acres, whatever that may mean, I think this agreement constituted a good assignment of dower, although as part of the estate was equitable, it could not be upheld at law, and therefore Mr. and Mrs. *Leach* were justified in invoking the aid of a court of equity to protect their possession. I find it stated in *Park* on Dower, p. 269, ed. of 1819, citing Co. Litt. 35 *a;* and *Rowe* v. *Power*, (*a*) that a parol assignment of dower is good. I have consulted the edition of *Park* in the library, and find that the passage remains unaltered. I have also looked at the Consolidated Statutes of Upper Canada, and see nothing relative to the assignment of dower; and I have read the statute 22 Vic., ch. 90, which is equally silent on this head. I therefore conclude that the law remains unaltered, and that a parol assignment of dower is good, although I confess that apart from these authorities I should have thought an agreement of this nature an agreement relating to lands within the Statute of Frauds. It does not, however, appear to be so.

Independently of the agreement being an assignment

(*a*) 2 B. & P. 34.

of dower, I do not, as at present advised, think that it could be supported on the ground of part performance, taking it out of the statute. In the same view, the claim of the plaintiffs would be barred by the Statute of Limitations according to the cases of *German* v. *Grooms*, and *McDonald* v. *McIntosh* which decide that a claim of dower is subject to the bar created by that statute. This determination was not free from difficulty; but it must be deemed to shew the law of this province so long as it remains undisturbed, and it is my duty to follow it, as it is the province of the courts of law to declare what the law is. I agree that dower would be fairly within the general meaning of the 16th clause of the act, although an express mention of it in an act of parliament providing specially for several cases, and to a certain extent also for dower itself, might be fairly expected. But the 59th clause, defining the meaning of the word land, raises a strong doubt whether the legislature intended to include an estate for a person's own life. The clause seems studiously framed to exclude such an estate. The legislature might have thought it unnecessary to guard against delay where the estate was held for a person's own life. Assuming, however, the law to be as decided in these cases, the bar of the statute would apply to the present case in the absence of actual assignment of dower, nor would the widow's possession of the whole 150 acres until 1853, and of the 50 acres afterwards, avail to preserve her right, since such possession was not in respect of the estate of dower, no such estate vesting until actual assignment according to the case of *McDonald* v. *McIntosh*.

I think, however, that the plaintiffs are entitled to a decree on the ground that the agreement, made in 1855, constituted a valid assignment of dower in equity. But event if this agreement could not be supported as a valid assignment of dower, I think it cannot be possible that a court of equity would permit the defendant *Shaw* to disturb Mr. and Mrs. *Leach's* possession of the 50 acres

under the circumstances of this case. I am satisfied as a matter of fact that he purchased both undivided thirds, subject to the widow's enjoyment of the 50 acres during her life, and paid in one instance £87 10s., and in the other £80 less, in consequence of that incumbrance. It is impossible, I think, that under such circumstances he could be permitted to deprive her of the possession of the 50 acres, and although perhaps the bill is not aptly framed to assert such a claim, yet in a case so morally just as the present is, so far as the plaintiffs are concerned, I would allow every facility for amending the bill, even at the eleventh hour, upon equitable terms. It is, however, unnecessary, as I think the other ground sufficient to warrant a decree in favour of the plaintiffs, who must be quieted in their possession of the 50 acres by the injunction being continued, and the defendant must be decreed to convey the 50 acres to Mrs. *Leach*, during her life. I think the plaintiffs entitled to their costs. Their case is a just one, and the conduct of the defendant has been, so far as I can judge from the evidence in the case, highly reprehensible and even fraudulent. He denies notice of the agreement, and the agreement itself to the best of his knowledge; whereas I am satisfied of its existence, and of his perfect knowledge of, and acquiescence in, it. He attempted, however, to take advantage of the form of the bond and deed, as he supposed he could, in order to contravene the terms and conditions of his own purchase, and to wrench from the plaintiffs a benefit for which he had been paid.

JACKSON V. JACKSON.

Alimony—Evidence of maltreatment.

Where, a few days after her departure from her husband's house, the wife was found with severe bruises and injuries upon her person, which in the opinion of a medical man must have been caused by external physical violence, not occasioned by a fall or other accident, and the husband having been shewn to have used violence towards her on other occasions, and in other ways had so conducted himself as to raise a strong presumption that the bruises and injuries were inflicted by him; the court made a decree for alimony.

The facts appear sufficiently in the head note and judgment.

Mr. *Hector*, for the plaintiff, contended that the evidence clearly shewed that the wounds and injuries sustained by the plaintiff had been inflicted recently, and that under the circumstances the court, in the absence of evidence to the contrary, would infer that they had been inflicted by the husband; and that the account of the wife given at the time as to how she had received them, should have been admitted as evidence of the fact. The evidence being clear as to former cruelty, which though condoned by the wife's return to reside with her husband, would be revived by subsequent ill-treatment. *Eldred* v. *Eldred*, (*a*) *Dysart*, (*b*) *English* v. *English*, (*c*) and *Pritchard* on Marriage and Divorce, page 60, were referred to by him.

Mr. *Turner* and Mr. *Carroll* for defendant. The plaintiff has not yet shewn sufficient grounds for a decree in her favour. The marriage, it is shewn, took place in the year 1851, and the bill alleges that about three years afterwards the defendant commenced ill-treating the plaintiff, and that such ill-treatment continued up to the year 1859, when the plaintiff was compelled to leave her husband's house; and yet the evidence, if deserving of credit, would shew that the defendant treated his wife with cruelty in 1851. The reason assigned by plaintiff at one time for not returning to the defendant's house, was the alleged fact of his having a wife in England, and which was the true motive of this suit having been commenced. Under all the circumstances the bill, they contended, should be dismissed. They cited amongst other cases, *Bostwick* v. *Bostwick*, (*d*) *Weatherall* v. *Weatherall*. (*e*)

Judgment.—SPRAGGE, V. C.—I have given this case a good deal of consideration, and have come to the conclusion that the plaintiff is entitled to a decree for alimony. She left her husband's house in November, 1859. I

(*a*) 2 Curteis, 385. (*b*) 1 Robertson, 541.
(*c*) Ante vol, 6, p. 580. (*d*) 31 L. J. 321.
(*e*) Cited in Pritchard.

should say, from the evidence, about the seventh of the month. She went to the house of a neighbour, *Bryan Fenwick*, on the evening of that day, about eight o'clock or a little later, and said she had come from her husband's house; she remained at *Fenwick's* until the afternoon of the following day, when she left; we next hear of her at the house of her niece, *Nancy Smith*, who does not fix the exact date of her coming to her, but taking her evidence with that of Dr. *Crombie*, it is probable that she went there on the same day that she left *Fenwick's*, or within a day or two afterwards. *Nancy Smith* thus describes her condition: "She was so much bruised that she could hardly sit down; she was black on the stomach and also on the throat: she was a good deal bruised. Dr. *Crombie* was attending my husband, who was ill; he came the next morning; he saw the plaintiff." Dr. *Crombie* says, that he saw the plaintiff in November, 1859, at the house of the last witness, and examined her at her request, that there were red spots on one or both sides of her neck; that they were recent, made a day or two, or perhaps three or four days, before; that there were also red spots on the breast and pit of the stomach; that these bruises were occasioned by external physical force; that the one on the throat may have been from a grasp of a hand, or perhaps by some other cause; that he does not think any of them could have been occasioned by a fall; that those on the stomach and breast might have been occasioned by a kick or a blow of the fist; that the plaintiff was in a state of irritable fever from the injuries which she had received; that she asked him to draw her will; that he told her she was in no immediate danger, and that he would be there again in a few days; he added, that she was pretty severely hurt; and upon cross-examination said that there were several spots of a red colour about the stomach and breast.

The first enquiry is, did she receive these injuries at the hands of her husband. I do not find from the evi-

dence that she stated how or from whom she received them. To *Bryan Fenwick* she did not state that she had been injured or ill-treated by her husband at all; but assigned to him other reasons for leaving her husband's house, connected with a Mrs. *Blanchard* being brought to the house, a daughter of her husband by a former marriage; she said the work was too hard for an old woman like her, and that her husband would not get a servant girl; *Fenwick* says he observed no marks of violence upon her person.

Upon this I observe that the wife giving these reasons to *Fenwick* is not to my mind proof that she had not received personal injuries from her husband. She told another witness, *Van Volkenburgh*, who some time afterwards endeavoured to prevail upon her to return to her husband, that she had left on account of Mrs. *Blanchard* being brought to the house, and receiving more attention than herself.

To *Val Volkenburgh* she spoke of having received blows and ill-treatment from her husband, but assigned as the reason for her leaving, the same reason as she had previously assigned to *Fenwick*. To *Fenwick* she said nothing about personal violence, and it is not difficult to suppose that she felt a repugnance to detail to a neighbour so humiliating and shameful a fact, supposing it to have existed, that she had just before received such injuries as Dr. *Crombie* describes, at the hands of her husband, and choosing rather to place her leaving upon another ground. If this is reasonably supposable, as I think it is, then her not telling *Fenwick* that she had received such injuries is no proof that she had not received them. *Fenwick* observing no marks of violence upon her person is of course consistent with the same hypothesis: if she abstained from talking of them, she would naturally conceal them, the mark on the throat, indeed, being the only one requiring any concealment; and that being easily hidden from view.

There is evidence of another witness against the fact of these injuries being inflicted by the defendant, that of *James Liston*, who was living as a servant man in the defendant's house at the time the plaintiff left it. The effect of his evidence is, that having cleaned his horses before supper, he went out to the stables after supper, leaving the defendant and his wife, and his daughter, Mrs. *Blanchard*, in the house; that the stable was not more than forty or fifty yards from the house, perhaps not more than twenty; that he was engaged at the stable about a quarter of an hour, feeding and bedding the horse; and when he returned to the house Mrs. *Jackson* was gone; that if there had been much noise in the house, he must have heard it in the stable, and that he heard none.

This evidence is only of weight if the noise made in the infliction of such injuries as Dr. *Crombie* deposes to, or the outcries of the person receiving them, would necessarily or in all human probability have reached the ears of *Liston*, engaged as he was.

I do not think it by any means certain that such would have been the case. It was November, and at night; the doors and windows of the house would probably be shut, and probably the door of the stable also; and it does not appear from the evidence that Mrs. *Jackson* was a person likely to scream; and it was only that, that would reach the ears of *Liston* if she was being beaten by her husband. Upon this point I refer to the evidence of cruelty inflicted in 1851 not as a ground for a decree, for the act is not alleged in the bill, but for the conduct of the plaintiff under its infliction, she merely begged her husband to have mercy and not kill her, and it was only when she feared (perhaps groundlessly) that he was about to cut her throat, that she screamed for assistance. Besides this, it does not follow that the blows were given, (supposing them to have been given by *Jackson*,) during this short absence of *Liston*: they may have been given

earlier in the day, and the plaintiff have waited until after supper to effect her escape.

I think, therefore, that there is nothing in the evidence *inconsistent* with the fact of the injuries seen by Dr. *Crombie* being inflicted by *Jackson;* but the question still remains, were they inflicted by him. Upon this as I have said, there is no direct evidence; what proof there is, is only presumptive.

We have to begin, with proof of *corpus delicti*. several injuries occasioned by external physical force, none of which could have been, in the opinion of the medical gentleman who examined them, occasioned by a fall; and the next inquiry is, by whom they were inflicted; they may have been inflicted by the husband, or by some other person.

There is evidence, that on one occasion, at least, before this, *Jackson* struck his wife, (I put out of view the alleged cruelty in 1851.) The occasion to which I allude is deposed to by *John Hayes;* he places it some years back. It was a blow given in the passage of an inn; not so heavy a one, the witness thinks, as to leave a mark and he does not know whether it was with the fist or the open hand. The occasion was, the wife objecting to drive home with her husband after dark, as it was dangerous; his manner was rough, the witness says, when asking her to go home; and he struck her a blow when she objected.

That is one fact, and I think a very material one. Another fact is, that she left her husband's house a short time before she was seen with these injuries upon her person. She is seen with injuries upon her, inflicted by *some* person not the result of accident. She left her husband's house suddenly, a short time, one or two or more days before; her husband had previously struck her. I think the presumption is so strong that he, and

not another person, inflicted these injuries, that I do not hesitate to fix the act upon him.

With regard to the nature of the injuries, and whether they are such as to entitle the wife to a decree, I cannot entertain much doubt. It appears that the plaintiff has given way to intemperance, and that when in that state she is irritable. Much the same is said of the defendant. It is certainly a lamentable state of things; and it is not unlikely that the dissensions and violence that have occurred may be traceable to the habits of the parties; but even supposing the wife alone guilty of intemperance, which is not the case, however, it would afford no justification for such cruel treatment as she has received.

There is this peculiarity in this case, that there is some reason to doubt whether the wife did leave in consequence of the cruelty proved. There is evidence of her own declaration not to *Fenwick* only, but to *Van Volkenburgh* also, that she left for another reason. The result of that would be, that rather than leave her husband's house she would have endured cruelty, which would justify her in leaving, were it not for slights and overhard work to which she was subjected in addition.

I do not think that, such being her position and her feeling in the matter, ought to disentitle her to a decree if she is otherwise entitled.

I think the injuries deposed to by Dr. *Crombie* prove cruelty to such a degree as to entitle the plaintiff to alimony. I must either pronounce them such, or hold that a wife must endure blows on the stomach, breast, and throat at the hands of her husband—blows by which she is seriously hurt—which for days leave marks of a dark red colour upon her person, and induce a state of irritable fever, and must still remain under his roof.

I do not think I can say that the wife can safely return

to her husband. I should exceedingly regret by any judgment of mine to encourage the notion that a wife may, upon light grounds, leave the house of her husband, and obtain a decree for alimony; on the contrary, I subscribe fully to the doctrine laid down by Sir *Herbert Jenner Fust*, in *Dysart* v. *Dysart*: "I am perfectly aware of the importance of keeping parties who have entered into the matrimonial state to the performance of their respective duties—it is the duty of a wife to conform to the tastes and habits of her husband; to sacrifice much of her own comfort and convenience to his whims and caprices; to submit to his commands, and to endeavour, if she can, by prudent resistance and remonstrance to induce a change and alteration." I trust I shall not be considered as trenching on these principles of law which require the sacrifice of a wife's comfort and convenience to the wishes and authority of her husband, when I say I hold that the plaintiff has proved her case —has proved an act of legal cruelty, with a reasonable apprehension that, on a slight occasion, similar violence might be resorted to again.

TAYLOR v. WALKER.

Practice—Mortgage—Sale or foreclosure—Paying deposit.

The orders of June, 1861, do not entitle a defendant to insist upon a sale instead of a foreclosure, against the consent of the mortgagee, without paying in the usual deposit upon his undertaking the conduct of the sale. The object of the order was to enable the court to grant the defendant that indulgence upon the consent of the plaintiff, in cases where the plaintiff desired to bid at the sale.

This was a suit for foreclosure. The bill had been taken *pro confesso*, and at the hearing a decree was made referring it to the master at Brantford to make the usual enquiries as to incumbrances; take accounts and settle priorities; reserving further directions and subsequent costs in the event of other incumbrancers proving claims before the master, and directing a foreclosure if no other incumbrancer appeared.

Several other incumbrancers having proved, the master made the usual report, settling their priorities, and stating the amounts due.

On the case coming on for further directions,

Mr. *E. B. Wood*, for plaintiff, asked for the usual decree of foreclosure.

Mr. *Meredith*, for subsequent incumbrancers, made parties in the master's office, asked that a sale might be ordered in case of default in payment, instead of a foreclosure, without requiring any deposit to cover the expense of sale, they undertaking the conduct of the sale, under the order of June, 1861.

Counsel for plaintiff objected to this, although willing that a sale should be ordered if the usual deposit were made, but could not consent to commit the carriage of the decree or the conduct of the sale to other hands. The order of June never was intended to enable a defendant in this way to take the conduct of a cause out of the hands of the plaintiff.

Judgment.—SPRAGGE, V.C.—After consulting with my brother *Esten* upon the proper construction of the order in question, I feel no doubt that the court never intended putting it in the power of any defendant, against the will of the plaintiff, to take the conduct of the cause out of his hands. Without going that length, we both think a very beneficial object is attained by the court being able to insist upon the defendant taking the conduct of the sale in cases where the plaintiff may desire to bid for the property, which, by the rules of this court, he cannot do when he conducts the sale.

Richmond v. Evans.

Mortgage with power of sale—Rights of mortgagor.

A mortgagee, when acting under a power of sale contained in his security, is not at liberty to proceed without any reference to the interests of the mortgagor. The mortgagee in such circumstances, is in fact a trustee for the mortgagor, subject to his own claim upon the mortgage estate. Where, therefore, the assignee of a mortgage, with power to sell or lease the mortgage premises in default of payment, gave notice to the mortgagor and the mortgagee of his intention to sell in consequence of default in payment of the amount remaining due upon the security, but did not give any public notice of the intended sale, either through the newspapers, or by posting bills; notwithstanding which, and the protest of the mortgagee, who had covenanted to make good any deficiency in case of a sale being enforced, the holder of the security proceeded with the sale, and sold for a sum little more than half of the balance remaining due, to a person cognizant of the facts, and then instituted proceedings against the mortgagee to enforce payment of the deficiency. Upon a bill filed by the mortgagee, praying a declaration that he was discharged by reason of the conduct of the holder of the security, and for an injunction to restrain proceedings at law, or in the alternative, to set aside the sale, the court set aside the sale, but refused the plaintiff his costs, he having made several charges of fraud against the defendants, which the evidence shewed were wholly unfounded.

Statement.—The bill in this case, which was filed by *Silvester Richmond*, against *Thomas Evans*, *Patrick Turley*, and *William Armstrong*, set forth that on the 1st of September, 1853, *Armstrong* had executed a mortgage to plaintiff on certain lands in the township of Murray, to secure payment of the sum of £775, and interest, payable by annual instalments of £125, with interest on the whole sum due on the 1st day of September, in the years 1854-5-6-7 and 1858, and the sum £150 in 1859, which mortgage contained a power of sale in default of payment: that on the 15th of July, 1858, plaintiff in consideration of £620, by indenture assigned this mortgage to the defendant *Evans*, together with all sums secured thereby, and remaining due thereon, in which assignment was contained a covenant guaranteeing payment of the amount due; and that the defendant *Turley* had taken a second mortgage on the same property to secure a debt due to him.

That afterwards, and on or about the 12th of September, 1860, *Evans* had caused to be delivered to

defendant *Armstrong* a notice to the effect that a sum of £525, and interest, amounting to £120, had become due, and that default having been made in payment, he would proceed to sell the mortgaged property on the 1st of October then ensuing, at the mill of *Armstrong*, on the premises. A copy of this notice was sent by mail to plaintiff with an endorsement thereon in form of a note addressed to plaintiff by the solicitor of *Evans*, to the effect following: "Dear Sir,—The within notice will shew you where the sale takes place, and when, so I will rely on your being present at the sale at the hour appointed. Yours truly, *R. P. Jellett.*"

That on the 1st of October the plaintiff attended at the place appointed, and while the parties assembled were at the house of *Armtrong*, *Jellett* read over the power of sale, the notice by *Evans* to *Armstrong*, and the covenant contained in the assignment from plaintiff to *Evans;* at the same time stating that it was not necessary for *Evans* to sell the property, as he could have sued plaintiff for the whole amount on his covenant, but he thought it better to proceed as he was then doing; and then called upon the persons present to make him an offer for the land, whereupon plaintiff stated in the hearing of all present that he should have to forbid the sale, having been instructed so to do.

That a kind of auction was then proceeded with, and one *Barron* bid for the property £975, and no higher offer having been made, after some time all the persons present, with the exception of *Jellett* and *Evans*, left the room, although the property had not been knocked down to *Barron*. After the lapse of nearly half an hour *Turley* returned to the room where *Jellett* and *Evans* still remained, and after some private conversation with them offered £700, whereupon *Jellett* came out and informed the persons present of this offer, which he said he would accept if no more was offered, which he did, and accepted from *Turley* a deposit of £50. That

Barron then went into the room, and was asked whether he was prepared to pay for the property, to which he answered that he would be in a day or two, and then left, leaving *Jellett*, *Evans*, and *Turley* in the room, and that after some delay *Jellett* again came out of the room, and stated that if any one would advance on the last bid of £700, a deposit of £50 would be required, and a month would be given for the balance, but no one offered to make any advance on such bid. In a few minutes *Jellett* again came to the door of the room, and stated *Turley* had withdrawn his offer of £700, and had returned to his former bid of £400, and *Jellett* requested plaintiff to go with him into the room, which plaintiff did, *Evans* and *Turley* being the only other persons present, when *Jellett* asked plaintiff if he would back up *Barron* in his offer, to which plaintiff answered, that he would, and would advance the money as soon as they could go to the village of Trenton for it, but that *Jellett* replied that he would not give plaintiff five minutes, and would close with *Turley* at £400, if plaintiff had not the money, intimating in the course of their conversation that he intended looking to plaintiff for the balance, when plaintiff said he shoud not obtain it from him without first going through a suit in Chancery. That *Evans*, notwithstanding, thereupon closed, or pretended to close, the sale.

The bill further stated, that no advertisement of the intended sale had been published in newspapers, or otherwise, and that the property should have been divided into three lots, in order to their being sold to advantage, and set forth in what manner an advantageous division of it might have been effected; and that a writ had been served upon plaintiff in a suit in the Court of Queen's Bench, at the suit of *Evans*, claiming £300 and costs.

The bill prayed, amongst other things, a declaration that plaintiff, by reason of the negligence and other

misconduct of *Evans* and his attorney, was discharged from all liability, an injunction to restrain proceedings at law; or that the sale to *Turley* might be declared fraudulent and void, and set aside.

The defendants answered the bill, denying the fraudulent practices attributed to them, and shewing that the bid by *Barron* was fictitious, he having attended the sale as a puffer only—not with any intention of buying—and the evidence taken in the cause sustained this defence.

