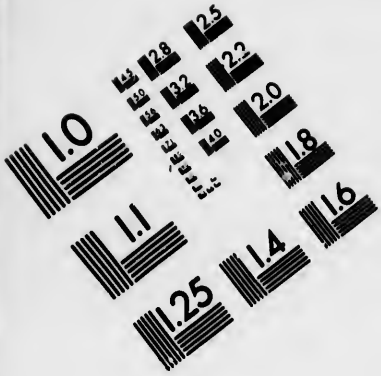

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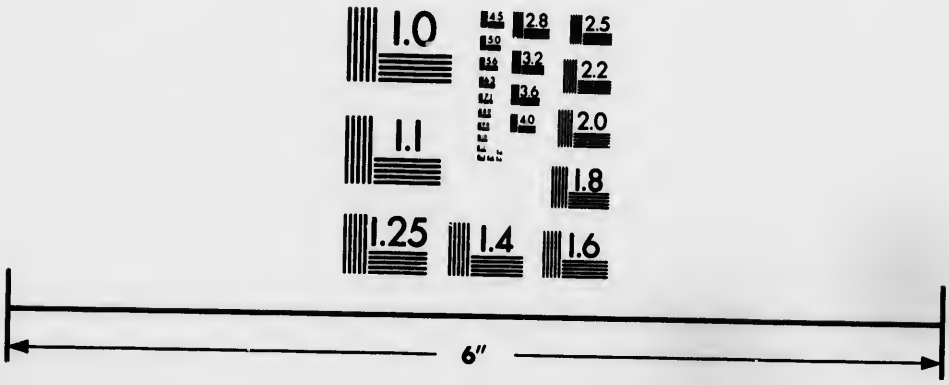

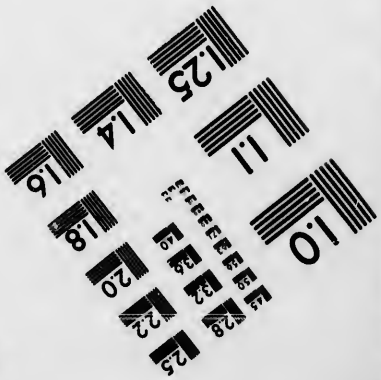

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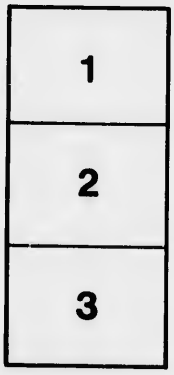

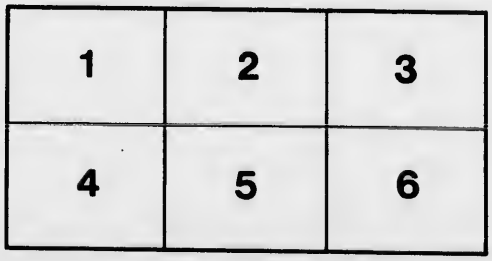

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REPORTS OF CASES

ADJUDGED

IN THE

COURT OF CHANCERY,

OF

UPPER CANADA:

DURING THE YEARS 1853-4.

BY

ALEXANDER GRANT, ESQUIRE,

BARRISTER-AT-LAW.

VOLUME IV.

SECOND EDITION.

TORONTO:

R. CARSWELL, 26 & 28 ADELAIDE ST.

1877.

THE HON. JOHN BEVERLEY ROBINSON, *Chief Justice of Upper Canada.*

" " WILLIAM HUME BLAKE, *Chancellor.*

" " JAMES BUCHANAN MACAULAY, *Chief Justice of the Court of Common Pleas.*

" " ARCHIBALD MCLEAN, *Judge of the Court of Common Pleas.*

" " WILLIAM HENRY DRAPER, *Judge of the Court of Queen's Bench.*

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

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

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

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

" " JOHN ROSS and JOH ALEX. MACDONALD, *Attorney-General.*

" " JOSEPH CURRAN MORRISON and HENRY SMITH, *Solicitor-General.*

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ORDERS OF THE PRIVY COUNCIL,

PASSED

AT THE COURT AT BUCKINGHAM PALACE,

the 13th of June, 1853.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY.

HIS ROYAL HIGHNESS PRINCE ALBERT.

LORD PRESIDENT.	EARL OF ABERDEEN.
LORD STEWART.	EARL OF CLARENDON.
DUKE OF NEWCASTLE.	VICOUNT PALMERSTON.
DUKE OF WELLINGTON.	MR. HERBERT.
LORD CHAMBERLAIN.	SIR JAMES GRAHAM, Bart.

WHEREAS there was this day read at the Board a report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the Committee with a view to greater economy, despatch, and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their Lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in Appeals, and recommending that certain Rules and Regulations therein set forth should henceforth be observed, obeyed, and carried into execution, provided Her Majesty is pleased to approve the same:

HER MAJESTY, having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the Rules and Regulations set forth therein, in the words following, videlicet:—

Appellant, when successful, may recover costs of appeal.

1. That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an Appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree, or order appealed from, shall be entitled to recover the costs of the Appeal from the Respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct.

Transcripts to be sent to Registrar of Privy Council.

II. That the Registrar or other proper officer having the custody of records in any Court or special jurisdiction from which an Appeal is brought to Her Majesty in Council be directed to send by post, with all possible despatch, one certified copy of the transcript record in each cause to the Registrar of Her Majesty's Privy Council, Whitehall; and that all such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from; and that such transcript be accompanied by a correct and complete index of all the papers, documents, and exhibits in the cause; and that the Registrar of the Court appealed from, or other proper officer of such Court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that special care be taken not to allow any document to be set forth more than once in such transcript; and that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registrar or other officer preparing the same.

Transcripts may be printed abroad.

III. That when the record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registrar or other proper officer of the Court from which the Appeal is brought shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal, if any, of the Court appealed from to these copies, with the sanction of the Court.

And that in all cases in which the parties in Appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio, and transmitted, at their expense, to the Registrar of the Privy Council, two of which printed copies shall be certified as above by the officers of the Court appealed from; and in this case no further expense for copying or printing the record will be incurred or allowed in England.

IV. That on the arrival of a written transcript of appeal at the Privy Council Office, Whitehall, the Appellant or the agent of the Appellant prosecuting the same shall be at liberty to call on the Registrar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case, and likewise all such parts thereof as the Respondent or his agent may require, to be printed by Her Majesty's Printer, or by any other printer on the same terms, the Appellant or his agent engaging to pay the cost of preparing a copy for the printer at a rate not exceeding one shilling per brief sheet, and likewise the cost of printing such record or appendix, and that one hundred copies of the same be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fees for solicitors' copies of the transcript, or for drawing the joint appendix, be henceforth allowed, the solicitors on both sides being allowed to have access to the original papers at the Council Office, and to extract or cause to be extracted and copied such parts thereof as are necessary for the preparation of the petition of appeal, at the stationer's charge not exceeding one shilling per brief sheet.

Written transcripts to be printed by Her Majesty's Printer.

V. That a certain time be fixed within which it shall be the duty of the Appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from Her Majesty's colonies and plantations east of the Cape of Good Hope or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad; and that in default of the Appellant or his agent taking effectual steps for the prosecution of the Appeal within such time or times respectively, the Appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council at their Lordships' next sitting.

Transcripts to be printed within a certain time

VI. That whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a

Appeals may be heard in the form of a special case

question of law, the agents of the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same; provided that nothing herein contained shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplification of the matter in dispute, the Registrar of the Privy Council may call the agents of the parties before him, and having heard them, and examined the transcript, may report to the Committee as to the nature of the proceedings.

And HER MAJESTY is further pleased to order, and it is hereby ordered, that the foregoing Rules and Regulations be punctually observed, obeyed, and carried into execution in all Appeals or petitions and complaints in the nature of Appeals brought to Her Majesty, or to Her heirs and successors, in Council, from Her Majesty's colonies and plantations abroad, and from the Channel Islands or the Isle of Man, and from the territories of the East India Company, whether the same be from courts of justice or from special jurisdictions, other than Appeals from Her Majesty's Courts of Vice-Admiralty, to which the said rules are not to be applied.

Whereof the Judges and officers of Her Majesty's Courts of Justice abroad, and the Judges and officers of the Superior Courts of the East India Company, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

WM. L. BATHURST.

A TABLE OF CASES REPORTED IN THIS VOLUME.

Versus is always put after the name of the plaintiff.

A

TABLE

OF

CASES CITED IN THIS VOLUME.

C.

D.

E.

F.

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING IN APRIL, 1853.

GRAHAM v. BURR.

June 25 & 26, 1852, & April 5th, 1853.

Riparian proprietors—Injunction.

The plaintiff and defendant were owners of mills on the same stream, the defendant's being lower down than, and erected before, that of the plaintiff. By the erection of the dam of the defendant, it was alleged that the plaintiff's mill privilege was affected injuriously. Although it was shewn that the plaintiff, in order to work his mill, was compelled to dam back the water so as to overflow lands higher up, the property of the defendant, the title to which he had obtained after the commencement of this suit, the court [Easten V. C. *dissentiente*] held the plaintiff was entitled to an injunction against the defendant, restraining him from damming the water back upon the plaintiff's property.

The bill in this case was filed by *William Graham* against *Rowland Burr*, and stated to the effect that plaintiff being the owner of eighteen acres of Lot No. 31, in the 10th concession of Vaughan, across which the river Humber flowed, began in April 1850, to erect a saw mill, and dig a mill race thereon: that defendant being the owner of Lot 31, in the 9th Concession, had in July 1849 thrown a dam across the river on his premises, the effect of which was to pen back the water upon the mill of plaintiff: that *Burr* had leased his lot to one *McIntosh*, who, after the lease, had raised the dam to a greater height, whereupon plaintiff brought an action at law and obtained judgment therein, upon Statement

1853. Graham v. Burr. which execution had been sued out against *McIntosh* for £111 7s. 5d., and which was returned *nulla bona:* that *Burr* had obtained a surrender of *McIntosh's* interest in the premises, upon which the dam was still allowed to remain, whereby the plaintiff was hindered in the use of his mill by reason of the backwater of such dam.

The bill prayed a perpetual injunction against the defendant and all others the occupiers of the said lot, restraining them from permitting the said dam to remain at its then height or at any such height as might pen or dam back the waters of the said river over and above the usual and natural water marks of the said stream, or prevent the water escaping from the race of the plaintiff's mill. To this bill the defendant put in an answer. The cause having been put at issue and evidence taken, now came on to be heard on the pleadings and evidence, the effect of which sufficiently appears in the judgment of the court.

Argument.

Mr. *McDonald* and Mr. *Charles Jones* for plaintiff, cited, amongst other cases, the Duke of *Devonshire* v. *Elgin, (a) Soltau* v. *De Held, (b)* and *Eden* on injunction 352.

The defendant in person.

April 5th. Judgment.

THE CHANCELLOR.—The plaintiff and defendant are mill owners on the river Humber. The plaintiff's mill is situated higher up the stream than the defendants, and his complaint is that the defendant's dam pens back the water to an extent which impedes the working of his machinery, and materially injures his mill site. He prays that the continuance of this nuisance may be prevented by perpetual injunction.

The jurisdiction is not denied; it is of very ancient

(a) 2 L. J. N. S. 495, S. C. 7 Eng. R. 39 (b) 16 Jur. 326.

1853.

Graham v. Burr.

date, (*a*) although its exercise has become much more frequent in modern times; (*b*) but several objections are made to its application in this particular case. It is said—first, that the plaintiff's title must be tried at law;—secondly, that the evidence before us fails to establish a case for equitable relief;—lastly, that the plaintiff is himself a wrong-doer, and on that ground disentitled to relief in this court.

The plaintiff answers the first objection by the assertion that he has established his title at law; and, as proof of that position, he produces the exemplification of a judgment obtained by him against one *McIntosh*, who occupied the premises in question when the dam was first constructed as tenant to the defendant, with a right to purchase. Upon the trial of that action, the plaintiff's damages were assessed at £60. As to the admissibility of this judgment, *Blakemore* v. *The Glamorganshire Canal Company* (*c*) and *Philips* on evidence, page 11, were cited.

Judgment.

In cases of this kind, where the jurisdiction which this court exercises is ancillary, it is certainly the practice, as a general rule, to require the plaintiff to establish his title at law. But that, although a general is not an universal rule, it is competent to this court, if it see fit, (*d*) to decree a perpetual injunction, without a trial at law. It is matter of discretion.

There are some obvious reasons why the practice which formally prevailed in England on this subject, should not be pursued strictly in this court. In the first place, there are many cases of this class, in which this court is obliged to proceed without having the

(*a*) Bush v. Field, Cary 129; Finch v. Resbridger, 2 Ver. 390; Bush v. Western, Pre. cha. 530.

(*b*) Dewhirst v. Wrigley, C. P. Coop. 319; Elmhurst v. Spencer, 2 Mc. & G, 45; Rochdale Canal Co. v. King, 2 Sim. N. S. 78; Dawson v. Paver, 5 Har. 415; Gardner v. The Village of Newburgh, 2 J. C. R. 162, Ib. 272 & 3.

(*c*) 2 C. M. & R., 133.

(*d*) Farwell v. Wallbridge, 2 Grant 341, and cases cited; v. The Yarmouth and Norwich Rail Road Co., 3 Rail. Ca., 531.

1853. Graham v. Burr.

legal question determined by the proper tribunal; because the right of suitors in this court to have the opinion of a court of law is denied. Secondly, the necessity of having the legal title first established at law has been abolished by a recent statute of the Imperial Legislature. (*a*) Lastly, one principle ground of the practice which formerly prevailed was the imperfect mode of taking evidence previous to the recent statute. That reason has no applicotion here; all the witnesses in the case were examined before the court.

Without determining the sufficiency of any of these answers, I am quite satisfied that this objection affords no ground for refusing relief in this particular case. The defendant makes no objection of this sort to the plaintiff's right to recover; on the contrary, his answer closes with this passage, "defendant is willing and begs that a competent person or competent persons be appointed by this court to survey, lay out and place monuments marking the height, width and depth this defendant's dam should and shall be, and the defendant shall abide faithfully by the said decision."

Judgment.

Again, the evidence adduced by the parties appearing to be insufficient, it was suggested that a new survey should be made by a person to be appointed by the court. This proposition was agreed to by both parties, and an order was drawn up, by consent, by which Mr. *Dennis* was directed to take the levels of the stream in its then state, and afterwards to cause the dams of both parties to be removed, so as to ascertain conclusively the effect of the defendant's dam. This order was complied with. Mr. *Dennis* has been examined before us as a witness; and, if the evidence be satisfactory, I am of opinion that it is our duty to dispose of this case now. It was competent to these parties to submit the question of nuisance to this court; they did so submit it, and the evidence before us is much

(*a*) 15 & 16 Vic. Ch. 86, Sec. 62.

more satisfactory than it is possible, in ordinary cases, to submit to a jury.

1853.

Graham v. Burr.

Lord Cottenham has discussed the law upon this subject in several of his most elaborate judgments; and in one of them, *Bacon* v. *Jones* (*a*), there are some observations very pertinent, as it seems to me, to the present case, "when the cause comes to a hearing," he observes, "the court has also a large latitude left it, and I am far from saying that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the right, and of the evidence by which it is established,—these and other circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties." And in *Cory* v. *The Yarmouth & Norwich Railway Co.*, Sir *James Wigram* says, "If, on the other hand, the court is clearly with him, the court may, in the exercise of its discretion, grant the injunction in the first instance, there being no doubt whatever, although the question is a legal one, and though a court of law is the proper tribunal before which such question should be tried, that a court of equity may decide the legal question if it thinks fit."

Judgment.

I am satisfied, therefore—subject to the question as to the sufficiency of the evidence—that this case ought to be disposed of here. Before proceeding to examine the evidence, it will be convenient to advert briefly to the state of the law upon this subject, which, at one

(*a*) 4 M. & C. 437.

1853. Graham v. Burr.

period, would seem to have been greatly misunderstood. It is said in 1 Wm. Saund. 114 a. n. 9, that "a mistaken motion appears to have prevailed for some time that the right to flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it, and thereby gain a good title against all the world excluding the proprietor of the land below, who may thereby be deprived of the benefit of the water, unless he has already applied the stream to some useful purpose." That doctrine is stated very plainly, as it seems to me, by Sir *William Blackstone (a)*, in his commentaries and also by several judges of acknowledged learning. *(b)* *Lord Denman*, indeed, considers that the passage from *Blackstone* and the dicta to which I have adverted, have been misconceived; but it is very difficult to reconcile the language to be found in the commentaries, and in the reported cases with the law as it is at present understood. In his chapter "on title to things possessed by occupancy," *Blackstone* says, "Thus too the benefit of the elements, the light the air, and the water, can only be appropriated by occupancy. * * * * * * If a stream be unoccupied, I may erect a mill thereon and detain the water; yet not so as to injure my neighbor's *prior* mill or his meadow, *for he hath by his first occupancy acquired a property in the current.*" And in *Liggins* v. *Inge*, Chief Justice *Tindal* says, "Water flowing in a stream, it is well settled by the law of England is *publici juris*. * * * * And, by the law of England, the person who first appropriates any part of this water flowing through his land to his own use has the right to the use of so much as he then appropriates, against any other." *Bayley J.* says, "Flowing water is originally *publici juris* So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he ap-

Judgment.

(a) 2 Blac. Com. pp. 14, 15, 402.

(b) See the judgment of Le Blanc, Bealey v. Shaw 6 East 208; of Holroyd, Saunder v. Newman, 1 B. & Al. 258; of Bayley, Williams v. Morland, 2 B & C. 910; of C. J. Tindal, Liggins v. Inge, 7 Bing. 682.

propriates it." And in *Bealey* v. *Shaw* Mr. Justice *Le Blanc* says, "The true rule is, that after the erection of works, and the appropriation by the owner of land of a certain quantity of the water flowing over it, a proprietor of other land afterwards takes what remains, the first owner, *however he might, before such second appropriation, have taken to himself so much more*, cannot do so afterwards." These passages do not seem to me to admit of the construction which has been placed upon them by Lord *Denman*. But, however that may be, this doctrine, if it did prevail, is plainly erroneous; it confounds the corporal thing, water, with the incorporeal right to have it flow in its accustomed channel; it treats the appropriation of a given portion of water from a stream as an appropriation of the current itself, which it plainly is not; for running water, from its very nature, is incapable of occupancy; and it assumes the absence of all ownership, where there had been an appropriation by operation of law for the common benefit of all riparian proprietors.

1853.

Graham v. Hurr.

Judgment.

It is now well settled that every riparian proprietor is entitled to the natural flow of the waters, without diminution or obstruction. Mere appropriation confers no right. The language of Sir *John Leach* in *Wright* v. *Howard*, (*a*) has been cited by Lord *Tenterden* as furnishing a clear and comprehensive statement of the law upon this subject. "The right to the use of water," he says, "rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor

(*a*) 1 S. & S. 203.

1853.

Graham v. Burr.

throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors effected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of grant."

Judgment.

The nature and extent of this right have not been settled as yet with precision. In *Acton* v. *Blundell(a)* Chief Justice *Tindal*, delivering the judgment of the Exchequer Chamber, appears to treat it as an easement acquired by each riparian proprietor, through the assent and agreement of all the others, implied from immemorial usage. But in *Shury* v. *Piggott (b) Whitelock J.* says, "There is a difference between a way, a common and a water-course. *Bracton*, lib. 4, fol. 221-2, calls them *servitutes procdiales*, those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity, because the greater benefit shall drown the less. *A water-course doth not begin by prescription, nor yet by assent; but the same doth begin ex jure naturæ, having taken this course naturally*, and cannot be averted." This opinion, in which the Chief Justice and the other judges concur, appears to me to assign the true ground and origin of the law; it has been adopted, I believe, in most of the States in the American Union, as it certainly has by two of their most eminent jurists, Mr. Chancellor *Kent (c)* and Mr. Justice *Story*; *(d)* and it has been recently approved by the Court of Exchequer in England. *(e)*.

(a) 12 M. & W. 348.
(b) 3 Bulst. 339, and see Browne v. Best, 1 Wil. 174.
(c) 3 Kent Com. 434.
(d) Tyler v. Wilkinson, 4 Mason U. S. Rep. 397
(e) Wood v. Waud, 3 Exch. 775.

1853.
Graham v. Burr.

The proposition that every riparian proprietor is entitled to have the stream flow in its accustomed manner, without obstruction or diminution, involves two other propositions;—first, that each proprietor must have a right to apply the stream to those useful purposes for which it was by nature intended;—secondly, that no proprietor can have a right to apply it so as to produce injury to any other. To deny the first would be to subvert the principle upon which the law rests,—would be, in effect, to deny the right itself. It is an incident annexed to the land by operation of law, or, as Mr. Justice *Whitelock* has expressed it, *ex jure naturæ*, because nature plainly intended the stream for the common benefit of all; but, if there be no right to apply the stream to beneficial purposes, there is no benefit, and the foundation of the rule fails. To deny the second would be to negative the existence of the *common* right. If all be entitled to have the stream flow in its accustomed manner, for their *common* benefit, it is obvious that the injurious application of it by any is necessarily excluded. Every mode of enjoyment, indeed, will be attended with some diminution of the quantity of the water, or some variation of the current, but no mode of enjoyment, no diminution of the quantity of water, no retardation or acceleration of the current, is regarded as an infringement of the common right, unless attended with material injury to some other proprietor.

Judgment.

Such would seem to have been the rule of the civil law. *Vinnius*, in his comment on the 2nd inst.,——says, "*Item aqua profluens, hoc est acqua jugis, quæ vel ab imbribus collecta, vel a venis terræ scanturiens perpetuum fluxum agit, flumenque aut rivum perennem facit: Postremo propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis amnium est harum rerum usus, ad quem natura comparatæ sunt, tum si quid earum rerum per naturam occupari potest, id*

1853. Graham v. Burr.

atinens occupantis fit, quatenus ea occupatione usus ille promiscuus non læditur." And in the digest (*a*) we find this passage, *Similiter sentiunt Sabinus et Cassius. Nam iidem aiunt, aquam pluviam in suo retinere, vel super fluentem ex vicini in suam derivare, dum opus in alieni non fiat, omnibus jus esse. Prodesse enim sibi unusquisque, dum alii non nocet, non prohibetur; nec quemquam hoc nomine teneri.*"

Judgment.

But it is said by Chief Baron *Pollock*, in the recent case of *Wood* v. *Waud*, that running water may be used for manufacturing purposes in the United States of America to an extent not permitted by the law of England, which allows an action to be maintained, he says, where a mode of enjoyment is adopted quite contrary to the ordinary one, by which the water is diverted into a reservoir, and there delayed for the purpose of manufacture. I am not satisfied that there is any ground for that distinction. In neither country will the use of running water for ordinary domestic purposes, constitute a good ground of action, although the quantity of water be seriously diminished, and positive injury thereby produced, *æqua profluens ad lavandum et potandum unicuique jure naturali concessa*; but in both countries its application to manufacturing purposes will constitute, I apprehend, a good ground of action where that mode of enjoyment materially affects other proprietors in their application of the stream.

Williams v. *Morland*, to which I have already referred, is sometimes cited as an authority for the proposition that no riparian proprietor can maintain an action for the disturbance of his right, unless he have previously appropriated the water to some useful purpose. The case is not an authority for that position; but unquestionably there are dicta of all the learned judges who determined it to that effect. Mr. Justice *Littledale*, for instance, observes, "the mere right to

(*a*) lib. 39, tit. 3.

1853.

Graham v. Burr.

use the water *does not give a praty such a property in the new water* constantly coming as to make the diversion or obstruction of the water *per se* give him any right of action." This passage obviously confounds the corporeal substance with the incorporeal right. Strictly speaking, no proprietor has any property in the water itself. In that sense it is *publici juris*. The action is not for the abstraction of water in which a property had been acquired, but for the disturbance of the incorporeal right; and it would be contrary to all principle if such an action could not be maintained without proof of previous appropriation. Mr. Sergeant *Williams*, in his note to *Mellor* v. *Spateman* (*a*), says, "wherever any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for the invasion of the right, without proof of any specific injury." And the judgment of *Buller J.* in *Hobson* v. *Todd*(*b*), is to the same effect. In *Mason* v. *Hill*, Lord *Denman* repudiates the doctrine attributed to several of the judges in *Williams* v. *Morland*, and *Bower* v. *Hill*(*c*) in the Common Pleas, goes far to establish the true rule. Chief Justice *Tindal* there says, "But independently of this narrow ground of decision, we think the erection of the tunnel is in the nature of, and, until removed is to be considered as, a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he received no immediate damage thereby. The right of the plaintiff to the way (a navigable water-course) is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which the revisioner is allowed to bring his action for an obstruction apparently permanent, to lights and other easements which belong to the premises. *The plaintiff's premises would sell for*

Judgment.

(*a*) 1 Wms. Saund. 346, C. (*b*) 4 T. R. 7. (*c*) 1 Bing. N. S. 549.

1853. Graham v. Burr.

less whilst the tunnel is in existence if now put up for sale." Applying these principles to the case now before us, I am of opinion that the plaintiff has established his right to equitable relief. That the water of the stream was penned back upon the plaintiff's land to an extent very injurious, is now established beyond all doubt. It is shewn clearly that there is a fall of about eleven inches in the plaintiff's tail race. But when Mr. *Dennis* examined the premises, before any obstruction had been removed, he found the water in the bed of the river, opposite to the mouth of the tail race, standing at a level three inches higher than the upper surface of the plaintiff's mill-apron; that is, he found that there was a fall from the river to the mill, instead of from the mill to the river. But when the obstructions had been partially removed, the water fell at the concession line eight inches, and not only the mill apron, but half the tail race, was quite free from water.

Judgment.

It is said, however, that this injury was not occasioned by the defendant's works, but by cortain accumulations of drift wood in the stream which constituted a sort of natural dam. Mr. *Dennis's* opinion is quite opposed to this hypothesis. He says, in his first report, "on lowering the defendant's dam fourteen inches and opening three drifts of logs and drift wood which had accumulated between the bridge and the said dam, the water fell at the said bridge eight inches. It is my opinion that, were the whole of the said dam removed, and the river between where it stands and the bridge referred to cleared out, the water at the latter point, at its ordinary flow, would stand still four inches, certainly two inches lower, *making the practical effect of the defendant's dam* to be that the water at the concession line stands ten inches higher than would be shewn by the natural flow of the stream at that point."

But it is said that the facts established by Mr. *Dennis's* survey would lead to a conclusion different

from that which he has drawn, and it is argued that a mere speculative opinion is insufficient, at least under such circumstances, to warrant a decree. This was not an objection taken for the first time at the hearing; it constituted the defence in the action at law, and much of the evidence in this court tended the same way. It is much to be regretted, therefore, that the plaintiff should have failed to direct Mr. *Dennis's* attention to this point, which, had it been suggested, might have been set at rest by the first survey. Had the drifts been removed before the dam, Mr. *Dennis* would have had the means of determining conclusively the effect of the dam taken singly. But unfortunately this was not suggested. The dam was first removed, and it became impossible, consequently, to ascertain the effect of the dam, taken alone, as a matter of fact.

1853. Graham v. Burr. Judgment.

The force of this objection was felt by the court; and, for the purpose of removing the supposed difficulty, a second examination was directed. I cannot say that this further inquiry seems to me to have been absolutely necessary. Facts had been clearly ascertained, quite sufficient to justify the conclusion at which Mr. *Dennis* had arrived. For previous to the removal of either drifts or dam, he had required the defendant to set his saw mill in operation, which was found to lower the water in the pond by two inches and a half, and at the bridge, by an inch and a quarter. Now these facts demonstrate very clearly, as it seems to me, that the defendants dam had an effect over and above that caused by the drifts; that it penned back the water to a higher level than would have been attained, had the drifts been the only obstacles; were it otherwise, the lowering of the water in the mill pond, before the drifts had been removed, would not have produced any affect at the bridge, a point higher up the stream than the drifts; but we find that a change of two and a half inches in the pond, did in fact produce a change of one inch and a quarter at the bridge; to that extent,

1853

Graham v. Burr.

therefore, the injury complained of must have been the effect of the dam and not of the drifts. It is true, that the subsequent lowering of the defendant's dam to the extent of nine inches failed to produce any perceptible effect at the bridge; but that fact, instead of weakening, greatly strengthens the argument in favor of the plaintiff; so far as each obstacle was sufficient of itself, to produce the given result, to that extent the removal of one only, must have been necessarily without effect; and *e converso*, so far as the removal of one only, did produce a change to that extent, such one must have been the efficient cause of the injury which its removal remedied.

Judgment.

But the further enquiry, if not absolutely necessary, was, under the circumstances, expedient, and would seem quite satisfactory. Mr. *Dennis*, having reconsidered the whole matter, reiterates his former opinion; and it seems to me that the substantial correctness of that opinion has been clearly demonstrated. It had been ascertained by the first survey, that removing the drifts, and lowering the defendant's dam fourteen inches, caused the water in the plaintiff's tail race to subside eight inches, and left his mill-apron and one half of the race free from water. This experiment as I before observed, was considered inconclusive, because it failed to determine whether this subsidence was attributable to the removal of the drifts or the reduction of the dam. But the further inquiry has quite removed that difficulty, for in the interval between the surveys the defendant's dam was reconstructed, by which means Mr. *Dennis* had been enabled to determine its effect, as a matter of fact, with perfect accuracy. It is now ascertained beyond doubt, that the defendant's new dam raises the water to nearly the old height, the level of the river at the plaintiff's tail race being at the time of the last survey one inch higher than the upper surface of his mill-apron. As a matter of fact, therefore, it can no longer be denied that the defendant's

dam does throw the water back upon the plaintiff to the extent of about nine inches. 1853. Graham v. Burr.

But it is said that the evidence still fails to make out a case for equitable relief. Mr. *Dennis* reports that the plaintiff's water privilege, though sufficient for the purpose of light machinery, as a cloth factory, for instance, is insufficient to work a saw mill, at least with advantage; and upon this evidence, it is argued that the plaintiff cannot come here to be protected in the enjoyment of a saw mill which his water power is insufficient to work; because, to entitle himself to equitable relief, he must show a substantial injury done to him in the application of the water to some useful purpose, which cannot be true when the attempt has been as in the present instance, to apply it to an impracticable purpose. Judgment

There are dicta in some of the cases particularly in the *Attorney General* v. *Nichol*, *(a)* which appear to support this objection to some extent. Perhaps the observations to which I refer should be confined to interlocutory injunctions *(b)*. But if those dicta are to be extended to applications for perpetual injunctions, at the hearing, where the legal right has been ascertained, there is great difficulty in reconciling them with principle, even when confined to the least favourable cases,—where no injury exists of the kind complained of in the present instance. In such cases, even, which are certainly much less favorable than the present, it is difficult to discover why equitable relief should be refused. Where rights of property (and such would seem to be the light in which easements of this class should be regarded,) are infringed, and where the infringment is of a permanent character, producing a constantly recurring grievance which cannot be adequately remedied except by a perpetual injunction, in such cases there cannot be a doubt, I apprehend, that

(a) 16 Ves. 338; and see Wood v. Sutcliffe, 16 Jur. 75; S.C. 2 S.N.S. 163

(b) Wynstanley v. Ley, 2 Swan. 333.

1853.

Graham v. Burr.

the court, as a general rule, will grant equitable relief. If such be the general rule, why should rights of this class, which our law both recognises and protects, constitute an exception. At common law, a nuisance, by act of commission, was remedied by an assize of nuisance, in which mode of proceeding the plaintiff was not only entitled to damages for the i y done, but to the abatement of the nuisance also *(a)*. And although the writ of assize of nuisance has given place to the action on the case, still a nuisance of this sort may even now be abated by the plaintiff himself *(b)*. Again, a reversioner, who cannot sustain any present damage, is permitted to maintain an action for the protection of his right; and, where the nuisance is continued after a first verdict, substantial damages may be recovered. In *Shadwell* v. *Hutchison (c)*, Sir *Launcelot Shadwell*, after having brought a previous action, as reversioner, against the defendant, for darkening an ancient window, in which he recovered one shilling damages, brought this second action for the continuance of the same nuisanse, and recovered £100 damages. This verdict the court refused to set aside. Now if courts of common law properly permit action after action to be maintained for injuries of this sort, and if verdicts for substantial damages are properly upheld, although no actual damage has been sustained, for the purpose of indirectly securing to the plaintiff the specific enjoyment of his right, I am quite unable to understand why this court, which can attain the same object directly, and by a single suit, should refuse relief.

Judgment.

But it is not necessary to determine the abstract point now. This is not a case of the kind supposed. The present complainant is the proprietor of a mill privilege, which is materially injured, as he has alleged and proved, by the nuisance of which he complains. Now, were that all, it would not be a defence, in my

(*a*) Vin. Ab. tit. "Nuisance," H. & J.

(*b*) Raikes v Townsend, 2 Smith Rep. 9: The Earl of Lonsdale v. Nelson. 2 B. & C. 302.

(*c*) 2 B. & Adol. 97.

opinion, to an application for equitable relief, under such circumstances that the water had not been applied to any useful purpose. A water privilege is a valuable property in itself,—more valuable frequently than the soil to which it is annexed. But, obviously, its value may be for the time lessened, or even wholly destroyed by such a nuisance as is here complained of, which, while it lasts, is something more than a mere prospective injury to the right when called into exercise. The very subject is for the time destroyed;—the water privilege, for the moment, ceases to exist, and the present value of the property, as a necessary consequence, is proportionally diminished; for, as there is a substantial difference between an actually existent water power and one which is to be called into being by a course of litigation, it follows that there will be a substantial difference in the price also. Now, if the defendant's mill-dam be such a nuisance,—if it be productive of material injury to the plaintiff's water privilege,—if it deprives him of the enjoyment of his legal rights, and depreciates the present value of his property, (and I am of opinion that all this has been satisfactorily established),—then, it will not be denied, I think, that for such a wrong there ought to be, somewhere, an adequate remedy; and it is equally clear, I apprehend, that the common law remedy is altogether inadequate. The power of bringing action after action, is not an adequate remedy. The necessity for such repeated litigation is, in itself, an intolerable evil, and affords sufficient ground for equitable relief. But the common law remedy is plainly inadequate, in other respects, to the ends of justice. It cannot wrest from the defendant that of which he illegally retains possession; it cannot secure the plaintiff in the specific enjoyment of his rights, nor can it restore his property to its real value. In all these respects, this court and this court alone, has the means of doing complete justice, because that cannot be accomplished otherwise than by the protection of the right in specie; and I am of opinion, therefore,

1852.

Graham v. Burr.

Judgment.

1853.

Graham v. Burr.

that the plaintiff would have been entitled to a decree although no attempt had been made to apply the water power to any useful purpose. (*a*) But where, as in the present case, such an attempt has been made and prevented by the illegal act of the defendant, the right to equitable relief appears to me to be free from doubt.

The last grounds of defence fails altogether upon the evidence. The defendant has not proved his title to Lot 33; indeed, neither is that fact, nor the defence which rests upon it, in issue in the cause, for the allegation is that the defendant's title accrued after answer filed, and no amendment has been made. (*b*) The evidence is materially defective in other respects.

Judgment.

Mr. *Dennis* disproves the existence of any mill-site on Lot 33; and there is not enough to show that the injury, if any exist, would sustain an action. The facts go far, moreover, to establish the plaintiff's right to raise the water on Lot 33 to the extent of one foot. Upon the whole, apart from the fundamental difficulty to which I have adverted, and assuming that this defence would have been available, upon proper proof, (to which as at present advised, I am not prepared to assent), it ought not, in my opinion, to prevail in the present case. If there be such an equity as is suggested, the circumstances of the present case are not such as to warrant us in giving effect to it by way of defence. The defendant, if he be entitled to equitable relief, must file a bill for the purpose.

ESTEN, V. C.—The plaintiff and defendant are two riparian proprietors on the River Humber, the owners of mills; and the bill is to restrain the defendant from backing the water of the river upon the plaintiff's mill, whereby, as is alleged, its operation is impeded. The defendant erected his mills some time before the

(*a*) The North Union Railway Company v. The Bolton and Preston Railway Company, 3 Rail. Ca. 355.

(*b*) Stamps v. The Birmingham, Wolverhampton and Stone Valley Railway Company, 6 Railway Cases 123.

plaintiff erected his mill, and while the land, now owned by the plaintiff, belonged to one *Burgess*, who did not complain of this defendant's proceedings.—*Graham* however having purchased about eighteen acres of *Burgess* bordering upon the stream, erected a saw-mill upon it, and has instituted this suit. The only mill that the plaintiff has is a saw-mill, and the sole object of the suit is to obviate injury to a mill of this description. The facts of this case, so far as the evidence extends are free from doubt. It is quite clear that the defendant *Burr* backs the water upon *Graham* to the extent of about ten inches, and that *Graham* backs the water upon the lot above him—namely, Lot 33, to three times that extent and upwards, or about two feet six inches or more. This lot, when *Graham* erected his mill, belonged to one *Cunningham*, and it continued his property at the filing of the bill and the putting in of the answer; but it is stated that five days after this latter period the defendant purchased this lot of *Cunningham*, and that he is now the owner of it. The answer contains an allegation that the plaintiff backed the water of the river upon the defendant's property, and that if the water there were reduced to its proper level, the plaintiff's sawmill would be wholly useless. This allegation cannot apply to the purchase by *Burr* from *Cunningham* which I have mentioned, because it was not completed until afterwards. It is said, indeed, that *Burr* had then a lease of two acres of this lot, but this is not poved. The defendant, however, entered into evidence on this point, and the plaintiff endeavoured to prove an arrangement with *Cunningham* entitling him to back water on Lot 33 to the extent of one foot, which was only material with respect to this matter. The case also was argued at considerable length on this ground. I think therefore that the defendant should be let in to prove his contract and deed as to Lot 33, and it becomes necessary therefore to view the case with reference to those possible facts. With regard to the privilege of raising the

Judgment.

1853

Graham v. Burr.

water a foot on Lot 33, I think it proved that the elder *Cunningham*, when the owner of the lot, granted that privilege to *Graham*, and if *Graham* had proceeded to build his mill on the strength of it without any interference on the part of *Cunningham*, he might be bound, and *Burr* claiming under him, if with notice, might also be bound. But it appears clearly that this license was revoked before the mill or dam was built. It was purely voluntary. It is not suggested that any consideration was given for it, and the *Cunninghams* say that they expected that some compensation would have been made for it, and some agreement concluded about it; but nothing of this sort ever occurred. It does not appear whether the land had been purchased when the revocation took place. *John Cunningham's* evidence and his wife's are at variance upon this point. If it appeared that the land had then been purchased, it might be contended that *John Cunningham* was bound: but for this purpose it must clearly appear that he knew when he granted the license, or before *Graham* purchased his land, that the land was intended to be purchased, and so permitted *Graham* to act upon his promise and place himself in a situation in which he would not otherwise have placed himself. This does not appear. Further inquiry may perhaps be proper under these circumstances. For the present, this matter must be laid out of the case.

Judgment.

The bill, as already observed, seeks to restrain the defendant from backing the water of the river upon the plaintiff's saw-mill so as to impede its operation; in other words, to prevent the infraction of a legal right; in which the court acts only *in subsidium* of the legal right, which ought, therefore, in the first instance to be established at law. The plaintiff did in the year 1851 bring an action against one *McIntosh*, who was then the tenant of *Burr*, and recovered a verdict and about £60 damages. This was while the plaintiff's mill was building, and the injury, to which the damages

were addressed, appears to have arisen from the plaintiff's inability, owing to the obstruction, to complete his mill. It is contended by the learned counsel for the plaintiff, that *Burr* was bound by this verdict. The authorities cited did not support this proposition in its full extent. But, without entering into this question, we may observe that the circumstances are so altered since that trial, that the right which at present exists, if any, was not in question on that occasion. It is then said, however, that the defendant is precluded from insisting on a trial at law by a submission in his answer, and by his agreement to refer the matter to Mr. *Dennis*. I very much question whether the defendant intended by these acts to waive any right that he had, and whether to consider them as producing that effect, is not to press them beyond the limits of justice and right. However, I think the defendant was not unwilling to refer the question entirely to this court without requiring the intervention of a jury. It is absurd, however, to suppose that anything was referred to Mr. *Dennis* but the solution of certain questions of fact on scientific principles. He was not to stand in the place of a jury, and to determine the whole question of nusiance or no nuisance. This duty a jury performs under the direction of the judge, who expounds the law on the subject to them. Even if the parties or either of them had so intended, the court would not have delegated its authority to any private individual; and nothing which has occurred will prevent the court, should it seem necessary, from ordering a trial at law for the purpose of establishing the right. It cannot be supposed that this court will be induced by the submission of parties to grant its injunction for the protection of an alleged legal right, when it is unable to ascertain whether any such right exists at all. It would be then placed in the ridiculous position of protecting by its injunction a supposed legal right, which perhaps, upon subsequent investigation before a court of law, might appear to have no existence. But, whatever the parties intended,

1853.
Graham v. Burr.
Judgment.

1853.

Graham v. Burr.

or this court has directed, Mr. *Dennis*, remaining within what I consider the due bounds of his authority, has determined nothing, having merely reported certain facts to the court ascertained through the application of scientific principles, and, when asked, expressed his opinion upon one or two points, upon which his opinion was desired by the court. One opinion expressed by him is, that the plaintiff has at all events upon his land sufficient water-power without committing any wrong to any one to drive the machinery proper for a woollen factory or other light machinery of that nature; and it has been contended by the plaintiff that, supposing him to have no saw-mill privilege whatever, he is nevertheless entitled to the remedy which he seeks, because he has sufficient power for a different purpose. The plaintiff suggests this proposition—namely, that a riparian owner having no mill whatever upon his land, the water only being backed upon his land a few inches so as to do him no sensible injury, has nevertheless a right to the preventive interference of the court to the damage and perhaps the ruin of the proprietor below him, merely because he may choose perhaps one day to erect a woollen factory upon his land, the injunction not being necessary for the preservation of his privilege until he should think fit to make use of it, because that could be effected by an action brought once in twenty years. From this proposition I wholly dissent. Nothing can justify the interference by injunction—having the effect perhaps of rendering useless the labor and expenditure of years, and of stopping a trade or manufacture—but the most absolute necessity. The plaintiff, upon whose land the water is only raised a few inches, doing him no sensible injury, ask the court to stop the trade and business of the man below him, perhaps to his ruin, merely because he may possibly some day erect a mill. The answer of the court to this application, in my judgment, ought to be, that when he had erected his mill, or was prevented from doing so by the acts of the defendant, it would be time

Judgment.

to protect him; that so long as he abstained from making use of the water himself he should not prevent his neighbor below him from using it, provided it did him no damage; that, if it were necessary to interfere in the way proposed for the preservation of his right until he wished to use it, the court would not withhold its assistance; but this was not the case, because an action at law once in twenty years would effectually preserve his right, while it permitted the proprietor below to use the water which he did not require. To grant an injunction to such a person seems to me contrary to every principle upon which the court exercises this branch of its jurisdiction. Wanting that absolute necessity, which alone can justify it, such an exercise of power seems to be arbitrary and oppressive. The application involves a deceit also, for it is in fact an attempt to protect a saw-mill, not entitled to protection, under colour of protecting a woollen factory, which has no existence. It is not pretended that the plaintiff has ever built or attempted to build a woollen or other factory, or to convert his saw-mill to that use. His bill is solely for the protection of his saw-mill.

1853.
Graham v. Burr.
Judgment.

Supposing then no mill on the plaintiff's land, and that the only injury he sustains from the defendant's proceedings is, that the water is backed or raised upon his land ten inches, doing it no appreciable damage, will such a case call for the interference of this court by injunction? I think not. It may be conceded that the plaintiff could maintain an action for this tort, because he may desire some day to erect a woollen factory on his property, to which the raising of the water would be injurious, and the defendant might otherwise through twenty years' enjoyment acquire the right so to raise the water *(a)*.

But the sole object of this litigation would be the preservation of the right, for which an action once in

(a) See Wood v. Waud, 3 Exch. Rep.

1853. Graham v. Burr.

twenty years is sufficient. Actions brought more frequently would be unnecessary and unreasonable; and if a party were so litigious as to bring them, he could expect no assistance from this court, which would leave him to his legal remedy The injunction being unnecessary for any proper purpose, would be oppressive and unjust. I utterly disclaim the notion that this court would guard this right by injunction so as to enable the party to extort money from the man below him; in other words, that this court would countenance any one in saying to his neighbor below him, "I do not want to make use of the water myself, and your raising the water on my land does me no real injury; nevertheless, I will make you pay for the privilege." The case of *The Rochdale Canal Company* v. *King*, cited by the plaintiff's council, was very different. There the canal company had built their canal at their own expense, under two acts of parliament, which jealously protected their right to the water, permitting the use of it to the mill owners for one purpose only. These acts, and all the provisions they contained for protecting the rights of the company and limiting the the use of the water by other persons, formed a contract between the company and the public, and any breach of these provisions, any use or abstraction of the water for other purposes than those specified, was a violation of this contract; besides, if one mill owner had a right to abstract the water for one purpose, he and all other mill owners could abstract it for that or any other purpose to the irreparable damage of the company, who, if they were willing to part with the water for any purpose, had a perfect right under such circumstances to demand some compensation for its use. On this principle *Lord Cranworth* would have thought it right to grant the injunction in the case cited, expressly however distinguishing it from the case of nuisance, which this is, and in which he lays it down, that when the injury is inappreciably minute, the party is entitled to what the assertion of the legal right will

Judgment.

1853.

Graham v. Burr.

give him, and to nothing more. If therefore we are to suppose that the plaintiff has no mill on his property, and that the only effect of the defendant's dam is to raise the water ten inches on the bank where his land is, which for aught that appears, may be attended with no sensible damage to his property, I do not think him entitled to an injunction, although he may be able to maintain an action for the injury, such as it is. That it does not follow that because a party would recover at law that he is entitled to an injunction in equity, is laid down in many cases, amongst which I may instance—*Attorney General* v. *Nichol*, *Wynstanley* v. *Lee*, and *Soltau* v. *DeHeld*. I do not mean to dispute the proposition that the court has jurisdiction to restrain continued injury in the nature of tort. It restrains repeated trespass after several recoveries at law, although capable of being compensated in damages; and the same doctrine must extend to injuries in the nature of tort. The principle is to prevent multiplicity of actions; but for this purpose not only must the injury be substantial and such that the party would be justified in reason in bringing repeated actions for the purpose of redressing it, but it would seem that even in such cases the exercise of this jurisdiction is discretionary, and the court is bound to weigh the inconvenience to either party of granting or withholding the relief sought. If the injury be merely nominal, and such that the party would be warranted in reason only in bringing an action once in twenty years for the preservation of his right, as in the case of raising water a few inches on the bank of a river without injuring the land, the court certainly would refuse to interfere. A party cannot apply to the court on the principle of preventing a multiplicity of suits when he himself is the author of the mischief of which he complains, and has of course the remedy in his own hands by simply refraining from bringing a number of actions, when he would be justified in reason only in bringing one action in a long period of time for the preservation of his right. In

Judgment.

1853.

Graham v. Burr.

short, where the only reasonable purpose of the litigation is the preservation of the right, for which an action once in twenty years will suffice, it is not a case which admits of the application of the principle of preventing a multiplicity of suits, the party being the author of his own mischief and having the remedy in his own hands. The doctrine however does not seem to stop here. It would appear from the language of the court in *Attorney General* v. *Nichol*, and *Soltau* v. *DeHeld*, that although the injury is substantial, and it would not be reasonable for the party aggrieved to bring an action from time to time in order to redress it, the question still remains, whether it is of that grave character which would induce the court to interfere for its prevention, to the great detriment of the party committing it. Where the injury is merely wanton, no doubt the court would interfere in such a case. But neither the heightening of the wall in the *Attorney General* v. *Nichol*, nor the use of the bells in *Soltau* v. *DeHeld*, nor the back-flowage of water in our own case, are mere wanton injuries. The first and last were done in the prosecution of the party's trade or business, the other in the exercise of religious worship. In the two cited cases, if it had appeared that the injuries complained of were not destructive of daily comfort and convenience, I doubt whether the court would have interfered on the principle of preventing multiplicity of actions where the detriment to the other party would have been severed. But, however this may be, I apprehend that it cannot be said with any certainty that if Mr. *Graham* had no mill on his property the back-flowage on his land would be productive of any material injury.

Judgment.

We then come to the question whether the court is to interfere by injunction to protect the business carried on at the plaintiff's saw-mill. Upon this point I apprehend it to be quite clear, that before the court can be called into action for the protection of one party and

to the detriment—perhaps ruin—of another, the party seeking its aid must shew that he has some substantial interest to protect. Suppose a party had built a mill, which he could not by any contrivance make to work at all; would the court interfere at his request to compel the proprietor below him to demolish his works? I apprehend not: and the same principle must apply where it appears satisfactorily that his mill will not pay expenses, or more than pay expenses, or yield enough to make it worth any reasonable man's while to work it. The court deals only with reasonable people, and will not countenance a person acting from vexation or caprice. Another remark should be made here. It appears that when this suit was commenced *Cunningham* owned Lot 33, and it is stated that after the commencement of the suit the defendant purchased it from him. Although at the time of the commencement of the suit *Graham* penned the water of the stream back upon Lot 33 to the extent of thirty inches or more, it cannot be said that he thereby did any wrong to any one, because *Cunningham* did not complain of it. Nor can it be said that *Burr* was wrong in purchasing Lot 33 from *Cunningham* after the commencement of the suit, and withdrawing the consent to the raising of the water on it, in order, if possible, to protect his works below the plaintiff's mill. The situation of the parties is very similar. *Burr* backed the water upon Lot 31, *Burgess* not complaining of it. Afterwards *Graham* purchased part of this lot, built a mill upon it, and is entitled, if he have a valuable right to protect, to compel *Burr* to lower his dam so as not to injure that right. On the other hand, *Graham* backed the water greatly upon Lot 33, *Cunningham* not objecting. *Burr* then buys the lot from *Cunningham*, and as, in imitation of *Graham*, he could build a mill upon it and compel *Graham* to demolish his works, so he can avail himself of his ownership of it to protect his own works below the plaintiff's. Nor is it material that this right was acquired after the

Judgment.

1853.

Graham v. Burr.

commencement of proceedings. It was acquired without fraud or wrong, and defendants often acquire after the commencement of suits the means of resisting them, although the circumstance of their being subsequently acquired may effect the liability to costs. Now I am of opinion that if *Graham* can acquire a water privilege only by committing a wrong upon *Burr*, he has in fact no privilege or right at all. The court cannot recognize a right founded on a wrong, or sanction such wrong by protecting such supposed right, which, if it could be supposed to exist, would be nothing more or less than a right to commit a wrong—a manifest impossibility, and the proposition of which involves a contradiction in terms. It is true that while *Cunningham* acquiesced, it was no wrong, and *Graham* had a right founded on the gratuitious permission of another. It may be true also, that even if *Cunningham* had resented and objected to this proceeding as a wrong, *Burr* would not have been permitted to complain of it, as it was no wrong to him. But the moment he becomes the owner of the lot above, he is the party aggrieved, and can complain of the wrong, and can object to *Graham's* supposed right as based upon wrong and having therefore no existence. It may be conceded that the wrong done to the owner of Lot 33 is not such as this court would interfere to prevent. The court might refuse at the instance of *Burr* to compel *Graham* to demolish his works for the protection of Lot 33 from injury, not considering the injury of that nature which would warrant its interference by the exercise of its preventive jurisdiction. But it is one thing to interfere against a party and another to interfere in his favor. The court often refuses to interfere either in favor of or against a party. To call the court into action in favor of a party, he must have right without any admixture of wrong: to induce the court to interfere against a party, the wrong complained of must be substantial and real, and perhaps, in the sense in which this court uses the term, irreparable or destructive of

Judgment.

1853.

Graham v. Burr.

comfort and convenience. The court might refuse to aid *Burr* against any riparian proprietor below him, who at the same time owned the lot above him, on account of the injury done by his water power to that lot, but it does not therefore follow that it is to interfere against him at the instance of a party having no better right than himself. Now I cannot concur in granting an injunction to Mr. *Graham* in this suit and upon this bill, without being convinced that he has a valuable mill privilege on his land, proper for the purposes of a saw-mill. If we are to decide this question without reference to a court of law, the evidence does not enable us to do so, even including that of Mr. *Dennis*. It may be tolerably clear that *Graham* has no right to back the stream upon Lot 33 to the extent he has done; and if the right to do this is essential to the constitution of his mill privilege, it may be clear that he has none whatever. As to whether he has any privilege, supposing the water reduced to its proper or natural level at Lot 33, it is, to say the least of it, extremely doubtful. Mr. *Dennis*, I think, decidedly negatives the existence of any such privilege to any—the smallest extent. It is true that his earlier evidence seemed to leave this matter in some degree of obscurity; but in his last examination when the question was put once and again to him pointedly, and his attention must have been drawn to the precise point, he uses this language: "If the water in the plaintiff's pond were so drawn down as not to back water on Lot 33, he could not work his saw-mill—he would not have sufficient water power even with any alterations he might make in the construction of his mill, or by lowering his head race to work a saw-mill, but only some light machinery such as a carding machine or something of that kind:" and after saying that if the mill could work in dead water it might be lowered ten inches, he said, in answer to a question from the court, "even then I do not think there would be sufficient power to drive a saw-mill if the water was so lowered as not to

Judgment.

1853.

Graham v. Burr.

back on Lot 33." I should, I think, have little difficulty in deciding upon Mr. *Dennis's* testimony, that with the water reduced to its natural level at Lot 33, the plaintiff would not have any privilege at all: It would not be a question of *majus* or *minus*, into which perhaps the court would not enter, provided the right appeared to be substantial, but it would appear that the mill must be wholly inoperative. The witness *Barons*, however, who is the tenant of the plaintiff, expresses the opinion that, with the water at its natural level on Lot 33, there would still be sufficient water-power at the plaintiff's mill. Without examining the weight to be attributed to this speculative opinion in opposition to the professional testimony of Mr. *Dennis*, it is sufficient to observe that the right under such circumstances, is, to say the least of it, too doubtful to warrant an injunction issuing in support of it. As to whether the plaintiff has the right to back the water upon Lot 33 to any extent less than he has been in the habit of doing, or if he has, whether by so doing he would obtain any water privilege at his mill, which it would become this court to protect by the exercise of its preventive authority, are points left wholly in the dark by the evidence. *Barons* indeed seems to say that with the water raised ten or twelve inches on Lot 33 he had six or seven feet head of water at the plaintiff's mill. Mr. *Dennis*, on the other hand, says that on lowering the plaintiff's pond twenty inches (which must have left about ten inches upon Lot 33) the plaintiff's head-race was perfectly dry. It seems to me impossible to reconcile these two statements. Whether, therefore, the plaintiff has any right to back the water upon Lot 33 to any extent less than he has hitherto done, or if he has, whether it would afford him a water-power, which it would be proper for this court to exert its extraordinary jurisdiction to protect, is wholly uncertain, and can be only ascertained by a trial at law, or a further investigation before this court.

Judgment.

The result is—1st. That I would not grant Mr. *Graham*

an injunction on the ground of his possession of a site for a factory until he shew that he has erected one or has been prevented from so doing by the defendant's proceedings: in other words, I would not act on the contingency or possibility of his making that use of the water some day, and thus enable him to obtain protection for a saw-mill not entitled to it, under pretense of protecting a factory not in existence. 2nd. That I would not grant Mr. *Graham* an injunction to protect his land, irrespective of any mill, from the injury arising from the back-flowage of the water, because I am wholly uninformed whether that injury is more than nominal, and because in such a case I think an injunction would be improper: and 3rd. That I cannot concur in granting an injunction to Mr. *Graham* to protect his saw-mill, because I would not grant such an injunction to the serious detriment of the defendant without being sure that the plaintiff has a valuable privilege to protect, and because in the present state of the evidence it is wholly uncertain whether he has any such privilege. I would not, however, debar him from further inquiry, should he think it advisable, either by action at law or further investigation before this court.

Judgment.

These are the views I have formed upon this case, and although I can have little confidence in their correctness, since they differ from those of the Chancellor and my brother *Spragge*; still, as they are the best that I have been able to form after a very careful consideration of the case, I consider it my duty to express them.

SPRAGGE, V. C.—The point for the decision of this court I consider to be, whether the dam erected by the defendant on Lot 31 in the 9th concession does so raise the water on Lot 31 in the 10th concession—the plaintiff's lot—above its natural level, and thereby injuriously affect the plaintiff's rights to the use of the water as it

1853.

Graham v. Burr.

flows through his lot, as to entitle him to relief in this court. The defendant has, I conceive, by his answer, as well as at the hearing of the cause so put himself upon the judgment of this court, desiring the decision of the court without proceedings at law, that if in the opinion of this court the plaintiff's rights are so injuriously affected by the defendant's dam, it is proper to decree a perpetual injunction.

There is no difference of opinion in the court as to the fact that the waters of the River Humber are raised on the plaintiff's lot above their natural level to the extent of about ten inches, and that this is produced by the backing of water caused by the defendant's dam: the consequence is, that the fall of water on the plaintiff's lot is less by about ten inches than it would be but for the plaintiff's dam.

Judgment.

It is not shewn that any part of the plaintiff's land is overflowed by the penning back of the water, or that any right of the plaintiff is infringed thereby; unless he have available waterpower on his lot, which he cannot enjoy so benefically to himself, by reason of the penning back of the water. If he have such available waterpower, than one mode in which as a riparian proprietor he is entitled to the use of the water as it flows past him may be injuriously affected.

The water-power on the plaintiff's lot and on the defendant's is about the same, there being only a difference of about an inch in the fall of water on the two lots. The defendant has for some years—much less however than twenty—had a factory and mill upon his lot, the latter more recently, and penned back the water upon what is now the plaintiff's lot, but no *easement* is shewn, nor anything to affect whatever rights the plaintiff may possess as an ordinary riparian proprietor. In 1850 the plaintiff put up his mill, and for the purpose of forming his mill-pond erected a dam, which pens back the waters of the river beyond the

upper boundaries of his own lot and overflows a small portion of Lot 33, in which the defendant in his suit claims an interest. On this lot also there is some fall of water—the river flowing through it as well as through the other two lots—but considerably less than on either of them. 1853. Graham v. Burr.

In the opinion of Mr. *Dennis*, the surveyor, there is not sufficient water power on any one of the three lots to work a saw-mill to advantage. On lots 31 respectively he is of opinion that a saw-mill may be worked, but not as he conceives profitably. He considers the water power on each of these two lots more suitable for a factory or other works requiring less water power than a saw-mill. The plaintiff's position then is, that he has upon his land a saw-mill, and that only, which in the opinion of Mr. *Dennis* can be worked, but not profitably; and the question is, whether he is entitled to be protected, and I think that he is.

Judgment.

If the plaintiff had from sheer folly, or to injure the defendant, built a mill on a stream where there was no possibility of working it, then I think that the defendant might reasonably object that his dam had nothing to do with the plaintiff's mill not working, and so that he ought not to be restrained; otherwise, a right would exist in every owner of land on a mill-stream to object to the waters of the stream being at all raised when they flow through his land, and that although it flooded no land, diverted no water, and in no way injured such proprietor. There would in such case, perhaps, be no mode of use of the waters of the stream injuriously affected. I do not assume however, that a proprietor of land through which a stream flows would have no right to prevent the continuance of a dam or other erection whereby water was so penned back, as to make that dead water which before was a running stream flowing through his land. It is obvious that in such a case much more than an imaginary injury might be sustained.

1853.

Graham v. Burr.

In this case the plaintiff has placed his mill where in his own judgment, and probably in the judgment of the mill-wright who put it up, there is what is termed a *mill privilege*—sufficient water power to drive a mill, but in the judgment of Mr. *Dennis*, not sufficient to work it profitably.

Now when it comes to so nice a point that a mill can be worked but in the judgment of one, not profitably, while even in the judgment of that one there is sufficient power for the working of a factory, can it be said that another proprietor on the same stream is at liberty so to use the waters of the stream as to prevent his working his mill at all? If the water power be such that he can work his mill, is it not a matter for his own judgment and discretion whether he will work it, even if it be not profitable; and is it not for him to judge what would be a profitable working of the mill? Mr. *Dennis* does not say that the mill cannot be worked in the ordinary state of the water—that it requires a freshet or any unusual quantity of water to work the mill; but only that in his judgment it would not be profitable. Now what would be unprofitable with lumber at a low price might be very profitable upon an advance in the price of lumber; and besides, persons may differ very much as to what would be a profitable working of a mill. Such an objection too, it strikes me, cannot reasonably be made by one who has *practically* admitted the sufficiency of the water power; for upon the defendant's own land, with a fall of water almost identically the same, he has both a factory and saw-mill.

Judgment.

But further, I do not consider it established that the plaintiff has not upon his land sufficient water power to work a saw-mill profitably. Whether he has or not, was not the question raised between the parties, nor was it the point upon which Mr. *Dennis* was deputed with the consent of parties, to examine and report.

1853.

Graham v. Burr.

Mr. *Dennis* is not a millwright, and declares himself ignorant of the effect and working of a modern kind of water-wheel in use in the plaintiff's mill, and however competent he may be as a surveyor; and I believe him thoroughly competent in his own profession, I think it would be too much to take his opinion as decisive against the plaintiff upon a point upon which he may not possess all the requisite knowledge to decide, because not lying within the proper sphere of his own profession. He may probably be right, but I think it is not such evidence as would justify this court in deciding that the plaintiff's water power is not sufficient for the profitable working of his mill.

Judgment.

But, taking him to be quite right in his opinion—viz., that a mill may be worked, but in his judgment not profitably—I think the defendant should be restrained from keeping up a dam that so materially interferes with his working it as almost to prevent its working at all.

I have not referred to the circumstances of the plaintiff's dam penning back the water so as to overflow a small portion of Lot 33, because it is not proved that the defendant has any interest in that lot.

Decree.

Declare, that the plaintiff is entitled to enjoy his mill cite on the north-east part of Lot number 31 in the 10th concession of Vaughan, free and clear of all injury thereto or infringement thereon by the penning back of the waters of the River Humber thereon by the defendant or the owners or occupiers for the time being of Lot number 31 in the 9th concession of Vaughan. Order and decree the same accordingly.

Order, that the said defendant and the owners and occupiers for the time being of the said Lot 31 in the 9th concession, together with their workmen, servants and agents, be restrained by the perpetual injunction of this court from permitting the water of the said River Humber to continue at its present height, or at any such height, on the said Lot number 31 in the 9th concession, as thereby to pen back the water of the said river on the plaintiff's land on the said Lot 31 in the 10th concession, to a height above its usual and natural flow, or at the highest to any height nearer than ten inches below a certain mark made by *F. Dennis*, Esquire, at the bridge on

1853. Graham v. Burr.

the road allowance between the said Lots 31 in the 9th and 10th concessions, and from preventing or retarding the escape of the water from the tail-race of the plaintiff's present or any future mill on a level not lower than the natural flow of the river, on his said land on the said Lot 31 in the 10th concession, or hindering or retarding the flow of the said water through, across and from his said land on the said Lot 31 in the 10th concession, at its usual, natural and ordinary speed and level.

Defendant to pay plaintiff's costs.

HAGGART v. ALLAN.

Specific performance—Laches.

Delay in filing a bill to enforce a disputed agreement for a partnership was considered sufficiently accounted for by evidence of an unanswered proposal for an arbitration, and of correspondence between the plaintiff and his solicitors before suit.

Statement.

The Master, in pursuance of the decree made at the hearing of this cause, whereby he was "directed to inquire and state whether any circumstances had occurred excusing the omission of the plaintiff to file his bill in this court, at any earlier date than the same was filed for the establishment of the alleged partnership, upon his exclusion by the defendants, as stated in his bill," reported as follows :—

"I find and state that the contracts referred to in the plaintiff's bill were declared on or about the sixteenth day of January, 1846; that within a short time thereafter the plaintiff, residing at Perth in the county of Lanark, and the defendant *Allan*, then residing in the vicinity of Perth, (having been notified through a letter from the defendant *Matthews* to the defendant *Allan*, which was shewn and read by him to the plaintiff,) went to Kingston in respect of the said contracts: that on the day next after their arrival there, the defendant *Allan* saw the plaintiff, and the plaintiff then insisted on his being a partner with the said defendants in the said contracts: that the defendant *Allan* then told the plaintiff, among other things, that the defendants could not take him as a partner: that about the time the government works at Kingston were contracted for but not commenced, the plaintiff

took legal advice of the Honorable *John A. McDonald*, of Kingston, and at a meeting between the plaintiff and both defendants, which took place in the presence of witnesses soon after the said arrival of the plaintiff and the defendant *Allan* in Kingston, the plaintiff urged his claim to be a partner in the said contracts, but that the defendant *Matthews* told him they could not take him as their partner, and assigned excuses for such refusal: that some weeks thereafter, at another meeting between the plaintiff and defendant *Allan*, the plaintiff again pressed his claim to be recognized as a partner of the defendants in the said contracts, and the defendent *Allan* refused to have anything to do with him as their partner therein: that in the course of the conversation on that occasion the plaintiff stated to the defendant *Allan* that he would have the matter settled in some way, and proposed an arbitration: that the defendant *Allan* replied to the effect that he did not know about an arbitration, but that he would speak to the defendant *Matthews* about it: that it appears that the defendant *Allan* did speak to the defendant *Matthews* about such arbitration, but it does not appear that they or either of them ever gave the plaintiff any answer to his said proposition for arbitration, but went on with the performance of the said contracts without giving the plaintiff any answer to such proposition: that after the plaintiff had advised as stated with the said *John A. McDonald*, he returned again to the office of the said *John A. McDonald*, and informed him that he, the plaintiff, had acted on his advice, and advised with him as to his, the plaintiff's, further course: that the said *John A. McDonald* stated to him that he should file a bill in the Court of Chancery: that the plaintiff said he feared the expense, and asked if there was no mode of proceeding in the ordinary courts of law; that the said *John A. McDonald* replied, that perhaps a special action for breach of the contract to admit him as a partner, might be brought at common law, and that he would look into

Statement.

1853.

Haggart v. Allan.

Statement.

the matter for him, the plaintiff: that it was arranged with the said *John A. McDonald* by the plaintiff that the plaintiff should return home to Perth, (which is about sixty miles from Kingston), and afterwards come to Kingston and consult the said *John A. McDonald*, when he should have made up his mind on the point, and that it does not appear that there was any particular period fix for the plaintiff's return to Kingston: that it appears from the evidence of the said *John A. McDonald* that the plaintiff always from the beginning expressed his intention of enforcing performance of the alleged contract of co-partnership between him and the defendants, and that it also appears from the evidence of the defendant *Allan* that the plaintiff, shortly after his first arrival at Kingston, subsequent to the declaration of the said government contracts, stated to the defendant *Allan* that he would press his claim to be a partner immediately: that in the month of November 1846, after it had become known that the said contracts would prove profitable, the plaintiff was again in Kingston, and addressed a letter to the defendants dated the 23d of November 1846, and marked as exhibit "A," insisting on his claim to participate in the said contracts with the said defendants as their partner, and informing them of his intention to abide by the agreement of partnership alleged by him; that such letter was received by the defendants, and they sent a reply thereto, dated 23d of November 1846, and marked as exhibit "B," refusing to acknowledge his claim: that in the month of February following the plaintiff went to Toronto, taking with him a letter from the said *John A. McDonald*, dated the 11th of the same month, to the Honorable *William Hume Blake*, for the purpose of employing him to proceed against the defendants to enforce the plaintiff's claim against them: that he saw Mr. *Blake* in Toronto, and made arrangements with him, and when the plaintiff left to return home he was to send further particulars before the bill in Chancery was filed: that in May following

the plaintiff did send Mr. *Blake* further particulars with his, the plaintiff's letter of that month, in which letter the plaintiff assigned as a reason for his not having done so earlier his having heard of Mr. *Blake's* severe indisposition: that after the plaintiff had left Toronto on the occasion referred to, Mr. *Blake* became suddenly and severely ill, and in consequence of such illness did not attend to any business in his office until the end of May to beginning of June following—that about that time he received the plaintiff's last mentioned letter, and before he, Mr. *Blake*, returned to his office to attend to regular business he went there and gathered the papers for instructions in this suit, and sent them to Mr. *Austen*, to draw the bill therein: that a draft of the bill was received on the 20th of July 1847, and having been engrossed, was filed on the 22nd of the same month: that it does not appear from what occurred at any of the said meetings between the plaintiff, and one or both of the defendants, nor up to the date of the letter from the defendants to the plaintiff of November 1846, (when it had become known that the said contracts would be profitable): that the defendants denied that there was an agreement for a partnership between them and the plaintiff, or the right of the plaintiff to be a partner with them in the said contracts, but that they only sought to excuse themselves on various grounds for excluding him from participating therein: that notwithstanding such non-denial by the defendants of the right claimed by the plaintiff to be their partner in the said contracts, and with full knowledge that the plaintiff claimed such right, the defendants, without compromising the matter with him, continued their exclusion of the plaintiff, and went on with the performance of the said contracts: that it does not appear that the said Mr. *John A. McDonald* or Mr. *Blake*, gave the plaintiff any intimation that he would lose any right he claimed as a partner in the said contracts by any laches or delay on his part in filing his bill, or in taking proceedings

Statement.

1853.

Haggart v. Allan.

at law or equity to enforce his claim; and that it does not appear, that up to the time of the hearing of this cause the defendants, either by their answer or otherwise, alleged or insisted that the plaintiff had lost the right he claims in this suit by laches or delays in filing his bill therein. And I find that circumstances have occurred as aforesaid, excusing (and that in my opinion there is sufficient in such circumstances to excuse), the omission of the plaintiff to file his bill in this cause at an earlier date than the same was filed for the establishment of the alleged partnership in the pleadings mentioned upon his exclusion, as stated in the said plaintiff's bill."

Statement.

Against this report the defendants appealed, contending that the inferences of the Master from the evidence adduced before him, were unfounded, and that the plaintiff's private transactions with his solicitors were no excuse for the delay: that their neglect or delay was his neglect or delay: that his private intentions amounted to nothing: that nothing could excuse him except some act of the defendants or to which they were parties: that what appeared on the evidence as to an arbitration was extremely loose, and did not appear to have misled the plaintiff.

Mr. *Mowat* for appeal.

Argument.

Mr. *McDonald*, contra.

Watson v. *Reid (a)*; *Heaphy* v. *Hill (b)*; *Walker* v. *Jeffreys (c)*; *England* v. *Curling (d)*, and *Collyer* on partnership, S. 202 et seq. were, amongst other cases, referred to.

The judgment of the court was delivered by—

Judgment.

SPRAGGE, V. C.—In this case I have to regret that my brother *Esten* declines taking any further part in disposing of the cause. Since the argument of the

(a) 1 R. & Mylne, 236.
(b) 2 S. & S. 29.
(c) 1 Hare, 341.
(d) 8 Beav. 129.

appeal from the master's report, I have read the evidence, oral and documentary, taken upon the reference, and have again referred to such parts of the evidence taken before the hearing as appeared to have any bearing upon the question referred to the master. 1853. Haggart v. Allan.

The delay in bringing and prosecuting this suit is accounted for partly by the time occupied in obtaining legal advice and assistance, and partly by a proposition for an arbitration made by *Haggart* to *Allan*, which *Allan* promised to communicate to *Matthews*, and which *Allan* says he did comunicate to him, though *when* he did so does not clearly appear. *Allan's* recollection as to the time when this proposition was made is not at all distinct. In one part of his evidence he says about a montn, in another part, some weeks after the meeting at *Bamford's* at which *Allan* and *Matthews* had refused to admit *Haggart* as a partner. From the manner in which he states it, I should say it may have been two or three weeks, or as many months after that meeting. To this propostion no answer was ever returned to *Haggart*. Some delay may be accounted for by assuming that he forebore to proceed for a while, in the expectation that an answer would be given to his proposal. At the interview with *Allan* at which he made this proposal, he declared that he would have the matter settled in some way, and he proposed an arbitration as one way of settling it. The defendants then had a reiteration of the plaintiff's claim, a declaration that he would not abandon it, and a proposal for a mode of settling it. I take it that *Haggart* cannot reasonably be charged with delay after this, until such a period had elapsed that any reasonable man would construe the silence of the defendants into a rejection of his proposition ; upon such a point men may differ very much. The defendants might have abridged this period by a prompt answer; while they kept the plaintiff in suspense, it was their delay, not his. Judgment.

It is suggested that *Allan* in his evidence confounds

1853. Haggart v. Allan.

the proposal for arbitration, of which he speaks, with a proposal for arbitration which it is admitted was made after the suit was commenced, and that no previous proposal for arbitration ever was made. This may be so, but it is evident that *Allan* believed that there were two such proposals; for, speaking of the the proposal after suit commenced, he adds, "there was something said about an arbitration earlier than this."

The plaintiff in his letter of the 23rd of November 1846, again insisted upon his rights as a partner, and declared his intention of enforcing them, if the defendants persisted in excluding him. The time between the meeting at *Bamford's* Hotel, about the end of January or beginning of February 1846, and the date of the above letter, is only accounted for by the proposal for arbitration spoken of by *Allan*, and by the time taken by Mr. *McDonald* of Kingston, the plaintiff's legal adviser, to consider whether he had no remedy at law. The defendants, by letter dated the 26th of November, 1846, absolutely denied the plaintiff's right to be considered as a partner. From that time to the 11th of February following there is no evidence that the plaintiff employed the time in prosecuting his rights. At the latter date, or soon afterwards, he proceeded to Toronto with a letter from Mr. *McDonald* to Mr. *Blake* on the subject of this suit, and from that time to the filing of the bill I cannot say that the delay which occurred is chargeable upon him. The evidence taken upon the reference to the master does certainly account for a portion of the time which elapsed between the defendants' refusal to admit the plaintiff as a partner and the filing of the bill; and though it does not, to my mind at least, satisfactorily account for the whole of it, there is sufficient, I think, to negative the presumption which might otherwise arise of an abandonment by the plaintiff of his rights as a partner: the delay is not such as to evidence an abandonment. I do not think that the defendants had

Judgment.

reason to infer such abandonment from the plaintiff's delay or otherwise; and as a fact, they do not appear to have inferred it, at least up to the 26th of November 1846, for in their letter of that date, written under legal advice, while insisting that the non-acceptance of the tenders, and the plaintiff and *Allan* leaving Kingston for Perth, were each acts of abandonment of what had previously taken place between them, they did not insist upon the plaintiff's delay in asserting his rights as an abandonment of them, nor indeed complain of his delay at all.

1853. Haggart v. Allan.

Upon this question, (the effect which the plaintiff's delay should have in this suit), it must be assumed that the agreement between the parties before the making of the tenders constituted them partners; and the plaintiff files his bill as a partner for an account. If he was a partner then, I think that his delay has not been such as to disentitle him to relief in this court. I say this without reference to other difficulties which may lie in his way, and which, or some of which, have been adverted to in the judgment given at the hearing of the cause.

Judgment.

The plaintiff has yet to establish by an issue, as was intimated to him at the hearing, that a partnership was actually formed between himself and the defendants. I regret the necessity for further proceedings after the protracted litigation which has taken place. I observe by the evidence that an arbitration has been proposed since the suit commenced, and that negotiations have been on foot for a compromise. I hope that such mode of settlement may yet be adopted.

The appeal must be dismissed, but I think the deposit should be returned to the defendants, because the granting the reference was an indulgence to the plaintiff in allowing him that opportunity of accounting for his delay which, in strictness, he should have done before the hearing.

1853.

Peterson v. Bowes.

PATERSON v. BOWES.

Practice.

Where a party neglects to comply with the terms of an order for the production of books and papers, the proper mode of proceeding is to serve, personally, a notice of motion to commit.

August 23d.

Mr. *Mowat*, for the plaintiffs, moved *ex parte* for an order *nisi* for the commitment of the defendant *Bowes*, for non-compliance with an order to produce books and papers issued under the 20th of the consolidated orders of June 1853.

An affidavit which was considered wholly irregular and insufficient, had been filed under the orders, and it was argued that such an affidavit should be treated as no affidavit.

The Court, however, said that the proper course in such a case was to serve, personally, a notice of motion for an order absolute to commit.

RE STUART.

The judge in chambers granted an application for a commission *de lunatico inquirendo:* the orders of

August 24th.

June 1853 giving to a judge in chambers authority to act in such a matter.

MOFFATT v. RUDDLE.

Practice.

The Court held in this case that whatever applica-

August 29th.

tions can, under the new orders, be made in chambers, must be so made.

FLINT v. CORBY.

1853.
June 3 & 4.

Injunction—Saw-logs—Delay.

Saw-logs cannot be intended *prima facie* to be of "peculiar value" without any evidence that they are so. But they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. The relief however must be applied for promptly.

This was a motion for an injunction to restrain the defendants, their agents, servants and workmen from keeping or taking possession of the logs cut by *James Bird*, his servants, agents and workmen, on the lands mentioned in the plaintiff's license from *Francis McAnnany*, Esquire, crown lands agent, and from interfering therewith, and from preventing or interfering with the said plaintiff's taking and keeping possession thereof and appropriating the same to his own use, and from sawing up the said logs or any of them, and from defacing or altering any of the marks on the said logs which had been put thereon for the purpose of distinguishing and identifying them, and from selling or disposing of the same logs or of the boards or planks manufactured therefrom. Statement.

The bill in this case was filed by *Billa Flint* against *James Bird* and *Henry Corby*, and, in addition to some statements which the affidavits of the defendants fully controverted, stated in substance that the plaintiff had obtained a license to cut timber from the 11th day of October 1852 to 30th April 1853 on certain ungranted lands off the province in the township of Elzevir, two of the lots being, as he long afterwards discovered clergy reserves and the rest being crown lands; that the plaintiff had similar licenses for the same lands for several successive years previously; that the defendant *Bird*, during the period to which the last license extended, without the leave, and contrary, as he knew, to the will of the plaintiff, cut a quantity of timber on the said lots; that defendant *Corby*, who had a saw-mill on the river Moira had furnished *Bird* with supplies: that in the autumn of 1852 the plaintiff warned *Bird* not

1853. Flint v. Corby.

to trespass on plaintiff's limits, and that he would not sell him any logs he should cut thereon, as the plaintiff was building a large saw-mill and required all the logs himself: that *Bird* took up with him a surveyor to ascertain the boundaries of certain other lots on which he claimed to have the right of cutting.

Statement.

That in January 1853, having heard that *Bird* was cutting timber on land in such a situation that the same was probably some of the lots embraced in the plaintiff's license, the plaintiff employed one *Elmore*, a surveyor, to go out and make such examination and surveys as would be necessary to ascertain the fact: that *Elmore* went out soon afterwards, and that about the 15th or 16th day of February following the plaintiff received from him a letter informing him, and the plaintiff charged the truth to be, that *Bird* had erected a shanty upon one of the plaintiff's lots aforesaid and had been cutting timber on several others of them: that on the day after receiving this letter the plaintiff called on *Corby* and informed him of its contents: that *Corby* answered that he was secured by *Bird* from any loss he might incur in reference to said logs: that some weeks afterwards *Elmore* returned to Belleville, where he and the plaintiff resides, and gave the plaintiff more accurate information with respect to the said matter, and informed him that *Bird* desisted, or pretended to desist from trespassing on the plaintiff's said lots for a short time while *Elmore* was on the ground ascertaining the lines of some of the lots on which *Bird* had been trespassing, but that *Bird* afterwards began again to cut upon the plaintiff's lots, and thenceforward continued to do so just as before: that the plaintiff then communicated with Mr. *McAnnany*, the crown lands agent at Belleville, on the subject of the said trespass, and then heard for the first time that two of the lots comprised in his license were clergy reserve lots but ungranted, the complainant having previously supposed them to be crown lands, and they having been so

1853.

Flint v. Corby.

entered in the books of *McAnnany;* that on the 21st March authority was given to two bailiffs, on behalf of the crown, to seize the logs *Bird* had cut on the clergy lots, and by the plaintiff to seize the others: that the bailiffs attempted to do so accordingly, but were driven off by *Bird's* men: that about the middle of April *Bird* commenced driving the logs down the river Scootomath, which is a tributary of the Moira: but that as communications with Belleville are not frequent or regular, the plaintiff did not learn until about the 1st of May that *Bird* had so commenced: that the plaintiff was and for many years had been extensively engaged in the business of manufacturing lumber, principally on the river Moira and its tributaries: that the plaintiff had a large quantity of logs to bring down the said river in the spring from above the place where the logs cut by *Bird* were cut and lying: that it was of great importance to the plaintiff that the logs which the plaintiff so had should not be detained in their course; and the plaintiff had heard and he charged the truth to be, that *Bird* had threatened and intended while these logs were passing down the river that in case the plaintiff should take any further steps in regard to the logs cut by *Bird*, he (*Bird*) would stop the progress of the plaintiff's said other logs: that from the nature of the river in several places this could be accomplished easily and secretly: that these logs had either reached their destination or had sufficiently advanced down the river to be safe from such interference: that if the said threats had been executed, not only the plaintiff, but also all other persons who were driving logs down the river, would have suffered great damage: that on the 16th of May the plaintiff gave *Corby* a written notice forbidding him to take or interfere with the logs in question: that *Corby* had called on the plaintiff as to the said notice, and besides using abusive language, threatening him with personal violence: that of the logs cut by *Bird* upon the plaintiff's land which had reached the mill of *Corby*, *Corby*

State ment

1853. Flint. v. Corby

though well knowing them, or by far the greater part of them, to have been cut by *Bird* on the plaintiff's lands, had sawed up some, mixing up the boards and planks with others: that all would probably reach the said mill before the middle of June, and that *Corby* intended to saw the same up at his mill, with other logs, as fast as possible. That there were no roads or bridges in or through the said lands when the plaintiff first obtained a license in respect thereof from the government: that none had been made since except at the expense of the plaintiff: that it is the usage and intention of the government to grant such licenses as aforesaid for the same limits to the same persons from year to year, such licensees complying with the regulations from time to time made, and the same are continued to the same persons with the view of compensating them for, and encouraging them to make, such roads, bridges and other improvements through and upon the lands comprised in such licenses, and such other expenditures as may be convenient or desirable for cutting and getting out the timber: that the plaintiff within the last two years, on the faith of the said licenses, and of the same being renewed to him from time to time according to the said usage, had gone to considerable expense in making roads and bridges upon the lands embraced in his said licenses, and in surveying the said lands, and also upon the river Scootomath, to adapt the same for driving down his logs: that the plaintiff had cut timber upon divers of the lots embraced in his said license, but not yet on those hereinbefore named; and that *Bird* and *Corby* had combined together to defeat, if they could, the plaintiff's right to the said logs.

Statement.

The affidavits filed by the plaintiff supported the bill.

The affidavits adduced by the defendants stated that *Bird* was not aware that he was cutting on the crown lands embraced in the plaintiff's license: that he meant

1853.

Flint v. Corby

to confine his cutting to the clergy lands embraced therein, and that he had had these valued and had made an application to be allowed to purchase them: that *Corby* was ignorant of the locality in which *Bird* intended to cut until after he had made large advances to him: that the logs cut on the clergy reserve lots were then undistinguishable from the others: that the seizure of these had been abandoned by the crown lands agent: that the plaintiff deliberately allowed the defendants to proceed with the work, in order to get the logs cut and brought down the river for nothing: that the logs were of twice the value at *Corby's* mill that they were where cut: that if the plaintiff had applied to the court in February *Corby* could have procured other logs, which now he could not obtain: that *Corby* entered into contracts on the faith of receiving these logs, and that he would sustain a heavy loss if they were taken from him: that these logs, on the other hand, were of no peculiar value to the plaintiff: that *Corby* had offered to pay the plaintiff the value of the logs, which the plaintiff refused; and that an injunction would cause more damage to *Corby* than it would be of advantage to the plaintiff: that, so far from having any particular necessity for the logs in question, the plaintiff had already more logs than he could saw at his own mill, and had in consequence engaged several other mills to saw for him. Statement.

Some of these allegations were denied by the affidavits in reply.

Mr. *Mowat*, for the motion, contended that the court would order the specific delivery of saw-logs as being in their own nature in this country of peculiar value. *Farwell* v. *Wallbridge* (*a*). In addition to the reasons there given by the court, it is notorious that the supply of saw-logs is not unlimited; that they are not always and everywhere to be had; and that these licenses are much sought for and not always to be obtained. Argument.

(*a*) Ante vol. 2, page 332.

1853.

Flint v. Corby.

Equity refuses the specific delivery of chattels only, where they are of a kind always to be had: and accordingly granted relief in *Duncuft* v. *Albrecht* (*a*), in the case of railway shares; in *Doloret* v. *Rothchild* (*b*), Neapolitan stock; in *Whetby* v. *Cottle* (*c*), an annuity; in *Adderly* v. *Dixon* (*d*), debts; and in *Ridgeway* v. *Roberts* (*e*), a ship. Yet the peculiar value was less in each of these cases than in the case of saw-logs in Canada.

Argument.

Again: the court grants specific relief in cases of all chattels where there is any ground whatever for attaching jurisdiction over the matter.—*Ridgeway* v. *Roberts*, *Wood* v. *Rowcliffe* (*f*), *Fuller* v. *Richmond* (*g*). This is the only way the intention of the legislature, as manifested in the statute 12th Victoria, chapter 30, can be carried out. Licensees are thereby declared entitled to the logs which trespassers shall cut on their limits. The statute also provides (sec. 2) that the licenses shall entitle the holders thereof to seize any logs cut within their limits, or cause them to be seized by way of revendication, *saisie revendication*, or otherwise. Courts of law have no means of giving specific effect to these provisions. The same section refers to proceedings in equity.

Again: the conduct of the defendants shews fraud, and fraud is always sufficient to attract the jurisdiction of the court—1 *Hovenden's Ins.* 17, *Chesterfield* v. *Janssen* (*h*), *Evans* v. *Beckwith* (*i*), *Colt* v. *Woolaston* (*j*), *Stent* v. *Bailis* (*k*).

If no fraud established the court has jurisdiction for an account—*Story* v. *Lord Windsor* (*l*), *Jesus College* v. *Bloom* (*m*).

(*a*) 12 Sim. 189.
(*b*) 1 S. & S. 590.
(*c*) 1 S. & S. 174.
(*d*) 1 S. & S. 607.
(*e*) 4 Hare, 106.
(*f*) 3 Hare, 304; 6 Hare, 183.
(*g*) Ante vol. 2, p. 24.
(*h*) 2 Ves. sen. 155.
(*i*) 6 Ves. 182.
(*j*) 2 P. W. 154.
(*k*) 2 P. W. 220.
(*l*) 2 Atk. 630.
(*m*) 3 Atk. 262.

1853.

Flint v. Corby.

One defence here is, that *Bird* cut on plaintiff's lands from the difficulty of recognizing boundaries and from ignorance of them: such circumstance, it was contended, is of itself sufficient to attach the jurisdiction—*Sayer* v. *Pierce* (*a*). On all, or some, or one of these grounds the court, having jurisdiction, will act upon it by decreeing specific delivery—*Wood* v. *Rowcliffe*, and *Ridgway* v. *Roberts* already cited, are authorities on this point; but if not, the court will preserve the property pending an inquiry or action. Acquiescence is out of the question here; besides, the explanation afforded by the plaintiff justifies the delay which has occured. The allegation of hardship to the defendants does not apply. *Pilling* v. *Armitage* (*b*), *Attorney General* v. *The Great Northern Railway Company* (*c*), *Rogers* v. *Nowell* (*d*), and *Caldwell* v. *Van Vlissengen* (*e*), were also cited.

Argument.

Mr. *Vankoughnet*, Q. C., and Mr. *Strong*, contra, controverted the positions taken by the plaintiff, and contended that the court will not as a general rule grant an injunction in reference to chattels unless it is clearly shewn that the property has some peculiar value attaching, either intrinsically or in the estimation of the owner. Here no peculiar value is proved or attempted to be shewn by the plaintiff. On the contrary, it is distinctly stated in the affidavits filed by the defendants that the plaintiff does not for any special object require these logs, he having already more than his mills will saw. The case therefore, differs in one of its most important features from *Farwell* v. *Wallbridge*, cited and strongly relied on by the other side, where it was clearly shewn that if the plaintiff had not obtained the relief sought, his mills, which were of great extent, would have been stopped. Under such circumstances they contended that the plaintiff's proper remedy was by an action at law.

(*a*) 1 Ves. sen. 232. (*b*) 12 Ves. 8. (*c*) 4 DeG. & S. 75.
(*d*) 17 Jur. 109, 171. (*e*) 9 Hare, 415.

1853.
Flint v. Corby.

In addition to the cases cited by the plaintiff, *Gordon* v. *The Cheltenham Railway Company (a)*, *Parrott* v. *Palmer(b)*, were referred to.

ESTEN, V. C.—The plaintiff is a mill owner and the holder of a license granted in pursuance of the statute 12th Victoria, chapter 30, and the object of the suit is to obtain a specific delivery of certain saw logs made from trees cut within the plaintiff's limits by the defendant *Bird* for the use of the other defendant *Corby*. The present application was for an injunction, and was made for the purpose of obtaining possession of the logs in question. The question which it raised, is one of considerable practical importance, and we desire to express our views upon it at some length. The jurisdiction of this court to compel the specific performance of agreements rests upon the foundation of peculiar value in the subject matter of the contract, not upon any intrinsic difference between land and chattels. The specific performance of an agreement respecting land, is enforced because the court intends in every particular instance that the estate, which forms the subject matter of the contract, possesses a peculiar value for the purchaser, and that pecuniary damages will furnish no adequate equivalent for the loss of his bargain. In this case the peculiar value, which attracts the jurisdiction of the court, is implied and needs not be proved. The same doctrine may probably extended to some descriptions of chattels; a ship, for instance. It would perhaps be highly reasonable to hold that a ship, the subject of a contract of purchase, possessed a peculiar value for the purchaser, and without requiring evidence of that fact, to compel the specific performance of the contract. The reason that the doctrine of specific performance does not in general apply to chattels is, not because they are chattels, but because for the most part it can-

Judgment.

(a) 5 Beav. 226. (b) 3 M. & K. 633.

not be predicted of them that they possess any peculiar value. In most instances pecuniary damages furnish an adequate compensation for the breach of the agreement, because other articles of precisely the same description can be had without difficulty or delay. The moment however the contrary appears, as in the case of the *Pusey* Horn, and other cases of that class, the jurisdiction of the court is called into action, and the specific delivery of the article in question is compelled. Land is always intended to be of peculiar value; but with respect to chattels the presumption is for the most part the other way, and the peculiar value upon which the jurisdiction rests, must be the subject of proof. It is possible that exceptions may exist to this rule, and that with regard to a ship, for instance, a specific performance of an agreement might be enforced without evidence of peculiar value any more than in the case of an estate. With regard to saw-logs, which form the subject of the present suit, we are of opinion that they cannot be intended *prima facie* to be of peculiar value, and without any evidence that they are so. It seems to us that they are more likely to be of peculiar value than most other descriptions of chattels; that it would be easier, consequently, to shew that they are so; and that specific relief would be given with respect to them in most instances, and in a much greater number of cases than almost any other sort of chattel property. It seems to us, as at present advised, that it might be extremely proper, at the instance of the grantee of a government license, to restrain the felling of timber within his limits, or the removal of any that had been already felled, and under some circumstances even specifically to restore to him what had been actually removed. A mill owner who had felled timber within his limits, and was conveying the saw-logs made from it to his mill, if deprived of them by the lawless act of a wrong doer, might, in general, we at present think, reasonably, call this jurisdiction of the court into exercise in order to procure the specific restoration of his property. I

1852.

Flint v. Corby.

Judgment.

1853. always suppose that no other objection exists to the interference of the court, and that in particular its interference has been sought with becoming promptitude. An individual suffering wrong of this description must determine promptly in his own mind whether he will apply to this court, or be content with his common law remedies; and should he resolve to seek the extraordinary aid of this court, he must in general seek it at once. A party who tries or looks to his common law remedies in the first instance, and, failing them, asks for the injunction of this court as a last resource, will in general ask it in vain. I am not making these remarks with reference to the present case, but with the view of making the judgment of the court as generally useful as possible, with respect to this important branch of its jurisdiction.

v. Corby.

Judgment.

The case before us, we decide on its particular circumstances. We think that the license was granted under the statute. The allegation in the bill appears sufficient for this purpose; and we also call for the license itself, which on production, was admitted, and it appeared to be so. It contained no limitation of the quantity of timber to be cut, and therefore we assume that the logs in question, made from trees cut within the plaintiff's limits during the currency of his license, were his property. Had any question occurred with respect to the license, when produced, we should have given the defendants an opportunity of speaking on it before deciding against them. It appeared however that the license had expired; that the plaintiff, who had provided all the timber that he required for the present purposes of his business, had not cut or intended to cut the trees from which the logs in question had been made; and that, but for the act of this trespasser, the property in them would never have vested in him at all. Under these circumstances, it seemed to us impossible to hold that they possessed any peculiar value. Then the delay in seeking the aid of this

court was of itself sufficient to prevent its interference, had the circumstances of the case in other respects been such as to warrant it. We altogether acquit the plaintiff of any intention of conniving at the proceedings of the defendants, in order afterwards to avail himself of the fruits of their labour without paying for them. We think he was really desirous of preventing these depredations and preserving the timber within his limits for his own use. It is a matter of regret that he had not sought the aid of this court on the 14th of February, when he was in possession of all the information necessary, as it seems to us at present, for obtaining either *exparte* or upon notice, a special injunction restraining the cutting of timber by the defendant *Bird* within his limits. In this case perhaps the cutting of the timber, from which have been manufactured all the logs in question between the parties might have been entirely prevented, and the defendant *Corby* would have been in a situation to procure other logs to supply their place. The plaintiff, however, suffers the remainder of the month of February, the whole of the months of March and April and part of the month of May, three months in all, to elapse without seeking the assistence of the court, and when he does apply for it, the season for procuring fresh logs had passed, and we do not think the general notice given in the autumn of 1852, sufficient to countervail this neglect. It is true that delay forms no objection to the awarding of an interlocutory injunction, where it is applied for upon notice, unless it is of such nature as to form a bar to the suit itself. But, if we rightly understood this case, the argument from delay would be equally available to these defendants at the hearing of the cause, and we should be compelled, in obedience to it, to refuse the relief prayed by this bill, and to leave the party to his legal remedy. We do not think the other grounds upon which the learned counsel for the plaintiff rested the jurisdiction of the court, sufficient, in this particular instance, to warrant our interference.

1853.
Flint v. Corby.
Judgment.

1853.

Flint. v. Corby

SPRAGGE, V. C.—The case made by the plaintiff is simply this: that he is a manufacturer of lumber, and that the defendant *Corby* has in his possession at his mill, for the purpose of converting into lumber, a certain number of saw logs, got out by defendant *Bird*, which logs having been cut on land for which the plaintiff held a timber license, have become, by force of the provincial statute, the property of the plaintiff.

It is no part of the plaintiff's case that any fiduciary relation existed between the plaintiff and either of the defendants, as was the case in *Fuller* v. *Richmond* in this court, or that the saw logs in question are of any peculiar value to the plaintiff, or that he has any peculiar necessity or occasion for them, as was the case in *Farwell* v. *Wallbridge*, also in this court: his case simply is, that he is a manufacturer, and that a quantity of the material used in his trade or business to which he is entitled is in the possession of another manufacturer, and about to be used by him. He does not allege that the logs in question are necessary for the carrying on of his manufacture of lumber, and the contrary rather appears to be the case.

Judgment.

This case does not appear to differ substantially from that of any other manufacturer, a portion of whose raw material, but a portion not necessary to the carrying on of his business, has got into the possession of another. Suppose hides in the case of a tanner or bricks in the case of a builder, without any allegation in either case that they were necessary to the carrying on of his business; would the owner be entitled to the interference of this court? By going on to allege and by proving that they were necessary to the carrying on of his business and could not be procured elsewhere, he might probably entitle himself, but not otherwise, I apprehend. The case put by Lord *Hardwicke* in *Buxton* v. *Lister (a)*, of a man contracting "for the purchase

(a) 3 Atk. 384.

1853.

Flint v. Corby.

of a great quantity of timber as a ship carpenter, by reason of the vicinity of the timber," is apposite to this, the *concurring* of the circumstances mentioned by Lord *Hardwicke* being put by him as necessary to entitle the buyer to come into a court of equity.

None of the cases go the length of saying that a personal contract will be enforced, or a specific chattel be ordered to be delivered up, simply because the plaintiff is entitled; but, as was said by Lord *Kenyon* in *Errington* v. *Aynesley* (*a*), "a specific performance is only decreed when the party wants the thing in specie, and cannot have it any other way." It is only when the legal remedy is inadequate, that equity will interfere.

Now, does the plaintiff show in this case that he wants these logs *in specie;* that their value, if he obtained that, would not be an adequate remedy? It is true that a jury might not give him the full value of the logs, but a risk of that nature is not what is meant by an inadequate remedy at law. If the value of the logs would be an adequate remedy, as it would be unless the logs in specie are needful, he has his full remedy at law. Judgment.

The case of *Nutbrown* v. *Thornton* (*b*) affords a good illustration of inadequate remedy at law. The chattels in question in that case were the stock of a farm; and Lord *Eldon* said, "the simple ground of the bill is, that the tenant bargained for the enjoyment of the farm for the purpose of agriculture, and in fact, for the enjoyment of the stock for seven years. It is said the plaintiff might have damages, but how are damages to be estimated in such a case? The direction to a jury must be to give, not the value of these chattels merely, but their value to this man, having his farm, enabling him to use them for the purpose of cultivation."

(*a*) 3 Br. C. C. 341. (*b*) 10 Ves. 159.

1853. Flint v. Corby. But in this case, there is nothing for which the plaintiff could ask a jury but the *simple value* of the logs.

In *Duncuft* v. *Albrecht*, the strongest case probably cited for the plaintiff, and in all the cases I have seen on this point, the chattel or other thing in question is distinguished as of peculiar value, and therefore such as cannot be compensated at law. That railway shares of a particular description is a thing of peculiar value, is evident; they are limited in number and are not always to be had, and a man desiring to invest his money in their purchase ought to have what he has contracted for in specie, for he cannot get the same thing or its equivalent through the medium of damages at law; but if he could, as in the case of government stocks, it is admitted in the same case that his remedy would be at law, and not in this court.

Judgment.

The position contended for by the plaintiff's counsel, I understand to be that the circumstances of a chattel or other thing in question not being obtainable as an ordinary marketable commodity, is a ground for coming to this court for specific delivery; and he applies that to the case of a chattel, not of a permanent nature, but to a mere raw material for manufacture. In the case of a chattel or thing of a permanent nature, its not being ordinarily procurable with money proves damages to be no adequate compensation; and in that sense there is a peculiar value in a thing of that nature, though not a peculiar value in the emphatic sense of the *Pusey* Horn case and others of that class. But in the case of mere raw material, I confess myself unable to understand how it is that the positive value of the thing is not adequate compensation, unless these circumstances concur, viz: that the thing is not procurable in the market, and also that the thing itself is needed in *specie*, which is not pretended in this case.

There may, however, be grounds for the interposition of this court, other than those to which I have referred. 1853. Flint v. Corby.

The property in question is of a nature peculiarly exposed to depredations, and it may frequently happen that the law can afford neither protection to, nor compensation for property of this kind; and where, unless the *preventive* jurisdiction of this court is called into exercise, parties will be remediless.

In a proper case, promptly brought before the court, I think the jurisdiction may be usefully and properly execised. But in this case, even if it were otherwise a proper case for coming to this court, I think the laches of the plaintiff has been such as should disentitle him to relief. A distinction certainly exists upon this point between *exparte* applications for injunction and applications upon notice, and delay in the latter case is less rigidly dealt with than in the former, but here there has been something more than mere delay. If the plaintiff had acted promptly, he would have come to this court upon receiving the report of Mr. *Elmore*, the surveyor, which was made on the 14th of February. At that time little if any of the logs cut on the Crown lands included in the plaintiff's license had been cut; and if the plaintiff had applied for an injunction then, the mischief now complained of would probably have been prevented. Again: after the 25th of March, when something like an affray occurred upon the attempt of the plaintiff's agent to mark the logs, the plaintiff (supposing his previous delay could be excused) should have come for an injunction, but he does not file his bill till two months afterwards. The effect has been that the defendants have been at the expense, not only of getting out these logs, but of floating them down the river, and, what is perhaps of more consequence, the defendant *Corby*, who is, like the plaintiff, a manufacturer of lumber, and who employed the defendant *Bird* to furnish him with a certain quantity of saw logs generally, not these logs or logs from this

Judgment.

1853.

Flint v. Corby

place, is dependant, as he swears, upon these logs, furnished to him by *Bird*, under his contract to keep his mill supplied with logs, so that if the court should interfere, his manufactory, his business, his means of living will be stopped; whereas if the plaintiff had applied to this court promptly, he might have supplied himself elsewhere. In questions which have arisen upon applications for injunctions against railway companies, the parties complaining of the acts of such companies have been held bound to apply for relief with more promptitude than had been required in ordinary cases, upon this principle, that as the injury to the defendants in being stayed, if it should ultimately turn out that they were acting lawfully, is great in proportion to the magnitude of their operations, the court will in general hold even slight acquiescence on the part of the complainant a bar to his obtaining an injunction; and further, that if the party be cognizant of his right, and do not take those steps to assert it which are open to him before he has allowed his adversary to incur material expenses, or to enter into engagements difficult to be discharged, he will lose his right to the interposition of a court of equity (*a*).

Judgment.

It appears to me that the principle of these cases applies to such a case as this. Their good sense is obvious. In proportion to the expense in the course of being incurred, and to the damage resulting from delay, to the party against whom relief is sought, should be the diligence and promptitude of the party who seeks the interposition of this court. Measured by that rule, a just and sound one, and one recognized in England; I think the plaintiff's laches in this case has been such as must disentitle him to relief in this court; and it does appear to me very clear that by interfering the court would do much more injury than good. I think the plaintiff should be left to his remedy at law.

(*a*) Greenhalgh v. The Manchester and Birmingham Railway Company, 1 Rail. Ca. 68; Temple v. The London and Manchester Railway Company, IB. 120; Drury on Inj. 293-4.

SAUL v. COOPER.

Practice.

1853.

Saul v. Cooper.

Sept. 24.

By section 7 of order 46 (orders of 1853) subpœnas for costs are abolished. This order (by order of 6th June) took effect from 6th June as to all suits, as well those then pending as those subsequently instituted. The effect of this order upon orders giving costs issued previously to the time it took effect is, that an order must be obtained, fixing a day for payment of the costs when taxed.

ANONYMOUS.

Practice.

The court refused to hear, otherwise than in chambers, a motion to enlarge the time appointed for payment of mortgage money; and on the motion being renewed in chambers, on an affidavit of the defendant's solicitor, stating his belief that the defendants had exerted themselves, and were still endeavouring to raise the money, and that the property was worth much more than the debt, the motion was refused with costs.

August 30th

MARTYN v. KENNEDY.

Rectories—Setting aside patent.

Where a party having, according to the custom of the clergy corporation, paid the patent fee for a lease, gone into possession and made large improvements; and such custom being that the party so paying was considered as having a lease for twenty-one years, with a right of renewal and pre-emption (not materially varied by the orders in council subsequently passed regulating the sale of clergy reserves,) and the crown having, in ignorance of the facts, subsequently by letters patent granted the lands in question as a glebe for the rector of Darlington, such patent was rescinded, as having been issued in error and mistake.

March 8, and April 5th.

The facts giving rise to this suit appear in the report of the case, *ante*, volume 2, page 80, and in the judgment.

Statement.

Dr. *Connor*, Q. C., and Mr. *McDonald*, for the plaintiff.

Argument.

Mr. *R. Cooper*, for defendants.

1853.

Martyn v. Kennedy.

The judgment of the court was now delivered by—

ESTEN, V. C.—The facts of this case, as I collect them from the pleadings and evidence, are as follows: The land in question in this cause—namely, Lot number twenty-five in the first concession of the township of Darlington—is a clergy reserve; that is to say, part of the lands which have been appropriated under the provisions of the 31st George III. to the support of a protestant clergy in this province. The act in question enabled his Majesty to authorize the Lieutenant Governor of the then province of Upper Canada to appropriate to this object a due proportion of the crown lands in respect of lands which had been already granted, and enacted that upon every subsequent grant of lands a reservation should be made of land in the same township or parish in the proportion of one-seventh for the same purpose, and the rents, profits, and emoluments of the lands so to be appropriated were to be applied to such purpose and to no other. The same act enabled His Majesty to authorize the Lieutenant Governor with the advice of the Executive Council, to erect parsonages and rectories in the different townships or parishes of the province, and to endow such parsonages or rectories with such portion of the lands so appropriated as should be deemed expedient.

Judgment

Under the provisions of this act a large quantity of land would be appropriated to the purpose specified in it; some time however would probably elapse after such appropriation before parsonages or rectories would be generally erected or endowed, and such endowment when made would not probably absorb the whole of the lands so appropriated. It does not appear to have been considered that the act in question authorized a sale of these lands; but it directed as already mentioned, that the rents, profits, and emoluments of them should be applied to the purpose for which they were to be appropriated.

In the year 1819 the whole quantity of land contemplated by the act of 1791 had been appropriated in accordance with its provisions, and it appears to have become necessary to make some provision for its care and management; for in that year the body called the "Clergy Corporation" was erected for the express purpose of superintending and managing these lands. This body was composed of the clergy of the province and two public officers. Under these circumstances, and under the management of this body, a custom grew up of leasing these lands; and from the year 1827 at all events, if not from an earlier period, the leases were in a form which is now well understood and acknowledged. A lease, granted by the clergy corporation, has been produced by the plaintiff, and Mr. *Baines*, a witness called on the part of the defendants, deposed that it was in the form used by the clergy corporation since the year 1827 without variation. This witness was well qualified to speak to this fact, as he has been in the employment of that body since the year 1833, in a capacity which necessarily brought him acquainted with the form of their leases.

Judgment.

This lease was for 21 years, and at a rent of £1 15s. for the first 7 years; £3 10s. for the second 7 years; and £5 5s. for the remainder of the term, or an equivalent quantity of corn, at the option of lessors; and it contained a covenant that the lessee should be entitled to renew the term at the expiration of any one of those periods according to the existing regulations applicable to the disposal of the clergy reserves. The leases, when granted, were contained in letters patent under the great seal of the province, and in the usual form. When a party desired to have a lease of a clergy reserve he petitioned the clergy corporation for it, and paid the patent fee to their secretary. This fee was a sum of money amounting to £2 17s. 6d. payable, I apprehend, properly, upon the issuing of the patent. If the petition was refused the fee was returned; if it was

1853. Martyn v. Kennedy.

granted the fee was retained; but in general the lease or patent was not actually taken out, but the payment of the fee was considered equivalent to the issuing of an actual lease, and conferred upon the party paying it the same rights as if a lease had actually issued. This practice appears to have been pursued until 1833, when the leasing of clergy reserves was discontinued.

In the year 1827 the bulk of these lands seem to have remained in an uncultivated and unproductive state, and it was thought desirable that a portion of them should be sold in order to provide means for improving the remainder.

It is not improbable that Mr. *Peter Robinson*, who then held the office of commissioner of crown lands, and who appears to have visited England about this time, may have done so with this object. At all events, Judgment. in the year 1827 an act was passed by the Imperial parliament authorizing the sale of a portion not exceeding one-fourth of the clergy reserves, provided that the quantity to be sold in any one year should not exceed 100,000 acres. The monies produced by the sales were directed to be paid to such officer of the revenue as Her Majesty should appoint, and to be invested by him in the stocks or funds of Great Britain. The dividends and interest were to be applied to the improvement of the residue of the clergy reserves remaining unsold, or otherwise to the purposes for which they were originally reserved. At this time, no doubt, a great part of these lands were in lease.

It does not appear how many rectories or parsonages had been erected or endowed. The quantity of land reserved appears to have been very large, and an ample field of selection was doubtless presented for the purpose both of endowment and sale. Lands under lease would not probably be selected for the purpose of endowment; and on sales it would be natural to give a

1853.
Martyn v. Kennedy.

preference to the lessee, who would not only be more inclined to purchase than anybody else, but who would expect compensation for his improvements, in case the land in his occupation should be purchased by any other person. Accordingly we find that a lessee of a clergy reserve could at any time purchase the land in his occupation if he desired to do so. This fact is deposed to by Mr. *Wilmot*, a witness of great experience on this subject, called on the part of the defendant. After the year 1827 therefore a person who had paid the patent fee for a clergy reserve must be considered as having a lease for 21 years, at a small, though increasing rent, with the privilege of renewing the lease at the end of 7, 14, and 21 years, according to the then subsisting regulations, and with the power of purchasing the land which he occupied whenever he desired to do so, at a price which was probably, as appears from the petition of the defendant presented to the government in 1844, much less than that for which it could have been purchased from a private individual. This was in fact an important and valuable estate, which, depending, as it did, upon the favour and justice or policy of the crown, was, I apprehend, as safe as if it had been actually secured to the individual claiming it by some legal instrument. Such appears to me to have been the state of things in this respect on the 21st of January 1836, when the letters patent, which it is the object of this suit to set aside, were issued.

Judgment.

The facts, which occurred as to Lot number 25, in the first concession of Darlington, the land in question in this cause, and from which the title of the plaintiffs accrued, and which have produced this suit, appear to be these. As soon as the act which has been mentioned as authorizing the sale of clergy reserves had passed, or within a short time afterwards, the commissioner of crown lands instructed Mr. *Wilmot*, the witness who has been already named, and who was a deputy provin-

1853.

Martyn v. Kennedy.

cial surveyor, to value such of those lands as were situated in the district of Newcastle. I have no doubt that this valuation was ordered with a view to sales in pursuance of the act in question. Mr. *Wilmot* however says that when he found a lot which was eligible as a glebe he set it apart for that purpose, if no obstacle interfered to prevent it. The language of the order in council, or rather of the report of the committee of the council of the 15th of January 1836, which is in evidence, would seem to import, that the appropriation of lots as glebes had been made after 1832; but it is not improbable, as the evidence of both *Wilmot* and *Baines* imports, that lots might previously to that time have been set apart as glebes, although not assigned to any particular rectory. There are four points, which, I think, are settled by Mr. *Wilmot's* evidence: first, that he never appropriated a lot as a glebe without making due enquiry as to the rights existing with respect to it: second, that he was not deterred from making such appropriation by the mere fact that there was a person in possession of the lot, if such person had no title to it; third, that he never set apart any lot for this purpose which was in the possession of a person who had paid the patent fee, (which circumstances therefore constituted the title to which he referred): nor, fourth, did he ever return lots as glebes while an application had been previously made for liberty to purchase. Mr. *Wilmot*, I think, received his instructions to value the clergy reserves in the Newcastle district in 1828, and he says that while thus employed he was frequently applied to by individuals desirous of purchasing lots to value them, which he did. *David Stevens*, a witness examined in this cause on the part of the defendant, applied to the commissioner of crown lands to purchase Lot number 25, in the 1st concession of Darlington, the land in question in this cause, on the 28th of March, 1828. He repeated his application on the 7th of February, 1829. The applications are produced and proved.

Judgment.

1853.

Martyn v. Kennedy.

It appears that he had several interviews with the commissioner of crown lands on this subject. At some or one of these interviews he is told by that officer, first, that he can purchase, but that the lot must be valued; then, that it must be valued by Mr. *Wilmot*. He is likewise informed that a person who had made improvements would be entitled to a preference on purchase, whereupon he goes upon the lot, and finding that no improvements had been made upon it, spends half a day in cutting down trees; and upon one of these occasions the commissioner of crown lands makes an entry in a book, which he tells him will secure to him the right of purchase. He is finally advised by the commissioner of crown lands to apply to Mr. *Wilmot* to value the lot, which he does, and thereupon they both go upon the lot, and it is valued by Mr. *Wilmot*. This I think happened in 1831. *Stevens* immediately afterwards comes to Toronto, then called York, for the purpose of paying the first instalment of the purchase money, supposing now that every obstacle to his purchase had been removed, and finds that one *Nathan William Tripp* had applied to the clergy corporation for a lease of the lot, and had paid the patent fee. In fact while *Stevens* was employed in procuring the valuation of the lot, *Tripp* had procured one *Charles Tripp* to make an affidavit which he lodged in the office of the commissioner of crown lands, stating that there was no improvement on the lot and that *Stevens* had endeavoured to sell his right for £12 10s. He must at the same time have applied for a lease to the clergy corporation. The affidavit, although attached to *Stevens'* application to purchase, must have been made in support of *Tripp's* application for a lease. It is evidently calculated to obstruct *Stevens'* purchase, and was made at Whitby on the 15th of August 1831, and on the 16th, the day after, *N. W. Tripp* paid the patent fee to Mr. *Markland*, the receiver of the clergy corporation, who felt justified under the circumstances in receiving it. This fixes *Stevens'* visit to York for the

Judgment.

1853. Martyn v. Kennedy.

purpose of paying the first instalment of the purchase money after the 16th of August, 1831, and the valuation of the lot by Mr. *Wilmot* about that time. *Stevens* must have visited York for this purpose between August and November, for in the latter month he wrote a letter to the commissioner of crown lands, which was probably called forth by his having learned the intelligence of *Tripp's* application. The letter is not produced, but the answer of the commissioner of crown lands is. It is dated the 5th of December 1831, and purports to be in answer to a letter from *Stevens* dated in the November previous. It refers to the affidavit of *Charles Tripp* and states that the writer had requested Mr. *Markland* to delay issuing the lease to *N. W. Tripp* until he (the writer) had inquired into the truth of the facts alleged in the affidavit. The witness *Baines* proves from a book used in the office of the clergy corporation called "The Township Book," that *Tripp* petitioned for a lease, and paid the patent fee. The receipt for the patent fee, dated the 16th August 1831, is produced and proved by Mr. *Ridout*. Mr. *Baines* also proves from the township book the payment of a year's rent by *Tripp*. He infers that the petition must have been granted, otherwise the patent fee would have been returned and the year's rent would not have been received. The receipt for the year's rent is produced and proved; it is dated the 24th of December 1832, and expresses that the sum thereby acknowledged was received in respect of rent for Lot number 25, in the first concession of Darlington, *then in dispute between Tripp and Stevens*.

Judgment.

The witness *Baines* proves an entry in the township ledger against the lot in question, as follows: "Lease to *N. W. Tripp*, Lot No. 25, 1st concession Darlington, by cash £1 15s." He also speaks to a pencil entry in the hand writing of Mr. *Markland* against the lot in question to this effect: "Lease not to issue, as *Stevens* has a claim." The former of these

entries was probably made in 1832, about the time of the payment of the year's rent before referred to, and the latter about the time of the commissioner of crown lands' letter to *Stevens* above mentioned, dated 5th December 1831.

There cannot be a doubt that *Tripp's* petition for a lease was granted subject to the claim of *Stevens*. This claim he purchased, and having paid the amount agreed upon by him and *Stevens* for that purpose, received an assignment from *Stevens* of all his interest in Lot No. 25, in the 1st concession of Darlington. This assignment is produced and proved. It is dated the 26th of May 1835; but I apprehend that the dispute between *Tripp* and *Stevens* must have been settled, and the money payable by *Tripp* on that account paid long before; for we find that *Tripp* went into possession in 1832, and that the first improvements on the lot were made in November in that year. At all events, as *Tripp's* petition was granted subject only to *Stevens'* claim, and as this was afterwards acquired by *Tripp*, it may henceforward be laid out of the case, and *Tripp* must be considered as having from the 16th of August 1831 a lease of the lot in question for twenty-one years, with a right of renewal, and the privilege of purchasing whenever he might desire to do so. It was, I think, after this, and probably after December 1832 that Mr. *Wilmot* returned his lot as a glebe. My reasons for fixing this fact at the time I have named are these: Mr. *Wilmot* says that he never was on the lot but once, and that was after *Stevens* had applied to him to value it, which was in 1831. I conclude that he would not return a lot as a glebe without having seen it, and at all events he would have mentioned to *Stevens*, who he knew, when he applied to him to value the lot, intended to purchase it, that it had been recommended as a glebe, if such were the fact. That he did so is nowhere stated; on the contrary, *Stevens* says that he first heard of the lot as a glebe about three years

Judgment.

1853.

Martyn v. Kennedy.

after his first application to purchase, which would bring it to about 1831. If *Wilmot* did not return the lot as a glebe before *Stevens* applied to him, he certainly would not do so afterwards, until *Stevens* had relinquished all claim; for he expressly informs us that he never recommended a lot as a glebe after anybody had applied to purchase it. Now *Stevens* had not relinquished all claim in December 1832, for the receipt of the year's rent, payed by *Tripp*, which is dated on the 24th of that month, states that the lot is still in dispute between *Tripp* and *Stevens*. *Wilmot* likewise says that he thinks he returned the lot as a glebe after he heard of the dispute between *Tripp* and *Stevens*, and that he heard of it from *Stevens* himself; which could not have been until after August 1831, for *Stevens* before that time did not know of *Tripp's* application, and the dispute had in fact not arisen. It is true that this witness says that he thinks he returned the lot as a glebe before 1831; but the weight of evidence is so much the other way, that I must attribute this not very positive declaration to a failure of memory, natural in a person of his age, especially as he says in the same breath that he does not recollect valuing the lot, which is distinctly deposed to by *Stevens*. *Wilmot* having returned this lot as a glebe, the word "glebe" is written in ink opposite to or against it in a book belonging to the clergy corporation called the Township Book; and at page 123 of that book, where the lot in question is mentioned, and other entries relating to it are likewise introduced. The first of these consists of the words "*Nathan William Tripp*" in the handwriting of Mr. *Ridout*, who received the patent fee from *Tripp*. This entry was, I presume, made when the patent fee was paid, and in consequence of its payment, and probably therefore in 1831. The next of these entries appears to have been the pencil memorandum before mentioned in the handwriting of Mr. *Markland*, which was probably made not long afterwards by way of check upon Mr. *Ridout's* entry.

Judgment.

1853.

Martyn v. Kennedy.

The next of these entries is the word "glebe" in black ink in the hand writing of Mr. *Baines*, which has been already mentioned. Mr. *Baines*, says he is clear that this entry was made as early as the year 1833, and he is probably right. I think it was made in that year and not before, and for these reasons: first, it was confessedly based on Mr. *Wilmot's* return or his notes, which were not, I think, made until 1833: second, the witness *Baines* was not employed in the office of the clergy corporation before that year, and this entry occurs in a book which then belonged to that body.

It is important to consider the circumstances, under which Mr. *Wilmot* recommended this lot as a glebe, which at first sight, regard being had to his own evidence, seems a strange proceeding. He himself says that he never recommended a lot as a glebe either after an application had been made to purchase it, or after a person had paid the patent fee upon, and gone into possession of, it. It is difficult or impossible therefore to find a point of time at which he could consistently with the rules—which invariably guided him in these matters—have recommended this lot as a glebe, unless he made his return either before *Stephens'* application to him, or under a misapprehension of the real facts of the case.

Judgment.

I think, for the reasons before mentioned, and another, to which I shall presently refer, that the evidence excludes all idea of his having returned the lot as a glebe before *Stevens'* application to him; in which case it must likewise be assumed that he would not intentionally have made such return while *Stevens'* application to purchase was still pending. Now *Stevens* states in his evidence that he told Mr. *Wilmot* that he had relinquished all claim to the lot. This must have been after the 24th of December 1832, because the receipt for the year's rent dated on that day represents the lot as being still in dispute between *Tripp* and *Stevens*,

1853.
Martyn v. Kennedy.

and was probably early in 1833. Mr. *Wilmot*, who says that he heard of the dispute between *Stevens* and *Tripp*, and as he thinks before he recommended the lot as a glebe, may have inferred from *Stevens'* information that the lot was vacant and disposable as a glebe. *Stevens'* application was the only one that he knew; nothing more than a rumour appears to have reached him with regard to *Stevens'* and *Tripp's* dispute, and he may not have borne it in mind when he made his return; so that, judging from what he had seen of the lot when he valued it for *Stevens*, that it was eligible for a glebe, and concluding from what he learned from *Stevens* that no claim existed against it, he may have at once returned it as a glebe without further inquiry. It is probable that increased activity was exerted in providing glebes about this time in consequence of the receipt of Lord *Goderich's* despatch upon that subject in 1832.

Judgment.

Mr. *Wilmot* says in his evidence: "I heard of some difficulty between *Stevens* and a person named *Tripp* about the lot in question. I cannot say whether it was before or after I heard of this dispute that I recommended the lot for a glebe; I think it must have been afterwards. I think it was from *Stevens* that I heard of his dispute with *Tripp*. I believe I never was on the lot more than once, and that was after *Stevens* had applied to me. I returned the lot in question as a vacant lot." I think *Stevens* told me he had given up the lot." And a little further on he says: "When I made the return as to the lot in question, I was satisfied that it was a vacant lot." It seems to me, as the most probable conclusion that I can draw from the evidence, that Mr. *Wilmot*, hearing from *Stevens* that he had relinquished the lot, inferred that it was vacant, and recommended it as a glebe accordingly, in ignorance that *Tripp* had paid the patent fee, and petitioned successfully for a lease, and had gone into possession and made improvements; in ignorance, in fact, that it

was not a vacant lot. It is, I think, clear from Mr. *Wilmot's* evidence that he considered the lot a vacant one, and made his return upon that supposition; and it is equally clear, from what he states in his testimony, that, when a person had paid the patent fee upon a lot, and gone into possession of it, he did not consider the lot as vacant or recommendable as a glebe; but, on the contrary, that the party in possession had a title to it. The necessary inference is, that he made his return in ignorance of the real facts of the case. Upon this return it is to be intended Mr. *Baines* entered the word "glebe" opposite the lot, at page 123 of the Township Book. He could not have done this without seeing Mr. *Ridout's* entry, and Mr. *Markland's* pencil entry, and without being referred to Mr. *Harrington's* entry in the township leger; and with this evidence, and the facts which it indicated, brought under the notice of those who directed the appropriation of this lot as a glebe, it is inconceivable how such appropriation could have taken place, if Mr. *Wilmot's* report, upon which it was based was dated previously to *Stevens'* application to him in 1831 to value the lot. If however it was made early in 1833, or after the settlement of the dispute between *Stevens* and *Tripp*, the persons who appropriated this lot as a glebe may have done so, placing implicit reliance on Mr. *Wilmot's* accuracy and carefulness, and concluding that, whatever dealing may have taken place with regard to the lot previously, it was at all events then vacant and eligible for a glebe.

Judgment.

It is to be remarked that all the evidence of *Stevens'* application, as well as that of the dealing with *Tripp*, was in the offices of the clergy corporation or the government; that nothing was known in these offices of the settlement of *Tripp's* and *Stevens'* dispute, or of the relinquishment of *Stevens'* claim; and that in making the appropriation in question this claim was disregarded equally with *Tripp's* rights; so that it is to be inferred that no regard was paid to anything but

1853. Martyn v. Kennedy.

Mr *Wilmot's* return, and that it was assumed that he had not made such return without due inquiry into the rights of parties. He himself states in his evidence that he never returned a lot as a glebe without full inquiry as to whether any rights existed with respect to it or not. I therefore reject the supposition that Mr. *Wilmot's* return was made before the application of *Stevens* to him to value the lot as altogether improbable. If this is a correct conclusion from the evidence, it seems to exclude the question which might otherwise arise—namely, whether *Tripp* did or not pay the patent fee with the knowledge that the lot had been recommended as a glebe and on the understanding that his rights were not to stand in the way of such an appropriation.

Judgment.

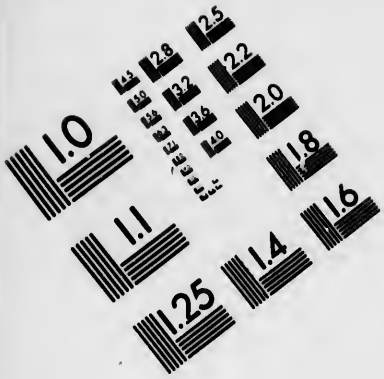
It appears that in 1835 *Tripp* presented a petition to the government or the clergy corporation. This petition is not produced and we are totally ignorant of its contents. It would probably, if produced, have furnished important evidence in the cause, in favor of one side or the other, and it is certain, that, if it could have been discovered, the party in whose favor it was, would have produced it. It was referred to Mr. *Baines* to report upon and his report is proved. It is dated the 9th of November 1835, and the 9th of February 1836, and states that the lot in question had been recommended as a glebe and described for the benefit of the incumbent of St. John's Church, Darlington, and that the petitioner had paid the patent fee in 1821 on the lot, with the understanding that it would be appropriated as a glebe, and was willing to accept a lease as such.

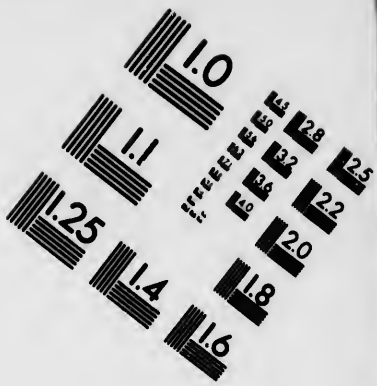
This report was made on the information of Mr. *Wilmot*, which appears however, from *Baines'* own evidence, to have been only to the effect that *Tripp* was aware that the lot had been recommended as a glebe. Mr. *Baines* says, "I endorse the report on the petition

from information received by me from Mr. *Wilmot*. Mr. *Wilmot* informed me that the party was aware that the lot had been recommended as a glebe; that *Tripp* the petitioner was so aware. My report was founded entirely upon the information I received from Mr. *Wilmot*, which was, I think, verbal. I saw him repeatedly upon the subject. I have not the petition of *Tripp*. The proper place for it is in the council office." The report is as follows: "*Nathan W. Tripp*, 9th November, 1835: Lot No. 25, 1st concession in Darlington was recommended for a glebe and has been described for the benefit of the incumbent of St. John's Church in Darlington. The petitioner paid the patent fee in 1831 with the understanding that the lot would be set apart for a glebe, and as such he is willing to receive a lease.—*T. B.*, 9th February, 1836."

Judgment.

Mr. *Baines* states that his report was founded entirely on information received from Mr. *Wilmot*, which purports only that *Tripp*, the petitioner, was aware that the lot had been recommended as a glebe. Mr. *Baines* must have applied to Mr. *Wilmot* for information after the petition had been referred to him, that is, in 1835. Mr. *Wilmot* might have meant only that *Tripp* was *then* aware that the lot had been recommended as a glebe. If he meant that *Tripp* was aware that it had been recommended as a glebe when he paid the patent fee, his information would not warrant the inference that *Tripp* understood when he paid the fee that the lot would be set aside as a glebe, and was at the time of this conversation willing to accept a lease of it as such. It is remarkable that Mr. *Wilmot* himself is not interrogated as to this fact, and is totally silent with respect to it. If Mr. *Wilmot* only meant in his communication to Mr. *Baines* that *Tripp* was aware then —that is, at the date of such communication—that the lot had been recommended as a glebe, the fact is obviously an immaterial one. If however Mr. *Wilmot* meant, and it was a fact that *Tripp* was aware when





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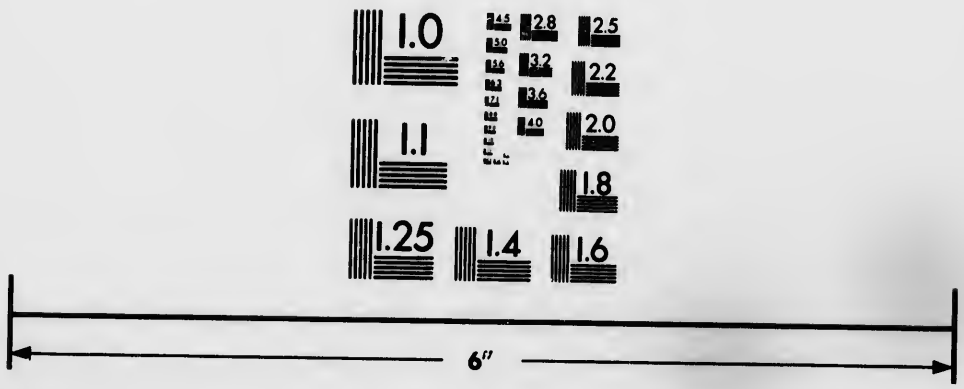

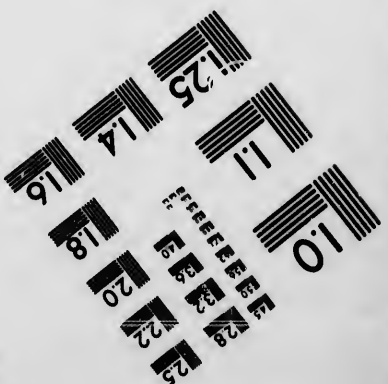

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1853. Martyn v. Kennedy.

he paid the patent fee that the lot had been recommended as a glebe, it does not follow that he then understood that it would be set apart for that purpose, or was willing to accept a lease of it as such. The very contrary may have been, and was probably the fact. The material fact, which it was important for the defendant to substantiate, was, that *Tripp* paid the patent fee with the understanding that the lot would be appropriated as a glebe, and was willing to receive a lease of it subject to such appropriation.

I feel it incumbent upon me to reject such a conclusion, and for the following reasons: 1st. It rests altogether on an inference, drawn by Mr. *Baines* from information given him by Mr. *Wilmot*, which did not warrant such inference; 2nd. Mr. *Wilmot* himself is not questioned, and is totally silent as to the fact; 3rd. It is extremely improbable that *Tripp* should have gone into possession of the lot, and made improvements upon and dealt with it in the way he did, if he held it by so precarious a tenure; 4th. I do not think, according to the best judgment that I can form upon the evidence, that when *Tripp* paid the patent fee the lot in fact either had been recommended, or was designated as a glebe; and last, no evidence has been produced upon the point which it would be consistent with the duty of the court to recognize as entitled to its attention.

Judgment.

The communication made by *Wilmot* to *Baines*, even if it meant more than it did, is no evidence against the plaintiffs; neither is the statement contained in *Baines'* report upon *Tripp's* petition. I think the fact in question was one which it was incumbent on the defendant to prove, if he wished, to rely upon it, being matter of defence offered by him against the plaintiffs' claim of relief, and at least as much within his power to prove, as within that of the plaintiffs to disprove. The defendant has not interrogated *Wilmot* upon this point, nor has he called *Tripp* at all; and I must necessarily

conclude that the fact was incapable of proof: in other words, that it never occurred. 1853.

Martyn v. Kennedy

There are some other points in the evidence which it is right to notice. Mr. *Baines* proves that in 1834 or 1835 he was instructed by the commissioner of crown lands to set apart in every township, where it had not previously been done, seven lots as glebes. They were to be the best lots that could be found, provided they were not appropriated or occupied, and were vacant. This evinces the anxiety of the government not to interfere with any claims, resulting even from mere possession. The witness *Cubitt* proves that he purchased the right of a person who had paid the patent fee for £50; that upon application to Mr. *Baines*, he procured the lot to be transferred into his own name on payment of the back rent, amounting to £27; that he applied to purchase, but was told that the clergy reserves were not then open to sale; whereupon he asked for a lease, and was informed by Mr. *Baines* that leases were not then given, but that the payment of the patent fee was sufficient, and was tantamount to a lease; that when the clergy reserves were again open for sale, he made a second application to purchase, whereupon it was referred to certain persons to value the lot; which being done, he purchased at their valuation, paying the back rent, which had accrued subsequently to his previous payment of back rent; that he considered that he had purchased a right to a lease for 21 years, and to purchase when the clergy reserves were open for sale, and that the back rent, which he had mentioned, was £3 per annum. This evidence is important and strongly corroborative of the plaintiffs' claim. This witness indeed adds, that in his opinion persons who had made improvements on clergy reserve were amply compensated for their improvements by holding the lands on such terms as he had mentioned: upon which all that it is necessary to remark is, that the government were not guided by any such consideration. The witness

Judgment.

1853.

Martyn v. Kennedy.

Neville speaks to interviews which took place between the defendant and one of the plaintiffs and the brother and agent or partner of the other, upon the subject of a settlement. From this evidence, I infer that the defendant offered to carry into effect the recommendation of the council issued in 1845, and also made other offers; all of them however falling very far short of the rights which the plaintiffs conceived themselves to have under the circumstances of the case. These offers were rejected by the plaintiffs, who insisted upon their right to purchase the land, or to be fully indemnified for their improvements. There is a document, produced in evidence, which it is right that I should notice. This is a return of the inspection of clergy reserves in the township of Darlington, which appears to have been called for by the government with a view to sales. The return is dated the 26th of February 1836, more than a month after the patent in this case had issued. The inspection however itself was executed between 1st of July and 31st of December 1831. It was made by Mr. *Wilmot*, who also signed the return, which he no doubt prepared from his notes made at the time. This return named *D. Stevens* as the applicant for the lot. Mr. *Wilmot*, when he made these notes, had in fact just valued the lot in order to enable *Stevens* to purchase. In the general remarks it is stated that "*Tripp* sold this lot to a young man for $250. *Tripp* lives in Baltimore, in the township of Hamilton, Newcastle district." This return nowhere describes the lot as a glebe, or contains any allusion to its having been, or being intended to be, appropriated for that purpose, which strongly corroborates the supposition that such appropriation must have taken place subsequently to 1831.

Judgment.

As to the improvements made upon the lot by the plaintiffs and those under whom they claim, the evidence is, as usual, contradictory. *Burke* says that *Kelly* began the improvements in November 1831, and raised

1853.

Martyn v. Kennedy.

the body of a log house on the 1st of December of that year on the south half; that the first clearance was made, and house built, in that year on the north half; that 25 acres were cleared on the south half when he sold to the plaintiff *Martyn* in 1837; that he made no improvements himself; that 25 acres were cleared and a log house and barn erected on the south half before 1836; that there is a house on the north half, and a house and frame barn on the south half; that the land is under good fence, and some of it in a high state of cultivation; that 75 or 80 acres are cleared on each end of the lot, and that the improvements are worth £700 or £800. The other witnesses who speak to the point estimate the value of the improvements very differently. The witness *Neville* represents them as being of an inferior description to what they were described to be by *Burke:* and he values *Martyn's* improvements at £70 or £80. *Cubitt* says that five years ago he was on the lot, and each of the plaintiffs had a house and some improvements. It is manifest however, upon the whole evidence, that considerable improvements were made on the lot before the 1st of January 1836. At this time therefore *Tripp* had paid the patent fee on the lot; had petitioned successfully for a lease; had paid a year's rent, and had made considerable improvements: in other words, according to all the rules which the crown and the clergy corporation had established for their own guidance, and invariably, except under extraordinary circumstances, observed in the disposal of lands of this description, had a lease of the lot for twenty-one years at a low rent, with the privilege of renewal, and the right to purchase at a moderate price whenever the clergy reserves were open for sale.