Mr. *Mowat*, Q. C., for plaintiff.—The case of *Matthie* v. *Edwards*, (*a*) lays down clearly the duty of a mortgagee acting under a power of sale contained in his security, and shews that he is not at liberty to act with a view to his own advantage solely, regardless altogether as to the rights and liabilities of the mortgagor, or the interests of others claiming under him.

Faulkner v. *Equitable Reversionary Interest Society*, (*b*) and *Lewin* on Trustees, page 414, are to the same point.

Here the evidence clearly establishes that the defendant *Evans* professing to act under the power of sale in the mortgage assigned to him by *Armstrong*, proceeded to sell the mortgage premises without any advertisement of his intention to do so, either in the newspapers or by handbills; such a course would never be adopted by any person dealing with his own property; and the proceedings of all courts, as also of public officers, shew that their invariable practice is to give the most ample publicity to all intended sales. The place selected for the sale taking place—the premises themselves—is also a strong circumstance to shew a want of good faith in acting under the power. The practice of this court and its officers is against it, and not one of them would have adopted the course here taken; that is, selling by

(*a*) 2 Coll. 495. (*b*) 4 Jur. N. S. 1214.

auction at a country mill where it is not shewn that a single *bona fide* purchaser was present. A deposit being required at the time of sale, should have been duly announced before the sale, and what the amount would be. This is the invariable practice pursued in carrying out sales directed by this court and this sale, if not sustained as a sale by auction, cannot be supported at all, the power of sale not giving authority to effect one by private contract; and if a private sale were authorised, and such a sale were effected, it must be shewn to be at a fair price, before this court would uphold it, if objected to by any one. And where a sale by auction was managed and conducted as this sale is shewn to have been, the court would require it to be demonstrated by the clearest evidence that the price obtained was a fair one.

The evidence also shews that *Turley* was to give £400, and a guaranty that the balance of *Evans'* claim would be recovered from the plaintiff, which destroys it as a sale for £400. If upheld it would in effect be allowing a trustee for sale to arrange for a benefit for himself. This conduct might have the effect of prejudicing the plaintiff, who was a surety only, and he was therefore entitled to be discharged. The value of the property has been materially depreciated by the course that has been taken, and the purchaser was cognisant of all that took place both before and at the sale.

Dickson v. *McPherson*, (*a*) *Capel* v. *Butcher*, (*b*) *Law* v. The *East India Company*, (*c*) *Jenkins* v. *Jones*, (*d*) *Story's* Eq. Jur., sec. 325, were also referred to.

Mr. *Gwynne*, Q. C., for the defendant *Evans*.—The whole case made by the plaintiff in his bill is one of fraud and collusion to obtain the mortgage property for *Turley* at a small price, which is not borne out by the evidence. He contended that a mortgagee with power

(*a*) Ante vol. 3, p. 207.
(*b*) 2 S. & S. 457.
(*c*) 4 Ves. 824.
(*d*) 6 Jur. N. S. 391.

of sale is not a trustee for the mortgagor; that he has a very different duty to discharge, and is not bound to advertise the intended sale. He may even sell by private contract, without any previous attempt at auction, and in the absence of fraud and collusion a purchaser from him will not be bound by any of his misconduct; neither is the purchaser bound to enquire what steps have been previously taken to effect a sale. *Matthie* v. *Edwards*, on appeal, (*a*) *Davey* v. *Durrant*. (*b*)

As to the place of sale, he submitted that the property itself was the best that could be selected, unless indeed there was something which it was desired to conceal; and notice of the time and place of the intended sale had been given to the mortgagor and the plaintiff, who should have caused it to be advertised, if such a course were desirable, instead of which no step was taken by either, nor was any objection made to the sale until the day on which it took place, when the plaintiff, by forbidding it upon legal advice, as he stated, injured any chance there was of procuring a better price. Had the plaintiff really desired to prevent the premises being sold at what he considered an insufficient price, he should have bid at the sale—no reason existed why he should not do so.

If a prudent owner *might* have sold, as here, in one lot, it is sufficient to protect him, and here it is questionable whether a sale in parcels would have been more advantageous for the persons interested.

The position of the plaintiff and *Armstrong* was not that of principal and surety; but even if it were so, then the surety had ample notice, and might have protected himself. Besides, here the covenant by the plaintiff is an absolute one to pay; and the proper tribunal is a court of law, where, if such an objection really does exist, the

(*a*) 16 L. J. ch. 405; S. C. 11 Jur. 761.
(*b*) 26 L. J. ch. 830; S. C. 1 DeG. & J. 535.

proper course would be to raise it by an equitable plea in any action that might be brought upon the covenant; for unless relief will be given as against the purchaser, by setting the sale aside, this court will not interfere to give any remedy against the mortgagee, as established by *Matthie* v. *Edwards*.

Gompertz v. *Pooley*, (*a*) *Fairbrother* v. *Welchman*, (*b*) *Kingsford* v. *Swinford*, (*c*) were also cited.

Mr. *Strong* and Mr. *Crombie*, for the defendants, *Armstrong* and *Turley*.—A mortgagee with power of sale is not a dry trustee for sale—his duty so far as the mortgagor is concerned, is only that he shall not do any thing whereby the rights or interests of the mortgagor may be prejudiced in any way—as laid down in the cases of *Matthie* v. *Edwards*, and *Faulkner* v. *Equitable Reversionary Interest Society*, already referred to, and an anonymous case, reported by Mr. *Maddock*. (*d*)

The case of *Davey* v. *Durrant* which has been cited, clearly establishes that no relief will be given against a purchaser at such a sale, unless he has participated in the fraud alleged to have been practised by the mortgagee, now nothing of the kind is alleged against *Turley*; and the evidence shews that the plaintiff was present at the sale during all the time it was going on; his duty was to have objected to whatever he conceived to be objectionable in conducting it; instead of which he contented himself with simply forbidding the sale, alleging no reason for such act on his part. The natural effect of this was to dampen the sale, and prevent intending purchasers bidding, and the property may have brought much less than it otherwise would. However, the plaintiff has no right to turn round and fix the defendants with what he must have known would be the consequences of his own act.

(*a*) 5 Jur. N. S. 261.
(*b*) 3 Drury, 12.
(*c*) 5 Jur. N. S. 261.
(*d*) 6 Mad. 10.

Turley, in fact, is in the position of a purchaser for value without notice; the mortgage under which this sale was effected gives to the mortgagee a very wide discretion; and if this power should be impeached it might have the effect of unsettling many titles under sales by public bodies.

The alleged guaranty of *Turley* was mere boast on his part, not stated in the bill as binding, and if even made as being seriously intended to contract for that purpose, it not being in writing, he is not bound to any extent.

Nesbitt v. *Smith*, (*a*) *Phelps* v. *Prothero*, (*b*) *Evans* v. *Bremridge*, (*c*) *Davies* v. *Stainbank*, (*d*) were also cited and commented on by counsel.

Judgment.—SPRAGGE, V. C.—The plaintiff was a mortgagee from defendant *Armstrong*, of certain property in the township of Murray, with a power of sale, or to lease, upon default, after ten days' notice; the provision as to lease or sale is, that it should be lawful for the mortgagee without any further consent or concurrence of the mortgagor to enter into possession, and whether in or out of possession, to make a lease or leases, as he should think fit, and also to sell and absolutely dispose of the mortgaged premises in such way and manner as to him should seem meet.

On the 16th of July, 1858, the plaintiff assigned his mortgage to the defendant *Evans*, and covenanted that the principal sum of £525 was due, *i. e.*, three instalments of £125, due on the 1st of September, 1856, 1857, and 1858, and one of £150, payable on the 1st of September, 1859, and he covenanted that after the maturity of the last payment, in case *Evans* should

(*a*) 2 B. C. C. 578.
(*b*) 7 DeG. M. & G. 722.
(*c*) 2 Jur. N. S. 311.
(*d*) 6 DeG. M. & G. 689.

not choose to foreclose, the mortgagor should within a reasonable time thereafter pay the principal and interest which should be then due. Then followed a proviso, from the acting upon which this suit has arisen, to the effect that in case *Evans* should not foreclose, but should sell the mortgaged premises under the power of sale, and the proceeds of such sale should not be sufficient for the payment of the principal and interest due, and all damages, costs, and charges which *Evans* should be put to in collecting the same, that the plaintiff should pay to *Evans* the deficiency, if any.

On the 1st of September, 1859, Mr. *Jellett*, solicitor for *Evans*, notified the plaintiff that the whole of the mortgage money was due, and that unless he paid it at once he would take proceedings against him. To this the plaintiff answered by letter dated the 6th of the same month: "If the farm will not pay the debt, then I shall be holden to pay the balance. All I ask of you, let me know when you sell the farm, and where, and I will tend the sale." On or about the 12th of the same month the plaintiff and the mortgagor *Armstrong* were formally notified that unless the mortgage money were paid, the mortgaged premises would be sold under the power of sale, on the 1st of October then next, at noon, at the mill on the premises; and on the 1st of October following, the premises were sold in one lot, by auction, Mr. *Jellett*, solicitor for *Evans*, acting as auctioneer; the purchaser was the defendant *Turley*, who held a subsequent mortgage upon the same premises.

The sale is objected to on several grounds:—

1. That there was no public notification of the intended sale, by advertisement, or otherwise.

2. That the premises were improvidently sold in one lot, when it would have been judicious to have sold them in three lots.

3. That the sale was also improvident, in being upon the premises, instead of in one of the circumjacent towns.

Also that the sale itself was improvidently conducted; and the bill charges collusion between *Jellett*, agent for *Evans*, and *Turley*, for whom it is alleged *Jellett* was also agent, in order to procure the property for *Turley* at as small a price as possible, and that *Armstrong* was a party to the scheme. I may say at the outset that this charge is not made out by the evidence, and my conclusion from the evidence is, that the sale itself was conducted by *Jellett* with honesty and fairness, though perhaps with some impatience towards the close, from finding that bids had been made by mere puffers, but whom he had supposed to be genuine bidders for the property.

With regard, however, to the absence of advertisements, or other public notification of the intended sale, it does appear to me to be a very serious objection. It is almost trite to observe, although it may not be generally known, that a mortgagee or his assignee selling under a power of sale, is a trustee for the mortgagor, and in the language of Lord *Eldon*, in *Downes* v. *Grazebrook*, (*a*) "bound to bring the estate to the hammer under every possible advantage to his *cestui que trust*." In *Faulkner* v. The *Equitable Reversionary Interest Society*, Sir *Richard Kindersley*, while holding that a mortgagee with power of sale does not stand in the position of a dry trustee, observing that "he has his rights, he has a beneficial interest, and that interest is the realising of his security; in other words, getting paid his mortgage money, interest, and any costs he may incur," adds, "That is his right, but this court will not allow him to exercise that right without a due consideration of the interest of the mortgagor; and undoubtedly

(*a*) 3 Mer. 205.

the interest of the mortgagor which the mortgagee, in my opinion, is bound to attend to, requires that the sale shall take place as beneficially to the mortgagor as if the mortgagor himself were selling the property."

In the late case of *Marriott* v. The *Anchor Reversionary Company*, (*b*) Sir *John Stuart* commented upon the absence of an advertisement of sale, and laid down the principle, (a clear and admitted principle) that a mortgagee with a power of sale is bound to act with the same care, and the same prudence, and to use every effort which a prudent proprietor would use to have the sale conducted under circumstances of the greatest advantage.

It is the ordinary course before a sale by auction to give every publicity to it by advertisement in the newspapers, and by handbills; I should almost have said it is the invariable practice. I think the sale in question is the only exception that has ever come under my notice. It is the course of this court and the practice of every one who desires to get the best price that can be gotten for the property to be sold. It was hardly necessary to shew by evidence what, however, has been shewn in this case, that persons would have attended the sale as bidders, if they had heard of the intended sale. *Armstrong* and *Turley*, and probably the plaintiff also, informed some persons of the intended sale. There was a rumour that such a sale was to take place, but no printed notification of the time, place, or terms of sale, or whether the land was to be sold in one block or in parcels, so that even those who were told, or who casually heard of the intended sale, were left in ignorance of these material points, and the consequence was, just what might have been expected, the audience that did attend was composed, in a large proportion, of parties interested in the sale, and of others taken to the sale

(*a*) 7 Jur. N. S. 155.

by those parties, for their own purposes. It is needless to say that the property, instead of being brought to sale to the best advantage, was brought to a sale at a great disadvantage.

It remains to consider, whether the plaintiff has by his conduct disentitled himself to complain of this; and next, whether the purchaser *Turley*, not being the trustee, and not having any duty cast upon him to see to the sale being properly notified and conducted, is not entitled to hold his purchase, notwithstanding any omission of duty by the mortgagee to bring the property to sale to the best advantage.

Upon the first point; he employed puffers at the sale; he himself attended the sale, and said he was advised to forbid it, but specified no grounds of objection, and gave no reasons for doing so. No case has been cited to shew that the employment of an agent or agents to bid will preclude a party from objecting to a sale; and in *Matthie* v. *Edwards*, where the same objection was made Sir J. *Knight Bruce* said: "I should notice that it has been objected, that the fact of the plaintiff having employed an agent to bid for him at the sale, precludes her from relief. That is not my opinion. The circumstance that her opposition to the sale was declared in the auction room, and the other circumstances, must be taken into consideration." It is true that the decree in *Matthie* v. *Edwards* was reversed upon appeal, but it was because Lord *Cottenham* differed from Sir J. *Knight Bruce* as to the sale having been oppressively or improperly conducted.

I do not think that any thing that passed at the sale could cover the omissions of duty on the part of the vendor, or disentitle the plaintiff to complain of them; and I may observe that I do not think that the plaintiff's letter of the 6th of September at all relieved the plaintiff from the duty of advertising, and taking all usual and proper steps for procuring an advantageous sale.

Upon the other point, the case of *Davey* v. *Durrant* is cited for the position that in the absence of fraud or collusion a purchaser from a mortgagee with a power of sale is not bound to enquire what steps have been antecedently taken for the purpose of promoting the sale; but on the other hand, if the purchaser is cognizant of improprieties in the conduct of the sale sufficient to set it aside, he will not be allowed to hold his purchase: this was decided in *Jenkins* v. *Jones*. In that case a sale was pushed by the mortgagee, not for the purpose of obtaining his money, but of forcing a sale; the mortgagor was anxiously desirous of redeeming, and offered to do so, before the sale, and at the sale the latter in the presence of the person who became the purchaser; and the sale was set aside, Sir *John Stuart* observing: "The fact that the purchaser was cognisant of a struggle by the mortgagor to redeem, put him exactly in the same situation as the persons from whom he was about to purchase in fact, as regarded the right to the equity of redemption; by the disclosure that there was a struggle to redeem, and a tendering of the money, he incidentally became an actor in the transaction."

In this case the purchaser was cognisant of the fact that there was no public notification of the intended sale. In his answer he says: "I believe it to be true that no advertisement was published in a newspaper or otherwise, of the intended sale," but he proceeds to say, all parties interested, *Armstrong* and the plaintiff, and himself, had ample notice. If he could have added, that at the time of the sale he was ignorant of the omission to advertise, I am satisfied he would have done so. The 23rd paragraph leads me to the same conclusion, where he says: "That the said *Jellett* thereupon concluding, as I believe, that there were really no *bona fide* purchasers, with the exception of myself, at the said sale, although he had given the said plaintiff ample notice thereof," &c.

I think there is quite sufficient to affect the plaintiff with the knowledge of the fact upon which I think the sale ought to be set aside.

It is not necessary that I should determine the other points of objection. I will only observe, that there is so much conflicting evidence upon them that I should very much doubt their sufficiency to invalidate the sale.

The plaintiff not only objects that the sale should be set aside, but claims to be wholly discharged from liability for any deficiency upon a re-sale, on the ground that his position is that of a surety, *Armstrong* being the principal debtor; that time has been in effect given to *Armstrong*, and that he, the plaintiff, may be prejudiced by what has taken place.

The bill treats the covenant upon which the plaintiff has proceeded at law as a guaranty for payment by *Armstrong*. There is a covenant by way of guaranty; that is, that in case of default, and *Evans* not choosing to foreclose, *Armstrong* should pay, but that is not the covenant upon which *Evans* proceeded at law. He proceeded upon the covenant that in the event of a sale under the power, he, the plaintiff, would pay the difference between the amount realised by the sale, and the balance due on the mortgage, and upon that covenant his position, I apprehend, is not that of a surety.

An objection was made by the defendants that the plaintiff had raised the same points by way of equitable plea to the action at law as are raised by this bill in this suit. I have looked at the plea. It does not raise the same points, and certainly does not raise the point upon which I decide the case; besides which there was no judgment or even verdict upon the plea.

The decree must be for setting aside the sale, but without costs. The plaintiff's charges, unfounded as I find them, of fraudulent collusion, disentitle him to costs.

GLASS v. FRECKELTON.

Judgment creditor—Foreclosure.

The court will not grant a decree of foreclosure in the first instance, where the lands of the judgment debtor are not specifically set out, and the value of them stated in the bill.

This was a bill filed by a judgment creditor, setting forth in general terms that the defendant had divers lands and tenements, situated in the county wherein the plaintiff had registered his judgments; and praying the usual reference to take accounts, make enquiries, and a foreclosure in case of default. The bill had been taken *pro confesso;* and now,

Mr. *Burns*, for plaintiff, asked that a reference to the master at London might be ordered, directing him to make the usual enquiries; and in the event of no other incumbrancers proving that an account might be taken of what was due to plaintiff, and in default of payment, that defendant might stand foreclosed.—Citing *McMaster* v. *Noble;* (*a*) but

SPRAGGE, V. C.—The rule which my brother *Esten* thinks should prevail in these cases, and in which opinion I fully concur, is, that when the lands sought to be affected are not set forth, or the value of them stated in the bill, the master should be directed to enquire what lands are so affected, and their value; and in any event, reserving further directions until after the master shall have made his report.

(*a*) Ante vol. v., p. 581.

WATT v. THE GORE DISTRICT MUTUAL INSURANCE COMPANY.

Mortgage—Covenant to insure mortgage premises—Lien on insurance moneys—Parties.

A mortgage deed contained a covenant on the part of the mortgagor to insure the houses then, or thereafter to be, built on the mortgaged premises, and an insurance thereon was effected accordingly. The houses having been destroyed by fire, the mortgagor attended with the mortgagee at the office of the insurance company and signed an order, which was drawn up by the secretary and agent of the company, to pay the amount of the insurance to the mortgagee upon a verbal understanding and agreement on his part to expend the money in re-building the houses. The mortgagee having afterwards withdrawn from his agreement to re-build, the mortgagor attended before the board of directors and obtained from them the usual promissory note of the company at three months, for the amount of the policy, which he transferred to a third party for value, but who was aware of the claim of the mortgagee. The mortgagee thereupon filed a bill against the mortgagor and the insurance company, claiming payment of the insurance money to the extent of the amount due on his mortgage. The court, under the circumstances, made a decree for payment; and ordered the company to pay plaintiff the costs of the suit; but dismissed the bill as against the mortgagor, with costs, he being an unnecessary party.

Held, also, that the person to whom the note of the company was transferred, was not a necessary party.

Statement.—This was a bill by *John Watt* against The *Gore District Mutual Insurance Company* and *James Clode*, setting forth that in May, 1855, *Clode* and wife had created a mortgage in favour of the plaintiff, on certain freehold premises in the village of Paris, in which mortgage was contained a covenant on the part of *Clode* that he would insure and keep insured during the continuance of such security, the buildings then standing or thereafter to be erected on the premises, in pursuance whereof *Clode* did insure the buildings in the office of the defendants, the Insurance Company, for £200, which buildings were subsequently and in the month of June, 1860, destroyed by fire, at which time the principal sum of £155, with interest thereon at the rate of 12½ per cent. from the 30th November, 1859, was overdue and unpaid upon the mortgage, in consideration whereof it was agreed between *Clode* and plaintiff that the money coming from the insurance Company should

be paid to plaintiff in satisfaction of his claim upon the mortgage; whereupon they attended at the office of the Company in Brantford to make the necessary arrangements for securing to plaintiff payment of the insurance money, on which occasion *Allen Good*, the secretary and agent of the company, at the request of *Clode*, drew out and witnessed the signing of an order for such payment, in the words and figures following, that is to say:—

"To the directors of the *Gore District Mutual Fire Insurance Company*, Brantford. Gentlemen,—Please pay to *John Watt*, Esq., M.D., of Paris, the sum of eight hundred dollars, coming due to me by your Company by the destruction of my one-storied framed building, situated on lots 4 & 5, Burwell Street, Paris, and covered by policy No. 8110, dated the 24th of February, 1860, for eight hundred dollars."

Witness: ALLEN GOOD." JAMES CLODE."

Which order was so given in consequence of the documents required by the company to establish the loss of the property, and *Clode's* claim to payment not having been supplied, otherwise the money would have at once been paid to the plaintiff, who on the completion of the order and delivery thereof to him, plaintiff, to attend the next meeting to present his claim; to which *Good* answered: "No, no; give yourself no further trouble about it; when it passes the board I will get the bill," meaning a note at three months' date for the amount payable under the policy; "and you know I am frequently in Paris, and will hand it to you the first time I am there;" and that relying upon this assurance, plaintiff did not attend at the meeting of the directors, or present the order, feeling satisfied that the bill would be handed to him by *Good* as soon as obtained, but plaintiff subsequently ascertained that the company in disregard of the plaintiff's rights had delivered the note

for the amount to one *Thomas W. Coleman*, by order and direction of *Clode*, *Coleman* not having had any notice of the order in favour of plaintiff.

The bill further stated, that the land without the buildings was a wholly insufficient security for the payment of plaintiff's claim, and prayed an account of what was due plaintiff on the mortgage; that the order in favour of plaintiff might be declared a valid assignment of the £200 secured by the policy, and that the Insurance Company might be ordered to pay the same to plaintiff, or so much as might be necessary to pay his claim; and an injunction to restrain payment thereof to any one else.

The Company and *Clode* severally answered the bill, the Company denying notice of the claim of plaintiff and *Good's* authority to give any undertaking binding on the Company, if the same were given, and set up that the order given by *Clode* to plaintiff was so given upon an agreement by plaintiff to re-build, but which he afterwards refused to carry out; that the intention of the parties thereto was, that the order in favour of *Watt* should be subject to revocation, and that the same was revoked by *Clode*, and the Company directed not to pay the money to plaintiff, and objected that *Coleman* ought to have been a party.

The plaintiff having filed a replication putting the cause at issue, evidence was taken before the Hon. Vice-Chancellor *Esten*, at Hamilton, the effect of which did not materially vary the facts set up in the pleadings.

Coleman was subsequently examined before the master, and swore that he was requested by *Clode* to call on plaintiff to give him the note, upon his giving a written guarantee to re-build; or if he declined doing so, then to leave it with certain parties for the purpose of paying the expense of re-building: that Dr. *Watt* said he wanted

to apply the money otherwise, that he would accept the note unconditionally, but which the witness refused to give. The witness also set forth the consideration for the note as between himself and *Clode*.

Mr. *A. Crooks*, for plaintiff.

Mr. *Roaf*, for defendants.

Garden v. *Ingram*, (*a*) *Wing* v. *Harvey*, (*b*) *Thompson* v. *Speirs*, (*c*) *Exp. Hennessey*, (*d*) *Re Barrs' Trust*, (*e*) *Exp. Bignold*, (*f*) *Malcolm* v. *Scott*, (*g*) *Rodick* v. *Gandell*, (*h*) *Myers* v. *The United Guarantee and Life Assurance Co.*, (*i*) *Angell* on Insurance, page 113, were referred to.

The points relied on by counsel sufficiently appear in the judgment.

Judgment.—ESTEN, V.C.—The facts of this case are these. The defendant *Clode* made a mortgage of some houses to the plaintiff to secure £155 and interest, at 12½ per cent., payable on the 31st of May, 1857. The mortgage deed contained a covenant to insure the buildings, but it was imperfect by reason of a reference in it to a schedule mentioned to be, but which was not in fact, annexed. *Clode*, however, effected an insurance in £200 in pursuance of the covenant, and Mr. *Roaf* himself considers that this cures the defect. The houses were destroyed by fire in 1859, and it was agreed between *Clode* and the plaintiff that the latter should receive the policy money, and re-build the houses. *Clode* and *Watt* applied at the office of the defendants, the insurance company with whom the insurance had been effected, and saw Mr. *Allen Good*, their secretary, who suggested that as an assignment could not be made of the policy after the loss, *Clode* should give to plain-

(*a*) 2 Wh. & T. 653.
(*b*) 18 Jur. 394.
(*c*) 13 Sim. 469.
(*d*) 1 Con. & L. 559.
(*e*) 4 K. & J. 219.
(*f*) 3 Dea. 151.
(*g*) 20 L. J. ch. 17.
(*h*) 1 D. M. & G. 763.
(*i*) 7 D. M. & G. 113.

tiff an order on the company for the policy money, stating at the same time that the claim would have to pass the board, which he supposed it would, and that the company had the right, if they chose, to re-build the houses themselves. This suggestion was acceded to, and the order was drawn by *Good* and signed by *Clode*, and witnessed by *Good*, whereupon it was delivered to plaintiff.

Afterward plaintiff refused to re-build, and *Clode* applied to the company, and received the bill from them telling them that plaintiff refused to re-build, and they wishing to assist *Clode* and enable him to re-build, delivered it to him without enquiry of *Watt*. This bill, however, *Clode* offered to plaintiff through *Coleman*, provided he would re-build the houses, but the plaintiff refused to receive it on those terms, and insisted upon his right to apply the money to the satisfaction of his debt. *Coleman* was not then interested in the bill, but he afterwards purchased it from *Clode*, and became the holder of it.

This suit has been instituted by *Watt* against the insurance company and *Clode* to make the company liable to him for the amount of the insurance money. *Coleman* is not a party. I think, and it is conceded, that the covenant to insure created a lien on the insurance moneys in favour of the plaintiff, to the extent of his debt, but this is of no avail against the company without notice; and it is not pretended or shewn that they had notice of the mortgage or covenant, express or implied, or otherwise than as is afterwards mentioned. No relief could therefore be afforded the plaintiff on this ground, except for the reason afterwards referred to. The bill, indeed, does not expressly proceed on that ground, except that the covenant is stated in it, whether as a make-weight or substantive ground of relief is not expressed. The bill seems to rely upon the order, and the notice of it to the company. I quite agree that the order constituted an equitable assignment, and that no

acceptance or assent was necessary on the part of the company, nay, I think that the mere agreement between *Clode* and *Watt* that the latter should receive the policy moneys, and notice of it to the company without any order, would have sufficed to have entitled the plaintiff to the money. The question is, whether the company can be deemed to have had notice of the agreement and order. I do not think that any formal notification was necessary, but think that notice of any kind clearly proved would be sufficient. The mere act of drawing and witnessing the order on the part of Mr. *Good* were probably unimportant—they were not done in his official capacity. But the parties certainly apply to Mr. *Good* in his official capacity, and inform him that it had been agreed between them that *Watt* should receive the money insured by the policy. If Mr. *Watt*, after receiving the order, had said to Mr. *Good*: "I give you formal notice, as secretary of the company, of this order," it would doubtless have been sufficient. But it would have been an idle ceremony for Mr. *Watt* to have done this when *Good* had drawn and witnessed the order, and saw it delivered to *Watt*. I look upon the case as being in effect this, namely, that it was agreed between *Watt* and *Clode*, for valuable consideration, that *Watt* should receive the policy moneys; and that they gave formal notice of this agreement to the company, through their secretary, and that *Clode* thereupon signed an order upon them, and delivered it to *Watt*, and that this order was likewise formally notified to the company through their secretary, independently of which Mr. *Good*, in a letter dated the 7th of September, 1860, addressed by him in his official capacity, to Mr. *Coleman*, admits in effect that the company had notice of this order when they delivered the bill to *Clode*. These facts would be sufficient, in my opinion, to fix the insurance company with liability to the plaintiff.

The only remaining question would be, whether the plaintiff's refusal to re-build the houses, amounted to a

forfeiture of his right. Mr. *Crooks* contends that the evidence of the undertaking to re-build is not admissible so as to vary the written order, but I am clear that the evidence is admissible to shew the agreement or trust upon which the money was to be received. The order was merely given at the suggestion of *Good*, in order to carry the agreement into effect. I think that *Watt* refusing to fulfil the condition on which he accepted the order, cannot claim the benefit of it.

The question is, whether this conduct on the part of *Watt* exonerates the defendants from liability to him. He had in fact a lien on the insurance moneys by virtue of the covenant for insurance contained in the mortgage deed, and if he had notified the existence of this covenant to the company, and they had paid the policy moneys to any other party, they would have been liable to pay him a second time. He does not notify his right to the company, because as soon as the fire happens he and *Clode* make a special agreement which he does notify to the company. He retains the order in his possession, and naturally concludes that the company knowing of this order in his hands, will do nothing to his prejudice behind his back. When *Clode* afterwards applied to them and told them that *Watt* refused to re-build, and requested them to deliver the bill to him, ordinary prudence dictated that they should make enquiry of *Watt* before they complied, and require the order to be surrendered. They chose, however, to favour *Clode*, and to act upon his one-sided statement, and delivered the bill to him without enquiry of *Watt*.

At this time *Watt* had been better advised as to his rights: he had learned that he was entitled to the moneys without the obligation to re-build; and who can say, if the company had enquired of him as they ought to have done, he would not have given them notice of his mortgage, and the covenant contained in; it, the probability is, that he would have given them notice of it; and I

think in the absence of this necessary precaution on the part of the company, it must be intended that such notice would have been given. It is true that the covenant is not stated in the bill, apparently with the intention of relying upon it as a ground of suit; but it is not stated for any other purpose that could mislead, and I think it would be too much to infer from this circumstance that the enquiry of *Watt* would not have led to the discovery of the mortgage. The covenant is stated in the bill in order to strengthen the case with the view of obtaining the insurance moneys, and although the case is more immediately founded on the order, yet I think it would be too great a refinement, under such circumstances, to deny to the plaintiff the relief to which he is entitled under the covenant. It cannot be, and indeed is not insisted, that the acceptance of the order involved any relinquishment of right under the covenant. In fact, at that time I think all parties were ignorant of the rights that the covenant conferred.

I ground the decree in favour of the plaintiff on the lien created by the covenant, and the implied notice of it arising from the obligation to enquire of *Watt* after knowing that he held an order for the payment of the money, and the neglect of that obligation, the case being presented sufficiently although not with technical correctness by the bill; and the acceptance of the order involving no abandonment of right under the covenant.

I think, under the circumstances, the plaintiff should have his costs from the company; but that the bill should be dismissed as to *Clode*, with costs, he being an unnecessary party.

GOODHUE v. WIDDIFIELD.

Mortgage—Usury.

Quære, whether the amount of interest reserved by a mortgage may not be so great as to evidence such a case of oppression as would induce this court to refuse to interfere in behalf of the mortgagee, leaving him to his remedies at law, notwithstanding the repeal of the usury laws.

This was a bill of foreclosure, which had been taken *pro confesso* against the defendant, setting forth the execution of a mortgage by the defendant in favour of the plaintiff, for securing the payment of certain moneys, with interest thereon, at the rate of 24 per cent. per annum; and on the cause coming on for hearing,

Mr. *Fitzgerald*, for plaintiff, asked the usual reference to the master at London, to enquire as to incumbrancers, and take accounts.

Judgment.—SPRAGGE, V.C.—The question which suggests itself to my mind, has formed the subject of conversation amongst the members of the Court of Appeal; the question being, whether a case so gross may not arise as to justify this court in refusing to lend its aid in carrying out the contract between the parties, on the grounds of undue influence and oppression. Before any decree is drawn up, I will take occasion to consult with my brother *Esten*.

On a subsequent day his honour stated that on consulting with Vice-Chancellor *Esten*, he found that in one case a decree was pronounced in favour of the mortgagee, when the rate of interest reserved was 30 per cent.; under these circumstances he made the decree as asked, observing that it may be urged that the legislature intended when they abolished the usury laws, that all the remedies both at law and in equity should be open to the lender.

Attorney-General v. Hill.

Crown patent—Mistake.

Where the provincial government had appropriated and patented as a glebe, a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier, and not returned by the government, the patent was set aside as having issued in error and mistake, but under the circumstances, without costs.

The facts are clearly set forth in the judgment.

Mr. *Mowat*, Q. C. and Mr *Blake*, for relator.

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

Judgment.—Esten, V.C.—This is an information by the Attorney-General, at the relation of Mr. *McKellar*, for the purpose of annulling a patent, as issued in error and mistake, by which lot No. 19, in the 9th concession of Vaughan, was appropriated as a glebe, parcel of the rectory, of which the defendant *Hill*, is the incumbent. The other defendants are the Lord Bishop of Toronto as the ordinary, and the Church Diocesan Society as the patrons of the living. The error and mistake under which it is alleged that this patent issued, was, that the government at the time of issuing it, thought the lot in question was vacant, whereas it had been and was then occupied and improved. The report of the case of *Martin* v. *Kennedy* decided in this court, was agreed to be admitted in evidence of the points there "decided, ruled and set out," and certain evidence taken before a committee of the House of Assembly, on the petition of *Martin McKinnon*, the occupant of the lot, was also agreed to be received; to which are added some affidavits, filed in support of the present motion, and the answer of the defendants, which, this being a motion for a decree, is of course to be treated as an affidavit. From these data it is abundantly clear that the government never would, without some extraordinary reason, have appropriated as a glebe a lot which had been occupied and improved, much less where the patent fee had been paid upon it, and not been

returned. If such then be the facts here, a strong presumption of mistake arises on the part of the government in issuing this patent. Some facts are clearly established by the evidence, namely, that one *French*, in 1829, applied to purchase lots 17, 18 & 19; also, as I think, that he paid the patent fees on them; that the patent fee for lot 19 was never returned to him: that he transferred his interest in this lot to *Martin McKinnon* for valuable consideration; and that *McKinnon* in 1835 had built a house, and cleared and brought under cultivation sixteen acres, and was then in occupation of the lot. That the government should have granted a lot, so circumstanced, as a glebe, was totally contrary to their ordinary practice, and the question is, whether it was not done in error and mistake. If the books were consulted, they shewed that *French* in 1829 applied to purchase lots 17, 18 & 19; that upon the entry of this application was endorsed a memorandum in pencil, to the effect that it had been cancelled, as it appeared that *French* had applied only to obtain money for his interest as first applicant; that opposite lots 17 & 18 was an entry that "the certificates of payment of patent fees had issued;" and opposite lot 19 an entry in these words: "Application made to purchase by *John French*." In 1835 an inspection and return was made of this lot. The return was dated 9th April, 1835, and was in these words: "*Martin McKinnon*, 19, 9th concession Vaughan, has been 14 years in the country—owned land in Caledon—is now cutting staves—purchased from *John French*—returned as a glebe. *Jas. McLean* states that he and *J. French* applied together, 16th April, 1835."

This return of course negatives the idea of *McKinnon* being in occupation of the lot. The officer never would have stated concerning the occupant of the lot, merely, that he was cutting staves on it. There was enough, I think in these entries to invite enquiry. The memorandum of *French's* application to purchase was left standing against lot 19, and the inspecting officer had thought

it right to mention *McKinnon* in connexion with this lot, as he had purchased it from *French*, and he so stated.

The government, however, appear to have considered that as *French's* application to purchase had been, as appeared from the pencil memorandum, cancelled, and attaching no importance under these circumstances to the memorandum opposite lot 19, or to *McKinnon's* purchased from *French*, and supposing from the return of the inspecting officer that *McKinnon* was not in the occupation of lot 19, but was merely cutting staves on it, and was probably living in Caledon, concluded that the lot was vacant, and under this impression granted it as a glebe.

In short, the government had reason to think that *French* had applied to purchase, but that his application had been cancelled, although the memorandum of it still stood against the lot that he had sold to *McKinnon*, and that *McKinnon* was cutting staves; but they were ignorant of the fact that *McKinnon* had occupied and improved, and was then living on the lot.

It is to be observed that *French* states that he was deprived of 17 & 18, but not of 19, and the evidence seems to countenance this, with the exception of the memorandum of cancellation, which appears to include the three lots; for the memorandum of the issuing of the certificate of payment of patent fees (which means, I think, payment by others than *French*) is confined to 17 & 18, and the memorandum of application to purchase is confined to lot 19. I am strongly inclined to think that the government, although considering *French* a speculator, left him in possession of lot 19; and that the patent fees of 17 & 18 were returned to him, but not of lot 19, at all events I am satisfied that *French* was persuaded of his title to lot 19, and *bona fide* transferred his interest in it to *McKinnon*, who occupied it a[nd] improved it, and in 1836, when this patent issued, h[e]

done a great deal to it, and was living on it, of which the government were ignorant, but if they had known it, would never have appropriated this lot as a glebe.

I think, therefore, that this patent was issued in error and mistake, and must be declared void, but I give no costs.

I may remark that in the case of *Martin* v. *Kennedy*, it was considered that if the patent fee had been paid and the lot occupied and improved, the government would not appropriate it as a glebe. Mr. *Baines* in his evidence in this case goes further, and says, that although the patent fee had not been paid, and although the lot had been returned as a glebe, yet, when it had been occupied and improved, it was not the practice to appropriate it for a glebe, but to respect the rights of the occupant, and I am satisfied that he is right. No man was more competent to give testimony. I think the lease taken by *McKinnon* from Mr. *Mayerhoffer* in 1841 would not have prejudiced his own claim under circumstances; much less can it operate to the prejudice of the rights of the government.

THE CORPORATION OF THE CITY OF KINGSTON V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railway company—Contract—Construction of branch road.

By the statute 16 Vic., ch. 169, municipalities are authorised to pass by-laws sanctioning the construction of branch railways of limited length, "under such restrictions as the councils may see fit." Acting under the provisions of this statute, the corporation of the city of Kingston passed a by-law authorising the Grand Trunk Railway of Canada to construct a branch line, running on and across certain streets of the city to the waters of the harbour; and articles of agreement and specifications were drawn up and agreed upon between the parties, under and in conformity to which the company proceeded to construct their branch line. When the works were well advanced and nearly completed the corporation discovered that the probable effect of the works being carried out in the manner proposed, would be to produce a large body of stagnant water, which would in all likelihood injuriously affect the health of the city, whereupon they required the company to fill in this space, or to desist from the completion of the works, with which requirements the company refused to comply, and the corporation thereupon filed a bill seeking to compel the company to perform the works according to such views of the corporation. At the hearing the court refused the relief prayed, and dismissed the bill with costs.

This was a bill by the corporation of the city of King-

ston against the Grand Trunk Railway Company of Canada, praying under the circumstances therein set forth, to restrain the defendants from constructing a branch line of their railway to the harbour of the city, except in accordance with the requirements of the plaintiffs.

From the pleadings and evidence in this cause, it appeared that on the 30th June, 1857, the mayor, alderman and commonalty of the city, passed a by-law granting leave and permission to the defendants

To carry a single track of railway along Ontario street in said city of Kingston, and also along such other street or streets of said city lying north-east of the northerly termination of Ontario street aforesaid, as may be requisite to connect the present Grand Trunk Railway with the waters of the said harbour lying south-west of said Cataraqui bridge. Provided always that the said company shall, (whenever the line of railway is above or below the present level of said streets respectively,) make, or cause to be made, the said streets level with the railway track running along such street or streets, and shall also bring all streets intersecting said line of railway level with said line of railway at such intersection, the levelling and alterations aforesaid to be made at the expense of said railway company, and to the satisfaction of the said mayor, aldermen and commonalty of Kingston, aforesaid: and it is also further provided, that the said railway company shall not, either by night or by day, run, or cause to be run, any railway car, carriage, locomotive or railway train over said railway, to be constructed as aforesaid, along said street or streets aforesaid, at any greater speed than five miles per hour, and shall cause the bell, attached to each locomotive engine or train, to be rung on every such train, engine or locomotive during its progress through, along, or across said street or streets respectively: and it is hereby further enacted, that this by-law shall not come into force or be of any effect until the said railway company shall bind themselves to the said mayor, aldermen and commonalty aforesaid, to fulfil all and every the provisions of this by-law.

That in pursuance of such enactment, the company

early in March, 1858, commenced the work, the plans, shewing the location of the road, having been filed in the office of the clerk of the peace in Kingston; but the corporation not being satisfied with the proposed mode of carrying out the work, it was desired that a meeting should take place between the railway committee of the corporation and the agent of the defendants, which accordingly took place about the middle of September, 1858, when, after discussing the matter, certain terms and stipulations were proposed and agreed to by the company, which were reduced into writing, and an agreement thereupon was drawn up between the parties, which, with certain proposed additions, were proved in the cause as exhibits A. B. and C., annexed to the affidavit of *Walter Shanly*, Esq., the managing agent, and chief engineer of the company, and were in the following terms:—

"A."—Kingston Branch:—Stipulations and construction required by accompanying bond.

1st. To fill up and in the slips of Scobell's wharf, foot of Brock street, on each side of wharf up to line, leaving 12 feet opening to fish market, and headway of 4 feet at least.

2nd. To fill out to line the full width of Clarence street to the rails; the filling in to be protected by a side tier of cribs; street to be levelled and gravelled to rail. Also construct a wharf extending out beyond the rail thirty feet, and of the full width of street, viz., sixty-six feet, if required by corporation, unless vested rights or interests prevent said wharf from being more than half that width, in which case said wharf may be only thirty-three feet wide.

3rd. To fill up to rail, slips on either side of Counter's wharf, between Johnson and Clarence streets, and at foot of Johnson street.

4th. Princess and Queen streets to be levelled to rails and gravelled over in made parts.

5th. All sewers and drains to be continued and left free.

And in consideration of above, corporation do permit and allow construction of railway in and through the

harbour south and west of Cataraqui bridge, provided said corporation do not hereby authorise any interference or damage to private property or rights, in respect of which the Grand Trunk Railway Company to be wholly responsible.

In default of execution of above, corporation shall cause same to be done and recover cost.

"C."—This agreement, made this —— day of ——, in the year of our Lord one thousand eight hundred and fifty ——, by and between the municipality of the city of Kingston, of the first part, and the Grand Trunk Railway of Canada, of the second part. Whereas, the said parties of the first part have assented by their by-laws to a construction of a branch line of the railway of the parties of the second part, shewn on the plan annexed hereto; and whereas the said city hath also agreed with the said company that the said company may build and construct by their contractors that portion of said branch line which passes through the harbour in front of the said city, as also shewn on the plan annexed hereto, and that they will pass a by-law to give their assent thereto in due and legal form; in consideration of which the said company have agreed as in this agreement hereinafter mentioned: therefore this deed witnesseth that the said company hereby covenant and agree that on said consent being given they, the said company, shall do, or cause to be done, the following matters and things; that is to say—

First.—To fill up and in the slips of Scobell's wharf, foot of Brock street, on each side of wharf up to line, leaving twelve feet opening to Fish-market, and headway of four feet at least.

Second.—To fill out to line the full width of Clarence street to the rails; the street to be levelled and gravelled to rail; also construct a wharf extending out beyond the rail thirty feet, and of the full width of street, viz., sixty-six feet if required by corporation, unless vested rights or interests prevent said wharf from being more than half that width, in which case said wharf may be only thirty-three feet wide.

Third.—To fill up to rail slips on either side of Counter's wharf, between Johnson and Clarence street, and at foot of Johnson street.

Fourth.—Princess and Queen streets to be levelled to rail and gravelled over in made parts.

Fifth.—All sewers and drains to be continued and left free.

That the whole of said work shall be done in a good substantial manner, and to the satisfaction (in case of dispute between the parties) of *Samuel Keefer*, Provincial Inspector of Railways, whose determination in case of dispute, as aforesaid, shall be final.

And the said city hereby covenant with the said company, that they the said company may construct the said branch on the line, and as shewn on said maps hereto annexed; also, that they will pass a by-law, or otherwise legally confirm and give their assent to the construction of said branch to the harbour, in the manner shewn on the said maps as aforesaid, and that they will not prevent, hinder, or molest the said company in doing the same.