Judgment.

It was under these circumstances that the patent in question issued. It recites part of the provision already referred to, of the before mentioned statute of the 31st George III. for the appropriation of land for the sup-

1853.

Martyn. v. Kennedy.

port of a protestant clergy and the erection of parsonages; and certain letters patent, issued in the 33rd year of the same king, whereby the provinces of Upper and Lower Canada were erected into a Bishop's See, and then proceeds to establish the first rectory or parsonage within the township of Darlington or the parish church of St. John in such township; and to appropriate two lots of land in the 1st concession of such township—namely, Lot 25 (being the land in question in this cause) and Lot 31—as the endowment or glebe to be appertaining to such parsonage or rectory. The act of the 31st George III. provides that the Lieut. Governor of Upper Canada should by an instrument under the great seal of the province from time to time endow parsonages or rectories, which should be erected in pursuance of that act, with such of the beforementioned lands as should be judged expedient, and should from time to time present incumbents to such parsonages or rectories, who should thereupon hold the same and "all rights, profits and emoluments thereunto belonging or granted, as fully and amply, and in the same manner, as the incumbent of any parsonage or rectory in England." Under these provisions the fee simple of the lands appropriated as the endowment of any rectory vested in the incumbent of such rectory as soon as he was presented, and became transmissible to his successors in like manner as in England. The effect then of the patent in question was to vest the fee simple of Lots 25 and 31 in the defendant, when, as afterwards happened, he became the incumbent of the rectory of Darlington. By this grant, no doubt the title and interest which *Tripp* had acquired in Lot 25 under the circumstances before detailed, was completely annihilated and destroyed. The question is whether this was done designedly and knowingly, or under error and mistake. It is remarkable that this patent bears date the 21st of January 1836, and that on the 15th of that month, exactly one week before, the executive council, by whose advice all grants for

Judgment.

the endowment of rectories were made, in a report addressed by them to His Excellency *Sir John Colborne*, the then Lieutenant Governor of Upper Canada, after stating that in pursuance of *Lord Goderich's* despatch dated 5th of April 1832, they had caused the necessary steps to be taken for the purpose of setting apart lots in each township throughout the province, used the following expressions—namely, "Much delay has been caused by their anxiety to avoid interfering with persons who might have acknowledged claims to any of the reserves, to be selected either for lease or purchase," and, after mentioning another difficulty which had retarded their proceedings, they used the following expressions—namely, "these obstacles have now been surmounted." From these passages I think it is certain that the grants recommended by the council were so recommended and made under the persuasion that thereby "no acknowledged claims, either for lease or purchase" were infringed or injured. There are other remarkable facts in the case, which strongly corroborate the same view. It appears that the defendant was licensed to the cure of souls in Darlington in 1838, but finding parties in possession of the lots which formed the endowment of the rectory, he did not apply for immediate presentment to the living from repugnance to be involved in a suit with his parishoners, and because he thought their case a hard one, a supposition of facts different from those which really existed, but not constituting a case of greater hardship. Under these circumstances he advised the parties in possession to present a petition to the government for compensation. A petition is presented accordingly, and the defendant awaits the result. In 1842, no answer having been received, he applies to be presented to the living, which is done. The parties in possession then appoint a person to attend to their petition, and the defendant agrees to await the answer of the government. The petitioners are advised by the president of the council to have their improvements valued, which is done, and

Judgment.

1853. the valuation is laid before the council, the defendant promising to take no step towards the dispossession of the petitioners, until an answer should have been received to their petition. No answer having been received, the defendant visits Kingston. the then seat of government, and has an interview with the president of the council, who holds out a prospect of scrip being given to the petitioners. This however was not done; and in 1844, on the 16th of February, the defendant presents a petition himself to the government, in which he prays compensation for the expenses which he had incurred in the matter, and recommends the petition of the parties in possession to the favourable consideration of the government. The petition of the plaintiff is not produced, nor are its contents known; but it must be presumed to have stated the facts of the case as they are proved by the evidence in this cause. In consequence of these applications an order in council was issued, dated 3rd of February 1845, recommending the government to transfer the back rents due on the respective lots to the defendant on condition of his arranging with the parties in possession for their continuance in possession until the expiration of 21 years from the dates of their respective applications. This order was obviously the recommendation of a compromise, and not in the nature of an adjudication on the rights of the parties.

Martyn v. Kennedy.

Judgment.

I have already mentioned that I think the defendant offered to fulfil this recommendation, but the plaintiffs rejected his proposal, which indeed fell far short of their rights as they understood them. On the 18th of July 1845 the defendant presented a second petition to the government, praying that he might be at liberty to surrender the lots appropriated as the endowment of his church, and to purchase others at the approaching sales of clergy reserves, to the amount at which the appropriated lot had been valued, which was 25s. per acre; and praying also compensation for the loss which

he would thereby sustain. This petition was stated by the defendant to be presented with the sanction of the Bishop. To this petition an answer was returned on the 25th of the same month—that is, within a week—in the shape of an order in council. The petition appears to have been referred to a committee of the council, who made a report which was approved on the same day, recommending that the application of the defendant to surrender the lots in question and to purchase others in the manner proposed in the petition should be granted. The reason assigned by the committee for their recommendation was, that the application of the defendant presented a favorable opportunity of relieving him from the difficulties in which he had been involved through an *injudicious* endowment of his rectory, and would, if acceded to, enable the occupants of the lots to hold them of the government, and thereby remove all cause of dissatisfaction on their part. I cannot help regarding the proceedings, which I have detailed, as a strong recognition of the validity of the plaintiffs' claims, both on the part of the government and the defendant himself. In his answer indeed the defendant thought it right to say that he did not believe the facts, on the grounds of which he considered their case a hard one and recommended it to the favorable consideration of the government. But these facts have been proved in the cause to be substantially true. On the part of the government the recognition of the plaintiffs' title is very decided. The president of the council first directs the plaintiffs to procure their improvements to be valued, which must have been with a view to the consideration of their claim: and afterwards presents to the defendant the prospect of land-scrip being allowed them. When an answer to their petition is obtained, it certainly recognized their claims, although it fell far short of their satisfaction. It did not say that they had no claim at law or in equity; that the whole estate, both legal and equitable, was in the defendant; and that

1853.

Martyn v. Kennedy

Judgment.

1853. if the plaintiffs would not agree to his terms, he must enforce his rights.

Martyn v. Kennedy.

It recommended a compromise, which under the circumstances afforded the only means, beside legal proceedings, or the payment of a large sum of money, of adjusting the dispute. At this time the hands of the government were shackled by the patent, which remained in force until it should be annulled, and deprived them of all power of satisfying the claims of both parties. But when this obstacle was removed by the offer of the defendant, contained in his second petition to surrender the appropriated lots and purchase others, they eagerly embraced his proposal, and intimate their assent to his application in the short space of a week, for the avowed purpose (partly) of giving full effect to the claims of the plaintiffs; for they were to hold the lots thenceforth of the government and obviously upon the terms upon which they claimed to hold them, for "thereby all cause of dissatisfaction was to be removed on their part." In the same document which conveyed this answer to the defendant's petition the government call the endowment "injudicious"—in other words, condemn it; which could have been for no other reason than because it interfered with the rights of the plaintiffs; and they evince by their conduct pretty plainly, that if the real facts of the case had been known, the endowment never would have been made, for they eagerly embraced the opportunity afforded them by the defendant's offer, of setting it aside for the acknowledged purpose of giving effect to the plaintiffs' claims. In the face of these facts it is impossible to believe that the government, by means of this patent, designedly and deliberately annihilated and destroyed rights, which, only six days before, they had expressed an anxious desire to protect. This patent undoubtedly issued in mistake and error, and it is not perhaps very difficult to discover how it arose. For information respecting a clergy reserve, reference would naturally be made to the books and documents in the

Judgment.

office of the clergy corporation, and in the proper government offices. No title could be acquired except through the medium of some transaction in some or one of these offices. Mr. *Wilmot* says that mere possession without title did not prevent him from returning a lot as a glebe; but that possession, improvements, and payment of the patent fee constituted a title. If these documents were consulted they would shew the titles acquired by *Stevens* and *Tripp*, but the latest transaction that would appear, would be the return of the lot for a glebe as a vacant lot, and its definitive appropriation as a glebe, which would probably satisfy the government that the lot was vacant and disposable for the purpose to which it had been appropriated. There would remain, as a source of information, the report made by *Baines* upon *Tripp's* petition. It is, I think, extremely doubtful whether this report came under the notice of the government at all before the issuing of the patent. There are two dates to it, one at the head, and the other at the foot. The former is the 9th November 1835; the latter the 9th of February 1836, 19 days after the patent issued. I should infer that the report was wholly or partially prepared on the 9th of November 1835, the former date, and withheld until the latter date—namely, the 9th of February 1836; probably in order to obtain further information, or that it might be completed, and was then finally despatched. Mr. *Baines* says that he saw Mr. *Wilmot* repeatedly on the subject of this report. If this hypothesis is well founded, the report in question has no application to the matter in dispute between these parties; if, however, this report did come under the notice of the government before the patent issued, it is possible that supposing *Tripp* to have acted with full information of this intention with regard to this lot, the government may have made the grant to the Rectory of Darlington advisedly.

1853.

Martyn v. Kennedy

Judgment.

But, if they had known that no such understanding

1853. Martyn v. Kennedy

at all existed, but on the contrary that *Tripp*, or those who claimed under him, had paid the patent fee; presented a petition for a lease, and procured a favorable answer to it; paid a year's rent and gone into possession, and for several years' expended time, labour and money, on the faith of having and enjoying the usual title acquired under such circumstances to a lease for twenty-one years, with a right of renewal and privilege of purchase, it cannot be supposed that they would have disturbed such an interest, regard being had to their ordinary course of practice, and the principles which usually guided them in matters of such a nature.

It appears, however, that the former supposition is correct, and that this report never met the eye of the government before the patent issued. The true date of the report is on the 9th of February 1836, and the date at the head of it—namely, the 9th of November 1835—

Judgment.

is the date of *Tripp's* petition. I mention this fact although it is not legally proved, because it is in fact immaterial, and it is satisfactory to know how it really was. It appears to me, therefore, that the patent in question issued in error and mistake, and probably under the mistaken supposition either that the lot was vacant, or that the title which the plaintiffs claim had been acquired with a full understanding that the lot would be appropriated to the purpose to which in fact it was subsequently appropriated. Whether this error or mistake is sufficient, under the act of parliament upon which this suit is founded, to invalidate this patent, will depend upon other questions, which I shall now proceed to consider. In the first place, however, I shall make some observations on the situation of the plaintiffs, as regards the deduction of their title, and the proceedings of the government respecting the Clergy Reserves since the issuing of the patent. Upon the latter point, I would remark that in the second and third years of the Queen, an act was passed by the Imperial Parliament, authorising the sale of the whole

of the Clergy Reserves, but limiting the quantity to be sold in any one year; and power was given to the Provincial Government to establish regulations for the conduct of these sales, subject to the approbation of the Queen in council. Two sets of regulations were issued in pursuance of this provision, both of which were approved by Her Majesty in council. They invite particular notice, as they have a material bearing on the present case. The first series of regulations were issued on the 13th of July 1841, and were approved on the 21st of October in the same year. Their effect, as regards the subject of contention in this suit, was that lessees were to hold the lands comprised in their respective leases during the then existing and any renewed terms to which they might be entitled; and the lands held under such leases were not to be open to sale during that time, unless such lessees themselves should choose to become purchasers, in which case they could purchase at the regular price, on payment of all arrears of rent; but if they should not avail themselves of this privilege, then at the expiration of their respective leases their right of pre-emption was gone. This provision formed the 8th article of the first set of regulations. The 9th gave a right of pre-emption for twelve months to persons whose leases had expired, and had not been renewed; and to persons, not having or having had any leases at all, but who had entered into possession and made improvements without authority during the five years next preceding the 1st of January then last past—that is since the 1st of January 1836. Both these classes of persons were, on a purchase, to be allowed a deduction in respect of their improvements not to exceed 25 per cent on the purchase money. It would seem that lessees, purchasing during their respective terms, were to be allowed the full value of their improvements. The 9th article of these regulations, relating to persons in possession whose leases had expired, or who had never held any leases at all, was varied by the second

Judgment.

1853.

Martyn v. Kennedy.

set of regulations, which were issued on the 19th of March 1842, and approved by the Queen in council on the 10th of December in the same year. The alteration consisted in charging these classes of claimants with interest on their purchase money from the expiration of their leases, or the commencement of their occupation respectively. The only other alteration made by the new regulations was to substitute payments by instalments for cash payments, which had been prescribed by the first series of regulations. In other respects, these regulations remained unaltered, and under them it is clear, that, if *Tripp* were the plaintiff in this suit, any injury which he sustained in consequence of the issuing of this patent on the 21st of January 1836, the day on which it issued, would have continued substantially unaltered in the year 1845, when this suit was commenced, and in the present year when it was heard; because, whereas on the 21st of January 1836, when this patent issued the interest which he claimed was a subsisting term for 21 years, with a right of renewing it for another 21 years, and an indefinite privilege of purchase, his interest at the times of commencing and hearing this suit would have consisted in the same existing and renewable terms, and an *exclusive* right of purchase during their continuance. These several interests have been destroyed by the patent in question; and therefore, although it might have been contended that *Tripp* would have had no right of suit or relief, had his interest in respect of which he sustained the injury above referred to been extinguished before the commencement or hearing of the cause, by other means than the issuing of this patent; that argument is wholly inadmissible under existing circumstances, since that interest has been substantially preserved by the regulations, which have been mentioned; and *Tripp*, supposing him to be the plaintiff, would, but for this patent, have had at this moment a right to the enjoyment of this land for the next 22 years, and an exclusive privilege

Judgment.

1853.

Martyn v. Kennedy.

of purchase during that time; of the whole of which, or at all events of the privilege of purchase, supposing the defendant to be bound by the implied agreement for the lease, this patent would have deprived him; consequently, he would have had in substance the same injury to complain of at the commencement and hearing of this cause, as he had when the patent issued. It must not be supposed that I regard this privilege of purchase as a legal right. It is not represented in that light either by the bill or in the argument. But the question is, not whether *Tripp*, if he were the claimant, would have any legal rights, but whether this patent issued in error or mistake; and the plaintiffs contend, that if it issued in ignorance of, or in error or mistake respecting, rights, not of a strictly legal character, but derived from the consideration of the Crown, and which the Crown, had it been aware of or truly informed as to their existence, would never have violated or disturbed, it is a case of error and mistake within the meaning of this act of parliament. The next point of inquiry is as to the deduction of the plaintiffs' title, and whether they stand in the place of *Tripp*, and claim the same rights and privileges that he had. The first instrument produced is an assignment by *Benjamin H. Kelly* to *Ira Burke*, of all his interest in the south half of lot No. 25. *Burke* states in his evidence that *Kelly* had purchased from *Tripp*, and held under *Tripp*, not against him. He appears from the evidence of the same witness to have made the greater part, if not the whole, of the improvements anterior to the plaintiffs' purchase. As he claimed under *Tripp*, his improvements enured to the support and corroboration of their common title; and any defect in the title, arising from the want of a written assignment from *Tripp* to *Kelly*, is cured by the direct assignment, afterwards noticed, from *Tripp* to *Williams*. In this assignment from *Kelly* to *Burke*, is contained an undertaking on the part of *Kelly* to return the consideration, deducting £12 10s. per

Judgment.

1853.

Martyn v. Kennedy.

annum as rent, in case *Burke* should be dispossessed either by the clergy corporation or *Tripp*, within three or four years. The time originally mentioned was four years; but the number "four" has been erased, and the number "three" substituted in its place. It is very clear that, although *Kelly* claimed under *Tripp*, yet as he held no actual title from him, *Burke* was apprehensive that *Tripp* might disturb him; and this undertaking likewise indicates some doubt of the title, as regarded the clergy corporation; which may have arisen from the parties having heard of the appropriation of the lot as a glebe, or of the issuing of the patent; which, as we have seen, actually did issue about six months before. *Burke*, however, purchased *bona fide* and for valuable consideration; and whatever title *Kelly* had passed to him. The same remark applies to the subsequent dispositions of the property, to be presently noticed; and therefore, if a title really existed at the time, or a remedy for such cases was subsequently provided by law, the plaintiffs are not in a worse situation or less entitled than they otherwise would have been, because when they purchased they entertained doubts as to the stability of their title, and in one instance provided a limited indemnity, in case it should be disturbed. This assignment is dated the 25th of August 1836, and the consideration consisted of £75, paid as to £55 in promissory notes, and £20 in farm-stock. The next instrument produced is an assignment by *Tripp* to *Williams* of all his interest in lot No. 25. The consideration is £50; and it is dated the 21st of March 1837. The next assignment is one from *Williams* and *Burke*, who were brothers-in-law, as appears from *Burke's* evidence, of the south half of the lot to the plaintiff *Martyn*. It is dated the 15th of April 1837. The consideration for it was £75, which was paid in cash by *Martyn* to *Burke*. *Williams* does not appear to have derived any benefit from this sale, but allowed his brother-in-law to receive the whole consideration for it, he having paid the same

Judgment.

amount previously to *Kelly*. *Williams*, however, gained £25 on the sale of the north half to *McLellan*; which took plaae according to *Burke's* evidence a fortnight afterwards. The last of the assignments is that from *Williams* to the plaintiff *McLellan*, of the north half of the lot. It is dated the 28th of November 1842. The consideration is £75, mentioned to have been previously paid. Thus it appears that *Tripp* sold to *Williams*, and *Williams* to *Martyn* and *McLellan* respectively; and that *Kelly* having acquired a title to the south half by purchase from *Tripp*, but not having received any assignment, this title was acquired by *Burke*, and transferred by him to *Martyn*; so that undoubtedly the title, whatever it may have been, is clearly deduced from *Tripp* to the plaintiffs in this suit. But it was objected in the argument that the plaintiff's purchase with notice of the patent, which at that time had issued; that they paid less for the property than they otherwise would have done, and that they are not in consequence entitled to the same consideration as the original claimants. It is quite clear from *Burke's* evidence that the plaintiff's, before they purchased, had heard either of the issuing of the patent, or that the lot had been appropriated as a glebe; and *Burke* says that he should have asked *Martyn* more for the south half, but for this report. He however purchased in August 1836, and sold in April 1837, and he made no improvements, nor does it appear that the lot had increased in value in the meantime. He says in a subsequent part of his evidence, that *Martyn* paid him in cash; that there was a difference between paying in cash and in stock; and that he should have asked more, if paid in stock. It appears then that *Martyn* did actually pay *Burke* more than *Burke* paid *Kelly*, because, although they each paid the same amount, one paid in cash, and the other in notes and stock. It is possible, however, that the price and value of the interest, which passed by these several assignments, may have been affected

Judgment.

1853. Martyn v. Kennedy.

and diminished by the doubt, which may have attached to the title, in consequence of the report, that the lot had been appropriated as a glebe, or possibly that a patent had issued. If such was the case, it does not appear to me to prejudice or vary the rights of the plaintiffs in this suit. A good title may unfortunately and without just cause be subject to a difficulty in consequence of circumstances which have occurred without the default of the owner, and yet if it be purchased *bona fide* and for valuable consideration, although for somewhat less than would have produced had such difficulty not existed, no doubt it passes. The only question that can arise in a case of this nature is, whether the transaction savours of maintenance and champerty. In this view, the case of *Prosser* v. *Edmunds* was mentioned by the court during this part of the argument. but this case differs very materially from that of *Prosser* v. *Edmunds*. There a share in a residue had been sold and assigned by the person entitled to it to another person. If this assignment was valid, the assignor had no further interest in what he had assigned. His interest had become totally extinct. He was not in possession. He afterwards made a second assignment of this share to another person. If the first assignment was good, it is obvious that nothing whatever passed by the second; if the first was not good, then nothing passed by the second but the right to file a bill to overset the first, for the assignor had nothing else to assign. Under these circumstances, it was considered that a suit could not be sustained at the instance of the second assignee, for the purpose of overthrowing the first assignment as having been obtained by fraud, the assignor not complaining of the fraud or joining in the suit. But the difference between that case and the present is obvious. Here the subject of assignment was a valuable interest coupled with possession; there no interest remained in the assignor, but the right to file a bill, and he had no possession. The distinction is between a substantial

Judgment.

interest subject to a question, and a mere right to litigate. If the subject of assignment is a real and substantial interest, although a suit may be necessary in order to protect or establish it, the assignment is good, and the right to sue merely passes as incidental; but if there is nothing upon which the assignment can operate but a right to litigate, the assignment is invalid. This case comes within the exceptions noticed in Lord *Lyndhurst's* judgment in the case of *Prosser* v. *Edmunds*, to the general rule he there laid down. The transfer of an equity of redemption is good, because there is an estate and generally possession for the assignment to effect, although a suit may become necessary in order to give the assignee the full fruits of his purchase. So where a bond is assigned, there is possession of the bond, and the money, secured by it, may be paid without suit. Nor would the rule be confined to cases in which the obligor or mortgagee admitted the right of the obligee or mortgagor, but drove him to a suit before he would pay or submit to redemption. It would equally apply, although the obligor or mortgagee disputed the right of the obligee or mortgagor. In short, wherever a real and substantial interest is claimed *bona fide*, and is coupled with possession, it may be transferred, although the title of the party transferring it may be disputed, and a suit may become requisite for its establishment. Under the 32 Henry the VIII., chapter 9, a pretended or disputed title might be the subject of sale, if the seller or those under whom he claimed had been in possession for a year previous. Here the title of *Tripp* could not be disputed, although the defendant might contend that his own would prevail against it. *Tripp* claimed *bona fide* an interest, which, under the favorable or politic consideration of the Crown, was a real and substantial one, as the objection pre-supposes; this interest was coupled with possession, which had continued for the five years immediately previous; and it was transferred *bona fide* and for a valuable consideration, although

Judgment.

1853. Martyn v. Kennedy.

the doubt or question which may have attached to the title may have somewhat diminished the value and affected the price of it. I think therefore that the assignments which have been mentioned had full effect according to their tenor and import; transferred all the interest of the parties by whom they were respectively executed, and established the assignees named in them respectively in all the rights and privileges of those under whom they claimed. The result is, that we are to consider this case as if *Tripp* was the party claiming the relief sought by the bill, and not the plaintiffs. Whatever rights he would have, if he were before the court, the plaintiffs have. But, supposing such to be the case, various objections have been raised to the relief sought by this bill. The first question which has been raised, is, that Clergy Reserves are not within this act of parliament at all, but that it is altogether confined to Crown lands.

Judgment.

The act repeals one which was passed in the seventh year of the late King, and forms the seventh William IV., chapter 18, which clearly included Clergy Reserves in all its clauses which were applicable to them. The present act affected the whole province, while the former one related to Upper Canada alone. Clergy Reserves appear to be expressly excluded from such of its clauses as relate to the *disposal* of the lands comprised in it, and were otherwise calculated to include them; probably because it was considered better that sales of Clergy Reserves should be regulated by directions established under the 3 & 4 Victoria, chapter 78. It is remarkable, however, that an act was passed in the last session but one of the Provincial Parliament to extend one of those clauses—namely, the eighteenth—to Clergy Reserves. It had been previously decided by the Court of Queen's Bench not to include them.

The question however, is not whether Clergy Reserves are within the act generally, but whether they

are within the 29th section of it. Upon this point it is to be observed that this provision is of an extremely remedial and beneficial nature, and should therefore be liberally expounded; that it contains nothing in matter or expression to limit its operation to any particular class of lands; that the Clergy Reserves had been open to sale for 14 years when this act passed, at the rate of 100,000 acres in every year; that thousands of patents had been issued for them; that they were as likely to have issued and to be issued through fraud, or in error or mistake, as any other patents; that, although the proceeds of the sales of Crown lands and Clergy Reserves were appropriated in a different manner, no difference existed between a patent of a Crown lot and one of a Clergy Reserve, nor was any difference discernable between the two classes of lands, after they were once disposed of or granted; and it would be a very extraordinary and a very hard thing, if a remedy should exist for relieving against a patent of a Crown lot, which should not exist with respect to a Clergy lot; that no other provision existed for affording relief as to Clergy Reserves than the one in question; and that Clergy Reserves therefore were as much within the reason and object of this clause as any other description of lands; that the words of the 29th clause are of the widest description, and amply sufficient to embrace every sort of lands of which a patent could be granted, and to exclude any of such lands from the influence of this clause, would be a construction against the words and the apparent meaning of it; that the clause itself is disconnected from the other clauses, which are thought to have an exclusive reference to Crown lands, and bears no direct reference to the object of those clauses, and has moreover a much wider scope, being retrospective in its operation, and doubtless embracing all patents of the class of classes of lands comprised in it, which had at any time theretofore issued under the circumstances which it specifies. For these reasons I have arrived at

Judgment

1853. Martyn. v. Kennedy.

the conclusion, that Clergy Reserves are included in the 29th clause of this act.

Before I quit this branch of the subject I should mention that the 7th William IV. chapter 118, which was superseded by the act in question, did not contain any provision answering to the 29th section of this act. This provision was introduced in the last mentioned act for the first time in the year 1841.

The next question which presents itself is, whether every suit under this act must not be at the instance of the Crown, or in the name and by the permission of the Crown—in both of which cases it cannot be supposed that it would in any other form than that of an information by the Attorney General; and whether the 29th clause of the act had any other object in view than to substitute a suit in equity for a *scire facias*. The arguments against this view appear to be, that the analogy upon which it rests does not seem to support it in its full extent, inasmuch as authority exists to shew that a *scire facias* to repeal a patent may issue at the common law in the name and at the instance of a subject, *(a)* and no doubt if this act permits a proceeding in the name and at the suit of a subject, it must be by bill; that for the purpose of permitting an information at the suit, or in the name of the Crown, the act does not seem to have been required; the Crown, it seems, not being confined to a *scire facias* to repeal a patent, but, as it is entitled by its prerogative to sue in whatever court it pleases, and may require a discovery in order to enforce its rights, might without this act, in any of the cases specified in it, have proceeded itself or have permitted a subject to proceed in its name by information in this court.—*Attorney General* v. *Vernon (b)*; Magdalene College case *(c)*;

Judgment.

(a) Bro. Ab. tit. sci. fa. 69, 185; 2 Ven. 344; 2 Bl. Com. 260, 1; 6 Mod. 229, 2 Mod. 72, *n*; Dyer 276 *b*; 3 Lev. 220; 4 Inst. 88; Dyer 137 *b*; 198 *a*; 2 Rol. Ab. 191, U. pl. 2.

(b) 1 Ver. 277, 370. *(c)* 11 Co. Rep. 75 *a*.

1853.

Martyn v. Kennedy.

that the words of the 29th clause, in describing the form of proceedings, are "action, bill, or plaint," excluding "information," perhaps because he required; while it cannot be supposed, that, if this clause was introduced into the act merely to enable the Crown to proceed or permit a proceeding in its own name in this court, any other form of proceeding than an information would have been contemplated, an information being altogether as short and convenient as a bill, and much more suitable to the dignity of the Crown; that the relief is to be administered "upon hearing the parties interested," a form of expression, which would indeed, if necessary, include the Crown, but it is not likely to have been employed upon the hypothesis suggested. For these reasons, I consider that in a case within the act, a bill in equity may be exhibited at the suit of the party aggrieved. The question then occurs, whether, under such circumstances, the Attorney General ought not at least to be a party on the record. This objection may be rested on three grounds; one is, the interest which the crown had in supporting and protecting its own grant; another, that unless the crown is a party through the Attorney General on the record it will not be bound, and the defendant may be subjected to a double litigation about the same matter in contravention of the legal maxim—*nemo debet bis vexari;* the other, that the advowson of this living is in the crown, and that the patron is a necessary party to every proceeding which concerns the existence of the glebe.

Judgment.

As to the first ground, it seems to me a sufficient answer to the objection that the sole effect of this suit, if it should succeed, would be to reinstate the crown in its former rights, and therefore that it cannot possibly be prejudiced. In the case of *Hovenden* v. Lord *Annesley(a)*, Lord *Redesdale* seemed to be of opinion that a suit between rival claimants under different grants of the crown might proceed in the absence of the

(a) 2 Sch. & Lef. 607.

1853. Martyn v. Kennedy.

Attorney General, if the result could not be prejudicial to the interests of the crown.

With respect to the second ground, upon which this objection rests, the difficulty would not be surmounted by making the Attorney General a party on behalf of the crown; which could not, of course, be prejudiced by the failure of the plaintiff to establish his case, and could then as well as now, in case of a decree against the plaintiff, proceed *de novo* against the defendant for the purpose of recalling this patent.

I think the third ground, upon which this objection stands, equally insufficient to support it—namely, that the Queen is the patron of this living. No doubt as a general rule, the patron of a living is a necessary party to any suit by which that living can be prejudicially affected. Thus he is a necessary party to a suit for establishing a *modus*, although the living would thereby sustain a loss only commensurate with the difference in amount or value between the *modus* and the tithe in kind.—*Gordon* v. *Simpkinson (a)*, *Cooke* v. *Butt (b)*, *Hales* v. *Pomfret (c)*, *De Whelpdale* v. *Milburn (d)*. But this rule does not apply to the present case. The only effect of a decree, made in this suit in favour of the plaintiff, would be to restore the land to the crown, the patron of the living, to be disposed of in any manner that might be just and most for the advantage of the clergy, which must be understood to be one and the same thing.

Judgment.

It was argued that the twenty-ninth clause of this act was not retrospective. It appears to me impossible to put such a construction upon the language of this clause, which seems to have been studiously chosen in order to exclude all doubt upon this point. No other meaning can be attributed to the words "have" and

(*a*) 11 Ves. 509. (*b*) 6 Madd. & Geld. 53.
(*c*) Contra Dan. Ex. Rep. 142. (*d*) 5 Pri. 485.

"shall have." It was also contended that this patent could not be deemed to have issued in error or mistake inasmuch that the crown had the means of information within its reach, and must be presumed to have been acquainted with all the facts. It is very just as between the contending parties to a litigation, to hold that each party knows what with reasonable diligence he may have known, but to apply that principle to the present case would be to charge the plaintiffs with the consequences, not of their own neglect, but of the misinformation of a third party in no way interested in the litigation. To exclude the application of the principle from the present case is not to relieve the plaintiffs from the effects of their own negligence, for they have been guilty of none. The oversight, too, which has occurred here, was committed in the performance of the very act upon which the defendant's title is founded; and therefore, if either party is to be responsible for it, the defendant, and not the plaintiffs, should be the one. If the mind of the crown was indeed misinformed and deceived *eo instanti* that the grant was perfected, it is sufficient I think to entitle the plaintiffs to relief, although further inquiry might have dispelled the misapprehension which had arisen. That the mind of the crown was misinformed and deceived when the grant received its completion cannot, I think, be doubted upon the facts of this case.

1853.

Martyn v. Kennedy.

Judgment.

The counsel for the defendant insisted very much upon the forfeiture of the interest existing in this case through non-payment of the rent, but the evidence clearly shews that all that was necessary to entitle a lessee to purchase was payment of the back rents, which was one of the conditions of the purchase; and certainly the conduct of the government in the present case shews that they did not consider that any forfeiture had been incurred by the plaintiffs.

I should mention that in the present case an objection

1853.

Martyn v. Kennedy.

having been made by the defendant that the suit was multifarious, that objection was by mutual agreement between the parties waived. My opinion is, that this patent should be declared void; but it is not a case in which costs should be awarded to the successful party. The defendant could not have acted otherwise than he has done, and he had throughout displayed a conciliatory spirit becoming his sacred character. I have felt considerable embarassment in deciding this case from having been concerned in it while at the bar, and from having been deprived of the assistance of the other members of the court. In consequence of this, when I was asked for my judgment the other day, I suggested to the counsel for both parties that they should re-argue the case before my brother *Spragge*, who had not been concerned in the case at all,—the Chancellor having been concerned in it both as solicitor and counsel. Had my proposal been acceded to, I should have taken no part in the adjudication of the case, and I so intimated to the counsel for the parties. They however, after consideration, declined my proposal and pressed for my judgment, which under such circumstances I did not think it right to withhold; knowing, that should it be wrong, either with regard to the law of the case, or as to the effect of the evidence, the parties can without any great delay or expense appeal to a higher tribunal, who will not fail to correct any error into which I may have fallen.

Judgment.

PATTERSON v. STANTON.

October

Practice—Sales.

THE CHANCELLOR, in answer to a question from Mr. Strong, counsel for the purchaser of the property sold under the decree made in this cause, stated that the signed contract and other papers mentioned in section 9 of the thirty-sixth of the general orders must, in order to a confirmation of the sale, be filed with the registrar, whether the sale has been conducted before a judge in chambers or the master of the court.

GOODEVE V. MANNERS.

1853

Practice.

August 25th.

When a defendant to a suit dies and the plaintiff desires to amend by way of revivor, pursuant to section 15 of the ninth general order, the court intimated that the proper mode of proceeding was to serve notice of motion to amend upon the person intended to be brought before the court by the amendment.

On a subsequent day the motion was made upon notice and an order made to amend.

IN THE MATTER OF THE ONTARIO, SIMCOE AND HURON RAILROAD UNION COMPANY AND JAMES COTTON.

Paying money into court for land.

Where money has been paid into court as and for the price or value of land required by a railway company, the court will not, upon an *exparte* motion, order it to be returned to the company. October 4th.

Statement. In this natter a sum of £300 had been paid into court, as and for the price of certain property belonging to *Cotton* in the City of Toronto required for the use of the company. Since that time the company had abandoned the idea of appropriating the property to the use of the company as had been originally intended: and now—

Argument. Mr. *Crickmore*, on behalf of the company, moved *exparte* for an order that the money might be paid out to the company, but—

Judgment. The Court refused to make the order unless upon notice to *Cotton*, or a petition on behalf of the company consented to by *Cotton*.

1853.

COLBORNE v. THOMAS.

Vendor's lien.

April 8, and September 22

A vendor of real estate who takes by way of security for the purchase money, the joint and several promissory notes of the vendee and surety, does not lose his lien on the estate for the purchase money though he took no mortgage therefor.

Statement.

The bill in this cause was filed by *Amos Colborne* against *Samuel Thomas* and *John Rosenburgher*, praying that the plaintiff might be declared entitled to a lien on the property in question for his unpaid purchase money, and that a sale of the estate, or a sufficient portion thereof, to satisfy his claim might be directed.

The facts which gave rise to the suit appear in the report of the case of *Colborne* v. *Rosenburgher (a)*, and in the judgment of the court.

Argument.

Mr. *Crickmore* for the plaintiff.

Mr. *Read*, for the defendant *Thomas*, cited, amongst other authorities, *Narin* v. *Prowse (b)*, 4 *Kent's* Commentaries 153, and *Story's* Equity Juris. 1227.

The point of defence mainly relied upon was, that plaintiff having taken the joint and several note of *Rosenburgher* and his surety, thereby lost any lien which he would otherwise have been entitled to hold on the estate conveyed.

September 22

The judgment of the court was now delivered by

THE CHANCELLOR.—The plaintiff in this suit claims a lien for unpaid purchase money upon a certain estate sold by him to one *Rosenburgher*, and resold by *Rosenburgher* to the defendant *Thomas*.

Judgment.

The plaintiff insists upon his right to recover against *Thomas* either upon the ground that the sale to him was fraudulent, or because he had notice of the non-payment of the purchase money at the time of the sale.

(*a*) Ante vol. 3, page 635. (*b*) 6 Ves. 752.

1853.

Colborne v. Thomas.

I incline to the opinion that the case is sustained on the first ground, but the conclusion at which we have arrived on the second branch relieves us from the necessity of pronouncing decidedly upon the point.

Upon the sale to *Rosenburgher* the purchase money, with the exception of £75, was payable in eight equal annual instalments, and each instalment was secured by the joint and several notes of *Rosenburgher* and his father. It was admitted upon the argument that *Thomas* had notice of the non-payment of the purchase money at the time of the sale; but Mr. *Read* contended that the vendor's lien for unpaid purchase money does not rest on any satisfactory principle; that it is opposed to the tendency of modern legislation; and that the court under the circumstances of this case, ought not to enforce an equity so doubtful in its origin, and so much discountenanced by the legislature, but ought to conclude that the plaintiff's lien had been waived by the acceptance of the promissory notes to which I have adverted.

Judgment.

It is impossible to represent the general question as being now open to controversy. In *Mackreth* v. *Symmons (a)*, a leading case upon this subject, Lord *Eldon* states the doctrine in this way: "Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon the back, if it is the simple case of a conveyance, the money, or part of it not being paid, as between the vendor and vendee, and persons claiming as volunteers, upon the doctrine of this court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in one case for the whole consideration; in the other for that part of the money which was not paid;" and again, after an elaborate review of the case, he says, "From all these authorities the inference is, first, that generally speaking, there is

(a) 15 Ves. 329.

1853. Colborne v. Thomas.

such a lien; secondly, that in those general cases in which there would be the lien as between vendor and vendee, the vendor will have the lien against a third person who had notice that the money was not paid."

Now I cannot accede to the argument that the equity of this doctrine is questionable; on the contrary, it appears to me to rest on the clearest principles of natural justice. That was stated very broadly by Lord *Redesdale* in *Blackburn* v. *Gregson* (*a*), where he advances this proposition, "*that according to the law of all nations* the absolute dominion over property sold is not acquired by the purchaser until he has paid the price. Sir *Samuel Romilly* argues to the same effect in *Mackreth* v. *Symmons*. "The plaintiff, he says, being called upon and obliged to pay the debt against which *Martindale* undertook to indemnify him, that undertaking forming the consideration of *Martindale's* purchase, *he cannot, on the ground of fraud, be permitted to retain the estate.*" And again, "No stronger instance of bad faith, no act more unconscientious can be stated, than taking an estate in consideration of making payments, and, by a direct violation of the contract, permitting the payments to fall upon the vendor." And Lord *Redesdale* refers this doctrine to the same principle. "Is there any case," he asks, in *Hughes* v. *Kearney* (*b*), "where the heir of the vendor has been permitted to hold what his ancestor unconscientiously obtained? *And is not a thing unconscientiously obtained when the consideration is not paid?* Suppose that nothing was paid, but that a receipt was signed by the vendor, a purchaser from the vendee without notice could hold; but if the person claiming as a purchaser admitted that the consideration was not paid, *this would be taken prima facie as a fraud, and it would lie upon him to shew that it was not a fraud.*" But in the civil law, from which we appear to have

Judgment.

(*a*) 1 Cox. 94. (*b*) 1 Sch. & L. 135.

derived the doctrine, it is referred with great distinctness to this principle of natural justice: "Venditæ vero et traditæ, non aliter emptori acquiruntur quam si is venditori pretium solverit, vel alio modo ei satisfecerit veluti expromissore aut pignore dato. Quod cavetur quidem ex lege duodecim tabularum, *tamen recte dicitur et jure gentium, id est jure naturali, id effici*" (*a*)

1853.
Colborne v. Thomas.

Neither can I accede to the second branch of the argument. Other doctrines quite as liable to objection as this have either been left intact, or are expressly sanctioned by the registry laws. Equitable mortgages are excepted from an operation by an express provision, and they would not seem to embrace any case of mere contract, certainly not parol contracts partly performed. Where the consideration was paid by one party, and the conveyance made to another—a case very analogous to the present—this court always implied a trust in favor of the former, notwithstanding the provisions of the Statutes of Frauds; and I am at a loss to discover why the vendor's lien for unpaid purchase money should be treated with less favor. Lord *Roslyn* says that this doctrine has been the acknowledged law of the court from its foundation; if not sanctioned by the legislature, it certainly has not been repealed; and so long as it remains the law of the court it is our duty, in my opinion, to apply it to every case coming fairly within its operation. We are here to administer the law, not to make it.

Judgment.

What we have to determine, then, is simply this: has the lien been waived? It is not argued that there was in this case any express waiver of the lien; but it is contended that a waiver should be implied, from the fact that the purchase money was secured to the vendor by the joint and several notes of the purchasr and

(*a*) Inst. lib. 2, tit. 1, S. 41.

1853.

Colborne v. Thomas.

his surety. In other words, the two things are so inconsistent, that the acceptance of these notes evinces a manifest intention to abandon the lien. Now I must confess my inability to find in the acceptance of the promissory notes any sufficient ground for concluding that the lien was abandoned. We every day see mortgages accompanied by promissory notes, and promissory notes secured by a deposit of title deeds, or by actual mortgages. It is quite impossible, therefore, to represent the two things as incompatable; and, upon examination, the argument will be found, I think, to resolve itself into this, that the parties did not intend to raise—did not rely upon the lien, otherwise an actual mortgage would have been required. But this inference, if just, would be quite beside the question we have to determine; for contract is not necessary to create this charge; it is raised by the court quite irrespective of contract; and what we have to be satisfied of is this, that the lien was expressly waived, or that the circumstances of the case are such as to lead fairly and manifestly to the conclusion that such was the intention of the parties. This is put very clearly by Lord *Eldon* in *Mackreth* v. *Symmons:* "The more modern authorities have brought it to this inconvenient state—that the question is not a dry question upon the fact whether a security was taken, but it depends upon the circumstances of each case whether the court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given to the person from whom the other security was taken." "*The principle has been carried this length, that the lien exists unless an intention, and a manifest intention, that it shall not exist, appears;*" and Lord *Redesdale* states the law in the same way: "It lies on the purchaser to shew that the vendor agreed to rest on the collateral security; *prima facie*, the purchase money is a lien on the land."

Judgment.

It is said that there is no direct authority in favour

1853.

Colborne v. Thomas.

of the plaintiff's bill, but there are several cases bearing more or less on this very point which indicate clearly that a waiver of the lien would not be inferred in England under the circumstances of the present case (*a*) ; but, upon general reasoning, *Mackreth* v. *Symmons* appears to me to be a very much stronger case than the present. Lord *Eldon* expressed himself as satisfied, in that case, that the intention of the parties was the same as to both sums in respect of which a lien was claimed, and yet he disallowed it as to one and affirmed it as to the other: "As to the other point of the case, he says, I have considered long whether the conclusion is just, that, not meaning to have a lien, as I think the party did not, with regard to the annuities, he should mean to have a lien as to the sum due to *Manners*. My individual opinion is, that the intention was the same as to both ; but, with regard to the latter the cases authorise a lien unless it is destroyed by particular circumstances, which do not exist here." And in the course of the same judgment, commenting on a doctrine of Sir *William Grant*, to the effect that taking a security upon another estate is conclusive evidence of an intention to waive the lien, he uses this language : "It must not however be understood that a mortgage taken is to be considered as a conclusive ground for the inference that a lien was not intended, as I could put many instances that a mortgage of another estate for the purchase money would not be decisive evidence of an intention to give up the lien, though in the ordinary case a man has greater security for his money upon a mortgage, than value for his money upon a purchase; *and the question must be, whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises.*" That opinion may not be well founded, but it indicates the principle of his Lordship's judgment with great distinctness.

Judgment

(*a*) Ex parte Parkes, 1 G. & J. 228; Ex parte Loaring 2 Rose. 79; Teed v. Caruthers, 2 Y. & C. C. C. 31.

1853.

Colborne v. Thomas.

Now, attending to the circumstances of real property in this country—considering that the quantity of land for sale is much larger than the quantity of money seeking investment, and that the land sold is therefore, in a great majority of cases, a very insufficient security for the purchase money; attending to that state of things, there is not, in my opinion, any ground for the conclusion that a vendor insisting upon additional security for his purchase money intends therefore to waive his lien. It may be that the security is often overlooked, and there may be room to infer, in the present case, that the mind of the plaintiff was not directed to it, and that he had not, therefore, any intention of preserving it; although even that inference is not just, the credit may have been given on that very ground; but, assuming it to be a just inference, the charge, as I before remarked, is not the result of contract; it is raised by the court irrespective of contract (*a*); and, so far from thinking such an inference just, I am quite satisfied that the proper conclusion in a great majority of cases, when there is no other circumstance to indicate such an intention, would be that the vendor did not in fact intend to relinquish any security provided by the law.

Judgment.

Upon the whole, admitting the inconvenience pointed out by Lord *Eldon* to its full extent, I do not feel at liberty to correct it by introducing refined technical distinctions, which are a disgrace to the administration of the law, and, in in the end, aggravate the evil it was intended to correct. Our plain duty is to apply the rule to every case coming fairly within its operation; and, as the circumstances of this case do not afford any just ground for the conclusion that the plaintiff intended to waive his lien, we are of opinion that he is entitled to the relief he asks.*

(*a*) Winter v. Lord Anson, 1 S. & S. 434.

* *Note*—Sir William Grant, in Grant v. Mills, reported in 2 Ves. & Beame 306, held that a bill of exchange drawn by a vendee, and accepted by him and his partner, did not operate as a waiver of

RE AUSEBROOK, AN INFANT.

1853.

Affidavit—Jurat of.

October 25th

In this matter, on production of the bond, from the guardian and sureties, for the approval of the court, an objection was raised to the form of the jurat of the affidavits of execution by, and justification of the sureties, in omiting to state that the affidavits had been read over and explained to the deponent (in the form prescribed in the general orders of June 1853).

The Court, however, approved of the bond, and intimated that in these and affidavits of a like nature the jurat in the form generally used is sufficient.

BOULTON v. ROBINSON.

Evidence—Issue at law.

March 8th

The rule that a distinct denial in an answer of statements made in the bill, must be contradicted by two witnesses, or by one witness corroborated by attendant circumstances, considered and acted upon.
Issue at law, when demandable as of right; when discretionary.

Statement.

The bill in this cause was filed by *D'Arcy Edward Boulton* against the the Hon. *John Beverly Robinson* and Messrs. *Moffatt, Murray & Co.;* the statements and object of which are clearly stated in the judgment.

On a previous day the cause came on to be heard.

Argument.

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

Mr. *Cameron*, Q. C., and Mr. *Brough*, for defendant *Robinson.*

Mr. *McDonald* for the defendants *Moffatt & Co.*

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vendor's lien; and in a case, determined in the State of Maryland, of Magruder v. Peter, 11 Gill & Johnson 217, it was held that the vendor taking a promissory note *endorsed* by a third party did not thereby waive his lien; and it is submitted that no different decision would have been arrived at, had the endorser joined in a joint and several note, as was done in the principal case.

1853. Boulton v. Robinson.

Ranelaugh v. *Haye (a)*, *Antrobus* v. *Davidson (b)*, *Fenn* v. *Harrison (c)*, *Pember* v. *Mathers (d)*, *Story* on agency, 253–8; *Story's* Equity Juris. 730, Mitford 148, were referred to.

The judgment of the court was now delivered by

SPRAGGE, V.C.*—The material facts out of which the question has arisen which is the subject of this suit, are shortly these. In the latter part of 1843 negotiations took place between the plaintiff and one *Benjamin Clarke*, both residents of Cobourg, for the purchase from the latter of his share—one-fourth—in certain village property in a place called Bond Head, together with certain harbor stock. The agreement to purchase was concluded early in the month of December in the above year, (the dates are important,) at the sum of £3250, payable as follows; £250 down, and the residue in eight instalments—the first four to be £250 each, and payable respectively the 1st of January, the 1st of May and first of September 1844, and 1st of May 1845, and the last four instalments to be £500 each and payable respectively on the 1st of May 1846, 1847, 1848 and 1849—less the amount of a certain mortgage, which I will refer to presently; such instalments to bear interest from the 5th of December 1843, being the date of the completion of the purchase.

Judgment.

The plaintiff did not make this purchase on his own behalf; he alleges in his bill that Mr. *William H. Boulton* and the defendant Mr. *Robinson*, who are and then were residents of the City of Toronto, constituted him their agent to treat with *Clarke* and to arrange the terms of the purchase, and that he made the purchase on their behalf. He alleges, further, that the purchase money was to be paid at the periods I have stated, and

(*a*) 1 Vernon, 189. (*b*) 3 Mer. 569.
(*c*) 4 T. Rep. 177. (*d*) 1 B. C. C. 51.

*The CHANCELLOR and V. C. ESTEN had been concerned in the case while at the bar.

1853.

Boulton v. Robinson.

that *William Boulton* and the defendant Mr. *Robinson* were to give to *Clarke* their joint and several promissory notes for the purchase money, and were to be let into possession, and that a conveyance was at once to be executed by *Clarke* to *William Boulton*, with the verbal understanding that he was to hold the same for himself and as a trustee for Mr. *Robinson*, in equal shares, as tenants in common.—[As a matter of convenience and brevity I will call Mr. *Robinson* "the defendant" generally; the other defendants, Messrs. *Gillespie, Moffatts & Co.*, being in the same interest with the plaintiff.]

It is denied that the plaintiff had any authority from the defendant to act for him in making the purchase; that he had authority from his brother *William Boulton* to act for him, is not disputed; and the defendant does not deny that before the purchase was made he had it in contemplation to acquire a portion of *Clarke's* share of the property in question, and that he requested the plaintiff to make inquiries as to the terms upon which *Clarke* would be disposed to sell, but he denies that he agreed to purchase or even made up his mind whether he would purchase or not till the spring of the year following that in which the plaintiff completed the agreement to purchase from *Clarke*, and that his purchase then, was not from *Clarke*, but from *William Boulton*.

Judgment

The agreement to purchase, on whosesoever behalf made, was completed on or before the 2nd of December 1843, as appears by a letter of that date put in by the plaintiff, addressed to *William Boulton*, in which he says—"I have concluded an arrangement with *Clarke* for his one-fourth of everything, for £3250, payable as follows," setting out the instalments as I have before stated; then he goes on to say, speaking of *Clarke*, "He preferred having the two first instalments of £500 divided into £250, payable quarterly; but you observe

1853. Boulton v. Robinson.

the first payment of £500 is put off to May 1846, so that it is easier than £500 down, and £500 per annum."

In another part of the letter occurs this passage: "I quite forgot to mention when I was up, and most stupidly too, for the Chief asked me in regard to the titles. They were all free of incumbrances, but there is a mortgage of £2500 on a portion of the property which is not laid out in lots. The amount looks very serious and heavy, but *Clarke* owes about £400 of it, which is to be deducted from your purchase money," &c.

From this it is evident that the terms of the purchase had been previously discussed, and that the agreement communicated in the letter was an absolute final agreement for the purchase. One of the two first instalments of purchase money was paid to *Clarke* by a draft at 90 days, dated 26th December 1843, drawn by *Clarke* in favor of the plaintiff upon Mr. *William Boulton*, and accepted by him. Whether this was given to meet the instalment payable in hand or that payable on the 1st of January 1844, does not appear; nor does it appear how the other of the two first instalments was paid. They were however both paid before the 12th of March following, on which day the following memorandum was given by the plaintiff to *Clarke*:—"I have this day received an assignment from Mr. *B. Clarke* of his Bond Head property to *W. H. Boulton*, which he has sold for £3250—less the sum of £410 8s. 11d. due by him on the mortgage—£500 only being yet paid on the purchase. This is to certify that I am to procure him the notes agreed upon for the balance of £2347 1s. 1d.

March 12th, 1844. D. E. BOULTON."

Judgment.

The assignment referred to in this paper bears date the 5th of December 1843; and after reciting that *Clarke* had contracted and agreed with *William H. Boulton* for the sale of his interest in the property in

1853.

Boulton v. Robinson

question (less certain lots therein referred to) the property is thereby conveyed to *William Boulton* for the consideration of £3250, (the receipt of which is acknowledged) subject to the payment of a mortgage upon the premises of £2500: the same mortgage, there is reason to infer, which is referred to by the plaintiff in his letter of 2nd December, and the proportion of it due by *Clarke* corresponds in amount with the sum mentioned in that letter and in the above memorandum. The memorandum was subsequently indorsed as follows: "Received of *D. E. Boulton*, Esq., the notes within named.

April 19th, 1844. B. CLARKE."

These notes were for the balance of the purchase money after deducting the £500 paid, and the mortgage money, as expressed in the memorandum, and were made by *Wm. Boulton*, payable to and endorsed by the plaintiff, and endorsed also then or afterwards by Mr. *Clarke Gamble*. The note payable in May 1847 was for £97 only, the mortgage money before referred to being deducted from that instalment, and reducing it from £500 to £97.

Judgment.

Before the giving of these notes the two first payments of £250 each had been met by Mr. *Boulton*. The defendant was in the habit of transacting his monetary affairs through the firm of *Gamble & Boulton*, and on the 2nd of May 1844 the defendant is charged in the accounts of that firm with £250 on account of the purchase money of the land in question under the head of "*Clarke's* draft." This is the first charge made against the defendant in relation to this purchase money. Under date of 2nd May 1845, the defendant is charged in the accounts of this firm with the sum of £429 16s. 2d. as half cost of Bond Head land, £679 16s. 2d.—less acceptance £250. Under date 22nd Dec. in the same year is the following charge; "half disbursements on Bond Head land since last statement £125

1853. Boulton v. Robinson.

19s. 9d." There are also various charges in the account in respect of expenses attending the Bond Head mill property, which had been purchased a short time before the property in question. It appears to have been the practice of the firm in respect to the mill property to pay the charges against it in full, and to charge against the individuals interested in it the proportions properly chargeable against each; and in relation to this other property, their practice was to pay to *Clarke* the purchase money from time to time falling due, and to charge the half of it, or what purported to be the half of it, against the defendant.

Judgment.

The defendant's object in acquiring a share in the land in question was to make a provision for his son *J. B. Robinson*, Jr., who after the purchase resided on the place or in the neighbourhood for some time. Afterwards abandoning the idea of residing there permanently, the defendant allowed him to make what he could of the place for his own benefit, and he, sometime before the 1st of May 1847 sold his interest in it to Mr. *George S. Boulton* of Cobourg, who paid his share of the note given for the purchase money, which fell due on the last mentioned date—that is, the same note of £97 before referred to.

Before the note for the next instalment of purchase money fell due—1st May 1848, the firm of *Gamble & Boulton* failed in business, and Mr. *W. H. Boulton* became insolvent. This occurred early in 1848, and Mr. *George Boulton* refused to pay any more of the purchase money to *Wm. Boulton* or any other person, on the ground that the defendant had purchased from *Wm. Boulton*, and was not liable to any other person for the purchase money; that he, *George S. Boulton*, as a purchaser intermediately from the defendant, stood upon the same footing; that *William Boulton* was largely indebted to him—in a sum exceeding the balance of the purchase money of the share purchased by the

1853.

Boulton v. Robinson.

defendant, and that he, *George Boulton*, therefore, was not indebted to *William Boulton* in respect of such purchase money and not bound to pay it. He refused therefore to furnish either *Wm. Boulton* or the plaintiff with funds to pay any proportion of the balance of the purchase money or to help to meet the notes for £500, each falling due respectively on the 1st of May 1848 and 1849. These two notes were endorsed by *Clarke* to the defendants *Gillespie, Moffatts & Co.*, who were the holders of them at the time they became due, and who, as the bill alleges, have brought an action against the plaintiff upon the first of the two notes, and threaten a suit upon the last. The bill prays that the defendant may be decreed to pay these notes to Messrs. *Gillespie Moffatt & Co.*, and to save harmless and indemnify the plaintiff from all loss in relation to them.

Judgment.

He founds his claim to this relief upon the allegation that *Wm. Boulton* and the defendant agreed to purchase *Clarke's* share of the premises in question *jointly*; that he was authorised by them to make such purchase, and that hs did accordingly make such purchase on their *joint* behalf; and that the payments were to be made by them jointly in equal proportions; that promissory notes were to be given for the payment of the purchase money; that the defendant was unwilling that his name should appear upon negotiable paper, and therefore proposed to the plaintiff that he should become a party to the notes instead of the defendant, the defendant engaging to meet the notes or his share of them, and to indemnify the plaintiff from the consequences of his signing them.

On the other hand, the defendant's position is, that beyond authorizing the plaintiff to make inquiries as to the terms upon which the property might be purchased, he gave no authority to the plaintiff whatever; that he did not purchase or agree to purchase jointly from *Clarke*, and did not purchase from *Clarke* at all; that

1853.

Boulton v. Robinson.

William Boulton by himself, purchased the whole of *Clarke's* share, and that the defendant afterwards purchased one-half of it from him; that defendant had nothing to do with plaintiff's signing the notes, and that he dealt with *William Boulton* only. The short question then is, whether the defendant purchased jointly with *Wm. Boulton* from *Clarke* and authorized the plaintiff to sign notes for the purchase money in his stead, or whether he purchased from *Wm. Boulton* only and gave no authority to the plaintiff to sign notes for him. Upon this point the evidence of *Wm. Boulton* and the answer of the defendant are wholly at variance. The plaintiff's case is supported almost exclusively by the evidence of *Wm. Boulton.* In relation to the purchase from *Clarke* being made jointly by the defendant and himself, he says that he made no purchase from *Clarke*, that he recollects, on his own individual account, but only on account of the defendant and himself; that he has no doubt that the purchase was made jointly by the defendant and himself; that the purchase was made through him, but jointly by the defendant and himself; that he should have no doubt whatever as to the purchase being so made, but that he is aware that the defendant is under a different impression. In another place he says he should say decidedly that he never arranged to purchase the property or any portion of it on his own account, or that he ever contemplated so purchasing it; that he never sold any interest in it to the defendant as a sale from himself; that it was never arranged between him and the defendant that he should purchase from *Clarke*, and that he then should sell to the defendant; that he has no doubt that the purchase was made as a joint purchase by the defendant and himself, and that the only difficulty on the part of the defendant was that he would not be a party to negotiable paper; that his recollection on the subject is distinct, and (apart from the defendant's impression,) he has no doubt on the subject; that he is satisfied that he had no idea of making the purchase

Judgment.

as an independent speculation of his own ; that there were no terms of payment which would indicate that the defendant purchased from *him*.

1853.

Boulton v. Robinson.

Upon passages being read to him from the defendant's answer, stating the transaction differently, and stating that he, the defendant, dealt with him only in the purchase, and did not purchase jointly with him from *Clarke*, he says he thinks the defendant is in error, and that what he said at the time was only in relation to the notes and not to the land ; that he gave the plaintiff to understand that the purchase was by the defendant and himself ; and after a memorandum of the defendant's being read to him, which had previously been read to him on the 19th April 1844, and which I will again refer to presently, he says that he is still positive that the property was purchased by the defendant and himself jointly.

Judgment.

I have quoted these various passages from the evidence of Mr. *William Boulton*, with a view to ascertaining the degree of positiveness with which he speaks as to the purchase being joint by the defendant and himself. I should say that he intended to speak with the utmost respect of the intended truthfulness of the defendant's answer ; but that he meant to say that the answer did not shake his confidence in the accuracy of his own recollection ; and what he says out of deference to the answer and the character of the defendant, whose answer it is, is not intended to qualify the positiveness with which he speaks, and therefore that he means to assert expressly and positively that the purchase was made as he states it to have been made.

Before noticing the defendant's answer upon this point, it will be convenient to see what the witness says as to the circumstances under which the plaintiff became a party to the notes given for the payment of the purchase money ; he says that six drafts of notes,

1853.

Boulton v. Robinson.

which are put in, and which are all drawn as joint and several notes payable to *Clarke*, and dated the 5th of December 1843, were sent up to him by the plaintiff, and that he called upon the defendant with them for his signature; that the defendant objected to signing them as he thought it improper in his position that notes with his name should be scattered as these might be in different hands through the country; that he, the witness, then said that the difficulty might be obviated by the notes being signed by some other person, and that he suggested the name of his brother, the plaintiff; that the defendant assented to any arrangements whereby he could be relieved from the necessity of his name appearing upon such paper, and that the arrangement was made in that way, only that his name might not appear; that he made no objection to meeting his share of the payments; that he assented to the witness making the arrangements in the way he proposed—viz, by getting another name on the paper instead of his own; that he assented to any arrangement the witness might make that would relieve his name from appearing on the paper, and that he would protect his share of the notes; that the arrangement was for the defendant's sake, not for the sake of the witness; that no definite arrangement was made as to meeting the payments; that the difficulty started was as to the defendant's name appearing on the notes, which was removed by the witness's suggestion above referred to; that he left the defendant on that occasion with the understanding that he, the witness, was to endeavour to obtain the names of parties who would be acceptable to *Clarke*, instead of the defendant's, and that the defendant was to meet his share of the payments as they fell due; that the defendant did not suggest that the witness should procure names instead of his own, but the defendant raised the difficulty and the witness suggested how it might be obviated. He says further, that the plaintiff became a party to the notes in consequence of what passed with the defendant, and that he has no doubt

Judgment.

1853.

Boulton v. Robinson.

that he communicated to the plaintiff the defendant's objection to signing the notes, and suggested his signing them instead. He says further, that he thinks he called on the defendant with the notes soon after receiving them. He says, upon cross examination that at a meeting in the defendant's library (which appears to have taken place after difficulties arose respecting these notes)—at which meeting the plaintiff and the defendant, the witness, and Mr. *George Boulton* were all present—the defendant put it to him whether he, the defendant, had asked him to request the plaintiff to put his name to the notes, when he, the witness, said that he had not, but that he had suggested it upon his making a difficulty about his own name appearing; he says he did not say that he conceived himself authorized by his general agency for the defendant to ask the plaintiff to sign his name to the notes; that the defendant also put it to him whether he had ever agreed to guarantee or protect the notes, and the witness said that he had not.

Judgment.

Upon both the points thus spoken to by the witness, the answer is at variance with his evidence, expressly and positively. And first, as to the purchase not being made jointly by the defendant and *William Boulton*, the defendant, at folio 25 of his answer, after stating that *Wm. Boulton* called upon him in the autum of 1843 with a letter from the plaintiff stating *Clarke's* price and terms of payment: says that he told *William Boulton* that he would consider of it, and that if he approved of the terms and determined to take half the share, he would understand that he must be prepared to pay to him *William Boulton*, the half of what *Clarke* asked, and be ready with the money at the time at which *Wm. Boulton* would have to make his payments; but that he expressly stated to *William Boulton* that in that case the defendant's transactions would be confined wholly to him, *William Boulton*, and that the defendant would not be in any shape a contractor with, or purchaser

1853.

Boulton v. Robinson.

from *Clarke*, as he did not know in what it might involve him; and therefore that the defendant would, if he determined to take half of *Clarke's* share, confine his transactions to the said *William Boulton*, and would pay him for the share as a matter wholly between the defendant and *William Boulton*. At folio 29, and following folios, the defendant says, to the best of his recollection it remained unsettled during the fall of 1843, the following winter, and a great part of the following spring, whether he, the defendant, would take the half or any part of *Clarke's* share; and that in several conversations with *Wm. Boulton* after *Clarke's* terms were known, he intimated a hesitation about taking any undivided interest in the land, and a preference to purchasing scattered lots for his son before referred to, as opportunity might offer after his son and his brother *William B. Robinson* should go down to Bond Head, which was not to be till the following spring; that in the following spring defendant visited Bond Head, and afterwards in April or May *William Boulton* went to him and said he hoped defendant would do as had been spoken of respecting taking half of *Clarke's* share, and hoped that defendant had not changed his mind, for that he, *William Boulton* had so many other things on his hands, that it would not be convenient to him to retain the whole as his own, and that he had fully reckoned on the defendant taking one-half; to which defendant answered at once, that if he put it on that footing, defendant would certainly not disappoint him by withdrawing. Again, at folio 49, upon defendant agreeing to take a share of the property, which, according to his recollection, was between the 19th of April and 8th of May 1844, he says he reminded *William Boulton* of what he had before said to him—viz, that he, the said *William Boulton*, must remember that his the defendant's bargain was only with him; that the defendant knew no one else in the transaction and would not be a party to any contract with *Clarke*, and that *William Boulton* made no objec-

Judgment.

tion. At folio 47 the defendant says that he never did in fact make any contract with *Clarke*, nor authorize any one to do so for him. At folio 351 he says he is satisfied that *William Henry Boulton* well understood that he was to deal alone with *Clarke*, and that defendant was to deal alone with *William H. Boulton;* that he does not know how the plaintiff acted in his negotiations with *Clarke*, or in what light he represented the proposed purchase to him, but defendant does not believe that plaintiff ever could have supposed that he had authority from the defendant to enter into any agreement of any kind with *Clarke* on defendant's behalf, and defendant is sure that he gave him no such authority. What instructions *William Boulton* may have given to the plaintiff, defendant cannot tell, further than that he never did, to the defendant's knowledge, instruct or authorize the plaintiff to enter into any agreement on defendant's behalf with *Clarke*, and that if he did so, it was without the defendant's sanction or approbation. The like denials are made incidentally in other passages of the answer.

Judgment.

Upon the second point; the plaintiff's becoming a party to the notes in question at the instance of the defendant or in his stead, or that defendant acceded to any suggestion that he should do so or assented to it, the answer is most positive in denial. At folio 50 the defendant says that he never did at any time request or authorize the plaintiff to become a party for him in his name, or in his stead, or on his behalf to any promissory note to be given to *Clarke*, or to any bill or other security whatever for securing the purchase money, or any part thereof for the said share, or for any other purpose whatever; and never did consent that the plaintiff should on defendant's behalf come under any liability to *Clarke* for any sum of money for any purpose or any pretence whatever; further, that he never did in any manner, directly or indirectly, authorize *William Boulton* or any other person to

1853.

Boulton v. Robinson.

become answerable, or to request the plaintiff to become answerable in defendant's place or on his account to *Clarke* for the payment of the whole or any part of his share in the property, either by note or bill, or in any other manner whatever, and that if *Wm. Boulton* did ask the plaintiff to make or indorse on account of defendant any note or bill to, or in favor of, *Clarke*, it was without defendant's knowledge, authority or assent; and he adds his belief that after what passed between himself and *William Boulton*, he, *William Boulton*, did not make any such request, as being or professing to be authorized by him, and that if *William Boulton* did make any such request to the plaintiff, it was contrary to the express understanding between *William Boulton* and the defendant. This denial is reiterated in various parts of the answer. I have noted no less than ten. Indeed it would be difficult to put denial in any shape more explicit and positive than is done in this answer; every shape in which it is put by *William Boulton* in his evidence is as clearly and positively met and denied as if it had been framed after, instead of before that evidence. The answer, it is to be observed, is responsive to the allegations of the bill and to the interrogatories, which, the pleadings being under the old practice, form part of the bill.

Judgment.

I have said that the plaintiff's case rests almost exclusively upon the evidence of Mr. *William Boulton*. One other witness was examined for the plaintiff, Mr. *Charles Clarke*, a brother of Mr. *Benjamin Clarke*, the vendor of the premises. His evidence however is confined to what passed at conversations between the plaintiff and the witness's brother, and though it may lead one to think that the plaintiff in his negotiations for the purchase of the land believed the purchase to be joint, and that he was acting for the defendant as well as *William Boulton*, still it is only from what he himself said that such an inference can be drawn. It is therefore not even evidence that he entertained such a

belief; still less that the facts were in accordance with any such belief.

1853.

Boulton v. Robinson.

Thus far then, the position of the parties on the evidence is, that the plaintiff's case is supported by the evidence of one witness only—Mr. *William Boulton*, and that the points deposed to by that witness are as positively, clearly and precisely denied by the defendant in his answer as they are deposed to in evidence; in which case the general rule is, that in the absence of circumstances corroborating the evidence, the plaintiff is not entitled to a decree. The council for the plaintiff felt this difficulty, and contended that notwithstanding the general rule, still the court gives less weight to an answer than to the evidence of a disinterested witness, and he cites Mr. *Gresley's* treatise on Evidence for his position. In the passage referred to, the author, after stating the general rule, and that when the answer is as precise, clear and positive as the evidence, some corroboration is required, the testimony of a second witness or any circumstances which may give a turn to the balance, adds, "the corroboration, however, has been sometimes so extremely slight, that although the fact of a defendant being an interested, and therefore at common law an incompetent witness, is professedly dismissed from the mind of the court, there can be little doubt but that the circumstance has a considerable weight." I understand Mr. *Gresley* to mean merely this, that in some cases where the evidence has been preferred to the answer, the corroborating circumstances have been so slight that the decision can only be accounted for by supposing that the court attached more weight to the edivence than to the answer. It may be that in some cases the court, seeing reason to believe the evidence rather than the answer, have given prominence to collateral facts agreeing with the evidence when the evidence itself, as well as the collateral circumstances, led them to disbelieve the answer; still this would be very far from a denial of the general

Judgment

1853.

Boulton v. Robinson

rule. The general rule is clear and is stated to be so, as well by modern text writers as in adjudged cases. *Pack* v. *Bathurst* (*a*) before Lord *Hardwicke*; *Pember* v. *Mathers* (*b*) before Lord *Thurlow*; *Mortimer* v. *Orchard* (*c*), before Lord *Loughborough*; *Cooth* v. *Jackson* (*d*); *Evans* v. *Bicknell* (*e*), and the *East India Company* v. *Donald* (*f*), before Lord *Eldon*, and *Pilling* v. *Armitage* (*g*) before Sir *William Grant*, all state the rule with no other qualification than that if the testimony of the witness is confirmed by circumstances, in that case the testimony of the witness so supported and confirmed shall prevail against the answer.

Judgment.

The plaintiff then, to succeed in this suit, must shew collateral circumstances supporting and confirming the evidence of his witness; and it is also open to the defendant to shew, as was done in *Pilling* v. *Armitage*, collateral circumstance sustained his answer, but this *onus* is not thrown upon him until the plaintiff has supported his evidence by corroborative circumstances sufficient to turn the scale against the defendant. To support his evidence the plaintiff puts in, besides the letter of the 2nd December 1843 to which I have before referred, two letters from *William Boulton* to himself, one dated 6th March 1844, the other the 26th of the same month. In the one he says: "I wish you would send me up a full statement of what you did with *Clarke*, what did he assign? What incumbrances has *George* on the property? how is he going to secure us, as we do not wish our heirs to be liable for his debts unless secured." By the words "us," "we," "our," in this letter, *William Boulton* swears that he meant the defendant and himself. In the other letter he says: "The Chief is so engaged that I have been unable to talk over matters with him; he however would like, and

(*a*) 3 Atk. 270.
(*b*) 1 Bro. C. C. 53.
(*c*) 2 Ves. Jun. 242.
(*d*) 6 Ves. 39.
(*e*) 6 Ves. 183.
(*f*) 9 Ves. 275.
(*g*) 12 Ves. 78.

1853.

Boulton v. Robinson.

so should I, before giving our notes, to know just what we have for them—that is to say, what town lots not paid for have been sold, how much money is due for them, what portion of the whole has been disposed of? *John* will accompany them. Our assizes will prevent me. They will all be at Bond Head on Thursday week, if the boat touches there." Mr. *William Boulton* in his evidence says he feels certain that any purchase alluded to in his letters meant a purchase by the defendant as well as himself: that his letters contained a true account of the transaction, and that he never made any statements to the plaintiff by letter or otherwise to deceive him, or containing any untrue representations of the transaction.

These three letters—the one of 2nd December 1843 from the plaintiff to his brother, and the two letters of March 1844 from his brother to him—are all that are put in as having passed between them in relation to this transaction. A letter to the plaintiff, dated 8th December 1843, from *W. B. Robinson*, brother to the defendant, is also put in, in which the writer says, "*William* writes me you have bought *Clarke* out for *John* and him."

Judgment.

Before considering the collateral circumstances relied on by the defendant, I will notice shortly the oral testimony adduced on his behalf. Mr. *Geo. Boulton* says he heard there was a negotiation for the sale of *Clarke's* interest in 1843 or early in 1844; that the plaintiff informed him that his brother would purchase *Clarke's* share, and that he expected that either Mr. *William Robinson*, or *John Robinson*, Jr., would take an interest in it, and that sometime afterwards he understood from the plaintiff that *John Robinson*, Jr., was coming down to the place, and that his father was to make the payments on his share. On cross-examination he says, "When Mr. *D'Arcy Boulton* spoke to me of the purchase of *Clarke's* share he said that Mr. *Wm. Boulton*, at all events, would join in the purchase, but

1853. Boulton v. Robinson

that he expected that others also would join in the purchase, and he named Mr. *William Robinson* as likely to go down and live there. He also named Mr. *John Robinson*, Jr. My understanding was that Mr. *William Boulton*, would entirely purchase *Clarke's* share: that if he could get others to take a portion he would—if not that he would keep it all himself."

The same witness also speaks as to what passed at the meeting in the defendant's library, to which Mr. *Wm. Boulton* deposes. He says: "I was present at a conversation in the Chief Justice's library, when the Chief Justice, Mr. *William Boulton*, and Mr. *D'Arcy Boulton* were present. I think it was in 1848. The conversation was respecting some notes given by *Wm. Boulton*. To the best of my recollection the Chief Justice asked Mr. *D'Arcy Boulton* if he had ever authorized him to act for him in giving such notes? whether he had ever given any writing or so expressed himself as to give them authority to do so? Mr. *Boulton* said he considered such authority implied, from the nature of the transaction between them. Both the Messrs. *Boulton* spoke to much the same effect. They each distinctly said that they had no express authority, but only such authority as might be implied from the nature of the transactions. The Chief Justice said at the time that he had been applied to to endorse notes in respect of this transaction, and that he had refused." "Mr. *William Boulton* mentioned as one reason why he considered he had authority in the matter, that he had paid money for the Chief Justice, which payments he had sanctioned afterwards." "I think I distinctly recollect the Chief Justice saying to Mr. *Wm. Boulton*, 'you know I refused to have anything to do with Mr. *Clarke* in the matter: that I would only deal with you.'" And, on cross-examination upon this point, the witness says, "I think Mr. *D'Arcy Boulton* on that occasion, or on some other, said to the Chief Justice that he had put his name to the paper because the Chief Justice

Judgment.

had an objection to his own name appearing on any, but the Chief Justice denied that he had authorized anything of the kind. I recollect the Chief Justice saying he was not to be a party to, or have anything to do with notes, but that he would meet his share of the payments as they fell due, as he had already done." "This was after the failure of *Gamble & Boulton*."

Mr. *John Beverly Robinson*, Jr., the son of the defendant for whose benefit it is agreed that he contemplated the purchase, is the next witness, and he states: "After the arrangement about the mill property it was suggested to me, I think, by Mr. *Wm. Boulton*, that it would be to my interest to get an interest in the village property as well as in the mill property. A conversation afterwards took place between Mr. *Wm. Boulton*, my father, and myself in my father's library, on the same subject. My father questioned me as to my desire to reside in the place permanently, and understanding that such were my views, he said he thought it advisable that I should have a share in the village property as well as the mill, and he then said, addressing himself to Mr. *William Boulton*, 'then I will take a share in that property.'" "I thought from what Mr. *William Boulton* said that he had himself completed a purchase from *Clarke* of his share, and that he thought it advisable that my father should for my sake take half of the share from him." And on cross-examination he says: "The conversation to which I have referred in my father's library was after I had visited the property. I visited it in February 1844."

Judgment.

The date of the conversation at which the defendant decided upon taking a share in the property, whether before or after 19th April 1844, is not stated, only that it was after the witness had visited the property in February of that year. The witness and the defendant differ as to what passed when the latter decided upon taking a share in the property, that is, if they both

1853. Boulton v. Robinson

speak of the same occasion, the witness representing that the defendant decided in the presence of himself and Mr. *Wm. Boulton* upon learning his, the witness's views as to settling permanently at Bond Head. The defendant states that he decided, upon *W. H. Boulton* going to him and expressing a hope that he would do as had been spoken of, and that he had not changed his mind, as he *William Boulton* had so many things on his hands that he could not conveniently retain the whole; when defendant answered at once, that if he (*Boulton*) put it on that footing he certainly would not disappoint him by withdrawing. This the defendant places in April or May. The conversation alluded to by the witness may have been earlier, and the defendant's decision less positive than the witness took it to be; still in a matter so nearly concerning himself, he is likely to have been attentive to what passed. Whichever may be correct in his recollection, it tells equally against the plaintiff; its only effect can be to diminish the weight which might otherwise be due, either to the answer or to the witness's evidence.

Judgment.

The only other witness is Mr. *William Robinson*, the defendant's brother; and in his evidence he states, that "I became aware of my brother acquiring an interest in the village property. I resided on the property afterwards for some time. After the purchase was made I had frequent conversations with my brother and with Mr. *William Boulton* on the subject. My brother first informed me that Mr. *William Boulton* had purchased from *Clarke* his share in the property, and that he, my brother, had purchased from him a part of his share for the benefit of his son *John*. Afterwards, perhaps a year afterwards, Mr. *Wm. Boulton* informed me in conversation that he had purchased *Clarke's* share and sold half of it to the Chief Justice." On cross-examination he says: "In my conversations with Mr. *William Boulton* he asked me if I did not recollect that he was to buy *Clarke's* share for himself

and *John*. He spoke as if it had been doubted. I said that I so understood it. This was in reference to the village property—not the mill property." 1853. Boulton v. Robinson.

Taking his evidence in chief and on cross-examination together, I understand him to mean that he understood that *William Boulton* had purchased with a view to half being taken for the defendant's son and retaining half himself. He could not have meant that he understood the purchase to be a joint one, for he says that after the defendant had told him that *William Boulton* had purchased from *Clarke*, and that he had purchased from him a part of his share for the benefit of his son, perhaps a year afterwards, *William Boulton* informed him that *he* had purchased *Clarke's* share and sold half of it to the defendant.

It may be said of Mr. *George Boulton's* evidence that what he relates as having passed between the plaintiff and himself is not inconsistent with *William Boulton* intending to purchase *Clarke's* share, in any event, whether the defendant or others joined him or not, and the defendant afterwards agreeing to purchase jointly with him; but *William Boulton's* own evidence does not agree with this. His words are, "I should not say decidedly that I *never* arranged to purchase the property or any portion of it on my own account, or that I ever *contemplated* so purchasing it." Upon the evidence then of Mr. *George Boulton*, the plaintiff stated to him the intention of *William Boulton* as to making the purchase as wholly different from what Mr. *William Boulton* now swears that his intentions were. Judgment.

The evidence of the son and brother of the defendant is wholly at variance with that of *Wm. Boulton* as to the purchase being made jointly by himself and the defendant, inasmuch as they swear to its being represented to be otherwise by *William Boulton* himself,

1853. and the son also deposes to a circumstance inconsistent with the purchase being so made.

Boulton v. Robinson.

Further: looking at the evidence of *William Boulton* apart from that of other witnesses, one cannot feel confidence in the accuracy of his memory. The Bond Head *mill* property had been purchased shortly before the property in question—about the close of 1843, the witness thinks. Of that purchase, he says in his evidence that he believes that some one suggested that Mr. *William Robinson* would be a good person to place in charge of a mill to be erected on the place. That this was before the purchase, and that the defendant agreed to purchase *with him* the mill property with that view. That the mill property, or rather *Clarke's* share in it, was purchased *jointly* by the defendant and himself—he thinks in equal shares. In this he was in error. On *re-examination* he says that his impression

Judgment.

was that the mill property had been purchased in the same way, but that in that he must have been mistaken: that he must have himself purchased the share in the mill property and sold a portion of it to the defendant. He was clearly in error as to the mode of one purchase; and though he declares himself still positive as to the other, it is natural for any one else to infer that if in error as to the one he may have been so as to the other. The two transactions were nearly together in point of time, and were transactions of the same nature; and, apart from recollections in the matter, it is not unlikely that if the earlier purchase were by *William Boulton* himself, followed by a sale of a portion of it afterwards to the defendant, the purchase of the property in question occurred in the same way. There is another point upon which it appears to me that his memory is at fault. He says: "I knew nothing at the time of the purchase of the Bond Head property, of *McKechnie's* incumbrance upon it." Now, unless there were two incumbrances, which is nowhere shewn, and the contrary to which I gather from the plaintiff's letter of

the 2nd December 1843, and from the papers, the witness is quite wrong in what he says, for the incumbrance is stated and explained in the letter of the 2nd December 1843, from the plaintiff to himself, communicating the terms of the purchase, he says, "they were all free of incumbrances, but there is a mortgage of £2500 on a portion of the property," &c. I have referred to this passage before.

The circumstances referred to by the defendant as corroborative of the correctness of his position are several. The deed of conveyance is made to *William Boulton* alone, and contains nothing shewing that any one else was at all interested in the purchase. It is dated on the 5th December 1843—the same date as the notes, and was delivered by *Clarke* to the plaintiff on the 12th of March following; when it was prepared, or when executed does not appear. No reason is given why, if the purchase was jointly made by two, the conveyance was to one only.

Judgment.

Another circumstance I have slightly adverted to already, viz., that *William Boulton* made two payments to *Clarke* of £250 each on account of the purchase without calling on the defendant to contribute towards them, or making any charge against him in respect of them. One was by the acceptance of 26th December 1843, before referred to, and if the defendant was a joint purchaser, he should have been charged with half the amount at that date; the other payment may have been before as agreed upon—that is, at the time of the purchase. The first call on the defendant, or charge against him, is of the 2nd May, 1844; at which time the defendant admits he had agreed to become a purchaser of half of *Clarke's* share, as he says, of *Wm. Boulton.* In relation to this Mr. *William Boulton* explains that the books in question were very irregularly kept; that entries were not made under the proper dates—especially where explanation was needed by the book-keeper

1853.

Boulton v. Robinson.

from himself or his partner: that sometimes weeks might elapse, in that way that errors occurred in the entries in relation to the Bond Head property, and that the books do not evidence the correct dates of transaction in relation to it. He says, also, that when he accepted the draft for £250 the purchase was not finally completed—the conveyance was not made. Giving all due weight to this explanation, it still seems strange that when *William Boulton* accepted this draft, which he did in Toronto, he did not direct his book-keeper to charge one-half of it against the person who he says was to pay half the purchase money for which it was drawn; or, if not charged then, it is still strange that three months afterwards, when it became due on the 28th of March and was paid by himself—which was after the conveyance was made—it was not charged then, but that no charge was made till the 2nd of May, and then of half the amount of the two payments together. I am unwilling to attach more weight to this circumstance than properly belongs to it, because the books being irregularly kept—the plaintiff and his brother being in the habit, as the latter states, of drawing and accepting for one another's accommodation, a delay may have occurred in charging the defendant, even if properly chargeable: still, in connexion with other circumstances, it must not be lost sight of.

Judgment.

Another piece of evidence, and a very important one taken in connexion with the evidence of *William Boulton*, is a memorandum made by the defendant and read to *William Boulton*. It is divided into clauses, the first three of which relate to the mill property. The fourth runs thus: "To place at *John's* disposal £250 to be laid out by him in purchasing town lots at Bond Head, either of the company or of individuals, as he may find most advisable." The fifth is in these words: "If *W. H. B.* wishes to retain only half of *Clarke's* share of the land, as he intended, then I must take the other half—in which case I will pay the £1625

thus: £125 on 1st May 1845, and the three last payments of £500 each on 1st May 1847-8-9." 1853.

Boulton v. Robinson.

The paper bears no date except that it is endorsed 19th April 1844. In relation to this paper, which was shewn to *W. H. Boulton* when giving his evidence, he says that it was read over to him by the defendant at the time it bears date, as he supposes; that he thinks it was read over on the occasion of *John B. Robinson*, Jr., being about to settle at Bond Head: that it was probably on the same occasion, as the defendant and he, the witness, made their first arrangement for the purchase of the property. The witness here intimates, as I read his evidence, that no final arrangement was made for the purchase from *Clarke* till this date, for he repudiates the idea of any other than one joint purchase by the defendant and himself. In this, the date of purchase, he is clearly wrong, for on the 12th of the previous month the deed of conveyance to himself had been delivered to the plaintiff, who on receiving it entered into a written engagement to procure notes for the balance of the purchase money. At this date too, 19th April, these notes had been signed by *Wm. H. Boulton* and transmitted to Cobourg to the plaintiff, who on that day delivered them, signed by himself also, to *Clarke*. The date of the purchase from *Clarke* was not later, I should say, than the 5th of December—the date of the notes and of the conveyance. The letter from the plaintiff to his brother of 2nd December announces it as then made. He says, "I have concluded an arrangement," &c., and *William H. Boulton*, as well as the plaintiff, must have so understood it; for in the letter from the defendant's brother to plaintiff, *put in by the latter*, which is dated the 8th of December, the writer says, "*William* writes me you have bought *Clarke* out for *John* and him." The witness, *W. Boulton*, is probably right in thinking that the paper of the 19th April was read over to him by the defendant on the occasion of his son being

Judgment.

1853.

Boulton v. Robinson.

about to settle at Bond Head. This was after the son had visited the place in February. The witness speaks of the paper—not as if drawn up on that occasion, but as if then produced and read over. It was probably drawn up on the day of its date, and read to the witness on the next occasion of the defendant conversing with him upon the subject. I should say, looking at *Wm. Boulton's* evidence in connexion with the paper, that the terms of it appeared to him, upon giving his evidence, inconsistent with the defendant having previously agreed to purchase, and that as he insisted there was only one purchase—a joint one—he inferred that this paper was read to him by the defendant before any purchase at all was made from *Clarke*—an inference wholly erroneous, as his own notes signed also by the plaintiff were at that moment in the hands of *Clarke*, and the conveyance had been executed more than a month before.

Judgment.

In addition to the inference arising from the date when this paper was read to Mr. *Wm. Boulton*, is this circumstance: that the terms of payment proposed by the defendant in case he should purchase, varied essentially from those agreed upon with *Clarke*. He proposed to make his first payment—£125 on the 1st of May 1845, at which time, according to the agreement with *Clarke* the instalments would have amounted to £1000. The other proposed payments also varied from the agreement with *Clarke*. I do not lose sight of the circumstance that before any purchase at all was made from *Clarke* the defendant contemplated acquiring a portion of his interest and intimated to *Wm. Boulton* that if he did so he should understand that he must be prepared to meet his share of the payments at the same times as he, *Boulton*, would have to make his payments to *Clarke*. This the defendant says in his answer, and does not explain why the paper of 29th April proposed other terms of payment. I do not see however that it makes against the defen-

dant, that he did—whether from forgetfulness of what had passed previously, from conceiving that he had the right, or from whatever cause—propose to vary the terms of payment. *Wm. Boulton* does not say that when the paper was read over to him he made any objection to it, or questioned the position then assumed by the defendant. All this appears to me quite inconsistent, with the fact being, that a purchase which in truth had been made some time previously was a joint one.

1853. Boulton v. Robinson.

I may notice here, that by subsequent arrangement the payments to be made by the defendant were to correspond as to time and amount with those to be made to *Clarke*, or rather that the defendant was to furnish half the amount to be so paid. This is stated in the answer and appears by the books of *Gamble & Boulton*, also by the evidence of *Wm. Boulton*, except that he does not state it as a *subsequent* agreement.

Judgment.

The whole question between the parties is not disposed of however, by shewing that the defendant is right in his position that *Wm. Boulton* purchased from *Clarke* the whole of his interest, and that the defendant subsequently purchased from *William Boulton* an undivided half thereof. The defendant having to meet one-half the payments, and agreeing to meet them at the same time as the principal purchaser, had agreed with *Clarke* to make his payments to him, there would have been nothing very improbable in a sub-purchaser, who had no objection to his name appearing on paper, joining the principal purchaser in notes to the vendor, or in one who had such objection agreeing to indemnify a relative or friend, who from respect to his scruples might be induced to give his own name as a substitute—not that such would be the ordinary business course, for in either case there would be a liability incurred for the whole purchase money by the purchaser of half of the property. The proper business course would be

1853.

Boulton v. Robinson

for the subsequent purchaser or his substitute to give notes for half the purchase money to the principal purchaser. Still, as business is often transacted in this country, the giving of joint notes would not have been a very extraordinary proceeding.

Upon the question of the defendant authorizing the plaintiff to sign his, the plaintiff's name to joint notes to be given to *Clarke* as a substitute for his own, I think that such authority, if given, would entitle the plaintiff to be indemnified by the defendant. I think, further, that if joint and several notes were presented to the defendant for his signature; if he declined to sign notes as an improper thing in his position, but said that he was willing to become responsible, but not in notes, to any one; and if it was suggested that his difficulty might be obviated by the notes being signed by some other person and the name of the plaintiff was suggested, and if he thereupon assented to any arrangement whereby he could be relieved from the necessity of his name appearing upon such paper; if he assented to the making of an arrangement in the way so proposed, namely, by getting another name on the paper instead of his own, then I think that such authority was given as entitled the plaintiff to an indemnity, and this although the purchase had not been joint, and the plaintiff therefore not an agent of the defendant in making the purchase. If he had been such agent perhaps even less would have sufficed.

Judgment.

All that I have put as entitling the plaintiff to be indemnified is sworn to in the evidence of *Wm. Boulton* to have passed. In addition to this the plaintiff relies upon a letter written to him by the defendant on the 24th of May 1846, in answer to one to the defendant from him, dated the previous day. One of the notes given for the purchase money (the one falling due in May 1846) was then past due; the defendant had not furnished Mr. *William Boulton* or any one else with

funds to meet half of it, and it had not been met by *Gamble & Boulton* or otherwise.—(The Vice-Chancellor here read both the letters referred.)

Upon these letters I would observe, that if in truth the plaintiff at that time believed that the defendant had authorized the signing of the notes by him in his stead and as his substitute, there was nothing in the defendant's letter to lead him to think otherwise; and, on the other hand, if the defendant was conscious that he had given no such authority, there was nothing in the plaintiff's letter to lead the defendant to think that the plaintiff conceived that such authority had been given, as there is nothing in his own letter that recognizes or makes any allusion to such authority, or to the plaintiff being a party to them with any such understanding. I have read the letters as if such authority had been given, and again as if it had not, and they both appear to me to consist with either being the case— it being remembered of course that long before this the arrangement was that the plaintiff's payments were to correspond in point of time with those of *Wm. Boulton*, and were to be half of the amount of the purchase money, and so half of the notes. Judgment.

I have read carefully the other letters which are put in by the plaintiff—those written by the defendant and his brother, and those also written by himself. I can discover in them nothing which does not consist with the defendant's position. My remarks in regard to the two letters of May 1846 apply generally to these also.

The question then of authority to the plaintiff rests upon the evidence of *William Boulton*. This is met positively and explicitly by the answer; and here I would observe in regard to that evidence, that it is not the evidence of a bystander, as it is put in one of the cases, who stand disinterested between the parties, but

1853.
Boulton v. Robinson.

of one who cannot but feel a strong interest in supporting the plaintiff's case, because both he and the plaintiff say that he represented to the latter that that had passed with the defendant which amounted to an authority to the plaintiff to sign the notes as his substitute; and if in truth that did not pass, the plaintiff has got into a very serious difficulty through his misrepresentation. His evidence goes to shew that he did not misrepresent, and so to exonerate himself from blame, if not from liability for the consequences.

Judgment.

Further: many of the remarks upon this evidence upon the point of joint purchase, and some of the collateral circumstances which have already been adverted to, apply to this point also. And in relation to the evidence, it is obvious that if shewn to be wrong upon the one point, it is the less to be relied upon as to the other. I must remark, too, that in his own account of what passed in the defendant's library after the difficulties arose he does not appear on that occasion, when the parties confronted one another, to have put what passed in relation to the plaintiff signing the notes so strongly as in his evidence—though, from the questions put by the defendant, it might have been expected that all would then have been said that could have been said. He does not say that upon that occasion he asserted that the defendant had assented to his suggestion that the plaintiff should sign the notes, or that he assented to any arrangement that would save his own name from appearing, or to the witness making the arrangement in the way he proposed.

Again: in Mr. *George Boulton's* account of what passed at the same meeting it does not appear that Mr. *William Boulton* asserted that any such assent had been given; indeed he says that both the plaintiff and his brother distinctly said that they had no express authority, but only such authority as might be implied from the nature of the transactions, and that on that

or some other occasion, upon the plaintiff saying to the defendant that he had put his name to the paper on account of the defendant's objections to his own name appearing, the defendant denied that he had authorized anything of the kind; the witness says at the same time, that he speaks from recollection, and has no particular reason to remember what passed.

There is one other circumstance to which I shall advert upon this point, and to which I have already referred in relation to the question of joint purchase. The paper of 19th April 1844, which was read over to the witness *Wm. Boulton* on or after that day, shews, I think, that at that time the defendant had not finally agreed to purchase at all; yet at that time the notes, with the plaintiff's signature, as well as his brother's, were in the hands of *Clarke*, as appears by the receipt of *Clarke* of the same date—indorsed on Exhibit X. put in by the plaintiff; so that if *William Boulton's* evidence be correct, he carried notes to the defendant for his signature, and the defendant assented to the notes being signed by another instead of by himself before he, the defendant, had determined whether or not he would become a purchaser at all. This circumstance appears to me so entirely at variance with the plaintiff's position with respect to the notes, and so strongly corroborative of the position of the defendant that if I had felt doubtful before, it would have decided me. There are some other minor circumstances supporting the same view which I have omitted to mention, lest it should extend my judgment to too great a length.

Judgment.

I believe I might have contented myself with resting my decision upon a comparison of the answer with the allegations of the bill, supported by the evidence of Mr. *William Boulton*, and ascertaining that the denial in the answer was equally precise, clear and positive—for the collateral circumstances relied on by the plaintiff rather tend to shew how he believed, and as he contends

1853.

Boulton v. Robinson.

had reason to believe the facts to be, than to shew how they really were. I have thought it better, however, to examine all the circumstances and to explain fully the grounds and reasons of the conclusion to which I arrive. In doing so I have found it necessary to comment upon the evidence of the principal witness for the plaintiff. I can come to no other conclusion than that his evidence is incorrect upon the principal points to which he was examined, but I should be sorry to impute to him so serious a crime as that of giving wilfully false testimony. In some points it is evident that it was his memory that was at fault. I rather take the truth to be that the defendant having contemplated acquiring a portion of the property before any purchase at all was made, Mr. *Wm. Boulton* fully reckoned upon his carrying out that intention and purchased himself in the confident expectation that such would be the case: that in his letters to the plaintiff he spoke of the defendant as taking half, because he relied upon his doing so, not observing that accuracy of language which is usual in matters of business, and which ought to be observed in such matters, between relatives as well as between strangers. If he supposed the purchase joint, he might suppose the signing of the notes by the plaintiff, looking back to the transaction after the lapse of several years, to have been on the defendant's account and with his sanction. If the plaintiff himself thought the purchase joint, and that he had been authorised to sign the notes instead of the defendant, he might not improbably have led the witness to think so too by conversation and by reference to the letters put in, written at the time by the witness to him. I am far from saying however, if the evidence admits of the explanation I have supposed, that it is satisfactory. I am satisfied that it is erroneous, but I think not wilfully so. I cannot forbear to remark upon the unbusinesslike carelessness of the plaintiff upon his own shewing; for, although a guarantee from the defendant to himself was in his contemplation, as appears

Judgment.

1853.

Boulton v. Robinson.

from what he said to *Clarke*, he never asked for one, or addressed a letter to the defendant on the subject of his proposed position, which he might have done without questioning the truth of what his brother had communicated to him or by letter, or so far as appears verbally, ever so expressed himself to the defendant as to inform him what he conceived his own position to be, until after the difficulties which resulted from the failure of *Gamble & Boulton*, had arisen.

The plaintiff claims to be entitled to an issue in case the court should be against him upon the facts. He cites no case for this, and I think he is not entitled to it, either as of right, or as matter of judicial discretion. Where, upon weighing the evidence of a single witness with the answer there are collateral circumstances which incline the court to decree for the plaintiff, it is usual to give to the defendant, if he desire it, the option of taking an issue (*a*). In a note at page 227 of *Gresley* on Evidence, the rule is stated to be almost decisive, that when the evidence stands quite alone the court will not send the question to a trial at law.

Judgment.

If the plaintiff could ask for an issue at all it must be upon the ground—sometimes taken in England—that the evidence is so conflicting that the court feels that it cannot satisfactorily ascertain how the facts are, chiefly from feeling sensible of the deficiencies of a trial upon written evidence; but here the evidence was taken openly *viva voce* before myself, and the witnesses were examined and cross-examined by counsel.

This, of course is not one of those cases where a party is entitled *as of right* to an issue. *Out of these cases* the court ought not, I apprehend, to grant an issue when it has reason to believe that a jury is less competent than itself to ascertain the truth; and certainly after hearing the evidence *viva voce*—after reading

(*a*) Daniel's Ch. Prac. 987.

1853. Boulton v. Rol inson.

carefully the voluminous pleadings in the cause, and after going through all the documentary evidence on both sides, comparing dates and circumstances with the attention and deliberation necessary to a satisfactory examination, I cannot effect to believe that the balance of competency would be in favour of a jury. I think, therefore, that it would not be a sound exercise of discretion to grant an issue.

Judgment.

Being with the defendant upon the *facts* of the case, it is not necessary for me to decide the legal objections which he has raised. I will notice them very briefly. It is objected, and even supposing the evidence of the principal witness to have been wholly unshaken, still, as no liability was shown from the defendant to *Clarke*, there was no suretyship on the part of the plaintiff; and that the plaintiff could not call upon the defendant to indemnify him, at least without proof of an express contract to do so; but I do not see why it should be more necessary to shew express contract in such a case than in the case of an ordinary surety, because the rights of the surety against the principal debtor are not at all founded upon the liability of the debtor to pay the creditor, but upon the contract, implied, where not express, on the part of the debtor, to indemnify his surety; here *that only* is absent from the ordinary case of a surety which forms no part of the grounds of the rights of a surety against the principal debtor. In the ordinary case of money paid by A. to B. at the request of C., it needs no express promise from C. to A. to entitle the latter to recover from him the money paid; and if, instead of money being paid, notes were given by A. to B. at the request of C., no express promise could be needed, but a contract would be implied on the part of C. to indemnify A.; and such, if sufficiently proved, would have been the plaintiff's position here. I am unable to see any substantial distinction between such a case and the case of an ordinary surety.

1853.

Boulton v. Robinson.

It is objected further, that the plaintiff, at all events, could not come to this court till he had *paid* the notes. It is clear that, in the case of an ordinary surety, though he has no remedy at common law until he has paid the debt, it is otherwise in equity, for upon default made by the principal, the surety is entitled to come into this court to be indemnified; there is a contract from the surety to the creditor that the debtor shall pay, and a contract from the debtor to his surety that he will indemnify him, and when the money becomes due and default is made, the equity arises; and this equity arising, not from the debtors liability to the creditor, but upon his contract to indemnify, which contract is as much implied, I conceive, where there is no liability from the person previously to pay to the principal creditor, as where there is such liability. I think that such equity arises in either case upon the money to be paid falling due and default in payment being made.

Judgment.

In this case, the *legal effect* of what passed, as deposed to by the principal witness, is a request by the defendant to the plaintiff to sign certain notes, for the payment of money which he, the defendant was to pay, and a promise to pay half the money as the notes fell due. I cannot say that I entertain any serious doubts that if such a case had been established an equity would have arisen, upon default made by the defendant in payment of the notes; which would have entitled the plaintiff to come to this court for indemnity.

I think, however, after a careful consideration of every fact and circumstance that appeared to me to be material, that the plaintiff has failed to establish such a case; and not merely that he has failed for want of evidence which may be in existence, but my strong conviction is, that the facts are otherwise.

The bill must be dismissed, with costs.

1853.

IN RE BODDY, AN INFANT, AND THE STATUTE 12 VICTORIA, CHAPTER 72.

Sale of Infant's estate.

The court will not direct a sale of the real estate of an infant merely because the ancestor was indebted: it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit.

Statement. In this case a petition had been presented by the mother of the infant under the provincial statute 12 Victoria, chapter 72, praying for the sale of the real estate descended to the infant, and for the appointment of the mother as guardian.

The infant, aged about 16 years, and his mother had been examined before a judge in chambers, and from their statements, as also the evidence of other parties called as witnesses, it appeared that the father of the infant had died equitably entitled to a small lot of land and dwelling-house in the city of Toronto, and being indebted on account of the building in a sum, which, together with interest, now amounted to about £75, upon which it was sworn interest would be charged by the creditor until paid. It did not appear that any proceedings had been taken or were likely to be taken by the creditor, who also held the legal estate, he having executed a bond to convey. The infant was apprenticed to a trade and was receiving a small sum annually in addition to his board from his employer.

Judgment. The court refused the prayer of the petition, as the only damage likely to arise to the infant was the increased interest which he would have to pay before obtaining the legal estate. No pressure was shewn. On the contrary, one of the witnesses swears that Mr. *Ritchey*, the creditor, is not pressing for his claim, but only insists on charging interest till paid. This we consider to be entirely insufficient to warrant us in making an order in this matter for the disposal of the infant's interest in this property.

PATTERSON v. SCOTT. 1853.

Carriage of decree.

Where any unreasonable delay occurs on the part of the plaintiff in carrying on a creditor's suit, the court will order the carriage of the decree to be given to another of the creditors upon his indemnifying the plaintiff against future costs. October 18.

The bill in this cause was filed by *Adam Patterson* against *Jane M. Scott*, as the executrix of *James Scott*—the testator in the pleadings mentioned—alleging that the estate was indebted to plaintiff, and praying the usual administration decree. Statement.

Two days after the bill was filed, and on the 21st of April 1849, a reference to the master had been obtained by consent of the defendant. One *Bernard* had carried in a claim before the master, which it was certified would exceed £1000. Since the obtaining of the decree the plaintiff had not taken any steps to establish his claim, nor had he proceeded in the cause further than carrying the decree into the master's office: and upon an affidavit stating these facts, and the master's certificate, a motion was now made by

Mr. *Strong*, on behalf of *Bernard*, for an order to transfer the carriage of the decree from the plaintiff to *Bernard*, upon the ground of the unreasonable delay which had occurred in carrying on the suit. Argument.

Mr. *Morphy*, contra, opposed the motion: such an order never being made unless upon the proof of facts, shewing some collusion between the parties to delay the other creditors.

Per Curiam.—Without imputing to the plaintiff any improper motives in instituting these proceedings, we cannot shut our eyes to the great and unexplained delay which has occurred; and, as has been remarked by Lord *Eldon* on several occasions, it is the duty of the court to watch with a jealous eye the conduct of

1853. Patterson v. Scott.

plaintiffs in suits of this nature, the effect of which may be to prevent creditors from enforcing their just demands for an indefinite period, and which there is great reason to believe has frequently been attempted to be done by a friendly creditor.

Judgment.

The rule we consider to be clearly established, that, upon the occurrence of a delay anything like what has taken place here, the carriage of the decree will be ordered to be transferred to another creditor. Under these circumstances therefore, we must order the future conduct of the suit to be entrusted to the present applicant upon his giving the plaintiff sufficient security to indemnify him against all future costs incurred in carrying on the cause; *Bernard's* costs of the present motion to be costs in the cause.

DAVIDSON v. MCKILLOP.

Decree—17th General Order.

October 10.

A plaintiff is not entitled, as of course, to a decree before the time for answering the bill has expired; some special ground must be shewn to induce the court to grant it.

Statement.

This was a foreclosure suit; the time for answering had not yet expired, and

Argument.

Mr. *Barrett*, for the plaintiff, moved *ex parte*, under the 17th general order, for leave to serve a notice of motion for a decree: no special grounds were stated for the application, but it was alleged that the plaintiff was desirous to proceed to a decree with as little delay as possible: but

Judgment.

Per Curiam.—Although this order was intended to apply as well to foreclosure as other suits, it is evident from the wording of the order itself that some ground other than the mere anxiety of the plaintiff to proceed, must be laid to entitle him to ask for such an order as now desired.

RE PATON. 1853.

Habeas Corpus.

A judge sitting in chambers, pursuant to the orders of 1853, is authorized to grant a writ of *habeas corpus*. November 3.

This was an application, on the part of *Robert G. A. Paton*, for a writ of *habeas corpus*, to bring in the body of *Jessie Paton*, his infant child, now in the custody of her mother.

Mr. *Mowat*, on behalf of the applicant, applied to the judge sitting at chambers for a writ of *habeas corpus* directed to his wife, *Jemima Paton*, calling upon her to produce the daughter of the said *Robert G. A. Paton* and *Jemima Paton* before the court. After taking time to consider the motion, the court were of opinion that, under the new orders, the motion might properly be made to a judge sitting in chambers.

PRENTISS v. BUNKER.

Pro confesso.

Where a defendant in a suit refused to attend before commissioners appointed for the purpose of taking his evidence in a foreign country, the usual order to set the cause down to be taken *pro confesso* was made. November 7.

In this cause a commission had been sued out on behalf of the plaintiff, for the purpose of taking the *viva voce* examination of the defendant.

By the certificate of the commissioners, and the affidavits now produced, it appeared that the defendant had been duly served with a summons to appear before the commissioners, but had neglected to attend, and

Mr. *Mowat*, for the plaintiff, now moved for an order (under the statute 16 Victoria, chap. 19) taking the bill *pro confesso* against the defendant.

Per Curiam.—Let the usual order be drawn up.

1853.

MEYERS V. HARRISON.

October 10. *Member of Parliament—Sequestration.*

Where a party having privilege of parliament had been in contempt for non-compliance with an order of the court, and the order *nisi* for a sequestration had been duly served; but between that and the application for the writ to issue the party had ceased to be a member, the court refused to grant the writ; and directed the party moving to commence proceedings for the contempt *de nova.*

SNYDER V. O'LONE.

Affidavit of Service abroad.

Mr. *Crickmore*, on behalf of the plaintiff, asked if it would be necessary to issue a commission to parties in the United States authorizing them to take an affidavit proving the service of certain papers on the defendant in that country.

The court thought no commission or order for that purpose was requisite.

PRENTISS V. BRENNAN, IN RE DAVID PETERSON, ELIZABETH BRENNAN, PAUL C. PETERSON, AND ELIZA BRENNAN.

Sept. 22. Divers conveyances executed by the defendant shortly before the commencement of this suit were declared fraudulent and void as against the plaintiff.

The facts giving rise to the present motions are fully stated in the judgment of the court and the report of case, ante volume 1, page 371.

Mr. *Mowat*, for plaintiff.

Mr. *Vankoughnet*, Q. C., Mr. *C. W. Cooper*, and Mr. *Turner*, for the other parties.

1853.

Prentiss v. Brennan.

THE CHANCELLOR.—The complicated frauds in which the defendant in this case has been engaged has given rise to numerous applications on behalf of parties claiming to be interested in various portions of the property in the hands of the sequestrators. In the several applications of which we are now about to dispose, the court thought that an enquiry before a jury would be the most satisfactory mode, under all the circumstances, of determining the right of property; but, at the desire of the parties, the matter was referred to the consideration of the master. Subsequently an application was made, on behalf of all parties, that the questions at issue should be determined by the court, and as the evidence had been taken, for mutual convenience, before an examiner at Kingston, and not before the master, we thought the application reasonable, and an order was drawn up accordingly, under which the matter has been argued before us.

Judgment.

The circumstances connected with these four applications are closely interwoven, and the evidence, which is very voluminous, has not been taken under each order, respectively, but under all the orders at once, so that it will be convenient that the applications should be considered together.

This case has been already before the court so frequently that it will be unnecessary to enter, here, into any minute details of its circumstances; but there are some things, common to all these claims, which must be borne in mind.

In the month of April 1850, and long previously, serious difficulties existed between these co-partners; the plaintiff remonstrating constantly with the defendant, whose conduct was certainly open to the gravest objection, and demanding a statement of the partnership affairs, to which he was clearly entitled, and the defendant as pertinaciously refusing compliance. It

1853.

Prentiss v. Brennan.

is shewn that in the preceding month the plaintiff's demands had become very pressing, and towards the close of the following May the present bill was placed upon the files. In the early part of June the defendant absconded, carrying with him, as is supposed, all the books of the copartnership, and the assets, so far as the plaintiff has been able to ascertain, with the exception of a sum of about £750, realized by the receiver in the cause from the remnant of the partnership stock.

The master's reports finds a sum of about £17,000 to be due from the partnership to the plaintiff. As to one portion of this large amount, the finding is to some extent conjectural, because the defendant having abstracted the partnership books and resisted all process of contempt to compel their production, the master was obliged to proceed on such loose evidence as the plaintiff was enabled to lay before him. But, as to a sum of about £12,000 there is no room for doubt, that being composed of £5,000—the capital furnished by the plaintiff and which, by the articles, was to be repaid him—and of further advances amounting with interest to about £7,000.

Judgment.

The transactions principally questioned on the present enquiry are said to have taken place in the intervening month of April; at a time, consequently, when the defendant must have been conscious of the existence of a very large demand against him, and but a few weeks before his withdrawal from the jurisdiction of the court, under the disgraceful circumstances to which I have adverted. With respect to his conduct, therefore, there is no room for speculation now; his fraud is flagrant, and his counsel attempted nothing in his vindication. But it is argued, and properly, that however flagrant his fraud, the motives of these claimants may have been pure, and they may have entered into these contracts in the utmost good faith. That is the question we are now to determine.

1853.
Prentiss v. Brennan.

But before proceeding to investigate these claims respectively, I would make two general observations. In the first place, all these applicants are nearly related to the defendant. *Elizabeth Brennan* is his mother, *Eliza Brennan* his sister, *David Peterson* his uncle, *Paul C. Peterson* his cousin; and *Barnabas Brennan*, the principal witness, his brother. In the next place, I am compelled very reluctantly to observe that I have no confidence in a great portion of the testimony adduced in support of these applications. The evidence is so voluminous that I find it impossible, within any reasonable space, to do much more than indicate the conclusions at which I have arrived, without adverting, as I always desire, to the particular grounds upon which those conclusions have been formed. I shall have occasion, however, to point out some of these grounds when I come to deal with the claims separately, and must content myself at present with the general observation, that the examinations of the principal claimants, and the testimony of the most important witness, appear to me, to use the mildest expression, extremely disingenuous.

Judgment.

Into the claim of *David Peterson* it will not be necessary to enter in any detail; all observation might have been spared, perhaps, but for the incidental bearing which this case has upon the claims of the other applicants. It is admitted on all hands that *David Peterson* mortgaged the property in question to the defendant, on the 20th of May 1845, to secure the sum of £200. This sum was not paid on the execution of the deed: indeed the full amount would not seem to have been ever advanced, while the evidence shews that several payments were made by *David Peterson* on foot of the mortgage. On the 10th of December in the same year, *Peterson*, in consideration of the £200, already due, and of a further sum of £750, then paid, as the deed recites, conveyed the equity of redemption in this property to the defendant: and the validity of this

1853. Prentiss v. Brennan.

latter transaction would have been the question for our consideration, but for the compromise between the parties to which I shall presently advert.

Peterson asserts that the defendant has no interest in this property beyond that which he derives under the mortgage of the 20th of May. He alleges that he never entertained any intention of releasing his equity of redemption, and that if he did in fact sign any such instrument as he is said to have done on the 10th of December, his signature was obtained by fraud. The facts of the case negative very clearly the supposed sale. There is no pretence for saying that the £750 mentioned in the deed was ever paid to *Peterson*. On the contrary, he always remained in possession of the property, and made several payments on account of the mortgage debt. The testimony of the witnesses leads to the same conclusion. *Barnabas Brennan*, in particular, who certainly had no disposition to pervert any fact to the prejudice of his brother, proves the defendant himself to have admitted, repeatedly and distinctly that this release of the equity of redemption had been obtained for the mere purpose of preventing the property from falling into other hands.

Judgment.

But it is unnecessary to enter into any further detail of the evidence. I have only adverted to the general features of the case, because of its incidental bearing upon the other applications, for upon the argument the learned counsel for the defendant admitted the facts and abandoned all claim to the equity of redemption, and, as between the plaintiff and *Peterson*, it was agreed that the transaction should be treated as a mortgage to secure the sum of £200. The court can have no difficulty in carrying out the arrangement. *Peterson* must have the usual time to redeem upon payment of the amount agreed between the parties, and in default will be foreclosed. The morgtage money must be paid into court to abide the determination of the

questions between the parties to the suit which are not now before us.

1853.
Prentiss v. Brennan.

Elizabeth Brennan's claim divides itself into two branches. A certain portion of the furniture in the hands of the sequestrators she claims as her absolute property; the residue of the furniture, and the dwelling house in the town of Kingston, as also two farms of considerable value, she claims to hold for a period of ten years under three leases, all bearing date, and said to have been executed, on the 6th day of April, 1850. The case stated in her examination is this: that in the year 1839 the defendant purchased the Fredericksburgh farm from Mr. *Cartwright*, for £300—one half of which was paid by a transfer of land to which she was entitled as the daughter of a U. E. Loyalist: that as between herself and her son the land was valued at £200, which sum constitutes one portion of the debt secured by these leases; that she resided upon the Fredericksburgh farm from the time of her son's purchase until the year 1845, during which interval she purchased with her own monies a considerable quantity of household furniture and farm stock; that in the latter year, at her son's earnest desire, she took up her residence with him at Kingston, and brought with her those articles of household furniture which she now claims as her own property: that shortly after this period the defendant sold her farm stock for £289, and applied the proceeds to his own use, and this sum with interest, constitutes the residue of the debt secured by the leases in question, which were executed, as she alleges, on the 6th of April 1850, *bona fide*, for the purpose of securing the debt and interest, amounting in all to about £700.

Judgment.

The reality of this debt is the first question that presents itself to the mind in considering the *bona fides* of this transaction of the 6th of April. It is quite certain that valuable buildings were erected, and extensive improvements made, during Mrs. *Brennan's*

1853.

Prentiss v. Brennan.

occupation, so that if the establishment was really maintained by her, she not only supported her large family, and acquired the valuable household furniture and farm stock already mentioned, but also expended, on permanent improvements, in the interval of five years, a sum much beyond the original costs of this property. The plaintiff, considering that hypothesis highly improbable, suggests, very naturally, I think, that as the defendant had confessedly procured this farm as a home for his mother and her family, so he, who alone had the means, must have made the improvements, and supplied the stock and furniture necessary for their comfort. The importance of this suggestion was sufficiently obvious, and much of the evidence turned upon it. If true, this debt would be fictitious, and the leases palpably fraudulent. This observation is not strictly applicable to the improvements, upon which no claim has been founded; but, on the question of credibility, the statements of the parties on this point will be found to furnish a most important test of the truth of their whole narrative. Looking at the case, as they state it, with that view, all parties, if I rightly understand the depositions and examinations, intend to represent that all the means requisite for carrying on the establishment at Hay Bay—for making the improvements upon the farm—for purchasing the stock and furniture—for maintaining the large family, were supplied by Mrs. *Brennan* herself. To place her right to the stock and furniture beyond doubt—that is, to establish the *bona fides* of the alleged debt—they assert broadly that no part of the expenses of this establishment, not even of the permanent improvements—I mean no substantial part—was supplied by the defendant. The evidence is so voluminous, that it would be impossible to refer to it in detail, but the point is important that I must cite one or two passages. Mrs. *Brennan* says at folio 174: "There was no household furniture sent to me by my son *Charles* while I was on the farm, that I recollect. There may have been some, but I have no

Judgment.

1853.

Prentiss v. Brennan.

recollection of any. I do not think that he sent or paid for the sofa or the dining table. I certainly think that I am very sure he did not. *Barnabas* always, as I thought, purchased and fetched them home." "I do not remember that *Charles* sent me, or paid for me for any farming utensils while I was at the farm." And again: "*I never received any money from Charles on account of the buildings, or for my support. I do not recollect of any monies. He may have given me a trifling amount, but I have no remembrance of it.* I do not know and never heard that he furnished any money to *Barnabas* or *Wesley* for that purpose. I do not know that *Charles* paid for any materials for the erection of the buildings: he might, but I have no knowledge of it. There might have been boards purchased for the barn, but I have no recollection of it. I do not remember *Charles* paying for any building materials to Mr. *Roblin*. *The buildings and improvements were made from the proceeds of the farm, so far as I have any knowledge.*" Every page of this examination evinces how carefully these parties meant to exclude all notion that any part of the expense of the establishment at Hay Bay had been borne by the defendant; but I shall only allude to one other instance. In the year 1842 two of Mrs. *Brennan's* children were sent to an expensive educational establishment at Cobourg. Now, considering the very narrow circumstances of this family, it may be assumed, I think, that this step was not taken without grave consideration, and some settled arrangement as to the mode of defraying the expense. I am satisfied upon the evidence that the expense was borne by the defendant; and I am equally satisfied that either Mrs. *Brennan*, or *Barnabas Brennan*, or Miss *Brennan* might have informed us of the fact had they been disposed. But Miss *Brennan's* reply to the question is; "I do not know what my education cost. I never heard my brother say. I have had no means of knowing myself. I do not know who paid for my education. I do not know that my brother paid for it;" and the

Judgment.

1853. Prentiss v. Brennan.

answers of Mrs. *Brennan* and *Barnabas* are equally disingenuous. It is objected, I believe, that this is not a question in issue. Certainly it is not, but their answers furnish an important test of veracity.

Now, it is admitted that Mr. *Brennan*, the defendant's father, was very much embarrassed, if not insolvent, at the time of his death; that he left his family quite unprovided for; that from the time of his death until their removal to the Fredericksburgh farm, Mrs. *Brennan* and her childern were maintained by the bounty of her father; and that, during her residence there, neither she nor any member of her family, except the defendant, had any source of income other than this farm. It consists of one hundred acres, and cost at that time, as we have seen, £300. It is proved that when Mrs. *Brennan* took possession the buildings and fences were in a state of great dilapidation, and the farm itself in a bad state of cultivation; and several respectable witnesses swear that the permanent improvements made during her occupation are worth from four to five hundred pounds.

Judgment.

I will not say that under such circumstances the statements of these claimants is impossible; although some witnesses, much more competent to form a correct judgment upon such a subject, have affirmed that upon oath; still, I will not say that the statement is impossible. That this widow lady, entering upon an ill-cultivated farm, may have done all that is asserted within five years, is, perhaps, possible; but it may be safely affirmed, I think, that it is highly improbable, and that we should not be warranted in affirming its truth except upon clear and credible testimony. But, apart from the improbability of the statement, and the evidence founded upon that improbability, and irrespective of internal marks of dishonesty to which I have adverted, there is some important positive proof that the testimony before us is not reliable. The

1853.

Prentiss v. Brennan.

allegation is, that the lumber necessary for the buildings on the Fredricksburgh farm was made by the family of this claimant at her father's mill, and that no part, at least no substantial part, of it was supplied by the defendant, or paid for by him. Now the truth of that assertion is most distinctly disproved. *Roblin* proves that he himself made a large sale of lumber to the defendant to be used in these buildings: he delivered the raft at Hay Bay, and the entire price—about £80—was paid by goods from the store of *C. W. Brennan & Co.*, with the exception of £10, which was set off against a debt due from the witness to *Prentiss*. *Denike*, the contractor, swears that the buildings were erected, as he thought, for the defendant. He says that a portion of the contract price was paid by the defendant himself in cash, and that the account was finally closed by the delivery of goods from the store of *Brennan & Co.* Lastly: there is much in the evidence which tends to shew that the furniture and farming implements were supplied, to a great extent at least, by the defendant. *Denike* swears that he was present when a considerable quantity of the furniture arrived from Kingston, and that he was informed by Mrs. *Brennan* herself that it had been sent by her son.

Judgment.

Other parts of the testimony to which I shall presently allude, indicate, still more clearly perhaps, intentional misstatement, and prove that we must be guided by the facts of the case and the conduct of the parties, much more than by their present representations. What, then, has been the dealing of these parties as to this supposed debt? In 1846 the defendant sells the farm stock as the apparent owner. For a large part of the purchase money he takes a mortgage from Mr. *Pringle*, which becomes involved, afterwards, in litigation; but it is admitted that nothing passed between the supposed debtor and creditor until shortly before the execution of their leases. The defendant then signs a paper admitting a debt of £692 19s. 4d.,

1853.

Prentiss v. Brennan.

consisting of £200 for the Hay Bay farm, *with eleven years and nineteen days interest*, and £289 for the farm stock, *with four years and one month's interest.*

Had the case turned entirely upon this question I would have had great difficulty in affirming the reality of the debt. The defendant seems to have acted with great liberality towards his mother and her family during their residence at Hay Bay. Upon their removal to Kingston he supported them all in great comfort, if not in affluence. I am inclined to think that the existence of this large debt was never dreamed of by any of the parties until the difficulties with the plaintiff made it expedient to execute the leases; and that, upon a fair account, the balance would be in favor of the defendant and not against him.

Judgment.

But, assuming the evidence upon this point to be more favorable to the claimant than I am disposed to regard it, the question as to the *bona fides* of these leases would still remain. Did these parties intend an actual transfer of these properties to Mrs. *Brennan* for the period specified in the leases, or was the whole proceeding colourable, to defeat the plaintiff's claim?

Now, circumstanced as this case is, the evidence of the subscribing witness would have been of great importance, both as to the date of its execution, and the other attendant circumstances; but he has not been examined. *David Robert Brennan*, the defendant's brother, is the subscribing witness to all these instruments. He remained in this country, or at Oswego, until the month of June 1851; he then migrated to California, and a commission was issued for his examination, by which the cause was delayed, it is said, for eleven months; but the testimony of this most important witness has not been laid before us and the omission remains quite unexplained.

Then look at the nature of these instruments. One of

1853.

Prentiss v. Brennan.

them is a lease for ten years of a property which, as we have already determined, belonged to *David Peterson*. I have not heard any explanation of that attempted, nor can I suggest any consistent with the *bona fides* of the transaction. It was admitted on all sides upon the argument that this farm was in reality the property of *David Peterson*. When the defendant executed this lease, consequently, he must either have intended to defraud his uncle for the purpose of paying his mother, or the proceeding as to the lease must be admitted to have been colourable for the purpose of protecting the property from the plaintiff's claim. Unprincipled as the defendant's conduct has been, I do not believe that he intended to defraud his uncle; and we are driven, therefore, to adopt the other alternative; because those who must have been aware of the real nature of the transaction, have not furnished us with any other explanation. But, if this part of the transaction of the 6th of April—and it is by no means an immaterial part—be confessedly tainted with fraud, it would require considerable skill to shew that the other parts of the same transaction are not infected with a similar taint.

Judgment.

The next instrument which I shall examine is the lease of the defendant's dwelling-house and furniture in the City of Kingston. I cannot conceive anything more unlike a real *bona fide* transaction than this. A house just fitted up by the defendant for his own residence, at a cost of about £1000, filled with valuable furniture, which must have cost an equal sum, is leased for ten years at a rent of £50 per annum; and that without a single covenant on the part of the lessee except the covenant that even this rent is to be retained in discharge of a supposed debt. Who ever heard of horses or cows leased for a term of ten years? or of new and expensive furniture being let for ten years, at a rent falling short of 3 per cent. on the cost?

I shall have to speak of the Fredricksburgh farm,

1853.

Prentiss v. Brennan.

when I come to dispose of *Paul C. Peterson's* claim; but I may now remark that in no case was the execution of these supposed leases followed by any change of possession. Mrs. *Brennan* admits that everything in the establishment at Kingston remained on precisely the same footing as before the execution of the lease. The evidence does not furnish us with a single act of any of the parties consistent with the assertion that there was a real *bona fide* transaction. I am inclined to think that this alone would be sufficient for the determination of the question; but I dwell the less upon this and other branches of the case, because the evidence to which I am about to advert has left no doubt upon my mind.

Judgment.

A letter from the defendant to *David Robert Brennan*, dated the 30th of September 1850, was found amongst the sequestered goods, and has been put in evidence. In this epistle the defendant furnishes his correspondent with minute directions for the clandestine removal of his furniture from Kingston to Oswego. Had *David Brennan* been examined as a witness, and had the whole correspondence been produced, it is quite probable, I think, that these parties might not have thought it worth their while to contest this matter as they have done. But it is fortunate for the ends of justice that even this fragment has been preserved, from which the citation of a passage or two will illustrate the observations I am about to make. After having given directions as to the packing of the furniture, and the mode of transit, he says: "The *Ives's* know all about the schooners afloat, one would think, and would be good people to go to for advice and assistance in procuring one. *I think they would be disposed to aid us in selling Prentiss*, and might take sufficient interest to aid you in many ways in the scheme. You might sound them. I think I would see *Jackson* as to the moving. Say that I sent you to him. Explain briefly what is to be done with the furniture, and avail yourself

1853.

Prentiss v. Brennan.

of any service he can afford. His judgment, I would say, would be good in packing and arranging for the removal. * * * Furniture, wearing apparel, bed and table linen &c. in use, is not liable to duty here. Merchandize is, or furniture would be if brought here as merchandize for sale. Ours would come as in use. *Merchandize being liable to duty it would not be advisable to briug the boxes containing "goods" from the store room. They must be quietly stored somewhere, subject to my order. Why could they not be taken to Jackson's?* If they are sent there, some trusty person must be employed. His own cart had better take them, but the driver should be trustworthy. If you sent your own cart it would be observed going to *Jackson's!* * * * *I hope to see Smith and Paul C. Peterson* this week and to manage through them, at least a sale of the bulky and unpackable articles, including carriage, harness, horses, cows &c."

Judgment.

Now as to the defendant, it will be admitted, I presume, that this letter is conclusive. On the 30th of September he, at least, treated these leases as mere stepping stones to enable him to defraud the plaintiff. But it is said that this letter of the defendant's, however conclusive it may be as to himself, is not evidence against the claimants. The observation is just, in the abstract, but has no application to the actual case; for if these claimants can be shewn to have received and adopted it, it will be no less conclusive against them than against the defendant. What then are the facts? The furniture is found packed shortly after the receipt of this letter. *Paul C. Peterson* and Captain *Jackson* are the persons who assist at the packing. It is seized on the wharf ready to be shipped on board a schooner for Oswego. The "goods" are not there, but it is proved by *Hysop* that two waggon loads had been taken from the house shortly before. The horse and carriage are not there, but when last seen *Paul C. Peterson* was in the act of driving it from the

1853.

Prentiss v. Brennan.

defendant's premises, and it has not been found since. Now if *Hysop's* account be correct, the concidence between the conduct of these parties, and the instructions of this letter is complete, and there can be no doubt that it was received and adopted by Mrs. *Brennan*, indeed by all the claimants, except *David Peterson*. Is there any room then, to doubt the truth of *Hysop's* evidence. In my opinion there is none. Mrs. *Brennan*, indeed, says in her examination: "I did not assist in packing it" (the furniture.) "I had nothing to do with packing them." * * * "I do not know of any goods or packages from the store being brought to our house at Kingston previous to our leaving it. I do not know of any such goods or packages from the store being brought or sent elsewhere. *There were no goods or packages sent from the house to any other place than the boat that I know of. I remember the carriage. The last that I knew of it it was in the carriage-house. I do not know where that carriage is now, nor have I heard.*" * * * None of the goods in our house could have been packed without my knowledge." This statement is certainly inconsistent—quite inconsistent with *Hysop's* evidence; but if there be any room for hesitation it is entirely removed by *Peterson's* evidence. He is asked whether he knew that any of the furniture had been removed by night from Mr. *Brennan's* house, to which he replies: "I am advised by my solicitor not to answer that question, because answering it might have a tendency to criminate myself." Again: "I remember seeing the carriage. I decline to answer the question now put to me as to where the carriage now is, because I think that answering it might criminate me. I decline to answer the question now put to me, whether I have now upon my premises in Sophiasburg any part of the property which I saw in Mrs. *Brennan's* house, because I consider that by answering it I might criminate myself. I decline to answer the question now put to me, whether I have now, or at any time have had on my premises

Judgment.

1853.

Prentiss v. Brennan.

in Sophiasburg any of the "goods" which were in the shop of Messrs. *Brennan & Company*. I decline for the same reason to answer, whether I know of any property at the house of *Charles W. Brennan*, or in the store of Messrs. *Brennan & Company* being sent to any place in or near Kingston." I do not enquire whether this witness should have been protected from answering these questions; nor is it necessary for me to consider whether strict reason would warrant any inference prejudicial to him from his refusal to answer. The question before us is not whether *Peterson* took any part in the removal of these goods, or whether that ought to be inferred from his refusal to answer; but the question is, whether the goods were in fact removed. His refusal to answer is a plain affirmation of that fact. Had there been no removal his replies could not have been criminatory; there would have been no fact as to which he could have been criminated. An answer in the negative would have materially confirmed Mrs. *Brennan's* statement, and would have tended to establish the *bona fides* of the transaction in question; and when, instead of insisting upon an answer, her solicitor interposes to prevent one, the inference is inevitable, and obliges me to say that I have no confidence in the statements of these claimants.

Judgment.

We have no doubt, upon the whole case, that the transaction of the 6th of April was not a *bona fide* contract between the parties, but a colourable proceeding designed merely to defeat the plaintiff's claim, and that the property must therefore remain in the hands of the sequestrators.

With respect to that portion of the furniture which Mrs. *Brennan* claims as her absolute property, we are all of opinion that the articles enumerated in the schedule to the lease must be regarded as the property of the defendant. Whether any portion of the furniture was at any time the property of Mrs *Brennan*

1853. Prentiss v. Brennan.

may be said, perhaps, to be doubtful upon the evidence; but the lease signed and sealed by her in the month of April represents the furniture specified in the schedule as being the property of the defendant, and it was so treated by all parties, as we have just shewn, in the month of September following. There is nothing either impossible or improbable in the statement. Assuming this furniture to have been at one time the property of Mrs. *Brennan*, it may have been transferred to her son. At all events we find nothing in the evidence to set against the plain declaration of the parties themselves, and we are of opinion therefore that the claim so far must be disallowed. But if any part of the furniture brought from Hay Bay has been omitted from the lease, which we are unable to determine from the evidence before us, we think that it ought to be returned to Mrs. *Brennan*.

Judgment.

We have had greater difficulty with respect to *Eliza Brennan's* claim, but on the whole we think that it must be disallowed. When all the circumstances of this case are considered, it will not be denied, I think, that the plaintiff is entitled to call for strict proof. But to constitute a valid gift there must have been a delivery, and the evidence fails, in our opinion, to establish that. It is proved, indeed, by several witnesses that this piano was frequently spoken of in the family as belonging to Miss *Brennan;* but there is no proof of an actual delivery, although that was clearly necessary to perfect the transfer of the property; on the contrary, the letter of the 30th of September, to which I have already adverted, would lead to the opposite conclusion, for throughout that letter the defendant treats the piano, in common with the other furniture, as his own property. But it is sufficient to say that we do not feel ourselves at liberty, under the circumstances of the case, to infer a delivery; and as none has been proved the claim must be disallowed.

Paul C. Peterson claims the Fredericksburgh farm

1853.

Prentiss v. Brennan.

as a *bona fide* purchaser for value under a deed dated the 17th of April 1850. He says that some time prior to the date of this deed he had a conversation with the defendant upon the subject. What passed at the interview I shall give in his own words. "We had a conversation about my farm, *in which I expressed my opinion that it would take about ten years* before my farm would be comfortable, and that I should like to buy a farm on which there were the necessary buildings and improvements. He suggested that I should buy his. I asked what he would charge. He said about a £1,000. I said that we should not bargain, for I could not give that sum. He replied that I should come down, and that he thought we could make a bargain." He then goes on to state that he purchased the farm, while on a casual visit to Kingston in the month of April 1850, for £300, subject to Mrs. *Brennan's* lease for ten years, and also subject to a mortgage to one *McGinn* for £200, and that the deed was executed accordingly *about* the time it bears date. He says that he paid £100 in cash, and gave his notes at distant dates for the balance.

Judgment.

In support of the present application nothing is adduced beyond the deed itself and the examination of the claimant. This single observation disposes, in my opinion, of the whole case. The production and proof of the deed cannot be alone sufficient, as was contended in argument, for then the provisions of the statutes of Elizabeth and of the common law for the protection of creditors would be wholly nugatory. When transactions of this kind are set aside as fraudulent against creditors, it is not for the want of formal papers, but notwithstanding them; and if a deed formally executed was an answer in such cases, no defence could fail, for the preparation of formal instruments is seldom if ever omitted.

But it is argued that the examination of the claimant is to be read as evidence in his favour. Without entering

1853.

Prentiss v. Brennan.

again into this question, it would be admitted, I think, that if such an examination is to have any weight, it must furnish a clear and consistent statement of all the circumstances connected with the transaction. Now let us examine the statement of this claimant. The contract itself is a highly improbable one, when we consider the object which this person had in view. He tells us that he wished to purchase the farm because he despaired of rendering his own comfortable for ten years; and yet he tells us in the next breath that he purchased subject to a ten years' lease. The improbability of such a purchase, under such circumstances, is so great as to be almost irreconcileable with the reality of the transaction, unless it can be said that he either knew Mrs. *Brennan's* lease to be fraudulent, or had made some arrangement with the lessee. But we cannot assume that he knew Mrs. *Brennan's* lease to be a mere sham, because he has sworn that he believed it to be valid, and that an abatement was made in the price in consequence of it; and it is equally difficult to conclude that any arrangement had been made with the lessee, for the claimant himself makes two different and quite irreconcileable statements upon that subject. In his examination he says: "I was told of the lease when I got the deed. I consider the mortgage money, the consideration money in the deed, and the incumbrance of the lease, made up the full value of the land. *I did not make any arrangement with Mrs. Brennan when I took the deed. There was no understanding about it at that time.*" But in his affidavit upon the application to be examined *pro interesse suo* he said: "the said purchase by this deponent was subject also to a lease to *Elizabeth Brennan*, the mother of the said defendant, who is a cousin of this deponent, for ten years, at a rental of £25 per annum if paid in cash, *but it was agreed and understood between the said defandant, this deponent and Elizabeth Brennan, that so long as the said defendant maintained and supported the said Elizabeth Brennan, the said Eliza-*

Judgment.

1853.

Prentiss v. Brennan.

beth Brennan would not exact the said rent, but in the event of the death or absence of the said defendant, then that the said Elizabeth was to reside with this deponent, or to be paid the rent, at the option of this deponent." This statement is not very intelligible in itself. Mrs. *Brennan* was the lessee of the premises, not the lessor; she was bound to pay rent, not entitled to receive it. But, whatever may be the meaning of the passage, the discrepancy between the affidavit and the examination appears to involve a designed misstatement; for the fraudulent nature of Mrs. *Brennan's* lease was either known to the defendant, or it was not. If known to him, and that in my opinion is the proper inference from the whole evidence, the statement in the affidavit must be pure fiction. There cannot have been a bargain about the mode of paying the rent, when there was in fact no rent to be paid. On the contrary, assuming him to have been ignorant of the fraud, the agreement in the affidavit would be natural—almost necessary—to the purpose he had in view; but could he thus have forgotten so material a circumstance? In that case the affidavit and examination would not have been discrepant.

Judgment.