And it is mutually agreed between the parties that in case of dispute as to the construction or meaning of this agreement, or the performing thereof, or any part thereof, or in respect of any matter or thing herein contained, that in every such case and so often as any such dispute may arise, it shall be referred to the said *Samuel Keefer* and that his award upon any such matter or matters so then in dispute shall be final, and shall conclude both parties.

And the said parties hereby covenant each with the other, that they respectively will do and perform all things above on their part agreed to be done, and shall stand and abide by the award of said *Keefer* in every respect, and that any and every award made by him shall be final and conclusive; and that this submission may be by either of the parties made a rule of court.

And it is further agreed, that the city of Kingston shall not by any such consent as aforesaid, or by this deed be deemed to have rendered themselves liable or assumed any responsibilities on their part to any person who may or can be affected by such works or any of them; and that the parties so claiming to be affected and said company shall in all respects determine or contest those matters on their own responsibility.

Also, that in the doing of the said work the same shall be done, as to time and progress, in a manner to Mr. *Keefer's* satisfaction, and in case of dispute, as he shall direct. Provided also, that if any of the acts above mentioned and required by the said city to be done are illegal, or enroach upon private rights in a way the city have no right to request or authorise the same to be done, that in that case the company shall not be responsible.

That the word "city" referred to in this agreement shall be held to mean the city of Kingston, and the word "company" shall be held to mean the parties hereto of the second part.

In witness, &c."

"B."—To be added as proposed and agreed to with Mr. *Shanly*, in January last:—

Clarence street wharf proposed to extend half way across Clarence street, thus leaving a slip thirty-three feet wide next Baker's wharf, was proposed by the committee named to meet Mr. *Shanly*, to be built wholly on one side of the street, thus leaving the full sixty-six feet next Baker's wharf clear.

The wharf to be sixty-six feet front and thirty-three feet in projection.

The penalty in the bond given by us under the former by-law was to be increased if the city desired it, to any further sum that might be agreed on.

An affidavit by Mr. *Shanly* proving the transactions, and the agreement and stipulations so set forth was used upon the motion for decree, which stated as follows:—

1. That I was general manager and chief engineer of the Grand Trunk Railway Company of Canada, from the first day of January, in the year of our Lord one thousand eight hundred and fifty-eight, or thereabouts, to the thirty-first day of January now last past, or thereabouts.

2. That while so employed as such chief engineer and general manager, I had the direction of the construction of the Kingston branch of the Grand Trunk Railway for the defendants.

3. That in the early part of March, eighteen hundred and fifty-eight, the work was commenced, the plans shewing the location of the road having been filed in the office of the clerk of the peace in Kingston, and public notice thereof given under the statute in that behalf, the work of construction was pressed forward and the right of way arbitrated for and otherwise acquired, along the front of the city of Kingston, and elsewhere on the line.

4. That some time in or immediately about the month of September last, near the middle of the month, I think, and while the work and the procuring of the land was in

progress, I was called to meet the railway committee of the city council of the city of Kingston, respecting the formation of the said branch, and certain things the city required the company to do for their accommodation; that I did so meet the said committee in Kingston, and that *James Harty*, of Kingston, merchant, who, I am informed and believe, was one of those arbitrated with for the crossing his wharf in front of the city, was the chairman, as I was told, of said committee.

5. That after hearing all said committee had to say, and all they had to ask, I agreed to do the work mentioned in the memorandum hereto annexed and marked "A." and which was then, on the part of the said council, agreed to as a final arrangement between the parties, and the said committee expressed their satisfaction with the manner in which I had met their views and agreed to their wishes, and that the said memorandum contains all that was so agreed to, and is the sum total of all that was well understood on both sides, as being what was to be done by the defendants in respect of the providing for the wants of the said city.

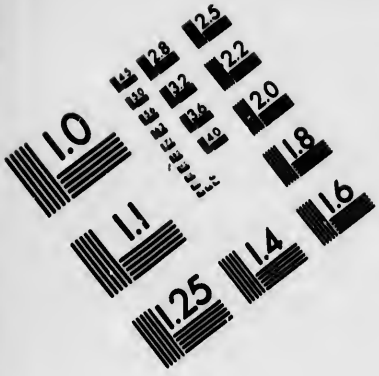
6. That it was agreed that an agreement, based on the said memorandum, should be drawn up and signed by both parties.

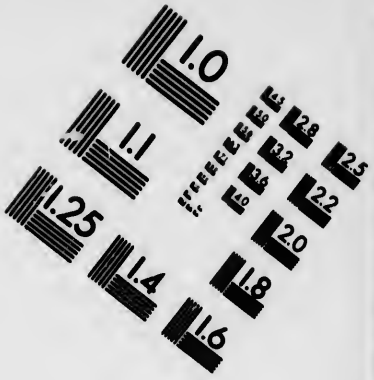
7. That I am informed, and believe, an agreement was prepared, of which I believe the exhibit hereto annexed, marked "C.," is a copy, and sent to the plaintiffs for approval.

8. That in the by-law of the thirtieth of June, eighteen hundred and fifty-seven, granting certain privileges to the defendants, a bond was provided for, to secure the performance of certain works, which works are only a portion of those covered by the said memorandum hereto annexed, and are indeed a very trifling part of them.

9. That under the said by-law the company's solicitor, as I am informed and believe, prepared a bond in the penalty of fifteen hundred pounds, or upwards, conditioned for the performance of the works in the said by-law mentioned; and that the said bond was, as I was advised by the plaintiffs, sent to them the plaintiffs.

10. That after the time these things were so done and some time in January last, (I think,) I was informed that the plaintiffs were not satisfied with said agreement and bond so sent them as aforesaid, but that they wished some modifications or additions thereto; that accordingly I again went to Kingston (this was in January last) and I then again met the committee of the said city council,





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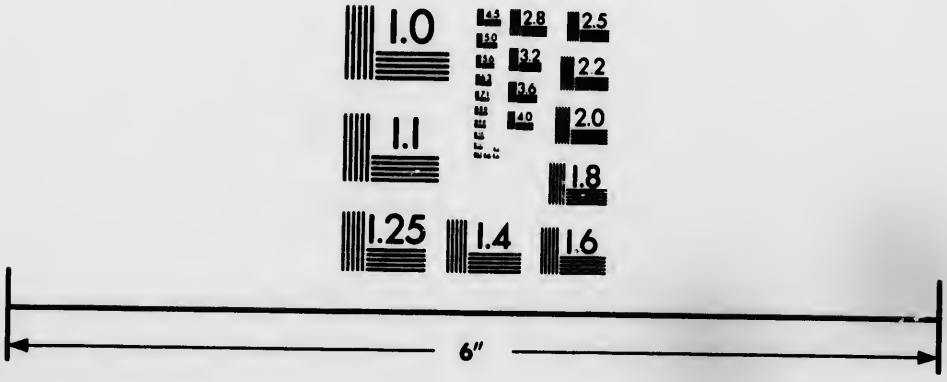

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when the additions and matters in the paper hereto annexed and marked "B." were made and agreed to, and these were, with the matters in the said memorandum marked "A.," to make and they did by consent and agreement on both sides form the whole of what the defendants were to do for the plaintiffs in respect of the said branch, and that all parties were satisfied, and the said committee expressed their satisfaction with the prompt manner in which I had met their wishes. I further say that nothing further was understood or agreed upon but what is above stated.

11. That I believe, and I have good reason to know and believe the defendants have done all in their power to meet the plaintiffs' wishes, and to have said agreement signed, and the said bond made to the plaintiffs' satisfaction; and I was anxious, before ceasing to be such chief engineer as aforesaid, to have it closed, and did all I could to effect that object, as also I believe did the defendants' solicitor, but that on one pretence or another it was put off by plaintiffs, and that now I am told they ask for and claim what never was before insisted upon or agreed for in any way while I was such chief engineer as aforesaid.

12. I also say, that to do and complete the work mentioned in the by-law of June, eighteen hundred and fifty-seven, and for the completion of which said bond was given, it would not cost more than five hundred pounds, nor so much, and that the penalty therefor in the bond would be ample at fifteen hundred pounds.

13. That I directed the work to be done, mentioned in the said two papers hereto annexed, and that I verily believe the same is either done or is being done as soon as the progress of the work will admit of, and that I am advised it is well nigh completed.

14. That as to the water space north of the Cataraqui bridge, there is a drawbridge with a pier in the centre and two openings of over thirty feet each; that in the plans filed, and of which notice was given as stated above, the present line was shewn, and it was also shewn that said water would be enclosed, and further, that if the current formed by the division of the opening by means of the pier is not enough, it is a very small matter, and hereafter when it is found to be required, if required, to make an opening through the bank at the point where the same may be found necessary, so as to carry off and give vent to the waters, but that until it is tried it must

remain matter of conjecture whether any such will be needed.

15. I further say that I endeavoured to meet the wishes of the plaintiffs, and did more for the sake of peace than I thought the defendants in justice were bound to do, and that in every way I tried to meet the wishes of the plaintiffs, and believed that when all was agreed to as stated above, they were satisfied and that there would have been an end of the matter.

The municipal council being still dissatisfied with the mode of carrying on the work, a meeting of the railway committee was convened on the 21st September, 1858, when the following minutes were entered on the books:

The manager of the Grand Trunk Railway Company, *Walter Shanly*, Esq., was present, who stated that the company were prepared to fill out to the line of the embankment at the foot of Clarence street, and make a wharf beyond the embankment thirty feet, to be made half the width of the street, that is thirty-three feet. Mr. *Shanly* further states that he has no objection to make the wharf thirty feet beyond the rail the full width, provided it can be done legally and required by the council.

Mr. *Coulter's* wharf to be filled up solid to the rail.

Slip at *Scobell's*, Brock street, to be filled. Fish market to be left open.

States he will not cause any filling in below the bridge.

And on the 4th of November following a by-law was passed, amending the by-law of the 30th June, 1857, and was as follows:

Whereas it is desirable to prevent the filling up of, or encumbering that part of the harbour of the City of Kingston south-west of the Cataraqui bridge, so that that part of said harbour may be kept free from all obstructions that would prevent the free use and enjoyment of the same by all of her Majesty's liege subjects, and others navigating or using the waters of the said harbour lying south and west of said bridge.

Be it therefore enacted by the mayor, aldermen, and

commonalty of the city of Kingston, that no person or persons, body corporate or otherwise, shall encumber that part of the harbour of the city of Kingston lying south and west of the Cataraqui bridge, and situate between the said Cataraqui bridge and the western extremity of said harbour, by placing, or causing to be placed, or sunk in that portion of the said harbour above described, any piers, cribs, embankments, or obstructions of any nature or kind whatsoever, that would impede or prevent the free access to and use of the said harbour or the waters thereof lying south and west of the said bridge as aforesaid, or that would impede or prevent the free access and communication by the waters of the said harbour to the slips or main shores of said harbour, situate as aforesaid.

2. That no person or persons, body corporate or otherwise, shall put or place or cause to be put and placed, any rubbish, stones, earth or clay in the harbour of said city, situate south and west of the said bridge as aforesaid, or in or upon any of the slips leading to the said harbour or the shores thereof, or the entrance to any of the said slips, or the shores aforesaid, south and west of the said bridge as aforesaid, so as to interrupt or prevent the free exercise or use thereof to any person or persons whomsoever, lawfully entitled to the use of the said harbour, and of the slips or the shores of said harbour, south and west of said Cataraqui bridge as aforesaid.

3. That any person or persons, body corporate or otherwise, who shall be guilty of a breach or violation of any of the provisions of this act, shall upon conviction thereof, by the mayor, police magistrate, or any alderman of said city of Kingston, be fined for each offence in such sum not to exceed five pounds exclusive of costs, as to such mayor, police magistrate or alderman may seem meet, which fine and costs may be levied of such offender or offenders' goods and chattels; or he or they may be imprisoned in the goal of the united counties of Frontenac, Lennox and Addington for any period not exceeding thirty days, unless the amount of such fine and costs be paid.

4. That all previous by-laws of the said city inconsistent with this by-law, shall be, and are hereby repealed.

After the passing of this by-law of the 4th November, 1858, some dissatisfaction being still felt on the part of the corporation, another meeting of the railway commit-

tee was held on the 13th of that month, at which meeting, as appears from the minute of that date, a letter was presented by the city solicitor, which it was moved should be adopted, when it was proposed, by way of amendment,

1. That the city solicitor should "transmit a bond to the managing director of the Grand Trunk Railroad Company, to be executed by said company, embodying the terms agreed to by Mr. *Shanly*, at a meeting of the railroad committee, held on the 21st September, 1858."

As an amendment it was proposed:

2. "That the solicitor be instructed to prepare a bond to be forwarded to the managing director of the Grand Trunk Railway Company, to be signed on behalf of the company, binding them to fulfil what Mr. *Walter Shanly* agreed to at the committee on railroads, held on the 21st September, 1858; and that portion of the filling in of the bay north of the barrack, to be kept an open question: which being put there was a tie. The chairman voted against the motion, which was lost, and the original motion was carried."

An affidavit of *Michael Flanigan*, clerk to the plaintiffs, was read by them, setting forth the passing of the by-laws of the 30th of June, 1857, and 4th of November, 1858, and that the by-law of the 30th of June, "for permitting the branch line of railway of the defendants to pass through and along certain streets of the city of Kingston, is the only by-law passed by the said corporation of the city of Kingston in that behalf or giving any sanction to the said defendants' line." And that the said corporation of the city of Kingston have not, by any other by-law or otherwise given or granted any greater sanction or permission than that contained or granted in the said by-law.

5th. That the said corporation of the city of Kingston never passed a by-law, or did any act, matter or thing sanctioning or allowing the said branch line of railway passing through the harbour of the said city of Kingston, or any portion or part of the same.

6th. That on or about the time the said defendants were entering the harbour south of the Cataraqui bridge,

a communication was forwarded to them by the said plaintiffs.

7th. That on the twenty-first day of September, 1858, an interview was had and held between *W. Shanly*, representing the defendants, and the railway committee of the said corporation of the city of Kingston, for the purpose of negotiating as to the matters and things to be done by the defendants in the bringing their railway into the city, and through that part of the harbour thereof south of the said Cataraqui bridge.

8th. That the said committee proposed among other things, that as to the part of the said branch line north of the bridge aforesaid, the said defendants should fill in the space of water inclosed between the said part of the said line and the shore of the said harbour to prevent the same from becoming unhealthy by the stagnation of the water if left unfilled in.

9th. That the said *Shanly* agreed to do any thing that was reasonable and necessary as to the part of the line south of the said bridge, but as to the filling in north of the bridge, he refused to agree to fill in any at that point, and no agreement or understanding was come to as to that part then, to the best of my recollection and belief.

10th. That afterwards negotiations continued pending between the parties, and on the thirteenth day of November, 1858, the city solicitor was instructed to forward to the managing directors of the Grand Trunk Railway Company a bond or agreement to be executed by the defendants embracing matters and things to be done by them (as agreed to by Mr. *Shanly*) as to the part south of the said bridge, and I am informed it was sent.

11th. That the plaintiffs felt called upon to decline accepting the said bond sent by the defendants' solicitor, with the penalty so much reduced, and to decline accepting the said agreement as drawn up by the defendants, differing as it did materially from the one sent.

12th. That subsequently the said defendants through their solicitor declined negociating further, or entering into any agreement or bond with the plaintiffs, as to the matters in question.

13. That during all this time, and now, the defendants prosecuted the said work and continued to construct, and still continue to construct the said branch line of railway through the harbour of the said city of Kingston, and

that they were not hindered or prevented so doing by reason, to the best of my information and belief, of such negociations pending, and because the said plaintiffs did not wish to throw any obstruction in the way of the defendants, as the plaintiffs believed, until the defendants' repudiation as aforesaid, that the defendants would still do what was reasonable and necessary in the premises, and bind themselves to do so as had been agreed upon as aforesaid.

14th. That the passing of the by-law of the 4th of November, 1858, was a matter of public notoriety in the said city of Kingston, and I believe came to the knowledge of the defendants or their engineers and servants in the said city.

15th. That I have good reason to believe that the said defendants from the time they entered the said harbour knew that they would not be allowed to do so, without the opposition of the plaintiffs, unless they agreed and became bound to do what was required to put the communication between the harbour and the city in a reasonable state, and such other things as were reasonably necessary by reason of the railway running through said harbour and across the wharves and slips thereof.

16. That in the month of August last past application was made under the direction of the board of health to *I. Sampson*, *John Main*, *J. Clark*, *H. Yates*, *T. W. Robinson* and *O. G. Strange*, members of the medical profession in the said city of Kingston, and that the annexed paper marked C. is a certificate signed by the said *Jas. Sampson*, M.D., *John Main*, M.D., *J. Clark*, M.D., *Horatio Yates*, M.D., *Thomas W. Robinson*, M.D., and *O. S. Strange*, M.D., as to that part of the embankment north of the bridge, and its probable effects on the health of the city.

17th. That in the month of July last the said plaintiffs employed *John C. James*, civil engineer, to examine and report as to the embankment, and that the paper writing hereto annexed and marked D. is the report sent in to the plaintiffs by the said *John C. James*, and is in his handwriting.

The certificate from the physicians, and the report of Mr. *James*, referred to as exhibit C. & D., were as follows:

KINGSTON, 2nd August, 1858.

We, the undersigned physicians and surgeons, are of

opinion that a shallow body of stagnant water of considerable extent of surface will produce, when exposed for a season to the rays of our summer's sun, a condition of atmosphere prejudicial to the health of the neighbourhood. And from the report of an engineer and our own observation, we believe that that portion of the Cataraqui bay, lying north of the city and west of the railway embankment now being constructed will become stagnant, and when the water shall fall to its ordinary level, will, under the circumstances above described, seriously impair the public health.

(Signed,) JAMES SAMPSON, M.D.
" JOHN MAIR, "
" J. CLARKE, "
" HORATIO YATES, "
" T. W. ROBINSON, "
" O. S. STRANGE, "

To His Worship JOHN FLANAGAN, Esquire,
Mayor of Kingston, and Chairman of the Board of Health.

To the Chairman and Committee of the Board of Health of the city of Kingston.

GENTLEMEN,—By instructions received from the mayor I have examined the Grand Trunk Railway embankment across Cataraqui bay, and along the water in front of the city, and beg leave to report that said embankment across the bay will prove very injurious to the health of the persons living in its vicinity, by causing a stagnation of the water in obstructing the action of the only motive agent there was,—that is the wind, there being no current in that part of the bay. Owing to the very unusual height of the water at present, the embankment does not appear as if it would prove a very serious obstruction to the action of the wind; but even allowing that the water was to remain at the same level it now is, the parts which would be principally affected by the wind so as to prevent stagnation, would be those in the immediate vicinity of the culverts, but as the water falls five feet lower than at present the height of the embankment would then prevent the action of an easterly wind for some distance inside of it, thereby preventing the transplacing of the water. I do not see any utility in the construction of any extra culverts, such a number as would be incompatible with the work.

A great preventative of stagnation of the water would have been to have run the railway across the bay on piles, leaving the tops driven to within six feet of the surface of the water, thereby allowing action for the wind under the railway. The only remedy now remaining is to fill in the space between the railway and the shore, a plan approved by Mr. *Thomas Keefer* in his preliminary survey for the Montreal and Kingston Railway Company. The embankment in front of the city may not prove so injurious, as I am informed there are to be two openings of twelve feet each at the foot of every street, which if given in the same proportion to the Cataraqui embankment would give five hundred and twenty-eight feet of waterway. The drains running into the river at the foot of each street will cause a slight current, but it would have been much better for the free action of the water if the railway had been built on piles, as there will be always more or less accumulation of the refuse of the drains about the embankment. I do not wish to be understood to represent the laying of a railway on piles advisable when it can be avoided, but have merely mentioned the course as a remedy for the dreaded evil of stagnant water along the shore of the city. The filling in of the whole space between high water mark and the embankment for the railway would, in my opinion, afford the most effectual security from malarious influences.

I have the honour to be,
Gentlemen,
Your most obedient servant,
JOHN C. JAMES.
Civil Engineer.

KINGSTON, July 26th, 1858.

Several other affidavits were filed by both parties, amongst them those of several engineers, one of them the city surveyor for the plaintiffs from the year 1848 until 1859, who swore that in such capacity he always found the defendants, their contractors, &c., willing and ready to do any thing required from them by the said agreement; that the drains were made as he wished them to be constructed; that the filling in of the slips, and other work required to be done, was well done, and all made in strict accordance with the said arrangement

—two from aldermen of the city, showing the work properly done according to the agreement, and one from *James Agnew*, the solicitor for the plaintiffs, which was as follows:—

1. That I was present at one or two interviews which were had between the railway committee of the corporation of the city of Kingston and *Walter Shanly*, Esq., representing the defendants, relative to the branch line of railway of the defendants being carried into the city of Kingston by the defendants, from the depot on the main line, to *Shaw's* wharf, near the foot of Johnson street, in the said city, partially through the waters of the harbour of the said city.

2. That the said *Shanly* refused to undertake to fill in at the part of said branch line north of the Cataraqui bridge, it being then proposed to him that the space of water between the railway embankment there and the shore of that part of the harbour should be filled in to prevent the bad effects of the water becoming stagnant, and no negotiation took place relative to that part of the line.

3 That at these interviews, to the best of my recollection and belief, all the requirements mentioned and contained in the specifications in the plaintiffs' bill in this cause, were mentioned and spoken of, except the platform descending from the outside of the embankment to the water's surface, at the slips crossed by the railway, which were, I am informed and believe, subsequently agreed to by the defendants or some person or persons in their employ and on their behalf.

4. That on or about the 15th day of November last past, I forwarded, by direction of the plaintiffs' to the president of the Grand Trunk Railway Company, an agreement containing certain matters and things to be done by the defendants, as to that part of the said branch line south of the said bridge, and also the bond required to be executed by the defendants under the by-law of the corporation of the city of Kingston, of the 30th day of June, 1857, the penalty in which bond was £50,000.

5. That I afterwards received from the defendants' solicitor an agreement (not executed) and a bond (executed) with a penalty of £1,500, which agreement and bond had been prepared by direction of the defendants, and were not the agreement and bond sent by me.

6. That the said agreement was different materially

from the one sent, and could not properly be accepted by the plaintiffs, and the penalty of the bond was reduced from £50,000 to £1,500, which was considered inadequate, and that I advised the plaintiffs not to accept either in consequence of such difference.