But no single circumstance connected with the case is free from suspicion. The claimant has not proved, either the time when the deed was executed or the payment of the purchase money. He says, indeed, that for a large part of it he executed promissory notes payable at distant dates, but that has not been proved; and if it had been, it would not have carried the case farther. He says, too, that he paid £100 in cash, but neither has that been proved, and the evidence renders his statement at the least, doubtful. In that state of things the testimony of the subscribing witness would have been very material. He is the near relation of both parties, and was very much mixed up with all these transactions; but he has not been examined, and the omission has not been explained. Then the deed

1853.

Prentiss v. Brennan.

is a mere quit claim; it does not contain any covenant for title, and has never been registered. Again: numerous witnesses prove that *Paul C. Peterson's* circumstances were anything but affluent, yet he is not required to execute a mortgage or to give any security other than his promissory notes, if that, for the purchase money. Lastly: upon the execution of the deed the property is allowed to remain, as before, in the possession of the defendant's tenant.

Upon the whole, considering the near relationship of the parties, the circumstances of suspicion under which the deed was executed, and the extent to which the claimant has been participant in the fraudulent practices of the defendant, this application could only have succeeded upon the most unexceptionable testimony; coming before us, as it does, upon the naked statement of the claimant, which is not only unsupported by evidence, but is in its nature, improbable and inconsistent with itself, the claim must be disallowed with costs.

Judgment.

Throughout this painful investigation the court has felt anxious to be relieved from the burthen and responsibility of determining the questions between these parties by referring them to the consideration of a jury; but as the parties have deliberately chosen a reference, and as great expense has been incurred in the prosecution of it, we did not feel ourselves at liberty to shrink from the discharge of this duty, however irksome, when our doing so would have imposed upon the parties the expense and delay of further litigation.

ESTEN, V.C.—Although I have come to the same conclusion with respect to the orders to be pronounced upon these applications; still I deem it right to state, that I do not concur to the full extent in the opinion expressed by his lordship the Chancellor, with respect to the evidence given by the members of the family of *Brennan*,

SPRAGGE, V.C., concurred.

COLBORNE v. THOMAS. 1853.

Costs.

The costs of a commission to take evidence in a foreign country, form October 4th. part of the costs of the cause.

In this case a foreign commission had been issued by the plaintiff, under which evidence for the plaintiff had been taken. The defendant did not examine any witness under it—confining himself to the cross-examination of the plaintiff's witnesses. At the hearing a decree was made in favor of the plaintiff, with costs to the hearing; and on the taxation the registrar had allowed the costs attending the issuing and execution of such commission as part of the plaintiff's costs in the cause. Statement.

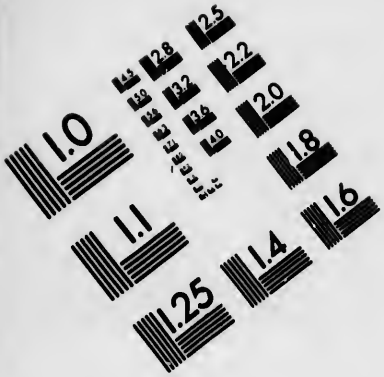
From this taxation the defendant appealed, on the ground that as the defendant had not examined under the commission he was not in any event liable for the charges attending it.

Mr. *Read*, for the defendant, cited *Grove* v. *Young* (*a*) *Jackson* v. *Strong*(*b*), and *Daniel's* Chancery Practice 1110, (*Perkins* Ed). Argument.

Mr. *Crickmore*, contra.—The cases referred to do not bear out the objection taken by the defendant: in the first, the question arose in consequence of the defendant objecting to pay his portion of the commissioner's fees. The second case has no application, as the bill was for discovery, and in such cases all the costs of the suit are borne by the plaintiff.

THE CHANCELLOR.—I think Mr. *Crickmore* takes the correct view of the practice. A plaintiff being obliged to issue a commission and succeeding in obtaining a decree with costs, it would require direct authority to lead me to the conclusion that the costs of such Judgment.

(*a*) 15 Jur. 97. (*b*) 13 Price, 309.



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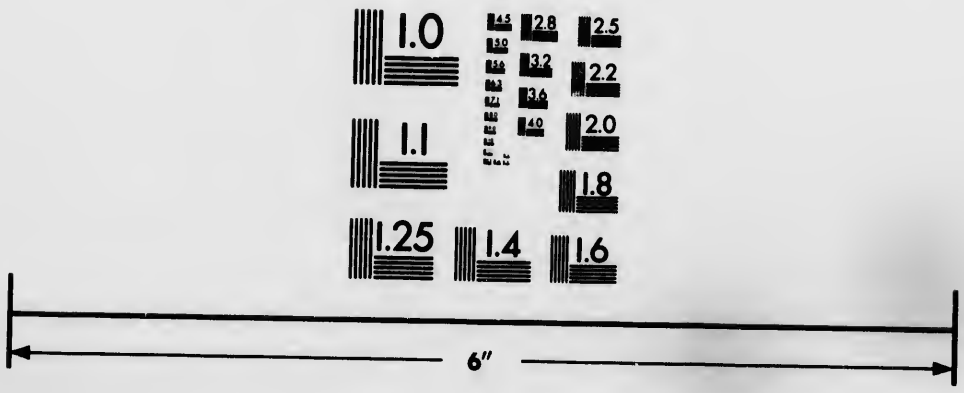

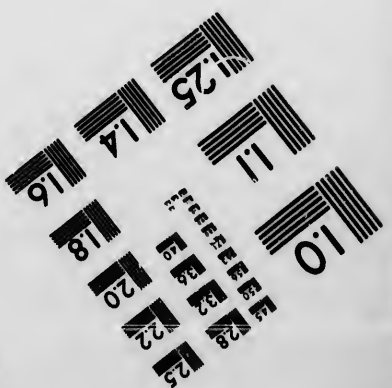

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1853. commission ought not to be included in the general costs of the cause, and I think that the taxing officer has properly allowed the amount to the plaintiff.

PATERSON v. BOWES.

Pleading—Parties.

June 10th and 29th. A bill will lie by some of the inhabitants of a municipality, alleging an illegal misapplication of the funds by the Mayor, which the council refused to interfere with. The Attorney General is not a party to such a suit.

Statement. The bill in this cause was filed by *David Paterson, Arthur Lepper, Hugh Miller, Robert Sargent* and *Jonathan Watson*, inhabitants of the city of Toronto, on behalf of themselevs and all other inhabitants of the said city of Toronto, and stated "that on the 18th of October 1852, the Common Council of the City of Toronto, defendant hereinafter named, passed a by-law authorising the Mayor of the city to subscribe for, or take, receive, and hold stock in the Ontario, Simcoe & Huron Union Railroad Company, to the amount of £50,000, for and on behalf of the said city.

"That this by-law was procured to be passed, and was passed, in consequence and pursuance of, and for the purpose of carrying out an agreement theretofore made, (subject to the approbation and concurrence of the said Common Council, so far as such approbation and concurrence might be necessary,) by *John G. Bowes*, one of the defendants hereto, and then and still Mayor of the said city, with Messrs. *M. C. Storey & Company*, the persons who were employed by, and who contracted with the said company to build the said railroad; and which agreement, so far as is material to the purposes of this suit, was to the effect that the said contractors should sell to the said city ten thousand shares of the said stock, which they then held and which was of the nominal but not actual value of £5 a share, for £40,000, and that debentures or instruments purporting to be debentures of the said city to

the nominal amount of £50,000, should thereupon, and by way of security for the said sum of £40,000, the purchase money of the said stock, be issued and deposited in the Bank of Upper Canada, until such debentures, or instruments purporting so to be, should be redeemed by the said city; and further, that the said contractors should receive therefor the said sum of £40,000 only, or four-fifths of the nominal amount of such debentures or instruments, and that the redemption of the said debentures or instruments should take place as soon as a loan, which was then contemplated, could be negotiated for the purpose on behalf of the city.

"That the said agreement, so far as communicated to the said Common Council, was sanctioned by them in full faith and confidence that the whole agreement had been communicated to them, and that the terms communicated to them were the best terms that it was possible to make with the said contractors; but that the said Mayor did not communicate to the said Common Council that the purchase money of the said stock, or the amount for which the said debentures were to be redeemed, was £40,000; and on the contrary, the said Mayor falsely represented to the said Common Council, and the Common Council relying on such representation, believed that the sum to be paid was £10,000 more—that is to say, £50,000, instead of £40,000, and so continued to believe, until after the redemption of the said debentures or instruments, and the receipt and misappropriation, by the Mayor, of the said sum of £10,000, as hereinafter mentioned.

Statement.

That the object of the said concealment and misrepresentation by the said Mayor was to enable the said Mayor to obtain and appropriate to his own use, or such other illegal uses as he might choose, the said sum of £10,000.

1853. Paterson v. Bowes.

"That after the making of the said agreement, and after the same had been sanctioned by a resolution of the said Council, but not otherwise, and before the passage of the said by-law, the contractors, in pursuance and part performance of the said agreement so entered into with the said Mayor for the said city as aforesaid, had transferred to the city, through the agency of the said Mayor, ten thousand shares of the said stock, and that the debentures or instruments contemplated by the said agreement, and to a large amount in the whole, were thereupon from time to time deposited in the said bank by way of security as aforesaid, and under and in pursuance of the said agreement.

"That a certain act of the Parliament of this province, intituled, "An Act to authorise the City of Toronto to negotiate a loan of one hundred thousand pounds to consolidate a part of the city debt," was then procured to be passed, and was passed on the seventh day of October last, and a loan of £ ,000 was effected by the said city under the provi , thereof soon afterwards, and the said by-law was then passed on the eighteenth day of October last.

Statement.

"That £40,000 of the said loan were immediately applied in pursuance and according to the terms and effect of the said agreement and in full satisfaction and discharge as well of the purchase money of the said ten thousand shares of stock, which the said by-law authorized the Mayor to take for the city as aforesaid, as of the debentures or instruments so deposited as aforesaid, and that the said debentures or instruments were thereby redeemed and discharged, and that no more than £40,000 were required for the said purposes or any of them, but that the chamberlain of the said city, through the contrivance of the said Mayor and in ignorance of the true amount which was to be paid by the city to the said contractors as

aforesaid, paid out of the said loan to the said bank as for the redemption of the said debentures or instruments already discharged by the said sum of £40,000, the further sum of £10,000, which sum, by direction of the Mayor and by arrangement with him, was paid over or accounted for by the bank to the said Mayor for his private use, and under circumstances (unknown to the plaintiffs) which free the said bank from any liability to the corporation or inhabitants in respect thereof.

"That the circumstances which so free the said bank from liability are well known to the defendants hereto, and should be disclosed, that the plaintiffs may, if necessary, introduce into this bill such further allegations as to the said circumstances as may be necessary.

"That the said Mayor persists in illegally holding the said sum to his own use and for his own benefit, without any account to the said corporation therefor and will do so unless prevented by the decree of this court to be pronounced in this suit. Statement.

"That throughout the whole of the said transactions the said defendant *Bowes* was an active party, and the said agreement, by-law, and act of parliament, were all shaped and framed through his means, in such a way as might enable him, and under the hope that he would be enabled, to possess himself of the said £10,000, without any discovery being ever made thereof by any of the parties interested therein, or entitled to call him to account therefor.

"That the said contractors have not and do not pretend to have any claim to the said sum of £10,000, or any part thereof.

"That the said sum hath been wrongfully and illegally diverted from the funds and uses of the said corporation—the City of Toronto—and that since the discovery

1853.

Paterson v. Bowes.

thereof the said Common Council, through the continued misrepresentations of the said Mayor, has refused to take and will not take any steps whatever to compel the said Mayor to restore or account for the said sum to the corporation, or to allow the plaintiffs or any of the rate-payers or inhabitants of the said city to use the corporate name or seal of the said city, in and for the purposes of any suit against the said Mayor for or in respect of the said money.

"That the said sum of £10,000 will be lost to the city unless relief is granted under the present bill.

"That the plaintiffs have from before the occurring of any of the said transactions until now been and still are rate-payers and inhabitants of the said city.

Statement.

"That the electors of the said city have during the whole of this period numbered several thousands, and the rate-payers and inhabitants respectively are more numerous still.

"That the interests of the plaintiffs in respect of the objects of this suit are identical with the interests of the other rate-payers and inhabitants respectively of the said city.

"That there are no means of legally ascertaining, (if such would otherwise be necessary,) the will of the majority of the rate-payers or inhabitants of the said city in respect of the said matters or of this suit."

The prayer of this bill was, that the said *John G. Bowes* might be ordered to restore and repay to the said corporation, to be applied to the proper uses and purposes thereof, the funds so diverted and misappropriated by him as aforesaid, and that an account of the said funds might be taken, and all proper directions in respect of the said account and funds respectively given: and for further relief.

1853.

Paterson v. Bowes.

To this bill the defendant *Bowes* demurred, on the grounds—

1st. That plaintiffs have not made a case for discovery, or for any relief against defendant.

2nd. That plaintiffs have not shewn any interest in the subject matter in respect of which discovery is sought, nor any proper right or title to institute a suit against defendant, and that the matter is only properly cognizable in equity on an information filed by the Attorney General for Upper Canada.

3rd. That plaintiffs shew that they have no right or title to recover, receive or demand the subject matter by the said bill demanded and sought to be recovered.

4th. That the plaintiffs by their bill show that if the rate-payers of Toronto have any interest in the subject matter by the said bill sought to be recovered, the Corporation of the said city of Toronto are the proper parties as plaintiffs to institute proceedings in respect of such subject matter; and that if the matters stated in the said bill be true, an action at law lies at the suit of the Corporation against the Bank of Upper Canada to recover the subject matter sought to be recovered; and that it does not appear by the said bill but [illegible] the refusal of the Corporation of the said city of [illegible]nto to institute any proceedings against the defendant in respect of the same, results from a just and deliberate conclusion arrived at by the said corporation; and that there is not in law or equity any foundation for the institution of any proceedings against defendant in respect of said matter.

Statement.

5th. That the subject matter by the said bill sought to be recovered appears by the bill to be a sum of money, and is by the said bill alleged to be payable from this defendant to the City of Toronto, and the matters alleged in the said bill do not show any suffi-

1853.

Paterson v. Bowes.

cient ground for withdrawing from the said defendants the City of Toronto the right in their corporate capacity of instituting all necessary and proper proceedings for the recovery of a sum of money alleged to be due and payable to the said corporation.

6th. That the matters alleged in the said bill are too vague and uncertain to charge the defendant with any accountability in respect of the subject matters sought to be recovered; and no specific act of fraud or misrepresentation upon the part of the defendant, so as to make him accountable in respect of the subject matter sought to be recovered, is by the bill stated or alleged.

7th. That the matters alleged in the said bill are altogether too uncertain and vague in this, that it does not appear by the said bill how the bank of Upper Canada are relieved from liability to the Corporation of Toronto in respect of the subject matter sought to be recovered, as is alleged by the bill, nor is it alleged or stated with sufficient certainty how any such presumed liability of the said bank had ever been incurred or had arisen.

Statement.

8th. That it is not shewn with sufficient certainty in and by the said bill how the Corporation of the City of Toronto or the rate-payers thereof have any interest in or right or title to the subject matter by the said bill sought to be recovered—and

9th. That the said bill is on the face of it a fishing bill, whereby the plaintiffs, without having any right to the relief by the said bill prayed against the defendant, or any relief in respect of the allegations in the said bill set forth, seek to obtain discovery from the defendant, whereon, as is alleged in the said bill, to frame a new bill.

Dr. *Connor*, Q. C., and Mr. *Guynne*, Q. C., in support of the demurrer, cited, amongst other cases

1853.

Paterson v. Bowes.

Hamilton v. *The Desjardins Canal Company (a)*, *The Attorney General* v. *The Corporation of Dublin (b)*, *The Skinner's Company* v. *The Irish Society (c)*, *The Attorney General* v. *The Earl of Ashburnham (d)*, *The Attorney General* v. *The Corporation of Poole (e)*, *The Attorney General* v. *Wilson (f)*, *The Attorney General* v. *The Mayor and Corporation of Carlisle (g)*, *Dummer* v. *The Corporation of Chippenham (h)*.

Argument.

Mr. *Vankoughnet*, Q. C., and Mr. *Mowat*, contra, referred to and commented on *Wood* v. *The North Staffordshire Railway Company (i)*, *Lord* v. *The Governor and Company of Copper Miners (j)*, *Cohen* v. *Wilkinson (k)*, *Carlisle* v. *The South Eastern Railway Company (l)*, *Heathcote* v. *The North Staffordshire Railway Company (m)*, *Bromley* v. *Smith (n)*.

June 29th. Judgment.

ESTEN, V. C.—This suit was instituted by five persons, inhabitants of Toronto, on behalf of themselves and all other the inhabitants, against the Corporation of the City of Toronto, and *John G. Bowes* the Mayor of the city, for the purpose of compelling the repayment of a sum of £10,000, alleged by the bill to have been received by the Mayor and applied to his own use, under circumstances, which, as is contended, make it proper that he should repay it. I need hardly remark that the allegations of the bill are taken to be true for the purpose of this argument, but only for that purpose. We have no choice on the subject, inasmuch as the defence, offered by the Mayor to this suit, amounts to this proposition—namely, that, supposing all that you state against me to be true, you have no right to call me to an acconut for it in a court of equity. Mr. *Bowes* desires before he gives an answer to the

(a) Ante vol. 1, p. 1. (b) 1 Bli. N. S. 337. (c) 12 Cl. & Fin. 425.
(d) 1 S. & S. 394. (e) 2 Keen, 190. (f) 1 Cr. & P. 1.
(g) 2 Sim. 437. (h) 14 Ves. 245. (i) 1 McN. & G. 278.
(j) 2 De G. & S. 308. (k) 1 McN. & G. 481. (l) 1 McN. & G. 689.
(m) 2 McN. & G. 100. (n) 1 Sim. 8.

1853. Paterson v. Bowes.

charges preferred against him to take the opinion of the court, whether, supposing those charges to be true, (which however he does not admit) he can be required to answer them in this court, and he has of course a perfect right to adopt this course; for, however good an answer a defendant may be able to make to charges preferred against him, it cannot excite any surprise that, if he doubts the jurisdiction of the court in which he is called to account, he should insist in the first place on having the question of jurisdiction settled.

Judgment.

It appears then that a loan of £100,000 and a purchase of stock in a railway company being contemplated by the city, the defendant *Bowes*, who was then and still is the Mayor of the city, purchased 10,000 shares of such stock of the nominal value of £50,000, from the holders of it, who happened to be the persons who had contracted to build the road, and who are for that reason called the contractors in this bill, for the sum of £40,000, or at a discount of 20 per cent. The Mayor having made this bargain communicated it to the Common Council, but communicated it in this way—that is to say, he stated that he had purchased the stock for £50,000, or at par, and the Common Council, believing such to be the case, ratified the purchase.

By the terms of the contract city debentures were to be deposited in the Bank of Upper Canada to the amount of £50,000 as security for the purchase money of £40,000 until it should be paid, and which was intended to be paid out of the contemplated loan of £100,000. As soon as the contract was communicated to and ratified by the Common Council, debentures to the requisite amount were deposited in the Bank of Upper Canada, in terms of the agreement. An act of parliament was then procured to be passed, and was passed on the 7th of October last authorizing the loan of £100,000, and on the 18th of the same month a by-law was passed by the Common Council of the city,

which had the effect of sanctioning the purchase in question. The loan having been effected, £50,000 were paid by the Chamberlain of the city to the Bank of Upper Canada as for the redemption of the debentures deposited in the Bank as before mentioned. The debentures were in fact released by the payment of £40,000, which was of course paid to the former holders and sellers of the stock, and the balance of £10,000 was, in the language of the bill, "paid over or accounted for by the Bank to the said Mayor, for his private use." The payment of the £50,000 was made by the Chamberlain and sanctioned by the Common Council in ignorance that the real price of the stock was £40,000, and by the procurement of the Mayor, so far as regards the excess above that sum.

The object of the suit is to compel the repayment of this sum. I repeat that we know nothing of the real facts of this case, and are only assuming the statements of this bill to be true for the purpose of determining the preliminary question, submitted to our judgment by the defendant, whether, supposing them to be true, we have any jurisdiction to grant redress of the supposed wrong charged against him. The effect of these statements is, that an agent of the corporation having purchased stock on behalf of the corporation for £40,000, represented to the corporation that he had in fact agreed to give £50,000 for it; that he procured £50,000 from the corporation in order to pay for it, and, having paid for it with £40,000, part of that sum, that he retained the balance of £10,000 for his own private use. Now if this case had occurred between private individuals, it would be quite idle to contend that the agent thus committing a breach of trust and fraud upon his principal could be permitted by this court to retain the fruits of his misconduct, or that it would be any answer to a claim of this kind to say that the £10,000 was received through the medium of a third party, a stakeholder between the contracting

Judgment.

1853.

Patterson v. Bowes.

parties, under such circumstances as gave the principal a right of action against such third party. This observation disposes, I think, of all the grounds of demurrer, except those which relate to the form of the suit; unless it can be shewn that the £10,000 was the absolute property of the corporation to dispose of as they pleased, so that they could make a present of it to the Mayor, if they thought fit. It is true that this point was not raised in argument, but it became necessary for us to consider it before we could overrule this demurrer, which objects in one part that there is no equity to support this bill, which would be quite true, if the corporation could bestow this money on the Mayor, and can of course, when he has got possession of it, refuse to enforce its repayment. It is true that when a municipal corporation is established and invested with property or the power of acquiring it for the purposes of local government, although it undoubtedly possesses such property for corporate purposes, and it is its duty to apply it to such purposes, yet unless they are to a certain extent defined, it is impossible to affix a trust to such property so as to enable this court to call the corporate body to account for any use of it inconsistent with those purposes. Before the passing of the Corporation Reform Act in England, a corporate body could dispose of its property as it pleased. It could, in the language of counsel in argument in reported cases, have "wasted, alienated or destroyed it."(*a*)

Judgment.

If a corporation neglected its duty, the remedy to compel its performance was by mandamus, but corporate purposes were considered too undefined to enable a court of equity to say what they were or recognize them as trusts. The Corporation Reform Act however defined the purposes to which corporate property was in future to be applied in such a manner as to impress it with a trust, which gave the Court of

(*a*) Corporation of Colchester v. Lowten, 1 V. & B. 226; Attorney General v. Corporation of Carmarthaen, Coop. 30.

1853.

Paterson v. Bowes.

Chancery jurisdiction to prevent its misapplication; and a number of cases almost immediately arose, (many of them cases in which the old corporations in the interval between the announcement of the corporation act and the period fixed for its coming into operation, attempted to dispose of the corporate property in a manner inconsistent with the purposes to which by that act it was rendered applicable,) in which corporate property, which had been applied in a manner inconsistent with the provisions of the act, was reclaimed on the ground of trust, and the jurisdiction of the court to compel the restitution of such property was established. Now, upon referring to the provincial acts of 4th William IV., chapter 23, and 16th Victoria, chapter 5, I can entertain no doubt that the sum of £10,000 in question in this case is impressed with a trust which gives this court jurisdiction to call the defendant *Bowes* to account with respect to it. The act last mentioned devoted the sum of £100,000 to be raised under it to specific purposes. £50,000 was to be applied to the redemption of certain specified debentures, and the remaining £50,000 to the purchase of the stock in question. Of course the legislature did not intend that the whole sum of £50,000 should be applied to the purchase of the stock, whether it should be required for that purpose or not. It appears however to have supposed that the stock to be purchased was or might be at par. Of this £50,000, £10,000 was not required for the purpose for which it was intended. It cannot be doubted however that it continued the money of the corporation, either applicable towards the formation of the sinking fund provided by the last mentioned act for the extinction of the loan thereby authorized under an implied provision of that act, or upon the doctrine of *cy pres*, applied by this court to cases of this description: or applicable to the general purpose, to which the monies of this corporation are devoted by the several acts of parliament affecting it, and which purposes appear to me sufficiently

Judgment.

1853. Paterson v. Bowes.

defined to impress the monies applicable to them with a trust. It is true that this court cannot superintend the application of these monies to such purposes, but it can restrain their misapplication and restore them to the proper custody, where they will be applicable to the purposes to which they are devoted, under the powers provided by the coustitution for compelling corporate bodies to perform their several duties.

Judgment.

The objections of form to this suit are—1st. That it should have been an information at the suit of the Attorney General. 2nd. If not, that it should have been instituted in the corporate name. To consider the latter question first, as being the one attended with the least difficulty, I may premise that it does not appear that the inhabitants at large possess any control whatever in the affairs of this corporation otherwise than in the election of Aldermen and Common Councillors. The whole power of government resides in the Common Council—consisting of the Mayor, Aldermen and Common Councillors. To examine this matter properly we must divide corporations into public and private. Private corporations are founded upon contract, and every member has a right to the injunction of this court to prevent a misapplication of its funds in contravention of the terms of the contract. In almost every case however of this sort the members of the corporate body are extremely numerous, and cannot all appear before the court. To remedy the inconveniences which result from such a state of things, and at the same time to prevent a denial of justice certain rules of pleading have been established. When the corporation itself is not the plaintiff, the individual members must be before the court either actually or by representation. This last form of pleading, however, is never permitted when it can be avoided: therefore, the individual members of the corporation cannot proceed when it is possible for the corporate body itself to act. The directors and other officers of the corpora-

1853.
Paterson v. Bowes.

tion, though constituent members, and composing the governing body of the corporation, are regarded as its agents; and if they are acting wrongfully, may be severed from the corporate body and proceeded against by the corporation itself for the purpose either of prevention or correction. Wrongful acts of the governing bodies of corporations must be divided into those which are, and those which are not susceptible of confirmation from the acquiescence of a majority of the members. When an act is illegal and cannot be sanctioned by the will of the majority, the minority may seek its redress. When it is otherwise, of course no right of suit exists, because the wrongful act being susceptible of confirmation, and having been actually confirmed, ceases to be wrongful. To justify a suit by some of the individual members of the corporation on behalf of themselves and the rest, it must be shewn that it is impracticable to proceed in the corporate name.

Judgment.

Now, supposing that public corporations, or the members of public corporations, can proceed in any case without the intervention of the Attorney General, it cannot be doubted that all or many of these rules are applicable to cases of this description. The learned counsel for the defendant argued that this suit was an interference with the rights of the corporation, and that it ought to be assumed that this matter had been inquired into by the Common Council, and that they had ascertained that no cause of complaint existed. Now if the learned counsel meant by this argument that it must be deemed that nothing wrong had occurred with respect to this sum of £10,000, that proposition cannot be maintained in the face of the allegations of this bill, admitted by the demurer. If however he meant that the Common Council had sanctioned the appropriation of these monies to the private use of the Mayor, then he advanced a proposition equally untenable, because the Common Council could not sanction a breach of trust. It was undoubtedly the duty of the

1853.

Paterson v. Bowes.

governing body of this corporation, under the circumstances stated in this bill—which, for the purpose of this argument, we must assume to be true—to reclaim this money; and had it been practicable for the inhabitants to have procured a suit to be instituted for this purpose in the corporate name, they would not have been permitted to proceed in their individual capacity. But the bill expressly states that "the said Common Council, through the influence and continued misrepresentation of the said Mayor, has refused to take and will not take any steps whatever to compel the said Mayor to restore or account for the said sum to the said corporation, or to allow the complainants or any of the rate-payers or inhabitants of the said city to use the corporate name or seal of the said city in and for the purposes of any suit against the said Mayor in respect of the said money." This allegation is admitted by this demurer to be true. It appears therefore that the Common Council have refused to institute a suit or to allow any of the inhabitants to institute a suit for the recovery of this money, and the inhabitants possess no controul in the affairs of the corporation which would enable them to institute a suit for that purpose of themselves.

Judgment.

The remaining question is, whether this remedy should not have been sought by means of an information at the suit of the Attorney General. The solution of this question has been attended with much difficulty. We have consulted all the cases cited on both sides in the course of the argument, and it cannot be denied that no case can be found, in which proceedings have been had against a public corporation without the intervention of the Attorney General; and it must equally be admitted that it would have been perfectly competent and proper for the Attorney General to have proceeded in the present instance. It does not appear that any application has been made to him for that purpose. The only case that has occurred which

1853.

Paterson v. Bowes.

appears to afford any authority for the suit being in its present form is the case to which we were referred, of *Bromley* v. *Smith*. This case was decided so long ago as 1826. It was however cited as a binding authority in the recent case of *Winch* v. *The Birkenhead Railway Company* (*a*), and it was decided by a very distinguished judge. In that case the inhabitants of Saint Mary's parish in the borough of Stafford had had rights of common over certain waste lands within the parish. An act of parliament had been passed authorizing the inclosure and cultivation of these wastes, and by it the householders being parishoners within the borough, occupying houses of the yearly value of £5, or any seven of them, were empowered to make rules and regulations for the management and cultivation of the allotments, and to impose a rate on the householders in order to carry such rules and regulations into effect. A sum of £107 or thereabouts, produced by a rate imposed under the act had been applied by the treasurer to a purpose, which, although sanctioned by a majority of the householders, was not authorized by the act, and the suit was instituted by some of the householders on behalf of themselves and the others in order to reclaim this sum and to prevent the misapplication of the rates in future. The suit was founded on precisely the same principle as the present. The money, when repaid, would be applicable to the use of the householders, and would relieve them *pro tanto* from future rates. Sir *John Leach* decided that although the act complained of was approved by the majority their sanction could not deprive the minority of their right to complain of it, because it was contrary to the provisions of the act of parliament, and that consequently some of the householders could proceed on behalf of themselves and all the others, for whose benefit the suit must be deemed to be; and that, although the Attorney General could proceed in such a case on account of the public nature of the right,

Judgment.

(*a*) 16 Jur. 1035.

1853.

Paterson v. Bowes.

yet his presence was not absolutely necessary for that purpose unless the whole body concurred in the abuse.

After the best consideration which I have been able to give to this question, I have arrived at the conclusion that the case of *Bromley* v. *Smith* is an authority for this suit in its present shape. The only respect in which the learned counsel for the defendant attempted to distinguish the two cases was, that in *Bromley* v. *Smith* the householders were not a corporate body. But it appears to me that the only effect of this distinction is to render it necessary for the corporate body to proceed in the present case, if it were practicable. The circumstance of a corporation being concerned does not make the presence of the Attorney General more necessary than it otherwise would be. The corporation could itself proceed without the Attorney General; then why not the inhabitants when the corporation refuses to proceed? I think, therefore, on the authority of the case of *Bromley* v. *Smith*, though with some doubt, that the bill can be sustained in its present shape. The principle seems to be that, where a specific portion of the public as distinguished from the whole public is concerned, the proceeding may be in this form. Where the whole public is concerned, it must be represented by the Attorney General.

Judgment.

These remarks will, I think, dispose of all the grounds of demurrer, which in my judgment ought to be overruled.

SPRAGGE, V. C.—The case made by the plaintiff's bill is in substance this: That an agreement was made subject to the approbation of the City Council of Toronto, between the defendant *Bowes*, Mayor of the city, and Messrs. *Storey & Co.*, contractors with the Ontario, Simcoe and Huron Railway Company for the construction of the Railway, for the purchase from *Storey & Co.* by the city, of 10,000 shares of railway

stock held by *Storey & Co.* for the sum of £40,000, such railway shares being of the nominal, but not of the actual value of £5 per share: that it was agreed that city debentures to the amount of £50,000 should be deposited in the Bank of Upper Canada as security for the payment of the purchase money of the debentures, until the debentures should be redeemed by the city—Messrs. *Storey & Co.* to receive only £40,000 as the purchase money of the railway shares, and the city debentures to be redeemed as soon as a loan then contemplated on behalf of the city could be negotiated.

1853. Paterson v. Bowes.

The bill then alleges that the Mayor concealed from the Common Council of the city the fact that £40,000 only was to be paid for the debentures, and that he falsely represented to them, and that, they believed, that £50,000 was to be paid, and that the Common Council continued so to believe till after the redemption of the debentures: that the object of this concealment and misrepresentation was to enable the Mayor to obtain and appropriate to his own use or to other illegal purposes the £10,000 difference between the £40,000 and £50,000.

Judgment.

It is further alleged that the agreement entered into between the Mayor and Messrs. *Storey & Co.* was sanctioned by a resolution of the Common Council, and that in pursuance of it Messrs. *Storey & Co.*, through the agency of the Mayor, transferred to the city 10,000 railway shares, and that debentures to a large amount (not mentioning to what amount) were deposited in the Bank of Upper Canada by way of security, in pursuance of the agreement: that on the 18th of October last the Common Council passed a by-law authorizing the Mayor of the city to suscribe for and take and hold stock in the railway company to the amount of £50,000 for and on behalf of the city: that the above by-law passed in pursuance of the agreement made by the Mayor with Messrs. *Storey & Co.* for the purchase

1853. Paterson v. Bowes.

of 10,000 railway shares and for the purpose of carrying out that agreement.

The bill further alleges that an act of the legislature of the province was passed on the 7th of October last, authorizing the city of Toronto to negotiate a loan of £100,000 to consolidate a part of the city debt: that a loan of £100,000 was effected by the city under the provisions of the act: that the by-law of the 18th of October before referred to was passed, and that immediately afterwards £40,000 was applied in pursuance of the agreement made with *Storey & Co.*, in full satisfaction and discharge of the purchase money of the railway shares, and of the debentures deposited as security in the Bank of Upper Canada: that for these purposes only £40,000 was required, but that the Chamberlain of the city, through the contrivance of the Mayor, and in ignorance of the true amount which was to be paid by the city to Messrs. *Storey & Co.*, paid to the bank out of the said loan as for the redemption of the debentures which had been already discharged by the payment of £40,000, the further sum of £10,000, which sum, by the direction of the Mayor and by arrangement with him, was, it is alleged, paid over or accounted for by the bank to the Mayor, for his private use.

Judgment.

The case thus presented comes under a very familiar head of equity jurisdiction. It is simply the case of an agent employed to expend £50,000 in the purchase of a certain description of stock; such agent purchasing the stock, nominally representing that amount but in truth purchasing it at a discount of £10,000 less, then representing untruly to his principal that the purchase money was £50,000, and upon that representation obtaining from his principal that amount, applying £40,000 of it in payment of the stock purchased, and putting the £10,000 difference in his own pocket. There can be no question that in such a case the

£10,000 would belong to the principal, and that this court would hold the agent to be a trustee for that sum for his principal, and bound to account for it. I have no doubt that, taking the allegations of the bill to be correct, the Mayor was the agent of the city, and that the monies in question were trust monies, for the due application of which he was accountable. 1853. Paterson v. Bowes.

I think therefore that the general demurrer for want of equity ought to be overruled.

Of the other causes of demurrer assigned, the principal one is, that these plaintiffs cannot file such a bill; that the proper remedy would be by information at the suit of the Attorney General.

The bill is filed by *David Paterson*, *Arthur Lepper*, *Hugh Miller*, and *Robert Sargent*, all of the city of Toronto, Merchants, and *Jonathan Watson* of the same place, Leather-dealer, on behalf of themselves and all other inhabitants of the city, and they allege themselves to be rate-payers and inhabitants of the said city. They aver that the electors of the city have during the whole of the period of the transactions in question numbered several thousands, and that the rate-payers and inhabitants respectively are more numerous still: that the interests of the plaintiffs in respect of the objects of the suit are identical with the interests of the other rate-payers and inhabitants of the city: that there are no means of legally ascertaining (if such would otherwise be necessary) the will of the majority of the rate-payers or inhabitants of the city in respect of the matters in question: and they also aver that the Common Council of the city, through the influence and continual misrepresentations of the Mayor, has refused to take and will not take any steps whatever to compel the Mayor to restore or account for the monies in question to the corporation, or to allow the plaintiffs or any of the rate-payers or inha- Judgment.

1853. Paterson v. Bowes.

bitants of the city to use the corporate name or seal of the city in, or for the purposes of any suit against the Mayor in respect of the monies in question.

In connexion with this point I may notice, that one of the grounds of demurrer is, that the plaintiffs by their bill shew that if the rate-payers of the city have any interest in the subject matter by the bill sought to be recovered, the corporation of the city are the proper parties as plaintiffs to institute proceedings in respect of such subject matter. Another ground of demurrer is, that it is not shewn with sufficient certainty by the plaintiffs' bill how the corporation of the city of Toronto, or the rate-payers thereof, have any interest or right or title to the subject matter by the bill sought to be recovered.

Judgment.

The objection that the suit should be by the Attorney General is, that it appears by the bill that the subject matter thereof can only be cognizable in Equity upon an information filed by the Attorney General, and that the plaintiffs by their bill show that they have no title or right to recover, receive or demand the subject matter by the bill demanded and sought to be recovered.

The position taken by the demurrer on the question of parties appears to me to be this: The suit should be by the Attorney General, the plaintiffs shewing in themselves no right, and not shewing with sufficient certainty in the corporation or the rate-payers any interest or right, in the monies in question; but that, if the ratepayers have such interest or right, the suit should be by the corporation.

In that view the first question would be whether the rate-payers have such interest, and next, whether if they have, and the governing body of the corporation refuse to sue, individual corporators may sue on behalf of themselves and all other corporators.

1853.

Paterson v. Bowes.

The bill shews that the monies in question were the monies of the city, and the provincial acts which have been referred to shew that the rates paid by the rate-payers go into the treasury of the city, and that those rates are increased or diminished according to the necessities of the city and the calls upon its funds. The interest of the rate-payers, therefore, to prevent a misapplication of those funds is obvious. The interest is of the same nature as that of the rate-payers referred to in the case of *Bromley* v. *Smith*, viz: that by the misapplication complained of in the bill all the rate-payers were injured, as more money must necessarily be collected from them than would otherwise have been required of them.

Then, if the rate-payers have such interest and the governing body refuse to sue, (taking them upon this point to be the proper parties to sue when the rate-payers have such interest, for so the demurrer alleges,) then can individual rate-payers sue on behalf of themselves and all others—I mean where the acts complained of are *illegal*—a point which arises more directly upon another ground of demurrer. Judgment.

I think the cases of *Cohen* v. *Wilkinson* (*a*), and *Carlisle* v. *The South Eastern Railway Company* (*b*), go far to shew that they may. The corporation in such case would sue in respect of a right common to every individual rate-payer; and if the corporation may sue but will not, I think that individual rate-payers may. The refusal of the governing body to assert the right cannot, I think, extinguish the right of the rate-payers who dissent from them, or prevent their asserting it, when, as in this case, they sustain a pecuniary loss by the act complained of. Where indeed the act complained of is of a different nature—a nuisance, for instance—and any individual suffers any pecuniary injury thereby, he must sue as an individual; for he

(*a*) 1 McN. & G. 481. (*b*) Ib. 689.

1853. Paterson v. Bowes.

must either sue in that character or on behalf of himself and all other the Queen's subjects—which of course he cannot do—the public part of the remedy being within the province of the Attorney General.

Upon the question whether the remedy ought not to have been sought by information at the suit of the Attorney General, it is not denied, I believe, that the wrong complained of is so far of a public nature that its redress might have been sought in that form. In the different cases cited arising out of the passing of the Municipal Reform Bill in England, the wrong complained of was similar in character to that alleged here, and the suits were by information. Several of the cases cited were charity cases, which clearly could be brought in no other shape. The crown, as *parens patriæ* having the peculiar care of charities, sues by the crown prosecutor, the Attorney General; and the crown occupies the same character in regard to rights of a public nature as of public corporate bodies, as is established by the case of the Attorney General against the Corporation of Dublin (*a*).

Judgment.

I think therefore that an information by the Attorney General would lie in respect of the matters complained of in this suit; but the question still remains, whether this bill is not sustainable.

I think the case of *Bromley* v. *Smith*, which has been referred to, is an authority for the bill filed in this cause. The bill in that case was filed by nine householders of the parish of St. Mary in Stafford, parishioners within the borough, on behalf of themselves and all other householders, parishioners within the borough against the treasurer, into whose hands certain rates assessed upon them were paid, for an account of a sum of money illegally paid by the treasurer to the attorney of a former treasurer; and it appeared moreover that

(*a*) 1 Bligh. N. S., 337.

the acts complained of in the bill had been approved by a majority of the householders.

1853.

Paterson. v. Bowes.

It was objected that the plaintiffs had no right to institute the suit against the wishes of a majority of the householders; and that, if there had been any abuse, the only mode of redressing it was an information filed by the Attorney General. The judgment of Sir *John Leach* is short and pertinent to this case. He says: "when a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong, nor deprive all other parties of their remedy by suit." "The Attorney General *may* file an information in a case like this, in respect of the public nature of the right; and the proceedings *must* be by the Attorney General where all persons interested are parties to the abuse, but where that is not the case, I am not aware of any principle or authority which makes it necessary that he should be before the court."

Judgment.

Counsel who supported the demurrer in this case attempt to distinguish the above case from the present by the circumstance that in that case the plaintiffs were not members of a corporation, while in this case they are so. They distinguish it on no other ground. I do not think the distinction a sound one. In the cases to which I have referred of *Cohen* v. *Wilkinson* and *Carlisle* v. *The South Eastern Railway Company*, the plaintiffs were members of corporate bodies, for they were incorporated, though private companies. The mere fact of being a member of a corporate body does not merge the individual right, as was contended. The question is not whether the right infringed be the right of a corporate body or of a body not corporate, but whether it be of a private or of a public nature, and Sir *John Leach* places it clearly upon this ground in *Bromley* v. *Smith*, for he held the right in that case to be of a public nature and that the Attorney General

1853.

Paterson v. Bowes.

might have sued because it was so, and at the same time held that individual rate-payers might sue on behalf of themselves and others though in respect of a right of a public nature, drawing only one distinction, viz, when all parties interested are parties to the abuse.

I think, therefore, that the case of *Bromley* v. *Smith* is not distinguishable upon any sound principal from the one before us, and that it must govern our decision.

Another ground of demurrer is, that if the matters stated in the bill be true, an action at law lies at the suit of the corporation against the Bank of Upper Canada to recover the monies in question.

If the *whole* of the bill be true, the corporation has no such right of action, for the bill alleges that the money was paid into the bank under circumstances (unknown to the plaintiffs) which free the bank from liability to the corporation or inhabitants in respect thereof: that such circumstances are well known to the defendants and should be disclosed, that the plaintiffs may if necessary introduce into the bill such further allegations in respect to them as may be necessary.

Judgment.

But besides, this objection is nothing more than an objection by an agent that his principal cannot call him to account for the misapplication of monies entrusted to him, because his principle who has a right of action against some third persons into whose hands the monies were improperly paid by the agent himself. I think this ground of demurrer clearly untenable.

One other ground of demurrer, varied somewhat in its terms, remains. It is objected that it does not appear by the bill but that the refusal of the corporation to institute any proceedings against Mr. *Bowes* in respect of the matters in question resulted from a just

and deliberate conclusion arrived at by the corporation that there is not in law or equity any foundation for the institution of any proceedings against Mr. *Bowes* in respect of the subject matter by the bill sought to be recovered. 1853. Paterson v. Bowes.

This cannot be taken as meaning that the matters alleged in the bill have no foundation in fact, for the demurrer admits their truth; the just and deliberate conclusion of the corporation can then be only a form of words for saying that, taking the allegations of the bill to be true, still there is no foundation in law or equity for instituting proceedings against Mr. *Bowes*. All that we have to deal with here is, proceedings in equity and these proceedings, and so this objection amounts to a general demurrer for want of equity—a ground of demurrer which has been already disposed of.

Another form of this objection is put more directly. It is, that the matters alleged in the bill do not show any sufficient ground for withdrawing from the defendants, the City of Toronto, the right in their corporate capacity of instituting all proper and necessary proceedings for the recovery of the sum of money in question. I do not know whether the pleader has intended to distinguish here between the city as a corporation and its governing body the City Council. If the words used be meant in their proper sense, it should have been shewn how the city in its corporate capacity, could institute such proceedings. It is an act that could only be done by the corporation through its governing body, the City Council; and if the City Council be meant, then it is shewn that that body refused to institute proceedings, and the only remaining question would be whether such refusal is a bar to the institution of the suit by rate-payers on behalf of themselves and others. Judgment.

The point which was argued, and which was probably intended to be raised by this demurrer was, that by

1853.

Paterson v. Bowes.

instituting these proceedings the plaintiff assumed to act in a matter which is delegated by the City to the Common Council; and that if this court interfere, it will be interfering with a matter in which the Council have a right to exercise, and have exercised their discretion.

But a broad distinction exists between acts falling within the scope of the powers vested in the City Council and acts which are beyond these powers. As to the former, the Council may deal with them as they may deem proper. The law vests in them a discretion as to such matters, and that discretion cannot be controlled by the corporators as a body or by any other power; though in the case of most private corporations there is a controlling power in the general body, but in the case of the city there is none, and indeed there could not well be any; but in regard to matters beyond their powers it is clear they can have no discretion to exercise, and then the simple question is, whether the alleged appropriation by Mr. *Bowes* of £10,000—the property of the city—to his own private use or other illegal purpose, is an act which the Council have any discretion to confirm or to repudiate, or as to which it is in their discretion to say that they will allow Mr. *Bowes* to retain it without asserting the right of the city to it by the institution of proper proceedings. It will hardly be contended, I suppose, that the Council could in terms sanction the misappropriation of monies complained of. They have a discretion in the appropriation of the monies of the city to the several purposes pointed out by the law, but beyond these specific purposes they have no power and no discretion. The discretion contended for, I take to be, the discretion of deciding in what cases and instances, and at what times and in what manner, the rights of the city shall be asserted by legal proceedings or otherwise. But to refuse relief under this bill it is necessary to go to this extent—that when the City Council refuse to take, and

Judgment.

1853.

Paterson v. Bowes.

will not take any, steps whatever to compel an account of city monies illegally appropriated by their Mayor while acting as agent for the city, or to allow the use of the corporate name or seal for the purpose; that in such a case, where the interests of the plaintiffs are identical with the interests of the other rate-payers and inhabitants of the city, such plaintiffs cannot come on behalf of themselves and others to this court for redress. This I think would be in contravention of what was held in *Bromley* v. *Smith* by Sir *John Leach*, whose words I have already quoted, and of what has been held in other cases. When the act in respect of which the remedy is sought is itself *illegal* and incapable of confirmation by the governing body, and is a matter *necessarily* injurious to the rights common to all on whose behalf the suit is brought, then individuals interested may sue, and there is no discretion vested in the governing body which can prevent the institution of such suit. Besides *Bromley* v. *Smith* *Cohen* v. *Wilkinson* and other cases which have been referred to, are authorities for this position.

Judgment.

In speaking of the discretion of the City Council in regard to the institution of suits—I mean, of course, where the substantial rights of the city are in question—there may be infractions of their rights so insignificant that no discreet man would think it prudent to enforce them.

Upon the best consideration that I have been able to give to the several points raised by this demurrer, and to the examination of the numerous authorities cited on both sides, Iam of opinion that the demurrer is not sustainable and must be overruled, and with costs

In speaking of the allegations of the bill being admitted to be true—I mean of course in the well understood sense of their truth being admitted for the purpose of the demurrer—for the purpose of raising

1853. Paterson v. Bowes. the question whether Mr. *Bowes* can be called to account, and in this mode, for whatever he may have done in relation to the transactions which are called in question by this suit.

RIGNEY v. FULLER.

Mortgage—Immediate sale.

December 5. *Prima facie* a mortgagor is entitled to six months to pay amount of mortgage money: to induce the court to exercise the discretion vested in them, the general orders of directing an immediate sale or a sale at an earlier day, some special ground must be shewn.

Statement. This was a mortgage case, and a decretal order for sale had been made. In drawing up the order, the solicitor for the plaintiff desired that the sale might be directed to take place immediately. This the registrar refused to do, unless upon the special direction of the court to that effect: and now,

Argument. Mr. *A. Crooks*, for the plaintiff, asked that the court would, pursuant to the second section of the 32nd order of June last, direct an immediate sale of the mortgage premises; alleging that the property was not sufficient to pay the claim of the plaintiff, and that there were several judgment creditors also incumbrancers on the estate: but

Judgment. *Per Curiam.*—The words of the order are not more extensive than the provisions of the statute in England, still there the court considers the mortgagor always entitled to the usual time to redeem, unless some peculiar circumstances are shewn to induce the court to restrict the time to a shorter period. Under our orders, there can be no doubt that the period appointed for redemption may be limited to less than the six months usually given to mortgagors, or indeed a sale may be ordered forthwith; but then some evidence must be adduced to show that the court would be acting in furtherance of justice in restricting the rights of the mortgagor. Now, here, nothing whatever is

shewn, further than that counsel for plaintiff shews that the plaintiff is anxious to obtain his claim, and that the mortgage estate will not realize sufficient to pay the incumbrances thereon. This, in our opinion, is not sufficient to induce us to interfere in the manner proposed. Had it been shewn that the mortgage premises were likely to be deteriorated in value by waiting the usual time, that might have been a reason for our interfering. Under existing circumstances, however, the mortgagor here must have the usual time allowed him to redeem.

1853. Rigney v. Fuller. Judgment.

GARDNER v. BRENNAN.

Practice—Dimissal of bill.

Where a cause has been set down for hearing, the plaintiff is not entitled as of course to an order dismissing his bill, with leave to file another bill.

December 5.

The bill in this cause was filed by *James C. Gardner*, against *Charles W. Brennan*, *Douglas Prentiss*, and *William Morrill*, claiming a right to redeem, as mortgagor, certain premises conveyed by plaintiff to *Brennan*, the particulars of which are stated in the report of the case of *Prentiss* v. *Brennan*, as reported ante volume 2, page 582. Statement.

The defendant *Prentiss* had answered the bill and taken evidence in the cause; the other defendants had not, neither had the plaintiff examined any witnesses: the cause had been set down by the defendant *Prentiss* for hearing, and was now called on to be heard; when

Mr. *Strong*, for the plaintiff, moved for an order to dismiss, with costs to be paid to the defendants, reserving leave to the plaintiff to file another bill. Argument.

Mr. *Mowat*, contra, opposed the reservation of leave to file another bill, although he had no objection to

1853. Gardner v. Brennan.

the dismissal; the effect of which would be to foreclose the plaintiff's equity of redemption, if in reality he had any. As between the defendants *Prentiss* and *Brennan*, the court have already determined to whom the estate belongs.

Judgment.

Per Curiam.—If leave were granted in this case to file another bill, it is almost impossible to say that in any case permission should not be reserved. Here, no ground is laid for granting this indulgence, nor is any reason assigned for the plaintiff having neglected to take his evidence. We think that, with a view to putting an end to litigation, the proper course to be pursued in this case will be to dismiss the bill with costs.

TALBOT V. HAMILTON.

Setting aside agreement.

February 15 and April 5th.

The defendant having induced the plaintiff's agent to enter into an agreement with him for the sale of *Black-Acre;* the agent, supposing that the land he was selling was *White-Acre*, through forgetfulnes, is ignorant of the relative situations of the lands respectively: the agreement was set aside with costs, it appearing that the agent's error was either fraudulently occasioned or confirmed by the defendant, or at all events well known to him when he entered into the agreement.

The bill in this cause was filed on the 3rd of April 1852 by The Honorable *Thomas Talbot* against *Archibald Hamilton*, praying under the circumstances set forth in the bill, that an agreement entered into by the plaintiff, through his agent, with the defendant, might be declared void and delivered up to be cancelled, and for further relief.

The defendant having put in his answer, evidence was taken and the cause now came on to be heard on the pleadings and evidence.

Mr. *McDonald*, for the plaintiff.

Mr. *Mowat*, for the defendant.

1853.

Talbot v. Hamilton.

The arguments of and cases relied on by counsel, as also the evidence used at the hearing, are clearly set forth in the judgment of the court, which was now delivered by

THE CHANCELLOR.—The object of this suit is to set aside a contract for the sale of lot number 8 in the 10th concession of the township of Dunwich, entered into by the plaintiff through his agent Mr. *Becher*.

April 5th.

At the date of this contract the plaintiff was seized in fee simple of large tracts of land in the township of Dunwich, and, amongst other parcels, of all the lots in the 10th concession from two to nine, both inclusive. These lots are all broken, being bounded towards the south by Lake Erie; and lots 8 and 9 are both intersected by Tyrconnell creek, which flows through the northerly part of 9, enters 8 at a distance of about 15 chains from the shore, and runs from thence, in a course nearly south, to about the centre of the southern boundary of that lot, where it empties itself into Lake Erie. At an early period mills were erected upon this stream, which were situated about the centre of 9, and a village was laid out on the eastern bank of the river, and towards the easterly limit of the lot. This village did not thrive well, as it would seem—a circumstance attributed by the witnesses, partly to the high price demanded for the village lots by the plaintiff, and partly to his indisposition to sell the wild lands in the neighborhood. Whatever may have been the cause, it seems to have been confined for a considerable time within its original limits, on the eastern bank of the river; but in the year 1848, or about that period, Colonel *Airey*, the then agent of the plaintiff, caused a new town plot to be surveyed on the western bank of the river. The new survey was extended beyond the westerly boundary of 9, and building lots were laid out, along a street designated on the map as Queen street, which extended to the centre of lot 8. The land

Judgment.

1853.
Talbot v. Hamilton.

along the shore of both 8 and 9 attains an elevation of about 100 feet above the level of the lake, except at the mouth of Tyrconnell creek, where it falls away and admits of access to the water. Queen street leads through lot 8 from the concession line, called High street, to this point, which has been always used by the inhabitants as their place of shipment, and which is, as I understand the defendant, the only place available for that purpose.

Before the village of East Tyrconnell had been laid out, as I gather from the evidence of *Henry*—at all events more than twenty years before the date of this contract—a considerable strip of land in the centre of lot 8, extending from the concession line to the mouth of the river, had been cleared by the then occupiers. This clearance, which covers about 43 acres, was for some time in the possession of one *Carley*, a tenant of the plaintiff, and at the date of the contract some portion of it next the concession line was under fence; the residue, reaching to the mouth of the river, although not under fence, was perfectly clear and fit for the plough. Another portion, to the north-east, between this clearing and lot 9, had been imperfectly cleared; and of this a strip of about nine acres, adjoining the concession line, was then overgrown with brushwood.

Judgment.

The defendant has resided for some years in the new village, on the corner of Hill and Queen streets, within two chains of the side line between 8 and 9. The plaintiff's agent, Mr. *Becher*, resides in the town of London, and the contract was executed at Wallacetown, a village distant some two or three miles from Tyrconnell.

It will be found convenient to have these circumstances in relation to the property and the parties present to our minds, before proceeding to investigate the points really in controversey. The bill then alleges

1853.

Talbot v. Hamilton.

that the plaintiff's agent was surprised into signing the contract for the sale of this property under an entire mistake as to its true locality: that he acted under a delusive but confident opinion that the only lot in the 10th concesson through which Tyrconnell creek flowed was 10, and in the full belief, therefore, that Tyrconnell village was situated upon that lot instead of upon lots 8 and 9; and that, in contracting for the sale of 8, he conceived, consequently, that he was selling, not the village plot, or any part of it, but a property distant from the village by at least the breadth of one lot.

Beyond this case, as one of mere mistake, the bill charges that the error into which the plaintiff's agent was betrayed had either been originally induced, or subsequently confirmed by the fraudulent misrepresentation of the defendant.

Now, laying aside for a moment the case of actual fraud, no doubt can exist, I apprehend, as to the law applicable to the case stated by the bill. If there were mutual mistake upon a fact so material,—if it be true that the plaintiff's agent was surprised into the execution of this agreement under an entire misconception as to the subject matter of the contract, then, whether both parties were under that misapprehension, or whether the plaintiff alone laboured under the delusion,—in either event, and apart from actual fraud,—it would be the duty of the court, I apprehend, to grant relief *(a)*. Judgment.

The question is, therefore, one of fact; did the plaintiff's agent enter into this contract under the erroneous impression imputed to him by the bill? Upon this point Mr. *Becher* himself is the principal witness. He says that his instructions from the plain-

(a) Calverley v. Williams, 1 Ves. Jr. 210; Hitchcock v. Giddings, 4 Price, 135; Neap v. Abbott, 1 C. P. Coop. 333, and case cited; Malins v. Freeman, 2 Keen, 25.

1853.

Talbot v. Hamilton.

tiff were, not to sell the lands in the neighborhood of Tyrconnell without express directions, and that lot 8 in the 10th concession is one which he never would have sold or thought of selling had he known its true position. He says that in effecting this sale he referred to a map which has been exhibited, and which is marked with the letter A, being the same map to which he ordinarily had recource for such purpose, and which is an exact copy of the last government plan prepared by Mr. *Springer*; that upon this map, as well as upon various other plans in his possession, which he enumerates, Tyrconell creek is placed upon lot 10; that relying upon the accuracy of these plans, and believing, therefore, that 8 was two lots westward of the village of Tyrconnell, he consented to sell to the defendant for two hundred pounds, a property of much greater value, which he would not have sold upon any terms without the express direction of the plaintiff.

Judgment.

If this evidence be reliable, and sufficient in point of law, there can be no doubt that it sustains the case of mistake made by the bill. But it is argued that the court cannot safely proceed upon the unsupported testimony of an agent, with ample means of information, and who, upon his own admission, must have recently known the fact of which he now represents himself to be ignorant. Had this been a case of mere mistake, and had Mr. *Becher's* testimony been unsupported, either by circumstances or by direct testimony, then, apart from the special grounds of objection, we should have had great hesitaton in granting relief; and it is not to be denied that the special grounds of objection which have been stated lend great weight to the defendant's argument. It is admitted that *Mr. Becher* had in his possession a plan of the village of Tyrconnell, on which it is described as "situated on lots 8 and 9, in the 10th concesson of the township of Dunwich." It is admitted that in selling village lots

1853.

Talbot v. Hamilton.

he was in the habit of referring to this map, and that he had himself transcribed its contents, including the description of the locality of the village, into a book prepared by him as a register of the plaintiff's lands. It is not to be denied that these admissions go far to counterpoise the weight of Mr. *Becher's* testimony. Had this been a case of mere mistake, resting upon the unsupported testimony of a single witness,—in such a case it is quite possible that the objection would have been insuperable. Still, even then, it could not have been regarded with any propriety as conclusive; for it is plain that words may reach the eye, nay, they may be transcribed, not once, but repeatedly, without conveying any real information,—without presenting any corresponding ideas to the mind; or, where the mind does pause and reflect, even then the images actually had may and frequently do fade wholly from the memory. The question is not whether Mr. *Becher* had the means of knowing the fact; nor whether he did at one time know it; but it is this, was the knowledge present to his mind at the date of this contract.

Judgment.

But this is not a case of mere mistake. The case made by the bill is of mistake combined with fraud; and the testimony of the principal witness is strongly corroborated; so that the question which we have to determine is relieved, in both respects, of much of the difficulty which otherwise would have belonged to it.

Viewing the case in this double aspect, it becomes extremely material to contrast Mr. *Becher's* narrative of the occurrences at Wallacetown, where the contract was signed, with that furnished by the defendant. Mr. *Becher*, after stating his own misconception in the way before described, says, "I knew that there was a very large clearing on the west side of the creek, which was formerly occupied by a man named *Bryan Carley*, a tenant of the plaintiff; and thinking it just

1853.
Talbot v. Hamilton.

possible that this clearing might extend into the lot I supposed I was selling, I asked the defendant if the '*Carley* clearing' came into or near this lot? He said 'No.' I then asked him if there was any clearing upon the lot. He said 'there was none; but some chopping had been done upon it, and it had grown up with underbrush, which made it worse to clear than if it had not been done at all.' Believing this, I closed the sale with him at his offer of £200."

The bearing of this evidence upon the question of fraud is obvious. It affirms the misrepresentations charged by the bill. But it has also an important incidental bearing upon the question of mistake. If Mr. *Becher* had not misapprehended altogether the true position of this property, he could never have asked these questions. He knew the *Carley* clearance. He was aware of its close proximity to the village. Now, had he known that 8 adjoined the village plot, he must have known that the *Carley* clearance not only came near to, but lay altogether within that lot; yet he swears that, "thinking it just possible that it might come into the lot in question, he asked the defendant if the *Carley* clearing came into or near the lot?" That question seems to me to imply Mr. *Becher's* ignorance of the true position of this property; and if the defendant, knowing the fact to be so, replied in the negative, that is such a misrepresentation as entitles the plaintiff in my opinion, to set aside the contract.

Judgment.

The account which the defendant gives of this transaction is, however widely different. He says, in his examination, "I said to Mr. *Becher*, at Wallacetown, *after the agreement was made out and signed*, that I supposed I might have got the place at $7 or $7½ an acre. He said no, *and remarked that there was some clearing on the land.* I answered that I would as soon have the place without the clearing."

1853.

Talbot v. Hamilton.

These statements are obviously irreconcileable. The defendant deprives the conversation of its most material effect by stating it to have taken place *after the agreement had been executed*; he negatives the misrepresentation imputed to himself; and excludes all idea of mistake, by describing Mr. *Becher* to have stated that there was a clearing upon the lot, and to have assigned that as his reason for requiring $8 per acre. It happens, fortunately, that four other persons were present upon this occasion, who have been examined as to the transaction. With respect to the first discrepancy to which I have adverted, all these witnesses concur in representing the conversation to have taken place during the treaty, and not after the agreement had been signed, as represented by the defendant; and, upon the whole, I am of opinion that that point has been conclusively established.

Judgment.

So far as their testimony is material to the case of fraud and misrepresentation, the witnesses differ in some minor particulars; but these differences are not such, in my opinion, as to leave the proper conclusion upon the whole evidence at all doubtful. Mr. *Stoneman*, the subscribing witness to the agreement, says, "Mr. *Becher* looked upon the map for some time, and asked if there was any clearing on the lot: *defendant said there was none*, but that some time, previous some timber had been chopped, and underbrush had grown up, which rather deteriorated the value of the lot than otherwise. Mr. *Becher* then agreed to sell him the lot for $8 an acre." Nothing is said here about the "*Carley* clearing;" but the witness swears very positively that the defendant denied the existance of any clearing, and, consequently, if he were really interrogated about the *Carley* clearing in the way sworn to by Mr. *Becher*, he must have answered that also in the negative. An admission that the *Carley* clearing was upon the lot would be quite inconsistent with *Stoneman's* evidence.

1853.

Talbot v. Hamilton.

John McKillop's evidence throws soms light upon this point, which I think material. He says, "*Mr. Becher asked something about the Carley clearing*, was it near that lot; and also if there was not clearing on the lot; the defendant said there was; but he would as leaf have it without a tree chopped on it, or to that effect." Then, having described the examination of the map, he says, "I cannot recollect the answer given by defendant to Mr. *Becher's* question as to the *Carley* clearing." *James Philpott*, after stating with great minuteness the previous steps of the treaty, proceeds to say, "Mr. *Becher* then said to defendant, 'is there much, or any clearing on the lot?' I cannot say which was the question that was asked. Defendant replied, "there is a little cleared, and a great deal slashed over. I would rather there had not been a stick cut on it." He goes on to describe the payment of the money and the execution of the agreement, and then proceeds: "I have since conversed with Mr. *Hamilton* about the purchase of this lot. I remarked that I was deceived in where that lot laid. I thought it was a lot to the westward of the lot in question, and I thought the slashing and clearing on that lot was upon the lot westward of it. I supposed, when he spoke of the slashing and clearing to Mr. *Becher*, that he meant that upon lot number 7; and therefore supposed that defendant was buying what now turns out to be lot 7, and which I then took to be lot number 8. I think that what the defendant said to Mr. *Becher*, as to the clearing and slashing, would apply to lot number 7 and not to lot number 8. *The clearing upon lot number 8 is very large and old, the greater part of the stumps are out of it. The greater part of the present clearing has been a clearing ever since I recollect, which is 25 years ago.*" *Archibald McKillop* says, "I heard Mr. *Becher* say to him, is there any clearance on that land? which made me take notice. The defendant said he did not know but there was, but he rather thought not."

Judgment.

1853.

Talbot. v. Hamilton.

These witnesses differ, as I before observed, in minor particulars; but, as a whole, their testimony is quite inconsistent with the defendant's statement, while it strongly corroborates Mr. *Becher's* evidence. I am satisfied that Mr. *Becher* made the enquiry respecting the "*Carley* clearing," stated in his evidence; and I am equally satisfied that the enquiry so made was answered in the negative. The other hypothesis is opposed, I think, to the testimony of all the witnesses; for although an admission of the existence of a small clearing is spoken of by some of them, it is quite clear, nevertheless, that the admission, if any such were really made, was calculated to mislead rather than inform. It is quite impossible to contend, upon the evidence, that anything was stated by the defendant which could have informed Mr. *Becher* of the existence of a clearing like that which had been occupied by *Carley*. *Stoneman* swears that he denied the existence of any clearing. *Philpott*, who had been acquainted with the locality for five and twenty years believed that the defendant was speaking of lot 7, on which there had been a great deal of slashing, but no clearing. *Archibald McKillop* says that the defendant's reply to Mr. *Becher's* question was, "that he did not know but there was some clearing, but he rather thought not." All this proves, indirectly indeed, but therefore perhaps the more forcibly, that Mr. *Becher's* question as to the *Carley* clearing must have been answered, as he swears it was, in the negative.

Judgment.

It is material however, to enquire, with reference to the charge of fraud, whether the defendant himself was aware of the actual state of the property, or of its true position. Considering his long residence in the immediate neighbourhood, and his ample means of information, there would have been great difficulty in establishing such a defence. But the evidence of *De Wit* places this matter beyond question. This witness

1853.

Talbot v. Hamilton.

swears that he assisted the defendant in making a survey of this property on the morning of the sale; that they ascertained the mouth of the river to be the centre on the southern side, and that they ascertained the centre at the concession line from Mr. *Springer's* previous survey. It is clear, therefore, that he must have traversed the whole *Carley* clearing, and must be taken, I think, to have had accurate knowledge of the real situation of the property.

The conclusion at which we have arrived upon this direct testimony is greatly strengthened, in our opinion, by the circumstantial evidence. It is clearly established that, in effecting this sale, Mr. *Becher* consulted map A, upon which Tyrconnell creek is designated as lying two lots to the eastward of its true position; and this mistake is shewn to prevade all the government plans of this township. It seems to us to be not only possible, but very natural, that Mr. *Becher* should have been misled into the erroneous belief under which he swears that he acted. It is very certain that the plaintiff set a high value upon this property. His project of establishing a village had not been very successful; but that is said to have arisen from his unwillingness to sell, except at extravagant prices. Looking to a town growing up there, as he certainly did, the possession of lot 8 was very material, because, irrespective of its capabilities as a village plot, it commanded the mouth of the river and the only place available for the shipment of produce; and, so late as the year 1848, a new survey was made, by which the village lots were laid down to the centre of that lot. It is not even surmised that the plaintiff had altered his views in relation to this property, nor do we perceive how the defendant could have thought so; for we find him applying, but a few months before the execution of this agreement, for two village lots situated partly on 8 and partly on 9, in consideration of his improvements; and we find that the plaintiff

Judgment.

assented to his request, upon condition that he would build a tavern and keep it open for a certain period for the convenience of the inhabitants. These circumstances, taken alone, tend clearly, as it seems to us, to prove that there must have been some mistake. What other probable explanation can be suggested for this sudden change of purpose? An object pursued steadily for more than 20 years is suddenly abandoned, without reason, when its attainment seemed within reach; and property upon which a high value had always been set is sold much below its value, without any apparent cause. Surely all this is very suggestive of mistake.

1853. Talbot v. Hamilton

Judgment.

We are of opinion, therefore, that fraud and mistake have been clearly established, and that the plaintiff is entitled to the relief he has asked, with costs.

The Attorney General v. The Weston Plank Road Company.

Injunction—Highway.

This court has no jurisdiction on the ground of public nusiance to enforce by injunction the ordinary repair of a highway; or to restrain an incorporated road company from suffering a road to continue out of repair; assuming such a jurisdiction to exist, the Attorney General does not seem the proper party to sue.

The court, however, will restrain a company which is authorized to construct a plank or macadamized road from constructing or continuing to construct one of poles.

Where such a company had already re-constructed part of a road (which was out of repair) with poles, without any objection on the part of the public, and there was contradictory evidence as to the quality of the road so made; but it appeared that by adzing off the upper side of the poles, which the company offered in court to do, the road would be rendered sufficiently smooth, and that to be obliged to take up the poles would ruin the company; an injunction for the removal of the poles was refused.

Statement.

The information in this case was filed at the relation of *William Mead*, *Thomas Hastings*, *Joseph Dennis*, *Herman Wittrock*, and *John W. Gamble*, setting forth that the defendants had been incorporated by statute 4 & 5 Vic. chap. LX. under the name of "The Weston Road Company," and were thereby authorized

1853.

Att. General v. Weston Plank Road Company.

to macadamize or plank a certain portion of Dundas Street (being the Queen's common highway) from the Peacock Tavern on Dundas Street to the village of Weston, and to impose tolls thereon when completed: that subsequently the company elected to plank and proceeded to plank the said road, and in May 1844 completed the planking thereof to the width of sixteen feet, and thereupon enforced and levied tolls and still continued to impose and collect such tolls; that in or about the month of November 1850 the said plank road became in many places ruinous and out of repair, and the planks wherewith it was constructed wholly worn out and useless, and the company, instead of taking up such worn out planks and repairing the road by laying down new and sufficient planks in lieu thereof, or macadamizing the road, by virtue of the powers in the said act contained, had lately proceeded to lay down, and were still continuing to lay down along the greater portion of the said road, round poles or sticks of the length of only twelve feet, and varying from eight to fourteen inches in diameter; and that the company threatened and intended to lay down such poles or sticks along the whole extent of the road which the relators alleged was not in accordance with the act incorporating the company. The information further alleged that the road had become and was a public nuisance: and prayed (*inter alia*) an injunction to restrain the company, their workmen, &c., from proceeding to lay down such poles or sticks or any other material than good and sufficient planks or stone upon the said road or any part of it; and from suffering all or any of such poles or sticks as had already been so as aforesaid laid down upon the said road to continue upon the same.

Statement.

The defendants having made default in putting in an answer, a traversing note was filed, and the cause having been put at issue, evidence was taken on behalf of all parties.

1853.

Att. General v. West'n Plank Road Company.

The testimony adduced was to a great extent contradictory, some of the witnesses called by the defendants swearing that they would as soon have the pole road as one constructed of planks, whilst those on behalf of the relators generally give evidence to the effect that the pole road was unfit for use, either by light carriages or heavy waggons. One witness, an engineer, swore that the part of the road "which is poled, is nothing but a corduroy road—it never could become a good road unless it were well drained and a great quantity of gravel were laid on the poles so that they never could be touched—it would require gravel to the thickness of twelve or fourteen inches." The president of the company had been examined, and in his testimony swore that "if the company are compelled to take up the poles, I think the effect would be to dissolve the company;" and again, that "the company intend to repair the road with new plank by half a mile at a time, till the whole road is renewed: they had commenced also to adze off the surface of the poles so as to make the road more smooth; and only await the result of the legal proceedings against them." The effect of this adzing off one side of the poles, it was stated by almost all the witnesses, would render the road nearly as smooth as a plank road, and for hauling heavy loads over was superior to a plank road.

Statement.

On the cause coming on to be heard,

Mr. Patrick, for the relators, submitted that the evidence, and admitted facts, shewed a case clearly entitling them to an injunction in the terms of the prayer of the information.

Argument.

Mr. Hagarty, Q.C., for the company. If an injunction do issue in the manner asked, no party will be benefitted, for it is distinctly sworn to in the evidence in the cause that if such a step were taken it would have

1853.

Att. General v. Weston Plank Road Company.

the effect of dissolving this company and the road must therefore remain unrepaired: by such a proceeding the public could not possibly be advantaged in any way. The company have evinced every disposition, consistently with the means at their disposal, of making that part of the road which has given rise to so much discussion fit for the public traffic and travel; they had already commenced to reduce the upper side of the poles to a smooth surface by adzing them off,

Argument

and, but for this suit, would have continued doing so till all had been finished; and thus it is shewn by the evidence, will render the road equal in many respects to any plank road. The company were still willing and now offered to complete what they had begun and no good therefore could possibly be answered by issuing the injunction asked for.

THE CHANCELLOR.—This information, filed by Her Majesty's Attorney General, at the relation of *William Mead* and others, against the Weston Road Company,

Judgment.

prays, "That the said Weston Road Company, their officers, servants, agents and workmen may be restrained by the order and injunction issuing out of and under the seal of this court from proceeding to lay down such poles or sticks as aforesaid, or any round poles or sticks, or any other material than good and sufficient planks or stone upon the said road or upon any part thereof, *or from suffering all or any of such poles or sticks as have already been so as aforesaid laid down upon the said road, to continue upon the same;* and in the meantime from collecting or levying, or suffering to be collected or levied, any toll or tolls upon the said road or any part thereof, so long as the said poles or sticks or any round poles or sticks, or any other material than good and sufficient planks or stone, as by the said act warranted and authorized, shall remain upon the said road, *and so long as the same shall be suffered to continue in its present ruinous and unsafe condition;* and

so long as the said road—that is, the whole or any part thereof—shall continue to be in any other condition than a planked or macadamized road, as by the said act contemplated; *and from suffering the said road or any part thereof to remain or continue a common nuisance and unsafe to be travelled upon.*"

The Weston Road Company having authority under their act of incorporation (4th & 5th Vic. c. 60) either to plank or macadamize the public highway then in use between Dundas street and the village of Weston, determined upon constructing it of plank except the approaches to Black creek, which, to the distance of about 40 rods on either side, were formed of small logs hewn flat on the upper surface. This portion of the road has been at all times satisfactory to the public; it is still in good repair, and is not the subject of complaint in this information. The whole line of road —which is about six miles in length—appears to have been very much out of repair in the early part of 1851, except the approaches to Black creek. During the summer of that year the planking was partially renewed, and the road was repaired in various places with logs in the manner originally adopted in the vicinity of Black creek, although, in point of execution, the new road was very inferior; but notwithstanding those partial repairs, it is alleged that the portion of the road where the plank had been continued in the month of February 1852, when this information was filed, continued, in many places, runious; and that those parts which had been repaired with logs, constituting together about two miles, had been so ill constructed and left in a state so rough as to deprive the public almost wholly of the advantage contemplated by the act of Parliament.

Judgment.

Upon the hearing it was contended that the defendants ought to be restrained by injunction from continuing to repair the road with logs in the way

1853.

Att. General v. Weston. Plank Road Company.

described, or from suffering the logs already laid to remain; and also from allowing the road to continue in its present dilapidated condition; and the plaintiffs' right to that relief was based upon these grounds; first, as to the repairs, it was contended that the road had become a public nuisance, which ought to be removed by the court at the instance of the Attorney-General; secondly, as to the mode of reparation adopted by the company, it was contended that they were bound by the act of incorporation either to plank or macadamize the road, and that the attempt to repair with logs was therefore an unauthorized and illegal proceeding, which ought to be restrained by injunction.

With respect to so much of this information as prays that the company may be restrained from suffering this road to continue out of repair, upon the ground of public nuisance—and that is the only ground upon which the right to this relief is rested—I am of opinion that the court has no such jurisdiction. The jurisdiction of this court in relation to matters of public nuisance of whatever description, is now perfectly well settled (*a*); although it is more frequently exercised for the purpose of preventing the creation of a public nuisance than of removing one already in existence; it is in its nature a preventive rather than a remedial jurisdiction (*b*). But no case was cited in which the ordinary repair of a highway had been enforced by writ of injunction, and I have not been able to discover any attempt to apply this process to any such purpose. Yet, had such a jurisdiction existed, some trace of its exercise would certainly have been discovered, as the necessity for its application must have very frequently arisen.

Judgment.

The writ of mandamus has been very extensively and

(*a*) Attorney-General v. Forbes, 2 M. & C., 123; Attorney-General v. The Manchester and Leeds Railway Co., 1 Railway Ca. 448

(*b*) Blakemore v. Glamorganshire Canal Co., 1 M. & K. 154.

1853.

Att. General v. Weston Plank Road Company.

very usefully applied in modern times for the protection of public rights in a great variety of cases; but I am not aware of any instance in which the repair of a public highway has been enforced by mandamus. And this is not to be explained upon the ground that there is in such cases another remedy, by indictment; because that, it has been held, is not a sufficient ground for refusing a mandamus (*a*); but the true reason, as I apprehend, was assigned in the case of the Queen v. The Trustees of the Oxford & Whitney Turnpike Roads (*b*), where Lord *Denman*, on refusing the writ, says, "I know of no instance of a mandamus to repair a road. * * * If we entertain applications for writs of mandamus in such cases, we might have to try questions of guilty or not guilty on the state of the roads, and all questions affecting the liability." Now that reason applies, obviously, with much more force to applications for writs of injunction for such purposes.

Judgment.

This becomes more apparent from considering the nature of the jurisdiction which this court exercises in cases of nuisance, as well public as private. The jurisdiction which this court exercises in such matters is not an original jurisdiction, but is founded upon and ancillary to the legal right (*c*). It follows, consequently, that, as a general rule, the establishment of the legal right ought to precede the exercise of the jurisdiction. No doubt where the right is clear, or where what has been somewhat inaptly termed irreparable mischief would ensue, the court has acted without any trial at law, or pending the establishment of the legal right (*d*). The power exists; its exercise is a

(*a*) Rex v. Severn & Wye Railway Co., 2 B. & Al. 646.

(*b*) 12 A. & E. 428.

(*c*) Temple v. The London and Birmingham Railway Co., 1 Railway Cas. 133; Cory v. The Yarmouth & Norwich Railway Co., 3 Railw. Cas. 531.

(*d*) Attorney-General v. Doughty, 2 Ves. Sr. 453; Bell v. Hull & Selby Railway Co., 1 Railw. Cas. 632; Attorney General v. Manchester & Leeds Railway Co., 1 Railw. Cas. 652; Great North of England Junction Railway Co. v. Clarence Railway Co., 1 Col. 520; Beman v. Rufford, 15 Jur. 914.

1853.

Att. General v. Weston Plank Road Company.

question of discretion in each case. But, that the general rule is as I have stated cannot be doubted; and, being so, mere neglect to repair would not furnish any sufficient ground of exception. If, therefore, this company be liable to indictment for non-repair, and of that I entertain no doubt (*a*), it follows that the question of nuisance or no nuisance must be in each case determined at law to justify the interference of equity; but upon conviction, courts of law have more effectual means of protecting the public than are provided by this court.

The absence of all authority, then, and the considerations to which I have been adverting, founded upon the nature of the jurisdiction which this court exercises in matters of nuisance, satisfy my mind that there is no foundation for this part of the relief asked by this information. But, apart from these considerations, the argument assumes, in my opinion, these two things: first, that this court will direct the defendants by its decree, in the nature of a decree for specific performance, to repair the highway; secondly, that it would do so at the suit of the Attorney General. There is no foundation for the assertion that this court interferes to compel specific performance of every duty. Relief has been refused in many analogous cases; (*b*) and there is no principle or authority which would justify such a decree as is asked for in the present case. To admit such a jurisdiction would be, in effect, to constitute this court the general superintendent of roads throughout the province; for, if it be our duty to direct the defendants to repair this particular highway, it must be equally our duty to grant relief in every other case of neglect—which is, I think, absurd.

Judgment

But allowing such a jurisdiction to exist, this would

(*a*) Rex v. Inhabitants of Lindsay, 14 East. 317; Rex v. Kerrison, 3 M. & S. 527.

(*b*) Flint v. Blandon, 8 Ves. 159; Heathcote v. North Staffordshire Railway Co., 2 McN. & G. 111.

not seem to be a case in which it would be exercised at the suit of the Attorney General (*a*).

1853.

Att. General v. Weston Plank Road Company.

With respect to so much of the information as seeks to restrain the defendants from continuing to construct the road with logs instead of plank, the plaintiff's right to relief was conceded upon the argument. It is so well settled now that acts of parliament, similar to that by which these defendants have been incorporated, are to be treated as contracts with the public, that it is unnecessary to cite an authority for that proposition (*b*); and the jurisdiction of this court to restrain such companies within the powers conferred by the several acts, is not to be doubted (*c*). These defendants, then, contracted, in effect, to construct either a planked or a macadamized road, and, in consideration of that contract, they derived from the legislature, as against the public, those corporate rights and privileges which their act confers. But, retaining all these rights and privileges, they now propose to construct a road of a kind altogether different from that specified in the contract. That is a course which, in my opinion, they ought not to be permitted to adopt.

Judgment.

The last branch of the relief prayed by this information is, that these defendants should be directed to remove so much of this work as has been improperly constructed. Apart from the consideration to which I shall presently advert, I should have had great difficulty in persuading myself of the propriety of an order of that sort under the circumstances of this case. The facts are these. The entire capital of this company is but £3,500. The new mode of repair which has been adopted in various sections, is sworn by Mr.

(*a*) Attorney General v. The Birmingham and Oxford Junction Railway Co., 3 McN. & G. 461; but see the report of this case, 16 Jur.; and see Imp. Stat. 8 Vic. ch. 85 sec. 17 & 18.

(*b*) Regina v. The Eastern Counties Railway Co., 10 Ad. & E. 531, and cases there cited.

(*c*) Wilson v. Port Hope Council, 2 Grant 381, and cases there cited.

1853.

Att. General v. Weston Plank Road Company.

Musson to be somewhat more expensive than planking; and the places so repaired, taken together, equal about one-third of the whole road. There is a great and very unaccountable discrepancy in the evidence as to the quality of the road so formed. Several witnesses on the part of the Crown speak of it as a public nuisance; while a still greater number of witnesses, I believe, on the part of the defendants, describe it as excellent, and not a few consider it superior to any planked road. In the view which I take of this case, it is unnecessary to balance the evidence very nicely; but I may observe that the evil, if any evil exist, has been greatly exaggerated, in my opinion, by the witnesses on the part of the Crown. I am confirmed in this opinion by the admitted facts that the portions of this road which were originally constructed and that are now objected to are allowed, on all hands, to have been superior to any other parts of the work; while the more recent repairs were completed during the summer of 1851 with the cordial approval of every person who conversed with the president of the Company upon the subject, and especially of Mr. *Wittrock*, one of the relators upon this record; no objection having been made until the month of November in that year, when the work had been nearly, if not altogether, completed. It appears, further, that the defendants have been prevented from declaring any dividend for the past eighteen months, all their available means having been expended upon repairs which are now made the ground of complaint; and it is sworn by the witnesses—*Musson* and *Wakefield*—that any decree which should necessitate the destruction of so large a portion of their works would inevitably result in the ruin of the company.

Judgment.

Now it is difficult to discern any principle, in such a state of things, sufficient to justify the order we are asked to pronounce. If it be true that this court has no jurisdiction to compel the defendants to repair this

1853.

Att. General v. Weston Plank Road Company.

highway—and I have already said that such is my opinion—upon what principle are we to destroy such repairs as have been already executed? If this road be a nuisance, in its present state, that may be remedied by indictment; or the public may proceed by mandamus. On the other hand, if it be not a nuisance, but a public advantage, as many of the witnesses have described it, upon what principle should we, by injunction, compel its destruction? In exercising this jurisdiction the court endeavours to protect the interest of all parties to the utmost possible extent; and it is very cautious in exercising this extraordinary power when it sees that its interference must be attended with injurious rather than beneficial consequences, even to those who want its protection. Now such an injunction as is here asked would be productive of unmixed evil. It would entail ruin upon these defendants, and it would at the same time be productive of injury to the public, for it would create a nuisance instead of removing one.

Judgment.

This consideration alone would be sufficient to make us pause; but this is not the whole of the case. The large sum expended by this company in these repairs was so expended without any objection on the part of the public. Now it is clear, I apprehend, that an individual stockholder could not have maintained a bill for this purpose under such circumstances; because permitting parties to come here for relief who have acquiesced in that sort of expenditure, assuming it to be illegal, would be productive of enormous evil. Acquiescense, therefore, in that case is said to raise a counter equity, which disentitles the plaintiff to equitable relief. (*a*). It is argued, however, that this principle does not apply to proceedings instituted by the Attorney General on behalf of the public. But I am not prepared to adopt that proposition. The consequences are equally injurious, whoever may be

(*a*) Graham v. the Birkenhead, Lancaster & Cheshire Junction Railway Co., 2 McN. & G. 146.

1853.

Att. General v. Weston Plank Road Company.

complainant; and no case has been cited which satisfies me that acquiescence may not raise this sort of counter equity against the public as well as against an individual. I am aware that time will not legalize a public nuisance; but, admitting that to be so, does it follow that acquiescence may not preclude *equitable relief* in a case like the present? I am by no means satisfied of that. In the Attorney General v. *Johnstone*, (*a*) Lord Eldon says, "In the Attorney General v. *Cleaver*, if I recollect rightly, there had been considerable delay in making the application; and if the king's subjects have permitted the erection of a building which they were aware would, when completed, be a nuisance, without promptly applying to this court to prevent it, the court would not consider them entitled to the extraordinary assistance of a court of equity, but leave them to their legal remedy."

Judgment.

But it is unnecessary to determine the point to which I have latterly adverted, because if this company will now undertake, what I understood them to offer at the hearing—an offer which, in my opinion, ought to have been then accepted—I am quite satisfied that, using the discretion which we are bound to exercise in such matters (*b*), we ought not to pronounce a decree which would be at once injurious to the public and ruinous to the defendants.

ESTEN, V. C.—This was an information by the Attorney General at the relation of certain individuals. It alleges that the defendants were incorporated by act of parliament, which provided that they might construct the road in question, either as a plank road or a macadamised road, using for that purpose the then existing highway or constructing an entirely new

(*a*) 2 Wil. C. Reps. 102, and the Attorney-General v. the Manchester & Leeds Railway Co., 1 Railway Cases 448.

(*b*) Attorney General v. The Eastern Counties Railway Co., 3 Railway Cas. 337; Hodgson v. Earl Powis, 1 DeG. M. & G. 6.

road at their option ; and might levy tolls from travellers using the road, which should be applicable, first, to the repairs necessary on the road, then to the payment of ten per cent. on the capital expended in its construction, and the residue should form a sinking fund for the purchase of the road by the government, and should be charged against the company for that purpose. The company was not otherwise directed to repair the road.

1853.
Att. General v. Weston Plank Road Company.

The information further states that the road had been completed with planks in 1844, since which time the company had levied tolls upon it, and that it had since fallen into great disrepair, and was in that state in the fall of last year, at which time the company, instead of repairing it with plank or stone as directed by the act, had used poles or logs for that purpose, and threatened to continue that mode of repair throughout the whole road. The information then suggests that this mode of repairing the road is not in accordance with the act, and that the poles were used so unskilfully for this purpose that the road was dangerous to travel and a public nuisance. It then prays that any further use of poles may be restrained, as also the retaining those that had been already used, and the levying of any tolls while the road should continue in any state not authorised by the act, and from keeping the road in the unsafe state in which it was, as before mentioned. To this information, which was filed on the 3rd and amended (not materially) on the 10th of February 1852, no answer was put in; but the informant filed a traversing note on the 2nd April following. The information prays no relief on account of the road being out of repair, and therefore we are not called upon to determine whether the court could grant an injunction for this purpose, or what the remedies of the public are for neglect to repair this road. It appears, however, that the road is a public highway, although the company was not obligedto use

Judgment.

1853.

Att. General v. Weston Plank Road Company.

the then existing highway, which they have done, but might have constructed their road through the private property of individuals. It would appear also, although they are not expressly required to repair the road, that such was the intention of the legislature, at all events if they could levy sufficient toll for that purpose; and therefore that in such case for a neglect of this public duty, they would be indictable. Whether the corporation or the individual corporators would be civilly accountable in this court for the tolls, and compelled to apply them to the reparation of the road, it is unnecessary to determine. Such a remedy, if it existed, might, under certain circumstance, be of great importance. The company, for instance, might proceed for years levying toll at the maximum and distributing it amongst the corporators, wholly neglecting at the same time the duty of repairing the road, so that at the end of ten or fifteen years the road might be completely out of repair; and if the corporation should be indicted, in which case only a fine could be enforced, they might have no corporate property from which the fine could be levied. In this case, if the company or the individual members of it, having received the tolls, were liable to account for them in this court, and to apply them to the reparation of the road, as monies received upon a public trust, the remedy would be of great utility and importance. A court of equity has no jurisdiction in general over criminal offences as such; but when a criminal offence involves also a civil injury, it is civilly cognizable both at law and in equity, with due regard to the administration of the criminal justice of the realm (*a*). However, it is unnecessary to express any opinion upon these points, as the only object of this information is to be relieved against the improper manner in which the road, so to speak, has been repaired. Now, it is quite certain that this act of parliament is in the nature of a contract between the company and the legislature acting on behalf of the

Judgment.

(*a*) Attorney General v. Brown, 1 Sw. 265.

1853.

Att. General v. West on Plank Road Company.

public. The company thereby contract an obligation to perform what they are empowered to do, and can do nothing else. Having contracted to make a plank or macadamized road, they can no more make a pole road than a gravel road; and it appears to me quite of course to restrain any further use of poles in the construction or repair of the road. It would equally follow that the poles already used should be removed, but the court may exercise a discretion in this respect; and, it appearing from the evidence that the removal of the poles already used would be attended with ruinous effects to the company, the court may forbear to grant this part of the relief—the company undertaking to put this part of the road in the state in which it ought to be; that is, to construct it properly, or to remedy any faults in its construction. With respect to the costs, it seems to me that the defendants having declined to answer the information, and having allowed the informant to file a traversing note, without applying to the court afterwards for liberty to answer, the only questions which could properly be raised for the consideration of the court, were whether the facts alleged in the information were true, and, if true, whether they afforded any ground for relief. The defendants could only endeavour to disprove the facts alleged in the information, or, if they failed in that attempt, argue against the informant's title to relief upon the ground of those facts. They could not set up any collateral defence. Under these circumstances, all that it was necessary for the informant to do was to prove the facts alleged in the information; namely, the completion of the road with plank, the levy of toll, the falling of the road into a state of disrepair, and the repairing or reconstructing it with poles in the manner described. The defendants could have disproved these facts had they been able; and if the evidence on both sides had been so limited, it would have been confined within a comparatively narrow compass. Now, the bulk of the evidence has been

Judgment.

1853.

Att. General v. Weston Plank Road Company.

directed to the question, whether a pole road is as good as, or better or worse than, a plank or macadamised road—a matter wholly irrelevant and beside the real issue between the parties. I propose, therefore, that each of the parties should pay their own costs of the evidence. In other respects I consider the informant to have completely succeeded. He is entitled to restrain any further use of poles, and in strictness to compel the removal of those already used; although, as a matter of indulgence to the defendants, which ought not to alter the case, this court forbears in terms to order this act to be done. It was contended indeed that the informant or these relators had by their laches precluded themselves from insisting upon this part of the relief; but this is a defence which the defendants should have set up had they desired to avail themselves of it. I think the informant in strictness entitled to the removal of the poles. My judgment, however, as to costs, would be the same whether the defendants could insist upon the supposed laches or not. The great bulk of the evidence has nothing to do with this question, it being either wholly irrelevant or useful only as offering a further inducement to the court as an act of indulgence not to order the removal of the poles, or in opposition to that view. I think therefore, that the parties paying the expense of their own evidence respectively, the company should pay the residue of the costs.

Judgment

My attention has been called by the Chancellor—from whom to a small extent I am so unfortunate as to differ—to the case of the Attorney General v. The Birmingham and Oxford Junction Railway Company. (*a*) That case is, I think, not only distinguishable from the present, but is even an authority in favour of the view that I take. There, the defendants had obtained an act of parliament for constructing a junction line

(*a*) 3 McN. & G. 461.

1853.

Att. General v. Weston Plank Road Company.

and a diverging line; they had nearly completed the junction line, but, as was said, had determined to abandon the diverging line. The bill prayed that the defendants might be restrained from using the junction line until they had completed the diverging line. Now, a shareholder or landowner could ask this, because his money or his land could not be taken for any other purpose, however beneficial, than he had contracted to furnish it for. The public could apply only on the ground of injury; but the object of the bill was to restrain not what was injurious or a breach of the contract, but what was beneficial and *pro tanto* a fulfilment of it. The true breach was in not constructing the diverging line, for which the public had the same remedy as if the junction line had not been constructed; namely, a mandamus. Here, the object is to restrain a breach of the contract, which is injurious to the public—and a refusal of the court to interfere would leave the public without remedy, and compel it to acquiesce in an inferior road to what they are specifically entitled to. The court cannot compel a specific performance of such a contract, or the execution of repairs where an adequate remedy exists by mandamus or indictment. But the reason for this forbearance does not apply to a mere breach of the contract; and I do not see why the public should not have the relief to which any individual would be entitled; and if they are, doubtless they are properly represented by the Attorney General.

Judgment.

It is said, that if the poles are ordered to be taken up the company may refuse to repair the road, and therefore the public may be injured rather than benefitted by such an order. The court however, will not presume that the company will not do their duty or that the remedy by indictment will not be sufficient to compel them, when the Attorney General assures us that it is for the benefit of the public that the order should be made.

1852.

Att. General v. Weston Plank Road Company.

SPRAGGE, V. C.—I agree with the judgments which have been delivered, that this court has jurisdiction to restrain the defendants from constructing any kind of road other than that which they are authorized to construct by their act of incorporation.

They were empowered to construct a plank or macadamized road, in pursuance of their application to the legislature; and in consideration of their constructing such a road, all necessary powers were conferred upon them, and they were authorized to levy tolls. A contract was thus created between the company and the public; and the company, on their part, executed the contract by constructing a planked road. By now converting the road, or a large portion of it, into what is termed a pole road, they deviate substantially from their contract, and do that in respect to a road, in which the public are interested, which they have no authority to do. The evidence as to whether a plank or a pole road is the best is very conflicting—the result of it, I think is that the former is more smooth, and the latter more durable; at all events, they differ materially, and power conferred to construct the one does not authorize the construction of the other.

Judgment.

As to the *repair* of the road, I agree that the proper remedy for that is not in this court.

With regard to that portion of the road which was laid with poles before this information was filed, I think there was some acquiescence on the part of the public, including some of those who are relators in this information. They did not object to the poles being laid, but I think they treated it as an experiment; and it certainly appears that when the wet weather softened the earth which was spread over the poles the wheels cut through to the poles—and that which was a good, smooth road as long as the weather remained dry

1853.

Att. General v. Weston Plank Road Company.

became a very rough and uneven one. It became evident, that to make a good road the upper surface of the poles should be *adzed* off; this was done in some places, and found to answer. From the evidence of Mr. *Wakefield*, it appears that it was only from an omission in the framing of one or more of the contracts that it was not provided for. The defendants agreeing, as I understood them to do, to cause such adzing off of the upper surface of the poles to be done where it has not been done already, I think the court will exercise a sound discretion in refraining from interfering with the portion of the road already laid with logs. But for such undertaking on the part of the company, I concer in my brother *Esten's* opinion, that the court would properly exercise its jurisdiction (which I agree with him in thinking that it possesses) to compel the company to remove the logs, which they would thus allow to remain in a state not only objectionable as varying from their contract, but objectionable also as a matter of public mischief.

Judgment.

With regard to the last, I should be disposed to give to the relators so much of the costs of the evidence as is in support of that part of their case upon which they succeed, in addition to the other general costs of the cause. The evidence as to the relative merits of a planked and poled road, I do not think altogether irrelevant, inasmuch as if the defendants had shewn that a poled road was superior to the other, they would have pressed that circumstance upon the court as a reason against its interference, whether successfully or not. I think it was, at all events, a point on which the plaintiff was justified in placing his evidence before the court; but as his Lordship the Chancellor is in favour of giving no costs to either party, and my brother *Esten* thinks that each party should pay his own costs of the evidence, I think it proper to concur in his judgment upon that point.

1853.

Att. General v. Weston Plank Road Company.

The decree drawn up in this case directed a perpetual injunction to issue, restraining the defendants from laying down any round poles or sticks, or any material other than good and sufficient planks or stone on the road in the pleadings mentioned, or upon any part thereof.

COUNTER v. THE COMMERCIAL BANK.

Practice—Pro confesso.

January 18.

The 13th of the General Orders, authorizing the Registrar to draw up an order to take the bill *pro confesso* at the expiration of one month from the service of the bill, does not apply to corporations.

Statement.

The bill in this cause had been served on the president and cashier of the bank; and, after the expiration of a month, no answer having been filed, an application was made to the registrar for the usual order upon *præcipe* to take the bill *pro confesso*; but it being doubted whether the 31st Order warranted such a proceeding in the case of a corporate body, where the service is affected by serving the bill on their officers, it was desired that the matter might be mentioned before the judge in chambers—and an application was accordingly now made before his Honor V. C. *Spragge*, for a direction to the Registrar to draw up the order.

On the following day, His Honor having looked into the question, thought that the orders did not embrace a case of this kind, although had the point occurred to the judges when framing the orders, it, no doubt, would have been provided for. His Honor also intimated that His Honor Vice Chancellor *Esten*, whom he had spoken to on the subject, took the same view of the matter as he did.

HOOK v. MCQUEEN.

1854.

April 19, 1853. January 30, 1854.

Laches—Specific performance.

Under the circumstances of this country, a much less delay will, in many cases, be sufficient to bar a party from obtaining a specific performance of a contract for the sale of land than would be sufficient for the purpose in England.

The decision of His Lordship the Chancellor, as reported ante vol. 2, page 490, affirmed upon re-argument, [*Esten* V. C., dissentiente.]

After the judgments had been pronounced as reported Ante vol. 2, page 490, and the arrangement referred to in the note having fallen through a reference had been directed to the master at London to "take evidence of what, if anything, passed between the said plaintiff and the said defendants, or any person on their behalf, or on behalf of either of them, relating to or in any manner respecting the agreement in the pleadings mentioned after the fifth day of June 1846." Upon this reference the plaintiff had himself been examined, together with three other persons. The nature of the evidence is stated with sufficient clearness in the judgment. The cause was now brought on for re-argument. Statement. Argument.

Mr. *Mowat* and Mr. *Crickmore* for the plaintiff.

Mr. *Gwynne* Q. C., and Mr. *Galt* for the defendants.

SPRAGGE, V.C., the chief question to be decided in this case is, whether the plaintiff has come to this court for relief as promptly as he was bound to do in such a case; or whether he has been guilty of such delay as to disentitle him to a decree for specific performance. Judgment.

As the leading facts of the case are fully stated in the judgment of the Chancellor and my brother *Esten* upon the former hearing, I will refer to them very shortly, principally with a view to the dates, which upon this point are very material.

1854.
Hook v. McQueen.

David Stilwell, locatee of the crown for one of the lots, part of which is in question, and assignee of the locatee of the other, agreed by bond of 16th September 1845, to sell to *George Thomas* the portions of those lots referred to in the former judgment, for the sum of £175, of which £75 was payable on the 1st of January following, and was in fact paid upon that date; the balance was payable by instalments on or before certain dates, the last of which was the 1st of January 1849. *Thomas* went into possession, or, according to *Stilwell's* evidence, continued in possession, made some improvements, and took and used a quantity of the timber on the land. The property consisted of a saw-mill and timber land.

Judgment.

Thomas, while in possession, on the 3rd of June 1846, sold and assigned to the plaintiff the bond and conveyances which he held from *Stilwell* and the land therein described. The consideration expressed is £75 and the receipt of that sum is acknowledged in the assignment; there is no evidence of its payment, nor is payment alleged in the plaintiff's bill. After this assignment *Thomas* remained as before in possession of the property, and so continued up to the date of his re-assigning it to *Stilwell*, from whom he had purchased it: this took place five months afterwards, at which time, 5th of November 1846, *Thomas* by a short indorsement on the bond, relinquished what he called his right and title under it, and in the words used "gives it up, the mill and all the things about it that belong to it, before these witnesses, this 5th day of November 1846:" and the paper, signed by *Thomas*, is witnessed by *William Thomas* and *Anderson P. Spencer*, and upon this *Stilwell* entered into possession and continued in possession until he sold to the defendants in September 1847, when the defendants went into possession and they have remained in possession to the present time. During these transactions, and up to November 1847, the title remained in the crown.

1854.

Hook v. McQueen.

At the latter date the defendants paid the patent and other fees and obtained a grant of the whole lots; and afterwards conveyed to *Stilwell's* assignees such portions as they were not themselves entitled to.

The question thus presented is as between two purchasers from the same vendor; the second purchaser having received from the vendor possession of the premises in question, having retained possession from thence hitherto, and having obtained the legal title; and the first purchaser alleging, and I think proving, that the second purchased with notice of his prior purchase, now seeks a conveyance from the second purchaser. *Thomas*, the vendor to both, appears to have left the province.

Judgment.

The bill in this cause was filed on the 19th of October 1849. Since the former hearing, when his Lordship the Chancellor and my brother *Esten* differed as to whether the plaintiff had by his delay disentitled himself to relief, further evidence has been given on the plaintiff's behalf by leave of the court, in order to afford him an opportunity of accounting for or explaining the delay which has occurred.

The plaintiff, whose evidence upon this point has been given, I suppose by consent, says that *Thomas* left the country in the fall or winter of 1846, having previously executed the assignment to him which has been referred to; that he the plaintiff became aware that *Stilwell* was in possession of the property, but thought, from what he knew of *Stilwell's* character, that there was no use in going to any trouble with him, and that he took no step whatever. He then refers to a visit made to his house by *Stilwell*, in his absence, which visit he says took place in the spring of 1847, and says that *Stilwell* then went to Woodstock to see a Mr. *McLeod*, whose evidence is also given.

1854.

Hook v. McQueen.

In relation to his not proceeding, he says: "The reason why I did not proceed with a chancery suit against the parties before October 1849, was because I could get no right advice; there was no chancery lawyer in Woodstock."

McLeod says that he was acting as agent of the plaintiff when *Stilwell* went to him, and which he says was in the spring of 1847, as far as his recollection carries him. At that interview he says that *Stilwell* said he would give a small sum for the plaintiff's assignment if he could get time for payment; and that he *McLeod* on his part, offered to pay *Stilwell* the sum due upon the bond if he would execute a deed to *Hook* according to the bond; and that *Stilwell* refused to do this. *McLeod* then asked Mr. *Hughes*, a professional gentleman, in presence of *Stilwell*, if the bond and assignment were good, who replied that they were, but that they would have to go to the Court of Chancery to recover. *McLeod* adds, on cross-examination, that nothing took place between himself, for *Hook*, and the defendants, either verbally, or in writing, which could cause any delay in bringing this suit; that the only cause was, that there was no one in Woodstock practising in this court. The evidence of Mr. *Hughes* is confirmatory of that of *McLeod*, as to what passed between them in relation to the legal right and remedy of the plaintiff. *Stilwell* himself, who was examined for the plaintiff before the hearing, in his account of this interview with the said defendant, differs somewhat from the latter witness; he says it took place in the fall of 1846, and says "that *McLeod* inquired of me about the property, and told me he had a bond from *Thomas* and also *Stilwell's* bond for the mill property; he told me that *Thomas* was owing them a considerable sum: I offered *McLeod*, if he would pay me the amount due upon the property, he could have it; he objected to pay me because *Thomas* was indebted to him."

Judgment.

1854.

Hook v. McQueen.

Although *McLeod* and *Stilwell* differ somewhat as to what passed between them at this interview, and also as to the time when it took place, it is apparent from the evidence of both that they failed to come to any agreement; and further, that from *McLeod's* understanding of what passed, there was no offer on *Stilwell's* part to give up the land to *Hook* on any terms, and it is undisputed that *Stilwell* continued in possession until he transferred that possession to the defendants; from the above interview until bill filed no step was taken by the plaintiff, except that in July 1849, when Mr. *Maddock* made the demand on behalf of the plaintiff which is deposed to in his evidence.

Upon the subject of the delay which has occurred, I understand my brother *Esten's* view to be that the last instalment of the purchase money, not being payable, and the purchaser not being bound, although he had the right, to pay it before January 1849, and not being entitled to conveyance until such payment, he cannot be charged with laches before that date; and that from that date to October of the same year, when the bill was filed, taken in connection with what occurred through Mr. *Maddock*, there was not such a delay as to disentitle the plaintiff to specific performance. With great and sincere respect for the opinion of my learned brother, I cannot think that the time which elapsed between the interview before referred to and January 1849, (a little less or a little more than two years, according to which witness is correct as to time) can properly be excluded from consideration.

Judgment.

During this time, as well as subsequently, the plaintiff had, if rightful purchaser—and if he be not, he cannot succeed, at all—both rights to exercise and duties to fulfil. As to the first, possession was withheld from him and kept first by *Stilwell* and then by the defendants, and that not of waste lands, but of a mill property: and as to the second, he neither paid nor

1854.

Hook v. McQueen.

offered to pay any one of the several instalments or interest from time to time accruing due; and, supposing him to have been doubtful whether *Stilwell* was willing to receive it or could properly receive it, it is certain that he never applied to him; and he does not seem to have taken any advice upon the subject; on the contrary, he says himself that "he took no step whatever." He neither gave notice of his willingness to pay, nor that he claimed to be purchaser, nor demanded possession of the premises purchased; and when one comes to look at his evidence and that of *McLeod*, they give no reason for delay, and point to no obstacle in the way of proceeding during this period; *Stilwell's* character being, as he says, such that there was no use in going to any trouble with him, indicates an abandonment of his right in preference to litigating it with such an opponent, rather than a reason for delay; he also gives the reason that he could get "no right advice," that there was at that time no chancery lawyer practising in Woodstock, and this *McLeod* says was the *only* reason; and besides, *McLeod* was at that time advised that his remedy was in this court. From all this evidence it is apparent, I think, that neither the plaintiff nor *McLeod* was conscious of the existence of any impediment in the way of their proceeding in this court at that time, if they had been so minded. Now, in regard to that, I take this view, that although a party may not properly be held to the consequences of not proceeding while impediments exist though unknown to himself, which would prevent his proceeding; yet, if he believe that he is in a condition to proceed to enforce his rights, and in that belief, though an erroneous one, abstain from proceeding for some inadmissible or insufficent reason, his omission to proceed may be *evidence* of abandonment of his rights, or of acquiescence in the right set up against him by another or of both; and that such evidence is stronger where each party is under the same misapprehension as there is reason to think was the case here, for Mr. *Hughes*

Judgment.

advised that *Hook's* remedy was in this court *in the presence of Stilwell*, and does not seem to have spoken of it as a remedy which he could not then pursue. 1854. Hook v. McQueen.

Such an omission to proceed is indeed in the mind and intention of the party *laches;* and while I think that relief cannot be refused to a party on the ground of delay in not proceeding when he could not proceed, still I think that such delay, or rather such passiveness, while believing that he could proceed, is evidence of intention; and besides of this there is the evidence furnished by the omission to pay or to offer to pay the purchase money from time to time falling due, and by the non-assertion or right in any shape, up to July 1849.

The evidence shews that after the interview between *Stilwell* and the plaintiff's agent *McLeod*, the position of the parties was adverse; *Stilwell* stood upon his rights as he understood them; and the plaintiff was informed of his rights and of the proper remedy for enforcing them. Neither poverty nor ignorance (frequent excuses for delay) are pretended, and the one single reason offered is one of the weakest that could be offered. Judgment.

I should say that the plaintiff's entire abstinence from all proceeding, legal or otherwise, and from all claim, might not unreasonably lead *Stilwell* to infer that he had abandoned all intention of contesting his right, and I cannot but think that there is much reason to think that he had really done so, if indeed, he ever entertained such intention; for it is hardly to be supposed that he entertained all along a prospective intention of enforcing his claim at some future indefinite time when a practitioner in the Court of Chancery might happen to settle in Woodstock. It looks much more like a dormant or abandoned claim revived upon the happening of that event, than an

1854.

Hook v. McQueen.

intention retained in the meanwhile; not that bare intention would suffice, but I doubt if there existed even that. It may be granted that the delay which has occurred in this case is not such as would have disentitled the plaintiff to relief in England, while the rule that time is not to be considered as of the essence of the contract was almost literally carried out; but it is not to be denied that that rule has been greatly and beneficially modified, and that the correction of the laxity which formerly prevailed in allowing parties, after unreasonable delay to enforce contracts, is a most salutary alteration.

Judgment.

At the same time it is proper to observe, that there does not appear to have been any affected delay on the part of the plaintiff, or any unwillingness to complete his part of the contract. If he is not entitled to relief, it must be, not because he has been himself unwilling to complete his purchase, but because he has been slow to enforce his right to its completion. Now it is clear that specific performance has, in several cases, been refused expressly upon that ground.—*Heaphy* v. *Hill*, referred to in the former judgment of the Chancellor, was a case of that sort. *Watson* v. *Reid* (*a*) was an equally strong case; there the contract was for the sale of some houses; and the vendee objecting to the title, refused to complete the purchase. From that time the parties were adverse as they were in this case; and, as in this case, the party seeking relief was never unwilling to complete his part of the agreement. In a few days, over a twelvemonth from the date of the vendee's refusal to complete the purchase the vendors filed a bill to compel him to do so; and this is the language of Sir *John Leach*: "on the 7th of April 1827, the vendors are informed that the purchaser would not complete the contract, and the vendors take no step until the 20th of April following, more than twelve months, when they file this bill.

(*a*) Tamlyn 381, S. C. 1 R. & M. 236.

1854.

Hook v. McQueen.

This is a most unreasonable delay, and the venders are not entitled to the interference of this court," and the bill was dismissed with costs. In the subsequent case of *Walker* v. *Jeffries* (*a*), Sir *James Wigram* refers to the cases of *Heaphy* v. *Hill* and *Watson* v. *Reid*, with approbation. He says of them and others to which he refers, " these cases appear to me so sound in principal that I certainly will not be the first to shake them." The still more modern case of *Gee* v. *Pearse* shews the tendency of modern authority to modify the old rule, that time is not of the essence of the contract.

I do not consider that the English cases furnish any rule binding upon this court as to the length of time which shall amount to such delay as should disentitle a party to specific performance; we are not, I conceive to wait until it is decided in England that six or three months may under certain circumstances amount to such delay before holding that it is in this country, and, having regard to the mode of dealing in lands in this country, such a delay as should bar relief here. Judgment.

In Canada a vendor frequently, perhaps generally, sells land, in order with the purchase money to buy other lands more suitable for his purpose elsewhere; and in like manner another contracts to purchase, not to make an investment of money, but because he requires the land for his own purpose and use, perhaps for his personal occupation. The vendor in the one case, and the vendee in the other, naturally and reasonably expect that the contract will be carried out promptly without any delay: and to allow the other party, after making any unreasonable or unnecessary delay, still to insist upon the performance of the contract, would in many cases work great hardship and injustice, preventing a party guilty of no delay and free of blame from making a contract with another, or leaving him exposed to a suit for specific perform-

(*a*) 1 Hare, 348.

1854. Hook v. McQueen.

ance. If it is more just, as I cannot but think it is, that a party guilty of unreasonable delay should lose whatever benefit might accrue from his bargain, than that a party innocent of delay or wrong should be held bound to it against his will and often to his disadvantage, it cannot be a sound exercise of discretion to enforce specific performance when there has been such delay. The rapid increase in the value of land in this country, and that contingent sometimes upon some extraneous circumstance, affords great temptation to insist upon the literal performance of old and unfulfilled contracts, which both parties may have tacitly abandoned: add to this that from the large quantity of disposable land in this country and its usual state at the time of sale, it is generally purchased with a view to its improvement.

Judgment.

In the majority of cases the purchased land becomes a man's *homestead*, and he deals with it and bestows upon it his means and labour accordingly; the disturbance of such a purchase cannot be otherwise than a hardship to the purchaser, and I cannot see the justice of doing so in favour of one who, although holding a prior contract, has been passive and neglectful in regard to it. Further, in contracting for the sale and purchase of land, it is the habit of parties in this country to carry out and complete them promptly, without delay; so that what would be considered in England a moderate time for the completion of a purchase would here be considered unaccountably long. Looking at all the circumstances under which contracts for the buying and selling of land are made in Canada, I think it reasonable and just to hold that a party disentitles himself to specific performance when he is guilty of unnecessary and unreasonable delay either in fulfilling his part of the contract or in enforcing the performance of it against the other party; and I do not think that this will conflict with any English authority: and further, that that may very properly be held to be

unreasonable delay in Canada, which might not be held to be so in England. 1854. Hook v. McQueen.

It does not, however, appear to me to be necessary for the decision of this case to resort to any such distinction; for I think that the plaintiff's non-assertion of claim, his omission to pay or offer to pay the purchase money, his long delay before bringing this suit, and the other circumstances upon which I have already commented, would be held in England to be sufficient grounds for refusing specific performance. I think specific performance should be refused in this case, and with costs.

ESTEN, V. C., briefly stated that he still adhered to the opinion pronounced by him on the previous argument of the cause; that as to the evidence taken on the reference, he had not looked at it, as, in the view he had taken of the case, it could not have any influence on the decision which ought to be arrived at by the court: that the evidence of *Hook* had been considered as proving an abandonment of the contract; but that, in his opinion, it could not be used for any such purpose: that it seemed also to be a mistake to treat *Thomas* as the vendor of the premises, and that *Stilwell* was the person who must be looked upon throughout all these transactions as the vendor. Judgment.

THE CHANCELLOR.—Suits for specific performance are very numerous, a circumstance which arises in part no doubt, from the great frequency of these contracts; but in part, I believe, from the fact that the principles upon which this branch of the jurisdiction is administered have not been accurately defined, because, until lately, the decisions of this court have not been published. Rules deducible from English authorities cannot be applied, without considerable modification, to a country where the habits of society and the condition of property are so widely different; and to

1854. Hook v. McQueen. no branch of equitable jurisdiction is the observation more applicable than to the one now under consideration. The uncertainty produced by these causes, which was felt to be a great evil, I believe, both by the public and the profession, it has been my constant endeavor to correct to the utmost of my ability, by stating in each case, too minutely it may be, the grounds upon which my judgment has proceeded; and in this particular instance I have no disposition, certainly, to depart from that practice—for it seems to be of great importance that the spirit in which this branch of the law is to be administered should be ascertained with as much accuracy as the nature of the subject will admit; but, adhering to the opinion which I formerly expressed, and having already stated the grounds of that opinion at considerable length, I shall confine myself to one or two observations.

Judgment. It is said that I was inaccurate in stating that this property had been improved by the defendants after their purchase. That observation is just. The defendants occupied the property, but there is no evidence of any improvements

It was almost assumed upon the re-argument, that both *Stilwell* and the defendants had notice of the assignment to the plaintiff. My judgment is independent of that question, but I must say that I am by no means satisfied upon that point. I have great difficulty in understanding *Stilwell's* testimony; and I agree to some extent in the remarks which were made upon Mr. *Maddock's* evidence. But assuming *Stilwell's* evidence to be strictly accurate,—and it must not be forgotten that he is the plaintiff's witness,—it is not correct to say that he admits notice of the assignment of *Thomas's* bond. So far from admitting notice of that he expressly and repeatedly denies it. His statement is, "He told me he had left it with Mr. *Hook, to whom he was indebted;* and that he had left

1854.

Hook v. McQueen.

it to please Mr. *Hook; Thomas told me that he did not assign the bond to Hook; I paid the money to Thomas with the understanding that he was to get the bond from Hook and give it to me.*" I incline now to the opinion that the assignment to *Hook* was not absolute, but by way of security; for *Thomas* was left in possession many months after the assignment, cutting the timber and using the property as his own; such a property as this is described to be would hardly have been dealt with in that way, had the plaintiff been a purchaser. Then, there is no proof of the payment of the consideration; and some parts of *Stilwell's* evidence tend very much to shew that the bond was only assigned as a security. But, however that may be, if *Stilwell* is to be believed, he did not enter into this contract, or obtain possession of the property fraudulently, as has been argued, but *bona fide*, upon the assurance that the bond would be obtained and delivered to him by *Thomas*.

Judgment.

An interview took place between *Stilwell* and one *McLeod*, acting for *Hook*, in relation to the assignment. *McLeod* says that this interview took place in the spring of 1847; but he speaks with hesitation: his expression is in the spring of 1847, "so far as my recollection carries me." *Stilwell*, on the contrary, swears positively that it was in November 1846, and, if there be any truth in the evidence, it must have been so, for he swears that it was a few days after the assignment, which was undoubtedly made on the 5th of November.

Then, how stand the facts? In November 1846, *Hook* has notice that *Stilwell* is in possession, and disputes his right to specific performance; and he is at the same time informed that *Stilwell* is prepared to make a conveyance upon receiving the sum due upon the property which he declines. The language of the deposition is this: "I offered *McLeod*, if he would

1854. Hook v. McQueen.

pay me the amount due upon the property, he could have it; he objected to pay me, because *Thomas* was indebted to him," And, again,—"I told him that *Thomas* had relinquished the duplicate original bond to me, and that I had paid back to *Thomas* what he had paid to me; this conversation took place in November 1846." Under such circumstances the plaintiff was bound, in my opinion, to perform his part of the contract with punctuality, and to assert his rights without delay; but, so far from taking that course, he neither pays nor offers to pay any part of the purchase money, and he refrains from asserting his rights for nearly three years. *Stilwell* is left in peaceable poesession until September 1847, nearly a year; he then sells to the defendants, who pay for and obtain the letters patent, and remain in possession of the property more than two years before the bill in this suit was filed,

Judgment.

Now, I continue to be of the opinion which I before expressed, that it would be an unwise exercise of the discretion of this court to decree specific performance under such circumstances,

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CLARKSON v. KITSON.

Setting aside conveyance—Drunkenness.

June 27 and Sept. 23.

The mere fact of a person executing a conveyance while in a state of intoxication will not, as a general rule, warrant this court in interfering to set such deed aside, unless there be evidence of some undue advantage taken of the party: However, where a person sixty-two years of age, who had become so addicted to drink as to be termed an habitual drunkard, executed a deed of certain real estate in trust for the benefit of the keeper of the tavern with whom he was residing—and who, it was proved, was in the habit of supplying him with whatever drink he desired—for a greatly inadequate consideration, and afterwards devised the same property to his brother: The court, after the decease of the testator, at the instance of the devisee, set aside the conveyance, and ordered the party for whose benefit the deed had been made to pay the costs of the suit.

Statement.

The bill in this cause was filed by *George Clarkson* against *John Kitson* and *John McPhee*, setting forth

1853.

Clarkson v. Kitson

that one *Francis Clarson*, late of the city of Toronto, deceased, had for some years before his death begun to acquire habits of intoxication, which went on increasing to the time of his death, and had long before his death greatly weakened his understanding, and unfitted himself for transacting, even in his sober hours, any business of importance, or which required the exercise of a sound judgment, and made him liable to be easily imposed upon by any who would desire to impose on him.

That he was frequently attacked with *delirium tremens*; and from the accidents and dangers to which his habits exposed him, he was not likely, without a change of habits, to live long.

That during this time, and in and prior to May 1850, he was in the habit of visiting a tavern in the city of Toronto, kept by the defendant *Kitson*, and of drinking there and playing cards: that his property at this time consisted of a piece of land with certain buildings thereon, in the city of Toronto; that the said property was then worth upwards of £500, and had increased in value since: that *Kitson*, being aware of all the circumstances set forth, took advantage of the visits of the said *Francis Clarkson* at his tavern, to induce the said *Francis Clarkson* to go there and live, with a view of obtaining from him his property: that accordingly, and in the month of May aforesaid, the said *Francis Clarkson* went to the said tavern to live, and remained there until a few days before his death, which took place in the fall of the same year: that while so living with *Kitson*, he was at all times supplied by him with as much strong drink as the said *Francis Clarkson* would have; and his mind then went on becoming weaker, his unfitness for business and liability to be imposed upon increasing, and the influence of *Kitson* and his wife over the said *Francis Clarkson* becoming greater from day to day; that avail-

Statement.

1853.

Clarkson v. Kitson.

ing himself of these advantages, and by means thereof and by threatening to turn the said *Francis Clarkson*, out of doors, unless he would make over his property to the said *John Kitson* on the terms hereinafter mentioned; and representing that no one else would in that case receive him or give him drink, and that he would soon be cheated out of all his property, and by promising that *Kitson* and his wife would take good care of the said *Francis Clarkson* during the rest of his life, and would give him as much intoxicating drink as he desired, the said *Kitson* prevailed on the said *Francis Clarkson* to make over his property to him *Kitson*. That all the negociation and conversation about the matter took place in private, none but the said *John Kitson*, his wife and the said *Francis Clarkson* being parties thereto: that the said *John Kitson*, as soon as he obtained the consent of the said *Francis Clarkson*, and having by the exercise of his influence over the said *Francis Clarkson* got him sufficiently sober and apparently in his right mind, induced the said *Francis Clarkson* to accompany him to a lawyer, to have the deed drawn and afterwards to execute it.

Statement.

That all this, through the influence of the said *John Kitson*, acquired by the means and under the circumstances aforesaid, was done without the said *Francis Clarkson* having the advice of, or even consulting on the subject with, any of his friends or any professional man acting on his behalf; that the said lawyer employed to draw the said deed, knew nothing of the said *Francis Clarkson*, or his habits or character, and was thereby and by means of the artful conduct of *Kitson* deceived as to the true nature of the case, or he would not have had anything to do therewith.

That the deed executed by the said *Francis Clarkson* under the circumstances aforesaid, bears date the 15th day of June 1850, but was not executed until sometime after that day—and is made, or expressed to be made,

between the said *Francis Clarkson* of the first part, *John Kitson* of the second part, and *Alexander McPhee* of the third part, and conveys and assures, or professes to convey and assure the said premises to the said *Alexander McPhee* in fee in trust for the said *John Kitson;* the pretended consideration for which is stated in the said indenture to be an agreement therein contained on the part of the said *John Kitson* with the said *Clarkson*, in the words following, viz.:—"That the said *John Kitson*, his executors or administrators, shall and will at his or their own expense find and provide unto the said *Francis Clarkson* good and sufficient board, lodging, fuel, washing, and mending apparel, with a bed-room to himself (if required), comfortable and well-furnished, in the city of Toronto aforesaid—equivalent to or at the rate of ten shillings per week—for the term of his natural life: and in case the said *Francis Clarkson* shall depart this life at any time within seven years from the date thereof, then that he the said *John Kitson*, his heirs, executors or administrators, shall and will well and truly pay or cause to be paid unto such person or persons as the said *Francis Clarkson* shall by deed or will appoint, or in default thereof to the next of kin of the said *Francis Clarkson*, the sum of two hundred pounds at the expiration of twenty years from the date hereof, but without interest. And in case the said *Francis Clarkson* shall not die within such period of seven years, but shall die afterwards at any time within the said period of twenty years from this date, then that he the said *John Kitson*, his heirs, executors or administrators, shall and will well and truly pay or cause to be paid unto such person or persons as the said *Francis Clarkson* shall by deed or will appoint, or in default thereof to the next of kin of the said *Francis Clarkson*, the sum of one hundred pounds at the expiration of the said period of twenty years, but without interest."

Statement.

That the said pretended consideration was grossly

1853.

Clarkson v. Kitson.

inadequate, and in fact not one-third of the value of the land; that, for the purpose of enabling the said *John Kitson* more effectually to accomplish his fraud, the purport of the said deed was misrepresented by him when he spoke of the same, and by his influence over the said *Francis Clarkson* he induced him the said *Francis Clarkson* often to concur in such misrepresentation; that accordingly they frequently spoke of the said deed as being a lease for three years only —though at other times the said *Francis Clarkson*, in his moments of comparative sobriety, and when the said *John Kitson* or his wife was not present, expressed his anxiety to break the said deed, alleging that he was drunk when he executed it; that immediately on the execution of the said instrument, the said *John Kitson* entered into possession of the said premises, or receipt of the rents and profits thereof, and had remained in such possession or receipt ever since;

Statement.

that from the time of the execution of the said deed, the said *Francis Clarkson* continued to reside at the tavern of the said *John Kitson*, and to be supplied by him and his wife with as much liquor as the said *Francis Clarkson* wanted or would take; and his habits of drinking thereby became so inveterate that he was constantly either drinking or drunk, until the month of December 1850, when, being in a state of intoxication from drinking at the said tavern, and in consequence of being in such state, he received a fall by which his leg was broken; that after remaining a short time at the house of the said *Kitson*, he was removed to the General Hospital in the city of Toronto, where the leg was amputated; and about two or three days afterwards he departed this life, having first duly made and published his last will and testament in writing, in such manner as is by law required for passing real estate, whereby he gave and devised all his real and personal estate whatsoever unto the plaintiff, whom he thereby appointed executor of his said will.

1854.

Clarkson v. Kitson.

That the plaintiff had duly proved the said will in the proper court, and had applied to the defendant *Kitson*, and requested him to cancel the said indenture and reconvey the said premises to the plaintiff, and offered at the same time to pay the said *John Kitson* for the maintenance of the said *Francis Clarkson* since the making of the said indenture at the rate therein mentioned, and to repay him any monies properly laid out upon the said premises; but the said defendant *Kitson* absolutely refused to comply with such request; that the said *Alexander McPhee* hath departed this life, leaving the other defendant *John McPhee*, his eldest son and heir at law, him surviving.

The prayer of the bill was that it might be declared that the said indenture was void and of no effect, and that the hereditaments therein comprised passed under the will of the said *Francis Clarkson*, or that the defendants were trustees for the plaintiff, and might be decreed to deliver up the said indenture to be cancelled, a reference to the Master to take an account of the rents and profits of the premises received by the said defendants, and for further relief. Statement.

The defendant *Kitson*, by his answer, set up:

That the deed of trust was founded upon valuable and adequate consideration, and was not liable to impeachment in this court, but was a valid instrument and conclusive against the plaintiff; that the contingency of the death of *Francis Clarkson*, the grantor therein named, within seven years and within twenty years from the date thereof was, before the execution of the said deed, considered, and a provision, applicable in that case introduced into the said deed, for the benefit of the said grantor's appointees or next of kin.

That one-half of the rents of a bake-house on the premises was secured to him during his life; that defen-

1854.

Clarkson v. Kitson.

dant covenanted to pay and paid all taxes; to keep the property fully insured, to pay and paid the premiums of insurance,—and, in fact, to turn the property in question to a better advantage for the said *Francis Clarkson* during his life, than he cared to be at the trouble of doing for himself; that there was no influence whatever exerted by defendant over the said *Francis Clarkson*, for the purpose of inducing or procuring him to execute the said deed; nor was he a person who could be s ubject to any undue influence, but, on the contrary, he had been a good man of business, and was at the time of the treaty for the settlement in the said deed contained, and at the time of executing the said deed, quite capable of transacting his own affairs.

That the house on the property in question had gone into disrepair for more than two years before the execution of the said deed; and during that period

Statement.

the said *Francis Clarkson* received little or no rent whatever therefrom, but the same was, as he stated, a bill of expense to him in taxes and other charges; that before entering into any negociation with defendant for the settlement in the said deed contained, the said *Francis Clarkson* had offered to sell the property to several individuals, but was unable to effect a sale thereof.

That the treaty with the defendant in respect thereof was under discussion off and on for upwards of three months immediately before the date of the execution of the said deed, during all which time the said *Francis Clarkson* was boarding in the house of one *John Best* in Toronto, and not, as stated in the bill, in the house of the defendant.

That *William C. Keele*, the solicitor who drew the said deed, was employed and paid as well by the said *Francis Clarkson* as by the defendant; that the said *Francis Clarkson* had been, as the defendant

believed, for a long time before the execution of the said deed a regular but not, except occasionally, an excessive drinker—and he never had an attack of *delirium tremens* to the knowledge, information or belief of defendant; that during the treaty between the defendant and the said *Francis Clarkson*, with respect to the said deed, and at the time of the execution of the said deed, he was not intoxicated as in the bill untruly stated; but was in his ordinary state of mind and body, and quite capable of transacting business.

That the said *Francis Clarkson* did not come to board or reside with defendant until after the execution of the said deed; that the said plaintiff visited him at the defendant's house shortly after the execution of the said deed, and expressed himself highly satisfied with the comfortable circumstances in which his relative the said *Francis Clarkson* was placed with defendant.

Statement.

That plaintiff then knew of the existence of the said deed, and the nature of the settlement thereby made, and approved thereof, and thought the same advantageous to the said *Francis Clarkson*. That the property in question did not fetch £30 of annual rent, and that if rented in the most advantageous way as two tenements, would not fetch more than £40 a year.

That at the time of the treaty and the execution of the deed, the house thereon was in a very deteriorated and dilapidated condition, and the repair thereof, so as to make the same rentable, cost considerable trouble and expense; that, so far from encouraging the said *Francis Clarkson* to drink or freely supplying him therewith, as in the said bill untruly stated, defendant was careful not to do so, but, on the contrary, defendant and his wife who managed his inn, were attentive to his comfort and well-being; and the said *Francis Clarkson* was not, as in the said bill untruly alleged,

1854. Clarkson v. Kitson.

constantly either drinking or drunk. The defendant also denied the use by him of any unfair means or undue influence in the treaty for the said deed, or the execution thereof, or that the said *Francis Clarkson* was affected by any bodily or mental illness that incapacitated him from negotiating the settlement in the said deed contained, or duly executing the said deed. Defendant also denied the fact of *Francis Clarkson* ever having played cards for money in defendant's house, or any unfair advantage having been taken of *Clarkson*, and all fraduluent practices whatsoever, or that the transaction had ever been kept secret or concealed by him *Kitson*.

Statement.

The defendant *McPhee* did not answer the bill, nor did he appear at the hearing: the bill as against him was taken *pro confesso*.

The cause having been put at issue, witnesses were examined for both parties; the purport of their testimony, however, is sufficiently set forth in the judgment.

Mr. *Morphy* for plaintiff.

Argument.

Mr. *McDonald* for defendant *Kitson*.

The points relied upon, and cases cited by counsel, are mentioned in the judgment.

THE CHANCELLOR.—The object of this suit is to set aside a conveyance executed on the 15th of June 1850, between *Francis Clarkson*, the testator in the pleadings mentioned, and *John Kitson* one of the present defendants. The plaintiff's allegation is, that *Francis Clarkson* had been for years a person of intemperate habits; that, from long indulgence, he had become, at the date of the transaction in question, an habitual drunkard quite incapable of managing his affairs; and that the defendant, by taking advantage of the testator's infirmities,

Judgment.

1854.

Clarkson v. Kitson.

and by constantly supplying him with drink, acquired a considerable influence over his mind, and thereby induced him to become a resident in the defendant's family, and shortly afterwards procured from him a conveyance of the property in question for a consideration grossly inadequate. *Francis Clarkson* did not live many months after the execution of this conveyance: he died miserably towards the close of the following December, in one of the public hospitals of the city, having first devised all his property, real and personal, to his brother, who is the plaintiff in the present suit.

The defendant, on the other hand, alleges that at the date of this conveyance *Francis Clarkson* was neither a person of weak intellect, nor an habitual drunkard, but, on the contrary, a man of more than ordinary intelligence, "who was not, except occasionally, an excessive drinker." The defendant denies all undue influence,—he asserts that the consideration for the conveyance was adequate, and that it was prepared by a solicitor, who was employed and paid as well by *Clarkson* as himself. Judgment.

Many witnesses were examined on the part of the plaintiff, but it will not be necessary for me to go through their evidence in detail. I agree, to some extent, in the observation of the learned counsel for the defendant, that it is not entitled to implicit credit. The evidence of *Sowden* and the *Sissons*, for instance, would place the testator in the very lowest rank of intelligent beings. But in that, and perhaps in other respects, I am satisfied that the picture drawn by the witnesses is too highly coloured. *Francis Clarkson* was born in a very humble station. He began life on this continent as a common labourer in the lead mines. He subsequently engaged in some sort of traffic in lead in the city of New Orleans, from which, for a person in his station, he appears to have realized, within a few

1854.

Clarkson v. Kitson.

years, a considerable fortune. Now, these facts appear to me to furnish a better evidence of what was in the man than the opinions of the witnesses who have been examined in the cause; and they lead me to think that the evidence is, in this respect, somewhat exaggerated. But, making every allowance for this exaggeration, it is abundantly clear, I think, upon the whole evidence, that *Francis Clarkson* had been for many years a person of intemperate habits, and that this debasing vice had grown upon him to a most lamentable extent towards the close of his life, so that he had become, at the time he executed this deed, broken in body and mind,—an habitual drunkard, his intellect weakened and his constitution shattered. I shall have occasion to refer more particularly to some passages of the evidence by and by; but that is the fair result of the evidence on the part of the plaintiff, and the defendant offers nothing in opposition; indeed, the one witness he has examined on the subject furnishes confirmatory evidence.

Judgment.

But, admitting the truth of this allegation, at least to a considerable extent, the learned counsel for the defendant contends that no case has been made for relief, because this court is not in the habit of interfering on behalf of either party when a transaction is impeached on the mere ground of drunkenness, and he cites *Cook* v. *Clayworth* (*a*) and *Lay* v. *Barwick* (*b*). I cannot accede to that argument. *Sir William Grant*, indeed, in one of the cases cited, does make this observation: "I think a court of equity ought not to give its assistance to a person who has obtained an agreement, or deed, from another in a state of intoxication; and, on the other hand, ought not to assist a person to get rid of any agreement or deed merely on the ground of his having been intoxicated at the time." But, then, he adds, "I *say merely on that ground, as if*

(*a*) 18 Ves. 12. (*b*) 1 V. & B. 198.

1854.

Clarkson. v. Kitson.

there was, as Lord Hadwicke expresses it in Cory v. Cory (*a*), *any unfair advantage made of his situation*, or as Sir *Joseph Jekyll* says in *Johnson* v. *Medlicote* (*b*), any contrivance or management to draw him in to drink, he might be a proper object of relief in a court of equity." So that this case is not concluded by *Cook* v. *Clayworth*. We must ask ourselves upon the evidence, whether the conduct of the defendant has been such as to furnish a ground for setting aside this deed? "Was any unfair advantage taken of the testator's intoxication to obtain an unreasonable bargain?"

Now, I have no hesitation in coming to the conclusion that the consideration in this case was grossly inadequate. The testator paid £400 for the property; and *Leak* swears that he could have procured a purchaser, at the date of this conveyance, for the same amount in cash. But the answer furnishes most unexceptional evidence upon this question of value, for the defendant admits that, with prudent management, the estate could be leased at £40 per annum. It had been rented at £50 per annum till within a recent period—but, taking the defendant's valuation to be correct, was the consideration adequate? The defendant covenants, first, to furnish the testator with board and lodging during his life, "equivalent to or at the rate of 10*s.* per week; secondly, should the testator die within seven years, he covenants to pay £200 further *at the expiration of twenty years without interest;* thirdly, should he outlive seven years and die within twenty, he covenants to pay £100 at the same time and on the same terms; lastly, should the testator outlive twenty years, he is to pay nothing beyond the board and lodging at the rate of £26 a year. The testator was at the time sixty-two years old, and was not likely, with his broken health and dissolute habits, to survive long. Conceiving him to

Judgment.

(*a*) 1 Ves. 19. (*b*) 3 P. W. 130.

1854.

Clarkson v. Kitson

die within seven years,—the probable event,—it is obvious that five years' rent would furnish a fund sufficient to meet the defendant's covenant, and after that time the defendant would practically hold the estate free from incumbrance; nay, more, he would be entitled to the interest of the reserve fund during the residue of the term of twenty years, in addition to the rents and profits of the estate. Allowing the testator to survive the seven years, in that case the surplus rents for eight years would furnish a sufficient reserve fund, besides paying for the board and lodging; and, after that, the testator would hold the estate subject only to the annuity of £56 for the residue of the testator's life. Lastly, allowing the testator to outlive twenty years, the transaction would be in effect a conveyance in fee of an estate worth £40 per annum, in consideration of an annuity of £26 for the life of a person aged sixty-two. Now, it does appear to me that that was in every supposable event, a most unreasonable bargain.

Judgment.

Still the circumstances connected with the execution of this conveyance, and the conduct of the defendant respecting it, remain to be considered. Upon that subject I find the following statement in the defendant's answer: "That the treaty of this defendant in respect thereto (the purchase) was under discussion off and on for upwards of three months before the date of the execution of the said deed, during all which time the said *Francis Clarkson* was boarding in the house of *John Best*, and not, as untruly stated in the bill, in the house of this defendant. That *William C. Keele*, the solicitor who drew the deed, was employed and paid as well by the said *Francis Clarkson* as by this defendant. That the said *Francis Clarkson* had been, as this defendant believes, for a long time before the execution of the said deed, a regular but not, except occasionally, an excessive drinker, and never had an attack of *delirium tremens*. That during the treaty between this defendant and the said *Francis Clarkson*

1854.

Clarkson v. Kitson.

with respect to the said deed, and at the time of the execution thereof, he was not intoxicated, as in the said bill untruly stated, but was in his ordinary state of mind and body, and quite capable of transacting business. That the said *Francis Clarkson* did not come to board or reside with this defendant until after the execution of the said deed." Had that statement been supported by evidence, it would have gone far to displace the plaintiff's equity; but so far is it from being supported, that every allegation material to the defence has been disproved. As to the defendant's habits during this period, *Best*, with whom he then resided, is the most important witness. He says: "The latter part of the time he was with me he was frequently drunk: he would come home twice a day the worse of liquor: this was the case about a couple of months: he was all the time in the habit of drinking, but these two months he was worse: during this time, he became daily worse: during the previous three months that he was with me, he might be drunk three times a week or perhaps more: he would begin to be bad about noon; but I have known him occasionally the worse for liquor about breakfast time: *during the last two months* (and this is the period specified in the answer), *he almost every day came home drunk.*" Now, this witness seemed to be a person of respectability; he was very intelligent, and appeared to me to give his evidence without any bias. His statement is borne out by a mass of evidence on behalf of the plaintiff; and the only witness produced by the defendant, not only does not contradict, but, in my opinion, corroborates his testimony. *Calvert*, the defendant's witness, describing the habits of this unfortunate man during the summer of 1850, says: "He was miserable before he got something to drink; I have never seen him a day or two together without having something to drink: he was pretty high almost all the time." Again, the defendant swears that the deed was executed before the testator came to reside

Judgment.

1854.

Clarkson v. Kitson.

at his house; but *Best* proves distinctly that he went there on the 3rd of June, and the deed was not executed till the 15th of that month, nearly a fortnight afterwards. Lastly, he swears that Mr. *Keele* was employed and paid as well by *Clarkson* as himself; but it is quite manifest from Mr. *Keele's* evidence that he was employed and paid by *Kitson* alone.

But there is one allegation which is not controverted, and it appears to me to be extremely material in support of the plaintiff's case. The defendant swears that the treaty for this purchase was under discussion off and on for three months before the execution of this deed. Mr. *Keele's* evidence throws a good deal of light on that statement. He proves that he received instructions for the preparation of this deed two months before its execution; that he did prepare it accordingly, but that *Clarkson* subsequently refused to carry out

Judgment.

the arrangement, paid the expenses then incurred, and took away his title deeds. Mr. *Keele* states further, that all his subsequent instructions came from the defendant—and that from the time *Clarkson* took away his title deeds, he had no interview with him until he came to execute the deeds at the time and place fixed by *Kitson*. What these negotiations were which continued off and on for three months is not explained. This much we know, that *Clarkson*, who refused to carry out this arrangement two months before the execution of the deeds, was induced to change his mind within two weeks after he became an inmate of the defendant's house; but as to the steps by which that change was brought about, we have no information.

Now, I will not say that the testator was drawn into drink by the defendant, although the evidence affords much ground for the imputation; but I find an old man, enfeebled in mind and body, miserably addicted to intemperance, becoming an inmate in the defen-

1853.

Clarkson v. Kitson.

dant's tavern, where he was at least made to feel that the proposed agreement would procure for him an unlimited supply of that upon which alone he appears to have placed any value; and I find him shortly afterwards assenting to an arrangement which he had before repudiated, conveying his property for a greatly inadequate consideration, without the interposition of any friend, professional or otherwise, to warn him of the impending danger; and I am very clearly of opinion that a deed so advantageous to the testator, and executed under such circumstances, cannot be permitted to stand.

ESTEN, V. C.—I think the deed should be set aside with costs. An habitual drunkard, dependant, in all probability, upon the person in whose favour the disposition in question is made, for the gratification of his favourite propensity, executes a sale of his property for a consideration so grossly inadequate as scarcely to amount to anything substantial, and almost shews that he could not have been master of his faculties at the time. Judgment.

The answer gives no satisfactory account of the matter, and the defendant's evidence does not materially better the case.

The bill states a case of fraud, and the consideration is so grossly inadequate as to be scarcely anything. Several suspicious circumstances appear in the evidence tending to shew actual fraud.

SPRAGGE, V. C., concurred.

Declare that the indenture of the 15th day of June 1850, between *Francis Clarkson* the testator in the pleadings named, and *Alexander McPhee*, therein also named, and the defendant *John Kitson*, ought to be set aside—decree the same accordingly: refer it to the Master of this court to take an account of all sums of money received by Decree.

1853.

Clarkson v. Kitson.

the defendants or either of them, or by the said *Alexander McPhee*, or by any other person or persons, by either of their order or for their or either of their use, or which, without their wilful default or neglect, might have been received by them or either of them by way of rents and profits, or otherwise for or in respect of the premises in the pleadings mentioned; and also an account of what the said defendant *John Kitson* is entitled to for the maintenance of the said testator *Francis Clarkson*, at the rate mentioned in the said indenture, from the date of the said indenture to the date of the death of the said testator, and for monies properly laid out by him upon or in respect of the said premises. Order—the amount to which the said defendant *John Kitson* shall appear to be so entitled, shall be allowed to him by the said Master on taking the account of rents and profits aforesaid. Order — the said defendant *John Kitson* to pay over to the plaintiff the balance (if any) of such rents and profits within ten days after service upon him of this decree, and of the Master's report in pursuance hereof; and if the rents and profits aforesaid be insufficient to satisfy the said defendant *John Kitson* for the maintenance and expenditure aforesaid—Order, the said plaintiff to pay to the said defendant *John Kitson* such deficiency, within ten days after service upon him of this decree and of the Master's said report. Order—the said defendants to reconvey the premises comprised in the said indenture to the said plaintiff, or to whom he shall appoint, free, &c.

Decree.

Order—*Kitson* to pay plaintiff's costs of suit up to the hearing, including decree. Subsequent costs reserved until after Master's report.

ABRAHAM v. SHEPHERD.

Practice—County Courts.

A defendant on moving to dissolve an injunction issued from a county court, is not bound to have the proceedings returned to the Registrar, from the county court office.

March 5th, 1854.

This was a suit commenced in the County Court of the County of York, to restrain waste alleged to have been committed on lands of the plaintiff—and a motion was now made to dissolve the injunction so issued, by

Statement.

Mr. *Morphy* for the defendant.

Mr. *R. Cooper*, contra, objected that there was nothing before the court to warrant them taking cognizance of this matter—the claim and other papers still remaining on the files of the county court, which it was the duty of the party moving to have had returned to this court.

Argument.

The Court, however, thought that a defendant is

entitled to make this motion, without having the papers transmitted to this court; that was a duty incumbent on the plaintiff, who has been regularly served with notice of this application. 1854.

TAYLOR v. SHOFF.

Deed—Setting aside—Issues.

May 27th 1853, and Jan'ry 30th 1854.

The plaintiff filed a bill praying that a deed he had given one of the defendants should be set aside for fraud; and though he failed to prove the fraud as alleged, yet as the case appeared to be an extremely peculiar one and surrounded with many circumstances of suspicion, the court directed issues for the trial at law of the points in dispute.

The bill in this case was filed on the 13th of March 1851, by *Ephraim Taylor* against *Daniel Shoff* and *Simeon Morrill*, stating that the plaintiff was a colored man, wholly illiterate and unacquainted with the form or effect of legal instruments, and obliged in that respect to trust to the representations of those with whom he might have to deal; that the defendant *Shoff* was a shopkeeper in the neighbourhood of plaintiff, in whose honesty plaintiff had the utmost confidence; Statement. that on the 22nd day of July 1847, plaintiff became seized in fee of lot No. 2, on the north side of the London proof line in the township of Biddulph, by a conveyance of that date from *James Charles Brown* and *Frederick Stover*, which deed remained in the plaintiff's possession unregistered until about the end of the year 1849, when *Shoff* applied to the plaintiff for the loan of his deed for the purpose, as he said, of enabling him to make use of it as a justice of the peace in some way not understood by the plaintiff, and upon such use thereof as a justice of the peace that he would return it to the plaintiff; that plaintiff placing, as he did, the utmost confidence in the honesty of *Shoff* and the truthfulness of his representations, gave him the said deed; that, subsequently, *Shoff* called the plaintiff into his shop, and requested plaintiff to put his mark to a deed or paper writing then produced by

1854.

Taylor v. Shoff.

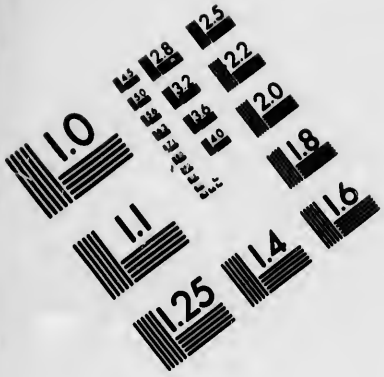
Shoff, and which he represented as necessary for the said magisterial purpose, and that, trusting as before stated to *Shoff's* honesty, the plaintiff did, as requested by *Shoff*, put his mark to such deed or paper writing; that upon this occasion two of *Shoff's* workmen, named *Utter* and *Groves* were present in the shop, and, as plaintiff believed, witnessed the plaintiff putting his mark to such deed, which, as the plaintiff afterwards and recently ascertained, was a conveyance by plaintiff to *Shoff* of plaintiff's said land; that in the month of January 1851, and then for the first time, plaintiff learned as the fact was that *Shoff*, having obtained possession of plaintiff's title deed and the deed from plaintiff to him, did in the month of April 1850, fraudulently convey or purport to convey the said land to the defendant *Morrill* by way of mortgage, payable in January 1851; that in that month *Morrill* commenced an action of ejectment on the mortgage against the plaintiff, who instructed an attorney to make an appearance and defence for plaintiff, but which such attorney neglected to do in proper time,—and *Morrill* thereupon obtained judgment by default, and issued a writ of possession thereon; that subsequently, and on the ninth of the said month of March, *Morrill*, accompanied by *James Daniel*, his attorney, and one *Philo Bennett*, came to plaintiff's house long after night had commenced, and insisted upon turning plaintiff with his wife and family out of the house and out of the said lot, by virtue of a sheriff's warrant, founded (as they alleged) on the said writ of possession; that plaintiff was completely taken by surprise by the said *Morrill*, *Daniels* and *Bennett*, and their said proceedings, and totally at a loss what to do with his wife and family about him; that it was then suggested by some one of them, the said *Morrill*, *Daniel* and *Bennett*, that plaintiff should acknowledge *Morrill* as landlord for three months, at the nominal rent of one shilling per month—and that upon giving such acknowledgment plaintiff, his wife and family, might retain pos-

Statement.

session under *Morrill;* that plaintiff, overwhelmed with surprise, and in order to avoid the plaintiff and his family being turned out of their home in the night time, assented to such suggestion—and thereupon *Daniel's* drew up a writing to the said effect, which plaintiff under the circumstances before s[illegible] dexecuted. 1854. Taylor v. Shoff.

That neither *Shoff*, nor any one for him, ever paid any consideration to plaintiff for the said lot; that from the time of the execution of the conveyance from plaintiff to *Shoff* until the said 6th of March, the plaintiff continued in the uninterrupted occupation of the said lot; that the conveyance to *Shoff* from plaintiff was never read over or explained to plaintiff, nor the contents thereof told or in any manner communicated to plaintiff; but, on the contrary, plaintiff was informed by *Shoff*, and the plaintiff believed, that the same was merely a paper necessary for the magisterial purposes of the said *Shoff*, and in no way a conveyance of plaintiff's interest in said land, being 100 acres with improvements thereon worth £400. The bill further charged that *Morrill* had notice of the possession and actual occupation of plaintiff, and had reason to believe, and did believe or suspect, before and at the time of the execution of the said mortgage, that the same belonged to plaintiff, or that plaintiff had some interest therein, and that the conveyance thereof to *Shoff* was obtained by fraud: that, under the circumstances, plaintiff was entitled to have deed and mortgage declared void, and to have same cancelled; or if it should appear that *Morrill* had not notice, then that plaintiff should be allowed to redeem him on payment of what was justly due to him on foot of said mortgage. Statement.

The prayer of the bill was, that the conveyance from plaintiff to *Shoff* might be declared to have been obtained by fraud and without consideration, and be declared void; and that *Morrill* might be declared to



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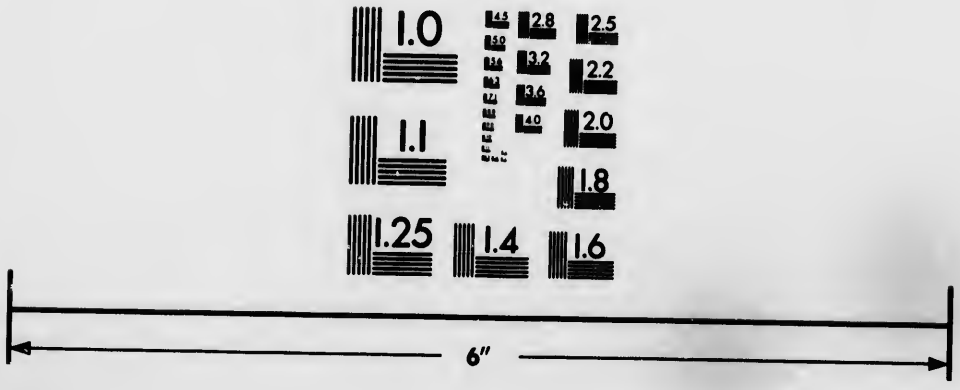

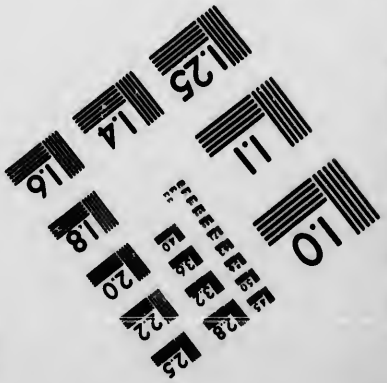

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1854.

Taylor v. Shoff.

be affected with notice of the fraud and want of consideration, and the said mortgage declared void, and that the said conveyance and mortgage might be delivered up to be cancelled; or if it should appear that *Morrill* had not notice, and that he must be taken and deemed to be a purchaser for value without notice, then that plaintiff might be allowed to redeem said mortgage on payment of what was due: and for further relief.

Statement.

Shoff, by his answer, alleged that the purchase money and interest paid by the plaintiff for the lot of land in question were paid with money of *Shoff*, by him paid to the plaintiff for the purpose of paying the same for the said land, in pursuance of an agreement between him and the plaintiff, (the plaintiff having some years before the making of such agreement agreed for the purchase of the westerly fifty acres of the lot in question, but that the plaintiff informed *Shoff* that he had paid nothing thereon,) that the plaintiff should purchase the easterly half of the said lot for *Shoff*, and immediately after such purchase assign over the whole lot to him; and that *Shoff* should give (and he accordingly gave) the plaintiff the money to pay the purchase money and interest due by the plaintiff for the westerly half and the purchase money for the other half; and that the plaintiff should for his interest in the lot receive (and the plaintiff did accordingly receive) fifteen pounds from *Shoff*, and be permitted (and he was accordingly permitted) by *Shoff* to occupy the premises, free of rent, until the fall of the year 1850; that shortly after *Shoff* had given and paid the plaintiff the monies which *Shoff* was to give and pay the plaintiff as aforesaid, the plaintiff represented to him that he had paid the same over to the vendors of the said property and got his deed, but that he had left it in the town of London for the purpose of its being proved and recorded, and he did thereupon execute a deed of the lot to *Shoff*; that

1854.

Taylor v. Shoff.

Shoff afterwards found that the plaintiff had untruly stated that he had obtained a deed of the lot, and in fact the deed to the plaintiff dated the twenty-second of July 1847, was not signed by *Stover*, one of the two vendors, until the year 1848; that immediately that *Shoff* learned that the execution of the said deed had been completed, the plaintiff, at the request of *Shoff*, executed another deed of the said lot to *Shoff*, and the first deed executed to *Shoff* as aforesaid was thereupon returned to the plaintiff, and by him destroyed; that the plaintiff executed the said deed in pursuance of the said agreement with *Shoff*, and under the circumstances appearing in his answer, and not otherwise; that the same was read over and explained to the plaintiff, and understood by him before being so executed; that there is no ground whatever for the statement in the said bill contained as to the object for which or circumstances under which the said deed was executed; that in the fall of the year 1850 the plaintiff requested *Shoff's* permission to remain in possession until the next spring, to which *Shoff* consented; that the plaintiff, then setting up a fraudulent claim to the same and refusing to give up possession, the action of ejectment was brought, which is referred to in the plaintiff's bill, and at this period for the first time, so far as *Shoff* was aware, the plaintiff set up the pretended title to the said lot which he sets up by the bill; that the plaintiff, after the execution of the said deed to *Shoff* and before the execution of the mortgage in the bill mentioned, admitted to one *Philo Bennett*, the agent of the mortgagee, that the plaintiff had no claim on the said lot, that he had given a deed of it to *Shoff*, and that he had also given a previous deed of it, which he the plaintiff had destroyed, and *Shoff* insisted that the plaintiff had a title or claim on the said lot.

Statement.

Morrill, by his answer, denied all notice of plaintiff's claim, and the misconduct charged in the bill against him.

1854. Taylor v. Shoff.

Evidence was gone into, and the cause now came on for hearing.

Mr. *McDonald* for plaintiff.

Mr. *Mowat* for defendant *Shoff*, referred to *Nedley* v. *Nedley* (*a*), *Curzon* v. *Belworthy* (*b*).

Statement.

Mr. *R. Cooper* for *Morrill*.

THE CHANCELLOR.—The circumstances of this case are very peculiar. The plaintiff states that he is an illiterate person, and quite unused to the managment of business; that the defendant, who is a shopeeper in his neighbourhood, induced him to execute a conveyance of the premises in question, of which he was then seized in fee, for some temporary purpose—some magisterial purpose, as the bill states it,—upon the assurance that such document would not be used to his prejudice; that the defendant never purchased the premises, or paid any consideration, but on the contrary suffered the plaintiff to remain in undisturbed possession for several years, notwithstanding all which he had lately set up a claim to be the owner in fee, and had mortgaged the property to the defendant *Morrill;* and the plaintiff prays, in the alternative, that the conveyance may be set aside as fraudulent and void, or that he may be let in to redeem.

Judgment.

That the plaintiff is an illiterate person cannot be disputed, and his total incompetence to manage any matter of business is clearly evinced not only by direct testimony, but more satisfactorily perhaps, by instances of his conduct stated incidentally in *Paul's* evidence. But the plaintiff has failed to establish that the deed was executed for any such purpose as that stated in the bill. The subscribing witness negatives

(*a*) 5 DeG. & S. 377. (*b*) 2 L. Ca. 742.

those allegations to some extent, and proves the execution in the usual way. I do not say sufficiently, for this is a very unusual case, and I am not prepared to hold that the evidence ought to be considered sufficient. When an illiterate person is permitted to execute a deed, affecting his whole property, without the intervention of any friend or professional adviser, it may not be unreasonable, perhaps, to require further evidence than has been adduced here, and that has been so held, I apprehend, at least with respect to voluntary conveyances (*a*). The execution is proved, however, in the ordinary way, but the suscribing witness add that no money passed in his presence. Nonpayment of the alleged consideration is a fundamental fact in the plaintiff's case; and, for the purpose of displacing it, I presume, the defendant furnishes us with a narrative of the whole transaction, upon which much appears to me to turn. He says: "That the purchase money and interest paid by the plaintiff for the lot of land in question in this cause, were paid for with the money of this defendant by him paid to the plaintiff for the purpose of paying the same for the said land, in pursuance of an agreement between this defendant and the said plaintiff (the plaintiff having some years before the making of such agreement agreed for the purchase of the westerly fifty acres of the lot in question, but the plaintiff informed this defendant that he had paid nothing thereon,) that the plaintiff should purchase the easterly half of the said lot for this defendant, and immediately after such purchase assign over the whole lot to this defendant, and that this defendant should give (and this defendant accordingly gave) the plaintiff the money to pay the purchase money and interest due by the plaintiff for the westerly half and the purchase money for the other half; and that the plaintiff should, for his interest

Judgment.

(*a*) Price v. Price, 1 D. McN. & G. 308; Hoghton v. Hoghton, 15 Beav. 310.

1854. Taylor v. Shoff. in the lot, receive (and the plaintiff did accordingly receive) fifteen pounds from this defendant, and be permitted (and he was accordingly permitted) by this defendant to occupy the premises free of rent until the fall of the year 1850."

Now, it must be admitted, I think, that this statement of the transaction is extremely unsatisfactory. With respect to the date of the alleged agreement—the amount paid—and the time at which it was paid, the answer is altogether silent. Dates and sums are carefully avoided. The difficulty of meeting so indefinite a statement must be obvious.

But, upon the evidence, the matter is involved in still greater obscurity. No receipt has been produced, and no witness has been called to prove either the alleged agreement or the supposed payment. Had any such Judgment. evidence existed it would have been adduced, I suppose, or some reason would have been given for its nonproduction. But no such evidence has been adduced, and it is to be inferred, I suppose, that none such exists. Now, the sum paid must have been upwards of £70, and, before we can adopt the statement in the answer, we must believe that the defendant, a person conversant with business, loaned the large amount to a poor illiterate person, without requiring any receipt, and in the absence of any witness to prove either this amount paid, or the purpose of the payment. This statement, sufficiently improbable in itself, becomes almost incredible when we consider the ordinary mode of dealing between these parties. We find them settling their accounts in January 1847, and again in February 1849; and on both occasions formal receipts are passed, although the amounts involved were very trifling. In January the amount was 10*s.*; and in the settlement of February the defendant acknowledges to have received from the plaintiff a promissory note for £1 14*s.* 0½d. in

full of his account. So that men accustomed to deal with such scrupulous caution in their most trifling concerns are described as transacting this, the only important matter in which we find them engaged, without the slightest regard to the ordinary rules of prudence.

But when was this large sum paid? Certainly not previous to January 1847, if *Paul* is to be believed. Now the deed was executed in July of that year; and in the interval between these periods we have no less than three receipts, for small sums paid by the plaintiff to the defendant, but not a line to evidence the existence of this important contract, or the payment of this large amount.

Again, *Paul* seems to have been intimately acquainted with the plaintiff's affairs. He was constantly consulted. He paid the purchase money to the vendors and obtained the deed. And yet he had no intimation of the supposed sale to *Shoff*. On the contrary, he points out the efforts made by the plaintiff to raise the purchase money—and the witness informs us that he himself lent a sum of about £4 to make up the required amount. All this evidence is very inconsistent with the defendant's statement.

Judgment.

Another important link in the plaintiff's case is his continued possession of the property until the spring of 1851, notwithstanding this supposed sale in 1847. That, the defendant asserts, was the result of agreement. It was certainly a most unusual agreement; and there is not a single particle of evidence in support of it. On the contrary, there are many circumstances with which it is quite inconsistent. Why the plaintiff should have been allowed to continue, for years, in possession, not only of the property sold by him to the defendant, but also of property purchased by the defendant himself, and paid for with his money, has not been at all explained.

1854.

Taylor v. Shoff.

In considering how far we can rely upon the statement of the defendant, so improbable in itself, and so little supported by evidence, it becomes very material to enquire when this claim was first advanced, and how far the defendant has been consistent in the assertion of it. *Workman*, a witness examined for the plaintiff, says that he had occasion to make inquiry of *Shoff* as to the plaintiff's circumstances during the summer of the year 1850,—and that *Shoff's* reply was, that "Taylor was good, having a deed of his farm." That is, of course, quite inconsistent with the case made by the answer. But the most important evidence upon this subject is furnished by the defendant himself. His first witness is *Philo Bennett;* he says: "Subsequent to the execution of the said mortgage, the account that *Daniel Shoff* gave me of the manner in which he got the lot was this, viz.: that there was a mill privilege either on or connected with the lot, which he had bought from the plaintiff, and that he had paid the plaintiff a sum of money for it; that he *Shoff* had entertained some fears of not getting the title to this mill privilege, and in order to secure the title that he *Shoff* advanced the money to the plaintiff to pay for the land, and had taken the title for the whole of the land now in dispute; and that he *Shoff* had waited upon *Taylor*, and that *Taylor* had never paid him for the place." Now, this is not evidence of a loose casual conversation, with a person having no connection with the estate, depending upon dubious testimony. The statement here is explicit beyond the possibility of mistake; it was made to a party connected with the estate in point of interest, and the veracity of the evidence must be considered, I presume, as out of question, for it comes from a witness produced by the defendant himself; and it is difficult to see how he can escape from the conclusion that the claim then set up is quite inconsistent with that advanced in the present suit.

Judgment.

1854.

Taylor v. Shoff

Again, *Waterman*, another of the defendant's witnesses, says: "I have often talked over with Mr. *Shoff* the way he got the land, and he told me that he held these monies in hand to assist to pay for the land; that *Taylor* had no money to pay for his fifty acres, and he was obliged to assist him to pay for that in order to get a deed from Messrs. *Stover* and *Brown* for the whole." Here then we have two versions of the transaction, both coming from witnesses produced by the defendant himself, and both materially differing from that set up by the defendant upon the pleadings in the cause. Lastly, the deed under which the defendant claims has not been produced, and its nonproduction has not been accounted for.

Still, I am not satisfied that the circumstances to which I have been adverting are sufficient to justify a decree in the plaintiff's favour. The defendant was not examined, although that, in my opinion, would have materially assisted our decision; and one easily perceives how important the transactions of the parties after 1847, and their subsequent dealings with this property, might become in connection with such an examination. I am not satisfied that the evidence has been exhausted. But it is quite clear, I think, that, with such evidence before us, we cannot dismiss the plaintiff's bill. Justice may be done, I hope, by directing the parties to proceed to trial at the next London assizes upon certain issues to be settled by the court.

Judgment.

The case fails, I think, as against *Morrill*; but he submits to be redeemed. No decision as to him can be pronounced, therefore, until the necessary issues be tried.

ESTEN, V. C.—It is quite clear that the plaintiff has executed a conveyance of the property in question to the defendant *Shoff*. His bill asserts and a witness

1854.

Taylor v. Shoff.

proves it. It is desirable that the instrument should be inspected; but assuming it to present no circumstances of suspicion on its face, the plaintiff must of course remove it out of his way. *Prima facie*, it is his deliberate and voluntary act, and the *onus* is upon him to nullify it. This he attempts to effect in his bill by stating that the defendant *Shoff* first obtained a loan of his purchase deed, to enable him to use it in some way, not understood by the plaintiff, as a justice of the peace, and afterwards procured his signature to a paper for the same purpose, assuring him at the same time that it was not a conveyance of his land although in fact it was. Of course it is implied in this representation that no consideration was paid for this conveyance, and it is also expressly asserted. There is no doubt that if this statement is correct, the plaintiff must have relief at all events against the defendant *Shoff*. It is true that the case represented by it pre-supposes a very great and unusual degree of simplicity and ignorance on the part of the plaintiff, It may, nevertheless, be regarded as a possible one. That it actually happened, however, there is no evidence at all. The plaintiff has offered no proof upon the point, and the evidence adduced by the defendant respecting it, although by no means conclusive, tends to show that nothing of the sort occurred. The witness *Utter*, who is named in the bill as having been present on the occasion, states that the deed was read over to the plaintiff in his presence, that the plaintiff acknowledged his signature, that nothing was said about returning it or about any magisterial purpose. If the matter had rested here; if the defendant had said nothing, or had merely called upon the plaintiff to prove his case, and if the plaintiff had entered into no further evidence, it would seem that his bill must have been dismissed with costs. Had the plaintiff gone into the evidence which he has adduced, without any explicit statement by the defendant *Shoff*, it would not appear that anything material

Judgment.

would have been accomplished. His witnesses are *Workmen*, *Hodgins* and *Paul*. *Hodgins'* evidence has no reference to this part of the case. *Workman's* evidence would have been quite insufficient of itself, being of words spoken by the defendant *Shoff* nearly two years before for a different purpose, and it being extremely improbable that he would have used such expressions in the sense in which alone it would be desired by the plaintiff that they should be understood. *Paul's* evidence is, no doubt, of an important character, and seems altogether worthy of credit; but, apart from the statement of the case made by the defendant *Shoff*, would appear to be insufficient to entitle the plaintiff to relief, although sufficient to excite suspicion. The defendant *Shoff's* statement, however, of the manner in which he became owner of the property is an important feature of the case: he says that an agreement was made between him and the plaintiff respecting the land—the plaintiff having some years previous to the date of the agreement, purchased the westerly fifty acres, but having paid nothing upon that purchase. I think the answer means that the plaintiff having purchased the westerly fifty acres from *Brown* and *Stover*, the agreement was that the plaintiff should transfer his interest in the westerly fifty acres to the defendant for £15, which the answer alleges was paid, and should purchase the easterly fifty acres for the defendant, and that the defendant should furnish the plaintiff with means to pay the purchase money and interest due on the westerly fifty acres, and the money for the easterly fifty acres, and that the plaintiff immediately after the purchase should be completed should transfer the whole lot to the defendant, but should remain in the possession or occupation of it free of rent until the autumn of 1850. The answer proceeds to state that the defendant furnished to the plaintiff the money required to effect the purchase, and that shortly afterwards the plaintiff informed the defendant that he had paid the purchase money and received the deed, and

1854.

Taylor v. Shoff.

Judgment.

1854.

Taylor v. Shoff.

executed a conveyance of the lot to the defendant, but that the deed to the plaintiff had not then received the execution of *Stover;* and that so soon as the defendant was informed that this had been obtained, the plaintiff at his request executed a fresh deed to the defendant, and the former one was returned to the plaintiff, who destroyed it. Now there is much in *Paul's* evidence which is inconsistent with this statement. His evidence shews that the plaintiff purchased the whole lot as long ago as 1838; whereas the statement in the answer imports that he had never purchased the easterly half on his own account, but in the first instance for the defendant, and paid cash for it. The answer imports that the first dealing between the plaintiff and defendant concerning the property occurred shortly before the 22nd July 1847; whereas *Paul's* evidence shews that an agreement had been made between them before the purchase by the plaintiff of the whole lot in 1838 that he should purchase the easterly half for the defendant, who should furnish him with the money to pay for it; that on the 3rd of January 1847, when a final settlement took place between the parties, this agreement was the subject of conversation, and each complained that it had been violated by the other, and it was deliberately rescinded by the plaintiff, who thenceforth determined to purchase the whole lot for his own use. The answer states that the defendant furnished the plaintiff with the money to pay for the whole lot, without, however, stating what the sum was, an instance of reserve which the defendant seems to have practised on a previous occasion towards the witness *Paul;* who gives evidence strongly tending to the conclusion that the plaintiff paid the purchase money for the lot out of his own means; for he says he believes the plaintiff disposed of two cows worth $15 each, just before the payment; that he himself borrowed $17 and paid it to him towards raising the required amount, and that the plaintiff had previously paid him $10, which he had just received from *Shoff*

Judgment.

for the same purpose. I do not say that the evidence of *Paul* is absolutely inconsistent with the answer, but it shakes its credit very materially. Thus the cardinal point in the defendant's case was the payment of the money to the plaintiff,—namely, the £5 for the purchase of his interest,—and the purchase money and interest to be paid to *Brown* and *Stover*; but he has not proved this in any way whatever, although it should be a fact capable of the easiest proof, as it is almost incredible that he should not only have paid the plaintiff £15 for the purchase of his interest, but also have intrusted him with so considerable a sum as was required for the completion of the purchase, without obtaining some voucher in return. Furthermore, it is extremely improbable that the plaintiff should have parted with his interest in the land for so small a sum as £15. *Paul* says, the land with the improvements is now worth £400. *Macklin*, the defendant's witness, says that the land, without the improvements, is now worth £250. In 1847—before which, according to the defendant's story, we must presume all the improvements to have been made—the land alone could not have been worth less than £150; that is to say, £75 for the westerly half, and estimating the improvements at £100, we have £175, for the value of the westerly half; from that would have to be deducted £30 or thereabouts, for the purchase money and interest; so that the plaintiff's interest in 1847 may fairly be reckoned worth £145, although, if the defendant's story be true, he must have parted with it for £15—not more than he probably paid to *Butler* for his right and much less than he must have expended in making improvements. Then, it is a somewhat singular arrangement that the plaintiff, although the defendant had paid him for his interest and furnished him with the principal and interest due on the westerly half, and the purchase money for the easterly half, should remain in possession not only of the westerly half but also of the easterly half, in which he had never had any

1854.

Taylor v. Shoff.

Judgment

1854.

Taylor v. Shoff.

interest, for three years without rent—the defendant all this time receiving no return for his money actually expended. If we turn to the evidence of the defendant *Shoff*, we shall not find his case cleared of the suspicion in which it had been involved. *Sutton's* and *Stanley's* evidence is entitled to no attention: *Mary Ann Morgan's* evidence seems worthy of credit; she says that the plaintiff told her he was getting the land for *Shoff*. This was while she was living on the land, and before the plaintiff got his deed; she says she settled on the land in 1830, and lived some years on it. This conversation must have occurred several years before 1847, and before the agreement alleged in the answer; but according to the defendant's statement, the plaintiff was not purchasing the land for him before this agreement was entered into. The evidence, therefore, does not agree with the defendant's story, but does with the evidence of *Paul*, if we suppose the conversation to refer to the easterly half. The witness uses the expression "the land," which she concluded to mean the whole 100 acres, but might well be mistaken in this particular. According to *Paul's* evidence, the plaintiff was in fact purchasing the easterly half for the defendant from 1838, but this agreement was evidently abandoned in 1847, and the defendant does not rely upon it. The witness adds, what also accords strongly with *Paul's* evidence, that the plaintiff afterwards told her that no white man should have the land. *Waterman's* evidence points to the execution of a prior deed by the plaintiff to *Shoff* of the land in question, and so far confirms the defendant's statement, and throws doubt upon the plaintiff's. Part of his evidence, however, is inconsistent with the defendant's statement, as it imports that the westerly fifty acres belonged to the plaintiff. *Utter's* evidence attaches much doubt to the plaintiff's statement. He says that the deed of 1849, to which he was a witness, was read over to the plaintiff in his presence. *Bennett's* evidence, as given for both defendants, points to the execution of a prior

Judgment.

deed by the plaintiff, and so far, if worthy of belief, discredits the plaintiff's statement: he speaks at the same time of a conversation with *Shoff*, after April 1850, in which he gives him a very different account of the manner in which he acquired the property from that contained in the answer. Upon the whole, as between the plaintiff and the defendant *Shoff* in this extraordinary and suspicious suit, I think it would be just to direct further inquiry, either by means of the *viva voce* examination of witnesses and perhaps of the parties, or by means of an issue, whether the deed in question was executed *bona fide*, and upon g... consideration, or was obtained by practice, deception or fraud, reserving costs. There is no evidence of notice on the part of *Morrill* of the plaintiff's claim, when he received his mortgage. It would not appear that *Morrill*, or *Bennett* his agent, knew that the plaintiff was in possession; nor does it seem that a mortgagee is bound to ascertain who is in possession before he accepts his mortgage. The denial of notice is sufficient, so far as the defendant himself is concerned; but he does not deny notice by an agent, if that is necessary.

Judgment.

It would seem that he ought to prove his debt due from *Shoff* to himself, and forming the consideration of the mortgage, but he should have an opportunity of offering this proof.

It should be seen also that he has the legal estate. I do not think the plaintiff should have any further opportunity of establishing notice against *Morrill*.

SPRAGGE, V. C., concurred.

Decree.

The court directed the plaintiff and defendant *Shoff* to proceed to the trial of the following issues:

1st, Wether before the execution of any deed of the property in queston by *Brown* and *Stover*, or either of them, to the plaintiff, it

1854.
Taylor v. Shoff.

was agreed between the plaintiff and defendant that the plaintiff should purchase the easterly half thereof for the defendant, and immediately after such purchase assign over the whole lot to the defendant; and that the defendant should give the plaintiff money to pay the purchase money and interest due by the plaintiff for the westerly half, and the purchase money for the other half; and that the plaintiff should, for his interest in the lot, receive £15 from the defendant, and be permitted by the defendant to occupy the premises free of rent until the fall of the year 1850. The jury to find the date of such agreement.

Order.

2nd, Whether, upon the occasion of such agreement or about that time, the defendant paid to the plaintiff the sum of £15 for the purchase of his interest in the west half of the lot, and gave to him the money to pay the purchase money and interest due from the plaintiff on the said west half to *Brown* and *Stover*, and the purchase money for the east half of the lot, in order to enable the plaintiff to complete the purchase of the whole lot for him the said defendant. The jury to find the amount, if any, so paid.

3rd, Whether the deed made by the plaintiff to the defendant was executed for valuable consideration paid by the defendant to the plaintiff. The defendant to admit that no consideration was paid at the time of its execution, and not to set up the receipts in the body or at foot or on back of the deed, or either of such receipts. The jury to state the amount and nature of the consideration, and when and how paid, and any special circumstances.

Defendant to be plaintiff and plaintiff defendant in all the issues.

WYLIE v. WYLIE.

Partnership—Lands.

May 6th and Sept. 23rd.

Two merchants entered into partnership (*inter alia*) in the buying and selling of lands; and accordingly bought lands with partnership moneys, some of which were conveyed to each partner, and some to both jointly. *Held*, that, as between the real and personal representative of one partner who died. the lands so bought were personal estate.

Statement.

This was an amicable suit, the bill in which had been filed by *James Hamilton Wylie* against *James Wylie*, *James Wylie* the younger, and *William Wylie*, setting forth that the honorable *James Wylie*, the father of the plaintiff, and *William Gillies Wylie* his son (now deceased) had carried on business in copartnership at Ramsay, from the 8th day of June 1843 up to the death of the said *William Gillies Wylie*, on the 22nd of January 1851, in the trade or business of buying and selling land, grain and other things, under certain articles of copartnership.

That at the decease of *W. G. Wylie* there were left

surviving him his widow, *James Wylie* his eldest son and heir-at-law, *Margaret Wylie*, since deceased at the age of four years, and *William Wylie*—the said *James* and *William* being of the age of five and three years respectively, being also two of the defendants. 1853. Wylie v. Wylie.

By the will of *W. G. Wylie* certain legacies were bequeathed, after declaring his intention to devise and dispose of his worldly goods and property which God had bestowed on him; and afterwards devised and bequeathed in the words following—namely: "I hereby devise, and as my last will bequeath, the remainder of my substance and effects to my children born or that may yet be born, to be equally divided among them, unless the remainder shall exceed the sum of £3,000," —in that event, the testator made a certain charitable bequest and appointed certain persons his executors one of whom was the plaintiff, who alone had proved the will.

Statement.

The bill alleged that, in the course of such partnership business, the firm became the owners in fee simple of large quantities of real estate, which were purchased with partnership means and for the purpose of the partnership business; that the legal estate in certain of such lands at the time of the testator's death was vested in the said *James Wylie* and the said testator as tenants in common in fee simple, and in other portions of the said land in the testator personally—a list or schedule of such portions respectively being appended to the bill,—the bill alleging that the lands so conveyed to the said *W. G. Wylie* were held by him in trust for and as the property of the partnership, and that all the lands were partnership property, having been purchased with the means of the firm and for partnership purposes: that at the time of the death of said *W. G. Wylie* the firm had contracted for the sale of said lands to certain persons named in the said schedules: that in the course of the partnership

1853. Wylie. v. Wylie.

business certain securities upon lands had been taken in the form of absolute conveyances to the partners as tenants in common in fee simple, bonds for reconveyances having been executed by the partners. The bill charged that plaintiff as executor was entitled to have the legal estate, vested in the testator of lands conveyed to the two jointly, conveyed to him; and as to those conveyed to testator solely, that they should be conveyed to plaintiff and the surviving partner, the said *James Wylie*.

The prayer of the bill was, that the rights and interests of all parties under the will might be declared, and that *James Wylie* the younger, as heir-at-law of the testator, and the said *William Wylie* (if necessary) should be directed to convey, or a person appointed to convey the legal estate vested in the said *William G. Wylie* to the said plaintiff, and to the said plaintiff and *James Wylie* respectively.

Statement.

The defendants answered: *James Wylie* admitted the truth of the several allegations in the plaintiff's bill: the infant defendants submitted their rights to the protection of the Court.

Evidence was taken in the cause, and the statements of the bill were fully borne out by it.

Mr. *Mowat* for the plaintiff.

Argument.

Mr. *Strong* for the defendants.

Broom v. *Broom* (*a*), *Townsend* v. *DeVaynes* (*b*), *Bell* v. *Phyn* (*c*), *Cookson* v. *Cookson* (*d*), were cited.

Sept. 23rd.

The judgment of the court was now delivered by

Judgment.

THE CHANCELLOR.—*James Wylie*, a defendant in this suit, and *William G. Wylie* his son, the testator

(*a*) 3 M. & K. 444. (*b*) Mont. Part. 97 app.
(*c*) 7 Ves. 453. (*d*) 8 Sim. 529.

1853.

Wylie v. Wylie.

in the pleadings mentioned, entered into copartnership in the month of June 1843, and so continued until the death of the testator in the month of January 1851. Articles of copartnership were duly executed, which provide that the parties should become copartners, amongst other things, "in the buying and selling of lands;" and, from the constant reference to this subject in the subsequent clauses of the instrument, it appears to have constituted a principal branch of their trade. In the course of this business numerous purchases of real estate were made with partnership funds, and the conveyances was made sometimes to the testator, sometimes to the partners jointly. Contracts for the sale of all this real estate, with the exception of one parcel, were entered into in the life-time of the testator, and the purchase monies as received were entered to the credit of the partners in the partnership books.

This bill is filed by the personal representative of *William G. Wylie* against *James Wylie*, the surviving partner, and the devisees under the will of the testator, who are infants. The plaintiff submits that the infant devisees are mere trustees, and should be ordered to convey the legal estate to them under the provisions of the statutes 11 Geo. IV. and 1 Wm. IV. chap. 60. He insists that all the real estate was converted into personal property, either by the contracts of sale, or under the articles of copartnership, and he submits that in either event the infants are trustees for him and should be ordered to convey accordingly. Mr. *Strong*, on behalf of the infants, submits that a decree as to all, except the unsold parcel, would be for the benefit of the infants. Judgment.

It does not appear to us that there is any foundation for a decree on the first ground. The question of conversion, as between the real and personal representative of the testator, depends, in that view, upon the validity of the contracts of sale at the time of his

1853. Wylie v. Wylie.

death; but neither have the contracts been proved, nor are the purchasers parties to the suit; and, though that were otherwise, it would be difficult to discover any ground for the decree that is asked. In that event the infant devisees would be trustees for the purchasers, and upon a proper case for that purpose a conveyance would be ordered, but we see no ground for ordering the legal estate to be conveyed to the executors of the testator.

Judgment.

Upon the other ground, however, it appears to us that a decree may be made which will accomplish the object of all parties, though not in the precise way contemplated. The question whether real estate involved in a partnership concern is to be regarded as retaining its original character, or as having been converted into personalty, as between the real and personal representative of a deceased partner, is still subject to some degree of controversy. We have not been referred to any authority on the subject later than *Houghton* v. *Houghton* (*a*). That case turned upon special circumstances, and will not be considered, perhaps, a very material authority upon the present question; but the two preceding cases before the same learned judge (*b*), do appear to limit to some extent the doctrine attributed to Sir *John Leach*, in *Phillips* v. *Phillips* (*c*), and *Broom* v. *Broom* (*d*). Mr. *Bisset* (*e*) suggests indeed that the judgment of the Master of the Rolls in *Phillips* v. *Phillips* has been misunderstood, and it may be found that the cases are not in reality contradictory. But, however that point may be finally decided, all the recent authorities warrant the proposition that real estate purchased with partnership monies, and used for partnership purposes, is to be

(*a*) 11 Sim. 491.

(*b*) Rahdall v. Randall, 7 Sim. 271; Cookson v. Cookson, 8 Sim. 529.

(*c*) 1 M. & K. 649. (*d*) 3 M. & K. 443.

(*e*) Bisset on partners, 50, and see Collyer on Partnership (Am. Ed.) page 131.

regarded, *prima facie*, as converted into personalty between the real and personal representative of a deceased partner. Now the present case goes much beyond that, not only was the real estate purchased with partnership monies for partnership purposes, but the sole purpose of these purchases was that the land might be sold as part of the stock in trade of the concern, an arrangement which amounts in effect to a contract that the lands so purchased are to be treated as personalty. *Dale* v. *Hamilton* (*a*), which was mentioned in the argument, gave rise to a question of considerable importance; for there was no written contract in that case, and it became necessary, consequently, to determine whether the title to real estate could be affected by a parol contract for partnership consistently with the Statute of Frauds. But no such difficulty exists here, for the written instrument constitutes these parties partners as to this land, and provides that it is to be treated as personal estate.

Judgment.

We are of opinion, therefore, that the devisees of *William G. Wylie* are trustees under the statute as to all lands purchased in pursuance of these articles, the legal estate in which was vested in their testator, and that they may be ordered to convey to a trustee for the partnership; and we think that the Court is authorized to make such a decree under the provisions of the orders of May 1850, without taking upon itself the general administration of this estate.

(*a*) 5 Hare 369.

1853.

LAWLOR v. MURCHISON.

May 19th, and September 23rd

A testator devised the property in question to his wife, who conveyed it to T. D. in fee. Afterwards T. D. and S. his wife joined in a deed of the property, for valuable consideration, to J. M. and his wife, reciting that she was entitled to the property as co-heiress of the testator. Subsequently J. M. and wife conveyed to a trustee for S. The plaintiff claimed under S., and notwithstanding the erroneous recital, the Court held her entitled to a conveyance.

Statement.

The bill in this cause was filed by *Mary Lawlor* against *John Murchison* and *Richard Duncan Murchison*, setting forth that on the 31st of May 1822 *John Murchison* and *Frances* his wife, or one of them, being seized in fee, in consideration of £100 and of natural love and affection towards *Sarah Deary*, sister of the said *Frances*, conveyed certain premises in the city of Toronto, being part of lot number 22 on the north side of King street, to *Dunkin Murchison* in fee, in trust to receive and pay rents, &c., to the separate use of *Sarah Deary* during her life, remainder to convey to such person as she should appoint: in default, to her right heirs.

That by deed of 13th January 1823, *Sarah Deary* appointed thirty-nine feet of the said premises (the land in question) to her husband *Thomas Deary* for life, remainder to her son *William Bowkett* in fee, after death of *Sarah Deary*. On the 16th of August 1832, *William Bowkett* by his will devised all his real and personal estate to his wife *Agnes Bowkett*, and died the same day; that *Sarah Deary* on the same day, after the death of *William Bowkett*, also departed this life; that *Thomas Deary* was in possession of the premises in question to the time of his death. The bill then set forth divers indentures, under which the plaintiff claimed the estate of *William Bowkett* as well as under his will. That on the 25th of February 1845, a deed was executed between the said *Duncan Murchison* of the first part, and one *John Joseph Murchison* of the second part, whereby after reciting at full length

the deed of the 31st of May 1822; that *Thomas* and *Sarah Deary* were dead, and that said *John Joseph Murchison* was the heir-at-law of the said *Sarah Deary*, *Duncan Murchison* conveyed to him in fee. The bill charged that this deed was a breach of trust on the part of the said *Duncan Murchison*.

On the 1st of July 1848, *John Joseph Murchison* died, leaving the defendant *John Murchison* his father and *Richard Duncan Murchison* his eldest brother of the full blood surviving: that *John Murchison* is in possession, claiming title as heir-at-law of his son, but that *Richard D. Murchison* is, or claims to be, entitled thereto as heir-at-law of the said *John Joseph Murchison*.

The bill then alleged applications to *John Murchison* to make a conveyance to plaintiff of the premises in fee, but which he refused to comply with, pretending that the said *John Murchison* and *Frances* his wife had no title to or interest in the said parcel of land at the time of the execution of the deed of 31st of May 1822; the bill charged the contrary, and that defendant was estopped by said deed from affirming what he so pretended, and further, that the said land was granted by the Crown to one *Joseph Hunt*; that *Elizabeth Hunt*, being devisee of *Joseph*, conveyed the premises in fee to *Thomas Deary* in fee on the 25th of April 1815. Statement.

That the said *Sarah Deary* and *Francis Murchison* were the only children and co-heiresses of *Joseph Hunt*, and that the said *Thomas Deary* and *Sarah* his wife, by deed of 16th of March 1820 made between them of the one part and the said *John Murchison* and *Frances* of the other part, for valuable consideration, conveyed the premises therein mentioned, and amongst them, the lands in question in this suit, to the said *John Murchison* and *Frances* his wife in fee, and that by such means they became absolute owners and

1853. Lawlor v. Murchison.

entitled to make the conveyance before mentioned of 31st May 1822. The bill alleges pretences on the part of defendants, that *Elizabeth Hunt* did not part with the lands in question in her life time, and by her will devised the same to *Sarah Deary* in fee; but charged that the defendants were estopped by deeds of 16th of March 1820 and 31st of May 1822. The bill prayed a declaration that defendants, or one of them, might be declared trustees or trustee for plaintiff, and ordered to convey to her the said premises.

Statement.

The defendants disputed the will of *William Bowkett*, on the ground that he was not of sound mind; they admitted that *Thomas Deary* was in possession up to the time of his death; the grant from the Crown to *Joseph Hunt*, and that *Elizabeth Hunt* was his devisee; also that she conveyed to *Thomas Deary* in fee, but alleged that such conveyance was a fraud upon creditors and made without consideration, and also that *Sarah Deary* and *Francis Murchison* were the only children and co-heiresses of *Joseph Hunt*.

The cause having been put at issue, evidence was taken therein, chiefly with a view of impeaching the will of *William Bowkett;* but this having failed, the argument turned upon the effect of the deeds stated in the pleadings.

Argument.

Mr. *Mowat* for the plaintiff.

Mr. *Turner* and Mr. *Strong* for the defendants.

Young v. *Raincock* (*a*), *Stroughill* v. *Buck* (*b*), Doe *Christmas* v. *Oliver* (*c*), *Bensley* v. *Burdon* (*d*), and 3 *Sugden's* Ven. & Pur. 425 (10th Ed.), were referred to.

(*a*) 13 Jur. 539. (*b*) 14 Jur. 741.
(*c*) 5 M. & Ry. 202. (*d*) 2 Sim. & S. 519.

1853.

Lawlor v. Murchison.

THE CHANCELLOR.—The case stated in the amended bill is, that by indenture dated the 31st day of May in the year 1822, between *John Murchison* and *Frances* his wife, of the first part, *Thomas Deary* and *Sarah* his wife, of the second part, and *Duncan Murchison* of the third part the premises in question in this cause were conveyed to *Duncan Murchison* in fee, in trust, nevertheless, for the separate use of *Sarah Deary* during her natural life, and then for such person as she should appoint, and, in default of appointment, for her right heirs; that by an instrument duly executed, in conformity with the power in the settlement, *Sarah Deary* appointed the settled estate to the use of *Thomas Deary* for life, and then to the use of her son *William Bowkett* in fee; that *William Bowkett* by his will, duly executed, devised all his real estate to *Frances Bowkett*, under whom the present plaintiff claims; that, by a deed executed in the year 1845, the trustee under the settlement conveyed the estate in fee simple to *John Joseph Murchison*, without consideration; and the prayer is, that the defendant, who claims as the heir-at-law of *John Joseph Murchison*, should be declared a trustee for her, and should be ordered to convey accordingly.

Judgment.

The grounds of defence are not stated with precision in the answer. I am inclined to think that the invalidity of *Bowkett's* will was the point principally relied on at first; for, if I recollect rightly, that was the sole ground on which the plaintiff's application for the production of documents was resisted; and the *viva voce* evidence on both sides has been directed to that point exclusively. But upon that, the principal question in the case, nothing was said on the argument, because the learned counsel for the defendant felt, I presume, that the evidence was too clear for discussion. All the witnesses were examined before us, and, having had ample opportunity for considering their evidence, I stated at the hearing that I had no doubt, and I

1853.

Lawlor v. Murchison.

have not now any doubt of the fact, that *William Bowkett* was of sound and disposing mind when he made his will.

But, admitting that point to be in the plaintiff's favor, the defendants contend that he cannot recover, because *Murchison* and wife had not any estate in the premises, when they executed the deed of the 31st of May. They say, truly, that *Murchison* and wife claimed under a conveyance from *Deary* and wife dated the 16th of March 1822, which recites that the premises in question were then vested in "*Frances Murchison* and *Sarah Deary*, as the co-heiresses of their father *Henry Hunt*; whereas, in point of fact the estate had been devised to *Elizabeth Hunt*, in fee, by *Henry Hunt*; and it is argued that nothing passed, consequently, under the deed of the 16th of March, because the estate was not then vested in *Frances Murchison* and *Sarah Deary*, as recited, but had been devised to *Elizabeth Hunt*; and it is argued that the settlement, and the appointment executed in pursuance thereof, were wholly nugatory.

Judgment.

In answer to this argument, the plaintiff alleges that long prior to the date of the deed of settlement,—namely, on the 25th of April 1815,—the premises in question were conveyed to *Thomas Deary*, in fee, by *Elizabeth Hunt*, devisee of *Henry Hunt*, and that the estate thus vested in *Thomas Deary* passed under the conveyance of the 16th of March 1822. To this the defendant replies that the plaintiff is estopped from setting up this title in *Thomas Deary*, because the deeds of the 11th of March and the 31st of May, both of which were executed by *Sarah Deary*, through whom the plaintiff claims, recite that the estate was then vested in *Frances Murchison* and *Sarah Deary* as the co-heiresses of *Henry Hunt*.

It is perfectly obvious, I think, that this argument

cannot be maintained. The defendant has not produced any evidence to impeach the deed of 1815; on the contrary, he has admitted its due execution. It must be taken, therefore, that the estate passed to *Thomas Deary* under that deed. Then the transaction of the 16th of March 1822 was a purchase of the premises in question by *Murchison* and wife, from *Deary* and wife, for a valuable consideration paid to *Thomas Deary*. The words in the operative part of the deed are: "they, the said *Thomas Deary* and *Sarah* his wife have and each of them hath granted, bargained and sold, aliened, assigned, released, conveyed, assured and confirmed," &c: and *Thomas Deary* covenants for himself, and on behalf of his wife, that they, and their heirs, and all persons claiming by, from or under "him, them, or any or either of them," will make further assurance. The facts, then, are, that at the time this conveyance was executed *Thomas Deary* was seized in fee; that it was the intention of all parties to convey the estate to the *Murchisons* in fee simple; and that the words in the operative part of the deed are sufficient for that purpose.

Judgment.

Now, I cannot discover any foundation for the argument that the *Murchisons*, and those claiming under them, are estopped from shewing the true state of the title, under such circumstances, by this erroneous recital. I take it to be quite clear that this deed was a valid and effectual conveyance of all the estate in the premises then vested in *Thomas Deary*, and that the error in the recital had not the effect of limiting its operation in the way contended for by the defendant. And, had the language of the deed been less comprehensive,—had it failed to pass all *Thomas Deary's* interest in the estate the grantees in that event would not have been estopped by the error in the recital, but might have come here for relief on that very ground, and this court would have enforced *Thomas Deary's* covenant for further

1853.

Lawlor v. Murchison.

assurance, by compelling him to execute a conveyance of all his interest in the premises; and that too, I presume, though his title had been acquired subsequent to the deed of the 16th of March, and by purchase (*a*). The *Murchisons*, then, being seized in fee simple under that deed, contracted to convey it to *Duncan Murchison* upon certain trusts. The deed of the 31st of May, by which this contract was carried into effect, states the title in the way it had been stated in the previous conveyance; or, rather, it recites the previous deed, including the erroneous recital as to the state of the title. But the estate was then vested in the *Murchisons* in fee simple; that estate is conveyed in express terms, according to the interests of the parties, to *Duncan Murchison;* and it is quite certain that the erroneous recital as to the manner in which the grantors derived their title, did not prevent the operation of that deed, which was, in my opinion, a valid and effectual conveyance of the estate to *Duncan Murchison* upon the trusts of the settlement. And as *John Joseph Murchison*, through whom the defendant claims by descent, had clear notice of the trusts—as it is admitted, moreover, that he was a mere volunteer, and not a purchaser for value—I am quite clear that the plaintiff is entitled to the relief he asks, with costs.

Judgment.

ESTEN, V. C.—The evidence establishes the validity of the will of *William Bowkett*.

It is presumed that the instruments under which the plaintiff claims entitle her to the property, supposing the questions that were argued to be decided in her favour. The earlier title rests upon facts that are not much disputed.

Both parties agree that lots 22 and 23, which com-

(*a*) Taylor v. Debar, 1 Cha. Ca. 274, 2 Cha. Ca. 212; Seabourne v. Powell, 2 Ves. 11; Smith v. Baker, 1 Y. & C. 223; Jones v. Kearney, 1 Dr. & W. 155.

1853.

Lawlor v. Murchison.

pose the land in question in this cause, were granted by patent to *Joseph Hunt*. It seems also that he devised these lots to his wife *Elizabeth Hunt* in fee. The answer asserts it and the bill does not contradict it, saying that *Elizabeth Hunt* was or claimed to be devisee in fee of *Joseph Hunt*, meaning that either she was so or he died intestate, in which case the lots descended to Mrs. *Murchison* and Mrs. *Deary*.

It is agreed that *Elizabeth Hunt* conveyed the land in question to *Thomas Deary* in fee. The bill says this was a valid conveyance; the answer says that it was fraudulent and without consideration and for the purpose of avoiding and defeating creditors, which statements amount in fact to the same thing; for, under the circumstances stated in the answer, the conveyance was as binding on *Elizabeth Hunt* as if those circumstances had not existed, and in either view the land in question was effectually vested in *Thomas Deary*. Both parties are agreed that this land was conveyed by *Thomas Deary*, and *Sarah* his wife, to *John Murchison* and wife in fee. It is equally admitted on both sides that *John Murchison* and *Frances* his wife conveyed this land to *Duncan Murchison* in fee,—in trust, to lease it and pay the rents to *Sarah Deary* during her life for her separate use, and after her death to convey to such persons as she should appoint, and in default of appointment to her right heirs.

Judgment.

It is agreed that an effectual appointment was made of the land in question to *Thomas Deary* for life, with remainder to *William Bowkett* in fee; and it appears that it passed under his will to his wife in fee, and has become vested, it is presumed, in the plaintiff under the indentures and deeds before mentioned.

Now the case of the defendant is, that the deed from *Elizabeth Hunt* to *Thomas Deary* was invalid

1853. Lawlor v. Murchison.

and that, notwithstanding the execution of that deed, she continued seized of the land comprised in it,—namely, eighty-nine feet,—which consequently passed by her will to *Sarah Deary;* did not feed the estoppel created by the deed of the 16th of March 1822, but devolved on her death and intestacy to her heir-at-law *John Joseph Murchison*, and from him to his father, the defendant.

This case, it will be observed, depends entirely on the assumed invalidity of the deed of the 2nd April 1815, which utterly fails, and therefore the case falls to the ground.

Judgment.

The defendants contend that the plaintiff is estopped by the deeds of 1822 from insisting on the deed of 1815 conveying the property to *Thomas Deary;* because they were parties to those deeds as co-heiresses of *Joseph Hunt*, and were so described in them. The plaintiff might very readily accept this proposition, because it would afford as good a title to the property in question as that resulting from the real facts of the case. If *Sarah Deary* and *Frances Murchison* were entitled to the property in question as co-heiresses of *Joseph Hunt*, *Sarah Deary's* moiety passed by the first deed of 1822 to *John Murchison* and *Frances* his wife, and the portion of lot 22, including the land in question, passed by the second deed of 1822 to *Duncan Murchison*, upon the trusts of that deed under which the plaintiff makes title. The defendant, however, insists that he is not estopped by the deeds of 1822 from shewing what is contrary to their import, and accordingly he aims at shewing not the truth, but only part of the truth, and therefore what is false—namely, that *Elizabeth Hunt* devised the property in question to *Sarah Deary*. His claim, however, is wholly founded on the estoppel. Estoppels must be mutual and if the defendant is not estopped by the deed of 1822 from shewing part of the truth in contravention

1853.

Lawlor v. Murchison.

of it, the plaintiff, in like manner, is not precluded from shewing the whole truth, by which she is as effectually entitled as by the state of facts, which, it is alleged, she is estopped from denying. My impression however is, although it is unnecessary to decide the point that married women executing a deed with the solemnities required by law for the alienation of their estates, are as much bound as if they were sole, and are therefore bound by the estoppel wherever it would have operated had they been sole. On this principle the defendant would be estopped by the deed of the 16th of March 1822, equally with the plaintiff; or, on the other hand, *John Murchison* is estopped by the deed of May 1822, to which he was a party, and by which *Thomas Deary*, under whom the plaintiff claims, was equally estopped.

In whatever light, therefore, we view the case, the plaintiff is entitled: she is entitled, if we take the real facts of the case; she is entitled, if both parties are estopped by the deed of March 1822: she is entitled, if both parties are estopped by the deed of May 1822. Judgment.

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

SPRAGGE, V. C.—To make out the plaintiff's case it is not necessary to go further back than the trust deed of May 1822. That deed, to which *Murchison* and wife and *Deary* and wife were parties, recites that *Sarah Deary* and *Frances Murchison* were co-heiresses of their late father *Joseph Hunt*, and as such co-heiresses were seized in fee of lots 22 and 23: the deed further recites a conveyance, dated the 16th of March preceding, whereby *Sarah Deary*, with the assent of her husband, had conveyed to *Murchison* and wife her interest in the said two lots; and the trust deed then conveys one of the two lots (lot 22) to *Duncan Murchison* in trust, subject to the appointment of *Sarah Deary*.

1853.

Lawlor v. Murchison.

By an instrument dated the 13th of January 1823, *Sarah Deary* exercised her power of appointment as to the parcel of land in question in this cause, being the easterly thirty-nine feet of lot 22, by appointing the same to her husband for life, in case of his surviving her—remainder to her son *William Bowkett* in fee. The plaintiff deduces her title from *William Bowkett*, and therefore, unless it is open to the plaintiff to shew that *Sarah Deary* and *Frances Murchison* were not co-heiresses of *Joseph Hunt*, the plaintiff has made out her case.

I incline to think that the trust deed of May 1822 operates as an estoppel to all parties in that deed, to *Sarah Deary* and *Frances Murchison* as well as to their husbands, and to all claiming under them, by force of the statutes enabling married women to convey their real estate. The reason that married women

Judgment.

cannot convey their real estate in the same mode as if they were sole is, because the law assumes that their will may be controlled or influenced by that of their husbands; and, inasmuch as it is deemed expedient that married women should be enabled to convey their real estate, the law has devised a mode for ascertaining, as far as practicable, whether the married woman executing a conveyance of her estate, does exercise her own will or merely expresses the will of her husband. If her own will is exercised, there is no reason why she should not convey, nor is there any reason why her conveyance should not have the same effect as if she were sole; and if ascertained to be exercised, the only objection to her making a conveyance of her property is removed.

The language of the provincial statutes enabling married women to convey their real estate favors the same view. The first statute on the subject recites that by the laws of England married women could only alien and convey their real estates by fine

or other matter of record; and that, there being as yet no express provision made for levying fines in this province, it had become expedient that some mode of conveyance should be by law adopted, to enable married women to alien their real estate. A subsequent statute (59 Geo. III. chap. 3) repeats a provision contained in the first act, that a conveyance in the mode prescribed shall be as valid and effectual in law to all intents and purposes, as if the married woman were sole, any law or usage to the contrary notwithstanding. And the statute 1 Wm. IV. chap. 2, provides that no greater or other force or effect shall be given to deeds so executed, so far as relates to the married woman or the interests of herself or of those claiming under her, than the same could have had in case such married woman had been sole at the time of executing the same.

1853. Lawlor v. Murchison.

If the two daughters of *Joseph Hunt* had executed a trust deed, similar in its terms to the deed of May 1822, while they were sole, they would have been estopped from denying afterwards that they were then seized; and, if a deed executed by married women with the formalities required by law did not estop them in like manner, such deed would have less force and effect than if executed by a *feme sole*. I think, therefore, (though it is not necessary in this case to decide the point) that all the parties to the trust deed are estopped from shewing that they were not seized as they then professed to be. But, supposing a married woman not estopped, the objection cannot apply to the defendant *John Murchison*, who now seeks to show that he and his wife were not seized of any title at the time they recited in their deed that they had title, and by their deed conveyed that title.

Judgment.

The defendants desire to go behind the trust deed in order to shew a will of *Joseph Hunt* in favor of his widow *Elizabeth Hunt*, and a will of *Elizabeth Hunt*, under which they claim. The trust deed, indeed,

1853.

Lawlor v. Murchison.

ignores the existence of any devise by *Joseph Hunt;* but if the defendants can shew such devise, or anything else inconsistent with the trust deed, it must be equally open to the plaintiff to go behind the trust deed in support of her title. This she does by shewing a conveyance from *Elizabeth Hunt* to *Thomas Deary;* and this conveyance is sufficiently admitted, for, taking it to have been executed for the purposes stated in *John Murchison*'s answer, *Elizabeth Hunt* could not impeach it, nor can those who claim under her. And if that deed stands, *Elizabeth Hunt* had nothing in the premises in question to dispose of by her will; and *Thomas Deary* had an estate to convey, and which he did convey by his deed of March 1822, to *Murchison* and wife. It is true that he conveyed it in the belief (as recited in the deed) that his wife was entitled as one of the co-heiresses of *Joseph Hunt;* but he joined in the conveyance, and covenanted for himself and his heirs, as well as for his wife and her heirs, for further assurance.

Judgment.

It appears to me, therefore, that whether the trust deed operates as an estoppel or not, the plaintiff must succeed.

HISCOTT v. BERRINGER.

Will—Partition.

June 7th 1853, January 30th 1854.

A testator who died in 1820, devised his farm to trustees in trust to pay certain legacies, and divide the residue amongst the testator's three sons. The trustees refused to act, and the eldest son in consequence, on coming of age in 1823, sold portions of the land and applied the proceeds, or part of them, towards paying the legacies. After his death, the surviving trustee executed a conveyance of the whole farm to the two surviving sons, from misunderstanding the nature of the deed presented to him for execution. The two sons then sold what remained of the farm, and brought an action of ejectment against the plaintiff, who had the parcels sold by the eldest son during his lifetime: The Court restrained this action, declared the plaintiff entitled, as far as might be necessary for his protection, to stand in the place of the eldest son in regard to his undivided third of the whole property, and to his charge, for two-thirds of the legacies he had paid, on his brothers' undivided two-thirds of the estate, and decreed a partition and other inquiries to give effect to such declaration.

In an early stage of this cause an injunction had been granted, staying proceedings at law; and on the

cause afterwards coming on for hearing before His Honor Vice Chancellor *Jameson*, an objection for want of parties was taken by Mr. *Blake* and Mr. *Esten*, then being of counsel for two of the defendants, and had been allowed, and the cause stood over to have the defect removed—the injunction being continued in the meantime. The parties to whose absence objection was thus taken, were added, and the cause again came on for hearing before His Honor Vice Chancellor *Spragge*.

The facts and circumstances of the case are sufficiently set forth in the judgment.

Statement.

The defendants *Abraham* and *Isaac Berringer*, by their answer, offered to repay what *John* or the plaintiff had paid on the legacies mentioned in the will, which had given rise to the suit, with interest, and also the value of all substantial improvements made by the plaintiff on the land devised. *Isaac* had died, during the progress of the suit, intestate and without issue; and the defendants now were *Abraham Berringer*, *Charles Boucher* and *Susan* his wife, *Garrett Stringerland Berringer* and *John Boyer*.

Argument.

Mr. *Mowat* for the plaintiff, now contended that the only question was whether the plaintiff was not entitled to more than was so offered, for the offer itself was equitable, and was therefore binding.—*Pelly* v. *Watkin* (*a*), and cases there cited; *Spurrier* v. *Fitzgerald* (*b*). Besides, the plaintiff is entitled to all that is offered, simply as tenant in common of the equitable estate.—*Pitt* v. *Pitt* (*c*), *Swan* v. *Swan* (*d*), *Story's* Equity Jurisprudence, sec. 655. The interest of *John*, and those who acquiesced in the sale he made, must be made use of to give effect as far as possible to

(*a*) 7 Hare, 371.
(*b*) 6 Ves. 548.
(*c*) T. & R. 180.
(*d*) 8 Pri. 518.

1854.

Hiscott v. Berringer.

the plaintiff's purchase.—*Taylor* v. *Debar* (*a*), *Seabourne* v. *Powell* (*b*), *Smith* v. *Baker* (*c*), *Averall* v. *Wade* (*d*), *Tooke* v. *Hastings* (*e*). Without resorting to this doctrine, however, the sales themselves should be upheld; they were not attacked for fourteen years after they took place, and *mala fides* is not charged on them now. The *cestuis que trust* were all living together, and none of them deny knowing of and sanctioning the sales when they took place; some are expressly proved to have done so. The trustees refused to act, and gave *John* the papers while there was no court of equity, or any other way of effecting payment of the legacies from the fund the testator provided therefor: The will, meanwhile, was allowed by all to remain unregistered; and long after, when *Abraham* and *Isaac*, by false representations, got a conveyance from the surviving trustee of the whole land devised, they sold for their own use what plaintiff had not actually bought, and they thus elected to take the same as their share: for them to aver the contrary, would be to aver an intention on their part to commit a fraud. *John* should therefore, in making the sales under which plaintiff claims, be considered the agent of the trustees, acting in their place of necessity, and with the consent of the *cestuis que trust*, and the sales ought, therefore to be decreed valid and allowed to stand.

Argument.

Mr. *Turner*, for defendants, contested these positions, and contended that the only equitable right which the plaintiff could properly urge was to be recompensed all his expenses in purchasing from *John* and making improvements on the property; the title acquired by plaintiff never was a legal or valid one, and, therefore, all that he was entitled to receive now

(*a*) 1 Ch. Ca. 274, S. C. 2 Ch. Ca. 212.
(*b*) 2 Vern. 11. (*c*) 1 Y. C. C. C. 228.
(*d*) Lloyd & G. Temp. Sug. 260. (*e*) 2 Vern. 97.

1854.

Hiscott v. Berringer.

was that which he was equitably entitled to, and which had been always offered to the plaintiff from the commencement of the suit. If, therefore, that relief were now granted to plaintiff, the defendants were entitled to receive their costs. It was also objected that the purchasers from *Abraham* and *Isaac* should have been made parties: He also contended that the personal estate of the testator was sufficient to have satisfied the legacies, and had been wasted by *John Berringer*, and that the defendants were entitled to an account of it, and to charge *John Berringer's* share with the amount. Also that *Boyer* was an unnecessary party. He referred to *McLelland* v. *Shaw* (*a*), *Powell* v. *Hankey* (*b*). Argument.

Mr. *Mowat*, as to the new objection for want of parties, contended that, even if it were well founded, which he disputed, it was too late to urge it.

The judgment of the Court was now delivered by January 13.

SPRAGGE, V. C.—The difficulties which have arisen between the parties to this suit have, in all probability, been occasioned by the anomalous state of the law in Upper Canada at the time when the transactions out of which these difficulties have arisen took place: a will devising real property in trust; the trustees refusing to act; no court of equity to interpose its jurisdiction; and one of the *cestuis qui trust* assuming to execute the trust. Judgment.

The testator, *Michael Berringer* of the township of Niagara, made his will, bearing date 19th of August 1820, and died shortly afterwards. He bequeathed £200 to his wife in lieu of dower, and £200 to his daughter *Susan*, to be paid out of his real estate devised, and he devised the farm and lands, which he

(*a*) 2 Sch. & L. 538. (*b*) 2 P. W. 83.

1854. Hiscott v. Berringer.

then occupied, situate at Niagara, to *John Boyer* and *John Thomas*, named as executors of his will, in trust, to sell such part of the same as should be necessary to pay and satisfy such legacies to his wife and daughter, and afterwards to convey the residue to his sons *John*, *Abraham* and *Isaac*; with a provision that in case his sons should give good and sufficient security to his said executors for payment of the said legacies to his wife and daughter, then that his trustees and executors should forthwith convey the said farm and lands to his said three sons and their heirs, as tenants in common.

The real estate devised consisted of lots Nos. 67 and 68 in the township of Niagara, containing 200 acres; he does not appear to have left any other real estate. He left a quantity of farming utensils and stock, and some household furniture; the value of this is variously estimated, the witnesses differing very much as to what was left, and as to its value. The executors named in the will never proved it, nor acted in the administration of the estate, or in the execution of the trusts of the will. At the time of the testator's death, there were living with him, besides his wife and four children named in the will, two if not three daughters (either his, or his wife's by a former husband), and their husbands; and the widow, afterwards marrying one *Wheaton*, at what time is not shewn, the two occupied a portion of the same house.

Judgment.

At the testator's death *John*, the eldest son, was under age; one witness supposes him to have been about eighteen, another eighteen or nineteen, another upwards of twenty. *Abraham* is spoken of as the second son, and according to the evidence of *Cox*, must have been only about twelve years old at his father's death. I believe no other witnesses speak of his age; nor do any speak of the age of *Isaac* or *Susan*: the age of the sons is material.

1854.

Hiscott v. Berringer.

The large household above enumerated, or the greater portion of them, continued on the place till about the time of *John's* coming of age; *Abraham* remained till 1824, and *Isaac* till the following year. What became of the personal property, in the meantime, does not appear, but I gather from the evidence that the greater part of it, if not the whole, was consumed and used by the time that *John* attained his majority. It is not shewn that any part of it was in his hands after he came of age.

In 1823 *John* took upon himself to deal with the estate devised, in a manner which has given rise to protracted litigation and much difficulty. The widow, who had married *Wheaton*, was desirous of receiving her legacy, and the daughter was desirous of receiving hers. With a view of satisfying the bequest to the widow, fifty acres of lot 67, the west half, was valued by a third party at £175, and *John* executed a conveyance to *Wheaton* of that parcel of land, bearing date the 17th of April 1823, in satisfaction of his wife's legacy *pro tanto*, and gave his note for the balance £25. At the same time, he gave his note to *Susan*, in satisfaction of her legacy, for £200 payable by instalments. *Wheaton* sold the fifty acres to the plaintiff in the October of the same year; and in the following year *John Berringer* sold and conveyed to the plaintiff twenty-five acres of lot 68, the south-west quarter, for £100, out of which he paid the balance due to *Wheaton*, and one instalment due to *Susan*. At the execution of this deed, which bears date the 17th April 1824, *Isaac* was present as well as *John* and *Susan*, and his *acquiescence* is contended for; but it is clear from the evidence that he was under age, a mere lad at the time. It is alleged that *Susan's* legacy has since been paid in full, and (she married afterwards) a release, under seal by herself and her husband, is put in and proved; they insist by their answers that £75 remains still unpaid.

Judgment.

1854.

Hiscott v. Berringer.

Out of what funds *John* made her any payments, beyond the first instalment, does not appear; but compensation for war losses belonging to his father's estate, to the amount of about £100, is said by *Cox* to have been paid to him. If such was the case, that amount, with the residue of the sale to the plaintiff, would suffice to pay the principal of *Susan's* legacy.

John Berringer was drowned in August 1830, leaving, it is alleged, the defendant *Garrett Stringerland Berringer*, his eldest son and heir at law, and a daughter surviving him.

Judgment.

I the autumn of 1823 *Abraham Berringer*, accompanied by the witness *John Cox*, went to *Boyer* the trustee and endeavoured to get from him an assignment of his trust under the testator's will. *Boyer*, after consulting Mr. *Cummings*, who is also a witness, declined to execute any paper until it was made to appear that the legacies bequeath by the will were paid or satisfied. In June 1835 *Boyer* was again applied to, to execute a release of his trust, or, it may be, a conveyance of the trust estate; he again consulted Mr. *Cummings*, and Mr. *Cummings* in his evidence relates what passed. That gentleman states very positively that the instrument which *Boyer* was asked to execute, and which he did execute, was described by Mr. *Boulton* (who acted for the *Berringers*) as a deed merely releasing *Boyer's* trust as an executor, and not as a deed of conveyance to the heirs, or any other person, of land. The witness states his conviction to be that it never was the intention of *Boyer* to give a deed of the land to the heirs of *Berringer*, and that he would not have executed the deed if he had believed it to be so; he says that *Boyer* was willing to execute any document by which he could keep out of trouble concerning the estate, but would not consent to execute any deed of land. *Boyer* appears to have been very reluctant to execute any instrument, but

was at last induced to execute the deed of the 24th of June 1835 upon a bond of indemnity made by Mr. *Boulton* being given to him. This bond, which is produced, is conditioned to indemnify *Boyer* against any claim in respect of the legacy to the widow of the testator, which legacy it is stated in the bond is supposed to be satisfied.

It is strange, certainly, that the nature of the deed of June 1835 should have been so wholly mistaken both by *Boyer* and Mr. *Cummings*; for Mr. *Cummings* says that both the deed and the bond were read over by Mr. *Boulton*; still he says that, from the reading of the deed and the explanation given of its purport by Mr. *Boulton*, he considered that *Boyer* was only releasing himself from his trusteeship or executorship, and that he so understood it. It is clear, from Mr. *Cummings'* testimony, that he is fully impressed with the belief that *Boyer*, in executing that deed, did so in ignorance that it was a conveyance of land to *Abraham* and *Isaac Berringer*, and in the belief that it was not so. It is observable that Mr. *Boulton*, who was examined for the defendants some time after Mr. *Cummings'* evidence was given, gives no evidence as to his reading or explaining the deed, or as to *Boyer's* understanding its nature. Probably he was not interrogated upon these points.

Judgment.

I should say, from what is said by Mr. *Cummings* and other witnesses, that *Boyer* never had acted in the execution of the will, either as executor or trustee, and that *Thomas* also abstained from acting in either capacity. The plaintiff entered into possession shortly after making his purchases, and has cleared, fenced, and built upon the premises.

After obtaining from *Boyer* the deed of June 1835, *Abraham* and *Isaac* brought an ejectment against the plaintiff, which was brought to trial in 1837, when the

1854. Hiscott v. Berringer. plaintiff was nonsuited. Another action was brought, in which the lessees of the plaintiff obtained a verdict, which was set aside, and further legal proceedings were either pending or threatened when this bill was filed.

Now, what are the equities upon which the plaintiff can claim the interposition of this court? He urges, in the first place, the anomalous state of the law to which I have already adverted, as justifying, or at least excusing, *John Berringer* for dealing with the estate as he did; that there was a strong necessity for some one acting, or the will would have remained unexecuted.

It is true that the intentions of the testator could not have been carried out, but the estate would not have been wasted or impoverished, but would simply have remained charged with the legacies to the testator's wife and daughter, and they would have had to suffer the inconvenience, perhaps a very serious one, of an indefinite postponement of the payment of their legacies, unless, indeed, they could have prevailed on the trustees to act, rather than that they should so suffer.

Judgment.

It would not be profitable to speculate upon the motives by which *John Berringer* was influenced; whether by good will and a sense of justice as regarded the legatees, or, whether he acted under an idea that the refusal of the trustees to execute the will prevented its being carried out, and so that he became entitled as heir-at-law. At all events, the evidence does not shew that he took any steps towards apportioning the residue of the property with his brothers; but, it may be, that the plaintiff did not think it important to his interests to shew this, and *John* himself being long dead, the facts in his favor may not be so fully disclosed as truth would warrant.

However this may be, his dealing with the estate as he did was wholly unwarrantable. His being heir-at-law, when by the will he only took as one of three tenants in common, could not better his position.

In the absence of all authority on the part of *John* to sell and convey, I apprehend that the purchaser must be taken to have purchased subject to the confirmation or repudiation of *John's* act by the other *cestuis que trustent*, when they should come of age. It is difficult indeed to imagine that any person could have purchased under such circumstances without having such a contingency present to his mind. At the same time, he might, perhaps, reasonably reckon upon the probability of the sale being confirmed; for the first parcel of land was sold upon a valuation, and the second parcel at a somewhat higher rate, and the whole land was relieved from the charge created by the will in favor of the legatees, or was believed to be so, by a sale of a portion, the purchase money of which was less by nearly a third than the full amount of the legacies. The purchaser, then, might think it probable that such sale would be accepted by *Abraham* and *Isaac* as a carrying out of the will, though by other hands than those designated therein; and, if willing to incur the risk, he might make the purchase without fraud or wrong: but I think, he clearly purchased subject to their confirmation. I do not indeed understand it to be contended, that there was anything in the peculiar circumstances under which the sale was made, or the defective state of the law at the time, that can have the effect of giving to the sale any legal validity, but only as entitling the plaintiff to consideration in the event of a partition of the estate being directed.

Judgment.

Another ground taken by the plaintiff is, that *Abraham* and *Isaac* acquiesced in the sales made by *John*. I think there is nothing in this. Before they

1854.

Hiscott v. Berringer.

came of age there could be no acquiescence; they were actively hostile in 1832, when *Abraham* was about twenty-four, and *Isaac* younger, and the litigation, which has occurred since, shews the reverse of acquiescence.

There is, however, a third ground urged by the plaintiff, upon which, I think, he is entitled to relief, if (which I will consider presently) he has himself a *locus standi* in this court.

The deed of conveyance from *Boyer* to *Abraham* and *Isaac Berringer*, of June 1835, was either executed by him under a misapprehension of its nature and effect, that misapprehension induced by his own mistake or by misrepresentation; or, he executed it with a full knowledge of its contents and its effect. If the former, it should be relieved against; and, if the latter, equally so, I think; for in such case it was a plain breach of trust on the part of *Boyer*, the then surviving trustee. The trust was to sell a sufficiency to satisfy two legacies, and then to convey the residue to the testator's three sons, or to take security from them to pay the legacies and then to convey the whole to the three sons. The deed was a conveyance of the land devised to the two surviving sons, thus ignoring the existence of any claim on the part of the legatees or of those by or through whom the legacies had been paid; and ignoring also the claim of the heir-at-law of *John Berringer*, and treating *Abraham* and *Isaac* as solely entitled to the whole land devised, and that freed from charge on accouut of the legacies. Taking the heirship of *John Berringer's* son not to be strictly proved in this suit, it was still a breach of trust to convey as if he had left no heir; for it is clear from the evidence that *John* and the mother of the children who survived him went through the form of marriage; that they believed themselves to be married, and lived together as man and wife, and were reputed to be so among

Judgment.

their neighbours; in fact, that their marriage was never questioned or doubted; and, further, that *Garrett Stringerland Berringer*, a defendant in this suit, was the fruit of that marriage and the eldest son of *John Berringer*.

The deed of June 1835 was a wide departure from the trusts of the will, and if a breach of trust on the part of *John Boyer*, the grantees in that deed were certainly *participes criminis*, for the deed was prepared by their agent, and obtained from *Boyer* through the instrumentality of their agent; and they could not but have known, and it is evident that in fact they did know, that that deed was a breach of trust on the part of the trustee. I am not now speaking of their motives, which, for aught I know, may not have been fraudulent, for they may have clothed themselves with the legal estate only to obtain possession of property from which they had been wholly excluded, and with the intention of acting justly to all parties interested; but it was not the less a breach of trust, and to which they were parties, to execute a deed not in accordance with the will, and which placed it in their power to act unjustly.

Judgment.

It is upon this deed so obtained that the actions of ejectment have been brought, which have been referred to, and upon which further proceedings at law are either pending or threatened; the title upon which the plaintiffs in these suits have sought and are seeking to recover, was acquired wrongfully and in breach of trust; they proceed on an instrument obtained by means of an inequitable transaction; and this I take to be a clear ground for the interference of a court of equity.

The present rights of the parties, and therein the right of the plaintiff to ask for the interposition of this court, appear to stand thus: The testator's three sons

1854.

Hiscott v. Berringer

being *custuis que trustent* as tenants in common, and the whole estate devised being charged with legacies to the amount of £400, the undivided share of each was affected with such charge; and from the terms of the will it is evident that each took an equal estate, and that the charge was also to be equal; for if they joined in a bond or gave separate bonds to secure the payment of the legacies, as it was provided by the will they might do, it is clear they would each pay an equal proportion; that alternative of the will could not be literally carried out by reason of the minority of *Abraham* and *Isaac*. Under these circumstances, *John*, the only adult *cestui que trust*, paid in part and gave security to pay the balance of these legacies, —not indeed to the executors and trustees, for they refused to act, but to the legatees themselves,—and thus relieved the devised land of that charge (unless indeed any continue to exist in respect of the £75 claimed by *Susan*). At the date of this transaction, though no court existed for the administration of equity law, yet the laws of England having been made by an early statute (*a*) the rule of decision in all matters of controversey relative to property and civil rights, it follows, I think, that although trusts could not be enforced, still trusts existed, and that equitable estates existed in *cestuis que trustent* as in England: the *law* was the same, although in many cases parties were remediless, from the want of a jurisdiction to administer that branch of the law. If so, then *John Berringer* was equitable tenant in common of an estate charged with legacies; and, I think, his being so without the means of resorting to a court of equity, which in England then, and here now, is an incident of his position, may properly be considered in judging of his acts. I incline to think, then, that as such equitable tenant in common, he had a right to disencumber the estate in which he was so interssted of the

Judgment.

(*a*) 32 Geo. III. chap. 1.

charge upon it; he could not disencumber his own estate otherwise than by disencumbering the whole estate devised, and this he could only do by satisfying the legacies. Suppose he had done this by paying the legacies out of his private funds, then, as between himself and the other equitable tenants in common, would he not have been entitled to stand as to them in the place of the legatees, to the extent of two-thirds of the monies paid, so that he might look to them for contribution, and have a charge on their individual shares to that extent? As to his own share the charge was *at home*, merged in the inheritance.

1854.
Hiscott v. Berringer.

John Berringer did not, however, pay off this charge out of his own funds, but partly from funds obtained by a sale of a portion of the property charged, and partly by other means. Now, taking this sale to have had no validity, as I have already observed, and as I think was the case, *John*, if alive, would have been equitable tenant in common with *Abraham* and *Isaac*, and this plaintiff, as purchaser from *John*, would be entitled as against him to stand *pro tanto* in his place—that is, to the extent, if necessary, of *John's* interest. If *John*, instead of assuming to sell certain parcels of the property devised, had sold his interest in an undivided share, which he might have done, the purchaser's right would have been plain; his selling what he had no right to sell somewhat complicates the question, but still leaves to the purchaser the right to be recouped out of what remained to *John* of the same estate, a portion of which he so assumed to sell. And, in this view, it may be that the plaintiff is entitled to stand in *John's* shoes to the extent of the land sold, or land of that value, even though the monies were not applied in payment of the legacies; but if they were so applied, I think it strengthens the case of *John*, and so of *John's* assignee against the other equitable tenants in common; because their estates were thereby disencumbered of the charge

Judgment.

1854.
Hiscott v. Berringer.

created by the will, and as, I think, a charge on behalf of *John* or *John's* assignee substituted in its place. I say of *John's* assignee, for I suppose that whatever rights *John* acquired under the will in relation to this property are the rights of this plaintiff, so far as may be necessary for his protection. The plaintiff having purchased, or being taken to have purchased, as I have remarked, subject to the confirmation or repudiation of the sale by *Abraham* and *Isaac*, cannot, I think, affect his position with *John Berringer*, and his rights arising out of that position.

In further illustration of the plaintiff's position, I would put this case: Suppose the land conveyed by the trustees to *John*, *Abraham* and *Isaac*, and that after 1832, before which time there was no process for enforcing partition of real estate, a partition had taken place, and the parcels sold by *John* allotted to him or to his heir; it cannot be, that *John* or his heir could hold it against him to whom he had sold it: or, suppose those parcels allotted to *Abraham* and *Isaac*, and another portion allotted to *John* or his heir, the plaintiff, as the purchaser from *John*, would, I conceive, be entitled to that other portion, or to so much as was equivalent in value to the parcels he had purchased.

Judgment.

In my view of this case, the plaintiff cannot claim to hold these parcels of land by reason of his purchase of them from *John Berringer*; but he is entitled to stand in *John Berringer's* place as to the whole land devised to the extent of these parcels, if allotted to him, or to the extent of their value upon any lands that may be allotted as the share of *John's* heir-at-law.

I think a partition should be made of the lands devised; to which partition the plaintiff, *Abraham Berringer*, and the heir-at-law both of *John* and *Isaac Berringer*, should be parties. The portions allotted to *Abraham* and to the heir of *Isaac*, will stand

1854.

Hiscott v. Berringer.

charged with two-thirds of the legacies paid and of the portion unpaid, if any, with interest from the time of payment; this in favour of *John's heir-at-law* to recoup him for the real estate lost to him by the dealing of *John* with the estate, but which was not intended by *John* as a conversion of his real estate into personalty. If, however, less than one-third of *John's* share should be allotted to the plaintiff, so that the residue go to his heir, then a proportion of the legacy monies shall be charged on that residue; that is, assuming that *John* satisfied the legacies, or so much as he did satisfy out of the monies realized by sale of the land, and out of his own funds, and not out of monies of the testator's estate.

Judgment.

It is not probable, however, that any portion of what would have been *John's* share will remain after satisfying the plaintiff; for the parcels sold by *John* and which he mediately and immediately purchased, comprise more than a third in quantity, and probably at least a third in value of the whole. If *John's* share should be in this way absorbed by the plaintiff, the position of the parties will be substantially the same as if *John* had sold his undivided share to the plaintiff, and had with the purchase money satisfied the legacies; whether he had sold the whole or half of his share for that purpose, or whether it required the whole or half of the purchase money for that purpose, can make no difference to *Abraham* and *Isaac*, for their shares were properly chargeable with two-thirds in any event. A loss indeed may fall upon *John's* heir if the sale was at an undervalue; for it may be, that a much smaller quantity of land ought to have realized sufficient to satisfy the whole legacies, instead of its taking more than a third to satisfy only £275 out of £400. At the rate at which the parcels in question were sold, it would have taken 120 acres out of the 200 devised to satisfy the legacies, leaving only eighty to be conveyed to the testator's three sons.

1854.

Hiscott v. Berringer.

As to the legacies having been satisfied by *John Berringer*; and, first, as to the legacy to the widow, the defendants *Abraham* and *Isaac* question her marriage to *Wheaton*. I see no reason to doubt it; but suppose her not to have been married to him, but to have lived with him as his wife and to have borne his name, which is clearly proved, she could not object that monies paid to him as her husband, and which, if her husband, he would be entitled to receive, were paid improperly, and claim that the same monies should be paid over again to herself. And, besides this, it is clear from the evidence that she assented to the payment, and the mode of payment by which the legacy to her was satisfied. I may mention also, that in the bond of indemnity to *Boyer*, given by Mr. *Boulton* when acting as agent for *Abraham* and *Isaac*, it is recited that the legacy in question was believed to have been satisfied. The legacy to the testator's

Judgment.

daughter *Susan*, if not wholly paid, has been so in great part. I am not satisfied that, in taking a note from *John* for the amount of her legacy, she intended to abandon her charge upon the land, and, I think, if anything remains due to her it should remain a charge.

As to the amount for which the heir-at-law of *John* is entitled to a charge, that must depend upon whether or not he satisfied any portion of these legacies out of funds of the estate: if he possessed himself of such funds, and out of such funds paid these legacies, that could give him no charge or lien on the shares of *Abraham* and *Isaac*, for he would then have paid off a charge common to all out of monies common to all, or more correctly, monies belonging to all those entitled to a distributive share of the testator's personal property. If, however, the personal estate was applicable in the first place to the payment of these legacies, and the real estate only after that was exhausted, then clearly whatever personal estate came to *John*

Berringer's lands must be taken to have been so applied, and a charge can only exist now for the residue. As to this, an enquiry must be directed if desired by the defendants; but, as far as I can judge from the evidence already taken upon that point, such an inquiry would not be profitable; for although a good deal of evidence has been given with a view to charge *John* with personal estate of the testator, it is not shewn that any was in existence when he came of age, but it rather appears that the whole family used it in common before he came of age; this is, with the exception of a sum of £278 1*s.* 3*d.*, compensation for war losses, of which, according to the evidence of *Cox*, thirty-five per cent. was received by *John*, and the balance by *Abraham* and *Isaac*.

Judgment.

The point whether the real estate devised was applicable to the payment of the legacies in exoneration of the personal estate, or whether in aid only of the personal estate, was very little discussed at the hearing. The legacies are directed to be paid out of the real estate devised; and the real estate is devised expressly in trust to sell such part thereof as might be necessary to satisfy the legacies—but this, I apprehend, to be insufficient to exempt the personal estate. There is nothing in the will to shew that the testator intended to exempt the personal estate; he makes no disposition of it whatever, not even a general disposition of it; and, I believe, it will be found that in no case has the personal estate been held exempt, unless the testator has *so* disposed of it that its being made applicable would be incongruous with the disposition of it plainly intended by the testator.

There is this further circumstances, that the testator names *Boyer* and *Thomas* as his executors as well as trustees; and this has been held to be a circumstance manifesting an intention to have the personal estate applied in its due course to the payment of debts and

1854.
Hiscott v. Berringer.

legacies. But for the appointment of executors there is nothing in the will to shew that the testator had his personal estate at all in his mind when making his will; and, if not in his mind, there could of course be no intention on his part to exempt it. My opinion is, that under this will the personal estate was applicable to the payment of the legacies, and the real estate only in aid of it. I do not, however, enter into any review of the authorities, as none were cited by the learned counsel for the plaintiff, and he may not have intended to contest the point.

Judgment.

As to the marriage of *John* with *Clarissa Slingerland* an enquiry must be directed,—for the proper legal proof to establish a marriage has not been given; a form of marriage appears to have been gone through in a foreign country, and one of the witnesses deposes to having himself been married in the same way, but it is not shewn whether by the laws of that country such a marriage would be valid; proper evidence should be given of this, and the domicile of the parties at the time of such marriage contracted may probably affect the question. If this marriage were lawful and valid, the defendant *Garrett Slingerland Berringer*, the eldest son of that marriage, is inheritor of *John's* share and interest in the estate devised, and also of the share of *Isaac*, who has since died without issue; if such marriage has no validity, then Abraham is the inheritor of both.

The plaintiff contends that, in the event of a partition being directed, the parcels of land in question should be allotted to him as being of peculiar value to him, as their possessor and occupier for many years, and from the improvements which he has made upon them. Even if it were proper in any case to give a direction as to any particular allotment, I do not think that it would be proper in this case, at least upon the evidence before me; for it does not furnish me with

the means of judging, whether the allotment of these parcels to the plaintiff would leave to the other tenants in common such advantages in the way of frontage, soil, position, and it may be of water, and otherwise as they may fairly be entitled to,—nor do I know whether it would not be assigning to the plaintiff an undue proportion as regards both quantity and value. But this much I think I may properly say, that unless some good reason exists why these parcels, or so much of them as may amount to a third in value of the whole land devised, should not be allotted to the plaintiff, it would be just and reasonable to allot them, or a proper part of them; and that in making partition of estates under the act, regard should be had to any circumstances which render any particular portion of peculiar value to one of those between whom partition is made. And I may add, that any partition made in disregard of such circumstances ought not, I conceive, to be allowed to stand. The case of the Earl of *Clarendon* v. *Hornby (a)* the remarks of Lord *Eldon* in *Watson* v. the Duke of *Northumberland (b)* and the case of *Story* v. *Johnson (c)*, appear to me to sustain this position. Judgment.

With regard to the improvements made by the plaintiff, the witnesses differ as to whether the land is of greater or less value at the present day in consequence of them; and some express the opinion that the timber and other wood sold by the plaintiff was equal in value to the improvements, and so raise the question whether, upon the whole, the estate is increased in value by these improvements. The case of *Swan* v. *Swan (a)* establishes that upon a bill filed for a partition, and it appearing that the defendant has expended monies in improving the property beneficially for the plaintiff, the court will make it a condition of its interference that a proper allowance

(a) 1 P. Wm. 446. (b) 11 Ves. 153.
(c) 1 Y. & C. Ex. 538: S. C. 2 Ib. 586. (d) 8 Price 518.

1854.

Hiscott v. Herringer

be made to the defendant for such expenditure. The plaintiff in that case claimed to have a lien upon the property for the monies so expended; this the court did not admit, but placed his title to be allowed for them upon the ground I have stated. I do not see my way to making any allowance to the plaintiff in respect of these improvements. However, if the plaintiff should be advised that he can in law sustain a claim for these improvements, and that an inquiry upon the subject would be to his advantage, taking into account the rents and profits received by him, I shall be glad to hear the parties upon that point.

Judgment.

With regard to the compensation for war losses stated by *Cox* to have come to the hands of *John*, *Abraham* and *Isaac*, respectively, in the proportions already mentioned, being in nearly equal proportions; it may be a question in what capacity they were received, and how they are chargeable against the parties receiving them—as part of the personal estate of the testator, and so applicable, in my construction of the will, to the payment of the legacies in exoneration of the real estate; and having been received by those severally whose joint estate was chargeable with the payment of those legacies, the sums so received should have been applied to pay them. Take it, that the portion received by *John* was so applied, and the charge on the estate, of all reduced *pro tanto*, and the portions received by *Abraham* and *Isaac* not so applied, the common estate, remaining charged in consequence with a so much larger amount, it appears to me that in adjusting the equities between *John* *Abraham* and *Isaac*, the two latter cannot claim to have their shares of the estate relieved of the legacies paid by *John* to the extent of the sum so received by him, without on their part contributing the sums received by them respectively to the same common object, so far as it can now be done. The share of *John* in the lands devised *in specie* is now gone, pro-

1854.

Hiscott v. Berringer.

bably the whole of it, by the sale to the plaintiff; but his charge, in respect of legacies paid, remains on the shares of *Abraham* and *Isaac:* this is a money claim and in ascertaining that, the amounts received, as I have stated, by *Abraham* and *Isaac* will, I conceive, properly be considered. After inquiry had, it will be a proper matter to come on, upon *further directions.*

Costs also may be reserved. Were I disposing of them now, I should be indisposed to give costs to either party; not to the plaintiff, for the difficulties have in a great measure arisen from the unauthorized dealing with the property on the part of *John Berringer*, under whom he claims; and I should not give costs to the defendants, because they have improperly procured the legal estate to be conveyed to them, and having so clothed themselves with the legal estate used it in suits at law inequitably. A further reason why I am inclined not to give either party costs, is that I consider the case somewhat analogous in principal to a suit occasioned by a testator expressing himself in his will so ambiguously as to make a suit in equity necessary *(a)*; or, in other words, the will being such as cannot be carried out without a suit. The trustees named in the will refusing to act, and the absence of any jurisdiction at the time to carry out the trusts of the will, have occasioned the difficulties and protracted litigation which have ensued. I do not, however, now dispose of the costs, but give my present impression in regard to them in case the parties should be disposed, as they very well may, to settle among themselves a partition or other arrangement in regard to the estate, and the other matters which must otherwise still stand for enquiry.

Judgment.

With regard to the objection for want of parties, it comes too late. It should have been taken at the

(*a*) Jolliffe v. East, 3 Br. C. C. 27.

1854. Hiscott v. Berringer.

opening of the cause before the merits were discussed; and what is more fatal to the objection, an objection for want of parties was taken when the cause was before brought on for hearing; the defendants were bound to take all their objections *then*; the party objecting now was defendant then, and the objection now made was open to him: he is clearly too late to object now.

Judgment.

It may probably be found necessary, however, to make *Cox*, who appears to have purchased a portion of the premises, a party to the partition. This may be done in the Master's office, and it will be open to him to object to the decree, if he conceives himself to be injuriously affected by it.

STEVENSON v. HUFFMAN.

Practice—County Court.

March 6th. Where a plaintiff in an injunction suit, instituted in the county court desires to extend the injunction, it is his duty to have the pleadings and papers in the cause transmitted to this court before the motion is heard.

A notice of motion given for a day which is not a regular court day, unless leave of the court be odtained for that purpose, is a void proceeding, and the party served need not attend thereon.

This was a motion to extend an injunction issued from the County Court of the United Counties of Frontenac, Lennox and Addington, the period for which it had been granted by the judge expiring either on this or the following day. The notice of motion had been served for the Saturday preceding, the court having appointed a special sitting throughout the week for the purpose of hearing causes; on that day, however, the court did not sit, the judges being occupied in the Court of Appeal. From the statements of counsel it appeared that the pleadings and papers filed in the County Court had not yet reached the office of the Registrar, and it was now desired either that the injunction might be extended according to the terms of the notice on reading the draft pleadings, or

that the motion might be directed to stand over in order to save the notice already given, and to enable the plaintiff to produce the original papers. 1854. Stevenson v. Huffman

The court refused the application, stating that the month allowed by the statute afforded a plaintiff sufficient time for the production of the papers in the registrar's office, and it was clearly his duty to see that they were there before bringing on his motion: Besides this, however, the notice shewn to have been given was merely nugatory; having been given for a day which was not a regular court day, without leave having been obtained for that purpose, the defendant would have been justified in taking no notice of it whatever. Judgment.

DOUGALL V. FOSTER.

Injunction—Tenants in common.

One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property [Esten V. C. *diss.*] 1853. August 23rd and Sept. 23rd.

The bill in this cause was filed by *Benjamin Dougall* against *Shubael Foster* and *Phœbe*, his wife, setting forth that *John Canniff* of the township of Thurlow, deceased, being in his life-time seised in fee simple in possession of (amongst other lands) lot number six in the first concession of the said township of Thurlow now within the limits of the town of Belleville, made and duly executed his last will and testament in writing, dated the sixth day of April 1841, and thereby devised the said lot to his wife during her widowhood, and subject thereto he devised the same with other lands to his four daughters, *Phœbe Foster*, *Mary Miller*, *Aulay Rutan* and *Elizabeth Nugent*, for and during their natural lives and no longer; he further willed that after the decease of his said daughters, their share of his real estate should descend in equal shares to their heirs in fee simple, and that as many of his said children as should die without issue, their share of his real estate

1853.

Dougall v. Foster.

should be equally divided among the survivors, to enjoy during their natural lives and no longer, and should then descend in equal shares to their heirs and assigns forever.

That the testator died without revoking or altering his said will, leaving his said wife and daughters him surviving.

That the said *Elizabeth*, and afterwards the testator's widow, died, and subsequently to their death the said *Shubael Foster* and *Phœbe*, his wife, took possession of the said lot in virtue of the said *Phœbe's* estate therein and of a lease from the said *Aulay Ruttan* (then a widow) of her interest therein and of some arrangement or understanding with the said *Mary Miller*, and the said defendants have remained in possession ever since.

Statement.

That the said *Aulay Ruttan* died in or about the month of April, one thousand eight hundred and fifty-one, leaving *Peter Ruttan* her eldest son and heir at law her surviving, and that soon after her death, *Shubael*, without the authority of the said *Peter Ruttan* or the other persons interested in the said lot commenced making brick thereon, digging up and using the soil and clay thereof for the pupose, and had continued doing so up to the time of filing the bill, thereby consuming, destroying and carrying away large portions of the soil and clay of the said lot: that in the course of such proceedings the said *Shubael* had made very large excavations in the soil of the said lot, and was still making large excavations therein; that the part of the said lot on which he was then digging and excavating the soil for the purposes aforesaid was very valuable for building purposes but the value of the same had been greatly deteriorated by the said *Shubael's* past excavations, and would be still further deteriorated by the excavations in progress on his part: that on the twenty-fifth day of June, then last, the

said *Peter Ruttan*, by indenture of that date and for the valuable consideration therein mentioned, duly conveyed his undivided estate and interest in the said lot to the plaintiff in fee; and before doing so the said *Peter Ruttan* had forbidden, and since the execution of the said indenture the plaintiff had forbidden the said *Shubael* from proceeding with or continuing the commission of the said waste and injury on and to the said property, but he refused to comply therewith: that a quantity of bricks made from the said soil and clay were then lying on the said lot, and a quantity of soil and clay dug up on the said lot, but not yet manufactured into bricks, but which the said *Shubael* intended to manufacture and was engaged in manufacturing into bricks as fast as possible, was also lying on the said lot—all which the said *Shubael* intended to remove and appropriate to his own use: that the plaintiff on or about the nineteenth day of July last served the defendants with notice as required by law, demanding a partition of the said lot and informing them that he would file his petition in the court of Queen's Bench on the first day of Trinity Term then next for the purpose of obtaining such partition, and had previously notified the said *Shubael* that he (the plaintiff) would apply for an injunction to restrain the said injurious proceedings of the said *Shubael* unless he immediately desisted therefrom, which however the said *Shubael* refused to do: that negotiations for a settlement had taken place, but had terminated without accomplishing any result: that all other persons who had any estate or interest in the said lot, except the defendants, had the same interest as the plaintiff in the object of this suit.

Statement.

The prayer of the bill was, that the defendant *Shubael*, his servants, agents and workmen might be restrained from committing any further waste, spoil or destruction on the said lot, and from digging up more of the soil or clay thereof, and from converting the soil

1853.

Dougall v. Foster.

or clay already dug up thereon into brick, or removing the same from the said lot, and for further relief. The statements of the bill were verified by the affidavit of the plaintiff.

A motion was now made for an injunction in the terms of the prayer of the bill.

Against this motion an affidavit of the defendant *Shubael Foster* was filed, stating that the lot in question had been in his possession for seven years and upwards under the will of *Canniff*; that *Canniff* in his lifetime resided upon the lot, and for a number of years before his death rented a portion of the lot (about three quarters of an acre) to different persons as a brick yard and it was used by them for that purpose, and large, quantities of the soil and clay had been dug up and used by them for that purpose; that since *Shubael* came into possession, his tenants, and latterly his son, had been employed in manufacturing brick on such portion of the lot, and that no one had interfered with his right to do so with the exception of the plaintiff, who gave notice to the defendant of his intention to apply for an injunction to restrain defendant from making brick: that the place where the bricks had been manufactured was upon a slope, and that in defendant's opinion no damage of any consequence had been done to the lot, as a part of the brick yard had been levelled and the grass was then growing thereon, and the remainder could be easily levelled in the same manner; that no large excavations had been made by defendant; that before coming to clay proper for the purposes of brick making, the surface had been removed to the depth of eight or nine inches, and after the clay had been taken away the top earth was replaced; and that defendant did not consider that the property had been in any way deteriorated: that at the time of making the affidavit, seven men were employed by the defendant's son in making brick, and that it would be extremely preju-

Statement.

dicial to the interests of the defendant and his son if they were prevented from continuing the manufacturing of such brick. The deponent swore that he had never been forbidden by *Peter Ruttan* (through whom plaintiff claimed) from proceeding with or continuing the commission of the alleged waste. 1853. Dougall v. Foster.

An affidavit of the defendants son, *Daniel Foster*, was also filed; the statements in which were to the same effect as those in his father's affidavit. Statement.

Mr. *Mowat*, in support of the motion, cited *Coppinger* v. *Gubbins*, (*a*) *Lord Courtown* v. *Ward*, (*b*) Anon. (*c*) *Barry* v. *Barry*, (*d*) *Viner* v. *Vaughan*, (*e*) and *Cruise's* Digest, vol. 1, p. 118, sec. 14, (4 Ed.) Argument.

Mr. *Hector* and Mr. *Turner* for the defendants, relied chiefly on the ground that the acts complained of were not such as the court would restrain a tenant in common from committing, and cited, amongst other cases, *Twort* v. *Twort*, (*f*) The Bishop of *London* v. *Webb*, (*g*) and *Spence's* Equity, vol. 2, p. 571; Drury on Injun. 142.

On a subsequent day Mr. *Mowat* mentioned the case of *Wilkinson* v. *Hoggarth* (*h*) as being in point.

Sept. 23. Judgment.

THE CHANCELLOR.—I am of opinion that the plaintiff is entitled to an injunction as prayed. It is quite true that this court refuses to restrict a tenant in common in the legitimate enjoyment of the estate, because an undivided occupation is of the very essence of that sort of title, (*i*) and to interfere with the legiti-

(*a*) 3 J. & La. 397.
(*b*) 1 S. & Lef. 8.
(*c*) 1 Ves. Jr. 93.
(*d*) 1 J. & W. 651.
(*e*) 2 Beav. 406.
(*f*) 16 Ves. 128.
(*g*) 1 P. W. 526.
(*h*) 12 Q. B. 837.
(*i*) Co. Lit. 189.

1853.

Dougall v. Foster.

mate exercise of that right would be to deny an essential quality of the title. A tenant in common, therefore, is not entitled to an injunction under such circumstances, but must proceed by partition; but when a tenant in common enters, not in virtue of his right as tenant in common, but under a lease from his co-tenants; or where entering as tenant in common he is proceeding to destroy the common property, in either event this court is in the habit of interfering by injunction. Now it appears to me that the plaintiff is entitled to relief on both grounds. It is sworn that the defendant entered under a lease from *Aulay Ruttan*, and under some arrangement with the other tenants in common. That allegation is not denied. The defendant swears indeed that he took possession under the will of *Canniff;* but that statement is obviously equivocal; it is not inconsistent with the plaintiff's allegation, for assuming its truth the defendant would still have had a right to enter, and would have entered, as to his own share, under the will of *Canniff*. Inasmuch then as this distinct allegation of tenancy has not been denied, except in the equivocal way I have mentioned, it is to be taken, I think, that the defendant is in possession under *Aulay Ruttan;* and if that be so, it is clear upon the authorities (*a*) that this court will restrain him from dealing with *Aulay Ruttan's* share, to which the plaintiff is now entitled, otherwise than as an occupying tenant; and such an injunction would in effect restrain the waste of which the plaintiff here complains.

Judgment.

It is probable, however, that the court would have given the defendant leave to file a further affidavit, if the case had turned upon that question. But it is not necessary to rely upon that view of the case, for I am of opinion that the plaintiff is entitled to relief upon

(*a*) Twort v. Twort, 16 Ves. 128.

1853.

Dougall v. Foster.

the other ground to which I before alluded. Where a case of actual destruction is made out the court will restrain, although the party be in possession in virtue of his right as tenant in common, upon this plain principle, that the destruction of the common property is not a legitimate mode of enjoying that right of occupation which arises out of his title. Here the defendant is removing the soil to a considerable depth, and converting it into brick for the purposes of sale, Now I am quite unable to discover any principal upon which to hold that the removal of the soil in that way is not actual destruction in the sense in which that term has been used. It has been determined that one tenant in common may maintain an action of trespass against a co-tenant who digs turf for the purpose of sale (*a*); but, if the digging of turf be such a destruction of the common property as will sustain an action of trespass, surely the removal of the soil for the purpose of conversion into brick cannot be less so. (*b*) Lord *Eldon* said, in *Hole* v. *Thomas*, (*c*), "I have no objection to grant an injunction against cutting saplings and any tender trees or underwood at unseasonable times, *for that is destruction.*" Now if this court does lawfully restrain the cutting of timber, which is in some sort an accruing profit, at unseasonable times, regarding that as destruction, it does seem to me impossible to argue that it has not jurisdiction to prevent the removal of the soil itself.

Judgment.

I am of opinion, therefore, that the defendant should be restrained from any further excavation; but, upon grounds to which I have frequently adverted, he comes too late, in my opinion, to obtain any further relief. It would be unjust to restrain the defendant, upon this interlocutory application, to any greater extent.

(*a*) Wilkinson v. Haygarth 12 Q. B. 837, and see Coppinger v. Gubbins, 3 J. & L. 397.
(*b*) And see Bishop of London v. Webb, 2 P. W. 527.
(*c*) 7 Ves. 589.

1853.

Dougall v. Foster.

ESTEN, V. C.—I think this application ought to be refused. It must be admitted that injunctions against one tenant in common at the instance of another, are of very rare occurrence. Indeed, I believe the only instances of it that have occurred were the cases of *Twort* v. *Twort* and *Hole* v. *Thomas;* and the case of *Twort* v. *Twort* turned on the defendant having become the tenant of his co-tenant's share; while the injunction in *Hole* v. *Thomas* was confined to malicious waste. It is difficult to conceive a larger power of committing waste than by the terms of the contract or gift belongs to the tenant for life or years without impeachment of waste. In fact, he is authorised by the terms of the contract, or gift to commit waste, which he may accordingly commit to any extent at law, without being accountable for it. He is, however, restrained in equity from felling ornamental timber, or rather timber planted for ornament, and other acts of a destructive waste, which are consequently called equitable waste, because allowable at law, but to be restrained in equity. A tenant in common has larger powers than a tenant for life unimpeachable for waste, since he can cut down ornamental timber. Even a tenant for life, however impeachable for waste, may make bricks when it has been practised by the testator, or settlor down to the time of the death or the date of the settlement, because he has thereby sanctioned that use of the property, and made the act in question by his example a legitimate perception of the annual profits of the estate. I very much question whether a tenant in common would, under any circumstances, be enjoined from manufacturing bricks, unless perhaps he conducted the process in such an unreasonable manner as to make it destructive of the property for other purposes. Certainly he cannot, I think, be restrained from a legitimate perception of the land; and this character has been stamped upon the act in question in the present case by the example of the testator, who sanctioned the

Judgment.

1853.

Dougall v. Foster.

manufacture of bricks on the property down to the time of his death. It is said that the removal of brick earth for the purpose of manufatcuring brick, will support an action by one tenant in common against another. This is true, and it is equally true that the removal of turf will sustain an action by one tenant in common against another. But it would be difficult to maintain that an injunction ought to issue in such a case. The truth is, that one tenant in common cannot maintain an action against another without an ouster. Now, destruction involves an ouster, and the term is applied to the acts in question very much in a technical sense, to enable a tenant in common to recover his share of the profits from his co-tenant. But it seems to me that an injunction must rest upon a more solid foundation. I have no idea that clay-pits are ever worked like mines by excavating the earth under the surface; not that, I think, it would make any difference, if such be the case. At all events, I cannot consent to grant an injunction upon a mere doubt. Mr. *Dougall's* remedy is to obtain a partition. I feel myself bound by the authorities in arriving at this conclusion. Whether it would not be more reasonable to hold that a tenant in common must obtain a partition before he uses the property in any manner exceeding the ordinary enjoyment of land, may perhaps be questioned.

Judgment.

SPRAGGE, V. C.—But for the view taken of this matter by my brother *Esten*, I should have felt but little hesitation in coming to the conclusion that the plaintiff is entitled to an injunction.

It is clear that a tenant in common has not an *unlimited* power to do as he will with the estate; for though the court is slow to interfere between tenants in common, yet where one commits any act amounting to *destruction*, he will be restrained; and I agree that unless the act complained of does amount to destruction, the court will not interfere.

1853.

Dougall v. Foster.

At the first blush it would appear reasonable that acts which the court would enjoin, if committed by a tenant for life, unimpeachable for waste, would be enjoined if committed by a tenant in common; in the one case, for the protection of those entitled in remainder; in the other, for those entitled in common. The principal reason for the difference (though not the only one) appears to be that the party complaining may at law (*a*) relieve himself by the writ of partition. This reason fails, however, when the acts complained of may operate to the destruction in whole or in part of the inheritance, before partition could be perfected at law; and fails, it must be admitted, in some cases where an injunction would be granted against one unimpeachable for waste, and would not be granted against a tenant in common; for example, where trees planted for ornament are cut down. The distinction appears to be, that when the acts complained of amount only to equitable waste the court will not restrain a tenant in common; but when the acts amount to destruction, they will restrain. I cannot but think that it would be a reasonable and just principle, that a tenant in common, before doing any act to the prejudice of any portion of the property which he holds only in common with others, should be held bound himself to obtain a partition, rather than that such acts should not be restrained, because the other tenants in common, ignorant probably that such acts were in contemplation, had not obtained partition. It should lie upon him, I think, to sever his own portion from that of the others, before he deals with any portion in such a manner as to operate to the permanent prejudice of the others. These considerations lead me to think that the English authorities upon the subject should not be pressed beyond their necessary consequences.

Judgment.

In no English case has an injunction been refused

(*a*) Tyson v. Fairclough, 2 S. & S. 144.

to restrain a tenant in common from taking the soil of land held in common for the purpose of making bricks, and in no English case has it been said that such an injunction would be refused; while at the same time such an act falls within the class of acts which it is said tenants in common not only have not the right to do, but which they will be restrained from doing—viz., acts which operate to the *destruction* of the inheritance. An old case upon this point is that of the Bishop of *London* v. *Webb*, which arose upon a long lease of lands in *Ealing* in Middlesex, made by Bishop *Bonner*, Bishop of *London*, in the time of *Edward* the Sixth. The lease was made without impeachment of waste, and the defendant *Webb*, in whom the residue of the lease was vested, articled with some brickmakers that they might dig and carry away the soil of twenty acres (part af the premises) six feet deep, provided they did not dig above two acres in the year and levelled those acres before they dug up others For the plaintiff Lord *Barnard's* case was cited, and it was contended that this was carrying away the soil, part of the inheritance, and would turn the pasture field into a pit or pond, and that the defendant in digging all the soil for bricks, was actually destroying the field. For the defendant, it was said that frequent experience shewed that the digging of brick did not destroy the field, there being many fields about the town where brick had been dug and those fields used again for pasture. Lord *Macclesfield* held the act complained of to be within the reason of Lord *Barnard's* case, and as he was not permitted to destroy Raby castle to the prejudice of the remainder-man; so neither should the lessee under Bishop *Bonner* destroy the field against the plaintiff, who, as bishop, had the reversion in fee.

Judgment.

In *Wilkinson* v. *Haygarth* the taking of brick earth is distinctly treated as an act which a tenant in

1854.

Dougall v. Foster.

common has not a right to do; and Lord *Denman*, in delivering judgment, referred to the case of *Clayton* v. *Corby* (*a*), before himself, which was a case of taking brick earth; and observed, that "the principle of that case was that such a taking destroyed the subject matter." In the principal case he speaks of its being admitted that in all cases the destruction of the property is an ouster; and he says, "I consider this, therefore, an ouster effected by means of the destruction of the property." Mr. Justice *Coleridge*, in the principal case, which was for carrying away turf, puts the carrying away brick earth by a tenant in common by way of illustration, as an act which it was clear a tenant in common could not do. And Mr. Justice *Wightman* asks, "Is not the carrying away the turf as much an *ouster* as the carrying away brick earth, which is only the soil a little lower down?"

Judgment.

On this ground,—that certain of the acts complained of amounted to destruction of the property,—Lord *Eldon* granted an injunction as to those acts in *Hole* v. *Thomas*; and in *Twort* v. *Twort* he says, referring probably to the former case, "When a case of positive and actual destruction appeared, I granted an injunction, as that was not the legitimate exercise of the enjoyment arising out of the nature of the party's title to that which belonged to him and the other party." In the same case, he says, if one tenant in common is doing merely what any other owner of the land might do, the other cannot have an injunction merely on the ground that he does not choose to do so; but if it amounts to destruction, the court will interfere.

The reason given by Lord *Kenyon*, in *Martin* v. *Knowllys* (*b*), why the court should not interfere

(*a*) 5 Q. B. 415. (*b*) 8 T. R. 185.

against a tenant in common cutting timber of a proper age and growth, *because doing so is no injury to the inheritance*, supports the same principle.

The case of *Viner* v. *Vaughan*, before Lord *Langdale*, does not appear to me to be an authority against this injunction. The terms employed in that case in describing the land whence the clay for bricks was dug, leads me to think that the surface was not taken off the earth as in this case: the words of Lord *Langdale*, when he speaks of opening old abandoned pits and mines, do not appear applicable to the taking of surface earth.

In that case the injunction was refused, it not appearing that the testator, under whom the defendant (tenant for life) claimed, was working the clay pits at the time of his death, and thus making them a part of the profits of the land; though it did appear that immediately before his death he had made some preparations for brickmaking on the premises. It further appeared that the former owner, from whom the testator purchased the property, had worked the clay pits.

Judgment.

In that respect the case in *Beavan* resembles this, as I read the defendant's affidavit. He says that *Canniff*, under whose will all the parties claim, resided upon the lot in question, and for a number of years before his death rented a portion of the lot (the portion in question) to different persons as a brickyard; that it was used by them for that purpose, and that large quantities of the soil and clay had been dug up and used by them for that purpose. He no where says that the land was so used, up to or at the time of the testator's death, which I have no doubt he would have done, had the fact been so. For all that appears, the place may have been disused for brickmaking for years before the testator's death; and I think the proper inference is that it was not so used at the time of his

1854. Dougall v. Foster.

death, because the defendant must be taken to state his own case as favourably for himself as the facts will warrant.

I think the cases of the Bishop of *London* v. *Webb*, *Clayton* v. *Corby*, and *Wilkinson* v. *Haggarth* fully establish, that taking the surface of the land for making bricks in the manner that has indisputably been done here, amounts to a destruction of the property, and that such acts by a tenant in common amount to an ouster of the other tenants in common. I think, further, that no cases were needed to establish this position, for certainly no act could more emphatically be destruction than the taking away the very substance of the inheritance, as has been done in this case. It is further established by the cases—and, I think, reason sustains them—that destruction by one tenant in common is ground for an injunction at the suit of the others to restrain it. It is true that, in *Hole* v. *Thomas*, Lord *Eldon* uses the phase, " a case of malicious destruction may be a ground ;" but it is not a malicious motive that gives the right to the other parties interested, but the wrong done, the destruction of their inheritance ; and in that very case he enjoined a tenant in common, among other things, from cutting any timber trees at unseasonable times, an act quite as likely to arise from his necessities as from malice ; and at the same time refusing to restrain him from cutting down ornamental trees, an act more likely to spring from a malicious motive or from mere wantonness than those acts which he did restrain. In *Twort* v. *Twort*, he says nothing about malice, but only of positive and actual destruction, and applies these words to the cutting of saplings and any timber trees or underwood at unseasonable times.

Judgment.

I think, therefore, that the two necessary points to entitle the plaintiff to an injunction are made out,—viz., that a tenant in common will be restrained from

doing acts which amount to destruction, and that the taking of brick earth, as the defendant has been doing and is doing in this case, is destruction.

I am not prepared to say that, even if it had been shewn that the testator was using the land in question as a brickfield at the time of his death, the court ought not to enjoin one of several tenants in common from so using it. It is not unusual, in this country at least, for landowners to make use of land for brickmaking for one or two or three years, or perhaps more, according to its position and elevation, but without any intention of using the land permanently for such purpose, not excavating clay pits or doing any thing more than taking away the surface, till it is reduced to such level as the owner thinks fit with a view to other purposes. Such a mode of using land affords no evidence of it being the intention of the owner to make brickmaking a part of the profits of the land, in the sense in which the words are used in *Viner* v. *Vaughan*, —meaning, as I understand, permanent annual profits, as annual growing crops are the profits of farm land. Judgment.

In this case, the acts complained of are causing deterioration in the value of the land, to what extent the parties differ. I think it a proper case for an injunction to go, restraining the further use of the earth for brickmaking.

1853.

PEEBLES v. KYLE.

Will—Construction of.

Sept. 6 & 23. The testator devised real estate to his wife for life, with remainder to A., B. and C., or the survivors or survivor of all of them, their heirs and assigns, for ever. *Held*, that the clause of survivorship meant the survivors at the death of the tenant for life, and not of the testator.

The bill in this cause was filed for the partition of certain properties devised by one *Allan Patterson*, who, after devising to his wife *Cornelia* a life estate in the land in which the parties to this suit were interested, from and after the determination of the said term, he devised the said land, or the remainder thereof, to the children of his brother *Robert Patterson; Elizabeth* the daughter of *Jane Corbet*, and the children of his late sister *Elizabeth Woodrow*, or the survivor or survivors of them their heirs and assigns for ever, in fee simple, to be equally divided among them; and stating that at the time of the testator's death there were living the said *Cornelia* his wife; the following children of *Robert*,—namely, *Elizabeth Patterson*, *Helen Murray Patterson* (both since deceased,) *Alexander Patterson* and *Janet Peebles* (two of the plaintiff's); also *Elizabeth* daughter of the said *Jane Corbet*, afterwards married to one *John Findlay;* and *Elizabeth Balfour Thompson* and *Maria Woodrow*, being the children of the testator's said deceased sister *Elizabeth.*

Statement.

That afterwards, and during the life-time of the testator's widow, the said *Elizabeth Patterson* and *Helen Murry Patterson* died intestate and without issue, leaving the plaintiff *Alexander Patterson* their heir-at-law.

The bill then went on to trace the title to the defendants in the suit, but it is unnecessary to state them: the only question involved was the share to which each of the parties was entitled under the will, and the events occurring since the death of the testator. The plaintiff

1853.
Peebles v. Kyle.

Alexander Patterson insisting that being heir-at-law of *Elizabeth* and *Helen Murray Patterson*, he was entitled to three-sevenths of the property devised. The defendants, on the other hand, contended that the shares of the deceased devisees went to the survivors, and that each of those who outlived the widow of the testator was entitled to an equal proportion—that is, one-fifth of the whole estate.

Mr. *Mowat*, for the plaintiff, submitted the matter to the consideration of the court; the whole question being whether the survivorship referred to the death of the testator or that of the tenant for life.

Mr. *Strong* for the defendants. Argument.

Buckle v. *Fawcett* (*a*), *Cripps* v. *Wolcott* (*b*), were referred to.

The judgment of the court was now delivered by

THE CHANCELLOR.—The only question argued before us in this case arises upon the will of *Allan Patterson*. Sept. 23.
After devising the premises in question to the testator's wife for life, the will proceeds in these words: "And from and after the determination of the said term, I give and bequeath the aforesaid real estate and lands, Judgment.
or the remainder or remainders thereof, to the children of my brother *Robert Patterson; Elizabeth*, the daughter of *Jane Corbet*, widow, now residing in Scotland, and the children of my deceased sister *Elizabeth Woodrow*, *or the survivor or survivors of all of them, their heirs and assigns, for ever, in fee simple, to be equally divided among them.*" And the question is as to the construction of this clause of survivorship,—does it mean the survivors at the death of the testator, or the survivors at the period of distribution?

(*a*) 4 Hare 536. (*b*) 4 Madd. 11.

1853.

Peebles v. Kyle.

The cases upon this subject have varied so much from time to time, that it would be impossible to adopt any construction which would not be inconsistent with some of them. In this state of the authorities, it is necessary to look to the reason of the thing rather than to the rules which have been from time to time propounded; and, viewed in that light, I concur in the construction placed upon this will by the learned counsel on both sides. I agree in the observation of Vice-Chancellor *Wigram* in *Buckle* v. *Fawcett* (*a*), "that the grounds upon which it was holden, as a rule of construction that indefinite words of survivorship should be referred to the death of the testator, are not conclusive" (*b*). I am of opinion that the clause of survivorship in this will, placing upon the language of the testator its natural construction, refers to the period of distribution, and not of the death of the testator; and that construction appears to me to be sanctioned by the current of modern authority. It must be admitted that the Vice-Chancellor appears to have proceeded upon a very imperfect, if not an erroneous view of previous decisions in determining *Cripps* v. *Wolcott* (*c*), the first case in which the old rule was expressly disavowed; and in Doe *Long* v. *Prigg* (*d*), a case subsequently decided, and as it would seem carefully considered, the doctrine of the older cases was adhered to; but the rule laid down by Sir *John Leach* appears to me to be so much more accordant with reason, and has been so often recognized by subsequent judges (*e*), that I have no hesitation in following it in the present case.

Judgment.

(*a*) 4 Hare 542.

(*b*) Rose d. Vere v. Hill, 3 Burr. 1882; Doe d. Borwell v. Abey, 1 M. & S. 428.

(*c*) 4 Madd. 11. (*d*) 8 B. & C. 231

(*e*) Gibbs v. Tait, 8 Sim. 132; Blewitt v. Stauffers, 9 Law Jour. Ch. 209; Spurrell v. Spurrell, 17 Jur. 755; and see Pope v. Whitcombe, 3 Russ. 124.

ARNOLD v. MCLEAN.

1854.
Feb 6th & 9th

Contract—Specific performance.

In the course of correspondence which the court was of opinion amounted together to a complete contract for the sale of the lands in question by the defendant to the plaintiff, the defendant wrote a letter to the plaintiff's agent containing the following passage: "I am strongly advised to retain them, but having other ground on which to build, and having some objects in view which I think may be accomplished with the proceeds, I feel inclined to sell at £1000. That amount in hand would suit me much better than to have a small portion, say £250 on interest, for so long a period. I dare say it would be quite the same thing for your friend to pay the whole at once. In order to raise a sum to pay for a property in Albion, which *Archy* has been improving, I gave in his behalf, a short time since, a mortgage to the University for £500 on the Niagara Street lots, to be paid in five years. If your friend should decide on giving the whole, I have no doubt the University would take a security on the Albion property, the title of which is secured by the advance, and release the lots on Niagara Street. The Albion property will more than pay up the mortgage within five years. Perhaps as matters stand your friend would take other security to bear him harmless as to the £500, and so it might be unnecessary to trouble the University on the subject." In the subsequent correspondence nothing was said as to this mortgage on either side: and it was held by all the judges that the contract was complete. It appeared from the other correspondence that the defendant's object in selling was to obtain the immediate use of the whole of the purchase money: and the Vice-Chancellors held that he was not bound to pay off the mortgage referred to out of the purchase money; that he was bound to transfer it to the Albion property and any other property he had if the University would consent to the exchange, and if the University refused he was bound to indemnify the plaintiff against the mortgage.

This was a motion for a decree for specific performance of an agreement, pursuant to the orders of July, 1853. Statement.

The bill stated that by an agreement evidenced by letters bearing date between the 17th January and 18th February, 1853, and signed by the defendant, the defendant contracted to sell to plaintiff certain freehold property therein described or referred to for the sum of £1000, payable in the mode therein set forth, and that he had made or caused to be made to the defendant an application specifically to perform the said agreement on his part, but that he had not done so.

The prayer was, that the agreement might be specifically performed, and for that purpose that all proper

1854. directions might be given: the plaintiff offering to perform the said agreement specifically on his part.

Arnold v. McLean.

The following was the correspondence between the parties. It was between Mr. T. G. Hurd and the defendant. The words in italics were those principally criticised on one side or the other at the bar.

NUMBER 1.—FROM HURD TO THE DEFENDANT.

"*Saturday afternoon, 3rd January*, 1853.

"DEAR SIR.—I had an offer to-day for your *two acres* on Niagara Street—and though not equal to what you recently spoke of obtaining, I think it worth while sending you. *The party* offers £700 *cash*, which would be paid so soon as the papers could be prepared. He is only buying on speculation—and having a little money to invest would take them at that.

"I think I could get my commission out of the party also. He has the money laying idle. I should be obliged if you could let me know *yes* or *no* this evening as some other things offer.

Statement.

NUMBER 2.—SAME TO SAME.

"*Monday Evening, 10th January*, 1853.

"MY DEAR SIR.—With reference to my last offer for your Niagara Street lots, I would not have *made the same* had I not been requested to do so. I hope you will not, however, think me troublesome if I now send you one more, I think very near your expectations. I have prevailed on *a customer of mine* to offer as follows:—£1000 *for the two acres*, which he will pay as follows—£500 cash and £500 on mortgage for 5 years, paying £100 per annum with interest. If you will take this, *the party* (who is a very respectable one) will *I think*, close the matter whenever it suits your convenience. With this offer I should have to look to you for the usual commission—unless I can get my *friend* to bear a portion of it. If inconvenient to give me an answer this evening, I should feel obliged by one as near 10 to-morrow morning as possible."

1853.

Arnold v. McLean.

NUMBER. 3—HURD TO THE DEFENDANT'S SON.

"*Toronto, Tuesday, 11th January, 1853.*

MY DEAR MCLEAN.—I got the Judge's note after I saw you this morning, and not wishing to bother him unnecessarily, I write you, and you can, if you think fit, communicate *another offer* to him. I was *instructed to offer* your father by my last purchaser, £900 *in cash*, and as none but I *advised* his making the offer which I sent last night, viz., £1000 on the terms of £500 down and remainder £500 in 5 years, under these circumstances *I can still offer* £900 *cash*, or £1000, paying £750 cash and £250 in 5 yearly payments with interest. The purchaser would not stand at perhaps £50 more in cash if £750 should not be enough. When you consider the amount of cash offered there has no sale been made in that neighboorhood at all equal to it. Dr. Hayes' purchase of the neighbouring property was made on 10 years' purchase, and nothing down. You would oblige me by calling on me as you go to town to-morrow morning or this evening if this reaches you before you go home."

Statement.

NUMBER 4.—SAME TO SAME.

"*Toronto, Friday morning, 14th January, 1853.*

MY DEAR MCLEAN,—I have been a number of times to your office and have found it locked. You would oblige me by calling the first time you pass. I think it probable I can manage what you require, but I want some further information also relative to *my offer (the last)* for the Niagara Street lots."

NUMBER 5.—LETTER FROM DEFENDANT TO T. G. HURD.

"*Monday Morning, 17th January, 1853.*

"MY DEAR SIR,—In my reply to your letter of the 8th January, 1852, respecting the Niagara Street lots I stated that I had no doubt that before a year I should be able to sell at £1000, so now I have just as little doubt that before another year they will command £1200.

"I am strongly advised to retain them, but having other ground on which to build and having *some objects in view which I think may be accomplished* with the

1854. Arnold v. McLean.

proceeds, *I feel inclined* to sell at £1000. That amount *in hand* would suit me much betterthan to have a small amount, say £250, on interest for so long a period. I dare say it would be quite the same thing for *your friend* to pay the whole at once.