7. That it was still understood that defendants would make matters right, and the plaintiffs were prepared to pass a by-law sanctioning their said branch line if they would bind themselves to do so.

8. That during all this time the defendants continued to construct the said railway and embankment, and were not hindered or prevented from doing so, for the plaintiffs, as far as I could understand, believed that the defendants were so disposed and would do what was reasonable and right in the premises, and that for this reason, and not wishing to hinder or obstruct the defendants, and believing as aforesaid, plaintiffs took and instituted no proceedings against the defendants.

9. That in the month of April last past, I received a communication from the solicitor of the defendants, refusing, among other things, to sign the proposed agreement, and as I understood the tenor of his communication, breaking off all negotiation in the matter.

10. That in consequence, early in May last past, the defendants were notified not to proceed further with their works, and to remove that already done.

11. That I have good reason to believe that the defendants were made, or were, aware shortly after entering the harbour with their line, if not before, that unless they complied with the reasonable and necessary requirements of the plaintiffs with respect to the health and communications of the city, the plaintiffs would not be willing that the said line should pass through the said harbour, and that in a communication from me to the president of the said company, it was intimated that unless the agreement required was duly entered into, proceedings would be taken by the plaintiffs for relief in the premises.

12. That I have heard the said *Shanly* repeat that the defendants as to that part of the line south of the bridge would do any thing which any person reasonably could require, and would execute an agreement to that effect.

13. That I believe that the reason why the plaintiffs did not institute proceedings long since against the defendants in this matter, was that the said negotiations were pending, and that they the plaintiffs believed that

the defendants would do what was reasonable and right in the premises, and what was necessary to be done for the public convenience.

Any other facts requisite for understanding the points in issue appear in the judgment.

Mr. *A. Crooks*, for plaintiffs.

Mr. *McDonald*, for the defendants.

Judgment.—SPRAGGE, V.C.—The plaintiffs, the corporation of the city of Kingston, passed a by-law on the thirtieth of June, 1857, for the purpose, as appears by the recital, of facilitating the Grand Trunk Railway Company in forming a connexion with the waters of the harbour of the city of Kingston, lying south-west of Cataraqui bridge, and the company's railway. It is entitled "A By-Law granting permission to the Grand Trunk Railway Company of Canada, to lay down a railway track on certain streets in the city of Kingston," and it enables the company to carry a single track of railway along Ontario street in the city of Kingston, and also along such other street or streets of the said city lying north-east of the northerly termination of Ontario street aforesaid, as may be requisite to connect the present Grand Trunk Railway with the waters of the said harbour lying south-west of said Cataraqui bridge." It then provides for the levelling of the streets along which the railway was to run, or which it should intersect, and for other matters not material to the points in question; and then provides that the by-law shall not come into force or be of any effect until the railway company should bind themselves to the municipality to fulfil all and every the provisions of the by-law.

The branch railway referred to in the by-law is authorised by 16 Victoria, chapter 169, which provides for the construction of branch railways of limited length,

"whenever a by-law sanctioning the same has been passed by the municipal council of the municipality within the limits of which such proposed branch is situated." By the act respecting municipal institutions in Upper Canada, municipalities are empowered to pass by-laws for authorizing any railway company, in case such authority is necessary, to make a branch railway on property of the corporation, or on highways, under such restrictions as the council may see fit.

The Railway Clauses Consolidation Act, 14 & 15 Victoria, authorises railway companies to take, use, occupy, and hold so much of the public beach, or of the land covered with the waters of any river or lake as might be required for the purpose of this railway, doing no damage to, and not obstructing the navigation.

The Grand Trunk Railway Amendment Act, 1854, authorises the company to construct, make and work any branch railway or railways which they may deem it advisable to make from any point or points on their main railway to the river St. Lawrence, or any of the lakes thereon, with certain qualifications not material to be considered here; one provision is, that the survey and plan of any such branch may be made, and deposited at any time before such branch shall be commenced.

In the negotiation between the parties, and in the correspondence and the proceedings, the branch line in question is divided into that part south of the Cataraqui bridge, and that part which lies north of it. At the hearing I was informed that no dispute remained between the parties as to that part of the line south of the bridge; but only as to that north of it; but inasmuch as I am to dispose of the costs, and among them the costs of an application for injunction, it will be necessary to enter into the merits of the case as to both sub-divisions of the line.

I take the following facts to be established: that surveys

and plans were deposited in pursuance of the act; that work was commenced in or about March, 1858, and has been prosecuted almost continuously since; that there has been no deviation from the surveys and plans deposited; and that early in 1858 the company arbitrated with individuals in respect to private rights.

Two maps are put in upon which the line of the railway is delineated; one of them shews the whole of the city and a portion of the harbour; south of the Cataraqui bridge the line runs along Ontario street, across the front of nearly three blocks, and then on a curved line southerly and south westerly, passes across a block of land and along wharfs, slips and the water of the harbour, and thus over both private and city property. North of the bridge it strikes the waters of the Cataraqui river, and is carried on an embankment in a direction a little westerly of north, until it strikes the land. This embankment leaves about fourteen acres of land covered with water, between it and the shore, which at this place forms a small bay, and where the water has always been still.

On the 21st of September, 1858, a meeting took place between the railway committee of the city council, on behalf of the corporation, and the chief engineer of the company, on their behalf: the meeting was sought by the council or the railway committee, in order to induce the railway company to perform certain works south of the bridge, particularly at the foot of streets which run down to the waters of the harbour; and also to fill in the space below the bridge, between the embankment and the land. The parties came to an agreement as to what was to be done south of the bridge, which was reduced into writing under five distinct heads. [His Honour here read the stipulations as above set forth; the 5th paragraph of Mr. *Shanly's* affidavit; also, the 7th, 8th, and 9th paragraphs of Mr. *Flanagan's* affidavit.]

It will be observed that these minutes are silent as to

any work to be done north of the bridge; and some of the affidavits, filed on behalf of the city, treat it as remaining an open question; but that point seems disposed of by the minute of the proceedings at this meeting of the railway committee with Mr. *Shanly*, and their subsequent meetings, and by the affidavit of the city solicitor, to which I will refer presently. [His Honour here read the minute of 21st September, 1858.]

After this, and on the 4th of November, in the same year, a by-law was passed, which, though general in its terms, seems pointed at the works which were in course of construction by the railway company. [His Honour read the by-law, as above set forth.]

From this, as well as from affidavits filed, it appears that the city authorities were not yet satisfied with what had been engaged to be done on the part of the railway company and Mr. *Shanly*, as appears by the affidavit of Mr. *Wise*, resident engineer in charge, who met them on several occasions.

A meeting of the city railway committee took place on the 13th of November, after this second by-law, at which, as I infer from the resolutions proposed, the agreement of the 21st of September was discussed. [His Honour read the minute of 13th November, 1858.]

After this Mr. *Shanly* again met the railway committee, the exact date is not shewn, but it appears to have been in January, 1859, and a modification of the former agreement was made. His Honour read the exhibit "B." referred to in Mr. *Shanly's* affidavit, and the 10th paragraph of the affidavit.]

So far as to what it was *agreed* on both sides should be done by the railway company; the next point is, was it done as agreed. This seems to me to be very fully established, with one single exception, arising certainly

from no default on the part of the railway company. [His Honour again read the 10th paragraph of Mr. *Shanly's* affidavit, and parts of several other affidavits to the same effect.]

This evidence establishes satisfactorily to my mind that the defendants have made no default in any thing which they engaged to do. But the plaintiffs' case is, that they have not done all that they were bound to do; and they set forth in their bill under nine heads what they seek the aid of this court to compel the defendants to do, that is on the south side of the bridge; and is independent of what they complain of in respect of that north of the bridge.

The bill treats the by-law of the 30th of June, I think properly, as authorising the construction of the branch line upon certain conditions: the statement on this point is, that "plaintiffs being desirous of forwarding and encouraging the construction of such branch line, so far as they could fairly do so, without detriment to the public rights, and the trusts reposed in them as representing the inhabitants of the said city of Kingston, did by a certain by-law, to which they crave leave to refer, confer on the said defendants, under certain conditions, the right and privilege of constructing such branch." It does not complain that these conditions have not been observed, except in one particular, the defendants binding themselves to fulfil its provisions. Certainly the nine heads of demand are not to be found in it, and but a small portion of the five heads of agreement. The agreement or agreements with the railway company are not at all alluded to in the bill; but it charges that the defendants, under various pretences, delayed, neglected, and avoided entering into any definite written undertaking, to construct the works according to the requirements of the plaintiffs, but frequently promised and agreed in general terms to construct them as not to impair the just enjoyment of the rights of the public and of the plaintiffs or others.

The allegation in the bill is not that the railway company undertook to do the works, the doing of which they seek to enforce. It is put in this shape, "and plaintiffs further shew that the said defendants in the construction of said branch line, *should* leave a sufficient opening," and then describes what it alleged *should* be done north of the bridge, and then what *should* be done south of it.

The evidence of the plaintiffs is of the same character as the allegations in the bill; they go to shew that in the opinion of the deponents, what the city require is reasonable, and what without it the citizens and others resorting to the harbour will not enjoy the same facilities of access as before the construction of the railway works: and that the piece of water north of the bridge will probably prove injurious to health.

Some of the evidence is more definite, and to that I will advert. [His Honour read the 9th paragraph of Mr. *Flanagan's* affidavit; also, the 1, 2, 3, 4, 8, 12 and 13th paragraphs of Mr. *Agnew's* affidavit.]

It was not made a question in argument whether the city railway committee had authority to enter into the arrangement which they did enter into with Mr. *Shanly;* their duty may have been merely to confer with the agent for the railway company, and to report to the council; or it may be that they had authority committed to them to do all that they assumed to do. I do not find their authority impugned or disavowed in any shape. The city clerk attended their meetings, and in his affidavit filed on behalf of the city he states what passed there. The city, by their bill, avail themselves of the arrangement entered into by them, so far as it goes; the first six heads of their demand corresponding with the arrangement. But if the by-law of the 30th of June authorised the construction of the branch railway, as I think it did, these subsequent arrangements with the railway committee must be regarded in the light of concessions on the part of the railway company, and I

cannot but observe that the demands of the city authorities seem to have grown as each concession was made.

Ever if that by-law did not authorise the construction of this branch, as the city seem at one time to have thought, it clearly authorised certain work on such branch, and the city acquiesced in what was done without any interference to prevent it: they state this in their bill; their allegation being, that "though the said defendants neglected to comply with the conditions contained in said by-law, inasmuch as they neglected to execute such bond as contemplated by said by-law, although tendered to them for execution; and inasmuch as they ran said line across the waters of the said bay; north of the Cataraqui bridge, instead of along the streets north of Ontario street, named in the said by-law as provided in said by-law, plaintiffs nevertheless being unwilling to interfere with the construction of such line, unless compelled by the public interest so to do, and relying on the defendants doing all necessary acts to protect public and private rights, refrained from taking any steps to stop the erection of the said line of railway."

There is only one point in which the railway company failed: they did not in the terms of the first by-law bind themselves to fulfil its provisions; this does not seem to have been a point in question until after the meeting with the railway committee in September, and then—it was the city solicitor who was to prepare it—he made the penalty fifty thousand pounds—it is sworn that the work to be done under it so far as the defendants were interested, would not cost more than five hundred pounds; the only provision besides work to be done, was that locomotives should ring a bell in passing along the streets. The penalty to this bond required by the city appears excessive; the refusal to execute the bond would not be a ground for such a bill as is filed, and certainly was not the ground upon which the bill was filed.

I am not informed upon what terms the parties have

agreed as to the work to be done south of the bridge: with respect to that north of it, I am clearly of opinion that the plaintiffs have no claim upon the railway company. Plans were filed, and notice given according to the statute, and the work north of the bridge has been done in accordance with it, with this exception in favour of the plaintiffs, that whereas the plans shewed no opening in the embankment—an opening was made with a pier in the centre, and an open space of thirty feet on each side. The by-law must be taken to have been passed with reference to such branch railway as was depicted in the plans deposited.

The bill complains that the railway was taken across the waters of the bay north of the bridge, instead of along the street south of Ontario street, as provided in the by-law. An inspection of the maps shews evidently that the streets meant were those which were reached after crossing the waters of the bay.

With respect to the filling up of the space cut off by the embankment, on the ground that the water is rendered more stagnant than before, and therefore injurious to health, affidavits are produced as to such being its probable effect, also a certificate from a number of medical gentlemen residing at Kingston to the same effect, and a report from a civil engineer who had been instructed by the mayor to examine the locality with a veiw to ascertaining its probable effect upon the health of the city. But the plaintiffs appear to me to be precluded upon that point, for the report is dated the twenty-sixth of July, 1856, and the medical certificate the 2nd of August, 1858; and it was after this, on the 21st of September, 1858, that the filling up of the space by the defendants was discussed between the railway committee and the chief engineer, and refused by the latter; and again on the 13th of November, the same point was made the subject of an amendment in the same body, which was negatived.

The plaintiffs' bill seems to go upon this, that they have only to shew that the construction of the railway will be in some way injurious to the city, or to some part of it, in the way of health or business facilities, and the railway company are bound to do whatever is necessary to remedy this. I think such a position untenable; and that a municipality passing a by-law authorising the construction of a branch railway, can exact nothing from the railway company but what is stipulated for in the by-law, or provided for by statute; the act enabling municipalities to authorise the construction "under such restrictions as the council may see fit."

The city of Kingston no doubt expected to derive some benefit from the construction of this branch; and if its construction entailed some inconvenience and disadvantage, which the authorities did not foresee, or at all events did not provide for, the burthen of remedying them must rest upon them. I see no principle upon which they can be thrown upon the railway company.

It is not necessary, taking the view that I do of this case, that I should decide whether the plaintiffs are the proper parties to complain. Assuming that they are the proper parties, I think that they have no ground of complaint. I think the bill should be dismissed with costs, including the costs upon the motion for injunction.

TULLY v. BRADBURY.

Mortgage—Assignment—Set-off—Injunction.

Upon sale of land which was subject to a mortgage, the vendor gave a bond to indemnify the purchaser against the incumbrance, and thereupon the transaction was completed, the purchaser giving a mortgage for £500, and paying the residue of purchase money in cash. The mortgage given by the purchaser was transferred to a third party for value, but with notice of the existence of the prior incumbrance, who subsequently took proceedings at law against the purchaser, to recover the amount of his mortgage, who thereupon filed a bill in this court, claiming a right to apply the amount due by him in discharge of the prior mortgage, which was then due and unpaid. A motion for an injunction to restrain the action at law was refused.

Statement.—This was a bill by *Kivas Tully* against *James R. Bradbury*, *William Bradbury*, and *Archibald John McDonell*, setting forth a purchase by the plaintiff, from the defendant *James R. Bradbury*, in November, 1856, of certain lands at Owen Sound, which at the time of such sale were held by his father, the defendant *William Bradbury*, as trustee for him, and were at the time subject to a mortgage made by the former owner thereof in the year 1853, for securing £500, which "*was payable at a time long since expired*," and which had been assigned to one *George Alexander*, who was entitled to receive the money secured thereby; that at the time of making such a purchase it was agreed between plaintiff and defendant, *James R. Bradbury*, that he (*Bradbury*) should pay off such mortgage, and should give to plaintiff a title free and clear of all incumbrances: that the conveyance therefore was executed to plaintiff, who paid a portion of the purchase money, and executed a mortgage in favour of the defendant *James R. Bradbury*, securing the balance, (£500,) which had been transferred by *James R. Bradbury* in the latter part of the year 1857, and was then held by the defendant *McLonell*.

The bill charged notice to *McDonell* of the assignment to pay off the mortgage held by *Alexander*, and claimed that plaintiff had a right to apply the £500 secured by his mortgage to *Bradbury*, to paying off the first mort-

gage so held by *Alexander;* and prayed, amongst other things, an injunction to stay proceedings at law by *McDonell* against plaintiff to recover the amount of the mortgage to *Bradbury.*

The defendant *McDonell* answered the bill, denying all notice of any agreement as to the discharge of the mortgage held by *Alexander*, or any notice with respect to it, other than appeared in the abstract of title furnished to him. The bill was taken *pro confesso* against the defendants *Bradbury.*

An affidavit of the plaintiff was filed, reiterating the statements in the bill. The defendant *James R. Bradbury* was examined on behalf of the plaintiff, before a special examiner: his evidence, however, did not vary materially from the facts set out in *McDonell's* answer. Upon this state of facts, a motion was made for an injunction to restrain the action at law, on the ground of plaintiff's right to apply the money due upon his mortgage to *Bradbury.*

Mr. *Fitzgerald,* in support of the application.

If the mortgage given by plaintiff had still been held by *Bradbury,* a clear right would exist for plaintiff to apply the amount due by him in reduction of the amount due upon the mortgage in the hands of *Alexander;* the position of the plaintiff is in fact that of surety for the debt due to him, and *Davis* v. *Hawke* (*a*) is an authority in favour of plaintiff. The same rule must apply as to *McDonell,* who took the assignment subject to all the equitable rights of plaintiff as such surety. *Jones* v. *Mossop,* (*b*) *Moore* v. *Jervis,* (*c*) *De Mattos* v. *Gibson.* (*d*)

The only point admitting of any question is the fact

(*a*) Ante vol. 4, p. 408.
(*b*) 3 Hare 568.
(*c*) 2. Col. 60.
(*d*) 5 Jur. N. S. 347.

of notice to *McDonell*, but the notice conveyed by the abstract of title, and which is admitted by his answer, is sufficient for this purpose.

Mr. *Strong*, contra. Although *James R. Bradbury* is bound to pay off the mortgage held by *Alexander*, still this affords no ground for plaintiff applying his debt in discharge of it. The pleadings and evidence shew that a bond was executed by *Bradbury* for the purpose of indemnifying plaintiff against the mortgage of *Alexander*: this, it was contended, evinced an intention on the part of the plaintiff to rely upon that security not upon any right of his to apply the amount secured by his own mortgage to discharge that held by *Alexander*. Besides, a person taking a bond of indemnity cannot refuse to pay his debt, because he has such bond before he has sustained any loss.

Here the most that can be claimed on behalf of plaintiff is a right of set-off, but this not having attached before the transfer of *Tully's* mortgage to *McDonell*, he must be treated as holding discharged of it.

Rigney v. *Vanzandt*, (*a*) *Ex parte* v. *Hippins*, (*b*) *Barnet* v. *Sheffield*, (*c*) *Clark* v. *Cort*, (*d*) were amongst other cases also cited by counsel.

ESTEN, V.C.—The material facts of this case I understand are these, the defendant, *William Bradbury*, purchased the lands in question, subject, with other lands, to a mortgage for £500 to one *Alexander*, which he covenanted to discharge. *James Bradbury*, another defendant, became entitled in equity to the lands in question, but received no conveyance of them from his father, *Wm. Bradbury*. He contracts for the sale of them to the plaintiff for £645, of which £145 is paid, and £500 is secured by mortgage; and *James Bradbury*

(*a*) Ante vol. 5 p. 498.
(*b*) 2 Gl. & J. 93.
(*c*) 1 D. M. & G. 371.
(*d*) Cr. & Ph. 154

by bond agrees to discharge the mortgage to *Alexander*. The conveyance to the plaintiff is made by *Wm. Bradbury*, as a trustee for *James Bradbury*, and he enters into covenants for the title limited to his own acts. *James Bradbury* transfers the mortgage for £500 to the other defendant *McDonell*, who commences an action against the plaintiff on the covenant for payment of the mortgage money contained in it, and this suit is thereupon instituted by the plaintiff for an injunction to stay proceedings in that action, and to apply the mortgage held by *McDonell* to the exoneration of the lands in question from the mortgage of *Alexander*. The claim is based on several grounds; first, that the estate is a surety, and is entitled to apply its own debt to its exoneration as such surety; second, that both *James* and *William Bradbury*, the former by his bond, the latter by his covenant, have agreed to discharge the mortgage of *Alexander*, and that plaintiff has a lien on his own purchase money or mortgage for securing all for which he bargained, namely, the estate free from incumbrances, and has therefore a right to apply his mortgage to the discharge of the incumbrance of the previous mortgage. Conceding the existence of these rights in the abstract, for the sake of argument, I think the circumstances of the case furnish an answer to them, inasmuch as they indicate an intention that the two mortgages shall be independent, and that one shall not be held as an indemnity or security against the other, and inasmuch as these rights cannot of course exist in opposition to the express intention. Had it been intended that the plaintiff should have a lien on his purchase money for the discharge of the incumbrance affecting the estate, he would have undertaken to discharge it, and purchased the equity of redemption merely, which would have been the prudent course. He would in this case probably have paid a little more for the estate. Aware of the incumbrance, and intending that it shall be discharged by the vendor, he nevertheless grants a mortgage and covenant, binding himself to pay the balance of the purchase

money at stated times, and takes from the vendor a bond to discharge the incumbrance. This agreement indicates a clear intention to my mind that the balance of the purchase money should be paid irrespective of the prior incumbrance, and that no lien should exist upon it for the discharge of that incumbrance.

It is true, that if the mortgage remained in *James Bradbury's* hands, and the plaintiff had paid, or was required to pay the previous incumbrance, an off-set would be made of one against the other in order to prevent any inconvenient circuity. But as I understand the law on this point, the right of set-off, when it is mere matter of arrangement, and does not arise from contract express or implied, accrues only when the necessity for making the arrangement occurs, and not before, and if one of the funds has been previously alienated it does not arise at all.

In the present case, the circumstances, I think, exclude any implied contract that one mortgage should be a security against the other; and as a *bonâ fide* transfer was made by *James Bradbury* of the mortgage executed by the plaintiff before the necessity for it arose, I think it would be unjust to restrain *McDonnell* from enforcing his legal rights; and therefore I think this application must be refused.

Buckley v. Wilson.

Judgment Creditor—Priorities—Parties.