"In order to raise a sum to pay for a property in Albion, which *Archy* has been improving, I gave in his behalf a short time since a mortgage to the University for £500 on the Niagara Street lots, to be paid in 5 years. *If your friend* should decide on giving *the whole* I have no doubt the University *would* take a security *on the Albion property*, the title of which is secured by the advance and release lots on Niagara Street. The Albion property will more than pay up the mortgage within 5 years, perhaps, *as matters stand, your friend* would take other security to bear him harmless as to the £500, and so it might be unnecessary to trouble the University on the subject."

NUMBER 6.—HURD TO DEFENDANT.

"*Toronto 18th January*, 1853.

Statement.

"MY DEAR SIR,—I have to trouble you with another note. The party offering has agreed to give £800 *cash* and a mortgage for £200, for the Niagara Street lots, and will close whenever convenient to you; this however, *upon the condition only* that you will pay 1¼ per cent commission on the amount, as he will pay the other half. Should you think fit to do this, I can see your son about the papers: *otherwise there will be an end of the matter.*

"P. S. The lots on Crookshank Lane I do not think anything could be done with.

NUMBER 7.—DEFENDANT TO HURD.

Tuesday Evening, Jan'y 18th, 1853.

MY DEAR SIR—As to the £200 proposed to remain *on interest* for 5 years on the purchase of the Niagara Street Lots, *I am disposed to yield.* If I require to raise the amount in the interim, I dare say I may be able to do so at a *discount*, but I do not like the notion of a discount on that and a discount also in the shape of commission from the whole amount. It was only in consideration of *cash* that I consented to pay 1 per

cent., but I am *not so anxious to sell as to induce me to pay on additional amount* and take *less cash* than I anticipated. 1854. Arnold v. McLean.

NUMBER 8.—HURD TO DEFENDANT.

Toronto 22nd January, 1853.

DEAR SIR.—Will you be good enough to instruct Mr. *Archibald McLean* to have prepared the deed and mortgage of the two acres of land in Niagara Street, on the terms mentioned in your LAST NOTE. I gave him the names, and *Mr. Arnold will be ready* as soon as the papers are prepared.

With reference to the 1 per cent. commission which you were willing to allow if £1000 cash were paid, I really think you should allow me at least a proportionate per centage on the £800 or £8. I think this a very modest request; nevertheless, *I do not intend this to affect the bargain.* I certainly *sold* for your benefit, and *got* you the highest price that has been given for anything in the reserve.

NUMBER 9.—HURD TO DEFENDANT'S SON.

Toronto, 12th February, 1853.

MY DEAR MCLEAN.—I promised the Judge I would let you know if *Arnold* would consent to the £500 mortgage remaining on the Niagara Street Lots, which he declines for many reasons, and I think you could hardly expect him to consent to it. I believe he would prefer CLOSING if it would suit Judge *McLean*, by giving him two notes of £100 each, endorsed by Mr. *Arnold*, his father. It is not an uncommon thing to change the security for a loan at the College office, and one which I am aware they will do immediately if the other security offered is sufficient. I called at your office twice lately but could not see you. Statement.

NUMBER 10.—DEFENDANT TO HURD.

Toronto, 4th February. 1853

MY DEAR SIR.—Your note to *Archy* on Saturday last was placed in my hands by him in the evening of that day, and in my reply I have only to say that I am quite ready to convey the Niagara Street Lots to Mr. *Arnold* without further delay, on payment of the

1854. amount AGREED UPON; but I can only do so at present subject to the mortgage to the University. I will, however, give Mr. *Arnold* any reasonable security that he shall not be troubled for that mortgage, or if he prefers it, that it shall be taken up and released, say within 18 months.

Arnold v. McLean.

If the mortgage were given for a debt of my own—that is, if the money secured by it were for my own use—it would of course be quite the same thing to me to pay it up now, or at the end of five years; but as the amount was for my son's benefit, and he is the party who will ultimately pay it, I do not wish to be deprived in the mean time of the use of the money, *which is the immediate object of selling*. I should much prefer giving a security against the mortgage to the substitution of other property for the amount of it, for several reasons: 1st, The University requires property to be of *double* the value of any loan; and 2ndly, There must be a valuation and expense incurred thereby; and the 3d, the titles must be referred to the University solicitor, and he cannot be expected to examine them and draw the necessary instruments without charge; and in addition to all this, the expense of releasing the former mortgage, of registering a new one, and the insurance of any buildings, would be considerable. As Mr. *Arnold* only requires to be secure in his *purchase*, and free from former incumbrances, I cannot see that he ought to have any objection to the security offered, or that he can possibly be put to any inconvenience in case he should desire to sell. An additional reason for preferring the giving security against the mortgage is that the loan from the University is of so recent a date, that it looks like trifling to desire now to change the security.

Statement.

I dare say the notes may answer quite as well as a mortgage for the £200, should Mr. *Arnold* desire to leave that amount unpaid at present; some expense will thereby be saved, and I shall not [illegible] any apprehension of the security.

NUMBER 11.—HURD TO DEFENDANT.

Toronto, 17th February, 1853.

MY DEAR SIR.—I beg to acknowledge your note of 16th instant. I have seen Mr. *John T. Arnold*, and I have shewn him your note and explained the mode in

1853.
Arnold v. McLean.

which you wished an arrangement to be made, by which the £500 mortgage now on the Niagara Street lots should remain undisturbed, and that he should receive security that the property should not be liable for the amount, &c.; and he *declines any other arrangement than carrying out* the terms of the sale made to him—namely, £800 cash to be paid down, and a mortgage at two years for balance of purchase money, viz., £200, and will not consent to the £500 mortgage remaining under any circumstances. He also requested me to say that he was prepared at any moment to carry out the terms of the sale.

NUMBER 12,—HURD TO THE DEFENDANT.

Toronto, 14th March, 1853.

DEAR SIR.—I shall be glad if you could make it convenient soon to close the sale of your lots made to Mr. *John T. Arnold*. He has requested me to see you about it, as it is almost two months since the sale was made. Statement.

P. S. If inconvenient at present to complete the papers, a note from you to the effect that they will be completed shortly, or a memorandum of agreement of sale, would be satisfactory, as Mr. *A.* looks to me to see to the matter.

NUMBER 13.—PLAINTIFF'S SOLICITOR TO THE DEFENDANT.

Toronto, March 26, 1853.

DEAR SIR.—Mr. *J. Arnold Jr.*, has placed in my hands the correspondence between you and him respecting the purchase of two lots on Niagara Street.

Mr. *Arnold* asserts that you sold him the property in question for £1000—£800 of which was to be paid down, and the remaining £200 to be paid in five years and secured on the propety—but that you now want to change the terms of the agreement, and leave an incumbrance of £500 on the land, Mr. *Arnold* taking other security for its ultimate payment.

On examining and carefully considering the correspondence in question, I am of opinion that you are bound to convey the property to Mr. *Arnold* free from every incumbrance on the terms by him above stated and I am instructed to file a bill for specific performance.

1854. Arnold v. McLean.

I respectfully request that you will favor me with an immediate reply, and trust it may not be necessary to file our bill. The £800 is lying some time past in the bank for your acceptance.

Statement.

The following passage from the answer was read by the plaintiff in reference to Mr. *Hurd's* letter of the 22nd January, 1853: "That this defendant soon after the receipt of the said last mentioned communication from the said *T. G. Hurd*, in which the name of a principal is for the first time disclosed, saw the said *T. G. Hurd* and requested him to ask the said *Arnold* if the last proposition contained in this defendant's letter of the 17th day of January herein before referred to would suit him." Also the following passage in reference to Mr. *Hurd's* letter of the 14th of March, 1853: "That this defendant soon after the receipt of the last mentioned letter saw and conversed with the said *Hurd* on the subject of it, and then informed him that this defendant had it not in his power to do otherwise than was stated in his letter of the 14th day of February."

The answer referred to the correspondence at length and then proceeded thus, "That no further communication or agreement, or negociation of any kind, took place between this defendant and the said *Hurd*, or the said *Arnold*, respecting the sale of the said lots; and this defendant submits that there is not, and denies that there is contained in the letters herein before referred to any specific agreement for the sale of the said lots to the said *Arnold*, which would make it incumbent on this defendant immediately or at any time before the filing of the bill of the said plaintiff, to cause the said mortgage of which the plaintiff had due notice to be released or discharged by the University of Toronto, or which would make it incumbent on this defendant to convey the said lots, as required by the said plaintiff, free from such incumbrance, before the filing of the said bill. That this defendant, as

expressed in his letters, hath been always ready and willing to convey the said lots to the said *Arnold* on the terms therein contained, but that the said *Arnold* required and still requires this defendant to convey to him the property free from every incumbrance, as appears by the letters of his solicitor bearing date on the 26th day of March last, and on the 20th day of September last, respectively. That if the said letters contain in fact any agreement on the part of this defendant, such as the said plaintiff seeks to enforce, the same is the result of mistake or misapprehension on the part of this defendant, as this defendant did not contemplate or intend to bind himself for the immediate release of the mortgage on the said property by the Toronto University, and would not have made any sale which would require the application of any portion of the purchase money to the redemption of the said mortgage—which application would have defeated this defendant's object in selling or desiring to sell the said lots for the consideration of one thousand pounds, and the contract should not therefore be enforced against this defendant. And this defendant saith that as the said complainant has attempted to enforce the said *alleged* contract according to a wrong construction thereof, if any contract there was, and hath repudiated the same according to what this defendant submits to be the true construction thereof, *if any contract there was*, he has thereby, as well as for other reasons, disentitled himself to any relief against this defendant; and this defendant submits that the time which has elapsed since the alleged making of the said contract and before the filing of the complainant's bill, and the facts that no possession of the said property hath ever been had by the complainant, and that nothing whatever has been paid on account of the alleged purchase money, and that this defendant's objects in selling or desiring to sell have thus far been defeated, are strong grounds upon which a decree should be given against the said defendant in the premises. And lastly, this

Statement.

1854. Arnold v. McLean.

defendant submits that under all the circumstances before mentioned, this defendant should be hence dismissed with costs in this behalf most wrongfully sustained, and that the said complainant should be restrained from any further or other proceeding for or on account of the said alleged contract.

Mr. *McDonald* and Mr. *C. Jones* for the plaintiff, cited *Townsend* v. *Champernown* (*a*), *Clive* v. *Beaumont* (*b*), *Gibbons* v. *Metropolitan Asylum* (*c*), and *Sugden's* Vendors and Purchasers, vol. 1, pp. 3–28, (10 Ed.)

Mr. *Mowat*, for the defendant, cited *Hyde* v. *Wrench* (*d*), *Howell* v. *George* (*e*).

Argument

As to whether there was a complete contract or not, the contention on behalf of the defendant was that the contract was incomplete until the proposition contained in his letter of the 17th of January should be disposed of by agreement in some way, or that the plaintiff's silence about it was an acquiescence, a view which he had always repudiated; that the defendant's letter of the 18th of January, reading it in connection with Mr. *Hurd's* of the same date, did not amount to an offer; that if it did, Mr. *Hurd's* letter of the 22nd was not intended as an acceptance of it, suggests a new term—that defendant should prepare the papers—and refers to the letter of the 18th of January for the terms, though that letter mentions neither price nor time of payment, and subsequent letters of Mr. *Hurd* speak of closing as a thing not yet done; and that there never was any agreement as to when the £200 was to be paid; that on the 11th of January the suggestion was for payment of it in five yearly instalments with interest; on the 18th for its remaining on interest for

(*a*) 1 Y. & J. 449.
(*b*) 1 DeG. & S. 397.
(*c*) 11 Beav. 1.
(*d*) 3 Beav. 334.
(*e*) 1 Madd. 1.

five years; and on the 17th of February Mr. *Hurd* states the terms on which alone plaintiff would perform the contract, namely, two years for the whole £200, with interest. The bearing and force of these circumstances were contested on the other side.

1853.
Arnold v. McLean.

THE CHANCELLOR.—Since the argument of the motion in this case I have read over the letters, and I continue to be of opinion that a perfect agreement was thereby constituted between the parties.

February 20th.

The answer does not appear to me to deny that; but, admitting a contract, it insists that upon a proper construction of the letters the plaintiff is bound to pay his purchase money, on being indemnified against any mortgage with which the property is at present incumbered.

That contention rests principally, if not altogether, upon a passage in the letter of the 17th of January, which is in the words, "If your friend would decide on giving the whole (meaning the whole purchase money), I have no doubt the University would take a security on the Albion property, the title of which is secured by the advance, and release the lots on Niagara Street. The Albion property will more than pay up the mortgage within five years. Perhaps, as matters stand, your friend would take other security to bear him harmless as to the £500, and so it might be unnecessary to trouble the University on the subject."

Judgment.

Now that paragraph does not constitute, in my opinion, a part of the agreement between these parties. It relates to an event which never happened—namely, to an agreement that the whole purchase money should be paid at once. But, had that event happened, it could not have been argued, I think, that the defendant would have had a right to immediate payment of the purchase money, indemnifying the plaintiff against the mortgage

1854.

Arnold v. McLean.

In the passage I have quoted—and the subject is not alluded to in any other part of the correspondence—that sort of arrangement is suggested as one that would be convenient to the defendant; but it is not insisted on as a matter of right, and does not constitute, in my opinion, any part of the agreement. The letter of the 14th of February, if we are at liberty to look at it for that purpose, shows that the understanding of the parties at that time was in accordance with what appears to me to be the true construction of the agreement.

Assuming the plaintiff's construction of the agreement to be correct, and I think it so, it is quite clear that there is nothing in the delay which has arisen which can bar his right to specific performance. He was ever ready and willing to perform the agreement upon what appears to me to be its true construction. The delay, which was short, arose from the erroneous construction placed upon the contract by the defendant, and is sufficiently explained. In my opinion, therefore, the plaintiff is entitled to the usual decree.

Judgment.

ESTEN, V. C.—I think there is a concluded contract between these parties which ought to be specifically performed; that the defendant never, however, meant to bind himself to discharge the mortgage to the University out of the purchase money, but undertook, if practicable, to get rid of it in another way, unless the plaintiff would accept of counter security, which he declined. I think at present that the decree should be without costs. The plaintiff, as appears to me improperly, insisted upon the absolute and unconditional discharge of the mortgage; but it will be necessary to direct an inquiry whether the University will accept a transfer of the security—reserving costs and further directions. If the mortgage cannot be otherwise got rid of, it would seem that the bill must be dismissed without costs, unless the plaintiff will accept counter security, which the defendant is bound to give.

1854.

Arnold v. McLean.

SPRAGGE, V. C.—I think the letters of the 17th and 18th of January, 1853, from the defendant to *T. G. Hurd*, and from Mr *Hurd* to the defendant of the 18th and 22nd of January, constitute a complete agreement between the parties—the last letter containing an unqualified acceptance of the terms proposed in the defendant's letter of the 18th, which is a modification of that of the 17th, in agreeing to accept £800 in hand, and that the balance, £200, should be paid by instalments in five years. Between the 18th and 22d there had been no rejection by the purchaser of the vendor's offer, nor any counter proposal on his part, and this distinguishes the case from that of *Hyde* v. *Wrench*, relied upon by the defendant.

The difficulty has arisen from the existence of the mortgage referred to in the defendant's letter of the 17th, which he refers to in these terms: "In order to raise a sum for a property in Albion, which property has been improving, I have on his behalf a short time since a mortgage to the University for £500 on the Niagara Street lots, to be paid in five years. If your friend should decide on giving the whole, I have no doubt the University would take a security on the Albion property, the title of which is secured by the advance, and release my lots on Niagara Street. The Albion property will more than pay up the mortgage within five years. Perhaps, as matters stand, your friend would take other security to bear him harmless as to the £500, and so it might be unnecessary to trouble the University on the subject." The defendant had a short time previously refused an offer from the same party of £1000, for the same property—£500 in hand, and £500 by five annual instalments with interest—on the ground that if he sold, it would be to apply the purchase money to a particular purpose, for which £500 in hand would be insufficient; and in the letters to which I have referred he shows a desire to get the whole in hand if possible, and if not the whole,

Judgment.

1854.

Arnold v. McLean.

as large a portion of it as possible. It is clear from this, and indeed from the whole correspondence, that he did not contemplate the applying of £500 of the money to be paid in hand, or any portion of it, to the discharge of the £500 mortgage, even supposing that the mortgagees who had but recently made the investment, would have consented to receive it.

Judgment.

Supposing this to have been a mortgage past due, so that it was in the power of the mortgagor to pay it off, he would, if silent upon the subject, have been bound to do so, and to convey the estate to the purchaser disencumbered of that charge; and, supposing the *defendant* conceived this to be his position when he referred to the mortgage in his letter of the 17th, I should in that case read his letter as providing against a liability which he would otherwise incur; or, on the other hand, if the defendant conceived that the mortgage not being due and his disclosing that circumstance to the purchaser would prevent any such liability attaching, I should read his letter as merely suggesting that the incumbrance need not affect their bargain for he should probably be able to transfer it to other property—unless, indeed, the purchaser should be content with being indemnified against the mortgage. Reading the letter either way, and taking it in connexion with his previous letter to which I have adverted, I think the purchaser was given distinctly to understand that no part of the purchase money was to be applied either by him or the vendor to pay off that mortgage, and that the defendant looked to its arrangement in no other way than by one of the two modes suggested in his letter. The purchaser, if he dissented from this, should have made known his dissent to the defendant; but his agent, Mr. *Hurd*, in his letters of the 18th and 22d, the latter of which appeared to leave nothing open for discussion, is silent upon the subject. If he had insisted then upon what he insists now—viz., that the defendant should in any event discharge the mort-

1854.

Arnold v. McLean.

gage, and failing that, that he, the purchaser, should retain the amount out of the purchase money, it would have been for the defendant to consider whether he would enter upon the contract on those terms; he might perhaps have then ascertained whether the mortgagees would have consented to the transfer of their security to the Albion property, or he might have broken off the treaty. It is manifest, I think, that if it involved the retention of the mortgage money out of the purchase money, there would have been no contract. It appears to me that the silence of the purchaser must be interpreted in one of two ways—either as acquiescence, or as leaving one term of the treaty not agreed to, in which case there would be no perfect contract. I think it amounts to acquiescence, and I think the defendant under his proposition bound to this: failing to obtain the purchaser's consent to the mortgage remaining on the land upon his being indemnified against it, (which consent he did fail to obtain,) I think he was bound to apply to the mortgagees for such transfer of their security as in his letter of the 17th of January he expressed a very confident belief that they would agree to, and of course to use all proper means in good faith to induce them to agree to it; and this it cannot be doubted that he would do. If such application were refused on the ground that one of the terms required by the mortgagees referred to in the defendant's subsequent application could not be complied with, the Albion property not being estimated as worth £1000, I am not satisfied that the defendant would not be bound to offer property to that value; because when he suggested such transfer of security as a mode of disencumbering the land in question, he knew the terms and conditions upon which the University made investments by mortgage, and assumed the Albion property to be of not less value than was by these terms and conditions required. If he failed to effect such transfer from some other cause and through no fault of his own, I am not satisfied that the pur-

Judgment.

1854.

Arnold v. McLean.

chaser would not be bound to complete the purchase and pay the purchase money, without the removal of the incumbrance, upon being sufficiently indemnified against the mortgage; and if such would be an unusual or anomalous position, it would be a contingency to which he left himself open by relying upon the probability that an arrangement could be effected whereby the incumbrance could be removed, and not making it a condition that it should be removed.

I think the plaintiff before and since the Bill was filed, has insisted upon more than he was entitled to. I think, at the same time, that the defendant offered less than the plaintiff was entitled to, for instead of endeavoring to affect a transfer of the incumbrance, he in his letter of the 14th of February gives reasons why he should not be expected or required to do so. I should be inclined, therefore, to let each party pay his own costs; but, as inquiries are directed, the costs may properly be reserved.

Judgment.

SHAW v. LIDDEL.

Practice—Pro confesso.

June 5th.

Where service of the office copy of a bill was made upon a solicitor acting on behalf of several defendants, and such solicitor gave a written undertaking to answer, but afterwards made default in so doing, the bill was ordered to be taking *pro confesso*

Statement

This was a motion made in chambers on a previous day before his lordship the Chancellor for an order to take the bill *pro confesso* as against certain of the defendants. By the affidavits filed, it appeared that the solicitor of the plaintiff had, at the request of Mr. *M. Cameron*, served him with an office copy of the bill for several of the defendants, instead of serving such defendants with a copy each; and Mr. *Cameron* gave a written undertaking to put in an answer for those defendants. No answer having been put in, Mr. *A. Crooks*, for the plaintiff, moved for an order to

take the bill *pro confesso*. When the motion was made a doubt was suggested whether the proper mode of proceeding would not be to order the solicitor to put in an answer; but 1854. Shaw v. Liddell.

The CHANCELLOR now directed the order, as moved for, to go, stating that upon consultation with the other members of the court they had come to the conclusion that, in cases like the present, keeping in view the great saving of expense which would be affected by serving a copy of the bill on a solicitor, especially in cases where the defendants are numerous, and the practice existing before the orders of 1853, the proper mode of proceeding would be to order the bill to be taken *pro confesso*. Judgment.

LANDMAN v. CROOKS.

Principal and agent—Rests

Where it appeared that an agent had received large sums of money for his principal, and had used it for many years in his own business, instead of remitting it, as he might and should have done, to his principal, he was charged with six per cent. interest and annual rests.

This was a bill for account of moneys received by the defendant as agent for the plaintiff. It appeared that upwards of thirty years ago the plaintiff, being about to leave this province for Europe, appointed the defendant his agent, with full power to sell and convey the lands of the plaintiff and receive the purchase money therefor. In the course of such agency the defendant sold a large quantity of lands, amounting in all to about 3,000 acres, and received a great portion of the purchase money, and remitted money at different periods up to some time in the year 1836. Since then no money had been remitted or communication sent by the agent to the principal, but the money subsequently received by the agent was by him mixed with his own funds and used in the course of his mercantile transactions. After repeated applications to the agent for Dec. 19th, 1853, and Feb. 20th 1854. Statement.

1854.

Landman v. Crooks.

an account a bill was filed, and the defendant filed an account shewing a balance in his hands of about £800, after deducting a sum of £231 for commission on the sums received by him.

By arrangment between the parties it was referred to a judge in chambers to take an account of what was due by the defendant to the plaintiff. After hearing evidence of witnesses, and the *viva voce* examination of the defendant, his Honor Vice-Chancellor *Esten* directed the account to be taken, with annual rests at the rate of six per cent. per annum. In making up this account the Registrar deducted the amount of commission allowed by the Vice-Chancellor from the gross amount of the account, in the same manner as the defendant had done when bringing in his accounts.

Statement.

From this decision of his honor the defendant appealed to the full court; and on the appeal now coming on for argument,

Mr. *Brough* and Mr. *Turner*, for the defendant, contended that the defendant's conduct was not such as to warrant the account being taken against him with rests; such a course has only been adopted when there has been gross misconduct and specific directions given for investing the funds.

Argument.

They contended, also, that the deductions for commission ought to have been made annually, and not at the foot of the account as had been done here, as thereby the defendant is made to pay interest on moneys which belonged to himself.—*Tickel* v. *Short* (*a*), *Willis* v. *Fernegan* (*b*), *Tebbs* v. *Carpenter* (*c*), *Westover* v. *Chapman* (*d*), *Shepherd* v. *Mould* (*e*), *Robinson* v. *Robinson* (*f*), were referred to.

(*a*) 2 Ves. Sr. 239.
(*b*) 2 Atk. 252.
(*c*) 1 Madd. 290.
(*d*) 1 Coll. 177.
(*e*) 4 Hare, 500.
(*f*) 9 Eng. R. 75.

1854.

Landman v. Crooks.

Mr. *Strong*, contra—The almost invariable rule established by the cases in England is, that where an agent has received the funds of his principal, and instead of paying them over, has mixed them with his own and used them in the course of his business, he is chargeable with rests. There are no means existing for ascertaining the profits derived by this defendant from these moneys; therefore rests must be allowed.

As to the objection that the amount of commission should have been deducted each year, he contended that under the circumstances shewn in this case no commission whatever should have been allowed,—such allowance being given not for receiving the money only, but for receiving and paying it over. He cited, amongst other cases,—*Williams* v. *Powell* (*a*), *Carmichael* v. *Wilson* (*b*), *Hutchins* v. *Hutchins* (*c*), *Raphael* v. *Boehm* (*d*), *Stacpoole* v. *Stacpoole* (*e*). Argument.

THE CHANCELLOR.—The account directed by this decree came before my brother *Esten* in chambers, and the defendant being dissatisfied with his veiw of the case, the matter was argued before the Court.

My learned brother ordered the account to be taken with annual rests, and the propriety of that direction was the point principally discussed before us. Mr. *Brough*, on behalf of the defendant, argued that courts of equity had always shewn a great indisposition to permit compound interest to be charged; that in *Raphael* v. *Boehm* (*a*), which he described as an exceptional case and frequently disapproved, there was not only a direction to accumulate, but a gross breach of trust; that in every case in which an executor had been charged with compound interest, one or both of these ingredients had exised; and that there was Judgment.

(*a*) 16 Jur. 393.
(*b*) 3 Moll. 79.
(*c*) 15 Jur. 869.
(*d*) 11 Ves. 92
(*e*) 4 Dow, 209.
(*f*) 11 Ves. 92 and 13 Ves. 410.

1854.
Landman v. Crooks.

nothing in the circumstances of this case to warrant such a direction, either upon principle or authority.

Mr. *Strong*, on the other hand, contended that the current of modern authority was strongly in favor of my learned brother's order.

The cases upon this subject are very numerous, but it would be uselesss to enter into any minute investigation of them, because it is perfectly plain that the law has undergone, in this respect, an almost entire change. Lord *Macclesfield* appears to have satisfied himself, upon ground of reason, that it would be unjust to charge an executor employing the trust funds in his trade with any interest, because of his liability to make good any deficiency in case of loss; and we have the authority of Lord *Hardwicke* for saying that there was no instance of any such charge against an executor in his time (*a*). But these cases are so entirely opposed to our present notions, that we find a difficulty in understanding how such a doctrine came to receive the sanction of so great a judge. It must be admitted too, as Mr. *Brough* argued, that the judgment in *Raphael* v. *Boehm* was rested principally upon the direction for accumulation in the will of the testator; and it is also true that, with all its specialties, it has been often considered a hard case. But in this respect, also, the practice of the court has undergone considerable modification, and I take it to be clear that compound interest may be charged at the present day in the absence of any direction either to accumulate or invest.

Judgment.

In *Carmichael* v. *Wilson* (*b*), although there had been great delay in compelling an account, the House of Lords ordered annual rests, in the absence of any direction to invest; and when the case came back to the court below, Sir *Anthony Hart*, then Lord Chan-

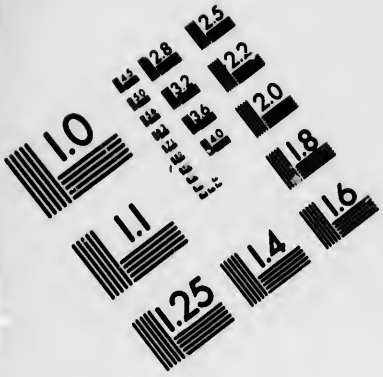
(*a*) Child v. Gibson, 2 Atk. 603. (*b*) 4 Bligh, N. S. 145.

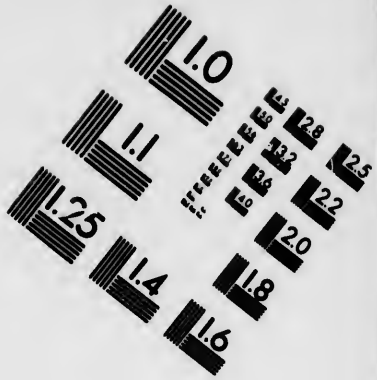
cellor of Ireland, expressed his cordial approval of the order made by the Lords *(a)*, and *Powell* v. *Williams* is a very recent authority for the same proposition.

But I do not apprehend that either of these cases establishes the proposition for which I understand the learned counsel to contend—namely, that the employment of the trust fund in trade is always sufficient to charge the executor with compound interest. Prior to *Carmichael* v. *Wilson* that certainly was not so. It is clear that at that period a special case was necessary to charge an executor with interest beyond 4 per cent. Where the funds had been employed in trade, trade interest—that is, 5 per cent.—was allowed; but that circumstance was not considered sufficient of itself to warrant the court in charging compound interest. That was the clearly established rule then *(b)*, and I apprehend that it is so still. Certainly there are numerous cases since that decision, in which, notwithstanding the employment of the money in trade, the court has refused to order annual rests *(c)*: and the rule contended for would be, in my opinion, contrary to the principle upon which 5 per cent. has been allowed. When an executor employs the trust fund in his trade he is charged with 5 per cent. because that is the ordinary price paid for money so employed, that is its assumed value; and, instead of directing an account of the profit actually made, which would be the accurate compensation, those interested in the fund are permitted the option of having it repaid with interest at 5 per cent *(d)*. It follows that something beyond the employment of the funds in trade, for which 5 per cent. is assumed to be a sufficient compensation, must be necessary to warrant annual rests.

Judgment.

(*a*) 3 Mol. 90.
(*b*) Crackelt v. Bethune, 1 J. & W. 586; Sutton v. Sharp, 1 Russ. 146; The Attorney General v. Solly, 2 Sim. 518.
(*c*) Mousley v. Carr, 4 Beav. 53; Westover v. Chapman, 1 Col. 177.
(*d*) Docker v. Somes, 2 M. & K. 666.





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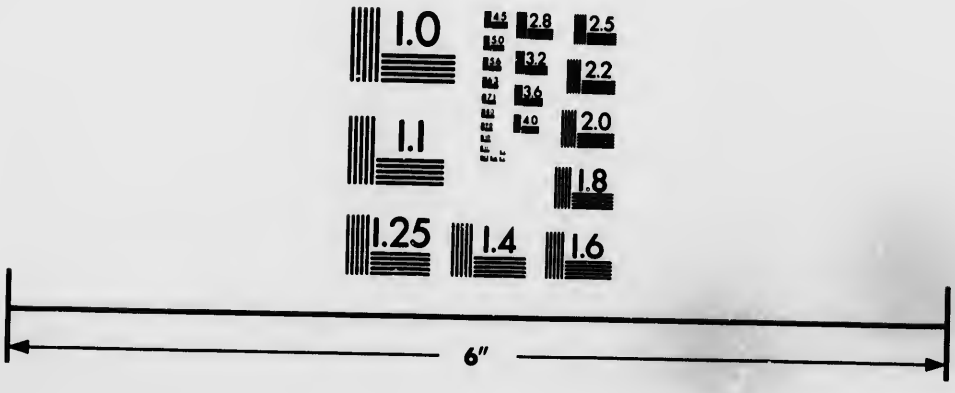

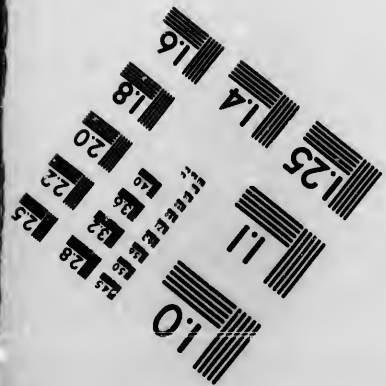

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1854.

Landman v. Crooks.

That circumstance is not sufficient of itself, therefore, to charge an accounting party with annual rests. The propriety of such an order depends, I apprehend, upon other considerations. Where the immediate distribution of the fund is for any reason impossible, in that case such an order would be, I presume, improper (*a*); but when the fund is immediately distributable, and the accounting party refuses to pay it over to those entitled, and embarks it in his trade for his own benefit, that is a species of misconduct which has been considered sufficient in modern cases, not only to fix him with 5 per cent. interest, but also to charge him with annual rests (*b*). It may be found, perhaps, that misconduct of that sort is necessary to warrant such an order. It appears to me to have constituted an important element in the decision of every case in which compound interest allowed (*c*); and, on the contrary, the order has been refused in cases of the highest authority, when that ingredient was wanting (*d*).

Judgment.

To apply these principles to the present case: The fund here was immediately distributable. Mr. *Crooks* received the monies as the agent of the plaintiff, for the very purpose of transmission, and upon his undertaking that they should be transmitted; but instead of discharging his plain duty to his principle, he withheld from him the fund to which he had an immediate title, and devoted it for years to his own purposes, employing it in his trade for his personal benefit. Now that was a species of misconduct which appears to me to bring the case within the principle of *Williams* v. *Powell*.

It is said, indeed, that the defendant did not know where the plaintiff was to be found. That is denied

(*a*) Court v. Robarts, 6 C. & F. 91 & 3; Fergusson v. Fyffe, 8 C. & F. 139. (*b*) Williams v. Powell, 16 Jur. 393.
(*c*) Stacpoole v. Stacpoole, 4 Dow. 209; Carmichael v. Wilson; Powell v. Williams, ubi sup. But see Jones v. Foxhall, 15 Beav. 389.
(*d*) Courts v. Robarts, Fergusson v. Fyffe, ubi sup.

by the plaintiff. It is certainly very difficult to understand why a correspondence which was carried on through a certain channel from the year 1821 down to the year 1836, might not have been continued in the same way down to the present time; and I am bound to say upon the evidence before me that it might have been continued, in my opinion, if Mr. *Crooks* had so desired. And I am confirmed in that conviction, and satisfied of the propriety of the order which has been made, by the evidence of Messrs. *Tylee* and *Miller*, from which it is manifest that for some years past the plaintiff's agent has been endeavoring in vain to force Mr. *Crooks* to a settlement. After three years of negotiation the plaintiff failed to obtain from his agent a single shilling of this large balance, and that after it had been for so long a time misapplied in the way already described.

Judgment.

I have considered this case hitherto, with reference altogether to English decisions; and upon the principles to be deduced from those cases I am of opinion that the order appealed from is right. But it may be found, perhaps, that these decisions are not strictly applicable. Certainly there are reasons for allowing annual rests here which do not exist in England. There the highest legal rate of interest is seldom obtained, and in a case of mere negligence, consequently, the executor is only charged at the rate of 4 per cent. But when a breach of trust has been committed, when the fund has been embarked in trade, 5 per cent. is charged. In other words, the interest charged is equivalent to the ordinary rate (4 per cent.), with half yearly rests. But in this country the highest legal rate of interest is the ordinary rate. Money is never loaned at a less rate. And, applying the principle adopted in England, an accountant who has been guilty of a breach of trust ought to be compelled to pay the ordinary rate of interest with half yearly rests. Thus much at least is evident; that an executor guilty of

1854. Landman v. Crooks.

mere negligence would be charged in this country with interest at the rate of 6 per cent.; that is the rate which any ordinary investment would produce; and to charge an executor who has embarked the trust fund in his trade, who has been guilty of a breach of trust, at the same rate, would be to ignore altogether the principle adopted in England.

It appears that the allowances which became due to the defendant from time to time have not been deducted from the annual balance, but in one gross sum at the end of the account. That was not, in our opinion, a correct mode of taking the account; and my learned brother informs us that he did not intend to lay down any such principle. That must be altered, but in all other respects the case appears to us to have been rightly decided.

Judgment.

ESTEN, V.-C., concurred.

SPRAGGE, V.-C.,—The law has undergone a very considerable change as to the strictness with which executors, trustees, and other agents are held to account for trust funds used by them. They are now held to account with interest at five per cent., and with rests, in cases where, in the time of Lord *Hardwicke* and Lord *Thurlow*, no interest at all, or interest at only four per cent., would have been allowed against them.

The more modern decisions, I think, clearly establish the proposition stated by his lordship the Chancellor—that when the fund is immediately distributable, and the accounting party does not pay it over, notwithstanding application by the party entitled, and embarks it in his own trade or business, these three things concurring amount to misconduct, which the court will visit upon the accounting party by charging him with full interest and taking the account with rests.

1854.

Landman v. Crooks.

I am not myself fully satisfied that those three elements must all concur, and that in the absence of application for payment by the party entitled and refusal to pay, the court will in no case direct annual rests.

I am not aware that there is any modern case in which rests have been refused where the accounting party has had trust funds in his hands presently distributable, and who has used them in his business, and where there have been no extenuating circumstances.

Wesley v. *Carr* is not such a case; for the widow of the testator had acted in perfect good faith upon a construction of her husband's will, which, though held to be erroneous by Lord *Brougham*, had been sustained by the judgment of Sir *John Leach*. It was not asked that she should be charged with rests; the only question was, whether she should pay four or five per cent., and Lord *Langdale's* language must be taken with reference to the question before him. He charged her with only four per cent., and made the decree without costs.

Judgment.

In *Westover* v. *Chapman* the defendants were executors. The will authorized the investment of the fund in public stocks or funds, or on good private securities. Under this latter clause they assumed that they might invest it with themselves, and divided the amount (£800) between them, each giving the other a promissory note for £400, and concealed from the parties entitled the true position of the money. They were farmers and graziers, and used the money in their business, which they admitted yielded some profit, but less than four per cent. It was not asked that they should be charged with rests, but with five per cent., and Sir *J. L. Knight Bruce* held it a plain case for fixing them with the payment of interest at five per cent.

1854.

Landman v. Crooks.

In *Docker* v. *Somes* it does not appear that there was any refusal to pay over the fund. The executors, in continuing and winding up the business of the testator, which they were authorized by the will to do, employed monies of the estate received from time to time in their own business, and for the use of those monies they *charged themselves five per cent.;* and Lord *Brougham*, in a most elaborate judgment, charged them, not indeed with annual rests, which were not asked, but with what was asked, and which was probably harder upon the executors,—with the proportion of profits made in the business in which these monies were used.

In the previous case of *Walker* v. *Woodward* (*a*), the intestate had been a farmer, and the husband of the administratrix possessed himself of the farming stock and carried on the farm. It does not appear that any applications to account were made. The bill prayed an account of the profits of the farm. The plaintiff having, as the report of the case says, elected to waive the account of profits, the only question was, whether, in taking the account, annual rests should be made and interest calculated at five per cent. upon those annual rests; and Lord *Gifford* held the plaintiff entitled to have the account taken with annual rests, and with five per cent. interest upon those rests.

Judgment.

This case was quoted among others by Lord *Brougham* in *Docker* v. *Somes* as an authority tending to establish the principle he was laying down in that case.

If these two cases are not questioned by subsequent authority, of which I am not aware, they seem to establish that where trust funds are used in trade, either as the sole subject of trade or mixed with other funds of the accounting party, the party entitled to

(*a*) 1 Russ. 107.

1854.

Landman. v. Crooks.

the fund may charge the party so using them, at his option, with the profits made, or with full interest and annual rests. And it does appear to me most reasonable that it should be so, and that, whether application for payment be actually made or not; for the use of such funds in trade is itself a misapplication of them—a breach of trust which places the fund itself in jeopardy; and is such a wrongful dealing with the fund as, I should think, must amount to misconduct.—See also, *Jones* v. *Foxall (a)*,

I have made these remarks upon this point lest my silence should be taken as an assent to the proposition, that a demand and refusal to pay the trust fund are necessary to constitute such misconduct as to charge the accounting party with rests. Without expressing any decided opinion, I incline to think that they are not.

Judgment.

In nearly all the cases which are referred to, the question has arisen between executors and parties entitled under the will of the testator; therefore between parties discharging a gratuitous and oftentimes a very troublesome duty, and parties not entitled as of their own right, but the objects of the bounty (generally, perhaps, with the best claims upon the bounty) of the testator, the party held to account executing a trust which the court is averse to deal with too rigidly, lest men should be deterred from accepting the office of executor. In this case the defendant was the paid agent of the plaintiff, and with duties clearly defined. I understand him to excuse himself for not transmitting, or rather not continuing to transmit the monies received by him, on the ground that he supposed his principal to be dead. In taking this ground I think he places himself in a false position; for if his principal were dead he was no longer his agent; and yet he continues to act for many years as if he were alive, and as

(a) 15 Beav. 388.

1854.

Landman v. Crooks.

if he had authority to act; whereas, according to his belief of the facts, his authority had ceased. But I do not think he shews any sufficient reason for such belief, nor did he act as if he believed so; for, besides continuing to act as his agent, he abstained from making inquiries after those who in that event were entitled to the monies in his hands and to the residue of the property of which he had the management. I must say, too, that the inquiries after the plaintiff were not such as he was bound to make under the circumstances; and that in my opinion no good reason is shewn why he should not have continued to remit after 1836 as he had done before.

The difficulties, too, which have occurred in bringing the defendant to account for the last three years are material, not only in judging of his conduct during that time, but as evidencing the reverse of a readiness to account *at any time*,—bringing the defendant fully within the principle of the late case of *Williams* v. *Powell*, where the defendant, an executor, not an ordinary agent, was charged with full interest and rests from a period anterior to any demand upon him to pay, by any party entitled.

Judgment.

If this were a case which operated with some hardship upon the defendant, I should still think it a proper case for rests; but I do not think that it is a case of hardship. The defendant, by his own shewing, used these monies as his own in his business, which he does not say was unprofitable. If the monies so used yielded a profit of only six per cent.—and if they yielded less it would be a very unprofitable business indeed—the defendant has actually made of these monies the full amount at least which will be charged against him, assuming, as may properly be assumed, that the profits of the business were reinvested from time to time and made further profits.

I agree in the remarks made by the Chancellor

1854.

Landman v. Crooks.

upon the difference between England and this country, arising out of the annual value of money there being less than the full legal rate of interest, while here six per cent. is not more than the real annual value. It results from this, that there is here no other mode of charging an accounting party with anything beyond the ordinary value of money than by charging him with rests; while in England this may be done by charging five per cent., without rests, or, where the case calls for it, with rests. If indeed five per cent. is about equal to four per cent. with rests, and four per cent. is the annual value of money, then charging six per cent. here, with rests, in going no further than charging five per cent., without rests, in England; and charging five per cent., with rests, in England is charging the accounting party by a stricter rule than has been in any case adopted in this country.

I think that the mode of charging the defendant directed by my brother *Esten* is correct, and that charging him without rests would have done less than justice to the plaintiff. Judgment.

There has been an error in not allowing the defendant his commission from time to time as it accrued due. This has arisen from oversight or from not clearly understanding the direction of my brother *Esten* in regard to it.

As to the *amount* of per centage to be allowed for commission, I think it was properly allowed at five per cent.

1854.

Sept 7, 1853, and Jan. 30, 1854.

FOOTE v. MATTHEWS.

Equitable assignment.

The plaintiff being liable for a debt as surety for one *Parr*, *Parr* gave him an order for the amount on the Government, for whom *Parr* was performing certain work. This order *Parr* countermanded before any acceptance on the part of the Government. The debt having been paid by a sale of the plaintiff's property, and *Parr's* contract having been assigned to *Matthews*, who received from the Government the money due upon it; *Held*, that *Matthews* was bound to pay the amount of the order.

The bill in this cause was filed by *George Wade Foote* against *Edward Matthews*, and prayed that under the circumstances set forth in the bill the defendant might be ordered to reimburse the plaintiff certain moneys paid by him as surety for one *Parr*.

Mr. *Turner* and Mr. *R. Cooper* for the plaintiff.

Mr. *Mowat* for the defendant.

The statements of the bill, the nature of the evidence taken in the cause, and the cases cited by counsel, sufficiently appear in the judgment of the court.

Jan. 30th. THE CHANCELLOR.—The pleadings in this case are voluminous, but the really material facts are not complicated, as the law applicable to them is clear.

In the month of June, 1844, one *Parr* entered into a contract with the Board of Works of this Province for the construction of certain improvements in the Rondeau harbour on Lake Erie. *Parr* was to receive his payments monthly, upon the certificate of the
Judgment. superintending engineer, less 15 per cent. to be retained by the Board of Works as a guarantee against eventual loss. *Matthews*, the defendant to the original bill, and one *Smith*, were *Parr's* sureties for the due fulfilment of this contract.

Previous to the period of which I am now speaking *Parr* had contracted to execute certain work for Messrs.

1854

Foote v. Matthews

Chrysler & Bostwick, and the plaintiff *Foote* and one *Billyard* had become his sureties. Messrs. *Bostwick & Crysler* brought an action for an alleged breach of this contract against *Parr* and his sureties, and recovered judgment for about £338 for damages and costs. A writ of *fieri facias* against goods was sued out upon this judgment and placed in the hands of one *Pegley*, a coroner of the Western District, *Foote* being the sheriff, some time in the month of June 1845, under which writ various goods and chattles of *Parr* were taken in execution. *Foote* appears to have been active in his exertions to relieve himself from his liability under this judgment, and on the 29th of October, 1845, he succeeded in obtaining an order from *Parr* directing the President of the Board of Works to pay the amount of *Chrysler & Bostwick's* execution out of his, *Parr's*, per centage on the contract with the Board to which I have already alluded. Upon the receipt of this order, as the plaintiff alleges, the coroner withdrew his officer and *Parr* was left in possession of all the goods and chattles which had been seized under the writ. This is denied by the defendant, who asserts that possession had been relinquished by the coroner long before the receipt of the order. However that may be, it is quite certain that proceedings upon the judgment were suspended until the month of November 1846, when, the order not having been paid, a writ of *fieri facias* against lands was placed in the hands of the coroner, under which *Foote's* interest in various parcels of real estate was sold for £356 on the 8th of April, 1848. A small amount had been paid by *Foote* previous to the receipt of the order; and it is said that the balance was realized by sale of other lands belonging to *Foote* in the London District, but of that I find no proof, and it seems to me, therefore that *Foot's* claim is limited to the £356 realized by the sale of his lands in the Western District.

Judgment.

In the meantime *Parr* had become bankrupt, and

1854. Foote v. Matthews. by a deed dated and executed on the 31st day of August, 1846, between the assignees of *Parr* of the first part, *Parr* of the second part, and *Matthews* of the third part, all *Parr's* interests in and rights under his contract with the Board of Works were assigned to *Matthews* with the assent of the Board. Under this assignment, *Matthews* has completed the contract, and has received already, or is entitled to receive the full price. No question remains open, as I understand the matter, between *Matthews* and the Board of Works; the contract has been closed to the satisfaction of both parties.

The plaintiff argues that his title to relief is clear under these circumstances. His contention is that the order of the 29th of October, 1845, constituted, in equity, a valid assignment, as against *Parr*, of so much money due or to grow due under that contract; that *Parr* himself, had his interest continued, would not Judgment. have had any defence to the present bill, and that *Matthews*, the assignee of the contract and of *Parr's* rights and interests under it, cannot stand in any better position because a chose in action, after assignment, remains liable to every equity which had attached upon it in the hands of the assignor.

This reasoning is resisted on several grounds. It is said that the argument assumes two facts, supposed to constitute a valuable consideration for the order of the 29th of October, 1845, neither of which has been proved: namely, first, that *Foote* was security for *Parr*; secondly, that *Parr's* goods were under seizure at the date of the order: and, in the absence of consideration, it is contended that the order in question did not give *Foote* any lien upon this fund, but was a mere voluntary approbation by *Parr* of his own property, to meet his own debt, which he was at liberty to revoke at any moment, and which he did in fact revoke previous to the assignment of the contract to *Matthews*.

1854.

Foote v. Matthews.

This argument, if well founded in fact, would be of great weight, but it is entirely unsupported by the evidence. It is established beyond doubt, as it appears to me that *Foote* was surety for *Parr*. The contract is produced, and in it *Foote* and *Billyard* are described as sureties for *Parr*. Then both *Parr* and *Billyard*, who have been examined, swear distinctly to the fact; and there is nothing of any weight on the other side. The evidence does establish very clearly, therefore, that *Foote* and *Billyard* were sureties for *Parr*. It is evident, also, from the letter of *Warren*, that *Foote* took a very active part in directing the proceedings upon this execution. He appears to have been anxious either that the amount should be made by sale of *Parr's* goods, or that *Parr* should be compelled to secure the debt; and to accomplish this object he procured a levy to be made in the first instance, and subsequently obtained the order which is the foundation of the present suit. Before *Foote* accepted that order he instructed Mr. *Prince* to apply to the Board of Works for the purpose of ascertaining *Parr's* position; and in answer to that application the Chief Engineer informed Mr. *Prince* by letter dated the 18th of October, that the amount of *Parr's* drawback was then £800—that it would be ample security for *Chrysler's* debt, and that no money would be paid by the Board except to *Parr's* order; and within a few days after the receipt of that letter, *Parr* executed the paper in question, which is in these words:

Judgment.

"*Chatham*, 29*th Oct.*, 1845.

"To the Hon. *H. Killaly*,
President of the Board of Works, Montreal.

"Sir—I hereby authorize and direct you to pay over to *Rowland Pegley*, Esq., or his order, out of my per centage which is now due me or may be hereafter for work and labor performed at the Rondeau Harbour under my contract with the Board of Works for completing the same, the costs and damages in the suit of *Chrysler & Bostwicke* v. *Parr*, *Billyard & Foote* as

1854. per writ in *Rowley Pegley's* hands, as coroner of this district.

Foote v. Matthews.

"I am, sir, your ob't serv't,

"R. B. PARR.

"Witness, *G. W. Foote.*"

And underneath the order is the following receipt:

"Received from defendant, *George Wade Foote*, the above order, which when paid will satisfy the costs and damages in the suit.

"ROWLEY PEGLEY."

This order was transmitted forthwith to the President of the Board of Works, and the proceedings on the writ were delayed until the month of November in the following year.

Judgment.

It is said, however, that *Parr's* goods were not then under seizure. That would seem to have been so, although it is evident from *Warren's* letter that an *alias fi. fa.* had been issued, under which a seizure might have been made. But the fact appears to me to be quite immaterial. *Foote* was *Parr's* surety. It was *Parr's* duty to have saved him harmless from this judgment. *Foote* might have filed a bill for that purpose without paying the debt. And it is therefore impossible to consider the order as a mere direction from *Parr* to his own agent as to the mode in which this fund should be applied. It was a contract founded upon the duty which he owed to his surety, that this particular fund should be applied to pay this particular debt. That was a valid assignment in equity (*a*), *Foote* thereby acquired a lien upon the fund which it was not in the power either of *Parr* or his assignees to revoke (*b*).

But it is said that the Board of Works were not

(*a*) Burn v. Carvalho, 4 M. & C. 690.
(*b*) Cockell v. Taylor, 15 Beav. 103; Mangles v. Dixon, 3 H. L. 702.

bound by *Parr*'s order; notwithstanding which they might have entered into an entirely new contract either with *Matthews* himself, or with any other person; in which event *Foote's* equity, it is said, would have been displaced. That question does not arise here, because the Board of Works did not enter, in fact, into any new contract with *Matthews*. It is manifest, on the contrary, from Mr. *Prince's* opinion, which is in evidence, and from the assignment executed in pursuance of it, that the defendant deliberately elected to complete the work as the assignee of *Parr* rather than under a new contract with the Board of Works, because his counsel advised him that he would thereby secure certain advantages which he could not otherwise enjoy; and it is unnecessary, therefore, to consider what might have been the consequence of the other course, had it been adopted.

Judgment.

It is said, next, that there is no proof of any promise by *Matthews* to pay this amount. I am not by any means satisfied of that. *Parr* swears not only that there was such a promise, but that the amount was brought into account between *Matthews* and himself; and his evidence is corroborated to a considerable extent, and has not been contradicted. That fact, if established would give rise to a new equity, quite unconnected, however, with the ground upon which the case has been rested, because *Foote's* lien was created by *Parr* and not by *Matthews*; and its continuance is not the consequence of any contract on the part of *Matthews*, but follows from his position as assignee of a chose in action, the legal consequence of which is that the subject matter remains subject, in his hands, to all the equities created by the assignor. It is immaterial therefore, in my view of the case, to determine whether *Matthews* did or did not enter into any positive undertaking to pay this debt. But if that were material, I incline strongly to the opinion that there was such an engagement; and I am drawn to that con-

1854. Foote v. Matthews.

clusion not by the direct testimony of *Parr* and *Billyard* only, but by the tenor of the whole evidence, all of which appears to me to point very much in that direction.

It is said, lastly, that the plaintiff's claim must be limited to £150, or at most to £200. It is said that in some of the properties sold by the coroner, *Foote* had no interest, or none which the coroner could have legally sold,—that the only property in which he had a saleable interest was not worth more than £150 or at most £200, and that he can have no just claim, consequently, to any greater extent. I cannot accede to that argument. The coroner sold *Foote's* interest, or supposed interest, in certain properties, for £356, and by that sale the debt of the principle has been satisfied, to that extent. Now that was in effect a payment of £356 by *Foote* on account of *Parr*. The Court has nothing to do with the question whether *Foote* had or had not a good title to the property sold for the purpose of realizing that amount. *Foote's* interest, or supposed interest, was exposed to sale. It was purchased at £356. The money so realized was *Foote's*. It has been paid in discharge of the debt of the principal; and there can be no doubt, in my opinion, that he is entitled to recover the full amount.

Judgment.

Upon the whole case it appears to me that the order of the 29th of October, 1845, was a valid appropriation. *Foote* thereby acquired a lien upon the fund, which *Parr* had not the power to defeat. The assignment to *Matthews* did not displace that lien. *Foote* might have filed a bill to enforce it, at any time, against either or both of those parties. And as the monies were not so employed, and *Foote's* property has been sold to pay the debt, he is now entitled to a decree against *Matthews* who is admitted to have received the fund; and the decree, in my opinion, should be with costs.

1854.

Foote v. Matthews.

ESTEN, V. C.—I think it appears that *Foote* was a surety for *Parr*, and that the order was supported by valuable consideration and was not revocable.

I think *Matthews'* title must stand upon the assignment of 31st August, 1845. The instrument of the 1st August, 1845, which is the only one that requires notice on this head, was in form a mere assignment of goods. There is no evidence that there was any transfer of the contract upon this occasion, and the circumstances are all against it. *Parr* gives and countermands an order upon the fund, and afterwards enters into a contract for the supply of timber for the work. *Matthews* does not assume the contract until the spring of 1846, when *Parr* became bankrupt; and on the 31st of August, 1846, he takes an assignment of the contract, in terms, importing that it was *Parr's* to the time of his bankruptcy, and was then the assignees. It is manifest that nothing was done in pursuance of Mr. *Gzowski's* letters of 23rd July and 3rd September, 1845. At least there is no evidence of any assignment but that of *Parr;* which, however, the defendant is not likely to accept, and which is so inconsistent with his sworn answer that it must on this point be laid out of the case.

Judgment.

The assignment then being posterior to the order, was subject to it whether *Matthews* had actual notice of it or not; although it is clear that, at the date of the assignment, he had actual notice of the order. It would seem therefore that the plaintiff is entitled to a decree for the satisfaction of the order out of the fund in the hands of the government.

It seems quite immaterial whether the plaintiff has paid the debt or not, he has equally a right to the satisfaction of the order for his indemnity or protection. It was contended that the plaintiff's claim ought at all events to be reduced by the value of a lot of

1854. Foote v. Matthews.

land conveyed to the plaintiff by his attorney *Baby*, by way of compromise of an action brought by *Foote* against *Baby*, for alleged negligence in the action brought by *Chrysler* and *Bostwick* against *Foote* and *Billyard* and *Parr*. If this compromise could be clearly connected with the satisfaction of the debt recovered in the action, I think this claim would be just; but this fact does not appear, and I do not think that any good would result from inquiry on this point. Costs must follow the event.

SPRAGGE, V. C.—I think the plaintiff entitled to so much of the amount in the hands of the Board of Works, retained by way of per centage upon *Parr's* contract, as will recoup him for the amount at which his property was sold at the suit of *Chrysler* and *Bostwick*.

Judgment.

I think that *Matthews* took the assignment of *Parr*'s contract subject to the order previously given by *Parr;* and that he must be held to have taken it subject to such order, independently of the evidence given to prove his express assent.

I think, however, that the evidence given does prove an express undertaking on his part to pay that order; and if *Parr's* evidence is to be believed, it is further proved that *Matthews* paid himself the amount, by retaining it out of monies for which he was accounting to *Parr*.

Parr says, in his evidence, that the assignment of materials and other chattel property, and the verbal assignment of the contract made by him to *Matthews* shortly after the date of the order, were made on condition that he should pay the amount of the order. He says, further, that the order was countermanded upon *Matthews'* assurance that he would pay the amount of the order, and that this was *Matthews'* own

proposal; further, that finding the execution, had not been paid, he spoke to *Matthews* upon the subject, who promised him several times that he would pay it. 1854. Foote v. Matthews.

In regard to *Matthews* charging him with the amount of the order, he says that the amount, about £356, was included in the charges made by *Matthews* against him; which charges were contained in certain statements and accounts rendered to him by *Matthews* and examined by him; but which statements and accounts, he says, were not left with him, but were retained by *Matthews*.

That *Matthews* should give to *Parr* no copy of these statements and accounts appears a strange and unusual kind of proceeding, but *Parr* appears to have been much under the influence of *Matthews*; and besides, if in truth his accounts against *Matthews* did not contain a charge for the amount of this order, a production of those accounts or of his own books would have shewn it. Judgment.

That *Matthews* engaged to pay this order, or, in other words, to satisfy the execution in the suit of *Chrysler* and *Bostwick*, does not rest upon *Parr's* evidence alone. *Billyard*, in his evidence, states that *Matthews* never objected to pay it, and that he has heard him say several times that he would have the amount of that order to pay.

I think the plaintiff entitled to succeed upon both grounds.

1854.

June 27th

GILMOUR v. MATTHEWS.

Practice—Absconding defendant.

In moving to take a bill *pro confesso* against an absconding defendant and who has been advertised as such, it is necessary to shew by affidavit that the defendant cannot be found to be served with notice of the motion.

In this case an order had been obtained, pursuant to section 7 of the 9th General Order, for leave to advertise the defendant as an absconding defendant, which had been duly published as directed by the order, and no answer having been put in by the defendant, notice of motion for an order to take the bill *pro confesso* was published in the Official Gazette, and a motion was now made by Mr. *Patrick* for the plaintiff,

Statement for an order to set the cause down to be taken *pro confesso* against the defendant.

The Court directed the order to go on production of an affidavit shewing that the defendant continued to reside out of, or conceal himself within, the jurisdiction so that the plaintiff could not serve him with notice of this motion: as, for all that otherwise appeared, the defendant might have returned within the jurisdiction although at the time the order had been granted for advertising the defendant it had been shewn that he was then absent from the Province.

CROOKS v. CROOKS.

Practice—Re-sales.

June 29th. When a purchaser neglects to pay in his purchase-money and no objection is made to the title, the court will order him within a limited time to pay in the amount with interest; or in default direct a re-sale of the propety, and that the purchaser pay costs of motion and deficiency, if any, on such re-sale.

Pursuant to the decree made in this cause sales of several portions of the estate had taken place, and default having been made by one of the purchasers to pay in his purchase money, although no objection was made to the title, Mr. *Morphy*, on behalf of the

plaintiff, now moved for an order, directing the purchaser to pay the amount of his purchase-money, with interest, by a certain day, or in default that the land purchased by him should be ordered to be re-sold and the purchaser ordered to pay the costs of the motion and the deficiency, if any, in the sum obtained, on such re-sale. He referred to *Daniels'* Chancery Practice 1461, and cases cited. 1854. Gilmour v. Matthews.

After taking time to look into the practice, the court granted the order. Judgment.

DAVIDSON v. GRANGE.

Railway company—Fraud—Parties.

This Court has jurisdiction to set aside an election of directors of a corporate body by persons who are subscribers nominally and not *bona fide*.

A suit for the purpose of setting aside an election of directors of a corporation, on the alleged ground of fraud, may be brought by some of the shareholders on behalf of all, and need not be in the name of the corporation itself.

A *bona fide* subscription for stock in a corporate company by one person in his own name, but really as trustee and agent for another who has requested such stock to be subscribed for, is valid.

Dec. 16th, 1853, and Feb. 13th 1854.

The bill in this cause was filed by *John Davidson*, *James Crombie*, *William Robinson*, *Morris Crater Lutz*, *Dominick Ramore*, *Æmilius Irving*, *John Fleming*, *James Malcolm Fraser*, *Andrew Malcolm James McMillan*, and *Adam Anislie*, against *George John Grange*, *George Sylvester Tiffany*, *William Clarke*, *George Sunley*, *William Hewatt*, *Jacob Hespeler*, *Abraham Erb*, *Richard Juson*, and *Henry McCracken*, praying that, under the circumstances stated therein, and which are clearly set forth in the judgment, certain of the defendants, who, it was alleged, would not have been declared to have been elected as directors of the Galt and Guelph Railway Company if it had not been that the colorable votes of the defendant *McCracken* had been counted for them, might and each of them might be restrained by the order and injunction of this court from interfering in any manner with the management and direction of Statement.

1854.

Davidson v. Grange.

the affairs of the said company, or furher taking upon themselves the office of, or assuming to act in any manner as directors of the said company, or proceeding to collect or enforce the calls, or suing for, calling in or collecting the deposit required to be paid on the shares subscribed, or any part thereof, or to take or remove the books and papers of the said company, or any of them, and from preventing certain of the plaintiffs from acting as directors of the said company; that *McCracken's* name might be removed from the register of shareholders, and in the meantime that he might be restrained from voting as a shareholder of the company, or assuming any of the rights or privileges thereof.

Statement.

A notice of motion for an injunction in the terms of the prayer of the bill was served, and affidavits filed by both parties, and several of the deponents were cross-examined before the court at great length. The nature of the evidence is set forth in the judgment.

Mr. *Gwynne*, Q. C., and Dr. *Connor*, Q. C., for the plaintiffs. The principal fact relied on for sustaining the motion was the want of *bona fides* on the part of *McCracken* in subscribing for one thousand shares of the stock, when, from his position in life, it was out of the question that he could ever contemplate paying up the calls; that he never intended to become a subscriber, and therefore did not come within the words of the act incorporating the company; and that the idea of his holding the stock in his name, as trustee for *Hespeler*, was a mere after thought. They cited *Prince Albert* v. *Strange* (*a*) *Inderwick* v. *Snell* (*b*), *The Exeter and Crediton R. R. Co.*, v. *Bullen* (*c*), *The Queen* v. *The Bank of U.C.* (*d*), *Mozley* v. *Alston* (*e*), *The Great Western Railway Co.* v. *Rushout* (*f*),

Argument.

(*a*) 2 McN. & G. 25.
(*b*) 34 Jus. 727.
(*c*) 11 Sim. 527.
(*d*) 5 U.C.Q.B. 338.
(*e*) 1 Ph. 790.
(*f*) 5 DeG. & S. 810.

Graham v. *The Birkenhead Railway Co. (a)*, *Simpson* v. *Denison (b)*, *The Attorney General* v. *Earl Clarendon (c)*.

Mr. *Vankoughnet*, Q. C., and Mr. *Mowat*, for the defendants, contested the grounds taken by the plaintiff; and also submitted that this Court had not the jurisdiction to interfere in the manner asked by this bill, which seeks, in effect, a declaration by the Court that one set of men had been duly elected and that another set had not been duly elected to act as directors of the company. They also contended that the company should have been made a party. In support of these objections they relied mainly on *Mozley* v. *Alston*, cited by the plaintiffs. They also referred to and commented on *Harmer* v. *Gooding (d)*, *Lovell* v. *Andrew (e)*, *Foss* v. *Harbottle (f)*, *Bedford* v. *Gates (g)*, *The Thames Dock Co.* v. *Rose (h)*, *Sheffield Company* v. *Woodcock (i)*.

Argument.

Mr. *Vankoughnet*, who had been counsel for the same parties at law, stated that the circumstance of *McCracken's* having taken the stock as trustee and agent for *Hespeler* was not mentioned in the affidavits at law, because he and the counsel associated with him at law thought it unnecessary and immaterial in that court.

THE CHANCELLOR.—This motion for an injunction is resisted on several grounds. It is said, in the first place, that this Court has no jurisdiction to interfere with the internal management of the affairs of this corporation. I cannot say that I entertain any doubt upon that part of the case. The bill, which is very

Feb. 13th.
Judgment.

(a) 12 Beav. 460.
(b) 10 Hare, 54.
(c) 17 Ves. 491.
(d) 13 Jur. 400.
(e) 15 Sim. 581.
(f) 2 [illegible] 461.
(g) 4 Y. & Coll. 21.
(h) 3 [illegible]. Ca. 180.
(i) 2 Rail. Ca. 522.

1854.

Davidson v. Grange.

carefully and clearly drawn, represents in substance that on the day appointed for the election of directors a number of *bona fide* stockholders, entitled to a great majority of votes, had determined upon the election of six persons whose names are enumerated; that the defendants, forseeing that such would be the result, fraudulently combined together to defeat the object of the *bona fide* shareholders by means of illegal and fictitious votes; that, to accomplish their purposes, they procured one *McCracken*, who is described in the bill as a person of no means, to subscribe for a very large amount of stock, upon the assurance that when elected directors they would cancel his subscription and thus release him from all responsibility; that *McCracken* did subscribe for one thousand shares upon the faith of that arrangement, and that by means of the illegal and fictitious votes thus created, the legal votes of the *bona fide* stockholders was overborne, and the defendants, or some of them, were declared the duly elected directors of the company.

Judgment.

Now, assuming the truth of those allegations, it is hardly possible, I think, to doubt that a very great fraud was perpetrated,—a fraud upon the act of Parliament, upon the public, and upon the *bona fide* stockholders of the company. The act of incorporation has been drawn with very little attention to the interests either of the public or of the *bona fide* holders of stock. If it be true, as the defendants contend, that every subscriber (that is, every person who had subscribed his name in the stock book), without more, had a right to vote—and I see nothing in the act against that—then one cannot help perceiving that, in the first election of directors, which is often matter of great importance, the rights of the *bona fide* stockholders are almost wholly unprotected. With a little management, directors might be elected in defiance of the wishes of every *bona fide* stockholder in the company, and that in a way which it would be very difficult,

1854.

Davidson v. Grange.

perhaps, for any court of justice to reach. But, however loosely the act may be worded, and however difficult it may be, under its provisions, to protect those entitled to protection, still it cannot be argued that the legislature either have conferred, or intended to confer a right to vote upon any except *bona fide* subscribers for stock. Now, it is too clear for argument that *McCracken*, upon the statements in this bill, was not a *bona fide* subscriber for stock, and had no legal right to vote. That is manifest, and being so, I find it very difficult to understand the argument that this court has not jurisdiction. What would there be to prevent this Court exercising its ordinary jurisdiction between these parties, under such circumstances? Is it to be understood that this Court has no jurisdiction to restrain the directors of public companies, however fraudulent and illegal their conduct may have been? Are the members of public companies to be deprived of that protection against frauds to which every other individual in the community is entitled? Neither *Mozley* v. *Alston*, nor *Lord* v. *The Governor and Company of Copper Miners* (*a*), nor any other case to which we were referred, establishes any such proposition. It may be that the jurisdiction of equity in relation to such companies has not been as yet fully developed, and these cases do certainly evince a reluctance to interfere in what is called their internal management; but they certainly do not negative the jurisdiction of the Court in a case circumstanced like the present—on the contrary, they, in my opinion, affirm it.

Judgment.

It was argued, in the next place, that the frame of this record is defective, in this that the bill should have been filed in the name of the company. The practice of the court in that respect has been the subject of much discussion in modern cases, and can-

(*a*) 2 Phil. 740.

1854.

Davidson v. Grange.

not be considered, perhaps as quite settled yet, but it does not appear to me that the objection can be sustained in the present case. It is clear, I apprehend, that a majority of the corporators have a right to institute a suit, in the name of the company, against any portion of the directors—nay, even against the whole body (*a*); and it may be considered settled, I persume, that the record *must* assume that form, when the acts complained of are voidable merely,—when they admit of being confirmed by a majority of the corporation (*b*). But, when the acts complained of are incapable of confirmation, in that case it would seem that the record may be framed in the present form, and that without alleging the existence of any impediment to the use of the corporate name. It would seem, certainly, that, on principle, suits in both classes of cases should be instituted in the name of the company, unless some impediment is shewn to exist; but Sir *James Wigram* distinguished *Bagshaw* v. *The Eastern Union Railway Co.* (*c*) from *Foss* v. *Harbottle* upon this very ground; and so many other cases appear to have turned upon this distinction, that the point must be considered, I apprehend, as settled (*d*). Now the manufacture of illegal votes in the way described in this bill would have been, in my opinion, an act incapable of confirmation; being clearly fraudulent and contrary to the act of parliament, it would not have been in the power of a majority to confirm such a proceeding against a single dissentient voice; and it follows, consequently, that this record has been correctly framed. I am inclined to think, moreover, that there are special grounds

Judgment.

(*a*) The Exeter & Crediton R. R. Co. v. Bullen, 11 Sim. 527, 532; The Attorney General v. Wilson, 1 C. & P. 1.

(*b*) Foss v. Harbottle, 2 Hare 461; Mozley v. Alston, 1 Phil. 790; Lord v. The Governor & Company of Copper Mines, 2 Phil. 740.

(*c*) 7 Hare 130.

(*d*) Coleman v. The Eastern Counties R. Co., 10 Beav. 1; Cohen v. Wilkinson, 12 Beav. 125; Solomons v. Laing, Ib. 377: Beman v. Rufford, 1 Sim. N. S. 550.

upon which this case may be distinguished from those cited in the argument *(a)*; but as I am in favor of the plaintiffs upon the other point, it is unnecessary to pursue that enquiry further. 1854. Davidson v. Grange.

It was argued, lastly, that the plaintiffs' case fails upon the merits, and upon that point I am in favor of the defendants. It is clearly established, indeed, that *McCracken* signed the stock-book at the instance of *Hespeler*, and acted throughout under his direction. But that is not the allegation in the bill. The allegation in the bill is that *McCracken* signed the stock-book for the purpose of voting for certain directors who had distinctly pledged themselves that his subscription should be cancelled upon their election. Now of that most important allegation there is no proof whatever; on the contrary, it has received an explicit contradiction from every person implicated in it. It is not even proved that *McCracken* was selected as a mere nominal stockholder, against whom, as being wholly destitute of means, the company could not enforce its calls. Under certain circumstances that would have been, I apprehend, fraudulent, although the fraud would have been, as I have said, difficult of detection. But here *Hespeler* swears that the intention from the first was that *McCracken* should subscribe for the stock as his trustee, and that this course was adopted simply because he *Hespeler* doubted the legality of subscribing in his own name. Other witnesses corroborate this statement, and it must be admitted that the facts which took place after the election lend great weight to the affidavits. *Hespeler* immediately admitted that the stock had been subscribed on his behalf; he at once offered to pay the five per cent., and subsequently presented the company with a letter of guarantee. Judgment.

The conclusion at which I have arrived upon the

(*a*) Preston v. The Grand Collier Dock Co., 11 Sim. 327; Bagshaw v. The Eastern Union Railway Co., 7 Hare 124.

1854.

Davidson v. Grange.

whole is, that *McCracken* subscribed for the stock as trustee for *Hespeler;* and if that be a correct conclusion, then it appears to me that *McCracken* was a *bona fide* stockholder in point of law, for I see nothing in the act of parliament to prevent any party from holding stock in the name of a trustee. Not that I would be understood to say that the case is one altogether free from suspicion: very far from it. But this motion must be disposed of upon the evidence before us; and, as that fails to establish the allegation in the bill, the application must be refused.

Judgment.

ESTEN, V. C.—I think this motion should be refused on the ground that, however suspicious the circumstances attending *McCracken's* subscription were, they are not absolutely inconsistent with a *bona fide* subscription, and are not sufficient to outweigh the positive affidavits of *Hespeler* and the other defendants. A subscription by a father in the name of a son, or by one person in the name of another as an agent or trustee, would, I think, be perfectly valid, when there was a *bona fide* intention to meet all calls—and I cannot arrive at the conclusion, upon the evidence we have before us, that such an intention did not exist here. I myself should be disposed to reserve the costs, but the other members of the Court thinking that they should be refused, I shall not disagree. I am fully persuaded of the jurisdiction of the Court in such a case. The case of *Inderwick* v. *Snell* shews that even where the shareholders themselves have the power of displacing directors, the Court will interfere when fraudulent means are employed to influence the exercise of that power. The Court will prevent any proceeding which amounts to a fraud upon the act of incorporation, which is the copartnership deed of the company, although when the governing body has once been properly constituted it will not interfere with its mangement.

1854.

Davidson v. Grange.

I think the suit is properly framed, the act complained of being illegal and incapable of confirmation. From this remark the last part of the prayer must be excepted; but this, I apprehend, could be waived at the hearing, although not perhaps on the argument of a demurrer.

SPRAGGE, V. C.—The statute incorporating the Galt and Guelph Railway Company makes the mere signature of any person, in a stock-book of the company, sufficient to constitute such person a member of the company, and to invest him, without any further act on his part with the same rights and privileges as are conferred by the act on those named therein as members of the company; so that if *McCracken* had, of his own accord, subscribed his name in the stock-book for a thousand shares of stock, I do not see that he could be treated otherwise than as a *bona fide* holder of such stock, unless circumstances could be shewn which should make it manifest that such stock was not taken *bona fide*. The mere fact of his means not being such as to enable him to answer calls from time to time, would not, I apprehend, suffice; for he might feel convinced, honestly though mistakenly; or, on the other hand, he might anticipate correctly that he should be able from some source to meet the calls, or to sell the whole or a portion of the stock to advantage. Such a taking of stock could not, I think, be impeached on the ground of *mala fides;* the policy of leaving it to be so taken, without payment of a deposit or providing other guards for the protection of the public or of other shareholders, was a question for the legislature.

Judgment.

At the same time, I am not prepared to say that the subscription of the name to a stock-book by any and every person could constitute such person a member. I should say, for instance, if half a dozen railroad laborers in the employ of one of the contractors

1854. Davidson v. Grange.

on the Great Western Railway, were to subscribe each for a large amount of stock, it would not be held to be a *bona fide* taking of stock; and if it were proved that they did so at the bidding of their employer, with an undertaking on his part simply to save them harmless, I cannot doubt but that such a taking of stock must be held to be in fraud of the act.

This, however, is not percisely such a case, if it is made out that *Hespeler* in good faith took the stock, intending to be the holder of the stock and to be answerable to the company for the calls just as if the stock had been taken in his own name; taking it in another name instead of his own, under the apprehension, though an erroneous one, that if taken in his own, difficulties might arise which would prevent his voting upon that stock at the election of directors.

Judgment.

I cannot say, after reading the affidavits carefully, and being present at the examination of witnesses, that this is made out altogether satisfactorily.

From *Hespeler* himself it has come piecemeal. In his affidavit, filed in answer to an application to the Court of Queen's Bench for a *quo warranto*, he is silent upon the subject; in his first affidavit, in answer to this application, he professes to give the words in which he requested *McCracken* to sign for the stock. He says he told him the state of affairs and said, "*Henry*, I want you to sign for one thousand shares, for which I will be responsible; and he answered that was quite sufficient, and signed and voted accordingly." His words to *McCracken* do not necessarily import anything more than that he would be responsible *to him* or indemnify him for signing—and in that sense *McCracken* appears to have understood them. It is not until his third affidavit that he alleges that the stock was taken *for himself*, and there certainly he does say so distinctly.

1854

Davidson v. Grange.

From the manner in which Doctor *Clarke* in his affidavit relates what passed, he appears to have understood *Hespeler* to have intended in good faith that the stock taken in *McCracken's* name should be for himself, and that he would answer the calls upon it: he says that he suggested to *Hespeler* to get some other party to subscribe (probably upon *Hespeler's* doubt whether having already subscribed in the book for stock he could do so a second time), and that *Hespeler* should be responsible for the calls on the stock subscribed by such other party; and that, thereupon, the landlord of the hotel was sent for, who suggested *McCracken* as a suitable person. Dr. *Clarke* proceeds to say that upon some fear of getting into trouble being expressed by *McCracken*, *Hespeler* said he would give him a written guarantee to pay all calls and save him *McCracken* harmless—and upon that *McCracken* signed the stock-book.

Judgment.

While upon this point it will be convenient to refer to the account of what passed as given by *McCracken* himself. He says that when the proposal was first made to him he hesitated. He hesitated until *Hespeler* offered to become responsible. He says further, that *Hespeler* said he might be served with a call, and if so he *Hespeler* would stand between him and the Company. *Hespeler* gave him no writing; *Hespeler* said he would bear him out harmless, or to that effect, and he adds that he relied entirely on *Hespeler's* promise of indemnity. In his affidavit, sworn previously though in the same month, he makes a much stronger case; for the stock, he says he subscribed not on his own account, but at the request and on the account of *Hespeler*, and on the express understanding that *Hespeler* and not *McCracken* himself was to be responsible for the same, as fully in every respect as if he had subscribed therefor in his own name. Between the affidavit and the *viva voce* examination, I do not hesitate in taking the latter as being the more correct account of what passed.

1854.

Davidson v Grange.

I have thought it necessary to examine and compare the different versions of *Hespeler*, *Clarke* and *McCracken*, of what passed at their interview, as helping us to get at the truth, as to the *bona fides* of the taking of this stock. It will be observed that their respective versions do not quite agree: that of *Clarke* I consider the most in favour of the stock, being taken in good faith; but that depends upon the mind and intention of *Hespeler*, which *Clarke* could not know. Putting out of mind for a moment *Hespeler's* third affidavit, I should be strongly inclined to believe, that, excited as he certainly was by the news of the Galt subscription carried to him by Dr. *Clarke* and by Dr. *Clarke's* mode of communicating it, his first impulse was, himself to take a thousand shares of stock in his own name and with all the responsibilities attaching to it, and that upon reflection he thought that he might attain his object without incurring the same responsibility; at the same time, the doubt which he says he entertained as to the legality of his taking stock a second time may have been the real cause of the change of intention. But, assuming that to be the real cause of the change, it does not follow that the stock was taken *bona fide* in that altered mode.

Judgment.

Taking the evidence of all the three parties in relation to the interview, and of *Clarke*, and *Hespeler*, as to what preceeded it. I do not think it proves anything beyond an engagement on *Hespeler's* part to *McCracken*, to indemnify him from the consequences of signing his name in the stock-book. It does not prove even a declaration on the part of *Hespeler* of his intention to become holder of the stock; nor even shew an intention at a future time to avow himself owner of, or answerable for the stock. His telling *McCracken* that he might be served with a call, and if so he would stand between him and the company looks to me like an intention on his part to be guided by circumstances in adopting or not adopting the stock as his own, and not like a fixed intention of taking the

stock in any event or considering the stock as then and thenceforth his own. 1854.

Davidson v. Grange.

Then, to look at the object with which this stock was taken and the circumstances which induced it. *Hespeler* and *Clarke* believed that *bogus* stock, as they called it, had been taken by the Galt subscribers for the purpose of defeating the road. *Hespeler* had already taken stock; and his purpose and object were, by some means to outvote the Galt subscribers; and the *McCracken* stock was taken solely with that object, not for the purpose of taking stock in the road. He imputed a bad motive to the Galt subscribers; and thought there had been a manœuvre on their part to take the other subscribers by surprise, and this he determined if possible to defeat. He evidently thought the greater part of the Galt stock fictitious as well as got up for the sole purpose of defeating the road; the predominant idea, then, in *Hespeler's* mind was, not to take stock, but to defeat the stock taken in Galt, and he only took stock at all, because it was the only mode of neutralizing the Galt stock; and this being the case, and believing the Galt stock fictitious, he might think it not unfair to foil the Galt subscribers with their own weapons. His conversation with *Crombie* about two weeks afterwards, supports this view. His language was rather that of one who had played a skilful and successful game, than of one who had been forced or induced by the unfair dealing of his opponents to take a very heavy amount of stock beyond what he had intended. Judgment.

Crombie says further, that he did not become aware of *Hespeler* being in fact the owner of the stock till after proceedings were taken at law. It appears, I think, that *Hespeler* did not avow the stock as his own at the meeting of the 18th of August, either before or after the election of directors, and when he offered to pay a deposit of five per cent., it was as

1854. upon *McCracken's* stock, and without any reference to future calls.

Davidson v. Grange.

When he took the *McCracken* stock he either felt confident that it would place the direction in his hands or uncertain whether he might not still be outnumbered. In either event his getting *McCracken* to take the stock with no other understanding than to *McCracken*, that he would stand between him and the company, gave him a great advantage; an advantage which, with his evident acuteness, he may have reckoned upon, in deciding upon that course. If successful, he might have the less objection to retain the stock for himself, but if unwilling to take it he might reckon upon his influence with the board not to enforce the calls against *McCracken*. On the other hand, if successful, he might well look upon his engagement to protect *McCracken* as a small matter compared to his liability, and that to an unfriendly board of directors, to meet the calls upon £25,000 of stock.

Judgment.

McCracken's language to Mr. *Rich* and Mr. *Crombie*, both of Galt, tends to shew that he at any rate did not look upon what had been done as a plain, fair transaction, or that it was understood by him that *Hespeler* was to answer the calls. To the former gentleman, two days after the election, he spoke of it as a "dodge;" and near the end of September expressed to him great regret at his part in it, and, what seems very significant, asked with great interest if Mr. *Rich* thought he could ever be called upon in respect of that stock. Again, at a conversation with *Crombie*, solicited by *McCracken* himself, he expressed his regret at what he had done, and in professing to relate what passed on the occasion, he only says that *Hespeler* said that he would hold him harmless; not a word about *Hespeler* being the real holder of the stock or being in any way responsible to the company.

1854.

Davidson v. Grange.

It is true that *McCracken* says he does not remember such conversations, but I have no reason to think that they are mere fabrications on the part of the gentlemen who depose to them. It is true also that neither *Hespeler* nor the other defendants are answerable for what *McCracken* may have said, or bound by his account of what passed; but they have produced his sworn account of what passed, differing materially from what he said to those gentlemen; what he did say was calculated certainly to excite a well founded suspicion in their minds as to the good faith of the whole transaction.

The answer of Mr. *Tiffany* to Mr. *Irving's* inquiry whether he could be allowed to subscribe for stock after the hour appointed for the election of directors had arrived, coupled with the fact of the *McCracken* stock taken after that hour being received, was another suspicious circumstance; though, I believe, upon reading Mr. *Tiffany's* affidavit, that he had no intention of misleading Mr. *Irving*. Judgment.

As to the object of the Galt subscribers, upon whom such strong imputations have been thrown: It is obvious that a strong rivalry existed between Galt and Preston, the latter seeking that the line should run through their town and that there should be a *station* there. This the Galt people believed would be very injurious to them, and they took stock no doubt solely with a view to defeat the object of the people of Preston, and as the latter believed, to prevent the road being built at all, but this latter purpose is denied; in the other there is certainly no bad faith, and stock taken with that sole view is open to no objection.

A number of affidavits are put in by the defendants to shew that the municipalities of Guelph and Preston would have no confidence in the board of directors which would have been elected but for the *McCracken*

1854.

Davidson v. Grange.

stock, and that they have every confidence in those who have been elected. That is beside the point. The true question is, whether they have been elected by duly qualified shareholders. If not, their being a better set of men than would have been selected by those entitled to select the directors, can form no reason for their being allowed to retain their seats; for they are not in such case the representatives of those whose representatives they assume to be.

I have adverted to a number of circumstances which have led me to entertain strong doubts as to the *McCracken* stock having been taken by *Hespeler* in good faith. At the same time, *Hespeler's* express declaration upon oath is not to be discarded from consideration. The bill charges that this stock was taken with an understanding that it was to be cancelled after the election of directors; and *Hespeler* says, "I never contemplated its being cancelled in any event whatever; such an idea never struck me. The subscription was obtained in good faith as a subscription for me and my benefit; and for which I was to be liable. All this was the intention from the first. My design in regard to the stock was to sell it, or part of it, as I should afterwards have opportunity; and I never thought of getting rid of it in any other way."

Judgment.

It does in my mind, detract from the weight to which this declaration would otherwise be entitled, that it is made very tardily. Still I cannot say that it is untrue. Dr. *Clarke*, who from his connexion with the matter had a good opportunity of forming a correct judgment, evidently believed that the stock was so taken; and the circumstances to which I have adverted, though of a very suspicious nature, are not absolutely inconsistent with such being the case. If the fact be so, then the stock was *Hespeler's*, and *McCracken* was his agent in taking it and voting upon it, and held it as his agent and trustee. There would

be nothing unlawful in this, although certainly such a mode of taking stock is liable to abuse.

Upon the whole, I think there are so many suspicious circumstances connected with the election of the defendants as directors, as to warrant the plaintiffs in believing that all of them, except the two first named, were elected by votes not given by a *bona fide* shareholder; but they were in fact the nominees of one individual under color of fictitious stock; and, I think, further, that what occurred at the election of directors and subsequently was calculated to confirm such belief. I think, therefore, that they were warranted in filing this bill, and ought not to pay the defendants' costs. For myself, I am not satisfied that this stock was taken in good faith; but, weighing all the evidence, I cannot say that it is proved to be otherwise; and therefore, I think, this application must be refused, but I think it should be without costs.

Judgment.

Upon the question of jurisdiction, and of the frame of this bill, it is not necessary in the view taken by the Court of the conclusion proper to be arrived at upon the facts of the case to decide those points. I may say, however, that my opinion is that the plaintiffs are right upon both points.

Upon the frame of the bill considerable doubt has formerly existed, whether the suit could be instituted in this shape; but the case of *Salomans* v. *Laing (a)* appears to settle that point, to which may be added *Hodgson* v. the Earl of *Powis*, in the same volume. In the latter a question was raised as to whether the suit was properly constituted, and it was objected that a railway company, with which the bill alleged an agreement had been entered into, should have been made a party; but it was not objected that the suit

(*a*) 12 Bea. 359.

1854. Davidson v. Grange.

could not be brought by individual shareholders in the name of themselves and other shareholders, except those whose acts are complained of, which is the form of the bill in this suit—an objection which it is reasonable to conclude would have been made while the frame of the bill was objected to, if it had been thought to be an objection which could be sustained.

DAVIS V. HAWKE.

Attorney and client—Fraud.

Sept. 19 & 26 1853, & Jan. 30, 1854.

An attorney had, for a long time been in the habit of advising his client with respect to raising money, and also of getting bills discounted for such client; upon an alleged settlement of accounts it was stated that the client was indebted to the attorney in a large sum, and a formal acknowledgment of such indebtedness was signed by the client: The Court, upon a bill filed impugning the *bona fides* of such settlement, refused to admit the signed acknowledgment of debt as *prima facie* evidence in favor of the attorney.

An attorney sold certain lands to his client at a most exorbitant price, and took back a mortgage on the estate sold and on other lands of the client securing the amount of the purchase money; the Court, on a bill filed, declared that the sale was fraudulent and that a third party to whom the mortgage had been assigned, without notice of the fraud, was not at liberty to sue on the covenant for payment of the mortgage money; although, as a *bona fide* purchaser for value without notice, he was entitled to hold the land in security for the amount; the Court, however, ordered the attorney to discharge the lands of the client from the encumbrance which had thus been created.

The facts of the case, the arguments of counsel and cases cited, appear in the judgment.

Mr. *Roaf* for plaintiff.

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

January 30. Judgment.

THE CHANCELLOR.—This suit is instituted by *John Davis* and certain trustees, under an assignment by him for the benefit of his creditors, against *Edward Hawke*, who was the attorney of *Davis* during the transactions which form the subject matter of this suit, and *William Proudfoot*, the assignee of a mortgage executed by *Davis* in favor of *Hawke*.

1854.

Davis v. Hawke.

The relief sought by the bill is twofold; first, an account of all transactions between *Davis* and *Hawke*; second, the avoidance of a sale of certain real property by *Hawke* to *Davis*, the price of which is represented as being exorbitant, and of the mortgage executed by *Davis* to secure the purchase money, which mortgage has been since assigned to the defendant *Proudfoot*.

Upon the argument two general propositions were advanced on behalf of the defendant *Hawke*, each applicable to the whole case made by the bill. It was said, in the first place, that the relation which subsists between attorney and client in this province bears little analogy to the relation which subsists between attorney and client in England; and it was argued that, as the relation is essentially different, the principles upon which transactions between attorney and client are governed in England, which grow out of that relationship, ought not to be applied here. It was said, secondly, that the matters brought into question in this suit were of a nature quite unconnected with the defendant's professional business,—they might have taken place between any ordinary individuals, and had no necessary connection with the defendant's professional character; and it was argued that the principles which govern transactions between attorney and client were, therefore, inapplicable.

Judgment.

It may be admitted, perhaps, that either proposition, if sustainable, would meet the whole case made by the bill. But I cannot accede to either. It is true, indeed, that the relation between attorney and client is usually of a much more intimate character in England than here; but the only conclusion fairly deducible from that admission is, that the necessity for a strict application of the principles of the court may be more pressing in the one country than in the other. But there is that in the very nature of the relation between attorney and client, even in its simplest form, which

1854. Davis v Hawke.

places the parties who stand in that relation upon an unequal footing, and which necessitates, consequently, the application of the equitable principles to which I have adverted. So long as the law is administered, to so large an extent, through the medium of a peculiar class, to whom important exclusive privileges are secured, it must be of vital importance to the interests of justice that the conduct of that class should be watched with jealous care. Dealings between attorney and client are not, and cannot with safety be placed upon the same footing as dealings between ordinary individuals. Care must be taken that privileges conferred for the benefit of the public are not abused to their predjudice. Courts of justice are bound to see that attornies, who are their officers, do not employ the knowledge which they ought, and are supposed to possess, to the injury of those who are entitled to their protection ; and although there may be some respects in which the social condition of England may call for a stricter application of this principle, yet I cannot help thinking, that there are other respects in which our own social condition renders the strict supervision of attornies more imperative here than in England.

Judgment.

With respect to the second proposition, it is quite true, as suggested, that many of the matters brought into question in this suit were not necessarily connected with the defendant's professional character. But this admitted fact does not afford any just ground for the conclusion drawn from it. The same observation might have been made in almost every case that has yet come under discussion. In all, the strictly professional business has borne a small proportion to the whole matters involved. The argument proceeds upon a misapprehension of the doctrine of the Court, which is not limited in the way supposed, but reaches all transactions while the relation of attorney and client subsists. Now, in the present case, these parties were first brought together in the month of December 1850,

1854.

Davis v. Hawke.

at the instance of Mr. *Proudfoot*, and for the purpose of preparing a lease from that gentleman to *Davis*. Between that period and the month of December 1852, the defendant acted as the attorney of the plaintiff in various actions in which he was engaged either as plaintiff or defendant; he prepared the deed and mortgage of January 1852, for which he made the usual professional charge; he drew the chattle mortgage of April 1852, for which he charged his client six guineas; and when the admission of debt was signed, *Davis* was without any other professional adviser. But the dealings between the parties during that interval were not confined to these trantactions. From January 1850, (to borrow an expression used by Mr. *Hawke* in his examination) "an intimacy sprung up between them, and whenever they wanted anything done in money matters they consulted him." These money transactions resulted, as Mr. *Hawke* alleges, in a debt of £1,540 being found due to him on the 8th of December 1852; and the question is whether that is to be dealt with as an account between ordinary individuals, or as an account between attorney and client. I have no doubt whatever that the whole must be treated as an account between attorney and client.

Judgment.

With respect to so much of the bill, then, as seeks an account, the defendant sets up an account stated on the 8th of December 1852; that constitutes, he argues, a *prima facie* case, and as no errors in that account have been either alleged or proved, he contends that it must now be regarded as conclusive in his favor. To determine this question, it is only necessary to refer briefly to some few of the leading facts of the case. Mr. *Hawke* admits that he never kept any account of these transactions between himself and *Davis*; and he alleges, further, that there are no entries in his books which would throw any light upon the matter. Then, as to the settlement upon which this admission

1854.

Davis v. Hawke.

was based, Mr. *Hawke* says, "I have no memorandum of it, I believe Mr. *Dempsey*, made up the memorandum of the amount." But when Mr. *Dempsey* is examined, he says, "I did not examine the books; I did not settle the amount named in the confession; it was made up by Mr. *Hawke*." So that this admission, which Mr. *Hawke* permitted his client to make, under hand and seal, appears to have been executed without any previous settlement of the accounts; at least, he has not laid any evidence of the settlement before the Court. Mr. *Hawke* admits that he cannot furnish us with any of the particulars of which this large debt is composed, or with any evidence respecting it, beyond the promissory notes which have been produced, of which his client is the maker. Now it is quite clear, I apprehend, that these promissory notes do not carry the case further than the admission itself, without proof of consideration; but though that were otherwise, there is still a sum of £100, included in the settled account, as to which Mr. *Hawke* admitted upon his examination that he was unable to furnish us with any explanation; and upon the argument of the cause, at a period long subsequent, his counsel was unable to suggest any, although there had been abundant opportunity for investigation, and he consented that the amount should be deducted from the defendant's demand. Lastly, Mr. *Hawke's* constant course of dealing has been to charge his client a commission of five per cent. on each indorsement, although the notes in several cases had only thirty days to run, and these sums are included in the amount admitted in this paper, which the defendant insists on as constituting a settled account between attorney and client.

Judgment.

Now these facts appear to me to place the plaintiff's right to relief beyond all question. The leading authority upon this point is *Lewes* v. *Morgan* (*a*). It

(*a*) 5 Pri. 42.

1854.

Davis v. Hawke.

is true that Sir *Anthony Hart*, in *Hickson* v. *Aylward* (*a*), expressed some doubt as to the correctness of Lord *Redesdale's* judgment in *Lewes* v. *Morgan;* but Lord St. *Leonards*, commenting upon that doubt, in *Lawless* v. *Mansfield* (*b*), says "It is much too late for any judge to impeach the doctrine of *Lewes* v *Morgan;* however oppressive it may seem, it cannot be stirred; it is so recognized that no individual opinion of any judge, however eminent, can avail; it is a decision of the highest tribunal establishing and affirming a principle by which all courts are clearly bound." *Lewes* v. *Morgan*, then, is to be regarded, I presume, as furnishing a correct statement of the doctrine of this Court; and, assuming that to be so, this case can hardly be said to be open to controversy. But, as the question is one of great importance, both to the public and the profession, I shall extract some passages from the opinions of the eminent judges by whom it was decided, both in the court below, and when it came before the House of Lords, which appear to me to be quite conclusive. On the hearing of the case in the Court of Exchequer, Chief Baron *McDonald* says (*c*), "this is a case of attorney and client. An attorney has often been described to be an officer of the court, and in that character responsible for the protection of his client from all acts which may prove detrimental to his interest. It is his duty to apprize him of the legal consequences of his actions; *and he ought to be able to lay before the court, when called upon, a ready account of all their mutual transactions, and to be able to corroborate them by evidence; and the court may refer them to the Deputy Remembrancer.*" Now that case was heard upon bill and answer. No specific error had been either alleged or proved; but, from the unsatisfactory state of the accounts set out in the schedules to the answer, the court felt bound to disregard a long series of settled accounts, after a great

Judgment.

(*a*) 3 Mol. 1. (*b*) 1 D. & W. 556. (*c*) 5 Fri. 56.

1854. Davis v. Hawke.

lapse of time, although those accounts were followed up by bonds and mortgages; and referred the accounts to the Deputy Remembrancer, requiring the defendant to prove the consideration for every security.

Judgment.

The judgment of the House of Lords upon the second appeal, was pronounced by two equity judges of great experience and great learning. Lord *Eldon*, who was the Chancellor, says, "That order (the former order of the House) proceeded on the principle in the case of *Vaughan* v. *Lloyd*, that securities taken from a client by an attorney for money proposed to be advanced by the latter are not conclusive evidence, as in other cases, of the consideration having been actually paid; for in all such cases it is incumbent on the attorney to shew that he acted as much for the advantage of his client as of himself. Lord *Redesdale* says, "This is the case of an attorney, who acts as general agent and legal adviser of his principal and client, obtaining his bond; he is therefore bound by a very strict rule of law to prove by other evidence the actual advance of the whole consideration. That principle was recognized in *Vaughan* v. *Lloyd*." * * * "The want of accuracy in *Morgan's* book of accounts is not to be used in his favor. *It is his business to keep regular accounts, and if he suffers any loss by not doing so, it is his own fault.* That was so held in *Vaughan* v. *Lloyd*, in which I was counsel, and I believe that *Lloyd* did suffer loss in consequence; but it would be monstrous to allow a man to avail himself of that irregularity so as to enable him on that account to charge another by his mere assertion." And upon that occasion, after the order of the House had been agreed upon, Lord *Eldon*, as if to avoid the possibility of any misconception as to the principle upon which the order of the House proceeded, makes this remark, "I am desirous of stating that the proceeding upon this record establishes the principle that in the case of an attorney who takes security from his client, they

cannot be used as conclusive evidence of their consideration as expressed, but require extrinsic evidence of the money having been actually advanced to prove the transaction to have been *bona fide*."

1854.
Davis v. Hawke.

When the case came before Chief Baron *Alexander* upon exceptions to the first general report, after a litigation almost unparalleled in extent and duration, that learned judge lays down the law quite as broadly as it had been laid down in the previous stages of the cause. He says (*a*), "The relative character in which these parties stood with respect to each other must not be forgotten for a moment in this case. The principle arising out of it is the foundation of all the most important decisions. The accounts between them having been found to be so confused and perplexed as to baffle every attempt at investigation, the tribunals had to consider on which party the burthen of proofs lay, and on whom any loss arising from the darkness in which they were involved ought to fall. They have been of opinion that, in the situation in which *John Morgan* placed himself, *he* was bound to explain everything; that the mere production of documents, which, in any other case, and if he had been a stranger, would have been sufficient *prima facie* evidence, and if unimpeached, conclusive evidence to establish his demad, proved nothing in this case for him." And in a subsequent part of his judgment, speaking of the order on the appeal, he says, "The House of Lords, however, and this court in concurrence with the supreme jurisdiction, have adopted a different principle. Taking into consideration the situation and conduct of *Morgan*, as the attorney, they have set his account at naught, and have even disregarded the more solemn instruments signed by *Lewes*, viz., the mortgages and bonds, and required the actual advances to be established by evidence beyond the mere production of the instruments themselves."

Judgment.

(*a*) 3 Y. & J. 239.

1854.

Davis v. Hawke.

The late case of *Lawless* v. *Mansfield*, to which I have already adverted, was decided by Lord *St. Leonards* while Chancellor of Ireland, upon great consideration, and in the course of his judgment this great lawyer, after commenting at considerable length upon *Lewes* v. *Morgan* and the other authorities upon the subject, states the conclusion to be deduced from them in these words; "These authorites prove that the law of this court is, that a general charge, like that in this case, is sufficient, and that, as between a solicitor and his client, his accounts, though he may have securities, must be vouched, and the items in the account proved by receipts and evidence independently of the instruments. A solicitor will not be allowed to say, Here is a bill settled and admitted by you on a former occasion; dispute the debt or any of the items, if you can." The same rule as to a general charge was laid down in *Matthews* v. *Wallwyn*, where Lord *Loughborough* says, as to the question upon the account, "Admitting that a settled account is not to be opened unless specific errors are pointed out, will this court permit an account to stand, where upon the face of the account the attorney admits that he has not given credit, and produced that state of his affairs that the client was entitled to have? It is the business of the attorney to keep his client's accounts."

Judgment.

Now, to apply the doctrine of these cases to the present, there does appear to me, I confess, to be a much stronger case in favor of the plaintiff than any of those to which I have been adverting. This is not a suit to open accounts long settled, and closed by solemn instruments, as was the case both in *Lewes* v. *Morgan* and *Lawless* v. *Mansfield*; for all the transactions are of recent date here, and the defendant is therefore relieved from any difficulty of proof growing out of the lapse of time. The court is not asked in this case to set aside long settled accounts between attorney and client upon the ground of minute errors,

1854.

Davis v. Hawke.

the result, perhaps, of mistake rather than fraud, as was the case, to a considerable extent, in *Lawless* v. *Mansfield*, and to some degree in *Lewes* v. *Morgan* also. Here we have the explicit statement of the attorney that he never kept any account of the mutual dealings between himself and his client, which was his plain duty; and, although the transactions are so recent, he avows that he is unable to offer any evidence of the advance of these monies, beyond the securities upon which he seeks to charge his client.

It is established, I think, that *Hawke* not only acted as the attorney of *Davis*, but evinced also a very considerable control over his general affairs. It is, clear from Mr. *Hawke's* examination, that in December 1852, and for some time previons *Davis* was reduced to a condition of almost complete dependence. One of the witnesses, Mr. *Proudfoot*, I believe, says that without *Hawke's* assistance he must have been ruined. But I have not felt it necessary to dwell particularly on these portions of the evidence, though they furnish important elements of decision, because the case may be safely rested, as it appears to me, on the more general ground. I am bound to observe, however, that this case cannot be treated as depending on the mere relation between attorney and client. The circumstances to which I am about to adver[illegible]ould be sufficient, perhaps, to entitle the plaintiff to relief irrespective of the grounds to which I have already alluded. Shortly before the execution of the paper of the 8th of December, the defendant had employed Mr. *Dempsey* as his attorney, to procure a confession of judgment from *Davis* for the amount claimed against him. That negotiation failed, owing, as it would seem, to the interposition of the person who was to have joined in the security, *Nathaniel Davies* who asserted openly that no such sum was due from *Davis* to *Hawke*. I do not forget the statement in Mr. *Dempsey's* evidence, that *Davis* himself made no such objection.

Judgment.

1854.

Davis v Hawke.

Mr. *Dempsey* has been betrayed into some inaccuracies with respect to other parts of the transaction; but, admitting his accuracy in this particular, still *Hawke* must have had notice that the correctness of his demand against *Davis* had been impugned,—that *Nathaniel Davies*, who had come under some liability respecting it had openly and positively denied its accuracy; yet, within a few days after that occurrence, he induces his client, who, from his own shewing, was wholly in his power, to execute a paper drawn in a most unusual form, admitting himself to be indebted to a very large amount, without any previous settlement of account, and without the interposition of any attorney to protect his interests. And he informs us that he adopted this particular course because he had been advised by Mr. *Gamble* and others to be careful in their dealings with the plaintiff. Now that was a course which no solicitor, with anything like a prudent regard to his own interests, ought to have adopted. Mr. *Hawke* ought to have known that no paper, in whatever form, executed under such circumstances, would be of any value. He should have felt himself bound not to permit his client to execute any such instrument without the fullest explanation. It is very difficult to reconcile the preparation of such a document with the *bona fides* of the transaction. Mr. *Hawke* held already promissory notes for the full amount of his demand. Consideration would have been implied in a court of law; the onus of disproving it would have been upon *Davis*; and assuming *Hawke* to have paid in fact full consideration, it is difficult to conceive why he should have prepared such a document, or how it would have been suggested to him. The whole case does appear to me, I confess, to be one of very grave suspicion.

Judgment.

Upon the first branch of the case, therefore, I am clearly of opinion that the plaintiff is entitled to the relief he asks; and in taking the account the defen-

dant must be required to establish his debt by some evidence beyond the securities upon which he relies. 1854. Davis v. Hawke.

I am also of opinion that the plaintiff is entitled to relief with respect to the sale of the land in Gwillimbury. The evidence shows that at the date of that transaction *Davis* was very much in *Hawke's* power. *Hawke* was his attorney and banker. Through him, as it would seem, *Davis* obtained all the supplies necessary to carry on his business; and he had it in his power, as I gather from the letter in evidence, to ruin him at any time by simply withholding his assistance. But, besides this general connection with *Davis*, he prepared the deed and mortgage relating to the land, for which service he charged his client with the ordinary fees; and it is clear, therefore, that he was the attorney of *Davis* in this very transactions. That would have been the legal consequence though no fee had been charged (*a*), but the fact that Mr. *Davis* was charged the usual fees places the matter beyond question. Now it is hardly necessarry to observe that an attorney who pursues that course will always find himself placed in a position of extreme difficulty. It is said by *Lord Eldon* in *Gibson* v. *Jeyes* (*b*), "Therefore I say he (the attorney) might contract; but then he should have said if he was to deal with her for this, she must get another attorney to advise her as to the value; or if she would not, *then out of that state of circumstances his clear duty results from the rule of this court, and throws upon him the whole onus of the case; that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given her all that reasonable advice against himself that he would have given her against a third party.*" In *Lawless* v. *Mansfield*, to which I have more than once referred, Lord *St. Leo-* Judgment.

(*a*) Lawless v. Mansfield, 1 D. & W. 600; Hewitt v. Loosmore, 9 Hare 454. (*b*) 6 Ves. 277.

1854.

Davis v. Hawke.

nard's says, "Now, whether that was or was not the case, Mr. *Lawless* was the only solicitor concerned in the transaction, and he throughout it acted as solicitor for his client, who was the mortgagor, and for himself, the mortgagee. There is no better established principle, no more trite remark, than that nothing can be more unwise on the part of a solicitor than conduct of that kind. If a solicitor wish to deal with his client for a mortgage, which no doubt he may, he is bound not only to see that his client has full information upon every point, *but he should, in justice to himself, take care that his client, by means of another solicitor, should have that protection against himself, which he (the client) would have had through him in a transaction with a third party. He is not in fact at liberty to act in a matter relating to his own benefit as the solicitor for both parties; and if he will do so, he must be content at all times to have the transaction examined with great jealousy, in order that the court may be satisfied that the client had the same protection which he would have had had he been represented by a regular solicitor, acting only for the advantage of his client.* And in *Edwards* v. *Meyrick* (*a*), when the law upon this subject was a good deal considered, Sir *James Wigram* says, "In other cases the relation between the parties may simply produce a degree of influence and ascendancy, placing the client in circumstances of disadvantage; as, when he is indebted to the attorney, and is unable to discharge the debt. *The relative position of the parties in such a case must at least impose upon the attorney the duty of giving the full value for the estate, and the onus of proving that he did it.*" And again, "On the evidence in the cause, I am satisfied that the only gronnd upon which I can proceed is this bare relation between the parties. Taking the obligations of the defendant to stand as high as the relative position of the parties enable me

Judgment.

(*a*) 2 Hare, 70.

to place them,—admitting the defendant to be the attorney *in hac re*,—*I cannot consider that he is bound to do more than prove that he gave the full value for the estate.*"

1854.
Davis v. Hawke.

I take it to be clear, therefore,—disregarding those collateral facts which under other circumstances it might have been very material to consider, and laying out of view the evidence of *Nathaniel Davies*, which goes to prove actual fraud,—I take it to be quite clear, I say, placing the plaintiff's equity on the lowest ground, that the defendant in this case is bound, at the very least, to prove that the estate was sold at a fair value. But so far from establishing that fact the evidence proves, conclusively I think, that the price was most exorbitant. *Samuel Thompson*, a farmer, who has resided in the immediate neighborhood for eleven years, swears that good land in that locality sells at from three and a half to five dollars. He himself purchased, about the same time, 50 acres nearly adjoining, which he describes as very good land, at three dollars and a half. Now this witness, who had the most ample means of forming a correct judgment, describes the land in question as almost valueless. He would not accept it as a gift subject to the payment of taxes. Lot 23 is one vast swamp, devoid of timber, and wholly unfit for cultivation; and 22 is little better, not containing more than 15 or 20 acres of dry land. *James Gibney*, also a farmer long resident in the immediate neighborhood, corroborates *Thompson's* evidence. In opposition to this testimony we have the evidence of two witnesses examined on the part of the defendant, that certain land which they inspected at the instance of the defendant, is worth three pounds per acre. Now, in the first place, these persons were strangers in the neighbourhood. They resided in Vaughan, and Mr. *Hawke* hired them to travel in Gwillimbury for the purpose of inspecting the land. I need hardly say that the court would not

Judgment.

1854. Davis v Hawke.

give much weight to such a valuation,—the mere speculative opinion of strangers unacquainted with the locality. In the next place, I am inclined to think that these witnesses never visited the land in question at all. They were strangers, unacquainted with this particular property, and as their description of the land they visited does not bear the most remote resemblance to the land in question, as described by *Thompson*, who knew it thoroughly, I adopt the conclusion that they were misled themselves, because I will not allow myself to believe that they deliberately intended to mislead the court. I must add, however, that they made a very unfavorable impression upon my learned brothers before whom they were examined. The weight of evidence, therefore, although there were nothing further in the case, would be greatly in favor of the plaintiff; but the consideration, which is conclusive to my mind, is, that Mr. *Hawke*, who might have contradicted *Thompson* and *Gibney*, had he found any room to doubt the correctness of their testimony, has not called any further witness. That consideration appears to me to relieve the case of all difficulty as to the question of value. Then, if the evidence of *Thompson* and *Gibney* is to be regarded as reliable, it is quite clear that the sale must be set aside, as being a sale by an attorney to his client at a most exorbitant price.

Judgment.

With respect to the defendant *Proudfoot*, the plaintiff is entitled to some relief. We have already determined that the deed and mortgage, as between *Davis* and *Hawke*, must be set aside, and as *Davis's* covenant to pay the mortgage money is a mere chose in action, and as it is well settled that the assignee of a chose in action takes it subject to all existing equities, (*a*) it follows that, as against *Proudfoot* also, the plaintiff is entitled to relief to that extent. But beyond

(*a*) Cockell v. Taylor, 15 Beav. 103; Mangles v. Dixon, 3 H. L. 702.

that the case as against *Proudfoot* fails, He is a purchaser for value without notice, and therefore entitled to the benefit of his security. But *Hawke* must pay the debt and discharge the plaintiffs' land from the incumbrance.

The plaintiffs are entitled to the costs up to the hearing. They must pay the defendant *Proudfoot* his costs, but that amount must be repaid by the defendant *Hawke*.

ESTEN, V.-C.—Upon the pleadings and evidence in this case, and upon the authority of the cases of *Lewes* v. *Morgan* and *Lawless* v. *Mansfield*, I think the account should be opened and the sale set aside. As between parties, standing towards each other in the relation which subsisted between *Hawke* and *Davis* of attorney and client, principal and agent, and borrower and lender,—where one party puts himself in the hands of the other,—it is sufficient, in case of an account settled or security taken, to throw suspicion on the transaction. Now it is impossible to say that this has not been done here. And when the account is opened the securities executed are not evidence of the consideration on which they purport to rest, and which must be proved by extrinsic evidence. The sale seems to have been for a grossly inadequate consideration, and, between parties standing in this relation towards each other, cannot be sustained. *Davis* seems to have been *in vinculis*. I do not regard the case as one altogether between attorney and client; that relation certainly subsisted, and is a circumstance to be considered; but the case in this respect does not resemble those which occur so frequently in England, where attornies are employed, because they are attornies, to transact business not strictly of a professional nature, for which, however, they make charges as if it was of that character, and in which the relation of attorney and client may be said to prevade the whole dealings

Judgment.

1854. Davis v. Hawke.

between the parties. Here Mr. *Hawke* acted as attorney for *Davis* only in two or three instances. In other respects he filled the character rather of agent or lender than of attorney, and made no charges in the latter capacity. The relative situation, however, which he occupied gave him at least as much influence as he could have had as attorney. I think the relief mentioned by the Chancellor should be given, without costs, as to *Proudfoot;* as to *Hawke*, an account should be decreed, and further directions and costs should be reserved.

Judgment.

SPRAGGE, V. C., concurred in the views expressed by Vice-Chanellor *Esten*, except as to costs of *Proudfoot.*

Per Curiam—Decree for plaintiff with costs as against *Hawke*,—plaintiff to pay *Proudfoot* his costs of suit and to add the amount to his costs against *Hawke.*

CLUTE v. MACAULAY.

Mortgage—Equity of redemption.

The court refused relief on a bill to redeem, filed in 1852 by a mortgagor who had given a mortgage to certain executors in 1827, payable in 1832, on property of not greater value than the amount secured upon it. The mortgagees having, in 1833, after the mortgagor's default, sold the property for less than was due on it, and the mortgagor having thereupon given possession to the purchaser, in pursuance of a letter from the acting executor (since deceased) to the mortgagor, informing him of the sale and requesting him to give the vendee possession, "in which case the executors relinquish all claim against you for the interest in arrear, &c."

Statement.

The bill in this cause had been filed in the office of the deputy registrar at Kingston, and by consent of parties the case was now heard upon affidavit evidence.

Argument.

Mr. *C. W. Cooper* for plaintiff.

Mr. *Mowat*, contra.

Chalmer v. *Bradley (a)*, and *Gregory* v. *Gregory (b)*, were referred to.

1854.

Clute v. Macaulay.

THE CHANCELLOR.—This is a bill to redeem. Previous to the month of March, 1827, the premises in question had been conveyed to one *Markland* in fee, for the purpose, however, of securing a sum of £238 due to him from the plaintiff. At this period the plaintiff was also indebted to the estate of the late *Peter Smith* in a sum of £342, and it was agreed between him and the executors of *Smith* that the latter should pay up *Markland's* debt and take a conveyance of the estate to secure both sums, and in pursuance of that arrangement the premises in question were conveyed to the executors in fee simple on the 16th of January, 1827. This conveyance was absolute, but the executors signed a separate defeasance binding themselves to re-convey the estate upon payment of the principal sum of £580 on the 1st of March, 1832, with interest in the meantime annually.

Judgment.

The executors allege that up to the 1st of January, 1833, nothing had been paid on the foot of either principal or interest; that, in consequence of such default, the debt, with the accumulations of interest, exceeded greatly the value of the estate; that being desirous of realizing this debt, and the defendant *Davy* offering to purchase the property at £600, they were willing to compromise the matter by accepting this sum in full satisfaction of their debt, provided the plaintiff would confirm the sale to *Davy*, which proposition they submitted to him in the following letter:

"Kingston, 7th January, 1833.

"Sir,—This will be handed to you by Mr. *John Davy*, to whom you are aware the executors of my late father's estate have sold the farm which you lately occupied. You will please give Mr. *Davy* quiet pos-

(a) 1 J. & W. 51. (b) G. Coop. R. 201.

1854. Clute v. Macaulay.

session of the premises without delay, in which case the executors relinquish all claim against you for the interest in arrear, &c. Should you still delay, I am authorized to say that a suit must be commenced without delay against you, which would be carried to the Home District.

"DAVID JOHN SMITH.

"Mr. *John Clute*, Fredericksburgh."

They allege that the plaintiff delivered up the premises in pursuance of this proposition to their vendee, who has remained in quiet possession ever since; and they submit that, under the 11th clause of the Chancery Act, the plaintiff ought not to be permitted to redeem after a lapse of five-and-twenty years from the date of the mortgage, and nearly twenty years from the sale to *Davy*.

The plaintiff alleges, on the contrary, that a large proportion of this debt had been paid in January, 1833, by means of a raft of timber conveyed to *David John Smith*, the proceeds of which were to be applied in liquidation of this debt. He affirms, secondly, that the estate was sold at a great undervalue; and he denies, lastly, that he was a consenting party to the sale.

Judgment.

The evidence fails altogether, in my opinion, to establish the alleged payment. One who seeks to open a transaction of this sort after the lapse of twenty-five years, and after the death of the only party who could have given us any satisfactory explanation, must not expect to recover upon a doubtful case. But here the inferences are all but conclusive against the plaintiff. The bill of sale of this raft of timber was made to *David John Smith*, not in his representative character, but individually, in consideration of £75. Now Mr. *Macaulay*, the sole surviving executor, swears that he had never before heard of this transaction; but that, having carefully examined Mr. *Smith's* books,

he finds certain entries as to a raft of timber, which he supposes to be the one in question, which shewed that nothing was realized by the transaction, but that, on the contrary, the plaintiff became indebted to *Smith* on the foot of it. The plaintiff, who had an opportunity of answering the affidavit of Mr. *Macaulay*, and who must be perfectly acquainted with the true state of the case, has not attempted any explanation; Mr. *Macaulay's* affidavit remains unexplained and uncontradicted; and, under the circumstances of the case at least, such a statement uncontradicted ought to prevail. Again: the letter of January, 1833, is quite inconsistent with the supposed payment; but the plaintiff, instead of insisting upon his present defence when the matter might have been cleared up without difficulty, relinquishes the possession to *Davy*, and comes now to open the transaction after the death of Mr. *Smith*, and after an acquiescence of nearly twenty years. I agree with Mr. *Mowat* that this supposed payment ought to be excluded in disposing of the question now before us.

Judgment.

As to the second point, I am of opinion that the sale to *Davy* was at a fair value. Three witnesses on the part of the defendant swear that he paid the full price, and their evidence is entitled to great weight, because their opinions are formed on the only grounds upon which such opinions can be safely based, namely, contemporaneous sales of property in the immediate neighborhood. Three witnesses on the part of the plaintiff fix a higher estimate, varying from £750 to £1,000; but these witnesses do not found their opinions upon actual sales. They exercise a present judgment as to the value of this property nearly twenty years back. Such a mode of estimating the value of property in this country at a period so remote, when there was in fact no fixed market value, it entitled to little respect. The evidence, taken together, appears to me to support the allegations of

1854. Clute v. Macaulay.

the defendants; but it is not fairly inferable, even from the plaintiff's evidence, that the value of the estate exceeded the debt, and that would be sufficient, perhaps, to sustain the defendants' argument.

The plaintiff appears to me to leave the last point, which is the principal ground of defence, quite untouched. He swears, indeed, that he did not assent to the sale to *Davy*, and that he had no intention of relinquishing his equity of redemption. But he does not deny that the letter of January, 1833, was handed to him by Mr. *Davy;* on the contrary, he produces the original letter and verifies it by his own affidavit. He does not deny that he delivered up possession to Mr. *Davy* in accordance with its terms. He swears, indeed, that he did not intend to relinquish any of his rights; but his intentions are unimportant if they remain undisclosed; and it is nowhere alleged that they were disclosed to Mr. *Davy;* on the contrary, although the plaintiff has been ever since a constant resident in the immediate neighborhood, it is admitted on all hands that this bill, filed after a lapse of nearly 20 years, gave to the defendants the first intimation of any such intention.

Judgment.

In January, 1833, then, the defendants, although mortgagees in fact, had a title, which, in the existing state of the law, could not have been disturbed. Their legal title was perfect; and as there was then no court of equity, foreclosure and redemption were equally out of the question. In that state of things, after great indulgence, the mortgagor having failed to make any payment on the foot either of interest or principal for a period of six years, and the estate being an insufficient security, a compromise is proposed which appears to me to have been liberal towards the plaintiff—certainly, under all the circumstances, fair and reasonable. They propose to sell the estate to *Davy* for £600—about two-thirds of the mortgage debt; and they offer to accept that sum in full, provided the

mortgagor, on his part, will give up possession to the vendee and confirm the sale. Mr. *Davy* is admitted into possession in accordance with that proposal, and the compromise is acted upon for a period of nearly twenty years without complaint. Now that appears to me to be just such a case as the legislature had in contemplation in enacting the 11th clause of the Chancery Act. To permit redemption in this case would defeat the ends of justice, and I am therefore of opinion that the bill must be dismissed with costs.

ESTEN, V. C., concurred.

SPRAGGE, V. C.—Upon all the grounds upon which the other members of the court are against allowing the plaintiff to redeem, I think that redemption ought to be refused.

The letter of January, 1833, informed the plaintiff that the land had been sold by the mortgagees to Mr. *Davy*, and the plaintiff must have given possession to Mr. *Davy* as the purchaser. The option was presented to him by the letter of giving up possession or of being sued for the debt, and the inducement for giving up possession was held out to him of the mortgagees' relinquishing all claim against him for interest in arrear, &c. He gave up possession and retained the letter, and appears to have preserved it very carefully. If he had chosen to retain possession he might have been compelled to pay the mortgage money, which he was bound to have paid long before, and upon payment of it he would have been entitled so retain the land; or, if ejectment had been brought against him, payment of the mortgage money would still have entitled him to retain the land. There was, therefore, no peculiar hardship in his position; for, having possession, he could keep possession, and in effect redeem. The hardship was rather on the other side; for, in the absence of a court of equity, the mortgagees could not foreclose. Whe-

Judgment.

1854.

Clute v. Macaulay.

ther they recognized or at all considered the existence of an equity, which required to be foreclosed, may be doubtful; I should say, rather, they ignored its existence by selling to *Davy*. This they did probably in the confidence that after the utter default which the mortgagor had made there was no chance of his paying the mortgage money. *Clute*, the mortgagor, adopting the alternative of giving up possession, is important in two points of view: he disabled the mortgagees from suing him; for the letter, I apprehend, would have been an answer to their suit, coupled with the fact of his giving up possession in compliance with it. How could he accept and retain this advantage and at the same time deny to the other party that for which the advantage was given? By taking and holding this benefit he impliedly agreed to the terms upon which the benefit was accorded to him. The other point is, that he gave up possession not to the mortgagees, but to a purchaser from the mortgagees—

Judgment.

one to whom they had sold not the mortgage, but the land itself. Of this he was plainly informed by the letter, and this letter was carried to him by the purchaser, and to him he gave up possession. I do not see that this can be anything less than an acquiescence in the sale; and this delivery up of possession would have been considered all that was necessary for perfecting the title of the purchaser, for those from whom he purchased had an absolute deed from *Clute*, and a deed from them to the purchaser *Davy;* and possession delivered by *Clute* to *Davy* as such purchaser would appear to perfect the title. *Clute* does not appear to have intimated to *Davy* that he retained any right or interest of any kind in the premises; if he had done so, I have do doubt he would have alluded to it in his affidavit. It is not probable that he had at that time the least idea or intention of retaining any interest in the premises. I should have thought, therefore, even if he had filed his bill to redeem promptly upon the establishment of the court in 1837,

that the dealing between the parties had been such as to preclude redemption. But the plaintiff delays filing his bill for about fifteen years *after* the establishment of the court; he lays by till *David John Smith*, the writer of the letter already referred to, and the acting executor of his father's will, is dead. All this is material when the court is asked to exercise its discretion in favor of one guilty of such great delay, for not only is the probability of getting at the truth diminished, but it becomes more and more inequitable to disturb those who for so many years have been in possession as owners, and whom it is now attempted to treat as mortgagees. I do not agree with the plaintiff's counsel that, since the establishment of the court, the delay has been as much that of the defendants as of the plaintiff, because they have filed no bill to foreclose. They could file no bill consistently with their position that there was no equity of redemption existing, and none appears to have been even asserted by the plaintiff until within the past year or two.

Judgment.

That the *plaintiff* has been guilty of great delay is unquestionable, and the cases referred to by the defendants' counsel shew that everything is to be presumed against a party guilty of great delay. There are other cases also in which the language of the judges is apposite. In Lord *Deloraine* v. *Brown* (*a*) the matter went off upon demurrer, but Lord *Thurlow* in the course of his remarks says,—"Here the inconvenience of entertaining the suit is manifest on the face of the bill. The death of *Browne* produces an inconvenience; had he been alive he might have stated many circumstances the present defendant cannot. Another inconvenience from the length of time is, that *Browne*, resting on the property as his own, has looked to it in the distribution of his other property among his children; so that great injustice would be done to the son if this was taken out of the share allotted to him. It has

(*a*) Br. C. C. 633.

1854.

Clute v. Macaulay.

been made the subject of a marriage settlement by the present Mr. *Browne*, who has lived twelve years on the presumption of its being his property." I quote this as showing the opinion of Lord *Thurlow* (though he decided against the defendant upon a point of pleading) as to delay, the evils resulting from it, and what in his judgment ought to be the consequences to the plaintiff for being guilty of it, and also because the consequences of delay in the case before him were not unlike those which have occurred in this case. In *Morse* v. *Royal (a)*, before Lord *Eldon*, that learned judge remarks upon the cases of plaintiffs lying by so long that witnesses were dead before the bill was filed, and quotes Lord *Kenyon's* opinion as confirmatory of his own. Among other things, Lord *Eldon* says,—"Where witnesses are suffered to die before the claim is made, much is to be presumed against it;" and again, speaking of the death of witnesses,—"How is it possible that length of time will not operate in this way: not to induce the court to refuse to hear the plaintiff; but that, unfortunately, without design he has put it out of the power or the court to see the wrong with the distinctness that is necessary in order to act?"

Judgment.

In the course this cause has taken, all that Mr. *Smith*, if alive, could have sworn would have had the weight of evidence; but even had it been otherwise, he might, as a defendant, have stated many circumstances unknown to the present defendants.

To allow this plaintiff to redeem after all that has occurred would be to allow him to open that which he has acquiesced in closing for considerations of benefit to himself, and that, too, after a lapse of time so great that he has put it out of the power of the court to see the facts with the distinctness necessary in order to act, and when possession, as owner—a possession, too,

(*a*) 12 Ves. 355.

delivered by himself—has existed for nearly twenty years, and when other interests have grown up in respect of the property. To allow redemption in such a case would work great injustice to innocent parties, and inure for the benefit of one who can make no moral or equitable claim. I think the bill should be dismissed with costs.

1854.
Clute v. Macaulay.

COMMERCIAL BANK v. GRAHAM.

Practice—Decree—Foreclosure.

A decree of foreclosure being erroneous, the court refused to pronounce the final order of foreclosure on default of payment.

1850.
January 18.

The plaintiffs were second mortgagees of the property in question, and the bill was filed against *Armstrong*, the first mortgagee, and *Graham*, the mortgagor,—the prayer being to redeem the former and foreclose the latter. *Graham* alone was served with the subpœna. A decree was drawn up on *præcipe* under the 168th of the Vice-Chancellor *Jameson's* orders, and through mistake recited that both defendants had been served, and treated the defendants as joint mortgagors. The mistake being perceived, the plaintiffs abandoned, in the master's office, all relief against *Armstrong*. The master's report recited this abandonment, and directed payment of the mortgage money by *Graham*, the mortgagor, alone; and this report was confirmed by order of the Vice-Chancellor.

Statement.

Graham having made default in paying the money at the time appointed, a motion was made to the new court for a final order of foreclosure, and the propriety of granting this motion under the circumstances above detailed was directed to be spoken to.

Mr. *Mowat*, for the plaintiffs—*Armstrong* being first mortgagee was an unnecessary party to the suit.—*Rose* v. *Page* (*a*). Not having been served with

Argument.

(*a*) 2 Sim. 471.

1850. Com. Bank v. Graham.

process, the decree was a nullity against him, and is, as against *Graham* precisely what it would have been if *Armstrong* had not been named in it. Thus the decree did no justice to either *Armstrong* or *Graham*, and neither is objecting to it, though *Graham*, whom alone it affects, was served with a copy more than a year ago. There is no case in which a court of equity has refused a final order of foreclosure on the ground of the decree being erroneous; nor is there any example of any subsequent order being refused on that ground on the objection being taken by the party himself in case of a decree even substantially and not merely technically wrong, and the reverse is the rule. —*Pritchard* v. *Draper* (*a*), *Wilson* v. *Metcalf* (*b*), *Clark* v. *Lubbock* (*c*). Such a refusal would have all the effect of a reversal without a re-hearing, which is contrary to the practice—2 *Maddock's* Practice, 454; *Mitford's* Pleadings, 65; *Jeremy*, 90; *Shepbrooke* v. *Hinchinbrooke* (*d*); and a re-hearing of this case would be too late now—*De Tastet* v. *Bordenave* (*e*), *Cusack* v. *Gilbert* (*f*), *Rotheram* v. *Browne* (*g*). Upon a re-hearing, the result, as regards *Graham*, would be the same as now, for the bill would be dismissed against *Armstrong* instead of being abandoned against him in the master's office, and the decree would, as against *Graham*, remain unchanged. Being right in the particulars to which the report and present motion are confined, its inaccuracies in other respects are immaterial. And even an irregular order must be obeyed, or the party is liable to the penalties of contempt.—*Woodward* v. Earl *Lincoln* (*h*). Again, an order for final foreclosure is an order of course, and is in England drawn up without being mentioned to the court.—1 *Smith's* Practice, 541. Analogies which common law practice supplies also support the application. Thus a *nolle prosequi* may be entered at

Argument.

(*a*) 1 R. & M. 191.
(*b*) 1 Russ. 530.
(*c*) 1 Y. & C. C. C. 492.
(*d*) 13 Ves. 394.
(*e*) Jacob, 516.
(*f*) 5 B. P. C. 471.
(*g*) 8 B. P. C. 29.
(*h*) 3 Swan. 626.

any time as against one defendant. One defendant cannot take advantage of an irregularity which affects another and not himself, and an irregular proceeding will only be set aside by the proper party on a direct application.

1850.
Com. Bank v. Graham.

The judgment of the court was delivered by

THE CHANCELLOR.—In this case the bill has been filed against *Armstrong*, a prior mortgagee, and *Graham*, the mortgagor, and contains the ordinary prayer for redemption of the previous incumbrance and foreclosure in the ordinary form. The decree would appear from the wording to have been taken *pro confesso*, under the mortgage orders, without a regular hearing. It recites the service upon both defendants of a subpœna to appear, with the endorsement prescribed by the orders of 1845; their failure to appear, and an entry of appearance for them by the plaintiff; their neglect to answer within the time limited; and then, instead of the ordinary decree in such cases, it directs the master to take an account of all sums due from *both defendants*, and decrees that on non-payment of the sum reported due at the time to be fixed both should be foreclosed.

Judgment.

The master in his report recites that the mortgagor, though notified, had not appeared; and *the plaintiffs having waived all relief against the other defendant*, and having taken an account of the sums due *from the mortgagor*, *it directs* him to pay the amount due at a fixed time, and proceeds as if the bill had been filed against him alone. This report was confirmed absolute *in the first instance*, and the plaintiffs now move for order of foreclosure absolute, upon affidavit of non-compliance with the requirements of the master's report.

In reply to an observation from the court, pointing out the error and irregularity apparent on the face of

1850. Com. Bank v. Graham.

the proceedings, the learned counsel for the plaintiffs argued that he was entitled to his motion, notwithstanding such error, upon the following grounds:—

1st. This is a motion of course. It would in England have been drawn up by the registrar, who could not question the regularity of the decree; and that if this court assume to itself the duty of the registrar, it should yet discharge that duty upon the same principles as the registrar would have done it, and therefore should consider only the sufficiency of the affidavits.

2ndly. Because this court cannot alter a decree upon motion; consequently, if the defendant were now before the court he could not effect any change in the decree; and should the court refuse the motion, it would in fact do for an absent defendant what that defendant if in court could not be heard to ask.

Judgment.

3rdly. We were pressed by the analogy to judgments at law, which, even when interlocutory, can only be impeached by a direct proceeding questioning their validity, and not collaterally.

Motions of course comprehend a vast variety of proceedings, which being of frequent occurrence, and governed by a well settled practice, are not only made *ex parte*, but, moreover, those to be effected are not permitted to offer any argument upon the application.

In England orders of this sort are usually obtained from the registrar without the intervention of the court, but that practice has only prevailed in later times from press of business; and inasmuch as the rule permitting these motions to be made *ex parte* and precluding discussion, would have obviously imposed upon the court the duty of seeing that such applications were in *the ordinary course*, so we think

that the registrars at the present day are bound before drawing up such order to see that the applications are in all respects regular, and that they would neglect their duty were they to draw up an order where any irregularity appears in the proceedings.—*Cooper* v. *Lewis (a)*, *Cartwright* v. *Smith (b)*. 1850. Com. Bank v. Graham.

Upon the registrar's refusal the party interested applies to the court, which then determines the question of regularity. *We* at present assume the duty discharged in England by the registrar, and feel ourselves bound to examine into the regularity of the proceedings before allowing orders of the sort to be issued.

The present application for foreclosure absolute obliges us to look to the master's report. How can we determine that the non-compliance of the defendant's with the master's direction has entitled the plaintiffs to the order asked for without examining the report to see what those directions are? On examining the report we find that the master has thought proper to proceed in the absence of one of the defendants, and assuming for the moment that it may be competent to him to adopt such a course in some instances, it is yet apparent that in numerous cases it would be irregular and unjust. We are driven, therefore, to examine the decree to see whether anything can be found there to justify the course adopted by the master; but the decree on examination is found palpably erroneous, unwarranted by the nature of the case or the prayer of the bill, injuriously affecting the interest not only of the mortgagor, who has been retained as defendant, but also of the prior mortgagee whose name the plaintiffs have assumed the right of blotting out of the record as though he had never been made a party to the suit. Judgment.

(a) 2 Phil. 178. (b) 6 Beav. 121.

1850.

Com. Bank v. Graham.

But it is argued that we cannot vary a decree upon motion, and that the refusal to grant the order would in effect vary the decree—and that, too, in favour of those who do not appear to ask such relief. The law, is, undoubtedly, that a decree cannot be varied, at all events substantially, upon motion. But we apprehend that the plaintiffs who use this argument are those who seek to infringe the rule they insist upon. They seek by this order to vary the decree in the cause; they are seeking to remedy by a proceeding in the master's office that which they could not have effected by motion here; and the refusal of this motion not only does not infringe the rule laid down, but enforces it.

Judgment.

But the case raises a further question, and one of vital importance in the practice of the court; for not only have the proceedings *under* the decree been irregular, but the decree itself is palpably erroneous, as is apparent upon the pleadings; yet do the plaintiffs contend that this erroneous decree, taken by themselves *pro confesso*, must be regarded as conclusive until altered or reversed upon a re-hearing or bill of review. It is indeed clear that the decree cannot be *altered* except in one of the modes permitted by the practice of the court. But it is one thing to alter a decree and quite another to refuse to carry it into execution. Without determining at the moment what course should be pursued where an erroneous decree has been pronounced upon discussion and *deliberation*, we think it is well settled that parties who take a decree *pro confesso* must be at all times prepared to vindicate its justice, and that it is the duty of this court—in regard to *such* decrees, at all events—to take care that it does not lend its assistance for the furtherance of that which is erroneous or unjust. But as this court *will examine the justice of a decree* taken *pro confesso*, as well upon further directions as upon a bill to carry it into execution, so will it, *a fortiori*, refuse to perfect

such decree when unjust by making such an order as that now asked for. This question being one of very general importance, we have felt it right to consider the cases upon the subject somewhat at length. We cannot say that the true rule has been explicitly laid down, neither has the practice been uniform. We think, however, that the conclusion at which we have arrived is in accordance with reason and authority.

1850.

Com. Bank v. Graham.

Hamilton v. *Houghton* (*a*) was an appeal from the equity side of the Irish Court of Exchequer. The bill had been filed in the Court of Exchequer in Ireland to have the benefit of a decree made in 1780, and of several subsequent decrees and orders which had all been acquiesced in for a very great length of time. The original decree was said to be erroneous in having been made in the absence of Sir *William Hamilton*, a necessary party, and also in giving interest where none should have been ordered.

Judgment.

Mr. *Hart* and Mr. *Raithby* argued for the respondents (p. 182), as the plaintiffs have here, "that the decree of the 13th of February 1780, was binding and conclusive on all parties until reversed by orignal bill or bill of review for fraud or error apparent on the face of the decree; and that the appellant, claiming as heir-at-law of his father, was equally bound by the decree as Sir *T. F. Hamilton*, and estopped from averring any matter, *dehors* the decree, because the decrees of the 14th of February 1812, 26th of June 1812, and the 20th of November 1813, were decrees founded on a suit merely to revive and carry into execution the decree of the 13th of February 1780, *which had never been disputed*. In bills to carry decrees into execution the law of the decree ought not to be examined into or the decree varied; and especially on this case, where the appellant's father *during his*

(*a*) 2 Bligh, 169.

1850. Com. Bank v. Graham.

whole life, and the appellant himself, have acquiesced in and submitted to the decree."

Lord *Eldon*, in moving judgment (p. 188), says,—"The appeal complains that the decree was taken in the absence of *Henry Hamilton* (afterwards Sir *Henry Hamilton*), the surviving trustee in the deed of 1758, then living and a necessary party. This is the objection to the decree of 1780 which is sought by the subsequent proceedings to be carried into execution. *If that decree was an erroneous decree, they were not entitled to have it carried into execution.*" Again, at page 189, "The original decree appears to me to be a decree the benefit of which cannot be had in this suit. That decree is at least wrong in these respects—1st, that the surviving trustee was not before the court; 2nd, that it was not a species of decree which ought to have been made to carry into execution the trusts of such a deed as this. * * * But under the circumstances of this case it appears to me that we can do no more than displace all these decrees, with liberty to the parties to go before the court again and amend the pleadings, if they shall be advised."

Judgment.

Lord *Redesdale*, at p. 193, observes,—"The party who comes into a court of equity to have the benefit of a former decree must show *that it was a right decree: if the decree appears to be erroneous, the court cannot carry it into execution.*"

O'Connell v. *Macnamara* (*a*) was a bill filed to have the benefit of a decree made December 1814, in a cause of *O'Connell* v. *Macnamara*, whereby the share of *Thomas Macnamara* in a fund was ascertained to be £750, with interest £950 1s. 2d., and the decree directed payment of that sum (£950), *with interest*, thus charging interest upon interest. It was submitted that the decree was erroneous in the above respect

(*a*) 3 D. & W. 411.

and should not be carried into execution, and, in addition to the case in the Lords, *Burke* v. *O'Malley (a)* was cited. Sir *E. Sugden* says—"I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. I apprehend that when a party comes into this court asking for the benefit of a former decree, he must be prepared to shew, if the case requires it, that such a decree was right." Then, after citing *Hamilton* v. *Houghton*, he says,—"It is true that as this case now comes before the court *I cannot order the decree to be amended;* but, as I am not bound to carry on or perpetuate error, I will not give the plaintiff the benefit of the former proceedings unless he consents to take the proper decree."

In the next case upon the subject—*Montgomery* v. *Southwell* (*b*)—a decree had been made in 1826, declaring a certain sum, with costs and interests, a charge upon lands. In 1836 the assignee of the securities in the former suit filed his bill to have the benefit of the decree, &c., and a decree was made, referring it to the master to ascertain what sums under the decree of 1826 bore interest. The question was, whether the court would carry into execution the decree of 1826, which allowed interest upon interest as against one *Henry*. Sir *Edward Sugden*, in delivering judgment, said,—"Then in consequence of what I have done in *O'Connell* v. *Macnamara*, I am not to perpetuate error. * * * I did not unravel anything in *O'Connell* v. *Macnamara;* I left things, previous to the original decree, as they stood under it, and after the decree I acted upon the merits of the case. *I did not alter the decree, but I refused to carry it into execution so far as it was erroneous.*" Yet it is clear that counsel pressed *O'Connell* v. *Macnamara* further than the Chancellor relished, and he seemed to draw unfounded distinctions and to shrink from carrying out that case.

Judgment.

(*a*) 1 Beat. 96, 121. (*b*) 2 C. & L. 269.

1850.

Com. Bank v. Graham.

The case of *Daly* v. *Daly* (*a*), came before the same learned judge in 1845. There, upon a bill to carry a decree into execution, an attempt was made to review a decree pronounced after argument.

Mr. Sergeant *Warren* argued against this course, and said,—"The court cannot upon a bill to carry a decree into execution review the decree. *It may under circumstances refuse to enforce a plainly erroneous decree;* but it will not examine into the law of it," and cited *O'Connell* v. *Macnamara.*

The Chancellor then said,—"I will not take upon myself to review in this manner the deliberate decision of my predecessor. What I said in *O'Connell* v. *Macnamara*, though it appears to be general, must be taken *secundum subjectam materiam.* In this case a point of law arose upon the construction of certain instruments stated in the pleadings; none of the parties were ignorant of it. The objection was taken by the answer, and the judge decided it. Until that decree has been reversed upon appeal or otherwise, I must assume that it is correct. There has been no surprise in the matter: it is the deliberate judgment of the court."

Judgment.

In *Stamer* v. *Nesbitt* (*b*), a bill had been filed in 1841 against *Francis Nesbitt* and *Eleanor Nesbitt* amongst other parties, praying an account of prior and contemporaneous incumbrances, payment of arrears of annuity granted by *Francis Nesbitt*, or sale of lands and receiver. Bill taken *pro confesso* for want of answer against *Francis* and *Eleanor*, and a reference to the master, and final decree in 1844, ordering *a sale of the lands* and payment of all sums due to subsequent incumbrancers. In proceeding under that decree it was discovered that the land sought to be sold was subject to two leases by *Francis*

(*a*) 2 J. & L. 752. (*b*) 3 J. & L. 447.

1850.

Com. Bank v. Graham.

in favor of *Eleanor;* and plaintiffs filed a supplemental bill to have the benefit of the former decree, and also that the land should be sold, discharged of the leases discovered subsequently to the original decree. That decree was erroneous, and the question was, whether the court would regard it as binding, and inquire into its validity. Sir *Edward Sugden*, in delivering judgment, says,—"The parties have taken a decree which is not warranted either by the rules of the court or the admissions or evidence in the case. I am not now called upon to correct that decree. The only question is, whether it is so informal that the court, as in *Hamilton* v. *Houghton*, will not act upon it. *I have in several cases followed the decisions of the House of Lords, holding that it is not within the province of the court to continue a manifest error in the proceedings, either upon a hearing for further directions or upon* a supplemental bill to carry the decree into execution." Then, in speaking of the error in the original decree, he says,—"They were not entitled to sell the *inheritance* for payment of the arrears of the annuity, but only to raise them out of the trust term; nor were they entitled, as judgment creditors, to sell the inheritance for payment of the consideration money given for the annuity. * * * *A plaintiff who takes a decree pro confesso ought not to go beyond what he prays by his bill and what is confessed by the defendant.* All this litigation has been occasioned by the plaintiffs taking a decree to which they are not entitled. Of course I pronounced no such decree, *but the parties have drawn up a decree which cannot be maintained.*"

Judgment,

In this case we have of necessity examined the master's report. That document discloses that the master has assumed to depart from the direction in the decree in proceeding in the absence of one of the defendants. We are obliged to refer to the decree to ascertain the regularity of the steps adopted by the master, and on examination we find it erroneous

1850. Com. Bank v. Graham.

throughout. We think upon reason, as well as the authorities cited, that it is our duty to take care that proceedings so palpably erroneous and unjust shall not be perpetuated, unless indeed we are *precluded* from looking beyond the report, and are bound to assume its regularity. But that we are not precluded from pursuing this course, but are bound, on the contrary, to adopt it, would seem abundantly proved by the case of *Parry* v. *Perryman* (*a*)—a case in many points similar to the one now before the court. We feel ourselves therefore obliged, though reluctantly, to refuse the motion.

Judgment.

BOOMER v. GIBSON.

Practice—Amendment.

Where a plaintiff desired to amend by adding a judgment creditor who had assigned his claim to the plaintiff as a party defendant, leave was given for that purpose, dispensing with service on the defendants already before the Court.

1854. June 17.

Upon the argument of a demurer for want of parties, it had been decided that one *McMasters*, a judgment creditor who had transferred his claim to the plaintiff, was a necessary party to the suit; and now Dr. *Connor*, Q. C., for the plaintiff, moved, pursuant to the tenth section of the ninth general orders (1853), for an order giving the plaintiff leave to amend by making *McMasters* a party defendant, and dispensing with service of the order, &c., on the defendants now before the court.

The court granted the order as moved for.

(*a*) 2 Danl. P. 805.

CARROLL v. HOPKINS.

1854.
June 21.

Judgment creditors—Foreclosure—Practice.

In suits of foreclosure, when there are several judgment creditors the decree should give the creditors successive rights of redemption although very short periods must be fixed for that purpose. —(*Semble*).

After payment of what is *payable* upon a mortgage payable by instalments, pursuant to orders of 1853, it is irregular to take any further proceeding in the cause until another instalment falls due.

In this cause there were several judgment creditors, and by the decree they had only one day to redeem. *Burton* and *Sadlier* (judgment creditors) obtained an order for stay of proceedings on payment of the amount actually due—the principal money, £850, was not yet payable. That order was drawn up, and the amount due paid into court pursuant to the orders of 1853. Subsequently, and on the day appointed for redemption, *Kennedy* and *Parker*, other judgement creditors, made a similar application, but no order was drawn up: *Burton* and *Sadlier*, without regarding either of these applications, paid to the plaintiff the whole amount of principle, interest, and costs; and now Statement

Mr. *Barrett*, for *Burton* and *Sadlier*, asked that an absolute decree of foreclosure against the other judgment creditors might be drawn up; that an account should be taken of what was due to *Burton* and *Sadlier* on their judgment, and paid to plaintiff by them, and to fix a time for the mortgagor to redeem or be foreclosed. Argument.

Mr. *Crickmore* for *James Bigelow Hapkins*, a judgment creditor prior in point of date to *Burton* and *Sadlier*, asked for an order that *Burton* and *Sadlier* should pay him off, and then that an account should be taken of what was due to *Burton* and *Sadlier*, and a day appointed for payment by *Isaac S. Hopkins*, and in default foreclosure.

The court thought the order under which the money had been paid in was clearly for the benefit of all

1854. incumbrancers; and after such an Order is obtained and acted upon, no further steps can be taken in the cause until another payment becomes due.

Carroll v. Hopkins.

With respect to appointing a day for judgment creditors to redeem, although some diversity of opinion existed on that point, the better opinion seemed to be that they should have successive days of redemption according to their priorities, but of necessity as short a time would be given to each as would be compatible with the ends of justice, in order that no unnecessary delays might be thrown in the way of a plaintiff bringing his suit to a final conclusion. This application must therefore be refused, but the plaintiff is clearly bound to assign his securities to *Burton* and *Sadlier*.

Judgment.

CLARKE v. MANNERS.
RE MANNERS.

Solicitor and client—Taxation of costs.

Where a solicitor had irregularly proceeded to tax his costs as between solicitor and client, in the absence of the client the courts upon a petition presented seven years afterwards, ordered a taxation of the costs; treating the taxation which had taken place as a void proceeding, and ordered the solicitor to pay the costs of the application.

1853. March 22.

The petition in this matter was presented by the defendant *Robert Charles Manners*, praying that, under the circumstances therein stated, and which are clearly set forth in the judgment, the bill of costs of the defendant's solicitors might be revised, and the solicitors ordered to pay any balance remaining in their hands to the defendant, with interest.

Statement.

Mr. *R. Cooper*, in support of the petition, contended that the client was not bound by the taxation which had been had in his absence, and that the solicitors were bound to pay over to the client any moneys retained by them, over and above what should be found due, on a proper taxation, with interest.

Argument.

1853.

Clarke v. Manners.

Mr. *Turner*, contra, contended that after so long a time having been allowed to elapse by the client without applying, after he had been made aware of the taxation, the court would not now interfere, but would hold the client to have acquiesced in it.

The judgment of the court was delivered by

SPRAGGE, V.-C.,*—This is an application by the above-named defendant for a re-taxation of the costs which had been taxed against him by his solicitors, Messrs. *Turner*, *Gwynne* and *Bacon*; for an account of monies which have come to their hands, and for payment of any balance that may appear to be due to him. The solicitors resist the application, insisting upon a taxation which took place on the 25th of October 1845, in pursuance of an order dated the 16th of the same month; and as to the matter of account, insisting upon a settlement with the client's agent in February 1846. If the taxation that has been had could stand, and if the solicitors are not properly chargeable with interest upon money of their client in their hands, the solicitors paid over in February 1846 the whole balance in their hands which was due to their client.

Judgment.

But I am of opinion, as I intimated at the hearing of this application, that the taxation of costs which has been had is not binding on the client.

The bill in this cause was filed to set aside an award. By the terms of the reference it was to be made an order of the *Court of Queen's Bench*, and upon a bill being filed impeaching the award, application was made to that court by the defendant against the plaintiff and his solicitor, Mr. *Maddock*, as for a contempt in filing the bill.

* The Chancellor and Vice-Chancellor *Esten* had been concerned in this cause while at the bar.

1853.

Clarke v. Manners.

Under an order of this court, dated 2nd February 1844, the plaintiff paid into court the amount of the award, £152 4s. 0d. On the 13th of August in the same year the plaintiff's bill was dismissed on his own petition, with costs; and on the 22nd of November in the same year an order was made for the payment to the defendant of the money in court; whereupon the plaintiff gave notice that he would appeal against this order; and upon the 29th of the same month an order was made staying the order of the 22nd pending the appeal; and further ordering, with the consent of the plaintiff's counsel, that the money in court should be paid out to the defendant's solicitors, upon their giving security that it should be forthcoming; and on the 3rd of December the money was taken out by the solicitors.

In this way the fund in court came to the hand of the solicitors; the defendant, the client, swears that it was without his knowledge or consent, and that he had no information of it until the month of August in the following year, when he applied to his solicitor personally and by agent, *John G. Stevenson*, a solicitor of this court, for a settlement, but, as he says, without success.

Judgment

An affidavit is put in by two of the solicitors, Mr. *Turner* and Mr. *Bacon*, and in accounting for the money being taken out of court Mr. *Turner* swears, and Mr. *Bacon* says he believes, that after the dismissal of the plaintiff's bill an order was obtained by them, the deponents, for payment of the money out of court; the defendant, their client, having written to them or verbally informed them that he utterly repudiated the order for the payment of the said money into court, and refused to have anything to do with the proceedings in Chancery, he having determined to rest upon the proceedings in the Court of Queen's Bench. The reason thus offered is obviously unsound,

for they had but a few days before obtained an order for the payment of the same money to their client. Besides, if their client refused to have anything to do with the proceedings in Chancery, it was not for them to get the money into their own hands; and at all events, having got it they should have notified their client of what they had done. Further, I think Mr. *Turner* must be in error in stating that his client utterly repudiated the payment of the money into court; he gives no data, but uses the phrase "having utterly repudiated." Now I find among the letters put in by the solicitors a letter from the client, Mr. *Manners*, to Mr. *Turner*, dated 5th February 1844, three days later than the date of the order for the payment of money into court, in which letter he says, "I hope the notice has been or will be immediately sent to be served on Mr. *Clarke*, directing him to pay the amount of the award and costs *into court*." If he repudiated it after this, something more definite should have been stated; as it is, I am inclined to think the solicitors' statement erroneous.

1853. Clarke v. Manners.

Judgment.

When in February 1846 a payment was made to the client's agent of £122 5s. 3d., as the balance coming to him, it was not then made in cash, but Mr. *Turner's* note to Messrs. *Blake* and *Marrison* was given for the amount payable six months after date. I mention this as shewing that the money taken out of court by the solicitors had been used by them or among them.

Under the circumstances I have stated, I have no hesitation in saying that the solicitor ought to pay interest from the day of the money being taken out of court by them until the date of the payment to the client's agent; upon what sum I will state presently.

The costs between party and party were taxed on the 30th of January 1845, and on the 7th of February

1853.

Clarke v. Manners.

1846, the sheriff having levied them, authorized the solicitors to draw upon him for the amount, and they received those costs.

The costs between solicitor and client were taxed in this way:—It was expected that the Court of Queen's Bench, in dealing with the plaintiff and his solicitor, Mr. *Maddock*, for their alleged contempt, would compel them to pay to *Manners* the full costs of this suit between solicitor and client, and with that view the solicitors requested their client to sign a retainer ticket which they sent to him, in order, as they say in their letter, to get their retainer allowed as between solicitor and client. The retainer ticket was signed and sent to the solicitors in a letter from the client dated the 8th of September 1845, in which he says, "I have no objection to sign it on the following understanding, that if not allowed by the taxing officer, I am not to be called upon by you privately, so that I shall have to suffer the loss; and therefore return it to you signed on these terms."

Judgment.

On the 16th of October following, the solicitors presented a petition in the name of their client, upon which an order was made for the taxation of their costs between solicitor and client; the taxation took place on the 25th of the same month; the solicitors in their affidavit say that under the expectation that *Clarke*, the plaintiff in this suit, would be ordered by the Court of Queen's Bench to pay the costs, they served the warrants for taxation upon his solicitor, Mr. *Maddock*. It appears by the Master's book that Mr. *Maddock* attended the taxation as on behalf of Mr. *Manners*, the only character indeed in which upon that taxation he could appear. Mr. *Manners*, however, swears that he never retained or employed him to attend; he swears also that he never authorized the presenting of the petition for taxation, unless the sending of the retainer ticket conveyed that authority.

1853.

Clarke v. Manners.

It is quite evident from the solicitors' own shewing, that the only purpose of that taxation was to charge the costs that might be then taxed against *Clarke*, that *Manners* was not intended to be bound by it, and was not at all represented at it, and that the solicitors' using it at a settlement between themselves and their client's agent as a taxation binding upon their client, was using it for a purpose for which they must have known that it never was intended.

I think the costs properly payable to the solicitors should be taxed under the order made upon this application, not as a *review* of the former taxation, for there has not been as yet any taxation between the solicitors and their client; the bill carried in by the solicitors, and upon which they still insist, may properly be the one to be taxed. In taking the account the solicitors should be charged with interest on the sum taken by them out of court, less the sum that may be found properly due to them for costs, from the 3rd of December 1844 to the 10th of February 1846; at that time the solicitors should be credited with the amount actually paid, not the face of the note, for it was made payable six months after date, and included no interest or discount; they should therefore be credited with the amount of the note less the discount; or interest be carried on against them till the money was actually paid; the interest should further be computed on any balance that may remain due to the client after the above payment, from its date to the date of the Master's certificate. Judgment.

As to the costs of this application, they must be paid by the solicitors, with the exception of the costs of the affidavits filed by the petitioner, as to which there should be no costs on either side. I except the affidavits because they do not give credit for all that was paid in 1846, and also because a large portion of them is taken up with objections to the long answer

1853.

Clarke v. Manners.

put in, the petitioner insisting that a short answer merely, to save an attachment, was all that he desired to put in, or instructed his solicitors to prepare. Besides other papers put in which lead me to doubt this, I find the following passage in a letter from himself to his solicitors, dated 3rd March 1844:—"I suppose it will therefore be necessary for you to prepare the answer to the bill, which from the memorandum I left you will be enabled to do. I hope you will make it pretty full and convincing." I charge the solicitors with the residue of the costs because they have made it necessary for their client to come to this court, by unjustifiably insisting upon the taxation of October 1845 as binding upon their client; by insisting that they had paid the full balance to his agent, and by resisting any opening of the matter when applied to more than once on his behalf. To grant to a client redress against his solicitors only upon the terms of its being at his own cost, would be doing the client but half justice.

Judgment.

I have gone over the items objected to in the bill taxed, and some of the objections appear to me well founded; but as this is not properly a *review* of taxation, I think it better that the Master should consider all objections when it comes before him as an original taxation between solicitor and client.

ALLAN v. BOWN.

1853-4.

Specific performance—Condition precedent.

Dec. 5 1853, and Jan. 30 1854.

A vendee covenanted to fence the land contracted for forthwith, and to build a house within a limited time; and the vendor agreed, upon payment of the purchase money *and the due fulfilment of all the other covenants entered into by the vendee*, to convey the premises in question. The vendee, without waiting for the time appointed for payment of the purchase money, and without either fencing in the land or building thereon, tendered the amount of his purchase money and interest and demanded his deed, which being refused, he filed his bill for specific performance of the agreement to convey. The court refused relief, and dismissed the bill with costs.

This was a motion for a decree under the XVI. of the general orders of 1853. Statement

Mr. *Roaf* for the plaintiff.

Mr. *Read* contra. Argument.

Fildes v. *Hooker* (*a*), *Williams* v. *Edwards* (*b*), and *White* and *Tudor's* Leading Cases, vol. ii. pp. 31 and 461 were cited.

The judgment of the court was now delivered by January 30.

THE CHANCELLOR.—We are all of opinion that this motion for a decree must be refused, with costs.

The bill is filed under these circumstances:—There was an agreement between the parties for the sale of the property on the 15th of February, 1853. That agreement was carried out in this way; the defendant demised the property to the plaintiff for three years, and the plaintiff covenants, amongst other things, to pay the interest, in the shape of rent, half-yearly, to pay the principal on the 15th of February, 1856, to fence in the land forthwith, and to build a house of a certain value within nine months from the date of the lease. The defendant covenants to execute a

(*a*) 3 Madd. 193. (*b*) 2 Sun. 78.

1854.

Allan v. Bown.

conveyance upon payment of the purchase money, *and upon the due fulfilment of all the other covenants entered into by the plaintiff.* Under that agreement the plaintiff is let into possession, and, having tendered the amount due for principal and interest, he files a bill for specific performance, before the time fixed for payment, and without having performed the covenants to fence and build.

It is unnecessary to consider whether the defendant was bound to receive his money before the time stipulated. If he is to be regarded as a mortgagor, then it is clear, I apprehend, that he was not bound to do so (*a*). But his actual position may be different. Neither is it necessary to consider how far this court would relieve against a breach of the covenant to build and fence. Whatever may be the proper determination of those questions, I take it to be quite clear that the fulfilment of the plaintiff's covenents is made a condition precedent. His right to call for a conveyance only arises upon the fulfilment, amongst other things, of the covenants to fence and build; both of which were unperformed when this suit was commenced. Mr. *Roaf* contends that the sole purpose of these covenants must have been to secure the principal and interest due to the defendant; and he argues that there can be no right, therefore, to insist upon the fulfilment of these covenants, because his client long since tendered, and is now prepared to pay, the full amount due for principal and interest. But it is quite impossible to hold that the enforcement of the security was the sole purpose which the defendant had in view. His object may have been altogether different, or, at the least, there may have been additional considerations of equal, or, at all events, of some importance. And it is quite clear, therefore, that the defendant is entitled to have those covenants fulfilled before he can be required to execute a conveyance.

Judgment.

(*a*) Brown v. Cole, 14 Sim. 427.

1854.

Dec. 5 1853 and Jan. 30 1854.

COOK V. SMITH.

Injunction.

The owner of land agreed to sell a portion thereof, and admitted the party into possession, who improved the premises and afterwards offered to sell his improvements back to his vendor; and, for the purpose of ascertaining the amount to be paid, referred it to arbitrators, who made an award, but its terms were never complied with, and the vendor afterwards brought an action of ejectment against the party in possession. The court, upon motion, granted an interim injunction, restraining the plaintiff in ejectment from executing a writ of possession.

This was a motion for an injunction to restrain proceedings at law. From the statements in the pleadings and affidavits it appeared that in December 1851, the defendant being owner of certain lands in the township of Murray, agreed to sell a portion thereof to the plaintiff, to be paid for in work; and the plaintiff thereupon entered into possession, and built a blacksmith's shop thereon, and did some work for the defendant: that defendant became dissatisfied with plaintiff, and remonstrated; whereupon plaintiff offered to sell to defendant his improvements, to be paid for according to a valuation to be put thereon by arbitrators; accordingly the matter was left to arbitration, and an award made, but nothing further was done under it until after bill filed, the plaintiff alleging that the defendant repudiated the award: that defendant brought an action of ejectment to turn the plaintiff out of possession, and the present bill was filed to restrain proceedings at law and for a specific perforance of the contract. Statement.

Mr. *Hector* for the plaintiff.

Mr. *Strong*, contra, objected to delay in proceeding to enforce the contract, and also that by the terms of the contract, the consideration for the land being to be paid in work, the court could not specifically perform it. Argument.

1854. Cook v. Smith. *McLure* v. *Ripley* (*a*), *Moses* v. *Lewis* (*b*), *Painter* v. *Ferguson* (*c*), and *Daniell's* Chancery Practice 1497, were referred to.

January 30. The judgment of the court was now delivered by

THE CHANCELLOR.—I have read the answer and affidavits; and I am of opinion that, upon the evidence at present before us, the defendant ought not to be permitted to execute a writ of possession. There is no doubt respecting the original agreement which the plaintiff seeks to have specifically performed; but the defendant insists that the rights of both parties under this agreement were submitted to arbitration, and that an award was pronounced by the arbitrators, by which he became entitled to the property in question. But that cannot be fairly deduced, in my opinion, either from the terms of the submission or from the language of the affidavits. The submission is an extremely informal paper, but, so far as I can underatand it, the valuation of the improvements appears to have been the only matter referred to the arbitrators. The matter is differently stated in the answer; but the defendant's affidavit, prepared after the answer had been sworn, and after all the other affidavits had been filed, is in accordance with what appears to me to be the proper construction of the submission itself. If this be a correct view, the object of the reference was not to determine the rights of the parties under the original contract of sale, but it was simply the ascertainment of a fact necessary to enable the parties to carry out an agreement for the sale of the plaintiff's interest, which they appear to have had in contemplation. I am not at all satisfied that any agreement was finally concluded between the parties, either before or after the award. The defendant's affidavit imports that no such agreement had been concluded before the

Judgment.

(*a*) 2 McN. & G. 276, note b. (*b*) Jacob, 502. (*c*) 1 McN. & G. 286.

reference, and the evidence goes far to establish that he subsequently repudiated the award altogether. Two witnesses, I think, besides the plaintiff, swear to that; and, so far as I can gather, for the fact is left in considerable obscurity, he brought an action of ejectment without either paying or tendering the amount fixed by the arbitrators. In that view of the case the evidence proves, not an agreement, but only proposals for an agreement which eventually failed, and which ought not to interfere with the plaintiff's right to specific performance. Whatever may be the result, there is quite enough in the evidence at present before us to make it proper to grant an interim injunction.

1854.
Cook v. Smith.

Judgment.

BREWSTER v. THE CANADA COMPANY.

Injunction—Corporation.

The Canada Company, through their agent resident in Canada, contracted by letter to sell certain lands of the company, upon condition amongst others, of the vendee building a saw-mill; thereupon the vendee proceeded, with the knowledge of the agents of the company, to erect a saw-mill and construct a dam across a river, the effect of which was to overflow a large tract of land belonging to the company: subsequently the company conveyed the lands contracted for, and which were situate on both sides of the river across which the dam had been constructed, reserving the bed of the river and about 30 feet on either bank, the title to the bed of the river being then in the Crown. Afterwards the Company, having obtained a grant from the Crown of the bed of the river, instituted proceedings at law against the persons owning the mill for the damage done by the overflowing of the river, and recovered a verdict for £500; and other actions were also brought for the same injury. Upon a bill filed for that purpose the Court, at the hearing, decreed a perpetual injunction restraining the company from proceeding with the actions; and a conveyance of the bed of the river and the portions on either side which had been reserved, and ordered the company to pay the costs.

The objection that a corporation cannot be bound unless by an instrument under the corporate seal is applicable only to actions at law.

Nov. 1 & 7 1853 and Feb. 15 1854.

The bill in this cause was filed by *William Brewster, Benjamin Brewster* and *John Owen*, who carried on business as lumber merchants in co-partnership,

Statement.

1854. against *The Canada Company*, praying specific performance and an injunction to stay proceedings at law.

Brewster v. The Canada Company.

The defendants answered, and the cause having put at issue and evidence taken therein, now came on for hearing.

Mr. *Vankoughnet*, Q. C., and Mr. *R. Cooper*, for the plaintiffs.

Argument. Mr. *Brough* for the defendants.

The statements in the pleadings, the evidence in the cause, as also the arguments of counsel and cases cited, appear sufficiently in the judgment.

February 15. THE CHANCELLOR.—The interest involved in this suit are of considerable magnitude, but the facts of the case, and the law applicable to it, appear to me, I must confess, to be free from doubt.

The defendants have recovered a judgment or judgments at law, for an injury to their property caused by a mill-dam erected by the plaintiffs, or by those under whom they claim, on the river Aux Sables; and other actions for the same cause are now in progress.

Judgment. Admitting the legal right which the judgments at law have established, the plaintiffs assert that there are equitable principles upon which the defendants ought to be restrained from exercising it, and the present suit is instituted to obtain that relief.

Prior to the year 1832, the defendants, by virtue of an act of the imperial parliament, and of their charter of incorporation, and under certain agreements entered into with the Crown, were entitled to purchase a tract of land in this province, including the premises in question in this cause. In that year the plaintiffs

or those through whom they claim, being desirous of purchasing these premises for the purpose of erecting a mill, made an application to that effect to Dr. *Dunlop*, then an agent of the Canada Company in this province; and Dr. *Dunlop*, considering it of importance to the Canada Company to secure the erection of a mill in that locality, acceded to the plaintiffs' proposal, upon certain conditions contained in a letter from him, under date the 9th of April 1832. That letter, which is the foundation of the plaintiffs' case, is in these words, viz.:—

"DEAR SIR,—I have communicated to the commissioners of the Canada Company your desire to establish a saw-mill on the river Aux Sables, and am instructed to say that the pinery you require will be sold to you at the rate of 7s. 6., Halifax currency, on the following conditions, viz.: That you build thereon a good and sufficient saw-mill, and that the company reserve the right of a lock, at their own expense, through your dam. That the said saw-mill be in operation within 12 months of this date, and that you furnish the company or the settlers with lumber at a reasonable rate—that is to say, at a rate not exceeding the price furnished [qy. at which it is furnished] by the mills on the Black River, and the others on the American side. These conditions complied with, the company will give you a deed of possession in free and common soccage, so soon as the land shall be surveyed and paid for. Should we agree that you make the lock in the dam, the price will be deducted from your payment on the land,—which payment is to be made in the usual mode that the Canada Company require of its settlers, viz.: one-fifth down, and the remainder in five equal annual instalments, with interest at 6 per cent.

Judgment.

"I remain, my dear sir,

"Yours truly,

"W. DUNLOP."

Before I proceed to the subsequent steps of this transaction, it will be convenient to refer to the nature of Dr. *Dunlop's* agency, and to the manner in which the general affairs of the company in this province

1854.

Brewster v. The Canada Company.

were managed at the period in question. By an instrument under the corporate seal, dated the 11th of September, 1836, *Dunlop* was appointed warden of the company's forests :—"To the intent and purpose that the said *Wm. Dunlop* should proceed with all practicable expedition to the said province of Upper Canada, and to the best of his skill and judgment protect and preserve the lands, timber, and other property of the said company there; and claim and recover, in the name and on behalf of the said company, all lands and other property of the said company, illegally possessed by any person or persons, and proceed against and remove all trespassers, and punish all persons doing injury to, or felling any of the timber belonging to the said company." This instrument was produced by the defendants under the usual order and appears to have been in force at the period in question; at least its revocation has neither been alleged nor proved.

Judgment.

The charter provides that the corporate seal is not to be affixed to any document, except in the presence of two directors, and as no directors were then resident in Upper Canada, or likely to be so, it became necessary, of course, to make provision for the management of the company's business in the province; and there is a clause in the charter, introduced, I presume, for that purpose, which provides,—"That it shall be competent to the said company to manage and conduct the affairs of the company in the province of Upper Canada, by a board of commissioners, to consist of two or more persons, resident in Upper Canada, with such powers and authority to contract for and bind the company to such extent, and subject to such restrictions as the court of directors of the said company shall from time to time determine; and such commissioners shall in all things conform themselves to such directions, regulations and instructions as shall be from time to time communicated to them by the

court of directors of the said company. Provided always, that such restrictions as shall be imposed by the said court of directors upon the powers and authorities of the said commissioners to contract for and bind the said company, shall be from time to time publicly made known in the said province, by transmitting a copy of such instructions to the clerk of the peace of the said province, which the said commissionere are hereby required to do, and to certify the same under their hands; which copy the clerk of peace shall permit all persons to inspect, at all reasonable times."

1854.
Brewster v. The Canada Company.

Under the above clause Messrs. *Allan* and *Jones* were appointed joint commissioners in the year 1829, by an instrument under the corporate seal, by which "the company gave and granted unto the said attorneys jointly, full power and authority to act in and about the premises as fully and effectually, to all intents and purposes, as any attorney or attorneys of the said company might or could do under or by virtue of the acts of parliament and charter constituting or authorizing the company in that behalf, or other the laws then in force relating to the said company, or the lands or possessions thereof, ratifying, allowing and confirming, and agreeing to ratify, allow and confirm, and to hold as good and valid in the law, all and whatsoever the said attorneys should lawfully do, or cause to be done, in and about the premises."

Judgment.

By another instrument, under the corporate seal, dated the thirtieth day of August, 1832, *Dunlop* was appointed a commissioner jointly with *Allan* and *Jones*. It is not alleged that the court of directors ever placed any restrictions upon the powers of the commissioners, in accordance with the provisions of the charter, and it follows, I apprehend, that the power of the board to contract for and bind the company was unlimited. In the view which I take of the case, it is unnecessary to consider whether an action at law could

1854.

Brewster v. The Canada Company.

be maintained against the company upon an unsealed contract, entered into with the commissioners; but if that question were material, the answer should be, I apprehend, in the affirmative.

To return to the letter of the 9th of April. Mr. *Jones* proves that the contract with *Dunlop* was confirmed by the commissioners. Indeed the letter in question appears to have been written by their direction; and in the month of July, *Longworth*, the engineer of the company, was directed by Mr. *Jones* to repair to the spot, with instructions to select a proper site for the mill-dam, keeping in view the lock and canal, the construction of which was then contemplated by the company. *Longworth*, visited the locality on several occasions, and he ascertained, before the mill had been erected, that the dam would have the effect of flooding a large tract of the company's land. He swears that he immediately prepared a re-

Judgment.

port, stating that fact, which he transmitted to Mr. *Prior*, then the agent of the company at Goderich; that he took Mr. *Prior* to the spot in the month of September, or about that time, and pointed out to him the injury occasioned by the dam, and that all the facts were communicated by him to Mr. *Dunlop*, then one of the Commissioners, about the same time, and to *Jones*, another of the commissioners, during the summer of the following year. *Longworth* states further, that he himself constantly and earnestly recommended that the plaintiffs' work should be stopped, in consequence of the injury caused by the dam, but that Dr. *Dunlop* continued to think that the injury would be more than counterbalanced by the benefit which the company would derive from the erection of the mill, and Messrs. *Jones* and *Prior* considered that they had no power to interfere with a contract entered into by the agent of the company, and confirmed by the commissioners. And it is admitted on all hands, that the plaintiffs were permitted to finish their works without

opposition or remonstrance of any kind on the part of the company.

The mill was in full operation before the close of 1833, and in the January of the following year a contract was entered into between Dr. *Dunlop* on behalf of the Canada Company, and the plaintiffs, for the sale to the company of all the lumber to be made at the mill until the month of July in the year 1835, and by an agreement with Mr. *Jones* entered into in September, this contract was extended to a further period of two years.

Towards the close of the year 1835 we find the parties in communication as to the terms on which the plaintiffs should receive a conveyance. Of the correspondence which took place on that occasion we have been furnished with the last letter only, which bears date the 9th of December 1835, and is as follows:

Judgment.

"GENTLEMEN,—I have to acknowledge the receipt of your letter of the 9th instant, containing a list of the lots you wish to take up under the agreement entered into by you and Mr. *Dunlop* in the month of April 1832. Of the quantity you have selected 808 acres were valued by our surveyor as far back as the date above mentioned at 12s. 6d. per acre (*a*); but, in order to come to a final settlement, without delay, of an arrangement which has been pending such a length of time, I waive now all objection on that head, on the following conditions: That you pay interest on the amount from the date of the agreement, or the month of April 1832, when the first instalment should have been paid, and that, considering the sale to have been then made, that you pay us the instalments now overdue, and the one which will fall due next April, in lumber during the year 1836, and that, until the full amount of all arrears and interest be paid up, we be not called upon for any payment on account of such

(*a*) The lands are in Williams; they are not in question in this cause, and do not appear to have been embraced in the contract with Dunlop.

1854.

Brewster v. The Canada Company.

lumber as we may receive from time to time at the mills, under the contract now existing between your firm and the Canada Company.

"THOS. MERCER JONES, Commissioner."

The controversy between the parties was arranged, so far as I have been able to learn, upon the terms stated in this letter, and on the 15th of September 1836 the premises in question, with the exception of the bed of the river and 30 feet on either bank, were conveyed by the company to the plaintiffs. At the period in question, the Canada Company had no title whatever to the bed of the river Aux Sables. It had been reserved by the Crown, and was not conveyed to the company till the month of July, 1840.

There was no remonstrance at the time this conveyance was executed on account of the injury caused by the dam,—no stipulation that it should be removed; on the contrary, the right which the plaintiffs now seek to enforce was distinctly recognized by the Canada Company within a few months before the commencement of the action which it is the object of this suit to restrain (*a*).

Judgment.

Now, waiving for a moment the consideration of the grounds upon which it has been sought to except this case out of the general rule; excluding from our present consideration the corporate character of the defendants, and the alleged latency of the injury, the

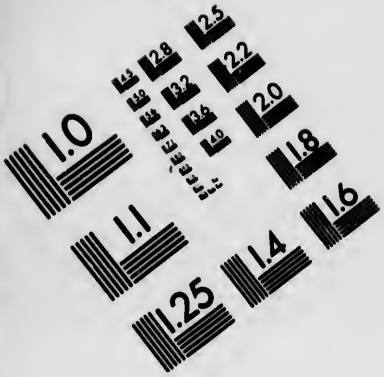
(*a*) See Mr. Jones's letter of the 30th May 1851, in which he writes —"In regard to the notice which Ketcheson has served upon you, all that I believe he can require of you is a sluice or slide over your dam, to allow of rafts of timber passing over it; he cannot of course require anything from you not provided by law, and I cannot conceive the grounds upon which you apprehend that he can oblige you to remove your mill-dam. But whatever course Ketcheson may take towards you on the subject, or whatever the result may be, you are altogether mistaken in supposing that the Canada Company are bound to interfere, or that they are in any way interested in the dispute between you—unless indeed it be that if your dam were removed the Canada Company would recover a great deal of valuable land which is now covered with water."

plaintiffs' equity would be, I apprehend, free from all doubt. The principle upon which courts of equity proceed in such cases was stated very distinctly by Lord *Eldon* in *Dann* v. *Spurrier* (*a*)—"This court," his Lordship observes, "will not permit a man, knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title, and the circumstances of looking on is in many cases as strong as using terms of encouragement. A lessor, knowing and permitting those acts which the lessee would not have done, and the other must have conceived he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment."

That equity has often been enforced, and appears to me to rest on the plainest principles of natural justice. In the case of the water-course, (*b*) A. diverted a water-course, which put B. to a great expense in laying out sooths, &c., and the diversion being a nuisance to B., he brought his action; but an injunction was decreed, upon a bill exhibited for that purpose, it being proved that B. did see the work when it was carrying on, and connived at it without shewing the least disagreement, but rather the contrary;" and in *Short* v. *Taylor*, cited in the water-course case, Lord *Somers* granted a perpetual injunction to restrain the defendant from bringing an action at law upon the same principle. In *Williams* v. the Earl of *Jersey* (*c*), a case very analogous to the present, Lord *Cottenham* cites the cases to which I have just adverted, and observes—"I think it is impossible, after these, to say that a party may not so encourage that which he afterwards complains of as a nuisance, as not only to preclude him from complaining of it in this court, but to give the adverse party the right to the interposition of this court, in the event of his complaining of the nuisance at law.

Judgment.

(*a*) 7 Ves. 235. (*b*) 2 Eq. Ca. Ab. 522 pl. 3. (*c*) C. & P. 97.



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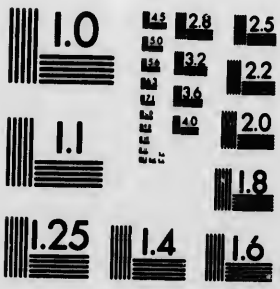

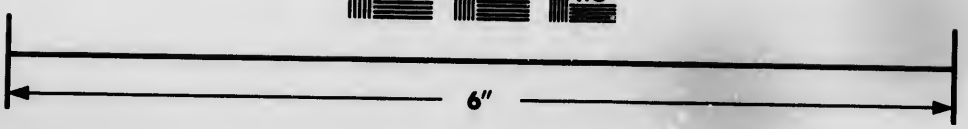

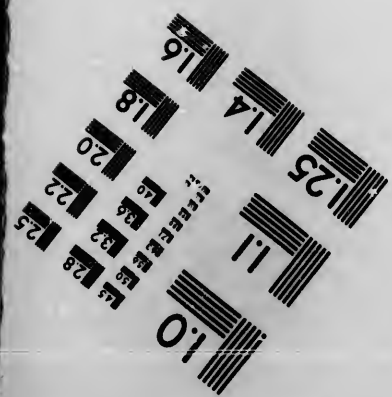

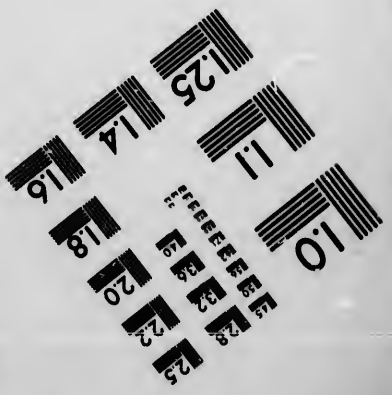

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1854.

Brewster v. The Canada Company.

In *Jackson* v. *Caton*, *(a)* Sir *Samuel Romilly* states the principle in this way,—"When a person has stood by, seeing the act done, or has consented to it, he shall not exercise his legal right in opposition to that permission." And *Brydges* v. *Kilburn*, cited by him, is a clear authority for that proposition. In that case a lease had been granted in 1725, during which a logwood mill was erected. In 1775 the lease was renewed, and in the renewal lease the mill was included, under the description of a logwood mill; afterwards the lessee altered it to a cotton mill of great value. The bill was filed by the landlord, contending that the alteration of the logwood mill into a cotton mill, though of great value, was waste. Upon the conduct of the plaintiff in lying by and seeing the cotton mill erected, and afterwards approving of the defendant's planting timber about the mill, Mr. Justice *Buller*, sitting for the Chancellor, refused the injunction upon the principle—"*that when a man encourages another to lay out money, upon the supposition that he never means to exercise his legal rights, this court will not permit him to exercise them.*" But in *Clavering's* case, cited by Lord *Loughborough* with approval in *Jackson* v. *Caton*, the principle was carried to a great length. There some person was carrying on a project of a colliery, and had sunk a shaft at considerable expense. Mr. *Clavering* saw the thing going on, and in the execution of the plan it was very clear the colliery was not worth a farthing without a road over his ground; and when the work was begun, he said he would not give the road; and upon this state of facts, the Chancellor's observation is this —"The end of it was that he was made sensible, I do not know whether by decree or not, that he was to give the road at a fair value." *(b)*

Judgment.

(a) 5 Ves. 688.

(b) And see Powell v. Thomas, 6 Hare, 300; the Master, Keeper Fellows and Scholars of Clare Hall, v. Harding, Ib. 273; the Duke of Devonshire v. Eglin, 12 Beav. 531.

1854.

Brewster v. The Canada Company.

Now this is in my opinion a much clearer case in favor of the plaintiffs than many of those to which I have just adverted; and, apart from the special circumstances upon which the defendants rely, to which I am about to allude, I would have thought the plaintiffs clearly entitled to the relief they ask.

It is said, however, that the injury in this cause was latent, and the conclusion drawn from the supposed ignorance of the defendants is, that it would be contrary to reason to intend that they either encouraged or acquiesced in a wrong, with the existence of which they were wholly unacquainted.

I cannot accede to that argument. The premises are not supported by the evidence, although, had that been otherwise, the conclusion drawn from them is, in my opinion, manifestly erroneous. First, as to the latency of the injury, *Longworth*, the engineer of the company, swears that he himself was well aware of it, and that he communicated the fact to *Prior* and *Dunlop* before the purchaser had erected his mill, and to *Jones*, during the summer of 1833. It is quite impossible, therefore, to arrive at the conclusion that these injurious consequences were unforeseen, unless the testimony of this witness is to be altogether disregarded. But so far from being shaken, his evidence is corroborated in several important particulars by the testimony of Mr. *Jones*, and still more strikingly by the documentary evidence furnished by the defendants themselves.

Judgment.

As to the documentary evidence, first, it is admitted that the company caused a survey to be made of the river Aux Sables in the year 1828, and it will be found from the map and field notes, that the survey then made was very minute. *(a)* Now the place at which the plaintiff's mill was subsequently erected is not designated in

(a) See page 23.

1854.

Brewster v. The Canada Company.

those documents as a mill site at all. The observation in the field notes is, (*a*) "a rapid with 10 inches fall," and this is not to be wondered at, as the country for miles above the bend is depicted as a dreary waste *(b)*; the adjoining lands, to a great extent, submerged, and the river banks raised scarcely, if at all, above the level of the stream. That is the general character of the country for many miles. It varies in the greater or less extent of marsh, but the general aspect remains the same, until the river approaches the township of Williams. At that point the features of the country begin to change; the banks there are described first, "a little higher than the water," then as "a foot higher," *(c)* and so on; but by the time the river has run about half its course through the township of Williams, its character is wholly altered; the banks become lofty, and the falls frequent and considerable, *(d)* and through the rest of its course numerous mill cites are designated both on the map and in the field notes *(e)*. Now any person examining these documents, must perceive, I think, that a dam, erected at such point on such a stream, would almost inevitably flood a considerable extent of land. They were placed in Mr. *Longworth's* hands in 1832, and he swears he arrived at that conclusion from an examination of them before he visited the land: and it is difficult to believe that those under whose instructions, and for whose information the survey was made, remained ignorant of that very important fact.

Judgment.

Again: some time after the erection of the plaintiff's dam, namely, on the 2nd of November 1832, letters patent were issued by which all the lands in the first and second concessions of the township of Bosanquet

(*a*) See page 23.

(*b*) At page 44 of the field notes, the marsh is described as 1 mile and ½ deep and 4 miles long.

(*c*) See page 45 and 69 of field notes.

(*d*) The first mill cite is at page 69 of the field notes.

(*e*) See field notes, pages 71, 73, 76, 77, 78, 80, 83.

were conveyed to the Canada Company. Now these concessions, which must have been surveyed prior to that date, constitute to some extent the southern boundary of the flooded land in that township. Then by letters patent, dated the 5th of May 1836, all the lots east of the lake road in the township of Bosanquet were conveyed to the company. These lots form the western boundary of the flooded land in that township for many miles. Lastly, by the same letters patent, all the lots from one to twelve, on the river Aux Sables, in the township of Stephen, were granted to the company. The flooded land in the township of Stephen is bounded toward the north by that concession, and upon the map of that portion of the flooded land adjoining these lots I find this note—"Deep water: appears as if it had been flooded." It follows, therefore, that the injury produced by the plaintiff's dam was partially ascertained by actual survey, so far back as November 1832, and that its whole extent was accurately defined upon maps in possession of the company, at the latest in the month of May 1836, several months prior to the execution of the plaintiff's deed (*a*). This is placed beyond dispute, I think, by the fact that *Rath*, the defendant's witness, calculates the extent of the flooded land, and bases his evidence in this cause upon the very map then in the possession of the company: and the description, in the patent of 1845 was prepared, I apprehend, from the same source.

Judgment

There is not any substantial disagreement between *Jones and Longworth*, they differ, though not materially, I think, as to date; but Mr. *Jones* appears to me to furnish a key to that difficulty. He says, "I heard of the dam being carried away *after* I had heard of its overflowing the lands of the company." But the dam was carried away in 1833, which brings the date of

(*a*) The map of Bosanquet, which embraces more than half of the flooded land, was completed in February 1835.

1854. *Longworth's* communication to the time fixed by him, namely, the summer of that year.

Brewster v. The Canada Company.

But irrespective of the sources of information to which I have been adverting, it would appear that the position of the dam, and the lie of the surrounding land, were sufficient in themselves to have put the company on their guard. Mr. *Jones* says, "The land is low and swampy for some distance at the back of the mill;" and again, "I should say that it is not such a mill site as could be made without flooding some land."

In whatever light I view the case, therefore, I am compelled to say that the commissioners and agents of the Canada Company had ample notice that the plaintiffs' dam was productive of considerable injury. I do not say that the extent or quality of the flooded land was precisely known; that may not have been ascertained, as Mr. *Jones* states, until recently. But that is beside the question. It was known that this dam was a nuisance; that it infringed the legal rights of the company, notwithstanding which the further outlay of capital, and the purchase of the land was permitted and encouraged by the company.

Judgment.

But, had the premises been true, the conclusion, in my opinion, could not have been sustained. The argument assumes that the plaintiff's equity rests upon an implied grant of an easement, and that such grant cannot be implied, when the extent of the injury, and therefore the easement claimed, was unknown. But that is a misconception of the doctrine of the court. The extent of the injury, the extent of the easement claimed, is quite immaterial. The principle is, "that when a person has stood by, seeing the act done, or has consented to it, he shall not exercise his legal rights in opposition to that permission," or, as Mr. Justice *Buller*, has expressed it, "Where a man

encourages another to lay out money, upon the supposition that he never means to exercise his legal rights, this court will not permit him to exercise them." It can be no answer to the plaintiffs' equity that the Canada Company were ignorant of the extent to which they were compromising their legal rights. That was matter for their own consideration; they were bound to have considered it before they encouraged the plaintiffs' outlay, and their neglect to do so does not furnish any answer to the plaintiffs' equity.

Had this been a case of mere acquiescence, therefore, I would have thought the plaintiffs' right to relief clear; but to treat this as a case of mere acquiscence would be to misconceive greatly its true character. The Canada Company did not merely permit and encourage the erection of this nuisance, but they required it—required it for purposes beneficial to themselves; they made its erection a condition precedent, without which the plaintiffs could not obtain a conveyance of the lands. In this view of the case, the question whether the Canada Company did or did not know of the alleged injury, appears to me quite immaterial. Their contract with the plaintiffs required the erection of the dam; surely it was their duty to have ascertained its effects. To permit them to maintain an action under such circumstances, would be my opinion contrary to the plainest principles of reason and justice.

Judgment.

It is said, however, that the defendants being a corporate body cannot be bound except by an instrument under their corporate seal, and that their rights are not affected therefore either by the letter of the 9th of April, or by the subsequent conduct of their agents. I have already intimated a doubt of the correctness of that opinion. I am inclined to think that under the particular provisions of their charter the Canada Company may be legally bound by the

1854.

Brewster v. The Canada Company.

contract of their commissioners, although no instrument has been executed under the corporate seal. But, in my opinion, this case does not involve the determination of that question. We have nothing to do with the enquiry whether the contract in this case was legally binding upon the Canada Company. The question for our consideration is, whether there be any rule of law to prevent the application of the principle involved in this case to corporate bodies; and I am clearly of opinion that there is not. The *East India Company* v. *Vincent* (*a*) is a clear authority for that position; and the *Rochdale Canal Company* v. *King* (*b*), which came before the present Lord Chancellor and also before the master of the Rolls (*c*), is a recent instance of the application of the principle to corporate bodies. The distinction is stated very clearly by Lord *Cottenham*. In *Edwards* v. *The Grand Junction Railway* (*d*), his Lordship says, "The objection" that the company was not legally bound "rests upon grounds purely technical, and those applicable only to action at law." And again, *The East London Water Works* v. *Bailey* (*e*) was cited to show that corporations were not liable for the acts of their agents unless authorized under their common seal; but it does not follow that corporations are not to be affected by equities, however created, binding those to whose position they have succeeded, or affecting the property over which they claim control. Here, *Dunlop* and the commissioners were authorized under the corporate seal, and the power of the commissioners was, as it seems to me, unlimited; but that is not, in my opinion material; the principle would have applied although that formality had been wanting.

Judgment.

I am of opinion, therefore, that this case is governed by the authorities to which I have adverted. The nuisance complained of was erected in the year 1832,

(*a*) 2 Atk. 82. (*b*) 2 Sim. N.S. 78. (*c*) 17 Jur. 1001.
(*d*) 1 Railway Cases, 173. (*e*) 4 Bing. 283.

at the instance of the agents of the Canada Company, and in pursuance of a contract legally binding upon them, as it seems to me, although that, in my judgment, is not material. The works then constructed were twice renewed at great expense, first in the year 1832 and again in the year 1840, without opposition from the company, perhaps it would be more correct to say with their concurrence. In September 1836, several years after the dam had been erected, and at a time when the company must have known that it was productive of extensive injury, the premises comprised in the agreement of 1832 with the exception of the bed of the river were conveyed to the plaintiffs, but their right to the continued enjoyment of the mill and dam was not in the least questioned; on the contrary, the company were at that very time the purchasers of all the lumber made at the mill. In short, the plaintiffs' rights were never disputed by the company until the year 1852; they were, on the other hand, repeatedly and distinctly admitted. When the conveyance of 1836 was executed, the legal estate in the bed of the river Aux Sables was in the Crown, but since that period it has been conveyed to the company. Under such circumstances the plaintiffs are clearly entitled, in my opinion, to a decree, with costs.

1854.
Brewster. v. The Canada Company.
Judgment.

ESTEN, V. C.—In this case the following points appear to me to be established or admitted—namely, that the defendants are a corporation existing in England, where the corporate seal remains, and can be affixed only in the presence of two directors; that before the date of the transactions in question in this cause, they had purchased a very large quantity of land from the government of the province of Upper Canada, with a view to its sale, which land formed what may be called the stock in trade, and its sale and management the business of the corporation; that their concerns in the province were managed by commissioners, who had unrestricted power for that pur-

1854.

Brewster v. The Canada Company.

pose; that a letter was addressed by Dr. *Dunlop*, an agent of the company, in April 1832, to *R. Smart*, under whom the plaintiffs claim, which contained all the materials of a complete contract, and after its acceptance by *R. Smart* and ratification by the commissioners, was regarded by both parties as such; that at its date the company through their officers knew, or by reasonable inquiry might have known, the injury to their land which has resulted from the transactions proposed in the letter in question, and has produced the present contention; that the company through their officers knew, as the fact was, that *R. Smart* was making a very large expenditure in pursuance of the proposal contained in the letter, and on the faith that it would be carried into effect; that they made no objection, but on the contrary, encouraged such expenditure, and that the understanding evinced by the letter has been acted upon on both sides for 19 years without any disagreement; at the expiration of which time the company commenced proceedings against the plaintiffs in respect of the injury I have mentioned. It also appears that at the date of the letter referred to the company had received no actual grant from the government of the land which they had purchased, but had what they call a pre-emption right, which included both the land conveyed to the plaintiffs, or those under whom they claim, in 1836, and the 30 feet and bed of the river excepted in that conveyance. These I think are the material facts disclosed in the pleadings, evidence and admissions in this case, although probably there are many facts of minor importance which I have not particularised.

Judgment.

With regard to the principles which govern cases of this nature, I think a few propositions may be very clearly deduced from the numerous authorities which have been cited and examined on this occasion. It appears very plain that if a party make a large expenditure on the faith that he will be allowed to enjoy

certain benefits, and this be manifest to the party who has it in his power to confer such benefits, and he do not object, but permit him to proceed in making such expenditure, he will be compelled to make good the contemplated benefits upon the faith of which the expenditure was made. The case is *a fortiori*, where the party having the power of bestowing the benefit positively encourages and induces the other party to make the expenditure for their mutual benefit; and it is strongest of all when he actually binds him by legal engagement and agreement to perform such acts. And this duty will be enforced, whether it consists in the positive extension or in the forbearance of rights. The first case involves knowledge on the side of the party subjected to the obligation, either actual or such as may be acquired by a reasonable attention to his affairs; but in the two latter cases he incurs all risks and must abide all consequences of his positive acts. And these rules affect corporations as well as individuals. I cannot doubt that if a corporate body employ agents for the transaction of its business, and certain facts come under the observation of such agents, which it is their duty in the management of the affairs of their employers to note and to communicate, this knowledge is brought home to the corporation itself, and if it refrain from interference, the same consequence will follow, so far as it is concerned, as would have followed in the case of a private individual.

Judgment.

To apply these principles to the present case: It is quite manifest that Messrs. *Jones* and *Allan*, the then commissioners of the Canada Company, with a knowledge that the erection of the contemplated dam would be attended with injurious effects to part of the land of the company, not only permitted, but actively and positively induced and encouraged *Smart* to make a very heavy expenditure, on the faith that he and those claiming under him would be permitted to enjoy the projected mill and its appurtenances as long as they

1854.

Brewster v. The Canada Company.

should desire, and to purchase the designated property at 7s. 6d. per acre: the understanding existing between the parties was acted on for nearly 20 years, during which *Smart* and those succeeding to his position might have realized a handsome fortune elsewhere: the knowledge of the commissioners was undoubtedly the knowledge of the company under such circumstances, for they were necessarily invested with the most extensive power and discretion in the management of the affairs of the company, and the facts in question came directly within their cognizance in the management of such affairs, and indeed it is quite certain that they were and could be actuated in assenting to the arrangement by no other motive than a desire to promote the interests of the company. Under such circumstances it appears to me very plain that the company became bound to make good to *Smart* and those claiming under him all the advantages contemplated by this arrangement, both by completing the projected sale, and by renouncing those legal rights which resulted from the effects of conduct which the company through its agents has not only permitted but encouraged.

Judgment.

The case, however, appears stronger than I have represented it, for I see no reason to doubt that a contract took place under the circumstances which have been detailed, which was binding upon the company. I see no reason to doubt that if a corporate body authorise an agent under its corporate seal to effect a sale of its lands, an agreement for that purpose signed by such agent will bind the Corporation. Now it cannot be doubted that the commissioners had power not only to contract for the sale of lands themselves, but to appoint agents for that purpose, and it appears from the evidence of Mr. *Jones* that *Dunlop* was an agent to effect sales subject to the ratification of the commissioners. His letter of April 1832 contained all the materials of a complete contract, was assented to

1854.

Brewster v. The Canada Company.

by *Smart* and ratified by the commissioners; independently of which this contract was acted upon and performed by *Smart* and those succeeding to his rights, with the knowledge and acquiescence of the company to an extent and in a manner which entitled them to a complete execution of it, if, as I do not doubt, a corporation equally with an individual is bound by a parol agreement partly performed with its consent in a manner which would make it a fraud not to carry it into complete execution. It is a fraud in the company, after having induced *Smart* and those standing in his shoes to perform certain acts, to avail itself of a legal right of action, founded upon technical rules, in consequence of those acts.

The learned judges of the Court of Queen's Bench have no doubt stated the law of the case correctly, but upon equitable principles it seems to me that a specific performance of the agreement should be decreed as regards the 30 feet and the bed of the river, and a perpetual injunction against proceedings at law by reason of overflowing the defendants' lands, with costs of this suit. I have referred to the cases of *Edwards* v. *The Grand Junction Railway Company* (*a*), The Duke of *Devonshire* v. *Elgin* (*b*), *Williams* v. The Earl of *Jersey* (*c*), *Powell* v. *Thomas* (*d*), *Money* v. *Jordon* (*e*), *The Great Northern Railway Company* v. *The Lincolnshire Railway Company* (*f*), *Kirk* v. *Bromley Union* (*g*), Lord *Cawder* v. *Lewis* (*h*), *Leggins* v. *Inge* (*i*), *Wood* v. *Leadbeater* (*j*).

Judgment.

SPRAGGE, V. C.—I do not understand the Canada Company to question the authority of their commissioners in Canada to enter into such an agreement as was entered into by Dr. *Dunlop* with *Robert Smart*, but I understand them to deny the authority of Dr. *Dun-*

(*a*) 1 M. & C. 650.
(*b*) 14 Beav. 530.
(*c*) 1 Cr. & Ph. 91.
(*d*) 6 Hare, 300.
(*e*) 21 L. J. 893.
(*f*) 5 De G. & S. 138.
(*g*) 2 Ph. 640.
(*h*) 1 Y. & C. 427.
(*i*) 7 Bing. 682.
(*j*) 15 M. & W. 838.

1854.

Brewster v. The Canada Company.

lop to enter into such an agreement; and also to deny that the construction put upon it by the defendants is the correct one.

By the imperial statute 9 Geo. IV. c. 51, it is made necessary that the attornies, or as they are usually called commissioners, of the company shall be actually resident in Upper Canada while in the discharge of their duties, and it is provided that their instruments of appointment should take effect only when and so long as the persons thereby appointed should actually be within Upper Canada. And the whole tenor of the act and of the company's charter manifest an intention that the affairs of the company in Canada shall be managed by local agents.

Indeed the very purpose for which they were incorporated could not be accomplished but by means of such agency; and so the legislature, while conferring certain privileges for an avowed public object—viz., the clearing and cultivation of large tracts of land, therein described as waste and unproductive—obliged those upon whom they conferred these privileges to conduct the business for which they were incorporated by such means as would be most likely to accomplish the public object which the legislature had in view; and the company in acting under its charter appears to have managed all matters of local detail by its commissioners in Canada.

Judgment.

Such an agreement as the one in question here, apart from the consequences which have grown out of it, appears to me, like the sale of land, to be of such a nature as would almost as a matter of course fall within the province of the commissioners: for the company were not only to sell land, but to expend a certain portion of the price they paid for it in public improvements; and although the nature of the improvements might probably be a matter of instruction

from the court of directors in London to their commissioners in Canada, still the carrying out of those instructions, involving contracts of various kinds, would necessarily devolve upon their agents in Canada; and I am not prepared to say that such a contract would not fall within the rule that matters of constant ordinary occurrence in the usual transactions of a corporate body do not require the corporate seal to give them validity. Any banking corporation may without their corporate seal empower their servants to make promissory notes in their name—a case very analogous to the present, as it seems to me; and in the case of the Canada Company there is this circumstance, that the corporate seal is in England and not in Canada, and is used to authenticate such instruments as pertain to the court of directors to grant, while such matters as properly fall within the functions of their agents here are not in practice so authenticated, and could not be so, consistently with a reasonable practical working of the affairs of the Company.

Judgment.

I think, however, that there is enough in this case to bind the company to the agreement in question without resorting to this principle; for if not submitted to the commissioners and approved of by them before it was entered into, which it professes to have been, it was confirmed by them afterwards; they as a company acted under it, and received the benefit which it stipulates for in their behalf. By the confirmation of the commissioners they made it their act and if they could as commissioners make such an agreement, they could do so without the coporate seal; for if they were duly authorized agents, which is not denied, they would make such agreement as agents, and not only did not need to use the corporate seal, but could not use it.

But if any doubt could exist upon this point, the answer appears to me to set it at rest, for it submits

1854.

Brewster. v. The Canada Company.

to the court the construction of the contract as "the contract in the said bill mentioned as the same is contained in the letter of *William Dunlop* in the said bill set forth, and dated Sandwich, 9th April 1832."

Then, as to the construction of the agreement taking it to be an agreement between the Canada Company and *Smart*. The company agree to sell to him certain lands upon certain conditions, which conditions the company stipulate for, as for a benefit to themselves. *Smart* was to build a mill within a time specified, and to furnish the company and their settlers with lumber at a certain rate; the company also make a provision in regard to the dam, which is assumed to be of such a nature as that a canal lock may be constructed through it, and they provide that they shall be at liberty to construct such a lock.

Judgment.

This was at the least an agreement that *Smart might* erect a mill and mill dam in a certain place upon land then the property (equitably) of the company. The agreement itself does not shew that either party contemplated the overflowing of any land, unless the erection of a dam penning back water would necessarily, as it does ordinarily, have that effect; but it might have that effect and yet overflow no land other than that contracted to be sold. The company contracted to sell only certain land; and it was known to the company—that is, to those through whom it administered its affairs in Canada—that what they agreed should be built could not be built without penning back water so as to overflow some of their land, other than that contracted to be sold: this I think is clear upon the evidence, though the extent of land which would be overflowed was not known. It was then *a necessary consequence* of their agreement that some land not comprised in their agreement would be overflowed if their agreement was carried out. I do not see that the contract can be construed differently from

1854.

Brewster v. The Canada Company.

what it would have been if the company had taken an express contract from *Smart* to build this mill and dam. In that case suppose the mill not completed within the time agreed upon, and an action brought and damages recovered for the breach of covenant; suppose the mill then completed and land of the company overflowed thereby, and an action on the case brought by the company for such overflowing, that overflowing being a necessary consequence of the act covenanted to be done, and the doing of which had been virtually compelled, and its being such necessary consequence known to the plaintiff in those suits when the covenant was entered into,—there can be no doubt, I apprehend, that the action on the case would be held to be an inequitable proceeding and would be restrained. Apart from the fact of there being more land flooded in this case than was contemplated, in what does it differ from the case supposed? only in this, that in the one case the plaintiff agreed that the defendant might do it, in the other he took his covenant that he should do it; but the former mode of agreement conferred as large a right on the other contracting party to do the act as the latter, and must, I apprehend, equally estop the party conferring the right from doing anything in contravention of it. It is not necessary to hold that such an agreement carries with it any grant in law of an easement to flood lands, but merely that a party shall be restrained in equity from doing an act so inequitable and inconsistent as first to contract, for a valuable consideration moving from the other contracting party, that he, the other, may do certain acts, and then instituting legal proceedings against him for doing those acts, because certain consequences have ensued necessarily consequent upon the doing of those acts, and known to be so by the party instituting such proceedings.

Judgment

With regard to the *extent* of the land overflowed; this contract was made by an agent of the company

1854.

Brewster v. The Canada Company.

whose official duty as an officer of the company would make him acquainted, generally at least, with the character of the country where this mill was to be built, and he made the agreement with a person resident at Detroit. Of the two contracting parties, the one of whom it was most to be expected that such an unforeseen contingency as has occurred would be provided against was, I should say, the officer of the company; and further, the river Aux Sables and the adjacent country had then been actually surveyed under the direction of the company, and the commissioners had in their possession the notes of that survey; therefore, if they had not present in their minds the facts that a dam could not be constructed where they agreed it should be constructed without flooding a considrable tract of land, they had certainly the means of knowing it; perhaps it is not too much to say that they must be taken to have known it, and to have entered into the agreement knowing not only that *some* land, but *how much* land would be overflowed.

Judgment.

I think, therefore, that the contract of the company, coupled with the partial knowledge which they admittedly had, if not the full knowledge, which I incline to think they must be taken to have had, raises an equity to prevent their suing at law. But there is also another ground, that of acquiescence.

Not to recapitulate the various acts evidencing acquiescence on the part of the officers of the company, I may observe that full knowledge of the extent to which land would be flooded by the dam was communicated by one of the company's servants both to Dr. *Dunlop* and Mr. *Prior*, the latter gentleman then resident agent in Goderich, as early as August or September 1832. Dr. *Dunlop* became a joint commissioner in August of that year. They were led to believe indeed that a much larger quantity of land was flooded than really was the case. At that time the

dam only was erected, not the mill. In the summer of the following year the like communication was made to Mr. Commissioner *Jones*. Both he and Mr. *Prior* considered the flooding a necessary consequence of the agreement made by Dr. *Dunlop*; they regretted it, but thought the company bound by it. Dr. *Dunlop* differed from them only in expressing no regret, but thinking the agreement a judicious one, notwithstanding the flooding of the land; no objection was made by any officer of the company, and *Smart* expended his money, a large sum in all, in building his mill-dam and mill, and rebuilding the dam after its being carried away, without objection or remonstrance.

1854.

Brewster v. The Canada Company.

The company availed itself of the advantage stipulated for, of being provided with lumber at particular rates. This was another act of acquiescence. But the grant of the land in pursuance of the agreement, as Mr. *Jones* says, and certainly says correctly, is still stronger evidence of acquiescence, for the conveyance of the land was made conditional upon the building of the mill, and it must have been assumed that the mill had been built in accordance with the agreement.

Judgment.

The question whether a corporation can be bound by acquiescence was very distinctly raised in the case of the *Rochdale Canal Company* v. *King*, (*a*) where it was contended that a company could not, like an individual, be bound by acquiescence; that a company may grant leave and license, but cannot acquiesce; and it was asked, how can it be shewn that the company had information of what was doing? Members of the company, it was said, may have been informed, but not the company. Lord *Cranworth*, then Vice-Chancellor, overruled the objection, and after commenting upon various facts evidencing aquiesence, he proceeded to say, "Now unquestionably if this be true, the plaintiffs can have no relief in this court;

(*a*) 15 Jur. 962.

1854.

Brewster v. The Canada Company.

such conduct, even if it be not sufficient to sustain a plea of leave and license in bar to an action, certainly incapacitated the plaintiffs from obtaining any assistance in a court of equity. It is not necessary," he adds, "to go further and say whether it would not entitle the defendants to restrain them from proceeding at law, according to what was stated by Lord *Eldon* in *Barrett* v. *Blagrove*." *(b)*. In that case Lord *Eldon* refused an injunction where there had been long acquiescence in the acts complained of, and said, "I rather doubt whether, so far from the court's interfering in your instance, a bill might not be filed to prevent your suing at law upon that covenant."

A corporate body then may, according to the judgment of Lord *Cranworth*, be bound by acquiescence as an individual may; and both he and Lord *Eldon* have intimated their opinion, though they have not decided, that a party who has acquiesced can not only not sustain a suit in equity, but will be restrained by a court of equity if he sues at law—a position certainly which has reason and common sense in its favor.

Statement.

I have not intended in my judgment to go at large into the facts of this case or the law applicable to them, both of which have been discussed more fully by the members of the court who have preceded me. From the best consideration that I have been able to give to the case, my opinion is that the actions at law brought by the company should be restrained.

There is one point, however, upon which I am not clear. A mill-dam will frequently cause the flooding of a number of acres of land, from ten to a hundred, or more; but here the quantity overflowed is so very large that it could scarcely have been contemplated by the parties to the contract; by one party, the Canada Company, by its official representatives it certainly was not.

(*b*) 6 Ves. 105.

The quantity of land thus virtually destroyed appears to me to be out of all proportion to the benefit that can accrue to any party from this mill, besides which it appeas to make the neighborhood unhealthy and to prevent fish from passing up the river. These indeed, as public injuries, may admit of remedy elsewhere; but still I think they may properly be considered in weighing the equities upon which the plaintiffs come to the court.

But, to take the private injury by itself: it may be of so vast an extent, and it may be a matter of such great importance to the company to get rid of that which causes it, that these plaintiffs may exact as the price of it something plainly beyond its value to them in any point of view; or they may refuse all offers, however liberal, and insist upon keeping up their dam whatever the extent of the injury which may be caused by it.

Judgment.

The *legal right* is with the company, and the plaintiffs come here to restrain an inequitable exercise of that legal right: then is not this a case in which the maxim that he who comes for equity must do equity will apply. For myself individually I should like that this point were argued.

At the same time I am prepared to say that if a case for compensation at all, it should be compensation of the most ample kind: and I doubt if any mode of compensation which would have the effect of forcing the defendants to discontinue the business which they carry on with this mill, could be a kind of compensation which can properly be forced upon them as the price of their obtaining the assistance of this court.

It has been suggested, I believe, that a steam-mill erected by the company would place the plaintiffs in as good a position as their present one. This may be

1854.

Brewster. v. The Canada Company.

doubtful, because fuel may be more expensive than keeping a dam in repair, and the costs of working and keeping in order the machinery of a steam-mill may be greater than would be the case in a mill propelled by water; on the other hand, there may be advantages in a steam-mill over a water-mill which may compensate, or partially compensate, for such expenses. Or it may be that there are difficulties in the way of adjusting any compensation to these plaintiffs for the mill which they now enjoy, which would render it improper to make any condition to granting them relief. It is, however, a point upon which I am not free from doubt.

Decree.

Declare, that the contract in the pleadings mentioned of the 9th of April 1832, ought to be specifically performed and carried into execution, and that the said plaintiffs are entitled to the quiet possession and enjoyment of the mill and mill-dam in the pleadings also mentioned: Order and decree the same accordingly.

And upon payment by the said plaintiffs to the said defendants of the price of so much of lots one, two, three, four, and five, in the township of Bosanquet as has not already been conveyed to them, being parts of the said lots comprising the bed of the River Aux Sables and the land on each side thereof, reserved in the conveyance of the 15th day of September 1836, in the said bill mentioned, at the rate of seven shillings and sixpence per acre, with interest from the date of the said contract: Order, that the said defendants do convey the said lands to the said plaintiffs free and clear of all incumbrances done by them, or any claiming by, from or under them; refer it to the master of this court at London, to settle the amount so to be paid by the said plaintiffs to the said defendants, and to settle the said conveyance in case the parties differ about the same.

Ordered that the said plaintiffs be quieted in the possession of the right to overflow the lands of the defendants by means of the dam aforesaid, to such an extent as the dam first erected after the making of the contract aforesaid caused the same to be overflowed.

Ordered that the said defendants do execute a conveyance securing to and conferring upon the said plaintiffs such right, such conveyance to be settled, &c.

Order that the injunction formerly granted in this cause be made perpetual, &c. And order defendants to pay costs, &c.

1854.

Rosenberger v. Thomas.

ROSENBERGER v. THOMAS.

Principal and agent—Issues at law.

An assignment of certain property was made to the defendant as agent for the plaintiff, and the defendant refusing to account therefor the plaintiff filed a bill for that purpose. The court, without directing an issue, decreed an account with costs, although the defendant denied his agency and swore that a receipt produced by the plaintiff was a forgery; and the evidence upon the point was conflicting.

June 24th, & Sept. 23rd

The bill in this cause was filed by *Jacob Rosenberger* against *Samuel Thomas*, for an account. The transactions which gave rise to the suit, and the evidence taken, are clearly set forth in the judgment. Statement.

Mr. *Crickmore* for plaintiff.

Mr. *Read* for defendant.

The judgment of the court was now delivered by

Sept. 23rd

THE CHANCELLOR.—This suit is for an account. The plaintiff represents that long prior to the year 1849 he contracted for the purchase of two parcels of land in the township of Blenheim, containing together about two hundred and fifty acres, and obtained bonds entitling him to a conveyance of the land on payment of the purchase money: that he resold the land to various parties, who executed bonds securing the payment of the purchase monies by certain instalments, and to whom the plaiutiff became bound in his turn to convey the land upon payment of the stipulated price: that having determined to emigrate to the United States in the year 1849, he wished to assign these bonds to an agent for the purpose of collecting the monies due to him and completing the contracts into which he had entered: and that, on the 24th of October in that year, he did in fact assign them all to the defendant with that object. In proof of this latter allegation the plaintiff, besides oth- evidence, relies upon a certain instrument, a copy o[illegible]ich he sets out in his bill, and which was executed by the defendant, Judgment.

1853.

Rosenberger v. Thomas.

as he alleges, on the same day with the assignments. This instrument contains an enumeration of the bonds and notes in respect of which the account is asked, and then proceeds in these words—

"This is to certify that I, *Samuel Thomas*, have received of *Jacob Rosenberger* the above bonds and receipts to collect and to pay the monies to him; if cannot be collected to be returned when called for.

"SAMUEL THOMAS."

"*Jno. Rosenberger.*"

Now if this be a genuine document, it would seem to be conclusive in the plaintiff's favour. The admission is explicit that these bonds and notes were assigned to the defendant, in the character and for the purpose asserted by the plaintiff.

Judgment.

But the defendant, in his answer, "denies that he ever gave the plaintiff the receipt, or any other such receipt, as is stated in the bill;" and then goes on to say, "that if any such receipt can be produced the same is not genuine, but a forgery; defendant never having put his signature to or given such a receipt." His statement of the transaction is, that the plaintiff offered to sell him all the bonds and notes in question in the previous month of August; that nothing was concluded until the 24th of October, when he purchased the whole at £350, for which sum he gave his promissory note payable in five years; that when he made this purchase he had no notice that the land in Blenheim had been resold, or that these bonds and notes were given to secure the purchase monies on such resales, but had been led to believe, on the contrary, that he would be entitled not only to the debts secured by the bonds and notes, but also to the land, on payment of the remaining instalments; that the plaintiff took up his residence in the State of Michigan, upon the completion of the sale, where the defendant visited him shortly afterwards, for the purpose of

removing his family and household furniture, pursuant to a previous arrangement; that on this occasion all open accounts were settled, and nothing remained due from the defendant to the plaintiff except the balance of the note for £350, after deducting the £110 already paid; and he swears, finally, that he had no knowledge of the resales until after he had obtained his deed for the 200 acre lot, when he learned the true state of the case, on demanding payment of *Broderick's* note, and became aware, for the first time, of the gross fraud which had been practiced upon him by the plaintiff.

1853.

Rosenberger v. Thomas.

It is obvious, therefore, that very much turns upon the question whether the receipt is a genuine instrument or a forgery. Now the principal witnesses on both sides are nearly related to the parties, and it must be admitted that their statements are lamentably discordant. The defence rests chiefly on the evidence of *David Thomas*, a son of the defendant, who bears out the case made by the answer; but I am quite unable to reconcile his statements with the evidence of several members of the *Rosenberger* family who have been examined for the plaintiff. In this painful conflict of evidence we would have gladly referred the question, whether this is a genuine instrument, to the consideration of a jury, had we found any reason to hope that further light could have been thrown upon the matter; but, as all the witnesses within the jurisdiction were examined before the court, we have no hope that such a course would tend to elucidate the question between the parties, and we feel bound therefore to dispose of the case upon the evidence before us, without subjecting the parties to the expense and delay of further litigation. I have said that the evidence is on some points lamentably discordant; but upon the question whether the defendant did or did not sign this receipt, there is not, strictly speaking, any conflict. *John Rosenberger*, who is the subscribing witness to the instrument, has been examined.

Judgment.

1853. Rosenberger v. Thomas.

He states the circumstances connected with the transaction, with which he swears that he was intimately acquainted, in great detail. He says that he drew the receipt at the instance of the parties; that he saw the defendant subscribe his name; and that it truly expresses the real transaction between the parties. Now this witness is not impeached; on the contrary, his testimony has been materially corroborated. Several witnesses, some of them certainly highly respectable and quite unconnected with the parties, have sworn that the signature to this document is in the handwriting of the defendant. In answer to this evidence the defendant has not been able to produce a single opposing witness—nay, although his own son was examined at great length, he did not venture to ask him a single question touching this signature. Under such circumstances, it is quite impossible to contend that there is anything in the case which would justify the court in pronouncing this receipt to be a forgery; and assuming it to be genuine, there can be no doubt, I think, as to the plaintiff's right to relief. On the one side we have the evidence of *David Thomas*, on the other that of several members of the *Rosenberger* family; and assuming their opposing statements to be of equal weight (a very favourable view of the case for the defendant), the receipt remains, and that document is sufficient of itself to support the plaintiff's case.

Judgment.

But, as the defendant positively denies that he signed this receipt, and as its contents are quite irreconcilable with the evidence of *David Thomas*, it will be proper to examine the evidence a little further, for the purpose of seeing how far the defendant's narrative is consistent with the admitted facts. The defendant says that he purchased both bonds and lands for £350. That was certainly a very advantageous bargain. That debts amounted to £750. The land was worth that sum at least, for the defendant would seem to have resold it for a much larger amount. So that he

represents himself as having purchased a property worth £1,500 for £350. But the defendant represents the plaintiff as about to abscond, and anxious, for that purpose, to convert his property into cash. Possibly that explanation might have accounted for the sacrifice if the defendant had paid cash, but he only gave a note payable in five years; so that the plaintiff, necessitated to sell for the purpose of obtaining cash, is represented as disposing of available securities and valuable real estate in consideration of a note payable at a very distant date. 1854. Rosenberger v. Thomas.

Again: The defendant states that he removed the plaintiff's family and furniture to Michigan, and that "all open accounts between defendant and plaintiff were then settled to the satisfaction of both parties, except defendant's charges and expenses of returning to his place of residence from Michigan aforesaid, and defendant's charge for the carriage of plaintiff's goods for a part of the way, which plaintiff agreed to allow the defendant, and to endorse defendant's charges therefor on said note of £350, still held by plaintiff, which was given as security as aforesaid for said bonds and notes sold as aforesaid by plaintiff to defendant." Now that statement appears to me to be quite inconsistent with the defendant's letter of the following February, which runs thus: Judgment.

"Detroit, 28th February, 1850.

"Mr. *Rosenberger*,—I have waited here two days in hopes of seeing you, but in vain. I sent five dollars to pay your fare to this place. But I could not stay no longer. Please to send me answer as soon as you can, and appoint when to meet. Try to come to Beachville or Ingersoll, for you can do your business with others at the same time. *Benjamin* is a providing to come, and you can get a team to come back. I have agreed with *Day*.

"No more at present.

"Yours,

"SAMUEL THOMAS.

"If you will send without delay, for fear as I should spend all of the money."

1853.

Rosenberger v. Thomas.

Now, if all open accounts had been settled, if nothing was due but the balance of the £250 note, which was not payable for five years, what can have been the inducement to the long journey to Detroit?—why the remittance to the plaintiff? Is it to be supposed that all this trouble was taken, and the expense incurred, for the purpose of making a payment in advance upon a note not due for five years.

Again: The defendant swears that he had no notice of the resale of the land until he had obtained his deed, which was in the month of June 1850. Now that is in itself a highly improbable statement. The proposition for the sale of this property was first made in the month of August. The contract was not completed until the close of the following October. The defendant resided within a mile and a half of the land. All the obligors in the bonds which he was about to purchase were his immediate neighbours. They resided upon this land, and had all made improvements. *Broderick* had cleared nearly the whole of his portion. Now, was the defendant really ignorant that all these parties were his immediate neighbours? Did he purchase this land, which almost adjoined the property on which he resided, without inspecting, without seeing what was its condition, and by whom it was occupied? Did he purchase bonds and notes securing a large sum payable by instalments, at distant dates, without knowing anything of the residence or circumstances of the obligors, and without enquiry as to the nature of the debts and the probability of payment, and that, when there was ample time and opportunity for enquiry?

Judgment.

But in the contemporaneous letters of the defendant we have a source of information which he, at least, must admit to be reliable; and they appear to me to furnish the strongest argument against the truth of his present statement. If his present account of the

plaintiff's conduct be true, his letters of that period will certainly disclose some trace of resentment on the discovery of so gross a fraud. Now I will not rely on the letter of the 28th of February, because that was written, it is said, before this fraud had been discovered; but that of the 11th of November, written in answer to one sent to the defendant through *Broderick*, was certainly subsequent. It runs thus: 1853. Rosenberger v. Thomas.

"Blenheim, Nov. 11, 1850.

"*Dear friend*,—I Received your letter sent by Mr. *Broderick*, and am glad to hear as you and all the family are well wen you wroght to mee. the complaints as is made to you and mee can not be stoped at present, nor do I pay aney respect to such a descors as some do hutter. *Shurchordis'* statement is rong. I never tould him as I would give him money on your order, or any thing to that efect. He tould me as he had hurd as I was to be seude from the hy court, and that I had agreed with your creditors as you should have no more money of me, and as I should say as I did not how you aney more money, nor should you have aney more from me, to which I did repli as I did how you a great sum of money, and no man should have none of them if you and me would liv. It is to long a storey for me to let you now the hole of your pretended frends. Som new stories is stil made up." Judgment.

This is certainly strange language, coming from one upon whom so gross a wrong has been practised. Instead of angry remonstrances, we have a letter of apologies and explanations,—instead of inculpating the plaintiff, all the defendant's efforts are directed to his own exculpation from slanders, by which the confidence of his "dear friend" has been abused by "pretended friends."

But upon this and other parts of the defendant's statement, the next paragraph of the letter is important. He proceeds: "Now I am a going to let you now something of importance. There is a new act of parliament made in Canada as notes, bonds, morges

1853.

Rosenberger v. Thomas.

and securities for moneys is liable to be levid on and colected, and the parti's can be sumoned befor the juge to ansor any question put to him on oth, wich wil come in operation next January, *but they can not make mee to com aganst you, it is only the deter they can sumon to ansor ther queschons.* Last night I was tould as thar is some partis as engaged to bring you back to Canada, and strip you of all you are to have, wich I have taken the erelest opportunety of informing you of it, so you may enquire if they can do so or not, and I will do so myself hear on your behalf, but thoate it advisable for mee to let you know as soon as I could. I will wright to you as soon as will receiv your letter which you sed would send to Eyr for mee, and will then inform you of all I can, and apoint whare and when we shall meet, and I do hope as this will com in tim to you."

Judgment.

Is it possible to believe that this letter was written under the circumstances detailed by the defendant? Some passages appear to me to be quite irreconcileable with the allegations in the answer. If all the plaintiff's bonds, notes and securities had been absolutely conveyed to the defendant—and this is his statement—what is the meaning of the important information as to the new act of parliament? What is the meaning of this sentence, "but they can not make me com aganst you, *it is only the detors they can sumons to ansor ther questions?*" Why, assuming the defendant's statement to be true, there was no debtor but himself. But without referring to particular passages, it must be admitted, I think, that the whole tone of the letter is utterly inconsistent with such an hypothesis. But when we advert to the fact that the plaintiff was at the very time pressing for payment; when we recollect that the receipt in question was placed in the hands of a solicitor within a few months from the date of the letter, we are furnished with a key to this difficulty. Read, in the light of these facts, this letter indicates fraud designed by the writer, not practiced

upon him; it negatives very clearly the fraud imputed to the plaintiff, but affords pregnant proof of that attributed to the defendant. 1854. Rosenberger v. Thomas.

But besides this argument from probability, the defendant is met by a considerable amount of direct testimony. *Wright* swears that he often saw the defendant passing along the concession line near his clearance. *Sales* swears that he saw him at *Broderick's* place. *Wright* and *Broderick* both swear that the defendant came to them in the *month of January* after the defendants departure, which was nine months before he obtained the deed. *Wright* says that the defendant exhibited no signs of surprise when he was informed that he (*Wright*) had a bond for a deed from *Rosenberger*. *Campbell's* evidence, after he saw *Wright*, is still more pointed. Lastly, Mr. *Miller* deposes to an admission of the defendant himself, that the note for £350 was given to secure the purchase money of land, and not in consideration of the assignment of the bonds and notes in question in this suit, and all this is irrespective of the clear direct evidence of *John Rosenberger*, and of several other members of the plaintiff's family, who have not been in any way discredited. Judgment.

Our conclusion upon the whole case is, that there must be a decree for the plaintiff with costs.

THOMPSON v. MILLER.

Principal and surety—Setting off judgments.

T. and *M.* having cross judgments at law applied to that court to set the one judgment off against the other, which application was refused on the ground that the judgment against *T.* had been assigned to a third person without notice; but it appearing that *M.'s* liability to *T.* arose in consequence of *T.* being surety for *M.* this court granted an injunction against the assignee, to prevent his enforcing the judgment recovered by *M.*; as a person purchasing a chose in action does so subject to all the equities to which it is liable in the hands of the assignor. Sept. 23rd 1853. and Jan'y 30th, 1854.

The bill in this case was filed by *Charles Thompson* against *Alonzo Webster Miller* and *Charles Brace*

1854.

Thompson v. Miller.

Hewitt, setting forth that on the 20th of December 1852 *Miller* recovered judgment, in assumpsit, against plaintiff for £338 9*s*. 7*d*. and a writ of *fieri facias* had been issued thereon and placed in the hands of the sheriff, who had seized under such writ: that at the time when *Miller* recovered such judgment the plaintiff *was responsible and liable for divers debts and liabilities of Miller* to the amount of £230 and upwards, for which amount executions had been sued out and placed in the hands of the sheriff, as well against the goods of the plaintiff as against the goods of *Miller*. The bill further stated that the plaintiff, not having paid the amount of his liability on account of *Miller* when the action brought by *Miller* was tried, plaintiff had been obliged to submit to a verdict going against him in favor of *Miller*, but that, since such recovery, plaintiff had paid the amount to the sheriff, and thereupon plaintiff sued *Miller* and recovered a verdict, upon which judgment was entered for £284 15*s*. 3*d*.: that in a second action, brought by *Miller*, plaintiff had obtained judgment on a nonsuit for £26 3*s*. 4*d*., which amounts, it was alleged, *Miller* was totally unable to pay: and unless set off against the judgment recovered by him against plaintiff were decreed, plaintiff would lose all benefit thereof; that plaintiff had made application at law to set one judgment off against the other, but which was refused, the defendant *Hewitt* denying notice of plaintiff's claim against *Miller*, although the attorney of *Miller* acted for both parties in the preparation of the assignment of the judgment from *Miller* to *Hewitt*; the prayer was for an account and an injunction to restrain the defendant from enforcing the execution so issued against the plaintiff. Affidavits were filed on both sides, the statements of which sufficiently appear in the judgment, and a motion was now made for an injunction, as prayed.

Judgment.

Mr. *Eccles* for the plaintiff.

Mr. *Vankoughnet*, Q. C., and Mr. *J. Duggan*, contra, referred to *Williams* v. *Davies* (*a*), *Thompson* v. *Speirs* (*b*), *and Whyte* v. *O'Brien* (*c*).

1854.

Thompson. v. Miller.

The judgment of the court was now delivered by

Jan'y 30th.

THE CHANCELLOR.—The question between the parties turns principally upon the circumstances under which the promisory note for £1000 was executed. The defendant swears that he became a party to the note simply and entirely for the accommodation of the plaintiff; that the plaintiff undertook to provide for it at maturity, and that any sum paid by him on foot of it was paid, consequently, in discharge of his own liability, and not as surety for the defendant, because the plaintiff himself was the person primarily liable upon the note in reality, though not in form. The plaintiff, on the other hand, swears that prior to the date of this note he had agreed to sell certain property to the defendant, at a price to be fixed by arbitrators, to be paid by the defendant's notes at 3, 6, 9, and 12 months; that one part of the arrangement was that the defendant should immediately grant his note for £ 000, the assumed value of the property; the plaintiff himself agreeing to take up the note at maturity by new notes of the defendant's, at 3, 5, 9, and 12 months, for the ascertained amount, but to pay the difference, if any, in cash; that the amount to be paid to the plaintiff was not ascertained until the 9th of October 1851, when it was fixed by Mr. *Hewitt*, who had been duly appointed sole arbitrator, at £1000; and, lastly, that the defendant then undertook to pay the note in question, upon which a verdict had been obtained against all the parties at the suit of the Commercial Bank, inasmuch as the amount had been found correct, and the period of credit had nearly expired.

Judgment.

These statements are obviously irreconcileable, and

(*a*) 2 Sim. 461. (*b*) 13 Sim. 469. (*c*) 1 S. & S. 551.

1854.

Thompson. v. Miller.

had there been nothing further, the injunction must have been refused. But the plaintiff's evidence is corroborated, not only by the written evidence, but by a long train of circumstances which are quite inexplicable upon the defendant's hypothesis. In the first place we have a memorandum of the terms on which the defendant granted the note, written at the time, and signed by the plaintiff. This quite corroborates, so far as it goes, the plaintiff's evidence, and establishes conclusively that this was not a mere accommodation transaction, but formed a part of the contract for the sale of this particular property.

Then consider the subsequent transactions. It is not pretended that any new notes were given by the defendant in pursuance of *Hewitt's* award; yet that would have been natural, nay necessary, assuming the truth of the defendant's present statement. Again: the defendant's goods were seized in December 1851,

Judgment

to satisfy the judgment of the Commercial Bank upon this very note, and they were sold in the January following, and the proceeds, about £1300, were applied by the sheriff to satisfy this amongst other executions in his hands. All that would hardly have passed without remonstrance had the defendant been a mere accommodation maker; but it is proved to have had his full concurrence. Subsequently to the seizure and sale the defendant brought an action against the plaintiff upon some ground not explained, but it is admitted that he made no claim for a large amount he had been compelled to pay upon a note, made, as he now alleges, solely for the plaintiff's accommodation; on the contrary, the present plaintiff was permitted to set off a sum of £200 which he had been compelled to pay upon the Commercial Bank writ. This is utterly inconsistent with the defendant's evidence, and yet nothing in the way of explanation was even suggested. Lastly: the sum which the plaintiff now seeks to set off is the balance due upon the Commercial Bank

execution, which he was compelled to pay after the recovery of the last verdict. But, so far as I can learn, the present defence was not then suggested, although the plaintiff's action was not commenced until December 1852, and judgment was only obtained in the following February.

1853.
Thompson v. Miller.

Looking at the written memoranda, then, and considering the subsequent transactions to which I have been adverting, I am of opinion that, upon the whole, there is a great preponderance of evidence in favor of the plaintiff's statement; there is quite enough of doubt, to say the least, to entitle him, so far as the facts are concerned, to an interlocutory injunction.

Then, assuming that this note was granted under the circumstances stated by Mr. *Thompson*, it follows, I apprehend, that all sums which he was compelled to pay on account of it were sums paid, not as the principal debtor, but as surety for the defendant; were sums from the payment of which it was the defendant's duty to have saved him harmless. Now when a surety becomes also the debtor of the principal, that combination of circumstances gives rise to a peculiar equity which flows from the relation of principal and surety, —an equity which is unknown in the simple case of debtor and creditor, and is quite unconnected with the statutes of set off. A surety under such circumstances is entitled at any moment to pay the debt for which he is surety, and to treat such payment as a payment out of the monies in his hands due to his principal. In other words, the debt due from the surety to the principal is subject to the surety's equity to be indemnified by his principal against the guaranteed debt. *(a)* As between *Thompson* and *Miller*, therefore, it is clear, I apprehend, that the debt due from *Thompson* was subject to his equity to be indemnified in respect of the promissory note for £1000. Now it is perfectly

Judgment.

(a) Jones v. Mossop, 3 Hare. 568; Priddy v. Rose, 3 Mer. 86.

1853. Thompson v. Miller.

settled that every assignee of a chose in action takes it subject to all the equities to which it was subject in the hands of the assignor; (*a*) and it follows, consequently, that *Miller's* judgment against *Thompson*, which is a chose in action, remains subject, in the hands of *Hewitt*, the assignee, to all the equities to which it was subject in the hands of *Miller*, the assignor; that it remains subject to *Thompson's* equity to treat the payments made upon the promissory note as payments made out of the monies due upon this judgment.

This motion was argued as if the case turned upon the question of notice, and much of the evidence is directed to that point. But it is perfectly plain that the plaintiff's equity is quite independent of notice. Notice may introduce a new kind of equity; but the doctrine upon which we determine the case is a doctrine deduced from the very nature of a chose in action, and applies equally whether the assignee has or has not had notice.

Judgment.

The fact that *Thompson's* judgment was recovered after the date of the assignment to *Hewitt*, is also immaterial. *Thompson's* equity would have existed though no judgment had been recovered. It depends, not upon the recovery of the jndgment, but upon the relation of principal and surety, as I have already shewn.

The proceedings in the Court of Queen's Bench, upon which reliance was placed, cannot bar the plaintiff's right to relief here. That decision was quite right, I dare say, upon the principles applicable to such cases in courts of law; but the case is determined here upon equitable doctrines, of which courts of law do not, I apprehend, take any notice.

For this reason we are of opinion that the plaintiff is entitled to an injunction.

(*a*) Mangles v. Dixon, 3 H. L. 702; Cockell v. Taylor, 15 Beav. 103.

HUNT v. PRENTISS.

1854.
October 9.

Examination de bene esse.

The Court ordered a commission for the examination of an aged witness to issue without requiring the bill to be served in the first instance; the object of the suit being to perpetuate testimony, and it having been sworn that there was danger of the testimony of the witness being lost; but directed notice of the execution of the commission to be served on the defendants.

On a former day, Mr. *Read*, on the part of the plaintiff, had applied for a commission to examine a witness resident at Michilimackinac, in the state of Michigan. The affidavit upon which the motion was founded stated that the witness was upwards of seventy-five years of age; that the object of examining him was to procure evidence of facts which had occurred in the year 1796; and that if a commission were not granted, there was great danger of losing the testimony altogether. The bill had not been served on the defendants. After taking time to look into the authorities, the judgment of the court was now delivered by Judgment

THE CHANCELLOR.—This is a bill to perpetuate testimony, and the plaintiff moves, *ex parte*, to examine an aged witness before bill served. The practice is not clearly defined. Lord *Eldon's* observation in *Frere* v. *Green (a)* indicates an opinion that such a motion cannot be made until the defendant is in default for want of appearance. But that certainly is not the practice. It is clear that the motion may be made before appearance and though the defendant is not in default (*b*), and it is equally clear that in a case like the present, the applications may be *ex parte*.(*c*) The question remains, whether it can be made before bill served, and I think it can. There is no principle to preclude it. Our orders provide for the service of notice of motion in all cases on the filing of the bill; and in England applications were allowed in analogous cases before the service of process.

(*a*) 10 Ves. 319.
(*b*) 1 Smith 508, Pritchard v. Gee, 5 Md. 364.
(*c*) McIntosh v. Great Western Railway Co., 1 Hare 328.

1854.

Hunt. v. Prentiss

As a question of practice there is room for doubt; but the authorities are sufficient to authorise the application. Mr. *Smith* says (*a*) "the practice appears to differ from the doctrine in *Frere* v. *Green*, inasmuch as immediately a bill was filed, and before an appearance, a petition of course, supported by the affidavit of the witness, being of the age of 70, will be answered, and an order drawn up to examine him, and for a commission if necessary." And this has been done in several cases before the service of process. (*b*)

But it is equally clear that the examination cannot take place without affording the defendants an opportunity of joining in the commission. If they are to be bound by this evidence the court must see that they have an opportunity of attending to the manner in which the evidence is taken, and of cross-examining the witnesses; and as some of the defendants reside in Illinois, there must be two months' notice of the execution of the commission. It is said that the evidence may be lost in the meantime. It may be so, but that cannot warrant the court in doing that which would be substantially unjust, (*c*) and the time specified is not more than sufficient to allow those parties to apply for time to join in the commission.

Judgment.

Some of the defendants are infants. As to them an office copy of the bill must be served, together with the order to be drawn up on this application; and the plaintiff must at the same time serve a notice of motion, returnable in three weeks, for the appointment of a solicitor as guardian.

(*a*) 1 Smith 508.
(*b*) FitzHugh v. Lee, Amb. 65; Loveden v. Lord Milford, 4 B. C. C. 540; Deed v. Clarke, 1 S. & S. 115.
(*c*) Lovedon v. Lord Milford, *supra*; Tomkins v. Harrison, 6 Mad. 315.

THE CITY OF TORONTO v. BOWES.

1854.
June 27 & 28
and
October 9.

Trustees—Municipal councillors.

The Mayor of Toronto, an incorporated city, secretly contracted to purchase, at a discount, a large amount of the debentures of the city, which were expected to be issued under a future by-law of the City Council; and was himself an active party afterwards in procuring and giving effect to the by-law which was subsequently passed.

Held, that he was a trustee for the city of the profit he derived from the transaction.

The original bill in this cause had been filed by *David Paterson* and others against *John George Bowes* and the *City of Toronto*. Sometime after the decision of the demurrer, (as reported ante page 170), the bill was allowed to be amended by substituting the *City of Toronto* as plaintiffs, as well as by changing several of the allegations in the bill; and evidence at great length was gone into, the main features of which, however, as also the facts of the case, appear clearly in the judgment of the court. Statement.

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

The principle involved is of great importance in this country, governed as it is by municipal bodies throughout the province; and the decisions already made in this country as well as in England, are quite sufficient for the decision of this cause. These municipal councils being in fact the governing bodies in their respective localities, the councillors cannot speculate in the debentures of their municipalities, even if the debentures have been issued before they are in office, and without such an arrangement being entered into as is shown to have existed in respect of the debentures in question here. Here, the debentures were in fact issued by the plaintiff to himself; he and his partner in the transaction being at the moment he was affixing his signature thereto, as Mayor of the city, the persons Argument.

1854.

City of Toronto v. Bowes.

really interested in the amount secured by them. The Mayor cannot by any contrivance manage to get into his own hands the property of the corporation and make a profit out of it, any more than if he had been expressly constituted a trustee.

Debentures of the city and stock are as much the property of the city as any real estate owned by the corporation. Suppose such an arrangement with respect to leases of real estate has been shewn to have existed in respect of these debentures, and after the leases perfected to the lessees the Mayor had obtained an assignment of such leases, it is clear upon principle as well as adjudged cases, that such a transaction would not for a moment be allowed to stand. This is precisely the case here, only that it is in respect of securities, not lands; and it has been decided that purchases by executors at a discount with their own monies, of debts due by the estate, enure to the the benefit of the estate and not the executors, whatever the intention may have been.

Argument.

The rule with respect to trustees not being allowed to purchase trust property has been established by the courts after the most mature consideration, and with most salutary effect. If it has been found desirable to establish this doctrine with regard to trustees of individual property, it is much more necessary to hold that it applies to persons holding the fiduciary relation of the defendant towards these plaintiffs.

The answer suggests that the same result to the city would have arisen if any other person had purchased these debentures. We deny that. But the option was never presented to the council; on the contrary, the facts, instead of being openly and candidly stated to the council, were fraudulently concealed, and the whole transaction covertly carried to completion by the defendant; and no doubt can exist, that had the council

been made acquainted with the fact that the Mayor was personally interested in the debentures, the influence which he no doubt exerted to have them issued would have gone for nothing, and the issue of them never would have been entrusted to him: in other words, they would not have deputed the Mayor to issue £50,000 of the city debentures to himself. 1854. City of Toronto v. Bowes.

Apart from the strong evidence of fraud and contrivance on the part of the defendant in obtaining these debentures, it is shewn that in pursuance of an agreement previously entered into he *did* obtain £50,000 of city property, upon which a profit of £8,000 or £10,000 has been made; under such circumstances, the universal rule is, that a guardian or trustee will not be allowed to retain the profit thus realized for his own advantage. Defendant was the person entrusted, in common with others, and in this case in a peculiar degree, with the duty of extricating the city out of its then existing difficulties; but he never suggested making the city bonds payable in London, although that course of procedure had been intimated to him; his own private interest prevented him giving that information. Argument.

Counsel commented on the facts of the case, and urged that it would be difficult to imagine any case in which the gross impropriety of allowing a municipal officer to traffic in the funds of the city could be more clearly shewn than by the elucidation of the facts of the present case.

Mr. *Gwynne*, Q. C., and Dr. *Connor*, Q. C., for the defendant.

The charges of actual fraud have in effect been abandoned; and the weight of evidence tends to show that the city has been largely benefitted by the transactions complained of. The whole case, and the right

1854.

City of Toronto v. Bowes.

of the plaintiffs to relief, is in substance based on the assumption that the defendant was the express agent of the city in the various transactions connected with these debentures; or if not the express agent, then that an implied agency or trusteeship by virtue of his office existed as to this and all other matters in which the city were interested.

The charges of express fraud are unsustained; but it is argued, that if there is no moral fraud, there is legal constructive fraud, because the defendant was the agent of the corporation. But how is this made out? He had no express authority to act in this matter as the agent of the city; if there had been, there must have been a resolution of the council for the purpose. Mr. *Daly's* evidence shows distinctly that such a step was indispensible, and would be found to exist in every case in which the defendant had been appointed an agent for the city; indeed, it is not contended that he was the express agent of the corporation in any one step that was taken. It is equally untenable, we submit, to allege that he was impliedly such agent; the simple test of that proposition is,—could he, by any act of his, have bound the corporation? The answer, we contend, must clearly be in the negative. The plaintiffs cannot sustain their case on these grounds, and must fail, unless they can establish that defendant filled a fiduciary position with respect to the city, which entirely incapacitated him from purchasing city debentures. We submit that the evidence clearly establishes that he did not occupy that position; but that he was a public officer for public purposes. If he acted corruptly he would be liable to indictment; but clearly no authority exists for holding that the city would have a right to claim as theirs any money a member of the council might receive or make, whether legally or illegally, in that office, unless at least it came out of city funds or was made out of city property.

Judgment.

Counsel then argued at considerable length that the

members of the common council of a city could not be classed or dealt with in the same manner or upon the same footing as the directors of a public company—as, for instance, a railroad company; that public companies chartered for purposes of trade or profit, were in reality only partnerships, and the directors of them were in fact partners, and were the acting agents of their co-partners, and all the strict rules and principles of law concerning partnerships are applicable to them; they could not be deemed volunteers; they were in fact paid, being also share holders. Now, it is submitted that members of one of these municipal councils cannot be looked upon as occupying a similar position; they are elected, whether they will or not, unpaid, and public officers whose duties are strictly prescribed by the various acts respecting municipal corporations, subject to those high prerogative remedies which could not be made to reach the directors of a private company. There is no sound principle upon which the city should be considered entitled to the profits arising from this transaction; they did not come out of their property, for city debentures were their debts, and not their property—they did not come out of the exchequer of the city. If any loss had been sustained, it was the contractors who had suffered such loss, and they are the parties entitled to receive the £10,000 claimed by the plaintiffs, if any persons are entitled to take it from the defendant.

1854.

City of Toronto v. Bowes.

Argument.

We submit, therefore, that no agency or fiduciary relationship ever existed between the plaintiffs and defendant, either express or implied, in respect of these transactions; and no loss, either real or constructive, has been or can be shewn to have resulted to the city.

On all these grounds the proper decision to be arrived at is to dismiss the bill with costs.

The cases principally relied upon in the argument are mentioned in the judgment.

1854.
October 9.
City of Toronto v. Bowes

THE CHANCELLOR.—The evidence in this cause is very voluminous, but in the view which we take of the case the material facts are few, and for the most part free from controversy.

The defendant was elected Mayor of the city of Toronto in the commencement of the year 1851, and continued to fill that office till the close of the year 1853.

By a resolution adopted on the 25th of November 1850, the Common Council of the City of Toronto resolved to grant a sum of £25,000 to the Ontario, Simcoe, and Huron Railroad Union Company, in aid of their undertaking; the amount to be payable in debentures of the City of Toronto, redeemable twenty years after date.

By another resolution, adopted on the 18th day of August 1851, the Common Council agreed to loan to the Railroad Company a further sum of £35,000, not in cash but in debentures, payable twenty years after date, with interest in the mean time half-yearly.

Judgment.

On the 28th of June 1852, a by-law was passed by the Common Council of the City of Toronto, which aurhorized the issue of debentures for £60,000, upon the conditions and under the regulations specified in the previous resolutions; but until the enactment of that by-law, no step had been taken to give effect to those resolutions, aud no debentures had been issued.

The legality of the course then about to be adopted was much questioned in the council, and two professional gentlemen of eminence were consulted, who concurred in thinking the proposed by-law illegal; first, because the intention to introduce it had not been notified in accordance with the provisions of the statute (*a*); secondly, because, besides being irregular

(*a*) 14 & 15 Vic. ch. 109, sec. 16.

in form, (*a*) it failed to provide a sinking fund for the liquidation of the debt, in accordance with the requirements of the statute. But a majority of the council voted, notwithstanding, in favor of the by-law, and it passed, as already stated, on the 28th of June 1852. 1854. City of Toronto v. Bowes.

Long prior to this period the Railroad Company had agreed to assign all debentures issued in pursuance of the resolutions to which I have adverted to Messrs. *Story & Co.*, the contractors for the construction of the work; and previous to the enactment of the by-law of the 28th of June, and at the latest, as I think, on the 24th of that month, Messrs. *Story & Co.* had agreed to sell all the debentures which should come to their hands under that agreement to the defendant at a discount of twenty per cent. This last point is involved in some obscurity, but I shall presently shew that the conclusion which I have drawn is the only one fairly deducible from the evidence.

Judgment.

Shortly after the by-law of the 28th of June had been passed, the Railroad Company found themselves placed in a position of considerable difficulty. On the one hand, to have fulfilled its requirements would, in their opinion, have jeopardized their right to the provincial guarantee, an object deemed, and I presume justly, of vital importance to the success of the undertaking. On the other hand, to have refused compliance, and thereby forfeited their right to the debentures, would have involved the contractors in almost hopeless embarrassment, necessitating, as it would seem, the stoppage of their works. It is unnecessary to enquire whether the views attributed to these parties were or were not well founded. The evidence leaves no doubt as to the opinion which they entertained and the motives by which they were actuated, the only points material to my present enquiry.

(*a*) 14 & 15 Vic. ch. 109, sec. 4.

1854.

City of Toronto v. Bowes.

To obviate these difficulties, Mr. *Berczy*, the president of the Railroad Company, proposed to the defendant, then mayor of the City of Toronto, that the previous agreement for a loan and gift from the City of Toronto to the Railroad Company should be cancelled, and that in lieu thereof the City of Toronto should purchase 10,000 shares in the stock of the company from the contractors, and should pay therefor £50,000 in city debentures, redeemable twenty years after date. This proposition was accepted, conditionally, by the mayor. He communicated it, on the evening of the same day, to the Common Council, at a meeting of that body convened by him for the special purpose; and the Common Council, at that meeting, adopted a resolution authorizing the proposed arrangement to be carried into effect.

In pursuance of this resolution script for 9250 shares in the stock of the company was deposited with the chamberlain of the City of Toronto by the contractors during the following month (August), and on the 22nd of September a certificate for 750 shares further; being the full amount of stock agreed to be transferred to the city.

Judgment.

Previous to the 29th of July, debentures for £10,000 had been issued under the by law of the 28th of June. These were accepted in part fulfilment of the new agreement, and the residue were issued at the following periods—namely, in August £23,000, in September £5000, in October £10,500, and on the 10th of November £1500, making in the aggregate £50,000, the whole amount agreed to be issued.

No new agreement was entered into between Messrs. *Story & Co.* and the defendant respecting the debentures to be issued under the resolution of the 29th of July. They were treated by all parties as subject to the former agreement. When issued they were deposited by the chamberlain of the City of Toronto at the

Bank of Upper Canada, in accordance with instructions from the contractors; and the Bank of Upper Canada, in pursuance of arrangements made by, or on behalf of the defendant, paid the contractors 80 per cent. in cash, amounting in the whole to £40,000. 1854. City of Toronto v. Bowes.

In the mean time the defendant called a special meeting of the Common Council of the City of Toronto on the 27th of August, for the purpose of taking into consideration a petition to the legislature, praying to be authorized to issue debentures for £100,000, in order to the consolidation of the city debt. This petition, which was adopted by the council, recites the various dealings between the City of Toronto and the railroad company, including the purchase of stock; but it does not ask, except inferentially, that the debentures to be issued under the proposed statutes should be applied to the completion of that purchase.

The solicitor for the City of Toronto drafted a bill to be introduced into parliament, based upon that petition; but the evidence does not show whether that draft was submitted to the Common Council, or whether it agreed in substance with the statute subsequently passed. On the 7th of October, however, the royal assent was given to a statute authorizing the City of Toronto to negotiate a loan of £100,000 for the consolidation of its debt; but the 5th section of that statute provides that £50,000 of the sum to be raised should be applied in payment of the stock purchased from the Railroad Company in the manner already described. Judgment.

On the 1st of November a by-law was passed by the Common Council of the City of Toronto, which by its first section authorized "the Mayor of the City of Toronto to raise by way of loan from any persons, body or bodies corporate or politic, who might be willing to advance the same upon the credit of the debentures thereinafter mentioned, and the special

1854.

City of Toronto v. Bowes.

rate thereinafter imposed, a sum of money not exceeding in the whole £100,000, and to cause the same to be paid and applied in the manner prescribed by the act of the provincial legislature authorizing the negociation of the loan."

Debentures for £82,000 sterling (equivalent, or nearly so, to £100,000 cy.) payable in London, were issued under the provisions of this by-law. The debentures for £50,000, issued under the resolution of the 29th of July, were then called in, and the holders, the defendant and Mr. *Hincks*, received in lieu thereof an equivalent amount of these sterling debentures. It is admitted that these latter securities were sold shortly after at a profit of £8237 8s. 6d. Of that amount the defendant confessedly received one half, a share proportionate to his interest in the purchase; and the prayer of the bill is, that the amount so received by him may be paid to the City of Toronto, the plaintiffs in the present suit.

Judgment.

In the narrative I have just given, which embraces I apprehend, everything material to the decision of this case, the facts are for the most part undisputed. The precise date of the negotiations between the defendant and Messrs. *Story & Co.*, and the nature and extent of those negotiations, are, as I have already intimated, the only points upon which any controversy can be said to exist. The defendant's statements upon these matters are very confused and somewhat conflicting. First as to the date of the negociations with Messrs. *Story & Co.*, and the period when these negociations were communicated to Mr. *Hincks*, the defendant on his first examination says, "There was no proposition with them on the subject previous to the letter containing the offer, (the 30th of June). There was talk about it. No doubt they spoke to me on the subject, but not on the subject of buying the debentures. I don't recollect, however, any such conversation. I

have no belief that they offered to sell me the debentures before receiving the letter. I believe I had no conversation with *Story & Co.*, about purchasing the debentures before receiving the letter." And again, "I had not spoken to the third party upon the matter until after I had received the letter about the £24,000 debentures, but I may have spoken to him about raising money generally for the city, and I believe I did." On his subsequent examination, however, which took place after an interval of some months, his statement of the transaction is a good deal modified. He then says, "I think the contractors spoke to me about the purchase of debentures more than two or three days before the date of the letter written by them to me. I don't think I had any conversation about purchasing them myself at all. They spoke to me, perhaps two or three months before the date of the letter, about selling the debentures, but not to myself, or I cannot tell whether to myself or not. I made no arrangement with them for purchasing debentures from them, until after I received the letter in question. I mean the letter of the 30th of June. I sent, I think, a copy of the letter to Mr. *Hincks* a day or two after I received it. I suppose I made a proposal to him to join me in purchasing them at the same time. I cannot say whether this was the first time I mentioned the matter to Mr. *Hincks*. I was at Quebec, and may have spoken to him on the subject before. It must have been in the summer. It may have been a month or two before I received the letter."

Judgment.

This evidence is extremely unsatisfactory. The passages to which I have referred are quite inconsistent; and, confining myself to the latter statement, I find it difficult to determine what is admitted and what denied. Now, as to the date of the negotiations between the defendant and Messrs. *Storey & Co.*, it is plain, not only from the general tenor of *Courtright's* evidence, but from particular passages to which I am

1854.

City of Toronto v. Bowes.

about to refer, that the letter of the 30th of June was not an original proposition, but the formal completion of a previously existing arrangement. He says, "Before writing the letter we had a conversation with *Bowes*—two or three days before he proposed to purchase the debentures at 80 cents on the dollar. We told him we thought he could have them, and he wanted a written proposition, and in consequence the letter was written." Mr. *Courtright* says that this negotiation took place only two or three days before the 30th of June. Mr. *Courtright* is distinct that he had but one interview with the defendant on this subject previous to the 30th. Now it is clearly established by Mr. *Hincks'* evidence, that the communication to which he refers must have taken place prior to the 24th of June, for on that day the defendant was at Quebec, and the arrangement for the joint purchase of these debentures at a discount of twenty per cent. was then made between them.

Judgment.

The defendant's account of the nature of the arrangement is equally unsatisfactory. His statement, if I understood his examination rightly, is, that the arrangement entered into by him related only to debentures for £24,000. He says, "it was not understood that the proposition in the letter as to the £24,000 should be carried out as to the rest of the £50,000. No subsequent arrangement, however, was made between me and the contractors." And again: "The £40,000 was bought at the same rate as the £10,000, but not under the same arrangement. I cannot say when the second arrangement was made under which the £40,000 was bought."

Now, some facts connected with this point are quite free from doubt. In the first place, it is quite clear that Mr. *Hincks* had no communication whatever with the contractors, except through the defendant. Secondly, the letter of the 30th of June, and the under-

1854.

City of Toronto v. Bowes.

standing previously arrived at, constitute the only agreement entered into by the defendant. His language is, "no subsequent arrangement however was made between me and the contractors," and this is asserted repeatedly in the course of his examination. Lastly, the contractors did in fact deposit debentures for £50,000 at the Bank of Upper Cannda, and the Bank of Upper Canada, as the agents of Messrs. *Hincks* and *Bowes*, did in fact pay the contractors £40,000 for the debentures.

Now, apart from the direct evidence, these established facts appear to me to lead irresistibly to the conclusion that the arrangement which preceded the 24th of June must have embraced all the debentures subsequently transferred. It is unreasonable to suppose that the contractors deposited their securities without having made some definite arrangement. And it is impossible to believe that the Bank of Upper Canada paid these large sums without distinct instructions. The magnitude and character of the transaction exclude any such notion. But as no agreement was entered into subsequent to the letter of the 30th of June, it follows that the whole subject must have been embraced in the previous arrangement.

Judgment

The direct evidence is not very full, but it leads clearly to the same conclusion. I have shown already from the testimony of Messrs. *Hincks* and *Courtright*, that the negociations with the contractors must have been previous to the 24th of June; and it is equally clear that both the negociations and the letter which was the result of them, embraced the whole amount of debentures to be issued to the Railway Company. Mr. *Courtright* says he "sold the whole £50,000 on the same terms, although my letter mentioned only £24,000. The residue of the debentures was talked about at the original conversation, but no arrangement was made with respect to them."

1854.

City of Toronto v. Bowes.

The defendant, indeed, although the statements on his examination are inconsistent, appears to me to admit this in effect. In his answer, when the enquiry is treated as unimportant, I find this passage—"I admit that upon the occasion of proposing to the said City Council that they should convert their engagements with the said Railway Company into stock as hereinbefore mentioned, I did not communicate to the said council *the fact of the said contractors having offered to sell me any of the debentures to which the contractors conceived themselves to be entitled*, but I say that I had communicated such fact previously to the finance committee of the said council at a meeting of that committee; and I submit that the fact of such an offer having been made to me by the said contractors, or the fact of my having any interest in such debentures, were matters wholly irrelevant to the question of the propriety of the said council adopting such a proposition for the taking of stock." And his reply to the last interrogatory at the close of his first examination is this—"the remainder of the debentures beyond the £10,000 were lodged in the bank on the tacit understanding that the contractors should receive eighty cents to the dollar, according to original offer in the letter."

Judgment.

Upon the whole, weighing the testimony direct and circumstantial, and keeping in mind the significant fact that all the written evidence, from which the whole truth would have been apparent, was destroyed by the defendant himself, I cannot say that the proper conclusion appears to me to be at all doubtful. I am satisfied that it was perfectly understood between the defendant and contractors, previous to the 24th of June, that the former might purchase, at a discount of twenty per cent, all the debentures which should come into the hands of the latter, under the agreement between the City of Toronto and the Railroad Company. Whether that arrangement had taken the shape of a

formal agreement at that time, is not material in my view of the case. As to a large amount, indeed, no formal agreemeent was ever executed. But I have no doubt that a definite understanding existed at the time I have mentioned, and that all the subsequent steps of the transaction were carried out in accordance with that understanding. 1854. City of Toronto v. Bowes.

Now, assuming the defendant to have been an agent for the City of Toronto in these dealings with the Railroad Company, the question is, whether the purchase which the bill in this case impugns can be sustained? My opinion upon this is clear that it cannot. On the 24th of June none of these debentures had been issued. There was no by-law then in existence authorizing their issue. The enactment of such a by-law depended of course on the Common Council. On the 28th of June the legality of passing such law was more than doubtful. In that state of things the defendant took this course:—He agreed to purchase debentures to be thereafter issued, the issue of which—the prudence, the legality of issuing which, were matters for his own determination as the agent of the City of Toronto. By that act he acquired a private interest, which, in every subsequent step of these transactions was directly opposed to his public duty. I shall have occasion to refer to these steps in detail. But, confining ourselves to the first, it is obvious that he was no longer in a position to consider with impartiality the question whether the by-law of the 28th of June should be passed—whether the debentures should or should not be issued, because he had made their issue a matter of personal concern to himself. Now, that course, I am bound to say, was diametrically opposed to the best established principles of equity. The settled rule is, that he who is entrusted with the business of others cannot be allowed to make such business an object of interest to himself. Or, as Lord *Eldon* expressed it, (*a*) "A trustee who is entrusted to sell and manage Judgment.

(*a*) Exp. Lacey, 6 Ves. 626.

1854.

City of Toronto v. Bowes.

for others, undertakes in the same moment in which he becomes a trustee not to manage for the benefit and advantage of himself." This is not a rule of positive law. It does not depend on reasoning technical in its character or local in its application. It is founded upon principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has been authoritively declared that a man cannot serve two masters, and is recognized and enforced wherever a well regulated system of civil jurisprudence prevails.

The doctrine to which I refer has been frequently applied in this court to cases which, though not similar in their circumstances (*a*), appear to me to be quite analogous to the present; and its firm establishment in the equity of jurisprudence of England is attested by a long series of authorities, reaching at least to the time of Lord *Hardwicke* (*b*). But, as the applicability of that doctrine to the present case was strenuously denied on the argument, and as the case itself is one of great public importance, it may be proper, perhaps, to open up a little of the principle upon which it rests. In the *Governor and Company of York Building Society* v. *Mackenzie*, (*c*) a leading authority upon this subject, the reasons of appeal were signed by two persons of great eminence, and they appear to me to state the rule itself and the reasons of it, with much force and clearness. The object of that suit was to set aside a purchase made by an officer of the Scotch courts, termed a "common agent." The contract was sustained in the court below, on the ground that the sale was fair in all par-

Judgment.

(*a*) Arthurton v. Dalley, ante Vol. 2, p. 1; Upper Canada College v. Jackson, ante vol. 3, p. 171.

(*b*) Whelpdale v. Cookson, 1 Ves. Senr. 9; Keech v. Sanders, 1 Eq. Ca. Ab. 74; Exp. Bennett, 10 Ves. 381; Attorney General v. Earl of Clarendon, 17 Ves. 149; Hamilton v. Wright, 9 Cl. & Fin. 111; Benson v. Heathorn, 1 Y. & C. C. C. 326.

(*c*) 8 Br. P. C. 42.

ticulars, and had been long acquiesced in; but the judgment was reversed in the House of Lords, upon the grounds, I presume, set forth in the reasons of appeal, from which I propose to make some extracts. It is there said "the sale in question was *ipso jure* void and null, because the respondent, from his office of "common agent," was under a disability and incapacity, which precluded him from being the purchaser. The office imports a natural disability, which *ex vi termini*, imports the highest quality of legal disability. A law which flows from nature, and is founded on the reason and nature of the thing, is paramount to all positive law. This is not an arbitrary or local regulation; it is the constitution of nature itself, and is as old as the formation of society, and of course it must be universal. It proceeds from nature, and is silently received, recognized, and made effectual, wherever any well regulated system of civil jurisprudence is known."

1854.
City of Toronto v. Bowes.

"The ground on which the disability or disqualification rests is no other than that principle which dictates that a person cannot be both judge and party. 'No man can serve two masters.' He that is entrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because, from the frailty of human nature, one who has the power, will be too readily seized with the inclination, to use the opportunity for serving his own interest at the expense of those for whom he is entrusted."

Judgment.

"The danger of temptation, from the facility and advantages of doing wrong which a particular situation affords, does, out of the mere necessity of the case, create a disqualification; nothing less than incapacity being able to shut the door against temptation, when the danger is imminent and the security against discovery great, as it must be when the difficulty of prevention or remedy is inherent in the very situation

1854. City of Toronto v. Bowes.

which creates the danger. *The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation.*" * * * * * * * * * * "*This conflict of interest is the rock, for shunning which the disability under consideration has obtained its force, by making the person who has one post entrusted to him incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust.*"

"And the analogy of the law of England appears perfectly to agree in the same doctrine. The cases are well known in the law books, both of England and Scotland, particularly with regard to the purchasing in of debts, with eases and compositions, and the like, where the law obliges the persons in the particular situation of trust, *in all things relative to the estate of those for whom they are entrusted, to act for them and not for themselves. The reason is, the law will not allow them to act otherwise for the danger of their situation. And another reason may also be assigned namely, that the law in no case will permit persons who have undertaken a character or a charge to change or invert that character by leaving it and acting for themselves, in a business in which their character binds them to act for others.*"

Judgment.

These reasons of appeal were penned before the doctrine of which I am speaking had been perfectly settled, but they embrace everything to be found in subsequent authorities, and they state the rule of this court so clearly, and justify it so fully, that I should but weaken their force by any observation of my own.

I do not believe that either of the learned counsel, by whom this case was argued for the defendant, meant to impugn this doctrine as applied to a case of

agency; but it was said that the defendant was the Mayor of the City of Toronto, and not an agent for the Corporation, and it was strenuously argued that none of the authorities apply to such a case.

1854.

City of Toronto v. Bowes.

I cannot accede to that argument. Reason and authority are against it. The large estates belonging to the City of Toronto, and the income which they produce; the ample public revenue derived from taxation; all their complicated transactions, pecuniary and otherwise, are under the management of the Common Council. Now it is impossible to deny that these important rights have their corresponding duties. This is in substance and effect a trust. There is no magic in a name. The Common Council is in fact entrusted with the management of the affairs of the city of Toronto, and I am at a loss to discover why the rule applicable to every other case of trust should not be applied to this. If the rule be one of pressing necessity in cases of ordinary trust, why is it to be abrogated where the trusts are of such vast magnitude and importance? Why is the principle to be held inapplicable when the probabilities of an abuse of trust are so greatly multiplied? Such a determination in a country, the local concerns of which are managed to so large an extent by corporations of this sort, possessed of such extensive powers, would be productive, in my opinion, of the worst consequences to the moral and material interests of the community.

Judgment.

To be satisfied upon that point it is only necessary to advert to the circumstances of the present case. I have referred already to the defendant's position in relation to the by-law of the 28th of June, and need not recur to that. But let us consider the next step. In the month of July the directors of the Railway Company found that it would be impossible for them to carry out the provisions of the by-law of June. They were extremely anxious at the same time to obtain the

1854.

City of Toronto v. Bowes.

city debentures. In that state of things it became necessary that an entirely new arrangement should be made; and, on the 29th of July the President of the Railway Company did, accordingly, propose that the City of Toronto, in lieu of the former arrangement, should become purchasers of 10,000 shares in the stock of the company. The propriety of this purchase, then, and the terms of it, were questions to be determined by the City of Toronto. But the City of Toronto had entrusted the management of this, as of all other matters, to the common council; and every member of the common council, in discharge of that trust, was bound to determine those questions with a single eye to the interests of the corporation. Now, had Messrs. *Story & Co.* agreed to pay the defendant £4,000 for his vote in favor of the new arrangement, everybody will admit, I presume, that such a contract would be corrupt and illegal—wholly void. But what was the defendant's actual position? It is clear that he had, at this time, agreed to purchase, at twenty per cent. discount, all the debentures which the City of Toronto was then asked to issue; and it is equally clear that he expected, and had good reason to expect, a profit of £4,000 upon the transaction. Had he not, then, a plain interest to the extent of that profit, in the acceptance of the company's proposition? and in advising its acceptance did he not advise a course from which he derived a personal profit of £4,000? It was his clear duty, at the least, to bring to the consideration of the question before him a mind unbiassed by any personal consideration. But his first act was to incapacitate himself for the discharge of that duty. Matters were not weighed in an even balance. Four thousand pounds were at the outset cast into one scale. He made the business of his employers a matter of personal interest to himself, and from that moment just judgment became impossible, for no man can serve two masters.'

Judgment.

1854.

City of Toronto v. Bowes.

It is unnecessary to speak in detail of the remaining steps of the transaction,—the petition of the 23rd of August, and the by-law of the 2nd of November. The observations already made apply with increased force to these parts of the proceedings, and they demonstrate clearly, as it seems to me, the propriety, perhaps I should say the necessity, of not excluding cases like the present from the operation of the principle under consideration.

How stands the case, then, upon authority? The reasons of appeal in the Governor and Company of the *York Building Society* v. *Mackenzie*, to which I have already referred, appear to me to place the matter in its true light. It is there said, "It is needless to enter into refinements or niceties as to the nature of trusts, or the specific name of trustee. There is no magic in the term; he is a trustee (in technical style) who is vested with property in trust for others; *but every man has a trust to whom a business is committed by another; or the charge or care of any concern is confided or delegated by commission.* He that is employed by one, either to buy or sell land for him, is in that instance his trustee, and has a trust reposed in him. *The respondent is an agent—that is, he is to act for others, not for himself.* All the authorities concentrate in one principle; it is of no moment what the particular name or description, whether of situation or position, is, on which the disability attaches. "*Tutor ait Paulus rem pupilli emere non potest; idemque porrigendum est ad* SIMILIA *id est ad curatores, procuratores,* ET QUI NEGOTIA ALIENA GERUNT." Judgment.

In the Mayor and Commonalty of *Colchester* v. *Lowten* (*a*), a case precisely like the present, Sir *Samuel Romilly* says in argument, "All corporations are trustees for the individuals of which they are composed;

(*a*) 1 Ves. & B. 232.

1854.

City of Toronto v. Bowes.

and in that character are bound to consult the interest of their members. If those who act on behalf of the corporation cannot apply the funds of the body to their own individual advantage, neither can they appropriate these funds to gratify their passions or serve the purpose of their own particular party." And again—"the select body is established by the decision at law to be trustees, mere ministerial agents of the corporation; and as such bound to exercise their powers for the benefit of the whole body."

In the *Attorney-General* v. *Wilson (a)*, Lord *Cottenham* says, "The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interest and property."

Judgment.

The case before Lord *Cottenham* was an information at the relation of the Mayor, Aldermen, and Burgesses of the Borough of Leeds, complaining of the misapplication of corporate funds by the governing body of the municipality. That was a case, therefore, very analagous to the present, and the learned judge who decided it, refers to what was said in the Charitable Corporation case (*b*) as a clear analogy for his guidance. Now in the latter case Lord *Hardwicke* treated the governing body as trustees. He says, "Therefore, committeemen are most properly agents for those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. .....By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees."

(*a*) C. & Ph. 1. (*b*) 2 Atk. 404.

1854.

City of Toronto v. Bowes.

In addition to these authorities, great weight must be given to the express language of the legislature, which appears to sanction distinctly the principle contended for. It is enacted, by a recent statute, (*a*) "that no person having by himself or partner any interest or share in any contract with or on behalf of the township, county, village, town or city in which he shall reside, shall be qualified to be, or be elected, alderman or councillor for the same or for any ward therein." Now that is a virtual adoption of the equitable doctrine. Equity had already provided that no person being an alderman or councillor could be allowed to make the business of his municipality a matter of interest to himself; and the Legislature has now declared that every person who is in that position is disqualified, and cannot be elected alderman or councillor; thus adopting and extending the doctrine long established by courts of equity.

Judgment.

Upon the whole, we are of opinion that the principle which has been stated is applicable to the present case. No authorities were cited by the learned counsel for the defendant in support of their argument; and those to which I have referred are quite sufficient for our guidance. Reason and authority equally negative the exception for which the defendant contends.

Before concluding I will advert briefly to two points, which were much pressed in argument, and to which a large portion of the evidence is directed. It was said in the first place that the defendant had not made use of his official influence with respect to any of the measures complained of; and secondly, that those measures had been productive of gain not loss, to the Corporation. I am by no means prepared to assent to these propositions; but though true, they appear to me to be immaterial.

(*a*) 16 Vic., ch. 181, sec. 25.

1854.

City of Toronto v. Bowes.

The precise import of the first proposition is not very apparent. Influence is a subtle agent. The mere will of the possessor often brings it into active operation. But when the defendant, as chief magistrate of the city convened special meetings of the common council, and proposed the measures in question for their adoption, it is difficult to conceive how his official influence could be brought to bear upon the subject more directly.

The argument, however, proceeds upon a misconception of the principle upon which the rule is founded. The question is not, whether he influenced others, but whether he discharged his own duty to the corporation. Now the corporation was entitled to his best advice and assistance in the management of its affairs; and to ensure the discharge of this duty, equity incapacitates those who fill such situations from acquiring any private interest opposed to their public duty (*a*). In that view the proposition, if true, is immaterial.

Judgment.

It is said, in the next place, that the measures complained of were beneficial to the corporation. The evidence, in my opinion, negatives that. It is clear from the testimony, particularly that of *Courtwright*, that the contractors would have sold this stock for £40,000, on the 29th of July. It is equally clear that the corporation might have raised that sum, or nearly so, by the issue of a like amount of debentures. The defendant was aware of these facts; at least, had the most ample means of information on the subject. Mr *Hincks* was then of opinion that the City of Toronto debentures were worth 96 per cent. The defendant knew that; and he had sufficient confidence in the soundness of that opinion to become purchaser of the securities on the faith of it. But the common council had no knowledge of these important facts, and the

(*a*) The York and North Midland Railway Company v. Hudson, 16 Beav. 491; Benson v. Heathorn, *ubi supra*.

measures proposed by the defendant were, in consequence, adopted. The assertion, therefore, that these measures were beneficial to the corporation is, in my opinion, quite unfounded. It is said, however, that the purchase of this stock at a discount by the corporation would be destructive of the object which the corporation had in view, the encouragement of the railroad, and that such an hypothesis is therefore inadmissible. But that is a plain fallacy. The course actually adopted was not more beneficial to the company, though more injurious to the corporation. The contractors did in fact sell this stock at a discount of twenty per cent., for they took in payment securities which they sold at that rate. The only difference was, that under the actual arrangement the defendant realized a large profit, which, upon the other hypothesis, would have belonged to the corporation.

1854.

City of Toronto v. Bowes.

But we have, in reality, nothing to do with the question whether the defendant did or did not take an undue advantage of his position. The rule we are about to enforce is a rule of preventive justice. The contract in question must be avoided on general principles, irrespective of that consideration; because to determine otherwise would be, in a great majority of cases, to subvert the rule altogether.

Judgment.

We declare, therefore, that the defendant being a trustee for the city of Toronto, was incapable of acquiring, and did not in fact acquire, any personal interest in the debentures which came into his hands under the arrangement with Messrs. *Story & Co.*, and that as a necessary consequence, the profit derived from the sale of those debentures must be paid to the plaintiffs with the costs of this suit.

ESTEN, V. C.—This case seems to depend upon two principles; one, that an agent conducting a sale on behalf of his principal cannot stipulate for a private advantage

1854.