A. is the owner of lands, and mortgages them to B., C. then registers a judgment against A. After the time for payment of the mortgage expires, A. conveys absolutely to B., who gives release of his mortgage, and then conveys to D. In a suit by C. to foreclose under his judgment, D. claims priority in respect of B.'s mortgage over C.'s judgment, on the ground that the conveyance from A. to B. was in substance a release of A.'s equity of redemption, and that B. still held his mortgage against subsequent incumbrancers.

Held, that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, a mortgagee acquiring the equity of redemption would be entitled to such priority; but that the release was strong evidence that there was no such intention here.

Where, after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties in a suit to foreclose the mortgage.

Statement.—This was a hearing by way of motion for decree as against the defendants *Wilson* and *Frank*, and *pro confesso* as against the defendants *Keefer* and *Foley*. The facts stated in the affidavits, used upon the motion, appear in the judgment.

Mr. *Fitzgerald*, for plaintiff.

Mr. *Roaf*, for defendant *Wilson*.

Mr. *Blake*, for defendant *Frank*.

Judgment.—Spragge, V. C.—The plaintiff files his bill as judgment creditor of one *Montague*, against whom he alleges in his bill that he recovered judgment and registered the same in the registry office of the county of Middlesex, on the third of March, 1857, at which time *Montague* had amongst other lands the north-east quarter of lot 15, in the fifth concession of Caradoc, and lots 109 and 110 in the village of Strathroy.

Upon the lots in Strathroy there was a prior mortgage to one *Hazleton*, registered 9th of December, 1856; this mortgage was assigned by *Hazleton* to one *Carroll*, and

was assigned by *Carroll* to the defendant *Frank*, on the 30th of December, 1857.

Between the date of that mortgage and its assignment to *Frank*, viz., on the 15th of July, 1857, *Montague* made a mortgage of the same lands to *Frank*. This was effected by a conveyance, absolute in terms, of the above date, which was registered on the following day, and by a bond from *Frank* to *Montague* to reconvey upon payment of the mortgage money. This bond has been assigned by *Montague* to one *Smith*, and by *Smith* to the defendant *Keefer*.

The position, then, of the Strathroy lands would appear to be this, *Keefer* is entitled to the equity of redemption. The defendant *Frank*, in respect of the mortgage to *Hazleton*, is first incumbrancer; and in respect of the mortgage to himself, third incumbrancer; while the plaintiff stands as second incumbrancer.

The Caradoc lands appear to stand in this position, a mortgage was made and registered on the 3rd of October, 1855, from *Montague* to the defendant *Foley*, to secure £300, which was thereby made payable in two years. After default, and on the 25th of November, 1857, *Montague* conveyed absolutely to *Foley*, and on the 5th of June, 1858, *Foley* conveyed to *Wilson*; (a re-conveyance from *Wilson* to *Foley* since bill filed, is stated by the plaintiff as upon his information and belief, but it is not in evidence, and was not referred to in argument.)

The defendant *Wilson* in his answer makes the following statement in relation to the dealings between *Montague* and *Foley*: "That default having been made in payment of the amount so due and owing under said mortgage, it was agreed by and between the said defendant *Horace Montague* and said *Samuel Foley*, that the said *Samuel Foley* should purchase the said lands and premises, and give besides, and in addition to the said mortgage, the further sum of one hundred pounds. That, instead of treating the said

mortgage as part of the conveyance, the said *Samuel Foley* took an ordinary conveyance from said *Horace Montague*, and released the said mortgage, thereby apparently making the plaintiff's judgment the first incumbrance on the said lands and premises, whereas in fact it was, and is, an incumbrance subsequent to the said mortgage."

In an earlier part of his answer, the defendant *Wilson* alleges that he purchased in ignorance of the plaintiff's judgment; he does not however allege that *Foley* purchased from *Montague* in ignorance of it; though I suppose he means to say that the price of the land as between those parties was the mortgage debt, and the further sum of £100.

It is contended on behalf of *Wilson* that he is entitled to priority over the plaintiff's judgment in respect to the prior mortgage to *Foley;* that in substance the transaction between *Montague* and *Foley* was a purchase by *Foley* of *Montague's* equity of redemption, and the conveyances to *Foley* a release of it, and the release by *Foley* of the mortgage to himself a mere mistake in the conveyance by which their dealings were carried out.

This is assuming that *Foley* intended to keep his mortgage on foot as against subsequent incumbrancers; and I apprehend that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, the mortgagee acquiring the equity of redemption would be entitled, under the statute, to priority, in respect of his mortgage, over puisne incumbrancers. But the actual release of the mortgage is difficult to be got over. In the first place it is strong evidence of the intention of the parties that the mortgage should not be kept on foot; and there is nothing in the way of evidence, or even of allegation in pleading, to negative that intention in this instance. Further, the mortgage is, or should be, in the possession of the mortgagor, and so the mortgagee is no longer the holder of it; and besides, *Foley* was not, and *Wilson* is not, in a position to carry

out such a decree as is ordinarily made between first and second mortgagee and mortgagor, if he were held entitled in priority to the plaintiff. Such a decree provides that upon redemption by the second mortgagee of the first, the first shall reconvey and deliver up all deeds and writings, &c. The second mortgagee would be entitled to an assignment and delivery of the first mortgage, but here the mortgagor would have it, and be entitled to retain it; and the second mortgagee, after redeeming the first, would be deprived of his rights over against the mortgagor in respect of the mortgage which he had paid off. But under the statute the first mortgagee stands in the position of mortgagor or owner of the equity of redemption, being bound to redeem the second mortgagee, which he can only do by re-paying what he has received from him, and paying off the puisne incumbrancer, or in default standing foreclosed. He may choose of course to stand foreclosed, retaining the amount of his mortgage in preference to redeeming. Should he do so, the puisne incumbrancer who has redeemed him, ought to be the holder of the mortgage which he has redeemed, for whatever be the rights as between the mortgagor and the first mortgagee purchasing the equity of redemption; the second mortgagee redeeming the first must have his full rights against the mortgagor, and it is obvious that he cannot have those rights when the mortgagor has in his hands the mortgage itself, released.

The position of *Frank* as to the lands in Strathroy is different. He stands as first and third incumbrancer, while the plaintiff is second, and under the statute is entitled to be redeemed by the plaintiff as to his first mortgage, and then again to redeem the plaintiff or not as he thinks fit by virtue of his third mortgage.

An objection is made by both *Frank* and *Wilson* to the constitution of the suit. The bill alleges that *Montague* had at the date of the registration of the plaintiff's judgment, *amongst other lands*, those

set out in Caradoc and Strathroy; and the objection is, that the plaintiff states in effect that he is a mortgagee, and that his mortgage comprises other lands than those in which the defendants are interested, and that the mortgagor (in this case the judgment debtor *Montague*) or his assignee ought to be made parties.

I think the objection is well founded. The general rule appears to be that when after mortgages being given, the equity of redemption is severed so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties.

From the way in which the allegation is made in the bill, it may probably have been inserted by way of precaution. The objection was not taken by answer. The cause comes on by way of motion for decree as to defendants *Wilson* and *Frank*, and *pro confesso* against defendants *Foley* and *Keefer*. I think the best course will be to direct the master to enquire whether any other lands are affected, by the registration of the judgment, in Middlesex; and if there are any, to certify that fact so that the plaintiffs may amend; and if there are no other lands, then that the master do proceed to enquire as to incumbrances and priorities in the usual way. Costs of enquiry to be borne by plaintiff.

LEWIS v. JONES.

Registered judgment—Rights of judgment creditor in a subsequent registered judgment of his judgment debtor.

Where the judgment creditor of A., who had registered his judgment, claimed the benefit of a judgment subsequently registered by A. against B.: *held*, that A. having actually assigned his interest in his judgment before registration thereof, was a good answer to the application.

This was a suit brought by *Rice Lewis* and *Charles William Lewis*, against *Edward C. Jones*, *Charles Westley Lount*, *Thomas Steers*, and others, the bill in which set forth that on the 16th of October, 1857, the plaintiffs had recovered judgment in an action at law against the defendant *Lount*, which was duly registered in the registry office of the county of Simcoe, on the 11th of October, 1857, at which time *Lount* was the owner of several lands, &c., in that county: that in Trinity Term, 1858, *Lount* recovered judgment at law against defendant *Steers*, which was duly registered in the same office, on the 13th of February, 1860; that after the recovery and registry of the judgment against *Steers*, and after the recovery and registry of the judgment by plaintiffs against *Lount*, he assigned the judgment so recovered by him against *Steers* to the defendant, *Jones:* charged that at the time of such assignment *Lount* was in insolvent circumstances, and that such assignment was made with intent to defeat and delay creditors; or if not, that it was made to give *Jones* a preference over other creditors of *Lount;* and prayed, amongst other things, an account; also a declaration that plaintiffs were entitled to a lien on such judgment against *Steers*, and on any other judgment registered in favour of *Lount*, as derivative mortgagees, and a sale of *Lount's* lands; and an injunction to restrain *Jones* and *Lount* from enforcing the execution against *Steers*. An *ex parte* injunction had been granted upon affidavits verifying the statements of the bill, and a motion being made to continue it, affidavits were filed on behalf of the defendant, *Jones*, shewing that before the recovery of the judgment by

Lount against *Steers*, it had been agreed between *Lount* and defendant that *Lount* should assign his debt to *Jones*, in consequence of which *Lount* from thenceforth ceased to have any beneficial interest in, and was merely a trustee of such judgment for *Jones*, and that the registration of such judgment was effected by *Jones* for his own benefit and security; and the execution then in the hands of the sheriff against *Steers* had been issued at the instance of *Jones*.

Mr. *Hodgins*, in support of the motion.—The amount claimed on the judgment against *Steers* has been paid into court, therefore no damage can result to *Jones* by the extension of the injunction already granted to the hearing. The plaintiffs are obliged to come to this court, being unable, under the circumstances, to garnishee the debt at law. *Steers* may be said to occupy the position of a stakeholder bound to pay over either to *Jones* or the plaintiffs, as the case may be; and under the circumstances here appearing, an interpleader might have been instituted to determine to whom that should be. *Jones* v. *Thomas*, (*a*) *Desborouyh* v. *Harris*. (*b*)

Mr. *Roaf* for *Steers*.—The amount of *Steers'* indebtedness having been paid into court, his judgment ought to be discharged.

Mr. *Blake*, for defendant, *Jones*.

So far as the interests of these plaintiffs are concerned, no necessity whatever exists for the court holding that the judgment creditor of a judgment creditor holds a lien on the judgment as is here contended for. He contended, also, that the present suit savours of maintenance and champerty; and cited, amongst other cases, *Carruthers* v. *Armour*, (*c*) *Daglish* v. *Jarvie*, (*d* *Burke* v. *Green*, (*e*) *Simpson* v. *Lamb*. (*f*)

(*a*) 18 Jur. 460. S. C. 2. Sm. & G. 186.
(*b*) 4 D. M. & G. 439.
(*c*) Ante vol. vii, p. 34.
(*d*) 2 M. & G. 231.
(*e*) 2 B. & B. 517.
(*f*) 26 L. J. Q. B. 121.

Mr. *S. Blake*, for *Lount*, referred to *Marsack* v. *Reeves*, (*a*) as an authority for giving *Lount* his costs of the motion, for in any result of the suit his costs cannot be costs in the cause.

Judgment.—Spragge, V. C.—One of the points raised by the defendant, *Jones*, in answer to the plaintiff's application, appears to me so clearly in his favour that I think I may properly dispose of it without going into the other points of this case.

The plaintiffs recovered and registered judgment against defendant *Lount*, and defendant *Lount* afterwards recovered judgment against the defendant *Steers;* and the bill alleges that that judgment was registered on the 13th of February, 1860, and that *afterwards Lount* assigned the said judgment to *Jones*. The position of the plaintiffs then is, that upon the registration of *Lount's* judgment against *Steers*, their judgment against *Lount* attached, and that the plaintiffs became in effect derivative mortgagees.

This is denied as a correct conclusion in law, as to which I propose to give no opinion; but the allegation of the bill as to the time of *Jones* acquiring his interest in the judgment of *Lount* against *Steers*, is denied as a matter of fact; and it is sworn that that interest was acquired before the registration of the judgment, and that such registration was made afterwards, and for the benefit of *Jones; Lount* at the time of such registration being a bare trustee for *Jones*.

The mere entry of the judgment, it is clear, created no charge or lien upon the lands; there was nothing for the plaintiff's judgment to operate upon until registration; and at that time no beneficial interest remained in *Lount*.

(*a*) 6 Mad. 108.

Nothing is shewn before me to impeach the validity of this transfer of *Lount* to *Jones;* and if valid, *Jones* was in the eye of a court of equity the judgment creditor from thenceforth, and at the time of the registration of the judgment.

The case is *sui generis*, because the plaintiff in such case acquires the position of derivative mortgagee, by operation of law, if at all, but his position cannot be better than if he had acquired it by act of the party. If so acquired in this case, *Lount* would have assigned by way of security to the plaintiffs that which he had already assigned absolutely (in equity) to the defendant *Jones*.

Upon this ground, therefore, I must refuse the application.

AN INDEX

TO THE

PRINCIPAL MATTERS.

ACCEPTANCE OF TITLE.
See "Specific Performance," 6.

ADDING PARTIES.
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See "Practice," 4.

ADMINISTRATION.

1. Under an administration order obtained by a creditor, the executors admitted a certain sum of money in hand, part of which they objected to pay into court, on the ground that it had been paid by them to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the master's office. *Held*, that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these enquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character. Re Babcock's estate, 409.

2. Where the executors are charged with misconduct, a bill must be filed. *Ib.*

3. Powers and obligations of foreign administrators dealing in Canada with foreign assets, and settling claims of Canadian creditors, considered. Grant v. McDonald, 468.

4. Injunction awarded at suit of the heir, to restrain execution against the lands of a deceased person in the hands of his administrator, the defendant having administered to the estate in England only, and there being at the time no Canadian administrator. *Ib.*

5. Where a cause of action accrues in the life-time of the debtor, the statute begins to run against his estate notwithstanding there is no executor or administrator; but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative who can sue and be sued. *Ib.*

6. An executor *de son tort*, cannot, by giving a confession of judgment, or making payments on account of a debt, or by any other act of his give a new start to the statute, as against the rightful administrator, or the parties beneficially interested in the estate. *Ib.*

AGENT.
(OF CORPORATION,) CONTRACT BY.
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AGREEMENT FOR SALE.

A., by an agreement, disposed of all his real estate to one B. his son-in-law, who agreed to pay to A. an annuity for life, and after A.'s death to pay the purchase money in equal annual instalments to A.'s daughters. A. by his will, made some years thereafter, assumed to grant a legacy to his wife out of his real estate, directing the same to be deducted from the payments to be made to his daughters. *Held*, that the agreement was complete, and the proceeds of the reality could not therefore be charged.

Honsberger v. Martin, 361.

(AS TO DOWER.)

See "Dower."

ALIMONY.

Where a few days after her departure from her husband's house, the wife was found with severe bruises and injuries upon her person, which in the opinion of a medical man must have been caused by external physical violence not occasioned by a fall or other accident, and the husband having been shewn to have used violence towards her on other occasions, and in other ways had so conducted himself as to raise a strong presumption that the bruises and injuries were inflicted by him; the court made a decree for alimony.

Jackson v. Jackson, 499.

ANNUITY, (JOINT.)

(ATTACHMENT, AGAINST SHARE OF.)

A testator having bequeathed the sum of £500 per annum, payable out of the rents, income and profits of his real and personal estate indiscriminately, for the support of his widow and family, (the widow having become sole executrix,) her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate against her as executrix, to be recouped for breaches of trust and the like: and *semble*, that where there is no form of legal proceeding or process whereby such a fund can be reached, this court has power under 22 Vic., ch. 22, sec. 288, to apply a remedy; as in this case by equitable attachment.

Bank of British North America v. Matthews, 486.

APPEAL.

See "Practice," 1.

(FROM MASTER'S REPORT.

See "Practice," 2.

ARBITRATION.

See "Award."

ASSIGNMENT.

(OF MORTGAGE.)

1. On the transfer of a mortgage the mortgagee covenanted that if default were made in payment of the mortgage money, he would pay the same. *Held*, that this did not constitute him a surety within the meaning of section 4 of the 32nd of the orders of 1853.

Clarke v. Best, 7.

2. A person holding mortgages in trust for sale to indemnify him against loss on account of

the mortgagor is not entitled to foreclose in case of default; the only decree to which he is entitled is to sell, allowing the mortgagor the usual time for redemption.

Paton v. Wilkes, 252.

3. Where two persons were mortgagees, and one of them assigned his interest to the other, the mortgagor was allowed credit, as against the assignee, for goods delivered to the assignor, until notice of the assignment.

Galbraith v. Armstrong, 289.

4. One of the defendants, the assignee of the mortgagee, by his answer, stated that he was not interested in the mortgage, or at all events only by way of security; and that it belonged to A.; and that he and A. had concurred in an assignment of it to B. *Held*, that A. and B. were necessary parties; and that notwithstanding the defendant consented to withdraw his answer, a decree could not be made in their absence.

Van Kleek v. Tyrrell, 321.

5. Upon the sale of land which was subject to a mortgage, the vendor gave a bond to indemnify the purchaser against the incumbrance, and thereupon the transaction was completed, the purchaser giving a mortgage for £500, and paying the residue of purchase money in cash. The mortgage given by the purchaser was transferred to a third party for value, but with notice of the existence of the prior incumbrance, who subsequently took proceedings at law against the purchaser to recover the amount of his mortgage, who thereupon filed a bill in this court, claiming a right to apply the amount due by him in discharge of the prior mortgage, which was then due and unpaid. A motion for an injunction to restrain the action at law was refused.

Tully v. Bradbury, 561.

(FOR BENEFIT OF CREDITORS.)

6. A provision in a deed of assignment for the benefit of creditors, appointing a time within which creditors are required to come in and execute, in order to receive the benefit of the trusts, does not render the deed void under the statute 22 Vic., ch. 26.

Metcalf v. Keefer, 392.

7. Neither does a provision for an allowance of a reasonable commission of remuneration to the trustees, notwithstanding they may be creditors of the estate under the statute 13 Elizabeth. Nor does a provision for the employment of the assignor at a reasonable remuneration; but a provision for carrying on the business in such a manner as to render the creditors partners with the trustees *quoad* third persons, or one which may cause unreasonable or prejudicial delay to the creditors, does.—*Ib.*

8. *Semble*, the 22 Victoria, chapter 26, has not altered the law except as to preferential assignments.—*Ib.*

ATTACHMENT.

See "Annuity."

ATTORNEY AND CLIENT.

An attorney retained to recover an estate for the heir-at-law of a former owner, bought up a paramount title to that of his client, and obtained possession of the property, which he conveyed to a brother of his client, as the heir-at-law, who subsequently sold portions of it to several purchasers, all of whom but one had not paid their purchase money, and as to that one he had employed the same attorney in effecting his purchase. In fact, the person in whose behalf proceedings had been taken was not dead, and the attorney had been made aware of it. On a bill filed for that purpose the purchasers were declared trustees for the heir-at-law.

Graves v. Henderson, 1.

AWARD.

1. Where an award was agreed upon between arbitrators, and afterwards one of them, having taken a new view of the case, dissented, and, the others, after discussing by letter the dissenting arbitrator's views, made and published the award as formerly agreed upon, it was set aside, because the arbitrators should have met for the discussion: a correspondence on such a case being insufficient, notwithstanding the dissenting arbitrator did not object to that method.

Jekyll v. Wade, 363.

2. Where the legal rights are not harsh, but the award disregards them entirely, it is void for inequality and partiality; and also where it is imperatively necessary that the award should determine whether a partnership was an ordinary one or not, and was not so clearly determined, the award is void for uncertainty.—*Ib.*

3. Where the time for making an award under a submission made an order of court had expired, and the parties afterwards meet, by consent, such meetings operate as a mere parol submission, which is revocable; and if revoked, the time for making an award cannot afterwards be enlarged by the court; and the party making the revocation will not be restrained from merely prosecuting his suit from the point at which it was arrested by the reference.

Ruthven v. Rossin, 370.

4. In the course of the proceedings under a reference to arbitration made in the suit the defendant made a representation to the arbitrators which was to influence their conduct, but suppressed a material fact, the court set aside the award.

Hickman v. Lawson, 386.

5. Where a witness for one party is examined in the absence of, and without notice to, the other party, the award will be set aside.—*Ib.*

6. Two out of three arbitrators took the evidence of B. in the absence of the plaintiff, and of the other arbitrator, by which evidence it appeared the two were influenced in making their award. *Held*, sufficient to invalidate the award.—*Ib.*

BONDS.

Where bonds were given for the payment of a certain sum of money and interest, in twenty years, and also mortgages of lands, redeemable in ten years, as security for the payment of the principal money of the bonds; *held*, that a breach of the covenant to pay interest on the bonds did not accelerate the right of the mortgagees to proceed upon the mortgages; but they were entitled to a decree for sale of other bonds given as collateral security.

The Great Western Railway Co. v. The Galt and Guelph Railway Co., 283.

BREACH OF TRUST.

See "Executor."

CHATTELS.

See "Fixtures."

CHATTEL MORTGAGE.

On a sale of goods upon credit to a trader, the purchaser executed a deed covenanting with one E. F., a clerk in the employ of the vendors, to buy all his goods from them, and that E. F. should be at liberty, at any time thereafter during the time such business might be carried on, to enter into the place of business and take possession of the goods and premises, and wind up the affairs. The business was carried on for two years and a half, during which time the vendors delivered goods to a large amount in pursuance of the agreement. *Held*, that the covenant not to purchase elsewhere was not binding on the purchaser, but that as he had received goods under the agreement, there was a sufficient consideration for the covenant to purchase from the vendors alone, so as to entitle them to the remedies given by the deed; and that this was not such an agreement as required to be registered under the chattel mortgage act, to enable the vendors to hold as against subsequent purchasers with notice.

Hill v. Rutherford, 9.

COLLATERAL SECURITY.

See "Bond."

CONTRACT.

(NOT UNDER SEAL.)

See "Corporation."

(RESCISION OF)

See "Vendor and purchaser," 2.
"Railway Company."

CORPORATION.

(HOLDING LANDS WITHOUT LICENSE.)

See "Mortmain."
"Stock."