City of Toronto v. Bowes

to himself in the same transaction: the other, that a corporate officer, appointed *ad consulendum*, cannot acquire an interest in a matter upon which he has to deliberate in his official capacity for the benefit of others. These principles may be illustrated by example in such a way as to command instant and universal assent. Suppose an agent for the sale of property to contract for the sale of it upon an understanding that he is to purchase it from the buyer. Is he not in fact selling to himself? and can such a transaction stand, or the agent retain the benefit thereby obtained? Again, suppose all the leases of corporate property to be about to expire, and the question to be much agitated in the corporation whether they shall be renewed or the property sold or divided into lots and let on building leases, and a great difference of opinion to exist among the corporators upon the subject; and suppose the mayor or other officer of the corporation to buy up all the leases at a great undervalue, as he would of course be enabled to do under such circumstances of doubt and uncertainty, and then to come to the discussion, and vote upon the question, with the strong bias which must necessarily exist in such a case could he be allowed to retain an advantage thus acquired? In both instances a breach of duty is committed, and the party committing it is deprived, on a principle of public policy, of the advantages resulting from it, and considered as acquiring such advantage on behalf of his principal, or *cestui qui* trust. There can be but one opinion, as to the cases which I have put, and the principles which they are designed to illustrate; and the only question is, whether the case now under our consideration comes within the influence of either of these principles. It appears from the evidence that the defendant *Bowes*, on the 29th of July, 1852, made an agreement with the contractors on behalf of the city for the purchase of £50,000 stock for an equal amount of city debentures, having previously made an arrangement with the contractors for the

Judgment.

purchase of those very debentures at twenty per cent. discount; he expected of course to derive some advantage from that transaction, otherwise he would not have gone into it. I am satisfied that this transaction cannot be sustained. It was in fact a sale of the debentures by Mr. *Bowes* to himself. The transaction was a purchase of the stock and a sale of the debentures. It is true that at the time Mr. *Bowes* entered into the arrangement on behalf of the city he was not the constituted agent of the city for that purpose, and he made the arrangement subject to the ratification of the council; but when his act was ratified by the corporation, he became its agent *ab initio*; and I have no doubt that a person who makes a bargain for another without his authority, but in the expectation that his act will be adopted, and with the intention of pressing its adoption upon his intended principal, is subject to all the rules which apply to transactions between principal and agent. I think, therefore, that this case is quite within the principle which I first mentioned, and this view of the matter is sufficient in my judgment to warrant and call for a determination of it against the defendant. But it is likewise capable of being regarded in another and perhaps a more important light, and one that brings it within the operation of the other principle or rule of the law above enunciated. It appears clearly from the evidence that at the time of the transactions in question Mr. *Bowes* was mayor of the city, and that it was an important part of his official duty to deliberate upon such matters as came under the cognizance of the city council, and to give his best advice upon them for the benefit of the city at large. It also appears, although the circumstance is not essential, and is merely noticed as a make-weight, that his opinion and advice had considerable weight and influence with the council, probably both from his personal character and his situation as mayor. I think it would be a breach of duty in a person holding such a position and having such

1854.

City of Toronto v. Bowes.

Judgment

1854. City of Toronto v. Bowes.

duties to perform, to acquire any interest in a matter which was to come under his cognizance in his official capacity, and that any gain or advantage thereby acuired must be considered as acquired for the benefit of the general body.

Now it appears to me that previously to the 28th June, 1852, Mr. *Bowes* had formed a plan for purchasing the £50,000 debentures to be issued under the expected by-law passed on that day, and had acquired a strong interest in the issue of those debentures, and that with that interest he went to the discussion of the question whether that by-law should or should not pass. This, I think, was highly improper ; and it appears to me that, if that transaction had proceeded, Mr. *Bowes* would not have been permitted to retain the advantage acquired by means of it, but that he would have been deemed to have acquired it for the benefit of the city. It is immaterial whether the matter to be deliberated upon is a plain one or not ; the principle equally applies. But there were questions to be considered respecting that by-law, upon which a difference of opinion might, and I believe did, exist. It was material to consider whether it was expedie nt to pass a by-law, the legality of which was doubted ; and some conditions were attached by it to the gift and loan thereby authorizeu, and others might have been proposed and become the subject of debate. But who can fail to see that Mr. *Bowes* went to the discussion of this matter with the strongest interest to promote the passing of this by-law, and to waive all conditions which might endanger or delay the speculation in which he was embarked? The original transaction, however, did not proceed in form, although, perhaps, it did in substance. Difficulties arose in carrying the arrangements respecting the gift and loan into effect, and delay was thereby occasioned, and on the 29th July, 1852, Mr. *Bowes*, at the suggestion of Mr. *Berezy*, the president of the company, proposed to

Judgment.

1854.

City of Toronto v. Bowe.

the contractors to substitute a purchase of stock to the amount of £50,000 for an equal amount of city debentures, in lieu of the gift and loan contemplated by the by-law of the 28th June previous. This proposal was acceded to by the contractors; and although it appears not a word was said on the subject, we cannot fail to perceive that it was perfectly understood between Mr. *Bowes* and Mr. *Lawmond*, with whom the conversation in question was had, that the arrangement already made respecting the £60,000 debentures should apply to the £50,000 debentures to be issued in pursuance of the new agreement. Mr. *Bowes* then attended the meeting of council at which this proposal was taken into consideration, and assisted at the deliberations which occurred on that occasion; and no doubt pressed strongly upon the council the adoption of the proposed plan. I have no reason to doubt that the plan itself was beneficial to the city, and that Mr. *Bowes* thought so, and advised the council to the best of his judgment and ability; and perhaps the same remark may apply to the passing of the by-law of the 28th June previous. But it must be perfectly obvious to every one that the case might have been far otherwise, and that Mr. *Bowes* had the strongest interest to advocate the proposed arrangement, right or wrong, because upon its adoption by the city council depended the success of the speculation in which he had engaged. These transactions on the part of Mr. *Bowes* appear to me to have been highly improper in a public point of view. They were the germ of the profit or gain afterwards acquired, and the recovery of which forms the object of this suit; and consequently such profit or gain thus acquired in breach of public duty cannot be retained, but must belong to the corporate body at large, towards whom such breach of duty was committed. The material facts upon which I base my judgment are, 1st, that Mr. *Bowes* before the 24th June formed the plan of purchasing some or all of the £60,000 debentures, and on that day pro-

Judgment.

1854.

City of Toronto v. Bowes.

posed the speculation to Mr. *Hincks*, who says in his evidence that the proposal related to a sum of £24,000 debentures, part of the £60,000, but that their conversation must have extended to the whole £60,000 intended to be issued; 2nd, that Mr. *Bowes* either before or afterwards, but before the 28th June, had a conversation with Mr. *Courtwright*, who stated that it was not confined to the £24,000 debentures then due, but extended to the whole £60,000, but he could not enter into a definite engagement respecting the whole £60,000, as the contractors considered themselves pledged to Mr. *Roberts* to some extent; 3rd, that the arrangement was carried into effect to the extent of the whole £50,000 debentures, without any fresh agreement; 4th, that the bargain was definitely concluded on or about the 8th July; 5th, that £5,000 of debentures were received on 30th of July; and 6th, that £25,000 of debentures were received on the 7th August. An attentive perusal of the evidence will, I think, leave no doubt of the facts I have enumerated, and of other facts material, though not in the same degree to the decision of the case. The principles of law which I have mentioned as governing the case are so reasonable that they require only to be stated to command universal assent. The cases of *Hamilton* v. *Wright*, *Benson* v. *Heathorn*, Ex parte *James*, and Ex parte *Bennett*, mentioned by his Lordship the Chancellor, are strong instances of their application. As regards the extent to which relief should be given in this case, I think it should be confined to half the profit realized upon this transaction. If Messrs. *Bowes* and *Hincks* had both acted personally in the matter, it could not have been contended that *Bowes* would have been liable to refund more than his share, and it can make no difference that he acted as the agent of Mr. *Hincks* in regard to his share. I think the decree should be for payment by Mr. *Bowes* to the plaintiffs of his share of the gain or profit with interest, and that this relief should be given with costs.

Judgment.

1854.

City of Toronto. v. Bowes.

SPRAGGE, V. C.—There are two leading points upon which, as it appears to me, this case must turn; the first, whether the defendant was, during the period covered by the transaction in question, an agent and trustee for the plaintiffs; and the second, whether, if so, the act which forms the subject of this suit was one which, in the fiduciary relation in which he stood, he was not justified in doing, and to the benefit of which the plaintiffs, as *cestui qui trustent*, are entitled in respect of any profit derived by the defendant from that act.

In relation to the first point, I do not think it is proved that any *special* agency was conferred upon the defendant, in the way of treating with the Railway Company or the contractors in regard to any debentures to be issued to either of them. The defendant did certainly take a very active part in all the negociations which took place on behalf of the city with those parties. This arose from his being, as mayor, the organ of the city, and probably also from his reputation as an active and able man of business; but it was in that way only, I think, that he came to be the medium of communication between the city council and the parties with whom they were dealing and not in virtue of any special agency, for none is shown to exist. Any prominent, active member of the corporation might have done the same. If the defendant can be brought to account, it must be, I think, because as a member of the council he was agent for the city in the management of its affairs, and so a trustee for whatever interests of the city he might, in that capacity, have to deal with.

Judgment.

The cases of the *Charitable Corporation* v. *Sutton* (*a*) before Lord Hardwicke, the *Attorney General* v. *Wilson*, and the *Attorney General* v. the Earl of *Clarendon*, are authorities to show that members of a corporate body, whether municipal or not, are trustees

(*a*) 2 Atk. 405.

1854.

City of Toronto v. Bowes.

for those whose affairs they are appointed to manage. In the case of the *Attorney General* v. *Wilson*, the members of a municipal body are repeatedly styled by Lord *Cottenham* agents and trustees of the municipality; and among other passages he says, "the true way of viewing this is, to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property." In that case there was a clear misappropriation of moneys belonging to the municipality, and in its circumstances it was unlike this case, but the case is very express upon the point that members of the governing body of a municipality are accountable as agents and trustees in cases where an ordinary agent or trustee can be brought to account. And in reason can it be otherwise? for if it can, a large class of interests would be left unprotected by this court. An individual may generally conduct his own affairs; but a municipality can conduct its affairs only through a governing body; necessarily and constantly its acts and its affairs are conducted through the agency of others. The body through which this is done is a managing as well as a governing body. Upon what ground can it be said that the members comprising this body are not agents for those whose affairs they manage; and upon what principle can they claim exemption from the rule applying to other agents? They are agents not only because they have certain duties, essentially duties of agency, to discharge, but they for whom they discharge those duties do actually appoint them their agents. A statute provides the mode in which this is done; prescribing the mode of management—in the city of Toronto, by aldermen and councilmen; and the manner of appointment, election by the inhabitants of the city. Here, then, is an agency for the management of affairs, and an express appointment of agents to manage them, and a trust as much and as plainly created by such appointment as by the

Judgment.

appointment by one individual of another individual to act as agent and trustee for him; and this agency and trusteeship on the part of members of the governing body of a municipality are in no way impaired or affected by the circumstance of there being other functions legislative or magisterial appertaining to their office, though there being such other functions may sometimes cause the plain duties of agency to be less clearly kept in view.

Upon the first point, then, I can come to no other conclusion than that a member of such a body as the Common Council of the City of Toronto is an agent and trustee, and accountable as such to the municipality whose affairs it administers; and I do not see that a mayor, warden or other presiding officer is either more or less an agent and trustee—and as such accountable—than any other member of the body.

Judgment.

Then, as to the second point; if the defendant did, during the transaction in question, occupy the fiduciary position which I take him to have occupied, do the acts which he has done coustitute a breach of duty—are they of such a nature as to bring him within that rule of public policy which the plaintiffs seek to apply to them. If within the rule at all, his liability to account, in respect of his acts, stands clear of the question whether or not his conduct has been fraudulently, or morally wrong. The rule is equally applicable to him, whether his conduct stand free from all taint of immorality, or whether he has been guilty of positive fraud; this is a necessary incident of its being a rule of public policy.

I take it to be proved, that before the 28th of June, 1852, how long before is not very material, the defendant entered into an agreement with Messrs. *Story & Co.*, the contractors for the construction of the Northern Railroad, for the purchase from them of

1854.

City of Toronto v. Bowes.

certain debentures of the city not then issued, which, under their contract with the Railway Company, were to be the property of the contractors; for which debentures the defendant was to pay them at the rate of eighty per cent. The amount of debentures which the contractors were then considered entitled to receive was £24,000, but the whole amount of debentures which at the time were contemplated to be isseed by the city on the railway account, and to pass into the hands of the contractors, was £60,000; and the understanding as to the defendant's purchase was certainly not limited to the £24,000, but extended to the whole amount of debentures to be issued. The evidence of Mr. *Courtwright*, one of the contractors, of Mr. *Hincks*, and of Mr. *Ridout*, the cashier of the Bank of Upper Canada, and the manner in which the agreement was carried out by the deposit at the bank of all the debentures from time to time issued to the contractors, without further agreement, all shew that both the defendant and the contractors understood that the purchase was to extend to the whole amount to be issued; and that, as issued from time to time, they were to pass into the hands of the defendant, upon the terms of the original agreement.

Judgment.

The rule within which it is sought to bring the case has been affirmed again and again by equity judges; and is stated in various terms by text writers of reputation.

Lord *Eldon*, in *Cook* v. *Collingridge*(*a*) says, that "the law will not permit parties invested with a trust to deal with it so as to benefit themselves." And in the same case, "one of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question; and this is so difficult to do, in a transaction in which they

(*a*) Jacob, 620

1854.

City of Toronto v. Bowes

are dealing with themselves, that the court will not enquire whether it has been done or not, but at once say that such a transaction cannot stand.

In Ex parte *James*, before the same eminent judge, the question arose upon the purchase of part of a bankrupt estate by the solicitor to the commission. In that case there was no imputation of improper conduct, and a full price was given for the property purchased. In giving judgment, Lord *Eldon* said: 'This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this —that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed, in every instance, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases."

Judgment.

Lord *Brougham*, in *Docker* v. *Somes* (*a*), states the rule thus: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is that he shall account to the *cestui qui trust* for all the gain which he has made."

Mr. *Paley*, in his treatise on the law of principal and agent, says, "It is a fundamental rule, applicable to both sales and purchases, that an agent employed to sell cannot be himself the purchaser; nor, if employed to purchase, can he be himself the seller."

"The expediency and justice of this rule are too obvious to require explanation. For, with whatever fairness he may deal between himself and his employer, yet he is no longer that which his services requires and his principal supposes, and retains him to be—he acts not as an agent, but as an umpire."

(*a*) 2 M. & K. 664.

1854.

City of Toronto v. Bowes.

Mr. *Lewin*, in his work on trustees, says, "It is a general rule established to keep trustees in the line of their duty, that they shall not derive any, the least advantage from the administration of the property committed to their charge."

Fonblanque, in his treaties on equity, states the principle of the decisions to be, "that a trustee shall not be allowed to raise in himself an interest opposite to that of his *cestui qui trust*" (*a*).

And Mr. *Spence*, in his more recent treatise on the same head, states the rule broadly, thus, "when a trustee or other person standing in a fiduciary character, makes a profit by means of any transaction within the scope of his agency or authority, that profit belongs to the *cestui qui trust*."

Judgment.

In some of the passages which I have quoted, the principle itself is stated; in others the consequences flowing from the principle; and in others, again, instances of the application of the principle; and in regard to these instances they are not given as the rule but as falling within the rule.

The application of the rule in *Benson* v. *Heathorn*, which has been already referred to, has a close affinity to this case. There, as here, the individual brought to account as a trustee was one of several, and the duty of the trustee to place himself in no position which would not leave his judgment unbiassed by his personal interest is very distinctly recognized and acted upon. Sir *James Knight Bruce*, in alluding to the anomalous position of such a trustee, says, "One of these very directors becomes himself the person whose conduct and accounts it is his duty to superintend, to check, and to watch; at once, therefore, to put the case at the very lowest, and in a manner most favourable to

(*a*) 2 Fonb. 189, note 2.

Mr. *Heathorn*, paralysing him as a director in this respect, and leaving the company, as far as these important matters were concerned, under the protection of but five, when they believed themselves to be under the protection of six."

1854.
City of Toronto v. Bowes.

The inquiry in this case is whether the defendant, standing to the city in a fiduciary character, and contracting for the purchase of debentures from Messrs. *Story & Co.*, placed himself in a position where his own interest might conflict with that of the city; and whether he made any profit in dealing for himself with that which he had to deal with as an alderman of the city; and the dealing with which in that capacity might redound to the benefit or the disadvantage of the city, according to how it was dealt with by those who were the city's agents to deal with it. It is clear that the dealing with the issue of these debentures, decided upon what should be issued, at what time, and upon what terms, was a matter within the scope of the agency or authority which the defendant in common with other members of the City Council exercised; and it is equally clear that the city was entitled to the unbiassed, disinterested judgment of each and every one of those to whom such agency and authority were confided. Then, to apply the principle, did the defendant's agreement and understanding, in reference to the purchase of the debentures, leave him in a position to act for the interests of the city unbiassed by private conflicting interests? The question is not whether he allowed his private interests to warp his judgment, and to prevail over the duty which, as an agent, he owed to the city—a question impossible to solve—but whether, by his agreement for the purchase of the debentures, he raised up a private personal interest in himself which conflicted or might conflict with the interests of the city. No other rule would be a safe one; for when a man views his duty to another through the medium of his private interests, it is *human*

Judgment

1854.

City of Toronto v. Bowes.

nature that this vision of the former should be imperfect, if not distorted.

Now, if the defendant knew, or expected that a profit, more or less, would be realized by him upon every £1000 of city debentures which might be issued, is it not obvious that he had a direct interest in using his position in the council to cause as many thousand pounds of debentures to be issued as possible, and that whether needful or advantageous to the city, or the contrary? And is it not equally obvious that he had a direct interest in having debentures issued in such a mode, at such a time, and payable at such a place, as would be most for his advantage, as the prospective holder of such debentures, although upon all these points the interest of the city might be directly opposite. His duty as agent was to advise and vote in regard to the issue of the debentures with a single eye to the benefit of the city, to have as few issued as might be consistent with its engagements and its interests, and upon the best terms possible; his interest was to have as large an amount issued as possible, and to have them issued upon terms the most favourable, not to the city, but to the holder of the debentures, that holder being himself. At the least then, his position as agent, his fiduciary character, was as Sir *J. Knight Bruce* puts it, paralysed by his private and conflicting interest. I should say it was more than paralysed, for he had made it his interest to advise and vote against the interest of the city, wherever, in relation to the issue of these debentures, that interest conflicted with his own.

Judgment.

I do not think there is anything in the circumstances of the agreement with the contractors not being absolutely for more than £24,000 of debentures: the understanding, which I cannot doubt from the evidence existed, as to the purchase of whatever further debentures might be issued to the company, was calcu-

lated to have the same influence in its nature, if not in degree, upon the advice and acts of the defendant in the council in reference to the issuing of the debentures, as if there had been a positive agreement for the whole amount.

It is a matter not affecting the principle which must govern this case, whether the defendant did or did not advise and act as a member of the council with a sole view to his private interest, or, as far as we can see, with a view to the public benefit; it is enough that he entered into a transaction which placed his private interest in conflict with the interests of the city; any other ground of decision would be unsafe, and would necessitate enquiries to which no court on earth is competent.

The concealment and denial by the defendant of his being concerned in the purchase of the debentures, it was not, in my view, necessary to prove. It may however, have been thought material in the view of excluding the defendant from the rule (or rather, the exception to the general rule) which allows an agent, in certain cases, to deal with his principal in respect of the thing which is the subject of the agency, when every fact and circumstance connected with it known to the agent are fully disclosed to the principal.

Judgment.

My idea, however, is, that in no case can an agent, in the position of the defendant, contract with his principal; for who is the principal to whom he is to make known all that is known to himself, and who is to consent to treat with him, notwithstanding his character of agent? Not the other members of the same council, for it is not their agent that he is, but they are his co-agents, and he and they are the agents of the whole body of corporators, the inhabitants of the city, and it is manifest that between them and their agent no such communication could be made as

1854.

City of Toronto v. Bowes

are required in such cases between principal and agent; nor is there any mode by which the assent of the corporate body to treat with its agent could be ascertained. And another condition to such dealing must also be necessarily wanting, for the agent so dealing with his principal cannot at the same time be agent for his principal, but must divest himself of that character, and place him, as it is termed, at arm's length; but an alderman or councilman, as long as he is so, necessarily continues agent, and cannot occupy such a position as to enable him to treat with his principal for himself, in respect of any matter which is the subject of his agency. I think, therefore, that if the defendant had been perfectly open and had freely informed the finance committee and the council of everything known to himself in relation to city debentures, and his own position in regard to these debentures, he still could not have purchased them; for his principal, the city, had a right to his services and his judgment as agent, which were at the least nullified by his interest in the debentures; and the mischief that would result, were the law otherwise, is palpable enough, for several members of the council might place themselves in the same position, and thus a door might be opened to the most improper practices; which would be likely to prevail in proportion to the number, whose judgment, as agents and trustees, might thus be perverted by their individual interests.

Judgment.

A case was put in argument in illustration of this case, which clearly falls within the rule which is invoked here. The case put was, of a member of a municipal body, such as the Common Council of Toronto, becoming a lessee of city property. It is plain that such a practice would be open to the greatest abuse, which could only be mitigated, not prevented, if the letting were by auction, and to all appearance fair and open. And if authority were necessary to shew that a lease so obtained could not stand, when

impeached in a court of equity, that point is clearly established by the *Attorney General* v. The Earl of *Clarendon*. The information was against the Governors and Head Masters of *Harrow School*, and alleged mismanagement in several particulars; among other things it was charged that a small piece of land and a barn, part of the property of the school, was let to a Mr. *Williams*, one of the governors (the number of whom appears to have been six) at an undervalue—the letting at an undervalue was denied, the Governors alleging that they received the full rent, and a higher rent than was offered by any other person. Yet this is Lord *Eldon's* language: "as to the lease to *Williams*, though nothing wrong in regard to it is, in a moral point of view, imputable either to him or the other governors, yet, according to the general rule which this court adopts for the purpose of guarding against possible fraud, he could not become a lessee of the lands which, as governor, it was his duty to let to the greatest possible advantage: therefore, if the premises are still in his possession, he must deliver them up; and he must be charged with the full value, if it shall appear that the rent he has paid fell short of that full value." It can hardly be necessary to say that the principle is equally applicable to the case of a lease taken by one of sixty governors or councillors, or directors or other agents or trustees, by whatever name called, as when taken by one of six.

Judgment.

The case establishes this, that when one of a body of agents raises up in himself on interest opposite to that of his and their principal, he shall not retain any advantage growing out of it, although, so far as appears, his private interest did not prevail over his duty to his principal, and his principal was not prejudiced by the act.

An objection make by counsel for the defendant in this case was, that here there was no property of a

1854.

City of Toronto v. Bowes.

cestui qui trust dealt with by a trustee or agent, and that therefore the rule does not apply; generally, indeed, there is such property, but such is not always or necessarily the case. The case referred to by Lord *Eldon* in exparte *James*, of a trustee having fairly and honestly endeavoured to get a renewal of a lease to his *cestui qui trust*, and the lessor positively refusing to treat for a renewal on his account, the trustee, as he very honestly might, as Lord *Eldon* says, took the lease to himself. The court held that a lease so taken must be for the benefit of the *cestui qui trust*, and should be destroyed rather than that the trustee should hold it himself under the circumstances. There was no property in the *cestui qui trust*, if the lessor had a right to refuse and did refuse to renew the lease for his benefit. Again, in the case of an agent to purchase; the agent in treating for the land is not dealing with the property of his principal, though, after a purchase effected in the name of the agent, a court of equity holds him to be a trustee for his principal; nor is there, that I can see, any necessity or reason for narrowing the rule in the manner contended for. Property is not a necessary element of transactions between principal and agent; and if there may be agency, of which property of the principal is not the subject, as certainly there may, I cannot see upon what grounds such an agency can be expected from the general rule.

Judgment.

The rule which has been considered in this case is a comprehensive one, and rests on the soundest principles of puplic policy and morality. The application of the rule may in some instances have appeared to bear hard upon individuals who had committed no moral wrong, but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity, and to apply it to every case as it arises, which justly falls within its principle. Again: it is not to be denied that acts and

conduct are treated in courts of equity as against good faith, and as morally wrong, which in the judgment of many are considered fair and allowable. Upon this point Vice Chancellor Sir *William Page Wood*, in a recent case *(a)*, held the following language, in which I heartily concur. He said: "the standard by which parties are tried here, either as trustees or copartners, or in various other relations which may be suggested, is a standard, I am thankful to say, far higher than the standard of the world." 1854. City of Toronto. v. Bowes.

The rule applied to this case—admittedly a most salutary rule—is to the full as applicable to this country as to England. To deny its application to municipal bodies would be to deprive it of much of its value; for the well-working of the municipal system, through which a large portion of the affairs of this country are administered, must depend very much upon the freedom from abuse with which they are conducted; and it is obvious that nothing can tend more to correct the tendency to abuse than to make abuses unprofitable to those who engage in them, and to have them stamped as abuses in a court of justice. Judgment.

In reference to the application of the principle to corporations, Lord *Cottenham*, in the *Attorney General* v. *Wilson*, pointedly said, "Why may not a corporation, upon the same ground, have the same relief? Why are they alone to be denied the exercise of this the most important jurisdiction of this court? certainly not because their affairs do not require it."

The tendency to abuse may indeed be in part corrected by public opinion, but public opinion itself is acted upon by the mode in which courts deal with such abuses as are brought within their cognizance. It has been well observed that the view taken by courts of equity with regard to morality of conduct among all parties is one of the highest morality; and this

(*a*) Blisset v. Daniel, 18 Jurist 128.

1854.

City of Toronto v. Howes.

cannot fail, I think, to have a salutary effect upon public opinion itself, just as, on the other hand, if a low standard of morality were presented by the courts, its inevitable tendency would be, the demoralization of the public feeling in regard to transactions of a questionable character.

I take these considerations to be not out of place in applying a principle founded upon public policy. The evil to be corrected is an abuse of trust, and that evil can be corrected only by the application of a general comprehensive rule to all cases falling within the principle of the rule. With such a rule so applied, and the fact of its existence and application present to the public mind, not only are abuses corrected when brought before the court, but the tendency to abuse is diminished by its being liable to correction; and by the effect produced on the public mind by the recognition and enforcement of a sound and moral principle.

Judgment.

With respect to the *amount* for which the defendant is accountable, I agree that it is the profit which he has made out of the transaction, not the profit made by Mr. *Hincks* as well as himself; the latter indeed is treated in the bill as the remuneration to Mr. *Hincks* for his agency in the matter, leaving the former as the only profit and advantage made by the defendant; and it is only in respect of that, that the bill seeks an account against him, for it charges £5,000 as the sum of which the defendant has illegally possessed himself, and as the sum wrongfully and illegally diverted from the funds and uses of the city; and it prays that the defendant may be ordered to restore and repay to the corporation the funds so diverted and misappropriated by him. I have no doubt that the frame of the bill and the relief prayed for were well considered by the learned counsel who has signed it; and I do not think that he has asked less than he is entitled to. I think the plaintiffs entitled to the relief asked for, with costs.

1854.

January 9 and March 6.

WILLIAMS v. TYAS.

Lease—Contract to re-build.

In a lease of property in the town of London a clause was inserted whereby the lessor agreed to erect the outside of a frame building, and bound himself, in case of its being destroyed by fire, to rebuild *to the same extent*, or in default the rent reserved to cease. Afterwards the house was burnt down, and in the interval between the execution of the lease and the destruction of the property, the Municipal Council of the town, under the authority of an act of the Legislature, passed a by-law prohibiting the erection of frame buildings in that locality. The lessee refused to pay rent until the terms of the lease were complied with on the part of the lessor by his rebuilding, and thereupon the lessor filed a bill to cancel the lease which had been executed, on the ground that it had become impossible for him to carry out the agreement in consequence of the provisions of the by-law. The court refused the relief asked; but, on a submission in the answer, directed a reference to the master to fix a proper rent to be paid by the lessee upon the lessor rebuilding with brick, with costs to be paid by the plaintiff.

Statement.

The bill in this cause was filed by *James Williams* against *George Tyas*, the nature of which is set forth in the judgment, and the prayer was that the decree of the court might declare the articles of agreement mentioned in the bill, and the demise therein contained repealed; the instrument to be given up to be cancelled; that the plaintiff might have possession; and for further relief.

Argument.

Mr. *McDonald*, for the plaintiff, moved upon affidavits, setting forth the facts, for a decree in the terms of the prayer of the bill. The lease provides for the erection of a framed building and re-building in case of fire. The municipal council, however, interposed and passed a by-law to prevent the erection of wooden buildings in that part of the town; and the performance of the contract on the part of the plaintiff having become impossible, the defendant will be enabled to retain possession without paying any rent, unless the relief asked is granted.

Mr. *R. Cooper* contra. The court will not order cancellation of the instrument where compensation can be given; all that is necessary for the plaintiff to do is to comply with the by-law, and build with brick, and

1854.

Williams v. Tyas.

a proper rent can be fixed by the master, having reference to defendant's lease; this the defendant has always been willing to do, and submits in effect to such a decree by his answer. Whatever the decree pronounced may be, however, the defendant is entitled to receive his costs from the plaintiff, the litigation having been entirely caused by his unreasonable demands.

Barker v. *Hogson (a)*, *Page* v. *Broom (b)*, *Bettesworth* v. *Dean, &c.*, *St. Paul's (c)*, were referred to.

ESTEN, V. C.*—In this case a lease was made by the plaintiff to the defendant for fifteen years, at a rent of £60, for a piece of ground in the town of London, with a house to be built upon it, of which the plaintiff was to build the outside by a particular time, and the defendant was to finish it, and the rent was to commence from the time the plaintiff was to perform his part of the work, and in case the house should be destroyed by fire, the plaintiff was to re-build to the same extent, and was to charge no rent until this should be done. The house was destroyed by fire, and the plaintiff was prevented from re-building in the manner proposed and of the stipulated materials by a by-law of the corporation, which prohibited the erection of buildings of that description. The question is, whether the defendant is to hold the land discharged of rent, or whether the lease is to be cancelled, or, upon the plaintiff's rebuilding with brick, whether the defendant is to be compelled to pay an advanced rent. The plaintiff seemed to consider it clear that the court had power to order either of these two things. It appears to us that the court has no power to cancel the lease or alter the agreement of the parties; but the defendant submitted to do what is equitable, an enquiry will be directed to fix a proper rent to be paid by the defendant, upon the plaintiff rebuilding the

Judgment.

(*a*) 3 M. & S. 267. (*b*) 4 Russ. 6. (*c*) 1 B. P. C. 240.

*The Chancellor did not give any judgment.

outside of the house with brick, but the plaintiff must pay the defendant his costs. 1854. Williams v. Tyas.

SPRAGGE, V. C.—By the agreement between the parties bearing date the 23rd of March 1847, the plaintiff leased the premises in question to the defendant for fifteen years from the 1st of June then next. The clause by which this demise is made is preceded by an agreement for building upon the premises, which provides that the plaintiff should, by the said first of June, put up what may be termed the shell of a building intended for two shops, and that the defendant should complete the building, each to insure for his own proportion, and in case of fire to receive his proportion of the insurance money; the plaintiff to replace his part of the building immediately, and no rent to be charged until he should have done so.

The plaintiff's agreement was to erect a two-story frame building, inclosed with siding and painted; and in case of fire immediately to rebuild *to the same extent* as under the agreement at first; and as to rent ceasing, it was provided that in case of the premises being destroyed by fire, no rent should be charged until so much was built as was to be performed by the plaintiff. Judgment.

The building was erected in pursuance of the agreement, and was destroyed by fire in January 1852; the by-law of the town council of London prohibiting the erection of wooden buildings in the locality, and the act authorizing such by-law having been passed in the meantime. Each party had insured, and each received his proportion of the insurance money, the plaintiff £150 and the defendant £250.

The position taken by the plaintiff is, that by the provisions of the by-law he is absolutely prevented and disabled from rebuilding according to the exigency of the agreement; that the defendant refusing to pay

1854.

Williams v. Tyas.

rent until the plaintiff should rebuild, and the lease being as he says auxiliary to the building, he is entitled to have the agreement cancelled. He states in his bill offers on his part and refusals on the part of the defendant, which are certainly not borne out by the evidence.

The plaintiff's agreement is in case of fire to rebuild *to the same extent* as before, which he interprets as meaning of the same *material;* and although certainly there is nothing to prevent his rebuilding to the same extent, he says he is not bound to do so because the by-law prevented his using the same material; and he not being bound to do so, and no rent being payable until rebuilding, he deduces as a consequence that the whole agreement is at an end. But the agreement creates a term; it is a lease of premises of which the proposed building was only a portion, and evidently not the principal portion; for the annual rental was £60, while the plaintiff's expenditure on the building, judging by the amount for which he insured, was only £150. It is evident from this and other circumstances that the ground as a building lot, as a site, was the most valuable portion of the thing devised. It may be that if it were absolutely unlawful for the plaintiff to rebuild, the defendant should be put either to pay the rent without requiring him to rebuild, or upon some reasonable terms, or else to cancel the agreement; but that is not the plaintiff's position: there has been a term created which is still subsisting; suppose a difficulty created which prevents rebuilding, is the term as a consequence to be destroyed? The by-law which has created the difficulty may be repealed, or a dispensation may be granted as to this particular building, or the defendant may choose rather to pay the rent without requiring the plaintiff to rebuild than that the lease should be cancelled, if the court thought him bound to make such election. I cannot see that a right to determine the lease at all results from the position of the parties.

Judgment.

I have made these remarks in a great measure with a view to the costs, which I think should be paid by the plaintiff, the reference which is ordered being directed upon the defendant's submission in his answer.

I think it may well be doubted whether the plaintiff was not bound in the terms of his agreement to rebuild after the fire to the same extent as before; and that he is not excused by the by-law which prohibits one kind of material only. The by-law was a contingency not provided for, which however did not, in my view, prevent on his part a literal performance of his covenant; but it is not necessary to proceed upon this ground. The plaintiff does not deny but that he can substantially perform the agreement as to rebuilding, though at some additional cost to himself, and very shortly after the fire the parties negotiated upon that ground; not that it was unlawful and impossible to rebuild, but as to the terms in respect of rent which would be reasonable, having regard to such increased cost.

Judgment.

The plaintiff by his bill takes ground which appears to me both untenable and unreasonable. The defendant on his part, by his answer, submits to pay such increased rent as may be reasonable.

The utmost that the court would do, I apprehend, if the plaintiff could not rebuild, and if the plaintiff had insisted upon the clause in the agreement which provides for the rent ceasing until the plaintiff should rebuild, would be put to the defendant upon terms; or, on the other hand, if the plaintiff came here to obtain a cancellation of the agreement and at the same time refused equitable terms proposed by the defendant, the court might in its discretion withhold its assistance.

Upon reading the correspondence and affidavits, I cannot but think that the plaintiff has from the first

1854.
Williams v. Tyas.

taken an extreme view of his rights. The fire occurred in January. On the 20th of February, only four days after the town council of London had decided to refuse to permit the re-erection of a wooden building, we find him addressing the defendant through a solicitor, Mr. *Daniell*, who assumes the agreement to be at an end, but professes, with a view to avoid trouble, to refer to arbitration the question of compensation for the unexpired term. At the same time he intimates that his client proposes to erect suitable buildings on the site of those burnt down if the defendant would pay sufficient additional rent to warrant the expenditure. The answer of the defendant was to the plaintiff himself, and I think was most reasonable. He depreciated the employment of lawyers, or arbitrators, as premature until they had failed to agree between themselves; and he proposed that two estimates would be made—one of what would be the cost of rebuilding to the same extent in wood, and the other of what a similar building would cost of brick, and that after ascertaining the difference of cost they should endeavour to agree.

Judgment.

He appears never to have insisted that he had a right to have the building restored in brick without additional rent, but only upon this, that the difference of cost between wood and brick should form the basis upon which to calculate what amount should be paid for additional rent beyond that reserved by the agreement.

A further correspondence took place between the parties in May, in which the defendant took the same ground; and in June an estimate was made by two builders, one named by each party, according to which £108 was the estimated difference in cost.

This led to no result. The defendant says that the plaintiff demanded 20 per cent. upon the additional

cost, and that he was willing and offered to pay 8 per cent., or if the plaintiff would put up a three-story building, 10 per cent. upon the additional cost. This is denied by the plaintiff, *in toto* as to the alleged demand of 20 per cent., and as to the defendant's offer, that it was not made till after bill filed.

1854.
Williams. v. Tyas.

A number of affidavits was put in, each party trying to throw upon the other the blame of acting inequitably. Much is said of refusals to arbitrate. Generally a refusal to arbitrate can form, I should say, no ground for imputing to the refusing party an unwillingness to act equitably; and in this case it is plain from the correspondence and documents put in that the plaintiff himself refused to arbitrate except upon his own terms, and among them, that it should be referred to the arbitrators whether the lease should not be cancelled. The simple question how much per cent. should be paid upon the additional cost of building was no doubt a proper point to submit to the judgment of others; but that point I should say, judging rather from the correspondence and draft of submission to arbitration than from the affidavits, the defendant never did refuse to leave to arbitration. I think indeed that the plaintiff has shewn throughout a disposition to dictate terms not warranted by his position, and to obtain a cancellation of the lease rather than to settle the terms upon which it should be continued.

Judgment.

There is one circumstance which looks to me of a suspicious character. The plaintiff's application to the town council for permission to re-erect a wooden building was on the 16th of February refused, on the motion of Mr. *Daniell*, (who was a member of the council), who four days after, as solicitor for the plaintiff, addressed to the defendant the letter to which I have referred.

1854.

Williams v. Tyas.

If the refusal of the council gave to the plaintiff the right which Mr. *Daniell's* letter assumed that it gave, it was greatly to the advantage of the plaintiff, considering the increased value of the land, that his application should not be successful. It is not necessary for me to suppose that Mr. *Daniell* so far forgot his duty as to vote under secret instructions from the plaintiff; but the circumstance throws some doubt upon the plaintiff's sincerity in asking for permission to rebuild with wood.

Judgment

But independently of this, the position taken by the plaintiff from the date of Mr. *Daniell's* letter to the hearing of the cause appears to me to be such as the defendant was justified in not acceding to; and while imputing to the defendant improper motives and conduct, I cannot but think upon the evidence that both may with more justice be attributed to himself.

January 9.

STEVENSON v. CLARKE.

Specific performance.—Saw logs.

The court will decree the specific performance of a contract for the manufacture and sale of saw logs, where they are capable of being identified and possess a peculiar value for the purchaser.

This was a suit instituted by *John Stevenson* and *John David Ham* to compel the specific performance of a contract for the manufacture and sale of saw logs entered into with them by *Eli Clarke*, *George Clarke* and *Charles Clarke*, the defendants in the cause; and the bill set forth that the plaintiffs being owners of certain saw mills in operation, had for the purpose of obtaining a supply of logs for the use of their mills entered into the contract with the defendants; that the defendants had refused to perform the contract, although a large quantity of saw logs had been got out by the defendants and marked with the mark of the plaintiffs

Statement.

in order to designate them as being the property of the plaintiffs, and that great loss had been sustained by the plaintiffs in consequence thereof, and if not performed, still greater loss would accrue to the plaintiffs by reason of the stoppage of their mills, for want of the logs, as they had calculated upon the delivery thereof to give employment to their mills. 1854. Stevenson v. Clarke.

The bill prayed a specific performance of the contract and an injunction to stay the sale of the logs by the defendant to any other person. Statement.

The defendants did not answer, and an injunction had been obtained for default. The cause was now brought on for hearing.

Mr. *Mowat*, for the plaintiff, referred to *Farwell* v. *Wallbridge* (*a*) and *Flint* v. *Corby* (*b*). Argument.

The judgment of the court was delivered by

ESTEN, V. C.—This suit was founded upon an agreement between the plaintiffs and defendants for the defendants to deliver to the plaintiffs from six to eight thousand logs of a certain size and description, in or before the month of June, 1853, at the price of 3*s.* 9½*d.* per log, payable in certain monthly instalments, while the manufacture of the logs was in progress, and the residue after their delivery; and the logs, when cut and drawn were to be distinguished by a peculiar mark, and the plaintiffs were to have security upon them for their advances. Several motions were made for an injunction in terms of the prayer of the bill, and finally a motion was made for a decree, upon none of which did the defendants appear, although they had received all the necessary notices. It was proved that a large number of logs distinguished by the stipulated mark were conveyed by the defendants down the Napanee river, the greater part to a point some Judgment.

(*a*) Ante Vol. 2, page 332. (*b*) Ante 45.

1854.

Stevenson v. Clarke.

miles above the village of Napanee, and the residue to the village itself. The plaintiffs had paid the sum of £114 and upwards under the contract, and stated that they had always been ready to pay the remainder of the monies payable for the logs, and had paid all that had been demanded of them. By the terms of the agreement the defendants engaged to receive as much as possible of the stipulated price for the logs in goods from the plaintiffs' store. The plaintiffs appear to have acted with becoming promptitude in the matter, and the defendants have not only failed in performing their contract, but have, as appears, attempted to defraud the plaintiffs by using all or part of the logs conveyed to the village of Napanee themselves and by disposing of the whole or part of the residue above the village to others. We think the plaintiffs entitled to a decree for the delivery of all the logs distinguished by the mark agreed upon, and remaining in the possession or power of the defendants, with costs. We distinguish this suit from one for the specific delivery of chattels, which rests upon property. The present suit is founded upon contract, of which the plaintiffs are entitled to the specific execution, the chattels forming the subject of it having been identified, and possessing a peculiar value. Such a right, we think, is quite consistent with the stipulation for security for advances. The contract might or might not be performed, but the plaintiffs were at all events to have security for the advances.

Judgment.

1854.

March 23rd and September 7.

WATT v. FOSTER.

Injunction—Partners.

The plaintiff and defendant entered into an agreement, under which the defendant was to procure goods, or guarantee the payment of goods, which were to be obtained and sold by the plaintiff, for their joint benefit, in certain proportions: and the plaintiff, to secure and indemnify the defendant against all loss in respect thereof, executed a confession of judgment, to be acted upon only in default of plaintiff meeting the payment of such goods: the plaintiff made default, and defendant entered up judgment and sued out execution: the court dissolved an injunction which had been issued, restraining proceedings upon the upon the execution so issued, although upon the construction of the agreement, it was doubtful whether a partnership had not been created between the parties: but the defendant (the plaintiff in the execution) having caused certain goods, provided by himself under the agreement, to be levied upon the court directed that the amount thereof, at cost and charges, should be deducted from the amount of the debt and costs, or that the injunction should be continued in respect of that amount. [THE CHANCELLOR dissenting who thought the injunction should be continued to the hearing.]

Statement.

The bill in this cause was filed in the office of the Deputy Registrar at Kingston, by *James Watt* against *Abraham Foster*, for an injunction to stay proceedings upon an execution issued by the defendant against plaintiff, under the circumstances set forth in the judgment of the court; an interlocutory injunction having been obtained, a motion to dissolve the injunction upon the coming in of the answer was now made by

Mr. *Mowat*, for the defendant, who offered, however, to allow the writ to remain in force if the amount of the execution debt were paid into court.

Argument.

Mr. *R. Cooper* contra, contended that the parties were partners, and therefore execution should not have been issued until after a final settlement of their dealings. He cited *Collyer* on Partnership, page 240.

Judgment.

THE CHANCELLOR.—This is plainly a partnership, I think, as to Watt's commission business.

I am not satisfied that it is not so as to the residue. The provisions which exempt *Foster* frrom loss (if that

1854.

Watt v. Foster.

be the true construction of the agreement), and which vest in him alone an absolute property in the partnership accounts, are not repugnant to such an interpretation of the deed (*a*). Then each has an interest in the profits as principal. The agreement does not assign to *Watt* a share of the profits for his trouble. The profits are to be divided equally (*b*).

The confession of judgment, proceedings upon which the plaintiff seeks to enjoin, was given "as a security to *Foster* against loss." Much depends on the meaning of the term loss. Does it mean, security against all loss arising from the joint transactions; or, security against loss consequent upon the plaintiff's misconduct?

The former construction is at variance with the other parts of the contract, apart from this particular provision, and that whether it is treated as a case of partnership or of agency. Equal participation in profits entails upon partners, in the absence of special provisions, equal liability to loss. If this be a mere agency, the loss, in the absence of neglect, would fall upon the principal.

Judgment

Then the construction contended for by the defendant would seem to be irreconcileable with another portion of the deed. The clause to which I allude stipulates that "the said *Watt* shall be accountable for all losses in the sale of the said goods and produce, *if sold without the consent of the said Foster, and shall reimburse the said Foster for the same.*" Can this clause be reconciled with an intention to subject *Watt* to all losses in every event? Did not these parties intend to distinguish between sales made with and without the assent of *Foster?* Suppose a sale made at a sacrifice, with *Foster's* consent; or suppose a debt upon a sale made by desire of *Foster* to be altogether

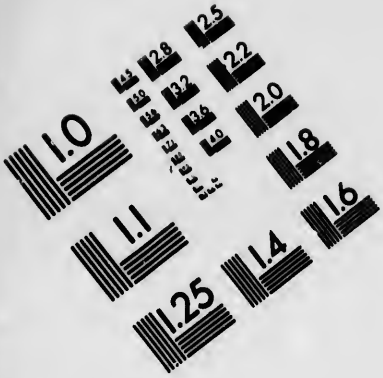
(*a*) Collyer on Partnership, secs. 17, 18, and note 1.
(*b*) Collyer on Partnerp. sec. 18; Story on Partnerp. sec. 34 et seq.

lost, was it the intention of these parties that, under such circumstances, the whole loss should be born by *Watt?* If such a construction would be plainly repugnant to the special provisions I have cited, must we not place upon the expression "loss" such a construction as will effectuate the intention of the parties to be collected from the whole deed? *(a)*.

Again: this confession of judgment may have been intended as a security to the defendant against *ultimate* loss, or as a means of raising from time to time the price of all goods purchased by him, or for which he should become guarantee. I have great difficulty in adopting the latter construction. The expression "security against loss," does not seem to me to import that. The defendant is authorised to purchase goods; and, I presume, to pay cash. Was it the intention that the confession might be enforced to secure instant repayment? Where he guarantees payment merely, he may still forbid a sale. Can he refuse his assent to a sale, and at the same time enforce the confession as upon default in the plaintiff? Judgment.

But, in either view of the contract, it is plain, in my opinion, that this confession was only intended to secure the payments as they should from time to time fall due. It was not intended, I think, that the defendant should be at liberty, upon a single default, to sue out execution for the entire amount of his liability, without reference to the periods of payment. But here judgment was entered up, and execution issued for £300, at a time when £12 only was due. At least the plaintiff swears that the fact was so, and the allegation is not denied. On the 27th of November a levy was actually made under a writ endorsed to levy £300, the full amount for which the defendant had become liable, when not much more than half that sum would seem to have been due; and under that writ the

(a) Ford v. Beach, 11 Q. B. 866.



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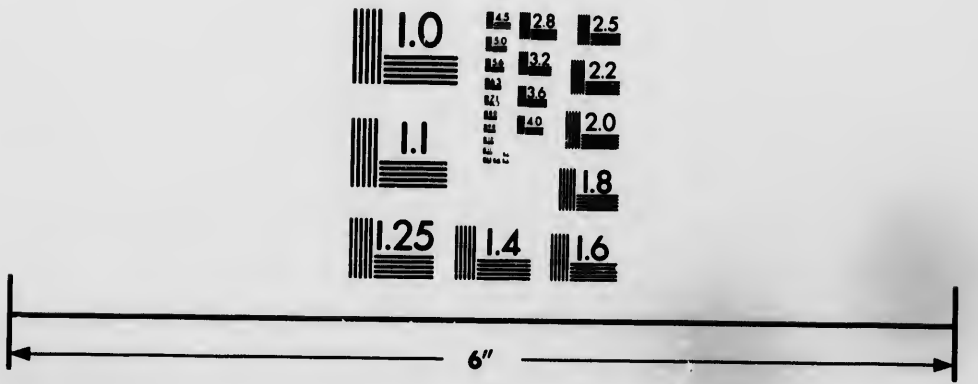

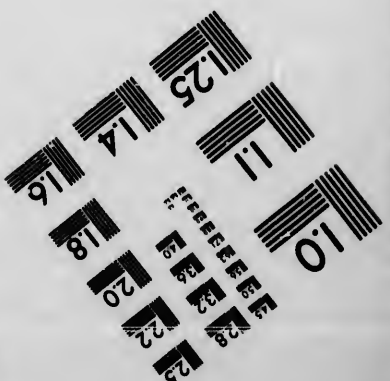

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1854. Watt v. Foster.

sheriff seized and sold goods of considerable value, which had been purchased for the purpose of the joint business. Now it must be conceded, I think, that this proceeding was not justifiable. The defendant had power to take possession of these goods under the agreement; but, then, to whatever extent that power might have been exercised, to that extent he would have precluded himself from proceeding under the judgment. He could not take possession of the goods, and at the same time sue out execution against the plaintiff for not selling so as to realize the debt. And, *e converso*, having issued execution for the full amount of his liability, his power to take possession, at the same time, of the joint effects, in my opinion, ceased. Assuming that he might have adopted either course at his option, it was not open to him, I think, to pursue both. The two remedies were incompatible.

Judgment.

In that view of the case, the plaintiff would seem to be entitled to credit, not only for all payments previously made, but also for the full value of the joint effects seized and sold by the sheriff, and proceedings upon the judgment ought to be stayed pending that account. But whether that be so or not, there is at all events, in my opinion, sufficient doubt to make it proper to continue the injunction until the hearing.

ESTEN, V. C.—I think the injunction should be dissolved, except as to the value of the goods seized, which *Foster* must be considered as assuming under the agreement without costs.

SPRAGGE, V. C.—As I read the agreement between the parties, the payments for goods purchased, whether purchased by *Foster* himself, or purchased by *Watt* and guaranteed by *Foster*, were to be met by *Watt*. The agreement is, that the cognovit "shall stand as a security to the said *Foster* for the amount which from time to time he has bought or guaranteed for the said

business; and only be acted upon in default of the said *Watt*, in meeting any of the payments for which the said *Foster* has become accountable as aforesaid."

The payment, for default in making which the cognovit was to be put in force, must have reference to the same matters for which the cognovit was to stand as a security, viz., for what was bought or guaranteed by *Foster*; and the words, "payment for which *Foster* has become accountable as aforesaid," evidently refer to what he had bought or guaranteed.

It is evident too that *Watt* was to meet those payments, as his not meeting them is treated as a *default* on his part, for which the cognovit might be acted upon. Then, is there anything in the agreement, or in the relation thereby established between the parties, to prevent *Foster* acting upon the cognovit upon *Watt* making such default as the agreement refers to? It is said that they are partners, and that until the account is taken between them it cannot be ascertained whether, from losses in the business, from monies not being realized, or other causes, *Watt* ought to be called upon to meet these payments; but, looking at the agreement, it does not appear that, as between the two parties, *Foster* was to be liable for losses. Those not chargeable against *Watt* alone, were only chargeable against what the agreement calls the commission account, which was divisible equally after charges and losses deducted; that account might be diminished, or might leave nothing to divide; but beyond that, according to the agreement, *Foster* was not to be affected by the losses, and if so, any losses that might occur could not affect *Foster's* right to be indemnified against default on the part of *Watt*. The one is made by the agreement independent of the other. There is nothing to shew that the parties meant that, though default were made by *Watt*, still *Foster* could not act upon the cognovit till a general account was taken

Judgment.

1854.

Watt v. Foster.

between them. *Watt* was to meet the payments; his not meeting them was a default, upon the happening of which the agreement provides that the cognovit might be acted upon.

Circumstances certainly might arise which would render it palpably unjust that *Foster* should act upon the cognovit; for instance, if he availed himself of the provision in the agreement to take away goods, and then insisted upon *Watt* meeting the payment for those goods, and enforcing the cognovit upon his failing to do so. But the gravamen of the complaint here is, that *Foster* did not purchase and continue to purchase goods to keep up a suitable assortment for the business. I do not see that his not doing so would deprive him of his rights, under the agreement, to enforce the cognovit upon *Watt's* defaults; and besides, when, instead of *Watt's* meeting the payments from time to time, *Foster* was forced to do so, and that upon goods purchased by *Watt* and of which he had the sale (for it does not appear that *Foster* at all interfered in sale), it surely does not lie in *Watt's* mouth to complain that *Foster* did not keep up the assortment of goods, and to give that as a reason which should disentitle *Foster* to a remedy given by the express terms of the agreement. *Watt's* repeated defaults may well have been the *cause* of *Foster's* not keeping up an assortment of goods: he swears that it was so. It is apparent from the agreement that he was to pledge his credit, not to provide capital. He was forced by *Watt's* default to do that which under the agreement he was not to have done. The payment by him was of course a necessary consequence of his guarantee upon *Watt* making default. Yet *Watt* complains that *Foster* did not continue to guarantee. Having forced him to make considerable payments which he himself should have made, he insists that he should have guaranteed further payments, sufficient to have kept up an assortment of goods, or, as a penalty, lose his

Judgment.

rights consequent upon his former payments, or rather consequent upon *Watt's* defaults. This is the equity which *Watt* makes by his bill; and I certainly do not think he has made out a case for the interposition of this court. Whether the agreement between the parties constituted them partners or not, does not, in my view of the case, make any difference, because their rights, duties, and remedies, were defined by the agreement; and it is against a remedy specifically given by the agreement that the plaintiff complains. 1854. Watt v. Foster.

Foster does not explain why he caused goods, which under the agreement were his own goods, to be seized in execution on a *fieri facias* against *Watt*. I think the amount of those goods, at cost and charges, should be deducted from the execution; and I think him entitled to enforce it for the residue of the amount for which *Watt* has made default. Judgment.

KIRKPATRICK v. FOUQUETTE.

Practice—Revivor.

When it becomes necessary to revive by way of amendment against infant defendants, the proper course is to amend simply in the first instance by making the infants parties. After that has been done, if the infants fail to have a guardian appointed, the plaintiff may apply under order XIII. to have a solicitor appointed guardian; and in either case the plaintiff will be in a position to move that the suit do stand revived.

The defendant in this suit died, leaving several infant children. After his death the plaintiff moved for leave to amend and serve the infants with notice of motion for appointment of a guardian *ad litem*; after taking time to look into the practice, Statement.

The court intimated that, under such circumstances, the proper course for a plaintiff to pursue is to amend simply in the first instance, by making the infants parties, who must, of course, have notice of such amendment, Judgment.

1854. Kirkpatrick v. Fouquette.

and if they fail to have a guardian appointed, the plaintiff may, under the XIII. of the general orders of June, 1853, apply to have a solicitor appointed guardian: and in either event the plaintiff will be in a position to move that the suit do stand revived..

IN APPEAL.

Before the Hon. the Chief Justice, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justic Draper, the Hon. Vice Chancellor Esten, the Hon. Mr. Justice Burns, and the Hon. Vice Chancellor Spragge.

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

BLACKWOOD V. PAUL.

Specific performance—Unreasonable bargain.

A party agreed to purchase for £200 a small piece of land, worth intrinsically not more than £7 10s., for the purpose of using it as a mill-pond, and in order to protect himself against suits at the instance of the owner; but owing to a dispute as to the metes and bounds of the land, no deed was ever executed until after the purchaser's mill was destroyed by fire, when the vendor tendered the deed, but the vendee not then requiring the use of the land, declined to complete the agreement. The court refused to enforce the contract, and dismissed the bill of the vendor, filed for that purpose, with costs. [The Vice Chancellor dissenting.]

Statement.

The facts of the case are fully stated in the report of the case in the court below. (*Ante* vol. 1, page 394.)

Dr. *Connor*, Q. C., and Mr. *McDonald*, for the appellant.

Argument.

Mr. *Mowat* for the respondent.

The cases principally relied on were the same as cited in the court below.

Judgment.

ROBINSON, C. J.—The pleadings and the facts of this case have been so fully and clearly set forth in the judgments given in the court below by his Lordship the Chancellor, and by Mr. Vice Chancellor *Esten*, that it would be occupying time to no purpose to restate them.

I concur fully in the opinion of the Chancellor, that the bill should have been dismissed and the plaintiff left to whatever remedy he may have at law under the agreement.

Suits for specific performance generally give rise as this has done, to a variety of questions. They are a class of cases in which courts of equity allow themselves the largest and most unfettered discretion. They have declared that in a suit for specific performance they can never be driven to do injustice. If a man has an agreement of such a nature that it can be enforced at law, and yet is not content to seek a recompence in damages for its non-performance, but desires a remedy more specific than he can obtain at common law, a court of equity will not give him such remedy unless they can grant it without doing positive injustice or acting harshly and unreasonably by others.

Judgment.

They will not put their equitable powers in motion, in order to give a man his pound of flesh; but will leave him to sue upon his bond, and will let the reproach rest upon other tribunals, which are some times under the painful necessity of administering law umtempered by equity.

It is reasonable that they should abstain from using their powers in such cases, for if they did not, they might be made the instruments of much greater oppression than could be inflicted by courts of law.

The small piece of land, an acre or less, which has given rise to this suit, appears to be of very little intrinsic value; one witness swears it was worth nothing except to the defendant, who required to be permitted to flood it in order to use his mill; another says it was not worth more than a pound, by another it is spoken of as perhaps worth two or three pounds; and that witness of the plaintiff who set the highest value upon it said it might be worth as much as thirty dollars.

1854. Blackwood v. Paul.

That might have been about a fair price to ask for it by a man who did not care about selling it from another who was driven to buy it, and who could not therefore expect to get it cheap. The plaintiff, as we see, wanted £200 from the defendant for this acre of land. It is plain such a price was not asked for it as the real measure of its value, either for cultivation or for any use that could be made of it as land. The real value to the plaintiff arises from the necessity the defendant was under of acquiring it. It was as a means of annoyance or obstruction only, that it could be estimated at any such sum by the owner. The fee simple of better land in the neighborhood could probably have been purchased for £5; but the plaintiff would not permit the defendant to cover his broken lot with water unless he paid him £200. The sum asked seems enormous; but we must not, I believe, think or speak of it in these times as any peculiar reproach to the plaintiff that he was willing to make the most of his opportunity, though it may seem unreasonable to moralists that any one should act in that spirit. The defendant for some time before the year 1848, had works driven by water at this place, which required the water to be raised, so as to overflow this acre of land. The plaintiff then owned it, but seems to have made no objection, and in fact he leased from the defendant a fulling mill for a time, which required this pond to be kept up in order to use it. Then the defendant in 1848 built an expensive grist mill, which, for its working required no more of the plaintiff's land to be overflowed than had been overflowed before. He used this mill, for all that we see, without difficulty or remonstrance on the part of the plaintiff, although the accident of the enbankment of the plank road giving way and letting down the water of the defendant's pond, which swept away the plaintiff's mill, seems to have placed them on less amicable terms; and when the culvert gave way in August, 1848, the plaintiff desired to profit by the opportunity by preventing the defen-

Judgment.

dant from clearing the mouth of the culvert, without which he could not raise the water again in the pond. This gave the defendant a plain intimation of what he might expect, and in order to secure himself against the annoyance of successive actions to which he might be subjected by the plaintiff, he submitted to give the £200 asked as the price of the acre of land. 1854. Blackwood v. Paul.

It is intimated as an excuse for the plaintiff asking a sum apparently so excessive, that in the action which the plaintiff brought against the defendant for the damages occasioned to him by the embankment giving way and the water of the pond escaping, although he recovered a large sum, he did not recover as much as indemnified him for his loss; and that he therefore felt himself justified in making up in this way what he failed to obtain from the jury in the action. This has the appearance of being rather unreasonable; but it may be said in the plaintiff's vindication, that if he had not agreed to sell the small piece of land, he might by repeated actions have compelled the defendant to move or lower his dam, which would secure him against such another casualty as he had suffered so that he was justified in being as hard as he pleased in withholding the privilege as a measure of self-defence. We see however that he exacted from the defendant much more than the £200, for he would not let the acre of land go even for that sum unless the defendant would agree in addition to give him a mortgage upon his mill property to the amount of £3000, to stand as a continuing security for any damage which might at any time occur to the plaintiff, his heirs or his assigns, from the mill-pond of the defendant. Judgment.

It can't be said, after what had happened, that the plaintiff had no reason for apprehending injury, and it was natural that he should desire to secure himself against loss; but, considering that the pond had been

1854.

Blackwood v. Paul.

for several years kept up with the plaintiff's acquiescence, the plaintiff himself, part of the time, making use of the head of water gained by it, and probably thinking as little as the defendant did of any danger from the road embankment giving away, it does seem rigorous in the plaintiff to exact a standing security upon the defendant's mill to the extent of £3000, to guard against a contingency which might be open for ever. This was in effect rendering the defendant's mills and land unsaleable in his hands, for few people would have any concern with a property with an incumbrance of that kind upon it, and it was exposing the defendant to an immense disadvantage from the apprehension of a loss which might never occur. The defendant indeed was hardly a free agent in such a negociation, from the moment that the plaintiff had assumed a hostile attitude, as he seems to have done on the 26th of August, 1849, when he endeavoured to prevent the defendant's men from filling up the opening of the culvert. The alternatives to the defendant of his mill being stopped or his being engaged in a succession of law suits, were such as he must have desired to escape from at almost any sacrifice; and he submitted to this condition also; that is, for the acre of land, which in itself was of little or no value, he agreed to pay to the plaintiff £200, and to give the mortgage security spoken of to the amount of £3000; and this agreement was made between them on the 29th of August, while we may suppose the parties were not on the most accommodating terms.

Judgment.

I dwell upon this part of the case, because, if there had been no difficulties about the title or description, of the land, and if the plaintiff had owned the fee, and had come soon after and tendered a valid deed of it, such as would have secured the defendant in the height of water he required, and if the defendant had refused to pay the £200, and give the mortgage, I am not

prepared to say that in my opinion the court of Chancery should have interposed to compel the specific performanc of an agreement apparently so stringent and so unequal in its terms and made under such circumstances. 1854. Blackwood v. Paul.

I think the court might properly have said that it had a hard appearance, and that if the plaintiff were determined to insist on the agreement, he might take such damages as a jury would give him at law. He had done nothing in reliance upon that agreement which had prejudiced his interest, or thrown any particular disadvantage upon him, and the court might well have said to him, if you are determined to push your legal right to the utmost, the defendant is at your mercy, he refuses at his peril; besides your legal remedy, you have it in your power to apply much stronger measures of compulsion than a court of equity ought to use, and we will not give the aid of our extraordinary power for enforcing the agreement.

Judgment.

It is true that the mere circumstance of inadequacy of price in a purchase will not, as a matter of course, induce the court to refuse specific performance. They did not set themselves scrupulously to consider whether the party applied against had what others would take to be a full consideration for an engagement which he deliberately entered into. But full effect, I think, may be allowed to all the cases which have affirmed that principle; and yet there would be found a weight of authorities against enforcing specific performance of this agreement which it would be difficult to overcome, and which, I think, I should not have been inclined to resist. A bill preferred even under such circumstances should, as I venture to think, have been dismissed, though not with costs, and the plaintiff left to sue for damages for non-performance of the agreement.

But, whether I am right or not in this opinion, I

1854.

Blackwood v. Paul.

am sure it must be admitted on all sides that what has occurred since the parties made their written agreement of the 29th of August, 1849, has placed the plaintiff's claim to sue for specific performance on much less favourable ground.

When the defendant agreed to pay the plaintiff £200, and give a mortgage for the sum of £3000, he stipulated for "a good and sufficient deed of conveyance in fee simple of all that part of the plaintiff's land which is or was overflowed by the water of the defendant's mill-pond." As the agreement was first drawn up, it read, "all that parcel of land, &c., which is overflowed by the water of the mill-pond." That would have given the defendant nothing of any value, for if the then condition of the water (29th of August), at the driest time of the summer, and while the pond had not yet filled up after the breach in the culvert, had been taken as the measure of the privilege which the defendant was acquiring, it would have been utterly useless for his purpose. The words "or was" were therefore interlined before execution, and the most important question raised in the case is, what those words must be taken to mean. The plaintiff has endeavored to force upon the defendant the construction that they relate to the time when they were negociating about the agreement; and in 1851, when he filed his bill, he asserts in it that "the land intended by the parties was the land which was overflowed by the mill-pond of the defendant on the 27th and 28th days of August, 1849;" and he gives such a description of the tract by metes and bounds as would confine the grant to that. The defendant, on the other hand, has always contended that the words "was overflowed" should be taken to mean the land that had been usually overflowed by the pond while the mill was working, taking the season through. No man in his senses could be content to pay such an extravagant price for anything less; and, considering how long that

Judgment.

privilege had been enjoyed without any such terms being exacted, it was unreasonable in the plaintiff to contend for anything else, more especially when, as was conceded in the argument, the only difference in effect, as regarded the plaintiff, between the one construction and the other, would be not to cover a larger area to any considerable extent, but merely to raise the water higher against a steep bank.

1854.
Blackwood v. Paul.

The plaintiff now in his bill, after he had been for a long time insisting on confining the tract in the manner I have mentioned, declares that he is willing to perform his agreement by conveying to the defendant the land so intended as aforesaid; that is, the land as it was flooded on the 26th and 27th of August, 1849, "*or so much more as for any reason the defendant shall appear to be entitled to.*" This seems to be a very clear admission on the part of the plaintiff that there is still some uncertainty as to what he may fairly be required to convey; but there can be nothing more fatal to the plaintiff's claim to specific performance than any uncertainty of that kind. The court can never decree specific performance of an agreement which is not in itself specific; and an uncertainty which applies to one side of the contract creates the same difficulty as an uncertainty on the other side, since it is as necessary that there should be a clear understanding about what the defendant is to receive as about what he is to give.

Judgment.

If the words "*is or was overflowed,*" should be taken as intended to describe the state of the pond at the end of August, just after the culvert had given way, and while they were making this arrangement, then the words "*or was,*" could have no meaning or effect, and need not have been added, although they were inserted as a correction before execution, and of course for the purpose of altering the sense; if they *must* mean to refer to the state of the pond at another

1854.

Blackwood v. Paul.

time than the 26th and 27th of August, then the question is, at what time? I see no authority whatever for fixing upon any particular period, and it seems obvious that what the parties must have meant was, that such land should be conveyed to the defendant as had been usually overflowed while the defendant's mill was working freely and not affected by extraordinary freshets.

The plaintiff has rejected that construction, and has all along contended in favor of one that he must know well would render the contract not merely unequal, but of no value whatever to the defendant. We can have no doubt that the defendant never could have assented to a bargain of that kind, unless under some delusion; and as I have before remarked, it has a very unfavourable appearance that the plaintiff should have insisted on the defendant's accepting what the plaintiff could not but know would be worthless to him, when the more natural and just construction would scarcely add perceptibly to the quantity of land to be conveyed.

Judgment.

I think there is the greatest justice in the observations made in the court below upon the disingenuousness of the plaintiff's proceedings in procuring such a survey to be made as was made by *Hanvey*, and in attempting to make that the foundation of his conveyance. After keeping the matter in an open and unsettled state for eighteen months, by advancing such a claim, he is not in a condition, I think, to come now into court and sue for specific performance, calling upon the court to give such effect as they think they ought to an agreement which, according to the construction all along insisted upon by himself, would be really an absurd agreement for the parties to have entered into.

Then, as to the other feature in the case, the very defective title which the plaintiff desires the defendant

should be compelled to accept;—the plaintiff sets out an agreement, such as he did execute, and by which he binds himself to convey the land in question, whatever it was, to the defendant, his heirs and assigns, by a good and sufficient deed of conveyance without covenants; and the agreement says that, "*in consideration of the above*"—that is, in consideration of the defendant's receiving a good and sufficient deed of conveyance—he is to pay the £200, and give the special mortgage exacted of him. The plaintiff did not merely engage to convey all his own interest in the land legal or equitable, but to convey the land itself, and that by a good and sufficient deed.

The plaintiff does in his bill state that the defendant knew the nature of his title, and was content to take it as it was, and thereupon, as the plaintiff says, entered into the agreement; but he does not admit that he has it not in his power to convey a good title, as he engaged to do; he states no particular defect which he asserts to have been waived, but on the contrary, he says he is willing to perform the agreement by conveying such land as he says was intended to be conveyed, not merely by conveying all his estate in it. He offers still to perform tha agreement *specifically on his part;* and in the deed which he did execute and wanted the defendant to accept, he assumed absolutely to convey, not his own interest merely, but the land; but the evidence shews plainly that he is in no situation to do this, he has no title to convey. A court of equity can no more than a court of law allow a man who is before them in a suit upon an agreement to convey land to allege that, although the agreement binds him to give a good title, yet that it was understood and known to the other party before the agreement that he had no title, or a very defective one, and that thereupon, that is, after this understanding, the agreement nevertheless was made in such terms as to bind the party to make a good title. If the plaintiff

Judgment.

1854.

Blackwood v. Paul.

had agreed to convey 100 acres of land to the defendant for the £200, why should he not as well be suffered to ask us to compel the defendant to pay him the £200 for fifty acres, upon the allegation that the defendant knew he could only convey him fifty, or meant only to convey such quantity, and that the defendant was willing to accept it, though thereupon—that is, with such knowledge and understanding—the plaintiff nevertheless engaged to convey 100 acres. There would be no value in writings, if a court of equity could allow them to be trifled with in that manner. No doubt questions of waiver of good title are often raised, and the court sometimes acts upon the principle that a party has waived some defect in a title; but never, I venture to say, in any case, that on a due consideration of its circumstances would be found analogous to the present, and especially not when a plaintiff in a suit for specific performance, while he is asking the court to use its equitable powers against the other party, alleges in his bill that he is himself ready and always has been, to do all that by the written contract he agreed to do. But, at any rate, I see nothing in this case that we could safely say was a waiver, even so far as regarded the plaintiff not having yet obtained any title himself from *Gates & Bancroft*. Such effect, I think, could not in reason be given to the fact of possession, because that had been enjoyed for years before while no such interest existed. (*a*) After all that had taken place, and in the position in which the defendant stood,—allowed for a long time past to keep up the pond and use his mill,—he could hardly be expected, if the plaintiff had refused all compromise, to abandon his mill and perhaps submit to be ruined. He might reasonably still resolve to go on as he had done before without any express agreement, and if things should come to the worst to trust at least to a jury giving but trifling

Judgment.

(*a*) Dixon v. Astley, 1 Mer. 133; Burroughs v. Oakley, 3 Swans. 159.

damage for overflowing this acre of land, where the injury was so trifling.

1854.

Blackwood v. Paul.

We cannot, I think, act in a case of this kind upon the conviction that the defendant meant any such waiver as is suggested. It would be the conduct of an insane person. All that we see is, that the plaintiff and his brother *Anson* had a bond from *Gates & Co.* to convey. For all that appears, they might have disabled themselves by their laches from enforcing the bond; and if they were not yet in default, can it be supposed that the defendant was really willing to take all the consequences in a case of this kind, of their failing afterwards to fulfil their own contract with *Gates & Bancroft;* and even if they should not fail, yet *Gates & Bancroft*, might choose (if they had the legal title) to pay the penalty of their bond, rather than convey it. I can believe that the defendant knew that the plaintiff had not yet obtained a legal title from *Gates & Bancroft*, and was content for the time to secure himself against annoyance by entering into this agreement; but in the agreement no day is set for finally closing the whole arrangement, either for conveying the land or paying the £200; and it is most reasonable to hold that the plaintiff undertook, at his peril, to get a perfect title before he could call for the money and the mortgage.

Judgment.

Now, as to the allegation, which is contrary to the tenor of the agreement, that the defendant agreed to take the plaintiff's equitable interest alone under the bond without insisting upon his brother *Anson* joining in the title such as they could give; it is impossible to say upon the evidence that was given that anything so utterly absurd was agreed to.

What the plaintiff pretends would leave the defendant (after he had paid his £200, and placed a perpetual incumbrance upon his mill property to the

1854. Blackwood v. Paul.

amount of £3000,) wholly at the mercy of *Gates & Bancroft* and of *Anson Paul*, who might subject him to all the inconvenience it was his object to avoid when he assented to the terms which the plaintiff imposed upon him.

What the plaintiff asserts in this respect is incredible upon the face of it. His own conduct is inconsistent with it, for he tendered an absolute deed long after the agreement, making no reservation as to his estate; but, assuming to convey the whole legal interest, though not in all the land, he was bound to convey; and if I could believe that the defendant made so silly a contract, which would really secure nothing to him of that which the plaintiff must have known it was his object to secure, I should still say that it was an agreement which a court of equity should not lend its aid to enforce, but should leave the plaintiff to sue at law and obtain what a jury would give him; and more especially when it is considered how unreasonable the conduct of the plaintiff has been in attempting to impose upon the defendant a deed with a description that would have made the land of no value to him, and when it is further considered that the defendant, by the destruction of his mill, has now lost—unless he chooses to rebuild—the motive which induced him to submit to such terms. While the plaintiff, on the other side, has not, as appears, done anything or given up anything in consequence of the agreement which has materially changed his position, he is really endeavoring to get a court of equity to interfere in his favor in a manner that would lead to the greatest injustice, by using a remedy that is never extended except in a benign and equitable spirit for advancing the real ends of justice. (*a*).

Judgment.

In my opinion, the plaintiff has brought into court a case in which, if he has law on his side he has no equity, and that his bill should be dismissed with costs.

(*a*) Cooper v. Denne, 4 B. C. C. 87.

MACAULAY, C. J. C. P., after stating the pleadings and exhibits in the cause, said—The leading facts of the case are recited in the judgment of his Lordship the Chancellor, in the court below. 1854. Blackwood v. Paul.

The first consideration is the construction of the agreement on the face of it; and, secondly, in reference to extraneous facts existing at the time it was entered into.

1st. The agreement is under seal, made and entered into between *Paul* of the township of Yarmouth, and *Blackwood* of the township of Southwold; and in the first place it states that they had thereby agreed to settle all differences existing between them, and "the said plaintiff hath for the consideration of £200, to be paid as hereinafter mentioned, agreed to *sell* and *convey* unto the said defendant all that *certain* small piece of land next to the embankment for plank road, *and which is or was flowed or overflowed* by the waters of the mill-pond of the said defendant, and to *convey* the same unto the said defendant, his heirs and assigns, *by a good and sufficient deed of conveyance*, without covenants. And *in consideration of the above*, the said defendant agrees to pay unto the said plaintiff, his heirs, executors, administrators or assigns, as the purchase money of the said above mentioned small piece of land, the just and full sum of £200, in manner following—that is to say, £100, part thereof, *within* six months from *the date hereof;* the residue of the same, being £100, within nine months *from the date hereof*, and said defendant shall and doth hereby agree to give promissory notes, *duly endorsed*, payable at the time aforesaid for the said sums." Judgment.

"And the said defendant doth hereby agree to grant unto the said plaintiff, his heirs and assigns, such mortgage security on the *mill property* of said defen-

1854. Blackwood v. Paul.

dant, conditioned to save harmless and keep indemnified the said plaintiff, his heirs and assigns, from all damages he may actually sustain (to be ascertained as therein provided), by reason or on account of the destruction or injury of *his property* by the waters of the *mill-pond* of the said defendant. Said mortgage to be given for £3000, to be held only as a collateral security," &c.; and "to be submitted to the judgment and approbation of Messrs. *Wilson & Becher* of London.

"And the said defendant shall, *as soon as he can*, say forthwith, *clear out* the *tail* race of the said plaintiff of the gravel and rubbish therein accumulated, or on any part of the premises of the said plaintiff, by reason of the breaking away of the embankment or culvert therein on the morning of the twenty-ninth of this present month of August."

Judgment.

Now the agreement does not say expressly that the plaintiff agreed to sell land of *his own*, but it may be inferred from the tenor of it that it was land of his own. Then the locality, quantity or description are not stated. It does not state in what town, township, concession or lot, the land was situated; and one party is described as of Yarmouth, and the other of Southwold. But the agreement does import that the defendant owned mill property—wherever it was; that the waters of his mill-pond did flow or overflow or had flowed or overflowed a small piece of land (of the plaintiff) next to an embankment for plank road, and that the embankment or culvert in the premises of the plaintiff had broken away the day before the agreement, and caused an accumulation of gravel and rubbish in the tail race of the plaintiff and other parts of his premises—importing that the plaintiff also had mill property and premises in the vicinity of the embankment alluded to and of the defendant's mill property.

Then the question is, what was plaintiff to sell and convey to defendant? "*All that piece of land next to the embankment for plank road, and which is or was flowed or overflowed by the waters of the defendant's mill-pond.*"

1854.
Blackwood v. Paul.

The land of plaintiff that then was or had been so overflowed might be susceptible of being rendered certain by the application of parol evidence; it is not ascertained by the agreement, and if ascertainable by extraneous evidence, the question of construction arises whether it means the land then flowed, or that had been overflowed, when the embankment or culvert broke away the day before, *or* at any other, and if any at what former period.

The reasonable answer would seem to be the quantity which the defendant's mill-pond, in the state it was, (supposing the embankment or culvert repaired or in *statu quo*) had overflowed, according to the waters therein, whether more or less, at different seasons,—in other words, high water-mark; a *fluctuating boundary*, not definable.

Judgment.

The word "*was*," no doubt, was intended to be retrospective, and the expression "*is or was flowed or overflowed*," means "*is*" *(now)* flowed or was overflowed, (exceeding what *is* flowed) but, as to *time*, it is uncertain whether *when* the culvert broke or at any cr what *former* period, unless a construction can be placed upon it that fixes it to some specific period or event.

It appears to me, in the first place, that the subject of the contract is too ambiguous to be enforced. If the quantity of land is to be measured not by the water mark when the culvert broke, which might at the time of the agreement, the following day, have been readily seen, traced and described, but by some higher line up to which the water *may* have risen at former

1854. Blackwood v. Paul.

periods,—I say *may*, for there is no express proof that it had—though then overgrown with grass and incapable of being traced on the ground or otherwise determined than by scientific calculations, based upon the diameter of the water wheel, the height of the flume, and the head of water necessary to drive the machinery at a good working speed, as it had been driven at certain seasons of the year prior to the disaster which led to the contract; and since which period the water might have subsided to a lower level when the accident occurred on the 29th of August, 1847.

I find no precedent for the Court of Chancery instituting an inquiry in other to ascertain and determine the boundaries of lands contracted for in terms so vague and uncertain. *(a)*

Judgment.

The plaintiff was not *able*, prompt, ready and eager. *(b)* He was not *able*; for, at best, he only owned a moiety of the land, and if the case were reversed and the defendant seeking performance against the plaintiff, his inability to perform for want of title would probably be a good answer, and if so, there is wanting *ab origine*, that reciprocity which ought to subsist *inter partes* in transactions of this kind. *(c)*

It does not appear to me a satisfatory answer that if he can obtain a title after a reference to the Master, it will be sufficient in a case circumstanced like this, however applicable such a rule may often be. He was not prompt or ready to do more than tender his own individual deed, bounding the land by the water line at the time the accident happened, which it is not now contended the court would compel the defendant to

(*a*) Price v. Griffiths, 15 Jurist, 1093; Webb v. London and Plymouth Railway Co., 16 Jurist, 323; Lord Stuart v. London and North Western Railway Co., Ib. 530.
(*b*) Walker v. Jeffreys, 1 Hare, 341.
(*c*) Howell v. George, 1 Mad. 1; Lawrinson v. Butler, 1 S. & L. 13; Chesterman v. Mason, 9 Har. 206; Flight v. Bolland, 4 Russ. 298.

1854.

Blackwood v. Paul.

accept, either as respected the sufficiency of the title or the correctness of the boundaries; on the other hand, he delayed doing or offering to do anything more until the period had elapsed when the defendant's notes, if made and accepted, would have become due and payable.

The defendant showed a willingness to proceed with the contract, on terms rejected by the plaintiff, and this is relied upon as a waiver: though it might perhaps be so, it only left the parties standing upon their original rights. Waiver of a perfect title is not distinctly alleged in the bill as it should be, if intended to be relied upon. (*a*)

There is no proof that the defendant ever went into possession of the land. He may have caused back-water thereon, after the culvert was repaired, as he had done before, and with the implied license of the plaintiff, but the agreement did not entitle him to take possession, nor did his causing back-water constitute a possession, though it was an infringement upon the plaintiff's possession, who was not dispossessed, and might have maintained trespass against any one *vi et armis* breaking and entering upon the *locus in quo*, which the defendant could not have done. The agreement does not even authorize the defendant to repair the culvert, and is quite silent as to possession previous to the sale being perfected.

Judgment.

It may be that the defendant knew the nature of the plaintiff's title and possession when he executed the agreement, but that instrument does not even allude to it, unless in the exemption of the plaintiff from entering into covenants; and the defendant's subsequent conduct does not argue that he had con-

(*a*) Clive v. Beaumont, 1 De G. & S. 397; Gaston v. Frankum, 2 De G. & S. 561; Warren v. Richardson, Your ; and see Cattel v. Corrall, 3 Y. & C. Ex. 418.

1854. sented to waive all question of title and accept such as the plaintiff had, such as it was.

Blackwood v. Paul.

Then this contract further obliges the defendant to mortgage his own estate to a large amount, as an indemnity against future damage to the plaintiff's remaining property, and considering the effect such a mortgage is calculated to have as a clog upon the defendant's estate, it seems to me to argue much in favor of the parties being left to their legal remedies, if any, rather than that a court of equity should be active in enforcing an undertaking, which though strictly binding, as having been deliberately made and supported by adequate consideration, is a very stringent measure to be exacted from, and probably a thing very incautiously promised by him. It may be, nevertheless, that mere hardship would not be a sufficient objection to the performance sought in this bill. (*a*) But still I cannot but think it may and ought to have weight under all the peculiar circumstances of this case.

Judgment.

I do not myself lay much stress upon anything imputable to the plaintiff in the way *Hanvey's* survey was made, or from his supposed knowledge that the boundaries specified in the deed tendered by him to the defendant would not afford a sufficient head of water to enable him to use his mill and other works advantageously, except as those circumstances tend to show the construction placed upon the contract by the plaintiff, contrary to what it seems now conceded the defendant was entitled to expect, and its consequent uncertainty; also, to the non-existence of the promptness and readiness incumbent upon him, and as otherwise influencing this case, including waiver, apart from anything sinister or fraudulent on his part. The parties evidently were not agreed as to what the one was to grant and the other to receive in relation either

(*a*) Adams v. Weare, 1 Bro. C. C. 567.

to title or boundaries, and it goes to repel acquiescence on the defendant's part, and fails to establish a definite subject matter of that tangible nature, that the court can satisfactorily, specifically and conclusively act upon it. 1854. Blackwood v. Paul.

For the foregoing, and other reasons stated by the learned Chancellor in expressing his elaborate opinion in the court below, I am led to adopt the conclusion arrived at by him, as the most satisfactory. How far the bill was proved, as respected the title therein alleged to be in the plaintiff and in some other respects, or whether the decree in its present form is capable of affording the relief it proposes to give, it is not necessary to consider.

Strict performance on the defendant's part is rendered impossible by the destruction of his mill by fire, since the bill was filed, unles he can be compelled to rebuild for the better security of the plaintiff. (*a*) Judgment.

I concur, therefore, in the conclusion arrived at by his Lordship the Chief Justice, and think that this appeal must be allowed, and the bill in the court below dismissed with costs.

DRAPER, J.—The ground on which the decree in favour of the plaintiff is endeavored principally to be supported is, that the defendant (having been wrongfully in possession of the land which by the agreement made pending such possession was to be conveyed by plaintiff to defendant) became, after the execution of that agreement, rightfully possessed, and must be taken from the date thereof to have been in possession under it; that if he desired to repudiate the agreement he would be obliged to restore that possession to

(*a*) Harford v. Purrier, 1 Mad. 532; Minor Exparte, 11 Ves. 559; Paine v. Miller, 6 Ves. 349; Batten on Contracts, 333.

1854.

Blackwood v. Paul.

the plaintiff; and that any attempted repudiation of the agreement unaccompanied by a relinquishment of such possession would be ineffectual; and that defendant cannot object to any laches on the part of the plaintiff in the assertion of his rights under that agreement, so long as he (defendant) was enjoying anything under it, and this although the plaintiff's conduct was such as otherwise to disentitle him from demanding specific performance.

In strict legal parlance, the defendant was neither in possession of, nor a trespasser on, the plaintiff's land—*i.e.* he had done no wrong for which the plaintiff could have maintained an action of trespass; nor had he any such possession that the plaintiff could have sustained an ejectment; nor would the plaintiff have been put to a right of entry.

Judgment

The defendant had erected a mill-dam on his own land—an act in itself perfectly lawful, and which *per se* could never furnish a cause of action against him. It is only by reason of consequential damage—the backing of water from the dam on to the plaintiff's land—that the latter has a right to sue. This cause of action arises neither from trespass nor unlawful entry, or taking possession, but simply from the consequence of an act done by defendant on his own land. Even twenty years' uninterrupted continuance of this consequence would not deprive the plaintiff of his title to the soil, though it would bar him from complaining of the defendant's act as a wrong.

The proposition urged for the plaintiff, then, amounts to this: if a defendant who has wrongfully assumed to exercise or enjoy an easement upon or over the land of another, enters into a contract with that other for the purchase of such lands, he cannot resist specific performance of the contract without first discontinuing the enjoyment of the easement, although the owner of

the land has been guilty of *mala fides* in carrying out the contract, or of laches and unjustifiable delay. In other words, the continued enjoyment of the easement is a continued affirmance of the contract, whatever may have been the conduct of the opposite party. 1854. Blackwood v. Paul.

Viewing it as an act of mere nuisance to the property of the plaintiff, as it would be, so long as the defendant derived no beneficial use or result whatever from backing the water on the plaintiff's land, having no mill or machinery to be propelled by the water, would this proposition hold good? If a man so build his house as to shoot water from the roof or gutter, &c., on to his neighbor's garden or buildings, thereby inflicting some appreciable injury, would the same rule apply that if he entered into a contract to buy the property injured, although there was *mala fides*, laches, or anything else in the vendor's contract which would otherwies disentitle him to claim specific performance, yet so long as he continued things in the state which caused the nuisance he must be held to be in continued affirmance of the contract, thereby waiving all objections to the vendor's right to enforce it. Judgment.

I confess nothing short of the clearest authority could induce me to adopt such a conclusion; and yet, unless it can be sustained, I think the reasoning of the learned Chancellor in giving judgment in favor of the defendant and denying the plaintiff's right to specific performance, unanswered. So far as I can judge, it is unanswerable, and I therefore am of opinion the defendant should succeed in this appeal.

ESTEN, V. C.—I adhere to the view I expressed in this case in the court below, with one exception. I think it was wrong to impute bad faith to the plaintiff when the answer was silent on the subject. The court is not warranted in imputing what the defendant has

1854.

Blackwood v. Paul.

not ventured to impute, unless it is so clear as to admit of no doubt, which certainly cannot be predicated of this case. I do not think the plaintiff's conduct in reference to the form of conveyance justly liable to blame. It is not easy to determine what is the effect of the provision in the agreement that the plaintiff should execute a conveyance without covenants, or to conclude that it did not mean that the defendant should accept whatever title the plaintiff could confer. I am quite sure the plaintiff may reasonably have thought so, and that the tender of a conveyance without the concurrence of *Anson Paul* might have been made with perfect good faith. If the case were otherwise, in what situation did *Anson Paul* stand? He had no title. The bond was made to the two brothers by a firm in Montreal more than twenty years before, and the plaintiff had been in possession ever since without any claim of title on the part of *Anson Paul* and under these circumstances I think the plaintiff might reasonably have supposed that the concurrence of *Anson Paul* was wholly unnecessary.

Judgment.

Now if a vendor promptly tender a conveyance conformable to the tenor of the contract according to his understanding of it, although he may be mistaken both as to the necessary parties to the deed or the quantity or description of the land to be conveyed, he will not be debarred from relief in this court if he have acted *bona fide* according to his understanding of the contract and from a real desire to carry it into effect.

When the defendant in his turn prepared and tendered a deed which the plaintiff declined to execute, I understand him to have meant that he had tendered a deed which he thought sufficient, and which he was still prepared to execute, but that he did not consider himself bound to execute such a deed as the defendant had caused to be prepared,—which also is perfectly consistent with good faith.

The answer asserts that the plaintiff had ever since refused to execute a proper conveyance, but no evidence was adduced of any other refusal than the one I have referred to. 1854. Blackwood v. Paul.

Then the defendant has enjoyed the fruits of the contract with the acquiescence of the plaintiff ever since, until the commencement of the suit. This leads me to make some remarks upon the situation of the defendant as regards the land in question both before and after the agreement. In the judgment given in the court below I had described the defendant before the agreement as a trespasser. This expression involved a verbal inaccuracy, pardonable perhaps in an equity judge, especially as it was not used in a technical sense. The remedy, it appears, was an action on the case, not an action of trespass. This inaccuracy of expression has not affected the correctness of the conclusion. The defendant was certainly a wrong-doer immediately before the execution of the agreement, by his own confession. He entered into the agreement in order that he might cease to be a wrong-doer and might enjoy rightfully, and it was the intention of the agreement that he should enjoy the use of the property as before without interruption. Judgment.

By that agreement he purchased the land in question and became in equity the owner of it in fee simple, and from that moment he had possession of it, in the intendment of a court of equity, whatever view a court of law might take of it. He had purchased it, and from thenceforth was to have the entire use of it, and it cannot be supposed that the plaintiff was to retain the possession during the short interval which would elapse previously to the execution of the conveyance.

This, I think, is the true construction; but supposing the possession was not to be given until the execuiion

1854. Blackwood v. Paul.

of the conveyance, the defendant was at least to enjoy an easement or a license to overflow the land until possession should be given. This mode of enjoyment, whatever it was, resulted from the agreement, because it was no longer tortious, but had become rightful, which could not be except through the operation of the contract. Now, this state of things continued from the date of the agreement until the commencement of the suit.

Although, therefore, the circumstances of this case were calculated to excite considerable doubt as to whether the contract was such a reasonable one as the court ought to execute; as to whether the change of circumstances ought not to make a difference; as to whether the plaintiff had not been guilty of bad faith; as to whether such an objection could be waived by the defendant's adherence to the contract; and as to whether the circumstances of the case did not afford the defendant an equitable claim to the property independently of the agreement, it does not seem to me that sufficient grounds exist on which to rest a conclusion against the plaintiff upon any of these points; therefore I regard the present as a case in which a fair and reasonable contract has been entered into, which the plaintiff has been prompt to execute according to his understanding of it, but the execution of which has been prevented by a misunderstanding existing in good faith as to the proper parties to the conveyance and the quantity and description of the property to be conveyed; while the vendor has suffered the purchaser to enjoy the property as claimed by him without objection or disturbance.

Judgment.

To such a case I cannot see any answer, and therefore I think the decree ought to be affirmed with costs.

SPRAGGE, V. C.—The arguments used upon the appeal of this case, where it has been very well argued,

and subsequent consideration, have not led me to change the view which I entertained in the court below. 1854. Blackwood v. Paul.

Upon the point of uncertainty in the description of the land agreed to be conveyed and of the parties to join in the conveyance—a point which appears to have had considerable weight with some of the learned judges in this court—I observe that no objection on that ground is taken by the answer; and further, that there is not, in my judgment, any such want of certainty as should prevent the court from decreeing the performance of the contract, if otherwise proper to be performed; for it is the clear duty of the court to place a construction upon this contract, if not incapable of being construed, and to render it certain by inquiry if not so already. Assuming then, for the purposes of this question, that it was doubtful upon the contract whether *Anson Paul* should have joined in the conveyance, and also doubtful whether the land covered by the water at the date of the agreement, or covered by water at any time before, was to be conveyed, and uncertain also how much land could in either case be covered with water; upon all these points it was competent to the court, after deciding the main question whether specific performance should be decreed or refused, to declare who should join in the conveyance, or to leave that point to the master, by whom the conveyance was to be settled. Upon the point to what extent the defendant was to be at liberty to flood the land, or in other words, to what height he was to be at liberty to raise the water, no question remained, the plaintiff's counsel submitting at the hearing that it should be taken at the highest point at which it had previously stood, and that the land overflowed by water when standing at that point should be the land conveyed. There remained then this inquiry, at what height the water had stood, and what land was thereby overflowed? and that land, properly described, was the land, a description of which was to

Judgment.

1854. Blackwood v. Paul.

be inserted in the deed. I do not think that there is anything in this which could not without much difficulty be reduced to a certainty.

Take the case of a contract perfectly unexceptionable, which provided in express terms for the sale and conveyance of so much land as had at any time theretofore been overflowed by the water of a certain mill-pond, could any supposed uncertainty in such a contract be a bar to specific performance being decreed? And yet in that case the same inquiries, and no more, would be necessary as in this case.

Upon again reading over the evidence I am less satisfied than I was before that the plaintiff knowingly and wilfully tendered a deed with less than the proper quantity of land. I think his conduct was obstinate and petulant, but I doubt if it was fraudulent, and I observe that the defendant does not set up in his answer that it was so. He came to the court to enforce an agreement upon the construction of which he and the other contracting party differed: he was wrong in his construction, and had acted illiberally, perhaps not very reasonably; but the other party had acted under the agreement, had treated it as still subsisting, and had been in the enjoyment of the benefit given to him by the contract *according to his own construction of it.* The words of Lord *St. Leonard's* when Lord Chancellor of Ireland, in the case of *Clarke* v. *Werre (a)*, are apposite to the circumstances existing between these parties and to the objection on the score of laches which has been raised by the defendant; he says, "It is new to me to hear it argued that because a party has neglected for a long time to call for the execution of a contract for a lease, he being in enjoyment of the benefits given to him by the contract, therefore he is not at liberty to enforce it at any time before the

Judgment

(a) 1 J. & Lat. at p. 727.

contract expires." In that case the heir at law of the intended lessor was plaintiff, and I almost doubt whether the party intended by the Lord Chancellor as being in the enjoyment of the benefits given by the contract was not the intended lessee, the defendant, who raised the objection which he was combating (the report may have been not strictly accurate), but supposing it to be strictly accurate, this case is stronger for if the enjoyment of the benefit of a contract by the party seeking to enforce it is in his favor, *a fortiori* is it in his favor when the party objecting to its being enforced has enjoyed the benefit of it.

1854.
Blackwood v. Paul.

There is another point in which that case closely resembles this: by the contract the rent agreed to be reserved was £5 13s. 9d. per acre, but by a subsequent verbal agreement it was reduced by the landlord to £4 per acre, and the rent was paid at that rate to the landlord up to the date of his death. The plaintiff, however, insisted upon the original rent, and only waived his right to it, properly as Sir *Edward Sugden* said, at the bar. His conduct, therefore, had not been perfectly correct, and costs were for that reason refused to him; for he had insisted upon giving to the defendant a lease varying in an important particular from the lease the defendant was entitled to; yet such a lease as the defendant was entitled to was decreed against him.

Judgment.

The language of Sir *James Wigram* in *Hunter* v. *Daniel (a)* asserts much the same principle as to a party taking the benefit of a contract. That case was for specific performance by a party who was bound to make certain payments at stipulated times; and time was of the essence of the contract. Sir *James Wigram* agreed that each default in payment by the plaintiff gave the defendant a right to rescind the contract, but

(a) 4 Hare, at p. 433.

1854.

Blackwood v. Paul.

that right he says should have been asserted the moment the breach occurred; and he adds, "the defendants were not at liberty to treat the agreement as still subsisting, and to take the benefit of it at the expense of the plaintiff if they meant to insist that it was at an end;" and he held the plaintiff entitled to specific performance.

Judgment

I have no doubt upon the evidence that *Hanvey's* survey was wrong, but it is not charged in the answer or established in evidence that it was intentionally so, or that the plaintiff knew it to be so; but even if he did, the defendant acting as he did, was not in a position, as I view the case, to resist specific performance.

KENDREW v. SHEWAN.

May 31st. and Sept. 23rd.

Specific performance—Dower.

Where a party agrees to convey property, he is bound to do so free from dower; or if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money.

This bill was filed by *William Kendrew* against *Christopher Shewan*, *Marcus Rossin*, and *Samuel Rossin*, to enforce the specific performance of a contract entered into by *Shewan* with plaintiff for the sale of a small piece of land in the city of Toronto for

Statement.

the sum of £287 10s., but which was bought in reality as agent for one *Walker*, in rear of whose premises the strip of land was situate. After the memorandum of agreement to sell was signed, the defendants *Rossin* having been in treaty for the purchase of it and hearing of the arrangement between *Kendrew* and *Shewan*, expostulated with *Shewan* for having sold to any other person without giving them the option of purchasing at the same price, the land being of greater value to them than any other person. It appeared in evidence that *Shewan*, before concluding an agreement

1854.

Kendrew v. Shewan.

with *Kendrew*, had consulted one *Hutchinson*, the partner of *Walker*, who expressed an opinion that the price was large. Afterwards *Shewan*, discovering that plaintiff had acted as agent of *Walker*, suspected that *Hutchinson* had had an interest in advising him as he had done; upon the examination of *Hutchinson*, however, it was shewn clearly that he had not, but on the contrary, was himself desirous of purchasing the land with a view of selling it to *Walker* at an advanced price.

Statement.

On plaintiff applying to *Shewan* for a deed, it was alleged that his wife would not consent to release her dower, and a deed was offered without such release, but this the plaintiff refused to accept. Thereupon *Shewan*, treating the refusal of plaintiff as an abandonment of the agreement, sold and conveyed the property to the defendant *Rossin* for £300, in which conveyance the wife's dower was duly barred.

Mr. *Turner* and Mr. *McMichael* for plaintiff.

Mr. *Vankoughnet*, *Q. C.*, and Mr. *Crickmore*, for defendants.

Argument.

On the argument the defendants relied chiefly on the objection that *Walker* should have been made plaintiff, and cited *Nelthrope* v. *Holgate (a)*. Opposed to this, counsel for plaintiff cited *Sugden*'s Treatise on Vendors and Purchasers, page 381, to shew that the principal in such a case might or might not be the plaintiff. This objection, however, was subsequently abandoned, the parties desiring the opinion of the court on the other points of the case, and judgment was now given by

Sept. 23.

ESTEN, V. C.—In this case the contract is free from objection, and the utmost diligence has been shewn by

(a) 1 Coll. 203.

1854.

Kendrew v. Shewan.

the plaintiff in carrying it into effect. The suit is resisted on three grounds. The first objection seems to be, that plaintiff appeared to be purchasing for himself, while he was really purchasing for *Walker*; this seems immaterial. The next is, that fraud was used by *Hutchinson* to induce him to sell the property to the plaintiff for *Walker's* benefit, by representing the price as very high. I think this wholly fails. I think *Hutchinson* expressed his real opinion *bona fide* to *Shewan*; that there was no mistake or misapprehension as to the real value; that there was no desire to favor *Walker*, much less was there any joint interest with him, or any collusion or concert between them; and a perfectly fair price having been offered for the property, and *Shewan* having upon an honest expression of opinion accepted it and concluded an agreement at that price, it is not because a third person to whom the property is peculiarly valuable was willing to give a little more, that this agreement is not to be carried into execution.

Judgment.

The third objection is, that the refusal to accept the deed divested the interest under the contract, and authorized *Shewan* to enter into the new agreement with the *Rossins*.

The contract, no doubt, bound *Shewan* to convey the estate free from incumbrances, including dower. His duty was to ascertain, *bona fide*, whether his wife was willing to bar her dower, and to induce her by any reasonable sacrifice on his own part to do so; if she refused, then to inform *Kendrew* of the fact, and offer to rescind the contract, paying his expenses, or offer a conveyance subject to dower, with an abatement; instead of which the defendant and his solicitor, mentioning indeed that Mrs. *Shewan* would not bar her dower, tender a deed without such bar, offering to receive the purchase money if such deed were accepted, but insisting that it was a good and sufficient deed,

and refusing to execute any other. This deed the plaintiff refused to accept; offering, however, the purchase money unconditionally, and calling four times besides in order to tender it in one day. 1854. Kendrew v. Shewan.

There is no doubt but that under these circumstances the interest of the contract was not divested: it, of course, could not be affected by the sale to the *Rossins* with notice, and the property having been conveyed to them at an advanced price but with notice, they received it subject to the plaintiff's equity. Judgment.

I think they are bound to convey to the plaintiff on payment of the £287 10s. to *Shewan*, leaving them to their remedy upon the covenants.

The decree should be with costs.

HAMILTON v. HOWARD.
BURNSIDE v. LUND.

Dec 13.

Practice—Foreclosure.

Where a plaintiff in suits for foreclosure or sale asks for a reference to the Master to enquire as to other incumbrances, he takes such reference at the peril of costs if there are in reality no other incumbrances on the estate.

These were foreclosure suits, and the bill in each had been taken *pro confesso*. At the hearing, Mr. *Roaf* in the former and Mr. *Morphy* in the latter cause, asked that the decree might direct a reference to the Master to inquire and report as to other incumbrances. No affidavit was produced shewing that any such did really exist. Statement.

The court directed the decrees to be made as asked, at the same time stating that where decrees are made in this form, as was done in *Moffatt* v. *March* (*a*), the

(*a*) Ante vol. 3, p. 163.

1854. Hurnside v. Lund.

proper course for the master to pursue in respect of judgment creditors who are summoned by him in the manner provided by the general orders of 1853, and neglect to prove their claims, is, after certifying that they had been served, to report that in consequence of default in proving their claims, if any, he finds that they are not incumbrancers upon the property in question.

Judgment

In *pro confesso* cases, where the bill is for foreclosure or sale of mortgaged premises, and plaintiff asks for a decree and a reference as to other incumbrancers, as here, without being prepared with evidence to show that there are other incumbrancers, he must pay the costs of the reference in case it shall appear to the Master that at the time of making the decree there were no incumbrancers on the property other than the one in question in the cause.

June 14 1853, and Jan. 30 1854.

GRANTHAM v. HAWKE.

Attorney and client—Fraud.

An attorney assigned to his client a mortgage securing £175, with a payment of £50 endorsed, leaving an apparent balance of £25 due; in reality no sum whatever had been paid on account, but the £125 was the amount for which the attorney (the mortgagee) had sold the land to the mortgagor. Afterwards the attorney claimed to have a demand against the client for a bill of costs in respect of proceedings taken upon this mortgage against the mortgagor, and obtained from the client his promissory note for the amount; when the note became due, the attorney charged the client 5 per cent. commission, in addition to legal interest on renewing it, and this was done on three several occasions. On a bill filed by the client, the court set aside the assignment of the mortgage, and directed an account of all dealings between the attorney and client with costs to the hearing.

Statement.

The bill in this cause was filed by *John Grantham* against *Edward Henry Hawke*, setting forth that defendant had for some years acted as legal adviser of plaintiff; that during that time defendant had a mortgage against one *Murphy* apparently for £175,

which defendant alleged was the price of the land mortgage, and which he had conveyed to *Murphy*, upon which mortgage there was endorsed a sum of £50; that plaintiff had, at the request of the defendant and relying on his statements, become the purchaser of this mortgage; that subsequently defendant, acting as attorney for the plaintiff, took proceedings against the mortgagor, and had incurred a bill of costs and charges which he claimed to have a demand upon the plaintiff for, and required plaintiff to give him a promissory note for the amount, which plaintiff accordingly did, and which the defendant when it matured renewed for the plaintiff, charging him on such renewal five per cent. commission in addition to the usual discount; that the plaintiff had since discovered that no sum whatever had been paid on account of the purchase money, and the bill prayed the assignment of the mortgage to be set aside on the ground of fraud, and an account directed of all dealings between the parties.

The defendant having put in an answer, was examined *viva voce* before the court.

The cause now came on to be heard on the pleadings and evidence, the nature of which is more fully set forth in the judgment.

Mr. *Roaf* for plaintiff.

Mr. *R. Cooper*, for defendant, objected that the bill was not tenable for any object other than setting aside the assignment of mortgage and the promissory note connected therewith. If this be so, the plaintiff has no right to draw in all other notes and bills of costs that may have passed between the parties. Argument.

THE CHANCELLOR.—This a very plain case. On the 31st of April 1851 Mr. *Hawke* sold and assigned to *Grantham* a mortgage, upon which £125 with a considerable amount of interest appeared to be due. At

1854.

Grantham v. Hawke.

that date, and for several years previous, and for some time subsequent, *Hawke* was the general attorney of *Grantham*, whose law business appears to have been extensive; and in the matter of the arrangement of the mortgage he acted as the attorney of both parties (*a*). Now it is scarcely necessary to observe, that transactions of that sort are regarded by courts of equity with the utmost jealousy. An attorney seeking to sustain a contract under such circumstances must be prepared to establish the perfect fairness of the transaction; and he must satisfy the court that he has afforded to his client all that protection and advice, as against himself, which he would have afforded had the transaction been with some third party; and the question for our determination is simply this, Have those conditions, indispensible to the validity of the contract, been complied with in the present case?

Judgment.

The facts are not in dispute. *Hawke* having sold the premises in question to one *Murphy* for £125, took back the mortgage to secure the purchase money. That was the real nature of the dealing between the parties. But the transaction is represented in the deed to have been wholly different. The deed states *Murphy's* debt to *Hawke* to be £175. That is quite untrue. The only debt then, or ever due, so far as we know, was the purchase money, which, as I have said, was but £125. It then states an agreement to pay £50 in hand. That is wholly fabulous. No such sum was either paid or agreed to be paid. Lastly, it provides for the payment of the balance of £125 by equal semi-annual instalments of £25 each. A receipt for £50 is endorsed upon the deed and signed by *Hawke*. Now it will not be denied, I think, that there is a very substantial difference between a mortgage upon land sold to secure the full amount of the pur-

(*a*) Lawless v. Mansfield, 1 D. & W. 600; Hewitt v. Loosemore, 9 Hare 454.

chase money, and a mortgage to secure two-thirds of the price, the remaining third having been paid by the purchaser in hand. In the one case the security would be considered, probably, sufficient; in the other clearly insufficient. Yet Mr. *Hawke* himself admits that, dealing for the sale of this security to his own client, he abstained from giving him any information as to the real nature of the transaction,—he failed to caution him against the erroneous statements in the mortgage, and which he knew to be altogether fabulous; and in that state of things it has been argued before us that this transaction cannot be impeached. Now I must confess that I am quite at a loss to understand the principle upon which it is supposed that this transaction can be sustained under such circumstances. Surely it cannot be said, with any show of reason, that *Grantham* had all that advice and protection against his attorney which, by the law of this court, his attorney was bound to have afforded him. Had *Grantham* been informed, as the truth was, that no sum had been paid down,—that the mortgage was given to secure the whole purchase money, and that from the time of its execution not one shilling had been paid on foot of either principal or interest; with such information it is not very likely, I apprehend, that he would have become the purchaser of such a security, at least without taking some steps to satisfy himself as to its intrinsic value. But Mr. *Hawke*, knowing the truth, permits his client to act upon erroneous statements in a deed to which he was himself a party; statements which represent this security as something wholly different from that which it really was, and upon which, if true, *Grantham* might have well concluded the security to be sufficient. How can such a transaction be sustained? We have no satisfactory explanation as to the manner in which these mis-statements came to be introduced into the mortgage deed. If we suppose that to have been done designedly, then it would be a case of direct, positive

Judgment.

1854. Grantham v. Hawke.

fraud which would have avoided the contract as between ordinary individuals. But assuming it to have been done innocently, still, clearly it was Mr. *Hawke's* duty to have furnished his client with full information as to the real nature of the transaction before he permitted him to become the purchaser of this security; and, having failed in that which was his plain duty to his client, it follows that this contract must be set aside.

The plaintiff's equity cannot be resisted, I think, on the ground of acquiescence or confirmation, which was suggested in argument, though not pressed. To have constituted a defence in a case like the present, the acquiescence must have been, I apprehend, clear and distinctly proved. The client must have been free from influence, aware of all material circumstances, and acquainted with the infirmity of the contract alleged to have been confirmed. Here there Judgment. is an entire absence of any evidence of that sort. It is not shewn that the plaintiff was aware of the material circumstances of this case even at the time he filed his bill. The contrary, perhaps, may be fairly inferred; and the evidence, in my opinion, fails altogether to prove that the defendant was aware of the infirmity of that contract during any of the occurrences which are relied on as a confirmation of it.

As the assignment of the mortgage must be set aside, it becomes immaterial to consider the question respecting the promissory note for £38 1s. 0d., which, of course, falls with it. But I think it right to add that; though the sale of the mortgage had been sustained, that note could not have been permitted to stand. In *Lawless* v. *Mansfield*, Lord *St. Leonard's* (*a*) stepped out of his way to make this observation, "I must remark, however, that whether the court will permit a solicitor to settle an account with his client,

(*a*) 1 D. & W. 616.

and strike a balance whenever he thinks proper, actually charging his client with interest upon interest by taking security for such balances, is a question deserving of the greatest consideration." I am very much inclined to think his lordship's doubt well founded. But, however that may be, I think I may venture to affirm that the illegality of the practice pursued in this case is clear beyond all doubt. A promissory note, obtained by an attorney from his client for a bill of costs at the close of February, is renewed for the third time on the 13th of September; the attorney charges his client, upon each renewal, five per cent. commission, besides legal interest. In other words, Mr. *Hawke* has been exacting from his client interest on this bill of costs at a rate approaching 40 per cent. per annum. That is a species of extortion which no court, in my opinion, ought to permit an attorney to practice.

1854.

Grantham v. Hawke.

The sale of the mortgage must be set aside, and account directed. The plaintiff is entitled to the costs till the hearing.

Judgment.

ESTEN, V. C.—The circumstance relied upon in this case to impeach the assignment of mortgage would probably not be sufficient for that purpose unless a fiduciary relation existed between the parties, or unless an actually fraudulent intention were shewn to exist: but Mr. *Hawke* having been employed as the legal adviser of the plaintiff for a number of years, and while that relation subsisted between them having executed this assignment, prepared by himself, without any attorney or legal adviser being employed in that matter by *Grantham*, I think he was the attorney of *Grantham* in the particular transaction, and as such it was undoubtedly his duty to communicate to him so material a circumstance as the mortgage having been originally for £125, and not for £175 with £50 paid upon it; and this having been omitted, I think the

1854. transaction cannot stand; but I impute no actual fraud to Mr. *Hawke*. An account should be decreed, and further directions and costs reserved.

Grantham v. Hawke.

SPRAGGE, V. C.—I concur in the views expressed by his Lordship the Chancellor, and think the decree should be with costs up to the hearing.

HUGHSON v. DAVIS.

Registration of judgment—Lien—Costs.

March 11. and Sept. 23. 1853.

A vendor's lien for unpaid purchase money has priority over the lien created by a registered judgement against the vendee.

The plaintiff filed his bill, founding his right to relief, *inter alia*, on grounds of fraud which he entirly failed to establish, and in his bill he had made statements which he knew to be untrue, and suppressed the truth in other matters: the court, considering him entitled to relief on other grounds, which he had sustained, made a decree in his favor, but without costs.

Statement.

The bill in this cause was filed by *Nathaniel Hughson* against *Joseph Davis* and *Jonathan Davis*, praying to have the benefit of certain mortgage securities executed by the defendant *Joseph Davis*, under the circumstances stated in th e bill, which are clearly set forth in the judgment of the court.

Argument.

Mr. *Morphy* for plaintiff.

Mr. *Freeman*, for defendant *Jonathan Davis*. The other defendant did not appear.

Sept. 23.

The judgment of the court was now deli vered by

Judgment.

ESTEN, V. C.—The facts of this case are as follows; The plaintiff *Hughson*, in the month of November in the year 1851, contracted with the defendant *Joseph Davis* for the sale to him of the lands in question in this cause,—being part of lots Nos. 9 and 10, and of the broken fronts of lots Nos. 9 and 10, in the 1st

concession of East Flamboro',—for the sum of £12 10s. per acre, amounting in the whole to the sum of £1218 15s., of which £300 was to be paid down, and the remainder, amounting to £918 15s., was to be paid by certain annual instalments, with interest, and was to be secured by a mortgage of the property in the meantime. This was the nature of the agreement; but it was understood before any agreement was concluded that *Davis* would be unable to pay the £300 which was to be paid down out of his own means, and that it would have to be raised out of the property; and it was accordingly agreed, as part of the original contract, that *Hughson* should make a conveyance, as originally intended, to *Davis*, and that *Davis* should execute two mortgages—one for £500, to a third person, and to stand as a first incumbrance; the other, for the intended balance of the purchase money, £918 15s., to form the second incumbrance on the property. The object of making the first mortgage of £500 was to dispose of it in order to raise the £300 which was intended to be paid down; so that this mortgage must be considered as coming in lieu of the cash payment. If no more than £300 should be obtained for this mortgage, it was all of course to go to the plaintiff *Hughson;* but if more should be obtained, the surplus was to be received by *Davis*. It might have been considered that it was necessary to make the first mortgage for so large an amount in order to secure the £300 being raised; and although thereby the plaintiff's mortgage for the balance of the purchase money would be rendered an insufficient security unless the property increased in value, yet, on the other hand, *Davis* was in consequence paying £200 more for the property than he had contracted to pay, and he incurred the risk of doing this without receiving any equivalent, as there might be no surplus over and above the £300, and if there were any, its amount was quite uncertain. When *Davis* visited Toronto, before the execution of the deed, he learned that he would have to submit to a

Judgment.

1853.

Hughson v. Davis.

sacrifice of ten or eleven per cent. upon the sale of this mortgage. If this, however, was all, it was quite unnecessary to make the mortgage for so large an amount, and a reduction of it would have bettered the plaintiff's security for the balance of the purchase money. *Davis* does not appear to have communicated this fact to *Hughson*, who, however, makes no complaint of it in his bill—and indeed he thinks proper, for his own purposes, to suppress all mention of this prior mortgage, the first intimation of which is received from the answer. The arrangement which has been mentioned was carried into effect without any alteration. *Hughson* executed a conveyance in fee to *Davis*, and he in his turn made two mortgages—one to a person of the name of *Yeates* for £500, which was registered first, and the other for £918 15*s.* to the plaintiff which was registered next, and formed the second incumbrance upon the property. Ineffectual attempts were made to dispose of the first mortgage, and a plan was formed of raising the £300 by means of a mortgage to the Trust and Loan Company. The agents of the company were consulted for this purpose, and such progress was made in carrying this arrangement into effect, that a note was discounted at the Bank of Upper Canada for £200, and £150 was paid to *Hughson*, and the remaining £50, less the discount, to *Davis*, in anticipation of the loan from the Trust and Loan Company, out of which the note was to be retired. The solicitors or agents of the company had insisted, as an indispensible condition of the loan, that the proposed mortgage of the company should stand as the first incumbrance on the property; and therefore it became necessary to discharge the two mortgages which were already on the register, which was accordingly done, and an agreement was signed by *Davis*, whereby he undertook, so soon as the mortgage to the Trust and Loan Company should be completed, to perfect a fresh mortgage to the plaintiff for £918 15*s.*, the balance of his purchase money, as the next imme-

Judgment.

diate incumbrance after the mortgage of the company. The negociation with the Trust and Loan Company failed, contrary to the expectations of all parties, even of the solicitors of the company themselves. When the refusal of the company to make the loan was intimated, the defendant executed a lease to the plaintiff for sixty years at a nominal rent, redeemable at any time within the term on payment of the sum of £918 15s. and interest. This lease was a clumsy contrivance, but it appears to have been intended for the plaintiff's security. The other defendant *Jonathan Davis*, had obtained a judgment against the defendant, *Joseph Davis*, as long ago as the year 1838. He registered this judgment in the county of Halton about the end of February or the beginning of March 1852. When the conveyance and mortgages were registered, the land in question was situated in this county, but before the registration of the judgment it had been severed from the county of Halton and annexed to the county of Wentworth. *Joseph Davis*, who has been examined by the plaintiff and cross-examined by the defendant *Jonathan Davis*, states in his evidence—and I see no reason to doubt the truth of such statement—that, finding that *Jonathan Davis* had registered his judgment in the county of Halton, he consulted Mr. *Burton*, a legal gentleman, as to the effect of such registration, and being informed by him that he did not consider it effectual, and hearing also upon inquiry that the judgment had not been registered in the county of Wentworth, and supposing such to have been the case, he executed a mortgage to the plaintiff for the whole amount of the purchase money, £1218 15s. and interest, without his knowledge, although he afterwards approved of it, for the purpose of giving him priority over *Jonathan Davis*. This precaution was, however, ineffectual, for *Jonathan Davis* had in fact effected the registration of his judgment in the county of Wentworth before the execution and registration of this mortgage. The £300 has not been raised or paid to the plaintiff; the note

1853.

Hughson v. Davis.

Judgment.

1853. Hughson v. Davis.

for £200 has not been retired, and actions have been brought upon it by the Bank of Upper Canada against both the plaintiff and *Joseph Davis*. Under these circumstances, this suit is instituted for the purpose of setting aside the whole transaction for fraud, and, failing that, to establish the mortgage for £918 15s., and a lien for the £300, in preference to the judgment debt of *Jonathan Davis*. I should have remarked, that the release of the mortgages were registered in the county of Halton after the severance of the lands in question from that county and their annexation to the county of Wentworth.

Judgment.

The case of the plaintiff, so far as it stands upon the ground of fraud, seems to me entirely to fail: it is in fact untrue. The bill asserts that *Davis* represented to the plaintiff that he was able to pay the £300, in cash, at the time of the sale; that he deceived him in this particular; and this alleged misrepresentation forms the principal feature in the fraud of which the bill complains. The untruth of this statement is manifest from what has been already mentioned of the case. It appears that *Hughson*, having occasion for money to meet some urgent demands, had advertised the property for sale; that *Davis* had spoken to him on the subject, and asked him what his price was; to which the plaintiff replied not less than £12 10s. an acre, and £300 down; upon which *Davis* remarked that he could not pay that amount out of his own means, but would probably be able to raise it out of the property if the plaintiff assisted him. The witness *Kenny* states that they were a long time making the bargain, because the plaintiff was unwilling to forego the cash payment. *Davis* also states in his evidence that the plaintiff was averse to the precedence of the £500 mortgage before his own, and that that was the only part of the bargain that he did not like. I apprehend that *Hughson* was fully alive to the importance of the cash payment and the priority of his own mort-

1853.

Hughson v. Davis.

gage; that he knew from the first that *Davis* would be unable to pay the £300 in cash out of his own means at the time of the sale; and that, being in want of money, and finding no other means present themselves of obtaining it, he reluctantly, but of his own free will, consented to the expedient proposed by *Davis*, of creating a mortgage antecedent to his own, for the purpose of rasing the £300 by the sale of it. He made a second attempt to obtain priority for his own mortgage at the time of the execution of the deeds, saying to *Yeates* that he thought the money could be raised by a second mortgage; but upon being assured by both *Yeates* and *Davis* that this was impossible, he relinquished the design. He afterwards consented in the same way to the release of the mortgages, in order to make a first mortgage to the Trust and Loan Company, for the purpose of raising the £300. I see no evidence of fraud in the whole of this transaction. *Davis* was not the solicitor of the plaintiff, and I think exerted no influence over him whatever. *Davis* drew the deeds, but they were drawn unexceptionably, and no complaint is made of them. The assurance given by *Yeates* and *Davis* of the impossibility of raising the £300 except upon a first mortgage was indisputably true; no misrepresentation was used or deceit practised; and *Hughson* thoroughly understood the transaction in which he was engaged, and was perfect master of his own actions. The most unfavorable feature in the transaction was the unnecessarily large amount of the prior mortgage, and the retention of the surplus by *Davis*, instead of its payment to *Hughson*, in reduction of his own mortgage. It is possible that the first mortgage might have been made originally for so large an amount from an apprehension that if made for a less amount it would not produce the £300; and yet it is difficult to understand how that supposition could be entertained. It has been already mentioned that *Davis* learned in the course of his enquiries that he would have to submit to a sacrifice of ten or eleven per

Judgment.

1853.

Hughson v. Davis.

cent.; but in this case a mortgage for between £300 and £400 would have sufficed, and the surplus ought to have been paid to *Hughson* in reduction of the purchase money. The plaintiff might not have been so alive to these considerations as *Davis*, and the assistance of a solicitor in this respect might have been useful. A suspicion may arise in the mind that *Davis*, under these circumstances, might have profited by *Hughson's* ignorance to raise a larger sum than was necessary, in order that the difference might be at his own disposal, —money, perhaps, being as welcome to him as to the plaintiff. And yet this suspicion may be unjust, as nothing has occurred to call for any explanation of these circumstances on the part of *Davis*, and the matter is related by him in his evidence with a great appearance of candor, and the apparent absence of any suspicion that there was anything wrong in it. On the other hand—and this is the most important circumstance of all—the plaintiff makes no complaint on this head; he suppresses all mention of the mortgage for £500, and of the circumstances connected with it; and, although he alludes to the project of raising the £300 by a mortgage to the Trust and Loan Company, he makes the amount of it, or the disposition of the difference, no subject of complaint, and does not insist on it as any instance of fraud.

Judgment.

Under these circumstances, it would be too much for the court to attribute any weight to these facts; and I feel bound to say, that the case stated by the bill as one of fraud is not according to the fact, and altogether fails.

We have therefore only the points of law to deal with, which, however, are of considerable importance and interest. The legal estate in fee in the lands in question of course passed to *Davis* under the conveyance from *Hughson*, and when the releases of the two mortgages were executed by *Yeates* and *Hughson*

respectively, supposing them to have been effectual, the legal estate in fee in the same lands again vested in *Davis* free from incumbrances, and when *Jonathan Davis* registered his judgment in the county of Wentworth, it attached upon the legal inheritance so vested in *Davis*. What, under these circumstances, would be the relative positions of *Hughson* and *Jonathan Davis* in regard to their respective claims upon the lands in question? It has been already mentioned that when *Hughson* executed the release of his mortgage an agreement was signed by *Davis*, to the effect that so soon as a mortgage should be perfected to the Trust and Loan Company, he would grant a new mortgage to *Hughson* on these or other lands of precisely the same nature as the one he had relinquished, to be subject only to the mortgage to the Trust and Loan Company if upon the same lands; and if that mortgage should never be perfected, to be subject to nothing, but to form the first incumbrance upon the property. This agreement was founded upon valuable consideration—the release of the existing mortgage—and formed a specific lien upon the lands in question, making *Hughson* in fact an equitable mortgagee of those lands for the amount of the discharged mortgage, and binding upon *Joseph Davis*, and upon all claiming under him, either as volunteers, or with notice of such agreement, or without an equal equity to that created by it. This claim, however, extended no further than the balance of the purchase money, the £918 15s., secured by the released mortgage. It becomes very material, therefore, to the plaintiff to determine what are his rights with respect to the £300, which, in the first instance, was to be paid in cash, and was afterwards to be raised by sale of the £500 mortgage. Had he, or not, a lien for this sum? Several cases were cited upon this point by the learned counsel who argued the cause on both sides. I have examined all the authorities which I thought it material to consult on the subject, and they appear to me to establish this

Judgment.

1853.

Hughson v. Davis.

rule—namely, that a lien always exists upon lands sold for purchase money unpaid, by implication of law, in favor of the vendor; that it lies upon the purchaser to shew that it does not exist; that he must shew this by evidence of express waiver, or of something incompatible with the lien; and that it is not sufficient to shew that the parties were ignorant of, and therefore did not trust to, it. A strong authority in favour of the lien is *Winter* v. Lord *Anson*, reported in 1 S. & S., and, on appeal, in 3 Russ. 488, where the vendor, upon a friend advising him to require a mortgage for the part of the purchase money which was to remain unpaid, remarked that he did not care about it, as he had the bond of the purchaser, with which he was satisfied. The cases in which the lien has been considered to be relinquished are those where a distinct security has been received for the unpaid balance of the purchase money. But to have this effect, the collateral security must contain in it something repugnant to and incompatible with the lien, as a mortgage upon part of the estate sold, or an amply sufficient mortgage upon another estate. A bond or covenant, a promissory note or bill of exchange, whether of the purchaser alone, or of him and others, will, it seems, not have this effect. Another class of cases where the lien has been considered not to exist consists of those in which the consideration of the conveyance is stated to be not a particular sum of money, but a bond or covenant by which it is secured; where the conveyance is made in consideration of such bond or covenant, and where, with reference to the intention of the parties, it appears that, in receiving the bond or covenant, the vendor has all for which he bargained. Possibly a class of cases may exist (noticed by Sir *Edward Sugden*) in which the conveyance states the entire transaction, and shews that the whole or part of the purchase money is to remain on security of the covenant of the purchaser, and the purchaser by the same instrument enters into such covenant. The present case is peculiar, and

Judgment.

1853.

Hughson v. Davis.

resembles none of those that are to be found in the books in its circumstances. Where the purchase money is to be paid at the time of the execution of the conveyance, of course it is not intended that a lien shall exist for it, because its immediate payment is contemplated; but if through any accident it remain unpaid while the conveyance is executed, I apprehend that a lien for it will exist. In this case the law gives the lien, and considers that the parties intend it, in the absence of evidence to the contrary. The circumstances of the present case are, I have already remarked, peculiar. The £300 was, in the first instance, intended to be paid at the time of the execution of the conveyance, and of course no lien for it entered into the contemplation of the parties. The payment was not postponed through accident; but it was deliberately planned and agreed that, in lieu of the immediate payment of the £300, a mortgage should be made precedent to the mortgage for securing the balance of the purchase money, and that the £300 should be raised by the sale of such prior mortgage. This mortgage was only released for the purpose of making another mortgage for substantially the same purpose, which, however, never has been perfected; and the question is, whether upon the release of that mortgage a lien attached upon the property for the £300 until the new mortgage should be completed, and, it never having been completed, whether it has continued ever since. My opinion is that it did attach, and has continued ever since to exist. The purchase money being unpaid, the law gave the vendor a lien for it upon the lands sold, unless he repudiated it in act or intention. But the circumstances, instead of amounting to such repudiation, seem to me to accord with and to countenance the legal implication. The land was to bear the burden; was to yield the £300; was relied upon for that purpose; and to hold that in the interval between the release of one and the creation of the other mortgage a lien attached upon the property for the amount to be

Judgment.

1853.

Hughson v. Davis.

raised, is in strict harmony with such an intention. There is no inconsistency between such an equitable lien and the subsequent mortgage for the £918 15s., which was to be perfected into a legal security, and even then subsisted in equity. The law then, by its own implication, giving this remedy, and the circumstances of the case according with that implication, it is to be deemed that the parties intended it. We are therefore to regard the plaintiff *Hughson* as having, immediately after the discharge of the two mortgages, an equitable lien for the £300 which was to be raised and paid at once, and an equitable mortgage by agreement for the balance of the purchase money, £918 15s. These claims were binding upon *Davis*, and upon all who should claim under him with notice, or as volunteers, or without an equal equity. *Jonathan Davis* stands in this situation: His judgment attached upon the lands in question at the date of its registration in the county of Wentworth; but at this time the claims of *Hughson*, by virtue of his equitable lien for the

Judgment.

£300, and of his equitable mortgage for £918 15s., under the agreement of the 10th of January, 1852, had already existed for some time. *Jonathan Davis'* payment attached, subject to these equities, unless he stands in the position of a purchaser for valuable consideration without notice. That he is a purchaser for valuable consideration to some extent may be conceded, and it is not pretended that he had notice of *Hughson's* equitable right; but, unless his equity is equal to that of the plaintiff, he is not entitled to the protection of this plea. The rule is otherwise expressed in the words, "where equities are equal the law shall prevail." It is quite certain that a person insisting upon the plea that he is a purchaser for valuable consideration without notice, must shew that his equity is equal to that of the party seeking relief against him. Now *this Jonathan Davis* cannot shew. He has two distinct classes of rights—the one legal; the other equitable. Before the passing of the act of 9th Vic. c. 34, it was generally

understood to be settled law, that lands and goods stood on the same footing in regard to judgments; that is to say, that a judgment attached upon neither until delivery of the writ to the sheriff. The law is understood to have been settled in this way by the Court of Queen's Bench of Upper Canada, in the case of *Gardiner* v. *Gardiner* (*a*). The statute of 9 Vic. c. 34 altered the law in this respect, and directed that judgments registered according to its provisions should attach upon and bind lands, as against all persons, from the date of such registration. The effect of this statute was, that the legal execution of a judgment creditor, whose judgment had been registered, could not be defeated by a subsequent sale of the lands of the debtor. It did not, however, otherwise alter the position of the judgment creditor. The 13 & 14 Vic. c. 63 made a further alteration in the law relating to judgments. That statute provides that registered judgments shall in equity bind the lands of the debtor in the same way as if he had signed a writing agreeing to charge them with the amount of the judgment. The effect of this statute may be considered to be to give the judgment creditor whose judgment is registered a specific lien, whereas before he had only a general lien on the lands of his debtor. The two classes of rights, however, are perfectly distinct, and do not unite so as to render each other more forcible than they would be of themselves. A judgment, as a legal charge, creates only a general lien, as it did before the 13th & 14th Vic. c. 63; and the specific lien arising from the operation of this statute is merely equitable, although the judgment creditor possessing it be also entitled to proceed against the lands of his debtor by process of legal execution. The equitable specific lien of the registered jndgment is also affected by another consideration: if money be advanced on the faith and security of a registered judgment, it may perhaps be contended that the equity

1853.

Hughson v. Davis.

Judgment.

(*a*) 4 U. C. Rep. 520.

1853.

Hughson v. Davis.

of the judgment creditor is equal to that of the mortgagee or vendor of specific lands. But can the same thing be predicted of a person who, having made an agreement which has been broken, or having allowed another to become indebted to him in the course of business, which debt has not been paid, or having suffered a wrong in his person or property, has brought an action to redress such grievance, and has obtained a judgment in such action, and registered it without the possibility of knowing, when he paid what may be considered the consideration for the judgment, what lands his debtor would have when he should register any judgment he might afterwards obtain by reason of such agreement, or indebtedness, or wrong? Can he be said to have equal equity with a person who has advanced money to the debtor on a mortgage of specific lands, or as the seller of particular lands who has a lien on them for his purchase money? The judgment in question in the present case was obtained fifteen years ago in an adverse action twelve years before the remedy of a specific charge entered into the contemplation of the legislature. It is true, an antecedent debt forms a valuable consideration, which will sustain a sale, or mortgage, or judgment; but in this case the situation of the parties is changed and time is given. I cannot, therefore, consider *Jonathan Davis'* obtaining a judgment *in invitum* fifteen years ago, and registering it so soon as he heard of his debtor's acquisition of the lands in question for the purpose of immediately charging them in execution, as having equal equity with the plaintiff, who looked to these specific lands for realizing his demand. The relative position of the parties, then, was this: *Hughson* had an equitable lien for the £300 and the £918 15s., and *Jonathan Davis* had a judgment registered in the county where the lands in question are situate, by virtue of which he could either charge them in execution at law, or claim a specific lien upon them in equity; but in the former capacity his lien was general, and therefore did not

Judgment.

confer equal equity with the plaintiff's, and in the latter, his right, in addition to that objection, was subsequent in point of time, and therefore obnoxious to the rule, "*qui prior est in tempore potor est in jure.*" Under these circumstances, I consider that the plaintiff's equitable claims, in respect of the purchase money of the land, must prevail over the judgment of the defendant *Jonathan Davis*, even supposing the discharge of the two mortgages to have been valid in point of law and effectual. It is true that *Jonathan Davis'* judgment was registered; and it may be contended, therefore, that it ought to prevail over the equitable claims of the plaintiff in respect of the purchase money of the lands. I, however, adhere to the opinion which I expressed in *Meacham* v. *Draper*, that the Register Act does not affect equitable liens or mortgages, or the interest arising from mere contract, as distinguished from actual disposition (*a*). Everything not avoided by the statute in consequence of non-registration, stands in the same plight as it did before the act was passed. The equitable rights of the plaintiff possess the same force as if the Register Act was not in existence, as they are not within its provisions or affected by them; and independent of this statute, they are clearly, I think, such as I have described them. I have hitherto considered the case on the supposition that the releases of the mortgage were valid and effectual; but the learned counsel for *Jonathan Davis*, who argued this case with much learning, ability and candor, admitted that the registration of these releases in the county of Halton was inoperative, and that the mortgage for £918 15*s.* was still subsisting; and the whole scope of

1853.

Hughson v. Davis.

Judgment.

(*a*) NOTE.—Since the judgment in this case was pronounced the law involved in it has undergone further discussion, and it seems doubtful whether contracts such as that relating to the mortgage in question in the cause for £918 15*s.* are not within the Register Act. If they are, the agreement to execute that mortgage was void as against *Jonathan Davis*, as it might have been registered, but was not: however, as it appears that the release of the original mortgage for £918 15*s.* was not effectually registered, the question is not material to the present case.

1853.

Hughson v. Davis.

his argument was the overthrow of the lien contended for by the plaintiff for the £300. If this view was sound—and I have no doubt of its correctness—it necessarily followed that the release of the mortgage for £500 was equally inoperative, and that that mortgage, too, was still subsisting. In this case I have no difficulty in determining that it stands as a security to the plaintiff for the £300. A good test of the plaintiff's rights in regard to the £300 is to ask the question, whether *Joseph Davis* could either compel a release of the mortgage to *Yeates*, or redeem that of the £918 15s., without paying the £300 and interest. If not, then the mortgage for £500 stands as a security for the £300 and interest, or the plaintiff has a lien for it upon the lands in question as for purchase money unpaid. In either view he is entitled to relief, but his proper remedy seems to be to claim the benefit of the £500 mortgage. It is satisfactory to find in any individual case that the rules of law quadrate with the dictates of abstract justice. It is without doubt abstractedly just that no incumbrance of *Joseph Davis* should attach upon this property until it becomes absolutely his, which cannot be until he has paid for it.

Judgment.

I think the plaintiff not entitled to his costs. Not only does his case so far as it rests upon fraud, entirely fail, but, in order to support it, he has stated facts which he must have known to be untrue, and has suppressed the truth. The decree, therefore, will be without costs.

DEVINE v. GRIFFIN.

1854.
Jan. 16th and May 1st.

Specific performance—Statute of Frauds.

A vendor having agreed to sell a piece of land, afterwards conveyed the same to a third party, with notice, at an advanced price, alleging as a reason for so doing, that he had been deceived in making the agreement. The court decreed a specific performance of the contract.—the statements in the answer having been contradicted by the person by whom the defendant swore he had been misled.

A paper containing a receipt for part of the purchase money, which clearly ascertains the land to be sold, and the amount of purchase money, but omits to state *when* a portion of the money left unpaid is to be made payable, although it provided that such portion should be secured by mortgage, is a sufficient writing within the Statute of Frauds.

Statement.

This was a suit for specific performance, the bill in which was filed by *Andrew Devine* against *Stephen Griffin* and *James Ferguson*, the nature of which is set forth in the judgment.

Argument.

Mr. *Strong*, for plaintiff, relied on *Dale* v. *Hamilton*. (*a*).

Mr. *Morphy*, contra, cited and commented on *Hook* v. *McQueen* (*b*), *Lindsay* v. *Lynch* (*c*), *Mason* v. *Armitage* (*d*).

May 1st.

The judgment of the court was now delivered by

Judgment.