(CONTRACT BY, NOT UNDER SEAL.)

The statutory agent and managing director of a railway company entered into contracts in his own name, *acting for and on behalf of the company*, for the construction of the road, erection of station houses, and maintenance of way, at certain prices set forth in the schedules, under which the contractor entered upon the execution of the works, constructed

the road and some of the station houses, and during the progress of the work had been paid large amounts on account of his work, according to the scheduled prices, after which the company refused to allow him to complete the contracts, alleging that the prices agreed to be paid were exorbitant, and that the agent had not been authorised to enter into them. On a bill filed for that purpose, the Court of Chancery [SPRAGGE, V. C., dissenting] declared the company bound by the contracts, on the ground of ratification and acquiescence therein, and that contractor was entitled to be paid for all the work that had been done according to the schedule of prices; and also to be paid for any loss he could shew he had sustained in consequence of not being allowed to proceed to a completion of the contracts. On appeal the decree was varied in so far as it allowed damages for not being allowed to complete the same; and per *Robinson*, C. J., the contractor was entitled to be paid a reasonable sum for damages sustained on account of the stoppages. [*Spragge*, V. C., dissenting,] who thought the only relief to which the party was entitled, was to be paid for what had been done as upon a *quantum meruit*.

The Buffalo and Lake Huron Railway Company v. Whitehead, (in appeal,) 157.

COSTS.

See "Administration,"
"Executors," 3.
See Judgment Creditor," 2.
"Mortgagee," 2.
"Parties."
"Practice," 2, 6.
"Specific Performance," 10.
"Taxes," 2, 5.

COVENANT.

(BREACH OF.)

See Bond.

(TO INSURE.)

See "Mortgage," 6.

CREDITORS.

(ASSIGNMENT FOR BENEFIT OF.)

See "Assignment."

(RIGHTS OF OTHER; ON REPRESENTATION MADE TO ONE.)

See "Guarantee."

CROWN LANDS.

1. Patents issued to a purchaser upon a right of pre-emption obtained by fraudulent concealment of other existing claims to such right, are void.

The Attorney-General v. MacNulty, 324.

2. If a party knowing that another person claims to have an adverse right to pre-emption of Crown lands, or that there are circumstances which may give the other such right, applies to the government to obtain these lands, and does not state the circumstances giving rise to such adverse claim in his petition, or otherwise to the officers of the government, such suppression o

the facts will, in the eye of a court of equity, be considered fraudulent, even if the circumstances were already known to the government, and if a patent be subsequently issued upon such application it will be declared void—*Ib.*

3. Where the provincial government had appropriated and patented as a glebe, a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupior, and not returned by the government, the patent was set aside as having issued in error and mistake, but, under the circumstances, without costs.

Attorney-General v. Hill, 532.

DAMAGES.

(REFERENCE TO MASTER AS TO.)

See "Specific Performance," 9.

DEBENTURES.

See "Municipal Debentures."

DEED.

(VARIATION OF.)

The decree of the Court of Chancery refusing to vary the bond for the conveyance of a steam-vessel affirmed, and the appeal dismissed with costs.

Cotton v. Corby, (in appeal,) 98.

DEPOSIT.

(ON SALE.)

See "Practice," 7.

"Donor and Donee."

DONOR AND DONEE.

See "Gift."

DORMANT EQUITIES.

Quære, where the Dormant Equities Act, 18 Vic., ch. 124, applies to every case of express trust; or whether a case of express trust so direct and plain might not arise that the court would feel authorised to hold that the statute does not extend it, though no exception of express trusts is contained in the act.

Attorney-General v. Grassett, (in appeal,) 130.

DOWER.

(VERBAL AGREEMENT AS TO.)

A widow having again married, she and her husband verbally agreed with the devisees that she and her husband should enjoy a certain portion of the estate during her life, in respect of her interest therein. *Held*, that this was binding on all parties interested, as being an agreement not within the Statute of Frauds; and the court restrained a purchaser of portions of the estate from disturbing the doweress and her husband during her life-time.

Leach v. Shaw, 494.

(IN UNPATENTED LANDS.)

A widow is entitled to dower in lands purchased from the Crown by her deceased husband, and whereof he died possessed, although no patent issued therefor, and the purchase money had not been all paid. She is also entitled

to one-third of the rents and profits for six years before the commencement of suit.

Craig v. Templeton, 483.

(WIDOW PUT TO ELECT.)

See "Will."

See also "Parties."

EQUITABLE INTEREST IN LANDS.

(ASSIGNMENT OF.)

A person equitably interested in land under an agreement for purchase, agreed to convey portions thereof to purchasers for value and subsequently a judgment was recovered against him, which was duly registered. Afterwards a party advanced a sum of money to complete the purchase, and the owner conveyed to the vendee, who conveyed to the person advancing the money, for the benefit of himself and the other purchasers. *Held*, that the purchasers had not thereby waived their priority over the judgment, and that the judgment held the land subject also to the sum advanced to perfect the title.

McQuestien v. Campbell, 242.

EQUITY OF REDEMPTION.

(RIVAL CLAIMANTS OF.)

See "Mortgage," 3.

EVIDENCE.

An objection to evidence for insufficiency must be taken at the hearing, and cannot be taken on a motion to vary the minutes.

McDonald v. Garrett, 290.

EXECUTOR.

(DE SON TORT.)

See "Administration." 6.

EXECUTORS.

1. An executor or trustee who has been guilty of negligence merely, in omitting to invest moneys, will be charged with interest at six per cent.

Wiard v. Gable, 458.

2. Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust funds to his own use; the court ordered the account to be taken against him with annual rests—*Ib.*

3. An executor or trustee will sometime be entitled to his costs in a suit for administration, notwithstanding he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach.—*Ib.*

See also "Specific Performance."

"Will."

EXECUTION.

(SALE OF TRUST ESTATE UNDER.)

See "Trustee, &c.," 3.

FIXTURES.

1. The intention, object, and purpose for which articles for the purposes of trade, or manufacture, are put up by the owner of the inheritance, are the true criterion by which to determine whether

such articles become realty or not, not the mere fastening to the soil.

McDonald v. Weeks, 297.

If the true owner of goods or chattels so conduct himself as to enable another, who has the possession, but not the property, of such goods or chattels, to hold himself out to the world as the real owner, the true owner is estopped from denying the title of an innocent purchaser for value. The possession of property attached to the realty, which thereby becomes realty, is a sufficient indication of ownership to estop the real owner as against an innocent purchaser for value.—*Ib.*

3. A mortgagee filed a bill to restrain the assignees of a mortgagor from removing a steam boiler and engine set up by the latter, for the purpose of working planing machinery. The boiler rested on brick-work, without fastening: the engine was firmly attached to the floor with bolts and nuts, to make it work steadily: the machinery propelled by it was all unconnected with the premises. *Held*, that the boiler and engine were not fixtures.

Schreiber v. Malcolm, 433.

FORECLOSURE.

See "Assignment of Mortgage," 4.
"Judgment Creditor," 3.
"Municipal Debentures."
"Practice," 5, 7.
"Priorities."

FRAUDS.

(STATUTE OF.)

See "Parol evidence."

FRAUDULENT CONVEYANCE.

See "Specific Performance," 7.

GIFT.

Where a gift is impeached it is incumbent upon the donee to establish that the donor thoroughly understood the nature and effect of it; and if any doubt exists on this head, the gift cannot be supported, and it is not incumbent upon the parties impugning the transaction to shew that the donor did not thoroughly understand the nature and effect of his own act.

Murray v. Murray, 293.

GUARANTEE.

S. by letter informed R. and K. that his son was a partner in a firm, and that he had advanced to him £3000 as his share of the capital thereof. The firm having failed, made an assignment, in which S. was preferred, to the amount of £3565 5s. 3d., represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1000. *Held*, notwithstanding that S. was bound to make good his representation to R. and K. so far as they alone were concerned; but that other creditors could not participate, the representation being only to a particular creditor; unless it should appear that a portion of the preferred claim of S. was not a debt of the firm to him, both consisted of capital advanced to the son, in which event that portion would be

applied on their claims, it not appearing that the goods furnished by them had been sold upon the faith of the representation to R. and K.: but if that had been shewn to have been the case, they would have had that right. (*Semble.*) *Held* also, that under the circumstances such statement of S. operated as a continuing guaranty so far as R. and K. were concerned.

Rainey v. Dickson, 450.

(OF MORTGAGE MONEY.)

See "Assignment of Mortgage," 1.

INFANCY—INFANTS.

1. Where a contract for the sale of an infant's estate had been approved of by the court, it was holden unnecessary for the purpose of obtaining a decree for specific performance, either to allege or prove that the sale was a proper one under 13 Victoria, ch. 62.

McDonald v. Garrett, 290.

2. Where on the hearing of a cause for partition of lands it was shewn that the estate was of such a nature that it could not be divided without prejudice to the owners, the court, without waiting for any return to that effect, ordered the lands to be sold by the master in the usual manner.

Bennett v. Bennett, 446.

See also "Leasehold."

INJUNCTION.

See "Administration," 4,
"Specific Performance," 7.
"Stock."
"Assignment of Mortgage," 5.

INSURANCE.

1. *Quære*, whether if in a receipt for premiums the words "lost or not lost," are not inserted, and before the policy issues a loss has occurred and become known to both parties, the insurers would be liable for the loss.

Walker v. Provincial Insurance Company, (an appeal,) 217.

2. *Held*, affirming the decree of the court below, that the mere fact of the agent of an insurance company sending a receipt for the premiums to the place of business of the assured, without actually receiving the money, although the receipt was left relying on the amount being sent, was not sufficient to complete the contract of insurance.—*Ib.*

(LIEN ON INSURANCE MONEY.)

See "Mortgage," 6.

ISSUE.

See "Mortgage," 1.

JOINT-STOCK COMPANY.

See "Stock."

JUDGMENT.

(ASSIGNMET OF.)

See "Judgment Creditor."

JUDGMENT CREDITOR.

(PRIORITY OF REGISTERED OVER UNREGISTERED CONVEYANCES.)

See "Vendor's Lien."

1. An execution at law against the lands of E. at the suit of K. was in the sheriff's hands, under which certain lands in the county of Oxford were advertised for sale. The Bank of B. N. A., who were registered judgment creditors of M., but subsequent to K., offered R., the assignee of K.'s judgment, to pay the same if he would assign it, but the assignee refused to do more than discharge the judgment. The Bank of B. N. A. then filed their bill against M. and R. praying to redeem R. and foreclose M., and moved for an injunction to restrain the sale by the sheriff. The court held a prior judgment creditor bound to submit to be redeemed by a subsequent judgment creditor, and to assign the judgment, and ordered that upon payment to R. (if he would receive and assign K.'s judgment) of the amount of that judgment, and subsequent costs, and if not, then upon payment into court of the same amount, an injunction should issue to restrain the sale by the sheriff.

The Bank of British North America v. Moore, 460.

2. Where a party made defendant as incumbrancer put in an answer, setting up that he had assigned the judgment in respect of which he was made a party, notwithstanding which he was retained as a party to the hearing, when, it not distinctly appearing that any effectual transfer of the judgment had ever been made, the court refused to make any order giving him his costs, otherwise than as an incumbrancer. —*Ib.*

3. The court will not grant a decree of foreclosure in the first instance, where the lands of the judgment debtor are not specifically set out, and the value of them stated in the bill.

Glass v. Freckleton, 522.

4. A. is the owner of lands, and mortgages them to B., C. then registers a judgment against A. After the time for payment of the mortgage expires, A. conveys absolutely to B., who gives a release of his mortgage, and then conveys to D. In a suit by C. to foreclose under his judgment, D. claims priority in respect of B.'s mortgage over C.'s judgment, on the ground that the conveyance from A. to B. was in substance a release of A.'s equity of redemption, and that B. still held his mortgage against subsequent incumbrancers. *Held*, that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, a mortgagee acquiring the equity of redemption would be entitled to such priority; but that the release was strong evidence that there was no such intention here.

Buckley v. Wilson, 566.

5. Where the judgment creditor of A., who had registered his

judgment, claimed the benefit of a judgment subsequently registered by A. against B.: *held*, that A. having actually assigned his interest in his judgment before registration thereof, was a good answer to the application.

Lewis v. Jones, 571.

See also "Equitable interest in Lands."
"Priorities."
"Vendor and Purchaser," 2. 3.

LACHES.

See "Mortgage," 1.
"Specific Performance."

LEASEHOLD.

(WITH RIGHT OF PURCHASE.)

A married woman, the owner of a leasehold interest, with a right of purchase, joined with her husband in a conveyance thereof to a purchaser. The vendors afterwards filed a bill to set aside this deed, on the ground that at the time of the execution thereof by the husband and wife, the wife was a minor; and also that she had not been examined under the statute touching her consent to alienate her real estate: or to declare the conveyance to have been by way of security only, and that the plaintiffs were entitled to redeem the same. *Held*, affirming the decree of the court below, that there was not sufficient to cut down the absolute conveyance to a mortgage interest. And *held*, also, that the non-age of the wife, or the fact that she was not examined according to the statute, was of no importance, as the statute related only to real estate; and that the deed of the husband alone would have been sufficient to convey the leasehold interest. And per *Robinson*, C. J., that although a party affected by a decree does not appeal from it, the court, upon the appeal of another party, may give such relief as the court may think the parties entitled to.

Sampson v. McArthur, (in appeal,) 72.

LIMITATIONS.

(STATUTE OF.)

A mortgagee having obtained possession by ejectment has a good title after twenty years, notwithstanding that during these years an administrative order of the person, not being the mortgagor, entitled to the equity of redemption, had been obtained.

Crooks v. Watkins, 340.

See also "Administration," 5.

LOST OR NOT LOST.

See "Insurance."

MARRIAGE.

(PROOF OF.)

1. The testimony of a woman of the ceremony of marriage having been performed, and evidence of respectable witnesses of the general reputation of the marriage, *held* sufficient proof of it, notwithstanding that it was not proven that the clergyman who performed the ceremony was duly authorised; and that evidence of reputation of marriage alone was sufficient proof.

Baker v. Wilson, 376.

2. A separation deed executed by the deceased husband, wherein he acknowledged the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of the registry of marriage, from the parish registry in Ireland: *held*, sufficient evidence of marriage against infant defendants, the adult defendants, by their answer, admitting the marriage.

Craig v. Templeton, 483.

MARRIED WOMAN.

A conveyance not conforming to the solemnities required by law for the protection of married women is not binding.

Hope v. Beard, 380.

Quære, whether a married woman consenting to a breach of trust, can afterwards complain of it; and *semble*, that if she make a representation and encourage another to act upon it, she will be compelled to make it good.—*Ib.*

See also "Leasehold"

MASTER'S OFFICE.

(ADDING PARTIES IN.)

See "Practice," 3, 4.

MILL.

(SALE OF.)

See "Specific Performance," 9.

MISTAKE.

See "Crown Lands," 4.

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. In October, 1840, the holder of a bond for the conveyance to him of real estate, assigned over the same to a creditor in payment of his demand, the creditor paying at the same time a sum in cash, who two years afterwards obtained possession of the property, by an action of ejectment brought against the debtor, who had in the interim been in receipt of the rents. In December, 1855, the debtor filed his bill, stating the transaction to have been by way of mortgage only, and praying to be allowed to redeem: issues were subsequently directed as to the question of mortgage or no mortgage, and found in favour of the plaintiff; after which, on further directions, a decree for redemption was pronounced in favour of the debtor, which, on appeal, was reversed, and the bill in the court below ordered to be dismissed with costs; and *semble*, that such a question is properly one of law, not of fact, and not such as forms an issue to be tried by a jury.

Watson v. Monro, [in appeal,] 60.

2. A mortgage was created by a trustee with the view of being sold to raise money for the purpose of being distributed amongst the creditors of the owner of the property, who had created the trust; the mortgagee failed in effecting a sale of the security, and a suit having been subsequently instituted by the representatives of the mortgagee, who

had died, to foreclose the mortgage, the court refused the relief sought, and ordered the mortgage to be delivered up to be cancelled; and the trustee having also filed a bill against the mortgagee's representatives, seeking relief on these grounds, was ordered to receive his costs of that suit, although the bill was not filed until after proceedings had been taken in the suit to foreclose the mortgage.

Worthington v. Elliott, 234.

3. A mortgagee having filed a bill to foreclose against two rival claimants of the equity of redemption, the court directed the usual redemption by, and conveyance to, the person *primafacie* entitled to the equity of redemption, with a right to the other claimant, at any time before the day appointed for payment, to shew himself to be entitled.

Rumsey v. Thompson, 372.

4. Where there was a conveyance of land, upon an advance of money, and a bond to re-convey, given by the pretended purchaser, with a condition that at the end of a year upon payment of the sum advanced, and an additional sum calculated upon the value of the money for that time, the transaction was held a mortgage, notwithstanding the instrument expressed it as a sale and purchase; but the bargainor at the expiration of the year surrendered the bond to re-convey to the assumed purchaser, and took from him a lease of the premises. *Held*, that this operated as a release of the equity of redemption, and a bill to redeem was dismissed with costs, but without prejudice to another bill being filed; because it appeared, though not relied on by the present bill, that the bargainor was at the time in difficulties; that the assumed purchaser was supplying him with money, and paying money for him to the sheriff; that their relative positions were such as to give the assumed purchaser great influence over the bargainor; that the inadequacy of price was gross and that the pretended purchaser's conduct was exacting and oppressive; and if it had been shewn that the assumed purchaser held other security for the advance, as if the amount of it was included in a chattel mortgage, which he held against the bargainor, his right to redeem would have been clear.

Fink v. Patterson, 417.

5. A mortgagee, when acting under a power of sale contained in his security, is not at liberty to proceed without any reference to the interests of the mortgagor. The mortgagee, in such circumstances, is in fact a trustee for the mortgagor, subject to his own claim upon the mortgage estate. Where, therefore, the assignee of a mortgage, with power to sell or lease the mortgage premises in default of payment, gave notice to the mortgagor and the mortgagee of his intention to sell in consequence of default in payment of the amount remaining due upon

the security, but did not give any public notice of the intended sale, either through the newspapers, or by posting bills; notwithstanding which, and the protest of the mortgagee, who had covenanted to make good any deficiency in case of a sale being enforced, the holder of the security proceeded with the sale, and sold for a sum little more than half of the balance remaining due, to a person cognizant of the facts, and then instituted proceeding against the mortgagee to enforce payment of the deficiency. Upon a bill filed by the mortgagee, praying a declaration that he was discharged by reason of the conduct of the holder of the security, and for an injunction to restrain proceedings at law, or in the alternative, to set aside the sale, the court set aside the sale, but refused the plaintiff his costs, he having made several charges of fraud and collusion against the defendants, which the evidence shewed were wholly unfounded.

Richmond v. Evans, 508.

6. A mortgage deed contained a covenant on the part of the mortgagor to insure the houses then, or thereafter to be, built on the mortgaged premises, and an insurance thereon was effected accordingly. The houses having been destroyed by fire, the mortgagor attended with the mortgagee at the office of the insurance company, and signed an order, which was drawn up by the secretary and agent of the company, to pay the amount of the insurance to the mortgagee upon a verbal understanding and agreement on his part to expend the money in rebuilding the houses. The mortgagee having afterwards withdrawn from his agreement to re-build, the mortgagor attended before the board of directors, and obtained from them the usual promissory note of the company at three months, for the amount of the policy, which he transferred to a third party for value, but who was aware of the claim of the mortgagee. The mortgagee thereupon filed a bill against the mortgagor and the insurance company, claiming payment of the insurance money to the extent of the amount due on his mortgage. The court under the circumstances, made a decree for payment; and ordered the company to pay plaintiff the costs of the suit; but dismissed the bill as against the mortgagor with costs, he being an unnecessary party. *Held*, also, that the person to whom the note of the company was transferred was not a necessary party.

Watt v. The Gore District Mutual Insurance Company, 523.

7. *Quære*, whether the amount of interest reserved by a mortgage may not be so great as to evidence such a case of oppression as would induce this court to refuse to interfere in behalf of the mortgagee, leaving him to his remedies at law, notwithstanding the repeal of the usury laws.

Goodhue v. Widdifield, 531.

See also "Assignment of Mortgage," 3, 5.
"Bonds."
"Chattel Mortgage."
"Sale with Right to Re-purchase."

MORTMAIN.

By the act of incorporation, 7 Victoria, chapter 68, the Church Society of Toronto is enabled to hold real estate without any license for that purpose.

The Church Society of the Diocese of Toronto v. Crandell, 34.

MUNICIPAL CORPORATION.

Where a corporation, having a debt to pay, which it is their advantage to discharge immediately, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, promising to protect the note, or to re-pay, relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor.

Burnham v. Peterboro,' 366.

MUNICIPAL DEBENTURES.

The Municipality of B., being authorised by statute to make a loan to the extent of £40,000 to a navigation company in the debentures of the municipality, payable in twenty years, issued debentures to that extent, of which, debentures to the amount of £16,500 were deposited by the Navigation Company in the bank. The municipality of B., with the consent of the Navigation Company, redeemed the debentures so deposited, and then instituted proceedings against the company to compel payment or foreclose the interest of the company under their act of incorporation. The court refused this relief but granted a receiver of the tolls, &c., of the company, which he was to apply in maintaining the works and payment of salaries of the servants of the company, and then in payment of the arrears of interest paid, and payment of interest on outstanding debentures.

Brantford v. The Grand River Navigation Company, 246.

NEW TRIAL OF ISSUE.

See "Marriage."

NOTICE.

See "Assignment of Mortgage," 3.
"Chattel Mortgage."
"Purchasers."

PAROL EVIDENCE.

Parol evidence to establish trusts not shewn upon a conveyance absolute in form, is admissible.

Langstaff v. Playter, 30.

PARTIES.

Where a testator devised land to A. for life or till marriage, and after A.'s decease or mar-

riage to the testator's executors, in trust to sell the same, and apply the proceeds for the benefit of infant children of the testator, and in payment of certain legacies: *held*, that the children were not necessary parties, and the plaintiff was ordered to pay them their costs. If the suit is simply for dower and the title is admitted no costs will be allowed, but where a defendant makes an unreasonable defence and fails, he will be ordered to pay costs.

Graig v. Templeton, 483.

See also "Assignment of Mortgage," 4.
"Mortgage," 6.
"Practice," 8.
"Specific Performance," 2, 3.

PAROL AGREEMENT.

(AS TO DOWER, NOT WITHIN STATUTE OF FRAUDS.)

See "Dower."

PARTNER.

A member of a partnership firm cannot bind his co-partner for transactions out of the usual scope of the business of the co-partnership; nor for things which are sometimes done by it, but are of unusual or rare occurrence: where, therefore, one member of a mercantile firm, without the knowledge of his co-partner, purchased lands from a debtor of the firm in his own name, which were subject to incumbrances, and for the purpose of discharging such incumbrances gave promissory notes signed by him in the name of the firm, but without the knowledge of his co-partner, the partnership was held not liable to pay the notes, although it was alleged that the arrangement had been effected for the purpose of more effectually securing the debt due the firm.

Fraser v. McLeod, 268.

PARTITION.

See "Infants," 2.

PATENT.

See "Crown Lands."

PAYMENT.

(OF MORTGAGE MONEY AFTER ASSIGNMENT.)

See "Assignment of Mortgage," 3.

(INTO COURT.)

See "Administration."

POWER OF SALE.

See "Mortgage," 6.

PRACTICE.

1. Per *Robinson*, C. J., although a person affected by a decree does not appeal from it, the court upon the appeal of another party may give such relief as the court may think the parties entitled to.

Sampson v. McArthur, (in appeal,) 72.

[In a late case of Topping v. Joseph, (in appeal,) the court refused to vary the decree in favour of parties who did not appeal.]

2. Three persons having entered into several contracts in the name of one of the three, for the construction of portions of a railroad, without any written articles of agreement as to the share each should have in the contracts, and a bill was filed by one of them to have an account taken, claiming a larger share in the profits than the master allowed him by his report, from which all parties appealed, being dissatisfied therewith; and by arrangement the court below affirmed the finding of the master with a view of taking the opinion of this court thereon. The court, on affirming the order of the court below, refused the costs of the appeal to either party.

Nicholls v. McDonald, (in appeal,) 106.

3. Defendants presented their petition for a second re-hearing on the ground that certain persons, necessary parties, were not before the court: but as two opportunities of making the objection had been disregarded, and the interests of the parties complaining of the omission would be properly protected by making them parties in the master's office, the petition was refused.

Patterson v. Holland, 238.

4. The proper practice is to bring all necessary parties before the court, at the hearing, and not to add them in the master's office.—*Ib.*

5. Where the prayer of the bill is in the alternative for either sale or foreclosure, the court will, at the instance of the plaintiff, make a decree for sale, and in the event of a sale failing to produce sufficient to cover the claim of the plaintiff, order foreclosure.

Blachford v. Oliver, 391.

6. The master by his report settled the proirities of incumbrancers as they appeared without determining whether the prior one had not lost his right in consequence of his conduct, leaving it to the party aggrieved to have the report set right on appeal. The court, under the circumstances, ordered the appellants to receive their costs of the appeal.

Huntingdon v. Van Brocklin, 421.

7. The orders of June, 1861, do not entitle a defendant to insist upon a sale instead of a foreclosure, against the consent of the mortgagee, without paying in the usual deposit upon his undertaking the conduct of the sale. The object of the order was to enable the court to grant the defendant that indulgence upon the consent of the plaintiff, in cases where the plaintiff desired to bid at the sale.

Taylor v. Walker, 506.

8. Where, after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels,

these different persons must be made parties in a suit to foreclose the mortgage.

Buckley v. Wilson, 566.

PERSONAL REPRESENTATIVE.

See "Administration."

PRE-EMPTIVE RIGHT.

See "Crown Lands."

PREFERRED CREDITOR.

(CAPITAL ADVANCED BY.)

PREMIUMS.

(PAYMENT OF.)

See "Insurance."

PRINCIPAL AND AGENT.

See "Corporation."

PRINCIPAL AND SURETY.

A person who is surety for another and holds collateral securities is not bound to wait until he has paid the debt of the principal before he assigns such securities, but may do so at any time to the creditor, in discharge of his liability.

Paton v. Wilkes, 252.

PRIORITIES.

A. being accommodation endorser for B. to a large amount, obtained from B., by way of indemnity, a confession of judgment, upon which judgment was entered up and duly registered. A. also recovered a judgment against B., which was registered subsequently on the same day: contemporaneously with the confession. B. also assigned to A. all his personal chattels and effects, and all debts due him. On hearing of the assignment C. notified A. that he would be holden accountable for what was assigned to him, but A. nevertheless permitted B. to use the chattel property, and to receive the debts, just as if no assignment had been made, whereby C. was deprived of any benefit which he might otherwise have derived. On the usual reference to the master in a suit for foreclosure of lands of B., A. and C. both proved their debts, and in settling priorities the master reported A. prior to C. On appeal by C. from the master's report, the court declared A. to be a trustee of the property assigned for C., and that having by his negligence permitted the property to become lost, A. ought to be postponed as to the lands, the common fund of both.

Huntingdon v. Van Brocklin, 421.

See also "Judgment Creditor," 4.

PROBATE.

(RENUNCIATION OF.)

See "Will."

PURCHASE MONEY.

(PAYMENT OF.)

See "Attorney and Client."

"Specific Performance," 5.

(INTO COURT PENDING INVESTIGATION OF TITLE.

See "Specific Performance," 4.

PURCHASER.

(FOR VALUE WITHOUT NOTICE.)

A. held a bond for the conveyance of property, and assigned it absolutely to B.; but for the purpose of security only. B. sold the property to C., and C. sold to others. C. before his purchase had no notice that the bond to B. was a security merely: A. having become bankrupt, his assignee applied to redeem, and was held entitled, in the absence of any evidence that C. was a purchaser for value; but the court directed the cause to stand over with liberty to C. to give such evidence, upon payment of costs, unless the plaintiff should desire also to give evidence, in which case the cause was to stand over without costs.

Cherry v. Morton, 402.

RAILWAY COMPANY.

By the statute 16 Vic., ch. 169, municipalities are authorised to pass by-laws sanctioning the construction of branch railways of limited length, "under such restrictions as the councils may see fit." Acting under the provisions of this statute, the corporation of the city of Kingston passed a by-law authorising the Grand Trunk Railway of Canada to construct a branch line running on and across certain streets of the city to the waters of the harbour; and articles of agreement and specifications were drawn up and agreed upon between the parties, under and in conformity to which the company proceeded to construct their branch line. When the works were well advanced and nearly completed the corporation discovered that the probable effect of the works being carried out in the manner proposed, would be to produce a large body of stagnant water, which would in all likelihood injuriously affect the health of the city, whereupon they required the company to fill in this space, or to desist from the completion of the works, with which requirements the company refused to comply, and the corporation thereupon filed a bill seeking to compel the company to perform the works according to such views of the corporation. At the hearing the court refused the relief prayed, and dismissed the bill with costs.

The Corporation of the City of Kingston v. The Grand Trunk Railway Company of Canada, 535.

RAILWAY CONTRACTORS.

See "Practice," 2.

RECEIVER.

See "Municipal Debentures."

REDEMPTION.

See "Judgment Creditor."
"Mortgage," 1, 4.

REGISTERED JUDGMENT.

See "Judgment Creditor," 5.

REGISTRATION.

See "Chattel Mortgage."

RE-HEARING.

See "Practice," 3.

RENUNCIATION.

(OF PROBATE.)

See "Will."

RIGHT OF WAY.

A. being entitled at his own expense to make a road for himself across B.'s farm at the most convenient point, it was agreed between them that A. should use B.'s road on certain terms. *Held*, that this agreement was a mere license, not coupled with any interest, or incident, or auxiliary to a sale or grant, and was therefore revocable, and being revoked at law, no equity arose to interfere with A.'s legal right on the ground of encouragement on the part of the one, or forbearance and irreparable inconvenience on the part of the other. *Semble*, [per *Esten*, V.C.,] that a way of necessity to a purchaser of land is the one most convenient to the grantee by the shortest cut over the lands of the grantor, but, [per *Spragge*, V.C.,] that the right to select such a way of necessity is qualified by the effect which the selection of a particular line would have upon the interests and convenience of the grantor.

Fielder v. Bannister, 257.

SALE.

(WITH RIGHT TO REPURCHASE.)

On application by the owner of real estate to effect a loan upon the security thereof, the party applied to refused to advance the money, but offered to purchase the land, which proposal the owner refused to accede to. About two weeks afterwards, upon the parties again meeting, the owner consented to sell for £400, provided the purchaser would give a bond to reconvey on payment of £512 at the end of two years, which was agreed to, and a deed and bond executed accordingly. When the time for payment was approaching, an application was made to extend the time for payment, to which the purchaser assented on certain terms, which were not finally carried out. Afterwards the purchaser sued the vendor, upon his covenant for good title, to which was pleaded a plea of usury, but which the jury by their verdict negatived; under these circumstances the court held that the transaction was one of sale with a right to re-purchase and not of mortgage.

Bullen v. Renwick, 342.

See also "Assignment of Mortgage," 2.
"Infants," 2.
"Mortgage," 6.
"Practice," 5, 7.
"Taxes."

SET-OFF.

See "Assignment of Mortgage," 5.

SHERIFF.

(SALES BY, FOR TAXES AND HIS DUTY THEREAT.)

See "Taxes," 3, 4.

SPECIFIC PERFORMANCE.

1. An action having been instituted by a legatee against the executors and residuary devisees of a testator, alleging an express agreement by all to pay interest upon a legacy which by the law was not recoverable, to which the executors pleaded, and judgment was given in their favour; but judgment was recovered against the residuary legatees by default, who afterwards filed a bill against the executors, claiming the specific performance of a covenant by the executors to indemnify against the claim of such legatee. *Held*, affirming the decree of the court below, that their own default having been the cause of judgment passing against them, formed no ground for the residuary devisees coming into equity for indemnity.

Crooks v. Torrance, (in appeal,) 220.

2. The general rule is that only the parties to the contract should be parties to a suit for specific performance.

Crooks v. Glenn, 239.

3. The vendor, after contracting with the vendee, had granted a lease with the right to purchase. It did not appear whether the option had been exercised, or the time for exercising it had arrived. The lease had been assigned, and the defendant, the vendee, objected that the assignee should be a party to this suit: but the court overruled the objection.—*Ib.*

4. Possession and user of the premises do not deprive the vendee of his right to have a good title shown; but where unreasonable delay has occurred in requiring title to be adduced, the court will order the purchase money to be paid into court, pending the investigation of the title.—*Ib.*

5. Where promissory notes had been given in payment of the purchase money of land, and several years afterwards a bill was filed by a vendee of the original proprietor, against the heirs-at-law of the original purchaser, it was held that the promissory notes must be produced or satisfactorily accounted for before the purchase money would be ordered to be paid, even although a good title were shewn. *Ib.*

6. A. is the owner of 50 acres of land, the title to one acre of which is defective. B., with knowledge of the defect, agrees to purchase the whole for a certain sum. B., with others, has, at the same time, an independent interest in the one acre, and obtains a decree ordering A. to convey it to him and the others. A. then files a bill for specific performance of the contract with B. *Held*, that B. must pay the whole

of the purchase money upon receiving a clear title to the remaining 49 acres.

Curran v. Little, 250.

7. In a suit for the specific performance of an agreement for the sale of lands, or to set aside a conveyance for fraud, the plaintiff is not of right entitled to an injunction to restrain alienation, unless it is alleged by the bill, and proved that the holder of the land threatens, and intends to convey the lands.

Kerr v. Hillman, 285.

8. In a suit for specific performance where there were infant defendants, the court held that the plaintiff's laches precluded him obtaining relief, but directed an enquiry as to whether it would be beneficial to the infants to affirm or annul the contract. If found beneficial to affirm it the plaintiff might excuse the laches; but, *semble*, all the parties beneficially interested must consent to the enquiry.

Chevelier v. Strong, 320.

9. The vendor and vendee of a mill and water power, (the vendor using the same water for another mill,) disagree in their construction of the contract of sale, as to who had the first right to use the water, there not being enough water for both during the greater part of the year. The court was of opinion that the vendee had the better right to the first use of it, and that the vendor, by using the water and depriving the vendee of the use thereof, committed a breach of the agreement, and was liable in damages, the amount of which the master was directed to ascertain.

Bishop v. Merkley, 335.

10. Where a purchaser objected to the title offered by his vendor, and refused to pay the balance of the purchase money, but remained in possession of the premises, and the vendor brought ejectment to recover them, falsely, denying the payment of part of the purchase money, the purchaser was held entitled to the costs of a suit in equity to restrain the action of ejectment, and compel specific performance, notwithstanding the vendor made a good title when required by the court.

Healey v. Ward, 337.

11. A clause in the conditions of sale that the vendors shall only produce certain title deeds and an abstract of the registers, and that the purchaser shall not be entitled to call for any other proof of title, does not exempt the vendors from shewing otherwise a good title.

The Canada Permanent Building Society v. Wallis, 368.

12. On an agreement for the sale of land, the vendor let the purchasers into possession, but some years afterwards, in consequence of default in payment of the purchase money, the vendor obtained possession by means of ejectment. Subsequently the

purchase money was tendered to the vendor, who refused to accept it, and the purchasers took no steps for eighteen years to enforce their claim, during all which time the vendor remained in possession as owner; the property, during the interval, having increased very much in value. Under these circumstances a bill filed by the purchasers, and subsequently revived by their representatives, was dismissed with costs.

Crawford v. Birdsall, 415.

STOCK.

(SUBSCRIPTION FOR.)

The act (22 Victoria, chapter 122) incorporating the North-west Transit Company, enacted that it should not be lawful for the company to proceed with their operations under the act until £50,000 of the capital stock shall have been subscribed, and ten per cent. shall have been paid thereon. Subsequently, and before £50,000 had been subscribed or the per centage paid thereon, a proposition was made by one C. to certain stockholders in the enterprise that C. should sell a steam vessel belonging to him to the company for £5,000, and that in that event he should become a subscriber to the amount of £50,000 and that the steamer should be paid for by taking her as a payment of 10 per cent. on the £50,000; which was acceded to, and the subscription and purchase made accordingly in compliance with a resolution of the company. *Held*, that this was an evasion of the statute, and an injunction was granted on motion restraining the company from proceeding with any of the operations thereof until the conditions pointed out by statute had been complied with,

Howland v. McNab, 47.

SURETY.

See "Assignment of Mortgage."

TAXES.

(SALE OF LANDS FOR.)

1. Where a person, in order to purchase lands to be sold at sheriff's sale for taxes, consented to representations which he knew to be untrue, and which had the effect of preventing competition, and so was enabled to purchase at less than the value of the land, the sale was declared void.

Foy v. Merrick, 323.

2. Upon a bill filed to set aside a sheriff's deed for land sold for taxes, it was shewn that by an arrangement between several of the parties attending and bidding at such sale, it was agreed that each should be allowed to bid off a whole lot for the amount of taxes due upon it; and others, not parties to this agreement, were prevented from bidding, by reducing the quantity to such a trifle as to be quite useless to the purchaser; under these circumstances the land in question, said to be worth £500, was bid off for £2 12s. The court upon

this state of facts set aside the sale, but without costs, it being shewn that the purchaser was not a party to the combination complained of.

Henry v. Burness, 345.

3. Where at a sale for taxes the sheriff discovers or has reason to believe that any combination has been entered into to prevent a fair competition thereat, his duty is to adjourn the sale.—*Ib.*

4. A sheriff has the means of ascertaining, to a certain extent, the value of land sold for taxes, and is bound to inform himself on the subject. He cannot be heard to say that he is so ignorant of its value, that he cannot tell whether it is worth £2 12s., or £500.—*Ib.*

5. Where at a sale of land for taxes a party became the purchaser of a lot of land at a trifling amount as compared with the value of the property by reason of a combination among some of the persons attending the sale, to prevent competition; and although it was not shewn that the purchaser was any party to such combination, still he acted in a manner so as to prevent competition, the court in setting aside such sale ordered the purchaser to pay the costs of the suit; and the sheriff having been joined as a party defendant, was, under the circumstances, refused his costs.

Davis v. Clark, 358.

TITLE.

(INVESTIGATION OF.)

See "Specific Performance," 4, 11.

(PURCHASER'S NOTICE OF DEFECT IN.)

See "Specific Performance," 6. "Waiver of Title."

TRADE.

(CONTRACT IN RESTRAINT OF.)

See "Chattel Mortgage."

TRUSTS, TRUSTEE AND CESTUI QUE TRUST.

1. A *cestui que* trust of land created a mortgage by an assignment absolute in form for a nominal consideration, but neglected to intimate to the trustee that the transfer was intended to operate as a security only. In fact the lands purported to be conveyed to the trustee, had already been sold and conveyed to the purchaser. The trustee without calling for the production of the assignment by his *cestui que trust*, executed a conveyance by way of quit claim to the original vendor, who conveyed other lots in their stead, absolutely to the assignee of the *cestui que trust*. *Held*, reversing the decree of the Court of Chancery, that the trustee was not under the circumstances answerable for any loss that had

been sustained by the party beneficially interested.

Ford v. Chandler, [in appeal,] 85.

2. The decree of the Court of Chancery in Attorney-General v. Grasett, as reported ante vol. 6, page 485, affirmed.

Attorney-General v. Grasett, (in appeal,) 130.

3. A judgment was recovered against trustees of land held under a conveyance absolute in form, of which no trust had been actually declared. Execution issued on the judgment under which the sheriff sold the trust land, but the purchaser knew that the execution defendants were trustees only. Upon a bill filed by the *cestui que* trust against the trustees and the purchaser at the sheriff's sale, the sale by a sheriff was declared void; the plaintiff decreed to be entitled to the land, and the defendants were ordered to pay the costs of the suit.

Blackburn v. Gummerson, 331.

4. A trustee dealing with his *cestui que* trust is bound to communicate all facts at all material in the transaction; therefore, where a trustee of lands for the payment of debts, paid the debts, without exercising the power of sale for that purpose, and took a release from the *cestuis que* trust to himself, without informing them that he had previously caused a large number of bricks to be manufactured upon the land, the profits of which might have paid a large part of the claim of the trustee against the estate, the release was held void.

Hope v. Beard, 380.

See also "Attorney and Client."
"Executor."
"Mortgage," 2.
"Parol Evidence," 1.
"Vendor and Purchaser," 4.
"Will."

USURY.

See "Mortgage," 7.

VENDOR AND PURCHASER.

1. A tract of land was bought by several parties with a view to laying off a portion thereof into building lots and selling the same to purchasers; for greater facility in doing so the legal estate was vested in one of them as trustee, however, for the several parties interested. Subsequently one of the owners sold out his share, receiving in payment notes of hand made by his vendee and endorsed by two other persons. *Held*, reversing the decree of the Court of Chancery, that the vendor did not, under such circumstances, retain any lien for the purchase money remaining unpaid.

Boulton v. Gillespie, (in appeal,) 228.

2. Where judgment is registered against the vendee of lands prior to the conveyances being executed in pursuance of the contract, the vendor is not entitled to a rescission of the contract in default of payment, but may obtain a decree of foreclosure or sale.

Galt v. Bush, 366.

3. If a vendor conveys land to a purchaser under an agreement that he will execute a mortgage to secure the purchase money, which agreement the vendor neglects to register; and judgments are subsequently registered against the purchaser, they will prevail over the agreement. *Semble.—Ib.*

4. The vendor of lands having taken a mortgage upon them for the purchase money, accepted from the purchaser a transfer of other lands, the price of which he endorsed on the mortgage; and the lands so transferred being subject to incumbrances, the vendor took from the purchasers their bond to discharge them, which having failed to do, the vendor was held entitled to claim under his mortgage against the lands sold by him, the amount of the incumbrances so left unpaid: the rights of no third party having in the meantime intervened.

Maulson v. Moore, 448.

VENDOR'S LIEN.

1. A purchaser of real estate executed to his creditor a mortgage thereon for a balance of unpaid purchase money, but which was not registered until after a judgment recovered against the purchaser had been recovered and registered. *Held*, that the judgment had priority to the mortgage, although the deed to the purchaser had never been registered; and that under such circumstances the vendor did not retain any lien for the unpaid purchase money.

Burgess v. Howell, 37.

2. The lien of a vendor for unpaid purchase money is not waived by the fact of his suing and recovering judgment for the amount, although such recovery is subsequent to another judgment registered against the purchaser.

Flint v. Smith, 339.

See also "Vendor and purchaser," 4.

WAIVER OF TITLE.

Writing a letter apologising for non-payment of purchase money; accepting a release of dower from a person whose title is identical; or, giving a mortgage to secure the payment of the purchase money, are circumstances indicating that the title of the vendor is approved of.

McDonald v. Garrett, 290.

WAY.

(OF NECESSITY TO GRANTEE OVER LAND OF GRANTOR.)

See "Right of Way."
GRANT VIII.

WILL.

(REVOKING AGREEMENT FOR SALE BY.)

A testator directed all the rents and income of his estate to be divided between his widow and children, one share to each of the children, and two to the widow, her heirs and assigns for ever, and proceeded as follows: "I hereby direct that each child on attaining his or her majority, receive his or her share, (after expenses of proper repairs are deducted,) for his or her sole use." *Held*, that this gave the widow an absolute interest in all his estate, and that a subsequent devise over of her share in the event of her dying intestate was repugnant and void; and that the children were entitled to the income only on attaining twenty-one; but, the testator by the same will directed "that no real estate be sold without the unanimous consent and direction of all my executors;" and also gave them power to buy and sell, give and take titles in fee simple in as full a manner as if he were living, and appointed his widow executrix, and F. and H. executors thereof; F. and H. renounced probate, and the widow alone proved the will. *Held*, that the powers conferred by the will were personal, and could not be exercised by the widow alone, and that being personal, they had become extinct, and that the division of the estate having been postponed only for the sake of the powers, that its distribution was accelerated by their extinction. *Held*, also, that the widow under the devises mentioned was put to elect whether she would take under the will, or claim her dower.

Kerr v. Leishman, 435.

See also "Agreement for Sale."

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