SPRAGGE, V. C.—The bill is for a specific performance of an agreement by defendant *Griffin* to sell to the plaintiff the east half of lot No. 11, on the south side of the Forks' road, in the township of Moulton. The agreement for sale was made on the 3rd of May, 1853, and on the 12th of the same month *Griffin* sold the same property to *Ferguson* for £125, being an advance of £25 over the price agreed to be given by the plaintiff. Specific performance is resisted, on the ground that the plaintiff, by his agent, *Guarins*, misrepresented a circumstance connected with the sale of the land, in order to obtain

(*a*) 5 Hare, 369. (*b*) Ante. Vol. II. p. 490. (*c*) 13 Ves. 25. (*d*) 2 Sch. & L. 1.

1854.

Devine v. Griffin.

it at less than its real value—viz., that one *McClure*, then a tenant of *Griffin*, had stripped the land of all its valuable timber; and on the further ground, that a less amount of the purchase money was paid down than, according to the agreement of the parties, was to be paid down, and that the time of the payment of such purchase money in hand was made by the agreement of the parties of the essence of the contract; that the agreement was to be void unless such portion of purchase money was paid within the stipulated time; and it is also objected that the alleged agreement was not in writing, and that there has been no part performance.

Upon the first point it is denied that there was any misrepresentation by *Guarins*; and, further, that the plaintiff can be affected by what *Guarins* said, as *Guarins* was not his agent. As to the agency; *Guarins* accompanied the plaintiff to *Griffin's* house, and took part in the treaty for the purchase in the presence of the plaintiff. I should say, therefore, that any misrepresentations made by *Guarins* which passed uncorrected by the plaintiff would affect the plaintiff, if of such a nature as would affect him if made by himself.

Judgment.

It is not very clear what it was that *Guarins* did say. Whatever it was, it is certain that he said it advisedly; for he appears to have told more than one person, before going to *Griffin's*, that he intended to tell him of the valuable timber on the lot having been taken away by *McClure*. This does not look like a fraudulent misrepresentation. Some witnesses say that he represented the land to be *bare* of timber. He says that he told *Griffin*, upon the plaintiff's agreement to purchase, that a part of the best of the timber was taken away, and that what he said is true; and it does appear by the evidence of other witnesses that if he stated that, he stated no more than the truth; for *John Walker* swears that the most valuable timber—

which is pine, oak, chestnut, and black ash—was taken off the land; *Guarins* says the same, and *Peter Boyce* also; and *Hainer* deposes to a quantity of timber of the same description being taken off the land. I should say, from the evidence, that *Guarins* said, when with the plaintiff in treaty for the purchase of the land, that *McClure* had made the land bare of valuable timber. None of the defendant's witnesses shew whether such is really the case. Even *McClure*, upon this point says, "the lands and premises were not deteriorated in value by reason of any timber being cut or destroyed thereon by me, or by any other person or persons with my knowledge; that the same has been increasing in value for some years, and was on the 3rd of May last worth at least $500." This is certainly anything but an explicit denial that he had stripped the land of its most valuable timber; it is rather an avoidance of the point, and reads like an assertion that the land, at any rate, had increased in value, whether the land had been denuded of its timber or not.

Judgment.

Upon the evidence, I take *Guarins'* allegation as to the timber to have been substantially true, and that it did not convey to the mind of *Griffin* any false idea upon the subject. At the same time, if it had been substantially incorrect, and the plaintiff had allowed the misrepresentation to pass in order to get the land at a low price, I think that specific performance of an agreement so obtained ought not to be decreed.

Upon the next point—whether the plaintiff, in addition to satisfying the balance due to Mr. *Boulton*, £32 10s., was to pay the plaintiff £5, or £42 10s. in hand, the evidence is very conflicting. If it were clearly open to the defendant to shew by parol that the purchase money was to be paid otherwise than is expressed in writing, I should still doubt whether the weight of evidence was against the writing, for it is not alleged that there was any agreement made after the written

1854.

Devine v. Griffin.

papers were signed; and if the agreement had been as the defendants alleged, I think both the mortgage and the receipt would not have been as they are. If, in addition to the £5 paid in hand, £37 10*s.* were to be paid within three days at the furthest, and in default of such payment the whole agreement to be void, it is strange that the mortgage should express the whole £62 10*s.* to be payable in four years, without note or memorandum of any kind evidencing what is alleged to be the true nature of the agreement. Again: the receipt of the £5 paid in hand is very formally drawn up and provides that the plaintiff was "to pay *H. J. Boulton* the sum of £32 10*s.* currency, and secure the purchase money, £62 10*s.* currency, by mortgage." If of this £62 10*s.* more than half was to be paid within three days, it is unaccountable that in this paper it was not so provided. Its absence both from this paper and from the mortgage appears to me strong negative evidence against the version of the agreement contended for by the defendants.

Judgment.

With regard to part performance, it is unnecessary to go into that point if the paper containing the receipt for £5 is a sufficient writing within the statute. I think it is. It ascertains the land to be sold, and the amount of the purchase money; how much to be paid in hand, and how much to be secured by mortgage, though it does not provide when the mortgage money is payable; and it is signed by the vendor, *Griffin*. It appears, therefore, to contain all the essentials to a contract for the sale of land.

1854.

June 24 and Sept. 22.

LANGSTAFFE V. MANSFIELD.

Speculative purchase—Specific performance.

The court will not encourage speculative purchases; where, therefore, it was shewn that a purchaser had not the means of paying for the property contracted to be sold, and after several demands upon him to complete the purchase, the vendor sold to a third party with the knowledge of the original purchaser, who did not forbid the sale, and appeared to acquiesce in it; but afterwards, when, by reason of the construction of a railroad, the land had increased very much in value, filed a bill to obtain a specific performance of his contract, the court dismissed his bill with costs.

The bill in this case was filed by *John Langstaffe* against *Owen Mansfield* and *Thomas Holmes*, setting forth that plaintiff had agreed with *Mansfield* for the purchase of fifty acres of land in Vaughan, then owned by *Mansfield*, for £500, deducting therefrom £180 due the Trust and Loan Company; £120, part of the purchase money, to be paid on the execution of the conveyance; the balance to be secured to *Mansfield* by a mortgage upon the premises, payable by annual instalments of £50: that the agreement was reduced into writing and signed by the parties: *that plaintiff had always been ready and willing to perform the said agreement* on his part, and had frequently applied to and requested *Mansfield* specifically to perform the same on his part, which he not only had refused to do, but that he had actually sold the premises to *Holmes at an advanced price*, and had conveyed the same to him, but before the conveyance, and before *Holmes* had paid his purchase money—if, in fact, he had paid the same—that he had notice of, or some reason to suspect or believe that *Mansfield* had entered into an agreement with plaintiff for the sale of the said premises to him. Statement.

Mansfield, by his answer, said that he had always been ready to complete the contract with plaintiff until sale to *Holmes*, and had only sold to *Holmes* because plaintiff would not perform the contract on his part, in consequence of which he was obliged to sell to *Holmes*

1854.

Langstaffe v. Mansfield.

for £25 *less than plaintiff* had agreed to pay; that the understanding with plaintiff was, that the sum of £120 was to be paid immediately; that, not hearing from plaintiff from the 14th till the 24th of June, he called on plaintiff to have the agreement carried into execution and the sum of £120 paid, when plaintiff requested time for a week, when he promised to call and settle; that he did not call during the following week, but on the 3rd of July defendant received from him a verbal message that everything would be settled by the following Tuesday, the 5th day of July, and that on that day he would come to defendant, which promise and appointment plaintiff also neglected to keep; that defendant, therefore, on the 8th of July went to Richmond Hill, where plaintiff resided, and saw him, when he requested further time, and said he would have the money during the following week, which promise was also broken; that after several other promises, which were not performed by plaintiff, defendant, on the 3rd day of September, wrote a letter, to the effect that if plaintiff wished to buy the property he must pay defendant £20 by the following Monday. and the residue by the 15th of October, otherwise that the defendant must do the best he could in other quarters; that on the 19th of September the plaintiff gave defendant a verbal answer that he would pay £20 on the next day or the day following; that this promise was also broken by the plaintiff; but defendant being anxious that plaiutiff should complete the purchase, determined to give him one more opportunity, notwithstanding all his past defaults, and on the 24th of September wrote to plaintiff to say, that if plaintiff did not pay the long promised money by the following day, the defendant would sell the property to another person; that plaintiff did not pay, or offer to pay, the money, or any part of it, on the day mentioned, or any other day, nor did he apply to defendant for further time, or offer any expostulation or objection against defendant's selling to any other person; that plaintiff

Statement.

although aware of negociations to sell to *Holmes*, never forbade the sale, or gave defendant any notice not to proceed therewith, or any notice that he meant to insist on his previous agreement, but, on the contrary, tacitly acquiesced in the sale to *Holmes;* that defendant believed plaintiff bought speculatively, in the hope of the property rising in value, when he was unable to pay for it; that plaintiff had been endeavoring to procure a station of the Ontario & Simcoe Railroad to be placed thereon, and defendant believed plaintiff was deferring the abandonment or completion of his contract until he could ascertain whether there would be a station on the property or not; that since the sale to *Holmes*, the railroad, as defendant believed, had deceided on having a station on such lot; that by reason thereof the property had risen in value, which circumstance defendant believed was the cause of the present suit being brought; and that plaintiff, from time of sale to *Holmes* until the 24th of February, 1853, the date of filing the bill, made no claim to defendant in respect of this property. Statement.

The defendant *Holmes*, by his answer, relied on the facts stated in *Mansfield's* answer, which he believed to be true: on the laches of the plaintiff; his acquiescence in the sale to *Holmes;* and the fact that plaintiff had applied to purchase a portion of the property.

Holmes also relied on the fact of *Mansfield's* title being registered, and want of notice of plaintiff's claim. The other points of defence are stated in the judgment.

Hotmes examined the plaintiff, who in his examination admitted having received letters from *Mansfield*—one asking him to name a day for the parties to meet in Toronto, as he was in want of money; that in his letters he stated that he would be obliged to make use of the land to raise the money, and that he understood *Mansfield* to mean that he would be obliged to sell the land

1854.

Langstaffe v. Mansfield.

to somebody else if he (plaintiff) did not give him the money; that *Mansfield* had an offer from somebody else. Plaintiff admitted that he had not the money when agreement was entered into, but expected to obtain it from the building society by the 1st of November following the date of the agreement, as Mr. *Crew*, the valuer of the society, had told plaintiff that the security offered would be sufficient—this was before the bargain with *Mansfield;* that he (plaintiff) was going to put up a saw-mill on the premises, and had a right to go on building on the land from the time of the bargain; and the security he intended to give the building society was on the property in question, which the society were willing to accept, subject to the mortgage to *Mansfield* for the balance of the purchase money; that he could have got the money at any time after this communication with Mr. *Crew*— that is, after he had erected the saw-mill. He was examined at considerable length as to his means of paying the first instalment of £120, the effect of which is also stated in the judgment.

Statement.

Richard Holmes, brother of defendant, stated in his evidence that plaintiff asked him if his brother would sell part of the property, and that if he would, he (plaintiff) would try and buy it.

John Lane, also examined on behalf of *Holmes*, swore that he, in company with *Holmes*, met plaintiff, and in a conversation which ensued, plaintiff stated that there had been a conversation or agreement between him and *Mansfield* about the place, but he had given up all idea of buying it, and had no further claim upon the property, and asked *Holmes* what he would take for two or three acres thereof.

Mr. *Turner* for plaintiff.

Mr. *Mowat* for defendant.

The judgment of the court was now delivered by

1854.

Langstaffe v. Mansfield.

ESTEN, V.C.—The laches would seem to be insufficient. Time was not of the essence of the contract. The message by Mr. *Williams*, and the non-compliance with it, seems unimportant. *Mansfield* treated the contract as open in both letters sent in the early part of October, and did not by either of them make time essential. The sale to *Holmes*, under such circumstances, had no effect; and being a wrongful proceeding, and *Holmes* standing in *pari casu* with *Mansfield*, the mere lapse of three months—which, if nothing had been done, would have been insufficient—cannot bar the plaintiff, when what has been done is wrongful.

The defence upon neglect to give notice, on the part of the plaintiff, when he was aware that the defendant *Holmes* was on the point of completing his purchase, fails,—*Langstaffe*, on his examination here, asserting that he did give such notice, and the defendant's denial in his answer affording no evidence, and, at most, making the fact on which the defence rests doubtful.

Judgment.

It is then attempted to rest a defence to the suit on the ground that the plaintiff purchased in the expectation that the railway depot would be established on the property, and with the intention of abandoning or completing his purchase according to the event; but this ground also fails.

I think the evidence shews that at the time of the sale to *Holmes* the depot had been fixed a mile and a quarter north of the property in question, and was not recalled for two months afterwards; but that on the very day when the defendants completed the purchase the plaintiff made every effort to prevent its completion, and to maintain the sale to himself.

The defence is then rested on the want of *bona fides*

1854. Langstaffe v. Mansfield

on the part of the complainant in entering into a contract without the means of completing it, or of making the first payment, or any reasonable prospect of obtaining such means. The defendants examined the plaintiff very minutely as to his circumstances. Such an examination is necessarily inquisitorial. It was objected to at the time, but the court did not see clearly that it was its duty to stop it. Without expressing any opinion upon the propriety of such an examination or as to the extent to which it ought to be carried, it is sufficient to observe that in the present instance it entirely failed to establish the point to which it was applied.

It was consistent with all the facts elicted by this examination that the plaintiff might have had the means on the 14th of June of completing his contract, and the facts elicted on his cross-examination and re-examination shewed, I think, conclusively that he had the means of making the first payment of £120. I think the evidence shews that the plaintiff, when he entered into the contract, owned real property worth £1000, subject only to an incumbrance of £243, upon which the building society, when the incumbrance was reduced to £189, advanced to £400 or £500, and upon which therefore we cannot doubt that in June they would have advanced £120.

Judgment

We must, I think, exclude the mortgage to the brother, on the assumption that what he did in December he would have done in June—that is, postponed his mortgage. The plaintiff, therefore, when he entered into this contract, certainly had the means of raising £120 so as to make the first payment, and it would be impossible to dismiss the bill on the ground that the plaintiff entered into the contract without the means, or any reasonable prospect of obtaining the means, of completing it. The doctrine cannot be presented more strongly than to the effect that a person

1854.

Langstaffe v. Mansfield.

entering into a contract for purchase of land, involving the payment of money at appointed times, whereby the vendor shackles himself for a time, must, when he so binds himself, have the means or a reasonable prospect of obtaining the means of making the payments for which he stipulates. Without this he may be said not to contract *bona fide*, and a court of equity would properly refuse him its aid to enforce the contract. But if he enter into the contract with the means, or a reasonable expectation of providing the means, of fulfilling it on his part, and with an intention to fulfil it, it is not any accidental disappointment and failure of his arrangements which will prevent a court of equity from assisting him, if he apply within the time during which a suit may be maintained, and with the means of performing his part of the agreement.

It may be observed that if the plaintiff is to be believed when he says that the 1st of November was appointed for the payment of the £120, he was guilty of no negligence whatever, and the applications of *Mansfield* for money were for an indulgence; and although evidence of this collateral understanding may be inadmissible to vary the agreement, it affords a complete answer to the defence of laches offered by the defendant. Judgment.

The only remaining ground on which the defendant resists the specific performance of this agreement, is the abandonment, on the part of the plaintiff, of that agreement, and his acquiescence in the purchase of *Holmes*.

Upon this point it may be observed, that acquiescence by a purchaser in a subsequent purchase by another, if it exists only in his own mind, and is not communicated, will have no effect; but if he not only resolve to abandon his own purchase rather than be involved in litigation or trouble, but actually communicate that resolution to the subsequent purchaser, it

1854.

Langstaffe v. Mansfield.

seems that a court of equity would not afterwards enforce the prior contract at his instance. Men are not lightly to undo their deliberate acts, although voluntary; and it is impossible to know how this may have influenced the conduct of the parties to whom they are done. In the present instance various acts are shewn upon which the defendants rely as acts of abandonment and acquiescence on the part of the plaintiff, and involving a communication of their import to the party affected by them. And it may be remarked, that as such renunciation may be express, so it may be implied; and if acts be shown which import abandonment and acquiescence, and if they be done to the opposite party so as to carry in themselves a communication of such abandonment and acquiescence to that party, they will produce the same result as an express renunciation. *Langstaffe*, in his examination, admits that he met *Holmes* within a fortnight after the completion of his purchase, and asked him whether any lots were for sale off the property in question, and what his price was.

Judgment.

This was treating *Holmes* plainly to himself as the owner of the property. I cannot attach any credit to the plaintiff's statement that his sole object in the inquiry was to ascertain whether or not *Holmes* had really completed his purchase.

Again, some weeks afterwards, *Langstaffe* met *Holmes*, and there being then a talk of removing the railway depot back to the property in question, and this depending in some measure on a road being made from Richmond Hill, *Holmes* being anxious that this road should be made, requested *Langstaffe* to exert himself to have it done, and to give him notice of any meeting that might be held for that purpose, in order that he might attend it,—*Langstaffe* being interested in having the depot established upon the property in question, as the owner of a mill upon other property

where he resided. Upon the same, or a different occasion, *Holmes* promised *Langstaffe* that if he would exert himself to have the road made, he would give him a piece of land of the property in question on which to store timber. 1854. Langstaffe. v. Mansfield.

On none of these occasions did *Langstaffe* make any pretence of right. *Lane* deposes to an express renunciation of right on the part of the plaintiff in *Holmes'* presence, and *Richard Holmes* to an offer to purchase part of the property from the defendant *Holmes*, which he must have intended to be communicated to him. These acts established beyond the possibility of doubt, seem to me unequivocally to import an abandonment by the plaintiff of his own purchase, an acquiescence in that of the defendant communicated to the defendant, by which the plaintiff ought to be bound; and therefore I think the bill should be dismissed with costs. Judgment.

CROOKS v. CROOKS.

Executors—Statute of Limitations.

Quære—Has the recent Statute of Limitations, 13 & 14 Vic. c. 61, a retrospective effect?

An executor has a right to retain a debt barred by the Statute of Limitations.

Where the personal estate of a testator is exhausted, has the executor a right to retain such a debt out of the proceeds of real estate?

September 4. and Nov. 13.

This was a motion by way of appeal on behalf of the Hon. *James Crooks*, executor of the late *William Crooks*, from the master's report, whereby the master had rejected the claim of the appellant, in taking the accounts of the estate under the decree in the case, on the grounds that the same was barred by the Statute of Limitations. Statement.

Mr. *A. Crooks* for the defendant. The other parties interested in the suit did not appear.

1854.
Crooks v. Crooks.

The arguments of counsel and cases cited are stated in the judgment of the court, which was now delivered by

Nov. 13.

THE CHANCELLOR.—This case gives rise to several considerable questions, some of which were overlooked in the argument of the appeal, and others excluded by the form of the report. The master, without determining how far the appellant had established any debt, rejected his claim upon the ground that it was barred by the Statute of Limitations; and this course was adopted, as I gather from the argument, at the instance of the parties, for the purpose of enabling them to obtain the opinion of the court upon certain legal questions sumitted for the master's consideration. But, in determining whether the appellant's debt is or is not barred by the statute, we are met on the very threshold by two questions, which were not alluded to in the argument here, and which seems to have been overlooked in the master's office: first, is this case within the exception in the Statute of James respecting merchants' accounts? (*a*) or, secondly, does it come within the principle of the decisions respecting mutual accounts? (*b*). Looking at the evidence in the master's office, the case would seem to come within the principle of Lord *Kenyon's* decision; but, from the course pursued, it is obvious that we have not before us materials for disposing of either of these questions.

Judgment.

Assuming the case to come within the principle to which I have just adverted, it would become necessary to consider whether the recent Statute of Limitations (*c*) has a retrospective operation; for that statute must be considered, I apprehend, as abrogating the rule laid down in *Catling* v. *Skaulding* (*d*). It was held, in

(*a*) Foster v. Hodgson, 19 Ves. 185; Robinson v. Alexander, 8 Bligh, 352; Forbes v. Skelton, 8 Sim. 335; Inglis v. Haig, 8 M. & W. 769; Cottam v. Partridge, 4 M. & G. 271.
(*b*) Catling v. Skaulding, 6 T. R. 189.
(*c*) 13 & 14 Vic. c. 61.
(*d*) 6 Bing. 258.

1854.

Crooks v. Crooks.

Towler v. *Chatterton* (*a*), that Lord *Tenterden's* act had a retrospective operation; and the same construction has been placed upon our provincial statute by the Court of Queen's Bench upon the authority of that case. I must confess that I should follow these decisions very reluctantly in the present case. The suit in which the question now before us arises has been long pending; and to give to the statute of Limitations a retrospective operation, would be to affect the rights of parties by a statute framed more than ten years after the commencement of the litigation. Now that would be obviously contrary to the very first principles of justice. Such a construction ought not to be adopted unless the intention of the legislature is clear beyond all doubt. The case in the court of Queen's Bench was not much discussed: *Towler* v. *Chatterton* and *Freeman* v. *Moyes* (*b*) were the only authorities cited; and the case appears to have been decided in conformity with these authorities, rather than upon the principles involved. But, in a recent case (*c*) the authority of *Towler* v. *Chatterton* is much questioned, especially by the present Lord Chancellor; and, as it appears to me, with much reason. Had *Moon* v. *Durden* been cited in the Court of Queen's Bench, it is quite possible that *Grantham* v. *Powell* might have been differently decided.

Judgment.

But, passing by these questions altogether, the learned counsel relied principally upon the appellant's right to retain his debt (he being one of the executors of the testator) as a conclusive answer to the objection upon the Statute of Limitations. The right of an executor to retain a debt barred by the statute appears to have been considered at one time clear; and it will be found, probably, that *Shewan* v. *Vanderhorst* (*d*) does not establish any contrary doctrine. *Stalschmidt* v. *Lele* (*e*)—of which Mr. *Crooks* was good enough to

(*a*) 6 Bing. 258. (*b*) 1 A. & E. 338. (*c*) Moon v. Durden, 2 Ex. 22.
(*d*) 1 R. & M. 349. (*e*) Law Times (1853), 209.

1854. furnish me with a note—is a very recent decision in favor of his argument; but here the whole personal estate has been exhausted. The right claimed, therefore, is a right in an executor to retain his debt out of the proceeds of the real estate. That raises an important question upon the statute of Geo. II., which has not been settled hitherto, so far as I am aware, and which was not discussed in the argument of this case. According to English authorities, an acknowledgment, although sufficient to take a case out of the statute as to the personal estate, may be quite inoperative as to the real estate. To take a case out of the statute as to the real estate, there must be an acknowledgment by the party entitled to that estate. (*a*) Again, a promise by one of several executors takes the case out of the statute as against that one only; and such a judgment can only be made available, I apprehend, against such portion of the personal estate of the testator as may have come into the hands of that particular executor. But if the real estate of a testator in this province can be sold under a judgment against his personal representative, and in that way only, then it would seem to follow that any acknowledgment sufficient to keep the debt alive as against the personal estate, will be sufficient to keep it alive as against the real estate also; and a judgment against one of several executors, upon a promise by him, will enable a creditor to sell the whole real estate of the testator. and that in the absence of any promise to take the case out of the statute as against the heir or devisee. If these conclusions be fairly deducible from *Gardiner* v. *Gardiner* (*b*) and the other cases of that class, they tend strongly to show that a personal representative must have a right to retain, or something analogous to a right to retain, out of the real estate of his testator. To what extent these cases are to be followed in this court remains to be determined; but I am not prepared

Crooks v. Crooks.

Judgment.

(*a*) Putnam v. Bates, 3 Rus. 188; Fordham v. Wallis, 10 Hare, 217; Mellersh v. Brigesden. 17 Jur. 908.

to adopt all the anomalous consequences to which they appear to me to lead, without discussion and further consideration.

1854.
Crooks v. Crooks.

There remains one other ground upon which it may be argued that the apellant is entitled to retain his debt out of the proceeds of the real estate of the testator. *James Crooks* is not only one of the executors of the testator, but he is also one of the devisees of his real estate. Now it has been determined, I believe, that the Statute of Fraudulent Devises (*a*) places an heir and a devisee on the same footing with respect to the right of retainer, and that the right to retain his specialty debt out of the proceeds of the real estate which belonged to the heir at common law, and is recognized by the statute, belong also to the devisee.(*b*) It is unnecessary to consider how far the present case is governed by these authorities, because the point was not taken in argument, and has not been at all discussed.

Judgment.

I may add, with reference to another branch of the argument, that when a suit is instituted by one creditor, on behalf of himself and all other creditors, for the administration of an estate, in that case it has been settled, I believe, that the filing of the bill operates to save the bar of the statute as to all creditors; or, in other words, the six years are to be reckoned from the filing of the bill. But here the first suit was not on behalf of all creditors; (*c*) and the filing of the bill had not the effect, I apprehend, of saving their rights. (*d*)

It is plain that this case cannot be finally disposed of now under all the circumstances. We do not know at present whether the appellant is a creditor at all,

(*a*) 3 W. & M. c. 14.
(*b*) Loomes v. Stotherd, 1 S. & S. 458; Player v. Foxhall, 1 Russ. 538; Thompson v. Grant, ibid. 540; Coppin v. Gray, Y. & C. C. C. 207.
(*c*) Forster v. Thompson, 4 D. & W. 317.
(*d*) Watson v. Birch, 15 Sim. 523.

1854. and until that fact has been determined, it is idle to speculate about the law applicable to the case. If the parties are prepared to admit that the appellant has established his debt, the case must be argued with reference to the questions and authorities to which I have adverted; but if the debt is not admitted, the matter must be referred back to the master, for the purpose of having that point ascertained, when the whole matter will be again brought under his consideration.

Crooks v. Crooks.

DAVIS v. BENDER.

Vendor's lien.

Where a sale was made and conveyance executed before a Court of Chancery was established in Upper Canada: *Held*, that a vendor had, notwithstanding, a lien for unpaid purchase money.

March 16 and Nov. 13.

Such a lien was enforced against subsequent purchasers who, when they acquired their interest had notice of the purchase money being unpaid.

The bill in this cause was filed in September, 1851, by *John C. Davis* against *George Bender*, *John Bender*, *Samuel Titus Beckett* and *William Davis*, setting forth that on the 23rd of August, 1823, the plaintiff in pursuance of an agreement previously entered into, had conveyed twenty acres in the township of Pelham, on which were erected a grist mill and distillery, to one *John Davis*, deceased, for £1000, when £750 was paid to plaintiff, and the bond of *John Davis* for the remaining £250 delivered to plaintiff; that *John Davis* thereupon went into possession but had never paid the £250, all which still remained due; that in the year 1848 two judgments were recovered at law against *John Davis*, upon which executions were issued against lands, and thereunder the said premises were sold and conveyed by the sheriff to the defendants *Bender*, but who, it was alleged, had notice of the existence of the bond for £250, portion of the purchase money; that in

Statement

1849 *John Davis* died intestate, leaving the defednant *William Davis* his heir-at-law. 1854. Davis v. Bender.

The bill further alleged, that the *Benders* pretended that they had conveyed to *Beckett;* but if that were the case the plaintiff charged that *Beckett* had notice of the lien existing in his favor, as a first charge on the premises, by reason of the unpaid purchase money; that *Beckett* had not yet paid his purchase money to *Bender;* and the bill prayed a declaration that plaintiff was entitled to his lien as a first charge and sale of the premises and payment of the amount due out of the proceeds. Statement.

The defendants answered, and the cause having been put at issue, evidence was gone into at considerable length, the important features of which, however, as also the other facts in the case, sufficiently appear in the judgment of the court.

Mr. *Turner* for plaintiff. The lien as against *Davis*, had he lived and retained the possession, is clear, so also as against the defendants *Bender*, who, it is shewn, purchased with notice of plaintiff's claim; and if plaintiff has failed to establish notice as against *Beckett*, that is immaterial, as it is established that he has not yet paid the *Benders* the price agreed to be paid by him to them.

Mr. *Mowat*, for the defendants other than *William Davis*, who did not appear. Argument.

The question that first suggests itself here is whether when a vendor, before a Court of Chancery existed in this country had conveyed an estate, and omitted to take any security for payment of the purchase money, such vendor can be looked on as having intended to retain any lien—*Roberts* v. *Tunstall* (*a*). According

(*a*) Hare, 257.

1854. Davis v. Bender.

to the Vice-Chancellor's language in that case, delay in asserting this lien is evidence of the party's intention to waive the equitable right. Here, fourteen years since the establishment of this court have been allowed to pass before any attempt was made to enforce this lien. He cited *Smyth* v. *Simpson* (*a*).

Nov. 13.

THE CHANCELLOR.—On the 10th of August, in the year 1852, the premises in question in this cause were sold by the plaintiff to one *John Davis*, through whom the defendants claim. The purchase money was one thousand pounds, of which sum seven hundred and fifty pounds were to be paid in hand, and the balance in twenty-one months from the time of sale. The purchaser, however, had an option to reconvey the land to the vendor at any time within fifteen months from the date of the contract; and in that event all advances made by the purchaser on the contract were to be repaid by the vendor. The agreement between

udgment.

the parties was carried into effect in this way—the premises were conveyed to *John Davis* in fee, and to secure the due performance of the executory portion of it, *John Davis* became bound to the plaintiff in the penal sum of fifteen hundred bounds, with a condition in the words, "that if the above bounden *John Davis* makes or causes to be made unto the above named *John C. Davis*, his heirs or assigns, a good and sufficient deed in law for a certain parcel or tract of land, lying and being on the Twelve Mile Creek, formerly owned by the same *John C. Davis*, where there is now a grist mill and distillery erected, within fifteen months from the above specified time, then the said *John C. Davis* to pay or cause to be paid unto the above named *John Davis*, his heirs or assigns, the full and just sum of seven hundred and fifty pounds, provincial currency; and if the above named *John Davis* concludes to keep the said property, then he is to pay to the said *John C. Davis*, his heirs or assigns, the sum of two hundred

(*a*) 7 Moore, 205.

and fifty pounds provincial currency, together with legal interest from the above date, within six months from the expiration of this said bond, then this obligation to be void, otherwise to remain in full force and virtue."

1854.
Davis v. Bender.

Now it is perfectly clear from the evidence of *Cummings*, of the two *Davises*, of *Ross*, and of *Hobson*, that *John Davis* elected to keep this land; and it is equally clear that no part of the two hundred and fifty pounds has been paid: *prima facie*, therefore, the plaintiff, according to the law of England, would have a lien upon the land for his unpaid purchase money.

It is argued, however, that the parties must have intended to waive this right, inasmuch as there was no court of equity in this province at the date of this contract, and no means therefore by which such a lien could be enforced. That circumstance may tend to shew that these parties had not the vendor's lien in contemplation when they entered into this contract; but that is not enough; the vendor's lien is not the result of contract; it is an equitable right based upon this principle of natural justice, that no man can conscientiously keep that for which he has not paid the stipulated price; and a purchaser seeking to escape from that principle must establish clearly that it was the intention of the vendor to waive his lien. It is not thrown upon the vendor to show an intention that the lien should be preserved, for, as I have said, it does not grow out of the contract; but, to borrow the language of Lord *Eldon*, "the lien exists, unless an intention, and a manifest intention, that it shall not exist appears" (*a*). But there is no circumstance in the present case from which any such intention can be inferred (*b*).

Judgment

(*a*) Mackreth v. Symmons, 15 Ves. 329.
(*b*) Colborne v. Thomas, ante, 102.

1854

Davis v. Bender.

It is said, however, that the plaintiff brought an action against *John Davis* on his bond, in the year 1835; that the plaintiff demurred to the defendant's pleas; that the demurrer to the third plea was overruled, and thereupon judgment was entered for the defendant; and it is argued that the judgment in that action is conclusive against the plaintiff in the present suit. That argument fails, for many reasons. It is not argued, I believe, that the judgment alone would operate as an estoppel. It obviously could not. A vendor may fail in an action at law for the recovery of the purchase money, and may have a perfect right, notwithstanding, to a decree for specific performance. But it is said that the plaintiff is estopped to deny the truth of the allegations in the third plea, and it is argued that these allegations constitute a defence to the present suit. But it is quite obvious that the allegations in the third plea, assuming their truth, do not constitute any defence to the present suit. The averments in the plea are confined, necessarily, to a period of fifteen months from the date of the bond, because *John Davis* was bound to exercise the option allowed him within that period. It is quite consistent with the plea that *John Davis* may have elected, at a subsequent period, to retain the property upon the terms of the original contract, in which event the plaintiff would have a right, of course, to come here for relief. Now the evidence to which I have already referred demonstrates that the fact was so; but the letters from *John Davis* to *Ross*, which are in proof, are conclusive upon the point.

Judgment.

It is argued, lastly, that *Bender* advanced his money upon the mortgage to *Joel* and *William Davis* without notice of the plaintiff's lien, and that he is therefore a purchaser for value without notice. There are several answers to that argument. The defendants do not deny notice. They deny notice that the plaintiff had or claimed any charge upon the land. But that is

an immaterial allegation. The plaintiff's charge arises from the non-payment of the purchase money. It is a legal consequence from that fact. But notice of that fact is not denied, and could not have been, I apprehend, from the evidence. Beyond that there is no proof whatever that the defendant's are purchasers for value The mortgage to *Joel* and *William Davis* was clearly fraudulent in its inception; and there is no evidence that the assignment to the *Benders* was for valuable consideration (*a*). 1854. Davis v. Bender.

It is unnecessary to consider the effect of the sheriff's deed, because it is clear from *Ball's* evidence, and indeed it is not denied, that the *Benders* had notice of the plaintiff's claim the time they acquired that title; and *Beckett* has neither paid the purchase money, nor obtained a conveyance. I think that it is clear, therefore, that the plaintiff is entitled to a decree with costs.

Judgment

ESTEN, V. C.—It is clear from the evidence in this case that the purchaser elected to retain the land and pay the £250. I do not understand that the judgment at law creates any difficulty in the plaintiff's way. Had the plaintiff taken issue on the pleas, instead of demurring to them, the judgment would have been in his favor. A lien of course accrued to him for the purchase money remaining unpaid; and the lapse of time seems to me under the circumstances of this case immaterial. The decree, therefore, against the defendant *Davis* would be as of course; and can the defendants, the *Benders*, stand in any better situation? Their only defence must be that they are purchasers for valuable consideration without notice: but they have failed to prove the payment of any consideration and therefore this defence fails. The decree, I think, should be with costs.

SPRAGGE, V. C., concurred.

(*a*) Molony v. Kernan, 2 D. & W. 40.

1854.

BURR V. GAMBLE.

Arbitrators.

May 20, 1853 and Jan. 30, 1854

A charge of corruption and partiality against an arbitrator is not sustained by general affidavits that throughout the arbitration he had evinced a hostile disposition towards the party complaining, by a constant disposition to discredit his witnesses, and by proposing to award a much larger sum against him than was ultimately done.

How an obscurely expressed rule of reference is to be constructed.

The bill in this cause was filed by *Rowland Burr* against *John W. Gamble*, praying, amongst other things, that the defendant might be restrained from removing certain machinery out of the Burwick Factory, and to compel defendant to carry out a certain agreement alleged to have been entered into by him with the plaintiff. After the cause had proceeded some length, a reference to arbitration was agreed on between the parties, under which an award was made in favor of the plaintiff, against which a motion was now made, on the ground of partiality and improper conduct on the part of one of the arbitrators—by

Statement.

Argument.

Mr. *Crickmore* and Mr. *Strong* for the defendants.

The plaintiff in person, *contra*.

The judgment of the court was now delivered by

Jan. 30.

the Chancellor:

I am of opinion that the award ought not to be disturbed.

The first ground of objection is the partiality and corruption of *Hall*, the plaintiff's arbitrator. It is said that he was actuated, throughout the proceedings, by feelings hostile to the defendant, which were evinced by a constant disposition to discredit the defendant's witnesses, and by a proposition to award to the plaintiff a sum very much larger than that finally adopted; and it is surmised that he had some

Judgment.

pecuniary interest in the result. The last allegation, which is conjectural merely, has been denied positively by both *Hall* and *Burr;* and the other statements are far too vague and inconclusive to warrant us in setting aside the award on the ground of partiality and corruption (*a*). A clear and satisfactory answer to this part of the argument is to be found in the fact that *Brown* himself, the defendants arbitrator, upon whose affidavit the charge principally rests, signed the draft award, although for some reason, of which he has not given us any satisfactory explanation, he eventually refused to concur.

It is argued, in the next place, that the arbitrators have exceeded their authority in two respects; First, in allowing damages for the non-delivery of certain saw-mill machinery; Secondly, in awarding to the plaintiff £10 in respect of a loom in the defendant's custody, instead of confining themselves to the determination of the question of property merely.

Judgment.

In placing a construction upon the rule of reference, it is proper and material to advert to the circumstances under which it was drawn up. The plaintiff had previously examined several witnesses in the cause, with reference, particularly, to his claim for damages on account of the non-delivery of the machinery of a woollen factory, of which the defendant had become the purchaser. Upon that examination an account current between the parties was produced by the defendant, which, if its correctness were admitted, would reduce the matter in litigation within a very narrow compass, and at the close of the evidence the plaintiff expressed his readiness to admit the correctness of the account current, with the exception of three items which were specifically pointed out, and at the suggestion of the court a memorandum to that effect was endorsed upon the account and signed by the

(*a*) Crossley v. Clay, 5 C. B. 581.

1854.

Burr v. Gamble.

parties. Subsequently, the parties agreed to a reference; and, while the matter was under discussion, the solicitor for the defendant applied to me to know whether it had not been the intention of the memorandum, which had been drawn up by myself, to exclude every matter except the three specified items. I answered that enquiry in the negative; informing the solicitor that the object of the memorandum was to admit the correctness of the account current with the specified exceptions, and not to exclude the other grounds of complaint in the plaintiff's bill; and the order of reference was thereupon drawn up between the solicitor of the defendant and the plaintiff, who had no professional adviser. The difficulty to which I am now adverting arises altogether, I apprehend, from the circumstance just stated. It is quite plain upon the bill that the non-delivery of the saw-mill gearing did form a ground of complaint in the suit. But for the memorandum of which I have spoken, the order of reference would have been, I presume, in the ordinary form, and the present difficulty would have been avoided; but some obscurity has been occasioned by an attempt to incorporate the memorandum in the order, and the defendant contends that upon the true construction of the order of reference, the plaintiff must be held to have abandoned this particular ground of complaint. I cannot accede to that argument. Certainly that is not the necessary construction. The language of the document, though obscure, is quite capable of the larger interpretation. The parties intended, in my opinion, to limit the reference to the same extent they had limited the suit, but not farther; and to adopt the narrow construction contended for, would be to contravene the principle deducible from modern authorities. (*a*)

Judgment.

The second objection must also be disallowed. The

(*a*) Slowman v. Wiggins, 6 C. B. 276; Faviell v. Eastern County R. R. Co., 2 Ex. 344.

effect of the award, if I apprehend the law correctly, is to vest the property in the loom in the defendant, allowing the plaintiff its value in damages, as in an action of trover (*a*); and it is said that this is an excess of authority, because the submission only authorized the arbitrators to determine the question of property. But the language of the order is extremely inaccurate. The words in relation to this subject are, "also the question of the plaintiff's right to a loom and teaming lumber." It would be absurd to attempt a strict grammatical construction of this passage. But is the reference to fail, because the language is obscure and incapable of any strict grammatical construction? I apprehend such references are intended to check litigation, and courts should be astute to sustain them (*b*). Now, construed strictly, what does "the plaintiff's right to teaming lumber" mean? The arbitrators understood it to mean the question between the parties as to the plaintiff's right to be paid for teaming certain lumber, which was to have deen delivered by the defendant, and they made their award accordingly; and their finding has not been questioned in that respect. But that is very far from a strict interpretation of the word. And in the same way the expression "the plaintiff's right to a loom" meant the question between the parties respecting the loom; and upon that construction of the submission the award is, I apprehend, free from objection.

1854.

Burr v. Gamble.

Judgment.

It is argued, lastly, that this award must be set aside on grounds of irregularity; First, because the arbitrators admitted the affidavit of one *Williams*; Secondly, because parts of the defendant's evidence were taken in the absence of *Clarkson*, who has joined in the award. The allegation that the arbitrators admit-

(*a*) Harries v. Thomas, 2 M. & W. 32; Gunton v. Nurse, 5 Moore 259.

(*b*) Symes v. Goodfellow, 2 Bing. N. C. 532; Phillips v. Evans, 12 M. & W. 309; Fuller v. Fenwick, 3 C. B. 705; Hagger v. Baker, 14 M. & W. 9.

1854. Burr v. Gamble.

ted the affidavit of *Williams* is denied on the other side; and it is said that the witnesses were examined in the absence of *Clarkson* at the special request of the defendants But, however that may be—for the affidavits are to some extent conflicting—the clear answer to all objections on the irregularity, and, perhaps, to the other objection also, is that they have been waived by the defendant. With a full knowledge of the manner in which *William's* evidence had been taken and his own witnesses examined, he not only abstained from making any objection, but argued his case before the arbitrators on all the evidence, and to use his own expression "went home satisfied that no just man who understood the facts of the case, as proved by the witnesses, could award anything against him," and this motion was not made for some months after the publication of the award. I am of opinion, therefore, upon the whole case, that the award ought not to be disturbed.

Judgment.

OWEN v. CAMPBELL.

IN RE MILLS, INFANTS.

Mortgagee—Trustee.

October 9. Where for the purposes of a suit it is necessary to obtain an order for the execution of a conveyance by infant representatives of a mortg. agee not parties to the cause, the proper mode of applying is by petition.

Statement. This was a motion on a petition for an order that the infant heirs of *Thomas Mills* should execute a conveyance to the purchaser of certain mortgage premises sold under a decree made in this cause.

Argument. Mr. *A. Crooks*, in support of the application, referred to Re *Hodges (a)*.

Judgment. THE CHANCELLOR.—The bill in this suit is filed by two mortgagees and the personal representative of the

(a) Ante, vol. 1, p. 285.

third, one *Mills*, who had died intestate. The real representatives of *Mills* were not parties to the suit. The decree directed a sale, which has taken place; and the object of this petition is to have the conveyance executed by the heirs-at-law of *Mills*, who are infants.

This case comes within the 6th section of the 11 Geo. IV. and 1 Wm. IV. c. 6. That section provides "That when any person seized or possessed of any land, upon any trust or by way of mortgage, shall be under the age of 21 years, it shall be lawful *for such infant*, by the direction of the Court of Chancery, to convey the same to such person and in such manner as the said court shall think proper; and every such conveyance shall be as effectual as if the infant trustee or mortgagee had been at the time of making or executing the same of the age of 21 years."

The doubt which existed at one time, whether the 8th section of the act embraces mortgages (*a*), has been removed by subsequent statutes; but the 6th section is free from doubt, and appears to us to authorize the present application *(b)*. Judgment.

The application has been properly made upon petition, because the act does not authorize the court to make such an order on motion *(c)*; and the decree for a rule, already pronounced, is sufficient to justify the order without further inquiry *(d)*.

Had the application been for a conveyance from the heir to the personal representative, it is probable that the court would have refused the order. In that case equities might exist between the heir and personal representatives which would make such an order improper; but the decree for sale puts an end to any question of that kind *(e)*.

(*a*) In re Hodges, ante, p. 285. (*b*) In re Kent, 9 Sim. 501.
(*c*) Moore v. Grogan, 9 Irish Eq. 472.
(*d*) Blackwell v. Blackwell, 7 Jur. 9; In re Trapp, 8 Jur. 437.
(*e*) In re Catherine Meyrich, 15 Jur. 505.

1854.

Owen v. Campbell.

The order must be that the infants execute the conveyance, for this statute neither enables the court to vest the estate in the purchaser, nor does it authorize the appointment of a person to convey in their stead. This inconvenience has been removed in England by the 13 and 14 Vic. c. 60, but that statute is not in force in this province (*a*).

Judgment

THE MUNICIPALITY OF THE TOWN OF GUELPH v. THE CANADA COMPANY.

Dedication—Parties.

June 29 and July 1, 1853. March 20, & Oct. 9, 1854.

In the year 1827 the Canada Company, through their agent, proceeded to lay out the town of Guelph into village lots, the surveyor who was employed for that purpose being directed to reserve a portion of the lands for the purpose of a market square, around which lots were laid off and sold to different parties. A market house was erected upon a portion of the reserved land, and the whole space remained open as public grounds without any interruption until the year 1852, excepting that about the year 1841 certain pencil marks were discovered upon a map belonging to the Company, the date and origin of which did not appear, seeming to lay off a portion of the land reserved into two blocks, which led to a correspondence with the officers of the Company, in the course of which one of the commissioners of the Canada Company wrote a letter, in which he stated that "they had determined not to dispose of those reserves otherwise than with a view to the public advantage of the town of Guelph: thus I hope this matter is satisfactorily set at rest." Nothing further occurred until the month of February 1852, when an advertisement was issued by the Company of their intention to sell these blocks in building lots; whereupon a bill was filed by the Municipality, praying an injunction to restrain the Company from proceeding to such sale.

Held, that under the circumstances a complete dedication of the land in question had been made for the uses of the town, and a perpetual injunction was decreed with costs: And,

Semble, that without the aid of the letter, sufficient was shewn to entitle the council to this relief.

To a bill filed by the municipal council of an incorporated town to prevent an injury to the property of the municipality, the attorney general is not a necessary party.

The facts of the case and the arguments of counsel appear in the judgment.

Argument.

Mr. *Hagarty*, *Q. C.*, and Mr. *Vankoughnet Q. C.*, for plaintiffs.

(*a*) See supplement to Daniel by Headlam, p. 50.

1853.

Guelph v. Canada Co.

October 9.

Mr. *Brough* and Mr. *Turner* for defendants.

THE CHANCELLOR.—The object of this suit is to restrain the sale of a certain property in the town of Guelph known as the Market-square.

The defendants object, in the first place, to the constitution of the suit, because the Attorney-General is not a party.

If we look at this as a case of nuisance,—the light in which it was viewed by the learned counsel for the defendants,—it is difficult to deny the right of the plaintiffs to maintain this suit.

The Legislature has entrusted the plaintiffs with extensive powers in relation to the public property of the town of Guelph, and has at the same time devolved upon them the duty of protecting the rights of the public from infringement (*a*). Now it cannot be denied that the inhabitants of Guelph have a peculiar interest in the Market-place. The infringement complained of would obviously inflict a special injury on the inhabitants of Guelph. A private individual sustaining special damage is allowed to file a bill of this sort, and it is difficult to understand why this municipality should not have the same right.

Judgment.

Cases of this sort are of frequent occurrence in the United States; and in the courts of that country corporations are considered as the representatives of the public, for the purpose of maintaining suits in equity for the preservation of the public rights in cases like the present. In The Trustees of *Watertown* v. *Cowan* (*b*), the point was expressly decided by Chancellor *Walworth*, and the learned judge referred to The City of *London* v. *Holt* (*c*) as an authority for his judgment.

(*a*) 12 Vic. c. 81, sec. 60, 138. (*b*) 4 Paige, 514. (*c*) 5 Ves. 129.

1853.

Guelph v. Canada Co.

But this is not, strictly speaking, a case of nuisance. The defendants had not done, nor were they about to do, anything which can be termed with propriety a nuisance. The object of the bill is to restrain the defendants from doing an act which, though not a nuisance is contrary to their duty and highly injurious to the plaintiffs. Viewed in that light, I think the suit properly constituted.

But the bill rests the case, in our opinion, upon its true foundation. It prays an injunction to restrain what would certainly be, if the plaintiffs can make out their case, an enormous evil. The defendants had divided the property into sixty parcels, and were about to sell it to, possibly, as many purchasers. Now that step would have been obviously productive of a great multiplicity of suits, and by means of it the plaintiffs' rights in that, and possibly in other respects, would have been greatly complicated. Now that is a clear and distinct ground for the interference of this court; and it would be, in my opinion, both unreasonable and inconvenient to hold that the plaintiffs are not the proper parties to maintain such a suit.

Judgment.

The defendants contend, in the next place, that the evidence wholly fails to establish a dedication of this property to the public; and they ask the court to determine that question upon the evidence before it instead of referring the question to a court of law.

This case has been very much contested, and the evidence is in consequence voluminous; but that has arisen, as it seems to me, from the value of the property and the position of the parties, rather than from any difficulty as to the law or the fact.

The power of the defendants to dedicate this property cannot be doubted; the only question, therefore, is one of fact—was there a dedication? and upon that the evidence seems to me extremely clear.

The town of Guelph was laid out in the year 1827 under the direction of Mr. *Galt*, then an agent of the Canada Company. The survey was made by Mr. *Tiffany*. He swears that he at first prepared a plan in accordance with his own views, which was quite different from the one finally adopted; that Mr. *Galt* disapproved of that plan; that under Mr. *Galt's* special instructions a new plan was prepared, laying out the Market-place as it has ever since existed; and that he himself performed the survey, and staked out the market-place and the lots which surround it, in accordance with the plan so prepared.

The plan prepared by Mr. *Tiffany* is not produced; it is said to have been lost: but that a survey was made round an open space in the way he has described is not denied. His statement, that Mr. *Galt*, the agent of the Canada Company, intended this open space as a public market, is confirmed by the *viva voce* evidence of several witnesses, and is placed beyond doubt, as it seems to me, by the documents to which I shall presently refer. But, however that may be, the space marked out by Mr. *Tiffany* as a market ground has been unenclosed ever since, and the inhabitants of Guelph have had the free use of it from that time to the present moment.

Judgment.

The allotment of this space, then, as a market ground, and the subsequent enjoyment by the public, are proved beyond controversy. It is argued, however, that the intention to dedicate has not been established. The evidence already adverted to, in connection with the subsequent user, would have been quite sufficient, I apprehend, to sustain the plaintiffs' case; but the documents and evidence of which I am about to speak place the question of intention beyond doubt.

In the year 1828 (the exact date does not appear) Mr. *John McDonald*, then in the employment of the

1853. Company, prepared a second plan of the town of Guelph, which has been proved in the cause. This, as Mr. *McDonald* informs us, is a copy of *Tiffany's* plan: it was drawn in Toronto, and is the oldest map of the town of Guelph now in the possession of the Company, or indeed in existence.

Guelph v. Canada Co.

At this period a large number of village lots—about one hundred and sixty, as I gather—including all, or nearly all, those around the Market-place, had been sold by the defendants; and a list of the purchasers is appended to the map of which I am now speaking, prepared by Mr. *McDonald*, as he tells us, in the year 1828. How many of the persons completed their purchases and obtained deeds does not very clearly appear, nor is it in our view material. There can be no doubt that many of the contracts then entered into were completed; and the evidence shews that many of the lots surrounding the market were built upon at a very early period, the houses opening towards the market in some instances, and in others towards the adjoining streets.

Judgment.

Now it is impossible to examine that map without coming to the conclusion that the person who designed this plan (Mr. *Galt*) intended to appropriate the whole space as a market; indeed the words "market ground" are written in such a way as to amount to a direct declaration to that effect. But, irrespective of these words, the general character of the plan, and particularly the way in which the streets immediately surrounding the market are laid out, convinces us clearly that such must have been the original design. Portions of this map were altered in 1829, and other portions in 1833, but the market ground remains to this hour in its original shape.

Another map has been proved in this cause—I mean the lithograph marked exhibit A—which is entitled,

1853.

Guelph v. Canada Co.

in our opinion, to great weight. This litograph plan was prepared in London, and Mr. *Jones* says he supposed it was sent out here—that is by the Company—for distribution; and no doubt that must have been so. It is an exact copy of the map of 1828 on a reduced scale, and in 1834 several hundred copies were in the office of the Company in this country. It is quite clear that it was prepared in London at the instance of the Company. In this plan the words "market ground" are written over the whole space, and a house is designed in the centre, under which are inserted the words "market-house." It is impossible to look at this plan without feeling convinced of the Company's intention to dedicate the whole space; it amounts to an explicit declaration to that effect.

The force of this was felt by the defendants, and an attempt was made to obviate its effect by questioning its authenticity. It was said, at least, that it had not been sanctioned by the Company. Mr. *McDonald* swears that in 1834, when he came into their service, his order was not to issue any further copies, and that he did not in fact issue any, with one or two exceptions. That point is contradicted. Mr. *Jones* swears that he never issued any such order. But, assuming Mr. *McDonald's* evidence to be strictly true, it is quite immaterial. In the year 1834 the plan was confessedly incorrect in some material points quite unconnected with the market ground; the order to discontinue its distribution would have been therefore natural enough. But such an order in 1834 does not destroy, or even weaken, the force of the plaintiffs' evidence. In preparing that plan in 1828, the Company deliberately declared their intention to adopt Mr. Galt's design—that is, deliberately declared their intention to dedicate this whole space to the public as a market ground; and their is not the slightest evidence of any change of intention until shortly before the commencement of these proceedings.

Judgment.

1853.

Guelph v. Canada Co

This evidence is of great weight in itself; but, coupled with the testimony to which I am about to advert, it becomes almost conclusive. Mr. *Jones* came to this country in April 1829, and he continued to be the acting commissioner of the company here for more than ten years. Mr. *Widder* did not arrive until August 1839. It is clear that Mr. *Galt* laid out the whole space as a market, and it is equally clear that at the time of Mr. *Jones's* arrival the company had deliberately adopted Mr. *Galt's* plan. Now if there had been any change of intention, I do not mean to say that the Company could legally undo what had been done: but if any change in their views had taken place, Mr. *Jones* must certainly have been aware of it. Such a change would have originated here, and in all probability with Mr. *Jones* himself; in any event he would have known of it. But his evidence shews distinctly that no such change of intention ever existed. He says, "I presume it was the intention of Mr. *Galt* to lay out the whole open space as a market-square, but I cannot say of my own knowledge that such was the intention of the Company or of Mr. *Galt*. I never directed any alteration to be made with reference to the laying out the open space as a market-square, except with regard to the piece allotted as the site of the Scotch church. My belief was, from all that I observed and knew, that the open space was intended to be laid out by the defendants as a market-square, and I never heard anything to the contrary till the lots in the disputed blocks were advertised for sale." Now if Mr. *Jones*, the acting commissioner of the Canada Company in this country, believed during all this period that the whole open space had been dedicated to the public—if he did, in fact, think, as he swears he did, that the Company did not lay claim to any part of the open space, it is impossible to deny that the user of this property by the public up to August 1839 was with his—that is, with the Company's —assent; and assuming that to have been so, it is difficult to conceive a clearer case of dedication.

Judgment.

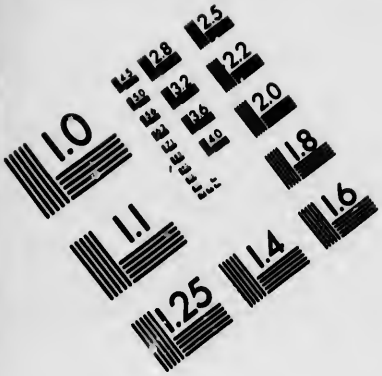
It is said, however, that the plan marked as exhibit X is the only authentic map of the town of Guelph, and that in that plan the disputed blocks are, and for a long time have been, marked out by dotted lines; and the existence of these lines, it is argued, negatives the intention to dedicate attributed to the Com[pany].

All the facts upon which this argument is based are contradicted. There is no pretence for the assertion that the plan of 1828 is not authentic. It was prepared at the instance of the Company by their authorized agent. It has been kept amongst the archives of the Company ever since. For many years it was the only plan in their possession, and a great portion of the town—all that portion surrounding the market-square—was sold in accordance with it, and long before map X had been in existence. Now I really do not know what is meant when it is said that this was a merely hypothetical plan.

Judgment.

The existence of the dotted lines, upon which much stress was laid, is also denied. But assuming them to have been delineated on map X in 1834, as I think they were, although the evidence is very conflicting, what does that fact prove? Mr. *John McDonald*, who described them, admits that he had no authority for doing so beyond his own fancy; and Mr. *Jones* swears that he never authorized any change in the plan. It is hardly necessary to remark, that lines in plan X, drawn without the Canada Company's knowledge or assent, cannot furnish data for determining the Canada Company's intentions.

The only other portions of the evidence to which I think it necessary to advert are Mr. *Widder's* letters of June 1841 and August 1843. At the first of these periods some uneasiness began to be felt as to the intentions of the Company respecting the reserves, which resulted in a long correspondence between the



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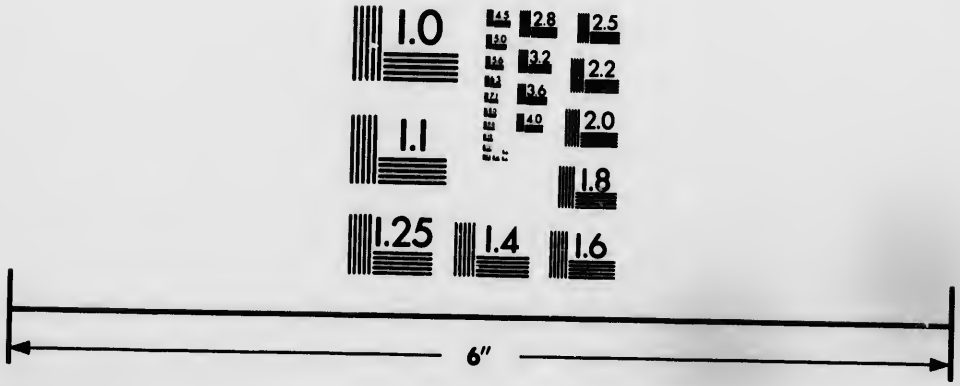

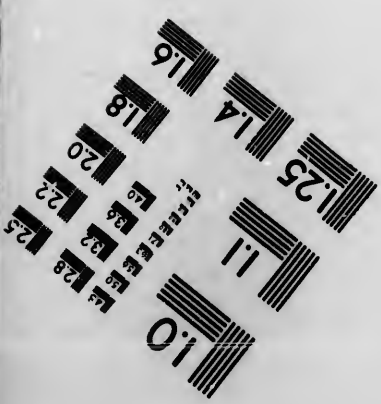

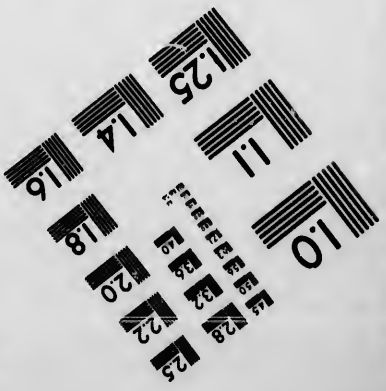

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1853. Guelph v. Canada Co.

local agent and the commissioner here. On the 20th of April Dr. *Allings* entered at great length into the merits of the question, and closes one branch of the subject with this sentence: "Lastly, I have observed that such is now, and has been for some long time past, the state of the public mind in Guelph, that it is absolutely necessary to have the Company at once give up all claim to the reserves, or to declare their determination to hold them for sale." Mr. *Widder's* letter in reply is dated the 4th of June, and is in these words:

"Dear sir,—I have now the pleasure to address you in reference to the reserves in front of lots 114 to 122, and 123 to 131, in Guelph. My colleague, Mr. *Jones*, having been here, we have taken the various points connected with this business into consideration, and especially those noticed in your late communication, and we have in consequence determined not to dispose of these reserves otherwise than with a view to the public advantage of the town of Guelph. Thus I hope this affair is satisfactorily set at rest. It is one of those questions which sufficiently illustrates the inconvenience of leaving matters undecided to be dealt with hereafter."

Judgment.

This letter was considered by the inhabitants as a satisfactory recognition of their claims: but Mr. *Widder*, speaking of it in his evidence, says, "Mr. *Jones's* opinion was, that the town had a right to the whole market-square, including the disputed blocks; such being the case, I wrote to Dr. *Alling* with a view to keep the matter open and in abeyance." What Mr. *Widder's* intentions may have been is not, perhaps, very material; but, looking at the terms in which his letter is couched, and recollecting the expostulation to which it was a reply, I am not surprised that it was wholly misunderstood, and that those to whom it was addressed concluded, as it seem they did, that it had been the intention of the writer to set the matter at rest and not to keep it open.

But, whatever may be the sound interpretation of the

first letter, the second, at all events, is not open to any misconstruction. It is dated the 7th of August, 1843, and contains this passage: "We shall have no objection to do anything that may be requisite to put the market-square more immediately under the control of the District Council, but I think that at present they have full powers to treat that in the same manner as the public streets and other district property. We can, however, give no deed or other title, but shall be always willing to support their authority in all improvements which they may wish to make in the town property of Guelph."

1854.

Guelph v. Canada Co.

These letters appear to me to be of great importance, or at any rate the latter is, whether we regard it as an exposition of what had been already done by the Company in relation to this property, or as a declaration of their intentions for the future. If it is to be regarded as an exposition of the rights of the town and the position of the Company in reference to past events, then it is a plain admission by the Company that this property had been already dedicated to the public. If it is to be regarded, on the other hand, as a declaration of intention merely, then it amounted to a dedication at that time, which has been followed by several years' enjoyment, and is now binding on the Company.

Judgment.

Upon the whole, the case appears to me to be quite free from doubt. The whole space was laid out as a market-square in 1827; that was followed almost immediately by a sale of all the adjoining lots. Now if there had been nothing more in the case, there would have been, as I apprehend the law, an immediate dedication to the public. But it is not necessary for the plaintiffs to rely on that legal consequence. The intention to dedicate is evinced by the clearest evidence, and the easement has been enjoyed for upwards of twenty years. I am of opinion, therefore, that the plaintiffs are entitled to a perpetual injunction, and that the defendants must pay the costs of this suit.

1854.

Guelph v. Canada Co.

ESTEN, V. C.—I think in this case there was a dedication to the public of the whole space called originally 'the market-square,' and that the defendants ought to be restrained from proceeding to a sale of any part of it. It must be assumed that Mr. *Galt* had authority to lay out the town of Guelph, and that any dedication which he made in so doing was binding on the defendants. It would seem very clear that the whole space was originally intended for a market-square by Mr. *Galt*, and not merely the eastern part. *Tiffany* proves that he surveyed the whole space, and staked it and laid it out as a market-square under Mr. *Galt's* directions; and it is impossible to doubt from Mr. *Tiffany's* evidence that the whole space was laid out by Mr. *Galt's* directions as a market-square. This is corroborated by the fact of map A being made by Mr. Surveyor *McDonald* under Mr. *Galt's* directions, which contained the market ground as laid out by Mr. *Tiffany*, and had the words "market-square" written across the whole space, and a representation of a building for a market-house in the [illegible]e; by the lithographic maps following map A in these respects, which must have been made by the directions of the defendants, although they did not afterwards use them; by the maps exhibited at New York, which, however, perhaps are not sufficiently proved; and by the concurrent testimony of numerous witnesses entitled to credit, that the westerly portion of the open space has always been regarded as public property. It is quite clear, I apprehend, that the easterly part alone was not laid out as the market-square and the westerly portion reserved; but the whole open space was laid out as the market-square originally by the defendants through their agent, Mr. *Galt*. This must have been in 1827; map No. 8 was made in 1828. At that time certainly the open space was wholly free from lines, and then the words "market grounds" were written. At this time a considerable number of persons had settled in Guelph, as appears from the list appended to map No. 8

Judgment.

by Mr. Surveyor *McDonald* from one furnished to him by the defendants, which must now be presumed to be destroyed. According to the best judgment that I can form from the evidence, this state of things must have continued to the year 1829, at the least, without any alteration whatever, even the tracing of the lines upon map No. 8. It is quite uncertain when these lines were drawn on map No. 8, but probably in 1832 or between that year and 1828. The lines are either in pencil or dotted; if in pencil or probably if dotted, it would indicate that it was a matter undecided, and, in the language of surveyors, hypothetical. The lithographic map must have been made before the 8th of April 1829, the date of the patch put by *McNaughten* upon map No. 8, or about that date. I doubt whether the lithograph is a copy of map No. 8, although surveyors seem to think that it is: it seems to me to be different. I am inclined to think that a map must have been framed from *Tiffany's* survey earlier than map No. 8, and that from this the lithograph was engraved.

1854.

Guelph v. Canada Co.

Judgment.

The Scotch church seems to have been built in 1833 or 1834. The facts relating to it are simply, that Mr. *Galt* promised a site for it, but whether in the place where it was afterwards built or not seems uncertain. I should be inclined to think that the promise had been made after the town had been laid out, because Mr. *Sandilands* says that Mr. *Smith* told him it had been promised to the Scotch people of the place. I should incline to think that Mr. *Galt*, having laid out the town without reserving any place for the Scotch church, and being afterwards pressed by an application for that purpose, had promised a site either generally or in that particular place; which latter, supposing it within his power, would not indicate an intention to revoke beyond the extent of the piece of ground appropriated. If the promise were contemporaneous with the laying out, the case is stronger the same way; and

1854.

Guelph v. Canada Co.

if the Company, in fulfilment of a general promise, allotted the site in question, it could not have a greater effect; it could not avail at all against a previous dedication, and, as evidence of an intention not to dedicate, it could not have much effect. The Company were not thereby claiming the ground for their own benefit, but giving it to a portion of those to whom it may have been dedicated, with the assent of the whole apparently. They conveyed the inheritance which they had, subject perhaps to the dedication. It is consistent with the fact of a previous dedication.

The drawing the lines of the disputed blocks cannot be traced to any authoritative source. It seems to have been done by Mr. Surveyor *McDonald*, but he cannot say that he received any instructions for the purpose; and Mr. *Jones* disclaims having given any to his recollection, and says that Mr. *Allan* would have taken no step of importance without consulting him, and that he took the more active part in the affairs of the Company. He says, moreover, that he always thought the town entitled to the ground in question until it was offered for sale. It would seem that Mr. Surveyor *McDonald* had, or may have, drawn the pencil lines on map No. 8 or map X by way of suggestion and without authority; that they never came or may never have come under the notice of the commissioners, but were of course acquiesced in by the clerks and agents.

Judgment.

An alteration was made in map No. 8 in 1829. It seems to have been done to correct some accuracy in the map. A patch was put upon the map, which covered part of the town, including the eastern part of the market square. The word "grounds," which would have been covered by the patch was partially obliterated, but the word "market," upon the western part of the square was left untouched. The part of the patch which covered the eastern part exhibited the

market-house in the centre of that part, with the word "market" written above and the word "house" below it, representing, as I apprehend, the actual state of the ground at that time. These facts are obviously immaterial, and could have been done with no intent to affect the dedication.

1854.
Guelph v. Canada Co

Mr. *McDonald* says in his evidence that the lithographic maps were never used, in consequence of instructions to that effect received from Mr. *Jones*. This gentleman does not recollect the circumstance; but if, as is probable, it really occurred, it seems to have been owing to the fact of this map embracing some hypothetical addition to *Tiffany's* survey, which was not sanctioned and was abandoned. *Tiffany's* survey was, I think, never altered or interfered with.

Much reliance was placed on the fact, that the market-house was erected on the eastern portion of this ground, and that the western portion was not used as a market-square. On the other hand, several witnesses concur in stating that Mr. *Galt* expected Guelph to become a large town, and considered that it would require a large market-square eventually, and that the western portion, although not used as a market-square, was always regarded as public property. It seems that the whole space was more than was sufficient for the then requirements of the town, and the erection of the market-house on the eastern part is referable to the fact of that part of the town being then more settled and inhabited. I do not think these circumstances argue any revocation on the part of the Company or abandonment on the part of the town.

Judgment.

The American cases which were cited throw much light on this branch of the law. There can be no doubt that if the owner of land lay out a town or village upon it, containing streets, squares, and other public places, and exhibit maps and plans of such

1854.

Guelph v. Canada Co

intended town or village so laid out, and people settle in the place upon the understanding that such public thoroughfares and places exist, and no effectual alteration is made, and the place grows under such circumstances into a town or village, there is a complete dedication of such thoroughfares and places to the public use.

Now, to sum up all that I have said, suppose the whole of this space had been used as a market-square from the time of the laying out of the town, the market-house erected in the centre of it, no Scotch church built, no lines drawn on maps, nothing, in short to affect or embarass the question, there could be no doubt that a complete dedication had taken place; but the circumstances which I have enumerated and remarked upon in detail appear to me quite insufficient to rebut the conclusion of a dedication in this case, and therefore I think the fact of dedication established, and that the consequential relief should follow.

Judgment.

In regard to the frame of the suit, the easement seems certainly vested in the municipality, and they would seem to have a right to sue for any injury offered to it. When the easement is vested in the public generally, the Attorney-General must proceed; but when the property is vested in a public corporation, there seems no reason why they should not sue. For this course, the case in *Paige's* American Reports (*a*), and the case of the corporation of *London* against *Bolt*, are authorities. If the latter case is to be referred to the principle that a public corporation charged with the good government of a town or city has a right to proceed to repress anything that disturbs its good government, then that principle seems to apply to this case.

I think a perpetual injunction should be decreed with costs.

(*a*) 4 Paige, 510.

SPRAGGE, V. C.—Looking at the grounds of defence taken by the answer, the defendants would appear to be in error as to several important facts and circumstances in relation to the land in question. 1854. Guelph v. Canada Co.

They allege that all maps which they have recognized as authentic, or which have ever been exhibited by them or their agents to the public or to intending purchasers have always shewn the two blocks or parcels of land in question marked off and distinguished either by dotted or continuous lines.

Now it appears clearly from the evidence that from the year 1827 for several years,—for five years at the least,—a map was exhibited to intending purchasers in the Company's office at Guelph. This was before any map was drawn by Mr. *John McDonald*, the surveyor, whose belief is that he drew dotted lines in pencil round the blocks referred to in 1832. I think it very doubtful, upon the evidence, whether Mr. *McDonald's* recollection is accurate as to the date of his drawing these lines on the map, and whether they were not in fact drawn several years afterwards; but whenever drawn upon that map, the concurring evidence of numerous witnesses is given to the fact, that upon the map used in the Guelph office from 1827 to 1832 there were no blocks marked off by either dotted or continuous lines upon any part of the open space, the westerly portion of which is in question; and the existance of a map at New York without these lines, and of another map in the company's office in St. Helen's-place, London, also without dotted lines, is confirmatory of the parol evidence given upon this point; and if the agency of Mr. *Buchanan* at New York is sufficiently proved, and I believe it was not denied, it is another instance of a map of Guelph without these lines exhibited by an agent of the company to intending purchasers. Judgment.

1854.

Guelph v. Canada Co.

As to the map at Guelph, it was not only exhibited openly in the office of the company's agent at Guelph, and inquirers for land in the town referred to it—a very clear recognition, I should say, that it was an authentic map—by the company's agent there; but it was recognized also by Mr. *Galt* himself, who, upon *Benjamin Harrison* applying to him to purchase a town lot, and telling him that he wished one in a public place, as he intended to keep a store, shewed him a map, telling him that all persons would be treated alike. Whether the map shewn by Mr. *Galt* was the one then kept in the company's office at Guelph does not appear, nor is it expressly stated that the shewing of the map occurred in Guelph. It probably was so, but if otherwise it would still more strongly negative the position taken by the defendants.

Judgment.

The answer denies that any lots surrounding the open space in question were sold to any person or persons whatever on the understanding that such open space was a reservation for the public purposes of the town. The evidence disproves this. Mr. *Galt* informed *Benjamin Harrison* on the occasion already referred to that the lot which he purchased was on the market-square, and *that* lot (No. 126) fronts on the open space in question. *Thomas Sandilands* purchased two lots from the company's agent, Dr. *Daly*, fronting on the open space in question, on the understanding that they were on the market-square; and other witnesses state (not precisely the point denied) that they purchased lots from purchasers from the Company on the like understanding.

The answer alleges that the two blocks of land now surrounded by dotted lines have been always known as the market-street reserves, and are so denominated in all official correspondence relating thereto. There is nothing to shew that these blocks have been always known as the market-street reserves, but the contrary;

for they appear to have been always known not as blocks at all, but as a portion of a large open space, the whole of which was known, notwithstanding its irregular shape, as the market-square. And as to the official correspondence, it is strange, if always so denominated therein, that not only successive agents at Guelph, but Mr. *Galt*, Dr. *Dunlop*, and Mr. *Prior* should have spoken of this land in question in a manner inconsistent with its being so; and that Mr. *Mercer Jones*, so many years conversant with the affairs of the Company, and well acquainted with the town of Guelph, should never have looked upon any portion of this land as blocks reserved.

Another point taken by the answer, and which is at variance with the evidence, is, that the words "market-square," or other similar designation, did not appear on the westerly portion of the open space in any map used by the Company or any of their agents; while the fact is, that maps so used and exhibited shew the site of the intended building between the easterly and westerly portions, and the word "market" is written on the westerly portion only, and the word "square" on the easterly portion. This is proved by some of the witnesses who proved the absence of the alleged dotted lines on the map used at Guelph before map X, and by the inspection of maps produced.

Judgment.

The answer denies that the land in question was ever set apart as a portion of the market-square, or that, with the exception of the site of St. Andrew's church, it was ever appropriated to the use of the public. If by this, the defendants mean to contend that what has occurred in relation to the land in question did not amount to a setting apart or appropriation thereof to the use of the public, that is a question of law to which I will come presently; but if they mean to say that the piece of land in question was not intended to be set apart and appropriated, but the

1854.

Guelph v. Canada Co.

easterly part of the open space only, then I think that the weight of evidence is certainly against them; for, besides the maps, which are themselves strong evidence, there is the public declaration of Mr. *Galt* on the spot in 1827, when he spoke of the great advantage which so large a place as the whole open space would be to Guelph. Again, in accounting for the place being so large, he spoke of its intended use as a "*cattle tryst.*" Dr. *Dunlop* also pointed out the whole open space as intended for a market-place; and in answer to a remark that it was a large space for a market-square, and that so much land would not be used for the purpose in England, he remarked that Guelph was going to be a large place; and Mr. *Prior*, another officer of the Company expressed himself similarly.

Judgment

The evidence of Mr. *Tiffany* is also material upon this point; for he it was who, as surveyor, had personal conferences with Mr. *Galt* as to the laying out of the town. He drew a plan or sketch which did not altogether meet Mr. *Galt's* approbation, and then, after receiving instructions from Mr. *Galt*, drew a map, which was approved of, and in accordance with which the town was laid out so far as that map shewed it laid out; and Mr. *Tiffany's* idea has always been that the market-place of Guelph comprehended the whole of the open space, and he says that he never heard it questioned until recently, when the Company were about to sell the westerly portion.

All this concurrent testimony discountenances the notion that there was any distinction between the easterly and westerly portions of the open space,—that is, between the easterly and that westerly of Huskinson and Wyndham streets. But the defendants contend that as to that westerly portion of the open space there was no *animus dedicandi*, without which there can be no dedication. They say in their answer that that portion has always been reserved and retained

by them as their own property, with a view to its being used in such manner as time and circumstances might suggest, and as they in their discretion should determine; and there is some evidence that this has been the view taken by some officers of the company in Toronto. There is another part of the answer which may well be read in connection with this. In it the defendants say that at sundry times, according as circumstances suggested the propriety or advantage of modifications, they (the defendants) have altered in several particulars their plans of the town of Guelph, and that such alterations were made by them without objection on the part of the public or any of the inhabitants of the town of Guelph, and without any apprehension on the part of the defendants that they had not authority to do so, or that in modifying the plans of the said town according to circumstances they were guilty of any breach of good faith towards the public or any individual.

1854.

Guelph v. Canada Co.

Judgment.

First, as to the fact of an *animus dedicandi* in this case; I think it appears clearly from the evidence that there was such an *animus*. The owners of the land on which Guelph was laid out being a corporate body, could only manifest their intention and speak their mind through those officers by whom its affairs were conducted, and through official documents, of which maps were, for such a purpose, most material. I think the *animus dedicandi* was evidenced by the map until the *animus mutandi* was evidenced upon the *McDonald* map at a later period. If there had been anything ambiguous about the earlier maps, which I think there was not, the declarations of Mr. *Galt*, who appears to have been in a sense the founder of the town, and the declarations of other officers of the company, would clear them up; for then shew that the *animus dedicandi* extended as well over the westerly as the easterly part of the open space. I think it appears sufficiently that the officers of the company at that day in Canada

1854.

Guelph v. Canada Co.

did not reserve, even mentally, an intention to retain a controlling power over the land in question; and I certainly have no doubt that if they did it could make no difference, for I feel satisfied that no one can be heard to say that he retained in his own mind an intention at variance with that which his acts manifested to the world. This is so plain as a matter of reason that it can hardly require authority to support it; but the observations of Lord *Denman* and of Judges *Patterson* and *Littledale* in *Barroclough* v. *Johnson* (*a*), and of Lord *Denman* and Mr. Justice *Patterson* in The *Queen* against The Inhabitants of *East Mark* (*b*), are pertinent to this point.

Judgment.

With regard to the supposed right which the defendants appear to have assumed as remaining in them to make such alterations in the plan of the town as circumstances might from time to time suggest, I can scarcely conceive a doctrine more dangerous to the rights of others. If such an unfettered discretion resides in the company, I see nothing to prevent their going much further than they now propose to do, and reducing the easterly portion of the open space to half its present dimensions, or making other alterations to the prejudice of the public, of the town, or of individuals residing in it; and that, after the lapse of almost any number of years. When a dedication has once taken place, whether made by a corporate body or an individual, the party dedicating has, as the very term imports, parted with all control over it inconsistent with the use to which he has appropriated it.

It is alleged that some alterations—deviations from the original plan of the town—have been made by the company and acquiesced in, and some instances are referred to in evidence, and it is contended that this is evidence against the fact of dedication. If in this case we were left to infer dedication from user, such

(*a*) 8 A. & E. 99. (*b*) 11 Q. B. 877.

assumption of right would be material evidence against it; but if dedication is made out independently of user, then such acts merely amount in my view to this: that they were obviously improvements upon the original plan, and being of general benefit were acquiesced in, or were otherwise of such a nature that no one cared to call them in question. Of this nature, I think, was the appropriation of a part of the market-place for the site of St. Andrew's church; for I think from the evidence that that act was not viewed by the inhabitants as a rightful exercise by the company of a disposing power retained by it over the land in question, but that they did not choose to object to it, to the prejudice of a religious body of the town for whose case no reservation had been made, while it had been made for others.

1854.

Guelph v. Canada Co.

I do not understand the defendants to limit the assumed right to which I have adverted to any time or to any part of the town; for they claim to exercise it more than twenty-five years after the town was laid out and mapped, and many town lots sold by the map and after the existence of maps by themselves called authentic as distinguished from what they call hypothetical maps, and to exercise it according to their discretion in any part of the town,—in parts where rights have been acquired by purchase of lots, as well as in other parts; and this claim is put forth as distinct from the alleged negation of the fact of setting apart the land in question afforded by the dotted lines, and would be good if good at all, taking the land in question to have been set apart equally with the easterly portion of the open space. It appears to me to be very clear that this assumed right has and can have no existence, at least as to any part of the town where others' rights have been acquired.

Judgment.

I think that the evidence given establishes these several points,—that, according to a map used by the

1854.

Guelph v. Canada Co.

agents of the company in Guelph in settling the town, exhibited publicly in their offices there, and to which intending purchasers were referred, the entire open space was laid down as a market-square or market-block, without any distinction by dotted lines or otherwise to indicate that one part of that open space was less appropriated to the public uses—which might be implied from the designation given to it—than any other part; that a map or maps of this description were so used from 1827 until 1832, if not later—I incline to think as late as 1839; that servants and agents of the company understood and declared the whole of such open space to be so appropriated; that some settlers—probably all who purchased lots fronting on this open space—did so purchase with the understanding that the whole was so appropriated; and that the early settlers, as well as those of a later date, settled in the town under the same understanding; for that it was and should remain so appropriated was a matter of general interest to the inhabitants, making the place more attractive and more desirable as a residence; and, further, I am of opinion that the *animus dedicandi* did exist, and that it was evidenced in the manner I have already stated.

Judgment.

The question here is not whether a private individual —one, for instance, who had purchased land from the company fronting on the land in question—could claim the interposition of this court, in which case he could come only only upon the ground of contract; but the question here is dedication or no dedication; and if the facts I have taken as proved are really established by the evidence, as I believe them to be, I think a dedication of the land in question is made out.

The laying out, upon a map of an intended town, of squares, or other open spaces for public recreation or amusement, or for any other public purposes, renders them as sacred to such purpose as the streets them-

selves. Upon this point, Chancellor *Walworth*, in the Trustees of *Watertown* v. *Cowan (a)*, is very clear. After alluding to cases, then recently decided, as "settling the principle that where the owners of certain property have laid it out into lots, with streets and avenues intersecting the same, and have sold their lots with reference to such plan, it is too late for them to resume a general and unlimited control over the property *thus dedicated to the public* as streets, so as to deprive their grantees of the benefit they may acquire by having such streets kept open." He adds, "And this principle is equally applicable to the case of a similar dedication of lands in a city or village to be used as an open square or public walk."

1854.

Guelph v. Canada Co.

It has been felt as a difficulty in some of the earlier cases that there has been no grantee of the land assumed to be dedicated; but this has ceased to be a question of any practical importance, since it has been repeatedly decided that when there has been a dedication to the public, and an attempted resumption of control interfering with the uses to which such dedication has been made, the court will interfere in behalf of those interested. Whether they must be represented by the Attorney-General or not is then the question. The objection that the suit must be in the name of the Attorney-General was made in the last case to which I have adverted, and was overruled, the learned Chancellor saying, "I can see no valid objection to considering the corporation as the proper representative of the equitable rights of the inhabitants of the village to the use of the public square, so as to authorize the filing of a bill by the corporation in this court to protect their equitable rights against the erection of this nuisance," and he referred to the case of The Mayor, Commonalty and Citizens of *London* v. *Bolt (b)*, and to the case of The City of *Cincinnati* against the Lessees of *White*. Other cases have since been decided

Judgment.

(*a*) 4 Paige, 510. (*b*) 5 Ves. 126.

1854.

Guelph v. Canada Co.

in the United States, where similar rights have been asserted in suits, instituted in the name of the municipality, the inhabitants of which have been immediately interested in the question. It is true that the right here in question is not exclusively the right of the inhabitants of Guelph, but is a right in which the Queen's subjects generally are or may be interested, But the right and interest of the inhabitants of Guelph are peculiar; they are actual and real, while those of the general public are remote, and exist rather as a matter of principle than of actual application. Looking at the acts in relation to the municipal corporations of Upper Canada, they appear to me to be intended to protect the interests of the municipalities, as well as to regulate their internal affairs; and it is certain that the interests of the inhabitants of Guelph are involved in the question presented in this suit not only in a different degree, but in a different sense from the interests of the public at large. I think that the suit is not improperly constituted.

Judgment.

I would make one remark in regard to the dotted lines so often adverted to. It has been assumed that if they always existed, it was in that case shewn by the map itself that there was no dedication of the land in question. This may be the case; but what was the meaning of *dotted* lines instead of the continuous lines, by which all other boundaries on the map are marked? They must denote something different from continuous lines, or continuous lines would have been used. My own interpretation of these lines appearing where they do on the more recent maps would be, that they were meant to shew Market-street continued through the land in question and streets around it inside the single tier of lots, and that the residue of the two blocks thus surrounded by streets was still part of the market-square. As, however, the evidence proves, as I think, that upon the original maps there were no lines, dotted or continuous, on the open space in question, the meaning of such dotted lines in such a place is not very material.

FULLER V. RICHMOND. 1854.

Saw-logs—Specific performance.

The court, in a proper case, will compel the specific performance of an agreement to manufacture and deliver saw-logs.

The nature of this case and arguments of counsel are clearly set forth in the judgment of the court and the report of the case on the motion for an injunction, reported *ante* volume II., page 24. Statement.

Mr. *Mowat* and Mr. *Turner* for plaintiff.

Mr. *Vankoughnet*, Q. C., and Mr. *Strong* for the defendants. Argument.

The hearing of the case had taken place some time ago; and after taking time to look into authorities, the court now proceeded to give judgment.

THE CHANCELLOR.—This case underwent considerable discussion on the motion for an injunction (*a*). But the learned counsel for the defendants contended at the hearing that the evidence in the cause differed materially from that which was before us on the former occasion; that it not only failed to prove the contract for a lien set out by the bill, but established the reverse; and that the proof of a delivery, upon which our judgment on the motion principally rested, was wholly wanting. They argued that the property in the logs not having been changed, remained in *Richmond* and *Carl* until the sale to *Redmond*, and having been then transferred to him, he was consequently entitled to a decree with costs. Judgment.

The evidence in the case does certainly differ materially from that which was before us on the motion. We had before us then the affidavit of *Craig*, which proved an express contract for a lien, and a delivery

(*a*) 2 Grant Rep. 24.

1854. Fuller v. Richmond.

in pursuance of that contract. But this witness died, unfortunately, before the evidence in the case was taken; and the facts to which he deposed have not been proved by any other witness—are incapable, perhaps, from their nature, of proof *aliunde*. The evidence of *Robertson* too, who is also dead, is said to differ from his previous affidavit, and is certainly inconsistent to some extent with the case make by the bill, and with the statement made by *Craig* on the motion. But enough remains, in my opinion, to entitle the plaintiff to a decree.

This case has little resemblance to those cited in argument. This is not, perhaps, a contract of sale; it is rather a contract for the performance of work and labour on account of the plaintiff. The subject on which that labour was to be performed, the trees, was comparatively of no value. The right to cut them might have been obtained by the plaintiffs from the Crown at a price almost nominal. Their whole value consisted in the labour necessary to render them portable and to transport them to the point of delivery; and it was for that that the price was really paid.

Judgment.

Such being the nature of the agreement between the parties, let us look at the provisions of the contract. After stating the work to be performed by the defendants, it goes on to provide that "*Fuller*, in consideration of the above undertaking of the defendants, *and in contemplation of the faithful performance of the above contract*, doth promise and agree to advance the following sums of money *for the performance of the said contract in part*, on the days and times following, that is to say, the sum of £50, to be paid on the first day of December now next ensuing; and the sum of £100, to be paid on the 15th day of January now next ensuing; and the sum of £75, to be paid on the 15th day of each and every month *during the performance of the contract*."

Now that has little resemblance to a contract for the construction of a carriage or the building of a ship. In such case the price, if paid in advance, goes into the common fund, and is applied in carrying on the general business of the manufacturer. There is no appropriation of it to any particular work. But here the agreement expressly appropriates the sums paid to the fulfilment of this particular contract. Could the defendants, neglecting to carry on the work, have claimed the instalments? Assuming the logs to have been cut and carried to a certain point, and then sold, could any further instalments have been claimed? I apprehend not. The contract is an express appropriation of the money to be paid, and amounts to an agreement on the part of the defendants to apply it as received to the fulfilment of the plaintiff's contract.

What, then, did the parties to this agreement intend? Did they intend that the property in these logs should remain in the defendants until delivery, to be disposed of by them at their pleasure up to that moment? I apprehend not. Contracts of this sort occupy, of necessity, much time. The logs are cut and hauled during the winter, and are driven down the stream at high water in the spring. That is a tedious and very expensive process. It occupied in this instance several months. Now, can it have been the intention of these parties that the plaintiff, paying these large sums from time to time during this long period for the transport of these very logs, was to remain up to the last moment at the mercy of the defendants? That, in my opinion, was not the intention. The contract expressly appropriates the monies paid by the plaintiff, first to the preparation of certain logs for his use; then to the transport of the logs so prepared to the place of delivery. Now that necessarily involves the appropriation of the logs so prepared and transported to the plaintiff's use.

Judgment.

1854.

Fuller v. Richmond.

In *Woods* v. *Russell* (*a*), and *Clark* v. *Spence* (*b*), an agreement that the property in the chattel should vest in the vendee, for his security, was implied in the absence of any express stipulation in the contract, and indeed contrary to what seemed its natural construction. In the present case that conclusion is fairly deducible not only from the nature of the agreement between the parties, but from the express stipulation of the contract.

But it is unnecessary to decide the case on that ground alone, for there is express evidence, I think, that it was the intention of these parties to vest the property in these logs in the plaintiff. *Robertson*, it is said, negatives that; but I do not so understand him. He swears, indeed that he had no instructions from *Fuller* to insert a clause in the agreement giving him security upon the logs. That, no doubt, must have been so, for he had no instructions from *Fuller* of any kind. He subsequently explains himself by saying that *Fuller's* instructions to *Craig* were not such as to warrant the introduction of such a clause. It is difficult to understand that explanation, for the witness was *Fuller's* professional adviser, from whom the suggestion would naturally have come: and it is hardly probable that *Fuller's* instructions would have forbidden so simple a security for the fulfilment of the contract. The evidence of this witness is somewhat unintelligible throughout; but it is clear upon the whole that *Craig* consulted him as to security, and that he advised the parties that *Fuller* would acquire what he calls a possessory right by having his initials marked on the logs. This is stated clearly more than once. In his re-examination he says, "I considered that the principal recourse of *Fuller* against the parties, in the event of a breach of the contract, would be against themselves personally; but that if the marking of the logs was carried out in pursuance of

Judgment

(*a*) 5 B. & Al. 942. (*b*) 4 Ad. & E. 448.

1854.

Fuller v. Richmond.

the opinion which I gave, it would give *Fuller* the possessory right, although not expressed in the original agreement in writing, and such is my legal opinion." And again: "My answer in regard to *Craig's* question as to the effect of marking the logs was made to *Craig*, but it was given for the benefit of all, and in the presence of all the parties concerned; and I consider that the marking of the logs was understood by *Richmond* and *Carl* to give to Mr. *Fuller* a certain right—an indefinite right—over the logs." What this witness means by the term "possessory right" is not very apparent. Perhaps he meant that the property would vest in *Fuller*, subject to the defendants' right to retain till payment. There is a passage in the re-examination which would seem to import that. He says, "I cannot say that *Carl* and *Richmond* considered that the possessory right I said the marking of the timber would give to *Fuller* would entitle *Fuller* to go and take possession in the event of a breach of the contract."

Judgment.

Carl, one of the defendants, has been examined as a witness on behalf of *Richmond*. Upon what principle that was done I do not understand, for, looking at the last order drawn up upon the injunction motion, by consent of parties, *Carl* and *Richmond's* interest in the suit is clearly admitted and provided for. Still he has been cross-examined, and the objection has been, I suppose, waived *(a)*. Now, *Carl's* account of the matter is this: "*James Craig* spoke about security, and Mr. *Robertson* said he thought, according to the writings or instructions *Craig* had from the plaintiff, security could not be taken. *Craig* said he did not know that it would make any particular difference. *Craig* said he wanted a heavier hammer, with "J. W. F." upon it. I did not care, I said, what mark was upon the logs so long as I could tell my own logs from the others in the river. *Craig* said he did not care

(a) Tristan v. Hardey, 14 Beav. 24.

1854.

Fuller v. Richmond.

about the mark, but would prefer having it; I said I did not consider the logs his until they reached the mouth of the river, and did not care what mark was on them." And in a subsequent part of his evidence he says, "*Fuller* was at the shanty once in the winter, and *Craig* was there twice. *I assented to the logs being marked with Fuller's mark.* I said I did not care at all whether they were marked or not."

Judgment.

Now, some parts of this statement are, to say the least, highly improbable. *Fuller's* instructions were not produced, and no explanation of so extraordinary a limitation of his agent's power to protect him has been suggested. Had he forbidden his agent to take security, even upon the logs, for his large advances, there must have been some very special ground for so unusual an order, which would have been explained, no doubt, to the agent; but the agent did not so understand his instructions, for his first inquiry was about security. Again: this witness's statement of what passed at this meeting cannot be reconciled with *Robertson's* evidence. *Robertson* swears that *he* suggested the marking of the logs, and informed the parties that the plaintiff would thereby acquire a specific security upon the logs without any express clause in the agreement. Assuming that to be true, and it is clear that something of the sort did take place, it is impossible to believe that the conversation which *Carl* represents to have taken place between himself and *Craig* did really occur. This evidence was taken after the statements of all parties upon affidavit had been examined by the court, and after judgment had been pronounced upon the facts as they then appeared, and wears very much the appearance of an attempt to meet the case upon which the plaintiff then succeeded. It is clear that security was talked of and intended; but beyond that point the evidence is not to be trusted—a conclusion at which I arrive without much hesitation, because *Richmond's* account

of the transaction differs materially from that given either by *Robertson* or *Carl*.

Then it is an admitted fact that *Craig* did produce a hammer with *Fuller's* initials; and it is proved by *Cartier* and several other witnesses that all the logs in question were marked with this hammer, most of them in the woods, and the residue after they had been put in the river.

It is therefore clear, I think, upon the whole evidence, that there was an agreement between the parties that the logs as cut should be marked with the plaintiff's initials for his security; and as it is not suggested how that act could secure the plaintiff except by transferring to him the property in the logs, it must be intended, I think, that such was the agreement of the parties (*a*); and it follows that each log when marked by the defendants became the property of the plaintiff, in pursuance of the intention and agreement of the parties.

Judgment.

In *Woods* v. *Russel* (*b*) the shipbuilder had signed a certificate to enable the defendant, the person for whom the ship was being built, to have her registered in his own name. There was no express stipulation that the property in the ship should vest in the defendant before completion, and the contract did not refer in any way to her registration, but Lord *Tenterden* considered the certificate as a declaration by the builder that the general property in the ship had vested in the defendant, and he determined that it had so vested in accordance with the implied intention of the parties. Now it does appear to me that the agreement to vest the property in these logs in the plaintiff before delivery, and the declaration that it had so vested, by the acts of the defendants in marking them, are much more clearly made out in the

(*a*) Read et al. v. Fairbanks, 17 Jur. 918. (*b*) Ubi sprua.

1854. Fuller v. Richmond

present case than in the one then under the consideration of the Court of Queen's Bench.

But, though it were clear that the property in these logs did not vest in the plaintiff, still the marking them in the way detailed in the evidence was, under the circumstances of the case, an appropriation of them to the plaintiff's use; and, assuming them to be of peculiar value, entitled the plaintiff to come here for specific delivery. There can be no doubt that when chattels have a peculiar value, and in other cases, they may be so appropriated as to entitle a vendee to come here for specific performance, although the property has not vested at law; and this court in such cases protects the equitable title of the vendee against the vendor or those claiming the legal title under him *(a)*. Now here the defendants marked the logs in question with the plaintiff's name. That was a declaration that these were the logs upon which the plaintiff had already paid large sums, and as to which he was about to be called upon to make further advances. He was called on for further advances, and upon the faith of that declaration did pay large sums for the transport of these very logs to the place of delivery. But it is said that all that was a mere voluntary appropriation by the defendants, which they were at liberty at any moment to recall. I cannot accede to that. It was a deliberate declaration, on the faith of which the plaintiff advanced his money, and which the defendants are bound to make good *(b)*.

Judgment.

Pooley v. *Budd* *(c)* was much relied on by the learned counsel for the defendant; but the chattles there were not of any peculiar value, and the case, therefore, is not analogous. In another point of view, however, it is an authority for the plaintiff. For it is

(*a*) Langton v. Horton, Hare 549.
(*b*) Hooper v. Nicholson, 4 M. & C. 179; Hammersly v. The Baron de Biel, 12 C. & F. 62; Pulsford v. Richards, 17 Beav. 87.
(*c*) 14 Beav. 34.

clear that the property had not vested in that case. The iron which formed the subject of that suit was part of a large mass at the company's works, and the company was bound to deliver it free on board at Swansea. Something, therefore, remained to be done by the vendors, and I take it to be clear that the property did not vest *(a)*. Still, the Master of the Rolls decreed in favour of the jurisdiction, because the purchase money had been paid, or rather the company had admitted such to be the fact, and were therefore estopped to deny it. That case is therefore an authority for our present decision.

1854.
Fuller v. Richmond.

It is said, however, that there is no evidence here of peculiar value. Assuming the evidence to be deficient in some respects, that should be regarded, I think, under the circumstances, as a mere formal slip, which the plaintiff ought to be permitted to supply. It would not do to conclude the plaintiff by an omission to prove facts already assumed throughout the case, if they must not be considered as established by the judgment on the injunction motion. But, as we are of opinion that the plaintiff is entitled to a decree on the other ground, it is unnecessary to determine this point.

Judgment.

I am of opinion, therefore, that the plaintiff is entitled to a decree with costs.

ESTEN, V. C.—In cases relating to saw-logs, which are of frequent occurrence and of an important nature in this province, it seems to me sufficient to prove that logs can be manufactured and conveyed down the rivers only at particular seasons; that markets are not kept for logs, but that each mill-owner supplies himself with his own logs; that they arrive irregularly; and that the plaintiff is a mill-owner, and

(a) Acraman v. Morrice, 8 C. B. 449.

1854.

Fuller v. Richmond.

required the logs in question for the purposes of his trade. If these facts do not sufficiently appear in this case, I think the plaintiff should have an opportunity of proving them. Where these facts sufficiently appear I think the specific performance of such agreements should be compelled. Reason dictates that in all cases the parties to a contract should have the contract specifically performed, or relief in damages, at their option. This is the opinion of Mr. Justice *Story*—a high authority in these matters; and certainly the court should be ready to extend this remedy to every case which reasonably calls for its application: nor do I think that parties should, in cases of this description, be put to prove any additional facts to those I have mentioned, in order to entitle themselves to relief. It seems reasonable, too, that whenever it can be ascertained that logs have been manufactured in pursuance of the agreement (and such will be the presumption where no other agreement is shewn to have existed), the agreement should attach upon them and bind them specifically so soon as they are manufactured. It is clearly proved in this case that an agreement was made between the plaintiff and the defendants *Richmond* and *Carl* that they, the defendants, should manufacture for the plaintiff 5000 saw logs, to be delivered at the mouth of the river Trent, in consideration of £1000 to be paid to the defendants *Richmond* and *Carl*, at the times agreed upon. It is also proved that 5000 saw-logs, or about that number, were manufactured in pursuance of this agreement. It is not pretended that *Richmond* and *Carl* had entered into any other such agreement; the logs are represented to the workmen and *Craig* and others as made for the plaintiff; they are impressed with his mark; the plaintiff performs his part of the agreement punctually. This appears from the defendants themselves.

Judgment

Under these circumstances the logs, when half way down the river, are sold and delivered by the defendants

1854.

Fuller v. Richmond.

Richmond and *Carl* to the other defendant, *Redmond*, who then had notice of the plaintiff's title beyond all question, as appears from the evidence of his own witnesses and the defendants themselves. The defendant *Carl* asserts in his evidence that a verbal agreement was made with the plaintiff at the same time with the written one, that further supplies should be furnished if required, and that this agreement was not performed. The witness *Robertson* negatives any such agreement; and the defendant *Richmond*, while corroborating *Carl's* statement as to the fact, represents it as a mere voluntary understanding not intended to bind as an agreement, which receives countenance from the fact of its not being inserted in the written agreement. However, whatever it was, *Craig* or *Fuller* does not appear to have shrunk from compliance with it. The agreement with *Redmond* was not, I think, for security on the logs. It is remarkable that this fact is nowhere asserted either in the answer or the evidence; all that is said is, that the balance due to him was to be paid before the logs left the mouth of the river. It is clear that *Redmond* was informed of the agreement between the other defendants and the plaintiff when the first arrangement was made between him and *Richmond* and *Carl;* and I think the agreement with *Redmond* was subordinate to and founded upon the agreement with the plaintiff —namely, that it was that *Redmond* was to receive payment for half his advances every month out of the monthly advances to be made by *Fuller*, and for the other half out of the balance payable by *Fuller* when the logs should arrive at the mouth of the river. I think that *Fuller*, paying the monthly instalments to *Richmond*, and *Carl*, and the balance after the arrival of the logs, was to have the logs free from all claims on the part of *Redmond*, although perhaps *Fuller* might be bound to see *Redmond* paid out of the balance due from him, so far as it would extend.

Judgment

1854. Fuller v. Richmond.

I have already expressed my views respecting the powers of the court in regard to matters of this description in the case of *Stevenson* v. *Clarke* (*a*).

A suit for the specific delivery of a chattel and for the specific performance of an agreement relating to chattels, seems to me to be different things and to depend upon different principles, although nearly akin to each other. The right to specific delivery of chattels rests wholly upon property, combined either with peculiar value in the subject or fiduciary relation between the parties, and it exists or may exist independently of contract altogether. The right to specific performance, of course, necessarily presupposes contract; and when it concerns a chattle, rests upon peculiar value in the subject matter of the contract. To this latter right property is not essential, except so far as the equitable maxims "that what is agreed to be done is to be considered done," and "that the vendor is a trustee for the purchaser," may extend to create property in the eye of this court. It is no objection, therefore, to a suit of this sort, that the property in the subject has not passed; that something remains to be done by the seller; that there has been no delivery, and the like,—which are valid objections enough at law generally, in similar cases. All that the purchaser has to shew is, that he has entered into a contract; that the subject possesses peculiar value; that it is capable of being identified; and that his conduct has been such as not to disentitle him to the aid of this court. The right to specific performance then arises, and this vests an equitable and qualified property in the purchaser, but it is not necessary that the property should pass at law. It seems to me, too, that all the consequences of applying this principal must necessarily follow: thus, if the article which is the subject of the contract be des-

Judgment.

(*a*) Ante 540.

troyed, the loss must fall upon the purchaser, when, at the time of its destruction, the court would have compelled the specific execution of the agreement in his favor; because that right must be mutual, and the seller must have a right to say that as he could have compelled the specific performance of the agreement, the property was that of the purchaser at the time of the destruction, and he must bear the loss. It is true that the application of this doctrine may occasionally produce an anomalous state of things, as where the property is destroyed and the purchaser, as in such a case he would, is endeavouring to repudiate the contract. The seller under such circumstances, in order to throw the loss upon the purchaser, must shew that the article was of peculiar value to him, he denying it, and the fact perhaps depending upon personal reasons best known to himself; and yet it seems to me that the principal must apply. Thus in *Buxton* v. *Lister* (*a*), where specific performance of an agreement relating to chattels was enforced, owing to the special circumstances of the case, if the property in question had been destroyed and the seller had been endeavouring to obtain payment of the stipulated price, he must have shewn, what, under the actual circumstances of the case the purchaser was endeavoring to shew, that the property possessed a peculiar value for the purchaser; although, of course, he would have denied it, and the proof of a matter perhaps personal to the purchaser would have been very difficult on the part of the seller. It seems to me that in the present case Mr. *Fuller* would have been entitled to a decree for the specific delivery of the logs, paying what remained due of the purchase money to *Redmond*, so far as might have been necessary for the satisfaction of his claim, and the residue to *Richmond* and *Carl*; and that, consequently, this amount being deducted from the fund in court, the

1854.

Fuller v. Richmond.

Judgment.

(*a*) 3 Atk. 383.

1854. Fuller v. Richmond. residue belongs to the plaintiff, and the amount deducted must be paid to the defendants according to their respective rights.

I think the plaintiff should have his costs.

AN INDEX
TO THE
PRINCIPAL MATTERS.

the covenant for payment of the mortgage money; although, as a *bona fide* purchaser for value without notice, he was entitled to hold the land in security for the amount; the Court, however, ordered the attorney to discharge the lands of the client from the incumbrance which had thus been created.—*Ib.*

3. An attorney assigned to his client a mortgage securing £175, with a payment of £50 endorsed, leaving an apparent balance of £125 due; in reality no sum whatever had been paid on account, but the £125 was the amount for which the attorney (the mortgagee) had sold the land to the mortgagor. Afterwards the attorney claimed to have a demand against the client for a bill of costs in respect of proceedings taken upon this mortgage against the mortgagor, and obtained from the client his promissory note for the amount; when the note became due, the attorney charged the client 5 per cent. commission, in addition to legal interest, on renewing it, and this was done on three several occasions. On a bill filed by the client, the court set aside the assignment of the mortgage, and directed an account of all dealings between the attorney and client, with costs to the hearing.

Grantham v. Hawke, 582.

AWARD.

See "Arbitrators."

CONDITION PRECEDENT.

See "Specific Performance," 4.

CONTRACT.

See "Lease." "Specific Performance," 3.

CONVEYANCE.

(SETTING ASIDE)

1. The mere fact of a person executing a conveyance while in a state of intoxication will not, as a general rule, warrant this court in interfering to set such deed aside, unless there be evidence of some undue advantage taken of the party: However, where a person sixty-two years of age, who had become so addicted to drink as to be termed an habitual drunkard, executed a deed of certain real estate in trust for the benefit of the keeper of the tavern with whom he was residing—and who, it was proved, was in the habit of supplying him with whatever drink he desired—for a greatly inadequate consideration, and afterwards devised the same property to his brother: The court, after the decease of the testator, at the instance of the devisee, set aside the conveyance, and ordered the party for whose benefit the deed had been made to pay the costs of the suit.

Clarkson v. Kitson, 244.

2. The plaintiff filed a bill praying that a deed he had given one of the defendants should be set aside for fraud; and though he failed to prove the fraud as alleged, yet as the case appeared to be an extremely peculiar one and surrounded with many circumstances of suspicion, the court directed issues for the trial at law of the points in dispute.

Taylor v. Shoff, 261.

CORPORATION.

The objection that a corporation cannot be bound unless by an in-

strument under the corporate seal, is applicable only to actions at law. Brewster v. The Canada Co. 443.

COSTS.

1. The costs of a commission to take evidence in a foreign country form part of the costs of the cause.

Colborne v. Thomas, 169.

2. The plaintiff filed his bill, founding his right to relief, *inter alia*, on grounds of fraud which he entirely failed to establish, and in his bill he had made statements which he knew to be untrue, and suppressed the truth in other matters; the court, considering him entitled to relief on other grounds, which he had sustained, made a decree in his favor, but without costs.

Hughson v. Davis, 588.

See also "Solicitor and Client."

COUNTY COURTS.

See "Practice," 9, 10.

DECREE.

(CARRIAGE OF)

1. Where any unreasonable delay occurs on the part of the plaintiff in carrying on a creditor's suit, the court will order the carriage of the decree to be given to another of the creditors upon his indemnifying the plaintiff against future costs.

Patterson v. Scott, 145.

2. A plaintiff is not entitled, as of course, to a decree before the time for answering the bill has expired; some special ground must be shewn to induce the court to grant it.

Davidson v. McKillop, 146.

DEDICATION.

In the year 1827 the Canada Company, through their agent, proceeded to lay out the town of Guelph into village lots, the surveyor who was employed for that purpose being directed to reserve a portion of the lands for the purposes of a market-square, around which lots were laid off and sold to different parties. A market house was erected upon a portion of the reserved land, and the whole space remained open as public grounds without any interruption until the year 1852, excepting that about the year 1841 certain pencil marks were discovered upon a map belonging to the company, the date and origin of which did not appear, seeming to lay off a portion of the land reserved into two blocks, which led to a correspondence with the officers of the company, in the course of which one of the commissioners of the Canada Company wrote a letter in which he stated that "he had determined not to dispose of those reserves otherwise than with a view to the public advantage of the town of Guelph: thus I hope this matter is satisfactorily set at rest." Nothing further occurred until the month of February 1852, when an advertisement was issued by the company of their intention to sell these blocks in building lots; whereupon a bill was filed by the municipality, praying an injunction to restrain the company from proceeding to such sale. *Held*, that under the circumstances a complete dedication of the land in question had been made for

the use of the town, and a perpetual injunction was decreed with costs. And *semble*, that without the aid of the latter, sufficient was shewn to entitle the council to this relief.

Mun. of Guelph v. Canada Co. 632.

DISMISSING BILL.

Where a cause has been set down for hearing, the plaintiff is not entitled as of course to an order dismissing his bill, with leave to file another bill.

Gardner v. Brennan, 199.

DOWER.

Where a party agrees to convey property he is bound to do so free from dower; or if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money.

Kendrew v. Shewan, 578.

DRUNKENNESS.

See "Conveyance."

EQUITABLE ASSIGNMENT.

The plaintiff being liable for a debt as surety for one *Parr*, *Parr* gave him an order for the amount on the Government, for whom *Parr* was performing certain work. This order *Parr* countermanded before any acceptance on the part of the Government. The debt having been paid by a sale of the plaintiff's property, and *Parr's* contract having been assigned to *Matthews*, who received from the Government the money due upon it: *Held*, that *Matthews* was bound to pay the amount of the order.

Foot v. Matthews, 366.

EVIDENCE.

The rule that a distinct denial in an answer of statements made in the bill must be contradicted by two witnesses, or by one witness corroborated by attendant circumstances, considered and acted upon.

Boulton v. Robinson, 109.

EXAMINATION.

(*De bene esse.*)

See "Practice," 17.

EXECUTOR.

1. An executor has a right to retain a debt barred by the Statute of Limitations.

Crooks v. Crooks, 615.

2. Where the personal estate of a testator is exhausted, has the executor a right to retain such a debt out of the proceeds of real estate?—*Ib.*

FOREIGN COMMISSION.

Costs of, form part of the costs of the cause.

Colborne v. Thomas, 169.

FRAUD.

See "Attorney and Client."

FRAUDS.

(STATUTE OF)

A paper containing a receipt for part of the purchase money, which clearly ascertains the land to be sold, and the amount of purchase money, but omits to state *when* a portion of the money left unpaid is to be made payable, although it provided that such portion should be secured by mortgage, is a sufficient writing within the Statute of Frauds.

Divine v. Griffin, 603.

FRAUDULENT CONVEYANCES.

Divers conveyances executed by the defendant shortly before the commencement of this suit were declared fraudulent and void as against the plaintiff.

Prentiss v. Brennan, 148.

HIGHWAY.

See "Injunction, 2."

INFANT.

The court will not direct a sale of the real estate of an infant merely because the ancestor was indebted: it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit.

Re Boddy, 144.

INJUNCTION.

1. Saw-logs cannot be intended *prima facie* to be of "peculiar value" without any evidence that they are so. But they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. The relief however must be applied for promptly.

Flint v. Corby, 45.

2. This court has no jurisdiction on the ground of public nuisance to enforce by injunction the ordinary repair of a highway; or to restrain an incorporated road company from suffering a road to continue out of repair; assuming such a jurisdiction to exist, the Attorney General does not seem to be the proper party to sue.

Att. Gen. v. Weston P.R. Co. 211.

3. The court, however, will restrain a company which is authorized to construct a plank or macadamized road from constructing or continuing to construct one of poles.—*Ib.*

4. Where such a company had already re-constructed part of a road (which was out of repair) with poles, without any objection on the part of the public, and there was contradictory evidence as to the quality of the road so made; but it appeared that by adzing off the upper side of the poles, which the company offered in court to do, the road would be rendered sufficiently smooth, and that to be obliged to take up the poles would ruin the company; an injunction for the removal of the poles was refused.—*Ib.*

5. One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property. (*Esten, V. C., diss.*)

Dougall v. Foster, 319.

6. The owner of land agreed to sell a portion thereof, and admitted the party into possession, who improved the premises and afterwards offered to sell his improvements back to his vendor; and, for the purpose of ascertaining the amount to be paid, referred it to arbitrators, who made an award, but its terms were never complied with, and the vendor afterwards brought an action of ejectment against the party in possession. The court, upon motion, granted an interim injunction restraining the plaintiff in ejectment from executing a writ of possession.

Cook v. Smith, 441.

7. The Canada Company, through their agent resident in Canada, contracted by letter to sell certain lands of the company, upon condition, amongst others, of the vendee building a saw-mill; thereupon the vendee proceeded, with the knowledge of the agents of the company, to erect a saw-mill and construct a dam across a river, the effect of which was to overflow a large tract of land belonging to the company: subsequently the company conveyed the lands contracted for, and which were situate on both sides of the river across which the dam had been constructed, reserving the bed of the river and about 30 feet on either bank, the title to the bed of the river being then in the Crown. Afterwards the company, having obtained a grant from the Crown of the bed of the river, instituted proceedings at law against the persons owning the mill for the damage done by the overflowing of the river, and recovered a verdict for £500; and other actions were also brought for the same injury. Upon a bill filed for that purpose, the Court, at the hearing, decreed a perpetual injunction restraining the company from proceeding with the actions; and a conveyance of the bed of the river and the portion on either side which had been reserved, and ordered the company to pay the costs.

Brewster v. the Canada Co. 443.

8. The plaintiff and defendant entered into an agreement, under which the defendant was to procure goods, or guarantee the payment of goods, which were to be obtained and sold by the plaintiff for their joint benefit, in certain proportions; and the plaintiff, to secure and indemnify the defendant against all loss in respect thereof, executed a confession of judgment, to be acted upon only in default of plaintiff meeting the payment of such goods: the plaintiff made default, and defendant entered up judgment and sued out execution: the court dissolved an injunction which had been issued, restraining proceedings upon the execution so issued, although upon the construction of the agreement it was doubtful whether a partnership had not been created between the parties; but the defendant (the plaintiff in the execution) having caused certain goods, provided by himself under the agreement, to be levied upon, the court directed that the amount thereof, at cost and charges, should be deducted from the amount of the debt and costs, or that the injunction should be continued in respect of that amount. (*The Chancellor dissenting*, who thought the injunction should be continued to the hearing.)

Watt v. Foster, 543.

See also "Dedication." "Riparian Proprietors."

ISSUE.

(AT LAW)

When demandable as of right when discretionary.

Boulton v. Robinson, 109.

See also "Principal and Agent." "Setting aside conveyance."

JUDGMENTS.

(SETTING OFF)

T. and M. having cross judgments at law applied to that court to set the one judgment off against the other, which application was refused on the ground that the judgment against T. had been assigned to a third person without notice; but it appearing that M.'s liability to T. arose in consequence of T. being surety for M. this court granted an injunction against the assignee, to prevent him enforcing the judgment recovered by M.; as a person purchasing a chose in action does so subject to all the equities to which it is liable in the hands of the assignor.

Thompson v. Miller, 481.

JUDGMENT CREDITORS.

In suits of foreclosure, where there are several judgment creditors, the decree should give the creditors successive rights of redemption, although very short periods must be fixed for that purpose.

Carrol v. Hopkins, 431.

LACHES.

See "Specific performance," 1, 2.

LANDS.

See "Partnership."

LEASE.

In a lease of property in the town of London a clause was inserted whereby the lessor agreed to erect the outside of a frame building, and bound himself, in case of its being destroyed by fire, to rebuild *to the same extent*, or in default the rent reserved to cease. Afterwards the house was burnt down and in the interval between the execution of the lease and the destruction of the property the Municipal Council of the town, under the authority of an act of the Legislature, passed a by-law prohibiting the erection of frame buildings in that locality. The lessee refused to pay rent until the terms of the lease were complied with on the part of the lessor by his re-building, and thereupon the lessor filed a bill to cancel the lease which had been executed, on the ground that it had become impossible for him to carry out the agreement in consequence of the provisions of the by law. The court refused the relief asked; but, on a submission in the answer, directed a reference to the master to fix a proper rent to be paid by the lessee upon the lessor re-building with brick, with costs to be paid by the plaintiff.

Williams v. Tyas, 533.

LIEN.

(VENDOR'S)

1. A vendor of real estate who takes, by way of security for the purchase money, the joint and several promissory notes of the vendee and surety, does not lose his lien on the estate for the purchase money though he took no mortgage therefor.

Colborne v. Thomas, 182.

2. A vendor's lien for unpaid purchase money has priority over the lien created by a registered judgment against the vendee.

Hughson v. Davis, 588.

3. Where a sale was made and conveyance executed before a Court of Chancery was established in Upper Canada: *Held*, that a vendor had, notwithstanding, a

lien for unpaid purchase money.
Davis v. Bender, 620.

4. Such a lien was enforced against subsequent purchasers, who, when they acquired their interest, had notice of the purchase money being unpaid.—*Ib.*

LIMITATIONS.

(STATUTE OF)

1. *Quære*—Has the recent Statute of Limitations, 13 and 14 Vic. ch. 61, a retrospective effect.
Crooks v. Crooks, 615.

2. An executor has a right to retain a debt barred by the Statute of Limitations.—*Ib.*

MEMBER OF PARLIAMENT.

Where a party having privilege of parliament had been in contempt for non-compliance with an order of the court, and the order *nisi* for a sequestration had been duly served; but between that and the application for the writ to issue the party had ceased to be a member, the court refused to grant the writ; and directed the party moving to commence proceedings for the contempt *de novo*.
Meyers v. Harrison, 148.

MISTAKE.

(SETTING ASIDE AGREEMENT ON GROUND OF)

See "Agreement."

MORTGAGE—MORTGAGEE—MORTGAGOR.

1. *Prima facie* a mortgagor is entitled to six months to pay amount of mortgage money: to induce the court to exercise the discretion vested in them by the general orders, of directing an immediate sale, or a sale at an earlier day, some special ground must be shewn.
Rigney v. Fuller, 198.

2. The court refused relief on a bill to redeem, filed in 1852 by a mortgagor who had given a mortgage to certain executors in 1827, payable in 1832, on property of not greater value than the amount secured upon it. The mortgagees having, in 1833, after the mortgagor's default, sold the property for less than was due on it, and the mortgagor having thereupon given possession to the purchaser in pursuance of a letter from the acting executor (since deceased) to the mortgagor, informing him of the sale and requesting him to give the vendee possession, "in which case the executors relinquish all claim against you for the interest in arrear, &c."
Clute v. Macaulay, 410.

3. In suits of foreclosure, when there are several judgment creditors, the decree should give the creditors successive rights of redemption although very short periods must be fixed for that purpose. *Semble.*
Carroll v. Hopkins, 431.

4. After payment of what is *payable* upon a mortgage payable by instalments pursuant to the orders of 1853, it is irregular to take any further proceeding in the cause until another instalment falls due.—*Ib.*

5. Where for the purpose of a suit it is necessary to obtain an order for the execution of a conveyance by infant representatives of a mortgagee not parties to the cause, the proper mode of apply-

ing is by petition.

Owen v. Campbell,
In re Mills, Infants, 630.

MUNICIPAL COUNCILLORS.

See "Parties." "Trustees."

PARTIES.

1. A suit for the purpose of setting aside an election of directors of a corporation on the alleged ground of fraud, may be brought by some of the shareholders on behalf of all, and need not be in the name of the corporation itself.

Davidson v. Grange, 377.

2. To a bill filed by the municipal council of an incorporated town to prevent an injury to the property of the municipality, the Attorney General is not a necessary party.

Guelph v. The Canada Co. 632.

See also "Pleading."

PARTITION.

See "Will."

PARTNERSHIP.

Two merchants entered into partnership *inter alia* in the buying and selling of lands; and accordingly bought lands with partnership moneys, some of which were conveyed to each partner, and some so both jointly. *Held*, that, as between the real and personal representative of one partner who died, the land so bought were personal estate.

Wylie v. Wylie, 278.

PATENT.

(SETTING ASIDE)

Where a party having according to the custom of the clergy corporation, paid the patent fee for a lease, gone into possession and made large improvements; and such custom being that the party so paying was considered as having a lease for twenty-one years, with a right of renewal and pre-emption (not materially varied by the orders in council subsequently passed regulating the sale of clergy reserves), and the crown having in ignorance of the facts, subsequently by letters patent granted the lands in question as a glebe for the Rector of Darlington, such patent was rescinded, as having been issued in error and mistake.

Martin v. Kennedy, 61.

PAYING MONEY INTO COURT.

When money has been paid into court as and for the price or value of land required by a railway company, the court will not upon an *exparte* motion order it to be returned to the company.

In re O. S. H. R. U. Co. & Cotton, 101.

PLEADING.

A bill will lie by some of the inhabitants of a municipality alleging an illegal application of the funds by the mayor, which the council refused to interfere with. The Attorney General is not a necessary party to such a suit.

Paterson v. Bowes, 174.

PRACTICE.

1. Where a party neglects to comply with the terms of an order for the production of books and papers, the proper mode of proceeding is to serve, personally, a notice of motion to commit.

Paterson v. Bowes, 44.

[The practice now pursued is to obtain an order *nisi* to commit.]

2. The judge in chambers granted an application for a commission *de lunatico inquirendo;* the orders of June 1853 giving to the judge in chambers authority to act in such a matter.

Re Stuart, 44.

3. The court held that whatever applications can, under the new orders, be made in chambers, must be so made.

Moffatt v. Ruddle, 44.

4. The court refused to hear, otherwise than in chambers, a motion to enlarge the time appointed for payment of mortgage money; and on the motion being renewed in chambers, on an affidavit of the defendants' solicitor, stating his belief that the defendants had exerted themselves, and were still endeavouring to raise the money, and that the property was worth much more than the debt, the motion was refused with costs.

Anonymous, 51.

5. By section 7 of order 46 (orders of 1853) subpœnas for costs are abolished. This order (by order of 6th June) took effect from 6th June as to all suits, as well those then pending as those subsequently instituted. The effect of this order upon orders giving costs issued previously to the time it took effect is, that an order must be obtained, fixing a day for payment of the costs when taxed.

Saul v. Cooper, 61.

6. The *Chancellor* in answer to a question from Mr. *Strong*, counsel for the purchaser of the property sold under the decree made in this cause, stated that the signed contract and other papers mentioned in section 9 of the thirty-sixth of the general orders must, in order to a confirmation of the sale, be filed with the Registrar whether the sale has been conducted before a Judge in chambers or the Master of the court.

Patterson v. Stanton, 100.

7. When a defendant to a suit dies and the plaintiff desires to amend by way of revivor, pursuant to section 15 of the ninth general order, the court intimated that the proper mode of proceeding was to serve notice of motion to amend upon the person intended to be brought before the court by the amendment.

Goodeve v. Manners, 101.

8. When a cause has been set down for hearing, the plaintiff is not entitled as of course to an order dismissing his bill, with leave to file another.

Gardner v. Brennan 199.

9. A defendant on moving to dissolve an injunction issued from a county court, is not bound to have the proceedings returned from the county court office.

Abraham v. Shepherd, 260.

10. Where a plaintiff in an injunction suit, instituted in the county court, desires to extend the injunction, it is his duty to have the pleadings and papers in the cause transmitted to this court before the motion is heard.

Stevenson v. Huffman, 318.

11. A notice of motion given for a day which is not a regular court day, unless leave of the court be obtained for that purpose, is a void proceeding, and the party served need not attend thereon.—*Ib.*

12. In moving to take a bill

pro confesso against an absconding defendant, and who has been advertised as such, it is necessary to shew by affidavit that the defendant cannot be found to be served with notice of the motion.

Gilmour v. Matthews, 376.

13. When a purchaser neglects to pay in his purchase money, and no objection is made to the title, the court will order him within a limited time to pay in the amount with interest ; or in default direct a re-sale of the property, and that the purchaser pay costs of motion and deficiency, if any, on such re-sale.

Crooks v. Crooks, 376.

14. A decree of foreclosure being erroneous, the court refused to pronounce a final decree of foreclosure on default of payment.

Com. Bank v. Graham, 419.

15. Where a plaintiff desired to amend by adding a judgment creditor who had assigned his claim to the plaintiff as a party defendant, leave was given for that purpose, dispensing with service on the defendants already before the court.

Boomer v. Gibson, 430.

16. After payment of what is *payable* upon a mortgage payable by instalments, pursuant to the orders of 1853, it is irregular to take any further proceedings in the cause until another instalment falls due.

Carroll v. Hopkins, 431.

17. The court ordered a commission for the examination of an aged witness to issue without requiring the bill to be served in the first instance ; the object of the suit being to perpetuate testimony, and it having been sworn that there was danger of the testimony of the witness being lost ; but directed notice of the execution of the commission to be served on the defendants.

Hunt v. Prentiss, 487.

18. When it becomes necessary to revive by way of amendment against infant defendants, the proper course is to amend simply in the first instance by making the infants parties. After that has been done, if the infants fail to have a guardian appointed, the plaintiff may apply under order XIII. to have a solicitor appointed guardian, and in either case the plaintiff will be in position to move that the suit do stand revived.

Kirkpatrick v. Fouquette, 549.

19. Where a plaintiff in suits for foreclosure or sale asks for a reference to the master to enquire as to other incumbrances, he takes such reference at the peril of costs, if there are in reality no other incumbrances on the estate.

Hamilton v. Howard, 581.

20. Where for the purposes of a suit it is necesssary to obtain an order for the execution of a conveyance by infant representatives of a mortgagee not parties to the cause, the proper mode of applying is by petition.

Owen v. Campbell,
In re Mills, Infants, 630.

PRINCIPAL AND AGENT.

1. Where it appeared that an agent had received large sums of

money for his principal, and had used it for many years in his own business, instead of remitting it, as he might and should have done, to his principal, he was charged with six per cent. interest and annual rests.

Landman v. Crooks, 353.

2. An assignment of certain property was made to the defendant as agent for the plaintiff; and the defendant refusing to account therefor the plaintiff filed a bill for that purpose. The court, without directing an issue, decreed an account with costs, although the defendant denied his agency and swore that a receipt produced by the plaintiff was a forgery; and the evidence upon the point was conflicting.

Rosenberger v. Thomas, 473.

PRINCIPAL AND SURETY.

See "Judgments."

PRO CONFESSO.

1. Where a defendant in a suit refused to attend before commissioners appointed for the purpose of taking his evidence in a foreign country, the usual order to set the cause down to be taken *pro confesso* was made.

Prentiss v. Bunker, 147.

2. The 13th of the general orders authorizing the registrar to draw up an order to take the bill *pro confesso* at the expiration of one month from the service of the bill, does not apply to corporations.

Counter v. The Com. Bank, 330.

3. Where service of the office copy of a bill was made upon a solicitor acting on behalf of several defendants, and such solicitor gave a written undertaking to answer, but afterwards made default in so doing, the bill was ordered to be taken *pro confesso*.

Shaw v. Liddell, 352.

RAILWAY COMPANY.

1. This court has jurisdiction to set aside an election of directors of a corporate body by persons who are subscribers nominally and not *bona fide*.

Davidson v. Grange, 377.

2. A suit for the purpose of setting aside an election of directors of a corporation on the alleged ground of fraud, may be brought by some of the shareholders on behalf of all, and need not be in the name of the corporation itself.—*Ib.*

3. A *bona fide* subscription for stock in a corporate company by one person in his own name, but really as trustee and agent for another who has requested such stock to be subscribed for, is valid—*Ib.*

See also "Payment of money into court."

RECITAL.

A testator devised the property in question to his wife who conveyed it to T.D. in fee. Afterwards T.D. and S. his wife joined in a deed of the property, for valuable consideration, to J.M. and his wife, reciting that she was entitled to the property as co-heiress of the testator. Subsequently J. M. and his wife conveyed to a trustee for S. The plaintiff claimed under S., and notwithstanding the erroneous recital, the court held her entitled to a conveyance.

Lawlor v. Murchison, 284.

RECTORIES.

See "Patent."

RE-BUILDING.

See "Lease."

REFERENCE.

See "Arbitrators."

RE-SALES.

See "Practice," 13.

RESTS.

See "Principal and Agent."

RIPARIAN PROPRIETORS.

The plaintiff and defendant were owners of mills on the same stream, the defendant's being lower down than, and erected before that of the plaintiff. By the the erection of the dam of the defendant, it was alleged that the plaintiff's mill privilege was effected injuriously. Although it was shewn that the plaintiff, in order to work his mill, was compelled to dam back the water so as to overflow lands higher up, the property of the defendant, the title to which he had obtained after the commencement of this suit, the court (*Esten, V. C., dissentiente*) held the plaintiff was entitled to an injunction against the defendant, restraining him from damming the water back upon the plaintiff's property.

Graham v. Burr, 1.

SALES.

The signed contract and other papers mentioned in section 9 of the thirty-sixth of the general orders must, in order to the confirmation of a sale, be filed with the registrar, whether the sale has been conducted before a Judge in chambers or the Master of court.

Patterson v. Staunton, 100.

See also "Infant." "Mortgage."

SAW-LOGS.

1. Saw-logs cannot be intended *prima facie* to be of "peculiar value" without any evidence that they are so. But they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. The relief however must be applied for promptly.

Flint v. Corby, 45.

2. The court, in a proper case, will compel the special performance of an agreement to manufacture and deliver saw-logs.

Fuller v. Richmond, 657.

See also "Specific Performance," 5.

SEQUESTRATION.

See "Member of Parliament."

SERVICE.

(AFFIDAVIT OF, ABROAD.)

It is not necessary to issue a commission for the purpose of taking the affidavit of service in a foreign country.

Snyder v. O'Lone, 148.

SETTING OFF JUDGMENTS.

See "Judgments."

SOLICITOR AND CLIENT.

Where a solicitor had irregularly proceeded to tax his costs as between solicitor and client, in the absence of the client; the court, upon a petition presented seven years afterwards, ordered a taxation of the costs; treating the taxation which had taken place as a void proceeding, and ordered the solicitor to pay the costs of the application.

Clarke v. Manners, Re Manners, 432.

SPECIFIC PERFORMANCE.

1. Delay in filing a bill to enforce a disputed agreement for a partnership was considered sufficiently accounted for by evidence of an unanswered proposal for an arbitration, and of correspondence between the plaintiff and his solicitors before suit.

Haggart v. Allan, 45.

2. Under the circumstances of this country a much less delay will, in many cases, be sufficient to bar a party from obtaining a specific performance of a contract for the sale of land, than would be sufficient for the purpose in England.

Hook v. McQueen, 231.

3. In the course of correspondence which the court was of opinion amounted together to a complete contract for the sale of the lands in question by the defendant to the plaintiff, the defendant wrote a letter to the plaintiff's agent containing the following passage: "I am strongly advised to retain them, but having other ground on which to build, and having some objects in view which I think may be accomplished with the proceeds, I feel inclined to sell at £1000. That amount in hand would suit me much better than to have a small portion, say £250 on interest for so long a period. I dare say it would be quite the same thing for your friend to pay the whole at once. In order to raise a sum to pay for a property in Albion, which *Archy* has been improving, I gave in his behalf, a short time since, a mortgage to the University for £500 on the Niagara Street lots, to be paid in five years. If your friend should decide on giving the whole, I have no doubt the University would take a security on the Albion property, the title of which is secured by the advance, and release the lots on Niagara-street. The Albion property will more than pay up the mortgage within five years. Perhaps, as matters stand, your friend would take other security to bear him harmless as to the £500, and so it might be unnecessary to trouble the University on the subject."

In the subsequent correspondence nothing was said as to this mortgage on either side; and it was held by all the judges that the contract was complete. It appeared from the other correspondence that the defendant's object in selling was to obtain the immediate use of the whole of the purchase money: and the Vice-Chancellors held that he was not bound to pay off the mortgage referred to out of the purchase money; that he was bound to transfer it to the Albion property and any other property he had if the University would consent to the exchange, and if the University refused he was bound to indemnify the plaintiff against the mortgage.

Arnold v. McLean, 337.

4. A vendee covenanted to fence the land contracted for forthwith, and to build a house within a limited time: and the vendor agreed, upon payment of the purchase money and the due fulfilment of all the other covenants

entered into by the vendee, to convey the premises in question. The vendee, without waiting for the time appointed for payment of the purchase money, and without either fencing in the land or building thereon, tendered the amount of his purchase money and interest and demanded his deed, which being refused, he filed his bill for specific performance of the agreement to convey. The court refused relief and dismissed the bill with costs.

Allan v. Brown, 439.

5. The court will decree the specific performance of a contract for the manufacture and sale of saw-logs, where they are capable of being identified and possess a peculiar value for the purchaser.

Stevenson v. Clarke, 540.
S. P. Fuller v. Richmond, 657.

6. A party agreed to purchase for £200 a small piece of land, worth intrinsically not more than £7 10s., for the purpose of using it as a mill-pond, and in order to protect himself against suits at the instance of the owner; but owing to a dispute [illegible] the metes and bounds of the land, no deed was ever executed until after the purchaser's mill was destroyed by fire, when the vendor tendered the deed, but the vendee not then requiring the use of the land, declined to complete the agreement. The court refused to enforce the contract, and dismissed the bill of the vendor, filed for that purpose, with costs. (*The Vice Chancellors dissenting.*)

Blackwood v. Paul [on Appeal], 550.

7. Where a party agrees to convey property, he is bound to do so free from dower; or, if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money.

Kendrew v. Shewan, 578.

8. A vendor having agreed to sell a piece of land, afterwards conveyed the same to a third party, with notice, at an advanced price, alleging, as a reason for so doing, that he had been deceived in making the agreement. The court decreed a specific performance of the contract,—the statements in the answer having been contradicted by the person by whom the defendant swore he had been misled.

Devine v. Griffin, 603.

9. The court will not encourage speculative purchases; where, therefore, it was shewn that a purchaser had not the means of paying for the property contracted to be sold, and after several demands upon him to complete the purchase, the vendor sold to a third party with the knowledge of the original purchaser, who did not forbid the sale, and appeared to acquiesce in it; but afterwards, when, by reason of the construction of a railroad, the land had increased very much in value, filed a bill to obtain a specific performance of his contract, the court dismissed his bill with costs.

Langstaffe v. Mansfield, 607.

TENANTS IN COMMON.

One tenant in common will be restrained at the suit of a co-tenant from digging earth for

bricks on the joint property.

Dougall v. Foster, 319.

TRUSTEES.

The Mayor of Toronto, an incorporated city, secretly contracted to purchase, at a discount, a large amount of the debentures of the city, which were expected to be issued under a future by-law of the City Council; and was himself an active party afterwards in procuring and giving effect to the by-law which was subsequently passed. *Held*, that he was a trustee for the city of the profit he derived from the transaction.

City of Toronto v. Bowes, 489.

VENDOR AND VENDEE.

A vendor of real estate who takes, by way of security for the purchase money, the joint and several promissory notes of the vendee and surety, does not lose his lien on the estate for the purchase money, though he took no mortgage therefor.

Colborne v. Thomas, 102.

See also "Lien."

WILL.

1. A testator who died in 1820 devised his farm to trustees in trust to pay certain legacies, and divide the residue amongst the testator's three sons. The trustees refused to act, and the eldest son in consequence, on coming of age in 1823, sold portions of the land and applied the proceeds, or part of them, towards paying the legacies. After his death, the surviving trustee executed a conveyance of the whole farm to the two surviving sons, from misunderstanding the nature of the deed presented to him for execution. The two sons then sold what remained of the farm, and brought an action of ejectment against the plaintiff, who had the parcels sold by the eldest son during his lifetime. The court restrained this action, declared the plaintiff entitled, as far as might be necessary for his protection, to stand in the place of the eldest son in regard to his undivided third of the whole property, and to his charge, for two-thirds of the legacies he had paid, on his brothers' undivided two-thirds of the estate, and decreed a partition and other enquiries to give effect to such declaration.

Hiscott v. Berringer, 296.

2. The testator devised real estate to his wife for life, with remainder to A., B. and C., or the survivors or suvivor of all of them, their heirs and assigns, for ever. *Held*, that the clause of survivorship meant the survivors at the death of the tenant for life, and not of the testator.

Peebles v. Kyle, 334.

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